

Improving the Criminal Justice System's Response to Victimization of Persons with Disabilities

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I. Introduction

One of the truly sad realities of the world we live in is that some of the most vulnerable persons in our society, those living with developmental disabilities, are at a much higher risk of criminal victimization than are others. Yet we hear very little about this problem, and we have a long way to go to fully understand it and develop tools and ideas to effectively address it. The time has come for criminal justice professionals to work together to better understand the dynamics of this serious problem, to establish policies and practices aimed at preventing this abuse from occurring in the first place and to more efficiently and effectively intervene to address it when it has occurred.

II. Scope of the Problem

Statistics relating to the criminal victimization of persons with disabilities are staggering. One in five persons in America has a mental or physical impairment, and for half of this population the disability is a severe one.² Numerous studies have shown that the risk of criminal victimization for persons with a disability is much higher than for persons without a disability.³ Persons with disabilities are four to ten times more likely to be abused than persons without disabilities.⁴ Sixty-eight to eighty-three percent of women with disabilities will be sexually assaulted in their lifetime.⁵ Children with disabilities are three times more likely than children without disabilities to be abused.⁶ The likelihood of sexual victimization is even higher for children with intellectual or mental health disabilities.⁷ The rate of violent crimes against persons with disabilities is also alarming. The United States Department of Justice reported that persons with disabilities experience violent crimes at more than twice the rate of persons without disabilities.⁸ Other physical abuse and financial exploitation of persons with disabilities is also far too

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² *First Response to Victims of Crime Who Have a Disability*, OVC Resource Center, Oct. 2002, p. 1, <http://www.disability-abuse.com/resources/OVC-ReportFirst-Response-To-Victims-Of-Crime-Who-Have-Disabilities.pdf> (last visited Sept. 1, 2015); DisabilityJustice.org, *Disability Demographics and Definitions*, <http://disabilityjustice.org/justice-denied/disability-demographics/> (last visited Aug. 5, 2015).

³ See BJS.gov, *Crime Against Persons with Disabilities, 2009-2013 – Statistical Tables*, http://www.bjs.gov/content/pub/pdf/capd0913st_sum.pdf (last visited Aug. 5, 2015); CivilRights.org, *Hate Crimes Against Individuals with Disabilities*, <http://www.civilrights.org/publications/hatecrimes/disabilities.html> (last visited Aug. 5, 2015).

⁴ DisabilityJustice.org, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last visited Aug. 5, 2015).

⁵ Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Sept. 1, 2015).

⁶ DisabilityJustice.org, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last visited Aug. 5, 2015).

⁷ *Id.*

⁸ DisabilityJustice.org, *Violent Crime and People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/violent-crime/> (last visited August 19, 2015).

common.⁹ As Colleen Wieck, Director of the Minnesota Governor's Council on Developmental Disabilities, put it in a 2009 report on this topic, persons with disabilities may be "the perfect, invisible victims."¹⁰ These individuals are often victimized repeatedly by the same person.¹¹ The majority of these abusers are known to the victim and it is often family members, classmates, caregivers, neighbors and staff members assigned to work with persons with disabilities who commit these crimes.¹²

Why is it that persons with disabilities fall prey to criminal victimization at such alarming rates? Persons with disabilities are taught to be compliant.¹³ These individuals are often unable to defend themselves¹⁴ and are more prone to accept improper advances without questioning or understanding the potential sinister motive behind them.¹⁵ Some persons with disabilities have limited communication skills, and they are often unable to describe what was done to them and by whom after the victimization has occurred.¹⁶ Many of these victims are often isolated, dependent on a small number of people, and live in segregated settings such as group homes.¹⁷ Other unique barriers also contribute to the increased risk of victimization of persons with disabilities, including social isolation; physical accessibility barriers; attitudinal behaviors; and dependence upon caretakers.¹⁸

Far too often crimes committed against persons with disabilities go unreported.¹⁹ This is often due to fear of retaliation or loss of care if the victim were to report the crime.²⁰ Limited advocacy resources on behalf of these vulnerable victims, including lack of access to lawyers, is also a factor involved in the underreporting of these crimes.²¹ A disability can affect a person's mental functioning, such as the ability

⁹ See Encarnacion Pyle, *Groups Team Up to Fight Crimes Against Elderly, Disabled*, The Columbus Dispatch, Apr. 25, 2014, available at <http://www.dispatch.com/content/stories/local/2014/04/24/fighting-crimes-against-elderly-and-disabled.html>.

¹⁰ Colleen Wieck, PH.D., Executive Director of the Minnesota Governor's Council on Developmental Disabilities, *The Perfect, Invisible Victim*, 2009, p. 2, <http://mn.gov/mnddc/resources/pdf/perfect-invisible-victim-mnddc.pdf> (last visited Sept. 8, 2015).

¹¹ DisabilityJustice.org, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last visited Aug. 5, 2015); *First Response to Victims of Crime Who Have a Disability*, OVC Resource Center, Oct. 2002, p. 1, <http://www.disability-abuse.com/resources/OVC-ReportFirst-Response-To-Victims-Of-Crime-Who-Have-Disabilities.pdf> (last visited Sept. 1, 2015).

¹² DisabilityJustice.org, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last visited Aug. 5, 2015).

¹³ Colleen Wieck, PH.D., Executive Director of the Minnesota Governor's Council on Developmental Disabilities, *The Perfect, Invisible Victim*, 2009, p. 2, <http://mn.gov/mnddc/resources/pdf/perfect-invisible-victim-mnddc.pdf> (last visited Sept. 8, 2015).

¹⁴ *Id.*

¹⁵ Joan R. Petersilia, *Crime Victims with Developmental Disabilities: A Review Essay*, *Criminal Justice and Behavior* Vol. 28, December 2001, p. 672, <http://cjb.sagepub.com> (last visited Sept. 9, 2015).

¹⁶ Colleen Wieck, PH.D., Executive Director of the Minnesota Governor's Council on Developmental Disabilities, *The Perfect, Invisible Victim*, 2009, p. 2, <http://mn.gov/mnddc/resources/pdf/perfect-invisible-victim-mnddc.pdf> (last visited Sept. 8, 2015).

¹⁷ DisabilityJustice.org, *Abuse and Exploitation of People with Developmental Disabilities*, <http://disabilityjustice.org/justice-denied/abuse-and-exploitation/> (last visited Aug. 5, 2015); Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, p. 5, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Sept. 1, 2015); Joan R. Petersilia, *Crime Victims with Developmental Disabilities: A Review Essay*, *Criminal Justice and Behavior* Vol. 28, December 2001, p. 672, <http://cjb.sagepub.com> (last visited Sept. 9, 2015).

¹⁸ Colleen Wieck, PH.D., Executive Director of the Minnesota Governor's Council on Developmental Disabilities, *The Perfect, Invisible Victim*, 2009, p. 2, <http://mn.gov/mnddc/resources/pdf/perfect-invisible-victim-mnddc.pdf> (last visited Sept. 8, 2015); Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Aug. 5, 2015).

¹⁹ Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Sept. 1, 2015).

²⁰ Joan R. Petersilia, *Crime Victims with Developmental Disabilities: A Review Essay*, *Criminal Justice and Behavior* Vol. 28, December 2001, p. 672, <http://cjb.sagepub.com> (last visited Sept. 9, 2015).

²¹ Colleen Wieck, PH.D., Executive Director of the Minnesota Governor's Council on Developmental Disabilities, *The Perfect, Invisible Victim*, 2009, p. 2, <http://mn.gov/mnddc/resources/pdf/perfect-invisible-victim-mnddc.pdf> (last visited Sept. 8, 2015).

to reason and use good judgment leading to the victim not reporting the crime.²² Crime victims with disabilities may also be embarrassed by what was done to them and may unjustifiably blame themselves for what occurred which can also lead to the failure to report the crime.²³ Some may not even realize they have been victimized due to lack of judgment or impaired cognitive abilities.²⁴ Many are fearful and untrusting of police and prosecutors and most do not fully comprehend the intricacies of the criminal justice system.²⁵

III. Ways to Help Overcome the Increased Rate of Victimization of Persons with Disabilities

Prevention of victimization is always the main priority. It is important to provide education to persons with disabilities and their families about appropriate safety precautions to take regarding activities they are involved in, including dangers associated with the use of the internet, proper management of their financial resources and who to call if they are in need of help. Unfortunately, there are predators looking for victims on the internet, phone scammers who often look for and prey upon the elderly and those with cognitive impairments and other criminals looking for victims who are easy to access, control and manipulate.

When prevention fails, however, it is important to work towards achieving full inclusion and full participation in the criminal justice system of all crime victims, including those with disabilities.²⁶ Networking and cross-training among criminal justice agencies and victim assistance programs is crucial.²⁷ These agencies can create joint training opportunities with disability advocacy programs and develop ways to communicate, such as e-mail listservs.²⁸ This level of communication allows timely information and ideas to be shared with individuals specializing in disability rights.²⁹ Utilizing resources of the community, such as schools, churches and citizen groups, also helps ensure that more people are aware of the issues and available resources.³⁰

When crimes against persons with disabilities occur, appropriate interviewing and intake procedures should be set in place. Victims with disabilities are often not interviewed because they may be thought of as a credibility risk.³¹ It is important to investigate and interview victims with disabilities just as in any other case because improper interviewing substantially limits the chances of prosecution.³² Law enforcement personnel may believe that a person cannot be interviewed because of the severity of an individual's disability, such as speech and communication problems.³³ Intellect, however, is often

²² See *First Response to Victims of Crime Who Have a Disability*, OVC Resource Center, Oct. 2002, p. 1, <http://www.disability-abuse.com/resources/OVC-ReportFirst-Response-To-Victims-Of-Crime-Who-Have-Disabilities.pdf> (last visited Sept. 1, 2015).

²³ Cheryl, Guidry Tyiska, *Working with Victims of Crime with Disabilities*, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Sept. 1, 2015).

²⁴ *Id.*

²⁵ *See id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Office for Victims of Crime, U.S. Dept. of Justice, *Victims with Disabilities: The Forensic Interview*, <http://ojp.gov/ovc/publications/infores/pdfxt/VictimsGuideBook.pdf> (last visited Sept. 1, 2015).

³² *Id.*

³³ *Id.*

unaffected in persons with such problems³⁴ and interviews need to be attempted utilizing family members, social workers or other caregivers to assist if needed.

Criminal justice agencies should assess on a case by case basis, potential accommodations, including the use of assistive technology in interviewing crime victims with disabilities.³⁵ This will help crime victims with disabilities to better communicate with law enforcement officers, prosecutors, judges and victim advocates.³⁶ Victim assistance and criminal justice agencies should also incorporate into existing policies specific procedures related to persons with disabilities who are victims or witnesses in criminal cases.³⁷

IV. Extra Support and Sensitivity During the Investigation Process

When investigating crimes against persons with disabilities, it is important for law enforcement investigators to take special steps to ensure that they provide extra support and treat with sensitivity crime victims who have disabilities. This would include teaming with child protection workers in the investigative and interview process if the victim is a juvenile with disabilities or teaming with adult protection workers if the victim is an adult with disabilities. Consulting with and utilizing other advocates for persons with disabilities working in state agencies or private organizations is also a good idea prior to or during the interview process. First and foremost, it is important that it be made clear to the victim with disabilities at the outset that what has occurred is not their fault. It is also important to take extra precautions to help reduce the stress and anxiety that a victim with disabilities will likely have when speaking to an investigator. Consideration should be given to meeting with the victim at his or her home or group residence so the victim feels more comfortable and at ease.

While it is important to assess the ability of victims with disabilities to understand and follow instructions, it is equally important to let the victims speak for themselves. It is also important for law enforcement investigators in cases involving victims with disabilities to meet with the victim's social worker, caregiver or therapist to obtain suggestions as to how to best communicate with the victim. Law enforcement investigators should work to build rapport with a victim with disabilities to make the victim feel comfortable and at ease. This will assist in later communication that the victim will have with the prosecutor and other persons involved in the case.

V. Extra Support and Sensitivity During the Charging and Pre-trial Process

Similar to the investigation process by law enforcement, the prosecutor should also consider meeting with a victim with disabilities at the victim's home or group residence so the victim feels more comfortable and at ease prior to charging, if time permits, and prior to a trial if charges are filed. It is also important for a prosecutor to work with and obtain assistance from the ongoing social worker assigned to a victim with disabilities as well as the victim's family and other caregivers.

Prior to any trial, the prosecutor and/or victim assistance staff in the prosecutor's office should take extra time to provide a victim with disabilities with a tour of the prosecutor's office, the courthouse and the courtroom to help reduce the victim's fear and anxiety. The prosecutor should address directly with the victim any fear he or she may have regarding seeing the defendant in the courtroom during the trial. The

³⁴ *Id.*

³⁵ Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (last visited Sept. 1, 2015).

³⁶ *Id.*

³⁷ *Id.*

prosecutor should also address any other safety and security issues the victim may have concerning the case.

One relatively new aspect of providing additional support to vulnerable victims during interviews or contact with the victim at the prosecutor's office or during trial is the use of support animals, specifically dogs, to provide support to and ease the fear and anxiety of a victim with disabilities. Several prosecutors across the country have already begun using dogs in this manner and such animals are specifically trained for this purpose by several organizations in the United States.³⁸ It is truly amazing to see how much more at ease a victim with disabilities or a child victim or witness becomes when a courthouse dog is sitting next to them during interviews or at trial.

VI. Use of Specific Laws Designed to Protect Vulnerable Victims

Prosecutors should be encouraged to use hate crime statutes or other specific statutory provisions to charge defendants who commit crimes against persons with disabilities or to enhance the penalties for such crimes upon conviction. In Minnesota, there are a number of specific crimes related to victims with disabilities. These include:

1. Mistreatment of Persons Confined³⁹

- Anyone in charge of or employed in a public or private institution who intentionally abuses or ill-treats any person confined therein who is mentally or physically disabled or who is involuntarily confined therein by court order is guilty of a gross misdemeanor.

2. Mistreatment of Residents or Patients⁴⁰

- Anyone in charge of or employed in any facility licensed by the state who intentionally abuses, ill-treats, or culpably neglects any patient or resident therein is guilty of a gross misdemeanor.

3. Criminal Abuse⁴¹

- A caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion is guilty of a felony if the act results in substantial bodily harm, great bodily harm, risk of death or death (the penalty is a gross misdemeanor if only bodily harm results).

4. Criminal Neglect⁴²

- A caregiver or operator (i.e., person in charge of administrative activities or decision-making for a facility) who intentionally neglects a vulnerable adult or knowingly permits conditions to exist that result in the abuse or neglect of a vulnerable adult is guilty of a gross misdemeanor.

³⁸ See Courthouse Dogs (<http://www.courhousedogs.com/>); and Florida Courthouse Therapy Dogs (<http://www.flcourhousedogs.com/>) for two examples of such organizations.

³⁹ Minn. Stat. § 609.23.

⁴⁰ Minn. Stat. § 609.231.

⁴¹ Minn. Stat. § 609.2325.

⁴² Minn. Stat. § 609.233. (It should be noted that several exemptions and affirmative defenses exist to this crime).

- A caregiver or operator who intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision, when reasonably able to make such provisions, is guilty of a felony if the deprivation could likely result in substantial or great bodily harm or the deprivation occurred over an extended period of time.

5. Financial Exploitation of a Vulnerable Adult⁴³

- This statute defines various acts of breach of fiduciary obligations, contractual obligations, and theft from or involving a vulnerable adult; and the failure to use the real or personal property or other financial resources of a vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct, or supervision.
- The penalties for these crimes range from gross misdemeanors to felonies depending upon the specific violations and value of property stolen or misappropriated.

6. Deceptive or Unfair Trade Practices Involving Elderly or Disabled Victims⁴⁴

- Any person who commits a charitable solicitation law violation, a consumer fraud law violation, a deceptive trade practices law violation, or a false advertising law violation which is directed at a victim with disabilities or senior citizen and which causes the victim to suffer loss or encumbrance of a primary residence, principle employment or major source of income; substantial loss of property set aside for retirement or personal or family care and maintenance; substantial loss of pension, retirement plan, or government benefits; or substantial loss of other assets essential to the victim's health or welfare is guilty of a gross misdemeanor.

7. Criminal Sexual Conduct⁴⁵

- Criminal Sexual Conduct charges can occur if the perpetrator knows or has reason to know that the victim is mentally impaired, mentally incapacitated or physically helpless regardless of whether the victim consents to the sexual contact.
- Criminal Sexual Conduct charges can also occur if the perpetrator is in a "significant relationship" with the victim (including caregivers who reside in the same dwelling as the victim).
- Criminal Sexual Conduct charges can also occur if the perpetrator is an employee, independent contractor or volunteer of a state, county, city or privately operated correctional or treatment facility that houses vulnerable adults.

8. Failure to Report⁴⁶

- Any mandated reporter⁴⁷ who knows or has reason to believe that a vulnerable adult is being or has been mistreated is guilty of a misdemeanor if they intentionally fail to make a report;

⁴³ Minn. Stat. § 609.2335.

⁴⁴ Minn. Stat. § 609.2336.

⁴⁵ Minn. Stat. §§ 609.342-609.345.

⁴⁶ Minn. Stat. §§ 609.234 and 626.557-626.5572.

⁴⁷ "Mandated reporter" is defined in Minn. Stat. § 626.5572, subd. 16. Mandated reporters include a professional or professional's delegate engaged in social services, law enforcement, education, the care of vulnerable adults, nursing, physical and family therapy, psychology, behavioral health, dietetics or nutrition, dentistry, medicine, veterinary medicine, among others.

knowingly provide information which is false, deceptive or misleading; or intentionally fail to provide all of the material circumstances surrounding the incident.

VII. Extra Support and Sensitivity During the Trial

It is important for the prosecutor to request the judge to allow for appropriate courtroom accommodations to make victims and witnesses with disabilities feel comfortable in a courtroom setting. Such accommodations could include ensuring that wheelchair accessible courtrooms are utilized; providing sign language interpreters or other communication enhancement accommodations whenever necessary; allowing the presence of a support person (or pet or stuffed animal) to be near the victim or witness with disabilities while they are testifying; using a modified oath, which is more easily understandable to a victim or witness with disabilities; making modifications to the setup of the courtroom (such as allowing the victim or witness with disabilities to testify at a table located in front of the bench rather than from behind the witness stand); and, if necessary, allowing attorneys to use leading questions in eliciting testimony from a victim or witness with disabilities. As noted above, one of the newest forms of courtroom support utilized in a number of jurisdictions across the country is the use of animals, specifically dogs, to support vulnerable witnesses.⁴⁸ Such dogs can provide significant support and help reduce anxiety and make a vulnerable victim or witness feel much more comfortable in a courtroom, which can otherwise be a very daunting and scary experience to a person with disabilities.

VIII. Seeking an Appropriate Sentence

It is important for the prosecutor or victim services professional to work with a victim with disabilities and the victim's family to help them develop a victim impact statement to be read in court prior to the sentencing of a convicted offender. Victim impact statements are often the only opportunity the victim and members of the victim's family have to let both the court and defendant know how much they have been adversely affected by the crime. Under Minnesota law all crime victims have the right to make a victim impact statement.⁴⁹ Such statements can be delivered orally by the victim, read by the prosecuting attorney, victim services professional or a family member, if requested, or delivered to the court in writing.

Prosecutors and victim services professionals in the prosecutor's office should also help the victim with disabilities file an appropriate restitution claim for the financial loss caused by the crime. Restitution ordered by the court can be required to be paid from prison wages if the defendant is sentenced to prison for the crime and can be entered as a judgment which can be pursued through civil court action if the restitution is not paid.⁵⁰

If appropriate, a prosecutor should discuss with a victim with disabilities restorative justice options relating to the crime, which could include the requirement of the offender to participate in group conferencing, circle sentencing or a restorative justice panel with the victim present.⁵¹ Such innovative

⁴⁸ For a summary of recent cases on the use of facility dogs by witnesses while testifying in court, see <https://www.animallaw.info/article/recent-cases-use-facility-dogs-witnesses-while-testifying> (last visited Aug, 28, 2015).

⁴⁹ Minn. Stat. § 611A.038.

⁵⁰ Minn. Stat. § 611A.04.

⁵¹ Restorative justice is an approach to justice that focuses on the needs of the victims and the offenders, as well as the involved community, instead of satisfying abstract legal principles or punishing the offender. Victims take an active role in the process, while offenders are encouraged to take responsibility for their actions, to repair the harm they've done-by apologizing, returning stolen money or by performing community service. In addition, it provides help for the offender in order to avoid

sanctions may help the victim recover from the trauma that has been inflicted upon them, but caution must be exercised to ensure that this is something the victim wishes to do and that these types of meetings with the offender will not cause further trauma.

Prosecutors should be encouraged to seek upward departures from sentencing guidelines if a conviction is obtained in a case involving a victim with disabilities due to the particular vulnerability of the victim whenever this is appropriate and authorized under the law. Minnesota Sentencing Guidelines allow a prosecutor to seek an upward departure on this basis.⁵²

IX. Training

It is important that sensitivity training dealing with crime victims with disabilities be made available on an ongoing basis to law enforcement agencies, prosecutors, probation officers, and others involved in the investigation, prosecution and disposition of cases involving crimes committed against victims with disabilities. Such training should include specifics on the difficulties and challenges associated with victims who have disabilities and other unique aspects associated with cases of this nature.

X. Conclusion

This paper has discussed some of the ways to help ensure full inclusion of crime victims with disabilities in the criminal investigation, charging and trial process and to achieve justice for this vulnerable population by holding accountable those who have committed these insidious crimes. Criminal justice agencies and victim assistance programs should make it a priority to advocate for victims with disabilities and implement appropriate procedures for handling these cases.

Those of us who work in law enforcement and prosecution must work to ease the fears and uncertainties that crime victims or witnesses with disabilities face when they are required to participate in the criminal justice process. We must impress upon vulnerable victims that we care about their well-being and safety. We must do all that can be done to empower persons with disabilities who are victims of a crime to come forward and share their stories of abuse and victimization. We must be committed to full and thorough investigations of crimes against these vulnerable victims, even in those cases where their disabilities make it difficult or impossible for them to describe what has been done to them or to testify in court. We must be prepared to take on the unique challenges of the cases associated with crimes committed against persons with disabilities and do all we can to bring to justice those who have harmed these vulnerable victims. These are some of the most important and difficult cases any prosecutor will handle in his or her career, and they can also be some of the most rewarding. Improved opportunities for training of law enforcement, prosecutors and others involved in the criminal justice system regarding how to handle the unique circumstances associated with crimes committed against persons with disabilities are needed. A strong commitment from the leaders of law enforcement and prosecutorial agencies is vital to ensure that the necessary resources to pursue crimes against persons with disabilities exist and to make these cases a priority. Then, and only then, will justice have a decent chance to prevail in these most challenging and difficult cases.

future offenses. It is based on a theory of justice that considers crime and wrongdoing to be an offense against an individual or community, rather than the state. (Wikipedia.org).

⁵² Minnesota Sentencing Guidelines, Guideline 2, subd. D., 3b(1).