



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

July 30, 2018

Hon. David Briley
Mayor
Metro Council
One Public Square, Suite 204
P.O. Box 196300
Nashville, TN 37219

Hon. Joseph P. Binkley, Jr.
Presiding Judge
20th Judicial District of Tennessee
One Public Square, Suite 509
Nashville, TN 37201

Re: Equal Just. Under L. v. Metro. Gov't of Nashville & Davidson Cty. & Twentieth Jud.
Dist. of Tenn. (15-OCR-970)
Closure Letter

Dear Mayor Briley and Judge Binkley:

In July 2015, the Office for Civil Rights (OCR), Office of Justice Programs (OJP), U.S. Department of Justice (DOJ) received the above-referenced administrative Complaint from Equal Justice Under Law (EJUL), a nonprofit, civil-rights advocacy organization, alleging, among other claims, that the pretrial bail practices of the Metropolitan Government of Nashville and Davidson County, Tennessee, (Davidson County or Recipient) impermissibly discriminate against African Americans. Specifically, the Complaint alleges that the Recipient's practice of requiring defendants to post secured money bail as a pretrial condition of release had a discriminatory effect on African Americans because they are disproportionately detained in jail prior to trial. On February 19, 2016, the OCR, following a jurisdictional review, opened an investigation of Davidson County's pretrial program under Title VI of the Civil Rights Act of 1964 (Title VI),¹ the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act),² and their respective implementing regulations.³ In view of the changes that Davidson County made on its own since this investigation commenced, the OCR is administratively closing this matter without making any findings as to the merits of the allegations in the Complaint.

The OCR is responsible for ensuring that Davidson County⁴ and other recipients of financial assistance from DOJ components subject to the OCR's jurisdiction comply with applicable federal civil rights

¹ 42 U.S.C. § 2000d (2012).

² 34 U.S.C.A. § 10228(c)(1) (West 2017).

³ 28 C.F.R. pt. 42, subpts. C & D (2017).

⁴ Davidson County has received over \$2.8 million in financial assistance from the OJP and its components. *See* Metro. Gov. of Nashville & Davidson Cty., Bureau of Just. Assistance (BJA), FY 2012 Edward Byrne Mem'l JAG Program, Grant No. 2012-DJ-BX-1102 (Oct. 1, 2011 – Sep. 30, 2015) (\$522,006); Metro. Gov. of Nashville & Davidson Cty., BJA, FY 2013 Edward Byrne Mem'l JAG Program, Grant No. 2013-DJ-BX-1138 (Oct. 1, 2012 – Sept. 30, 2016) (\$490,328); Metro. Gov. of Nashville & Davidson Cty., Off. of Juv. Just. & Delinq. Prevention (OJJDP), FY 2013 Se. Reg'l Training Ctr. Grant, Grant No. 2013-JV-FX-0070 (Oct. 1, 2013 – Sept. 30, 2015) (\$325,000); Metro. Gov. of Nashville & Davidson Cty., BJA, FY 2014 Edward Byrne Mem'l JAG Program, Grant No. 2014-DJ-BX-0215 (Oct. 1, 2013 – Sept. 30, 2017) (\$532,216);

laws. Among these federal laws are Title VI and the Safe Streets Act, which prohibit recipients of federal financial assistance from discriminating against program beneficiaries based on race. Before an applicant for funding from the OJP may receive a grant, it must provide OJP certified assurances attesting to future compliance with the nondiscrimination requirements that are a condition of an award. When it agreed to accept funding from the OJP, Davidson County submitted to the OJP certified assurances, acknowledging that it would comply with the civil rights requirements of both Title VI and the Safe Streets Act.⁵

At the time the EJUL filed its administrative Complaint with the OCR, Twentieth Judicial District of Tennessee (Judicial District) officers weighed the criteria mandated by Tennessee law when deciding whether to release defendants prior to trial. While Davidson County did not use a fixed schedule when determining the amount of bail imposed on defendants, the vast majority of them had to post some form of secured money bail as a condition of release before trial. In April of 2018, Davidson County began using a risk-assessment tool that it, along with the Crime and Justice Institute (CJI), developed to aid judicial officers in making pretrial release decisions.⁶ Pretrial risk-assessment tools use case information to identify factors that correlate with pretrial outcomes, such as rearrest or failure to appear at the next court appearance.⁷ Using data Davidson County collected from July 1, 2014, to June 30, 2016, the CJI identified risk factors statistically related to a defendant's likelihood of rearrest or failure to appear, and then it tested the identified factors to ensure that each factor predicted the desired pretrial outcome. The CJI also conducted a retrospective analysis to assess how the risk factors it identified impacted African-American defendants and found that the risk factors, both individually and collectively, were effective at predicting rearrest and failure to appear. They also did not have a statistically significant disparate impact on African Americans.

Because a risk-assessment tool does not provide guidance to judicial decision makers on how to decide to release defendants, Davidson County and Judicial District officials developed matrices for judicial officers to use when making them in misdemeanor and felony cases. Each misdemeanor and felony matrix has an axis representing a defendant's risk levels for rearrest and likely failure to appear at future court dates. Judicial officers make release decisions after correlating the defendant's risk levels on the two axes and may impose the release conditions that are associated with the indicated level of risk. For example, for a misdemeanor defendant who is a low risk on the rearrest axis and who is likely to appear

Metro. Gov. of Nashville & Davidson Cty., BJA, FY 2015 Edward Byrne Mem'l JAG Program, Grant No. 2015-DJ-BX-0803 (Oct. 1, 2014 – Sep. 30, 2018) (\$471,673); Metro. Gov. of Nashville & Davidson Cty., BJA, FY 2016 Edward Byrne Mem'l JAG Program, Grant No. 2016-DJ-BX-0647 (Oct. 1, 2015 – Sept. 30, 2019) (\$504,412).

⁵ See U.S. Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605 (1986) (“[T]he recipient's acceptance of the funds triggers coverage under the nondiscrimination provision . . .”).

⁶ Through the Tennessee Office of Criminal Justice Programs, the Tennessee Department of Finance and Administration (TDFA) used Edward Byrne Memorial Justice Assistance Grant Program funds from the OJP to contract with the CJI to provide over \$350,000 in technical assistance to Davidson County. TDFA, Tennessee's Strategy for the FY 14 Edward Byrne Mem'l JAG Program, BJA, Grant No. 2014-MU-BX-0804 (Oct. 1, 2013 – Sep 30, 2017) (\$5,095,990).

⁷ PRETRIAL JUST. INST., ISSUE BRIEF: PRETRIAL RISK ASSESSMENT 101: SCIENCE PROVIDES GUIDANCE ON MANAGING DEFENDANTS 2 (2011), https://www.bja.gov/publications/pji_pretrialriskassessment101.pdf (research funded by BJA Grant No. 2010-DB-BX-K034 (Oct. 1, 2010 – Dec. 31, 2012)).

at court, the matrix indicates that decision makers should release the defendant on personal recognizance with a text-messaging reminder program for upcoming court dates.⁸

RECOMMENDATIONS

Because Davidson County is now using a race-neutral, risk-based system to inform its pretrial release and detention decision-making, the OCR is administratively closing this Complaint. The changes Davidson County has made to its pretrial release system are consistent with the remedies the OCR would have sought if it had fully investigated the Complaint and found a violation.⁹ Davidson County is now collecting data with the aim of validating its risk-assessment tool.¹⁰ During the validation process, Davidson County and CJI should strive to ensure that the tool continues to meet Davidson County's public safety goals while minimizing racial, ethnic, and gender disparities.¹¹ Toward this end, Davidson County should consider incorporating the following recommendations to ensure that the current pretrial release program is operating in conformance with Title VI and the Safe Streets Act:

- Collect and analyze data on race, national origin, and sex for all individuals eligible for pretrial release, including those detained and those released;¹²
- Monitor concurrence rates between judicial decisions and the terms of release recommended by the risk-assessment tool and any associated decision-making framework;¹³

⁸ Davidson County cautioned its judicial officers to use the matrix as a guideline for initial release decisions, advising them to use matrix recommendations in conjunction with all required statutory factors and the particular circumstances of each case.

⁹ See also Equal Just. Under L. v. Tenth Jud. Cir. of Ala., No. 15-OCR-970, OJP Resolution Agreement (U.S. Dep't of Just. Apr. 6, 2018), https://ojp.gov/about/ocr/pdfs/15-OCR-970_Resolution-Agreement-Signed.pdf.

¹⁰ The validation process generally evaluates whether a pretrial risk-assessment tool is an accurate predictor of pretrial outcomes. Kelly Dedel Johnson & Patricia L. Hardyman, *How Do You Know if the Risk Assessment Instrument Works?*, TOPICS IN CMTY. CORRS. (2004), <https://www.cpoc.org/sites/main/files/file-attachments/johnson.pdf>.

¹¹ In a recent *amicus curie* brief, the DOJ argued that the general presumption of release before trial “may be circumscribed on a case-by-case basis,” and in “appropriate circumstances, financial conditions may be constitutionally imposed” if a court sets a bail amount with the aim of supporting public safety or limiting risk of flight. Brief for the United States as Amicus Curiae in Support of Neither Party [Walker II Amicus Curie] at *18, *Walker v. Calhoun*, (11th Cir. Sept. 13, 2017) (No. 17-13139-GG). Davidson County should also consider during the validation process whether rearrest is the best measure to assess public safety. See CHARLES SUMMERS & TIM WILLIS, BJA, PRETRIAL RISK ASSESSMENT: RESEARCH SUMMARY 4 (Oct. 8, 2011), <https://www.bja.gov/Publications/PretrialRiskAssessmentResearchSummary.pdf> (noting report concluded that “rearrest as generally used may not be the best measure of community safety, as offenders may not be rearrested but will face revised charges, plea bargains, etc.”).

¹² See, e.g., MONA J.E. DANNER ET AL., LUMINOSITY, INC., RACE & GENDER NEUTRAL PRETRIAL RISK ASSESSMENT, RELEASE RECOMMENDATIONS, & SUPERVISION: VPRAI & PRAXIS REVISED 6–11 (2016), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/race-and-gender-neutral-pretrial-risk-assessment-release-recommendations-and-supervision.pdf>.

¹³ Though risk-assessment tools are not intended to replace judicial discretion, they are ineffective if they do not in practice guide decisions on the terms of pretrial release. See NAT'L INST. OF CORRS., MEASURING WHAT MATTERS: OUTCOME & PERFORMANCE MEASURES FOR THE PRETRIAL SERVS. FIELD 4 (Aug. 2011), <https://nicic.gov/measuring-what-matters-outcome-and-performance-measures-pretrial-services-field>.

- Document the reasons for overriding the risk-assessment tool’s recommendations and analyze any trends that could contribute to systemic bias;¹⁴ and
- Measure concurrence rates between the outcomes predicted by the risk-assessment tool and actual outcomes for the pretrial population.¹⁵

The validation process offers Davidson County the opportunity to examine, in light of the substantial personal liberty interests at stake in a criminal prosecution prior to a finding of guilt, whether its practices meet legitimate pretrial objectives while minimizing any potential discriminatory impact.¹⁶ Davidson County may also want to pay particularly close attention during the validation process to data regarding the release of defendants on secured bond for individuals who pose a high risk for rearrest during the pretrial period and a moderate-to-high risk of not appearing for their next court date. For defendants who pose a high risk of rearrest, both misdemeanor and felony matrices call for Davidson County judicial officers to release defendants on secure bonds after conducting an ability-to-pay determination and considering other bail conditions.¹⁷ This result, which may lead to the release of defendants who can afford to post bond but nonetheless still pose a risk of committing another crime, could negatively impact Davidson County’s public safety objectives. Davidson County should also be mindful to revalidate all risk-assessment instruments at regular intervals to ensure that they retain their legitimacy.¹⁸

¹⁴ BRIAN LOVINS & LORI LOVINS, CORR. CONSULTANTS, INC., RIVERSIDE PRETRIAL ASSISTANCE TO CAL. CTYS. PROJECT: VALIDATION OF A PRETRIAL RISK ASSESSMENT TOOL 18 (2016), http://www.crj.org/assets/2017/07/6_Riverside_Validation_Final_Report_5-3-16.pdf.

¹⁵ See Nat’l Inst. of Corrs., *supra* note 13, at 4.


¹⁶ The validation process may also provide an equally effective and less discriminatory way for the Recipient to weigh factors that the risk-assessment instrument evaluated. For example, a 2013 BJA-funded study found, when controlling for pretrial assessment levels, defendants released without having to post a secured bond did just as well, in terms of court appearance and safety risk, as those who did post a secured bond. See MICHAEL R. JONES, PRETRIAL JUST. INST., UNSECURED BONDS: THE AS EFFECTIVE & MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013), <https://nicic.gov/unsecured-bonds-most-effective-and-efficient-pretrial-release-option>.

¹⁷ In the Walker II Amicus Curie, the DOJ expressed a similar public safety concern in addressing fixed-bail practices. Walker II Amicus Curie, at *19 (“Under [fixed] bail schemes, arrestees who can afford to pay the fixed bail amount are promptly released whenever they are able to access sufficient funds for payment, even if they are likely to miss their assigned court date or pose a danger to others.”).

¹⁸ See Pretrial Just. Inst., *supra* note 16, at 4.

Davidson County should be mindful of its ongoing civil rights obligations, not only in regard to protecting individuals who come into contact with its criminal justice system but also in regard to safeguarding individuals who participated in this investigation from retaliation. This Letter addresses only the specific facts of this investigation and does not preclude the DOJ from taking additional action to evaluate Davidson County's compliance with any of the laws the DOJ enforces. This Letter is a public document that the OCR may post on its website. The OCR thanks you and your staff for your cooperation at every stage of this investigation. If you have any questions, please contact OCR Attorney Advisor Benjamin Hernandez-Stern at Benjamin.Hernandez-Stern@usdoj.gov.

Sincerely,

A handwritten signature in black ink that reads "Michael L. Alston". The signature is written in a cursive style and is positioned to the right of a large, bold, black "X" mark.

Michael L. Alston
Director
Signed by: MICHAEL ALSTON

Copy: Phil Telfeyan, Esq.
Executive Director
Equal Justice Under Law
601 Pennsylvania Avenue, NW
Washington, DC 20004

Jennifer Crim, Esq.
Assistant Metropolitan Attorney
Department of Law
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219

Cynthia E. Gross, Esq.
Assistant Metropolitan Attorney
Department of Law
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219

Jennifer Brinkman
Office of Criminal Justice Programs
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 18th Floor
Nashville, TN 37243