

From My Vantage Point

by Jonathan E. Gradess*

WHY WE NEED THE COMMISSION NOW

At the recent Annual Dinner for the Homeless Action Committee in Albany, a good friend of mine from one of the larger Legal Aid Societies in the State was pleasantly surprised when I described why I remained optimistic about the chance for public defense reform *now*, even in the midst of the current fiscal downturn. Because she seemed buoyed by my thinking I thought it would be good to share my thoughts with readers.

The economic emergency is actually a reason to begin the independent public defense commission *now*. The long term benefits of state oversight, particularly its economic ones, cannot be realized without a structure that takes hard looks at long-standing questions: the improvement of quality, the scope of the right to counsel, including converting many jailable offenses to civil penalties; the generation of new and creative revenue streams, broadening the base for financing defense services; and the development of private and public partnerships to enhance funding support, including building an endowment for the services. All of these are tasks for the early phase-in years of the IPDC.

This is a positive moment for the Governor to begin the IPDC because expectations will be so reduced that those who know the great need for reform will be delighted with modest beginnings. Inclusion of the IPDC in the budget even at such a level will signal a strong commitment. More importantly, implementation planning for infrastructure can be done incrementally to keep costs reasonable, with the economy at its nadir, while still focusing on important goals that need to be reached in the first couple of years: establishing the Commission's members, bringing on a competent core staff, evaluating current programs against existing standards, designing regions, developing a case management system, record keeping programs and databases for decision-making, and standards development. There is an already identified revenue stream, the Indigent Legal Services Fund (ILSF), to pay start up costs. Significantly the ILSF now anticipates \$15 million more next year than initially projected and in some cases relied on for county budget development.

This is an opportune moment for action for another reason. The lawsuit against the State has survived a motion to dismiss, and five counties have now been joined as defendants. Several former Court of Appeals Judges—Joseph Bellacosa, George Bundy Smith, and Stewart F. Hancock—and others have editorialized about the value of settling *now*. The counties and the State would benefit from the settlement as would the plaintiffs

because more can be controlled through negotiation than through litigation. As an added advantage, implementing the vital recommendation made by Judge Kaye would pay a meaningful tribute to her as she leaves the bench at the end of 2008.

Many many people want this reform *now*. More than 160 groups statewide have joined the Campaign for an Independent Public Defense Commission. These include the New York State Association of Criminal Defense Lawyers, National Bar Association Region II, Womens Bar Association of New York, NYSDA, and other bar associations as well as scores of church groups, Community Action programs, other service organizations, and good government groups. (See the full list at www.newyorkjusticefund.org/campaign.htm). Several hundred individuals have joined the campaign. The New York State Bar Association supports implementation of the Kaye Commission recommendations as does the Black, Puerto Rican, Hispanic and Asian Caucus in the Legislature. The IPDC has bi-partisan support. A bill that would establish the IPDC (S.4311-A/A.9087-A) is sponsored by one of the state's best-known Republican Senators and is supported by a majority of Assembly members. Counties and cities are passing resolutions favoring the idea. The New York State Association of Counties (NYSAC) passed a resolution supporting state takeover of public defense services, and the Campaign is working with NYSAC to design the mechanics of reaching that goal through a fair and reasonable formula that protects counties from untoward economic consequences.

Most importantly, and also quite relevant to the fiscal crisis, New York is beginning to understand that it cannot continue systems that propel people mindlessly toward prison, it cannot fail to restore the lives of those released, and it must begin to embrace structures and ideas long rejected. Appreciating the high costs of collateral consequences and understanding recidivism have led the state to explore reentry programs. Recognizing the relationship of crime and substance abuse has led to drug courts. Appreciating alternatives to criminal justice processing for substance abuse has led to the decriminalization of public intoxication and marijuana possession.

It is now time for the State to recognize the pivotal role that adequately-funded, well-equipped defense services can play in reducing our inappropriate and highly costly overreliance on jails and prisons. If you starve the defense, so that lawyers stumble forward in courtrooms after only a few hurried and hushed moments of client hallway conversation, you end up with a system where people are *wrongly incarcerated* (meaning sent away for something they didn't do). They are *over incarcerated* (meaning sent away for a longer period than their culpability would warrant). And they are *unnecessarily incarcerated* (meaning locked away when keeping them in the

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Fourth Department *continued*

grand jury. (County Ct, Allegany Co [Euken, J (judgment); Michalski, J [proceedings after remittal])

Identification (Eyewitness) IDE; 190(10) (35) (57)
(Photographs) (Wade Hearing)

**People v Hill, 53 AD3d 1151, 860 NYS2d 780
(4th Dept 2008)**

Holding: The court erred in denying the defendant's motion to suppress the pretrial identifications. "The witnesses identified defendant from photo arrays that were compiled using a photograph of defendant taken after an illegal arrest, and thus those identifications should have been suppressed as the fruit of the illegal arrest (*see People v Dodt*, 61 NY2d 408, 417 . . .). Because none of the witnesses testified at the *Wade* hearing, the People did not establish that each witness had an independent basis for his or her in-court identification of defendant (*see [People v] Walker*, 198 AD2d [826] at 828 . . .)." Judgment reversed, motion to suppress pretrial identifications granted, and matter remitted for a new *Wade* hearing and a new trial, if the prosecution are so advised. (Supreme Ct, Erie Co [Burns, JJ]) ⚖

Defender News *(continued from page 6)*

Part1.pdf.) The Commission's recommendations include consolidation of the justice courts, instituting new minimum age and education requirements for justices, and giving criminal defendants the option to have their cases heard by attorney justices. Concluding that it would be impossible to make the necessary improvements to the justice courts as they currently exist, the Commission proposes that the state legislature set up review panels in each of the state's 55 upstate counties that would develop court consolidation plans in accordance with specific guidelines and standards. The report provides extensive details regarding the composition of the review panels and the review process.

The other report, *Action Plan for the Justice Courts: Two Year Update* provides a review of the Office of Court Administration's implementation of the November 2006 plan for the justice courts. (www.nycourts.gov/whatsnew/pdf/JusticeCourts2YearUpdate9-08.pdf.) Some of the completed objectives discussed in the report are: supervising judges have been appointed for each judicial district outside of New York City and attorneys have been assigned to assist the supervising judges; all the justice courts have received digital recording equipment to ensure compliance with Rule 30.1 of the Rules of the Chief Judge, which requires all justice court proceedings to be recorded; and a redesigned education and training

program has been implemented for justices and clerks, including a new seven-week pre-bench training program for non-attorney justices. Of particular note, supervising judges are required to work with the justice courts to assure that defendants financially unable to hire an attorney have counsel. ⚖

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community would have sufficed or been *more* effective at ensuring the community's safety).

These three categories represent thousands of people currently facing costly wrongful imprisonment in this State. Defense lawyers know what we need to make a difference in the lives of people in each of these categories to keep them out of jail and prison. At present we don't have those things, including time, access to experts and client services, and a partnership role in the State's effort to reduce its own addiction to incarceration.

We are asking New York State to join us in a paradigm shift. To recognize that when defenders are adequately trained, paid, and given resources, benefits will flow to the State at the same time they flow to our clients. Lawyers who do not have to ask about clients' cases while standing next to them before the judge; lawyers who know their witnesses before calling them to the stand; lawyers who have investigated facts, and researched law, traced family histories, and found prior critically important records; lawyers who have worked with client employers; and lawyers who make collegial decisions with clients—these lawyers can be true advocates, not disempowered cogs in an administrative processing apparatus. They become trusted gatekeepers preventing the wrongful incarceration of their clients.

New York needs an Independent Public Defense Commission that will build a competent, well-funded public defense system around the gatekeeper function just described, protect it from negative political interference, and administer it in a way that helps clients and the State both reach their goals.

The time for beginning the Independent Public Defense Commission is *now*. ⚖

2008 Legislative Review *(continued from page 16)*

- S.7616-a — uniformed marine patrol officers in Cayuga County
- S.7729-a — village of Lake George seasonal constables
- S.8106 — uniformed officers of the fire marshal's office of the town of Huntington
- S.8183-a — uniform members of the bureau of fire prevention of the town of Islip
- S.8205 — security officers for the town court of the town of Alden
- Chap. 564 — certain employees of the New York City business integrity commission ⚖

NYSDA MEMBERSHIP APPLICATION

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