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Testimony of Christopher Ahmuty,  
Executive Director of the ACLU of Wisconsin  
in support of AB395/SB263 relating to criteria for determining indigency for  
purposes of representation by the State Public Defender.

Before the Assembly Committee on Judiciary and Ethics and  
the Senate Committee on Judiciary, Corrections, Insurance,  
Campaign Finance Reform and Housing  
October 6, 2009

Good morning, I am Chris Ahmuty, the Executive Director of the American Civil Liberties Union of Wisconsin, a group of over 8,500 dues paying members who support the civil liberties and rights of all Wisconsin residents.

Thank you for the opportunity to testify today in support of AB395 and SB263, which if signed into law will make the financial eligibility criteria for representation by the State Public Defender much more reasonable. At the ACLU of Wisconsin we look upon these bills as perhaps the Legislature and Governor's last chance to begin necessary repairs to a system which casts criminal defendants' rights to a fair and just trial in doubt.

The ACLU by means of advocacy and litigation has supported the Sixth Amendment's guarantee of the right to counsel for many years, but our support has not been as long as the support for the right to counsel articulated by the Wisconsin Supreme Court. Justice Cole spoke for our state's highest court in 1859, when he wrote, "it would be a reproach upon the administration of justice, if a person, thus upon trial, could not have the assistance of legal counsel because he was too poor to secure it."<sup>1</sup>

Over a century later, in 1962, the ACLU filed an amicus brief in Clarence Gideon's landmark case, in which the United States Supreme Court ruled that the Sixth Amendment guarantee requires states to provide counsel to those persons accused by the state of criminal wrongdoing and unable to afford private counsel.<sup>2</sup> The Court subsequently made clear that such persons are entitled to

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<sup>1</sup> *Carpenter & Sprague v. Dane County*, 9 Wis. 274 (1859)

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963)

more than just a lawyer standing next to them at trial. Instead, states must ensure that they receive “*effective assistance of competent counsel.*”<sup>3</sup>

Our amicus brief doesn’t pull any punches. ACLU lawyers wrote “A criminal trial without a defense lawyer ... is a mockery and a sham, designed to obtain the speediest possible conviction for the State, whose full power is arrayed against the defendant.”<sup>4</sup>

To the extent that Wisconsin’s hodge-podge public defense system leaves poor defendants without competent counsel, much less without any counsel at all, it compromises our state criminal justice system’s ability to produce just results, jeopardizes public confidence in that system, perpetuates racial disparities, endangers public safety, wastes taxpayer dollars, and ultimately diminishes Wisconsin and the United States in the international community.

The ACLU of Wisconsin has been hopeful that the Legislature and Governor would address deficiencies in our public defense system. We believe that the ABA’s *Ten Principles of a Public Defense Delivery System* offers guidance concerning what needs to be done.<sup>5</sup>

I am still trying to understand exactly why Governor Doyle vetoed provisions of 2009 Assembly Bill 75 (the biennial budget) which would have increased the financial eligibility standard. In his June 29<sup>th</sup> veto message he expressed his commitment “to ensuring adequate representation of individuals with limited income.” He added “I will continue to review this policy issue in future budgets.”<sup>6</sup>

We acknowledge that Wisconsin and Wisconsin’s counties face severe budget problems. However, it’s not within the ACLU’s mandate to solve those problems – we believe that constitutional rights are priceless. Furthermore, we believe that policy makers should not ignore the public’s support for fundamental American values.

Public opinion polls show that voters support a criminal justice system that delivers fair results and that they are willing to commit the tax dollars necessary to accomplish this goal. A 2002 nation-wide public opinion poll showed that 64% of those polled supported the use of taxpayer dollars to provide indigent persons with lawyers. A majority supported reforms to ensure those accused of crime received competent counsel, including proposals that would provide public defenders and prosecutors with the same resources per case (88%); establish standards on qualifications for public defenders and court-appointed lawyers

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<sup>3</sup> *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added).

<sup>4</sup> *Gideon v. Cochran*, 1962 WL 115121 (U.S.) Brief of the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae, p. 13.

<sup>5</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System*, approved by the ABA House of Delegates, February 2002 available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (last viewed on October 5, 2009).

<sup>6</sup> Governor Jim Doyle, Veto Message to 2009 Assembly Bill 75, p. 9

(78%); and ensure that judges and local governments do not appoint attorneys based solely on who charges the least (50%).<sup>7</sup>

Since *Gideon* ACLU litigation regarding indigent defense has taken several approaches, including recent actions in these states: <sup>8</sup>

Montana: In 2005 in the wake of a class-action lawsuit filed by the ACLU, the Montana Legislature passed a bill creating for the first time a statewide public defender system in that state.

Ohio: In 2006 the ACLU of Ohio and others filed a petition calling for the Ohio Supreme Court to adopt a rule making it much more difficult for children charged with a crime to waive counsel. In some Ohio counties an estimated 90 percent of children charged with criminal wrongdoing were not represented by an attorney. In September 2007 the Supreme Court of Ohio in *In Re: Spears* affirmed that the appointment of counsel is mandatory in all cases where a juvenile does not have a parent or guardian available for advice, and allows juveniles to waive counsel only if the decision is made voluntarily, knowingly and intelligently.

Michigan: In June 2005 in a landmark decision, *Halbert v. Michigan*, the U.S. Supreme Court struck down a 1999 Michigan law that barred judges from appointing attorneys to help poor people who have pled guilty to appeal their sentences.

Michigan: In February 2007 the ACLU of Michigan and other members of the Michigan Coalition for Justice filed a lawsuit, *Duncan et al. v. Michigan & Granholm*, charging that the State of Michigan failed to fulfill its constitutional obligation to provide adequate counsel to criminal defendants who cannot afford private counsel. The Circuit Court granted class certification and dismissed the state's motion for summary judgment. The Court of Appeals affirmed. These matters are now before the Michigan Supreme Court.

The variety of these ACLU cases indicates that we will consider a variety of strategies should Wisconsin's public defense system fail to provide adequate representation for all types of poor criminal defendants in all of Wisconsin's counties throughout all stages of the judicial process. We may even use non-frivolous arguments not previously before our courts.

For instance, the United Nation's committee charged with overseeing compliance of signatory nations with the Convention on the Elimination of All Forms of Racial Discrimination (CERD) has repeatedly identified under-resourced and poorly

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<sup>7</sup> Belden, Russonello & Stewart, *Americans Consider Indigent Defense: Analysis of a National Study of Public Opinion*, Jan. 2002, available at <http://www.nlada.org/DMS/Documents/1075394127.32/Belden%20Russonello%20Polling%20short%20report.pdf> (last viewed on October 5, 2009).

<sup>8</sup> An overview of ACLU's advocacy and litigation regarding indigent defense, as well as documents related to specific cases is available at <http://www.aclu.org/crimjustice/indigent/index.html>

managed indigent defense systems as a factor contributing to racial disparity in criminal justice systems.

In March 2008, the United Nation's CERD committee issued specific recommendations to address this problem:

The Committee recommends that the [United States] adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes [sic] for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised.<sup>9</sup>

AB395 and SB263 will not remedy the all problems that plague public defense in Wisconsin. We need to know more about what is happening (or not happening) in each of Wisconsin's Circuit Courts. While changing the eligibility standard will allow the Office of the State Public Defender to represent many more clients, there will still be individuals dependent upon court-appointed counsel. Counties will save millions of dollars, should this legislation be signed into law, but they will still have some expense. Nevertheless, AB395 and SB263 represent a necessary step on the most promising road to reform.

Thank you for your consideration. On behalf of the ACLU's members in Wisconsin, I ask you to please support passage of the AB395/SB263.

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<sup>9</sup> Committee on the Elimination of Racial Discrimination, February 18 – March 7 2008, 72nd Sess., *Concluding Observations of the Committee*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (Mar. 7, 2008): [http://www.aclu.org/pdfs/humanrights/cerd\\_concluding\\_report.pdf](http://www.aclu.org/pdfs/humanrights/cerd_concluding_report.pdf) (last viewed on October 5, 2009).

And see Governor Jim Doyle's Commission on Reducing Racial Disparities in the Wisconsin Justice System, *Final Report*, February 2008, available at <http://oja.wi.gov/docview.asp?docid=13615&locid=97>, (last viewed October 5, 2009).