



Public Defense Backup Center **REPORT**

Volume XVI Number 1

January-February 2001

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Another Innocent Cleared, Years Later

“This is wrong, it’s horrible. It’s going on all over the United States. We’ve got to stop this.” These are the words of a woman whose young daughter was killed 13 years ago in Austin, Texas. She was not referring to the crime but to the injustice done to the man accused and wrongly convicted of committing it. Christopher Ochoa had confessed and been serving a life sentence. He had long claimed that his confession was coerced, but not until DNA evidence exonerated him and pointed to the true culprit, through the efforts of the Wisconsin Innocence Project, were authorities willing to listen. A judge finally declared his case “a fundamental miscarriage of justice.” Even the prosecutor conceded the mistake and was quoted as saying that “It’s a bad feeling knowing it’s failed. But it’s a good feeling fixing it.” Ochoa had testified against another man, his roommate at the time, who remains in prison for raping the victim. (*Toronto Star* [online at www.thestar.com], 1/17/01.)

Finding and Fighting Injustice, Imbalance, and Ineffectiveness

Every day, public defense clients seek some measure of justice from the legal system. Too often, the measure of justice received is small—or is in negative numbers. Individual and organizational efforts to address individual and systemic injustice continue—as does injustice itself. One well-known example is The Innocence Project at Cardozo School of Law and the growing number of its

progeny across the country, through which Barry Scheck, Peter Neufeld, and others screen cases and through the use of DNA testing exonerate many wrongfully-convicted people.

Hellerstein Helps Free Harris

Law schools and faculty can play a significant role in marshalling resources in the service of justice. Recent examples include the Wisconsin Innocence Project that helped free Christopher Ochoa and Brooklyn Law School Professor William Hellerstein’s successful efforts to free Gerald Harris, a promising young boxer from Queens. Nine years ago, Harris was convicted of armed robbery and sent to prison for a crime his brother committed. Today, thanks to Hellerstein and a group of dedicated Columbia University journalism students, Harris is no longer convicted and no longer in prison. (*Newsday* [online], 12/16/00.)

Knowing that there are more Gerald Harrises in New York jails and prisons, Professor Hellerstein is seeking funds to start a “Second Look Program” at Brooklyn Law School. (*New York Law Journal* [online], 1/10/01.)

AALS Asks Law Profs to Help Improve Access to Justice

The Association of American Law Schools (AALS) has chosen “Equal Justice” as the theme for its 100th anniversary. Recognizing the “critical national need to provide competent lawyers for persons and communities unable to afford adequate legal representation,” AALS “has begun a project calling upon law professors to work to improve universal access to the legal system.” Equal Justice Colloquia are being held during the 2000–2001 academic year at law

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schools around the country. AALS seeks “to create cutting-edge opportunities for law schools, working in conjunction with the equal justice community, to lend their unique talents in the critical quest for equal justice in our current legal systems and communities.”

The Equal Justice Project reflects a recognition by legal academia of a serious problem in public defense services. The Project Director, Professor Dean Hill Rivkin of the University of Tennessee College of Law, commented: “The delivery of competent legal services to many segments of our population is reaching crisis proportions. Poor people lack proper representation in our civil and criminal systems, our juvenile courts, and in the pervasive administrative tribunals that determine important issues for people with disabilities, those out of work, or those facing discrimination. . . . Law schools have an important role to play in helping solve these problems, from providing theory and data to educating the next generation of lawyers who will face these complex issues.”

NYSDA Board Members Robin Steinberg and Leonard Noisette along with many New York City area public defense attorneys participated in the Colloquium held at Pace University last October. The next Colloquium scheduled in New York will be at Syracuse University College of Law on Mar. 21-22, 2001. Public defense lawyers thinking of participating in a Colloquium should contact the sponsoring law school. Information about the Project and registration is available on the AALS web site: www.aals.org/equaljustice. (Equal Justice Project Press Release, 9/13/01.)

Ineffective Assistance Warrants New Trial

George Lindstadt was convicted in state court of sexually abusing his nine-year old daughter and sentenced to 12½ to 25 years in prison. His lawyer failed to investigate and present the fact that Lindstadt was not living with his family at the time the alleged abuse occurred. Defense counsel did not request or controvert unnamed studies relied on by a prosecution expert on sex abuse—the 2nd Circuit later called this an “amazing dereliction.” Defense counsel’s opening statement helped the prosecutor meet their burden of proof, as the federal court decision described: “Lindstadt’s counsel announced in his opening that Lindstadt was under no obligation to testify; that, after hearing the state’s evidence, Lindstadt and counsel would decide ‘whether [the prosecutors] have proven their case’; and that, only ‘if they have made their case,’ Lindstadt would testify.” Counsel also failed to argue the relevance of critical defense witnesses excluded at trial. After Lindstadt spent 11 years in prison, the federal appeals court found that, “these errors, in combination, fall outside the ‘wide range of professionally competent assistance’ and that they ‘prejudiced the defense.’” The court ordered Lindstadt’s release or a new trial within 90

days. *Lindstadt v Keane*, No. 99-2002 (2nd Cir. 2001). (*New York Law Journal* [online], 1/8/01.)

Incarceration Rates Disparate for Public Counsel Clients

In criminal practice, some view the quality of justice as differing depending on whether clients have public defense representation or private counsel. A new study brings statistical data to bear on the issue, at least as to federal courts and state court cases in the nation’s 75 largest counties. According to a special report by the Bureau of Justice Statistics, a survey showed that defendants in these systems had the same conviction rates with publicly financed or private attorneys. However, there was a statistical difference when it came to sentencing: “Convicted defendants represented by publicly financed counsel were more likely than those who hired a private attorney to be sentenced to incarceration.” Of those imprisoned, however, those represented by publicly financed counsel received somewhat shorter sentences.

Another portion of the report indicates that a survey of prison inmates revealed a wide disparity in how soon clients saw their lawyers. Of the inmates surveyed who had court-appointed counsel, 37% of state inmates and 54% of federal inmates spoke with their attorneys within the first week; of those with hired counsel, about 60% of state inmates and 75% of federal inmates had contact with their attorneys within a week of arrest.

A copy of *Defense Counsel in Criminal Cases* (BJS November 2000) is available on the web: <http://www.ojp.usdoj.gov/bjs/abstract/dccc.htm>. (And see LexisONE, 1/12/01 on the web: <http://www.lexisone.com/news/nlibrary/b011201a.html>.)

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THE REPORT IS PRINTED ON RECYCLED PAPER

State of Justice in NY Addressed

Governor and Chief Judge Talk About Criminal Justice Issues

The new year has begun with a round of official speeches full of reflections and promises about the justice system. In his 2001 State of the State Address, Governor Pataki reiterated his commitment to “protecting people from harm.” Reflecting on the last year, the governor pointed out that New York’s criminal laws have been toughened. This year Pataki will seek to make more changes: expanding the DNA databank to include *all* convicted criminals; abolishing the statute of limitations for rape, sexual assault, and other serious violent felony offenses; and ending parole for *all* convicted felons. He also proposed the creation of “emergency financial assistance” for battered women who have left their homes. This move follows last year’s veto of legislation offering battered women behind bars the chance to enter temporary release programs, because district attorneys were not given a say about releases.

The governor has also committed to reforming the state’s drug laws. Concluding that however well intentioned, “key aspects of those laws are out of step with both the times and the complexities of drug addiction,” he promised that, “In the coming weeks, I will send you legislation that will dramatically reform New York’s Rockefeller drug laws.” The State of the State Address is available on the web: <http://www.state.ny.us/sos2001.html>.

In her State of the Judiciary webcast (itself a sign of the times), Chief Judge Judith Kaye expressed concern about “recycling people through the courts.” She lauded the work of specialized and community courts noted and her plan to establish “integrated domestic violence courts in each Judicial Department” within the next few months. Kaye said that the impressive achievements of existing drug treatment courts will be replicated in every county under a “Statewide Drug Court Initiative.” She also called for legislative action to reform the Rockefeller Drug Laws.

In regard to procedures affecting criminal defense, Kaye stated that she would seek: “statutory reform both to end automatic sequestration of jurors and to reduce criminal case peremptory challenges.” She pointed out that “New York continues to lead the nation in the number of peremptory challenges allowed in criminal cases—up to 20 challenges for a party—causing an extraordinary number of qualified jurors to be excluded and inviting *Batson* challenges that charge invidious discrimination in jury selection.” The State of the Judiciary 2001 is on the web at: <http://www.courts.ny.us/nystateofjudiciary2001.pdf>

18-B Rate Increase to Be, Maybe

There have been several developments in the ongoing crisis around New York’s stagnant rates for lawyers assigned to represent in family court and criminal justice matters people who are financially unable to obtain counsel. Fees under County Law article 18-B have not been raised since 1986.

Three Branches Agree Change Needed

Against a backdrop of lawsuits, lawyers’ refusal to accept assigned cases, and judicial fee hikes, legislative action on assigned counsel rates is expected.

Judge Kaye concluded her State of the Judiciary remarks by addressing the need for a rate increase. “Assigned counsel fees . . . were barely adequate 15 years ago when they were set by the Legislature. Today, they have decimated assigned counsel panels. And the consequences are severe.” The Chief Judge’s proposal to increase rates to “\$75 an hour for felony and Family Court cases, and \$60 an hour for nonfelony cases” would be funded by expanding the collection of surcharges and fines. Kaye noted: “It is the responsibility of all of us in government to address this deepening crisis now. We simply cannot let another year pass without resolving this problem.”

The governor and the legislative leaders have announced the creation of a Joint Task Force to study assigned counsel rates and develop a proposal for increasing them. “We are committed to increasing the current rates of compensation paid to law guardians and assigned counsel, especially for the lawyers who represent children and domestic violence victims in Family Court,” Governor Pataki said. “The current rates are too low and they need to be raised without an undue burden being placed on local governments or the State. With all the work Chief Judge Kaye has already done on this issue, I am confident the task force will be able to present a thorough and sensible proposal this session.” Senate Majority Leader Joseph Bruno echoed these remarks: “The Senate supports raising 18-B lawyer fees and our efforts will be directed at finding an appropriate funding source that does not place an additional burden on local governments.” Assembly Speaker Sheldon Silver commented, “I fully support increasing the compensation to these attorneys, an increase that I believe is long overdue and one that the Assembly Democratic Conference has fully supported.”

The Task Force will investigate: rate increases; different rates for in-court and out-of-court work; different rates for felony and non-felony defense work; caps on amount of compensation paid; a greater reliance on institutional providers; and funding sources. The Governor’s Press Release of Jan. 12, 2001 announcing the Task Force is available on the Internet through links on the NYSDA web site.

Lawyers Decline Assignments

Evident from the governor's plea that "lawyers currently serving as assigned counsel and law guardians continue to take new cases and provide adequate representation to the children and families who need it" was the impact of family court lawyers' refusal to take assignments of cases. (See *Backup Center REPORT*, Vol. XV, #10.) *The New York Times* reported that "As of Jan. 1, almost all the 200 or so lawyers in New York City's family courts are refusing new assignments until they get a raise, saying that after 15 years without a pay increase they can no longer afford the work." The article noted that, "Many judges freely attribute the court crisis to lawmakers in Albany, who have not raised the lawyers' rates since 1986."

Gary Schultz, a family court lawyer in Manhattan who went to Albany on a quick lobbying trip in January, said that he was reassured by legislative staff members that a raise would be given. However, plans were described as "legislation this year and an appropriation next year, meaning an effective date of Jan. 1, 2003." Schultz described this timetable as "ridiculous." (*New York Times*, 1/17/01.)

Courts Raise Rates In Individual Cases and Across the Board

Pending legislative action on assigned counsel fees, some courts have inaugurated a *de facto* rate increase. Dutchess County Family Court Judge James V. Brands has ordered that all attorneys he appoints in the future will be paid \$75 an hour. Brands found that the court's ability to find needed lawyers has deteriorated so much that the statutory "extraordinary circumstances" requirement for justifying an upward departure from the rates under Article 18-B of the County Law has been met. *Matter of Sweat v Skinner*, B-1508-00. A copy of the decision is available from the Backup Center. (*New York Law Journal* [online], 1/23/01.)

A second Family Court judge in Dutchess County, Damian J. Amodeo, followed suit on Jan. 30, 2001. Amodeo ordered the across-the-board hike in *Anthony S. v Patricia S.* (*New York Law Journal*, 1/31/01.)

Earlier, in Bronx County, Supreme Court Justice Patricia Anne Williams ordered that a defense attorney who won a complete victory after a six-day rape trial be paid \$70 an hour for in-court work and \$50 for out-of-court work, for a total of \$11,430. In another decision, Justice Williams indicated that in an appropriate case, she might find that the failure to raise the rates constitutes "per se" an "extraordinary circumstance" warranting the approval of higher rates. (*New York Law Journal* [online], 1/18/01.)

The County Attorney of Broome County sought appellate review of an assigned counsel fee award increase but those efforts ran afoul of precedent in the

Appellate Division, Third Department. County Court had granted assigned counsel Joseph F. Cawley's request that he be paid \$75 per hour for in-court work and \$50 per hour for out-of-court work. After an initial *ex parte* order, an order was issued requiring the county to pay assigned counsel based on the maximum statutory hourly rates. Appellate review of the order increasing the assigned counsel fees award was denied. *People v Herring*, No. 87596 (3rd Dept., 1/11/01.) The decision is available on the Internet through NYSDA's Research Links, or from the Backup Center.

Judges have ordered higher pay for other lawyers in past months as well. Information about those cases and other fee developments can be seen on the "Assigned Counsel Rates" Hot Topic page of NYSDA's web site (see "Spotlight on the Web," p. 12).

NYSACDL "Favors" Fee Motions

Lawyers attending the New York State Association of Criminal Defense Lawyers annual meeting at the end of January found unusual "table favors" at the dinner. Along with the *Herring* decision described above, they received model motion papers, including "Affidavit in Support of Final Payment of Attorneys Fees and Expenses and for Payment of Enhanced Attorneys Fees."

Fee Litigation Continues

On the litigation front, court actions on assigned counsel fees are proceeding. Manhattan Supreme Court Judge Lucindo Suarez has found that the New York County Lawyer's Association (NYCLA) has standing to bring a lawsuit challenging the validity of the assigned counsel compensation law: "NYCLA's members fall within the zone of interests of the statutes and related court rules, satisfying the first requirement of organizational standing that one or some of its members have direct standing to sue. In addition, the NYCLA members' injury is different from the public at large because they are an advocate class enlisted to defend the indigent." As for the substance of the case, NYCLA's causes of action alleging that "failure to provide sufficient compensation to private counsel" has resulted in "systematic deficiencies in the assigned counsel system" were found to be valid claims. However, a claim for tortious interference with contract was dismissed, and Governor Pataki has been eliminated as a party to the action. (*New York Law Journal* [online], 1/19/01; NYCLA Press Release, 1/18/01.) A copy of *New York County Lawyers' Association v Pataki*, Index No. 102987/00 (NY Sup. Ct. 1/16/01) is available on the NYCLA web site: www.nycla.org.

The New York State Association of Criminal Defense Lawyers (NYSACDL) continues its challenge to a reduction by the Court of Appeals of assigned counsel rates for capital litigators. (See *Center REPORT*, Vol. XV, #3; Vol. XIV, #1, #5, and #9.) The Attorney General's challenge to

NYSACDL's standing has proceeded all the way up to the Court of Appeals, which agreed on Jan. 21, 2001, to hear the matter. When seeking permission to appeal, NYSACDL had asked that five of the Court of Appeals judges recuse themselves, since they had been involved in setting the rates or hearing the case below and therefore were parties to the case. Judge Kaye voluntarily removed herself. As to the remaining judges, the court drew a sharp distinction between their role as administrators and as judges: "respondent Judges have no pecuniary or personal interest in this matter and petitioners allege none. Nor do petitioners allege personal bias or prejudice. No traditionally recognized basis for conflict exists here." *New York State Association of Criminal Defense Lawyers v Judith S. Kaye*, Mo. No. 1226 (12/21/00). (*New York Law Journal* [online], 12/22/01.)

As the *REPORT* went to press, the Nassau Criminal Courts Bar Association had just filed a federal lawsuit on behalf of current and future criminal defendants in Nassau County represented by 18-B attorneys and all others similarly situated. The complaint asserts that the defendants, Governor Pataki and Nassau County, have deprived the class of meaningful and effective assistance of counsel and due process, in violation of the federal and state constitutions and deprived the class of the equal protection of the law as guaranteed by the federal and state constitutions. *Edwin Griffin, John Doe and all other similarly situated v George E. Pataki [as Governor] and County of Nassau*, United States District Court for the Eastern District of New York, filed Jan. 23, 2001.

Lawyers in Nassau's criminal and family courts refused to take on new cases representing the indigent as part of a one-day protest of assigned counsel rates when the suit was filed. The protest was largely symbolic, having little practical effect on the courts because judges had been warned. About 60 lawyers gathered on the steps of County Court in Mineola on Jan. 23, 2001, holding a banner reading, "Justice Isn't Free." (*Newsday* [online], 1/24/01.)

Defense Cut from Governor's Budget Again

A preliminary review of the Executive Budget for State Fiscal Year 2001-2002 reveals that no funding is included for several public defense programs, including NYSDA, the Indigent Parolee Representation Program, Prisoners' Legal Services, and Neighborhood Defender Service of Harlem. Nearly \$500,000 less than last year's final appropriation is included for capital defense representation. And while 30 counties are slated to receive the same amount of Aid to Defense as they received last year, this aid remains less than what those counties will receive in Aid to Prosecution. Furthermore, the 32 counties that have historically not participated in the Aid to

Prosecution program are positioned to split \$1,600,000 (\$50,000 each). That additional money was added by the legislature last year, but was not then, unlike this year, part of the Executive Budget. No state defense funding is budgeted for the 32 counties that are to receive this additional prosecution money for the second year in a row.

Counties are also set to receive money to offset the cost of district attorneys' salaries. Over three million dollars is included pursuant to County Law 700, mandating state aid for certain counties with full-time district attorneys. The amount per county depends on population and judicial salaries, to which district attorney salaries are tied. An additional \$415,000 is earmarked for those counties that have a full-time district attorney but do not meet the population requirement of Section 700. These appropriations are unchanged from FY 2000-2001. There are no funds in the Executive Budget to offset any cost of public defender salaries.

Funding to cover services and expenses relating to the prosecution of capital crimes, and to training and assistance for prosecutors dealing with capital cases, is also included. Figures from the budget are set out below.

| | Program FY 2000-2001 | Proposed FY 2001-2002 |
|----------------------------------|---------------------------------|----------------------------------|
| Capital defense | \$15,197,500 | \$14,706,000 |
| NYS Defenders Association | \$1,500,000 | \$0 |
| Prisoners' Legal Services | \$3,500,000 | \$0 |
| Neighborhood Defender Ser. | \$450,000 | \$0 |
| Indigent Parolee Program | \$1,600,000 | \$0 |
| Aid to Defense | \$13,837,300 | \$13,837,300 |
| Aid to Prosecution | \$22,763,000 | \$22,763,000 |
| DA salary reimbursement | \$3,582,100 | \$3,582,100 |
| DA training & capital assistance | \$3,500,000 | \$3,500,000 |

Judicial News

Judge Duncan Admonished

In the annals of reading between the lines, please take note of "aggravated speeding," *i.e.*, *don't aggravate the court by driving too fast through the judge's neighborhood*. Two cab drivers, engaged to be married and separately ticketed for speeding, learned this unspoken rule in Albany City Court. Both defendants made timely requests for supporting depositions, which had not been provided when they appeared before City Court Judge E. David Duncan. After dismissing the tickets issued against the male driver, Duncan "took a series of extraordinary steps which not only effectively insured that the two cases would not end with a prompt, statutorily required dismissal, but conveyed the clear impression that respondent favored a different result." The judge researched the male cabbie's driving record, asked the arresting officer to reissue those tickets, failed to recuse himself from the matter, and delayed making a decision on a motion to dismiss the woman's ticket, instead telling her to return and to bring

her fiancé. All of these actions created an appearance of bias, which was compounded by the judge's disapproving remarks about the male cabbie's driving record and by the judge's inappropriate comment that the alleged speeding violation had occurred in the judge's neighborhood. The New York State Commission on Judicial Conduct concluded that "the totality of respondent's behavior as to both matters 'conveyed the impression that he was biased, had a personal interest in the outcome of the cases and could not render an impartial decision.'" Duncan was admonished. *Matter of Duncan*, SCJC (12/29/00). The decision is available on the Internet at: www.scjc.state.ny.us/duncan.htm.

Election Changes Selection Method for NY Federal Judges

In the wake of the presidential election, the selection of New York federal judges will apparently change. Traditionally, the president has sought the recommendation of his party's senator. For nearly four decades, at least one New York senator was of the president's party. As of January 20th that came to an end. With both New York Senators in the Democratic Party, one press account says that President Bush will look to the senior Republican congress member, Benjamin Gilman of Rockland County, and possibly Governor George Pataki, for a list of nominees. Based on the history of sharing the selection process on an equitable basis between senators, and the fact Senator Charles Schumer is on the Judiciary Committee, there is expected to be some Democratic input if this scenario is adopted. (*New York Law Journal* [online], 1/10/01.)

However, another article indicates that no one is certain exactly how federal judgeships in New York state now will be filled. Furthermore, it appears that the method of selecting U.S. Attorneys for New York State, which has for some time allowed incumbents to finish their four-year terms before being replaced by the party in charge, may also change. (*Albany Times Union* [online], 1/24/01.)

Habeas Deadline Becomes Lifeline

Two 2nd Circuit decisions have widened the door for some prisoners seeking post-conviction relief. Immediately after conviction, Mathilde Muniz filed a *pro se* habeas corpus motion claiming that her guilty plea to federal drug charges was involuntary, her counsel ineffective, and the sentencing guidelines misapplied. Over a year passed without action, "'[f]or various unfortunate' (but unspecified) reasons," until her petition was denied as untimely. Since Muniz's conviction became final before the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the court applied a "reasonable time" standard. Muniz then unsuccessfully applied for a Certificate of Appealability, challenging the district

court's decision. Her appeal of that decision was denied as untimely. Finally, she filed a "motion for an order authorizing her to file a 'second or successive' §2255 petition." The 2nd Circuit found that "Muniz's present petition is a 'first' petition, not a 'second or successive' petition." The district court's dismissal of her original petition as untimely was wrong. The circuit court, like all others addressing the issue, had found that prisoners whose convictions became final before AEDPA's effective date were entitled to a one-year grace period after that date within which to file their habeas or §2255 petitions. Since Muniz's first petition was timely, no successive petition was needed. Her case has been transferred back to district court for further proceedings. *Muniz v United States*, No. 003571 (2nd Cir. 1/2/01).

The procedural door was opened still wider in the case of James Williams. During his trial for murder in New York Supreme Court, the judge restricted courtroom access while a key prosecution witness testified. People in the gallery were allowed in or out only during breaks. After being convicted and sentenced to 25 years to life, Mr. Williams filed appeals based on the denial of his 6th Amendment right to a public trial. Two separate leave applications to the Court of Appeals, as well as a *certiorari* petition to the US Supreme Court, were denied. Williams filed a *pro se* habeas corpus petition in federal district court. The court dismissed the petition as untimely because although Williams filed his habeas petition within one year of the denial of *certiorari*, more than one year had elapsed after the Court of Appeals' final denial of leave. The 2nd Circuit decided that the petition was timely. A state prisoner's conviction becomes final for purposes of the AEDPA one-year limitations period (USC 2244[d][1][A]) when *certiorari* has been denied by the US Supreme Court or the time for seeking *certiorari* has expired. On the merits, the court denied Williams's 6th Amendment claim based on the test for courtroom closure in *Waller v Georgia*, 467 US 39 (1984). *Williams v Artuz*, No. 992195 (2nd Cir. 1/3/01). (See *New York Law Journal* [online], 1/4/01.)

NYSDA Board Members Recognized with Bar Awards

On January 25th, two NYSDA Board members were recognized for their role in improving defense services. The New York State Association of Criminal Defense Lawyers (NYSACDL) honored NYSDA Board Member David Steinberg, Chief Assistant Public Defender, Dutchess County Public Defender, with the Distinguished Service Award. The award cited Steinberg for his ongoing work with NYSACDL, including successful efforts to provide quality CLE to defense lawyers.

The New York State Bar Association Criminal Justice Section presented the Award for Outstanding Work in the

Field of Delivery of Defense Services to Robin Steinberg. Ms. Steinberg—no relation to David—is Executive Director of the Bronx Defenders Office. NYSDA congratulates these two Board members for this well-deserved recognition.

Dual Protective Orders Curtailed

Reflecting Chief Judge Kaye’s interest in court consolidation and her domestic violence court initiative calling for “one judge, one family” [see p. 3], the Court of Appeals has recognized a double jeopardy violation when a defendant is charged with violating two orders of protection for committing one act. Timothy Wood was charged with violating orders of protection issued by two different courts—Rochester City Court and Monroe County Family Court. The same conduct, alleged harassing phone calls, formed the basis for the violation charges in both courts. The family court sentenced Wood to six months in jail. He was also convicted of first-degree criminal contempt and first- and second-degree aggravated harassment in Supreme Court. The Court of Appeals held that the criminal contempt prosecution was barred because Wood was previously prosecuted for contempt under Family Court Act article 8. (*New York Law Journal* [online], 12/22/00.)

The decision in *People v Wood*, 4 No. 162 (12/21/00), is available on the Internet through links on NYSDA’s web site, www.nysda.org. A digest will be published in a future issue of the *REPORT*.

Megan’s Law Effect

A new phenomena has crept into New York jurisprudence—the Megan’s Law Effect. It occurs when a non-sex offense is treated like a sex offense or when a dismissed sex-offense case refuses to disappear. In one example, a man pled guilty in Westchester County Supreme Court to one count of attempted distribution of indecent material to minors in the first degree—a non-sex offense. The charges were based on a series of on-line conversations with a minor describing sexual activity he wanted to have with her. The court ordered preparation of a probation report. The Probation Department responded with a list of thirty proposed sex offender special conditions. Such conditions, and the efforts of a probation Comprehensive Intervention Unit, are apparently the standard response for any defendant convicted of any offense perceived as sexual in nature by the Probation Department. Defense counsel objected to imposition of “sex offender” conditions to a non-sex offense conviction. The court reviewed the applicability of all the conditions as a guide to future cases. Some of the conditions that were approved over defense objections included: psychiatric/psychological evaluation; participation in and successful completion of a sex offender treatment program approved by the

Probation Department; submitting to penile plethysmography (use of a device to measure a male defendant’s level of arousal in response to pictures or aural stimulation for evaluating “what, if any, non-normative behavior the individual may engage in”), and polygraph testing. (*New York Law Journal* [online], 12/20/00.) *People v Manson*, #00/0292. A copy of the opinion is available from the Backup Center.

Fulton County Judge Richard C. Giardino reluctantly dismissed charges of child molestation on speedy trial grounds. Giardino reportedly “bemoaned the fact that there is no public safety exception to the speedy trial rule and no legal test that would allow him to balance the likelihood of conviction against the actual prejudice to the defendant.” Refusing to seal the record, the judge applied an “interest of justice exception,” supported by a Bronx County Supreme Court decision. Factors considered included probative evidence of guilt, a public safety concern, and relevance of the record to an ongoing investigation of the federal Immigration and Naturalization Service (INS) to determine whether the defendant, an undocumented immigrant, should be deported. (*New York Law Journal* [online], 12/28/00.) A copy of the opinion is available from the Backup Center.

BUC Attorney Provides Search and Seizure Training

Al O’Connor, a Staff Attorney at the Association’s Backup Center, presented “Litigating a Search Warrant Case” at a First Department Assigned Counsel Plan CLE training event on Jan. 22, 2001. Over one hundred lawyers attended. O’Connor walked them through nuances of this complex legal area with the help of a PowerPoint presentation (below). ☺



2. Last Wednesday, September 5, 2000, a confidential informant, who has previously supplied this department with reliable information about the drug trade in Hudson on occasion... New York City... a gun... in a... small s... Street, and that he conceals smaller amounts of crack-cocaine for sale on the street in the waistband of his pants.

PACK OF LIES

[People v. Bashiam](#), 190 A.D.2d 681 (2d Dept. 1993) (Defendant not entitled to suppression under [Alfinito](#) based on confidential informant’s sworn statement that he never purchased drugs from defendant as indicated in search warrant application – no allegation that police officer affiant was aware of the falsity of the informant’s report)

A recent CLE presentation memorably illustrated the difficulty of getting evidence suppressed because an informant lied—you have to show that the officer getting the warrant knowingly passed lies along or did so with reckless disregard for the truth or with deceitful intent.

Conferences & Seminars

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance: Capital Case Training for Mitigation Specialists, Defense Investigators and Defense Attorneys
Date: March 3-6, 2001
Place: Albuquerque, NM
Contact: Ron Gottlieb: tel (202) 452-0620 x233; e-mail r.gottlieb@nlada.org; web site www.nlada.org

Sponsor: Appellate Division, First Judicial Department
Theme: DNA with Peter Neufeld
Date: March 5, 2001
Place: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

Sponsor: Appellate Division, First Judicial Department
Theme: Defending Against Allegations of Child Abuse and Neglect
Date: March 12, 2001
Place: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

Sponsor: Appellate Division, First Judicial Department
Theme: Defending Against Allegations of Child Sexual Abuse
Date: March 19, 2001
Place: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

Sponsor: Gideon Coalition
Theme: Gideon Day
Date: March 20, 2001
Place: Albany, NY
Contact: Shahrul Ladue, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail sladue@nysda.org; web site <http://www.nysda.org>

Sponsor: New York State Defenders Association
Theme: 15th Annual NYU Trainer
Date: March 24, 2001
Place: New York City
Contact: Shahrul Ladue, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail sledue@nysda.org; web site <http://www.nysda.org>

Sponsor: New York State Bar Association
Theme: The Ethics of Representing the Criminal Defendant [telephone seminar]
Dates : March 28, 2001
Contact: CLE Registrar's Office, New York State Bar Association, One Elk Street, Albany NY 12207; tel (800) 582-2452 [Albany area (518) 463-3724]; fax on demand (800) 828-5472; web site <http://www.nysba.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Federal Appellate Seminar
Date: March 30, 2001
Place: New York City
Contact: Patricia Marcus, tel (212) 532-4434, e-mail nysacdl@aol.com, web site www.nysacdl.org

Sponsor: National Association of Sentencing Advocates
Theme: Death Penalty Mitigation Institute
Date: June 6-7, 2001
Place: Nashville, TN
Contact: NASA Conference, 514 10th NW, Suite 1000, Washington DC, 20004; tel (202) 628-0871; fax (202) 628-1091; e-mail nasa@sentencingproject.org; web site www.sentencingproject.org

Sponsor: National Association of Sentencing Advocates
Theme: Annual Conference
Date: June 7-9, 2001
Place: Nashville, TN
Contact: NASA Conference, 514 10th NW, Suite 1000, Washington DC, 20004; tel (202) 628-0871; fax (202) 628-1091; e-mail nasa@sentencingproject.org; web site www.sentencingproject.org

Sponsor: New York State Defenders Association
Theme: Defender Institute Basic Trial Skills Program
Date: June 10-16, 2001
Place: Troy, NY
Contact: Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail nsteuhl@nysda.org; web site www.nysda.org

Sponsor: New York State Defenders Association
Theme: 34th Annual Meeting and Conference
Date: July 26-29, 2001
Place: Lake George, NY
Contact: Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail nsteuhl@nysda.org; web site www.nysda.org ☪

From My Vantage Point*

by Jonathan E. Gradess

NYSDA Urges AC Fee Increase—And More

With the leaders of all three branches of state government now on record in support of increasing the rates at which assigned counsel are compensated (see p. 3), NYSDA is working to assure public defense lawyers—and their clients—real, lasting relief from the years of neglect that have driven many dedicated lawyers from public defense work and wreaked havoc with the practices of those who remained.

Reasonable AC Rates Long a NYSDA Priority

Since it was founded in 1967, our Association has been in the vanguard of the struggle for increased assigned counsel fees. We were responsible for efforts to raise the fees in 1978, and our monograph, “Assigned Counsel Fees: Time for a Change” (1985), written as part of our Backup Center contract, helped bring about the 1986 increase.

The majority of our members are assigned counsel practitioners. When the Backup Center was founded, our secretary was Nat Zablow, the assigned counsel administrator of Nassau County; our treasurer was Sanders Heller, the assigned counsel administrator of St. Lawrence County. At least five members of our Board of Directors must be assigned counsel plan administrators or assigned counsel panel members. Unlike other bar associations, our bylaws require that one of our Board’s vice presidents be from an assigned counsel plan. We have assisted Davis Polk in the current NYCLA assigned counsel fee litigation and tried to help fashion an improved complaint in the recently filed Nassau County matter.

Last year, we were appointed to Judge Juanita Bing Newton’s assigned counsel committee and urged a unitary rate, the removal of caps, the raising of fees, and the improvement of public defense services generally for clients. Despite reservations concerning the devil we anticipated in the details, we helped shape consensus that resulted in the report, “Assigned Counsel Compensation in New York: A Growing Crisis.” Daily, we help assigned counsel lawyers in cases across this state, and our comments in the press and before the Legislature regarding the need to raise assigned counsel fees speak for themselves. We are on record and remain unequivocally committed to an assigned counsel fee increase.

Call for a State Commission is Consistent with Increased Fees

Our Association’s recognition of the need for a unified public defense system and recent suggestion that this be

* *The REPORT* will periodically feature a column by the Association’s Executive Director on major issues concerning public defense in New York State.

accomplished by the creation of a public defense commission at the state level (see report on Board resolutions, *Backup Center REPORT*, Vol. XV, #6), have raised in some the suspicion that we oppose raising assigned counsel fees. The absurdity of a suggestion that we are not committed to an increase in the assigned counsel rates should be clear from the facts with which this article began.

Calls for increased assigned counsel fees and for the establishment of a statewide public defense commission and an office of defense services are not mutually exclusive. The latter call has long been the subject of debate within our Association and is the subject of current debate elsewhere. If the timetable had been different, we would have been pleased to build greater consensus around the issue of a unified defense system before floating the idea in the Legislature. Nevertheless, circumstances are what they are. If now is the time that public defense issues are being aired and acted upon, now is the time we must ensure that the needs of the whole defense and client communities are addressed.

Our members interested in assigned counsel fees, assigned counsel lawyers throughout this state, and anyone interested in increasing fees to assigned counsel lawyers must know what occurs in real life in Albany and in counties when change takes place. Over the Public Defense Backup Center’s two decades, we have been contacted numerous times by counties seeking to reduce the cost of their public defense plan by switching from assigned counsel programs to public defender or vice versa. Our role has been to attend to their formal request, retrieve data from their county, to sometimes write reports, but always to fight to secure the best representation for clients, to try and inform local governments of the requirements of the Constitution, and to work with them to ensure that client needs are served and that cost per case issues trail behind, not override, concrete issues concerning zealous representation.

Our experience should inform those who are uncomfortable with a unified public defense system. It would not at all surprise us if the State offered a raise in assigned counsel fees contingent upon the right of county attorneys to review and appeal vouchers, so that assigned counsel lawyers would have to wait for and fight for any increased payment. It is possible for someone to suggest that any rate increase be contingent upon the requirement that partial payment programs be routinized, or that eligibility standards be ridiculously tightened, injuring clients who should be categorically eligible for defense services. We foresee a cats-cradle of strings that could be attached to the increase in current rates: that assigned counsel lawyers periodically handle cases for no fee; that assigned counsel programs be administered through comptroller offices; that only state experts be used in assigned counsel cases; that caps be placed on the amount

(continued on page 15)

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas and Sejal R. Zota*

US Supreme Court to hear appeal of decision striking down retroactive application of the 1996 repeal of a waiver of deportation for certain lawful permanent resident immigrants

On Jan. 12, 2001, the US Supreme Court agreed to review the Sept. 1, 2000 decision of the US Court of Appeals for the 2nd Circuit upholding a grant of habeas corpus relief. The petitioner had challenged the retroactive application of 1996 amendments restricting or eliminating relief from deportation to lawful permanent resident immigrants who pled guilty or nolo contendere to deportable offenses before the enactment dates of these amendments. *St. Cyr v Immigration and Naturalization Service (INS)*, 229 F3d 406 (2d Cir. 2000). The Supreme Court also granted cert in a group of companion cases in which the 2nd Circuit had dismissed petitions for review bringing the same challenges directly to the appeals court, without prejudice to the claims being brought instead under district court habeas jurisdiction. *Calcano-Martinez et al v INS*, 232 F3d 328 (2d Cir. 2000). See the *Backup Center REPORT* Vol. XV, #8, at pgs. 5-6. These cases—*INS v St. Cyr*, No. 00-767, and *Calcano-Martinez, et al, v INS*, No. 00-1011—are scheduled to be argued during the week of April 23, 2001.

BIA refuses to reconsider holding that NY YO dispositions are not convictions

On Jan. 18, 2001, the Board of Immigration Appeals (BIA) denied the Immigration and Naturalization Service (INS) motion requesting reconsideration of an important Sept. 12, 2000 decision. As a result, New York youthful offender (YO) dispositions still are *not* considered convictions for immigration purposes. *Matter of Devison-Charles*, Interim Decision #3435 (BIA 2000).

The BIA's original decision in this case found that an adjudication of YO status pursuant to New York Criminal Procedure Law Article 720 is "similar in nature and purpose" to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), 18 USC 5031-5042 (1994 & Supp. II 1996). Reaffirming that an adjudication of juvenile delinquency is not a criminal con-

**Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. Sejal R. Zota is working with the Project on a Kirkland & Ellis New York City Public Service Fellowship. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.*

viction for purposes of the immigration laws despite recent broad readings of the new statutory definition of conviction, the Board held that the same reasoning applied to a New York YO adjudication. See the *Backup Center REPORT*, Vol. XV, #8, at pg. 5.

In its decision denying reconsideration of *Devison-Charles*, the BIA rejected the INS argument that New York's YO procedure parallels an adjudication under the former Federal Youth Corrections Act (FYCA), which the BIA would consider a conviction for immigration purposes. The Board stated:

"As we pointed out unanimously in our prior decision, there is a significant difference between the FYCA and the New York law in that under the FYCA a conviction was set aside on the basis of the offender's subsequent good behavior, whereas under the New York youthful offender procedure the conviction is vacated immediately and unconditionally once the offender is accorded youthful offender treatment."

Matter of Devison-Charles, supra, at pg. 22

The BIA also rejected INS arguments based on differences between New York YO procedures and the FJDA, stating: "In our prior decision we recognized that there are differences between the state statute and the FJDA. Nevertheless, we concluded that the state procedure is sufficiently analogous to the FJDA to classify and adjudication under the New York procedure as a determination of delinquency, rather than as a conviction for a crime. We are not inclined to revisit the issue." *Matter of Devison-Charles, supra, at pg. 22.*

The New York State Defenders Association, along with the Legal Aid Society of the City of New York and the New York State Association of Criminal Defense Lawyers, had filed an *amici curiae* brief in opposition to the motion for reconsideration.

2nd Circuit refuses to rehear decision holding a misdemeanor may be deemed an "aggravated felony" for illegal reentry sentencing purposes

On Dec. 12, 2000, the US Court of Appeals for the 2nd Circuit refused to rehear its Aug. 29, 2000 holding that amendments to the definition of an aggravated felony mean that certain misdemeanors can now be deemed aggravated felonies. The court had reached this conclusion in a federal criminal illegal reentry case. The defendant, who had been convicted of three misdemeanors prior to his deportation, was found to have been correctly subjected to the enhanced federal sentencing applicable to an illegal entrant whose prior deportation was subsequent to conviction of an aggravated felony. *US v Pacheco*, 225 F3d 148 (2d Cir. 2000).

In 1996, Congress had reduced the prison sentence threshold for a crime of violence or a theft offense to be

considered an aggravated felony for immigration purposes from “at least five years” to “at least one year.” In *Pacheco*, the 2nd Circuit held that the aggravated felony term, as amended, now included even misdemeanor crimes of violence or theft offenses if the prison sentence—whether actually imposed or suspended—was one year. See the *Backup Center REPORT* Vol. XV, #8, at pg. 6.

NYSDA, along with the American Immigration Lawyers Association and the National Immigration Project, had filed an *amici curiae* brief in support of the defendant-appellant’s petition for rehearing. *Amici* discussed legislative history demonstrating that Congress did not intend for the aggravated felony term to include misdemeanors, and legal precedent regarding the authority of the federal sentencing guidelines commentary, which defines felony as meaning only offenses punishable by imprisonment for a term exceeding one year. The rehearing petition was summarily denied without comment.

106th Congress adjourned without passing legislation to repeal any of the retroactive provisions of the harsh 1996 immigration laws

Congress adjourned for the year 2000 without passing HR 5062, legislation that would have provided a discretionary waiver hearing to a small number of lawful permanent residents who were retroactively deemed aggravated felons by the harsh 1996 immigration laws. A bipartisan bill, HR 5062 passed unanimously in the House of Representatives in September. Despite overwhelming bipartisan support for the measure, the Senate abandoned it during the December budget negotiations, pursuant to staunch opposition raised by Senator Phil Gramm from Texas.

Federal Court authorizes appointment of CJA counsel in federal habeas proceedings for noncitizen petitioner challenging removal order

In *Lawrence v INS*, Magistrate Judge Peck of the Southern District of New York appointed counsel pursuant to the Criminal Justice Act (CJA) for the petitioner who filed a federal habeas corpus petition under 28 USC 2241 to challenge the validity of his order of removal and his mandatory detention pending removal. The government opposed this appointment, arguing that the CJA does not authorize such appointment for challenge to administrative immigration orders. Judge Peck denied the government’s application to vacate the order, finding that federal law authorizes appointment of counsel in 2241 proceedings “whenever the United States magistrate or the court determines that the interests of justice so require.” 18 USC 3006A(a)(2)(B).

New York defense attorneys should advise former indigent noncitizen clients challenging their orders of removal that they may seek appointment of counsel

under CJA when seeking relief in federal court under section 2241, 2254, or 2255 of title 28.

New York County Supreme Court grants resentencing to avoid deportation

In *People v Cheung*, Oct. 30, 2000, New York County Supreme Court granted a 440 motion and resentenced a defendant to a term of imprisonment of 364 days in order to avoid his deportation. The defendant had been promised a judicial recommendation against deportation (JRAD) in 1983, as a condition of his plea. However, he was never granted a JRAD. While the legislation authorizing a JRAD has been repealed, New York defense attorneys should be aware of this case because it provides support for the idea of reducing a client’s sentence to avoid deportation.

INS releases memo authorizing the exercise of favorable prosecutorial discretion in low priority immigration cases

On Nov. 17, 2000, the INS released a memo explaining the exercise of prosecutorial discretion by its officers in determining which immigration cases to pursue. The memo specifies which factors can be taken into account in deciding whether to exercise prosecutorial discretion favorably, including immigration status, length of residence in the U.S., criminal history, eligibility for relief, and community attention. As the memo indicates, the exercise of prosecutorial discretion does not grant a lawful status under the immigration laws; there is no legally enforceable right to the exercise of such discretion.

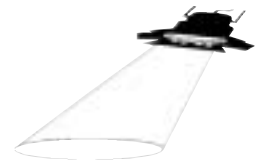
Defense attorneys and their noncitizen clients should be aware of the INS’s authority to exercise prosecutorial discretion, as clients are often approached and interviewed by the INS while awaiting resolution of a criminal case or when in prison. In sympathetic cases where a client has been approached by the INS, defense attorneys may want to get involved and use the memo as a tool to persuade the INS not to charge the client as being deportable. A copy of the memo is available on the Internet at: <http://www.ins.usdoj.gov/graphics/lawsregs/handbook/discretion.pdf> or from the Backup Center. ☞

ABA Award Nominations Sought

The Government and Public Sector Lawyers Division of the American Bar Association is accepting nominations for the Dorsey Award, which is given to a public defense or legal aid lawyer for outstanding work in providing legal services to indigent clients. The awards will be presented at the ABA’s Annual Meeting. Complete information about filing a nomination and the award are available on the ABA’s web site: <http://www.abanet.org/govpub/dorsey.html> or by contacting Theona Salmon at (202) 662-1023. **All nominations must be received by April 5, 2001.**

SPOTLIGHT ON THE WEB

Information Center for New York Public Defense



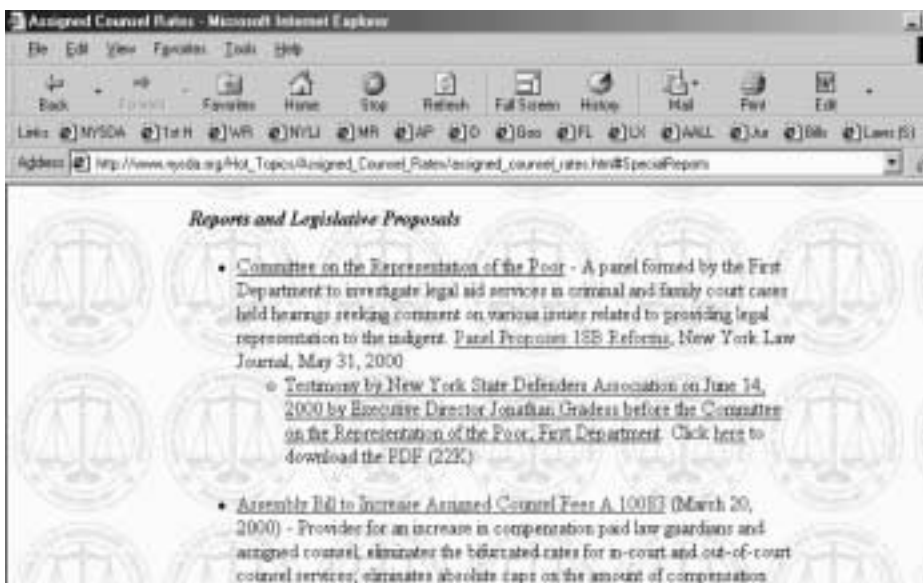
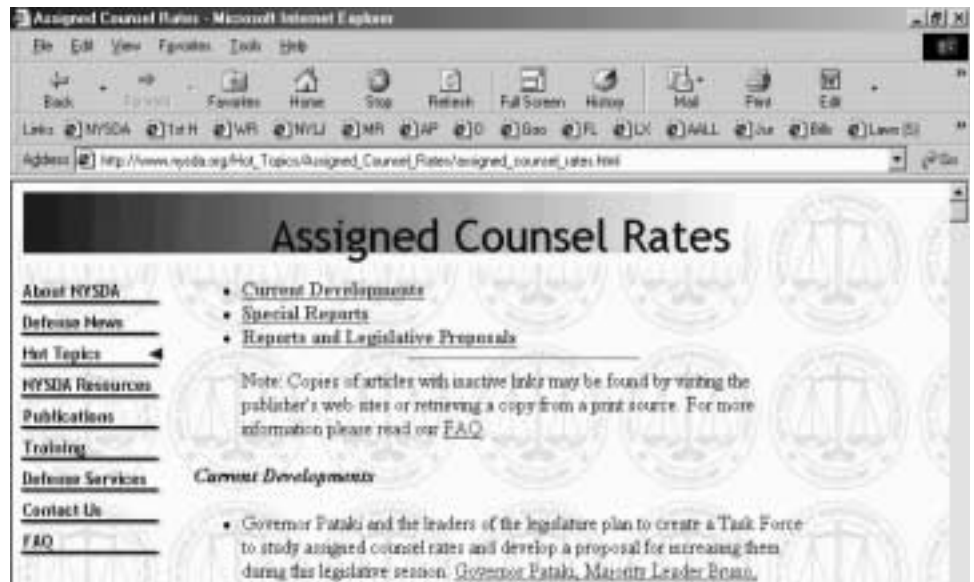
On NYSDA’s web site you will find: the largest collection of defense news on the web; more than a dozen hot topics pages; resources such as the Criminal Defense Immigration Project, Expert Directories, Public Defense Data, and NY Chief Defenders list; training calendars; thousands of Research Links; and much more.

New information and resources appear on the site regularly. In Spotlight on the Web we highlight one page or resource, providing a glimpse of what is available. Please visit our web site, www.nysda.org to view the spotlighted area and others in full, and give us your comments. We welcome suggestions for improving access to public defense information through the web.

HOT TOPIC: ASSIGNED COUNSEL RATES

Current Developments...

- Governor Pataki and the leaders of the legislature plan to create a Task Force to study assigned counsel rates and develop a proposal for increasing them during this legislative session. **Governor Pataki, Majority Leader Bruno, Speaker Silver Reach Agreement to Study Counsel Compensation Rates**, Governor’s Press Release, January 12, 2001
- New York County Lawyer’s Association has standing and stated a cause of action in lawsuit challenging assigned counsel rates. **Lawyers’ Group**



Reports . . .

Assigned Counsel Compensation in New York: A Growing Crisis (OCA January 2000) “This Report outlines the historical role of assigned counsel in New York, and it describes the dramatic impact that the exodus of attorneys from the assigned counsel panels has had on the justice system. The Report also discusses the Judiciary’s recent efforts to convene representatives of the bar, law enforcement and local government to devise a solution to this problem.” ☺

Case Digest

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.

Ed. Note: Due to computer problems, a number of case summaries, including cases predating those summarized here, could not be included in this issue. Those case summaries will be included in a future REPORT and will appear in the next Case Digest System update.

United States Supreme Court

Due Process (General) DUP; 135(7)

Evidence (Sufficiency) EVI; 155(130)

Fiore v White, No. 98-942, 1/9/01

The petitioner was charged with violating a Pennsylvania statute by operating a hazardous waste facility without a permit. After his conviction became final, the Pennsylvania Supreme Court interpreted the statute, for the first time, in a co-defendant's case. The court in that case found that where the defendant did in fact have a permit, although he deviated from the permit's terms, he could not be found to have operated a facility "without" a permit. The state courts denied the petitioner collateral relief, and after a federal district court granted him habeas corpus relief, the 3rd Circuit reversed, finding that the state supreme court's ruling had been a new rule of law. The state supreme court, responding to a certified question on that issue (528 US 23 [1999]), made clear that retroactivity was not an issue in the petitioner's case.

Holding: The petitioner's conviction and continued incarceration on this charge violate due process. For a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt is a violation of the 14th Amendment. *Jackson v Virginia*, 443 US 307, 316 (1979). No evidence was put forth to prove that the petitioner did not possess a permit, a required element of the crime for which he was convicted. Judgment reversed, case remanded.

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

Glover v United States, No. 99-8576, 1/9/01

A probation office presentence report recommended grouping together the petitioner's labor racketeering, money laundering, and tax evasion convictions under federal Guidelines 3D1.2. The government objected to the

grouping of these convictions, and the trial court agreed. The petitioner contended that he was denied effective assistance of counsel because his attorneys failed to pursue the issue, and therefore he was sentenced to an additional 6 to 21 months, affirmed on appeal. The petitioner filed a *pro se* motion to correct his sentence, which the district court denied. The 7th Circuit affirmed because a 6 to 21 month sentencing increase was not significant enough to amount to prejudice for purposes of *Strickland v Washington*, 466 US 668 (1984).

Holding: The 7th Circuit erred by relying on *Lockhart v Fretwell*, 506 US 364 (1993) to hold that a 6 to 21 month sentencing increase is not prejudicial under *Strickland*. There is no obvious dividing line by which to measure how much of a sentencing increase is required to constitute substantial prejudice. Precedent suggests that any amount of actual jail time has 6th Amendment significance. Compare *Argersinger v Hamlin*, 407 US 25 (1972) with *Scott v Illinois*, 440 US 367 (1979). The merits of the petitioner's claim of ineffective assistance of counsel must still be determined, it now being clear that prejudice would flow from the asserted error. Judgment reversed, case remanded.

Second Department

Transcripts (Right to) TSC; 373.5(40)

People v Oglesby, No. 1997-08569, 2nd Dept, 10/16/00

The defendant was convicted of first-degree robbery and second-degree criminal possession of a weapon.

Holding: The indigent defendant should have been provided a copy of the suppression hearing transcript as requested instead of forcing him to go to trial without it. Failure to do so was reversible error. *People v Sanders*, 31 NY2d 463. Further, the defendant was improperly adjudicated a persistent violent felony offender. See Penal Law 70.04[1][b]; 70.08[1][a]; *People v Morse*, 62 NY2d 205. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Vaughan, J])

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)

Trial (Presence of Defendant) TRI; 375(45)

People v DePallo, No. 1998-06437, 2nd Dept, 10/23/00

The defendant was convicted on numerous counts of burglary, robbery, and murder.

Holding: The defendant's contention that he was deprived of the effective assistance of counsel because his attorney informed the court that the defendant intended to perjure himself is without merit. Counsel noted at sidebar at the end of the prosecution's case that he had told the defendant that the defendant was not required to tes-

Second Department *continued*

tify and that if he did, he should do so truthfully. Counsel elicited the defendant's direct testimony in narrative form. "A defendant's right to testify does not include a right to commit perjury." *United States v Dunnigan*, 507 US 87, 96 (1993). Attorneys must comply with the Professional Code of Responsibility and their ethical obligations to advance the best interest of the client while at the same time helping to prevent and disclose frauds upon the court. *Nix v Whiteside*, 475 US 175, 168-169 (1986). Withdrawal of counsel would not have resolved the dilemma but would rather have provided the opportunity for the defendant to successfully commit fraud or to further delay proceedings by repeating these actions.

The defendant's contention that his right was violated because he was not present at all material stages of the trial is also unfounded. The right to be present at all material stages of trial when a defendant might have "something valuable to contribute" (*People v Morales*, 80 NY2d 450, 456) did not apply to an *ex parte* conference between counsel and the court about the propriety of counsel's actions regarding the defendant's testimony, as the record reveals that the defendant would not have had a chance to affect the issue before the court. Any charge that the defendant's presence would have had a substantial effect on his ability to defend against the charges (*People v Spotford*, 85 NY2d 593, 596), impacting the outcome of the trial, is speculative and any violation of CPL 260.20 is, at best, *de minimus*. Judgment affirmed. (Supreme Ct, Richmond Co [Rooney, JJ])

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| Arrest (Probable Cause) | ARR: 35(35) |
| Evidence (Sufficiency) | EVI; 155(130) |
| Identification (In-court) | IDE; 190(24) |

People v Flores, No. 1998-06872, 2nd Dept, 10/23/00

Holding: The evidence was legally insufficient to find the defendant guilty of second-degree gang assault as it failed to establish that the complainant sustained a "serious physical injury" within Penal Law 10.00(10). *See People v Amon-Ra*, 239 AD2d 200.

At the suppression hearing the prosecution was unable to establish that the defendant's arrest was supported by probable cause. That the defendant was present at the scene and took flight when the gun was fired are as probative of his innocence as they are of his guilt. *See People v DeBour*, 40 NY2d 210. The arrest was unlawful and evidence that the defendant was identified in police lineups must be suppressed as the fruit of illegal police conduct. *See People v Dodt*, 61 NY2d 408. Given the insufficient evidence of gang assault, and the defendant's acquittal of all other charges, dismissal of the indictment is required under double jeopardy principles. *See People v*

Mayo, 48 NY2d 245. The prosecution is granted leave to resubmit any appropriate lesser included charges to the grand jury. If a new trial is to be held, the defendant is entitled to a hearing on whether an independent source exists for any in-court identification testimony. Judgment reversed, indictment dismissed without prejudice. (Supreme Ct, Queens Co [McGann, J at hearing; Rios, J at trial])

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| Arrest (Probable Cause) | ARR: 35(35) |
| Double Jeopardy (Lesser Included and Related Offenses) | DBJ; 125(15) |
| Identification (In-court) | IDE; 190(24) |

People v Galisia, No. 1998-06873, 2nd Dept, 10/23/00

Holding: The evidence was legally insufficient to find the defendant guilty of first-degree gang assault and first-degree assault as the evidence failed to establish that the victim sustained a "serious physical injury" within the interpretation of Penal Law 10.00(10). *People v Amon-Ra*, 239 AD2d 200. For the same reason, the charge of second-degree gang assault must be dismissed. However, since the jury was instructed not to consider second-degree assault (Penal Law 120.05[2]) if it convicted on first-degree assault, double jeopardy principles will not be violated by a retrial on second-degree assault. *See People v Charles*, 78 NY2d 1044.

At the suppression hearing the prosecution was unable to establish that the defendant's arrest was supported by probable cause. That the defendant was present at the scene and took flight when the gun was fired are as consistent with his innocence as with his guilt. *See People v DeBour*, 40 NY2d 210. The arrest was unlawful and evidence that the defendant was identified in police lineups should have been suppressed as the fruit of illegal police conduct. *See People v Dodt*, 61 NY2d 408. His conviction of fourth-degree possession of a weapon must be reversed. Before a new trial, the defendant is entitled to a hearing on whether there is an independent source for in-court identifications by any witnesses as to whom no hearing has yet been held. Judgment reversed, certain counts dismissed, new trial ordered on the remaining counts. (Supreme Ct, Queens Co [McGann, J at hearing; Rios, J at trial])

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| Instructions to Jury (Burden of Proof (Witnesses)) | ISJ; 205(20) (55) |
|--|-------------------|

People v Gray, No. 1998-11661, 2nd Dept, 10/23/00

A jury convicted the defendant on two counts of criminal possession of a controlled substance.

Holding: The trial court erred by granting the prosecutor's request for an improper jury instruction following defense summation concerning the prosecution's failure

Second Department *continued*

to call an officer present at the defendant's arrest. The trial court should not have instructed the jury that the prosecutor had made the officer available for the defense counsel to call as a witness. Further, the trial court should not have stated that the defense counsel "apparently chose not to" call this witness. The defendant was prejudiced by these actions because the jury was led to believe that the defense was now obligated to call the witness. *See People v Roman*, 149 AD2d 305. The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Giaccio, J])

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|--|--------------|
| Arrest (Probable Cause) | ARR; 35(35) |
| Double Jeopardy (Lesser Included and Related Offenses) | DBJ; 125(15) |
| Identification (In-court) | IDE; 190(24) |

People v Sanchez, No. 1998-07269, 2nd Dept, 10/23/00

Holding: The evidence was legally insufficient to find the defendant guilty of first-degree gang assault as the evidence failed to establish that the victim sustained a

"serious physical injury" within the interpretation of Penal Law 10.00(10). *See People v Amon-Ra*, 239 AD2d 200. For the same reason, the charge of second-degree gang assault must be dismissed. However, since the jury was instructed not to consider second-degree assault (Penal Law 120.05[2]) if it convicted on first-degree assault, double jeopardy principles will not be violated by a retrial on second-degree assault. *See People v Charles*, 78 NY2d 1044.

At the suppression hearing the prosecution was unable to establish that the defendant's arrest was supported by probable cause. That the defendant was present at the scene and took flight when the gun was fired are as consistent with his innocence as they are with his guilt. *See People v DeBour*, 40 NY2d 210. The arrest was unlawful and evidence that the defendant was identified in police lineups should have been withheld as the fruit of illegal police conduct. *See People v Dodt*, 61 NY2d 408. His conviction of fourth-degree possession of a weapon must be reversed. Prior to a new trial, the defendant is entitled to a hearing on whether there is an independent source for in-court identifications by any witnesses as to whom no hearing has yet been held. Judgment reversed, certain counts dismissed, new trial ordered on the remaining counts. (Supreme Ct, Queens Co [McGann, J at hearing; Rios, J at trial]) ⚖

From My Vantage Point

(continued from page 9)

of all fees paid; or even, down the road, that contract bidding be an alternative to assigned counsel programs. Regrettably, over time, each of these ideas has been suggested by New York public officials.

One Community Needs One Voice

To prevent these and other developments guaranteed to lower the availability and quality of defense services, it is necessary in 2001 for the organized defense bar—public defenders, legal aid societies and not-for-profit corporations—and the private assigned bar—numerous assigned counsel programs and several thousand lawyers—to unite and speak with one voice. We must understand that the long-term interests of our clients lie in the supervision of the system by those committed to client-centered representation. This is not a time to allow measures invasive of the right to counsel as a *quid pro quo* for an assigned counsel rate increase. It is not the time to ally with those who would feel no shame at radically undermining the right to counsel, nor the time to promote one defender delivery mechanism over another. The defense community needs to stand together to improve, preserve, and enhance representation of the poor. ⚖

Job Opportunities

👉 **Always check the NYSDA Web site for the latest job notices:**
www.nysda.org

PRISONER'S LEGAL SERVICES OF NY seeks applicants for two **Staff Attorney** positions (Ithaca and Plattsburgh). Previous legal service or civil rights experience preferred. Recent graduates with interest in Public Interest law are encouraged to apply. Serious need for Spanish-speaking staff. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references to Maria McGuinness, Human Resources Manager, Prisoners Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850; tel (607) 273-2283; fax (607) 272-9122.

THE LEGAL AID SOCIETY OF ORANGE COUNTY is seeking a **Staff Attorney** with criminal defense or family court background in the range of law clinic to three

years experience. Salary \$34,000 to \$47,000, excellent benefits. Send cover letter and resume to: Gary Abramson, Legal Aid Society, PO Box 328, Goshen NY 10924.

THE OSBORNE ASSOCIATION is seeking a **Family Ties Counselor** to implement parenting courses, child visitation services, and provide outreach to promote increased and improved relationships between incarcerated mothers and their minor children at Albion Correctional Facility. Required: Bachelor's degree in early childhood education, social work, or child psychology; 3 years experience as a counselor; experience working with families at risk and incarcerated women; excellent writing and communications skills; ability to multi-task; and a working knowledge of the NYS criminal justice system. Post-graduate courses in family development and family counseling a plus. Send cover letter and resume to: The Osborne Association, Inc., 135 East 15th Street, New York NY 10003; fax (212) 979-7652. ⚖

NYSDA Membership Application

I wish to join the **New York State Defenders Association** and support its work to uphold the Constitutional guarantees of all citizens accused of crimes to legal representation and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues:

\$50 Attorney \$15 Law Student / Other Student / Inmate \$25 All Others

I have enclosed a tax-deductible contribution: \$500 \$250 \$100 \$50 Other \$ _____

Name _____ Firm/Office _____

Address _____ City _____ State _____ Zip _____

Home Address _____ City _____ State _____ Zip _____

County _____ Phone (Office) _____ (Fax) _____ (Home) _____

E-mail Address (Office) _____ E-mail Address (Home) _____

Please indicate if you are: Assigned Counsel Public Defender Private Attorney
 Legal Aid Attorney Law Student Concerned Citizen

(Attorneys and law students please fill out) Law School _____ Degree _____

Year of graduation: _____ Year admitted to practice _____ State(s) _____

Checks are payable to the **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

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