COPY

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al,
Plaintiffs

-against-

DECISION/ORDER
Index No. 8866-07

THE STATE OF NEW YORK, GOVERNOR
DAVID PATERSON, in his individual 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.

Appearances:

New York Civil Liberties Union Foundation
By: Deborah Berkman
Arthur Eisenberg
Christopher Dunn
125 Broad Street, 19th Floor
New York, New York 10004
For the Plaintiffs

Schulte Roth & Zabel, LLP
By: Gary Stein
Danny Greenberg
Sena Kim- Reuter
919 Third Avenue
New York, New York 10022
For the Plaintiffs

Hon. Andrew M. Cuomo
Attorney General of the State of New York
By: David Cochran
Adrienne Kerwin
The Capitol
Albany, New York 12224
For the State Defendants

Gordon Cuffy
Onondaga County Attorney
By: Michael McCarthy
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Syracuse, New York 13202
For Defendant Onondaga County

John Park
Ontario County Attorney
By: Michael Reinhardt
Ontario County Courthouse
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For Defendant Ontario County

James P. Coleman
Schuyler County Attorney
By: Dennis Morris
Schuyler County Office Building
Watkins Glen, New York 14891
For Defendant Schuyler County

Christine Malafi
Suffolk County Attorney
By: Leonard Kapsalis
P.O. Box 6100
Hauppauge, New York 11787-4311
For Defendant Suffolk County

Fitzgerald Morris Baker Firth P.C.
By: William Scott
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For Defendant Washington County

Devine, J:

Plaintiffs are allegedly indigent individuals who had criminal charges pending in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties at the time this action was commenced. They commenced this purported class action seeking a declaration that their

constitutional rights were being violated due to systemic deficiencies in the manner of providing a defense to indigent individuals in the five named counties and for injunctive relief requiring the state to provide a system of public defense which complies with the New York and United Sates Constitutions, as well as state law, in such counties. However, the proposed class does not include all persons who may suffer harm and the portion of the system challenged is not responsible for inflicting much of the harm. Plaintiffs have now moved for a preliminary injunction requiring the State defendants to take immediate steps to:

1. Implement standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training;

2. Establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case;

3. Guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding;

4. Ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense; and

5. Establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney.

Plaintiffs also seek additional forms of relief to ensure compliance with the injunction, including mandatory status reports, monitoring and negotiations with respect to a compliance plan.

It is well settled that a party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, the risk of irreparable injury in the absence of an injunction

and a balance of equities in its favor.[1] Whether to issue a preliminary injunction rests in the trial court's sound discretion.[2] The existence of factual questions for a trial does not prevent a party from establishing a likelihood of success on the merits; success need not be a certainty to obtain a preliminary injunction.[3]

Importantly, the purpose of the provisional remedy of an injunction is to preserve the status quo until the underlying action can be decided and does not "constitute an adjudication on the merits."[4] Here, it does not appear that plaintiffs are seeking the injunction to maintain the status quo, but rather are seeking a mandatory injunction which would grant some, though not all, of the ultimate relief sought in the action. Moreover, in order to obtain the ultimate relief available in the underlying action by way of a preliminary injunction, extraordinary circumstances must be found to exist.[5]

With respect to plaintiffs' likelihood of success on the merits, the complaint alleges that due to a number of systemic deficiencies in the manner in which public defense services are provided to indigent persons accused of crimes, the plaintiffs, as well as all others similarly

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[1] see Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; CPLR 6301.

[2] see Schweizer v Town of Smithtown, 19 AD3d 682 [2005]; Honeywell Intl. v Freedman & Son, 307 AD2d 518, 519 [2003]).

[3] see Cooperstown Capital, LLC v Patton, 60 AD3d 1251, 1252-1253 [3d Dept 2009]; Karabatos v Hagopian, 39 AD3d 930, 931 [3d Dept 2007]; see also Emerald Green Property Owners Assn., Inc. v Jada Developers, LLC, ___ AD3d ___, ___ 2009 NY Slip Op 05046 [3d Dept 2009]).

[4] Bonded Concrete, Inc. v Town of Saugerties, 42 AD3d 852, 855 n 2 [3d Dept. 2007] [internal quotations and citations omitted].

[5] see Egan v New York Care Plus Ins. Co., 266 AD2d 600, 601 [3d Dept. 1999].

situated, are subject to a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel at every critical proceeding during their criminal prosecutions. It is alleged that in the Counties of Onondaga, Ontario, Schuyler and Washington, defendants are rarely represented at arraignment when critical bail determinations are made, that many of the counties have incoherent or excessively restrictive eligibility standards, that there is a general lack of contact and communication between the accused and the attorney which is required to provide meaningful representation, that there is a lack of hiring criteria, performance standards, supervision and training, that there are insufficient expert and investigative services available, that the attorneys are subject to excessive caseloads and workloads which prevent them from providing meaningful and effective representation, that there is a lack of vertical representation with the accused being represented by several different attorneys, that there is a lack of political and professional independence which compromises both institutional and individual providers of public defense services and, finally, that there is chronic under-funding and inadequate compensation which prevents the provision of meaningful and effective representation.

The Court observes that there are a great number of similarities between the recent cases involving school funding and the instant action. The Court of Appeals has held that the New York State Constitution only requires the state to provide a minimally adequate, sound, basic education.[6] Similarly, the state is only required to provide a minimally adequate criminal defense.[7] It need not provide the best possible defense. In fact, what constitutes adequate and meaningful representation "cannot be fixed with yardstick precision, but varies according to the

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[6] see Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 316-317 [1995]).

[7] see e.g. Strickland v Washington, 466 U.S. 668, 687 [1984]).

unique circumstances of each representation."[8] Moreover, it would be troubling to require the state to provide a higher quality defense than that which could be afforded by the multitude of criminal defendants who are above the level of income required to obtain counsel at public expense, but who can not afford the best, most experienced attorneys.

Just as in school funding cases, plaintiffs herein must prove that the alleged deficiencies in the system are a proximate cause of the circumstances which give rise to a high likelihood of not receiving meaningful and effective assistance of counsel at every critical proceeding during their criminal prosecutions.[9] In the education cases, the state met its burden by showing that it provided adequate funding to allow local school districts to offer a basic, sound education. The fact that students did not actually receive a useful education as a result of other factors did not give rise to a viable cause of action.[10] Similar to the viable school funding cases, the instant claims are not directly result oriented; that is, plaintiffs do not seek a level of defense which would obtain dismissals or acquittals in every case. Rather, they seek the equivalent of adequate teachers, both in number and ability, facilities and equipment. However, contrary to the education cases, the state's burden is not met solely by providing adequate funding for criminal defense. The state must also ensure that minimally adequate representation is actually provided, as by prohibiting any political or judicial pressure or oversight which interferes with the actual provision of adequate legal representation. Notwithstanding such requirement, in the context of the instant action and motion, plaintiffs must show that deficiencies attributable to the named

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[8] People v Baldi, 54 NY2d 137, 146 [1981].

[9] see Campaign for Fiscal Equity v State of New York, 86 NY2d at 318.

[10] see Paynter v State of New York, 100 NY2d 434, 439 [2003]).

defendants have caused the failure. If, for example, the constitutional violations are attributable to the judiciary, injunctive relief would be inappropriate.

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) as well as affidavits from the named plaintiffs and other criminal defendants from the five counties. They have also submitted affidavits and affirmations from defense attorneys and from an expert witness who was involved in an analysis of criminal defense services in Washington, Schuyler and Ontario Counties. Defendants have objected to the admissibility of the Kay Commission Report as hearsay. Indeed, it is clearly hearsay. Plaintiffs contend that it comes within the common law exception for public documents.[11] However, such exception is limited to public documents which contain specific findings of relevant fact based upon admissible evidence.[12] 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.

In addition, the Court finds that most of the additional affidavits from defense attorneys

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[11] see e.g. Martin v Ford Motor Co., 36 AD3d 867, 867 [2d Dept 2007]; Kozlowski v City of Amsterdam, 111 AD2d 476, 478-479 [3d Dept 1985].

[12] see Cramer v Kuhns, 213 AD2d 131, 135 [3d Dept 1995]; see also Brown v State of New York, 45 AD3d 15, 25 [3d Dept 2007]; Donovan v West Indian American Day Carnival Assn, Inc., 6 Misc 3d 1016(A) [Sup Ct, Kings County 2005]; Bogdan v Peekskill Community Hosp., 168 Misc 2d 856, 858-860 [Sup Ct, Westchester County 1996].

and the expert witness submitted by plaintiffs in support of the motion are conclusory or not based upon personal knowledge or admissible evidence in the record. Defendants have also submitted affidavits from the defense counsel for the named plaintiffs or the prosecuting attorneys involved in the criminal proceedings which controvert many of the allegations intended to illustrate the deficiencies in the provision of criminal defense services. Thus the plaintiffs' factual showing of a likelihood of success on the merits is not very persuasive.

Plaintiffs must also show that irreparable injury is likely in the absence of the requested injunction. It is not enough to allege that irreparable injury will occur if some injunction is not granted. Rather, plaintiffs must show a direct causal connection between each of the five aspects of the requested injunction and a likelihood of irreparable injury. They must offer proof that each aspect of the requested injunction is necessary to remedy a situation which is a proximate cause of a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel at every critical proceeding during the plaintiffs' criminal prosecutions.

Plaintiffs seek an injunction requiring the state defendants to implement standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants in the five counties have sufficient qualifications and training. The complaint further alleges that there is a lack of hiring criteria, performance standards, supervision and training for assigned counsel. However, there are no factual allegations in evidentiary detail that any of the attorneys who regularly take assignments as counsel in the subject counties are incompetent or inadequately trained to provide the constitutional minimum level of representation. As such there is no proof that the alleged failures have proximately caused a likelihood of inadequate assistance of counsel. Furthermore, there are already applicable minimum standards for admission to the practice of law

as well as continuing legal education requirements for all lawyers and rules requiring attorneys only to accept representation of clients within their abilities. Plaintiffs have not offered any proof with respect to the inadequacy of the existing requirements nor have they included any of the governing bodies regulating the practice of law as defendants.

Plaintiffs seek to establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case. However, plaintiffs have failed to submit any proof in evidentiary detail establishing that any attorneys, let alone a significant number of attorneys, in the five counties are actually burdened with excessive caseloads. Anecdotal claims that attorneys have not spent a great deal of time on routine criminal matters do not constitute proof that the attorneys do not have sufficient time to devote to their clients. Moreover, defendants have submitted affidavits and affirmations from defense attorneys stating that they have not been assigned excessive numbers of cases, and further that they could decline cases if they were too busy. In addition, Disciplinary Rule 6-101 (22 NYCRR § 1200.30) already provides that an attorney shall not handle a legal matter without adequate preparation. Plaintiffs have not offered evidentiary proof of a statistically significant number of actual violations of such rule.

Plaintiffs seek some form of guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding. The complaint alleges that criminal defendants are rarely represented at arraignment, when critical bail determinations are made. None of the parties have offered any proof as to whether private pay criminal defendants are

normally represented at arraignment, which can occur at almost any hour of the day or night. Moreover, there is no proof as to whether or not a criminal defendant's rights can be protected by assignment of counsel within a reasonable period of time following arraignment with an immediate application by counsel for bail or dismissal of the charges following the arraignment. Furthermore, 22 NYCRR 200.26 expressly authorizes the issuance of a securing order when a defendant does not have counsel present. Plaintiffs have not challenged such regulation nor have they included any of the judiciary or the Chief Administrative Judge as defendants. It is also unclear how the state defendants could effectuate the requested injunctive relief, since it is the judiciary which actually assigns counsel and they are not parties to this action.

Plaintiffs also seek an injunction to ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense. While they have submitted anecdotal claims that no investigators were used in the defenses of the named plaintiffs and other witnesses, there is no proof that an attorney deemed such services necessary. There is also no proof in evidentiary detail indicating that the services of investigators and experts have actually been denied in any of the five counties when an attorney has deemed them useful. Defendants have submitted affidavits and affirmations from defense counsel alleging that they have always been able to receive such services when necessary. Moreover, pursuant to County Law § 722-c, it is for the court to determine whether services of investigators and experts are necessary and to provide for compensation. As noted above, the judiciary has not been made a party hereto.

Finally, plaintiffs seek preliminary relief to establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney. The

complaint alleges that many of the counties have incoherent or excessively restrictive eligibility standards for assignment of counsel at public expense. However, the statutory system for the provision of defense services to indigent persons leaves the issue of coverage to the counties. All that is required is that all persons who are actually indigent within the meaning of the constitutions of the state and federal governments be provided with a defense at public expense. There is no prohibition against a county determining to provide additional coverage to persons who are near, but above, the minimum constitutional level of indigence. As such, there is no constitutional requirement for uniform standards. Moreover, it appears that establishing such a uniform standard would be next to impossible since the level of income necessary to constitute indigence may vary greatly based upon the cost of living of the locale in which the defendant lives, the defendant's debts and reasonable expenses, as well as the seriousness of the crime for which the defendant is charged. Furthermore, plaintiffs have not offered any proof in evidentiary detail indicating that any significant number of actually indigent individuals have been wrongly denied the services of defense counsel at public expense. Plaintiffs have therefore failed to show that irreparable injury is likely in the absence of the requested injunction.

The Court further finds that under the circumstances of this case a showing of irreparable injury is necessary to tip the balancing of the equities in plaintiffs' favor. In the absence of proof that the injunction is necessary to protect the plaintiffs' constitutional rights, plaintiffs are in effect seeking an improvement in criminal defense services above the level mandated by the constitution at significant expense to defendants, both in money and legislative and administrative workload. Plaintiffs have failed to meet this test, as well.

It is therefore determined that plaintiffs have failed to show a likelihood of success on the

merits. In fact, if this Court had not felt bound by the First Department's decision in New York County Lawyers' Assn. v State of New York (294 AD2d 69 [2d Dept 2002]) when deciding defendants' prior motion to dismiss, it likely would have dismissed the entire action. Moreover, the Court has not found that plaintiffs will suffer irreparable injury in the absence of the injunction or that the equities weigh in their favor. Accordingly, it is

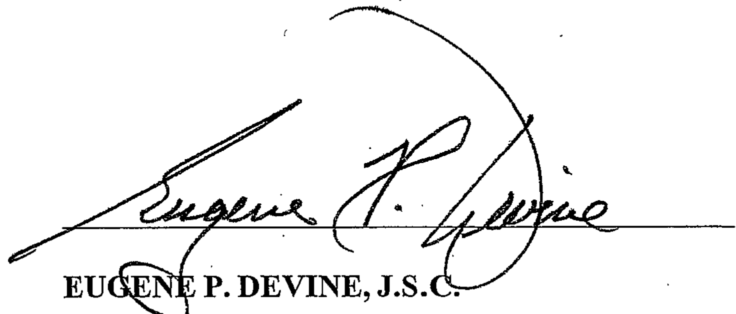
ORDERED that plaintiffs' motion for a preliminary injunction is hereby denied.

This memorandum constitutes both the DECISION and ORDER of the Court. This Original DECISION/ORDER is being sent to the attorney for the State defendants. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiffs is not relived from the applicable provision of that section with respect to filing, entry and notice of entry.

SO ORDERED

ENTER

Dated: Albany, New York
July 15, 2009



EUGENE P. DEVINE, J.S.C.

cc: New York Civil Liberties Union Foundation
Schulte Roth & Zabel, LLP

Papers Considered:

1. Plaintiffs' Notice of Motion, dated December 5, 2008.
2. Affirmation of Attorney Berkman, with exhibits, dated December 5, 2008.
3. Affirmation of Attorney Greenberg, with exhibit, dated December 5, 2008.
4. Affidavit of Demetrius Thomas, with exhibits, sworn to December 4, 2008.
5. Plaintiffs' Memorandum of Law, dated December 5, 2008.
6. Affirmation of Attorney Cochran, with exhibits, dated February 27, 2009.

7. Affirmation of Attorney Monastero, undated.
8. Affirmation of Attorney Gomes dated February 19, 2009.
9. Affirmation of Attorney Neldner dated February 18, 2009.
10. Affirmation of Attorney Oswald dated February 11, 2009.
11. Affirmation of Attorney Caponi dated February 19, 2009.
12. Affirmation of Attorney McDivitt dated February 11, 2009.
13. Affirmation of Attorney Reinhardt, with exhibits, dated February 13, 2009.
14. Affirmation of Attorney Hayden, with exhibits, dated February 20, 2009.
15. Unsworn, undated "Affidavit" of Attorney Duclos.
16. Unsworn, undated "Affidavit" of Attorney Sperano.
17. Affidavit of Attorney Schick sworn to February 23, 2009.
18. Affidavit of Attorney Roulan sworn to February 19, 2009.
19. Affidavit of Attorney Roe sworn to January 5, 2009.
20. Affidavit of Attorney Tantillo sworn to February 17, 2009.
21. Affidavit of Attorney Trunfio sworn to February 20, 2009.
22. Affidavit of Attorney Captor sworn to February 19, 2009.
23. Affidavit of Attorney Mosher, with exhibits, sworn to illegible day of October, 2008.
24. Affidavit of Attorney Vitale, with exhibits, sworn to February 17, 2009.
25. Affidavit of Attorney Barber, with exhibits, sworn to February 19, 2009.
26. Affidavit of Lisa Orr sworn to February 23, 2009.
27. State Defendants' Memorandum in Opposition dated February 27, 2009.
28. Affirmation of Attorney Scott, with exhibits, dated February 27, 2009.
29. Memorandum in Opposition of Defendants Counties of Suffolk, Ontario, Onondaga and Washington dated February 27, 2009.
30. Affirmation of Attorney Morris, with exhibits, dated February 13, 2009.
31. Memorandum in Opposition of Defendant County of Schuyler, undated.
32. Supplemental Affirmation of Attorney Berkman, with exhibits, dated March 27, 2009.
33. Plaintiffs' Reply Memorandum of Law dated March 28, 2009.