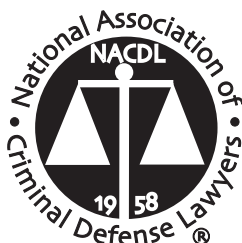


# SUMMARY INJUSTICE:

## A Look at Constitutional Deficiencies in South Carolina's Summary Courts





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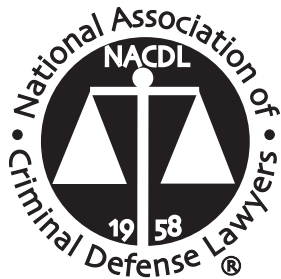
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# SUMMARY INJUSTICE:

## A Look at Constitutional Deficiencies in South Carolina's Summary Courts

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# Acknowledgements

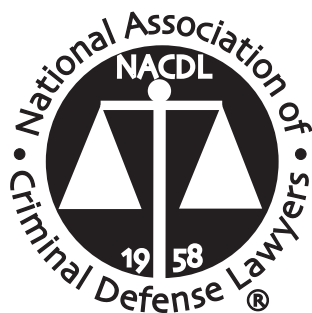
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# About the National Association of Criminal Defense Lawyers



The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 9,200 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The Foundation for Criminal Justice (FCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them access to effective counsel, due process, freedom from unreasonable search and seizure, and fair sentencing. The FCJ supports NACDL's charitable efforts to improve America's public defense system, and other efforts to preserve core criminal justice values through resources, education, training, and advocacy tools for the public and the nation's criminal defense bar.

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# About the American Civil Liberties Union



The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has been committed to ensuring that access to effective counsel, as guaranteed in the Sixth Amendment, is a robust right for all and not a privilege reserved only for the affluent. The ACLU's Criminal Law Reform Project focuses its work on the "front end" of the criminal justice system — from policing to sentencing — seeking to end excessively harsh criminal justice policies that result in mass incarceration, overcriminalization, and racial injustice, and stand in the way of a fair and equal society. By fighting for nationwide reforms to police practices, indigent defense systems, disproportionate sentencing, government abuses of authority in the name of fighting crime, and drug policies which have failed to achieve public safety and health while putting an unprecedented number of people behind bars, the Criminal Law Reform Project is working to reverse the tide of overincarceration, protect constitutional rights, eliminate racial disparities, and increase government accountability and transparency.

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## About the American Civil Liberties Union of South Carolina



The American Civil Liberties Union of South Carolina, Inc. ("ACLU-SC") is a statewide, nonpartisan, nonprofit organization with more than 2700 members. As a state affiliate of the ACLU, it is dedicated to preserving, in South Carolina, the civil liberties enshrined in the U.S. Constitution and Bill of Rights including the right to counsel. ACLU-SC has filed numerous amicus briefs cases in raising the issue of right to counsel in municipal and magistrate courts. Those courts include Oconee County Magistrate Court, City of Beaufort Municipal Court, Port Royal Municipal Court and Surfside Beach Municipal Court.

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# Preface

There is a widely held belief that the Sixth Amendment right to counsel guarantees that all accused persons in the United States never stand alone when the state seeks to deprive them of their liberty. And indeed that should be the case. But in reality, the right to counsel remains elusive, shrouded in the shadow of systemic deficiency. In his classic poem, *The Hollow Men*, T.S. Eliot famously observed, “[b]etween the idea and the reality falls the shadow.” And so it is with the right to counsel in this country. In practice there is a gaping chasm between this fundamental right and its realization. This study of the municipal and magistrate courts of South Carolina documents the existence of that chasm, an abyss into which countless poor people fall as a matter of course in the Palmetto State.

Several years ago, at the approach of the 50th anniversary of the landmark case of *Gideon v. Wainwright*, the National Association of Criminal Defense Lawyers (NACDL) adopted a formal policy that no person should ever face the loss of liberty or criminal conviction without access to criminal defense counsel. This policy sensibly recognizes that the loss of a single day of liberty, or a criminal conviction even without a loss of liberty, can have profoundly negative implications. It aspires to extend the right to counsel beyond that which is currently mandated by current Supreme Court jurisprudence. But confronted with repeated reports that there are places in the United States where even the more narrowly drawn right is routinely denied, NACDL resolved to act. And act it did.

NACDL’s public defense team reached out to their counterparts at the American Civil Liberties Union Criminal Law Reform Project and proposed an ambitious collaboration to go out into the field and conduct firsthand observations to assess whether the disturbing reports were accurate. What these dedicated professionals saw was far worse than imagined. This report documents practices that are beyond disturbing: courts where there is no lawyer present, not even the judge; poor people literally held ransom for want of bail on the most minor of charges; and a routine failure to advise accused persons of their rights, let alone any effort to ensure that they understand them. It is incredible to see that such routine abuses of fundamental rights are still prevalent in this country in the second decade of the 21st century. These magistrate and municipal courts truly constitute an abyss — places in which lives are ruined with alarming regularity. The vignettes portrayed in this report paint an ugly picture of what passes for justice in these courts.

Since this report is merely a snapshot of what transpired over the brief period of observation, more in depth research must be conducted to document the scope of the problem. And NACDL and its partners at the ACLU are determined to tackle that task. But this preliminary report provides startling evidence that injustice occurs with mind-numbing regularity for thousands of poor people in South Carolina. For them, their experience in these courts evokes the last two lines of Eliot’s famous poem: “This is the way the world ends. Not with a bang but a whimper.”



**Norman L. Reimer**  
Executive Director, NACDL

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# Executive Summary

When a person is accused of a crime and faces loss of life or liberty as punishment, the U.S. Constitution guarantees that person the right to a lawyer even if he or she cannot afford one. The U.S. Supreme Court affirmed this basic principle more than a half century ago in *Gideon v. Wainwright*, and in subsequent cases that expanded the right to misdemeanor prosecutions. Yet it is violated routinely every day in South Carolina courts, where scores of people are convicted, sentenced, and sometimes incarcerated, without having been represented by counsel. This paper documents the constitutional violations observed by attorneys with the National Association of Criminal Defense Lawyers (NACDL) and the American Civil Liberties Union (ACLU) in 27 different courts throughout the state during several weeks between December 2014 and July 2015.

In South Carolina, the bulk of criminal cases are low-level offenses heard in municipal and magistrate courts, collectively referred to as summary courts. Towns are not required to have municipal courts; each town chooses whether to establish such a court. Because these courts are moneymakers, through the generation of fines and fees from defendants, many towns have created them. Across the state, there are more than 400 magistrate and municipal courts. In 2013, South Carolina municipalities netted over \$20 million in assessed fines from municipal courts.

- ⌚ In many of these courts, not a single lawyer is involved in the entire criminal proceeding. Municipal and magistrate judges are not required to be lawyers, the police frequently function as the prosecutor, and defense attorneys are scarce. Despite the absence of lawyers — and the constitutional requirement that defendants be provided a lawyer — individuals in these courts face criminal charges that carry serious consequences, including jail time.
- ⌚ Lack of counsel is also prevalent *prior* to trial in South Carolina, at the stage where defendants are legally presumed to be innocent. Accused individuals are not provided counsel during bond hearings, when the judge determines whether someone will be held in jail following arrest. Poor people who cannot afford to pay even a modest bond amount end up imprisoned in jail until their cases are adjudicated. As a result, many people often serve the maximum possible sentence *prior* to being found guilty or, as in some cases, *not* guilty.
- ⌚ The accused in these South Carolina courts are rarely represented by lawyers. Many times they are not even told of their right to have a lawyer, much less at the state's expense. In the few courts observed where the accused were informed of their rights to a lawyer and a trial, that advisement was often conducted in a group or by video, with no individual inquiry into a particular defendant's understanding of these rights and what it meant to waive them.
- ⌚ Poor people accused of low-level offenses in these courts suffer disproportionately throughout the process. Many judges offer a "choice" to defendants: pay a fine or spend time in jail. If the accused cannot afford the fine, or the judge simply suspects the accused will not be able to pay the fine, that person will be sentenced to jail merely because she is poor.

In short, this report demonstrates that summary courts in South Carolina often fail to inform defendants of the right to counsel, refuse to provide counsel to the poor at all stages of the criminal process, and force defendants who cannot afford to pay fines to instead serve time in essentially a debtor's prison. These are unconscionable and unacceptable practices that cause significant harm and must be remedied. These abuses masquerading as "justice" are a corruption of the legal process and an embarrassment to the people of South Carolina. Unfortunately, the many constitutional violations documented in this paper may be merely the tip of the iceberg of injustices being committed against people in South Carolina.

The denial of fundamental constitutional rights in South Carolina's summary courts urgently calls for comprehensive study and real solutions. Accordingly, additional investigation is underway to systematically gather data from magistrate and municipal courts in several counties across the state. The study will examine the procedures used in municipal and magistrate courts to understand the degree to which the court procedures comply with constitutional requirements. A second report detailing the findings of that research is forthcoming later in 2016.

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# Introduction

*In December 2014, in the Municipal Court in North Charleston, South Carolina, an African American grandmother, SG, stood before the court charged with shoplifting meat and cake from a Walmart. The judge asked if she understood the charge and how she wanted to plead. SG quietly asked for a public defender. Responding that the case had already been postponed once for her to get an attorney, the judge began to aggressively question SG about whether she had filled out the public defender application at her prior court appearance. SG explained that she had not; she had been planning to hire an attorney but she could not afford one and wanted a public defender. The judge said he would not allow a second continuance for a lawyer and she would have to proceed today on her own. He again asked her how she wanted to plead. When SG did not respond, the judge entered a plea of not guilty for her. He asked her if she wanted a bench or jury trial. When she did not respond, he said “bench.” It was very clear that she did not understand what was happening.*

*The judge then began to proceed with the bench trial, swearing in the witness who was present from Walmart. When SG asked what was going on, the judge said the case was going forward today and again asked whether she wanted a bench or jury trial; the confused grandmother waved her hand in a gesture of frustration and said, “I don’t care,” and the case went on. The witness reported seeing the woman with her granddaughter in the grocery department of the store picking up some meat and cake and trying to leave without paying. The judge asked SG if she had anything to say. She said no. The judge asked if she wanted to cross-examine. She mumbled something but ultimately did not ask any questions or testify — it was unclear if she knew she could. Finding that SG had been arrested without incident, that there was no restitution owed, and that the State had met its burden, the judge pronounced SG guilty.*

*The judge proceeded to publicly list several prior encounters SG had had with the justice system — fraudulent check and shoplifting charges. Noting that SG had been with her two-year-old granddaughter at the time — a fact that seemed to anger him — he dismissively said, “There’s not a whole lot I can do for you ma’am,” and sentenced her to the maximum sentence of thirty days in jail. As she was being handcuffed and escorted from the courtroom, he told her she had 10 days to appeal. SG was removed from the courtroom, sobbing and in handcuffs. The trial and sentencing took less than three minutes.<sup>1</sup>*

When the average person in America thinks of a criminal courtroom, the immediate images that jump to mind are frequently driven by fictional television dramas — theatrical courtroom battles between a prosecutor and a defense attorney, while a jury sits riveted by the action. The reality is that most interactions with the criminal court system are not major felony cases or even trials, but rather misdemeanor matters shuffled through overburdened court systems. In South Carolina, the bulk of the state’s criminal charges are low-level offenses heard in municipal and magistrate courts, collectively referred to as summary courts. While these misdemeanor offenses are widely characterized as “minor,” they are criminal charges that carry serious consequences, including a permanent criminal record, the possibility of jail time, and potential collateral harms such as exclusion from public housing, revocation of one’s driver’s license, revocation and ineligibility for certain professional licenses, and ineligibility for federal student aid, among many others.

**Criminal defendants in these courtrooms were rarely represented by defense counsel and many times defendants were not even told of their right to have an attorney, much less provided one.**



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From December 2014 to July 2015, attorneys from the National Association of Criminal Defense Lawyers (NACDL) and the American Civil Liberties Union (ACLU) observed numerous magistrate and municipal courts across the state of South Carolina.<sup>2</sup> During court observations, criminal defendants in these courtrooms were rarely represented by defense counsel and many times defendants were not even told of their right to have an attorney, much less provided one. In courts where defendants were informed of their rights to an attorney and trial, that advisement was generally conducted in a group, via a video or through a brief, often unintelligible statement by the judge, with no individual inquiry into a particular defendant's understanding of these rights and what it meant to waive them. Many defendants were held in jail pending trial because they could not afford to post bail, resulting in individuals serving the maximum possible sentence *prior* to even being found guilty, eviscerating this nation's fundamental principle of "innocent until proven guilty." Some of these magistrate and municipal courts routinely operate without a single attorney in the courtroom. Solicitors — the term that South Carolina uses for its prosecutors — are usually absent from summary courts. Instead, the police officer who charges the offense is responsible for prosecuting it and serving as a witness. Judges are not required to be lawyers — most are not — and defense attorneys are a rarity.

**Many defendants were held in jail pending trial because they could not afford to post bail, resulting in individuals serving the maximum possible sentence prior to even being found guilty, eviscerating this nation's fundamental principle of "innocent until proven guilty."**



This report provides a snapshot of the workings of the criminal justice system in South Carolina's summary courts. Some of the problems witnessed may be confined solely to the courts in which they were observed; some may be more widespread. Only additional systematic study of the magistrate and municipal courts can unveil the depth and breadth of the constitutional violations evident from these more limited observations.

## Overview of South Carolina Summary Court System

South Carolina has 46 counties divided into 16 judicial districts. Each county has one general sessions court, which has jurisdiction over all crimes unless exclusive authority is granted to magistrate or municipal court. In practice, general sessions court usually hears felonies and misdemeanors that carry statutory sentences of more than 30 days. Lower level misdemeanors, traffic offenses, and town ordinances are heard in summary courts — either county magistrate courts or town municipal courts, depending upon where the alleged violation took place. The South Carolina Summary Court Judges Association reports that there are 312 magistrate judges and 249 municipal court judges in South Carolina.<sup>3</sup> These judges staff about 200 magistrate courts and another 200 municipal courts across the state.<sup>4</sup> Criminal jurisdiction in magistrate

**Municipal courts generate a substantial amount of revenue for towns. Although some of the money from fines, fees, and assessments associated with convictions in municipal courts is handed over to the state, a large sum is retained by those cities.**



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courts is, for the most part, limited to cases in which the maximum penalty is no more than 30 days' incarceration, a \$500 fine, or both.<sup>5</sup> Municipal courts generally have the same criminal jurisdiction as magistrate courts; however, pursuant to South Carolina law, municipal courts are allowed to hear more serious criminal charges if the solicitor petitions and the defendant agrees.<sup>6</sup> Magistrate and municipal courts have also been statutorily granted jurisdiction over a few charges that carry sentences higher than 30 days and a \$500 fine, such as second or subsequent charges of driving with a suspended license.<sup>7</sup>

Municipal courts have no exclusive jurisdiction — they are purely optional courts that are created by towns to enforce violations within city limits. In municipalities that choose not to have municipal courts, offenses that would be prosecuted in a municipal court are instead prosecuted in the county magistrate court. Municipal courts generate a substantial amount of revenue for towns. Although some of the money from fines, fees, and assessments associated with convictions in municipal courts is handed over to the state, a large sum is retained by those cities. South Carolina's Municipal Association reported to the South Carolina Commission on Indigent Defense that municipalities retained over \$20 million in assessed fines in 2013. These are solely fees retained by the municipalities and do not include fees collected that are remitted to the state. This figure does not include financial data from many municipalities that did not report fines collected.

**The individuals who preside as judges in magistrate and municipal courts are not required to be attorneys or have any prior legal expertise.**



The individuals who preside as judges in magistrate and municipal courts are not required to be attorneys or have any prior legal expertise.<sup>8</sup> In fact, according to information from the South Carolina Summary Court Judges Association, only 127 of the state's 249 municipal judges and a mere 66 of the state's 312 magistrates are lawyers. Magistrates are appointed by the Governor, "by and with the advice and consent of the Senate."<sup>9</sup> Municipal court judges are appointed by the local municipal council.<sup>10</sup>

The rules regarding qualification of magistrate and municipal judges are largely similar. Prior to initial appointment, both magistrate and municipal judges must pass a certification exam, which consists of a Wonderlic Personnel Test (WPT) and a Watson-Glasser Critical Thinking Appraisal (WGCTA).<sup>11</sup> The WPT is described as a "test of general intelligence" that requires an individual to have "at least a sixth grade reading level, knowledge of basic mathematics, how to tell time, days of the week and months of the year, and a basic knowledge of the U.S. monetary units and the U.S. Customary System of weights and measures."<sup>12</sup> The WGCTA assesses critical thinking skills including inference, recognition of assumptions, deduction, interpretation, and evaluation of arguments.<sup>13</sup> Magistrate and municipal court judges are required to re-take the certification exam every eight years, and are also required to take continuing legal education courses in criminal and civil procedures.<sup>14</sup>

**As of 2005, magistrate judges are required to have a baccalaureate degree, although no parallel requirement exists for municipal judges.**



Additionally, as of 2005, magistrate judges are required to have a baccalaureate degree, although no parallel requirement exists for municipal judges.<sup>15</sup> Newly appointed magistrate and municipal judges are required to complete a training program, which consists of a two-week long session, held 9 am - 5 pm daily, covering both civil and criminal law.<sup>16</sup> Non-lawyer magistrate judges are required to observe ten trials before presiding over a trial, but may conduct bond hearings or issue warrants without completing the observation requirement.<sup>17</sup> There is no comparable requirement for municipal judges. Given the brevity and unconstitutional procedures of the trials observed by NACDL and ACLU attorneys, this observation requirement is unlikely to teach new judges much about the law and the constitutional protections that the accused is entitled to, further institutionalizing injustices rampant in the state summary courts.

# Public Defense Services in South Carolina

The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” In 1963, the U.S. Supreme Court confirmed in *Gideon v. Wainwright* that the right to counsel necessarily includes the right to have counsel provided by the government in felony cases if the individual is unable to afford to hire an attorney.<sup>18</sup> The Court in later years clarified that unless a person waives the right to an attorney, he or she cannot be sentenced to jail if he did not have counsel, thereby extending the right to counsel to misdemeanor cases that result in jail sentences.<sup>19</sup> In the most recent major case regarding the right to counsel, the Supreme Court held that counsel must also be provided in cases in which a jail sentence is suspended and the person is placed on probation.<sup>20</sup> Many states have gone beyond the Supreme Court’s mandate and require by state constitution or statute that poor defendants be appointed counsel any time they are facing criminal charges, regardless of whether jail time may be imposed.<sup>21</sup>

**Many individuals who are charged with offenses in magistrate and municipal courts are not given the opportunity to request appointed counsel until they come to court for their trial date. If individuals wish to seek public defense services, they will have to return for a second court date.**



South Carolina law provides that anyone who is entitled to counsel under the U.S. Constitution must be advised of the right to have an attorney, and must have one appointed if unable to afford to hire one, unless the individual “voluntarily and intelligently waives that right.”<sup>22</sup> Therefore, defendants who are faced with jail sentences — either an active sentence or one that is suspended for probation — are required to be advised of their right to an attorney and are entitled to have counsel appointed if they cannot afford to hire an attorney on their own. For general sessions and juvenile cases, the procedure in South Carolina appears to comply with this — requiring that every person arrested for a crime within the jurisdiction of general sessions court, any juvenile charged with anything that *may* result in imprisonment, and anyone charged with a probation violation be taken before the clerk of court or other designated judicial officer as soon as possible “for the purpose of securing to the accused the right to counsel.”<sup>23</sup> However, in contrast, the rule only requires magistrate and municipal court judges to inform a defendant of the right to counsel if the judge determines that “a prison sentence is *likely* to be imposed following . . . conviction,” and the determination is not made until the case is called for disposition in trial court rather than upon arrest or at first appearance.<sup>24</sup> The effect is that many individuals who are charged with offenses in magistrate and municipal courts are not given the opportunity to request appointed counsel until they come to court for their trial date. If individuals wish to seek public defense services, they will have to return for a second court date. For many defendants for whom a second court appearance means unpaid leave from work or costly childcare arrangements, multiple court appearances are particularly onerous.

**Those who are properly informed and do choose to exercise their right to counsel find that the “free” lawyer provided by the State is not in fact free.**



Those who are properly informed and do choose to exercise their right to counsel find that the “free” lawyer provided by the State is not in fact free. Individuals are required to fill out an affidavit of indigency and pay a fee of \$40 to be screened for qualification for appointed counsel.<sup>25</sup> The fee may be waived or reduced if the applicant is unable to pay it, but in that case the accused may be required to pay the fee later, if placed



on probation.<sup>26</sup> To determine if a person qualifies for counsel, the judge is required to consider all aspects of a person's financial situation including "income, debts, assets and family situation."<sup>27</sup> If a person's net family income is less than or equal to the federal poverty guideline, he or she is presumed to qualify for counsel.<sup>28</sup> If a judge determines that a person is partially indigent — that is, the person can afford to pay something toward legal representation but does not have enough to hire counsel — the judge may order the individual to pay whatever assets are available to the state.<sup>29</sup> Further, the use of assigned counsel in South Carolina creates a civil claim "against the assets and estate of the person who is provided counsel," such that a judgment and lien may be entered to reimburse the state for the cost of the defense.<sup>30</sup>

**After more than three weeks since her initial arrest, MB was finally brought to court and told that she could plead guilty for time served. MB refused, insisting that she wanted an attorney. She was sent back to jail, and was only released after she had already served the maximum possible sentence for the offense charged — thirty days. In that time, she lost her job and spent Thanksgiving away from her children.**



Delivery of public defense services is coordinated mostly through the State's public defender system, which was created in 1993 and funded by the state and contributions from the counties. Each of the 16 judicial districts has a circuit defender, and each county has one or more deputy or assistant defenders. Public defenders are primarily responsible for representing indigent clients in general sessions and magistrate courts, with private appointed attorneys stepping in when there are conflicts that preclude the public defender from representing an individual. Due to funding and staffing decisions by circuit defenders, coverage by public defenders in magistrate and municipal courts varies among counties. Since counties contribute to public defense funding, albeit at varying levels, public defenders are expected to provide representation in magistrate courts to the extent possible given caseload and budget limitations. However, in some counties where funding for public defense is low, coverage is only available for certain case types that receive state funding, such as Criminal Domestic Violence (CDV) and Driving Under the Influence (DUI) cases.

Many of the counties have so many municipal courts that the magistrates handle very few criminal matters other than bond setting and preliminary hearings for felony matters. Municipal courts are not automatically covered by the public defender system. Some municipal courts contract with circuit defenders or private attorneys to provide public defense services, but many simply make no provision for public defense services at all. In an attempt to clarify the financial responsibilities of municipalities regarding public defense, a proviso was attached to the state budget for 2015-2016, which requires municipal courts to provide for indigent defense and precludes public defenders from providing for such defense unless contracted by the town — even when that public defender represents the individual on related charges in another court.<sup>31</sup>

Additionally, the sheer number of summary courts in the state presents a problem for public defender offices that often lack the staff to be able to send attorneys to each of these courts, even when they are contracted to cover them. In Richland County (Columbia, SC), for example, there are twelve magistrate courts, four municipal courts, and a centralized bond court that operates 24 hours a day, 7 days a week.<sup>32</sup> Because the public defender office in Richland County has only two lawyers to staff those courts, they in fact only go to three of the magistrate courts. If a defendant in one of the courts that is not staffed wants a public defender, the case will be transferred to one of the courts that the public defender office does staff, which means the individual will have to return to court on a different day at a different location.

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# Observed Problems in South Carolina's Summary Courts

## Bond Setting

*In Beaufort County, an attorney spoke with a young, white, single mother, MB, who had been arrested for her first DUI offense — on a moped. Arrested on October 29, 2014, she was taken for an initial appearance before a magistrate judge the next day. At that appearance, bond was set at \$1,022, based on the judge's assertion that MB owed unpaid fines to the Department of Motor Vehicles (DMV). When she asked what the fines were, the judge indicated that he did not have any more information and told MB to contact the DMV. Unable to afford the bond amount, MB signed a form indicating that she wanted to be screened for a public defender, and was returned to the custody of the Beaufort County Detention Center. No attorney was provided.*

*Almost three weeks later, the day MB was scheduled for court, she was held in a court staging area at the jail but was never transported to the court — located across the parking lot — and received no information about what was going on with her case. On November 24, the Monday before Thanksgiving, MB submitted an inmate request/complaint form, asking when she would be released, since she had now been in jail for 25 days and her court date had passed. After more than three weeks since her initial arrest, MB was finally brought to court and told that she could plead guilty for time served. MB refused, insisting that she wanted an attorney. She was sent back to jail, and was only released after she had already served the maximum possible sentence for the offense charged — thirty days. In that time, she lost her job and spent Thanksgiving away from her children.*

*MB later learned that on November 18, when she was still in the custody of the Beaufort County Detention Center, her case had proceeded in her absence. Recording her erroneously as a defendant who had willfully failed to appear in court, MB was tried in absentia, found guilty, sentenced to a fine of \$1,022, and had a bench warrant issued against her. The error was only corrected when a clerk caught the mistake and filed a motion to reopen the case, setting the case for a new date in January 2015.*

*After her release, MB contacted the DMV regarding the unpaid fines referenced by the judge at her bail hearing. No fines were owed. With the help of an attorney, the DUI charge against MB ultimately was dismissed and expunged. Although MB was not convicted, the damage caused by her month in jail, including losing her job, could not be undone.*

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**Although this bond setting is the first step in the criminal prosecution, appointed attorneys are not present for those defendants who cannot afford an attorney.**



In South Carolina, municipal court and magistrate court judges are the judicial officials most commonly tasked with the setting of bond in all criminal cases.<sup>33</sup> South Carolina law requires that a person charged with a criminal offense for which there is a right to have bail set receive a bond hearing within twenty-four hours of being arrested.<sup>34</sup> By judicial order, bond hearings must be conducted at least twice daily, once in the morning and once in the evening.<sup>35</sup> Although this bond setting is the first step in the criminal prosecution, appointed attorneys are not present for those defendants who cannot afford an attorney. The Summary Court Judges Bench Book notes that “the bond proceeding is a very important phase of the criminal process, though it has never been held to be a stage at which the accused has the right to be represented by counsel,” so although defendants may have attorneys present, the State believes they have

“no absolute right to be represented.”<sup>36</sup> This initial appearance is, however, the point at which the U.S. Supreme Court has held that the right to counsel attaches — meaning that from this point forward, no critical stage of the criminal process can proceed without the defendant either having counsel representing him or executing a knowing and voluntary waiver of that right.<sup>37</sup>

**During first appearance bond proceedings, no defendant facing summary court charges was ever asked about whether he or she would like to apply for appointed counsel at the time of this initial appearance and bond hearing.**



At the bond hearing, the summary court judge is responsible for explaining the charges against the accused, informing him or her of certain rights, and setting conditions of release.<sup>38</sup> The judge is required to advise individuals of their rights to have an attorney and to have an attorney appointed if they cannot afford to hire one. While the judges observed did mention those rights during first appearance bond proceedings, no defendant facing summary court charges was ever asked about whether he or she would like to apply for appointed counsel at the time of this initial appearance and bond hearing.

When setting conditions of release, under South Carolina law, defendants must be released pending trial without having to post a monetary bond — providing only promises to appear, remain on good behavior, and not leave the state — unless the judge makes a determination that such release on recognizance either “(1) would not reasonably assure the appearance of the accused at trial, or (2) would result in an unreasonable danger to the community.”<sup>39</sup> Only if the judge determines that the defendant falls into one of those two exceptions may the judge impose additional conditions, including a secured bond; supervision by a designated person or organization (such as a pretrial services organization); restrictions on residence, travel, or association; or “any other condition deemed reasonably necessary to assure appearance.”<sup>40</sup>

Despite the requirement that defendants should be released on personal recognizance bonds, lawyers who observed bond setting in municipal and magistrate courts saw many defendants held on cash or surety bonds for even summary court offenses and low-level nonviolent felonies such as drug possession, with little or no reason provided as to why the defendant was considered a flight risk or a danger to the community. For example, in Lexington County Bond Court in April 2015, observers reported a judge setting a \$652.50 surety bond for a man charged with a first offense of driving on a suspended license, commonly called Driving Under Suspension or just DUS. While the defendant did have a prior record for other crimes, he also reported being steadily employed for the last three years. The judge did not state in open court any reason why he felt that the charged individual was either a danger to the community or a flight risk.

**With no attorneys in the courtrooms to advocate for the defendants, present evidence, or challenge the judge’s views, individuals are usually unable to effectively argue for recognizance, and may not even know that they are entitled, in most cases, to a personal recognizance bond.**



With no attorneys in the courtrooms to advocate for the defendants, present evidence, or challenge the judge’s views, individuals are usually unable to effectively argue for recognizance, and may not even know

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**Studies in the mid-1960s, 1985, and 2002 all found that defendants who were represented at their first appearance before a judicial officer were more likely to achieve pretrial release than unrepresented defendants.**



that they are entitled, in most cases, to a personal recognizance bond. Some may question whether having an attorney present would make a difference. If judges are unwilling to set a personal recognizance bond, would an attorney really be able to change the judge's mind? Empirical data shows that representation does make a difference. Studies in the mid-1960s, 1985, and 2002 all found that defendants who were represented at their first appearance before a judicial officer were more likely to achieve pretrial release than unrepresented defendants.<sup>41</sup> In the 2002 study in Baltimore, "empirical data confirms that counsel's effective advocacy and offering of credible information has succeeded in gaining pretrial release on recognizance for two and a half times as many defendants charged with misdemeanors and non-violent crimes than those defendants without a lawyer."<sup>42</sup> Additionally, for those defendants who did have monetary conditions of bail set, being represented by an attorney made a defendant two and a half times more likely to have bond set at an affordable level as compared to unrepresented individuals.<sup>43</sup> Further, with counsel, a clear record would be established, which can potentially impact the case at a number of subsequent stages.

**Some initial bond hearings are so cursory that defendants barely have a chance to process what is going on before they are shuffled out of the way for the next person.**



Without an attorney, defendants are left to try to argue for themselves, if they are even given a chance. Some initial bond hearings are so cursory that defendants barely have a chance to process what is going on before they are shuffled out of the way for the next person. In North Charleston Municipal Court in December 2014, observers witnessed a municipal judge complete bond setting for 23 defendants in approximately 30 minutes — that averages out to about 1 minute and 20 seconds per defendant. Even if an attorney is appointed at a later date, it may be difficult to get the release terms reconsidered. Once a bond is set, only the magistrate or municipal judge who set it is authorized to change it, unless there are "compelling circumstances" that prevent the original judge from hearing the new information that the defendant seeks to have considered.<sup>44</sup>

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**Observers witnessed a municipal judge complete bond setting for 23 defendants in approximately 30 minutes — that averages out to about 1 minute and 20 seconds per defendant.**



Although monetary bonds for summary court offenses are relatively low, they remain out of reach for many poor defendants. The result is that individuals who are presumed innocent remain in jail until their trial dates, at which time they may feel pressured to plead guilty to get out of jail, with the promise of a sentence of "time served," and with no discussion of the collateral consequences that result from a conviction. This pressure is especially high if the person has children, a home, or a job that they have not already lost as a result of incarceration. Unlike MB, discussed above, many defendants will give in to that pressure to plead guilty. In Beaufort County in December 2014, a homeless man had been held in jail for thirty days on a

## Although monetary bonds for summary court offenses are relatively low, they remain out of reach for many poor defendants.



charge of trespassing at McDonald's — the maximum amount of time he could be sentenced to on such a charge — before being brought to court on his trial date. Without being informed of his right to an attorney, he pled guilty for time served and was still also required to pay \$55 in court costs. Similarly, in municipal courts in Newberry and Simpsonville in July 2015, defendants who remained incarcerated on their trial dates pled guilty without counsel for time served. When imposed without counsel or a knowing, voluntary waiver of counsel, such sentences are unconstitutional.

### Ineffective or Absent Advisement of Rights

*In Chester County Magistrate Court in April 2015, an African American man in his early twenties, AE, appeared before the judge on a charge of malicious injury to property from four years prior. AE pled not guilty, but was not advised of his rights to an attorney or to a jury trial. The judge swore in the investigating officer and promptly commenced a bench trial. The officer testified that on February 21, 2011, near midnight, he had been dispatched to a local telecommunications provider in Chester on a report of two males wearing black hooded sweatshirts trying to steal wire. No other identifying information about the suspects, such as race, age, height, or weight, was known. He responded to the call and found evidence of property damage and heard someone running through the woods. Another officer located AE and his companion nearby, spoke to them, took photographs of them, and released them. The officers lacked sufficient evidence to make an arrest at that time, and only filed charges after reviewing security footage of two individuals whose clothing was similar to the clothing of the men they had stopped. The faces of the individuals were not visible in the video footage.*

*After the brief testimony of the officer, AE was not asked if he wanted to cross-examine the sole witness. Instead, he was asked if he had anything to say. AE gave a brief explanation of why he and his companion had been in the area and made clear that he had nothing to do with the crime. After a moment of deliberation, the judge declared, "I'm satisfied that the State has made its burden, and find the defendant guilty beyond a reasonable doubt." Before pronouncing his sentence, the judge asked AE if he had any money with him and how much. AE pulled out his wallet in open court, counted his money, and replied that he had \$160 on him but could get more if needed — he was employed. Without any testimony from a witness about the type or amount of damage that had occurred, the judge ordered restitution in the amount of \$100 and court costs of \$55, telling AE that he could pay immediately and be done.*

*After court, AE confirmed no one had given him any information — either written or oral — about his rights to an attorney or a jury trial prior to his going before the judge.*

**Advisements that occurred were almost always conducted quickly and in a group, either through a brief speech or a video playing before court. Little to no individual inquiry was conducted to determine if defendants actually understood their rights.**



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In both bond-setting courts and trial courts, some judges made attempts to advise defendants of their rights, but did so in ineffective ways. Advisements that occurred were almost always conducted quickly and in a group, either through a brief speech or a video playing before court. Little to no individual inquiry was conducted to determine if defendants actually understood their rights.

**The entire explanation of rights took just over a minute. As far as observers could tell, nothing was given to the individuals in writing to explain their rights.**



In the bond session that attorneys observed in North Charleston Municipal Court in December 2014, recently arrested defendants were brought before the judge in groups via a live video feed. After a large group of defendants was crowded into a holding area much too small for their number, the judge would proceed with a rote recital of all of their rights and responsibilities. During that speech, the judge told the group that they had the right to remain silent, the right to a trial by jury, the right to an attorney, and the right to be appointed an attorney to represent them free of charge if they applied and qualified. He explained that if they wanted appointed attorneys they would need to apply and attend a screening session, and that if an individual missed that screening date “for any reason whatsoever,” he or she would “forever waive [the] right to have an appointed lawyer.” He told them that he would give each of them a court date, which may be different from the date that the officer had indicated on the paperwork they had received, and that if they should fail to appear on that date or violate any other condition of bond, the court could prosecute them for contempt. If found in contempt, the judge explained, the individual could be subject to a year in prison and a \$1,000 fine, in addition to any sentence that would be imposed if the individual pled guilty to or was found guilty of the underlying charge itself. He finished by asking if everyone understood their rights. The entire explanation of rights took just over a minute. As far as observers could tell, nothing was given to the individuals in writing to explain their rights.

Several courts in Richland County were observed in April 2015 using videos to inform defendants of their rights and options. In the video, which was about 10-15 minutes long, a magistrate judge explains quite a bit about what people in the courtroom should expect and what their options are. The video advised defendants and victims to check in with the clerk upon arrival; informed defendants about available diversion programs such as alcohol and traffic education programs and conditional discharges for first time marijuana offenders after a guilty plea; explained the right to have an attorney and the right to appointed counsel if the individual is indigent according to poverty guidelines and likely to be sentenced to jail; cautioned defendants on the dangers of self-representation; outlined general courtroom procedures including how a trial works and the difference between a jury and a bench trial; informed defendants that if they were found guilty, they will be sentenced to jail or a fine or both, and may get a payment plan; and explained that the court has no authority to change certain things, such as driver’s license or insurance points. Although the video was fairly informative, observers noted that individuals in the courtroom did not seem to be paying much attention to it, instead wandering in and out of the room or chatting, making it sometimes difficult for those who wanted to pay attention to hear. Some individuals who came in later in the session missed the video entirely, and were not given any explanation of much of the information that the video contained.

**In that court, no one was affirmatively asked if they wanted counsel — they were only asked if they waived those rights. Nearly every person did.**



The use of a video may be appropriate if it is not the only way in which defendants are informed of their rights. The video does not substitute for an individual inquiry to determine if the person understands those rights. A video cannot respond to questions. As highlighted by the Sixth Amendment Center,<sup>45</sup> “That a

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defendant has seen the video recording, or worse yet merely been present in the room where that video was playing, however, does not mean she has *understood* the video.<sup>46</sup> In the session of Columbia Magistrate Court that observers visited in April 2015, the judge did conduct a brief inquiry, asking each individual who approached to enter a plea if he or she understood the charge, understood the right to an attorney, and understood the right to a jury trial. However, in that court, no one was affirmatively asked if they wanted counsel — they were only asked if they waived those rights. Nearly every person did.

**Very few individuals in summary courts are represented by attorneys. This observation was confirmed by the South Carolina Summary Court Judges Association, which indicated that the “vast majority” of defendants do not have counsel in summary court proceedings.**



Worse than these presumably well-meaning yet ineffective advisements of defendants’ rights are the many courts in which defendants were advised of some, but not all, of their rights or were simply not given any information about their constitutional rights at all. The judge presiding in the Beaufort County North Magistrate Court when observers attended in December 2014 asked defendants how they wished to plead and whether they wanted a jury or bench trial, but never addressed the right to counsel. In Chester County Magistrate Court in April 2015, the attorney viewing proceedings reported that the judge gave absolutely no information about any of a defendant’s rights. Even the video presentation was absent from this courtroom, no written forms were used, and there was no signage anywhere in the courtroom or lobby advising people of their constitutional rights. In July 2015 in Landrum Municipal Court, an observer reported that the judge advised defendants that they could request a jury trial, but never made any mention of other important rights including the right to counsel and the right to appointed counsel if the defendant could not afford counsel. In all three of these courtrooms, defendants were sentenced to jail time without ever being informed of their legal rights.

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**One judge told an observer that he often informs defendants interested in applying for indigency status for public defenders that it is a waste of their application fees if they seem to have a good job, since you need to be “dirt poor” in order to qualify.**



Individuals certainly have the right to waive the assistance of counsel and represent themselves. In some cases, defendants may, in fact, enter a knowing, intelligent, and voluntary waiver of that right. But in others, defendants may not understand the rights they are waiving, either because they do not understand the rights that were explained to them, or because the rights were not explained at all. Very few individuals in summary courts are represented by attorneys. This observation was confirmed by the South Carolina Summary Court Judges Association, which indicated that the “vast majority” of defendants do not have counsel in summary court proceedings. Some judges also made statements to dissuade defendants from exercising their right to counsel. One judge told an observer that he often informs defendants interested in applying for indigency status for public defenders that it is a waste of their application fees if they seem to have a good job, since you need to be “dirt poor” in order to qualify.

If more individuals were to request public defenders, the indigent defense system as it currently exists in South Carolina would collapse. Public defenders in South Carolina are chronically under-resourced, particularly as compared to their prosecutorial counterparts. The disparity in county funding between prosecution and defense is unconscionable, with prosecution funding totaling about \$46 million versus

**A staff member of the South Carolina Commission on Indigent Defense speculated that it would take an increase in funding of \$10 million to get close to what is needed to fund public defense properly in general sessions and magistrate courts.**



public defense funding of only \$16 million. A staff member of the South Carolina Commission on Indigent Defense speculated that it would take an increase in funding of \$10 million to get close to what is needed to fund public defense properly in general sessions and magistrate courts. That number does not even contemplate additional funds that would be needed to staff municipal courts without additional contributions from municipalities. A chief public defender in one jurisdiction flatly admitted that he funnels the lion's share of his resources toward general sessions cases to the detriment of summary courts because the cases are, presumably, more serious. Assistant public defenders in another jurisdiction reported that the two attorneys covering summary courts there each carry a caseload of approximately 500 cases at any given time, and the office lacks the space to hire more attorneys to help ease the load.

## Police Prosecutors

*In Beaufort County in December 2014, a middle-aged African American man, DP, arrived in court, dressed in a shirt and tie, to answer for his alleged traffic violations of no insurance, no proper driver's license, and a broken taillight. The charging police officer approached DP in the courtroom and asked to speak to him in the hallway about his case. What transpired outside the courtroom is unknown, but the two came back into the courtroom after a very short time, with the officer telling DP that they could address his concerns with the judge "if that's the way you want to go with this." The conversation became somewhat heated, with DP asking the deputy for his name and his supervisor's name, and the deputy telling DP where he could file a complaint.*

*Later the same day, after the case was called for a bench trial, DP tried to explain his defense to the magistrate — he brought proof of insurance that he had been unable to find at the time of the stop and explained that he had a valid Virginia driver's license, since he is a 25-year military veteran currently on reserve in Virginia and living on base there. DP had only been in South Carolina visiting his estranged wife with whom he was hoping to reconcile. While DP attempted to present his defense, the charging officer repeatedly interrupted him and challenged his story in a very unprofessional and disrespectful manner. Ultimately, DP was found guilty of both driving without a license and having a defective taillight, and required to pay a fine and get a South Carolina license.*

In most of the magistrate and municipal courts where site visits were conducted, no prosecuting attorney was present. Instead, the arresting or charging officer directly prosecuted the case. Since the vast majority of defendants proceed on their own, without a defense attorney, this means that the accused individual has to work directly with the officer who charged him if he wants to work out a plea arrangement, ask for a dismissal, or otherwise resolve the case. It was not uncommon for court observers to overhear defendants asking the officers who charged them, "What should I do?" In some circumstances, the officer would tell the individual that he could not answer that question, but in some circumstances the officer would offer advice that usually amounted to some variation of "Plead to this charge and I'll dismiss that charge; you'll just get a fine." Undoubtedly, the practice of negotiating directly with the officer who issued the citation or effected the arrest of the charged individual is particularly problematic in cases where the interaction between the defendant and officer did not go smoothly, for example, cases that include allegations of resisting arrest, or those in which a defendant feels that he or she was somehow treated unfairly by the police.



Another problem with the practice of police prosecutors is that law enforcement officers lack the legal expertise that a prosecuting attorney would have. Even a well-meaning officer might make a mistake such as charging an incorrect offense, but without a single lawyer in the courtroom — not for the state, the defense, or on the bench — such an error might not ever be brought to light, much less corrected. Police officers may not be aware of, or seek to ignore, the deficiencies in their own cases, such as missing elements or insufficient evidence. Coupled with the lack of solicitors to screen cases or defense attorneys to hold the state to its burden, this can lead to unfair, even illegal, results.

The conflicting results in the cases of two co-defendants, TB and JC<sup>47</sup>, illustrate the strange outcomes that can result in a system with no lawyers screening cases. In April 2015, a young African American man in the Columbia Magistrate Court in Richland County, TB, was charged with disturbing schools and elected to waive counsel and proceed pro se by pleading no contest. TB was sentenced to costs and fines totaling \$1,125 or thirty days in jail. Later in the session, TB's co-defendant, JC, had his case called, but failed to appear and was tried in absentia. The charging officer prosecuted the case himself and provided testimony to the magistrate about what he had been told happened and what he saw on video, but provided no firsthand knowledge and did not bring the video surveillance to submit to the court. The magistrate found that there was no competent evidence to convict JC and dismissed the charge. The result is that TB, who appeared in court, left with a criminal record because neither a solicitor nor a defense attorney was present to ensure that the charging officer had sufficient evidence to support the allegations before TB pled no contest. Meanwhile, JC failed to appear, but had his case thrown out, resulting in no conviction or criminal record.

## Disproportionate Impact on the Poor

*In the Chester County Magistrate Court in April 2015, a white 17-year-old, AR, was in court to answer for a charge of receiving stolen goods.<sup>48</sup> It was, according to what the judge said when asking AR for his plea, his first offense. Without being advised of his right to an attorney, right to a trial, or potential consequences of the case, AR pled guilty. The arresting officer gave a brief statement of the allegations, which included the fact that the property owner had contacted the police indicating that he did not want to press charges, and AR was asked what he had to say for himself. AR told the judge that his parents moved away and left him to take care of himself. AR was attending a free GED program in the area, had been seeking employment, and had received some positive feedback that indicated he might be starting a new job within a few days. The judge told him that the maximum sentence was a fine that could be up to \$1,000 and change, or 30 days in jail. AR said he would prefer the fine so he could finish the program and start work, but the judge would not allow him the opportunity to try to pay a fine, saying that without a means to pay, the judge could not do anything to help AR. The judge sentenced AR to 15 days in jail with no option to pay a fine in lieu of jail time and the young man immediately was handcuffed and taken out of the courtroom.*

A typical sentence for a summary court offense, such as possession of marijuana, might be a \$620 fine or 30 days in jail, with the defendant ostensibly given the choice between which sanction to fulfill. What happens when someone cannot pay? In some jurisdictions, defendants might be allowed time to pay or be placed on a payment plan. However, in other jurisdictions, convicted individuals who cannot pay are forced to serve a jail sentence, in a debtors' prison of sorts.

In the Landrum Municipal Court in July, a white woman in her late twenties, AP, appeared to answer for her charge of possession of drug paraphernalia. Without an attorney, AP pled guilty to the charge, while also providing an explanation to the judge that, if true, would have in fact made her innocent of the allegations. The judge made clear during sentencing that he did not believe her story and asked AP if she had \$620 with her to pay the fine. AP said she did not, but had just started a job at a fast food restaurant. The judge scoffed and said she would not be able to pay with that job and sentenced her to 30 days. AP began sobbing, explaining she has two children, begging for time to pay, and asking why others were given time to pay and she was not. With no response from the judge, AP was handcuffed and taken to jail.

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**WG agreed to serve 15 days in jail on the charge. WG's mother quietly told him in the back of the courtroom that she would find the money to spare him the jail time, but WG made clear that he did not want to make his mother pay for his mistake, saying that paying the fine was "just a waste of money." No defense lawyer was involved in this case. WG got a criminal record and went to jail for more than two weeks for having alcohol.**



On the same day in April that AR went to jail in Chester County, an attorney observed a session of the York-Bethesda Magistrate Court, consisting mostly of drug and alcohol offenses. During the session, another white 17-year-old youth, WG, who was there with his mother, pled guilty to charges of minor in possession of alcohol and attempting to purchase tobacco underage, and was sentenced to fines of \$255 and \$106, respectively. When asked about his employment status, WG said he was not working, so the magistrate told him to have a seat and his sentence would be addressed at the end of the session. While others were having their cases called, WG and his mother stepped outside to talk to the charging officer about a resolution. Ultimately, the officer agreed to dismiss the tobacco charge and WG pled guilty only to the minor in possession of alcohol charge. However, since he could not pay the fine, WG agreed to serve 15 days in jail on the charge. WG's mother quietly told him in the back of the courtroom that she would find the money to spare him the jail time, but WG made clear that he did not want to make his mother pay for his mistake, saying that paying the fine was "just a waste of money." No defense lawyer was involved in this case. WG got a criminal record and went to jail for more than two weeks for having alcohol.

**Spending more than 24 hours in jail has measurable negative impacts on defendants.**



Any time behind bars can have devastating consequences. Just a few days in jail can lead to missed school, lost jobs, lost housing, loss of custody of children, and declines in physical and mental health.<sup>49</sup> Although much of the research regarding short amounts of time in jail is in the context of pretrial incarceration rather than incarceration following a plea or finding of guilt, the principles remain the same — spending more than 24 hours in jail has measurable negative impacts on defendants. Research by the Laura and John Arnold Foundation found that "low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their cases were pending, but also years later."<sup>50</sup> This reliance on jail is also costly to taxpayers. According to the Vera Institute, local expenditures on corrections increased nearly 235% from 1982 to 2011.<sup>51</sup>

The practice of sending people to jail because they are unable to pay is patently unconstitutional, as well as against South Carolina law. The U. S. Supreme Court held in *Bearden v. Georgia* in 1983 that to imprison those who cannot pay their fines or restitution in criminal cases is unconstitutional, unless the failure to pay is willful.<sup>52</sup> South Carolina's Code of Laws echoes this sentiment, mandating that any judge or magistrate who finds a person guilty and sentences that person to a fine must "set up a reasonable payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual."<sup>53</sup> The same statute goes on to say that "No person found to be indigent shall be imprisoned because of inability to pay the fine in full at the time of conviction."<sup>54</sup>

**The practice of sending people to jail because they are unable to pay is patently unconstitutional, as well as against South Carolina law.**



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# Conclusion

Based on the observations of NACDL and ACLU attorneys, basic constitutional principles designed to safeguard the accused are not being followed in many South Carolina summary courts. Individuals charged, but not convicted, of minor crimes are being held in jail on bonds simply because they do not have the resources to pay to be released. Defendants are not being appropriately informed of their rights and are making life-altering decisions without fully understanding the rights at stake and the resources they are entitled to in order to help them counter accusations by the state. Because summary court judges are frequently not lawyers, and neither solicitors nor defense attorneys are routinely involved in proceedings in summary courts, accused individuals are walking into these courtrooms, pleading guilty to criminal charges, and leaving with permanent criminal records, without a single lawyer involved in the process. This is not the way the nation's criminal justice system should operate. These unconstitutional processes and convictions have far-reaching collateral consequences on jobs, housing, and other opportunities, not just for the convicted people, but for their families as well. The lifelong impact these fundamental violations of rights have on tens of thousands of people in South Carolina each year tears at the fabric of society and undermines public safety and welfare.

This report does not identify every issue of concern that court observers saw during site visits; rather, it highlights a few of the most common issues that were seen in multiple locations. These anecdotes may merely be the tip of the iceberg of injustice being done to people in South Carolina's summary courts. A further systemic study has been commissioned to more comprehensively investigate these issues.

## Endnotes

1. NACDL attorneys brought this case to the attention of the public defender in Charleston, S.C., and an assistant public defender was able to get the woman's sentence reduced to time served a few days later.

2. Court observation was conducted by Colette Tvedt, director of public defense training and reform for NACDL; Diane DePietropaolo Price, public defense training manager for NACDL; Emma Andersson, staff attorney for ACLU Criminal Law Reform Project; and Rachel Shur, legal intern for ACLU Criminal Law Reform Project.

3. The number of municipal court judges listed on the South Carolina Judicial Department website is higher — 327 judges. The discrepancy in numbers may be due to municipal court judges who also work as magistrates in other jurisdictions being counted as magistrates and not being counted a second time as municipal court judges, or may be due to incomplete information collected by the SCSCJA. South Carolina Judicial Department [hereinafter S.C. Jud. Dep't], <http://www.judicial.state.sc.us/index.cfm>.

4. According to the S.C. Judicial Department website, "There are approximately 300 magistrates in South Carolina, each serving the county for which he or she is appointed. They are appointed to four-year terms by the Governor upon the advice and consent of the Senate." *Id.*, <http://www.judicial.state.sc.us/magistrateCourt/>. Many counties have multiple magistrate courts within the county, and may include specialized courts such as Domestic Violence, DUI, Bond, and Preliminary Hearing courts. The Judicial Department website also shows 207 unique municipalities where judges preside.

5. "Magistrates generally have criminal trial jurisdiction over all offenses subject to the penalty of a fine, as set by statute, but generally, not exceeding \$500.00 or imprisonment not exceeding 30 days, or both. In addition, they are responsible for setting bail, conducting preliminary hearings, and issuing arrest and search warrants. Magistrates also have civil jurisdiction when the amount in controversy does not exceed \$7,500." *Id.*

6. "Municipal courts have jurisdiction over cases arising under ordinances of the municipality, and over all offenses which are subject to a fine not exceeding \$500.00 or imprisonment not exceeding 30 days, or both, and which occur within the municipality. In addition, S.C. Code Ann. § 22-3-545 provides that municipal courts may hear cases transferred from general sessions, the penalty for which does not exceed one year imprisonment or a fine of \$5,000, or both, upon petition by the solicitor and agreement by the defendant. The powers and duties of a municipal judge are the same as those of a magistrate, with regard to criminal matters; however, municipal courts have no civil jurisdiction." *Id.*, <http://www.judicial.state.sc.us/municipalCourt/>.

7. S.C. CODE ANN. § 56-1-460.

8. South Carolina Bench Book for Summary Court Judges, General Section, Section B: The South Carolina Magistrate and Municipal Judge, available at [http://www.abajournal.com/%20magazine/article/is\\_there\\_a\\_lawyer\\_in\\_the\\_court/](http://www.abajournal.com/%20magazine/article/is_there_a_lawyer_in_the_court/). South Carolina is not unique in this. An ABA Journal article states that "in 24 states across the country, judges don't need a law degree to serve on certain courts." See Brendan L. Smith, *Legislative Efforts Requiring Judges to Hold JD Meet with Mixed Results*, 97 ABA JOURNAL 6 (July 2011), available at [http://www.abajournal.com/magazine/article/is\\_there\\_a\\_lawyer\\_in\\_the\\_court/](http://www.abajournal.com/magazine/article/is_there_a_lawyer_in_the_court/).

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9. S.C. CONST. art. V, § 26.
10. S.C. CODE ANN. § 14-25-15.
11. Order 2015-02-25-01 of the South Carolina Supreme Court, *available at* <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2015-02-25-01>.
12. South Carolina Court Administration, Memorandum to Prospective Magistrates, March 25, 2015, *available at* <http://www.judicial.state.sc.us/Wonderlic-Watson-GlaserInfoSheet.pdf>.
13. *Id.*
14. See *generally* Title 22, Chapter 1 of the South Carolina Code for the rules regarding appointment and education of magistrates. See *generally* Title 14, Chapter 25 of the South Carolina Code for the rules regarding appointment and education of municipal court judges.
15. S.C. CODE ANN. § 22-1-10. Beginning Jan. 1, 1989, magistrate judges were required to have a high school diploma or equivalent to be eligible for an initial appointment. Magistrates who were currently serving at that time were also required to provide proof of education, unless they had been serving for at least 5 years, in which case they were exempt from the requirement. Beginning July 1, 2001, the educational requirement was increased to a two-year associate degree, and beginning July 1, 2005, prospective magistrates seeking initial appointment are required to have a baccalaureate degree. The college education requirements do not apply to magistrates who were serving before the effective dates, regardless of the brevity of their term prior to the change.
16. S.C. Summary Court Bench Book, *supra* note 8 at General Section, Section B.
17. *Id.*
18. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
19. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
20. *Alabama v. Shelton*, 535 U.S. 654 (2002).
21. John D. King, *Beyond 'Life and Liberty': The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 40-41 (2013). See also Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers on Right to Counsel at Initial Appearance Before a Judicial Officer at which Liberty is at Stake or at which a Plea of Guilty to any Criminal Charge may be Entered, *available at* <http://www.nacdl.org/resolutions/2012mm1/>. In a resolution adopted by its Board of Directors on Feb. 19, 2012, NACDL set out its position urging "all states and U.S. territories to adopt such constitutional provisions, laws or regulations necessary to guarantee that every accused person, irrespective of financial capacity to engage counsel, shall be guaranteed counsel at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered." In light of the proliferation of collateral consequences, and their potentially life-altering impact, NACDL and the ACLU hope the Supreme Court will ultimately agree.
22. S.C. CODE ANN. § 17-3-10.
23. S.C. APPELLATE RULE 602(a), *available at* <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=602.0&subRuleID=&ruleType=APP> (emphasis added).
24. *Id.* (emphasis added).
25. S.C. CODE ANN. § 17-3-30.
26. *Id.* Failure to pay fines and fees while on probation may result in re-arrest on a probation violation.
27. S.C. APPELLATE RULE 602, *supra* note 23.
28. The U.S. Department of Health and Human Services sets the federal poverty guidelines. For 2016 those numbers are \$11,880 for a household size of 1; \$16,020 for a household size of 2; \$20,160 for a household size of 3; \$24,300 for a household size of 4; \$28,440 for a household size of 5; \$32,580 for a household size of 6; \$36,730 for a household size of 7; and \$40,890 for a household size of 8. For households larger than 8, add \$4,160 for each additional person.
29. S.C. CODE ANN. § 17-3-30.
30. S.C. CODE ANN. § 17-3-40. For more on qualification for appointed counsel in South Carolina and throughout the United States, see NAT'L ASSOC. CRIM. DEF. LAWYERS, GIDEON AT 50 PART 2 — REDEFINING INDIGENCE: FINANCIAL ELIGIBILITY GUIDELINES FOR ASSIGNED COUNSEL (Mar. 2014).
31. The reason for this, according to the South Carolina Commission on Indigent Defense, is that most municipalities, unlike counties, do not currently contribute to the indigent defense system. Prior to the passage of the proviso, only four of the more than 200 municipal courts were contributing toward indigent defense services. Although a portion of the fines that municipal courts collect is turned over to the state, those funds go to several state agencies and were never intended to fund indigent defense for municipal courts. Municipalities that do not contribute money to the public defender but still expect a public defender to staff their courtrooms are essentially asking the public defender to provide those services for free. In FY 2013-14 South Carolina Court Administration data shows that 584,455 cases were filed in municipal courts — 108,105 criminal cases; 404,406 traffic cases; 6,564 DUI cases; and 65,383 town ordinance cases. To put those numbers in perspective there were only approximately 114,000 charges opened in general sessions court in FY 2013-14. NACDL and the ACLU are currently monitoring the situation in South Carolina to determine if municipalities come into compliance with this new funding requirement.



32. According to the Richland County Government website, the following magistrate courts operate in the county: Bond Court, Central Court, Columbia, Blythewood, Dentsville, Dutch Fork, Eastover, Hopkins, Lykesland, Olympia, Pontiac, Upper Township, and Waverly, <http://www.richlandonline.com/Government/Courts/Magistrates.aspx>. There are also municipal courts in Arcadia Lakes, Forest Acres, Columbia, and Dutch Fork.

33. S.C. Summary Court Bench Book, *supra* note 8, at Criminal Section, Section E: Bail Proceedings.

34. S.C. CODE ANN. § 22-5-510(B).

35. Order 2007-09-19-01 of the South Carolina Supreme Court, available at <http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2007-09-19-01>.

36. S.C. Summary Court Bench Book, *supra* note 8, at Criminal Section, Section E: Bail Proceedings.

37. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

38. *Id.* The rights that the magistrate or municipal court judge must inform the defendant of include the right to remain silent, the right to have an attorney, the right to an appointed attorney if he or she cannot afford one, the right to a preliminary hearing if the charge is one that will be prosecuted in general sessions court, and the right to be present at his or her trial. Defendants in South Carolina are tried *in absentia* if they do not appear for their trial dates.

39. *Id.* When determining if a defendant is at risk of failure to appear or poses a risk to the community, the judge must consider (1) a person's criminal record; (2) any charges pending against a person at the time release is requested; (3) all incident reports generated as a result of an offense charged; (4) whether a person is an alien unlawfully present in the United States, and poses a substantial flight risk due to this status; and (5) whether the charged person appears in the state gang database maintained at the State Law Enforcement Division. The judge may also consider the nature and circumstances of an offense charged and the charged person's (1) family ties; (2) employment; (3) financial resources; (4) character and mental condition; (5) length of residence in the community; (6) record of convictions; and (7) record of flight to avoid prosecution or failure to appear at other court proceedings. S.C. CODE ANN. § 17-15-30.

40. S.C. CODE ANN. § 17-15-10.

41. THE CONSTITUTION PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING (March 2015) at 33-34.

42. *Id.* at 11, citing Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002).

43. *Id.*

44. S.C. Summary Court Bench Book, *supra* note 8, at Criminal Section, Section E: Bail Proceedings. If the case has been transferred to general sessions court, the general sessions judge may adjust bond since the magistrate or municipal judge who set the original bond no longer has jurisdiction.

45. The Sixth Amendment Center (6AC) is a non-profit organization that "seeks to ensure that no person faces potential time in jail without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution." Sixth Amendment Center, [www.sixthamendment.org/about-us/](http://www.sixthamendment.org/about-us/).

46. THE SIXTH AMENDMENT CENTER, THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES 26-27 (2015).

47. May not be his actual initials.

48. It should be noted that juvenile jurisdiction in South Carolina terminates at 16. Seventeen-year-olds are always prosecuted in the adult criminal system, not in family court.

49. VERA INSTITUTE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (February 2015) (Updated 7/29/15).

50. LAURA AND JOHN ARNOLD FOUNDATION, RESEARCH SUMMARY: PRETRIAL CRIMINAL JUSTICE RESEARCH (November 2013).

51. INCARCERATION'S FRONT DOOR, *supra* note 49.

52. *Bearden v. Georgia*, 461 U.S. 660 (1983).

53. S.C. CODE ANN. § 17-25-350.

54. *Id.* ■

## SOUTH CAROLINA

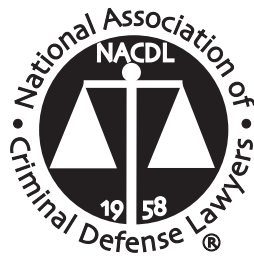
## REPORT

**REPORT**

**SOUTH  
CAROLINA**

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