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Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors - Testimony of Erica J. Hashimoto before the U.S. Senate

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Testimony of Professor Erica Hashimoto
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May 13, 2015

Senate Judiciary Committee Hearing: Protecting the Constitutional Right to Counsel for
Indigents Charged with Misdemeanors

Chairman Grassley, Ranking Member Leahy, and Members of the Committee.

Thank you for the invitation to testify today. My name is Erica Hashimoto, and I am the Allen Post Professor of Law at the University of Georgia School of Law in Athens, Georgia.

I am pleased to offer my thoughts regarding the denial of the right to counsel in criminal misdemeanor cases.

Criminal misdemeanor prosecutions are not minor. They affect millions of Americans, their families and their communities. They are criminal convictions with lifelong consequences. The Supreme Court has recognized the importance of providing counsel to misdemeanor defendants, but courts routinely violate this constitutional mandate. This in part is because the enormous volume of misdemeanor cases being prosecuted in state and local courts across the country has overwhelmed virtually every court system, from state courts, to county courts, to local city courts. Lacking sufficient resources to resolve all of these cases in accordance with Constitution, many states and localities simply do not provide lawyers to misdemeanor criminal defendants who have a constitutional right to counsel.

Before turning to the well-documented pattern of constitutional violations across the country, I will describe the unique combination of factors that has generated this constitutional crisis. I then will turn to the evidence—both statistical and anecdotal—of these patterns of constitutional violations. Finally, I will propose federal legislative solutions that, if enacted, would help states and localities come into constitutional compliance.

FACTORS GENERATING THE CONSTITUTIONAL CRISIS IN MISDEMEANOR CASES

The constitutional crisis of denial of counsel in criminal misdemeanor cases has been caused by the massive volume of misdemeanor cases in which defendants have a constitutional right to counsel, combined with the failure of states and localities to adequately fund the defense of these cases. Under existing Supreme Court precedent, many indigent misdemeanor defendants have a clear constitutional right to counsel. But although the number of misdemeanor cases has burgeoned over the past fifty

years, many municipalities and states have decreased indigent defense funding. As a result, many jurisdictions simply do not provide lawyers to misdemeanor defendants who have a clear constitutional right to counsel under Supreme Court precedent.

The Supreme Court has held that misdemeanor criminal defendants in all but a narrow category of cases have a constitutional right to counsel. In 1972, the Supreme Court, recognizing that the sheer volume of misdemeanor cases “may create an obsession with speedy dispositions, regardless of the fairness of the result,” held that every indigent misdemeanor defendant sentenced to *any* period of incarceration (even a day) has a constitutional right to counsel appointed by the state. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). Thirty years later, for many of the same reasons, the Court held that indigent misdemeanor defendants sentenced to probationary terms that can be enforced through incarceration have the same right to court-appointed counsel. *Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002). The Court was quite clear, moreover, that the right to counsel in these cases applies at the time of conviction and imposition of the probationary term *even if* the state never seeks to revoke probation. *Id.* As a result, although misdemeanor defendants sentenced only to a fine that *cannot* be enforced through incarceration do not have a right to counsel, virtually every other indigent misdemeanor defendant has a constitutional right to court-appointed counsel. See *Scott v. Illinois*, 440 U.S. 367 (1979). In sum, indigent misdemeanor defendants have a right to have counsel appointed in every case in which they ultimately receive a sentence either of imprisonment or of a probationary term that can be revoked and result in incarceration if the defendant violates a condition of probation.

In at least some jurisdictions, moreover, most *indigent* misdemeanor defendants have a constitutional right to counsel because many municipalities (and some states) impose probationary sentences specifically in order to collect fines from indigent misdemeanor defendants who cannot afford to pay the entire fine at sentencing.¹ Many misdemeanor defendants, both indigent and not indigent, are sentenced to fines upon conviction for minor crimes. If the defendant has the resources to pay the fine, the case terminates upon payment of that fine. But because many (if not most) indigent defendants cannot pay their entire fine at the time of sentencing, they often are put on probation conditioned upon repayment of the fine (and, as discussed below, many of those defendants also are required to pay the costs of their probation supervision). Of critical importance, the condition of probation requiring payment of fines can be enforced through incarceration.² Because all of these sentences include suspended sentences of imprisonment, every single one of those defendants who is indigent has a right to court-appointed counsel. See *Alabama v. Shelton*, 535 U.S. 654, 673-74 (2002). Appointing counsel in these cases is especially critical because indigent defendants

¹ See Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry 21 (2010), available at <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry> (reporting that all fifteen states studied in the report, including California, Texas, Florida, New York, Arizona, and Missouri, used probation as a means to collect at least some criminal justice debts from those who could not afford to pay the full amount at the time of sentencing).

² See Carrie Teegardin, Lives Upended as Judges Push Legal Limits, Atlanta Journal Constitution, May 2, 2015 (documenting the number of cases in Georgia municipal courts that result in probationary sentences because of defendants’ inability to pay fines).

often cannot meet the condition of probation requiring monthly payments. As a result, many defendants violate that condition of probation, which in turn lead to incarceration.³

The rate of incarceration attributable to probation revocations based on inability to pay also has increased in at least some jurisdictions because indigent defendants who are put on probation not only have to pay fines but also have to pay a monthly fee to the probation company collecting the monthly fine payment from them.⁴ These fees, ranging from the low end of \$35 per month to a high of \$100 per month in Montana, exacerbate the debt facing the defendant, making it increasingly more likely that they will be found to have violated probation for insufficient payments.⁵ As a result, indigent misdemeanor defendants—the group entitled to appointment of counsel by the government—are much more likely to be constitutionally entitled to counsel because their indigence gives rise to probationary sentences that require counsel.

States and municipalities, moreover, prosecute millions of misdemeanor cases every year, and the number of such cases appears to be rising. No nationwide data tracks the precise number of misdemeanor cases,⁶ but one report estimates that states and localities prosecute 10 million misdemeanor defendants every year, which would be more than double the number of misdemeanor cases prosecuted in 1972.⁷ The evidence is clear, moreover, that the volume of misdemeanor cases dwarfs that of felony cases in state and local courts. According to data from 2013 provided by the National Center for State Courts, for instance, in a number of states, including Texas, Minnesota, Washington, Iowa, Florida and Arizona, misdemeanors constitute more than 80% of criminal cases prosecuted. And in most other states for which data are available, roughly 70% of criminal cases are misdemeanors.⁸

These estimates of the volume of misdemeanor cases, moreover, may drastically understate the number of cases in at least some jurisdictions. This is so because they exclude some less-serious traffic offenses that some states deem criminal misdemeanors and that often give rise to a constitutional right to counsel. In Georgia,

³ See Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry* at 51-52 (reporting that in Georgia, the only state for which such data was available, courts issued arrest warrants for 124,788 offenders on private probation in 2012).

⁴ See *id.* at 12 n. 3 (documenting the use of offender-funded private probation systems in localities throughout the country, including in Colorado, Utah, Alabama, Mississippi, Washington, Missouri, Michigan, Tennessee, Montana, Florida, Idaho, and Georgia).

⁵ *Id.* at 24.

⁶ As discussed below, one of the real challenges with understanding the magnitude of constitutional violations in misdemeanor cases has been that, unlike with felonies, very little data are compiled on misdemeanors. For instance, no nationwide data exists regarding even the total number of misdemeanor cases prosecuted in this country, let alone the outcomes in those cases or whether the defendant had representation by counsel. Instead, academics can provide only their best estimates of the number of cases.

⁷ See, Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, Nat'l Assoc. Criminal Def. Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 11 (2009) (providing estimate of the number of misdemeanor cases based upon data gathered in 12 states by the National Center for State Courts) [hereinafter *Minor Crimes, Massive Waste*].

⁸ Only Alabama and Hawaii had rates of misdemeanor prosecutions below 50% of criminal cases.

for instance, most traffic offenses are misdemeanors punishable by up to one year in jail.⁹ But although statistics available from the Administrative Office of the Georgia courts reflect that over a *million* people were charged with non-serious traffic misdemeanors in state and local courts, the only offenses reflected in the statistics from the National Center for State Courts cited above were *serious* traffic offenses and non-traffic misdemeanor offenses.¹⁰ In short, it appears clear that state and local courts process overwhelming numbers of people in criminal misdemeanor cases every year.

The vast increase in the number of misdemeanor cases over the past fifty years is attributable, at least in part, to the fact that in some jurisdictions, a number of civil offenses that had previously been punishable only by civil penalties (such as fines) were reclassified as criminal misdemeanors carrying the possibility of imprisonment.¹¹ The breadth of conduct that has been criminalized, moreover, is staggering. In New York, for example, possessing cigarettes without a tax stamp is a misdemeanor.¹² Nor is New York anomalous in criminalizing such minor conduct. Utah, Georgia, and Delaware deem virtually all vehicular moving violations as misdemeanors punishable by up to one year in jail. Because all of these offenses have been designated criminal misdemeanors, the number of misdemeanor cases has skyrocketed.

The massive volume of these cases highlights the importance of the right to counsel, as the Court in *Argersinger* recognized. Court systems processing millions of misdemeanor cases risk turning into “assembly line justice” that causes prejudice to the rights of misdemeanor defendants. *Argersinger*, 407 U.S. at 36. And in fact, it appears that assembly-line justice is dispensed across the country in misdemeanor cases with prejudicial effects for defendants.¹³ A report on Florida misdemeanor courts, for instance, demonstrated that 82% of arraignments—at which the vast majority of defendants resolved their cases—took *less than three minutes*.¹⁴ And perhaps not surprisingly, represented misdemeanor defendants were much more likely to plead not

⁹ See, e.g., O.C.G.A. § 40-6-1 (providing that *all* traffic offenses are misdemeanors unless specifically excepted); O.C.G.A. § 40-6-124 (prohibiting failure to use turn signal); O.C.G.A. § 40-6-184 (outlawing driving too slowly); O.C.G.A. § 40-6-246 (criminalizing coasting downhill in neutral).

¹⁰ Indeed, data from the National Center for State Courts reflect that Georgia prosecuted less than 300,000 misdemeanor cases in 2013.

¹¹ At least some states and localities have begun to recognize the extraordinarily high costs associated with deeming all of these transgressions criminal offenses and have begun to decriminalize or de-penalize certain offenses, including driving on a suspended license.

¹² The New York Tax Code provides as follows: “Any person . . . who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax . . . or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes . . . shall be guilty of a misdemeanor.” N.Y. Code § 1814(a). This code provision provided the basis for the arrest of Eric Garner that led to his death.

¹³ See Nat’l Legal Aid and Defender Assoc., *A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis* 15 (2008) (noting the colloquial reference by stake holders in one Michigan court to “McJustice Day,” when misdemeanor defendants are processed through assembly line justice).

¹⁴ See Alisa Smith & Sean Madden, Nat’l Ass’n of Criminal Def. Lawyers, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts* 15 (2011), <http://www.nacdl.org/News.aspx?id=23653&terms=three+minute+justice> [hereinafter *Three-Minute Justice*].

guilty at arraignment than unrepresented misdemeanor defendants, nearly 80% of whom pleaded either guilty or no contest at arraignment.¹⁵

Finally, states and localities simply have not devoted sufficient resources to ensure compliance with the Constitution in all of these misdemeanor cases. Some jurisdictions simply lack any structure for providing lawyers in misdemeanor cases. And even if jurisdictions have the *structure* for appointment of counsel, they have not provided sufficient resources to ensure appointment of counsel in all misdemeanor cases constitutionally entitled to counsel.

Beginning with structural considerations, virtually all states have structures in place to provide counsel in *felony* cases,¹⁶ but structures for providing representation in misdemeanor cases are much more limited in many local (and, to a lesser extent, some state) courts. This is so because many of the courts that handle misdemeanor cases are separate from the felony courts that view representation as the norm and in which counsel regularly appear. Court structures vary across states, but most jurisdictions create two tiers for their courts: “limited jurisdiction courts” (usually at the county or municipal level although sometimes also at the state level) have jurisdiction over misdemeanors,¹⁷ and “general jurisdiction” courts have jurisdiction over both felonies and misdemeanors.¹⁸

Limited jurisdiction courts, which handle the vast majority of misdemeanor criminal cases in many states, in particular have struggled to create structures to ensure representation in misdemeanor cases. In at least some jurisdictions, including South Carolina and Georgia, the state-funded public defender offices do not provide representation in limited jurisdiction misdemeanor courts unless the counties or cities enter into a contract with the public defender office to cover those cases. And although some cities and counties enter into contracts with public defender offices to provide representation, many do not. The jurisdictions without public defender contracts often enter into contracts with lawyers who agree to represent, for a flat fee, defendants who request counsel. These lawyers have no economic incentive to appear in any case unless required to do so by the court because they collect the same fee regardless of

¹⁵ Id. at 23 tbl.9.

¹⁶ Many states now have statewide public defender systems to ensure representation of indigent felony defendants. And although some states still do not have statewide public defender systems for felony cases, most states have put in place mechanisms to assure that counsel are appointed in every felony case. Indeed, in 2009, every state except Pennsylvania and Utah provided at least some funding for indigent defense. See Nat’l Right to Counsel Comm., Constitution Project, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel 54 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [hereinafter Justice Denied].

¹⁷ In some states, limited jurisdiction courts sometimes also hear the initial stages of felony cases, including bond hearings and preliminary hearings.

¹⁸ There are five states, California, Illinois, Iowa, Minnesota, and Vermont—that do not have limited jurisdiction courts. Nat’l Center for State Courts, Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads 7 (2014). But because of the volume of misdemeanor cases, most states have had to abandon that model.

the number of cases they accept.¹⁹ As a result, often no lawyer is present in the courtroom to represent misdemeanor defendants when they appear and request counsel, and those defendants are simply told that they cannot have a lawyer.

In many of these courtrooms, lawyers simply are not present, and as a result, violations of core constitutional rights--the First Amendment right to free speech, the Fourth Amendment right to be free of unconstitutional searches and seizures, and the Fourteenth Amendment right to due process, including the right not to be jailed solely because of indigence—occur with no consequence. Violations of the Constitution’s specifically delineated protections against states overreaching into defendants’ private lives essentially become invisible because the defendant does not have a lawyer to raise those constitutional violations. For instance, many disorderly conduct charges involve allegations that the defendant directed profanity at a police officer. But people have a First Amendment right to speak their mind unless their speech either is threatening or incites violence. In the absence of a lawyer representing the defendant and challenging the violation of her client’s fundamental constitutional rights, constitutional violations of the defendant’s First Amendment rights remain invisible and never receive court scrutiny.

To give another example, it appears that misdemeanor defendants in many states are incarcerated because of their poverty in direct violation of the Supreme Court’s holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), that a state cannot constitutionally imprison a person solely on the basis of his inability to pay a fine unless he “has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay.”²⁰ But unless counsel is appointed to raise violations of *Bearden*, those errors will go undetected because pro se indigent misdemeanor defendants likely will never know to raise objections to the treatment by the government that the Constitution has prohibited. In some courtrooms in which misdemeanors are prosecuted, moreover, no lawyers are present at all—including prosecutors and judges—to recognize these constitutional

¹⁹ The problems of these sorts of flat fee contracts have been documented in numerous reports. See, e.g., ABA Standing Comm. On Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* 11-12 (2004).

²⁰ See, e.g., American Civil Liberties Union of Ohio, “The Outskirts of Hope, How Ohio’s Debtors’ Prisons Are Ruining Lives and Costing Communities,” April 2013, at 8 (documenting the practice in mayor’s courts throughout Ohio of incarcerating defendants who have not paid fines without informing of their right to counsel or inquiring into their ability to pay); Carrie Teegardin, *Lives Upended as Judges Push Legal Limits*, Atlanta Journal Constitution, May 2, 2015 (documenting cases in Georgia in which probationary sentences were revoked because of defendants’ inability to pay fines without any inquiry into ability to pay). Recognizing the constitutional problems these practices can raise, the Georgia General Assembly has passed legislation that attempts to limit the regularly occurring *unconstitutional* revocations of probation for indigent misdemeanor defendants who cannot afford to pay fines. The legislation is laudable, and it highlights the importance of protecting the right to counsel. A lawyer representing an indigent probationer threatened with revocation for failure to pay a fine could invoke both the protection of the Constitution and the statute (if signed into law). But if those indigent probationers do not have counsel to ensure compliance with the new statute, there is nothing to suggest that local courts that have not complied with the Supreme Court’s prohibition on revoking the probation of an indigent person because of his inability to pay a fine will comply with a new statute. See *id.*

violations. Judges in misdemeanor courts are not required to have law degrees, and in some jurisdictions, no prosecuting attorneys appear.²¹ As a result, constitutional errors, even if inadvertent, are neither identified nor corrected if defense counsel is not in court to object to them.

The inadequacy of indigent defense budgets also impedes representation of misdemeanor defendants. Many of these jurisdictions currently do not allocate adequate funding to cover the volume of misdemeanor cases that need appointment of counsel.²² In Kentucky, for example, the legislature in 2008 reduced the indigent defense budget by 6.4%, as a result of which the Department of Public Advocacy could no longer provide representation in certain types of misdemeanor cases.²³

In other jurisdictions, the lack of funding has led to excessive caseloads that prevent lawyers from providing even the most basic representation.²⁴ In New Orleans, for example, part-time defenders handled the equivalent of 19,000 cases per year for a full-time attorney, limiting those attorneys to an average of seven minutes per case.²⁵ The searching pursuit of justice guaranteed by the Constitution simply cannot happen in seven minutes. As the Court in *Argersinger* noted: “An inevitable consequence of volume that large . . . [is that] speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication . . . The frequent result is futility and failure.” 407 U.S. at 35 (internal quotation marks omitted).

STATISTICAL AND ANECDOTAL EVIDENCE OF WIDESPREAD VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO MISDEMEANOR REPRESENTATION

The enormous volume of misdemeanor cases giving rise to a right to counsel, combined with the fact that states have neither the structure nor the budget to comply with the demands of the Constitution, has led to widespread violations of the constitutional right to counsel set forth in *Argersinger* and *Shelton* in states and localities across the country. In stark contrast to the almost uniform representation by counsel in felony cases,²⁶ every report that has studied the issue of misdemeanor representation has found that a significant percentage of misdemeanor defendants have no lawyer. And because these misdemeanor defendants are not represented by lawyers, they suffer severe consequences, including unconstitutional or unwarranted incarceration. Such incarceration has enormous costs above and beyond the fact that defendants have

²¹ The Supreme Court has held that it does not violate due process for non-lawyer judges to try criminal cases, as long as the defendant has the right to request a new trial before a judge who is a lawyer. See *North v. Russell*, 427 U.S. 328 (1976). But pro se defendants are unlikely to know of their constitutional right to de novo review of their convictions.

²² Justice Denied, *supra* n.16, at 59-60 (documenting cuts to indigent defense funding in a number of states).

²³ *Id.* at 60.

²⁴ Minor Crimes, Massive Waste, *supra* n.7 at 20-27 (setting forth statistics on excessive caseloads—including statistics demonstrating that in Chicago, Miami, and Atlanta, public defenders have more than 2000 misdemeanor cases per year—despite standards recommending that a lawyer represent no more than 400 misdemeanor defendants per year).

²⁵ *Id.* at 21.

²⁶ Over 99% of felony defendants appearing in state and federal courts are represented by counsel.

been unconstitutionally incarcerated, including the loss of jobs that provide vital (and often the only) means of support to low-income people, the inability to get jobs in the future, and, perhaps most tragically, the state's shuttling of children into the state foster care system because their parents have been unconstitutionally incarcerated.

Violations of the right to counsel arise in three distinct, but related, ways. First, in some instances, defendants are denied counsel even upon request or are simply never told that they have a right to counsel. Second, trial courts in many jurisdictions either fail to adequately inform defendants of their right to the assistance of counsel or exert inordinate pressure on misdemeanor defendants to waive their right to counsel (by, for instance, telling defendants that they will be released from jail only if they waive their right to counsel and will remain incarcerated if they invoke their constitutional right to counsel). And finally, even if a lawyer is appointed, in some jurisdictions that appointment means three minutes of a lawyer's time, which violates *Argersinger's* clear conclusion that counsel is necessary in misdemeanor cases "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger*, 407 U.S. at 34.

First, many jurisdictions directly violate the misdemeanor constitutional right to counsel by simply failing to provide counsel either at all or before defendants talk to prosecutors. The reports on this particular point are legion.²⁷ For instance, a study of misdemeanor cases in Florida found that 27% of unrepresented defendants were not told that they had a right to counsel.²⁸ The only available nationwide data on representation rates in misdemeanor cases come from a Bureau of Justice Statistics survey of inmates confined in local jails.²⁹ Data from those surveys demonstrate that 30% of *inmates confined in jail* as a result of their misdemeanor conviction reported that they were not represented by counsel. Every single one of those defendants had a constitutional right to counsel guaranteed by *Argersinger*, 407 U.S. at 34. But 30% remained unrepresented.

And although the statistics on violations of the right to counsel vary somewhat depending on the jurisdiction, it is significant that reports in *every* jurisdiction on which data has been collected have demonstrated direct violations of the right to counsel, *i.e.*, instances in which defendants entitled to counsel were never either offered counsel or informed that they had a right to be represented by counsel.³⁰ Indeed, the Chief Justice of the South Carolina Supreme Court has acknowledged that her state "simply [doesn't] have the funding" to provide counsel to all of the misdemeanor defendants that the Supreme Court has held have a right to counsel "and that chief justices from other

²⁷ See, e.g., *Minor Crimes, Massive Waste*, *supra* n.7 at 15 (documenting numerous instances of courts failing to inform defendants that they have a right to counsel); *Three Minute Justice*, *supra* n.14 at 15 (noting the practice, in some courts, of informing the defendants of their right to counsel only in written documents).

²⁸ See *Three-Minute Justice*, *supra* n.14 at 22 tbl.6 (2011).

²⁹ Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 Wash. & Lee L. Rev. 1024 tbl.1 (2013).

³⁰ See, e.g., *supra* n. 27.

states have told her the same.” John R. Emshwiller and Gary Fields, Justice is Swift as Petty Crimes Clog Courts, Wall Street Journal (Nov. 30, 2014).

In some jurisdictions, the denial of the right to counsel happens slightly more subtly. In Delaware, for instance, defendants arriving in misdemeanor cases are either told by bailiffs, before they are informed of their right to counsel, that they need to speak to prosecutors, or are told by judges, before those judges decide whether the defendant has a right to counsel, that they need to speak to the prosecutor about pleas.³¹ These defendants are overwhelmingly likely to resolve their cases with prosecutors and waive their right to counsel *before ever being informed that they have a right to counsel*. Because these cases end up being resolved before defendants have even been told of the right to counsel guaranteed by the Supreme Court, they constitute violations of the right to counsel.

Second, many jurisdictions have engaged in a practice of obtaining unconstitutional waivers of the right to counsel. The Supreme Court has recognized that criminal defendants have a right to waive the right to counsel, but it also has emphasized that the trial court must not only inform the defendant of the existence of the right but also the risks of waiving the right before the defendant can validly waive the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938). In many jurisdictions, however, defendants either are never informed of their right to counsel and the risks of waiving that right or are compelled to waive the right. In Florida, for instance, observers found that in over 60% of cases, judges failed to advise misdemeanor defendants of the importance of being represented by counsel.³² And in courts throughout Michigan, although misdemeanor defendants are given a form outlining their “basic right” to the assistance of counsel, this “right” is never explained to the defendants nor are they asked whether they want to waive that right.³³ A related problem arises with compelled waivers of the right to counsel. In some jurisdictions, for instance, misdemeanor defendants appearing in court are told that they can resolve their cases that day *only if* they waive their right to counsel.³⁴ If they refuse to waive the right to counsel, the case is delayed. For defendants who are incarcerated pending trial, any delay can mean additional time spent in jail. Such waivers are not knowing, intelligent and voluntary, and therefore likely violate defendants’ constitutional right to counsel.

Finally, structural deprivations of counsel—for instance, cases in which lawyers on average have less than three minutes to represent their clients—represent a real

³¹ See, e.g., David Carroll, Sixth Amendment Center, *The Crucible of Adversarial Testing: Access to Counsel in Delaware’s Criminal Courts* 29-30 (2014) (documenting the practice, in Delaware courts, of shuttling unrepresented misdemeanor defendants to talk to prosecutors *before* informing them of their right to counsel). See also Minor Crimes, Massive Waste, *supra* n.7, at 16-17 (documenting evidence that in many jurisdictions, including Texas, Washington, Pennsylvania and Colorado, prosecutors speak directly to criminal misdemeanor defendants before those defendants are informed of their right to counsel).

³² See Three-Minute Justice, *supra* n.14 at 22 tbl.6.

³³ See Nat’l Legal Aid and Defender Assoc., *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* 16-17 (2008).

³⁴ See Minor Crimes, Massive Waste, *supra* n.7 at 18-19.

problem in many county and local courts, as well as in at least some state courts.³⁵ Describing all of the ways in which three-minute representation violates the Constitution's right to counsel would take many pages, so I will describe just three. First, in three minutes, a lawyer cannot know or explore whether the client actually committed or has a defense to the crime with she has been charged. Second, a lawyer simply cannot ascertain, within three minutes, whether the police who arrested the client, and in many instances conducted a search, complied with the guarantees of the Constitution. Finally, a lawyer cannot, in three minutes, know enough about a client to advocate for a sentence that makes sense, either in negotiating a plea or in court.

Pelham, Georgia provides a compelling example of the denial of the right to counsel. In 2012, out of a total of nearly 2000 misdemeanor defendants, only *nineteen* misdemeanor defendants had court-appointed counsel. And only *nine* misdemeanor defendants were appointed counsel in 2013. Of course, only indigent defendants have a right to court-appointed counsel, so if Pelham had a high-percentage of wealthy residents, this statistic might make more sense. But 46% of the households in Pelham earn less than \$25,000 per year. In short, *less than 1%* of misdemeanor defendants in Pelham received court-appointed counsel.

The lack of counsel in these cases, moreover, has startlingly negative consequences, not only for the individual defendants and their families but also for the states. As discussed above, unrepresented misdemeanor defendants are more likely to plead guilty or no contest to criminal charges than their represented counterparts. And the consequences stemming from the guilty and no contest pleas can be life-altering. To give but one example, defendants convicted of misdemeanors face statutory and regulatory bars to employment that can completely deprive them of their ability to be employed in many occupations, including as home health aides, as well as being barred from employment by many private employers.³⁶ These consequences of misdemeanor convictions deprive states of otherwise employable residents who lose their ability to obtain gainful employment.

An example serves to illustrate the horrifying consequences of the denial of counsel in misdemeanor cases. A low-income single mother of a four year old from Atlanta needed to drive from southwest Georgia back to her home in Atlanta. She was pulled over for speeding in Colquitt, GA, and after searching the car, the police found, under a mat in the car, the cold remains of a marijuana cigarette. Charged with speeding and possession of marijuana (less than one ounce), the defendant explained to the court that she did not have the money to hire a lawyer, and she asked for one to be appointed. No lawyer was appointed, in spite of the fact that the defendant never waived her right to counsel. She pled guilty without a lawyer (in spite of the arguable Fourth Amendment issues related to her case), was fined \$1,591.75, and was put on probation for two years with the condition that she had to pay not only the \$1591.75 fine but also the city's probation provider an additional \$50 each month to "supervise" her.

³⁵ *Id.*

³⁶ See Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 299-301 (2011).

The defendant also was required to report *in person* every month to the probation office in Colquitt, which required a 430 mile monthly trip for her. After she violated several conditions of her probation, the court revoked her probation and sentenced her to 176 days in jail. Despite her requests for counsel, at no point did the court appoint counsel to represent her. The defendant languished in jail for four months, until pro bono lawyers who learned of her situation undertook representing her and ultimately won her release. Compounding the damage brought on by this conviction, *solely* because of the defendant's incarceration, the government adjudicated her child a "deprived child." The costs to the defendant, her daughter, and the state from that misdemeanor conviction are immeasurable.³⁷

Misdemeanor defendants in jurisdictions across this country have been denied the right to representation by counsel guaranteed by the Constitution. The denial of that right has profoundly negative consequences for states and localities. This is so because these defendants likely will end up incarcerated, straining the resources of their families who bear the brunt of their incarceration, the state that pays for that incarceration, and their communities, that lose them as citizens. Misdemeanor cases exact an enormous toll not only on the individual defendants charged but also on their communities. In the face of these widespread constitutional violations, Congress needs to act to protect the constitutional rights of its citizens and to help states and localities move toward complying with the Constitution.

SOLUTIONS

Solving the constitutional crisis in misdemeanor courts requires two key components: (1) states and localities must reclassify at least some minor crimes as non-criminal violations; and (2) indigent defense providers need to have sufficient resources to provide representation to the remaining misdemeanor defendants. At least some states have begun to recognize that reclassifying minor crimes as non-criminal violations not only can help them achieve constitutional compliance but also can result in significant cost savings.³⁸ For instance, Massachusetts undertook a study in which it determined that attorneys were appointed to represent 59,000 indigent defendants charged with minor crimes that did not threaten public safety, including operating a motor vehicle with suspended registration or license, trespassing, writing a bad check, disturbing the peace, and shoplifting. If those cases had been deemed civil infractions, rather than criminal offenses, the state would have saved approximately \$8.5 million in costs of representing those defendants.³⁹

Reclassifying minor misdemeanors to remove them from the criminal justice system will reduce, at least in part, the volume of misdemeanor cases and will make representation

³⁷ The one direct cost of the defendant's incarceration that can be measured is the roughly \$10,000 for her four month incarceration. On average, incarcerating a person in jail for a year costs \$31,286.

³⁸ See *Minor Crimes, Massive Waste*, *supra* n.7, at 27-29 (describing efforts undertaken in Hawaii, Massachusetts, and Washington to decriminalize or de-penalize minor offenses that do not create a risk to public safety).

³⁹ *Justice Denied*, *supra* n.16, at 73.

in such cases a more realistic possibility for states and localities. But reclassification alone cannot solve the constitutional crisis in misdemeanor representation without states and localities devoting additional resources to fund indigent defense providers. Of fundamental importance, states must have an incentive to take steps to comply with the constitutional rights of these defendants, otherwise the current patterns of widespread violations will continue unabated.

THE IMPORTANCE OF FEDERAL LEGISLATION TO PROVIDE STATES WITH INCENTIVES TO UNDERTAKE REFORMS

Federal legislation would provide states and localities with much-needed incentives to take the steps necessary to come into compliance with the right to counsel in misdemeanor cases. I will identify five options for federal legislation, all of which I believe could help move states towards constitutional compliance.

First, legislation providing the Department of Justice with the authority to file civil actions for declaratory or injunctive relief against states or municipalities that engage in patterns and practices of violations of the misdemeanor right to counsel would provide states and localities with significant incentive to comply with their constitutional obligations. The authorization provided to the Department of Justice in 42 U.S.C. §14141 to file actions where states or municipalities engage in a pattern or practice of violating the rights of juveniles provides a useful model. The Department has exercised that authority very sparingly, and has resorted to litigation only in the most extreme cases. But because it has the authority to seek injunctive relief against states it has reasonable cause to believe are engaging in patterns and practices of constitutional violations, states have an incentive to comply with the Constitution in juvenile cases. Similarly, providing such authority here both would give states an incentive to rectify practices that have led to patterns of violations of the constitutional right to misdemeanor representation as set forth by the Supreme Court and would allow the Department to assist those jurisdictions in finding ways to come into compliance.

Second, legislation should be enacted to ensure that states and localities receiving federal funding for law enforcement and criminal justice systems are not engaged in widespread violations of the constitutional right to counsel in misdemeanor cases. Legislation conditioning funding provided under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program could require that states and localities receiving such funding submit documentation of (1) the total number of misdemeanor cases processed through their courts; (2) the numbers of misdemeanor defendants who were represented by counsel; and (3) the percentage of represented defendants who were represented by court-appointed counsel.

Particularly given the fact that most jurisdictions now maintain electronic databases on their cases, requiring the collection of information regarding representation should not be burdensome.⁴⁰ Conditioning funding on the collection of this data would serve

⁴⁰ Indeed, the Bureau of Justice Statistics already collects this information in felony cases in the most populous jurisdictions, and it likely can assist states with ways to collect these data.

several critical functions. First, it would provide important data (that currently do not exist) regarding both the volume of misdemeanor cases and, more importantly, the precise scope of the constitutional violations. Second, requiring states and localities to collect and report these pieces of data may lead them to discover the magnitude of the constitutional violations which could lead to local reform efforts. Finally, if the Department of Justice is authorized to bring actions alleging a pattern or practice of violations of the constitutional right to counsel in misdemeanor cases, these data can help the Department understand the jurisdictions in which the violations are most widespread.

Such compliance obligations, moreover, could be developed in conjunction with the National Center for State Courts, which has taken the lead in ensuring that data are available for cases in state and local courts. The National Center for State Courts likely would prove to be an incredibly valuable resource as states and localities keep these data, and also could help make such data publicly available.

Third, in conjunction with the previous recommendation, Byrne JAG funding could be conditioned on states and, more importantly, local jurisdictions, having an indigent defense structure. Jurisdictions that do not have limited jurisdiction courts have reported far fewer problems with providing counsel in misdemeanor cases. This fact likely is because those jurisdictions provide representation in misdemeanor cases as a part of their overall representation of defendants in the state. That structure does not exist in most states. Misdemeanor cases arise in county, municipal, local, and mayor's courts, as well as in state courts among many others. Some of these courts have the structure to provide counsel to defendants. But many do not. Conditioning funding on ensuring that jurisdictions have developed structures to provide lawyers will help assure the appointment of lawyers to defendants who are constitutionally entitled to counsel.

Fourth, legislation authorizing funding for pilot programs in state, municipal, and local courts would assist those jurisdictions as they examine the feasibility of reclassifying some of the high-volume misdemeanor cases (such as driving on a suspended license) as civil infractions. As discussed above, at least some jurisdictions are eager to reclassify some minor offenses, but they need assistance both in assessing the offenses that make most economic sense to reclassify and in measuring the impact of reclassification on public safety. Federal support could help courts transition minor offenses out of the criminal justice system, thereby saving jurisdictions the cost of representation and all of the other costs associated with criminal cases.

Finally, federal legislation could create a National Defender Services Center that would both organize the efforts of indigent defense providers nationwide and provide training to indigent defense lawyers nationwide.⁴¹ Organizing the efforts of indigent defense providers across the country would result in significant benefits to misdemeanor defendants by raising the awareness of every defense lawyer to the ongoing constitutional violations occurring sometimes before their eyes.

⁴¹ See Gideon's Broken Promise, *supra* n. 19, at 41 (recommending creation of such a Center).

CONCLUSION

The constitutional right to counsel in misdemeanor cases has been ignored in courts throughout the country. And while courts protest that they cannot comply with defendants' constitutional right to counsel, misdemeanor defendants suffer the consequences of the lack of counsel. Violations of core fundamental constitutional rights—including the First Amendment right to free speech and the Fourteenth Amendment right to be free of incarceration based solely on an inability to pay—occur in many courts, and no lawyer is available to protest these violations. States and localities desperately need incentives that the federal government can provide both to convert some of these criminal offenses out of the criminal justice system and to comply with defendants' constitutional rights in cases that remain part of the criminal justice system.