QUESTIONS FOR THE RECORD

HEARING ON "PROECTING 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.