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Testimony of the New York Civil Liberties Union

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before

The Joint Legislative Hearing on the 2015-16 Public Protection Budget

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Good afternoon Chairman DeFrancisco, Chairman Farrell, and to all the members of the joint budget committee. My name is Corey Stoughton. I am a senior staff attorney with the New York Civil Liberties Union. The NYCLU is a membership organization dedicated to protecting the civil rights and civil liberties of New Yorkers. The organization has eight offices across the state and 50,000 members and supporters.

For more than seven years I have been lead counsel in litigation seeking reform of our state's public defense system. That case is *Hurrell-Harring v. State of New York*. I appear before you to today to seek your support for provisions in the Governor's proposed budget that implement the settlement of that litigation – and that begin the long-overdue and essential reform of public defense services in five counties. I also appear before you to seek your support for expansion of those reforms statewide.

The Need to Invest in Public Defense Reform

This is a story with a long history, known to many of you but perhaps not all. I'll address that history briefly. The Sixth Amendment to the U.S. Constitution and the constitution of New York guarantee that every poor person charged with a crime is provided with a lawyer at state expense. In the 1960s, New York State delegated this responsibility to county governments. The result has been what Judith Kaye, the former Chief Judge of New York, described as a "patchwork system" that "fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." This result is responsible for what the New York State Association of Counties refers to as one of the "top five" unfunded mandates born by county governments.

In 2007, the NYCLU, along with our co-counsel at the law firm Schulte Roth & Zabel LLP, filed a lawsuit on behalf of indigent criminal defendants in five counties—Onondaga, Ontario, Schuyler, Suffolk and Washington—demanding that the state fix this broken system. In

response, the state created the New York State Office of Indigent Legal Services (ILS) in 2010. ILS is charged with developing more effective and more accountable systems and procedures for distributing state aid to counties for public defense services.

The ILS staff has done an exemplary job of collaborating with public defenders and county officials. But its creation does not address the problem of resources – or the lack of resources – that are needed to fix the state’s broken public defense system. Nor does the creation of ILS address the underlying cause of that broken system, which is the state’s failure to assume the costs of providing such services.

State aid to localities accounts for no more than about 25 percent of the cost of providing counsel to people in counties outside New York City who face criminal charges but who lack the resources to hire a private attorney. And New York remains among the very small number of states nationwide where the state does not provide the majority of the funding for public defense. In that regard, our justice system is comparable to a few outlier states, including Arizona, Texas, and Louisiana.

Indeed, the state’s public defense services are so deficient that the Hurrell-Harring lawsuit drew the attention of the United States Department of Justice and Attorney General Eric Holder, who filed a brief in support of the litigation. Attorney General Holder called for remedies to reduce attorney caseloads and ensure that public defenders and assigned counsel have the resources they need to ensure justice is done.

The Hurrell-Harring Settlement

In October of last year, on the day before trial was to begin, the NYCLU and the Governor’s office reached a settlement of the Hurrell-Harring litigation. This was an important day, an historic moment. With this settlement the state’s leaders have acknowledged the call, long unheeded, to reform the state’s failed public defense system. With this settlement the state commits to engaging constructively in determining how reform will be implemented and sustained.

The settlement has four major components. First, it guarantees counsel at every arraignment, funded by the state. This marks the end of an era, for the five defendant counties, in which defendants were brought before a judge, charged with a crime, issued a bail order and sometimes sent to jail – all without legal counsel.

Second, the settlement sets state-funded caseload limits for public defenders. This is intended to ensure that each attorney has sufficient time to provide adequate representation to every client. For these five counties, gone are the days of criminal defense practice by triage – a form of lawyering that has lawyers juggling hundreds of cases without the capacity to investigate charges or do anything but advise their clients to take the prosecution’s plea offer. Triage lawyers lack

the time and resources required to determine whether the offer is a good one and whether justice is being done.

Third, the settlement commits state resources to develop quality-improvement plans so that defenders are able to undertake the essential functions of criminal-defense lawyering – that they have access to and use investigators, interpreters and expert witnesses; that they communicate with their clients in person, confidentially, and as soon as possible after arrest; that they are sufficiently qualified and experienced to handle the cases they are assigned; that they are adequately trained and supervised; and that they are assigned to cases in a manner that accounts for their level of experience and their existing workload.

In these five counties, gone are the days when the state promulgates performance standards but provides no oversight to ensure that standards are met and that indigent defendants are actually provided meaningful and effective assistance of counsel.

Fourth, and finally, the settlement creates statewide financial eligibility criteria to ensure that all people charged with crimes who cannot afford a lawyer are provided one. Gone are the days when people caught up in the criminal justice system are forced to sell a car – which they need to get to work – or to beg from friends and family in order to pay a lawyer to help them navigate the complex procedures of criminal court.

The Hurrell-Harring settlement will transform five New York counties from a symbol of New York's failed public-defense system into exemplars of how an effective public-defense system should work.

Where public defense systems are effective, people have greater confidence in the criminal justice system – especially those who reside in communities of color, who are disproportionately affected by that system. The system becomes more rational. Wrongful convictions are avoided. Sentences are fairer; costly pretrial incarceration is reduced. Evidence is already emerging from Onondaga and Ontario counties that when public defenders are able to advocate for their clients at arraignments and beyond, counties save money because poor people charged with minor crimes are not kept in jail for months merely because they cannot afford to make bail.

On behalf of the NYCLU, I commend Governor Cuomo for introducing an executive budget that fulfills the promises made in the Hurrell-Harring settlement. The governor's leadership and vision for reform will be transformative for the five counties named in the litigation.

The NYCLU urges you to support the Governor's budget proposals and thereby fulfill the requirements set by the terms of the settlement.

The Need for Statewide Reform

As proud as the Governor's office should be about the settlement, however, it leaves unanswered a critical question: Why only five counties? That question has no good answer. Numerous commissions and reports have identified the failures of New York's public defense services as a statewide problem that requires a statewide solution. Why should indigent defendants in Ontario County and Onondaga County be guaranteed counsel at arraignment when defendants in Yates County are not? Legal aid lawyers in Nassau County look to Suffolk and ask: Why is the state not addressing our caseload problem? The five counties of New York City have had caseload controls—funded by the state—for almost five years now. We hear advocates, defenders, and county officials across the state asking about “the Forgotten 52” counties; they are calling for statewide reform.

We ask that you heed those calls and that you endorse the settlement in Hurrell-Harring as a framework for statewide reform.

There should not be different standards of justice in different parts of the state. Full implementation of the Hurrell-Harring settlement will create a sound, workable model for providing counsel at arraignment in the town and village courts and for establishing replicable standards and mechanisms for controlling defenders' caseloads and workloads. The settlement also provides a template for creating an integrated system of oversight and accountability for existing county-based public-defense programs.

Through implementation of the settlement, ILS will develop an evidence-based assessment of public-defense services based upon both quantitative and qualitative data. This analysis will establish a foundation and framework that will support performance-based public-defense services – measured by quality of legal representation and by efficient and cost-effective use of resources.

Therefore, we also request that legislative leaders support the budget request submitted by ILS for the funding needed to implement the Hurrell-Harring settlement and to undertake the work of replicating statewide the reforms prescribed by the settlement – in particular, the provisions that address caseload relief and the requirement to provide counsel at arraignment.

ILS, under the leadership of William Leahy, has developed a track record of improving the quality of public-defense representation at the county level. ILS has a key role in the Hurrell-Harring settlement; the office has primary responsibility for implementation and the authority to shape the details of that implementation. That role reflects Governor Cuomo's confidence in the capacity of ILS to advance the quality of justice in New York. The ILS staff possesses the skill, experience and vision required to execute reform of public defense services statewide. What is

required is the state's commitment to this goal – a commitment backed by the requisite resources.

Conclusion

The Hurrell-Harring settlement demonstrates that the state can fulfill its constitutional responsibility to provide representation to the poor and address the unfunded mandate of indigent defense by supporting and overseeing county-based systems. Statewide public defense reform is a smart investment in fair and efficient criminal justice. We ask you to support the down payment on reform required by the Hurrell-Harring settlement and provide ILS with resources they need to advance reform in all of New York's counties.

