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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.