



May 19, 2015

Dear Chairman Grassley and Senator Leahy:

We write to thank you for holding the hearing on Wednesday, May 13 on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors and to file a post-hearing statement with the Committee. We are the National Association for Public Defense (“NAPD”), a national organization of public defense professionals, [www.publicdefenders.us](http://www.publicdefenders.us), founded a little over 18 months ago. In our first 18 months we have enrolled almost 10,000 members.

We followed the May 13 hearing closely, conferred with some of the witnesses afterwards, and then surveyed our leaders and members around the country to present data to the Committee with respect to (1) the complete absence of counsel whatever in many misdemeanor courts; and (2) public defender workloads in the misdemeanor and municipal courts in which they do appear.

A list of the responses evidencing some of the worst practices our leaders and members have experienced around the country is attached as Exhibit “A. We will comment here on some of the most problematic and systematic practices identified in the data presented in Exhibit “A.”

### **BRIEF OVERVIEW**

*Argersinger v. Hamlin*, 407 U.S. 25 (1972), like *Gideon v. Wainwright*, 337 U.S. 335 (1963) is an unfunded federal *judicial* mandate imposed upon the states. Despite *Argersinger’s* mandate, counsel for misdemeanor violations has never been systematically funded. And with the advent of the “war on drugs” in the 1980’s and the onslaught of overcriminalization that followed in its wake, the number of misdemeanor cases increased dramatically, putting crushing pressure on an already overburdened criminal justice system.

As full-time public defender systems grew, legislators piled thousands of new cases onto full-time attorneys who, at least until recently (see below), had no alternative but to simply process the vast majority of these cases, triaging their clearly inadequate resources in order to provide some measure of actual representation in what they deemed the most serious cases.

During this period of time the goals of the criminal justice system changed dramatically. The traditional and legitimate goals of the criminal justice system – to punish, deter and modify behavior that ran afoul of the criminal laws – were seen as inadequate. Increasingly state legislatures added hundreds of collateral consequences as additional sanctions for misdemeanor convictions, denying employment, housing, education and a host of other public benefits to anyone convicted of a misdemeanor.

These collateral consequences now act to dramatically impair the lives of those convicted of misdemeanors, making it almost impossible for them to recover from their mistakes and get on with their lives as productive members of our society. The Criminal Justice Section of the American Bar Association has published a National Inventory of the Collateral Consequences of Conviction, available at [www.abacollateralconsequences.org](http://www.abacollateralconsequences.org). In Missouri, for example, there are 259 collateral consequences for a misdemeanor conviction.

At the same time, cash-strapped municipalities began to see persons charged with minor violations of municipal codes such as traffic violations as a very profitable source of revenue. The collection of costs, fines, and fees in many criminal and misdemeanor courts across the nation became predatory in nature, impacting poor people in catastrophic and life altering ways. Most disturbingly, these practices were invariably disproportionately levied against people of color. In response, the NAPD recently issued its Policy Statement on the Predatory Collection of Costs, Fines, and Fees in America's Criminal Courts. See Exhibit "B."

## NO LAWYER COURTS

As set forth in great detail in Exhibits "A" and "B," many of these courts, both criminal and municipal, effectively operate as courts without defense lawyers, in open violation of the constitutional mandate of *Argersinger*. Again as detailed in Exhibits "A" and "B," nonetheless many poor people appearing in these courts are frequently sent to jail for failure to pay fines, fees or costs. And because there is no defense lawyer present, no inquiry is made with respect to a person's ability to pay, as required by *Bearden v. Georgia*, 461 U.S. 660, 662-63, 668-69 (1983).

This total abdication of judicial responsibility is occurring despite the fact that a trial court has the constitutional duty to make an affirmative finding that a person has the ability to pay a fine before it may impose incarceration for a person's failure to pay, and despite the fact that the burden of proving an individual's inability to pay is placed upon the state.

In many senses, then, it is a mistake to refer to these enterprises as courts, since they are functioning so far outside the bounds of recognized judicial authority, and since their principal reason for existence is not justice,

but revenue generation. As we point out in our Reform section below, because the financial stakes involved in any change from this enterprise system of revenue generation to a constitutional system of justice are so large, resistance to any such change will inevitably be massive and sustained.

A second problem with no lawyer courts is the inevitable and unavoidable problem of uncounseled pleas, again as described in Exhibits “A” and “B.” Since no defense lawyer is present in these courts, the prosecutor, frequently at the direction of the court, confers with the unrepresented defendant, prior to a waiver of counsel on the record (which will shortly follow) to offer the defendant a plea bargain, which invariably includes benefits or inducements to plead guilty. Of course, the prosecutor cannot and therefore does not discuss with the defendant how the hundreds of collateral consequences that will follow upon conviction will affect the defendant. In return, the defendant often pleads guilty in order to be released from jail, unaware of what will follow if he fails to pay a fine.

This practice has been condemned by the American Bar Association. “Defendants are urged to speak directly with prosecutors, in violation of ethics rules barring such communication...NACDL site teams witnessed similar behavior all across the country.” (ABA Recommendation 102C, Report, P. 4, February 8-9, 2010, available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily\\_journal/102C.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102C.authcheckdam.pdf)) Again, this behavior is so far outside the bounds of acceptable professional responsibility that it is difficult to characterize these enterprises as courts.

### EXCESSIVE WORKLOADS

As set forth in Exhibit “A,” public defenders all over the country are carrying excessive workloads in misdemeanor cases, sometimes representing as many as 2,000 people charged with misdemeanors at once. The problem of excessive workloads was the primary organizing principle driving the formation of the NAPD, as well as the subject of the first position paper issued by the NAPD on March 19, 2015. See Exhibit “C.”

There is no question where the primary responsibility for ensuring effective assistance of counsel rests. “Under *Argersinger*, trial judges have an obligation to ensure that every person’s right to counsel is met if he or she faces the prospect of imprisonment...Beyond simply ensuring that counsel is appointed to assist every defendant who faces the possibility of imprisonment, a judge must also ensure that the defendant has *effective* assistance of counsel.” *State v. Pratte*, 298 S.W.3d 870, 875-6 (Mo En Banc, 2009); emphasis in original. Yet it is undisputedly trial judges all over the country who are daily watching public defenders with grossly excessive workloads as they simply process thousands of misdemeanor cases in their courts. And these trial judges are doing nothing about it.

However, two state supreme courts – Missouri and Florida – have now squarely held that when a public defender’s workload is so excessive that he or she can no longer provide effective assistance of counsel, that public defender should seek judicial relief from such excessive caseloads, and in appropriate cases, the entire office of the public defender should be relieved by the court from appointment to any further cases. See Stephen F. Hanlon, *The Gideon Decision: Constitutional Mandate or Empty Promise? A Fifty-Year Deal Under Fire*, 52 U. Louisville L. Rev. Online 32 (2013). (See Exhibit “D”).

“The Missouri Project,” prepared by RubinBrown, one of the nation’s leading accounting and professional consulting firms, on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) was published in February, 2014. Using a methodology developed by the Rand Corporation in the 1960s and thereafter successfully applied by a wide array of industries and professions, this study of the workload of the Missouri Public Defender (“MPD”) established what level of workloads the MPD could – and could not – sustain in order to provide reasonably effective assistance of counsel pursuant to prevailing professional norms – the *Strickland v. Washington* standard. Upon its release, James Silkenat, then President of the American Bar Association, commented on the study’s implications: “It can now be more reliably demonstrated than ever before that for decades the American legal profession has been rendering an enormous disservice to indigent clients and to the criminal justice system in a way that can no longer be tolerated. “

In short, the courts have told us that we can no longer tolerate these excessive workloads and that we must seek to withdraw from appointment to future cases once we have reached the limit of our capacity to be reasonably effective, and we now have a proven methodology to establish when we have reached that point. Studies similar to The Missouri Project are being conducted by the ABA and the NACDL in Tennessee and Rhode Island under a grant from the Department of Justice. Similar studies are under consideration in at least six additional states, and a similar study was recently published in Texas, available at <http://www.tidc.texas.gov/resources/publications/reports/special-reports/weightedcaseloadstudy.aspx>.

This development in the courts and in the indigent defense community has major implications for policymakers. It will unquestionably put enormous pressure on an already gravely overburdened criminal justice system. Since we are the first of the actors in this hopelessly compromised criminal justice system to explicitly acknowledge our responsibility for the current state of affairs, and since we are the first of the actors in the criminal justice system to proactively develop the law and the metrics so essential for our own reform, we believe that we have standing to press the other actors in this system – in particular, trial judges, prosecutors and legislators – to similarly acknowledge their own responsibility and to similarly undertake legal and cultural reforms

just as difficult as the ones we are now undertaking to restore the criminal justice system to what it was supposed to be: the crown jewel of our republic.

## REFORM

We propose two fundamental reforms that the Committee should seriously consider. Neither reform calls for any additional funding.

**DOJ Authority to File Suit:** Enact federal legislation to prohibit any state from engaging in a pattern and practice of conduct that deprives criminal defendants of their right to effective assistance of counsel as protected by the Sixth and Fourteenth Amendments, and authorize the Department of Justice to file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations in the adult criminal justice system throughout the country.

DOJ already has such authority in state juvenile justice systems. 42 U.S.C. S. 14141. Its record in the enforcement proceedings that it has brought under that section has been exemplary. No good reason exists to support a different state of the law in the adult criminal justice system.

Moreover, as we have demonstrated above, the massive economic incentives, rewards and benefits that currently exist in the present adult criminal justice system mean that any reform that threatens those incentives, rewards and benefits will be met with massive and sustained resistance. There is little likelihood that the non-profit sector of the legal profession could successfully prosecute actions all over the country to end these well-established patterns and practice of unconstitutional activity in the misdemeanor and municipal courts of this country.

These patterns and practices have been in existence for over a half a century, most particularly in the last 30 years. These patterns and practices have produced enormous economic benefits to the systems and parties involved, and it is only the federal government that has the resources that are needed to end these unconstitutional patterns and practices.

**Reclassification and Diversion.** Use every available tool available to the federal government to incentivize state and local governments to transfer offenses currently in the criminal or municipal code that do not have significant public safety implications to a civil infraction code where there are no statutory collateral consequences, and where these minor violations can be treated far more effectively and at far less cost to the taxpayers.

By common agreement, misdemeanors constitute at least 70 to 80% of the criminal justice system. Thus the potential to shrink the system is at its greatest here. The vast majority of these cases have no public safety

implications whatever. A compelling case can be made that they therefore have no place whatever in the criminal justice system.

Enormous additional pressures are going to be put on the supply side of the criminal justice system, as public defenders obtain relief from excessive workloads in the courts, pursuant to the metrics and the case law described above. Now is the time to turn to the demand side of the criminal justice system – all the conduct we have criminalized over the course of the last 30 years that has no public safety implications whatsoever. Now is the time to get ahead of the coming curve and relieve the system of the grossly excessive pressure under which it is currently unnecessarily laboring.

The American Bar Association has strongly urged local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties, including fines and incarceration. See ABA Resolution 102C, supra.

There is a plethora of community courts, diversion programs, mental health courts, drug courts and other courts that are alternatives to criminal and municipal courts all over the nation. These courts, instead of preying upon their citizens in search of additional revenues for their cities, towns or municipalities, can refer their citizens who run afoul of the laws of their communities that do not implicate public safety to non-profit and other governmental actors who can actually help their citizens recover and return to being productive members of our society. There are numerous options that should be utilized, options that would balance the need for public safety and rehabilitation and that would help our communities heal and save our governments precious resources, including community service, restitution, wrap-around mental health services, and drug and alcohol treatment. We need to put an end to the former and encourage and incentivize the latter.

### **A FINAL NOTE**

In our Policy Statement on the Predatory Collection of Costs, Fines and Fees in America's Criminal Courts, we tell the story of Arch City Defenders' client Nicole Bolden, a mother of four children whose license was suspended after failing to pay fines and fees associated with a prior traffic violation. She was arrested for driving with a suspended license and spent two weeks in jail. She had a part-time job and was in the process of studying to be a paralegal. After two weeks in jail without income, and the loss of her job, she fell further and further behind in her valiant effort to keep up with her bills and support herself and her four children. Every month she struggles to continue to make payments on fines and fees that are compounding with interest and penalties. Despite paying on these fines for more than five years, she still struggles to

overcome her criminal justice debt. Ms. Bolden's experience is shared by thousands of people throughout the nation.

Nicole Bolden wanted to invest her money in a paralegal career in an effort to better herself and work her way out of poverty and provide a better life for herself and her four children. But the municipal court in the St. Louis County community in which she lived had other plans for her money and her time, without any consideration of her ability to pay or the impact of those fines (and subsequent arrest warrant) upon the welfare of her children. By any fair reckoning, Nicole Bolden needed that money and that time far more than that municipal court did. We owe it to Nicole Bolden (and to all the Nicole Boldens all over the country) to find a way forward, so that next time Nicole Bolden (or any other poor person) runs afoul of a law that has no public safety implications, she can use that money to support herself and her children and to advance her prospects for gainful employment, rather than have that money wind up in the coffers of a municipality that can find other legitimate ways of providing for the real needs of its citizens.

Respectfully submitted,



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