NATIONAL LEGAL DEPARTMENT
125 BROAD STREET, 18TH FLOOR
T/212.549.2607
F/212.549-2651
VWARREN@aclu.org

E. VINCENT WARREN,
SENIOR STAFF COUNSEL

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL LEGAL DEPARTMENT

Statement on

THE NEED FOR INDIGENT DEFENSE REFORM IN NEW YORK STATE

Before

THE NEW YORK STATE COMMISSION
ON THE FUTURE OF INDIGENT DEFENSE SERVICES

February 11, 2005
New York City

Good afternoon. My name is Vincent Warren and I am senior staff counsel to the American Civil Liberties Union Foundation. I have been a practicing attorney for 11 years, the first 5 of which, as a staff attorney with the Legal Aid Society's Criminal Defense Division in Brooklyn. I am pleased to be before you today to discuss the ACLU's recent indigent defense reform work and to put the future of the state of New York indigent defense in a national context.

The ACLU's commitment to ensuring adequate defense to the indigent dates back to the 1930's, with our involvement in *Powell v. Alabama*.[1] Since then, we've fought vigorously to balance the scales of justice for those who don't have the financial means to afford zealous advocates. In the 1980's the ACLU and other attorneys litigated the case of *Luckey v. Harris*[2] in Georgia, which stands today as a landmark decision recognizing the ability of indigent defendants to sue for prospective injunctive relief to remedy systemic deficiencies in defense representation.

In the 1990's the ACLU sued the State of Connecticut for failure to adequately fund their statewide public defender office. The ACLU also filed suit against Allegheny County, PA (Pittsburgh) for failure to adequately fund and provide meaningful oversight into their county public defender office. Both of these cases settled on terms favorable to the plaintiffs, resulting in increased resources, better management and oversight for the challenged systems. Within the last year, the ACLU has filed class action lawsuits in Grant County, WA and Hampden County, MA. The Washington case, which challenges a low-bid, county contract system is still being litigated. The Massachusetts Supreme Court recently issued a decision in the Hampden County case. The Court found that inadequate funding for local public defenders resulted in long delays in appointments, thereby depriving clients of their constitutional rights. To remedy these constitutional violations, the Court ordered the release of any detained client in the county who was not appointed counsel within seven days of arrest. The Court further ordered the dismissal of cases against clients who were not appointed counsel within 45 days of arrest.

---

[1] 289 U.S. 45 (1932).
[2] 860 F.2d 1012 (11th Cir. 1988), *rehearing denied*, 896 F.2d 479 (11th Cir. 1989) (*en banc*), *cert. den*. 495 US 957 (1990).

I am currently plaintiffs' counsel in a class action lawsuit the ACLU filed in 2002 seeking to reform the indigent defense system in the state of Montana. In that suit, the ACLU, along with the law firm of Cravath, Swaine and Moore, LLP, represents a class of current and future indigent defense clients in seven counties.

You might wonder what Montana has to do with the work of this Commission. It's true, Montanans and New Yorkers might not have a great deal in common. However, the one thing that both states share is that they contain woefully underfunded, stewardless, and neglected indigent defense systems. Notably, today the American Bar Association released its long-awaited report, "Gideon's Broken Promise: America's Continued Quest for Equal Justice.[3] I commend that report to the Commission if you have not yet had a chance to review it. The report's findings with respect to New York and Montana are strikingly similar in many respects.

Last spring, just as the Montana case was to proceed to trial, the State Attorney General, who was defending the case, approached us with the following offer: if the ACLU agreed to suspend the lawsuit during the current legislative session, the Attorney General and his clients, which include a large county, seventeen judges, the appellate defender commission, the governor, and the chief justice of the Montana Supreme Court (in her administrative capacity), would advocate for a statewide system that included the necessary state funding, resources and oversight to ensure that the state complied with the mandates of 6th Amendment of the Constitution. We agreed to postpone our lawsuit until

[3] The ABA report can be found at: http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/

the end of this legislative session and are working with the Montana legislature to craft a delivery system that would remedy Montana's systemic deficiencies.

Allow me to explain to this Commission what it took the State of Montana two years of litigation to learn: *Gideon v. Wainwright* and the cases that follow it, require that states *not simply* provide indigent defense legal services, but require them to *ensure* that indigent persons are afforded qualified counsel that are capable of providing a constitutionally adequate defense. That means that New York must ensure that lawyers who represent the poor in the criminal context are knowledgeable of the law, skilled advocates, are provided the necessary tools for an adequate defense and must be ready, willing and able to bring those tools to bear on behalf of each and every client they represent.

New York State neither complies with this bedrock constitutional mandate nor complies with established national standards governing the provision of indigent defense services[4]:

- Like Montana, New York cannot be considered an indigent defense "system." Rather, it is a 35 year-old patchwork quilt of uncoordinated delivery programs, starved of necessary funds, lacking oversight, and geared more towards cost-savings than towards providing the legal services that its clients desperately need.
- Like Montana, New York State has failed to adequately fund the provision of indigent defense services. It has not assumed full responsibility for the funding

[4] For example, many New York indigent defense delivery programs do not meet the American Bar Association's *Ten Principles of a Public Defense System*. Adopted in February 2002, the ABA's *Ten Principles* document *is* perhaps the most widely accepted distillation of the voluminous national standards for indigent defense. The introduction to the standards explain that they "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." The *Ten Principles* may be found at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

of indigent defense services in misdemeanor and felony courts. This responsibility has fallen primarily to the counties. Like Montana's counties, New York Counties, severely squeezed on funding, seek to hold down indigent defense costs by severely limiting public defender office budgets and looking to lawyers who will low bid their services under flat fee contracts. *See* ABA *Ten Principles*, Number 2.

- Like Montana, New York's failure to adequately fund indigent defense services has resulted in woefully inadequate resources for indigent defense, particularly as compared to those available to the prosecution. Public defenders in many counties must pay for their own office overhead, computers, software, telephones, photocopying, secretarial and paralegal assistance — items they cannot afford they go without. *See* ABA *Ten Principles*, Number 8.

- Like Montana, indigent defense services in New York are not sufficiently independent and free from undue political interference. The judiciary, county commissioners and assignment panels largely control indigent defense in many counties by appointing counsel, approving attorney compensation and/or reviewing the use of experts and investigators. Judges are free to deny public defenders additional compensation for complex cases, and subject the use of experts and investigators to limits not applicable to prosecutors. *See* ABA *Ten Principles*, Number 1.

- Like Montana, New York has failed to ensure that only qualified counsel represent indigent defendants and that public defenders receive the training necessary to perform competently. Many attorneys are assigned to cases with no regard for their level or area of experience. Attorneys are often forced to learn on the job, or not at all, as the State does not provide any orientation program for newly hired public defenders, any systematic and comprehensive training, or any technical assistance. *See* ABA *Ten Principles*, Numbers 6 and 9.

- Like Montana, in New York, there is no uniform system for determining eligibility for indigent defense and appointing public defenders in a timely manner. Screening for indigency varies from county to county, resulting in abuses of the system. Resulting delays in appointment and initiation of client contact are a ubiquitous. *See* ABA *Ten Principles*, Number 3.

- In many areas of the state, public defenders in New York are not supervised in any meaningful way or monitored for compliance with any performance standards. There are no uniform standards governing a defender's obligations to his or her client, conflicts of interest, the use of investigators and experts, the right to a speedy trial, plea bargaining, or the requesting of continuances. *See* ABA *Ten Principles*, Number 10.

Because of these and other systemic deficiencies, indigent clients are not receiving the type of representation they are entitled to under the United States and New York Constitutions. Another difference between New York and Montana is that Montana lawmakers are now creating a statewide public defender system to remedy the longstanding deficiencies in that state. The current version of the public defender bill includes:

- State funding
- A statewide public defender office
- An independent public defender commission
- Issuance of comprehensive, statewide indigent defense standards
- Uniform caseload and workload data collection and monitoring
- A statewide indigent defense training program; and
- Uniform eligibility standards.

It took an ACLU lawsuit in Montana for the state finally to confront and remedy the systemic deficiencies in its indigent defense programs. It is my sincere hope that New York State takes meaningful and immediate action to remedy its deficiencies and thus avoid the costliness of further litigation on behalf of indigent clients in this state.