



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE
CRIMINAL JUSTICE OPERATIONS COMMITTEE,
CRIMINAL COURTS COMMITTEE AND
MASS INCARCERATION TASK FORCE**

**A.5689
S.1279**

**M. of A. Cruz
Sen. Bailey**

AN ACT to amend the criminal procedure law, in relation to streamlining the assignment of appellate counsel for indigent criminal defendants.

THIS BILL IS APPROVED

The New York City Bar Association (“City Bar”) supports passage of the above-referenced Bill, which would help ensure that all people convicted of crimes can exercise their constitutional right to appeal, whether or not they can afford a lawyer.

I. BACKGROUND

“[T]here can be no equal justice where the kind of appeal a [person] enjoys ‘depends upon the amount of money he has.’”¹ Indigent defendants are, therefore entitled to counsel on direct appeals of their convictions.²

In Civil, Family Court, and Sex Offender Registration Act (SORA) proceedings, the process of obtaining counsel on appeal is relatively straightforward. In SORA proceedings, if counsel is assigned to represent a defendant due to his or her inability to pay a lawyer in trial court, poor person status automatically continues through the pendency of the appeal.³ In Civil and Family Court appeals, poor person status is presumed to continue upon an attorney’s certification to the appellate court.⁴ The same procedure obtains in criminal cases before the Court of Appeals.⁵

¹ *Douglas v. People of the State of California*, 372 U.S. 352, 355(1963) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

² *Id.*; see also *People v. Perez*, 23 N.Y.3d 89, 99 (2014)

³ Correct. L. § 1688-n(3).

⁴ FCA § 1118; CPLR § 1101(e).

⁵ New York Court of Appeals Rule 500.21(g)(2). In federal courts and at least 27 states, poor person status is carried through to appeals. See Letter from Matthew Bova & Scott Danner, Chairs, New York County Lawyers Association,

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

Securing the right to an attorney in a criminal appeal to an intermediate appellate court is, however, significantly more cumbersome. There are currently two methods to obtain counsel in a criminal appeal if the appellant cannot afford a lawyer. One is to file a motion with the appellate court establishing that the appellant remains indigent. In these motions, appellants must re-establish their inability to afford a lawyer by filing detailed, sworn affidavits, even if they were represented by assigned counsel below.⁶ Obtaining an affidavit from a client following a criminal conviction can be a difficult task for an attorney, especially if the client is being moved from local to state custody during the period when a motion for assignment of counsel must be filed. Furthermore, public defender offices that wish to aid clients in filing these applications must expend scarce resources to do so (in contrast, if the defendant is represented by a lawyer from the assigned counsel plan (18-B), then the State foots the bill).

Given these difficulties, poor defendants are often left to file in forma pauperis motions on their own, without the aid of counsel.⁷ Indigent defendants may be homeless, lack legal training, have difficulty speaking or writing in English, or face significant mental health or other issues. The obstacles to filing motions for assignment of counsel may lead to repeated applications, creating additional expense and delay, or to indigent defendants being left without counsel altogether.

In 2016, the Legislature tried to remedy the problems with this system by authorizing an alternative procedure for securing counsel on appeal.⁸ Under Criminal Procedure Law section 380.55, an attorney assigned to represent a person before a trial court may request that counsel be assigned to represent the defendant on appeal at the time of sentencing. Counsel need not furnish

Appellate Courts Committee to Hon. Lawrence K. Marks, Chief Administrative Judge, Office of Court Administration (January 17, 2018), 3.

⁶ 22 N.Y.CRR § 1250(d) (requiring an application for poor person relief to include an affidavit setting forth “the amount and sources of the movant’s income; that the movant is unable to pay the costs, fees and expenses necessary to prosecute or respond in the matter; whether trial counsel was assigned or retained; whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses . . . the date and county of conviction; whether the defendant is at liberty or in custody; the name and address of trial counsel; whether trial counsel was appointed or retained and, if retained, the source of the funds for such retention and an explanation as to why similar funds are not available to retain appellate counsel; whether the defendant posted bail during the trial proceedings; and, if bail was posted and the defendant is currently in custody, an explanation as to why the funds used to post such bail are not available to retain appellate counsel”).

⁷ See Letter from Matthew Bova & Scott Danner, *supra* n.5, 2 (quoting *People v. Arjune*, 30 N.Y.3d 1207, 1217 (2017) (Rivera, J., dissenting) available at <https://www.nycla.org/pdf/January%202017,%202018%20NYCLA%20Appellate%20Courts%20Committee%20Proposals%20for%20Assignment-of-Appellate-Counsel%20Reform.pdf>. (Explaining that, although ethical and court rules require trial counsel to aid clients in securing counsel on appeal, “all too often, ‘lawyer[s] fail to live up to the prevailing professional standards’ forcing their clients to navigate the process [of seeking assigned counsel on appeal] on their own.”) (All websites last visited Nov. 3, 2021.)

⁸ Letter from Risa Gerson, Chair of the Criminal Justice Operations Committee of the New York City Bar Association to Hon. Daniel Conviser, Chair, Advisory Committee on Criminal Law and Procedure, Office of Court Administration (May 4, 2016), 2, available at <https://www2.nycbar.org/pdf/report/uploads/20073064-CPLOCAAdvisoryReportCommentsCJOFINAL5.4.16.pdf> (approving proposed amendment to Criminal Procedure Law to process of granting poor person relief on appeal).

an affidavit from the client but can, instead, simply affirm that his or her client remains unable to afford an attorney.⁹

There are, however, flaws with the section 380.55 procedure as well. First, by its terms, the statute applies “[w]here counsel has been assigned to represent a defendant at trial,” casting confusion on whether it can be used following a guilty plea, despite the Legislature’s apparent intention that the provision apply in both scenarios.¹⁰ In a system where 98 percent of felony cases are resolved by guilty plea,¹¹ this is a serious limitation. Additionally, the application must be made at the time of sentencing—if counsel for whatever reason fails to make the application at that time, the defendant is forced to use the more cumbersome procedure of applying to the Appellate Division and furnishing a sworn affidavit. Perhaps due to these or other reasons, section 380.55 has been little used since it was enacted in 2016.¹²

II. THE PROPOSED LEGISLATION

The Bill clarifies Criminal Procedure Law section 380.55 and removes impediments to its use. First, the Bill amends the statute to make explicitly clear that counsel may apply for assignment of counsel at a sentencing proceeding following a trial or guilty plea. This ensures that the statute is broadly useful, and that it is used in the manner the Legislature originally intended.

Second, the amended statute would allow appellate courts to assign counsel to indigent defendants who were assigned an attorney below, based on trial or plea counsel’s sworn affirmation that the defendant remains unable to pay for an attorney. This streamlined procedure makes sense. The attorney representing the defendant before the trial court is in a good position to ascertain whether the client remains indigent. And it stands to reason that most people who are

⁹ C.P.L. § 380.55.

¹⁰ *Id.*; see also *News Picks from NYSDA Staff*, New York State Defenders Association (April 28, 2017), <https://myemail.constantcontact.com/News-Picks-from-NYSDA-Staff---April-28-2017.html?soid=1111756213471&aid=3bNnD9NS91k> (suggesting that the statute “includes an ambiguous prefatory phrase . . . that has led to confusion about whether the sentencing court may grant poor person status in all cases, or whether the relief is limited to judgments entered upon verdicts” despite the fact that the “bill sponsor’s memo makes clear that the option is available for all judgments of conviction.”).

¹¹ Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It’s Too Late*, N.Y. Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?_r=0.

¹² A review of decisions on motions from the websites of each of the Departments of the Appellate Division from January 1, 2021 to March 12, 2021 reveals that counsel was *never* assigned using the 380.55 procedure in the Second, Third, or Fourth Departments. In the Appellate Division, First Department, counsel was assigned pursuant to applications to the Appellate Division over twice as often as pursuant to section 380.55. See also *Implementing the Hurrell-Haring v. State of New York Settlement: 2017 Update*, Office of Indigent Legal Services, 11 <https://www.ils.ny.gov/sites/ils.ny.gov/files/2017%20Update%20Quality%20and%20Counsel%20at%20Arraignment%20Plans%20FINAL%20103017.pdf> (reporting that, in 2017, a “trial judge denied” an “application [under CPL § 380.55 application “in a manner suggesting that the judge was unwilling to ever consider appointing appellate counsel.”); Letter from Matthew Bova & Scott Danner, *supra* n.5, 4-5 (listing reasons why the procedure established by § 380.55 is not being used); *News Picks from NSDA Staff*, *supra* n.8 (suggesting that “in practice, public defense lawyers may need to employ [C.P.L. § 380.55] strategically, and refrain from making applications in situations where a particular judge may react unfavorably, and may even disruptively, to any discussion about the appeal at the sentencing proceeding, (eg, where a client waived the ‘right to appeal’)”).

convicted of crimes do not become more able to afford an attorney during the pendency of their prosecution. The amendment simply gives counsel the option of making the application to the appellate court instead of the trial court at sentencing.

The amendment brings the practice for criminal appeals in the intermediate courts into line with the system that already works in SORA appeals, family court appeals, and in criminal appeals to the Court of Appeals, not to mention federal courts and the courts of other states. There is no reason why criminal appeals to intermediate appellate courts in New York should be treated any differently.

Additionally, the rule comports with the eligibility standards for assigned counsel set by the New York State Office of Indigent Legal Services, which state that “[a]ppellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by the trial courts.”¹³ Under the current model, this standard is often breached when pro se, indigent defendants fail to meet the appellate courts’ exacting requirements for demonstrating their continued indigence, even where they were represented by assigned counsel below.

The proposed legislation will not only lead to gains in efficiency, it will also ensure that extremely vulnerable people—indigent people convicted of crimes—are not denied their constitutional right to appeal merely because they are poor.

III. CONCLUSION

For the aforementioned reasons, we respectfully urge our elected officials to support A.5689/S.1279.

Criminal Justice Operations Committee
Tess M. Cohen, Chair

Criminal Courts Committee
Terri S. Rosenblatt, Chair

Mass Incarceration Task Force
Sarah J. Berger, Co-Chair
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November 2021

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¹³ *Standards for Determining Financial Eligibility for Assigned Counsel*, New York State Office of Indigent Legal Services (February 16, 2021), at 18, available at <https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf>.