SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

Index No. 8866-07
(Devine, J.)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Corey Stoughton
Taylor Pendergrass
Mariko Hirose
Erin Harrist
Brooke Menschel
Susannah Karlsson
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

SCHULTE ROTH & ZABEL LLP
Gary Stein
Daniel L. Greenberg
Kristie M. Blase
Matthew Yoeli
Mark Arnot
919 Third Avenue
New York, New York 10022
(212) 756-2000

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF UNDISPUTED FACTS 3

ARGUMENT 7

There Is an Indelible Right to Counsel at Arraignment in New York 8

It Is Undisputed That Indigent Defendants in the Five Counties Are Frequently and Deliberately Arraigned Without Counsel 12

A. Indigent Persons in the Defendant Counties Are Frequently Unrepresented at Arraignments Because County Public Defense Systems Cannot Provide Counsel at All Arraignments 13

B. The State Does Not Ensure the Presence of Counsel at Arraignments in New York 15

1. The State Has Long Known that Indigent Defendants Are Arraigned Without Counsel, and Has Failed to Act 16

2. The State's Recent Grant Program for Lawyers at Arraignment Proves the State's Knowledge of and Liability for Constitutional Violations of the Right to Counsel at Arraignment 16

3. The State Cannot Escape Liability for Violations of Indigent Defendants' Rights to Counsel at Arraignment by Blaming the Judiciary 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Argo Global Special Situations Fund v. Wells Fargo Bank, N.A.,
810 F. Supp. 2d 906 (D. Minn. 2011) 1

Brill v. City of New York,
2 N.Y.3d 648 (2004) 7, 8

Coleman v. Alabama,
399 U.S. 1 (1970) 11

Davis v. City of New York,
49 A.D.2d 874 (2d Dep't 1975) 1

DeWolfe v. Richmond,
--- A.3d ---, 2012 WL 10853 (Md. Jan. 4, 2013) 9

Gideon v. Wainwright,
372 U.S. 335 (1963) .... *passim*

Gonzalez v. Commissioner on Correction,
68 A.3d 624 (Conn. 2013) 9

Hurrell-Harring v. State of New York,
15 N.Y.3d 8 (2010) .... *passim*

Hurrell-Harring v. State of New York,
81 A.D.3d 69 (3d Dep't 2011) 1

In re Bauer,
3 N.Y.3d 158 (2004) 11

Missouri v. Frye,
--- U.S. ---, 132 S. Ct. 1399 (2012) 9

People v. Blake,
35 N.Y.2d 331 (1974) 9

People v. Chapman,
69 N.Y.2d 497 (1987) 12

People v. Lopez,
16 N.Y.3d 375 (2011) 9

People v. Samuels,
49 N.Y.2d 218 (1980) 9, 11

People v. Settles,
46 N.Y.2d 154 (1978) 11

Rothgery v. Gillespie Co.,
554 U.S. 191 (2008)...11

Roulan v. County of Onondaga,
90 A.D.3d 1617, 1621 (4th Dep't 2011)..14

SEC v. Founding Partners Capital Mgmt.,
639 F. Supp. 2d 1291 (M.D. Fla. 2009)...1

SEC v. Infinity Group Co.,
993 F. Supp. 324 (E.D. Pa. 1998) 1

Suffolk County Dep't of Soc. Servs. on Behalf of Michael V. v. James M.,
83 N.Y.2d 178 (1994) 8

United States v. Cronic,
466 U.S. 648, 659 (1984)...11

Constitutions

U.S. Const. Amend. VI 8

New York Const., Art. 1 § 6 8

Statutes

CPL 1.20 9

CPL 100.05 9

CPL 100.15 ....4, 10

CPL 140.20 3

CPL 140.45 10

CPL 170.10 ....3, 4, 10, 11

CPL 180.10 ..... 3, 4, 10, 11

CPL 210.50 11

CPL 510.30 10

CPL 530.12 ..... 4, 10

CPL 530.13 ..... 4, 10

NY County Law § 722 ..... 4, 12

Plaintiffs Kimberly Hurrell-Harring, James Adams, Joseph Briggs, Richard Love, Jacqueline Winbrone, Lane Loyzelle, Tosha Steele, Shawn Chase, Robert Tomberelli, Christopher Yaw, Luther Woodrow of Booker, Jr., and Randy Habshi, on behalf of themselves and all others similarly situated (the "Plaintiff Class"[1]), by their undersigned attorneys, respectfully submit this memorandum of law in support of their motion for partial summary judgment on their claim that the State of New York and Governor (collectively, the "State Defendants" or the "State")[2] have violated the federal and state constitutional right to counsel by failing to provide counsel at arraignment to indigent criminal defendants who are members of the Plaintiff Class.

PRELIMINARY STATEMENT

The proposition that indigent criminal defendants in New York are entitled to the assistance of an attorney at arraignment is, by now, a given. Arraignments mark the beginning of a criminal process in which counsel is vital to fairness and the validity of outcomes. In the arraignment proceeding itself, the sufficiency of the charging documents is tested, bail is determined, orders of protection issued, plea negotiations begun, and—occasionally—guilty

---

1 As certified by the Appellate Division, the Plaintiff Class consists of "all indigent persons who have or will have criminal felony, misdemeanor or lesser charges pending against them in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel." *Hurrell-Harring v. State of New York*, 81 A.D.3d 69, 71 (3d Dep't 2011).

2 The Defendant Counties— Onondaga, Ontario, Schuyler, Suffolk, and Washington—are party defendants in this action by virtue of the Court's order deeming them necessary parties. Plaintiffs' motion seeks final judgment on Plaintiffs' claims concerning lawyers at arraignment. However, the Court of Appeals and the U.S. Supreme Court place the constitutional responsibility to provide counsel to indigent defendants on the State of New York. Therefore, liability for the failure to provide counsel at arraignment belongs to the State, not to the Counties. In this sense, the Defendant Counties are akin to "relief defendants"—parties against whom no claim for liability has been asserted, but whose presence is necessary to ensure that plaintiff can obtain complete relief. *See, e.g., Davis v. City of New York*, 49 A.D.2d 874, 875 (2d Dep't 1975); *Argo Global Special Situations Fund v. Wells Fargo Bank, N.A.*, 810 F. Supp. 2d 906, 913 n.10 (D. Minn. 2011); *SEC v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1293 (M.D. Fla. 2009); *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 331 (E.D. Pa. 1998).

pleas are taken. Yet three years after the Court of Appeals described a lawyer at arraignment as "[in]dispensable," and two years after the Chief Judge predicted that, by 2012, "the norm in our great State will be that defendants are represented by counsel at arraignment," thousands of indigent defendants in New York are arraigned every year without counsel.

It is often lamented that, fifty years after *Gideon v. Wainwright*, the promise of the right to counsel remains unfulfilled. This motion seeks to ensure that the promise of lawyers at arraignment does not follow the same pattern. The undisputed facts show that indigent persons in the Defendant Counties are regularly and systematically denied attorneys at arraignment, in violation of the state and federal constitutional guarantee of the right to counsel. Under this guarantee, the State is liable for that regular and systematic denial of indigent defendants' constitutional rights. The undisputed facts also show that the State has long known about this systemic failure and deliberately refused to rectify it. As a result, the Plaintiff Class—hundreds of thousands of indigent defendants who presently are relying or in the future will rely on public defense counsel in the Defendant Counties—remain in jeopardy of an actual denial of counsel during the critical stage of arraignment.

Instead of facing this reality and focusing its attention on a solution, the State denies the facts and searches for scapegoats. At various times it has blamed the judiciary, the counties, individual lawyers, and indigent defendants themselves. But the Supreme Court in *Gideon* and the Court of Appeals in *Hurrell-Harring* placed the obligation to ensure the presence of counsel at arraignment on the State itself, and no attempt to deflect, delegate, denigrate, or obfuscate can relieve the State of that obligation.

In light of the State's policy decision to permit indigent New Yorkers to be arraigned without the assistance of counsel, indigent defendants will only receive counsel at arraignments

consistently if the State is ordered make sure that they do. Based on the State's failure to meet its "foundational obligation under *Gideon* to provide legal representation," *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20 (2010), the Court should issue an order holding the State liable and requiring it to remedy this constitutional violation in the Defendant Counties.

Such an order would be a straightforward exercise of this Court's obligation to review the actions of government and ensure that constitutional rights are not violated. Whether the Legislature will allocate money, whether the Office of Court Administration will cooperate to remove barriers, and whether defendants will use attorneys' advice wisely, must await another day. Today, Plaintiffs have shown that lawyers are not present at arraignments, in violation of the New York and United States Constitutions, and the State bears the responsibility to remedy that situation.

STATEMENT OF UNDISPUTED FACTS

The undisputed material facts are fully set forth in Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment Against the State Defendants (September 6, 2013) ("Stoughton Aff.") and the documents and testimony appended thereto. The following is a brief summary of those facts:

Arraignment in New York is an accused person's first appearance in court after a criminal prosecution is commenced against him. CPL 140.20, 170.10, 180.10. At arraignment, a court must determine whether a defendant should be released on his own recognizance, released only upon the posting of bail, or remanded into custody. CPL 170.10(7); 180.10(6). A defendant is entitled to test the facial sufficiency of the accusatory document that commenced his prosecution and to have the charges dismissed if that document fails to satisfy the procedural and substantive requirements of New York law. CPL 100.15, 170.10, 180.10. Defendants also face

the possibility of a temporary order of protection restricting their freedom of movement and association. CPL 530.12(1), 530.13(1). The CPL contemplates that guilty pleas may be accepted at arraignment. CPL 530.13(7).

New York State's system for the provision of counsel to indigent defendants is set forth in County Law, Article 18-B. That statute places the burden of providing counsel on counties, including the burden of providing counsel to indigent defendants at arraignments. *See* N.Y. County Law § 722. Since the filing of this lawsuit, hundreds of thousands of indigent defendants have required representation at arraignment in Onondaga, Suffolk, Schuyler, and Washington counties—more than 100,000 in 2011 and 2012 alone. (Stoughton Aff. ¶ 65.) More than a quarter of those defendants faced felony charges. (*Id.*)

Although the State of New York provides some funding to support the counties' delivery of public defense services, including some funding for the purpose of encouraging counties to provide better representation at arraignments, the head of the state agency in charge of distributing that funding acknowledges that it is nowhere near what would be necessary to provide counsel at all arraignments. (*Id.* ¶¶ 56-57.) Other than by its inadequate funding, the State does not take any steps to ensure that counsel is present at arraignment. (*Id.* at ¶¶ 33-40, 59-62.) The State does not have a policy or any procedures in place to ensure the presence of counsel at arraignment; it does not track whether counsel is present at arraignments; it has never studied or assessed the system in place to ensure counsel at arraignment. (*Id.*) The State Defendants have admitted that they have no information of any kind related to the provision of counsel at arraignment, and any such information is solely in the hands of the counties themselves, or the judiciary. (*Id.* ¶ 36.) In short, the State of New York has never undertaken

any of the actions that one would expect of a government agency that is aware of its failure to fulfill a constitutional or legal mandate and is intent on remedying that failure.

In response to the State's failure to require or to support the provision of counsel at arraignment, the Counties have created systems that differ only in the choice of which specific population of indigent defendants to deprive of their right to counsel. In Onondaga County, the primary provider of public defense is the Assigned Counsel System ("Onondaga ACP"). (*Id.* at ¶ 67.) As a matter of policy, Onondaga ACP has no system in place to ensure that defendants arraigned in Town and Village Courts have counsel. (*Id.* at ¶ 68.) In 2012 alone, Onondaga ACP received more than 5,000 criminal case assignments from Town and Village Courts. (*Id.* at ¶ 98.) Although Onondaga ACP has tried to ensure the presence of counsel at some arraignments—namely, for defendants arraigned in Syracuse City Court who are incarcerated prior to the arraignment—it does not have a system to ensure counsel for unincarcerated defendants arraigned in City Court. (*Id.* at ¶¶ 69-72.)

Even as to the defendants that Onondaga ACP tries to reach through its City Court arraignment program, it does not ensure representation at arraignment because representation depends on whether the arraignment attorneys have sufficient time to interview all the incarcerated defendants before arraignments begin. (*Id.*) Onondaga ACP received 7,511 criminal assignments from City Court in 2012 but only provided representations at 4,159 City Court arraignments. (*Id.* at ¶ 97.)

Plaintiffs Joseph Briggs and James Adams, as well as several class members identified by witnesses in recent months, were all arraigned without counsel in Onondaga County. (*Id.* at ¶¶ 98-101; *Id.* at Ex. 67 (Affirmation of Jeffrey R. Parry (Sept. 4, 2013) ("Parry Aff.") ¶¶ 4-11).) Plaintiff Richard Love was arraigned without counsel both on his original charge that led to the

filing of this complaint and when he was re-arrested in 2012. (*Id.* ¶ 99.) The reason Onondaga ACP has been unable to provide representation to all indigent defendants at arraignment is that it lacks the resources to do so. (*Id.* at ¶ 121.)

In Suffolk County, the primary provider of public defense services is the Suffolk County Legal Aid Society ("Suffolk LAS"). (*Id.* at ¶¶ 78-79.) In 2012 alone, Suffolk LAS was responsible for providing representation at arraignment for more than 33,000 indigent defendants. (*Id.* at ¶ 80.) In some courts, Suffolk LAS provides representation to indigent defendants only in certain circumstances or on certain days. (*Id.* at ¶¶ 81-86.) In other courts, Suffolk LAS has no system whatsoever to ensure representation. (*Id.*) Class members Naun Perez, Emma MacWhinnie, and David Velasquez, as well as more than 100 defendants who were collectively arraigned and pled guilty in a single proceeding, were arraigned without counsel in the past few weeks. (*Id.* at ¶¶ 109-12; *id.* Ex. 57, Affidavit of Trevor Boeckmann (Sept. 5, 2013) ("Boeckmann Aff.") ¶¶ 3-22; *id.* at Ex. 56, Affidavit of Ryan Cleary (Sept. 5, 2013) ("Cleary Aff.") ¶¶ 9, 13.) Suffolk LAS does not cover all arraignments because it lacks adequate funding and staffing. (*Id.* ¶ 123.)

In Schuyler County, the Public Defender's Office is the primary provider of criminal defense services. (*Id.* at ¶ 73.) According to the estimate of Schuyler County's own public defenders, "98 percent of the time" defendants are arraigned in Town and Village Courts without counsel. (*Id.* at ¶ 76.) The Public Defender's Office has made a policy decision not to ensure the presence of counsel at arraignment and, by their own admission, they frequently are not present. (*Id.* at ¶¶ 74-77.) Plaintiffs Shawn Chase, Robert Tomberelli, and Christopher Yaw—as well as several additional class members in more recent times—were arraigned without counsel in

Schuyler County. (*Id.* at ¶¶ 105-108.) The reason for the county's failure to provide counsel at arraignment is a lack of resources to do so. (*Id.* at ¶ 130.)

In Washington County, public defense services are provided primarily by the Washington County Public Defender's Office. (*Id.* at ¶ 87.) The Public Defender's Office does not have a system to ensure counsel at arraignment in Town and Village Courts and does not even understand that such a system is required by law. (*Id.* at ¶¶ 88-93, 96.) As a matter of policy, indigent defendants who are not incarcerated at the time of their arraignment do not receive any representation until after a lengthy application process, leaving them without counsel not only at arraignments but in the additional critical periods following arraignment. (*Id.* at ¶ 93.) Class members Nadine Bayard, Michael Winchell, Robert Adam, Jason Ball, Jacqueline Aiken, Ralph Anderson, and Latasha Cook were arraigned without counsel in Town and Village Courts in Washington County in recent weeks. (*Id.* at ¶¶ 117-19.) The Washington Public Defender's Office also has only an *ad hoc* system for providing counsel to indigent defendants at arraignment in Washington County Court, such that the provision of counsel depends on whether the County Court judge is able to "find" a public defender to cover arraignments on a particular day. (*Id.* at ¶¶ 94-96.) The Public Defender's Office admits that arraignments occur without a public defender present. (*Id.* at ¶¶ 113-15.) The reason that the Washington County Public Defender's Office does not cover all arraignments is that it does not have the resources to do so. (*Id.* at ¶¶ 131-32.)

ARGUMENT

"Summary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, thereby avoiding needless litigation cost and delay." *Brill v. City of New York*, 2 N.Y.3d 648,

651 (2004). "Summary judgment does not deny the parties a trial; it merely ascertains that there is nothing to try. When properly employed, moreover, summary judgment is a highly useful device for expediting the just disposition of a legal dispute for all parties and conserving already overburdened judicial resources." *Suffolk Cnty. Dep't of Soc. Servs. on Behalf of Michael V. v. James M.*, 83 N.Y.2d 178, 182 (1994) (internal citations and quotations omitted); *see also Brill*, 2 N.Y.3d at 650-51 (finding that summary judgment, when properly used, conserves judicial resources).

The affidavits and evidence described herein and submitted with the affirmation accompanying this motion establish that there is no material issue of fact to be tried regarding the question of whether indigent defendants are being regularly and systematically denied their right to counsel at arraignment in the Defendant Counties. This, alone, is sufficient to establish the State's liability for failing to meet the state and federal constitutional requirement to provide representation to the poor, which is clearly established in *Gideon* and *Hurrell-Harring*. Moreover, there can be no dispute that the State has long known about the existence and extent of the systematic denial of counsel at arraignment, and has failed to take effective steps to end it.

I. THERE IS AN INDELIBLE RIGHT TO COUNSEL AT ARRAIGNMENT IN NEW YORK.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution of the State of New York, Article 1 § 6, similarly provides that a "party accused shall be allowed to appear and defend in person and with counsel." As the United States Supreme Court noted in the seminal case of *Gideon v. Wainwright*, "[t]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." 372 U.S.

335, 343 (1963). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done." *Id.*

The right to counsel requires the presence of counsel at arraignment. Relying on both the federal and state constitutional provisions, the Court of Appeals has held in this case that "arraignment itself must under the circumstances alleged be deemed a critical stage" requiring the presence of counsel. *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20 (2010).[3] In reaching this conclusion, the Court of Appeals specifically rejected the suggestion "that the presence of defense counsel at arraignment is ever dispensable," as well as the notion that "counsel, as a general matter, is optional at arraignment." *Id.* at 21. "Indeed," the Court held, "such a proposition would plainly be untenable since arraignments routinely, and in New York as a matter of statutory design, encompass matters affecting a defendant's liberty and ability to defend against the charges." *Id.* The Court of Appeals has subsequently reaffirmed this principle, holding that the post-arraignment interrogation of an incarcerated criminal defendant was a violation of the right to counsel because "[a]rraignment undoubtedly signified that defendant's right to counsel had attached." *People v. Lopez*, 16 N.Y.3d 375, 383 (2011) (citing, *inter alia*, *Hurrell-Harring*, 15 N.Y.3d at 20).[4] Likewise, the United States Supreme Court has straightforwardly held that "[t]he Sixth Amendment guarantees a defendant the right to have counsel present" at critical stages and that "[c]ritical stages include arraignments." *Missouri v. Frye*, --- U.S. ---, 132 S. Ct. 1399, 1405 (2012) (citation omitted).

---

[3] Since the Court of Appeals's decision in 2010—and based in part on that decision—other state courts across the country have affirmed the proposition that arraignment (or an equivalent first appearance) is a "critical stage" requiring the presence of counsel. *E.g., DeWolfe v. Richmond*, No. 34, --- A.3d ---, 2012 WL 10853 (Md. Jan. 4, 2012); *Gonzalez v. Comm'r on Correction*, 68 A.3d 624 (Conn. 2013).

[4] In fact, under New York law, the right to counsel attaches before—not at—arraignment. A prosecution is officially "commenced," and the constitutional right to counsel triggered, when accusatory papers are filed. *See* CPL §§ 1.20, 100.05; *People v. Samuels*, 49 N.Y.2d 218, 221 (1980); *People v. Blake*, 35 N.Y.2d 331, 339-40 (1974). Thus, the presence of counsel is required when, subsequent to the attachment of the right to counsel, a defendant appears before a court to stand accused at arraignment.

The reasons for this are clear to anyone familiar with New York's criminal justice system: by statute and by practice, arraignment is a stage at which a defendant requires counsel to fully protect his rights. Four aspects of arraignment best illustrate this point. First, New York law requires that a court at arraignment must determine bail, and the undisputed facts show that, in fact, bail determinations are made at arraignments. CPL 170.10(7), 180.10(6); (Stoughton Aff. ¶¶ 99-101, 107, 110, 119; *Id.* at Ex. 67 (Parry Aff. ¶ 6); *Id.* at Ex. 56 (Cleary Aff. ¶¶ 9, 13)). If the defendant faces a felony charge, he is entitled to a hearing on whether the evidence is sufficient to warrant his detention. CPL 180.10(2). Even when such a hearing is not required, a bail determination involves judicial application of complex and discretionary statutory factors, which are susceptible to persuasive argumentation. *See* CPL 510.30 (setting forth the factors to be taken into account in bail determinations). Thus, of necessity, a defendant's liberty is at stake at arraignment and the guiding hand of counsel is required.

Second, at arraignment defendants are afforded the right to test the facial sufficiency of the charging instrument. *See* CPL 100.15, 170.10, 180.10(1). Defects in the charging instrument can result in the dismissal of the charges. *See, e.g., People v. Alejandro*, 70 N.Y.2d 133 (1987); CPL 140.45. Without the assistance of counsel, the opportunity to test the sufficiency of the prosecutor's efforts—and possibly dismiss the charges at an early stage—is lost.

Third, along with making a decision to set bail or release a defendant on his own recognizance, New York courts are empowered at arraignment to enter temporary orders of protection significantly limiting the contacts and movements of defendants accused of a wide range of crimes. CPL 530.12(1); CPL 530.13(1). Counsel's assistance and advocacy when courts consider such liberty-limiting protective orders is plainly essential to fundamental fairness, particularly when their violation could result in a finding of contempt. *See, e.g.,* CPL

530.13(7). The undisputed facts submitted to the Court on this motion show that such determinations do, in fact, occur at arraignments when counsel is not present. (Stoughton Aff. Ex. 58 (Affidavit of Noah Breslau (Sept. 6, 2013) ("Breslau Aff.") ¶¶ 33-35).)

Fourth and finally, New York law creates a process by which guilty pleas may be accepted at arraignment, *see* CPL 210.50, and the undisputed evidence shows that guilty pleas are, in fact, accepted at arraignments. (Stoughton Aff. at ¶¶ 111-12, 117; *Id.* Ex. 57 (Boeckmann Aff. ¶¶ 21-22; *Id.* Ex. 56 (Cleary Aff. ¶¶ 18-28).)

As a matter of law, the "critical stage" inquiry has always been a categorical question, not a case-by-case inquiry. "Nice distinctions between the need for counsel at various stages of the proceedings are irrelevant once the right to counsel has indelibly attached." *People v. Settles,* 46 N.Y.2d 154, 165 (1978); *see also Samuels*, 49 N.Y.2d at 222-23 ("Once a matter is the subject of a legal controversy *any* discussions relating thereto should be conducted by counsel: at that point the parties are in no position to safeguard their rights"); *Rothgery v. Gillespie Co.,* 554 U.S. 191, 212 n.16 (2008) (surveying cases finding, categorically, that certain stages are "critical"). Given the Court of Appeals's and federal courts' controlling authority on this matter, the Court should reject the proposition that a "critical stage" may be critical for some defendants, but not for others, depending on the individual facts.

The absence of counsel at a critical stage such as arraignment is a *per se* constitutional violation. *See Hurrell-Harring*, 15 N.Y.3d at 20; *United States v. Cronic*, 466 U.S. 648, 659 n.25. (1984); *Coleman v. Alabama,* 399 U.S. 1, 9 (1970).[5] Indeed, the absence of counsel at any critical point subsequent to the attachment of the indelible right to counsel is a *per se*

[5] Counsel at arraignment is also required by statute. *See, e.g.,* CPL 170.10, 180.10; *In re Bauer*, 3 N.Y.3d 158, 158-59 (2004) (noting that the CPL "provides that upon arraignment the court must, among other things, inform defendants that they have the right to counsel *at that time* and at every subsequent stage of the action") (emphasis added).

constitutional violation. *People v. Chapman*, 69 N.Y.2d 497, 500-02 (1987). Thus, if the Court finds that there is no factual dispute that lawyers are not present at the critical stage of arraignment, it must grant partial summary judgment to Plaintiffs for the State's failure to meet its constitutional obligations. *Hurrell-Harring*, 15 N.Y.3d at 19 (describing the State's "foundational obligation under *Gideon* to provide legal representation"); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

II. IT IS UNDISPUTED THAT INDIGENT DEFENDANTS IN THE FIVE COUNTIES ARE FREQUENTLY AND DELIBERATELY ARRAIGNED WITHOUT COUNSEL.

The State itself has no system to provide counsel at arraignment. Instead, it relies on the counties to fulfill the State's foundational obligations under *Gideon*, including the provision of counsel at arraignment. *See* N.Y. County Law 18-B. While such a delegation is not unconstitutional, *per se*, it comes with the obligation to ensure that the delegation is effective. In other words, delegation of responsibility may be constitutional under *Gideon* and *Hurrell-Harring*, but abdication of responsibility is not. The undisputed facts show that the State has deliberately failed, by its own acts and by its abdication of responsibility to the counties, to provide counsel at arraignment to indigent defendants. Lawyers are not absent only sporadically or on occasion; rather, by design, the system guarantees that thousands of indigent persons in the Defendant Counties are arraigned without counsel.

A. Indigent Persons in the Defendant Counties Are Frequently Unrepresented at Arraignments Because County Public Defense Systems Cannot Provide Counsel at All Arraignments.

The Defendant Counties' public defense systems exist in the vacuum created by the State's failure to take responsibility for its obligations under *Gideon*. That those systems fail to

provide counsel at all arraignments, and that indigent defendants are frequently arraigned without counsel, is not disputed. Those facts are established by party admissions in Counties where the public defense system is run by a party defendant and by undisputed documentary and testimonial evidence in counties where the system is run by a third party.

Those admissions, documents, and testimony paint a consistent picture: namely, that the lack of resources from the State places enormous pressure on the Counties and their defense providers to triage indigent defendants at arraignment, notwithstanding the clear constitutional mandate to provide representation. Lacking money and staffing, their systems cannot handle the responsibility of ensuring the presence of counsel at every arraignment. Some Counties triage entire courts, or specific sessions of court; others scramble to place an attorney at arraignments now and then, when possible.

Onondaga County's Assigned Counsel Program, for example, does not, as a matter of policy, represent indigent defendants at arraignment in Town and Village Courts, where more than 5,000 indigent defendants are arraigned every year. In Syracuse City Court, the program represents only some incarcerated defendants, leaving other incarcerated defendants and anyone not incarcerated prior to arraignment without counsel. (Stoughton Aff. ¶¶ 68-72.) In 2012, ACP received 7,511 criminal assignments from City Court but only provided representations at 4,159 City Court arraignments, suggesting that more than 3,000 indigent defendants went unrepresented by counsel at arraignment in Syracuse City Court alone that year. (*Id.* at ¶¶ 97-98.)

Like the Onondaga ACP, Suffolk's Legal Aid Society has tried to provide representation to indigent defendants at arraignment, but has been unable to finance or support a system to ensure the presence of counsel at all arraignments and, as a result, has made a policy decision to

provide counsel at arraignment in some courts, but not in others. (*Id.* at ¶¶ 79-86.) This decision leaves the more than 30,000 indigent defendants arraigned in Suffolk County each year at risk of finding themselves without counsel depending on which court they are arraigned in, and on what day of the week. (*Id.* at ¶ 80.)

Schuyler County's Public Defender Office does not participate in arraignments in Town and Village Courts, and has admitted that approximately "98 percent" of those arraignments occur without counsel. (*Id.* at ¶¶ 74-77.)

Washington County's Public Defender Office also opts out of representing indigent defendants at arraignments in Town and Village Courts. (*Id.* at ¶¶ 88-93.) Whether a defendant arraigned in Washington County Court is represented depends upon both the whim and the luck of a judge who may try to "find" a public defender to stand in at arraignments, if he can. (*Id.* at ¶¶ 94-96.) Indigent defendants in Washington County who are not incarcerated following their arraignment receive no representation whatsoever until the completion of a complex eligibility determination process, *id.* at ¶ 93, a policy that the Appellate Division has found on its face is invalid because it requires attorneys to violate the indelible right to counsel that attaches at or prior to arraignment. *Roulan v. County of Onondaga*, 90 A.D.3d 1617, 1621 (4th Dep't 2011), *aff'd on other grounds,* 21 N.Y.3d 902 (2013).

Members of the Plaintiff Class illustrate the problem. Class representatives Joseph Briggs, James Adams, Richard Love, Shawn Chase, Robert Tomberelli, and Christopher Yaw all did not have counsel at arraignment. (*Id.* at ¶¶ 99-101, 105-07.) The failure to provide counsel at arraignment is endemic and on-going. In recent weeks, class members Joseph Chironis, Nicholas Franzone, Naun Perez, David Velasquez, Nadine Bayard, Michael Winchell, Robert Adam, Jason Ball, Jacqueline Aiken, Ralph Anderson, Latasha Cook, Emma MacWhinnie, and

Nathan Beauregard—as well more than a hundred unidentified class members whose arraignments were witnessed first-hand by affiants —were arraigned without counsel. (*Id.* at ¶¶ 102, 108, 110-12, 116-19.) Some of these individuals accepted guilty pleas without counsel, and others faced bail determinations and the issuance of orders of protection at their arraignment without counsel. (*Id.* at ¶¶ 99-101, 107, 110-12, 117, 119.) All were unable to exercise their right to challenge the sufficiency of their charging instruments with the guidance of counsel.

In the past two years alone, more than 100,000 indigent defendants have relied on the public defense systems in Onondaga, Suffolk, Schuyler, and Washington counties for representation at arraignment, at least a quarter of whom faced felony charges. (*Id.* at ¶ 65.) Because of the State's failure to guarantee their right to counsel, each of the many thousands of members of the Plaintiff Class who currently or in the future will also be arraigned in these counties faces faces a constitutionally unacceptable risk of being denied counsel at arraignment.

B. The State Does Not Ensure the Presence of Counsel at Arraignments in New York.

The very fact that arraignments without counsel are widespread is sufficient to establish the State's liability under *Gideon* and *Hurrell-Harring* and to warrant summary judgment. But the State's liability is exacerbated by its longstanding knowledge of the failure to protect the constitutional rights of indigent defendants, and its deliberate and ongoing choice not to remedy that failure.

1. *The State Has Long Known That Indigent Defendants Are Arraigned Without Counsel, and Has Failed to Act.*

The State of New York has known for many years that its system for providing counsel to indigent defendants fails to ensure the presence of counsel at arraignment. (Stoughton Aff. ¶¶ 3-32.) Reports issued by state agencies in 2006 and 2008 called for a solution to this problem. (*Id.* at ¶¶ 3-4, 6-13.) Speeches by government officials in nearly every year since 2008 have

lamented the State's continued failure to provide counsel at arraignment. (*Id.* at ¶¶ 5, 14-18.) The State agency charged with responsibility for the public defense system has admitted its knowledge of the problem and its failure, to date, to solve it. (*Id.* at ¶¶ 19-22.) The Office of the Governor has, on multiple occasions, been informed in direct communications about the failure to ensure counsel at arraignment and the need for a change in policy to address this constitutional violation. (*Id.* at ¶¶ 18, 21, 23.) State officials have admitted that the present system violates indigent defendants' constitutional and statutory right to counsel. (*Id.* at ¶ 32.)

The State knows not only about the existence of the general problem, but about its great magnitude. (*Id.* at ¶¶ 3-32.) To the extent that the State lacks specific knowledge of the exact frequency with which indigent defendants are arraigned without counsel, that lack of knowledge is the result of a deliberate ignorance; the State has the capacity to track when counsel is and is not provided at arraignment and has chosen not to act on that capacity. (*Id.* at ¶¶ 33-40.)

2. *The State's Recent Grant Program for Lawyers at Arraignment Proves the State's Knowledge of and Liability for Constitutional Violations of the Right to Counsel at Arraignment.*

Although the State Defendants have begun to address the problem of lawyers at arraignment—specifically, in authorizing the distribution of $12 million in grants over a three-year period to 25 counties by the Office of Indigent Legal Services—it is undisputed that this first step forward will not solve the problem. (*See* Stoughton Aff. ¶¶ 56-57.) The State's $12 million grant program is, for purposes of assessing the State's liability, merely an admission that, given greater political will or court order forcing the issue, the State has the ability to address the absence of counsel at arraignment.

The details of the State's grant program for counsel at arraignment illustrate the inadequacy of its current efforts and further establish its liability for continued violations of

indigent defendants' constitutional rights. First, the program depends upon the initiative of counties to apply for the grant program. As a result, indigent defendants in counties that did not take that initiative continue to have their constitutional rights violated. That is exactly what has occurred in Defendant Washington County, which did not avail itself of the State's grant program and so will not receive any State assistance to provide counsel at arraignment. (Stoughton Aff. ¶¶ 131-32.) Just as the State could never claim to be meeting its constitutional obligation to protect the right to vote by distributing ballots only to voters in counties that applied for a grant to receive them, this haphazard approach does not suffice to meet constitutional standards.

Second, the proposals from the Defendant Counties that did apply for and receive grant allocations are themselves party admissions that the State is not guaranteeing the right to counsel at arraignment. Onondaga County's proposal, if fully funded, would still leave at least ten percent of indigent defendants in Town and Village Courts without representation at arraignment, and that proposal was not fully funded. (*Id.* ¶¶ 126-27.) Schuyler County's grant proposal similarly indicated that it will be unable to provide counsel at all arraignments even after the proposal is implemented. (*Id.* at ¶ 129.) Suffolk County's proposal only purports to cover two of the many courts in which the Suffolk Legal Aid Society presently does not provide counsel at arraignment. (*Id.* at ¶ 130.) Washington County did not even submit a proposal for grant money from the State, despite having admitted that the Washington County Public Defender's Office needs additional funding to provide counsel at all arraignments. (*Id.* at ¶¶ 131-32.)

3. *The State Cannot Escape Liability for Violations of Indigent Defendants' Right to Counsel at Arraignment by Blaming the Judiciary.*

Faced with undisputable facts about its failure to provide counsel at arraignment, the State's frequent response is to dodge responsibility and blame others. In their motion for summary judgment—and in many prior submissions to the Court—the State Defendants argue that the failure to provide counsel at arraignment is the fault of the judiciary. (Memorandum of Law in Support of the State Defendants' Motion for Summary Judgment (August 22, 2013) (hereinafter "State's Summary Judgment Memo") at 25-26.) As a matter of law, however, the responsibility to provide counsel to the indigent falls on the State. *Hurrell-Harring*, 15 N.Y.3d at 19 (describing the State's "foundational obligation under *Gideon* to provide legal representation"); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The State cannot escape liability for failing to meet its constitutional obligations by telling the Court that it assumed someone else would do it.

Moreover, that "someone else"—the Office of Court Administration (OCA)—has not and cannot guarantee that indigent defendants receive counsel at arraignment. As OCA has itself noted, it is the responsibility of the Legislature and the Governor, not the judiciary, to ensure that lawyers are available to represent indigent defendants. (*See* Stoughton Aff. ¶¶ 54-55.) Thus, to the extent that the State is claiming that its policy on counsel at arraignment was to delegate that responsibility to OCA and absolve itself of any obligation to ensure that delegation was properly executed, that policy on its face establishes the State's liability, because OCA has no means to ensure that county public defense systems are sufficiently staffed and financed to be able to provide counsel at all arraignments.

Although OCA has proposed taking measures to improve judicial awareness of the right to counsel and to make it easier for counsel to be present at arraignment, those proposals either

have never been implemented or have been ineffective. (*See* Stoughton Aff. ¶¶ 47-53; Stoughton Aff. at Ex. 3, Affirmation of Paul McDonnell (Sept. 4, 2013) (hereinafter "McDonnell Aff.") ¶¶ 3-4.) Thus, even if it was possible for OCA to fund and staff attorneys at arraignments, which it is not, the State knows or should know that its decision to rely on OCA to ensure counsel at arraignment does not satisfy its constitutional obligations under *Gideon*, and the State remains liable for the widespread failure to provide counsel at arraignment.

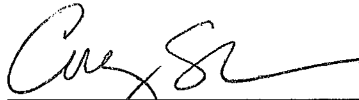
Any suggestion that the problem of arraignments without counsel cannot be remedied without the cooperation of the judiciary is dispelled by the undisputed facts in this case. Although there is no doubt that the State could seek OCA's support to ease the path to providing counsel at arraignment, it is also true that the State *could* remedy the problem of the absence of lawyers at arraignment by providing the resources to ensure the presence of counsel at arraignment proceedings so that counsel can be assigned by the judiciary. This simple point is amply illustrated by the State Defendants' claim that it is working through the Office of Indigent Legal Services to provide additional resources for this very purpose. (*Id.* at ¶¶ 56-57.) Indeed, some counties in New York have undertaken to provide lawyers at all arraignments *despite* the State's failure to require them or support them in their efforts to do so. (*See id.* ¶ 58 (discussing independently pilot projects to provide counsel at arraignment in three counties, including Ontario County).) The remaining counties, or their indigent defense providers, have admitted that the barrier to the provision of counsel at arraignment is resources—a problem that the State is capable of solving. (*Id.* at ¶¶ 121-32.) Thus, the State cannot credibly claim that the judiciary is *preventing* it from meeting its constitutional obligations in a manner that could possibly excuse liability for the violation of indigent defendants' constitutional rights.

In fact, the State's finger-pointing gets it exactly backwards. The State's failure to create a functioning public defense system capable of providing lawyers at arraignment puts the judiciary into a constitutional dilemma: judges must either arraign indigent defendants without counsel or delay arraignment indefinitely (including for defendants in custody) in vain hope that counsel will appear, while knowing that the State and counties have no adequate system for ensuring that counsel will show up. Under these circumstances, the decision of OCA and judges to proceed with arraigning indigent defendants without counsel is the best that the judiciary can do to cope with a dysfunctional, unconstitutional system that the State has refused, thus far, to remedy.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for partial summary judgment on their claim that the State Defendants have violated the federal and state constitutional right to counsel by failing to provide counsel at arraignment to indigent criminal defendants who are members of the Plaintiff class, and order the State of New York to take steps necessary to ensure the presence of counsel at arraignment in the Defendant Counties and the Defendant Counties, as relief defendants, to cooperate in the implementation of such measures.

Dated: New York, New York
September 6, 2013



Corey Stoughton
Taylor Pendergrass
Mariko Hirose
Erin Harrist
Brooke Menschel
Susannah Karlsson
Christopher Dunn

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

-and-

SCHULTE ROTH & ZABEL LLP
Gary Stein
Daniel L. Greenberg
Kristie M. Blase
Mark Arnot
Matthew Yoeli
919 Third Avenue
New York, New York 10022
(212) 756-2000

Attorneys for Plaintiffs