CORNERSTONE

National Legal Aid & Defender Association

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Equal Justice Sees Progress on Capitol Hill

Congress approves increase for the Legal Services Corporation, hearings take place on the current state of public defense.

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— Reginald Heber Smith

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MESSAGE TO MEMBERS

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

Despite Challenges, Equal Justice Movement Forges Ahead with Renewed Vigor

By Rosita Stanley, Vice Chair for the NLADA Board of Directors

In these times of domestic and global political and economic uncertainty, we must recognize that our old paradigms and models are collapsing on themselves. Institutions, corporations, organizations, and people we used to trust as models of excellence are no longer valued as credible and reliable. The need for basic human services has expanded with the creation of the "new poor." Many people who used to wear the label of professional are now among the ranks of the poor. All of this is happening while the people who have been living in poverty prior to the economic meltdown have been forgotten. I recognize that the national economy needed a bailout for banks and other financial institutions. I am concerned, however, that too many people and politicians have focused on Wall Street, and Main Street without thinking of the people living on the side streets, alleys, and back roads.

Our nation can no longer afford to take people for granted. We cannot afford to have "throw away people." Our challenges are too great and the needs too complex to believe that only some people have something to contribute to the common good. Labels based on race, gender, ethnicity, income, class, sexual orientation and observable ability have little place in our public life. There are "no more throw away people." People with little economic means living in communities with minimal material wealth have knowledge, assets, and strengths to contribute to the larger community. Our challenge to create sustainable communities built on justice, compassion, and reconciliation requires us to collaborate radically. We must work differently in our efforts to build a just world.

Let's create culture within our programs and communities that are people centered, accountable, community-based, and empowering. People centered means that we must recognize the humanity in all individuals, families and communities. Moving beyond the status and position of individuals to embracing each person's aspirations, potential and contributions is a critical step in building equal justice. Let's use people centered language in relating to each other. Replace "ex-offender" with formerly incarcerated people. Substitute "differently able people" for "disabled" or "handicapped." This is not about being politically correct. It is about changing our mental models about our neighbor. Recognizing the difference between people based language and status driven distinctions allows us to see each other as total human beings instead of through the lens of the visible challenges.

It is time that we hold each other accountable for the commitments that we make. President Barack Obama created a new standard of accountability for leaders, communities, and organizations. We no longer have the luxury of extra money and time. The public trust requires us to deliver responsive services, quality representation and dynamic leadership.

If we are community-based in our focus and outlook, we will be perceived as genuine and authentic voices for change and transformation. It is not enough for us to have offices in or near the community. We must engage the community, embrace the community and collaborate with the community. A community-based approach to service and leadership means that we meet people where they are instead of requiring them to meet us where we are comfortable. People need and want their leaders and advocates to respect and understand them. Grounding our work in the perspective and reality of the people "who sometimes come to be served, and sometimes come to serve" will transform the community's view and opinion of us and our work.

If we create an environment that is empowers people to make the difference in the lives of their neighbors and colleagues, we will create meaningful change. It is time for leaders throughout the community to recognize the mutual existence of new and old voices. We must strive to hear and raise up the voice of the emerging leader and the seasoned advocate. We must recognize the concerns of the African American, Latin American, Native American and Asian & Pacific Islander. Our work can no longer exist and operate in a context of false choices or zero sum mentality. An empowering community is one that expands opportunities to speak, advocate and lead as we fight for equal justice in the larger society. Let's create the world we want in our programs, on our boards, and in our communities. ✩

WASHINGTON WATCH — CIVIL

Current Budget, Future Requests Include LSC Increases

By Julie Clark, Vice President of Strategic Alliances & Government Relations

The 111th Congress has kept NLADA unusually busy during its first three months. Typically there is a lull before the appropriations process begins in earnest and other legislative initiatives are launched. The combination of a new, energetic administration and the economic crisis the country is experiencing has jump-started the Congressional calendar considerably.

Stimulus Package

First on its agenda, after releasing the second installment of the Troubled Asset Relief Program (TARP), was the formulation and passage of a massive stimulus package. NLADA and our allies worked hard to target funds for legal services providers, both LSC and non-LSC, as they faced burgeoning demands for assistance with foreclosure, unemployment, healthcare, domestic violence and other recession-related issues. Unfortunately, we were unsuccessful in securing such funds in the Neighborhood Stabilization Program (NSP) because the $30 million dedicated to foreclosure-related legal assistance was not included in the Senate bill in an effort to secure 60 votes for its passage.

FY 2009 Appropriation

On February 25, the House passed the omnibus appropriations bill that included FY 2009 funding for the Legal Services Corporation (LSC). The Senate followed on March 10 and President Obama signed HR 1105 into law on March 11. The 11.4 percent ($40 million) increase, from $350 million to $390 million, was a welcome boost (in funding and morale) to programs facing imminent layoffs, increasing demand and a recent history of stagnant funding. The precipitous drop in IOLTA funding, caused by reduced balances and the diminution of interest rates, has only compounded their financial situations.

FY 2010 Appropriation

The Obama Administration sent a blueprint of its budget to Capitol Hill in late February. In mid-May the details were provided. The White House requested $435 million in funding for the Legal Services Corporation, an 11.5% increase over that received in FY 2009. It also recommended removal of restrictions to grantees' non-LSC funds, the claiming, collecting and retaining of attorneys' fees and participation in class actions. These restrictions, along with numerous others, have been in place in annual appropriations bills since 1996.

On June 4, the House Subcommittee on Commerce, Justice, Science and Related Agencies (CJS) recommended a $50 million increase for the Legal Services Corporation, which would bring the FY 2010 funding level to $440 million. This legislation also removes the current restriction on seeking attorneys' fees included in each appropriations' bill rider since 1996. The bill does not remove other restrictive riders, including restrictions on non-LSC funds and class actions, a removal of which had been sought by the Obama Administration in its budget request to Congress. It is possible, in the coming months, that the Senate version could include removal of these restrictions in its recommendation on LSC's FY 2010 funding level. NLADA continues to work diligently with her allies to remove the restrictions placed on the appropriation, with particular emphasis on the non-LSC funds restriction.

LSC Reauthorization

On March 26, Senator Tom Harkin (D-IA), a staunch supporter of legal services (and former legal aid attorney), introduced the "Civil Access to Justice Act of 2009" to reauthorize LSC. LSC has not been authorized since 1980 and has been guided by "riders" on annual appropriations bills, the most onerous of which were imposed in 1996 and have been continued each year thereafter. Harkin's bill would authorize $750 million for LSC, an amount (when adjusted for inflation) equivalent to that provided under the "minimum access" goal achieved in 1981. More importantly, it would provide the tools necessary for legal services lawyers to represent their clients effectively and efficiently, as well as broaden the categories of clients who may be served. A companion measure is being drafted in the House and should be introduced soon. There is no timetable for consideration by either body. A detailed description of the Harkin bill may be found in the April 9, 2009 issue of *Update*.

Nominations to LSC Board

On April 14, President Obama named Laurie Mikva to a fill a vacancy on the LSC Board. Mikva has a strong background in legal services. From 1992-2008, she was a staff attorney at Land of Lincoln in Champaign, Illinois, where she specialized in the areas of family law and domestic violence. From 1988-91, Mikva was assistant public defender in Urbana, Illinois and, before that, served in the Appellate Division of the Maryland Public Defender's Office.

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NATIONAL LEGAL AID & DEFENDER ASSOCIATION

Congress Takes First Steps in Public Defense Reform

By Richard Goemann, Director of Defender Legal Services

With the convening of a historic federal hearing on indigent defense, NLADA's reform efforts have entered a new world of challenges and opportunities. I hope that many of you have already watched the hearing via the Web. If you have not, please stop reading this Washington Watch column and take the time to do so. This development is too important for anyone in our community not to be as informed as possible (www.nlada.org/News/NLADA_News/2009032618086782).

The March 26 hearing before the U.S. House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security was entitled *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?* The subcommittee chair, Rep. Bobby Scott of Virginia, opened the hour and a half hearing with a broad overview that described many of the terrible public defense practices that NLADA found during our recent assessment in Michigan, as well as elsewhere around the country.

NLADA was proud to be represented by David Carroll, who testified before the House subcommittee about the failure of many states to live up to their Sixth Amendment constitutional obligations. The subcommittee also heard testimony from Dennis Archer, former mayor of Detroit and former president of the American Bar Association; Nancy Diehl, past president of the State Bar of Michigan and chief of the trial division for the Wayne County Prosecutor's Office; Erik Luna, professor of law at Washington & Lee University School of Law and adjunct scholar with The Cato Institute; Regina Daniels-Thomas, chief counsel of the Juvenile Law Group with the Legal Aid & Defender Association of Detroit; and Robin Dahlberg, senior staff attorney for the ACLU Racial Justice Program.

By the conclusion of the hearing, committee members and witnesses all agreed that many of our nation's indigent defense systems are in crisis. While this hearing began a conversation with our national leadership on the problems of indigent defense, it was followed by another hearing before the same committee on June 4. The second hearing began to focus on how the federal government can support states in guaranteeing the Sixth Amendment. As we know from our experience in advocating for the John R. Justice Prosecutors and Defenders Incentive Act, the path to federal legislation can be long and byzantine, but we are optimistic that we are beginning to move the ball through Congress.

One priority that is of utmost importance in many minds right now is federal funding for public defense systems. Currently and historically, federal grant funding for criminal justice systems has been funneled almost exclusively to police and prosecution agencies through numerous Department of Justice grant programs. The most visible programs for most of us, the Byrne/JAG grants, provide hundreds of millions of dollars to police and prosecution with few dollars reaching our funding-starved public defense programs. NLADA is working to correct that imbalance and achieve equity in the way the federal government funds state and local criminal justice systems, which ensures that public defense receives the support it needs in order to play its proper role in the adversarial system.

One of the tools we are using in our national advocacy is the new report by the National Right to Counsel Committee. The report can be downloaded at www.nlada.org/Defender/Defender_Publications/Defender_Publications_Home.

The Right to Counsel Committee is a bi-partisan group that includes persons with judicial, law enforcement, prosecution and defense experience, as well as policymakers, victim advocates and scholars. The membership also included a person who was convicted of a crime that he did not commit, sent to prison and later exonerated due to DNA evidence. NLADA, along with The Constitution Project, supported the creation of the committee and the development of the report.

As the first report ever by such a diverse group of experts to address the full breadth of indigent defense deficiencies from a national perspective, the committee's report carries the potential for carrying the message of reform across political and ideological perspectives. As such, it can be a particularly potent tool for supporting the work of chiefs and other reform advocates.

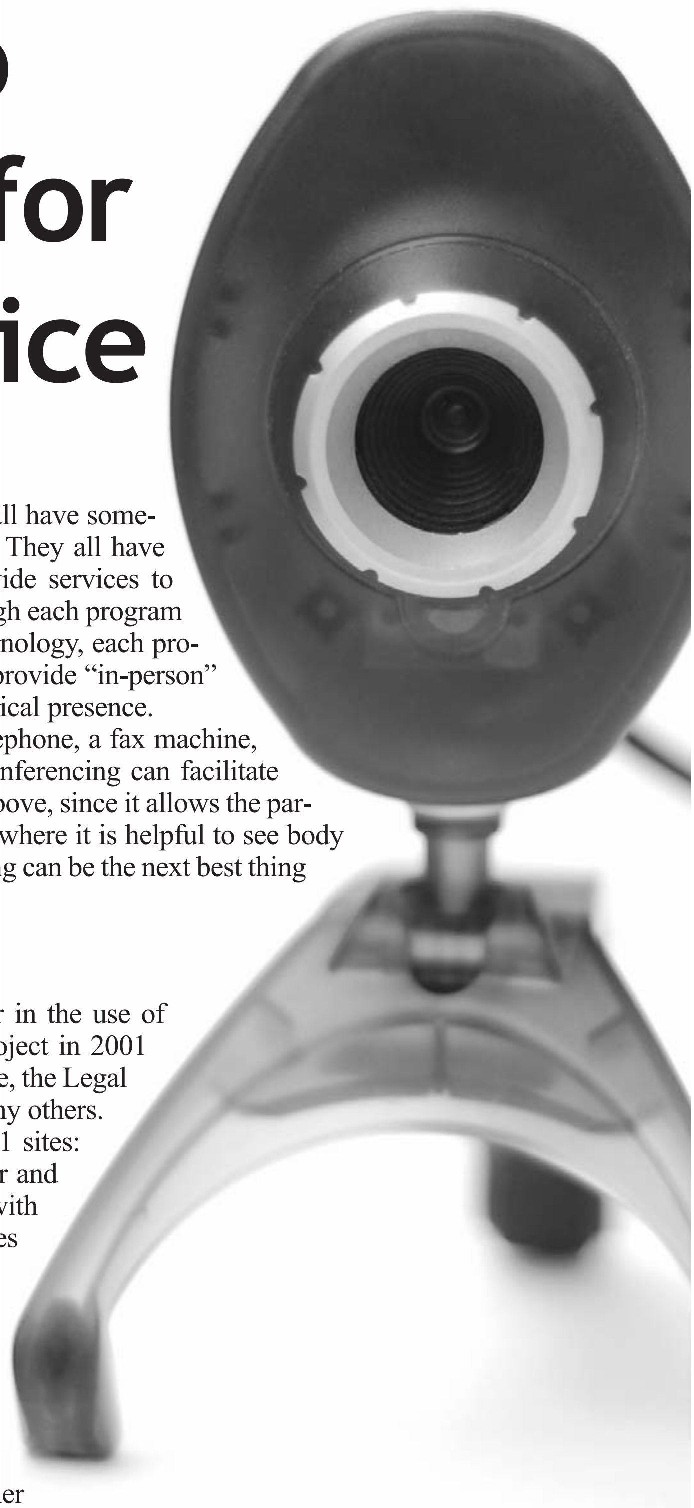
The Right to Counsel Committee concludes its report by making 22 recommendations directed at state and federal governments as well as at individuals, criminal justice agencies and bar associations. Of course, when a diverse group of experts makes a series of 22 recommendations, some of those recommendations are bound to prove provocative. But the ability of such a group to think differently and offer creative solutions which stretch the bounds of conventional wisdom is a strength that can also generate great opportunities.

NLADA will, of course, keep our community up-to-date on these exciting national initiatives through our listservs, website and future editions of *Cornerstone*. Our new world of advocacy will no doubt present many challenges, but it is a world full of promise for our community, especially our clients, for whom adequate public defense resources cannot come a day too soon. ✯

CORNERSTONE

Utilizing Video Conferencing for Access to Justice

By Ed Higgins and Alison Paul



Legal aid programs in Maine, Montana, Ohio and Hawaii all have something in common besides a passion for access to justice. They all have used video conferencing to expand their ability to provide services to clients and reach out to remote parts of their service areas. Although each program experienced varying degrees of success in implementing the technology, each program used video conferencing to expand the capacity of staff to provide "in-person" services to communities where the program does not have a physical presence.

Video conferencing is a communication tool, much like a telephone, a fax machine, or email. If used correctly in the appropriate situation, video conferencing can facilitate more effective communication than the technologies mentioned above, since it allows the participants to see, hear and interact with one another. In situations where it is helpful to see body language or other non-audible communications, video conferencing can be the next best thing to being there.

Pine Tree Legal Assistance

Pine Tree Legal Assistance (PTLA) in Maine was a pioneer in the use of video conferencing by legal aid programs. PTLA started its project in 2001 with federal grant funding from the U.S. Department of Commerce, the Legal Services Corporation, the Maine Community Foundation and many others. PTLA established a video conferencing network that included 11 sites: seven PTLA offices, two district courts, a family violence shelter and the administrative office of the Maine Courts. PTLA partnered with Maine Tele-Medicine to split the cost of the high speed phone lines needed for quality video. While the initial pilot use never materialized, PTLA and others have used PTLA's video conferencing system for meetings and trainings. PTLA makes the system available to community partners and others, charging some a rental fee. However, scheduling issues with partners have limited the planned use of the system for client work.

What can we learn from Maine? Partner, partner, partner. Find another agency that can share the cost. Make sure your partner is not only financially invested, but also institutionally invested in the use of video. Much like computers, the costs of the system can not be seen as a one-time expense. High speed data lines have monthly charges and the video conference equipment does become outdated and will need to be replaced.

Montana Legal Services Association

The Montana Legal Services Association (MLSA) uses video conferencing to reach its vast service area through a partnership with the district courts in Montana. MLSA received a Technology Initiative Grant from the Legal Services Corporation in 2002 to set up a direct link between an MLSA office and a district court located 461 miles away. The purpose of the grant was to put direct legal representation by MLSA attorneys into a community that was not receiving those services. This pilot project was instrumental in the development of the current court-based video conferencing system in Montana. As of the beginning of 2009, there were 31 video conferencing sites located across the state,

including sites in all judicial districts, the state crime lab, the state mental hospital, the Montana Supreme Court and the University of Montana Law School.

After its initial experiment with having a video conferencing site located in its own office, MLSA decided to forgo a site in its office and completely partner with the court for the use of its video conferencing system. MLSA currently uses this system for the delivery of self-help legal clinics in family law and bankruptcy, meetings with clients, staff and task force meetings, and staff and community trainings.

In implementing the use of video conferencing within the program, MLSA found some practical limitations with the system. Users should keep in mind that video conferencing equipment only gives you a limited range of vision. Depending on the situation, it may or may not be a possible to pan the camera around the room during the video conference session. It does not let you see everything or everyone in the room. In addition, because of this limited vision, with video conferencing you only get part of the non-audible communication. If the camera is not pointed at someone, you won't see his or her physical reaction.

Further, video conferencing does not easily allow private interactions between participants in a meeting or a court hearing. Often when you meet with a group of people, it is possible to whisper a comment or question to the person seated next to you. However, there is no way to whisper to someone in a remote location without everyone else in the conference hearing it.

In 2007, MLSA and Richard Zorza completed a formal evaluation of the use of video conferencing in a legal aid setting titled, Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment (June, 2007). The evaluation report and other resources on video conferencing are available at www.lsntap.org.

Legal Aid of Western Ohio

Legal Aid of Western Ohio (LAWO) used grant money and its own funds to set up a point to point video conferencing system within its own offices. LAWO uses their system to support internal operations, including for staff meetings, trainings, case reviews, and supervision. They also do client interviews and informational sessions for clients. LAWO finds that since it has implemented the system, it is almost always in use.

Staff at LAWO stress that it is important to make sure that users, clients and staff, are comfortable with the system. While most clients are comfortable speaking to an attorney using the video conferencing system, some clients become so distracted by the technology they are unable to participate effectively. It is important to make sure that there are technical support staff at the client video site that are familiar with the equipment. It is also important to obtain staff buy in for using the system. Where the system meets the needs of the users and the users have bought into its use, the project will be a success.

See TELECONFERENCE on page 30

On the "green"

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SUPREME COURT WATCH

A Fourth Amendment Trilogy

By Marshall J. Hartman and Laurence A. Benner

Three important Fourth Amendment cases have been decided by the Roberts Court this term. *Herring v. United States*[1] expanded the "good faith" exception to the exclusionary rule to errors by police clerks (where the "error was the result of isolated negligence and attenuated from the arrest"). *Arizona v. Johnson*[2] authorized an officer who reasonably feared for her safety to pat down a passenger during a traffic stop without suspicion of criminal activity. And in *Arizona v. Gant*[3] the Court attempted to restore some logic to Fourth Amendment jurisprudence by modifying *New York v. Belton's* bright line rule which had automatically allowed vehicle searches incident to a custodial arrest. Under *Gant,* such searches are now valid "only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." The one thing all three cases have in common is that each of them have narrowly crafted decisions.

Laurence A. Benner

Marshall J. Hartman

Herring v. United States

In *Herring* the Court continues to chip away at the exclusionary rule. In a five to four decision by Chief Justice Roberts, the Court holds that fruits from an unlawful arrest will not be excluded where the arresting officer reasonably relied upon an inaccurate computer database of a neighboring sheriff.

Bennie Dean Herring went to the sheriff's impound lot in Coffee County, Alabama to get something from his impounded truck. Coffee County Investigator Mark Anderson learned of Herring's arrival and requested the sheriff's warrant clerk to check if there were any outstanding warrants for Herring. When she reported back that there were none, Anderson asked her to check with the neighboring county sheriff's office in Dale County. The Dale County Sheriff's computer database erroneously showed there was an outstanding warrant on Herring for failure to appear on a felony charge. Based upon this inaccurate information, Anderson and a Coffee County Deputy Sheriff pulled Herring over after he drove away from the impound lot. A search incident to the arrest revealed methamphetamine in Herring's pocket and a gun in his vehicle.

It was conceded that Herring's arrest violated the Fourth Amendment because the Dale County warrant had been issued in error and had been recalled some five month earlier. The Dale County Sheriff's Department knew about the recall, but failed to update its computer records. Despite confusing testimony of the Dale County Sheriff's warrant's clerk about the frequency of errors, the District Court found that there was no evidence of "routine problems with disposing of recalled warrants" and the Eleventh Circuit concluded on direct appeal that the error was "negligent not reckless or deliberate."

Observing that "extent to which the exclusionary rule is justified by … deterrence principles varies with the culpability of the law enforcement conduct," Chief Justice Roberts found this fact "crucial." Just what level of culpability is necessary is somewhat muddied by the fact that the Chief Justice uses a lot of different words to describe it, including "deliberate" "reckless" and "grossly negligent." The word that appears most frequently (four times) is "flagrant."

In prior "good faith" cases, *United States v. Leon*[4] and *Arizona v. Evans*[5], the Court refused to apply the exclusionary rule to errors by judges and court clerks because they had no incentive to violate the Fourth Amendment and would not in any event be deterred by exclusion.[6] Noting that the purpose of the exclusionary rule was to deter police misconduct, the Court found no deterrent benefit from exclusion in those cases because the police had reasonably relied upon the actions of the judicial branch actors. In Leon, for example, where a judge had issued a search warrant without probable cause, the Court emphasized this "reasonable reliance" requirement stating:

> the officer's reliance on the magistrate's probable-cause determination … must be objectively reasonable …. Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.[7]

By casting the test in terms of "reasonable reliance" and utilizing the reasonably well trained officer as an objective standard for determining whether this test was met, the *Leon* Court thus appeared to be using the language and methodology for determining criminal negligence.[8] Indeed, the Court expressly refused to inquire into the police officer's actual subjective mental state, because "'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'"[9]

The Chief Justice argues, however, that his heightened culpability requirement (which appears to require at least recklessness) flows from the central premise underlying *Leon*: that the deterrent impact of exclusion must be substantial enough to outweigh the harm caused by exclusion of relevant evidence. The exclusion of evidence in a given case must therefore not only be shown to deter police misconduct, it must also be shown that the "benefits of deterrence outweigh the costs." The upshot, as Roberts emphasizes, is that

> [t]o trigger the exclusionary rule, police conduct must

be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.[10]

Quoting Cardozo's famous statement, Roberts thus concludes that "the criminal should not go free because the constable has blundered." The majority appears to believe negligent "blunders" are so infrequent that checks and balances on the police are no longer needed, as demonstrated by the following colloquy between Justice Scalia and defense counsel during oral argument:

JUSTICE SCALIA: … really, [you believe] that the police will not keep good records unless -- unless we let the criminals go [free].
MS. KARLAN: they need a powerful incentive.
JUSTICE SCALIA: And that's the theory of the exclusionary rule as has been expressed in writings in some of our prior cases. But things have changed a whole lot since we adopted the exclusionary rule, and I think policing has become much more professional, and I think it's quite unrealistic to think that if we don't adopt the rule that you propose, that police departments will just willy-nilly not keep track of warrants. I just don't think that's true. That's not professional policing, and I think to apply the — the severe remedy that you propose in this area at this date seems to me excessive.

The majority does not cite any empirical evidence for the assumed "substantial cost" of the exclusionary rule. Nor do they give any indication of being aware of the recent police scandals in Los Angeles, Dallas, Tulia, Texas and elsewhere, showing the continuing need to deter police misconduct.[11]

The one ray of light that can possibly be gleaned from *Herring* is found in Robert's summary of the Court's holding which emphasizes: "Here the error was the result of isolated negligence attenuated from the arrest." Roberts does not develop this statement, but if by "attenuated from the arrest," he is referring to the fact that the arrest was not made by the same police agency that made the error. Hence, this would be one way to distinguish *Herring* and limit it to only law enforcement errors made outside the arresting agency. That is probably wishful thinking. Nevertheless it would seem clear that *Herring* should not apply to an error made by the arresting officer, or those closely associated with him, such as a paid informant.

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer dissented. She pointed out the dramatic expansion of "interconnected collections of electronic information" and the corresponding need to ensure integrity of such databases, noting that the error in this case had gone undetected for five months because the Dale County Sheriff had no apparent procedure in place for checking the accuracy of its database. Justice Ginsburg also noted the unfairness of placing the burden of showing reckless conduct upon the defendant, asking: "How is the impecunious defendant to make the required showing?"[12] Considering the current economic climate where budget cuts threaten to undermine already understaffed and overburdened public defender offices, *Herring* thus reflects a Court that seems both out of touch with reality and indifferent to the need to protect the liberty of innocent citizens from wrongful arrest.

Arizona v. Johnson [13]

In a unanimous opinion written by Justice Ginsburg, the Court upheld the *Terry* pat down of a passenger during a traffic stop. Johnson was a passenger in the back seat of a car stopped by three officers from Arizona's gang task force after a license plate check revealed "the vehicle's registration had been suspended because of an insurance related violation."

While other officers dealt with the driver and front seat passenger, Officer Maria Trevizo approached Johnson. She testified that Johnson was dressed all in blue, including a blue bandana, which was consistent with membership in a Crips gang (although the driver was wearing red – the color for the Bloods- a rival gang). In response to her questions, Johnson told her he was from Eloy, Arizona, allegedly the home of a Crips gang. Johnson also admitted that he had been in prison for burglary. Because she wanted to question him further in private to get "intelligence" about the gang she believed Johnson might be in, she asked him to get out of the car. He complied and she then patted him down because she suspected he "might have a weapon on him." During the pat down Trevizo felt a gun butt at Johnson's waist. He was arrested and convicted for illegal possession of the weapon.

On appeal the Arizona Court of Appeals reversed Johnson's conviction finding that the initial seizure resulting from the traffic stop had ended when the officer began questioning him about matters unrelated to the traffic stop.[14] The Arizona court therefore believed that the officer had no right to pat down Johnson in the absence of reasonable suspicion he was "engaged in or about to engage in criminal activity."[15] The Supreme Court reversed, ruling that under *Brendlin v. California*[16], Johnson was lawfully seized for the duration of the traffic stop.

Brendlin held that a passenger is seized during a traffic stop and thus has standing to contest the stop. As we predicted in an earlier article [See Supreme Court Watch, *Brendlin v. California*, A Trojan Horse?, 29 NLADA *Cornerstone*, No. 3, 6 (2008)], the decision has a dark side because the Court implicitly assumed that the seizure of a passenger during a valid stop was reasonable. We now see the fruits of that prediction revealed in Johnson. Rejecting the Arizona Court's conclusion that the traffic stop had ended with respect to *Johnson*, Justice Ginsburg declared:

The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave (citing *Brendlin*). An officer's inquiries unrelated to the justification for the traffic stop…do not convert the encounter into something other than a lawful

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Evolution of Pro Bono Partnerships

By D'Ann Johnson

"The difficulty for transactional pro bono managers was not recruiting willing lawyers, but offering quality pro bono opportunities."

The legal world's traditional practice of providing free legal services to persons in need has expanded through the years. Legal services programs in the 1960s and 1970s often represented community organizations working to improve their residents' lives. The organizations generally provided services to low-income persons and fell within the LSC guidelines for organizational representation. The first pro bono programs that helped microenterprises were often based on a lawyer's love for the arts and music. Accountants and lawyers teamed up to assist individual artists and musicians, as well as arts organizations. Many of these programs were locally based and relied on the personality of individual lawyers to keep community connections.

But these ad hoc programs left hordes of business lawyers without meaningful pro bono opportunities. For such lawyers, transactional law has many advantages when compared to traditional litigation pro bono activities. Lawyers are delighted to work in an area without having to learn a new area of law, such as family law, and without having to go to court. In addition, clients need not be in the same geographic area. This fact is especially important when a resource-rich urban area is able to transfer free legal resources to rural areas.

Lawyers who represent corporate clients have the legal skills and experience many community-based and nonprofit organizations need. This includes attorneys who work for corporations and firms. These lawyers provide nonprofit organizations with a wide range of business skills including:

- Drafting by-laws and articles of incorporation
- Obtaining tax-exempt status
- Negotiating lease agreements
- Reviewing contract matters
- Assisting with personnel issues
- Providing tax advice
- Advising on corporate governance matters
- Establishing subsidiary corporations
- Reviewing loan documents

To help lawyers access the network of nonprofit organizations, transactional community pro bono programs developed. These programs matched volunteer attorneys and nonprofit organizations and provide technical and legal support. A Business Commitment (ABC), was created in 1993 as a partnership between the ABA Section of Business Law and the National Legal Aid & Defender Association. ABC had a mission to provide business lawyers with pro bono opportunities and to serve nonprofit organizations that could not afford to hire a lawyer. Power of Attorney provided assistance to transactional programs nationwide by setting standards, sharing forms and making grants. This type of support helped transactional programs serving nonprofits to formally expand into new cities and to begin representation of microentrepreneurs.

The difficulty for transactional pro bono managers was not recruiting willing lawyers, but offering quality pro bono opportunities. New transactional programs often offer tax exempt entity formation, bylaws updates and training programs. As the programs become more sophisticated, and as the clients become more knowledgeable, new opportunities for transactional work develop. The new opportunities are not simply a one-shot legal matter, but to step into the role of a general counsel with the nonprofit. With an overflow of volunteers, programs can assist a variety of types of nonprofits and move beyond the traditional groups that serve low-income populations. Clients are now not only affordable housing builders, but Pug Rescue groups and after-school organizations.

Developing Legal Partnerships

The evolution of transactional pro bono partnerships will vary depending upon the method of delivery of services to the clients. A program may offer transactional services, clinics or hotline assistance, or a general counsel option. Clinics may concentrate on a particular area of the law-entity formation or property tax information. Some transactional programs offer the opportunity to serve as general counsel for a nonprofit for a year. This program contemplates meeting with the board, attending board meetings and frequent communication to understand the operations of the organization.

The more long-term commitment offers an opportunity for law firms and corporate law departments to work together to help the client through nonprofit means. Law firms and in-house counsel can also provide advice at clinics and can present workshops on important legal topics. These partnerships can be incentives for law firm attorneys to participate. However, the

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NLADA's David Carroll Testifies Before Congress on the Current Standing of Indigent Defense

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

By Jeff Billington, Deputy Director of Communications

In response to the uneven and often unconstitutional functioning of public defense in Michigan, as well as the rest of the nation, NLADA Director of Research & Evaluation David Carroll on March 26, 2009 testified before the U.S. House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security.

The hearing, *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?,* was spurred by the recent NLADA report on Michigan's public defense system, *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis*, which studied 10 of the state's 83 counties and determined the state has failed time and again to uphold the constitutional rights of its citizens or to meet the nationally recognized standards prescribed in the American Bar Association's *Ten Principles of a Public Defense Delivery System*.

Subcommittee Chairman Rep. Bobby Scott (D-VA) started the hearing by personally recognizing that there was a problem with public defense not only in Michigan, but across the nation. While the problems would not be answered in one hearing, he pledged to move forward to improve the country's public defense system.

"This problem has been growing for decades and little has been done," he said. "We need to make sure we continue this dialog in the future."

Carroll, along with other speakers at the hearing, also did not stick purely to the theme of Michigan, but touched on the failure of other states to live up to their constitutional duty to provide fair and adequate representation to those accused of a crime and in danger of incarceration.

"Although we are focusing today on the Sixth Amendment crisis in Michigan, I could be talking about the crises related to public defender work overload in Kentucky, Tennessee, Missouri or Florida, or the lack of enforceable standards in Mississippi, Maine, Arizona, Utah or South Dakota," said Carroll. "In sum, the Sixth Amendment crisis is not limited to Michigan. It is national in scope and will require federal involvement to ensure this fundamental constitutional right. In *Gideon v. Wainwright* the U.S. Supreme Court stated, 'The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.'"

Carroll explained that the problems that plague Michigan, as well as dozens of other states across the nation, leave the Constitution's promise of equal justice a distant hope for our country's poor.

"Poor people are routinely processed through the criminal justice system without ever talking to a lawyer," he said. "The district courts employ a variety of means to avoid their constitutional duties including: uninformed waivers of counsel, requiring defendants to speak to prosecutors before appointing counsel, and using the threat of personal financial strain through the imposition of unfair fines."

Photo by Jeff Billington

NLADA's David Carroll testifies before the U.S. House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security.

Carroll detailed for the subcommittee that the problems facing public defense are similar to those that have also enabled it for decades.

"Many of the systemic deficiencies identified more than three-quarters of a century ago by the U.S. Supreme Court in the "Scottsboro Boys" case still permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trial and sentencing; attorneys violating their ethical

See CARROLL on page 32

Why It's Important to Provide Legal Services to Victims of Identity Theft

By Russell P. Butler, Pauline Mandel and Bridgette Harwood

Identity theft and fraud is a widespread problem affecting many aspects of American society. Anyone can become a victim of a financial crime; however, certain groups are at higher risk and have access to fewer resources to assist in recovery, including: the elderly, persons with limited English proficiency, persons with disabilities, the uneducated and the mentally ill.

Reports indicate that fraudulent practices, ranging from Internet auction fraud to identity theft have increased. (See, http://www.ic3.gov/media/annualreport/2006_ic3report.pdf). While many people think of financial identity theft, this crime of identity theft and fraud is a term that includes many types of personal invasion. One may suffer from medical identity theft where one's personal identifying information or medical insurance has been used to obtain medical treatment. Employment identity theft occurs when a victim's identifying information is used to obtain or maintain employment. This form of theft is usually discovered when a tax return or benefits are revoked or a notice of taxes due is received. Criminal identity theft is when the perpetrator uses false identifying information in connection with commission of a crime, manifesting to the victim in the form of failed background checks, arrests, notice of outstanding warrants, or inability to renew a driver's license.

The reality is that nearly one in two households were affected by this crime in the previous year. According to a 2003 Federal Trade Commission survey, 27.3 million Americans had been victims of identity theft within a five-year period. In the 12 months prior to the release of the survey, 3.23 million consumers discovered that new accounts had been opened and other frauds, such as renting an apartment or home and obtaining medical care or employment had been committed in their name. (See www.rfg.com/docs/FTC%20IDT%205%20Year%20Survey.pdf).

The numbers are daunting and continue to rise, as do the numbers of victims impacted by this faceless crime. Victims can spend countless hours dealing with creditors, banks and credit reporting agencies, yet still be unable to negotiate the quagmire of civil legal issues facing the victim. Legal service providers who are already stretched thin in being able to assist the indigent must expand their services delivery program to assist victims of identity theft and fraud. Victims may need a lawyer when:

1. Their age, health, language proficiency, or economic situation prevents them disputing false claims.
2. They are sued and harrassed by creditors attempting to collect debts incurred by an impostor and when creditors or credit reporting agencies are uncooperative.
3. The perpetrator is arrested for crimes using the victim's identification to assist with victims' rights and restitution.

The American Bar Association recently released a recommendation urging bar associations and lawyer referral services to establish programs for pro bono representation of victims of identity theft who need assistance in recovery, including the development and dissemination of materials for use in such programs. (See, American Bar Association's Recommendation, available at http://www.abanet.org/ adminlaw/conference/2007/Tabs/Tab8idtheftprobono.pdf).

In efforts to serve clients, attorneys and paralegals can advise or assist victims with these steps:

1. Immediately review a credit report and place a fraud alert on the credit reports.
2. Close tampered or fraudulent accounts and dispute the account in writing.
3. File an identity theft report with local law enforcement. Although many perpetrators will never be found or prosecuted, the copy or police report number is vital to the victim. The report is supplied to creditors as proof of the crime. If police are reluctant to file a report, ask them to do a "Miscellaneous Incident" report so it can be filed. See. http://www.mdcrimevictims.org/_pages/PrintedIDTComplaint.pdf
4. File a complaint with the Federal Trade Commission; filing this complaint provides important information to law enforcement throughout the nation, which is helpful in tracking down perpetrators and involving other government agencies in indentifying the offenders.
5. Negotiate or litigate with creditors or others who violate your client's interests.
6. If prosecution of the offender occurs, make referrals to entities that can assist victims with their crime victims' rights in criminal cases. See eg. www.ncvli.org. ✫

The Maryland Crime Victims' Resource Center, Inc. currently administers a federal grant to assist victims of identity theft and fraud as well as assisting legal service providers and law enforcement agencies who help victims. This grant covers many aspects of assistance including legal representation to victims in criminal cases. For more information on how you can assist victims, please call MCVRC at 1-877-VICTIM-1 or visit www.mdcrimevictims.org.

This article was written by Russell P. Butler, Pauline Mandel and Bridgette Harwood of the Maryland Crime Victims' Resource Center, Inc. and is supported by Grant No. 2007-VF-GX-KO33, awarded by the Office for Victims of Crime (OVC), Office of Justice Programs. Points of view in this article and accompanying references are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

National Legal Aid & Defender Association

The Mills Criminal Defense Clinic, Stanford Law School

Defender Legal Services is featuring law schools in a regular column to highlight their unique programs that are of interest to the indigent defense community. Our first featured law program is Stanford Law School's Mills Criminal Defense Clinic. Their staff has shared an enlightening piece describing the clinic and its purpose, telling readers what is unique about their work, and highlighting particular successes this clinic has achieved.

By Michael Romano

The Mills Criminal Defense Clinic at Stanford Law School is the only academic program in the country devoted to litigating cases under California's so-called "three strikes and you're out" law. While many states have enacted stiff sentencing laws for recidivists, California's Three Strikes law is the most punitive in the county. In terms of its scope, minor crimes that would otherwise qualify as misdemeanor offenses can trigger life sentences. Consequently, more than 8,500 inmates are serving life terms under California's Three Strikes law.

The Stanford clinic represents indigent defendants at all stages of the criminal process: at trial, on appeal and in state and federal habeas corpus proceedings. Our clients are all facing life sentences under the Three Strikes law for minor crimes, including stealing a car radio, petty theft of a pair of socks, writing a bad check and possession of 0.03 grams of methamphetamine.

Most of the legal work at the Stanford clinic is performed by second and third year law students under close supervision of experienced attorneys. Students conduct field investigations, draft legal pleadings and argue those pleadings in open court. Students are also responsible for maintaining the clinic's relationship with clients and developing case strategy.

The clinic currently represents 16 clients in state and federal court. Despite a political climate that remains hostile to criminal defendants and a pair of U.S. Supreme Court decisions in 2003, which seemed to shut the door on litigation under the Three Strikes law, *Ewing v. California* and *Andrade v. Lockyer*, the Stanford clinic has been remarkably successful. Most recently, we won the reversal of a life sentence for a client sentenced under the Three Strikes law for stealing tools from the back of an open tow truck. Our client had already served 13 years for the crime and was ordered released "forthwith" by a Superior Court in Los Angeles on April 6. Clinic students successfully argued that our client received ineffective assistance of counsel at his original sentencing hearing in 1996, and presented newly discovered mitigating evidence that compelled the court to impose a lesser sentence.

The overall goal of the Clinic is to provide expert legal counsel to a group of defendants and inmates all but forgotten by the criminal system, while providing the highest level of hands-on instruction to students in advanced criminal litigation skills and strategies. The clinic was founded in 2006 by Michael Romano who was inspired in large part by the successes of Larry Marshall, the dean of clinical education at Stanford, and the innocence and death penalty movement that he helped lead. One of the missions of the Stanford Clinic is to apply the innovations developed in that context to cases under the Three Strikes law.

The Stanford Criminal Defense Clinic is just one of several clinics under the umbrella of the Mills Legal Clinics at Stanford Law School. Other clinics concentrate on immigration litigation and reform; employment, community and housing advocacy; environmental law; youth and public education disputes; criminal prosecutions; small business and non-profit transactions; international human rights; cyberlaw; and litigation before the U.S. Supreme Court.

For more information about the Mills Legal Clinics, contact: Michael Romano at (650) 736-8670 or by email to mromano@standford.edu. ✯

Michael Romano is a lecturer in law at Stanford Law School.

Growing Up with *Gideon:* The Modern Public Defender

Growing up with Gideon is Defender Legal Services' inaugural column in Cornerstone that focuses on members of the indigent defense community whose life work coincides with the development and expansion of Gideon. We are honored to introduce Marshall J. Hartman as our first member to discuss his personal observations concerning the changes in public defender services since Gideon.

By Marshall J. Hartman

The modern public defender is a client centered constitutional lawyer. Prior to the *Gideon v. Wainwright* decision in 1963, less than 5 percent of American counties had some form of public defender or assigned counsel system. Many of them were financed by local merchants or communities, which viewed them as mere aids to the court in expediting guilty pleas. However, once *Gideon* held that having the assistance of counsel in felony cases is a right guaranteed by the Constitution, the new public defender was charged to represent his client only — not the court or county government or the public — but the criminally accused client to whom he or she was assigned.

Four Principles of Public Defense

In the advent of *Gideon* and its progeny (*Argersinger*-misdemeanors; *Gault*-juveniles), several basic ideas emerged:1.) guidelines to effective assistance of counsel were promulgated by the ABA, NLADA and the National Advisory Commission on Criminal Justice Standards and Goals, so cases were reversed where guidelines were not followed; 2.) as a result, training programs were established locally and nationally so the public defender was apprised of the latest cases and forensic developments (such as DNA) in the field; 3.) public defenders began to utilize social sciences to investigate possible mitigation and to explain causes of criminal behavior to the Court; and 4.) independent public defender and assigned counsel systems, freed from political or judicial control, blanketed the United States so 85 percent of Americans were served by them. These events and others influenced the formation of modern public defender systems, which have inured to the benefit of our criminal justice systems and our clients. ✯

Fostering Information Sharing, Collaboration to Maximize Successful Team/Partnership Efforts

By Madelynn Herman and Don Reinhart

With limited resources necessitating more efficiencyt and cost effectiveness, but still remaining responsive to client needs, practitioners are frequently asking questions about the most effective ways to achieve their goals. New approaches, such as systems-wide collaborative efforts or working as collaborative partners, in order to identify new problems and solutions, are increasingly becoming more commonplace today. Partnerships are including collaborations between both traditional and non-traditional partners. While partnerships and collaborations can break traditional boundaries by sharing information, resources and best practices, they can also create greater opportunities for all, better meet client needs and reach goals that could not have been achieved alone. This article discusses the when and why to partnering or collaborating, strategies for setting the stage for collaboration, the challenges and barriers to collaborative efforts and how to overcome some of these barriers.

The When and the Why to Partnering or Collaborating

Collaboration makes sense when there is a desire to work together and a strong commitment to solving a specific problem. When several organizations have a common purpose and a shared vision for the future, a partnership or collaboration would benefit all involved. Collaborative efforts can improve efficiency and effectiveness by eliminating the duplication of efforts and providing a more efficient use of time, talents, services and resources. Funders enjoy and encourage collaborative efforts and are more frequently requiring it. Sometimes the nature of the work necessitates a collaborative project. As a result of a successful collaboration, services can be better coordinated and client needs can be met with improved efficiency. In addition, as a result of collaborating, each agency or organization is able to respond more effectively with new expertise that has been developed through the collaborative process.

Developing Strategy and Setting the Stage for Collaboration

Gaining leadership support for your collaborative effort is important when setting the stage for a potential collaborative project. Frank discussions about the purpose of the collaboration, why the collaborative effort is important, what the collaboration expects to achieve and how it fits into the organizations' mission is essential when discussing a potential collaborative project with your organization's decision-makers. It is also important to stress that partners in a collaborative effort will be just as committed to their own organizational goals as they are to their collaborative objectives. Finally, focusing on results and improved efficiencies will help gain the leadership support for a collaborative project.

At the same time leadership support is being obtained, ongoing planning with research and idea exploration needs to take place. This means looking at trends nationally and needs locally. Identifying problems, coming up with common goals and looking for partners with similar goals is a great starting point. The development of an infrastructure for a collaborative effort includes determining the key partners for the collaboration, getting the partners together to agree on the problem and goals for the project, looking at different ways that each partner can contribute and exploring funding for the collaborative effort. Networking, listening to the needs of others, encouraging participation from a wide range of stakeholders and thinking 'outside the box' will also help set the stage for developing partnerships or collaborations (Rasnow, 2005). In addition, specific barriers or challenges to the collaboration need to be identified and explored in the planning phase of a collaborative project.

The Many Challenges to Collaborative Efforts

While there are many benefits to partnering or collaborating on projects, it does not always make sense. The reasons why not to collaborate could be as simple as: the timing not being right, the uncertainty of who to collaborate with, or not fully understanding how the collaborative efforts will benefit your organization. Other reasons why collaborating might not work include the lack of agreement on defined outcomes for the project between partners, lack of leadership support for the effort, real or perceived power differences between potential partners, or a fear of compromising the mission of the organization. Finally, if there is a lack of trust and confidence between potential partners, a history of difficult relationships, an absence of information sharing and poor or strained communication, then the time might not be right for a collaborative project.

In a feature article in the August 2006 issue of *Corrections Today*, author Judith Berman articulates the challenges of collaborations for partners within the criminal justice system:

"Participating in criminal or juvenile justice collaborations can be challenging for all kinds of professionals for different reasons. Prosecutors and defense attorneys must relinquish their polarizing roles and find common ground in policies that both protect individual rights and public safety. Judges must be vigilant about protecting their neutrality, because even general issues addressed in a group can be perceived as influencing their positions on individual cases. Victim services professionals must be willing to participate in developing policies to help offenders succeed, insofar as success implies that offenders will no longer engage in offending behavior. For corrections professionals, the challenge may involve opening the scrutiny of others and allowing them to participate. It may also involve the challenge of cross-cultural communication, because institutional environments often have their own unique and distinctly hierarchal systems of operation" (Berman, 2006).

Barriers that Get in the Way of Collaborating or Working as a Team

Barriers are just what they infer: they could be physical space barriers that tend to wall off one function from another; they could be the separation of professional and specialist staff from the operating staff; they might be in the form of how a job description is written; they might be the lack of trust issue between people responsible to achieve organizational objectives; they might be the lack of information sharing out of fear or intimidation from superiors or peers in the department ... they could be the lack of subject knowledge about the product or service being offered to customers or clients; they could be that the mission and goals of the organization are never discussed with staff both old and new; they could be that the management leadership qualities in the organization are not there to support specific collaborative and partnering objectives; they could be a myriad of things getting in the way of collaborative efforts which can all result in the formation of individual, as well as departmental and divisional 'silos' in our organization.

Beware of the 'Silo' Organization as a Barrier to Collaborative Efforts

When working towards "partnering and collaboration objectives," we may discover that the old adage "all is not what it seems to be" has become a reality. There are barriers all around us that inhibits our ability to be an effective manager, project coordinator, or inter-agency collaborating partner, and the "silo" organization is one of them. The "silo" mentality can be defined as a strong organizational culture of protectionism, a strong desire to maintain the status quo with the attitude of "we have always done it this way." Turf issues are common in a "silo" organization and can greatly affect the ability to collaborate both within our host organization as well as on a collaborative partnership effort.

As noted, there are many reasons for the creation of barriers, but the most important point to understand is the fact

See COLLABORATION on page 31

Court-Based Access to Justice Innovations in Tough Budget Times: Ideas, Models, Tools

By Bonnie Rose Hough, Richard Zorza, Susan Ledray, Judy Meadows and Tina Rasnow

In tough economic times, courts, just like legal aid programs, are suffering simultaneous cuts in resources and increases in demands and pressures. As is well reported in the media, courts are freezing hiring, closing programs, furloughing staff, closing on some days and threatening to de-prioritize certain kinds of cases. At the same time, economic pressures are dramatically driving up caseloads in some areas, hence more people are going to court unrepresented.

But this crisis also presents opportunity. In the last 10 years or so, courts around the country have come to see themselves as not just case processing institutions, but as access to justice institutions and they are now taking this broader sense of mission into account as they attempt to manage this crisis. The Self-Represented Litigation Network (SRLN) is a national network of organizations as varied as the Conference of Chief Justices and the Legal Services Corporation (LSC), working on issues of access to justice for the self-represented. The SRLN has gathered information about, and conducted surveys of, these programs.

The SRLN found that court-based self-help services have not generally been funded out of current legal aid streams, but represent a new source of funding for services to low and moderate income people. Legal aid organizations that provide self-help services in courts find that most of the litigants they assist meet their income eligibility levels – and, in fact, find it a very useful opportunity to provide basic levels of assistance, while providing appropriate referrals for those who need full representation.

Recent SRLN surveys suggest that even though they are new, court-based programs facilitating access are not taking a disproportionate share of cuts, and many courts are attempting to protect this important access resource. They do so because they realize that programs of the kind discussed below not only improve access, but can save money and make all the components of the court function more efficiently.

In the spirit of this attempt, and bearing in mind the important insight that difficult times offer an opportunity for change, this article describes some of the tools that have been developed to assist courts to think about the kinds of innovations that can, at very low or no cost, increase access to justice even in times such as these. We also offer some thoughts about how access advocates, working at the state and local level with groups such as their access to justice commissions, bar associations, and bench-bar committees, might use these tools to move the "access-in-crisis" discussion forward.

The tools are in the form of a Leadership Package, each of which includes PowerPoint, video, resources, profiles of models, and leadership activities. While the full package includes fifteen Modules, we focus here on seven that have the lowest potential deployment cost. All the materials can be accessed on www.selfhelpsupport.org, except for the video, which is available from the National Center for State Courts.

1. Establishing and Operating a Court-Based Self Help Center. Court-based informational services that assist the self-represented navigate the court and file needed forms are highly cost effective. In many places they are operated in cooperation with the local legal aid program. This is an area in which we should be looking at establishing a national roll out, with help from federal resources.
2. Establishing Justice Corps and Volunteer Programs. Leveraging AmeriCorps money makes it possible to build high quality and cost-effective services. This is another national initiative for which we should be advocating.
3. Ethical Guidelines for Clerks and Court Staff. Many courts have established guidelines and conducted educational programs so that clerks and other staff know what they can and cannot do to provide information to litigants without violating court neutrality.
4. Developing and Deploying Plain Language Forms and Instructions. Such forms remove barriers for the public, greatly enhance the quality and accuracy of information provided to the court, save time for court staff and judges in reviewing and understanding the claims and requests, and result in better outcomes for litigants. To the extent that such forms are available and easy to use, it is then relatively easy for the legal aid program to obtain LSC/SJI partnership funding to automate those forms in cooperation with the court.
5. Working with Judges on Access. Extensive curricula are available to help judges manage their courtrooms in a controlled and neutral way that insures litigants are heard even when they do not have lawyers.
6. The Court Role in Establishing and Supporting Discrete Task Representation. States have found that courts and judges can help encourage unbundling of legal services so that litigants obtain legal assistance for the portions of the case that most require attorney expertise, or where the need is greatest.
7. Supporting and Integrating Law Library Services for the Self-Represented. Often courts and law libraries

can work together to provide additional services to the self-represented using existing resources including space that is often open after traditional court hours.

In advocating for these approaches, it is important to remember an overwhelming difference between courts and legal aid programs – courts cannot cut off their caseload. There can therefore be no debate about quality versus quantity. This means that the current focus has to be on innovations that are cost effective in the short term, and can be achieved with minimum disruption. In tough times, most court administrators, and indeed many judges, are best reached not with moral claims, but with practical solutions. Similarly, legal aid advocates must be deeply sensitive to the courts' core neutrality commitment, and should focus on solutions that help a broad range of litigants, not just the very poor.

For court communities that have already implemented these approaches, the economic crisis is likely pushing programs to rethink and refine how they provide the services. We encourage readers to share their experiences with us, and look forward to hearing of successful access to justice partnerships and successful program adaptations. ✯

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Richard Zorza is with the Self-Represented Litigation Network.
Susan Ledray is with the 4th District Court, Minnesota.
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Special Education: Helping Children With Special Needs Exercise Their Right To A Free, Appropriate Education

By Jay E. Grenig and Charles F. Williams

The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) seeks to ensure that all children with disabilities have available to them a free appropriate public education (FAPE). While IDEA does not require public schools to maximize the potential of disabled children, they must provide such children with meaningful access to education. A free appropriate public education under the IDEA must include special education and related services tailored to meet the unique needs of a particular child, and must be reasonably calculated to enable the child to receive educational benefits.

The key element of IDEA is development of an individualized education program (IEP) for each disabled child, including a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be employed to meet those needs. In developing a child's individualized education program, a Committee on Special Education is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development and (4) managerial or behavioral needs.

Prior to 1997, the courts granted private school reimbursement where a school failed to provide a FAPE under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C). Congress amended IDEA in 1997 to include a new section — 20 U.S.C. § 1412(a)(10)(C). Clause (ii) of the new statutory section states:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

In *Board of Education v. Tom F. ex rel. Gilbert F.*, 128 S.Ct. 1 (2007), the Supreme Court affirmed by an equally divided court (Justice Kennedy did not participate) a decision of the Second Circuit (193 Fed. Appx. 26 (2d Cir. 2006)) remanding a tuition-reimbursement case to the district court with instructions that, if a state fails in its obligation under the IDEA to provide a FAPE to a child with disability, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state. The a tuition-reimbursement case is presently before the court in *Forest Grove School District v. T.A.* (Oral argument was heard on April 28.) If Justice Kennedy participates, his vote will probably be the crucial vote.

In *Winkelman v. Parma City School District*, 550 U.S. 516 (1994), the Supreme Court declared, in an opinion authored by Justice Kennedy, that because parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf. The provision of related services, such as nursing services, to special education students has been the subject of numerous disputes. In *Cedar Rapids v. Garret F. ex rel. Charlene F.,* 526 U.S. 66 (1999) (Kennedy & Thomas, JJ., dissenting), the Supreme Court held that continuous nursing service was "related service" a school district was required to provide under IDEA). ✯

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Abuse, Affective Dysregulation, and Shame

Neglected Aspects of Sex Offender Treatment

This article comes from the National Alliance of Sentencing Advocates & Mitigation Specialists, a section of NLADA and originally appeared in its Spring 2009 newsletter.

By Jay Adams

Even though there is no reliable data on whether sex offenses have increased, decreased or remained the same since the women's movement first focused public attention on them in the early 1980's, sex offenders are constantly in the news and laws to regulate them are proliferating rapidly. Both those who treat them and those who make public policy are constantly under pressure. This pressure has in some instances created an unfortunate rush to make decisions that are not well-founded and have resulted in some negative, though perhaps unintended, consequences.

In our attempts to "do something" about this population, some clinicians have abandoned virtually every clinical principle and ethical standard that applies to other clinical populations (Glaser, 2003). One obvious example of this is the failure by some sex offender therapists to recognize the therapeutic relationship has anything to do with treatment success. There is a consistent body of research pointing to the conclusion that the quality of the therapeutic alliance is the major variable that accounts for improvement, cutting across all theories and approaches. This is acknowledged by some cognitive behavior therapists, such as Linehan (1993), who expresses it in reinforcement terms as "The relationship with the therapist is the primary reinforcer." Despite this widespread research finding, many have adopted a "cook book" approach to sex offender treatment, and this mechanistic approach may itself have attracted individuals to the field who lack the qualities necessary for effective clinical practice. A corollary to this is the widespread use of people who are not professionally trained therapists, such as psychiatric technicians and parole agents, to conduct sex offender groups in relapse prevention. While this is often done because of financial constraints, it is questionable whether it can legitimately be viewed as "treatment."

Treatment providers have been all too willing to accept the notion that sex offenders are somehow inherently different from every other clinical population, and they offended because of some developmental anomaly. One result of this is that we have largely failed to see the obvious applications of research in other fields, such as attachment theory, trauma treatment and neurobiology of right brain development. Instead we have pursued ever more intrusive and coercive forms of treatment. As a result, we have often failed to provide sex offenders with anything that feels like help, but then blame them for being "resistant" and fleeing therapy. This is not to say there are not special precautions that need to be observed when treating sex offenders.

Some Lapses in Relapse Prevention

Hanson and Bussiere's (1998) meta-analysis of 61 different studies involving a total of 28,972 sex offenders, followed for an average of 66 months, found that the average recidivism rate was 13.4 percent, with 18.9 percent of rapists re-offending and 12.7 percent of child molesters re-offending, without regard to treatment history. In the most carefully designed and controlled study to date, Marques at al. (1999) found that adult sex offenders treated in an intensive relapse prevention program at Atascadero State Hospital in California for an average of 22 months re-offended at a rate of 10.8 percent through a 10-year follow-up period. The difference between the treated group's rate of recidivism and that of a group that volunteered for, but did not receive, treatment (13.2 percent) and a group of incarcerated sex offenders that did not volunteer for treatment (13.8 percent) was not statistically significant. Moreover, in 2000, the Canadian national sex offender treatment program moved away from relapse prevention as its primary paradigm because of dissatisfaction with its efficacy. Its director noted therapists in their program report their new model, self-management, is more positive, less punitive, less likely to precipitate power struggles between clients and therapists and more effective in keeping offenders in treatment (Yates, 2003, personal communication). Laws (2003) recently concluded that "The application [of relapse prevention] to sex offending involved making what seemed at the time to be small alterations in the original model, but which contained serious faults that have rendered it not very useful over the long term" (p. 28). Thornton (1997) asserts that relapse prevention may actually be counter-productive because it makes deviant behavior too visible and too tempting by constantly focusing on the specifics of offenses. These observations of the relapse prevention model, accruing during a period of almost 25 years, suggest the promise held out by the model has not been realized, and there is a "core" group of sex offenders who are at high risk for re-offense with or without the treatments we have tried thus far.

Hanson and Bussiere (1998) also found that "contrary to popular belief, being sexually abused as a child was not associated with increased risk" (p. 353) of re-offense. However, there are several reasons why this conclusion

should be regarded with caution. It is well established in the literature on psychotherapy with adult survivors of childhood sexual abuse that many individuals do not disclose their abuse history, even when seeking therapy. For example, Courtois (1988) found that 50 percent of her clients who later disclosed incest did not report it at the beginning of treatment. The studies included by Hanson and Bussiere covered a period ranging from 1948 to 1995. It is likely that male forensic clients would have been even more reluctant to report being sexually abused than the voluntary female clients Courtois treated. Moreover, a study involving more than 18,000 individuals conducted by San Diego Kaiser Permanente in conjunction with the national Center for Disease Control (Felitti, 1998), points to the conclusion that the cumulative impact of childhood abuse is crucial in determining a variety of adult health outcomes. This study examined seven types of "adverse childhood experiences" (ACE factors) in the histories of patients seeking medical treatment. Patients were asked about emotional abuse, sexual abuse, physical abuse, domestic violence between their parents, substance abuse by one or both parents, whether one or both of their parents was mentally ill and whether either of their parents had been in prison while they were growing up. Although the focus of this study is the long-term health consequences of abuse, several of the findings are relevant to sex offenders. An individual with four or more ACE factors in his childhood history is five times more likely to become an alcoholic than someone with none of these factors. A person with four or more ACE factors is three times more likely to be promiscuous as an adult, as defined by having more than 50 sex partners, a finding with obvious implications given the sexual compulsivity encountered in many sex offenders. This study clearly shows that abuse is much more prevalent in our society than previously thought, and its effects can only be understood when viewed in a broader overall context. The more ACE factors in a person's history, the more likely the abuse was early, ongoing and severe, resulting in an impact on brain functioning and chronic difficulties handling stress. A child in a stable family who is sexually abused is more likely to report it, to receive validation and support from parents and to succeed in terminating the abuse. By contrast, a child who is sexually abused in the context of several other ACE variables (e.g., parental domestic violence or mental illness) may be less likely to report it and hence more affected by it, thus increasing his likelihood of becoming a perpetrator. These "cumulative effects" help us understand why most individuals who experience some form of abuse do not go on to become perpetrators, but a certain subset do.

DESNOS: Its Relevance to Sex Offenders

Even though the majority of sex offenders have suffered some form of childhood abuse (Hanson, found that 75 percent of 409 sex offenders in treatment reported being sexually, physically and/or emotionally abused), most of them never fit the specific diagnostic criteria for post-traumatic stress disorder (PTSD), and their trauma symptoms are often overlooked or misdiagnosed. The reason for this lies in part in the historical circumstances under which the criteria for PTSD were developed. This occurred in the 1970's, and stemmed primarily from studies of returning Vietnam veterans. Obviously war veterans are people who experienced trauma primarily in late adolescence or early adulthood. At the same time, the women's movement was bringing sexual violence against women and children out of the closet and increasing numbers of therapists were treating adults who had been abused as children. Many of these therapists noticed their clients frequently displayed a set of symptoms that were pervasive but not as acute as those seen in PTSD. This set of symptoms is still being considered for inclusion in the DSM, and is known by a variety of names, with the two most common being "complex PTSD" and Disorders of Extreme Stress Not Otherwise Specified (DESNOS) (Luxenberg et al., 2001).

Adults abused as children differ from war veterans in two very significant ways. In the vast majority of child abuse cases, at least some of the trauma suffered was at the hands of one or more trusted individuals who should have cared for and protected them. Secondly, the trauma occurred at a time when the human brain is not fully developed and much more likely to be affected by adverse circumstances (Perry, 1997; Siegel, 1999). The resulting syndrome or symptom pattern is considered to consist of six sets of symptom clusters. These symptoms will be discussed in some detail, in order to make more clear their relevance

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Honor

Wisconsin State Public Defender Nicholas Chiarkas has been named the winner of the 2009 Dorsey Award by the American Bar Assoiciation's Government and Public Sector Lawyers Division's. The award will be presented on July 31, 2009 in Chicago.

Honors

NLADA honored Michael Holston, executive vice president, general counsel and secretary for Hewlett-Packard, with the 2009 Exemplar Award on June 6, 2009. At the same event Julie Levin with Legal Aid of Western Missouri and Danalynn Recer with Gulf Region Advocacy Center were awarded the 2009 Kutak-Dodds Civil and Defender Prizes, respectively. Please see the next issue of Cornerstone for complete coverage of these awards.

Honors

Glenn Rawdon of LSC's Office of Program Performance and Joyce Raby, formerly of LSC, have received NLADA's Innovation in Technology Award for creating and ensuring the continued success of LSC's Technology Initiative Grants program, which funds technology projects aimed at increasing access to justice for low-income Americans.

Appointment

The board of directors of the Legal Aid Society of Hawaii has appointed M. Nalani Fujimori to the position of executive director of Hawaii's oldest and largest non-profit public interest law firm, effective May 13, 2009.

Bankruptcy Pro Se Assistance Models That Work

By Jennifer A. Beardsley and Erin Ennis

Debt can cripple a person. Credit card companies target the poor with late fees, overlimit fees and APRs of more than 30 percent. Medical bills, often unavoidable, are regularly collected by debt collection companies who readily sue to collect the debts. Faced with harassing calls and eventually litigation, there are few options for people who cannot afford an attorney. Many people see no escape from the pressure of both the mental and fiscal stress. The results can be disastrous.

Montana Legal Services Association (MLSA) strives to change it. While the majority of Chapter 7 bankruptcies are filed by "middle class debtors," bankruptcy is an important resource and tool for the working poor. Bankruptcy provides low-income consumers with a fresh start and relief from stresses caused by financial difficulties. Changes in the bankruptcy code in 2005 resulted in increased attorney fees, with far more paperwork and attorneys leaning away from taking pro-bono or small numbers of bankruptcy cases. In effect, those low-income debtors who already shoulder the burden of low wages and sporadic health insurance were left without access to the safety net a bankruptcy can provide. Most low-income Montanans can no longer afford private attorneys, who charge between $1,200 and $2,100, and pro-bono options are increasingly slim.

"MLSA has also partnered with Consumer Credit Counseling Services of Montana, who will provide the required bankruptcy counseling and post-petition financial management class free of charge to individuals participating in MLSA's Pro Se Bankruptcy Clinic."

MLSA's Pro Se Bankruptcy Clinic is an answer to these issues. The process includes an intake interview in which individuals are qualified for MLSA services, a five hour class in which all forms necessary for a Chapter 7 Bankruptcy filing are reviewed, a one hour follow up with an attorney and continual access to legal advice and support.

After the intake interview, if the attorney feels it is appropriate, a client starts the bankruptcy process. First, clients attend an instructional class. Due to the rural nature of Montana, the five hour class is held in Billings and broadcast to three additional remote locations via videoconferencing equipment available in most Montana County court houses. Catering to various learning needs, the class includes a few key aids. A scrap copy of the bankruptcy forms are provided, giving the clients something to follow as well as allowing them to take notes directly on the forms. Additionally, an in-depth PowerPoint provides a visual example of how the forms should be completed. Most importantly, the attorney discusses each page of the bankruptcy forms in detail, paying special attention to confusing schedules such as D, F and I.

Following the class, clients who choose to continue the process fill out their paperwork. Each client then meets with either one of the two MLSA attorneys in the Consumer Protection Unit, or with a volunteer attorney. The Bankruptcy Section of the Montana Bar has been supportive of MLSA's Pro Se Bankruptcy Clinic process. During the meeting, the attorney reviews all the paperwork, helps with the few sections that require legal knowledge and makes sure the client is ready to file. Typically, shortly after the meeting, a client will file bankruptcy. Annually, more than 400 clients are invited to attend one of MLSA's quarterly clinics, and nearly 100 clients successfully file their Chapter 7 Bankruptcy. In 2008, the United States Bankruptcy Court for the District of Montana had 1,890 Chapter 7 and 13 filings. Pro se debtors accounted for 189 of the filings and just more than 50 percent of those filers had attended MLSA's Pro Se Bankruptcy Clinic.

MLSA has also partnered with Consumer Credit Counseling Services of Montana, who will provide the required bankruptcy counseling and post-petition financial management class free of charge to individuals participating in MLSA's Pro Se Bankruptcy Clinic. Normally these classes cost up to $50.00 each per debtor

Linda, a typical legal services client, waited almost two years before going forward with her bankruptcy. She had lost her job due to a work related injury and she increasingly lived on credit. Yet, she needed to reconcile the stigma of bankruptcy and her own moral compass with what was becoming an oppressive and threatening need to get her finances under control. That reconciliation she attributes, in part, to MLSA. In Linda's eyes, the MLSA attorney approached the clients with understanding and most importantly respect.

"I was told I was going to be okay," said Linda. "For the first time, I let myself believe it."

MLSA's Pro-Se Bankruptcy Clinic was created to meet Linda's needs, and the needs of others like her. ✯

Jennifer A. Beardsley is a staff attorney in MLSA's Consumer Protection Unit.

Erin Ennis is part of Americorps© VISTA in MLSA's Consumer Protection Unit.

Collateral Consequences of Criminal Convictions

National Legal Aid & Defender Association

By Penny L. Willrich

The man sitting on the light rail bench had a forlorn look about him. Under most circumstances I probably would not have even spoke to him, but something about him drew me to ask him, "How's it going?" He looked at me, sizing me up; trying to determine if I was sincere, or if it was mere small talk as I stood next to him waiting for the train. But, seeing the compassion on my face and perhaps in my eyes, he said, "The day would be great if I could find a job."

His answer started a conversation about the predicament in which he found himself. He was a convicted felon, having been convicted of driving while under the influence (DUI) of alcohol six years prior. He had been sentenced to serve a term of four months in prison. He was supposed to be sent to a special DUI unit, but was instead placed in the general population. He was placed in the cell with two Aryan "brothers" who commenced to beat the "s@#*" out of him, causing two back surgeries and a permanent disability. As an African American man over the age of 50, he could not find permanent employment. He had just left the agency that screened employees for a local hospital. He was applying to work in the hospital cafeteria. He was told, "come back when you have had 10 years without a criminal incident." In other words, it would take 10 years of "clean living," in addition to his four months of prison, three years of probation and more than $6,000 in fines and restitution, before he would be eligible to be a bus boy in a hospital cafeteria.

Anyone who has been convicted of a criminal offense (misdemeanor or felony) may be subject to profound penalties after completion of their initial sentence. These penalties are known as "civil sanctions" or "collateral consequences" or "invisible punishments." They are found among the state and federal statutes. They are insidious and injurious to the rehabilitated citizen's successful reintegration into society or their community. They dramatically affect the convicted person's ability to obtain and maintain employment. The impact of the criminal conviction results in a stigma and a civil disability.

The civil consequences imposed as a result of the criminal conviction often have a lifetime affect. It is a form of discrimination. It is a form of shaming. The civil consequences are not a part of the criminal sentencing process, therefore many persons find out about the sanction when trying to apply for a license or obtain employment. The penalties associated with the civil consequences relegate the citizen who has "paid his or her dues to society" to the status of second class citizen. The civil consequences have been called "invisible punishments," because they are buried deep within federal and state statutes and secure passage with little scrutiny. The laws permit agencies regulating federal and state to deny benefits.

While much attention has been given to disenfranchisement or the denial of the civil right to vote because of a felony conviction, little has been written about the invisible civil punishments or its impact on the ability to obtain employment. Little has been written about the implicit bias that exist in the criminal justice system that incarcerates more than 2 million people each year or the half million released into unwelcoming communities, where criminal conviction coupled with racial barriers prevent gainful employment and often leads to recidivism. ✯

Penny L. Willrich is a professor at Phoenix School of Law.

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She is the daughter of former congressman, judge and White House counsel Abner Mikva. There have been no other appointments to the LSC board, all members of which may be replaced by the new administration.

Funding Opportunities for Legal Aid (FOLA)

NLADA has formed a task force to work with us to maximize federal support for critical legal service through relevant federal programs and on streamlining processes for federal funding. This work has taken on particular importance as states struggle to gain access to stimulus funding for addressing the growing need for legal assistance.

NLADA is excited to have launched a dedicated Web site (FOLA) to assist in sharing information with the field and to stimulate dialog among stakeholders regarding funding strategies and opportunities.

Loan Repayment Assistance Programs (LRAP)

We have continued to work in the Congress to achieve funding for the Harkin civil legal aid LRAP, as well as legislative fixes for certain problems contained in the Higher Education Act reauthorization, which created the program. NLADA also commented during the development of a regulatory process for the Harkin program, as well as the loan forgiveness proposal contained in the College Cost Reduction Act. ✯

Appellate Defenders Brave "Snowy" New Orleans to Build Skills at NLADA'S Appellate Defender Training Program

By Phyllis H. Subin

From Thursday, December 11 through Sunday, December 14, 2008, almost 60 state and federal court appellate public defenders and an outstanding faculty came together for NLADA's Appellate Defender Skills Training, held in New Orleans at the Hampton Inn & Suites Convention Center. Neither the cold weather, nor a surprising three inches of snow, nor some flight delays prevented this dynamic group from focusing on the task at hand: the building of appellate brief writing skills, the enhancement of oral argument skills, the drafting of more persuasive *Writs of Certiorari* to the United States Supreme Court, and a greater understanding of relevant recent term and current term holdings from the U.S Supreme Court.

This year's national gathering of appellate defenders included two separate and distinct training tracks. The Skills Writing Track has as its focus a methodology for case analysis and approach to facilitate the writing of more persuasive (and winning) appellate briefs. New this year was the Advanced Track for experienced appellate litigators who handle complex cases and federal constitutional issues that may not only result in state Supreme or federal Circuit Court decisions, but may also warrant the drafting of a Writ of Certiorari to the United States Supreme Court. Every participant, regardless of their assigned track, received a complete conference CD filled with all of the excellent handout materials prepared by the faculty for their particular plenary presentations. The CD also includes material from the special ethics presentation which was offered to all participants by Sheila Lewis, the Director of Professional Development for the New Mexico Public Defender Department.

NLADA's Appellate Defender Skills Training is unique in that participants in both tracks work during the training on their own case issues and their own appellate case file, which they also bring to the program. Even before they arrive at the conference, participants are asked to write-up their appellate case file's issues and prior holdings on a work sheet that is subsequently shared with the faculty and other members in their small group workshops. The Appellate Defender Skills Training is also unique in providing a national gathering place for appellate defenders to share their experience and knowledge with one another and in building an active network of appellate litigators who support defender appellate advocacy efforts throughout the country.

The Appellate Defender Skills Track includes a series of plenary presentations that build upon one another and that provide a methodology of approach for the analysis and structure of writing a persuasive appellate brief. Faculty members offer ideas and concepts through their interactive plenary presentation discussion with the audience and through their workshop suggestions and feedback offered to their small group members. The plenary discussions actively use and incorporate an appellate fact problem; a "real" appellate case litigated by faculty member Ira Mickenberg, a nationally recognized appellate litigator and trainer.

After opening remarks by Richard Goemann, Director of NLADA Defender Legal Services, Sara Thomas, Chief of the Appellate Unit at the Idaho State Appellate Public Defender Office, began the program with a presentation on Brainstorming the Facts, and she was followed by Ira Mickenberg's discussion of Brainstorming the Law: The Reality Check. Following these presentations, the participants had the opportunity to move into their assigned small workshop group, and to work on brainstorming the facts and the law in their particular case with their faculty member(s) and their peers. By the end of the first day, everyone returned to the plenary room to hear Sheila Lewis talk about Developing a Theory of Defense and Supporting Themes. Sheila was followed by Mike Jones from the Appellate Section of the New Jersey Office of the Public Defender who talked about Transforming the Facts into a Persuasive Story.

For the Skills Track, all of the second day's morning and most of the afternoon were devoted to small group workshops on developing their case file's theory of defense as well as persuasive story that "sells" the case theory of defense. In the late afternoon participants heard from Trace L. Rabern, an experienced state and federal court appellate practitioner, who talked about Writing a Persuasive Brief: Statement of Fact—Words and Pictures. Participants ended the second day working on drafting a statement of facts for their case file, and continued this process throughout the morning of the third day. In the afternoon, Ira Mickenberg spoke on Integrating the Facts and the Law: Dealing with the Good, the Bad and the Ugly – Writing Your Argument, and the participants returned to their workshop sections that afternoon and the following morning to apply Ira's discussion points to their own appellate brief writing. The program's final presentations focused on a discussion by Vicki F. Rogers, Acting Director of Countywide Operations for the Cook County Public Defender Office, on Persuasive Oral Arguments, followed by Ira Mickenberg talking about Persuasive Reply Briefs.

The new Advanced Track program attracted a group of very experienced and engaged state and federal court

appellate litigators who heard an excellent opening session analysis of pending term and recent term United States Supreme Court critical criminal case decisions by Professor Laurence Benner, California Western School of Law. Participants had the opportunity to dialogue with Professor Benner and with faculty facilitator Molly Huskey, Chief Appellate Defender for the Idaho State Appellate Public Defender Office, on some of these issues, and to consider how these decisions are or will impact litigation in their particular state or federal court forums. The following morning was devoted to current appellate litigation issues that the participants brought to the program, and Phyllis H. Subin, the Director of NLADA's 2008 Appellate Defender Skills Training and a former appellate defender at the Defender Association of Philadelphia, facilitated this session which was called an Appellate Defender Potpourri and which generated many sound suggestions, comments, and ideas from the whole group. During the afternoon session, the participants heard from Jelpi Picou, Executive Director of the Louisiana Capital Appeals Project, a conflict defender office based in New Orleans and responsible for the U.S. Supreme Court's decision in *Kennedy v. Louisiana*, 128 S. Ct. 558 (2007), which overturned Louisiana's statute authorizing the death penalty for a child rape conviction. Through interactive discussion Mr. Picou offered his office's approach and philosophy for drafting and executing a successful Writ of Certiorari, and he shared with the participants his office's Writs in *Kennedy*, as well as *Montejo v. Louisiana*, a sixth amendment right to counsel case pending in the current U.S. Supreme Court term.

The following morning, Advanced Track participants broke out into two small groups where they had the opportunity to work on their own case file's Writ of Certiorari and where they had the opportunity to apply some of the ideas generated by Mr. Picou and the group's discussion. A Theory of the Case as well as a Case Theme was developed for each participant's case file. The afternoon session, Becoming a Skilled Communicator and Persuader at Oral Argument, offered Molly Huskey an opportunity to put the group through a series of communication exercises which her office had learned from national communication's consultant Joshua Karton, who had recently worked as a consultant with the Idaho Appellate Public Defender Office to improve their oral argument skills. The group then heard two perspectives on oral argument preparation and presentation. One was offered by David McColgin, Supervising Appellate Attorney at the Defender Association of Philadelphia Federal Community Defender Office, who talked about oral argument preparation anticipating a "hot" court and within the context of *Coreley v. United States*, as case that he will argue before the U. S. Supreme Court this term. He then offered a sample of his anticipated oral argument in *Coreley*. Gregory L. Ayers, Appellate Supervisor with the Kanawha (WV) Public Defender Office, presented on his ideas for oral argument before a "cold court", and he too offered a sample of an oral argument that he had previously presented before the West Virginia Supreme Court. Throughout these presentations, the full group had the opportunity to question and to comment upon the information and material presented by the faculty.

The Advanced Track Program ended with the participants giving an oral argument in the case that they brought to the program. Although somewhat artificial, the goal of this session was to offer an oral argument opportunity in which the participants "argued" to a panel of faculty/peer judges for the granting of their case Writ of Certiorari. This allowed the participants to practice the oral communication preparation and presentation techniques that were discussed the previous day. This last session also offered the participants an opportunity to provide the faculty with their feedback and comments on this initial Advanced Track training effort, and all of their suggestions will be considered as NLADA continues to build an outstanding training opportunity for experienced appellate defenders.

This year's NLADA Appellate Defender Skills Training received excellent reviews from participants in both tracks, some of whom took the time to send follow-up e-mails of thanks and appreciation for a well planned and successful training program. NLADA's Appellate Defender Skills Training provides a very real and concrete skills training opportunity for the appellate defender community. It represents sophisticated training that many appellate defenders cannot and do not receive through their local defender offices or their criminal defense attorney organizations. NLADA is committed to continuing the Appellate Defender Skills Training conference, and to serving the defender community through this unique educational process. So stay tuned, and keep a look out for the "Save the Date" notice announcing the next NLADA Appellate Defender Skills Training. ✯

Phyllis H. Subin, Esq. was the justice systems leadership, development & consulting director for the 2008 NLADA Appellate Defender Skills Training.

National Legal Aid & Defender Association

"This year's NLADA Appellate Defender Skills Training received excellent reviews from participants in both tracks, some of whom took the time to send follow-up e-mails of thanks and appreciation for a well-planned and successful training program."

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to many sex offenders.

The first group of symptoms considered part of DESNOS deals with alteration in the regulation of affects and impulses. They include: difficulty with affect regulation and especially with the modulation of anger, behavior that is viewed as "self-destructive," suicidal preoccupation, difficulty modulating sexual involvement, and excessive risk-taking. Affective dysregulation means that such individuals tend to "overreact" to minor stress, become easily overwhelmed and experience their emotions more intensely than other people. They have trouble calming themselves once emotionally aroused, and may engage in extreme and/or self-destructive behaviors in an attempt to distract themselves from emotional pain. These behaviors can include eating disorders, substance abuse, compulsive sexual activity, self-injury and suicidal preoccupation. In forensic settings, where staff are often unfamiliar with the literature on early trauma, this emotional lability is frequently mistaken for bi-polar disorder. Moreover, another form of distracting behavior, excessive risk taking, may be incorrectly interpreted as an indicator of psychopathy. It has been suggested that affective dysregulation is the "core" or defining symptom of DESNOS. Its central significance in the treatment of sex offenders is discussed with reference to the work of Marsha Linehan, below.

The second group of symptoms comprising DESNOS is disturbances in attention and/or consciousness. It is not uncommon for individuals who were severely abused at an early age to have memory gaps, in some cases for large segments of their childhoods. Such gaps may occur as a result of dissociation or because some abuse takes place at times when children are asleep. Briere (2002) has noted that "avoidance strategies are used [by survivors of abuse] a) to reduce awareness of potential environmental triggers; b)to lessen awareness of memories once they are triggered; and c) to reduce cognitive and emotional activation once CERs [conditioned emotional responses] to these memories are evoked" (p.10). Avoidance strategies are self-reinforcing because they reduce emotional pain. They may account for many "resistant" clients who don't remember things from session to session, forget to do homework, tune out during victim empathy films, etc. They must be addressed early in treatment and replaced by more adaptive ways of dealing with pain, because of their interference with treatment and their deleterious effects on the development of the self. Clinicians should be familiar with the signs of dissociation and assessment for it should be an ongoing part of treatment with sex offenders.

A third group of symptoms concerns disturbances in self-perception. Childhood trauma survivors display a host of painful emotions and cognitive distortions which are sometimes referred to as "impaired self-reference" (Briere, 1992). Some of these long-term effects are the result of direct messages from perpetrators, who often blame the victim and/or invalidate the victim's feelings ("Shut up or I'll really give you something to cry about;" "I know you want it."). In addition, the egocentric, immature nature of a young child's thinking virtually guarantees that the child will blame himself for the abuse. Both physical and sexual abuse are also emotional abuse because they represent an attack on the self: "The assault is not only upon the physical body, but upon the individual's perception of the self as competent, and among other things, the perception that the world is beneficent or neutral, rather than innately hostile" (Navarre, 1987). In addition, the use of dissociation and the necessary adaptation of scanning the external environment for signs of danger occur at the expense of the survivor's awareness of internal cues. Thus "severe child maltreatment may interfere with the child's access to a sense of self — whether or not he or she can refer to, and operate from, an internal awareness of personal existence that is stable across contexts, experiences, and affects. Without such an internal base, the survivor is prone to identity confusion, boundary issues and feelings of personal emptiness"(Briere, 1992, p.43).

One of the most common characteristics of sex offenders described in the literature is the degree to which they are out of touch with their feelings and bodily cues. Lisak (1997) has examined the link between male gender socialization and the perpetration of sexual abuse. He notes that boys learn at an early age that there are many emotions they are not allowed to display. Except for anger, virtually all the emotions associated with childhood abuse are "off limits" for boys: fear, anxiety, helplessness, humiliation, shame and vulnerability. "Once evoked, these states are likely to create distress, since they are precisely the emotions that the male has had to suppress in the service of achieving and maintaining his masculine identity" (p.164). Male socialization, Lisak contends, obstructs a male's ability to respond sympathetically to both his own and other people's distress i.e., it interferes with empathy. "As he learns that vulnerable emotional states are 'unmasculine,' and that they must be expunged from his experience lest he be forced to label himself 'unmasculine,' the male is forced to respond as aggressively to his own internal displays of vulnerability as he would to those of others" (p.166). This leads to a lack of empathy, which allows sex offenders to hold the "attitudes tolerant of offending" identified by Hanson and Harris (1998) as related to sexual recidivism. Based on their research on child molesters who had been sexually abused themselves, Craissati et al.(2002) concluded, "it could be argued that unless the offender is heard as a victim in his own right, his capacity to develop appropriate victim empathy will be impaired" (p.236).

A fourth group of symptoms involve disturbances in interpersonal relations. The most profound and pervasive of these is difficulty with intimacy and an inability to trust. Abused individuals experience fear and ambivalence with respect to interpersonal attachment and vulnerability. As closeness increases, they expect re-victimization, become more anxious and may push others away or engage in behavior that sabotages the relationship. Because of the problems that result from past abuse and the use of dissociation to cope with it, they do not have a strong sense of "inner guidance" or a healthy template for interpersonal interactions. Consequently they do not

read social cues well and make poor judgments about whom to trust. They may identify with the "victim" role, or, in an effort to fend off feelings of powerlessness, identify with the aggressor, increasing the likelihood they will become perpetrators (Lisak, 1997). Their past experiences have often created faulty assumptions regarding the acceptability of high levels of aggression in relationships (Briere, 1992). Moreover, past abuse and betrayal by adults likely plays a large role in the need for control that motivates many sex offenders. Survivors of abuse typically re-enact their interpersonal traumas with the therapist, intimate partners and/or other group members (Briere, 1992, Courtois, 1988). "Intimacy deficits," which are a common long-term effect of childhood abuse, were found by Hanson and Harris (1998) to be related to sex offender recidivism.

A fifth group of DESNOS symptoms are persistent physical symptoms that often defy medical explanation. The most common are digestive symptoms, chronic pain, cardiopulmonary symptoms, conversion symptoms, irritable bowel syndrome, headaches, chronic pelvic pain, "acid" stomach and sexual dysfunction. Clinicians who have worked with sex offenders in inpatient settings are aware that they often have multiple ill-defined physical complaints which resist medical treatment. These complaints are not manifestations of hypochondria or a need for attention, but rather the long-term effects of repeated early traumatic experiences, which have compromised the body's ability to cope with stress. Traumatized individuals have both overactive sympathetic and parasympathetic nervous systems, which through time cause the body to react like a car that is constantly having both the brake and the gas applied. The body wears out prematurely under these conditions, explaining the findings of the Kaiser ACE study, which clearly linked a history of childhood abuse to the 10 leading causes of death.

Finally, individuals with chronic trauma histories often show disturbances in meaning systems, i.e., they fail to find meaning in the things which usually give life a sense of purpose. They are alienated from any system of spiritual belief ("How could God have let this happen to me?") and have an adversarial view that all human relationships are a power struggle and that everyone is out for himself. This may be accompanied by a profound sense of learned helplessness and a pervasive decreased sense of competency. Herman (1992) has observed that those who seem to recover best are those who find some over-arching meaning or activity related to the abuse, i.e., getting legislation introduced or changed, or speaking as a victim advocate.

There is considerable overlap between DESNOS and borderline personality disorder (BPD), which is not surprising, given the fact that BPD is the personality disorder that research has associated most definitively with a history of child abuse (Briere, 1992). Luxenberg et al. (2001) suggest that BPD is primarily a disorder of attachment, with the hallmark feature being intense longing for an idealized relationship alternating with equally intense devaluation and eventual sabotage of the relationship. The primary feature of DESNOS is considered to be affective dysregulation, with patients being unable to sustain positive emotional states. Although both groups struggle with feelings of guilt, shame, and a sense of being "damaged goods," DESNOS patients have a more substantial and enduring basic core sense of identity. Their interpersonal relations are characterized by avoidance and re-victimization. Dissociation is a significant ongoing aspect of DESNOS, while it is more a transient response to stress among BPDs. Dialectical Behavior Therapy, devised by Marsha Linehan for severe borderline patients, has also been found to be effective with DESNOS individuals (Luxemberg et al., 2001).

Why CBT Does Not Work for Some Sex Offenders

In their analysis of the disappointing outcome data from the Atascadero State Hospital SOTEP program, Marques et al. (1999) stress a lack of commitment to abstinence and a lack of motivation to apply telapse prevention principles once out of the treatment situation. This review, like much of the literature on sex offenders, fails to appreciate the importance of affect in sexual offending. Sex offenses are about feelings, and in many cases they stem from feelings that are overwhelming and out of control. This is especially true in offenders with impulse control problems, but may also apply to more planned offenses.

Infants are born with the capacity to experience certain emotions which have a survival value, most notably fear. When they are raised in environments in which their innate startle response is frequently triggered by environmental events, such as parental yelling or fighting, breaking dishes or furniture, or other loud noises, a "kindling effect" occurs. Each time the startle response is triggered, the connections in the brain which cause it are strengthened, and this in turn makes it more likely to be triggered in the future. As the connecting fibers become more

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"Traumatized individuals have both overactive sympathetic and parasympathetic nervous systems, which through time cause the body to react like a car that is constantly having both the brake and the gas applied."

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numerous, it takes less and less to trigger the response. What results is a child who is hyper-aroused and may respond with fear to stimuli that other children would perceive as neutral. The parts of the brain which are involved are those which regulate emotional and sexual arousal. Prolonged hyperarousal while the brain is developing causes difficulties in affect regulation. This means the individual becomes emotionally vulnerable. This is likely to take the form of a high degree of sensitivity to emotional/sexual stimuli, an intense response to such stimuli, a slow return to baseline, and an inability to inhibit inappropriate behavioral responses to strong emotion. This may be what Hanson is picking up on in his statement that "deviant sexual schema gain their power from their sense of urgency" (Hanson, 1999, p.86). Indeed for some offenders this urgency is the result of early trauma that has altered their brains' ability to handle stress and to modulate emotional/sexual arousal. Sex offender treatment professionals have all worked with clients who are emotionally labile. The connection with one of the "stable dynamic factors" implicated by Hanson and Harris (1998), difficulties with emotional/sexual self-regulation, seems all too obvious yet it has been largely ignored in sex offender treatment.

There are also other factors in early development that are related to later sexual deviancy. One of the most important is the attachment relationship with the primary caregiver and its relation to the capacity for empathy. The process of attachment begins early, as soon as the infant is able to discern one face from another. Four decades of research on attachment has established that a caregiver can create a secure bond with an infant IF AND ONLY IF that caregiver is able to discuss her own childhood traumas and losses without showing lapses in either reasoning or discourse, as measured by the Adult Attachment Interview (Main 1997). This means what is crucial is not the amount of trauma a caregiver has experienced but the degree to which she has emotionally processed it. It also means that mothers who are being continually traumatized while raising infants and toddlers (for example, in domestic violence situations) are virtually unable to produce securely attached children. It is the caregiver's capacity to "mirror" what the infant is feeling and respond appropriately that lays the groundwork for empathy, and helps the infant learn how to self-soothe when upset.

The attachment literature (for example, Schore, 2003; Siegel, 1999) further tells us when a caregiver does not accurately "mirror" what an infant is feeling, when there is an emotional "mismatch" between caregiver and infant, the infant may experience shame. In a recent review of the literature on shame and guilt, sex offender researchers Proeve and Howells (2002) concluded proneness to shame is correlated with irritability, suspiciousness, resentment, anger arousal and the externalization of blame. They note that shame inhibits empathy, and caution that victim empathy work which stresses victims' experiences is likely to trigger a feeling of personal threat, which leads to the emotion of shame. In research on large samples of domestic violence perpetrators, Dutton (1998) concluded the primary emotion behind wife battering is shame that has been converted to anger. There are a variety of practices common in the treatment of sex offenders which are likely to elicit shame. Some examples are the preparation of a detailed autobiography, the processing of crimes in detail through the construction of a Behavior Chain and phallometric assessment. Individuals who have difficulty with affect regulation may become overwhelmed in the face of these practices, and are likely to either increase externalizing the blame for their behavior or flee from treatment.

How Can We Address Affect Dysregulation?

Nick Groth, a pioneer in sex offender treatment, used to say, "if you want offenders to come to treatment, you have to give them something that feels like help." Therapy that focuses exclusively on cognition and ignores affect will never be successful with sex offenders. Sex offenses are about feelings. The central fallacy of relapse prevention is its insistence that thoughts determine feelings and behavior and beliefs, and thoughts are therefore under voluntary control. Developmentally, affect precedes cognition. We are capable of experiencing feelings long before we develop rational thinking, and the feelings we experience early in our development determine both how our nervous systems respond to stress and how we interpret the world around us. Marsha Linehan, the originator of Dialectical Behavior Therapy (DBT), states, "the fundamental message given to clients in DBT is that cognitive distortions are just as likely to be caused by emotional arousal as to be the cause of the arousal." Linehan's work (1993) with borderline personality disorders has specifically targeted the problem of affect dysregulation with promising results. As already noted, it has been found to be effective with DESNOS clients, and there is every reason to believe it could be equally effective with sex offenders who are assessed to have poor impulse control and other indicators of problems regulating affect.

Linehan's approach is based on two fundamental assumptions: that distress tolerance and emotional regulation are internal skills that can be taught but require repeated practice to learn, and that problems with affect regulation do not reflect a "structural defect" but rather arise from developmental disruptions (this is consistent with the "phenomenological perspective," discussed below). Such problems may be addressed individually or in a small group of four or five, and the process typically takes about six months with severe borderlines in outpatient therapy. This should be done before beginning other forms of sex offender treatment because it will reduce the risk of emotional overwhelm and consequent flight from treatment, and will provide the offender with skills to handle strong affects that are likely to emerge during offense-specific therapy.

Linehan recommends problem behaviors related to affect dysregulation be approached in a specific order. The first set of behaviors that must be dealt with are suicidal ideation and/or behavior and self-injurious behavior. It has been my experi-

ence that self-injury is much more common among sex offenders, and other forensic clients, than is generally thought. In forensic settings, such behavior is considered by custody staff to be either an attempt at suicide, or a manipulation designed for secondary gain. The response in both cases is to deprive the inmate of his belongings and put him in a security cell. In fact, the vast majority of self-injury is never known to staff and clearly serves other psychological purposes than suicide or manipulation, because it is done in secret. Many potent opportunities for therapeutic work are missed when staff does not know how to respond to self-injurious behavior in any other way but with punishment. Moreover, such behavior needs to be understood because it may result in accidental death or dangerous infections from untreated wounds. Linehan suggests these behaviors be the first focus of treatment for obvious reasons (you cannot treat someone who is dead), but her approach is especially applicable to sex offenders because it conveys an immediate message that treatment is going to delve into some private and difficult areas. Clients are provided with large file cards ("diary" cards) at each session and are instructed to record any experiences of suicidal feelings and behavior, and of self-injury. Each such experience is then processed in the group with regard to what feelings or events may have triggered it, any memories associated with it, etc., in much the same way a behavior chain would be constructed in relapse prevention work. The goal is to identify maladaptive behaviors, behavioral deficits that are maintaining them and environmental and behavioral events that may be interfering with more appropriate responses. Clients are taught ways to tolerate the stress of unpleasant feelings, more adaptive behavioral responses to perform when they occur and emotional regulation skills.

Distress tolerance skills include distraction, ways to self-soothe and leaning to "bear the moment" through the use of "core mindfulness" skills such as relaxation training, meditation, prayer, or whatever technique the client feels drawn to and is likely to use. Skills to increase interpersonal effectiveness include deciding on goals, practicing assertion training and limit setting, modeling and role playing. Emotional regulation skills involve learning how to identify and label affect by becoming more aware of body cues, reducing vulnerability to hyper-emotionality through the use of stress reduction techniques, increasing the frequency of positive emotional events and developing an ability to experience emotion without judging, rejecting, or fearing a loss of control. When everyone in the group has been able to eliminate suicidal ideation and self-injury, the therapist then moves on to behaviors that interfere with therapy, which includes things like coming late or missing sessions, not paying in timely fashion, forgetting to do the homework, etc.

Finally, the therapist turns the focus to what Linehan calls behaviors that "interfere with the quality of life." These include serious substance abuse, severe eating disorders, high risk and out of control sexual behaviors, repeated hospitalizations, being in abusive relationships, etc. Most clinicians who treat sex offenders are well aware the vast majority of them continue to masturbate to deviant sexual fantasies while in treatment. It is a weakness of relapse prevention that it unrealistically assumes abstinence from the beginning. This group work, which precedes offense-specific treatment, is the ideal place to introduce the concept that continued masturbation to deviant fantasies is detrimental to recovery and to provide the client with the tools to interrupt deviancy and replace it with more appropriate behavior. This enables the client to begin the actual sex offender treatment with a much greater sense of control and understanding, so the processing of his offenses, or listening to others' offenses, will be less likely to induce a lapse. While Linehan's approach consists of some fairly traditional cognitive-behavioral techniques, she considers them as merely a first step in preparing clients for more in-depth work on trauma resolution. She recognizes early treatment of adult survivors of abuse has in many instances put premature emphasis on processing traumatic incidents too soon, overwhelming clients and in some cases causing them to leave treatment in worse shape than before (Briere, 1996).

Enhancing Relapse Prevention: Therapy from a "Phenomenological Perspective"

The approach used by some experts in trauma treatment (Briere, 2002, 1992) is referred to as "the phenomenological perspective." One of its primary assumptions is that the client is not defective or mentally ill, but adaptive. His symptoms and defenses are not dysfunctional, but rather reflect accommodation to early abuse and/or responses to the long-term effects of abuse. Traditional diagnosis and treatment frequently overlook or misinterpret the effects of abuse, resulting in inadequate, or at times even destructive, interventions. The client's own personal experiences and perceptions form the basis for interventions in trauma treatment, not theory or the clinician's interpretations about what the client's behavior means. The goal of such treatment is not only the removal of symptoms, but also the correction of distorted assumptions and damaged ways of relating to others. Since symptoms serve a deep psychological purpose, they cannot be easily given up. Therapists need to understand the adaptive significance of symptoms in order to formulate appropriate treatment. Sexual deviance is one of many symptoms which some adults who have been abused as children suffer from, and it should be treated with the same principles as other symptoms. This means not assuming that deviant sexual behavior means the same thing in every person, so it is important to do a thorough assessment and history with every client. Relapse prevention has generally failed to appreciate the complex symbolic meaning which sexual behavior has for humans.

Once clients have been taught skills for managing strong emotional arousal, therapy can begin to deal with the identification and processing of traumatic past events that play a role in ongoing symptoms, including deviant sexual behavior. It is not necessary for survivors of abuse to remember every incident of abuse in order to heal. It is, however, necessary for the therapist to remain within the "therapeutic window" (Briere, 2002) when working with such events. What this means is the therapist must be careful not to trigger emotional reactions so painful and frightening the client reverts back to previous mal-

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adaptive strategies or leaves treatment altogether. The paradigm in which trauma is processed may be loosely thought of as a form of desensitization. It involves gradual exposure to traumatic events, and the activation of associated negative feelings, occurring in a setting in which the client feels safe, cared for and validated. Trauma is processed first at an emotional level, with the client connecting with the feelings he experienced at the time of the event but without becoming overwhelmed, and then exploring its meaning at a cognitive level. (Go to www.JohnBriere.com for a detailed description of the "phenomenological perspective" and associated techniques.)

The application of trauma treatment principles to sex offender therapy in no way contradicts the use of relapse prevention techniques. Rather it brings an added dimension to the treatment which greatly increases the likelihood offenders will feel they are receiving help and will consequently remain in treatment. A trauma paradigm is especially useful in modules that attempt to develop victim empathy in offenders. It is counterproductive, and indeed almost sadistic, to show offenders films or use other materials which will elicit memories and feelings of their own abuse and then not allow them to deal with it. Indeed, it shows a total lack of understanding of how empathy develops. In most sex offender groups, it is likely there are people whose victimization experiences correspond with the behavior of each of the perpetrators. This represents a tremendous therapeutic opportunity which is usually missed. Moreover, the use of techniques that are likely to elicit shame, such as detailed processing of offenses, writing of autobiographies and phallometric assessment, may be a necessary part of sex offender treatment, but it is incumbent upon treatment professionals to provide a safe place where offenders can explore their reactions to such techniques. Otherwise, therapists run the risk of further damaging their clients and increasing their risk of re-offense. As already noted, a trauma-based approach directly addresses many of the issues identified by Hanson and Harris (1998) as being related to sex offender recidivism. ✯

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seizure, so long as those inquiries do not measurably extend the duration of the stop."[17]

Because the officer's pat down of Johnson took place "within minutes" of the initial stop, Johnson's continued seizure was thus still lawful as an incident of the traffic stop. It therefore follows that there was no need for the officer to have independent justification to seize Johnson for the weapons pat down. Ginsburg noted that the issue of whether the officer had reasonable fear for her safety was not before the Court because the Arizona state court had assumed without deciding that this requirement was met.

Johnson therefore is a very narrow decision. It does not hold that police officers can automatically pat down passengers during a traffic stop, nor does it authorize an officer to seize a pedestrian without reasonable suspicion of criminal activity and pat them down in order to talk to them in a consensual encounter. It only holds that where a passenger is already lawfully seized and an officer reasonably fears for her safety, she may conduct a pat down for weapons before continuing a voluntary conversation with the passenger.

Arizona v. Gant [18]

This important case limits *New York v. Belton's*[19] bright line rule which previously allowed police to automatically search the passenger compartment of a vehicle when they made a custodial arrest of the driver. Under the new reading of *Belton* the Court creates a two-pronged test under which either prong is sufficient to authorize a search.

The arresting officers knew Gant's driver's license had been suspended. While at a suspected drug house they saw Gant drive up and park in the driveway. Gant was immediately arrested within ten feet of his vehicle for driving on a suspended license. After Gant was handcuffed and securely locked away in a patrol car, two officers then searched his vehicle and discovered a gun and a bag of cocaine in a jacket lying on the backseat.

In *Chimel v. California*,[20] the Court stated that the twin rationales for allowing a search incident to arrest are the need to secure disposable evidence and officer safety. Neither rationale is present, however, in an arrest of an ordinary traffic offender whose only offense is driving on a suspended license. *Belton*, however, expressly held that the passenger compartment of a car could be searched even if the officer had no fear for his safety and had no reason to believe that destructible evidence would be found.

In *Thornton v. United States*[21] both Justices Scalia and Ginsburg decried the rule as illogical and called for its reexamination. Observing that the defendant was typically handcuffed and secured in the back seat of a squad car at the time of the search, Scalia proclaimed that the average arrestee must possess "the skill of Houdini and the strength of Hercules" if the officer safety and destruction of evidence rationales were to be relied upon as a policy justification for the rule. *Belton*, of course, had been an attempt to create a bright line rule to avoid litigation over what area could be searched when an arrest took place in or near a car. Because it was creating a bright line rule, the *Belton* Court abandoned proof that the *Chimel* rationales applied and based the justification for the search solely on the fact there was a valid custodial arrest.[22]

In *Gant,* an odd group of justices combine to restore the *Chimel* rationales and place limits on the *Belton* rule. Justice Stevens, joined by Justices Scalia, Souter, Thomas and Ginsburg, declared that *Belton* had undervalued the privacy interests at stake. Observing that *Belton* permitted searches of any container within the passenger compartment, including a purse, Stevens found the interest in having a bright line rule did not outweigh the motorist's privacy interests. Therefore the five justice majority ruled that *Belton's* reach should be restricted to only "permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

Applying this rule Justice Stevens concluded: "Because police could not reasonably have believed either that Gant could have accessed his car at the time of arrest or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable."[23] Because a warrantless search is always presumptively unreasonable unless an exception is established, it would therefore appear that the prosecutor will have the burden of establishing that one of the two prongs is satisfied before evidence obtained during a search incident to arrest is admissible.

It should be noted that Justice Scalia, who concurs to make the fifth vote, joins Stevens's opinion, but at the same time complains that he disagrees with the two pronged rule Stevens creates. Scalia does not truly agree with the first prong — i.e.that an officer can conduct a vehicle search whenever the defendant is unsecured and has access to the car. Absent a reasonable belief that the suspect is dangerous (which would justify a limited search for weapons under *Michigan v. Long*[24]) Scalia would permit a search "only when the object of the search is evidence of the crime for which the arrest is made, or of another crime that the officer has probable cause to believe occurred." Scalia nevertheless joins Stevens's opinion in full to make a majority, because he viewed *Belton* without any restraints at all as the "greater evil." Ironically, however, unless Scalia's position prevails, the police may in non-dangerous arrests apparently nullify the Court's attempt to curb unjustified exploratory searches by simply searching before they handcuff the arrestee.

Justice Alito, joined by Chief Justice Roberts, and Justices Kennedy and Breyer dissented, complaining that the law of search incident to arrest was now thrown into a "confused and unstable state." Alito also observed that there is no logical reason the restrictions on *Belton* should not also apply to area searches of all arrestees. We agree. Assuming that the police practice of handcuffing a suspect immediately after arrest is continued, the extension of *Gant* to all arrests would require that the police have reasonable grounds to believe that evidence of the crime of arrest will be found in the *Chimel* zone— i.e. the area that was within the arrestee's immediate control at the moment of arrest. Gant may have the most far reaching

implications of this term's Fourth Amendment trilogy.

Decisions Handed Down: *Knowles v. Mirzayance*

We discussed this case in the last issue (A Lawyer's Dilemma, 30 *Cornerstone* 6). The important question raised in *Mirzayance* is whether criminal defense lawyers must raise every possible defense that is viable. In an opinion by Justice Thomas, the Supreme Court held unanimously that defense counsel have discretion to forego a defense that they "reasonably believe" after "thorough investigation of law and facts relevant to plausible options" has "no realistic chance of success."

After the jury returned a verdict of first degree murder during the guilt phase of the two stage insanity defense trial, defense counsel advised the defendant to withdraw his plea of insanity. This advice was based upon defense counsel's belief that the jury would reject the insanity defense because they had just rejected in the guilt phase expert testimony that defendant's mental condition did not allow him to premeditate the murder. In addition defendant's parents had indicated they did not wish to testify in their son's behalf during the insanity phase. Mirzayance followed counsel's advice and withdrew his insanity plea and was sentenced to 25 years to life, the lowest sentence possible for first degree murder, plus a four year weapons enhancement.

The Ninth Circuit granted defendant habeas relief ruling that counsel's advice to give up the only available defense constituted ineffective assistance under *Strickland v. Washington*. Finding no precedent for what he characterized as a "nothing to lose" standard for ineffective assistance of counsel claims, Justice Thomas reversed. Thomas first found under the "deferential lens" of 28 U.S.C. 2254 (d) that the state court's prior determination that Mirzayance was not denied effective assistance did not violate "clearly established federal law." Thomas then, in a unanimous portion of the opinion, held that Mirzayance's counsel had not in fact been ineffective.

Observing that *Strickland* required both deficient performance on the part of counsel and prejudice to the defendant, Thomas found the defendant could prove neither.

With respect to counsel's advice to withdraw the insanity defense, Justice Thomas stated: "we are aware of no prevailing professional norms that prevent counsel from recommending that a plea be withdrawn when it is almost certain to lose…. The law does not require counsel to raise every available nonfrivolous defense." With respect to the prejudice prong, Thomas found, moreover, that there was no reasonable probability that Mirzayance could have prevailed on his insanity defense because "it was highly improbable" that a jury which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence in the NGI phase where he bore the burden of proof by a preponderance of the evidence.

This case highlights that judicial scrutiny of counsel's performance as "highly deferential" under *Strickland*, but it should be noted that the defense lawyer at bar investigated the insanity defense thoroughly, prepared four expert witnesses, and was therefore able to make an informed assessment of the insanity defense's chance at success. ✯

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1 129 S. Ct. 695 (2009).
2 129 S. Ct. 781 (2009)
3 129 S. Ct. __, 2009 WL 1045962
4 468 U.S.897 (1984).
5 514 U.S. 1 (1995).
6 Leon, supra n 4 at 916.
7 Id. at 922-23, fn. 23.
8 As defined by the Model Penal Code a person acts negligently when she "should" but fails to "be aware" of the risk that her conduct will cause a certain result and is blameworthy for the lapse because a "reasonable person" would have perceived the risk. See MPC §2.02(d). By contrast a person acts recklessly when he is subjectively aware of the risk and "consciously disregards" it. See MPC §2.02(c).
9 Leon, supra note 4 at 923, fn. 23 quoting Massachusetts v. Painten, 389 U.S. 560 (1968) (WHITE, J., dissenting).
10 129 S. Ct. at 702.
11 See, for example, the California Commission on the Fair Administration of Justice report noting the dismissal of over 100 convictions, "many of them on pleas of guilty" which had been obtained as a result of "a pattern of false arrests, perjured testimony and the planting of evidence by L.A.P.D. officers assigned to the Crash Unit of the Department's Rampart Division." CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON COMPLIANCE WITH THE PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE 3 (2008). See also Megan K. Stack, Drug Busts Gone Bad, Then Worse, L.A. TIMES, Apr. 5, 2002, at A-1, available at http://articles.latimes.com/2002/apr/05/news/mn-36338 reporting the wrongful conviction of 40 innocent defendants in Dallas, Texas, where police used fake drugs. See also NATE BLAKESLEE, TULIA: RACE, COCAINE AND CORRUPTION IN A SMALL TEXAS TOWN (2006). These examples reveal that police are not everywhere uniformly as "professional" as Justice Scalia would like us to believe.
12 Id. at 710.
13 129 S. Ct. 781 (2009).
14 170 P.3d 667, 673 (App. 2007).
15 Id. at 674.
16 551 U.S. 249 (2009).
17 129 S. Ct. at 788.
18 2009 WL 1045962
19 453 U.S. 454 (1981). Belton involved a case where a speeding driver with several passengers was stopped by a lone officer after a chase. The driver and passengers were ordered out of the car and placed under arrest for drug possession after the officer smelt burnt marijuana and saw an envelope marked "Supergold" on the floor of the car.
20 395 U.S. 752 (1969).
21 541 U.S. 615 (2004). Thornton expanded Belton to circumstances where the police did not initiate contact with the defendant until he was already out and away from his car.
22 Belton was grounded upon the questionable theory that because the officer had probable cause to make a custodial arrest, no additional justification was needed for the search of the passenger compartment of the arrestee's car: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." Belton, supra note 19 at 461, quoting United States v Robinson, 414 U.S. at 235.
23 It should be noted that Justice Stevens states the requirement here as a reasonable belief that evidence "might be found." On two other occasions Stevens indicates that the officer has to actually believe that the car "contains evidence." 2009 WL 1045962, at 9 and 11. While these two different formulations of the second prong of the rule may have been inadvertent, they make it unclear whether the justification for conducting a search for evidence is probable cause, reasonable suspicion or some new standard. A reasonable belief that a car actually contains evidence of a crime would equate to probable cause. However, both at the beginning of the opinion and (as noted above) when applying the new rule, Stevens appears to require that the officer only has to believe that evidence "might be found" in the vehicle. 2009, WL 1045962 at 2, 7 and 8. A reasonable belief that evidence might be found arguably equates to reasonable suspicion. Justice Scalia, who makes the fifth vote, does not mention any standard in his concurring opinion, stating only that the "object of the search" must be for "evidence of the crime for which the arrest was made." In Thornton, however, he indicated that the officer only needed to have a reasonable belief that such evidence might be found in the car. Thornton, 541 U.S 615 at 631.
24 463 U.S. 1032 (1983).

TELECONFERENCE - Continued from page 5

Legal Aid Society of Hawaii

The Legal Aid Society of Hawaii (LASH) received a Technology Initiative Grant from the Legal Services Corporation in 2001 to implement a video conferencing system to connect eight offices and six social services agencies on six different islands. The purpose was to connect the offices for meetings and trainings, and allow partner agencies to do the same. LASH's experience with video conferencing was not as productive as the programs mentioned above, and is a good learning example for other programs.

In designing the system, LASH staff admit to several missteps. First, the design of the system did not take into account the needs of the users, leading to issues with staff adoption of the technology and issues with ease of use of the equipment.

Second, LASH did not give enough consideration to the effect the technical limitations of the system would have on how LASH intended to use the system. For example, LASH intended to use the video conferencing system for all staff meetings and trainings. However, the system configuration would only allow four sites to connect at once without an additional bridge (this is common among video conferencing systems). As a result, these staff meetings ended up being partly by phone and partly by video. Trainings that depended on visuals had to be repeated, or limited to no more than four offices attending. In addition, even though it appeared the Internet lines being used would be sufficient to handle the video conferencing system, in actual use, images and audio became jumpy and difficult to follow. Partner agencies that had come to trainings and brown bag events stopped attending because they could not see or hear the trainings.

LASH's experience reiterates that staff buy-in is important for the adoption of any new technology system to be effective. If the staff, who are expected to use and operate the equipment, are not supportive of the technology and involved in the initial design and setup, staff resistance will lead to reasons not to use the equipment.

Court Self-Help Assistance and Referral Program

An example of how video conferencing is being used to effectively extend services by Court Self-Help Centers to clients in remote areas is the Self Help Assistance and Referral Program run by the California Court system (SHARP). SHARP is an example of three, rural counties in north central California working together to provide self represented litigants with legal information and resources through the use of video conferenced workstations. Assistance includes individual help and clinics where a lawyer in one location can teach a workshop for pro se litigants in multiple locations.

SHARP's use is unique in that equipment is on all the time. If staff in a location does not know the answer to a question they can communicate with staff at other centers. The video link also allows multilingual staff at a single location to serve customers at all the locations, because the link is always up it is a safety check. Other centers can keep an eye out for possible problems.

Tips for Making Video Conferencing Work in Your Program

The "Do List"

- Ask the question "is video conferencing the right tool?"
- Find the right partners.
- Make sure the partners are invested in using the technology.
- Get input from users so the system will work for them.
- Once the system is running, evaluate it. Does it work? Are we using it? Could we do more with it? How could it be better? Is it meeting our needs?
- Plan for upgrades, maintenance and regular service bills.
- Think about all the possible uses. If you want a system to cut down on travel times for meetings, could you also use the system to provide direct services to clients?

The "Don't List"

- Don't get seduced by the idea that video conferencing is the solution to a problem. It is a tool to help achieve a solution.
- Don't do it alone.
- Don't forget to make sure the system does what you expect at a price you or your partners can support. It is not a one time investment.
- Don't assume that there is only one way to use the equipment. Video conferencing connects people. It can connect staff for meetings. It can connect judges, lawyers and clients for hearings and trials. It can connect teachers and participants at pro se clinics. It can connect interpreters with staff who have answers.

Conclusion

In the end, a well used video conferencing system can allow a program to use technology to save money and extend its reach. If properly implemented, resources that had been assigned to travel can be re-allocated to serve more clients. As a technology that allows a legal services program to serve more individuals, the experience of these programs is that video conferencing is worth considering. ✯

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1 Special recognition should be given to LASH and its staff for their candidness about their video conferencing system, and willingness to allow the legal services community to learn from their experience.

that barriers do create 'silos', and the 'silo mentality' can destroy the mission and purpose of any organization as well as a collaborative effort. In fact, in the traditional professional organization, the professional role may have centered on its specific knowledge and skill-sets, and not necessarily on the stated overall mission and objectives of the organization. This uniquely stilted focus has tended to dominate the professional organization's decision-making processes, often at the expense of the organization itself as observed by Handy, 1995 and Mintzberg, 1998, and others. This widespread condition continues to exist today in professional organizations as well as government and industry, and can also affect how individual partners in a collaborative effort function within their team.

So with this 'silo' structure as a challenge to our need to effectively communicate and collaborate within our organization, as well as with those outside our agency; we must find ways to shift away from this potentially 'self-destroying practice,' while still achieving our mission and goals. We know that we can't change the 'silo' mentality overnight, thus we must learn to work as a collaborative team within the 'silo' organization.

Overcoming Challenges and Barriers to Collaboration is Not Easy, but Can be Done

Starting with a frank discussion on agency roles and responsibilities is an important first step. There may be misconceptions or unrealistic expectations about what can and cannot be accomplished by a specific partner or agency. This can culminate into a detailed Memorandum of Understanding or Agreement (MOU) between partners that specify not only roles and responsibilities, but also goals and objectives of the partnership. MOUs are always encouraged in any collaborative or partnership effort.

The cornerstone of information sharing is trust. Building trust involves a person or organization showing that they are predictable, reliable and responsible to do what they say they are going to do. A non-threatening environment to share ideas without retribution also helps build trust. Frequent and open communication, a willingness to share information, as well as to contribute equally to the goals and objectives of the project help build trust between collaborating partners.

Successful information sharing may require a major cultural shift within an organization as well as within a collaborative effort. Developing a communication strategy, using technology as an aid (such as listserves, e-groups, and e-newsletters) and benchmarking successful ideas are all ways that information sharing can be increased. An information-sharing environment should be encouraged through leadership support and modeling. Having decision-making protocols, working through conflict, giving credit where credit is due, and being accountable to the partnership are other ways to prevent as well as overcome challenges and barriers to collaborative efforts. Additionally, in order to break down or overcome the 'silo' mentality barrier, the same principles of building trust and increasing information sharing apply.

While collaborations and partnerships can be a challenge with many barriers to overcome, we know that we can't change each and every obstacle overnight. Our job is to work as a collaborative, blended team that maneuvers through those barriers placed in our path. We know doing it alone is frequently not an option to address the complex problems we are faced with today. Even though there is no single approach to a successful collaboration, collaborative efforts can go a long way to achieve goals that result in the establishment or enhancement of programs or services and the development of new problem solving approaches. Finally, collaborations can create greater opportunities for all, but it is important to remember it is not always a matter of what's in it for us, but rather what is the right thing to do for the clients we serve. ✩

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PRO BONO - Continued from page 8

coordination and planning is more difficult for the transactional program managers.

Transactional programs can partner with bar association sections. The sections are able to recruit volunteers to represent clients, prepare legal resources and present workshops. Sections are also often an untapped area for donations for the programs. The downside of working with sections to recruit lawyers is that the chair of the section changes every year and few sections have a working pro bono committee.

Transactional programs that serve micro entrepreneurs can offer pro bono opportunities to transactional lawyers, as well. For example, Legal Assistance to Microenterprises (LAMP) partners with Akin Gump Strauss Hauer & Feld LLP to help small business owners. LAMP has a website with documents and legal minutes to offer guidance to any small business. Staff or volunteer attorneys provide training for small business owners. With the economic downturn putting lawyers out of work, deferred hires and externships with transactional programs provides an opportunity for law firms to partner with transactional programs.

The challenges for transactional programs are taxing. Entity formation matters are being replaced with dissolutions. There is still a constant need to educate nonprofits about legal needs they don't even realize they have. The efforts to make the experience fulfilling for the volunteer lawyers must continue. Programs must make it easy for lawyers to donate their time through new partnerships and high quality opportunities. Because business lawyers who volunteer their time and talent make real, tangible differences in their cities. ✭

D'Ann Johnson is the Austin branch manager for Texas RioGrande Legal Aid.

CARROLL - Continued from page 9

obligation to zealously advocate for clients; and, a lack of sufficient time, training and resources to properly prepare a case in the face of the state court system that values speed over due process," he explained.

Carroll also shared the true story of one Michigan defendant, Eddie Joe Lloyd, who faced personal tragedy as the result of the state's broken system.

"The appointing judge in that high profile rape and murder case picked an economic-minded lawyer who did minimal research and then withdrew eight days before the trial; his replacement willingly took the case with only a week to prepare and never called a single defense witness at the trial," Carroll said. "Mr. Lloyd spent 17 years in prison before being found innocent based on DNA evidence. Mr. Lloyd's case ultimately cost Wayne County tax payers $4 million in a wrongful conviction settlement.

Also appearing before the sub-committee were: Dennis Archer, former mayor of Detroit and former president of the American Bar Association; Nancy Diehl, past president of the State Bar of Michigan and chief of the trial division for the Wayne County Prosecutor's Office; Erik Luna, professor of law at Washington & Lee University School of Law and adjunct scholar with The Cato Institute; Regina Daniels-Thomas, chief counsel of the Juvenile Law Group with the Legal Aid & Defender Association of Detroit; and Robin Dahlberg, senior staff attorney for the ACLU Racial Justice Program. ✭

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