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 OPPOSITION TO PLAINTIFFS' CROSS-MOTION ON BEHALF OF DEFENDANTS STATE OF NEW YORK AND GOVERNOR ANDREW M. CUOMO

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This memorandum of law is submitted on behalf of defendants the State of New York and Governor Andrew M. Cuomo ("State defendants") in opposition to plaintiffs' cross-motion for summary judgment on the issue of whether indigent criminal defendants are regularly and systemically at risk of being denied the right to counsel at arraignment in four of the five defendant Counties[1] -- Suffolk, Onondaga, Schuyler and Washington (the "Four Counties").

PRELIMINARY STATEMENT

In finding that the complaint sets forth sufficient facts to withstand a motion to dismiss, the Court of Appeals relied on the dramatic allegations of the complaint which assert that defendants in the defendant Counties are systemically and routinely "unrepresented in . . . proceedings where pleas are taken and other critically important transactions take place," Hurell-Harring, et al. v SONY, et al., 15 NY3d 8, 19 (2010), and that "plaintiffs' pretrial liberty interests were regularly adjudicated [citation omitted] with most serious consequences both direct and collateral . . . ." That characterization is, however, belied by the record before the Court on this cross-motion. The actual experiences of the plaintiffs do not support the scenario, set forth in the complaint, of system-wide infirmities in the arraignment processes in the defendant Counties. No liberty interest was at stake with respect to a number of the plaintiffs; none of them pled guilty to any charges; and none were impaired in their ability to present a defense. Moreover, the record demonstrates, at most, that criminal defendants are, on occasion, arraigned without a lawyer; there is no evidence to support Plaintiffs' claim of systemic denials of counsel at arraignment in the defendant Counties.

1 Not surprisingly, the plaintiffs have failed to seek summary judgment as to defendant Ontario County.

The gap between the plaintiffs' characterization of arraignments in the defendant Counties and the reality is, in part, attributable to the significant State and County efforts made since the filing of the complaint to ensure that counsel is available to defendants at every arraignment. Those continuing efforts include: establishing the New York State Office of Indigent Legal Services ("OILS"); providing grants to Counties, through OILS, for improving access to counsel at arraignments; and steps taken by the Counties to meet the goal of making representation available to defendants at all arraignments.

That plaintiffs may be able to demonstrate that some defendants are arraigned without benefit of counsel does not establish that defendants in the defendant Counties are regularly and systemically being denied counsel at arraignment. The record, in fact, shows that the defendant Counties are steadily moving toward making representation available to indigent defendants at all arraignments.

Beyond these ongoing State and County efforts, New York has enacted a statutory scheme which places upon the judiciary the obligation to ensure that indigent defendants are represented at arraignment. The plaintiffs, however, have chosen not to name the judiciary as a party. Thus, even if the Court were to find a Constitutional violation, neither the declaratory nor the injunctive relief sought by the plaintiffs can properly be granted as against the State and County defendants.

ARRAIGNMENTS IN NEW YORK

When a person is arrested in New York State without an arrest warrant, that person must be brought "without unnecessary delay" before a local criminal court, see N.Y. Crim. Law §140.20(1), unless that arrested person is issued a desk appearance ticket to appear in court on a subsequent date. See id. at §140.20(2)(a), §150.10. At the initial

appearance, the court must inform the defendant of the charges against him or her, and provide a copy of the charges to the defendant. See N.Y. §170.10(2). The Court must then inform the defendant of his or her right to counsel, and the right to have counsel appointed if the defendant cannot afford to hire counsel. Specifically, 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).[2] The court must provide the defendant the opportunity to exercise the right to counsel before permitting the defendant to enter a plea to the charges. See id. at §170.10(4)(1). If the defendant informs the court that he or she cannot afford counsel and wants counsel appointed by the court, the court must take whatever "affirmative steps necessary" to determine whether the defendant is eligible for such services. See id. To prevent the defendant from entering a plea, which statutorily must be done orally by the defendant himself or herself, see N.Y. Crim. Law

2 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 seetions contain the same relevant language.

§340.20(2)(a), the court can enter a not guilty plea on behalf of the defendant to preserve the defendant's rights. The court must then issue a securing order releasing the defendant on his or her own recognizance ("ROR"), set bail -- if permitted by law - or remand the defendant into custody. See id. at §§530.20(1), 170.10(7).

Thus, New York's statutory scheme places upon the judiciary the obligation to ensure that indigent defendants have the opportunity to be represented by counsel at arraignment. However, as discussed in Point II below, the plaintiffs have chosen not to name the judiciary as a party to this lawsuit.

ARGUMENT

To defeat a motion for summary judgment, a party need only show the existence of an issue of material fact when the facts are viewed in the light most favorable to the non-moving party. See CPLR 3212(b); Kosson v. Algaze, 84 NY2d 1019, 1020 (1995). However, to be entitled to summary judgment, a party must put before the court evidence sufficient to establish his or her entitlement to relief. Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985) (a party that fails to meet its burden on its cross-motion is not entitled to summary judgment, regardless of the adequacy of the non-moving party's opposition). For the reasons discussed below and in the State defendants' moving papers, the plaintiffs cannot meet their burden of establishing that indigent criminal defendants in the Four Counties are systemically at risk of being denied the right to counsel at arraignment.

POINT I

PLAINTIFFS ARE NOT ENTITLED TO CLASS RELIEF

As an initial matter, for the reasons discussed by the State defendants in their motion for summary judgment, the class should be decertified. See State Defendants' 8/22/13 Memorandum of Law at Point II. If the class is decertified, plaintiffs' cross-motion must be viewed as cross-motions on behalf of the individual plaintiffs only. As discussed below, two of the remaining plaintiffs were represented by counsel at arraignment, see Point III(B)(1), (2)(a), two of the plaintiffs were not held in custody as a result of their arraignments, see Point III(B)(3)(a), two of the plaintiffs were not statutorily eligible for bail, see Point III(B)(2)(b), and the remaining plaintiffs cannot establish that they were denied counsel at arraignment as a result of a systemic problem in any of the Four Counties. See Point III(B)(2)(c); Point III(B)(3)(b)(4). To the extent that any plaintiff is able to show that he or she was denied counsel at arraignment because of systemic conditions in a defendant County, any declaratory relief from the court will be applicable to that plaintiff only, and the remedy of injunctive relief will be unavailable, since the plaintiffs' criminal proceedings have all concluded.

POINT II

PLAINTIFFS CANNOT IDENTIFY A REMEDY THAT THE STATE DEFENDANTS CAN EFFECT

As stated above, it is the duty of the Court pursuant to Criminal Law §170.10(3) and 180.10(3) to advise the defendant of his or her rights to counsel, to an adjournment to obtain counsel and to the appointment of counsel if the defendant cannot afford to hire an attorney. The Criminal Procedure Law also requires the Court to "not only accord [the defendant] 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 are apprised of their right to have counsel at arraignment, and has mandated that courts enforce that right. Plaintiffs allege that the Courts in the Four Counties are not complying with the requirements of the Criminal Procedure Law that a criminal defendant be provided with counsel at arraignment. However, this Court has noted on many occasions, and the State defendants articulated in their moving memorandum of law, the State's judiciary is not a defendant in this case.

As a result, any finding in this case that criminal defendants are systemically denied counsel at arraignment in the Four Counties cannot be remedied by the State defendants and therefore injunctive or declaratory relief against the State defendants would be improper as a matter of law. See 8/22/13 Kerwin aff. at Exh. B, pp. 10-11; Exh. F, pp. 6-7, 9. Accordingly, plaintiffs' cross-motion should be denied.

POINT III

PLAINTIFFS CANNOT ESTABLISH THAT THE REPRESENTATIVE PLAINTIFFS WERE ACTUALLY DENIED COUNSEL AT A CRITICAL STAGE OF THEIR CRIMINAL PROCEEDINGS

The plaintiffs allege that their experiences in the public defense systems of the Four Counties represent systemic denials of counsel at arraignment in the Four Counties. Therefore, as a threshold issue, plaintiffs have the burden of establishing that the class representatives of those Four Counties were actually denied their right to counsel at arraignment and "truly embody the violations that are claimed by the entire class." See 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 at arraignment were caused by systemic deficiencies. See Hurell-Harring, et al. v SONY, et al., 15 NY3d 8 (2010).

To establish a denial of the right to counsel, a plaintiff must show that she or he is completely denied counsel at a "critical stage" of a criminal proceeding. United States v. Cronic, 466 US 648, 659-60 (1984). 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 v. United States, 898 FSupp2d 659, 671 (SDNY 2012). A stage is critical if it could result in the "irrevocable loss of a privilege." Id. For example, in Hamilton v. Alabama, 368 US 52, 54 (1961), the Supreme Court held that an arraignment in Alabama is a critical stage for purposes of the right to counsel because 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.

"Courts decide whether a state criminal proceeding is critical by looking to the functions of the proceeding under state law." Farrow v. Lipetzky, 2013 US Dist LEXIS 111493, *31 (NDCA 2013) (citing Hamilton v. Alabama, supra). In a very recent case, the United States District Court for the Northern District of California considered three factors when determining if a defendant's initial appearance is a critical stage under California law for purposes of the Sixth Amendment. Farrow at *32. Farrow was a class action brought by two indigent criminal defendants against a County Public Defender

("PD") Office alleging, *inter alia*, the violation of their Sixth Amendment rights at their first appearances. The court described plaintiff Farrow's experience as follows:

> . . . Farrow was arrested on August 30, 2011. [Citation omitted] He appeared alone in court for his arraignment on September 2, 2011. [Citation omitted] The court asked him if he could afford counsel, and he replied that he could not. [Citation omitted] The court then asked him if he wanted the court to appoint counsel, and he said that he did. [Citation omitted] The court set bail, referred the matter to the Public Defender, and continued the matter to September 15, 2011 for "further arraignment" without advising Farrow of his right to a prompt arraignment, his right to bail, or his right to a speedy preliminary hearing and trial. [Citation omitted] Farrow languished in jail, without meaningful examination of bail, the protection of statutory speedy trial rights, or legal representation, for thirteen days. [Citation omitted] Also at his September 2, 2011 arraignment, the court referred the matter for a bail study. [Citation omitted] The bail study was conducted between Farrow's first and second court appearances and, because Farrow was not represented by counsel, there was no means for the probation department to include any favorable information in the highly influential report. [Citation omitted]
>
> At the further arraignment held 16 days after his arrest and 13 days after his first court appearance, counsel was appointed for Farrow and he was permitted to enter a plea. [Citation omitted] He immediately asserted his right to a speedy preliminary hearing and his preliminary hearing was held on September 27, 2011. [Citation omitted] As a result of the delay in the appointment of counsel, Farrow's counsel had 13 days less than the prosecutor to prepare for the preliminary hearing.

Id. at **8-9.

In determining that plaintiff Farrow's initial appearance did not constitute a critical stage for purposes of the right to counsel, the court considered (1) whether "failure to pursue strategies or remedies" at a first appearance "results in a loss of significant rights;" (2) whether "skilled counsel would be useful in helping the accused

understand the legal confrontation;" and (3) whether "the proceeding tests the merits of an accused's case." Id. at *32. In its analysis of plaintiff Farrow's initial appearance, the court strongly relied on the Ninth Circuit's recent holding in Lopez-Valenzuela v. County of Maricopa, 719 F3d 1054 (9th Cir. 2013), which also determined that initial appearances in Arizona are not a critical stage for Sixth Amendment purposes. Farrow at **46-52.

At initial appearances in Arizona, the court (1) learns a defendant's name and address, (2) advises the defendant of the charges, the right to counsel and the right to remain silent, (3) makes a probable cause determination, (4) appoints counsel if the defendant is eligible and (5) determines the defendant's release conditions, including making a bail determination. Lopez-Valenzuela, 719 F3d at 1068. Applying the three factors described above, the Ninth Circuit held that the initial appearance in Arizona is not a critical stage for Sixth Amendment purposes because (1) the "'initial appearance provides no opportunity for a defendant to present evidence or make any argument regarding the law or evidence,'" (2) counsel would not be helpful in understanding the court's routine questions regarding the defendant and his or her financial resources, and (3) the merits of the case are not tested. Id. at 1068-69. Importantly, defendants in Arizona have opportunities to present evidence and make legal arguments at proceedings after the initial appearances, and the defendant can also make a motion to have bail re-examined after the initial appearance. Id. at 1069.

In both Farrow and Lopez-Valenzuela, the defendants were only (1) advised of the charges, (2) offered the appointment of counsel and (3) subject to a bail

determination.[3] Farrow at *50. The Farrow court noted how the conclusion that such situations cannot constitute a critical stage for Sixth Amendment purposes

> is buttressed by the practical implications of Plaintiffs' argument. If Plaintiffs are correct, the Sixth Amendment would put the state in an impossible position: Counsel must be present, whether available or not, and a continuance for appointment of counsel (as happened here) would not remedy the constitutional violation,

of the absence of counsel at that appearance. Id. at *51. The court held that "[t]he Constitution imposes no such restriction." Id. at *52.

Pursuant to statute in New York, a criminal defendant is not entitled to the appointment of counsel until she or he (1) requests it after being advised of the right to free counsel and (2) is found eligible by the court for public defense services. See N.Y. Crim. Pro. Law §§170.10(3), 180.10(3); N.Y. County Law §722. The impracticability and unfeasibility of having an attorney available to represent every indigent defendant brought before a judge for a first appearance has been long recognized. A rule that every indigent criminal defendant has the right to appointed counsel from the time she or he first appears before the court must be given "a common sense interpretation. . .To require that counsel be appointed before the judge asks routine questions such as defendant's name and financial ability would be self-defeating." United States v. Perez, 776 F2d 797, 800 (9th Cir. 1985).

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

3 The court in Lopez-Valenzuela also held that the court's determination of whether there was probable cause to justify the charges against the defendant did not elevate Arizona's initial appearance to a critical one. See 719 F3d at 1069.

> 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, 15 NY3d at 20.

The Court of Appeals in this case noted that the Sixth Amendment guarantees representation at all critical stages of a criminal prosecution, and observed that the period between arraignment and trial is critical for Sixth Amendment purposes. Plaintiffs, relying on the Court of Appeals decision, argue that arraignment is also a critical stage. The Court of Appeals holding on that issue, however, is less than clear.[4] 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, based on a reading of the complaint, 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 respect to a number of the class representatives, (e.g., the individual was released), nor was the ability of any of the defendants to defend against the charges they faced impaired by the absence of counsel at arraignment. Indeed, the facts in this case are vastly different than those upon which the Court of Appeals' decision was based.

4 The lack of clarity is illustrated in Singleton v. Lee, 2013 US Dist LEXIS 87005 (WDNY 2013), where the court "assume[d] arguendo" that the criminal defendant's arraignment was a critical stage. Id. at *10.

Perhaps the most useful way to compare (1) the facts alleged in the complaint with (2) the actual evidence in this case is to juxtapose (a) the dramatic and startling allegations in the complaint that produced the Court of Appeals decision in this case and (b) the affirmations submitted by the plaintiffs as alleged proof of systemic violations of the right to counsel in the defendant Counties. For instance, the Court of Appeals was given the impression, through the complaint, that this case would prove that defendants in the defendant Counties are "unrepresented in . . . proceedings where pleas are taken and other critically important legal transactions take place," id. at 19, and that "plaintiffs' pretrial liberty interests were . . . 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." Id.

In contrast, plaintiffs' proof on this cross-motion of the systemic denial of the right to counsel in the defendant Counties -- which is now finally before the court in lieu of the unsupportable allegations in the complaint -- includes proof of defendants (1) not being represented by counsel at their first appearances on traffic tickets, including disobeying a stop sign, see Stoughton aff. at Exh. 57, ¶5; (2) being permitted to plead guilty, while unrepresented, to public urination and open alcoholic container charges and given fines, see id. at Exh. 56, ¶¶25-26; (3) whose arraignments were adjourned, see id. at Exh.56, ¶28; Exh. 58, ¶¶6, 7,10; (4) who knowingly waived their right to counsel for arraignment purposes, see Exh. 56, ¶¶7, 14, 28; Exh. 58, ¶¶9, 29, 41; and (5) who were not incarcerated at the time of their arraignment and were not taken into custody at arraignment. See id. at Exh. 56, 16, 19-20, 26-27; Exh. 57, generally; Exh. 58, generally.

Accordingly, based on the record evidence in this case, first appearances in New York are not a critical stage triggering the constitutional right to counsel.

A. Plaintiffs Mischaracterize Arraignments in New York State

Plaintiffs allege that arraignments in New York State are a "critical stage" because (1) the court must make a determination of whether bail should be set or the defendant released on his own recognizance, (2) a defendant may "test the facial sufficiency of the accusatory document" and possibly have charges dismissed, (3) a temporary order of protection may be issued and (4) guilty pleas may be accepted. See Plaintiffs' Memorandum of Law at pp. 3-4. However, all but the entry of a guilty plea can be addressed and remedied after arraignment, and the plaintiffs cannot identify any representative plaintiff who pled guilty at arraignment, and have not provided evidence sufficient to show that guilty pleas are regularly and systematically accepted by New York Courts at arraignments from unrepresented defendants who are facing jail time. In addition, motions to challenge (1) the validity of, or otherwise dismiss, an accusatory instrument, see N.Y. Crim. Pro Law §§170.30, 170.35, 170.40, 170.45, 210.20, 210.25, 210.30, 210.35. 210.40, 210.43. 210.45, (2) the need for permanent orders of protection, see id. at §530.13, and (3) bail, see id. at §530.30, are typically made after, and not at, arraignment in the regular course of criminal defense practice. In fact, bail applications, discovery demands and motions were made by counsel for some of the representative plaintiffs. See e.g. 8/22/13 McGowan aff. at ¶¶98, 112, 113, 142, 143, 205. There is no evidence in this record that a temporary order of protection was issued against any representative plaintiff.

These post-arraignment remedies are precisely the procedures that led to first appearances in California and Arizona being deemed non-critical for Sixth Amendment purposes. Based on the similarity between New York State arraignments and those at issue in Farrow and Lopez-Valenzuela -- namely, the reading of charges, advising of rights and bail determinations -- the plaintiffs cannot establish that arraignments in New York are a critical stage. Farrow at 1066; Lopez-Valenzuela at *47.

B. Plaintiffs' Arraignments

The proof relating to the representative plaintiffs' experiences at their arraignments fails to establish that indigent criminal defendants in the Four Counties are regularly and systemically at risk for being denied their Sixth Amendment right to counsel at first appearances in those Counties.

1. Suffolk County -- Luther Booker

Not surprisingly, plaintiffs fail to even mention plaintiff Booker, who is the only Suffolk County representative plaintiff who appeared for his court-ordered deposition, because plaintiff Booker was represented by counsel at his arraignment in Suffolk County District Court. See Booker dep.[5] at pp. 54-55; Monastero 2009[6] at ¶3. Therefore he was not denied his right to counsel at arraignment. As a result, plaintiffs cannot establish that indigent criminal defendants in Suffolk County are systemically denied the right to counsel at arraignment.

5 "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 8/22/13 Dvorin Affirmation.
6 "Monastero 2009" refers to the undated affirmation of Deborah A. Monastero annexed as Exhibit E to the 8/22/13 Dvorin Affirmation.

2. Onondaga County

a. Winbrone

Like plaintiff Booker, plaintiff Winbrone was represented by counsel at her arraignment in Syracuse City Court. See Winbrone dep.[7] at pp. 17-18. Therefore, plaintiff Winbrone was not denied her right to counsel at arraignment. As a result, plaintiff Winbrone is not representative of any alleged systemic denial of counsel at arraignment in Onondaga County.

b. Briggs and Love

By stating simply that "no bail was set" at the arraignments of plaintiffs Briggs and Love, the plaintiffs attempt to imply that the lack of bail was somehow a result of the absence of counsel at the arraignments of these plaintiffs. However, in actuality, plaintiffs Briggs and Love were both held in custody on no bail because the Court was without statutory authority to consider bail based upon plaintiff Briggs's and plaintiff Love's criminal histories, which included two prior felony convictions. See N.Y. Crim. Law §530.20(2)(a)(prohibits local courts from setting bail for defendants who have previously been convicted of two felonies). See also Trunfio 2009[8] at ¶60; Love dep.[9] at pp. 26, 61. Therefore, whether or not an attorney was present at the arraignments of these plaintiffs, nothing about their bail status could have been different as a matter of law. There are no allegations, or proof, in this case that either plaintiff Briggs or Love pled guilty at arraignment, made incriminating statements at arraignment or was prevented

7 "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 8/22/13 McGowan Affirmation.
8 "Trunfio 2009" refers to the 2/20/09 affirmation of Dominic Trunfio annexed as Exhibit B to the 8/22/13 McGowan Affirmation.
9 "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 8/22/13 McGowan Affirmation.

from raising any issue during their criminal proceedings as a result of not being represented by counsel at arraignment. Therefore, plaintiffs Briggs and Love were not denied the right to counsel at a critical stage.

c. Adams

Plaintiff Adams was not represented by counsel at his arraignment in Syracuse City Court, and bail was set in an amount that plaintiff Adams could not initially make. However, as discussed below, arraignments in Syracuse City Court are now staffed by members of the Onondaga County Assigned Counsel Program ("ACP"), who represent in-custody defendants who appear in City Court for arraignment every day of the year, including Sundays and holidays. See Captor dep.[10] at p. 113. Therefore, plaintiff Adams' experience at his arraignment is not representative of how arraignments are now conducted in Syracuse City Court.

3. Schuyler County

a. Chase and Tomberelli

Plaintiff Chase was issued an appearance ticket at the time of his arrest, and was not subject to bail or held in custody at his subsequent arraignment. See 8/22/13 Rutnik aff. at Exh. N. Plaintiff Tomberelli was released on his own recognizance at his arraignment. See 8/22/13 Rutnik aff. at Exh. T. There are no allegations, or proof, in this case that either plaintiff Chase or Tomberelli pled guilty at arraignment, made incriminating statements at arraignment or was prevented from raising any issue during their criminal proceedings as a result of not being represented by counsel at arraignment.

10 "Captor dep." refers to the transcript of the October 10, 2012 deposition of plaintiff Renee Captor, the relevant portions of which are annexed as Exhibit D to the 8/22/13 McGowan Affirmation.

b. Yaw

While plaintiff was arraigned in Dix Town Court on June 26, 2007 without an attorney present, see 8/22/13 Rutnik aff. at Exh. O, Mr. Yaw testified that he had been represented by the Schuyler County PD Office on other charges in August or September 2007 and he was, in fact, represented by counsel at the arraignment on those charges. See Yaw dep.[11] at pp. 73-74. Therefore, to the extent that plaintiff Yaw is said to represent indigent criminal defendants who are arraigned without counsel in Schuyler County, his experience belies the notion that defendants in that County are systemically denied counsel at arraignment.

4. Washington County -- Hurrell-Harring and Habshi

The plaintiffs fail to even mention plaintiff Hurrell-Harring's or plaintiff Habshi's arraignments in their papers in support of their cross-motion.

C. Plaintiffs Cannot Connect the Experiences of the Representative Plaintiffs to a Systemic Condition in the Four Counties

Plaintiffs appear to believe that they can establish a systemic deficiency if they can show that indigent criminal defendants in the Four Counties are, on occasion, arraigned without counsel. However, since the Four Counties are continuously moving toward providing indigent criminal defense lawyers at all arraignments, it cannot be the case that the Four Counties are regularly and systemically not providing counsel at arraignment. The State and the Counties continue 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, the New York State Office of Indigent Legal Service

11 "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 8/22/13 Rutnik Affirmation.

("OILS") issued a Request for Proposals ("RFP") seeking applications for grants to be used to improve the quality of representation provided to indigent criminal defendants at first appearances. See 8/22/13 Kerwin aff. at Exh. S. Three of the Four Counties in this case applied for, see 8/22/13 McGowan aff. at Exh. V; 8/22/13 Dvorin aff. at Exh. T; 8/22/13 Rutnik aff. at Exh. V, 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. Suffolk, Onondaga and Schuyler Counties received awards of $747,000, $588,000 and $94,000 over the three year period, respectively.[12] See 8/22/13 Kerwin aff. at ¶66.

As discussed below, these funds are being used to supplement and improve the representation of indigent criminal defendants at arraignments. Unbelievably, the plaintiffs point to the OILS request for proposals for the Counsel at First Appearance grant, the Counties' application for such grant monies, and other efforts of OILS as "evidence" that indigent criminal defendants in the Four Counties are systemically at risk of having their Sixth Amendment rights violated at arraignment. See Stoughton aff. at Exhs. 16, 26, 58. As testified by OILS Director, William Leahy, the mandate of OILS is to improve the quality of legal representation provided to indigent defendants in New York. See 8/22/13 Kerwin aff. at Exh. P, p. 43. OILS's goal of improving the quality of representation is certainly not the same as plaintiffs' goal of establishing constitutional violations. Moreover, the availability of the grants clearly evidences the State's ongoing

12 Upon information and belief, Washington County did not apply to participate in the OILS Counsel at First Appearance grant program. The State cannot be held responsible for a County failing to participate in a grant program designed and offered by the State to address specific issues involved in indigent criminal defense representation.

efforts to ensure the availability of counsel at all arraignments. Certainly steps can be taken to improve the quality of already-constitutional public defense programs. Therefore, for the plaintiffs to rely on the Counties' applications for funds to improve the quality of indigent legal services as evidence that the delivery of those services in the Counties is unconstitutional is disingenuous and operates only to, again, distract the court from what is actually occurring, and improving, in the defendant Counties.

Perhaps the most drastic change in the provision of indigent criminal defense services has been in defendant Ontario County, against whom the plaintiffs have not moved for partial summary judgment. Interestingly, Ontario County received the largest OILS grant to improve the quality of representation at first appearances out of the four defendant Counties that applied for such grant money. See Kerwin aff. at ¶44. If plaintiffs' logic is applied as to Ontario County, the fact that that County (1) applied for grant money to improve the quality of representation at arraignments and (2) received such a large amount should indicate that its provision of public defense services is woefully inadequate. However, even plaintiffs acknowledge, by omitting Ontario County from this cross-motion, that indigent criminal defendants in Ontario County are not at risk of having their right to counsel denied at arraignment.

The proof in this case of the already-existing arraignment representation plans, as well as the enhanced services to be provided by the recently awarded OILS grant program, establishes that -- or at the very least, created issues of fact as to whether -- indigent criminal defendants in the Four Counties are not systemically and regularly at risk of being denied counsel at arraignment in the Four Counties.

1. Suffolk County

Suffolk County Legal Aid Society ("LAS") attorneys represent clients at arraignment in the District Courts, which conduct arraignments for the towns on the western side of Suffolk County. See Mazzola dep.[13] at p. 33. All of the arraignments from the five western Suffolk County towns[14] are heard in courtroom D11 in District Court every day of the year, including Sundays and holidays, and those arraignments are always staffed by LAS attorneys. See Caponi dep.[15] at p. 167. In addition, LAS attorneys represent clients at arraignments in the eastern towns of Riverhead and Southampton, which hold court everyday. See Mazzola dep. at pp. 34-35; Caponi dep. at p. 166.

If clients are arraigned during a regularly-scheduled court time in the eastern towns of Southold, East Hampton[16], West Hampton Beach, Quogue, Sag Harbor and Shelter Island, which are not busy courts, they will be represented by an LAS attorney. See Mazzola dep. at pp. 36-37; Caponi dep. at p. 95. If arraignments are held off-hours in these eastern towns, an LAS attorney may not be present. See Mazzola dep. at pp. 36-37. However, in such cases when the defendant is not going to be held in custody, the judge usually adjourns the matter to the next regularly-scheduled court date so that an LAS attorney may be present for arraignment. See id. at pp. 36-37. If a defendant is going to be placed in custody off-hours in the East End, the judge will have that defendant brought back to court before the next regularly-scheduled court date so that the client may appear with an LAS attorney as soon as possible. See id. at pp. 36-37.

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13 "Mazzola dep." refers to the transcript of the September 19, 2012 deposition of Louis Mazzola, the relevant portions of which are annexed as Exhibit H to the 8/22/13 Dvorin Affirmation.
14 The area of Suffolk County from Riverhead to Montauk are referred to as the "East End".
15 "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 8/22/13 Dvorin Affirmation.
16 East Hampton will call LAS if they are bringing in someone for an arraignment on a non-court day, and LAS will dispatch an attorney to cover it. See Caponi dep. at p. 166.

In cases in the justice courts where the court does not have legal authority to set bail because the defendant is charged with a felony and has a prior felony conviction, LAS does not send a lawyer to cover that person's arraignment off-hours. See Caponi dep. at pp. 166-67. In such cases, if the court assigns LAS to represent that client, the court faxes the paperwork to LAS, and an attorney will go directly to the jail to speak to the client. See id. at p. 167. In cases where a person is arraigned pro se and cannot make bail, LAS automatically picks the case up at the next appearance. See id. at p. 137.

Typically, there are two LAS attorneys at District Court arraignments so that one can interview potential clients before the arraignment to advocate for bail. See Mazzola dep. at p. 88. In County Court, judges assign LAS to represent all in-custody defendants. See Schick dep.[17] at p. 19. For conflicts, there is an 18-b felony attorney designated as the attorney of the day each day in County Court and the District Court arraignment part. See Besso dep.[18] at p. 13. District Court arraignments are covered every day, including weekends, by a member of the 18-b panel. See id. at pp. 33, 95-96. Additionally, a member of the 18-b misdemeanor panel is assigned as the attorney of the day for the rest of the District Court parts as well as the District Court arraignment part in case of any misdemeanor arraignments. See id. at p. 14. When a defendant cannot be represented by LAS because of a conflict, judges in District Court wait for an 18-b conflict attorney to arrive before proceeding with an arraignment. See Monastero dep.[19] at pp. 35-37.

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17 "Schick dep." refers to the transcript of the October 24, 2012 deposition of John Schick, the relevant portions of which are annexed as Exhibit L to the 8/22/13 Dvorin Affirmation.
18 "Besso dep." refers to the transcript of the September 26, 2012 deposition of David Besso, the relevant portions of which are annexed as Exhibit O to the 8/22/13 Dvorin Affirmation.
19 "Monastero dep." refers to the transcript of the October 19, 2012 deposition of Deborah Monastero, the relevant portions of which are annexed as Exhibit M to the 8/22/13 Dvorin Affirmation.

Suffolk County intends to use its $747,000 in OILS grant money to hire two LAS attorneys to institute two model court parts in the East End in which an LAS attorney will always be physically present at arraignments in those courts. See Dvorin aff. at Exh. S. Specifically, LAS plans to staff the remote East End town courts of Southold and East Hampton, which have historically had "intermittent representation" at arraignment because of their geographical location and lack of resources. See 8/22/13 Dvorin aff. at Exh. S. It is anticipated that the other East End town and village courts will replicate the program and services provided in Southold and East Hampton through this grant program toward the goal of staffing all East End arraignments. See id. at p. 4. In addition, Suffolk County intends to use its OILS grant money to ensure that an "Arraignment Attorney" from the Suffolk County 18-b panel is present in District Court whenever the Court is in session to interview defendants who are ineligible for LAS representation and not represented by a private attorney. See id. That attorney will prepare and represent such a defendant at arraignment and then, if the defendant is deemed eligible for LAS or ACP representation, the Arraignment Attorney will provide all client and case information to the LAS courtroom attorney or the ACP attorney of the day. See id. With the implementation of the East End arraignment initiative, most arraignments in Suffolk County will be staffed by LAS attorneys, toward the ultimate goal of providing LAS representation at every arraignment in the County.

2. Onondaga County

The arraignment program in Onondaga County provides representation at arraignment to almost all defendants in Syracuse City Court for afternoon arraignments and arraignments every morning of the year, including Sundays and holidays. See Captor

dep. at p. 113; 9/30/13 Captor aff. at ¶2. The ACP attorneys that staff the arraignments interview potential clients before the arraignment calendar, fill out the eligibility form and then handle the arraignments. See Captor dep. at pp. 113, 158. The arraignment attorneys are all felony qualified. See id. at p. 137. Since June 13, 2013, the ACP has been providing representation at arraignment in Syracuse City Court for defendants that are both in custody and out of custody. See 9/30/13 Captor aff. at ¶2.

Onondaga County intends to use its $588,000 in grant money to provide counsel at arraignment "in the 14 largest justice courts, before 33 judges," which will provide counsel at arraignment "for approximately 90% of defendants arraigned in town [and village] courts." See 8/22/13 Kerwin aff. at ¶44; 8/22/13 McGowan aff. at Exh. V. In addition, ACP intends to "work with the justice court judges to develop a workable protocol to provide representation at arraignment in the 14 smaller and village courts." See 8/22/13 McGowan aff. at Exh. V. In fact, the final planning for the implementation of the arraignment initiative for 90% of the defendants arraigned in the town and village courts is underway. When that initiative is implemented, only a very small percentage of indigent criminal defendants in Onondaga will be arraigned without counsel, as the County diligently moves toward the goal of ultimately providing representation at every arraignment.

3. Schuyler County

If an arraignment occurs when an attorney from the Schuyler County PD Office is present in court and a judge determines the defendant to be eligible for services, representation begins immediately - with the caveat that representation is for arraignment

purposes only until a conflict of interest check can be performed. See Hughson dep.[20] at pp. 36, 37. During regular court sessions, if a defendant asks for an attorney during a local court arraignment, courts will stop the arraignment and make sure an attorney is made available. See Hughson dep. at p. 38. If the defendant indicates he or she cannot afford an attorney, the Judge will provide an application for PD services. See id. at pp. 38, 39.

Schuyler County intends to use its $94,000 in grant money to fund a full-time position for the now part-time Assistant PD and increase the salary and fringe benefits of the Office's legal secretary to address the increase in workloads that are required to provide quality representation at arraignments. See 8/22/13 Rutnik aff. at Exh. Exhibit V; 8/22/13 Kerwin aff. at ¶44. The Schuyler County PD proposed this use of grant funds because "[w]ith two full time attorneys on staff the office will be more available to go beyond the regular[ly] scheduled appearances and be available to appear at ... unknown/unscheduled appearances." See 8/22/13 Rutnik aff. at Exh. V. It would also permit the PD Office to staff County Court for all arraignments. See id. Schuyler County intends to inform the local courts that the PD Office be notified whenever an arraignment was taking place in those courts during the day, and the success of this proposal "[d]epends on cooperation of the Courts," and "assum[es] that the local courts will cooperate." See id. As a result, when the Schuyler County arraignment initiative is implemented, it is expected that many more indigent criminal defendants will be represented at arraignment in Schuyler County.

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20 "Hughson dep." refers to the transcript of the October 2, 2012 deposition of Matthew Hughson, the relevant portions of which are annexed as Exhibit D to the 8/22/13 Rutnik Affirmation.

4. Washington County

The Washington County Court attempts to schedule arraignments for days when the PD office is present, resulting in counsel being present at all arraignments for felony charges except in the rare situation where arraignment occurs in the evening and the PD Office is not notified. See Mercure dep.[21] at pp. 108-112. Local courts generally do not provide the PD office with notice that individuals are being arraigned, though the PD Office provides counsel for all local court arraignments when the PD office has notification of the arraignment or if a member of the PD Office is present in Court at the time of arraignment. See id. at p. 112-113; DeCarlo-Drost dep.[22] at p. 93. Additionally, the County Court regularly requires the PD Office to appear for unrepresented defendants at arraignment, regardless of a defendant's ability to qualify for representation. See Mercure dep. at pp. 110-111. If an APD is present in a local court while a defendant is being arraigned without counsel, PD Mercure has instructed the APDs to appear as counsel, for the purpose of arraignment. See id. at p. 108; Morris dep.[23] at pp. 63-64.

D. Experiences of Alleged Class Members

In a desperate, last ditch effort to salvage a cause of action in this case, the plaintiffs observed court appearances in the Four Counties within the last two months to attempt to garner "evidence" of some systemic violation of the right to counsel at arraignments. Based on these observations, the plaintiffs now rely on hearsay accounts of the arraignments of criminal defendants in a couple of courts in these Four Counties --

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21 "Mercure dep." refers to the transcript of the October 15, 2012 deposition of Michael Mercure, the relevant portions of which are annexed as Exhibit B to the 8/22/13 Muse Affirmation.
22 "DeCarlo-Drotl dep." refers to the transcript of the October 16, 2012 deposition of Marie DeCarlo-Drost, the relevant portions of which are annexed as Exhibit A to the 8/22/13 Muse Affirmation.
23 "Morris dep." refers to the transcript of the October 22, 2012 deposition of Christian Morris, the relevant portions of which are annexed as Exhibit C to the 8/22/13 Muse Affirmation.

without regard to whether or not those defendants were "indigent" and, therefore, entitled to representation under the County Law -- charged mostly with traffic and quality of life offenses.

The four affidavits submitted by the plaintiffs are (1) inadmissible hearsay and (2) fail to establish that indigent criminal defendants in the Four Counties are regularly and systemically denied the right to counsel. The affidavits do nothing more than document what the affiants heard in court, which is textbook hearsay and inadmissible. Since only admissible evidence may be considered on a motion for summary judgment, Zuckerman v. New York, 49 NY2d 557, 562 (1980), these affidavits must be rejected in their entirety. However, even if the affidavits were, *arguendo*, not inadmissible hearsay, the contents of these affidavits is insufficient to establish that plaintiffs are entitled to judgment as a matter of law.

1. Suffolk County

Even though there is no representative plaintiff who was arraigned in Suffolk County's East End, the affidavits of Ryan Cleary and Trevor Boeckman document Mr. Cleary's and Mr. Boeckman's observations of court sessions in the Suffolk County East End. Specifically, Mr. Cleary's affidavit describes the appearances of two defendants in the Southampton Town Justice Court on August 10, 2013 during a one and one-half hour court session, and appearances of a number of defendants charged with local quality of life offenses during one four and one-half hour court session in Patchogue Village Justice Court. See Stoughton aff. at Exh. 56. The affidavit of Trevor Boeckmann documents Mr. Boeckmann's observations of the appearances of two defendants in Northport Village

Justice Court on August 26, 2013 and two defendants in Westhampton Beach Village Court on August 28, 2013. See Stoughton aff. at Exh. 57.

Mr. Cleary states that the arraignment of defendant Emma MacWhinnie took place in Southampton Town Justice Court on Saturday, August 10, 2013 on traffic violations, including a misdemeanor charge of Driving While Intoxicated. See Stoughton aff. at Exh. 56, ¶¶4, 5. The judge "advised Ms. MacWhinnie of her right to counsel and right to remain silent, [and] then asked if she would like to proceed without counsel." See id. at ¶7. Ms. MacWhinnie then waived her right to counsel at arraignment, and the judge "explained the nature and consequences of a guilty or not guilty plea and entered a plea of not guilty on Ms. MacWhinnie's behalf." See id. After asking Ms. MacWhinnie about her personal and financial situation, the judge set bail at $200.00 because Ms. MacWhinnie had a previous failure to appear on her record, and told Ms. MacWhinnie to come back to the courthouse the following Monday to speak to an LAS attorney. See id. at ¶¶8, 9. Bail was paid, and Ms. MacWhinnie left court. See id. at ¶9.

The only other arraignment observed by Mr. Cleary in Southampton on Saturday, August 10, 2013 was of a defendant "whose named was or sounded like Ms. Connick,[24]" who was charged with misdemeanor petit larceny. See id. at ¶10. This defendant was in custody at the time of her arraignment. See id. at ¶12. After speaking to a lawyer on the telephone who elected not to represent this defendant, the defendant informed the judge that she needed counsel assigned. See id. at ¶13. The judge "stated that she could proceed now without an attorney or she could wait for a Legal Aid attorney on Monday, but that she would remain in custody until then." See id. at ¶14. The defendant waived

24 The State defendants are at a loss as to how they are supposed to defend allegations about a defendant "whose named was or sounded like Ms. Connick," or "a man who appeared to be in his thirties or forties and who limped and walked with a cane." See *infra*.

her right to counsel at arraignment. See id. The judge then asked the defendant about her personal and financial information and released her on her own recognizance. See id. at ¶¶15-16. The judge then directed the defendant to return to court on Monday to meet with a Legal Aid attorney. See id. at ¶16.

Plaintiffs' own evidence establishes that these two defendants were advised of their right to counsel, and waived that right for arraignment purposes. Of particular significance is that the experience of the defendant "whose name sounded like Connick" is illustrative of the likely implications of requiring the presence of public defense counsel at every first appearance in New York. Specifically, the alternative to conducting a first appearance without counsel when an attorney is not present or available is a defendant on a petty or minor charge -- who would otherwise have been released on his or her own recognizance immediately -- is a defendant remaining in custody until an attorney is assigned and available. Notwithstanding, both Southampton defendants knowingly waived their rights to counsel at arraignment, and were advised how to meet with LAS for representation in the rest of the proceeding.

Mr. Cleary also attended a court session in Patchogue Village Justice Court on August 15, 2013 at which he observed the prosecutor "call[] out the names of many defendants and then conferenced with them individually in a private room" with no one else present. See id. at ¶¶17, 19. It is unclear how Mr. Cleary has any idea what occurred in that room or in those alleged conversations, and there is no mention in Mr. Cleary's affidavit whether any of the defendants who conferenced in the private room were eligible for public defense services. Therefore, there is no proof that any of these defendants were actually alleged class members.

The judge informed "everyone in the courtroom that they had a right to counsel, to remain silent and to a jury trial. He also explained what conditional discharge means, since every plea of guilty in exchange for a lower fine would be accompanied by a conditional discharge of one year."[25] See id. at ¶21. The judge then stated that "he would not be appointing counsel for any defendants because **he was not considering jail time**." See id. at ¶22 (emphasis added). When each defendant was before the court, the judge informed the defendants that "they had been charged with violating a particular section of the Patchogue Village Code and that they 'had a right to counsel at this and every stage of this process.'" See id. at ¶23. The judge then informed each defendant "what the sentence would be if the defendant pled guilty that day" and asked each defendant if he or she "'wanted to proceed without a lawyer.'" See id.

Other than five defendants who appeared with private counsel, all but four waived their right to counsel at arraignment and pled to quality of life infractions for which incarceration was not considered. See id. Two of the four that did not waive their right to counsel at arraignment had the proceeding adjourned so that they could appear with counsel. See id. at ¶28. Because the other two defendants were charged with vandalism and a possible sentence of fifteen days in jail, the court entered pleas of not guilty on their behalves and adjourned the cases so that the defendants could seek counsel. See id. at ¶29.

The Supreme Court has held that the Sixth Amendment does not

> require the provision of defense services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely if ever imposed

25 Mr. Cleary claims that approximately forty people in the hallway did not hear this announcement, but does not explain how he has any idea what those people heard or did not hear.

> for certain types of offenses, so that for all intents and purposes the punishment they carry at most is a fine.

Argersinger v. Hamlin, 407 US 25, 39 (1972). In holding that counsel need only be appointed in cases where imprisonment is **actually imposed**, the Court stated

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, **even though local law permits it**, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused. . .

Id. at 40 (emphasis added). See also Alabama v. Shelton, 535 US 654, 662 (2002) (applying the Argersinger "actual imprisonment" rule).

Mr. Cleary's affidavit establishes that Patchogue Village Judge McGuire determined that he would not be imposing jail time for the minor offenses on the court's calendar -- even though the Village Code permits it. Upon that determination, the defendants charged with those offenses did not have the right to appointed counsel. Argersinger, 407 US at 39. Therefore, the defendants that pled guilty to those petty offenses at their first appearance were not denied their constitutional right to counsel.

Similarly, in Westhampton Beach Village Court, defendants Naun Perez and David Velasquez -- who were both charged with the vehicle and traffic offense of driving without a license -- pled guilty to a reduced charge without "explicitly waiv[ing]" their right to counsel. See id. at ¶¶20-22. Like the defendants observed in Patchogue, these defendants did not have a constitutional right to the appointment of counsel for the minor vehicle and traffic offense with which they were charged. Argersinger, 407 US at 39.

In Northport Village Justice court on August 26, 2013, affiant Trevor Boeckmann observed the arraignment of Joseph Chironis, who was charged with the Vehicle and

Traffic Law offense of disobeying a stop sign. See Stoughton aff. at Exh. 57, ¶5. The judge informed Mr. Chironis that he was facing a possible sentence of up to fifteen days in jail because of his prior record, and did ask if Mr. Chironis could afford counsel. See id. at ¶¶6, 8. Although Mr. Chironis stated that he wished to plead guilty, the court entered a not guilty plea on behalf of Mr. Chironis and gave Mr. Chironis a date to come back and conference his case with the prosecutor. See id. at ¶¶9, 11.

Mr. Boeckmann also describes his observation of the arraignment of Nicholas Franzone the same night, who was charged with the misdemeanor of Aggravated Unlicensed Operation of a Motor Vehicle. See id. at ¶12. The court found that Mr. Franzone was eligible to be represented by the Legal Aid Society and released Mr. Franzone on his own recognizance. See id. at ¶¶15, 18.

Neither defendant was (1) permitted to enter a guilty plea, (2) in-custody or (3) denied any rights. Instead, these first appearances were continued for, at least Mr. Franzone's purposes, to appear with appointed counsel. Mr. Chironis, having only been charged with disobeying a stop sign was not entitled to have counsel appointed unless the court contemplated imposing jail time for such a minor, petty offense. As stated in Argersinger, 407 US at 39, a defendant does not have the right to appointed counsel just because the law permits a sentence of jail time. Accordingly, these observations in Northport Village Justice Court do not establish a system in which indigent criminal defendants are at risk of being denied their right to counsel at arraignment.

Finally, affiant Noah Breslau describes observing one court session in Suffolk County District Court on September 3, 2013, including the arraignment of "a man who appeared to be in his thirties or forties and who limped and walked with a cane." See

Stoughton aff. at Exh. 58, ¶¶11-37. While this affidavit purports to allege that five defendants were arraigned without counsel during one court session in courtroom D53, such an occasion is inconsistent with the rest of the proof in this case that Suffolk County District Court arraignments are covered by LAS attorneys 365 days a year. See Caponi dep. at p. 167. As a result, this single observation cannot establish that indigent criminal defendants in Suffolk County are at risk of being denied their right to counsel at arraignment.

2. Onondaga County

As alleged proof that indigent criminal defendants in Onondaga County are at risk of regularly and systemically being denied the right to counsel at arraignment, the plaintiffs submit the affirmation of Jeffrey Parry purporting to document some of Mr. Parry's observations at three justice courts in Onondaga County. First, Mr. Parry states that he observed court sessions in Liverpool Justice Court on approximately three occasions "in the past few months" and saw "approximately half a dozen defendants arraigned without counsel, including defendants who were being transported from jail." See Stoughton aff. at Exh. 67, ¶¶3-4. However, this affidavit fails to address (1) the charges that the defendants were facing, (2) whether in-custody defendants were held or ROR'd, (3) whether the defendants were advised of and/or waived their right to counsel, (4) whether pleas were entered or (5) whether the arraignments were adjourned. As a result, this information fails to provide any evidence sufficient to support plaintiffs' cross-motion.

Second, Mr. Parry states that he observed proceedings in the Van Buren Town Court on August 28, 2013 for forty minutes and observed one woman who was at her

second appearance without counsel. See id. at ¶¶5-7. That defendant told the court that she needed an attorney assigned and the court told the defendant that she had to apply for representation with the Onondaga County Assigned Counsel Program ("ACP"). See id. at ¶6. Mr. Parry then states, "[t]he judge told an attorney who was in court to approach the bench, but set the defendant's bail at $1500 before the attorney had the chance to say anything to the defendant or the court or to formally appear." See id.

Finally, Mr. Parry observed a session of the Town of Onondaga Justice Court on August 28, 2013 for thirty minutes. See id. at ¶¶8, 12. During that half-hour period, Mr. Parry allegedly observed two defendants arraigned without counsel, one of which was incarcerated. See id. at ¶¶9-10. One defendant informed the court that he had an assigned attorney on another pending case, and the other told the court that he needed counsel assigned. See id. at ¶10. The court told that defendant to apply to the ACP for counsel. See id. at ¶11.

These brief observations by Mr. Parry fail to offer any support for plaintiffs' position that indigent criminal defendants are regularly and systemically at risk of being denied their right to counsel at a critical stage in Onondaga County.

3. Schuyler County

Affiant Noah Breslau describes his observations of the initial appearances of three defendants during one court session in the Montour Falls Village Court on July 8, 2013. See Stoughton aff. at Exh. 58, ¶¶4-5. All three cases were adjourned to another date with no action being taken other than one defendant, Mr. Lakony, waiving his right to counsel. See id. at ¶¶4-10. Nothing about this court appearance even arguably demonstrates a violation of the right to counsel.

4. Washington County

The affidavit of Noah Breslau also documents Mr. Breslau's alleged observations in two Washington County justice courts -- Hudson Falls Town and Village Court and Fort Ann Town and Village Court. Mr. Breslau attended Hudson Falls Town and Village Court on August 20, 2013 and August 22, 2013 and documented his observations of seven defendants. See Stoughton aff. at Exh. 58, ¶¶39-39, 50. Mr. Breslau states that he observed five defendants arraigned without counsel on August 20, 2013. See id. at ¶39. Defendant Adams -- charged with driving without a license and the non-criminal possession of marijuana -- was informed of his right to counsel, waived it and accepted a plea offer from the prosecutor of an adjournment in contemplation of dismissal ("ACOD"). See id. at ¶¶40-42. Although not explicitly stated, it appears that defendant Ball -- charged with the non-criminal offense of possession of marijuana and unlicensed growing of cannabis -- also waived his right to counsel after being advised of same and accepted an ACOD. There is no indication in the record whether defendant Adams or Ball was indigent, so it is impossible to ascertain whether these defendants are alleged class members.

Defendant Aiken was arraigned without counsel on a charge of driving ten miles over the speed limit. See id. at ¶45. However, there is no information in Mr. Breslau's affidavit about whether defendant Aiken was advised of her right to counsel, waived or invoked the right to counsel or was indigent and entitled to appointed counsel. Therefore, there is no evidence in the record that defendant Aiken was an alleged class member. Notwithstanding, defendant Aiken agreed to a plea bargain to a lesser charge and was

fined $50.00. See id. at ¶45. Defendant Bayard[26] was allegedly charged with the non-criminal offense of possession of marijuana and unlicensed growing of cannabis, and told the court that she wanted an attorney but could not afford one. See id. at ¶¶46-47. There is no further discussion about what happened at the appearance except that defendant Bayard also accepted an ACOD without counsel. See id. at ¶47.

Finally, Mr. Breslau states that defendant Winchell was arraigned without counsel on August 20, 2013 on a charge of endangering the welfare of a child. See id. at ¶48. Defendant Winchell was advised of his right to counsel, and stated that he wanted to be represented by the PD. See id. at ¶49. The court then gave defendant Winchell the PD application and instructed him to submit it. See id. Apparently no further action was taken on Mr. Winchell's case at that proceeding. Mr. Breslau's affidavit fails to demonstrate how his observations of these five defendants are demonstrative of a systemic risk of the denial of the right to counsel at arraignment in Washington County.

Mr. Breslau also observed the Hudson Falls Town and Village Court on August 22, 2013 and saw two defendants arraigned without counsel. See id. at ¶50. Defendant Anderson was arraigned on the charges of petit larceny and trespass and advised of his right to counsel. Mr. Anderson told that court that he wanted to be represented by the PD. See id. at ¶52. The court then gave defendant Anderson the PD application and instructed him to submit it. See id. Apparently no further action was taken on Mr. Anderson's case at that proceeding. Similarly, defendant Cook was arraigned on the charge of aggravated unlicensed operation of a motor vehicle and other traffic charges. See id. at 53. Ms. Cook told that court that she wanted to be represented by the Public

26 Clearly, the offenses with which defendants Adams, Aiken, Ball and Bayard were minor petty offenses for which imprisonment is not typically imposed as a penalty.

Defender. See id. at ¶54. The court then gave defendant Cook the PD application and instructed her to submit it. See id. Apparently no further action was taken on Ms. Cook's case at that proceeding, and it is inferred from Mr. Breslau's affidavit that defendants Anderson and Cook were not in custody.

During Mr. Breslau's one observation of a session of Fort Ann and Village Court on August 21, 2013, he allegedly saw "a woman with the first name of Elizabeth" charged with speeding arraigned without counsel. See id. at 55-57. This defendant was advised of her right to counsel, and apparently waived that right, although Mr. Breslau's affidavit is silent on such a waiver. See id. at 58. The defendant pled guilty and a fine was assessed by the court. See id. at 58. However, after being advised of administrative penalties that would be assessed by DMV as a result of her guilty plea, the defendant asked to withdraw her plea and come back on another day to negotiate a better plea. See id. at 59. The court advised the defendant when to return. See id.

This alleged "evidence" of a handful of observations for short periods of time concerning the court appearances of defendants mostly charged with offenses for which jail time is not typically imposed -- including minor traffic offenses -- is utterly insufficient to establish a systemic denial of the right to counsel at arraignment in the Four Counties, and is not worthy of being presented at a trial. Further, this pittance of alleged "evidence" cannot be found by any trier of fact to demonstrate regular and systemic conditions in the Four Counties that put indigent criminal defendants at risk of being denied the right to counsel at a critical stage under New York law.

E. Plaintiffs Rely on Outdated and Inadmissible Evidence That is Not Relevant to the Four Counties

This Court has already addressed the inadmissibility of the now-seven year old Kaye Commission Report in connection with its denial of plaintiffs' motion for a preliminary injunction. Specifically, the court stated,

> Plaintiffs rely primarily upon the Final Report to the Chief Judge of the State of New York by the Commission on the Future of Indigent Defense Services dated June 18, 2006 (hereinafter the Kaye Commission Report) . . . Defendants have objected to the admissibility of the Kay[e] Commission Report as hearsay. Indeed, it is clearly hearsay. Plaintiffs contend that it comes within the common law exception for public documents. [Footnote omitted] However, such exception is limited to public documents which contain specific findings of relevant fact based upon admissible evidence. [Footnote omitted] The Kaye Commission Report is conclusory in nature and does not contain any specific findings of fact with respect to any of the five counties. Moreover, it is based in large part upon a report prepared by a private research organization which does not appear to be subject to any of the exceptions to the hearsay rule. As such, plaintiffs have not shown that the Kaye Commission Report constitutes admissible evidence.

See 8/22/13 Kerwin aff. at Exh. F. Despite this clear and supported finding by the Court, the plaintiffs have cited to the Kaye Commission Report countless times in their motion papers and, despite years of discovery, continue to rely on, and focus their case around, its contents.

Like the Kaye Commission Report and the affidavits relating to the observations of recent first appearances in the Four Counties discussed above, the articles, speeches, letters, emails, memoranda, "reports" and other documents that comprise most of the plaintiffs' alleged "proof" on their cross-motion are all similarly inadmissible hearsay. See e.g. Stoughton aff. at Exhs. 2, 5, 6, 7, 8, 10, 12, 13, 14, 20, 23, 40, 25, 36, 53, 54, 62,

74. Additionally, this same inadmissible evidence fails to address the arraignment programs in the Four Counties and, instead, the plaintiffs ask the Court to consider irrelevant generalized state-wide information as proof that indigent criminal defendants in the Four Counties are regularly and systemically at risk of being denied counsel at arraignment in violation of the Sixth Amendment.

In addition, the plaintiffs rely on reports and statements that are over seven years old in an attempt to illustrate what is actually occurring in the Counties currently. This is not surprising, as the delivery of indigent criminal defense services in the defendant Counties has changed and improved during the pendency of this litigation, as discussed above.

Based on the sparse admissible relevant evidence submitted by the plaintiffs, together with the admissible evidence submitted by the State defendants in support of their motion for summary judgment and in opposition to plaintiffs' cross-motion, the plaintiffs have failed to meet their burden on this cross-motion and show that they are entitled to partial judgment as a matter of law. Therefore, plaintiffs' cross-motion should be denied.

CONCLUSION

For the reasons discussed above and in the State defendants' moving memorandum of law, the plaintiffs cannot establish – using the actual proof in this case about (1) what happened to the representative plaintiffs and (2) what is happening in the defendant Counties – that the State defendants are systemically denying the right to counsel at arraignment to indigent criminal defendants in the defendant Counties. Therefore, plaintiffs' cross-motion should be denied.

Dated: Albany, New York
September 30, 2013

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