

October 2021

TJLP, Vol.10 Issue 1 Fall 2014

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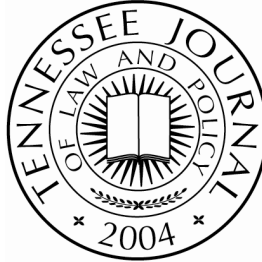
Recommended Citation

(2021) "TJLP, Vol.10 Issue 1 Fall 2014," *Tennessee Journal of Law and Policy*. Vol. 10: Iss. 1, Article 1.

DOI: -

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ISSN 1940-4131

<http://www.law.utk.edu/publications/tennessee-journal-of-law-and-policy/>

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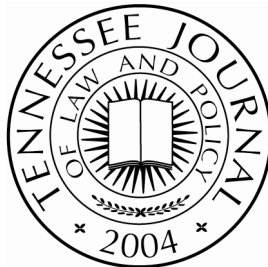
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ARTICLE

**DUE PROCESS TOLLING OF THE POST-
CONVICTION STATUTE OF LIMITATIONS IN
TENNESSEE AFTER WHITEHEAD V. STATE**

*By: Brennan T. Hughes**

On May 9, 2002, a man with a handgun slipped inside the back door of B.B. King's Restaurant and Blues Club in Memphis, Tennessee. He headed toward the basement office where the restaurant kept its safe. At the same time, a chef named Mr. Arnold was in the basement of B.B. King's. Mr. Arnold noticed a man carrying a shipping box. When Mr. Arnold asked the man what he was doing in the basement, the man pulled out a gun. Mr. Arnold fought back. The gunman shot him in the head. It was not fatal.

Shortly thereafter, a purchasing agent walked into the basement office of the restaurant. To her surprise, on the office floor she saw a man, Mr. Arnold, bleeding, with his hands and feet hog-tied behind his back. The next thing the woman saw was a gun pointed at her face. The gunman forced her to the floor and hog-tied her, too. In doing so, the gunman kned her in the back, cracking one of her vertebrae. Later, a produce delivery driver and another purchasing agent came downstairs. They also were

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captured. The gunman ordered each victim to open the safe. None of them could, and soon, there were four people lying hog-tied on the office floor.

A fifth person, Ms. Miller, stumbled upon the scene. When she entered the office, she screamed and immediately fled down the hallway. The gunman chased and caught her. But while the gunman was outside the room, Mr. Arnold, bleeding from the gunshot wound to his head, struggled free from his bonds and armed himself with a broom. Wielding this wooden weapon, Mr. Arnold waited behind the door as the gunman dragged the petrified Ms. Miller back into the office. Mr. Arnold lunged at his assailant and swung his broom, but to no avail. The gunman shot him again, this time in the hip. Again, Mr. Arnold found himself hog-tied on the floor. Frustrated that no one knew the combination to the safe, the gunman removed his victims' money and jewelry. The gunman knew he had to find the general manager to open the safe, so he went upstairs.

Bleeding from the head and hip, Mr. Arnold again struggled up from the floor and telephoned the police. He was still on the phone when someone knocked on the office door. It was the general manager. The gunman found the manager, but the manager had distracted the gunman and escaped. With the police on the way and his victims free, the robbery was over. The gunman, later identified by witnesses as Artis Whitehead, fled the scene.

Although Mr. Whitehead's robbery attempt was a dismal failure, the State's prosecution against him was a smashing success. A Memphis jury convicted Mr. Whitehead of five counts of especially aggravated kidnapping, two counts of aggravated assault, two counts of aggravated robbery, two counts of especially aggravated

robbery, and one count of attempted aggravated robbery. Mr. Whitehead received a 249-year sentence.¹

Mr. Whitehead lost his direct appeal, and the state and federal supreme courts declined to accept his case. At this point, Mr. Whitehead's story makes an impact on Tennessee law. Mr. Whitehead filed a petition seeking a new trial under Tennessee's Post-Conviction Procedure Act.² Unfortunately for him, Mr. Whitehead failed to submit his petition within the one-year statute of limitations. Mr. Whitehead argued, however, that his petition ought not be dismissed as untimely on the ground of due process.³

Like the crime itself, Mr. Whitehead's post-conviction process was a series of unfortunate events. Mr. Whitehead had hired an attorney to handle his direct appeal. When the direct appeal was concluded by virtue of the federal Supreme Court's denial of a writ of certiorari, appellate counsel sent Mr. Whitehead what was essentially a good-bye letter informing him that his appeal was concluded and that he had one year to file for post-conviction relief. But there were two problems. First, appellate counsel's letter gave Mr. Whitehead the *wrong deadline date* because the attorney had mistakenly calculated his statute of limitations period from the federal Supreme Court's denial of certiorari rather than the state supreme court's denial of his Tennessee Rule of Appellate Procedure 11 application to appeal. Second, although the letter asked Mr. Whitehead where he would like his records sent and although Mr. Whitehead responded twice, appellate counsel did not send Mr. Whitehead his trial records until after the actual statute of limitations had

¹ These facts were gleaned from *State v. Whitehead*, No. W2004-03058-CCA-R3-CD, 2006 WL 1273749, at *1-4 (Tenn. Crim. App. May 10, 2006), *appeal denied* (Tenn. Oct. 16, 2006).

² TENN. CODE ANN. §§ 40-30-101 to -122 (2012 & Supp. 2013).

³ See *Whitehead v. State*, 402 S.W.3d 615, 618-21 (Tenn. 2013).

expired. As soon as he received the record, Mr. Whitehead quickly composed a relatively lengthy and detailed post-conviction petition, but by then it was too late.⁴

The post-conviction court and the Tennessee Court of Criminal Appeals decided that these circumstances did not authorize them to toll the post-conviction statute of limitations on due process grounds.⁵ The Tennessee Supreme Court accepted the case and used the opportunity to adopt a new rule for evaluating whether due process warrants tolling the one-year post-conviction deadline.

In its opinion, the Tennessee Supreme Court reviewed the grounds for which it had tolled the statute of limitations in the past. As of 2013, the court had designated three categories of circumstances that called for due process tolling: later-arising claims, mental incompetence, and serious attorney misconduct.⁶ Mr. Whitehead said his case was an attorney misconduct case. Nonetheless, in a previous case the court held that only egregious intentional misconduct, not mere attorney negligence, could trigger due process tolling.⁷ The court determined in *Whitehead* that the distinction between attorney negligence and attorney misconduct was too nebulous to be helpful.⁸ The court also decided to discard its previous “ad hoc” approach to due process tolling.⁹ Instead, the court decided to follow the federal courts and many state jurisdictions and adopt the test articulated by the Supreme Court in *Holland v. Florida* as a one-size-fits-all framework for analyzing post-conviction due process tolling claims.¹⁰ Under the

⁴ *See id.*

⁵ *See id.* at 620; *Whitehead v. State*, No. W2010-00784-CCA-R3-PC, 2011 WL 3912856, at *5 (Tenn. Crim. App. Sept. 7, 2011).

⁶ *Whitehead*, 402 S.W.3d at 623-24.

⁷ *See id.* at 624-25; *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011); *Williams v. State*, 44 S.W.3d 464, 468 n.7 (Tenn. 2001).

⁸ *Whitehead*, 402 S.W.3d at 630-31.

⁹ *Id.* at 631.

¹⁰ *Id.*

Holland test, a petitioner is entitled to equitable tolling of a statute of limitations if the petitioner (1) “has been pursuing his or her rights diligently, and (2) . . . some extraordinary circumstance stood in [the petitioner’s] way and prevented timely filing.”¹¹

The problem that gives rise to this article is that, in its post-*Whitehead* decisions, the Tennessee Court of Criminal Appeals has not consistently applied the *Whitehead-Holland* test. Instead of recognizing that the Tennessee Supreme Court intended the *Whitehead-Holland* test to replace its prior ad hoc framework, several panels of the Court of Criminal Appeals have understood the test to apply only in attorney misconduct cases like Mr. *Whitehead*’s. Under this view, the three pre-*Whitehead* categories of circumstances that warrant due process tolling remain in force, but the *Whitehead-Holland* test comes into play only when the third category is at issue. This article will trace the development of this misunderstanding and attempt to correct it.

Part I will summarize the case law leading up to *Whitehead v. State* and engage in a more fine-grained reading of the analytical section of the Tennessee Supreme Court’s 2013 *Whitehead* opinion. Part II will survey the Tennessee Court of Criminal Appeals’ use of the *Whitehead* opinion between the publication of *Whitehead* and the Tennessee Supreme Court’s January 2014 opinion, *Bush v. State*. Part III will examine *Bush v. State*, in which the Tennessee Supreme Court applied the *Whitehead-Holland* test in a case that did not concern attorney error. One particular sentence in *Bush* appears to have been written to gently correct the intermediate appellate court’s misunderstanding of the scope of *Whitehead*. Part IV will survey the Tennessee Court of Criminal Appeals’ use of the *Whitehead* opinion since the publication of *Bush* in January

¹¹ *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

2014, which shows that the Tennessee Supreme Court's attempt in *Bush* to clarify *Whitehead* largely went unnoticed. Part V makes concluding recommendations.

I. Due Process Tolling Takes Shape: From *Burford* to
Whitehead

It is appropriate at this juncture to say a few words about the Post-Conviction Procedure Act and due process. Tennessee's Post-Conviction Procedure Act, which was significantly amended in 1995, allows prisoners who did not appeal their convictions, or whose state appeals are exhausted, to challenge their conviction or sentence on the basis of the conviction or sentence being "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States."¹² The majority of post-conviction petitions allege ineffective assistance of counsel.

As courts are sometimes quick to point out, the United States Constitution does not require states to provide prisoners with post-conviction relief.¹³ But Tennessee has provided post-conviction relief since the passage of the Post-Conviction Procedure Act in 1967.¹⁴ The 1986 Amendment to the Act gave prisoners three years after their sentences became final to file a petition for post-conviction relief.¹⁵ This statute of limitations is what gave rise to the doctrine of due process tolling in Tennessee.

The concept of due process, as enshrined in the state and federal constitutions,¹⁶ embodies the concepts of

¹²TENN. CODE ANN. § 40-30-103 (2012).

¹³*Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

¹⁴Act of May 25, 1967, ch. 310, 1967 Tenn. Pub. Acts 801.

¹⁵See *Burford v. State*, 845 S.W.2d 204, 206 (Tenn. 1992) (citing 1986 Tenn. Pub. Acts 348).

¹⁶See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall .

fundamental fairness and the community's sense of decency and fair play.¹⁷ As a leading Tennessee case explains, there is no precise definition of due process because what is fundamentally fair depends on the facts of the individual situation.¹⁸ The contours of due process are therefore flexible and can be ascertained, the Tennessee Supreme Court has held, by weighing three factors: "(1) the [nature of the] private interest at stake; (2) the risk of erroneous deprivation of [that] interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and finally, (3) the government's interest, including the nature of the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁹ The question thus becomes: under this balancing of interests, when does the Post-Conviction Procedure Act's statute of limitations become fundamentally unfair such that applying the statute would offend the citizenry's notions of fair play and decency?

A. Placing Limitations on the Statute of Limitations

The seminal Tennessee due process tolling case is *Burford v. State*.²⁰ The post-conviction petitioner in

. . . deprive any person of life, liberty, or property, without due process of law. . . ."); TENN. CONST. art. I, § 8 ("[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.").

¹⁷ See *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Rochin v. California*, 342 U.S. 165, 173 (1952); *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000).

¹⁸ *Seals*, 23 S.W.3d at 277.

¹⁹ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993)).

²⁰ *Burford*, 845 S.W.2d at 204.

Burford claimed he had been “caught in a procedural trap.”²¹ The petitioner, a repeat offender, had been given an enhanced sentence. After the three-year post-conviction deadline for the enhanced sentence expired, the trial court ruled that his predicate convictions were invalid, and vacated them.²² However, the expiration of the statute of limitations barred Mr. Burford from petitioning to have his subsequent enhanced sentence reduced. Mr. Burford argued to the Tennessee Supreme Court that the statute of limitations was unconstitutional on its face. While the high court rejected this argument, it held that denying Mr. Burford relief on the basis of these “later arising grounds” would violate due process.

The court explained that on one hand the State had a legitimate interest in enacting procedural rules in the post-conviction context to prevent stale or fraudulent claims and to curtail the costs associated with repeated groundless claims.²³ On the other hand, the court held that before the State can terminate a claim for failure to comply with procedural rules, such as a statute of limitations, due process requires that the claimant be given a “reasonable opportunity” to have the issue heard and determined.²⁴ The court found the Act’s deadline to be unreasonable under these circumstances, and remanded the case for an evidentiary hearing.²⁵ *Burford* therefore established that certain types of “later-arising grounds” claims may warrant tolling of the post-conviction statute of limitations.²⁶

Three years after *Burford*, the Tennessee General Assembly significantly amended the Post-Conviction

²¹ *Id.* at 208.

²² *Id.* at 210.

²³ *Id.* at 207.

²⁴ *Id.* at 208.

²⁵ *Id.* at 205.

²⁶ *See Sands v. State*, 903 S.W.2d 297 (Tenn. 1995) (applying *Burford* and declining to toll the statute of limitations).

Procedure Act.²⁷ Two changes are significant to this discussion. First, the legislature shortened the statute of limitations from three years to one year.²⁸ The legislature doubled down on this statute of limitations in 1996 when it added the following proviso to Tenn. Code Ann. § 40-30-102(a):

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.²⁹

²⁷ Post-Conviction Procedure Act of April 26, 1995, ch. 207, 1995 Tenn. Pub. Acts 305.

²⁸ See TENN. CODE ANN. § 40-30-102(a).

²⁹ Post-Conviction Procedure Act of Apr. 25, 1996, ch. 995, 1996 Tenn. Pub. Acts 753.

This was a clear message from the General Assembly to the courts that the statute of limitations was meant to have teeth.

Second, the legislature codified a list of three exceptional circumstances that would permit a petitioner to bypass the statute of limitations or to amend a previously-filed petition.³⁰ The first statutory exception is implicated when an appellate court recognizes a new constitutional right for which retroactive application is required. That ruling triggers a new one-year statute of limitations.³¹ The second exception occurs when the petitioner obtains “new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted.”³² The third exception codifies the *Burford* scenario: when a sentence enhancement is based on a prior conviction that is later held invalid, this holding resets the statute of limitations.³³

These three new statutory exceptions, however, did not take the Tennessee Supreme Court out of the due process tolling business. The court recognized a second due process-based exception to the post-conviction statute of limitations in 2000 in *Seals v. State*.³⁴ The court in *Seals* essentially established that when a prisoner is mentally incompetent to file for post-conviction relief, the statute of

³⁰ See TENN. CODE ANN. § 40-30-102(b) (exceptions to the statute of limitations); TENN. CODE ANN. § 40-30-117 (grounds for amending a previously-filed petition). The circumstances described in these two statutes are identical.

³¹ TENN. CODE ANN. § 40-30-102(b)(1).

³² TENN. CODE ANN. § 40-30-102(b)(2). The Tennessee Supreme Court interpreted this provision in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

³³ TENN. CODE ANN. § 40-30-102(b)(3).

³⁴ *Seals*, 23 S.W.3d, at 272.

limitations is tolled during the period of the prisoner's incompetency.³⁵

The Tennessee Supreme Court recognized a third due process tolling exception in 2001 in *Williams v. State*,³⁶ the case that set the stage for *Whitehead*. Mr. Williams claimed his untimely post-conviction petition had been unfairly dismissed. Mr. Williams said his appointed appellate counsel withdrew from representation without informing him, and in fact misled Mr. Williams into believing he was appealing the case to the Tennessee Supreme Court. While Mr. Williams waited to learn the outcome of this appeal, he alleged that the deadlines for appealing to the supreme court and for petitioning for post-conviction relief both passed.³⁷

The Tennessee Supreme Court held that if Mr. Williams “was, in fact, misled to believe that counsel was continuing the appeals process,” this would require tolling the statute of limitations.³⁸ The court later explained this decision: “[l]ike the ‘procedural trap’ in *Burford v. State* and the petitioner’s mental incompetence in *Seals v. State*, ‘an attorney’s misrepresentation, either attributable to deception or other misconduct, would also be beyond a defendant’s control.’”³⁹ The court emphasized that mere attorney negligence would not meet this threshold.⁴⁰ The supreme court remanded Mr. Williams’s case for an

³⁵ *Id.* at 279. When a prisoner is mentally incompetent, Tennessee common law permits a “next friend” to file a post-conviction petition on the prisoner’s behalf. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 484 & n.1 (Tenn. 2013).

³⁶ *Williams*, *supra* note 7, at 464.

³⁷ *Id.* at 470-71.

³⁸ *Id.* at 471.

³⁹ *Whitehead*, 402 S.W.3d at 624 (quoting *Williams*, 44 S.W.3d at 469).

⁴⁰ *Williams*, 44 S.W.3d at 468 n.7.

evidentiary hearing, and the post-conviction court found that due process tolling was not actually warranted.⁴¹

Justice Drowota, joined by Justice Holder, dissented in *Williams* and averred that the conduct of Mr. Williams's attorney was "textbook negligence," and that there was no meaningful distinction between attorney negligence and attorney misconduct.⁴² Instead, the dissenting Justices would have effectuated the Tennessee General Assembly's "clearly expressed legislative intent" that the statute of limitations be strictly construed, and would have denied relief.⁴³

The Tennessee Supreme Court elaborated on its *Williams* decision in *Smith v. State*⁴⁴ in 2011. Regarding the rule of *Williams*, the court noted:

In every case in which we have held the statute of limitations is tolled, the pervasive theme is that circumstances *beyond a petitioner's control* prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations. In *Williams*, 44 S.W.3d at 468, we held that *misrepresentation* concerning the status of the direct appeal could constitute ineffective assistance of counsel. Short

⁴¹ *Id.* at 624 & n.9; *Williams v. State*, No. E2004-01267-CCA-R3-PC, 2005 WL 2148626, at *1 (Tenn. Crim. App. Sept. 7, 2005), *appeal denied* (Tenn. Dec. 19, 2005).

⁴² *Williams*, 44 S.W.3d at 476-77 (Drowota, J., dissenting).

⁴³ *Id.* at 474, 476 (Drowota, J., dissenting).

⁴⁴ *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011).

of active misrepresentation, however, we have never held that trial or appellate counsel's inadvertent or negligent failure to inform his or her client of the right to file a post-conviction petition constitutes ineffective assistance of counsel.⁴⁵

Thus, after the *Williams* and *Smith* decisions, it appeared that due process tolling was warranted only when a prisoner suffered from active misrepresentation – not mere negligence – of his or her attorney. Essentially, petitioners who did not qualify for one of the three statutory exceptions could obtain due process tolling only if they could fit their claim into one of three common law pigeonholes: (1) later-arising claims under *Burford*; (2) mental incompetence under *Seals*; and (3) active attorney misrepresentation under *Williams* and *Smith*. The Court's 2013 decision in *Whitehead v. State* changed this calculus.

B. *Whitehead v. State*: The Tennessee Supreme Court Shifts Gears

The distinction between attorney negligence and willful attorney misconduct that the Tennessee Supreme Court struggled to maintain in *Williams* and *Smith* fell apart once the court accepted Artis Whitehead's post-conviction appeal. Here was a clear case of attorney negligence which nevertheless left Mr. Whitehead "trapped." Despite his best efforts, he was unable to obtain his trial records. Further, despite his attempt to file a timely petition, he was sabotaged by the fact his appellate attorney gave him the

⁴⁵ *Id.* at 358 (alteration in original) (citation omitted).

wrong deadline date in her farewell letter. While the court signaled that neither problem would have warranted tolling on its own, the “sockdolager” – or knockout blow – that warranted tolling was the effect of the combination of attorney errors.⁴⁶ These facts did not fit the willful misconduct framework of *Williams* and *Smith* because the attorney testified that she had no idea why she miscalculated Mr. Whitehead’s deadline, and no evidence suggested the failure to return Mr. Whitehead’s files was anything more than an inter-office organizational management mishap.⁴⁷ Faced with these facts, the court not only decided that the negligence/misconduct distinction had to go, but also went further.

The court began its analysis by recounting in detail its prior decisions concerning due process tolling.⁴⁸ The court began this historical survey by stating, “To date, this Court has identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”⁴⁹ The court then described the three grounds: later-arising claims, mental incompetence, and attorney misconduct.⁵⁰

In the next section of the opinion, the court looked to “cases from other jurisdictions that have considered a prisoner’s similar claims under the analogous doctrine of ‘equitable tolling.’”⁵¹ The court deemed these foreign cases instructive because “Tennessee’s doctrine of due process tolling in the context of petitions for post-conviction relief is essentially the same as the doctrine of equitable tolling recognized in the federal courts and the courts of other

⁴⁶ *Whitehead*, 402 S.W.3d at 632.

⁴⁷ *Id.* at 619; *see also* *Whitehead v. State*, No. W2010-00784-CCA-R3-PC, 2011 WL 3912856 (Tenn. Crim. App. Sept. 7, 2011).

⁴⁸ *Whitehead*, 402 S.W.3d at 623-25.

⁴⁹ *Id.* at 623.

⁵⁰ *Id.* at 623-25.

⁵¹ *Id.* at 626. The Court’s discussion of cases from other jurisdictions is found at 626-30.

states.”⁵² By recognizing this equivalence, the court was charting new territory.

To demonstrate this equivalence between Tennessee’s post-conviction due process tolling and the doctrine of equitable tolling recognized by other states (particularly by federal habeas courts), the court emphasized the parallels between a key line in *Smith v. State* and the wording of the federal *Holland* test. Both doctrines, the court said, are triggered when “circumstances beyond a prisoner’s control prevent the prisoner from filing his or her petition on time.”⁵³ In fact, the court said there was no “substantive difference” between the application of the two doctrines.⁵⁴

The court then performed an in-depth examination of the 2010 United States Supreme Court case of *Holland v. Florida* (which “solidified” the federal doctrine) and the 2012 case of *Maples v. Thomas*,⁵⁵ in which the Supreme Court adopted much of the reasoning of Justice Alito’s concurring opinion in *Holland*.⁵⁶ Finding *Holland* and *Maples* “persuasive,” the Tennessee Supreme Court concluded that when it comes to attorney misconduct, the proper focus is not on the attorney’s mental state, but upon “whether the *result* of that negligent, reckless, or intentional attorney misbehavior amounted to an extraordinary circumstance beyond the petitioner’s control that thwarted timely filing.”⁵⁷ Under principles of agency law, when such extraordinary circumstances occur, the attorney’s errors cannot be fairly attributed to the client.⁵⁸

⁵² *Id.* at 626.

⁵³ *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Smith*, 357 S.W.3d at 358).

⁵⁴ *Whitehead*, 402 S.W.3d at 627.

⁵⁵ *Maples, v. Thomas*, 132 S. Ct. 912 (2012).

⁵⁶ *Whitehead*, 402 S.W.3d at 627-30.

⁵⁷ *Id.* at 631.

⁵⁸ *Id.* at 629-30.

Then comes the passage upon which this article must focus. In announcing its key holding, the court states:

Rather than perpetuate an artificial and unhelpful distinction between attorney negligence and attorney misrepresentation, we conclude that the better course is to adopt the rule of *Holland* and *Maples* for determining when due process necessitates tolling the Post-Conviction Procedure Act's one-year statute of limitations. While the elements of the *Holland* rule have been present in this state's due process tolling jurisprudence for some time, our courts have tended to focus on whether particular cases fit one of the three ad hoc due process exceptions we have identified in the past, i.e., later-arising claims, petitioner mental incompetence, and attorney misrepresentation significantly more egregious than negligence.

Henceforth, when a post-conviction petitioner argues that due process requires tolling the Post-

Conviction Procedure Act's statute of limitations based on the conduct of his or her lawyer, the two-prong inquiry of *Holland* and *Maples* should guide the analysis. A petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.⁵⁹

The court explained here that the three categories of exceptions the court “identified in the past” were developed “ad hoc,” and therefore lacked a clear unifying principle. Going forward (“Henceforth”), the court intends to replace this “ad hoc” approach with a single framework – the same one used by the federal courts and most other states, the *Holland* test.

The court is not necessarily sweeping away the three historical grounds for due process tolling. A person can reasonably infer from *Whitehead* that later-arising claims and petitioner mental incompetence will still toll the statute, even if these situations may not necessarily involve a petitioner who “has been pursuing his or her rights diligently.”⁶⁰ The *Whitehead* opinion effectively abrogates the third category – attorney misconduct – and adopts a one-size-fits-all tool for assessing any claims in which a prisoner’s attempted compliance with the statute of limitations is thwarted by external circumstances. For

⁵⁹ *Id.* at 631.

⁶⁰ *Id.*

example, the behavior of prison officials may give rise to a *Whitehead-Holland* claim.

The problem is that the Tennessee Court of Criminal Appeals did not fully grasp the sweeping nature of the court's adoption of the *Holland* test. The Tennessee Supreme Court attempted to correct this misapprehension in *Bush v. State*, but this attempt at correcting the Court of Criminal Appeals went essentially unnoticed and unheeded.

II. The *Whitehead-Holland* Test in the Court of Criminal Appeals: From *Whitehead* to *Bush*

The Tennessee Court of Criminal Appeals issued seven opinions between *Whitehead v. State*⁶¹ on March 21, 2013, and *Bush v. State*⁶² on January 28, 2014, that are relevant to our discussion – four from the Middle Section of the Court of Criminal Appeals⁶³ and three from the Western Section.⁶⁴ Each of these cases was assigned on briefs.

The first two opinions – *Morgan v. State* and *Lackey v. State* – were released on the same day by the same three-judge panel of the Middle Division. Both opinions appear to interpret *Whitehead* in a manner that

⁶¹ *Whitehead*, 402 S.W.3d at 618.

⁶² *Bush v. State*, 428 S.W.3d 1 (2014).

⁶³ *Alderson v. State*, No. M2012-01154-CCA-R3-PC, 2013 WL 6237027 (Tenn. Crim. App. Dec. 3, 2013); *Perry v. State*, No. M2013-00986-CCA-R3-PC, 2013 WL 5775814 (Tenn. Crim. App. Oct. 24, 2013), *appeal denied* (Tenn. Feb. 24, 2014); *Lackey v. State*, No. M2012-01482-CCA-R3-PC, 2013 WL 5232345 (Tenn. Crim. App. Sept. 17, 2013), *appeal denied* (Tenn. Jan. 15, 2014); *Morgan v. State*, No. M2012-02329-CCA-R3-CO, 2013 WL 5232459 (Tenn. Crim. App. Sept. 17, 2013).

⁶⁴ *Brown v. State*, No. W2012-02584-CCA-R3-PC, 2013 WL 6405736 (Tenn. Crim. App. Dec. 5, 2013); *Nelson v. State*, No. W2012-02234-CCA-R3-PC, 2013 WL 6001955 (Tenn. Crim. App. Nov. 12, 2013); *Thomas v. State*, No. W2012-00999-CCA-R3-PC, 2013 WL 6001938 (Tenn. Crim. App. Nov. 8, 2013), *appeal denied* (Tenn. Mar. 5, 2014).

perpetuates the three pre-*Whitehead* categories as the framework that governs due process tolling. The key language in both opinions is verbatim: “In the recent case of *Artis Whitehead v. State of Tennessee*, our supreme court discussed the matter of due process in a post-conviction context. The court identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”⁶⁵ The appellate court then listed the three historical circumstances. Nowhere in these two opinions does the appellate court reference the *Holland* test.

As suggested in part I.B, the section of *Whitehead* that the Court of Criminal Appeals referenced was a section containing an historical survey of due process tolling in Tennessee. The *Whitehead* opinion went on to describe these three categories as exceptions that the court had “identified in the past” in an “ad hoc” manner.⁶⁶ Instead, “[h]enceforth,” the court said, the *Holland* test should apply in due process tolling cases, especially since the *Holland* test was in substance identical to Tennessee’s guiding principle that due process tolling depended on the presence of circumstances “beyond a petitioner’s control.”⁶⁷ The failure of the Court of Criminal Appeals to mention this shift in its first two post-*Whitehead* opinions set an unfortunate precedent.

The next case, *Perry v. State*, came a month later from a different panel of the Middle Section. Mr. Perry sought tolling on the basis that he believed his attorney had appealed his case to the Tennessee Supreme Court, when in

⁶⁵ *Lackey*, 2013 WL 5232345, at *5; *Morgan*, 2013 WL 5232459, at *3. In *Lackey*, the petitioner alleged he had been mentally incompetent. In *Morgan*, the petitioner alleged that his post-conviction attorney’s failures should have tolled the statute of limitations.

⁶⁶ *Whitehead*, *supra* note 3 at 631.

⁶⁷ *Id.* at 625 (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011)).

fact the attorney had not.⁶⁸ In addressing *Whitehead*, the appellate court stated:

Recently, the Tennessee Supreme Court clarified its earlier holdings with regard to due process tolling based on the conduct of a petitioner's attorney, ruling in *Whitehead* that '[a] petitioner is entitled to due process tolling upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.'⁶⁹

This characterization of *Whitehead* is essentially correct. The *Perry* court also found no need to discuss the three pre-*Whitehead* categories of due process tolling situations.

The next opinion, *Thomas v. State*,⁷⁰ is the first post-*Whitehead* tolling opinion from the Western Section. The court in *Thomas* stated the significance of *Whitehead* even more precisely than the court in *Perry*: "In the recent case of *Whitehead v. State*, our supreme court adopted a new standard for determining if due process required tolling of the statute of limitations in post-conviction cases."⁷¹ The opinion then quotes two paragraphs from

⁶⁸ *Perry*, 2013 WL 5775814, at *2.

⁶⁹ *Id.* (quoting *Whitehead*, 402 S.W.3d at 631).

⁷⁰ *Thomas*, 2013 WL 6001938, at *2 (applying the *Holland* test and finding no ground for relief).

⁷¹ *Id.*

Whitehead, beginning at the crucial “[h]enceforth.”⁷² When it comes to applying *Whitehead*, the Western Section started off on the right foot.

The next case, *Nelson v. State*,⁷³ came four days later from another Western Section panel. The *Nelson* opinion also handled *Whitehead* correctly, surmising that the Tennessee Supreme Court in *Whitehead* “clarified the proper analysis” for attorney misconduct tolling cases.⁷⁴ The court analyzed *Whitehead* rather thoroughly and found no basis for tolling the statute for Mr. Nelson.

The sixth case is *Alderson v. State*,⁷⁵ which was released by the Middle Section in December 2013. Rather than claiming attorney misconduct, the petitioner in *Alderson* alleged that misinformation given by prison officials prevented her from filing on time.⁷⁶ Although the *Alderson* court appeared poised to apply the *Whitehead-Holland* test, it noted that the post-conviction court had discredited the petitioner’s testimony that she had been misled by a prison guard concerning whether she could file for post-conviction relief.⁷⁷ Because the post-conviction court found no misinformation was given, the Court of Criminal Appeals found that Ms. Alderson’s claim did not merit relief.⁷⁸

The seventh opinion that emerged between *Whitehead* and *Bush* was written by the same judge who authored the first two. This opinion, *Brown v. State*,⁷⁹ exacerbated the misinterpretation of *Whitehead* that was

⁷² *Id.*

⁷³ *Nelson*, 2013 WL 6001955.

⁷⁴ *Id.* at *4.

⁷⁵ *Alderson*, 2013 WL 6237027.

⁷⁶ *Id.* at *1.

⁷⁷ *Id.* at *5.

⁷⁸ *Id.* at *6.

⁷⁹ *Brown v. State*, No. No. W2012-02584-CCA-MR3-PC, 2013 WL 6405736, at *2 (Tenn. Crim. App. Dec. 5, 2013), *appeal denied* (Tenn. May 14, 2014).

latent in *Morgan* and *Lackey*. It may have prompted the Tennessee Supreme Court to make a clarification in *Bush*.

The tolling issue in *Brown* was not premised on alleged attorney error. Instead, Mr. Brown stated that he was unable to complete his petition on time because the correctional facility where he was housed was on “administrative lockdown” for a few days about one week before his petition was due.⁸⁰ Would the Court of Criminal Appeals apply the *Whitehead-Holland* test even though *Brown* was not an attorney misconduct case? The answer at that time was no.

The *Brown* court’s treatment of *Whitehead* began well enough. “Our supreme court recently noted,” the court said, that “our courts have tended to focus on one of the three ad hoc due process exceptions we have identified in the past.”⁸¹ The Court of Criminal Appeals noted that the supreme court in *Whitehead* “adopted a two-prong analysis from [*Holland* and *Maples*].”⁸² However, the *Brown* court then decided to read *Whitehead* narrowly:

The way the *Whitehead* opinion is written, the two-prong inquiry is literally limited to situations of attorney conduct. (‘Henceforth, when a post-conviction petitioner argues that due process requires tolling the Post-Conviction Procedure Act’s statute of limitations **based on the conduct of his or her lawyer**, the two prong

⁸⁰ *Id.* at *2-3.

⁸¹ *Id.* at *2 (quoting *Whitehead*, 402 S.W.3d at 631).

⁸² *Id.*

inquiry of *Holland* and *Maples* should guide the analysis.’ *Whitehead*, 402 S.W.3d at 631 (emphasis added)).⁸³

Although the *Brown* court made a plausible reading of *Whitehead*, the court’s decision to focus on the phrase “based on the conduct of his or her lawyer” narrowed the impact of *Whitehead* in a way that is at odds with other language in the *Whitehead* opinion.⁸⁴ In *Whitehead*, the Tennessee Supreme Court intended to adopt the same one-size-fits-all equitable tolling test that most jurisdictions were already using. A holistic reading of *Whitehead* does not generate the conclusion that the *Whitehead* court intended the *Holland* test apply solely in attorney misconduct cases. The supreme court acted quickly to repudiate this narrow interpretation.

III. *Bush v. State*: All You Need is *Whitehead*

The *Brown* opinion was released on December 5, 2013.⁸⁵ On January 28, 2014, the Tennessee Supreme Court announced *Bush v. State*.⁸⁶ Mr. Bush pled guilty to attempted rape but was not informed that his guilty plea would result in a sentence of lifetime community supervision. Mr. Bush was eventually released and was surprised to learn of this additional indeterminate sentence.⁸⁷ The Tennessee Supreme Court held that failure to inform a defendant that his or her plea subjects him or

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *Brown*, No. 2013 WL 6405736.

⁸⁶ *Bush*, 428 S.W.3d at 1.

⁸⁷ *Id.* at 6.

her to lifetime community supervision violates due process.⁸⁸

The main issue in *Bush* was whether the petitioner could rely on the statutory exception to the post-conviction statute of limitations that concerned the retroactive application of new constitutional rulings.⁸⁹ The court determined that its 2010 ruling in *Ward v. State*⁹⁰ did not qualify for retroactive application under the *Teague v. Lane*⁹¹ test that the Tennessee General Assembly had imported into the Post-Conviction Procedure Act in 1995.⁹² The court then considered whether Mr. Bush might nevertheless be eligible for due process tolling, and applied the *Whitehead-Holland* test for the first time since the *Whitehead* opinion.⁹³

The court summarized its prior holding in *Whitehead* (pay particular attention to the final sentence):

We recently clarified Tennessee's due process tolling standard in *Whitehead v. State*. We held that a post-conviction petitioner is entitled to due process tolling of the one-year statute of limitations upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance

⁸⁸ See *Ward v. State*, 315 S.W.3d 461 (Tenn. 2010).

⁸⁹ *Bush*, 428 S.W.3d at 5.

⁹⁰ *Ward*, 315 S.W.3d 461 (Tenn. 2010).

⁹¹ See *Teague v. Lane*, 489 U.S. 288 (1989).

⁹² *Bush*, 428 S.W.3d at 5-6 (citing TENN. CODE ANN. § 40-30-102(b)(1), (2012)).

⁹³ *Id.* at 21-23.

stood in his or her way and prevented timely filing. *Whitehead v. State*, 402 S.W.3d at 631 (citing *Holland v. Florida*, [560 U.S. 631, 648-49 (2010)]). This rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.⁹⁴

Several observations are noteworthy at this juncture. First, the court in *Bush* applied the *Whitehead-Holland* test in a case where the ground for tolling had nothing whatsoever to do with attorney negligence or misconduct. Simply put, Mr. Bush's case did not fit into any of the three pre-*Whitehead* ad hoc due process tolling categories. This approach repudiates the reasoning of the Court of Criminal Appeals in *Brown v. State* that the *Whitehead-Holland* test applies only to tolling claims based on attorney misconduct.⁹⁵

Second, the supreme court made the repudiation of *Brown* explicit, stating that the *Whitehead-Holland* test "applies to all due process tolling claims, not just those that concern alleged attorney misconduct."⁹⁶ Although the supreme court in *Bush* did not cite *Brown* (or *Morgan* or *Lackey*), the supreme court likely reasoned that this sentence, embedded in a tolling case that was not based on attorney misconduct, would correct the error. However, the Court of Criminal Appeals has not subsequently cited this

⁹⁴ *Id.* at 22.

⁹⁵ See *Brown*, 2013 WL 6405736, at *2 ("The way the *Whitehead* opinion is written, the two-prong inquiry is literally limited to situations of attorney conduct.")

⁹⁶ *Bush*, 428 S.W.3d at 22.

statement from *Bush*, and the *Brown* court's error persists in some appellate opinions.

Third, one might also notice how *Bush* handles the tripartite pre-*Whitehead* due process tolling framework. After describing the *Holland* test, the *Bush* court explained:

Prior to *Whitehead*, this Court had tolled the post-conviction deadline on due process grounds in cases (1) where the grounds for overturning the conviction arose after the statute of limitations had run; (2) where the prisoner was mentally incompetent; and (3) where a prisoner has been actively misled by attorney misconduct.⁹⁷

The supreme court then reasoned that Mr. Bush's claim could be construed as a *Burford*-style later-arising claim, with the petitioner's awareness that his rights had been violated serving as the later-arising ground.⁹⁸ But the court held that even viewed through this lens, Mr. Bush was not eligible for due process tolling because he was not "diligently pursuing his rights under the first prong of the *Whitehead-Holland* test."⁹⁹ At the risk of going out on a limb, this paragraph could imply that a prisoner faced with

⁹⁷ *Id.* at 23 (citing *Whitehead*, 402 S.W.3d at 623-24).

⁹⁸ *Id.* As the Court explained, the violation of Mr. Bush's rights (failure to inform him of lifetime community supervision prior to a plea deal in a sex-crime case) occurred before he was sentenced in 2001. Mr. Bush learned about his lifetime community supervision sentence much later, by December 2004. He failed to apply for post-conviction relief until April 2011. *Id.*

⁹⁹ *Id.*

a *Burford*-style later-arising-grounds claim could toll the statute of limitations by acting quickly once he or she becomes aware of the later-arising grounds. Conversely, this dicta could merely be the court offering an alternative rationale for finding that Mr. Bush loses his appeal.

What can we gather from the supreme court's opinion in *Bush*? In this non-attorney-misconduct case, the court began its analysis with the *Whitehead-Holland* test. Only later did the court even list the three pre-*Whitehead* tolling categories. Even when, toward the end of the opinion, the court re-conceptualized the case as a species of *Burford* later-arising-grounds claim, the court applied the *Whitehead-Holland* test. The supreme court made clear in *Bush* that the *Whitehead-Holland* test, not the ad hoc framework, is the go-to rule for assessing post-conviction due process tolling claims.

It is worth mentioning that *Whitehead* and *Bush* had nothing to say about tolling claims that involve alleged petitioner mental incompetence. While one could easily say that mental incompetence is a “circumstance beyond the petitioner's control” that can thwart a timely petition, it would be difficult to assess whether a mentally incompetent petitioner is pursuing his or her rights diligently. This observation is simply to note that petitioner mental incompetence might be a free-standing ground for tolling, and that the *Whitehead-Holland* test should govern all other types of claims.¹⁰⁰ For example, a person in a later-arising-grounds case will be pursuing his or her rights diligently when the petitioner acts quickly to take advantage of the

¹⁰⁰ Two months before the publication of *Whitehead*, the Court released *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013) cert. denied, 134 S. Ct. 224 (2013), in which the Court clarified the analysis used to determine petitioner mental incompetency in cases that involve due process tolling of the post-conviction statute of limitations. At this juncture *Reid ex rel. Martiniano* remains the governing case for mental incompetence post-conviction cases.

later-arising grounds, as the court's analysis in *Bush* may imply.

IV. *Bush* Unheeded: The Court of Criminal Appeals Remains Divided on *Whitehead*

In *Brown v. State*, the Tennessee Court of Criminal Appeals suggested that the *Whitehead-Holland* test applied only to due process tolling cases that are based on attorney misconduct.¹⁰¹ But then, in *Bush v. State*, the Tennessee Supreme Court clarified that the *Whitehead-Holland* test “applies to all due process tolling claims, not just those that concern alleged attorney misconduct.”¹⁰² The Tennessee Supreme Court likely wrote this sentence specifically to correct the *Brown* court's misinterpretation of *Whitehead v. State*. In *Whitehead*, the Supreme Court adopted a new, two-pronged, one-size-fits-all test to analyzing post-conviction due process tolling claims. This section will examine the post-*Bush* cases in which the Court of Criminal Appeals applied *Whitehead*. The focus will be to determine whether the Tennessee Supreme Court successfully corrected the Court of Criminal Appeals' misplaced notion that the *Whitehead-Holland* test applies only in tolling cases premised on alleged attorney misconduct or negligence.

Between the publication of *Bush v. State* on January 28, 2014, and the writing of this article in November 2014, the Court of Criminal Appeals released ten opinions relevant to this discussion. Seven are from the Middle Section,¹⁰³ one is from the Eastern Section,¹⁰⁴ and two

¹⁰¹ *Brown*, 2013 WL 6405736, at *2.

¹⁰² *Bush*, 428 S.W.3d at 22.

¹⁰³ *Woodard v. State*, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641 (Tenn. Crim. App. Sept. 15, 2014); *King v. State*, No. M2013-02505-CCA-R3-PC, 2014 WL 2854804 (Tenn. Crim. App. June 23, 2014); *Kimbrough v. State*, No. M2013-02536-CCA-R3-PC, 2014 WL

come from the Western Section.¹⁰⁵ The court held oral arguments in only one of these cases,¹⁰⁶ and *Whitehead* was never mentioned in the arguments.¹⁰⁷

A. Post-*Bush* Cases Based on Alleged Attorney Negligence or Misconduct

It is useful to distinguish the post-*Bush* cases that were based on alleged attorney error (six cases) from those that were based on grounds other than alleged attorney error (four cases). This section will consider the post-*Bush* cases in which the petitioner sought equitable tolling based on alleged attorney error. The earliest of these, *Johnson v. State*,¹⁰⁸ is the first post-*Whitehead* tolling case from the Eastern Section. In this brief opinion, the Court of Criminal Appeals applied the *Whitehead-Holland* test without mentioning the old ad hoc categories and denied relief.¹⁰⁹ The same can be said for the Middle Section's opinion in

2592877 (Tenn. Crim. App. June 10, 2014); *Rutherford v. State*, No. M2013-01575-CCA-R3-PC, 2014 WL 1669960 (Tenn. Crim. App. Apr. 25, 2014); *Samuel v. State*, No. M2013-01272-CCA-R3-PC, 2014 WL 1669963 (Tenn. Crim. App. Apr. 25, 2014); *Wong v. State*, No. M2013-01684-CCA-R3-PC, 2014 WL 1369756 (Tenn. Crim. App. Apr. 7, 2014); *Morris v. State*, No. M2013-01652-CCA-R3-PC, 2014 WL 1323617 (Tenn. Crim. App. Apr. 2, 2014).

¹⁰⁴ *Johnson v. State*, No. E2013-01464-CCA-R3-PC, 2014 WL 1118018 (Tenn. Crim. App. Mar. 20, 2014).

¹⁰⁵ *Webb v. State*, No. W2013-01250-CCA-R3-PC, 2014 WL 4244028 (Tenn. Crim. App. Aug. 27, 2014); *Griffin v. State*, No. W2013-01009-CCA-R3-PC, 2014 WL 2941239 (Tenn. Crim. App. June 26, 2014).

¹⁰⁶ *Woodard*, 2014 WL 4536641.

¹⁰⁷ Oral arguments are available at <http://tncourts.gov/courts/court-criminal-appeals/arguments/2014/07/16/state-tennessee-v-dennis-cedric-woodard>.

¹⁰⁸ *Johnson v. State*, No. E2013-01464-CCA-R3-PC, 2014 WL 1118018 (Tenn. Crim. App. Mar. 20, 2014).

¹⁰⁹ *Id.* at *2.

Wong v. State.¹¹⁰ Neither of these opinions is at odds with *Whitehead* and *Bush*.

In *Samuel v. State*,¹¹¹ however, a panel from the Middle Section adopted verbatim the boilerplate description of *Whitehead* from *Morgan* and *Lackey*.¹¹² In other words, the Court of Criminal Appeals said that *Whitehead* “identified three circumstances” in which tolling was warranted, i.e., the three old ad hoc categories.¹¹³ But the court blunted this potential misreading by stating, “Essentially, due process serves to toll the post-conviction statute of limitations for petitioners who face circumstances beyond their control, such as the above numerated circumstances, which preclude them from actively raising their post-conviction claims.”¹¹⁴ The court then quoted the *Whitehead-Holland* test and applied the test to find that tolling was not warranted.¹¹⁵ The most generous reading of *Samuel* is that the Court of Criminal Appeals says the three ad hoc categories are examples of circumstances in which the *Whitehead-Holland* test has historically been met. While this is not an incorrect approach to *Whitehead*, it would be better for the appellate court to begin with the *Whitehead-Holland* test, as the supreme court did in *Bush*.¹¹⁶

¹¹⁰ *Wong v. State*, No. M2013-01684-CCA-RE-PC, 2014 WL 1369756, at *3-4 (Tenn. Crim. App. Apr. 7, 2014).

¹¹¹ *Samuel v. State*, No. M2013-01272-CCA-R3-PC, 2014 WL 1669963 (Tenn. Crim. App. Apr. 25, 2014).

¹¹² See the discussion *supra*, Part II.

¹¹³ *Samuel*, 2014 WL 1669963, at *2. The *Samuel* court also noted that the “attorney misconduct” rationale also applied to “possible misrepresentation by prison officials.” *Id.* (citing *Alderson v. State*, No. M2010-00896-CCA-R3-PC, 2010 WL 4888137 (Tenn. Crim. App. Nov. 30, 2010)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *3, *6.

¹¹⁶ See *supra*, Part III.

The fourth alleged attorney error case is *Kimbrough v. State*,¹¹⁷ written by the author of *Samuel, Morgan, and Lackey*. The *Kimbrough* court applied the *Whitehead-Holland* test, but its analysis implied that the test only applies “when the claim is predicated on attorney misconduct.”¹¹⁸ Applying *Whitehead*, the court found no diligent pursuit and no extraordinary circumstance.¹¹⁹

The analysis in *Webb v. State*¹²⁰ is similar. The petitioner in *Webb* sought due process tolling on two grounds – attorney misconduct and mental incompetence. The appellate court’s analysis began by citing *Whitehead* for the “three circumstances” the Tennessee Supreme Court “identified” that warrant tolling. The court found that Mr. Webb had “raised the second and third circumstances.”¹²¹ When the court turned to the attorney misconduct question, it implied that the *Whitehead-Holland* test applied only to attorney error claims.¹²² Moreover, the court relied on a statement from *Williams and Smith* that *Whitehead* expressly overruled:

“Short of active
misrepresentation, however,
[the supreme court has] never
held that trial or appellate

¹¹⁷ *Kimbrough v. State*, No. M2013-02536-CCA-R3-PC, 2014 WL 2592877 (Tenn. Crim. App. June 10, 2014).

¹¹⁸ *See id.* at *2.

¹¹⁹ *Id.* at *3.

¹²⁰ *Webb v. State*, No. W2013-01250-CCA-R3-PC, 2014 WL 4244028, at*3-4 (Tenn. Crim. App. Aug. 27, 2014).

¹²¹ *Id.* at *3.

¹²² *Id.* at *4 (“To toll the statute of limitations for attorney misconduct or abandonment, a petitioner must make ‘a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing.’”) *Id.* (citing *Whitehead*, 402 S.W.3d at 631 (citing *Holland v. Florida*, 560 U.S. 631, 648-49 (2010))).

counsel's inadvertent or negligent failure to inform his or her client of the right to file a post-conviction petition constitutes ineffective assistance of counsel" sufficient to toll the statute of limitations in post-conviction proceedings.¹²³

Here, the appellate court seems unaware that the supreme court overruled its earlier "artificial and unhelpful distinction" between "active misrepresentation" and negligence in *Whitehead*.¹²⁴

In the recent case of *Woodard v. State*, the Court of Criminal Appeals remanded an untimely petition for an evidentiary hearing.¹²⁵ Mr. Woodard sought due process tolling on two bases. First, Mr. Woodard said his attorney failed to inform him for almost two years that his application for permission to appeal to the Tennessee Supreme Court had been denied.¹²⁶ Second, Mr. Woodard made a later-arising ground claim that he presented in the form of a writ of error coram nobis: Mr. Woodard said he did not learn until 2012 that his trial attorney had committed malpractice by simultaneously representing (and allegedly coaching) one of the witnesses against him at his murder trial.¹²⁷

In its analysis, the *Woodard* court began with *Whitehead*, but stated that the *Whitehead* opinion

¹²³ *Id.* (quoting *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011); citing *Williams*, *supra* note 7 at 468 n.7 (Tenn. 2001) (alteration in original)).

¹²⁴ *See Whitehead*, 402 S.W.3d at 631.

¹²⁵ *Woodard v. State*, No. M2013-01857-CCA-R3-PC, 2014 WL 4536641 (Tenn. Crim. App. Sept. 15, 2014).

¹²⁶ *Id.* at *5.

¹²⁷ *Id.* at *6.

“identified three scenarios” that require tolling. The court cited the *Whitehead-Holland* test, but implied that the test applies only to attorney misconduct cases.¹²⁸ The court determined that an evidentiary hearing was necessary in “the interests of justice,” especially when Mr. Woodard appeared to have been “pursuing his rights diligently.”¹²⁹

The Tennessee Court of Criminal Appeals’ post-*Bush* attorney misconduct cases therefore contain two cases that apply the *Whitehead-Holland* test without mentioning the ad hoc categories and four cases that begin with the ad hoc categories and apparently situate the *Whitehead-Holland* test within category three. The appellate court’s approach is not uniform.

B. Post-*Bush* Tolling Cases Not Premised on Attorney Error.

There are four post-*Bush* cases in which the Tennessee Court of Criminal Appeals considered due process tolling claims founded on bases other than alleged attorney negligence or misconduct. These cases deserve special attention because if the Court of Criminal Appeals applied the *Whitehead-Holland* test to a non-attorney case, this would indicate an awareness that the *Whitehead* rule is not limited strictly to tolling claims premised on attorney error. Again, none of these cases makes reference to the *Bush* opinion’s clarification of the scope of the *Whitehead-Holland* test. Three of these opinions are at odds with *Bush*, but the final case appears to get it right.

*Morris v. State*¹³⁰ from the Middle Section of the Court of Criminal Appeals only addresses *Whitehead*

¹²⁸ *Id.* at *9.

¹²⁹ *Id.* at *11.

¹³⁰ *Morris v. State*, No. W2013-01652-CCA-R3PC, 2014 WL 1323617, at *1 (Tenn. Crim. App. Apr. 2, 2014), *appeal denied* (Tenn. June 25, 2014). The petitioner’s grounds for due process tolling in *Morris* are

briefly, and when it does so, it makes the same error as the pre-*Bush* cases of *Morgan* and *Lackey* and the post-*Bush* cases of *Samuel* and *Rutherford*.¹³¹ The court in *Morris* states that in *Whitehead*,

the Tennessee Supreme Court identified three circumstances in which due process requires tolling the limitations period: (1) claims for relief that arise after the statute of limitations has expired; (2) claims involving prisoners whose mental incompetence prevents them from complying with the procedural deadline; and (3) claims in which attorney misconduct resulted in the delay in filing the petition. Petitioner argues that he was unaware that his conviction could be used to enhance punishment in subsequent cases. This is not one of the circumstances that would require tolling of the statute of limitations.¹³²

The appellate court never cites the *Holland* test in this opinion. The *Morris* opinion is, therefore, another Court of

unclear, although the grounds do not appear to involve any allegation of attorney negligence or misconduct.

¹³¹ The author of the *Morris* opinion was on the panel that decided *Samuel* and *Rutherford*. *Id.*

¹³² *Id.* at *2.

Criminal Appeals opinion at odds with the Tennessee Supreme Court's tolling analysis in *Bush*. Rather than applying the *Whitehead-Holland* test as the Tennessee Supreme Court has instructed, the appellate court approached the tolling issue by asking whether the petitioner's claim could be located within one of the old pre-*Whitehead* ad hoc categories. The Tennessee Supreme Court abrogated this approach in *Whitehead*, as it made clear in *Bush*.¹³³

The second post-*Bush* non-attorney case is *Rutherford v. State*,¹³⁴ released the same day as the attorney misconduct case of *Samuel* and decided by the same panel. Written by the same judge who wrote *Samuel*, *Morgan*, and *Lackey*, the *Rutherford* opinion contains the same boilerplate description of *Whitehead* which claims that *Whitehead* "identified three circumstances" in which due process tolling of the post-conviction statute of limitations is warranted.¹³⁵ The Court of Criminal Appeals in *Rutherford* does allude to the *Whitehead-Holland* test (the language is identical to language in *Samuel*),¹³⁶ but the court's analysis focuses on whether the petitioner's tolling claim fits within one of the three (now four)¹³⁷ ad hoc categories.¹³⁸ The analysis in *Rutherford* is therefore at odds with *Bush*.

¹³³ See *Bush*, 428 S.W.3d at 22. ("[The *Whitehead-Holland*] rule applies to all due process tolling claims, not just those that concern alleged attorney misconduct.") *Id.*

¹³⁴ *Rutherford v. State*, No. M2013-01575-CCA-R3PC, 2014 WL 1669960, at *2 (Tenn. Crim. App. Apr. 25, 2014).

¹³⁵ *Id.* at *2.

¹³⁶ *Id.*

¹³⁷ The fourth category is the *Alderson* situation, in which the petitioner alleges misrepresentation by prison officials. *Id.*

¹³⁸ *Id.* at *3 ("The petitioner has not presented a later-arising claim, makes no allegation of mental incompetence precluding the raising of the issues, no allegations of attorney misconduct, and no allegations of interference by prison author[it]ies.") *Id.*

The third case in this category is *King v. State*,¹³⁹ decided by the Middle Section (like *Morris* and *Rutherford*). The analysis in *King* is by now familiar. “[O]ur supreme court,” the court says, “has identified three circumstances in which due process requires tolling the post-conviction statute of limitations.”¹⁴⁰ Mr. King’s tolling claim was based on a lack of access to legal materials at his local correctional facility’s library. The Court of Criminal Appeals found no need to determine whether this would “constitute a fourth circumstance” that warranted due process tolling.¹⁴¹ The court did not quote, cite, or consider the *Whitehead-Holland* test. This silence by itself suggests the court believed, as in *Brown*, that the test applied only to tolling claims premised on attorney error.

The Tennessee Court of Criminal Appeals delivered a better analysis in *Griffin v. State*,¹⁴² decided by the Western Section in late June 2014. Like the petitioner in *Brown*,¹⁴³ Mr. Griffin claimed his petition was late because his facility was on administrative lockdown for several days in April 2011.¹⁴⁴ The *Griffin* court’s analysis is superior to that in *Morris*, *Rutherford*, and *King* because the court goes straight to the *Whitehead-Holland* test and does not bother with trying to locate the administrative lockdown within one of the old ad hoc tolling categories.¹⁴⁵ Applying *Whitehead*, the Court of Criminal Appeals declined to toll the statute of limitations.¹⁴⁶

¹³⁹ *King v. State*, No. M2013-02505-CCA-R3PC, 2014 WL 2854804, at *1 (Tenn. Crim. App. June 23, 2014).

¹⁴⁰ *Id.* at *3.

¹⁴¹ *Id.*

¹⁴² *Griffin v. State*, No. W2013-01009-CCA-R3PC, 2014 WL 2941239, at *1 (Tenn. Crim. App. June 26, 2014).

¹⁴³ *Brown*, 2013 WL 6405736, at *1, discussed *supra*, Part II.

¹⁴⁴ *Griffin*, 2014 WL 2941239, at *1. Mr. Griffin specified that the reason for the lockdown was “inclement weather.” *Id.*

¹⁴⁵ *See id.* at *3.

¹⁴⁶ *Id.* at *4.

With *Griffin*, the Court of Criminal Appeals finally applied the *Whitehead-Holland* test without first considering the ad hoc categories to a tolling claim that was not premised on attorney error. It remains to be seen whether future cases will hew to the narrow reading of *Whitehead* that persists within the Court of Criminal Appeals' due process tolling jurisprudence, or whether *Griffin* is the true harbinger of things to come.

V. Concluding Remarks

In *Whitehead v. State*,¹⁴⁷ the Tennessee Supreme Court eliminated its previous distinction between attorney negligence and willful misconduct and also abrogated the ad hoc approach to due process tolling. The court embraced the test of *Holland v. Florida* as a one-size-fits-all rubric for assessing post-conviction due process tolling claims.

The Court of Criminal Appeals has tended to misread *Whitehead*. Rather than wielding the *Holland* test as the multi-tool it really is, the Court of Criminal Appeals persists in citing the portion of *Whitehead* in which the Tennessee Supreme Court described the way things used to be. The Court of Criminal Appeals often begins its analyses by expounding the three categories that defined the boundaries of due process tolling prior to *Whitehead*. Further, the court has circumscribed the scope of the *Whitehead-Holland* test by confining its use to attorney misconduct cases. The Tennessee Supreme Court noticed this error and clarified in *Bush v. State* that the *Whitehead-Holland* test “applies to all due process tolling claims, not just those that concern alleged attorney misconduct.”¹⁴⁸ But the Court of Criminal Appeals has never cited this language or any other part of the *Bush* Court's application of *Whitehead*.

¹⁴⁷ *Whitehead*, 402 S.W.3d at 631 (Tenn. 2013).

¹⁴⁸ *Bush*, 428 S.W.3d at 22 (Tenn. 2014).

This article's ambition has been to make clear that – with the possible exception of petitioner mental incompetence claims – claims for due process tolling of the Tennessee Post-Conviction Procedure Act's one-year statute of limitations should be analyzed under the two-step *Whitehead-Holland* test regardless of the specific basis of the claim. The practical effect is that petitioners will be free to point to any circumstance beyond their control that thwarted their otherwise diligent efforts to file their petitions on time. Although the bar one must clear to obtain due process tolling is still incredibly high,¹⁴⁹ Tennessee courts are no longer straightjacketed by an ever-growing list of narrowly defined pigeonholes into which they must stick a tolling claim before tolling is possible. The Tennessee Supreme Court in *Whitehead* made a sagacious decision to adopt a flexible test that was already being deftly utilized by courts across the country. The new rule promotes fairness, and lower courts and practitioners would do well to embrace it in all its breadth.

¹⁴⁹ As the Tennessee Supreme Court has emphasized,

[D]ue process tolling must be reserved for those rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result. The threshold for triggering this form of relief is very high, lest the exceptions swallow the rule.

Id. (internal citations and quotation marks omitted).

ARTICLE

**JUDICIAL LEADERSHIP IN FAMILY COURT: A
CAUTIONARY TALE**

*By: Jane M. Spinak**

*Charles Miller Endowed Lecture
University of Tennessee College of Law*

For the past 35 years I have been practicing in, teaching, and writing about the Family Court. The problem-solving court movement in the last two decades – with its proliferation of drug courts, mental health courts, and veterans courts, to name a few – renewed my interest in the historical roots of the family court because of the parallels between the original juvenile court and the recent problem solving court movement. One of the key elements—perhaps the defining element—in both is the role of the judge as the leader of the court. That is what I want to focus on today. I’ve called this talk a cautionary tale; what I mean is that the idea of judicial leadership as it developed in the juvenile and family court historically, and as it is still being applied in those courts and in the newer problem solving courts today, is based on an idealized conception of the judge that has never been true and is unlikely ever to be true. Consequently, building a court around this idealized notion of the judicial leader is a dangerous proposition.

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We'll begin with the words of a contemporary family court leader. Judge Leonard Edwards received the 2004 William H. Rehnquist Award for Judicial Excellence, bestowed each year by the National Center for State Courts to a state court judge who "exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics."¹⁵⁰ Judge Edwards, a distinguished and dedicated family court judge from California, is the first and only juvenile or family court judge to receive the award, a testament to his national leadership on behalf of these courts. Here are his words:

Judges in the juvenile court are charged with keeping children safe; restoring families; finding permanency for children; and holding youth, families, and service providers accountable . . . We have to convene child- and family-serving agencies, schools, and the community around the problems facing our most vulnerable and troubled children . . . The role of the juvenile court judge is unlike any other. In the traditional judicial role, deciding a legal issue may complete the judge's task; however, in deciding the future of a child or family

¹⁵⁰ Leonard P. Edwards, Remarks of Judge Edward P. Leonards at the Presentation of the William H. Rehnquist Award for Judicial Excellence (Nov. 18, 2004), *in* 5 J. CENTER FAM. CHILDREN & CTS. 169, 169 (2004).

member, the juvenile court judge must, in addition to making a legal decision, be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate.¹⁵¹

Judge Edwards is proud that the family court judge is not limited to the traditional judicial role of legal decision-maker, but instead given broad responsibility for children and families, which requires each judge to be an administrator, collaborator, convener and advocate. Judge Edwards' award was presented in the Great Hall of the United States Supreme Court and Judge Edwards took the opportunity to remind his august audience of the critical work done by his colleagues throughout the country while also lamenting how infrequently the Court has acknowledged that work. Judge Edwards carefully sidesteps the severe chastisement that the Court had delivered in several of its most famous juvenile cases, such as *In re Gault* and *Mckeiver v. Pennsylvania*, where the Court criticized the work of many of his colleagues as it struggled to define the proper role of the juvenile court judge, expressing uncertainty whether the multiplicity of roles that Judge Edwards heralds can be filled by the mere mortals who become family court judges.

These multiple roles are a departure from the impartial, restrained and objective judge in the common law tradition and shift judicial responsibility from individualized legal determinations to a broader conception of judicial leadership. As the ultimate authority in the courtroom, judges in all trial courts today assume a leadership role to make sure the case moves along

¹⁵¹ *Id.* at 170.

expeditiously, that due process protections are upheld, and that everyone in the courtroom is doing his or her job. Professor Judith Resnik calls this modern decision-maker the “managerial judge.”¹⁵² The family court judge, however, is given a different managerial role. As defined in the New York Family Court Act, the family court judge is given “a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it.”¹⁵³

As the myriad proceedings concerning families have become increasingly consolidated into a single court system – a unified family court in many states – the role of the judge as the leader inside and outside the courtroom has intensified. The trajectory toward unification and greater judicial authority over all aspects of family conflict within a single judicial decision-maker raises significant questions about the ability of the judge to balance his or her ability to make impartial and fair determinations while using the extensive discretion granted to the court to “fit the particular needs of those before it.”¹⁵⁴ The family court unification movement, which began in earnest in the middle of the twentieth century and continues today, is the most important development since the juvenile court’s creation. The movement, however, has resisted the historical lessons of judicial leadership in its predecessor courts, which provide a cautionary tale against consolidating too much power in one judge. Even in Tennessee, where a unified system has not been adopted, juvenile court jurisdiction extends to dependency, status offenses, delinquency, custody, termination of parental rights, paternity, support and other related issues. Without unification, judges with juvenile court jurisdiction here have tremendous authority over the intersecting issues that

¹⁵²Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹⁵³ N.Y. FAM. CT. LAW § 141 (McKinney 2008).

¹⁵⁴ *Id.*

bring families before them. Later, I will distinguish between the administrative advantages of unification and the disadvantages of situating too much power within a single decision-maker. First, let us look at the similarities between Judge Edwards' description of his role and the words used by some of the founders of the juvenile court to understand better the historical underpinnings of the judge's role.

In his remarks Judge Edwards said: "We are the legal equivalent of an emergency room in the medical profession. We intervene in crises and figure out the best response on a case-by-case, individualized basis."¹⁵⁵ At the beginning of the 20th century, juvenile court judges were similarly described as "doctor-counselors" or "judicial therapists" who "[are] specialists in the art of human relations."¹⁵⁶ The judge's task was to "get the whole truth about a child" like "a physician searches for every detail that bears on the condition of a patient."¹⁵⁷ The medical metaphor is in stark contrast to a judge who is being asked to determine whether a child committed a crime or a parent is neglectful. Those determinations rely on evidence of acts and intent rather than what the best response to those acts might be. Judge Harvey Humphrey Baker, the first judge of the Boston juvenile court, uses medical metaphors to explain why the juvenile court doesn't "confine its attention to just the particular offense which brought the child to its notice."¹⁵⁸ Judge Baker believed "it is helpful to think of [court officials] as physicians in a dispensary,"¹⁵⁹ referring to both the physical arrangement of a juvenile

¹⁵⁵ Edwards, *supra* note 150 at 170.

¹⁵⁶ Anthony M. Platt, *THE CHILD SAVERS* 142 (1969).

¹⁵⁷ *Id.* at 142-43.

¹⁵⁸ Harvey H. Baker, *The Procedure of the Boston Juvenile Court*, in HARVEY HUMPHREY BAKER, *UPBUILDER OF THE JUVENILE COURT* 114 (1910).

¹⁵⁹ *Id.* at 109.

court but also to the way in which the court conducts its business:

In determining the disposition to be made of the case the procedure of the physician is very closely followed . . . The judge and probation officer consider together, like a physician and his junior, whether the outbreak which resulted in the arrest of the child was largely accidental, or whether it is habitual or likely to be so; whether it is due chiefly to some inherent physical or moral defect of the child, or whether some feature of his environment is an important factor; and then they address themselves to the question of how permanently to prevent the recurrence.¹⁶⁰

Even Judge Baker knew the limitations of the analogy, recognizing that a child did not come voluntarily to the court as a patient comes to a dispensary. And while a doctor may have a duty to minimize pain, the judge and probation officer “from time to time deliberately cause the child discomfort, because the discomfort of punishment affords in some cases an indispensable stimulus or moral tonic which cannot be supplied in any other way.”¹⁶¹

¹⁶⁰ *Id.* at 114.

¹⁶¹ *Id.* at 116.

This medical metaphor does not fit well into the common law tradition where the judge's "sole duty is to determine under the law and the facts the questions presented."¹⁶² Some judges at the time suggested that the juvenile court seemed better suited to the investigative tradition of civil law countries.¹⁶³ Judge Willis B. Perkins, a prosecutor and later a Michigan Circuit judge early in the 20th Century, urged adoption of the inquisitorial tradition of the civil law courts of continental Europe to allow the judge to scrutinize deeply into the family's life. Judge Perkins said:

The judge of a family court must have larger powers than these. He must be at liberty to investigate or cause to be investigated every anti-social or abnormal act growing out of family disturbances. His duties must necessarily be inquisitorial rather than accusatory . . . To empower a judge to act on his own initiative immediately and without pleadings; to authorize him to become the general supervisor and mentor of the home and its several occupants, will be a new thing in our jurisprudence.¹⁶⁴

¹⁶² Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 380 (1919).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 381.

Judge Perkins was nevertheless concerned that society would not tolerate these “tyrannical methods unless they are fruitful of good results,” so he set the standard for this new kind of judicial officer very high:

It is apparent, therefore, that a judge who is given these extraordinary powers must be a man well versed in the law, of large experience, unswerving firmness, broad sympathies, and clear, quick and accurate judgments. Wanting in any of these elements, his work must fail.¹⁶⁵

The tension between setting extraordinary high standards for judges implementing this foreign, even tyrannical, process and worrying that they will fail to meet those standards pervades the history of the court.

Julian W. Mack, a founder of the juvenile court and one of its most famous jurists, put it this way:

I know – and the other judges have told me the same thing – that the good people of the community think that every judge of the juvenile court must necessarily be a fine fellow, filled with the wisdom of the ages, capable of dealing with all the

¹⁶⁵ *Id.*

children that come before
him.¹⁶⁶

Like Judge Edwards nearly a century later, Judge Mack conceived:

[T]he duty of the juvenile court judge [is] to go out into his community, if not into the larger community of the country at large, and stimulate and arouse the people to a sense of their obligation to the wards who come into his immediate care, as it is to sit daily on his bench and deal with those individual children.¹⁶⁷

Both Judge Mack and Judge Edwards fulfilled those duties, lecturing widely, writing about their experiences, sitting on local and national commissions and serving as models of great jurists. With hindsight, Judge Mack admits that this fine fellow is less perfect than the community thought:

That sort of a genius does not exist. He may in the course of time, through unusual experience and opportunity, gain considerable wisdom . . . But few judges are really temperamentally fitted, and few are so eminently

¹⁶⁶ Julian W. Mack, *The Chancery Procedure in Juvenile Court*, in *THE CHILD, THE CLINIC AND THE COURT* 313 (1925).

¹⁶⁷ *Id.* at 316.

endowed as to be able to do the juvenile work and the probation work and all the other work that must be done if the court is to be really successful.¹⁶⁸

Judge Mack made this observation only twenty-five years after the juvenile court was founded and only a few years after Judge Perkins' comparable reflection. Yet, the narrative of this extraordinary judicial creature is undiminished in Judge Edwards' remarks almost a century later. This may be, in part, because Judge Edwards embraces a version of the judge who is rightly more constrained by statutory limitations and constitutional due process protections today and therefore not quite the same "fine fellow" the early court employed.¹⁶⁹ Even so, the judge's role as a leader continues to define the court today, even as the medicalized juvenile court evolved into a family court more tethered to the law. This evolution began in earnest in the middle of the 20th Century. I would like to use the example of creating the unified family court in New York to illustrate the enduring power of judicial leadership 50 years after the juvenile court was founded before turning to its enduring power today.

In 1953, Alfred Kahn published what was called a "controversial and provocative" report, *A Court for Children*, about the New York City Children's Court.¹⁷⁰ Dr. Kahn received the first doctorate in social welfare issued in New York State by writing a dissertation that would later become this report. He taught at the Columbia School of Social Work for 57 years and became world

¹⁶⁸ *Id.* at 313.

¹⁶⁹ Leonard P. Edwards, *Improving Juvenile Dependency Courts*, 48 JUV. & FAM. CT. J. 1 (1997).

¹⁷⁰ Alfred J. Kahn, *A COURT FOR CHILDREN* (1953).

famous for his work on children and families. Kenneth Johnson, then Dean of the Columbia School of Social Work, wrote in the Foreword of Kahn's report that "[i]t gives us facts which are not sugarcoated and which are not pleasant to take."¹⁷¹ The following year, the Association of the Bar of the City of New York issued a special report, *Children and Families in the Courts of New York City*, written by another Columbian, Professor Walter Gellhorn.¹⁷² Gellhorn incorporated some of Dr. Kahn's research and insight into his own report and recommendations. Both Dr. Kahn and Professor Gellhorn were at the end of their careers by the time I came to Columbia and long past thinking about family court, but I knew them both and admired them immensely. As I've worked on a book about family court, of which this talk is part of a chapter, I feel their ghosts hovering about my shoulders, urging me along.

By the time their reports were written, courts for children and families had moved far beyond the original juvenile court, addressing various issues of family functioning including neglect and abuse, termination of parental rights, and all aspects of domestic relations. Some states continued to separate delinquency from other areas of jurisdiction but many combined family issues within specialized courts or court divisions.¹⁷³ By 1949, the national model Standard Juvenile Court Act recommended that courts for children and families should have jurisdiction over all family issues.¹⁷⁴ Gellhorn's report agreed with that recommendation, ultimately concluding that New York families would be better served by a unified

¹⁷¹ *Id.* at vii.

¹⁷² WALTER GELLHORN ET. AL., *CHILDREN AND FAMILIES IN THE COURT OF NEW YORK CITY* (1954).

¹⁷³ *Id.* at 27; Khan, *supra* note 170 at 22.

¹⁷⁴ *Id.* at 27; NATIONAL PROBATION AND PAROLE ASSOCIATION, *A STANDARD JUVENILE COURT ACT* (1949).

family court.¹⁷⁵ His recommendation was adopted by a special City Bar Committee and led, in part, to the passage of the 1962 New York Family Court Act, which combines most, but not all, family proceedings in one unified Family Court.¹⁷⁶

Despite Gellhorn's strong belief in unifying jurisdiction over family matters in the new court, he resisted recommending that the highly successful "school part" of the Children's Court merge into the unified court. Gellhorn was impressed with the expertise of the four school part judges and with the fact that children did not seem to feel stigmatized by attending the school part. He feared that the helping functions that seemed so successful in the school part were not sufficiently understood nor implemented by the bench in the rest of the Children's Court. Gellhorn concluded that the school part should remain a separate entity until the community supported — and the bench fully embraced—the helping function of the new court that he saw exemplified by the judges of the school part.

When Gellhorn conducted his study in the early 1950's, his conclusion that the disjointed ways in which child and family problems were parsed out to at least six different courts and several divisions of those courts led easily to a conclusion this was not a productive way to get the work done. For Gellhorn, who is credited as one of the creators of modern administrative law and who cared deeply that fairness and due process were imbedded into administrative processes, a unified Family Court was necessary for that job. Efficiency was a by-product of his conclusions or, as he puts it more artfully, "[t]here is more to this suggestion than a mere aesthetic impulse to create an orderly pattern. It rests on the solid proposition that

¹⁷⁵ Gellhorn, *supra* note 172 at 390.

¹⁷⁶ *Id.* at 12-16; Family Court Act of 1962 §115, N.Y. FAM. CT. ACT §115 (McKinney 2012).

familial controversy can best be handled by judges who specialize in the family.”¹⁷⁷

A comprehensive family court would allow the judge to provide an opportunity for the family to address their problems in a constructive (rather than punitive) way while using “skills drawn from the social and biological sciences.”¹⁷⁸ Staff would be trained in these skills and judges would have to be willing to adopt this approach. Judges should not be assigned to the court unless they are “particularly understanding of the methods it must employ” and if assignments to the court were to be rotated among judges, they need enough stability to learn this methodology and to develop relationships with the other staff.¹⁷⁹

Gellhorn’s point, throughout the study, is that the many courts that address family issues are not set up to do this well. He also has no doubt that many judges in the courts he reviewed are not suited for the unified family court he is proposing. Gellhorn does not doubt, however, that suitable judges can be found and trained to do the work. He remains optimistic that combining the right organizational structure with the right personnel will produce an effective court where “modern methods are brought to bear on modern problems.”¹⁸⁰ Within ten years, the New York State Family Court had been created, shifting most jurisdictional authority over family issues into one unified court system. The Family Court Act also addressed what Gellhorn had earlier proposed: “that legal training and experience should be required before any person may assume the office of family court judge... [and] Judges of the family court should also be familiar with areas of learning and practice that often are not supplied by

¹⁷⁷ Gellhorn, *supra* note 172 at 382.

¹⁷⁸ *Id.* at 384.

¹⁷⁹ *Id.* at 388.

¹⁸⁰ *Id.* at 390.

the practice of law.”¹⁸¹ Like the judges of the Children’s Court school part, judges so trained would be the judicial leaders that Gellhorn envisioned for the new court. Gellhorn was very careful to minimize his concerns about the quality of the judges he was observing in his report. He needed all the allies he could get for his ultimate unification recommendations. His goal was to change the structure of the system and, by doing so, he believed he would also change the quality of the judiciary. Modern interdisciplinary education and better organization would make better judges.

Dr. Kahn, the social scientist, was less convinced that structural change was the main impediment to an effective family court judge. He certainly agreed that judges with specialized knowledge in a better-structured and resourced court would do a better job. Kahn could not avert his eyes, however, from how judges use the jurisdictional authority that they’ve been given. His core concern is that “in too many instances, consciously or by implication” many Children’s Court judges “see themselves as *the Court*.”¹⁸² Moreover, the litigants see the judge as *the Court*: “For the majority of parents and children, the significance of the entire court is largely decided on the bench.”¹⁸³

Kahn wants to hold onto the idea of the juvenile court, but he portends Justice Fortas’ concerns in *Gault* about the lack of due process by more than a decade.¹⁸⁴ Kahn believed that the judge lacks the legitimacy to enter into the dispositional phase of a proceeding unless the adjudicative phase incorporates the basic due process protections of a common law court. Informality has its

¹⁸¹ N.Y. FAM. CT. ACT §141 (McKinney 2012).

¹⁸² Kahn, *supra* note 170 at 269.

¹⁸³ *Id.* at 98.

¹⁸⁴ *See In re Gault*, 387 U.S. 1 (1967).

place in making families more comfortable in the court and in integrating the opinions of the social service or mental health experts involved, but informality is not a substitute for fairness at either the adjudicative or dispositional phases of hearings; nor is the judge's innate sense of what to do. As Kahn bluntly writes: "Judges are prone to a major occupational hazard – the feeling that they can readily appraise a situation and regularly make wise decisions not subject to question."¹⁸⁵ A court with few lawyers, press oversight or regular appellate review "lends itself particularly to such hazards."¹⁸⁶ Kahn finds these hazards throughout his study: he recounts stories of judges chiding children for bad spelling; for not going to church or learning the Ten Commandments; of chastising parents for their clothes or demeanor; and for issuing orders that will change peoples' lives without ever looking up from the bench. One story recounts the judge calling a young boy into the courtroom to introduce him for the first time to his putative father and then sending him home to live with him! These stories don't include the various punishments judges regularly meted out to their young charges.¹⁸⁷ Kahn recognizes these occupational hazards and urges restraint on the use of the court's power:

It is clear that, even within a juvenile court concerned with arranging treatment, the process which considers intervention (judicial steps) must be carefully separated procedurally from treatment planning (disposition) since

¹⁸⁵ *Id.* at 115.

¹⁸⁶ *Id.* That these changes have not resulted in a significantly improved system is for other chapters.

¹⁸⁷ *Id.* at 98-123.

the court properly should assert jurisdiction only in clearly defined situations and not simply because a judge considers a particular child to need treatment.¹⁸⁸

The judge who is given the power to exercise such instrumental authority must understand the grave implications of that power in order to make wise findings and proper dispositional orders. Kahn wants the judge to be the leader of the court team that Judge Edwards described in his 2004 speech, but most of the judges he observes don't define their roles in ways "consistent with the intent of the law" or "fail to implement [the law] successfully."¹⁸⁹ He reluctantly concludes, "[from] the perspective of the aspirations of the juvenile court movement and the expressed goals of court leadership, the accomplishments are outweighed by the inadequacies."¹⁹⁰

Kahn was not alone in his assessment. A few years after Kahn's New York study was published, the fiftieth anniversary of the juvenile court was commemorated by a conference at the University of Chicago in 1959 and resulted in a book of essays on the court called *Justice for the Child*. Margaret Keeney Rosenheim, a professor and Dean at Chicago's School of Social Services Administration, wrote in her essay contribution that throughout the country, the first few judges to occupy the juvenile court bench were men of outstanding reputation whose prestige enhanced the work of the court staff and guaranteed community interest and support for the new institution. Yet within two decades of its establishment, this promising institution had become the victim of

¹⁸⁸ *Id.* at 277.

¹⁸⁹ *Id.* at 106.

¹⁹⁰ *Id.* at 273.

criticism and attacks that have, in substance, continued to the present.¹⁹¹

Whether those original judges were as outstanding as Professor Rosenheim reminisces a half-century on, by the middle of the 20th century the original juvenile court was not fulfilling its founders' aspirations, in large part because of its reliance on a flawed system of judicial leadership. This leads us inevitably toward the question I pose today. If every family court judge can't be Julian Mack, Len Edwards or the four judges in the school part that Walter Gellhorn so admired, what does it mean for judicial leadership to continue to motivate the juvenile court, the family court and the unified family court movement? How can this serve as the foundation of the new problem solving court movement? Why do I recommend caution?

I begin to answer this question with Kahn's conclusion that the family court judge must have a clearly defined basis for legal intervention in family life prior to ever asserting authority over the dispositional phase of a proceeding, something Kahn calls treatment planning. In other words, I start with where we draw the jurisdictional line before a judge can intervene in a family's life. Let's use status offenses, also called unruly children in Tennessee, as an example. These acts are called status offenses because only minors, not adults, can be held responsible for being incorrigible, running away, being truant, not listening to parents or other authorities, using drugs, or getting drunk; what Professor Rosenheim called in the 1970's "juvenile nuisances".¹⁹²

¹⁹¹ Rosenheim, JUSTICE FOR THE CHILD, THE JUVENILE COURT IN TRANSITION 10 (1962).

¹⁹² See generally, MARGARET K. ROSENHEIM, PURSUING JUSTICE FOR THE CHILD (Univ. of Chicago Press 1976) (summarizing Ch. 3: Notes on Helping Juvenile Nuisances).

Today, the youth are called CHINS, PINS or JINS; children, juveniles or persons in need of supervision. There has always been significant disagreement about whether the jurisdictional line should be drawn at actual criminal acts or for acts that just really bother or worry us. Bringing a youth to court for robbery or assault is very different than bringing her to court for having sex or underage drinking. States have drawn that line differently at different points in their histories. Where the line is drawn affects when the court is going to begin impacting the life of the child or family.

States also distinguish among acts that may constitute neglect, abuse, or a sufficient basis to terminate parental rights. These political and cultural choices are tempered by constitutional mandates protecting individual liberty and family integrity. The United States Constitution prohibits states from intervening in family life without establishing that a family is unable to protect a child from harm, neglect, abuse, or trouble. The Supreme Court has repeatedly held that parents have fundamental rights in raising their children, most recently declaring, “[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁹³ Unless a legally defined harm can be established or a person voluntarily seeks the assistance of the court, there is no authority for the judge to intervene in the family’s life because she believes she can make that family better.

The late Judge Robert W. Page, a New Jersey Family Court judge who worked tirelessly for effective family court reform, succinctly described the court’s legal basis to intervene in a comprehensive unified family court plan:

¹⁹³ Troxel v. Granville, 530 U.S. 57, 66 (2000).

A court derives its very existence and the validity of its orders from an initial determination of a legal basis to act. This is true regardless of the substantial needs of those who are affected most by the decision. A good rule of thumb is the more substantial the need for judicial involvement, the more the need to be substantial in finding the legal basis. A legal basis includes the findings of jurisdiction and venue at the onset, full respect of the rights of due process, with reasonable notice and an opportunity for all to be heard and adherence to all statutes, court rules, case precedents and established legal and equitable principles. The family court is no place for either judicial scofflaws or goodwill ambassadors without portfolio.¹⁹⁴

Once a legal basis is established and supported by sufficient evidence that a youth committed a crime or that a parent abused a child, the judge is then empowered to assert the broad “treatment planning” powers to administer

¹⁹⁴ Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 84-85 (2005).

so-called “individualized justice,” or determining what is best for a child or a family. When Judge Baker said in 1910, “The court does not confine its attention to just the particular offense which brought the child to its notice,” he was lauding the court’s ability to fix whatever is wrong with the child or his family beyond the child’s misbehavior.¹⁹⁵ Today, judges retain significant dispositional discretion, even if not the same unlimited authority used by Judge Baker. Constitutional protections and statutory requirements limit the freewheeling authority of earlier generations of the court. Nevertheless, within those limitations, the judge retains tremendous authority to craft services and dispositions. How the judge exercises that authority often defines the court and the role it takes in family life.

Most states have created some type of family court as either a separate court or a division of a trial court. The jurisdictional authority granted to these courts, however, continues to vary considerably. Some have comprehensive jurisdiction over a broad range of family law matters and are able to consolidate cases about the same family under one judge or one “team” of court personnel that includes the judge.¹⁹⁶ The administrative impetus for consolidating cases is to make the court more efficient by providing a judicial forum with broad jurisdiction that centralizes court activities and minimizes the need for litigants to appear in multiple proceedings in multiple fora about the same or overlapping issues. The most obvious example is that divorce, custody, support and maintenance issues should be heard in the same court, preferably by the same judge, with

¹⁹⁵ HARVEY HUMPHREY BAKER, UPBUILDER OF THE JUVENILE COURT 114 (1910).

¹⁹⁶ Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

all the judicial officers having access to the same information.

A less clear-cut instance of the need for “one family/one judge” is when a youth is being charged with delinquency and his mother has brought a domestic violence case against her partner. There may be information relevant to whether the judge paroles the youth, such as whether the mother can supervise the youth. On the other hand, the judge might use that information to justify detaining the youth because he doesn’t want the youth to witness domestic violence or live in a home with a lesbian mother and her partner, two reasons for taking away the youth’s liberty that may be irrelevant to the issue of parole.

This administrative impulse for efficiency through unification, seen half a century earlier in Professor Gellhorn’s report, has been attributed to Roscoe Pound’s controversial call for consolidation of trials within a unified trial court in 1906.¹⁹⁷ Pound, the legendary Dean of Harvard Law School, was pursuing efficiency and conserving resources for an inefficient court system. Late in his life, in 1959, Pound applied those same justifications to the family court, hoping to eliminate what he called “the waste of time, energy and money” in addressing multiple family issues in a multitude of judicial and administrative settings.¹⁹⁸ Pound leaves to others “what that court should be or may be, or do,” while he focuses more on the court within his broader goal of eliminating multiple tribunals as part of modern court organization.¹⁹⁹ Pound, nevertheless,

¹⁹⁷ Andrew Shepard & James Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 337 (2003).

¹⁹⁸ Roscoe Pound, *The Place of the Family Court in the Judicial System*, 5 CRIME & DELINQUENCY 161,168 (1959).

¹⁹⁹ Roscoe Pound, *The Place of the Family Court in the Judicial System*, 10 CRIME & DELINQUENCY 532 (1964).

sees this court as shouldering some of the work previously done by other social organizations, like the church, in deterring bad behavior and encouraging civilized society in an increasingly heterogeneous and urban landscape.²⁰⁰

In leaving to others “what that court should be or may be, or do,” Pound sidesteps the second impulse of court unification, the therapeutic role of the court “to make the emotional life of families and children better.”²⁰¹ This is the impulse of judicial leadership that I have cautioned against. In the current unification movement, the therapeutic role of the court is manifested in two ways: whether services to litigants are provided within or by the court and in what way does the judge participate in creating or monitoring the impact of any therapeutic intervention.

As part of the court’s statutory responsibilities in a large array of cases, the judge issues orders that include requiring family members to seek or secure assistance to address the problems that allegedly led to court intervention. These requirements could come at the very beginning of a case, when the court sets conditions for a youth’s parole after being charged with delinquency; conditions for unsupervised visits when a child is removed from a parent charged with neglect, or limitations on access to the family home after allegations of domestic violence. A youth could also be ordered to attend an afterschool program as a condition of parole, a parent may be required to comply with drug screening to be permitted visitation, or a spouse may be precluded from the home without a third party present. The court may also be statutorily mandated to send disputing parties to mediation or other dispute resolution mechanisms prior to adjudicating a custody case.

The scope of the court’s power to order the litigants to comply with these types of behavioral requirements increases dramatically once the court determines that a

²⁰⁰ *Id.* at 539.

²⁰¹ Schepard, *supra* note 197 at 339.

youth is guilty, a parent has been neglectful, or domestic violence has occurred. Dispositional orders in these cases could include probation, secure residential placement, foster care, substance abuse or psychiatric treatment, or anger management therapy. While some of these services can only be provided by specialized agencies, many, like substance abuse treatment or testing, parent training or education, mediation or case conferencing, are services that could be provided in-house by court-related or court-directed service systems.

From the very beginning, many of the juvenile court's founders wanted the youth to receive whatever help they needed at the courthouse itself. Probation officers or social workers who were part of the court staff would provide supervision or counseling or other assistance directly to the young person.²⁰² Some court reformers were uncomfortable with courts being service providers, urging instead a clearer line between the judge's authority to order a service and the provision of that service by an executive branch agency or an independent provider.²⁰³

Recent calls for a unified family court include centralizing services within the court again, minimizing concern about blurring the boundaries between the court's power to order a disposition and the subsequent implementation of that order.²⁰⁴ Instead, the proponents focus on reducing multiple locations or service providers for families and on developing a more holistic approach to the families' needs under the court's auspices.²⁰⁵

²⁰² ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 138 (Univ. of Chicago Press, 2d ed., 1977); DAVID TANNENHAUS, *JUVENILE JUSTICE IN THE MAKING* 33-35, 41, 112-13 (Oxford Univ. Press, 2004).

²⁰³ ALICE SCOTT NUTT, *THE FUTURE OF THE JUVENILE COURT* 160-65 (Natl. Prob. Assn. Yearb. 1939) *reprinted in* PAUL TAPPAN, *JUVENILE DELINQUENCY* 197 (McGraw Hill, 1949).

²⁰⁴ Schepard, *supra* note 197 at 340-41.

²⁰⁵ *Id.* at 340-42; Babb, *supra* note 196 at 522.

There are many concerns with the revived model of court-based services. First, there is the traditional objection that a court is not a social services agency and should not act as one. The judge's role is to make the determination that a service is necessary by considering the evidence presented. If the judge determines the service needs to be ordered, it should be. What happens if the service is part of the court itself and then there is a dispute over whether the youth or parent has complied with the service or the service provider has delivered the service? If the service provider is part of the court system the court may be unable to impartially resolve the dispute. This is not theoretical.

Professor Melissa Breger has persuasively applied the social psychology concept of "groupthink" to family court practice. Breger notes that "[g]roupthink may be defined as 'a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.'"²⁰⁶

Courts, like all institutions, have a culture; a way of doing things that often separates insiders from outsiders.²⁰⁷ An extensive study of criminal courts, found, "all [criminal] courts have the same work to do in guaranteeing justice and liberty, but they organize themselves differently to accomplish these goals depending on their culture."²⁰⁸ Building on the criminal courts study, Professor Breger considers how the culture of family court is especially conducive to groupthink mentality.

²⁰⁶ Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lends of Social Psychology Groupthink Theory*, 34 *LAW & PSYCHOL. REV.* 55, 57 (2010).

²⁰⁷ *Id.* at 63-64.

²⁰⁸ BRIAN J. OSTROM ET AL., *TRIAL COURTS AS ORGANIZATIONS* 39 (2007).

The family court's traditional informality and collegiality, the presence of the same institutional players interacting over long periods of time, and the crisis nature of so many of its cases, can undermine the independence of the various players in the court system. There is tremendous pressure to reach consensus, not to rock the boat by challenging court norms, and, especially, to keep the judge happy.²⁰⁹ Breger identifies that, "Groups have a predilection to achieve uniformity, which is often embedded in members' subconscious. This desire for uniformity is specifically manifested in the context of a leader who exerts subtle pressure on the group to achieve consensus. In the family court context, this leader is the judge."²¹⁰

Breger's conclusions are directly applicable to the question of whether service providers should be part of the court system or independent. As part of the court system, these providers interact routinely with court staff and the judge. They learn the "rules" of the court, the way things are supposed to work, and may be reluctant to challenge the status quo. Court-based service providers may be more compliant with the court's view of a family than they would if they were establishing an independent relationship. Their opinion about a youth or a parent may be given greater weight with less supporting evidence by a judge who "trusts" the provider she sees everyday and who knows what matters to the judge. This in turn may reinforce a bias against an independent service provider's opinion when another opinion is sought.²¹¹

Outsiders, even those trying to help the judge make a good decision, may be more loyal to their independent professional obligations toward the litigant than an insider. They may also have a different experience with the client

²⁰⁹ Breger, *supra* note 206 at 79-82.

²¹⁰ *Id.* at 81-82.

²¹¹ *Id.* at 80.

outside of court, where the client may be more comfortable and less anxious. This leads to the second reason for separating services from the court, a litigant's reluctance to engage in services closely aligned to the court.

Court reformers who want to situate services within the court rarely consider the negative impact this may have on the way family members accept help. Little attention is paid to how family members may feel about the court generally and, specifically here, securing services within the court system. The proponents of the unified family court believe the court serves as a place for families to get help. I do not. People come to the family court either because they have to, such as when the state charges a youth with a crime or a parent with mistreating his children or not paying child support, or because the court is the only or last remaining place to address their unresolved custody, visitation, domestic violence, or paternity issues. If these families could resolve disputes themselves or receive readily available and appropriately crafted assistance in their communities, they would come to court only when they needed a legal judgment. This is because courts, even family courts, are essentially coercive institutions.

Writing about the family court unification movement in 2002, Professor Wallace Mylniec and Anne Geraghty bluntly summarized their concern:

A court is, at its core, an instrument of social control. What it does best is resolve disputed factual issues at a point when the litigants cannot resolve them by themselves. Courts gain control over these acrimonious situations only through the threat or reality

of coercion. Thus, courts are generally seen as an option of last resort, somewhere for people to go to resolve serious disputes without resort to violence, and a place where society can assert its control over behavior that it considers too egregious to go unpunished. Most people who appear before a court do not wish to be there, and would have chosen another form of dispute resolution had it been possible.²¹²

Mylniec and Geraghty focus on the fact that most litigants in family court are indigent and do not view the process as consensual. These litigants understand, instead, that if they do not comply with court-ordered services, the court can apply even more coercive sanctions, including fewer visits with their children, loss of custody, or even jail time.

When Judge Baker waxed eloquent about the medical metaphor of the juvenile court in 1910, he nevertheless acknowledged that court-ordered services had a punitive component that “affords in some cases an indispensable stimulus or moral tonic....”²¹³ Kahn acknowledged that an improved court incorporating legal safeguards would still be “a refined instrument of social control and treatment...”²¹⁴ My colleague, Professor Philip Genty, has written about the need for lawyers to empathize

²¹² Wallace J. Mylniec & Anne H. Geraghty, *United Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 441 (2002).

²¹³ Baker, *supra* note 195 at 116.

²¹⁴ Kahn, *supra* note 170 at 280-81.

with indigent clients' fear of the legal system. This empathy requires "an understanding of the client's deep fear and mistrust of the very legal system upon which the client must rely for a solution to her or his legal problem."²¹⁵ This mistrust does not arise in a vacuum.

Most parents and youth begin the court process in communities deeply suspicious of government intervention. When services are in the courthouse, most litigants may find it very difficult to distinguish between the power of the judge to order their compliance with services and the court-related service provider trying to engage the litigant with the service. When the service provider is so closely aligned to the judge, can a parent say to the provider that she thinks the judge's decision was wrong? Will she admit to using drugs even though she has clean urine tests? That she's angry with her child for reporting her to child protective services? That she thinks mediation is a waste of time? The litigant may or may not want to receive help. Yet, if she does not work with the provider, what is the likelihood that the parent will get her children back, her support reinstated, or her order of protection renewed? In short, how else could the parent get or keep the judge on her side?

While no court-ordered service is voluntary, a parent may still feel she has more privacy to discuss these issues with a service provider outside the court system, maybe even someone she chose, or who may work in her community and may be willing to assist her long after the court case is done. She may feel that she has some say about what is reported back to the court by a treatment provider who is not part of "the system." Or, as Kahn noted in 1953, "[C]hildren and parents can better accept

²¹⁵ Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 275-76 (2000).

social services from other agencies than from courts which have called them in on petition.”²¹⁶

These two concerns about court-based services, along with others, raise serious issues about the experiences of litigants that court reformers have mostly ignored. In the end, these concerns are only a structural manifestation of the more fundamental question facing unified courts: how the therapeutic impulse defines the role of the judge. When we look at that impulse what we find is that the medical model of the early 20th century juvenile court is transforming into the therapeutic jurisprudence model of the early 21st with all its attendant dangers.

Therapeutic jurisprudence, according to its adherents, “looks at law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences.”²¹⁷ The way a law is written or a court is organized or a judge acts impacts the well being of the persons involved. The proponents of therapeutic jurisprudence want to raise awareness of the legal system’s potential for good or harm *as a system* and encourage reform efforts that strive to minimize the negative experiences individuals have when they find themselves immersed in legal processes. They want to add therapeutic considerations into the mix of other important considerations about legal processes including “autonomy, integrity of the fact-finding process, and community safety.”²¹⁸ In the family law context, “therapeutic justice should strive to protect families and children from present

²¹⁶ Kahn, *supra* note 170 at 274.

²¹⁷ Babb, *supra* note 196 at 509 (quoting DAVID B. WEXLER, PUTTING MENTAL HEALTH INTO MENTAL HEALTH LAW: THERAPEUTIC JURISPRUDENCE *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991)).

²¹⁸ *Id.* at 511 (quoting DAVID B. WEXLER, JUSTICE, MENTAL HEALTH, AND THERAPEUTIC JURISPRUDENCE *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 714 (David B. Wexler & Bruce J. Winick eds., 1996)).

and future harms, to reduce emotional turmoil, to promote family harmony or preservation, and to provide individualized and efficient, effective family justice.”²¹⁹ Creating a unified family court will accomplish that goal. The words of the leading proponents of the movement are unequivocal on that point:

Rather, it is that we seem to be onto something good for children and families, something that helps people secure basic necessities and leaves them with the tools necessary to do so long into their respective futures. This something is a unified family court, the underlying principle of which is the practice of therapeutic justice. Therapeutic justice concentrates on empowering families with skills development, assisting them in resolving their own disputes, enhancing coordination of court events within the justice system, providing direct services to families when and where they need them, and building a system of dispute resolution that is more cost efficient,

²¹⁹ *Id.* (quoting Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 800 (1997)).

user-friendly, and time
conscious.²²⁰

I have advocated that UFCs embrace the notions of therapeutic jurisprudence and an ecological, holistic approach to the family's problems. In that vein, I have advocated that specially trained and interested judges address not only the legal issues, such as divorce, custody, child support, and domestic violence, but also that they consider the family's nonlegal needs, such as substance abuse, mental health issues, or domestic abuse. A therapeutic and ecological UFC model allows for the resolution of legal, personal, emotional, and social disputes with the aim of improving the well-being and functioning of families and children.²²¹

A UFC has an
additional and vital goal

²²⁰ Jeffrey A. Kuhn, *A Seven-year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 1, 68 (1998).

²²¹ Barbara A. Babb, *Unified Family Court: Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230-32 (2008).

beyond simple, efficient umpiring: to make the emotional life of families and children better...The UFC is based on the premise that family members are interconnected emotionally, economically, and spiritually. Any court order about one family member is likely to affect all. Whatever behavioral, mental-health problems, or conflict that brought one family member to court is likely caused or influenced by other family members. The legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court's attention in the first place.²²²

These three descriptions have in common several therapeutic components: the court is capable of intervening in a family's life not just to resolve the legal dispute that brought the family to court but to improve the family's life by addressing the complex social, emotional or psychological issues underlying the dispute; when therapeutic courts intervene in the lives of families, the

²²² Schepard, *supra* note 197 at 339-40.

outcomes for the families will improve; and, most centrally, the court is a good place to resolve family problems. These basic tenets of the unified family court sound remarkably like the therapeutic justifications for the original juvenile court. Our brief historical review of judicial leadership in the juvenile and family court systems, however, has never found these therapeutic attempts to be successful on a systemic level. Of course, a particular judge or a particular program may work well for a while, such as those school part judges in New York in the 1950's or Judges Mack or Edwards, because they are being run by exceptional, committed judges and have received additional funding and other resources. The few investigations into how unified courts are working now, however, only show that there are some administrative improvements in the way the court works or some improved outcomes from consolidation of court cases, not that a therapeutic approach is effective.²²³

This matters for fundamental reasons. Choosing to create a court based on therapeutic principles means that other principles, such as fairness or due process, may be given less value. A judge being asked to help solve a family's problems may be less concerned about each litigant having legal counsel or following strict evidentiary standards or even reaching a decision based on the evidence.²²⁴ In considering the role of therapeutic jurisprudence in family court, Judge Gerald W. Hardcastle recently wrote:

²²³ Mylniec, *supra* note 212 at fn 102; Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147 (1998); *Unified Family Courts Literature Review*, American Institute for Research (2002).

²²⁴ Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIG., GENDER & CLASS 127-30 (2010) (explaining that the role of the judge should be to be an impartial decision maker and protector against government overreach, rather than the solver of family problems).

Therapeutic justice implies the court system will not only resolve litigants' disputes but also will resolve the underlying dysfunctions existing in the litigants and the families. It also implies the judges know the "right" answer. As a result, the process is not about judicial discretion. In complex social relationships, the judge is charged with finding the right answers and accepts responsibility for finding those answers - keeping the parties before the court until answers are found. It is an arrogant, ambitious task.²²⁵

Moreover, it is a task that puts at risk the trust that litigants try to have in a fair process. Shifting from a neutral judge to a "healer" or "participant in the process" or a "sensitive, emphatic counselor," can undermine a litigant's understanding of the way a court should operate and a judge should act.²²⁶ A family court judge should be empathetic and respectful, requiring everyone in the courthouse to treat litigants considerately. Civility and respect have, as their end goals, a fair and timely process even if the outcome does not satisfy everyone. As Judge

²²⁵ Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 90-91 (2005).

²²⁶ *Id.* at 92.

Hardcastle points out, the promise that a court can solve problems is essentially a lie.²²⁷

Most litigants in family court have complex family issues and are in desperate need of basic human services that might make a difference: employment, decent education and health care, child care and mental health treatment, good housing and safe neighborhoods. Family court judges cannot provide for those complex needs even if they wish they could. As Kahn pointed out in 1953, “In reviewing the Court’s total performance it must be recalled that its task is exceedingly difficult and that many people come to it because of the failings or lacks in other agencies in the community...The basic fact which remains, however, is that many children and parents known to the Court require a complex range of services and facilities, but only a minority are well served.”²²⁸ Myleniec and Gerraghty repeated this “basic fact” fifty years later when they warned that a unified family court cannot solve family problems:

Unified family courts by themselves cannot stem the increase in caseloads. They can have no effect on the life chances of the litigants prior to the time a case is filed. Nor will families face fewer complex problems just because court process and jurisdiction have been unified and the court becomes more efficient. Poor education, dwindling housing stock, mental illness, drug use, crime, and crumbling

²²⁷ *Id.* at 91-94.

²²⁸ Kahn, *supra* note 170 at 273.

neighborhoods are all beyond the reach of the court. Nor can a court force the executive and legislative branches of government to create more and better services.²²⁹

Abandoning the therapeutic impulse to solve family problems and improve family well-being does not mean divesting the court of its adjudicative and dispositional responsibilities. It means rethinking them. Juvenile and family court judges have very difficult jobs. They see thousands of litigants each year. These litigants are usually the least favored among us, the poorest and the most fragile. They are disproportionately people of color.

The court cannot solve the problems that bring them there. What the court can do is make the best and fairest decision possible with the resources available. Instead of all the words used by judges who want to have some other job, the litigants have a right to expect an impartial decision-maker, who will listen to the evidence and make a reasoned decision. Processes like hearings and settlement conferences, slow our thinking down and require us to be more deliberative. This is not an easy thing to do. We know from the newest mind sciences that we're not the rational beings we thought we were. We know that judges, like the rest of us, are subject to cognitive biases, but cognitive biases can be challenged by trial procedures subject to accountability standards, open courts and appellate review. They are difficult to challenge in a court where, as Judge Cindy Lederman says, "I'm not sitting back and watching the parties and making a ruling. I'm making comments. I'm encouraging. I'm making judgment

²²⁹ Mylniec, *supra* note 212 at 445.

calls. I'm getting very involved with families. I'm making clinical therapeutic decisions to some extent, with the advice of experts."²³⁰

My plea is that Judge Lederman, and those like her, be cautious, learn the lessons of history, mark the words of Judge Hardcastle that therapeutic justice is an arrogant task, and return to the humbler but nobler job of being a judge.

²³⁰ Matthew I. Fraidin, *Decision-making in a Dependency Court: Heuristics, Cognitive Biases and Accountability*, 60 CLEV. ST. L. REV., 913, 937 (2013).

ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

**ESSENTIALS TO JUSTICE: A RIGHT TO
COUNSEL SYMPOSIUM**

WELCOME AND INTRODUCTIONS*

By: Douglas A. Blaze and Penny White

DEAN BLAZE: Can everybody hear me? I use my classroom voice. I'm Doug Blaze. I'm Dean of the University of Tennessee College of Law and I am incredibly pleased to welcome all of you here. This is an amazing program that has been put together. We six should not be surprised when you put Mark Stephens, Penny White, Jerry Black, Joy Radice, Val Vojdik and I'm leaving somebody out. I'm leaving tons of people out. Mike Whalen claims this was not steered, but obviously, these people did a great job steering us into this position here today, so welcome to the U.T. College of Law. It is particularly appropriate, I think, that we have a program like this at this College of Law at this law school because this law school is incredibly -- has always been committed to producing the absolutely best lawyers that we can and to being connected with practice as tightly as we can. As many of you may know, we have the, and I can say it without even thinking, oldest continually operating legal clinic program in the country and at one time, our clinic was in fact the public defender for this area and so we have a long connection with these issues, with access to justice and with issues of defense. In fact, I hope -- and we have had a long partnership with the public defender's office. Very pleased to see a number of you here today, in addition to Mark. You teach for us; you mentor our students; and

* Edited for readability.

most importantly, you hire our students, so that is a critical part of what we do. And I hope that you -- those of you that had the good fortune to come in from White -- from Cumberland Avenue saw what this law school is about when you walked in and it said Equal Access Equal Justice Under Law. And those of you that came in from the back understood that the real underpinning of that is written above our door coming in off White Avenue, which is to have the assistance of counsel, and that's what we're all here about today. So we are very, very pleased you're here. I'm very pleased to welcome you to the law school. It's going to be an incredible three days. I also am incredibly impressed that our mayor has managed to give you great weather while you're stuck inside all day. At any rate, we have an incredible city. Madeline Rogero is a terrific mayor and we're very pleased that she is here today to welcome you as well.

MAYOR ROGERO: Good afternoon everyone. I am so pleased to be here. I was really thankful that Mark, our public defender, gave me a call and asked if I would be here today. I'm pleased to be here one for a couple of reasons. One is that this is a great law school. We have great professors here. We have great assets such as the legal clinic. And I have personally, over the years, seen the work that they have done and they do serve the community so it's an amazing school and amazing resources and so we as a community are really very privileged and lucky to have them here and the commitment to the community. You know, sometimes you get in a university setting and you can tend to get within the ivy walls, right, you know, and be kind of insulated. This school isn't like that. This college is always reaching out to our community. So thank you, Doug, for you and all of your faculty and the way you do that, and your students who so willing give of their time to

our organizations and our people.

Also, I wanted to say something about Mark Stephens, our public defender. The whole, the Public Defender's Office again goes beyond just representing your clients in the courtroom. They try to help change their lives. We have a community, a law -- a community office, what do you call that, a community law office, which is the social service piece of that, and I was just talking to Roger Noe, who works in that office, and I just sent something -- somebody to him the other day, a young man who had had a lot of problems and had some legal difficulties and yet, he's trying to get his life back together and you know, the kids, they dig themselves into a hole and get fines and this and that and can't get their license and it gets worse and worse and then when they're trying to get their life together, you know, get it back and get committed, then it's so hard to dig out from under that so the community law office helps them dig out from underneath that and get their life back together. That's an unbelievable commitment from the Public Defender's Office and an unbelievable resource for our people here in the city and so thank you, and I can brag about a lot of you so I'm not going to take up all my time doing that, but I am very pleased with the quality of legal service we have and the commitment from our legal community to really promoting access to justice for our people.

I have looked at the agenda and it looks interesting. I would really love to hear a lot of the stuff. I wish I could stay. And when I looked at the panelists, I probably know most all of the local panelists, and I know you're going to be really pleased. This is a really top-notch group. They're respected not only in the legal circles but respected throughout our community so I know you will enjoy what they have to say.

Now, I'm not a lawyer; I am a city planner and I

have a background in community development and youth development, but I know and appreciate that the right to competent representation is a bedrock of our legal system and our democracy. And one of our biggest responsibilities as a society, as legal counsel, as mayor, is to make sure that we protect those who are most vulnerable, so I really applaud you for being here and for the work that you do. I know that's a principle that you all really hold dear and it's one that I do as well. And both of all of us on a daily basis have to live that and make sure that happens.

Now, really my main duty as mayor is to talk to you about what a great city you're in and hope – how many are not from Knoxville? Okay. Well, I'm going to say some things that even those who are from Knoxville may not even know but I want you to know that -- I want to encourage you to get out and enjoy Knoxville while you're here. I know you're going to be at the SunSphere I think tonight so when you look out when you're up there high and you look out, you will see three hundred and sixty degrees what our city looks like, you know, from campus -- I mean from the World's Fair Site, the home of the 1982 World's Fair to -- which is now a wonderful park for community events. You will be able to see our downtown, our surrounding areas and even off to the mountains. Also, just a little ways from there is our downtown and I hope you will have time either after the reception tonight and maybe dinner tomorrow night to get out on Market Square. That's a place where we have a lot of community events. Tonight, actually is -- we have a band from 7:00 to 9:00 p.m. called Dixie Ghost, and I'm told that the acoustical part sounds like Allison Krauss and Union Station, so if you like that kind of music, and Blue Highway, you're going to enjoy Dixie Ghost. And there's some other surprises there happening tonight since it's close to Halloween. Also, Gay Street, you need to walk Gay Street. We have a great general store called Mast General Store.

There's a great little music shop with banjos and mandolins and guitars, and often there might even be a little pick-up, a little gig that somebody decides to play while you're there. The -- also, we have some wonderful performance theaters on Gay Street. The Tennessee Theater, if you can sneak in there and see what that looks like. It's an unbelievable facility that we've spent millions of dollars on that the community came together a few years ago and, you know, and restored that, so a lot of great things downtown. Of course, there's some clubs, there's some bars, there's restaurants, many ways to spend your money. And if you're young enough, Urban Outfitters. We have our own Urban Outfitters downtown as well. Buy something for your kids if you can't fit into that stuff. I know I can't. Anyway. Also, Knoxville is an outdoor community. You know, we're a river city, we're a mountain city and we have really focused on the outdoors and when you get outside and just kind of look beyond right downtown, you will see, you can see the mountains in the distance. We used to have to go to the Great Smoky Mountains, that's what we did, to get outdoors and enjoy nature, but what we realized is that we have a little jewel right here in South Knoxville right across -- right over the river, and that's -- and we have branded that jewel the Urban Wilderness. We have a thousand acres of property of ten city parks, a three hundred acre nature city called Ijams, blueways, greenways. We have four Civil War battle sites. We have these thousand acres that are connected that we're working to connect together and this is an outdoor recreation destination. We've got forty-six -- just within a mile or two of downtown, we have forty-six miles of hiking and biking trails that the Appalachian Mountain Bike Club volunteers built, forty-six miles. They built it with their blood, sweat and tears, and cases and cases and kegs of beer went into that, but they did it themselves so it's an unbelievable resource right in our city. And we've got two quarries, one

where you can paddle in or kayak and people rappel off into the water so it's a pretty amazing asset. We also have a great group called Legacy Park Foundation that really started this and they have a center where their headquarters are right -- headquarters is, right near the river near the Ruth's Chris Restaurant. And they have an outdoor Knoxville Adventure center there so if you have a little bit of time and you want to paddle board or you want to bicycle, you can go there and rent bikes or canoes or paddle boards and get out in and enjoy our greenways or our Tennessee River. So there's lots of things to do while you're here. So we encourage you to spend your money, to enjoy your time while you're here and if -- hopefully there will be some time for them to do that. Are you finished on Saturday? Eleven-thirty. Oh, Farmer's Market on Saturday on Market Square, so you really want to see some of this. And for those of you who do live in Knoxville, if you haven't taken advantage of all that, then you need to get out there too and see it.

Anyway, hope you have a wonderful three days here. It's an important topic. I know you will dig into it but also have some fun while you're here and enjoy Knoxville. Thank you.

PROFESSOR WHITE: So you see how fortunate we are not only to have a wonderful mayor but to have a wonderful dean and wonderful law school. I'm Penny White and I'm the director for the Clinic for Advocacy and Dispute Resolution and had another wonderful opportunity to work on this conference but only in the background. So I want to tell you the people who made this conference possible very quickly before I turn it over to Reverend Fels. So if you're here and you were part of this non-steering steering committee as Professor Whalen called it, please stand and accept the appreciation of the crowd so the community was comprised of Mark Stephens; Reverend

Charlie Fels; Mike Whalen; Ursula Bailey; Beth Ford; Randy Reagan; Jonathan Cooper; Jerry Black; Tom Dillard; myself and folks, you just cannot believe the work that Joy Radice has put into this conference. Whalen can tell you all day long that there was no steering but she's been steering for over a year on this endeavor so I hope you will have a chance to tell her personally how much you appreciate it.

Another thing we're grateful for are great lawyers who did great things as lawyers but now are doing great things wearing other hats so with no more time being taken, I would like to present Reverend Charles Fels.

ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

**INTRODUCTORY ADDRESS: WRONGFUL
CONVICTIONS***

*By: Ndume Olatushani and Anne-Marie Moyes
Introduction: Reverend Charles Fels*

REVEREND FELS: In the year 1765, William Blackstone began to publish his magisterial commentary on the laws of England. When he came to the criminal justice process in England in the eighteenth century, he wrote, "It is far better to acquit ten guilty men than it is to convict a single innocent person for a crime he did not commit." Benjamin Franklin and Thomas Jefferson raised the ante. They said, "It is far better to acquit a hundred guilty people than to convict a single innocent person." And they were put in the shade by the great Jewish Rabbi, Maimonides, who said, "It is far better to let a thousand guilty go free than to convict a single innocent person." Throughout the generations, we, as a moral people, know that it is repugnant to our souls to convict the innocent and yet we know we do it. My name is Charles Fels. I am a recovering lawyer and a priest in the Episcopal Church. I have served as a federal prosecutor, a state prosecutor and a criminal defense attorney and I know from personal experience the importance of quality legal representation for both sides in a criminal case.

And it has been my somber privilege to meet, to know and to introduce not one, not two, but three men who were falsely convicted and sentenced to die and were finally released.

This afternoon, you and I are deeply privileged to be with Ndume and his wife, Ann Marie, as they tell us

* Edited for readability.

their story of what it is to live Blackstone's nightmare. Ndume was convicted of a murder in Memphis, a town he had never visited, represented by, no doubt, well-intended lawyers, who in Shelby County, Tennessee, with a fifty percent black and white population, managed to succeed in picking an entirely one hundred percent white jury. At the end of the first part of the proceedings, when Ndume, to his astonishment, was found guilty, these lawyers began to work on their preparations for the death penalty phase of the case. They gave it their best shot in three hours and failed to call a number of witnesses who had important testimony to give as they had failed to call important witnesses in the first half of the case. This is no surprise. Blackstone's nightmare becomes reality when lawyers are not qualified to do the job they have been hired to do. Sentenced to death, Ndume spent twenty-seven years in prison, nineteen years on death row in a cell that is six feet by ten feet and when you go home tonight, you might pace that out in your smallest bedroom and see what it feels like. He was blessed with a great internal strength that led him to art, and if you have the chance to see his paintings, you will see this explosion of righteous colors depicting an Africa he has never yet visited except in his spirit and in his soul. He experienced a miracle.

Ann Marie, graduate of Johns Hopkins, went to Germany for a year and when she returned, she was appalled by the disparity between black and white, rich and poor in America and she became dedicated to work on death row in California and came to know Ndume as an artist and then as a human being. And she studied her case, his case. And she invited Gottlieb Cleary, some of you know that famous New York firm, to represent Ndume pro bono and she herself decided to acquire a legal education. And went to Vanderbilt, which gives me great pleasure because I went to Vanderbilt and my wife Susan went to Vanderbilt. And unlike me, Ann Marie was first in her

class at the end of three years and became a public defender, what a noble call for a highly credentialed lawyer, and she did it to help Ndume, and she was the one that found the missing piece that had led to his wrongful conviction and she was the one that helped sustain him through the arduous process of Tennessee's direct appeal, post-conviction appeal and that well known writ of error, Coram Nobis.

Today is a gift for you and for me, but I hope it will frame the next two and a half days because for the next two and a half days, we are studying what we need to do to fulfill the mandate of the life and the witness of Clarence Gideon. And if it stands for anything at all, it stands for this: whether it's ten or a hundred or a thousand who are released, it is a moral imperative in America to never convict an innocent man.

It's a privilege to be able to introduce Ndume and Ann Marie, husband and wife, and have them share with us today what it is to live the nightmare and what it is finally to live the dream. Welcome.

MS. MOYES: Thank you so much for having us here today. Ndume and I feel very lucky to share our story often with different groups of people. I think it's so important that we tell and retell these stories of wrongful conviction because they really help us to think about what goes wrong in our criminal justice system and hopefully, prompts us all to work harder for the reforms that need to happen. I'm going to speak for a little while to tell you the story about Ndume's case, but I'm going to try to not keep it too long because I know you want to hear from Ndume. But I think his comments will be more meaningful if you hear the details of exactly what happened that led to his wrongful conviction.

So let me tell you first a little bit about the crime. Ndume was convicted of a felony murder. That just means it was a

murder that took place in the course of a felony. So what happened is several individuals went into a grocery store in Memphis early on a Sunday morning, Sunday October 2nd. One of the perpetrators went up to the storeowner, who happened to be working at the cash register. What they didn't know is that he was armed and so when they realized he was armed, there was a moment of panic, several shots were fired in the store and one of them killed the storeowner. Witnesses in the store -- there were about ten people in the store -- described the perpetrators as two black men and one black woman. And soon the police got a big lead. They found the getaway car that had been used in the perpetrators abandoned near the store and they figured out that that car had been stolen from the Hertz Rental Car Agency at the St. Louis Airport. So immediately, the Memphis police started looking at suspects from the St. Louis area. Ndume is from St. Louis. He was born and raised there. He had a minor criminal record. There was nothing in his background that made him stand out from the thousands of other black men in St. Louis, but for some reason that has never been explained to us, they ended up zeroing in on him as a possible suspect.

So what case did the prosecution come up with to convict him? This was their case. Of the ten witnesses in the store, they were unable to find anybody who could make a positive identification of Ndume, but they brought in one witness, Tommy Perkins, who said that Ndume looked like the person he had seen for just a few seconds as he was leaving the store and the perpetrators were coming in. He admitted on the stand that he was not more than eighty percent sure of his identification. Two individuals, Elizabeth Starks and Dennis Williams, were boyfriend and girlfriend at that time, and they said that Ndume and several friends of his had stayed at their house that weekend. They identified the get-away car and said they had seen Ndume and his companions in the get-away car.

They said that these individuals were talking about robbing a store but they had no firsthand knowledge of what had actually transpired in the store. Beverly Batts was an acquaintance of Ndume. She had a criminal record herself but she testified that Ndume confessed to her that he committed a murder in Memphis. She knew no details of it. She just said he had made the statement to her. And finally, the police said that they found a palm print of Ndume's on the exterior of the get-away car on the roof of the car. So, that was the State's case.

Ndume had an alibi defense. Miraculously for him, he thought, when he was first suspected of the crime, is that he remembered exactly where he was that weekend. His mother's birthday is October 1st. He has a large family. He's one of eleven children. And that weekend they threw a big party for his mother's birthday. So that was that Saturday night that the party took place. So even him being at the party Saturday night was a strong alibi because the State's case had him in Memphis that entire weekend. Even if he was in St. Louis on Saturday night, that in itself was very exculpatory. There were about thirty alibi witnesses who all insisted that he was in St. Louis at this party and other people who saw him even throughout the day on Sunday. There was a gardener who had done some work on a property Ndume owned. He said he went by Ndume's house Sunday morning, right around the time the crime was committed. He went by Ndume's St. Louis house and Ndume was there and paid him some money that he owed him.

Despite that alibi, the all-white jury convicted Ndume. As Reverend Fels mentioned, the prosecution was able to empanel an all-white jury. This was before *Batson*. *Batson* was pending before the Supreme Court at the time of Ndume's trial, so the prosecution actually used each one of their preemptory strikes to eliminate African Americans from the jury pool. No preemptories were used against

white, potential white jurors.

And also as Reverend Fels mentioned, Ndume's trial counsel admitted in post-conviction that he did zero preparation for the penalty phase of the trial until the guilt phase was over. So then he had about three hours to do that preparation. The only thing that he did was he talked to Ndume's mother and mildly prepped her to testify. She basically got on the stand and pleaded for Ndume's life. The trial lawyer waived opening statement. And as I said, he called just one witness, Ndume's mother, and he made a very meager closing argument in which he said something to the effect of "it's not my role to tell you whether Ndume is a good enough man to live. That is your decision." So he was not the most effective advocate. The jury obviously unanimously voted to impose the death penalty.

So at this point, the appeals process began. Ndume's conviction and sentence were upheld on direct appeal but prior to post-conviction review, a huge miracle happened. Ndume had been appointed a post-conviction lawyer who was a solo practitioner in Memphis who really didn't want to do a lot of work on the case and when he realized that I was starting to agitate for some real representation to happen and some real investigation to happen, he did some pretty unethical things to try to get off the case. But it ended up being a great opportunity for us because we knew the court was going to appoint new counsel; we wanted to just make sure it was the right counsel this time. So I started a phone campaign where I just called anybody I knew with any sort of reasonable reputation in the post-conviction field and when they said no, I can't take it, I would say well, who[m] do you think I should talk to. And that just went on for a few months.

At one point, I talked to somebody at the NAACP Legal Defense Fund in New York and there was an effort at the time in New York to recruit big New York law firms to take death penalty cases in the south. And so they agreed to

pitch Ndume's case as one of the cases they were pitching to New York firms. And miraculously, Cleary Gottlieb Steen and Hamilton, a firm of, I'm not sure how many lawyers worldwide, I think they have five hundred lawyers in their New York office, but they agreed to take the case pro bono. So that was huge. And one of the pleasures of going through the appeals process with Ndume, I mean it was always frustrating because until the very end, despite how strong I felt like our claims were, you know, it was -- it felt hard to get a fair hearing before the courts, but it was always very satisfying to walk into the court with the Cleary team. There would be, you know, one or two prosecutors on one side and there would be the five lawyers and the two paralegals and, you know, the whole, you know, with their boxes and stuff and so that was always satisfying.

So in post-conviction, we received the police file for the first time, and I'm sure as many of you are aware, you know, you rely on the prosecutor to give you *Brady* material at the time of trial, but in most jurisdictions when you start post-conviction, they will turn over that file. That's not universally true, but in Tennessee and most jurisdictions, including Memphis, they will turn over that file. So this was the big explosive moment in the appeals process that we found a lot *Brady* material in the file. We found a lot of evidence that all pointed to an alternate group of suspects that had no connection at all to Ndume. The withheld evidence all pertained to this group of people. We actually started calling them the Brown Gang just because that's sort of a short name and then the courts ended up, you know, taking on that moniker. And so that's what they have been referred to. But it was comprised of Michael Brown, his brother Eric Brown, their cousin by marriage, Charles Keller, and two women. Only one of [the women] is pictured here, Betty Jo Ford, and Darvi Cunningham. And this is a group of people that committed a lot of criminal

activity together. They stole cars. They engaged in prostitution, a host of different things.

And this is the evidence that was withheld. There were two eyewitnesses that identified members of the Brown Gang. There was an eyewitness in the store who saw the shooting at close range who identified Michael Brown as the shooter. There was a witness outside the store. He was a young man, a teenager, and he actually had seen the perpetrators changing the license plates and thought, "something fishy is going on here." And he went back and told his mother what he had seen, and she said well, you need to walk back there and you need to pay real close attention so that if you ever need to report something to the police, you can. So he walked by again and really gave it his attention. When the police said they were going to show him a photo array, he said he was confident he would be able to pick out the two individuals he saw changing the license plate. And, when he was shown an array of twenty-four pictures that included Ndume's picture, he immediately picked out Michael Brown and his cousin Charles Keller as the two men who were changing the license plate. The police then began investigating the Brown Gang. What they found out is consistent with the getaway car that had been stolen from the Hertz Rental Car Agency at the St. Louis Airport. The Brown Gang had a history of stealing rental cars from the Hertz Agency. And they were -- when the Memphis police contacted the St. Louis Airport police and said who are your suspects in this string of car thefts that you had, they got a fax back that said Michael Brown, Eric Brown, Charles Keller and a couple other names at the bottom.

Then not only that, but the police, they were able to figure out that one of the other rental cars that the Brown Gang had stolen had been recovered by the Memphis police in Memphis. So they went to the address where this previous rental car had been recovered and they decided to

canvas the neighborhood. And they found a neighbor who said well, not only did I see them in this previous car that the police recovered, but he actually said I saw them in the getaway car. And the getaway car was distinctive because it had a piece of chrome missing from the front fender. And before the police showed him a picture of the car or brought him out to the impound lot to look at the getaway car, he mentioned that specific feature of the car. So he positively identified the car and said he had seen the members of the Brown Gang in the car just weeks before the crime happened.

There were items in the car that also further implicated the Brown Gang. They had a reputation for traveling up the highway between Memphis and Chicago and stopping at truck stops along the way and engaging in prostitution. And in the car, there were receipts from exactly that route showing that they had stopped at some truck stops along the way. So that was also consistent with their pattern of criminal activity.

So when we found all of this stuff, I thought wow, this is it. I mean how can a court look at all of this and say this isn't a winning *Brady* claim.

Oh, sorry, I missed one thing. In addition to the Brown Gang, there were a couple other things we found in the police file that undermines some of the other evidence. The palm print was always a big problem for us because it's physical evidence and how do you explain that. But in the police file, there was actually an initial report that they had done when they were first looking into Ndume as a suspect. And their initial print report said that his prints came back negative but then in the margin of what looks like different handwriting, there's a notation saying "no palm prints submitted." So their explanation was that early on in their investigation -- when they initially compared the prints -- they didn't have a palm print of his and so that's why the prints initially came back negative. So one thing we found

out in our own investigation is that, and this is kind of complicated, but at the time they did their initial comparison, they had obtained a print file from an agency in St. Louis that definitely had a palm print. So that agency told us anybody that requested his print file would have gotten the entire range of prints and it made no sense that they wouldn't have gotten the palm print. So there's every reason to believe when their print report initially came back negative that they did indeed have a palm print at that time. But maybe more importantly, in the police file, there was a report where the police had done an inventory when they took the prints from the car., And according to their own inventory, they didn't take a print from the area of the car where they claim they matched Ndume's palm print. So we felt like this was pretty circumstantial evidence that there was something fishy going on, that there was some fabrication.

I know you all know the *Brady* standards. You have to show that the evidence was withheld, that it was exculpatory. And then, you know, the thing that always makes it difficult is showing that it was material, in dealing with the subjectivity of the courts and what can be their sort of results-oriented jurisprudence. So when we went through post-conviction, the state courts denied the *Brady* claim. And basically what they said is there was no reasonable probability of a different outcome because the remaining evidence of guilt was still too strong. That was disappointing, but fortunately, the court did give sentencing relief. And at the time, that was pretty devastating for me. You know, I think in -- I don't know if any of you practice in, you know, the capital, the capital world, but I think we often, in that setting, look at, you know, overturning the sentence as the big victory and all the lawyers around us were just, you know, just celebrating like this was the big thing, we got him off of death row. And at the time, I felt just really disappointed because I felt like so much more

needed to happen. But in retrospect, I think it happened the way it just had to in the sense that you know, death penalty cases are so politically charged., And I think that it's hard, you know, especially on the state level, for courts to overturn not just a sentence but a conviction. And once the death penalty was off the table and we started litigating his case as a regular case and not a capital case, I think it left more room, more maneuverability for a court to do the right thing. So the death sentence was overturned, not because of ineffective assistance of counsel, the court said that Ndume's lawyer was perfectly effective in his three hour preparation for the penalty phase. But the state had withheld evidence pertaining to one of the aggravators and so based on that, the death sentence was overturned. The state postured for little while like they were going to re-seek death. We had a few dates for a resentencing hearing but ultimately, when it really came down close to our final hearing date, they ended up conceding to a life sentence without demanding any concessions for Ndume. So he was allowed to continue the appeal process. So after nineteen, twenty years on death row, he was resentenced to life imprisonment.

So this was the point where I decided that I needed to investigate the case. There had been tremendous resources brought to bear on this case and Cleary Gottlieb did an amazing job. But they didn't have the ability to write a check for hundreds of thousands of dollars, which is what it would have cost to do the investigation that I did. So over a period of about three years, after I graduated from law school, I investigated Ndume's case mostly on the weekends, and I traveled all around the country tracking witnesses down.

I talked to Tommy Perkins. Basically, he said that when the police did the identification process with him, instead of showing him an array of pictures, they showed him only photos of Ndume. And so they did a very -- a

highly suggestive identification process which is very improper. And then right before he went into court, they actually cautioned him and said, you know, he might have changed his appearance in some ways and don't let him fool you by that. You know, you need to just go in there and make an identification even if he looks different.

Beverly Batts, we uncovered some information that she had previously made a false accusation against Ndume's niece for a crime that she herself committed. You know, there's a string of things we found out about her. She had a history of committing perjury. The prosecutor in Ndume's case had actually promised to expunge her record if she testified against him. She had a history of mental illness of dissociative personality disorder. So we felt like that was pretty significant in impeaching her reliability.

But I think what it all boiled down to in the investigation is, you know, that Dennis Williams and Elizabeth Starks were saying that Ndume was at their house that weekend and, you know, that he was in the get-away car and somehow we had to undermine their testimony. I went to talk to Dennis Williams and he very immediately recanted. He said that he had identified Ndume in advance of trial under a lot of police pressure that he was very scared that he was going to be charged himself. Both he and Elizabeth had been given immunity in exchange for their testimony, so they both were definitely scared that they had been in the get-away car themselves that weekend, they had been around the perpetrators. But that was helpful that he recanted his testimony.

We made multiple attempts to speak to Elizabeth Starks but she would never speak to us. She was very hostile. But I started thinking, and this is what got me thinking, as I looking at the police reports one day and I noticed that -- I knew that, East Dison was Elizabeth's mother's house because I had been by there looking for her. And the police reports, you can see a little clip there that

shows, you know, “we went to 575 East Dison and located Elizabeth Starks.” But one day I was looking at the police reports and I noticed on page 224 that when the police were describing Betty Jo Ford as a member of the Brown Gang, her background, they mentioned Dison as a former address of hers. And all of a sudden, this light bulb went off in my head and I’m like oh, my God, they’re connected. Like that would explain everything. So I went and talked to a couple of people and I ended up determining that yes, there was a strong connection between them. They had been friends since childhood. They held themselves out as cousins to people. People said when you saw one, you always saw the other. They were inseparable.

These are three witnesses we put on in a Coram Nobis hearing that confirmed the strong connection between Elizabeth Starks and Betty Jo Ford. So basically, you know, we were able to show through that connection not only that Elizabeth Starks had a huge motive to lie and point attention away from the perpetrators, her friends, the Brown Gang, and toward someone else, but it also just further implicates the Brown Gang. because somebody was at her house that weekend. According to tips the police had gotten, the perpetrators were at her house, and she has the connection to the Brown Gang. It just further reinforces that the Brown Gang were indeed the real perpetrators.

So fortunately in Tennessee, there was a mechanism to bring this new evidence before the state courts through a Coram Nobis petition. And on December 9th, 2011, we had our big moment and the Tennessee Court of Criminal Appeals vacated Ndume’s conviction. They said Elizabeth Starks had been significantly impeached and discredited. They said the sole witness, -- eyewitness, to make an identification had likewise been significantly impeached and multiple pieces of evidence implicated the Brown Gang. Then several months later on June 1, 2012, Ndume was released. He actually did end up taking an Alford Plea.

That was a difficult decision, but he was down in the Shelby County Jail. After his conviction was overturned, he was moved down there and he was there for about a month. And Memphis is a difficult place. It's very different from where I practice in Nashville. You know, as soon as his conviction was overturned and we were anticipating going back to Memphis, I thought well, certainly, they will let him out on bond, you know, he can get a bond. He served so much time, and in a weird twist of events, he had gone up for parole and been granted parole right before his conviction, the overturning of his conviction became final, and sort of made that parole decision moot and ineffective. So he had just gotten parole, , but it didn't become effective and then he was whisked out of there back to the county jail and I thought, how could a court not give him a bond., But we're talking with people in Memphis and they say "oh, well, there's a good chance they'll re-seek the death penalty just as a way to make sure that he can't get out on bond.," And it was just such a different world down there and we were, you know, counseled by people that I trust that there was a good chance he would spend two to three more years down in the Memphis County Jail trying to call their bluff and have them finally admit there was no case left to be tried. So, Ndume decided that the Alford Plea was the best thing for him to do.

So now what I'm going to do is show you a video, the moments Ndume walked out of the Memphis County Jail, and then after that, I will turn it over to him.
(Video Playing)

MR. OLATUSHANI: Good afternoon, everybody. Every time I see that video, I can't tell you guys what type of emotions there that actually raised for me. You know, we often hear this, you know, people say a picture is worth a thousand words, but I'm telling you even when you look at that video, it belies everything that I really -- I mean

everything that was really going on inside of [me] emotionally and also what is still happening to me right now. Today, I've been home now a little over, almost two and a half years, and I still wake up every day as happy as I was -- as happy as I was when I walked out of that Memphis County Jail. When you look at that -- when you look at that, you know, kind of look at that picture, one of the things that happened when they was -- you heard them talking about, we was talking about the letter. I was actually supposed to get out two days before I actually walked out of there, so they was able to squeeze two more days out of me and so, but like I said, every time I see it, it, you know, it's just another reminder, you know, of how grateful I really am.

I will start out by telling you guys that even though I spent right at twenty-eight years in prison, and certainly a whole lot was taken from me the time that I was sitting there, but I'm telling you I stand before you guys a fortunate man. I really am. It's truly a miracle that I'm actually here. Obviously, you guys know the system and you know how serious that it really is to be sitting on death row and for me to actually be here, you know, with a lot of work just like Anne-Marie said, on her part and other people, it really is a miracle. The one thing Anne-Marie didn't say about -- what she was saying about the law firm and how they decided to take my case was the story goes that the lawyers at Cleary that decided that they was going to, you know, opt in and try to help, you know, with cases coming out of the south or whatever, and they said that they was two cases came before mine and they was like this, no, this case is too bad and all, send us another one; and they got the second case, and after that, they said they decided, listen, we agreed that we was going to do a case so the next case come across our desks, we're just going to have to take it and so lucky, -- lucky for me, it was my case.

As you see, it was up there, they did over seventeen

thousand hours on my case over a period a little over seventeen years that they worked on my case and, you know, like I said, it was a miracle, you know, that my case came when it actually did. I think the one thing, and I'm sure a lot of you guys, you know, practicing attorneys, you did, you know, probably had the occasion to go inside the jail or a prison and visit a client or whatever case it is, and a lot of these places that you go to, you go to these prisons, I mean you got these manicured lawns, you know, flowers. If you go there, you can go there in the wintertime, you're liable to see some flowers. This is how, you know, pretty they make it and, you know. But I think the thing that you don't know is when you're sitting, like Reverend Fels said, in a six by ten foot cell twenty-three hours of the day, only -- every time I came out of my cell, I'm being shackled and chained like some imaginary monster to be moved from right here no further than this point up here to be put in the shower and take another ten to fifteen minutes to unchain me and shackle me just to give me a ten minute shower more or less depending on which officer was actually taking me out to give me the shower that, you know, that in the unit too, I don't know if any of you guys have been there, I know you have, that, you know, you in this unit and you can't walk more than fifty feet and not be turning in a circle. That's how small this unit is.

And the only time -- the only time that a person comes out of there is you either going to court or God forbid, you got to be going to the prison infirmary or outside hospital for something that may have went wrong. But other than that, these are the only times that you would actually come out of that unit. And what they had is this outside, supposedly outside, rec yard that we would get an hour outside a day to come out, is really was just probably about a fifteen by, maybe fifteen, foot cage, a concrete wire cage, that we would actually be brought out, you know, to just come out in the yard so for like twenty years, I'm

standing in this cage, I'm looking outside, I can see there's grass, but I don't even get a chance, for twenty years, I don't even get access to, you know, to touch grass, let alone walk on it. And I say this, you know, to, like again, to say in my own situation it's truly a miracle that I stand before you guys hopefully, you know, a whole person given everything that I had to, you know, just kind of deal with.

You know, one of the things that I think that when this thing happened to me, I was completely angry about what happened and I can't -- I ain't going to even tell you what I wanted to tell them people when we was in court when they actually did what they did, but you probably can imagine what I wanted to say. But for the first couple of years, I was really angry about, you know, what had happened to me and—but unfortunately, what happened, the worst thing, the worst possible thing that could have happened to me, was the thing that actually knocked me down where I was able to pick myself back up and begin to just put my best foot forward and, you know, get -- get on that road to getting to where I am right now.

And that is that the worst possible thing that can happen to a person sitting in prison is that the people come and tell you, you need to make a phone call home because you know if they come and tell you this, something really bad has happened at home and so you never want to get this phone call -- people coming and telling you about this phone call. And so for me, they came, I'm in my cell, they came and the guy came and told me that I needed to come downstairs because I needed to make a phone call home and so, you know, when I'm, you know, getting geared up for this thing, I'm thinking, you know, I'm thinking all these worst possible scenarios about what's going to happen when I get out of here on this phone but the one thing that didn't come to my mind was that when I get down there that my mother wasn't going to be on the other end. And so when I get down there, it was my sister on the other end

telling me about my mother had been killed in a car accident and like I said, even before that happened, I was in a place that I was, angry as hell, you know, and pretty much, you know, at the bottom as far as I was concerned, but that knocked me. I'm talking about that laid me out. I'm talking about I couldn't be hurt no more at that point. I'm flat on the ground and so it was that thing that happened like I said that began to allow for me to pick myself up and begin to try to put the pieces back together, because one of the things – the thing that -- one of the things that -- the last thing that I said to my mother before this happened, she was leaving out of the visiting room and I just jokingly said to her “oh, girl, I wouldn't know what to do if I didn't have you in my life,” And that was really true I'm talking about because she was with me when I felt like the world was against me. And she just kind of jokingly said, “Oh, you're going to know exactly what to do when the time comes,” and I can't imagine that either one of us knew that that was going to be the last time we see each other but it was. And so -- and, you know, when I get this, - - when I get this news, I'm telling you for the first three days, if my eyes was open, I was crying. If I wasn't crying, I was sleeping. I wasn't -- them was the only things I was doing because I was trying to pick myself back up.

But the thing that happened, I was laying down in bed and I'm telling you as clear as we sit here, my mother just came to me and said “Get up,” and when she said it, I jumped straight up, because I'm telling you this is how it really was, and I'm thinking man, this nightmare is actually over, but obviously I woke up to the same thing so -- but like I said, it was the thing that she said to me that kept ringing in my ears about that I'm “going to know exactly what to do.” And so it was then, and it certainly didn't happen overnight, but it was then, like I said, that I began to try to move forward and maintain everything that this system was trying to take from me or trying to, you know,

rob me of in terms of my humanity, dignity and everything, because this is what this whole process is. I'm sure you guys know that in order for somebody to be at a place where you trying to, I mean just methodically or consciously think about taking somebody's life, you got to first dehumanize them. You got to make them something less than human. And that's what this whole -- the whole death penalty process is I'm talking about. I sit on -- I mean from where I sit, I seen people commit suicide, I seen people come in that wasn't on medication and that still on medication because of this whole process. And so that's what I began to do is like I said, is just to try to pull myself back together.

And one of the things that happened, and you guys will walk out of here, you will see some of my artwork out there, one of the things that happened, it was a guy on death row with me, he was an artist, and I actually commissioned him to do a portrait of me because I wanted to send it to my mother. And she didn't get a chance to see it and she probably wouldn't have recognized me anyway from his interpretation. But what happened, he did this portrait, but by the time I got it, you know, my mother had passed away. [Jason – Ndume is pointing to photo on projector screen of his mother, but it seems unclear in text what he's saying. I think this edit makes it at least understandable.] But one of things that once he did this portrait, when I said it looked nothing like me, it looked nothing like me, but I had to pay him and so I still had to pay him. And so I'm in this little cell, in this little space, and every time I looked at it, I'm, you know, kind of beating myself up about, you know, almost feeling like a sucker, I had to pay, you know, this money for this portrait. But the thing that I kept telling myself was that, you know, where I'm sitting at, man, I could have actually did a better job myself and kept my money. And so one of the -- and I didn't immediately start, you know, drawing then, but as I -- like I said, I was trying

to go through this fire that I did start drawing and once I started drawing, I just, you know, stuck with it and, you know, and started painting and hopefully, you know, became a pretty good artist, but I know I still got some work to do, but art in a lot of ways saved my life though. It really did. Like he said, you can see a lot of my work. It's a lot of color in my work.

And because I was sitting in this environment, I mean if it were -- was some paint on the wall, most of the paint looked like the color of this ceiling if it was painted, you know, in places where it should have been., I began to try to, you know, just bring this color and imagination into my life that allowed for me to, like I said, you know, begin to just try to get through this fire that I had found myself in. And, you know, and I think that one of the things -- one of the things that I learned through that process is that, and maybe this is just me and how I kind of, you know, kind of coped with what I had to deal with, I think that -- well, I know that life going to certainly knock us down, ain't no question about that., Everybody ain't going to get knocked down like I did, but we are going to always run into these where we kind of get knocked down in life and the thing about, I think what's important is not that we got knocked down but how we picked ourselves back-up. Because I think, you know, that if somebody came and knocked one of you guys out of your chair right now, I mean that's kind of on them, but if a person come back and you lying there for more, talking about woe you, well then, that's kind of on you at that point. And so I just think that, you know, whatever, you know, whatever we go through and the thing that I went through in life, you know, I mean I survived it because like I said, I seen a lot of, you know, a lot of people that still on death row, good friends of mine, that certainly, you know, weren't able to handle it or are still not handling it in the way that I actually was.

I had a lot of good people in my life, family and

people that helped shore me up when I was weakening and you know, just kind of beaten down by the system. But I think that, you know, like I said, that whatever you guys do – let me say this here too real quick before I say that, and that is that one of the things that really, you know, that really made a difference to me while I was sitting there when those lawyers came on my case and they seen me as a human being as opposed to just somebody just on paper that they was coming there trying, you know, work to save my life, like she said, just to get me off death row, and, you know, and just kind of have, you know, say that they did what they, you know, came to do. I mean these were people that I'm certainly good friends with right now. I talk to some of them regularly. That really made a difference in my life when I had, you know, lawyers, you know, seeing me as who I was and not, you know, like I said, this case on paper, you know. And they dealt with me like that because the one thing that Anne-Marie didn't say when she said the lawyer, prior to them coming on, that were doing these unethical things just to trying to get off my case, he actually, Stephen Leffler, I don't know what he doing in Memphis now if he still down there, but he actually filed a motion in court telling the court that they needed to re-evaluate my indigent status because Anne-Marie and some other people had raised five thousand dollars and had paid investigators to do some stuff on my case. And so when he found this out, he actually went and finagled copies of the checks from them and went and filed a motion with the court telling the court that they needed to re-evaluate my indigent status. And like she said, it was the best that happened that he actually did that, but I mean that's the type of lawyer that I was dealing with.

And so like I said, when I had, you know, David and other people from Cleary come in and treat me like a human being, then it really made a difference. And I say that, you know, simply to say you guys, as public

defenders, I know that you, you know, you probably got a lot of work on your desk but it really made a difference when people sit down with me and treated me like a human being and I would encourage you guys to do the same thing whoever you're working with, you know, just try to treat them like human beings.

But the thing that I was fixing to say too is that, about like I say, just going through this fire, that the thing that helps me keep getting up doing the work that I do and hopefully trying to make a difference in people not ending up not only in the situation that I did but also too just this whole, you know, criminal justice system generally that -- I think that the thing that, you know, I believe is, you know, whatever fires that we go through that if we get through to the other side, it ain't meant for us. It was meant for other people. I mean like I said, I survived it and certainly, I didn't do it by myself, but, you know, like I said, it's certainly given me the ability and just the will to come out here and do some of the work that I'm doing and I mean the work that I'm doing, I'm so fortunate. Like I said, the work that I'm doing, I work for the Children Defense Fund and my whole sole focus is on this issue of this cradle to prison pipeline issue. And I get a chance to work with a lot of young kids in high schools, you know, wherever, you know, I'm allowed to go speaking with them and just trying to educate them about this system because a lot of them look like the very people that I was seeing as I sit nearly three decades seeing younger and younger people coming in with more and more time and, you know.

I think that, like I said, some of the work that I was doing in prison, because I was one of the people that I chose not to have a TV in my cell for the first ten years that I was in prison because I didn't want to get lost in the space of this just little small space into this TV. Like I said, once I began to pick myself back up, I wanted to make sure that I was doing everything that I possibly could to make sure

that the people that was trying to murder me, that they -- it certainly wasn't going to happen because I laid down in the fight. And so like I said, I chose not to have a TV, but as I went through, you know, I was one of the people that chose to read. I'm sure I, you know, read, you know, probably a few thousand books the time I was sitting in prison. I took some college courses, became a certified paralegal. I did everything that I possibly could to prepare myself to come out and, you know, be a productive person as much as I possibly could. And like I said, but it certainly didn't happen -- I couldn't have did it by myself. I really couldn't have.

And like I said, I think it's important that whatever work that you do and whoever you're working for makes a difference when you treat them like human beings and it really do. And I don't know how much time we got.

PROFESSOR RADICE: I think we wanted to field some questions so we probably have maybe seven minutes for two to three questions. I would love to hear from students too.

AUDIENCE MEMBER: It's actually a question for both of you. You are a paralegal and a lawyer working in capital habeas work. Did you do anything about the prosecutors that hid the evidence, and is there any recourse on prosecutorial misconduct?

MR. OLATUSHANI: Well, I mean I'm sure you guys know that prosecutors operate with impunity. I mean these are the most powerful people in the system in terms of just they position and when you got a system that's, you know, failed to hold them accountable, unless you got a prosecutor coming in there saying yeah, I did it, so what, then it's really hard to, I'm sure you guys know, to try to hold they feet to the fire. Every now and then it happens

but I think that -- I'm sure you guys know about the case out of Texas where the prosecutor and that judge, they end going on trial and was found guilty for what he did in the case where they wrongfully convicted a person but that's the only case that I know about that.

MS. MOYES: I think one downside to the Alford Plea is that kind of ties your hands a little bit about what you can do. Then the other thing in Ndume's case is so much time passed by the time he got out, that the individual prosecutors that were involved in the misconduct in his case weren't practicing anymore. So there was no room left for sort of professional consequence for them. But I do think it's interesting what people are brainstorming about doing in this area because I do think that we so need to hold prosecutors more accountable than they are being held. And I know recently I read about some effort to create like a national data base where, you know, any time something like this happens, we all can report it and then, you know, you realize somebody's individual history and that maybe over time it would be a way to hold people more accountable. But I think that's a real flaw, you know, in our current system and there have to be some reforms and improvements to create more accountability than currently exists.

AUDIENCE MEMBER: I want to first say thank you to both for telling your story. It's amazing. And it also takes a lot of courage. And so I want to thank you both for being here today. And I couldn't help but think when I was listening to you, I have so many people, clients and prisoners that I know, that are serving long sentences or serving death sentences. I wonder, are you working with any prisoners right now because I think that they could be really inspired and sustained by your story and your thoughts about how you made it through some many

decades.

MR. OLATUSHANI: Yeah, actually I do. One of the reasons I became a certified paralegal once I got off death row was I wanted to be able to go back on death row and work and see those guys over there and let them know that as long as you alive, everything and anything is possible. You just got to keep getting up. And so, but yes, part of the work that I do is I work with, you know, guys coming home from prison. A fine example, I mean just out of the system where I was sitting down to lunch with a guy who had spent thirty-eight years in prison, you know, just got out and I guess now he had been home almost a month, walked out of there after thirty-eight years almost eighty years old, seventy dollars in his pocket, and people telling him in order for him to get some type of benefits that he need to at least show that he didn't work for ninety days before he can get any type of Social Security benefits. So part of the work that I do, yes, working with, you know, guys coming home, but yeah, we also too work with guys inside as well too. In fact, I'm working with a group of people where we fixing to start this organization where we working with guys in prison, but also too just trying to prepare for something for them when they come home.

MS. MOYES: And I know Ndume too has, just because of so many contacts that I have professionally, my colleagues are sometimes aware of his story and have asked, "Would Ndume be willing to go talk to a client of mine, he's really struggling about whether to take this plea that involves a lot of time?" So he's always been willing to do that, but I know if you had any ideas about, you know, ways to make that broader, , I know that's something he's interested in.

MR. OLATUSHANI: Anyway I can, yeah. I told

guys before I left prison that -- like I said, I was one of them people that I was always an advocate because one thing that I knew while I was -- even while I was sitting on death row that I knew that I was fortunate than a lot of people that was around me, even some people even outside, I mean because surely you guys know, you got people outside of here outside of prison that's in probably worse prisons than people that's physically confined. I'm just talking about from a mental standpoint. So I always knew that I fortunate even sitting there, you know, and I was one of them people that I was always advocating not only for myself but for other people as well too. So, and I told the guys before I left that once I get out of here, I will be out here doing the work, that I ain't going to be talking about what people ain't doing, I'm going to be doing it myself..

PROFESSOR RADICE: I think we have time for one more.

AUDIENCE MEMBER: Again, I would like to thank you for being here. As somebody who has to deal with the system every day and sometimes in the middle of the night has thought about blowing the place up, you told us about how your mother visited you and told you to get up and get going, and I understand that and I understand that video of you being happy to come out and I understand how that can last for a while. I want to know how it is that you manage everyday now not to want to blow the damn thing up having been treated the way you've been treated?

MR. OLATUSHANI: Yeah, that's a good point. You know, the thing that -- the thing that, you know, kind of worked for me in terms of just getting back on track was that being able to let go of that anger and let go of the anger that I had for the people that did what they did to me. I think that a lot of people when you, you know, talk about

forgiveness and that type of stuff that, you know, people think that's -- I mean it's really for us. I mean just like standing up here, I mean as long as I stand up here and hold onto this here, I can't never get up there to that door and walk out of here. See what I'm saying? And that's what I chose to do is just kind of let go of that doorknob so to say and just begin to try to walk through the doors that was, you know, that was taking me forward rather than holding me back or having me looking back so, you know. I think that -- I mean anger is a human emotion first off. I'm still -- I'm mad about some stuff. I'm mad about some stuff. But I just try to -- one of the things that I learned sitting, you know, sitting in the small space was that, I mean we should be mad about stuff because that's what -- that's when we get motivated to do something and I just learned to just try to channel my anger into positive stuff. And so, you know, part of that mean, you know, kind of letting go of, you know, whatever feelings or emotions that I had toward the people or, you know, how it just kind of played out so, but I'm mad as hell about the system. I'm trying to work with you guys to change it.

PROFESSOR RADICE: Thank you so much, Ann Marie and Ndume. What an incredible way to start off this conversation. I know Penny said I did a ton of work but I can't tell you how many times when things went wrong, the person I called, and he's actually on my speed dial on my phone right now, my cell phone, is Mark Stephens and so I would like to invite him up here to introduce our next speaker.

ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

**WHAT DOES A CLIENT HAVE THE RIGHT TO
DEMAND?***

By: Jonathan Rapping
Introduction: Mark Stephens

MR. STEPHENS: I must not have read the program. I didn't know I was going to introduce Rap the Genius we call him now. Rap recently won the MacArthur Genius Award and so we're having a whole lot of fun every time he does anything wrong or even questionable, we can throw that at him about he's such a frigging genius, you think he would be able to figure out this or that.

Several years ago, Jerry Black sent me a law review article and suggested that I read it written by John Rapping and it had something to do with building a foundation on shaky ground or something, you know, I was just kind of going through the motions. It was about how you structure indigent defense within an institutional defender organization and what Rap was basically saying in the article, and I know I'm going to get a bunch of crap for this because I'm sure I'm not summarizing it correctly, but what he was saying is you got to start from the ground up and you have to get the right people with the right commitment to the work to come in and transform a culture of an office that maybe isn't where it should be. You can't do that from the top down. You have to do it from the bottom up. And Rap was engaged in an organization called Gideon's Promise. At the time, it was called the Southern Public Defender Training Center, SPDTC, but so many people choked on that name that they eventually had enough -- I mean he is a genius, he had enough sense to change the

* Edited for readability.

name of the organization so the acronym at least is a lot easier to remember. And so I e-mailed him and I told him I don't know who you are but you get it, you get my world, institutional defense at being public defenders and how to structure public defense and so from that grew a friendship. I consider Rap a friend of mine and his organization has really transformed the Knox County Public Defender's Community Law Office. A third of my staff now have all gone through Gideon's Promise. I don't hire anybody that doesn't go through Gideon's Promise, and it is making an incredible difference in my office. It's making an incredible difference in the work that we do in our community. It has empowered and it fires up the older lawyers that are in my office, and I'm very, very thankful for Jerry Black for introducing me to Rap and then my relationship that I've had with him over the last seven years, so with that, let me introduce you to Rap. I also hope that you can come by the reception tonight. We're going to have a reception at the Sunsphere. We're going to tell you more about Gideon's Promise and Rap and his wife Illy, who really does all the work, and we would hope that you could come and learn a little bit more about the organization so with that, John Rapping.

MR. RAPPING: So if I was a genius, why would I be hanging out with Mark Stephens? That's what everyone is asking. I have to say thank you for your presentation, both of you. When Ndume said we couldn't put people on death row and execute people unless we saw them as something less than human, you know, I couldn't agree more. I think that's absolutely true. I think that extends beyond death row. I believe we couldn't lock people up for twenty years for drug offenses unless we saw them as less than human, and I believe we couldn't lock up people presumed innocent on bonds they couldn't make as they lose their homes and jobs unless we saw them as less than

human. I believe we couldn't shackle juveniles unless we saw those children as something less than human. So I couldn't agree with you more. I think that all of these problems we're talking about are symptoms and the problem we've got to tackle is injecting humanity back into a system that's lost sight of that.

I'm reminded of that every day because I really am married to a genius. Ilham Askia is the executive director of Gideon's Promise. She's not a lawyer. I'm reminded of that by just working with someone every day who lifted herself from a different perspective.

So Illy grew up in a household where every man in her family has been through the criminal justice system. Her father got locked up when she was five years old. She grew up and raised her baby brother. Every uncle and cousin she knew was locked up. Her baby brother ended up in prison, got out, back in prison. And Illy talks about how she became a teacher because she wanted to interrupt this cradle to prison pipeline at sort of the early part of the process and she talks about how she met these lawyers who represented the men in her lives and they didn't see the humanity in them. They didn't learn who they were as people. They didn't tell their stories and she had no faith in public defenders.

And then she started meeting some public defenders who were courageous and who care and who work against incredible odds. And when we started Gideon's Promise eight years ago, I asked her to take the year off teaching and help build this organization and she didn't -- she hasn't gone back because I think she believes that she can do more good at this stage, the last stop before the cradle to prison pipeline is finalized. But again, I think she reminds me, and I appreciate, Ndume, you saying this again, that this is about injecting humanity into the system. It's shocking to me that we could have gotten to a place where we have a system that sees people as so subhuman.

It's shocking to me when I think about how last year we celebrated the fiftieth anniversary of *Gideon vs. Wainwright*, which I really see as a milestone, not a criminal justice milestone, I see it as a human rights milestone and a civil rights milestone. I think *Gideon* was decided, it was, I don't think, I know it was decided in 1963. It was decided the same year as the march on Washington, the same year as so many civil rights milestones and that's not coincidental. It was decided at a time when we as a nation were struggling with our rhetoric not matching our actions, when we realized we weren't affording people, humans, basic civil rights in all walks of life and certainly the criminal justice system was one of those areas. And so *Gideon* said something really simple. It said that when a person is in the criminal justice system, a complex system, complex procedures, complex rules, they cannot receive justice if they don't have a lawyer. The lawyer is literally the vehicle necessary to ensure that justice is done. And if we believe in equal justice, which is what *Gideon* was about, then it goes without saying poor people have to have the kinds of lawyers that those of us with means would pay for, right? It's really, I think, quite simple.

And I think about this all the time, but as I sort of thought about this coming over here, I was reminded of some of the young lawyers I started working with when I first moved to Georgia. I just saw Steve Bright walk in the room and I remember I got a call from Steve Bright when I was a lawyer in Washington, D.C. back in 2004, and he asked how I would feel about moving from Washington, D.C. to work with the public defender system in Georgia and I was like, you got to be kidding. Then I talked to Illy, and she was like, you got to be kidding me. We asked our six-month-old daughter. She was like (unintelligible), you got to be kidding me. But Steve's persuasive so we moved down there and we started trying to do what Mark was

talking about, build a community from the ground up of sort of lawyers who were inspired and help them sort of keep that inspiration.

And one of them after two years, she left. She wrote a letter to the Atlanta Journal Constitution and she talked about how she couldn't do the work any more because she was sort of losing her soul. When she talked about on the last thirteen months, she had closed nine hundred cases. She calculated for the readers of the paper that if she worked every single day taking no vacation and working fifty hours a week for a year, she could give each client three hours and so she quit because she felt she just couldn't be the lawyer that *Gideon* demanded that she believed she needed to be. And she left and that was sad. That was sad to me. And over the years, I've seen a lot of lawyers leave for that reason, but I think what was sadder to me was she left behind a group of lawyers, many of whom believed they were doing right by their clients, that what they were doing was okay, that in fact, there are three hour cases, and let me just be very clear when I say this because I really don't want to be misunderstood. I do not mean to be critical of those lawyers. They stepped into an arena that most law students will graduate and never consider stepping into. They have decided to do really important work but they walked into a system that has shaped them. It has shaped them and they have become lawyers they never meant to be when they started, but sometimes these systems make our public defenders become lawyers who have to process human beings and so to me, that was the sadder part of the story, was not that Marie left, but that we have a system that allows so many who have been left behind feel okay about the three hour case,. And so I've talked to Mark Stephens about that quite a bit, about this idea of the "three hour case," and I think there are a lot of public defenders who I respect who would say to me oh, that case, you could do that case in three

hours. And I actually think that's not true. I think there's no such thing as a "three hour case."

When Mark asked if I would speak about what clients deserve, I want to talk a little bit about why I say there is no such thing as a three hour case. I can't imagine a case and I ask any of you to imagine the most minor charge you could be charged with, and you walk into a lawyer's office to hire them and they say it's your lucky day. I'm looking at my calendar, I've got three hours this year that I can give you. How many of you would hire that lawyer? My guess is none of you for any case. And so what do people accused of crimes deserve? I think, you know, we can look to the floor, we can look to things like the Rules of Professional Conduct, and that informs the answer a little bit.

Here in Tennessee, like all over the country, you have Rule 1.1, right, [referring to a slide] that's supposed to be an incompetent lawyer with a clown mask. But competence, quite literally, right, the Rules of Professional Responsibility demand that lawyers have legal knowledge, skill, that they are thorough, that they are prepared and that comments made clear that in every case you must [engage] in factual and legal analysis so that means before you ever advise a client to plead guilty, you have to engage in factual analysis. You have to do an investigation. You have to identify legal issues and hit the law library or the computer and do some legal analysis. That takes time. So that's step one. I don't know how many of you how who have ever sort been in courtrooms, have seen lawyers, and again, I don't mean to be critical, I'm just curious, seen lawyers who have advised clients to take pleas the day they meet them? It happens all over this country. I would suggest to you that, by definition, is a violation of Rule 1.1.

Rule 1.3, diligence. A lawyer has to act with reasonable diligence and promptness in representing a client. Steve Handlin is going to talk tomorrow about

workloads and what's in your comments, and comments in similar codes all over the country say is that a lawyer's workload must be controlled. We can't be diligent if our caseloads and workloads, and there's a difference, are too high. Again, Steve will talk about that quite a bit. But diligence, communication. You know, the greatest complaint that I think in most places, I haven't looked into it in Tennessee, but I bet it's true here, the greatest complaint to bar counsel when it comes to lawyers not living up to their obligation to clients, is a lack of communication, right? I've met again a lot of lawyers who I have respect for, who will say to me I know what I need to do in the client's case and I've got limited time and so I would rather focus on that than going to meet with the client. It is really missing something fundamental, right, and that is it's not your case. It's your client's case. And how can they direct you if you haven't communicated? That communication means keeping clients informed, having them, you know, replying to requests that they make for information and explaining things so they can make informed decisions.

This reminds me, I was doing a training in Kentucky, a leadership training in Kentucky. This was a few years ago. And I was leading a small group of managers from Kentucky and we were talking, everyone brought a management challenge and we were talking about a management challenge. And one of the lawyers said, one of my challenges is I've got this lawyer, he's a really good lawyer, but he hates his clients. Whoa, time out, right? That's like an oxymoron. How is that possible? How can you be a really good lawyer and hate your clients? I think what he meant was this lawyer is really good at cross-examination, they're a great orator, but they're not a great lawyer because a relationship with the client is, by definition, part of being a great lawyer, but we're in a world where we start to be -- it's signaled to us that being a good

lawyer is about skills as opposed to representing people. It's part of the dehumanizing that we see.

Conflict of interest, Rule 1.7, makes clear that you are prohibited as a lawyer from taking on a case if that representation may materially limit, may be materially limited by your responsibilities to existing clients. And quite simply, what that means is if I take on a case right now, am I going to be able to give it all the time it deserves looking at my caseload, and so I think what Rule 1.7 says if you can't honestly say you are able to give every client what they are entitled to do under the Constitution and the Rules of Professional Responsibility, you are by definition ineffective. Now I think as public defenders in this country, listening to that, you think whoa, I'm ineffective. Yes. You are, by definition, as a public defender in America, you are ineffective, but rather than trying to cover that up, rather than trying to suggest we are effective, that we can do a three hour case, what I think we need to be doing is owning the fact that we are ineffective and it's not our problem; it's a system. We're in a system that won't let our clients have the lawyers they need and we should own that and we should move to improve it, but we shouldn't run from it or we're becoming part of a community that is justifying the process.

While not binding, the ABA Standards for Criminal Justice also tell you some other -- give you some other insight into what clients deserve, right, duty to render effective quality representation. Again, about the client, lots in there about communication and interviewing and client relationships, investigation and preparation, preparing for trial. And this doesn't mean preparing for trial in those cases that will go to trial. It means preparing in every case, because how can you advise a client as to whether the right course of action is foregoing a trial and taking a plea or going to trial if you haven't prepared and you don't have a sense of what the likely outcome is at trial and what the

likely consequences are. Sentencing advocacy, I think was illustrated in Ndume's case, right, often overlooked. And advising clients with respect to appeal. So all of these, all through the case, there are these obligations that I would suggest mean that there is no such thing as a three hour case. Are we there yet? I guess you know my answer to that. No. We're not there yet.

And I think about when I first moved to Georgia and we did a training. We did a training for all of the new public defenders. There were chief public defenders. There were brand new public defenders. And it was in the first training January of 2005, and we this training on motions practice, basic motions practice. And it was just, I thought pretty straightforward stuff. It talked about filing Fourth Amendment, Fifth Amendment, Sixth Amendment Motions, the kinds of motions I had filed in every single case for ten years as a public defender, the kinds of stuff that every law student learns in basic criminal procedure. And we finished the session and one of the new chief public defenders, one of the leaders who's tasked with ushering in this new system in Georgia, came up and he said, "I love that, that's great, but, you know, we can't do that where I practice." And I said, "what do you mean you can't do that?" He said, "we can't do that." And I said, "oh, no, you can do it, I assure you. That's the Federal Constitution. It applies in Georgia. You can do it." And he said, "no, we can't do that, because when we file motions, our Judges get mad." It was my first introduction to a world where systemic pressures drive defenders to be Judge-centered."

I began thinking about that. And I sort of share, you can't hear me talk without seeing this slide, so people like Paul DeWolfe, who has probably heard me talk ten times in the last two weeks because Gideon's Promise is in this great partnersipp with the State of Maryland, and so he's seen this slide more times than he would like to

acknowledge. But I love this slide. It's my favorite painting. It really is not about public defense. But it's all about public defense. It's these robotic legs walking past this homeless veteran curled up in a fetal position and the label just says indifference, the caption is indifference, and it's a simple message, right? We are all bombarded everyday by so much misery and poverty that our defense mechanism is so frequently to just kind of become desensitized. It happens to all of us. It happens to those of us who know better. We have a beautiful ten year old daughter and a six year old son, and my daughter is this ten year old homeless advocate. She wakes up in the morning and she goes into her piggy bank and gets change and puts it in a baggy so when we drive on her way to school down the off ramp, she can give it to the homeless man.

And not long ago, I was walking down the street and there was a homeless man who asked me for a dollar and I said, "I'm sorry," and I kept walking and I felt this tug on my sleeve and I looked down, it's my daughter. And I said, "yes?" and she said, "daddy." And I said, "yes, baby." She says "doesn't that man need a dollar more than you?" And I thought of course, right, it happens to all of us. It's not like she just, you know, she just learned that lesson in school. She gets that from her parents. But we forget the lessons we teach our own children when we go into systems and we go into the world every day that beats that out of us. And it happens to lawyers all the time. Well intentioned lawyers who are overwhelmed, who are forced to look for shortcuts. And it's one thing to look for shortcuts with your eyes open knowing that's what you need to do and being thoughtful about it while you try to change the system. It's another thing to accept those shortcuts as what our clients deserve. And so, that's what I think about when I think about culture.

Steve Bright is going to talk tomorrow and I'm sure he will talk about what's happening in Georgia, but there's

an opening for a new chief public defender in Georgia and the state posted a job announcement and the job announcement listed job requirements. One of the job requirements was you're expected to run an office that handles seventeen hundred cases a year with three lawyers. That's five hundred and sixty-six cases each. The job requirement wasn't, you have to have the passion, the creativity, the thoughtfulness, the advocacy skills to change this. The job requirement was you have to be able to do this, as though this is okay.

I was watching a video of a budget hearing here in Tennessee and there was one of the leaders here in Tennessee was speaking for some of the public defenders [and] was asked a simple question. Do you have enough resources? And he described his situation. He said, "you know, I've got five lawyers in a five county district and we have five courthouses and I've got one investigator for those five lawyers and last year we closed four thousand cases, that's eight hundred cases per lawyer, and he said we're blessed, we have enough resources." And again, I want to be really clear. I don't mean to suggest, if you asked me ten years ago, I might have been really critical of that human being. I'm not anymore. I now believe that is a person who probably came into this work thinking it wasn't okay to process eight hundred cases. But has become part of a system that taught that's what justice for poor people is. And, so, I really try to be less about pointing fingers and placing blame and thinking how can we as a community start to change that justice narrative that is accepted something so far short of what we know clients deserve until we get into a system that beats that out of us.

In D.C. recently, well, not recently, it's been a couple years now, there was a story about a young public defender, and DC is a public defender office, if you don't know about that office, it is sort of a model public defender office. Not because the public defenders there are any

better than any of the public defenders I work with all over the country, but because those public defenders have manageable case loads, they have resources, they have an eight week training program they go through before they even handle a case. They are given, and I don't point to them and say they should have less, they are given what every client deserves and they have worked on changing the culture and educating Judges and educating prosecutors about what you better expect when it comes to advocacy for poor people.

And a couple of years ago, a young public defender in DC was before a Judge and it was a probation violation hearing and her client lost his job and lost his home, and was homeless, and one of his conditions of release was that he maintain a residence and report his address to his probation officer. Well, he didn't have an address. And so the Judge said, "let me ask you one question, counsel, has your client reported his address to probation?" She said, "well, no, but he doesn't." Stop counsel. That's all I need to hear. I'm revoking probation." She said, "Judge, you have to understand. "Counsel, I don't want to hear another word from you. "Judge, but he's homeless." That's enough. One more word and you will be help in contempt." "But, Your Honor." Contempt. She was taken away and put in lockup.

Well, some of her colleges in the courtroom ran back to the office and described it to the office and phone calls started being made and motions started to be filed and the next day all of the lawyers in the D.C. public defender system showed up for work in the courthouse with black clothing and a red armband. They were essentially saying, we as a community aren't tolerating this and as an organization, they stood up to a system and reminded the system that this was a human being and he deserved an advocate. And what was the end result there? A Judge apologized.

Now, I'm not suggesting that will happen all over

the country and that all of a sudden public defenders should show up in red armbands. I'm not suggesting that at all. But what I am saying is this was forty years of changing a culture, forty years of reminding a system of what poor people deserve and the question I think isn't how do we change things tomorrow. It's how do we start reeducating today and it's a long game.

So I'm going to end with a final story, and it's a story about another young lawyer I know, a young lawyer named Janelle. Again, I met her when I was working in Georgia. Janelle in this remarkable lawyer. She came from Brooklyn, New York, an all African American community, and she went to Spelman College for undergrad Howard Law School, both HBCUs, historically black colleges and universities. Came to Georgia to become a public defender, because in her words she wanted to represent people who looked like her. And she joined this program we started which was kind of like a Peace Corps for public defenders where we invited public defenders to come to Georgia and we placed them in places where the need was the greatest and they didn't choose where they went. They agreed for three years to go work somewhere. And she got placed in Bartow County, Georgia. And it's about forty-five minutes outside of Atlanta, but it may as well be a whole other world. And Janelle, she was the only African American female lawyer in the county at the time and she would walk into court and she would describe how weeks into her job she would walk into court with her suit and her briefcase and the Judge would say, "where's your lawyer?"

And she started appearing, she started handling juvenile cases. And she was in juvenile court and she had a sentencing hearing or a disposition hearing and she was going to argue that the Judge could not detain this client because she found a less restrictive alternative in the community, and by statute, the Judge has to go with the least restrictive alternative. And she started talking to some

senior lawyers in the community about that and the senior lawyers said to her, “I wouldn't argue that.” The Judge is going to laugh you out of the courtroom. This is what the Judge does in every case. And undeterred, she started calling some of her colleagues from the Honors Program, which is what we called it at the time, the precursor to Gideon's Promise. And people started talking to her and saying, “of course, you got to make that argument.” And she said, “of course, I do.” And so she sat down and prepared a sentencing argument, and the next day she stood up and she made that argument, [she] describes how she heard snickers in the back, in the background, some of these more seasoned lawyers who thought it was humorous that she was doing this. And she made her argument. And the Judge ended up agreeing with her.

And to this day, some of those snickerers now make that same argument. Right. It's a story of how when we individually can maintain sight of what our clients deserve, and we can become part of a community that understands that and starts to do that and spread that from county across the state across the region across the nation. It's a long game, but we can start to raise expectations so that maybe fifty-one years from now that promise of Gideon will be a reality.

The last thing I'm going to say is this: I really do, I would be remiss if I didn't give a nod to so many of the public defenders I know in the audience and many of you who I don't know, but I do think what you all are doing in Knoxville, Mark, and all of public defenders here in Knoxville, it's not an easy place to practice and I know that you all have case loads that are higher than they need to be and sometimes you walk into courtrooms where you're expected to do less than your clients deserve, but what I've seen in working here and partnering with Mark and with the Knox County Public Defenders Office over the last probably six years now is really just a spirit that is

contagious. Lawyers who don't quit. And I think while poor people in Knox County, surely not everyone is getting everything they deserve in every case, they have an amazing group of advocates. So I just want to end by just giving a nod to the public defenders, and can I ask you to stand because I want to give you a hand, public defenders, all the public defenders, come on public defenders. All right. Thank you. I hope to see some of you at the reception. It's been great.

PROFESSOR RADICE: Thank you so much. So, we have the reception at the Sunsphere. I think it is going to be just exciting and beautiful, and we will be showing the movie around six-thirty, Mark? Six-thirty. So come just for some drinks and some food or stay the whole time for the movie and then everybody, we'll see you eight-fifteen for breakfast tomorrow morning. Looking forward to it.

ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

WYC & LYN ORR DISTINGUISHED LECTURE*

IS MEDIOCRITY THE BEST WE CAN DO?

By: Stephen Bright
Introduction: Penny White

PROFESSOR WHITE: It is most fitting that the Wyc and Lyn Orr lecture this year is part of the “Essential to Justice: A Right To Counsel Symposium,” and it is equally more fitting that the Orr lecturer is Stephen Bright. If I had Ndume's talent and I were to draw a graphic for this introduction, it would consist of three concentric circles, all with the same center and the same common bond. The first circle would represent Wyc Orr, the second, Stephen Bright, and the third, the symposium, and at the core of all three would be the commitment to make good at last on Gideon's promise.

Over the past decade when the law school counted its supporters, at the top of the list has been Wyc and Lyn Orr. Wyc graduated from the College of Law in 1970 and his wife, Lyn, graduated as an undergraduate from UT as well. Their daughter, Kris, who is with us today, does not have a UT degree, but she is an attorney and she practices in the firm that she and her father started in North Georgia. We welcome you, Kris, and we welcome your friend, Angela, as well. Thank you for being here.

The Orr Brown Law Firm, and Wyc and Kris, have a mission of helping others. And because of an uplifting experience that Wyc had when he was a student at the College of Law when the law school hosted Jim Neal as a guest speaker, Wyc and Lyn endowed this lecture series in

* Edited for readability.

order to provide similar opportunities to members of the law school community. The College of Law is grateful to Wyc, to Lyn, to Kris for enabling us to share great speakers like today with our students.

It is really most important that this lecture is held this year in conjunction with the Right to Counsel Symposium because fulfilling the Sixth Amendment right to counsel was at the center of Wyc Orr's professional life circle. The hallmark of Wyc's practice was a commitment to the disadvantaged, a willingness to fight for equality, and a passion for justice. Wyc served on the Georgia Public Defenders Conference, on the Public Defenders Standards Council, and he was an outspoken advocate for adequate funding for public defenders in Georgia. Days before his recent death, Wyc received the Lifetime Achievement Award from Steve's shop, the Southern Center for Human Rights. And so you begin to see the symmetry of this event. In previous years before Wyc's death I would sometimes have the opportunity to talk with the dean, and with Wyc, and with Lyn about who would be a fitting person to deliver the Orr lecture. Wyc often said that hearing Jim Neal changed his life, and so we strive to meet a difficult challenge, to find a speaker who inspired, who was courageous, and who changed lives. Some years, we met Wyc's challenge, bringing as the first Orr lecturer Jim Neal, his personal hero, and then, in later years, Bobby Lee Cook, his friend.

For many, many reasons, I wish that Wyc were here today because he would enthusiastically acknowledge that this year's Orr lecturer is a perfect choice, an extraordinary individual who inspires, who is courageous, and who changes lives.

Stephen Bright is the president and senior counsel of the Southern Center for Human Rights. He is the Harvey Karp visiting lecturer in law at Yale Law School, he is a visiting professor intermittently at Georgia, Chicago,

Emory, Northeastern, Harvard, and he is now the advocate in residence at the University of Tennessee College of Law. Periodically, he is referred to in Georgia as the agitator of the year, and I think he is definitely going to earn that title this year. Don't you, Steve? But Stephen Bright is not a man of titles; he is a man of deeds. Steve's awards and accolades could cover the walls of this room. There is a documentary film that honors his work, books that have been written about him and the lawyers he works with at the Southern Center. He has received the ABA Thurgood Marshall Award, the ACLU Roger Baldwin Medal of Liberty, the John Minor Wisdom Public Service Award, the NACDL Lifetime Achievement Award, and the NLADA Kutak-Dodds Prize.

But Stephen Bright is not a man of accolades; he is a man of deeds. He's written books and dozens of Law Review articles and the titles sometimes make us uneasy, for example, "The Death Sentence Not For The Worst Crime But For The Worst Lawyer," "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases." And he can turn a phrase. He tells us in our criminal justice system it is poverty, not justice, that dictates outcome, and he says America has an inquisitorial system posing as an adversarial system with all the power concentrated in the prosecution.

He's argued twice in the Supreme Court, numerous times in Federal Court, testified in Congress, and made a presentation before the United Nations. But despite his literary gifts and despite his talent for oratory, Steve Bright is not a man of words; he is a man of deeds. When Amy Bach was researching her book *Ordinary Justice* and she and Steve huddled with in a courtroom listening to a judge who could not be heard, it was Steve who stood up and politely asked the judge, speak up, these people have taken off from work, they need to hear what you're saying, you

are determining their future. And just recently when the Georgia Public Defenders Standards Council engaged in a sham application process to keep qualified lawyers from knowing about and applying for the job of Cordele Circuit Defender, Steve Bright not only sued the Council, he applied for the job. So, by his actions, Steve exemplifies what we all know but are sometimes too intimidated to say, that justice cannot flourish when the defense a person gets depends on the size of the person's bank account. He has, by his actions, inspired generations to follow the thankless call of indigent defense. He has, by his actions, demonstrated every day the power of respect and the importance of honoring human dignity. He exposes cracks in the system and he provides the mortar to plug them. And that is why it is most fitting that today, in honor of Wyc and Lyn Orr, the Orr lecturer is Stephen Bright. Join me in welcoming him.

MR. STEPHEN BRIGHT: Thank you, Professor White. When they named me the agitator of the year, I wasn't quite sure how to take that. Dr. Joseph Lowery, our great civil rights leader, the head of the Southern Christian Leadership Conference, called me and told me that he was once called a "racial agitator." Not long afterward, he said he went to visit one of the women in his church who took him to the very back of her house to the room where the washing machine was. She told him that it doesn't matter how hot the water, it doesn't matter how strong the soap, she didn't get anything done there without an agitator. So agitators are necessary not only in washing clothes but in stirring up issues, including some things that are unpleasant, if society is going to get anywhere.

It is great to be teaching once again at this law school. Dwight Aarons and I taught a class a few years ago, and now Penny White and I are teaching a course on the right to counsel. I am honored to be working with one

of the great teachers here, one of the great lawyers that this law school and that the State of Tennessee has ever produced, Penny White. And I have met such outstanding students here. Sarah McKee, who was in the class with Dwight Aarons just a few years ago, went on to be a Prettyman Fellow at Georgetown in Washington, following in Penny White's footsteps, and is now back a public defender in Nashville. I know many of the people that are in the class this year are going to follow a similar path.

I am also also tremendously honored to give a lecture named for Wycliffe and Lyn Orr and that is attended by Kris Orr Brown, his daughter and law partner. Last spring, in the last few weeks of his life, my organization, the Southern Center for Human Rights, recognized Wyc. We thanked him for all that he had done and particularly for his willingness to speak out. Dr. Martin Luther King, Jr. pointed out the value of a person who speaks out and says what needs to be said no matter how uncomfortable it may make the listener. Wyc was one of those people. He spoke out about the shameful quality of legal representation for poor people accused of crimes in Georgia.

It was no secret. Right there in Gainesville where Wyc practiced law, there was a lawyer who specialized in title searches and real estate closures. He was conscripted to do a certain number of criminal cases every year. Every lawyer in town was required to represent a poor person accused of a crime when his or her turn came. There was no compensation. The real estate lawyer finally hired a lawyer and filed a lawsuit seeking to prevent the judges from assigning him criminal cases. He pointed out that his practice was limited to real estate closings and title searches, that he did not have the personality to be a trial lawyer, and yet he was being assigned to represent young men facing tremendous amounts of prison time but he was not competent to do it.

On the third day of a trial in Gainesville, it was discovered that the person sitting at the counsel table beside the defense lawyer was not the person whose case was being tried. The wrong person had been brought over from jail and the lawyer didn't even realize it was not his client. The lawyer said the man kept saying it's not me, it's not me, but he thought he meant that he was not guilty. But it was not the right person who was on trial.

Wyc did everything he could do to expose this kind of representation and see that people accused of crimes were competently represented. He was a driving force on the Georgia Bar's indigent defense committee. Getting the Georgia Bar to do anything about indigent defense is about like trying to move Stone Mountain down to Macon. But he did it. He was head of the Georgia Indigent Defense Council, which allocated what little funds the Georgia legislature would appropriate for indigent defense in the 1990s to counties to improve representation. The county officials would agree to do certain things in exchange for the funding, but many of them just took the money and never did what the Council required of them. But Wyc persisted. Eventually, three consecutive chief justices of Georgia made the right to counsel a priority. One of them appointed a Blue Ribbon Commission and appointed Wyc to it. The Commission recommended creation of a public defender system. The legislature followed the recommendation and created the system which finally started providing representation on January 1, 2005, over 40 years after the Supreme Court's decision in *Gideon v. Wainwright* holding that states must provide counsel to people accused of crimes who could not afford to retain a lawyer.

When he honored, congratulated and thanked him for all that he had done on the evening that we recognized him, he said simply, "I've always felt that if there is going to be a fight, it should be a fair fight, particularly if

someone's life or liberty is at stake. And that is what I am here to talk about – a fair fight for people whose liberty and whose lives are at stake. When people accused of crimes do not receive competent representation and, as a result, it is not a fair fight, the courts lose their legitimacy and their credibility. People do not have faith in their verdicts and their sentences. They do not respect the criminal courts because they are not entitled to respect.

I would like to discuss three things. The first thing is the importance of the right to counsel just from the standpoint of the clients. I offer these comments particularly to the law students who are here. Because the answer to the failure to provide counsel is not going to come from the courts, it is certainly not going to come from judges, it is not going to come from bar associations, although it should, and it is not going to come from legislatures. It is going to come from people who graduate from law school dedicated to making the Sixth Amendment right to counsel a reality and willing to go to places where they are needed to serve people facing a loss of life or liberty. That is who is making the Sixth Amendment right to counsel a reality in this country today – public defenders and dedicated private lawyers. A law school graduate can make a tremendous difference as a public defender.

Secondly, we must recognize the complete failure to enforce the right to counsel over the last 50 years by all our institutions from the Supreme Court of the United States on down. It is more than a crisis; it is a colossal failure to make good on the most basic constitutional right that is essential for fair trials and reliable verdicts. No right is celebrated so much in the abstract and so little in reality as the right to counsel. And every day, from the highest court in the land to the municipal courts that serve as cash cows for their communities, the right to counsel is violated day in and day out.

And, finally, a little more must be said about what can be done to make the right to counsel a reality in these courts. As I said, the judiciary and those responsible for the criminal courts are not going to do it. Many of those courts are courts of profit that bring in thousands of dollars in fines, fees, forfeitures, surcharges and other assessments for their communities. They are worried about moving cases as fast as possible. But these courts of profit are not courts of justice. They are unwilling to spend money to see that those charged are competently represented and fairly treated. Beyond that, the legal profession is largely concerned the incomes of lawyers, even if it means that the legal system fails completely as a dispute-resolving mechanism for the rest of society.

There are times when the bar and legislatures respond to crisis, but there is not the sustained commitment to the right to counsel that is needed for a fair and just system. When Harold Clarke was Chief Justice of Georgia, he described the representation of the poor in one of his annual addresses to the legislature as follows: “We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.” Chief Justice Clarke, a real gentleman who tried to see the best in everything, was being charitable. Because Georgia had never set its sights on the target of mediocrity; it had never aimed that high. It had tried to do a little as it could get away with. *Gideon* came down in 1963, a decade after *Brown v. Board of Education*, when Georgia and other southern states were in massive resistance to the Court’s decision requiring integration of the schools. They paid no attention to a decision that said states had to provide lawyers for poor people accused of crimes. Georgia just left representation of the poor up to its 159 counties, which

were not inclined to pay for representation of the accused. But finally it became so embarrassing and the chief justices kept pointing it out, so the Georgia legislature brought representation up to a level that still wasn't mediocrity, but a little better than what it had been. But then, everyone went home – the Georgia Bar, the new Chief Justice, and others were off to other things even though there was so much more to do with regard to the right to counsel.

You heard yesterday from Ndume Olatushani, who spent time on death row for a crime he did not commit. That is about as good a reason as you will ever hear about why the right to counsel is so important. The best possible guarantee against the conviction of the innocent is a competent, capable, well-resourced lawyer defending the accused. And that is true in cases not quite as dramatic as Olatushani's.

I received a letter not too long ago from a young woman whose apartment had burned – she lost everything except the clothes she was wearing. She lost photographs, her diploma, everything. She worked hard at two jobs, got a place to stay and continued to attend her community college part-time. But six months later she was charged with arson. She was assigned a public defender who recommended to her – as she wrote in all caps – “A PERSON NEVER CHARGED WITH ANY CRIME OF ANY SORT IN MY LIFE, TO TAKE 15 YEARS.” She said, "I declined."

She went on to write,

“My lawyer missed his court dates. I've been to court so many times that I finally lost both of my jobs. Because I have this arson charge pending over me, I can't get a job. I have no place to go. I'm a certified

nurses' aid, but I can't find employment because of this arson charge. I don't know how to fix this. I've asked to be placed in jail because I fear I may take my own life, or I may die from the conditions of being homeless. But my request to be taken to the jail was denied as well.

“The last offer was 10 years and restitution of half a million dollars. I told my attorney, I said I don't care if I spend the next 20 years in prison, I'm not going to plead guilty to something I didn't do. I will never accept the blame for something I didn't do. A guilty plea even with no jail time will ruin my life more than this case has already. It means I will never be able to use my nursing degree, and I will never be taken seriously.”

She already appreciated the collateral consequences of a conviction. She continued:

“I've lost my job. I've lost my dogs. I sleep in my car. I'm now going to lose my car because I can't make the next payment. I'm tired, I'm beaten, and I don't understand how to fight this. My only question is what to

do now when I have no way to care for myself? I just don't want to die without someone knowing what these people have done to me and how I have cried out for the last three years. I'm only 23, Mr. Bright, and I have fought to stay afloat for the last three years. I just want to know what's left for me to do.”

Her whole life was in the balance, as much as if she were facing the death penalty. She could either be convicted of arson and never again be a useful and productive citizen, or she could get the case behind her because she was not guilty of arson and move on and be a nurse, get her degree from college, and go on with her life.

We took her case. I know that innocent people get convicted in arson cases. Todd Willingham was executed in Texas after being wrongly convicted in an arson case. We found a lawyer who had represented insurance companies in arson cases for 30 years, knew about the forensic testing that is done in arson cases and all the leading experts. He provided his services *pro bono*. Within a short time he had taken the prosecution's case completely apart. We met with the assistant district attorney and the lawyer played a video on his laptop showing how quickly the fire could spread and that it started above the ceiling because of faulty wiring, not where they thought it did. He demonstrated that there was no case against the woman. The prosecutors dismissed the case.

And she went on with her life. She was a remarkable young woman. I remember one day when we were in court, and I looked over at Shanna, our client, and she was reading and underlining in her textbook while she

was waiting for her case to be called. Since the case was dismissed, she has worked sometimes 60 hours a week – always 40, but sometimes 60 – taking care of mentally-ill people who need nursing care. She is back in school getting her degree.

Her public defenders could have helped her enter a guilty plea if she had accepted the plea offer. They were perfectly capable of that. They did it all the time. But they could not try an arson case. They did not have a lawyer who knew the arson science, what experts to call, and how to investigate an arson case. The public defenders lacked the time and resources to learn how to defend an arson case – or even to reach out to someone like the insurance lawyer who could have helped them. Other innocent people accused of arson will not receive a capable defense.

Robert Halsey, executed by Georgia in December, 2014, was represented at trial by a lawyer who was about to be indicted, and ultimately convicted and disbarred for stealing client funds. He was so concerned about his situation that he was drinking a quart of vodka every day during the trial. He did not put on evidence of Halsey's intellectual limitations or any evidence that, as a child, he was, as Judge Rosemary Barkett put in her dissent, subject to abuse so severe, so frequent, so notorious, that his neighbors called his childhood home "the torture chamber." The state trial judge who held a hearing on the representation thought it was obvious that Halsey had been denied the effective assistance of counsel and was entitled to a new trial. He granted a new trial, but the Georgia Supreme Court reversed, holding that despite the vodka, the pending indictment, and the failure to present critical evidence, it would not have made a difference.

The Court relied on the U.S. Supreme Court's decision in *Strickland v. Washington*, which allows judges to sweep ineffective lawyering under the rug by saying there is a substantial probability that the lawyer's deficient

performance did not make a difference. When courts make this finding – that it probably didn't make a difference – their legal holding is that there was no ineffective assistance of counsel, despite the scandalous quality of representation. The media reported that the courts found that Holsey's lawyer was not ineffective and that's technically correct under *Strickland* but completely dishonest with regard to the representation that Robert Holsey received. It is a significant way in which the courts hide the truth about how poorly people are represented.

Thurgood Marshall, the one justice who had actually been in trial courts and had tried death penalty cases,²³¹ was the sole dissenter. He pointed out that the Court had adopted a malleable standard that it is in the eye of the beholder – some judges will say it made a difference and some will say it did not. But judges are unable to determine whether bad representation at a capital trial made a difference. They didn't see the witnesses. They weren't on the jury. Yet they make a guess that it didn't make a difference, shrug their shoulders, and send the defendant to the executioner.

Eric Wyatt was arrested in March in Ben Hill County, Georgia. He kept trying to get the public defenders there to talk to him. One of the important roles that attorneys play is in interviewing and counseling clients. Wyatt spent four months in jail and didn't talk to anybody. Finally, he is hauled to court in a jumpsuit and chains. That's the way those accused are treated – like slaves. There is a lot of discussion of re-entry programs. But it is unrealistic to expect that people who are abused by law enforcement, degraded and humiliated by the courts,

²³¹ See Gilbert King, *Devil in the Grove*, a Pulitzer Prize-winning account of the defense of black youths accused of rape of a white woman in Groveland, Florida in the late 1940s by Thurgood Marshall and other lawyers from the NAACP.

brutalized in prison are going to overcome all that in a few months in a re-entry program.

When Wyatt gets to court, a public defender tells him he can plead guilty and be sentenced to 20 years in prison, 10 to serve. There has been no interview with the public defender. No investigation of the charges. Wyatt has been trying to tell them that he is not guilty, but he has been unable to get a public defender to listen. He rejects the plea offer and is returned to jail. Eight days later, he is called from his cell to the front of the jail and told the prosecution has dismissed the case and he is free to go. He would not have been in jail four months if his public defender had talked to him about his case, looked into it, and explained to the prosecutors what they found out later – that there was no case against him. Of course, he is just a poor fellow and no one cares.

Jacqueline Winbrone had a similar experience in New York. She was arrested and bail was set at \$10,000. No lawyer represented her at the bail hearing, and Winbrone, who was the sole caretaker of her husband, could not reach her court-appointed lawyer to seek a bail reduction in order to care for her husband, who needed transportation to dialysis treatment several times per week. Days later, her husband died.²³² Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance – her promise to return for court. Ultimately, the charge against Winbrone – possession of a firearm found in the family car – was dismissed.

We were recently contacted by a man who was arrested for driving under the influence. He was thrown in jail. He had no lawyer. He was taking care of his mother who was in her 90s; he fed her, clothed her, cleaned her, and everything else. Without his care, she died while he

²³² Hurrell-Harring v. State, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

was locked up. These are the consequences that most people never think about. There are no small cases. If you are a lawyer, you can prevent these kind of things from happening.

In Florida, lawyers missed the statute of limitations in the cases of 34 people sentenced to death.²³³ That means that 34 people condemned to die will never have their cases reviewed by federal judges who have life tenure and some protection in following the law that elected state court judges do not have. There is no more basic responsibility of a lawyer than filing within the statute of limitations in any kind of case. If a person cannot file papers on time, that person should not be practicing law. If state bar associations care at all about protecting the public from incompetent lawyers, they should be suspending and disbaring those lawyers. But as long as the victims of such gross malpractice are poor, the bar associations take no interest, even in capital cases.

A lawyer in Houston, Jerome Godinich, missed the statute of limitations in three federal habeas corpus cases in 2009. Both clients were executed. Yet, the Texas Bar took no action, nor did the Texas Court of Criminal Appeals. One would hope that at least the trial judges in Houston would quit appointing him to represent poor people in criminal cases or – at the very least – stop appointing him to represent people in capital case. But the judges kept appointing him so often that he has had 350 criminal cases at one time. One of his clients, Juan Balderas, was sentenced to death in Houston in March 2014. The only way to explain this is, at best, that the judges do not care what kind of representation poor people receive, or, at worst, that judges are intentionally appointing incompetent lawyers to make it easier for prosecutors to get convictions and death sentences. The judges know how bad he is; they

²³³ Lugo v. Secretary, 750 F.3d 1198, 1216-18, 1222-26 (11th Cir. 2014) (Martin, J., concurring) (listing the 34 cases).

would not have him represent a member of their family in traffic court, but they appoint him to represent people facing the death penalty.

In many courts, people accused of crimes are processed in assembly line fashion. When they get to court, a lawyer who they have never seen before tells them about the prosecution's plea offer and tells them to take it or they will get a much more severe sentence. After a conversation of five to fifteen minutes, the defendant pleads guilty, the judge accepts the plea and imposes sentence. This meet 'em and plead 'em processing of people is the utter corruption of the courts. The judge knows, the prosecutor knows, the defense lawyer knows, the lawyers sitting around the courtroom know – everyone knows that there is no legal representation whatsoever of the defendants. It is like a fast-food restaurant – putting on a slice of lettuce and moving it on, putting on a tomato, putting on a pickle, and moving it on down the line. This is not representation.

How could this be? The primary reason is that the government that is trying to convict people, trying to fine people, trying to imprison people, trying to kill people, has no incentive to provide a lawyer to those people who might frustrate its purpose. And so most state legislatures, county commissions, and city councils do as little as they possibly can with regard to providing representation and the courts let them get by with it. And prosecutors take full advantage of the perfunctory representation of the poor. It was not always that when. When Clarence Earl Gideon's case was before the Supreme Court presenting the question of whether a poor person accused of a crime had a right to a lawyer, twenty-three state attorneys general led by Walter Mondale, then the attorney general of Minnesota, filed an *amicus* brief in support of Gideon and the right to counsel. They said if there is going to be an adversary system, then the accused must be represented by a lawyer just as the

government is represented by a lawyers. Today, most prosecutors oppose any efforts to improve representation for the poor and, at least in my experience, they are usually successful.

What do we do about this? I recently applied for the job of public defender in a four-county judicial district in Georgia. The public defender office has three lawyers and a caseload of 1,700 – 566 cases for each attorney. It is a rural area and a lot of time is spent in travel from one county to the others, which gives the lawyers even less time to work on their cases. And the lawyers are incompetent. One wrote a letter to one of her clients who had told her he wanted a preliminary hearing asking the client to write and tell her why he needed a preliminary hearing.

I applied for this job because I am so discouraged that so little is being done about a problem that is so great and an issue that is so fundamental to how human beings are treated in the courts. I have gone to a lot of meetings; I have written some articles; I have testified before Congressional and state legislative committees; our office has published some reports on the problems; and we have filed some class action lawsuits seeking to improve things. But I feel like we are not accomplishing anything. We must to go to the places where we are needed and make the right to counsel a reality in those cases. Law students, upon graduation, must go to the places where the need is, where people are languishing in jail without lawyers, and provide representation.

In response to my application, I was interviewed by two senior lawyers who practiced in the district. They asked me how, with two other lawyers, I was going to handle all of the cases. I said we're not going to do it. It is impossible. There are four counties and each one has an adult court, a juvenile court, and a jail. Three lawyers

cannot be in all those courts and all those jails and provide people with real legal representation.

“Representation” is a term of art. It involves much more than meeting and pleading people guilty. It involves interviewing each client – some, particularly those with intellectual limitations or mental illnesses – will require several interviews. It involves counseling each client and answering the questions they have, learning about their backgrounds, developing a sentencing plan if the client is convicted. It involves investigating – obtaining police reports and other documents and interviewing witnesses. It includes looking into whether there are any legal issues in the case and raising them in motions and other pleadings such as requests for jury instructions. It involves being as familiar as possible of the prosecution's case, getting discovery asking for any exculpatory evidence. I told them that just relaying a plea offer from a prosecutor to a person, that is not representation. And the Sixth Amendment requires representation. If we cannot provide representation because of the number of clients we already have, we must decline taking any more cases.

There is also the ethical responsibility to accept a case only if the lawyer can represent the client competently. Every lawyer is bound by this ethical requirement. A lawyer who had 300 clients and is asked to take another one is going to have a choice of neglecting some of the existing clients to represent the new one, or giving short shrift to the new one in order to continue providing representation to the clients the lawyer already has. And so, not being able to do one of those things, we would have to stop taking cases that we could not handle competently. They would need to find lawyers from somewhere else to take the cases until we got the public defender office to where it needed to be. Obviously, it needed a lot more lawyers – at least twice as many as it now has – and it needs investigators. It became clear that I am not going to

get that job. Because the decision that is being made there and the decision that is made all across this country is to minimize costs, not meet the requirements of the Sixth Amendment and the ethical responsibilities of lawyers. The decision is to process people through the courts, give them a few minutes with a lawyer and call it representation.

This corruption of the courts, this treatment of the poor has some serious repercussions beyond the harm done to the accused, their families and their communities. There has been a great deal of concern about white law enforcement officers killing unarmed black men in Ferguson, Missouri, Staten Island, Cleveland, Milwaukee and other places. There have been demonstrations and even some riots, as there were in the 1960s in response to police shootings of blacks. People of color know they are being abused all the time by law enforcement. All over this country a person of color is more likely than a white person to be stopped by the police, more likely to be abused during that stop – knee in the back, chokehold, gun pointed, made to sit in squad car, handcuffed – more likely to be arrested at the end of that stop, more likely to be charged with a more serious crime and denied bail, and more likely to be treated more harshly all the way through the court system. The courts are the institutions least affected by the Civil Rights Movement. The courts are not much different now than they were in the 1940s and 1950s. The judges are white. The prosecutors are white. The defense lawyers are white. Even in communities where 35 percent of the population is African-American, the jurors are all white because the prosecutors are striking all the blacks from the jury. The Supreme Court decision in *Batson v. Kentucky*, which was supposed to prevent discrimination in striking juries, may as well not exist. Many people of color know this system is not legitimate. They know they will not be treated fairly there. They are being marginalized and they realize they are being marginalized by the very institutions

that are supposed to uphold order and the rule of law. And that mistreatment coupled with the lack of legitimacy and credibility of the courts produces distrust, bitterness, hopelessness, and desperation. People feel that they are outside the system – denied its protections and subject to abuses from it – and outside the larger community.

There are things we can and must do – large and small. We must keep bringing lawsuits to make “representation” a reality. Mark Stephens, the community public defender in Knox County, has filed two lawsuits. The first one declared that his office could not represent all the people who were entitled to representation and the courts appointing the mayor of Knoxville, a Congressman, and some other prominent lawyers and almost immediately there was funding for public defense. More recently he filed a lawsuit about caseloads. He may have lost the suit, but when it was over his staff had grown substantially and the number of cases had been reduced. Public defenders in Missouri and Florida have brought suits to limit caseloads, but, unfortunately, many public defender offices are not independent and cannot bring such suits.

My experience in Georgia demonstrates that the people in control of public defense in that judicial district are not going to hire anyone who would challenge caseloads. The same is true for the entire state. The director of the public defender agency in Georgia serves at the pleasure of the governor. His main concern is that no one in the public defender agency do anything that might aggravate the governor, not zealous representation of poor people accused of crimes. If a public defender challenged case loads in Georgia, he or she would be fired and the case would be over.

Georgia had an independent system briefly, but it was too much justice for Georgia. Wyc Orr was on the board when the public defender agency was created in 2004. He and other members of the board cared about

representation. They would go to the legislature and say we cannot do the job with the funding provided. After about five years, the legislature amended the statute and gave the governor the power to appoint a majority of the board. He put people on it that cared little about right to counsel and more about limiting expense. So any lawsuit to enforce the right to counsel in Georgia is going to be brought by an organization like the Southern Center for Human Rights because the public defenders are not able to do it.

Gideon's Promise, the program directed by Jon Rapping, is critical to making the right to counsel a reality. One of the great challenges is to overcome the culture in places where it has become acceptable to process people through the system instead of representing them. Gideon's Promise is teaching law school graduates how to represent the poor in criminal cases. It teaches more than trial techniques. It teaches the attitude that one must have to be an effective public defender. It is producing the people who will refuse the 300th case or the 156th case when they can no longer represent clients competently and ethically.

The question for real representation and for fairness for the accused is an enormous issue, bigger than any one of us. The struggle has gone on for generations and will never end. But as Dr. King said, we stand on the shoulders of others so that someday others will stand on our shoulders. Those of you who are now students can make a huge difference in the lives of people like Shanna Shackelford, Eric Wyatt, and Jacqueline Winbrone. You can get people released on bail so that they keep their jobs, their homes, and their means of transportation. You can keep them from becoming a street person. You can keep them alive. Of course, you are not always going to be successful, but that is one of the things that makes being a public defender such a high calling, right up there with kindergarten and elementary school teachers and people

who run soup kitchens and other people who serve those most in need.

A doctor who was reflecting on treating Ebola victims, said that one of the most valuable lessons he had learned as a doctor was what you could do for patients when there was not anything medicine could do for patients. The same can be said for what a lawyer does when there is nothing the law can do for them. A lawyer can still be there to be their confidant, their friend, their supporter, the person who's there for them when no one else is.

My friend William Neal Moore was sentenced to death a long time ago, and when the judge sentenced him to death, he said, "Mr. Moore, you will be taken to the Georgia State Prison and so many volts of electricity will be run through your body on September the 20th until you're dead and may God have mercy on your soul. Sheriff, take him away, take him away." His lawyer never told him that there was an automatic appeal. He never told him that he was not going to be executed on September 20th. So Billy thought he was going to be executed that day. As the day is getting closer, he is writing his sister and his mother in Columbus, Ohio. There is nobody with him in Georgia. But when the day came, he was not taken off to be executed. It is not hard to see the value of a lawyer as a counselor, talking to him and letting him know that they would be an appeal and explaining the whole review process in the state and federal courts. About all the reasons to hope – for a reversal in the courts or, as in Billy's case, commutation of the sentence by the Board of Pardons and Paroles.

The law is a system of oppression that masks a lot of cruelty. But being a lawyer can be a helping profession, just like teaching school, like practicing medicine was at one time. People who are committed to that old-fashioned notion of practicing law – the client-oriented, the family-

oriented lawyers with a good “bedside manner,” – who are reaching out to people, and doing it every day, despite all the setbacks, are in some small way taming some of the savagery and the corruption of the system and making the world a little more gentle, a little more humane, and a little more decent for all God’s children.

