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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 Amendment[6]—Justice Scalia has

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[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,

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[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

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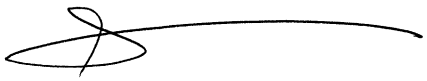
[13] *Id*. at 869-870.
[14] *Id*. at 875-77.
[15] *Id*. at 884.
[16] *Id*. at 885-86. On this issue, it is notable that many solicitors' offices strenuously opposed the creation of public defender offices because of the risk of competition. *Id*.
[17] LASPO, Part 1, § 1.
[18] Indeed, England's experience 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,



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[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").