NYSACDL

NEW YORK STATE ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

MEMORANDUM OF SUPPORT

NYS Office of Indigent Legal Services
FY 2018-2019 Budget Request of $161.2 Million

Includes $50.7 Million for Statewide Expansion of *Hurrell-Harring* Justice Equality Reforms to Improve All Public Defense Programs

Amendment Needed to Maintain Independence of ILS

We support the Governor's proposed budget for the NYS Office of Indigent Legal Services (ILS) Budget Allocations. It includes the following provisions.

Aid to Localities: $155.5 million would be allocated as follows.

- $81 million for ILS Grants and Distributions to public defense programs.
- $23.8 million for the *Hurrell-Harring* settlement in the five counties:
  - $19 million for the five settlement counties to add staff and other resources to comply with caseload and workload standards;
  - $2 million to implement the ILS plan to improve the quality of public defense in the five settlement counties; and
  - $2.8 million to implement the ILS plan to provide Counsel at First Appearance in the five settlement counties.
- $50.7 million to extend the *Hurrell-Harring* Justice Equality reforms statewide with:
  - $50 million to implement the plans submitted by December 1, 2017 to extend *Hurrell-Harring* settlement reforms statewide; and
  - $720,000 for the development, administration and auditing of contracts.

State Operations: $5.7 million would fund the following office operations: $3 million for general office operations; $1.3 million for office operations to implement the *Hurrell-Harring* settlement in five counties; and $1.4 million for office operations to implement statewide expansion of the *Hurrell-Harring* settlement.

However, an amendment is needed to maintain the independence of the ILS.

- The Executive Law 832(4) states, "[a]ny plan developed pursuant to this subdivision shall be submitted by the office to the director of the division of budget for review and approval, provided, however that **the director's approval shall be limited solely to the plan's projected fiscal impact of the required appropriation for the implementation of such plan and his or her approval shall not be unreasonably withheld.**"
- The Executive Budget appropriation language inappropriately gives more authority to the Division of Budget and states, "No expenditures shall be made from this appropriation until the director of the division of the budget approves an operational plan, submitted by the director of the office of indigent legal services, for the implementation of the plans developed pursuant to subdivision 4 of section 832 of the executive law."

The Budget language should be replaced with the Executive Law language bolded above.

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MEMORANDUM IN SUPPORT

New York State Defenders Association $2.589 Million Budget: $2.089 Million for Backup Center & $500,000 for Veterans Defense Program

We strongly support a New York State Defenders Association's $2.589 million budget. This year, the Executive Budget only proposed $1,030,000 for NYSDA's Public Defense Backup Center. **We urge support for an Assembly restoration of $1,059,000, for a total appropriation of $2,089,000. For the Veterans Defense Program, we urge support of the continued annual Assembly match with the Senate of $250,000 each for the Veterans Defense Program.**

Public Defense Backup Center

- **The Center will be vital to the statewide expansion implementation of the *Hurrell-Harring* Justice Equality reform by providing training, data collection relating to quality improvements and caseload analysis, and case management services.**
- It provides services to over 130 county-level public defender offices, legal aid societies, conflict defender offices, and assigned counsel programs. It saves the State, counties, and taxpayers money by coordinating statewide training, centralizing services, and functioning as a clearinghouse.
- It provides free and low-cost continuing legal education (CLE) programs to more than 6,000 attorneys who represent clients unable to afford counsel in criminal and family court.
- Public defense attorneys routinely call for expert referrals, transcripts, briefs and motions, saving them countless hours of legal research.
- The Public Defense Case Management System (PDCMS) is used by 70 public defense offices. It improves caseload management, reduces redundant data entry, and streamlines workflow so that county public defense resources are spent on client representation.
- It assists the Office of Indigent Legal Services (ILS). For example, expert legal staffs extensively assisted on the ILS standards for trial court representation, parent representation, and appellate practice.
- It supports ILS in the implementation of the *Hurrell-Harring* settlement in the 5 counties. ILS selected NYSDA's PDCMS for settlement data collection, including caseload reduction and quality improvements. NYSDA offers training programs to attorneys and co-sponsored with ILS a series of training sessions on financial eligibility guidelines, customizing PDCMS so defender offices could comply with the data collection requirements of the guidelines.
- It developed and supported a case intake system used by four Regional Immigration Assistance Centers and provided CLE and training support to those Centers.

Veterans Defense Program (VDP)

The VDP provides in-depth training, support, and legal assistance to engender effective representation of veterans in criminal and family courts, taking a treatment-oriented approach. The VDP helps the most vulnerable of our veterans by assisting defense attorneys to represent clients who have military-related mental health issues, such as Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and facilitating treatment to heal veterans' war wounds.

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MEMORANDUM IN SUPPORT

Support Restoration of $600,000 for the Indigent Parolee Representation Program

Under New York State law, poor people facing parole proceedings and parole appeals have a right to court-appointed counsel in revocation hearings and in appeals from adverse parole release or revocation decisions. To ensure that counties would not be fiscally burdened by this state mandate, the Indigent Parolee Representation Program (IPP) was created in 1978. **The program was designed to reimburse expenses incurred by localities—especially those with prisons in their jurisdictions—in providing counsel in these parole-related proceedings.**

IPP funding has been devastated over the years. In every year since 1996, the Executive budget proposal has not included any funding for IPP. In the past few years, the Legislature has added $600,000 to the budget for IPP, with 31% of the appropriation allocated to Wyoming County and not less than 6% of the remaining amount allocated to representation related to the Willard drug and alcohol treatment program. **By cutting the reimbursement to counties for cases arising from parole representation—a completely state-administered system—and by perpetual reduction of the amount provided to localities, the State has wrongly imposed another unfunded mandate on localities.**

Background: In 1989, the NYS Defenders Association was asked by the Division of Criminal Justice Services and the Division of the Budget to project the amount needed for this program in light of the 1986 assigned counsel fee increase. NYSDA reported a need in counties then more than twice the traditional appropriation amount at $3.5 million. (See *The Deepening Crisis in the Indigent Parolee Representation Program: The Critical Need for Additional Funds,* NYSDA 1990, and *Indigent Parolee Representation: A Mandate Unfulfilled,* NYSDA 1992.) Today the appropriation would need to be much higher; yet it is completely absent in the Executive budget. But public defense lawyers still represent clients, and counties still absorb the cost.

We strongly urge the Legislature to restore $600,000 for the IPP in the 2018/2019 Budget.

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MEMORANDUM

Governor's Criminal Justice Reform Budget Proposals on Bail, Discovery Reform & Speedy Trial

We applaud the Governor for proposing major steps toward equality in our criminal justice system with his bail reform proposal. The bold changes proposed to the State's dysfunctional bail system recognize that money cannot be the determinative factor in deciding who goes to jail and who goes home. The elimination of money bail for misdemeanors and nonviolent felonies and the expanded use of alternative forms of bail would be groundbreaking changes that build on New York's progressive traditions.

Meaningful reform—that reduces our jail population, confronts race- and wealth-based disparities, and ensures fairness and individualized justice—requires bold vision and new laws that make that vision a reality. An amended bail proposal coupled with a more progressive discovery reform bill will go a long way towards achieving such much-needed criminal justice reforms.

Bail Reform

We strongly support those parts of the Governor's proposed reforms that will help end wealth-based detention. However, there are significant problem areas which require improvement, and do not align with what we believe truly progressive reforms must look like.

Strongly Support Major Reform Provisions

- *New York State must eliminate cash bail for misdemeanors and non-violent felonies.*
- *Judges must be required to set the least restrictive conditions when imposing any non-monetary conditions on release and set monetary bail at an amount a person can actually pay.*
- *Judges must be required to set three forms of bail, one of which must be a partially secured or unsecured bond.*
- *Evidentiary hearings must be required if a person faces pretrial detention, with the burden placed on the prosecutor to demonstrate by clear and convincing evidence the basis for pretrial detention.*

Amendments Needed to Address Problem Areas

- ***The categories for preventative detention must be narrower, if they are to exist at all.*** The Governor's proposal would unnecessarily and dramatically expand the class of people subject to preventive detention (no option for release) at a time we are seeking to reduce the jail population. Under the Governor's proposal, a District Attorney could ask for preventive detention whenever a person is re-arrested for hopping a turnstile while another low-level case is pending, or a person is unable to make it to a court date. Preventive detention undermines the presumption of innocence—it should only be available in extremely limited circumstances.

- ***Prosecutors must not have unfettered power to detain someone until their hearing date. Judges must retain discretion to decide whether to release or detain someone at first appearance.*** The Governor's proposal gives prosecutors the unilateral power to detain people at first appearance for five days pending a detention hearing. The unchecked power to detain will inevitably lead to abuse. Judges must maintain discretion over all detention decisions so that detention is used sparingly.

- ***When a judge does order detention, a hearing must be held within 48 hours.*** Under the Governor's proposal, a person could be held for up to five days before seeing a judge and gaining the right to release. Five days of preventive detention can lead to the loss of employment or housing; the loss of children; missed days of school; and the disruption of medical treatment. Nobody should be detained for more than 48 hours without an evidentiary hearing being held.

- ***There must be no presumption of detention. The prosecution must show by clear and convincing evidence that preventative detention is necessary in every case.*** The Governor's proposed presumption of detention wrongly places the burden on the accused.

- ***There must be strict speedy trial release provisions for those preventatively detained. The exception to the release provision for risk must be eliminated, as the exception swallows the rule.*** The Governor's proposal would create a loophole in the release provision that would render the release mandate meaningless for many people detained due to risk to a reasonably identifiable person. The release provisions must have teeth if they are to be effective.

- ***The speedy trial release times must be shortened and must mirror the current speedy trial release provisions.*** The release times must be shortened, particularly for misdemeanors and violations. The provisions mandating release for misdemeanors and violations must be shortened to mirror the current statute's rules requiring the release of people accused of A misdemeanors within 30 days, B misdemeanors within 15 days, and violations within 5 days.

Speedy Trial

The Governor's speedy trial proposal inappropriately places blame for court delay on the defense, while ignoring the underlying problems of New York's "readiness rule," which does not count congestion in speedy trial calculations.

- ***Speedy trial reform must not undermine the attorney-client relationship by requiring the accused to personally waive the right to a speedy trial and placing limits on waivers.*** The Governor's proposal would drive a wedge between an attorney and her client on critical matters of strategy by implicitly blaming defense attorneys for pretrial delay, while leaving the underlying causes of delay--court congestion and inadequate discovery--untouched.

- ***Speedy trial reform must not erect barriers to vindicating the right to a speedy trial by placing unnecessary and counterproductive time limits on the filing of speedy trial motions.*** The Governor's proposal would prevent the accused from filing a speedy trial motion within 20 days of trial. This creates an unworkable rule, as most speedy trial claims do not become ripe until the eve of trial because of New York's "readiness rule."

- ***If the "readiness rule" is retained, judges should be required to scrutinize prosecutors' statements of readiness for trial.*** The "readiness rule," which does not include delay due to court congestion as part of the speedy trial calculation, allows prosecutors to manipulate the speedy trial clock by stating ready for trial early in a case and later stating "not ready." Speedy trial reform must place meaningful limits on this type of gamesmanship.

- ***At a minimum, the "readiness rule" should be abandoned in misdemeanor cases and replaced by a true speedy trial clock.*** Because the "readiness rule" does not include court congestion in speedy trial calculations, misdemeanor cases often drag on for months, if not years. There should be a true speedy trial clock for misdemeanors.

Discovery Reform

Discovery reform must mandate automatic, early, and complete disclosure of information. The Governor's proposal does not significantly expand the information required to be shared, while simultaneously allowing prosecutors to withhold information for virtually any reason.

- ***Discovery reform must require prosecutors to share all relevant information with the defense, unless there is a compelling reason not to.*** Through various loopholes--including the ability for prosecutors to redact materials for virtually any reason--the Governor's proposal allows prosecutors to pick and choose what information to disclose. Principles of transparency and fairness require that *all* relevant information be shared, unless there is a compelling reason not to.

- ***Discovery must be turned over prior to a guilty plea.*** The Governor's proposal does nothing to ensure that critical information is turned over before a person pleads guilty. New York is one of only 10 states where prosecutors can wait until a trial to turn over witness names and statements, grand jury testimony and other evidence known as discovery, which backs up criminal charges. The Marshall Project reported this year that "the practice gives prosecutors a strategic advantage, especially because the vast majority of cases never

make it that far. More than 98% of New York felony arrests that end in conviction occur through a guilty plea, not a trial. Defendants often plead guilty without ever knowing the strength of the case against them." (1/4/18) Often, exculpatory or other favorable evidence is never turned over to defendants, resulting in wrongful convictions. The proposed bill does nothing to change this. Prosecutors must be required to turn over information before a person pleads guilty.

- ***Significant portions of the Governor's proposal are likely unconstitutional.*** Certain portions of the Governor's proposal, including the requirement that the defense share information not required by the prosecution, would likely not survive judicial scrutiny under the Due Process Clause and *Wardins v. Oregon, 412 U.S. 470 (1973)*. Please see The Legal Aid Society's January 22, 2018 Memo in Opposition for a detailed analysis (Attached LAS Memo in Opposition).

The Chief Defenders Association of New York (CDANY) was created in 2014 by a group of chief defenders from across the state. CDANY advocates for those who administer organizations providing mandated legal representation, their staff, and their clients, in an effort to bring positive change to the criminal justice system.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Our guiding principle is that vigorous defense is the strongest bulwark against error and injustice in the criminal justice system. In an era when the United States has the highest incarceration rate in the world, we expand on the question most often posed to our members and ask "how can we defend those people most effectively?