

NATIONAL SYMPOSIUM ON INDIGENT DEFENSE

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“The right to freedom and equality of justice is the cornerstone of the Republic.”
— Reginald Heber Smith

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NLADA Meets New Challenges Head-On in 2010

By Jo-Ann Wallace, President & CEO

Greetings from Washington, D.C. and welcome to 2010! It seems such a short time ago that we witnessed the turn of the century. Yet now we are turning the corner on the first decade of this millennium. 2009 was full of excitement and anticipation that new national leaders would work with us to address the policies and practices that deny low-income people access to justice and opportunity. We similarly enter this year full of hope -- ready to seize opportunities for change yet mindful of the challenges still facing us.

In 2009 NLADA set out to accomplish the goals and objectives established by the board of directors in a strategic plan aimed at securing "consistently well-funded legal aid and public defense systems that deliver quality representation in every state and territory. Quality representation that: (1) promotes access to and fair results in our courts; (2) provides a gateway to justice in our communities by increasing opportunities that support positive life outcomes; and (3) promotes economic and racial equity. We readied ourselves with an ambitious but realistic agenda and developed a course of action that would lead to real change. At the same time, Americans struggled with the devastating effects of an epic recession. It was a time of great hardship for millions of Americans -- hardships that continue to haunt our communities today. Foreclosures, joblessness and homelessness reached all time highs, driving up demand for civil legal services, while resources for civil legal aid plummeted in the wake of the financial crisis. As state budget gaps increased, the struggle to establish and maintain fair criminal justice systems worsened and the indigent-accused languished in jail or received no counsel at all.

But despite these challenges, there was advancement in 2009. We charted a course to make measureable progress toward eliminating the justice gap, including identifying and establishing new federal funding mechanisms for civil legal aid. Following our success in securing additional resources for legal aid programs through the Federal Housing and Urban Development ("HUD") funding, we set out to help the millions of people who joined the ranks of the low-income by attempting to secure passage of a mortgage reform bill that authorized \$35 million for legal aid assistance specific to

the mortgage crisis. Another effort was the launch of the interactive site "Funding for Legal Aid" (FOA), which has more than 200 subscribers sharing information on sources of funding for the civil legal aid community. We worked with our partners to secure an increase in Legal Services Corporation (LSC) funds from \$390 million to \$420 million. We steered a course faithful to our commitment to a new generation of legal aid leaders by working for the reauthorization of the civil legal aid loan repayment program so that the careers of young advocates can be shaped by their passion for justice and not limited by the burden of law school debt.

Understanding that our vision of equal justice will never be fully realized as long as attorneys must develop advocacy strategies hampered by onerous restrictions we re-dedicated ourselves to eliminating them. On December 16, 2009 the President signed into law the 2010 appropriations bill that eliminated the statutory ban on claiming, collecting and retaining attorneys' fees. Shortly thereafter NLADA successfully urged the LSC board to lift the regulatory restriction on the same. Well before then we already were back at work to change that first step into a stronger foothold that further expands the exceptions to the restrictions as we set our sights on the day when they are gone altogether.

The appointment of Attorney General Eric Holder brought new optimism that civil rights and indigent defense would no longer simmer on a back burner. At NLADA's June meeting of the American Council of Chief Defenders (ACCD) in Washington, AG Holder outlined five initial steps that his administration would take to renew the Department's commitment to improving indigent defense systems. One of those steps was recently realized with the National Indigent Defense Symposium that took place February 17 -19 at the Mayflower Hotel in Washington, DC., which brought together indigent defense leaders, unlikely allies, and justice system stakeholders from throughout the country. The first convening of such leaders in ten years, NLADA played a critical support role to DOJ in the development of the Symposium. (See page 24 for more on the National Indigent Defense Symposium).

NLADA continues to be a leader in state public defense reform work in states like



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Class Action Settlement to Restore Benefits to More Than 200,000 Disabled and Elderly

By Emilia Sicilia

A recent settlement reached in the class action *Martinez v. Astrue*¹ requires the Social Security Administration (SSA) to dramatically change its implementation of the “fleeing felon” provisions of the Social Security Act (Act) and provide relief to over 200,000 class members, including the restoration of more than \$500 million in retroactive benefits to 80,000 individuals. The subject of the suit was the Act’s provisions denying Supplemental Security Income (SSI) and Old Age, Survivors and Disability Insurance program (OASDI) benefits to individuals “fleeing to avoid prosecution, or custody or confinement” for a felony.² To implement this “fleeing” provision, SSA had been automatically suspending and denying benefits – often an individual’s only means of subsistence – based solely on the existence of a warrant, regardless of whether the person was even aware of the warrant or had any intention to flee the charges. The *Martinez* settlement ensures that SSA will suspend benefits based on a warrant only if it is issued specifically for a charge of flight or escape.

Historically speaking, SSA’s policy was borne of the welfare reform effort of the 1990s, and an agenda to diminish the public safety net. Politically, it has been branded a way to bring criminals to justice. In practice, SSA obtains warrant information from law enforcement and relays names of beneficiaries with outstanding warrants to law enforcement agencies so that they may take appropriate action. The law enforcement aspect of the policy is therefore limited to this data-sharing feature, as that is what leads to arrests. But for SSA, the suspension and denial of benefits – which occur after SSA has apprised law enforcement of a person’s whereabouts – had been permitting the agency to “save” millions in unpaid benefits from the most vulnerable citizens it is charged to protect. For those affected, there have been devastating and senseless results.

One common scenario is that of a Florida man with bipolar disorder whose disability benefits were suspended in 2008 for a 1996 Texas warrant issued for writing a check with insufficient funds to a grocery store. He had been living in Texas at that time for a temporary job assignment, but he was unaware his check had bounced or that charges had been filed. Like many class members, he was unaware a warrant had been issued until SSA suspended his benefits. Without benefits, he was unable to pay for food or rent. He also faced a demand from SSA that he pay \$43,000 in benefits he was “overpaid” in the years since 2005.

Since the settlement, some lawmakers involved in the original design of this program have indicated plans to introduce legislation to undo the changes resulting from *Martinez*, arguing that amending the law is necessary to continue identifying wanted criminals. In reality, the settlement explicitly left intact SSA’s ability to share information with law enforcement regarding all warrants, and does not in any way hinder law enforcement’s ability to apprehend individuals. This data-sharing was never even challenged in *Martinez*.

The SSA’s pre-*Martinez* policy was, at its core, an effort to avoid paying benefits to individuals otherwise eligible to receive them. Ill-conceived and rife with problems, it wreaked extensive havoc on the lives of poor, elderly, and disabled individuals dependent upon such benefits. The settlement will assist many to rebuild their lives. Advocates can play a crucial role in learning about the settlement to ensure that class members get the relief to which they are entitled.

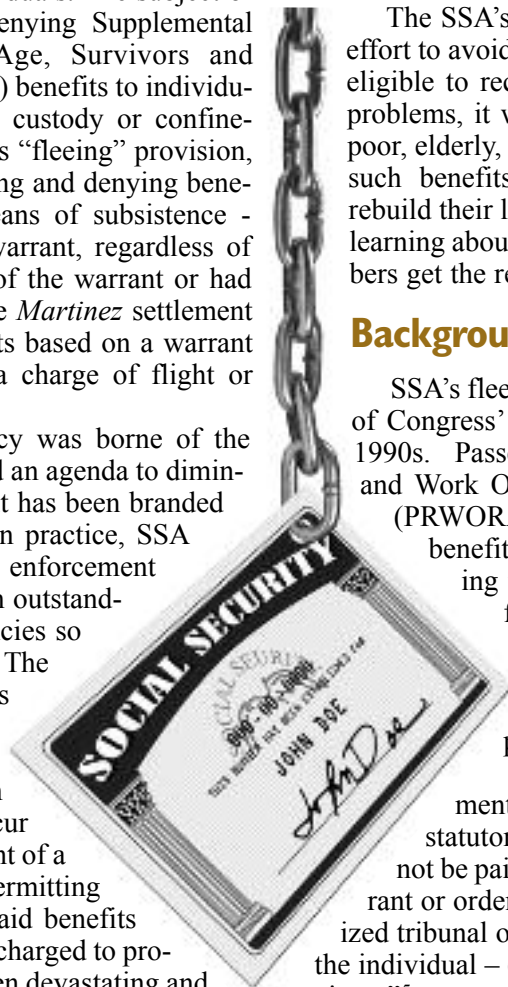
Background

SSA’s fleeing felon policy is a lesser-known element of Congress’ large-scale welfare reform effort of the 1990s. Passed in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996³ (PRWORA) prohibited payment of certain federal benefits, including SSI, to individuals “(A) fleeing to avoid prosecution, or custody or confinement... for a crime... which is a felony... or (B) violating a condition of probation or parole.” Similar provisions were passed for other benefits programs.

SSA promulgated regulations to implement this provision in 2000.⁴ It repeated the statutory language but added that benefits would not be paid in any month in which there was a warrant or order “issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual – (A) is fleeing, or has fled to avoid prosecution...”⁵

Eight years after PRWORA, Congress significantly expanded the reach of this policy by extending the prohibition to OASDI.⁶ The 2004 law also included a set of “good cause” provisions permitting SSA to pay benefits under certain circumstances. These provisions provided a mandatory exception when there is a not-guilty finding, dismissal, or if the warrant is vacated.⁷

The law also made discretionary good cause available when the underlying charges are non-violent and not drug related, and there were other mitigating factors present.⁸ SSA’s policy instructions set forth strict requirements for these mitigating factors. In addition to the statutory require-



ment that the underlying charge be non-violent and not drug-related, SSA permitted discretionary good cause only if there were no felony convictions since the issuance of the warrant, and either (1) law enforcement reports that it will not extradite, or (2) the only existing warrant is more than 10 years old and the beneficiary has an impaired mental capacity, is incapable or legally incompetent, or has a representative payee or resides in a long-term care facility.⁹

Regulations were proposed regarding the OASDI program but were not adopted.¹⁰

An Overexpansive Policy

SSA adopted an overbroad interpretation of these provisions to mean that a person is “fleeing” prosecution for a felony or “violating” a condition of probation or parole “when a person has an outstanding warrant for his or her arrest, even if that person is unaware of that warrant.”¹¹ To implement, the agency put into place a policy of relying only on outstanding warrant information to deny or suspend benefits. SSA entered into agreements with law enforcement agencies across the country to obtain information about outstanding warrants and share data about benefit recipients and applicants. After a data-match indicates that a recipient has an outstanding warrant, SSA notifies law enforcement of the recipient’s address and provides the agency the opportunity to apprehend the individual. After waiting 60 days for law enforcement to act, SSA then takes steps to suspend or deny benefits.

Therefore, it is only individuals who are not pursued by law enforcement who have their benefits suspended or denied. Law enforcement has already been apprised of an individual’s whereabouts before SSA suspends or denies benefits. In reporting that the program has led to 87,600 arrests since 1996, SSA notes that it is the data-sharing efforts – and thus, not the suspension of benefits – which contribute to the arrests.¹²

In addition to working in contradiction to the language of the statute, SSA’s pre-*Martinez* policy had numerous other serious flaws.¹³ By definition, the individuals dependent on OASDI and SSI included poor, elderly, and disabled individuals. And most of the warrants that law enforcement choose not to resolve – even when presented with information regarding the individuals’ whereabouts – involve charges filed years or even decades earlier for relatively minor offenses and in jurisdictions quite far from the place the individual now resides. Most recipients are limited in their ability to travel and to navigate the daunting task of remotely resolving a warrant in another state, often years later and without the benefit of the assistance of counsel. Cut off from their income, it becomes even less feasible.

Many class members first learn of a warrant when benefits are denied and are consequently in the position of having to disprove a charge they know little or nothing about, with a minimal amount of information provided by SSA. There are many circumstances where a person may not know of a warrant. Sometimes, it is the result of identity fraud. Criminals also often use aliases when arrested. Sometimes the warrant is intended for someone with a sim-

ilar or common name. In other instances, a person may have left the jurisdiction after charges are filed and without knowing he or she was under investigation. Even when the person has come into contact with the police, he or she may not have the intention to flee. They may have had been hospitalized, or may lack the mental capacity to form the intention to flee.

Efforts to resolve a warrant in another state involve many obstacles. Without being able to appear on a matter, it is difficult to get a public defender, judge, or prosecutor to look at the case at all, let alone to obtain the level of proof demanded by SSA to resume benefits. In fact, the older and less serious the matter, the more difficult it is to obtain the information, witnesses, and evidence necessary to have the case dismissed.

Solving the problem of a fleeing felon suspension was no easy task even for those with representation. Due process rights available for all agency determinations vanish in fleeing felon cases because SSA representatives routinely turn away appeals, insisting, invariably and incorrectly, that the only recourse is to resolve the warrant. Even when aware of the right to appeal, individuals and attorneys did not always perceive a basis to do so because SSA’s notice of suspension misleadingly stated, in complete contradiction to the statute, that the law prohibited it from paying benefits when there is an outstanding warrant. Additionally, appeals were often conflated with the good cause mechanism, which is only an exception, and not the means to challenge the basis for the appeal.

The good cause exception, in turn, was simply too limited and too strictly defined for it to ensure any fairness. The exclusion of charges categorized as violent or drug-related encompassed a wide range of low-level charges. And while law enforcement was almost always uninterested in the person – the suspensions occur after the agency had already been provided with the person’s name and whereabouts – it was not always willing to provide documentation held necessary by SSA to satisfy the good cause requirement.

By conflating the existence of a warrant with flight, SSA employed a policy divorced from both the language of the statute, and from the reality of how and when warrants are issued. The burden is inappropriately placed on the individual – who lacks the ability and resources – to prove otherwise, but without a functioning appeals process.

Success Through Litigation

Because of how extraordinarily difficult it was to appeal a fleeing felon determination, few federal courts had ruled on the issue. Those that had, however, were unanimous in finding SSA’s policy of determining a person was “fleeing” based solely on the existence of a warrant to be contrary to the statute. SSA was forced to abandon its policy in the states that make up the Second Circuit, where the only appellate decision was issued. In response to the decision in *Fowlkes v. Adamec*, SSA issued an Acquiescence Ruling

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Housing Crisis: Foreclosures in Michigan and Ohio

By Linda Cook

Legal services advocates in both Ohio and Michigan are struggling to meet the needs of the low- and moderate-income homeowners in the wake of the foreclosure crisis and the economic downturn. Ohio is a judicial foreclosure state; Michigan is a non-judicial state. Both have collaborative statewide foreclosure intervention initiatives. This article compares and contrasts how these two states deal with the foreclosure crisis including how state support organizing centers and direct service field programs impact their practices.

In Ohio, spurred by the Governor's September 2007 Foreclosure Intervention Task Force recommendations, a host of statewide partners came together in December 2007 to craft a comprehensive approach to providing assistance to Ohio's residential homeowners in crisis.

This response evolved into its current form, Ohio's Save the Dream initiative. In a very short time, the partners set up a statewide foreclosure intervention hotline with direct referrals to housing counselors and legal assistance, and a comprehensive public information Web site. The Ohio Supreme Court developed a model foreclosure mediation program, and in conjunction with the Ohio State Bar Association (OSBA), sent letters to all licensed attorneys in the state of Ohio asking each to volunteer to help homeowners in foreclosure. The Ohio legal services delivery system, in cooperation with the Save the Dream hotline, the OSBA, the Ohio Legal Assistance Foundation (OLAF), the Ohio Attorney General and the Ohio Supreme Court, accepted the challenge of two broad objectives: (1) increasing capacity internally to provide direct and indirect assistance to homeowners; and (2) expanding existing Volunteer Lawyer Programs (VLPs), or creating new VLPs, to train volunteer attorneys, match them with eligible borrowers, and mentor and support them in the case work.

OLAF committed discretionary monies for three years to help the legal services programs increase resources to meet the challenge. State agencies and the state and local bar associations allocated personnel and resources. Housing counseling agencies increased resources with the availability of federal National Foreclosure Mitigation Counseling funds. The public rollout of the statewide telephone hotline was April 1, 2008. Despite a very short lead time, all the programs and agencies had systems in place as of April 1, ready to meet the needs of Ohio homeowners.

Eligible homeowners enter the legal assistance delivery system in two ways. First, homeowners at or below 250 percent of poverty screened by the Save the Dream opera-

tors are referred directly by email to the regional legal aid societies. These homeowners are then contacted by legal aid within 48 hours for further assessment and possible assistance. Second, homeowners contact the local legal aid societies directly and are assessed for eligibility. Suitable cases are then referred on to volunteers, if volunteers are available and willing to accept a referral.

The legal assistance delivery system consists of dedicated advocates in nine legal aid societies and volunteer lawyers serving six basic regions. In addition, the Ohio Poverty Law Center (OPLC) is the State Support unit in Columbus that coordinates the legal assistance initiative and provides ongoing legal support for the lawyers directly representing homeowners, policy advocacy for foreclosure reform, training and public outreach. In addition to working with the Save the Dream

partners to provide direct legal assistance to homeowners in foreclosure, OPLC and the regional legal aid societies are also engaged in community work, court advocacy, policy advocacy and public outreach and education.

Legal aid lawyers have participated in over 100 public education events around the state, providing information on foreclosure assistance and prevention, budget counseling, credit and debt collection, and foreclosure rescue scams. They have also taken every available opportunity to direct media attention to the foreclosure crisis and the availability of assistance for distressed homeowners, appearing on local radio and television news shows, providing information for newspapers stories, and participating in Save the Dream phon-a-thons. In addition, in the first year of the programs, the regional programs offered over 40 basic foreclosure litigation trainings for volunteer lawyers throughout the state, and have continued to provide a variety of formal and informal trainings for volunteers.

By contrast, the Michigan Foreclosure Prevention Program (MFPP) is funded by grants from the Ford Foundation, the Michigan State Bar Foundation, the Institute for Foreclosure Legal Assistance, and by a contract with the Michigan State Housing and Development Authority. This project is comprised of attorneys from seven major legal services programs working together as a statewide foreclosure prevention unit. Nine of these advocates are funded directly by the grants. The goal of this project is to provide comprehensive and coordinated foreclosure prevention advocacy by: 1) providing direct legal representation to homeowners facing foreclosure; 2) providing support to housing counseling organizations; 3) coordinating advocacy on a statewide basis; and 4) providing training and technical support. The National Consumer Law Center provides training and advocacy assistance. The Michigan Poverty



Law Program, Michigan's State Support center, coordinates and supports the work of the project with trainings, litigation, and legislative and administrative advocacy. In addition, MPLP convenes statewide task force meetings, keeps partners updated with a newsletter and issue alerts, and maintains a Michigan Foreclosure Prevention Program Web site and foreclosure list serve.

Because of this statewide coordination, troubled borrowers can seek assistance through a variety of channels: the Michigan State Housing Authority hotline, contact with participating housing counseling agencies and legal services programs, or by intake through the MFPP Web site.

For both states, the goal was to reach as many distressed homeowners as possible to provide information, support and assistance. For the direct client services programs, this meant and continues to mean a dramatic increase in the number of requests for assistance. For example, in the first year of Ohio's initiative, foreclosure intake at The Legal Aid Society of Cleveland increased from 552 to 1,228. In Michigan, case services for all of 2008 totaled 1,600. In the first two quarters of the program, case services totaled 2,300. To meet the increasing demand, legal services programs had to train more personnel, both staff and volunteer lawyers, in fore-

closure work, set case acceptance criteria, and establish measurable outcomes and reporting requirements. For example, all Ohio programs use PIKA as a case management tool. Once the project leaders determined the outcomes to measure and the reporting format, the state's PIKA team designed special screens for inputting and capturing project information. As the projects continue, and the legal services systems are saturated with cases, participating programs must constantly reevaluate case acceptance criteria. After the initial wave of volunteers, private attorneys willing to commit to the complexities of foreclosure litigation have dwindled. Ohio rules of professional responsibility permit the unbundling of services, which programs have used as a tool to engage volunteers in more limited representation. For both states, engaging and maintaining the commitment of volunteer lawyers is an ongoing challenge.

For both states, the statewide collaboration on the foreclosure prevention projects has laid the groundwork and set an example for future collaborations and coordinated responses to issues affecting the low income community. ★

Linda Cook is the senior staff attorney at Ohio Poverty Law Center.

NLADA's Board and Policy Group Transitions 2009

Departing members

Lillian Moy (Board and Civil Policy Group)
Harry Johnson (Board and Civil Policy Group)

New members

Steve Eppler-Epstein from Middletown, CT (Civil Policy Group)
Jennifer Sommer from Blommington, IN (Civil Policy Group)
T. Patton Adams from Columbia, SC (Defender Policy Group)

Re-elected members

Chief Staff Officer (region IV) - Allison Thompson from Gainesville, FL (Civil Policy Group)
Civil Member (Non-CSO/Non-Client) - Betty Torres from Austin, TX (Civil Policy Group)
Chief Defender or Director of Defender Program - Gary Windom from Riverside, CA (Defender Policy Group)
Defender Staff - Lori James-Townes from Baltimore, MD (Defender Policy Group)

Redrawing the Boundary Lines for Ineffective Assistance of Counsel?

*Bobby v. Van Hook*¹, *Wong v. Belmontes*², and *Porter v. McCollum*³

By Laurence A. Benner and Marshall J. Hartman

In a trio of per curiam opinions issued in November 2009 the Roberts Court appears to be engaged in an attempt to retrench the boundary lines that establish ineffective assistance of counsel (IAC). The decisions, which arose from trials in Ohio, California and Florida in the 1980s, all deal with the failure to conduct a proper investigation into mitigating evidence in connection with the penalty phase of a capital case. The new tone sounded by two of these anonymous decisions is troubling. In *Bobby v. Van Hook* the Court backs away from ABA standards which were previously relied upon by the Court for defining professionally reasonable representation. In *Wong v. Belmontes* the Court appears to have raised the bar for determining what constitutes prejudice under *Strickland v. Washington*. What is particularly disturbing about both *Van Hook* and *Belmontes* is that even though they deal with representation impacting the determination of life or death, they were summarily decided without full briefing or oral argument. Perhaps in an attempt to appear balanced, or, as commentator Linda Greenhouse has called it, an example of “selective empathy,”⁴ the Court then on the last day of the month also summarily decides *Porter v. McCollum*, involving a decorated and twice wounded Korean War veteran who murdered both his former lover and her new boyfriend. Although the crime occurred more than 30 years after the Korean War, the Court finds that the failure of standby counsel to obtain military and medical records (which would have led to a diagnosis of PTSD⁵) was prejudicial. The outcomes of these decisions are not hard to understand (*Porter* is indeed more complex), but the differences in tone and content of the anonymous per curiam opinions indicate that a battle is being waged within the Court over how to define the boundaries of the right to the effective assistance of counsel.

In order to understand how the landscape may be changing as a result of these decisions we must first look at the Supreme Court’s prior decisions which, following performance standards drafted by NLADA and approved by the ABA, have during this past decade clearly established counsel’s duty to conduct a thorough investigation in connection with both guilt and sentencing phases, especially in a capital trial.

Previous Supreme Court Precedent

In 1984, *Strickland v. Washington*⁶ established a two pronged test for determining when counsel’s deficient per-

formance constituted a violation of the Sixth Amendment right to the effective assistance of counsel: Defense counsel’s error must not only be objectively unreasonable under prevailing professional norms, but must also be prejudicial.⁷ To establish prejudice a defendant must show there is a reasonable probability that but for counsel’s unprofessional error the outcome of the proceeding would have been different. *Strickland* defined a reasonable probability as “a probability sufficient to undermine confidence in the outcome.”⁸ Strategic decisions by counsel were to be given great deference by the Court and if based upon a reasonable investigation were “virtually unchallengeable.”

Strickland itself involved a strategic decision. There the defendant had confessed and, against the advice of counsel, pleaded guilty in 1976 to three gruesome stabbing murders committed during a ten day crime spree which included kidnapping for ransom, robbery and numerous assaults and other crimes. The defendant, also against counsel’s advice, waived his right to an advisory jury and elected to be sentenced by the trial judge. After consulting with the defendant and talking to his wife and mother on the telephone, counsel found no basis for believing the defendant suffered from mental illness. Based upon the judge’s comment that he respected people who accepted responsibility for their crimes, counsel therefore decided to rely upon the defendant’s remorse and acceptance of responsibility to spare his life. He argued that the defendant was basically a good man who had gone temporarily bad due to extreme stress created by his inability to provide for his family. The Court found that counsel had elected not to pursue or present any other mitigation evidence in order to prevent the state from rebutting his claim that the defendant had no significant criminal history with evidence of his prior record (which counsel had successfully excluded). For similar reasons counsel did not request a presentence investigation or have the defendant psychologically evaluated.

While today this representation would seem shockingly lame, the Supreme Court found counsel’s strategy and the decision not to seek additional mitigation evidence or psychiatric evaluation “was well within the range of professionally reasonable judgments” circa 1976. In addition, the Court concluded that in light of the overwhelming weight of the evidence in aggravation created by the nature and brutality of the crimes committed by the defendant, nothing that could have been presented in mitigation would have made any difference in the outcome. Although post conviction counsel produced affidavits from friends, teachers and neighbors indicating that it was “out of character” for the



Laurence A. Benner



Marshall J. Hartman

David Washington they had known to have committed such crimes, no evidence suggested defendant suffered from any mental illness. Finding neither a deficiency in performance nor prejudice, the Court therefore affirmed the defendant's death sentence.

Only Justice Marshall dissented from the *Strickland* standard finding its "debilitating ambiguity" constituted an abdication of the Court's duty to interpret and enforce the Constitution.⁹ A recent study of over 2,500 California state and federal appellate cases raising an IAC claim confirms Justice Marshall's view of *Strickland*.¹⁰ In only 121 cases was counsel's performance determined to be deficient and in only 104 cases was this deficient performance also found to be prejudicial and thus justify reversal of the defendant's conviction or sentence. The success rate for IAC claims was thus only 4%.¹¹ Many of these successes moreover were due to recent Supreme Court decisions which put some teeth into the *Strickland* standard by employing American Bar Association standards as benchmarks for determining professional norms of conduct.

Williams v. Taylor,¹² decided in 2000, was the first Supreme Court case to find that the failure to conduct a proper investigation into mitigation violated the *Strickland* standard. In *Williams* the defendant robbed and murdered a man who refused to loan him money. During the penalty phase of his 1986 trial, evidence of ten other violent crimes committed by Williams was introduced and two prosecution expert witnesses predicted there was a high probability that Williams would pose a future danger to society. In a weak closing argument defense counsel admitted that it was difficult to ask the jury to "give this man mercy when he has shown so little of it himself." Williams was not surprisingly sentenced to death.

Subsequent post conviction proceedings revealed that defense counsel had begun an investigation into mitigating evidence only a week before trial and had failed to uncover records that documented Williams had a "nightmarish" childhood of abuse and neglect (including repeated beatings by his father). Counsel also failed to discover Williams was borderline mentally retarded and failed to uncover positive evidence from prison records that showed Williams adapted well to the structured environment of prison life. The trial judge granted post conviction relief, but the Virginia Supreme Court reversed on appeal.

Applying *Strickland*, the Virginia Supreme Court conceded that counsel's failure to investigate fell below an objective standard of reasonableness, but found no prejudice because of the defendant's extensive violent criminal history. Indeed in the months following the murder for which he was on trial, Williams "savagely beat an elderly woman [leaving her in a vegetative state], stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates."¹³ The U.S. Supreme Court, however, reversed the state court's determination there was no prejudice with only Chief Justice Rehnquist and Justices Scalia and Thomas dissenting.¹⁴

It is important to note that Williams was decided after

AEDPA¹⁵ which requires federal courts to give deference to state court judgments on habeas review. A state court's decision can only be overturned if it is "contrary to or an unreasonable application of clearly established" Supreme Court precedent. The Court found, however, that this restriction did not bar habeas relief in *Williams*. First, the Virginia Supreme Court had added an additional requirement, ruling that counsel's deficient performance must render the proceeding "fundamentally unfair or unreliable." This made its legal test "contrary to" *Strickland*'s simple two pronged test. Second, the Virginia high court's determination that the outcome would not have been different was deemed an unreasonable application of *Strickland* because either a "graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."¹⁶ The Court explained that if all of the available mitigation evidence had been presented and its significance explained to the jury, its verdict might therefore have been different because the jury might have understood that Williams' violent behavior "was a compulsive reaction rather than the product of cold-blooded premeditation."¹⁷ It was no doubt significant that the state court judge who had determined upon post conviction review that the newly discovered mitigating evidence was sufficient to grant relief, was the same trial judge who had presided over Williams' penalty phase without this mitigation evidence.

In 2003 the Court in *Wiggins v. Smith*¹⁸ again held that the failure to conduct a detailed mitigation investigation and present evidence of defendant's family and social history constituted ineffective assistance in a 1989 capital murder trial. Although defense counsel had obtained a psychiatric evaluation of defendant, they presented no evidence of Wiggins' abusive childhood which included severe physical abuse from an alcoholic mother up to the age of six, sexual abuse during foster care and homelessness at the age of sixteen.

The Court noted that evidence of defendant's life history was relevant to mitigation because of the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background... may be less culpable than defendants who have no such excuse."¹⁹

Rejecting as a post hoc rationalization counsel's assertion that they had chosen to focus their limited resources on showing defendant had not been directly responsible for drowning the 77 year old robbery victim in her bathtub, the Court refused to give talismanic effect to the claim of strategic decision. While emphasizing that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence" the Court made clear that a decision not to pursue or present mitigating evidence must itself be professionally reasonable:

[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that

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makes particular investigations unnecessary....[S]trategic choices made after less than complete investigations are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.”²⁰

In holding that counsel’s failure to conduct a full investigation of defendant’s family background was professionally unreasonable, the Court expressly relied upon the “well defined norms” of professional conduct set forth in the ABA Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, the commentary to which expressly mentions the need to thoroughly explore the defendant’s family and social history including possible physical and sexual abuse.²¹

Noting that the defendant had no prior criminal record and that the evidence in aggravation was “far weaker” than in *Williams*, the Court found there was a reasonable probability that “at least one juror would have struck a different balance” had the mitigating evidence of defendant’s childhood abuse been discovered and presented.

Counsel’s duty to thoroughly investigate records containing information concerning the defendant’s background was further highlighted in *Rompilla v. Beard* in 2005.²² Rompilla was arrested in 1988 for the murder of a bar owner in Allentown, Pennsylvania. The prosecution notified Rompilla’s counsel that they were going to use the transcript of a prior rape conviction in aggravation. The defense interviewed several family members but failed to examine a readily available court file containing records relating to the prior rape conviction. Had they done so, the defense would have found leads to significant evidence of mental illness, mental retardation, and an abusive childhood. Rompilla’s parents were alcoholics. He was repeatedly beaten by his father and kept isolated from others. Tests indicated that Rompilla suffered from schizophrenia and had only a third-grade level of cognition. None of this was brought to the attention of the jury and Rompilla was sentenced to death. His claim that counsel had been ineffective was rejected and his death sentence affirmed by the Pennsylvania Supreme Court.

On habeas review, post conviction counsel developed testimony in mitigation that Rompilla suffered from organic brain damage, probably caused by fetal alcohol syndrome, which significantly impaired his cognitive functioning and substantially impaired “Rompilla’s capacity to appreciate the criminality of his conduct or to conform his conduct to the law.” The Federal District Court granted relief, because counsel had failed to investigate “pretty obvious signs” that Rompilla had a troubled childhood and suffered from mental illness. The Third Circuit Court of Appeals, however, in an opinion by Judge Samuel Alito, as he then was, reversed holding the state court’s resolution of the IAC claim was entitled to deference.

In finding counsel’s performance had been adequate the Pennsylvania Supreme Court found it significant that defense counsel had interviewed some family members and neither they nor the defendant himself had suggested that any abuse occurred. Defense counsel also had Rompilla examined by three experienced psychiatrists who did not detect mental illness. Although these individuals later testified that had they known of the defendant’s background they would have conducted further tests, the state court found defense counsel’s reliance upon these professionals to be reasonable. Judge Alito, over a strong dissent, held that the state court’s conclusion “that trial counsel acted reasonably and rendered effective assistance” was not an unreasonable application of *Strickland* and AEDPA thus barred relief.

In the Supreme Court, Justice Souter, writing for a five-justice majority, joined by Justices Stevens, Breyer, Ginsburg, and O’Connor, reversed Circuit Court Judge Alito, finding that counsel’s duty to obtain and review the readily available court file (that led to the mitigating evidence) was not only a matter of common sense, but an unmistakable “obligation” established by the ABA Standards for Criminal Justice. Justice Souter observed that it

flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forego examination of [such a] file.

The majority thus concluded that the state court’s decision that counsel’s investigation was adequate was objectively unreasonable.

Because the state court never reached the issue of prejudice, Justice Souter then addressed the second prong of the *Strickland* standard de novo, concluding that the newly discovered mitigating evidence “‘might well have influenced the jury’s appraisal’ of [Rompilla’s] culpability,” [citing *Wiggins* quoting *Williams*].²³ Acknowledging that it was possible that the jury might have still returned the death penalty even had they learned of Rompilla’s abusive childhood, mental illness and low level of mental functioning, Justice Souter pointedly stated “but that is not the test.” Rather the mere “likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’” and thus constitute prejudice.

Chief Justice Rehnquist, and Justices Kennedy, Scalia and Thomas dissented, claiming that the Court was imposing rigid rules upon defense counsel. To be sure the tone set by *Rompilla* does suggest that a capital mitigation investigation by defense counsel into a defendant’s social and family history should leave no stone unturned unless there are reasonable grounds for believing the effort will not bear fruit. With the replacement of Justice O’Connor by Justice Alito, however, there has been a shift in the balance of power that decided *Rompilla*. Justice Souter has also been

replaced by Justice Sotomayor. It is against this backdrop that we now examine the three per curiam decisions of the 2009 Term.

Bobby v. Van Hook

After a night of drinking, Van Hook lured a man in a gay bar into taking him home. His intent was to rob him. After arriving at the victim's apartment, Van Hook strangled him into unconsciousness and then stabbed him repeatedly in the brain with a kitchen paring knife. According to his confession he tried unsuccessfully to cut off the victim's head and then cut his abdomen open because in his words he wanted "to see more blood."²⁴ Van Hook then stole a few items and fled to another state. Although the crime was committed in a gruesome manner this technically did not count as an aggravating factor. It was the fact that the killing occurred during the commission of a robbery that made the defendant both death eligible and at the same time served as the sole aggravating factor under Ohio law.²⁵

Van Hook's trial began on July 15, 1985, less than three months after his arrest. Defense counsel properly focused attention on attacking defendant's confession which appeared to violate *Edwards v. Arizona*.²⁶ The Court appointed three mental health experts to examine Van Hook. They determined that he suffered from a "borderline personality disorder characterized by impulsive behavior, self-damaging acts...and problems with gender identity." While his condition was exacerbated by drugs and alcohol on the night of the crime, these court appointed experts did not find that Van Hook had a mental disease or defect which impaired his ability to appreciate the criminality of his conduct.²⁷ The experts conceded, however, that Van Hook had a "horrific" childhood. The mitigation evidence presented at trial showed that both his parents were alcoholics and his father was extremely violent, causing Van Hook to grow up in a "combat zone" where he regularly watched his father beat his mother who at one point was under psychiatric care. Van Hook started using drugs at age 11 and was ultimately kicked out of the military because of drug and alcohol abuse. He had "fantasies about war and killing," was depressed after being dismissed from the military, and tried to commit suicide five times.

The Sixth Circuit Court of Appeals found counsel's representation ineffective because defense counsel did not begin their investigation into mitigation until "the last minute" resulting in the failure to complete a thorough investigation which missed significant evidence. This failure violated ABA Guidelines for death penalty cases which mandate that counsel should begin an investigation into mitigation "as quickly as possible."²⁸ Although the trial occurred in 1985, the Sixth Circuit had previously established that the ABA Guidelines codify pre-existing norms of competent representation and "provide the 'guiding rules and standards to be used in defining the prevailing norms of professional conduct.'"²⁹ Thus the Sixth Circuit established a bright line rule requiring that counsel in capital cases "must fully comply" with the ABA Guidelines.³⁰

With respect to prejudice the Court of Appeals found that as a result of the incomplete investigation counsel failed to present additional significant mitigating evidence. In particular the defense failed to interview Van Hook's step-sister and several aunts and uncles who would have established that 1) Van Hook was repeatedly beaten by *both* his parents from the age of three, 2) that he witnessed his father attempt to *kill* his mother on several occasions, and 3) that Van Hook's mother had been *committed* to a psychiatric hospital. These witnesses, the Court of Appeals believed, would have narrated a more complete picture of Van Hook's terrible childhood. Because under Ohio law the aggravating factors must outweigh the mitigating factors and the only aggravating factor was the commission of robbery, the failure to discover and present this additional information was therefore deemed prejudicial.

The Supreme Court's per curiam opinion, however, saw things much differently and found that counsel "met the constitutional minimum of competence." First and most importantly the per curiam opinion harshly criticized the Court of Appeals for using the 2003 ABA Guidelines to measure the prevailing norms of professional conduct in 1985. "To make matters worse", said the Court, ABA standards were treated as "inexorable commands with which all capital defense counsel must fully comply" rather than mere evidence regarding what reasonable attorneys would do. Justice Alito went even further in a separate concurring opinion to emphasize his view that the ABA Guidelines, being issued by a "private group with limited membership" have no "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." No other justice joined Alito's opinion, which is simply wrong as a matter of historical fact. The Guidelines were initially drafted by NLADA and represent the norms of professional conduct thought necessary for competent representation by public defenders and assigned counsel across the country. Because publicly provided indigent defense systems provide representation mandated by the Sixth Amendment for the vast majority of criminal defendants in serious cases, it is thus hard to understand how Justice Alito can deny the relevance of standards sanctioned by both NLADA and the ABA.

The per curiam is also wrong in claiming that Court of Appeals' reliance upon the current version of the Guidelines somehow did not represent the "prevailing norms of professional conduct" in 1985. The deficiency at issue was the failure to promptly begin a mitigation investigation so that there would be time to conduct a thorough examination of defendant's social and family history. The Supreme Court recognized counsel's duty to conduct a "prompt and thorough-going investigation" as far back as 1932 in *Powell v. Alabama*.³¹ Indeed it was the inability to conduct an adequate investigation that was central to the reasoning in *Powell*.³² This constitutional underpinning formed the backdrop for Standard 4-4.1 of the ABA Standards for Criminal Justice which mandated in 1980 (five years before Van

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Hook's trial) that counsel had a duty to conduct a "prompt investigation...and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."³³ While the per curiam opinion found this standard to be "in general terms," it acknowledged that the Commentary to Standard 4-4.1 specifically noted the importance of acquiring information "concerning the defendant's background...mental and emotional stability, family relationships and the like." The per curiam then jumped to the 2003 ABA Guidelines for death penalty cases, claiming that these much more detailed directives, issued 18 years after the trial, could not set the standard for Van Hook's counsel's performance. But the per curiam ignored the 1989 version of the Guidelines, adopted just four years after Van Hook's trial, which contained virtually the same level of detail, and contained what was most relevant — the specific black letter duty to begin investigation into mitigating evidence "immediately upon counsel's entry into the case" and in particular to seek "witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing..." Not only does the per curiam not explain why the 1989 Guidelines are not relevant, it never states what guides it used to determine that counsel's performance was adequate.

Addressing the merits of the performance prong the per curiam opinion accepted the state's argument (made in its brief in opposition to certiorari) that defense counsel's billing records showed that they talked to Van Hook's mother "early and often" thus showing the investigation was not started at the last minute. However, this is simply wrong. The billing records do not tell what was discussed. Moreover defense counsel's motivation for initially interviewing Van Hook's mother logically was connected to the confession issue because it was necessary to determine her role in initiating contact with the police which led to her son's damaging confession.²⁶

The per curiam notes approvingly that counsel "looked into enlisting a mitigation specialist" while the trial was still five weeks away. Nothing suggests, however, that a mitigation specialist was employed or that this single phone call resulted in any investigational activity. The court also noted with apparent approval that defense counsel were "in touch" with one of their experts a month before trial and spent two hours with the second expert "a week" before the verdict was rendered! While the trial was begun less than three months after arrest, this still indicates that a mitigation investigation was not commenced immediately. Further proof of this is seen in the fact that the defendant's military records were not sought until seven weeks before trial, and were not received until July 1st — just two weeks before trial started. There is no mention that defense counsel ever asked for a continuance. Nevertheless the per curiam finds this representation was reasonable under the then prevailing professional norms. The Court's tacit approval of going to trial in a death case in less than 90 days on the basis

of just a few weeks preparation for mitigation is one of the most disturbing aspects of the *Van Hook* opinion. Fortunately the per curiam decision has no precedential relevance for performance issues in current cases because it only holds that this type of representation was adequate in 1985, not today.

With respect to the prejudice prong, the per curiam viewed the additional mitigation evidence that would have been discovered as merely being cumulative. It noted that evidence was presented that Van Hook had a "chaotic" childhood, was abused by his father and had a mother who had received psychiatric care. This was good enough. More evidence would not have made a difference in the outcome. Here too the per curiam is simply wrong. Had the Court been less hasty and had fully briefed and argued the case, it might have had greater appreciation of the fact that under Ohio's death penalty statute, even if the defendant is not insane, the defendant's mental state is an important mitigating factor. Indeed the death penalty is automatically "precluded" if the offense was "chiefly the product of the offender's mental deficiency or psychosis." At trial Van Hook's expert testified that in his opinion on the night of the crime, due to the combination of alcohol, drugs and his unstable mental condition, Van Hook experienced "an acute break with reality and acute psychosis" which interfered with his ability to perceive right from wrong.³⁴ The three judge panel that determined his sentence, however, rejected this conclusion (although the state produced no witness to counter the expert's testimony) because technically Van Hook had not been diagnosed as having a mental disease or defect which produced psychotic episodes. Had Van Hook's expert (and the sentencing panel) been aware, however, that Van Hook's mother had not just received psychiatric care (to which no stigma should attach), but had actually been committed to a psychiatric hospital suffering the same suicidal tendencies Van Hook suffered, this "might well have influenced" the diagnosis and thus the verdict of death. At the very least, in light of the fact that the state court had noted that there was only "scant evidence" introduced in mitigation, it would seem that this additional undiscovered piece of information, taken together with all the evidence as a whole, would have created a likelihood that the mitigating factors would weigh more than the sole aggravating factor (robbery), even if mandatory preclusion did not apply.

The stark contrast between the "leave no stone unturned" message which Rompilla signaled and the Van Hook per curiam's "good enough for minimal competence" approach is telling, especially since AEDPA did not apply to Van Hook's habeas petition and thus no deference to the state court's decision was statutorily required. The Sixth Circuit established clear guidance for defense counsel: Follow the ABA Guidelines. By undoing the Sixth Circuit's clear bright line rule regarding the determination of the performance prong, the Roberts Court has once again returned us to the "debilitating ambiguity" of Strickland's original reasonableness test. This will make it virtually

impossible for defendants to now prevail under AEDPA because 18 U.S.C. §2254(d) restricts federal courts from granting federal habeas relief unless the state court decision is contrary to or involved an unreasonable application of “clearly established” Supreme Court precedent. The Roberts Court, however, seeks to obfuscate rather than clearly establish the boundaries of the right to effective assistance of counsel. Section 2254(d) thus needs urgent amendment to remove this restriction which impairs the federal judiciary’s Constitutional duty to enforce the Sixth Amendment.

Wong v. Belmontes (Belmontes II)

While *Van Hook* demeaned the role of the ABA standards and muddied the waters in making a determination under Strickland’s performance prong, Belmontes appears to have heightened the degree of prejudice that needs to be shown under *Strickland*’s second prong.

Fernando Belmontes, aged nineteen, killed Steacy McConnell in the course of a burglary by crushing her skull with fifteen to twenty blows from a steel dumbbell bar. Belmontes and his confederates sold her stereo for \$100 and bought beer and drugs for the evening’s entertainment. This case was previously before the Supreme Court in *Ayers v. Belmontes*³⁵ which held five to four that California’s confusing catchall jury instruction on mitigation (subsequently amended) adequately allowed the jury to consider Belmontes’ mitigation evidence concerning his potential to make a positive contribution in prison should he be given a life sentence. The issue in this round of litigation (Belmontes II) concerns counsel’s failure to conduct a thorough investigation which would have uncovered numerous additional adverse experiences during Belmontes’ youth, counsel’s failure to consult with a mental health expert and the basic failure to explain to the jury, either thru expert testimony or closing argument, the linkage between Belmontes’ troubled childhood, past illness and mental state and his criminal behavior.

After the jury found Belmontes guilty of murder at his trial in 1982, defense counsel faced a dilemma at the penalty stage. Belmontes had, in a previous case, been charged with brutally murdering one Jerry Howard, execution style with a bullet to the back of the head. However, several prosecution eye-witnesses apparently refused on the eve of trial to testify and the prosecutor was left with only proof that the bullet came from Belmontes’ gun. The prosecutor therefore in that case accepted Belmontes’ no contest plea to being an accessory after the fact to voluntary manslaughter.

Defense counsel was successful during the guilt phase of the McConnell murder trial in keeping the jury from learning of Belmontes apparent involvement in the Howard murder on the theory that the plea to being an accessory after the fact to manslaughter constituted *res judicata* regarding any claim that Belmontes murdered Howard. The trial judge, however, indicated that during the penalty phase he would admit the evidence connecting Belmontes to the Howard murder if defense counsel “opened the door.” This evidence included admissions alleged made by Belmontes that he

“wasted” Howard. Under California law, evidence of unjudicated violent criminal activity may be introduced in aggravation, if relevant.³⁶ Defense counsel thus had to be circumspect in what evidence he presented during the penalty phase in the McConnell trial lest his mitigation evidence “sweep too broadly” and trigger admission of evidence that Belmontes had committed a second murder. For example, at one point defense counsel elicited testimony from a witness that Belmontes was not a violent person. The judge struck the testimony and warned counsel that if he persisted in this line of questioning, the judge would feel that counsel had “opened the door” and he would allow the state to bring in evidence of the Howard murder.

Defense counsel thus restricted his mitigation to nine witnesses who testified to Belmontes’ deprived childhood, the death of his 10 month old sister when he was five, the drug addiction of his grandmother and her tragic death, and his father’s alcoholism and extreme abuse. Defense counsel also introduced mitigating evidence to show Belmontes’ future contributions to society should he live. Belmontes testified that while incarcerated in a California Youth Authority Camp (CYA), he embraced Christianity and was baptized. He also admitted on cross-examination, however that once he had gotten out of prison he had gone back to his old ways and was not 100% committed to his religious beliefs. A CYA chaplain nevertheless testified that he thought Belmontes’ conversion was genuine, and that Belmontes would participate in prison ministries in the future. An assistant chaplain felt that Belmontes could counsel other inmates to not repeat his mistakes. Finally, a Christian couple who sponsored him said that he had been a positive influence on their own son. Although shown graphic pictures of Steacy McConnell’s “mangled head” crushed by 15 to 20 blows from a steel bar, the jury initially deadlocked and asked the judge whether it had the power to order life imprisonment. Ultimately, however, it sentenced Belmontes to death.

On habeas review both the district court and the Ninth Circuit held that defense counsel had been ineffective because he failed to conduct a complete investigation with respect to obvious leads which would have uncovered significant additional humanizing evidence. For example, counsel knew Belmontes had been hospitalized for rheumatic fever as a boy, but failed to discover the extent of the debilitating effects of this disease and its impact on Belmontes, who had been repeatedly told that as a result he would not live to see his 21st birthday. There were numerous other examples of adverse events and also examples of Belmontes’ positive attributes that counsel failed to uncover.

In addition the Ninth Circuit also found that counsel had failed to consult with a mental health expert and present to the jury, either through expert testimony or through explanation in closing argument, the significance of Belmontes’ childhood traumas. In others words counsel failed to con-

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nect the dots and show how Belmontes' troubled childhood was linked to his criminal behavior. The Court of Appeals concluded that given the fact it appeared that the jury had initially deadlocked over consideration of a life sentence there was a reasonable probability that at least one juror would have voted for life had the significance of the mitigating evidence been properly explained.

The Supreme Court's per curiam opinion reversed the Ninth Circuit, painting an entirely different picture of counsel's performance. The per curiam ignored the main basis for the Court of Appeals decision and focused instead on the "dilemma" counsel had concerning the Howard murder evidence. Ignoring counsel's failure to conduct a complete investigation, the failure to consult with a mental health expert and most importantly the failure to explain the significance of the mitigation evidence which was presented and connect the dots for the jury, the per curiam opinion's discussion blithely gives the reader the impression that counsel's failure to present all of the newly discovered evidence was strategically mandated because counsel was walking on eggshells. According to the per curiam if the evidence connecting Belmontes to the Howard murder came in it would be "the most powerful imaginable aggravating evidence" and counsel therefore "built his entire mitigation strategy around the overriding need to exclude it." Then suddenly, the per curiam abruptly shifts gears and decides that it is unnecessary to decide whether counsel's performance was professionally unreasonable because Belmontes could not show prejudice.

The per curiam concedes for "the purposes of our prejudice analysis" that "a reasonably competent attorney would have introduced more mitigation evidence." However, the per curiam then concludes that the "more is better" approach would have been unsuccessful because "the Howard murder evidence would have almost certainly come with it." Thus there was no prejudice because the outcome would have been the same. But "certainty" at trial is a rare commodity. The per curiam does not satisfactorily explain why counsel could not through the mechanism of a motion in limini have carefully tailored what an expert would testify to regarding the linkage between Belmontes' life history and his criminal conduct. This would not have involved an attempt to portray him as non-violent, but rather would have explained why he was violent. The trial judge, moreover had already excluded the Howard murder evidence once, and had refrained from taking advantage of an opportunity to admit it when counsel did directly elicit a statement about Belmontes not being a violent person. Had counsel properly prepared an expert witness and made a motion in limini before trial, the outcome cannot be said to be a foregone conclusion. By making an unsupported finding of fact to the contrary, however, the per curiam tips the balance against the accused.

The per curiam also faulted the Ninth Circuit's prejudice analysis which had concluded that "the aggravating evidence, even with the addition of evidence that Belmontes

had murdered Howard, is not strong enough to rule out a sentence of life in prison." Finding Belmontes had committed an "intentional murder of extraordinary brutality" the per curiam stated:

Strickland does not require the State to 'rule out' a sentence of life in prison to prevail. Rather *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.

One has only to compare *Van Hook* with *Williams v. Taylor* (where the defendant had committed at least ten violent crimes and had savagely beaten an elderly woman and left her in a coma) to recognize that Belmontes appears to have raised the bar, making the determination of prejudice more difficult.

Significantly in restating the test for prejudice the per curiam conspicuously omits *Strickland's* definition of a reasonable probability (stressed in *Wiggins* and *Rompilla*) which states: "A reasonable probability is a probability sufficient to undermine confidence in the outcome."³⁷ The anonymous author of the per curiam, however, had no doubts that Belmontes, having cheated death once before in the Howard murder, deserved to die. Never mind that Belmontes had not been actually convicted of that offense, or that the people to whom he had allegedly made admissions regarding the Howard murder never testified under oath or were subject to cross-examination. The Belmontes per curiam should give us pause because it undermines confidence in this Court's commitment to the rule of law and reflects an agenda driven by a sense of rough justice that now appears to be the order of the day.

Porter v. McCollum

Decided the last day of the term, *Porter* presents a case involving clearly deficient performance in the face of severe aggravation because two people were murdered. Porter, aged 53, killed his former girlfriend, Evelyn Williams, and her current boyfriend, Walter Burrows. He was convicted of both murders, and received the death penalty for the murder of Ms. Williams.

In July, 1986, after an argument, Porter threatened to kill Ms. Williams and then left town. Three months later when he returned to Florida, the defendant went to Ms. Williams' house, but she refused to see him and instead called the police. Porter then began a night of drinking. Early the next morning he returned to Williams' home and shot and killed both Williams and her new boyfriend Burrows.

At trial in late 1987, Porter represented himself, with standby counsel appointed. Near the end of the state's case, however, he changed his mind and pled guilty. He then agreed to be represented by standby counsel for the penalty phase of the trial, which occurred one month later. It was the first time standby counsel had conducted a penalty phase proceeding. He put on only one witness, the defendant's ex-wife, and read from a deposition. This mitigation evidence simply described Porter's behavior when drunk

and showed he had a good relationship with his son. The lawyer also told the jury that Porter had other handicaps that weren't apparent during the trial, and stated that Porter was not "mentally healthy." However, his lawyer did not put on any evidence with respect to Porter's mental health.

The jury recommended the death penalty for both murders, but the judge imposed the death penalty for only the murder of Ms. Williams. On appeal, the Florida Supreme Court struck one of the aggravating factors (that the crime was especially heinous, atrocious or cruel) on the ground that the evidence was more consistent with a crime of passion than a crime that was meant to inflict pain, but still upheld the death sentence. Two Florida Supreme Court Justices dissented finding death disproportionate punishment given Porter's drunken condition and the emotional circumstances which motivated the crime.

Thereafter, Porter filed a petition for state post-conviction relief, arguing that counsel had been ineffective. Counsel had met only once to discuss mitigation with Porter who was in counsel's words "fatalistic and uncooperative." Counsel conducted almost no investigation, failing to interview family members or obtain school, medical or military records. Had he done so he would have discovered extensive mitigating evidence. Porter's father was an abusive drunk who beat his wife, beat Porter and even shot at him once for coming home late. Porter joined the Army at age 17 to escape this abusive environment and fought in Korea where he was twice wounded in two separate battles above the 38th parallel close to the Chinese border. He was decorated for this service and received two purple hearts. Testimony from his commanding officer graphically described the fierce battles Porter survived when the 2nd Division came under constant fire. After five days of continuous fighting, which included hand to hand combat, many of the men "were like zombies." In the second battle Porter's company was again in the thick of the fighting and suffered 50% casualties.

When Porter returned to the US he went AWOL and was subsequently imprisoned for six months, but ultimately received an honorable discharge. After discharge he suffered from nightmares and repeatedly attempted to climb the walls of his bedroom at night with knives, forcing his family to remove all knives from the home. He also developed a serious drinking problem. According to Porter's commanding officer, many of the men came back from Korea as nervous wrecks and expert testimony confirmed that Porter undoubtedly suffered from PTSD.³⁸ Post conviction counsel also called an expert in neuropsychology who testified that Porter had cognitive deficiencies which affected his memory and his ability to read and write and suffered from brain damage which could cause him to engage in "impulsive, violent behavior." In this expert's opinion Porter's mental condition at the time of the offense met two statutory mitigating factors under Florida law: his ability to conform his conduct to the law was substantially impaired and he suffered from an extreme emotional disturbance. The state countered with two experts who, while not examining Porter and conceding they could not rule out brain abnormality,

found his mental condition did not qualify as statutory mitigators.

Without addressing the issue of deficient performance, the state court post-conviction judge denied relief, finding there was no prejudice. Reweighing the aggravating and mitigating factors with the new mitigation evidence added still did not tip the balance because the state judge found that the new evidence was entitled to little weight. Siding with the state experts the judge found that the mental health statutory mitigators were not established. Porter's military service record was discounted because he had gone AWOL, and his childhood abuse was deemed irrelevant because of his age. The Florida Supreme Court affirmed, again with two justices dissenting. Upon federal habeas review the district court granted relief, but the Eleventh Circuit reversed, holding under AEDPA that in determining prejudice the district court had failed to give proper deference to the state court's determination that only minimal weight should be given to Porter's new mitigating evidence.

The Supreme Court summarily reversed the Eleventh Circuit. Finding that counsel was ineffective for failing to conduct a thorough investigation of the defendant's background as required by *Williams* and *Wiggins*, the per curiam opinion found the state court's determination that this failure did not prejudice Porter was an unreasonable application of *Strickland*.

With respect to the performance prong the Court noted that despite the fact Porter was uncooperative and had instructed counsel not to talk to his ex-wife and son, counsel still had an obligation "to conduct some sort of mitigation investigation." Unlike counsel in *Van Hook*, who gathered a substantial amount of information before making a decision not to pursue additional sources, here counsel "did not even take the first step in interviewing witnesses or requesting [school, medical and military] records."

The per curiam then confronted AEDPA's requirement that deference be given to the state court's determination that no prejudice occurred. Observing that "Our Nation has a long tradition of according leniency to veterans in recognition of their service" the Court found that the state courts' discounting of Porter's "heroic military service" simply because he had gone AWOL reflected "a failure to engage with what Porter actually went through in Korea" and was therefore unreasonable. The state courts also erred in failing to give any consideration to Porter's mental health evidence. Even if Florida's statutory mitigators were not established, under *Eddings v. Oklahoma*³⁹ the Constitution requires consideration of any relevant mitigating factor and clearly Porter's mental health evidence was relevant as nonstatutory mitigation and should have been considered.

The Court then found that had the advisory jury and sentencing judge had known the intense mental and emotional toll that Porter's military service had on him, including his struggle with PTSD upon returning from Korea, and had it been informed of his history of physical abuse as a child, and the evidence of his brain abnormality and cognitive

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ACCD Report Provides Guidance for Assigned Counsel Systems

By Michael Tobin

At the NLADA Annual Conference in November 2009, NLADA's American Council of Chief Defenders (ACCD) released a preliminary report on assigned counsel systems. The report, stemming from a national survey of assigned counsel systems, is entitled "Implementation of the *ABA's Ten Principles* in Assigned Counsel Systems."

The report was prepared by the ACCD's Best Practices in Leadership and Management Committee, whose committee members perceived that leaders of assigned counsel programs do not have access to the same national sources of standards and guidance as have been prepared for public defender office programs. The committee identified the *ABA's Ten Principles* as the appropriate starting point for the report, because these general principles promote quality defense services regardless of the organizational structure of a specific jurisdiction. Through survey questions, interviews and written descriptions, committee members collected examples of ways in which assigned counsel systems have implemented the *Ten Principles*.

Recognizing the many different procedures for appointment of attorneys throughout the nation, the committee adopted a broad definition of an assigned counsel system: "any mechanism for assigning private attorneys" to represent indigent defendants.

Report Highlights

The report divides the *Ten Principles* into major topics: 1) Independence; 2) Structure and Resources (Funding & Structure, Workloads and Parity); 3) Qualifications, Training and Accountability; and 4) Prompt Appointment, Attorney-Client Privilege and Continuity of Representation. For each of the four topic areas, the report provides a summary of the applicable principles and their implementation in the context of an assigned counsel system. The report also provides examples of how specific programs have implemented the principles.

Independence

Although government funding necessarily entails a degree of dependence, organizational structure can insulate an assigned counsel system from day-to-day influences that can adversely affect the quality of the representation provided. The report provides examples of programs overseen by boards, some appointed by local bar associations and some by governmental officials. In some jurisdictions, the terms of board members are staggered, which decreases the likelihood of political pressure or interference.

Structure and Resources

Principle 2 calls for a mixed system of indigent defense

services, comprising both a defender office and an assigned counsel system. Such a system can leverage the specialization and expertise of staff defenders to provide training sessions and materials to the private bar. A mixed system can also provide flexibility for assigning additional cases to private attorneys when the defender program experiences case-load increases. The report describes several mixed systems, including both statewide and county-based systems.

Historically, indigent defense systems have struggled to obtain sufficient resources to provide quality representation. The report discusses how assigned counsel systems address the resource-related principles of attorney workload, attorney compensation and support services. The report also encourages representatives of assigned counsel programs to advocate for effective indigent defense services and for improvements in the criminal justice system. These forms of advocacy fall within the "equal voice" provision of Principle 8.

Qualifications, Training and Accountability

Assigned counsel systems differ greatly in their procedures to ensure high-quality representation. Unfortunately, in jurisdictions that rely exclusively on case-by-case appointments made by individual judges, these procedures are minimal at best. Each individual judge subjectively decides which attorneys to appoint. The report describes assigned counsel systems that review attorney qualifications, review performance, and provide training for participating attorneys. These procedures comply with the *Ten Principles* and support skilled representation of indigent clients.

The report describes certification criteria and performance standards from different organizations, and the report's appendix includes contact information for anyone interested in obtaining these materials.

Prompt Appointment, Attorney-Client Privilege and Continuity of Representation

The final major topic focuses on how systematic procedures can promote an effective attorney-client relationship. Despite the administrative requirement of determining financial eligibility for appointment of counsel, prompt appointment is necessary to provide indigent defendants with the same access to representation as is available to wealthier defendants. The earlier that an attorney is appointed, the more time that he or she has to communicate with the client, to prepare for court hearings, and to evaluate all dispositional and procedural options. Conversely, delay in appointing an attorney jeopardizes the client's rights because the client lacks a skilled advocate in dealing with both law enforcement and the court.

The conditions of attorney-client communication can be

challenging, particularly for incarcerated clients. Individual attorneys are ethically required to ensure both the adequacy and the confidentiality of their client communications. Assigned counsel systems can help attorneys fulfill these requirements by emphasizing the importance of proper communication and by providing such resources as confidential meeting rooms and confidential telephone lines for use by incarcerated clients.

Continuous representation by the same attorney, often called vertical representation, promotes quality representation because one attorney has clear responsibility for the client representation and also has the ability, as the representation continues, to enhance his or her knowledge of both the client and the client's case. The report identifies systems that provide continuous representation starting at the first appearance, thus combining the principle of vertical repre-

sentation with the system of appointing attorneys promptly.



Distribution of Report and Next Steps

The ACCD Executive Committee approved distribution of the report in November 2009 on a preliminary basis. The ACCD plans to update the report and encourages leaders of assigned counsel programs to submit additional information to Michael Tobin, chair of the Best Practices Committee, at tobinm@opd.wi.gov. ★

Michael Tobin is the chair of the Best Practices Committee at the Office of the Public Defender of the State of Wisconsin.

Serving Outside the Box: Innovative Approaches to Meeting the Critical Justice Needs of Homeless People

By Julie Yurth Himot

EDAR (Everyone Deserves a Roof), a 501(c)(3) non-profit organization providing mobile shelters to the homeless, was very excited to be a part of the 2009 NLADA Annual Conference. At the conference, Peter Samuelson, EDAR's Founder; Julie Yurth Himot, executive director; and Andrew Krastins, EDAR board member, spoke about their unique approach to helping the growing homeless population on a panel entitled "Serving Outside The Box: Two Innovative Approaches To Meeting The Critical Justice Needs Of Homeless People."

Legal Aid Society of Orange County's (LASOC) Executive Director Robert J. Cohen; Renato Izquieta, LASOC staff attorney; Abby Edwards Saunders, dean of students at the Charleston School of Law; and Jeff Yungman, clinical director of Crisis Ministries, described how they developed new strategies and partnerships to expand access to essential survival services to the homeless community.

Through these partnerships with legal services providers, public defenders, community-based organizations, law schools, and homeless service organizations, EDAR distributes four-wheeled units, based on a cart design allowing for storage during the day. At night, the EDAR unit unfolds into a framed tent-like enclosure with a bed providing a comfortable place to sleep.

During the conference, EDAR partnered with LASOC to showcase the EDAR unit at a booth where participants were able to see the unit, learn about the organization, its expansion efforts and how legal aid organizations can become a distributing partner of EDAR units in their own communities.

Founded in 2007, EDAR began when Media Executive

and Philanthropist Peter Samuelson counted the homeless individuals on his weekend bicycle route from his home in West Los Angeles to the beach in Santa Monica and back. There were 62 homeless people on the streets, including many women and several children. Peter interviewed those homeless individuals and with their input, conceptualized a mobile single-person device that would facilitate recycling and storage by day and, at night convert into a safe, elevated, covered enclosure where one could sleep.

In 2008, EDAR beta-tested sixty units in the Greater Los Angeles area. Through partnerships with local shelters, churches and homeless agencies, including Legal Aid of Orange County, EDAR has now distributed 170 units to the homeless. Many of these units remain in Southern California, with a beta-test phase in Phoenix, AZ and expansion efforts throughout the country.



Photo Credit: Joe Ravetz

EDAR units are used in a variety of modalities determined by both the needs of the distributing agency and homeless client. In all cases, EDAR asks the distributing agency to collect feedback from the EDAR user. In many instances, the EDAR unit has become a "first step" for those that are typically reluctant to enter a traditional shelter system. By collecting the feedback, the distributing organization creates a relationship with the EDAR user increasing the chance of them transitioning into a more structured program offering a continuum of care.

Following the NLADA Conference, the demo unit remained in Denver and is being used by a local men's shelter for their female clients.

For more information about EDAR and how you can bring EDAR to your community, please visit www.edar.org. ★

Julie Yurth Himot is the executive director of EDAR, Inc.

Legal Advocates Challenging Stereotypes and Increasing Access to Justice for LGBT Communities

Reprinted with the permission of the Legal Services of Northern California Race Equity Project

By Lisa Cisneros and Cathy Sakimura

Legal aid groups and national legal organizations are forging new programs to improve access to technically sound and culturally competent legal services for lesbian, gay, bisexual and transgender (LGBT) people. Access to civil legal counsel is a profound challenge for those who struggle with poverty, racial disparities, geographic isolation, and barriers associated with age, language or immigration status. Securing quality legal counsel becomes especially difficult when the matter at stake involves a client's sexual orientation or gender identity. Laws impacting LGBT people have changed dramatically in recent years. Legal protections exist in a patchwork across the state and federal level. Lawyers, including legal aid attorneys, continue to climb the learning curve with respect to LGBT-related law, and the experiences of LGBT clients.



Programs That Make a Difference

One example of leadership to improve access to justice for LGBT people is the National Center for Lesbian Right's Family Protection Project. NCLR is a national legal organization committed to advancing the civil and human rights of LGBT people and their families through litigation, public policy advocacy, and public education. The Family Protection Project

improves access to family law services for low-income LGBT families, with a focus on serving families of color.

The Family Protection Project is a source for training and technical assistance for legal aid attorneys assisting LGBT families on legal issues involving sexual orientation or gender identity. The project works in coalition with organizations serving communities of color to provide culturally competent legal services, and issues publications on legal topics of particular relevance to low-income LGBT communities. The Family Protection Project has also created a resource kit for serving LGBT clients. The kit packages tools for advocates serving LGBT clients with materials for clients, themselves, such as a plain language brochure for LGBT parents about their rights. NCLR helps improve access to justice by sharing its legal expertise with attorneys on the front lines.

Legal aid-led efforts include California Rural Legal Assistance's Proyecto Poderoso | Project Powerful. CRLA

provides no-cost legal representation to California's rural poor in the areas of health, housing, civil rights, education, family security, and employment law. Proyecto Poderoso is increasing and improving LGBT-related legal services. The program carries out three areas of activity: professional development on LGBT-related law and cultural competency, community education, and direct assistance for low-income LGBT people, particularly LGBT farmworkers. CRLA has partnered with NCLR to implement the program, leveraging NCLR's knowledge of LGBT legal issues to help CRLA attorneys develop expertise in this area. CRLA and NCLR have also jointly created Tips for Serving LGBT Clients, a publication for legal services and pro bono attorneys.

Since its inception, Proyecto Poderoso has trained nearly all staff members across CRLA's 21 field offices. The program has conducted most of its community education in Spanish, reaching more than 3,000 individuals through presentations and outreach activities during the past year. The program attorney and community worker have appeared in 26 television and radio interviews, speaking out about LGBT civil rights in rural, predominantly Latino media markets. CRLA has significant increased its provision of legal services to LGBT people.

Other legal organizations, in addition to CRLA and NCLR, have launched initiatives to ensure that existing legal protections make a practical improvement in the everyday lives of LGBT people, regardless of poverty, racial disparities or other types of barriers. In Michigan, Lakeshore Legal Aid hosts a program directed towards serving LGBT survivors of domestic violence. The Los Angeles Gay and Lesbian Center hosts a general legal services program that offers assistance on a wide-range of LGBT-related legal matters. Lambda Legal's Proyecto Igualdad extends its organizational resources and information to Spanish speakers and seeks to engage the Latino community on LGBT-related issues. These programs illustrate a growing recognition that the creation of new civil rights laws alone will not secure justice for LGBT people and their families. Rather, a robust infrastructure for justice is required. Critical to this infrastructure are legal aid attorneys with expertise in serving LGBT communities.

Overcoming Stereotypes to Recognize the Need for Affordable LGBT Legal Services

The success of the Family Protection Project, Proyecto Poderoso and similar initiatives has required confronting the widespread stereotype that LGBT people are predominantly wealthy and white. This stereotype creates a serious challenge to responding to the legal needs of low-income

LGBT people and LGBT people of color. The myth feeds the mistaken belief that LGBT people are generally able to hire private attorneys to adequately handle their legal matters. These assumptions have slowed poverty and racial justice organizations' responsiveness to the struggles faced by LGBT people within their constituencies. Similarly, LGBT organizations that neglect poverty and racial diversity within LGBT communities reinforce longstanding disparities and decrease their organization's range of impact.

There are many reasons to dismiss the stereotype of overwhelming affluence and whiteness within LGBT communities. At the outset, the common experiences of LGBT people create challenges that could easily lead to equal if not higher rates of poverty compared to their non-LGBT counterparts. Employment discrimination, lack of access to marriage, higher rates of being uninsured, and less family support increase LGBT communities' economic vulnerability.



Hard data also contradict conventional wisdom. The Williams Institute at the University of California, Los Angeles has found clear evidence that poverty is at least as common in the LGB population as among heterosexual people and their families.¹ The Institute's report analyzed data from three surveys to compare poverty (as defined by the federal poverty line) between LGB and heterosexual people: Census 2000, the 2002 National Survey of Family Growth (NSFG), and the 2003 & 2005 California Health Interview Surveys (CHIS).

National data indicate higher rates of poverty for lesbian and bisexual women, compared to heterosexual women, and roughly equal poverty rates between gay and bisexual men, compared to heterosexual men. Data from the NSFG for people from ages 18-44 revealed that 24% of lesbians and bisexual women are poor, compared with only 19% of heterosexual women. At 15%, gay and bisexual men have poverty rates equal to those of heterosexual men (13%).

According to Census 2000 data, poverty rates for people in same-sex couples are comparable to or higher than rates for married couples. When poverty rates are calculated for all members of the family, that is two adults and their children, the poverty rate for lesbian families is 9.4% compared to 6.7% for those in different-sex married couples and 5.5% for those in gay male coupled families.

Subsets of the LGB population face even higher poverty rates. African Americans in same-sex couples have poverty rates that are significantly higher than black people in different-sex married couples and are roughly three times higher than those of white people in same-sex couples. Latino and Latina same-sex parents have fewer financial resources to raise their children than those Latinos in married couples, with an average household income of \$49,385 compared to \$63,017.² People in same-sex couples who live in rural areas

have poverty rates that are twice as high as same-sex couples who live in large metropolitan areas. The rural same-sex couples are also poorer than people in different-sex married couples who live in rural areas.

The data sets analyzed by the Williams Institute do not include information about poverty rates within transgender communities, however a recent study indicates that transgender people face profound economic challenges. The Transgender Law Center commissioned a survey to gauge the well being of transgender people in California. In this survey transgender respondents were twice as likely to be living below the poverty line of \$10,400 as compared to the general population.³ One in five respondents reported having been homeless since they first identified as transgender.

Contrary to stereotypes, the context of LGBT lives and demographic data confirm that many LGBT people face economic hardship. Advocates who wish to marshal organizational resources to serve low-income LGBT people or LGBT people of color may need to battle the assumption that LGBT people do not need no-cost legal services. The data and reports cited above provide useful information to dispel those myths, replacing them with a more realistic understanding of LGBT communities.

Conclusion: Ways to Support LGBT Communities

Legal aid attorneys play a critical role in ensuring that expanded legal protections have a real positive impact on diverse LGBT communities. There are a number of steps that legal advocates can take to make a difference. Those actions include participating in trainings to become knowledgeable about laws protecting LGBT people and ways to work effectively with LGBT clients. Legal aid organizations can make their office spaces friendly to LGBT people with visual cues such as posters, stickers or displayed resources that positively reflect LGBT people. It is also helpful for legal aid organizations to forge relationships with local LGBT organizations and activists to inform the larger community that the organization is a resource for LGBT people. Legal aid attorneys are also encouraged to reach out to LGBT legal groups to identify the most effective ways to address LGBT-related legal issues. ★

Lisa Cisneros is a Pride Law Fellow and attorney for Proyecto Poderoso, a joint project with California Rural Legal Assistance, Inc. and NCLR.

Cathy Sakimura is a staff attorney and family protection Coordinator with NCLR.

Last Goodbye to Good Friends...

Remembering Champion of Legal Services F. William (Bill) McCalpin and Ms. Ethics
Melissa Kupferberg

Bill McCalpin

Bill McCalpin was the epitome of a "champion" of legal aid. Bill's history with legal services spanned from its inception, serving as chairman of the American Bar Association's (ABA) Special Committee on Availability of Legal Services (1965-1970) and member of the National Advisory Committee for the Legal Services Program of the Office of Economic Opportunity (OEO) to 2003 when he completed his second "tour of duty" as a member of the Legal Services Corporation (LSC) Board of Directors. He was on the board from 1977-1981 and again from 1993-2001. He served as chair in 1980 and 1981. After the last ten year stint, Bill became a board member of the National Senior Citizens Law Center. He was president of the NLADA Board of Directors from 1989-1991.

Between 1965 and 2003, Bill was director of Legal Services of Eastern Missouri, ABA secretary, chair of the ABA's Standing Committee on Legal Aid and Indigent Defendants (twice), chair of the ABA's Consortium on Legal Services, recipient of the ABA's most prestigious award (the ABA Medal), chairman of the ABA's Commission on Legal Problems of the Elderly, and partner of the St. Louis law firm Lewis, Rice and Fingersh.

These positions tell the formal story but not the actual impact that Bill had on the civil legal aid program. First he played a key role in getting the ABA to support the nascent legal services program at OEO. That was essential for the survival of the program. Then ABA President Lewis Powell delegated Bill and John Cumiskey (Michigan Bar Leader) as the ABA representatives to meet with Edgar and Jean Cahn who were representing OEO. They struck the deal that led to the ABA endorsement of the OEO Legal Services Program. Bill also played a prominent role in getting the ABA House of Delegates to pass that endorsement.

Second, he led LSC at a time of severe crisis when, after the election of Ronald Reagan, the very existence of LSC was at stake. His calm and committed leadership steered LSC through the early days of the Reagan Administration and put in place a structure that survived the efforts first to eliminate LSC and then to render it toothless. He also helped develop the private attorney involvement program and negotiated its direction with the ABA.

Esther Lardent, president and CEO of the Pro Bono Institute, remembers Bill's close relationship with the American Bar Association and his fearless opposition to the Reagan Administration's onslaught:

Bill McCalpin was, uniquely for that time, a highly respected and trusted leader both in the bar and in legal services at a time of crisis for legal services. His ability to marshal the support of the American Bar Association when the Reagan

administration tried to eliminate all federal funding for legal services was a critical element not only in preserving funding in the short term but also in ensuring that local, state, and national bars became major supporters and protectors of legal services. In this, as in all he did, Bill accomplished a great deal with little visibility.

LaVeeda Battle, former board colleague of Bill's during their ten-year tenure, recalls their service together:

Bill was a vital member of our board. Having previously served on the board with now Secretary of State Hillary Clinton, he provided institutional memory and future vision for our task at that time. He was sensitive to the need for legal services to keep a great relationship with the bar. He paid special attention to policies pertaining to Private Attorney Involvement (PAI). As a member of the Operations and Regulations Committee, he made sure our final regulatory proposals were clear, concise and carefully crafted. This involved the delicate balance of assuring continued representation of low-income clients to the extent possible while meeting the Congressional restrictions imposed on our Appropriations.

Finally, Bill worked closely with the civil legal aid community during his tenure as president of the National Legal Aid & Defender Association (NLADA) and provided extraordinary leadership and guidance as the community sought to move forward from the Reagan - Bush years into a new era. Bill testified in Congress on reauthorization and appropriations, he worked on the Future's project of PAG and NLADA and helped move NLADA forward as the leader of the community.

Alan Houseman, director of CLASP, the Center for Law and Social Policy, who worked with Bill during much of Bill's career in legal services, remembered Bill as follows:

Bill was truly unique among those in the private bar who championed civil legal aid and the federal legal services program. No one did more to ensure support of the organized bar or as a LSC board member to ensure the growth and sustainability of LSC. Bill fought with every tool at his fingertips to ensure that legal services could provide the highest quality representation to the poor that he as a lawyer in a major law firm provided to his clients. He advocated vigorously for an effective legal services program nationally and in Missouri. I had the opportunity to work closely with Bill over four decades. Every encounter was a learning experience. He was a craftsman of language. He was a true leader of peers. He inspired all of us who worked with him to do better. His commitment to civil legal aid was never ending.

And his friendship everlasting. Bill was a great man and we are all the better for what he has done.

NLADA joins her colleagues in commemorating Bill. We all remember him for his intellect, his integrity, his generosity, his humility, his remarkable institutional memory and his humor. There will never be anyone quite like Bill. We are thankful for the years he influenced our lives and for the indelible memories he has left us.

Melissa Kupferberg

Melissa Kupferberg was the ideal defense-based advocate, an excellent and sought-after trainer, an outstanding colleague, and an inspiration to all those who were fortunate enough to know her. Melissa grew up in the Hagerstown, Maryland area and graduated from Texas A&M University in College Station, Texas, with a bachelor of science in psychology. She earned a master of science in psychology from Arizona State University in Tempe, Arizona. She was employed with the Public Defender Office in Maricopa County, Phoenix, Arizona as a capital investigator until she was hired four years ago by the Department of Justice, Office of the Federal Public Defender, Middle District of Florida Federal Defender's Office in Tampa, Florida where she was an investigator on capital and non-capital cases.



Her untimely and sudden death on Sunday, November 7, 2009 at the young age of 32, shocked the community, yet immediately inspired NLADA's National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS) to establish a permanent conference scholarship in her name. Due to her extensive work and training with National Defender Investigator Association (NDIA), NDIA is also establishing an annual scholarship in Melissa's name.

Through scholarly work and training, persistence and long hours, Melissa became a shining star in the mitigation profession. Melissa did not take the easy road; she traveled the unpaved path and gently gathered each stone knowing the gems she may find in each person she represented.

Melissa always went beyond the call of duty with each person she met whether client, colleague or friend. She loved exploring her clients' lives and was passionate about the mysteries within each of us. She was one of the greatest listeners in the profession which led clients as well as

friends to trust her and confide their secrets knowing they would be safe.

"Melissa had the uncanny ability to become a cherished part of someone's life within minutes of meeting her; I know she did for me and others as well" said Betsy Biben, a founding board member of NASAMS. "She embraced life and all it had to offer."

Melissa's numerous accomplishments never stopped her from being humble. She made time for everyone who had a question – if she couldn't answer the question she'd lead you to the person who could.

Melissa was vice-chair and co-chair of national NASAMS conferences and was an active member of the board. She had co-developed and presented ethics training for social workers in defender offices and had planned to concentrate on writing professional articles on the subject. Melissa had also begun to develop graduate school curriculum on defense-based mitigation training. In the years before she died, Melissa provided training throughout the county for the Administrative Office of the U.S. Courts, Office of Defender Services and nearly completed her book which was to be a handbook for mitigation investigators, specialists, and social science experts.

Melissa became a leading expert on ethical issues for social workers and investigators in defender offices. With a nickname of "Ms. Ethics," she developed a training curriculum and co-trained on this subject with leading trainers throughout the country. She was a constant source of answers on the NASAMS listserv and always encouraged people to contact her and offered assistance to our client representation. We could always count on Melissa for brainstorming ideas, researching unique issues, and always being there. Melissa lived a full life in her mere 32 years and with her every step left us all with gifts we will always treasure.

The executive committee of NASAMS voted unanimously last year to honor Melissa Kupferberg by establishing a scholarship in her name. The scholarship will be in the form of a conference registration. The recipient will be a non-capital practitioner.

Ann & Steve Kupferberg, Melissa's parents, Andrew Kupferberg, her brother, her aunts, uncles, godparents, cousins, and many friends throughout the country are very thankful to NASAMS for honoring Melissa and keeping her name as a constant reminder of the commitment, dedication, and love she had for defense-based advocacy.

Thank you Bill and Melissa for living a life committed to equal justice. ☆



THANK YOU



NLADA thanks the equal justice community for voting for NLADA!

NLADA was selected by Yodle, a leader local online advertising company connecting local businesses with consumers, to receive an end of the year contribution for doing incredible work to make the communities we live in better places. Special thanks to Yodle for their donation, especially during the current difficult economic environment!

Focus on a Public Defender: Paulino Durán

By Paulino Durán

I am passionate about being a chief public defender. My job is dynamic, challenging, and intellectually stimulating. It allows me to work for the public good and help people. My practice and actions are consistent with my values and beliefs. I feel that I was born hardwired for this profession and then molded by how I was raised, where I grew up and a series of significant social, political and cultural movements and events that I experienced during my student years.

Before proceeding any further, let me tell you about my office. I am the chief public defender of the Office of the Public Defender in Sacramento, California. We are an institutional Public Defender System funded by the County of Sacramento. We handle 40,000 cases per year (adult: felony and misdemeanor; juvenile delinquency and conservatorships) with a staff of approximately 185 (107 attorneys + 24 law students certified to practice law pursuant to the California State Bar).

My Foundations

I immigrated to the United States from Mexico with my parents at a very young age. This was the beginning of my rich, confusing and challenging journey between two languages (Spanish and English) and two cultures (Mexican and “American”). I put quotes around “American” because my parents and many of their friends believed that anyone born in the Americas (North, Central or South) is an American and it was presumptuous of people from the United States to claim sole proprietorship of being an “American”. They referred to them as “estadounidenses”, i.e., people from the United States. This, I guess, is an example of my learning to be technical and analytical with the use and definition of words.

Basic tenets of my upbringing centered on: everyone is equal; treat others as you want to be treated; protect and assist the weak; share your good fortune; be fair; respect others; be tolerant; and, be true to yourself. My parents taught by example. Our home was always open to those in need. To this day, my wife and I open our home on holidays to friends, acquaintances, friends and acquaintances of friends and neighbors who are alone with no place to celebrate. It was not uncommon for people to ask my parents to take their child(ren) because they could not provide for them. My parents would help those parents find jobs, help them financially or take temporary custody of their child(ren) until the distressed parents got back on their feet. My mother was the unofficial social worker and good will ambassador for many in the Latino community. In essence, she was the go-to-lady in our community. She would counsel and/or help people with whatever problems and/or issues they might be experiencing. The problems could be personal or related to government or business issues, e.g., issues involving family, child rearing, husband–wife; immigration;

Department of Motor Vehicles; Department of Unemployment; insurance; hospitals, etc.

From the age of seven, I was the interpreter in many of her efforts dealing with government and business.

My parents were great proponents and practitioners of the concept of “pay it forward”, i.e., I do something for you not for compensation but for you to remember to help another person in need in the future.

With this upbringing, is it any wonder that I would gravitate towards becoming an attorney, social worker, activist or priest?



My Environment

When my family immigrated to the United States, my parents settled in San Francisco, CA. I feel fortunate to have been raised and have received my entire formal education in a city that is intellectually and culturally vibrant with an openness and acceptance of diverse people, languages, cultures, art, food and lifestyles. Growing up in this rich environment certainly had a significant impact in molding me. Even though I was exposed to and experienced discrimination in this “enlightened” milieu, I know that it was far less than what existed outside of this area.

Defining Events, Experiences and Movements

We are the product of our experiences and I am lucky enough to have been exposed to and was active in significant activities throughout my student years. My life and career path were greatly influenced by the following: my immigrant status; the Civil Rights Movement (1954-1968); the Student Protest Movement (1960s); the Prisoners' Rights Movement (1960-1980); and, the Vietnam War.

Each of the aforementioned experiences taught me the significance of knowing, understanding, appreciating and using the “rule of law” to bring about and support significant political, social and cultural change. I learned that it was essential to know how to use the constitutional framework that was used by the authorities to deal with the issues before them. Taking part in and/or being exposed to and discussing the merits of these movements was the equivalent of an advanced educational degree for me.

It did not take long to decide that I wanted to become an attorney; an attorney who would fight for people’s rights and those in need of a voice.

Successes

Our Felony and Misdemeanor Intake Units do a fantastic job of evaluating which cases should be litigated and which ought to settle. The Intake Units screening abilities are consistently validated by the results obtained by our Felony and Misdemeanor Trial Units. The number of felony and misdemeanor jury trials have significantly increased with great results for our clients while also improving the offers that are made in other cases.

I am particularly proud of the level of advocacy and accomplishments of our Juvenile Division. A significant achievement was the establishment of a heretofore non-existent competency issue for juveniles based on emotional development.

We have a number of specialty units that consistently exceed expectations. These specialty units assist those most forgotten in our criminal justice system.

Interested in Public Defense Work?



Do you like challenges? Are you part idealist and iconoclast? Are you creative and like to perform? Do you thrive in conflict and chaos? Are you a risk taker? Are you an adrenaline junkie? Do you want to make a significant difference in our society? If so, you will find Public Defense work rewarding and it will enrich your life! ★

Paulino Durán is the Chair of the American Council of Chief Defenders.

Defender Legal Services' Focus on a Public Defender is a regular column in Cornerstone that focuses on one public defender per issue. The intention of this column is to create an opportunity for NLADA membership to learn about each other and each other's work.



TRAINING & CONFERENCES Calendar 2010

ABA/NLADA Equal Justice Conference

Phoenix, AZ - May 13-15, 2010

The Equal Justice Conference brings together all components of the legal community to discuss equal justice issues as they relate to the delivery of legal services to the poor and low-income individuals in need of legal assistance. The emphasis of this conference is on strengthening partnerships among the key players in the civil justice system.

Client Impact Leadership

Chicago, IL - July 19-20, 2010

Civil Impact: Emerging Leadership II

Chicago, IL - July 20- 21, 2010

A New Era of Advocacy: Substantive Law Conference and Litigation and Advocacy Directors Conference

Chicago, IL - July 21-24, 2010

In July 2010, we will be hosting concurrently the Substantive Law and Litigation and Advocacy Directors Conferences. We are motivated by this moment in time to bring together these two distinct conferences in order to facilitate dialogue between advocates and foster the exchange of information and knowledge as it relates to the work of civil legal aid.

Nuts & Bolts of Leadership & Management

Cincinnati, Ohio - September 24-26, 2010

This program provides an introduction to selected issues of leadership within public defense systems, focusing primarily on internal management. It is designed for current supervisors and managers and for those considering a move from line attorney to a leadership role within their system.

Defender Train the Trainers

Atlanta, Georgia - November 8-9, 2010

Annual Conference

Atlanta, GA - November 10-13, 2010

NLADA's annual gathering of advocates from both the civil legal aid and indigent defense communities, offering innovative training tracks and workshops. The conference offers advocates the latest knowledge and professional skills to enable them to creatively and effectively meet the legal needs of low-income people.

Farmworker Law Conference

Atlanta, GA - November 10-13, 2010

**For more information,
visit www.nlada.org/training.**

Senior Justice John L. Kane Gives Hope, Inspiration to NLADA Annual Conference Attendees

By Kara Allinson, Marketing Associate

NLADA's 2009 Annual Conference was a celebration of the theme "Justice in Times of Challenge and Change." The event, held at the Hyatt Regency Convention Center, celebrated and honored the tremendous contributions of three equal justice heroes, offered nearly 200 pre-conference and conference sessions, workshops, affinity group meetings, and networking events, and welcomed Senior Justice John L. Kane, who boasts more than forty years of service in the legal community and currently holds the title of Senior Judge of the United States District Court for the District of Colorado as the conference's keynote speaker. The heroes honored for their contributions at the Annual Conference, were Ann B. Lever, retired civil attorney for Legal Services of Eastern Missouri, the Michigan State Appellate Defenders Office (SADO) and Edgar and the late Jean Camper Cahn.

Senior Justice John L. Kane

More than 700 people were in attendance to hear the honorable Senior Judge John L. Kane speak at the opening ceremony at the 2009 NLADA Annual Conference on Wednesday, November 18, 2009.

It was from more than 40 years of experience, personal and professional, in the legal community and in life that Kane drew on for his speech, one chalk-full of life's lessons and western analogies and hard times, a fitting theme for the Conference held in Denver, Colorado.

After welcoming the audience to "Cowboy Country," Kane shared stories of his first indigent defense cases (stolen cows and cattle brands), how he participated in the team that wrote the NLADA amicus brief for the Supreme Court case *In re Gault* that extended the bill of rights to

juveniles and the solidarity he felt when he worked for the first public defender office in the state of Colorado.

Kane stated that much has changed since his "early days," in indigent defense. "Cattle-branding is now computerized and the ranch-land of yesterday is now a sea of residential development."

But, Kane warned, even with such advances and change, legal aid has not seen the same progress as the technological or developmental world.

"Let me state the obvious...the poor are still with us. If there was a war on poverty, much like the war on drugs, we lost it." Kane expressed his frustration with the lack of funding for legal aid comparing it to the lack of funding for health-care, both of which are financially unreachable, he said, even by the middle class.

Yet, despite the political obstacles, lack of resources and the steadily-increasing need, Kane pointed out that there are still people (pro bono lawyers in the audience) willing to do the decent and right thing and devote their time, without reward, to help the less fortunate.

Kane closed his speech with hopeful words of encouragement. He thanked the audience for their work in helping the 'least fortunate' in society and with his conclusion "My advice is short and demanding...Never Give Up! Never Give Up! Never Give Up," the audience rose to their feet and cheered.



"My advice is short and demanding..."

NEVER GIVE UP, NEVER GIVE UP,

NEVER GIVE UP!" - John L. Kane

Three Equal Justice Heroes Honored with National Awards at 2009 NLADA Annual Conference in Denver

Reginald Heber Smith Award

The 2009 recipient of the Reginald Heber Smith Award was Ann B. Lever, former director of litigation at Legal Services of Eastern Missouri in St. Louis, MO. The Reginald Heber Smith Award recognizes the dedicated service and outstanding achievements of a civil legal aid attorney or indigent defense attorney while employed by an organization supporting such services. The "Reggie" is named for a former counsel at the Boston Legal Aid Society and the author of "Justice and the Poor," published by the Carnegie Foundation in 1919. After 30 years of service as a

civil legal aid attorney at Legal Services of Eastern Missouri (LSEM), Lever retired on September 4, 2009. Lever's history as an innovative litigator put her at the forefront in preserving low-income housing, enforcing fair housing laws and helping clients gain access to health care, education, public benefits and immigration benefits. Her extraordinary commitment to her clients in whose name action was brought has impacted thousands of individuals inside and outside the eastern Missouri legal community.

Lever's legal achievements began while interning at LSEM in 1978, when she drafted legislation that provided for court-issued Orders of Protection prohibiting persons



Jose Padilla, Ann Lever and Daniel Glazier

from abusing another with whom they live; allowed the abuser to be excluded from the home; and permitted the court to address financial support issues. The proposed legislation became law in 1980 giving Missourians access to legal protection from domestic violence for the first time.

For the next 30 years, Lever's legal achievements on behalf of low-income individuals continued to grow. In 1989, Lever successfully demonstrated that the restrictions on coverage for the drug Retrovir (AZT) violated federal law by denying medically necessary treatment. Thousands of lives were prolonged as a result of her success.

In 2006, Lever led an effort to file an Administrative Procedures Act Claim with the District Court for the Eastern District of Missouri, successfully challenging the government's withholding of decisions on naturalization for 50 Bosnian refugees.

Clara Shortridge Foltz Award

The Michigan State Appellate Defenders Office was honored with the 2009 Clara Shortridge Foltz Award. This award commends a public defender program or public defense delivery system for outstanding achievement in the provision of services to indigent defendants. The award, co-sponsored by NLADA and the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, is named for the founder of the nation's public defender system.

The Michigan State Appellate Defenders Office (SADO) is led by Director James R. Neuhard, who accepted the award on its behalf. SADO is recognized for several landmark accomplishments related to the development and automation of a case weighting system that, under the control of the Appellate Defender Commission, automatically controls intake to the office.



Dawn Van Hoek and Jim Neuhard

This development has allowed the office to meet and exceed the ABA *Ten Principles of a Public Defense Delivery System*.



In the spring of 2008, in response to the closing of the Detroit Crime Lab due to rampant testing errors in firearms cases and certification errors, SADO recruited law students to review pending cases, contact clients and select a group of cases to send for retesting. As a result, negotiations with the chief prosecutor and her staff were opened and an agreement reached that assured that tens of thousands of cases would be reviewed and retested by the State Police Crime Lab with no questions asked.

Additionally, SADO has been recognized as being at the forefront of automation for many years. The Criminal Defense Resource Center is one such example, whereby case summaries, briefs, sentencing manuals and a slew of other resources are captured in a comprehensive legal Web site under SADO's Web site, allowing access to support for thousands of attorneys with limited resources.

Charles Dorsey Award

The 2009 Charles Dorsey Award recipients were Edgar Cahn and the late Jean Camper Cahn. This award recognizes an individual who has provided extraordinary and dedicated service to the equal justice community and to organizations that promote expanding and improving access to justice for low-income people. The award celebrates the accomplishments of the longtime executive director of the Legal Aid Bureau of Maryland, whose many national leadership roles included service as chair of the Project Advisory Group and as a member of the ABA Standing Committee on Legal Aid and Indigent Defendants.

Prior to the development of the legislation for the War on Poverty in 1964, Edgar and Jean Camper Cahn helped to implement the work of Community Progress Inc., developing the first neighborhood-based law firm in New Haven, CT as part of that program. As part of the War on Poverty, the Cahns conceived, designed, proposed and founded the National Legal Services Corporation, which served as the blueprint for the Legal Services Program. Later, both Cahns helped shape the Legal Services Corporation as consultants to the President's Commission on Reorganization.

In 1972, through the efforts of the Cahns, Antioch School of Law in Washington, DC, was established as the first clinical law school in the nation broadening access to legal careers and providing free legal services to thousands of District residents. As co-deans of the law school, the Cahn's pioneered legal programs for poor residents of the District, and, many years later, when the school fell on hard times, the Cahn's returned to Washington to play crucial roles in mobilizing the community and securing support to launch the UDC David A. Clarke School of Law as a successor to the Antioch School of Law.

In 1980, Edgar Cahn developed the strategy of co-production to empower the poor with a tax-exempt currency initially called services credits and later renamed as Time

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National Symposium on Indigent Defense Draws Experts from Across the Country

By Deborah Dubois, Vice President of Marketing, Communications and Development

Looking Back, Looking Forward, 2000-2010 was the theme of the US Department of Justice's (DOJ) National Symposium on Indigent Defense, held February 18 – 19 in Washington, DC at the Mayflower Hotel. Several hundred experts joined DOJ in building upon two conferences that were held in 1999 and 2000, under then Attorney General Janet Reno and Deputy Attorney General Eric Holder. Those early meetings launched a dialogue with government officials, the private defense bar and national public defense advocacy organizations on improving indigent defense in America, a crisis considered so grave that thousands in communities across the country currently find themselves lost in a criminal justice system. Sadly, however, in the intervening ten years, little progress has been made in reforming the criminal justice system. The problems that plagued indigent defense ten years ago are largely the same problems and concerns today though there have been some bright spots in places like Louisiana, Nevada and Michigan, where technical assistance and research by NLADA has pushed the states onto the path of reform.

Assistant Attorney General Laurie O. Robinson and Charles Ogletree, the Jesse Climenko Professor of Law at Harvard University and the executive and founding director of the Charles Hamilton Houston Institute on Race and Justice, kicked off the Symposium with brief remarks before turning the podium over to Attorney General Eric Holder. Holder addressed the attendees, stating that it was time for his office to resume an active role in the conversation around indigent defense. His words built on the remarks he delivered at the 2009 NLADA American Council of Chief Defenders meeting in June of last year, where he outlined five key steps for improving indigent defense.

After initially welcoming participants to the event, Holder stated, "I'm here to discuss a responsibility that we, as stewards of our nation's criminal justice system, all share – a responsibility to ensure the fairness and integrity of that system...I would argue that the our criminal justice system is one of the most distinctive aspects of our national character. And I would argue that it is one of the most praiseworthy. That said, we must face facts. And the facts prove that we have a serious problem on our hands."

Holder went on to talk about recent reports that evaluate state public defense systems and that cite examples of defendants who have languished in jail for weeks or months before ever receiving counsel. Such examples are numerous and widespread and underscore dysfunctional state-based systems that undermine the integrity not just of the criminal justice system, but of our faith in that system. Holder went on to say:

"As a prosecutor and former judge, I know that the

fundamental integrity of our criminal justice system, and our faith in it, depends on effective representation on both sides. And I recognize that some may perceive the goals of those who represent our federal, state, and local governments and the goals of those who represent the accused as forever at odds. I reject that premise. Although they may stand on different sides of an argument, the prosecution and the defense can, and must, share the same objective: Not victory, but justice. Otherwise, we are left to wonder if justice is truly being done, and left to wonder if our faith in ourselves and in our systems is misplaced."

But problems in our criminal defense system aren't just morally untenable. They're also economically unsustainable. Every taxpayer should be seriously concerned about the systemic costs of inadequate defense for the poor. When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense.

In a brutal economic environment such as the current one that has seen millions of people lose their homes, jobs and healthcare, and systems such as our criminal justice system continue to fall victim to dwindling resources, the message that "poor systems of defense do not make economic sense,"



Justice Stephen Breyer and Jo-Ann Wallace

was a welcome one. Holder continued to outline three broad steps in addressing the crisis, starting with a commitment to collaboration with diverse partners, which in turn would lead to an expanding and improving upon the work currently being done, as well as "learning from each other; recruiting new partners; and making sure that, for our criminal defense community, government is viewed as an ally, not an adversary." Holder's three areas of focus are:

"First, we must commit to an ongoing dialogue

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Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010

Washington, D.C. ~ Thursday, February 18, 2010

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Department of Justice. www.doj.gov

Thank you, Laurie. It's an honor to join with you and my old friend, Tree, in opening today's conference and welcoming our participants. Many of you have traveled from all across the country to be here, and I want to thank each of you for your engagement, for your service to your communities, and for your commitment to the principles that define who we are, and who we can be, as a nation.

For well over two centuries now, we, as a people, have been striving to build a more perfect union – an America that lives up to the vision of our Founders. A country where the words of our Constitution can, finally, reach the full measure of their intent.

It is no less than this ongoing work – the fulfillment of our Constitution – that brings us together today. I'm here to discuss a responsibility that we, as stewards of our nation's criminal justice system, all share – a responsibility to ensure the fairness and integrity of that system.

I would argue that our criminal justice system is one of the most distinctive aspects of our national character. And I also would argue that it is one of the most praiseworthy. That said, we must face facts. And the facts prove that we have a serious problem on our hands.

Nearly half a century has passed since the Supreme Court's decision in *Gideon v. Wainwright*. The Court followed with other decisions recognizing the right to counsel in juvenile and misdemeanor cases. Today, despite the decades that have gone by, these cases have yet to be fully translated into reality.

But you already know this. All of you have read the reports and know the data. And many of you have learned this truth in the hardest of ways – by experiencing it on the ground. You've seen how, in too many of our counties and communities, some people accused of crimes – including juveniles – may never have a lawyer, either entirely or during a critical stage of the proceedings against them. In fact, juveniles sometimes waive their right to counsel without ever speaking to an attorney to help them understand what they are giving up. And our courts accept these waivers.

Meanwhile, recent reports evaluating state public defense systems are replete with examples of defendants who have languished in jail for weeks, or even months, before counsel was appointed.

When lawyers are provided to the poor, too often they cannot represent their clients properly due to insufficient resources and inadequate oversight – that is, without the building blocks of a well-functioning public defender system, the type of system set forth in the ten principles of the

American Bar Association and the National Juvenile Defender Center.

As we all know, public defender programs are too many times under-funded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding. And the problem is about more than just resources. In some parts of the country, the primary institutions for the delivery of defense to the poor – I'm talking about basic public defender systems – simply do not exist.

I continue to believe that if our fellow citizens knew about the extent of this problem, they would be as troubled as you and I. Public education about this issue is critical. For when equal justice is denied, we all lose.

As a prosecutor and former judge, I know that the fundamental integrity of our criminal justice system, and our faith in it, depends on effective representation on both sides. And I recognize that some may perceive the goals of those who represent our federal, state, and local governments and the goals of those who represent the accused as forever at odds. I reject that premise. Although they may stand on different sides of an argument, the prosecution and the defense can, and must, share the same objective: Not victory, but justice. Otherwise, we are left to wonder if justice is truly being done, and left to wonder if our faith in ourselves and in our systems is misplaced.

But problems in our criminal defense system aren't just morally untenable. They're also economically unsustainable. Every taxpayer should be seriously concerned about the systemic costs of inadequate defense for the poor. When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense.

So, where do we go from here?

I want to speak with you clearly and honestly about this. In the last year, I have thought about, studied, and discussed the current crisis in our criminal defense system. What I've learned, and what I know for sure, is that there are no easy solutions. No single institution – not the federal government, not the Department of Justice, not a single state – can solve the problem on its own. Progress can only come from a sustained commitment to collaboration with diverse partners.

I expect every person in this room to play a role in advancing the cause of justice. Yes, everyone. And, yes, I say this with the knowledge that we have some unlikely partners among us. Some might wonder what the United States Attorney General is doing at a conference largely

about the defense that poor people receive in state and local courts.

Likewise, many of you – the local officials, budget officers, and prosecutors gathered here – have not traditionally been engaged in discussions about the right to counsel. But all of us should share these concerns. It must be the concern of every person who works on behalf of the public good and in the pursuit of justice. That's what this conference is all about – expanding and improving this work; learning from each other; recruiting new partners; and making sure that, for our criminal defense community, government is viewed as an ally, not an adversary.

In particular, I think our common work must have three areas of focus. I've touched on each of these goals over the last year. But all of them are worth mentioning here again today.

First, we must commit to an ongoing dialogue about these issues. We need partners at the federal, state, and local levels, both within and outside of government, to be involved. By sharing information and working together, I believe we can build on the good work that has gone into developing model standards for our public defense systems.

Second, we must raise awareness about what we're up against. As Americans understand how some of their fellow citizens experience the criminal justice system, they will be shocked and angered – feelings I hope would compel them to become advocates for change and allies in our work.

Third, we must expand the role of the public defender. We must encourage defenders to seek solutions beyond our courtrooms and ensure that they're involved in shaping policies that will empower the communities they serve. I'm committed to making sure that public defenders are at the table when we meet with other stakeholders in the criminal justice system. I have charged the Department's leadership with calling on our components to include members of the public defense system in a range of meetings. We will also involve defenders in conferences, application review panels,

and other venues where a public defense perspective can be valuable. And it should not go without saying – every state should have a public defender system. Every state.



In all of this, I stand with you and with anyone who is committed to ensuring the Sixth Amendment right to counsel. Last year, when I became Attorney General, I took an oath to support and defend the Constitution of the United States. I also made a promise. A promise to the citizens I serve and the colleagues I work alongside. A promise to guard the rights of all Americans and make certain that, in this country, the indigent are not invisible.

So let me assure you today that this is not a passing issue for the Department. I have asked the entire Department of Justice – in my office, in Laurie Robinson's, and in components as diverse as the Office of Legal Policy and the Criminal Division – to focus on indigent defense issues with a sense of urgency and a commitment to developing and implementing the solutions we need.

In the coming weeks, we will take concrete steps to make access to justice a permanent part of the work of the Department of Justice, with a focused effort by our leadership offices to ensure the issue gets the attention it deserves. Government must be a part of the solution – not simply by acting as a convener but also by serving as a collaborator.

Once again, we stand at the beginning of a new decade. We must seize this opportunity to return to the beliefs that guided our nation's founding and to renew the strength of our justice system.

I have every expectation that our criminal defense system can, and will, be a source of tremendous national pride. And I know that achieving this requires the best that we, as a profession and as a people, have to offer.

I pledge my own best efforts. And, today, I ask for yours. Thank you. ★

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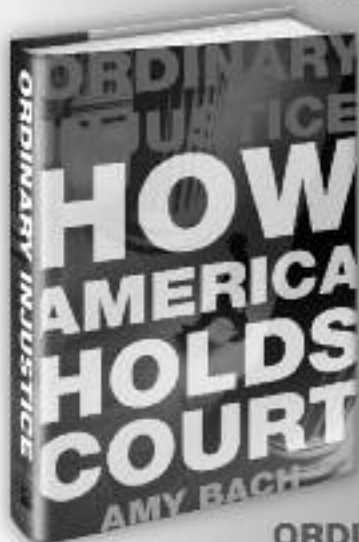
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NLADA Welcomes Ed Burnette and Kevin Mills



NLADA is pleased to announce that Ed Burnette and Kevin Mills have joined the NLADA family.

Ed Burnette, Vice President of Defender Legal Services

Ed Burnette joined the NLADA staff in January 2010 as the vice president of Defender Legal Services. His service in the leadership of the organization, NLADA board of directors, the ACCD, and the Defender Policy Group, as well as many other activities has been outstanding. He has been a long-time NLADA member and supporter.

Ed's extensive professional experience includes being a strategic leader of large groups of people as well as working in the trenches as a public defender with a caseload. He served as the public defender and the first assistant (deputy) public defender for Cook County, IL., the second largest defender office in the country. He has handled capital and felony litigation as well as appellate representation.

Ed began his career as an attorney with the Marine Corps, with experience in both prosecution and criminal defense.

In addition to his service on the NLADA board he has served on numerous boards and commissions within the

legal community, including, among others, serving as: chair of the Criminal Justice Section of the Illinois Bar Association, a member of the board of directors for the Lawyers Assistance Program for the Illinois Bar Association, a member of the board of directors for the John Howard Association (prison reform work), a gubernatorial appointee to the Board of Commissioners for the Office of the State of Appellate Defender, as well as to the Sex Offender Management Board. He was appointed by the Supreme Court to the character and fitness committee for the first judicial district of Illinois.

Throughout his career Ed has been engaged in community service beyond the legal arena. He was the president of the Board of Education for Olympia Fields, Illinois, president of the board of directors of All Nations Community Church and participates on the staff of Operation Snowball, a drug prevention and awareness program for teens.

NLADA welcomes Ed Burnette to the team.



Kevin Mills, Director of Membership

In mid-November Kevin Mills accepted the director of Membership position.

Mills completed his B.A. degree from Howard University in 1988 as a Criminal Justice major and pursued additional courses toward his masters degree in Public Administration at Bowie State University. During the past 12 years, he has worked with a number of professional organizations large and small, charged specifically with the task of implementing strategies that would enhance benefits to members and increase financial support to the organization's goals and mission. He worked with the National Science Teachers Association, the American Chemical Society, the American Psychiatric Association and the American Association for Justice before joining NLADA.

Over the past decade, Mills managed to increase non-dues revenue by 21 percent and positively impacted membership totals by 10 percent. His efforts provided those organizations with much needed resources that were utilized to increase member programs and increase the visibility of the organization's mission.

As he becomes more familiar with the mission of NLADA and the work the legal aid community provides, Mills looks forward to a long successful relationship with NLADA colleagues. His immediate goal is to work diligently to create benefits that will impact individuals and programs positively, increase productivity and reduce organization expenses. In order to be successful he will need your input regarding your needs and how NLADA can best deliver those resources to meet those needs. Over the years, he has learned the importance of the membership community and ensuring the voice of the community is heard when

developing member strategies. With that said, he will be calling upon all of you to help in the development of the strategies that will ultimately benefit all members.

Mills had the opportunity to meet some of you at the Annual Conference in Denver. He has also spent many hours speaking with members and member groups to gain a greater understanding of the important work that you have committed to by serving our nation's most vulnerable and underserved community. As a Criminal Justice major, working to support your efforts and the mission of NLADA is a welcomed challenge. He is excited about his new role with NLADA and looks forward to visiting a number of your programs to promote your work, to increase support of our mission, increase the visibility of member programs and their accomplishment and the significance of NLADA's 100 years of existence.



As NLADA approaches its centennial, Mills is expecting great things from our sister organizations, program members, individual members and associate members to speak out about the work that is being done and needs to be done to ensure that every American has access to justice. We must work together and call on the entire community if we expect change for the clients.

Finally, NLADA is here for you to ensure that your work is recognized and appreciated. As the membership director,

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Charleston School of Law Students Find Calling and Fill Critical Need by Assisting Rural Public Defenders

By Michelle Mensore Condon

Within the first week of his externship at the Berkeley County Public Defender's Office in the summer of 2006, Chad Shelton, then a second-year student at the Charleston School of Law in Charleston, South Carolina, realized that he had found his legal calling.

Today, Shelton, who credits his externship as an "invaluable experience" that helped him narrow his career path, is in his second year as an assistant public defender in the Berkeley County Public Defender's Office.

Shelton landed his job thanks to his participation in the Indigent Defense Externship Program, known as the IDEP, a cooperative effort between the Charleston School of Law and the South Carolina Commission on Indigent Defense.

In 2005, Patton Adams, the director of the South Carolina Commission on Indigent Defense, approached Richard Gershon, who was serving as the first dean of the then one-year-old Charleston School of Law, about his idea for placing law students in rural public defender offices. Recognizing the program as a perfect match for the private law school with a public service mission, the Charleston School of Law readily entered into an agreement with the South Carolina Commission on Indigent Defense.

Under the leadership of Adams, Dean Gershon and Professor Elizabeth McCullough, who directs the Externship Program, the IDEP became a reality in the summer of 2006. Since then, the IDEP has placed 22 Charleston School of Law students in summer externships in 14 rural public defender offices throughout South Carolina.

"It really does epitomize the mission of our law school, which is to train our students to be members of the profession while also training them that they need to give something back to those who would not otherwise have access to legal services," said Gershon, who is now a full-time professor at the school. "For me, this is the program that really does best represent what our law school is trying to accomplish."

Dean Andy Abrams, the current dean at the Charleston School of Law, described the IDEP as a "wonderful program that accomplishes one of the Charleston School of Law's overriding goals of teaching students the value of public service. Not only are the students' lives impacted by the legal experience they gain, they also impact the lives of the rural public defenders, the clients and the communities they serve."

Although a growing number of law schools offer externship programs where students are not compensated but gain practical work experience for course credit, the IDEP fills a critical, often unmet need by serving rural public defender offices.

"The IDEP is unique in the sense that it is limited to the rural public defenders," said Bob Spangenberg, founder of the Spangenberg Group, a nationally recognized research and consulting firm that has studied public defender offices throughout the United States and in several foreign countries. As Spangenberg explained, urban public defender offices attract more support from law firms and most law students want to work in cities. "Public defender offices in rural communities have a terrible time getting outside help," he said.



Photo by Karen Alexander.

Third-year Charleston School of Law student Beth Santilli did the IDEP with the Berkeley County Public Defender in the summer of 2008 and Assistant Berkeley County Public Defender Chad Shelton. Chad graduated from the Charleston School of Law in 2007 and did the IDEP in Berkeley County in the summer of 2006. Chad was working as an assistant public defender when Beth did her externship.

The need for help in public defender offices, particularly in states that include many rural areas like South Carolina, is even greater now because of the economy, said Adams. As Adams explained, South Carolina's state budget for indigent defense has been slashed by \$1.8 million over the past year while caseloads have increased as more defendants declare that they are indigent and need free legal representation.

"Our public defender offices are not able to hire additional attorneys at this time and are struggling to hold on to those they have. Our offices always have been underfunded and always have needed the extra help, but now the need is greater than ever. The help these externs provide is a Godsend," Adams said.

Unlike most law students, who according to Spangenberg are attracted to urban areas, the Charleston School of Law students in the IDEP embrace rural living with enthusiasm. During their externship summer, students live in the communities in which they work. Local attorneys either provide or help the students find free housing. By living with residents, students get to know the communities, the local bar and judges in a way that commuting would not allow.

"I really learned how a criminal justice system works in a small, tight knit community and how personal relationships are so important," said Judah Van Syckel, a third-year student who lived in the Walhalla home of attorney Larry Brandt during his externship with the public defender's office in Oconee County in the summer of 2008 and recently completed another externship with the public defender's office in Pickens County. "I learned so much about the personal side of the law as well as the technical side of the law."

Along with developing relationships with the local legal community, the externs also provide invaluable help to overworked public defenders. Externs hit the ground running by assisting their supervising public defenders with legal research and trial preparation. "In an office that's strapped for resources, these students become a great resource," said Shelton. "The IDEP was the most hands-on legal experience I've ever had," said May 2009 graduate Vanessa Bassett, who worked for Martin Banks, the part-time sole public defender in Calhoun County. "He really relied on me. I had a lot of responsibility."

The externs also offer seasoned attorneys a fresh perspective on the law. "Having externs makes me a better lawyer," said Patty Kennedy, a public defender in Berkeley County. "They have a fresh perspective, akin to what a prospective juror would have. They help you reprocess the way you think about a case."

Robert Gamble, the public defender for Anderson

and Oconee counties, agreed. "We just enjoyed the fresh air a law student brings," he said. Gamble credits Van Syckel with bringing a fresh perspective to the Oconee County office and helping to alleviate the workload there.

Just like the public defenders they serve, the students find that because of their externships they reprocess the way they look at the law and their lives.

"The IDEP completely turned my law school experience around," said Beth Santilli, a third-year student at the Charleston School of Law who worked in Berkeley County in the summer of 2008. "It wasn't until I did the externship that I realized that law school is the means to an end. It reshaped my thinking about the law and made me realize that people needed my help, not just the clients but the public defenders."

Especially in these tough economic times, the IDEP serves as a model program for rural public defender offices nationwide. Helping the clients, helping the public defenders and helping the students make the IDEP a winning experience for all.



Michelle Mensore Condon is the Director of Public Service and Pro Bono at Charleston School of Law.

The Charleston School of Law's Externship and Pro Bono programs

The Charleston School of Law's Externship Program works with about 118 sites to offer students the opportunity to gain practical legal experience while earning academic credit.

The law school also has a Pro Bono Program which works with over 100 sites and requires students to perform 30 hours of free legal work under the supervision of a licensed attorney before they graduate. Many students perform more than their required 30 hours. IDEP externs often will continue to work for public defenders for pro bono credit after they have fulfilled their course requirements.

Charleston School of Law students have contributed over 100,000 hours of free legal work through the Externship and Pro Bono programs since August 2004.

For more information on the Externship Program, contact Professor and Director of the Externship Program Elizabeth McCullough at emcullough@charlestonlaw.edu. For more information on the Pro Bono Program, contact director of Public Service and Pro Bono Michelle Mensore Condon at mcondon@charlestonlaw.edu.

affirming its policy of finding flight based only on a warrant, even if the person was unaware of it. SSA carried on with its “fleeing” policy in the rest of the country until the settlement in *Martinez*.

Martinez was filed in October 2008 as an attempt to obtain a court decision that would bind SSA in all jurisdictions. Plaintiffs were represented by National Senior Citizens Law Center; Munger, Tolles & Olson; Urban Justice Center; Disability Rights California; and the Legal Aid Society of San Mateo County. Filed as a class action, the plaintiffs claimed SSA’s implementation of the “fleeing” provision violated the Act.¹⁴ The named plaintiffs’ experiences demonstrated the misguided nature of SSA’s policy. Lead plaintiff Rosa Martinez, for instance, had her disability benefits suspended for a warrant issued for drug possession in 1980 in Miami. Ms. Martinez had never been to Miami and was pregnant in Chicago at the time of the charges. She was also eight inches shorter than the “Rosa Martinez” identified in the warrant. Despite this, SSA refused to reinstate benefits until the warrant was vacated.

After several months of motion practice, the parties reached a settlement in April 2009, just prior to an initial hearing on the merits. The settlement received court approval on September 24, 2009 and went into effect November 30, 2009.

Over 200,000 individuals are expected to benefit from the settlement. Approximately 80,000 may be eligible to receive over \$500 million in back benefits, which SSA will administer in stages depending on the type of benefit involved, and the timing of the suspension, denial, or appeal.

The settlement provides for a new policy whereby SSA will now rely on a warrant to suspend or deny benefits for “flight” only if the warrant was issued with one of the three NCIC codes indicating flight or escape. The three codes represent 0.7 percent of warrants identified by SSA. As of April 1, 2009, the new policy should be applied to all decisions, including pending claims.

Class members whose benefits were suspended or denied on or after January 1, 2007, or those who had a live, pending administrative claim as of August 11, 2008 will receive full retroactive benefits for the entire period benefits were suspended or denied. Within this group, OASDI recipients will be reinstated retroactively by June 2010. SSI recipients are scheduled to receive full retroactive reinstatement by December 2010. For these class members, it will not be necessary to file a new application. The process should be automatic for most OASDI beneficiaries, but SSI recipients will have to re-establish eligibility.

Those whose benefits were suspended or denied between 2000 and 2007 will have the opportunity to have benefits reinstated effective April 1, 2009 if they contact SSA within six months of the notice to re-apply. These individuals are scheduled to receive a notice by the end of this year, and will have any overpayments waived.

Accessing Relief Under *Martinez*

Implementation of the relief to be provided under *Martinez* is already underway. To ensure that class members receive the relief to which they are entitled, it is essential that class members check that SSA has their updated addresses. SSA will issue only one notice. Because class members are likely to have had their housing impacted by the loss of benefits, they may have moved or been rendered homeless since the time they had benefits suspended or denied. This makes it crucial that advocates and service providers are aware of the settlement and can assist class members in accessing relief.

For more detailed information about the implementation of *Martinez*, see “Social Security Retreats from ‘Unknowing Flight’ Doctrine and Will Pay Hundreds of Millions in Back Benefits,” by Gerald McIntyre, Anna Rich, and Kevin Prindiville, appearing in the January-February 2010 issue of *Clearinghouse Review Journal of Poverty Law & Policy*, (available at www.povertylaw.org/clearinghouse-review.)

Information is also available at www.urbanjustice.org/ujc/litigation/mental.html. Also, for regular updates about the settlement’s implementation, including information about the continued effort to challenge the suspension of benefits for alleged probation and parole violations, advocates may join the National Senior Citizens Law Center’s “*Martinez* Settlement Listserv” by emailing Oakland@nslc.org.

Other Developments

More developments may lay ahead. Following the *Martinez* settlement, SSA and a few lawmakers indicated they may pursue legislation to undo the new rules resulting from *Martinez*. A set of proposed legislative changes sent by SSA to the Office of Management and Budget last summer included a clarification of the agency’s “fleeing felon” policy. And in October, 2009, SSA’s Office of the Inspector General issued a report at the request of some members of Congress regarding the impact of *Martinez*. The report focused on the monetary cost to the agency.

The fate of SSA’s “fleeing felon” penalty may impact other benefit programs. The course of SSA’s policy – more expansive and more frequently litigated – has come to bear on other benefits such as Veterans Administration, food stamps, and Temporary Assistance for Needy Family (TANF), which have similar, sometimes identical, provisions. In the past, other agencies have taken note of developments in SSA’s policy. Following *Fowlkes*, for instance, New York State’s Office of Temporary and Disability Assistance ceased suspending food stamps and cash assistance based on warrants alone and adopted the standard indicated in *Fowlkes*, requiring a finding of flight by a court or tribunal, and some evidence that the individual knew he or she was wanted.¹⁵ Hopefully, the *Martinez* settlement may encourage other agencies to abandon overbroad interpretations and implementation. ★

¹ *Martinez v. Astrue*, No. 08-cv-4735 CW (N.D. Cal. Sept. 26, 2009).

² 42 U.S.C. § 1382(e).

³ Pub. L. No. 104-193, 110 Stat. 2105, Sec. 202.

⁴ 65 Fed. Reg. 40492 (Jun. 30, 2000).

⁵ 20 C.F.R. § 416.1339(b)(i).

⁶ Pub. L. No. 108-203, March 2, 2004, *codified at* 42 U.S.C. § 402(x).

⁷ 42 U.S.C. §§ 402(x)(1)(B)(iii), 1382(e)(4)(B).

⁸ 42 U.S.C. §§ 402(x)(1)(B)(iv), 1382(e)(4)(C).

⁹ POMS SI 00530.015B2, GN 02613.025B2.

¹⁰ 70 Fed. Reg. 72411.

¹¹ Social Security Acquiescence Ruling 06-1 (2), *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005); Determining Whether an Individual is a Fugitive Felon Under the Social Security Act (Act) – Titles II and XVI of the Act, Federal Register, Vol. 71, No. 66, at page 17551 (Apr. 6, 2006) (emphasis added); SSA, Program Operations Manual System (POMS), GN 02613.001.B.3.

¹² Social Security Administration Office of the Inspector General, Semi-Annual Report to Congress April 1 to September 30, 2009 at

20.

¹³ For a longer discussion, see W. Lienhard & J. Parish, Social Insecurity: How the Social Security Administration's "Fugitive Felon Program" Harms Disabled,

Retired and Poor Americans Without Aiding Law Enforcement, [available at](http://www.urbanjustice.org/pdf/projects/Social_Insecurity_10_07.pdf)

http://www.urbanjustice.org/pdf/projects/Social_Insecurity_10_07.pdf.

¹⁴ *Martinez* was limited to SSA's implementation of the "fleeing" provision of the statute, and did not address SSA's practice of suspending and denying benefits without a finding that the individual had violated probation or parole. This represents 38.6 percent of warrants and is the subject of a separate lawsuit, *Clark v. Astrue*, 2008 WL 4387709 (S.D.N.Y. Sept. 22, 2008), appeal docketed, No. 08-5801-cv (2d Cir. 2008). SSA prevailed on a motion for summary judgment in *Clark*, and the case is now pending before the Second Circuit.

¹⁵ General Information System (GIS) 08 TA/DC016 (July 22, 2008), available at www.otda.state.ny.us/main/gis/2008/08dc016Upstate.pdf.

SYMPOSIUM - Continued from page 24

about these issues. We need partners at the federal, state, and local levels, both within and outside of government, to be involved. By sharing information and working together, I believe we can build on the good work that has gone into developing model standards for our public defense systems.

Second, we must raise awareness about what we're up against. As Americans understand how some of their fellow citizens experience the criminal justice system, they will be shocked and angered – feelings I hope would compel them to become advocates for change and allies in our work.

Third, we must expand the role of the public defender. We must encourage defenders to seek solutions beyond our courtrooms and ensure that they're involved in shaping policies that will empower the communities they serve. I'm committed to making sure that public defenders are at the table when we meet with other stakeholders in the criminal justice system. I have charged the Department's leadership with calling on our components to include members of the public defense system in a range of meetings. We will also involve defenders in conferences, application review panels, and other venues where a public defense perspective can be valuable. And it should not go without saying – every state should have a public defender system. Every state."

Holder concluded his remarks with a pledge to do his own best efforts as together, the community of indigent defense professionals and advocates "return to the beliefs that guided our nation's founding and to renew the strength of our justice system."

The Symposium's opening plenary session, Fulfilling the Promise of Counsel, moderated by NLADA President and CEO Jo-Ann Wallace immediately followed Holder's remarks. The plenary featured speakers Avis Buchanan, director, Public Defender Service for the District of Columbia, Washington, DC; The Honorable Michael A. Cherry, Supreme Court Justice, Nevada Supreme Court, Carson City, NV; Nancy Diehl, retired attorney, Wayne County Prosecutor's Office, Detroit, MI; The Honorable Lydia P. Jackson, state senator, Louisiana Senate, Shreveport, LA; and Norman Lefstein, professor of law and dean emeritus, Indiana University School of Law, Indianapolis, IN. The opening plenary speakers represented myriad arenas of the public defense system. They were challenged to address the lessons learned from failed attempts at public defense reform as well as successful efforts and to think beyond past practices as they explored what it will take to secure the right to counsel in America. To read the Attorney General's remarks in full, review the Symposium's agenda and to view the morning and afternoon plenary sessions, please visit <http://www.nlada.net/library/article/agholderkeynotessymposium02-18-2010>. ★

defects, there was “a reasonable probability” that they would have “struck a different balance.” The Court concluded that the Florida courts’ determination to the contrary was “an unreasonable application of our clearly established law” because:

We do not require a defendant to show ‘that counsel’s deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’”⁴⁰

Conclusion

The contrasting treatment of *Strickland*’s prejudice prong by the anonymous per curiam opinions in *Belmontes* and *Porter* seem puzzling at first glance. It is not that the results are puzzling. *Porter* involved a crime of passion by a decorated war veteran while *Belmontes* involved a brutal murder by a hardened criminal during a burglary. The different outcomes are easy to understand in light of the different factual contexts. What is puzzling is the different tone and content of the opinions. It is almost like there are two different standards, and indeed that would appear to be the answer to the riddle. The ambiguity of the *Strickland* prejudice standard allows the justices (and lower court judges) a great deal of discretion in determining what constitutes a “reasonable probability” of a different outcome. In *Belmontes* the court makes no mention of *Strickland*’s additional qualifying sentence which defines a reasonable probability as one “sufficient to undermine confidence in the outcome.”⁴¹ Yet in *Porter*, this qualifying sentence is relied upon as an important aspect of the standard. But what is a probability sufficient to undermine confidence? Would not a reasonable doubt be sufficient? The Court did not use the term reasonable doubt in *Strickland* (no doubt because of fears such a standard would lead to too many reversals) yet what *Strickland* has evolved into is a Janus-headed standard revealing a duality contained within the breadth of the reasonable probability calculus. When (as in *Porter*) the Court feels an injustice has been done because it has empathy for the defendant as a result of the mitigating evidence that was not presented due to a totally inadequate investigation, then it concludes the new evidence “might well have influenced” the jury and finds prejudice. When, on the other hand (as in *Belmontes*) the investigation, while not perfect, has not been egregiously negligent and the Court has no empathy for the defendant (because it believes the defendant previously got away with committing an execution style murder before and bragged about it) then the Court raises the bar and finds the defendant has not met his burden of showing prejudice. Thus has discretion reentered the picture. It is moreover discretion that in the end analysis, as Linda Greenhouse rightly recognizes, turns on empathy — a human emotion — rather than rational analysis.

What can we take away from this trilogy of cases? First

Williams, *Wiggins* and *Rompilla* are still good law. *Porter* relied upon them. Second, the precedential value of *Van Hook* is limited to the standard of representation that existed in 1985. It does not control what is reasonable representation in this century. Third, the ABA standards, while diminished in stature by *Van Hook* are nevertheless still solid guides to professional conduct.⁴² They therefore will continue to serve as reliable guideposts for investigation even if compliance is not mandatory. A strategic decision not to investigate a particular lead, for example, must still be a reasonably informed decision, based upon a reasonable preliminary investigation as required by *Rompilla*.

Finally, the trilogy should spur us to renewed commitment to continue the struggle to eliminate the death penalty as indeed the American Law Institute has recently done by withdrawing its death penalty provision from the Model Penal Code in recognition of the fact that after nearly 50 years the experiment has failed. Comparing the fates of Robert Van Hook and George Porter underscores that failure. Both men are veterans. Both men are victims of a terrible childhood. Both men have a history of mental problems. Both men have a history of substance abuse. Yet it is possible to identify with Porter, a decorated veteran, to feel his pain as a rejected lover, and understand, despite his cold and calculated killing of two fellow human beings, how his violent behavior could be related to his childhood and war experience. With Van Hook, on the other hand, it is more difficult to have empathy. Picking up a man in a gay bar and mutilating his body after strangling him are not easy to identify with. It is harder to make the same connection between Van Hook’s behavior and his traumatic childhood and mental instability because we cannot feel his pain and do not understand it. So we kill him. To us his crime seems freakish and wanton. But it is the administration of the death penalty that is still freakish and wanton even at the level of the Supreme Court. ☆

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¹ 130 S. Ct. 13 (November 9, 2009)

² 130 S. Ct. 383 (November 16, 2009)

³ 130 S. Ct. 447 (November 30, 2009)

⁴ Linda Greenhouse, Selective Empathy, New York Times, December 3, 2009, available at <http://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy>.

⁵ Post-traumatic stress disorder.

⁶ 466 U.S. 668 (1984).

⁷ Id. at 687.

⁸ Id. at 694.

⁹ Justice Brennan also dissented from the judgment based upon his belief that the

death penalty was unconstitutional in all of its applications, but he otherwise joined the opinion.

¹⁰ See Benner, Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California, 45 California Western Law Review 265, 323-324 (2009) available electronically at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475478.

¹¹ Id.

¹² 529 U.S. 362 (2000).

¹³ Id. at 419 (Rehnquist, CJ, dissenting opinion).

¹⁴ Although counsel's deficient performance was conceded and thus not at issue in Williams, Justice Stevens's majority opinion referenced the ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980) in noting that the investigation conducted by counsel did not meet professional norms.

¹⁵ Anti-Terrorism and Effective Death Penalty Act. The provision at issue was codified as 28 U.S.C. 2254(d) which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

¹⁶ Williams v. Taylor, 529 U.S. at 398 (emphasis added).

¹⁷ Id. at 399.

¹⁸ 539 U.S. 510 (2003).

¹⁹ Id. at 535.

²⁰ Wiggins v. Smith, 539 U.S. at 521, 533, quoting Strickland 466 U.S. at 690-91.

²¹ See 1 ABA Standards for Criminal Justice, Standard 4-4.1 (1982) and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (C) (1989).

²² 545 U.S. 374 (2005).

²³ Id. at 393.

²⁴ State v. Van Hook, 530 N.E.2d 883, Appendix at 898.

²⁵ Van Hook v. Anderson, 560 F.3d 523 at 530. Despite the fact Ohio law allows this double dipping, the Ohio Supreme Court rejected defendant's claim that the death sentence was excessive and disproportionate. In just three short conclusory sentences the state court found that "in light of the facts of the case before us, [death] is appropriate." Id. at 892. What facts the court considered relevant it did not say. Since the "facts of the case" only establish that Van Hook took a leather coat and some jewelry after the victim was dead, it would appear that the Ohio Supreme Court must have taken into account the bizarre manner in which the defendant killed an unconscious victim and mutilated his body. Yet that was not a permissible aggravating factor under Ohio law.

MESSAGE - Continued from page 1

Michigan, Nevada and Louisiana. That work has garnered national attention, leading to three congressional hearings focused on the public defense crisis, and significant attention at the National Symposium. More and more meaningful data is being collected that will better inform and equip the leaders at DOJ and on Capitol Hill as they grapple with the task of crafting policy that ensures justice for those unable to afford counsel who are facing a loss of liberty in our court systems.

At NLADA we know that lawyers alone will not be able to achieve justice for all. Thus, our strategic plan recognizes a commitment to supporting the development of client leaders so that they will be equal partners in the pursuit of justice. NLADA delivered leadership training to client board and policy group members as a step toward designing and delivering a leadership event in 2010 that will be open to broader client participation.

As we make progress toward our goals in 2010, NLADA is readying itself to celebrate 100 years of delivering equal justice! From our humble beginnings in 1911, when 15

26 451 U.S.477 (1981). Under Edwards police are barred from attempting to re-interrogate a defendant who indicates unambiguously that he wants a lawyer after being read Miranda warnings, unless the defendant later initiates contact with the police and indicates a willingness to engage in a general discussion about the case. This argument initially won reversal on federal habeas review, but was overturned by the Sixth Circuit en banc on the ground that a third party (Van Hook's mother) could initiate contact with police on the defendant's behalf, and thus lift the Edwards bar on re-interrogation.

²⁷ State v. Van Hook, 530 N.E. 2d 883 at 889-890.

²⁸ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.7.

²⁹ Van Hook v. Anderson, 560 F.3d 523 at 526.

³⁰ Id.

³¹ 287 U.S. 45 (1932).

³² In Powell eight black youths were charged with the rape of two white girls, at that time a capital offense in Alabama. The defendants were not allowed time to secure their own counsel. Instead the trial court appointed the counsel for them and forced them to trial immediately without an opportunity to conduct an adequate investigation. The Supreme Court held that due process was violated by the appointment of counsel "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Id. at 71.

³³ Standard 4-4.1, ABA Standards for Criminal Justice (2nd ed. 1980)(emphasis added).

³⁴ State v. Van Hook, 530 N.E.2d 883 at 890.

³⁵ 549 U.S. 7 (2006).

³⁶ California Penal Code §190.3(b).

³⁷ Strickland v. Washington, 466 U.S.668 at 694.

³⁸ Called "shell shock" and "combat fatigue" during WWII, post-traumatic stress disorder was first defined as a distinct diagnosis in the 3rd edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) in 1980, seven years before Porter's trial. According to the National Viet Nam Veterans Readjustment Survey, veterans with PTSD are two to three times more likely to perpetrate violence than those without PTSD. Twenty-three percent of returning veterans from Iraq and Afghanistan seeking treatment have been diagnosed with PTSD. 72,000 veterans currently receive disability compensation for PTSD.

³⁹ 455 U.S. 104 (1982).

⁴⁰ 130 S. Ct. 447, at 455-56, quoting Strickland 466 U.S. at 693-94.

⁴¹ Strickland v. Washington, 466 U.S.668 at 694.

⁴² Despite Justice Alito's concurrence in Van Hook, which minimizes the relevance of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, no other justice, not even the Chief Justice, joined that opinion.

legal aid societies gathered together to form a national association, has come a story replete with history that affirms NLADA's place as a leader in the fight for justice for those who cannot afford counsel. From the establishment of the Legal Services Corporation to the creation of a public defender system in America - not one milestone in this nation's quest for equal justice is without NLADA's fingerprints.

We are planning to ring in our Centennial in a style worthy of the role that NLADA has played in shaping equal justice in America and worthy of honoring the men and women who came before us whose vision, passion and dedication made that possible. We are confident that with your help we will make 2011 and beyond a turning point in the equal justice movement. To quote Judge John Kane, the keynote speaker for last year's Annual Conference in Denver, we will "Never give up! Never give up! Never give up!" – until "justice for all" are not only words but reality. ☆

AWARDS - Continued from page 23

Dollars. The currency equates one hour spent helping others or building community or fighting for justice with one time dollar, which can be used to secure computers, food, or clothes for families.

Today, while continuing the work of Time Banking, Edgar Cahn has embarked on a civil rights initiative to address racial disparity by proposing to shift the focus from past to future by formally giving officials a future choice between continuing with present practices that often result in racially disparate impact, with validated, less expensive and replicable alternatives.

“The selfless commitment of each of our award winners has advanced justice for countless people over several decades,” said NLADA President & CEO Jo-Ann Wallace. “Their passionate commitment, zealous advocacy



Jonathan Cahn, Edgar Cahn, Shelley Broderick and Jo-Ann Wallace

and visionary leadership represent the finest tradition of the equal justice community and hope for equality in the future.” ☆

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Mills will serve you and looks forward to hearing from you with respect to how NLADA can best meet your needs. In order to do that, he is counting on you to share your thoughts and invites you to e-mail him at k.mills@nlada.org.

Welcome Kevin to the NLADA team.

LGBT - Continued from page 17

¹ Randy Albelda, et al., Poverty in the Lesbian, Gay, and Bisexual Community, May 2008, <http://www.law.ucla.edu/williamsinstitute/pdf/LGBPovertyReport.pdf>. Other demographic studies can be accessed at <http://www.law.ucla.edu/williamsinstitute/publications/Policy-index.html>.

² Williams Institute – University of California, Los Angeles, Census Snapshot: California’s Latino/Latina LGB Population, <http://www.law.ucla.edu/williamsinstitute/publications/CASnapshotLatino.pdf>

³ View the full report, The State of Transgender California, March 2009, at <http://transgenderlawcenter.org/pdf/StateofTransCAFINAL.pdf>.

Formation of NOCA Section Underway

This announcement serves as official notice to NLADA members that application has been made for the formation of a National Organization of Client Advocacy (NOCA) section.

The National Organization of Client Advocacy, Inc. proposes to form a National Organization of Client Advocates Section of NLADA for the following purposes:

1. Working with low and no-income people to secure their legal and human rights and improve the quality of their lives.
2. Set up training, education and technical assistance for low and no-income people and clients.
3. Work with low and no-income people to create an attitude of self-reliance and self-help.

Any members who want to express support should do so in writing by contacting Julie Clark, NLADA board secretary, at 1140 Connecticut Ave. NW, Suite 900, Washington, DC 20036, or via e-mail at j.clark@nlada.org.

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