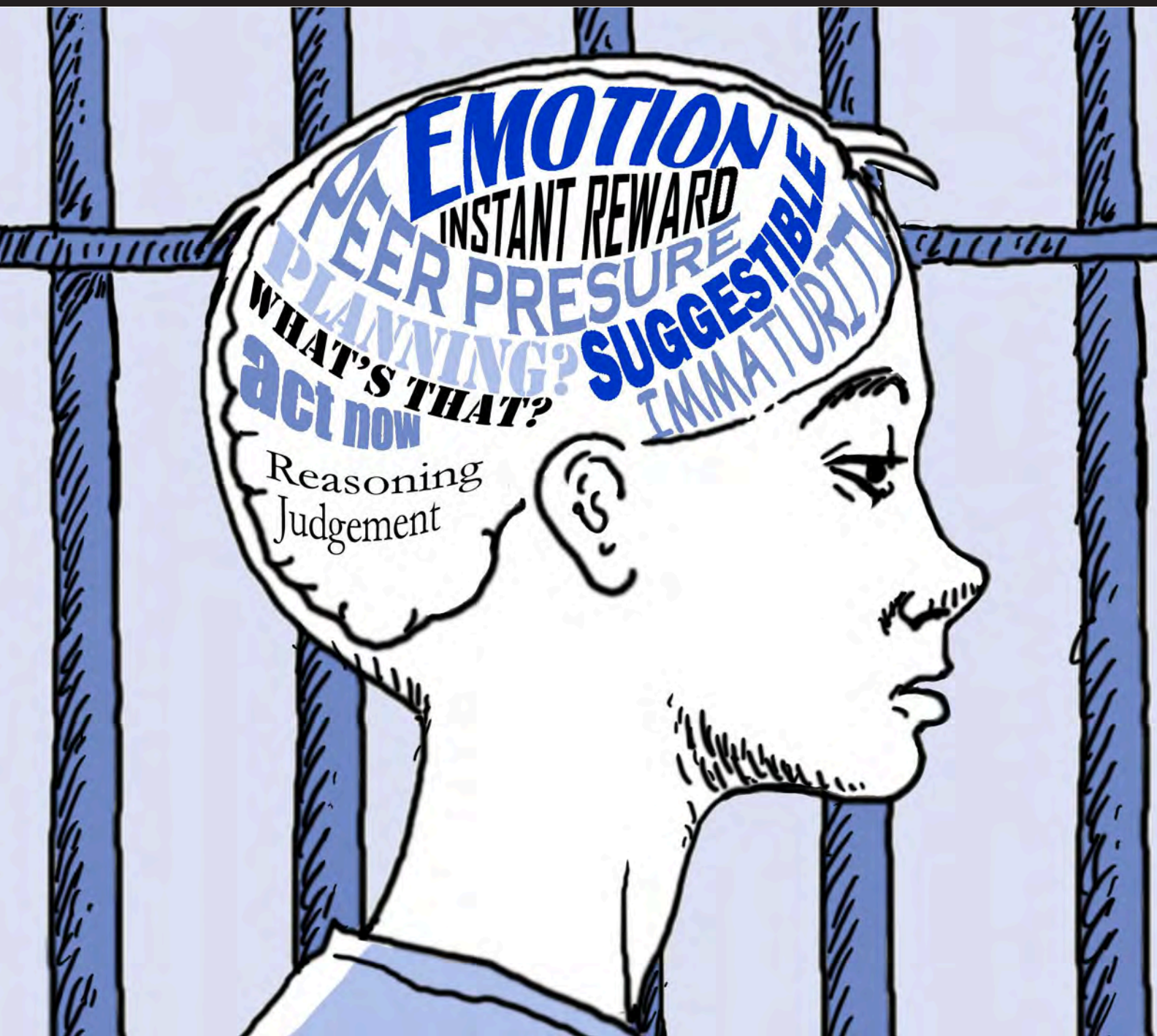
YOUTH • THE TRIAL TAX • PARENTS

WASHINGTON CRIMINAL

DEFENSE

November, 2017 Volume 31 No. 4



EDITOR
Teresa Mathis

ASSOCIATE EDITOR
Christie Hedman

COPY EDITOR
Fred Rice

EDITORIAL COMMITTEE
Cindy Arends Elsberry, Robin Emmans, Robert Freeby, Laura Shaver, Terry Mulligan, Keith Tyne

DESIGN
Fred Rice

ILLUSTRATIONS
Steve Konz

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Teresa Mathis, Executive Director

1511 Third Avenue, Suite 503
Seattle, WA 98101
206-623-1302 • www.wacdl.org

OFFICERS
Patricia Fulton, President
Jeffery Swan, Vice President/East
Larry Jefferson , Vice President/West
Robert Butler, Secretary
Les Tolzin, Treasurer
Christopher Black, President Elect
Amy Muth, Immediate Past President

BOARD OF GOVERNORS
John Brangwin, Dean Chuang, Jonathan Dichter, Jessica Fleming, David Hammerstad, Michelle Hess, Kathy Knox, Stacey MacDonald, Schöen Parnell, Sarah Perez, Greg Scott, Laura Shaver, Maggie Smith Evansen, Heather Straub, Paul Strophy, Aimée Sutton, Paul Thompson

WASHINGTON DEFENDER ASSOCIATION
Christie Hedman, Executive Director

110 Prefontaine Place South, Suite 610
Seattle, WA 98104
206-623-4321 • www.defensenet.org

OFFICERS
Jeremy Ford, President
Paul Thompson, President Elect
Kathy Knox, Vice President East
Harry Gasnick, Vice President West
Christopher Swaby, Secretary
Kelli Armstrong-Smith, Treasurer
Daryl Rodrigues, Immediate Past President

BOARD OF DIRECTORS
Andrea Burkhart, Heather Carroll, Rachel Cortez, Starck Follis, Matthew Harget, Brett Hill, Michael Kawamura, Paul Kelley, Greg Link, Dan McGreevy, Patrick O'Connor, Terry Mulligan, Keith Tyne, Diane Whaley, Lorinda Youngcourt

Washington Criminal Defense is published four times a year. We welcome contributions from our members. For information about submitting articles contact Teresa Mathis, 206-623-1302. For advertising information, contact Fred Rice, 206-623-1302.

FEATURES

COLUMNS

Views and opinions expressed in articles published are the authors' and are not attributed to the Washington Association of Criminal Defense Lawyers, the Washington Defender Association, their editors, or members unless expressly stated. Authors are solely responsible for the accuracy of all citations and quotations.

Opposing the Trial Tax

Only the judge — and not the prosecutor — can amend the charges.

BY DARON MORRIS

Prosecutors routinely threaten to add charges to coerce guilty pleas. As a result, plea bargaining has overtaken the constitutional right to jury trial as the principal means of convicting people in this country.[1] Nationally, over 95% of criminal cases resolve by guilty plea.

Courts Have Broad Discretion to Deny Amendments

Prosecutors have tremendous power but, in Washington, it is not the prosecutor but the court that decides whether to amend the charges.[2] Our state supreme court, in *State v. Lamb*,[3] has made clear that, while the prosecutor may make a motion, the court retains broad discretion whether to permit the amendment.[4] The court can exercise such discretion for any non-arbitrary reason, and the defense need not show prejudice.[5]

There has been some confusion among lawyers and judges on this point because CrR 2.1(d) provides:

> The court may permit any information or bill of particulars to be amended at any time before verdict or finding *if substantial rights of the defendant are not prejudiced.*

(Emphasis added). Many judges interpret this to mean that a motion to amend must be granted if the defense cannot show prejudice. But, as *Lamb*, makes clear, that is a logical error and a misreading of the rule.[6] Instead, the trial court *may* permit an amendment absent a showing of prejudice, but it is not required to do so.[7]

In order to address this confusion it is important to fully understand the relevant case law, starting with *Lamb.* In *Lamb,* the defendant was charged with ten counts of unlawful possession of a firearm 2, in addition to other charges. Prior to trial, Lamb moved to withdraw his 1991 guilty plea to a burglary 2, which was the predicate conviction for the ten unlawful firearm possession charges. Lamb claimed he had not been informed that those convictions would result in his ineligibility to possess a firearm.[8] The trial court granted his motion and vacated the predicate burglary conviction. The state then sought to amend five of the ten firearm charges so as to base them on Lamb's separate predicate conviction for indecent liberties. The trial court denied the state's motion and dismissed all ten counts of unlawful firearm possession. The state appealed, claiming that the trial court erred in denying its motion to amend because Lamb had not shown any prejudice to his right to a fair trial. The court of appeals agreed but our state supreme court took review.

In a unanimous opinion, Justice Owens held that, while the trial court had erred in permitting Lamb to withdraw his 1991 plea to the predicate burglary 2 conviction, there was no showing that the trial court abused its discretion in denying the amendment.[9] Although Lamb had not shown prejudice, that issue was immaterial.[10] "Even if true, the absence of prejudice to the defendant does not establish that the trial court abused its discretion in denying the motion."[11]

Similarly, in *State v. Rapozo*, 114 Wn. App. 321 (2002), Division Two rejected the state's appeal of the trial judge's refusal to amend the charges. As in *Lamb*, the state moved to amend in response to a successful legal attack by the defense.[12] The trial judge refused the amendment, finding that the state's motion was untimely.[13] The defense made no showing that amendment would prejudice its right to a fair trial.[14] Nevertheless, the court of appeals rejected the state's challenge, holding that the trial court had broad discretion to deny the amendment even in the absence of prejudice.[15]

An abuse of discretion occurs only where there is arbitrary and capricious action or a disregard for the

An abuse of discretion occurs only where there is arbitrary and capricious action or a disregard for the facts.

facts.[16] Thus, trial courts have broad discretion to deny charging amendments for any non-capricious reason whatsoever.

For example, it is abundantly clear that trial courts can consider policy issues in their exercise of discretion. Not infrequently, judges deny motions to amend the charges in connection with a plea offer when they feel a plea is too lenient. Such discretion is perfectly acceptable, and is neither arbitrary nor capricious.[17] In *Haner*, the defendant and the prosecutor agreed to a plea bargain where a charge of assault 2 would be reduced to one of assault 3.[18] The trial court, however, rejected the amendment, feeling that Haner should serve more time in prison. The Washington State Supreme Court affirmed the trial court, finding that the trial judge did not "abuse[ ] his discretion in concluding that the public interest would not be served by reduction of the charge…."[19]

Clearly, if CrR 2.1(d) allows judges to refuse amendments down for policy reasons, it also empowers judges to refuse upward amendments on the same type of grounds. As we all know, we are in the midst of a national conversation about the problems of mass incarceration, executive power, racial disproportionality, and the plea bargaining system. *All* of these issues are perfectly acceptable policy considerations judges can rely on to refuse upward amendments. If a judge can deny an amendment because it is too lenient, then a judge can clearly deny an amendment because it is too harsh or coercive. A judge can even deny an amendment because it occurs in a system that does not adequately address issues of racial discrimination.

Judges can also refuse amendments due any number of considerations. Examples include:

- Timing (even in the absence of prejudice);
- The need for further use of defense resources;
- Impacts on defender workload and effective assistance; and
- Concerns about the strength of the state's case or witness credibility.

Defense lawyers are encouraged to think creatively about other considerations that might be germane to the trial court.

> Never mind that the motion is brought swiftly on the heels of the defendant rejecting the plea offer.

Responding to the Prosecutor's Arguments

Prosecutors will attempt to frame their amendments in terms of "evidentiary considerations." In other words, they will say that they need to stack up multiple charges to ensure the likelihood of a conviction. Take for example a burglary case that has additional possible allegations of kidnapping, assault, and the use of firearms. The prosecutor might complain that, if the only charge is burglary, the jury might acquit without considering the other charges. Therefore, the prosecutor will say, it needs to add all possible charges — with a firearm enhancement on each one. The defendant's standard sentence thereby increases from two years to thirty. "This is not a trial-tax," the prosecutor might say. Never mind that the motion is brought swiftly on the heels of the defendant rejecting the plea offer.

The prosecutor's concern about the strength of its case is perhaps legitimate. But this should not mean that the defendant must suffer a 15-fold increase in his or her legal jeopardy. It does not mean that the defendant should be coerced into a plea bargain even though he or she is innocent.

So what can judges do here?

One option is ask the court to condition the state's motion to amend on an agreement to not seek a higher sentence than a stated number of years. If the state is primarily motivated by evidentiary concerns and not by a desire to coerce a plea, it should have no reason to balk at such an agreement. Another option might be to ask that, if the court grants the amendment, that it also find that the amendment results in a presumptive sentence that is clearly excessive under the Sentencing Reform Act, thereby justifying an exceptional down should the client be convicted.

Whatever the outcome or approach, we must start the conversation in our courtrooms and encourage our judges to push back on a coercive plea bargaining system that is essentially a constructive denial of the right to trial by jury. Again, defense lawyers are encouraged to think creatively.

Other Arguments

If a trial judge will not exercise discretion in this context, then defense counsel must resort to arguments that *require* the court refuse the amendment. These arguments are often more difficult but are available and include:

- **No probable cause for the charges**: Prosecutors must have probable cause for all charges and any threatened charges;[20] you may want to remind them of the ABA guidelines for prosecutors:

  > In connection with plea negotiations, the prosecuting attorney should not bring or threaten to bring charges against a defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support he charges or the prosecuting attorney has no good faith intention of pursuing those charges.[21]

  If the charges are not supported or if you suspect that the prosecutor does not have a reasonable expectation of proceeding on the charge at trial but they are using the threat to coerce a plea, move to dismiss the count under CrR 8.3(b)/Governmental Misconduct. Your client has been prejudiced by the government's conduct in trying to coerce a plea.[22]

- **Prejudice / Late notice of amended charges**: Forcing a defendant to choose between the right to speedy trial and the right to a fair trial with adequately prepared counsel is grounds for dismissal.[23] Any amendment that otherwise prejudices the right to a fair trial also requires that the court refuse the amendment under CrR 2.1(d).
- **Vindictive prosecution:** Prosecutors may not act vindictively when adding or threatening charges.[24] Vindictive prosecution occurs when

the government acts against a defendant in response to the defendant's prior assertion of a constitutional or statutory right.[25] Thus, the prosecutor may not add a charge or increase the seriousness of the current charge or charges because your client has exercised a constitutional right, including the right to appeal or the right to go to trial. But given the wide discretion granted to prosecutors, showing vindictiveness is very challenging.

Daron Morris is the investigation supervisor for The Defender Association Division of the King County Department of Public Defense. This article was originally published as a WDA Technical Assistance Practice Advisory.

Notes

1. *See, e.g.,* Emily Yoffe, "Innocence is Irrelevant," *The Atlantic,* September 2017, https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.
2. CrR 2.1(d).
3. *State v. Lamb,* 175 Wn.2d 121 (2012).
4. CrR.2.1(d).
5. *Lamb* at 131.
6. *Lamb* at 130-32.
7. Id.
8. At the time of Lamb's 1991 plea, the juvenile burglary conviction did not result in loss of firearm rights, but the legislature subsequently amended the statute.
9. *Lamb* at 131.
10. Id.
11. Notably, the basis for the trial court's order denying the amendment was the same basis it had used to support its order vacating Lamb's second degree burglary plea – that Lamb's indecent liberties conviction would, likewise, not have provided him notice of his ineligibility to possess a firearm. *State v. Lamb*, 163 Wn.App. 614 (2011). Even though Justice Owens rejected that as a basis to withdraw Lamb's plea to the predicate conviction, she accepted that it was not an abuse of the trial court's discretion to deny a motion to amend on that basis.
12. *Bordenkircher v. Hayes*, 434 US 357, 364 (1978).
13. Id. at 322
14. Id.
15. Id.
16. Id.
17. *Farrell v. City of Seattle*, 75 Wn.2d 540 (1969).
18. *State v. Haner*, 95 Wn.2d 858 (1981).
19. Id. at 860.
20. Id. at 865; *cited with approval in State v. Lamb* at 130.
21. ABA Criminal Justice Standards on Guilty Pleas, Standard 14.-3.1(h). Found here: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#3.1.
22. See *State v. Miller*, 92 Wn.App 693 (1998) (court dismissed one count for improper threat to amend the charge up) *Cf. State v. Lee* (court denies CrR 8.3b motion to dismiss; threatened charges supported).
23. *State v. Teems*, 89 Wn.App. 385, 948 P.2d 1336 (1997) (after waiting 40 days from mistrial to refile information, prosecutor provided notice only to defendant's former counsel, and just 12 days remained on speedy trial clock when defendant actually received notice and was appointed new counsel); *State v. Michelli,* 132 Wn.2d 229, 244, 937 P.2d 587 (1997) (late amendment or addition of charges prejudiced the defendant in that he was forced to waive his right to speedy trial and ask for a continuance to prepare for surprise charges brought three business days before the scheduled trial. Three trafficking charges were added to the original theft charge three business days before trial).
24. *State v. Korum,* 157 Wn.2d 614 (2006) (filing of additional charges after the withdrawal of a plea agreement without providing additional facts does not give rise to a presumption of vindictiveness); *Bordenkircher v. Hayes,* 434 US 357, 98 S.Ct. 663 54 L.Ed 2d 604 (1978*); State v. Lee,* 69 Wn. App 31 (1993) (defendant must show actual vindictiveness).
25. *Korum*, at 627 (citing *US v. Meyer*, 910 F.2d 1242, 1245 (DC Cir. 1987)).

Judicial and Prosecutorial Conduct Committee

WACDL's Judicial and Prosecutorial Conduct Committee serves as an intermediary on behalf of WACDL members encountering systemic problems in the courts. It reviews and responds to cases brought to its attention in a manner that will maintain members' anonymity while directly addressing their concerns to judges.

It also receives reports from WACDL members about suspected instances of prosecutorial misconduct; reviews and screens the complaints it receives; and determines, after investigating complaints, an appropriate WACDL response. The committee has, in the past, met with the elected prosecutor and/or chief criminal deputy in a county to discuss concerns related to a particular prosecutor. The committee may also, with Board approval, file a Bar complaint. The committee does not normally step in during trial.

To request assistance, contact the committee co-chairs:

Mary Kay High: (253) 798-7857 or mhigh@co.pierce.wa.us

Peter Mazzone: (425) 259-4989 or peterm@mazzonelaw.com

Sentencing

Taking youthfulness into account.

BY LAURA SHAVER

Courts are beginning to recognize what common sense and parenting experience have told us for years: young people undervalue the consequences of their actions and they are more impulsive and more likely to be rehabilitated when they engage in criminal conduct. This common sense knowledge and emerging scientific studies — which conclude that the human brain does not settle into its mature, adult form until after the adolescent years — have challenged the criminal justice system's treatment of young people. While this issue has been argued and ruled on by courts throughout the country for over a decade, the current state of the law in Washington remains a moving target.

This article will discuss key cases shaping laws surrounding sentencing youth in adult court and the steps attorneys should take when representing a young adult or juvenile.

Evolution of Sentencing Juveniles in the Adult System

In 2005, in *Roper v. Simmons*, the United States Supreme Court recognized the principle that youth are significantly different from adults and must be treated differently within the criminal justice system.[1] In *Roper*, the Court held the Eighth and Fourteenth amendments forbid the imposition of the death penalty on individuals who are under 18 years old when their crimes were committed.[2] Five years later, in *Graham v. Florida*, the Supreme Court deemed mandatory life sentences for youth who committed non-homicide offenses unconstitutional.[3] Justice Kennedy explained the prohibition would give "all juvenile non-homicide offenders a chance to demonstrate maturity and reform" and noted that juveniles "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[4]

The Supreme Court took another step in recognizing the fundamental unfairness of sentencing children to die in prison in 2012 when, in *Miller v. Alabama*,[5] it held that mandatory life sentences for juveniles convicted of homicide offenses are unconstitutional. *Roper*, *Graham*, and *Miller* demonstrate an evolving recognition that juveniles are not little adults and they should not be treated as such. The Supreme Court based its decisions, in part, on the fact that a teenager's immature brain leads to an underdeveloped sense of responsibility, recklessness, impulsivity, and heedless risk-taking.[6]

When *Miller* was decided it effectively struck down laws in 28 states — and it took years for most states to pass statutory reform. In fact, many states refused to apply *Miller* retroactivity because the opinion was silent on the issue.[7] In 2014, the Washington Legislature sought to provide a remedy for those affected by *Miller,*[8] two years before the Supreme Court ruled in 2016 that *Miller* did apply retroactively. Washington's "*Miller* fix" statutes (1) allow new sentencing hearings for juveniles sentenced to life without parole for aggravated murder and (2) set minimum terms to be served before parole suitability hearings can occur for crimes other than aggravated murder.[9]

In 2015, the Washington State Supreme Court decided *State v. O'Dell*, which held that youthfulness, while not a per se mitigating factor, can support an exceptional sentence below the standard range.[10] Justice Sheryl Gordon McCloud, writing for the majority, pointed to studies showing human brain development occurring well into people's twenties and acknowledged the scientific and technical nature of the studies, but concluded that the defense does not need to

> "[C]hildren are different." *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017).

put on expert testimony about youth or immaturity and could instead, rely on lay opinion testimony.[11]

Since *Miller*, our supreme court, in addition to *O'Dell*, has held that de facto life sentences — such as the 85-year sentence handed down in *State v. Ramos* — are permissible so long as an individualized *Miller* hearing takes place and the court considers youth and its attributes before determining the sentence.[12] In 2017, the court, in *State v. Houston-Sconiers*, reversed a Division Two holding that sentencing courts must have absolute discretion to impose any sentence below the applicable range and enhancements.[13] Prior to *Houston-Sconiers*, it was well-settled that judges did not have discretion when it came to weapon enhancements.

Two important cases are pending before the Washington Supreme Court that will greatly impact juvenile justice moving forward.

Two important cases are pending before the Washington Supreme Court that will greatly impact juvenile justice moving forward.

Two important cases are pending before the Washington Supreme Court that will greatly impact juvenile justice moving forward. Oral arguments were held on September 12, 2017, in *State v. Scott*. The key issue in *Scott* is whether the "*Miller*-fix" statute remedies Scott's unconstitutional sentence because it gives him

the possibility of release (also known as parole).[14] The defense argued the "*Miller*-fix" statute applying to youth convicted of crimes other than aggravated first degree murder does not provide a constitutional remedy because these youth do not get the benefit of re-sentencing hearings during which there is an individualized consideration of youth.

On October 3, 2017, arguments were heard in *In re PRP Light-Roth* after the state petitioned for accelerated review following Division One's holding that *O'Dell* applies retroactively and was material to Light-Roth's sentence.[15] In its decision, Division One announced that prior to *O'Dell* defendants could not meaningfully argue youthfulness as a mitigating factor for sentencing purposes. Since Light-Roth was 19 years old at the time of his offense, they said, he could have asked for an exceptional sentenced based on his youth pursuant to *O'Dell* — something courts had characterized as "absurd" in earlier cases.[16]

Understanding the Science

In *Miller*, the Court identified three specific gaps between teenagers and adults:

- First, children have a lack of maturity and an underdeveloped sense of responsibility.
- Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.
- Third, a child's character is not as well formed as an adult's; traits are less fixed and actions less likely to be evidence of irretrievable depravity.[17]

The Court cited, as part of its authority, "Less Guilty by Reasons of Adolescence," a 2003 article published in the *American Psychologist* by Laurence Steinberg and Elizabeth Scott. This article discusses the mounting evidence of the neuropsychological and neurobiological differences between adults and adolescents with the following consequences:

1. As they begin the process of individuating from parental control, adolescents are more susceptible to peer influence.
2. As a result of limited cognitive abilities making them less able than adults to think about events that have not occurred and fewer life experiences, adolescents are less future-oriented and more concerned with the short-term consequences.
3. Because of their limited time perspective and the different values and goals they have from adults, adolescents' use of risk-reward calculus places less weight on the risks of their actions.
4. As a result of their lesser capacity for self-management, adolescents have more rapid mood swings than adults — causing them to act more impulsively.[18]

An assessment of your client's developmental maturity can be argued as a solid basis on its own to justify a departure.

Each of the factors identified in *Miller* constitute reasons to justify leniency for young offenders. Ultimately it is the defense attorney's job to ensure the court has all the information it needs so the court will be able to consider youthfulness and so give a sentence that reflects developmental reality, and not just the offense.

"Developmental Maturity" as a Reason to Depart

RCW 9.94A.535(1) lists numerous reasons the court can depart downward when sentencing in a felony matter. The list is illustrative only. An assessment of your client's developmental maturity can be argued as a solid basis on its own to justify a departure.[19] Be creative and argue the facts of the case and evidence that fits into the research findings related to adolescent brain development.[20] Possible arguments include:

- **Youth did not contemplate that his or her conduct would cause harm to another.** Youth are impulsive. Perhaps your client did not have time or the capacity to stop and think about his or her actions? The teenage brain is like a highway under construction. The frontal lobe (the "CEO" of the brain) is still developing. This area of the brain is responsible for throwing the brakes on bad ideas. Youth are sensation seekers, and they are more driven by the prospect of a positive reward than deterred by negative consequences.
- **Youth acted under strong provocation.** Youth are much less capable of assessing threats or risk and may overreact to a perceived

threat.

- **Criminal conduct was induced or facilitated by another.** Adolescent youth are highly attentive to their peers, and more susceptible to negative peer influence than positive peer influence. Was the crime committed in a group, as many youth offenses are? Was the youth being pressured by others to act? Did the youth acquiesce to authority? Was your client the youngest in a crowd following the lead of older kids?
- **Criminal conduct was the result of circumstances unlikely to occur again.** Youth are more likely to be transformed and rehabilitated; they will grow up and out of their developmental deficits.
- **Youth is likely to comply with the terms of probation.** Discuss how the youth has done in custody or while released; show by behavior that the youth has matured while the case has been pending.
- **The sentence is not necessary to deter others.** Because youth do not do so well thinking about consequences before acting, a lengthy sentence is not a deterrent.

Remind the court of the ways our society recognizes that youth should be treated differently outside the criminal justice arena: military, contracts, marriage and more. We treat them differently in these contexts because we don't think they have the maturity necessary for certain actions or decisions. The same reasoning applies when considering culpability for criminal actions.[21]

It Doesn't End at Age 18

Because age 18 is the cutoff for many activities, the Supreme Court has been comfortable using 18 as the cutoff when considering appropriate sentences for the most serious offenses. But that doesn't mean we should stop there. The Supreme Court recognized this in *Roper v. Simmons*: "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."[22]

Conclusion

The evolution of cases involving juvenile sentencing are significant to anyone representing young adults or juveniles because each case has altered the way a sentencing court must treat youth in the criminal justice system.

Laura Shaver has been practicing law since 2011, focusing exclusively on the representation of adults and juveniles accused of misdemeanors and felonies. She is a member of the WACDL Board of Governors.

Notes

1. 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).
2. Id.
3. 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).
4. Id. at 79.
5. *Miller v Alabama,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).
6. Id.
7. Id., and Josha Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, (Washington, D.C.: The Sentencing Project, June 25, 2014), http://www.sentencingproject.org/publications/slow-to-act-state-responses-to-2012-supreme-court-mandate-on-life-without-parole.
8. *Montgomery v. Louisiana*___ U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), RCW 9.94A.730 & RCW 10.95.030.
9. RCW 9.94A.730 & RCW 10.95.030.
10. 183 Wn.2d 680, 358 P.3d 359 (2015).
11. Id. at 697.
12. 187 Wn.2d 420, 387 P.3d 650 (2017).
13. 188 Wn.2d 1, 391 P.3d 409 (2017).
14. RCW 9.94A.730.
15. ___ Wn.App. ___, 401 P.3d 459 (No. 75129-8) (Div. I) (August 14, 2017).
16. Id.
17. *Miller,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).
18. Laurence Steinberg and Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," *American Psychologist* 58, no. 12: 1012-13, https://www.ncbi.nlm.nih.gov/pubmed/14664689.
19. An expert's evaluation and opinion about your individual client is the most compelling evidence to support this conclusion. RCW 9.94A.540(3) provides that youth charged as adults are not subject.
20. For example, RCW 9.94A.535(1)(a)(c),(d) and (e) could easily apply with a youthful client.
21. Military - will not accept anyone under 18; Contracts - cannot legally enter until age 18; Marriage- RCW 26.04.010 (must be 18, void if under 17, unless condition waived by superior court); Voting - Wash Constitution, Art VI, section 1 (must be 18 to vote); Driving laws restrict driving by age; DOC's Risk Assessment tool - DOC's static tool recently introduced accounts for age of probationer when assessing risk; Alcohol - must be 21 years old; Jury Service - RCW 2.36.070(1) (must be 18 to serve); Firearms - RCW 9.41.040(2)(a)(ii) must be 18 (except in limited circumstances set out in RCW 9.41.042)
22. *Roper*, 125 U.S. at 1197.

Beyond Sentencing

Supporting connections for children and their incarcerated parents.

BY D'ADRE CUNNINGHAM, JD

Our incarcerated clients are also often parents.

The United States of America incarcerates about 870 for every 100,000 U.S. residents.[1] The rate of incarceration for women doubled between 1991 and 2007.[2] Low-incomed people have been more directly affected by the country's high rate of incarceration than higher-incomed people.[3] A federal review of 2011 crime data revealed that over 60% of those convicted of crimes were age 11 to 30.[4] Men without high school diplomas are incarcerated at a higher rate than men of all education levels, even within racial categories.[5]

Nationally, approximately half of all incarcerated people in state prisons are parents of minor children,[6] and approximately three-quarters of incarcerated women in state prisons are mothers.[7] Prior to becoming incarcerated, over three-quarters (77%) of mothers and one-quarter (26%) of fathers incarcerated in state prisons were living with their children, and over two-thirds (68%) of fathers and nearly half of mothers (47%) were employed.[8]

In Washington State, there are nearly 30,000 people in jails and prisons, and an additional 104,800 people are under correctional supervision.[9] About 80% of Washington State prisoners in DOC custody reported an average of 1.91 children.[10] Washington's child welfare agency estimates that between 27,000 and 30,000 of the state's children are directly affected by parental incarceration.[11] However, the estimated total number of minor children in Washington State who have ever experienced parental incarceration is above 100,000.[12]

There is currently no readily available Washington State data tracking the number and demography of minor children directly or indirectly impacted by parental incarceration. However, national data suggests that the incidence of child-parent separation caused by parental incarceration differs by race.[13]

> The longer a separation continues, the less likely the child-parent relationship will legally remain intact.

Practice Tip

As defense attorneys, we understand that not all those who commit crimes are detected; not all those detected are charged; not all those charged are convicted; and not all those convicted are imprisoned.

Collateral Consequences of Incarceration

Imprisonment, not just arrest and conviction, undermines the incarcerated person's long-term employment, earning potential, and successful reentry into society.[14] Parental incarceration plunges families teetering on the edge over the financial cliff.[15] Parental incarceration adversely impacts the family staying together, the family's housing stability, and the child's immediate and long-term educational outcomes.[16]

Children of incarcerated parents move more frequently than their peers, and even more so when both parents are imprisoned.[17] Children with incarcerated mothers are less likely to live with their other parent (37%) than children with incarcerated fathers (88%).[18] Parental incarceration is associated with the children experiencing additional major, potentially traumatic events, greater school disruption, lower school performance, and lower long-term economic prosperity.[19]

Practice Tip

Because indigent parents have a state constitutional and statutory right to counsel at every stage of a child welfare proceeding, defense attorneys, when possible, should help their incarcerated clients identify and contact their dependency attorney. The Washington State Office of Public Defense now contracts with all counties for parents representations. *http://*

www.opd.wa.gov/index.php/program/parents-representation/14-admin/24-directory.

When a parent is incarcerated and the child welfare system is involved with the family, the child becomes at risk of never reunifying with their incarcerated parent. Children with incarcerated mothers are more likely to live in foster care (11%) than children with incarcerated fathers (2%).[20] When deciding whether to allow state intervention into the family, the child welfare court assesses whether a child can live safely with either parent. The longer a separation continues, the less likely the child-parent relationship will legally remain intact. Even without research specifically on the topic, child welfare practitioners anecdotally understand that parental incarceration increases the likelihood that the court will terminate the child-parent relationship. Keeping parents in the community helps to ensure that the child-parent relationship will remain intact.

Practice Tip

Washington State provides a guide of resources for children of the incarcerated and their caregivers. Available in English and Spanish at: *https://www.dshs.wa.gov/node/8532.*

Minor Children Can Experience Several Negative Impacts of Parental Incarceration

The grief and loss caused by the separation between the child and parent can be severe. Children of the incarcerated often experience fear, sadness and loneliness, guilt, low self-esteem, depression and emotional withdrawal, eating and sleeping disorders, anxiety and hyper-arousal, physical aggression, "acting out," classroom behavior difficulties, and self-medication, among other things.[21] Some children think they are the cause of the separation and imagine dangers and fears for the parents where they are living.[22] Withholding information of a child's parent's imprisonment may cause a child to have difficulty managing the child's loss of an incarcerated parent.[23]

Incarcerated parents are wholly reliant upon the state penal institution for access to visits with their family members.

Practice Tip

Helping incarcerated parents and caregivers navigate how to talk about the incarceration can ease anxiety and grief for the children. See some online resources at: *https://sesamestreetincommunities.org/topics/incarceration.*

Maintaining contact helps chil-

dren[24] by allowing them to express emotional reactions to the separation from their parent; by promoting a more realistic understanding of where their parent is living; and by reducing the child's anxiety about whether their parent is safe.[25] The best way to support the child-parent relationship after the parent has been incarcerated is to create safe and developmentally appropriate opportunities for contact.[26] Effective methods of contact recognize the importance of direct physical contact between the child and parent.[27]

Practice Tip

It is better to ask the court not to impose broad-reaching no-contact orders; and, when appropriate, to ask the court to state that visits *should* happen for the parent and child.

Advocating Against Child-Parent Separation

- ***Pre-trial.*** The accused and convicted alike have a First Amendment right to freedom of association with their own children.[28] They also have a Fourteenth Amendment liberty interest in the custody, companionship, and care of their children and in making child-rearing decisions.[29] As a defense attorney, it is important to prevent the imposition of pre-trial release conditions that eliminate contact between a client and their child. Because the First Amendment protects the right to associate, the rights of non-custodial parent should still be litigated.
- ***At sentencing.*** Sentencing conditions must be a *crime-related* prohibition.[30] Further, conditions of community custody may not be unconstitutionally vague.[31] While it is permissible to restrict a parent's contact with his or her own child upon conviction, contact for non-victim children should not be completely abrogated, unless the condition is reasonably necessary to further the state's compelling interest in preventing harm and protecting children[32]
- ***Post-sentencing.*** Probationers may be afforded less protection of those constitutional rights than those who are not convicted.[33] Although prisoners retain fewer constitutional rights than those not imprisoned,[34] "[w]e do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners."[35] Incarcerated parents are wholly reliant upon the state penal institution for access to visits with their family members.[36] Whether the infringement of prisoners' constitutional rights is permissible while incarcerated) depends upon whether the state's action (or rule) is rationally related to a legitimate penological interest.[37]

Practice Tip

Defense attorneys should consider using mitigation and other experts to help the client facing incarceration take the necessary steps to qualify for visitation after incarceration begins.

Exceptional Downward Sentences

A parent can ask for an exceptional downward based on personal circumstances relating to the their parenting status, parenting or caretaking role, or parenting circumstance, so long as the factor articulated was not a factor necessarily considered by the legislature in establishing the standard sentencing range.[38] In addition, the parent must demonstrate to the sentencing court that the factor identified (1) is sufficiently compelling and substantial to distinguish the crime form others in the same category;[39] and (2) relates to the crime or to the parent's culpability for the crime.[40] That is, the parent must connect how their parenting role or circumstance relates to the culpability for or commission of the crime of conviction at the time of the offense, not at the time of sentencing.[41]

Practice Tip

Because federal funding restrictions prohibit some civil legal aid organizations from directly representing incarcerated parents in custody proceedings, they only can receive legal information and legal referral while incarcerated. Defense attorneys should consider connecting clients in need of legal services on family law, child support, or parentage issues prior to the client becoming incarcerated. Online legal resources are available at: *https://www.washingtonlawhelp.org/issues/family-law.*

Alternatives to Incarceration

The Sentencing Reform Act (SRA) provides for a sentencing alternative for custodial parents, convicted of nonviolent offenses (in which their child is not the victim), who are facing of at least 366 days and who were parenting their child at the time of their offense.[42] There are several other criteria for this sentencing alternative, including the categorical exclusion of anyone with prior violent or sex offense convictions and of anyone who is or *may become* subject to a deportation order. Being involved in the child welfare system is not an exclusionary criteria.[43] DOC's Sentencing Contacts Unit administers this sentencing

alternative.[44]

In Conclusion

The impact of parental incarceration has severe consequences for their children and society. As sentencing advocates, defense attorneys and mitigation professionals are uniquely positioned to support a client's child-parent connections by helping the client prepare for custodial and visitation arrangements, by helping to protecting the right to contact in the criminal case, and, if necessary, by making referrals for family law or dependency support.

D'Adre Cunningham, JD, is currently the Incarcerated Parents Project (IPP) resource attorney at the Washington Defender Association. The IPP offers in-person and online training and resources supporting these and additional practice ideas. IPP's mission is to reduce the overall chances of family separation due to parental incarceration in Washington State. IPP provides technical case assistance in litigation for advocates and their incarcerated parent-clients; provides training to lawyers, judges, and other system stakeholders on the impact of parental incarceration on children and their incarcerated parents; and engages in legislative and policy advocacy. More information can be found on the IPP webpage at http://www.defensenet.org/ipp.

Notes

1. At year end 2015, 870 persons per 100,000 U.S. adult residents were under the jurisdiction of state or federal prisons or in the custody of local jails. Danielle Kaeble and Lauren Glaze, *Correctional Populations in the United States, 2015* (U.S. Department of Justice, Bureau of Justice Statistics, Office of Justice Programs: Washington, D.C. 2016), 4.
2. Lauren E. Glaze and Laura M. Maruschak. *Parents in Prison and Their Minor Children. Bureau of Justice Statistics.* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: Washington D.C. 2016), 2.
3. Bernadette Rabuy and Daniel Kopf. *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned.* (Prison Policy Initiative: 2015). https://www.prisonpolicy.org/reports/income.html.
4. Federal Bureau of Investigations. *Crimes against Persons, Property, and Society.* National Incident-Based Reporting System, (U.S. Department of Justice: Washington, D.C. 2011). http://www.fbi.gov/about-us/cjis/ucr/nibrs/2011/resources/crimes-againstpersons-property-and-society.
5. Becky Pettit and Bruce Western. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69 (2004):151–69. http://www.asanet.org/images/members/docs/pdf/featured/ASRv69n2p.pdf.
6. Glaze, *Parents in Prison*, 1.
7. Note: The nation's prisons held approximately 744,200 fathers and 65,600 mothers at midyear 2007 (appendix table 1). Additionally, fathers in prison reported having 1,559,200 minor children; mothers reported having 147,400 minor children. Glaze 2016, 2.
8. Lauren E. Glaze and Laura M. Maruschak, *Parents in Prison and Their Minor Children.* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics: Washington D.C 2008), 5.
9. Kaeble, *Correctional Populations*, 12. Correctional supervision means on probation or parole, and means they are subject to incarceration.
10. Miriam L., Bearse, Children and Families of Incarcerated Parents: Understanding the Challenges and Addressing the Needs. (Washington Department of Social & Health Services: 2008), 20.
11. K. Russell,"Children of incarcerated parents in Washington State: Invisible children made visible." Presentation at the Office of the Superintendent of Public Instruction Conference (2008); Washington State Children's Administration and Planning PowerPoint presentation. (Department of Social and Health Services: February 2009).
12. even percent of Washington's minor children have experienced parental incarceration in their lifetime. Table 1: Children Who Have Experiences Parental Incarceration: 2011-2012. *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families, and Communities.* (The Annie E. Casey Foundation: Policy Report Kids Count 2016), 5. Number of Minor Children in Washington State from The Annie E. Casey Foundation, KIDS COUNT Data Center, www.datacenter.kidscount.org.
13. In 2007, nationally the rate of parental incarceration by race of child was 1 in 111 for non-Hispanic white children; 1 in 42 for Latino children; and 1 in 15 for non-Hispanic black children. See Table 5: Racial and Ethnic Characteristics of Minor Children of Incarcerated Individuals. *Incarcerated Parents and Their Children, Trends 1991-2007* (The Sentencing Project: February 2009), 7.
14. The Pew Charitable Trusts, 2010. *Collateral Costs: Incarceration's Effect on Economic Mobility.* (The Pew Charitable Trusts: Washington, D.C. 2010), 10. Richard Freeman, *Crime and the Employment of Disadvantaged Youth*. National Bureau of Economics Research Working Paper #3875 (1991). http://www.nber.org/papers/w3875.pdf.
15. *A Shared Sentence*, 3.
16. National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and consequences.* (Washington D.C.: The National Academies Press), 274.
17. A. Geller, I. Garfinkel, C. E Cooper, & R. B. Mincy, "Parental Incarceration and Child Wellbeing: Implications for

Urban Families." *Social Science Quarterly* 90 (5) (2009, December 1): 1192, https://doi.org/10.17226/18613.

18. Table 8. Current caregiver of minor children of parents in state prison, by gender, 2004.Glaze 2016), 5.
19. D.Murphey, & P.M. Cooper, *Parents Behind Bars: What Happens to Their Children?* (Child Trends: Washington, D.C., 2015), 2.
20. Glaze*, Parents in Prison,* 2, 5. Note: Fathers in prison reported having 1,559,200 minor children; mothers reported 147,400 minor children..
21. Washington State Department of Social & Health Services. *Behavioral Health Toolkit for Providers working with children of the Incarcerated and their families.* (Olympia: 2009): 3. http://www.f2f.ca.gov/res/pdf/Behavioral_Health_Toolkit.pdf.
22. Lynne Rechman and Debra Rothstein, *A Voice for the Young Child with an Incarcerated Parent.* (American Bar Association, 2012). https://apps.americanbar.org/litigation/committees/childrights/content/articles/winter2012-young-child-incarcerated-parent.html. Nancy G. La Vigne, Rebecca L. Naser, Lisa E. Brooks, Jennifer L. Castro. "Examining the Effect of Incarceration and in-prison Family Contact on Prisoners' Family Relationships." *Journal of Contemporary Criminal Justice* 21, v. 4 (2004).
23. Rechman, *A Voice*. Also, "Working with Children with a Parent in Prison: Messages for Practice From Two Barnardo's Pilot Services," *Believe in Children* (Barnardo's Pilot Services, 2013).
24. Maintaining family ties during incarceration is also linked to post-release success for the incarcerated family member; success is defined as lower rates of recidivism and fewer parole violations. National Conference of State Legislatures. *Children of Incarcerated Parents* (National Conference of State Legislatures: March 2009): 4.
25. La Vigne, "Examining the Effects," 314-335. Also, Mary Ellen White, Eric Albers, and Christina Bitonti, "Factors in Length of Foster Care: Worker Activities and Parent-Child Visitation," *Journal of Sociology and Social Welfare XXIII*, No. 2 (June 1996): 75–84. Inger P. Davis, John Landsverk, Rae Newton, and Williams Ganger, "Parental Visiting and Foster Care Reunification," *Children and Youth Services Review* 18, Nos. 4, 5 (1996): 363–382.
26. Rechman, *A Voice*.
27. Rechman, *A Voice*. ("The importance of touch in building attachment is honored in visiting environments where children and parents are given a child-friendly place to play together.")
28. Turner v. Safley, 482 U.S. 78, 96 L.Ed.2d 64, 107 S.Ct. 2254 (1987). Also, where the incarcerated parent has a preexisting familial relationship with the children in his life, consider the First Amendment right as well. *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) (holding parent has substantive constitutional right to familial association under First Amendment in addition to the substantive constitutional right to companionship of children under Fourteenth Amendment, which in that case was violated by the city's law enforcement agency).
29. *State v. Corbett*, 158 Wn.App. 576, 598, 242 P.3d 52 (2010) (internal quotations and citations omitted) ("Parents have a fundamental right to raise their children without State interference. But parental rights are not absolute and may be subject to reasonable regulation. Limitations on fundamental rights must be reasonably necessary to accomplish the essential needs of the state and the public order. Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children.")
30. *State v. Letourneau*, 100 Wn.App. 424 (2000).
31. *State v. Valencia*, 169 Wn.2d 782 (2010) (abrogating *State v. Riles*,135 Wn.2d 326 (1998)).
32. *State v. Corbett*, 158 Wn.App 576 (2010).
33. *Washington v. Olsen*,194 Wn.App. 264 (2016), review granted by *State v. Olsen*, 186 Wn.2d 1017 (2016).
34. *Pell v. Procunier*, 417 U.S. 817 (1974).
35. O*verton v. Bazzetta*, 539 U.S. 126, 131-132,156 L.Ed.2d 162, 123 S.Ct. 2162 (2003).
36. *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L.Ed.2d 935, 94 S.Ct. 2963, 2976(1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889)). ("A person's liberty is equally protected, even when the liberty is a statutory creation. The touchstone of due process is protection of the individual against arbitrary action of government.")
37. *Overton v. Bazzetta*, 539 U.S. 126, 131-132,156 L.Ed.2d 162, 123 S.Ct. 2162 (2003).
38. *State v. Pascal*, 108 Wn.2d 125, 135-36 (1987). See also RCW 9.94A.010.
39. *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005).
40. *State v. Law*, 154 Wn.2d 85, 94–95, 110 P.3d 717 (2005) (footnote citation omitted).
41. A fictional example is Jean Valjean in *Les Miserables*, who as the guardian of his sister's children, stole bread to feed them.
42. RCW 9.94A.655.
43. RCW 9.94A.655.
44. http://www.doc.wa.gov/corrections/justice/sentencing/contact.htm. An online video describing the program and its development can be found at: https://www.youtube.com/watch?v=vJiA_NrXyGI. The program's most recent evaluation abstract is available online at: http://www.tandfonline.com/doi/abs/10.1080/00377317.2017.1248629, or contact the author at WDA's IPP for more information, at dadre@defensenet.org.

Commentary

Mass incarceration: America's new apartheid.

BY GARY DAVIS

Racism may well be the biggest crime in the criminal legal system. Black people now constitute nearly 1 million of the total 2.3 million incarcerated. Black males represented the largest percentage (35.4 percent) of inmates held in custody, followed by white males (32.9 percent) and Hispanic males (19.7%). If present trends continue, one of every three black males born this decade can expect to go to prison in his lifetime despite the fact that the Census Bureau reports that only 13% of the population is black. This is a staggering statistic.

According to the *Sentencing Project* (a non-profit organization that analyzes the U.S. criminal system), black males are nearly six times as likely to be incarcerated as white males. Hispanic males are 2.3 times are likely to be incarcerated than their white counterparts, and one in six Hispanic males born after 2001 can expect to be incarcerated during his lifetime.

The premise for this commentary is that racial policy drives mass incarceration and that mass incarceration *is* racial policy. If the past is any guide, penal reform in the U.S. rarely attacks the root of the problem, which is racial and economic injustice. As the rising numbers of our minority prison population continue to grow, so too is the proliferation of prison privatization as a potentially lucrative economic boon to the incarceration crisis. Here is a quick look at how manifestly racist state and federal drug policies have helped fuel this phenomenon.

Mass Incarceration: A Grand "Social Service Program?"

One dramatic change in the political landscape of the U.S. criminal justice system has been the expansion of our jails and prisons (both privatized and non-privatized) over the last several decades. Many people associate the mass imprisonment of a population with authoritarian political systems. Consequently, many Americans are surprised when they learn that their country incarcerates more of its own citizens than any other. With 2.3 million prisoners, the "land of the free" has more people in prison than China, which has a population four times the size of the United States. This political reality, when combined with the deep institutional racism embedded into every step of the criminal justice system, has created an inherently racist criminal legal system, accomplishing exactly what it has been designed to achieve: to incarcerate as many black people and other minorities as possible.

> As a result, thousands of drug offenders convicted under the old laws remain incarcerated.

The United States has a long and ongoing history of implementing policies ensuring that black people and other minorities are both physically segregated and denied Constitutional rights all but guaranteed to whites. While we were still a British colony, white settlers first exterminated much of the indigenous population. They then started to import people from Africa to work as slaves on the plantations and to serve as domestic servants.

Even after achieving political independence, white policy makers under our newly formed "democracy" and their creation of the Bill of Rights immediately made evident this country's hypocrisy: Privileged white males benefited by continuing the practice of slavery and ensuring that only white male property owners could vote. In short, there was no "independence" for black Americans.

When slavery was finally abolished in the United States in 1865, black people still remained second-class citizens under a system of apartheid in which a series of Jim Crow laws kept them segregated. It wasn't until the mid-1960s, one hundred years after the abolition of slavery and almost two hundred years after independence, that officially-sanctioned segregation eventually ended. Finally all black people in the United States obtained the right to vote and to equal access to public schools and other public spaces.

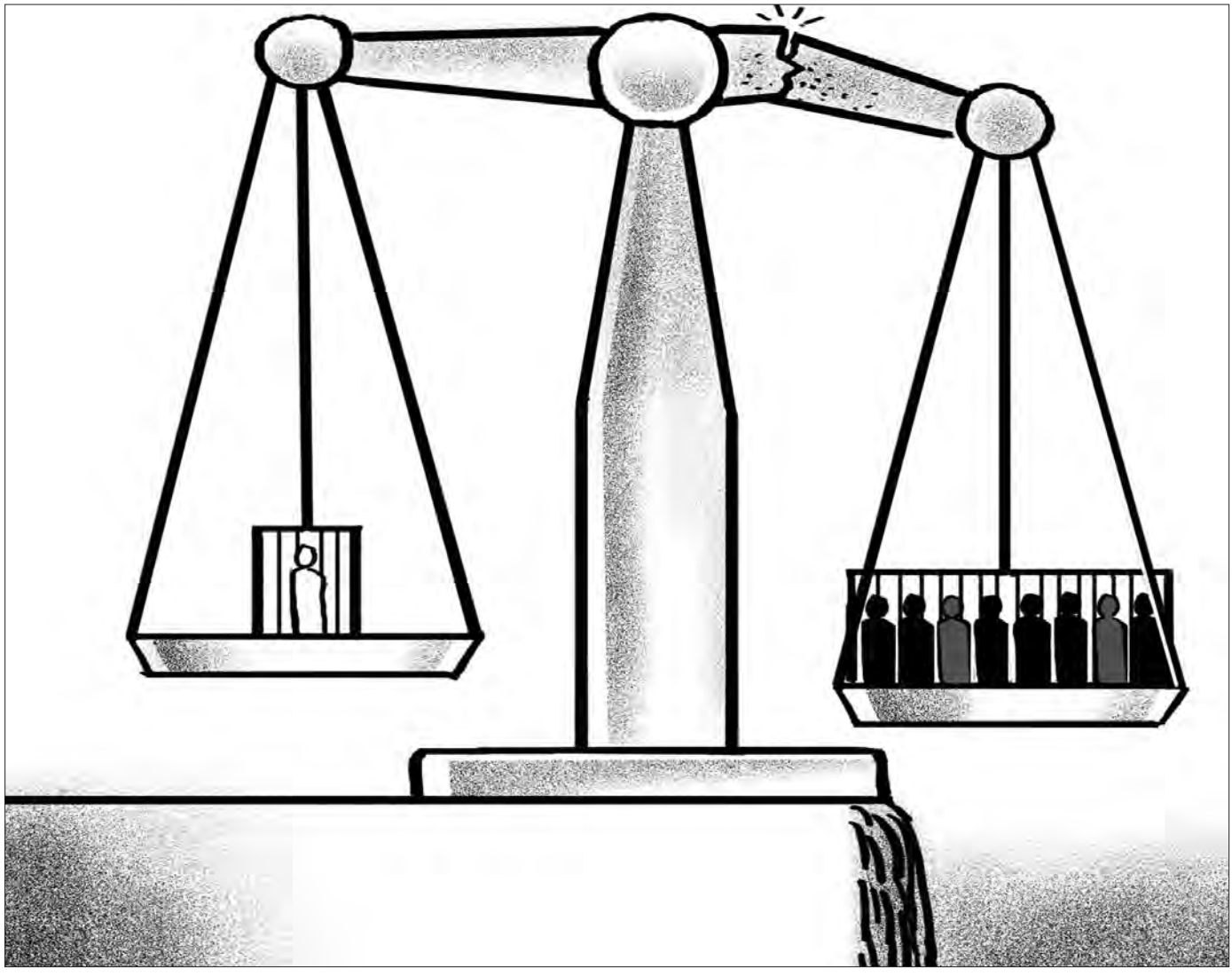
Impact of Drug Wars

However, by 1971, the U.S. government's "war on drugs" became another tool for implementing social control over black people in order to segregate them from the general white population. It was during the 1970s that drug arrests and incarceration rates increased significantly, with a disproportionate number of those targeted being black. By 1980, there were 41,000 imprisoned drug offenders. That number skyrocketed to more than half a million by 2011, according to *The Sentencing Project.*

In 1986, President Reagan intensified the war on drugs by declaring that illegal drugs constituted a threat to national security. That same year, Congress passed the Anti-Drug Abuse Act with very little debate, establishing harsher and mandatory prison sentences for crack and powder cocaine. But the mandatory sentences for crack were much harsher than those for powder cocaine.

The race and class bias of the 1986 sentencing laws soon became apparent as the ratio of black people who were imprisoned compared to white people increased dramatically. Crack cocaine was much cheaper than powder cocaine and it became popular in poorer urban neighborhoods, many of which were predominantly black. In contrast, most of the principal users of powder cocaine were middle- and upper-class white people living in relatively wealthy suburban neighborhoods.

Consequently, a conviction for selling 500 grams of powder cocaine



resulted in a five-year mandatory sentence, whereas only five grams of crack cocaine would trigger the same five-year sentence. In other words, a conviction for possession of crack cocaine resulted in a prison sentence 100 times longer than a conviction for the equivalent amount of powder cocaine. Essentially, Congress imposed disparate sentencing laws for basically the same drug. Furthermore, crack became the only drug that carried a mandatory sentence for first offenders.

So while record numbers of black and Hispanic low-level urban drug dealers and users were being sent to prison, most middle- and upper-class white suburban dealers and users remained relatively free to indulge their criminal activity with little police harassment.

By the late 1990s, despite constituting only 13% of the nation's drug users, 58% of imprisoned drug offenders were black. According to the *United States Sentencing Commission,* the majority of these offenders were low-level dealers or users.

This rate of incarceration contributed to a social breakdown in many poor and inner-city neighborhoods. The number of minority children growing up fatherless skyrocketed, with 70% living in single-parent homes without their biological father at the beginning of the 21st century. This is compared to only 14% twenty years earlier.

In 2010, Congress finally addressed the 100:1 sentencing disparity between crack and powder cocaine by reducing it to an 18:1 ratio and eliminating mandatory prison terms for crack possession. While an improvement, the new sentencing laws still disproportionately impact black people because the new sentencing laws were not made to be applied retroactively. As a result, thousands of drug offenders convicted under the old laws remain incarcerated.

Impact of Mass Imprisonment on Local Communities

While the mass imprisonment of black people and Hispanics has created a social crisis, particularly in poor urban neighborhoods, it has proven to be an economic boon for corporations and rural communities. The prison system is becoming largely privatized, thereby turning this part of the criminal justice system into a for-profit industry.

Rural communities that have struggled to survive economically have found one solution is to host privatized prisons. With an average of 35 jobs created for every 100 inmates, local elected officials began viewing prisons as an economic development tool. In the decades following Reagan's intensification of the war on drugs, more than 213 prisons were opened in rural areas, housing prisoners from distant cities and even other states. Many of these prisons were operated by private corporations.

This process has had devastating consequences on poor minority communities in cities. First, it has made it even more difficult for children to maintain a relationship with their imprisoned parents, especially fathers, because of the expense and time required to visit distant prisons. Second, it has undermined the democratic system by shifting federal dollars and elected representation away from urban neighborhoods to rural communities. The privatization of our prisons has incentivized rural communities because Congress has allowed rural communities to include the prison population in their census count, which translates into more federal funding for the local community.

The flip side of this coin occurs in communities where prisoners come from, which primarily are poor inner-city neighborhoods. With increasing numbers of black people and other minorities being sent to distant prisons as a result of mandatory drug sentencing, the census count shows a smaller population. This results in less federal funding. Given that the census only occurs every ten years, many prisoners return home to live in under-funded urban neighborhoods while rural communities continue reaping the financial benefits from their incarceration.

The disproportionate incarceration of our minorities also has implications for democracy. All but two U.S. states (Maine and Vermont) prohibit prisoners from voting while incarcerated and twelve states disenfranchise convicted felons for a specific period of time following their release or for life. As of 2010, disenfranchisement laws meant that 6 million Americans were prohibited from voting in elections with black people constituting a hugely disproportionate percentage of the disenfranchised; in fact, one out of every thirteen is banned from voting.

The mandatory sentencing and disenfranchisement laws are not the only forms of legislation that have disproportionately affected minorities and lower economic classes. The Welfare Reform Act of 1996 used to contain a provision stating that anyone with a felony conviction for using or selling drugs is subject to a lifetime ban on receiving government financial assistance and food stamps. The provision had applied to drug offenders, not to violent felons. Consequently, someone who has served a sentence for murder or rape remains eligible for welfare benefits upon their release.

In a recent update, the Free Appli-

cation for Federal Student Aid (FAFSA) program has since slightly modified eligibility requirements involving drug convictions only. For example, if the drug offense occurred while already receiving federal student aid, eligibility is automatically suspended. To regain eligibility, the program requires the successful completion of a state-approved drug rehabilitation program. These programs, of course, can run into thousands of dollars or more. This becomes particularly onerous on indigent minorities who are not typically covered by insurance or eligible to receive any state or federal aid to pay for the program due to immigration issues. There have been no modifications regarding prisoners who are currently incarcerated in a state or federal institution. They are still not eligible to receive any federal student loans.

If there is a conviction for a drug-related offense after you submit the FAFSA, eligibility is lost and the applicant would be liable for returning any financial aid that has already been received.

In 1998, Congress enacted a similar ban preventing drug offenders from receiving government grants or financial aid for college education. Tens of thousands of college-bound students have been denied federal aid because of prior drug convictions, often for past misdemeanors such as marijuana possession. As is the case with the lifetime welfare ban, the college aid ban only applies to drug offenders, while convicted murderers and rapists remain eligible for government grants and student loans. As a result of the war on drugs, black males are almost seven times more likely to go to prison than whites, resulting in a disproportionate number of young black men being declared ineligible for federal college aid.

Ultimately, U.S. drug-war policies that have utilized mandatory sentencing laws, disenfranchisement and lifetime bans on receiving welfare benefits and student financial aid have disproportionately affected minorities and the poor. A black teenager convicted for a first offense of possessing five grams of crack cocaine could be sentenced to five years in prison, lose his or her right to vote for life, become ineligible to receive welfare benefits and food stamps, and not qualify for student financial aid should he or she want to get an education in order to obtain a decent job.

This dead-end approach generates almost unsurpassable barriers for individuals and families attempting to change their lives, thereby continuing the cycle of marginalization experienced by many black people and other minorities from generation to generation. Furthermore, it could be argued, given that a hugely disproportionate percentage of prisoners are black, that the exploitation of their labor in prison call center constitutes modern-day slavery while disenfranchisement undermines the hard-won gains of the civil rights movement.

> The provision had applied to drug offenders, not to violent felons.

Ultimately, millions of black people continue to be segregated through imprisonment and the denial of their basic rights. Though the mechanisms of oppression have changed over time from segregation through slavery to segregation under Jim Crow laws to segregation by incarceration, many black people and other minorities in the United States continue to be treated as second-class citizens in the 21st century.

But no matter where the polemic begins in an attempt to accurately frame the question, what is both anecdotally and statistically crystal clear is that racism, whether blatant or insidiously hidden, accelerates the process of incarceration of black males and other minorities. The resultant mass incarceration of our minorities has now become our country's new apartheid.

Gary Davis is a Capital Case Felony Attorney for the King County Dept. of Public Defense at Associated Counsel for the Accused.

WACDL Amicus Committee

WACDL's Amicus Committee files amicus curiae briefs in cases of importance to the defense bar. If you are working on a case where amicus support might be helpful, please contact one of the co-chairs of the Amicus Committee:

George Bianchi
(206) 728-9300
GeorgeBianchi@
thebianchilawfirm.com

Rita Griffith
(206) 547-1742
griff1984@comcast.net

Briefs

IN MEMORIAM

Charlie Williams

Former WACDL President Charlie Williams died in October after a brief illness, of cancer.

Charlie grew up in south Seattle, graduated from Franklin High School, attended the University of Chicago and then transferred to Evergreen State College to complete his undergraduate degree. He worked in the office of the Washington State Attorney General before getting his JD from the University of Puget Sound with a full scholarship.

He had a passion for justice and firmly believed in the rights of all for competent legal representation. His criminal defense practice, first in Thurston County and then in Seattle, embodied that belief. He was active in the Washington Association of Criminal Defense Lawyers with multiple leadership roles including that of president from 2000-2001. He was WACDL's first Legislative Committee Chair, served on the editorial committee for Washington Criminal Defense, and represented the association on the Washington State Supreme Court's Time-for-Trial Task Force.

In 2007 he received the Daniel Bigelow Award from the Thurston County Bar Association, honored by his peers for his outstanding professional and community service.

He taught and published numerous articles on courtroom strategies. For ten years he coached the Franklin Mock Trial Program and was proud of their six state championships, three top-ten national awards and the national championship in 2000 during his tenure.

Charlie's intellect knew no bounds. He read and studied broadly and deeply with particular interest in philosophy and spirituality.

Charlie is survived by his wife, Cappy Thompson, step-daughter Kendra Palmen, mother Shizue, sister Mary and brothers John and Robert.

Condolences can be sent to Cappy Thompson (707 S Snoqualmie St, #4A; Seattle, WA 98108).

WACDL NEWS

WACDL Proposes Court Rules Changes

WACDL's Court Rules Committee has submitted eight proposals to the Washington State Supreme Court for their consideration. The committee has been working on this package of proposals for some time in preparation for the review cycle beginning this fall, when the court considers changes to the criminal rules.

WACDL is proposing the following new rules and amendments to rules:

- **CrR/CrRLJ 3.4 - Presence of the Defendant:** Proposed amendments to require courts that use video appearances to provide a means for defendants appearing by video to review documents (e.g., conditions of release, scheduling orders, no contact orders, judgment and sentences).
- **CrR/CrRLJ 3.7 - Recording Interrogations:** Proposed rule establishing a presumption in favor of recording interrogations.
- **CrR/CrRLJ 3.8 - Out-of-Court Identification Procedure:** Proposed rule to establish a presumption in favor of recording eyewitness identification procedures.
- **CrR/CrRLJ 3.9 - In-Court Identifications:** Proposed rule to make in-court eyewitness identifications inadmissible.
- **CrR/CrRLJ 4.7 - Prosecuting Attorneys Obligations - Eyewitness ID:** Proposed amendment to add a new prosecutor obligation to provide eyewitness identification procedure evidence to the defense.
- **CrR/CrRLJ 4.7 - Prosecuting Attorneys Obligations - *Brady*:** Proposed amendments to bring the court rules into accord with *Brady v. Maryland* and its progeny.
- **CrR/CrRLJ 4.7 - Prosecuting Attorneys Obligations - Access to Discovery:** Proposed amendments to allow all criminal defendants to have proper access to the discovery materials gathered on their case in order to have relevant and significant consultations and conferences with their defense attorney regarding the evidence presented against them by the prosecutor while preserving the privacy of alleged victims and witnesses alike.
- **CrR/CrRLJ 4.11 - Recording Witness Interviews**: Proposed new rule to improve the reliability of evidence by permitting the recording of pretrial interviews.

A special thanks to co-chairs **Kent Underwood** and **Emily Gause**, and committee members **Jay Krulewitch, Harry Gasnick,** and **Heather Weir.** They took the lead in drafting rule proposals and supporting memoranda. Thank you also to the other committee members who provided input over many months of teleconference calls. Over the next several months, we expect the WSBA's and Washington State Supreme Court's rules committees to consider these

proposals. We'll keep members informed and let you know when they are published for comment.

WACDL Amicus Report

WACDL's Amicus Committee (George Bianchi & Rita Griffith, co-chairs), has been very busy! Since June, rulings have been issued in the following cases:

- *In Re Griffin* (No. 42012-1-II

  Issue: In an unpublished decision, Division Two remanded for a new trial because the state failed to disclose evidence favorable to Griffin that created a reasonable probability that the outcome would have been different. WACDL joined as amicus in motion to publish

  Amicus authors: Suzanne Elliott & Emily Gause

  Ruling: In July, the Washington State Supreme Court (WSSC) denied the motion to publish.

  Appellate lawyers: Innocence Project Northwest

- *Weaver v. Commonwealth of Massachusetts* (No. 16-240)

  Issue: Structural error requires automatic reversal of a conviction but when the error was ineffective assistance of counsel in the *Strickland* context is a defendant required to show prejudice?

  Amicus author: Suzanne Elliott signed on to the amicus for WACDL

  Ruling: On June 22, 2017, the US Supreme Court ruled that courtroom closure error that is not raised until collateral attack via an ineffective-assistance claim does not require automatic reversal despite being a claim of structural error.

- *In Re Troy Belcher* (No. 93900-4)

  Issue: The appropriateness of civilly committing a person as a sexually violent predator whose only criminal history was as a juvenile.

  Amicus authors: Amy Muth & Prachi Dave

  Ruling: On August 17, 2017, the WSSC ruled that using juvenile convictions as predicate offenses for continued commitment as an SVP does not violate due process.

  Appellate lawyer: Travis Stearns

- *Seattle v. Erickson (No. 93408-8)*

  Issue: Is the use of a peremptory challenge against the only member of a cognizable racial group a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.

  Amicus authors: Suzanne Elliott & Lila Silverstein

  Ruling: In July of 2017, the WSSC ruled that a *Batson* challenge is timely when brought at the earliest reasonable time while the trial court still has the ability to remedy the wrong, even if after the venire has been dismissed. Using a peremptory strike of juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring full *Batson* analysis.

  Appellate lawyers: Michael Schueler & Philip Chinn

In addition, there have been a number of new WACDL amicus briefs filed:

- *In Re Fero* (No. 92975-1)

  Issue: The state chose not to dispute petitioners' factual basis for relief but argued the PRP should fail as a result of the time bar, the test of newly discovered evidence and whether the petitioner exercised due diligence. After losing in the COA the state sought review arguing that the COA should not have found the fact experts credible without a reference hearing.

  Amicus author: Neil Fox for WACDL

  Status: Oral argument was held on June 6, 2017.

  Appellate lawyers: Christopher Baird, Margaret Hupp, Fernanda Torres

- *State v. Blockman* (197 Wn. App 1047 (2017) (unpublished), WSSC #94273-1)

  Issue: Whether a warrantless "protective sweep" of a person's home by a law enforcement officer violates Article 1, section 7 when conducted outside the context of an arrest, and whether such searches have such broad public impact that review by this court is is warranted.

  Amicus authors: Tom Weaver for WACDL; Nancy Talner for ACLU; Magda Baker for WDA

- *In Re Bar Application of Tarra Simmons*

  Issue: Whether evidence of rehabilitation is sufficient, despite past criminal conduct, to establish "character and fitness" to practice law.

  Amicus author: Joint brief with

Briefs

ACLU and numerous organizations; Rita Griffith for WACDL

Status: Oral argument will be on November 16

Representing Simmons: John Strait & Shon Hopwood

- *State v. Erik Petterson* (No. 94439-3)

Issue: Whether the trial court has the authority in a SSOSA case to modify community custody conditions, WACDL specifically addressed whether any party to a SSOSA — defendant or victim — has any recourse to petition the sentencing judge for modifications or terminations of no contact orders at any time during supervision

Amicus authors: Rita Griffith & Amy Muth

Status: Oral argument on October 31, 2017

Appellate lawyer: Tom Weaver

- *State v. Jai'Mar Scott* (No. 94020-7)

Issue: Is a sentencing court's constitutional and statutory failure to consider the mitigating attributes of a defendant's youth cured by the possibility of parole even where the juvenile's reduced culpability at the time of the come was not considered. Does the one-year time bar for collateral attacks restrict consideration of this issue or was the *Miller v. Alabama* decision a significant change in law allowing for retroactive application and an exception to the time limit.

Amicus author: Rita Griffith

Status: Oral argument on September 12, 2017.

Appellate authors: Jeffrey Ellis, Robert S. Chang & Melissa R. Lee

- *Smith v. Smith* (COA #76247-8, Division I)

Issue: Simultaneous DVPO and criminal proceedings require a respondent to make a choice to either waive Fifth amendment protections and testify, exercise Fifth amendment rights and decline to testify, or make a motion to continue the hearing until the termination of criminal proceedings using the Olympic Pipeline analysis. Delaying the DVPO proceedings has de minimum impact on the courts and should be granted.

Amicus author: Tom Weaver

Status: Oral argument September 25, 2017

Appellate lawyer: Bradley Barshis

- *State v. Nickels* (COA #35369-9, Division III)

Issue: Following reversal of a murder conviction an objection was raised to the participation of the entire Grant County prosecutors office which should be disqualified as the elected prosecutor personally represented Mr. Nickels during the first trial while in private practice. Also the current chief deputy prosecutor represented a material witness during the first trial.

Amicus authors: John Strait & Rita Griffith

Status: In August, the Motion for Discretionary Review was granted.

Appellate lawyers: Mark Larrañaga & Jacqueline Walsh

- *John Doe G v. Dept. of Corrections* (No. 94203-0)

Issue: Did the superior court properly allow respondents to use pseudonyms when bringing injunctive action against the release of SSOSA evaluations and are SSOSA evaluations protected health care information exempted from release under the PRA?

Amicus authors: Amy Muth & Tom Weaver

Appellate lawyer: Benjamin Gould

In Re Cecil Davis (No. 89590-2)

Issue: Death penalty case arguing that Washington's statutes fail to protect defendants with intellectual disabilities from execution. WACDL's amicus focused on the issue of whether the right to counsel for a capital defendant in a state post-conviction PRP requires appointment of capital-qualified counsel with prior experience and training in PRPs. WSSC has established qualification requirements for attorneys representing death penalty cases on a PRP in RAP 16.25 and in this case the PRP attorney did not satisfy those requirements.

Author: Joint amicus with WDA; Colleen O'Connor and Rita Griffith for WACDL

- *State v. Oscar Lopez* (No. 944181)

Issue: WSSC accepted review of a COA decision which reversed trial court granting a motion for a new trial based upon the determination that defense counsel's severe depression affected counsel's performance before and during trial.

Amicus author: Tom Weaver

Status: Oral argument set for November 16, 2017.

Appellate lawyer: George Trejo

In addition, we are currently working on amicus briefs in the following cases:

- *State v. Tanya James-Buhl*: WSSC accepted review of a COA decision which reinstated charges dismissed by the trial court. COA held that as a teacher she was required to report under mandatory reporting RCW 26.44.030(1)(a) for daughters' disclosure that stepfather had touched them inappropriately finding that no course of employment could be imputed to the reporting requirement. David Sulzbacher is writing the WACDL amicus brief.
- *State v. Hubbard*: Timing for certificates of discharge. Mark Muenster is writing the WACDL amicus brief.
- *State v. Bassett*: Juvenile life without parole case. Jeff Ellis is writing the WACDL amicus brief.
- *State v. Dennis*: Firearms restoration. Vitaliy Kertchen is writing the WACDL amicus brief.
- *State v. Nichols*: Conflict of interest for elected prosecutor; does entire office have to be recused? John Strait and Rita Griffith writing the WACDL amicus brief.

WDA NEWS

WDA Staff Updates

WDA is pleased to introduce two new staff members, Hillary Behrman and Sara Sluszka.

Hillary Behrman has joined WDA as our Director of Legal Services. Hillary brings passion, experience and commitment to further WDA's mission to support high quality public defense and advocate for systemic change that brings about just solutions. She will be overseeing WDA's resource assistance staff and helping to coordinate WDA's training and amicus work.

Hillary comes to WDA after more than 14 years as Legal Director of TeamChild. Prior to joining TeamChild, Hillary worked as juvenile resource attorney for WDA and was a staff attorney and felony investigator at Society of Counsel Representing Accused Persons (SCRAP). She is an experienced educator who has conducted trainings locally and nationally on a wide range of issues related to indigent defense and civil legal services. Hillary has served as an adjunct faculty member at the University of Washington School of Law teaching juvenile justice policy. Hillary was a founding board member of Legal Counsel for Youth and Children (LCYC). She currently serves on the board of Powerful Voices, a social justice program for girls. Hillary received her JD in 1992 from Georgetown University School of Law where she was a Public Interest Law Scholar. Hillary is a writer, activist and parent of two thoughtful and engaged young adults.

Sara Sluszka and Hillary Behrman

Sara Sluszka succeeds Enoka Herat as a resource attorney with the WDA Immigration Project. She has an extensive background in direct representation of immigrant clients in removal proceedings, and has provided comprehensive assistance to noncitizens to mitigate the immigration consequences of their convictions. For the past four years, as a detention staff attorney at the Northwest Immigrant Rights Project in Tacoma, she provided pro se legal assistance and direct representation to immigrants detained at the Northwest Detention Center and facing deportation. Prior to joining NWIRP, Sara worked for two years on the U.S.- Mexico border as an attorney at Casa de Proyecto Libertad, a community-based immigration legal services organization in Harlingen, Texas. Sara earned a JD from Northeastern University School of Law in Boston, and is admitted to practice in Washington and New York. She is a member of the National Immigration Project of the National Lawyers Guild, and is especially passionate about challenging the systemic discrimination and abuses of power that immigrants, people of color, and people with criminal records face in the U.S.

Please feel free to reach out to Hillary and Sara for any support you may need. Hillary can be reached at *hillary@defensenet.org* and Sara at *sara@defensenet.org* or at 206-623-4321.

Washington Association of Criminal Defense Lawyers
1511 Third Avenue
Suite 503
Seattle, WA 98101
Change Service Requested

Non-Profit Org.
U.S. Postage
PAID
Seattle, WA
Permit No. 1933

CLE CALENDAR

Criminal Defense: Emerging Issues and Longstanding Challenges
November 3 (Spokane)
Sponsor: *WDA*

Headline News: New Issues in Criminal Defense
December 8, 2017 (Seattle)
Casey Stamm on emerging issues — new case law, policies & predictions; Shankar Narayan on big data policing: algorithms, analytics and inequalities; Colin Fieman & Stacey Brownstein on collecting and using social media evidence; Jeff Landon & Mark Kucza on empirical and dynamic risk assessments in DOC; Kate Kelly on the opioid crisis; Catherine Chaney on ethics issues related to representing clients who decide to cooperate; Kim Ambrose & Paul Holland on the return of individualized sentencing based on youth; and Louis Frantz on defense of a dog (case). David Donnan & Jessica Fleming, co-chairs. The program will be followed that evening by the WACDL Holiday Party. Sponsor: *WACDL*

Ethics CLE
December 15 (Seattle)
Sponsor: *WDA*

Preparing Your Case
March 9, 2018 (Seattle)
Sponsor: *WACDL*

WDA Annual Conference
April 27-28, 2018
Sponsor: *WDA*

WACDL Annual Conference
June 7-9, 2018 (Chelan)
For the best selection of room options, make your lodging reservations now by calling Campbell's Resort at 1-800-553-8225; let them know you are attending the WACDL conference. Sponsor: *WACDL*

To Register
WDA Programs: send an e-mail to *wda@defensenet.org* and state the title and date of the training, or call 206-623-4321.
WACDL Programs: Go to *http://www.wacdl.org/cle*; call us at 206-623-1302; or email us at *info@wacdl.org*. (Pre-registration not required for federal bar programs.)