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Criminal Defendants Still Denied Timely Appeals

By R. Nils Olsen, Jr.

There is no constitutional right to a direct appeal of a state-imposed criminal conviction. Having made a right of appeal available, however, the state is obligated to avoid impeding effective access to its corrective process. Fundamentally, an excessive delay in adjudicating a prisoner's appeal may constitute a denial of due process of law, as guaranteed by the Fourteenth Amendment.

In Erie County, indigent criminal appeals to the Fourth Department of the Appellate Division are handled by the Legal Aid Bureau of Buffalo (LAB), pursuant to a contract with the County. At least during the past four years, these cases have been systematically denied reasonably prompt appellate access.

As of Oct. 22, 1987, there was a backlog at LAB of nearly 414 unperfected criminal appeals. The delay in perfecting appeals ran nearly three years from the date of assignment of counsel. Thirty-two unperfected appeals had been assigned to LAB before 1983, with two more than seven years old.

Prejudice from the deprivation of reasonably prompt corrective process is apparent. Those sentenced to relatively brief terms of imprisonment, up to five years, may never have the legitimacy of their convictions assessed while in custody. It is true that relatively few will ultimately prevail on their direct appeals. However, those with sufficiency of the evidence or double jeopardy claims which are sustained cannot be re-prosecuted. Time spent in confinement is forever lost and can never be adequately compensated. Those who obtain tardy reversals on other grounds might earlier have been acquitted on retrial, nego-

tiated new pleas for time served or, as a matter of prosecutorial discretion, gone free without re-prosecution. Even those whose convictions are ultimately affirmed pay a heavy price, despairing over the long delay, developing justifiable skepticism concerning the integrity of legal institutions and directing their attention away from whatever minimal opportunities for rehabilitation our "correctional" system provides.

Causes of endemic appellate delay in Erie County are complex. Both the State and the County have contributed to the problem. As with other federally-mandated services, New York passes the obligation to provide representation to indigent criminal defendants on to the Counties. This system burdens smaller units of government with more restricted means to pay. Politically unpopular line items in County budgets are susceptible to challenge and must survive competing demands from other more acceptable groups.

Erie County has failed to comply with its state-imposed mandate, underfunding its contract with LAB through the years. The Erie County Executive and Legislature have consistently ignored the cries of alarm concerning backlog, both by the Bureau and, in an unprecedented appearance last year, by Chief Judge Michael Dillon of the Fourth Department. The County has further failed to monitor the performance of its designated counsel, to establish reasonable standards or to inquire concerning the developing backlog of representation.

LAB has also played a role. Persistent underfunding, with a growing backlog of unrepresented clients, and a salary scale much lower than that paid for equivalent

work by the district attorney, unquestionably led to disillusionment and the failure to retain committed, highly skilled senior staff. Serious management questions can also be raised, particularly concerning both internal allocation of resources to a vestigial civil division when mandated services remain unmet, and the failure to fully implement policies to maximize the effectiveness of limited resources.

Another factor in the appellate delay over the years has been administrative problems in state courts. Until recently, the Fourth Department lacked computer capability and had no way to monitor, or even be aware of, the status of these appeals. Unlike the federal system, the Court had no plan for indigent criminal appeals which set forth obligations for assigned counsel or time periods for perfecting appeals. As a result, cases languished for years unperfected with no active oversight or involvement by the Court.

The Erie County district attorney's office generally files responsive briefs promptly and has not directly contributed to delay. However, under Appellate Division rules in effect until recently, the only way to bring delay to the Court's attention was by motion of the district attorney to dismiss for failure to prosecute. Because it was almost never in the adversarial interest of the People to bring such motions, which would usually result in imposition of briefing schedules, requests to dismiss were not brought until recently. The district attorney, through his silence, thus implicitly permitted the backlog to accumulate without judicial intervention.

Counsel who represent criminal defendants at trial also have contributed to



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appellate delay. Private practitioners provide pre-trial and trial representation to indigent criminal defendants in Erie County. Pay for such services is low and generally ceases upon entry of judgment. Accordingly, there is little incentive, beyond individual notions of professional responsibility, to engage in post-sentence representation by filing *in firma pauperis* motions in the Appellate Division or by promptly communicating with LAB concerning possible error. Failures of some assigned counsel to promptly file pauper's motions, and of nearly all to meaningfully assist assigned appellate counsel, further impede the process.

The bar, too, must take some responsibility for the torpid pace of indigent criminal appeals. Until the problem was in the public spotlight, bar involvement was minimal. The Erie County Bar Association Committee on Criminal Law did establish a distinguished sub-committee which issued a detailed report on the crisis of 1988. Little other direct assistance in resolving the problem as it developed was given, however. The duty to ensure that the judicial system is available to all, irrespective of

means, is a responsibility of the bar.

Despite all of the difficulties detailed above, the story is not all bleak. On Nov. 19, 1987, a class action application for a writ of habeas corpus, on behalf of all LAB clients whose appeals had not been perfected within six months of Notice of Appeal, was filed in United States District Court. This case is presently proceeding before Magistrate Edmund Maxwell, on referral from District Judge John Elfvin. It stands as a stark reminder that the underfunding of indigent criminal appeals, and the lack of concern and involvement it represents, does carry a cost. If the crisis is not addressed and corrected, ultimate federal intervention, ordering class-wide release pending perfection of appeals, could be the result.

Other steps to address the problem directly have been taken. The Appellate Division, effective Jan. 4, 1988, promulgated an Indigent Criminal Appeals Management Plan which imposes meaningful deadlines for perfection of appeals and establishes a Criminal Appeals Council to make resource recommendations to the Court. The private bar has also mobilized.

On Jan. 12, 1988, County Executive Gorski wrote to law firms seeking *pro bono* assistance to reduce the backlog. At least 70 of the older pending appeals have been undertaken by local firms.

LAB resources have also been increased. Through a County special appropriation and internal reallocation of responsibilities of staff assigned to other units, LAB has augmented the number of attorneys assigned to perfect indigent criminal appeals. Efforts have been undertaken to comply with the Fourth Department's new deadlines for perfection.

While progress has been made in addressing the problem, and public and legal profession awareness has been heightened, more remains to be done. A large number of indigent criminal defendants are still being denied timely access to appellate consideration on the legality of their convictions. ■

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