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December 6, 2016

Senator Charles Grassley  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510-6275

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ALPHONSE GERHARDSTEIN

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.

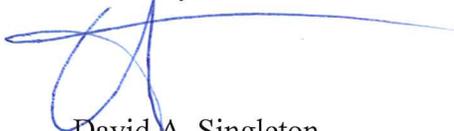
However, I am often suspicious of voucher programs in other areas and would be suspicious of them in the indigent defense context. I worry that such a program would not necessarily improve quality of defense but in some ways could make it much worse. The reason why NDS was a good office was because we 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