

MONDAY, JULY 28, 2008

In defense of a need to remedy public defense

By JOSEPH BELLACOSA

Auto mechanics tell their customers that when it comes to preventive maintenance, they can pay now or they can pay much more later. The lesson and the warning apply even more to New York State's dilapidated public defense system for those who cannot afford privately retained counsel. But now there's an opportunity for reform.

Chief Judge Judith S. Kaye's blue ribbon Commission on the Future of Indigent Defense Services found that the current system of public defense is a fragmented, county-based, essentially unaccountable, underfunded "ongoing crisis." I'd characterize it further as a mess.

This crisis directly impacts and disserves thousands of real people. Last year a class-action lawsuit, mirroring the findings of the report to Judge Kaye, was also started to seek a financial and systemic set of remedies as a solution for this "ongoing crisis."

The bottom line of the commission report and the lawsuit is a call to repair and remedy public defense. The lawsuit pending in Supreme Court, Albany County, identifies five counties, including Suffolk, as illustrative of constitutional defects - that is, services demonstrating disparities so disproportionate and lacking in essential aspects that they really aren't services at all. The current system is so fundamentally flawed that it warrants a judicial declaration of unconstitutionality.

So the lawsuit and report tee up a real opportunity for courageous leadership. Gov. David A. Paterson, Attorney General Andrew Cuomo, Comptroller Thomas DiNapoli, the legislative leadership - including, especially, new Senate Majority Leader Dean Skelos (R-Rockville Centre), working with Assembly Speaker Sheldon Silver (D-Manhattan) - should move to fix the crisis, end the mess and do the right thing by creating the proposed statewide Independent Public Defense Commission.

Losing this lawsuit - a realistic possibility - could disrupt the orderly processing of criminal proceedings, delaying pending prosecutions until the public defense system is fixed. It could also open post-conviction proceedings by defendants asserting they were tried under a constitutionally deficient system.

How much better it would be to do the right thing with initiative and leadership, rather than by external compulsion.

Recent experience in Montana, where the ACLU challenged its county-based public defense system, offers some guidance. Montana's Democratic attorney general asked the parties for the opportunity to change the system, and a Republican state senator joined the effort to create an independent Montana Public Defender Commission.

Similar efforts, in some cases spurred by lawsuits, are under way in states as diverse as

Utah, Louisiana, Michigan, North Dakota and Kentucky.

In New York, unrelenting efforts to create an Independent Public Defense Commission are under way and supported by every major legal, civic, religious and community group that has looked at the issue, including the New York State Bar Association. Paterson expressed support for creating an independent commission in a recent public forum. Unfortunately, the legislature took no action in the last session. So the opportunity for a solution searches for leadership and a jump start to escape the grip of litigation.

Implementing the Kaye Commission's recommendations for a state takeover of New York's public defense system would provide other advantages. It would lift an unfunded mandate from counties, which collectively pay more than a quarter-billion unreimbursed local tax dollars a year providing public defense services mandated, but not paid for, by the state.

These may be lean and hard fiscal times, but my 30 years in various roles in the judicial branch taught me there are smart ways to work through road bumps.

And the cost is measured in more than dollars. It's paid every day by poor people incarcerated because of their inability to gain even temporary freedom so as to mount an effective defense to charges against them. A system

of "meet 'em, greet 'em and plead 'em" - a description from Louisiana, that's also applicable to New York, where overworked defense attorneys actually don't even meet clients before disposition hearings - is a recipe for wrongful convictions and a

pervasive lessening of respect for the rule of law.

The path to fixing the public defense crisis has been laid out by the Kaye Commission. Albany decision makers should now lead and embrace the challenge and opportunity posed by the lawsuit

and do what their own independent experience and good judgment must show them to be the right thing: Create a statewide Independent Public Defense Commission and honor our state's pre-eminent and treasured commitment to equal justice.

Joseph Bellacosa, a resident of Garden City, was a judge of the New York Court of Appeals.

Copyright © 2008, [Newsday Inc.](#)