JOINT LEGISLATIVE PUBLIC HEARINGS

ON THE 2021-2022 EXECUTIVE BUDGET PROPOSAL

Testimony before
The New York State Senate Finance Committee
and
The New York State Assembly Ways and Means Committee **on**
the Public Protection Budget

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Online Video
Testimony

Quality Public Defense Services are Vital to Justice and to New York's Well-being

Thank you for this opportunity to testify for the New York State Defenders Association (NYSDA) and on behalf of public defense providers and their clients. This testimony focuses on what the 2021-2022 State Fiscal Year budget means for public defense, racial justice, and the well-being of our legal system. It will not dwell on unknowns—I can't predict the amounts of future federal funding and state revenue, or the pace of economic recovery and policies crucial to that recovery. But based on history and experience, I can predict the result of underfunding or undermining public defense. New York has been there, and it is not somewhere to which we should return.

Public defense representation in our criminal and family legal systems is crucial to the rule of law and to justice for the individuals swept into those systems. Quality public defense representation is a unique function with constitutional dimensions. It is unique because it is the duty of those who provide it to vigorously oppose the very government that funds their work. They must speak for their individual clients. Sometimes they must say that police illegally stopped a client based on racial bias, and that evidence stemming from those illegal police actions should be thrown out. Sometimes defenders must say that a prosecutor has hidden evidence helpful to the defense, such as evidence tending to show that an eyewitness's identification of the client was wrong, so that a charge or a conviction must be thrown out. Sometimes defenders must say that a client's behavior resulted from brain trauma received during military service and that resulting criminal charges are inappropriate or should be reduced despite harm done to another, or that the veteran's family should not be irrevocably sundered following the behavior, but rather that proper treatment must be found and allowed to work so the family can be safely reunited.

Just saying such things on a client's behalf is not enough. To do their job of supporting those statements, public defense lawyers need resources. These include investigators, mental health experts, consultants who understand military records, legal research services, training about specialized legal issues, and more. Lack of resources can lead to ineffective assistance of counsel by even the most dedicated and talented lawyer, which leads to injustice and distrust of the system. Injustice and reasonable distrust erode the rule of law upon which our entire governmental structure stands. Lack of quality public defense services flouts the fundamental promise of equal justice for all. **Ensuring quality representation of all people accused of offenses by the State or in danger of losing access to their children through court action is one way to address the long-standing racial inequities that, after long being ignored or denied by many, flared into full view in the last year.**

Because public defense services in New York State are provided at the county level, the State has faced difficulties in ensuring the resources needed to provide justice to all clients from those in Niagara County to those in Nassau County. I will not detail here the long history of efforts to ensure the State fulfill its duty to ensure quality representation statewide. I do note with thanks that the Legislature and Executive have been adhering

to the incremental increase in state funding set out in historic 2017 legislation. The intent is to provide all counties the same assistance that five counties receive as a result of the settlement in *Hurrell-Harring v State of New York,* a suit brought to enforce the State's duty to effectuate the constitutional right to counsel. **Support for public defense is necessary to avoid further lawsuits, to help end racial disparities in criminal and family court outcomes, and to live up to the ideals on which our system rests.**

I turn now to several programs that the State has developed to fund public defense and that NYSDA asks the Legislature to fund again this year, beginning with our own.

NYSDA Helps Defenders Statewide Strive to Ensure Equal Justice in the Face of New and Continuing Challenges and Changes

NYSDA's Public Defense Backup Center	
Public Defense Backup Center: Executive Budget	$1,030,000
Public Defense Backup Center: Assembly and Senate budget request- to restore base funding	$1,059,000
Subtotal	**$2,089,000**

NYSDA's Veterans Defense Program	
Veterans Defense Program: Senate and Assembly budget request	$500,000
Veterans Defense Program Long Island Office: Senate budget request	$220,000
Subtotal	**$720,000**

New York State Defenders Association Total Budget Request	**$2,809,000**

NYSDA greatly appreciates that New York State has funded our Public Defense Backup Center since 1981. We thank the Legislature for its ongoing recognition of the critical services we provide. The Backup Center helps the State meet its public defense responsibilities by providing centralized, comprehensive support to public defense lawyers statewide. Our assistance is available to all of the approximately 6,000 public defenders, legal aid society lawyers, and court-appointed attorneys in more than 130 county-based programs who represent people accused of crime and adults involved in family court cases who cannot afford to hire an attorney.

Being accustomed to offering consultation, legal research, technical assistance, and other support services to providers far from our Albany office through remote communication, our staff was able to continue those services without interruption when the COVID-19 pandemic forced us to begin working from our homes. While our well-respected continuing legal education (CLE) programs had not been offered remotely before the novel coronavirus struck, our training team moved quickly to a webinar

format. That has allowed us to reach a greater number of attorneys and defense team members than ever. Our 2020 Annual Report describes how NYSDA continued our training and other services after New York State was put on pause in March last year; that report and past Annual Reports are available on our website.

We expanded our training agenda and our electronic publications to help public defense lawyers deal with issues created or exacerbated by COVID-19 distancing requirements. Such issues include whether and how due process can be achieved in virtual proceedings, what skills lawyers need to provide quality representation virtually, and what future pitfalls and improvements to anticipate post-pandemic. NYSDA welcomes technology that benefits clients, and opposes use of technology that fails to address the "digital divide" currently hampering justice for people of limited financial means and, disproportionately, people of color. For example, we oppose virtual arraignments in criminal courts, except during the pandemic, as noted later in this testimony.

To make more information readily accessible, we expanded our website and updated the new content on a regular basis, sometimes once or twice a day.

When the pandemic began, we created a section on our website devoted to issues related to COVID-19, including pages with defender practice resources, information about efforts to seek release of clients, court re-opening plans and relevant administrative orders, office re-opening guidance from federal and state governments about recommended safety practices, and resources regarding self-care and helping support others. We also added pages under the menu of our Resources section that address:

- bail, discovery, and speedy trial reforms that took effect in 2020;
- law enforcement issues, such as Executive Order 203 and police reform, the repeal of Civil Rights Law 50-a, and the use of the Freedom of Information Law;
- the Domestic Violence Survivors Justice Act;
- defense representation of children and young people; and
- forensics resources.

Due to the pandemic many defenders, already separated geographically from one another across the state, became more isolated while the need to share information and support increased dramatically. NYSDA's Backup Center worked to connect defenders remotely. These efforts included gatherings of chief defenders, sometimes by judicial district or region; family defenders, including meetings in which different pandemic-related problems facing families in the City and those upstate could be brainstormed; attorneys who represent youth in Raise the Age cases; and others, including those interested in a specific topic such as impediments faced in implementation of the repeal of Civil Rights Law 50-a.

As the range of those virtual gatherings demonstrate, the Backup Center has been helping defenders cope professionally and personally with pandemic-related issues and

assisting them with issues arising from landmark justice-related reforms including discovery in criminal cases, bail, policing, Raise the Age, and family court/child welfare issues. Some of these reforms predated the massive outpouring of support for Black lives and protests against racism that followed the killing of George Floyd by police in Minnesota in May 2020. Others resulted from that public awakening to widespread racial injustice. **Many of the reforms present public defense lawyers with opportunities—and duties—to better represent their clients. NYSDA helps defenders employ and enforce these changes in New York law.**

The Backup Center has continued to offer its long-standing technical assistance, including training and our case management service, to defender offices and Regional Immigration Assistance Centers (RIACs) that are funded by the NYS Office of Indigent Legal Services (ILS). The RIACs provide public defense practitioners with legal support and training to ensure that those attorneys provide accurate advice to non-citizen clients about the potential immigration consequences of criminal and family court proceedings and dispositions. NYSDA developed and supports a case management system in five of the state-funded RIACs. Details about our Public Defense Case Management System (PDCMS) appear below.

NYSDA's Veteran's Defense Program (VDP) promotes trauma-informed, client-centered representation of veterans and military service members whose invisible wounds of war underlie their involvement in the criminal and family court systems of New York State. We thank the Legislature for its past funding of VDP's focused training, support, and legal assistance to public defenders and their clients; we ask that the funding be renewed. While VDP funding has come from outside the Public Protection budget, and the VDP offered separate budget testimony during the Human Services hearing on February 9, 2021, we need the support of other members of the Senate and Assembly as well to ensure that last year's budget appropriation is implemented and for a new appropriation so that we can continue to provide assistance to those who have served our country.

For both the Backup Center and VDP, we ask that the Legislature restore funding that has been omitted from the Executive Budget, as it has done in past years. The NYSDA appropriation proposed by the Executive is a 63% decrease from last year's final appropriation.

We ask that the Backup Center be funded again at $2,089,000 and VDP, which was omitted entirely by the Executive, again at $720,000. Additionally, the Executive Budget does not include a reappropriation of the $1,059,000 that the Legislature added for the 2020-2021 State Fiscal Year; the State has not commenced the contracting process for those funds to date, so NYSDA has been unable to seek reimbursement for that appropriation. We ask the Legislature to add reappropriations for the full amount of the NYSDA appropriations in the Fiscal Year 2021 Enacted Budget. This will allow NYSDA to continue to offer the vital services we provide around the state.

Funding NYSDA's services is an efficient way to support public defense statewide.
While some needs are best determined and provided at the local level, others are more appropriately designed and/or offered by a central entity that can work with providers, help them meet their professional responsibilities, and advocate for improvements needed at the state level.

NYSDA's Public Defense Case Management System exemplifies the efficiency and effects of NYSDA's services. We have installed this software, designed with New York State reporting requirements in mind but customizable to meet local needs, in 90 offices in 53 counties. PDCMS helps providers improve case management, perform conflict checks, and streamline workflow as well as run reports for internal management, including assessing workloads, and meet the expanding data reporting requirements of the ILS and other entities. By adding new functionality, NYSDA's PDCMS team has helped defenders make the most of some statutory reforms discussed above (and in last year's budget testimony). By using PDCMS, defenders can support the continuing pretrial release of clients by generating text or email reminders about court appearances. PDCMS also helps providers handle the expanded discovery materials now being disclosed; further improvements will include a cloud-based option for better storage capacity and secure remote accessibility to the material by lawyers. The chief Public Defender in Wayne County spoke for many when he said recently, "PDCMS is the lifeblood of my office at the Wayne County Public Defender, and we couldn't meet our state imposed data mandates without that program and the staff at NYSDA who make it work." While last year's State Budget included aid to localities funding for prosecutors to cover anticipated increases in costs from discovery reform ($40 million), no similar funding was added to cover the costs to defense of accessing, storing, and analyzing expanded discovery materials and litigating issues arising from the reform.

The consultation and research services provided by the legal staff at our Backup Center are similarly efficient uses of state money. Our direct defender services put at the disposal of providers extraordinary resources for new, unique, and particularly difficult issues. For small counties and public defense programs to replicate NYSDA's robust in-house information clearinghouse, staff expertise, and centralized online research capabilities for only occasional use would be wasteful, if not impossible. And assigned counsel lawyers struggle to meet the basic costs of representing clients, much less the expenses associated with tackling unexpected or unexpectedly difficult issues, at the long-stagnant statutory rates of compensation they currently receive. NYSDA's assistance helps lessen inequality of representation and maximizes the impact of state dollars. New York has been in this situation before, not quite 20 years ago, when stagnant fees created a crisis, particularly in declining numbers of lawyers available for parental representation. **NYSDA continues to support an increase in the rates set in County Law 722-b and creation of a procedure for future adjustments**, as we did in our budget testimony last year.

The services to public defense providers that NYSDA's Family Court Staff Attorney spearheads are particularly important. The *Hurrell-Harring* settlement and

expansion did not address the representation of parents and other adult respondents facing the loss of time with their children or even their right to act as parents. New York State continues its near-total delegation of family defense to counties, making NYSDA's centralized services and assistance invaluable in localities struggling to carry this burden. For example, our family court staff attorney led several virtual meetings of family defenders from across the state about legal issues and representation during COVID-19. We presented a number of CLE training sessions for family defense providers, some in conjunction with broader public defense events and some held separately. Information relevant to family defense is also included in NYSDA publications like the print newsletter, *Public Defense Backup Center REPORT*, and electronic newsletter, News Picks from NYSDA Staff. The consultation and research services noted above are equally available to family defenders.

While NYSDA's assistance to family defenders is invaluable, our efforts alone can barely touch the enormous needs of parental representation statewide. **As noted below, we support the ILS request for a very modest, additional $5 million to assist counties with needed improvements in the delivery of parental representation in Family Court cases.**

The centrality of parental representation in exposing and fighting the systemic racism that continues to devastate Black families cannot be exaggerated. NYSDA, which has increased its efforts to help defenders recognize and combat implicit bias as well as overt racism, strives to include family defenders and their clients whenever the topic is addressed. See, for example, our selection of Resources on Racism in the Child Welfare/Family Court System on the NYSDA Racial Justice and Equity webpage.

Funding Other Programs is Also Necessary to Help Fulfill the State's Public Defense Duties

Indigent Parolee Representation Program

The Indigent Parolee Representation Program (IPP), created in 1978 to reimburse expenses incurred by localities—especially those where prisons are located—in providing counsel in parole-related proceedings, **should be funded at least at last year's amount of $600,000**. Withholding funding for representation in the completely state-administered parole system imposes an unfunded mandate on counties. Even this small amount of funding helps to offset the costs of providing representation. The Legislature must provide funding for parole representation, and pass the parole reform bills that are currently pending before the Senate and Assembly. And the Legislature must **ensure that the current year's appropriation is reappropriated** so that counties can seek reimbursement for services provided since April 1, 2020.

Aid to Defense

The Aid to Defense Program (ATD) should be **restored by the Legislature with a $441,000 add-on to what is in the Executive Budget**. ATD was created as a counterpart to Aid to Prosecution to offset some of the increased costs of certain law enforcement initiatives. Calculation of the amount of funding needed to ensure full

implementation of the *Hurrell-Harring* expansion statewide was based on the assumption that other public defense funding in the State Budget would remain level. Reducing ATD funding, as occurred in the past two years, undercuts such implementation.

Indigent Legal Services Aid to Localities

NYSDA supports the ILS Aid to Localities budget appropriations, including the 4th year of funding ($200 million) for the expansion of the *Hurrell-Harring* settlement and **urges the Legislature to add $5 million in funding for improving parental representation**. Since the inception of ILS in 2010, NYSDA has deployed its services to support the work of that government agency, whose responsibilities are related to but distinct from ours. Our PDCMS has been tailored to capture and report data that ILS requires from public defense providers, as noted earlier, while sequestering confidential information about clients and their cases. To the degree that different reports are required from *Hurrell-Harring* (*H-H*) settlement counties and others, PDCMS makes it easier for the respective providers to supply what was sought. Following the legislative expansion of *H-H*, NYSDA worked, and continues to work, with ILS to support that expansion. Backup Center staff participate in ILS advisory entities like the Parental Representation Advisory Council and the Appellate Defender Council.

Article VII Legislation

The Executive Budget includes a number of legislative proposals that could impact public defense providers and clients, and legislators have already filed bills that would impact public defense and/or clients and client communities. NYSDA asks the Legislature to consider our comments about the items below. We anticipate providing information about other proposals as the session progresses, and welcome legislators' inquiries.

NYSDA opposes extension of virtual/remote court appearances for arraignments proposed in Part J of the Executive's Public Protection and General Government (PPGG) Article VII bill. While defenders agreed to virtual arraignments as a health necessity during the pandemic, in-person arraignments should resume as soon as the COVID-19 emergency ends. In 2012, NYSDA issued a statement opposing audio-visual arraignments that notes many issues still relevant today. As set out in our most recent comment on the issue, we continue to oppose "the use of virtual/remote communication for holding non-emergency court proceedings deemed critical stages, and for any proceedings, absent the consent of the person whose case is being heard." While there may be occasions when a client might want to proceed virtually, there is grave danger that routine requests for the defense to waive the right to in-person appearances at arraignment will be coercive. The effects of virtual appearances on outcomes is unknown; the quality of virtual appearances varies widely depending on the technology available in a given location; and how permanent, routine imposition of virtual appearances will impact public trust in our court system is undetermined. And implementation of routine virtual arraignments appears to violate the terms of the *H-H* settlement, which calls for representation in person.

NYSDA urges caution regarding the proposal to allow contiguous counties to share jails in Part PP of the PPGG Article VII bill. While cost savings may appear possible and inviting, shared facilities can create issues of due process and interference with necessary services; protections are necessary. Counsel and families must be able to conveniently and productively visit people in custody. Greater distance, with resulting increased transportation costs and inconvenience, must not be used to coerce consent to virtual appearances. And at the current time, the State Commission of Correction lacks capacity to oversee and monitor consolidated jails; only two of the three Commission seats are filled and the funding level keeps staff low.

NYSDA asks the Legislature to ensure equity and inclusivity in the commercial sale and regulation of marihuana by passing the Marihuana Regulation and Taxation Act (MRTA), S.854/A.1248, without any damaging amendments. New York State has increasingly limited criminal liability for possession of marihuana, but selective, racialized arrests that have characterized policing around marihuana for a half-century have not stopped. Public defenders have seen the harm done to clients and client communities by these practices. It is time to end statutory excuses for police to target Black and other disenfranchised communities. Further, past harm should be redressed. MRTA should become law, with provisions intact that will provide access to operating licenses, start-up equity, and training and guidance in business development to individuals, businesses, towns, and cities that have disproportionately suffered the consequences of prosecution and incarceration related to the possession or sale of marihuana. We oppose the Cannabis Regulation and Taxation Act (Part H of the Executive's Revenue Article VII bill).

Conclusion

Thank you again for the opportunity to provide information about the importance of public defense services, including NYSDA's, in this extraordinary time. I would welcome further opportunities to answer questions or provide further information about what is presented here and about any aspect of public defense. I realize that you as legislators face difficult decisions and I hope we can assist you during the budget process and throughout the session and 2021-2022 State Fiscal Year.

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Virtual/Remote Court Appearance at a Critical Stage of Criminal Proceedings Is Not the Correct Answer to Any Long-Term Question

New York Courts—like much of society—closed nearly all in-person public activities in March 2020 for an undetermined amount of time. A worldwide outbreak of a previously unknown disease caused by a novel coronavirus capable of killing untold numbers of people required this move. As the spread of COVID-19 slowed in New York, and knowledge about the virus's characteristics grew, courts began slowly re-opening.

In the interim, much was learned about the mechanics of conducting court proceedings remotely. And some officials and even lawyers began suggesting that criminal courts can and should continue holding certain critical-stage proceedings, such as arraignments, via electronic communications. **The New York State Defenders Association (NYSDA) opposes the use of virtual/remote communication for holding non-emergency court proceedings deemed critical stages, and for *any* proceedings absent the consent of the person whose case is being heard.**

This is not a new position. NYSDA issued a Statement in Opposition to Audio-Visual Arraignments in 2012. Recognizing that employing technology for remote appearances may be appropriate "when nothing of substance will occur in court," the statement emphasized that remote appearances should be limited to those occasions and should continue to require informed, uncoerced consent by the litigant. The statement pointed out the limitations of electronic "appearances" in which decisions about someone are made without full personal engagement. Nonverbal cues and eye contact are lost. More broadly, having litigants physically appear in court demonstrates that they are the focus of the proceeding and that decisions will be made by an independent judiciary, not prosecutors or law enforcement. And, the statement noted, remote appearances infringe on the right to counsel, requiring difficult choices about client-attorney communications and attorney presence. The statement was noted in the January-May 2020 issue (p. 5) of the *Public Defense Backup Center REPORT* (*REPORT*).

Even prior to its 2012 statement, NYSDA noted the hazards of virtual court proceedings. An item in the September-October 2002 issue of the *REPORT* noted that "substituting virtual presence for real attendance threatens due process." It went on, "[c]redibility, demeanor, and the ineffable value of having a judge, lawyers, witnesses and the jury in the same room cannot be fully realized on a television screen."

NYSDA's position is not unique. As noted in a 2013 NYSDA blog post, the New York State Office of Indigent Legal Services (ILS) specifically said in its initial Request for Proposals (RFP) for initiatives intended to ensure representation at first court appearances, "'Proposals should provide for the physical presence of counsel with the client in court.'" That requirement remained in the most recent (2017) RFP. The initiatives being funded stemmed from a decades-long delay in ensuring the right to counsel at first appearance, set out by ILS on its webpage; that history contributes to on-going fears that the right will be eroded by efforts to save time or money, including by a switch to virtual appearances.

That NYSDA's 2012 statement addressed only arraignments/first appearances stemmed from threatened developments at the time, not from any limitation of the underlying rationale to one type of critical court appearance. And while much has changed in the last eight years, the concerns underlying the 2012 statement have not. In-person, physical presence of the person who is the subject of court proceedings remains vital to ensuring constitutional and human rights. A recent 10-page Statement from the National Association for Public Defense sets out dangers of holding proceedings remotely and steps to take to avoid them—all in the context of honoring an underlying limit on virtual proceedings to situations in which holding them enhances, or avoids a shutdown of, access to justice. Except in times of emergency, when physical presence is literally impossible or when vital interests clash (the need for physical health and safety vs. the need to ensure due process), virtual appearances should not occur at *any* criminal court proceeding leading to decisions other than those of a ministerial or calendaring nature absent uncoerced and knowing consent. **A litigant's right to appear in person, along with counsel, the decision-maker, and witnesses, should not be abridged.**

November 23, 2020 For more information, contact Executive Director Susan C. Bryant, at 518-465-3524.

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STATEMENT IN OPPOSITION TO AUDIO-VISUAL ARRAIGNMENTS

In 1990, the Legislature authorized the experimental use of audio-visual court appearances via two-way closed-circuit television in the Bronx, Brooklyn and Manhattan. The purpose of the legislation was to "eliminate transportation costs, court detention facility resources, and the waiting time and inconvenience that precede court appearances in situations where *nothing of substance* will be determined (e.g., where both sides anticipate an adjournment.") (Preiser, Practice Commentary McKinney's Cons. Laws of N.Y. CPL Art. 182) (emphasis added). When the experiment was not undertaken in any of the three boroughs during the original eighteen-month study period, the legislation was renewed in 1993, at which time additional counties were added to the list of authorized jurisdictions, a trend that has continued to the present day. There are currently twenty-seven jurisdictions authorized to participate in the experimental use of audio-visual court technology. In most places, the statute is being appropriately employed to avoid needless court appearances when nothing of substance will occur in court. Lawyers with established attorney-client relationships also use the technology to stay in close touch with incarcerated defendants. However, every now and again, a jurisdiction floats the idea of using audio-visual technology to dispense with the personal appearance of defendants at the initial arraignment, a critical phase of a criminal prosecution. The New York State Defenders Association continues to strongly oppose such initiatives as an improper use of the technology.

In over 22 years, no jurisdiction in New York has implemented a system of audio-visual arraignments under the statute. The reasons are twofold. First, the statute requires each defendant to give informed consent to the procedure and the choice must be voluntary. Consent may not be coerced by penalizing defendants who opt to personally appear in court by delaying the arraignment. Thus, counties must maintain an expensive dual system of audio-visual and conventional arraignments. Secondly, as explained below, no competent criminal defense lawyer would routinely recommend to clients that they waive personal appearance in court at the arraignment.

As counsel to the Office of Court Administration commented in response to the original legislation in 1990, "[N]ew technology in the judicial forum must be embraced carefully and only after thorough study of its impact upon court procedures and the administration of justice."[1] The use of audio-visual technology to avoid transporting pre-trial detainees to courthouses for routine case status conferences is fundamentally different from use of the technology to eliminate a defendant's personal appearance at the initial arraignment proceeding.

Important matters are reviewed and critical decisions are made at a criminal court arraignment. Central among these is the court's duty to apprise a defendant of the cause and nature of the allegations, and decide whether to release or hold the defendant in lieu of bail

[1] Letter from Michael Colodner to Evan Davis, Counsel to Governor Cuomo, dated July 20, 1990 at p. 2.

during the pendency of the criminal action. For the accused person, few decisions are as critical as the court's bail decision. Detention in jail for even a few days can result in the loss of employment, financial hardship, loss of custody of children, and devastation to one's family. Pre-trial detention can also adversely affect a defendant's ability to mount a successful defense to a criminal charge. Given the important liberty interests at stake at a criminal court arraignment, any plan that restricts the flow of information to the court and interferes with its ability to render a fair and impartial bail decision demands a compelling justification. Clearly, the administrative urge to save a few dollars on personnel expenses does not meet this high threshold. Indeed, a recent study in Cook County, Illinois, noted a statistically significant increase in bail amounts resulting from videoconferenced arraignment proceedings. The study concluded that "defendants were significantly disadvantaged by . . . videoconferenced bail proceedings." Shari Seidman Diamond, et. al. "Efficiency and Cost: The Impact of Videconferenced Hearings on Bail Decisions." 100 Crim. L. and Criminology 869, 898 (2010). Moreover, higher bail amounts "can impose additional financial costs on the justice system by leading to increased pre-trial incarceration of defendants who would otherwise be released." Id. at p. 901.

In addition to bail decisions, judges must make other important determinations during the arraignment that can have wide-ranging consequences for criminal defendants. Judges must decide at the arraignment whether to refer an apparently mentally unstable defendant for psychological testing to determine competence to stand trial,[2] or whether to issue a temporary order of protection to protect a crime victim,[3] or whether to suspend a defendant's license to possess a firearm,[4] or to drive a motor vehicle.[5] In order to make any of these discretionary judgment calls, judges must have the ability and means to "size up" the defendant, a difficult and largely intuitive process that would be seriously impaired if judges were relegated to making decisions based on whatever information they could glean from the defendant's image and voice on a video monitor. When the accused is not physically present in the courtroom, the court cannot get a full spectrum of nonverbal cues about the defendant's character and trustworthiness. The court literally cannot "look the defendant in the eye" to make a personal assessment of credibility. The defendant is likewise deprived of an opportunity to personally engage the judge when endeavoring to convey sincerity and respect for the legal process. *See* Ann Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004).

A defendant's personal appearance in court in response to a criminal charge also serves an important symbolic function in our criminal justice system. Unlike a police detention facility, a courtroom is an independent place. While police and prosecutors may be physically present in the courtroom, it is not *their* domain. The courtroom is the province of an independent judiciary, and the defendant is the central participant and focus of the arraignment proceeding. The defendant's presence is not a mere formality that can or should be routinely dispensed with. Physical presence in the courtroom has its own significance and meaning. Under our justice system, the accused must be turned over by his captors and allowed to stand, as a person presumed innocent, before a court of law. While accused persons may be in custody, they are in

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[2] CPL § 730.30
[3] *See* CPL §§ 530.12, 530.13
[4] *See* CPL § 530.14
[5] *See* VTL § 510 (3)

the hands of the court and its officers. Family and loved ones can see the accused and be reassured that he or she has not been harmed, and will be treated with respect by the court. From this small event, public respect for the law and for our system of justice flows.

The right of personal appearance is not only important to the accused; it is also important to the independence of the judiciary. Even when physically producing a defendant in court may cause inconvenience and expense, judges have an obligation to perform their duties with dignity and decorum. This obligation should not be lightly surrendered to administrative and fiscal concerns about convenience and cost-cutting. The right to personally appear in court at a critical stage of a criminal proceeding is indispensable. It should be relinquished only in the most extraordinary circumstances when no practical alternatives exist.

Arraignments conducted via two-way closed-circuit television can interfere with the development of trust between attorney and client, and can seriously interfere with a lawyer's ability to effectively advocate for a client. The closed-circuit process offers defense lawyers two equally objectionable choices: to be physically present in the police detention facility with a client, or in the courtroom with the judge and prosecutor. In the former situation, a defense lawyer's ability to advocate for a client is diminished by his or her absence from the courtroom, the locus of authority and decision-making. In the latter situation, counsel cannot stand by the client's side during the arraignment process, the critical first stage in most attorney-client relationships. The physical separation of attorney and client inevitably results in poor communication between the two parties, a situation that is only made worse when the client has special needs, such as language difficulties, mental health problems, or limited intelligence. In one study in New Jersey, 68% of the clients arraigned by closed-circuit television did not get to speak to an attorney during the bail hearing, and an overwhelming 96% did not get to speak to their attorney following the hearing.[6] This lack of communication can only serve to alienate attorney and client during this important early phase of their relationship.

For all of these reasons, audio-visual arraignments via two-way closed-circuit television are destructive of the rights of criminal defendants and are inconsistent with the deliberative process of the courts. The New York State Defenders Association strongly opposes it.

December 5, 2012

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[6] *See* Hudson County Video Link System, a report prepared for the Public Defender of New Jersey, on file with NYSDA.