RESPONSE

CLAY HILES*: Eligibility for assignment of counsel is one of many areas in which there is more policy than law. The time is ripe to consider practicalities. I do not lay claim to any authority with regard to the law, the policy or the theory. I learned about practical reality as a battered participant in an effort to effectuate the operation of an eligibility screening program within the confusion of the New York City courts.

Unless one indulges in the fantasy world outlined by Jim Neuhard, in which everyone would be eligible for assigned free counsel[1], one must recognize that only some people are eligible for publicly assisted counsel. We must confront the obvious consequence of that, which is the need to determine who is eligible. As a practical matter this has proven to be virtually impossible and has added to cynicism about the administration of criminal justice in New York City. To date, the decision on eligibility has been made by a member of the judiciary, the assigned counsel, or, as in the ongoing New York City experiment, a neutral third party. Presently, the Criminal Justice Agency, whose primary function is to interview arrested defendants and assist the courts in making a release or bail determination, is making the eligibility decision. It is partly because of the Agency's convenient position in the pre-arraignment process that it has inherited the task of screening for eligibility all those who come through the system.

It has been forcefully argued that judges are the wrong people to make these eligibility decisions, except in the case of review. Judges are not trained to make determinations of an individual's financial situation and they are disinclined to divert their attention from what they consider to be more important questions. Most criminal defendants do not have their professional personal investment counselor and portfolio with them. Additionally, judges vary enormously in their own positions, opinions, prejudices, and perceptions. The impact on different defendants and the defense of their cases depends on which judge presides and how the judge feels on a particular day. Obviously, such differences have an effect on all aspects of the case, but it troubles me that judges, with limited training and varying attitudes, have the power to rule on eligibility for assigned counsel.

Placing the burden of the eligibility determination on defender agencies has its own set of problems. Assigned counsel in New York City are reluctant to take on this responsibility. They see the screening process as the first antagonistic step in what may or may not be a long and fruitful lawyer-client relationship.

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* Director, Criminal Justice Agency, New York City.

1. Neuhard, *Free Counsel: A Right, Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 109 (1986).

In New York City the third party option was adopted a few years ago. An experiment set out to determine whether a neutral third party could develop the appropriate standard to assume the responsibility (if delegated by the judge) of eligibility determinations. We began the process of trying—as technocrats—to enable judges to make the most accurate determinations possible. To date, we have not gotten very far.

Once it is agreed who is going to make the decisions, it must then be decided what standards are to be applied to ensure fairness and equity in the eligibility determination. A variety of cut-off standards have been suggested, including some just alluded to, but there has never been any consensus about the definition of indigency for determining eligibility in general, much less for quantifying the amount of money that would be necessary for someone to obtain adequate counsel in a particular case. Leaving this impossible complication aside, we found in New York City—and I think this has to be the experience in other jurisdictions—absolutely no consensus on what qualifies one as an indigent. Earlier, we had the opportunity to bring the judges into this discussion, but it was during the period when they were fighting desperately for their well-deserved raises; we found them arguing before the press that some figure around $45,000 was the poverty cut-off in New York City. This hardly put them in a perfect frame of mind to help me decide exactly how much the average criminal court arraignee would have to have in her pocket before being sent off to find privately retained counsel.

Nevertheless, we decided that some standards had to be set. We questioned judges as well as others to make a determination. Once we collected all the data we rounded the figures and decided that X would be the amount of money which, after certain essential expenses like rent had been subtracted, would make someone presumptively eligible or ineligible. We would advise each arraigning judge that the person is above or below this determined eligibility line. I will not argue now whether or not we had any authority to do this under New York State law, but the judges who interpret the law seemed at least acquiescent to the process.

After selecting some presumptive standards, and designing some forms that detailed the various elements of eligibility, we set off on what turned out to be the impossible task of applying them. Until one realizes what it's like to sit in a central booking facility in New York City and watch defendants sweep past while some kind of assessment of their net worth is attempted, one cannot appreciate how out of touch with practical reality any theoretical framework for determining eligibility is.

I have a highly trained and very competent staff, yet imagine them sitting down and trying to determine the financial ability of a defendant living off someone else's welfare, or living off the licit or illicit gain of an irregular activity in which she may have been engaged in last week but not this week. Exactly how to capture this information in a systematic way, and summarize it for a judge, is something that has continued to escape us.

Our problem was compounded by the fact that even if we had been able to obtain appropriate information and summarize it in such a way so that we could have said, "This is Ms. X's net worth and she does or does not have jewelry and furs in excess of $250, or a boat, or a summer home" (some jurisdictions use such a form), we would still have to convince the judge that this in fact was the person's true net worth. Our attempt to verify any of the information the defendant had given us opened up a wide range of problems of potential abuse, particularly when the verification was occurring without defense counsel.

These are the problems which we have found to be essentially insurmountable. And many policymakers object to increasing resources for remedies. Their concern is focused on the idea of a criminal defendant perpetuating yet another crime in the form of fraud by obtaining counsel at the expense of the public treasury.

Aside from the problems already discussed there are two reasons I am not optimistic that the eligibility question will be resolved soon. First, there is the concern about money, which underlies any effort to try to determine eligibility. We have the ongoing debate about appropriations—who is going to get the public resources and who is not. Moreover, the amount of money that could be saved by excluding from eligibility defendants who could afford counsel is small compared to the amount of money that is involved in the effort to make the eligibility determination and certainly negligible in relation to the overall costs of operating the criminal justice system. I have seen some unreliable evidence to the contrary but, regardless of that evidence, this is certainly the prevailing wisdom among participants in the New York criminal justice system. Second, policymakers view the determination as a moral issue. They favor eligibility determination because even if it costs more to track down the fraudulent defendant, even if it costs more to screen her initially, fraud is being prevented. It is a sincerely held belief that this fraud is a very serious matter and that in order to maintain the integrity of the system we must make objective and rational determinations of a defendant's financial ability and prevent fraud.

I conclude with the observation that as long as both the money and the principle are considered relatively unimportant, in the context of the overwhelming problems faced by the criminal justice system we can expect very little effort directed toward resolving this problem in a practical way.

RESPONSE

JOHN ARANGO*: This morning Norm Lefstein noted that there has been enormous growth of indigent defense services from the 1960's until the present. His speech suggested that if this growth continues, this country may reach a point where there are adequate funds for indigent defense services.[1] I think that the tenor of the comments from most of the other speakers has been that this point will never be reached. While I do not want to suggest that funding for indigent defense services is now on an inevitable decline, we do face some problems which must be addressed.

One problem is that, in recent years, expenditures for indigent defense services have not been increasing as quickly as the number of indigent defendants. That is, the cost per case has, in many states, decreased. In Virginia the total cost for indigent defense has decreased in each of the past three years.[2] In many jurisdictions, especially in western states, use of contracts which pay a fixed total amount for representing all indigent defendants (regardless of number and nature of charge) has often had the effect of reducing the amount paid per case.

A second problem has been the use of income guidelines to limit access to attorneys. Many states are moving away from a standard based on inability to pay reasonable attorney's fees to one which limits representation to persons whose income is less than some specific amount. The effects of moving from a system based on reasonable judgement to one based on arbitrary guidelines have been to 1) deny counsel to persons whose income is only slightly over the standard, but who obviously cannot afford counsel; and 2) create a bureaucracy which devotes much of its energy to splitting hairs and whose cost may be greater than the amounts "wasted" on providing representation to persons who could afford to hire their own attorney.

A third problem is the attempt to reduce the cost of indigent defense by recouping part or all of the state's cost for the defendant's attorney. The record for all states (except Virginia, which collects 16%) is that the amount recouped is minimal—always less than 10% and often less than 5%.[3] The cost of collecting may exceed the amounts collected. For example, I visited several local offices of an indigent defense program in Canada which had a strict recoupment policy. Each office had a room full of old files awaiting col-

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* Director, Bar Information Program, American Bar Association.

1. Lefstein, Keynote Address: *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 8-9 (1986).

2. *See* Office of the Executive Secretary, Sup. Ct. of Va., A Report to the Governor and General Assembly on Indigency Standards 8 (1984).

3. *See* National Legal Aid and Defender Assoc., Eligibility and Recruitment Survey (1984).

lection action. It would have taken the full time of the local staffs to simply process these files, much less collect from former defendants.

These problems result from widespread misunderstanding of the purpose of the indigent defense system. Few attorneys, and hardly any laypersons, are willing to accept that the purpose of the indigent defense system is to ensure that every defendant receives a fair trial. The standard ought to be justice, not cost per case, overall cost per year, or the percentage collected from destitute defendants.

The grim reception given to Jim Neuhard's idea that the state should assume all defense costs indicates how far even the experts have moved away from the concept that an adequate defense is a criticially important part of any real democracy.

The real threat to the growth of indigent defense services is that our society has forgotten why defendants need counsel.

RESPONSE

ROBERT SPANGENBERG*: My remarks on the question of indigency standards and recoupment stem from a year's research for the National Institute of Justice. Those who have said that whatever standards exist will not save the system any money are absolutely right.

Neuhard's plan[1] to provide counsel to all who need it is too impractical because of opposing political and economic forces. Throughout the country thousands of counties are funding their own indigent defense system and would be reluctant to spend any more money to extend thoses services on the scale that Neuhard's plan would require. In fact, the cost would be substantially greater than Neuhard predicts. This would not be a nominal increase.

Trying to recoup money from defendants at the end of the case is not worth it. One jurisdiction levied the following at the end of every criminal case: $75 for a victim compensation fund, $25 for police academy training, $23.65 to court costs for the county, $75 for a drunk driving school (whether the defendant was at fault in a drunk driving case or not), and $23.65 for court costs for the state. They also had recoupment fines and restitution. In a criminal case the charges amount to $221.70 in that jurisdiction before the question of recoupment is ever reached.[2] Collections are, in a word, negligible.

Another prevalent trend is contributions and reimbursements. Money is taken from the defendant at the time of screening. Interestingly enough, while the ABA and NLA standards oppose recoupment, they do not oppose contributions. Reimbursements and contributions are collected with increasing frequency because the money is received prior to the disposition of the case. This sytem merits greater attention. Clear written standards are needed. Screening should be done by an outside agency, not by the public defender, probation officer, or any other court official. Most importantly, standards should be based upon the cost of privately retained counsel.

Too many cases in the criminal justice system proceed although counsel is needed but not appointed. A second problem is the overabundance of cases in the system requiring appointment of counsel where it is not needed. Also, there are too many defendants in this country who are in jail prior to trial. They are in jail not because they are dangerous, but because the system is understaffed.

My first recommendation in addressing these problems is to eliminate standing municipal ordinance cases that carry jail sentences. There are hun-

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* Director, Criminal Defense Technical Assistance Project, Abt Associates.

1. Neuhard, Free Counsel: A Right, Not a Charity, 14 N.Y.U. REV. L. & SOC. CHANGE 109 (1986).

2. *See* National Institute of Justice, U.S. Dept. of Justice, Recoupment and Indigency Screening 63 (1986).

dreds of cases being processed involving municipal ordinance violations, which are completely victimless. My second recommendation is to decriminalize some victimless crimes. This was more popular five years ago than it is today, but the criminal justice system is absolutely overwhelmed with such cases. Third, the penalty for certain misdemeanor cases, particularly those involving victimless crimes, should be reduced.

Fourth, prosecutors must conduct better intake screening and prevent the police from overcharging as much as they are today. Sloppy prosecution is common. Tougher intake screening will keep out of the system a vast number of cases and that, ultimately, will reduce the total dollars expended.

Fifth, early representation should be effected. The involvement of good public defenders and good prosecutors at the earliest point in the process will improve the quality of representation to defendants as well as reduce the number of cases in the system, prosecutor time, court time, and the jail population. I favor mass arraignment counsel. I suggest removing indigency requirements completely and appointing counsel at arraignment for everyone, to be followed by screening and excluding.