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LEGISLATIVE PUBLIC HEARINGS
ON THE 2016-2017 EXECUTIVE BUDGET PROPOSAL

Testimony before
The New York State Senate Finance Committee
and
The New York State Assembly Ways and Means Committee

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*A body in motion tends to remain in motion, and
a body at rest tends to remain at rest. (Newton's First Law of Motion.)*

The State Must Continue Forward Motion on Public Defense.

A year ago I testified here about the unique opportunity presented to the Legislature by the settlement agreement in the public defense class action lawsuit *Hurrell-Harring v State of New York*. Announced in October 2014 and approved by the court in March 2015, that settlement put several needed reforms in motion.

The State acknowledged in *Hurrell-Harring* its responsibility to set standards and funding levels that ensure quality representation for people unable to afford counsel in cases where representation is constitutionally required. Recognizing the need to fund implementation of the settlement, the Executive and Legislature added about a million dollars to the Indigent Legal Services (ILS) Office budget for that purpose last year. This year, the Executive has proposed a slight increase for *Hurrell-Harring* implementation.

But only slight. And other areas of public defense funding are flat-funded or cut. This impedes the momentum for much-needed reform.

The Legislature should instead accelerate it. This testimony describes why, and how.

Inertia Put Us Here.

The *Hurrell-Harring* lawsuit arose from the State's decades-long refusal to renovate the infrastructure for providing justice to people without financial means. Like delayed upgrades of water mains, the disregard of obviously-needed reconstruction of the public defense system led to a predictable breakdown in delivery of required services. Now the State, and each county, confronts a geyser of problems and must make short-term repairs and long-term plans for solutions. Returning to the do-nothing state that prevailed for years is not a viable option.

As you know, the *Hurrell-Harring* settlement focuses on five of New York's sixty-two counties. Those counties, chosen by the plaintiffs to **demonstrate the statewide failure** of New York's county-based public defense system, were **added as defendants by the court**. Implementing reforms in those five counties makes sense within the confines of the litigation. Failure to make the improvements called for by the settlement could have immediate judicial consequences.

Focusing on those counties first, as pilots, arguably also makes sense on a broader scale, so long as the county-by-county structure remains. But maintaining the status quo as to the remaining fifty-seven counties is a problem. It is a problem for public defense clients, taxpayers, and officials in counties across the state, from Niagara to Nassau and Clinton to Cattaraugus. It is also a problem for the State, which faces liability if counties or others sue over conditions similar to those in the *Hurrell-Harring* five. ***The Legislature must continue, and accelerate, movement toward full public defense reform, not brake and become once again a body at rest when action instead is required.***

Provision of public defense representation affects, and is affected by, the many criminal justice issues currently facing the Legislature, the Executive, the Judiciary, and all New Yorkers. These range from bail reform to curtailing use of solitary confinement in jails and prisons, and the many negative aspects of mass incarceration, which is fueled by multiple policies that a public defense perspective can help identify and improve. Public defense also influences, and is influenced by, funding of and policies regarding Family Court proceedings in which families may receive the assistance they need to flourish – or may be torn asunder due in part to lack of effective representation.

Dealing with the broad range of public defense issues means not just funding more fully the implementation of the lawsuit settlement, but also funding more fully other public defense programs, including those housed in the New York State Defenders Association. It also means looking at broader remedies, such as starting to reimburse counties for money spent on public defense so that clients in counties left out of the *Hurrell-Harring* settlement are not denied equal treatment under the law.

NYSDA Needs Full Funding for its Veterans Defense Program and Its Backup Center.

You took a giant step for justice last year when you funded NYSDA's Veterans Defense Program (VDP) for the first time. Experiences while in the military can profoundly affect those who serve. When people who have had military service become involved in criminal and family courts, the VDP can help these veterans by providing assistance to their lawyers. ***Veterans and military personnel caught up in state courts need attorneys who understand their ethical obligation to investigate their veteran clients' military backgrounds and how to use that information in their defense in the most effective way.***

Proper representation of veterans promotes public safety and public policy. It does so by helping veterans deal with service-related trauma, make restitution and address any harm done to members of their family or the public, and avoid barriers to veterans' full reintegration in society.

VDP provides training on veteran-specific topics: How to get and understand clients' military records. How military culture may affect not only criminal or family court matters but also veterans' interactions with their lawyers and others. How obtaining the assistance of someone from a client's branch of service may benefit the client and the case. By training not only individual lawyers, but also a set of "point people" in strategically located public defense offices, VDP has multiplied the assistance it provides.

Staff members of VDP offer direct defender services to lawyers and also, in a small number of cases that address systemic problems, direct representation of clients. The VDP's first Activities Report details how VDP assisted or trained nearly 1,000 veterans and public defenders representing veterans in New York State's criminal and family courts in its initial eighteen months. Case studies in the report reveal the human stories that lie behind the data demonstrating VDP's success. ***In sum, the Activities Report details the impressive returns produced by the \$500,000 invested by the State in VDP last year.*** The report is being provided to you today and can also be found at <http://www.nysda.org/docs/Veterans/VDP%20Activities%20Report.pdf>

To not just continue but increase VDP's success, and to meet an ever increasing need, NYSDA needs to expand VDP's ability to provide services across the expanse of Upstate New York and to open a Downstate VDP office. The absence of any funding for VDP in the Executive Budget threatens the progress being made in representation of veterans and the continued existence of this vital program. We ask you to restore what has been cut and to add the funding needed to make VDP's services available to many more veterans and their lawyers. ***The requested VDP budget of \$1.1 million dollars is a small investment for the State, one that will yield great returns for veterans, for the State, and for justice.***

NYSDA, of course, provides services to many besides military veterans and the lawyers who represent them. As has been true since 1981, NYSDA's Public Defense Backup Center uses state funds—as well as its own—to help the State meet its constitutional and statutory responsibility to provide quality mandated legal services. The duties required of the Backup Center by the State include offering expert legal advice, consultation, publications, and training to public defense providers and responding to requests from state and local governmental entities and others involved in the criminal justice system and the public. Backup Center duties also include consulting with defense attorneys and the NYS Office of Indigent Legal Services.

Specifically, NYSDA's **Public Defense Backup Center** serves approximately 6,000 public defenders, conflict defenders, legal aid society lawyers, and court-appointed attorneys in more than 120 county-based programs with training, legal research, a statewide clearinghouse, and substantial technical assistance critical to the effectiveness of overburdened defenders. A team of expert lawyers and researchers respond annually to over 2,000 requests to assist attorneys and counties on criminal defense and adult family court cases. Over 35 training programs are conducted yearly for hundreds of attorneys. Legal updates and practice advisories are provided through a quarterly *REPORT*, bi-weekly E-bulletin, and website—accessed 30,000 times a month—with online entree to investigators, expert witnesses, and case summaries. A premier example of assistance is NYSDA's Public Defense Case Management System operating in 67 offices in 45 counties covering the vast majority of Legislative member districts.

NYSDA's 2015 Annual Report provides information about the Backup Center's many services that warrant not just restoration of the 58% funding cut contained in the Executive Budget but an increase in funding. The report can be found at http://www.nysda.org/docs/PDFs/AnnualReport/15_NYSDA_Annual_Report.pdf. I refer you there for more details on the Backup Center's ongoing services while I focus the rest of my testimony on specifics with regard to the need for expanded funding for NYSDA and ILS and for passage of legislation to begin reimbursing counties for their public defense expenditures.

The Hurrell-Harring settlement has increased the need for NYSDA assistance. The advent of increased State funding earmarked for only the five counties named in the settlement has led to many questions from officials and public defense providers in non-lawsuit counties, including questions about pending legislation that would begin to address the inequities resulting from State efforts to fix public defense in five counties out of sixty-two. NYSDA has responded to these and other concerns of county representatives and public defense providers in a variety of settings, including at convenings of Chief Defenders from around the state, in county site visits,

and through individual communications with county officials and local public defense providers. Among the topics often addressed is the pending legislation, A.6202-B/S.6341. As discussed further below, this legislation is a vital step toward ensuring that the State meet its constitutional and statutory public defense responsibilities in every county, not just the five named in the settlement. But whether or not this legislation passes, NYSDA's Backup Center is vital to meeting the public defense needs in counties across the state in a cost-effective manner.

Hurrell-Harring has raised awareness of public defense issues, leading to a need for more help in addressing them across the state. And not only the settlement but also a Court of Appeals decision earlier in the case's history require that people charged with crimes have access to legal representation at first court appearance, the place in court where liberty is first placed in jeopardy. This means that counties and providers need advice, assistance, advocacy, and training on providing this long-neglected aspect of public defense outside New York City, where it has long been the practice.

For these and other reasons, funding the Backup Center to increase available services should be a part of the Legislature's response to *Hurrell-Harring*. The training, research, direct defender services, technical assistance, and other services that NYSDA generates centrally and provides locally through electronic communications, regional events, and site visits reduce wasteful duplications of effort while addressing specific local needs. The Backup Center needs more attorneys and other staff to bring existing services to more counties and providers.

Additional funding would also allow NYSDA to expand services initiated at substantial Association expense that can help public defense providers address new or long-neglected areas. These include our Restorative Justice practice, which works at a community level to decrease incarceration, reduce recidivism, end the cycle of violence, and promote healing. Our ***restorative justice and trauma-informed practices currently being modeled in the Capital Region should be expanded statewide.***

Similarly, the Prisoner Pre-Entry Mentoring Pilot Program initiated at the Backup Center with the assistance of NYSDA's Client Advisory Board helped public defense clients prepare for prison life and develop goal-oriented plans to help them be productive and healthy in prison and plan for their re-entry. The pilot program was limited in scope, with only a male mentor working with male clients. ***Funding is needed to institute a permanent, expanded Prisoner Pre-Entry Mentoring Program that could offer assistance statewide, to women as well as men.***

NYSDA's assistance to ILS should also be more robustly supported by the State. Staff from ILS and the Backup Center confer on a variety of issues, providing ILS the benefit of information and experience collected and analyzed by NYSDA over decades. Backup Center lawyers have participated in workgroups on a variety of public defense standards, and that work, as well as other ILS/NYSDA collaborations, will continue in 2016.

The *Hurrell-Harring* settlement has increased the need for such collaboration. To continue, and increase, assistance to ILS while also continuing and increasing assistance to counties and public defense providers, NYSDA requires additional resources. ***Restoration to the \$2.089 million of last year is imperative to avoid regression in the quality of public defense representation at this***

critical time. The Backup Center should be fully funded at \$3.15 million to maintain and accelerate much-needed public defense reform.

NYSDA and ILS both need expanded budgets to help counties implement uniform eligibility criteria and procedures. For instance, ILS is required by the settlement to develop statewide standards for determining whether litigants are financially eligible for legally mandated representation. NYSDA has long noted the lack of uniformity and the common use of improper criteria in eligibility determinations across the state, too often resulting in improper denial of counsel to those who cannot afford to hire a lawyer.

Once courts are apprised of the new uniform criteria and procedures that ILS is expected to soon promulgate, positive changes will follow. But appropriate and fair eligibility standards will not come without the need to assist counties and courts as well as defenders themselves in the implementation phase which will shortly begin. This body needs to recognize these tasks as it considers funding for public defense. And these tasks will not be limited to the five lawsuit counties. Under the Executive Law you have directed ILS to pass statewide eligibility standards (Executive Law § 832) and under the settlement provisions, the eligibility standards being developed by ILS will be applied across the state. There will be a need to help counties and their defender employees as well as courts and clerks to work with and understand the new standards and your funding of both ILS and NYSDA should reflect this need and these tasks.

ILS Needs Increased Funding in Hurrell-Harring's Wake.

The Executive Budget increase in the ILS budget, while an indication of awareness that implementation of the *Hurrell-Harring* settlement must be funded, falls woefully short of the need. Furthermore, increasing funding solely for formal implementation costs ignores the result of five decades of inertia that has made public defense services across New York State inadequate and unconstitutional. For ILS to fully implement *Hurrell-Harring* and also meet its many other statutory responsibilities to improve the quality of mandated representation not just in five counties but in all, the full budget that ILS has requested should be provided. In this way the discrimination that has affected the unfunded 57 counties not covered by a global settlement of the *Hurrell-Harring* case can begin to be immediately addressed. The ILS budget request for a \$52 million dollar increase over last year in addition to *Hurrell-Harring* settlement implementation also reflected the needs of the 57 neglected counties. Its local assistance share included:

- \$20 million proposed for upstate caseload relief (which has been the reality in NYC since 2009).
- \$8 million proposed for compliance with the *Hurrell-Harring* decision requiring counsel at first appearance in all counties. See *Hurrell-Harring v New York State* 15 NY3d 8 (2010).
- \$3 million proposed to help counties comply with ILS standards.

All this and more was needed. As stated, only funding for the implementation of the settlement was included in the Executive Budget. The full ILS budget request should be appropriated.

The Legislature Should Pass A.6202-B/S.6341.

Pending bill A.6202-B/S.6341, introduced by State Assemblymember Patricia A. Fahy and State Senator and Deputy Majority Leader John A. DeFrancisco, is a vital step toward ensuring that the State meet its constitutional and statutory public defense responsibilities in every county, not just the five named in the *Hurrell-Harring* settlement. It would incrementally lead to the State reimbursement of all county public defense expenditures within four years, providing mandate relief and maintaining momentum toward full public defense reform.

Many of you have heard or read past testimonies in which NYSDA has called for a statewide, fully and adequately state funded public defense system headed by an Independent Public Defense Commission. I am today asking you to take actions that will lead to incremental improvements in the dire situation still confronting public defense lawyers and clients. None of these actions are inconsistent with NYSDA's long-standing support for the findings and recommendations of the Kaye Commission in 2006, which, in this year of former Chief Judge Judith Kaye's death, remain all too apt.

The Legislature should fully fund NYSDA, ILS, and other public defense programs that traditionally receive state monies including the restoration of \$600,000 for the Indigent Parolee Representation Program. The Legislature should also pass A.6202-B/S.6341. By doing these things, the Legislature can remain a body in motion toward justice, not one anchored by inertia in the injustices of the past.