

PUBLIC DEFENSE IN TENNESSEE: PUBLIC PRETENSE?

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I am a public defender, and I am going to talk about public defense in Tennessee from a public defender's perspective.

Public defense took root in the United States largely as a result of the United States Supreme Court's 1963 decision in *Gideon v. Wainwright*.² That decision today might be labeled an unfunded federal mandate, because the Court recognized a federal constitutional right to counsel for someone accused of a crime that could not afford to hire a lawyer, but placed the responsibility (or burden) of fulfilling that right squarely upon the States. Since then, the Federal government has never provided States or local governments the funding necessary to make that constitutional guarantee a reality for everyone in need. The Court also did not tell the States how they were supposed to pay for it, or offer any guidance on that issue. So, for the last fifty years, we as a country--and as individual States--have struggled with how to make that unfunded federal mandate a reality.

Today I will talk about the problems I see in Tennessee, and some solutions that could help. Again, I speak from the very specific viewpoint of a public defender practicing in Nashville for the past twenty years. I will touch upon ideals of equality, justice, fairness, and ethics. I will also touch on our legal duty, as well as our moral duty as people who care, hopefully, about equal justice in this country.

Where are we today? 50 years after *Gideon*,³ we are facing a "crisis" in indigent defense, or at least that is the word often used to describe the current situation. New Orleans is one example of a broken public defense system in crisis; Tennessee is no different. We struggle to provide quality representation for poor people, and we have for years -- despite study after study telling us we are falling short. The Tennessee Supreme Court currently has another Task Force looking at the issue of

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2. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)

3. *Id.*

indigent representation. What is their mission? An article published in the *Tennessean* last year described it well – “How can we help poor defendants in our criminal justice system get more equal treatment and get adequate and effective representation?”

As a public defender, I have not seen equal justice for everybody in Tennessee. Instead, I have seen two justice systems -- one for people with money and one for people without. Why do I say that? One example -- as I was preparing to speak to the Task Force last year, I read in the newspaper that the State was paying lawyers to represent the University of Tennessee in a Title XI lawsuit \$250 per hour, and their paralegals \$75 per hour (noted as “reduced rates”). Meanwhile, the State pays lawyers representing poor criminal defendants \$40 per hour – or about half of what those *paralegals* were making. This disparity says a lot about our legal system, our priorities, and us; what it says troubles me.

As we consider why this disparity exists, we need to ask ourselves, “what does quality, ethical representation of a criminal defendant look like?” Regardless of how much a lawyer is paid, or who is paying that lawyer, the rules of ethics apply to all lawyers equally, in all kinds of cases. There is no exception for public defenders, or for lawyers in court-appointed cases. So, what does that representation, if it is ethical, look like? What does it require?

Every lawyer has an ethical duty⁴ to investigate the law and the evidence in a case, and criminal defense performance standards direct us to do the same in every case before advising a client whether or not to take a plea offer. We also have the duties⁵ of zealous advocacy and diligence, and to communicate promptly and effectively with clients.⁶ All of which takes time. Many clients do not understand the law well; they are often unfamiliar with legal proceedings; and even if they have been through the system several times, they are not trained in the law or court procedures. Some clients are also experiencing other challenges, such as mental illness, substance abuse, or lack of education. Poverty impacts individuals in more ways than I have time to discuss here. So, when we talk about the duty to communicate promptly, effectively and thoroughly with clients, we must consider the client’s background and circumstances, and recognize our clients often need us to spend significant time with them to insure they understand what is happening, and can make informed decisions.

Lawyers also have a duty under Tennessee Ethics Rule 1.3 to control workload, so they can competently handle all matters.⁷ For me, this is the primary issue facing public defenders today in Tennessee. How many

4. Meritorious Claims and Contentions, Ann. Mod. Rules Prof. Cond. § 3.1; Fed. R. Civ. P. 11

5. Diligence, Ann. Mod. Rules Prof. Cond. § 1.3

6. Communications, Ann. Mod. Rules Prof. Cond. § 1.4

7. Diligence, Ann. Mod. Rules Prof. Cond. § 1.3

cases can a public defender handle competently? What does it take to represent someone competently, and how much time does it take? If I have too many cases to competently handle them all, how do I deal with that? Do I simply do the best I can? Or do I limit my workload? If I limit my workload, how do I do that? If I'm a line attorney, how do I do that? If I'm the elected Public Defender, what responsibility do I have to limit the workload for the lawyers who work in my office?

A lawyer has an ethical duty to avoid concurrent conflicts of interest.⁸ If I have two clients and I know that to represent one client competently I will have to ignore some responsibilities for the other client -- because I don't have enough time to handle the responsibilities associated with both cases -- that creates a concurrent conflict of interest. If I have 30 clients can I juggle those? If I have 50 clients? If I have 200 clients?

I have listed on this slide components of meaningful representation recognized by courts in recent indigent defense litigation. These are all essential to constitutional representation, which is *not* simply having a lawyer standing next to someone in court. It is having a meaningful attorney-client relationship that involves all of the listed components. Under these standards, the Tennessee system is failing in both of its current delivery models -- mostly elected public defenders for each of our 31 judicial districts, and a private appointed counsel system to handle conflict cases. Why do I say that?

How many of you have seen the *I Love Lucy* episode in which Ethel and Lucy are working on the conveyer belt at the chocolate factory?⁹ Their job is to wrap the pieces of candy coming down the conveyer belt. When they first start, the belt is moving at a reasonable speed, and they have no trouble doing their job well. When the conveyer belt starts to speed up, it gets harder and harder to keep up, until Lucy and Ethel are completely overwhelmed. That scene is the perfect analogy for what happened in public defense nationally and in Tennessee as America got "tough on crime" more than three decades ago. Lawmakers made more behaviors criminal, made punishments harsher, and started pouring money into law enforcement. We saw arrest rates, conviction rates, incarceration rates, and imprisonment rates go up exponentially. At the same time, the government did not make comparable investments in public defense. The conveyer belt in our court system started speeding up, and public defenders could not keep up.

When I came to Nashville in 1996 as a new public defender, our office culture was to help everyone in need who qualified for our services. We saw ourselves as the last line of defense for so many; in many respects, we were. We took on that burden believing our cause was noble, and it was -- but we were trying to do too much with too little. What I did not

8. Conflicts of Interest: Current Clients, Ann. Mod. Rules Prof. Cond. § 1.7; Conflicts of Interest: Current Clients, Specific Rules, Ann. Mod. Rules Prof. Cond. § 1.8

9. *I Love Lucy* (Desilu Productions, CBS Television Distribution 1951)

appreciate at the time was that our clients were suffering in ways we could not and did not know – because we were not in a position to listen to them, or give them the time to tell us that.

So, like Lucy and Ethel, public defenders over the years have rarely, if ever, stood up to those in power to say, “Hey stop, we can’t do this anymore.” Instead, we took on all the cases sent our way, and developed a reputation for being “overworked and underpaid” lawyers who were not very good at their job, and whose goal was to plead their clients guilty. In this way, public defenders have been complicit in how our indigent defense system has developed. We did not demand our clients get the kind of representation they deserve – the kind that those with money can buy.

Tennessee’s private appointed counsel system does not function any better, as demonstrated by Alfred’s story. Alfred is a man living in Nashville who is frequently arrested, and then jailed because he cannot afford to pay bail. Recently, a private attorney was appointed to represent him. That lawyer met him on the jail docket, which is a where cases are heard when someone does not make bail. Alfred was charged with the felony offense of burglary of a motor vehicle. His attorney met with him for less than an hour, and negotiated an agreement for Alfred to plead guilty to the charge and receive a two-year sentence. About four weeks later, Alfred appeared before a judge, pled guilty, and was sentenced to two years in jail. What Alfred’s lawyer never recognized – and what the DA never heard and the judge did not notice during the plea – was that Alfred was incompetent to stand trial due to significant mental impairments. Although Alfred has an obvious speech impediment suggestive of cognitive disabilities, his appointed attorney did nothing to investigate that possibility. As a result, she did not uncover the medical records detailing his condition, or discover that he receives disability through a payee whose name he still does not remember years after meeting her.

Alfred’s story demonstrates how wrong things can go in a system that provides no quality oversight or performance standards for those taking appointments. Our system simply requires that you have a law license, without any regard as to whether you have the expertise necessary to represent clients in criminal cases. It doesn’t monitor performance, or supervise lawyers taking appointments to insure they are fulfilling the constitutional right to counsel, which begs the question – if your appointed attorney is not providing the basic services necessary to constitute quality representation (i.e., coming to see you at the jail, discussing possible defenses with you, investigating your case and your background), what can you do about that? To whom can you complain? Who can you ask to appoint a different lawyer to represent you?

The answer is practically nobody. The Board of Professional Responsibility only evaluates whether a lawyer has violated ethical rules. It does not investigate whether your lawyer is providing you with effective

representation. The only person who can address problems between private appointed counsel and his client is the judge who appointed that lawyer – who is also the judge presiding over the trial of the case. Navigating that process can be difficult for everyone. It is virtually impossible for a trial judge to assess whether a lawyer is providing meaningful and effective representation. Often, the judge ends up interrogating the lawyer and the client about their privileged communications. Beyond the problems inherent in that, such judicial intervention is wholly ineffective at identifying whether a lawyer is meeting right-to-counsel standards.

Unfortunately, these problems have existed in appointed counsel systems since they started. In *Powell v. Alabama*, also known as the “Scottsboro Boys” case, the United States Supreme Court considered a claim that the defendants were constructively denied their right to counsel because their attorneys’ performance, qualifications, and preparation was so bad that their representation essentially amounted to no representation at all.¹⁰ The Court agreed, finding there were so many deficiencies in the representation that their performance was presumptively ineffective. So, what were those deficiencies?

For one, not having enough time to prepare a defense. The lawyers appointed to represent the defendants were required to go to trial within a matter of days on very serious charges. They also were not experienced criminal defense lawyers familiar with practicing in Alabama; they were civil practitioners who had never tried a criminal case before. They were loyal to the judge who appointed them, rather than to their clients. The judge brought them in to get the case tried, and they saw their duty as satisfying the judge’s request for a speedy trial. In the end, the Supreme Court held that because the defense failed to subject the prosecution’s case to any meaningful “adversarial testing,” the defendants were constructively denied counsel.

Today, the state still bears responsibility under the Fourteenth Amendment to the United States Constitution for providing effective assistance of counsel to indigent defendants. As the Court said in *Gideon*, “The right of one charged with crime to counsel may not be deemed fundamental and essential to a fair trial in some countries, but it is in ours.”¹¹ But neither our public defender system nor our private appointed counsel systems have sufficient resources or quality oversight to make that right meaningful.

That we are still in this position today is even more disheartening because we have known for years of our obligation to do better. More than ten years ago, the American Bar Association answered the ethical question, “What can public defenders and lawyers taking court appointments do if they feel overwhelmed with too many cases?” The ABA issued explicit

10. *Powell v. State of Ala.*, 287 U.S. 45, 53 S. Ct. 55 (1932).

11. *Gideon*, 372 U.S. at 344.

direction that all lawyers, including public defenders, must and should control their workload to the extent necessary to provide ethical representation to every client. But we rarely see that happening here or elsewhere.¹²

A few years ago, Amy Bach released her book *Ordinary Injustice*, which I recommend to you.¹³ She documents how injustice has become the norm in criminal courts across this country. She placed responsibility for that with everyone involved – prosecutors, defenders, police and judges alike. In one chapter, she describes a public defender in Georgia who had been co-opted by the system to process his clients through as quickly as possible, and provide them virtually no representation. His behavior was no different than that of the prosecutors, police and judges she observed, all of whom were overwhelmed by the high volume of cases coming through the court system.¹⁴

Some jurisdictions are starting to grapple with this kind of ordinary injustice. In Missouri, public defenders began raising excessive caseload issues years ago. Eventually, the State developed a process by which public defenders could decline cases based on workload caps.¹⁵ But, when public defenders attempted to do that, trial judges found themselves in a difficult spot – they had no one else to appoint. So, they appointed the public defender anyway. The Missouri Supreme Court reversed that action, and offered an unconventional solution. When a public defender was unavailable, judges could continue cases, placing the prosecution on hold, until such time that the public defender or another attorney was available.

In the wake of that decision, the Missouri legislature appropriated more funding for public defense, based largely on a workload study conducted by the Rubin Brown accounting firm.¹⁶ Missouri's governor, however, impounded the additional money, and refused to give it to the public defenders. That prompted the Public Defender and the Public Defense Commission to sue the governor.¹⁷ The final outcome is still to be determined.

Missouri's situation reminds us that our government operates under a system of checks and balances – executive power, legislative power, and

12. Normal Lefstein, American Bar Association, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, 44-5 (2011).

13. Amy Bach, *Ordinary Injustice: How America Holds Court* (2010).

14. *Id.*

15. Missouri State Public Defender System, *Guidelines for Representation* (1992).

16. Rubin Brown, LLP Certified Public Accountants & Business Consultants and the American Bar Association, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards with a National Blueprint*, Volume 1, 5, (2014).

17. Lorelei Laird, *Missouri Public Defenders Sue Governor Over Withholding of Funds*, ABA Journal (Jul. 14, 2016), http://www.abajournal.com/news/article/missouri_public_defenders_sue_governor_over_withholding_of_funds/.

the court's power. As the highest court in the judicial branch of government, the Tennessee Supreme Court has an obligation to make the right to counsel for indigent defendants in criminal cases meaningful. In our political climate, that will take courage, because it is not a popular cause. But, if we do not implement significant reforms soon, the State of Tennessee should prepare to be sued. Why? Because that's what is happening elsewhere.

For instance, the American Civil Liberties Union filed a §1983 suit against five New York counties alleging they had violated indigent criminal defendants' Sixth Amendment right to counsel by failing to provide an adequate public defense system.¹⁸ That litigation was settled on the eve of trial with an agreement that New York increase funding for public defense significantly in those jurisdictions, and implement a new public defense structure with performance standards, oversight, and workload controls. Similar suits have been filed in Connecticut and Idaho.

In Washington State, the cities of Mt. Vernon and Burlington faced a similar federal class action suit for operating municipal public defense systems they knew were woefully inadequate.¹⁹ That case went to trial, and the plaintiffs prevailed. As a result, the court entered an injunctive order with a laundry list of requirements those municipalities had to meet in order to guarantee poor defendants received meaningful defense representation. They also had to pay nearly \$2 million in plaintiff's attorney's fees.

In Pennsylvania, the State Supreme Court recently held that individuals have a right to sue *proactively* for a violation of their Sixth Amendment right to counsel.²⁰ This development is significant, because courts traditionally require criminal defendants to wait until their cases are concluded to pursue a claim that they received "ineffective assistance of counsel." At that stage, defendants bear a nearly impossible burden of proving their lawyer's inadequate representation caused them a worse case outcome. The Pennsylvania decision recognizes that the constitutional right to counsel means more than simply having a lawyer who does not demonstrably harm you. It means you are entitled to a lawyer who will defend you effectively, and you should not have to wait until you get convicted to raise a claim that your lawyer is failing to meet that obligation.

Georgia, California, Utah, and New Orleans, Louisiana, are also on the list of places where litigation has been filed to challenge inadequate public defense systems.²¹ Closer to home, the United States Department of Justice has been engaged with Shelby County, Tennessee for more than five

18. William Glaberson, *Key New York Suit Calls Public Defender Programs Inadequate*, (Mar. 15, 2010), <http://www.nytimes.com/2010/03/16/nyregion/16defenders.html>.

19. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

20. *Com. v. Arroyo*, 555 Pa. 125, 723 A.2d 162 (1999).

21. C.J. Ciaramella, *Missouri Public Defenders are so Overwhelmed, it's a 'Constitutional Crisis'*, Reason (Mar. 9, 2017, 3:05 PM), <http://reason.com/blog/2017/03/09/missouris-public-defenders-are-so-overwh>.

years over problems in its juvenile justice system, including the lack of independent and zealous defense counsel for children.²² And the Department of Justice is not alone in its efforts – the American Civil Liberties Union, the American Bar Association, and the Sixth Amendment Center are devoting significant attention and resources to addressing inadequate public defense systems.

So, how can we do the right thing in Tennessee –how can we provide good lawyers for people accused of crimes who can't afford to hire counsel? More than 20 years ago, the ABA published guidelines outlining the basic components of a quality public defense system – what I call the “must-haves.”²³ The first and most necessary component is lawyer independence from political influence, which means judges cannot and should not be involved in deciding whom to appoint, or how much they should be paid. Beyond independence from the judiciary, lawyers receiving appointments must be allowed to control their workloads to insure they provide effective representation, and should have relevant experience and training in criminal defense. They should be paid reasonable compensation, and their performance should be evaluated on a regular basis to insure they are meeting constitutional standards.

Beyond the “must-haves,” there is what I call the “smart-haves” – or best practices for implementing the “must-haves” well. In my opinion, Tennessee would be smart to adopt a Commission structure to oversee indigent defense services statewide – so long as it, too, has political independence from each branch of government. Several states have adopted this model, in which a Commission (comprised of individuals with experience in, knowledge about, and commitment to quality indigent defense) is responsible for developing policies that insure the State is meeting its constitutional right-to-counsel obligations.²⁴ In turn, an Executive Director (who reports to the Commission) is responsible for implementing those policies statewide, and developing recommendations related to funding and allocation of resources.

This leads me to another suggested “smart-have” – addressing our system overload from the front end, rather than the back end. As I mentioned earlier, the overload in our criminal justice system puts a strain on everyone. Tennessee could and should examine minor behaviors we have criminalized over the years, and decide whether we can afford the associated cost, or even more importantly, whether we are actually better

22. The United States Department of Justice, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, TN* (Dec. 18, 2012), <https://www.justice.gov/opa/pr/departement-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee>.

23. The American Bar Association, *ABA Ten Principles of a Public Defense Delivery System*, Vol. 1, 1 (2002).

24. *Id.*

off criminalizing those behaviors. Are we safer today because we made driving on a suspended license a criminal offense? Do we want to pay prosecutors, judges, clerks, public defenders and jailers to deal with that behavior, or can we find a cheaper, more effective method to address the problem and others like it?

With that, I've reached the end of my slides, and I'm happy to take questions.

Audience. Have you looked at case caps? It's not just the \$40 per hour. If you go to trial, you go way over your cap – so there's an incentive for appointed attorneys to plead stuff, because at least you get \$40 per hour if you plead it. If you go to trial, it comes out to be less than \$40 per hour.

Dawn Deaner. That's correct. He's asking about case caps – maximum amounts you can bill for a particular case. They are pretty low, so it puts an incentive into the system for appointed lawyers to plead a case, and creates a personal conflict between the lawyer's interests and the client's interests. For instance, a lawyer may need to spend twenty hours on a case, but knows she will only be paid for ten hours of work. She's trying to run a business, feed her family, and do the right thing for her client. The Supreme Court's Task Force has absolutely looked at the caps, and understands they are a problem.

Audience. Looking at solutions from the perspective of the Tennessee State Legislature, can you talk about past policy efforts, if any, or current policy efforts? And in the future, are we looking at a legislative fight or a court fight on the level of Missouri here in Tennessee?

Dawn Deaner. I don't know if there's been a whole lot of policy discussion at the legislature about funding for indigent defense. In the late 90s, the legislature funded workload studies for all branches of the court system -- public defenders, DAs and judges. That was almost twenty years ago, and those studies are now outdated -- practicing law today is different than it was twenty years ago. Of course, the Supreme Court's Task Force will come out with recommendations, and the Supreme Court has the ability to make rules. For instance, hourly fees and case caps are set by Supreme Court rule. The Court could publish a new rule raising the rate for attorneys to \$150 per hour and eliminating the caps. The question would then be, will the legislature fund it? Which leads back to the Missouri example.²⁵ The challenge for our Court is whether it can find a way to avoid the kind of battle going on there, and instead, persuade the legislative and executive branches that reforming indigent defense is the smart move.

David Carroll, who heads up the Sixth Amendment Center, gave a presentation to the Task Force several months ago in which he laid out the case for why reform would be smart for Tennessee. When asked, "How much will this cost," he acknowledged the State would need to spend more on indigent defense. BUT, he also explained that States spending more on

25. Missouri State Public Defender System, Guidelines for Representation (1992).

indigent defense at the front end of the system have some of the lowest expenditures on the back end of the system – meaning prison costs. In many places, consensus is starting to build across political spectrums that our criminal justice spending may not be producing the best outcomes for individuals or society, and may actually be hurting us rather than making us safer. That could produce momentum in Tennessee to focus on policy reforms.

Audience. This may sound similar but it seems to me that for people wanting change, they want to be in court. You almost want to be sued, because if the court says the system is unconstitutional, that gives politicians cover to change the system and fund it. I'm curious, are there successful models in other states?

Dawn Deaner. Yes.

Audience. OK. The question then is cost. Is that a challenge?

Dawn Deaner. There are a couple of challenges particular to Tennessee when it comes to indigent defense reform. Number one is cost. The second is that Tennessee is one of only two States that elects its public defenders – Florida is the other. Indigent defense reform in Tennessee has the potential to disturb an entrenched culture of elected public defenders. As a result, the Task Force has faced questions around whether or how to provide oversight to 31 independent, and mostly elected, officials. How can it (or any entity) tell an elected public defender what their standards are? That is another reform challenge particular to Tennessee.

Audience. At a budget hearing I heard you mention the “75% Rule.” When did that pass, and what is that?²⁶

Dawn Deaner. In the early 1990s, Tennessee decided to create a statewide Public Defender Conference. By that time, Nashville, Davidson County, and Memphis, Shelby County, had pre-existing public defender offices. As a result, and for reasons too complicated to address here, Davidson County and Shelby County were carved out of the Conference funding structure, and a different State funding formula was established for them. At the time, those offices were also receiving substantial local funding. The 75% statute addresses the local funding formula, and was enacted around the same time the Conference was created.²⁷ It requires increases in local funding for public defenders anytime local government increases funding for the prosecutor's Office, at a ratio of 75%. Since roughly 80% of criminal defendants are indigent, the statute essentially protects the State from bearing sole responsibility for the increased public defense costs inevitably associated with enhanced prosecution resources. It creates accountability for local governments to contribute to defense costs with some level of parity.

26. Tenn. Code. Ann. § 16-2-518 (West).

27. *Id.*

