NY Chief Judge Spotlights Need To Strengthen Public Defense

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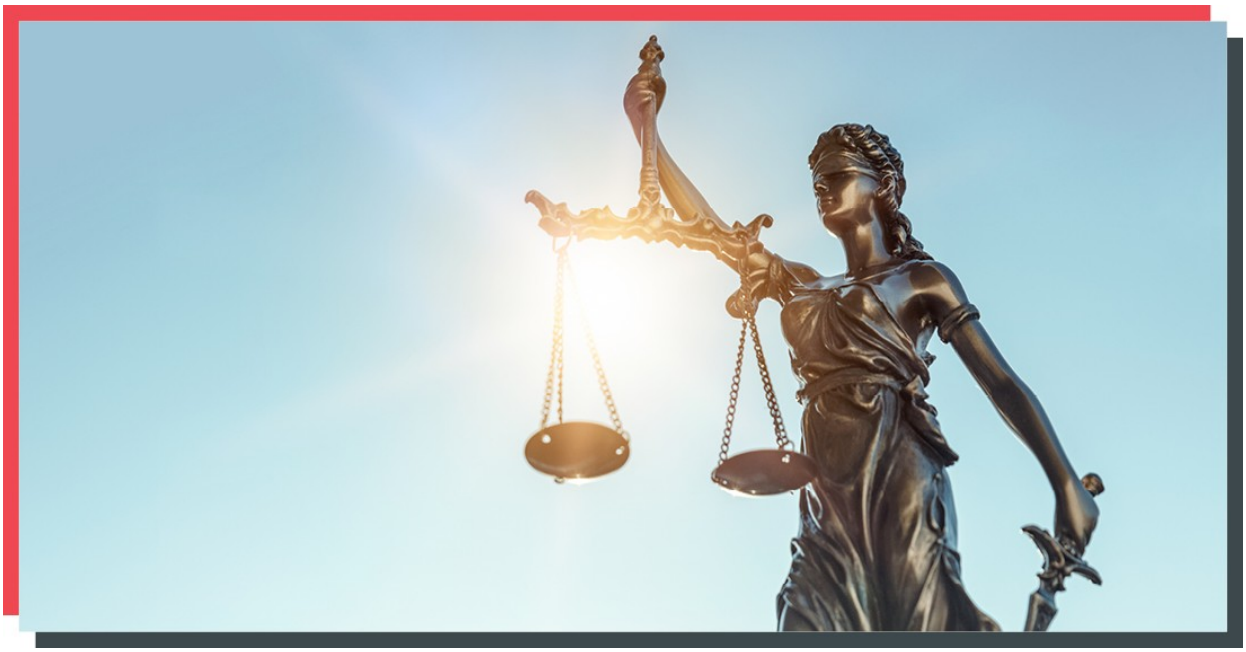

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In a recent concurring decision, Chief Judge Rowan D. Wilson of the New York Court of Appeals added his name to the long line of New York chief judges who have called attention to the need for greater investment in public defense services. In doing so, he highlighted not only the urgency of addressing current crises but also the need to look beyond basic legal standards and embrace a more ambitious vision of equal access to justice.

Every American has a constitutional right to a lawyer if they are accused of a crime. This includes the right to effective assistance of counsel, which, when denied, can lead courts to overturn a conviction.

In the decades since this principle was heralded in the landmark 1963 U.S. Supreme Court decision in Gideon v. Wainwright, post-conviction remedies for ineffective assistance of counsel have not put adequate pressure on state and local governments to develop systems capable of ensuring equal justice.

Deference to defense counsel and a requirement to show actual prejudice means that ineffective assistance of counsel claims establish a low constitutional floor enforceable only by criminal defendants with demonstrable chances of acquittal.

The recent case of People v. Watkins examined whether a defense attorney was unconstitutionally ineffective.[1] While joining in the majority's May 23 opinion that the representation in that case met the low bar of constitutional effectiveness, Judge Wilson wrote separately to highlight the gap between what the law provides and what justice requires.

He notes, "[W]e can and should expect not only representation that meets the constitutional minimum, but high-quality representation — the type of representation we would hope for if the accused were a family member or friend."

In doing so, Judge Wilson echoes points raised by Justice Thurgood Marshall almost exactly four decades earlier.

Dissenting from the Supreme Court's decision in Strickland v. Washington, the 1984 case that defined the test for constitutional effectiveness of counsel, Justice Marshall foresaw that the court's low standards would reinforce the reality

that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.

Like Judge Wilson, Justice Marshall recognized that equality before the law means little if people of means can expect one level of representation and everyone else gets the constitutional minimum.

The facts of the Watkins case aptly illustrate the gap between real justice and what the law provides. Watkins was accused of striking a stranger in the face based solely on testimony from the victim, who identified Watkins as the attacker.

Because Watkins and the victim are of different races, New York law requires that, upon request of the defense, the jury be instructed in the perils of cross-racial identification. That rule is the result of the Court of Appeals' 2017 decision in People v. Boone, which acknowledged the well-established heightened risk of wrongful convictions in cases involving cross-racial identification.[2]

Boone was pending at the time of Watkins' trial, and the decision would not be issued until a few months later. Nonetheless, Watkins' attorney did not request a cross-racial identification instruction.

Because Boone had not yet been decided when Watkins was on trial in 2017,[3] Appellate Division precedent was unclear at the time and the Court of Appeals had characterized the Boone rule as "a new approach," the majority in Watkins affirmed the decision of the lower court.

The Court of Appeals concluded that the failure to request the instruction cleared the low performance bar set by right-to-counsel cases, which have previously emphasized how rare it is to reverse a conviction based on "a single alleged error."

As the dissent of Judge Shirley Troutman notes, this conclusion was reached despite a range of decisions and reports available to members of the bar emphasizing the risk of cross-racial identifications and the majority "acknowledging the heightened risk that defendant Mark Watkins was wrongly convicted for these crimes."

The division between the majority and the dissent in Watkins encapsulates the unsatisfactory limits of right-to-counsel jurisprudence: On the one hand, courts defer to defense counsel's judgments, however flawed or constrained by limited resources; on the other hand, they acknowledge the deeply uncomfortable risk of profound injustice.

As Justice Marshall predicted, post hoc attempts to reverse convictions are not capable of incentivizing democratic systems to meet even the constitutional floor, let alone aspiring to meaningful equality before the law.

Post-conviction relief is not the only way to enforce the right to counsel. In some states, claims for prospective relief designed to address systemic deficiencies that prevent effective assistance of counsel have been attempted. But even that relief has limits.

In New York, a class action called Hurrell-Harring v. State of New York eventually resulted in a 2014 **settlement with the state**, which required reforms such as statewide caseload and eligibility standards, greater state oversight of the quality of representation, and significant increases in state funding. But, as Judge Wilson notes in Watkins, those reforms neither addressed all the problems in New York's public defense system, nor proved capable of ensuring that funding keeps pace with inflation and the growing complexity of criminal defense practice.

Although litigation has an important role to play, in the end it will take more than court-ordered remedies to ensure that the constitutional right to counsel has meaning.

In that context, Judge Wilson's concurrence is a welcome spur to action. New York has a long history of chief judges who have used their judicial power to fight for equal access to justice.

In 2006, a commission convened by Chief Judge Judith Kaye issued a report that condemned New York's broken public defense system and called for sweeping state reforms. Her successor, Chief Judge Jonathan Lippman, authored the decision allowing the Hurrell-Harring case — which challenged the state's failure to respond to the Kaye Commission report — to proceed to trial, after which it was settled.

That decision affirmed the viability of prospective systemic challenges to state and local governments' failure to establish systems capable of delivering constitutionally effective assistance of counsel. Judge Lippman was also instrumental in achieving the legislative changes that expanded the Hurrell-Harring reforms statewide.

Like his predecessors, Judge Wilson calls for policy change to address the urgent crisis holding back effective public defense. He notes that despite the reforms ushered in by Hurrell-Harring, "many aspects of the system remain in crisis" and even "the modest gains achieved since 2017 are threatened by the failure of funding to keep pace with costs."

The lawyer who represented Watkins worked in a system in which, as Judge Wilson notes, "pay rates for assigned counsel had stagnated for decades at rates less than half of what lawyers could receive for other comparable work, resulting in a situation where few

attorneys would take such cases and those who did were overwhelmed by crushing caseloads."

While the state has since allowed for an increase in compensation for assigned counsel, the gains are modest and institutional public defenders still face an attrition crisis born of low pay and high workloads. The call for additional funding is urgent and should be heeded.

The last time New York's chief judge issued a clarion call for investment in public defense, it took nearly a decade of expensive litigation to finally compel a result from the governor and state Legislature; in the meantime, hundreds of thousands of people suffered in a system incapable of equal justice. We should hope for better this time around.

However, Judge Wilson's concurrence in Watkins goes beyond the traditional use of the chief judge's pulpit to call for legislative action to meet basic standards. He articulates an ambition for something better than the minimum constitutional floor.

It can be difficult to imagine such a reality when, in many parts of America, public defense systems are struggling with threats to funding and independence that make even the achievements of New York's public defense system — flawed as that system might be — appear out of reach.

But Judge Wilson reminds us, as Justice Marshall did before him, that our standard of justice is measured by whether the poor are treated the same as the rich, not whether we can manage to treat the poor merely well enough.

[1] People v. Watkins , 2024 N.Y. Slip Op. 60042 (May 23, 2024).

[2] People v. Boone , 30 N.Y.3d 521 (2017).

[3] Watkins was convicted in July 2017; the Boone decision issued later that year, in December. The Appellate Division affirmed Watkins's conviction in 2022. People v. Watkins , 206 A.D.3d 452 (1st Dept 2022).

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