

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

NEW YORK COUNTY LAWYERS ASSOCIATION,
BRONX COUNTY BAR ASSOCIATION,
BROOKLYN BAR ASSOCIATION,
QUEENS COUNTY BAR ASSOCIATION,
RICHMOND COUNTY BAR ASSOCIATION,
ASSIGNED COUNSEL ASSOCIATION OF NEW YORK STATE, INC.,
METROPOLITAN BLACK BAR ASSOCIATION,
MACON B. ALLEN BLACK BAR ASSOCIATION,
LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY,
and ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK,

Plaintiffs,

- against -

[REDACTED]

Defendants.

Index No. [REDACTED]

BRIEF IN SUPPORT OF THE PLAINTIFFS

[REDACTED]

as *Amicus Curiae*

On behalf of the Chief Defenders Association of New York, I submit this *amicus curiae* brief in support of the relief requested by the plaintiffs, including their motion for a preliminary injunction setting the assigned counsel rates at \$158 per hour. We ask this Court to recognize the following principle: that indigent defendants have a Sixth Amendment right to parity in effective compensation – pay after overhead expenses – between the attorneys assigned to prosecute them and the attorneys assigned to defend them. In light of the clear disparity the State of New York has created between these two groups, the declaratory and injunctive relief requested by the plaintiffs should be granted.

This Court granted permission to file this brief on [REDACTED]

I. Indigent defendants have a Sixth Amendment right to parity in effective compensation between public prosecutors and assigned counsel.

“In our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him” (*Gideon v. Wainwright*, 372 US 335, 344 [1963], Black, J.). Justice Black recognized the disparity in the quality of representation between prosecution and indigent criminal defense, noting that state governments “spend vast sums of money to establish machinery to try defendants accused of crimes” (*id.*).

Wherever the State pays public prosecutors far more than assigned counsel in effective compensation, it is putting its thumb on the scales of justice – and tipping them in favor of the prosecution. In such a case, the State has an obligation to correct the “severe imbalance in the adversary process” that the Court of Appeals identified in another context (*Hurrell-Harring v. State*, 15 NY3d 8, 27 [2010], Lippmann, C.J.). When evaluating the constitutionality of assigned counsel rates, the heart of the analysis is “an indigent defendant’s right to competent and effective

representation, not the attorney's right to reasonable compensation" (*White v. Board of County Comm'rs of Pinellas County*, 537 So2d 1376, 1379 [Fla. 1989]).

The parity standard has support from a number of sources.

In a constitutional analysis of the statutory rates for mandated representation in capital cases, the Supreme Court of Oklahoma held that "[i]n order to place counsel for the defense on an equal footing with counsel for the prosecution, provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses" (*State v. Lynch*, 796 P2d 1150, 1153-54 [Okla. 1990]). In a constitutional analysis of statutory fee limits for court-appointed counsel in capital cases, the Supreme Court of Florida noted that "the relationship between an attorney's compensation and the quality of his or her representation cannot be ignored," creating the danger that a defendant will receive "less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy" (*White*, 537 So2d at 1380). One law professor suggested that an inquiry into the effectiveness of counsel take into account "whether the defense is institutionally equipped to litigate as effectively as the prosecution" (Donald A. Dripps, "Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard," 88 J. Crim. L. & Criminology 242, 243 [1997]). Another noted that parity "could become the centerpiece of constitutional standards that judges announce and enforce when interpreting the Sixth Amendment right to counsel" (Ronald F. Wright, "Parity of Resources for Defense Counsel and the Reach of Public Choice Theory," 90 Iowa L. Rev. 219, 222-223 [2004]).

As the plaintiffs observe, the State is violating one of the American Bar Association's principles of a public defense delivery system, which includes "parity between defense counsel and the prosecution with respect to resources ... workload, salaries, and ... benefits" (ABA, Ten

Principles of a Public Defense Delivery System, Principle 8 [2002]). This parity is not merely an aspiration, but an ideal rooted in *Gideon*, a constitutional right of indigent defendants.

II. By creating a disparity in effective compensation between public prosecutors and assigned counsel, the State of New York is violating the Sixth Amendment right to counsel for indigent defendants.

The statutory rates for assigned counsel in criminal cases are \$60 per hour for misdemeanors and \$75 per hour for felonies (County Law §§ 722[1][a], [b]). Thus, working forty hours per week, fifty weeks per year, will earn an assigned counsel gross annual compensation \$120,000 for misdemeanors and \$150,000 for felonies.

But what is the annual *effective* compensation? In the last constitutional challenge to the assigned counsel rates, this Court found “credible testimony that overhead expenses are more than \$72,000 per year for attorneys on the 18-B panel” (*New York County Lawyers Ass’n v. State*, 196 Misc2d 761, 787 [NY Sup Ct 2003]). According to data gathered from the U.S. Bureau of Labor Statistics, this amount has the same purchasing power as approximately \$111,000 today (www.in2013dollars.com/us/inflation/2003?amount=72000). In her affidavit, Brooklyn attorney Fredericka P. Bashir, Esq. estimates her monthly business expenses – health insurance, office rent and personnel, taxes, a Westlaw account, and many more – at \$7,904, or nearly \$95,000 per year (Plaintiffs’ Exhibit 28).

Using these two data points, a full-time assigned counsel would earn between approximately \$9,000 - \$39,000 and \$25,000 - \$55,000 in annual effective compensation.

Compare this to the effective compensation for the attorneys assigned to prosecute criminal defendants. The official website for the District Attorneys Association of the State of New York lists job offerings for 29 counties throughout the state. As of the date of this filing, the annual

salaries listed for Assistant District Attorney positions range from \$53,000 - \$65,000 (Sullivan County) to \$82,267 - \$130,000 (Nassau County). Several also mention benefits, including health insurance, paid leave time, membership in the state retirement system, and the possibility of student loan forgiveness (www.daasny.com/?page_id=180). The disparity could not be clearer.

Again, the right to parity in effective compensation does not belong to assigned counsel, but to indigent defendants. “There can be no equal justice where the kind of trial a [person] gets depends on the amount of money he has” (*Griffin v. Illinois*, 351 US 12, 19 [1956], Black, J.). The current disparity creates a grave and imminent danger that indigent defendants will receive systematically inferior representation. The Constitution requires more.

As applied, the statutory assigned counsel rates violate the Sixth Amendment. The plaintiffs have established all three requirements for a preliminary injunction: “a likelihood of ultimate success on the merits; the prospect of irreparable injury if the provisional relief is withheld; and a balance of equities tipping in the moving party’s favor” (*Doe v. Axelrod*, 73 NY2d 748, 750 [1988]). By recognizing the right of indigent defendants to parity between the attorneys assigned to prosecute them and the attorneys assigned to defend them, this Court has the opportunity to fulfill the promise of *Gideon* for the next generation.

The relief requested by the plaintiffs should be granted.

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This brief has the support of the New York State Association of Criminal Defense Lawyers, the Erie County Bar Association, the Monroe County Bar Association, the Onondaga County Bar Association, the Schuyler County Bar Association, and the Onondaga County Assigned Counsel Program.

CERTIFICATION OF WORD COUNT

This brief complies with the word count limit set forth in 22 NYCRR 202.8-b. The total number of words in this brief, exclusive of the caption and signature block, is 1,182.

Dated: Buffalo, New York
March 28, 2022

