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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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:

> 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?*

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=kPB7NzCnW9GImO1jlYwO0U%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.

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:

> 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