

A Preliminary Report Concerning the Inadequacy of Defense Services Available to Farm Workers

**Based on Testimony Received at a Fact-Finding Hearing Conducted
by the New York State Defenders Association and the League of
Women Voters of New York State**

**St. Joseph's School, Albion, NY
July 31, 2003**

INTRODUCTION

Some of the legal injustices suffered by New York's migrant farm workers were publicly aired in a fact-finding hearing held in Albion, New York on July 31, 2003.¹ These hearings were among a series of fact-finding hearings held throughout the state by the New York State Defenders Association (NYSDA) and the League of Women Voters of New York State (LWV). NYSDA is a non-profit organization that seeks to improve the quality and scope of legal representation offered to poor people. Under contract with New York State, NYSDA is called upon to "...review, assess and analyze the public defense system in the State, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities."

Fourteen farm workers and their advocates testified about inadequate defense services provided to immigrant farm workers. Although problems in Orleans, Genesee and Monroe counties were revealed during the hearing, the primary focus by farm workers was Orleans County.

INADEQUACIES IN THE CRIMINAL JUSTICE AND PUBLIC DEFENSE SYSTEMS

The hearings demonstrated that predominantly rural areas generate major criminal justice problems involving racial profiling, discriminatory treatment of indigent defendants, and a lack of respect for the rights and needs of non-English-speaking farm workers. Migrant farm workers find themselves caught up in dragnets set by local police and immigration authorities. From our investigation, it appears that farm workers are most commonly charged with DWI and traffic violations, although it is clear that more serious offenses also occur. There is no right to public defense for ordinary traffic violations, but for non-traffic violations, misdemeanors and felonies, public defenders are required, under County Law Article 18-B, to represent eligible defendants, including non-citizens.

¹ This hearing was preceded by several months of meetings with farm workers, their advocates, and growers, and two days of field interviews with farm workers.

Many defendants eligible for public defense are arrested and deported without ever seeing a lawyer. Currently there are no standardized statewide eligibility requirements to determine who qualifies for public defense services.² Some public defense offices base their eligibility partly on pay stubs, which can work against farm workers who labor for only a few months out of the year in any given locale. These problems need to be addressed. Due to their lack of knowledge about the American legal system and their fear of government officials, many farm workers seek private legal representation that they cannot afford, or they rely on not-for-profit advocates who lack legal expertise. The constitutional rights to counsel and equal protection of the law never materialize for many farm workers.

HUMAN CONSEQUENCES OF AN INADEQUATE SYSTEM

One Spanish-speaking farm worker testified that in 1994 his brother was charged with manslaughter 2nd and was represented by the Orleans County Public Defender. His testimony indicates numerous inadequacies in that office.

The assistant public defender representing the witness' brother refused to communicate with his client or the family, and never informed the family when the case would be heard in court. He gave the impression that he believed the defendant was guilty. He kept pressuring the defendant to accept a plea bargain. The defense lawyer failed to discuss with the defendant what effect his plea of guilty would have on his right to remain in the United States. On one occasion an investigator from the Public Defender's office came to the witness' home, where five of the family members were living. The investigator, who did not speak Spanish, did not bring a translator, and the family did not speak English. Genuine communication was impossible. No one from the Public Defender's office ever attempted to communicate with the family with an interpreter. The witness testified that when he went to the lawyer's office to ask about the status of the case, he was told that the District Attorney's office would contact him.

During the two years the defendant was detained prior to trial, the public defender never responded to the defendant's letters. On only one occasion did the attorney meet in jail with the defendant. No public defender interpreter was present, and the defendant eventually agreed to accept the plea bargain because he saw no alternative. The witness testified, "We did not really know about the case. The defender never presented anything about the case, or tell us much about the case. So my brother didn't have any choice but to take that."

Another farm worker testified that he was arrested in Orleans County for burglary 2d, assault 2d, and menacing 1st after he used his keys to return to his girlfriend's house, which he had left two weeks earlier. The defendant was arraigned at night without a lawyer, and was held in jail with a court date scheduled for several days later when supposedly the Public Defender would represent him. However, when he was brought back to court no lawyer was present, the judge appointed the Orleans County Public Defender to represent him, and the attorney asked for a postponement. Two or three weeks later, the defendant was brought back to court, although his attorney had not contacted him at all during this time. Another lawyer met the defendant at court and said the initial lawyer had other business that day and the new lawyer would sit in for him. The other lawyer then asked for another adjournment, which was granted. The defendant

² See, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* (1994), which documents this longstanding, statewide problem.

appeared on a number of other occasions, but the lawyers kept changing and each asked for an adjournment.

During the entire eight months the defendant was in jail, a lawyer visited the defendant only once. This was the only time the client ever saw a lawyer outside the courtroom. The lawyer told him at the jail meeting that the District Attorney had offered a plea of 3 to 6 years in prison, and the defendant agreed to accept the offer. Just before the defendant returned to court to plead guilty, still another lawyer from the Public Defender's office called him at the jail and asked the defendant to explain what happened in his case. The defendant said he did not feel comfortable talking about his case over the phone because there were many people standing around him. The lawyer then said that if he had to impose the sentence, he would give the defendant a higher sentence than the proposed plea bargain, and that the defendant should be leery about whether the judge would approve the previous offer of 3 to 6. This same lawyer appeared to represent the defendant in court when the plea was to be accepted.

During the defendant's appearance in court to change his plea to guilty, the prosecutor and judge made erroneous statements about the facts of the case and the defendant's personal history. When the defendant said something to the lawyer about it, the lawyer told the defendant to be quiet. Then the judge refused to accept the plea bargained sentence and said that he would impose a sentence of 5 to 10 years or require a trial. The judge told the defendant that he had a few minutes to talk about it with his lawyer. The lawyer, still in the courtroom, then spoke to the defendant for two or three minutes, and advised the defendant to accept the 5 to 10, because if he went to trial he would be found guilty and would probably receive 7 to 15. So the defendant accepted the sentence of 5 to 10 years. He eventually served 6 years and 8 months.

During the entire proceeding the lawyers never reviewed with the defendant what motions they intended to file, nor were any pretrial hearings held. The lawyers did not review the defendant's pre-sentence report with him or discuss with him whether the contents of the report were true. The Public Defender's office never explained why it kept changing lawyers, and why on the day he pleaded guilty he was given yet another new lawyer. The defendant was never given copies of court papers, and the lawyers did not share with him the victim's medical records or other documents in the case. The lawyers never discussed with the defendant the elements of the crimes with which he was charged. The defendant accepted the fact that he was guilty of menacing because the District Attorney had said that a knife in his hand could have been perceived as a threat. His public defender never discussed with the witness the difference between felony and misdemeanor assault and he still does not know the difference. The only thing he knew was that he hit someone.

The witness filed an appeal, but his first lawyer wrote him a letter saying there were no grounds for an appeal. The Appellate Division appointed him another lawyer who tried to get his sentence reduced to the original 3 to 6, but this was not successful.

Another farm worker, who was interviewed in the field, stated that in November 2002, after he was assaulted in a fight, he was given an appearance ticket. When he appeared in court, no lawyer was present to represent him and he was told to return on another day. At the next appearance, no court-certified interpreter was present and the matter was again adjourned. On the

third appearance, it was discovered that the lawyer who was assigned to represent him was in fact representing the person who had assaulted him in the fight. When he was interviewed by our staff in July, he still did not know what he had been charged with or why.

FAILURE TO COMMUNICATE WITH CLIENTS USING INTERPRETERS

As the above stories illustrate, public defense lawyers often do not provide adequate representation and sometimes do not communicate properly with their clients. Farm workers are a community whose rights are often overlooked in our society due to immigration issues, language differences and cultural barriers. One of the central themes emerging from the testimony was that Spanish-speaking migrant farm workers are often herded through a legal system they don't understand, without receiving proper assistance from local law enforcement, justice courts, or public defenders. At the police station, Spanish-speaking farm workers are sometimes asked to sign statements written in English that they can neither read nor understand. By law, defendants who do not speak English are entitled to have interpreters appointed by the courts to ensure that they fully understand the legal proceedings. (*Negron v. State of New York* 310 F.Supp. 1304, affd. 2nd Cir. 434 F.2d 386; *United States v. Si*, 333 F.3d 1041 (2003)). Yet too often judges do not provide interpreters or, worse, require defendants to supply their own interpreters. For example, in *Matter of John Carr*, 1997 Commission Annual Rept. p.80, the Commission on Judicial Conduct reprimanded a judge in Orleans County for repeatedly refusing requests that he provide an interpreter to a defendant who could not speak English. The defendant eventually accepted a guilty plea while using a teenage friend as an interpreter. Defendants and public defenders are not obliged to proceed in a court matter where there is no official interpreter, and the defendants are not obliged to supply their own interpreters. Defendants who are not fluent in English are entitled to insist on an interpreter in order to communicate with their attorney. Ironically, if the defendant has language difficulties communicating with his or her attorney or the court, these rights are not likely to be explained.³ The failure of the public defense system to create and enforce standards regarding representation of clients who do not speak English must be corrected.

One of the witnesses noted, "Many times the court drops the case because to hire a translator costs money. In a little town, say, Oakfield Town Court, you might have to pay \$25 an hour for a translator. Well, they say we're not getting into that. They kind of say, let's just call INS. It is easier getting rid of the case that way." (Sexton, 192)

Another witness noted, "I have heard stories where inmates who have been brought to trial are asked to translate. I have heard stories where public defenders act as the public defender and the prosecutor." (Salgado, 78)

As a result of the lack of an interpreter, non-English-speaking defendants can languish in jail waiting for the services of an interpreter.

³ If no objection is made to the denial of these rights, appeal of that issue may be precluded. See for example, *People v. Calizaire*, 190 A.D.2d 857; 593 N.Y.S.2d 879 (Second Dept. 1993).

IGNORANCE OF THE LAW AND FEAR OF DEPORTATION

“The workers are in a state of fear,” said Aspacio Alcantara, the director of Centro Independiente de Trabajadores Agrícolas (CITA), a farm worker advocacy group in Albion. “The fear comes because they don’t know the English language. The fear comes because they don’t know their legal rights in the United States.” The fear is increased because convictions of even very minor infractions can have devastating consequences with respect to deportation under Federal Law.⁴ Without adequate legal representation, a defendant can easily plead guilty to a minor crime without realizing that the conviction could lead to deportation.⁵

Prior to the hearings, NYSDA staff visited farm worker camps in Genesee, Orleans and Wayne counties. They came away with a sense that many workers would not speak out for fear of losing their jobs or suffering other reprisals. They also heard horror stories, such as one involving a farm worker who was arrested for the crime of trespass and arraigned before a judge in Genesee County, without counsel or an interpreter, and remanded to jail. The next day, the farm worker was released to the custody of INS, along with the notation that he had pled guilty to trespass. He had, however, not pled guilty, nor had he been afforded a lawyer, nor had he been brought back to court. The INS then tried to use this phony “conviction” as a basis to deport the defendant. Only prompt intervention by an informed lawyer prevented the defendant from being deported.

RACIAL PROFILING USED TO BRING DEPORTATION PROCEEDINGS

Most of the witnesses complained about the police using racial and ethnic profiling. One witness stated, “Hispanics are stopped by the police. They are not asked for a license and insurance card. They are asked for license and immigration cards, or license and your blue card***It is...already decided that there is an immigration issue, not that I am stopping you on a traffic violation.” (Smith, 133). The discriminatory, minor or even unfounded criminal charges then lead to deportation proceedings. One witness stated, “They stop somebody because of a traffic violation and right away they call INS. They pass the case to the INS.” (Alcantara, 51) Federal deportation law is highly specialized and few public defense lawyers claim expertise in it.⁶ Yet the arrest of any non-US citizen raises potential deportation problems, which may have to be argued in state and federal proceedings. These problems are greatly exacerbated when the

⁴ In 1998, Jesel Joseph, a 20 year old defendant, pleaded guilty to possession of marijuana, which in New York is a violation, not a crime, carrying a maximum \$100 fine and no jail time. She paid a \$50 fine. No one ever told her that this simple non-criminal disposition of her charges might lead to years of incarceration and ultimately deportation. Yet two years later, when she arrived back in the United States after visiting her grandmother in St. Lucia, the Immigration and Naturalization Service held her in jail and began a deportation proceeding based on her earlier marijuana conviction. (“1996 immigration act keeps woman in prison,” *The Journal News [Westchester County, NY]*, January 22, 2001, page 1A)

⁵ See, *Vera-Bedolla v INS*, No. 02-70812, 61 Fed Appx. 364; 2003 US App LEXIS 6082 (March 3, 2003, Ninth Circuit).

⁶ Lawyers, including public defense lawyers, have an ethical obligation to not handle matters they lack time, resources, knowledge or experience to handle properly. NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 1.3; see also 22 NYCRR 1200.30. Where knowledge of immigration consequences of state criminal proceedings is a recurring part of practice, public defense lawyers clearly must obtain this information.

police work together with INS officials to make illegal stops and searches and then allow the information obtained to be used by the INS in a deportation proceeding. Unless a lawyer acts promptly and vigorously, the defendant may be deported before the illegal stop and search can be raised and litigated. Yet the ineffective system for providing legal representation to defendants often results in long delays before counsel is appointed,⁷ and may actually deny counsel to persons facing deportation based on unrealistic and outdated eligibility standards.

OVERVIEW OF PROCEEDINGS

The farm worker hearing panel included Jonathan Gradess of NYSDA; Lenore Banks of the LWV; Gary Horton, public defender of Genesee County; Ed Nowak, public defender of Monroe County; Darryl King, a member of NYSDA's Client Advisory Board; and Manny Vargas, director of NYSDA's Immigrant Defense Project in New York City. The Orleans County Public Defender, Sanford Church, was invited but did not attend.

Witnesses included: Aspacio Alcantara of CITA; Wilfredo Antoinette of Rural Opportunities in Albion; John Cebula, director of Oak Orchard Legal Services in Batavia; Laura Fitzsimmons, an advocate and court interpreter for Batavia Migrant Outreach; Leroy Jones; Betty Garcia Mathewson, a diversity project coordinator for the Cornell Migrant Program; Ramona Palmer, an attorney and director of the Victim Resource Center for the Finger Lakes; Sister Marlena Roger, assistant director of the Migrant Ministry for the Catholic Diocese of Buffalo and Rochester; Renan Salgado, a paralegal with Farm Worker Legal Services of New York; Dennis Sexton, a recruiter, outreach worker and court interpreter for the Batavia School District and Batavia Migrant Outreach; John Solberg of CITA; Velma Smith, executive director of Rural Opportunities in Rochester; Jesus Vallejo; and Cerafine Zapien.

PRELIMINARY FINDINGS AND RECOMMENDATIONS

1. An Independent Public Defense Commission

The farm workers' legal plight is one of many problems facing indigent persons statewide, and NYSDA has been seeking a comprehensive statewide response. To that end, it has proposed a statewide Independent Public Defense Commission to reform the state's inadequate public defense system. By helping counties with increased funds, promulgating and monitoring public defense standards, and providing statewide support and oversight, legal representation in New York can be improved. A bill to create such a commission has been introduced in both houses of the Legislature as A.5394 and S.1894.

2. Public Defense Practices Need Improvement and Public Defender Offices Need Community Involvement

Witnesses testified to their lack of knowledge about the United States legal system and the perception that public defenders and INS officers are viewed as working together. Little expectation that constitutionally sufficient defense advocacy would be provided was expressed

⁷ Early entry of counsel into a criminal case has long been recognized as necessary for proper representation—and has long been an unrealized goal in many public defense programs due to time and money constraints. *See*, National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States*, Guideline I (1.2) (1.3) (1.4) (1976); National Advisory Commission on Criminal Justice Standards and Goals, "Task Force on Courts," Chapter 13 (The Defense), Standards 13.1; 13.3.

and descriptions of representation by farm workers made clear why this is so. Pleas taken under duress after long periods without meeting or talking to counsel were described as routine events in Orleans County. Testimony revealed that little oversight exists to constrain this. Much of what goes on is misunderstood by clients, who expressed the need for having important documents available in Spanish and for having interpretation services available. It was clear that public defense attorneys in all three counties need to develop increased expertise to deal with the immigration consequences of criminal charges for non-citizens. Farm workers and their advocates must find ways to communicate these problems and potential solutions to the public defense offices involved.

3. **Fair Warning for Immigrant Defendants**

Proposed legislation would require courts, prior to accepting guilty pleas, to advise defendants in New York of the potential immigration consequences of their criminal convictions and give them an opportunity to withdraw a guilty plea if such advice was not given. The bill requiring that this advice be given to all non-citizen defendants in criminal proceedings has been introduced in both houses of the Legislature as A.5267 and S.3826.

4. **Local Courts Should Make Interpreters Routinely Available for Those Who Cannot Speak English and Public Defenders Representing Large Numbers of Spanish Speaking Clients Should Retain Bilingual Staff or Take The Steps to Achieve the Availability of Routine Interpreter and Translation Services**

Witnesses testified to police confrontations in which they could not understand the police, to meetings with INS where they could not understand those officials, to meetings with public defenders who could not communicate with them, to proceedings in courts that did not employ interpreters. They testified to signing documents written in English, which they did not understand, and to the use of employees of the INS as “interpreters” for the police. Courts and public defenders must assure the availability of interpreters and translation services. Further exploration of local practices must continue to pinpoint specific courts and offices failing to do so.

5. **Using ESL Courses as the Vehicle for Conveying Legal Rights Information**

Both our field investigation and testimony at the hearing made it clear that the vast majority of farm workers do not understand their legal rights in criminal proceedings nor do they appreciate the role that public defenders should play in protecting what rights farm workers do have. Because the specific cultural characteristics and frequent non-citizen status of farm workers exacerbates already present problems of the public defense system, it is essential that farm workers at least be apprised of what their rights should be so that they can exercise informed judgment about how and when to exercise those rights. English as a Second Language (ESL) courses could provide a vehicle for both teaching English and engaging farm workers in legal topics of vital interest to them. Farm workers themselves suggested the viability of this idea and we believe it should be explored in cooperation with local public defender offices.

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