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.)

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

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PRELIMINARY STATEMENT

In the face of overwhelming evidence that indigent defendants in Onondaga, Suffolk, Washington, and Schuyler Counties are systemically denied counsel at arraignment, Defendants State of New York and Governor Andrew Cuomo (the "State Defendants") argue that they are not legally obligated to fix the problem; that even if they are, they cannot fix the problem; and that they have already tried to fix the problem.

Notably, the State Defendants do not dispute the *existence* of the problem: the fact that defendants are arraigned without counsel. They try to characterize those events as sporadic rather than systemic, but characterizations are not facts, and the facts conclusively prove the State Defendants wrong. Thus, there is no dispute as to the material—indeed, dispositive—fact that thousands of indigent defendants in the Defendant Counties are arraigned without counsel every year because the State Defendants lack a system to provide counsel at arraignment.

The only factual dispute that the State Defendants attempt to raise is the question of whether a recent grant program regarding counsel at arraignment excuses them from liability. But the State Defendants themselves admit in their brief, as the state official in charge of that program admitted in his deposition, that this grant program will not solve the problem. Moreover, the State's own record confirms the undisputed fact that the grant program is not presently ameliorating any of the ongoing violations of indigent defendants' right to counsel at arraignment. Thus, its mere existence does not absolve the State of liability for those ongoing constitutional violations.

Perhaps recognizing that they have no record with which to create a factual dispute, the State Defendants' opposition to summary judgment focuses mainly on two legal questions. First, the State Defendants argue that arraignments are not a critical stage, citing cases from other jurisdictions. But they are wholly unable to explain how that argument is not foreclosed by the

decision of the New York Court of Appeals in this very case, which held in no uncertain terms that arraignments are, as a categorical mater, a critical stage requiring the presence of counsel. Second, the State Defendants argue that providing counsel at arraignment is the judiciary's responsibility. This argument is irreconcilable with the clear mandate from the Court of Appeals and *Gideon v. Wainwright*, 372 U.S. 335 (1963), which both hold that the obligation to provide counsel to indigent defendants falls squarely on the State's shoulders. The State Defendants cannot blame the judiciary for failing to assign lawyers that they refuse to provide.

As the State Defendants' own arguments about the arraignment grant program illustrate, there are a number of ways that the State could remedy systemic violations of the right to counsel at arraignment, but on this motion the Court only needs to decide Plaintiffs' right to relief, not the form of that relief. Given the undisputed facts, a trial on this issue would be a waste of time and resources. The Court should therefore grant Plaintiffs' motion for partial summary judgment.

ARGUMENT

I. THE STATE DEFENDANTS DO NOT DISPUTE THE MATERIAL FACTS THAT ESTABLISH THEIR SYSTEMIC FAILURE TO PROVIDE INDIGENT DEFENDANTS WITH COUNSEL AT ARRAIGNMENT.

The Court should deem admitted all the material facts offered by Plaintiffs, as the State Defendants fail to controvert any of them in opposition to summary judgment. *See Kuehne & Nagel, Inc. v. F.W. Baiden*, 36 N.Y.2d 539, 544 (1975) ("Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted").[1] At most, the State Defendants quarrel about the import of the undisputed facts, but their import is clear:

[1] The State Defendants raise hearsay objections as to some of the documents submitted by Plaintiffs. Although those documents are not necessary for Plaintiffs to prevail on summary judgment, the objections are meritless, as explained in Point IV, *infra*.

(a) the State is systemically failing to provide attorneys at arraignments of indigent defendants; and (b) the State has long been aware of this constitutional violation and has failed to remedy it.

A. The State Defendants Do Not Dispute That Indigent Defendants Are Arraigned Without Counsel In The Defendant Counties Because Of The Lack Of A System To Provide Attorneys At A Large Number Of Arraignments.

The State Defendants do not dispute that New York State does not have a system in place that ensures the provision of attorneys at all arraignments. At best, the State's "system" is a patchwork of County programs that accepts as a given that a substantial number of poor people accused of crimes will be haled into courts where counsel is by design not present at all or not present in adequate numbers. (Stoughton Aff. ¶¶ 67-96.)[2] In Onondaga, Schuyler, and Washington, for example, it is undisputed that there is no system for providing attorneys to defendants who are arraigned in town and village courts. (Stoughton Aff. ¶¶ 68, 75, 89, 90; State Opp. at 22-25.) In Suffolk, it is undisputed that the public defense provider is only able to provide representation at arraignment in some courts, and there only in certain circumstances or on certain days, leaving arraignments in other courts unstaffed. (Stoughton Aff. ¶¶ 81, 82, 84; State Opp. at 20-22.) In all four of the counties, it is undisputed that there is no comprehensive system to ensure the provision of counsel at all arraignments of indigent defendants. (Stoughton Aff. ¶¶ 69-72, 74, 81-86, 90-96; State Opp. at 20-25.)

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[2] "Stoughton Aff." refers to the Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment, dated Sept. 6, 2013. "State Opp." refers to the Memorandum of Law in Opposition to Plaintiffs' Cross-Motion on Behalf of Defendants State of New York and Governor Andrew M. Cuomo, dated Sept. 30, 2013. "Pl. Mem." refers to the Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, dated Sept. 6, 2013. "Pl. Opp." refers to the Memorandum of Law in Opposition to the State Defendants' Motion for Summary Judgment, dated October 9, 2013. Like the State Defendants (State Opp. at 4), Plaintiffs also rely on their opposition papers on the State Defendants' summary judgment motion, including the documents submitted therewith.

The State Defendants also do not dispute that this patchwork system leaves uncovered, *i.e.*, without the assistance of counsel, a large number of arraignment sessions where thousands of indigent defendants are arraigned each year. (*E.g.*, Stoughton Aff. ¶¶ 63-66, 76, 97, 98.) For example, the State Defendants do not even attempt to refute Plaintiffs' evidence that more than 5,000 arraignments take place annually in the Onondaga County justice courts, where there is no system to provide counsel at arraignments, or that the Onondaga Assigned Counsel Program ("ACP") did not provide attorneys at arraignment in more than 3,000 of the assignments they received last year in Syracuse City Court. (Stoughton Aff. ¶¶ 97-98.) The record on Plaintiffs' opposition to the State Defendants' summary judgment motion confirms the large volume of arraignments that occur in the court sessions in the Defendants Counties that are not adequately covered by this patchwork system.[3]

Likewise, the State Defendants do not dispute that numerous class representatives were arraigned without counsel as a result of the systemic failure to provide counsel at arraignment. (Stoughton Aff. ¶¶ 99-101, 105-107; State Opp. at 15-17.) Class representatives James Adams, Christopher Yaw, Richard Love, Joseph Briggs, Shawn Chase, Robert Tomberelli, Kimberly Hurrell-Harring, and Randy Habshi all were arraigned without counsel, and four of them were jailed after the court set bail in amounts they could not pay. (Stoughton Aff. ¶¶ 99-101, 105-107;

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[3] For example, even just counting unsealed, terminated cases involving finger-printable offenses, over 600 defendants were arraigned in the six justice courts on the Eastern End of Suffolk County in 2010 where the Legal Aid Society does not have a system for ensuring representation. (Stoughton Aff. ¶ 81; Harrist Aff. ¶¶ 195-205; King Aff. Ex. A at 14.) Using the same data parameters, over 850 defendants were arraigned in the justice courts in Schuyler and Washington Counties in 2010 where there are no systems for ensuring representation. (Stoughton Aff. ¶¶ 75-76, 90; King Aff. Ex. A at 113, 121.)

State Opp. at 15-17.)[4] The State Defendants' argument that the experiences of these individuals alone do not prove systemic denial of counsel (State Opp. at 1) misses the point that Plaintiffs *have* proven the systemic nature of that denial through the abundant (and undisputed) evidence establishing that the State has no system of providing attorneys at arraignments and that arraignments regularly occur in the Defendant Counties without counsel. Plaintiffs did not fall through the cracks in a system meant to provide them with representation; they received no representation because there was no system to provide them with representation. This is the definition of systemic failure, one that violates the clear dictates of *Gideon* and the Court of Appeals's ruling in this case.

That this systemic failure continues to this day, six years after the filing of this case, is confirmed by the affidavits documenting arraignments that have occurred without counsel in the Defendant Counties in recent months. Other than an unfounded hearsay objection, *see infra* **Part IV**, the State Defendants do not dispute the affiants' accounts of defendants arraigned without counsel regardless of whether they state that they cannot afford counsel—including the four defendants who directly negotiated pleas or other resolutions with the prosecutor in Washington County and the close to 90 defendants in Patchogue Village Justice Court in Suffolk County who pleaded guilty at one arraignment session to violations punishable by imprisonment (Stoughton Aff. Ex. 56 ¶¶ 17-29; Ex. 58 ¶¶ 38-47).[5] Although the State Defendants argue that Noah

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[4] Although Ms. Hurrell-Harring and Mr. Habshi's arraignments were not specifically mentioned in Plaintiffs' cross-motion, it has long been undisputed that both defendants were arraigned without counsel and were incarcerated after being unable to meet the bail set by the court at arraignment. (Affirmation of Matthew Schmidt, Oct. 8, 2013, ¶¶ 170-71, 176.)

[5] The State Defendants argue that some of the arraignments observed were constitutionally unproblematic because the defendants either "waived" their right to counsel or were not sentenced to prison terms. Again, that is hardly material to the point that arraignments are regularly occurring without counsel in the four counties. Moreover, the State Defendants'

Breslau's observation of five defendants arraigned without counsel in Suffolk County District Court is inconsistent with "proof" that District Court arraignments are covered by Legal Aid Society ("LAS") attorneys 365 days a year (State Opp. at 32), the cited testimony that LAS staffs courtroom D11 (Dvorin Aff. Ex. G (Caponi Dep. 167:12-21)) does not create a dispute with Mr. Breslau's testimony that he witnessed arraignments without counsel in courtroom D53 (Stoughton Aff. Ex. 58 ¶¶ 11-12).

The State nevertheless attempts to characterize the record as showing that uncounseled arraignments occur only "on occasion," not regularly or systematically. (State Opp. at 1-2.) But this conclusory characterization flies in the face of the undisputed facts, including—among other things—that *thousands* of defendants in the four counties are denied counsel at arraignment (Stoughton Aff. ¶¶ 76, 97-98); that the absence of counsel in town and village courts within the counties is so complete that, as one county witness put it, "*98 percent* of the time [defendants in those courts are] being arraigned without an attorney" (Stoughton Aff. ¶ 76 (emphasis added)); that some of the Defendant Counties have submitted grant applications to the Office of Indigent

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arguments betray a misunderstanding of the broad right to counsel under New York law. First, under New York law, defendants cannot validly waive their right to counsel at a critical stage of criminal proceedings without counsel present. *See People v. Cunningham*, 49 N.Y.2d 203, 210 (1980) (affirming that "the right to counsel in this State includes the right of an accused to have the advice of counsel before making the decision to waive . . . his right to the assistance of an attorney"); *People v. Settles*, 46 N.Y.2d 154, 157, 164 (1978) (holding that "no knowing and intelligent waiver of counsel may be said to have occurred without the essential presence of counsel"). Second, that there was no actual sentence of imprisonment does not matter for the broad right to counsel under New York law, which attaches to any felony, misdemeanor, or the breach of law other than a traffic infraction "for which a sentence of a term of imprisonment is *authorized* upon conviction thereof." County Law § 722 (emphasis added); CPL § 170.10(3)(c); *see also People v. Ross*, 67 N.Y.2d 321, 326 (1986) (noting that New York law "clearly provides broad statutory protection to all defendants accused of felonies and misdemeanors" beyond that provided by federal law); *Settles*, 46 N.Y.2d at 161 (explaining that the right to counsel in this State has been construed more broadly than the federal right, including when the State began to provide legal representation to indigent defendants through county law prior to *Gideon*).

Legal Services ("OILS") seeking hundreds of thousands of dollars for the express purpose of helping them provide counsel at arraignment, *which they admit they are now not doing* (Stoughton Aff. Ex. 26, 27, 54); and that the Director of OILS, the state official with the greatest familiarity with New York's public defense system, admitted in his deposition testimony that the lack of attorneys at arraignment is "widespread" and "very frequent." (Stoughton Aff. ¶ 22; *id.* Ex. 9 (Leahy Dep. 108:9-21).)

The State Defendants controvert *none* of these or the multitude of other *facts* described above and in Plaintiffs' moving papers. Those facts establish beyond any doubt that indigent defendants are at risk of being denied, "with a fair degree of regularity," constitutionally mandated counsel in the Defendant Counties. *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 26-27 (2010). The State Defendants' self-serving characterization of the undisputed facts cannot defeat Plaintiffs' entitlement to judgment as a matter of law. *See, e.g., Amery Realty Co., Inc. v. Finger Lakes Fire & Cas. Co.*, 96 A.D.3d 1214, 1216 (3d Dep't 2012) ("self-serving and conclusory" assertions are "insufficient to defeat" summary judgment).

B. The State Defendants Do Not Dispute That They Have Long Had Notice Of The Systemic Denial Of Counsel At Arraignment And Have Failed To Cure The Deficiency.

The systemic failure to provide attorneys at arraignment established in **Part I.A** is sufficient to grant Plaintiffs' motion, but the State Defendants also do not dispute that they have long had actual notice that they do not have a system for providing counsel at arraignment of indigent defendants and as a result that indigent defendants are regularly arraigned without the assistance of counsel. (Stoughton Aff. ¶¶ 3-62.) The State Defendants have been warned of this widespread problem as far back as the Kaye Commission finding in 2006 that "all too often" counsel are not present at arraignments in the numerous justice courts (Stoughton Aff. ¶ 4) and

as recently as the 2011 OILS survey of City Court judges in which 95% of them reported that indigent defendants appear unrepresented at the first appearance and 59% reported that this happens "always" or "often" (Stoughton Aff. ¶¶ 27-28). The State Defendants are liable for this deliberate and ongoing failure to remedy the systemic lack of attorneys at arraignments despite the longstanding knowledge of their own failure.

Moreover, although the State Defendants argue that they have begun to address the systemic lack of counsel at arraignment with an OILS Counsel at First Appearance grant program (State Opp. at 17-25), they do not dispute that even the full implementation of the grants at some point in the future would not remedy the systemic denial of counsel—either because the grants made available were insufficient to ensure a comprehensive system of representation or because counties like Washington County did not take part in the grant.[6] (Stoughton Aff. ¶¶ 125-132.) Nor could they, since the state official in charge of the grant program has testified that the available funding is "[n]ot nearly" sufficient to solve the arraignment problem. (Stoughton Aff. ¶ 57 (citing Leahy Dep. at 82:5-88:17).) The most that the State Defendants can say is that the funding will "improve" the representation of indigent criminal defendants at arraignment *once* the funds are distributed and *if* and *when* the counties successfully implement their proposals. (State Opp. at 18.) Moving towards satisfying a constitutional mandate does not qualify as satisfying a constitutional mandate.

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[6] The State argues that it "cannot be held responsible" for the undisputed fact that Washington County did not apply to participate in the OILS grant program to help provide attorneys at more arraignments. (State Opp. at 18 n.12.) It can be and it is, because the duty to provide counsel at arraignment belongs to the State. *See Hurrell-Harring*, 15 N.Y.3d at 15, 27 (describing the State's obligation under *Gideon*); *Gideon*, 372 U.S. at 342 (holding that the Sixth Amendment is a fundamental right made obligatory to the states).

The State Defendants' newly acquired affidavit from the Executive Director of the Onondaga County ACP only confirms that funding is currently insufficient to provide universal representation in any court with initial appearances in Onondaga County except Community Court, and that the OILS grant proposal has not been implemented yet. (Affirmation of Renee Captor, Sept. 30, 2013 ("Captor Aff.") ¶ 3 (stating that the OILS proposal will be finalized by October 2013 and "that initiative will be contracted and implemented thereafter").) The State Defendants' belated efforts to begin to confront their violation of indigent defendants' right to counsel, therefore, do not diminish their liability for ongoing violations of those rights.

II. THE COURT OF APPEALS' DECISION FORECLOSES THE STATE DEFENDANTS' ARGUMENT THAT THERE IN NO RIGHT TO COUNSEL AT ARRAIGNMENT IN NEW YORK.

As Plaintiffs' opening brief noted, the Court of Appeals held three years ago in this case that the State has the obligation to provide legal representation at arraignments of indigent defendants because arraignments in New York are a critical stage of criminal proceedings to which the right to counsel attaches. *See Hurrell-Harring*, 15 N.Y.3d at 19-20; Pl. Mem. at 8-12. The Court of Appeals examined the New York State Criminal Procedure Law ("CPL") and determined that arraignments are a critical stage as a legal matter because "in New York as a matter of statutory design, [arraignments] encompass matters affecting a defendant's liberty and ability to defend against the charges." *Hurrell-Harring*, 15 N.Y.3d at 21. The Court thus flatly rejected the suggestion that "counsel, as a general matter, is optional at arraignment" *id.*, because such a proposition would "plainly be untenable" with the design of the CPL. *Id.*[7]

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[7] In coming to this conclusion, the Court rejected the State Defendants' argument, made here (State Opp. at 10) as well as before the Court of Appeals, that the design of the CPL renders it impractical to designate arraignments as a critical stage. *See id.* at 21 ("Contrary to defendants' suggestion and that of the dissent, nothing in the [CPL] may be read to justify the conclusion that the presence of counsel is ever dispensable.").

Recognizing that the highest court of this State has already held that arraignments are categorically a critical stage, the State Defendants argue, in effect, that this Court should refuse to follow that holding because "the facts in this case are vastly different than those upon which the Court of Appeals' decision was based." (State Opp. at 11.) This argument is completely without merit. The principal "fact" upon which that decision was based is the CPL itself, which not only authorizes but obligates arraignment judges to make bail determinations. *See* CPL 170.10(7), 180.10(6). And there can be no dispute that, pursuant to this statutory mandate, bail is routinely set or denied at arraignment for defendants who have no counsel, as the factual record amply demonstrates. (Stoughton Aff. ¶¶ 99-101, 105-07; *id.* Ex. 56 ¶¶ 5-9; *id.* Ex. 67 ¶ 6; Schmidt Aff. ¶¶ 167-68, 172.)

That some uncounseled indigent defendants are released on their own recognizance (State Opp. at 16), may not be entitled to bail (*id.* at 15), or have bail applications made on their behalf later, after counsel is assigned (*id.* at 13), is all beside the point. The fundamental and undeniable fact, as true today as when the Court of Appeals issued its decision, is that under New York law defendants' pretrial liberty interests are adjudicated at arraignment, rendering arraignment categorically a critical stage. *See Hurrell-Harring*, 15 N.Y.3d at 20 ("There is no question that a bail hearing is a critical stage of the State's criminal process.") (internal quotation marks omitted).

Although not required, the undisputed facts also show, as demonstrated in Plaintiffs' moving papers, that uncounseled defendants enter guilty pleas at arraignments, have orders of protection entered against them, and forgo opportunities to challenge the prosecution's charges. (Pl. Mem. at 9-12; Stoughton Aff. Ex. 56 ¶¶ 17-29; Ex. 57 ¶¶ 20-22; Ex. 58 ¶¶ 27-35, 40-47; *see also* King Aff. Ex. A at 16, 44, 81, 116, 124 (showing that over 300 defendants pleaded guilty on

their initial appearance date in the justice courts in the four counties in 2010, even counting only unsealed cases involving finger printable charges).) This evidence further confirms that "matters affecting a defendant's liberty and ability to defend against the charges" are routinely adjudicated at arraignments. The State Defendants' argument that no guilty plea was entered by, or order of protection issued against, any of the class representatives (State Opp. at 13) is of no moment. Whether arraignments are a critical stage is not a person-by-person analysis but a categorical one (Pl. Mem. at 11), and in any event the case has been certified as a class action and thus the Court must consider the experiences of all class members on this motion. *See Hurrell-Harring v. State*, 81 A.D.3d 69, 75 (3d Dep't 2011) (certifying the class in the case in part to ease Plaintiffs' ability to present evidence of denial of counsel to class members).

Given the Court of Appeals's opinion and the undisputed facts, the out-of-state cases cited by the State Defendants are no help to them. (*See* State Opp. at 7-10.) As the State Defendants acknowledge (*id.* at 7), courts decide whether a stage of a criminal proceeding is critical by looking to the functions of the proceeding under state law. *See Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). Therefore, whatever a California magistrate judge decided about a "first appearance" in Contra Costra County, California, *Farrow v. Lipetzky*, No. 12 CV 06495, 2013 WL 4042276 (N.D. Cal. Aug. 7, 2013), or the Ninth Circuit decided about an administrative initial appearance proceeding in Arizona, *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 1069 (9th Cir. 2013), has no relevance to New York in light of the Court of Appeals's controlling decision in this case. Moreover, the initial appearances analyzed in *Farrow* and *Lopez-Valenzuela* differed in key respects from arraignments under New York law.[8] As

[8] In the initial appearance at issue in *Farrow*, "nothing happened" once the defendant requested counsel. *Farrow*, 2013 WL 4042276, at *11-13; *Farrow v. Lipetzky*, No. 12 CV 06495, 2013 WL 1915700, at *12-13 (N.D. Cal. May 8, 2013) (describing it as "an appearance at

Plaintiffs have demonstrated, and as the Court of Appeals has squarely held, in New York arraignments are structured to be a critical stage in criminal proceedings. (*See* Pl. Mem. at 10-12); *Hurrell-Harring*, 15 N.Y.3d at 21. The State is bound by that holding.

III. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF REQUIRING THE STATE DEFENDANTS TO REMEDY THE SYSTEMIC VIOLATIONS OF THE RIGHT TO COUNSEL AT ARRAIGNMENT.

Although the State Defendants advance a series of back-up arguments as to why, "even if the Court were to find a Constitutional violation" (State Opp. at 2), it should not order declaratory or injunctive relief, each one of those arguments is patently without merit.

A. The State Defendants' Unsupported Assertion That Uncounseled Arraignments Are The Fault Of The Judiciary Does Not Obviate The Need For Relief.

The Court should reject out of hand the State Defendants' unsupported assertions that New York law "places upon the judiciary the obligation to ensure that indigent defendants are represented at arraignment" and that, since the State's judiciary is not a named defendant, the systemic violations of the right to counsel demonstrated by Plaintiffs "cannot be remedied by the State defendants." (State Opp. at 2, 5-6.)

In the first place, the State Defendants' suggestion that indigent defendants are being arraigned without counsel because judges are shirking their statutory responsibility to appoint counsel (State Opp. at 5-6) is baseless. As demonstrated in Plaintiffs' moving papers, the reason

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which nothing happens" and specifically distinguishing *Hurrell-Harring* on the ground that in New York, "pretrial liberty interests [are] adjudicated at the arraignment"). In the initial appearance at issue in *Lopez-Valenzuela*, no plea was entered, and there was no opportunity to present evidence or make an argument. 719 F.3d at 1068-69. In any event, to the extent Ninth Circuit courts have held that the setting of bail is not a critical stage, those decisions are directly contrary to the controlling Court of Appeals holding here that there is "no question" that setting of bail *is* a critical stage. *Hurrell-Harring*, 15 N.Y.3d at 20.

why the counties have been unable to provide representation to indigent defendants at arraignment is not a mystery: they lack the resources to do so. (Pl. Mem. at 5-7; Stoughton Aff. ¶¶ 121-24, 131.) The State Defendants do not, and cannot, contest that indisputable fact, nor do they offer a shred of evidence to the contrary. Notably, the Defendant Counties' budget requests and applications for OILS grants confirm that the barrier to providing counsel at arraignment is resources—money and staff—not the judiciary. (*See, e.g.*, Stoughton Aff. ¶¶ 121-24; *id.* Ex. 31, 2013 Legal Aid Society Budget Request, at 5 ("We do not have enough money to provide attorneys on weekends in [certain] courts"); Ex. 27, Schuyler County OILS proposal at 2-3 ("The extent of the problem of providing counsel at first arraignment or appearance revolves around . . . the availability of counsel at that moment to make contact with client and to attend the appearance.").)

Resting as it does on a misrepresentation as to the source of the problem, the State Defendants' additional assertion that they cannot remedy the lack of counsel at arraignment, rendering declaratory and injunctive relief "improper as a matter of law" (State Opp. at 6), is equally meritless. The problem is one of funding and resources, and there is no question that the State is *capable* of providing the necessary funding and resources to meet its constitutional obligations. It simply has refused to do. Indeed, the State Defendants' assertion that they cannot remedy the lack of counsel at arraignments is directly contradicted by their own argument that they have already taken steps to remedy the problem with the recent OILS grant program. Although it is undisputed that the OILS program will not solve the arraignment problem, *see infra* **Part III.B**, it demonstrates that a remedy involving increased funding to the counties, increased oversight and/or other measures—all within the State's control—is certainly attainable.

In any event, the question for this motion is simply whether Plaintiffs have established liability against the State Defendants and therefore are entitled to declaratory and injunctive relief[9]; the question of what form such injunctive relief should take can be reserved for a proceeding following a finding of liability.[10] This question must be answered in the affirmative. It is the State Defendants who have the constitutional obligation to provide counsel. *Hurrell-Harring*, 15 N.Y.3d at 26 (*Gideon*'s mandate "require[s] *the State* to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them" (emphasis added)). That obligation cannot be shifted to the judiciary, the counties, or anyone else.

B. The State Defendants' Unimplemented And Concededly Insufficient OILS Grant Program Does Not Obviate The Need For Relief.

Equally unavailing is the State Defendants' argument that the recent OILS grants somehow moot Plaintiffs' entitlement to declaratory and injunctive relief. (State Opp. at 17-25.) Even in federal court actions, which are governed by more stringent justiciability standards than

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[9] As the Court of Appeals held, the fact that remedies might be difficult "does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right." *Hurrell-Harring*, 15 N.Y.3d at 26. *See also Klosterman v. Cuomo*, 61 N.Y.2d 525, 530 (1984) ("[C]laims do not present a nonjusticiable controversy merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion.").

[10] The Court does not have to decide now what the injunctive relief will ultimately look like, or even the process for making that determination. After determining liability and issuing declaratory judgment, the Court can make decisions about what approach to take, after affording all parties an opportunity to be heard. The Court could, for example, initially charge the State Defendants "with the task of devising a Constitutionally sound program." *Bounds v. Smith*, 430 U.S. 817, 818-20 (1977) (internal quotation marks omitted) (describing court order in a systemic reform case that gave the State the first opportunity to come forward with a remedial plan that would most easily and economically satisfy its constitutional duty, subject to briefing by the other party and modification as necessary prior to the final order). Alternatively, the Court could "offer[] more detailed remedial directions" consistent with its declaration of specified constitutional deficiencies. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 932 (2003) (affirming trial court's detailed and specific remedial directions for addressing inequitable educational funding).

state court actions, a defendant claiming that its voluntary action moots a case "bears the formidable burden of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000); *see City of New York v. Maul*, 59 A.D.3d 187, 192 (1st Dep't 2009) (noting that federal Constitution's case and controversy clause, which restricts a court's ability to review a moot case, has no analog in the New York State Constitution), *aff'd*, 14 N.Y.3d 499 (2010). This burden is only met if the defendant shows that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 110-11 (2d Cir. 2010) (internal quotation marks omitted).

And in state court, even where the court credits assurances that there will be no future violations, injunctive relief to ensure that the relief is permanent remains proper because it will not prejudice the enjoined party. *See Spitzer v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 316 (1st Dep't 2003) (holding that the court retains the power to issue an injunction after voluntary cessation to protect plaintiffs from further harm and because the injunction would not cause prejudice); *State v. Midland Equities of N.Y., Inc.*, 117 Misc. 2d 203, 206-07 (Sup. Ct. N.Y. Cnty. 1982) ("even if the Court were to credit respondents' representations with regard to future activity, an order granting injunctive relief would not harm respondents and could be properly granted"); *Agusta v. Agusta*, 2007 N.Y. Misc. LEXIS 2790, at *17-18 (Sup. Ct. Nassau Cnty. Apr. 9, 2007) (holding that "expressed willingness" to voluntarily cease conduct does not moot equitable relief).

The State Defendants are nowhere near meeting the "formidable burden," *Laidlaw*, 528 U.S. at 190, or any burden, of proving either that they have completely remedied the

constitutional violation or that they have reasonably ensured that it would not recur. As explained above, it is undisputed that the OILS grants, even if fully implemented, would *not* remedy the systemic violations of counsel—in the words of OILS' Director, "[n]ot nearly." *See supra*, **Part I.B**. Moreover, the OILS grants have not been finalized or distributed (Captor Aff. ¶ 3), there is not even an estimated date by which Counties will implement their proposals (*id.*), and there is no guarantee whatsoever that the grants will be maintained or increased as necessary to continue supporting a system that provides counsel at arraignment to indigent defendants. Indeed, the State's recent history of raiding funds specifically targeted for indigent defense for other uses, as well as the expiration in 2012 of counties' previously guaranteed indigent defense funding, furnish ample reason to believe that the necessary funding will not be maintained. (*See* Affirmation of Susannah Karlsson, Oct. 8, 2013, ¶¶ 101-09.)

For all these reasons, Plaintiffs are entitled to declaratory and injunctive relief ensuring that the State Defendants take complete and continuing remedial action to provide counsel at arraignments in accordance with their constitutional obligations.

C. The State Defendants' Decertification Motion Does Not Obviate The Need For Relief.

Finally, the State argues that Plaintiffs' summary judgment motion should be denied because the State has moved to decertify the Plaintiff class. (State Opp. at 5.) For the reasons fully articulated in Plaintiffs' opposition to the State's summary judgment motion, however, the State Defendants have not raised any reason for this Court to alter the Third Department's class certification order in this case, and so this argument, too, fails. (*See* Pl. Opp. at 93-99.)

But even if the State Defendants could succeed on their motion for decertification, it would not shield them from summary judgment on this motion. The State's argument that no relief could be awarded because "the plaintiffs' criminal proceedings have all concluded" (State

Opp. at 5) is incorrect. The lack of counsel at arraignment, as with the rest of the case, falls within "the well-established exception to the mootness doctrine for recurring claims of public importance typically evading review." *Hurrell-Harring*, 15 N.Y.3d at 25 n.5 (citing *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (1980)). Thus, even if the class were decertified, the named plaintiffs would continue to have standing to seek declaratory and injunctive relief to remedy the deficiency that caused their denial of counsel at arraignment—the lack of a system for providing attorneys at arraignment for indigent defendants.

IV. THE STATE DEFENDANTS' HEARSAY OBJECTIONS ARE MERITLESS.

The State Defendants challenge, as "inadmissible hearsay," certain of the exhibits submitted by Plaintiffs with the Stoughton Affirmation, including the Kaye Commission report (Ex. 1), the court monitoring affidavits (Exs. 56, 57, 58 and 67), and other exhibits (Exs. 2, 5, 6, 7, 8, 10, 12, 13, 14, 20, 23, 40, 25, 36, 53, 54, 62, and 74).[11] (State Opp. at 26, 37-38.) While none of the State Defendants' hearsay objections, together or separately, would affect Plaintiffs' entitlement to summary judgment, the objections lack merit in any event.

First, in their own motion for summary judgment, the State Defendants relied on some of the very same documents or types of documents that they now claim are inadmissible when tendered by Plaintiffs. Thus, although the State Defendants object to Plaintiffs' use of Suffolk County's OILS grant proposal and a related document (Exs. 53 and 54), they submitted the same OILS grant proposal on their motion (Dvorin Aff. Ex. S), and likewise submitted the same Onondaga County ACP contract (McGowan Aff. Ex. O) that Plaintiffs have submitted (Ex. 25).

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[11] The State Defendants imply that these are examples of exhibits that they challenge (State Opp. at 37), but the Court should construe their list as a complete list of the challenged exhibits. The State Defendants are required to object specifically to the admissibility of each piece of evidence and state the specific ground for the objection. *See People v. Everson*, 100 N.Y.2d 609, 610 (2003).

Similarly, the State Defendants object to Plaintiffs' use of an OILS arraignment survey (Ex. 14) and documents reflecting OILS' activities (Exs. 20, 23), yet their motion relied on an OILS caseload survey (Kerwin Aff. Ex. W) and documents reflecting OILS' activities (Kerwin Ex. R). The State Defendants' absurd position that only they, and not Plaintiffs, can use such documents on summary judgment should be swiftly rejected.

Second, Plaintiffs tendered the Kaye Commission report, speeches by the Chief Justice and related emails, and several other documents to which the State Defendants object (Exs. 1, 2, 5, 6, 7, 8, 10, 12, 13, 14) specifically for the purpose of showing that the State has (and has long had) notice of the widespread problem of the lack of attorneys at arraignment. (*See* Stoughton Aff. ¶¶ 3-27 (referencing these exhibits in a section entitled "Notice to the State of the Systemic Failure to Provide Counsel at Arraignment").) Regardless of whether any of these documents may also be properly admitted for their truth, they are plainly admissible to prove the State's knowledge and, under well-established law, thus fall outside the hearsay doctrine. *See Ferrara v. Galluchio*, 5 N.Y.2d 16, 19-20 (1958) (holding that it is not hearsay to introduce a statement for the effect that it has on a party); *Frederick v. Theresa*, 99 A.D.2d 656, 656 (4th Dep't 1984) (holding that letter to town from state agency informing the town of safety issues is admissible to show foreseeability of harm, even if not for the truth therein).

Third, the court monitoring affidavits documenting observations of recent arraignments in the four counties (Exs. 56, 57, 58, 67) are not "textbook hearsay and inadmissible," as the State Defendants wrongly contend (State Opp. at 26). These affidavits report the affiants' observations of events in court they personally witnessed, and as such are a textbook example of admissible non-hearsay. *See People v. Swamp*, 84 N.Y.2d 725, 731 (1995) (police officer's testimony as to his own observations are not hearsay); *People v. Giarraputo*, 37 Misc. 3d 486,

487 (Crim. Ct. Richmond Cnty. 2012) ("It is axiomatic that personal observations of a condition, event, incident or tangible item made by a witness are not hearsay."). Plaintiffs are not offering these affidavits for the truth of the statements made by judges, lawyers, and defendants during the arraignments, but rather for the fact that those statements were made and that the events occurred.

Finally, the remaining exhibits to which the State Defendants object include annual UCS 195 reports that public defense providers are required to file with the State under County Law § 722-f (Exs. 36, 40), which fall squarely under the business records exception to the hearsay rule, *see* CPLR 4518; court records (Ex. 62), of which the Court can take judicial notice, *see Lagano v. Soule*, 86 A.D.3d 665, 667 (3d Dep't 2011); and a newspaper article that is submitted solely for the purpose of showing that Washington County did not seek to participate in the OILS arraignment grant program (Ex. 74), a fact that is uncontested on this motion.

CONCLUSION

As the State Defendants have not offered any material factual disputes with respect to Plaintiffs' showing that the systemic denial of counsel to indigent defendants at arraignments in the Defendant Counties is a violation of Plaintiffs' statutory and constitutional rights, the Court should grant Plaintiffs' motion for partial summary judgment. Plaintiffs request that the Court enter declaratory relief and schedule a court conference to discuss a process for determining a court order on injunctive relief.

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