

# From My Vantage Point

by Jonathan E. Gradess\*

## Islands of Hope

Yes, there is still much repression. Courts are fearful. Executive authority has been released from constitutional moorings. The Legislature panders. It is a bad time to be labeled a sex offender, or an anarchist or a drunken driver, and a bad time to represent one also. All true. I know it and you know it.

Yet as we approach our annual membership meeting and conference, I cannot help but think about the good things that have happened this year. And in these I see islands of hope.

## The Death Penalty Remains Blocked

Twelve months ago the Court of Appeals imposed a court-ordered moratorium on the death penalty in New York. At our last summer meeting we honored the men and women of the Capital Defender Office (CDO) for that victory. But now, a year later, more islands of hope have emerged, building on what was feared to be but a temporary victory. Thousands of citizens across our state have called for an end to the death penalty. The New York State Assembly held unprecedented hearings between December and February with 170 witnesses, almost all of whom spoke against capital punishment. Consensus grew that the system was broken beyond repair. A permanent statewide infrastructure for New Yorkers Against the Death Penalty has been created and relationships among a broad spectrum of death penalty opponents have solidified. Two legislative committee chairs, long time advocates of the death penalty, publicly switched their votes. Many other members—including Republicans—also switched, less publicly, and the Assembly Codes Committee held the Governor's "quick fix" bill in Committee. Though the CDO has become a casualty of its own success—struck a budget deathblow by the Governor—New York has pursued a course long hoped for. On April 12th we became the first state since *Furman v. Georgia* (1972) to have reinstated capital punishment (1995) and then abolished it (2005). Much continues to be done to hold the line and preserve this victory, but surely this has been a great year for death penalty abolitionists and for those wishing for a fairer system of criminal justice.

## New Statewide Standards Offer Guidance; Commission Support Grows

The year also saw the passage of defender standards and broadening support for the Independent Public Defense Commission. Last summer the Chief Defenders approved and the NYSDA Board adopted *Standards for Providing Constitutionally and Statutorily Mandated Legal*

*Representation in New York State*. The Chiefs also voted in favor of the Commission, which the Board had already done.

The Association's Client Advisory Board, which has been drafting and refining Client-Centered Representation Standards for some time, presented those standards publicly on Gideon Day this March.

And in April, the House of Delegates of the New York State Bar Association passed *Standards for Providing Mandated Representation*. Together, all these standards are already helping to show the way toward better practice.

The new standards can be used to encourage quality representation, but New York needs an entity to enforce statewide standards, and recent progress in that direction is encouraging. In four public hearings held around the state since February, the New York State Commission on the Future of Indigent Defense Services [Kaye Commission] has heard witness after witness call for state oversight and standards and increased state funding. It is clear that a broad consensus exists for standards-driven, state funded, structured oversight of the public defense function, and equally clear that many New Yorkers enthusiastically endorse NYSDA's call for an Independent Public Defense Commission.

Significantly, a host of witnesses and some organizations are calling for even greater State involvement, with suggestions for complete State takeover of the defense function (New York State Association of Counties), the creation of a Defender General or State Defender (New York State Association of Criminal Defense Lawyers), and full state funding and administration of public defense services (American Civil Liberties Union and the National Association of Criminal Defense Lawyers). And the New York Civil Liberties Union is exploring lawsuits against the State to require it to live up to its constitutional obligation to administer an adequate system of public defense representation.

Against this backdrop, the Spangenberg Group is performing a statewide defense assessment for the Kaye Commission. State Chief Administrative Judge Jonathan Lippman has produced a new rule to try and assure more prompt appointment of counsel, and we continue to be called upon to help structure improved defender delivery systems.

## Legislative Reform Offers Hope

The last year has delivered two reforms of the Rockefeller drug laws, the Forgotten Victims of Attica have received compensation, and we are death penalty free. At the end of March, state money for public defense flowed to counties for the first time from the Indigent Legal Services Fund. These are all islands of hope.

\* Jonathan E. Gradess is NYSDA's Executive Director.

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(unbeknownst to all) one of his two trial lawyers was not admitted to practice law. Lead counsel had been duly admitted.

*People v Joan Suarrcy-Bongarzone* — (1) When a family member hires an attorney for the defendant, and then the attorney communicates her representation to the proper police authority, has the suspect's right to counsel indelibly attached such that the suspect cannot disavow that representation outside the presence of that attorney? (2) When a person enters a police station and confesses to murder, is that person then in custody for the purposes of Miranda warnings?

*People v Matthew Waldron* — (1) CPL §30.30: the excludability of pre-indictment delay where defense counsel sought to postpone the grand jury proceeding in order to secure a favorable plea bargain. (2) Whether trial counsel was ineffective for not objecting to the prosecutor's opening and closing statements.

*People v Santos Suarez* — Whether, where the defendant deliberately stabbed the deceased three times with a kitchen knife, the evidence made out "depraved indifference" murder (*People v Payne*, 3 NY3d 266)

*People v Calvin Moore* — Whether, by walking away from the police, a defendant elevates the predicate supplied by an anonymous tip from a level two to a level three (reasonable suspicion), thereby justifying a stop and frisk.

*People v Sandro Lopez* — Whether the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid waiver of the right to appeal.

### III. NEW LEAVE GRANTS

*People v Winston Nicholson* — (1) Whether appellant's waiver of the right to appeal was unknowing and involuntary when he was advised that he waived the right to appeal "by pleading guilty." (2) Whether, alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v Yolanda Billingslea* — (1) Whether appellant's waiver of the right to appeal was unknowing and involuntary when she was advised that the appeal waiver was an automatic consequence of the guilty plea. (2) Whether, alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v John Boyer* — The scope of the Wharton "confirmatory identification" exception to the CPL §710.30 notice requirement: Whether a police officer's fleeting glimpse of a suspect many floors above him on a fire escape at night permits the subsequent show-up identification to be classified as "confirmatory" and thus not subject to ID notice.

*People v Gerald Garson* — (1) Whether grand jury evidence of counts of receiving reward for official misconduct was insufficient, where judge's duty as a public servant was defined solely by reference to the Rules of Judicial Conduct. (2) Whether count charging official misconduct was multiplicitous.

*People v Trisha McPherson* — (1) Whether there was sufficient proof of depraved indifference (as opposed to intentional) murder, where the People's proof showed only that the defendant stabbed her abusive boyfriend a single time after he pushed her during an argument. (2) In a case in which trial counsel raised a battered woman's defense, whether counsel was ineffective for failing to investigate abuse witnesses and to obtain corroborative hospital records.

### IV. CAPITAL APPEALS PENDING

*People v Robert Shulman* — 21 issues. For details see the Court of Appeals Update in the last issue of the *REPORT* or on the website.

*People v John Taylor* — Appeal as of right directly to Court of Appeals from Queens County conviction for capital offense. Defendant was convicted in the "Wendys" slayings. Appellant's brief due April 2006. ♪

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#### **Defender Institute BTSP Participants Represent Hope**

What represents the most permanent island of hope for me came just weeks prior to this writing, at our Defender Institute. This year's class of 56 defenders from across the state came to the week filled with remarkable zeal. They soaked up information, contributed wise counsel to one another, and went away with a resounding commitment to client-centered representation. Each member of the class represented an island of hope for me, for our staff, and for the dedicated coaches who come from across the country to help train these committed members of the defender community.

#### **Cherish These Glimpses of a New Day**

I know for some of you this column may sound a little too rosy. I know this from the 1200 cases we do with you each year, from our visits to your offices, your counties and your legislative bodies, and from your many calls regarding budgets. This year has not been rosy in the trenches. The daily battles with time-driven judges, discretion-challenged DAs and resource-starved offices are depressing, exhausting and recurring. But we never know how close we are to a new day.

This year gave us some glimpses of that day to cherish. I hope you will cherish them with me. ♪