

# DRAFT

TENNESSEE SUPREME COURT  
INDIGENT REPRESENTATION TASK FORCE  
REPORT AND RECOMMENDATIONS

2016

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[Letter from Dean Koch, Task Force Chair]

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## Executive Summary

[To include overview and brief version of recommendations.]

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## History of Indigent Representation in Tennessee

Tennessee has long recognized that the promise of justice includes the right to legal counsel. The state's first constitution provided "[t]hat in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel."<sup>1</sup> The right to counsel clause was expanded in Tennessee's Constitution of 1835.

That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.<sup>2</sup>

The "heard by counsel" phrase has historically enjoyed broad interpretation:

A party is entitled, by our bill of rights, when accused, to be heard by counsel. This means more than a simple argument before a jury. It guaranties, that in the preparation of his defense, he is entitled to the advice and assistance of counsel that his defense may be properly shaped, so that his innocence may be made to appear, if the facts shall so warrant. It would be a cruel mockery to follow the letter, and give counsel for mere argument, when, for want of that counsel's assistance, there may be no case to argue, and the argument be a useless ceremonial.<sup>3</sup>

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<sup>1</sup> Tenn. Const. art. XI, § IX (1796).

<sup>2</sup> Constitution of 1835 Tenn. Const. art. I, § 9 <http://www.tngenweb.org/law/constitution1835.html>

<sup>3</sup> *State v. Poe*, 76 Tenn. 647, 654, 1881 WL 4469, at \*4 (1881). As a condition of being re-admitted to the Union, the southern states were required to draft new constitutions subject to Congressional approval and to ratify the 14<sup>th</sup> Amendment. <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=460>. The Due Process clause of the Fourteenth Amendment provides as follows "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Tennessee's Constitution of 1870 (still governing today) also contains due process clause: "that no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8. The right to counsel clause also remained, unchanged, in the new state constitution.

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Tennessee also began to adopt statutory rights to appointed counsel in criminal matters well before the right was established at the federal level. It appears that the right to a court-appointed attorney for those who are unable to employ counsel extends at least as far back as the Tennessee Code of 1858.<sup>4</sup> While the right to counsel has been firmly enshrined, the implementation of the right was, throughout most of the state's history, uneven at best.

## I. Development of the Right to Counsel in Criminal Matters

During the nineteenth century, when a criminally-accused party could not afford an attorney, local members of the bar, in true Volunteer spirit, generally stepped up through various systems of appointment by local judge.<sup>5</sup> They provided their services without remuneration.<sup>6</sup> However, then, as now, the all-volunteer system was an imperfect means of securing the right to counsel.

[Insert summary of the story of *United States v. Shipp*]

While *U.S. v. Shipp* was unique in its impact, the systematic failings in the justice system were not. The idea of a defense office for the public to serve as a counter to the prosecutorial branch of the government was first championed by Clara Shortridge Foltz (California's first female lawyer) in a speech at the 1893 Chicago World's Fair. In 1913, Los Angeles County, California became the first jurisdiction to create a public defender office.<sup>7</sup> And just two years later, the pro bono service of a Memphis lawyer would result in Shelby County, Tennessee, positioning itself as a leader in providing defense for the indigent.

In 1915, Samuel O. Bates was a 33-year-old attorney and former state representative. He was appointed in Shelby County to defend a black man who had been charged with murdering a white woman. Mr. Bates was convinced that his client was innocent and spent \$500 of his own money to fund an investigation, discovering evidence that proved the woman had been murdered by her own husband, and setting Mr. Bates's client free.<sup>8</sup>

Moved by his experience, when Mr. Bates later returned to the General Assembly as a senator, he proposed the idea of providing publicly-funded criminal defense counsel to those

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<sup>4</sup> Code of 1858 § 5206 (as referenced in 1932 Tenn. Code, Ti. 4, Ch. 13, Art. I, section 11734).

<sup>5</sup> Detailed records of such service are not extant, but many sources describe the historical processes anecdotally.

<sup>6</sup> Mileage reimbursement was allowed at some point (need citation).

<sup>7</sup> [http://sixthamendment.org/understanding-gideons-impact-part-2-the-birth-of-the-public-defender-movement/#\\_ftn1](http://sixthamendment.org/understanding-gideons-impact-part-2-the-birth-of-the-public-defender-movement/#_ftn1)

<sup>8</sup> <https://justcity.files.wordpress.com/2013/03/mini-mba-g50.pdf>

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who could not afford representation. Thus, in 1917, Memphis became home to the third public defender's office in the nation.<sup>9</sup>

In the rest of the state, piecemeal enactment of various statutory provisions expanded the right to counsel without charge in criminal matters,<sup>10</sup> but the needs of the indigent continued to be represented by lawyers who were appointed by the local judges and served without compensation. Eventually, right to counsel in certain civil matters was also established.<sup>11</sup> As judicial caseloads grew, however, an interest in quantifying the use and availability of resources arose, and this led to calls for an examination of the process for providing for indigent representation.<sup>12</sup>

In 1959, the general assembly directed the Legislative Council Committee to study the trial court system, and the Council's report provided some of the first insight as to the general perception of indigent representation and the opinions of the bench and bar as to whether the needs of the accused were being met by the then-current system.<sup>13</sup> It was noted that at the time, the Shelby County Public Defender's Office—which consisted of three attorneys working on a part-time basis<sup>14</sup>—was already handling approximately 56% of the criminal indictments in the county and that this was in line with statistics suggesting that, on a national basis, more than half of those charged with serious crimes did not have sufficient funds to retain counsel.<sup>15</sup> Yet, in Davidson County, routine practice was that if defendants could afford a bondsman, they were not appointed counsel.<sup>16</sup> Additionally, reports were that appointments in criminal cases were “usually” made 5 to 10 minutes before trial or “possibly” 24 hours in advance.<sup>17</sup> One story recounted an instance in which counsel in a capital case was appointed only 48 hours before trial.<sup>18</sup>

The Council's report included comments from judges and attorneys across the state and reflected varying opinions on the efficacy of the appointed counsel system. Some judges expressed that counsel should be paid for their efforts, both because many lawyers lacked the independent financial means to work for free and because it would encourage the same level

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<sup>9</sup> *Id.*; 1917 Tenn. Priv. Acts Ch. 69

<sup>10</sup>

<sup>11</sup> These include the right to counsel in proceedings such as parental rights termination, involuntary judicial hospitalization, and contempt for failure to pay child support. For more, see p. \_\_ of this paper.

<sup>12</sup> It appears that the first attempt at a systematic survey of caseloads in Tennessee covered the years 1947-48. Final Report Judiciary Study 1960, p. 15; 1965 Comparative Study, p. 29.

<sup>13</sup> Final Report Judiciary Study 1960

<sup>14</sup> *Id.* at p.7

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 12. The Council's report included findings from a study commissioned by the Tennessee Judicial Conferences conducted during the same time period.

<sup>18</sup> *Id.*



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of zealous representation found in cases where attorneys were compensated.<sup>19</sup> This sentiment was far from unanimous, however, with other attorneys arguing strongly against the idea of compensation and against the idea of expanding the public defender system.<sup>20</sup> There was a noted division in opinion between urban and rural areas, whose caseloads and experiences with appointed private counsel varied.

The Council also asked every state to respond to its survey questions regarding indigent representation, and every state but Alaska responded.<sup>21</sup> At the time, eleven states including Tennessee were using some form of public defender. While the Council noted that there was “disconcerting scarcity concerning the costs of operating public defender systems,”<sup>22</sup> the Council concluded that the cost of paying for a private appointment system was far greater. Ultimately, the Council recommended that a limited Public Defender System be adopted so that jurisdictions could choose to establish such a system and that the Defender be appointed by the county’s governing body.<sup>23</sup> Shortly thereafter, in 1961, the Nashville-Davidson County Public Defender’s Office was created by Private Act of the Tennessee General Assembly.<sup>24</sup>

In 1963, the United States Supreme Court rendered its opinion in *Gideon v. Wainwright*,<sup>25</sup> establishing for the first time as a matter of federal constitutional law that the 14<sup>th</sup> Amendment guaranteed all persons accused of felonies the right to an attorney, including the indigent. *Gideon* was followed by a series of Supreme Court cases that further expanded the parameters of the right to counsel. *Gideon* and its progeny resulted in a renewed attention to the plight of the indigent in Tennessee’s state court systems.

In 1965, Tennessee enacted statutory provisions that provided for the reimbursement of private counsel appointed to represent indigent persons and a provision for reimbursing any public defender’s offices that had been established for costs that would have otherwise been incurred via private counsel appointment.<sup>26</sup> The definition of an “indigent person” was established as “any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.”<sup>27</sup> A Tennessee Supreme Court Rule was adopted to implement the provisions of the 1965 act,<sup>28</sup> establishing procedures for the appointment of counsel for the indigent and for payment of appointment counsel. The system

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<sup>19</sup> *Id.* at pp. 1-2, 7-8.

<sup>20</sup> *Id.* at 2, 7-8.

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<sup>22</sup> 1960 report, p. 11

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<sup>24</sup> 1961 Private Acts Ch. 128, p. 456

<sup>25</sup> 372 U.S. 335 (1963).

<sup>26</sup> TCA 40-2023 Acts 1965 Ch. 217 § 10

<sup>27</sup> TCA. 40-2014.

<sup>28</sup> Needs confirmation.

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provided that the appointed attorney apply for payment with the trial court, who would then forward the request to the Executive Secretary of the Supreme Court for “audit review and payment.”<sup>29</sup>

This time period also coincided with the Federal Economic Opportunity Act of 1964<sup>30</sup> and amendments that provided for federal funding of community action programs including “legal services for the poor.”<sup>31</sup> This led to the expansion of already-existent legal aid programs throughout the state and the establishment of organizations that are now referred to as “Legal Aid Society” in various cities throughout the state. The organizations varied with respect to whether they accepted criminal cases.<sup>32</sup>

In March 1972, a Private Act of the Tennessee General Assembly served as enabling legislation for the creation of the Washington County’s Public Defender’s Office.<sup>33</sup> The office could be established upon a two-thirds vote of the county’s Quarterly Court,<sup>34</sup> with all funds to be disbursed from the County General Fund, supplemented by such funds as might ultimately be made available from other sources such as the state.<sup>35</sup> A few months later, in July 1972, the Quarterly County Court in Sumner County voted to create a Public Defender’s Office and appropriated local funds to establish the office.<sup>36</sup> However, a subsequent Attorney General Opinion deemed the act invalid,<sup>37</sup> and Sumner County’s Public Defender’s Office was ultimately established by Private Act in 1973.<sup>38</sup> Anderson County had also established a grant-funded Public Defender’s Office in 1972, but it closed when the grant expired.<sup>39</sup>

Between 1968 and 1974, Tennessee’s crime rates statewide grew almost 60%, a rate far greater than the population growth of only 7% between 1970-1975.<sup>40</sup> It was not surprising, then, that the system for reimbursing private appointed counsel and local public defender offices shuddered under its own weight. The state appropriated funds only to cover representation for those accused of felonies; attorneys representing those accused of

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<sup>29</sup> TCA. 40-2027.

<sup>30</sup> 2 U.S.C. § 2701

<sup>31</sup> William G. Haemmel, *The Poor Man Before the Bar of Justice in Tennessee--Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act*, 38 Tenn. L. Rev. 33, 34 (1970).

<sup>32</sup> Haemmel, p. 38-40.

<sup>33</sup> 1972 Tenn. Priv. Acts. Ch. 262

<sup>34</sup> 1972 Tenn. Priv. Acts. Ch 262, § 1.

<sup>35</sup> *Id.* at § 5.

<sup>36</sup> Letter of July 31, 1972 from Hon. I.C. McMahan, County Judge, Sumner County, to Hon. David M. Pack, Attorney General and Reporter.

<sup>37</sup> Letter of August 4, 1972 from Robert H. Roberts, Assistant Attorney General, to Hon. I. C. McMahan, County Judge, Sumner County.

<sup>38</sup> Tenn. Priv. Acts. 1973 Ch. 168

<sup>39</sup> 1977 report, p. 28; Letter of July 27, 1976 from Robert E. Kendrick, Deputy Attorney General, to Harry D. Mansfield, at p. 2.

<sup>40</sup> 1976 Alternative Legal Defense Services for Montgomery County, Tennessee, p. 32.

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misdemeanors remained obligated to do so on a pro bono basis.<sup>41</sup> By 1974, the annual appropriations made in support of the reimbursement statutes were insufficient to cover the claims made.<sup>42</sup> This resulted in the doling out of payments for some claims. For example, despite provisions that attorneys be paid by the hour, compensation was paid on a fee-for-service basis: \$25 per guilty plea and \$50/day for trial work.<sup>43</sup>

In addition to what would become a perpetual shortage of funding, the indigent representation process for the criminally accused suffered from inconsistencies in procedural implementation. In 1975, the Tennessee Supreme Court adopted the American Bar Association's Standards for the Defense Function for the measurement of competency of counsel,<sup>44</sup> yet the then-existing Supreme Court Rule governing appointment and payment procedures was at odds with the standards for ensure timely, competent legal advice and appropriate investigation. For example, the rule did not provide procedures for misdemeanor cases, even though appointment of counsel was required by law. The counsel payment section of the rule also did not provide for reimbursement for necessary investigatory costs or a mechanism for adequate investigation at all levels.<sup>45</sup>

Public sentiment continued to grow in favor of the establishment of local public defender's offices. In 1976, efforts were made to establish such an office in Jackson, the county seat of Madison County. However, once again the Attorney General rendered an opinion that a county could not create such an office without enabling legislation.<sup>46</sup> Thus, the majority of the state continued to rely on an ad hoc system of private counsel appointment, with individual judges varying in their approach as to when and how counsel was appointed.<sup>47</sup> Some appointed from a list of all attorneys in the county; some used a list provided by a local bar association. Some maintained a personal list or appointed local attorneys who practiced

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<sup>41</sup> 1976 Montgomery County report, p. 23.

<sup>42</sup> 1977 Report at p. 21.

<sup>43</sup> 1976 Montgomery County

<sup>44</sup> *Baxter v. Rose*, 523 S.W.2d 930 (1975).

<sup>45</sup> For a detailed description of the perceived shortcomings of the reimbursement procedures at the time, see Tennessee Court Study: Defense System Study Fall 1977, pp. 13-19.

<sup>46</sup> Letter of July 27, 1976 from Robert E. Kendrick, Deputy Attorney General, to Harry D. Mansfield.

<sup>47</sup> Notably, in addition to the use of appointed private counsel, indigent representation in Knox County in civil and criminal matters (including juvenile court) was also handled by the Legal Aid Clinic of the University of Tennessee College of Law. 1977 report, pp. 50-54. The clinic had first been established in 1947, and by 1970 it was staffed by 85 students who handled cases from intake through trial under the supervision of 3 full-time and 3 part-time attorneys. William G. Haemmel, *The Poor Man Before the Bar of Justice in Tennessee--Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act*, 38 Tenn. L. Rev. 33, 36-37 (1970). Detailed records of the percentage of time devoted to criminal matters as compared to civil matters are unavailable. 1977 report, p. 50.

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criminal law, and some simply relied on attorneys who were present in the courtroom at the time of the need of appointment.<sup>48</sup>

Discontent with the indigent representation system grew alongside other perceived problems with local government structures, the court system, and the selection of judges. In 1977, Tennessee held a limited constitutional convention,<sup>49</sup> and eventually the delegates instructed the general assembly to set criteria for a statewide system of public defenders to provide for the adequate defense of indigents charged with criminal offenses.<sup>50</sup>

It took some years after the 1977 convention, but the General Assembly did move forward with the implementation of a statewide system of public defenders. In 1986, the Tennessee General Assembly launched a pilot project, establishing public defender's offices in a total of 7 jurisdictions.<sup>51</sup> In 1986, offices were established in the twenty-third,<sup>52</sup> twenty-seventh,<sup>53</sup> and seventh<sup>54</sup> judicial districts, and, in 1987, establishing offices in the twenty-second,<sup>55</sup> twenty-fourth,<sup>56</sup> and twenty-fifth<sup>57</sup> judicial districts.

**Comment [crh1]:** The identification of counties assumes that today's judicial district are the same as in 1987.

In 1989, Tennessee modernized its criminal code and, at the same time, adopted a statutory scheme for public defender's offices statewide—excepting from its application three jurisdictions: the offices in Shelby and Davidson Counties because those offices were longstanding under prior authorization and local ordinance,<sup>58</sup> and the sixth judicial district (comprising Knox County) because of local political reasons.<sup>59</sup> An office in Knox County was ultimately created in 1990.<sup>60</sup> This means that there are now thirty-one one public defender's offices in Tennessee—one based in each judicial district. In all but Shelby County, the chief public defender is popularly elected.<sup>61</sup>

<sup>48</sup> 1977 report, pp. 31-32.

<sup>49</sup> "The only distinction between an unlimited constitutional convention and a limited constitutional convention is that a limited constitutional convention can only consider a Specified part or parts of the Constitution while an unlimited constitutional convention may consider the Whole of the Constitution, and alter, reform or abolish any part, or all of it." *Snow v. City of Memphis*, 527 S.W.2d 55, 71 (Tenn. 1975)

<sup>50</sup> Lewis L. Laska, *The 1977 Ltd. Constitutional Convention*, 61 *Tenn. L. Rev.* 485, 563 (1994)(internal quotations omitted).

<sup>51</sup> 1986 Tenn. Pub. Acts ch. 910.

<sup>52</sup> Cheatham, Dickson, Houston, Humphreys, and Stewart Counties.

<sup>53</sup> Obion and Weakley Counties

<sup>54</sup> Anderson County.

<sup>55</sup> Giles, Lawrence, Maury, and Wayne Counties.

<sup>56</sup> Benton, Carrol, Decatur, Hardin, and Henry Counties.

<sup>57</sup> Fayette, Hardeman, Lauderdale, McNairy, and Tipton Counties.

<sup>58</sup> 1989 Pub. Acts, c. 588; Tenn. Op. Atty. Gen. No. 16-06 (Feb. 10, 2016); T.C.A. § 8-14-202(a)

<sup>59</sup> 1989 Pub. Acts c. 588; Jamie Satterfield, "Cost for Concern" *Knoxville News Sentinel* (Aug. 21, 2011)

<sup>60</sup> 1990 Tenn. Pub. Acts. Ch. 964

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In 1995, the legislature established another agency devoted to indigent representation: the Tennessee Office of the Post-Conviction Defender (“TPCD”), a state-funded agency of the judicial branch providing representation to death row inmates in state collateral proceedings.<sup>62</sup> The TPCD also provides training and assistance to district defenders on death penalty cases. A statewide nine-member commission oversees the TPCD. The Governor, Lieutenant Governor,<sup>63</sup> and Speaker of the House each make receive two appointments, and the Supreme Court makes three.<sup>64</sup>

Even with the statewide establishment of public defenders offices, the appointment of private counsel remains necessary. In some cases, the Office of the Public Defender may have a conflict of interest or is otherwise unavailable to accept the case. Additionally, many matters in which there exists a right to counsel are not areas handled by public defenders. Indeed, the concept of indigent defense encompasses a broad range of civil matters, as well as the representation of juveniles, which often straddles the concept of criminal and civil law.

And of course, even a system in which the indigent routinely and efficiently receives appointed counsel must remain vigilant in its guard against injustice. The story of Ndume Olatushani makes this point abundantly clear.

[Insert story of Ndume Olatushani. Note that the extended quote below is from a speech describing Mr. Olatushani’s experience.]

[S]everal individuals went into a grocery store in Memphis early on a Sunday morning, Sunday October 2nd. One of the perpetrators went up to the storeowner, who happened to be working at the cash register. What they didn’t know is that he was armed and so when they realized he was armed, there was a moment of panic, several shots were fired in the store and one of them killed the storeowner. Witnesses in the store--there were about ten people in the store--described the perpetrators as two black men and one black woman. And soon the police got a big lead. They found the getaway car that had been used in the perpetrators abandoned near the store and they figured out that that car had been stolen from the Hertz Rental Car Agency at the St. Louis Airport. So immediately, the Memphis police started looking at suspects from the St. Louis area. Ndume is from St. Louis. He was born and raised there. He had a minor criminal record. There was nothing in his background that made him stand out from the thousands of other black men in St. Louis, but for some reason that has never been explained to us, they ended up zeroing in on him as a possible

<sup>62</sup> 1995 Pub.Acts, c. 510, § 1 (codified at TCA 40-30-201 et. seq.)

<sup>63</sup> Tennessee’s Speaker of the Senate is, by virtue of the office, named Lieutenant Governor of the state.

<sup>64</sup>

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suspect.

So what case did the prosecution come up with to convict him? This was their case. Of the ten witnesses in the store, they were unable to find anybody who could make a positive identification of Ndume, but they brought in one witness, Tommy Perkins, who said that Ndume looked like the person he had seen for just a few seconds as he was leaving the store and the perpetrators were coming in. He admitted on the stand that he was not more than eighty percent sure of his identification. Two individuals, Elizabeth Starks and Dennis Williams, were boyfriend and girlfriend at that time, and they said that Ndume and several friends of his had stayed at their house that weekend. They identified the get-away car and said they had seen Ndume and his companions in the get-away car. They said that these individuals were talking about robbing a store but they had no firsthand knowledge of what had actually transpired in the store. Beverly Batts was an acquaintance of Ndume. She had a criminal record herself but she testified that Ndume confessed to her that he committed a murder in Memphis. She knew no details of it. She just said he had made the statement to her. And finally, the police said that they found a palm print of Ndume's on the exterior of the get-away car on the roof of the car. So, that was the State's case.

Ndume had an alibi defense. Miraculously for him, he thought, when he was first suspected of the crime, is that he remembered exactly where he was that weekend. His mother's birthday is October 1st. He has a large family. He's one of eleven children. And that weekend they threw a big party for his mother's birthday. So that was that Saturday night that the party took place. So even him being at the party Saturday night was a strong alibi because the State's case had him in Memphis that entire weekend. Even if he was in St. Louis on Saturday night, that in itself was very exculpatory. There were about thirty alibi witnesses who all insisted that he was in St. Louis at this party and other people who saw him even throughout the day on Sunday. There was a gardener who had done some work on a property Ndume owned. He said he went by Ndume's house Sunday morning, right around the time the crime was committed. He went by Ndume's St. Louis house and Ndume was there and paid him some money that he owed him. Despite that alibi, the all-white jury convicted Ndume.

[T]he prosecution was able to empanel an all-white jury. This was before Batson. Batson was pending before the Supreme Court at the time of Ndume's trial, so the prosecution actually used each one of their

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preemptory strikes to eliminate African Americans from the jury pool. No preemptories were used against...potential white jurors.

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And this is the evidence that was withheld. There were two eyewitnesses [to the crime] that identified members of the [local Memphis] Brown Gang. There was an eyewitness in the store who saw the shooting at close range who identified Michael Brown as the shooter.

There was a witness outside the store. He was a young man, a teenager, and he actually had seen the perpetrators changing the license plates and thought, "something fishy is going on here." And he went back and told his mother what he had seen, and she said well, you need to walk back there and you need to pay real close attention so that if you ever need to report something to the police, you can. So he walked by again and really gave it his attention. When the police said they were going to show him a photo array, he said he was confident he would be able to pick out the two individuals he saw changing the license plate. And, when he was shown an array of twenty-four pictures that included Ndume's picture, he immediately picked out Michael Brown and his cousin Charles Keller as the two men who were changing the license plate.

The police then began investigating the Brown Gang. What they found out is consistent with the getaway car that had been stolen from the Hertz Rental Car Agency at the St. Louis Airport. The Brown Gang had a history of stealing rental cars from the Hertz Agency. And they were-- when the Memphis police contacted the St. Louis Airport police and said who are your suspects in this string of car thefts that you had, they got a fax back that said Michael Brown, Eric Brown, Charles Keller and a couple other names at the bottom. Then not only that, but the police, they were able to figure out that one of the other rental cars that the Brown Gang had stolen had been recovered by the Memphis police in Memphis. So they went to the address where this previous rental car had been recovered and they decided to canvas the neighborhood.

And they found a neighbor who said well, not only did I see them in this previous car that the police recovered, but he actually said I saw them in the getaway car. And the getaway car was distinctive because it had a piece of chrome missing from the front fender. And before the police showed him a picture of the car or brought him out to the impound

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lot to look at the getaway car, he mentioned that specific feature of the car. So he positively identified the car and said he had seen the members of the Brown Gang in the car just weeks before the crime happened. There were items in the car that also further implicated the Brown Gang. They had a reputation for traveling up the highway between Memphis and Chicago and stopping at truck stops along the way and engaging in prostitution. And in the car, there were receipts from exactly that route showing that they had stopped at some truck stops along the way. So that was also consistent with their pattern of criminal activity....

[In the police file] there was actually an initial report that they had done when they were first looking into Ndume as a suspect. And their initial print report said that his prints came back negative..... But maybe more importantly...there was a report where the police had done an inventory when they took the prints from the car. And according to their own inventory, they didn't take a print from the area of the car where they claim they matched Ndume's palm print.<sup>65</sup>

[Insert conclusion of Ndume Olatushani commentary]

## II. Development of the Right to Counsel in Civil Matters

As the understanding and interpretation of due process developed, the right to counsel was expanded as a matter of state and federal constitutional law. Thus, a system of indigent representation in civil matters has also developed in Tennessee.

[Insert development of right to counsel in civil matters]

In 2011, the Tennessee Supreme Court established another alternative to the individual appointment of private counsel. Tenn. Supreme Court Rule 13 authorizes the Administrative Office of the Courts may enter into contracts with attorneys, law firms, or associations of attorneys in areas certain areas of civil law (emergency involuntary judicial hospitalization, child support enforcement proceedings, and cases involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights).<sup>66</sup> Currently contract programs to provide legal representation of indigent respondents facing involuntary emergency judicial hospitalization exist in Blount, Davidson, Hamilton,

<sup>65</sup> Ndume Olatushani, Anne-Marie Moyes, Introductory Address: Wrongful Convictions, 10 Tenn. J.L. & Pol'y 85, 88-89,92-94 (2014).

<sup>66</sup> Tenn. S. Ct. R. 13 § 7.



## HISTORY OF INDIGENT REPRESENTATION IN TENNESSEE

Hardeman, Shelby, Williamson, and Wilson counties. Additionally, the AOC has agreements with attorneys to provide legal services for a fee to indigent persons in: Title IV-D child support enforcement proceedings brought pursuant to Tenn. Code Ann. Title 36, in Davidson County Juvenile Court.

### III. Development of the Right to Counsel for Juveniles

[Insert Juvenile Matters Overview]

During the series of studies of criminal representation in the 1960s and 1970s, troubling issues with respect to the representation of juveniles came to the attention of the broader public. In particular, it was noted that juveniles were routinely being shortchanged by the system—infrequently being advised of their right to counsel and infrequently receiving an appropriate opportunity for a determination of indigency. Additionally, in many circumstances, judges expressed displeasure at the use of counsel in juvenile court, viewing counsel as being “too vigorous” in its representation.

### IV. In Closing

While this writing has attempted to trace the development of representation provided by the state to those who are unable to afford counsel, the concept of “indigent representation” in its broadest interpretation must also include consideration of the various legal aid societies and other non-profit law firms (which receive funding from a variety of source that can include the state) that provide representation to the indigent in circumstance in which counsel is not a statutory or constitutional right. Any study of indigent representation in Tennessee must bear in mind the many ways and many reasons that counsel may come to represent their client.

# CURRENT INDIGENT REPRESENTATION SYSTEMS IN TENNESSEE

## Current Indigent Representation Systems in Tennessee

### SUMMARY OF RIGHT TO COUNSEL AND SOURCES OF REPRESENTATION

In Tennessee, a person is entitled to court-appointed counsel upon a showing of need when:

- accused of “any crime or misdemeanor whatsoever” at every stage of the proceedings
- a minor accused of an offense that could result in detention, and, under certain circumstances, in other cases.<sup>67</sup>
- a minor who is the subject of a judicial proceeding regarding suspected abuse or neglect<sup>68</sup>
- parental termination proceedings are brought against him/her<sup>69</sup>
- facing involuntary hospitalization as a result of judicial order<sup>70</sup>
- contempt actions are brought from an alleged failure to pay child support<sup>71</sup>
- seeking post-conviction relief in capital cases and, under certain circumstances, in non-capital cases.

Additionally, the state is responsible for providing investigatory services and expert witnesses where necessary for an adequate defense,<sup>72</sup> and, the indigent accused are also entitled to interpreter services if they have limited proficiency speaking English.<sup>73</sup>

By statute, if a person accused of a crime is indigent (a matter left largely to the discretion of the local judge, although a uniform affidavit of indigency is used), an appointment must to the public defender if the public defender is available.<sup>74</sup> There is no standardization as to how “availability” is determined. Currently, the public defender’s offices do not generally become involved in matters of contempt, judicial hospitalization, dependency, neglect, abuse, custody, child support, or termination of parental rights.<sup>75</sup> While

<sup>67</sup> TCA 37-1-126(c)(i)

<sup>68</sup> Statute provides that a guardian ad litem appointed on behalf of the child in dependent and neglect or abuse cases must be an attorney.

<sup>69</sup> TA 37-1-126. But note that *In re: Carrington H*, No. M2014-00453-SC-R11-PT (Tenn. January 29, 2016) holds that there is no requirement for a procedure to prove that counsel was ineffective.

<sup>70</sup> TCA 33-3-503

<sup>71</sup> *Gideon v. Wainwright*; Tenn. S. Ct. R. 13

<sup>72</sup> *State v. Edwards*, Tenn. S. Ct. R. 13

<sup>73</sup> Title VI Civil Rights Act; Tenn. S. Ct. R. 13

<sup>74</sup>

<sup>75</sup> See 2011 AOC report, at p. 13.

# CURRENT INDIGENT REPRESENTATION SYSTEMS IN TENNESSEE

public defenders are directed by statute to attend juvenile court proceedings and represent children at risk of being placed in detention, in practice, this does not occur in most counties.<sup>76</sup>

## PROGRAMS OF REPRESENTATION

- Public Defender Offices
- Post-Conviction Defender
- Private Appointed Counsel
- AOC Contracts for certain civil matters
- Local Pro Bono Programs
- Non-Profit Law Firms

## ORGANIZATIONAL STRUCTURE OF PROGRAMS

### Public Defender's Office

Statewide, the various public defenders offices are administratively coordinated by the Tennessee District Public Defender's Conference ("TDPDC"), which is headed by a director elected by a majority vote of the 31 chief defenders. Among its duties, the TDPDC submits budget requests to the state and distributes funding to the local conferences (with the exception of Davidson County and Shelby County which do not participate in the budget process of the TDPDC<sup>77</sup>), and generally serves as liaison to the branches of state government.

Post-Conviction Defender

Private Appointed Counsel

AOC Contracts for certain civil matters

Local Pro Bono Programs

Non-Profit Law Firms

## SOURCES OF FUNDING OF INDIGENT REPRESENTATION IN TENNESSEE

### State Funds:

- District Public Defender's Conference (administers budget for 29 of 31 districts; funded by state)
- Office of the Post-Conviction Defender (funded by state)

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<sup>76</sup> 2011 AOC report, at p. 21

<sup>77</sup> Since \_\_\_\_, the state-provided funds for the of the Davidson and Shelby county offices is tied to the consumer price index

## CURRENT INDIGENT REPRESENTATION SYSTEMS IN TENNESSEE

- “Indigent Defense Fund”--appointed private counsel fees and expenses (funded by state; courts authorized to charge \$50-\$200 administrative fee to indigent with court-appointed counsel)
- Allocations for Shelby County and Davidson County Public Defender’s Office (tied to consumer price index; no adjustment for corresponding increased caseload in times of economic retraction when consumer price index does not increase)

### Local Funds:

- Any increase in local funding for district attorney general’s office must have corresponding 75% increase to office of public defender.<sup>78</sup> (Currently only Knox, Hamilton, and Shelby receive this)
- Local Assessment on Criminal Prosecutions<sup>79</sup> (Generally, counties may charge \$12.50 fee on every misdemeanor and felony prosecution; only 10 districts currently receive funding from this source.)
- Other local contributions<sup>80</sup> (Currently only Davidson, Knox, and Shelby receive this)

**Comment [crh2]:** Need to confirm, particularly re: Davidson County. This comes from May 2007 Spangenberg Group Report.

**Comment [crh3]:** May 2007 Spangenberg Group Report

**Comment [crh4]:** May 2007 Spangenberg Group Report

### In Kind Contributions:

- Many appointed counsel do not submit claims, or they submit claims at less than the level to which they could request reimbursement
- Many lawyers serve on a pro bono basis for an indigent client whether or not the client comes to them through a formal appointment process.
- Because of ethical responsibilities, it is expected that lawyers serve their clients whether or not the lawyers can ever expect full compensation. In the case of private counsel, this may mean hours of work beyond what is compensable. In the case of public defenders whose salaries are based on the state’s 37.5 hour work week, this means a workload significantly beyond that contemplated by the job description and pay scale.

<sup>78</sup> TCA § 16-2-518

<sup>79</sup> TCA § 40-14-210.

<sup>80</sup> Authorized by T.C.A. § 40-14-210(d).

## Issues Studied by the Task Force

[Summary of Recurring Challenges of the System, as evidenced through studies over last fifty years]

[Issues addressed by Task Force and issues unable to be addressed given time and resources]

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## TASK FORCE RESEARCH AND FINDINGS

### Task Force Research and Findings

[Task Force Activities:

Listening Tour

Expert Advisors

Research/Data

Nation-wide Information

State-specific information

Findings:

Civil

Criminal]

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Recommendations

DRAFT

Conclusion

DRAFT



Acknowledgements

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Appendix

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