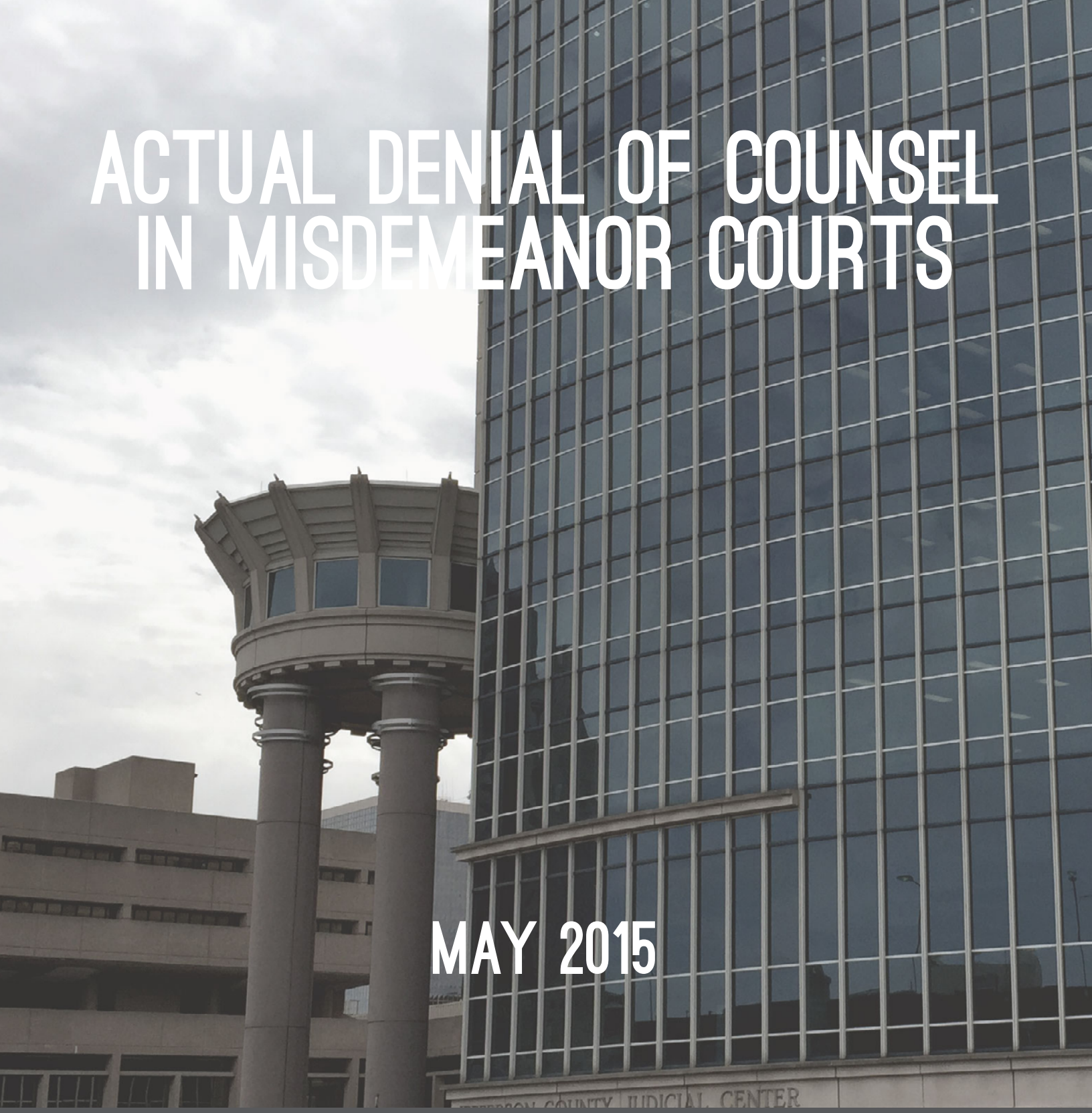
ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS



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6AC
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ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

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ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS

Testimony to the United States Senate Judiciary Committee
Sixth Amendment Center[1]
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INTRODUCTION

The United States of America stands for the universal notion that every individual possesses the inalienable right to liberty and to determine one's own path to happiness free from undue governmental control. Patrick Henry preferred death to living without it.[2] In fact, "liberty" is so central to the idea of American democracy that the founders of our nation created a Bill of Rights to protect personal liberty from the tyranny of government. All people, they argued, should be free to express unpopular opinions, choose one's own religion or take up arms to protect one's home and family without fear of reprisal from the state.

The Bill of Rights' Sixth Amendment prohibits federal, state and local governments from taking the liberty of a person of limited financial means unless a competent attorney is provided to the indigent accused at all critical stages of a criminal or delinquency procedure.[3] This is true, even if the potential term of incarceration is no more than a single day. John Adams risked his reputation for these American ideals by defending in court the British soldiers involved in the Boston Massacre, recounting years later that a defense lawyer ought to be the last thing an accused person should be without in a free country.[4]

Mr. Adams' words remain true today. Without the aid of an effective lawyer, almost any individual stands the risk of the government putting him in jail when charged with a crime.[5] The majority of us would not know, for example, what is and is not admissible in a court of law let alone how to procedurally convince twelve jurors that the government has failed to prove their charge beyond a reasonable doubt. If this is true of even the most affluent and educated among us, is it then fair to let someone who has fallen on hard times, or has been let down by our country's educational system, or is not yet an adult face a loss of liberty at the hands of government, simply because they lack the guiding hand of counsel to navigate the complexities of our legal system?

To this question, the U.S. Supreme Court answers a resounding *no*. "[R]eason and reflection, require us to recognize that, in our adversary system of criminal justice, 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," the Court declared in 1963. "This seems to us to be an obvious truth."[6]

Despite the necessity of competent counsel to fair and equal justice, state and local governments regularly fail their Sixth Amendment duties.[7] Though indigent people accused of felonies have attorneys appointed to their cases more regularly than not, those public attorneys are far too often appointed so late in the court process, or are so financially conflicted, or experience such undue judicial interference, or do not have the legal training/experience to match the complexities of charges filed, or juggle far too many case at any one given time (and usually all of the above) that defendants have, in effect, no legal counsel advocating on their behalf.[8]

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."

United States v. Cronic, 466 U.S. 648 (1984)

But the problems of our nation's misdemeanor courts are starker. Many misdemeanor courts across the country simply fail to provide any lawyers at all, despite the constitutional imperative to do so. The balance of this testimony focuses solely on the actual denial of counsel in state, county and local misdemeanor courts, explaining: how our misdemeanor courts are filled with uncounselled defendants; the prevalence of the problem; and a diagnostic of why this problem exists.

HOW MISDEMEANOR COURTS DENY COUNSEL

The U.S. Supreme Court cautioned in 1972: "Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed 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."[9] Today, the U.S. Supreme Court estimates that 94 percent of all criminal convictions

in state courts are the result of plea negotiations[10] noting, without judgment, "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[11] The states are free to serve as laboratories of democracy, and they have discretion to try new ideas.[12] But they do not always get it right. "When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[13] And so, while our nation's misdemeanor courts seek to resolve the overwhelming majority of cases through plea negotiations, they retain the original constitutional obligation to protect the rights of the accused.

A poor person charged with crime who tries to invoke his constitutional right to counsel in a misdemeanor case often faces hurdles beginning the moment he encounters a court officer. Following an arrest, most people charged with misdemeanors are brought to a police station or detention center for processing. At some point thereafter the defendant is likely brought before a judicial officer to determine whether or not he should be released pending further court action. In 2008, the U.S. Supreme Court determined that the right to counsel attaches the first time a defendant is brought before a judge or magistrate.[14] From that point forward, a court cannot proceed with a critical stage of a case without providing counsel to the poor defendant.[15]

Despite this, prosecutors often interfere with that right to counsel process. If a defendant is unable to make bail and remains in jail prior to his next court date, prosecutors may offer the defendant a chance to get out of jail for time served if the accused simply pleads guilty. Of course, the defendant may jump at the opportunity to get out of jail. He may want to get back to family, or he might be afraid of losing his job. But he may not be aware of valid defenses he loses by taking the quick plea deal. That is why courts are constitutionally required to make individualized inquiries to determine if defendants are intelligently waiving their right to counsel prior to negotiating directly with the prosecutor.[16]

Some misdemeanor court judges, however, attempt to determine the validity of such waivers of the right to counsel simply by asking defendants: "Do you make this decision knowingly, voluntarily, and intelligently?" But offloading this standard on the defendant to make a determination

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Gideon v. Wainwright, 372 U.S. 335 (1963)

for himself cannot meet the constitutional threshold.[17] After all, if the defendant is, in fact, not capable of making an intelligent choice with respect to his constitutional rights,[18] how then could he intelligently respond to a judge's question?

Such problems do not only affect defendants held in custody pending trial. If the defendant is out of jail pre-trial he may not only have the opportunity, but in fact may be required, to meet with a prosecutor before speaking with his constitutionally guaranteed lawyer. For example, a Sixth Amendment Center report details how one misdemeanor court in Delaware asks defendants appearing for arraignment to wait in one of two lines based alphabetically on last name.[19] After standing in line, the first person a defendant encounters is not a public defender, but a prosecutor seeking to make a plea deal. On an average day, these two lines total approximately 200 individuals. Not surprisingly, more than 75 percent of misdemeanor defendants in Delaware proceed through the Court of Common Pleas without ever having spoken to a lawyer.

Both in-custody and out-of-custody poor people may then be told that they can get a lawyer, but that they will have to repay the government for part or all of the cost of that representation. Under such a scenario, chances are high that the indigent accused will forgo an attorney rather than incurring personal debt. Sometimes this threat of financial sanction is overt. A 2010 National Legal Aid & Defender Association (NLADA) report on the right to counsel in Idaho notes that defendants entering the courthouse in Nez Perce County, for example, are greeted by a sign stating: "If you apply for a Public Defender and the service is granted to you IT IS NOT FREE!"[20]

But, more likely, the financial chilling of the right to counsel is subtler. Some jurisdictions simply add the cost of counsel to the list of fines and fees a defendant must pay at the end of the case. And, if the jurisdiction regularly incarcerates people for failing to pay these fees, the indigent community quickly learns not to seek counsel or face the potential of eventually being jailed for evoking that right. A 2008 NLADA report on indigent defense in Michigan notes that in Jackson County, the imposition of a $240 charge for all misdemeanor representation results in 95% of defendants waiving counsel and 50% of them pleading guilty at first appearance.[21]

If defendants persist in invoking their right to counsel despite these barriers, they still may not get a lawyer. Misdemeanor judges often err in concluding that, so long as there is no imminent threat of jail time, the court does not have to appoint counsel to the accused. In these cases, judges often tell a defendant that he does not get a lawyer because, if he is found guilty, will only receive a "suspended" jail sentence. That is, the defendant will be given only the *potential* of serving a jail term but will remain at liberty post-conviction. So long as the defendant completes any duties or pays any fees imposed by the court he will remain at liberty. Yet, if the defendant does not complete the terms of his probation, he can be re-arrested and brought to answer before the court. If determined to have violated his probation, the defendant's liberty can be revoked and he will be sent to jail.

In 2002, the U.S. Supreme Court prohibited this very practice, stating: "A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense."[22] In other words, there is no opportunity in a probation revocation hearing for that lawyer to go back to the

trial phase to challenge the government's case on the original accusations – the accusations that, after all, the defendant had already faced without the assistance of counsel.

THE SCOPE OF THE PROBLEM

Despite the advancements in technology over the past decade, most courts simply do not track the number of people going without counsel.[23] For example, Illinois does not have a centralized court case management system. The Administrative Office of Illinois Courts (AOIC) must rely on each of the state's 102 counties to self-report statistics despite non-uniform case management systems and reporting capabilities. Since the AOIC does not require data on uncounselled defendants, the local counties do not track such data.[24] It is hard to define the scale of the misdemeanor crisis if our state courts have limited means to track the relevant data points.

"[F]or most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous."

Argersinger v. Hamlin, 407 U.S. 25 (1972)

To be clear, the unavailability of data on uncounselled defendants is a court issue, *not* a public defense issue. So, even though trial-level indigent defense services in Pennsylvania looks very much like those in Illinois,[25] the fact that Pennsylvania has a unified court-tracking system means the Administrative Office of Pennsylvania Courts (AOPC) can produce data on uncounselled defendants in misdemeanor courts.[26] For example, the AOPC reports[27] that 27% of all defendants facing the highest charge of a misdemeanor in the Court of Common Pleas do so without counsel.[28] The percentage jumps to 37% when applied to local governments' "minor courts."[29]

DENIAL OF COUNSEL IN JURISDICTIONS WITH COUNTY-BASED INDIGENT DEFENSE SERVICES

Despite this lack of data, it is possible to establish some factual evidence on the prevalence of so-called "no-counsel misdemeanor courts." For example, though *Gideon v. Wainwright* makes the provision of indigent defense services a state obligation through the Fourteenth Amendment, many states pass on that obligation to local governments. Though

TABLE I. NON-STATE INDIGENT DEFENSE MISDEMEANOR SERVICES

NO STATE STRUCTURE	LIMITED STRUCTURE	IN TRANSITION
Arizona	Georgia	Idaho
California	New York	Michigan
Illinois	Ohio	
Indiana	Texas	
Kansas		
Mississippi		
Nebraska		
Nevada		
New Jersey		
Pennsylvania		
South Dakota		
Utah		
Washington		

it is not believed to be unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so. Thirteen states currently have no state structure to support trial-level right to counsel representation for misdemeanors, let alone an agency to set standards and evaluate local misdemeanor services against said standards: Arizona, California, Illinois, Indiana, Kansas, Mississippi, Nebraska, Nevada, New Jersey, Pennsylvania, South Dakota, Utah, and Washington.[30]

There are a number of reasons why having counties fund and administer the states' constitutional duties is problematic, but two reasons stand above the rest. First, most counties have significant revenue-raising restrictions placed on them while generally being prohibited from deficit spending. Therefore local governments must rely more heavily on unpredictable revenue streams, such as court fees and assessments, to pay for their criminal justice priorities. Unfortunately, there is no relation between what a county can raise through such alternative revenue streams and the amount of revenue needed to provide constitutionally adequate defender services.

Second, the counties that are often most in need of indigent defense services are the ones that are least likely to be able to afford it. That is, in many instances, the same indicators of limited revenues – low property values, high unemployment, high poverty rates, limited household incomes, limited higher education, etc. – are often the exact same indicators of high crime. Higher crime rates and a higher percentage of people qualifying for public counsel quickly drain a county's limited resources. And those same counties have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted. Therefore, making the right

to counsel a local government function increases the likelihood of the denial of counsel in misdemeanor cases.[31]

There is another group of states that have some marginal level of state indigent defense structure, but that structure has limited ability to impact representation at the misdemeanor level. (See Table I, previous page.) These states are broadly classified as having county-based right to counsel services. For example, some states have created an indigent defense boards that pass state money to counties, though local counties are still responsible for the administration and funding of services. These include Georgia, New York, Ohio, and Texas.[32] Included in this group are two states that have enacted comprehensive reform that are still being implemented that, when fully up an running, will supplement local funding with money to meet statewide standards: Idaho[33] and Michigan.[34] Similar to the previous group of states, reports and litigation in these six jurisdictions indicate that misdemeanor defendants can and do face the issues in invoking their right to counsel detailed above.[35]

DENIAL OF COUNSEL IN JURISDICTIONS WITH STATE-BASED INDIGENT DEFENSE SERVICES

The extent to which no-counsel misdemeanor courts exist in the balance of states varies widely based on a number of factors. For example, 27 states have a single agency charged with the representation of the indigent accused in all state courts.[36] However, many of these systems only provide misdemeanor representation in *state* court cases. If the state allows local government to pass local ordinances that carry jail sentences and to prosecute them in municipal courts, state public defender systems generally have no authority to ensure that poor people facing the threat of jail in these local courts are adequately defended.

For example, Colorado has an indigent defense system that, on paper, is generally regarded as one of the more structurally sound systems in the country. The municipalities are on the hook for the cost of public defense services. Each could opt to use the Office of the State Public Defender, but each would have to pick up the tab, and so none of them do. Instead, each locality provides services as they see fit, with only Denver and Aurora having established municipal defender offices – the rest of the state's municipal courts have no institutional oversight.

This problem may be compounded in the four additional jurisdictions[37] that organize indigent defense services at the state-level, though those services are not organized into a single unit. For example, Rhode Island is home to the nation's first-ever statewide, state-funded public defender office.[38] The Rhode Island Public Defender (RIPD) remains to this day as the state's primary system for providing right to counsel services. However, conflict representation is provided by a panel of private attorneys, paid hourly on a per-case basis, and administered directly by the Rhode Island Supreme Court.

Rhode Island does have municipal courts that prosecute jailable offenses, and in almost all municipalities in Rhode Island legal representation is not provided.[39] Despite being outside of the purview of the RIPD, the RIPD is now working in association with the American Civil Liberties

WHY THE APPEALS PROCESS CANNOT SOLVE MISDEMEANOR PROBLEMS

State appellate systems are not set up to rectify the problems of actual denial of counsel. Many misdemeanor courts are not courts of record. This means that there literally is no recording of what is occurring in these courts. In turn, this means that there is no official record from which a case can be appealed. Instead, defendants have a right to a "do over" at a higher court (known as a *de novo* review). But, without counsel to advise them of this procedure, poor defendants simply do not know how to get a higher court to take a second look. Further still, while a "do over" might change the outcome in some cases, it can never change the underlying systemic flaws that resulted in faulty convictions in the first place.

Union (ACLU), Roger Williams University School of Law, and private attorneys to try to address the issue of lack of representation in municipal courts. For example, in meetings with the chief judge of the Providence municipal court and the city solicitor, the city agreed to a moratorium on incarceration unless and until a public defender was hired. Thereafter, in November 2014, the court hired a part time municipal public defender for the city. This attorney is a city employee and not a member of the RIPD staff. There are a total of 27 municipal courts in Rhode Island. To date, only twelve have committed to not incarcerating anyone without counsel. And, this issue is just now being addressed some 40 years after the U.S. Supreme Court clarified that the right to counsel applies to any case in which the loss of liberty applies.[40]

The Oklahoma Indigent Defense System (OIDS) is a state-funded agency in the executive branch that provides trial-level, appellate and post-conviction criminal defense representation to the indigent accused in 75 of the state's 77 counties. Both Tulsa County (Tulsa) and Oklahoma County (Oklahoma City) established public defender offices prior to statewide reform and were allowed to continue to provide services outside of the OIDS system. However, neither the two county systems nor OIDS provides representation in municipal courts, where local government is allowed to impose jail time and where local government is responsible for choosing whatever manner of defender services without regard to OIDS policies and regulations.

Table II (next page) indicates the likelihood of which statewide systems experience denial of counsel issues in misdemeanor cases. The first column shows those states with statewide indigent defense systems and where local courts (if existent) are not allowed to prosecute misdemeanor cases carrying jail time. These 15 states are the states that most likely do not have regularized actual denial of counsel issues in its lower courts. Similarly, the second column indicates those states that do statutorily authorize local courts (e.g., municipal courts) to prosecute misdemeanors carrying jail time, but where the state system regularly provides representation in such cases.

TABLE II. LOCAL MISDEMEANORS IN STATES WITH STATE-BASED INDIGENT DEFENSE SERVICES

STATE SYSTEMS WITH NO MUNICIPAL COURTS	STATE SYSTEMS WITH MUNICIPAL COURTS	
	STATE SYSTEM HANDLES ALL MISDEMEANOR CASES	MUNICIPAL MISDEMEANORS BEYOND THE PURVIEW OF STATE SYSTEM
Alaska	Arkansas	Alabama
Connecticut	Louisiana	Colorado
Hawaii	Tennessee	Delaware
Iowa	West Virginia	Florida
Kentucky		Missouri
Maine		New Mexico
Maryland		North Dakota
Massachusetts		Oklahoma
Minnesota		Oregon
Montana		Rhode Island
New Hampshire		South Carolina
North Carolina		Wyoming
Vermont		
Virginia		
Wisconsin		

To be clear, inclusion on either of the first two columns does not mean that actual denial of counsel never happens in these jurisdictions – just that it is not likely to happen. Also, the first two columns in no way suggest that there are not issues with *constructive* denial of counsel issues in these jurisdictions, associated with excessive caseloads, undue judicial interference, and financial conflicts of interests, among others.

The third column indicates those states with statewide indigent defense systems but where local prosecution of jailable misdemeanor offenses takes place beyond the purview of that public defense system. It is in these nine states that actual denial of counsel is likely to occur. And, several reports on these state systems indicate just that.[41]

WHY ACTUAL DENIAL OF COUNSEL PERSISTS

Before serious debate can take place on how to abolish the denial of counsel in America's misdemeanor courts, it is necessary to undertake a diagnostic as to *why* this problem persists.

Though many people may think of tyranny as an abrupt overthrow of a democracy by a despot, the truth is that governmental tyranny occurs in democracies at a slow creep. It is accomplished through a myriad of seemingly inconsequential decisions made over many decades by numerous, and likely well-intentioned, policymakers. For example, no one consciously set out to create our bloated state criminal codes in totality. And yet, now that they exist, a seemingly endless demand on taxpayer resources are dedicated year in and year out to the pursuit of justifying the existence of those criminal codes.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."

United States v. Cronic, 466 U.S. 648 (1984)

Court structures therefore are adjusted to accommodate earlier and quicker case resolutions, under the guise of efficiency and cost-effectiveness, but only serve to create the ability to bring more and more charges against an ever-expanding set of defendants. Think of how the creation of new lanes on a highway often fails to solve traffic congestion because the expansion simply results in a greater number of commuters using the roadway, and one begins to get the picture.

When the demand for more and more resources outpaces the ability of a jurisdiction to support the continued expansion of the criminal justice system, the system itself turns to extracting as much money out of poor defendants as possible. When 6AC staff are in the field, court actors often report to us that they need to charge the indigent accused fines and fees to pay for the structures to collect fines and fees.[42] When liberty is no longer an inalienable right, but rather the leverage criminal justice systems exert to justify and pay for their own existence, government tyranny is achieved.

This tyranny produces a myriad of seemingly disconnected problems throughout the greater criminal justice system. Why do convicted persons have difficulty re-entering society upon release from prison? They do so, in part, because there are no public advocates to fight on their behalf for better conditions of confinement, and treatment and reentry programs after defendants are incarcerated. Why is the United States one of the few countries in the world that still relies on bail? The answer is that many states and counties provide no lawyers for the accused until after bail hearings (if at all). Without an impetus for change, the bail system continues unabated.

Point to almost any criminal justice issue – disproportionate minority contact, wrongful convictions, over-incarceration, non-violent offenders serving life sentences, etc. – and the root problem will be a lack of true advocacy on the part of people of insufficient means charged with or convicted of crime. Just as a doctor treating only the visible symptoms of an underlying ailment may fail the patient, the focus of any number of well-meaning advocacy groups to address the countless issues plaguing criminal justice *without concurrently reforming indigent defense services* will result in half-measures and unsustainable policies.

CONCLUSION

Our criminal justice systems have evolved without the necessary checks and balances that competent defense lawyers bring to guard against such tyranny. Therefore, the solution to America's criminal justice problems is simply to provide the indigent accused with a competent attorney the moment the court process begins, with the time, training and resources to zealously advocate on his behalf, just as the Constitution requires.

The problem is that we have asked states to police themselves in this regard. There is currently no federal entity tasked with ensuring that the dictates of Sixth Amendment case law are upheld. If the past 50 years have proved anything, it is that states are not likely going to end the denial of counsel on their own. Therefore, the federal government should authorize the U.S. Department of Justice to investigate and litigate Sixth Amendment violations.

ENDNOTES

1. The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide competent counsel to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case. This testimony was prepared by: David Carroll, Executive Director; Jon Mosher, Deputy Director; and Elly Kalfus, Program Associate.

2. Henry, Patrick. *Speech before the Second Virginia Convention*. St. John's Church, Richmond, Virginia March 23, 1775.

3. *Gideon v. Wainwright*, 372 U.S. 355 (1963), established the right to counsel in felony proceedings. The U.S. Supreme Court has subsequently clarified that the promise of *Gideon* extends to any case in which a defendant may potentially lose his liberty: direct appeals [*Douglas v. California*, 372 U.S. 353 (1963)]; juvenile delinquency proceedings [*In re Gault*, 387 U.S. 1 (1967)]; misdemeanors [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; misdemeanors with suspended sentences [*Shelton v. Alabama*, 505 U.S. 654 (2002)]; and appeals challenging a sentence as a result of a guilty plea [*Halbert v. Michigan*, 545 U.S. 605 (2005)].

4. John Adams. *Autobiography, part 1, "John Adams," through 1776*. Sheet 12 of 53, 1768 – 1770. 1807: "Council ought to be the very last thing that an accused Person should want [be without] in a free Country."

5. This paper focuses on the absence of counsel in America's state and local misdemeanor courts. As such, this paper will use the terms "crime," "criminal proceeding," "criminal justice system," etc., when discussing the Constitutional right to counsel, despite the fact that the Sixth Amendment applies equally to youth in delinquency proceedings. This editorial tool is used simply for ease of readership and in no way should be interpreted as diminishing right to counsel deficiencies in the provision of indigent defense services to children. Far too often in America, children face longer terms of governmental detention than if they were charged as adults with misdemeanors of a similar nature. Indeed, the denial of counsel in delinquency courts demands its own U.S. Senate Judiciary Committee hearing.

6. *Gideon v. Wainwright*. *Supra*, note 2.

7. This testimony does not try to duplicate the efforts of numerous organizations to prove that which is already proven – namely, that states regularly fail to meet the parameters of Sixth Amendment jurisprudence as determined by the U.S. Supreme Court. See for example: The National Right to Counsel Committee. *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*. The Constitution Project. April 2009.

8. The U.S. Supreme Court calls this a "constructive denial of counsel." [See: *United States v. Cronic*, 466 U.S. 648 (1984).] The problems of constructive denial of counsel are so widespread they deserve their own U.S. Senate Judiciary Committee hearing.

To explain briefly, there are two main public defense delivery models in the United States: a) salaried government employees; and b) private attorneys. (Private attorneys can be paid per hour, per case, per case event, per set number of cases, or for an unlimited number of cases.) Though constructive denials of counsel happen under every iteration of delivery model, it is most readily seen in the most prevalent delivery model in the country – namely, private attorneys handling an unlimited number of cases for a single flat fee under contract to a judge or county administration. These non-coordinated delivery models are rife with financial incentives for lawyers to do as little work on cases as possible and rarely have supervision structures to assess performance quality.

According to the U.S. Census Bureau, *Census of Governments* (2007), there are 3,033 organized county or county-equivalent governments in the United States. The DOJ, Bureau of Justice Statistics reports that there are only 957 public defender offices in the country. Some percentage of those 957 offices operates within the same county as other public defender offices [e.g., Orange County, California (Santa Ana) has primary, secondary and tertiary public defender offices]. And, even in those counties with organized public defender offices, there are usually private attorneys handling conflict and overflow cases paid under contract or for hourly rates – many of which have so little coordination and administration that they are best classified as "non-systems."

So, even when one acknowledges and accounts for the counties in those states that provide services primarily through coordinated assigned counsel plans (e.g., Massachusetts – 5 counties) or coordinated contract systems (e.g., Oregon – 36 counties) and those individual counties that have coordinated non-public defender systems (e.g., San Mateo, California), it is simply a fact that the vast majority of jurisdictions in the U.S. operate "non-systems" for delivering constitutionally mandated indigent defense services. Even under the most generous definition of "system," a full 64% of counties do not have organized "systems" (or, over 1,900 counties).

9. *Argersinger v. Hamlin*. *Supra*, note 2.

10. *Missouri v. Frye*, 566 U. S. ____ (2012).

11. *Lafler v. Cooper*, 566 U. S. ____ (2012).

12. U.S. Supreme Court Justice Louis Brandeis famously asserted that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

13. *Evitts v. Lucey*, 469 U. S. 387, 401 (1985).

14. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

15. Governments' constitutional requirement to appoint counsel in the initial stages of a criminal case is detailed in the following report: Sixth Amendment Center. *Early Appointment of Counsel: The Law, Implementation & Benefits*. Commissioned by the Pretrial Justice Institute. March 2014. Over the decades, the Supreme Court has inch-by-inch delineated many criminal case events as being critical stages, though it has never purported to have capped the list of events that might potentially fall into this category. Events that are definitely critical stages: custodial interrogations both before and after institution of prosecution [*Massiah v. United States*, 377 U.S. 201 (1964); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Brewer v. Williams*, 430 U.S. 387, 399 (1977).]; preliminary hearings prior to institution of prosecution where "potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation [*Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).];" lineups and show-ups at or after initiation of prosecution [*United States v. Wade*, 388 U.S. 218, 236-38 (1967); *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).]; during plea negotiations and at the entry of a guilty plea[*Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).]; arraignments [*Hamilton v. Alabama*, 368 U.S. 52 (1961).]; during the pre-trial period between arraignment until the beginning of trial [*Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).]; trials [*Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); and *In re Gault*, 387 U.S. 1, 36-37 (1967).]; during sentencing [*Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 6 (March 21, 2012); *Glover v. United States*, 531 U.S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); and *Wiggins v. Smith*, 539 U.S. 510, 538 (2003).]; direct appeals as of right [*Douglas v. California*, 372 U.S. 353, 357 (1963); and *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).]; probation revocation proceedings to some extent [*Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).]; and parole revocation proceedings to some extent [*Id*.; *cf*. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent")].

16. The U.S. Supreme Court is clear that an accused person has the constitutional right to forego his right to counsel and to proceed without the assistance of a lawyer [*Faretta v. California*, 422 U.S. 806, (1975)]. But first, courts are required to ensure that, before a defendant waives that right, he fully understands what he is doing [*Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)]. For any such waiver to be valid, it must be knowingly, voluntarily, and intelligently made [*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See also *United States v. Ruiz*, 536 U.S. 622, 629 (2002)]. The constitutional "knowingly, voluntarily, and intelligently" standard exists, in large part, to protect the accused from the accused [*Feretta v. California*]. Defendants may seek to waive counsel for any number of reasons. It is the court's burden to ensure such waivers are effectively made. Thus, a judge must ensure that the defendant possesses the information necessary "to make an intelligent election" depending on "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding" [*Iowa v. Tovar*, 541 U.S. 77 (2004)].

17. Many misdemeanor courts rely on video recordings, often created and distributed by their state administrative office of courts, to advise defendants of their constitutional rights and to give an overview of the criminal court pro-

cess. That a defendant has seen the video recording, however, does not mean she has understood the video.In fact, the reliance on such videos in lieu of an individual colloquy by the judge is especially problematic. Such videos, usually touching upon the presumption of innocence, the right to a jury trial, the right to a speedy trial, the right to remain silent, the right to confront and examine witnesses, the right to appeal, and the right to the assistance of counsel, can be several minutes in length. It is not uncommon, therefore, for court personnel to start the video once a critical mass of defendants has arrived in advance of the court hearing's official start time. But none of those who arrive late see the whole video.

In other courthouses, such videos are displayed in a continuous loop in the waiting area outside of the courtroom. In theory, defendants are supposed to fill out the paperwork, while also listening to the advice of rights video. In reality, most defendants arrive in waiting rooms mid-way through the video, and few defendants sit through its entirety. A defendant's failure to diligently watch the video from middle-to-end and then beginning-to-middle – in order to ensure they caught the whole thing – does not constitute a knowing, voluntary, and intelligent waiver. For these reasons, judges need to make an individualized determination to ensure a waiver is effectively made, regardless of whether a defendant saw the video or not.

The same holds true even if a defendant affixes his signature to a standardized court form explaining what a "knowing, voluntary and intelligent" waiver of the right to counsel is. The court still needs an individualized, minimal examination into the defendant's "education or sophistication" [*Iowa v. Tovar*, 541 U.S. 77 (2004)]. In fact, the problem with many courts' reliance on such standardized "advice of rights forms" is compounded because the forms often get the law wrong. For example, some courts use a written form that incorrectly advises the accused persons that if they plead guilty, they give up the right to a lawyer. While this is the reality in such courts, as no defense lawyer is present for most hearings, the law does not permit it; the defendant retains the right to representation in entering her guilty plea, and likewise she has the right to the assistance of counsel at her sentencing hearing [*Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 6 (March 21, 2012); *Glover v. United States*, 531 U.S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)].

Some standard forms likewise inform defendants that any failure on their part to hire a private lawyer or file an affidavit requesting public counsel will be treated as an implied waiver of the right to counsel. This is also not consistent with the law [*Carnley v. Cochran*, 369 U.S. 506, 516 (1962)].

[18.] See *Tovar*, *supra*, note 16. Defendants with certain learning disabilities, mental illness, or suffering from lingering effects of alcohol or drugs, may not be capable of making an intelligent election as to their constitutional rights.

[19.] Sixth Amendment Center. *The Crucible of Adversarial Testing: Access to Counsel in Delaware's Criminal Courts*. 2014. Page 36. This study of the right to counsel in the state of Delaware was conducted by the Sixth Amendment Center on behalf of the Office of Conflicts Counsel, a division of the Office of the Public Defender, and made possible by a generous grant awarded by the U.S. Department of Justice, Bureau of Justice Assistance. DOJ Office of Justice Programs Grant Award #: 2012-DB-BX-0005.

[20.] National Legal Aid and Defender Association. *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts*. January 2010. Page 52.

[21.] National Legal Aid and Defender Association. *A Race to the Bottom: Speed & Savings over Due Process*. June 2008. Page 32.

[22.] *Alabama v. Shelton*, *supra*, note 2.

[23.] To aid the Congressional record, the 6AC, in partnership with the National Center for State Courts, is conducting a survey of state courts to determine the number of states that have the ability to determine the number of people that go unrepresented while facing misdemeanor charges. The 6AC will make the information available when complete.

[24.] Email to the Sixth Amendment Center from Administrative Office of Illinois Courts dated May 8, 2015.

[25.] By state statute, Illinois counties with populations above 35,000 must maintain a county public defender office; 42 of the state's 102 counties meet this threshold. The remaining 60 select whatever method they so choose. In counties maintaining public defender offices (whether compelled or by choice) the chief public defender is selected either by the president of the county's board of supervisors (in counties with more than 1 million residents) or by the presiding circuit court judge (everywhere else). The state covers 66.6% of the cost of the chief defender's salary in each county with a standing public defender office. For everything else, the counties must determine for themselves

how much to fund services, with no oversight by the state.

Similarly, the Commonwealth of Pennsylvania provides no statewide administration or funding of trial-level right to counsel services. Its county-based systems remain entirely decentralized with no oversight by state government. In fact, the state's only statutory requirement is that each county must operate a county public defender office.

[26.] Conversely a state with more indigent defense structure, but no unified court system, cannot report data on uncounselled defendants in misdemeanor courts. Tennessee is one such state. The Tennessee District Public Defender Conference (TDPDC) is a state-funded organization that coordinates training, provides assistance, and disseminates state funding to each of the state's 31 judicial districts (encompassing 95 counties). With the exception of Shelby County (Memphis), whose chief defender is appointed by the county mayor, the heads of each of the remaining 30 district defender offices are popularly elected. Despite this, data on uncounselled defendants cannot be obtained because of the non-uniformity amongst the lower courts. Most jailable misdemeanor offenses are heard in General Sessions Courts. Though the courts are authorized by state statute, they are funded and administered locally, meaning that different data protocols and case management systems are used. As such, the Tennessee Administrative Office of Courts cannot provide the necessary data on misdemeanor defendants. (Email to the Sixth Amendment Center from Tennessee Administrative Office of Courts dated May 12, 2015.)

[27.] Email to the Sixth Amendment Center from Administrative Office of Pennsylvania Courts dated May 12, 2015.

[28.] In 2014 in Pennsylvania's Court of Common Pleas, 44,535 of 165,071 misdemeanor defendants proceeded without counsel.

[29.] According the AOPC website, "Minor courts, or special courts, are the first level of Pennsylvania's judiciary. These courts are presided over by magisterial district judges (MDJs) and municipal court judges. MDJs do not have to be lawyers, but they are required to pass a qualifying exam. Philadelphia Municipal Court General Division judges need to be lawyers, but Traffic Division judges do not. Each court has its own elected judges. In Allegheny County, the Pittsburgh Municipal Court is staffed by Allegheny County magisterial district judges and the complement is included in the total of 526 MDJs." (Available at: http://www.pacourts.us/learn.) In 2014 in the minor courts, 10,134 of 27,070 misdemeanor defendants proceeded without counsel.

[30.] The states of Arizona, South Dakota, Pennsylvania and Utah have no state structure of any sort for the provision of Sixth Amendment services. Other states in this category do, but each state entity has no responsibility over misdemeanor representation. We discuss each in turn.

In 1976, the California legislature created the Office of the State Public Defender as part of the judicial branch of government. Unlike other states with statewide, state-funded public defender offices, California's was originally designed as a state appellate defender office without any trial-related responsibilities. But SPD was defunded in the 1980s and now handles only a limited number of post-conviction death penalty cases each year.

The Illinois Office of the State Appellate Defender is a state-funded, statewide agency in the judicial branch representing indigent persons in criminal appeals. It has no authority over trial-level services, including misdemeanors.

The state of Indiana has three state-funded right to counsel agencies – the Indiana State Public Defender, the Indiana Public Defender Council, and the Indiana Public Defender Commission – but none provides direct trial-level services, and none holds authority to ensure quality at the county level. The Indiana State Public Defender provides representation in post-conviction proceedings (i.e., indigent adults and juveniles who are incarcerated and are challenging a sentence or a commitment). All other direct representation services are county-based, provided through a mixture of traditional public defender offices, contracts with private attorneys, or attorneys appointed on a per-case basis. The Indiana Public Defense Council is a public defense support center, providing training and help-desk assistance to approximately 1,100 public defenders, assigned counsel and contract defenders across the state.

Limited state assistance is provided to counties to help defray costs through the Indiana Public Defender Commission (IPDC). The IPDC promulgates standards related to workload, attorney qualifications, and pay parity, among others, for both capital and non-capital felony representation. Those counties that meet the IPDC standards are eligible to be reimbursed up to 50% of their capital representation costs and up to 40% of their non-capital costs. The IPDC has no authority over misdemeanor representation.

The Kansas Board of Indigents' Defense Services (BIDS) is a statewide, state-funded commission administratively housed in the state's executive branch. BIDS' authority at the trial level, however, is limited to felonies; counties maintain the responsibility for funding and administering right to counsel services on behalf of defendants in adult misdemeanor and juvenile delinquency matters.

In 2011, the Mississippi state legislature took initial steps toward state oversight of indigent defense services by establishing the Office of the State Public Defender (OSPD). OSPD combined the previously existing state Office of Indigent Appeals and the Office of Capital Defense Counsel into one administrative unit in the executive branch. In addition to providing the direct client-representation services for which the two newly merged offices were previously responsible, the legislature also mandated that this new office examine the delivery of trial-level indigent defense services across the state. However, they have no authority over trial-level representation, including misdemeanors.

In 1995, the Nebraska legislature established the Nebraska Commission on Public Advocacy (NCPA) in the executive branch. NCPA employs a small, six-attorney office that provides direct representation only in capital trials, appeals, some serious non-capital felonies involving drugs and violent crime, and otherwise serves as a resource and training center for the county-based systems. It has no authority over misdemeanor representation.

Nevada statutes require all counties whose population is 100,000 or more to create a county-funded office of the public defender – Clark County (Las Vegas) and Washoe County (Reno) are the only two counties that qualify. The remaining fourteen counties and one independent city (Carson City) may if they so desire also establish a county public defender office, though only one other (Elko County) has done so. The others may elect to pay for the services of the Office of the State Public Defender though only three counties do so.

The provision of Sixth Amendment right to counsel services in the state of New Jersey has two distinct tiers: adult felony and juvenile delinquency cases handled by the statewide Office of the Public Defender, funded entirely by state general fund appropriation; and "non-indictable" misdemeanor cases handled by whatever method and funded at whatever level each individual municipality deems best. The municipal public defenders, in general, are private attorneys working part time under contract with the city government.

The Washington Office of Public Defense (OPD) provides direct representation, through contracts with private attorneys in direct appeals and civil commitment cases, as well as dependency and termination of parental rights in a limited number of counties.

31. Several reports suggest the presence of actual denial of counsel at the state and local levels. For example: California (see (1) Benner, Laurence A. (2009) "The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California." *California Western Law Review*: Vol. 45, No. 263. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475478, and (2) Albert-Goldberg, Nancy (2009) "Los Angeles County Public Defender Office in Perspective," *California Western Law Review*: Vol. 45: No. 2, Article 5. Available at: http://scholarlycommons.law.cwsl.edu/cwlr/vol45/iss2/5); Mississippi (NAACP Legal Defense and Educational Fund. *Assembly Line Justice: Mississippi's Indigent Defense Crisis*. February 2003. Available at: http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf); Nebraska ("The Indigent Defense System In Nebraska: An Update" (2004). Publications of the University of Nebraska Public Policy Center. Paper 103. Available at: http://digitalcommons.unl.edu/publicpolicypublications/103); Nevada (Sixth Amendment Center. *Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future*. March 2013. Available at: http://sixthamendment.org/reclaiming-justice/); and Pennsylvania (Joint State Government Commission. *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania*. Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants. December 2011. Available at: http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf). In addition, the Sixth Amendment Center expects two of its forthcoming studies of right to counsel services, in Indiana (anticipated 2016) and Utah (anticipated 2015), will further expand the record on this issue.

32. Georgia passes state money to those counties opting into the state system. The Georgia Public Defender Standards Council (GPDSC) is a nine-member commission within the executive branch that appoints circuit public defenders to oversee trial-level indigent defense services in 49 of the state's judicial circuits. GPDSC has limited authority to enforce standards it promulgates because counties can and do opt out of the system all together.

New York provides state grants to local governments that successfully apply. The Office of Indigent Legal Services (ILS) is a state agency of the executive branch, overseen by a nine-member board, with limited authority to assist the state's county-based indigent defense systems to improve the quality of services provided. It does so primarily through funding assistance grants to counties.

The state of Ohio, for the most part, passes onto its county governments the responsibility for funding and administering the provision of Sixth Amendment right to counsel services. Ohio has a nine-member statewide indigent defense commission overseeing an executive branch state public defender agency. However, unlike statewide defender agencies in other jurisdictions, the Ohio State Public Defender (OSPD) provides direct representation in only cer-

tain case types statewide. OSPD's Legal Division, its largest team, handles non-death adult appeals and post-conviction cases. Trial-level services are the responsibility of Ohio's 88 counties, though a county may opt to contract with the OSPD to provide these services (only 10 counties have done so). OSPD reimburses counties a portion of the cost of trial-level representation. The commission is responsible for promulgating standards, and the office responsible for disbursing state funds to counties meeting those standards. If counties complied with state-promulgated standards of quality, as originally conceived, the state would reimburse up to 50% of the county's costs made available in the next fiscal year. But state funding never reached the promised 50% level, dropping in some years to as low as 25%. At the same time, for decades, the state commission failed to promulgate any standards whatsoever, meaning there was no minimum threshold of quality against which to attach the state dollars. As a result, counties have little incentive to provide constitutionally adequate services.

Texas provides local governments with state money for meeting standards and grants for innovative projects. Texas' 254 counties are responsible for funding and administering the right to counsel, with limited support from the state. The vast majority of counties rely on assigned counsel systems administered by the judiciary in which private attorneys are paid either on an hourly rate or on a set rate per case. The state's limited oversight and fiscal support is directed through the Texas Indigent Defense Commission (TIDC). TIDC is authorized to set standards and policies related to, among others: attorney performance, attorney qualifications, training, caseload controls, indigence determinations, contracting, and attorney compensation. Counties are required to submit an annual indigent defense plan to TIDC indicating how the county meets TIDC standards and in return TIDC disseminates state funding to offset the cost of meeting standards. TIDC serves as a compliance monitor for state standards, acts as a clearinghouse for Texas indigent defense data, and provides technical assistance to counties looking to improve right to counsel services. Importantly, TIDC also awards single- and multi-year grants to fund innovative direct client services.

33. In April 2014, a new law was passed that bans the use of flat fee contracts and creates a seven-person public defense commission within the Department of Self-Governing Agencies – a constitutional provision in Idaho which, though technically still in the Executive Branch, means that the proposed commission will not have to answer directly to the Governor. The Idaho Public Defender Services Commission (IPDC) is authorized to set standards and disseminate state funding to counties to meet those standards, though to date they have not done so.

34. The Michigan Indigent Defense Commission (MIDC) is a 15-member commission in the executive branch appointed by diverse authorities with the power to develop and oversee the implementation of binding performance standards for trial-level right to counsel services in each of the state's 83 counties. While each county determines the delivery methods it will use to provide direct services (public defender office, contracts, or assigned counsel panel), the county must submit a plan for compliance with MIDC's standards, and MIDC has authority to investigate, audit and review the operation of local county right to counsel services to assure compliance. Counties must contribute a set amount of money each year (based on pre-MIDC spending levels) with all additional moneys for meeting standards coming from the state. To date, the MIDC has yet to promulgate standards.

35. Several reports suggest actual denial of counsel at the state and local levels. For example: Idaho [National Legal Aid & Defender Association, *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts*, January 2010. See: http://www.nlada.net/sites/default/files/id_guaranteeofcounseljseri01-2010_report.pdf]; Michigan [National Legal Aid & Defender Association, *A Race to the Bottom: Speed & Savings Over Due Process*, 2008. See: http://www.mynlada.org/michigan/michigan_report.pdf]; New York (Chief Judge's Commission on the Future of Indigent Defense Services. *Final Report to the Chief Judge of the State of New York*. June 2006. See: http://www.nycourts.gov/ip/indigentdefense-commission/indigentdefensecommission_report06.pdf.); Ohio (National Legal Aid & Defender Association, *Taking Gideon's Pulse: An Assessment of the Right to Counsel in Hamilton County, Ohio*, July 2008. See: http://www.nlada.net/sites/default/files/oh_takinggideonspulsejseri07-2008_report.pdf); and Texas (Sixth Amendment Center. *Williamson County, TX settles "no counsel court" lawsuit*. See: http://sixthamendment.org/williamson-county-tx-settles-no-counsel-court-lawsuit/).

36. They are: Alabama, Alaska, Arkansas, Connecticut, Delaware, Kentucky, Hawaii, Iowa, Louisiana, Maryland, Massachusetts, Maine, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Vermont, Virginia, Wisconsin, West Virginia, and Wyoming. For ease of readership, we include Colorado in this group. Technically, Colorado has two statewide agencies: one for primary services and one for services in which the primary system has a conflict of interest.

37. Besides Rhode Island and Oklahoma, which are explained in the body of the testimony, this group of states

include only two states that choose to elect regional defenders by vote of the public: Florida and Tennessee. In each state, trial-level conflict services are provided by either assigned counsel attorneys paid by the state court (Tennessee) or by a combination of state-funded conflict offices and assigned counsel (Florida). In only a few Florida counties and municipalities, local governments contract with circuit public defenders to provide representation in cases brought under county and municipal ordinances. Whereas, the Tennessee district public defenders provide representation in all misdemeanor courts.

[38.] The Rhode Island General Assembly created the Rhode Island Public Defender in 1941, twenty years before *Gideon v. Wainwright*.

[39.] See: Wall Street Journal. *Justice Is Swift as Petty Crimes Clog Courts: Cases Adjudicated in Minutes or Less, Often Without Lawyers*. November 30, 2014. Available at: http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782.

[40.] *Argersinger*, *supra*, note 2.

[41.] See, for example: Sixth Amendment Center. *The Crucible of Adversarial Testing: Access to Counsel in Delaware's Criminal Courts*. 2014. Available at: http://sixthamendment.org/6ac/6AC_delawarereport.pdf. The Florida Bar. *Public Defender Triage Not Good Enough*. Florida Bar News, June 15, 2013. Available at: http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/c094dc4da35b9c5085257b860041bc35!OpenDocument. National Legal Aid & Defender Association. *Missouri's Chronic Right to Counsel Problems Revisited*. February 9, 2011. Available at: http://www.nlada.net/jseri/blog/missouri's-chronic-right-counsel-problems-revisited. The Albuquerque Journal. *Public Defender Financial Situation Dismal*. April 23, 2015. Available at: http://www.abqjournal.com/573690/news/official-public-defender-financial-situation-dismal.html. Sixth Amendment Center. *Oil Boom Rapidly Creating a Sixth Amendment Crisis in North Dakota*. September 25,2012. Available at: http://sixthamendment.org/oil-boom-rapidly-creating-a-sixth-amendment-crisis-in-north-dakota/. The Island Packet. *American Civil Liberties Union: Equal Justice for Poor Remains Unfulfilled in South Carolina Municipal Courts*. October 5, 2013. Available at: http://www.islandpacket.com/2013/10/05/2723229/aclu-equal-justice-for-poor-remains.html. As another example, an email to the Sixth Amendment Center from the Equal Justice Initiative dated May 19, 2015 indicates that there are numerous cases in Alabama in which multiple municipalities have imposed significant jail time for violations of local ordinances such as driving with an expired tag or minor traffic offenses, particularly in places such as Birmingham, Montgomery, Leeds, Childersburg, and Clanton, as well as in municipalities in Houston and Etowah counties.

[42.] See also: Balko, Radley. "This isn't 1968. Baltimore isn't Watts. And Hillary Clinton isn't Michael Dukakis." *The Washington Post*, May 6. "The poorer the town and its residents . . . the more likely its residents are getting treated like ATMs for the local government." Available at: http://www.washingtonpost.com/news/the-watch/wp/2015/05/06/this-isnt-1968-baltimore-isnt-watts-and-hillary-clinton-isnt-michael-dukakis/.

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