

From My Vantage Point

by Jonathan E. Gradess*

Learning on the Journey to an IPDC

While the journey isn't everything, what happens along the way does affect the journey itself, though not the destination. We still seek an Independent Public Defense Commission (IPDC) overseeing a statewide, fully and adequately state-funded public defense system. But along the way in the first few months of 2008 we encountered washed-out roads and eventful detours that altered our path. Both the barriers and the people who help us surmount them provide new perspectives about where we go next.

New Reform Measures Proposed

My last column discussed former Governor Spitzer's proposed Office of Indigent Defense Services (OIDS). By the time my column was in print, NYSDA had completed a white paper on OIDS (posted on our website), but OIDS soon became largely irrelevant. David Paterson was sworn in as Governor. The Assembly rejected OIDS entirely and proposed instead a step toward real public defense reform—creation of an Independent Public Defense Commission empowered to study costs and other questions, and make recommendations for needed change (A.9806-B Part Y).

The Senate included in its budget a fragment of the OIDS proposal—amendments to the maintenance-of-effort (MOE) provisions of the Indigent Legal Services Fund (ILSF). Those amendments (S. 6806-B Part C) change the fund distribution in two ways. One change, looking back at an average of local money spent over the last three years instead of just the prior year, was intended to make it easier for counties to pass. The second would lower the amount of ILSF money taken from failing counties by changing the all-or-nothing provision of the formula.

The MOE issue took on immediacy when 13 counties learned they were to lose state money. These counties had reported spending less local funds on public defense in 2007 than they did in 2006, thereby failing the threshold MOE provision. These 13 counties received notice that they would not be included in the annual distribution of ILSF funds unless they could refile establishing greater 2007 expenditures or prove that all ILSF money went to improve quality. Nine counties remain at risk.

Campaign for an IPDC Urges Agreement

Although it did not happen immediately, the MOE failures have helped galvanize the defender community and many counties. A few Commission supporters initially dropped their focus on long-term reform to hone in on

MOE fixes. Some who had been oblivious to the need for a Commission began to listen when proponents pointed out that MOE problems would disappear if a Commission was administering a state-funded system.

Under pressure to pass a nearly on-time budget, the Legislature and Governor Paterson did not come to agreement on public defense reform. To buy time for the nine counties, a bill was passed giving them until May 27 to show that they could meet the MOE provisions. There is still time to work out an agreement on public defense reform that helps these counties *and* moves toward real reform.

The New York State Defenders Justice Fund, through its Campaign for an Independent Public Defense Commission, has begun lobbying to insist that any legislative waiver of the MOE provisions for the nine counties be accompanied by the passage of A.9806-B Part Y. The bill is posted on the Justice Fund website (www.newyorkjusticefund.org). The Albany *Times Union* has urged the Legislature to pass the bill. (*Patchwork Justice*, 4/27/08) and the Genesee County Legislature has passed a resolution calling for the Commission and ILSF payments to the counties. Additional editorials are anticipated and other support is growing.

Getting it All Together

Meanwhile, NYSDA continues to work with the MOE counties and analyze the MOE provisions themselves. Discussions with county officials have been revelatory. I have received a number of insightful suggestions, such as having counties set their own goals for improving quality, and measuring whether they were able to obtain those goals using ILSF money. I have come to realize that some counties failing the MOE requirements are making strong efforts to improve quality. I have been made more aware of the absurdity of equating quality with the expenditure of as little as "one dollar more" in local funds, and of punishing localities that cannot improve quality by taking away funds needed to make that improvement. The goals of the MOE provisions remain valid, but evidence grows that the provisions themselves are flawed.

The Backup Center just completed "How the Indigent Legal Services Fund Functions: A Preliminary Data Analysis," which can be found on our website. In table form, this document presents information on what is known about the allocation of ILSF monies from 2005 through 2008 in relation to local net expenditures. The data presented establishes a baseline and presents concrete questions that need to be answered. The data also shows that the proposed fixes to the statute either don't work to solve the problem or work a hardship for counties and public defense clients alike.

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Defender News (continued from page 5)

Recent Case Highlights Right to Counsel Problem

In a recent decision, Justice Thomas F. Liotti concluded in *dicta* that County Law article 18-B violates the Sixth Amendment right to counsel because it does not authorize the appointment of counsel in traffic infraction cases, despite the possibility of jail time up to 15 days per violation. See *People v Quiroga-Puma*, No. LX6701631, 2008 NY Slip Op 50490(U) (Justice Ct, Village of Westbury, Nassau Co 3/12/2008). Justice Liotti recommended that the legislature amend article 18-B to specifically allow justice courts to appoint counsel in violation cases. "No one charged with a violation and who is *in forma pauperis* and where there is a possibility of jail should be denied the assignment of effective counsel." See also *People v Florcke*, 120 Misc 2d 273 (App Term, 2d Dept 1983) (holding that the court must advise a defendant charged with a violation for which a period of incarceration is authorized that, if eligible, she is entitled to assigned counsel); *Matter of Davis v Shepard*, 92 Misc 2d 181 (Sup Ct, Steuben Co 1977) (holding that CPL 170.10(3)(c) provides defendants charged with violations with the right to assigned counsel and notes that in traffic infraction cases, if there is a possibility of a sentence of imprisonment which is not waived by the court, defendants would be entitled to assigned counsel).

FAMM Seeks Commutation Cases from New York

Families Against Mandatory Minimums (FAMM), a nonprofit, nonpartisan sentencing reform organization, is launching a Commutation Project campaign in New York. The Commutation Project pairs nonviolent drug offenders serving excessive sentences with pro bono lawyers who help the offender file and raise support for a petition for a commutation of sentence. When possible, FAMM also provides suggestions and support-raising help to those who have already filed commutation requests. FAMM seeks case referrals that fit some or most of the following criteria: non-violent drug offender; no gun involved; played a minor role in the offense; first-time offender or very few (1-2) nonviolent prior convictions; excessive sentence: Rockefeller Drug Law mandatory minimums, sentence over five years for a first-time offender, long drug sentence with no parole eligibility; prisoner accepts responsibility for the offense; sentence of at least 10 years; prisoner has served at least half of his/her sentence; prisoner is not eligible for parole for at least one year; prisoner has shown extraordinary rehabilitation and good conduct in prison; and all legal remedies have been

exhausted, no pending cases or motions. FAMM is a small organization with limited resources and can work on only a very small number of clemency cases each year. FAMM does not provide prisoners with legal advice or representation and cannot guarantee that anyone who seeks clemency will receive it. To refer a case to FAMM, send a completed Case Summary Form (available at www.famm.org/Repository/Files/case%20summary.pdf) to FAMM, Attn: Molly M. Gill, 1612 K Street NW, Suite 700, Washington, DC 20006 or fax to (202) 822-6704. ☪

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If the Independent Public Defense Commission proposed by the Assembly is brought into being to conduct the studies set out in the bill, many of the questions raised by the ILSF data can be answered by an entity the defense community and the State can both trust. Those answers will then provide the basis for deciding how best to move from a State study commission to full State takeover.

When core questions such as the impact of meeting standards, the ultimate cost of a state takeover, and whether there is defense/prosecution disparity are answered, I believe the paralyzing fear of change will subside, and support for reform will grow. While the route is not what I imagined a year ago, I continue to believe that we will arrive at a statewide, fully and adequately state-funded public defense system headed by an Independent Public Defense Commission. ☪

Defense Practice Tips (continued from page 13)

imposed for a trial conviction, vacatur of the plea may not be available if the trial conviction is subsequently reversed. *People v. Hemphill*, 229 AD2d 324 (1st Dept), *lv den* 88 NY2d 1021 (1996).

9. The exception to the sentence capping provision was added in 1978 as part of the amendment to PL § 70.30(1)(b) that provided that the minimum terms of consecutive indeterminate sentences should be added together to arrive at a new aggregate minimum term. See L.1978, ch 481, § 24. Until 1978, consecutive life sentences would not result in a defendant serving any more time than concurrent life sentences before becoming eligible for parole and, therefore, there was no reason for judges to impose consecutive life sentences. Under the version of PL § 70.30(1)(b) enacted in 1965 (L.1965, ch 1030), when consecutive sentences were imposed, the maximum terms were added together to arrive at an aggregate maximum term, but the minimum terms merged together and were satisfied by service of the minimum term with the longest unexpired time to run. It was only in 1978, when the law was amended so that minimum terms of consecutive sentences would be added together to form a longer aggregate minimum sentence, that judges had a basis for imposing consecutive life sentences and an exception to the capping provision for class A felonies was needed to ensure that the aggregate maximum term of consecutive life sentences was not reduced to less than life in prison.