

SUPREME COURT COPY

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Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Jorge Navarrete Clerk

Deputy

Re: **Gardner v. Superior Court, S246214**
Court-Ordered Supplemental Letter Brief

To the Court:

In accordance with the Court's November 20, 2018 order, this supplemental letter brief is submitted on behalf of amici curiae The Innocence Project, The California Innocence Project, The Project for the Innocent at Loyola Law School, The Northern California Innocence Project, The University of San Francisco Criminal and Juvenile Justice Clinic, The American University Washington College of Law Criminal Justice Clinic, Professor Lara Bazelon, and Professor Jenny Roberts.

* * *

This Court recognized an indigent defendant's right to appointed counsel under Article I, Section 15 of the California Constitution long before the Supreme Court recognized such a right under the Sixth Amendment. It should be unsurprising, therefore, that the Court has recognized the breadth of that right to counsel even in circumstances in which federal law has not caught up. Federal law is the floor, not the ceiling and states have every right to afford greater constitutional protections. The Court should reaffirm that under the California Constitution, an indigent misdemeanor defendant has a right to appointed counsel, without regard to whether the defendant will ultimately be sentenced to a term of imprisonment, even though the Supreme Court has not yet recognized such a right under the United States Constitution.

This Court repeatedly has held that the California Constitution provides a more robust right to counsel than the United States Constitution.

This Court initially granted review of the question whether a defendant has a right to counsel when "charged with a misdemeanor offense on an appeal by the prosecution." The answer is yes. The right to counsel exists at "critical stages" of the prosecution. *People v. Houston*, 42 Cal. 3d 595, 602 (1986). A "critical stage" is one that holds "significant consequences for the accused," *People v. Hernandez*, 53 Cal. 4th 1095, 1106 (2012) (citations and internal quotation marks omitted), and "[a]ppellate review at the request of the People necessarily imposes substantial burdens on an accused." *People v. Williams*, 35 Cal. 4th 817, 822-23 (2005) (citations and internal quotation marks omitted); see also *United States v. Loud Hawk*, 474 U.S.

302, 319 n.2 (1986) ("Surely a Government appeal under 18 U.S.C. § 3731 is a 'critical stage' of the prosecution, implicating the Sixth Amendment right to counsel.") (Marshall, J., dissenting).

This Court's request for supplemental briefing adds to the question presented specific consideration of the California Constitution, and "whether a defendant facing misdemeanor charges is entitled to the assistance of appointed counsel at critical stages of the criminal case, *without regard to whether the defendant will ultimately be sentenced to a term of imprisonment.*" (Emphasis added.) As the Court's request suggests, being charged with a misdemeanor, rather than a felony, does not abrogate the defendant's right to counsel. "[T]here can be no doubt that the fundamental constitutional right to the assistance of counsel at all stages of the proceedings . . . is, in California at least, not limited to felony cases but is equally guaranteed to persons charged with misdemeanors." *In re Johnson*, 62 Cal. 2d 325, 329 (1965). Accordingly, the crux of the question appears to ask whether the right to counsel somehow depends upon a sentence of actual or suspended incarceration. At least under state law, it does not.

As amici described in their brief and address further below, the so-called "collateral consequences" of a misdemeanor conviction can ultimately carry vastly more significance than a period of incarceration. Collateral consequences can include "civil sanctions such as forfeitures, deportation, disqualification to receive government benefits, and the like." ABA Criminal Justice Standards: Pleas of Guilty, at xi (3d ed. 1999), *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf. These consequences have proliferated in recent years, and many attach to misdemeanor convictions. MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE, Ch. 2 (3rd Ed. 2018) (listing various types of consequences). Because collateral consequences may be the most serious ones that a misdemeanor defendant faces, it is arbitrary and unjust for the right to counsel in misdemeanor cases to hinge on whether the judge ultimately decides to impose a sentence of incarceration.

Nevertheless, federal courts have found incarceration to be significant in Sixth Amendment jurisprudence. Less than a decade after deciding *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that misdemeanor charges resulting in incarceration require the appointment of counsel—suggesting that misdemeanor charges not resulting in incarceration might not. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). While *Argersinger* was "not unmistakably clear," the Supreme Court later concluded that the Sixth Amendment requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *see also Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (holding that a defendant "who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel") (citation and internal quotation marks omitted).

In deciding the scope of the right to counsel under Article I, Section 15 of the California Constitution, however, this Court is not—and has never been—required to *follow* the limitations on the right to counsel suggested by the Supreme Court. In fact, this Court has always taken the *lead* on the right to counsel. Once again, amici invoke the bedrock principle that the state courts are empowered to provide greater constitutional protections to their citizens than those

afforded by the federal courts. See, e.g., *People v. Martinez*, 22 Cal. 4th 750, 754 (2000) (noting "important differences in the operation of the state and federal constitutional rights as construed by our courts.").

This Court recognized indigent defendants' right to appointed counsel under Article I, Section 15 of the California Constitution for twenty-three years before indigent defendants gained such right under the Sixth Amendment. "[W]hen in 1963 the United State Supreme Court decided the justly famous case of *Gideon v. Wainwright* . . . and interpreted the federal Constitution to require states to provide indigent criminal defendants with attorneys free of charge, the high court simply mandated that which the State of California had already required for decades under the California Constitution." *People v. Noriega*, 48 Cal. 4th 517, 527 (2010) (Werdegar, J., Dissenting) (citing *In re Connor*, 15 Cal. 2d 161, 164 (1940)).

This Court similarly took the lead on the scope of the right to counsel. After the Supreme Court decided *Argersinger*, this Court made clear that the California Constitution is more expansive when it comes to the right to counsel. *Mills v. Municipal Court*, 10 Cal. 3d 288, 300 (1973). "Under the California Constitution, a trial judge must advise a defendant of his right to state-appointed counsel in all felony and misdemeanor proceedings whether actual imprisonment is to follow or not." *Id.* at 301.

This Court should continue to recognize indigent defendants' right to counsel without regard to the imposition of any sentence of incarceration under the California Constitution. Like its ruling recognizing a right to appointed counsel before *Gideon*, this Court's robust interpretation of the right to counsel may go farther than federal law—for now. But the reasons that support the recognition of such a right apply just as well to the Sixth Amendment, and amici hope that one day—as it did in *Gideon*—the Supreme Court will harmonize the two provisions by adopting the rule that this Court first adopted in *Mills*, which the Court should reaffirm here.

This Court has recognized that collateral consequences are relevant to the right to counsel under Article I, Section 15.

Unless this Court continues to recognize a right to counsel for misdemeanor defendants irrespective of any sentence of incarceration, defendants will face the collateral consequences of a conviction—and, in some cases, of a wrongful conviction—without the benefit of representation. One important example of these collateral consequences, for non-citizen residents of California, is deportation. The immigration consequences of a criminal conviction shine a gut-wrenching spotlight on the need for misdemeanor defendants to be appointed counsel whether or not they face jail time.

"While potentially dire, immigration consequences nevertheless are, in many jurisdictions including California, considered collateral consequences of a criminal conviction." *In re Resendiz*, 25 Cal. 4th 230, 242 (2001) (citation and internal quotation marks omitted), *abrogated in part on other grounds in Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). Though technically not a part of the actual sentence in a criminal case, deportation is a very real and often inescapable result of being convicted. Even the Supreme Court has recognized that "[t]he 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of

noncitizens convicted of crimes.” *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citation omitted).

In *In re Resendiz*, this Court acknowledged the significance of collateral consequences—and specifically deportation—to the right to counsel under the California Constitution. In that case, a lawful permanent resident of the United States, whose children were United States citizens, faced deportation after entering a guilty plea. 25 Cal. 4th at 235. He argued that he received ineffective assistance of counsel because his attorney misadvised him about the deportation consequence of that plea. This Court concluded “that the ‘collateral’ nature of immigration consequences does not foreclose petitioner’s ineffective assistance of counsel claim.” *Id.* at 243. That decision sends a strong signal that collateral consequences—not just potential incarceration—are relevant to the right to counsel under Article I, Section 15.

Indeed, the failure to recognize a right to counsel for misdemeanor defendants who do not face incarceration would lead to troubling results. If that were the law, a defendant sentenced to incarceration would receive an attorney and, under *Padilla*, must be advised regarding the deportation consequences of a conviction. But a defendant not facing incarceration would receive no attorney at all, and thus no warning regarding deportation consequences. In that case, individuals facing the most minor charges would be at the greatest risk of being deported without ever having been advised of the possibility. That cannot be the law.

The immigration consequences of a conviction are critically significant to countless California residents who are not United States citizens, and may be subject to deportation. The Department of Homeland Security estimates that there are 3.3 million lawful permanent residents, like Mr. Resendiz, who live in California. Office of Immigration Statistics, *Population Estimates* June 2017, available at <https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202014.pdf>. California is also home to numerous other non-citizens, including those who received Temporary Protected Status, as well as hundreds of thousands of “Dreamers” who received protection from deportation under the Deferred Action for Childhood Arrivals program, or DACA. Pew Research Center, *Key facts about unauthorized immigrants*, available at <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/>.

Current events have made clear that immigrants’ fears of deportation are not speculative, but very real. Many aspects of this process, including the policy decision to break up families and deport long-time residents as a result of minor misdemeanor convictions, flow from federal law. But Article I, Section 15 can and should have a significant impact on the process by recognizing defendants’ right to counsel. Before misdemeanor defendants are subjected to deportation or other devastating collateral consequences of a conviction, they should at the very least be represented by an attorney—regardless of whether a sentence of incarceration may be imposed.

This Court should reaffirm the right to counsel because of the scope and severity of collateral consequences of a misdemeanor conviction.

While this Court has recognized the severity of the immigration consequences of conviction, deportation is just one of 44,000 estimated collateral consequences of a criminal conviction. See Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L.J. 1197, 1206–07 (2016). The Council of State Governments publishes an inventory of collateral consequences of convictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities. *National Inventory of Collateral Consequences of Conviction*, located at <https://niccc.csgjusticecenter.org/>.

This Court has recognized that, "[i]n numerous instances under provisions of California law, a criminal conviction may give rise to a variety of collateral consequences." *Larsen v. Department of Motor Vehicles*, 12 Cal. 4th 278, 283 (1995). "The direct and collateral consequences of a criminal conviction are becoming matters of increasing public concern. The legal situation, confusing even to the trained lawyer, is generally quite beyond the understanding of the convicted offender who ordinarily is not advised as to the disabilities and disqualifications accompanying his conviction, nor as to any procedures which may be available for their removal." *People v. Navarro*, 7 Cal. 3d 248, 279 (1972) (citations and internal quotation marks omitted).

It is beyond the scope of this brief, and this case, to address the point that myriad collateral consequences may be excessive punishment for a misdemeanor conviction. But with so much on the line, the right to counsel is paramount to ensure that innocent defendants are not wrongfully convicted in the first instance. A defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Gordon v. Justice Court*, 12 Cal. 3d 323 (1974) (citation and internal quotation marks omitted).

Nearly a hundred years ago, this Court declared that "the conviction of an innocent person through relaxation of those fundamental legal principles such as the constitutional 'due process of law' . . . would be a tragedy. It is the duty of the courts to be watchful of the constitutional and inalienable individual rights of the citizens and to halt any stealthy encroachments thereon." *People v. Scott*, 24 Cal. 2d 774, 795 (1944). To now deprive a misdemeanor defendant of the right to counsel, simply because the government does not seek incarceration, would be a stealthy and tragic encroachment on the rights this Court previously recognized under Article I, Section 15 of the California Constitution, in *Mills*, 10 Cal. 3d at 301, and *Gordon*, 12 Cal. 3d at 332 ("defendant's fundamental right to the assistance of counsel is guaranteed to him regardless of the severity of the punishment he faces if convicted.").

The California Constitution recognizes a right to counsel during the plea bargaining process, and pleas can be negotiated and accepted while a case is on appeal.

The California Constitution protects a defendant's right to counsel during plea bargaining. *In re Alvernaz*, 2 Cal. 4th 924, 933 (1992) ("The pleading—and plea bargaining—stage of a criminal

proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions."); see also *Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."). Counsel's advice about a misdemeanor guilty plea can be particularly important in light of the often unexpected and severe collateral consequences of such a plea, discussed in the previous section.

The government and defense counsel may conduct plea bargaining at any stage of a criminal case, including during the appellate process. If a defendant is *convicted* of a misdemeanor after a trial or guilty plea and either the defendant or the government files an appeal, the defendant will be represented by counsel for any plea negotiations at this stage. However, under the government's and lower court's cramped view of the right to counsel in this case, that same defendant would not have access to the clearly-established right to counsel during plea bargaining should any bargaining occur during a *pre-conviction* appeal by the government. In this case, for example, the government could offer Ms. Lopez a plea bargain during the pendency of its appeal. Yet she would be denied the right to counsel to advise her at this critical stage of the case. Although she would presumably get counsel again if her case were returned to the trial court for entry of a plea, even under the government's and lower court's limited view of the right, this puts Ms. Lopez in an untenable and unconstitutional situation. She could only return to the trial court to accept a plea offer by indicating a willingness to accept a plea, but would not have counsel to advise her about that plea offer.

Sincerely,



Brett J. Williamson
of O'MELVENY & MYERS LLP

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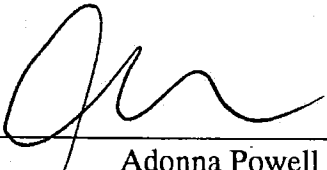
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SUPPLEMENTAL LETTER BRIEF

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