

**PROTECTING THE CONSTITUTIONAL RIGHT
TO COUNSEL FOR INDIGENTS CHARGED
WITH MISDEMEANORS**

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COMMITTEE ON THE JUDICIARY
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C O N T E N T S

MAY 13, 2015, 10:03 A.M.

STATEMENTS OF COMMITTEE MEMBERS

	Page
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa	1
prepared statement	75
Franken, Hon. Al, a U.S. Senator from the State of Minnesota	3
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	77
prepared statement	

WITNESSES TESTIMONY

Witness List	27
Boruchowitz, Professor Robert C.	10
prepared statement	45
Cady, Honorable Mark S.	5
prepared statement	28
Fulton, Neil	8
prepared statement	42
Hashimoto, Professor Erica J.	12
prepared statement	61
Singleton, David A.	7
prepared statement	35

QUESTIONS

Questions submitted to Boruchowitz, Professor Robert C. by:	
Senator Grassley	85
Questions submitted to Cady, Honorable Mark S. and Singleton, David A. by:	
Senator Grassley	79
Questions submitted to Cady, Honorable Mark S. by:	
Senator Grassley	79
Questions submitted to Fulton, Neil by:	
Senator Grassley	94
Questions submitted to Hashimoto, Professor Erica J. by:	
Senator Grassley	100
Questions submitted to Singleton, David A. by:	
Senator Grassley	79

ANSWERS

Responses of Boruchowitz, Professor Robert C. to questions submitted by Senator Grassley	85
Responses of Cady, Honorable Mark S. to questions submitted by Senator Grassley and Senator Vitter	91
Responses of Fulton, Neil to questions submitted by Senator Grassley	94
Responses of Hashimoto, Professor Erica J. to questions submitted by Senator Grassley	100
Responses of Singleton, David A. to questions submitted by Senator Grassley .	107

IV

	Page
MISCELLANEOUS SUBMISSIONS FOR THE RECORD	
Internet Locations of Citation Documents	111
Submitted by Senator Grassley's Office:	
NLADA American Council of Chief Defenders dated May 20, 2015	112
ACLU American Civil Liberties Union dated May 13, 2015	116
Koch Industries Letter dated May 6, 2015	122
The Constitution Project dated May 12, 2015	124
NLADA National Legal Aid & Defender Association dated May 13, 2015 ..	127
SJC joint letter - misdemeanors hearing	133
Submitted by Senator Leahy's Office:	
Exhibit A—NAPD National Association for Public Defense—Reports from Members	135
Exhibit B—NAPD National Association for Public Defense—Statement on Predatory Practices in Criminal Courts	138
Exhibit C—NAPD National Association for Public Defense—Workload Statement	150
Exhibit D—Louisville Law Review Article	154
National Association for Public Defense—Letter to Chairman Grassley and Senator Leahy	164

PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL FOR INDIGENTS CHARGED WITH MISDEMEANORS

WEDNESDAY, MAY 13, 2015

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10:03 a.m., Room 226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Durbin, Klobuchar, Franken and Coons.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Chairman GRASSLEY. The Minority members are on their way to the Committee meeting. I think I will start out with my opening statement. Before I give my opening statement, my friend, Senator Leahy, cannot be here today as Ranking Member of the full Committee and he has a statement that I am going to put in the record, that he has asked me to put in the record for himself. I have done that.

[The prepared statement of Senator Leahy appears as a submission for the record]

Chairman GRASSLEY. I want to say thank you to all the people that are participating, as well as those in the audience.

Today the Senate Judiciary Committee holds this hearing on indigent misdemeanor representation. According to the Sixth Amendment Center and certainly in my memory, this is the first time the Senate Judiciary Committee has ever held a hearing on this specific subject.

The Sixth Amendment provides criminal defendants with assistance of counsel. For more than 50 years following the Gideon decision, it has been clear that it is necessary to give low income people accused of crime the right to a lawyer to help them navigate the system, preserve their rights, and make sure innocent people do not go to jail.

Clarence Gideon himself, when retried with a lawyer representing him, was acquitted, and that landmark ruling was extended in 1972 to misdemeanor defendants for good reason. The overwhelming majority of people who face criminal charges are prosecuted for misdemeanors.

In Iowa, for example, 80 percent of all criminal prosecutions are for misdemeanors, among the highest rate in the country. Some

States have adhered to the Constitution. In Iowa, our district courts do an excellent job of providing counsel to misdemeanor defendants.

I am pleased that our Chief Justice of the Iowa Supreme Court is with us today. Last month his court extended the right to counsel by not permitting un-counseled convictions to be used as sentencing enhancements in subsequent crimes.

Un-counseled convictions must exist in Iowa, however, or the decision would not even be necessary. Many States are not providing counsel as our Constitution requires. I think it is quite a widespread problem.

In reality, the Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times. No Supreme Court decision in our history have been more violated so widely, so frequently, and for so long.

Consider what is happening just in some of the States represented on this Committee. Defenders are not present at arraignment. A large number of misdemeanor defendants plead guilty without lawyers. Defendants who have been locked up pending their first appearance are told that they can plead guilty and be sentenced to time served, but if they choose to be represented by counsel, they will wait in jail until one is appointed. Problems exist on a smaller scale within our own Federal system, as we will hear.

When misdemeanor defendants are not given counsel, no one can challenge the legality of a traffic stop or to make the prosecution prove every element of an offense beyond a reasonable doubt. Innocent people may be going to jail.

In locations where lawyers are provided at every stage of the process, about 25 percent of all cases are dismissed. There are members of the Senate who want to reduce sentences for felons. At least those individuals have been proven beyond a doubt to have, for instance, sold large quantities of drugs that poison our children or bring violence to our streets.

To really address sentencing reform, we should also be looking at the vast majority of crimes in the country, meaning misdemeanors, and the un-counseled prison sentences that punish them.

These constitutional violations cause serious repercussions. People who are convicted of misdemeanors, whether they receive legal representation or not, may have problems obtaining a job for the rest of their lives. That hurts those individuals, it hurts the economy, it hurts all of us.

Misdemeanor convictions give rise to other collateral consequences. Housing assistance and student loan eligibility might be compromised. Some misdemeanor convictions can lead to loss of gun ownership rights. Some misdemeanors, when repeatedly violated, become felonies.

Yet, prior un-counseled misdemeanors should not count toward felonies and their consequences. Misdemeanor convictions can also make defendants ineligible for a Federal safety valve. That is a provision that allows first-time low-level drug offenders to avoid mandatory minimum sentences. In many instances, misdemeanor defendants are unaware of those consequences then, when they enter their guilty pleas.

I do not think that the solution to the problem is another Federal grant program. According to a 2012 GAO report, there are already such—13 such programs and of the nine that can be used for indigent defense and for other purposes, States have not used the grants for counsel.

Indigent representation is not a high priority. In fact, barely half of all defender offices even knew that these funds could be used for indigent defense.

Perhaps we need a better Federal effort in coordinating and maybe even dispensing these funds, combined with transparency and accountability for why States are not spending available funds for indigent defense.

One way to address the problem would be for States to reclassify some misdemeanors as civil offenses or eliminate prison sentences for various misdemeanors. Perhaps civil fines would be just as effective without making States pay for lawyers or causing collateral consequences.

We will hear testimony today about divergent programs that take some offenses out of the criminal justice system. Again, there are Committee members who are concerned about over-criminalization. This is a place to begin.

States often make lawyers sit through CLE programs of dubious value. Perhaps it would render a better public service by requiring lawyers to provide assistance to indigent misdemeanor defendants instead.

What is particularly troubling about these constitutional violations is who is committing them. It is our judicial system. The States and the State courts must adhere to the Bill of Rights. Respect for our courts, as well as the rule of law demands that.

Widespread, intractable violations of the Sixth Amendment have existed for more than 40 years. Few prospects exist that the States will soon remedy those violations.

State systems need to be reformed. We need to know what is happening. We pride ourselves on a legal system that provides equal justice for all. For that to be real, we must make sure that people without financial means receive representation.

I would, at this point, ask unanimous consent to include in the record a letter from Mark V. Holden, Senior Vice President, General Counsel and Secretary, Koch Industries, in support of today's hearing.

[The letter referred to as a submission for the record]

Chairman GRASSLEY. We also have 13 other letters to place in the record that I will just categorize as varying from across the political spectrum in support of this hearing and doing something with it.

[The letters referred to as a submission for the record]

Chairman GRASSLEY. I call on my friend from Minnesota for any statement that you want to make, and thank you for coming.

**OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR
FROM THE STATE OF MINNESOTA**

Senator FRANKEN. Thank you, Mr. Chairman, for calling this hearing on the Sixth Amendment right to counsel in misdemeanor cases.

This is a very important issue and a bipartisan issue. Despite the fact that misdemeanors represent 70 to 80 percent of all criminal cases, misdemeanors have not been a significant part of the conversation surrounding criminal justice reform, and they should be.

I am glad to see this issue come before the Judiciary Committee and I appreciate the opportunity to attend this hearing. It has been more than 50 years since the U.S. Supreme Court unanimously ruled in *Gideon v. Wainwright*, saying that defendants facing criminal charges have a right to counsel regardless of their ability to pay for legal representation.

In that decision, Justice Black wrote that any person held in the court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. He called that an, quote, "obvious truth."

Yet, in State and local courts across this country, defendants in misdemeanor proceedings are still appearing before judges without an attorney because they are unable to afford one. States and localities staring down record misdemeanor backlogs and shrinking budgets are not providing those defendants with access to counsel despite their constitutional obligation to do so.

As the Nation engages in difficult conversations about the effects of mass incarceration and the State of our criminal justice system, we are permitting scores of defendants from our most vulnerable communities to appear unrepresented in court.

The stakes are high. Misdemeanors or so-called lesser offenses carry enormous and lasting consequences. Individuals convicted of misdemeanors do not just face crime and imprisonment. Long after they have served their sentences, misdemeanor offenders are denied job opportunities and career advancement. They are deemed ineligible for student loans and even housing.

Despite the consequences and the costs those consequences impose on our communities and on our country, many of our citizens face these charges alone without assistance and with little chance of success.

I look forward to hearing more from our witnesses about how we can confront this obvious truth and better meet our constitutional obligation to ensure that defendants receive a fair trial.

Thank you again, Mr. Chairman.

Chairman GRASSLEY. Thank you, Senator Franken.

I am going to introduce everybody before you testify and then we will move from Mr. Cady over to Ms. Hashimoto, in that way.

I want to introduce a person that has testified before our Committee before, the Chief Justice since 2010, but a member of the Supreme Court of Iowa since 1998. He earned both his undergraduate and law degrees from Drake University. He has been a State judge since 1983.

In 2013, he was elected to the Conference of Chief Justices' Board of Directors. Chief Justice Cady is also an adjunct faculty member at Buena Vista University.

David Singleton is an Executive Director, Ohio Justice and Policy Center. OJPC provides free legal representation to prisoners and ex-offenders. Mr. Singleton is a graduate of Duke University and Harvard Law School.

Next is Neil Fulton, United States Federal Public Defender for the District of North and South Dakota since 2010. Mr. Fulton formerly was in private practice and was also Chief of Staff to our new colleague, then Governor Mike Rounds. Mr. Fulton graduated from Yale University and the University of Minnesota Law School.

Robert Boruchowitz—I may just call you Professor Robert—Professor of Practice and Director of the Defender Initiative at Seattle University School of Law. He was Director of the Defenders Association in Seattle for many years and has published widely on misdemeanor defense cases. He is a graduate of Kenyon College and Northwestern University School of Law.

Erica Hashimoto is Associate Dean and a professor at the University of Georgia School of Law. She is a former Assistant Federal Defender. Much of Professor Hashimoto's scholarship has been devoted to the right to counsel in criminal cases. She graduated from Harvard University and Georgetown Law Center.

Chief Justice Cady, will you start out, please?

**STATEMENT OF HON. MARK S. CADY, CHIEF JUSTICE, IOWA
SUPREME COURT, DES MOINES, IOWA**

Mr. CADY. Thank you very much, Mr. Chairman, Ranking Member Franken.

I did have the honor to address this Committee 3 years ago on the issue of cameras in the courtroom and it is again an honor to be before you this morning to talk about this important issue of protecting the constitutional right to counsel for indigents being charged with misdemeanors.

Before I begin my remarks, let me just briefly describe the background of the organization of the Council for Chief Justices, and I submit my testimony this morning as a member of the Board of Directors of that organization.

It was established in 1949 and its purpose was to provide input and improve the administration of justice throughout the country. As you know, State courts handle 97 percent of all judicial proceedings in this country.

The Conference of Chief Justices recognizes the Sixth Amendment right to counsel and the parallel State Constitution provisions that project the most important—some of the most important rights of people that are brought into our courts on criminal offenses.

It is indeed important this morning that we remember the protection at the center of the issue that we address provided by the United States Constitution. It is a protection that, as the Chairman described, is trumpeted by Clarence Gideon over 50 years ago and later extended by the U.S. Supreme Court to all criminal cases, including misdemeanors, where it could lead to a sentence of incarceration or even a suspended sentence.

It is—it is a right that helps define our collective understanding of justice.

Providing indigent defendants with representation, however, is fiscally challenging for many States. In 2014, the Conference of Chief Justices adopted a resolution entitled In Support of the Establishment of a National Center for the Right to Counsel, identified as H.R. 3407.

The resolution noted that State and local governments continue to struggle to adequately fund legal representation for indigent criminal defendants. A copy of this resolution is attached to the written testimony.

At present, the mechanism used to deliver indigent defense services nationally can best be described as a patchwork of programs rather than a comprehensive system. They are funded in different ways. They are structured to operate in different ways and even the guidelines for eligibility are different.

Attached to the testimony is a spreadsheet describing the statutory provisions for indigent determination in most States, but I think a review of that information will demonstrate that courts have gone to considerable lengths to ensure that everyone with a bonafide need for representation can qualify for counsel.

Indigent defense delivery systems in every State are underfunded; in many States, severely underfunded. Courts handling misdemeanor cases almost always have caseloads that are so high that they necessitate processing cases in almost an assembly line fashion.

This leads to a high percentage of cases resulting in guilty pleas without counsel to get the benefit of receiving the fine and court costs as a sole sanction. Although this may look attractive to criminal defendants at the time and it may even induce them to waive legitimate defenses, they are exposed to many, many collateral consequences, as have already been identified. These consequences can make the quality of representation more and more essential.

The conviction itself and the permanent and easily accessible record that it leaves can and does result in significant hurdles to future employment, education, housing and so many other opportunities to achieving a productive life.

The States have made efforts to ensure that they are in compliance with their requirements under the Sixth Amendment to the Constitution to provide representation to indigent defendants. Nevada and Pennsylvania, for example, have recently established commissions to look into the issue.

Other States have chosen to limit and redefine the number of charges that can carry the possibility of incarceration as a sanction in hopes of utilizing existing resources more effectively. North Carolina is an example.

Washington's Supreme Court recently adopted mandatory misdemeanor caseload limits, as well as other representation improvements. These standards have brought attention to the misdemeanor issue for public defense and have resulted in public defense upgrades in hundreds of local courts there. These efforts do mark progress, but much, much more remains.

The Conference of Chief Justices believes that the public would greatly benefit by the establishment of a national center for the right to counsel to fund innovations, support research on indigent defense delivery systems, support training and technology assistance programming, and to serve as a clearinghouse of information. The center could help identify the best practices currently employed nationally and, over time, help bring uniformity to this issue. It would also help improve the public confidence and trust in our criminal justice system.

Thank you again for asking for our input on this very important matter. The Conference of Chief Justices stands ready to work collaboratively and cooperatively to craft solutions to this important issue.

I will look forward and be happy to answer questions later on. Thank you.

[The prepared statement of Mr. Cady appears as a submission for the record]

Chairman GRASSLEY. Thank you, Mr. Chief Justice.
Mr. Singleton.

**STATEMENT OF DAVID A. SINGLETON, EXECUTIVE DIRECTOR,
OHIO JUSTICE AND POLICY CENTER, CINCINNATI, OHIO**

Mr. SINGLETON. Good morning, Chairman Grassley, Ranking Member Franken and Senator Durbin.

I am delighted to be here this morning to offer my thoughts on this very important issue of protecting the right to counsel in misdemeanor cases. I think we can all agree that the problem is widespread and in my written testimony I have some examples from Ohio, recent examples where the courts of appeals had to reverse convictions where the right to counsel was denied.

Rather than talk about those cases and rather than getting into lots of statistics and numbers, I want to do something different in my brief time this morning. I want to try and put a human face on this problem and talk about how misdemeanor convictions impact the lives of folks who are just trying to do the best they can in society and lead productive lives.

There are some people out there who would say misdemeanors, what is the big deal; you do not go off to prison for a long time if you get convicted of misdemeanors. Misdemeanors matter. They matter because they can have life—lifelong impacts on people's lives, their ability to provide for themselves, and all sorts of collateral sanctions that apply that make that difficult.

I want to tell you about Melinda. Melinda is a former client of mine. She is a mother of three and she has raised her children pretty much by herself. Back in the 1990's, she got convicted of misdemeanor offenses that stemmed from a seizure that she suffered. She has suffered from seizures since she was 19 and had gone off the medication because the doctors were trying to find a new therapy for her.

One afternoon while she was on the phone, she suffered a seizure and, luckily, her friend on the phone recognized it and called 911. The paramedics come. When the paramedics come, they find her three young children, ages 3, 4 and 5, downstairs unattended and there were cleaning supplies out and knives on the counter in the kitchen.

They walked upstairs and there were missing screens in the windows, an electrical outlet not covered. They took her to the hospital. She got better. The paramedics reported what they found to the police. A couple of weeks later, Melinda got summoned to court where she learned she was being charged with child endangerment.

A month after that, Melinda stood before the judge without a lawyer and she was appointed a public defender, but the public defender was not there. What the judge did was say, "Look, I am not

sure why you are here based on the facts of this case, but I will tell you what I am going to do. If you plead no contest, I will allow you to get non-reporting probation. You do not have to show up and report to a probation officer. You can be on your way."

That is what Melinda did. The problem was that years later when she was struggling to earn a living to support her three children, she found this great job in a daycare center and she was good at it, she was very good at it. The employer loved her, the kids loved her. Then there was a change in the law that required a mandatory background check.

When the employer found that she had been convicted of endangering children, they fired her, let her go. That was a job that Melinda loved and was good at.

What would have happened had Melinda had a lawyer standing by her side? Would she have pled no contest to crimes for which she had a viable defense? That viable defense was, No. 1, she was cleaning her house on the day that this happened, cleaning her kitchen. That is why the cleaning supplies were out. She tried to get her landlord to fix the problems, but he told her it was not his responsibility because he had just sold the building to someone else.

Would she have been found guilty? Perhaps not. She had a viable defense, but nobody told her that. As a result, she loses her income and her ability to support her children.

Melinda is not alone. There are thousands of people in Ohio and millions across this country who are impacted by collateral sanctions.

In the State of Ohio, there are 700 laws on the books that restrict people from working in certain industries; 20 percent of those apply to misdemeanor offenses. We know from the work that the ABA has done cataloging collateral sanctions across this country that this problem has huge dimensions. It is not just jobs. It is also the ability to get educational support, housing and the like.

The time has come for us to do something about this problem, to make the promise of Gideon real. I urge you—I am not going to go through a lot of recommendations. I have read the recommendations from Professors Boruchowitz and Hashimoto and I agree with them and I agree with what the Chief Justice just said in terms of the establishment of a center. I urge this body to recommend that change happen and change happen soon.

Thank you.

[The prepared statement of Mr. Singleton appears as a submission for the record]

Chairman GRASSLEY. Thank you, Mr. Singleton.

Mr. Fulton.

**STATEMENT OF NEIL FULTON, FEDERAL PUBLIC DEFENDER,
DISTRICT OF SOUTH DAKOTA AND NORTH DAKOTA, PIERRE,
SOUTH DAKOTA**

Mr. FULTON. Thank you, Mr. Chairman, Ranking Member Franken and Senator Durbin, for your interest in the issue and the invitation.

In North and South Dakota, with 13 Indian reservations and approximately two-thirds of our cases in any given year arising from

Indian country and the concurrent Federal and Tribal jurisdiction over many offenses, our interaction with Tribal courts in the Federal defenders office is frequent and the issue of misdemeanor representation in Tribal courts is critical to our practice.

Many of the problems we encounter are similar to those you will hear from State practitioners, but some are unique to the interplay of Federal law and Tribal jurisdiction.

A first and critical unique aspect about Tribal courts is that there is no Sixth Amendment right for Native American offenders in Tribal courts. Sentences of up to 1 year of incarceration can be imposed with no right to appointed counsel in Tribal courts.

In instances where tribes allow counsel under their laws, in many instances, counsel is provided by lay advocates, not law trained individuals. That problem is exacerbated by the rural nature of most reservation areas. There simply are no lawyers.

In South Dakota, the Chief Justice has initiated a program to draw more lawyers to rural areas because regardless of whether you are in Tribal or State court, there just is no lawyer available. In Tribal court, the problem is unique because there is no protection and no guarantee of a lawyer.

As a result, guilty pleas without counsel are common, I would say typical, in my experience in Tribal courts. Why? It is the ultimate rational choice. You plead today, you get out; you assert your right to counsel and a defense, you will stay in jail.

Additionally, because of concurrent Federal jurisdiction, many of our clients, unfortunately, believe that a guilty plea will provide them with double jeopardy protection against Federal charges down the road. That belief is mistaken.

In fact, the concurrent Federal and Tribal jurisdiction exacerbates that problem because in many instances, Tribal misdemeanors are used as entry points to a Federal prosecution. As an example, an individual may be initially arrested for a simple assault or for a public intoxication or a liquor violation for a more serious assault charge or even a homicide.

That individual is detained. Statements are obtained and the case is developed with that individual not realizing that Federal charges are available, not realizing the right to counsel and no guarantee thereof.

Admissions are made. No global plea agreements are worked out. In some instances, the appointment of special United States Attorneys deputized in both Tribal and Federal court, the prosecution is initiated and driven by the person who will eventually pursue it in Federal court and the individual has no counsel at any point while they make critical admissions.

Collateral consequences are severe. You have heard from other people about that and will hear more, but it is particularly acute in Indian country. Six of the 10 lowest per capita income counties are in North and South Dakota. They are all Indian country. Employment is unavailable endemically. If you have disqualifying misdemeanor convictions, it is even worse.

Student aid is unavailable to lift people out of poverty and if you are ineligible for government subsidized housing in Indian country, that is to say you are ineligible for housing, period.

In many instances, heads of households will plead guilty to misdemeanors, thus becoming ineligible to retain their housing and displacing both them and their family.

Additionally, a disturbing collateral consequence is that un-counseled Tribal convictions can serve as predicates for certain Federal offenses. An example, the Eighth Circuit Court of Appeals has affirmed the use of un-counseled Tribal domestic assault convictions as predicate offenses for habitual domestic offender convictions under 18 USC 117.

The efforts by Congress to address these issues in Tribal courts under the Indian Civil Rights Act, the Tribal Law and Order Act and VAWA have not solved the problem, at least not yet.

My compatriots in other places have described instances where the Indian Civil Rights Act or the Tribal Law and Order Act protections have been ignored, either by mistake or bad faith; individuals receiving up to 2,500 days in detention post the enactment of TLOA, individuals receiving almost 2.5 years after TLOA was enacted, without counsel.

The problem is the remedies to address these issues are very cumbersome. One has the right to pursue habeas corpus in Federal court, but you have to first exhaust your remedies, excuse me, remedies in Tribal court. That is a cumbersome process and you again face this rational choice of do I assert my rights or do I get out of jail now, and most people get out of jail now.

Additionally, the Violence Against Women Act Reauthorization of 2013 expanded the number of people subject to this problem by giving tribes the ability to exercise jurisdiction over non-Indians in certain instances and both TLOA and VAWA expand the available sentencing resources and maximums that tribes can impose.

This problem is significant, it is systemic, and it has a real impact on our clients on a daily basis. It needs to be addressed.

I appreciate the Committee's interest in the topic and the opportunity to be here today. Thank you.

[The prepared statement of Mr. Fulton appears as a submission for the record]

Chairman GRASSLEY. Thank you, Mr. Fulton.
Professor Boruchowitz. Is that pretty close?

**STATEMENT OF ROBERT C. BORUCHOWITZ, PROFESSOR FROM
PRACTICE, SEATTLE UNIVERSITY SCHOOL OF LAW, SE-
ATTLE, WASHINGTON**

Mr. BORUCHOWITZ. That is very close, Senator. Thank you. Thank you, Ranking Member Franken and Senator Durbin. Thank you for holding this hearing.

Misdemeanor public defense in much of the country is broken and in many places it hardly exists. Thousands of people go to jail every day without a lawyer. Other thousands have lawyers who are overwhelmed with cases, poorly trained, poorly paid, and operating without investigation and expert witness resources.

As you have just heard, convictions result in heavy consequences besides jail and fines. As Federal Judge Lasnik said about two cities in Washington, "Actual innocence could go unnoticed and unchampioned."

Capable lawyers can help avoid many of those convictions and consequences. In other cases, the amount of jail and fines could be diminished and cases against innocent people like David's client could be dismissed.

Federal legislation and targeted funding could make a difference.

Most people who go to court go to misdemeanor court. There are approximately 10 million cases a year; in many States at least one for every 30 residents. The cost is staggering, as the full cost of a misdemeanor is estimated to be about \$1,700.

This affects every American. Almost everyone knows someone who has been charged with a misdemeanor, whether a minor in possession of alcohol, shoplifting, driving with a suspended license, or something more serious, such as DUI or assault.

I have seen judges run through the advice of rights so quickly that people do not understand what is being said. Many courts send defendants to talk to a prosecutor before they even have a chance to see a defender.

I saw a judge in Arizona instructing defendants to waive their right. He said, "I want you to waive your right to an attorney. You have a right to have an attorney, but I am not going to give you the public defender. You would have to go and hire one and I do not think you are going to do that. I think you and I are going to talk about this right here, right now, right."

Many court proceedings take only a few minutes, making justice impossible. I submitted a transcript of one that took less than 90 seconds. There is no way in that time that an accused person can understand and make a meaningful decision about whether to exercise their rights and how to present their perspective of the case for the judge to consider, and there is no way for the judge to know whether the person has made a knowing, intelligent and voluntary waiver of their rights or is making a valid guilty plea or to know anything about the defendant or the case and what an appropriate sentence should be.

I have seen defenders so overwhelmed that they literally spend 5 minutes in a hallway talking to a client before advising her to plead guilty. The lawyers never asked her what happened in the case or what she wanted to do with it.

The racial disproportionality in misdemeanors is significant. A black person is 3.7 times more likely to be arrested for marijuana possession than a white person, even though blacks and whites use marijuana at similar rates.

Historically, although Seattle's African-American population is roughly 8 percent, more than 40 percent of the suspended license charges have been against African-Americans.

A recent Federal court decision highlights many of the problems. The for-profit contract defenders in these two cities were each handling about 1,000 cases a year part-time. The judge found that public defense clients were systematically deprived of the assistance of counsel. There was almost no evidence that the defenders did any investigation or legal analysis and adversarial testing of the government's case was nonexistent. It was basically a meet-and-plead system.

One way of responding to reducing the demand for defenders is that hundreds of thousands of cases could be reclassified or di-

verted, in my opinion, saving more than \$1 billion a year. Each year, there are more than 700,000 arrests for drunkenness, disorderly conduct and vagrancy. There are about 600,000 for possession of marijuana.

If drunkenness were treated as a health problem and not a crime, as Colorado does, for example, approximately \$600 million a year would be available for treatment and other uses. Savings easily could exceed \$1 billion if disorderly conduct were included, not to mention suspended driver's license, which the Spokane City prosecutor, for example, has developed a diversion for, not only reducing the defender caseload by one-third, but also saving hundreds of thousands of dollars and by combining with a relicensing program, yielded millions of dollars in revenue as people paid their fines.

King County, Washington has law enforcement-assisted diversion, diverting drug and prostitution suspects to a social service program instead of jail and prosecution. An evaluation found that participants in that program were 58 percent less likely to be arrested.

I recommend the Senate take several steps. Some existing Justice Department funding to the States could be devoted to misdemeanor public defense, with funding for pilot projects, training, research and development of relicensing and diversion programs.

Some of the funding could be conditioned on a certification by the State that they are providing counsel for eligible defendants.

The Senate should adopt the Gideon's Promise Act proposed by Senator Leahy, providing technical assistance and authorizing the attorney general to bring civil actions to remedy patterns or practices that deprive persons of their right to counsel.

The Senate should adopt the national center for the right to counsel as proposed by Representative Deutch.

It is a disgrace that 52 years after *Gideon* and 43 after *Argersinger*, thousands of accused persons face the power of the State alone. It is not fair, it is economically foolish and wasteful. The impact on people's lives is dramatic.

The Congress can help remedy this situation. Thank you very much.

[The prepared statement of Mr. Boruchowitz appears as a submission for the record]

Chairman GRASSLEY. Thank you, Professor.

Professor Hashimoto.

STATEMENT OF ERICA J. HASHIMOTO, ALLEN POST PROFESSOR OF LAW, UNIVERSITY OF GEORGIA LAW SCHOOL, ATHENS, GEORGIA

Ms. HASHIMOTO. Thank you. Thank you, Chairman Grassley, Ranking Member Franken, and Senator Durbin. Every year, thousands, if not millions, of defendants charged with misdemeanor criminal offenses are not represented by lawyers, even though our Constitution guarantees them the right to counsel.

These widespread constitutional violations have created a crisis in which defendants charged with criminal misdemeanors are steamrolled by our criminal justice system.

The Supreme Court has said that the processing of millions of criminal misdemeanors each year resembles assembly line justice. In one jurisdiction, it is known as McJustice, because of the breathtaking speed with which cases are resolved.

In Florida, for instance, the adjudication of misdemeanor cases, including findings of guilt and sentencing, took an average of 3 minutes per case. In 3 minutes, a person transforms from a full rights-bearing citizen, presumed innocent, into a convicted criminal, subject to the government's authority to intrude in every part of her life.

The searching pursuit of justice that the Constitution guarantees before States can deprive citizens of their freedom simply cannot happen in 3 minutes.

Because of these concerns, the Supreme Court has held that there is a constitutional right to counsel in most misdemeanor cases. As the Court recognized, in a system in which speed often is substituted for care, lawyers can ensure that the constitutional rights of criminal defendants remain protected.

When the right to counsel is denied, violations of fundamental constitutional rights, including the First Amendment right to free speech, the Second Amendment right to bear arms, the Fourth Amendment right to be free from unconstitutional searches and seizures, and the Fourteenth Amendment right to due process will occur. And without lawyers, deprivations of the protections that our founders enshrined in the Constitution become invisible and go uncorrected.

In that sense, the Sixth Amendment right to counsel serves as the gateway to protecting all of the other constitutional rights of defendants. Lawyers also can assure that facts about defendants that may bear on guilt or sentencing and that may have gotten lost in the haste of pushing the case to a resolution are brought to the attention of the court.

Despite its importance, the constitutional right to counsel has been ignored in many local and State courtrooms across the country. Because many jurisdictions do not keep data on misdemeanor representation rates, authors of numerous reports have had to go out to individual jurisdictions to watch what is actually happening in those courts and every report that has studied the issue of misdemeanor representation in States from Florida to Michigan to Kentucky to Washington and many States in between has found a significant percentage of misdemeanor defendants who do not have a lawyer and who have not waived the right to counsel.

The failure to provide counsel has enormous costs above and beyond the average \$30,000 a year the government spends incarcerating that person, including the loss of jobs that provide vital and often the only means of support to low income people, the inability to get jobs in the future, and the States' shuttling of children into State custody because their parents have been unconstitutionally incarcerated.

The cost to State and local jurisdictions, to the defendants and their families, and to the community as a whole are immeasurable.

There is a crisis in misdemeanor courts in communities across the country. The question is what to do about it. Federal legislation is vital in order to provide States and localities both with incen-

tives to address the problem and assistance as they try to move toward constitutional compliance.

Beginning with incentives, States and, in particular, local courts have no incentive to comply with the Sixth Amendment right to counsel because there is no cost to the denial of that right. Federal legislation needs to provide that incentive.

If there is clear evidence that a jurisdiction is engaging in a pattern or practice of violating the constitutional right to counsel, the Department of Justice should have authorization to take action against that jurisdiction by filing for injunctive or declaratory relief.

In addition, funding from the Federal Government should be conditioned, first, on providing data on representation rates in misdemeanor cases and, second, on having an indigent defense structure to ensure that counsel are available to represent defendants.

Finally, as Chief Justice Cady pointed out, a national center for right to counsel would assist States as they try to move toward constitutional compliance.

Such measures would bring us closer to the right to counsel guaranteed by the Sixth Amendment.

Thank you for your attention to this issue.

[The prepared statement of Ms. Hashimoto appears as a submission for the record]

Chairman GRASSLEY. Thank you, to all of you. I am going to call on Senator Durbin, if he would go first, please.

Senator DURBIN. That is kind of you, Mr. Chairman. Thank you very much.

As I listen to the testimony here, several things come to mind. There is an answer, I think, that I believe is helpful and I would like your reaction to it.

In 2008, we passed a bill here, which became the law, called the John R. Justice, let me get the titles right—Prosecutors and Defenders Incentive Act and what we did with this was provide money through the Department of Justice to young prosecutors and public defenders who were willing to make a 3-year commitment and if they would make that commitment, we would help them pay back their student loans.

It turns out to be an extremely popular program because many law school grads find it impossible to take these jobs—they do not pay as much as some other opportunities—and we are denied their services.

It has been a good law, I think, despite the fact that I sponsored it, and it has not been adequately funded. We had it authorized at \$25 million. One year I believe that there was \$10 million for the Nation put into this student loan forgiveness, and now we are down to about \$2 million.

We have helped thousands stay in these jobs and commit themselves to these jobs.

Tell me what you think the impact of that would be in terms of providing more professional prosecutors and more public defenders, in your experience.

Mr. BORUCHOWITZ. Senator, it is a great program. It has made an enormous difference. The debt of many of our graduates now is in excess of \$100,000 when they get out. If they are lucky, they can

make \$50,000 as a public defender or a prosecutor starting out. If they have an opportunity to go with a big firm making double or triple that, it is hard to go into public service.

It would be enormously helpful to fund that fully so that defenders and prosecutors could be paid.

However, it assumes that those jobs exist and if you are in a place like South Carolina, for instance, where the magistrate courts and the municipal courts frequently have no public defenders at all, first of all, you would have to get the local government to agree to fund the position and then hire the person who could pay their loan back. The jobs do not exist in a lot of these courts.

If the Congress could take some steps in that direction, incentivizing, as Erica suggested, so that they could get funding, just as the law graduates could get funding, to enable the local governments to have the public defender positions, incentivize them, or, alternatively, authorize the Justice Department to bring actions against them if they do not provide counsel, then those are the kinds of incentives that would make a difference.

As Senator Grassley pointed out, a lot of the States are ignoring their obligation. Your program is—when it passed, I had recently left public defense for academia and I know that it was very, very popular among defenders.

Senator DURBIN. I hope we can expand it. I would say to the Chairman, we are talking about the John R. Justice Act to help defer student loan payments for those who will give a 3-year commitment to become prosecutors and defenders, and I hope I can approach you a little later and talk about how we can adequately fund that.

Let me also say that one of the things we are trying to do is to take a look at Federal sentencing, and the object, of course, is to reduce incarceration of those who are being held for an extraordinary period of time for offenses which might not merit mandatory minimums, for example, and money which is currently being diverted into the Bureau of Prisons might then be diverted into things that we have talked about here.

We are talking about prosecutors and defenders. We are also talking about, I think, the prevalence—and I do not remember if I heard this—it is your testimony—of many of these criminal defendants dealing with substance abuse and mental illness, and diversion from our penal system, corrections system into treatment is certainly more valuable for the individual and, I think, for society at large.

The last question I will ask in the minute or so left, if anybody would like to respond. In my State, there has been a suggestion that maybe we ought to change the law school curriculum so that in the third year there are more apprenticeships and more actual in-court experience by some of these law students, so they might then entertain possibilities of becoming prosecutors and defenders more realistically.

Does anyone have a reaction?

Ms. HASHIMOTO. I would agree with that, Senator Durbin. I think the ABA has moved in that direction and is really encouraging law schools across the country to expand their clinical and experiential offerings so that law students can serve the commu-

nities in which their law schools are housed and provide assistance to those folks and, when they graduate, be more capable of taking these jobs and be more experienced when they start those jobs.

Senator DURBIN. Thanks. Thanks, Mr. Chairman.

Chairman GRASSLEY. I am going to start out with Chief Justice Cady. Tell me if I am wrong, but I kind of believe that Iowa has a better record than a lot of States in providing defense in misdemeanor cases for indigents.

Are there any approaches that Iowa has taken to address this problem that might help other States to improve compliance with the Sixth Amendment for misdemeanor defendants?

Mr. CADY. There is, Senator. As a beginning to answer that question, I think what we have tried to do is educate our judges and our magistrates and, in turn, our prosecutors to understand what the problem is that we have all identified this morning, because to begin with, the myth has to be eliminated from the process that a disposition that results in a fine is a good outcome.

I think a lot of the magistrates and the judges and the prosecutors in small misdemeanor cases work in that direction thinking that they are providing an outcome that will work for the offender.

It does not. What we are trying to do is educate the people involved in our process so that our courts work in a way that it solves the problems of people that come into its courtroom instead of piling on to the problem.

I think our focus has been for judicial education.

Chairman GRASSLEY. I am going to go to Mr. Fulton, please.

How does the expansion of Tribal courts' jurisdiction, for instance, under the Violence Against Women Act and particularly for non-Native Americans, impact the problem of indigent representation for misdemeanor defendants, especially as it affects Federal proceedings?

Many of us had concerns regarding the expansion of this jurisdiction when we reauthorized that legislation. Are there particular remedies the Committee could consider to address the right to counsel issues arising from Tribal court proceedings?

Mr. FULTON. I think there are some things that could be done, Mr. Chairman.

First, I think that in no circumstance should an un-counseled conviction be an element, a sentencing enhancement, or a predicate offense for a subsequent offender statute under Federal law. It seems improper for our Federal laws to capitalize on unrepresented convictions, wherever they come from, Tribal or State court.

The Violence Against Women Act and Tribal Law and Order Act, whether through lack of information or whatever basis, I have heard from people where tribes have exercised that expanded jurisdiction, but the protections under those statutes are not being provided and individuals are receiving sentences that are greater than they should receive.

The remedy to fix that is to go to Federal court and pursue habeas corpus. I think that one thing the Committee could look at there is to eliminate a requirement to exhaust Tribal court remedies before seeking habeas under TLOA or VAWA. That would expedite that and make it a meaningful remedy so the individual would not have to sit in jail and go there.

Then lastly, I think going back and looking at whether an expansion of Tribal court jurisdiction when resources may not be available to non-Natives and sentencing enhancements when there are existing Federal offenses that can cover many of these is something the Committee could do, as well.

Chairman GRASSLEY. Now, I am going to go to Professor Hashimoto.

Your written testimony describes how misdemeanors and misdemeanor prosecutions have exploded. This seems to reflect a mind set that every problem has a criminal solution.

If this trend, as I see it, is right—and you had it in your testimony, so I assume it is—what can be done to reverse the trend?

Ms. HASHIMOTO. Thank you, Chairman Grassley.

I think it is important for the education that Chief Justice Cady has talked about and, also, for States to undertake looking comprehensively at their criminal codes and identifying the offenses that are leading to the very high volume of criminal cases.

Bob mentioned a couple of those, including driving on suspended licenses, disorderly conduct cases. All of these kinds of cases, particularly the ones that do not constitute threats to public safety, could easily be reclassified either as non-criminal cases or depenalized so that the collateral consequences do not attach to those.

I think studying that problem in every State is very important because I think in every State, the types of offenses are slightly different and the offenses that are prosecuted at the highest rates are also slightly different.

I do think that the States need some assistance looking at their criminal codes and determining ways to decriminalize some of those offenses.

Chairman GRASSLEY. Thank you.

Now, Senator Franken and then after Senator Franken, Senator Klobuchar.

Senator FRANKEN. I just want to ask—thank you, Mr. Chairman, for this very important hearing.

Just to the Chairman's question on court jurisdiction and VAWA on Indian Tribal courts, those cases tend to be not misdemeanor cases. Am I right?

Mr. FULTON. The underlying predicates frequently are misdemeanor cases, Senator Franken.

Senator FRANKEN. They are.

Mr. FULTON. Yes. I will give you an example. An individual is called to a house. There is a report of a disturbance. There is a public intoxication charge. There is a liquor violation charge. There is a simple assault charge. Those can then give rise down the road to the predicate offenses. Then the tribes will exercise what I would call misdemeanor analogs, simple assault for what is actually an aggravated assault. Frequently they are misdemeanors.

Senator FRANKEN. Okay. Thank you. In your testimony, you reference reports from colleagues suggesting that Tribal courts are failing to appoint effective counsel or failing to appoint counsel all together. Clearly, this is not unique to Tribal courts, as the testimony of all the witnesses testifies.

You mentioned severe backlogs and a general lack of available lawyers in sparsely populated areas. You do the Dakotas or just South Dakota?

Mr. FULTON. North and South Dakota, Senator.

Senator FRANKEN. I imagine you see that throughout the Dakotas.

Mr. FULTON. Absolutely, and it is a problem not only in Tribal courts in the Dakotas, but also in State courts. I mentioned Chief Justice Gilbertson in South Dakota has started a program to try and incentivize lawyers to come back to underserved rural communities. It is just a problem of rural areas generally.

Senator FRANKEN. What, in your opinion, and there has been some testimony to this effect, what can we do to incentivize attorneys, when they are starting their careers, to consider serving the communities, these rural communities?

Mr. FULTON. I think John R. Justice is great, Senator Franken. I have lawyers in my office that are beneficiaries of that. State programs like South Dakota has initiated that is similar to John R. Justice incentivizing people with student loan forgiveness or repayment to bring them back to underserved communities is a great idea.

I have to be candid. There is a ceiling at some level. I love South Dakota. Not everyone chooses to live there. That is just fine, but it is a reality. But those programs do work and they do give people an opportunity. I think the discussion of law school education and apprenticeship programs are great.

The University of Minnesota, my alma mater, has an excellent misdemeanor defense clinic and it, frankly, when I was there, incentivized a lot of people to go into indigent defense. And those are great models to follow.

Senator FRANKEN. University of Minnesota.

Professor Boruchowitz, it seems to me that one of the major obstacles to solving the crisis is cost and you bring out in your testimony that this really is cost to not providing counsel.

Some of the witnesses here today have suggested that there is a role for Congress to play in supporting an increase in funding for the type of programs that provide indigent defendants, but some of my colleagues might balk at the price tag associated with funding those programs.

You have written the staggering—you just testified about the staggering cost of misdemeanor cases.

Is it not true that a significant part of that cost is not just prosecuting the misdemeanors, but incarcerating misdemeanor offenders who may not have faced jail time at all had they been effectively represented by counsel?

Tell us about this, the real cost here. Would it be less expensive if we were providing counsel?

Mr. BORUCHOWITZ. I think there are several different ways of answering that. First, there is what you could call the demand side, which is all the cases that need lawyers, and Spokane is a good example, I think, in answering all of your question.

First of all, the prosecutor realized that with the caseload limits, which Chief Justice Cady mentioned, we now have in Washington, they were going to need lots more defenders if they did not get rid

of some of the cases they had. Plus, she also did not have enough lawyers to do what she needed to do focusing on DUI and domestic violence.

She initiated a diversion program to work with relicensing on suspended driver licenses. It took a third of the cases out of the system and as a result, they only had to add two lawyers to the defender office instead of many more.

Second, they reduced the cost for her office, as the prosecutor, as well as the jail and the defender and they started collecting more revenue for the underlying fines that people with suspended licenses had because they helped them get their licenses back so they could work, drive their kids to school and so forth. They have brought in, over the past several years, \$4 million in additional revenue that they probably would not have gotten otherwise.

The cost of jailing somebody is significant. As Erica said, it is in the \$30,000 a year range. For every person that you are not locking up, you are saving that money.

On top of that, there is all the cost to the economy of somebody losing their job, their housing, all of the consequences that come from that.

Then finally, I would say that there is some research to indicate, and my own experience confirms this, that when you have a lawyer at the first hearing, very often the lawyer can persuade the judge, "My client is going to be safe to be in the community, you can let them out pending the next hearing," and you save jail costs there.

For a relatively small investment in having the lawyer there, you can yield a much greater savings in the jail costs later on.

Senator FRANKEN. Thank you very much. Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you, Mr. Chairman. Thank you to Senator Franken for also being part of this hearing. It is a really important topic.

I was once a prosecutor, ran an office of 400 people, and I remember you, Judge Cady, because I had you testify on the cameras in the courtroom issue, and you are back, when we had that hearing. Thank you for that.

I thought—also, this is near and dear to our heart in Minnesota, because *Gideon v. Wainwright*, when Walter Mondale was the Attorney General, he actually led the Attorney General sent a letter supporting the right to counsel in that case. I know there are many issues that come out of it and have not been resolved, including this one. Thank you.

I will start with you, Chief Justice. When an individual pleads guilty or no contest to a misdemeanor crime, there are consequences of that action that extend beyond the immediate fine or jail sentence.

What other effect do you think these convictions can have that people do not think about immediately? And maybe you would like to answer that, as well, Mr. Singleton.

Thank you.

Mr. CADY. The consequences are many and they come down the line where they are not even considered at the time. That is largely

because our constitutional standard is premised on the protection of someone's liberty from incarceration.

The consequences that follow, whether they are employment, education, military service, whatever it might be, are not part of the constitutional standard that is sought to be protected.

We have to uncouple our analysis of the issue at that point and understand that this involves the right to counsel, but it also involves making our justice system more fair and more just, because when we do become better in doing our work, we do avoid so many costs and so many heartaches later on down the line.

I think it is imperative to understand that these collateral consequences oftentimes have much more impact than a jail sentence.

Senator KLOBUCHAR. Right. Mr. Singleton, do you want to elaborate on that a little bit?

Mr. SINGLETON. I wanted to add—thank you for the question, Senator. One of the things I wanted to add that we have not talked about yet is these collateral sanctions or consequences can also lead to increased crime.

One of the things that we do at the Ohio Justice and Policy Center is we have legal clinics in the community where we meet with folks who are impacted in terms of getting work, primarily getting work, but also other impacts, housing and the like, but who come to us because they want to be law-abiding, productive members of the community and they are shut out of work because of their criminal convictions.

I had one client—

Senator KLOBUCHAR. We just did a letter on this, a group of Senators, for job application purposes, not having that be the first question.

Mr. SINGLETON. That is terrific. I had a client a while back say, "Listen, what am I supposed to do to support my family if I cannot get a job? I am going to have to do something," and too often that something is something that is illegal.

I think that—I mean, this is indirect, but I think that if someone has a good lawyer, they can prevent the conviction, they can prevent the spiral of having collateral consequences that shut you out of work, I think that ultimately pays off in public safety for all of us because we are keeping people more stable and able to support themselves through legitimate work rather than resorting to crime.

Senator KLOBUCHAR. Very good. Thank you.

Professor Hashimoto, you talked about the need for better data about indigent representation. How do you collect that data? Just based on some of the research you have done, I guess you could also answer that, Professor Boruchowitz. Just what you see as a model that works in States. Go ahead.

Ms. HASHIMOTO. The Bureau of Justice Statistics has been very good in felony cases about requiring jurisdictions to keep pretty good data on who is being represented in felony cases and by whom, so whether it is public defenders, court-appointed counsel, or private attorneys. In felony cases, the data indicates that it is about a 99 percent representation rate.

In misdemeanor cases, by contrast, there is just simply no nationwide data at all. I think the Bureau of Justice Statistics could be really helpful in helping to get some data systems up.

My sense is that many, many, many misdemeanor courts already keep some data, they have got court records on these cases, and so all that would need to be added is a box that says "Was the defendant represented by a lawyer; if yes, what kind of a lawyer."

Senator KLOBUCHAR. Okay.

Mr. BORUCHOWITZ. I think collecting that data and then compiling it so that we have got some record of exactly what is happening on a nationwide basis is very important.

Senator KLOBUCHAR. Professor, just quickly. I was asking about models in other States that work the best.

Mr. BORUCHOWITZ. Right. Part of the problem is that a lot of these courts have their own systems that do not talk to other systems. And so having some incentive for the States to coordinate the data collection.

Some States are very good about keeping track of how many cases individual lawyers have or at least what courts they are operating in, but other States do not do that. Being able to incentivize the States to coordinate the data and get their local—I mean, some States literally have hundreds of courts and so—and very often these are city courts with very little resources. Having their computer systems talk to the State system is not always to do, but being able to get all of them to report that data, as Erica suggested, incentivize them to do that perhaps with some Federal assistance to coordinate it.

Senator KLOBUCHAR. Thank you. I am out of time here, but I also wanted to thank you, Mr. Fulton, for your work. I know your counterpart in Minnesota and I know how hard that work can be.

I do want you to know when I was a prosecutor, I testified at the legislature several times for full funding for public defenders. I actually argued that it was our best way to get good results if you have lawyers that are matched on both sides.

Thank you.

Chairman GRASSLEY. Senator Coons, you arrived just at the right time.

Senator COONS. Thank you, Chairman Grassley. I would like to thank you and Ranking Member Leahy and Senator Franken for calling this hearing.

This is an important issue. We all know, the right to counsel is one of the foundational rights of our constitutional order. In misdemeanor prosecutions, as I know you have explored in great depth, which are the majority of all cases and prosecutions in the country, there is an uneven collection of data, uneven access to counsel, uneven representation both in terms of quality and timeliness and its impact on outcome.

I am grateful for the chance for us to talk about this vital piece of criminal justice reform.

In the last Congress, I was pleased to be able to join with Senator Sessions in holding a hearing about the Federal Public Defender Service and then working on the appropriation side to try and reduce some of the harmful impact of sequester on our judiciary as a whole, but, in particular, on the Public Defender Service.

I just wanted to ask a few questions, if I might, since I suspect I am the very last thing between you and concluding the hearing.

If I could, Mr. Singleton, there has been testimony about misdemeanor sentencing and the significant racial disparities which mirror some of the very disturbing racial disparities in the criminal justice system as a whole.

One example cited earlier is that it is 3.7 times more likely that an African-American will be charged with marijuana possession than a white person despite identical rates of use.

How does the lack of representation in misdemeanor cases contribute to or exacerbate the racial disparities in our criminal justice system?

Mr. SINGLETON. I can speak certainly in terms of the experience in Cincinnati and what we find there is that if you are a person of color, you are more likely to be targeted for police enforcement. As a result of that, not having good representation just magnifies the problem that you face.

You are more likely to wind up with a conviction. Actually, let me just say this. In Cincinnati, we have got our public defender in Hamilton County is getting better. It had some problems before, but it is getting better now. When I first came to the Cincinnati area in 2001, it was a disaster and because you had predominantly low income people of color in our municipal court, which is where misdemeanors are prosecuted, they were not getting adequate representation.

You had so many more of them winding up locked up in jail when maybe they should not have been, but also accumulating these collateral consequences, which make it hard to get work, which drives the cycle of going in and out of the system.

Senator COONS. Collateral consequences in terms of employment, access to housing, access to skills or training programs, lots of other things that once you have a criminal record continue to accumulate and in the absence of advice of counsel on a three strikes law, for example, what began as relatively minor misdemeanor offenses can end up having really significant consequences long term.

Mr. SINGLETON. That is exactly right.

Senator COONS. Are there other members of the panel who wanted to comment on this particular aspect of the impact of lack of counsel for misdemeanor charges?

Mr. BORUCHOWITZ. Senator, thank you for the question. I think that David Singleton has pointed out that it is a spiral. And one of the things that an effective lawyer can do is when you identify racial disproportionality happening, you can sometimes make a difference.

I had a case myself in our juvenile clinic. The client was African-American. He was charged with trespass for literally walking into a shopping mall. He had been there 11 months earlier wearing a hood and in this particular shopping center, you are not allowed to wear a hood.

Guess who they enforced that against? They enforced it against African-American teenagers. They told him you cannot come back for 1 year. He came back 11 months later and they arrested him just for showing up.

I had been at a session at the University of Washington Law School a week or so earlier and I heard the prosecutor talking about we cannot have racial disparity. I know him and I could call

him up. Not every lawyer can do that. He looked into the case and the next thing I know, the day before trial, the prosecutor dismissed the case, which they should have done. It made no sense to prosecute a young man just for showing up, particularly, in the first place, when all he did was wear a hood to get thrown out.

If that young man did not have an effective lawyer, he could very easily have been convicted and the spiral would have continued.

Senator COONS. If I could, Chief Justice Cady, we have heard testimony today that suggests as much as \$1 billion in government resources could be saved by decriminalizing some offenses that would really be better treated as civil infractions, and that figure is in addition to the immeasurable benefit to our citizens who might have to pay a fine, but would not have to suffer diminished job prospects, loss of liberty, other things we have been talking about.

In my home State of Delaware, there are some who have an interest in undertaking this task moving toward civil citation, but the process can be difficult both procedurally and politically.

What advice would you have for States that want to rewrite portions of their criminal codes in ways that would make them more just, but also that would achieve the buy-in of the community, law enforcement, prosecutors, judges, and elected leaders?

Mr. CADY. That is something that certainly needs to be explored and has been explored, but we also have to ensure that we are solving the larger problem by doing it, because sometimes switching into the civil enforcement concept does not shed the problems that can follow later on because there is still a record of that and the like.

I just think it is important that we continue to be thoughtful about this. It is interesting, when I did testify before this body 3 years ago, the testimony was divergent. People had sides. I do not sense that at all this morning and I sense that this is an issue that is profound. It impacts people in such significant ways, and we are all pointing to the same thing.

I think it just illustrates that when we sit in a contemplative way and think about ways to make our process work in a just way, it solves so many problems, whether it is the cost avoidance later on or whether it is the racial disparity, the problem that has now surfaced in our criminal justice system that we are all aware of.

I think this is a unique opportunity for us to come together on this issue and see how it can solve so many other things.

Senator COONS. Thank you, Mr. Chief Justice. That is a great concluding comment and I appreciate both the testimony of the witnesses and your calling this hearing today. Thank you, Mr. Chairman.

Chairman GRASSLEY. I would like to have the last 5 minutes. Before I do that, do any of you have followups you want to ask?

[No response]

Chairman GRASSLEY. Then I will conclude this with a couple questions.

Kind of a philosophical approach here, but it also has practical, and I would like to have you all listen and any or all of you that want to address it.

Some of the testimony today makes me wonder what is really behind many misdemeanor prosecutions. States and localities are fining defendants who cannot pay fines. Rather than prioritizing serious misdemeanors that may pose a real threat to the community, I have concerns that what might be driving many of these cases is money and the people who are paying the real costs are people who cannot afford it.

No one is really seeking jail time. Fines are being imposed and fees are monitoring—for monitoring are paid to private companies and when people cannot pay those fines, they go to jail for not paying the fines that were imposed for minor offenses.

Two questions. What is driving States and localities to establish a system and do you think that the current system looks uncomfortably like a minor—modern debtors’ prison? Any of you.

Ms. HASHIMOTO. Thank you, Chairman Grassley. Yes. I think that is exactly what is happening. What we are seeing in States across the country is local courts that, particularly after the recession hit, did not have money to keep their courts afloat and so began funding their local courts through the fines assessed to usually poor people. The only way to get those fees out of poor people was by threatening them with incarceration, at which point people would beg for money from their families.

There are stories of this from across the country. We have private probation companies threatening to revoke probation and incarcerate people if they cannot pay; unconstitutional under *Bearden v. Georgia*, but it is happening across the country. Because there are no lawyers in those courtrooms, there is nobody to say “this is unconstitutional, you cannot do this.”

Mr. BORUCHOWITZ. I think you are right, Senator. It is consistent with the Justice Department finding about the town in Missouri. And often it is really counterproductive because it costs so much money to lock people up. It costs more money to lock them up than it does to get the money from them to pay the fines for which you are locking them up.

There are many, many courts that have what they pay or stay, pay your fine or go to jail, without any consideration of the ability to pay and if they cannot pay, they cannot be locked up. If they did not have a lawyer in the first place, they cannot be locked up for violating the condition of the probation.

There is no question that money is driving a lot of this and you can see it when you go into some of these lower level courts and the focus of everybody from the clerk to the judge to the bailiff, the sheriff, is how do we get money from this person and how do we get a fine. There are standard fines that are imposed often in hundreds of dollars or more without any consideration of whether the person can pay.

Chairman GRASSLEY. Anybody else?

Mr. FULTON. If I could, Mr. Chairman. One thing that I think is true in Tribal courts is that and also a unique factor is it becomes a proxy for enforcement of addiction issues, dealing with addiction issues.

Singlehandedly, the most common misdemeanor offenses we see in people’s background are tribal liquor offenses or public intoxica-

tion. It becomes a proxy for dealing with problems of addiction and homelessness a lot of times in tribal communities.

Mr. SINGLETON. I just wanted to add one thought. I agree that money drives a lot of this, but I think we also have a cultural issue here and the cultural issue is I think we over-prosecute in this country.

I think we tend to bring into court and charge criminally people we are mad at and we lock up people we are mad at rather than people who are a true danger to the community. I think that that is also behind the explosion of misdemeanor cases, as well as felony cases, in our criminal justice system.

Yes, we should prosecute people who break the law and pose—and lock up people who pose a serious danger to the community, but most of the cases in municipal court in Hamilton County, Ohio are not very serious at all, yet they can have huge repercussions if there is a criminal conviction.

Chairman GRASSLEY. Mr. Chief Justice, do you have anything to add to the other four?

Mr. CADY. Mr. Chairman, I would just add that the explosion of misdemeanor filings and convictions across the country and in our State of Iowa, too, certainly has been looked at as a revenue opportunity and that has exacerbated the issue that brings us here this morning.

I would just tell you that in our State, we try to collect the fine for a short period of time and if not, we refer it to the prosecutor, who gets an opportunity to try to collect the fine. About half of our counties have a process where the prosecutor does that. After that, after a year, it is shipped out to a private company and they go after it like any other debt collection.

Chairman GRASSLEY. I am going to end with this question then for Professor Bruer—Robert. [laughter] Than you very much.

Washington State has adopted approaches to take driving with suspended license misdemeanor cases out of criminal justice. That is a way to avoid triggering the constitutional right to counsel and its accompanying State expense. It is my understanding that this has taken a fair proportion of misdemeanor cases out of the criminal justice system in that State.

However, it is also my understanding that additional misdemeanor cases are being filed that add to the criminal justice system and negate all the driving cases that have been moved out.

Is there—is that your understanding of Washington's experience and if it is, what is causing new misdemeanor cases to take the place of the old and what can be done about it? Am I right?

Mr. BORUCHOWITZ. You are partially right, Senator.

Chairman GRASSLEY. Go ahead.

Mr. BORUCHOWITZ. We have reduced dramatically the number of driving while license suspended third degree cases. There used to be probably 100,000 a year in Washington and I think those have been reduced by at least half, maybe more than half.

The two largest cities, Seattle and Spokane, hardly file any anymore because they divert them or they put them in relicensing programs.

There has been some increase in filings, nothing close to the amount that has gone away. One of your staff asked me to look

into that in Spokane and I did check with the prosecutor and the prosecutor said, yes, there has been some increase since the recession, but nothing close to the volume of what we are taking out with suspended driver license.

Really there are three different things happening. One is diversion accompanied with relicensing programs and local prosecutors can do that without any State action.

Second, the legislature narrowed the type of offense that could lead to suspended driver license, and then the department of licensing passed a regulation that narrowed the group. There are fewer cases that are eligible for it and then within that, the prosecutors are filing fewer.

Of course, when you do not get your license suspended, you cannot get arrested for driving with license suspended, with saves a lot of money all around.

In general, the volume of misdemeanor cases has declined in Washington very dramatically. We used to have over 300,000 a year, now there is something like 220,000 or 210,000, and a big part of that drop has been getting rid of the DWS-3 cases.

Chairman GRASSLEY. Thank you very much, and all my colleagues who have come. I appreciate very much your testimony and the participation of everybody.

I will adjourn the hearing. By the way, the record will be open for 1 week. You may get questions from any of us on the Committee. Please answer in writing.

[Whereupon, at 11:28 a.m., the hearing was concluded.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

“Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors”

Wednesday, May 13, 2015
Dirksen Senate Office Building, Room 226
10:00 a.m.

The Honorable Mark S. Cady
Chief Justice
Iowa Supreme Court
Des Moines, IA

Mr. David A. Singleton
Executive Director
Ohio Justice & Policy Center
Cincinnati, OH

Mr. Neil Fulton
Federal Public Defender
District of South Dakota and North Dakota
Pierre, SD

Professor Robert C. Boruchowitz
Professor from Practice
Seattle University School of Law
Seattle, WA

Professor Erica J. Hashimoto
Allen Post Professor of Law
University of Georgia Law School
Athens, GA

THE CONFERENCE OF CHIEF JUSTICES

TESTIMONY

by

Hon. Mark S. Cady
Chief Justice
Supreme Court of Iowa
Board of Directors, Conference of Chief Justices (CCJ)

on

***Protecting the Constitutional Right to Counsel for Indigents Charged
with Misdemeanors***

Submitted to the

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

Committee Hearing
Wednesday, May 13, 2015
Room 226, Dirksen Senate Office Building
10:00 AM

Mr. Chairman and Members of the Committee,

The Conference of Chief Justices (CCJ) is pleased to present testimony at today's hearing, "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," as the committee examines the issue of legal representation of indigent persons charged with a misdemeanor offense.

ABOUT CCJ

Before I begin my remarks, I would like to provide some background on our organization and membership. I submit this testimony as a member of the Board of Directors of the Conference of Chief Justices (CCJ).

CCJ was established in 1949. Its mission is to improve the administration of justice throughout the country. As you may know, state courts handle 97% of all judicial proceedings in the country. Membership in the Conference is limited to the highest judicial official of each state of the United States; the District of Columbia; the Commonwealth of Puerto Rico; the territories of American Samoa, Guam, and the Virgin Islands; and the Commonwealth of the Northern Mariana Islands. Members of the Conference also include the presiding judges of the appeals courts that are the courts of last resort exclusively in criminal matters. At present, Texas and Oklahoma have such members.

The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange, and disseminate information and knowledge of value to state judicial systems;
- educate, train and develop leaders to become effective managers of state judicial systems;
- promote the vitality, independence and effectiveness of state judicial systems;
- develop and advance policies in support of common interests and shared values of state judicial systems; and
- support adequate funding and resources for the operations of the state courts.

THE ISSUE

The Conference of Chief Justices recognizes that the Sixth Amendment Right to Counsel and the parallel state constitutional provisions are amongst the most important rights of people brought before the courts on a criminal offense. It is important to note that some states may afford criminal defendants broader protections within their own state constitutions or statutory frameworks. However, it is also important to remember the protections provided by the U.S. Constitution with regard to representation of indigent defendants.

In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in Johnson v. Zerbst, 304 U.S. 458 (1938), applies to state criminal prosecutions through the Fourteenth Amendment. In 1972, the Court revisited the issue in Argersinger v. Hamlin, 407 U.S. 25. In Argersinger, the Court clarified their previous holding by expressly

stating that defense counsel must be appointed for indigent defendants in any criminal prosecution, “whether classified as petty, misdemeanor, or felony...that actually leads to imprisonment even for a brief period.” Five years later, the Court again heard a Sixth Amendment Right to Counsel case, in Scott v. Illinois, 440 U.S. 367 (1979), the Court drew the line at “actual imprisonment,” holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.

In 2002, the United States Supreme Court rendered an opinion in Alabama v. Shelton, 535 U.S. 654. Mr. Shelton representing himself at a bench trial in the District Court of Etowah County, Alabama, Shelton was convicted of third-degree assault. The statutorily authorized sentence was up to one year imprisonment and up to a \$2000 fine. The trial judge sentenced Shelton to serve 30 days in the county prison, but the court suspended that sentence and placed Shelton on two years’ unsupervised probation. The primary issue on appeal was whether a suspended sentence constitutes a “term of imprisonment” within the meaning of Argersinger and Scott even though incarceration is not immediate or inevitable, and therefore required the Mr. Shelton receive appointed counsel. The U.S. Supreme Court affirmed the opinion of the Alabama Supreme Court and held that a suspended sentence is sufficient to trigger the Sixth Amendment Right to Counsel.

It is important to note that the Right to Counsel provision of the Sixth Amendment to the U.S. Constitution is not triggered merely because a defendant is tried for an offense which the statute or ordinance authorizes incarceration. Rather, this provision is only implicated if the defendant upon conviction is either sentenced to incarceration or receives a sentence that places that defendant at risk of future incarceration. Therefore, defendants that are tried for offenses that are only punishable by a fine, are clearly not entitled to counsel. Additionally, if a defendant that is otherwise eligible for court appointed counsel is tried on an offense for which incarceration is possible, is convicted and sentenced to only a fine, there is no violation of the Right to Counsel provision of the Sixth Amendment to the U.S. Constitution. Although the Conference of Chief Justices would not condone this behavior, it is conceivable this approach could be used to lawfully navigate around the Sixth Amendment Right to Counsel. Additionally, in jurisdictions that use a civil infraction system for minor offenses rather than a misdemeanor system, a Right to Counsel would not attach to those cases as they are neither criminal nor do they have incarceration as a sanction.

Providing indigent defendants with representation is fiscally challenging for many states. In 2014, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution *In Support of Establishment of the National Center for the Right to Counsel* as identified in H.R. 3407 (113th Congress) sponsored by Representative Theodore Deutch¹. The resolution noted that “state and local governments continue to struggle to adequately fund legal representation for indigent criminal defendants.” The creation of a National Center for the Right to Counsel would provide: (1) financial support to supplement, but not supplant, state and local funding for public defense systems; and (2) financial and substantive support for training programs and technical assistance to improve the delivery of legal assistance to indigent criminal defendants. A copy of the resolution is attached to this testimony.

¹ Representative Deutch re-introduced his legislation (H.R. 2063) in the 114th Congress.

OVERVIEW OF STATE PRACTICE

At present, the mechanism used to deliver indigent defense services nationally can best be described as a patchwork of programs rather than a comprehensive system. For example, in some states indigent defense is the responsibility of the judiciary while in other states it is the responsibility of the executive branch². Additionally, in some states indigent defense services are funded at the state level, while others funding is provided from the local level.³ To make matters more complex, city and municipal courts may or may not utilize the same indigent defense system used by the state courts. Also, there is substantial variance by state in terms of the oversight and quality assurance that are incorporated into indigent defense systems.

There is some commonality between many of the states in regard to the eligibility determination for indigent defense services. Many use a percentage of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services. A common threshold is 125% of the poverty income guidelines. Individuals with incomes under that threshold are presumptively eligible. Alabama, Iowa, North Dakota, Texas and West Virginia are examples of states with this 125% threshold in their statute. Other states set this threshold substantially higher or lower. For example, Maryland sets it's at 100%, Maine at 110%, Idaho at 187% and Florida at 200%. Most states have additional mechanisms to ensure that people who may be mathematically outside the percentage calculation, but are nonetheless indigent at a practical level, can receive indigent representation. For example, the Michigan Indigent Defense Commission Act states, "Substantial financial hardship shall be rebuttably presumed if the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, medicaid, or disability insurance, resides in public housing..." [MCLS § 780.991(3)(b)]. This type of provision, which ties eligibility to receipt of some type of federal financial assistance, is very common in state indigency determination statutes.

Additionally, many states offer an even more personalized determination to people who do not fit any of the other criteria but feel that they are unable to afford the costs associated with hiring retained counsel. For example, the Michigan Indigent Defense Commission Act further states, "A defendant not falling below the presumptive thresholds described in subdivision (b) shall be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel [MCLS § 780.991(3)(c)]."

Attached to this testimony is a spreadsheet with the statutory provisions for the indigency determination for most of the states. A review of the statutory constructions demonstrates that states have gone to considerable lengths to ensure that anyone with a bona fide need for representation can qualify in some way, while conserving this precious resource by eliminating access for persons who can afford to hire counsel.

² [Indigent Defense Services in the United States, FY 2008–2012](#), Bureau of Justice Statistics, (July, 2014).

³ [State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008](#), Spangenberg Project, (2010).

FUNDAMENTAL CHALLENGES TO STATE INDIGENT DEFENSE DELIVERY SYSTEMS

Indigent defense delivery systems in every state are underfunded, in many states severely underfunded. The funding issue manifests itself in a variety of different ways. In public defender offices, a significant percentage of new employees are hired directly out of law school. New public defenders will typically be tasked with misdemeanor and/or juvenile representation, leaving felony representation to more experienced attorneys. The typical new public defender will only stay on the job a year or so before moving on to a more lucrative job. As a result, many are leaving public defender offices just as their knowledge of the law and advocacy skills have reached a point where they are effective. A very similar sequence of events is common with court appointed counsel, whether they are in a private law firm or a contracted counsel office. Just as those attorneys are beginning to gain skill handling misdemeanor cases, the firm that employs them gets misdemeanor appointments diverted to their next new hire. This situation is particularly disturbing because there usually is not financial parity with the corresponding prosecutors in a given jurisdiction. In fact, it is all too common for defense counsel to see prosecuting as a financial advancement. The net effect is the skill level of lawyers handling misdemeanor indigent defense cases is all too frequently inadequate and inferior to their counterparts prosecuting.

Courts handling misdemeanor cases almost always have caseloads that are so high that they necessitate “processing” cases in an almost assembly line fashion. The caseloads for attorneys handling indigent defense cases, and for prosecutors for that matter, are normally correspondingly high. This leads to a high percentage of cases resulting in guilty pleas to get the benefit of receiving a fine and court costs as a sole sanction. Although this looks attractive to criminal defendants at the time and may induce them to waive legitimate defenses, they expose themselves to a plethora of collateral consequences. These consequences make quality representation more and more essential for misdemeanor crimes. The conviction itself can result in significant hurdles to future employment, education, housing and other important opportunities to achieving a productive life, and can often be used later as an enhancement under recidivism sentencing statutes. For example, a young defendant who is convicted of a “domestic” offense, even if the facts suggest that the conduct did not result in injury, will be barred by federal law from firearm possession. This would preclude that defendant from military service, which for many indigent defendants is a means to obtain skills and escape poverty. A fine can also lead to future contempt of court charges and incarceration if not paid.

The Sixth Amendment to the U.S. Constitution and many of the corresponding state constitutional provisions are only triggered by a sentence that places a defendant at risk of incarceration. Many states are now using a civil infraction system for traffic offenses and other minor offenses which were traditionally misdemeanors. As a sentence of incarceration is not a possible sanction, defendants “charged” with a civil infraction are not entitled to court appointed counsel. However, they remain exposed to some serious collateral consequences.

It is also problematic for states to provide appropriate training, oversight and support for their indigent defense systems. In 2002, the American Bar Association using concepts that were generally accepted nationally created the “[Ten Principles of a Public Defense Delivery System](#).” States should have both the financial resources and technical assistance available for an oversight

group within each state to monitor their indigent defense system to make sure it is providing constitutionally effective representation and doing so in accordance with the ten principles. States also need the resources provide appropriate training and technical support for indigent defense attorneys handling misdemeanor cases. Although some training on substantive law would be state specific, there is a significant amount of training on constitutional law, forensic science, and advocacy skills, which could be developed on a national level.

EXAMPLES OF EFFORTS BY STATE EFFORTS TO ADDRESS THE CHALLENGES

States have made efforts to ensure that they are in complete compliance with their requirements under the Sixth Amendment to the U.S. Constitution to provide representation to indigent defendants. For example, several states commissioned studies of their indigent defense systems. The Nevada Supreme Indigent Defense Commission Rural Subcommittee issued a report in 2008. The report recommends that the “State of Nevada accept its constitutional responsibility to totally fund all aspects of the delivery of indigent defense services in all counties of Nevada.” Additionally, “That the State of Nevada create and totally fund an independent, statewide oversight board to oversee the delivery of indigent defense services in Nevada.” Pennsylvania⁴ also conducted an evaluation of their indigent defense system. Their report contained twelve recommendations that collectively cover everything from constitutional compliance to workload. These states are both trying to implement the recommendations from their respective reports.

Other states have chosen to limit the number of charges that have the possibility of incarceration as a sanction as a method of utilizing existing resources more effectively. For example, in 2013, the North Carolina General Assembly reclassified a number of Class 1 and 2 misdemeanors to Class 3 misdemeanors and created a new category of “fine only” Class 3 misdemeanors for defendants with three or fewer prior convictions.⁵ However, there are states have chosen to expand the interpretation of their own state constitution to provide protections that are broader than those afforded under the Sixth Amendment. For example, the Court of Appeals in Maryland held that “under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to state-furnished counsel at an initial appearance before a District Court Commissioner.”

Washington’s Supreme Court recently adopted mandatory misdemeanor caseload limits, as well as other representation improvements. The Standards implement mandatory training and investigation requirements for public defense attorneys as well. The Standards brought new attention to misdemeanor public defense and have resulted in public defense upgrades in hundreds of local courts.

CCJ RECOMMENDATION

The public would greatly benefit by the establishment of a National Center for the Right to Counsel, with adequate funding to fund innovations, support research on indigent defense delivery

⁴ A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania (December, 2011), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf>

⁵ Report of the Commission on Indigent Defense Services, submitted to the General Assembly (2/1/15) <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf>

systems, support training and technical assistance programing, and serve as a clearinghouse for information. This Center could help identify the best practices currently employed nationally, which over time may help bring some uniformity to the indigent defense systems. It could also help improve the public's trust and confidence in the criminal justice system by creating parity between the defense in indigent cases and the prosecution.⁶

CONCLUSION

Thank you for asking for our input on this important matter. The Conference Chief Justices stands ready to work collaboratively and cooperatively to craft solutions to this important issue. I will be happy to answer any questions you may have.

ATTACHMENTS

<http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07232014-Establishment-of-National-Center-for-Right-to-Counsel.ashx>

[Spreadsheet: State Indigency Determinations](#)

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet_authcheckdam.pdf

⁶ Ten Principles of Public Defense Delivery System, ABA (2002)



Good morning. Thank you for the opportunity to address the Committee on the very important issue of protecting the right to counsel for poor people charged with misdemeanors.

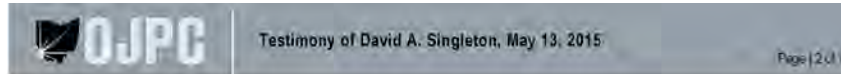
My name is David Singleton, and I am the executive director of the Cincinnati-based Ohio Justice & Policy Center ("OJPC"). OJPC is a non-profit public interest law firm which works to achieve criminal justice reform that both promotes public safety and fairness. Ensuring that poor people are adequately represented when facing criminal charges is something OJPC has worked to promote. I am also an associate professor of law at Northern Kentucky University Chase College of Law, and have worked previously as a public defender, first with the Neighborhood Defender Service of Harlem and then with the Public Defender Service for the District of Columbia. Accordingly, I care deeply about making sure that poor people who face criminal charges receive the representation to which they are constitutionally entitled.

Two Ohio Examples of Denial of Counsel in Misdemeanor Cases

In my work, I have often heard various criminal justice system players say the following about misdemeanor cases: "They don't matter." Too often, this sentiment is reflected by the failure of courts to appoint lawyers in misdemeanor cases where the accused has the right to counsel.

Just recently an Ohio appellate court reversed a conviction where the accused, a man named Kenyaha Jackson, faced 180 days in jail for child endangerment.¹ Although

¹ *State v. Jackson*, 3d Dist. No. 13-14-30, 2015-Ohio-1694.



Mr. Jackson was entitled to counsel because he faced jail time, he was not provided a lawyer, and the record did not demonstrate that he waived his right to counsel.

*State of Ohio v. Taylor*² is another example where a court denied the accused the right to have counsel assist in his defense. In that case, Mr. Taylor faced a “he said/she said” misdemeanor domestic violence charge. The following is an excerpt from the transcript of Mr. Taylor’s arraignment, which he handled on his own without the benefit of counsel.

THE COURT: What would you like to do? Do you wish to enter a plea or do you wish for a short continuance in order to speak with an attorney?

MR. TAYLOR: Uhm, how – how long is a short continuance exactly?

THE COURT: A week.

MR. TAYLOR: I’ll just go ahead and plead not guilty.

THE COURT: I’ll accept your plea of not guilty. I’m gonna direct that this matter be set for trial within 90 days of today’s date.

Ten days later, Mr. Taylor appeared for trial, and the following dialogue with the court occurred after the judge asked if Mr. Taylor was ready for trial:

THE COURT: Mr. Taylor?

MR. TAYLOR: No, your Honor.

THE COURT: No? Any reason why not?

MR. TAYLOR: I guess I misunderstood you last week at my initial hearing about counsel. Uhm, I heard – I heard you state continuance. I did not understand that meant that, I would like –

² 3d Dist. No. 13-12-35, 2013-Ohio-1300.



THE COURT: Well, I entered a not guilty plea and we ordered it be set for trial and here we are because you're in custody.

MR. TAYLOR: Yes, sir. And I wasn't aware that for – for me to get counsel. I realized I didn't have counsel after I got back.

THE COURT: Mr. Taylor, I don't just hand them out. You gotta ask me for them.

MR. TAYLOR: I – I – I –

THE COURT: If you want an attorney and you don't have the means, which I'm assuming you're trying to kind of allude to, I mean, I don't know how I'm supposed to figure that out.

MR. TAYLOR: No, I do not have the means. I –

THE COURT: Mr. Taylor, this is what I'm going to do. I'm gonna give you a few minutes to talk to the prosecutor. If you come on up with something you can agree on, great. Otherwise, I believe that we're going to proceed.

Taylor could not make a deal with the prosecutor, represented himself at trial and was convicted by the judge.

Why Representation in Misdemeanor Cases Matters

Some may say, "Well, it is just a misdemeanor. What's the big deal? It's not like Mr. Taylor or Mr. Lewis did hard time in prison." But misdemeanors matter. And the reason they matter is not only because many people convicted of misdemeanors spend time incarcerated on the offense but also because of the lifelong impact that a misdemeanor conviction may have on a person's ability to work, support his or her family and to lead a productive life.



Let me tell you the story of one of my former clients, whom I will refer to as Melinda, not her real name. Melinda is the mother of three children, whom she has raised mostly as a single mother.

Melinda has suffered from seizures since she was nineteen years old. She is now in her early forties. After four years of taking anti-seizure medication her doctors took her off of it because the medication had lost its effectiveness. While off medication, Melinda suffered a seizure that led to the charges in her case.

On a warm summer day in the mid-1990s, Melinda was in the process of cleaning her house when she received a phone call from a church friend. Melinda went upstairs to take the call, leaving her children, who were three, four and five at the time, downstairs to watch a Barney video. While on the phone, Melinda suffered a serious seizure. The children were downstairs and unaware of what was happening, but the friend on the call realized that Melinda had suffered a seizure and called 9-1-1.

Upon arrival, the EMS crew helped Melinda downstairs and out to the ambulance. While in the home, the paramedics noticed that cleaning supplies had been left out in the kitchen; dirty dishes were in the sink; an electrical outlet was missing a cover; there were knives on the counter; window screens were missing from the upstairs windows; and that the smoke alarm did not work.

A week after her seizure, Melinda learned that she was being charged with child endangering because of the conditions observed by paramedics during her seizure. But there were innocent explanations for the conditions the paramedics had seen. For example, her landlord had failed to address a number of problems that Melinda had



brought to his attention. When Melinda asked the landlord to fix their broken smoke alarm and to replace the missing window screens and outlet cover, he told her that he had sold the building and it was no longer his responsibility. Melinda could not afford to repair all of these problems on her limited income but did purchase moveable screens which she put in the children's upstairs bedrooms at night and placed downstairs during the day. Additionally, the reason why the paramedics found unsecured cleaning supplies and knives was that Melinda was in the process of cleaning her house, including the kitchen, shortly before her seizure.

Two months after she was charged, Melinda entered an uncounseled no contest plea to two counts of misdemeanor child endangering. Although Melinda had been appointed a public defender, she does not recall ever meeting with her lawyer and was unrepresented when she entered her no contest plea. Melinda remembers that when the case was called, the judge asked, "Why do I even have this?"

After speaking briefly with the prosecutor, the judge told Melinda that she understood what it was like to be a single mother. The judge then explained the different kinds of pleas and then advised Melinda that the court would sentence her to six month non-reporting probation if she pled no contest to two counts of child endangering. Melinda decided to plead no contest because she did not think she had any other options. She did not have the benefit of assistance of counsel, who could have discussed her available defenses and whether child endangering could bar her from working in the daycare industry.



In the years following her conviction, Melinda worked a number of odd jobs to support her family until she finally found a stable job as a daycare teacher, employment she was good at and enjoyed. The center considered Melinda to be one of its best employees, and the children Melinda taught loved her. However, after performing state mandated background checks on all of its employees, the center fired Melinda after learning of her misdemeanor conviction.

What would have happened to Melinda if she had quality legal representation in her criminal case? Would she have entered a plea of no contest to a charge she would have had a strong defense to at trial? Would she have wound up with a conviction that caused her to lose the job she depended on to support her children? To this very day, Melinda continues to be affected by the lack of representation she received at her plea hearing because she is unable to work in a field she loves. Had Melinda had quality representation, I do not believe she would be in the circumstances she finds herself in today.

Melinda's story is just one example of many people who either received no legal representation or inadequate counsel while facing misdemeanor charges. And the point I want you to remember is that separate and apart from possible jail time, misdemeanor convictions can ruin people's lives by shutting them out of opportunities to work and lead productive lives.

In fact, in Ohio, there are over 700 laws on the books that deny employment based on the job applicant's criminal record, and approximately 20 percent of these laws apply to people with misdemeanor offenses. And we know from the ABA's National



OJPC

Testimony of David A. Singleton, May 13, 2015

Page | 7 of 7

Inventory of the Collateral Consequences of Conviction³ that misdemeanor convictions potentially bar millions of Americans across this country from gainful employment.

Conclusion

The time has come for our justice system to live up to the promise of *Gideon v. Wainwright*,⁴ and ensure that every person charged with a misdemeanor for which jail time is possible receives the legal representation to which they are entitled under the Sixth Amendment to the United States Constitution. It is for this reason that I concur in the recommendations offered by Professor Boruchowitz.

Thank you for your time and attention.

³ Available at <http://www.abacollateralconsequences.org/>.

⁴ 372 U.S. 335 (1963).

STATEMENT OF NEIL FULTON
Chief Federal Public Defender for the Districts of North and South Dakota
Before the Senate Judiciary Committee on Protecting the Constitutional Right to Counsel
of Indigents Charged with Misdemeanors
May 13, 2015

Thank you for the opportunity to address the availability of counsel for misdemeanor prosecutions. While it is easy to think of misdemeanor charges as “small,” the reality is that there are often significant direct and collateral consequences arising from misdemeanor convictions.

I would like to look the issue through the lens of tribal courts and the interaction of tribal court misdemeanors and federal law. Both jurisdictional issues and practical realities on the ground in Indian Country present real problems for individuals charged with misdemeanors in tribal courts. My observations are driven largely by my own experience as a practitioner in tribal courts while in private practice and now in the Federal Public Defender office for South Dakota and North Dakota where the vast majority of our cases arise from Indian Country.

Due to the overlap of jurisdiction between the United States and tribes over Indian defendants, I frequently see individuals charged initially in tribal courts with misdemeanors arising for the same conduct later giving rise to federal charges. For example, an Indian defendant may be initially arrested and charged with misdemeanor assault by tribal law enforcement and later prosecuted for aggravated assault by the United States Attorney for the same conduct. Where there is not a perfect misdemeanor analogue to the felony offense, charges for tribal liquor violations, public intoxication, disorderly conduct, or similar offenses can often provide an avenue to charge and hold that individual while an investigation of the felony offense proceeds. That investigation can, and often does, include law enforcement interrogation without counsel. Those statements can then be used against the defendant in developing and prosecuting the federal case.

Entering guilty pleas to get out of tribal custody is a disturbing and recurring reality that encounter. Many tribes do not provide counsel and many that allow counsel permit lay advocates rather than law trained ones. When a defendant requests counsel, they often face the reality that due to case backlogs, the lack of readily available counsel given sparse populations, and other practical impediments they will remain in jail longer to obtain counsel and fight a charge than if they simply pleaded guilty and got a sentence of time served. In my experience that is common. In fact, I have spoken with advocates who have dealt with the conflict of advising clients who may want to assert their innocence and use counsel, but would face extended detention to do so and simply plead guilty as a result of not understanding how those admissions may be harmful in the future.

The pressure to plead guilty without counsel can be intensified by the overlapping jurisdiction of tribes and the United States. I frequently work with clients who entered misdemeanor guilty pleas in tribal court with the mistaken belief that doing so would mean that

their case will not “go federal.” Without a lawyer, many individuals think that a quick guilty plea in tribal court will get them out of custody and get them double jeopardy protection against federal prosecution. It does not. In fact, due to the increased use of Special Assistant United States Attorneys (often referred to as “SAUSA’s”), who are tribal prosecutors deputized to the United States Attorney’s Office the same individual developing the “tribal” case, is contemporaneously assessing it for federal charges. In the absence of a plea agreement, which is rarely forthcoming or sought without counsel, the defendant will make admissions in tribal court, believing they are protecting themselves, when they in fact are doing the exact opposite.

A second reality is that misdemeanor guilty pleas can have significant consequences down the road through the operation of federal law. Tribal court convictions for certain misdemeanors can result in the loss of financial aid for education and eligibility for low income housing. With six of the ten lowest income per capita counties in the nation being reservation counties in South Dakota and North Dakota, those are huge consequences. In some tribal communities, it may mean the individual is not able to obtain any housing themselves or may place family members at risk of losing their residence if they take that individual in. That impediment may follow the individual off the reservation if they seek employment or education in a larger community outside of Indian Country as well. Some tribes have statutes or ordinances in place that may trigger registration requirements under SORNA. A common example would be consensual sexual relationships between individuals with certain age gaps. In my experience, consensual sexual relationships among teens are common in many communities, but can lead to criminal charges when one individual is below the legal age of consent (even when known and approved by the adults in their life). A conviction for such an age based offense may trigger the SORNA registration requirements. Combined with often itinerant residence patterns, this can expose young men and women to state or federal felony prosecutions for failure to register as a sex offender that they never anticipated or understood at the time of their guilty plea.

I also frequently see prosecution for domestic assault by an habitual offender under 18 U.S.C. § 117 based on tribal misdemeanor assault convictions that are obtained without counsel. While there are clearly many instances of real and troubling domestic abuse in Indian Country and elsewhere, there are also many instances where conduct that would more accurately be described as public intoxication or disorderly conduct results in a guilty plea to domestic violence in tribal court without counsel. Later, those uncounseled tribal court convictions provide the foundation for federal prosecution and enhanced penalties. There is a split of authority among the Courts of Appeals on this issue. See *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). However, South Dakota has had the largest number of Indian Country prosecutions by a considerable margin in recent years, with North Dakota in third place and it remains the law there. In a very direct way, misdemeanor tribal convictions without counsel, often entered as a perceived “get out of jail free” card become the basis for federal felony prosecution down the road.

Finally, two remaining aspects of the interaction of federal law and tribal court misdemeanor prosecutions must be considered: statutes providing possible protections or remedies for those convicted in tribal court and federal statutes seeking to expand the jurisdiction of tribal courts. Neither does much to effectively address the problems I have discussed so far.

Under the Indian Civil Rights Act, Tribal Law and Order Act, and Violence Against Women Act Reauthorization of 2013 procedural protections for individuals prosecuted in tribal courts are created. However, none of them is self-effectuating. Those protections, including the right to obtain an attorney must be enforced by tribal courts in the first instance. Too often I have heard from colleagues in other Federal Public Defender offices, or private practitioners in tribal courts directly, about denials of counsel in tribal courts. I have heard reports about the failure to appoint counsel; the continued use of lay, rather than law trained counsel; denying counsel access to necessary documents or legal texts; or sentences in excess of jurisdictional limitations. I am not trying to present instances as patterns, they are serious incidents. Prior to seeking federal habeas corpus relief, an individual who suffered such a deprivation of rights would need to exhaust tribal remedies, including of appeal, which can be a long and cumbersome process. Again, a plea to some time-served disposition is often the result.

Under TLOA and VAWA, the sentencing authority of tribal courts has been expanded and jurisdiction over non-Indians for certain offenses has been created. Existing federal avenues of prosecution did, and do, exist for assault (18 U.S.C. § 113), domestic violence (18 U.S.C. § 2261), and other offenses under the General Crime Act, 18 U.S.C. § 1152, and the Assimilative Crimes Act, 18 U.S.C. § 13. Expansions of jurisdiction carry the expanded risk of violations of the right to counsel. In my portion of the world tribal governments lack the resources to reliably provide counsel in misdemeanor cases irrespective of expanded jurisdiction. Even if expanded financial resources are provided, the reality remains that most portions of Indian Country are exceptionally rural and sparsely populated making obtaining counsel an issue of supply as well as demand—there simply may not be lawyers available.

In closing, not all of the issues I have discussed are unique to Indian Country. Nor should my comments be taken as criticism of many dedicated and capable employees of tribal courts. They are, however, my observations of real problems that presently exist in the system of misdemeanor prosecutions in tribal courts and the very real way in which those problems spread quickly and significantly into prosecutions in the courts of the United States.

Thank you again for the opportunity to address the Committee and for your interest in this important issue. Please let me know if I can provide additional information to the Committee.



**Testimony of Professor Robert C. Boruchowitz,
Senate Judiciary Committee, May 13, 2015
On Misdemeanor Public Defense**

Thank you for the opportunity to speak with you about misdemeanor courts and the problems in meeting the constitutional obligation to provide lawyers for people in those courts. I have spent much of the past 12 years working on improving misdemeanor courts and I will draw on that experience here.

Most People Who Go to Court Go to Misdemeanor Court and the Volume and Cost are Staggering

There are approximately ten million cases in misdemeanor courts in the U.S. each year. The cost is staggering, as the full cost of a misdemeanor case is estimated to be \$1679.¹ In many states there is at least one misdemeanor case per year for every 30 residents.²

Misdemeanor courts are where most people who go to court have their experience with American justice. Almost every person in the country knows someone who has been charged with a misdemeanor, whether it is minor in possession of alcohol, shoplifting, driving with a suspended license, or something more serious such as DUI or assault.

In a recent op-ed article, Charles G. Koch and Mark V. Holden addressed a variety of the issues that affect misdemeanor courts.³ They pointed out the overcriminalization of America and that the U.S. has the highest incarceration rate in the world. They discussed the racial disparity in the people who are imprisoned and the connection between poverty and incarceration. And they called for strong public defense:

...we must ensure that all those charged with a crime receive their Sixth Amendment right to representation by a lawyer. Inadequate or no legal

¹ See Robert C. Boruchowitz, Issue Brief, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AM. CONST. SOC'Y FOR LAW & POL'Y, Dec. 2010, [hereinafter *Diverting and Reclassifying*], available at http://www.aclaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf.

² See, e.g., "Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts", National Association of Criminal Defense Lawyers (2011), at 9. "Nearly a half million people, approximately 3% of the state's adults, pass through Florida's misdemeanor courts each year." Available at <https://www.nacd.org/reports/threeminutejustice/>.

³ Charles G. Koch and Mark V. Holden, "Koch: End overcriminalization of America," Des Moines Register, January 24, 2015, <http://www.desmoinesregister.com/story/opinion/columnists/2015/01/25/koch-end-overcriminalization-america/22303859/>.

representation results in devastating consequences for criminal defendants and their families.⁴

There are Systematic Violations of the Right to Counsel in Misdemeanor Courts

Unfortunately, 52 years after the U.S. Supreme Court case of Gideon v. Wainwright⁵ and 43 years after the case of Argersinger v. Hamlin,⁶ in many places people go to court with no lawyers at all, or the lawyers they have are overwhelmed with cases, poorly trained, poorly paid, and operating without necessary support such as investigation and expert witness resources. As a result, many people end up with convictions that result in jail time and heavy fines as well as the consequences of losing jobs, housing, and school opportunities. With capable lawyers, many of those convictions and consequences could be avoided, and in other cases the amount of jail time and fines could be diminished.

The Gideon case established that there is a right to counsel in state felony prosecutions and the Argersinger case applied that right to misdemeanor cases. If a case is important enough to have lawyers to prosecute, it is important enough to have lawyers to defend, as the US Supreme Court made clear in Gideon.⁷ The Argersinger Court emphasized that “Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.”⁸

In Alabama v. Shelton, the Court ruled that a suspended sentence that may “end up in the actual deprivation of a person’s liberty” even for thirty days, as happened in Mr. Shelton’s case, may not be imposed unless the defendant was accorded “the guiding hand of counsel” in the underlying prosecution that led to the suspended sentence.⁹

Yet in many places the right is more an illusion and there are systematic violations of the right to counsel established by the Supreme Court. This means that every day people across the country go to court and end up convicted of crimes without ever having the opportunity to talk with a lawyer and to have the help of a lawyer to negotiate their case with a prosecutor or advocate for them to a judge or jury. The protection that the Sixth Amendment contemplated for the individual against government mistake or abuse is simply not provided in those cases.

The problems of so-called “no counsel courts”, courts with no public defenders to represent accused persons, are not confined to one region of the country. For example, I have documented courts with no defenders at arraignment hearings in New York State, South Carolina, and Arizona. A significant percentage of cases are resolved at

⁴ Id.

⁵ Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

⁶ Argersinger v. Hamlin, 407 U.S. 25, 33, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

⁷ “That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” Gideon, *supra*, at 344.

⁸ Argersinger v. Hamlin, 407 U.S. 25, 34.

⁹ Alabama v. Shelton, 535 U.S. 654 (2002).

arraignment hearings, and despite the U.S. Supreme Court having made clear that arraignment is a critical stage at which counsel is required, many courts proceed without counsel. According to a recent article, “Of the more than 300 municipal courts in South Carolina, only three--Rock Hill, North Charleston, and Charleston--provide public defenders, according to state court officials.”¹⁰ The South Carolina Chief Justice admitted, “I will tell you straight up we [are] not adhering to Alabama v. Shelton in every situation.”¹¹ And in many courts in a number of states, there is no prosecutor present at arraignment, which puts the judge in an untenable position of handling the case with no advocate on either side.

In Kentucky, only 32 per cent of misdemeanor defendants have a public defender.¹² In Texas, 25.4 per cent of the misdemeanor defendants appear without counsel.¹³ The cost of inadequate representation to individuals, families, and local and state governments is in the hundreds of millions of dollars per year.

Very Minor Offenses are treated as Crimes

In many places, very minor offenses are treated as crimes. That can include conduct such as sleeping in a cardboard box, providing food to homeless people in a park, having a dog off a leash.¹⁴ A just-published report found that of 72 Washington State cities, 78 per cent have laws that prohibit or limit sitting, standing, or sleeping in public places. These ordinances tend to be enforced against homeless people. The report noted that in many places, if an individual fails to pay the fine for or respond to a civil infraction, a bench warrant might be issued for their arrest and they can be charged with a misdemeanor.¹⁵

In many states, driving with a suspended license is a crime, and people go to jail every day on those offenses. For example, in Jefferson County, Kentucky in September 2011, among the bookings there were 260 charges for driving while license suspended or revoked. Non-DUI traffic charges were the third most common charge at booking.¹⁶

¹⁰ Tom Barton, ACLU: Equal justice for poor remains unfulfilled in SC municipal courts, THE ISLAND PACKET (Oct. 5, 2013) <http://www.islandpacket.com/2013/10/05/2723229/aclu-equal-justice-for-poor-remains.html#storylink=cpy>.

¹¹ Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007).

¹² Statistics in chart provided by the Kentucky Department of Public Advocacy, on file with author.

¹³ Data provided to the author by the Texas Indigent Defense Commission.

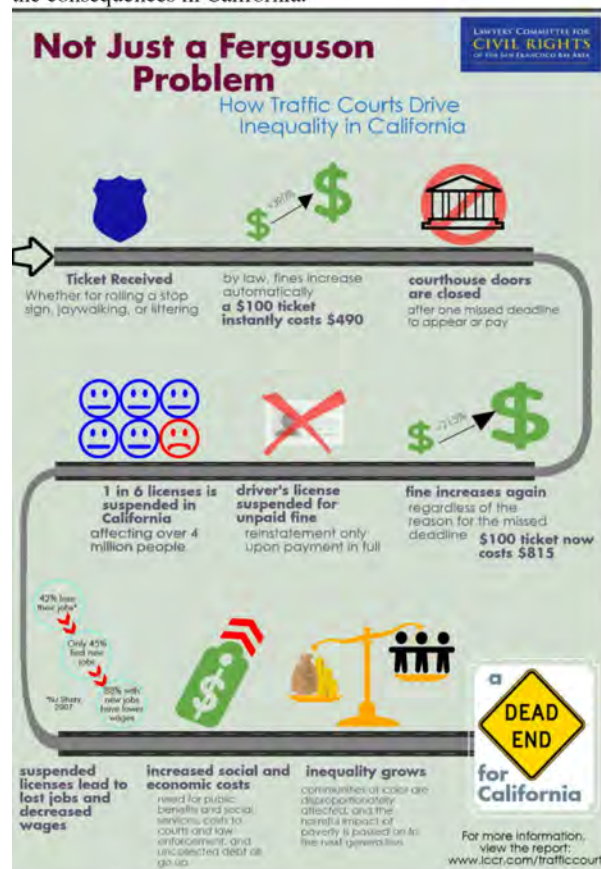
¹⁴ See ROBERT C. BORUCHOWITZ, MALIA N. BRINK, MAUREEN DIMINO, NAT'L ASS'N OF CRIM. DEF. LAWYERS, “MINOR CRIMES, MASSIVE WASTE, THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS” 25(2009). See also, “In Orlando, a Law Against Feeding Homeless — and Debate Over Samaritans’ Rights”, Associated Press (Feb. 3, 2007).

¹⁵ See, “Washington’s War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement”, Seattle University School of Law Homeless Advocacy Project (May 2015), available at: <http://ssrn.com/abstract=2602318>.

¹⁶ LOUISVILLE METRO. DEPT OF CORR. 2012 FACT SHEET (2013), available at http://www.louisvilleky.gov/NR/rdonlyres/E881F827-9898-41A0-89194D063AD8F641/0/LMDCFactDocument_2012.pdf. Most of these defendants with license charges had other charges as well, according to data provided to the author by the jail.

Often the reason for the suspension is not dangerous driving but the failure to pay a traffic ticket for a minor traffic citation, usually because the driver cannot afford to pay the fine. The criminalization of driving with a suspended license can lead to devastating impacts on the defendant. The Justice Department's recent report on Ferguson, Missouri, documented that, describing a "community where local authorities consistently approached law enforcement *not* as a means for protecting public safety, but as a way to generate revenue.... where both policing and municipal court practices were found to disproportionately harm African American residents."¹⁷

The chart below from the San Francisco Lawyers' Committee for Civil Rights illustrates the consequences in California.



¹⁷ See, "Investigation of the Ferguson Police Department", U.S. Department of Justice, Civil Rights Division, March 4, 2015.

Racial Disproportionality in Misdemeanor Cases is Significant

The racial disproportionality in many misdemeanor cases is significant. One scholar has written, “In minority communities where order maintenance policing generates thousands of problematic convictions, the misdemeanor process has become the first formal step in the racialization of crime.”¹⁸

In Texas, where the population is 50.3 percent black or Latino, 73 percent of those arrested for disorderly conduct are black or Latino persons.¹⁹

In Louisville in 2011, nearly 60 percent of those with marijuana charges and about 46 percent of those with suspended driving charges were black defendants, in a county whose population is 21 percent black.²⁰ A study in 2007 found that by 2000, smoking marijuana in public view (MPV) had become the most common misdemeanor arrest in New York City.²¹ The authors found that “most MPV arrestees have been black or Hispanic. Furthermore, black and Hispanic MPV arrestees have been more likely to be detained prior to arraignment, convicted, and sentenced to jail than their white counterparts.”²²

A recent study by the American Civil Liberties Union documented that the disparity is nationwide. The report found that, on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates.²³

In Many Courts Proceedings Take Only a Few Minutes, Making Justice Impossible

In many courts, particularly when there are no lawyers available for the accused person, the proceedings are completed in only a few minutes. For example, a study in Florida found that 82 per cent of arraignments lasted three minutes or less.²⁴ I have documented hearings in a Washington State court in which the entire proceeding, from advice of rights through guilty plea and sentencing, took less than a minute and a half. [See Appendix for an example.] There is no way that an accused person can understand their rights, including the right to a lawyer and to a trial and to confront the witnesses against

¹⁸ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

¹⁹ Robert C. Boruchowitz, *Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 Seattle J. for Soc. Just. 891, 893 (2013).

²⁰ LOUISVILLE METRO. DEPT OF CORR., 2011 FACT SHEET (2012) (on file with author). Numerous reports have documented the racial disproportionality in American criminal courts. See, e.g., BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE, *supra*, at 47-48.

²¹ Golub, Johnson & Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, abstract available at http://www.sentencingproject.org/detail/clearinghouse.cfm?clearinghouse_id=126.

²² *Id.*

²³ *The War on Marijuana in Black and White: Billions of dollars wasted on racially biased arrests*, ACLU 4 (June 2013), <http://www.aclu.org/files/assets/aclu-thewaronthemarijuana-rel2.pdf>.

²⁴ “Three Minute Justice”, FN 2 *supra*, at 4.

them, make a meaningful decision about whether to exercise those rights, and present their perspective on the case for the judge to consider, when the entire proceeding takes less than 90 seconds. And there is no way for the judge to know whether the person has made a knowing, intelligent, and voluntary waiver of their rights to counsel and to trial or is making a knowing, intelligent, and voluntary plea of guilty, or to know anything about the defendant and what an appropriate sentence should be when the entire proceeding takes less than 90 seconds.

In many ways the misdemeanor courts resemble the description in the 1972 Supreme Court case of Argersinger v. Hamlin, in which the Court noted that the volume of misdemeanor cases may create an obsession for speedy dispositions, regardless of the fairness of the result. The Court cited a Presidential Commission report that noted:

The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure. As Dean Edward Barrett recently observed:

“Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything longer, and so there is no choice but to dispose of the cases.

“Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.

“Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.”

The Court continued:

That picture is seen in almost every report. ‘The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.’ Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 *The Legal Aid Brief Case* 151, 152 (1970).

There is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly-line justice.’ One study concluded that ‘(m)isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.’ American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970).²⁵

I have noted that in the City of Seattle Municipal Court, where defenders are provided from the beginning of the case and have limited caseloads and investigators on staff, 25 per cent of cases are dismissed.²⁶

Recent Federal Case Highlights Many of the Factors Contributing to the Denial of Effective Representation

A recent Federal Court decision in a Washington State case against two cities highlights many of the problems in misdemeanor courts around the country. Judge Robert Lasnik, who had been a prosecutor and state trial court judge before joining the federal bench, found as follows:

Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.²⁷

The Court continued:

The period of time during which Richard Sybrandy and Morgan Witt (hereinafter, Sybrandy and Witt) provided public defense services for the Cities was marked by an almost complete absence of opportunities for the accused to confer with appointed counsel in a confidential setting. Most interactions occurred in the courtroom: discussions regarding possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals, and potential dispositions were, if they occurred at all, perfunctory and/or public. There is almost no evidence that Sybrandy and Witt conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the elements of the crime charged or possible defenses or that they discussed such issues with their clients. Substantive hearings and trials during that era were rare. In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption. The appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case

²⁵ Argersinger, *supra*, at 2011-12.

²⁶ Fifty Years After Gideon, FN 17 *supra*, 11 Seattle J. for Soc. Just. 891, 920 (2013).

²⁷ Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

closure or plea bargain having almost nothing to do with the individual indigent defendant. To the extent that “adequate representation” presumes a certain basic representational relationship, there was a systemic failure in the Sybrandy and Witt era. Adversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system.²⁸

The Court found that this was the natural and foreseeable result of the caseloads that the attorneys carried. Each of the two lawyers had about 1000 cases a year and they only devoted part-time to the practice.²⁹ They often spent less than an hour per case. This denial of effective representation was the responsibility of the two cities.

...the services they offered to their indigent clients amounted to little more than a “meet and plead” system. While this resulted in a workload that was manageable for the public defenders, the indigent defendants had virtually no relationship with their assigned counsel and could not fairly be said to have been “represented” by them at all. The Cities, which were fully aware of the number of public defenders under contract, remained wilfully blind regarding their overall caseloads and their case processing techniques.³⁰

The judge found that the cities did not allow appointed counsel to give each case “the time and effort necessary to ensure constitutionally adequate representation for the client and to retain the integrity of our adversarial criminal justice system.” He added:

Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship. Public defenders are not required to accept their clients' statements at face value or to follow every lead suggested, but they cannot simply presume that the police officers and prosecutor have done their jobs correctly or that investigation would be futile. The nature and scope of the investigation, legal research, and pretrial motions practice in a particular case should reflect counsel's informed judgment based on the information obtained through timely and confidential communications with the client. A failure of communication precludes the possibility of informed judgment. If actual, individualized representation occurs—as opposed to a meet and plead system—the systemic result is likely to be more adversarial testing of the prosecutor's case throughout the proceeding and a healthier criminal justice system overall.³¹

In language that could apply to many misdemeanor courts across the nation, the judge wrote:

²⁸ *Wilbur, supra*, at 1124.

²⁹ Defenders in numerous other cities in the U.S. carry more than 1000 cases per year. See *Minor Crimes*, at 21.

³⁰ *Id.*

³¹ *Id.*, at 1126-1127.

The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence case may appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status. It is the lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.³²

The judge noted that even when the cities contracted with a new law firm to provide public defense, the attorney caseloads often prevented the attorneys from meeting their clients before court. When the attorneys meet the client for the first time in court, with a plea offer in hand, "there is really no opportunity for a confidential interview, the client may or may not understand the proceedings, and the public defender is unprepared to go forward on the merits of the case."³³

The U.S. Supreme Court has emphasized the importance of adversarial testing of the government's case:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors-- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.³⁴

Judge Lasnik concluded:

Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel. While the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent,

³² *Id.*, at 1127.

³³ *Id.*, at 1128.

³⁴ *United States v. Cronin*, 466 U.S. 648, 657 (1984).

would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed. *Cronic*, 466 U.S. at 658–60, 104 S.Ct. 2039; *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940).³⁵

The judge concluded that the two cities’ defender system had systemic flaws “that deprive indigent criminal defendants of their Sixth Amendment right to the assistance of counsel.” He emphasized the failure of the defenders to provide real representation.

Although counsel are appointed in a timely manner, the sheer number of cases has compelled the public defenders to adopt case management practices that result in most defendants going to court for the first time—and sometimes accepting a plea bargain—never having had the opportunity to meet with their attorneys in a confidential setting. The attorney represents the client in name only in these circumstances, having no idea what the client’s goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist. Such perfunctory “representation” does not satisfy the Sixth Amendment.³⁶

Judge Lasnik emphasized the cost to the defendants and to the community of such a flawed system:

A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole.³⁷

Diversion and Reclassification of Misdemeanors Can Save \$1 Billion a Year and Reduce the Workload for Defenders

There literally are hundreds of thousands of cases heard in misdemeanor courts that could be reclassified or diverted without adversely affecting public safety. In 2013, for example, nationally there were 356,427 arrests for drunkenness, 372,202 for disorderly conduct, 21,354 for vagrancy, and 5055 for gambling.³⁸ There were 1,501,043 arrests for drug

³⁵ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131.

³⁶ *Id.*, at 1131–32.

³⁷ *Id.*, at 1133.

³⁸ Crime in the United States 2013, Available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43>

abuse violations, nearly 41 percent of which were for possession of marijuana.³⁹ The racial disparity in those arrests is dramatic—34.8 per cent of the disorderly conduct, 31.8 per cent of the vagrancy, and 66.5 per cent of the gambling arrests were of African-American persons.⁴⁰

Some states do not treat drunkenness as a crime but view it as a health problem. Colorado law, for example, states:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. The general assembly hereby finds and declares that alcoholism and intoxication are matters of statewide concern.... public intoxication and alcoholism are health problems that should be handled by public health rather than criminal procedures.⁴¹

A University of Oregon study in 2010 found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was \$1,679.⁴² At that rate, if the 356,427 drunkenness arrests were avoided, approximately \$598 million would be available for treatment and other uses. Savings easily would exceed \$1 billion if disorderly conduct cases and even a small percentage of the possession of marijuana cases were diverted or treated as non-criminal violations.⁴³

The ACLU report cited above found that between 2001 and 2010, there were more than 8 million marijuana arrests in the United States, 88% of which were for possession. In 2010, there was one marijuana arrest every 37 seconds, and states spent more than \$3.6 billion enforcing marijuana possession laws.⁴⁴

In some courts, the combination of driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can total between 40% and 50% of the caseload.⁴⁵ The day I observed a court in a university town in Washington, Lower Kittitas District Court, the court heard 29 cases. Twelve were third degree driving with license suspended cases and six were minor in possession of alcohol cases. So, 62 per cent of the cases could have been diverted out of the court without any impact on public safety.⁴⁶

³⁹ *Id.*, at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested>

⁴⁰ *Id.*, table 43 A. The racial disproportionality is found in the juvenile arrest statistics as well. Of 47,622 arrests for curfew and loitering law violations, 21,351, or 44.8 per cent, were of Black or African American youth.

⁴¹ Colo. Rev. Stat. Ann. § 27-81-101.

⁴² HEIDI BLAINE ET AL., UNIV. OF OR., DEPT OF PLANNING, PUB. POLICY & MGMT., THE COSTS ASSOCIATED WITH PROSECUTING CRIME IN OREGON 11 (2010), available at <http://library.state.or.us/repository/2010/201007161627305/index.pdf>.

⁴³ See, *Diverting and Reclassifying*, FN 1 *supra*, at 4 et seq.

⁴⁴ *The War on Marijuana*, FN 21 *supra*, at 4.

⁴⁵ *Diverting and Reclassifying*, FN 1 *supra*, at 1.

⁴⁶ See *Minor Crimes*, *supra*, at 25-26.

Probably the most common misdemeanor offense, and likely the one most easily removed from the system, is driving with a suspended license when the suspension is caused for failure to pay a traffic fine. Most of the people charged with that offense are poor. A Seattle study in 1999 found that of 184 people with suspended licenses, the average person had \$2,095 in unpaid fines and a monthly income of \$810.⁴⁷

Even if states do not wish to re-classify minor crimes as non-criminal violations, it is possible to reduce the volume and cost of cases through diversion programs. The City of Spokane Prosecutor developed a diversion program for suspended license cases that not only reduced the defender caseload by one-third, it also saved hundreds of thousands of dollars and, by combining with a re-licensing program, yielded millions of dollars in revenue as people paid their fines.⁴⁸ The slides below from the Spokane Prosecutor highlight the benefits.⁴⁹



DWLS3 Diversion

- ALL jurisdictions benefit from directly interfacing with the defendants through our Diversion Programs
- Both City and County Prosecutors have diversion programs specifically for handling DWLS3 cases.
- These are both designed to reduce potential jail time and assist defendants with reinstating their privilege.
- The diversion programs help alleviate court congestion and compliance with defender case load standards.
- In 2014 the City diverted 948 DWLS3 cases.

All of these cases were handled by the City of Spokane Prosecutor.

Payments Received From Participants

	2014	2013-2014
• Spokane County	\$ 377,665	\$2,303,866
• Spokane City	\$ 364,833	\$2,224,221
• Pend Oreille	\$ 5,826	\$ 29,770
• Cheney	\$ 6,437	\$ 27,939
• Medical Lake	\$ 2,560	\$ 20,141
	\$757,301	\$4,605,933
• Total received in 2014:	\$757,301	

Because of a combination of the use of diversion programs and a slight amendment to the statute, Washington State as a whole reduced third degree suspended driver license

⁴⁷ EVALUATION OF SEATTLE RE-LICENSING PROGRAM (2002), available at <http://www.cityofseattle.net/courts/PDF/RelicensingEval.pdf>.

⁴⁸ Presentation, Spokane City Prosecutor, Defender Initiative Conference, *Diversion for Relicensing*, (Feb. 25, 2011), available at <https://www.regonline.com/custImages/260000/269600/845am%20Diversion%C20for%20Relicensing.pdf>. See also JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 9 (2012), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf. At a national focus group to explore cost-effective innovations to improve the overall caliber of the nation's public defense, former Spokane City Prosecutor Mary Muramatsu discussed a highly successful diversion program for suspended drivers that allows relicensing while aggregating all prior judgments into a single payment. *Id.*

⁴⁹ While there has been some increase in theft (shoplifting) and domestic violence offenses in Spokane in the past few years, the increase has not been as great as the number of DWLS 3rd cases the prosecutor no longer prosecutes. The Prosecutor says, "Sadly, the increases we've seen seem to be economically induced by the fallout from the 2008 economic collapse. Diversion has been an overwhelming success. The evidence of this was certainly shown when the city public defender's office was only required to hire two attorneys to deal with the imposition of caseload standards. ... without diversion, [they] would've needed to hire four attorneys instead of two." Email from Justin Bingham to author April 27, 2015.

(DWLS 3) criminal filings by 41.5 per cent from 2009-2014.⁵⁰

Seattle's City Attorney charged 94% fewer DWLS3 filings in 2013 than in 2009.⁵¹ In its annual report, the City Attorney noted that the "crime of DWLS 3 has a disproportionate impact on Seattle's African-American community. Although the current census shows Seattle's African-American population is roughly 8 percent, the data shows they have historically been charged with DWLS 3 at a rate of 40+ percent of the overall charges filed."⁵²

Another program in King County, Washington, Law Enforcement Assisted Diversion, designed by Seattle's Defender Association's Racial Disparity Project in partnership with local prosecutors and law enforcement, diverts drug and prostitution suspects directly to a social service intervention program in the community in lieu of jail booking and prosecution. An evaluation found that participants in LEAD were 58% less likely than people in the control group to be arrested.⁵³

Financial Impact of Suspended License Cases Can Be Overwhelming

The financial impact of criminalizing driving with a suspended license can be overwhelming. Two Seattle University School of Law professors have criticized the practice: "the entire enterprise of using driver's license suspensions to collect fines from low-income individuals is seriously misguided." They concluded:

Whatever solution one arrives at for the problem of collecting fines, society should never revoke a driver's license for non-safety related issues. Using revocation to collect revenue is the functional heir of the debtor's prison. Most low-income individuals need to drive to continue working. But if they continue to drive, they will go to jail, avoidable only by paying the monies owed -- monies they do not have. This current variant on what is basically a medieval theme replicates that same futility and resultant harm to the interests of the wider society that debtor's prison has always borne.⁵⁴

Reclassifying or diverting these offenses has enormous benefits. The American Bar Association passed a resolution calling for governments to review misdemeanor provisions and, where appropriate, allow the imposition of civil fines or nonmonetary civil remedies, as opposed to criminal penalties.⁵⁵

Some Prosecutors Negotiate Pleas with Unrepresented Defendants

In many courts, prosecutors negotiate pleas with unrepresented defendants who have not

⁵⁰ Spreadsheet from Washington Administrative Office of the Courts, on file with author.

⁵¹ Seattle City Attorney Annual Report 2013, at 58, available at www.seattle.gov/documents/departments/cityattorney/annualreport2013.pdf

⁵² *Id.*, at 59.

⁵³ Evaluation available at <http://leadkingcounty.org/lead-evaluation/>.

⁵⁴ John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 440, 470-71 (2005).

⁵⁵ AM. BAR. ASS'N, CRIM. JUSTICE SECTION COMM'N ON HOMELESSNESS & POVERTY, 102C: REPORT TO THE HOUSE OF DELEGATES (2010), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midear2010_102c.pdf.

waived counsel. This was documented in a national study conducted by the National Right to Counsel Committee, JUSTICE DENIED:

There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.⁵⁶

The American Bar Association Model Rule of Professional Conduct 3.8, Special Responsibilities Of A Prosecutor, states in part:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; ...⁵⁷

Federal Funding to the States Provides Relatively Little for Public Defense

The Federal government provides a great deal of funding for criminal justice to state and local governments, most of it through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. The great bulk of it, 64 per cent, goes to law enforcement.⁵⁸

The General Accounting Office found in 2012 that for a five year period, "among grant recipients who reported in GAO's surveys that they had allocated funding for indigent defense, allocations as a percentage of total awards ranged from 2 percent to 14 percent."⁵⁹

Recommendations

Judge Lasnik pointed out in his opinion in *Wilbur* that "Although the right to the assistance of counsel regardless of economic status is established by the Constitution, legislative enactments are required to ensure that the right is maintained, and funding

⁵⁶ NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF THE CONSTITUTIONAL RIGHT TO COUNSEL 8 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 3.8, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule38special_responsibilitiesofaprosecutor.html.

⁵⁸ "Grant Activity Report, Justice Assistance Grant (JAG) Program, April 2012-March 2013, available at https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf

⁵⁹ INDIGENT DEFENSE: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose, GAO-12-569: May 9, 2012. <http://www.gao.gov/products/GAO-12-569>

limitations imposed over the past few years are having a cumulative and adverse impact at both the state and national levels.”⁶⁰

I recommend that the Senate take several steps, both enacting law and providing funding, to help the states meet their constitutional obligations in misdemeanor courts.

1. The Senate should require that some of the existing Justice Department funding to states for criminal justice assistance be devoted to improving misdemeanor public defense in the following ways:

a. Provide funding for pilot projects that have lawyers at every misdemeanor court appearance, reasonable caseload limits for the lawyers, and adequate training and resources for the lawyers.

b. Provide funding for training for judges, defense attorneys, and prosecutors on the right to counsel in misdemeanor courts.

c. Condition some of the funding provided to states for criminal justice purposes on a certification by the state that counsel is provided for eligible defendants at every stage of criminal proceedings, including arraignments and first appearances in court.

d. Require that some of the funding provided for criminal justice research be targeted for misdemeanor public defense.

e. Require that some of the funding be used for developing re-licensing and diversion programs. This could include inviting government and bar leaders to regional education seminars and conferences featuring successful diversion programs.

2. The Senate should provide additional funding targeted at improving misdemeanor public defense services to support pilot projects, training, and research on the implementation of quality defender services.

3. The Senate should adopt the Gideon’s Promise Act proposed by Senator Leahy. This Act would provide technical assistance to state and local governments to help them meet their Sixth Amendment obligations and it would provide \$5 million per year for that purpose. It would authorize the Attorney General to seek relief in civil actions to remedy any pattern or practice by local government that deprives persons of their constitutional right to counsel.

4. The Senate should adopt the National Center for the Right to Counsel Act (H.R. 2063) proposed by Representative Deutch. This Center would provide financial support to supplement funding for public defense systems and provide financial and substantive support for training programs to improve the delivery of public defense services. The Center would be a clearinghouse for information and conduct research.

⁶⁰ Wilbur, supra, at 1129.

The Act would establish state advisory councils. The councils would collect information and monitor compliance by grant recipients. The Center would develop public defense standards that would be used to evaluate the work of grant recipients. The Center would establish regional backup centers to assist state and local public defense systems.

Conclusion

It is a disgrace that 52 years after Gideon and 43 years after Argersinger, thousands of accused persons face the power of the state alone. It is not fair, and it is economically foolish and wasteful. The Congress can help remedy this situation.

These remarks do not necessarily represent the views of Seattle University or its School of Law.

APPENDIX

Court Transcript Trial Date: October 16, 2006

Start Time: 9:46:35

Judge: "...J"

Prosecutor: "Mr. J is represented (inaudible). You are or you're not represented?"

Defendant: "No, uh-uh."

Prosecutor: "I just need to find your file here (inaudible). Case # C748. Defendant is present without counsel. What did I talk to you about doing (inaudible)?"

Defendant: (Inaudible)

Prosecutor: "You want to enter your plea. Uh, Your Honor, my understanding from the defendant is he wishes to enter a plea on the charge and the state offers no jail time and \$150 fine."

Judge: "Well alright, Mr. J, how do you plea to Driving While Suspended third degree?"

Defendant: "Guilty, sir."

Judge: "All right. Twenty-four months unsupervised probation, ninety days jail, all suspended, \$1000.00 fine, \$850 suspended with \$150 fine to pay plus the \$150 monitoring fee and a \$43 assessment. Conditions: no driving in the next twenty-four months unless you have a valid license and insurance and no moving traffic violations or criminal charges are to be filed against you in the next two years. Exonerate bond."

End Time: 9:47:52

Total Time: 1 minute, 17 seconds

Testimony of Professor Erica Hashimoto
Associate Dean for Clinical Programs and Experiential Learning
Allen Post Professor of Law and Josiah Meigs Distinguished Teaching Professor
University of Georgia School of Law

May 13, 2015

Senate Judiciary Committee Hearing: Protecting the Constitutional Right to Counsel for
Indigents Charged with Misdemeanors

Chairman Grassley, Ranking Member Leahy, and Members of the Committee.

Thank you for the invitation to testify today. My name is Erica Hashimoto, and I am the
Allen Post Professor of Law at the University of Georgia School of Law in Athens,
Georgia.

I am pleased to offer my thoughts regarding the denial of the right to counsel in criminal
misdemeanor cases.

Criminal misdemeanor prosecutions are not minor. They affect millions of Americans,
their families and their communities. They are criminal convictions with lifelong
consequences. The Supreme Court has recognized the importance of providing
counsel to misdemeanor defendants, but courts routinely violate this constitutional
mandate. This in part is because the enormous volume of misdemeanor cases being
prosecuted in state and local courts across the country has overwhelmed virtually every
court system, from state courts, to county courts, to local city courts. Lacking sufficient
resources to resolve all of these cases in accordance with Constitution, many states
and localities simply do not provide lawyers to misdemeanor criminal defendants who
have a constitutional right to counsel.

Before turning to the well-documented pattern of constitutional violations across the
country, I will describe the unique combination of factors that has generated this
constitutional crisis. I then will turn to the evidence—both statistical and anecdotal—of
these patterns of constitutional violations. Finally, I will propose federal legislative
solutions that, if enacted, would help states and localities come into constitutional
compliance.

FACTORS GENERATING THE CONSTITUTIONAL CRISIS IN MISDEMEANOR CASES

The constitutional crisis of denial of counsel in criminal misdemeanor cases has been
caused by the massive volume of misdemeanor cases in which defendants have a
constitutional right to counsel, combined with the failure of states and localities to
adequately fund the defense of these cases. Under existing Supreme Court precedent,
many indigent misdemeanor defendants have a clear constitutional right to counsel.
But although the number of misdemeanor cases has burgeoned over the past fifty

years, many municipalities and states have decreased indigent defense funding. As a result, many jurisdictions simply do not provide lawyers to misdemeanor defendants who have a clear constitutional right to counsel under Supreme Court precedent.

The Supreme Court has held that misdemeanor criminal defendants in all but a narrow category of cases have a constitutional right to counsel. In 1972, the Supreme Court, recognizing that the sheer volume of misdemeanor cases “may create an obsession with speedy dispositions, regardless of the fairness of the result,” held that every indigent misdemeanor defendant sentenced to *any* period of incarceration (even a day) has a constitutional right to counsel appointed by the state. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Thirty years later, for many of the same reasons, the Court held that indigent misdemeanor defendants sentenced to probationary terms that can be enforced through incarceration have the same right to court-appointed counsel. *Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002). The Court was quite clear, moreover, that the right to counsel in these cases applies at the time of conviction and imposition of the probationary term *even if* the state never seeks to revoke probation. *Id.* As a result, although misdemeanor defendants sentenced only to a fine that *cannot* be enforced through incarceration do not have a right to counsel, virtually every other indigent misdemeanor defendant has a constitutional right to court-appointed counsel. See *Scott v. Illinois*, 440 U.S. 367 (1979). In sum, indigent misdemeanor defendants have a right to have counsel appointed in every case in which they ultimately receive a sentence either of imprisonment or of a probationary term that can be revoked and result in incarceration if the defendant violates a condition of probation.

In at least some jurisdictions, moreover, most *indigent* misdemeanor defendants have a constitutional right to counsel because many municipalities (and some states) impose probationary sentences specifically in order to collect fines from indigent misdemeanor defendants who cannot afford to pay the entire fine at sentencing.¹ Many misdemeanor defendants, both indigent and not indigent, are sentenced to fines upon conviction for minor crimes. If the defendant has the resources to pay the fine, the case terminates upon payment of that fine. But because many (if not most) indigent defendants cannot pay their entire fine at the time of sentencing, they often are put on probation conditioned upon repayment of the fine (and, as discussed below, many of those defendants also are required to pay the costs of their probation supervision). Of critical importance, the condition of probation requiring payment of fines can be enforced through incarceration.² Because all of these sentences include suspended sentences of imprisonment, every single one of those defendants who is indigent has a right to court-appointed counsel. See *Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002). Appointing counsel in these cases is especially critical because indigent defendants

¹ See Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 21 (2010), available at <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry> (reporting that all fifteen states studied in the report, including California, Texas, Florida, New York, Arizona, and Missouri, used probation as a means to collect at least some criminal justice debts from those who could not afford to pay the full amount at the time of sentencing).

² See Carrie Teegardin, Lives Upended as Judges Push Legal Limits, Atlanta Journal Constitution, May 2, 2015 (documenting the number of cases in Georgia municipal courts that result in probationary sentences because of defendants' inability to pay fines).

often cannot meet the condition of probation requiring monthly payments. As a result, many defendants violate that condition of probation, which in turn lead to incarceration.³

The rate of incarceration attributable to probation revocations based on inability to pay also has increased in at least some jurisdictions because indigent defendants who are put on probation not only have to pay fines but also have to pay a monthly fee to the probation company collecting the monthly fine payment from them.⁴ These fees, ranging from the low end of \$35 per month to a high of \$100 per month in Montana, exacerbate the debt facing the defendant, making it increasingly more likely that they will be found to have violated probation for insufficient payments.⁵ As a result, indigent misdemeanor defendants—the group entitled to appointment of counsel by the government—are much more likely to be constitutionally entitled to counsel because their indigence gives rise to probationary sentences that require counsel.

States and municipalities, moreover, prosecute millions of misdemeanor cases every year, and the number of such cases appears to be rising. No nationwide data tracks the precise number of misdemeanor cases,⁶ but one report estimates that states and localities prosecute 10 million misdemeanor defendants every year, which would be more than double the number of misdemeanor cases prosecuted in 1972.⁷ The evidence is clear, moreover, that the volume of misdemeanor cases dwarfs that of felony cases in state and local courts. According to data from 2013 provided by the National Center for State Courts, for instance, in a number of states, including Texas, Minnesota, Washington, Iowa, Florida and Arizona, misdemeanors constitute more than 80% of criminal cases prosecuted. And in most other states for which data are available, roughly 70% of criminal cases are misdemeanors.⁸

These estimates of the volume of misdemeanor cases, moreover, may drastically understate the number of cases in at least some jurisdictions. This is so because they exclude some less-serious traffic offenses that some states deem criminal misdemeanors and that often give rise to a constitutional right to counsel. In Georgia,

³ See Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry* at 51-52 (reporting that in Georgia, the only state for which such data was available, courts issued arrest warrants for 124,788 offenders on private probation in 2012).

⁴ See *id.* at 12 n. 3 (documenting the use of offender-funded private probation systems in localities throughout the country, including in Colorado, Utah, Alabama, Mississippi, Washington, Missouri, Michigan, Tennessee, Montana, Florida, Idaho, and Georgia).

⁵ *Id.* at 24.

⁶ As discussed below, one of the real challenges with understanding the magnitude of constitutional violations in misdemeanor cases has been that, unlike with felonies, very little data are compiled on misdemeanors. For instance, no nationwide data exists regarding even the total number of misdemeanor cases prosecuted in this country, let alone the outcomes in those cases or whether the defendant had representation by counsel. Instead, academics can provide only their best estimates of the number of cases.

⁷ See, Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Nat'l Assoc. Criminal Def. Lawyers, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 11 (2009) (providing estimate of the number of misdemeanor cases based upon data gathered in 12 states by the National Center for State Courts) [hereinafter *Minor Crimes, Massive Waste*].

⁸ Only Alabama and Hawaii had rates of misdemeanor prosecutions below 50% of criminal cases.

for instance, most traffic offenses are misdemeanors punishable by up to one year in jail.⁹ But although statistics available from the Administrative Office of the Georgia courts reflect that over a *million* people were charged with non-serious traffic misdemeanors in state and local courts, the only offenses reflected in the statistics from the National Center for State Courts cited above were *serious* traffic offenses and non-traffic misdemeanor offenses.¹⁰ In short, it appears clear that state and local courts process overwhelming numbers of people in criminal misdemeanor cases every year.

The vast increase in the number of misdemeanor cases over the past fifty years is attributable, at least in part, to the fact that in some jurisdictions, a number of civil offenses that had previously been punishable only by civil penalties (such as fines) were reclassified as criminal misdemeanors carrying the possibility of imprisonment.¹¹ The breadth of conduct that has been criminalized, moreover, is staggering. In New York, for example, possessing cigarettes without a tax stamp is a misdemeanor.¹² Nor is New York anomalous in criminalizing such minor conduct. Utah, Georgia, and Delaware deem virtually all vehicular moving violations as misdemeanors punishable by up to one year in jail. Because all of these offenses have been designated criminal misdemeanors, the number of misdemeanor cases has skyrocketed.

The massive volume of these cases highlights the importance of the right to counsel, as the Court in *Argersinger* recognized. Court systems processing millions of misdemeanor cases risk turning into “assembly line justice” that causes prejudice to the rights of misdemeanor defendants. *Argersinger*, 407 U.S. at 36. And in fact, it appears that assembly-line justice is dispensed across the country in misdemeanor cases with prejudicial effects for defendants.¹³ A report on Florida misdemeanor courts, for instance, demonstrated that 82% of arraignments—at which the vast majority of defendants resolved their cases—took *less than three minutes*.¹⁴ And perhaps not surprisingly, represented misdemeanor defendants were much more likely to plead not

⁹ See, e.g., O.C.G.A. § 40-6-1 (providing that *all* traffic offenses are misdemeanors unless specifically excepted); O.C.G.A. § 40-6-124 (prohibiting failure to use turn signal); O.C.G.A. § 40-6-184 (outlawing driving too slowly); O.C.G.A. § 40-6-246 (criminalizing coasting downhill in neutral).

¹⁰ Indeed, data from the National Center for State Courts reflect that Georgia prosecuted less than 300,000 misdemeanor cases in 2013.

¹¹ At least some states and localities have begun to recognize the extraordinarily high costs associate with deeming all of these transgressions criminal offenses and have begun to decriminalize or de-penalize certain offenses, including driving on a suspended license.

¹² The New York Tax Code provides as follows: “Any person . . . who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax . . . or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes . . . shall be guilty of a misdemeanor.” N.Y. Code § 1814(a). This code provision provided the basis for the arrest of Eric Garner that led to his death.

¹³ See Nat’l Legal Aid and Defender Assoc., *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* 15 (2008) (noting the colloquial reference by stake holders in one Michigan court to “McJustice Day,” when misdemeanor defendants are processed through assembly line justice).

¹⁴ See Alisa Smith & Sean Madden, Nat’l Ass’n of Criminal Def. Lawyers, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts* 15 (2011), <http://www.nacdl.org/News.aspx?id=23653&terms=three+minute+justice> [hereinafter *Three-Minute Justice*].

guilty at arraignment than unrepresented misdemeanor defendants, nearly 80% of whom pleaded either guilty or no contest at arraignment.¹⁵

Finally, states and localities simply have not devoted sufficient resources to ensure compliance with the Constitution in all of these misdemeanor cases. Some jurisdictions simply lack any structure for providing lawyers in misdemeanor cases. And even if jurisdictions have the *structure* for appointment of counsel, they have not provided sufficient resources to ensure appointment of counsel in all misdemeanor cases constitutionally entitled to counsel.

Beginning with structural considerations, virtually all states have structures in place to provide counsel in *felony* cases,¹⁶ but structures for providing representation in misdemeanor cases are much more limited in many local (and, to a lesser extent, some state) courts. This is so because many of the courts that handle misdemeanor cases are separate from the felony courts that view representation as the norm and in which counsel regularly appear. Court structures vary across states, but most jurisdictions create two tiers for their courts: “limited jurisdiction courts” (usually at the county or municipal level although sometimes also at the state level) have jurisdiction over misdemeanors,¹⁷ and “general jurisdiction” courts have jurisdiction over both felonies and misdemeanors.¹⁸

Limited jurisdiction courts, which handle the vast majority of misdemeanor criminal cases in many states, in particular have struggled to create structures to ensure representation in misdemeanor cases. In at least some jurisdictions, including South Carolina and Georgia, the state-funded public defender offices do not provide representation in limited jurisdiction misdemeanor courts unless the counties or cities enter into a contract with the public defender office to cover those cases. And although some cities and counties enter into contracts with public defender offices to provide representation, many do not. The jurisdictions without public defender contracts often enter into contracts with lawyers who agree to represent, for a flat fee, defendants who request counsel. These lawyers have no economic incentive to appear in any case unless required to do so by the court because they collect the same fee regardless of

¹⁵ *Id.* at 23 tbl.9.

¹⁶ Many states now have statewide public defender systems to ensure representation of indigent felony defendants. And although some states still do not have statewide public defender systems for felony cases, most states have put in place mechanisms to assure that counsel are appointed in every felony case. Indeed, in 2009, every state except Pennsylvania and Utah provided at least some funding for indigent defense. See Nat’l Right to Counsel Comm., Constitution Project, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel 54 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [hereinafter Justice Denied].

¹⁷ In some states, limited jurisdiction courts sometimes also hear the initial stages of felony cases, including bond hearings and preliminary hearings.

¹⁸ There are five states, California, Illinois, Iowa, Minnesota, and Vermont—that do not have limited jurisdiction courts. Nat’l Center for State Courts, Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads 7 (2014). But because of the volume of misdemeanor cases, most states have had to abandon that model.

the number of cases they accept.¹⁹ As a result, often no lawyer is present in the courtroom to represent misdemeanor defendants when they appear and request counsel, and those defendants are simply told that they cannot have a lawyer.

In many of these courtrooms, lawyers simply are not present, and as a result, violations of core constitutional rights—the First Amendment right to free speech, the Fourth Amendment right to be free of unconstitutional searches and seizures, and the Fourteenth Amendment right to due process, including the right not to be jailed solely because of indigence—occur with no consequence. Violations of the Constitution's specifically delineated protections against states overreaching into defendants' private lives essentially become invisible because the defendant does not have a lawyer to raise those constitutional violations. For instance, many disorderly conduct charges involve allegations that the defendant directed profanity at a police officer. But people have a First Amendment right to speak their mind unless their speech either is threatening or incites violence. In the absence of a lawyer representing the defendant and challenging the violation of her client's fundamental constitutional rights, constitutional violations of the defendant's First Amendment rights remain invisible and never receive court scrutiny.

To give another example, it appears that misdemeanor defendants in many states are incarcerated because of their poverty in direct violation of the Supreme Court's holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), that a state cannot constitutionally imprison a person solely on the basis of his inability to pay a fine unless he "has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay."²⁰ But unless counsel is appointed to raise violations of *Bearden*, those errors will go undetected because pro se indigent misdemeanor defendants likely will never know to raise objections to the treatment by the government that the Constitution has prohibited. In some courtrooms in which misdemeanors are prosecuted, moreover, no lawyers are present at all—including prosecutors and judges—to recognize these constitutional

¹⁹ The problems of these sorts of flat fee contracts have been documented in numerous reports. See, e.g., ABA Standing Comm. On Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 11-12 (2004).

²⁰ See, e.g., American Civil Liberties Union of Ohio, "The Outskirts of Hope, How Ohio's Debtors' Prisons Are Ruining Lives and Costing Communities," April 2013, at 8 (documenting the practice in mayor's courts throughout Ohio of incarcerating defendants who have not paid fines without informing of their right to counsel or inquiring into their ability to pay); Carrie Teegardin, *Lives Upended as Judges Push Legal Limits*, Atlanta Journal Constitution, May 2, 2015 (documenting cases in Georgia in which probationary sentences were revoked because of defendants' inability to pay fines without any inquiry into ability to pay). Recognizing the constitutional problems these practices can raise, the Georgia General Assembly has passed legislation that attempts to limit the regularly occurring *unconstitutional* revocations of probation for indigent misdemeanor defendants who cannot afford to pay fines. The legislation is laudable, and it highlights the importance of protecting the right to counsel. A lawyer representing an indigent probationer threatened with revocation for failure to pay a fine could invoke both the protection of the Constitution and the statute (if signed into law). But if those indigent probationers do not have counsel to ensure compliance with the new statute, there is nothing to suggest that local courts that have not complied with the Supreme Court's prohibition on revoking the probation of an indigent person because of his inability to pay a fine will comply with a new statute. See *id.*

violations. Judges in misdemeanor courts are not required to have law degrees, and in some jurisdictions, no prosecuting attorneys appear.²¹ As a result, constitutional errors, even if inadvertent, are neither identified nor corrected if defense counsel is not in court to object to them.

The inadequacy of indigent defense budgets also impedes representation of misdemeanor defendants. Many of these jurisdictions currently do not allocate adequate funding to cover the volume of misdemeanor cases that need appointment of counsel.²² In Kentucky, for example, the legislature in 2008 reduced the indigent defense budget by 6.4%, as a result of which the Department of Public Advocacy could no longer provide representation in certain types of misdemeanor cases.²³

In other jurisdictions, the lack of funding has led to excessive caseloads that prevent lawyers from providing even the most basic representation.²⁴ In New Orleans, for example, part-time defenders handled the equivalent of 19,000 cases per year for a full-time attorney, limiting those attorneys to an average of seven minutes per case.²⁵ The searching pursuit of justice guaranteed by the Constitution simply cannot happen in seven minutes. As the Court in *Argersinger* noted: "An inevitable consequence of volume that large . . . [is that] speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication . . . The frequent result is futility and failure." 407 U.S. at 35 (internal quotation marks omitted).

STATISTICAL AND ANECDOTAL EVIDENCE OF WIDESPREAD VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO MISDEMEANOR REPRESENTATION

The enormous volume of misdemeanor cases giving rise to a right to counsel, combined with the fact that states have neither the structure nor the budget to comply with the demands of the Constitution, has led to widespread violations of the constitutional right to counsel set forth in *Argersinger* and *Shelton* in states and localities across the country. In stark contrast to the almost uniform representation by counsel in felony cases,²⁶ every report that has studied the issue of misdemeanor representation has found that a significant percentage of misdemeanor defendants have no lawyer. And because these misdemeanor defendants are not represented by lawyers, they suffer severe consequences, including unconstitutional or unwarranted incarceration. Such incarceration has enormous costs above and beyond the fact that defendants have

²¹ The Supreme Court has held that it does not violate due process for non-lawyer judges to try criminal cases, as long as the defendant has the right to request a new trial before a judge who is a lawyer. See *North v. Russell*, 427 U.S. 328 (1976). But pro se defendants are unlikely to know of their constitutional right to de novo review of their convictions.

²² Justice Denied, *supra* n.16, at 59-60 (documenting cuts to indigent defense funding in a number of states).

²³ *Id.* at 60.

²⁴ Minor Crimes, Massive Waste, *supra* n.7 at 20-27 (setting forth statistics on excessive caseloads—including statistics demonstrating that in Chicago, Miami, and Atlanta, public defenders have more than 2000 misdemeanor cases per year—despite standards recommending that a lawyer represent no more than 400 misdemeanor defendants per year).

²⁵ *Id.* at 21.

²⁶ Over 99% of felony defendants appearing in state and federal courts are represented by counsel.

been unconstitutionally incarcerated, including the loss of jobs that provide vital (and often the only) means of support to low-income people, the inability to get jobs in the future, and, perhaps most tragically, the state's shuttling of children into the state foster care system because their parents have been unconstitutionally incarcerated.

Violations of the right to counsel arise in three distinct, but related, ways. First, in some instances, defendants are denied counsel even upon request or are simply never told that they have a right to counsel. Second, trial courts in many jurisdictions either fail to adequately inform defendants of their right to the assistance of counsel or exert inordinate pressure on misdemeanor defendants to waive their right to counsel (by, for instance, telling defendants that they will be released from jail only if they waive their right to counsel and will remain incarcerated if they invoke their constitutional right to counsel). And finally, even if a lawyer is appointed, in some jurisdictions that appointment means three minutes of a lawyer's time, which violates *Argersinger's* clear conclusion that counsel is necessary in misdemeanor cases "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger*, 407 U.S. at 34.

First, many jurisdictions directly violate the misdemeanor constitutional right to counsel by simply failing to provide counsel either at all or before defendants talk to prosecutors. The reports on this particular point are legion.²⁷ For instance, a study of misdemeanor cases in Florida found that 27% of unrepresented defendants were not told that they had a right to counsel.²⁸ The only available nationwide data on representation rates in misdemeanor cases come from a Bureau of Justice Statistics survey of inmates confined in local jails.²⁹ Data from those surveys demonstrate that 30% of inmates confined in jail as a result of their misdemeanor conviction reported that they were not represented by counsel. Every single one of those defendants had a constitutional right to counsel guaranteed by *Argersinger*, 407 U.S. at 34. But 30% remained unrepresented.

And although the statistics on violations of the right to counsel vary somewhat depending on the jurisdiction, it is significant that reports in every jurisdiction on which data has been collected have demonstrated direct violations of the right to counsel, *i.e.*, instances in which defendants entitled to counsel were never either offered counsel or informed that they had a right to be represented by counsel.³⁰ Indeed, the Chief Justice of the South Carolina Supreme Court has acknowledged that her state "simply [doesn't] have the funding" to provide counsel to all of the misdemeanor defendants that the Supreme Court has held have a right to counsel "and that chief justices from other

²⁷ See, e.g., *Minor Crimes, Massive Waste*, *supra* n.7 at 15 (documenting numerous instances of courts failing to inform defendants that they have a right to counsel); *Three Minute Justice*, *supra* n.14 at 15 (noting the practice, in some courts, of informing the defendants of their right to counsel only in written documents).

²⁸ See *Three-Minute Justice*, *supra* n.14 at 22 tbl.6 (2011).

²⁹ Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 Wash. & Lee L. Rev. 1024 tbl.1 (2013).

³⁰ See, e.g., *supra* n. 27.

states have told her the same.” John R. Emshwiller and Gary Fields, Justice is Swift as Petty Crimes Clog Courts, *Wall Street Journal* (Nov. 30, 2014).

In some jurisdictions, the denial of the right to counsel happens slightly more subtly. In Delaware, for instance, defendants arriving in misdemeanor cases are either told by bailiffs, before they are informed of their right to counsel, that they need to speak to prosecutors, or are told by judges, before those judges decide whether the defendant has a right to counsel, that they need to speak to the prosecutor about pleas.³¹ These defendants are overwhelmingly likely to resolve their cases with prosecutors and waive their right to counsel *before ever being informed that they have a right to counsel*. Because these cases end up being resolved before defendants have even been told of the right to counsel guaranteed by the Supreme Court, they constitute violations of the right to counsel.

Second, many jurisdictions have engaged in a practice of obtaining unconstitutional waivers of the right to counsel. The Supreme Court has recognized that criminal defendants have a right to waive the right to counsel, but it also has emphasized that the trial court must not only inform the defendant of the existence of the right but also the risks of waiving the right before the defendant can validly waive the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938). In many jurisdictions, however, defendants either are never informed of their right to counsel and the risks of waiving that right or are compelled to waive the right. In Florida, for instance, observers found that in over 60% of cases, judges failed to advise misdemeanor defendants of the importance of being represented by counsel.³² And in courts throughout Michigan, although misdemeanor defendants are given a form outlining their “basic right” to the assistance of counsel, this “right” is never explained to the defendants nor are they asked whether they want to waive that right.³³ A related problem arises with compelled waivers of the right to counsel. In some jurisdictions, for instance, misdemeanor defendants appearing in court are told that they can resolve their cases that day *only if* they waive their right to counsel.³⁴ If they refuse to waive the right to counsel, the case is delayed. For defendants who are incarcerated pending trial, any delay can mean additional time spent in jail. Such waivers are not knowing, intelligent and voluntary, and therefore likely violate defendants’ constitutional right to counsel.

Finally, structural deprivations of counsel—for instance, cases in which lawyers on average have less than three minutes to represent their clients—represent a real

³¹ See, e.g., David Carroll, Sixth Amendment Center, *The Crucible of Adversarial Testing: Access to Counsel in Delaware’s Criminal Courts* 29-30 (2014) (documenting the practice, in Delaware courts, of shuttling unrepresented misdemeanor defendants to talk to prosecutors *before* informing them of their right to counsel). See also *Minor Crimes, Massive Waste*, *supra* n.7, at 16-17 (documenting evidence that in many jurisdictions, including Texas, Washington, Pennsylvania and Colorado, prosecutors speak directly to criminal misdemeanor defendants before those defendants are informed of their right to counsel).

³² See *Three-Minute Justice*, *supra* n.14 at 22 tbl.6.

³³ See Nat’l Legal Aid and Defender Assoc., *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* 16-17 (2008).

³⁴ See *Minor Crimes, Massive Waste*, *supra* n.7 at 18-19.

problem in many county and local courts, as well as in at least some state courts.³⁵ Describing all of the ways in which three-minute representation violates the Constitution's right to counsel would take many pages, so I will describe just three. First, in three minutes, a lawyer cannot know or explore whether the client actually committed or has a defense to the crime with she has been charged. Second, a lawyer simply cannot ascertain, within three minutes, whether the police who arrested the client, and in many instances conducted a search, complied with the guarantees of the Constitution. Finally, a lawyer cannot, in three minutes, know enough about a client to advocate for a sentence that makes sense, either in negotiating a plea or in court.

Pelham, Georgia provides a compelling example of the denial of the right to counsel. In 2012, out of a total of nearly 2000 misdemeanor defendants, only *nineteen* misdemeanor defendants had court-appointed counsel. And only *nine* misdemeanor defendants were appointed counsel in 2013. Of course, only indigent defendants have a right to court-appointed counsel, so if Pelham had a high-percentage of wealthy residents, this statistic might make more sense. But 46% of the households in Pelham earn less than \$25,000 per year. In short, *less than 1%* of misdemeanor defendants in Pelham received court-appointed counsel.

The lack of counsel in these cases, moreover, has startlingly negative consequences, not only for the individual defendants and their families but also for the states. As discussed above, unrepresented misdemeanor defendants are more likely to plead guilty or no contest to criminal charges than their represented counterparts. And the consequences stemming from the guilty and no contest pleas can be life-altering. To give but one example, defendants convicted of misdemeanors face statutory and regulatory bars to employment that can completely deprive them of their ability to be employed in many occupations, including as home health aides, as well as being barred from employment by many private employers.³⁶ These consequences of misdemeanor convictions deprive states of otherwise employable residents who lose their ability to obtain gainful employment.

An example serves to illustrate the horrifying consequences of the denial of counsel in misdemeanor cases. A low-income single mother of a four year old from Atlanta needed to drive from southwest Georgia back to her home in Atlanta. She was pulled over for speeding in Colquitt, GA, and after searching the car, the police found, under a mat in the car, the cold remains of a marijuana cigarette. Charged with speeding and possession of marijuana (less than one ounce), the defendant explained to the court that she did not have the money to hire a lawyer, and she asked for one to be appointed. No lawyer was appointed, in spite of the fact that the defendant never waived her right to counsel. She pled guilty without a lawyer (in spite of the arguable Fourth Amendment issues related to her case), was fined \$1,591.75, and was put on probation for two years with the condition that she had to pay not only the \$1591.75 fine but also the city's probation provider an additional \$50 each month to "supervise" her.

³⁵ *Id.*

³⁶ See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 299-301 (2011).

The defendant also was required to report *in person* every month to the probation office in Colquitt, which required a 430 mile monthly trip for her. After she violated several conditions of her probation, the court revoked her probation and sentenced her to 176 days in jail. Despite her requests for counsel, at no point did the court appoint counsel to represent her. The defendant languished in jail for four months, until pro bono lawyers who learned of her situation undertook representing her and ultimately won her release. Compounding the damage brought on by this conviction, *solely* because of the defendant's incarceration, the government adjudicated her child a "deprived child." The costs to the defendant, her daughter, and the state from that misdemeanor conviction are immeasurable.³⁷

Misdemeanor defendants in jurisdictions across this country have been denied the right to representation by counsel guaranteed by the Constitution. The denial of that right has profoundly negative consequences for states and localities. This is so because these defendants likely will end up incarcerated, straining the resources of their families who bear the brunt of their incarceration, the state that pays for that incarceration, and their communities, that lose them as citizens. Misdemeanor cases exact an enormous toll not only on the individual defendants charged but also on their communities. In the face of these widespread constitutional violations, Congress needs to act to protect the constitutional rights of its citizens and to help states and localities move toward complying with the Constitution.

SOLUTIONS

Solving the constitutional crisis in misdemeanor courts requires two key components: (1) states and localities must reclassify at least some minor crimes as non-criminal violations; and (2) indigent defense providers need to have sufficient resources to provide representation to the remaining misdemeanor defendants. At least some states have begun to recognize that reclassifying minor crimes as non-criminal violations not only can help them achieve constitutional compliance but also can result in significant cost savings.³⁸ For instance, Massachusetts undertook a study in which it determined that attorneys were appointed to represent 59,000 indigent defendants charged with minor crimes that did not threaten public safety, including operating a motor vehicle with suspended registration or license, trespassing, writing a bad check, disturbing the peace, and shoplifting. If those cases had been deemed civil infractions, rather than criminal offenses, the state would have saved approximately \$8.5 million in costs of representing those defendants.³⁹

Reclassifying minor misdemeanors to remove them from the criminal justice system will reduce, at least in part, the volume of misdemeanor cases and will make representation

³⁷ The one direct cost of the defendant's incarceration that can be measured is the roughly \$10,000 for her four month incarceration. On average, incarcerating a person in jail for a year costs \$31,286.

³⁸ See *Minor Crimes, Massive Waste*, *supra* n.7, at 27-29 (describing efforts undertaken in Hawaii, Massachusetts, and Washington to decriminalize or de-penalize minor offenses that do not create a risk to public safety).

³⁹ *Justice Denied*, *supra* n.16, at 73.

in such cases a more realistic possibility for states and localities. But reclassification alone cannot solve the constitutional crisis in misdemeanor representation without states and localities devoting additional resources to fund indigent defense providers. Of fundamental importance, states must have an incentive to take steps to comply with the constitutional rights of these defendants, otherwise the current patterns of widespread violations will continue unabated.

THE IMPORTANCE OF FEDERAL LEGISLATION TO PROVIDE STATES WITH INCENTIVES TO UNDERTAKE REFORMS

Federal legislation would provide states and localities with much-needed incentives to take the steps necessary to come into compliance with the right to counsel in misdemeanor cases. I will identify five options for federal legislation, all of which I believe could help move states towards constitutional compliance.

First, legislation providing the Department of Justice with the authority to file civil actions for declaratory or injunctive relief against states or municipalities that engage in patterns and practices of violations of the misdemeanor right to counsel would provide states and localities with significant incentive to comply with their constitutional obligations. The authorization provided to the Department of Justice in 42 U.S.C. §14141 to file actions where states or municipalities engage in a pattern or practice of violating the rights of juveniles provides a useful model. The Department has exercised that authority very sparingly, and has resorted to litigation only in the most extreme cases. But because it has the authority to seek injunctive relief against states it has reasonable cause to believe are engaging in patterns and practices of constitutional violations, states have an incentive to comply with the Constitution in juvenile cases. Similarly, providing such authority here both would give states an incentive to rectify practices that have led to patterns of violations of the constitutional right to misdemeanor representation as set forth by the Supreme Court and would allow the Department to assist those jurisdictions in finding ways to come into compliance.

Second, legislation should be enacted to ensure that states and localities receiving federal funding for law enforcement and criminal justice systems are not engaged in widespread violations of the constitutional right to counsel in misdemeanor cases. Legislation conditioning funding provided under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program could require that states and localities receiving such funding submit documentation of (1) the total number of misdemeanor cases processed through their courts; (2) the numbers of misdemeanor defendants who were represented by counsel; and (3) the percentage of represented defendants who were represented by court-appointed counsel.

Particularly given the fact that most jurisdictions now maintain electronic databases on their cases, requiring the collection of information regarding representation should not be burdensome.⁴⁰ Conditioning funding on the collection of this data would serve

⁴⁰ Indeed, the Bureau of Justice Statistics already collects this information in felony cases in the most populous jurisdictions, and it likely can assist states with ways to collect these data.

several critical functions. First, it would provide important data (that currently do not exist) regarding both the volume of misdemeanor cases and, more importantly, the precise scope of the constitutional violations. Second, requiring states and localities to collect and report these pieces of data may lead them to discover the magnitude of the constitutional violations which could lead to local reform efforts. Finally, if the Department of Justice is authorized to bring actions alleging a pattern or practice of violations of the constitutional right to counsel in misdemeanor cases, these data can help the Department understand the jurisdictions in which the violations are most widespread.

Such compliance obligations, moreover, could be developed in conjunction with the National Center for State Courts, which has taken the lead in ensuring that data are available for cases in state and local courts. The National Center for State Courts likely would prove to be an incredibly valuable resource as states and localities keep these data, and also could help make such data publicly available.

Third, in conjunction with the previous recommendation, Byrne JAG funding could be conditioned on states and, more importantly, local jurisdictions, having an indigent defense structure. Jurisdictions that do not have limited jurisdiction courts have reported far fewer problems with providing counsel in misdemeanor cases. This fact likely is because those jurisdictions provide representation in misdemeanor cases as a part of their overall representation of defendants in the state. That structure does not exist in most states. Misdemeanor cases arise in county, municipal, local, and mayor's courts, as well as in state courts among many others. Some of these courts have the structure to provide counsel to defendants. But many do not. Conditioning funding on ensuring that jurisdictions have developed structures to provide lawyers will help assure the appointment of lawyers to defendants who are constitutionally entitled to counsel.

Fourth, legislation authorizing funding for pilot programs in state, municipal, and local courts would assist those jurisdictions as they examine the feasibility of reclassifying some of the high-volume misdemeanor cases (such as driving on a suspended license) as civil infractions. As discussed above, at least some jurisdictions are eager to reclassify some minor offenses, but they need assistance both in assessing the offenses that make most economic sense to reclassify and in measuring the impact of reclassification on public safety. Federal support could help courts transition minor offenses out of the criminal justice system, thereby saving jurisdictions the cost of representation and all of the other costs associated with criminal cases.

Finally, federal legislation could create a National Defender Services Center that would both organize the efforts of indigent defense providers nationwide and provide training to indigent defense lawyers nationwide.⁴¹ Organizing the efforts of indigent defense providers across the country would result in significant benefits to misdemeanor defendants by raising the awareness of every defense lawyer to the ongoing constitutional violations occurring sometimes before their eyes.

⁴¹ See Gideon's Broken Promise, *supra* n. 19, at 41 (recommending creation of such a Center).

CONCLUSION

The constitutional right to counsel in misdemeanor cases has been ignored in courts throughout the country. And while courts protest that they cannot comply with defendants' constitutional right to counsel, misdemeanor defendants suffer the consequences of the lack of counsel. Violations of core fundamental constitutional rights—including the First Amendment right to free speech and the Fourteenth Amendment right to be free of incarceration based solely on an inability to pay—occur in many courts, and no lawyer is available to protest these violations. States and localities desperately need incentives that the federal government can provide both to convert some of these criminal offenses out of the criminal justice system and to comply with defendants' constitutional rights in cases that remain part of the criminal justice system.

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Hearing on "Protecting the Constitutional Right to Counsel
for Indigents Charged with Misdemeanors"
May 13, 2015**

Good morning. Today the Senate Judiciary Committee holds a hearing on indigent misdemeanor representation. According to the Sixth Amendment Center, and certainly in my memory, this is the first time the Senate Judiciary Committee has ever held a hearing on this subject.

The Sixth Amendment provides criminal defendants with the assistance of counsel. For more than 50 years, following the Gideon decision, it has been clear that it is necessary to give people without financial means accused of crimes the right to a lawyer to help them navigate the system, preserve their rights, and make sure innocent people don't go to jail. Clarence Gideon himself, when retried with a lawyer representing him, was acquitted.

And that landmark ruling was extended in 1972 to misdemeanor defendants for good reason. The overwhelming majority of people who face criminal charges are prosecuted for misdemeanors. In Iowa, for example, 80% of all criminal prosecutions are for misdemeanors, among the highest rate in the country.

Some states have adhered to the Constitution. In Iowa, the county courts do an excellent job of providing counsel to misdemeanor defendants. I am pleased that Chief Justice Cady of Iowa is with us today. Last month, his court extended the right to counsel by not permitting uncounseled convictions to be used as sentencing enhancements in subsequent crimes. Uncounseled convictions must exist in Iowa, however, or the decision wouldn't be necessary.

But many states are not providing counsel as the Constitution requires. It is a widespread problem. In reality, the Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long.

Consider what is happening just in some of the states represented on this Committee. Defendants are not present at arraignments. Large numbers of misdemeanor defendants plead guilty without lawyers. Defendants who have been locked up pending their first appearance are told that they can plead guilty and be sentenced to time served. But if they choose to be represented by counsel, they will wait in jail until one is appointed. And problems exist on a smaller scale in the federal system.

When misdemeanor defendants aren't given counsel, no one can challenge the legality of a traffic stop or to make the prosecution prove every element of an offense beyond a reasonable doubt. So innocent people may be going to jail. In locations where lawyers are provided at every stage of the process, about 25% of all cases are dismissed.

There are members of the Senate who want to reduce sentences for felons. At least those individuals have been proven beyond doubt to have, for instance, sold large quantities of drugs that poison our children and bring violence to our streets. But to really address sentencing reform, we should also be looking at the vast majority of crimes in this country – misdemeanors – and the uncounseled prison sentences that punish them.

These constitutional violations cause serious repercussions. People who are convicted of misdemeanors, whether they received legal representation or not, may have problems obtaining a job for the rest of their lives. That hurts them. It hurts the economy. It hurts all of us.

Misdemeanor convictions give rise to other collateral consequences. Housing assistance and student loan eligibility might be compromised. Some misdemeanor convictions can lead to loss of gun ownership rights. Some misdemeanors, when repeatedly violated, become felonies. Yet prior uncounseled misdemeanors should not count toward felonies and their consequences. Misdemeanor convictions can also make defendants ineligible for the federal safety valve. That is a provision that allows first time, low level drug offenders to avoid mandatory minimum sentences. In many instances, misdemeanor defendants are unaware of those consequences when they enter into guilty pleas.

I don't think that the solution to the problem is another federal grant program. According to a 2012 GAO report, there are already 13 such programs. And of the 9 that can be used for indigent defense and for other purposes, states haven't used the grants for counsel. Indigent representation isn't their priority. In fact, barely half of all defender offices even knew that these funds could be used for indigent defense. Perhaps we need a better federal effort in coordinating and maybe even dispensing these funds, combined with transparency and accountability for why states aren't spending available funds for indigent defense.

One way to address the problem would be for states to reclassify some misdemeanors as civil offenses or eliminate prison sentences for various misdemeanors. Perhaps civil fines would be just as effective without making states pay for lawyers or causing collateral consequences. We will hear testimony today about diversion programs that take some offenses out of the criminal justice system.

States often make lawyers sit through CLE programs of dubious value. Perhaps they would render a better public service by requiring lawyers to provide assistance to indigent misdemeanor defendants instead.

What is particularly troubling about these constitutional violations is who is committing them. It is our judicial system. The states and the state courts must adhere to the Bill of Rights. Respect for our courts as well as the rule of law demands that.

Widespread, intractable violations of the Sixth Amendment have existed for more than 40 years. Few prospects exist that the states will soon remedy those violations. State systems need to be reformed. We need to know what is happening. We pride ourselves on a legal system that provides equal justice for all. For that to be real, we must make sure that those who cannot afford it receive representation.

I thank our witnesses for being with us today.

**Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on “Protecting the Constitutional Right to Counsel for Indigents Charged with
Misdemeanors”
May 13, 2015**

Rarely does a hearing touch core constitutional obligations more directly than what we are discussing today. Our Founders were determined that the government’s power be limited. The Sixth Amendment right to counsel is a cornerstone of that principle. It is a guarantee that before your liberty is taken, before the government can put you in jail, it must prove its case against you in what the Supreme Court has called the “crucible of meaningful adversarial testing.” And that requires a lawyer.

It should shock us that that basic promise – the right to counsel – a promise every school child knows -- is being violated daily all over this country. When coupled with the tremendous expansion of misdemeanor offenses, the result is that people are being jailed -- sometimes for weeks or months -- for petty infractions like burning leaves, driving on a suspended license, or sleeping on a public bench.

This over-criminalization and over-incarceration makes people feel powerless and under attack. It eats away at communities. One of the most disturbing findings in the Department of Justice’s review of Ferguson, Missouri, is that in a city with a population of 21,000 people -- 16,000 people have outstanding *arrest* warrants, most of them for minor parking and traffic violations. Something has gone terribly wrong with our system.

I am grateful that Chairman Grassley has convened this hearing today. The constitutional violations we will hear about deserve our attention and action. I would very much like to work with him to find solutions.

Fifty-two years ago, the Supreme Court issued its landmark decision in *Gideon v. Wainwright*, affirming a fundamental principle of our democratic society, that no person, regardless of economic status, should face prosecution without the assistance of a lawyer. Cases since then have held that this must hold true regardless of whether the crime is a misdemeanor or a felony. When the government seeks to take a person’s liberty – even if only for a day or two - it must also assume the cost of providing an effective defense.

The consequences of misdemeanor charges and convictions can be life altering. Even short jail sentences often mean the loss of a job, and that in turn means car payments cannot be made and rent cannot be paid. The dominos continue to fall and what was once a stable life is upended. Add to that mix payments to a probation company for your monitoring, and the new difficulty in getting a job because of your record, and what was once a simple infraction is now an insurmountable hurdle. Misdemeanor convictions matter. And that is why having a lawyer matters.

Vermont has a strong record of providing counsel to all indigent defendants and I am proud of our Office of the Defender General. Unfortunately, far too many cities, counties and states

around the country still lack adequate systems for providing effective representation. We cannot turn a blind eye to that failure. Our constitution requires more.

I offer one approach to solving this problem in my Gideon's Promise Act. That bill would provide technical assistance to state and local governments to help them meet their Sixth Amendment obligations and it would authorize the Attorney General to seek relief through civil action if systemic failures continue. I am sure there are other ideas we should consider as well.

Americans need and deserve a criminal justice system that keeps us safe, ensures fairness, and fulfills the promise of our Constitution for all people. While it is easy to talk about lofty constitutional principles, the reality is that it will be hard work to implement the kind of change we are talking about today. I stand ready to do this work with Chairman Grassley and the rest of this committee.

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QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY
HEARING ON "PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL FOR
INDIGENTS CHARGED WITH MISDEMEANORS"
MAY 13, 2015

Question for Chief Justice Cady:

It was suggested at the hearing that some Sixth Amendment violations could be avoided if more misdemeanors were reclassified as civil offenses punishable only with civil penalties. You, however, indicated that changing criminal offenses in this way might pose problems that might not be considered. Can you indicate what issues might be associated with reclassifying misdemeanors as civil offenses?

Question for Mr. Singleton:

Your testimony was valuable in discussing particular situations where individuals were denied counsel for misdemeanor charges. At the hearing, you explicitly stated that you preferred to address individual examples rather than statistics due to the time constraints. Would you like to take this opportunity to supplement your testimony by presenting any statistical information that might be useful to the Committee?

- Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?
- You mentioned diversion programs in your testimony as a solution to the overwhelming caseload for prosecutors instead of plea deals. There are many criticisms of diversion programs, including the monetary costs to offenders and the community, the inability of some offenders to abide by the requirements of the program, and the leniency of such programs contributing to a lack of respect for the law. Is it your contention that diversion programs are actually effective in light of these criticisms and, if so, how do you suggest jurisdictions change diversion programs to address these problems?
- England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

- Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?
- In full consideration of the right to speedy trial, along with the significant debt of the Federal Government, the inability of States with budget shortfalls to allocate more resources in this area, and the effectiveness of Clinton era policies in reducing crime through tougher sentencing laws, what are some specific suggestions that would reduce your concerns in this area without risking the safety of law abiding citizens while also allowing States to maintain balanced budgets?
- England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

- Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?
- As you mentioned, Indian Civil Rights Act of 1968 incorporated many constitutional protections, but did not include the right of indigents to appointed counsel in criminal cases because the Federal Government recognized the different political and cultural status of the tribes. Some of your suggestions in your testimony would undermine the sovereignty of Indian tribes to make their own laws and policies, such as eliminating the requirement to exhaust tribal court remedies before seeking habeas relief in federal court. Do you have specific suggestions for addressing the expansion of Indian rights while also respecting the sovereignty of Indian tribes?
- England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

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June 3, 2015

Senator Chuck Grassley
Chair, Senate Judiciary Committee
c/o Jason A. Covey
Hearing Clerk
Washington, D.C. 20610

Dear Senator Grassley:

Thank you again for the opportunity to testify at your hearing on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors. Please accept this letter as my answers to Senator Vitter's questions that you forwarded to me.

Question 1:

- *Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?*

The Fourteenth Amendment, adopted in 1868, was designed to apply the Bill of Rights to the States. The text of the Amendment reads in pertinent part:

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court interpreted the due process clause of the Fourteenth Amendment to require that "state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the states, and do not depend upon or vary with local legislation." *Hebert v. State of La.*, 272 U.S. 312, 316-17, 47 S. Ct. 103, 104, 71 L. Ed. 270 (1926).

The Court made clear in *Powell v. Alabama*, 287 U. S. 45, 68 (1932) that "the right to the aid of counsel is of this fundamental character." The Court also pointed out that the American colonies

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Senator Chuck Grassley
June 3, 2015
Page 2

recognized the importance of the right to counsel:

Before the adoption of the Federal Constitution, the Constitution of Maryland had declared 'That, in all criminal prosecutions, every man hath a right * * * to be allowed counsel. * * *' Article 19, Constitution of 1776. The Constitution of Massachusetts, adopted in 1780 (part the first, art. 12), the Constitution of New Hampshire, adopted in 1784 (part 1, art. 15), the Constitution of New York of 1777 (article 34), and the Constitution of Pennsylvania of 1776 (Declaration of Rights, art. 9), had also declared to the same effect. And in the case of Pennsylvania, as early as 1701, the Penn Charter (article 5) declared that 'all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors'; and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700—1781, vol. 1, p. 134), that in capital cases learned counsel should be assigned to the prisoners.

Powell v. State of Ala., 287 U.S. 45, 61, 53 S. Ct. 55, 61, 77 L. Ed. 158 (1932).

An example of the states' long-standing recognition of the fundamental nature of the right to counsel is the Louisiana Supreme Court's decision in 1886 in which it wrote: "The Constitution and laws of the land guarantee to parties charged with crime, the right to be heard by counsel. This is no meaningless formality, but it is an inestimable right, and the more appreciable when the charge involves the life of a human being." *State v. Simpson*, 38 La. Ann. 23, 24 (1886).

The U.S. Supreme Court in *Powell* noted that the fundamental principle of providing counsel "is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution." *Powell v. State of Ala.*, 287 U.S. 45, 67.

In 1938, the Court said:

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

Johnson v. Zerbst, 304 U. S. 458, 304 U. S. 462 (1938).

Of particular importance to the consideration of lawyers in misdemeanor cases, the Supreme Court said in *Argersinger v. Hamlin*, 407 U.S. 25, 31(1972): "The assistance of counsel is often a requisite to the very existence of a fair trial."

The Court in *Gideon v. Wainwright*, 372 US 335, 344 (1963), explained the fundamental nature of the right to counsel:

Senator Chuck Grassley
 June 3, 2015
 Page 3

Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Twenty-three of the states supported Gideon's position by filing an amicus curiae brief, calling for recognition of the Sixth Amendment right to counsel in state courts. See, Anthony Lewis, Gideon's Trumpet, at 146-148.

The original framers of the Bill of Rights had no view about the Fourteenth Amendment as it was adopted 77 years after the original first ten amendments were adopted in 1791. The Supreme Court's analysis that the Fourteenth Amendment protects fundamental principles of justice such as the right to counsel makes sense. Without lawyers, court proceedings often can be unfair and result in unjust verdicts. Requiring the states to respect the right to counsel is consistent with American traditions of fairness and the protection of the individual against possible government abuse.

Question 2:

- *You mentioned diversion programs in your testimony as a solution to the overwhelming caseload for prosecutors instead of plea deals. There are many criticisms of diversion programs, including the monetary costs to offenders and the community, the inability of some offenders to abide by the requirements of the program, and the leniency of such programs contributing to a lack of respect for the law. Is it your contention that diversion programs are actually effective in light of these criticisms and, if so, how do you suggest jurisdictions change diversion programs to address these problems?*

Senator Chuck Grassley
June 3, 2015
Page 4

Well-run diversion programs, such as the City of Spokane suspended driver license program and the Seattle Law Enforcement Assisted Diversion (LEAD) program I mentioned are effective and can minimize or avoid the problems identified in the criticisms of other programs. The LEAD program was developed by defenders, prosecutors, law enforcement, and community and business leaders, and it addressed in advance a wide range of concerns. That kind of careful preparation by a broad spectrum of stakeholders can build a strong foundation for a new program. As I testified, LEAD has proven effective in reducing recidivism. The recent evaluation found that “the LEAD group had 39% lower odds of being charged with a felony subsequent to evaluation entry compared to the control group.” See, LEAD Program Evaluation: Recidivism Report”, March 27, 2015, available at http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=kPB7NzCnW9GImOljYwO0U%2B40zk%3D.

The City of Spokane diversion program for suspended driver license cases is conducted in connection with a re-licensing program. The City prosecutor developed the program with significant support from non-profit program leaders. The cost of running the program is more than recouped by the fines paid by defendants who are able to get their driver’s licenses back and work. An evaluation of a similar program in King County, Washington, “found that it returned two dollars for every dollar spent, cut the jail population, and helped people get their licenses back.” Robert C. Boruchowitz, Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own, 11 Seattle J. for Soc. Just. 891, 922 (2013).

These programs have minimal costs for the participants and the savings they generate (in court costs, attorney costs, and jail costs, and in Spokane, increased receipt of outstanding fines) exceed the community’s costs in running them. Rather than foster disrespect for the law, these programs increase respect by treating people fairly and providing them an opportunity to overcome the obstacles to leading productive lives. The LEAD evaluation notes that traditional approaches to prosecution of certain crimes have been counterproductive:

Despite policing efforts, drug users and dealers frequently cycle through the criminal justice system in what is sometimes referred to as a “revolving door.” The traditional approach of incarceration and prosecution has not helped to deter this recidivism. On the contrary, this approach may contribute to the cycle by limiting opportunities to reenter the workforce, which relegates repeat offenders to continue to work in illegal markets. This approach also creates obstacles to obtaining housing, benefits, and drug treatment. There have thus been calls for innovative programs to engage these individuals so they may exit the revolving door.

LEAD Program Evaluation, *supra*, at 4.

Senator Chuck Grassley
June 3, 2015
Page 5

Other cities have adopted the LEAD approach or are considering it. Santa Fe, New Mexico began a program in 2014. See, “City Launches LEAD Putting Santa Fe in Proactive Spotlight”, available at http://www.santafenm.gov/news/detail/city_launches_lead_putting_santa_fe_in_proactive_spotlight. Ithaca, New York, is considering implementing LEAD. See, “The Seattle model Ithaca may use to shatter drug-jail cycle”, The Ithaca Voice, May 22, 2015, available at <http://ithacavoice.com/2015/05/the-seattle-model-ithaca-may-use-to-shatter-drug-jail-cycle/>.

Well-run diversion programs can hold people accountable, reduce the costs of traditional prosecution and incarceration, and provide proportionate responses to behavior. They can avoid the barriers to employment and housing that can result from convictions for misdemeanors and low-level felonies and at the same time help people become gainfully employed.

My suggestion is that jurisdictions evaluate their existing diversion programs to assess their costs and benefits and make appropriate changes and develop new ones that include the full spectrum of criminal justice professionals and community and business leaders in the planning process.

- *England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?*

The English experience is worth studying. The English central national government has responsibility for and the duty to provide and fund public defense. See, Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 Hastings L.J. 835, 861 (2004). England has been implementing major changes in the structure of its legal aid and public defense services. See, Legal Aid Agency Annual Report and Accounts 2013-14, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323366/laa-annual-report-accounts-2013-14.pdf. There has been considerable turmoil because the government drastically reduced payments to defense counsel. See, “U.K. Legal Brawl Puts Spotlight on Public-Defense Office”, Wall Street Journal, May 23, 2014, available at <http://www.wsj.com/articles/SB10001424052702303749904579579491037640928>. It will be interesting to see how England proceeds with its mix of defender and private counsel services.

There is a pending pilot program in Texas that permits some choice of counsel, with defendants able to choose among a list of qualified lawyers. The Texas Indigent Defense Commission describes it as follows:

Senator Chuck Grassley
June 3, 2015
Page 6

On February 2nd Comal County kicked off its first-in-the-nation Client Choice pilot project. Indigent defendants are now given the option to choose their attorney from the lawyers who have been qualified by the courts to handle indigent cases. The program aims to enhance the independence of indigent defense, foster more effective attorney-client relationships, and create new and stronger incentives for attorneys to provide good quality representation. Not all defendants wish to exercise the choice option, so the county reverts to the attorney rotation system when defendants decline.

Indigent Defense Newsletter 2015 Winter Edition, available at <http://archive.constantcontact.com/fs166/1117104151347/archive/1119972021965.html>

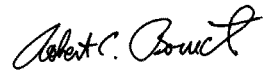
The evaluation of the program, due next year, should provide useful information on the effectiveness of a Client Choice approach. It is worth noting that Comal County has a population of about 119,000 people. Harris County, Texas, with a population of more than four million people, recently developed a hybrid system with a public defender and private assigned counsel. It would be more difficult to administer a full Client Choice system in a large urban jurisdiction.

While the structure of a public defense program can make a difference, the key components of independence, limited workload, and adequate resources, as well as the other essential dimensions recognized by the American Bar Association Ten Principles of a Public Defense Delivery System, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf, are needed in any system. Principle Two states: "Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."

Funding pilot programs including Client Choice that implemented the ABA Ten Principles would be a worthwhile effort. This is particularly so in jurisdictions that do not have an existing public defender office but are using panels of assigned counsel.

Thank you again for the opportunity to testify. Please let me know if there is additional information I could provide.

Sincerely,



Robert C. Boruchowitz
Professor from Practice

QUESTIONS FOR THE RECORD

HEARING ON "PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL FOR INDIGENTS CHARGED WITH MISDEMEANORS"

MAY 13, 2015

Question for Chief Justice Cady from Senator Charles E. Grassley:

It was suggested at the hearing that some Sixth Amendment violations could be avoided if more misdemeanors were reclassified as civil offenses punishable only with civil penalties. You, however, indicated that changing criminal offenses in this way might pose problems that might not be considered. Can you indicate what issues might be associated with reclassifying misdemeanors as civil offenses?

Answer:

Although minor misdemeanor offenses in many states could be reclassified as civil infractions to reduce the burden on the indigent defense system, states would need to do so carefully. Judges have long considered an individual's misdemeanor record when deciding on the appropriate felony or significant misdemeanor sentence. The reason for this is that defendants who demonstrate a pattern of unlawful behavior are a higher safety risk for their communities and are known to be less amenable to rehabilitation through probation or other alternative programming. If we are too liberal in the reclassification of misdemeanors to civil infractions, we will prevent the building of a criminal history on individuals who repeatedly appear before the courts. This may inadvertently prevent more serious and appropriate sanctioning of those individuals for their future conduct.

There are a number of misdemeanors for which state legislatures have determined that the underlying conduct should be punished more seriously upon the second or subsequent conviction. For example, in many states, the charges of driving under the influence, domestic battery/assault, shoplifting, carrying a concealed weapon, etc., fall into this category. If these misdemeanors are reclassified as civil infractions, the infraction may not be able to be used as an underlying conviction to support a more significant offense in a future charge. This may not be problematic in the state making the change as they can adjust other aspects of their criminal code accordingly. However, it could significantly impact other states as they try to enhance an offense for repetitive unlawful conduct, only to find that the precatory offense was a civil infraction.

In the past few decades state courts have placed a significant amount of human and financial resources into developing problem solving courts. Although there are many types of these, one essential characteristic is present in all of them. The court uses the threat of incarceration as an inducement to get people to participate. If there is no threat of incarceration, there may be less incentive for participation. Although problem solving courts focus mainly on felony defendants, some of these courts are open to defendants with misdemeanor charges.

Last, fines and courts costs are a court ordered sanction and the court needs to ensure that defendants comply by paying, at least to the extent that they can. From a judicial perspective, requiring payment is much more about ensuring fidelity in the justice system than it is about the actual monetary amounts received. If a defendant gets the sense that they don't need to pay for a speeding ticket, how likely are they to pay court ordered child support or appear for a jury summons? In some cases, giving a trial judge the ability to render a sentence of incarceration and then suspend that sentence, provides the court with the necessary leverage to ensure that a defendant complies with the court ordered responsibility to pay.

There are misdemeanors that can and should be reclassified as civil infractions. This change would reduce the burden on a strained indigent defense system and can be done without impacting the safety of communities. However, state legislatures should only make these adjustments after consulting with leaders in their judiciary and other justice system partners so the consequences of any prospective changes can be thoroughly considered.

Questions from Senator David R. Vitter:

Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?

Answer:

The U.S. Supreme Court addressed this issue in Gideon v. Wainwright, 372 U.S. 335 (1963), and held that the Sixth Amendment's guarantee of the right to state-appointed counsel applied to the States through the Fourteenth Amendment. Although this ruling has been refined over the years, it has not been significantly challenged in over 50 years and as such is deeply rooted in the fabric of American jurisprudence. It is the duty and responsibility of each and every judicial officer in state courts to comply with the requirements of Gideon and its progeny.

In full consideration of the right to speedy trial, along with the significant debt of the Federal Government, the inability of States with budget shortfalls to allocate more resources in this area, and the effectiveness of Clinton era policies in reducing crime through tougher sentencing laws, what are some specific suggestions that would reduce your concerns in this area without risking the safety of law abiding citizens while also allowing States to maintain balanced budgets?

Answer:

As indigent defense representation is constitutionally mandated, states must place more emphasis on it in their fiscal decision making process. Legislatures are faced with complex fiscal decisions based on competing requests for funding. However, indigent defense system funding must be a priority.

England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender

offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

Answer:

The Sixth Amendment does not require that an indigent defendant be provided with an attorney of his/her choice. However, that being said, a pilot program would be an interesting innovation to study a number of aspects of an indigent defense system. The program could look at outcome differences, cost differences, etc. I would support this pilot program if a robust evaluation of the results was incorporated into the program.

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June 3, 2015

Senator Charles E. Grassley
Chairman
Attention: Jason Covey
Hearing Clerk
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224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

Thank you again for the opportunity to testify before the Committee on the right to counsel. Thank you also for the supplemental questions on behalf of Senator Vitter. Here are my responses to those questions.

- 1) **Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?**

In *Gideon v. Wainwright*, the Supreme Court held that the assistance of counsel in a criminal prosecution is so “fundamental and essential to a fair trial” that it fit within that class of rights that are “fundamental” and thus incorporated against states under the Fourteenth Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932). I agree with the Supreme Court that having counsel is fundamental to a fair and reliable criminal justice system. Within the selective incorporation framework, I believe that also makes it appropriate for incorporation against states. See *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 759-66 (2010) (tracing the history of selective incorporation jurisprudence). That conclusion has not been seriously challenged since *Gideon* was decided more than fifty years ago.

- 2) **As you mentioned, Indian Civil Rights Act of 1968 incorporated many constitutional protections, but did not include the right of indigents to appointed counsel in**

criminal cases because the Federal Government recognized the different political and cultural status of the tribes. Some of your suggestions in your testimony would undermine the sovereignty of Indian tribes to make their own laws and policies, such as eliminating the requirement to exhaust tribal court remedies before seeking habeas relief in federal court. Do you have specific suggestions for addressing the expansion of Indian rights while also respecting the sovereignty of Indian tribes?

Any suggestions addressing this question must be considered first in light of the interplay of federal criminal law and the laws of tribal governments. Second, it must be considered in light of the long history federal Indian law and its impacts, often detrimental, to the sovereignty and independent functioning of tribal governments.

My suggestions at the hearing were intended to target how federal law promotes or undermines the right to counsel. To that end I would say again: federal law should never permit a conviction without counsel to serve as an offense element, predicate offense for sentencing enhancement based on recidivism, or sentencing enhancement. That has been done, however. For example, 18 U.S.C. § 117 punishes assault of domestic partners following two or more convictions for domestic abuse in federal, state, or tribal court. In my experience, and the experience of other Indian Country practitioners I have spoken with, tribal court convictions are commonly obtained without counsel. Counsel may simply be unavailable or, more commonly, regardless of availability a defendant who is detained is told that if they enter a guilty plea they will receive a time served sentence but will remain detained until counsel can be appointed. The defendant thus chooses to get out that day rather than waiting for an uncertain result at some later point. While the practice of “plea for release” also occurs in state courts, through application of the Sixth Amendment, such uncounseled convictions could not be used for a prosecution under 18 U.S.C. § 117.

At least two Circuit Courts of Appeals have upheld this use of convictions obtained without counsel to serve as elements of a federal offense. See *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011). Thus, federal law is using a conviction obtained without counsel to be an element of a federal offense. This is not a question of tribal sovereignty, it is a question of whether federal law is respecting the right to counsel or not.

In a similar vein, the Indian Civil Rights Act itself imposed limits on the sovereignty of tribal governments through application of some aspects of the Bill of Rights which did not apply to tribal governments before ICRA’s passage. See *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (constitutional limits do not apply to tribal governments). ICRA’s purpose was to extend protections under the United States Constitution to a class of citizens, Indians, who did not have the same protections as all other citizens of the United States. However, ICRA did not extend the right to counsel, leaving Indians as the only American citizens who could be subject to criminal prosecution and incarceration without a lawyer. Later, the Tribal Law and Order Act did provide that counsel must be provided, but only for cases involving incarceration for more than one year. Thus federal law specifically allows a class of American citizens, and only that class, to be incarcerated for up to a year without a lawyer. This too seems not so much a question

of tribal sovereignty as respect for the rights of all American citizens and equal protection of the laws.

It might be a different question had Congress simply not acted in either circumstance. Tribal governments, acting under their pre-constitutional authority, could have structured their own systems of justice (and historically did so). However, in both instances rather than arguably respecting by tribal sovereignty by not acting, federal law affirmatively provided Indians with fewer constitutional protections than other citizens. If Congress acts in these areas, it should do so in a way that does not disadvantage Indians in the name of tribal sovereignty.

Secondly, the history of interaction with tribal justice systems is not one of promoting or respecting tribal sovereignty. In *Ex Parte Crow Dog*, the Supreme Court affirmed a tribal government's resolution of a murder through its traditional system and held that federal law enforcement had no role in the matter. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The almost immediate federal response was to enact the Major Crimes Act, which provided federal criminal jurisdiction over certain enumerated crimes, including murder. 18 U.S.C. § 1153. This effectively eliminated the ability of tribes to make and be governed by their own laws for the most serious criminal offenses because those cases could, and would, be prosecuted federally regardless of how the tribes might otherwise have handled them.

Traditional tribal systems of justice were destroyed over the course of decades of federal Indian law and policy. In the 1880's, Courts of Indian Offenses were imposed by the Bureau of Indian Affairs and with them, the western model of an adversarial justice system. *See generally, Barbara Creel, The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 *Michigan Journal of Race & Law*, 317, 338-42 (2013). This process continued with enactment of the Indian Reorganization Act of 1934. Under the IRA, tribes were encouraged to adopt constitutions and law codes, but only with the approval of the Bureau of Indian Affairs, which resulted in systems that moved from traditional tribal practices to replicas of the western justice system, typically in the form of "model" constitutions and codes put forth by BIA. *See Creel* at 341-44.

Tribal governments have long ago been forced into systems of law and order that are not theirs. With that reality in mind, Congress should not take additional steps that leaves Indians, or non-Indians subject to tribal court jurisdiction pursuant to the Violence Against Women Act Reauthorization of 2013, with fewer protections than all other American citizens are entitled to in all other courts within the United States.

It is light of this background that I offer suggestions about how to proceed to balance federal criminal law and expansions of tribal court jurisdiction with tribal sovereignty. First, my suggestion about eliminating the requirement for tribal court exhaustion prior to seeking a writ of habeas corpus is intended to provide an effective and expeditious remedy for violations of the right to counsel under ICRA, TLOA, and VAWA. The reality of my experience in Indian Country is that, even setting aside whether counsel is available as a matter of law, geographic isolation and sparse population makes getting a lawyer a very difficult problem practically. That problem is paired with the fact that detention is often continued while counsel is sought or remedies pursued. Expediting a remedy of the rights guaranteed under these jurisdictional statutes is a necessary concomitant to providing the expanded jurisdiction. It is not an

undermining of tribal sovereignty, but a necessary protection of the rights of individual criminal defendants.

Second, as part of expanded jurisdiction under TLOA, additional resources for tribal governments should be explored. Under TLOA, Special Assistant United States Attorneys are authorized and can appear concurrently in tribal and federal courts on matters of concurrent jurisdiction. Changes to TLOA and the Criminal Justice Act could be made to authorize Special Assistant Public Defenders who could provide counsel to individuals for both matters as federal and tribal prosecutions often occur in parallel for some offense conduct. These individuals could also provide additional training and other support for tribal public defender offices. Along the same line, expanded funding and authority to the Defender Services Office, or to state and local public defenders, could be provided to assist tribal public defenders. Programs for that purpose exist within the Department of Justice but it is ultimately a difficult pairing for the same entity that is charged with prosecuting offenders to train and fund those defending them.

Third, as an alternative to expanded jurisdiction under TLOA and VAWA, the authority of tribes to utilize traditional tribal justice systems should be restored. As part of that, a formal consultation process should be implemented so that if the tribe chooses to use its traditional justice practices that federal charges do not follow. This would truly promote tribal sovereignty and self-determination.

It may be difficult to balance tribal sovereignty and individual rights. That is true for any government, however. It the largest part of the history of the United States Constitution. From scratch a different balance may have been struck. Working from the history and reality that we must, however, it is critical in my judgment that we assist tribal courts to provide the American citizens prosecuted in their courts full Constitutional protections while providing tribes with real choices on whether to accept the adversarial western criminal justice system for some, all, or none of the crimes that occur within their jurisdiction. That would be a true balance.

- 3) **England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?**

Recent history in England demonstrates that, fundamentally, any system of indigent defense must be provided adequate funding, staff, and resources. Without adequate resources, no system can provide effective assistance of counsel.

England's system, including the choice of counsel, was highly regarded. *See In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 *Hastings L.J.* 835 (2004); *Public Provision of Legal Services in the United Kingdom: A New Dawn*, 24 *Fordham Int'l L.J.* 143 (2000). At that time, England provided per capita funding for indigent defense that was triple that provided in the United States. *See Norman Lefstein, Criminal Defense Representation in England and the United States*, Int'l Society for the Reform of Criminal Law - 18th International Conference (August 2004). However, England recently made drastic cuts to

its indigent defense system and imposed a stringent system of financial means testing for eligibility for counsel. See Margo Patrick, *U.K. Legal Brawl Puts Spotlight on Public-Defense Office*, *The Wall Street Journal* (May 23, 2014); Samira Shackle, *How legal aid cuts are harming the voiceless and most vulnerable*, *NewStatesman* (Jan. 13, 2014). Without adequate resources, England's program has suffered as have those receiving counsel through it.

In my opinion an effective system of indigent defense must have certain key attributes. First, counsel must be available, in both structural and practical terms. As I described at the hearing, in many tribal courts counsel is not provided and is often simply not practically available due to geographic isolation and limited numbers of lawyers. Another widespread problem that was discussed (in tribal, state, and local courts alike) was facing the choice of significant delays to obtain counsel which results in continued detention prior to trial, admissions against interest, and other significant tactical errors that can compromise the ability to defend the case, and the disturbing and widespread practice of simply pleading guilty without counsel to "move on," without a full understanding of the collateral consequences that often follow even misdemeanor convictions. To be effective, a system of indigent defense has to make counsel actually and readily available at all proceedings.

Second, any system of indigent defense must have adequate resources. Those resources need to be on par with those available to the prosecution. As discussed at the hearing, many public defenders labor under excessive caseloads, without adequate investigative or expert resources, and without ability to get additional resources or training. It is hard, if not impossible, to identify a "typical" case and the resources needed to handle it. Some high level felony prosecutions ultimately involve very straightforward facts, legal issues, and consequences while some lower level offenses can involve significant resources including mental health experts or technical experts (such as chemists in driving under the influence cases) and implicate complicated legal issues such as immigration status, eligibility for subsidized housing, and impacts on the ability to be employed in certain positions. Setting a "standard cost" for any offense or class of offenses risks not making adequate resources available.

Lastly, there must be independence. Those providing indigent defense must have the ability to be loyal first, last, and completely to the best interests and decisions of their clients. That need exists both under the rules of professional responsibility for lawyers and for effective representation. The structures of any indigent defense system must be attentive to preventing improper influence through the appointment, management, or compensation processes.

I identify these three bedrock aspects of a robust indigent defense system because I think they inform the discussion of how such a system can and should be structured. I would not argue that a pilot project for vouchers is impossible. In fact, due to conflicts in multi-defendant cases (e.g., drug conspiracies) involvement of private attorneys through appointment is necessary even with a dedicated indigent defense office. That is central to provision of indigent defense in the federal courts under the Criminal Justice Act. In light of that involvement, a hybrid system allowing for client choice is certainly possible. I do think, however, that a system of public defender offices being the primary means of indigent defense has advantages. I think it is easier to obtain the necessary conditions of availability, adequate resources, and independence through those offices. The expertise developed through doing only criminal defense results in better

service to clients more efficiently. The relationships developed with other stakeholders in the criminal justice process promotes the identification of and proposed solution of issues within the system. Public defender offices do not have to solicit clients, handle civil cases, or otherwise be distracted from effective representation of the client. While I recognize that this system is not the only possible system, I do think it is the best system.

Thank you again for the opportunity to address this important issue and these questions. I would be happy to provide any additional information to the Committee at any time.

Sincerely,



Neil Fulton
Federal Public Defender

NF/ng



School of Law

Erica J. Hashimoto
*Assoc. Dean for Clinical Programs
 & Experiential Learning
 Allen Post Professor of Law*

June 3, 2015

Senator Charles Grassley
 Chair, Senate Judiciary Committee
 c/o Jason A. Covey
 Hearing Clerk
 Washington, D.C. 20610

Dear Senator Grassley:

Thank you for calling me as a witness at the hearing on May 13, 2015, and for providing the opportunity to respond to the questions posed by Senator Vitter. My responses are set forth below.

1. *Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?*

As many scholars have recognized, there is a strong historical argument for the right to counsel in criminal cases initiated by the state, and the Court so held in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Even if one were to disagree with the *Gideon* Court's analysis, moreover, every Justice on the current Supreme Court appears to agree that the right to counsel serves as one of the most foundational rights afforded to criminal defendants. Whether through the incorporation of the Sixth Amendment right to counsel into the Fourteenth Amendment Due Process Clause,¹ or through a right to counsel located directly in the Fourteenth Amendment

¹ The Court in *Gideon*, 372 U.S. at 335, held that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel. Because the Supreme Court has so held, that would appear to be the strongest argument for applying the Sixth Amendment right to the states through the Due Process Clause. Because the Supreme Court set forth that holding so clearly, however, I have devoted most of this section to the other arguments for incorporation.

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right to Due Process, there appears to be no disagreement on the Court that the Fourteenth Amendment guarantees criminal defendants a right to counsel.²

In *Gideon*, the Court quite properly recognized that the right to counsel “expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” 372 U.S. at 340. The Court emphasized that “in our adversary system of criminal justice”—a system in which the government was represented by counsel—“any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Id.* at 344. Accordingly, the Court held that the Fourteenth Amendment’s Due Process Clause guaranteed the right to counsel in criminal cases.

The Court’s judgment that the Fourteenth Amendment guarantees a right to counsel, moreover, rested on solid historical and textual footing.³ As Professor Akil Amar and others have painstakingly set forth, the text of the Fourteenth Amendment, along with the debates accompanying it, demonstrates that the framers intended at the very least that the Fourteenth Amendment incorporate the individual rights and privileges that the Bill of Rights guaranteed against the federal government.⁴ And, of course, the Sixth Amendment right to counsel guarantees a right to counsel in order to protect individuals from the risk of an unfair trial by the government. As a result, the history of the Fourteenth Amendment demonstrates that the framers intended that the Sixth Amendment right to counsel apply against state governments.

Even if one believes that the Fourteenth Amendment did not incorporate the *Sixth Amendment* right to counsel, moreover, the right to counsel is so essential to the fundamental fairness of criminal proceedings that the Fourteenth Amendment itself guarantees a right to counsel.⁵ Indeed, in a similar context—the right of criminal defendants to waive the right to counsel and self-represent, which the Court found in the Sixth Amendment⁶—Justice Scalia has

² To be sure, Justice Felix Frankfurter expressed a very strong view that the Fourteenth Amendment’s Due Process Clause guaranteed nothing more than “an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.” See *Adamson v. California*, 332 U.S. 46, 67-68 (Frankfurter, J., concurring). But no member of the current Court appears to take quite so restrictive a view of the Fourteenth Amendment.

Justice Thomas, of course, has expressed the strong view that certain substantive (as opposed to procedural) guarantees of the Bill of Rights apply to the states only through the Privileges and Immunities Clause, rather than the Due Process Clause. See, e.g., *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 809-813 (2010) (Thomas, J., concurring in part and concurring in the judgment) (concluding that, as a substantive protection, the Second Amendment right to bear arms applies to states through the Privileges and Immunities Clause). But unlike the Second Amendment right to bear arms, the right to counsel is a procedural right that falls squarely within the Due Process Clause.

³ See, e.g., Akil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992) (setting forth detailed history of the Fourteenth Amendment).

⁴ See *id.*

⁵ See Tracey Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215 (2003) (arguing that fundamental fairness forms a more appropriate standard for defining Fourteenth Amendment rights than incorporation of the Bill of Rights).

⁶ See *Faretta v. California*, 422 U.S. 806 (1975) (holding that the Sixth Amendment guarantees a defendant the right to represent himself).

expressed the view that the right of self-representation may be directly guaranteed by the Fourteenth Amendment, rather than being a Sixth Amendment right incorporated into the Fourteenth Amendment.⁷ As a result, even had the Supreme Court not held that the Fourteenth Amendment incorporated the Sixth Amendment's right to counsel (as it did), the Fourteenth Amendment independently guarantees the right to counsel.

2. *In full consideration of the right to speedy trial, along with the significant debt of the Federal Government, the inability of States with budget shortfalls to allocate more resources in this area, and the effectiveness of Clinton era policies in reducing crime through tougher sentencing laws, what are some specific suggestions that would reduce your concerns in this area without risking the safety of law abiding citizens while also allowing States to maintain balanced budgets?*

I think it is crucial for the federal government to assist states and localities in their efforts to more efficiently allocate their precious criminal justice resources towards prosecuting crimes that *threaten public safety*. Helping states and localities decriminalize minor offenses that require significant expenditures and do not threaten public safety provides the most effective path towards ensuring both public safety and constitutional compliance.

Many of the offenses that states and localities have designated “crimes” are public order offenses that do not threaten the safety of any person. There are no victims and the defendant has not threatened the safety of the community in any way. In jurisdictions that have designated these offenses “crimes,” they are crimes only because the legislature or a local municipal authority has so designated them. Re-designating these offenses as civil infractions, rather than crimes, would result in enormous economic benefit. It would relieve jurisdictions of the obligation to provide counsel, decrease the cost of jailing minor offenders,⁸ and enable offenders to remain employed and supporting their families.

As to the first point—that many misdemeanor crimes simply do not pose threats to public safety—the breadth of misdemeanor crimes is somewhat stunning. For instance, in many jurisdictions, driving on a suspended or expired license is a misdemeanor. A person driving on a suspended or expired license does not, however, pose a risk to public safety simply because of the suspended or expired license.⁹ But prosecuting all of the suspended or expired license cases as criminal offenses creates enormous costs, not only to states (or municipalities if they prosecute) but also to defendants prosecuted for these crimes and to their families. Indeed,

⁷ See, e.g., *Martinez v. California*, 528 U.S. 152, 165 (1999) (Scalia, J., concurring) (noting that although he “might have rested [*Faretta*] upon the Due Process Clause rather than the Sixth Amendment,” he believes it “was correct”).

⁸ A number of studies have examined the costs of confining individuals in prisons. More recently, a study examining the cost of incarcerating individuals in county jails found that the costs have increased significantly over the past twenty years. See Christian Henrichson, Joshua Rinaldi, & Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INSTITUTE OF JUSTICE REPORT (May 2015), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-jails.pdf> (demonstrating that the estimated \$22.2 billion cost of incarceration in local jails vastly underestimates the costs of incarceration in those facilities).

⁹ To the extent that an unlicensed driver presents a danger, that danger likely is completely unrelated to the license issue. And, like all other drivers on the road, the individual can be cited by authorities for any danger s/he poses to others on the road.

particularly given all of the collateral consequences of misdemeanor convictions—including employment barriers, as well as bars from many federal and state programs, to name just a few—convicting all of these defendants of crimes significantly drains the economy of otherwise-skilled individuals.

Nor does the prosecution of these offenses as *criminal* offenses further the goal of reducing crime in the way that some claim that “tough on crime” policies like mandatory sentencing have done.¹⁰ This is so because prosecuting such minor offenses as *criminal* offenses degrades the condemnation that conviction of criminal offenses historically has carried with it. Prosecuting as “crimes” a set of offenses that are completely victimless (with the possible exception, perhaps, of the state that is foiled in its attempt to regulate the individual) does not further public safety. And for those who need to drive to work in order to be responsible but lack sufficient resources to renew or reinstate their licenses, driving on an expired or suspended license to work in order to earn that money does not necessarily appear to be an irresponsible choice. *Criminalizing* that conduct degrades the censure of a criminal conviction. Many crimes, including at least some public order criminal offenses, have victims, even if those victims are willing and therefore not identifiable. But many of the minor public order offenses now criminalized lack even a willing victim. After all, a person driving on a suspended or expired license simply does not pose a more significant risk than a licensed driver.

Of course, states and localities throughout this country criminalize a variety of misdemeanor offenses. And at least some of those criminal offenses may curb a sufficiently high risk of public danger to render the cost of criminalization cost-worthy. But many of the state criminal codes and municipal codes contain crimes that are prosecuted on a high-volume basis that could be decriminalized with little to no risk that public safety would suffer. Activating the apparatus of the criminal justice system—including the right to counsel, the threat of incarceration, and all of the other associated rights and expenses—does not make sense for offenses that give rise to little or no public benefit.

To be sure, states and localities need the assistance of the federal government to help them identify offenses, the decriminalization of which would have little to no effect on public safety and would result in the greatest monetary savings. That opportunity—helping states and localities more effectively target their precious criminal prosecution dollars—presents this body with a unique opportunity to help states reform their criminal justice systems to function more effectively at little to no cost to public safety, and I hope this Committee will seize that opportunity.

¹⁰ The question specifically refers to the “effectiveness of Clinton era policies in reducing crime through tougher sentencing laws.” For purposes of responding to this question, I will assume that the tougher sentencing laws in fact had an effect on reducing crime. Most of those studies, however, focused on felony sentencing, and in particular felony drug sentencing. Indeed, those tougher sentencing laws focused almost exclusively on increasing penalties for drug offenses. Even if those policies were effective—a much-disputed question—that success would tell us little about whether criminalizing the most-minor offenses effectively reduces crime.

3. *England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?*

England's indigent defense system has historically had two critical features that have led to its success: (1) adequate funding for lawyers representing criminal defendants, and (2) implementation of rigorous standards that lawyers must meet before they are deemed qualified to be reimbursed for representing criminal defendants. These two factors have proven to be critical to the success of England's system. As a result, I would support a pilot program for a choice of counsel or voucher system *only if* that program ensured *both* adequate funding and rigorous standards for those receiving contracts for reimbursement of indigent defense expenditures.

But because states and municipalities are struggling to provide even minimal funding for indigent defense, and because every study that has examined the issue has concluded that public defender systems provide indigent defense services more cost-effectively than contract systems, I am skeptical that any jurisdiction has sufficient resources to fully fund and monitor a system similar to that existing in England. Indeed, England recently has taken steps to rein in the costs of its indigent defense system by establishing public defender offices in some jurisdictions.

A brief history of the indigent defense system in England will help put this discussion in context. Since 1949 (before the Supreme Court's *Gideon* decision), English law has guaranteed counsel to indigent criminal defendants. And because Parliament (rather than the courts) guaranteed the right to counsel, the English government has historically centrally funded indigent defense systems.¹¹ In the 1960's, the Widgery Committee, tasked with examining indigent defense, determined that defendants should have the right to choose their own counsel, and England therefore did not develop the tradition of public defender offices that we have in this country.

The choice of counsel model largely has endured, although in 1999, with the goal of reducing the cost of indigent defense services, Parliament passed the Access to Justice Act that authorized (among many other things) the creation of at least some public defender offices.¹² Several features of the Access to Justice Act deserve mention. First, the Act set forth hourly reimbursement fees for lawyers representing criminal defendants that fully reimbursed solicitors for the hours they spent representing criminal defendants. Indeed, very detailed reimbursement rates were set based upon the type of work the solicitor performed. And the Access to Justice

¹¹ See Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 862-63 (2004). This funding model contrasts starkly with the model in this country, in which states and localities bear the cost of providing lawyers in all but federal criminal cases.

¹² *Id.* at 866-69.

Act made clear that the government would reimburse solicitors for the hours they spent along with any expenses that the solicitor reasonably incurred.¹³

Second, the Access to Justice Act required that solicitors selected by criminal defendants be “qualified.” The process of qualification was somewhat detailed, but it essentially required that those solicitors first obtain a specialist quality mark (“SQM”) by demonstrating, among many other things, that they had mechanisms in place to assure that they could adequately meet clients’ needs and to assure the quality of their representation.¹⁴ An independent agency screened SQM applications, and the solicitor’s office then underwent a number of audits before receiving the SQM. Offices that received SQM designation also had to undergo annual audits to ensure quality representation.

Finally, the Access to Justice Act permitted creation of public defender offices.¹⁵ Because defendants still could choose between the public defender and any of the solicitors who had achieved SQM designation, public defender offices had to compete for clients with those solicitors. As a result, although some public defender offices were created after the Access to Justice Act was passed, they have flourished primarily in rural areas that lacked adequate counsel.¹⁶

In 2012, concerned about the soaring costs of indigent defense services, Parliament passed the Legal Aid, Sentencing and Punishment of Offenders Act (“LASPO”), which modified certain ways in which indigent defense services were provided. For instance, the organization that had been charged with designating SQM’s was disbanded, and the Lord Chancellor now is more directly involved in designating a person to qualify eligible solicitors.¹⁷ But the two main features discussed above—guaranteed adequate funding and qualification of solicitors—remain. The assurance of adequate funding and quality control mechanisms has led to the success of England’s choice of counsel system.

By contrast, in this country, the right to counsel has been chronically and severely underfunded, both for public defenders and for contract counsel. As a result, unless legislatures correct the chronic underfunding of the indigent defense systems, providing a choice of counsel in that underfunded system will not improve the American system. Instead, providing that choice may well exacerbate the existing problems with the indigent defense system in this country because adequately funding such a system likely would be even more expensive than adequately funding our current system.¹⁸

Unlike in England, which has only very recently begun to develop a limited number of public defender offices, states across this country have steadily moved towards public defender

¹³ *Id.* at 869-870.

¹⁴ *Id.* at 875-77.

¹⁵ *Id.* at 884.

¹⁶ *Id.* at 885-86. On this issue, it is notable that many solicitors’ offices strenuously opposed the creation of public defender offices because of the risk of competition. *Id.*

¹⁷ LASPO, Part 1, § 1.

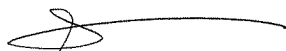
¹⁸ Indeed, England’s experience with the exponentially increasing costs of its choice of counsel (rather than public defender) system of counsel demonstrates this point.

systems, in large part because all of the evidence demonstrates that public defender offices operate more efficiently than indigent defense systems that enter into contracts with private lawyers. Of course, as discussed in my earlier written testimony, part of the difficulty that localities face in providing representation to misdemeanor defendants is that in at least some jurisdictions, the state-wide public defender systems do not represent criminal defendants who appear in courts in which misdemeanor cases are prosecuted. As a result, localities have had to enter into contracts with private attorneys to provide representation in these cases, and those lawyers simply fail to provide the representation that the clients need.¹⁹

The key point is that jurisdictions across the United States have been unable to adequately fund even the more efficient public defender model that has developed in this country, let alone a more expensive system like that operating in England. Without devoting resources to each criminal defendant in this country that are roughly equivalent to that spent per defendant by England, a choice-of counsel system likely would have all of the problems that flat fee contract systems have had in this country.²⁰ As a result, without significant infusions of resources into indigent defense systems, jurisdictions should operate systems that most efficiently use indigent defense resources—namely, public defender systems, rather than choice of counsel systems.

Thank you very much.

Sincerely,



Erica J. Hashimoto
 Assoc. Dean for Clinical Programs
 & Experiential Learning
 Allen Post Professor of Law and
 Josiah Meigs Distinguished Teaching Professor

¹⁹ For a discussion of the problems with flat-fee contracts for indigent defense service providers, see, e.g., Bureau of Justice Assistance, U.S. Dep't of Justice, *Contracting for Indigent Defense Services: A Special Report* 13-15 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (detailing the caseload problems that often arise in contract counsel systems).

²⁰ See Am. Bar Ass'n, *Standards for Criminal Justice: Providing Defense Services*, standard 5-1.2 cmt. At 6 (3d ed. 1992), available at http://www.abanet.org/crimjust/standards/providing_defense.pdf (noting that contract systems have "failed to provide quality representation to the accused").



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December 6, 2016

Senator Charles Grassley
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: May 15, 2015 Hearing on Protecting the Constitutional Right to Counsel for
Indigents Charged with Misdemeanors

Dear Senator Grassley:

I am embarrassed and deeply apologetic for how long it has taken for me to respond to the written questions you and Senator Vitter posed to me after I testified. Though I have been extremely busy and simply overlooked my obligation to respond, there really is no excuse I can offer for being this late. The issue I testified about is an important one that was deserving of my prompt response to your questions. Please forgive me.

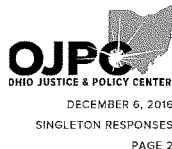
Below are my answers to the questions posed to me by you and Senator Vitter.

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY
HEARING ON "PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL
FOR INDIGENTS CHARGED WITH MISDEMEANORS"
MAY 13, 2015

Question for Mr. Singleton:

Your testimony was valuable in discussing particular situations where individuals were denied counsel for misdemeanor charges. At the hearing, you explicitly stated that you preferred to address individual examples rather than statistics due to the time constraints. Would you like to take this opportunity to supplement your testimony by presenting any statistical information that might be useful to the Committee?

Answer: Senator Grassley, I specifically chose to focus on individual examples because, unlike some of the other individuals who testified, I have not studied the statistical data in a manner that would be useful to the Committee.



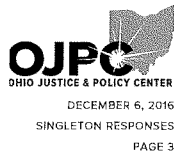
QUESTIONS FOR THE RECORD FROM SENATOR DAVID VITTER
 HEARING ON “PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL
 FOR INDIGENTS CHARGED WITH MISDEMEANORS”
 MAY 13, 2015

- Selective incorporationists and other scholars have argued that based on original intent, the framers did not intend for the Fourteenth Amendment to apply the Bill of Rights to the States. What is the constitutional basis, in your view, for applying the Sixth Amendment right to counsel to States through the Fourteenth Amendment?

Answer: *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), is helpful in answering this question. There, the issue was whether the Fourteenth Amendment extended the Sixth Amendment right to a jury trial to a man who convicted of battery and sentenced only to sixty days confinement on a state charge. In holding that it did, the Court set forth the following test to determine whether a right guaranteed by the Sixth Amendment in federal criminal cases is also protected against state action by the Fourteenth Amendment:

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Powell v. State of Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932); whether it is ‘basic in our system of jurisprudence,’ *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948); and whether it is ‘a fundamental right, essential to a fair trial,’ *Gideon v. Wainwright*, 372 U.S. 335, 343—344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492, 12 L.Ed.2d 653 (1964); *Pointer v. State of Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067, 13 L.Ed.2d 923 (1965).

Duncan, 391 U.S. at 148-49, 88 S.Ct. 1444, 20 L.Ed.2d 491 (footnote omitted). I believe that under any of the above phrasings, the Sixth Amendment right to counsel in federal cases is extended to state prosecutions. At its core, the Fourteenth Amendment protects against is the deprivation of liberty. The right to counsel where the accused is at risk of losing his liberty is just as important in state criminal prosecutions as it is in federal criminal prosecutions.



- In full consideration of the right to speedy trial, along with the significant debt of the Federal Government, the inability of States with budget shortfalls to allocate more resources in this area, and the effectiveness of Clinton era policies in reducing crime through tougher sentencing laws, what are some specific suggestions that would reduce your concerns in this area without risking the safety of law abiding citizens while also allowing States to maintain balanced budgets?

Answer: There is no substitute for the provision of counsel in misdemeanor cases. We spend more money incarcerating individuals who should not – and would not – be in jail if they had adequate representation than we would if we paid for quality representation.

When I was a young public defender with the Neighborhood Defender Service of Harlem (“NDS”) in the mid-1990s, we made a compelling case that we actually saved the state money in incarceration costs by providing high quality representation. As a result of our services, we saved people who did not belong in jail or prison from costly incarceration at taxpayer expense. And our effectiveness did not compromise public safety. To the contrary, because NDS provided holistic services in addition to legal representation, we were often able to provide, or connect our clients to, social services that addressed the root causes of their entry into the criminal justice system. Thus, our services enhanced, and did not detract from, public safety. For this reason, choosing between funding public defenders and protecting the community is a false choice. We can – and should – do both.

- England has a choice of counsel system that is widely regarded as one of the strengths of their criminal legal assistance system. Even in the jurisdictions where there are public defender offices, the indigent can choose the PD office for representation, or opt to retain their own counsel using a voucher. Would you support pilot programs in the U.S. that would incorporate choice of counsel or vouchers for the indigent? Why or Why not?

Answer: This is an interesting idea that I have not spent much time thinking about. I do have serious concerns about such a program, which I will share below. But first I have some anecdotal information to provide.

When I was a public defender with NDS, our clients “retained” us as an alternative to the traditional public defender services offered by the Legal Aid Society Criminal Defense Division (“LAS”). Unlike LAS, NDS was a community-based public defender that made itself available to its clients 24 hours a day, 7 days per week. Clients or their families could call us as soon as they were arrested, and in some instances before arrest, to get services, as opposed to waiting for the first court appearance to meet their assigned lawyer. I never had



the problems that many other public defenders had in gaining their clients' trust. My NDS clients never called me a "public pretender" or other derogatory names in part, I believe, because they chose me, as opposed to me being thrust upon them. Accordingly, my clients felt better served than had they had representation from a traditional public defender provider.

However, I am often suspicious of voucher programs in other areas and would be suspicious of them in the indigent defense context. I worry that such a program would not necessarily improve quality of defense but in some ways could make it much worse. The reason why NDS was a good office was because we were well funded, had excellent training and were motivated to serve our clients. Many private lawyers who take court appointed cases are no better than staff lawyers of public defender offices and are often worse. So, I worry that a voucher recipient could pick a private lawyer believing that he would receive better service when in reality he may not.

Then there is the question of whether a voucher program would fund lawyers at a level that would motivate them to provide excellent services. A voucher system that did not provide fair compensation could result in a scenario where you get what you pay for, which is often very little in the case of indigent defense.

So, although I have studied the idea of providing vouchers to indigent defendants so they may choose their own counsel, I believe such a program would have more negatives than positives. On the one hand, choice was important to my clients at NDS. They felt empowered by choosing our office and the representation we provided to them was top notch. But the reason our clients received excellent representation is because NDS was a well-funded office that hired quality attorneys and trained them well.

I appreciate the opportunity to testify. Please accept my apologies for being so tardy in responding to these questions.

Sincerely,

David A. Singleton
Executive Director
Attorney at Law

INTERNET LOCATIONS OF CITATION DOCUMENTS

Norman Lefstein, *Criminal Defense Representation in England and the United States*, Int'l Society for the Reform of Criminal Law - 18th International Conference (August 2004), available at <http://www.isrcl.org/Papers/2004/Lefstein.pdf>.

Margo Patrick, *U.K. Legal Brawl Puts Spotlight on Public-Defense Office*, The Wall Street Journal (May 23, 2014), available at <http://www.wsj.com/articles/SB10001424052702303749904579579491037640928>

Samira Shackle, *How legal aid cuts are harming the voiceless and most vulnerable*, NewStatesman (Jan. 13, 2014), available at <http://www.newstatesman.com/politics/2014/01/how-legal-aid-cuts-are-harming-voiceless-and-most-vulnerable>

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May 20, 2015

The Honorable Charles E. Grassley
Chair
Senate Judiciary Committee
Dirksen Senate Office Building
SD-224
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Dirksen Senate Office Building
SD-152
Washington, DC 20510

Re: May 13, 2015 Hearing –
“Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors”

Dear Senator Grassley and Senator Leahy:

The American Council of Chief Defenders (ACCD) submits this letter to supplement the record of the May 13, 2015, hearing, “Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors.” The ACCD is an organization that represents public defender chiefs from across the country; it is a section of the National Legal Aid and Defender Association, a non-profit association dedicated to excellence in the delivery of legal services for people who cannot afford counsel.

The ACCD thanks you for drawing attention to the significant problem of the deprivation of counsel for people charged with misdemeanors who cannot afford to hire an attorney. The ACCD supports the solutions proposed by those who served as witnesses during the May 13 hearing. Those solutions include authorizing the Department of Justice to sue states that fail to meet their obligation to provide counsel, establishing a National Right to Counsel Center for states and localities, decriminalizing lower level misdemeanor charges, and directing existing grant funds to address the complete absence of court-appointed misdemeanor counsel in some jurisdictions.¹

¹ One remedy under discussion at the hearing was providing funding for the federal John R. Justice loan repayment program for public defenders and prosecutors. That program would neither address the unavailability of counsel in misdemeanor cases where no public defense system exists, nor reform public defense systems that fail to provide counsel or do so

We also want to note our concern, however, about the view that existing criminal justice-targeted grant programs managed by the Department of Justice provide sufficient resources to make counsel available to indigent individuals charged with misdemeanors. As the Sixth Amendment Center notes in its response to the Government Accountability Office's May 2012 report on indigent defense, where these grant programs allow for public defense funding, the states typically give priority to awarding it to law enforcement agencies. In addition, the grant funding is functionally available in jurisdictions that do not have a public defender system to apply for it.²

The insufficient availability of defense representation for individuals charged with misdemeanors creates problems/challenges for defendants as well as for society as a whole. Those who lack counsel do not have the training or objectivity to effectively represent themselves, they are more likely to plead guilty out of ignorance or to be found guilty, and they are less equipped to be able to persuade a judicial officer who may be considering imposing a sentence of incarceration. To the extent that an increase in the amount of jail time such defendants are ordered to serve results, the costs to society rise – both in taxes for correctional facilities and in these defendants' lessened capacity for being contributing members of society upon reentry. The variety of solutions proposed could together or separately address these challenges.

Despite the fact that the Supreme Court made clear decades ago that the right to counsel exists in misdemeanor cases,³ misdemeanor defendants have still had to fight to try to have the right applied. On June 8, 2012, the Texas Supreme Court unanimously ruled that a putative class of indigent misdemeanor defendants can proceed in its Section 1983 lawsuit alleging violations of the right to counsel in Williamson County, Texas. The plaintiffs in *Heckman v. Williamson County*,⁴ claimed that the county and its judges provided defendants inaccurate information about the right to counsel, failed to make timely rulings on requests for counsel, and denied appointed counsel to financially eligible defendants. In reversing an intermediate court of appeals decision dismissing the lawsuit, the Texas Supreme Court recognized that, "A criminal defendant's right to counsel – enshrined in both the United States and Texas Constitutions – ranks among the most important and fundamental rights in a free society." In the settlement of the lawsuit, Williamson County agreed to changes in its procedures as well as independent monitoring. Others should learn from past mistakes, thus making such costly lawsuits less likely.

Most people facing state and local prosecutions throughout the country are charged with misdemeanors. In Washington, D.C., for example, out of a total of 20,911 criminal cases resolved in the District of Columbia Superior Court in Fiscal Year 2014, 16,523 – or 79 percent

inadequately. At best, the bill would provide support and incentives for public defenders who are already practicing, some of whom may also represent people in misdemeanor cases.

² "Understanding the GAO Report on Indigent Defense," David Carroll, Sixth Amendment Center, July 2012.

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁴ 369 S.W.3d 137 (Tex. 2012).

– were misdemeanor cases. Of the 29,214 misdemeanor cases “available for disposition” that same year, 6,139 – or 21 percent – resulted in guilty pleas or verdicts.⁵ While in Washington, D.C., defendants in misdemeanor cases have counsel appointed to them, the number and percentage of misdemeanor cases illustrate the extent to which misdemeanors make up a court’s criminal docket. Also, the misdemeanor conviction rate in the District of Columbia is generally lower than elsewhere, almost certainly because of the availability of appointed counsel. Failure to provide counsel in misdemeanor cases in such systems means that defendants are more likely than not to lack counsel in a criminal case and, possibly, more likely to be convicted. A system that allows its failure to meet its Constitutional obligation to provide counsel to generate convictions is fundamentally and intolerably unfair.

Misdemeanor cases, while not equal to felony cases in their potential sentences, are virtually the same in other respects. Misdemeanor cases call for the same kind of work from attorneys that they perform in felony cases – both types of cases may involve making arguments to judicial officers about release pending trial; both require investigation; both can involve multiple charges, which have the potential for increasing the number of factual and legal issues; both can involve assessing whether evidence was properly seized or whether statements from the defendant were properly taken; both usually involve plea negotiations with the prosecutor; both can involve similar numbers of witnesses at a trial; both can involve sentencing advocacy that includes exploring alternatives to incarceration; and both can include post-trial appeals that require evaluating trial-level errors, and writing legal briefs that explain and argue the import of those errors and that respond to legal arguments made by prosecutors. A defendant with no attorney to provide professional advice or assistance is left alone not only to recognize that these issues exist but to figure out how to pursue them.

Also, the Constitutional rights that exist in felony cases are the same as those in misdemeanor cases – the right to confront witnesses against the defendant, the right to subpoena witnesses to testify on the defendant’s behalf, the right to be presumed innocent, the right to present a defense, the protection against self-incrimination, and more. Enforcement of those rights is severely compromised when defendants don’t have attorneys to represent them, and perceptions of the criminal justice system’s fairness are negatively affected.

Misdemeanor convictions – and sometimes even misdemeanor arrests that don’t result in convictions – have many implications. One major implication is what is known as a “collateral consequence” – a penalty or disadvantage that a defendant suffers that is imposed as the result of a conviction. This penalty or disadvantage often comes in the form of a disqualifying factor, such as for eligibility for professional or occupational licensing. The American Bar Association has a state-by-state listing of collateral consequences that shows the breadth of the ways that people charged with misdemeanors “pay their debt to society” far beyond the immediate sentence of probation or jail time; the list can be found at www.abacollateralconsequences.org. Increasing the chances of the imposition of these collateral consequences is the existence of electronic databases, which, in combination with the Internet, makes defendants’ misdemeanor records much more accessible and for much longer periods of time.

⁵ “District of Columbia Courts’ Statistical Survey, CY 2014” at 4, (2014).

As stated above, we support the solutions proposed by the witnesses at the May 13 hearing. We also believe that holding additional hearings on this subject is important. The May 13 hearing was a good start in laying the groundwork for establishing a record of the scope of the problem and in noting some solutions. More work on this needs to be done, and we should take advantage of the momentum established by the hearing to make progress. The very fact that the federal government is directing attention to these Constitutional deficiencies in the states is a step forward in making improvements.

The ACCD is available to work with you and your staff to identify and implement solutions to the problem of unavailability of counsel in misdemeanor cases. No one should have the Constitutional right to counsel denied simply because he or she cannot afford to retain an attorney for a misdemeanor charge.

Sincerely,

Avis E. Buchanan

Avis E. Buchanan
Chair
Executive Committee
American Council of Chief Defenders

AMERICAN CIVIL
LIBERTIES UNION



May 13, 2015

The Honorable Chuck Grassley
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Patrick J. Leahy
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

AMERICAN CIVIL
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Re: ACLU Supports Congressional Response to the Indigent Defense Crisis

RICHARD W. BENTLEY
PRESIDENT

Dear Chairman Grassley and Ranking Member Leahy:

BERNARD J. GERTIN
VIRGINIA BENTLEY, JR. J.C.
PRESIDENT

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. Consistent with this mission, the ACLU has long advocated for the fulfillment of the Sixth Amendment right to counsel, having filed a friend of the court brief in *Gideon v. Wainwright* (372 U.S. 335).

OFFICERS AND DIRECTORS
BRUCE A. BERNARD
PRESIDENT

The ACLU commends the Senate Judiciary Committee for providing a much needed examination of the indigent defense crisis in this country. More than 50 years after *Gideon*, the promise of equal access to justice remains unfulfilled. In deciding *Gideon* in 1963, the Supreme Court held that our Constitution guarantees the right to counsel for anyone accused of a felony offense, even if they cannot afford one. Subsequent Supreme Court decisions affirmed this mandate and went further, with the Court extending the right to counsel to those incarcerated for a misdemeanor offense in *Argersinger v. Hamlin* (407 U.S. 25) in 1972.

ANTHONY D. DOMARCO
PRESIDENT

The Country Faces an Indigent Defense Crisis

Nevertheless, the right to counsel evades many in our criminal justice system. Approximately 80% of criminal defendants cannot afford counsel. Nationwide, public defenders or assigned counsel are ill equipped to meet this demand. They are often forced to juggle hundreds of cases at once, without resources to investigate, conduct legal research, or prepare in even the most basic fashion for hearings and trial. Often, public defenders meet

their clients for the first time minutes before critical proceedings. There are many courts around the country where cases are adjudicated without the presence of counsel at all. Additionally, public defenders are frequently outgunned by prosecutors armed with greater resources, larger staffs, and partnerships with local police departments.

The Indigent Defense Crisis Is Exacerbated by Misdemeanor Offenses

These failures are even more glaring when considering the deprivation of the right to counsel in misdemeanor cases. As demonstrated through litigation and other advocacy, the ACLU shares the concerns of the Committee and others that “justice” is “blindingly swift” for the millions of Americans charged with misdemeanors each year.

Misdemeanor charges, which account for 70% to 80% of criminal cases annually, are how a majority of Americans are exposed to our criminal justice systems. And unfortunately, misdemeanor convictions can have consequences similar to felony convictions – fines, jail time, and loss of employment opportunities. Despite these consequences, it is estimated that one in every four misdemeanor defendants facing jail time is not represented by a lawyer.¹

Indigent Defense Failures Fuel Mass Incarceration

Additionally, ineffective handling of indigent defense cases, including misdemeanor cases, fuels mass incarceration. The failure to provide zealous representation throughout a criminal case results in more people being detained pretrial, more convictions (and hence more people with criminal records, which have both direct and indirect consequences on future incarceration), and more sentences of incarceration. Along with numerous other factors, inadequate indigent defense systems have resulted in the United States representing 5% of the world’s population but nearly 25% of its inmates.

By the close of 2010, America had 1,267,000 people behind bars in state prisons, 744,500 in local jails, and 216,900 in federal facilities – more than 2.2 million people incarcerated. The “tough on crime” politics of the 1980s and 1990s – which has inundated our court system with misdemeanor cases – has also fueled an explosion in incarceration rates. Mass incarceration has proven more costly than providing adequate counsel to poor defendants.²

In New York, Named Plaintiff Charged with Misdemeanor, but Pleads to Felony

In October 2014, the New York Civil Liberties Union settled *Hurrell-Harring et al., v. State of New York* (15 N.Y.3d 8 (2010)) having challenged New York’s public defense system. The law suit argued that New York’s failure to provide adequate funding, resources, and oversight to the public defense system threatened to deprive indigent

¹ John R. Emshwiller and Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WSJ, Nov. 30, 2014, available at <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782>.

² ACLU, *Mass Incarceration*, available at <https://www.aclu.org/issues/mass-incarceration>.

defendants of their constitutional right to meaningful and effective assistance of counsel. The named plaintiff Kimberly Hurrell-Harring, who committed a misdemeanor, was advised by her public defense attorney to plead guilty to a felony, causing her to lose her job and home while in jail.³

The terms of the settlement agreement reflect the substantial and systemic reforms that are needed in the New York indigent defense system. Indigent criminal defendants will now have a lawyer at the first court appearance, where bail is often set and pleas are taken. Caseload standards will be imposed to now substantially limit the number of cases any lawyer can carry. The Office of Indigent Legal Services will also serve as a state-level oversight entity that ensures the constitutional provision of public defense service.

In Mississippi, Failure to Pay Bail Results in Indefinite Detention (Even for Misdemeanors)

In September 2014, the ACLU brought a class action suit in Scott County, Mississippi (*Burks, et al. v. Scott County, Mississippi*, 3:2014cv00745 (S.D. Miss)), where people who can't afford bail are routinely held in jail for as long as a year without appointed counsel or an indictment. In Mississippi, there is no limit on how long a prosecutor has to indict someone. One Scott County resident was held in the county jail three times in seven years with no formal charges against him and without the assignment of counsel. For this ACLU client, these three arrests have meant over three years in jail without being found guilty of a crime – each time, he was eventually released from the jail without a trial or conviction.⁴

Indefinite detention in Mississippi is not limited to felony offenses. A 2003 NAACP LDF report featured the story of a Gulfport misdemeanor shoplifter who was incarcerated for 14 months before trial.⁵ And unfortunately, Mississippi is not an isolated example, with poor people throughout the country confined to jail indefinitely because they cannot afford bail and are waiting for an indictment or public defender.⁶

³ NYCLU, *Hurrell-Harring et al., v. State of New York (Challenging New York State's failure to provide adequate public defense services)*, available at <http://www.nyclu.org/node/1538>.

⁴ ACLU, *ACLU Sues Scott County on Behalf of Mississippians Jailed Indefinitely Without Lawyer or Indictment*, Sept. 24, 2014, available at <https://www.aclu.org/news/aclu-sues-scott-county-behalf-mississippians-jailed-indefinitely-without-lawyer-or-indictment>.

⁵ NAACP LDF, *ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS*, Feb. 2003, http://www.americanbar.org/content/dam/aba/migrated/legal-services/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

⁶ *Supra* note 4.

In Washington, Indigent Misdemeanor Defendants Deprived of Right to Counsel

Reforms are also underway in Washington's Mt. Vernon and Burlington municipal defense systems as a result of litigation brought by the ACLU of Washington State. In December 2013, in *Wilbur v. City of Mt. Vernon* (989 F. Supp. 2d 122 (W.D. Wash. 2013)), the U.S. District Court in Seattle found that the public defense system of Mt. Vernon and Burlington deprives indigent persons who face misdemeanor criminal charges of their fundamental right to assistance of counsel.

In Mt. Vernon and Burlington, public defenders had excessively high caseloads, rarely provided an opportunity for the accused to confer with them in a confidential setting, rarely engaged in investigations or researched possible legal defenses, and overall failed to meaningfully represent their clients. Further, it found that city officials made deliberate choices that directly led to the deprivation of rights and failed to monitor or evaluate the system, turning a blind eye to its obvious problems. The court concluded that the defense services for indigent clients amounted to little more than a "meet and plead" system.⁷

In Michigan, District Judge Has Over 100 Misdemeanors on His Docket Every Day

In June 2013, as result of ACLU litigation and advocacy with allies, Michigan created an indigent defense commission – a statewide structure for the delivery of public defense services. The commission goals include a more independent defense system; county-based systems with reasonable caseload requirements; additional resources to provide experienced and quality representation of counsel; and regular oversight and support to ensure the right to counsel is protected.⁸ However, in cities like Detroit, court statistics show that a district judge may have over 100 misdemeanor cases – or one every four minutes – on his or her docket every day.⁹

In Pennsylvania, Public Defender Office Stops Representation in Misdemeanor Cases

In April 2012, the ACLU of Pennsylvania filed a class action lawsuit against Pennsylvania's Luzerne County (*Flora v. County of Luzerne*, No. 14-1854 (3d Cir. 2015)), alleging that gross and chronic underfunding of its Office of the Public Defender has led to widespread violations of indigent defendants' constitutional right to adequate counsel. Overwhelming caseloads in Luzerne County caused the Chief Public Defender to restrict new cases to only the most serious ones, such as murder, sex and other felonies that resulted in pre-trial detention. As a result, many individuals face criminal prosecutions

⁷ ACLU, *Ruling says individuals "not represented in any meaningful way,"* Dec. 5, 2013, available at <https://www.aclu.org/news/federal-court-finds-public-defense-system-violates-constitutional-rights-indigent-defendants>.

⁸ Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform*, ACLU BLOG, July 1, 2013, available at <https://www.aclu.org/blog/victory-michigan-turns-corner-public-defense-reform>.

⁹ *Supra* note 1.

without lawyers. The defender's office has turned away at least 300 people. Since unmanageable caseloads prevent lawyers from providing representation that met constitutional and professional standards, the ACLU is seeking manageable caseloads, public defender hiring, and assignment of private counsel for Luzerne's public defender office.¹⁰

In 1996, the ACLU sued Pennsylvania's Allegheny County in *Doyle v. Allegheny County Salary Board* (No. GD-96-13606 (Penn. Ct. Com. Pl. 1997)), alleging that their Office of the Public Defender failed to provide constitutionally adequate representation to indigent criminal defendants, juveniles charged with delinquency, and people subject to involuntary mental health commitments. After two years of contentious litigation, the lawsuit resulted in an agreement designed to improve the office, which called for increased funding, staffing, training and management, as well as written policies promoting best practices. Today, while the county met the funding and staffing requirements, reforms remain for the office to adopt necessary standards, maintain high-level training, and implement practices that are an indispensable part of a constitutionally adequate indigent defense system.¹¹

Congress' Role in Indigent Defense Reform

As this Committee examines the failures of states and localities to provide indigent defense in accordance with the Constitution, there is a role for the federal government to play. Congress should consider how to incentivize state and local jurisdictions to use federal dollars for indigent defense. A Government Accountability Office (GAO) study revealed that little more than half of grantees knew that Department of Justice federal dollars could be used for indigent defense. And for those grantees that did allocate federal dollars to indigent defense, they allocated just 2% to 14% for this purpose.¹²

Congress should explore legislation that would create a national clearinghouse that would support state and local indigent defense systems and provide training to improve the quality of representation provided to indigent clients. Representative Ted Deutch's (D-FL) National Center for the Right to Counsel Act, H.R. 2063, would create such a resource.

Congress should consider legislation that would give the U.S. Attorney General the authority to obtain appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct that deprives persons of their rights to assistance of counsel. The

¹⁰ ACLU of PA, *Flora v. Luzerne County*, available at <http://www.aclupa.org/our-work/legal/legaldocket/flora-v-luzerne-county1/>.

¹¹ ACLU of PA, *A Job Left Undone: Alleghany County's Fork in the Road*, available at <http://www.aclupa.org/issues/criminaljustice/indigent-defense-reform/job-left-undone-allegheny-countys-fork-road/>.

¹² GAO, *DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose*, May 2012, available at <http://www.gao.gov/assets/600/590736.pdf>.

Gideon's Promise Act, S. 597 sponsored by Senator Patrick Leahy (D-VT) in the last Congress, would provide the Attorney General with this authority.

The House and Senate Judiciary Committees should continue examining indigent defense through hearings, including oversight hearings of the Department of Justice's Access to Justice (ATJ) office. Congress should support ATJ and its mission to address the access-to-justice crisis in the criminal and civil justice system. ATJ, along with the Civil Rights Division, has taken an active role in addressing the indigent defense crisis by filing statements of interest in right to counsel cases.

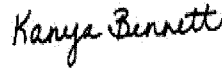
Finally, Congress should consider the impact of sequestration on federal public defender offices. In order for the federal public defender system to continue serving as a model for indigent representation, funding may need to be restored to pre-sequestration levels.

Thank you for considering our concerns with the country's indigent defense systems. Please contact legislative counsel Kanya Bennett at (202) 715-0808 with any questions or comments.

Sincerely,



Michael W. Macleod-Ball
Acting Director



Kanya Bennett
Legislative Counsel

cc: Members of the Senate Judiciary Committee



MARK V. HOLDEN
SENIOR VICE PRESIDENT
GENERAL COUNSEL & SECRETARY

May 6, 2015

The Honorable Charles Grassley, Chairman
Senate Judiciary Committee
United States Senate
135 Hart Senate Office Building
Washington, DC 20510

RE: Sixth Amendment Right to Counsel in Misdemeanor Cases

Dear Senator Grassley:

On behalf of Koch Industries, thank you for convening a hearing on the vitally important issue of the circumstances under which the United States Constitution's Sixth Amendment right to counsel applies to misdemeanor defendants. We commend you for convening this hearing and support efforts to ensure that a criminal defendant in any jurisdiction, whether charged with a misdemeanor or felony, is provided with effective counsel, if incarceration or a suspended sentence/probation is possible.

The Sixth Amendment provides that those accused of a crime have the right to counsel, and over 50 years ago *Gideon v. Wainwright* unanimously upheld the right to counsel at state expense for the indigent. This right to counsel attaches and should apply when adversarial proceedings commence to determine if the accused will lose liberty and potentially face a prison sentence or a suspended sentence/probation, regardless of whether it is a misdemeanor or felony charge.¹ The text of the Sixth Amendment makes no distinction between felony or misdemeanor cases, and none should apply in these circumstances.

Traditionally, the focus on the right to counsel has been on those accused of a felony and the prospect of a prison sentence if convicted. However, the vast majority of the accused make first contact with the criminal justice system through a misdemeanor charge.

¹ In fact, in *Rothgery v. Gillespie County*, the U.S. Supreme Court held that the right to counsel must attach at the point that adversarial proceedings have commenced, and that "adversarial proceedings" commence when the suspect learns about the charge against him and his liberty is at stake. Furthermore, counsel must be appointed within a "reasonable time" after the right to counsel attaches.

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The Honorable Chairman Grassley
May 6, 2015
Page 2

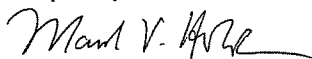
A misdemeanor is a less serious offense, for which punishment is generally limited to one year in jail. Nationally, the number of annual admissions to jail for misdemeanor convictions have nearly doubled, from 6 million in 1983 to approximately 12 million in 2013, about 19 times the number of those entering state and federal prisons for felony convictions.²

Whether an individual has a misdemeanor or felony conviction, the collateral consequences faced because of a criminal record exist. This makes it even more vital that the individual liberties guaranteed by the Sixth Amendment are provided in both situations. Currently, 1 in 3 Americans have some type of criminal record (felony, misdemeanor, or arrest) and this often means limited access to jobs, professional licenses, housing, education and/or certain constitutional rights. Even if the criminal record is for a misdemeanor, the individual and his/her family could bear collateral consequences. Had the individual been provided effective counsel when charged, there may not have been a guilty plea and the resulting negative consequences of a criminal record. Thus, it is essential the Sixth Amendment right to counsel apply in misdemeanor cases when there is any chance of incarceration, probation or suspended sentence.

We unconditionally support the Sixth Amendment and the entire Bill of Rights, which is the bedrock of our free society. As a result, last year, we made a grant to the National Association of Criminal Defense Lawyers (NACDL) to fund training for court-appointed lawyers in criminal cases and to examine state level indigent defense delivery systems to ascertain strengths in the systems that can be replicated elsewhere, as well as weaknesses and the ways in which those can be rectified.

Once again, thank you for convening a hearing to highlight this important issue and thank you for the opportunity to submit this letter of support. We hope your leadership will strengthen the Sixth Amendment and protect the freedom and rights of all Americans, including those who are most negatively impacted by lack of access to a competent defense lawyer.

Respectfully submitted,



Mark V. Holden

² Todd D. Minton and Daniela Golinelli, *Jail Inmates at Midyear 2013—Statistical Tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014, p. 4. E. Ann Carson, *Prisoners in 2013*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014.



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*Affiliations listed for
identification purposes only*

May 12, 2015

Senator Chuck Grassley
Hart Senate Office Building, SH-135
Washington, DC 20510-1501

Dear Senator Grassley:

I write to provide you with relevant materials for your review and consideration in advance of the United States Senate Judiciary Committee hearing on *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors* on Wednesday, May 13, 2015. I commend Chairman Grassley for his consideration of this important constitutional issue and, on behalf of The Constitution Project, look forward to working with him and all members of the Committee as you examine and develop next steps for addressing this pervasive problem with far-reaching implications for individuals and society-at-large.

The Constitution Project National Right to Counsel Committee (Committee) has examined the state of indigent defense in our country for several years, determined to assist governments in realizing the promise of *Gideon v. Wainwright* that any person accused of crime – regardless of his or her ability to afford a lawyer – has the right to effective legal representation under the Sixth Amendment. The Committee – for which former Vice President Walter Mondale and former FBI Director and federal judge William S. Sessions serve as honorary Co-Chairs – comprises individuals from across the political spectrum with vast experience in the criminal justice process. Like all of The Constitution Project's bipartisan, blue ribbon committees, all recommendations set forth by the National Right to Counsel Committee are the product of consensus. The Committee's reports and recommendations seek to level the playing field in our system of justice. Below is an overview of the Committee's findings as they relate to jurisdictions' adherence to Sixth Amendment and Supreme Court precedent governing the right to counsel in misdemeanor cases.

Denial of Counsel and Systemic Ineffective Assistance of Counsel

In 2009, the Committee issued *Justice Denied*, which documents the structural and financial impediments jurisdictions face in ensuring that indigent defendants receive effective assistance of counsel and sets forth recommendations for reforms to address these concerns. Among the several issues examined by the Committee were the denial of counsel for those charged with misdemeanors, including uncounseled and invalid waivers of counsel and guilty pleas – and the persistent problem of denial of *effective assistance* of counsel to people facing any potential loss of liberty – whether it be for a traffic violation, commission of a minor offense, or failure to pay a fine or some other probation violation. The Committee's investigators – comprising two

former judges and one law professor – visited eight jurisdictions across the country.¹⁰⁹ Some of their findings are as follows:

- In **Rhode Island**, a judge offered a defendant six months in jail for an immediate guilty plea without counsel and cautioned that if the defendant requested a lawyer, he would likely be sentenced to three years in jail.¹¹⁰
- In **Ohio** and **Indiana**, many juveniles waive the right to counsel and acknowledge guilt without ever speaking to a lawyer.¹¹¹
- In **Mississippi**, a woman accused of stealing \$200 from a slot machine languished in jail for eight months without a lawyer before she finally decided to plead guilty in order to get of jail.¹¹²

The following is illustrative of the general findings of the Committee's investigators:

...the judge advised... [approximately 15]... defendants [all of whom were in custody] that they had the right for counsel to be appointed, but the circumstances... almost impel indigent defendants to plead guilty and give up their right to counsel. There is no public defender or appointed counsel present at the proceedings with whom defendants can consult. Consequently, a defendant who wants... counsel must wait several days for counsel to be appointed and possible several more days for appointed counsel... to make contact.¹¹³

In such cases, all but one or two defendants pleaded guilty and received fines with probation and a suspended sentence.

Further, in jurisdictions in which a public defender is available to represent an accused misdemeanor defendant, she or he is often laboring under such an **excessive caseload** that effective representation under the Sixth Amendment is simply not possible. For example:

- In **Tennessee** in 2006, six misdemeanor attorneys handled over 10,000 cases, averaging just less than one hour per case.¹¹⁴
- In **Florida**, defender misdemeanor caseloads in Miami rose from 1,380 in 2006 to 2,225 in 2009. One defender was so busy that he did not have time to check the calculation of a minimum sentence for a client charged with theft. He accepted the prosecutor's calculation of 2.6 years, but later found – only through the prosecutor's disclosure – that the client's minimum sentence was only one year.¹¹⁵

Late Assignment of Counsel

In March 2015, our Committee released a new report, entitled *Don't I Need a Lawyer?*, to address one of the most common and overlooked deprivations of the right to counsel: **denial of a lawyer when a judge or magistrate determines if an indigent accused will remain incarcerated or will remain free prior to trial**. This practice has a significant effect on the quality of justice administered to the most low-level

¹⁰⁹ THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, 85 (2009) (hereinafter JUSTICE DENIED). The jurisdictions were California, Colorado, Florida, Georgia, Mississippi, Nevada, South Carolina, Texas, and Washington. *Id.* The full version of JUSTICE DENIED can be found at <http://www.constitutionproject.org/issues/criminal-justice-reform/right-to-effective-counsel/>.

¹¹⁰ JUSTICE DENIED, at 89.

¹¹¹ *Id.* at 87. Jurisdictions employ varying nomenclature to describe the entrance of a guilty plea in juvenile proceedings, including "acknowledgement of guilt," "assumption of responsibility," or that the youth is "found involved" – all of which are tantamount to and have the same effect as a guilty plea.

¹¹² *Id.* at 86-87.

¹¹³ *Id.* at 85-86.

¹¹⁴ *Id.* at 68.

¹¹⁵ JUSTICE DENIED, at 86.

offenders, since the vast majority of criminal prosecutions in courtrooms across the country are for misdemeanor violations.

Without a lawyer to marshal resources and advocate on behalf of the accused at a freedom or bail hearing, a judge is more likely to order a financial condition on release, which often results in poor, misdemeanor defendants remaining incarcerated prior to trial for no reason other than their indigency. While the law presumes innocence and sets forth only limited circumstances in which detention before trial is permissible, many judicial officials nonetheless order a money bond as a condition of release for poor and low-income defendants. In jurisdictions that do not provide counsel at the first bail hearing, these judicial decisions go unchallenged and as a result, many indigent defendants with limited personal or family financial resources are left with two choices: scrape together the necessary money to pay a bondsman's ten percent fee or stay in jail until the case concludes.

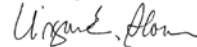
Among the panoply of adverse effects and collateral consequences of such needless incarceration are scenarios like the 19-year old defendant in **Maryland**, charged with possession of marijuana and who had no prior convictions or prior arrests, who languished in jail for 24 days because neither he, nor his grandmother with whom he lived, could afford the \$3,000 bond ordered by the court.¹¹⁶

Today, lawyers are never present at the first bail hearing in eight states¹¹⁷, while defenders appear infrequently or in token circumstances in 17 states.¹¹⁸ In 11 other states, the chances of a poor person obtaining a representation depend upon where the arrest occurred, with many counties denying counsel at first appearance in these hybrid states.¹¹⁹

People of color are more likely to be incarcerated prior to trial, regardless of their own circumstances and those pertaining to the charges. Defendants incarcerated prior to trial often suffer dramatic and often tragic consequences, such as losing their jobs, housing, and children. However, when represented by counsel at first appearance, there is a greater likelihood of a defendant gaining pretrial release, receiving a more favorable plea offer, a favorable jury verdict, and a less harsh sentence.¹²⁰

Congressional attention to the crisis in our indigent defense system is a welcome development. This letter summarizes The Constitution Project Committee's reports. We invite your consideration of the National Right to Counsel Committee's complete recommendations found in Justice Denied and Don't I Need A Lawyer?, several of which were crafted in view of the federal government's role in and capacity to improve access to justice for misdemeanor and other defendants. It is our sincere hope that you will look to us, our reports, and our Committee members as a resource as you investigate this important issue affecting the millions of Americans each year who are charged with misdemeanor offenses and are unable to afford a lawyer.

Sincerely,



Virginia Sloan
President and Founder, The Constitution Project

¹¹⁶ THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 32 (2015) (hereinafter DON'T I NEED A LAWYER?). A student-attorney eventually helped secure the defendant's pretrial release without the Court's imposition of a monetary condition on release.

¹¹⁷ DON'T I NEED A LAWYER?, at 24. The eight states include Alabama, Kansas, Michigan, Mississippi, Oklahoma, South Carolina, Tennessee and Texas.

¹¹⁸ *Id.* Assigned defenders for an accused poor person appear at the first appearance only in a minority of local jurisdictions in Alaska, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, West Virginia and Wyoming.

¹¹⁹ *Id.* The 11 states include Idaho, Kentucky, Louisiana, Minnesota, Montana, Ohio, Oregon, Rhode Island, Utah, Virginia and Washington.

¹²⁰ *Id.* at 25, 30.



May 20, 2015

The Honorable Charles E. Grassley
Chairman, Senate Judiciary Committee
Dirksen Senate Office Building, SD-224
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
Dirksen Senate Office Building, SD-152
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

The board, members, and staff of the National Legal Aid & Defender Association (NLADA) thank you and the United States Senate Judiciary Committee for convening the hearing on “Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors” on May 13, 2015. As you are well aware, the Sixth Amendment right to counsel in misdemeanor cases is not fully realized, and your recognition of the deprivation of this Constitutional right is a great step forward towards solving this incredible problem. We applaud your efforts to address this issue and thank you for the opportunity to contribute to the record.

Founded in 1911 and located in Washington, DC, NLADA is America’s oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. A leader in the development of national standards, NLADA also provides advocacy, training, technical assistance and peer-to-peer networking, with emphasis on practices that improve delivery systems and promote access to justice.

With the National Opinion Research Center (NORC), through a grant from the Bureau of Justice Statistics (BJS), NLADA has been identifying and collecting information on the types of indigent defense delivery systems across the country for the National Survey on Indigent Defense Systems (NSIDS). We have learned that, while there are 27 states that appear to have statewide indigent defense delivery systems, many of these states commit so few resources to their indigent defense systems to provide for representation misdemeanor and municipal courts.¹ Other states have different indigent defense delivery systems, county by county, with little or no cohesiveness in their approach and little to no resources devoted to meeting their Constitutional obligation to provide counsel in misdemeanor cases. Many of these counties do not have public defense systems at all, but rather, contract or fee-based attorneys for felony cases. For completion of the NSIDS survey, NORC is distributing surveys to over 1120 counties,

¹ Despite having an Indigent Defense Commission, Chief Justice of South Carolina indicated that the state cannot afford to appoint attorneys in all misdemeanor cases; (see n. 10, *infra*) and in some municipal courts there is no system to appoint counsel at all in misdemeanor cases. Other states also have statewide commissions, but no resources adequately committed to the indigent defense delivery system to allow for coverage of misdemeanor cases.



with at least half going to court personnel because there are no defender offices in their counties. There are structural “black holes” where there is no indigent defense delivery system for representation in misdemeanor cases at all.

Our nation’s criminal justice system adjudicates at least 10 million misdemeanor cases per year.² While 99 percent of felony defendants have legal representation,³ at least 30 percent of misdemeanor defendants – 3 million persons per year – do not have a lawyer.⁴ Here are a few examples of criminal justice systems where there is actual denial of the right to counsel – where there is no counsel present during the pendency and disposition of misdemeanor cases with exposure to jail time:

- Utah’s own court brochure⁵ about court-appointed counsel states that a defendant must request an appointment of an attorney, and that determination of indigence is only mandated for Class A misdemeanors, which carry sentences of more than 90 days in jail, and felonies. No such requirement of determination for appointment of counsel is mandated for Class B misdemeanors, which carry up to six months incarceration if convicted or for Class C misdemeanors carrying up to 90 days in jail.⁶ In Utah, over 80percent of all criminal matters per year are misdemeanors.⁷
- In Texas, in 73 counties, 80percent of misdemeanor defendants have their cases resolved without counsel; and 25percent of all misdemeanor defendants in the state did not have counsel in 2014.⁸
- In South Carolina, although there is an indigent defense commission, “in some counties there are no defense counsel in magistrates courts at all; and in some small municipalities there are no systems to appoint counsel in misdemeanor cases.”⁹ South Carolina’s Chief Justice has said that the state “simply does not have the funding” to

² National Center on State Courts (NCSC) Court Statistics Project, 2012 Trial Courts – Criminal Caseloads, available at

http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro

³ See, e.g., Caroline Wolfe Harlow, Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases 1 (2000) (reporting that in 1996, 99.6percent of felony defendants in the Nation’s 75 largest counties were represented by counsel), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

⁴ Inter-Univ. Consortium for Political & Soc. Research, Bureau of Justice Statistics, Survey of Inmates in Local Jails (2002), available at <http://dx.doi.org/10.3886/ICPSR04359.v2>. This is a conservative estimate because many states do not keep adequate statistics on misdemeanor cases, and the survey did not include many defendants in misdemeanor and traffic courts around the country who may have received probationary sentences.

⁵ http://www.utcourts.gov/courts/just/docs/QA-Appointed_Counsel_Pamphlet.pdf

⁶ Utah Code Ann. §§ 76-3-204, 76-3-301

⁷ NCSC, *supra*, note 2.

⁸ Information provided by Texas Indigent Defense Commission, May 19, 2015.

⁹ Conversation with South Carolina Circuit Public Defender Chief, May 18, 2015.



appoint a lawyer in all misdemeanor cases where there is a constitutional right to counsel.¹⁰

- In Alabama, “there are pleas being taken every day ... without defense counsel. As the court (or a DA) tells a person about their right to counsel they will also say ‘or you could take this plea right now and resolve the case.’ The reason that this happens is money and time. The appointing court does not want to pay for a lawyer in the case and does not want to wait for lawyer to get into [a] case and work it out. Believe me when I say that this is a very common practice, and no matter how many times I argue that this is wrong, it continues right up to today.”¹¹
- In Michigan, defendants are notified that, if they plead not guilty, they may be required to pay the entire cost of assigned counsel. Then they are sent to a room to speak with a prosecuting attorney, without a defense attorney present. One district court judge noted that 95 percent of indigent defendants charged with misdemeanors waive assigned counsel and 50percent plead guilty – and without counsel – at arraignment.¹²

The right to counsel when liberty is at stake is embedded in the Sixth Amendment of the Constitution and has been repeatedly affirmed by the U.S. Supreme Court. For nearly fifty-two years, *Gideon v. Wainwright*, 372 U.S. 335 (1963), has exemplified the baseline for right to counsel, but, alas, in much of the country we have yet to provide this basic right. Since then, through cases including *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel for misdemeanor defendants sentenced to incarceration), and *Alabama v. Shelton*, 535 U.S. 654 (2002) (misdemeanor defendants sentenced to probation with threat of incarceration have right to counsel), the Supreme Court has further affirmed the right for misdemeanor defendants. Yet and still, indigent misdemeanor defendants are pervasively and systematically being denied counsel, as if the Constitution applies only to those who can afford to hire an attorney.

Presence and access to counsel is crucial whenever someone is charged with a crime and liberty is at stake. Even a short time in jail is traumatic and life-altering. Jail inmates risk loss of employment, housing, and family while incarcerated. Even if a defendant pleads guilty to a misdemeanor and ultimately spends no time in jail, that criminal record stays with him and subjects him to potentially thousands of collateral consequences, civil restrictions and penalties as a result of the criminal record. The American Bar Association has compiled over 50,000 collateral consequences of having a criminal record, on its website, www.abacollateralconsequences.org. Over eighty percent of these collateral consequences affect one’s ability to obtain and maintain employment. Other consequences can include deportation, loss of children, loss of housing, denial of public benefits, and denial of exercise of

¹⁰ “Justice is Swift as Petty Crimes Clog Courts,” John R. Emshwiller and Gary Fields, Wall Street Journal, Nov. 30, 2014.

¹¹ Communication with associate public defender in Tuscaloosa, AL, May 18, 2015.

¹² “A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis,” NLADA, 2008, p. 32.



freedoms others enjoy. While the criminal penalty may be a fine and probation, collateral consequences can be life-long and life altering.

Recommendations

Whenever policy advocates address problems, they are also inclined to suggest recommendations to solve those problems; this is no exception. Here, however, NLADA endeavors to recommend actions that are within this Committee's power and authority.

Recommendation: extend 42 U.S.C. § 14141 to adult proceedings:

The greatest authority this Committee can exercise is its ability to propose legislation to enforce the constitutionally guaranteed right to counsel. Through the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), the federal government has the authority to enforce the right to counsel and other constitutionally protected rights in juvenile court, as it has recently done in the Juvenile Court of Memphis, in Shelby County, Tennessee.¹³ After the U.S. Department of Justice conducted an investigation into patterns and practices of violations of juveniles' constitutional rights, the Department and the county came to an agreement, which included the establishment of a juvenile defender unit and the collection of data to assess the amelioration of county's juvenile justice system.¹⁴ This Committee has the authority to modify Section 14141 to extend its coverage to adult court proceedings as well, to give the Department of Justice authorization to investigate patterns and practices of violations of adult defendants' right to counsel in misdemeanor cases.

Recommendation: codify the right to counsel.

Although the right to counsel is boldly stated in the Sixth Amendment of the U.S. Constitution, there has been an evolution of litigation and precedent to establish this right in misdemeanor cases. If the Committee were to propose a codification of the right to counsel in misdemeanor cases into law, it would help to clearly state the constitutional right as guidance for states to follow. As it stands now, there is Supreme Court precedent, yet some states are still choosing not to ensure the right to counsel. Codification based on precedent, would outline if and when the right to counsel attaches: when liberty is at stake and at first appearance before a judicial entity determining pretrial release.¹⁵ Then, "[t]he law will govern the decisions of judges, and not the decisions the law."¹⁶

¹³ See, "Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County", U.S. Department of Justice, Civil Rights Division, Dec. 17, 2012. Available at <http://www.justice.gov/opa/pr/departments-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee>.

¹⁴ *Id.*

¹⁵ See, *Rothgery v. Gillespie County, TX*, 554, U.S. 191, (2008).

¹⁶ Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 Fordham L. Rev. 983, 987 (2004), quoting William Sampson, *Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law, Anniversary Discourse Before the Historical Society of New York* (Dec. 6, 1823), in *The Legal Mind in America: From Independence to the Civil War*, 132 (Perry Miller ed., 1962)



Recommendation: incentivize states to comply with the right to counsel and support indigent defense.

Without allocating additional funds to this endeavor, the Committee has the authority to use federal funds allocated for criminal justice reform to incentivize state and local jurisdictions to prioritize the right to counsel and the indigent defense service needed to comply with this constitutional right. At present, state and local governments are receiving federal funds for criminal justice reform, yet most do not include indigent defense as a funding priority.

According to the Government Accountability Office (GAO) 2012 Report on Indigent Defense,¹⁷ Department of Justice's Byrne Justice Assistance Grant Program (Byrne JAG), disbursed over \$500 million to state and local governments between 2005 and 2010, but indigent defense services received less than 1 percent of these funds.¹⁸ The GAO report recommends that the Department of Justice "could increase awareness of eligible funding and better determine the extent to which funds help support" indigent defense, but this Committee has the authority to do much more. The Committee can legislate that Byrne JAG funds and other federal funds for criminal justice programs (such as Justice Reinvestment Initiative, and others) be contingent on the state or locale's demonstration of prioritization of indigent defense services, to be demonstrated by increased allocation of funds to indigent defense, as well as the development and support of indigent defense service delivery in areas where such delivery is lacking or nonexistent. The Committee can also make receipt of part of all of federal funds for criminal justice contingent on this demonstration. Furthermore, the demonstration should not require just a substantial increase in funds allocated to indigent defense, but also affirmative steps to ensure that indigent defense advocates or representatives are part of the allocation and decision-making process surrounding federal funds allocation.

This Committee can also support loan repayment initiatives, including the John R. Justice Loan Repayment Program, which provides loan repayment assistance to both defenders and prosecutors alike. Having well-qualified counsel who desire to do the work is critically important, but many cannot do so without loan repayment assistance. An important part of criminal justice reform is ensuring that we develop the capacity to ensure the constitutional right to counsel by having counsel willing and able to be public defenders. John R. Justice funds are distributed by states, so continuation of this program would be a persuasive sign to states that Congress continues its commitment to criminal justice attorneys in their state and county courtrooms.

This Committee's support of a National Center on the Right to Counsel would also send a clear message that the federal government is committed to the establishment of consistent and best practices in the enforcement of this Constitutional right. Such a Center would provide guidance,

¹⁷ Available at, <http://www.gao.gov/assets/600/590736.pdf>

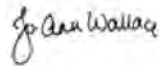
¹⁸ "GAO Study Shows Federal Justice Grants Overwhelmingly Favor Law Enforcement Over Indigent Defense," Press Release, Constitution Project, May 10, 2012. Available at <http://www.constitutionproject.org/wp-content/uploads/2012/05/2012.05.10-GAO-Study.pdf>



training, and resources to state and local criminal justice systems, especially those that have yet to establish public defense delivery systems.

This hearing and comment period is just the beginning of what we are sure will be more collaboration and discussion about how to address the critical issue of the right to counsel in misdemeanor cases. Also, more research, data collection, and analysis are needed to fully grasp the depth and breadth of the problem. Again, we thank you for holding a hearing to engage NLADA and others in this process, and we are at your service to provide you any information or support the Committee might need as it grapples with this important issue.

Sincerely,



Jo-Ann Wallace, President & CEO
National Legal Aid & Defender Association



May 12, 2015

The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Senator Leahy:

We are writing to thank you for holding a hearing on the issues surrounding the provision of counsel for individuals facing misdemeanor charges. The problems related to misdemeanor proceedings are often overlooked or minimized in light of more harshly punished felony offenses. As Chairman Grassley has rightly pointed out, misdemeanors carry serious direct and indirect consequences for the accused, our justice system, and society at large. The denial of the 6th Amendment right to effective assistance of counsel in adult and juvenile misdemeanor cases has serious repercussions, undermining citizens' faith in the fairness and reliability of our criminal justice system. Shining a light on these issues is the first step in bringing accountability and justice to a system that has been ignored for too long.

This neglect is regrettable given that most jailable offenses are misdemeanors and that most contact with our criminal justice system is at the misdemeanor level. It is estimated that misdemeanors account for approximately 80% of the criminal docket in state courts across the country. One study found that in 2006, there were over 10 million non-traffic misdemeanor prosecutions.¹ By comparison, that same year there were over 1.1 million persons convicted of a state felony and approximately 58,000 federal felony cases filed in the nation's largest urban counties. Traffic offenses and civil infractions also lead to incarceration in many jurisdictions, yet counsel is often unavailable or unconstitutionally waived in these cases in courtrooms across the United States.

The most glaring examples of these deficiencies occur at first appearance, the proceeding at which charges are read and, when applicable, pretrial release conditions are determined. Throughout the country, individuals charged with relatively petty, victimless offenses are pleading guilty in abbreviated proceedings without being granted or informed of their right to an attorney.² The level of process provided in such courts often does not comport with constitutional requirements and is simply not adequate to ensure that convictions correspond

¹ National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Court*, available at <http://www.nacd.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>. This estimate is based on the extrapolation of caseload statistics collected from twelve states in 2006.

² National Association for Criminal Defense Lawyers, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, available at <http://www.nacd.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764>.

with culpability.³ Even when counsel is available, misdemeanor caseloads are so high as to all but prevent meaningful investigation and preparation, virtually ensuring ineffective lawyering on behalf of a misdemeanor defendant.

Individuals – including juveniles – caught up in this system frequently do not appreciate the life-altering collateral consequences that flow from a misdemeanor conviction. Aside from the stigma of a criminal conviction and a jail sentence, misdemeanors carry the potential loss or denial of professional licenses, benefits and employment opportunities. Fines that exceed financial ability to pay and sentencing regimes that include enhancements for prior misdemeanors are other pitfalls that may ensnare certain individuals.

Every year, thousands of individuals' first and only exposure to our criminal justice system is a misdemeanor court system that does not reflect American values or the Constitution precepts. Thank you again for your attention to this important issue. We stand ready to assist you and the committee as the discussion moves forward to potential solutions.

Sincerely,

National Association of Criminal Defense Lawyers

The Constitution Project

American Civil Liberties Union

American Council of Chief Defenders

Faith & Freedom Coalition

Federal Public and Community Defenders

FreedomWorks

Justice Fellowship / Prison Fellowship Ministries

National Association for Public Defense

National Juvenile Defender Center

National Legal Aid & Defender Association

Right on Crime

Southern Center for Human Rights

cc: Members, Senate Committee on the Judiciary

³ The Constitution Project, *Don't I Need A Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing*, available at http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.



EXHIBIT A



Reports from Members

- In the City of St. Louis, Missouri, there are no attorneys provided for 70% of persons charged with misdemeanors.
- In all Missouri counties, the public defender is statutorily prohibited from representing indigent defendants, leaving virtually all defendants without counsel.
- In New Mexico, there are few lawyers being appointed for persons charged with municipal court violations, though persons routinely receive 6 month jail sentences.
- In New Orleans, Louisiana, the prosecutor routinely engages in uncounseled pleas prior to the defendant waiving his or her right to counsel. These unrepresented indigent defendants are then jailed when they are unable to pay the fine. Public defenders who are appointed in municipal court routinely carry caseloads in excess of 2,000.
- In Mississippi, appointment of counsel is "routinely" denied. Contempt and jail are routinely used to punish failure to pay. In fact, in Jackson, Mississippi, judges often use the term "pay or stay." In Jackson, Mississippi, persons are routinely found guilty in abstentia, and a warrant is issued, they are arrested, charged with contempt for failure to pay the fine and then jailed. There are many lower courts in the state that have no lawyers practicing in them and guilty pleas last a matter of seconds.
- In Colorado, with the exception of two jurisdictions, there are no lawyers in municipal court, and persons routinely go to jail for unpaid fines.
- In Kentucky, public defenders are representing only about 32% of the people charged with misdemeanors. Most of the remaining 68% of the people charged with misdemeanors are unrepresented and either engage in plea agreements with the prosecutor before waiving their right to counsel, or enter a naked plea to the court unaware of the consequences.
- In Lincoln, Nebraska, there is no counsel provided if the judge has no intent to jail. These uncounselled persons are then jailed if they fail to pay fines and fees. People lose their driver's licenses when they fail to pay a traffic fine, with life altering consequences, such as loss of employment and housing.
- In South Carolina, there are no public defenders in 6 of the 46 counties in misdemeanor courts, and there are no public defenders in any municipal court.
- In North Carolina, Class 3 misdemeanors result in a fine only, but those persons are then routinely jailed for failure to pay the fine.
- In Augusta, Georgia, no lawyers are provided for probation revocations for failure to pay fines, and persons are routinely jailed for failure to pay the fine.
- In Birmingham, Alabama, no lawyers are appointed for the bad check docket, and persons are routinely jailed when they fail to pay restitution and attendant fees and fines.

- In Idaho, few persons charged with misdemeanors have counsel.
- In Iowa, public defenders handle only about 15% of the misdemeanor docket.
- In Arkansas, persons charged with misdemeanors are charged \$400 for the services of a public defender.
- In Nashville, Tennessee, 54% of the misdemeanants have no lawyer.
- In South Dakota, in only 1 of 62 counties does a public defender appear at first appearances.
- In Virginia, a person loses his or her driver's license for the failure to pay a fine, with life altering consequences, such as loss of employment and housing.
- In Florida, there is no lawyer provided for cases where jail time is not going to be imposed, and jail is routinely imposed for failure to pay the fine.



EXHIBIT B





NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS

Published May 13, 2015

Executive Summary

The collection of costs, fines, and fees in too many criminal courts across the United States are predatory in nature and an economic failure. These predatory practices impact poor people in catastrophic and life altering ways and are disproportionately levied against people of color.

In the criminal justice system, significant fines, fees and court costs are levied upon poor people to fund criminal justice costs, and in some instances a significant part of municipal budgets. Privatization of the criminal justice system function is also increasing, aggravating the impact. Functionally, the status of being poor has been turned into a crime, resulting in the poor being used to enrich the courts and municipalities through a cycle of debt that continually increases. The methods used to collect costs, fines, and fees are so extreme that many, if not all, practices have been outlawed when applied to predatory lenders. These court practices include:

- Usurious interest rates
- Payment plans that are harsh, unrealistic and designed to cause failure
- Hidden costs and additional fees
- Loss of freedom and repetitive arrests over nothing more than a few dollars that is increased each time an arrest is made creating a never ending cycle of debt
- Denial of access to families while in jail

Meanwhile, too many courts are ignoring their constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients, and many courts are illegally imposing jail time as a punishment for unpaid criminal justice debt.

Public policy weighs strongly against funding government on the backs of poor people. It should end now.

PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

1. Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.
2. Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; and civil debt collection is the only method to collect fines assessed for ordinance violations or infractions that are not criminal violations.
3. Non-payment of fees should be treated as a civil debt.
4. A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.
5. The determination of the ability to pay should be the same as need-based assistance in other government programs.
6. Contempt of court is not an appropriate method to collect fines, fees or court costs.
7. Fines may not be made a condition of probation without regard to a person's ability to pay.
8. Indigent defense fees should not be collected by defense agencies.
9. The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.
10. Ending excessive costs and fines is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.

NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS

Predatory collection of costs, fines, and fees has shifted the expense of essential government services to the poor. The most dramatic shift happening anywhere in government is in the third branch where the criminal justice system is funding itself through its reliance on predatory costs, fines, and fees. The greatest amounts are borne by those who can least afford it. Worse than creating more debt for the poor and acting worse than companies that prey on this vulnerable sector of our economy with pay day loans, rent-to-own, and title loans, our justice system goes beyond the tactics of these private debt agencies and uses the court system to deprive people of their liberty in the collection of debt. This is debt which was created by the very system that is now jailing them; debt that until recently was always a general revenue cost of guaranteeing our government functioned as our founders intended.

Criminal justice fines, fees and costs are significant. Today, anyone encountering our justice system is likely to face fines, fees, and costs for every aspect of his or her case. There are mandatory fines imposed for tickets, like a dog at large or disturbing the peace for playing a car stereo loudly. There are fees for applying for counsel when you are too poor to hire counsel; fees for supervision while on pretrial release; fees for filing any pleading; fees for requesting a jury, a constitutionally guaranteed right; and fees for vehicle interlocks or impounded vehicle costs, again all before ever having been found guilty of anything. And if there is a conviction, there will be court costs charged, which may include special project fees to build a new courthouse and fees for the processing of paperwork by the clerk's office. In addition, there may be a charge for every visit to probation which is required to maintain freedom, fees for every test the individual is required to take, fees for every program she is required to attend, and even fees to stay in jail.

Privatization of the criminal justice system function is increasing. On top of these government imposed fees, the courts have started to privatize many traditionally governmental functions turning clients into profit centers. Courts have contracted probation services to for profit companies. People are not just being charged for probation but they are being charged a surplus so the company can make a profit. Complain about it or fail to make the payments and the probation officer can recommend incarceration in jail. And the families of those who go to America's criminal courts are subject to extortion-like behavior from private vendors as well. Rather than operate their own phone systems, many prisons and jails make money by selling a contract to private vendors who then charge up to a \$1 per minute, with the jail or prison receiving a per minute profit. This means children cannot talk to their parents, many of whom are jailed prior to trial and are innocent of any crime or who may only be in jail because they have been unable to pay prior costs, fines, and fees. Even staying in jail can cost money. Failing to

pay for the daily cost of incarceration can result in more jail time, requiring more money.

Courts are ignoring the constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients. By ignoring an individual's ability to pay assessed fines, fees, and costs, courts routinely assess financial penalties that individuals cannot pay. If a person fails to pay, the penalties escalate with additional fines and fees, court costs, contempt rulings, arrest warrants, and often, time in jail – even though imprisonment for inability to pay (the “debtor’s prison”) is unconstitutional. Some jurisdictions offer payment plans, but can have an application fee, and compounding interest. Without regulation or principles, criminal justice expenses are far more predatory and far less transparent than the interest rates on personal credit cards.

Predatory collection of costs, fines, and fees is an economic failure. While courts regularly issue annual reports of how much money they collect, these reports suggest this collection is a net gain. The reality is that courts spend far more than they ever collect and there is no improvement in public safety. Courts are part of a justice system and when a court issues a warrant for someone because they owe the court \$100, the court has issued a directive to numerous other justice agencies to spend money. That warrant causes the police to expend resources to arrest the person and the person is then jailed where more money and resources are expended to book them, house them, feed them, and provide necessary medical care. When the person is brought to court, the clerk has expended resources, the prosecutor has expended resources, and the public defense system has expended resources. So, while the court has collected \$100, the other justice agencies have spent immeasurably more. This type of accounting is disingenuous by placing assets on one set of books and debts on another set of books and then only reporting the assets. Predatory collection is a burden on society that should end. It provides no real increase in revenue and, in fact, costs money, and it wastes valuable limited resources without any accompanying improvement in public safety.

The impact of predatory collection practices in the criminal justice system is catastrophic on poor people generally and on people of color particularly. Litigation filings throughout the country tell the stories of people threatened with or actually taken to jail – often for parking and traffic tickets that have almost no impact on public safety – because they struggle to keep up with court-assessed fees that are imposed without any consideration of ability to pay.

In 2009, in St. Louis County, Nicole Bolden was arrested for driving with a suspended license and spent two weeks in jail. Five years later, lawyers at the Arch City Defenders met with her at her kitchen table to discuss her still-outstanding fees. Ms. Bolden is the mother of four children. She has a part-time job and is in the process of studying to be a paralegal. In 2009, failure to pay fines and fees resulted in the suspension of her license, which she needed in order to drive to work so that she could support her family. She was arrested on her way to drop her children at school. After two weeks in jail without income, and the loss of her job, she was

farther behind and had new bills to pay associated with her court costs. Each month for the past five years she has struggled to pay her rent and utilities, provide for her children, maintain her transportation and have something left over to contribute to her fines and fees. Some months there is money, some months there is not. On months when the court gets paid, another bill does not. Having already been taken to jail for failure to pay her fines, she knows the consequences can be severe, but she has an absolute inability to pay. Her struggle to extricate herself from fines assessed in 2009 will take years more, creating acute hardships that will dominate the entire childhood of her children, and affect her ability to advance her work opportunities. Her experience is shared by thousands of people throughout the country.

This is the shameful truth of predatory collection practices: many individuals start with a small infraction that becomes a life-changing struggle to satisfy ever-mounting debt to the criminal justice system. Its effect can be generational, and condemns the poorest communities to persistent poverty.

PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

- 1. Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.**

The purpose of fines and court costs are different. Fines are part of the punishment levied against the individual for the infraction committed. Court costs are not intended to punish but are intended to defray the operational costs of the court. "Costs are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system Statutory provisions for payment of court costs were not enacted to serve a punitive, retributive or rehabilitative purpose, as are fines." *Strattman v. Studt*, 20 Ohio St. 2d 95, 102 (1969). Because the purposes of fines and costs are different, the methods used to collect them must also differ.

The practice of setting numerous fines and imposing incarceration for failure to pay echoes the worst of American tradition – calling to mind Reconstruction era charges such as vagrancy that were applied predominantly to black men, punished by loss of liberty as well as insurmountably high fines and fees, and subsequently paid back through hard labor for private companies.

- 2. Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; civil debt collection is the only method that should be used to collect fines assessed for ordinance violations or infractions that are not criminal violations.**

Not only are the purposes of court costs and fines different in criminal cases, thus mandating different methods of collection, there are constitutional restrictions in most states governing the collection of civil debt. Most state constitutions have a provision forbidding any loss of liberty for civil debt. "Imprisonment for debt.— That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law." Missouri Const., Article I, Sect. 11. "A person may not be imprisoned for civil debt." Ohio Const., Article I, Section 15.

Because court costs are a civil debt the collection of this money must be made with constitutional guarantees in mind. Courts may only use civil debt collection methods for court costs - even when assessed in a criminal case. Pursuant to each state's constitution, under no circumstance may a person be imprisoned for failing to pay court costs.

The same is true of fines levied in non-criminal cases. "[V]iolations of municipal ordinances are civil matters but, because of the quasi-criminal nature of an ordinance, are subject to the criminal standard of proof beyond a reasonable doubt." *City of Dexter v. McClain*, 345 S.W.3d 883, 885 (Mo. App. S.D.2011). For example, in Ferguson, Missouri and surrounding St. Louis County, there are 90

municipalities with 81 separate courts that have jurisdiction only over the ordinances governing their municipality. The practice of jailing the indigent for non-payment of fines levied for infractions is unfortunately all too common. Because these fines are levied in civil matters that are only quasi-criminal because of the burden of proof, the same constitutional protections that bar imprisonment for court costs as civil debt applies to these fines based on infractions, which are a civil debt, as well.

3. Non-payment of fees should be treated as a civil debt.

Different than fines, almost all fees are the same as court costs in purpose; they are to pay to defray the costs of operating the justice system. Fees of all types have proliferated in the criminal justice system, including impound fees, filing fees, probation supervision fees, special project fees, jail fees, test fees, and even jury fees. Since the purpose of fees is to assist in the payment of the operating costs of the court they are civil in nature. Thus, the payment of fees is identical to court costs and only civil collection methods may be used. Courts must observe the constitutional restriction disallowing imprisonment for civil debt.

4. A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.

A court has a constitutional duty to make an affirmative finding that a person has the ability to pay a fine before it may impose incarceration for a person's failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 662-63, 668-69 (1983). The burden of proving an individual's ability to pay is placed upon the state. A court must inquire into a person's ability to actually pay the fine because the choice between paying and going to jail is not really a choice at all for those who cannot pay and results in an equal protection violation. *Id.* This duty to inquire into the person's ability to pay is a continuing duty because a person's ability to pay may change over time. Thus, if a court is considering jail because a person has not paid a previously ordered fine, the court must again inquire whether the person can actually pay at the time the jail sentence is being considered.

5. The determination of the ability to pay should be the same as need-based assistance in other government programs.

The *Bearden* Court failed to define the term "ability to pay." As a result, the number of definitions may be as myriad as the number of judges deciding who can pay and who cannot pay every day, millions of times a year in courtrooms across this country. The one finding that makes the most sense and provides consistency and fairness across cases and jurisdictions is to use need based assistance determinations as the standard for the ability to pay. Many jurisdictions use 125% of the federal based poverty guidelines to determine eligibility for basic needs like food assistance, medical assistance, and housing assistance. If this is the level of income at which a person is entitled to assistance with fundamental basic needs like food, housing and medicine, then it would be strange, if not immoral, to have the

third branch of government taking from those who are in such need. Thus, at a minimum, courts should find that persons who meet the need based assistance calculations for other government assistance programs do not have the ability to pay. Certainly, there will still be situations where a person is above 125% of federal poverty guidelines and cannot pay based upon an examination of a person's income, assets, and debts. Courts should not limit the analysis to only those who fall below need based assistance standards.

6. Contempt of court is not an appropriate method to collect fines, fees or court costs.

Contempt citations and collections of fines, fees and costs have incompatible purposes. The purpose of contempt is to compel or coerce a person's compliance with a court mandate. However, collection before a hearing ensnares people who cannot comply even when they do not have the ability to pay. Proponents argue a person was ordered to pay and violated the order, which would simply make the entire holding in *Bearden* meaningless. A court cannot bypass constitutional principles, like equal protection, by reframing everything as contempt. It is an axiomatic principle of contempt that a court cannot do indirectly what it cannot do directly. *Bailey v Alabama*, 219 U.S. 219 (1911). If a person's ability to pay a fine is the constitutional threshold before a person may be jailed for not paying, a court may not bypass that threshold by reclassifying an inability to pay as contempt of court. When the money involved is court costs or fees, the state constitutional prohibitions against any jail for a civil debt also protects against an improper use of contempt of court powers.

7. Fines may not be made a condition of probation without regard to a person's ability to pay.

Whether a court collects money through its clerk's office or the court makes fines, fees, or court costs conditions of probation, the court must still observe the equal protection requirements granted to citizens and determine if the inability to pay fines are at issue. The court must also maintain the constitutional protection against imprisonment where court costs as a civil debt are concerned. Thus, if a person on probation does not pay the fine and payment of the fine has been made a condition of probation, the condition precedent to any revocation still must be the ability to pay. In the case of court costs and fees, no incarceration can be imposed because of the prohibition on imprisonment for a civil debt, whether made a condition of probation or not.

A number of states have programs that give citizens accused of a crime an opportunity to keep a clean criminal record. These programs are sometimes called diversion where an individual is diverted from a criminal prosecution and consequence. The inability to pay the costs and fees of diversion programs should not preclude participation. Preventing those with an inability to pay suggests that poor people are less deserving of forgiveness and opportunities in the criminal justice system than those with financial means.

8. Indigent defense fees should not be collected by defense agencies.

The constitutional right to counsel must be provided at every stage of a criminal proceeding including any setting of fines, fees, and court costs as well as the determination of an individual's ability to pay. Public policy should be made clear: No fee or cost should be associated with providing counsel to those who meet need based assistance standards. A conflict of interest is created when public defense agencies must collect from individual clients to sustain the agency so more indigent clients can be represented. By charging a fee to the poor to exercise their constitutional right to counsel, it is a barrier to those who can least afford it. State and local governments should end the practice.

9. The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.

Our criminal justice system at present includes pretrial release for the wealthy and pretrial incarceration for the poor. There is no empirical evidence to suggest that those released after posting a cash bond are more likely to be present at trial, or are less likely to reoffend while released.¹

Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violate the Equal Protection Clause of the Fourteenth Amendment. *See Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). It wholly fails to consider the ability of the defendant to pay fines and undermines the constitutional protections against incarceration for costs and fees which are a civil debt. It is a system that favors the wealthy who can make bail over the poor person who cannot.

A court may not use monetary bond as a savings plan to set aside funds in the event fines, fees or court costs are imposed. Requiring monetary bond to ensure payment of fines and costs later in the case has other consequences when individuals cannot pay. Whether a person can afford bail can be outcome determinative at trial or upon plea bargaining. Defendants who are detained for the entire pretrial period before their case is decided are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial. (LJAF Research Summary, November, 2013 at www.arnoldfoundation.org/research/criminaljustice). It becomes clear that the best outcomes in criminal cases are heavily skewed toward those who have money for bail, even though statistically they may be more at risk

¹ A study by VanNostrand, Lowenkamp & Holsinger found that a money-based pretrial release system enables over 50 percent of defendants who are rated a higher risk to fail to appear or reoffend to be released, while those who are rated a lower risk are more regularly detained. (International Association of Chiefs of Police Resolution, adopted at the 121st Annual Conference, Orlando, Florida, October, 2014.)

to reoffend and not come to court than their poor counterparts who have been unable to post bail.

10. Ending excessive fines and costs is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.

Where fines, fees, and costs are assessed they must be reasonable and payable within a finite amount of time. Criminal Justice debt that places a life altering burden upon an individual is excessive. The amount is excessive if the person cannot reasonably pay it in the foreseeable future or if the amount will require the person to forgo necessities. The court system was not designed nor intended to be funded by users. It certainly was not designed to be funded primarily by the poor. But with fines, fees and court costs increasing to the hundreds, and even thousands of dollars per case, that is exactly what has happened in too many jurisdictions within the third branch of government.





EXHIBIT C





**NAPD STATEMENT ON
THE NECESSITY OF MEANINGFUL WORKLOAD STANDARDS
FOR PUBLIC DEFENSE DELIVERY SYSTEMS**

This statement was approved by the NAPD Steering Committee on March 19, 2015.

Excessive workloads in public defense delivery systems are an ethical issue.¹ Where they exist, public defense providers have a duty to remedy them; where they do not exist, public defense providers have a duty to avoid them. While this premise sounds simple, public defense providers, with rare exceptions, have been historically unsuccessful in maintaining reasonable workloads. Our most significant impediments to meeting this obligation have been our inability to: 1) define convincingly what constitutes an excessive public defense workload; and 2) demonstrate effectively how and when it exists. Without this information, public defense providers have been unable to persuade funders to provide necessary resources, or alternatively, to prove to judges their need for reduced caseloads. Generally speaking, the result has been a long-standing and widespread epidemic of excessive public defense workloads in jurisdictions across the United States.

With this historical perspective in mind, and in the interest of our clients, ourselves, and justice, NAPD believes the time has come for every public defense provider to develop, adopt, and institutionalize meaningful workload standards in its jurisdiction. In some systems, caseload standards (or a variation thereof) may already exist, courtesy of the National Advisory Commission (NAC) on Criminal Justice Standards, which published maximum annual caseloads for public defense providers in 1973. The American Council of Chief Defenders affirmed the continued viability of the NAC Standards in 2007 while recommending that jurisdictions develop local caseload standards that do not exceed NAC limits.² NAPD applauds every jurisdiction that at some point over the past 40 years has recognized the NAC standards as the best available measure of reasonable public defense workloads, and implemented them with rigor and commitment during that time. They are truly pioneers and visionaries in the effort to insure a meaningful Sixth Amendment right to counsel for everyone.

As good as the NAC standards have been, however, our country has seen significant changes in criminal defense practice since 1973, including: 1) scores of new criminal offenses that did not previously exist; 2) ever-increasing complexity in criminal practice, procedure and sentencing laws; 3) an explosion in the number of people charged each year with criminal offenses; and 4) a ballooning system of

¹ See American Bar Association Formal Ethics Opinion 06-441 ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation").
² American Council of Chief Defenders on Caseloads and Workloads (August 2007).

"collateral consequences" of criminal convictions. Undoubtedly, these changes have drastically increased the amount of time it takes a lawyer to provide effective representation to a client.

For this reason alone, NAPD strongly believes that while the NAC standards remain useful, they must today be considered the "absolute maximums" of acceptable public defense workload standards. Additionally, NAPD believes that any jurisdiction currently using the NAC standards as its public defense workload standard should also have, or implement, an evidence-based method of assessing whether they remain a reliable measure. Finally, NAPD believes that a lawyer's well-spent time is the single most important factor in a client receiving effective and meaningful representation, and as such, NAPD believes meaningful evidence-based standards for public defense workloads can best be derived and institutionalized through ongoing, contemporaneous timekeeping by public defense providers.

Contemporaneous, conscientious, and ongoing timekeeping allows public defense providers to demonstrate concretely what they have (or have not) done for their clients. It also provides public defense providers with the data necessary to assess whether what they *are* doing for clients comports with what they *should be* doing for clients based on professional performance standards. Finally, and perhaps most significantly, it allows public defense providers, funders, judges, and anyone else interested to examine for themselves whether any deficiencies in performance are related to an excessive workload. In this regard, timekeeping provides a cogent, transparent, adaptable, long-term, and data-driven methodology to: 1) develop reasonable public defense workload standards; and 2) modify them when necessary to meet the changing demands of the public defense system. Stated another way, it allows us to "define convincingly what constitutes an excessive public defense workload and demonstrate effectively how and when it exists" – the very impediments that have historically prevented us from achieving reasonable workloads.

Evidence-based standards are the hallmark of 21st century policymakers. Recent history shows us that timekeeping, along with analysis of the data it produces, has led to workload controls, increased funding, and judicial relief from caseloads in jurisdictions where it has been used. While these are not guaranteed results of timekeeping, NAPD believes the practice professionalizes public defense systems, and produces clear and measurable benefits to individual lawyers and clients. Whether a lawyer has worked a sufficient amount of time to provide competent and effective representation to his or her clients is a relevant question to ask, and the answer is something clients are entitled to have. Producing data that helps us manage our workloads and better understand our practices makes us better lawyers. Public defense providers should be committed to professional practices that help the client.

For far too long, public defense providers have accepted crushing workloads that rob clients of their constitutional right to assistance of counsel, and erode the morale of lawyers who cannot possibly meet the demands placed on them. We can no longer operate in a system without meaningful workload standards, and with this statement, we encourage public defense providers in every jurisdiction to develop, adopt, and institutionalize meaningful, evidence-based workload standards in their jurisdictions.

ON BEHALF OF THE NAPD STEERING COMMITTEE:

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Director, Ohio Public Defender
Columbus, OH

MARK STEPHENS, VICE-CHAIR, NAPD
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EXHIBIT D



THE *GIDEON* DECISION: CONSTITUTIONAL MANDATE
OR EMPTY PROMISE?

A FIFTY-YEAR DEAL UNDER FIRE

*Stephen F. Hanlon**

For 50 years now, with a few notable exceptions, courts, legislatures, governors, the organized bar and, yes, even public defenders, have brokered a deal about how to respond to the U.S. Supreme Court's 1963 decision in *Gideon v. Wainwright*,¹ which established the right to counsel in criminal cases. Here's the deal. Legislatures and other public funders would grossly underfund public defender organizations. Public defenders thus faced with grossly excessive caseloads would then triage these scarce resources, pushing more resources to more serious cases, but providing the illusion of a lawyer for thousands of clients with less serious charges, including misdemeanors and even felonies, in a "meet 'em and plead 'em" assembly line system of justice.

Make no mistake about it, these public defenders were for the most part remarkable lawyers, undertaking the Herculean, yet Sisyphean task of providing counsel to millions of impoverished, primarily black and brown citizens accused of crime. But a deal is a deal. And this particular deal played out in front of trial courts every day. Our courts knew very well what was going on right in front of them. Justice Stevens, speaking in a Fourth Amendment context that could well apply to the Sixth Amendment, has described our criminal courts as "loyal foot soldier[s] in the Executive's fight against crime."²

Until recently, the silence of state bar associations about this complete abandonment of the rule of law has been nothing less than astonishing. The Sixth Amendment aside, Model Rule 1.7(a)(2) provides that a lawyer shall not represent a client if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.³ Model Rule 1.16(a)(1) provides that in

* Remarks of Stephen F. Hanlon at the 2013 Annual Kentucky Bar Association Convention. Chair, ABA's Indigent Defense Advisory Group for the Standing Committee on Legal Aid and Indigent Defendants and former Pro Bono Partner at Holland & Knight, LLP.

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² *California v. Acevedo*, 500 U.S. 565, 600 (1991) (Stevens, J., dissenting).

³ MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2013).

that situation the lawyer must decline the representation.⁴ Faced with certain knowledge of this virtually universal system of triage in the defense function in our criminal courts, other than plaintive cries for more funding from legislative bodies, the state bar associations did little or nothing.

That same thing could not be said for the American Bar Association. Led by its Standing Committee on Legal Aid and Indigent Defendants (SCLAID), the ABA has been in the forefront on this issue for decades. In 1990, The ABA House of Delegates approved “black letter” standards that were published in the *ABA Standards for Criminal Justice: Providing Defense Services*.⁵ Standard 5-5.3 provided in pertinent part that public defenders faced with excessive caseloads “must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments.”⁶

In 2002, the House of Delegates of the American Bar Association approved a resolution sponsored by SCLAID entitled *Ten Principles of a Public Defense Delivery System (Ten Principles)*.⁷ Principle 5 stated succinctly: “Counsel’s workload should never be so large as to lead to breach of ethical obligations, and counsel is obligated to decline appointments above such levels.”⁸ In 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441, which reiterated that public defenders faced with excessive caseloads must not accept new clients.⁹ Finally, in 2009 the ABA’s House of Delegates approved the *Eight Guidelines of Public Defense Related to Excessive Workloads* (the *Eight Guidelines*), providing a detailed action plan for declining representation in the face of excessive caseloads.¹⁰

In the midst of all of this ABA attention to this problem, The Missouri Bar joined the effort to repudiate the fifty-year deal. Missouri Bar President

⁴ MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(1) (2013).

⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providin_defense_services.authcheckdam.pdf

⁶ *Id.* at Standard 5-5.3.

⁷ See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), *available at* www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter TEN PRINCIPLES].

⁸ *Id.* at 2.

⁹ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006).

¹⁰ See generally ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (Aug. 2009), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf-29k-2013-02-04.

Doug Copeland led that bar association's efforts by appointing a task force to study this problem, composed of judges, legislators, prosecutors, bar leaders and practitioners, and ultimately obtained passage of a bill providing for case refusal for public defenders facing excessive caseloads, unanimously in the Missouri Senate and overwhelmingly in the Missouri House. Unfortunately, the Governor vetoed the bill. But another important party to the deal had disavowed the deal.

Next, the Missouri Public Defender (MPD) challenged the deal. In 2006, all Missouri public defenders kept their time for 12 weeks and, based on that timekeeping, the MPD developed a protocol for case refusal and in 2008 promulgated a rule for case refusal, incorporating the protocol into the rule. In 2010, the MPD filed a motion in a trial court in Springfield, Missouri seeking to refuse additional cases. The trial court did not question the fact that the MPD faced excessive caseloads, but appointed the MPD to represent an indigent criminal defendant anyway.

On appeal, the Missouri Supreme Court held that a judge may not appoint counsel when he is aware that counsel is unable to provide effective assistance of counsel because of excessive caseloads.¹¹ The court specifically rejected the *Strickland* standard in a case which seeks prospective, not retrospective relief, and then held that the Sixth Amendment includes a prospective right to effective counsel at all critical stages of the proceeding.¹² The court advised trial courts to manage their dockets by triaging cases so that the most serious offenses and other priority cases take precedence in appointment of the public defender and in scheduling for trial. The court noted that this remedy was not without certain costs, including the potential release of some offenders because of their rights to speedy trial.¹³

So at this point, three of the parties to the 50-year deal, at least in Missouri, had disavowed that deal: the Missouri Bar, the Missouri Public Defender and the Missouri Supreme Court. The legislative response to the *Waters* decision, however, at least initially, was a strong reaffirmation of

¹¹ See Missouri Pub. Defender Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc).

¹² *Id.*

¹³ *Id.* at 611–12. Nearly half of the states, including Missouri, have constitutional provisions that provide their supreme courts with a power of general superintendence over the state's justice system or its functional equivalent. Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 767 n. 106 (2010). A compelling case can be made that in states like Missouri with longstanding systemically unconstitutional criminal justice systems (to the extent, usually about 80%, that they involve the public defender), the state supreme court should direct trial courts to so triage their cases, (not simply so advise them, as the court did in *Waters*), when no lawyer is available because of the excessive caseload of the public defender.

the 50-year deal, with threats to privatize large parts of the defender system and cap compensation for the private bar at unreasonable levels.

Fortunately, the Director of the MPD, Cat Kelly, waged a remarkably effective campaign to persuade the Legislature of the folly of most of its proposals, and in the end, while stripping the MPD of its rule making authority, the Legislature provided a statutory procedure for case refusal when the MPD faces excessive caseloads. That statute attempts to limit relief in excessive caseloads cases to an individual lawyer or lawyers,¹⁴ and to prohibit office-wide relief, but such a limitation has obvious separation of powers problems, which will undoubtedly be litigated in the context of an office attempting to operate at 200% or 300% of capacity. The Governor is not expected to veto this bill, since the prosecutors have voiced no opposition.

Thus, all parties to the 50-year deal in Missouri now appear to have rejected it: the Legislature, the Governor, the Missouri Supreme Court, the Missouri Bar and the MPD. But shortly after the decision of the Missouri Supreme Court in *Waters*, Missouri's Auditor, Tom Schweich, raised an important and principled objection to the MPD's case refusal protocol. In developing that protocol, the MPD had used the 12 weeks of timekeeping it had conducted in 2006, but had also relied in part on the 1973 NAC Standards in adjusting the resulting case weights to arrive at its determination of how many hours should be spent on the various categories of cases it handled.

That was a serious problem. The NAC Standards were not evidence based and did not account for changes in technology, changes in complexity or even different degrees of seriousness (e.g., the category "felonies" was not broken down into felonies of various seriousness). For those reasons, Norman Lefstein in his recent publication *Executive Summary and Recommendations: Securing Reasonable Caseloads*,¹⁵ has specifically advised public defenders not to rely on the 1973 NAC Standards, and has

¹⁴ The decision to transfer one or more cases of one public defender facing an excessive caseload to another public defender within that office not so burdened is one for which the judiciary is uniquely unfit. That decision, pursuant to Model Rule 5.1, belongs to the supervising attorney in that office, whose obligations in that regard are spelled out in some detail in ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, at 3. In a state such as Missouri, which ranks 49th out of 50 states in per capita funding for indigent defense, it is precisely office-wide relief that will almost invariably be required.

¹⁵ NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140-60 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf-434k-2013-02-04.

more recently described them as “absolutely worthless” for case refusal purposes.¹⁶

The Missouri Auditor acknowledged that the MPD had a serious excessive caseload problem. That was obvious, since the MPD’s caseload had dramatically increased in the past ten years, while its budget had been essentially flat-lined. But, Auditor Schweich argued persuasively, the MPD did not have reliable data to support its conclusion about where to draw the line at which its workload was excessive. An evidence-based approach was essential, he concluded, and the MPD did not have that.

The MPD and SCLAID took up Auditor Schweich on his conclusion. SCLAID retained the highly respected St. Louis accounting and consulting firm of RubinBrown to develop a Delphi study for the MPD for use in budgeting, operations and case refusal, if necessary. A Delphi study is a structured process for collecting and distilling knowledge from a panel of experts. Here, based on timekeeping (now in effect permanently for the MPD for all attorneys and staff), the MPD will produce evidence in tenths of an hour, by category of case and by task, as to (a) what the MPD is now doing, (b) what the MPD is not now doing and (c) what the MPD should be doing. Included in the panel of experts will be highly respected members of the private criminal defense bar who do work similar to that of the MPD.

RubinBrown’s deliverable will be made available to the MPD by August 31, 2013. Included in the RubinBrown deliverable will be a detailed description of the methodology employed in this study, written in such a way that it can, to the extent practicable, and with appropriate modification, provide a blueprint for how other state and local public defender programs can replicate this methodology in their respective jurisdictions. This blueprint will be widely distributed by SCLAID to public defenders throughout the nation.

A central premise of the ABA’s *Eight Guidelines* is that the evidence-based professional judgment of an experienced public defender is entitled to substantial deference by the courts. The MPD will now take the results of the RubinBrown Delphi study and use it for the budget it will present to the Governor and the Legislature in the fall. This Delphi study, therefore, will not be just another study that winds up on the shelf. On the contrary, the MPD will emerge from this process with the intellectual capacity to

¹⁶ Jenna Greene, *Reckoning for Caseload Relief*, THE NATIONAL LAW JOURNAL (May 27, 2013), available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202601584033&rss=rss_nlj&slreturn=20130624225353

incorporate the study's techniques and methodology in its budgeting, its operations and, if necessary, its case refusal litigation.

On May 23, 2013, the Florida Supreme Court issued a decision upholding the right—indeed the duty—of Carlos Martinez, the Miami-Dade Public Defender to refuse additional appointments when his defenders were carrying an average of 400-plus felonies.¹⁷ Here again, the Florida Supreme Court squarely held that *Strickland* is not the standard in a case seeking prospective relief such as this one.¹⁸ *Strickland* is the standard for cases where the relief sought is to overturn a conviction, and since no such relief is sought in case refusal cases like this and *Waters*, it is inapplicable. In the latter cases, the appropriate standard is the standard articulated in the Eleventh Circuit's 1988 decision in *Luckey v. Harris*:¹⁹ likelihood of substantial and immediate irreparable injury.²⁰

This was not the first time that the *Strickland* standard had been rejected in litigation involving prospective relief in the context of indigent defense. In *Lavallee v. Justices in the Hampden Superior Court*,²¹ a case involving chronic underfunding of the Commonwealth's assigned counsel system of indigent defense seeking prospective relief, the Massachusetts Supreme Judicial Court specifically adopted the *Luckey v. Harris* test and did not require a *Strickland* showing of harm.²² Likewise, the Iowa Supreme Court in *Simmons v. State Public Defender*,²³ specifically rejected *Strickland's* prejudice test and adopted the *Luckey v. Harris* test in a case involving systemic or structural challenges to an indigent defense system.²⁴

Public defenders have long and rightly complained of *Strickland's* "malleable" and unenforceable standard. But we now know there is a way out of the *Strickland* forest, case refusal litigation. If public defenders attack the excessive caseload problem prospectively, not waiting for the caseloads to overwhelm them and then asserting ineffectiveness

¹⁷ Pub. Defender, Eleventh Judicial Circuit of Florida v. Florida, Nos. SC09-1181 & SC10-1349, 2013 WL 2248965 (Fla. May 23, 2013).

¹⁸ See generally *id.*

¹⁹ *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988).

²⁰ The ABA filed amicus briefs in both the Missouri and Florida cases. The Florida Supreme Court cited the *Ten Principles* with approval and the Missouri Supreme Court cited the *Eight Guidelines* with approval. We now have two important state supreme courts articulating a case refusal remedy for excessive caseloads based squarely on the principles set forth in the *Ten Principles* and the *Eight Guidelines*.

²¹ *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

²² *Id.* at 905.

²³ *Simmons v. State Pub. Defender*, 791 N.W.2d 69 (Iowa 2010).

²⁴ *Id.* at 85.

retrospectively in an effort to overturn convictions, there is a vehicle for relief with a reasonable standard that can be met with an evidence-based showing. But public defenders must keep their time in tenths of an hour for the rest of their professional lives if they want this *Strickland*-free relief from excessive caseloads.

There is now a chink in the armor of the 50-year deal. All five parties to the deal in Missouri have rejected it, in whole or in part. We will know more when the first case refusal litigation hits the ground, but there is a way forward now in Missouri, although the statutory response is clumsy at best. In Florida, the Miami-Dade public defender and the Florida Supreme Court have rejected the 50-year deal; again, we will know more when we see the response of the Florida Legislature when case refusal litigation hits the ground.

A new generation of indigent defense litigation is in the making. It will demand enormous cultural changes from public defenders who want to take advantage of this opportunity. Timekeeping is admittedly culturally challenging and, at first blush, refusing cases seems contrary to an ethos that rightfully values access to justice for all. But a continuation of the 50-year deal is simply unacceptable. What about those hundreds, maybe thousands, of indigent defendants who desperately need but will not have counsel if a public defender's efforts to decline additional clients are successful? There are a number of very important responses to this very important question. The first is that continuing to provide those defendants with the fruits of the 50-year deal—the illusion of a lawyer—is a wholly unacceptable, unethical and unlawful “solution.”

The Rules of Professional Responsibility may provide some helpful guidance here. “A lawyer’s *primary* duty is owed to existing clients,” ABA Formal Opinion 06-441 advises, suggesting that there may be some duty to those defendants who will not be represented if the public defender obtains the case refusal relief sought.²⁵ Rule 1.16(d) of the Rules of Professional Responsibility, which covers “Declining or Terminating Representation,” arguably alludes to such a duty: “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests. . . .”²⁶

One reasonably practicable step to protect a rejected indigent defendant’s interests is to remind a court granting a public defender’s requested case refusal relief of the paramount duty of that court itself to

²⁵ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006).

²⁶ MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2013).

ensure effective assistance of counsel for *all* indigent defendants. In their moving case refusal papers, therefore, public defenders should seriously consider urging the court to specifically provide for administrative procedures and reports to the chief judge and/or court administrator regarding a list of defendants whose speedy trial rights would require dismissal and/or release from custody in the event that the public defender's case refusal motion is granted, at least until such time as the criminal justice system in that jurisdiction is able to provide effective assistance of counsel to all those for whom it is required.²⁷

The Missouri Supreme Court was not the first state supreme court to make clear that if the state would not adequately fund its indigent defense system, the remedies of dismissal and release based on speedy trial rights could potentially occur. The Florida Supreme Court so held in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*.²⁸ The Massachusetts Supreme Judicial Court so held in *Lavallee v. Justices in Hampden Superior Court*.²⁹

The *Lavallee* experience may be particularly instructive.³⁰ In Massachusetts the assigned counsel ("bar advocates") provide a substantial part of the Commonwealth's indigent defense services, as much as 70%. The bar advocates had not received any significant increase in compensation in twenty years, and as a result indigent pretrial detainees had no attorneys to represent them due to a shortage of bar advocates, who could no longer stay in business at those rates. Swiftly (perhaps too swiftly) the Massachusetts Supreme Judicial Court ordered that any indigent defendant incarcerated pretrial in the one county that was the subject matter of that case must be released after seven days if counsel was not appointed. Confronted with political pushback, however, the court momentarily retreated, but the dye was cast.

A second lawsuit challenging the statewide assigned counsel system was filed. The court stayed that action to give the Massachusetts legislature time to respond to the crisis. Nothing happened for a year. Bar advocates across the Commonwealth refused to work. Chaos reigned throughout the criminal courts of the Commonwealth. The petitioners in the second lawsuit filed a motion to lift the stay. Three days before the date set for that

²⁷ See *supra* note 13 (regarding the power of general superintendence in half of the nation's state supreme courts).

²⁸ 561 So. 2d 1130 (Fla. 1990).

²⁹ *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

³⁰ See Hanlon, *supra* note 13.

hearing, the Massachusetts Legislature passed bills which eventually increased funding for the bar advocates from \$98 million to \$154.5 million.

So it is not a Hobson's choice that confronts a public defender experiencing grossly excessive caseloads. The choice is not simply: continue acting unprofessionally or throw hundreds or thousands of indigent defendants under the bus without a lawyer. Public defenders who have stood up to the other parties to the 50-year deal and said "No" have achieved success for their clients by way of increased funding for the indigent defense system and by way of orders of release and/or dismissal for those whom they could not ethically represent.

The jurisprudential predicate for case refusal relief is firmly in place in Missouri, Florida and Massachusetts. The factual predicate for case refusal relief is being made in Missouri as we speak with remarkable help from a great accounting and consulting firm. The *Luckey v. Harris* test, not the *Strickland* test, for structural challenges to indigent defense systems is the law in Missouri, Florida, Iowa and Massachusetts.

The time for significant evidence-based case refusal litigation is fast approaching.



May 19, 2015

Dear Chairman Grassley and Senator Leahy:

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

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

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

BRIEF OVERVIEW

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

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

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

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

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

NO LAWYER COURTS

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

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

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

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

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

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

EXCESSIVE WORKLOADS

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

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

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

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

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

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

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

REFORM

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

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

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

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

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

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

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

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

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

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

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

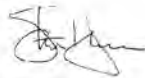
A FINAL NOTE

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

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

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

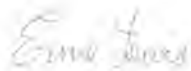
Respectfully submitted,



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