

***MORE THAN MEETS THE EYE:***  
***Rethinking Assessment, Competency and Sentencing for***  
***a Harsher Era of Juvenile Justice***

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#### AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER

The American Bar Association's commitment to improving the nation's juvenile justice system spans well over two decades. Beginning in the early 1970's with the creation of the comprehensive, twenty-four volume set of IJA/ABA Juvenile Justice Standards, the American Bar Association has been a central voice in promoting thoughtful and balanced juvenile justice system reform. The Juvenile Justice Center seeks to disseminate relevant and timely information, provide training, technical assistance, research, model program design, standards implementation and advocacy. The Juvenile Justice Center responds to a vast assortment of issues and provides guidance to state and local bar associations, juvenile defense attorneys, prosecutors and judges, youth workers, legislators and policy makers. The Center, and its active Juvenile Justice Committee, are housed with the American Bar Association's Criminal Justice Section.

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## ***AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER***

Building upon its work embodied in the report *A Call for Justice*, the Juvenile Justice Center seeks to improve both access to counsel and quality of representation for juveniles through its Due Process Advocacy Project. The Due Process Advocacy Project provides training, technical assistance, networking and advocacy for juvenile defenders across the country. *More Than Meets the Eye: Rethinking Assessment, Competency and Sentencing in a Harsher Era of Juvenile Justice* is presented in response to a lack of information for juvenile defense attorneys on these vital issues.

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# *FOREWORD*

In every state children are prosecuted as adults and receive adult sentences for offenses for which they would have been placed in juvenile facilities a few years ago. There are more children incarcerated with adults and facing confinement until middle age than ever before in this country's history. Juvenile arrests have gone down for several years, but citizens are fearful that crimes are getting worse.<sup>1</sup> Crime is blamed on teenagers, although they consistently comprise less than 20% of all arrests: 9% of all murder arrests and 13% of all drug arrests in 1995 were juveniles. Theft remains the highest volume offense category for juveniles. While other categories of juvenile crime have decreased, handgun killings by young people -- usually in their own neighborhoods -- are on the rise. Although small in number, armed violent offenses by juveniles have caused increasingly punitive responses by courts and legislatures against all young offenders.

Child advocates know that the seriousness of the crime does not make a child an adult and that children will be made worse by incarceration in adult facilities. But attorneys representing juveniles and the experts hired to assist in dispositional planning are not prepared to respond effectively to the criminalization of children's offenses. Tackling transfer/waiver hearings, criminal trials and sentencing hearings for young people requires strategies different from those in juvenile or family court.

This monograph is designed to strengthen representation of juvenile offenders. The first chapter encourages attorneys to arrange a specialized evaluation to present the young person in a developmental context. Specialized evaluations should tell the court where the child is developmentally and if an immature thought process influenced the offense. The expert should describe what areas of developmental growth remain for the child, in anticipating consequences, making choices and applying moral values. Specialized evaluations should describe what services would help this developmental process and what conditions -- particularly an adult sentence -- would impede it. The checklist at the end of the first chapter can be used by attorneys to request specialized evaluations for juveniles.

The second chapter presents competency issues: a new concept for juveniles because they are in adult court, and potentially a much broader subject than adult competency. Immaturity and a lack of understanding of how their decisions affect their future compromise adolescents' ability to assist in their own defense. Despite the dramatic rise in juveniles facing waiver/transfer hearings or being "direct filed" by prosecutors in the criminal system, courts have been slow to recognize the importance of children's competency. In the course of doing the evaluation described in the first chapter, the expert (who must also be skilled at assessing juveniles' competency) may conclude that the child is too immature to participate in his/her defense. Attorneys must prevent the criminal court from handling an incompetent child as they would an adult -- incarcerating him/her to restore competence is not a sensible way to address immaturity. Instead, finding a juvenile not competent would logically lead to the case being handled in juvenile, rather than criminal court. If the juvenile is found not competent for a transfer or waiver hearing, the specialized evaluation initiated to prepare for those hearings will be useful to achieve a juvenile disposition that meets the child's needs and protects the community.

The third chapter describes individual sentencing plans for juveniles prepared by social workers and other non-lawyers. Sentencing professionals who have worked with adults in criminal court are skilled at putting together combined treatment and punishment proposals. These juvenile dispositional/sentencing plans are necessary given the current punitive orientation of courts toward juveniles. The juvenile dispositional/sentencing plan elements presented in the third chapter provide advocates with a framework for assisting in the representation of children, whether they work within a public defender's office, with a sentencing program, or as private practitioners, and are advantageous for juveniles at risk of long incarceration.

## CHAPTER 1

### ***EXPERTS FOR JUVENILES AT RISK OF ADULT SENTENCES***

*by Dr. Marty Beyer*

*I had one of those psychological tests. As soon as I got there, he did all the talking. Maybe if he had listened to me more, he could have found out more about my problems. In the end, it just made me feel crazy.*

*--Steve B., 15-year-old committed to a secure  
juvenile facility*

Mental health professionals have an ethical obligation to help courts, the media and the public understand that committing a serious crime does not make a child an adult. While those uninformed about child development have persuaded themselves that it is reasonable to punish 12, 13, 14 and 15-year-olds as if they were adult criminals, experts must present what is known about cognitive and emotional growth during adolescence. It is not acceptable to complete standard psychological testing on children and allow the results to be misused in the adult criminal process.

Experts must inform the court where the child is developmentally, what developmental steps remain and the child's likely response to treatment. Instead of concentrating only on pathology, an evaluation that identifies the child's strengths will assist the court in seeing the aspects of each child that can change. As well as identifying the child's needs and what services would meet those needs, experts should render an opinion about how a child was thinking at the time of the offense and about the family, educational and social factors that contributed to the child's decision-making process. Experts have a continuing responsibility to insure that children's needs are met, even when courts and the media insist on a simplistic paying-for-the-crime focus.

Instead of making a referral for a standard psychological, psychiatric or educational evaluation, lawyers representing children should request specialized expert assistance in preparation for transfer or waiver hearings and adult criminal proceedings.<sup>2</sup> Lawyers can tailor the checklist at the end of this chapter to request a specialized evaluation. Evaluators provide more effective reports and testimony when they develop their evaluation of a child in response to specific questions raised in the attorney's request.

Experts evaluating children in preparation for transfer or waiver hearings and adult sentencing hearings may give their opinions on the following, which are discussed in this chapter:

*Mental health professionals have an ethical obligation to help courts, the media and the public understand that committing a serious crime does not make a child an adult.*

*Instead of concentrating only on pathology, an evaluation that identifies the child's strengths will assist the court in seeing the aspects of each child that can change.*



*Instead of making a referral for a standard psychological, psychiatric or educational evaluation, lawyers representing children should request specialized expert assistance in preparation for transfer or waiver hearings and adult criminal proceedings.*

- Characteristics that make this individual a child
- The needs of this child
- The services that would meet this child's needs
- The risks of adult corrections for this child

In advising the court about the child's amenability to treatment, evaluators should not present information they do not verify. Often the "social history" in reports about a juvenile contains inaccurate, superficial material about the child's family, peer relationships and prior participation in programs. Assessing the child's attachments is difficult when the evaluator cannot observe the child with family members and certainly requires interviewing the family (a step surprisingly omitted in many evaluations). Much has been made of the importance of having a "reliable, caring adult" for positive child development, but this assessment is fraught with culture and class bias and requires the evaluator to tune in sensitively to the unique connection between a child and extended family members. For example, evaluators should avoid premature conclusions about a child growing up "fatherless" or without positive adult role models -- this is a subject which children are often reluctant to talk about because of their experience of negative labeling by culturally insensitive professionals. Similarly, instead of accepting a law enforcement conclusion that a child is gang-involved, the evaluator must be sophisticated in assessing the role of peers in this child's life in the context of what is known about the evolving need to belong in adolescence.

In presenting these opinions, in addition to clarifying child development research, mental health professionals have an obligation to inform the court about the culture-bound nature of standardized tests.<sup>3</sup> Often traditional evaluations rely on tests with limited reliability and validity; there is no basis for concluding they accurately assess intelligence or personality characteristics of children who are not middle-class Caucasians. Experts must use extended clinical interviewing, family sessions and approaches that are less class- and culture-bound to get a full picture of the child's needs. Particularly where the developmental factors contributing to the offense may be misinterpreted by those of a different class and culture than the child, experts must strive to present a more accurate view from the child's shoes.

#### **CHARACTERISTICS THAT MAKE THIS INDIVIDUAL A CHILD:**

*"WHERE IS THIS CHILD DEVELOPMENTALLY?"*

Too often, evaluations are written with the expectation that the reader will interpret them in the context of the particular child's development. For example, a 13-year-old during his first stay in a secure detention center where he is the youngest resident is administered the MMPI and has

scores reflecting anger and paranoia reported in the evaluation. The evaluation further reports that an individual with these scores has an increased likelihood of impulse control and authority problems. The evaluator knows that similar scores for a middle-class adolescent evaluated in the office after school would have considerably different meaning. The evaluator is also aware of the shortcomings of the instrument: the possibility of measuring reactivity to environmental conditions rather than constant dimensions of emotional life, its limited value in predicting future behavior and its culture-bound questions and interpretations. But these limitations are not usually presented in the evaluation report. Consequently, the judge and others who are less informed about child development typically misunderstand the evaluation to indicate that elevated anger and paranoia are fixed, precise measures of this child's dangerousness.

The evaluator's job is to educate others about child development by presenting information about this child in at least the following areas:

- Thinking like a child at the time of the offense
- Moral development
- Whether previous services were sufficient to meet needs
- Gender-related needs
- Cultural needs
- Recovery from early trauma and its effect on the offense
- Unmet special education needs
- Substance use

Doing so requires skill at listening to adolescents. The evaluator cannot be put off by adolescents' anxiety and must know how to help them relax so an accurate picture of the needs underlying their behaviors emerges. Interviewing techniques that allow the adolescent's telling of his/her own story to drive the discussion can assist the evaluator in appreciating the child's experience. Carefully getting behind the child's story without causing defensiveness allows the evaluator to see the reality known only by the child, within his/her unique family and cultural context.

Increasingly, evaluators are also being asked to determine a child's competence to stand trial in adult court. This is a complex determination unfamiliar to evaluators who previously interviewed children in the juvenile court context. "When society punishes adolescents like adults, due process [includes]...the right not to be tried unless one is competent to participate in a defense. Applying this protection to adolescent defendants, however, raises questions that have received little attention until recently. Do adolescents have the capacities of adults to understand their legal cases and potential consequences?"<sup>4</sup> For children, determining competence to stand trial would require not only evaluating mental illness and intelligence, but also assessing the impact of immaturity on their ability to

assist in their own defense. While some of the material presented has value in assessing the child's ability to participate in his/her defense, determining competency is not the focus of this chapter (See Grisso chapter). Asking an expert to render an opinion about competency is different from requesting an evaluation of the thought process, needs, and developmental window for change for a particular child.

### *1. Thinking like a child at the time of the offense*

During adolescence most children gradually expand their awareness of the outcomes of behavior. The child's thought process is characterized by irrationality, reacting to fear without thought, and being surprised afterward by the outcome. Children frequently say, "It happened so fast, I couldn't think." Children usually view as "accidental" the unintended consequences of actions that adults could have predicted would have a bad outcome:

*"David's"<sup>5</sup> recollection of the fight is typically adolescent in several respects. First, he felt very threatened. He reported always being short and unathletic, and he was terrified because he was much smaller than his attacker who was a varsity football player drunk after a victory celebration. He was also frightened by the racist comments made by the victim before the fight. David described being "scared, not mad." This fear interfered with rational thought. Second, he thought they would walk away and was surprised when they started fighting. Third, he started carrying the knife as a preventive measure--he had not thought any further than looking like he could protect himself, given the increasing racial pressures he had encountered in the community. He had no plan to use it. He had not thought about the kind of wound it could inflict. Fourth, he used the knife in desperation because he was being strangled and believed he was about to pass out. Fifth, he thought the knife would only nick his victim. Because he was being choked with his shirt pulled over his head, David reported not being able to see what he was doing with the knife. When his victim let David go and walked away, David was surprised that his victim had been hurt. This is a typical adolescent thought process: he did not think about the possible consequences of behavior. It was only after his victim fell on the ground outside the school that David saw his responsibility for the unexpected outcome of carrying a weapon. In his statement to police, David's adolescent thought process was apparent: "It was just not to be used as a weapon, but usually when someone sees a knife, they run...they wouldn't try and attack you...I had no plans to draw it..." A 14-year-old first offender, David lost his first transfer hearing to adult court on a homicide charge.*

*Children usually view as "accidental" the unintended consequences of actions that adults could have predicted would have a bad outcome...*

The evaluator recognizes both that the outcome of David's desperate actions is tragic and also understandable. While the above description might sound like a strong case for self-defense, in fact David was charged with

premeditated murder. He was an African American who carried a knife to a school function in a white middle class community and killed a white student, and petitions were circulated for him to receive the death penalty.

Several aspects of thinking like a child during the offense should be explored in depth by the evaluator: (1) magical thinking; (2) self-protection; and (3) planning. The child development expert's view of these aspects of cognition may be substantially different from the layperson's. All three contribute to the expert's understanding of whether the child's actions could be considered "willful."

Magical thinking is a uniquely childlike inability to approach situations with an adult decision-making process. The child's wish becomes his/her reality. David's thought that he would only scare his attacker and that the whole incident would go away was a wish characteristic of young adolescents under stress. The child feels cornered and is incapable, because of immaturity, to think of any way out except a "bargain" that overwhelms his/her moral values and distorts things the child would otherwise know are true. In the same situation, an adult would be able to see a non-magical way out. At the moment when David was first grabbed by the older student, he was developmentally incapable of seeing how to get out. His magical thinking made him believe the only way out was "nicking" his attacker with a knife even though before the fight he (a) thought hurting people was wrong and (b) knew stabbings usually cause injuries and have legal consequences. An adult, on the other hand, does not wish away the consequences.

Self-protection from the child development perspective is different from demonstrating self-defense in a legal context for adults. The egocentrism of adolescents exaggerates their sense of danger. Children's fears are typically overpowering and irrational. David's fear that the large football player was going to strangle him to death interfered with his thinking. For children of color, females and victims of physical or sexual abuse who have felt threatened before, self-protection is understandable even if, after the fact, an adult's assessment of the actual danger facing the child was that it was minimal. Each child has a unique personal reality defined in part by trauma. If the evaluator is interviewing a child who was previously victimized, his/her view of self-protection from harm in other situations as well as during the offense must be carefully explored. Evaluators must be cautious about determining that a child behaves in a "predatory" manner. The evaluator must look behind a horrifying crime to see if the child became aggressive in response to a threat (perhaps something that is a unique trigger for him/her because it resembles past victimization). Understanding how that response cycle pre-determines the child's behavior in certain situations is the key to identifying treatment to help the child

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*For children of color, females and victims of physical or sexual abuse who have felt threatened before, self-protection is understandable even if, after the fact, an adult's assessment of the actual danger facing the child was that it was minimal.*

think and react differently to threat in the future.

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Planning is weighed by the court as the determining element of premeditation by adults, but child development experts view planning differently. Children operate with much more limited choices than adults. Stress constricts their choices even more. Adolescents are developmentally limited in their ability to plan because of their fluidity of time and structure. Five minutes before his victim made racist comments and locked him in a hold, David's "plan" was to continue to hang out at the party with his friends. He did not "plan" to use his weapon, but he carried it because of his fears about walking across town at night after school affairs. Most adults would respect the boundary of a school party and not bring a weapon. Children often fail to plan or anticipate and get caught up in events that happen to them. Present-oriented thinking may be all a child is capable of. The prosecutor's argument, based on adult cognitive processes, was that carrying a weapon demonstrates intent to use it. In identical situations where adults see clear-cut choices with consequences, adolescents may believe they have only one option. The high incidence of adolescent suicides demonstrates this tendency to operate with an all-or-none mindset. Not seeing choices is developmental, and choice-making experience is more limited for youth with few opportunities and those with lower intelligence. Sensation-seeking or risk-taking behavior characteristic of adolescents is a component of choice-making. Difficulty in managing impulses, or limited "temperance," is a normal aspect of immaturity, which should be the context for the evaluator's presentation of a particular child's judgment or planning ability.<sup>6</sup> Furthermore, maturity of judgment varies in the developing child, depending on the demands of the situation.

*Not seeing choices is developmental, and choice-making experience is more limited for youth with few opportunities and those with lower intelligence.*

## *2. Moral development*

The media's portrayal of teenagers as amoral predators, which has fueled the adult criminalization of delinquency, is unsupported by research.<sup>7</sup> The evaluator must explore the values of the child and his/her moral development. One approach is to modify Kohlberg's technique of presenting dilemmas to children to assess their moral development.<sup>8</sup> These dilemmas are brief descriptions, appropriate to the youth's experience, of situations in which a person has to make a difficult decision. Although Kohlberg's original dilemmas are culture-bound and designing dilemmas within the experience of the child being evaluated is unstandardized, moral dilemmas appear to be an accurate barometer of the youth's sense of right and wrong.

Magical thinking may result in a momentary loss of children's ability to apply their values, but moral dilemmas can uncover their true view of right and wrong:

"Alonzo" is advanced in his moral development, recognizing not only laws and social rules but also principles of mutual respect. He has a strong conscience and believes he and others should abide by the values he learned in church. When presented with a series of moral dilemmas, his responses were thoughtful. Responding to a hypothetical about an teenager left by a drug-addicted parent to care for an infant sibling, Alonzo was resourceful in coming up with a range of alternatives when asked if the teenager should steal milk. His immediate response was that the teenager should leave the baby with a reliable adult and find work. Before the teenager received his first paycheck, Alonzo thought he should borrow money for milk and promise to pay it back. He was convinced that the teenager would not have to resort to stealing because he could get help from family, friends or a church: "Stealing is always wrong. If the teenager was sure he wouldn't get caught, he might consider stealing out of desperation, but if he thought through the possible consequences like going to jail and being separated from the baby, he wouldn't steal." When asked about the morality of famous athletes, musicians and politicians he had heard of, Alonzo talked about greed being wrong and how self-indulgence corrupts. He was troubled that "people at the top always bring themselves down. Why not enjoy it and share what they have? Why kill themselves with drugs or bad decisions?" He believed there is a way to have a comfortable life and not be greedy. Alonzo said music stars and athletes should donate a building to a hospital or set up a program for children from their old neighborhood. Responding to a moral dilemma faced by a teacher with a student who repeatedly had bruises but did not want to be placed in foster care, Alonzo's first response was that the teacher should call protective services because the child would be better off in a foster home instead of being abused: "He's just scared because of what he doesn't know about the foster family." Then he said that a child who had lived with his mother for eight years would miss her, and the mother should go to counseling to learn not to beat the child so he could return to her. Alonzo said that if the mother could change in counseling, it would be best for the child to return to her. If the mother did not improve and he stayed in a foster home and the foster parents loved him, Alonzo thought the child could recover from having been hurt.

Alonzo's girlfriend was from a different social group than his, and he was beaten up several times on the way to and from school by friends of her former boyfriend trying to end the relationship. Alonzo started carrying a knife with the hope that his enemies would stop attacking him. Nevertheless, it is difficult, from the perspective of middle-class adult values, to understand how Alonzo, who knows right from wrong and has strong moral beliefs, could arm himself at 15. Alonzo said:

*I have never considered robbing someone or stealing. I know that's wrong. Weapons are for unavoidable situations when you have to protect yourself. When it's him or me. Adults really don't understand how threatened kids feel every day. The only way to make it is to act tough, so everyone knows not to mess*

*with you. In school everyone has to stand their ground and be big and bad. Everyone is trying to prove they are better than everyone else.*

*The evaluator must recognize the purposes served by misbehavior by stating them as needs that can be met in other ways. The evaluator must include the child's closeness to family members in presenting the child's needs. The evaluator must put the child's learning difficulties into clear-cut needs statements. The evaluator must identify the child's unique strengths and how they can be built on to support the child's development.*

Although the injury did not require stitches, because Alonzo used his knife when he was "jumped" by his girlfriend's former boyfriend in the school hallway, he faced a transfer hearing to adult court. Even with otherwise strong moral values, Alonzo's experience made him believe that sometimes an unavoidable wrong was necessary to protect himself and others. To assess the child's moral development the evaluator must understand his/her family's values and social environment.

### *3. Whether previous rehabilitative services were sufficient to meet needs*

Another argument for prosecuting children as adults is the assumption that delinquents cannot be rehabilitated. The evaluator must identify the child's needs and examine whether the services provided to date have met the child's needs (later the evaluator should describe what services are necessary to meet the child's needs and in what juvenile or adult facilities these services may be offered). Seeing children's needs requires careful observation and listening to the child and family members. Instead of stating the child's basic needs and then thinking about services, a shortcut is often taken in case planning and services are confused with needs: "Child needs tutoring" or "Child needs counseling." These are services, not needs. Regardless of the services that are available, it is essential to itemize specifically the child's emotional, educational and other needs.<sup>9</sup> The evaluator must recognize the purposes served by misbehavior by stating them as needs that can be met in other ways. The evaluator must include the child's closeness to family members in presenting the child's needs. The evaluator must put the child's learning difficulties into clear-cut needs statements. The evaluator must identify the child's unique strengths and how they can be built on to support the child's development. For example, Alonzo was abused and neglected by his mother and kept from seeing his father; he became an angry child and an underachiever in school. Alonzo's needs include:

- To learn that everything he does is a choice and to learn how to make choices that benefit himself and others, even under stress
- To change his self-talk so he can separate the present from the past, feel less depressed and respond in ways that benefit him when he feels victimized
- To make peace with his parents' abandonment and value the strength as well as seeing the weaknesses of his family
- To have opportunities to develop and value his talents

- To be treated by others as intelligent and to make more positive use of his decision-making abilities
- To be helped to find a future goal for himself that he believes in

Once the evaluator has specifically stated a young person's needs, possible treatment to meet those needs should be suggested.

In some cases, interventions have not been designed to meet the child's unique needs and have failed. The court's question is, "Does the failure of past treatment demonstrate that this child cannot be rehabilitated?" To answer this question, the evaluator must itemize the child's needs, examine whether the services provided met those needs and suggest services that are likely to meet those needs.

*"Trina" became pregnant at age 13 while living in a group home. She had previously been in several foster homes and received outpatient counseling after disclosing her alcoholic parents' physical and emotional abuse. Trina was difficult to manage in all her placements. Reports in her record are full of negative comments about behavior that is understandable given her history. Adults disliked her hypochondria and her displays of anger, which are common characteristics of abused youngsters; the record indicates a tendency of treatment providers to be punitive toward Trina rather than giving reassurance and teaching her new ways to respond when she felt threatened. Trina was criticized for "flip-flopping" between maturity and childishness (typical of children of alcoholics). In group care, the provocations of other needy children brought out the worst of Trina's attention-seeking and controlling behaviors and led to power struggles with adults. She was placed in a maternity home and ran away with her infant, living with friends and on the street. Trina was indicted as an adult after her boyfriend shook her 11-month-old baby who died.*

The evaluator found that at 15 Trina was a child with unmet needs and suggested how services could be provided in a way that addressed her needs:

*Trina needs to learn that her outbursts, which others consider an overreaction, tap into a reservoir of unresolved anger from her parents' abuse and rejection. She describes herself negatively as 'stubborn,' but it appears that being in control of even small things has been functional--she has survived a traumatic childhood with many strengths. Because being in charge has made Trina resilient, it is essential that caregivers, however well-motivated, not be too controlling.*

The evaluator also suggested services to address Trina's long-standing, untreated depression which had worsened after the loss of her baby. The evaluator concluded that Trina would respond to treatment provided in a different way than in the past.

*The court's question is, "Does failure of past treatment demonstrate that this child cannot be rehabilitated?" To answer this question, the evaluator must itemize the child's needs, examine whether the services provided met those needs and suggest services that are likely to meet those needs.*

*Racial oppression and difficulty in finding a positive identity when a young person's culture is not valued result in special needs.*



#### 4. Cultural needs

Racial oppression and difficulty in finding a positive identity when a young person's culture is not valued result in special needs. In the following example, the cultural context of the young person's identity struggle was seen as the key to understanding the intoxicated 16-year-old's accidental shooting of his friend, for which he went to a waiver hearing:

*"Darrell" has grown up in a conflict between middle-class values and a violent neighborhood. He has close relationships with his parents, who are separated and both work in government jobs. In his loving family Darrell has developed strong moral values, and he has been raised to be caring and well-behaved. He is an only child and describes himself as spoiled. He is protective of his mother and has wished for a long time that he could earn the money to help his mother move to the suburbs. Despite his upbringing, Darrell has been attracted to the excitement of his neighborhood. The dream of easy money and the image of young hustlers impressing girlfriends with their cars enticed Darrell. He was an obedient "nerd" in a college preparatory program who successfully hid his dabbling in illegal activities from his parents, teachers and classmates. Darrell also denied his risk-taking to himself. Even getting shot leaving a concert at age 14 did not make him honest with himself about how involved he was in dangerous activities. He describes himself as a "basically good person with a nice personality who knows right from wrong, but with a bad part that comes out with alcohol." Darrell viewed his excessive drinking on weekends as benign adolescent partying. Darrell is struggling with his definition of himself as a man and minimizes how difficult it is to choose against the popular image of success. Caught between the values and hopes of his parents and the attraction of partying and hustling, Darrell tried to satisfy both by denying his internal conflict and the wrong he was doing. He never saw it as an available choice to be simply a college bound student. Darrell feels sad about and responsible for the death of his friend when they were drunk and "playing" with his friend's gun. He does not see his partying and attraction to hustlers in his neighborhood, which culminated in the shooting, as an identity struggle.*

Darrell's identity struggle is typically adolescent, but it is made more complex by the cultural context: he needs help figuring out how to be satisfied with himself as a middle-class African American college-bound male.

#### 5. Gender-related needs

The offenses of some young women and some gay and lesbian youth can only be understood in the context of gender-related needs. Young people who were sexually abused also have special needs that must be met in designing services.<sup>10</sup>

*"Jenny," a 14-year old who set fire to her house which killed her mother and sister, had been sexually abused for years and prostituted by her mother in their home. Numerous calls had been made to protective services with no follow-up. Jenny was desperate to be removed from her mother and started the fire in order to get placed in a foster home. She later said she assumed the fire department would arrive and her mother and sister would escape; she never imagined they would die. Jenny was deeply troubled by years of maltreatment at home, and she had special needs that resulted from her sexual abuse, her view of her body, her difficulty getting attention in other than sexual ways and her guilt for killing her mother and sister.*

Jenny's identity struggle is adolescent, but her definition of herself as a woman is complicated by the self-dislike and difficulty trusting others that result from sexual abuse and her identification with her mother who she both hated and loved.

#### *6. Early trauma affected the offense*

As in Jenny's case, some juvenile offenses are related to childhood trauma that remains unresolved. The evaluator must assess the unmet emotional needs resulting from the trauma, how they affected the offense and what services could help the young person make peace with the past.

*Prior to "Joshua's" birth, his depressed, alcoholic father killed himself. His 16-year-old mother, in shock after her husband's suicide, was emotionally distant from infant Joshua. He and his half-sister reportedly had to raise themselves because of their mother's chronic depression and erratic employment. Joshua did well in elementary school in a small town, but when he moved to the city he was not accepted and his school behavior and attendance worsened. As he became depressed himself, he gained weight, which led to being even more isolated and teased by peers. Reportedly by the time he was a nearly 200 pound sixth grader, his anger at being mistreated had built up — he was a bully and had to repeat the grade. He was evaluated for special education, but special services were not provided because he was not learning disabled. Joshua was characterized in the transfer hearing as a 15-year-old with escalating aggressive delinquency. In fact, he had been on probation twice and his offense history consisted of curfew and truancy violations, burning weeds, shoplifting food and cigarettes, vandalism, taking things from a neighbor's home, lighting fireworks and putting matches into a night deposit slot. An evaluator found that Joshua showed no predatory quality in his behavior which "...derived instead from his desire to look cool...the fuel for Joshua's conduct disorder came from affective problems." The evaluator described Joshua's extreme dependency on his co-defendant, becoming susceptible to his influence and acting out the robbery and shooting as he dictated. Another evaluator described Joshua as angry at his father for killing himself, at his sister for criticizing him, at peers for teasing him and at his mother for abandoning*

*him. He had been in a psychiatric hospital after a suicide attempt but had difficulty using the anger management techniques and social skills he had learned there in eighth grade at a new school after discharge. The second evaluator also described Joshua's strong need for acceptance in the weeks before the offense and his desperation for his co-defendant's approval.*

Joshua's arrest at age 15 for killing a stranger with his co-defendant's gun in a robbery was front-page news in his rural state. He was given an adult life sentence, in part because experts failed to demonstrate child-like thought processes at the time of the offense and that a juvenile rehabilitative program would have the services to meet Joshua's lifelong emotional needs. Developmentally, Joshua did not understand what he was getting himself into by seeking approval from his co-defendant. The robbery felt "like a nightmare" and the shooting happened so fast he never saw himself as having choices that would be less harmful.

Defining for the court what it would take for a young person like Joshua to recover from early trauma is a challenge. Repeated loss from his father's death and his mother's depression affected his need for approval and had not been resolved with prior treatment. Children's loyalty to their families is another significant factor in the limited choices they perceive regarding education, employment and delinquency.<sup>11</sup> Children reacting out of a patterned response to feeling threatened and re-experiencing memories of earlier trauma require specialized treatment.<sup>12</sup> Simply labeling the child's incomplete recovery from trauma as Post-Traumatic Stress Disorder (PTSD) is not helpful. A coherent explanation of the diagnosis of Post-Traumatic Stress Disorder and suggestions for effective treatment for the particular child is especially necessary as judges become exasperated with the widespread misapplication of this diagnosis.<sup>13</sup>

Early trauma appears to be a significant, but often untreated, factor in sexual acting out by teenagers. The insistence of many professionals that children charged with sex offenses are predatory, using an adult model, fails to recognize their own sexual victimization and the necessity of recovering from it. Molesting younger children is a repetition of the sadistic treatment they received. Correcting thinking errors and developing empathy are necessary for normal sexual relationships, but may only be possible for such young people as they recover from their own victimization.

### *7. Unmet special education needs*

Learning difficulties compromise the ability of some children to digest information and often lead to a faulty thought process in delinquents. Youth who have failed in school may see criminal activities as their only hope of employment. The evaluator must assess the child's learning difficulties and their impact on his/her school experience and behavior. It is

essential that lawyers obtain attendance, grades, standardized testing records and IEPs (Individualized Education Plan) from the school and provide them to the evaluator.

*"Oliver," charged as an adult at age 14 for a carjacking, had been in a residential drug treatment program, on probation, in a group home and in a juvenile training school. The most striking characteristic of the voluminous materials in Oliver's file is that he remains a mystery to psychiatrists, psychologists, social workers and educational evaluators. Since about age 10, Oliver has been described as behaving aggressively and without an awareness of consequences. But none of these professionals has offered an explanation of the source of his anger. Evaluators have suggested but never proven that Oliver might be brain damaged, suffering from fetal alcohol effects, unable to concentrate because of substance abuse, or simply too withdrawn to respond in interviews. His mother had no prenatal care and described birth trauma and seizures in his infancy, but there is no indication that neurological testing was done despite a psychologist's report of findings "typically associated with brain damage." Oliver's mother's moves resulted in six changes in elementary school. He repeated first and second grade, his attendance was poor, and he was difficult to control in the classroom. At age 10 a school system evaluation found that Oliver had an IQ just above mildly retarded. He was unable to follow instructions or answer questions requiring interpretation of information. At age 14, Oliver could not read and was doing arithmetic at the third grade level.*

Both Oliver's ability to process information and his belief in a positive future have been compromised since early childhood, which affected this delinquent act. If Oliver is described simply as having low intelligence, services are unlikely to be designed to help him process information so he can see different choices. In fact, Oliver was placed in a special education classroom for emotionally disturbed children and later for retarded children; learning disability services were never provided. While recognizing the seriousness of the offense, the evaluator must describe how meeting Oliver's educational needs requires improving his information processing which would have a significant effect on his employability.

*The evaluator must assess the unmet emotional needs behind the substance abuse, how these needs and abusing substances at the time affected the offense and what services could assist the young person in tolerating their feelings without drugs or alcohol.*

#### 8. Substance use

Many delinquent acts are committed under the influence of drugs or alcohol. Some young people use substances to numb the pain of childhood experiences.<sup>14</sup> The evaluator must assess the unmet emotional needs behind the substance abuse, how these needs and abusing substances at the time affected the offense and what services could assist the young person in tolerating their feelings without drugs or alcohol.

*"Victor," a 16-year-old African American, killed his white former foster mother*

*in a drug-induced rage. She met him when he was 9 and she was delivering a Thanksgiving food basket; impressed by his intelligence despite a poverty-stricken environment, she and her husband took him into their home. While he lived with them he excelled in the religious school their own children had graduated from. He was traumatized by the angry confrontations between his foster mother and mother. He felt a major loss when his foster father died when Victor was 12. He returned to his biological family and eventually started selling drugs. He continued to mow his foster mother's yard and asked her to keep \$800 for him because he wanted to save enough money to move into an apartment. He lied and told her he made the money working on a job. She wanted to believe he was straightening up and asked for proof of his employment. He promised her he would bring a statement from his job on his next visit. Frustrated at being unable to reach her for a week when he wanted his money, Victor went to her house after a night of drinking and smoking marijuana. She was upset and seemed disinterested in him, having spent several days in the hospital with her adult daughter. She demanded that he show her his pay stubs from his job. Because he had none, she refused to give him his money. He angrily told her she had no right to hold his money. Exasperated, she shouted that he was never going to amount to anything. Victor remembered that moment clearly: "She finally said what I thought she believed all along. That even though she had given me everything, I was never going to be any better than my mother. That this was my fault. That I had a chance, a better chance than most, and I had blown it. And it was too late for me. That I was no good, never had been in her eyes." He felt rejected, cursed at her and told her to stay out of his life. She slapped his face for disrespecting her. He later observed that neither of them were behaving normally. Victor struck out at her because he was terribly hurt by what she said, but not imagining he would really injure her. When he hit her she fell backward, smashing her head on the fireplace hearth. Victor describes feeling "paralyzed" and "in shock" as he walked out of the house. He could not understand why he behaved as he did: "I didn't believe any of it was happening. It must have all been a terrible nightmare." She died from the head injury. After he sobered up, Victor was horrified by his actions. He was deeply sad and knew he had betrayed his foster mother's generosity. Victor had gone to see her intoxicated, full of guilt for his substance abuse, not attending school and not having pay stubs to show her. He knew he was letting her down, and he was flooded with confused anger about how his self-destructive behavior resulted from the two different worlds he felt she had forced him to choose between. She had never been a person he could talk openly with, so for years this anger at her and his complicated struggle to find himself between his two families remained unexpressed.*

The expert must clarify how Victor's substance abuse compromised his ability to think: his offense was horrible, committed by a child thinking like a child and caught up in a profound emotional struggle.

### UNIQUE NEEDS OF ADOLESCENT OFFENDERS:

*"WHAT DEVELOPMENTAL GROWTH REMAINS FOR THIS CHILD?"*

The evaluator must place the particular child in a complex developmental timeline in order to provide the court with the basis for sentencing decisions. Adolescents have vital developmental tasks which must be supported if they are to become productive adults: identity, mastery and moral development. Each adolescent matures uniquely, but these essential developmental tasks must occur even if he/she has committed a serious crime or has been prosecuted as an adult:

#### *Identity*

Adolescents must complete the work of childhood in refining a stable definition of themselves and their outlook on life. The central core of identity comes from early nurturing and success through which children learn they are lovable and capable. When a child has patched together a self after traumas, failure and inconsistent attention, developing a positive identity in adolescence is more difficult.<sup>15</sup> If parents are abusive or have a history of substance abuse, domestic violence or mental illness, the adolescent is also confused in the natural process of identifying with family members. The young person may not have had assistance from someone who can help them balance their view of the strengths and weaknesses of what they come from. Some young people remain in a chronic angry state about what happened to them--if they do not face their underlying hurt, it is difficult to form a firm positive identity.

#### *Mastery*

Adolescents must be good at something. Doing well in school or sports or another legal activity is necessary to become a responsible adult. Mastery is how the adolescent struggling with control and authority issues becomes a young adult in charge of something. An educational/vocational program designed to allow the adolescent to experience success --with high-interest teaching techniques and subject matter-- is a necessary component of supporting mastery. For young people with learning disabilities, assistance must be specially tailored to insure that they feel competent. Mastery is a particularly difficult task for children who have experienced chronic loss of control and trust. Interpersonal satisfaction is a crucial form of mastery which requires maturing trust developed in childhood and learning about the give-and-take of relationships. Cognitive restructuring helps adolescents change their self-talk, reduce their anxiety, and learn to trust.

*Successful juvenile rehabilitation programs use conviction for an offense as an opportunity for the young person to take stock of himself/herself and decide on choices in the future that will not be harmful to others and will be less self-destructive.*

*Moral development*

*The individualization and empowerment necessary for young people to work effectively on their developmental tasks is impossible in a facility where group control is the primary goal.*

Although youth may alter their behavior momentarily to avoid punishment, attitudes and behaviors usually do not change as a result of punishment. Successful juvenile rehabilitative programs use conviction for an offense as an opportunity for the young person to take stock of him/herself and decide on choices in the future that will not be harmful to others and will be less self-destructive. Positive choice-making starts with a young person's concept of right and wrong. When family members do what everyone knows is wrong--sexual abuse and physical abuse--and are not stopped by the police or child protective services, a young person's view of right and wrong gets distorted. On the other hand, the child's loyalty to family must be recognized in the process of positive choice-making and values clarification.

Children of the same chronological age often have accomplished different aspects of identity, mastery and moral development. Based on an assessment of where the individual child is on these essential developmental tasks, the evaluator presents the child's emotional and cognitive needs and suggests services to match these unique needs to allow completion of identity, mastery and moral development.

**COMPARISON OF SERVICES FOR ADOLESCENT & ADULT OFFENDERS:**

*"WHAT CONDITIONS WOULD HELP THIS CHILD'S DEVELOPMENTAL GROWTH?"*

The evaluator knows that some services more effectively meet adolescent needs than others. Rehabilitative recommendations should be specific and individualized, asking the question, "Does this program have the services that will meet this young person's needs?"<sup>16</sup>

The court must be informed by the expert that the high failure rate of juvenile training schools and boot camps is not a reason to conclude that rehabilitation of serious juvenile offenders in general, and with this young person in particular, cannot succeed.<sup>17</sup> While there is still only limited research on effective services for adolescents who have committed serious offenses, numerous programs around the country have high success rates with delinquents.<sup>18</sup> These programs have several characteristics in common:

- They meet each youth's need to feel competent at something.** Effective programs provide opportunities for success and celebrate each youth's competence. Recognizing that school and non-criminal employment have been inaccessible, these programs offer youths real preparation for self-respecting work.
- They meet each youth's need to be in charge.** Successful programs emphasize choice-making and encourage genuine youth involvement

in designing the daily routine and carrying out tasks. Sanctions for misbehavior are seen as fair by the young people in the program.

•**They meet each youth's need to appreciate the strengths of their families.** Effective programs empower families and support young people in identifying with the positive characteristics of family members and make peace with the disappointments and hurt from their families.

•**They meet each youth's need to belong.** Successful programs offer a non-violent group as desirable as a gang that gives recognition and encouragement and is hopeful about the future. Young people are valued by positive peers and also by adults they admire.

In effective juvenile treatment programs, delinquents learn to change their choice-making and recover from their early victimization. In addition, through individualized educational and vocational services, these programs meet the needs of children with histories of school failure to be stimulated in class, experience success in school, have unconflicted relationships with teachers and believe that education has value for the future. These accomplishments are the result of careful planning and staff training, going way beyond a court order to attend school or traditional counseling. Young people's success requires someone taking an interest in their talents, exposing them to career possibilities that could motivate them to continue their education, intervening in school to insure that they have success and assisting family members in encouraging their hopefulness about the future. The failure of traditional mental health services to address emotional needs and the failure of schools to address educational/vocational needs of many teenagers are national social problems which cannot be solved by incarcerating children in adult facilities.

Effective services for young offenders are individualized, recognizing that each youth has a unique combination of maturity and immaturity and has to be helped with tasks of identity, mastery and moral development differently. The individualization and empowerment necessary for young people to work effectively on their developmental tasks is impossible in a facility where group control is the primary goal.

Staff have to be specially trained to be fair, non-defensive and open to helping youth who feel unfairly treated. Staff also need clinical supervision to learn how to help young people recognize their thinking errors. Staff who work with adolescents have to see themselves as teachers to assist youth in their developmental tasks.

Programs for adolescents must have a staff to youth ratio that insures that needs will be met. Most juvenile correctional programs are required to have a 1:10 ratio in residential staff, a 1:7 ratio in the education program and sufficient clinical staff; therapeutic programs often have a 1:4 ratio in residential staff; typically young women have high need for medical ser-



*The suicide rate of juveniles in adult corrections is eight times higher than in juvenile facilities.*

vices in correctional facilities. Most juvenile institutions have a significantly higher daily rate than adult correctional facilities because of the staff ratios necessary for rehabilitating adolescents.

The adult criminal system fails the basic test of balancing nurturance and opportunities for independence which are both needed during adolescence. In addition to lacking individualized services to meet adolescent needs for competence, independence and making peace with the past, adult maximum security prisons are dangerous, expose young offenders to negative adult role models and do not provide a positive peer group. An adolescent's progress on essential developmental tasks will be impeded in an adult correctional facility. The evaluator presents the individual child's potential for rehabilitation. The evaluator specifically describes services that have been demonstrated to be effective with delinquents and would be likely to meet this child's unique needs.

#### **INCARCERATION IN ADULT FACILITIES PUTS ADOLESCENTS AT RISK**

*"WHAT CONDITIONS WOULD HINDER THIS CHILD'S DEVELOPMENTAL GROWTH?"*

Adolescents are at greater risk for suicide, sexual victimization and physical harm in adult facilities. Depressed children are at risk for suicide in a facility where staff do not recognize that suicidal adolescents are different from suicidal adults. Adolescents can swing quickly from a "normal" emotional state to killing themselves, often in reaction to an apparently minor event. Adolescents frequently unintentionally kill themselves. Consequently, surveillance is simply not sufficient to prevent suicide in adolescent inmates. Activity, positive relationships between staff and youth and counseling, which are unlikely in an adult facility, are necessary aspects of adolescent suicide prevention.

The suicide rate of juveniles in adult corrections is eight times higher than in juvenile facilities.<sup>19</sup> Facility and staff limitations in adult corrections result in children being held in isolation without supervision, which has been shown to increase the risk of suicide.<sup>20</sup> Incarcerated victims of rape are at higher risk of suicide.<sup>21</sup> Adult corrections have not made training staff in preventing suicide a priority, although the American Correctional Association and related organizations have promulgated suicide prevention standards.<sup>22</sup>

Young people are at risk of physical harm in adult facilities because of their emotional childishness and small size. Their need to be liked makes them naively do things for acceptance without realizing that others will retaliate in an adult facility. Staff must be exceptionally non-judgmental to manage young people who expect to fail and be disliked because of their past history. Most adolescents are intolerant of anything that seems unfair and reject what might be offered as assistance when they mistrust the adults in charge. Staff must have a high tolerance for acting out, rec-

*Staff who work with adolescents have to be able to use encouragement instead of punishment to change behavior.*

ognizing that most young people mature and then regress before making more progress. Staff who work with adolescents have to be able to use encouragement instead of punishment to change behavior.

Children in adult institutions are 500% more likely to be sexually assaulted, 200% more likely to be beaten by staff and 50% more likely to be attacked with a weapon than those confined in juvenile facilities.<sup>23</sup> At least three juveniles have been killed in adult facilities recently (Ohio, Florida and Idaho). A 1982 study finding that 14% of inmates are raped in adult prisons is an underestimate.<sup>24</sup> A 1984 report indicated that young inmates cannot avoid being raped in adult facilities. Once raped, young victims are marked for repeated sexual assaults.<sup>25</sup> Youth typically are frightened of adult inmates and do not know how to protect themselves. If they are approached by adult inmates offering "protection," they have to "pay" for it sexually. Adult corrections typically do not train staff in the emotional needs of adolescents which put them at risk of being physically harmed.<sup>26</sup> In addition to lacking individualized services to meet adolescent needs, adult prisons expose young offenders to negative adult role models.

In Florida, where thousands of juveniles were tried in adult courts last year, a recent study has shown that the youth in adult prisons were less rehabilitated than those who served time in juvenile facilities.<sup>27</sup> Similar results were found in a comparison of 15 and 16-year-olds charged with burglary and robbery in New York and New Jersey. The New Jersey teenagers were sentenced as juveniles and the New York teenagers were sentenced as adults, with the same average length of incarceration in both groups. After release, the youth who had been in adult facilities had a higher recidivism rate.<sup>28</sup>

Given what is known about the harm to children in adult correctional facilities, the expert must form opinions about:

- How the conditions of current and possible correctional placements enhance or interfere with this specific adolescent's rehabilitation.
- How the conditions of current and possible correctional placements put this specific adolescent at risk, given his/her size, emotional maturity, depression, past victimization and dependency needs.

In conclusion, the expert must present a complex developmental picture of a young person in preparation for transfer or waiver hearings:

...there is great diversity among midadolescents in the etiology and nature of their offending, as well as characteristics related to their future development. These observations, together with the greater risk of misinterpretation of potentially mitigating mental conditions in adolescent homicide cases, offer arguments against mandatory transfer and the harshly punitive consequences of criminal court convictions based on the nature of adolescents' offenses alone.<sup>29</sup>

*Children in adult institutions are 500% more likely to be sexually assaulted, 200% more likely to be beaten by staff and 50% more likely to be attacked with a weapon than those confined in juvenile facilities.*

The expert should explain how particular services would address the child's choice-making, moral development, recovery from trauma, cultural needs, education needs, gender related needs and substance abuse. For example, an evaluation should describe a program designed to build Oliver's skill at an employable activity and teach him how to compensate for his learning disability. A combination of individual and group counseling and developing talents unrelated to physical appearance would help Jenny recover from sexual abuse. An education program directed at a positive cultural identity would be effective with Darrell. Anger management coaching, school placement that capitalized on his intelligence and support to make peace with his parents' abandonment would encourage Alonzo to live up to his potential.

The expert should go beyond a traditional clinical evaluation to give a full picture of where the child is developmentally, the development context of the offense, what growth remains and what conditions will help and hinder his/her developmental growth. A specialized evaluation should describe the young person's thought process, moral development, unresolved trauma, identity development, source of behavior problems and school history. Convincing the court of the development tasks this child has yet to accomplish provides the framework for suggesting services that would meet the young person's unique needs. Finally, the expert must give an opinion of the harm this young person would face by being incarcerated in an adult facility. The expert educates the court by clarifying that this child is not fully formed. Consequently, rehabilitative services can facilitate his/her development and placement with adults is harmful.

In writing a report and preparing for court testimony, the evaluator should consider organizing his/her opinions according to the criteria the statute requires the judge to rule on in a transfer/waiver hearing. The evaluator should first formulate his/her developmental view of the young person and then translate clinical material into forensic opinions by addressing the criteria the judge must consider. Lawyers can provide these criteria to the expert and use the checklist that follows to tailor a specialized evaluation that will assist the court in understanding this child's development.

## ***CHECKLIST FOR JUVENILE EVALUATIONS***

1. Child's Thought Process
  - Magical Thinking
  - Protecting self from perceived harm (fear; racism)
  - Failure to anticipate (surprised; "happened to" child)
  - Minimized danger? Did not see potential harm?
  - Choice-making
2. Moral Development
  - View of laws and social rules
  - Appreciating mutual respect and responsibility
  - Family and religious values
  - Conscience and responsibility for role in the alleged offense
  - Conflict between moral values and rules of the street
3. Unresolved Trauma
  - Victim of abuse and/or neglect
  - Unresolved losses
  - Difficulty trusting
4. Identity
  - Patchwork self due to trauma, failure, inconsistent attention
  - Disloyalty to family, including cultural identity issues
5. Purpose(s) Served by Behavior
  - Express anger at past maltreatment?
  - Release frustration about school failure?
  - Attention-seeking?
  - Relieve depression?
  - Achieve a sense of belonging?
  - To be in control?
6. School Experience
  - Attendance, grades and standardized scores
  - How do the youth's measured intelligence and "street smarts" affect his/her behavior
7. Strengths (including what child is best at)

*(Continued on next page)*

8. Needs

Emotional needs (including family)

Educational needs

Cultural needs

Gender-related needs

Medical needs

Where is youth developmentally? In what areas is he/she still developing?

9. Services Child Has Received; Did They Meet His/Her Needs?

10. Effective Rehabilitation: Services to Meet Needs and Build on Strengths (amenability to treatment)

11. Potential Harm From Incarceration in Adult Facility

## CHAPTER 2

### **JUVENILES' COMPETENCE TO STAND TRIAL: NEW QUESTIONS FOR AN ERA OF PUNITIVE JUVENILE JUSTICE REFORM**

by Dr. Thomas Grisso

*I'm not really sure what my lawyer does. She's not a paid lawyer. I still haven't told her the whole story, because I think she might tell the judge what I tell her.*

*— Aaron T., 16-year-old detained at a  
secure detention facility*

At age 14, Jimmy was charged with second-degree murder. The victim, an elderly man, had been struck on the head in a robbery and had died of a heart attack on the way to the hospital. Under a new state law, murder was excluded from juvenile court jurisdiction, so Jimmy was charged in criminal court and assigned public counsel.

As Jimmy's attorney began to investigate the case, she found that the evidence against Jimmy--which at first seemed substantial--was less than conclusive. For example, the witness who identified Jimmy had been drinking and had seen the event only from a distance in poor light. When he was arrested, Jimmy at first had told police officers he wasn't there, then after considerable questioning he tearfully said, "I did it--I want to go home," and his mother had insisted that officers stop the questioning at this point because Jimmy was sobbing and looking ill.

Upon visiting Jimmy at the detention center, the attorney's hopes for getting a more complete story quickly evaporated. Although Jimmy was 14, in many ways he acted much younger. It took a long time for her to get Jimmy to say anything to her, because he acted shy and scared, as though he saw her more as a school principal than an advocate. After several contacts he finally began responding to her questions, but his answers were mostly shrugs, nods, and partial sentences spoken in quiet diffidence.

Across several interviews, the explanations he gave for the evening came out in unrelated pieces that didn't at all produce a coherent picture. For example, he eventually told her he was with two other boys that night, but he said he didn't know who they were (was he fabricating or protecting?), and it was impossible to understand from his account exactly when and where he was with them. She soon found, however, that this was the way Jimmy described other events in his life as well, even those that he would not have any reason to try to avoid or conceal. The attorney cer-

*Although Jimmy was 14, in many ways he acted much younger. It took a long time for her to get Jimmy to say anything to her, because he acted shy and scared, as though he saw her more as a school principal than an advocate.*

*Despite the attorney's careful efforts to explain the potential consequences of a conviction, and Jimmy's ability to repeat what they were, she began to doubt whether Jimmy had any real notion of a long-range future.*

tainly hoped that her line of defense never required Jimmy to testify; it would be a disaster.

When it came time to make a decision about the pleading, Jimmy grew increasingly apathetic, distant, and disinterested. Despite the attorney's careful efforts to explain the potential consequences of a conviction, and Jimmy's ability to repeat what they were, she began to doubt whether Jimmy had any real notion of a long-range future. As far as she could tell, he rarely thought beyond the Nintendo sessions that the detention center allowed him every afternoon. This feeling became truly disturbing when Jimmy, contrary to her advice, said he wanted to plead guilty.

Jimmy is a fictitious boy, but the problems he presented for his attorney are a composite of real frustrations that attorneys encounter when working with youthful defendants. Given their developmental immaturity -- incapacities to understand the trial process, to assist their attorneys, and to make decisions that will affect them for the rest of their lives -- can adolescents as young as Jimmy really assist adequately in their own defense? Or does their incomplete development jeopardize the fundamental fairness of the adjudicative process? Are they competent to stand trial?

All states require that criminal defendants cannot be tried if they are not capable of meaningful participation in their defense. The defendant must be competent to stand trial, having "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him."<sup>30</sup> In many states this includes defendants' abilities to make decisions about the waiver of important rights. If they are incapable of doing so at any time during the legal process, from arraignment to adjudication and sentencing, then proceeding despite their incapacity would be unfair. Moreover, their waiver of constitutional rights during this process would be invalid.

The matter of youths' competence to stand trial, however, has little history in law. Only in the past few years has it emerged to raise new questions of law and enigmatic problems of legal representation for youths in delinquency and criminal cases. Forensic mental health examiners across the country report a sudden increase in requests for evaluations for youths' competence to stand trial, both in juvenile court and criminal court proceedings. In many states, even veteran court clinicians say that they performed only a few evaluations for juveniles' trial competence until the last two or three years.

What is the reason for the legal system's recent attention to the question of youths' capacities to participate in their defense? What special questions about the right to be competent to stand trial are raised by youths' developmental immaturity? Does the doctrine of competence to stand trial, as it has developed in criminal law, provide meaningful answers?

## JUVENILES' COMPETENCE IN CRIMINAL COURT

These questions began to emerge in the early 1990s in the midst of a dramatic increase in violent offenses by juveniles. Alarmed by this trend, state after state began changing its laws that apply to violent juvenile offenses.<sup>31</sup> Almost without exception, these changes ensured an increase in the number of juveniles who, at younger ages and for a wider variety of offenses, would be tried in criminal court rather than juvenile court. The legislative message was quite clear: whenever possible, youths would be punished like adults for their serious offenses.<sup>32</sup>

Until recently, almost all youths waived from juvenile to criminal court for trial were older adolescents, usually 16 or 17 years of age, who were near the upper age limit of juvenile court jurisdiction. Judicial waiver, traditionally the most common form of waiver to criminal court, allowed juvenile court judges the discretion to retain younger adolescents in the juvenile system, which they usually did.

Recent juvenile justice reforms in many states, however, have replaced or augmented judicial waiver with prosecutorial discretion to file charges in juvenile or criminal court, or "waiver by exclusion"--laws that automatically place certain offenses by juveniles under the jurisdiction of criminal courts.<sup>33</sup> Many of these reforms also lowered the age of waiver to criminal court to 14 in some states and 12 or 13 in others, with a few states specifying no age limit.

This change in the way that the legal system responds to youthful offenders has produced difficult challenges for criminal justice. Already-crowded criminal court dockets are stretched even further by new cases, in some states thousands each year, that are no longer under juvenile court jurisdiction. They include substantial numbers of young adolescents who never used to appear in criminal court. It is this new group of younger adolescents, under age 16, about whom questions of competence to stand trial are emerging.

The necessity for defendants' competence, as well as due process that protects them from incompetent participation in their trials, has always applied to youths who are tried in criminal court just as it does to adult defendants. The increasing number of youths in criminal court who are in their early adolescent years, however, raises issues for which there is little legal precedent.

For example, throughout the history of criminal justice, questions of adult defendants' competence have involved considerations of incapacity due to mental illness or mental retardation. Defendants suspected of incompetence typically are evaluated by forensic mental health examiners, who assist the court in weighing the issue. When defendants are found incompetent, all states provide for a delay of the trial process while efforts are made to restore their competence through treatment for their mental

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incapacity. If their competence cannot be restored, criminal charges eventually must be dismissed.

Yet for some youths, abilities to participate in the legal process may simply be limited because those capacities simply have not yet developed, just as surely as the capacities of some adults are limited by their mental disorders. Most states' laws recognize this in other legal contexts. For example, the law does not presume that Jimmy and his classmates are as capable as adults of understanding the implications of decisions about their medical treatment, to make binding legal contracts, or to operate automobiles.

How will the law respond to cases like Jimmy's, where competence to stand trial might be questioned because of developmental immaturity rather than mental illness? And what should be done with youths whose incompetence is not due to mental illness, but to immaturity that cannot simply be "treated" to improve their abilities to participate in their trials?

Some states provide that when youthful offenders appear in criminal court, a hearing must be held to determine whether the case will proceed in criminal court or whether it will be remanded to the juvenile court. In some jurisdictions these hearings seem to include a consideration of the level of maturity of the youth in question. Thus youths who are not likely to possess capacities required for competent trial participation often may be dealt with by remand. Some states, however, do not provide this option for a return to juvenile court when youths have been charged with very serious offenses.

In summary, the law appears to be silent on how to deal with youthful criminal defendants whose capacities to participate in their defense can be questioned, not on the usual basis of mental illness or mental retardation, but on the unfamiliar ground of developmental immaturity. As they enter the criminal courts with increasing frequency, however, the question seems destined to be raised.

#### COMPETENCE IN JUVENILE COURT

The emergence of competence to stand trial in juvenile court has a different history. During the first 50 years of the juvenile justice system, the concept of competence to stand trial was conceptually irrelevant for juvenile court proceedings. A justice system that intended not to punish but to provide for the rehabilitative needs of youths "in their best interest" had no need for formal due process or the right to legal counsel. Its objectives were beneficent, so there was no need for a "defense" for youthful offenders in juvenile court and, therefore, no necessity for a competent defendant.

Then the U.S. Supreme Court decisions in *Kent v. United States*<sup>34</sup> and *In re Gault*<sup>35</sup> ushered in revisions that provided to youths in delinquency

proceedings many of the same due process rights that were afforded to adult defendants. This included a right to counsel and, presumably, the right to be competent to stand trial, without which the right to counsel would have little meaning. Within another 20 years, about one-third of the states recognized, by statute or case law, the right of youths to be competent to stand trial in delinquency proceedings.<sup>36</sup> The issue, however, was rarely raised, and no significant body of case law emerged to define the meaning of competence for youths in juvenile court hearings.

The issue arises now in the context of the new laws providing for waiver of youthful offenders to criminal court, as well as changes in laws that apply to juveniles who are not waived. In states that retained judicial waiver, threshold criteria often were modified (e.g., lower ages for allowable waiver, changes in standards and burdens of proof) in ways that increased the jeopardy of youthful defendants in waiver hearings.

Other laws were revised to assure that youths who remained in juvenile court faced new and more serious consequences. Many states decided to authorize juvenile court sentences that could extend well into the adult years. For example, for adolescents who are found guilty of murder in juvenile court, Massachusetts and New Mexico now allow juvenile court judges to sentence youths under juvenile law or criminal law. Thus in Massachusetts, being found guilty of murder in juvenile court may result in a life sentence without possibility of parole (Massachusetts has no death penalty).

As adjudication in juvenile courts has become more similar to criminal courts in their process and potential outcomes, the argument that youths should be competent to stand trial in juvenile court has increased. In murder cases, a hearing on waiver to criminal court may be one step toward the death penalty, a step that should require no less due process than the criminal trial itself. The decisions that some defendants might have to make regarding their choices in a waiver hearing are no less complex than in a criminal trial--arguably more so, because the range of outcomes is greater. Nevertheless, only one state (Virginia) requires that the question of juveniles' competence as defendants must be decided at the hearing on waiver to criminal court.

In this context of increasing stakes in juvenile cases, some states (most recently, Arizona and Florida) have amended their statutes to provide rules and definitions for competence to stand trial in juvenile proceedings that are nearly identical to those in their criminal codes. Other states have begun to address the question on appeal. For example, in a recent case in a juvenile court in Georgia, involving a 12-year-old boy charged with aggravated sodomy of two younger children, defense counsel claimed that the boy was not competent to assist counsel in his defense. The youth was diagnosed with mental retardation, and defense counsel pointed out that the youth could not give a coherent or consistent account of the events

*...only one state requires that the question of juvenile's competence as defendants must be decided at a hearing on waiver to criminal court.*

surrounding the allegation, for which reason counsel was unable to obtain information critical for developing a defense. In denying the motion, the judge explained that Georgia law did not provide a statutory framework protecting juveniles from being tried in delinquency proceedings while they were incompetent.

The Georgia Court of Appeals reversed.<sup>37</sup> In Georgia, the court noted, juveniles have long had such rights as notice of charges, legal counsel, and privilege against self-incrimination, all apparently in order to assure due process and fairness at trial in juvenile court. Providing these rights would be meaningless, the court reasoned, if a juvenile defendant was not capable of exercising them. The value of legal counsel, for example, was denied in this case if the defendant's incapacity to assist counsel by providing important information jeopardized the development of a defense. The court concluded that youths in delinquency proceedings could be tried only if they were competent to stand trial.

Recognition of youths' competence to stand trial in juvenile court, however, is only the beginning of a series of questions yet to be answered in law, policy, or practice. The law currently is almost silent on how competence is to be defined for participation in juvenile proceedings, what characteristics of youths are relevant for decisions about their competence, and how the juvenile court will respond to incompetent youths.

#### DISCOVERING YOUTHS' CAPACITIES AS TRIAL DEFENDANTS

While the law struggles with these questions, child developmental researchers have begun to examine what they know about children's and adolescents' capacities that may be of help. To serve this end, the John D. and Catherine T. MacArthur Foundation recently inaugurated a number of projects focusing on juvenile justice issues, one of them a research initiative called the Program on Adolescent Development and Juvenile Justice. As the juvenile justice system completes its first 100 years, the program is performing research to guide juvenile justice policy, law, and decision makers in several areas: juveniles' risk of future violence, their amenability to rehabilitation, developmental questions about their culpability, and their capacities related to trial competence.

Still in the early stage of their work, the program's researchers have been reviewing what is known about adolescents' psychological and social development that may be relevant for forming policy and law about juveniles' competence to stand trial. The picture that emerges from past studies of adolescent development is not complete, but as the following discussion will show, it provides some guidance while we await research that is more definitive.

Ultimately, judgments about competence to stand trial require two things. One must consider the types of abilities that the law construes as

relevant for defendant's participation in their defense. In addition, one must consider the level of those abilities that are required for a fair trial, compared to the capacity of the individual about whom the question of competence has been raised.

Legal precedent has been fairly clear concerning the types of abilities that need to be considered.<sup>38</sup> Generally, they include:

- The ability to understand the nature and possible consequence of charges, the trial process, the participants' roles, and one's rights.
- The ability to participate with and meaningfully assist counsel in developing and presenting a defense; and
- The ability to make decisions to exercise or waive important rights.

Adult defendants themselves typically manifest these abilities only to some degree. Adult defendants who are considered competent to stand trial usually do not have a flawless understanding of the trial process or ability to assist counsel. The question for policy and judicial decisions about juveniles' competence, therefore, is not whether they have deficits in these areas, but whether their deficits are sufficiently great to render them less capable of participating in their defense than is the average adult defendant. Do adolescents' capacities relevant for trial competence differ on average from those of adults?<sup>39</sup>

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### YOUTHS' UNDERSTANDING OF THE TRIAL PROCESS

Current research suggests that by ages 13 or 14, youths on average tend to have a basic idea of the roles of persons in the trial process, and they can understand that defendants are charged with offenses and that the consequences may be punitive. More questionable is their ability to deal with abstract legal concepts that are grasped by the majority of adults.

For example, adults typically see a legal right as an "entitlement," provided to them by law, that cannot be taken away. In contrast, research suggests that children think of a right as "conditional"--something that authorities allow them to have, but which could also be retracted by authorities. Only at around ages 13 or 14 do youths develop the capacity to think of a right as "belonging" to them, and hence as something that they should be able to assert or waive as they wish.

To say that younger adolescents develop the capacity to think about rights in this way, however, is not to say that most adolescents do think this way. Evidence for this point was found in a comprehensive, government-funded study that involved the administration of special tests to determine understanding of Miranda warnings among more than 400 delinquent youths in juvenile detention facilities and 200 criminal adults.<sup>40</sup> Even at ages 14 through 16, youths were much less likely than adults to

describe a “right” in a way that defines it as an entitlement (only about one-quarter of delinquent youths, compared to about one-half of adult offenders). Thus, when asked what is meant when police tell you, “You do not have to make a statement and have the right to remain silent,” many youths give responses indicating a conditional view of legal rights: for example, “You can be silent unless you are told to talk,” or “You have to be quiet unless you are spoken to.” Even though many youths may develop the capacity for understanding rights early in adolescence, often it takes some additional time and life experiences for that capacity to develop so that it influences their actual understanding.

Moreover, to say that youths “on average” develop certain capacities does not tell the whole story. Not surprisingly, research also shows that understanding of information about the trial process and rights is poorer for adolescents with lower intelligence test scores, problematic educational histories, learning disabilities, and mental disorders.<sup>41</sup> For example, in the Miranda study noted earlier, delinquent youths 15- to 17-years-old with low IQ scores showed significantly poorer understanding than did the average 12-year-old. Moreover, while adolescents of average intelligence compared well with adults of average intelligence, comprehension of legal information was poorer for adolescents of low intelligence than for adults of similarly low intelligence.

Among other things, this means that in the age range of 14-16, age by itself is a poor indicator of whether a youth has reached an adult level of knowledge about the legal process, or an adult’s capacity to understand it. Youths at these ages who have various types of cognitive and emotional disabilities, which is true for many delinquent youths, simply take longer to reach their adult potential. As a consequence, there is much more variability in capacities among youths at these ages. This variability gradually decreases until, in the older adolescent years, it is about the same as one finds among adults.

Finally, some courts have assumed that if delinquent youths have been repeatedly arrested and exposed to court procedures, they are likely to have a better understanding of legal matters. Current research does not support this presumption. Certainly some youths will learn from such experiences and may even become quite sophisticated, but others will learn nothing at all from the same type of experiences. As a consequence, research is finding that the mere fact that a youth is a repeat offender is not a reliable indicator of the youth’s understanding of the trial process and rights.

#### ASSISTING COUNSEL

Developmental psychologists tell us that fundamental abilities of sensation, perception, and memory ordinarily have matured by early adoles-

cence. This suggests that adolescents on average should be about as capable as adults of providing accurate information (e.g., to their attorneys) from their experience. They should also be capable of tracking the trial process as it unfolds, so that with some assistance they can relate the significance of one event to another later one—for example, contradictory testimony occurring on different days.

The exceptions will be those cases in which youths have specific deficits that impair these abilities: for example, youths whose Attention Deficit/Hyperactivity Disorder makes them so vulnerable to distractions that the significance of trial events as they transpire simply eludes them. Another example is provided by the Georgia case of S. H., described earlier, involving a youth whose mental retardation seriously impaired his ability to communicate a coherent and chronologically meaningful account of critical events. Mental retardation, however, is not the only circumstance in which deficits in communication may occur. As in Jimmy's case, the youth described at the beginning of this article, communication may be impaired by developmental delays and emotional immaturity in youths with intellectual capacities that are otherwise adequate.

Assisting counsel, however, requires more than being able to watch, listen, and communicate. The youth also must see legal counsel as someone with whom collaboration is meaningful because of the attorney's advocacy role and the promise of confidentiality. Of course, not all adult defendants perceive their attorneys as helpful and as someone to be trusted. What we find with some juveniles, however, is not so much a paranoid skepticism as a simple misperception. Relevant studies suggest that even when youths can describe the basic advocacy role of counsel ("She's there to help me—to get me off"), often they have trouble separating the defense attorney's function from court authority. For example, one study asked detained juveniles why defendants must be truthful with their lawyers. About one-third of them (compared to about 10% of adult offenders) believed that this was necessary so that the lawyer could decide whether to advocate the defendant's interests, to report the defendant's guilt to the court, or to decide whether to "let him go or send him up."<sup>42</sup>

It is not difficult to imagine why some youths would have this misperception. For many of them, ordinary past experience with adults in authority provides little reason for them to imagine that an adult in a professional role would take their side against other adults in a legal process.<sup>43</sup> Moreover, not so long ago, in the decade following *Gault* when defense attorneys were introduced into juvenile courts, attorneys in delinquency cases actually had a dual role that was not so different from the one described by these youths. Vestiges of this may still be found in some circumstances. Overall, therefore, the developmental, social, and historical circumstances of adolescents raises special questions about their abilities to work with counsel in their defense.

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## MAKING DECISIONS

Making decisions is a critical part of the defendant's role. Some decisions are related to important rights--waiving jury trial, pleading, and weighing plea bargains. Others are client decisions that attorneys must consider when developing a defense. For example, Rule 1.14 of the Model Rules of Professional Conduct instructs attorneys to maintain a normal client-lawyer relationship, as far as reasonably possible, when the client's abilities are impaired due to mental disability or the client's youthful age. It is often appropriate, therefore, for attorneys to advise their young clients on certain matters of trial strategy and to honor their choice concerning whether or not to accept counsel's advice--for example, to testify, to provide evidence against one's cohorts, or to reveal family secrets in court.

An essential part of meaningful decision making about such matters is the ability to imagine the future consequences of one's options. Defendants must be able to think about hypothetical situations, envisioning conditions that do not now exist and that they may never have experienced, but which may be the outcomes of a choice they have to make. Imagining those outcomes, they must then evaluate and compare them using their own notions of what is more or less desirable or painful in life.

Several studies have found that pre-adolescents are significantly less capable of imagining risky consequences of decisions and are more likely to consider a constricted number and range of consequences. One recent study (with non-delinquent youths) found that pre-adolescents were less likely than older adolescents to think "strategically" about pleading decisions.<sup>44</sup> Sometime in early adolescence, though, youths begin to develop the ability to think in terms of hypothetical conditions. Once this begins, how long it takes youths to achieve their adult potential to do this, and to use the ability in unusual and emotionally-charged circumstances (such as their own trials), will vary from one adolescent to another.

In general, though, child developmental researchers are beginning to identify ways in which adolescents typically do not perform these decision making judgments in the same way as do most adults.<sup>45</sup> For example, until late adolescence, youths tend to differ from adults in their perceptions of risks, such that they are more likely to underestimate their likelihood or undervalue their negative implications.<sup>46</sup> Time perspective continues to develop through adolescence, such that younger adolescents are less likely to focus on longer-range consequences.<sup>47</sup> Moreover, their decisions may be related to certain values, such as the importance of peer approval, that often guide adolescents' decisions, but which may result in choices that they would not make when their values and sense of personal identity have matured.

One might expect such differences to be reflected in youths' judgments

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about the value of accepting plea bargains and of waiving important rights in the legal process. For example, in the study of over 400 detained youths described earlier, youths were asked to imagine the consequences of waiving or asserting rights to silence when questioned by police. The consequence mentioned most frequently, especially by younger adolescents, was the immediate response of the police (for example, "They might send me home tonight if I say I did it"), rather than the impact of the decision on later events in court.<sup>48</sup>

Much more scientific evidence is needed, however, before we know whether and how youths' immature judgment influences their decisions in their criminal and juvenile court trials, and some child development researchers are now at work to examine those questions. If they find that younger adolescents are greatly at risk of making decisions at trial that they might not make if they were adults, this will be of considerable importance in a time of juvenile justice reform that increases the likelihood that youths will suffer the consequences of their immature decisions well into their adult years.

#### THE LAW'S RESPONSE TO YOUTHS' QUESTIONABLE COMPETENCE

The evidence in this review identifies significant differences between youths younger than 14 and older adolescents or adults in most of the abilities that are relevant for defendants' participation in their trials. This conclusion about pre-adolescents and younger adolescents is consistent with the results of the only study to date of forensic mental health examiners' opinions about youths' competence to stand trial. The study involved all 144 youths who had been referred during a seven-year period to South Carolina's William S. Hall Psychiatric Institute for evaluations of their trial competence.<sup>49</sup> Only one-fifth of youths younger than 13, and only about one-half of 13-year-olds, were evaluated as competent. In contrast, studies of adults referred for competence evaluations have found that about 80-90% were considered competent.

If the available evidence is correct, then we must ask whether it is just to try the cases of defendants younger than 14 in criminal court, when it is considered unjust to require adults to defend themselves if they are similarly disadvantaged due to mental disabilities. In contrast, we might find justification for considering youths younger than 14 competent to stand trial in juvenile court, despite their immaturity and questionable capacities, to the extent that juvenile justice sanctions are restrictive for a shorter period of time and continue to have some rehabilitative objective even in an era of punitive reform.

The message is different for 14- to 16-year-old youths. The evidence suggests that some of them are not markedly different from adults in many abilities related to competence to stand trial. Yet the range of abilities

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among youths at any of these ages is much greater than among adults. While some youths acquire these abilities by mid-adolescence, others progress more slowly and achieve their adult capacities only near the end of their adolescent years. Therefore, for this age group, policy makers may wish to consider a legal requirement for mandatory review of the question of competence to stand trial on a case-by-case basis, whenever these youths face criminal court proceedings or juvenile proceedings that may lead to criminal adjudication.

Questions about the legal definition of competence to stand trial as it applies to adolescents require immediate attention by policy makers. As noted earlier, current standards for competence to stand trial in criminal court identify incompetence as deficits in trial-related abilities when they are produced by serious mental illness or mental retardation. In contrast, the current review suggests that some adolescents' capacities to participate in their trials are impaired for reasons that would not fall within these categories--developmental immaturity, as well as learning disabilities or emotional disturbances that are not the equivalent of mental illnesses but which can delay cognitive and social development.

Criminal courts appear not to have dealt with this question to date. Recognition of developmental immaturity as a relevant factor would seem to be a more familiar notion for juvenile courts, but its relation to the law of competence to stand trial in juvenile court is quite uncertain. For example, lawmakers are only now beginning to address whether criminal statutory provisions governing competence to stand trial apply in delinquency proceedings, or whether the circumstances of juvenile court adjudication allow for somewhat different standards.<sup>50</sup>

Perhaps the most perplexing problems to be faced in this area pertain to the disposition of youths when they are found incompetent to stand trial due to developmental immaturity. The disposition for incompetent defendants that has evolved in criminal law includes treatment to restore competence within a time limit, after which continued incompetence must result in dismissal of charges.<sup>51</sup> This remedy was framed in the context of mental illness as the cause of incompetence. But this dispositional scheme makes less sense when incompetence is due to a youth's immaturity or delayed development. In many cases, modifying these conditions--for example, providing remedial education and allowing the youth "time to mature"--could take longer than the time allowed in most states' provisions, resulting either in dismissal of charges or in lengthy state custody of juveniles without adjudication. This is another instance in which the mere extension of criminal law provisions for incompetence to stand trial does not fit the special circumstances of youthful defendants, raising the need to formulate special remedies that protect the rights of youths while meeting the state's need to adjudicate serious crimes by youthful offenders.

What remedies are possible? When youths are incompetent in juvenile or criminal court due to mental illness or mental retardation, current laws providing for commitment and treatment to restore the competence of mentally-disabled adults may be appropriate for youths as well. To deal with incompetence due to developmental immaturity, however, it would first be necessary to achieve legal recognition for two propositions on which potential remedies could be based:

- That in juvenile and criminal court, defendants below the statutory age for juvenile jurisdiction may be found incompetent for reasons of developmental immaturity.
- That the threshold for competence to stand trial -- the degree of ability required -- should be considered lower for adjudication in juvenile court than in criminal court.

A lower threshold for competence in juvenile court might be justified on the basis of the lesser severity of consequences of adjudication on delinquency charges, as well as the continuing obligation to provide rehabilitative services to youths found delinquent and placed in the custody of the state's youth authority.

Given legal recognition of these concepts, when youths do not meet the standard for trial competence in criminal court due to developmental immaturity, their criminal charges could be dismissed and their cases filed as delinquency charges in juvenile court. The lower threshold for competence in juvenile court proceedings would more likely allow them to proceed to adjudication, although the justification for the lower threshold would require that the consequences would be confined to dispositions that would not involve incarceration beyond the age of jurisdiction of the state's juvenile correctional authority.

Some youths proceeding in juvenile court might not even meet the juvenile court's lower threshold for competence. Although there is no empirical way of knowing, one suspects that this group would be very young and would constitute a very small proportion of delinquent youths, once those with mental illnesses were dealt with under the usual provisions for treatment to restore competence. In cases of this type that involved offenses of moderate seriousness, courts might see fit to dismiss the charges in light of the youth's very young age and the family's willingness to make use of appropriate social services. Yet there would remain a small number of important and troublesome cases involving offenses too serious to dismiss: for example, the 9-year-old habitual house-breaker who is surprised by an occupant and shoots her, or the 11-year-old who explains that he killed his parents because they were too strict.

No clear remedy for handling this small minority of youths is apparent. Whatever solution may be found probably will require systemic changes,

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not merely changes in the laws pertaining to the competence of juvenile defendants. Most states' juvenile justice systems have no appropriate settings even for the rehabilitation of adjudicated 9-year-old murderers, much less for supervising their development while they reach sufficient maturity to be competent to stand trial.

#### ATTORNEY RESPONSE TO YOUTHS' INCAPACITIES

While the law begins to deal with these challenges, attorneys who represent youths in cases involving serious offenses should be sensitive to the questionable capacities of some juvenile clients to participate in their defense. When a youth's incapacities are identified, however, a motion for a finding of incompetence need not be the first order of business, nor is it necessarily in the youth's best interest. The attorney might first consider what steps are necessary, within the reasonable role of counsel, to try to augment the youth's understanding or decisionmaking ability.

Sometimes this can be accomplished by providing careful explanations and discussion that may correct the youth's misunderstanding. Parents' assistance might be considered. Although there are exceptions, sometimes parents' familiarity with their children's difficulties allows them to communicate matters in ways that their children can best understand, or to assist the youth in dealing with decisions that exceed the youth's own abilities or emotional capacities.

When these efforts fail, however, attorneys may consider raising the question of youths' competence to stand trial, especially (a) when their capacities actually preclude their meaningful participation in their defense such that their trial would be unfair, and (b) when their immature decisions as defendants place them in serious legal jeopardy that otherwise might be avoided. When an attorney raises the question of possible incompetence to stand trial, typically the court will order an evaluation of the defendant by a mental health professional who is qualified to perform evaluations and testify about the defendant's capacities. Attorneys who raise the question about adolescent defendants should be attentive to special difficulties that this process may present.

If the case is in criminal court, often the examiners who perform the evaluation will have had little experience in the assessment of adolescents, because until recently (that is, prior to the recent influx of adolescent cases in criminal courts), their work has involved the evaluation of adults. Their attention, therefore, will be on the presence of mental illness or mental retardation, but not necessarily on the ways that developmental immaturity may be responsible for deficits in youths' abilities as defendants (for example, incomplete development of capacities related to communication and judgment in decision making as discussed earlier). Moreover, mental health professionals who are eminently qualified to diagnosis mental dis-

*...mental health professionals who are eminently qualified to diagnose mental disorders in adults are not necessarily qualified by training and experience to identify adolescents' developmental disabilities or mental illnesses...*

orders in adults are not necessarily qualified by training and experience to identify adolescents' developmental disabilities or mental illnesses, which are quite different from those of adults in their types and manifestations.

In contrast, examiners to whom juvenile courts refer cases for evaluation typically will be better prepared to identify mental disorders among adolescents. On the other hand, because the concept of competence to stand trial has not often been raised in juvenile court until recently, its assessment may be less familiar to mental health professionals whose primary activity has been evaluations for juvenile courts. They, too, may believe that only mental illness is relevant for the question of competence, or that the competence definition is satisfied if the youth simply knows the charges, knows what can happen, and knows generally what a trial is like. If they are quite unfamiliar with mental health law concepts typically associated with criminal cases, they may confuse the question of competence with that of criminal responsibility: that is, the youth's mental status at the time of the offense as it relates to questions of insanity and reduced culpability.

To avoid these problems, attorneys should be particularly attentive to the qualifications of mental health examiners and what they actually evaluate. They should consider requesting that:

- The examiner appointed by the court will be qualified to evaluate children and to perform competence to stand trial evaluations;
- The examination will include not only an assessment of mental disorder, but also an assessment of developmental disabilities as well as cognitive and social developmental status; and
- The assessment will include the full range of abilities relevant for competence to stand trial: (a) understanding of the charges, consequences and trial process, (b) cognitive, attentional, communication, and interpersonal abilities relevant for assisting counsel meaningfully, as outlined earlier in this review, and (c) capacities for decision making and judgment about rights that are essential for due process.

In conclusion, youths in cases like Jimmy's have taken on new significance in an era of punitive juvenile justice reform. The presumption that adolescents should be held to adult-like accountability does not necessarily mean that their capacities to participate in their defense will meet legal standards that ensure the integrity of the juvenile and criminal justice systems. In *In re Gault*, the U.S. Supreme Court observed that juvenile justice had provided youths the worst of both worlds: denial of due process rights in exchange for beneficence that was never received. Providing them due process rights in a fully adversarial system of justice is no better, if we fail to identify youths whose immaturity negates their ability to exercise those rights, thereby rendering them meaningless.



## CHAPTER 3

### ***AN INTRODUCTION TO DEFENSE-BASED SENTENCING***

*by Malcolm Young*

*They're just warehousing us. I have a drug problem. I need to get in a program that can help me with that. Up here, we can just do whatever we want and that doesn't help at all.*

*--Ronald B., 18-year-old committed to a secure juvenile facility*

"Defense-based sentencing" is an inclusive phrase that describes the systematic use of social workers and other non-lawyers to help individualize offenders and the illegal actions which brought them to the attention of the criminal courts, and to develop sentencing options to be offered in lieu of incarceration. Programs which implement defense-based sentencing concepts in criminal court are relevant for juveniles in the adult and juvenile justice systems.

In the last fifteen years, defense-based sentencing has become an increasingly popular tool for defense attorneys, particularly public defenders. Around 1980 there were fewer than 20 individuals and programs involved in this work. In 1997 The Sentencing Project documented 301 programs and offices which provide attorneys and their clientele defense-based sentencing program services. More than 800 individuals provide sentencing services nationally. Some work within larger public defender or state defender offices; some work within non-profits serving counsel and the court system; and others are private practitioners who work on a fee or reimbursed basis for clients in their area or across the nation.

According to a 1996-97 survey, at least half of these programs and offices serve juvenile as well as adult offenders in some instances. Within some juvenile courts, there is, moreover, a strong tradition of social workers serving defense attorneys and the children who are their clients: social workers assess the needs of juveniles; they provide information about children to prepare for dispositions; and, more recently, they have been critical in developing information to be used for the juvenile in transfer or waiver hearings, and in those cases in which juveniles are prosecuted as adults.

Today, defense-based sentencing has unfortunately become more relevant in the juvenile setting because of the acceleration of punitive concepts and related theories, such as "holding kids accountable" for their alleged criminal acts. As national policy moves away from the "benevolent" juvenile court model, defense attorneys are called upon to

*Around 1980 there were fewer than 20 individuals and programs involved in this work. In 1997 The Sentencing Project documented 301 programs and offices which provide attorneys and their clientele defense-based sentencing program services.*

offer prosecutors with whom they negotiate and judges before whom they plead more control, restrictions, sanctions and punishments for their young clients. As schools more quickly refer their "problems" to the juvenile courts and as public services become less and less available, the advocate for a troubled juvenile must look harder and demand even more vigorously assistance that was once routinely available.

This chapter outlines the goals and design requirements for defense-based sentencing programs in criminal court. Juvenile court authorities and defenders particularly should consider its application in the delinquency context. Of course, not all aspects of adult defense-based sentencing programs are transferrable to the juvenile setting. For example, the estimates for caseload and staffing ratios in this chapter, based on adult sentencing, are probably low. More social workers and dispositional advocates are needed in juvenile court because of the investigation of collateral issues, client support and records-gathering that is required in many cases. The juvenile setting calls for more emphasis on laws which give juveniles with disabilities or special needs a right to access educational services at public expense or a right to remedial services instead of detention.<sup>52</sup> Nor does this chapter emphasize the special requirements and skills for those who interview juveniles and vastly underestimates the importance of spending time with and supporting each juvenile offender, who more than adults are likely to be confused and frightened after arrest. It bears remembering even by advocates that, contrary to the image supplied by some, our clients are in fact children.

But most of the program elements described in this chapter are analogous to those needed by the sentencing/dispositional advocate in juvenile court. This is all the more true as more and more juveniles are prosecuted as adults, and as even juvenile court personnel adopt the current harsh approaches being applied to their charges. If at first glance this introduction to defense-based sentencing seems less relevant to juveniles under *Gideon v. Wainwright* and its progeny, upon closer look it should be found highly relevant under the dictates and ideals of *In Re Gault*.

### GOALS OF DEFENSE-BASED SENTENCING PROGRAMS

The history behind the development of defense-based sentencing programs helps to explain the varied and sometimes competing goals offered for these programs and the issues which frequently arise when defense-based sentencing programs are established.

Although defense-based sentencing programs are relatively new to the criminal justice system, they have antecedents going back to the 19th century.<sup>53</sup> Some observers have linked the roots of defense-based sentencing to the inception of American probation with a Boston shoemaker, John Augustus. In 1841 Augustus first provided bail for public drunkards otherwise fated for the local House of Correction. Augustus would make

individual housing arrangements for defendants and after a period of time, return with them to court, where the defendant would be sentenced to a fine, rather than several months confinement. Augustus is attributed with saving nearly 2,000 men and women from incarceration.<sup>54</sup> He actively promoted the concept to his state legislature, and in 1878 Massachusetts became the first state to implement his ideas by enacting a probation statute.

The image of the humble shoemaker in court may be useful to depict the function of defense-based sentencing programs. Augustus demonstrated the power of individual intervention, and the ability of advocacy and appeals on humanitarian and common-sense grounds to influence the sentencing judge's decision.

More recent antecedents of defense-based sentencing programs begin in the 1960s.<sup>55</sup> With the historic *Gideon v. Wainwright*<sup>56</sup> decision in 1963 guaranteeing a lawyer for every defendant who could not afford one, and with courts defining adequacy of counsel at all stages, it made sense that court systems would show greater interest in the sentencing process. Indeed, some of the key cases defining the right to counsel arose out of sentencing or dispositional issues.<sup>57</sup> In 1968, the American Bar Association spoke out in favor of the defense bar's "ethical obligations" to prepare rehabilitation plans for its clients. In 1971, the Association reaffirmed counsel's duty to provide treatment options for sentenced offenders.<sup>58</sup> In 1976, the U. S. Court of Appeals for the District of Columbia issued a seminal decision in *Pinkney v. United States*.<sup>59</sup> The court reversed for sentencing a case in which the offender's lawyer had failed to fully explore the range of appropriate programs and services that might have aided the offender and persuaded the court to order a sentence other than prison. *Pinkney* seemed to say that counsel should know, explore, and recommend alternatives whenever possible.

A few years later, the American Bar Association published its second edition of the *Standards for Criminal Justice*.<sup>60</sup> This edition seemed virtually to require defense counsel to engage in aggressive efforts to find programs, employment, or treatment for defendants and to link the defendant with appropriate community resources. The standards also urged defense counsel to propose sentencing options to the court where possible. The Commentary to the text of the Standards relied heavily upon *Pinkney*.<sup>61</sup>

During this period, local and state governments were establishing new public defender programs to implement *Gideon*, initially using private funds and then federal Law Enforcement Assistance Administration (LEAA) grant funds, state or local resources. Some of these programs introduced special units to provide sentencing-related services:

- In Washington, DC, the Public Defender Service established an Offender Rehabilitation Division of social workers who assessed clients with emotional, mental or health substance abuse problems, for the purpose of arranging needed services.

*Augustus demonstrated the power of individual intervention, and the ability of advocacy and appeals on humanitarian and commonsense grounds to influence the sentencing judge's decision.*



- In Portland, Oregon, the Metropolitan Public Defender organized itself into teams of attorneys, investigators and social workers or paralegals who together prepared each case for trial and sentencing.
- In New York, the Legal Aid Society, which provides public defender services, established a special defender services unit staffed by social workers to provide social histories for selected clients.
- In Wisconsin, a new state public defender office built social workers into its staffing to provide an array of sentencing and support services.
- In Chicago, Illinois, the Woodlawn Criminal Defense Services Program, affiliated with the Mandel Legal Aid Clinic, University of Chicago, organized its office with an equal number of social workers and lawyers, whose services were augmented by a consulting psychiatrist, to help a team of lawyers and law students prepare each trial and sentencing.

Each of these programs was intended to provide high-quality legal representation, including advocacy at sentencing. Another rationale for their design was based on the belief in the value of rehabilitation in reducing crime overall. The programs' non-lawyer staff were usually social workers, and their goals were those of the traditional social worker: to provide aid and assistance to the client of the criminal justice system. Together, social workers and lawyers developed an advocacy orientation, and kept a focus on individual defendants. They prepared sentencing memoranda or plans for the courts' consideration at sentencing. Other features of these early programs were different from today's defense-based sentencing programs. For example, early programs did not usually include punishment or accountability as objectives.

However, the vast majority of public defender offices established in the 1970s had no access to social workers, paralegals, or other assistance at sentencing. Too often, for both indigent and non-indigent defendants, the representation provided at sentencing was pro forma, perhaps a passing reference to the offender's criminal record (or lack thereof), a good family (or a terrible family), and a request for leniency. The American Bar Association decried the frequent absence of meaningful sentencing advocacy: "Unfortunately, it cannot be said that [defense counsel's responsibilities are] being regularly fulfilled in most courtrooms today."<sup>62</sup>

The *Pinkney* case itself failed to strike a chord among the nation's higher courts, and became one of those reasoned, broadly-stated decisions which, while never reversed, is seldom applied to guide trial court sentencing proceedings. There are few appellate court decisions today which establish clear expectations for vigorous defense planning at sentencing.<sup>63</sup> As a result the vast majority of public defender offices and criminal defense practitioners have not adopted *Pinkney's* standards of representation at sentencing.

Despite this relative lack of attention to sentencing advocacy, some

modest echoes of John Augustus were making themselves heard. In the 1970s, west coast criminologist G. Thomas Gitchoff began submitting sentencing recommendations, which he called "private presentence reports," on behalf of individual defendants.<sup>64</sup> Gitchoff soon was publishing detailed trial practice notes on defense attorneys' use of the private presentence report writer.<sup>65</sup> At the same time, on the east coast, Dr. Jerome Miller, who was to found the National Center on Institutions and Alternatives (NCIA), developed the "Client Specific Planning" (CSP) methodology. And, while Gitchoff, a few public defender offices, and a handful of private practitioners were independently developing and providing individualized sentencing recommendations to criminal courts, Dr. Miller and NCIA successfully popularized the concept with the label, "Client Specific Planning." They must be credited with formalizing the presentation of detailed sentencing plans in court.<sup>66</sup>

Perhaps reflecting Miller's corrections background -- he had employed advocacy methods on behalf of youthful offenders to close the juvenile training schools in Massachusetts and Pennsylvania-- NCIA's sentencing plans emphasized punishment, control and accountability for the offender even as they focused on treatment. As social service ideals and support for rehabilitation as a sentencing goal waned in the 1980s, the Client Specific Planning approach imposed conditions and restrictions on offenders, made restitution possible through work, established community-based monitoring and supervision of the offender, and incorporated treatment and other services as a means of reasonably assuring community safety.<sup>67</sup> Lawyers who followed the Client Specific Planning approach found themselves asking courts for "meaningful punishments" and "sanctions," albeit combined with treatment and constructive conditions, instead of appealing to mercy or referring to the offender's troubled past.

Client Specific Planning also addressed a growing need during the 1980s for new correctional options to help reduce overcrowding and the public expense of jails and prisons. In 1981, The Edna McConnell Clark Foundation funded the establishment of three public defender sentencing programs in West Palm Beach, Florida; Fayetteville, North Carolina; and Lincoln, Nebraska. These programs were designed to explore whether Client Specific Planning would work for a resource-poor, indigent defendant population, and to meet the foundation's goal of reducing prison overcrowding. From the establishment of these three offices, and four more a year later, defense-based sentencing programs have increasingly been funded for their value in reducing prison overcrowding.<sup>68</sup>

In summary, the goals of defense-based sentencing programs reflect their historical roots, by incorporating following features:

- As did John Augustus, they seek to work with each individual, on a case-by-case basis.

*...the Client Specific Planning approach imposed conditions and restrictions on offenders, made restitution possible through work, established community-based monitoring and supervision of the offender, and incorporated treatment and other services as a means of reasonably assuring community safety.*

- As did John Augustus, they propose reasoned alternatives to incarceration as an appropriate sanction.
- They are guided by the highest standards of legal representation, standards that usually exceed the minimum requirements of practice.
- They attempt to offer meaningful punishments and sanctions, including restitution or other assistance to victims, and controls that help ensure the defendant's compliance with the law and, thereby, community safety.
- They measure their success in part by their contribution to reducing unnecessary incarceration.

### PROGRAM DESIGN

There are a variety of defense-based sentencing models. Some serve rural areas, others urban communities. Some are lodged in public defender offices, and others are independent agencies which serve public defender offices and the private defense bar. Any program should be tailored to meet the needs of its particular community. But taken together, the experiences of these and other programs teach what is required in a sound program, one that is effective both in achieving its goals in criminal justice and for the community and in obtaining the necessary financial support to fulfill its mission.

#### *1. Staff and Position Descriptions*

The key to success for many defense-based sentencing programs has been the choice of staff.

Staff of defense-based sentencing programs have been assigned many titles: social worker, sentencing advocate, case developer, sentencing specialist, client services worker, paralegal, criminologist, mitigation specialist, and more. Staff backgrounds and qualifications are just as varied. Some hold graduate degrees in social work or other fields, while other competent staff have not completed college. A few staff are lawyers or have law degrees, and a substantial number are former probation officers. Because the educational background of capable staff has been so varied, it is not advisable to restrict hiring to persons with advanced degrees.

The personal characteristics that successful sentencing advocates bring to the criminal justice system include:

- An inquisitive, insightful, non-judgmental personality and an interest and ability to work with the full range of criminal defendants.
- Superior communication skills, written and oral. Since most programs submit written reports to prosecutors and the court, sentencing staff must be able to write with clarity and conciseness.

- Knowledge of, or ability to learn, the network of available services, including education, employment, vocational rehabilitation, health, training, and treatment services.
- The ability to assess a criminal defendant. For social workers and other trained professionals, this requirement pertains to the preparation of psycho-social diagnostic assessments and the identification of programs and resources to meet the client's needs. For others, intuitive abilities, training and life experiences help to determine the most appropriate intervention and to know when a person with professional training should be consulted.
- A working understanding of the court system, the role of probation, prosecutor and court officers and plea negotiations and sentencing hearings as they are conducted in a jurisdiction.
- The ability to work in the offender's community for the purpose of obtaining information, support and structuring sentences that will work in and for that community. The position requires home interviews, contact with client and family, development of trust with the client's family and work with churches, schools and other community organizations.
- Understanding the problems of, and services available to, crime victims.
- An advocacy orientation that is consistent with defense obligations to serve their clients.
- Management skills such as the ability to collect and evaluate data in order to make recommendations concerning office and court practices and policies.

Few people combine all these qualities. For programs with more than one staff, talents should be balanced. For example, a staff person strong on insight and the ability to work with a particular community might lack professional or educational qualifications that can be brought to a program by a person with an MSW or substance abuse assessment skills. In hiring, it is helpful to consider the needs of the client population: to develop sentencing alternatives for juveniles requires knowledge of adolescent development, skills at interviewing young people and their families and familiarity with services for this age group.

## 2. Salary Levels

Sentencing program staff have been notoriously underpaid, though this situation may be improving as funding and recognition of professional status increases. Obviously, salary ranges vary from region to region. The range will be higher for a person with more formal schooling, particularly under civil service guidelines. The experience has been that for newly-hired sentencing staff without specific experience, starting salaries are in the range of \$1,000-2,000/year below the salary of an entry-level public

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defender, occasionally at the same salary range. However, the attorney salary usually increases at a faster rate with seniority, and ceilings are higher.

Some offices have established salary scales similar to those of new probation officers. Others, though, have set higher salaries in order to draw qualified employees, often because long-term funding has been uncertain.

### ***3. Target Populations and Selection Process***

One of the most important attributes of successful defense-based sentencing programs is the decision to select an appropriate target population for services, and then *adhering to that selection* in operation.

Because most programs' goals include reducing or controlling incarceration, most programs need to target jail- or prison-bound defendants. Programs may also be designed to serve a particular category of offenders such as juvenile offenders.<sup>69</sup> On the other hand, it makes sense that programs avoid duplication of effort when a particular segment of the defendant population already has special services available. For example, if a jurisdiction has a special drug court available, a sentencing program might be well advised not to target the category of drug offenders who are served by that court.

Legislatures or program planners sometimes place restrictions on the kinds of cases that can be considered for services. Examples include restrictions against "violent" offenders (as defined by the crime charged), or "drug dealers" or "gang members" who are otherwise eligible for probation. Restrictions of this kind are often counter-productive for programs whose goal is to reduce incarceration, since it is precisely the kind of case usually considered "too serious" for an alternative to incarceration that is most certainly jail- or prison-bound. It may be that while most such cases are not appropriate for an alternative sentencing plan, an appropriate alternative can be fashioned for the exceptional case. Defendants who are truly violent, predatory, or otherwise dangerous are neither likely to be accepted for alternatives by courts nor accepted as candidates for alternatives by defense-based sentencing programs.

In most programs, typical cases involve second- or third-time property offenses, drug possession, or offenses related to substance abuse. Offenders in typical cases are thought to be facing one-to-four years incarceration. Some small number of cases may involve offenses against persons, such as a one-time situational act of violence between acquaintances. On occasion, they may involve an offender caught on the periphery of a serious crime. The classic example is the mildly retarded "follower" who is in a car at the time of a major drug transaction, legally accountable for the principal offense, but clearly a minimal participant and not a serious threat to the community.

In other programs, more serious offenders are considered appropriate

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candidates for services, but the length of sentence, not the use of an alternative, is at issue. These programs often cite a goal of reducing prison use, though with a long-term impact on the offender.<sup>70</sup>

For programs which seek to reduce unnecessary incarceration, identifying jail and prison-bound defendants is always a challenge. Three methods have proven useful:

1. Application of statistical criteria: Researchers at the Institute of Government of the University of North Carolina studied defendant characteristics and prison admissions statewide in the early 1980s. From this, they developed a scoring system which was able to predict the likelihood that a defendant will receive a prison term if convicted. Factors found to be relevant included prior record, number of current charges, and the length of pretrial detention.

The North Carolina scoring system was applicable only to that state and became dated after a period of time, but similar studies and scoring systems could be replicated in other states, particularly by making use of data collected by and for sentencing guidelines commissions and court agencies.

2. Use of internally-developed analysis: program planners and staff can prepare their own guides to case selection based on local sentencing patterns and statutes through a three-step process:
  - (a) Staff obtain data from their jurisdiction on general sentencing outcomes for specific offenses. For example, a public defender office may find from a survey of recently closed cases that 95% of its armed robbery convictions, 60% of its cases of possession with intent to distribute controlled substances, 35% of its burglary cases, and 10% of its theft convictions result in prison terms. If available, additional case information, such as prior convictions, employment, or pre-trial detention, can provide additional insights into the distinction between prison and probation sentences.
  - (b) Using these data, the public defender can develop criteria based on current charge, criminal history, and other factors which indicate the likelihood of incarceration. In the example above, clients with the greatest likelihood of incarceration are those likely to be convicted of armed robbery and possession with intent to distribute. While a few armed robbery defendants may be appropriate for alternatives, the clients with drug possession and burglary charges probably offer more likely candidates. Those convicted of theft would, as a class, be the least appropri-

ate for the cost of intensive case planning because they are least likely to face incarceration after sentencing.

- (c) Enlarging upon criteria that emerge from the data, the public defender can also refer to office experience and factors which experienced practitioners identify as indicating the likelihood of incarceration. Examples of such factors include:<sup>71</sup>

- number of prior felony convictions
- prior incarceration (pre-trial or after conviction)
- currently charged with a violent offense
- injury to victim
- public notoriety
- defendant detained prior to trial (and sentence is expected to be greater than served)
- prosecutor is advocating for incarceration
- mandatory sentencing law governs the offense but prosecutor may agree to charge reduction if significant alternative plan is offered

3. Application of the jurisdiction's sentencing guidelines: guideline sentencing systems are in effect in more than a dozen states, providing a clear indication of whether or not a defendant is likely to be prison-bound. In these states, defense-based sentencing programs would be well-advised to "score" defendants as soon as they are considered for services to determine likelihood of incarceration (or the possibility of a non-incarceration alternative).

Whichever of these methods of identifying jail- or prison-bound defendants is selected, program managers can prepare a simple check list based upon the selection criteria, similar to a risk assessment tool, which attorneys can complete in a matter of minutes. The completed check list is given to sentencing program staff as a basis for accepting or rejecting cases referred by attorneys. Retained, completed checklists provide easily accessible documentation of a program's adherence to its goals and particularly the extent to which it accepted and completed cases for clients who were truly "prison- or jail-bound." This information is critical to the program's evaluation of its success and to the community's ability to judge whether the program is meeting its goals.

While development of criteria and a check-list of factors is essential as a means of selecting cases that serve program goals, blind adherence to rigid criteria is usually not helpful. There are always cases that do not meet established criteria yet are prison-bound nonetheless. When this seems to be the case, the referring attorney should present a compelling reason to explain why the case merits a departure from the usual criteria.

There are also cases which appear to fit established criteria, but in which other factors, such as a defendant's highly manipulative personality, would render services meaningless. Defense-based sentencing programs should allow their staff leeway to reject cases or clients who will not cooperate or would not, in their judgment, be willing and able to complete any kind of reasonable plan.

#### **4. Caseloads and Staffing Ratios**

Staff of defense-based sentencing programs engage in time-consuming work involving investigation, client assistance, and writing. Increasing caseloads can produce rapidly diminishing returns. The recommended caseloads often surprise people who are not familiar with the work required in defense-based sentencing advocacy.

According to 100 programs which responded to a 1994 survey conducted by The Sentencing Project, a "typical" felony case requiring some court presentation took an average of 27 hours to complete. (The median was 25 hours). When respondents were asked for the most time spent on a felony case, the average answer increased to 72 hours. Of course, the time spent is in court, on interviews, and contacting resources, so it never falls evenly over time.

A skilled staff person can be expected to conclude approximately 24-36 felony cases each year if some kind of written report and court appearance is required. The caseload can be increased if a significant number of cases require no more than assessment and placement in a treatment program, residential setting, or arrangement for a return to a different jurisdiction. Fewer cases will be handled if the charges are more serious or if the staff person works with mental health issues or must spend an inordinate amount of time to arrange placements.

Because only a fraction of an average public defender's caseload is appropriate for referral to a defense-based sentencing program, there need be far fewer sentencing professionals than lawyers in any office. In most settings, a satisfactory ratio works out to be one sentencing program staff for each 8-10 full-time public defenders handling felony cases.

#### **5. Early Referral**

Successful sentencing advocacy demands early involvement in a case by sentencing program staff. It is most difficult to undertake an investigation, establish a relationship with a defendant, obtain expert evaluations, pursue treatment resources and prepare a credible written report for the court unless a defendant is screened, interviewed, and accepted for services early in the case.<sup>72</sup> Defense-based sentencing programs should be designed to identify and become involved in appropriate cases as early after arrest and charging as possible.

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For sentencing programs located in public defender offices, a check-list screening instrument provides a simple, efficient means of identifying cases early. For example, attorneys in the arraignment court can complete a short check-list based on the criteria decided upon by the office for each felony case. The check-list can be forwarded to the sentencing staff for review. The staff can then assess which cases are likely candidates for services. This procedure is more efficient than relying on the attorney who is ultimately assigned to the case and speeds up the referral process in systems in which the attorney is not assigned until the first trial date.

Early involvement by sentencing staff can be used to help obtain pre-trial release particularly for indigent defendants who have difficulty posting cash bond. The sentencing planner can prepare a social history or report on the defendant's background and a "release plan," which may contain recommendations for electronic monitoring, continued employment, drug treatment, a third-party monitor or other options. The attorney can then offer the court a combination of supervision and control within the community which may influence a court to allow bail. For sentencing programs whose objective includes reducing jail overcrowding, participation in bond hearings contributes greatly to program success.

The case developer can next become involved when plea negotiations are conducted. As is well-known, most cases are resolved by a plea of guilty. For those cases, it is the prosecutor whose discretion often matters the most. Although sentencing programs may intentionally accept difficult cases in which a plea agreement is less likely, program experiences suggest that even in these cases, many are resolved by agreement with the prosecutor and go before the judge uncontested for sentencing.<sup>73</sup> If there has been no systematic referral of cases before the defense attorney considers entering plea negotiations, such a review should occur at that time. In some jurisdictions, cases are assigned to a court or a special judge for plea purposes. A public defender office can screen all cases set for such a hearing for consideration of alternative sentencing services. By providing a means of resolving cases relatively early, through a negotiated plea, public defenders can help shorten court processing time. For cases not resolved during plea negotiations, defense attorneys must prepare for a contested sentencing hearing. Cases *not referred* to sentencing staff in advance of any plea negotiations are at a disadvantage. Public defender programs and private attorneys will find that most defense-based sentencing programs require *as a minimum* 30 days to prepare a significant felony case for a sentencing hearing. Keeping in mind that an earlier referral is always preferable, public defenders and private attorneys should arrange schedules and court appearances to allow at least this minimum period for preparation of a case for sentencing. The need to obtain medical, mental health, or other records, or to investigate and obtain placements or residential arrangements may require more time than the minimum.

Private attorneys handling fee-paying or assigned cases might find it

helpful to prepare a check-list, as recommended for public defenders. The need to consider sentencing services early is just as important for private counsel as it is for public defenders.

## **6. *Post-Sentencing Programs***

By design, some defense-based sentencing programs become involved in cases only after sentencing. There are three different points at which these kinds of programs provide services after the initial sentence:

1. Probation violation proceedings: In some jurisdictions, sentencing programs have focused on providing services to offenders brought back to court on petitions charging a violation of conditions of probation. Some petitions for probation violation allege "technical" violations such as remaining out after a curfew or failure to report. Often these may be addressed by proposing additional supervision in the community or other sanctions, allowing the court to respond to technical violations by means short of incarceration. For probation violations that are filed when new charges are lodged against the defendant, or after probation staff are convinced that the offender is a continuing risk and unmanageable on probation, involvement by defense-based sentencing staff may be the only possibility of the offender's avoiding incarceration.
2. Parole hearings: The skills and techniques used in defense-based sentencing programs are directly applicable to inmates awaiting release on parole. Paroling authorities are influenced by factors such as employment, residential placement, and treatment or counseling to address substance abuse problems, all of which can be arranged by a sentencing professional. Historically a few public defender programs have extended services to clients facing parole release decisions or parole revocation petitions.
3. Corrections Inmate Advocacy Programs: There have been efforts to use the techniques and staff of a state's defense-based sentencing programs or specially-trained corrections staff, to prepare release plans for prison inmates eligible for release through judicial resentencing, parole, or discretionary actions of the Department of Corrections. Such efforts can be staffed by corrections personnel who are trained in the methods of defense-based sentencing. One pilot project in Alabama proved successful in moving inmates out of work-release programs and into their communities.<sup>74</sup> This new model gives corrections departments a local resource to help integrate the offender into his or her community.

### ***7. Professional Relationships between Program Staff and Defense Attorneys***

Successful defense-based sentencing programs are designed to foster a sense of professionalism among sentencing staff and respect among attorneys and court officers who work with them. They are also designed to respect attorney-client privilege and other legal doctrines which govern the flow of information between the defendant and his or her lawyer.

The best means of fostering a sense of professionalism is to hire people with professional capabilities and to protect their ability to work as professionals. In law offices, there is often a tendency to treat non-lawyers as "lesser" members of a team. For example, sentencing staff are frequently not consulted about issues concerning their clients, and lawyers sometimes refer cases for sentencing at the last minute and without considering selection criteria. These problems can usually be addressed satisfactorily by the head of the office. Some programs, such as the Metropolitan Defender Service in Portland, Oregon, have gone to great lengths to develop true teams of lawyers, paraprofessionals, and investigators who work on each case.

Difficult issues arise out of the attorney-client relationship. The sentencing professional must be able to discuss the facts of a case as well as the life of the defendant before his or her arrest. Not infrequently a defendant will make incriminating statements or admissions to a sentencing staff person. At times, the sentencing professional's investigation touches upon issues of concern in the defense, or the trial, of the defendant and may uncover information that could be helpful, or harmful, to the defendant if introduced at trial. It is crucial that sentencing staff fall under the protection of the attorney-client privilege, a doctrine that has been acknowledged to apply to sentencing professions.<sup>75</sup>

To preserve and protect the attorney-client privilege, defense-based sentencing programs should:

- Specifically acknowledge that the sentencing program's staff fall under the ambit of the attorney-client privilege and the attorney's obligations of confidentiality. Private sentencing programs should clearly state the relationship in a contract or letter of agreement through which they are retained.
- Prepare a legal memorandum interpreting state evidentiary codes governing privileged communications, the theories of agency that apply to their work, and the implications of a defendant's right to counsel and rights against self-incrimination which act to prohibit disclosure, in most instances, of information provided by the defendant or obtained in the course of investigation. All staff should be familiar with the contents of this memorandum.

- Provide all reports or information which might be submitted to the court to the attorney first, and require the attorney to make the final decision on what should be submitted or whether testimony should be offered. This decision is the attorney's and the client's responsibility.
- Last, and most importantly, defense-based sentencing programs need be exceedingly cautious about assuming *any* post-sentencing supervisory or reporting responsibility for a defendant. Some programs do supervise and report to the court on their client's progress and compliance with conditions of sentencing. But most do not, for to do so puts program staff, who act as agents of the defense, in a position of revealing privileged communications about his or her client to the sentencing court. Revealing such information without permission of the defendant violates the attorney-client privilege; failing to reveal it violates the duty of a court officer charged with supervising an offender. These duties are difficult if not impossible to reconcile.

*Last, and most importantly, defense-based sentencing programs need be exceedingly cautious about assuming any post-sentencing supervisory or reporting responsibility for a defendant.*

#### 8. *Facilitating Relationships with Other Court Professionals*

Staff of defense-based sentencing programs must also work well with others in the criminal court system. Program design can hinder or facilitate a working relationship with those outside the office as well as within. Considerations applicable to different professional groups are:

**Judges and Prosecutors:** Sentencing program staff gain the respect and trust of judges and prosecutors over time through accuracy, timeliness and credibility of the information they provide. Defense-based sentencing programs must be given the time and resources necessary to prepare accurate reports and to submit them at least three days in advance of use in court whenever possible. While the defendant's lawyer and sentencing staff need to decide how most effectively to present information and recommendations to the court, no lawyer should ask sentencing staff to suppress or withhold information. The choice for the lawyer may be between submitting a full report or submitting no report at all. Asking sentencing staff to change their recommendations cannot be permitted in a program that expects to maintain credibility.

A good rule of practice for public defenders and private attorneys alike is to understand that, while a defense-based sentencing program staff person is an advocate, he or she is also a resource which may be more useful in some cases, and less so in others.

**Probation Officers:** In some jurisdictions there has been a history of difficult relations between probation officers and sentencing program staff, particularly when probation staff conclude that sentencing program staff are usurping their responsibilities or authority. The issue is often one of "turf." Public defender and independent defense-based sentencing programs have confronted this issue directly in the following ways:

- **By clearly defining the sentencing staff's role, particularly as it relates to the attorney-client privilege.** Probation officers are not generally allowed to invade the attorney-client relationship or to provide services prior to a conviction or plea of guilty. Defense sentencing advocates do exactly this. This difference usually needs to be explained to probation officers.
- **By working cooperatively with client-monitoring and probation violation procedures that probation may have established.** Defense-based sentencing programs frequently recommend third party or volunteer mentor involvement in a defendant's case. Probation will be concerned as to the reporting responsibilities of the volunteer or mentor. Some probation officers want to be involved; others do not. Whichever the case, defense-based sentencing programs should establish acceptable procedures for volunteers or mentors to report non-compliance to the probation department or the court.
- **By attempting to develop a working relationship with probation officers.** Whenever possible, a sentencing recommendation should be reviewed in advance of a court date with the probation officer assigned to a case. The observations or objections of a probation officer should be carefully considered and incorporated when appropriate. In time, the defense-based sentencing program staff should become a resource for probation officers. In some areas, local probation officers tend to refer their own clients to a defense-based sentencing program.
- **By avoiding recommending a sentencing plan that saddles an overworked probation officer with yet another difficult supervision case whenever possible.**

Most of these suggestions require time, which must be afforded to the staff of a defense-based sentencing program by the program's sponsor.

## 9. *Maintaining Standards of Professionalism and Training*

A public defender, public agency, or private defense-based sentencing program requires resources and time to afford staff training. The opportunity for professional development and continued training is as essential for sentencing staff as it is for lawyers, judges, probation officers, and others in the court system. As members of a new profession, sentencing staff are often not afforded the same opportunities and usually do not have access to the same institutionalized training resources as do attorneys.

Sentencing program staff also tend to experience professional isolation. Even in larger programs, staff are outnumbered by attorneys and other court officers. More often than not, the sentencing person is alone among a sea of attorneys. Many defense attorneys do not understand the nature and demands of their work. In smaller offices, it is not unusual that the sentencing staff person maintains a close relationship with local attorneys and yet is geographically remote from any other person doing similar work.

A defense-based sentencing program should have access to the following resources:

- A library of books and periodicals considered essential to the profession. A recommendation for a basic library is set forth in Appendix A.
- Local office, regional, or state training. Even smaller private and public defender offices provide annual or periodic training for staff. Training programs last about two days and include topics touching the range of issues mentioned above. Faculty are senior staff, outside speakers from probation offices, counseling, treatment, and rehabilitation programs, and lawyers who are skilled sentencing advocates and knowledgeable about defense and sentencing.
- National training programs. The National Association of Sentencing Advocates sponsors an annual conference devoted to training and information.

*The opportunity for professional development and continued training is as essential for sentencing staff as it is for lawyers, judges, probation officers, and others in the court system.*

Professional development requires ongoing training and education. Training programs and conferences are also remedies for isolation. The budget and time allocation for training staff of defense-based sentencing programs should provide for maintenance of a small library and for staff attendance at a regional or national conference annually.

## 10. *Program Costs and Funding*

Most of the costs of a defense-based sentencing program are salary expenses for staff and for secretarial support. Staffing recommendations,

from which salary expenses may be drawn, are as follows:

**Supervisor/Director:** Any program with more than three sentencing staff requires a director or coordinator, or at a minimum, a senior sentencing staff person with supervisory and coordinating responsibilities. This is particularly important when the sentencing staff are in several offices in one state; programs without centralized coordination, administrative support, and a voice in the central office, are likely to suffer organizational problems.

**Sentencing Staff:** Ideally, one staff person for each eight to ten attorneys handling cases in the target population (felony, misdemeanor, juvenile), or the part-time equivalent. Sentencing work in rural jurisdictions may require more staff time than in urban areas since travel time decreases the numbers of cases that can be handled.

**Support Staff:** Support staff knowledgeable in the work of the office who can answer phone calls is essential to efficiency. Full time secretarial support is usually justified when there are four or more sentencing staff. Computer skills and the ability to maintain files are also essential.

Applying these rules, a program planner could assume that one staff person should be sufficient in a rural jurisdiction with 25 attorneys who handle felony cases on a part-time basis.

A new sentencing program serving a public defender office with a felony division of 30 full-time attorneys should have three sentencing staff, one of whom serves as director or part time coordinator, and one secretary who handles telephone responsibilities and word processing tasks and may also have time for some collateral duties within the public defender office. Other budget items include:

**Consultants:** A modest budget for outside consultants who can provide client needs assessments, psychological evaluations or substance abuse assessments is vital to program success. Sentencing staff can usually identify appropriate professionals, but such services are not free. A budget of \$2,000/year for each sentencing staff is a good starting point.

**Travel:** For training and a mileage allowance to investigate, visit clients, pursue employment and placements, and interview potential witnesses. These items will vary from location to location. Rural programs will usually face higher costs.

**Supplies and equipment:** Computers and high-quality printing

equipment are essential. Sentencing reports tend to be changed and amended frequently, up to the date of submission. Other office supplies and equipment are standard. Reports should be bound in distinctive covers identifying the defense-based sentencing program and "host" office, such as the public defender. Funds are also needed for long distance telephone service and for express mail.

### PROGRAM OUTCOMES AND BENEFITS

For defense-based sentencing programs, outcomes are usually measured by the number or percentage of cases in which the sentencing court ultimately approves all or a portion of the alternative plan. In some cases, the plan includes a period of incarceration or periodic confinement, so success is not measured solely by the number of cases resulting in a non-incarcerative sentence, but also when the incarceration is thought to have been significantly less than that which would have resulted without the plan.

Nationally and over time, defense based sentencing programs have achieved a surprising consistency in program outcomes. From the first reports in the early 1980's through recent evaluations, sentencing plan acceptance rates have run at about 65% or better, and not unusually as high as 80%.<sup>76</sup>

Another indication of program success is its experience with recidivism or subsequent offending. Few rigorous studies over the period of time required to provide statistically valid data about recidivism have been conducted, principally due to lack of funding for such studies. One recent study of a variety of community corrections programs in North Carolina found that the defense-based Community Penalties program was significantly associated with avoiding rearrest for a violent offense for program participants.<sup>77</sup>

Properly designed and staffed, defense based sentencing programs offer many advantages to the courts and their communities. These include:

- Confidence that the sentencing court is fully and accurately informed about the background and character of each defendant;
- A range of sentencing options for courts to choose from, including options that offer punishments, control, accountability and a reasonable prospect of avoiding criminal conduct, at less cost than jail or prison
- The ability to respond to the needs of an offender's victim
- Improved prospects for returning offenders to employment, and therefore the ability to support families or pay restitution



- Reduction in jail and prison use, with potential for an impact upon management and overcrowding problems
- Effective and efficient representation by counsel at sentencing
- Defendants who are well-counseled and informed upon entering pleas of guilty, often leading to faster disposition times and more efficient court processing
- Improved efficiencies in a public defender office
- Decreased case processing times for courts, gained when defendants can more quickly come to terms with the prospect of acknowledging guilt and accepting a sentence that although punitive or restrictive, may also offer positive benefits

*From the first reports in the early 1980's through recent evaluations, sentencing plan acceptance rates have run at about 65% or better, and not unusually as high as 80%.*

Not all programs achieve high success rates for cases, particularly early in operations. Not all programs deliver all of the benefits that collectively defense-based sentencing programs have in the past. But based on the national experience, program planners have every reason to be optimistic that, as for most programs, theirs too will obtain results that benefit defendants, courts, and the community.

## ***ELEMENTS OF A JUVENILE DEFENDANT'S DISPOSITIONAL PLAN***

The possible elements advocates may consider in fashioning a dispositional plan for juvenile defendants are many and varied, with the special needs, assets, limitations and history of each child and his or her family suggesting more permutations. The Sentencing Project urges advocates to consider as full a range of support services, reliance upon positive family and community connections, constructive controls and alternative sanctions as is possible for each child. A *partial* list of options to consider includes the following:

**1. Living Arrangements and Residential Options.** Where and with whom the child lives, and any necessary special consideration throughout the duration of the period of court supervision. Options include the family home, residences of collateral family members or adult friends, group homes, half-way houses and secure residential treatment centers. A serious proposal to place a child in a family member or friend's home requires a visit to that home and a visit with the responsible adults in advance.

**2. Geographic Relocation.** Removing a juvenile offender from a particular area or family setting may be an acceptable solution to several problems, including regular interaction with the victim. Question children about family members or adult mentors or friends who may live elsewhere.

**3. Psychological Assessment or Treatment.** To assist the child with problems which give rise to criminal behavior or to further rehabilitation, appropriate assessment or treatment may be arranged for alcohol and drug dependency and for emotional and psychological disorders, including unacceptable sexual conduct. Plans must document a juvenile offender's acceptance into a program, the location of treatment, the treatment facility personnel and the extent of the period of treatment. In some jurisdictions, juvenile probation may assist in finding and obtaining appropriate services; in other jurisdictions the advocate's initiative will determine whether a child actually obtains needed assessments or services.

**4. Counseling.** Some juvenile offenders are very receptive to counseling in areas such as substance abuse, anger management, parenting skills, family relationships and the like. We too often neglect the difficulties juvenile offenders have coping with the basics of their lives.

**5. Community Service.** Many juveniles are too young to work for payment, but unpaid work or volunteer assistance to a community agency, church, school or law enforcement may constitute a genuine "pay back" for an injury or damage and offer the juvenile a positive experience while assuring supervision for the time that is involved. As for adults, activity arranged for a child should be more than "busy work."

**6. Public Acknowledgment of an Offense or a Characteristic.** In its negative forms, this kind of sanction is sometimes called "public humiliation" sentencing when imposed in criminal court. To ensure that criminal defendants publicly acknowledge their offense or responsibility, courts have required them to obtain paid newspaper advertisements, wear marked clothing or post signs or bumper stickers. Juvenile court confidentiality may bar public acknowledgment, but in limited circumstances advocates might wish to consider whether some public acceptance of responsibility might be appropriate. Community service concepts are generally more constructive than the "humiliation" a few judges seem to desire.

**7. Contributions to Law Enforcement.** Some juvenile offenders might gain from working with, or being around, law enforcement officers; some police units are set up to provide mentoring or sponsoring

support to juveniles through Big Brother/Big Sister or community policing programs.

**8. Public Information Services.** Some juvenile offenders are well positioned to inform the public about the seriousness or the means of preventing certain types of offenses, such as drug abuse, gang participation and vandalism including graffiti. The means of providing information might include speaking to schoolmates, groups of offenders or adult groups, and even assisting reporters and other media professionals in preparing articles on delinquency issues.

**9. Victim Restitution.** Payment of the victim's monetary loss in order to compensate for damages or financial loss suffered as a result of the juvenile offender's criminal activity; limited by a juvenile's ability to legally obtain an income.

**10. Symbolic Restitution.** When monetary restitution is not possible, there is often an option of providing partial, symbolic restitution, which punishes the juvenile offender as it partially offsets a victim's loss. Symbolic restitution may be paid to any individual or group who may have suffered an indirect financial expense due to the juvenile offender's behavior, or to a charitable organization.

**11. Special Consideration for the Victim.** There is no reason why a sentencing order should not take into account the reasonable needs or desires of the victim. A juvenile offender's offer to "stay away from" an individual or a neighborhood, or to in some way assist a victim, his or her friends, family or a person in whom the victim has an interest, may be appropriate in some cases.

**12. Education.** For most juveniles, a plan to continue education is important whenever realistic. The plan might include continuation in public or private schools, GED preparation courses, remedial or special education programs or specialized training; usually considered to serve a rehabilitating function. For many juveniles with legal problems, learning or other disabilities are factors which often have never been addressed. Under the Individuals With Disabilities Education Act (IDEA), juveniles have a right to appropriate educational and remedial services. Access to these services usually requires specialized advocacy skills.

**13. Employment.** If not in school, and of legal age to work, the juvenile offender should be employed whenever possible. The advocate should specify who should supervise the juvenile offender, the hours of employment, the salary and the duties of the position.

**14. Vocational Training.** When employment is impossible or inappropriate, vocational training should be considered, as it may lead to gainful employment in the future. In addition to state vocational rehabilitation, manpower, Job Corps and corporate on-the-job training, advocates might consider variations on the apprenticeship and mentoring models even for youths too young to work for salary.

**15. Community Advocate/Third Party Monitor.** A highly recommended, if not essential, component for most children, this element provides individuals in the community to monitor a juvenile offender's compliance and behavior. Properly arranged, a third party monitor can extend supervision beyond that normally provided by probation or parole officials. There may be more than one advocate or third party monitor. This function may be linked to employment, counseling, vocational training and the like. Community organizations such as churches and civic organizations may contribute to this function.

**16. Relinquishing a Right/Sacrificing Freedom.** The most common form involves "house arrest," which need not be linked to electronic monitoring. However, "house arrest" is over-played as a probation option that requires increased supervision. Other provisions may involve limits upon use of a car or

travel, rigid structuring of a juvenile offender's time, restrictions on privacy and voluntary submission to searches, breathalyser tests and the like at the behest of law enforcement, including probation. Punishment for some juvenile offenders may be having to give up treasured activities, including fishing or hunting, sports, television and the like.

**17. Part-Time Incarceration.** A sanction rarely applicable for juveniles, even those in criminal court, this involves work release or periodic (e.g., weekends) imprisonment, usually in a local (jail) facility.

**18. Short-Term Incarceration.** Many jurisdictions permit short-term incarceration as "punishment" for juveniles, although it has limited utility or positive benefit.

**19. Day Reporting/Treatment Programs.** There are an increasing number of juvenile day reporting centers or programs. Day reporting offers daily accountability and observation, including optional drug testing, schooling, counseling and activities.

**20. Special Considerations.** Juvenile offenders often require dispositional arrangements that involve unique elements tailored to their special needs or circumstances. Examples include steps to solve medical needs, transportation problems, transferring probation elsewhere (interstate compact), obtaining financial assistance including public assistance and Medicare benefits, help with immigration problems, or, as previously noted, a program to address developmental disabilities.

**21. Letters of Support and Recommendation.** A sentencing plan needs to provide indications of the support available to the juvenile offender in the community and from family, friends, employers, public officials, clergy and the like. Care must be taken that letters are consistent with the sentencing strategy, including acceptance of responsibility, presented to the court.

\*Modified from the Sentencing Project's Briefing Sheet, *Elements of a Defense Sentencing Plan*. The elements listed here also may be considered in preparing a motion for release from detention, or in preparing for bail motions or sentencing for children prosecuted in criminal court.

## ENDNOTES

1. Less than one-half of 1% of all persons ages 10 through 17 in the U.S. were arrested for a violent crime in 1995 (OJJDP Juvenile Justice Bulletin, February 1997). The arrest rate for juveniles dropped between 1991 and 1993; 16,036 per 100,000 were arrested in 1989, 16,893 per 100,000 were arrested in 1991, and 16,681 per 100,000 were arrested in 1993. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, SELECTED NATIONAL STATISTICS ON JUVENILE ARRESTS AND DETENTION (1995). In 1995 murder, rape, robbery and aggravated assault arrests of juveniles dropped 3%. Based on 1992 data before the juvenile arrest rate dropped, the Department of Justice acknowledged that juveniles are not responsible for most of the increase in violent crime. "If juvenile violence had not increased between 1988 and 1992, the U.S. violent crime rate would have increased 16% instead of 23%." OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS IV (1995).
2. The Specialty Guidelines for Forensic Psychologists are a clear statement of the special responsibilities of forensic evaluators to know the law relevant to an individual child's case. Experts do not give legal conclusions, but go much further than non-forensic evaluators in presenting clinical material in ways that can be used effectively in court. Forensic psychologists come within the medical exception to hearsay restrictions and may present information obtained during the evaluation and used in forming an opinion. Since the Specialty Guidelines for Forensic Psychologists call for forensic evaluators to have "current knowledge about legal developments," evaluators should ask attorneys for statutes regarding the offense and be able to provide clinical opinions about the juvenile's thought process in the context of how the law defines the particular offense. *Specialty Guidelines for Forensic Psychologists*, 15 L. AND HUMAN BEHAVIOR, 655 (1991).
3. R. Dana, *Impact of the Use of Standard Psychological Assessment on the Diagnosis and Treatment of Ethnic Minorities*, in PSYCHOLOGICAL INTERVENTIONS AND CULTURAL DIVERSITY (J.F. Aponte et al. eds., 1995); see also M. Lindsey, *Ethical Issues in Interviewing, Counseling and the Use of Psychological Data with Child and Adolescent Clients*, 64 FORDHAM L. REVIEW 2035 (1996).
4. T. Grisso, *The Competence of Adolescents as Trial Defendants*, PSYCHOL., PUB. POL'Y AND L. 291 (1992).
5. The names and identifying information of the adolescents in these case studies have been changed, but the description of their offenses and needs and quotations from interviews with them are true.
6. L. Steinberg & E. Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision Making*, 20 L. AND HUMAN BEHAVIOR 249 (1996).
7. "Recent figures showing a drop in juvenile crime across America have some 'experts' who warned of a new generation of 'superpredators' seeking forgiveness for being so far off in their predictions. The effect would be comical --except that the pundits' pronouncements are still being used to justify ever more draconian policies directed against younger and younger kids." V. Schiraldi & M. Kappelhoff, *Where are the Teen 'Super Predators'?*, HandsNet (May 5, 1997).
8. L. KOHLBERG, MORAL STAGES AND MORALIZATION: THE COGNITIVE-DEVELOPMENTAL APPROACH; T. LICKONA, MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (1976); C. GILLIGAN, IN A DIFFERENT VOICE (1982).
9. M. Beyer, *One Child and Family at a Time: Strengths/Needs-Based Service Crafting*, 12 CARING 3 (1996).
10. A. Browne & D. Finkelhor, *Impact of Child Sexual Abuse*, 99 PSYCHOLOGICAL BULLETIN 66-77 (1986); see also J.R. Conte & L. Berliner, *The Impact of Sexual Abuse on Children*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN (L.E.A. Walker ed., 1987); A SOURCEBOOK ON CHILD SEXUAL ABUSE (D. Finkelhor ed., 1986); D. Kolko, *Treatment of Child Sexual Abuse*, 2 JOURNAL OF FAMILY VIOLENCE 303-31 (1987).

11. P. STEINHAUER, *THE LEAST DETRIMENTAL ALTERNATIVE* (1991).
12. E. Deblinger, S.V. McLeer, & D. Henry, *Cognitive Behavior Treatment for Sexually Abused Children Suffering Post-Traumatic Stress*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 747 (1990); *see also* J.D. Osofsky, *The Effects of Exposure to Violence on Young Children*, in AMERICAN PSYCHOLOGIST (1995).
13. Simon points out that 4 out of every 10 Americans are exposed to a major trauma by age 30, and PTSD develops in about a quarter of them. He emphasizes that often clinicians do not verify the specific criteria required for a diagnosis of PTSD met by the individual being evaluated. "Repeated reexperiencing of the traumatic event, either through recurrent nightmares, distressing, intrusive recollections, or flashback experiences, is the hallmark feature of PTSD." Simon also emphasizes the importance of assessing the specific impairment in functioning, another required criterion of the PTSD diagnosis. R. Simon, *Toward the Development of Guidelines in the Forensic Psychiatric Examination of Posttraumatic Stress Disorder Claimants*, in PTSD IN LITIGATION (Robert Simon ed., 1995).
14. POST-TRAUMATIC THERAPY AND VICTIMS OF VIOLENCE (Frank Ochberg ed., 1988).
15. DAVID ELKIND, *ALL GROWN UP AND NO PLACE TO GO* (1984).
16. In putting together a rehabilitative proposal, counsel for children facing transfer or waiver hearings or sentencing should request that more than one program (preferably public and private delinquency agencies) interview the young person and describe in writing specifically the services they would offer him/her to meet the needs identified by the expert. If the expert can become familiar with the services offered and the security of these programs, their recommendations regarding the programs' capacity to meet the young person's needs can be valuable.
17. T. Grisso, *Society's Retributive Response to Juvenile Violence*, 20 LAW AND HUMAN BEHAVIOR 229 (1996). Grisso also presents a number of studies indicating that juveniles who commit homicides rarely kill a second time and, in fact, have low re-arrest rates for other offenses.
18. S. Henggeler, G. Melton, and L. Smith, *Multisystemic Treatment of Serious Juvenile Offenders*, 60 J. OF COUNSELING AND CLINICAL PSYCHOL. 953 (1992). Nevertheless, as Grisso points out, "...even if rehabilitative programs are found to be relatively successful with many adolescents found guilty of violent offenses, one can expect that they will fail with a sizable minority of them. Under those conditions, the public is likely to support a rehabilitative response to juveniles with violent offenses only if we can identify which adolescents are unlikely to respond to such interventions. This is a formidable challenge, in light of the primitive status of our abilities to assess which adolescents present greater risk of life-course-persistent antisocial behavior."
19. Eisikovits & Baizerman, *Doin' Time*, J. OFFENDER COUNSELING, SERVICES & REHABILITATION, Vol. 6 (1983). See also complaints filed by the Youth Law Center (San Francisco, California) in the Robbins, Horn and Armstrong cases: 15-, 14-, and 17-year-olds who killed themselves in adult facilities in California, Kentucky and Indiana.
20. COMMUNITY RESEARCH FORUM, *AN ASSESSMENT OF THE NATIONAL INCIDENCE OF JUVENILE SUICIDE IN ADULT JAILS, LOCKUPS AND JUVENILE DETENTION CENTERS* (1980).
21. ROWAN & HAYES, NATIONAL INSTITUTE OF CORRECTIONS, *TRAINING CURRICULUM ON SUICIDE DETECTION AND PREVENTION IN JAILS AND LOCKUPS* (1988).
22. Williams, *When A Private Act of Desperation Becomes a Public Issue*, CORRECTIONS COMPENDIUM, Vol. 14 (1989); *see also* STANDARDS FOR HEALTH SERVICES IN JAILS (Nat'l Comm. on Correctional Health Care 1996).
23. M. Forst, J. Fagan & T. S. Vivona, *Youth in Prisons and Training Schools*, JUV. AND FAM. COURT J., Vol. 40 (1989); *see also* Thomas et al., *The Impact of Confinement on Juveniles*, L. AND SOCIETY REV., Vol. 14 (1983).
24. National Prison Project Fact Sheet (1996).

25. R. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. OF SOC. OF L. 135 (1992).
26. See complaints filed by the Youth Law Center in the Eric P.I and Doe cases on behalf of juveniles subjected to cruel and harsh conditions of adult confinement in Maine and Ohio, resulting in irreparable harm.
27. Bishop et al., *The Transfer of Juveniles to Criminal Court*, 42 CRIME AND DELINQUENCY 171 (1996).
28. J. FAGAN, THE COMPARATIVE ADVANTAGE OF JUVENILE VERSUS CRIMINAL COURT SANCTIONS ON RECIDIVISM AMONG ADOLESCENT FELONY OFFENDERS (1996).
29. Grisso, *supra* note 17.
30. *Dusky v. United States*, 362 U.S. 402 (1960). Fully 90% of states revised their codes pertaining to the adjudication of youths charged with serious and violent offenses.
31. See P. TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (1996).
32. T. Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. AND HUMAN BEHAVIOR 229 (1996).
33. See *supra* note 31.
34. 383 U.S. 541 (1966).
35. 387 U.S. 1 (1967).
36. T. Grisso, M. Miller & B. Sales, *Competency to Stand Trial in Juvenile Court*, 10 INT'L J. OF PSYCHIATRY AND L. 1 (1987).
37. *In the Interest of S.H.*, 469 S.E.2d 810 (Ga. Ct. App. 1996).
38. See, e.g., *Godinez v. Moran*, 113 S.Ct. 2680 (1993); see also R. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAVIORAL SCI. AND THE L. 291 (1992).
39. A more detailed review of research supporting the following discussion may be found in: T. Grisso, *The Competence of Adolescents as Trial Defendants*, PSYCHOL., PUB. POL'Y AND L. 291 (1992).
40. T. GRISSE, JUVENILES' WAIVER RIGHTS (1981); see also T. Grisso, *Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis*, CAL. L. REV. 1134, Vol. 68 (1980).
41. See, e.g., R. Shepherd & B. Zaremba, *When a Disabled Juvenile Confesses to a Crime: Should it be Admissible?* 9 CRIM. JUST. 31 (1995).
42. Grisso, see *supra* note 40; see also M. Peterson-Badali & R. Abramovitch, *Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?* 34 CAN. J. OF CRIMINOLOGY 139 (1992).
43. See E. Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyer's Roles*, 64 FORDHAM L. REVIEW 1699 (1996).
44. M. Peterson-Badali & R. Abramovitch, *Grade Related Changes in Youth People's Reasoning about Plea Bargains*, 17 L. AND HUMAN BEHAVIOR 537 (1993).

45. For reviews, see E. Scott, *Judgement and Reasoning in Adolescent Decision Making*, 37 VILL. L. REV. 1607 (1992); E. Scott, N. Reppucci & J. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. AND HUMAN BEHAVIOR 221 (1995); L. Steinberg & E. Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision Making*, 20 L. AND HUMAN BEHAVIOR 249 (1996).
46. See J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339 (1992); A. Benthin et al., *A Psychometric Study of Adolescent Risk Perception*, 16 J. OF ADOLESCENCE 153 (1993).
47. E. Cauffman & L. Steinberg, *Age Differences in Decision-Making Are Due to Differences in Maturity of Judgment* (1997) (unpublished manuscript on file with author)
48. Grisso, see *supra* note 40.
49. V. Cowden & G. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629 (1995).
50. See *State v. E.C.*, 922 P.2d 152 (Wash. Ct. App. 1996) (granting juvenile courts greater latitude in handling incompetent juveniles, if that is necessary in order to meet the needs of a particular juvenile offender).
51. See *Jackson v. Indiana*, 406 U.S. 715 (1972).
52. Mary G. Hynes, *Children with Disabilities in Detention: Legal Strategies to Secure Release*, 3 THE DISTRICT OF COLUMBIA L.R. 299 (1995); Jeanne Asherman-Jusino, *THE RIGHT OF CHILDREN IN THE JUVENILE JUSTICE SYSTEM TO INCLUSION IN THE FEDERALLY MANDATED CHILD WELFARE SERVICES SYSTEM*, 3 THE DISTRICT OF COLUMBIA L.R. 311 (1995).
53. See M. YOUNG, *HISTORY OF DEFENSE-BASED SENTENCING PROGRAM DEVELOPMENT*, THE SENTENCING PROJECT (1995).
54. G. Frederick Allen, *Probation and Parole*, in *ENCYCLOPEDIA OF SOCIAL WORK 1910-1911* (1995).
55. See *supra* note 53.
56. 372 U.S. 335 (1963).
57. *Mempa v. Rhay*, 289 U.S. 128 (1967).
58. *Standards Relating to Providing Defense Services*, ABA Proj. on Standards for Crim. Just., ABA Advisory Comm. on Prosecution and Def. (1968) (approved draft); *Standards Relating to the Prosecution Function and the Defense Function*, ABA Standards for Crim. Just., ABA Advisory Comm. on Prosecution and Defense (1971) (approved draft).
59. 551 F.2d 1241 (D.C. Cir. 1976).
60. ABA Standards for Criminal Justice, Chap. 18 (1980). These Standards are discussed for their applicability to defense based sentencing and sentencing advocacy in The Sentencing Project, *An Introduction to the American Bar Association "Standards for Criminal Justice"* (1980) reprinted in *National Conference on Sentencing Advocacy*, Practising Law Institute (1989). They are cited throughout this text as: "ABA Standards for Criminal Justice".
61. *Supra* note 60, pp. 18-437-438, 440.
62. *Id.* at 18-447 and Commentary to Standard 18-6.3.
63. See, e.g., *State v. Taylor*, 339 S.E.2d 859 (N.C. App. 1986); *Christy v. State*, 731 P.2d 1204 (Wyo. 1987); *State v. Fortin*, 859 P.2d 359 (Idaho Ct. App. 1993). But see *Copas v. Warden*, 621 A.2d 1378 (Conn. App. Ct. 1993).



64. G. Thomas Gitchoff, T. Rodgers, & O. Ibar, *The Privately Commissioned Pre-Sentence Report: A Multi-Disciplinary Approach*, 2 Crim. Just. J. 271 (1979).
65. G. Thomas Gitchoff, *Expert Testimony at Sentencing*, 1 NAT'L J. OF CRIM. DEFENSE 101-60 (1981).
66. M. Yeager, *Client Specific Planning: A Status Report*, Criminal Justice Abstracts 537 (Sept. 1992).
67. L. Berman, *Meeting the Goals of Sentencing: The Client Specific Plan*, NEW ENGLAND J. ON CRIM. AND CIV. CONFINEMENT, Vol. 331 (Summer 1983).
68. See, e.g., Report: Citizens Commission on Alternatives to Incarceration (Durham, N.C. 1982) (promoting specifically the defense-based program model developed with support of The Edna McConnell Clark Foundation in Fayetteville, N.C.) North Carolina subsequently adopted and funded this model through its Community Penalties Act in 1983.
69. See, e.g., M. MAUER & M. YOUNG, PROGRAM EVALUATION OF COMMUNITY SERVICES FOR WOMEN IN LOWELL, MASSACHUSETTS, THE SENTENCING PROJECT (1994).
70. Two such programs are the Client Services Program of the Wisconsin State Public Defender Office and the Offender Rehabilitation Division of the Public Defender Service of Washington, D.C.
71. These criteria were identified by The Sentencing Project staff: BRIEFING SHEET: DEVELOPING A 'PRISON-BOUND' CASELOAD: SELECTION PROCESSES AND CRITERIA, THE SENTENCING PROJECT (1989).
72. *Supra* note 8, Standards 18-6.3(e), (f), pp. 18-426-429; see also *supra* note 8, p. 18-441; J. Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative*, 37 MERCER L. REV. 981 (1986).
73. M. YOUNG, ALTERNATIVE SENTENCING/SENTENCING ADVOCACY PROJECT — 1982, NATIONAL LEGAL AID AND DEFENDER ASSN. (1983).
74. T. ROCHE, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, ALABAMA WORK RELEASE ADVOCACY PROJECT (1992).
75. *Briefing Paper: The Sentencing Specialist and Attorney-Client Privilege*, The Sentencing Project (1990). For a rare instance of a challenge to the attorney-client relationship by a prosecutor in a trial court, and a collection of legal pleading and amicus brief on issues of privilege, work product and confidentiality submitted in that case, see M. Young ed., *The Matthew Yeager Subpoena Case — A Defense of Confidentiality of Attorney-Client Privilege Extended to the Professional Sentencing Specialist*, The Sentencing Project (1990).
76. M. YEAGER, SUMMARY OF EVALUATIONS OF DEFENSE-BASED SENTENCING PROGRAMS, THE SENTENCING PROJECT (1995).
77. M. Jones & D. Ross, *Recidivism of Offenders Assigned to Community Corrections Programs or Released from Prison in North Carolina: Fiscal Year 1992-93*, N.C. Pol. Advisory Comm., Vol. 62 (April 1996).

## ***APPENDIX***

# ***THE COMPETENCY SCREENING TEST\****

1. The lawyer told Bill that
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19. When I think of being sent to prison, I
20. When Phil thinks of what he is accused of, he
21. When the jury hears my case, they will
22. If I had a chance to speak to the judge, I

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# HANDBOOK FOR COMPETENCY SCREENING TEST\*

## 1. *The lawyer told Bill that*

- (a) Legal criteria: ability to cooperate in own defense, communicate, relate
- (b) Psychological criteria: ability to relate or trust

SCORE 2: includes obtaining and/or accepting advice or guidance

examples: "he should plead not guilty"  
"he was free"  
"he should plead nolo"  
"he should plead guilty"  
"he would take his case"  
"he would need to know all the facts concerning the case"  
"he should turn himself in"  
"the outlook was good"  
"he will try to help him"

SCORE 1

examples: "he is innocent"  
"everything is all right"  
"be truthful"  
"he will be going to court soon"  
"he is competent to stand trial"  
"it will be file"

SCORE 0: includes regarding the lawyer as accusing or judgmental

examples: "he was wrong in doing what he did"  
"he is guilty"  
"he is going to be put away"  
"no comment"

## 2. *When I go to court the lawyer will*

- (a) Legal criteria: ability to cooperate in own defense, communicate, relate.
- (b) Psychological criteria: ability to relate or trust

SCORE 2:

examples: "defend me"  
"be there to help me"  
"do his best to get me off with a light sentence"  
"represent me"  
"present my case"

SCORE 1:

examples: "be there"  
"ask for postponement"  
"ask me to take the stand"

SCORE 0:

examples: "put me away"  
"keep his mouth shut"  
"prosecute me"

## 3. *Jack felt that the judge*

- (a) Legal criteria: understanding and awareness of court process
- (b) Psychological criteria: awareness and acceptance of court process

SCORE 2:

examples: "was right"  
"was fair"  
"tried to keep an open mind"  
"was a rough judge to face on his particular charge"

SCORE 1:

examples: "was doing his job"

SCORE 0:

examples: "was unjust"  
"was wrong"  
"was too harsh"  
"was his enemy"  
"no comment"

## 4. *When Phil was accused of the crime, he*

- (a) Legal criteria: understanding and awareness of the consequences
- (b) Psychological criteria: appropriate coping attitude/emotion

SCORE 2: includes appropriate response to a formal accusation as in a courtroom situation

examples: "pleaded not guilty"  
"got a lawyer"

SCORE 1: includes appropriate emotion without coping as a positive outcome not appropriate to the situation

examples: "could not believe it"  
"shivered"  
"felt nervous"  
"was arrested"  
"was innocent"  
"denied it"  
"was let free"

SCORE 0:

examples: "pleaded guilty"  
"confessed"  
"wanted what was coming to him"  
"wasn't himself"

5. *When I prepare to go to court with my lawyer*

- (a) Legal criteria: ability to cooperate in own defense, communicate, relate
- (b) Psychological criteria: appropriate coping attitude/emotion

SCORE 2:

examples: "we will know that we are ready"  
"I will tell him the truth"  
"I hope to win"  
"we will have long talks"

SCORE 1:

examples: "everything is all right"  
"he'll tell me to take the stand"  
"he does the talking for me"  
"I felt better"  
"I feel nervous"

SCORE 0:

examples: "I will go to court with my lawyer and my family"  
"they tried me"  
"he will change his mind and set me free"  
"I will get a fine"

6. *If the jury finds me guilty, I*

- (a) Legal criteria: understanding and awareness of consequences
- (b) Psychological criteria: realistic assessment of consequences

SCORE 2:

examples: "will go to jail"  
"will serve my sentence"  
"will appeal"  
"will ask my lawyer what to do"  
"will pay a fine"

SCORE 1: includes passive acceptance of fate

examples: "will have to take whatever sentence I get"  
"will be mad"  
"take the punishment"  
"go where they send me"  
"will do life"  
"accept the decision"  
"will try to be calm"  
"will feel very bad"

SCORE 0:

examples: "the only thing I can say is I'm not guilty"  
"will be back"  
"I think I'll hate the world"  
"will die"  
"will be sentenced to the maximum penalty"

7. *The way a court trial is decided*

- (a) Legal criteria: understanding and awareness of court process
- (b) Psychological criteria: ability to select correct information

SCORE 2:

examples: "is by the evidence"  
"is by the jury"  
"is by the judge and jury"  
"is the judge decides"  
"is based on the facts given"

SCORE 1: also includes awareness of the role of the lawyer

examples: "is fair"  
"is up to the laws of the state"  
"by the court"  
"is through due process of the law"  
"depends on the way your lawyer presents the case"

SCORE 0:

examples: "is whether he is able to stand to trial"  
"is open for improvement"  
"is always by a lawyer"  
"is on the majority of opinion"  
"is for the people"  
"guilty -- not guilty"

8. *When the evidence in George's case was presented to the jury*

(a) Legal criteria: understanding and awareness of consequences

(b) Psychological criteria: appropriate emotion and/or coping

SCORE 2: includes awareness of jury's function and procedures

examples: "they listened carefully to the evidence presented to them"  
"felt his lawyer had done his job"  
"the case was dismissed"  
"they found him not guilty"  
"they were fair in judgement"  
"he was very worried"  
"they deliberated and reached a verdict"

SCORE 1:

examples: "they retired"  
"he remained calm"  
"the case was settled right away"

SCORE 0: includes expectation of losing

examples: "he was found guilty"  
"he felt persecuted"  
"they looked bewildered"  
"it was presented wrong"  
"he cried"

9. *When the lawyer questioned his client in court, the client said*

(a) Legal criteria: ability to cooperate in own defense, communicate, relate

(b) Psychological criteria: appropriate coping attitude

SCORE 2:

examples: "the answer to whatever question was asked"  
"I am not guilty"  
"I did not do anything"

SCORE 1: includes overspecificity, vagueness and/or hesitancy to cooperate with lawyer

examples: "he did not know the person in question"  
"he had no knowledge of it"  
"I don't know why -- not guilty"

SCORE 0:

examples: "the obvious things"  
"he's guilty"  
"I refuse to answer on the grounds that I may incriminate myself"  
"he was too nervous to talk"

10. *If Jack had to try his own case, he*

(a) Legal criteria: understanding and awareness of the court process

(b) Psychological criteria: acknowledgment of need for attorney and recognition of complexity of situation

SCORE 2:

examples: "would not know where to begin"  
"would lose"  
"would refuse"  
"would try to make the jury understand"

SCORE 1:

examples: "would tell the truth"  
"could offer substantial defense"  
"would plead not guilty"  
"would proceed with it"

SCORE 0:

examples: "would possibly make a good lawyer"  
"would set himself free"  
"would plead guilty"

11. *Each time the D.A. asked me a question, I*

(a) Legal criteria: understanding and awareness of court process

(b) Psychological criteria: responses that reflect appropriate behavior of defendant

SCORE 2:

examples: "thought before I answered him"  
"told the truth"

"answered"  
 "refused to answer because my lawyer was not present"  
 "would listen very carefully"

SCORE 1:  
 examples: "got nervous"  
 "would take a long time"

SCORE 0:  
 examples: "stood mute"  
 "take the fifth"  
 "not guilty"

12. *While listening to the witnesses testify against me, I*

- (a) Legal criteria: understanding and awareness of court process  
 (b) Psychological criteria: ability to adequately attend to the sequence of court events and his relationship to it

SCORE 2:  
 examples: "would listen carefully"  
 "listened to find out if they were presenting any perjury"  
 "began to remember pertinent details"

SCORE 1: includes appropriate contentiousness  
 examples: "listened"  
 "was getting very mad"  
 "prayed"  
 "got nervous"  
 "felt they were lying"

SCORE 0: includes inappropriate courtroom behavior  
 examples: "laughed"  
 "got bored"  
 "agreed"  
 "denied their testimony"

13. *When the witness testifying against Harry gave incorrect evidence, he*

- (a) Legal criteria: understanding and awareness of court process  
 (b) Psychological criteria: ability to adequately attend to the sequence of court events and his relationship to it

SCORE 2:  
 examples: "was perjuring himself"  
 "informed his lawyer"  
 "asked for a conference with his lawyer"  
 "objected to it"

SCORE 1:  
 examples: "lied"  
 "got mad"  
 "was hurt"  
 "was wrong"  
 "was not guilty"

SCORE 0:  
 examples: "stood up and said it was a lie"  
 "laughed"  
 "thought he could not do anything"

14. *When Bob disagreed with his lawyer on his defense, he*

- (a) Legal criteria: ability to cooperate in his own defense and communicate with his lawyer  
 (b) Psychological criteria: ability to trust and appropriately express self-protective attitude

SCORE 2: must include attempt to reconcile or compromise  
 examples: "argued his point"  
 "asked for a ten minute recess"  
 "deferred to his lawyer"

SCORE 1: includes appropriate uncommunicated emotion, evaluative comment or statement of outcome  
 examples: "was right"  
 "was wrong"  
 "was mad"  
 "complicated matters"  
 "was advised to do as he was told"

SCORE 0: characterized by withdrawal or refusal to cooperate  
 examples: "got another lawyer"  
 "figured there was no sense arguing"

15. *When I was formally accused of the crime, I thought to myself*

(a) Legal criteria: awareness of the peril of his situation

(b) Psychological criteria: appreciation of personal involvement in the legal system

SCORE 2:

examples: "how wrong"  
"I did not do it"  
"what if they found me guilty"  
"I know I was in trouble"

SCORE 1:

examples: "it wasn't my fault"  
"how foolish I've been"  
"the law could use some modification"  
"I've been framed"

SCORE 0:

examples: "it's all over"  
"here we go again"  
"it's all for the best"  
"I'm going to jail"

16. *If Ed's lawyer suggests that he plead guilty, he*

(a) Legal criteria: understanding and awareness of the court process and ability to cooperate with attorney in own defense

(b) Psychological criteria: ability to trust and appropriately express self-protective attitude

SCORE 2:

examples: "will do so"  
"will probably go along with it"  
"will try to talk over the evidence with his lawyer and then decide"  
"would seek further advice"

SCORE 1: includes explanation of lawyer's intent without personal involvement

examples: "would try to get him off on a light sentence"  
"will disagree"  
"will start to worry"  
"was wrong"

SCORE 0:

examples: "won't do it"  
"will be released"  
"will be put away"

17. *What concerns Fred most about his lawyer*

(a) Legal criteria: ability to cooperate in own defense and relate to his attorney

(b) Psychological criteria: ability to interact constructively with attorney

SCORE 2: characterized by a concern with lawyer's interest and competence in regard to the case

examples: "how good he is"  
"the fact that he isn't adequately defending him"  
"he doesn't know him too well"  
"he is trying to help him"  
"he thinks that I am guilty"

SCORE 1: includes concern with general adequacy

examples: "insight into the matter"  
"money"  
"is he qualified"  
"his drive"

SCORE 0:

examples: "his integrity"  
"tardiness"  
"facts"

18. *When they say a man is innocent until proven guilty*

(a) Legal criteria: understanding and awareness of court process

(b) Psychological criteria: fundamental understanding of the basic legal concept

SCORE 2: characterized by understanding that the burden of proof lies with the prosecution

examples: "just that"  
"exactly what it says"  
"until they get proof against him"  
"that he is not guilty until the jury decides"  
"that everyone has the right to a fair trial"

SCORE 1:

examples: "not guilty"



"that he is innocent"  
 "he has to be proven beyond a shadow of a doubt"

## SCORE 0:

examples: "guilty"  
 "nothing"  
 "guilty until proven innocent"  
 "it's for the judge to decide"

19. *When I think of being sent to prison, I*

- (a) Legal criteria: understanding and awareness of the consequences  
 (b) Psychological criteria: appropriate affect related to threat of disrupted life and separation

## SCORE 2:

examples: "get very depressed"  
 "start to worry about my family"  
 "get scared"  
 "think of the time I shall lose"

## SCORE 1:

examples: "go into a deep depression". (The incapacitating nature of the depression differentiates from above.)  
 "cry"  
 "hope it won't be for very long"  
 "don't feel too good"  
 "feel wrongly accused"  
 "feel uneasy"

## SCORE 0:

examples: "feel like dying"  
 "don't worry"  
 "think that is where I belong"

20. *When Phil thinks of what he is accused of, he*

- (a) Legal criteria: understanding and awareness of peril of position  
 (b) Psychological criteria: appropriate affect related to potential threat to self

## SCORE 2:

examples: "gets upset"  
 "gets nervous and depressed"  
 "gets angry"  
 "worries about the outcome"

## SCORE 1:

examples: "is ashamed"  
 "is very sorry for himself"  
 "thinks how foolish he was"  
 "just can't believe it"  
 "wonders why it happened this way"

## SCORE 0:

examples: "cries"  
 "does not worry"  
 "thinks the law should be changed"

21. *When the jury hears my case, they will*

- (a) Legal criteria: understanding and awareness of the court process  
 (b) Psychological criteria: appropriate assessment of role and function of jury

## SCORE 2:

examples: "try to be fair"  
 "find me innocent"  
 "set me free"  
 "go along with my defense"  
 "probably understand"  
 "say not guilty"

## SCORE 1:

examples: "be the ones to decide"  
 "agree"  
 "think it over"  
 "say guilty or not guilty"  
 "find extenuating circumstances"

## SCORE 0:

examples: "be confused by the conflicting opinion"  
 "laugh"  
 "say guilty"  
 "convict me"  
 "send me to jail"  
 "not think very much of me"

22. *If I had a chance to speak to the judge, I*

- (a) Legal criteria: capacity to communicate in own defense  
 (b) Psychological criteria: appropriate communication and trust

**SCORE 2:**

**examples:**

"would tell my story"  
"would try to explain things"  
"would ask for a break"  
"would cop a plea"

**SCORE 1:**

**examples:**

"would"  
"would feel more happy and relaxed"  
"would tell him I am being framed"

**SCORE 0:**

**examples:**

"will die"  
"would say nothing"  
"it wouldn't do any good"  
"would tell him to give me the gas chamber"

## ***TWELVE STEPS TO EFFECTIVE DEFENSE SENTENCING ADVOCACY***

Preparing full defense-based sentencing plans that fulfill the defense counsel's duty at sentencing often seems beyond the limits of time and financial resources of appointed counsel and public defenders in particular. Defense counsel are expected to know sentencing law and procedures, including court rules and sentencing guidelines, in their jurisdiction. Yet for many criminal defendants, their counsel's application of twelve simple rules for sentencing would greatly improve the sentencing outcome. These rules, developed with the advice of judges at a sentencing workshop directed by Professor Daniel Freed on 15-17 April, 1993, at Yale University Law School are:

### **1. Interview for Sentencing**

From the first, interview with an eye toward disposition. Ask your new client about family, schooling, mental health, substance abuse, employment and community ties.

### **2. Keep Sentencing in Mind from Day One**

The early stages of a criminal case can shape the outcome at sentencing. With some advance thought, discovery, motions practice, plea negotiation strategies, evidentiary hearings and the trial itself can bring out information useful to your client at sentencing. For example, police testimony often reveals that your client willingly volunteered information and otherwise cooperated with police after arrest.

### **3. Walk in Your Client's Shoes**

Visit your client's home, or at the very least know what it is like and in other ways learn what life is for your client. Knowing your client will help you to speak up for someone who has behaved poorly, perhaps harming another person. In preparing for sentencing, apply the injunction against condemning another until you have walked in his or her shoes.

### **4. Build a Theory of Sentencing**

Just as a lawyer builds a theory of the case for trial so should a lawyer build a theory of sentencing. Make use of, but do not be constrained by, the classic purposes of sentencing. Choose a theme from the array available: punishment; control in the community; restoring the victim; holding the offender accountable; rehabilitation; and deterrence. In this way, control the discussion about the fate of your client.

### **5. Don't Hesitate to Call for Help**

Selectively, don't hesitate to obtain good psychiatric or psychological evaluations, substance abuse assessments, diagnosis of learning disabilities and the like. There are times and cases that require experts on various aspects of human behavior.

### **6. Put the Defendant to Work and to the Test**

Many defendants are capable of helping you line up witnesses for sentencing hearings and can obtain employment references, apply to programs, contact people in their community, or pick up papers and run errands. In this manner many defendants can increase your resources and put you in the position of being able to tell the judge he or she did everything you asked. When possible, get the defendant

into a program, a job, or counseling as appropriate, and build a track record of success before sentencing that a judge will naturally conclude may carry over after sentencing.

#### **7. Prepare a Plan**

Judges and your client have the same objective at sentencing: a reasonable, credible plan for your client's future that fits the theory of sentencing you have developed. Be prepared to outline where your client will live and work, how he or she will spend time, and what will make a difference from the past. In general pleas for mercy or a discussion of your client's good character are no longer sufficient themselves.

#### **8. Let the Prosecutor Help Design the Alternative Sentence**

Use the information you've obtained and the theory of sentencing you've developed in plea negotiations. Put forth a sentencing plan and be prepared to modify it to meet the prosecutor's concerns. Good prosecutors often contribute constructive suggestions for sentencing alternatives. Your job is to give them something to work with. At the least, you'll understand and be better prepared to respond to their objections.

#### **9. Prepare the Defendant for the Pre-Sentence Interview**

Tell him or her exactly what the interview with probation will be like, and what information to have ready. Think of it as an important job interview; prepare, or help your client prepare, a written "resume" of schools, jobs, home addresses, accomplishments, and references. You will find most probation officers truly appreciate and will use this information. If your client is inarticulate, or the issues complex, participate in the interview.

#### **10. Advise and Prepare Witnesses for the Sentencing Hearing**

Bring them to court. Just a show of support can make a difference. And if you're bringing them, take the time to explain what will happen and, if there is a hearing, what they will be asked to do or say. Prepare for their testimony as you would a witness for a key trial.

#### **11. Teach the Defendant to Talk in Court**

You prepare final arguments. Your client should prepare as well, and will need your help. Saying "sorry" isn't easy, but in most cases there is no excuse for a tongue-tied defendant unprepared to make the simplest statement about his or her feelings or desires at sentencing and in support of the theory of sentencing you have developed.

#### **12. Consider the Social Implications of Sentencing**

With prisons costing as much per inmate as a Harvard education, corrections budgets draining state coffers, with crime and drug use little affected by the highest incarceration rate in the world, and with one in four young black men under some kind of criminal justice control, judges are increasingly willing to listen to carefully thought-out statements about disparity, utility and purpose at sentencing. Learn the basic facts about crime and punishment in the U. S. and your state, and apply them when appropriate.

# **GLOSSARY**

**ANGER MANAGEMENT TECHNIQUES:** Methods that help a person deal with anger without hurting him/herself or others.

**BOOT CAMPS:** Also known as a military model, boot camp programs are patterned after basic training for new military recruits. Juvenile offenders are given a taste of hard military life, and it is hoped these regimented activities for up to 180 days will “shock” them into giving up delinquency.

**CHRONOLOGICAL AGE:** Time since birth, as opposed to developmental age.

**COGNITIVE-BEHAVIOR TREATMENT:** A form of psychotherapy which helps a child understand the beliefs and reasons behind their behaviors so they can change them.

**COGNITIVE RESTRUCTURING:** A form of cognitive therapy which focuses on changing the manner in which an individual organizes their beliefs, particularly after trauma.

**ETIOLOGY:** The cause of a disease or disorder.

**FLASHBACK EXPERIENCE:** A cognitive recurrence of an original experience complete with the sensations experienced at the earlier time.

**JUVENILE TRAINING SCHOOL:** Secure institutions for committed delinquents with educational and vocational training.

**IDENTITY:** A person’s essential, continuous self; the internal, subjective concept of oneself as an individual.

**IEP (Individual Education Plan):** A plan assessing a child’s educational needs and prescribing appropriate special education services for them.

**IMPULSE CONTROL:** Failure to resist an impulse or temptation to engage in action that is harmful to oneself and/or others; can be due to developmental immaturity and/or emotional disturbance.

**INTERVENTION:** Any technique that is designed to help a person change.

**KOHLBERG’S DILEMMAS:** A form of psychological assessment which uses stories of personal crisis to assess a subject’s moral development.

**LOCKUPS:** See *secure detention centers*.

**MAGICAL THINKING:** A normal stage of development during which the child believes that his/her wishes are reality.

**MASTERY:** The achievement of a skill.

**MMPI (Minnesota Multiphasic Personality Inventory):** A 550-question test used to diagnose personality types.

**PATHOLOGY:** An abnormal condition or biological state in which proper functioning is prevented.

**POST-TRAUMATIC STRESS DISORDER:** A disorder characterized by the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or close associate. Symptoms include persistent reexperiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma, numbing of general responsiveness, and persistent symptoms of increased arousal.

**PRESENT-ORIENTED THINKING:** Thought process whereby consequences of actions are not anticipated.

**RECIDIVISM:** A tendency to relapse into a former pattern of behavior, especially a tendency to return to criminal habits.

**SECURE DETENTION CENTER:** A facility for juveniles awaiting court hearings which restricts movement in community.

**SELF-TALK:** The internal words a person uses to understand what is happening to them.

**TRANSFER/WAIVER HEARINGS:** A hearing held in juvenile court to determine the fitness of a minor for retention in juvenile court, and the minor's amenability to juvenile court resources; must be held before any evidence is heard on the petition; a prerequisite to transfer of a minor's case to adult court except where state law permits prosecutorial discretion for direct filing of certain juveniles' cases in criminal court, or allows "automatic" transfers of juveniles to adult court.

**VALUES CLARIFICATION:** A variation on moral education which emphasizes awareness of moral judgements and ethical considerations.

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# ***RESOURCES***

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