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Constitutional Protections: State v. Individual Interests – Which Should Prevail? Symposium Report

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SYMPOSIUM REPORT

BY JENNIFER PONDER AND ABRE' CONNER

CONSTITUTIONAL PROTECTIONS: STATE V. INDIVIDUAL INTERESTS—WHICH SHOULD PREVAIL?

The Criminal Law Brief would like to thank Julie Swaney, Criminal Law Society President; Refugio Perez, CLS Vice President; and Meredith Owen, CLS Secretary for taking the lead in organizing this year's symposium and securing three captivating panels. Further assistance was gathered from Allyson Valadez, CLS Treasurer; Rob Genovese, CLS Event Coordinator/Treasurer-Elect; Ashley Prather, CLS President-Elect; Alexis Overstreet, CLS Vice President-Elect; Allison Negrinelli, CLS Secretary-Elect; Abre' Connor, CLB Staff; Jennifer Ponder, CLB Staff.

CURRENT STATE OF DRUG LAWS

Speakers:

Kara Gotsch, *Director of Advocacy for the Sentencing Project*. As a leader in the national "Crack the Disparity" Coalition, Kara Gotsch plans legislative strategies and develops public education initiatives to eliminate the federal crack cocaine sentencing disparity. She also oversees The Sentencing Project's federal advocacy on voting rights, reentry and racial disparity. Through The Sentencing Project's partnership in the Right to Vote Campaign, Gotsch guided state advocates in planning their media strategies to advance voting rights for people with felony convictions, including successful campaigns in Maryland and Rhode Island. While at The Sentencing Project, Gotsch has authored articles appearing in The Washington Post, Virginia Pilot, Los Angeles Daily Journal, TomPaine.com, and other news outlets. Gotsch holds a Bachelor of Arts in Political Science from Binghamton University and a Master of Public Policy degree from the University of Maryland.

Kyle O'Dowd, *Associate Executive Director for Policy for the National Association of Criminal Defense Lawyers*. Before joining NACDL, he was General Counsel for Families Against Mandatory Minimums, where he lobbied Congress and the U.S. Sentencing Commission, and ran a project that raised court challenges to inflexible sentencing laws. He was a criminal defense lawyer at the firm Moffitt, Zwerling & Kemler in Alexandria, Virginia, for several years after graduating from Emory University School of Law.

Kevin Sabet, *Special Advisor for Policy at the White House Office of National Drug Control*. Working on drug policy issues for more than sixteen years, this position allows Dr. Sabet to advise Director Kerlikowske on all matters affecting priorities, policies, and programs of the National Drug Control Strategy. He previously worked on policy and speechwriting at ONDCP in 2000 and from 2003-2004 Clinton and Bush Administrations, respectively. As a Marshall Scholar, he received his Ph.D. and M.S. in Social Policy at Oxford University and graduated with a B.A. in Political Science from the University of California, Berkeley. Dr. Sabet has published widely in peer-reviewed journals and books on the topics of marijuana policy, cocaine sentencing, legalization, medical marijuana, addiction treatment, and other issues. He is a regular contributor to editorial pages and the television news media, including the Washington Post, New York Times, San Francisco Chronicle, CNN, CNBC, and more than a dozen other media outlets. Prior to joining ONDCP, Dr. Sabet consulted in a private capacity on drug policy initiatives for the United Nations, local governments, and various non-profit organizations.

Moderator:

Jamin Raskin, Professor at the Washington College of law and Director of the Law and Government Program.

Kara Gotsch discussed her efforts to reform drug laws, namely that she works to improve the sentencing disparities between powdered and rock cocaine. In the mid-1980s, cocaine was a relatively new drug, but its use was spreading across America's urban areas. It quickly became an epidemic. Gotsch argued that the fatal cocaine overdose of rising basketball star Len Bias in 1986 sparked Congress's offensive against the new drug. Many suspected that Bias's overdose was caused by a more potent rock form of cocaine commonly known as "crack." Soon thereafter, Congress passed the "The Anti-Drug Abuse Act," law which Gotsch characterized as the "hardest drug laws ever created." She asserted that the Act imposes much harsher sentences upon users of crack cocaine than it does upon powdered cocaine users of comparable quantities. According to Gotsch, the Act imposed sentences upon crack cocaine users at a ratio of 100:1. In other words, in order for a powdered cocaine user to warrant the same sentence as a crack cocaine user, he/she would have to possess 100 times more of the drug than a crack cocaine user. Despite cocaine's widespread use across racial demographics, over 80% of people incarcerated under

the Act have been African American. Moreover, she noted that most of the people are not even high-level traffickers and are usually mules, or low-level drug distributors. Gotsch attributed this disproportionate effect to mandatory minimum sentences, “tying judge’s hands” such that they must impose harsh sentences.

According to Gotsch, some progress had been made to eliminate sentencing disparity. The 100:1 ratio has been brought down to 18:1, naming Senator Dick Durbin (D-IL) as spearheading efforts in Congress to reform federal drug laws. Gotsch was also hopeful that Congress would pass pending legislation which would eliminate the mandatory minimum sentences for federal drug laws. If passed, it would be the first time that Congress scaled-back minimum sentences since the Nixon Administration.

Kyle O’Dowd, from the National Association of Criminal Defense Lawyers (NACDL), discussed alternative ways in which jurisdictions are handling drug cases. He noted that many jurisdictions are now employing “drug courts,” which are non-adversarial courts that combine treatment with graduated sanctions to adjudicate cases. In 1989, Miami created the first drug court. Now, there are over 2300 drug courts across the country. According to O’Dowd, more than half of the individuals in prison were convicted of drug related crimes. O’Dowd contributed to NACDL’s publication, *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, which found that, generally, results are positive in drug courts, but there are some meaningful drawbacks. The cost to prosecute a case in drug courts are less than prosecution in conventional courts. However, the data shows that drug courts are effective for only low-risk defendants and low-level offenses. For high-risk defendants facing lengthy prison sentences, drug courts are generally ineffective. Additionally, the NACDL found that drug courts lead to an increase of incarcerated; in some places, drug-related crime increased three-fold. The theory, however, is that new revenue for governments to arrest and prosecute through drug courts has given governments more incentive to arrest individuals for drug-related crimes.

O’Dowd recommended that drug courts should be reformed in at least four ways: 1) treat drug abuse as health problem, guilty pleas should not be the price to enter drug court; 2) criterion for selecting defendants for drug court should be objective and fair, and prosecutors, alone, should not make the selections; 3) racial disparity should be addressed as data indicated that people of color were underrepresented in the programs; 4) drug courts should not alter established ethical rules.

Kevin Sabet asserted that the Obama Administration has adopted a more balanced approach between public health and safety in enforcing drug laws. Under the latest budget, Sabet stated there has been a thirteen percent increase in funding for drug abuse prevention programs. Although the Administration

would like to appropriate more money for such programs, Sabet was happy with the increase during this economic crisis. Additionally, he said the White House is moving towards a more community-based approach to prevent drug use, which would focused on was intervention, screening, and referrals to treatment. Sabet argued that drug use treatment should be part of one’s primary health care plan, similarly to how one might proactively discuss and treatment smoking with his/her doctor.

In his analysis of drug courts, Sabet believed that they can be effective because of their adjudication of high-risk abusers. He mentioned a project entitled “HOPE” in Hawaii which has imposed swift sentences and rigorous drug testing. According to Sabet, this type of treatment stopped nearly eighty percent of highly addicted drug users. He argued that society has mistakenly believed a deterrence theory that harsh, but infrequent punishments were most effective in deterring crime. Rather, Sabet argued, it is the swiftness and the certainty of a punishment that most effectively deters actions.

ENFORCEMENT AND THE CRIMINAL PROCESS

Speakers:

Winsome G. Gayle, *Special Litigation for the Civil Rights division at the Department of Justice*. Winsome Gayle attended Harvard Law School, graduating in 2000. She participated in the Harvard Black Law Students Association and Harvard Civil Liberties Union and was a member of the *Harvard Civil Rights-Civil Liberties Law Review*. In 1998, Ms. Gayle worked for the American Civil Liberties Union, and in 1999, she completed worked in the Public Corruption Unit at the US Attorney’s Office in Boston. In 2001, Ms. Gayle completed a judicial clerkship for Honorable Donald M. Middlebrooks, drafting opinions on various federal statutory and constitutional issues including civil rights law, criminal law, and criminal procedure. From 2004 until 2007, Ms. Gayle was a staff attorney with the Public Defender Service for the District of Columbia, Appellate Division, representing clients in direct appeals before the D.C. Court of Appeals. As a litigation associate for Debevoise & Plimpton, LLP, Ms. Gayle represented clients in private securities litigation, enforcement actions before the SEC, and parallel white collar crime investigations by the DOJ.

Paul Batchelor, *Assistant Public Defender for Prince George’s Couty, Maryland*. Paul Batchelor graduated from The George Washington University in 2000 with a B.S. in Economics. He received his J.D. from Georgetown in 2003, and was admitted to the MD bar the same year. At Georgetown he was student attorney in the Juvenile Justice Clinic representing juveniles in delinquency proceedings in the D.C. Superior Court. Paul joined the Prince George’s County Office of the Public Defender since 2004. He practiced in the district court

division for about 2 1/2 years, and has been in Circuit Court since October 2006

Victor Del Pino, *Chief of the Gang Unit for the Montgomery County State's Attorney Office*. Mr. Del Pino assumed his current position in December 2004. He graduated from the University of Baltimore School of law in 2002. Vincent has an undergraduate degree from Virginia Wesleyan College, where he majored in Sociology with an emphasis in Criminal Justice. When hired at the State's Attorney's office in 2004, he was assigned to the District Court team. He joined the Gang Prosecution Unit in March 2007, as the District Court and Juvenile Gang Prosecutor. In February 2008, he became the gang prosecutor for the Felony Prosecution Unit. In March Victor was invited by Maryland Attorney General Doug Gansler and the NAACP to be a panelist in discussing gangs and civil rights. Victor has also been asked to testify in Annapolis regarding new gang crimes bills that have been introduced to the Senate. Victor is a member of the Mid-Atlantic Regional Gang Investigators Network (MARGIN) and has had the opportunity to also work and attend trainings focused on gang intelligence sharing

Moderator:

William Yeomans, Special Faculty Appointment to the Washington College of Law.

Winsome G. Gayle questioned whether society can continue to effectively enforce drug laws given the human, administrative, and financial costs. Gayle recounted the cases of several of her clients, noting that she found several commonalities; all were black men who had spent time in jail, juvenile programs, or prisons without any violent incidents and suffered from substance abuse. Second, Gayle shared her observations that incentives in enforcement of drug laws lead to more racial profiling than any other group of laws. Gayle attributed the racial profiling to incentives granted for "finding" offenders. Third, she noted the impact on institutions – not regarding overcrowding or financial costs – but rather the effect on low-level offenders who are placed in the same facilities with inmates incarcerated for violent offenses. Gayle argued that drug users are in need of treatment, but are placed in a facility where they cannot get that treatment and face physical or sexual violence. Finally, Gayle asserted that, although she considers drug courts to be good, they are still "diversion programs." Diversion programs are programs that move people out of the streamlined criminal justice system for special consideration. She said that these diversion programs give society a sense of comfort, but in reality exert an extreme level of scrutiny over each defendant such that it diminishes the chance of successful completion of the programs.

Paul Batchelor, a public defender, observed that prosecutors have great discretion to determine how cases should be tried. Batchelor argued that there are many prosecutors who do

not know how to deal with the responsibility of that discretion and do not consider long term repercussions of trial upon a defendant. Batchelor has noted this effect within his own cases where there are widely different results solely depending upon which prosecutor tries the case. Also, Batchelor there are only a few ways to defend a drug case: (1) the police have made a mistake; (2) the police officer is lying; (3) those may be the defendant's drugs, but he is a drug user not an addict; (4) "What drugs?;" and (5) entrapment, which is a largely unsuccessful defense.

Victor Del Pino discussed the merits of the Intervention Program for Substance Abusers (IPSA) in Montgomery County, Maryland (a suburb of Washington, D.C.). Within the IPSA program, when a person is arrested for a first time drug-related offense, the person must remain arrest-free and past drug tests, which amounts to a "miniature probation system." If the person successfully completes the program, which can range from six months to a year, then the case would be dropped. Del Pino believes the system is a significant attempt to separate addicts from dealers.

Del Pino agreed with Batchelor that prosecutors are given tremendous discretion. However, he also argued that many defense attorneys request that prosecutors treat their clients as merely addicts. Thus, prosecutors must make the difficult evaluations of drug offenders. Inevitably, prosecutors will look to prior criminal records to make these determinations. Del Pino also believes that prosecutors should, at times, take on a non-adversarial approach and look for opportunities to help addicted individuals.

Responding to the role of racial profiling in drug enforcement, Del Pino stated that there are no benefits to racial profiling. While many believe that the prosecutor's office and the police department frequently come together, the reality is that "[he does not] know if there is anybody who questions the decisions the police department more on specific cases than [the prosecutor's office]."

COLLATERAL CONSEQUENCES OF CONVICTION

Speakers:

April Frazier, *Community Reentry Coordinator for the Public Defender Service*. In her role, Ms. Frazier assists persons returning home to the D.C. community with legal and administrative issues arising from their criminal records. Prior to joining PDS, she served as Deputy Director of the Legal Action Center's National H.I.R.E. (Helping Individuals with criminal records Reenter through Employment) Network, a project aimed at increasing the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion. Prior to assuming this position, April served as the Project Coordinator

of the ABA Commission on Effective Criminal Sanctions in Washington, D.C., where she worked with the legal community, policy makers, employers and local advocates on policy reforms concerning alternative sentencing, post-conviction relief mechanisms and collateral consequences. She also served as a judicial law clerk to Administrative Law Judge Pamela Wood at the U.S. Department of Labor in Washington, D.C. April is a graduate of Howard University School of Law. While at Howard Law, she served as a student attorney in the Criminal Justice Clinic, and represented clients facing misdemeanor and felony charges at D.C. Superior Court. She received a bachelor of arts in English and Philosophy from Tennessee State University.

Mary Denise Davis, *Related Services Attorney for the Neighborhood Defenders-Northwest*. Ms. Denis works closely with trial attorneys in advising attorneys and clients of the possible collateral consequences. Her main area of focus is the expungement of criminal records. Annually, she represents over 800 clients in expungement matters; provides expungement workshops to service agencies; works with the legislative division; and conducts weekly open houses for OPD clients seeking expungements. Currently, two of her expungement cases are pending decision by the Maryland Court of Special Appeals.

Moderator:

William Yeomans, Special Faculty Appointment to the Washington College of Law.

April Frazier began by defining collateral consequences as civil consequences imposed on a person under the law or policy simply because they have a criminal record. Frazier argued that the issue of collateral consequences is a civil rights issue because the overwhelming majority of people who suffer from collateral consequences are “poor people of color.”

Frazier asserted that it was important to frame the issue in a larger context – not merely that a released prisoner “cannot find a job.” Rather, society should view the issue on a larger scale. Collateral consequences are a set of vast laws and policies, mostly created in the 1980’s and 90’s, which results in relegating a large percentage of American society to second class citizenship—forced into a cycle of re-arrest and re-incarceration. Frazier believes that Americans should step back and ask, “What is the goal of collateral consequences and what is happening to that segment of society that is being closed out?”

Mary Denise Davis began by stating that public defenders have a higher duty to not just leave the client at the courthouse steps, but also to provide services in the realm of expungement and civil forfeiture. Since September 11th and in conjunction with the rise of the Internet, the use and availability of one’s criminal record have exploded. In Maryland for example, every criminal and civil case is entered into a public, searchable database. Davis has witnessed that anyone can find a criminal record, which does not solely consist of convictions, but also

can include every time a person has come into contact with the court system, even those contacts that a person lawfully does not have to disclose. Employers, often lay people, cannot decipher the terminology, and frequently turn away individuals from employment, even if the person had not been convicted.

Those in favor of keeping criminal records public argue that society needs to know of past convictions for public safety, and that the government should not expunge records of individuals who might pose a danger to society. Davis argued that there comes a point at which public safety no longer needs to be at the forefront. At some point, the individual is no longer a threat to the community, and that Americans should give judges more discretion to expunge records. **CLB**

ABOUT THE AUTHORS

Jennifer Ponder was born and raised in Dallas, Texas. She graduated from the University of Texas at Austin with a Bachelor of Arts in Government, History, and Religious Studies. Currently she is a second year law student at American University Washington College of Law and incoming Associate Publications Editor on the Criminal Law Brief.

Abre’ Conner graduated with a dual degree in Marketing and Political Science from the University of Florida in May 2009. At the University of Florida, she was the founder of the first minority mentoring pre-law organization. She is an upcoming Marshall Brennan Constitutional Law fellow set to work as a constitutional law teacher for DC public school students. She interned after at Senator Nelson’s office and the Department of Education in the Equal Employment Office. She is interested in education, employment, and budget related issues and their relation to criminal law.