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# ME AND MR. JONES: A SYSTEMS-BASED ANALYSIS OF A CATASTROPHIC DEFENSE OUTCOME\*

*Pamela R. Metzger\*\**

## I. INTRODUCTION

Leo S. Jones spent four months in jail, accused of a probation violation when his probation had long since expired. His incarceration was illegal. It was also preventable.

In this article, I describe the unique data collection project that identified Mr. Jones's case. Then, I analyze the various individual, institutional, and systemic practices that contributed to Mr. Jones's illegal incarceration. I show how an investigation of Mr. Jones's case led to the discovery of widespread latent errors that may have adversely affected innumerable other detainees. I conclude by explaining what this case reveals about how data collection and analysis can improve public defender practice.

## II. THE KATRINA-GIDEON INTERVIEW PROJECT

In August of 2005, Hurricane Katrina made landfall. The Orleans Parish Prison evacuated thousands of pretrial prisoners to jails across the state. In the weeks and months after the storm, New Orleans police arrested thousands more. With the Orleans

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\* This article was reviewed by graduate student editors from the University at Albany's School of Criminal Justice under the supervision of Andrew Davies, Ph.D., and the Professional Board of Editors for *Miscarriages of Justice*. Because of the interdisciplinary nature of this special issue, the citations in this article use an APA-based alternative to the *Bluebook: A Uniform System of Citations*.

\*\* Associate Professor, Tulane University School of Law. After Hurricane Katrina and the collapse of the Orleans Parish criminal justice system, the Chief Judge of the Orleans Parish Criminal Court appointed Professor Metzger and the Tulane Criminal Law Clinic (along with Professor Steve Singer and the Loyola Criminal Law Clinic) to represent more than eight thousand inmates in the Orleans Parish Prison, who were left unrepresented when the public defender's office collapsed. In that capacity, Professor Metzger directed the Katrina-Gideon Interview Project, a data-driven project assessment of the legal needs of nearly 500 incarcerated public defender clients. Between 2009 and 2013, Professor Metzger served on the Louisiana Public Defender Board; her work on that board included the development of board policies and practices for data collection and analysis.

Parish Prison still closed, these new arrestees joined the languishing Katrina prisoners in remote parish jails and large state prisons. Meanwhile, the Orleans Indigent Defender Board (OIDB) collapsed, leaving thousands of unrepresented “Katrina prisoners” in jails across the state.<sup>1</sup>

By December of 2006, indigent defendants were represented by a newly funded, client-centered public defender’s office (Orleans Public Defenders or OPD). Yet, by conservative estimates, hundreds of “Katrina prisoners” had had cases pending since before the storm made landfall. Most had never met with an attorney. Most of their new attorneys lacked basic case information, such as charging documents and police reports. With new arrests occurring every day, OPD was unable to address this backlog of criminal cases.

In response to this constitutional crisis, OPD, the Tulane Criminal Law Clinic (the Clinic), and the Student Hurricane Network (SHN) launched the Katrina-Gideon Interview Project (KGIP), an ambitious defender-assistance project. KGIP’s primary goal was to interview the pre-Katrina prisoners and to create case files for their assigned public defenders. Secondarily, KGIP sought to assess the legal needs of post-Katrina arrestees who had spent an extended period in jail without counsel or court appearance.

#### A. Criminal Justice Stakeholders as Wary “Limited Partners”

KGIP’s viability depended upon two key factors that were beyond OPD’s control. First, students needed access to defendants. That access depended on the willingness of the jailers—the Sheriff and the Department of Corrections—to allow hundreds of students to enter the jail to conduct dozens of inmate interviews over a four week period. Second, students needed information about the defendants. Since the old public defender’s office lacked any practice of creating and keeping case files, OPD and KGIP were

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<sup>1</sup> For a description of Katrina’s impact on New Orleans’s public defender system, see Chiarkis, N. L., Henry, D. A., & Stone, R. N. (2006). *An assessment of the immediate and longer-term needs of the New Orleans public defender system*. Washington, DC: American University. Retrieved from <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/An%20Assessment%20of%20the%20Immediate%20and%20Longer%20Term%20Needs%20of%20the%20Orleans%20Public%20Defense%20System.pdf>. For narratives of the city’s post-Katrina criminal justice collapse and reform, see Vance, S. S. (2008). Justice after disaster—What Hurricane Katrina did to the justice system in New Orleans, *Howard Law Journal*, 51, 621–649; Metzger, P. R. (2007). Doing Katrina time, *Tulane Law Review*, 81, 1175–1217; Garrett, B. L., & Tetlow, T. (2006). Criminal justice collapse: The Constitution after Hurricane Katrina, *Duke Law Journal*, 56, 127–178.

unable to assemble even rudimentary facsimiles of files.<sup>2</sup> KGIP lacked the resources to locate and print publicly available docket information. KGIP was unable to pay for police reports (\$25 each) and had no access to any discovery that might have been provided before Katrina. Cooperation with the district attorney's office and the local bar would be essential to KGIP's construction of meaningful case files.

However, KGIP's interests were not entirely aligned with those of other criminal justice stakeholders. OPD had a different set of priorities than the district attorney, the Orleans Parish Criminal Sheriff's Office (the Sheriff) and the Department of Corrections (DOC). And, as the project's director, I had a particularly challenging relationship with some of these stakeholders. I had been a vocal critic of the district attorney's office and had sued the sheriff's office over its failure to comply with judicial orders for prisoner release. I was on better terms with the Department of Corrections—DOC administrators and staff had been extraordinarily helpful in locating "lost" prisoners and identifying prisoners who were detained past the expiration of their sentences. Still, DOC was technically on the "opposite side" of my work as a criminal defense attorney. KGIP's success, therefore, would turn upon our ability to develop cooperative relationships with our institutional adversaries.

In the wake of Hurricane Katrina, the Louisiana Supreme Court had created a Southeast Louisiana Criminal Justice Recovery Task Force. That task force met regularly to explore cooperative possibilities for responding to the post-Katrina criminal justice crisis. After previewing the nascent KGIP concept with the court, I brought the KGIP proposal to the task force. There, I sought—and received—help from the district attorney's office, the Sheriff, and DOC. That cooperation, however, was not easily obtained.

The Sheriff and DOC had two significant institutional concerns about KGIP. First, by interviewing more than 300 inmates in less than four weeks, KGIP would place extraordinary demands upon local and statewide correctional systems—systems that had already been stretched far beyond their ordinary capacities. Law enforcement would have to prescreen each volunteer. Each jail would have to reserve multiple interview facilities. Correctional

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<sup>2</sup> See Chiarkis, N. L., Henry, D. A., & Stone, R. N. (2006). *An assessment of the immediate and longer-term needs of the New Orleans public defender system*. Washington, DC: American University.

staff would have to transport dozens of inmates to and from interview rooms according to a rigorous interview schedule. The interview process might conflict with the facility operations, interrupt inmate activities, or require additional security. The interviews might prove disruptive, “riling” inmates, stirring discontent about interminable post-Katrina delays, or raising worries about loved ones left behind in the storm.

To minimize KGIP’s administrative burdens, we agreed to provide DOC with advance copies of a “KGIP clearance list.” That list would include each student’s name, date of birth, address, and social security number. DOC would “clear” each volunteer or identify the volunteer as “ineligible” to enter correctional facilities. (Ultimately, only two volunteers were excluded.) In addition, KGIP agreed to a standardized interview schedule: interviews would occur twice daily, at 10:00 a.m. and 2:00 p.m. KGIP would provide DOC and the Sheriff with a detailed schedule for each day of interviews at each facility. The schedule would include each interviewee’s name, each volunteer’s name, the proposed time and date of each interview, and a list of any special requirements, such as additional clearance for an interpreter.

Having resolved these logistics, we still had to address the Sheriff and DOC’s public relations and litigation concerns. The Sheriff’s failure to timely evacuate the Orleans Parish Prison (OPP) had been the subject of widespread negative publicity. As described in the American Civil Liberties Union’s 2006 report, *Abandoned & Abused*:

[T]housands of men, women, and children were abandoned at OPP. As floodwaters rose in the OPP buildings, power was lost, and entire buildings were plunged into darkness. Deputies left their posts wholesale, leaving behind prisoners in locked cells, some standing in sewage-tainted water up to their chests. . . . [W]ithout food, water, or ventilation, prisoners broke windows in order to get air and carved holes in the jail’s walls in an effort to get to safety. Some prisoners leapt into the water, while others made signs or set fire to bed sheets and pieces of clothing to signal to rescuers.<sup>3</sup>

After the prisoners were rescued, the DOC worked with sheriffs

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<sup>3</sup> American Civil Liberties Union. (2006). *Abandoned and abused: Executive summary and recommendations*. New York, NY: American Civil Liberties Union. Retrieved from <https://www.aclu.org/abandoned-abused-executive-summary-and-recommendations?redirect=prisoners-rights/abandoned-abused-executive-summary-and-recommendations#exec>.

around the state to place inmates in any available facility, from local jails to maximum security prisons. Social activists and national media issued widespread criticism of the resulting prison conditions:

At the Elayn Hunt Correctional Center, thousands of OPP evacuees spent several days on a large outdoor field, where prisoner-on-prisoner violence was rampant and went unchecked by correctional officers. From there, prisoners went to other facilities, where some were subjected to systematic abuse and racially motivated assaults by prison guards.<sup>4</sup>

Naturally, the Sheriff and DOC were worried that KGIP might generate similarly adverse publicity and provide fuel for lawsuits over prison conditions.

So, as a condition of access to the prisoners, the Sheriff and DOC required us to limit KGIP's scope: (1) KGIP's sole mission would be to help OPD develop case files for the Katrina prisoners, and (2) KGIP would not assist any inmate in a claim relating to prison conditions.<sup>5</sup> KGIP agreed not to pursue any civil or administrative complaints about jail conditions. KGIP also required each volunteer to sign an agreement prohibiting her from making any public statement about the project. To build trust around these issues, KGIP allowed the Sheriff and DOC to review and approve KGIP's standardized interview template. Finally, each volunteer acknowledged that, upon any breach of these terms, KGIP would report the breaching volunteer to the appropriate disciplinary authority.

To conduct meaningful interviews and to create useful case files, KGIP needed copies of the most basic documents: arrest warrants, bills of information, police reports, and discovery. However, the public defender's office had not, in the past, retained copies of these documents. Rather, OIPD attorneys gave these court papers to the client; OIPD had no client files and, therefore, had no place to store these legal documents. As a result, the district attorney's office had to duplicate its own work, providing KGIP with copies of police reports and discovery that had already been provided to the clients' previous attorneys.

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<sup>4</sup> American Civil Liberties Union. (2006). *Abandoned and abused: Executive summary and recommendations*. New York, NY: American Civil Liberties Union.

<sup>5</sup> A copy of this agreement is on file with the author.

### *B. Law School and Law Firm Support*

Beginning in November of 2006, SHN funded a full-time project coordinator who worked with student and law firm volunteers to create KGIP files and a list of KGIP detainees and their locations. The project required students to locate attorney supervisors to accompany them at an eight to one student-supervisor ratio. SHN recruited law students from across the country to spend one week of their winter breaks working with KGIP.

During the earliest weeks of interviews, OPD did not have electricity or furniture. Tulane Law School was too far away from the jail to be practical and had too few printing resources. Internet access was spotty, at best, throughout the city. Local law firms stepped into the breach. Law firms volunteered to create case files for the interviewees. Lawyers, paralegals, and administrative assistants downloaded and printed docket information from the Sheriff's online database. When limited workspace and minimal computer access posed significant challenges, law firms opened their doors to the volunteers.

Because of this unprecedented cooperation between government, private law firms, and student volunteers, nearly 300 KGIP law students and supervisors interviewed hundreds of incarcerated public defender clients and created cases files for their beleaguered attorneys.

### *C. Project Protocols*

Upon their arrival in New Orleans, volunteers participated in a full day of training. They were then assigned to teams on a facility-by-facility basis. Some teams conducted interviews in Orleans Parish. Others traveled hundreds of miles to interview inmates in the most remote rural locations.

During the days, the volunteers met with inmates. They conducted their interviews following a standardized template designed to capture both statistical data about the interviewee population and narrative data about individual defendant's experiences. In the evenings, students worked with their supervisors to convert their interview templates into file memoranda. Once a supervisor signed off on a memorandum, a student uploaded the interview form and the memorandum into the KGIP database; hardcopies were placed in the OPD client files. No volunteer was allowed to start on another detainee interview until she had completed any outstanding interview memoranda.

### III. MR. JONES'S ILLEGAL INCARCERATION

In September of 2006, the Orleans Parish Criminal Sheriff's Office arrested Mr. Jones on a probation violation warrant. On December 14, 2006, Sean Zehtab, a second-year law student at the University of Nebraska, drove a thousand miles—from Lincoln, Nebraska, to New Orleans, Louisiana—to volunteer with KGIP. Less than forty-eight hours later, Zehtab traveled another 250 miles to the Winn Correctional Center in Winfield, Louisiana, to interview several Katrina prisoners, including Leo Jones.

In his interview, Mr. Jones explained, "I don't know why I'm in here. I had a probation but it expired." In almost four months, Mr. Jones had not seen an attorney or appeared in court. Mr. Jones's docket sheet did not contain any reference to his current incarceration. His presence in the prison was a mystery—to us and to him. A call to the sheriff's office solved that mystery, but created new ones.

The Louisiana Criminal Code requires the sheriff's office to promptly notify the trial court and the probation department whenever it takes custody of a person arrested on a probation violation warrant. It also requires that, within 10 days, the court determine whether there is probable cause to support the probation violation allegations.<sup>6</sup> Mr. Jones was arrested on a probation violation warrant. However, the sheriff's office failed to notify either the court or the probation officer of his arrest. Since no other criminal justice stakeholder knew that Mr. Jones was in jail, there was no one to alert the court or demand a hearing.

Once we knew why Mr. Jones had been detained, we returned to a review of the docket in case. What we saw shocked us.

On April 1, 2003, the court had sentenced Mr. Jones to two years of probation, with special conditions that included payment of fines and completion of drug treatment. Over the next two years, Mr. Jones had had more than one "dirty" urine; however, the court never revoked or extended his probation. Therefore, Mr. Jones's probation expired on April 1, 2005. Nevertheless, docket entries from April 1, 2005, through January 1, 2006, continued to address Mr. Jones's compliance (or noncompliance) with the terms of his probation.

On August 23, 2005, the court stated that, although his "probation ha[d] expired," Mr. Jones must "remain in drug court

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<sup>6</sup> La. C. Cr. P. § 899(E).



program until successfully completed.”<sup>7</sup> A week later, Hurricane Katrina made landfall. Like thousands of others, Mr. Jones evacuated to Houston, Texas, where he remained until September 2006.

On January 12, 2006, New Orleans’s criminal courthouse was still closed. Thirteen state criminal judges shared two borrowed courtrooms in the United States District Court for the Eastern District of Louisiana. The Department of Probation and Parole had only a skeleton crew. The collections office—which administered the payment of fines—remained shuttered. Nevertheless, the district court issued a no-bond warrant for Mr. Jones’s arrest. Why? Because he had failed to pay his fines or appear for drug court.<sup>8</sup>

In September of 2006, Mr. Jones returned to his bedraggled city. Days later, the Sheriff arrested Mr. Jones on the warrant for probation violation. As noted above, the Sheriff did not file a return on the warrant or otherwise notify the district court that Mr. Jones was in custody. Instead, Mr. Jones was transferred to the Angola State Penitentiary and then to the Winn Correctional Center in Western Louisiana. It would be nearly four months before anyone “discovered” Mr. Jones.

With the help of Brian Privor, a lawyer volunteering in post-Katrina reform, the Tulane Criminal Law Clinic obtained Mr. Jones’s release. That ended KGIP’s official involvement with Mr. Jones. It began my interest in defenders and data.

#### IV. USING MR. JONES’S CASE TO EXPLORE A DATA-BASED SYSTEMS APPROACH TO PUBLIC DEFENDER SERVICES

On the surface, Mr. Jones’s illegal incarceration appeared to be the result of a unique series of errors. However, I wanted to know more. Even in the chaos of post-Katrina New Orleans, there must have been something that someone—anyone—could have done to avoid or mitigate Mr. Jones’s tragedy.

I quickly lost interest in trying to catalogue the public defender’s mistakes and the judge’s errors. OPD bore no resemblance to the old OIDB office and Mr. Jones’s attorney no longer worked for OPD. The judge, who was stubbornly unapologetic, had been elected by a large majority and had five more years on the bench before he

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<sup>7</sup> Records on file with author or available at Orleans Parish Sheriff’s Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcso.org>.

<sup>8</sup> Records on file with author or available at Orleans Parish Sheriff’s Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcso.org>.

would face another election. So, I abandoned an investigation into individual errors and began, instead, to explore the multiple systemic errors and oversights that contributed to Mr. Jones's illegal incarceration. Nearly ten years later, I see this decision more clearly: I had abandoned the operator approach in favor of the systems approach to error.

### *A. A Systems Approach to Public Defense Practice*

As I explain below, a systems approach to defender practice and the collection and analysis of defender data might have prevented or mitigated Mr. Jones's prolonged incarceration.

In an earlier article, I argued that a data-driven systems approach to public defender practice should investigate catastrophic and adverse outcomes (as well as near misses and unexpected successes).<sup>9</sup> A catastrophic outcome is one that is adverse to the client's interest and either factually erroneous or contrary to well-established law. An adverse outcome is one that compares unfavorably, and to the client's detriment, with the baseline or normative outcome for similarly situated defendants.

Leo Jones's case had a catastrophic outcome. For nearly four months, the State illegally imprisoned Mr. Jones in a remote correctional facility, nearly 250 miles from his New Orleans home. Mr. Jones's imprisonment was factually erroneous; it was based upon an alleged violation of an expired (i.e., nonexistent) term of probation. Mr. Jones's imprisonment was also contrary to well-established law; the district court lacked jurisdiction to issue a warrant for his arrest.

However, this study of Mr. Jones's case is unusual among the studies of other catastrophic criminal justice outcomes. In general, the criminal justice community uses the systems approach to study the catastrophic outcome of wrongful convictions.<sup>10</sup> Since wrongful convictions are universally abhorred, stakeholders in an otherwise adversary system can come together to investigate their causes. However, wrongful conviction reviews offer only limited insight into

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<sup>9</sup> Metzger, P. R., & Ferguson, A. G. (forthcoming 2015). Defending data. *Southern California Law Review*, 88.

<sup>10</sup> See, e.g., Garrett, B. L. (2008). Judging innocence. *Columbia Law Review*, 108, 55–142; Garrett, B. L. (2011). *Convicting the innocent: Where criminal prosecutions go wrong*. Boston, MA: Harvard University Press; Gould, J. B., Carrano, J., Leo, R., & Young, J. (2012). *Predicting erroneous convictions: A social science approach to miscarriages of justice*. Washington, DC: National Criminal Justice Reference 2009-IJ-CX-4110. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf>.

the wide range of public defender practice.

First, wrongful conviction reviews are disproportionately devoted to the trials of serious felony and capital cases. As a result, these reviews offer little insight about the frequency of catastrophic or adverse outcomes in less serious cases, and even less insight about the causes of the outcomes.

Second, the criminal justice system is slow to recognize wrongful convictions. Often they remain undiscovered for decades. With the passage of time, the systems approach becomes less useful as a means of improving daily practice. The lawyers involved in the case no longer practice; the laws applied to the case have been repealed. Memories fade, evidence vanishes. Trends emerge—such as the prevalence of cross-racial identifications in wrongful convictions. But daily practice rarely improves.

Third, wrongful conviction reviews depend heavily upon a collaborative “360-degree” assessment of contributing causal factors. However, other than in the context of wrongful convictions, public defenders can rarely collaborate with other criminal justice stakeholders in exploring public defender outcomes. Confidentiality and attorney-client privilege sharply constrain public defenders’ ability to share information. An interest in maintaining prosecutorial privilege and preserving convictions sharply constrains law enforcement’s interest in sharing information. Nevertheless, a wide range of external causal factors contributes to public defender outcomes; many of those factors are beyond public defenders’ knowledge or control. Unlike wrongful conviction reviews, a systems approach to public defender outcomes must adapt to conflicting interests and find a way to investigate outcomes *without* full disclosure by criminal justice stakeholders.

Fourth, most criminal justice stakeholders evaluate case outcomes with reference to broad social goals, such as public safety, accuracy, and efficiency. However, a systems approach to public defender practice must evaluate case outcomes with reference to client interests. A good outcome is any outcome that benefits the client. Every acquittal is a victory, even if the acquitted client is guilty. However, the vast majority of criminal cases are resolved by plea bargains. In those cases, it is far more difficult to distinguish victory from defeat. How “good” is any particular plea bargain? How “bad” is any particular sentence? Removed from the wrongful conviction context, a systems approach to criminal defense demands a nuanced, case-specific evaluation of outcomes.

Finally, defenders face a perpetual information deficit. As in Mr.

Jones's case, defenders are often the last to know about criminal justice errors or omissions. "In the data-less world of overworked and under-resourced defenders, defendants may experience—and defenders may not notice—more "routine" catastrophes, such as illegal sentences or detention beyond the mandatory release date."<sup>11</sup> Defenders do not know what they do not know. Without the collection and analysis of data about *ordinary* criminal cases, defenders will never know what systems and institutions require refinement and repair.

Mr. Jones's case had a catastrophic outcome: an undetected, illegal detention that persisted for months. And, Mr. Jones's case was uniquely ripe for analysis under a systems approach. Mr. Jones's catastrophic outcome was discovered within months—not years—of its occurrence. Individual stakeholders would have fresh memories and perspectives that might add to our investigation of current criminal justice practices and procedures that contributed to Mr. Jones's incarceration. And, because Mr. Jones's case involved procedural and systemic operational errors, it would offer insights about the functioning of the criminal justice system.

*B. Understanding the Causal Factors that Contributed to Mr. Jones's Catastrophic Outcome*

Alarmed by Mr. Jones's case, we conducted two parallel inquiries. One KGIP team doubled back through Orleans Parish inmate lists to review the cases of all persons detained on probation violations. Another team conducted a close review of Mr. Jones's case. Together, the results of those investigations yielded a surprising insight. Our moral outrage had focused us on the illegality of the court's conduct and the incompetence in the OIDB attorney's representation. Our systemic investigation revealed that a cascade of individual and systemic errors and omissions contributed to Mr. Jones's illegal imprisonment.

*C. Examining the Larger Data Pool*

Our data review indicated that, post-Katrina, there had been dozens of illegal delays in processing of probation violation cases. These delays occurred in all sections of court and in all types of cases. We did not discover any other detainee whose probation had

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<sup>11</sup> Metzger, P. R., & Ferguson, A. G. (forthcoming 2015). Defending data. *Southern California Law Review*, 88.

already expired at the time of arrest. However, one detainee's term of probation had expired during his prolonged prehearing detention. Many other probation detainees had been incarcerated for weeks, or even months, without the knowledge of anyone in the court system.

Each of these probation violation cases represented a catastrophic procedural error: an untimely hearing in clear violation of well-established law. However, since each case was—or would eventually be—resolved on its particular facts, we were unable to assess whether the procedural delay negatively impacted individual case outcomes (for example, by unnecessarily prolonging someone's incarceration). Later, resource constraints prevented us from retrospectively tracking case outcomes to assess the impact of the procedural error.

Nevertheless, we did interview OPD lawyers about their post-Katrina experiences with probation violation cases. The attorney interviews demonstrated that many public defenders were *aware* that the court system was not timely processing probation violation cases. Several of them had handled probation violation cases marked by lengthy delays between arrest and appearance. Generally, those cases had come to the court's attention when the defendant or the defendant's family contacted a probation officer or court clerk. None of the OPD attorneys were aware of the pervasive nature of these probation violation delays. Each attorney's knowledge was limited to his or her personal representation of individual clients.

When interviewed about these delayed probation violation cases, defenders generally agreed that the delays violated their client's procedural rights. However, the attorneys also believed that the arrest-to-appearance delays had little, if any, substantive impact on case outcomes. Attorney performance in those cases reflected this assessment: many defenders did not raise the delays in court.<sup>12</sup> Others made procedural objections, but those objections did not appear to produce demonstrable benefits in case outcomes.

As to the cause of the illegal detentions, we also spoke to representatives of the probation department and the sheriffs' office. Our investigation revealed a wholesale breakdown in the Sheriff's protocol for notifying the court and the probation department about probation arrests. This was the error common to all of the illegal delays in probation violation cases.

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<sup>12</sup> The researchers did not attempt to determine whether this was because the defenders had not noticed, or had noticed but ignored, the delays in processing probation cases.

Armed with the inmate data, public defender administrators alerted the sheriff's office, which promised to reform its practices. The cooperative nature of the KGIP project meant that OPD did not alert the press about the Sheriff's administrative failure. Instead, the systemic error was addressed quickly, and cooperatively, through informal communications.

*D. Systems Analysis of Mr. Jones's Case and the Cases of Delay in Probation Violation Hearings*

The Sheriff's failure to notify the court and the probation department about probation violation arrests was the most obvious causal factor common to the delayed probation violation cases. To explore other causal factors and develop potential safeguards against future errors, we attempted to identify *all* causal factors, either common to the group or unique to Mr. Jones. Based on that list, we hoped to devise proactive solutions to this type of problem. We broke the causes down into three categories: individual attorney error, institutional factors at OPD, and systemic criminal justice factors that were beyond OPD's control. Working in roughly chronological order, we identified the following causal factors:

1. The Assigned Public Defender's Deficient Performance

Although Mr. Jones's assigned public defender appeared with him several times *after* his April 1, 2005, probation expiration date, that attorney never objected to the court's continued imposition of probationary terms. Either the lawyer was unaware that Mr. Jones's probation had expired, or he did not understand the legal implications of the probation's expiration.

While we did not conduct a retrospective analysis of pre-Katrina probation cases, this appeared to be a unique "operator" error that was unlikely to recur in the post-Katrina public defender's office. In 2005, when the court "extended" Mr. Jones's expired probation, the OIDB office was wildly understaffed and underresourced. By 2007, Mr. Jones's OIDB attorney no longer worked for the public defender's office. Indeed, almost the entire legal staff had been hired after Katrina, as part of OPD's reform efforts.

Our survey of the OPD attorneys made us skeptical that a misunderstanding about probation expiration was a mistake common to the current public defender's office. Our interviews of the current public defenders suggested that they fully understood the implications of an expiration of probation. In contrast, we had

no way to assess whether the misunderstanding exhibited by Mr. Jones's judge and his probation officer was representative of a widespread systemic misperception. However, since the public defender's office understood the significance of the expiration of a term of probation, it seemed that attorney advocacy could keep this relatively unique problem in check. Accordingly, we did not consider a focus on individual attorney error or specific judicial conduct to be a meaningful avenue for preventative reform.

## 2. The Pervasive Underfunding of the Public Defender's Office

Prior to Hurricane Katrina, the public defender's office hired only part-time attorneys. They, in turn, were assigned to work in particular courtrooms, not to represent individual clients. Funded almost entirely by traffic tickets, the public defender practice was wildly under-resourced and highly dependent upon the judiciary, leading to a system that was "court-based rather than client-based."<sup>13</sup> The public defender's office had only two desktop computers and one ancient copy machine. There were "no client files or any other records or data, save a monthly tabulation of cases closed and how they were closed."<sup>14</sup> There was "no phone number for the office, and clients [could] not come to the office."<sup>15</sup> It is impossible to separate these grotesque working conditions from the individual attorney error in Mr. Jones's case.

On any given day, Mr. Jones's attorney had a caseload of more than 300 open felony cases. His part-time public defender salary provided neither health care nor retirement benefits. He had no paralegal or social work support and shared the services of only two investigators with more than twenty other attorneys. To blame Mr. Jones's attorney would miss the forest for the trees. As an institution, the public defender's office had operated within conditions that doomed Mr. Jones's attorney to failure. And, blaming the public defender's office would also overlook larger causes. Funding inequities in the criminal justice system, and a

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<sup>13</sup> Chiarkis, N. L., Henry, D. A., & Stone, R. N. (2006). *An assessment of the immediate and longer-term needs of the New Orleans public defender system*. Washington, DC: American University, at 11.

<sup>14</sup> Chiarkis, N. L., Henry, D. A., & Stone, R. N. (2006). *An assessment of the immediate and longer-term needs of the New Orleans public defender system*. Washington, DC: American University, at 12.

<sup>15</sup> Chiarkis, N. L., Henry, D. A., & Stone, R. N. (2006). *An assessment of the immediate and longer-term needs of the New Orleans public defender system*. Washington, DC: American University, at 12.

court-centered culture of representation, had doomed the public defender's office to failure.

In 2006, reform of the state's system for funding indigent defense was already underway. In that highly politicized endeavor, Mr. Jones's case—and the cases of the other probationers—would, at most, be a footnote in the larger discussion of the relationship between funding and attorney performance.

### 3. Criminal Justice Stakeholders' Incorrect Belief that an Expired Probation Could Be Continued Until Pending Satisfactory Completion of the Probationary Terms

At a status conference on August 23, 2005, the district court acknowledged that Mr. Jones's "probation ha[d] expired."<sup>16</sup> However, the court ordered Mr. Jones to remain on probation until he successfully completed a drug court program.<sup>17</sup> In January of 2006, the court compounded this error by issuing an arrest warrant for Mr. Jones based on his post-Katrina failure to appear in court.

More than two years later, when KGIP sought Mr. Jones's release, the court still insisted that it retained jurisdiction over Mr. Jones. The Department of Probation and Parole concurred that, notwithstanding the expiration of Mr. Jones's probation, the court retained jurisdiction over him. Over counsel's objections, the court put Mr. Jones's case on the calendar for a "probation status hearing."<sup>18</sup> Subsequently, the court ordered the Sheriff to drug test Mr. Jones. Then, the court remanded Mr. Jones to jail for a "dirty" urine. The district court also ordered him to pay outstanding fines and complete a drug treatment program.<sup>19</sup> Only after the appellate court granted an emergency writ did the district court "close" the case and terminate Mr. Jones's probation "unsatisfactorily."<sup>20</sup>

The incorrect belief that the expiration of a term of probation did not end the court's jurisdiction over Mr. Jones was clearly a causal factor in Mr. Jones's illegal incarceration. However, it was a factor largely beyond the control of the public defender's office. Since the

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<sup>16</sup> Records on file with author or available at Orleans Parish Sheriff's Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcs.org>.

<sup>17</sup> Records on file with author or available at Orleans Parish Sheriff's Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcs.org>.

<sup>18</sup> Records on file with author or available at Orleans Parish Sheriff's Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcs.org>.

<sup>19</sup> Records on file with author or available at Orleans Parish Sheriff's Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcs.org>.

<sup>20</sup> Records on file with author or available at Orleans Parish Sheriff's Office. (n.d.). Retrieved April 15, 2015, from <http://www.opcs.org>.



Tulane Law Clinic had litigated Mr. Jones's release, we were unable to assess whether, and to what extent, the public defender's office might have been successful in "retraining" the bench or the probation office. Moreover, since the problem appeared to be isolated, it was not appropriate for the public defender's office to formally address the matter with the board of judges or the head of probation.

#### 4. The Sheriff's Failure to Report Probation Violation Arrests

Upon execution of a probation violation warrant, the Louisiana Code of Criminal Procedure requires prompt arrest notification to the court and the probation department. In Orleans Parish, the sheriff's office handles this notification. After booking, the Sheriff notifies the judge and the probation department of the probationer's arrest. The probation officer then calendars the case for a probable cause determination, which must occur with ten days of the probationer's arrest.<sup>21</sup>

No one ever filed a return on the warrant for Leo Jones's arrest. As a result, neither the court nor the probation officer knew that Mr. Jones was in custody. Since the criminal justice system had no other notification process, no other criminal justice stakeholder even knew of Mr. Jones's arrest.

Similar errors by the Sheriff caused illegal delay in the cases of many other probation detainees. And, in each individual case, the latent nature of the notice error precluded individual public defenders from acting until the harm—untimely probation determination—had already occurred. In this regard, the Sheriff's notification failure was a systemic failure beyond OPD's control.

#### 5. OPD's Institutional Failure to Track the Probation Expiration Dates

Neither the pre- or post-Katrina public defender's office calendared or tracked defendants' probation expiration dates. There was no automated notification system that might have alerted Mr. Jones's attorney to the expiration of his probation. Similarly, no supervisory support system routinely reviewed attorney case files for basic compliance with procedural rules.

We considered supervisory review to be an inefficient means of

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<sup>21</sup> La. C. Cr. P. § 899(E).

error avoidance. In any case, a court might modify, revoke, or extend a term of probation and it might do so several times. An OPD supervisor would have to read through dozens of docket entries in order to determine a defendant's probation expiration date.

Accordingly, we turned our attention to the possibility of a calendaring system that would "alert" the public defender's office to probation expiration dates. We analogized such a system to the routine maintenance alerts so prevalent in aviation. However, after speaking with administrators in the public defender's office, we concluded that such a calendaring system would not be successful. It would depend heavily on reporting by overworked and overwhelmed OPD attorneys. Individual attorneys would have to document each extension or modification of probation. This dependence upon ongoing, individual data reporting would increase the possibilities of noncompliance and of erroneous inputs. Since the illegal extension of Mr. Jones's probation seemed to be entirely aberrant, we concluded that an automatic notification system would demand too much work for too little return.

However, we also determined that OPD had an overlooked and underutilized capacity to pool attorney knowledge about common practices that were clear violations of statutory law. Because the delays in probation violation hearings did not immediately appear to affect case outcomes—either adversely or catastrophically—it is not surprising that line defenders did not report these arrest-to-appearance delays to OPD supervisors. There was no office culture of error and risk investigation and, in the high-pressure practice of public defense, delays in probation violation proceedings were a low priority. As a result, the public defender's office had no institutional awareness of the notification problem and, therefore, no institutional appreciation of the risk that the notification problem might cause or exacerbate a catastrophic error.

We advised that OPD develop an error reporting practice that would collect and analyze instances of systemic basic noncompliance with procedural rules.

## V. LESSONS LEARNED ABOUT APPLYING THE SYSTEMS APPROACH TO THE DELIVERY OF PUBLIC DEFENDER SERVICES

Using an individual or operator error approach to Mr. Jones's situation would clearly have demonstrated serious errors by his attorney. His attorney either failed to notice that Mr. Jones's

probation had expired or believed that, notwithstanding the expiration, the district court had jurisdiction over Mr. Jones.

However, pointing the finger at Mr. Jones's attorney would have been an inadequate response to the error. The public defender's office had changed; Mr. Jones's lawyer had moved on.

Had OPD required defenders to report black-letter system failures, such as the probation violation notification delays, analysts might have noticed the frequency of the delays in producing probation violators and considered the risks inherent in the underlying notification error. Instead, a culture of isolated and individuated attorney practice helped conceal the Sheriff's repeated latent error in probation violation cases.

OPD might also have tried to forecast the "worst-case scenario" that might be associated with the notification delays. Or, OPD might have concluded that this was a low-priority administrative error that merited only an administrative response. Certainly, OPD could not have predicted the unique complications of Mr. Jones's case. However, OPD might have imagined a notification delay that would result in a probationer being detained pending a hearing far longer than the he would have been detained on the actual violation sentence.

The office might also have considered what steps it could take to reduce the risk of such errors. OPD might have asked the sheriff's office for better notification. However, it might also have asked the jail to produce a daily or weekly list of probation violators in custody so that the office could review that list for notification failures.

OPD might also have determined that, for some defendants, the notification delay was an unanticipated benefit. In that jurisdiction, the sheriff's office did not routinely perform drug screens on those arrested for probation violations. So, in some cases, the notification delays might have benefited drug-using arrestees who might otherwise have provided an incriminating urine sample. OPD might, therefore, have made a reasonable risk-reducing decision to review the notification delay cases for catastrophic over-detention errors, but to make case-specific determinations about when to demand prompter court appearances.

Instead, the scope and prevalence of the arrest-to-appearance delay did not emerge until a large data-driven pro bono project interviewed hundreds of detainees within a two-month period. Absent such a data collection project, Mr. Jones might have spent many more months of illegal incarceration. As Mr. Jones's case demonstrates, the collection and analysis of public defender data is

essential to preventing the next defendant's illegal incarceration.

