The Need for Pro Bono Assistance to Unaccompanied Immigrant Children

Inside

Supreme Court Watch — Anonymous Cellular Tips and Warrant-less Cell Phone Searches 2

Legal Services Access for All: Implementing the Violence Against Women Act of 2005 20
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Contents

2 Supreme Court Watch — Anonymous Cellular Tips and Warrantless Cell Phone Searches
By Marshall J. Hartman & Laurence A. Benner

14 The Need for Pro Bono Assistance to Unaccompanied Immigrant Children
By Cheryl Zalenski

20 Legal Services Access for All: Implementing the Violence Against Women Act of 2005
By Benish Anver, Henriissa Bassey and Leslye E. Orloff

By Phyllis H. Subin

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Supreme Court Watch

Anonymous Cellular Tips and Warrantless Cell Phone Searches

By Marshall J. Hartman and Laurence A. Benner

The Supreme Court has recently made it easier for police to rely upon anonymous tips, conveyed via a cell phone, to establish reasonable suspicion, but has restricted the right of police, absent exigent circumstances, to make a warrantless search of a cell phone as an incident to a full custodial arrest.

Navarette v. California, 134 S. Ct. 1683 (2014)

In Navarette a sharply divided Court held five to four that a contemporaneous, detailed anonymous tip by a 911 caller (that a specifically described pickup truck had just run her off the road) was sufficiently corroborated to be reliable and was also adequate to create reasonable suspicion that the driver was intoxicated, even though police later followed the truck for five minutes without observing any irregular driving by an apparently sober driver.

In August 2008, at approximately 3:47 p.m. a California Highway Patrol (CHP) officer received a message, relayed from a 911 dispatcher in Humboldt County, that approximately five minutes earlier a Silver Ford 150 pickup with license plate 8-David-94925 had just run the 911 caller off the road at mile marker 88 on Highway 1. The Ford pickup was traveling southbound.

Approximately 18 minutes later the CHP officer, traveling northbound, saw the Silver Ford travelling southbound near the 69 mile marker. It had a camper shell with darkened windows. He made a U-turn and followed the truck for approximately five minutes before making a stop. During this time no weaving or other irregular driving was observed. A second officer also appeared on the scene. The officers smelled marijuana coming from the bed of the truck and a search discovered 30 pounds of marijuana in some bags. The driver Lorenzo Navarette and passenger Jose Navarette were convicted of transporting marijuana and were each sentenced to 90 days in jail and three years probation.

The California Court of Appeal affirmed, relying upon the state Supreme Court’s ruling in People v. Wells that an anonymous tip that a driver was “weaving all over the road,” although uncorroborated because no erratic driving was observed, nevertheless created reasonable suspicion to make a driving under the influence (DUI) stop. The California Supreme Court denied review.

Justice Thomas, joined by the Chief Justice, and Justices Kennedy, Breyer and Alito, upheld the stop finding that the anonymous tip created reasonable suspicion that the driver was intoxicated. Acknowledging that “[t]he ‘reasonable suspicion’ necessary to justify such a stop “is dependent upon both the content of information pos-
sessed by police and its degree of reliability.” Thomas conceded that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.”

However, under the “totality of the circumstances” approach the Court has adopted for determining both probable cause and reasonable suspicion, corroboration of an anonymous tip’s predictions about future behavior consistent with criminal activity, can make it reasonable to rely upon the tip. Thus, in *Alabama v. White*, an anonymous tip (that predicted that a named suspect would leave a specified apartment carrying an ounce of cocaine inside a brown attaché case and drive in a brown Plymouth station wagon with a broken right tail light, to a specified motel) was deemed sufficient when all of the predicted events were observed by police.

By contrast, in *Florida v. J.L.* no reasonable suspicion was found where a “bare-bones” tip, which claimed a black male juvenile possessed a gun, had merely described his clothing (plaid shirt) and his location (standing at a particular bus stop). Refuting the state’s contention that corroboration of J.L.’s description and location was sufficient, the Court observed:

> Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Refusing to make an exception for firearms, a unanimous Court, in *J.L.* held that “an anonymous tip lacking the indicia of reliability of the kind contemplated in...White does not justify a stop...” Like *J.L.*, the tip in *Navarette* contained only a description of the truck and its location. There was no corroboration of any significant prediction of future behavior consistent with criminal activity.

> “The fact the call was made ‘under the stress of excitement caused by a startling event’ therefore ‘weigh[ed] in favor of the caller’s veracity’ under the totality of the circumstances approach.”

It is of course easy to distinguish any prior precedent when the test is the totality of the circumstances, and in *Navarette*, Justice Thomas (over a vigorous dissent by Justice Scalia) first addresses the reliability issue by distinguishing *J.L.* Thomas points out that in *J.L.* there was “no indication that the tip...was contemporaneous with the observation of criminal activity [i.e. possession of a gun].” The tip in *Navarette*, by contrast, was a “contemporaneous report” of a “startling event” (being run off the road) that would be reliable enough to be admissible either under the “present sense impression” or “excited utterance” exception to the rule against hearsay. See FRE 803(1) & (2). The fact the call was made “under the stress of excitement caused by a startling event” therefore “weigh[ed] in favor of the caller’s veracity” under the totality of the circumstance approach.

In *J.L.* the record disclosed nothing about the type of call made or whether the caller’s number was known. There was also no recording or even a notation concerning the call to prove that it actually took place. In *Navarette*, however, the 911 call was logged. Furthermore, Thomas argues, the fact that the caller used the 911 emergency system is itself an indicia of reliability. This is because the FCC has required carriers to provide a 911 caller’s number to dispatchers (which are exempt from the caller’s “privilege” to block caller id), and under Phase II of FCC regulations involving 911 calls, carriers “have been required to identify the caller’s geographic location with increasing specificity.”

Thus, while “911 calls are not per se reliable” Thomas asserts it is reasonable for police to believe that a person would “think twice” before making a false tip on a 911 call, because they could be apprehended and prosecuted under several California statutes that prohibit harassment and making false reports of crime to law enforcement.

Finding that the anonymous tip is sufficiently reliable, Thomas then turns to the second issue: whether the caller’s assertion that she was “run off the road” was sufficient to establish reasonable suspicion that the driver of the truck was intoxicated. Using a “commonsense approach” Thomas concluded that this “specific and dangerous result of the driver’s conduct: running another car off the highway” was (like other “erratic behaviors” such as weaving or crossing the center line) a “significant” indicator of drunk driving. Therefore the officer’s suspicion that the driver of the truck might be intoxicated was reasonable.

Thomas dismissed the defendant’s contention that the officer’s failure to observe any erratic driving, while following him for five minutes, negated any reasonable inference that he was impaired. Thomas acknowledged that “[e]xtended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of in-
toxication, but the 5-minute period in this case hardly sufficed.” Moreover, Thomas maintained, once reasonable suspicion to stop arises, there is no obligation on the officer to rule out innocence or engage in less intrusive investigatory techniques like surveillance, especially when the suspected conduct is a dangerous ongoing crime like DUI and “giving the driver a second chance “could have disastrous consequences.”

**Scalia’s Dissent**

Justice Scalia, in a strong dissent joined by Justices Ginsburg, Sotomayor and Kagan, accuses the Thomas majority of serving up a “freedom-destroying cocktail” consisting of two false premises: 1. that an anonymous tip about a traffic infraction made via a 911 call is reliable if it merely describes the car and its location and those details alone are corroborated without corroboration of any predictive information indicating ongoing criminal activity, and 2. that a single instance of careless driving creates reasonable suspicion the driver is intoxicated.

Attacking the premise that using the 911 emergency system to make the call creates an indicia of reliability for an anonymous tip, Scalia points out that it is not what the current state of technology may be, but what the tipster’s belief is about the anonymity of 911 calls that is relevant. He argues that there is “no reason to believe that your average 911 tipster is aware that 911 callers are readily identifiable” assuming they make the call using their own phone.

Scalia is in fact wary of the tipster’s veracity, asking: “When does a victim complain to the police about [being run off the road] without giving his identity...?” Scalia also questions how the “mystery caller” would have had time to observe the truck’s 7-digit license plate number –“a difficult task if she was forced off the road and the vehicle was speeding away.” Noting that an anonymous tipster can “lie with impunity” he concludes: “Who knows what (if anything) happened?” Scalia also questions Thomas’ assertion that the statement relating the event after the fact to the 911 caller was trustworthy enough to qualify as an exception to the hearsay rule as a present sense impression or excited utterance. The justification for both exceptions is grounded in the fact that the statement is made spontaneously while the event is being perceived or immediately thereafter so that there is no time to fabricate or embellish. For Scalia, however, there was “no such immediacy here” because presumably the caller had to copy down the license plate number and then “dial a call to police.” According to Scalia the observer of a traffic infraction would thus have “[p]lenty of time to dissemble or embellish.” On an iPhone, however, all that is required to place an emergency call, even on a locked phone, is about four seconds to push the home button, swipe and hit the emergency or call button.

Finally Scalia turns to the second issue concerning the sufficiency of the tip. Even if credible, he argues the reported incident was insufficient to create reasonable suspicion that the driver was drunk. Noting that the truck “might have swerved to avoid an animal [or] a pothole,” Scalia believed that even if the incident was the result of careless or reckless driving, a single isolated instance of bad driving causing someone to run off the road was a completed offense and did not, without more, give rise to reasonable suspicion of drunken driving.

Furthermore, if a tip that the driver of an identified vehicle has “run an-
other vehicle off the road” is sufficient to create reasonable suspicion
that the driver is drunk, then it is also reasonable to predict that the police
who spot that vehicle 18 minutes later will witness evidence of erratic or impaired driving skill after following them for five minutes. But Thomas sidesteps this failure of corroboration by claiming that reasonable suspicion is already established by the 911 tip once the specifically identified trunk is sighted at a location consistent with the tip. By not requiring corroboration of reasonably predicted behavior implied by the assertion in the tip, Navarette thus departs from Alabama v. White and Florida v. J.L.

**Terry Stops for Misdemeanors: Ongoing Crime versus Past Offense**

Both Justices Thomas and Scalia emphasize in footnotes that the holding of Navarette is limited only to a Terry stop for ongoing criminal activity. In United States v. Hensley, the Court upheld a stop to investigate a completed felony on only reasonable suspicion, but stated “[w]e need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted.” As Justice Scalia indicates the circumstances that may justify a Terry stop to investigate completed misdemeanors and traffic infractions “is far from clear.” Whether there is a threat to public safety present, and whether the officer is authorized to make a warrantless arrest if the misdemeanor was not committed in his presence are just some of the variables involved.

There have been conflicting decisions by both federal and state courts In U.S. v. Hughes 517 F. 3d 1013 (8th Cir. 2008), for example, the Eighth Circuit Court of Appeals held that the government interest in investigating a completed trespass (a misdemeanor not involving a threat to public safety) did not outweigh the defendant’s liberty interest in being free from police interference. Compare U.S. v. Moran, 503 F3d 1135 (10th Cir. 2007) (upheld due to threat to public safety) and Rodriguez v. State, 29 So Ed 310 (Fla. Court of Appeal) (upheld without threat to public safety and without authority to arrest without warrant). See generally 78 A.L.R. 6th 599 (2012) collecting cases both upholding and invalidating stops for completed misdemeanors.

**“By not requiring corroboration of reasonably predicted behavior implied by the assertion in the tip, Navarette thus departs from Alabama v. White and Florida v. J.L..”**

**Understanding and Distinguishing Navarette**

Navarette weakens the corroboration requirement established in White and J.L., by requiring, on the facts of this case involving a contemporaneous 911 call, that only the description of the car and its location be confirmed. While this confirms the identity of the car in question, as Scalia points out, this corroboration alone does not make it plausible that the tipster was telling the truth or that the driver was drunk because “[e]veryone in the world who saw the car would have that knowledge, and anyone who wanted the car stopped [for whatever nefarious reason] would have to provide that information.”

While noting that the majority opinion does not “explicitly” depart from the normal requirement that an anonymous tip be corroborated, Scalia warns: “Be not deceived” because the police “will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop.”

This statement, however, is an exaggeration and cannot be correct. Despite Scalia’s passion for categorical rules, “there can be no ‘new rule’ when the test for determining reasonable suspicion in every case is the ‘totality of the circumstances.” As Thomas points out, prior cases can serve only as “useful guides,” because each case depends upon its own unique set of facts. Admitting that Navarette was, like White, a “close case,” Thomas explains that although the indica of reliability “present here are different from those we found sufficient in White, there is more than one way to demonstrate ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity’.”

That is of course true under the totality of the circumstances test. However, leading Supreme Court decisions involving the determination of probable cause or reasonable suspicion based upon an anonymous or otherwise unreliable tip have all stressed the importance of corroboration or lack of corroboration of future behavior predicted by the tip. Thomas substitutes for this missing factor, his conclusion that in Navarette, the indica of the caller’s reliability “are stronger than those in J.L.” because here there was an extremely detailed (rather than just “bare-bones”) tip and the tip was communicated using the 911 emergency system, which made it unlikely the caller would lie. That reliability, combined with his belief that the report of being run off
the road was sufficient to reasonably suspect drunken driving, were therefore factors key to Thomas’ analysis.

If Navarette is, as Thomas admits, a close case, then under the totality of the circumstances test for determining reasonable suspicion, it will be important to distinguish future anonymous tip cases by arguing that they do not include key facts that were central to the Navarette analysis, such as the following:

1. The suspected crime is a completed misdemeanor, not ongoing criminal activity that constitutes a threat to public safety (thus Terry stop is not justified under balancing test).
2. The call was not made to 911 (e.g. caller knew they had anonymity).
3. The conduct was not contemporaneously reported (e.g. longer than 5 minutes after event).
4. There is no indication the conduct was personally observed by the caller.

In addition, with respect specifically to DUI tips, Navarette also can be distinguished if:

1. The tip does not give as detailed a description of the car. (e.g. no license plate number, model or color: thus insufficient for adequate corroboration).
2. The suspect car’s location is not consistent with coming from the location where conduct was observed (i.e. time and distance of suspect car from spot of tipster’s observation).
3. The conduct observed by tipster, standing alone, does not give rise to reasonable suspicion (e.g. failure to use turn signal or wear seatbelt).

Where there are significant departures from Navarette’s facts, then it may be possible to argue, using Florida v. J.L., that the lack of predictive information in the tip (or the lack of corroboration of predicted behavior) negates the existence of reasonable suspicion.


In a resounding victory for privacy rights, the Court held in Riley that absent a warrant, or, probable cause and exigent circumstances, police cannot access digital data in a cell phone found in the pants pocket of a person who has been arrested.

Writing for eight members of the Court, Chief Justice Roberts found that the search incident to arrest exception to the warrant and probable cause requirement did not apply to cell phone searches, because neither the interest in officer safety nor prevention of the destruction of evidence routinely justified such a massive intrusion into individual privacy. In a consolidated companion case, U.S. v. Wurie, the Court also required a warrant even where the information obtained from the cell phone was a phone number from its call log. Justice Alito, concurred in the judgment because he could find no “workable alternative” to the majority’s bright line rule banning all warrantless intrusions into a cell phone.

These cases continue the trend, seen in Knowles v. Iowa4 and Arizona v. Gant5 limiting this categorical exception to the warrant requirement to only circumstances in which the exception is normally justified—even though proof of such justification is not necessary in each individual case. Although Riley does not address ob-
taining cell phone generated data held by third parties, such as tracking data known as Cell Site Location Information (CSLI), the Court’s recognition of the privacy implications of such aggregated data and language in the Chief Justice’s opinion hints that the cell phone exception may have broader application.

Facts:

Riley: In 2009 Riley was stopped for driving on expired registration tags and officers discovered his license had been suspended. He was arrested for possession of concealed weapons, found under the car’s hood during an inventory search, after the car had been impounded. As a contemporaneous incident to this custodial arrest, police searched Riley’s person and seized a cell phone from his pants pocket.

Riley’s “smart phone” was not locked or password protected. An officer accessed information on his contacts list that linked him to the Bloods gang. Photos showing Riley posing in front of a car that police suspected was involved in a gang related shooting and gang related videos were also found stored on the cell phone.

Following an unsuccessful motion to suppress testimony concerning this evidence, some of the photos were admitted into evidence at Riley’s trial for the shooting incident. He was convicted of attempted murder and other offenses committed for the benefit of a criminal gang and sentenced to 15 years to life. On appeal, an intermediate appellate court affirmed Riley’s conviction based upon the California Supreme Court’s decision in People v. Diaz, 51 Cal. 4th 84 (2011) that permitted warrantless cell phone searches as an incident of arrest if the phone was immediately associated with the person’s body.

Wurie: In U.S. v. Wurie, a consolidated companion case, police arrested Wurie after observing him make a drug sale and seized his cell phone, an older model “flip phone.” This phone also was not locked or password protected. Following the arrest, Wurie’s phone received several calls from a number identified on the phone’s external screen as “My House.” Police opened the flip phone and pressed a button to access the phone’s call log and were able to find the telephone number associated with the label “My House.” This number was linked to Wurie’s apartment where more drugs were found pursuant to a search warrant.

“The Court limited the search incident to arrest exception to only the “area within [an arrestee’s] immediate control...”

Prior Precedent

Acknowledging that the right to search for fruits or evidence of crime when making an arrest has been recognized as an exception to the warrant requirement for a century, the Chief Justice nevertheless noted that the scope of such a search “has been debated for nearly as long.” In Chimel v. California, 395 U.S. 752 (1969), for example, arresting officers had searched the defendant’s entire three-bedroom house including his attic and garage. The Court limited the search incident to arrest exception to only the “area within [an arrestee’s] immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” Id. at 7623. Chimel’s justification for the search incident to arrest exception was thus seen as grounded in protecting officer safety and the preservation of evidence.

In United States v. Robinson, 414 U.S. 218 (1973), however, the court effectively gutted Chimel’s twin rationales by converting the search incident to arrest exception into a bright line rule. The defendant in Robinson had been arrested for driving on a revoked license and taken into custody. A crumpled cigarette pack was seized from his coat pocket and opened, revealing 14 capsules of heroin. The Court upheld the search, asserting that “[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found.” Id. at 235.

In a cryptic sentence the Court added that “a custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” Id. (emphasis added). Thus, despite the fact that no evidence in Robinson suggested that the officer feared for his safety and even though the crumpled cigarette pack could contain neither a weapon nor evidence establishing the traffic offense of driving on a revoked license, a full search of Robinson’s pockets and any containers found was permissible.

Majority Opinion

Distinguishing Robinson on the ground that it involved physical objects rather than electronic data, the Chief Justice rejects a rigid, mechanical application of Robinson’s categorical bright line rule. Instead he narrows the search incident to arrest exception by carving out a special bright
line rule which, in the absence of exigent circumstances, requires a warrant for all cell phones searches.

In an eloquent opinion, often passionate about personal privacy, Chief Justice Roberts begins by noting that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” With respect to searches “to discover evidence of criminal wrongdoing,” the Chief Justice reaffirms that “reasonableness generally requires the obtaining of a judicial warrant.” In the absence of “precise guidance from the founding era,” he then employs the traditional Fourth Amendment balancing test, under which an exception to the warrant requirement is generally determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”

Roberts agrees with Robinson that a “case-by-case adjudication” is not required to justify the search incident to arrest exception on the facts of each case. However, in making the assessment of governmental need for dispensation from the warrant requirement the Court still must determine whether application of the search incident to arrest exception to a particular “category of effects would ‘untether the rule from [its] justifications.’” 134 S. Ct. at 2485, (emphasis added). Thus if neither concern for officer safety nor fear of destruction of evidence is routinely present with respect to a particular category of “papers or effects” then the need to search items falling within that category will not be weighty.

Treating the cell phone as a separate category of “effects” protected by the Fourth Amendment, Roberts then finds that neither one of the Chimel rationales is present with sufficient frequency to support the need to immediately access digital data stored on a cell phone, as a routine practice incident to arrest. With respect to officer safety, the data itself, of course, cannot harm the police and once the cell phone has been seized, it cannot be used either as a weapon or to call for assistance in aiding an escape. Rejecting hypothetical scenarios, which he found had no evidentiary basis in actual experience, the Chief Justice concludes that “the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board.” Id. at 2486, (emphasis added).

Turning to the second Chimel rationale—prevention of the destruction of evidence—Roberts found there was little danger that any data constituting evidence of crime would be deleted once the phone was seized. Although there were some anecdotal examples of remote wiping of cell phone data following an arrest, Roberts found that this problem could be easily avoided because police could take reasonable steps to preserve evidence under the principles set out in Illinois v. McArthur. For example, simply removing the battery or placing the phone in a Faraday bag made of aluminum foil, would block any signal to the phone that might prevent access or destroy data.

Roberts also observed that because today most cell phones are password protected, granting police the right to immediately access a cell phone without obtaining a warrant might not in the end “make much of a difference.” To the extent the police were “truly confronted with a ‘now or never’ situation” where an immediate search was feasible and necessary, Roberts concluded that such a case could be ad-
equately addressed through application of a “case-specific” exception to the warrant clause such as the exigent circumstances exception, citing War-ден v. Hayden, 387 U.S. 294 (1967).

Finding little need for an immediate search, Roberts then turned to the other side of the scales to balance the privacy interests of the arrestee. In *Maryland v. King*, 133 S. Ct. 1958 (2013), the Court recently signaled that it did not hold an arrestee’s privacy interests in very high esteem. There the Court ruled that routinely conducting suspicionless searches of felony arrestees to obtain their DNA for a crime solving data base was reasonable. Employing the balancing test independently from any previously recognized exception, the Court tipped the scales in favor of the government because King had a diminished expectation of privacy by virtue of his arrest.

In *Riley*, however, Chief Justice Roberts tacks in the opposite direction, declaring that “[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely [if] privacy related concerns are weighty enough.” 134 S. Ct. at 2488. Countering the government’s claim that cell phone searches are no more invasive of privacy than other approved searches incident to arrest involving personal items, such as an address book, wallet or purse, Roberts declared “That is like saying a ride on horseback is materially indistinguishable from a flight to the moon.” *Id.*

Pointing out that over 90 percent of adult Americans own a cell phone, Roberts observes that because of its “immense storage capacity” it is not only a phone, but a camera, rolo-
dex, calendar, tape recorder, diary, and electronic library holding medi-cal, financial, religious, political and personal records, including intimate communications, photos, videos, and historic location information tracking personal movements. Modern cell phones, which most keep on their person, thus contain “a digital record of nearly every aspect of [our] lives” (*Id.* at 2490) and “as a category implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet or a purse.” *Id.* at 2488-89. Furthermore, permitting a search of a cell phone would allow police to access information stored in the cloud, going “well beyond papers and effects in the physical proximity of an arrestee” which are the proper subjects of a search incident to an ar-rest.

“...Modern cell phones, which most keep on their person, thus contain ‘a digital record of nearly every as-pect of [our] lives.’”

Roberts rejected pleas that the government could develop “protocols” to regulate and limit cell phone searches. Noting that “general warrants” known as writs of assistance, which allowed unrestrained searches during colonial times, were a driving force that propelled the American Revolution, he declared “the Founders did not fight a revolution to gain the right to govern-ment agency protocols.” Instead they required a warrant, based upon individualized justification. The judicial warrant, Roberts points out “is an im-portant working part of our machin-ery of government” that can now be obtained electronically “in less than 15 minutes.” *Id.* at 2493.

Refusing to extend *Robinson* to elec-tronic data, *Riley* thus establishes a bright line rule: “the search incident to arrest exception does not apply to cell phones.” (*Id.* at 2495) The Chief Justice concluded with the following admonition to police: “Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.” *Id.*

The Court’s new understanding of privacy embodied in this bright line rule is revealed in the Court’s rejection of the government’s proposed alternative. At oral argument, the government urged as an alternate limiting principle, that an officer could search cell phone data if the same type of data could have been obtained from a pre-digital counterpart. Rejecting this argument with respect to the digital photos in *Riley*, Roberts declared “the fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery.” *Id.* at 2493.

Similarly, in *Wurie* the government argued that the discovery of the telephone number of Wurie’s house in his cell phone’s call log was permissible because the Court in *Smith v. Mary-land*, 442 U.S. 735 (1979) had held that the warrantless installation of a pen register at the telephone com-pany’s premises to retrieve the telephone numbers of persons dialed by defendant did not offend the Fourth Amendment. *Smith* was based upon a cramped and outdated notion of privacy embodied in what is known as the third party doctrine.

Under the third party doctrine a “search” for Fourth Amendment pur-poses only occurs where the government has invaded a “reasonable ex-pectation of privacy.” Voluntarily re-vealing information to a third party,
even for a limited purpose, however, is deemed to extinguish any expectation of privacy. This is because the discloser assumes the risk that the third party will reveal the information to the police.

The Chief Justice distinguished Smith on the ground that in that case the Court had simply ruled that the use of the pen register on the telephone company’s premises did not constitute a search as to the defendant. In Wurie, however, the fact that there was a search of Wurie’s cell phone was not disputed by the parties. Roberts noted that cell phone call logs also typically contain identifying information linked to the telephone number, like the label “my house” in Wurie’s case. The Chief Justice did not, however, elaborate further on whether the conceded search was based upon a trespass theory or an intrusion upon a reasonable expectation of privacy, and in a footnote indicated that “Because the United States and California agree that these cases involve searches incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.”

Justice Alito’s Concurring Opinion

Justice Alito concurred only in the judgment because he does not believe that the justification for the “ancient rule” on searches incident to arrest “is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence.” Id. at 2495. Rather Alito believes, citing to 19th century treatises, that those arresting a suspected felon could seize “goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed” to use as proof at trial. Id. at 2496. Furthermore, Alito points out, the Chimel rationales have never been followed with respect to written items (such as a diary or ledger) found on the person of the arrestee. These may be seized, read and examined even though they present no danger to the officer and, once they are seized, are not likely to be at risk of being destroyed. Alito therefore does not join Robert’s opinion because he does not think the search incident to arrest exception should be limited to Chimel’s twin rationales.

Nevertheless Justice Alito agrees with the majority that the scope of an exception to the warrant requirement developed in the pre-digital era should not be mechanically applied to the modern cell phone, which has the capacity to store vast quantities of highly personal information that no one would carry on their person in hard-copy form. This changed circumstance therefore requires “a new balancing of law enforcement and privacy interests.” Id. at 2496–7.

Alito recognizes that the majority’s bright line rule protecting all cell phones and all information contained in them creates an anomaly favoring “information in electronic form (which will be protected) over information in hard-copy form.” However, at the present time he does not see a workable alternative and agrees that the police need clear rules governing searches incident to arrest. Alito would, however, reconsider the issue and defer to state or Congressional legislation which, after assessing the needs of law enforcement and privacy interests, drew “reasonable distinctions based upon categories of information or perhaps other variables.”
Future Ramifications: Cell Site Location Information

One of the unresolved issues remaining after Riley is whether the Fourth Amendment protects cell site location information (“CSLI”). This is a very complex issue because there are so many variables concerning both how this data is generated and how it is collected. For example, electronic data is generated by the user when a call is made, but it is also created automatically when a mobile phone periodically sends out a radio signal searching for and identifying itself to the nearest cell tower in the carrier’s network so it can receive calls. Only data from calls made is routinely logged by the service provider for business purposes, and if limited to one tower can generally only reveal when a cell phone is near that particular cell tower.

“Location tracking data, however, is also generated when a driver places a cell phone call and the call is handed off from one cell tower to another as the phone travels along the highway.”

Location tracking data, however, is also generated when a driver places a cell phone call and the call is handed off from one cell tower to another as the phone travels along the highway. By triangulating data from multiple towers the phone’s location can be pinpointed within 50 meters if the tower has special radio equipment. The location will be more precise in urban areas than rural areas because there are more towers in cities (including auxiliary microcells, picocells and femtocells) that can pinpoint location with a high degree of accuracy. Apparently not all carriers routinely collect and record such triangulated data, but the practice is increasing and can be done where police request prospective surveillance of a specific phone number.

Cell phones and many apps made for cell phones are now also equipped with GPS capability which can reveal the phone’s location within 25 meters. GPS signals, however, are relatively weak and generally do not penetrate indoors or operate effectively in some dense urban environments. Connecting to the Internet through Wi-Fi can also reveal the approximate location of a cell phone.

Finally a cell phone service provider can secretly “ping” a specific cell phone to determine its location. Also police can call a cell phone and hang up before it rings to generate cell site data on a phone’s location that can then be obtained as historical data. For a comprehensive discussion of the technological issues involved see Pell and Sogholian, Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact, 27 Berkeley Tech. L.J. 117 (2012).

There are now over 80 decisions by lower courts addressing a multitude of issues presented by the many facets of CSLI. As a federal magistrate judge in the District of Columbia recently observed, “these decisions are impossible to reconcile.”

One threshold issue concerns whether a U.S. Magistrate has statutory authority under the Stored Communications Act (“SCA”) to order the disclosure of cell site location data pursuant to 18 U.S.C. § 2703(d). A more fundamental issue is whether disclosure of such electronic data under the SCA in fact violates the Fourth Amendment because probable cause is not required. Under §2703(d) records can be obtained merely upon presentation of “specific and articulable facts showing that there are reasonable grounds to believe that the [information] is relevant and material to an ongoing criminal investigation.”

There is a split of authority with respect to both issues. Some decisions find either no statutory authority to order some types of CSLI unless probable cause is shown. Others believe the Fourth Amendment requires probable cause because there is a reasonable expectation of privacy in aggregated CSLI data. These decisions rely upon the concurring opinions of Justice Alito and Justice Sotomayor in U.S. v. Jones. Those opinions represent the views of five justices, but not the holding of Jones, (which was based upon a trespass theory). This group of justices, called the de facto or shadow majority, believes that regardless of whether a trespass occurred, government use of a GPS device to track the public movements of the defendant violates a reasonable expectation of privacy under Katz v. United States. See Benner and Hartman, Redefining the Fourth and Fifth Amendments, Supreme Court Watch, 34 NLADA Cornerstone 4 (2013) discussing the Jones case.

Recent decisions, however, continue to rely upon Smith v. Maryland and uphold CSLI disclosure orders by treating the electronic data as business records in which cell phone users have no reasonable expectation of privacy. This is because under the third party doctrine the cell phone user, in their view, voluntarily transmits the CSLI data to the service provider. See, for example, U.S. v. Gid-
Riley thus provides support for the view that a majority of the members of the Court may well favor making an exception to the Third Party Doctrine and find a reasonable expectation of privacy in CSLI electronic data generated by a cell phone.

Furthermore a more sophisticated understanding of the technology involved in generating and collecting CSLI is leading some courts to question whether the Third Party Doctrine actually applies on its own terms. For example one question that has arisen is whether the signal from the cell phone to the cell tower is in fact “voluntarily” disclosed by the user. See In re Application of the U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, (3d Cir., 2010) (distinguishing Smith because a “cell phone customer has not ‘voluntarily’ shared his location information with a cellular provider in any meaningful way” Id. at 317).

An interesting case to watch will be the pending decision of D.C. Magistrate Judge John M. Facciola, who has asked the Government and the Electronic Frontier Foundation, appointed as amicus curiae, to address the following questions:

• If the phone is in range of multiple towers when it makes a call, does it generate CSLI with each tower in range or only the tower that has the strongest signal?
• Is CSLI generated when the data functions are used? E.g., email, Twitter, Facebook, Web surfing, etc.
• What kind of CSLI records are stored by the provider?
• For what length of time is CSLI stored?
• Does the provider have the capability to sort CSLI for any given

...one question that has arisen is whether the signal from the cell phone to the cell tower is in fact ‘voluntarily’ disclosed by the user.”
phone number so that it provides CSLI that is made only for incoming/outgoing phone calls?

- When a phone “updates” with the network—indeed independently of specific use by the user—is CSLI generated?
- How often does the average phone “update” with the network and connect to a cell tower?
- Is the collection of CSLI at all affected by the network that is used? E.g., LTE, WiMax, 3G, 2G
- Are all phones certified for E–911 Phase II regulations per 47 C.F.R. § 20.18 (h) (i) (1), (ii)?
- When a request for CSLI is received, what exactly is given to the government?

Although modification of the Third Party Doctrine, as least as to electronic data generated by cell phones, may seem promising in the future, attempts in the short term to exclude CSLI evidence that has been obtained via a judicial order are dismal. First, there is no exclusionary remedy for violating the SCA as no statutory exclusionary rule was enacted. Furthermore even where a violation of the Fourth Amendment has been found, the good faith exception to the constitutionally mandated exclusionary rule has been applied to allow admission at trial because the police reasonably relied upon the judicial order. See United States v. Leon, 468 U.S. 897 (1984). United States v. Espudo, 954 F. Supp. 2d 1029 (U.S.D.C., S.D. CA., 2013) ■

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1. 38 Cal. 4th 1078 (2006)
4. 529 U.S. 266 (2000)
5. id at 272.
6. id. at 274(idemphased added)
7. FRE 803 (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
8. 134 S. Ct. at 1690
9. id.
10. id. at 1691.
11. 469 U.S. 221, 229 (1985)
15. 525 U.S. 113 (1998)(limiting the exception to custodial arrests)
17. In New York v. Belton, 453 U.S. 454 (1981) this reasoning was extended to permit automatic searches of the passenger compartment of a car as an incident to a custodial arrest of the driver. In Arizona v. Gant, 556 U.S. 332 (2009), however, the Court restored the Chimel rationales, holding that Chimel permitted a search incident to arrest “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” id. at 343. Gant also added that a search of the passenger compartment is permitted “when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. As Chief Justice Roberts explained in Riley, this passage in Gant created an “independent exception” not based upon Chimel, but rather upon “circumstances unique to the vehicle context.” These “unique” circumstances, of course, refer to the diminished expectation of privacy that a person has in the contents of items found in a car that travel on public streets. See Wyoming v Houghton 526 U.S. 295 (1999) applying the automobile exception to the warrant requirement to uphold a warrantless search of a woman’s purse found in a car. In Houghton the search was based upon probable cause. The Court in Gant, however, creates a special search incident to arrest sub-rule with respect to cars, which disposes with both the normal warrant and probable cause requirements. Be-
The Need for Pro Bono Assistance to Unaccompanied Immigrant Children

By Cheryl Zalenski

The Critical Need

During the summer months of 2014, the media focused attention on the plight of unaccompanied children from Central America who were streaming across the U.S. border, fleeing from gang and cartel violence, abuse and poverty. These children were either apprehended or turned themselves over to Customs and Border Protection officers. In either case they traveled to the United States seeking safety, protection and the ability to reunify with family members already living here. The numbers of children entering the United States increased tenfold from an average of 7,000 in 2011 to almost 70,000 in Fiscal Year 2014.

Unfortunately, these children are not entitled to legal representation in the ensuing immigration proceedings. Regardless of age and fluency in English, children frequently appear in immigration court without legal counsel. The presence of legal counsel is vital in these cases. Data indicates that children represented by an attorney appear more frequently in court (92.5 percent) than those without (27.5 percent). Further, studies indicate that 90 percent of children appearing in court without an attorney are ordered deported. Children appearing with an attorney fare much better — roughly 50 percent are allowed to remain in the United States, while another 25 percent are permitted a voluntary departure rather than deportation. Pro bono legal assistance is critical to ensuring that these children receive due process.

The American Bar Association’s Response

ABA leaders were able to witness first-hand the pressing issues confronting these children during a July 2014 visit to Lackland and other youth shelters on the southwest border, including the critical need for legal representation in immigration court and related proceedings. In response to this need, ABA President William Hubbard, with the approval of the Board of Governors, established the Working Group on Unaccompanied Minor Immigrants (“Working Group”) in late August 2014. In support of its charge to recruit attorneys to represent unaccompanied children, the Working Group has developed a website at www.ambar.org/ican to collect ABA training, materials and policy on the issue, as well as links to external resources. Additionally, attorneys can volunteer to provide pro bono legal assistance through a link on the page.
The Working Group also supported Pro Bono Net’s development of the Immigration Advocates Network website (www.immigrationadvocates.org). This site offers pro bono attorneys resources, including a calendar of trainings, a library of documents, podcasts, a guide to pro bono opportunities, and more. The site also offers similar resources for provider organizations.

Making the Case for Pro Bono

Private attorneys may be reluctant to volunteer to assist children in immigration matters, as it is an area of law in which relatively few have experience. The need among these children, however, is too great to ignore. As minors, unfamiliar with the American and immigration court systems and law, they are at a great disadvantage. Many have no or limited fluency in English. While most of the children are teenagers, some are as young as 4 or 5 years old, or even younger. The best assurance of due process for these children is the presence of an attorney, who has a far greater knowledge of the proceedings — even if it is not his or her area of expertise.

Attorneys interested in providing pro bono services to children can build their knowledge and expertise through a variety of resources. In addition to the websites mentioned above, a number of organizations exist across the country to provide training, forms and mentoring to attorneys new to immigration matters. Both attorneys on staff and experienced pro bono attorneys are available for mentoring and guidance.

Providing pro bono legal services in unaccompanied minor immigration cases can be a deeply satisfying experience. One volunteer attorney was told by her client, as they walked in to apply for a green card, that simply having the attorney there kept him from being scared.

In addition to the intangible benefits, volunteering to provide pro bono legal assistance offers professional development. Attorneys gain experience in interviewing clients and fact finding. They will gain experience in appearing before a judge in immigration court; if they represent a child in a Special Immigrant Juveniles Status (SIJS) matter they also gain experience in appearing before a
family law court. This valuable experience is applicable and transferable to the attorney’s daily practice and business.

**Overview of Forms of Relief**

An attorney can assist the unaccompanied immigrant child in determining which of several forms of relief are most appropriate. Possible options include:

SIJS protects immigrant children who have been abused or neglected by providing immediate eligibility for legal permanent residency (green card) and a path to citizenship. Applying for SIJS requires two steps, the first in state court and the second in immigration court. To be eligible for SIJ status, the child must meet the following requirements:

- Be under 21 years old on the filing date of the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant
- Obtain a state court order that must be in effect on the filing date of the Form I-360 and when United States Citizenship and Immigration Services (USCIS) makes a decision on your application, unless the child “aged out” of the state court’s jurisdiction due to no fault of her own
- The child cannot be married, both when filing the application and when USCIS makes a decision on the application
  - “Not married” includes a child whose marriage ended because of annulment, divorce or death
  - The child must be inside the United States at the time of filing the Form I-360

If the child is in the legal custody of the U.S. Department of Health and Human Services (HHS):

- The child must request permission from HHS for the court to legally place her somewhere else
- The child does not need to request permission from HHS if the state court does not place her somewhere else.

Asylum claims are sought by children who seek protection in the U.S. from harm or fear of future harm in their home countries. Grounds for asylum frequently involve resistance to gangs or cartel recruitment, resistance to relationships with gang members (e.g., girl with a boyfriend who is a gang member), domestic or family violence, forced marriage, gender violence, imputed political opinion, and clan-based persecution.

There are six requisite elements for an asylum claim:

- The child is in the U.S. and is afraid to return to her home country.
- The reason the child is afraid to return is because someone harmed him in the past or he has a future fear of being harmed.
- The harm must be serious, may be physical but also may be threats or verbal abuse.
- The reason the person is harming the child is because of an affiliation that cannot be changed (race, religion, political views, gender, sexual orientation, or membership in a social group).
The country from which the child is fleeing cannot or is unwilling to protect the child from harm.

There is no other location in the home country where the child can live safely.

Two visas offer protection in limited circumstances:

- A trafficking visa (T Visa) protects victims of severe forms of human trafficking, including sex and labor trafficking. It allows a child to remain legally in the U.S. for four years; after three years the child can apply for legal resident status.

- A U visa protects victims of certain serious crimes that occur within the United States. Certification is required from federal, state, or local law enforcement to show the child is being helpful/cooperating. While a U visa protects immigrant children who are victimized in the U.S., claims involving harm during an immigrant child’s journey may support a U Visa if the action can be tied in some way to the U.S.

Deferred Action for Child Arrival Program (DACA) is a discretionary form of temporary status that provides the youth employment authorization and a two-year deferral from deportation. On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. On November 20, 2014, the President announced an extension of the period of DACA and work authorization from two years to three years.

Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status. Many immigrant youth are ineligible for this relief since they are just crossing the border or have not been in the country for the required period.

“Grounds for asylum frequently involve resistance to gangs or cartel recruitment...domestic or family violence, forced marriage, gender violence, imputed political opinion, and clan-based persecution.”
Both [www.ambar.org/ican](http://www.ambar.org/ican) and [www.immigrationadvocates.org](http://www.immigrationadvocates.org) contain catalogue trainings – available online and in person – as well as materials that provide greater detail on the requirements for each form of relief described above.

**What Organizations Can Do to Help**

Not all legal providers assist unaccompanied minors in immigration matters. Some, such as LSC grantees, are limited in the assistance they are able to provide by governing regulations; others are limited by resources or mission. That does not mean, however, that those organizations cannot support this critical issue in other ways.

One key manner by which to support this issue is to familiarize yourself with organizations in your area that do offer assistance to unaccompanied minors in immigration matters. In the event that a potential client contacts your organization, the ability to refer that person to the appropriate organization for assistance goes a long way toward getting them the necessary assistance.

Another is to know what assistance your organization can offer. LSC grantees, for example, may offer assistance to certain immigrants in limited matters. A detailed examination of the circumstances is beyond the scope of this article, but it is recommended that LSC programs review and become familiar with §1626, and in particular §1626.4, regarding alien eligibility for services as well as LSC Program Letter 14-3.

Organizations can also collaborate with immigration-oriented providers on recruitment of attorneys. Examples include developing joint recruiting campaigns to bar associations or referring volunteers with family law experience to organizations as volunteers or mentors in SIJS matters. Partnering on training in substantive areas, such as U and T Visas, or on the ethics of representing a child client, is yet another way organizations can pool resources in the furtherance of addressing this crisis.

**Conclusion**

The influx of unaccompanied children from Central America in 2014 was unprecedented in comparison to previous years, but likely to repeat as long as conditions in Central America continue to remain a threat to the security of families and children residing there. It is crucial that the legal community unite to address the vast need for representation and to ensure that these and future children receive the due process to which they are entitled.

*Cheryl Zalenski is the director of the American Bar Association Center for Pro Bono.*
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Legal Services Access for All: Implementing the Violence Against Women Act of 2005

By Benish Anver, Henrissa Bassey and Leslye E. Orloff

I. Congress’ Expansion of Access to Legal Services for Survivors

Legal advocacy services provide crucial support for survivors of violence against women. These services assist survivors in rebuilding their lives and the lives of their children and achieving a life free of abuse. Over the past two decades, congressional recognition of the central role legal services play in enabling survivors to attain social, emotional, and economic well-being has led to the continuous expansion of access to federally funded legal services for survivors of violence. This expansion has included providing access to free legal services from programs funded by the Legal Services Corporation (LSC) for immigrant survivors of violence.

The LSC, created in 1974, is the largest funder of civil legal aid for low-income populations in the United States. LSC annually distributes funding allocated by Congress to legal services programs throughout the country in furtherance of LSC’s mission to promote equal access to justice. However, the LSC Act, implementing regulations, and annual appropriations riders govern the types of services grantees may provide and restrict who is eligible for those services. Two decades ago, access to LSC funded legal assistance by immigrants who were not lawful permanent residents was severely limited. Even with significant experience in representing victims of domestic violence in protection order cases, custody cases, and other legal matters, LSC grantees were prohibited from providing critical legal services for immigrant survivors of domestic violence with tragic results. The murder of Mariella Batista, an immigrant lawfully present in the United States, by her abusive husband, sparked the beginning of Congress’ expansion of access to legal services for immigrant survivors of violence.

Remembering Mariella

Twenty-eight-year-old Mariella, applied to an LSC funded program for assistance in a custody case brought by her abusive husband, after suffering years of abuse. Her income was within LSC’s poverty guidelines and she was financially eligible for their services. But, the program was forced to deny her representation because Congress had severely limited access to LSC funded service for immigrants who were not lawful permanent residents. Mariella was able to locate a pro bono attorney to assist her. This attorney, with no domestic violence or safety planning experience or expertise, scheduled a meeting with her...
on the courthouse steps on the date of her custody hearing. As Mariella climbed the courthouse steps to meet her lawyer, her husband shot her to death in front of their nine-year-old son.

“The vast majority of victims who sought legal services were victims of domestic violence...and sexual assault...who were living with their children.”

Mariella’s case precipitated the passage of the 1996 “Kennedy Amendment” allowing LSC funded programs to use non-LSC funds to provide legal services to immigrant victims of domestic violence who were not otherwise eligible for LSC funded services, provided that the victim was battered by a spouse or parent. Congress continued to expand Violence Against Women Act (VAWA) protections. A key provision in VAWA 2005 championed by Senators Richard Durbin and Edward Kennedy expanded access to LSC funded legal representation to all immigrant victims of domestic violence, sexual assault, and human trafficking, and immigrant victims of the full range of criminal activities that the U visa for crime victims was designed to protect.

These improvements provide legal protections for crime victims who, because of their immigration status, are especially vulnerable to victimization. Lack of legal immigration status and dependence on family members and employers to attain legal immigration status and work authorization leave immigrant women and children vulnerable to sexual and domestic violence. Immigrant women’s work in the informal economy places them at risk of experiencing unsafe working conditions and susceptibility to discrimination, sexual harassment, sexual exploitation and mistreatment. As the immigrant population grows in communities, small and large, urban and rural, across the United States, facilitating access to the criminal and civil justice systems for immigrant crime survivors also improves public safety. With access to help from police, prosecutors, lawyers and courts, immigrant crime victims play an enhanced role in reporting and assisting law enforcement in bringing perpetrators of crime to justice.

Unfortunately, despite VAWA 2005’s expansion of access to LSC funded legal services for a broad array of immigrant crime victims, as late as 2012 large numbers of immigrant crime victims legally eligible for representation by LSC funded programs were being turned away. Research on access of LSC funded programs found that only 26.4 percent of LSC funded programs took cases of immigrant crime victims without restriction. Acceptance rates for immigrant victims’ cases were low: 21 percent non-spousal domestic violence; 20.6 percent human trafficking; and 26.9 percent sexual assault. The vast majority of victims who sought legal services were victims of domestic violence (44.8 percent) and sexual assault (37.1 percent) who were living with their children.

When immigrant crime victims sought access to LSC funded programs, significant numbers were told by LSC funded programs that they were turned away for reasons that reflected lack of understanding of VAWA’s immigrant access provisions. The graph below reveals the types of cases accepted. The red bars are 1997 Kennedy Amendment cases that remain eligible under current law. The blue bars indicate the new types of cases acceptable under VAWA 2005.
II. Expansion of Eligibility for Services in Revised LSC Regulation, 45 C.F.R. 1626 and LSC Program Letter 14-3 – Two Paths: Relief from Abuse & Immigration Status

In April 2014, LSC amended its regulation to fully implement Congressional expansions of access to legal services by both VAWA 2005 and VAWA 2000. A non-citizen can be eligible for services under the Anti-Abuse laws or based on immigration status. Seeking immigration relief is not a prerequisite to LSC funded representation under the anti-abuse section of the statute and the new LSC regulations. Some immigrant victims will, for victim safety reasons, choose not to apply for immigration relief. If a victim chooses not to apply for immigration relief, immigrant victims of domestic violence, sexual assault, human trafficking or U-visa qualifying crimes can and should receive a wide range of other legal assistance from LSC funded agencies related to their abuse. Available representation related to the abuse may include but is not limited to family law, protection order, housing, and public benefits matters.

Representation in Any Legal Matter “Directly Related” to the Abuse

While victims who fall within the definition of severe forms of human trafficking are not limited in the scope of the legal services they can receive, all other victims receiving services funded by LSC under the anti-abuse section of the regulation may only receive legal assistance needed to “escape from the abusive situation, ameliorate the current effects of the abuse, or protect against future abuse, so long as the recipient can show the necessary connection of the representation to the abuse.” Though it may appear that these definitions, on their face, are narrow, LSC funded agencies are authorized to provide legal assistance that is directly related to escaping abuse, ameliorating the effects of the abuse, or preventing future abuse for immigrant victims including legal assistance related to accessing public benefits, attaining any form of legal immigration status, securing quality housing, and any “other matters related to the abuse that are offered to other clients of the LSC agency.” In the preamble to the final anti-abuse rule, LSC discusses the fact that it expects LSC funded agencies to interpret the term “directly related” broadly. The examples in the preamble were intentionally meant to be “illustrious rather than exhaustive.” This approach is similar to the approach LSC took in the original regulation implementing the Kennedy Amendment, and is consistent with VAWA’s legislative history. Therefore, LSC funded agencies are now authorized to provide a broad range of related legal assistance to immigrant crime victims including representation, advocacy or counseling meeting a multitude of victim client needs.

If the immigrant victim, after safety planning, determines that they can safely apply for immigration relief, the attorney working with the immigrant victim must first determine whether obtaining immigration relief is related to the immigrant victim’s ability to overcome or prevent the underlying qualifying abuse. Once it is determined that applying for immigration relief for the immigrant victim qualifies as “related legal assistance,” the attorney has an ethical obligation to pursue forms of immigra-
tion relief that the immigrant victim is most likely to safely apply for and successfully obtain, including but not limited to VAWA related options.

Immigrant victims represented under the anti-abuse regulation, 1626.4, who pursue immigration relief, will become eligible for full representation under 1626.5 once they file for lawful permanent residency. For example, when an LSC funded attorney files a victim’s VAWA, T or U visa case, approval of the case eventually leads to the victim’s eligibility to apply for lawful permanent residency. VAWA self-petitioners whose abusers are U.S. citizen spouses, parents or over 21-year-old children are immediately eligible to apply for lawful permanent residency once the VAWA self-petition has been approved. As soon as the victim’s application for lawful permanent residency is pending, the victim’s basis for representation by the LSC agency can shift from representation related to abuse under anti-abuse laws to immigration status based representation, which allows for representation on any legal matter. It should be noted that there are much longer wait times to qualify to apply for lawful permanent residency for VAWA self-petitioners whose abusers are lawful permanent residents (9 months to 2 years as of April 2014) and U visa recipients (3 years).42

**Representing victims of domestic violence, battering or extreme cruelty**

The LSC rule adopts the definition of “domestic violence” developed by the U.S. Department of Homeland Security (DHS) in the VAWA self-petitioning regulations.43 Both immigration relief and legal services representation are open to immigrants who suffer “battering or extreme cruelty”44 including those who have been “subject to battery or extreme cruelty by a spouse, parent, or member of their spouse’s or parent’s family residing in the same household,” and the immigrant parents of child crime victims who have faced battering or extreme cruelty by a spouse, parent or member of their spouse’s or parent’s family residing in the same household.45

The Immigration and Naturalization Service (INS) and DHS recognized, in issuing regulations and policy memoranda, that it was not possible to anticipate all of the different types of abuse that are a part of an “overall pattern of violence”46 that could qualify as battering and extreme cruelty.47 Applying the DHS approach, the range of abusive acts that could qualify as battering and extreme cruelty is broad, allowing many needy immigrant crime victims to qualify for legal services.

In many cases, abandonment and/or neglect of children falls within the scope of abusive behaviors covered by DHS’s broad definition of battering or extreme cruelty. LSC has issued a program letter, LSC Program Letter 14-3, to provide guidance on when LSC funds can be used to represent unaccompanied minors entering the United States. The child’s circumstances must fall within one of the exceptions in 45 C.F.R. 1626, which include being the victim of battery or extreme cruelty.

Eligibility may vary based on the facts of the individual immigrant child’s case. Factors programs should consider in determining whether a child’s neglect or abandonment constitute extreme cruelty should include both an examination of the harm suffered by the child experiencing neglect or abandonment and the severity of the parents’ actions towards the child and would include, but not be limited to, at a minimum, some of the following types of considerations:48 the child’s age, physical and mental health; any preexisting conditions the child may have that may have been aggravated by the abandonment or neglect; how the neglect or abandonment affected the child; whether the neglect or abandonment of the child caused mental injury; whether the neglect was a

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**Victims Who are Eligible for LSC Funded Legal Assistance under Anti-Abuse Laws**

- Battered or subjected to extreme cruelty:
  - All victims of domestic violence as defined by state protection order and criminal statutes
  - Victims of extreme cruelty including but not limited to coercive control
  - Victims that have been abused or subjected to extreme cruelty by a parent, step-parent, spouse, former spouse, or a son or daughter
  - Victims of heterosexual and same-sex partner violence, married and unmarried
- Victims of sexual assault
- Victims of human trafficking
- Victims of severe forms of human trafficking (continued presence and T visas)
- U visa criminal activity that has occurred in the United States or has violated U.S. law
- Children of all of the eligible victims listed in the anti-abuse regulations
series of acts that, if taken together, establish a pattern of extreme cruelty, even when no single act alone rises to that level; whether the abandonment or neglect would qualify for mandatory child abuse reporting under state law; or the severity of the parents’ conduct in abandoning or neglecting the child. Each of these factors should be considered at the time of the neglect or abandonment, at the time of application, and against the background of the totality of the circumstances of immigrant child’s life. Location of the abuse, abandonment or neglect in or outside of the U.S. is not a factor.

For Many Victims, Presence in the U.S. is Not Required for Representation

One of the important issues the LSC anti-abuse section of the regulation addresses is whether and in which types of cases LSC funded programs can represent immigrant crime victims without regard to whether the crime victim is in the United States at the time the victim applies for legal services from the LSC funded agency. Victims do not need to be present in the U.S. at the time they apply for legal services. Following the lead of Congress and DHS in cases involving immigrant crime victims, under LSC’s anti-abuse regulations, victims of domestic violence, battering, extreme cruelty, sexual assault and other U-visa listed criminal activities (e.g. trafficking, felonious assault, kidnapping) may be represented whether they are in the U.S. or abroad and do not have to have been victimized in the United States, so long as the qualifying victimization would have “violated a law of the United States.” LSC issued Program Letter 14-3 on October 29, 2014 defining the term “violated a law of the United States” to include domestic violence, battering or extreme cruelty, sexual assault, human trafficking, severe forms of human trafficking, and other U-visa listed criminal activities, regardless of whether the qualifying criminal activity occurred in the U.S.

The chart above illustrates which immigrant victims must be present in the United States at the time they apply for legal services and which do not.

Three Distinct Paths to LSC representation available to victims of human trafficking

LSC funded agencies may provide legal assistance to victims of “severe forms of trafficking”, as defined by the Trafficking Victims Protection Act (TVPA), even if the trafficking did not take place in the United States, as long as the victim is present in the United States when applying for legal services. The TVPA defines victims of severe forms of human trafficking to include victims who have been recruited, harbored, transported, or obtained for the purpose of a commercial sex act and include adults compelled to engage in “sex acts” through the use of fraud or coercion, minors induced to perform sex acts, and people who are forced or fraudulently recruited, harbored, or transported for

<table>
<thead>
<tr>
<th>LSC Regulation Section</th>
<th>Immigrant Victim Category</th>
<th>Presence Required?</th>
<th>Activity’s Relation to the United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1626.2(k)(2)</td>
<td>Human trafficking VAWA LSC 2005</td>
<td>Yes</td>
<td>Trafficking can take place inside or outside the U.S.</td>
</tr>
<tr>
<td>§ 1626.2(j)</td>
<td>Severe form of human trafficking (TVPA)</td>
<td>Yes</td>
<td>Trafficking can take place inside or outside the U.S.</td>
</tr>
<tr>
<td>§ 1626.2(h)</td>
<td>Human trafficking as a U visa crime</td>
<td>No</td>
<td>Trafficking can take place inside or outside the U.S.</td>
</tr>
<tr>
<td>§ 1626.2(b)</td>
<td>Domestic violence</td>
<td>No</td>
<td>Domestic violence can take place inside or outside of the U.S.</td>
</tr>
<tr>
<td>§ 1626.2(k)(1)</td>
<td>Sexual assault</td>
<td>No</td>
<td>Sexual assault can take place inside or outside of the U.S.</td>
</tr>
<tr>
<td>§ 1626.2 (h)</td>
<td>U visa qualifying criminal activity</td>
<td>No</td>
<td>Qualifying criminal activity can take place inside or outside of the U.S.</td>
</tr>
<tr>
<td>§ 1626.2 (b)</td>
<td>Battering or extreme cruelty</td>
<td>No</td>
<td>Battering or extreme cruelty can take place inside or outside of the U.S.</td>
</tr>
</tbody>
</table>
The ability of LSC funded programs to represent immigrant trafficking victims is not limited to immigrant victims of severe forms of human trafficking as defined by the TVPA. The LSC anti-abuse regulations authorize representation for two additional groups of human trafficking victims: 1. U-visa-eligible trafficking victims and 2. VAWA-2005 trafficking victims who do not fall within the TVPA’s “sex trafficking” and “severe forms of trafficking person” definitions and who may not be eligible for U visas. A significant distinction between these groups is the fact that U-visa-eligible trafficking victims qualify for legal services representation whether or not they are physically present in the U.S. at the time that they seek legal assistance from an LSC funded agency.

LSC Funded Representation for Unmarried Victims and Victims in Same Sex Marriages

VAWA 2005 removed the Kennedy Amendment’s spousal restrictions, allowing LSC funded programs to use both LSC and non-LSC funds to provide legal assistance for immigrant victims of domestic violence, sexual assault, trafficking, and other U visa criminal activities to represent victims of domestic violence who were not married to their abusers.

Additionally, on June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States are valid without regard as to whether the marriage is between a man and a woman, two men, or two women. As federal government agencies implement Windsor, DHS began granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples. As a result, VAWA self-petitioning is now available to same-sex married couples. This includes protections for all spousal without regard to their gender, gender identity, or sexual orientation including transgender individuals. Victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage are now eligible to file VAWA self-petitions. Similarly, immigrant victims of child abuse or extreme cruelty perpetrated by the child’s U.S. citizen or lawful permanent resident step-parent through a same sex marriage are eligible to self-petition.

III. Effective Implementation

Revising screening and intake procedures

Under the LSC regulations, LSC funded agencies can determine how they will conduct their intake processes in the ways they determine are the most effective at identifying clients who are eligible for services and whose cases are within the agency’s priority areas. LSC funded agency intake and screening procedures should be revised to focus on initially determining eligibility based on victimization and only turning to immigration status inquiries for non-victims. LSC funded agencies should allow immigrant victims applying for legal assistance under the anti-abuse section of the regulation to prove their eligibility for representation using the standard of credible evidence available to the victim. Information provided by victim services providers and other professionals or witnesses may be available to some victims providing evidence of battery, extreme cruelty, sexual assault or crime victimization that can be helpful to LSC funded agencies in their eligibility determinations. The issue of whether an immigrant crime victim additionally qualifies under immigration grounds of eligibility can be addressed at a later stage of representation if the victim may need such eligibility to secure legal assistance on an issue that is not related to the abuse. If an immigrant applicant is not initially referred to the LSC funded agency as a crime victim, then the agency should determine eligibility based on immigration status.

Removing recordkeeping

The LSC recently removed the recordkeeping requirement that LSC funded agencies keep or retain copies and supporting documentation for U visa, T visa and “any other grant of immigration status” for victims receiving legal services from LSC funded organizations. To protect privacy and confidentiality, it is recommended that the least amount of evidence be utilized to demonstrate that the victim is eligible for U Visa, T Visa, VAWA self-petition or another type of immigration status. LSC recommended that, in those cases where an immigrant victim presents evidence of immigration status, recipients should record the type of evidence they were shown, the applicant’s alien registration number (“A number”), the date of the document, and the staff member that was shown the document. Further, when an LSC funded pro-
gram is presented with evidence documenting an applicant’s immigration status, they are required to protect that information both under client confidentiality and VAWA confidentiality.

**Improving privacy and confidentiality**

Immigrant victims of domestic violence and sexual assault are understandably hesitant to share private information. In addition to attempting to escape their perpetrators, they may worry about being reported to a law enforcement agency that may deport them. For immigrant crime victims’ confidentiality, privacy, VAWA immigration confidentiality, and privileged communications are essential components of effective legal representation. For these reasons, the LSC letters and LSC regulations have prohibited LSC funded agencies from asking immigrant victims of crime about their immigration status. Thus, intake procedures should be changed so that immigrant victims are first questioned about criminal activities committed against them rather asking questions about victims’ immigration status.

**Opportunities for LSC funded agencies created by developing collaborative partnerships with victim services agencies**

The anti-abuse pathway provides LSC funded agencies an opportunity to reach out to and to develop relationships with victim services programs in the LSC agencies’ service area that have experience and expertise serving immigrant victims of domestic violence, sexual assault, and human trafficking. Many LSC funded agencies have already established these relationships and are models of successful collaboration. Collaboration with victim services programs can help LSC funded agencies with the agency’s priority setting process, outreach, community education, case management, safety planning, obtaining U-visa certifications, and other critical issues that victims services programs have expertise in. LSC programs interested in identifying organizations with experience serving immigrant populations in their state should consult the National Directory of Programs Serving Immigrant Victims developed and maintained by NIWAP.

**IV. Conclusion**

LSC was designed in recognition of indigent population’s heightened vulnerability and need for critical legal services. Congress has recognized that legal representation is often an immigrant victim’s sole pathway out of poverty and abuse. Continuing to expand the types of legal services for which immigrant victims are eligible, will secure for them a future free of domestic violence, sexual assault, trafficking and trauma, and filled with economic productivity, employment opportunities, and the core tenet behind VAWA, the Durbin and Kennedy Amendments, and the Legal Services Corporation – Justice.

Lesley Orloff is an adjunct professor and the director of the National Immigrant Women’s Advocacy Project (NIWAP) at American University Washington College of Law.

Benish Anver, NIWAP’s policy staff attorney, graduated from the American University Washington College of Law in 2013 and is a former NIWAP dean’s fellow.
Henrisya Bassey is a student at American in the Disability Law Clinic.

1. Legal Services Corporation, Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626.5 (2014).
2. Legal Services Corporation Appropriations Act of 1996 § 504(a)(11); Legal Services Corporation Act of 1974, 42 U.S.C. § 2996; TPRA 2000 § 1201; see also Sen. Edward M. Kennedy, Address Before the Senate Committee on Appropriations (June 26, 1996) (transcript on file with author); see also Leslye Orloff et al., Opening a Door to Help: Legal Services Programs’ Key Role in Representing Battered Immigrant Women and Children, 37 CLEARINGHOUSE REV. 37 (May-June 2003).
5. Id.
6. Id.
7. Id.
8. Id.
10. See generally, Leslye E. Orloff et al., Opening a Door to Help: Legal Services Programs’ Key Role in Representing Battered Immigrant Women and Children, 37 CLEARINGHOUSE REV. 37 (May-June 2003).
12. VAWA 2005 Section 103.
14. Employment in the informal economy includes work for who were not identified as family health care providers, domestic workers, hotel and restaurant workers, office cleaners, and farm and food processing industry workers.
16. As of 2013, 131 percent of persons living in the United States were foreign born and over half (51 percent) of the foreign born population are female. Among foreign born persons, 46.7 percent are naturalized citizens. Of the 53.3 percent noncitizen foreign born population, 60.3 percent are lawful permanent residents and the remaining 39.7 percent have temporary legal immigration status or are undocumented. Of the under 18 year-old children population in the United States, 24.9 percent have one or more foreign born parents. Seventy-seven percent of Latina immigrant workers work as childcare workers, elder care workers, hotel and restaurant workers, office workers, and farm and food processing industry workers.
20. Id. at 15.
21. Id. at 14 (30.2 percent had one child; 32.3 percent 2 children and 37.5 percent three or more children).
22. Id. at 21.
26. For a detailed discussion on legal services and how to provide legal services to an immigrant victim of crime, regardless of whether an application of immigration relief is part of those services and a graphic flow chart that summarizes the eligibility process, see id at 27.
27. See also, 45 C.F.R. § 1626.5 (2014). For a discussion of legal services available to victims of human trafficking and severe forms of human trafficking, please see the section titled Three Paths to LSC representation available to victims of human trafficking below.
34. See also id at 27.
35. “Two Invited” means the program accepted cases of immigrant victims and no restrictions were imposed and the LSC funded programs accepts cases of immigrant crime victims consistent with VAWA 2005.

35. For technical assistance on wait times, please contact NIWAP at 202-274-4457 or via email at info@niwap.org.


39. Refers to human trafficking that includes, but is broader than “severe forms of human trafficking” or “sex trafficking”, and could include crimes that violates a state or federal law. To qualify for legal representation by an LSC funded agency, the trafficking may have occurred inside or outside of the U.S., but the victim must be present in the United States at the time of the application for legal services.

40. 45 C.F.R. § 1626.4(a)(2014); see also 22 U.S.C. § 7105(b)(1)(c) (defining “severe forms of trafficking”).

41. U visa listed crimes are any of the following: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful imprisonment, perjury, prostitution, rape, sexual assault, human trafficking, and all U visa crimes without regard to the victim’s status in the United States.

42. 61 Fed. Reg. 13925 (1996) (in its 1996 regulations regarding VAWA self-petitions, the Immigration and Naturalization Service (INS), the predecessor agency to DHS, recognized a broad definition of battering and extreme cruelty).


44. 45 C.F.R. § 1626.4-1626.5 (2014).

45. Id.

46. Id.


49. In cases of immigration relief under VAWA, victims filing VAWA self-petitions can file either from inside the United States or abroad (VAWA 2000 § 1534(a)(1)(A)(v)) (2000) (provided that the victim “is a spouse, intended spouse, or child living abroad of a citizen who... is an employee of the United States Government; is a member of the uniformed services... or has subjected the (victim) or the (victim’s) child to battery or extreme cruelty in the United States; and is eligible to file a petition under clause (iii) or (iv), shall file such petition with the Attorney General under the procedures that apply to self-petitioners under clause (iii) or (iv), as applicable”), available at: http://niwaplibrary.wcl.american.edu-immigration/vawa-self-petition-and-cancellation/statutes/VAWA-TVRA-2000-whole-bill.pdf.

50. Program Letter from Ronald S. Flagg, General Counsel and Vice President for Legal Affairs, Legal Services Corporation, to All Executive Directors, Assessing Eligibility of Aliens Under 45 C.F.R. § 1626.4(c)(1)(v) (Oct. 29, 2014) (hereinafter “Program Letter 14-3”) (noting that “Section 1626.4(c) describes the relationship between both (1) the qualifying activity and the United States and (2) the victim and the United States. Under section 1626.4(c), the qualifying activity does not have to have occurred in the United States”)(emphasis in original), available at: http://niwaplibrary.wcl.american.edu-reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/Program_Letter-14-3.pdf.


53. Id.


Now Ensures Legal Services for Immigrant Victims, 40 CLEARINGHOUSE REV. 538 (Jan. – Feb. 2007).


57. Memorandum from James J. Sandman, President, Legal Services Corporation, to All LSC Program Directors, Legal Services Corporation, Alien Eligibility under 45 C.F.R. Part 1626 (May 19, 2014)(hereinafter “LSC Program Letter 14-2”) (Consistent with the positions taken by the U.S. Department of Justice and the U.S. Department of Homeland Security, following the Supreme Court’s decision in United States v. Windsor, LSC will use the law of the place where the marriage was conducted, rather than the law of the state in which legal assistance is sought, to determine whether the marriage is legally valid for purposes of eligibility for LSC-funded legal assistance.) available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/2014-lsc-regulations/LSC Program Letter 14-2 with chart.pdf


59. Id.

60. 79 Fed. Reg. 21861, 21869 (2014) (noting that the Office of Legal Affairs “stated that once a recipient determined that an individual has a legal need that would qualify for the exceptions of the anti-abuse statutes to the alienage requirement, the recipient does not need to inquire into the citizenship or immigration status of that individual”), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/2014-lsc-regulations/LSC_regulations_April 2014.pdf


63. Id.


67. There are many successful collaborative partnerships between LSC funded agencies and local victim services programs across the country, examples NIWAP has identified include: Legal Aid Foundation of Los Angeles (CA), Bay Area Legal Services (CA), Legal Aid Society of NY (NY), South Brooklyn Legal Aid (NY), Texas RioGrande Legal Aid, Inc. (TX), and Legal Aid of North Carolina (NC).

68. Program Letter 14-3 notes that anti-abuse representation can now be part of the 45 C.F.R. Part 1620 priority setting process. For more on best practices for including victim services providers in developing the agencies implementation plan submitted to LSC, see Anver, et al., And Legal Services for All: Implementing the Violence Against Women Act of 2005’s New Path to Legal Services Corporation Funded Representation for Immigrant Survivors of Domestic Violence, Sexual Assault, Human Trafficking, and Other Crimes at 26, available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/access-to-legal-services-for-immigrant-victims/civil-society/2014-lsc-regulations/And-LSC-for-All.pdf/view


70. For a list of programs with expertise serving immigrant victims developed for the Office on Violence Against Women, DOJ, please visit: http://niwaplibrary.wcl.american.edu/reference/service-providers-directory
<table>
<thead>
<tr>
<th>JANUARY</th>
<th>MARCH</th>
<th>MAY</th>
<th>NOVEMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal Justice Conference</td>
<td>Life and Liberty in the Balance</td>
<td>Appellate Defense &amp; Persuasive Writing Skills Institute</td>
<td>NLADA Annual Conference</td>
</tr>
</tbody>
</table>

Upcoming Conferences:
- NLADA Annual Conference: November 4-7, New Orleans, LA
- National Defender Leadership Institute: June 4-6, University of South Carolina
- Equal Justice Conference: May 7-9, Hilton Austin
- Chief Defenders’ Network Annual Conference: July 15-16, University of the District of Columbia
- American Council of Defender Summer Conferences: July 14, Columbia University
- Community-Oriented Defender Institute: Washington, DC

Save the Date!

Annual Conference 2015
New Orleans, LA
November 4-7

Save the Date!

By Phyllis H. Subin

Program Overview

From January 22-25, 2015, more than 80 state and federal court public defenders, Criminal Justice Act attorneys, and retained appellate criminal defense counsel gathered at the New Orleans Sheraton Hotel for the National Appellate Defense & Persuasive Writing Skills Institute. The overall goal of the Institute is to fully support a national network of skilled appellate defense attorneys participating in a community that shares a commitment to zealous, quality and client-centered appellate advocacy.

This year’s Institute was co-sponsored by the National Legal Aid & Defender Association (NLADA) along with the Louisiana Appellate Project (LAP) and the National Alliance of Indigent Defense Educators (NAIDE), a section of the NLADA. The Institute also received excellent assistance from the Training Division of the Defender Services Office, part of the federal Administrative Office of the United States Courts, and from Bob Burke, Training Branch director, who was present for the Institute.

NLADA, LAP, and NAIDE have consistently been strong supporters of the Institute, which remains the only national, multi-day skills building training program that brings together a state and federal court appellate defender faculty and participants who engage in federal and state appellate and habeas corpus law practice.

The Institute actually consists of two separate but concurrent training tracks. The United States Supreme Court Advanced Advocacy Track is only open to 14 experienced state or federal court appellate attorneys, each of whom brings to the Institute their own case file that involves a federal issue(s) possibly subject to review by the Supreme Court. The Skills Writing Track is open to approximately 63 participants who may be experienced, intermediate or new appellate litigators, and it includes plenary sessions followed by specialized small group workshops for federal, state, and delinquency appellate practitioners. Skills Track participants also bring to the Institute their own case file and they work on that file throughout the Institute, applying the learning that is presented in the plenary session.

“...[the only] training program that brings together a state and federal court appellate defender faculty and participants who engage in federal and state appellate and habeas corpus law practice.”
United States Supreme Court Advanced Advocacy Track

The United States Supreme Court Advanced Advocacy Track began with an excellent presentation by Professor Laurence A. Benner, California Western School of Law, who offered his analysis of Supreme Court decisions from the current and 2013-2014 terms and who facilitated a discussion with participants and faculty on current trends and possible future decision-making. Professor Benner was followed by Timothy P. O’Toole from Miller & Chevalier, PC in Washington, DC. Mr. O’Toole has extensive experience filing Writs of Certiorari before the United States Supreme Court as well as lead counsel and amicus briefs, and he talked about the Writ screening process in the Court and the elements necessary for either successful granting of the Writ or for successful denial of the state/government’s Writ.

For the remainder of the first day and for all of the following day, participants worked with faculty in their small workshop group discussing and analyzing their own case file in preparation for writing their Writ of Certiorari issue(s). Experienced faculty facilitated this work and included Marshall Dayan, assistant federal defender, Capital Habeas Unit, Pittsburgh Federal Defender Office; Stuart Lev, assistant federal defender, Capital Habeas Unit, Defender Association of Philadelphia, Community Federal Defender Office; Judith H. Mizner, assistant federal defender, Chief of the Appellate Unit, Office of the Federal Defender Boston; Rosemary Percival, capital appellate defender, Missouri State Public Defender Office, Kansas City; and Phyllis H. Subin, Institute director.

On Saturday, participants spent the entire day working on oral argument and communication skills building with faculty members Jeff Sherr, branch manager, Education & Strategic Planning, KY Department of Public Advocacy and Patti Heying, recruiter and communications trainer, KY Department of Public Advocacy. Working in their small groups on Sunday morning, each participant had the opportunity to present the first 15 minutes of their oral argument to the mock justices consisting of small group faculty and their participant peers and to receive immediate feedback for positive improvement.

Skills Writing Track

After the conference welcome and introductory remarks by Ed Burnette, vice president of NLADA’s Defender Legal Services; Stephanie Griffith-Richardson, NLADA’s interim conference manager; and Phyllis H. Subin, the Skills Writing Track began with remarks by Ira Mickenberg, Esq, the Skills Track facilitator and faculty member. Mr. Mickenberg introduced Idaho State Appellate Defender Sara B. Thomas who presented a plenary session on Brainstorming the Facts. She was immediately followed by Mr. Mickenberg’s presentation on The Reality Check: Brainstorming the Law.

Skills Track participants then spent most of the first morning and afternoon in small workshop groups working on their own case file, brainstorming the facts and the law with their peers and faculty. In addition to Ed Burnette, Sara Thomas and Ira Mickenberg, our outstanding small group faculty included Lisa Freeland, chief defender, Western District of Pennsylvania; Ross Richardson, chief defender, Community Federal Defender Office, North Carolina; How-
ard Pincus, assistant federal defender, Federal Defender Office, Colorado; Paresh Patel, assistant federal defender, Federal Defender Office Maryland; Eileen Hirsch, assistant defender, Wisconsin State Public Defender Office; Jacqueline Bullard, deputy defender, Illinois State Appellate Defender; Melinda Pendergraph, director of training, Missouri State Public Defender Office; Professor Diane Courselle, University of Wyoming College of Law; Joseph Nursey, supervising attorney, Office of the Appellate Defender, New York; Stephen Goldmeier, assistant public defender, Office of the Ohio Public Defender; Mike Jones, assistant public defender, New Jersey Public Defender Office; Vicki Rogers, deputy, Labor, Human Resources, Community Affairs, Cook County Public Defender Office, Chicago; James Looney executive director, LAP; and Chris Aberle, deputy director, LAP.

The first day ended with a plenary session by Joe Nursey on Developing a Theory of Defense and Supporting Themes, and he was immediately followed by Prof. Courselle who presented on Transforming the Facts into a Persuasive Story.

For most of the second day, participants worked with faculty in their small groups on their theory of defense and developing a persuasive story that “sells” the theory. At the end of the day Mike Jones spoke about Writing a Persuasive Brief: Statements of Fact, Words and Pictures.

The third day had participants working in their small groups on their brief’s statement of the facts, and, after lunch, Melinda Pendergraph presented on Integrating the Facts and the Law: Dealing with the Good, the Bad, and the Ugly...Writing Your Argument. Participants again returned to their small groups for the remainder of the day and worked on their brief’s integrating the facts and the law into appellate argument.

The final morning consisted of Jeff Sherr and Patti Heying working with the Skills Track participants on their communications and oral argument skills building.

Institute faculty and participants considered the 2015 National Appellate Defense & Persuasive Writing Skills Institute a huge success. Even with the intense learning, everyone still found some time to enjoy New Orleans and its outstanding restaurants. We also had the opportunity to witness the annual Rock and Roll Running Marathon with weekend runners filling the Sheraton.

Many thanks to our outstanding Institute faculty for their commitment to teaching excellence and to our participants for their concentrated hard work throughout the conference. With continued support from the NLADA, LAP, NAIDE, and the federal Training Branch, we hope to return to New Orleans in January 2016 to continue this unique national appellate advocacy skills building program. So, please stay tuned for news about the 2016 National Appellate Defense & Persuasive Writing Skills Institute.

Phyllis H. Subin is a consultant for justice systems leadership and development.