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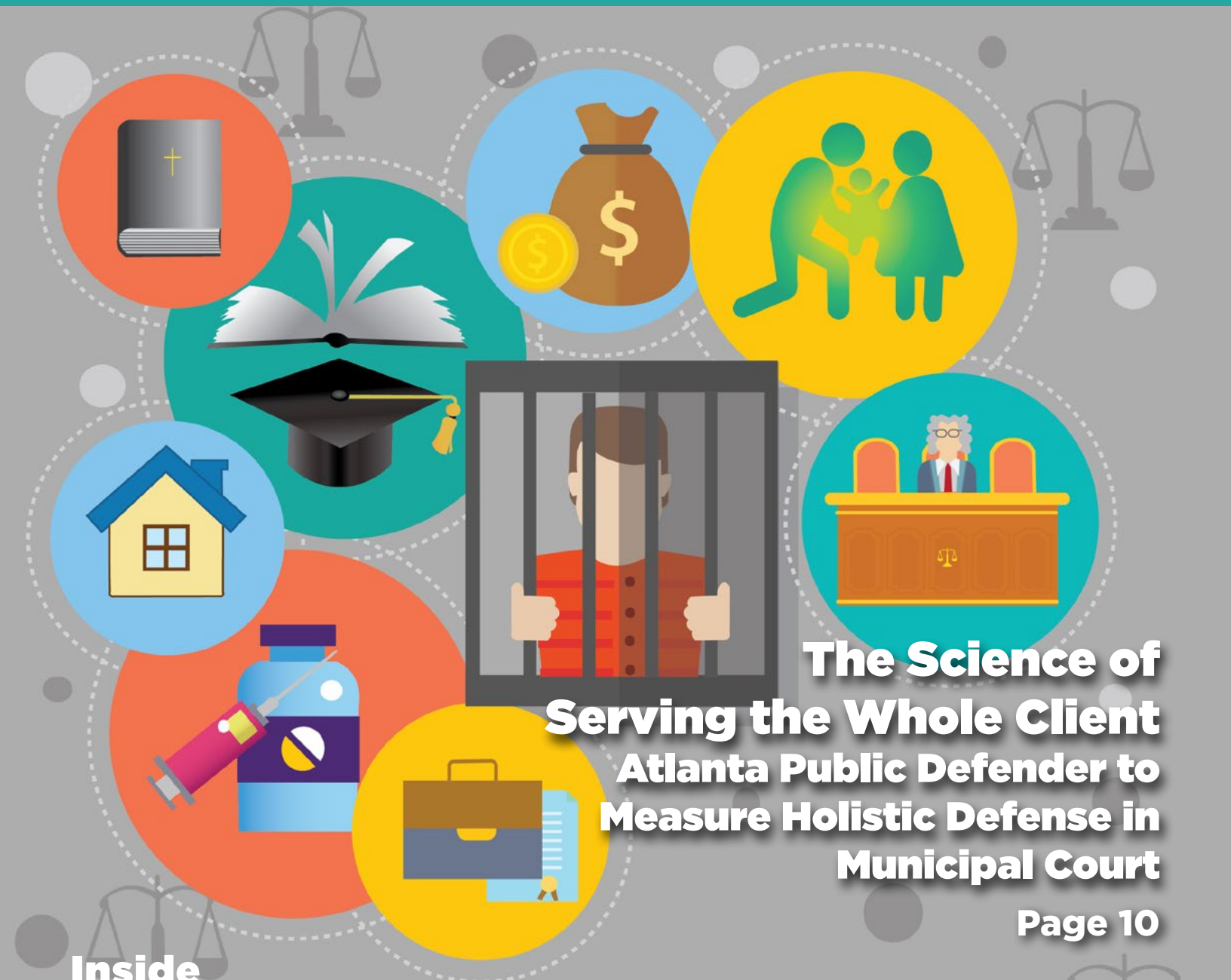

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Invest in NLADA's Advocacy Efforts on Behalf of the Equal Justice Community

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Cornerstone

Editor: Carol Ponce

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Ending Racial Discrimination in Jury Selection: *Foster v. Chatman*

"Under the totality of the circumstances, the prosecution's reliance upon a race-neutral reason that was used to strike a black juror, but not a similarly situated white juror, constituted evidence of purposeful discrimination."

By Laurence A. Benner and Marshall J. Hartman

Foster v. Chatman, 136 S. Ct. 1737 (2016), constitutes a rare victory for defenders fighting racial discrimination in jury selection. In an opinion by Chief Justice Roberts, the Court held that where the race-neutral reasons used by the prosecutor to peremptorily strike black jurors did not also result in striking similarly situated white jurors, the disparity constituted evidence of purposeful discrimination and violated the Equal Protection Clause of the 14th Amendment. The Court's decision is also noteworthy because, under the totality of the circumstances employed, the chief justice held that on the issue of prosecutorial intent, a court may consider evidence involving all actors in the prosecutor's office, not just evidence personally attributable to the prosecutor.

Facts

In *Foster* a poor, black, 18-year-old defendant was sentenced to death by a jury selected after the prosecutor had used his preemptory challenges to strike all of the prospective black jurors qualified to serve on the jury.

In *Batson v. Kentucky*[1] the Court established a three-step process for "ferreting out" racial discrimination in the exercise of peremptory challenges. First, the defense must establish a reasonable inference of purposeful racial discrimination. Second, the burden then shifts to the prosecutor to give a plausible race-neutral reason for excusing the juror. The third step involves the trial court's evaluation of the prosecutor's credibility: Is the race-neutral reason proffered by the prosecutor genuine or a pretext to hide purposeful discrimination?

As interpreted by the Supreme Court, the third step has been an almost insurmountable hurdle. As Stephen Bright, president of the Southern Center for Human Rights and lead counsel for Foster astutely observed: "You're asking the judge to say that the prosecutor intentionally discriminated on the basis of race, and that he lied about it. That's very difficult psychologically for the average judge."

Not surprisingly even the silliest of race-neutral reasons are often accepted by trial judges and upheld on appeal. In *Foster* the prosecutor recited a laundry list of race-neutral reasons — 44 in all — for striking the four black jurors. The reasons included working with low-income children as a teacher's aide, religious affiliation (attending a Black church), being divorced, being too young (age 34), and not seeking to be excused from jury duty. However, these same

characteristics also applied to many white jurors who were accepted. For example, one white juror was only 21 and three were divorced. Nevertheless, the trial court accepted such "implausible" race neutral explanations as genuine reasons for striking all of the black jurors on the panel.

During closing argument the prosecutor, in advocating for execution, stated: "We have got to believe that if you send somebody to death, that you deter other people out there *in the projects* from doing the same again." The reference to "the projects" was, of course, code for blacks, and it is unlikely such an argument would have been made if the jury had been racially diverse. Defense counsel renewed the *Batson* claim in a motion for new trial, which was denied, and Foster's conviction and death sentence were affirmed on appeal by the Georgia Supreme Court and the Supreme Court denied certiorari.

Stephen Bright's State Post-Conviction Investigation

Normally this would have been the end of the line. However, 19 years after conviction, Bright discovered a treasure trove of prosecution documents and notes by employing Georgia's Open Records Act. These prosecution files revealed a concerted effort to keep blacks off the jury. Black jurors' names on the prosecutor's jury list were specially highlighted and their race circled on their juror questionnaire. Notes made by the prosecutor's investigator also showed they were singled out for special treatment — referring to them as B#1, B#2, etc. The first five names on a list marked "definite No" were black jurors. Another handwritten document had a notation stating "NO. No Black Church."

The most damning discovery was an early draft of a sworn affidavit by the prosecutor's investigator. This draft contained a paragraph describing how he had ranked the acceptability of four black jurors in case "it comes to having to pick one of the black jurors." This paragraph, however, had been deleted from the actual affidavit submitted by the prosecution in proceedings on the defendant's motion for a new trial.

Bright filed a state habeas petition, alleging new evidence, but was denied relief on the merits. The Georgia Supreme Court refused to hear an appeal in an unreasoned summary order.

Chief Justice Roberts' Opinion

Writing for a 7-justice majority, Chief Justice Roberts, reversed. Reaffirming *Miller-El v. Dretke* [2], Roberts found that under the totality of the circumstances, the prosecution's reliance upon a race-neutral reason that was used to strike a black juror, but not a similarly situated white juror, constituted evidence of purposeful discrimination. He highlighted the prosecutor's shifting explanations for the strikes, multiple misrepresentations of the record when attempting to explain his strikes, and "the persistent focus on race in the prosecution's file." Considering all the circumstantial evidence, the chief justice was "left with the firm conviction that the strikes of two jurors were 'motivated in substantial part by discriminatory intent.' " (citing *Snyder v. Louisiana* [3]).

The chief justice's opinion is instructive in helping to open the door in *Batson* hearings to the admission of evidence that is not directly attributable to the prosecutor. The two prosecutors were not called at the state habeas hearing. While the state conceded that some documents had been authored by the prosecutors, the authors of other notes were unknown. Noting that genuine questions remained about the provenance of some documents, Roberts nevertheless, declared that "[w]e cannot... blind ourselves to their existence" because "all of the circumstances" that bear on the issue of racial discrimination "must be consulted." Quoting a well-known equal protection case (*Arlington Heights v. Metropolitan Housing Development Corp.*[4]), he observed that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available."

Declaring that the Court was "comfortable that all documents in the file were authored by *someone* in the district attorney's office" Roberts then approved the approach taken by the state habeas court, which admitted the documents as evidence while reserving the determination as to what weight should be given to each of them.

Alito's Concurrence

Justice Alito concurred only in the judgment. Observing that there was a new trend afoot in granting cert petitions, he complained that the Court (actually four members[5]) now increasing had started accepting direct appeals from state habeas decisions instead of waiting until federal habeas petitions reached them (where the Court is shackled by the chains of deference under

"A more realistic reform would be to bring transparency to the process by simply keeping track of prosecution strikes."

AEDPA[6]). While it is passing strange for a Supreme Court Justice to opine in *obiter dictum* on matters of state law, Alito nevertheless stated that he wrote separately to "explain my understanding of the role of state law in the proceedings that must be held on remand." In his view, the Georgia Supreme Court could under Georgia law "reassess" (i.e. re-litigate) the issue of whether its law on *res judicata* restricted the re-litigation of the *Batson* claim since that claim had previously been decided adversely to the defendant on direct appeal.

Res Judicata as Independent State Ground

If the Georgia Supreme Court had in fact clearly declared that its state law on *res judicata* procedurally bared defendant's state habeas *Batson* claim, its summary denial of relief would rest upon an independent state ground and not on an interpretation of a federal constitutional right. Where a state court judgment rests on a state law ground that is both independent of the merits of a federal claim and an adequate basis for the decision, a federal court lacks jurisdiction. (*Harris v. Reed*.) But the Georgia Supreme Court denied relief in a one sentence summary order without any reasoning.

The chief justice had addressed this jurisdictional issue, finding that the Supreme Court had federal jurisdiction because the state habeas trial judge had expressly stated that it would "review the *Batson* claim as to whether [*Foster*] had shown any change in the facts *sufficient to overcome* the *res judicata* bar." (emphasis added). This of course referred to the treasure trove of new documents found in the prosecution files, which were unknown to defense until after defendant's direct appeal had become final. It is a well-established principle of res judicata that the doctrine does not apply if one of the parties did not have the opportunity for a fair hearing. The state habeas trial court, however, had ruled that even when the newly discovered factual evidence was considered, it was insufficient to raise a meritorious *Batson* claim. Clearly then the state procedural bar in this case was interwoven with the sufficiency of the federal claim.

In conformity with past precedent, the chief justice treated the Georgia Supreme Court's summary two sentence order denying review as a decision on the merits and concluded (what the state of Georgia had not contested) that the U.S. Supreme Court had jurisdiction. This conclusion was consistent with long standing precedent. See *Michigan v. Long*,[8] where the Court ruled that it had jurisdiction to hear such federal claims in the absence of a plain statement that the decision below rested on an adequate and independent state ground.[9]

Alito agreed that the Supreme Court had jurisdiction and agreed that defendant's constitutional rights had been violated. Yet he expended time and ink to render an advisory opinion to inform the Georgia Supreme Court that it could, in his opinion, re-litigate the issue of *res judicata* so that the state of Georgia could contrive to continue depriving Foster of a federal right, which the U.S. Supreme Court had determined had been violated. That is as breath taking as it is ironic, because the reason Alito purportedly set out on his white horse to enlighten us with this message was to promote the "principle of finality" which in his view "is essential to the operation of our criminal justice system."

For an interesting critique on the questionable foundations for claim preclusion under the *res judicata* doctrine itself see Y. Sinai, Reconsidering Res Judicata: A Comparative Perspective, 21 Duke Journal of Comparative & International Law 353, which observes that "*Res judicata* changes white to black and black to white, it makes the crooked straight and the straight crooked." Sinai points out that in other justice systems the "discovery of truth" is a principle of justice "to which all else is subordinated." Certainly this principle should apply under these circumstances when a death sentence has been obtained by an officer of the court, who redacted an affidavit revealing the intent to exclude black jurors, engaged in multiple misrepresentations and committed a fraud upon the court. For Justice Alito, however, something more important than justice is on his agenda—countering the trend in granting direct review of state court decisions that deny post-conviction relief because this allows the Court to escape from the bonds of AEDPA.

Because of AEDPA's restrictions, a defendant seeking federal habeas relief has to overcome 28 U.S.C. 2254(d), which requires a federal habeas petitioner to show that the state court's decision denying relief was either "contrary to or an unreasonable application of a clearly established Supreme Court precedent." This statutory restriction of habeas corpus has been interpreted by the Supreme Court to require that a case already directly on point must exist. Otherwise the federal court must defer to the state court's determination (*Woods v. Donald* [10]). The federal court's review moreover "is limited to the record that was before the state court" (*Premo v. Moore*[11]) and under *Harrington v. Richter*,[12] a federal habeas court must give deference to a state court's summary post-conviction order, consisting of a single sentence. For an example of the stark contrast in the type of "justice" delivered under direct review and AEDPA restricted habeas review see *Benner & Hartman, Supreme Court Watch: Ineffective Assistance of Counsel in the Robert Court, 36 NLADA Cornerstone 2 (2015).*

"The chief justice's opinion is instructive in helping to open the door in *Batson* hearings to the admission of evidence that is not directly attributable to the prosecutor."

As a result of the AEDPA restrictions on federal habeas corpus on federal court of appeals judge has called for its repeal. In a thoughtful law review article (disguised as a preface) which analyzes the numerous failings of our criminal justice system, Judge Kozinski, of the Ninth Circuit stated:

> We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal. There are countless examples of this, but perhaps the best illustration is *Cavazos v. Smith*, the case involving a grandmother who had spent 10 years in prison for the alleged shaking death of her infant grandson — a conviction secured by since-discredited junk science. My court freed Smith, but the Supreme Court summarily reversed (over Justice Ginsburg's impassioned dissent) based on AEDPA.
>
> AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.[13]

Justice Alito, (and Justice Thomas, who dissented in *Foster* [14]) would, however, in the interest of finality, give priority to state procedures designed to limit post-conviction review, and thus like AEDPA defer to each state's determination of the scope of federal constitutional rights. While Alito acknowledged that "*Batson* is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends," he appears to believe that the Court should nevertheless defer to "state courts to structure their systems of post-conviction review in a way that promotes the expeditious and definitive disposition of claims of [Batson] error.

Conclusion

In an article for the New Yorker, commenting on the *Foster* case, Gilad Edleman reported that while there are no comprehensive statistics on how often prosecutors use peremptory challenges to strike jurors based upon race,

> there is little doubt that the practice remains common, especially in the South. In Caddo

"*Batson* is a reminder that a legal system formally blind to race is just as often blind to racism."

> Parish, Louisiana, prosecutors struck forty-eight per cent of qualified black jurors between 1997 and 2009 and only fourteen per cent of qualified whites... In 2012, a North Carolina judge found that in capital cases between 1990 and 2010 prosecutors statewide struck potential black jurors at twice the rate of non-blacks.[15]

Foster was tried in Kentucky in 1987 just after *Batson* had been decided. It is unlikely such blatantly revealing notes and records would be made, much less kept today, but at least the *Foster* decision is a sign that a the majority of the Court may be waking up to the reality that race plays a significant role in our criminal justice system and may be willing to do something about it — at least when the discrimination occurs in the courtroom.

The problem of implicit racial bias, however, still infects the jury selection process and the improper use of preemptory challenges will therefore always be difficult to combat. Justice Breyer has suggested that we abolish preemptory challenges, but the preemptory challenge is a necessary tool in the arsenal of the defense. It has also been suggested by others that a more realistic reform would be to bring transparency to the process by simply keeping track of prosecution strikes the same way we track racial statistics for traffic stops. That documentation could be undertaken by law schools and universities, and could involve not only students, but also tap a new resource — retirees from the baby boom generation — who could serve as court watchers to collect current data. As Edleman observed: "*Batson* is a reminder that a legal system formally blind to race is just as often blind to racism." ■

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Laurence A. Benner is a professor at California Western School of Law, San Diego, CA, where he teaches Criminal Procedure and Constitutional Law.

1. *476 U.S.79 (1986).*
2. *2 545 U.S. 231 (2005).*
3. *552 U.S. 472, 477 (2008).*
4. *429 U.S. 252 266 (1977).*
5. *The approval of only four justices is needed to grant a petition for certiorari.*
6. *Anti-Terrorism and Effective Death Penalty Act.*
7. *489 U.S. 255, 260 (1989).*
8. *463 U.S. 1032 (1983).*
9. *"[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id. at 1044.*
10. *135 S. Ct. 1372 (2014).*
11. *562 U.S.115 (2011).*
12. *562 U.S. 86 (2011).*
13. *Hon. Alex Kozinski, Preface, Criminal Law 2.0, 44 Geo. L. J. Ann. Rev. Crim. Proc (2015) xli-xlii.*
14. *Thomas also claimed in dissent (without a shed of support from the record) that "the likely explanation for the [Georgia Supreme Court's] denial of [state] habeas relief is that Foster's claim is procedurally barred." But as Roberts pointed out in a footnote, "there is no way to know this, of course, from the face of the Georgia Supreme Court summary order." Thomas also dissented on the merits, finding that Foster had not made out a Batson claim.*
15. *Gilad Edelman, Why Is It So Easy to Strike Black Jurors? New Yorker, June 5, 2015.*
16. *Id.*

Maryland's Model Is Working

Training Social Workers in a Holistic Defense Practice

"Community-oriented and holistic defense offices seek to utilize a multidisciplinary team, including a diverse group of attorneys, social workers and investigators."

By Lori James-Townes

Providing appropriate mental health and substance abuse treatment, job training, and social support to individuals within the criminal justice system has been a focus of the social work profession since its inception. It has only been in recent decades, however, that researchers began to examine and discuss the need for and use of social workers within public defender offices in this country.[1]

Community-oriented and holistic defense offices seek to utilize a multidisciplinary team, including a diverse group of attorneys, social workers and investigators.[2] This model recognizes that public defenders serve the same clientele being serviced by social workers in other settings. Therefore, the mission to provide holistic representation shared by social workers and public defenders creates a working relationship that merges well to meet the needs of the indigent clients they represent.

By strengthening its Social Work Division through staffing practices, internal collaborations, external social work experts, intern placements and quality trainings, the Maryland Office of the Public Defender has been able to enhance team collaborations with attorneys, providing a national model for holistic defense practices. This investment in social work has yielded better outcomes for clients and, in turn, better performance and cost savings for the criminal justice system as a whole.

The History and Practice of Defense Teams in Maryland

The State of Maryland has been committed to the criminally accused and convicted for more than a century, evidenced by the establishment of the Prisoners' Aid Association of Maryland in 1896. Following the Supreme Court decision of *Gideon v. Wainwright*, and in keeping with this tradition of providing basic representation to those charged of crimes, the General Assembly established the State of Maryland Office of Public Defender (MOPD) in 1971. The value of having social workers as part of the defense team in MOPD has been recognized for quite some time; as such the office has maintained social work staff for more than 20 years. Since its founding, MOPD has grown from an agency of 72 lawyers and 17 locations to 570 lawyers, 320 support staff, 28 social workers and more than 35 social work interns, serving over 50 locations.

The MOPD statewide Social Work Division has become an essential

"Social workers collaborate with one another, attorneys, investigators, mental health professionals, educators, family members, and anyone else who may provide insight pertaining to the lives of their clients."

component of the agency's mission. As public defenders develop legal strategies that promote the most positive litigation and sentencing outcomes for their clients, highly skilled social workers work in like-minded partnership with them to unearth, scrutinize, and evaluate valuable client information. Social workers collaborate with one another, attorneys, investigators, mental health professionals, educators, family members, and anyone else who may provide insight pertaining to the lives of their clients. This crucial information, when presented to courts, offers evidence-based support for alternative, life-affirming sentencing plans designed to help MOPD clients change the course they are on and remain out of the prison pipeline in the future.

A Model Training Program

The training modules and support provided to the social workers have made the MOPD a model program for other public defender offices across the country. This program requires that each staff member and intern receive training tailored to the duties they are required to perform, including working with clients and their families; understanding mitigation; report writing; interviewing; understanding the importance of collateral information; testimony; and working in as an agent of a defense counsel. Honing these written and oral advocacy skills is critical to successful client interactions and courtroom presentations.

Traditional education does not address the role of the social worker as employees, consultants, or experts in criminal litigation and representation. There are aspects of traditional social work practice that do not apply to defense-based practices and many ethical dilemmas and implications to consider. In defense offices, for example, all staff members – including the social worker, investigator, secretary, receptionist, interns, law clerks and paralegals – are considered agents of the attorney for purposes of attorneys' ethical duties. This topic is included in the MOPD training program through lecture, role plays and case study scenarios.

"Traditional education does not address the role of the social worker as employees, consultants, or experts in criminal litigation and representation."

The Social Work Division has expanded its scope to include a Social Work Intern Program that has fostered mutually beneficial partnerships. The Division utilizes interns from every accredited social work program to assist with social work caseloads, coordinate trainings, provide policy and procedural input, and conduct research. As a result of the intern program, the office has been able to lead the way in the creation of a training program that is a pipeline for social work interns interested in forensic social work practice.

To be effective, social workers must understand the barriers faced by their clients and use their specialized skills and tools to help advocate for at-risk populations served in the criminal justice context. Thus, proper training of social work staff and interns must be a priority for any public defender office.

Better Outcomes

MOPD has created a culture that recognizes the need for team representation, and every office and division in the agency regularly seeks the support of social work assistance. As a result, money that would otherwise be spent on attorneys' billable hours or external mental health experts is instead invested in highly-trained, in-house professionals. This investment pays off in better outcomes for clients, courts, and communities.

"Defense team social workers help disrupt cycles of poverty, crime, and racial discrimination."

\Judges frequently rely on the social workers to provide them with reports or testimony that present options for dispositions, so that they may make sentencing decisions based on well-researched information about defendants and about alternatives to incarceration. Some judges have also become accustomed to having social workers present in court, and have expressed frustration when no social worker is available to assist clients in desperate need of intervention and treatment. This is recognized as a positive shift in court culture.

Social workers also connect clients to community and family support by, for example, reuniting parents and children. This support can be instrumental in preventing people from returning to the criminal justice system. Better outcomes for communities therefore make for more effective criminal justice systems, all while controlling costs associated with utilizing expensive external mental health experts, days of incarceration, extended detention stays, and other collateral consequences associated with the practice of over-incarceration.

Defense team social workers help disrupt cycles of poverty, crime, and racial discrimination. Jonathan Rapping, founder and president of Gideon's Promise and a MacArthur "Genius" Award recipient, has extensively trained MOPD staff on client-centered representation. He has stated, *"Public defenders are doing the most important civil rights work of our generation because the greatest abuses that happen to poor people and people of color are occurring in our criminal justice system".* If you agree with his assessment, then you must concede that the social workers who are working hand-in-hand with public defenders are doing important civil rights work as well. More social work programs like MOPD's could propel a generational shift in how we approach criminal justice.■

This article was adapted for Cornerstone from a book chapter written by Lori James-Townes. Lori James-Townes, MSW, LCSW-C is director of Social Work, Leadership & Program Development for the Maryland Office of Public Defender, and is the chairperson for the National Alliance of Sentencing Advocates and Mitigation Specialists (NASAMS), a section of NLADA. She will provide training at both the 2017 NASAMS and Community-Oriented Defender Network Conferences in June.

1. Roberts, A., & Springer, D. (2007). *Social Work in Juvenile and Criminal Justice Settings, Third Edition.* Springfield: Charles C. Thomas.
2. The Ten Principles of Community-Oriented Defense are available at http://www.nlada.org/community-oriented-defender-network.

"MOPD has created a culture that recognizes the need for team representation, and every office and division in the agency regularly seeks the support of social work assistance."

The Science of Serving the Whole Client

Atlanta Public Defender to Measure Holistic Defense in Municipal Court

"A client's best chance for an outcome that doesn't drive them right back into the criminal justice system is a zealous advocate who humanizes their story."

The Safety and Justice Challenge is a national initiative, backed by a $100 million investment by the John D. and Catherine T. MacArthur Foundation, to reduce over-incarceration by changing the way America thinks about and uses jails. Earlier this year, the MacArthur Foundation announced that 20 new jurisdictions would join the Challenge. Each will design and test innovative local justice reforms to safely drive down jail usage and reduce racial and ethnic disparities in their local justice systems.

Cornerstone spoke to Rosalie Joy, Chief of the Atlanta Office of the Public Defender, about the reform she is leading: implementing a case management system to measure holistic, municipal defense practice.

The City of Atlanta is one of 20 jurisdictions to join the Safety and Justice Challenge Network this year through the Challenge's Innovation Fund. What innovative approaches are you taking to rethinking the way Atlanta uses its jails?

Rosalie Joy: Atlanta, like so many other local jails across the nation, is populated with people who have not been convicted of a crime, but are too poor to post bail. These jails are also populated with people who have been convicted of minor charges; unlawful conduct that in many respects is a direct consequence of poverty and weaknesses in our nation's strategies for providing education, health care and opportunity in our local communities.

The criminal justice community in Atlanta, however, has embraced the need to change course. It started, from our perspective, with a communications strategy that promoted mutual respect for all stakeholders, including the police, jail leadership, prosecutors and judges. Leading change through programmatic success stories has cultivated not only buy-in, but also generated motivations to model holistic strategies. Judges routinely consider alternative sentencing and rely on public defenders to chart interventions. Prosecutors are developing pretrial intervention programs that avoid convictions. Jail leadership has developed programs of their own; including mental health care and job training that provides certification in marketable skills. Large investments in police training include implicit bias and crisis intervention. Special operations

units include the implementation of a police led pre-arrest diversion program that is slated to begin this summer. Galvanizing the community of police, jail officials, judicial and prosecutorial agencies is a critical benchmark to achieving a reduction in the use of jail, and in Atlanta, a promising effort to embrace the needs of our community and reduce incarcerations.

Our Innovation Fund grant is the next step forward. The Public Defender's new case management system will allow us to track the progress of our clients linked to social services and help us make evidence-based arguments for productive alternatives to jail.

What are the challenges to providing holistic defense representation in municipal courts?

RJ: Municipal and other lower court systems that adjudicate misdemeanors and city ordinance violations are shouldering the highest volume of criminal cases of any other court in the nation. When the Supreme Court expanded the 6th Amendment right to counsel in Argersinger v. Hamlin the justices opined that there would not be enough lawyers in the country to take on the workload of clients facing charges in these courts. Defenders are challenged every day with standing-room-only city courtrooms and judges who have to make way too many important decisions within the span of a single docket. The pressure to represent the client without causing delays in the courtroom is daunting even with the most basic advocacy. Add in holistic defense, and it may be said that the equation gets more complicated because it takes more time. But in fact, it's just good lawyering as attorneys take time to know their clients, to advocate for release from jail, defend against charges, find alternatives to incarceration, and mitigate sentencing and collateral consequences.

Holistic defense is critical to lower court systems. The intersection between public health, disparate treatment, and public safety collides inside these courtrooms. A client's best chance for an outcome that doesn't drive them right back into the criminal justice system is a zealous advocate who humanizes their story. Holistic representation prevents assembly-line justice and outcomes that are failures. The reality of how issues like homelessness, mental illness, drug addiction, unemployment, discrimination and poverty drive clients into the system and punish them for these conditions is illuminated by the holistic defender. The defender is the voice in the room that reminds these busy court systems that defendants are people who are deserving of health, housing, food and opportunity. Many of our clients grew up without these basic needs and now stand before the court looking for justice themselves.

Why are data and analytics important to holistic defense practice?

RJ: Let's face it. The government obligation to provide counsel free of charge doesn't come with an ATM card for defender organizations. Funding is typically very tight and funders typically scrutinize what they have to give and why they have to give it. Engaging in a holistic defense practice is a new concept in many jurisdictions where funders may question why social workers and client advocates are necessary to the organization. After all, from their vantage point, what do they have to do with the right to counsel? The answer, of course, is

"The defender is the voice in the room that reminds these busy court systems that defendants are people who are deserving of health, housing, food and opportunity."

found in the data and analytics that empirically establish the proof of how essential holistic defense is to improving public safety, reducing public safety costs and preventing recidivism.

A holistic defense practice that dedicates resources to understanding client needs far beyond the criminal charge and the courtroom must also be able to demonstrate the value of these services to the community and the funders who make next year's decisions.

What kinds of information are you hoping to track and report using your case management system?

RJ: I have a client whose life story is unique, but at the same time, represents the thousands of people that my office represents every year. Anyone who works as a defense attorney recognizes the common threads that bind the brotherhood together. The childhood memories of hunger, struggling parents, mean streets, discrimination and inopportunity are common themes that weave through the experience of clients caught in the prison pipeline.

What happens when your holistic defense strategies lift someone up out of poverty and away from the trauma of hopelessness? What's the magic bullet? Is it the amount of time defense counsel or their social worker spent supporting the client and working with them as they charted a new course? Is it the social services you linked your client to; or could it be the supportive housing

environment that your client resides in after 25 years of living in a tent? Is there a correlation between these services and your client's reduced encounters with police? And how does the cost of policing and punishment compare to the cost of interventions? This kind of data that is so critical to developing effective strategies that accomplish three key things: The first is improvements in the quality of life for the client and the communities where they live. The second is improvements to public safety, police and prosecutor awareness, and their responses to the community. The third is sustaining stakeholder and funder support for alternatives to incarceration through empirical evidence of what works and what does not.

The Office of the Public Defender is representing Atlanta in the Safety and Justice Challenge Network. What does defender leadership bring to criminal justice reform initiatives like the Challenge?

RJ: In my experience, defenders have struggled to be included in policy conversations and the development of strategic plans to address the crisis that our country faces regarding the overuse of jails and the recidivism that ineffective methods of accountability in our justice system have cultivated. It is exciting that our advocacy has gained momentum and that executive leadership, legislators, prosecutors, police and judges are engaged with defender leaders who bring voice and valuable insights to the conversation. Defender leadership includes the voice of the client – the very people that have lived the criminal justice experience – the only people that can teach all of us about the realities of what some of our current systems are accomplishing by adhering to old standards and philosophies about what defines justice and what improves public safety.

Reform initiatives like the Challenge provide defender leadership critical opportunities to contribute to the development of strategies that can forever change the landscape of criminal justice and the American response to legitimate public safety concerns. It's not an us-versus-them contest anymore, and it shouldn't be adversarial when interests on both sides of the table are equipped with evidence-based technologies and social science that points us all in the same direction.■

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"The childhood memories of hunger, struggling parents, mean streets, discrimination and inopportunity are common themes that weave through the experience of clients caught in the prison pipeline. "

Clients Come First for Zealous Public Defenders

"The public defense function, including the selection, funding, and payment of defense counsel is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel"

—ABA Ten Principles of Public Defense Delivery Systems

"The lens we use to analyze defense strategy, make hiring decisions, or plan policy reform efforts must always be set to increase justice and due process of our clients..."

By Tina Luongo and Matthew Knecht

As public defenders, our essential function is to push against the "system" on behalf of our clients. Sometimes the "system" is a District Attorney who is prosecuting our client. Sometimes the "system" is a judge who set harsh bail on our client who clearly can't afford to make. Sometimes the "system" is an elected official who needs to be pushed towards reform efforts that increase justice and fairness or called out for policies that hurt the people we serve. Most days, if we are doing our jobs correctly, we are pushing on all of them.

In order to represent our clients zealously and effectively we must never pause to consider whether or not a position or action we take would jeopardize our funding or our jobs. The lens we use to analyze defense strategy, make hiring decisions, or plan policy reform efforts must always be set to increase justice and due process of our clients and the communities our clients come from. This is precisely why the American Bar Association, the National Legal Aid & Defender Association and the National Association of Public Defense hold public defender independence as a key principle that must guide our offices and our mission.

The Setup Matters

To understand why independence really matters, one must understand the setup of the public defense system.

There are county-based delivery systems and statewide delivery systems. In county-based systems, each county decides what delivery model they will use to provide public defense. Often a county-based system is a hodge-podge of systems with very little standardization of practice among the counties and often lacks a central body of oversight. In contrast, statewide systems have a central overseer standard practices to be more uniformed.

Within the county verse state system differences, the level of independence that is afforded an office often varies. Some public defenders are part of the executive branch of government and have no independent commission. Some report to a fulltime or part-time independent commission comprised of political appointees that oversee the public defender. Some of us are nonprofit organizations who have a

board of directors that oversees the organization and exists solely for the health and well-being of the nonprofit mission and staff.

So given all the differences in how we provide services and who oversees our work, it is no surprise that some public defenders are able to be completely free to take all necessary steps to ensure zealous advocacy and some fear, rightfully so, that should they push too hard, too loud, too far, they will lose jobs and/or funding.

And the fear is real. For chief defenders, independence is critical to run an office and ensure that staff provides the true level of zealous advocacy for clients. When public defenders are an agency inside government, they are often overseen by the same bureaucrats who monitor district and state attorneys. As a result, many chief public defenders in this delivery method can be removed. If a judicial authority is the appointing authority for the public defender, the court can remove the chief defender if it is not satisfied with the agency's performance or most certainly if it's in conflict when the public defender assumes an adversarial positon against the judge. Imagine needing to take a writ against the judge that appoints you or hires you. Do you think that implicit coercion would affect a real assessment of what is in the best interest of the client?

New York State and New York City

New York State is a county-based system with 68 different counties (New York City (NYC) is counted as 5 separate counties). Deliver services range from county to county. Some solely utilize public defenders that are agencies of the government. Some, strictly assigned counsel programs. Others, a mixed use of assigned counsel programs and public defenders. And lastly, counties can contract with nonprofit defender organizations to provide representation.

Clearly this patchwork failed to have any oversight, continuity of funding, caseload standards or best practices. To rectify this, in 2010, the state created the Indigent Legal Services Board and the Office of Indigent Legal Services. OILS provides grants, training and other resources to counties to ensure quality representation. The ILS Board is a nine-member board whose chair is the chief judge of the New York State. In addition to the board, the New York State Defender Association and the Chief Defender Association of New York provide opportunities for separate county offices to come together on client related issues, lobbying efforts for funding and policy reform, and to create a network within the state for all of us engaged in public defense.

This year, after years of lobbying, a class action lawsuit (Hurrell-Harring et al. v. State of New York) provided national attention on the crisis of crushing public defender caseloads, improper funding and a lack of independence. New York State Governor Andrew Cuomo signed into law statewide funding to improve the representation of those who cannot afford counsel. Along with this funding came the debate on independence. In his plans, the Governor sought to have public defender funding administered through the budget arm of the executive branch despite the presence of the independent Indigent Legal Services (ILS) Board of the Office of Indigent Legal Services (OILS). Clearly, the shift to where the executive branch's budget office would serve as the primary overseer caused concern because

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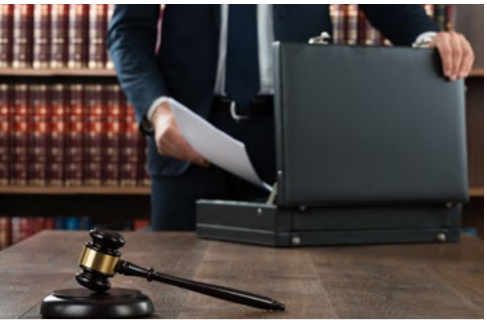

"...innovations have collectively improved the level of services for all clients in the city, and that would not have been possible without independence."

decisions made by chief defenders in New York state would be viewed by a financial lens and not one that placed the client at the focal point. Luckily, the proposed shift was met with much public opposition (again a benefit of independence) and ILS and OILS will continue to have oversight and coordination of legal services.

New York City is served by six independent public defender organizations: The Legal Aid Society, the Neighborhood Defender Service of Harlem, Brooklyn Defender Services, New York County Defender Services, the Bronx Defenders, and Queens Law Associates. New York City also manages an assigned counsel plan that are completely administered by the Office of Court Administration, the judicial branch.

Each of these defense organizations is an independent, 501(c)(3) nonprofit organization funded by the New York City Mayor's Office of Criminal Justice (MOCJ) through a competitive bidding process and the Office of Court Administration (OCA) for caseload assistance. Once funded, the organizations report pending caseloads and intake numbers to satisfy their contractual obligations to the city and state. Neither MOCJ nor OCA imposes strict regulations on the organizations dictating how they should staff their offices or how their direct services must be provided. Rather, each organization is free to organize in whatever manner they believe best satisfies the needs of their clients and communities.

This independence has several important benefits to clients, the organizations themselves, and the city's criminal justice system. Individual clients benefit from the independence of the public defense organizations. Attorneys are free to advocate zealously for each of their clients, and they can utilize whatever resources the organization provide for those clients, without getting judicial or bureaucratic approval. Social workers and investigators are great examples of this. Each of the six defender organizations have on staff fulltime social workers and investigator staff paid by our city and state contracts. Social workers and investigators are members of the defense team and are automatically added to many of the over 300,000 matters we handle on behalf of our clients. We do not need to seek judicial permission to hire or retain this staff. In contrast, attorneys who provide defense services in an assigned counsel program in NYC must get judicial approval from the judge that is presiding over the case before hiring a social worker or investigator to assist in the matter. Vouchers for services rendered by social workers and investigators must be approved for payment by the same judge. Often a judge will critique the extent of the number of hours or overall amount of a voucher, sometimes they will deny a request. This certainly is not best practice.

New York City is home to some of the most dynamic public defense organizations in the nation. This is largely because of the independence we have. As nonprofit organizations, NYC defense providers are able to organize their programs in any way that best meets the needs of their clients, leading to innovation. Since its founding in 1990, The Neighborhood Defender Service of Harlem has been able to provide their legal services through a community-based, client-centered, holistic practice model. The Legal Aid Society, the oldest and largest defense organization in the nation, uses its citywide profile to not only provide direct representation

to clients, but launches large reform efforts seeking system wide, big picture changes. Similarly, the other organizations have also been able to provide their legal services in new and innovative ways, largely because they enjoy independence from their funder. These innovations have collectively improved the level of services for all clients in the city, and that would not have been possible without independence.

Finally, the independence of New York City's public defense organizations allows us to advocate for systemic changes without risking our organizational funding. In recent years, the providers have advocated for changes in the New York Police Department's arrest and summons policies, pre-arraignment diversion opportunities, and various bail and pre-trial release programs. Additionally, the defense organizations enjoy the freedom to publicly applaud when the city takes actions that improve the lives of our clients, and we are free to publicly criticize the city when the city takes actions that we believe will be harmful to our clients. Independence allows us to advocate for change without risking our funding or the outcomes our clients receive in court, and our participation in these conversations has undoubtedly improved the lives of our clients.

So What Do We Do?

For those who do not have independence, the frustrating question is always "so what am I supposed to do"? Across this nation, there are incredible public defense offices with incredible leaders that push hard despite being part of the government. These leaders and staff are some of the bravest defenders we know. They have been able to navigate the fine line between pushing the system to ensure their clients are represented fully and responding to those that hold their budgets in their hands. For many, working with their community and faith leaders is critical to their success. For some, using data to prove that adding resources to the public defender office in terms of social workers or investigators means a cost reduction in recidivism and pre-trial jail time. Bottom line, we need to be creative, push back in ways that make sense and always remember that no matter the delivery system we work in, clients must come first.■

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