CADWELL SANFORD DEIBERT & GARRY LLP
LAWYERS

Joe W. Cadwell (Retired)
Steven W. Sanford
Douglas M. Deibert
William C. Garry
Scott Perrenoud*
Stephen C. Landon
Brett A. Lovrien*†
James S. Simko
Shawn M. Nichols
Kristi M. Laber
Melissa R. Jelen
Alex M. Hagen
Michelle Stratton
Joseph A. Meader

* Also admitted in Iowa
† Also admitted in Minnesota

River Centre
200 East 10th Street, Suite 200
Sioux Falls, South Dakota 57104

Telephone
(605) 336-0828

Telecopier
(605) 336-6036

Writer's E-Mail Address

ahagen@cadlaw.com

October 11, 2018

The Honorable Lawrence L. Piersol
United States District Judge
United States Courthouse
400 S. Phillips Avenue, Room 202
Sioux Falls SD 57104

RE: *Winston Brakeall v. Dennis Kaemingk, Bob Dooley*, et al.

Dear Judge Piersol:

As requested, enclosed are true and correct copies of expert reports from three experts whom Plaintiff has identified and expects to call at trial:

1. Professor Christine Hutton, of the University of South Dakota Law School;
2. Professor David Shapiro of Northwestern Law School; and
3. Mr. Jeff Larson, Esq.

Sincerely,
CADWELL SANFORD DEIBERT & GARRY LLP

Alex M. Hagen

AMH/lb

c: James Moore [via e-mail, with enclosures]
Alexis Warner [via e-mail, with enclosures]

September 14, 2018

TO: Alex Hagen

FROM: Jeff Larson

SUBJECT: Legal Resources for Penitentiary Inmates

You have requested my opinion, based on my career experiences as a criminal defense lawyer, on how the termination of the inmate legal services contract would affect inmates' access to the courts. My opinion is set out below.

Before drafting this document, I did review the Complaint in Brakeall v. Kaemingk, Civ. 18-4056 and also interviewed Delmar "Sonny" Walter, the former contract provider of inmate legal services.

In lieu of a full CV, I will set forth here my relevant academic and professional experiences. I have a BS in political science and sociology from South Dakota State University (1976) and a JD from the University of South Dakota (1978). I spent three years as a staff attorney for South Dakota/Dakota Plains Legal Services (January, 1979 – December, 1981), where I accepted criminal appointments in addition to the civil legal services work. I spent thirty years with the Minnehaha County Public Defender's Office (1983 – 2011), twenty-two of which (1983 – 2005) as the head Public Defender. I was in private practice doing solely criminal defense work from 2012-2017. During my career, I was lead counsel in over six thousand criminal cases, including forty homicide cases.

I have presented continuing education programs for the State Bar, the South Dakota Trial Lawyers Association, and the National Legal Aid and Defender Association on at least twenty occasions on various topics, including multiple presentations on working with clients in a court-appointed attorney setting. I am a frequent guest lecturer at the USD Law School, and served as an Adjunct Professor teaching Advanced Criminal Procedure for one semester when Professor Hutton was on sabbatical.

WHAT HAD BEEN PROVIDED

Under the contract that existed before the policy change, inmates had access to a full-time experienced paralegal and the "as needed" services of a lawyer, who was in regular contact with the paralegal and provided office time on-site both at the Penitentiary and at Mike Durfee State Prison in Springfield. Inmates also had access to hardcopy law library materials and could obtain copies of cases from the contract office.

Mr. Walter and his staff gave advice on a variety of topics, including exhaustion of remedies, statutes of limitation, procedural defaults, time calculations, grievance procedures, parole appeals, prison conditions pleading, habeas corpus and direct appeals. He provided form banks for habeas corpus, direct appeals, and divorces. If inmates had attempted filings returned due to errors in pleadings, he would assist in correcting the problem that got the pleadings rejected.

WHAT IS NOW PROVIDED

In lieu of professional legal assistance, the penitentiary provides an electronic tablet that has access to some legal research, but which does not allow inmates to "save" or print any materials. There is no longer access to hardcopy library materials or out-of-state statutes, and there is no professional assistance in doing the online research.

DISCUSSION

Giving an untrained inmate a tablet and expecting him to do competent legal research is akin to giving a layperson a copy of Gray's Anatomy and expecting her to be able to do surgery. There is a reason we lawyers attend law school and work at staying current in our specialized areas of practice. As the United States Supreme Court noted in Gideon v. Wainwright, 372 U.S. 335, 345 (1963), "Even the intelligent and educated layman has small and sometimes no skill in the science of law." (Citing Justice Sutherland in Powell v. Alabama, 287 U.S. 45, 69 (1932)).

My experience with the inmate population at the State Penitentiary causes me grave concern as to their ability to have meaningful access to the courts via unguided tablet research. To begin with, many inmates do not have a high school education and

many of those with a diploma do not read at a twelfth grade level. My rule of thumb when trying to explain concepts to clients was to assume a sixth grade reading level.

Even those with adequate reading skills may not possess computer skills necessary to frame meaningful boolean search terms and following up on the results. And without printing and saving capabilities, those having difficulties will find it more difficult to go to others for help.

Another potential problem is a common one in prison environments. When a resource is scarce, a black market develops within the inmate population to meet the demand for the scarce resource. When the resource is legal knowledge, inmates will pay for information that may or may not be accurate. But if someone holds himself as knowing the process, he will extract a fee from a seemingly less knowledgeable fellow inmate. Inmates will continue to seek out someone to answer their legal questions, and if a lawyer is not available, they will turn to the inmate that sounds most like a lawyer regardless of that person's knowledge or skill.

There are a few areas where unguided legal researchers can do themselves great harm. Some of the most obvious danger areas revolve around exhaustion of remedies, statues of limitations, and calculations of times.

A. Exhaustion of Remedies. The requirement that a person exhaust remedies, whether before administrative agencies before getting into court, or in state court before filing in federal court, is a difficult concept for lawyers, let alone for people untrained in the law. An inmate who is able to navigate his tablet to research case law may well find himself with a pile of relevant cases but no legal remedy because he did not exhaust his remedies. Having someone trained in the law available to answer questions could prevent that from happening.

B. Statutes of Limitations and Calculation of Time. The area most likely to be a stumbling block without the availability of a lawyer to answer questions, is the confusing overlap of state and federal statutes of limitations in habeas corpus actions. Although there is a two-year statute of limitations on a state habeas action, there is a parallel one-year statute of limitations for federal habeas actions . They both run at the same time, but filing a state habeas stops the clock on the federal habeas. Most inmates would have no idea that a timely filing of the state habeas one to two years after final

judgment could preclude a subsequent federal habeas action. The unguided tablet-user would likely never know that.

C. Other Problem Areas. There are numerous other areas where simply having someone explain a process would be crucial, such as:

1. explaining the difference between habeas corpus and coram nobis;
2. whether to sue a government official individually, in his official capacity, or both;
3. how to apply to modify a child support obligation when one is no longer employed;
4. what facts need to be alleged to support a particular legal claim;
5. how to frame an issue as a due process violation.

These are but a few examples.

OPINION

Based upon my experience with the inmate population in South Dakota, it is my opinion that termination of the legal services contract and replacing it with tablet research will deny multiple inmates meaningful access to the courts.

Jeff Larson

EXPERT REPORT OF DAVID SHAPIRO[1]

Introduction

I have been asked to opine on whether, and to what extent, having a lawyer's assistance affects the chances that a prisoner with a meritorious case will prevail in prison conditions litigation. I have also been asked to opine on whether, and to what extent, having access to a lawyer affects the chances that a prisoner's initial pleading will survive initial screening or a motion to dismiss.

I have not previously given a deposition as an expert witness. My publications within the last four years are listed in my CV, which is attached. My hourly rate for work performed in my capacity as an expert in this case is $350. I will donate any proceeds from my work on this case to the Roderick and Solange MacArthur Justice Center.

Opinion

Based on my expertise as both a prisoners' rights attorney and a scholar on that subject, I conclude that it is clear that access to counsel dramatically improves the chances that a prisoner with a meritorious case will survive screening of his or her complaint, plead a facially cognizable claim that is not subject to dismissal, and ultimately obtain a favorable outcome. Providing access to an electronic database

[1] Clinical Associate Professor of Law, Northwestern Pritzker School of Law, and Director of Appellate Litigation, Roderick and Solange MacArthur Justice Center

with case law and legal information would not be sufficient to compensate for harm done to prisoners' cases by removing access to counsel.

Prisoners face several situational barriers to successful litigation—that is, barriers inherent in the reality of the prison environment. These include a scarcity of counsel, low rates of literacy and educational attainment, limited access to evidence and witnesses, and a paucity of legal materials. Meanwhile, the law governing prisoners' rights is complex, and even in the face of their practical disadvantages, incarcerated litigants must navigate a treacherous doctrinal landscape. Pitfalls abound. Successful litigation will require a prisoner to tackle decades of precedent on standing, capacity to be sued, prudential limits on federal court jurisdiction, summary judgment procedure, statutory interpretation, and supervisory liability—to name just a few of the theories that tend to converge, and may prove dispositive, in a prison-conditions suit. There exists a striking mismatch between the disadvantages faced by incarcerated litigants and the complex and technical legal issues they must navigate, and this mismatch contributes significantly to the difficulty of litigating without counsel.

Access to Counsel

Prison-conditions cases are overwhelmingly and disproportionately litigated pro se.[2] Plaintiffs represented themselves in 94.9% of prisoners' civil rights cases litigated in federal court in 2012 (compared to 26.1% for the entire pool of federal

2 Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 166–67, 167 tbl.6 (2015).

cases).[3] The prisoner civil rights category of federal litigation has a higher pro se rate than any other type of case.[4] The next-highest pro se rate (88.8%) is for a category that consists of habeas cases and other "quasi-criminal" cases.[5] From there, it drops to 35.4% (for immigration cases).[6]

There are multiple reasons for prisoners' difficulty in finding counsel. First, attorneys have few financial incentives to take prisoners as clients. Most prisoners cannot afford to pay counsel except through contingent fees, and the low damages value of prison conditions cases make the cases unattractive to lawyers who work on contingent fees. Deferential legal standards in the prison conditions context, combined with qualified immunity, limit the chances of success on the merits and recovery of fees, making it less likely that a lawyer will take a given case. And the PLRA imposes drastic limits on attorneys' fees that exacerbate the access to counsel problem.[7]

Second, attorneys are hard to find and harder to meet with. The United States incarcerates more people than any other country on Earth—2.2 million men and women.[8] In comparison, there are very few public interest lawyers who litigate prison cases. Compounding the problem, prisons are generally located far from the urban

---

3 *Id.* at 167 tbl.6.
4 *See id.*
5 *Id.*
6 *Id.*
7 42 U.S.C. § 1997e(d)(2), (d)(3) (2012).
8 DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016)

centers where attorneys are concentrated, which makes it more difficult for attorneys to meet both clients and prospective clients.[9]

Third, prisoners cannot count on the government for assistance with getting a lawyer. Courts rarely appoint counsel, and organizations that receive federal funding to provide legal aid are prohibited from litigating prison-conditions cases.

Access to Law and Evidence

Even the most legally sophisticated and well-informed prisoners face an evidentiary disadvantage.[10] Prisoners overwhelmingly lack the money and freedom of movement necessary to gather evidence and place it in the record.[11] Consequently, prisoners with meritorious claims—claims for which concrete evidence likely exists—may well be forced to navigate both summary judgment and trial with nothing but their own testimony to counter the prison's version of events.[12]

---

9 *See, e.g.*, John M. Eason, *Prison Building Will Continue Booming in Rural America*, SALON (Mar. 15, 2017), https://www.salon.com/2017/03/15/why-prison-building-will-continue-booming-in-rural-america_partner/ (highlighting that between 1970 and 2000, the number of prisons in the United States increased by more than 1000—and "roughly 70 percent" of prisons constructed during that time were in rural areas).

10 Billman v. Ind. Dep't of Corr., 56 F.3d 785, 790 (7th Cir. 1995) (recognizing that "it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so," even when the prisoner knows the law well, "because he is not able to investigate before filing suit").

11 *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1611 (2003) ("Inmates are unable to conduct most kinds of informal investigations; they cannot interview most witnesses, for example. And they cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners. Even in a very strong case, inmates have no cash and little access to credit, so they cannot fund litigation expenses (for example, deposition costs or expert fees) on the expectation of an eventual judgment or settlement." (footnotes omitted)); *see also* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 343, 349 (2016)("For those niceties of practice that lawyers take for granted, inmates must contend with prison rules, inadequate libraries, and unresponsive or uncooperative information sources in the outside world. Thus, meeting a deadline, obtaining a witness affidavit, consulting with an expert, or acquiring a hard to find piece of research is well-nigh impossible.").

12 *See* Schlanger, *supra* note 15, at 1615 ("[B]ecause inmates are unable to run investigations of their cases in order to get documentary or testimonial support for their claims, oftentimes at trial the best an inmate can do is turn the case into a swearing contest."); *see also* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1010-11 (2016)

The prevalence of illiteracy and mental illness in the prison population compound the difficulty of litigating without counsel. According to the U.S. Department of Education, many prisoners are unable to "cycle through or integrate two or more pieces of information based on criteria; compare and contrast or reason about information requested in the question; or navigate within digital texts to access and identify information from various parts of a document."[13] It is difficult to imagine such a prisoner bringing—much less winning—a civil rights suit in federal court without substantial legal assistance, no matter how egregiously the prison violates the Constitution.

In my opinion, providing prisoners with access to a lawyer would mitigate the potential obstacles posed by a prisoner's limited education and ability to understand legal concepts. It is my understanding that the South Dakota Department of Corrections has replaced access to counsel with an electronic database that prisoners can use to conduct keyword searches and review case law and other materials. Available data regarding the prisoners' educational attainment, as cited above, suggests that having a lawyer who can listen to a prisoner's story and translate it into a comprehensible and legally sufficient pleading or legal argument can

---

(describing the tremendous difficulty of obtaining evidence in a First Amendment suit even when plaintiff prisoners were represented by the ACLU). Additionally, the few pro se prisoners who claw their way to the damages phase of a trial are confronted with a paradox: they "have the nearly impossible task of simultaneously conducting effective litigation and trying to demonstrate to the court or jury just how devastating their injury was." Schlanger, *supra* note 15, at 1612.

13 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS 6, B-3 (2016), https://nces.ed.gov/pubs2016/2016040.pdf (reporting that twenty-nine percent of prisoners assessed in national survey lacked key reading comprehension skills); *see also* John Matosky, *Note, Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 301-02 (1998) (discussing a 1994 study of literacy among the prison population).

dramatically affect the chances of surviving screening and ultimately obtaining a favorable result. It is unlikely that an electronic database can adequately stand in for a lawyer's ability to spot issues, understand procedural requirements, and grasp various legal concepts. In fact, given the rate at which digital technology advances outside of prison walls, it stands to reason that prisoners who have been sequestered from society for years if not decades will often have particular difficulties in navigating written information that is available only on a digital platform.

Estimates vary on the prevalence of mental illness among prisoners, but there is widespread agreement that the rate is disproportionately high.[14] Although there are many varieties of mental illness, some of which may impede pro se litigants more than others, it is reasonable to assume that mental illness makes it harder for a prisoner to successfully file and pursue a meritorious claim.

---

14 *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf (reporting that in 2005, "56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates" had "a mental health problem"); Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVS. 862, 866 (2014) (concluding, from meta-analysis of scholarly literature on mental illness in prison, that despite the "wide variation in prevalence [of mental illness] found among even the more robust studies," the "current and lifetime prevalence of numerous mental illnesses is higher among incarcerated populations than in nonincarcerated populations, sometimes by large margins"). Briefly surveying research on mental illness among prisoners, Edward P. Mulvey and Carol A. Schubert, of the University of Pittsburgh School of Medicine, have written that:

> Once mentally ill people are arrested, the dynamics of criminal justice processing contribute to their high prevalence rates in jails and prisons. People with serious mental illness, compared with others charged with similar offenses, stay longer in jail. They are less likely to be placed on probation or other forms of community-based supervision. Mentally ill prison inmates are more likely to be involved in assaults while there and more likely to be assault victims. Perhaps not surprisingly, mentally ill inmates are less likely to be granted parole at an early date and are more likely to serve out their maximum sentences. They are also more likely once released to violate parole conditions and be returned to prison as a result.

Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231, 236–37 (2017) (citations omitted).

Traps for the Unwary

Prisoners' rights litigation is a complicated and technical area of law. Effective practice requires a grasp of constitutional law under the First, Fourth, Fifth, and Eighth Amendments; the law of immunities; civil procedure; standing; supervisory liability; administrative exhaustion; various doctrines unique to § 1983 litigation; prudential limitations on federal court procedure; and a variety of federal statutes, including the PLRA, the Americans with Disabilities Act, and the Religious Land Use and Institutionalized Persons Act.

The complexity of the doctrine creates a minefield for prisoners litigating without counsel. In my opinion, providing prisoners with access to a legal database would not sufficiently equip most prisoners to draft a complaint that avoids the pitfalls necessary to survive screening and ultimately obtain a favorable result in a meritorious case. A few examples of doctrines that trip up pro se litigants and that can pose barriers on screening include:

Sovereign Immunity. Prisoners quite naturally name as defendants entities such as the prison in which they are incarcerated, the department of corrections of their state, or the state itself. A case naming only such parties, however, will be dismissed on the basis of sovereign immunity.

Capacity to Be Sued. Detainees in county jails often name the jail or the sheriff's department running the jail as defendants. While these municipal entities do not enjoy sovereign immunity, suits naming such parties have nonetheless been

dismissed where state law deems jails and sheriff's departments to be components of county governments—not separate defendants with the capacity to be sued. Even if a detainee is savvy enough to name a proper county defendant—the county itself, or the sheriff in her official capacity, for example—the detainee may not know that policy and practice allegations are necessary to state a claim under *Monell*.

Supervisory Liability. Prisoners might assume that a warden is legally responsible for what happens in her prison, or that a lieutenant is liable for what happens in her division. Not so. Section 1983 suits against supervisors require a showing of personal involvement by the supervisor and cannot be premised on a theory of respondeat superior.

Diffusion of Responsibility. In prisons and jails, responsibility for a calamity may be diffused among many actors. For example, a group of doctors, nurses, and officers may each commit mistakes in noticing and treating symptoms that result in a severe and preventable medical injury. It is logical enough for a prisoner to think that these officials should be held collectively liable because they are collectively responsible for the wrong. But if none of the officials' acts or omissions individually constitute deliberate indifference, all of them will escape liability.

Administrative Exhaustion. Prisoners may not realize that insignificant mistakes in exhausting administrative remedies can doom their civil rights suits. Courts have dismissed federal cases based on administrative exhaustion mistakes such as failing to attach copies of documents to a grievance or mailing multiple grievance appeals in a single envelope. Without the assistance of a lawyer, it is very

easy for a prisoner not to know that exhaustion is a prerequisite to suit or to make a procedural error in the exhaustion process. Once a complaint is filed, a lawyer can also be critical to demonstrating to a court that exhaustion has occurred by properly summarizing and presenting the documents and facts relevant to exhaustion in sufficient and non-conclusory detail, the law of exhaustion under the PLRA, and the particular barriers that a prisoner faced to exhaustion.

Summary Judgment Evidence. It is probably not obvious to most people that a single sentence can make the difference between winning and losing on summary judgment—but it can. When a prisoner signs and dates her complaint or statement and writes "I declare under penalty of perjury that the foregoing is true and correct," the complaint or statement is considered "verified," and the prisoner can use it as evidence to establish a dispute as to material fact. (Provided that the facts in the complaint or statement are based on the prisoner's personal knowledge.) In contrast, a complaint or statement containing exactly the same content but lacking the magic quoted words generally will not suffice to create a dispute as to material fact.

Heck *Bar.* Prisoners can shorten their period of incarceration by earning "good time" for their behavior, but they can also lose good time (and incur other punishments) for disciplinary violations. Prisoners may think they have a federal claim for disciplinary sanctions imposed without due process, but *Heck v. Humphrey* and its progeny prevent prisoners from challenging in federal court a state disciplinary punishment that increases the duration of confinement.

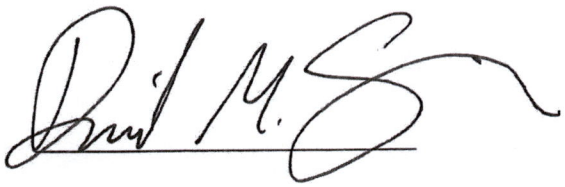
Mootness. Corrections systems often transfer prisoners from one prison to the next. A prisoner who suffers from lack of medical treatment or denial of religious access at one prison may assume that a claim for injunctive relief remains live after transfer to another prison, especially if similar wrongs occur at the new facility. But when a prisoner is transferred, a court is likely to view her claims for injunctive relief as moot.

It is very difficult for the average prisoner to understand, much less negotiate, the traps for the unwary described above without the aid of counsel. If access to counsel is replaced with an electronic database it is unlikely that the database will provide most prisoners with the information they need to survive screening and litigate their cases in a manner that they can reasonably assimilate.

Conclusion

In sum, access to counsel is key to the ability of prisoners to with meritorious cases to survive screening under the Prison Litigation Reform Act and to ultimately obtain favorable results in litigation. An electronic database will not compensate for the harm to prisoners' cases that will be caused by the deprivation of access to counsel.

Date: September 10, 2018



David M. Shapiro

David M. Shapiro
Pritzker Northwestern School of Law
Roderick and Solange MacArthur Justice Center
375 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Experience

Clinical Associate Professor of Law, Bluhm Legal Clinic, Pritzker Northwestern School of Law, Chicago, IL, September 2018-present

Clinical Assistant Professor of Law, Bluhm Legal Clinic, Pritzker Northwestern School of Law, Chicago, IL, October 2013-September 2018.

Director of Appellate Litigation, Roderick and Solange MacArthur Justice Center, Chicago, IL, April 2016-present

Attorney, Roderick and Solange MacArthur Justice Center, Chicago, IL, October 2012-April 2016

Staff Attorney, ACLU National Prison Project, Washington, DC, November 2008-February 2010; July 2010-October 2012

Counsel, Brennan Center for Justice, New York University School of Law, Washington, DC, February 2010-July 2010

Associate, Davis Wright Tremaine, LLP, Washington, DC, 2006-2008

Law Clerk, Hon. Edward R. Becker, Third Circuit U.S. Court of Appeals, Philadelphia, PA, 2005-2006

Education

Yale Law School, J.D., 2005

Fulbright Scholar, Moscow, Russia, 2001-2002

Harvard College, A.B., summa cum laude, History and Literature, 2001

Publications

Law Reviews

David Shapiro and Arielle W. Tolman, *From City Council to the Streets: Protesting Police Misconduct after* Lozman v. City of Riviera Beach, Charleston L. Rev. (forthcoming 2018)

Evan Bianchi and David Shapiro, *Locked Up, Shut Up, Speech in Prison*, St. John's L. Rev. (forthcoming 2018)

David Shapiro and Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prisons and Jails*, 93 Notre Dame L. Rev. 2021 (2018).

David Shapiro, Commentary: Guns, Speech, Charlottesville: The Semiotics of Semiautomatics, 106 Geo. L. J. Online (2017)

David Shapiro, *The Cutting Edge of Prison Litigation,* 1 UCLA Crim. J. L. Rev. 95 (2017)

David Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech and Scrutiny*, 84 Geo. Wash. L. Rev. 972 (2016)

David Shapiro, *To Seek A Newer World: Prisoners' Rights at the Frontier*, 114 Mich. L. Rev. First Impressions 124 (2016)

David Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, Colum. Human Rights L. Rev. 47 (2012).

David Shapiro, *Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?* Florence v. Board of Chosen Freeholders, 6 Charleston L. Rev. 131 (2011)

Short Commentaries

Can the President Dismantle Immigration Hearings, The National Law Journal, June 26, 2018

No, Trump Can't Punish NBC and the NFL for Their Speech, The Hill, Oct. 13, 2017

How The First Amendment Could Save Don Jr., The Hill, Aug. 3, 2017.

Is Michelle Carter's *Punishment for Death-by-Text a Slap on the Wrist or Cruel and Unusual?*, The Hill, Aug. 4, 2017

No Lives Matter? Pro-Cop Bill Would Make It Law of the Land, United States Law Week, July 6, 2017

No Denying: Sessions' Moves Revive Allegations of Racism, Chicago Tribune, May 15, 2017

Sentenced To Shut Up: To Protect Free Expression, Curb Prison Censorship, Apr. 21, 2017

Can the *Trump Administration Kick Disfavored Reporters Out of Briefings?*, The Hill, March 21, 2017

New Illinois Prisoner ID Law Is Weak Medicine, Chicago Sun-Times, Jan. 6, 2017

President Obama Should Curb Mass Incarceration with Clemency, The Hill, Dec. 9, 2016

Alan Mills and David Shapiro, *Stop Suing Ex-prisoners To Recover Room-and-Board Costs*, Chicago Tribune, Aug. 23, 2016

Private Prisons Are A Public Shame, Chicago Sun-Times, Aug. 17, 2016

Lock Up Fewer People To Improve Illinois Inmate Health Care, Chicago Sun-Times, June 6, 2015.

Do These Little-Noticed Ruling Point to a Prison Reform Renaissance?, Crain's Chicago Business, July 27, 2015.

Fire Top Officials Who Claim Bogus "Ferguson Effect," Chicago Sun-Times, Nov. 10, 2015

Government Should Not Expel, Charge Students for Tasteless Speech, Juvenile Justice Information Exchange, Nov. 18, 2015

State Making It Harder for Ex-Cons to Go Straight, Chicago Sun-Times, Jan. 19, 2016

Isolation, Torture: Shine Light on Transformation of U.S. Prisons, Crain's Chicago Business, Feb. 18, 2015

Illinois' Prison Fix Requires Action, Not A Commission, St. Louis Post-Dispatch, Feb. 17, 2015

Solitary Confinement is Overused in Illinois Prisons, Chicago Sun Times, Nov. 7, 2014

My Fight with an Electioneering Cone, Chicago Sun Times, Mar. 19, 2014

David M. Shapiro & Alan Mills, *Chicago 'NATO 3' Trial Limits Public Access*, Chicago Sun Times, Jan. 17, 2014

What Do PETA and CCA Have in Common?, Huffington Post, Mar. 1, 2012

Smart Policy Is To Lock Up Fewer People, Not More, Palm Beach Post, Feb. 13, 2012

For-Profit Prisons: A Barrier to Serious Criminal Justice Reform, CNBC.com, Oct. 12, 2011

Classification and Consequences: Secrecy Should be Justified, Not Automatic, Roll Call, Apr. 16, 2010 (David Shapiro & Liza Goitein)

Investigate the 'Bad Things Opinion,' Nat'l L.J., Mar. 22, 2010

Bull v. San Francisco Ruling Permits Overly Broad Policy of Strip Searching Jail Detainees, Jurist, Feb. 17, 2010

Other Publications

Investigating Immigration Detention Conditions with the Freedom of Information Act, Bender's Immigration Bulletin (2012)

Banking on Bondage: Private Prisons and Mass Incarceration (American Civil Liberties Union Foundation 2011)

Liza Goitein & David Shapiro, Reducing Overclassification Through Accountability (Brennan Center for Justice 2011)

Selected Cases

Abu Jamal v. Kane, 96 F. Supp. 3d 447 (M.D. Pa. 2015) (denying motion to dismiss), 105 F. Supp. 3d 448 (granting permanent injunction): Lead counsel; obtained permanent injunction striking down state statute as facially invalid under First Amendment.

Vonperbandt v. Baldwin, No. 16-cv-2674 (N.D. Ill. filed Feb. 29, 2016): Lead counsel; filed motion for TRO; prison then cancelled the punishment of my client, who had been disciplined for expressing his views as an atheist.

Chancy v. Prison Review Board, 15-CH-1456 (Sangamon County Cir. Ct. filed Jan. 28, 2015): Lead counsel; putative class action challenging state's failure to utilize a risk assessment tool in parole proceedings; the state implemented the tool during the litigation.

Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir 2016) (en banc): Lead amicus counsel; argued case to en banc court and obtained ruling reversing the panel opinion and improving the legal standard for failure-to-protect claims brought by pretrial detainees.

Prison Legal News v. DeWitt, No. 2:10-cv-2594 (D.S.C.) (consent decree entered Jan. 13, 2012): Lead counsel; obtained monetary settlement and consent decree expanding the right of detainees in a South Carolina jail to receive publications.

Benkahla v. Federal Bureau of Prisons, No. 2:09-cv-00025 (S.D. Ind. 2009): Lead counsel; first major case challenging Communication Management Units (CMUs) designed to restrict the communications of federal prisoners suspected of connections to terrorism; after filing, the

Bureau of Prisons doubled telephone and visitation time for all CMU prisoners and released my client from the CMU.

Hudson v. Preckwinkle, No. 13-08752 (N.D. Ill. filed Dec. 6, 2013): Co-lead counsel; major putative class action regarding violence in Cook County Jail.

Andrews v. Persley, No. 16-11943, __ Fed. Appx. __ (11th Cir. 2016): Obtained ruling reversing district court and removing imposition of a "strike" under the Prison Litigation Reform Act.

Henderson v. Thomas, 913 F.Supp.2d 1267 (M.D. Ala. 2012): Obtained permanent injunction enjoining the Alabama Department of Corrections from segregating prisoners with HIV in separate units and prisons.

American Civil Liberties Union v. United States Department of Homeland Security, 738 F. Supp. 2d 93 (summary judgment decision); 810 F. Supp. 2d 267 (D.D.C. Sept. 15, 2011) (attorneys fees decision): Obtained, through Freedom of Information Act litigation, thousands of documents regarding deaths of immigration detainees in Department of Homeland Security custody.

Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009) (en banc): Argued case to en banc court and obtained reversal of panel decision in First Amendment case regarding the right of street artists to perform at the Seattle Center.

August 23, 2018

To: Alex Hagen

From: Chris Hutton

Subject: Assistance of Counsel for Inmates in the South Dakota State Penitentiary

You have requested comments on the process by which an individual acquires familiarity with legal concepts, and have asked that I draw on my education and experience in endeavoring to provide an answer. Following are my responses. Please note that I have had the opportunity to review the complaint in BRAKEALL v. KAEMINGK, Civ. 18-04056, and Judge Duffy's Report and Recommendation in BRAKEALL v. DOOLEY, Civ. 17-04112.

BACKGROUND AND EDUCATION

In academic year 1983-84, I attended Harvard Law School, from which I received an LL.M. degree. My program had both international and American students, with the latter steered toward possible careers as legal educators. As part of the academic program, the American LL.M. students were enrolled in a course on Legal Theory and in another on Legal Education. Those courses were designed to provide some foundation for scholarship and also to enhance classroom teaching. Following my year at Harvard, I was employed by the University of South Dakota School of Law and have been a member of the faculty since that time. I was promoted to the rank of Professor in 1987 and received tenure in 1990. During my years at USD Law, I have been a visiting faculty member at Cooley Law School, Washburn University School of Law, and the University of Kansas School of Law. My attached CV provides details about courses taught, dates, scholarship and other information.

When I joined the USD Law faculty, I knew my work experience (Army JAGC officer and Legal Aid Attorney), brief undergraduate teaching experience (in Army-sponsored colleges overseas), and legal education (J.D. Washburn) were useful but insufficient for discerning what was required to become the type of legal educator I aspired to be. Some techniques could be gleaned from great speakers—an effective priest in the pulpit, a persuasive courtroom advocate, or a respected undergraduate educator. Other insights came from fellow faculty members, and listening to Professor Mike Driscoll or Professor John Hagemann was always a worthwhile learning experience. Faculty members realized how much we could learn from each other, and over time we have met informally and formally to discuss classroom teaching. One such endeavor involved faculty meeting voluntarily once/month over the course of a year to discuss how best to improve our work for students. Most faculty also read quite a bit about legal education. Some basic hints, such as not using notes in class and maintaining as much eye contact as possible, have been useful. I experimented with both for a period of time and was pleased enough with the results that I permanently incorporated the techniques into my classes and wrote brief comments about them for a legal education publication.

As part of the USD Law retention and promotion process, the Dean visits faculty members' classes annually. That continues after the person receives tenure. Deans Driscoll, Vickrey and Geu have visited my classes and in follow-up meetings we discussed the quality of the classes and possible ways to improve.

Over time, I became a senior member of the faculty at USD Law. That led to appointment to numerous promotion and tenure committees for fellow faculty, where my visiting their classes was part of the process. Observing their approaches to students has been helpful as I continue to try to refine my own classroom work. I also focus on how to make difficult material comprehensible, using, among other things, examples, hypotheticals, one-on-one meetings with students as needed, review sessions, informal conversations, use of movie clips in class, and simply asking students informally whether they understand the material and need help. Several times per semester I take a few minutes of class time to ask students to write me a note stating one thing about the course material they understand and one thing they are having difficulty understanding. This semester I also will incorporate some computer exercises for students to do on their own to assist with their understanding and to help them develop the technique needed to pass the multiple choice section of the bar examination. I am available for students in-person at the Law School and also by electronic communication. They take advantage frequently.

Much to students' dismay, we end the semester in the basic classes with an examination. The point of the test is to provide an objective measure of how well the student understands the material taught during the semester. It is not the only way to measure performance and may be inaccurate for a particular student (for example, who had a health issue the night before the exam), but it can be a useful gauge of performance. In advanced classes, my preference is not to give an essay exam as the sole measure of performance. For a class such as Advanced Criminal Procedure, for example, students are required to prepare motions and briefs, and can choose to prepare a Habeas Petition and Brief as their final project.

Classroom work, homework, class exercises, examinations, and any other aspect of course material are thought about, designed, and evaluated in terms of their usefulness to law students. All are geared toward enhancing students' understanding of complicated legal material. I do not waste their time in class or in grading, and I try to give them as honest an assessment of their performance as possible.

GAINING FAMILIARITY WITH LEGAL CONCEPTS AND LEGAL PROCESSES

After gaining some experience and competence as a legal educator, I have been able to dwell on what students bring to the study of law and where difficulties might lie. This aspect of my comments likely will be the most pertinent to the inquiry about inmates' access to legal assistance.

A. Components of Legal Education

Law students have graduated from college before they begin their studies. In theory this means they have analytical skills, a sophisticated vocabulary, and the ability to put coherent paragraphs together. Obviously, some in the group are better educated or have more skills than others.

With first-year students in my course in Criminal Law, one of the first things I try to explain to them is that memorizing black-letter law is only part of what they need to do, and that any intelligent high school student can memorize parts of the code. What they need to do is understand how the court decided the case, how the rule of the case might apply to future cases, what policies or background information might be reflected in the case, and what prediction they can make for their client about how the client's case will be resolved. Students learn at the outset that snipping a phrase or sentence from a case and assuming that will dictate future cases is a mistake. They are forced to confront hypotheticals to test their understanding of the facts and rules. They are forced to articulate in class why a case is decided in a particular way and why not in several alternative ways. Students are asked to make judgments and to consider background principles of justice. They are asked to consider alternative strategies for tackling a problem. They are introduced to ethical rules from the outset.

In second semester, first-year students are required to study Criminal Procedure, in which the cases and concepts are considerably more difficult than in first semester. Search and seizure, confessions, assistance of counsel, and steps in the process of resolving a criminal case are difficult for many students. The cases analyze complex concepts and processes.

As students develop into second and third-year students, they have acquired some basic ability to read and think about the law. Their writing skills should have improved through their basic Legal Writing classes. The subject matter of the courses is more challenging for them, with required Evidence and Constitutional Law posing considerable difficulty. Hearsay (and nonhearsay uses of out-of-court statements) is not self-explanatory. Exceptions to the Hearsay rule, Rule 404b evidence, character evidence, and multiple ways to impeach a witness are incomprehensible at times. Students work their way through these subjects with guidance from their teachers but not all students succeed at the first effort.

Other challenging aspects of the curriculum are introduced at this point in legal education. Classes such as Antitrust, Tax, and Administrative Law are not easy for them. Advanced Criminal Procedure is another difficult class, and with the topic of Habeas Corpus in particular, concepts such as procedural default, retroactivity and its limits, direct appeal versus collateral attack, exhaustion of remedies, waiver, and adequate and independent state grounds take considerable effort to master. Bright, hard-working students can sit in class in a panic as they try to grasp these concepts. With time, effort, and study they may be successful, but that is not guaranteed.

B. Application of these components to inmates at SDSP

The SDSP argues that providing inmates with a tablet that enables them to search legal terms in cases is sufficient to enable them to receive adequate legal assistance without the need of consultation with an attorney. To analyze the effectiveness of that policy, an assessment of inmate abilities and the role of in-person assistance should be made.

Given the inmate population at SDSP, a starting point is to assess how many have completed college. How many additional inmates completed high school? How many, if any, have advanced degrees? How well can inmates read? Assuming some inmates have some reasonable educational level and ability to read, but many are deficient in these respects, the next question is how well can inmates understand and analyze legal concepts? An inmate will have at least a little familiarity through his own case, but that may be skewed and not reflective of the criminal justice process as a whole. As noted above, students often try to "snip" a quotation from a case, thinking it resolves the question presented. Unfortunately, often the question presented has not been properly identified and the snippet of a case does not help resolve the current issue. Procedural issues are an additional challenge and inmates may not realize there is an overall process with rules that are strictly enforced.

Furthermore, it should be recognized that law students have teachers to guide them through their courses. Law faculty demand careful reading and analysis, and the examination helps determine how well a student can perform it. Inmates have no guidance, no assistance with concepts they might be able to grasp if an explanation were available. Trying to explain procedural default to a law student who fears justice will not be done in a case is difficult; trying to convey and justify that concept to an inmate who procedurally defaulted a worthwhile claim because of a lack of legal assistance is impossible. Typing a search term into a computer is a good start for legal research and the law student can receive guidance on how to proceed. The inmate is left with the search term results and no broad-based view of how to use the search results. Legal procedures can be a challenge to practicing attorneys, and the difficulty for inmates with limited resources is magnified.

Inmates with valid substantive claims need assistance in presenting those claims and following proper procedure. Inmates without valid claims can benefit from legal advice that the claim is groundless. Preserving access for the former and not the latter gives the court the opportunity to devote resources to where they should be placed.

OPINIONS

The following opinions are based on my experience as a legal educator, as summarized in the comments given above. I have been asked to provide opinions on the following three questions based on that experience:

1. Is it more likely that an inmate who lacks access to legal assistance other than a tablet for research would default a claim in seeking habeas corpus relief? Yes.

2. Is access to case law derived from an inmate's use of a tablet to research search terms sufficient to enable the inmate to represent himself? No.

3. Is there a qualitative difference between being given access to legal materials in a searchable electronic database versus having access to an attorney/law-trained person who can help define legal issues and present a sound legal position? Yes.

Chris Hutton

Chris Hutton

7864 S. Townsley Av, #1

Sioux Falls, SD 57108

FACULTY CURRICULUM VITA

1. NAME — Mary Christine Hutton

2. DEPARTMENT — School of Law

3. RANK AND/OR TITLE — Professor

4. YEARS AT USD — 1984 to present

5. EDUCATION

	INSTITUTION	AREA OF SPECIALIZATION	DEGREE	YEAR EARNED
a.	Harvard Law School	Law	LL.M.	1984
b.	Washburn University	Law	J.D.	1978
c.	St. Joseph's University	History	A.B.	1973

6. PREVIOUS PROFESSIONAL EXPERIENCE

	FIRM/INSTITUTION	POSITION/TITLE	DATES
a.	U.S. Army	Attorney	1979-83
b.	Legal Aid Society	Attorney/Legal Intern	1977-78

7. COMPLETE LIST OF PUBLICATIONS

a. *South Dakota Evidence: Noteworthy Developments,* 63 S.D. L. REV. ___ (forthcoming 2018).
b. Comment, Charles Thatcher Dedication, 63 S.D. L. REV. ___ (forthcoming 2018).
c. Comment, Barry Vickrey Dedication, 62 S.D. L. REV. [xvii] (2017).
d. *South Dakota Evidence: Comments on a "Giant Step,"* 59 S.D. L. REV. 343 (2014).
e. SOUTH DAKOTA EVIDENCE, Second Edition, John Larson and Mary Christine Hutton (2013).
f. Comment, Cathy Piersol Dedication, 59 S.D. L. REV. [v] (2014).
g. Comment, Frank Slagle Dedication, 52 S.D. L. REV. [i] (2007).
h. John Larson's SOUTH DAKOTA EVIDENCE (edited annually 2001-2011 when treatise was revised).
i. *The Landscape of Search and Seizure: Observations on Recent Decisions from the United States Court of Appeals for the Eighth Circuit*, 51 S.D. L. REV. 51 (2006).
j. *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington* (*or, What You Learned in Law School About Confrontation is Passé*), 50 S.D. L. REV. 41 (2005).
k. *A Noteless Approach*, in TEACHING THE LAW SCHOOL CURRICULUM 182 (Steven Friedland & Gerald F. Hess, eds., 2004).
l. *Music and Movies, Not Notes*, in TEACHING THE LAW SCHOOL CURRICULUM 200

(Steven Friedland & Gerald F. Hess, eds., 2004).

m. *South Dakota Criminal Law and Procedure Review* (completed annually 1986-2012).

n. *South Dakota Criminal Law and Procedure Review. Cumulative Supplement I, 1985-1996,* (1996); *Cumulative Supplement II, 1996-2001* (Spring 2002); *Cumulative Supplement III, 2001-2007* (2007); *Cumulative Supplement IV, 2007-2012* (2012).

o. *Powell, Wiggins and Turow: Competent Counsel for the Capital Defendant*, 49 S.D. L. REV. 409 (2004) (book review).

p. *Flaws in Capital Sentencing: Skewing the Reasoned Moral Response*, in THE LEVIATHAN'S CHOICE (Martinez and Richardson, ed.) (2002).

q. *Reason and Passion: A Review of Morton Horwitz' The Warren Court and the Pursuit of Justice*, 46 S.D. L. REV. 466 (1999).

r. *Legitimizing Capital Punishment: Rationality Collides with Moral Judgment*, 42 S.D. L. REV. 399 (1998).

s. Review of *Beyond All Reason* for South Dakota Law Review, Spring 1998.

t. Review of *Drop Him 'Till He Dies* by C. John Egan, NORTH DAKOTA HISTORY (1995).

u. *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442 (1995).

v. *Report on Survey of Perceptions of Judges, Prosecutors, Defense Counsel* (September 1993) prepared for Nebraska Commission on Indian Affairs.

w. *Sex and Reason: A Review and Application of Judge Posner's Theory*, 38 S.D. L. REV. 2 (1993).

x. *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1993).

y. *Schools as Good Parent: Symbolism versus Substance in Drug and Alcohol Testing of School Children*, 21 J.L. & EDUC. 33 (1992).

z. *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989).

aa. *I Fought the Law and the Law Won: A Report on Women and Disparate Sentencing in South Dakota*, 15 NEW ENG. J. CRIMINAL AND CIVIL CONFINEMENT 177 (1989) (with Pommersheim and Feimer).

bb. Review of *Presumed Innocent* by Scott Turow, 34 S.D. L. REV.206 (1989).

cc. Review of *The Prosecution and Defense of Criminal Conspiracy Cases* by Paul Marcus, THE CHAMPION (March 1989).

dd. *Employee Drug Testing: Some Implications for Criminal Law* (December 1989). Report prepared for ABA Criminal Justice Section's Committee on the Rules of Criminal Procedure and Evidence. Model Rules and Analysis on same topic prepared for Committee's discussion in January and August 1991.

ee. *Confrontation, Cross Examination and Discovery: A Bright Line Appears in* Pennsylvania v. Ritchie, 33 S.D. L. REV. 437 (1988).

ff. *The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases*, 40 ADMIN. L. REV. 377 (1988).

gg. *Child Sexual Abuse Cases: Reestablishing the Balance Within the Adversary System*, 20 U. MICH. J.L. REF. 491 (Winter 1987).

hh. State v. Logue*: Ultimate Issue Testimony in the Absence of a State Equivalent to Rule 704*, 30 S. D. L. REV. 530 (1985).
ii. *Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing*, THE ARMY LAWYER, Nov. 1983 at 10.
jj. *Jury Instructions: Theory of the Case*, 10 CRIMINAL DEFENSE 18 and 15 THE ADVOCATE 149 (1983) (with Green).
kk. *Prisoners' Rights: Constitutional Restrictions on Censorship of Prisoners' Mail*, 16 WASHBURN L. J. 535 (1977).

8. PROFESSIONAL ACTIVITIES (see Public Service)

a. Revised Flandreau Santee Sioux Tribe Evidence Code (2018).
b. Appointed by Chief Justice, Judicial Elections Commission, 2013-14.
c. Appointed by Governor Daugaard, Criminal Justice Initiative, 2012-13.
d. Visiting Professor, University of Kansas School of Law, Summer 2011 (Evidence).
e. Visiting Professor, Washburn University School of Law, Spring 2011 (Criminal Procedure and Evidence).
f. Chair, State Bar Evidence Committee (2012-2015)(revised S.D. Evidence Code); member (2016-2018).
g. South Dakota Judge's Training (annually since 1985 – update on criminal law cases from the United States and South Dakota Supreme Courts).
h. Appointed by Chief Justice to his Committee on Delivery of Legal Services to the Poor (2011-2014).
i. SDTLA speaker – Innocence Project (2016).
j. Reviewed draft of Military Rules of Evidence for United States Army (2011).
k. Member, Supreme Court's Committee for the Study of Cameras in the Trial Courts (2008).
l. Evidence CLE, State Bar of South Dakota (April 2008).
m. Pro bono assistance on brief to United States Supreme Court with Minnesota Public Defender (Summer 2007). The Supreme Court resolved the case as I had argued, and quoted my article in the text of the decision. *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008).
n. Chair, Committee for Active Participation of Women, South Dakota State Bar (2007-08).
o. Reviewer, South Dakota Trial Academy (Summer 2007).
p. Special Committee on Judicial Election Campaign Intervention (South Dakota Supreme Court appointment)(2006).
q. Evidence CLE, South Dakota State Bar (June 2006).
r. Visiting Scholar, United States Military Academy, West Point (March 2006).
s. Member of ABA Standing Committee on Armed Forces Law (SCAFL) (2005-2008).
t. Presentation on *Crawford v. Washington*, South Dakota State Bar CLE (April 2005).
u. Fellow, American Bar Foundation.
v. South Dakota State Bar Access to Justice Committee (2004-present).

w. Moderator, Sentencing Symposium (November 2004).
x. Speaker, The Changing Landscape of the Fourth Amendment, Judges' Conference, United States Court of Appeals for the 8th Circuit (July 2004).
y. Commentator, *Blakely v. Washington*, Judges' Conference, United States Court of Appeals for the 8th Circuit (July 2004).
z. Testimony presented to Criminal Code Revision Commission (June 2004).
aa. South Dakota Trial Lawyers' Association – update on Criminal Law (April 2004).
bb. South Dakota Bar Commissioner (2004-2007).
cc. South Dakota Judges' Training, Search and Seizure (November 2003).
dd. Evidence CLE, State Bar of South Dakota (June 2003).
ee. South Dakota Judges' Training (May 2003).
ff. South Dakota Judges' Training – Search and Seizure (November 2001).
gg. Chair, Evidence CLE, South Dakota State Bar (2000).
hh. Speaker, South Dakota Trial Lawyers' Association Evidence Program (1999).
ii. Chair, Evidence CLE, South Dakota State Bar (June 1998), including update of CLE Evidence outline.
jj. Evidence CLE, South Dakota State Bar (March 1998).
kk. Board of Directors, Dakota Plains Legal Services (1997-2017).
ll. Tribal Court Training – Evidence, Pretrial Practice and Trial Practice, Rosebud Sioux Tribal Court (March-May 1996).
mm. Five State Regional Judges' Training (1994, 2002).
nn. Member of South Dakota Bar since 1993; member of Kansas Bar since 1978.
oo. American Bar Association, Section of Criminal Justice - prepared position papers on drug testing for Committee on Rules of Criminal Procedure and Evidence Section, in conjunction with AALS, for presentation in January 1990 and January 1991.
pp. South Dakota Magistrate's Institute – Overview of Criminal Law and Procedure (July 1986).
qq. Association of American Law Schools; reviewed casebook for Section on Criminal Justice (Fall 1985).
rr. National Association of Criminal Defense Lawyers; South Dakota Association of Criminal Defense Lawyers.

9. HONORS AND RECOGNITION

a. Dean Marshall M. McKusick Award (2015).
b. University of South Dakota School of Law John Wesley Jackson Award (2017, 2013, 1999, 1986).
c. University of South Dakota Belbas-Larson Award for Excellence in Teaching (2008).
d. Quoted favorably by Justice Stevens in *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008).
e. Nominee, Women Aware Award (2001).
f. Nominee, Spirit of South Dakota Award (2000).
g. Women In Law Attorney of the Year (1997).

10. GRANTS

Summer research grant from USD School or Law or USD annually since 1985.

11. CONSULTING ACTIVITIES

a. Informal consultation with many members of the South Dakota Bar on Evidence and Criminal Law cases.

12. UNIVERSITY COMMITTEE ASSIGNMENTS

a. University of South Dakota Law School Relocation Committee (2017).
b. Provost Search (2013-14).
c. Reviewer, Research Catalyst Program proposals for Office of Research and Sponsored Programs.
d. Judicial Board hearing examiner (2004-05).
e. Faculty Development Grant (2000, 2002).
f. Disciplinary Committee.
g. Member, USD Efficiency Committee on Academic Affairs (1995-96).
h. Representative, Affirmative Action/EEO (1992-95).
i. Competitive Scholarship Committee.

13. DEPARTMENT/DIVISION COMMITTEE ASSIGNMENTS

a. Dean Search Committee (2012-13, 1992-93, 1987-88)
b. Chair (2015-18, 2006-10), Admissions Committee; member for approximately 20 years
c. Faculty Performance Evaluation Committee (formerly Retention, Promotion and Tenure)(2009-18, 2007-08, 1999-2001, 1985-86).
d. Faculty Recruiting Committee, Chair (2011-14; Member (2003-04, 2004-05, 2005-06, 2007-08).
e. Mentor for new professors, as needed.
f. Member, Academic Affairs/Curriculum Committee (1990-93; 2000-03).
g. Advisor, Innocence Project of South Dakota (2004-10) (supervise cases from SD inmates handled by law students; administer project; organize and provide training).
h. Chair, Joint Law/Contemporary Media and Journalism Faculty Recruiting Committee (2003-04).
i. Member, University Research Council.
j. Chair (2000-2001); Member (1997-2000, 1985-86), Financial Aid/Awards Committee.
k. Advisor, NAPIL (National Association of Public Interest Lawyers (1999-2004).
l. Curriculum and Instruction Committee, Chair (1997-98); Member (1988-91).
m. EEO representative (1992-93, 1994-95).
n. Member, Discipline Committee (1987-88).
o. Member, Grievance Committee (appointed April 1986).

p. Member, Student Advisory Committee (1985-86).
q. Advisor, Women in Law (1984-present).
r. Advisor, Veterans Legal Education organization (2006-present).

14. DISSERTATION/THESIS COMMITTEE ASSIGNMENTS

a. Member of thesis committee, Adam Stratmeyer (2016-17).
b. Member of thesis committee, Brian Ney (2008).
c. Member of thesis committee, Heather Karp (2007).
d. Member of thesis committees, Lana Ewing, Autumn Ascano.
e. Member of thesis committee, Debi Bonds (2002-2004).
f. Member of two undergraduate Honors' Papers Committees (2001).
g. Member of thesis committee, Leslie Orien (2001).
h. Member of dissertation committee for Kari Scovel (2000).
i. Member of thesis committee for Gregory Giles, M.A. Theater (1989).

15. ACADEMIC RESPONSIBILITIES -- COURSES TAUGHT REGULARLY

a.	Criminal Law	LAW 704
b.	Criminal Procedure	LAW 754
c.	Advanced Criminal Procedure	LAW 875
d.	Evidence	LAW 823

Courses taught previously: Administrative Law, Pretrial Practice, Trial Techniques, Legal Writing

16. ADMINISTRATIVE/TECHNICAL RESPONSIBILITIES

a. Associate Dean (1993-1994).

17. PUBLIC SERVICE (see Professional Activities)

a. Speaker, OLLI classes (2017-18)(three classes for adult education program).
b. Speaker, Augustana College, Constitution Day (Fall 2007).
c. Guest Speaker, USD School of Education class (April 2007).
d. Speaker, ACLU (Sioux Falls meeting, February 2007).
e. J.A.I.L. Speaker (2005-2006).
f. Presenter, Chiesman Foundation Youth Conference (July 2005).
g. Presenter, South Dakota School Law Institute (June 2005).
h. Presenter, Red Road Gathering for Native American Youth (April 2005).
i. Freedom Forum, Native American Journalists Training – Criminal Law (October 2004).
j. Speaker, PATRIOT Act (October 2004).
k. Speaker, South Dakota Trial Lawyer's Assn. (June 2004).
l. Speaker for Girls' State (annually 2004-2010).

m. Commentator (TV, radio) on Criminal Law issues, in particular, Janklow case (Sept. 2003-March 2004).
n. Commentator, USD Political Science Conference (Spring 2003).
o. Several addresses and classes, USA Patriot Act (Summer and Fall 2003, Fall 2004).
p. Advisor, South Dakota Peace and Justice Center about habeas corpus and capital punishment.
q. Advisor, South Dakota Legislature in regards to inquiries about legal aspects of proposed legislation.
r. Speaker, South Dakota Advocacy Network for Women on role of women in legal profession (April 1998).
s. Coordinator, Gay-Military program for Women In Law (March 1998).
t. Speaker, South Dakota Peace and Justice meeting on habeas corpus and death penalty (March 1998).
u. Interview for week-long program on juveniles, NPR (February 1998).
v. Speaker, USD graduate education class (February 1998).
w. Chair, South Dakota State Bar Committee for the Active Participation of Women in the Bar (1998-2001).
x. Member of State Bar Committee on Women in Profession (1997-1998).
y. Radio interview KSCJ, Sioux City, regarding *Woodard* murder trial (November 1997).
z. Speaker, USD undergraduate enrollment honors program (November 1997).
aa. Witness for Women in Law mock trial (October 1997)
bb. Interview regarding death penalty for NPR (September 1997).
cc. Speech on Admissions to PAD pre-law group (March 1996).
dd. Commentator for KOLY radio, Mobridge, SD on aspects of trial for the murder of Candace Rough Surface (March - May 1996).
ee. Moderator, Women's Research Conference "Feminism and Firearms" (April 1994).
ff. Panelist, South Dakota Public Radio, discussing juries with Tom Sorenson and Greg Eiesland (April 1994).
gg. Boys' State Law presentation. (May 1994-96, 1998-2003).
hh. Introduced panelist for Indian Law Symposium, assisted with planning and implementation (Spring 1994).
ii. Ex-officio member of South Dakota Gender Fairness Study Committee (1993-1994).
jj. Southeast Sexual Abuse Training Project (legal issues surrounding sexual abuse) (April 1985).
kk. Review of two articles for Tenure Committee, Washburn University School of Law.
ll. Additional service projects are included in RPT file.

18. NAMES AND ADDRESSES OF THREE PERSONS IN YOUR FIELD ON OTHER CAMPUSES (or elsewhere) WHO MAY BE ASKED TO EVALUATE YOUR PROFESSIONAL REPUTATION.

a. Richard Henke, Thomas Cooley Law School, Lansing, MI.
b. Alex Glashauser, Washburn University School of Law, Topeka, KS.
c. Marla Mitchell, Thomas Cooley Law School, Lansing, MI.