DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE

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SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE

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Prior Evidence of the Problem

National reports have documented the failure of state and local governments and their courts to implement, as required, the right to counsel in misdemeanor cases for accused persons unable to afford a lawyer. This report is further evidence that we are dealing with an extremely serious and pervasive problem that can no longer be ignored or tolerated. The American Bar Association (ABA) Section of Civil Rights and Social Justice is committed to revealing the kinds of violations discussed in this report, and we are determined to investigate other jurisdictions and expose abuses that are found.

The most recent and extensive report about public defense in America was published in 2011 by The Constitution Project under auspices of the National Right to Counsel Committee,[1] which asked investigators to observe misdemeanor proceedings in a number of state courts. The report offered the following summary of the gulf that exists between legal requirements and court practices: "[T]here is a shocking disconnect between the system of justice envisioned by the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's [misdemeanor] courts. These conclusions were borne out by investigations conducted on behalf of the Committee during 2006 by three experienced criminal justice professionals who visited court proceedings in eight states across the country."[2] One of the common practices documented by investigators was prosecutors negotiating plea agreements directly with defendants who had the right to a lawyer but had never validly relinquished that right before speaking to the prosecutor. In fact, in some courts, defendants are required to speak with the prosecutor before judges will even appoint a lawyer for a defendant who cannot afford counsel.[3]

The Constitution Project's report was not the first to expose what occurs in misdemeanor courts in this country. Similar practices were documented in other national reports published by

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[1] The committee was organized by the Constitution Project of Washington, D.C. in cooperation with the National Legal Aid & Defender Association. *See* JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* https://www.opensocietyfoundations.org/reports/justice-denied-americas-continuing-neglect-our-constitutional-right-counsel (last visited July 27, 2017).

[2] *Id*. at 87.

[3] "In several courts, the Committee's investigators found that defendants were encouraged to negotiate with prosecutors without the assistance of counsel, and in one court they were required to do so. These negotiations frequently involved a discussion of the charged offenses and led to guilty pleas. As one of our investigators explained in his report: "In . . . [this] County defendants are frequently told by the judge to negotiate with the prosecutors before . . . [the judge would consider] appointing a lawyer. These negotiations usually result in guilty pleas. No lawyer for defendant is present or involved." *Id*. at 89.

the American Bar Association Standing Committee on Legal Aid and Indigent Defendants[4] and by the National Association of Criminal Defense Lawyers.[5] One of the authors of the latter report testified in 2015 in a public hearing of the Senate Judiciary Committee on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors:

> [I]n many places the right is more an illusion and there are systematic violations of the right to counsel established by the Supreme Court. This means that every day people across the country go to court and end up convicted of [misdemeanor] crimes without ever having the opportunity to talk with a lawyer and to have the help of a lawyer to negotiate their case with a prosecutor or advocate for them to a judge or jury. The protection that the Sixth Amendment contemplated for the individual against government mistake or abuse is simply not provided in those cases.[6]

At this same hearing, Republican Senator Charles Grassley, Chair of the Senate Judiciary Committee released a public statement about the failure of state courts to implement the right to counsel: "[T]he Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long."[7]

This report reveals practices observed in Nashville, Tennessee, misdemeanor courts. The report also explains the reasons the practices violate Tennessee law, federal constitutional requirements, ethical rules, and American Bar Association Criminal Justice Standards.

This Report about Nashville

At the request of the ABA Section of Civil Rights and Social Justice, ArchCity Defenders of St. Louis[8] conducted a court watching program at the Davidson County General Sessions

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[4] GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 24-5 (ABA Standing Comm. Legal Aid & Indigent Defendants (2004)).

[5] Robert C. Boruchowitz, Malia N. Brink and Maureen Dimino, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14-19 (Nat'l Assoc. Crim. Defense Lawyers 2009) (hereafter MINOR CRIMES, MASSIVE WASTE).

[6] Testimony of Professor Robert C. Boruchowitz, Senate Judiciary Committee, May 13, 2015, On Misdemeanor Public Defense 2, *available at* https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Boruchowitz%20Testimony.pdf (last visited July 10, 2017).

[7] Statement by Senator Chuck Grassley of Iowa, Chairman, Senate Judiciary Committee, Hearing on "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," May 13, 2015, *available at* https://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-protecting-constitutional-right (last visited July 10, 2017).

[8] As stated on its website, "ArchCity Defenders (ACD) is a 501(c) 3 non-profit civil rights law firm providing holistic legal advocacy and combating the criminalization of poverty and state violence against poor people and people of color. ACD uses direct services, impact litigation, and policy and media advocacy as its primary tools to promote

Criminal Court in Nashville. The observations were undertaken by volunteer lawyers on Monday, September 12, 2016, preceded by a several-hour training program on Friday afternoon, September 9, led by ArchCity Defenders' Executive Director, Thomas B. Harvey. .After completing their court watching, the volunteer lawyers submitted written accounts of their observations, which are the basis for much of this report.

The purpose of the program was to determine the manner in which the right to counsel is administered in misdemeanor courts in Nashville. In addition, observers wanted to learn whether defendants are sometimes imprisoned for their inability to pay fines and fees assessed by these courts, frequently without legal representation or inquiry of the defendants' ability to pay the costs imposed. The observations in Nashville are the launch of a larger, national project to review practices in misdemeanor courts in other states throughout the country.

The Right to Counsel in Tennessee Misdemeanor Cases

In 1972, the United States Supreme Court in Argersinger v. Hamlin[9] held that, absent a valid waiver of counsel, the right to a lawyer at government expense applied to defendants charged with misdemeanors that resulted in a loss of liberty.[10] Thirty years later, in Alabama v. Shelton,[11] the Supreme Court went further holding that a suspended sentence in a misdemeanor case could not be imposed unless the defendant was afforded the assistance of counsel. By that time, however, Tennessee (and many other states) already required the appointment of counsel where a defendant "*may* be subjected to a loss of liberty"[12] following conviction. Since a suspended sentence "may end up in the actual deprivation of a person's liberty," such a sentence may not be imposed in Tennessee unless the defendant was afforded

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justice, protect civil and human rights, and bring about systemic change on behalf of the poor and communities of color directly impacted by the abuses of the legal system." *Available at* http://www.archcitydefenders.org/ (last visited July 10, 2017).

[9] 407 U.S. 25 1972).

[10] Nine years earlier in Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the Constitution's Sixth Amendment right to counsel clause required that defendants charged with felonies and unable to afford a lawyer in state courts be provided a lawyer unless they validly waived their rights to legal representation. The right to counsel in juvenile delinquency cases was recognized by the Supreme Court in In re Gault, 387 U.S. 1 (1967).

[11] 535 U.S. 654 (2002).

[12] Hickman v. State, E2003-00567-CCA-R3PC, 2004 WL 170351 (Tenn. Crim. App. Jan. 28, 2004) (citing State v. Tyson, 603 S.W.2d 748, 752 (Tenn. Crim. App. 1980)). *See also* Tenn. Code Ann. § 40-14-102: ("Every person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for the person's defense, as well to facts as to law.")

the opportunity to be represented by counsel in the original prosecution or executed a valid waiver of the right to legal representation.[13]

Waiver of the Right to Counsel in Tennessee

Under Tennessee court rules, statutes and case law, judges are required to follow specific and thorough procedures before permitting a criminal defendant to waive the right to counsel. Rule 44 of the Tennessee Rules of Criminal Procedure, which is applicable in General Sessions Court by virtue of Tennessee Rule of Criminal Procedure 1(b), states that before accepting a waiver of the right to counsel, "the court shall: (A) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and (B) determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters." Further, the rule provides that "[a] waiver of counsel shall be in writing."

After the U.S. Supreme Court decision in Von Moltke v. Gillies,[14] which established a strong presumption against waiver of the Sixth Amendment right to counsel, Tennessee's Supreme Court adopted the same strict standard and guidelines for use by trial judges in evaluating a defendant's waiver of the right to counsel.[15] In accord with the guidelines, judges must "investigate as long and as thoroughly as the circumstances of the case before him demand" to determine if there is an intelligent and competent waiver by the accused:[16]

> The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a *penetrating and comprehensive examination of all the circumstances under which such a plea is tendered*.[17]

Tennessee's courts repeatedly have reaffirmed these standards, with the Court of Criminal Appeals recently reversing three convictions due to invalid waivers of the right to counsel.[18]

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[13] State v. Hernandez, 2013 LEXIS 366, (Tenn. Crim. App. at Nashville, May 2, 2013).
[14] 332 U.S. 708, 723-24, 68 S.Ct. 316, 323 (1948).
[15] State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984) (quoting Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316 (1948)).
[16] *Id*.
[17] *Id*. (emphasis added).
[18] State v. Mark Stephen Williams, 2016 WL 3704664 (Tenn. Crim. App. at Knoxville, July 6, 2016) (unpublished opinion); State v. Charles Fletcher, 2014 LEXIS 780 (Tenn. Crim. App. at Knoxville, Aug. 11, 2014); State v. Charles Phillip Maxwell, 2011 Tenn. Crim. App. LEXIS 201 (Tenn. Crim. App. at Nashville, March 16, 2011).

Davidson County's General Sessions Criminal Court

The General Sessions Court is a high volume limited jurisdiction court that hears misdemeanor and felony cases. The court has 11 judges elected to eight-year terms. There also are five law-trained judicial commissioners who conduct probable cause hearings on criminal warrant applications and a referee who handles non-traffic metro ordinance violations and environmental cases.

While attending misdemeanor courts, volunteer lawyers repeatedly observed both judges and prosecutors violate indigent defendants' right to counsel under Tennessee law. Prosecutors also were seen violating their duties under Tennessee Rules of Professional Conduct. Moreover, observers noted that the courtrooms were not staffed full-time by lawyers from Davidson County's Metropolitan Public Defender's Office.[19]

Observations in Court 1A: Prosecutor's Role in Securing Guilty Pleas

All accused persons who appear in this court are charged with misdemeanor offenses, the least serious of which carries up to 30 days in jail and a maximum fine of $50. Therefore, absent a valid waiver of counsel, all defendants qualify under Tennessee law for appointment of a defense lawyer if they are unable to afford a reasonable attorney's fee.[20]

All defendants who appear in Court 1A were given state citations to appear rather than taken into custody. In 2015, 33,260 defendants received citations and scheduled to appear in Court 1A; in 2016, 30,215 defendants received citations and scheduled to appear in Court 1A.[21] While many of these defendants are charged only with driver's license offenses (which are criminal offenses carrying jail time), more than a third of them are charged with other kinds of misdemeanors.[22] Nevertheless, during 2015 and 2016, approximately 80% of defendants charged by citation were not represented by a lawyer when their charges were resolved.[23]

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[19] Later, we were informed that the absence of assistant public defenders available to accept appointments to cases was due to insufficient resources. One assistant public defender was present in the courtroom, but this individual was limited to assisting indigent clients who had come to the agency's office in advance of the court date and sought representation. This same lawyer also was present to speak to all foreign-born defendants.

[20] *See* notes 10 through 13 *supra* and accompanying text.

[21] Executive Summary, State Citations Filed January 2014 through December 2016, Metropolitan Government of Nashville and Davidson County 2 (Feb. 16, 2017).

[22] Comparison of Citation Bookings with Only Drivers License Charges to Those Having At Least One Non-Driver-License Charge, Metropolitan Government of Nashville and Davidson County 1 (March 9, 2017).

[23] Number of Defendants Without a Lawyer at Disposition Disposed in General Sessions Court 2015 / 2016, Metropolitan Government of Nashville and Davidson County 1-2 (March 24, 2017).

On the day of observations, court observers witnessed defendants being booked, photographed, and fingerprinted in a room across the hall before being ushered into Court 1A. When defendants arrived, no judge was present. A prosecutor was there, however, and she announced to the people in the room that all defendants who wanted to plead guilty should approach her, and she read a list of defendants' names. In response, a number of defendants got up and went to the prosecutor, who informed each of them of their charges. The prosecutor then offered a plea agreement to each defendant separately, usually a guilty plea in return for a suspended sentence along with various other conditions, ranging from fines to attending a class.

Court observers also witnessed the prosecutor calling up groups of multiple defendants to plead guilty together for the same crime. In one instance, a group of three defendants were charged with possession of drugs and drug paraphernalia, which were discovered during a traffic stop. In exchange for a guilty plea, the prosecutor offered each defendant a suspended sentence, a fine ranging from $150 to $250 and up to four days in jail if they failed to complete a class. The prosecutor negotiated the pleas simultaneously, and each of the defendants accepted the plea bargain.

In another instance, court observers witnessed the prosecutor call up a group of five defendants, inform them they were charged with driving with a suspended license and offer each a plea bargain. The prosecutor told these defendants that if they pled guilty, they would receive a sentence of two days in jail if their license was still suspended. When one defendant asked to see a judge, or to discuss the guilty plea separately from the rest of the group, the prosecutor informed the defendant that this was impossible: either the defendant would have to plead guilty or not guilty. When the defendant hesitated, the prosecutor told the defendant her case would be set for trial, and that she could talk to the judge. The prosecutor informed the remainder of the defendants that they could either take the plea, or go to trial, like the other defendant. The remaining four defendants took the uncounseled plea negotiated by the prosecutor.

At no point in this process did court observers witness the prosecutor inform defendants of their right to an attorney. Nor did they hear her ask defendants if they had an attorney, if they could afford an attorney, or if they wanted to waive the right to counsel when the judge took the bench. The prosecutor also did not inform defendants that that there may be "collateral consequences" of pleading guilty, or explain the meaning of a collateral consequence.[24] Nor did court observers hear the prosecutor inform defendants about the process for them to seek

[24] For further information about collateral consequences, *see* notes 44 and 48 and accompanying text *infra*.

waiver of fines, fees, and/or court costs if they could not afford to pay them.[25] Instead, they witnessed the prosecutor negotiate plea agreements with numerous uncounseled defendants, and then announce to defendants that they should wait for the clerk to "go over [their] rights." The clerk subsequently called up each defendant planning to plead guilty to sign a waiver of their rights and instructed defendants to wait for the judge, who would be coming to the courtroom.

Denial of Access to Uniform Affidavit of Indigency

The preceding section describes how one defendant in a group of five declined the state's offer of a guilty plea, prompting her case being set for trial. Court observers followed up and spoke separately with her. She was a single black woman, age 37, with three children, ages 14, 10, and 8. Her disabled grandmother also lived with her. She worked two jobs to take care of her family and brought home just under $1200 monthly. After paying rent of $715, she had very little left to meet everyone's needs. She reported having been to Court 1A five times in the past two years, facing charges of driving on a suspended license. Each time, her experience was the same. She was assessed a fine she could not afford and, for this reason, she was unable to get her license reinstated.[26]

While observers were talking to this defendant, a bailiff who had been present in the court approached them. The bailiff explained the defendant could go to the clerk's office on a different floor of the courthouse and ask for an indigency affidavit form, which if she completed, could result in the reduction of her fines.[27] The woman went to the clerk's office and returned

[25] "Fines, costs and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of the defendants to pay the assessed amount." MINOR CRIMES, MASSIVE WASTE, *supra* note 5, at 12-13.

[26] She also described seatbelt checkpoints set up at intersections in her neighborhood which led to her ticket for driving while suspended. At these checkpoints, two officers in marked vehicles were stationed at gas stations while another stopped drivers as they passed by. Officers checked to see if drivers had their seat belts fastened and then asked each of them for their driver's license and insurance.

[27] A copy of the Uniform Affidavit of Indigency form is attached as Exhibit A to this report. As stated on the form, it has been prepared pursuant to Tennessee Supreme Court Rule 13, which pertains to the appointment of counsel. If an accused does not waive the right to counsel and wants the court to appoint a lawyer, the affidavit form is to be completed. Apparently the completed form can also be used by a defendant to reduce and even eliminate a fine, fees or court costs that would otherwise be imposed by the court. In at least one state, the highest court has held that imposition of discretionary legal financial obligations requires the judge to conduct an individualized inquiry into defendant's ability to pay. *See* State v. Blazina, 344 P.3d 680 (Wash. 2015). In Turner v. Rogers, 564 U.S. 431 (2011), the Supreme Court held that due process is violated when a court orders a parent in a civil contempt proceeding jailed for failure to pay child support, without first inquiring into the parent's ability to pay. In so doing, the Supreme Court urged that "safeguards [for the defendant] include (1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and

with the affidavit. She told the observers that during all of her prior appearances in General Sessions Court, no one had ever mentioned this form to her despite the fact that she repeatedly had told the court she was unable to afford the fines assessed.

Several of the court observers then went to the clerk's office and asked for an indigency affidavit. The clerk offered a single copy of the form. When the observers asked for 10-15 copies of the form, explaining they had encountered other people who were unable to pay the fines they owed in Court 1A, the clerk replied she was only permitted to hand out one copy, and people who needed them had to request them from her directly. When the observers asked how defendants were supposed to know that these forms existed, she replied they would have to know they existed in order to request them. However, no signs were displayed either in the courtroom or in the clerk's office indicating the existence of the form.

Decisions of the U.S. Supreme Court have made clear that persons cannot be jailed because they are too poor to pay fines that courts impose.[28] Besides jail, however, individuals often do suffer adverse consequences, such as losing a driver's license or the inability to have it reinstated, when they are unable to pay fines and court costs imposed in criminal cases. Although our observers in Court 1A did not witness persons being imprisoned for fines they could not afford, judges apparently impose fines without regard to whether a defendant can reasonably afford them. Observers never saw any defendants required or invited to complete the indigency affidavit prior to their case being resolved, nor did they see the indigency form routinely made available to defendants. But as observers learned from speaking to the woman whose case was set for trial, defendants in Nashville who appear in Court 1A experience adverse consequences as a result of the court's failure to inquire about their financial situation before imposing fines, fees and costs.

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questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. *Id*. at 448-47. Also, some courts, such as in San Diego, CA, post on their websites a range of alternatives for defendants who are unable to pay fines, including working out payment plans, a reduction in the total fine, and discharging up to one-half of the amount due through community service, to cite just a few examples. *See* *http://www.sdcourt.ca.gov/portal/page?_pageid=55,1890965&_dad=portal&_schema=PORTAL* (last visited July 28, 2017).

[28] In Bearden v. Georgia, 461 U.S. 660 (1983) the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id*. at 672-73. *See also* Tate v. Short, 401 U.S. 395, 398 (1971) (state cannot convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); and Williams v. Illinois, 399 U.S. 235, 241-42 (1970) (an indigent defendant cannot be imprisoned longer than the statutory maximum for failing to pay his fine).

Observations in Court 1A: Judge's Role in Securing Guilty Pleas

When the judge arrived, court observers witnessed her call up each defendant by name and ask if they would plead guilty or not guilty. After defendants announced they would plead guilty, the judge read the plea agreement and confirmed with the clerk or the prosecutor that the plea agreement had been signed by the defendant. The judge did not inquire whether the defendants understood the plea agreement or its consequences; did not inform defendants of their right to counsel and to a trial; and did not ask if defendants were waiving any of their rights. After accepting the pleas, the judge announced that she would return to the bench after the clerk had seven more pleas prepared. During the morning's court session, this process was repeated several times.

Observations in Court 3A: Judge's and Prosecutor's Roles in Securing Guilty Pleas

Court 3A is a criminal bond trial/hearing docket for Nashville's General Sessions Court. All cases on the docket are criminal and involve felony and/or misdemeanor charges. Many of the defendants appearing in this courtroom are represented by defense counsel. On the day of observations, the judge opened court with a general announcement of defendants' legal rights, stating "you have the right to a speedy public trial; you have the right to counsel at all stages of the proceedings; but if you plead guilty, you waive the right to a jury trial."

After the docket was called, the clerk informed the judge there were two unrepresented defendants. One of these defendants, a young white male, approached the podium when his name was called and told the judge he was representing himself. The judge asked him how he pleads, and he stated, "Guilty." The prosecutor told the judge he would talk to the defendant. The judge did not ask the defendant if he could afford defense representation and, if he could not, whether he would like to have the court appoint a lawyer for him.[29]

Court observers witnessed the discussion between this young man and the prosecutor. The prosecutor told him to plead guilty and his sentence would be attending "two classes." The prosecutor also said, "if you do it, the charges will be dismissed and can be expunged. If not, you get ten days in jail. Today, you plead to driving on a suspended license and simple possession. Sound good? Take the classes, the charges will be dismissed, the other two

[29] Previously, Rule 44 of the Tennessee Rules of Criminal Procedure was quoted. *See* text preceding note 14 *supra*. The rule provides that a court shall "advise the accused in open court of the right to the aid of counsel *at every stage of the proceedings*," and "determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters." (Emphasis added).

charges will be dropped." The defendant agreed. Observers never witnessed the prosecutor inform him of the procedure for obtaining an attorney.

When the judge reentered the courtroom, he called this man to the bench, and the prosecutor announced the agreement. The judge had already asked him whether he had an attorney, but the judge did not mention the right to counsel nor inform defendant of the consequences of his guilty plea. The prosecutor announced the defendant was pleading guilty to driving on a suspended license and simple possession, and the other charges would be dropped; however, he had to take two classes, which consisted of two eight-hour courses. The judge told the defendant he would go to jail for ten days if he failed to take the classes. The plea was entered "under advisement."[30] He was again informed that if he took the two classes, he would avoid jail. Defendant signed the paperwork while at the podium. During his two interactions with the defendant, the judge never discussed the defendant's right to counsel, nor whether the defendant wished to waive that right; the defendant also never executed a waiver of the right to counsel in the judge's presence.

Court observers also witnessed an unrepresented young black man interact with the prosecutor and the judge. When this defendant entered the courtroom, he informed the prosecutor that he missed the docket call. The prosecutor asked the defendant whether he had an attorney and he stated, "No." Upon learning his name, the prosecutor looked up his charge on the docket. The prosecutor asked him if he had a license, and he said he did not. The prosecutor then stated, "Simple possession of oxycodone last December, no class. Ok. Have a seat, we'll figure it out." Later, the prosecutor told defendant to go to the clerk's office and get proof that he had taken a required class.

When the young man returned to the courtroom, he had a second conversation with the prosecutor, during which court observers heard the prosecutor say, "You have a right to an attorney. You are waiving your right to a jury. I will turn this over to the clerk. Plead to the judge and address the class you haven't done. I won't give you anymore two-for-ones."[31] The

[30] In an "under advisement" plea, defendant signs paperwork entering a guilty plea with an agreed upon "multiple choice" of sentencing options. The judge, however, does not find the person guilty and does not impose final sentence. Instead, the judge takes the guilty plea "under advisement" and sets a "return" court date. The defendant is required to return to court on that date with proof that the person completed a "diversion" option, i.e., attended two eight-hour courses. If the defendant does so, the judge dismisses the case. If the defendant does not complete the courses, the judge either issues a warrant for failure to appear or makes a finding of guilt and imposes a jail sentence.

[31] It is not entirely clear what occurred in this instance. From the context, and based upon what observers learned about court operations, probably the most likely explanation is that the defendant either could not obtain from the clerk's office the required paperwork or there was an additional class defendant was required to take in connection with another offense.

prosecutor then advised the clerk in connection with this defendant: "no jail, time served. He will talk to the judge about the class."

When the judge called this man's case, the prosecutor announced that defendant was pleading to driving without a license and simple possession, and receiving a sentence of "time served" for both. The judge asked whether he went to school for driving on a suspended license charge, and the defendant signed paperwork at the podium. The judge never addressed the defendant about the right to counsel, or inquired if the defendant wanted to waive his right to a lawyer.

Summarizing the Legal and Ethical Rules Violated

Role of the Judge

Earlier this report explained that the right to counsel for those unable to afford a lawyer was applicable to all defendants who appeared in General Sessions Courts 1A and 3A. This is because all of the defendants in misdemeanor cases were charged with offenses that could result in a loss of their liberty.[32] Some defendants also received suspended sentences, and the U.S. Supreme Court has held that such sentences cannot be imposed unless defendants are first afforded the right to legal representation.[33] In addition, the U.S. Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[34] In Court 1A especially, the proceedings dealt overwhelmingly with defendants pleading guilty.

Yet, despite Tennessee law and U.S. Supreme Court decisions, judges in these courtrooms did not fully advise defendants of their right to counsel, nor did defendants waive their right to legal representation in a manner that can be characterized as "knowing, voluntary and intelligent."[35] Waiver of the right to counsel can occur only after the trial court conducts a thorough colloquy with the defendant, and the judge determines the propriety of the defendant's waiver.[36]

In one of its first decisions about waiver, the U.S. Supreme Court pointed to the important role trial courts play in protecting the accused in a criminal case, and emphasized the precarious position faced by an unrepresented defendant:

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[32] *See* note 20 *supra* and accompanying text.
[33] *See* note 11 *supra* and accompanying text.
[34] Padilla v. Kentucky, 559 U.S. 356, 373 (2010). Although *Padilla* involved a felony prosecution, the Supreme Court has never suggested that the need for a lawyer during plea negotiations is less important or inapplicable in misdemeanor prosecutions.
[35] Iowa v. Tovar, 541 U.S.77, 88 (2004) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[36] Von Moltke v. Gilles, 332 U.S. 708, 722-24 (1947)

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.[37]

Given the requirements for waiver of counsel, the reports of our court observers make it abundantly clear that unrepresented defendants in Courts 1A and 3A were not adequately advised of their right to legal representation. Judges did not address defendants personally, ask questions of defendants, or make individual determinations of whether defendants' waivers of legal representation were voluntary, knowing, and intelligent. Although defendants apparently signed a waiver of counsel form, such a waiver signed outside the presence of the judge, and without inquiry by the judge into the defendant's understanding of the waiver, is insufficient to constitute a legal waiver of the right to counsel.[38] Moreover, since the majority of defendants in Court 1A had just finished speaking with the prosecutor who encouraged them to plead guilty, it is doubtful that any of the defendants were in position to enter a valid waiver of legal representation, especially without first speaking to a defense lawyer.[39]

Role of the Prosecutor

Provisions of Professional Conduct Rules

The Davidson County District Attorney's Office, which prosecutes all criminal cases in Nashville, represents the State of Tennessee in these cases. As in all criminal prosecutions,

[37] Johnson v. Zerbst, *supra* note 34, at 465.

[38] *See* State v. Merriweather, 34 S.W.3d 881, 885 (Tenn. Crim. App. 2000) (finding that a waiver of the right to counsel signed in the probation office was insufficient and that "any waiver of the right to counsel had to be determined by the trial judge in open court to be knowing and voluntary"). This issue is also summarized in the most recent comprehensive report about misdemeanor representation in the United States: "A waiver form is not a substitute for a colloquy. If a waiver form is used, the colloquy must still ensure that the defendant fully understands the right to counsel and the dangers of waiving the right. The form should serve merely to reinforce the important conversation that the judge has with the defendant." MINOR CRIMES, MASSIVE WASTE, *supra* note 5, at 18.

[39] The ABA has long recommended that if incarceration of a defendant is possible, the defendant should never be permitted to waive the right to counsel without first speaking to a lawyer. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, In-Court Waiver, Std. 5-8.2 (a) (3rd ed. 1990): "[A] lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer."

the government's interest is directly adverse to those of all accused persons.[40] Set forth below are provisions of Tennessee Rules of Professional Conduct applicable to the conduct of prosecutors described in this report. *All of the black-letter provisions and comments of Tennessee's Professional Conduct Rules quoted below are either identical or virtually identical to language contained in the ABA Model Rules of Professional Conduct, and the numbering of the provisions is substantially identical as well*. The key provisions involved are in Rule 3.8, Rule 4.1, and Rule 4.3.

Breach of Duty Pursuant to Professional Conduct Rule 3.8

Prosecutors in Tennessee, like prosecutors everywhere, have special ethical duties when dealing with pro se defendants. Rule 3.8 (b) and (c) of Tennessee's Rules of Professional Conduct provide as follows:

> The prosecutor in a criminal case . . .:
>
> (a) . . .
> (b) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (c) shall not advise an unrepresented accused to waive important pretrial rights;

Based upon the above rules, prosecutors have a mandatory duty to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel," as stated in Rule 3.8 (b). Further, pursuant to subsection (c) prosecutors "shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." This necessarily includes not seeking to obtain a waiver of the right to a lawyer since there is no "pretrial right" more important to a defendant than the right to legal representation.[41]

Based on what court observers witnessed, prosecutors in Court 1A do not make any "efforts to assure that the accused . . . [was] advised of the right to, and the procedure for obtaining, counsel and . . . [providing] reasonable opportunity to obtain counsel." Instead, their efforts with defendants are aimed at encouraging waivers of the right to counsel and securing

[40] The client of the district attorney is the state of Tennessee. *See* Tennessee Formal Ethics Opinion (TFEO) 2002-F-146 (a public prosecutor's client is the State of Tennessee). *State v. White*, 114 S.W. 3d 469, 477 (Tenn. 2003) ("Tempered only by their impartial search for justice, prosecutors are to keep the interest of the State as their preeminent concern.")

[41] *See, e.g.,* Cronic v. United States, 446 U.S. 648, 654 (1964) ("'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'") (quoting Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

guilty pleas by advising defendants of the bargains acceptable to the prosecutor's office. These conversations do not cover the subjects that defense lawyers normally discuss with their clients, such as whether there is any defense to the charge(s), the terms of the plea agreement, and whether there are "collateral consequences" that might attach to a defendant's guilty plea. (The latter subject is addressed in the section that follows.)

The ABA Criminal Justice Standards for the Prosecution Function and the Defense Function contain recommended performance standards for those engaged in the prosecution and defense of criminal cases. The standards, which are now in their fourth edition, have been favorably cited by the United States Supreme Court.[42] For purposes of this discussion, the following standard is especially pertinent: "The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused's counsel consents."[43] In Court 1A, this principle is wholly ignored, as prosecutors routinely negotiate plea deals with unrepresented defendants who have not even been advised of the right to counsel by the judge, let alone executed a valid waiver of their right to legal representation.

Breach of Duty Pursuant to Professional Conduct Rule 4.1

Rule 4.1 of Tennessee's Rules of Professional Conduct addresses the duty of a lawyer when dealing with persons other than one's client. Rule 4.1 (a) states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." Comment 1 to the Rule declares that "[a] lawyer is required to be truthful when dealing with others on a client's behalf. . . . *Misrepresentations can also occur by . . . omissions that are the equivalent of false statements*." (Emphasis added).

This rule and its comment have serious implications for prosecutors when they negotiate guilty pleas with unrepresented defendants who have not validly waived their right to counsel. In American courts today, defendants who are convicted of criminal offenses, whether by trial or plea, face an enormous array of collateral impacts imposed by federal and state laws that are either mandatory or discretionary. Specifically, in Tennessee *mandatory collateral consequences for misdemeanor convictions* include, among many others, forfeiture of student

[42] "We have long recognized that 'prevailing norms' of practice as reflected in American Bar Association Standards . . . are guides to determining what is reasonable . . . although they are 'only guides' . . . and not 'inexorable commands' . . . these standards may be valuable measures of the prevailing professional norms of effective representation . . . ." Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010), citing, *inter alia*, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE RELATED TO THE DEFENSE FUNCTION.

[43] ABA CRIM. J. STANDARDS FOR THE PROSECUTION FUNCTION, Std. 3-5.1 (e) (4th ed. 2015).

loans, grants, or financial assistance supported by state funds for education; ineligibility to serve as an employee or volunteer with a mental health residential treatment facility for children or youths; ineligibility to serve as an adoptive or foster parent; and ineligibility for caregiver employment with child care services. Pursuant to federal law *mandatory collateral consequences for misdemeanor convictions* include, among many others, ineligibility to reside in public housing; ineligibility for employment in a program of all-inclusive care for the elderly; ineligibility to work as a child care provider; and ineligibility for immediate disaster assistance. A database that catalogs these and hundreds of additional collateral consequences for each of the 50 states shows that Tennessee laws provide for 152 collateral consequences for misdemeanor convictions and 390 collateral consequences pursuant to federal laws.[44]

However, in negotiating plea agreements with unrepresented defendants, prosecutors know virtually nothing about defendants' personal situations, and are thus unaware of specific collateral consequences that may adversely impact defendants pleading guilty. An ethical prosecutor also cannot inquire about an unrepresented defendant's personal situation in order to advise the defendant of potential collateral consequences that might apply. In contrast, defense lawyers who represent defendants are required to discuss with their clients "relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter."[45]

Court observers witnessed this dilemma play out in Court 1A, where unrepresented defendants who had not waived their right to a lawyer pled guilty believing the bargain they struck with the prosecutor was exactly what the prosecutor described to them (i.e., a fine, probation, no custody, etc.). However, the defendants, just like the prosecutor, had absolutely no idea of collateral consequences that might apply to them due to their guilty pleas. This situation arises because defendants rely on what the prosecutors tell them as "the whole truth" about the consequences of their guilty plea, when in fact this is not true. Under Rule 4.1 and its accompanying comment, the brief conversations between prosecutor and defendants involve "omissions that are the equivalent of false statements." Using the language of the rule and its accompanying comment, the prosecutors are making statements to a third party (the defendant) that omit "material facts" (collateral consequences of a conviction) with the intent that the third party (the defendant) rely on the prosecutor's statements. In turn, the third party (the defendant) reasonably relies on the prosecutors' statements to their possible substantial detriment.

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[44] *See* National Inventory of Collateral Consequences, *available at* https://niccc.csgjusticecenter.org/ (last visited July 13, 2017. *See also* note 47 *infra* and accompanying text.

[45] ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Std. 4-3.3 (c) (viii) (4th ed. 2015).

Breach of Duty Pursuant to Professional Conduct Rule 4.3

Under Tennessee Rules of Professional Conduct, Rule 4.3, prosecutors are prohibited from giving any legal advice to an unrepresented defendant, other than the advice to secure the advice of counsel.[46] The text of Rule 4.3 is set forth below:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are, or have a reasonable possibility of being, in conflict with the interests of the client.

Under this Rule, prosecutors are prohibited from giving legal advice to unrepresented defendants, other than the advice to secure counsel. But in Court 1A, court observers did not witness prosecutors encouraging defendants to secure counsel. Instead, they watched the prosecutor repeatedly advise, if not strongly encourage, unrepresented defendants (whose interests were in direct conflict with the State) to settle their cases through plea bargains. Comment 2 to Rule 4.3 makes clear the ethical violation that occurs: "The possibility that the lawyer will compromise the unrepresented person's interest is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur."

The ABA has condemned this practice. Several years ago, the ABA House of Delegates approved a recommendation urging federal, state and local governments to review their misdemeanor laws in order "to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties, including fines and incarceration." In describing current practices, the report accompanying the recommendation cited ABA Model Rules of Professional Conduct, Rule 4.3, in support of the following statement: "Defendants are urged to speak directly with prosecutors, in violation of ethics rules barring such communication."[47]

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[46] The text of Tennessee Rule 4.3 is identical to the ABA's version of Rule 4.3. *See also* text in this report immediately following note 40 *supra*.

[47] ABA Resolution 102C, at 4, adopted by ABA House of Delegates, February 2010, *available at* https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_102c.authcheckdam.pdf (last visited July 28, 2017).

When defendants plead guilty without advice of counsel, in addition to any penalties (probation, fees, fines and costs) imposed by judges, potentially the thousands of defendants found guilty in Court 1A will suffer one or more collateral consequences when convicted even of a minor misdemeanor offense, and some of those consequences – such as access to public housing, state educational funds, and ineligibility for various kinds of employment – will be devastating to them. As noted in the preceding discussion of Rule 4.1, a wide variety of federal and state mandatory and discretionary collateral consequences can be imposed on defendants who plead guilty to misdemeanor offenses.[48]

Conclusion

This report outlines what court observers learned when they visited Nashville's General Sessions Courts in September 2016. In both Courts 1A and 3A observers witnessed the failure of Nashville's judges to inform defendants adequately of their right to a lawyer and to determine if defendants' waivers of counsel are "knowing, voluntary and intelligent."[49] As a result, it is doubtful that the judges' conduct can be reconciled with Tennessee's Code of Judicial Conduct, which requires in Rule 1.1 that "[a] judge shall comply with the law."

In addition, court observers learned that when fines, fees or costs are imposed on defendants, judges make little to no effort at the time of imposition to determine if persons have the financial capacity to make the necessary payments. No one in Court 1A or the clerk's office was observed informing defendants about the option of seeking an indigency waiver or a reduction of fines, fees, or costs. Defendants somehow have to know to request the indigency affidavit form, which apparently is not readily available in the courtroom. This strongly suggests

[48] *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011): "A common misperception is that misdemeanor charges might lead to a night in jail and the punishment of going through the process — often requiring a number of court appearances — culminating in dismissal, deferred adjudication, or a quick guilty plea with community service, a fine, or perhaps some small amount of jail time. Yet the consequences of even the most 'minor' misdemeanor conviction can be far reaching, and include deportation, sex offender registration, and loss of public housing and student loans. In addition, criminal records are now widely available electronically and employers, landlords, and others log on to check them. These 'collateral consequences' of a misdemeanor conviction are often more dire than any direct criminal penalty. What often stands between an individual and an avoidable misdemeanor conviction, with its harsh effects, is a good lawyer."

[49] In January 1963, during oral argument of the *Gideon* case before the U.S. Supreme Court, former Justice Abe Fortas, who represented Mr. Gideon, offered his opinion about the importance of defense counsel: "Indeed, I believe that the right way to look at this, if I may put it that way, is that a court, a criminal court is not properly constituted -- and this has been said in some of your own opinions -- under our adversary system of law, unless there is a judge, and unless there is a counsel for the prosecution, and unless there is a counsel for the defense." *Available at* https://apps.oyez.org/player/#/warren11/oral_argument_audio/14085 (last visited Aug. 3, 2017).

the General Sessions Court prefers defendants not complete the affidavit form regarding their financial status, thereby maximizing the amount of revenue collected.

As for the prosecutors, court observers witnessed their engagement in practices that are inconsistent with their ethical obligations pursuant to Tennessee Rules of Professional Conduct, particularly in Court 1A. Prosecutors routinely ignore the requirement of Rule 3.8(b) to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel," as well as Rule 3.8 (c), not to "advise an unrepresented accused to waive important pretrial rights." Additionally, the colloquies prosecutors engage in with unrepresented defendants who have not waived the right to counsel violate other ethical rules, i.e., Rule 4.1 (Truthfulness in Statements to Others) and Rule 4.3 (Dealing with Unrepresented Persons).

In fact, a coercive atmosphere pervades Court 1A when the prosecutor calls defendants' names and the judge has not yet taken the bench. From the outset of the proceeding, the prosecutor's obvious goal is to arrange for defendants to plead guilty. The prosecutor makes no mention of a defendant's right to a lawyer, but instead informs each defendant of the state's plea offer. When a defendant expresses a desire to speak to the judge, as occurred in one instance, the prosecutor advises that this is not possible, but if this is what you want, your case will be set for trial. The operation of Court 1A in this fashion does not comply with the way in which the right to counsel is required to be administered and is a patent violation of the prosecutor's ethical duty.

The burden of these practices fall disproportionately on the poor and minorities, because these are the persons who are the most frequent defendants in the courts observed. Over the course of a year, just in Court 1A alone, approximately 30,000 persons are impacted annually, as noted earlier in this report. Unfortunately, what transpires in the courts observed in Nashville is not all that different from what happens in countless misdemeanor courts in much of this country, as documented in the Introduction to this report.

An exploration of the reasons that misdemeanor courts in Nashville and other cities function as they do is beyond the scope of this report. Nevertheless, we comment briefly on one of the obvious major causes – the desire of judges and prosecutors to handle the substantial volume of the courts' misdemeanor business as expeditiously as possible. It is undoubtedly more efficient and less expensive if defendants' cases can be resolved without defense attorneys.[50] If defendants do not waive their right to a lawyer, those appointed for the

[50] "One judge observed . . . told defendants that, despite defendants' right to counsel, he would not appoint a lawyer. Another judge, in the city of Phoenix, noted that by convincing people to proceed without counsel, he can

indigent will need to be paid, and they inevitably will take the time of judges and prosecutors, raise questions and make legal arguments, and will want to participate in plea discussions.

Ultimately, this report is about the rule of law and the conduct of members of the bar who, despite an obligation to adhere to legal and ethical principles, routinely violate their solemn duties. The desire to operate efficient and cost-effective courtrooms cannot excuse the conduct described in the preceding pages, which deny defendants their right to a lawyer and fundamental fairness required by due process of law. It is ironic that defendants in the Nashville misdemeanor courts described in this report are charged with violations of law and then appear in courts where judges and prosecutors routinely violate their own obligations mandated by law and ethical rules.

Finally, this report demonstrates the need for members of the legal profession and other interested persons to participate actively in court observations throughout the nation. Misdemeanor courts almost always are of "low visibility," operating with scant public attention from the outside world. It is important, therefore, that procedures that fail to comply with legal and ethical rules in these courts be exposed so that essential reforms can be implemented.

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deal with a lot of cases faster. He observed that without lawyers on either side, '[o]n a good day, I can take 35 suspended license pleas.' One veteran Massachusetts lawyer asserted that the greatest challenge to the misdemeanor practice is '[p]ressure from courts to turn cases over quickly instead of preparing the defense of them.' Similarly, an Oklahoma lawyer, responding to a question about recommendations for change, wrote, 'Teach judges that just because they are misdemeanors doesn't mean they are not important. Judges here convince defendants every day to go pro se and plead just to speed up the process without regard for the consequences to these peoples' lives." MINOR CRIMES, MASSIVE WASTE, *supra* note 5, at 44.

EXHIBIT A

UNIFORM AFFIDAVIT OF INDIGENCY