

No. 19-169

In The
Supreme Court of the United States

—◆—
JANE DOE,

Petitioner,

v.

IOWA,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The Iowa Supreme Court**

—◆—

**BRIEF OF AMICUS CURIAE
PUBLIC DEFENDER ASSOCIATION OF IOWA
IN SUPPORT OF PETITIONER JANE DOE**

—◆—

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INTEREST OF *AMICUS CURIAE*¹

The Public Defender Association of Iowa (“PDAI”) is an Iowa non-profit organization dedicated to the promotion of equality of justice for all and access to effective legal representation. The PDAI is comprised of attorneys and investigators who represent indigent persons accused of criminal acts throughout Iowa.

**STATEMENT OF THE CASE**

The PDAI respectfully refers the Court to Doe’s petition for certiorari for the pertinent facts of the case. For its own Statement of the Case, the PDAI provides this supplemental analysis of Iowa Code sections 815.9, 901C.2 and 901C.3.

All indigent defendants charged in Iowa state court with a crime carrying the “possibility of imprisonment,” including a “misdemeanor criminal prosecution,” have a right to court-appointed counsel under Article I, Section 10 of the Iowa Constitution. *See State v. Young*, 863 N.W.2d 249, 281 (Iowa 2015); *accord* Iowa R. Civ. P. 2.61(2). “Indigence” is determined by Iowa Code section 815.9(1) (2018), which sets forth the various requirements for a defendant to establish his or

¹ This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties consent to its filing. All parties received timely notice of the intent to file this *amicus* brief and explicitly granted their consent.

her financial incapacity, measured against the overall United States poverty level.

But an indigent defendant in Iowa does not receive counsel free of charge, even if he or she is eventually *acquitted* of the charges against him or her. Iowa law provides that “the court shall order” the payment of costs and fees to the extent the defendant is “reasonably able to pay.” *Id.* § 815.9(5)–(6); *see also id.* § 815.9(3) (“If a person is granted an appointed attorney, the person shall be required to reimburse the state.”).

In short, the Iowa criminal code expressly requires that indigent persons charged with minor crimes who invoke their constitutional right to counsel to pay for that counsel, even if they are acquitted of the charges.

And the deleterious effect of that payment requirement is enhanced when it comes to the expungement of criminal records for those who have been acquitted. Under Iowa Code section 901C.2(1)(a)(1), an innocent applicant for expungement must establish that he or she has paid “[a]ll court costs, fees, and other financial obligations ordered by the court or assessed by the clerk of the district court,” including the costs of being represented by a public defender and being acquitted. *Id.* § 901C.2(1)(a)(2). Likewise, a convicted applicant must have paid “all court costs, fees, fines, restitution, and any other financial obligations ordered by the court or assessed by the clerk of the district court.” *Id.* § 901C.3(1)(d). A court retains no discretion to excuse this payment requirement on any basis.



SUMMARY OF THE ARGUMENT

Gideon v. Wainwright, 372 U.S. 335 (1963), established that in all criminal prosecutions, an indigent defendant has the right to counsel appointed by the state. It did not say that the defendant had to pay the state back, and courts have understood it as requiring appointment of counsel free of charge to the indigent defendant. *See, e.g., Archie v. City of Racine*, 847 F.2d 1211–22 (7th Cir. 1988) (Easterbrook, J.). Iowa, by contrast, imposes a debt on all indigent defendants in Iowa—innocent or guilty—that follows them wherever they go and prevents them from obtaining other rights and benefits to which they would otherwise be entitled. A primary example is expungement of criminal records under state law: to avail themselves of this remedy, even indigent persons adjudged not guilty must first repay the state for the costs of counsel appointed for them under *Gideon* and its progeny. Iowa’s payment requirement presents a serious obstacle to indigent defendants who are striving for financial improvement—indeed, it impedes those who are among the most at risk of financial instability and therefore most urgently in need of the means to improve their economic situation.

This approach is abhorrent as a matter of public policy and does not comport with the United States Constitution.

First, court debt—including the charge of court-appointed counsel—leads to greater societal harm and sustains the cycle of poverty.

Second, imposing court debt on indigent defendants who have been acquitted violates the Excessive Fines Clause of the Eighth Amendment, such that the state cannot condition expungement of those charges upon satisfaction of that debt.

Third, regardless of the efficacy of expungement statutes as a matter of policy, it is improper to force indigent defendants to continue to experience the collateral consequences of being charged with or convicted of a crime but for their inability to repay the state the costs of court-appointed counsel and other court debt.

◆

ARGUMENT

I. Imposing Court Debt, Including the Cost of Court-Appointed Counsel, on Indigent Defendants Sustains the Cycle of Poverty.

The sheer size of Iowa's gargantuan court debt is staggering: by the end of fiscal year 2017, it had reached \$731.9 million and counting—and this is only what is owed to the State of Iowa and does not include additional debt owed to counties, cities, or sheriffs. Judicial Branch Accounts Receivable Report (June 30, 2017), www.legis.iowa.gov/docs/publications/DF/860848.pdf; Ethan Stoetzer, *Iowa's Outstanding Court Debt Reaches over \$700 Million*, InsideSources (January 31, 2018), <https://www.insidesources.com/iowas-outstanding-court-debt-700-million/>. Since fiscal year 1998, Iowans' outstanding court debt has grown by 410.4%. Fiscal

Services Division, Legislative Services Agency, Issue Review: Court Debt Collection (January 3, 2018), <https://www.legis.iowa.gov/docs/publications/IR/916685.pdf> (hereafter Court Debt Collection).

Iowa Code section 602.8107 defines “court debt” as an umbrella term including but not limited to fines, restitution, indigent defense fees, jail fees, court reporter fees, and examination and expert fees. Court debt can roll over from year to year, and indigent individuals can take on more of this debt in addition to the existing amounts owed to the court through the accumulation of interest. *See* Lee Rood, *Overdue Court Debt Costing Iowans Millions of Dollars in Collection Fees*, Des Moines Register (November 9, 2017, 5:26 PM), <https://www.desmoinesregister.com/story/news/investigations/readers-watchdog/2017/11/09/overdue-court-debt-costing-iowans-millions-dollars-collection-fees/827461001/>.

Indigent defendants face the brunt of the mounting court debt conundrum—or “poor tax” as Phil Brown of the American Civil Liberties Union called it—and they accumulate far bigger debts simply because they cannot afford to pay defense costs upfront. *Id.* Because Iowa permits defendants to be charged the full cost of their public defenders, legal fees constitute one major area in which defendants can owe thousands or tens of thousands of dollars. *Id.* Moreover, as already mentioned, Iowa does not have a cap on what defendants might owe to court-appointed attorneys and public defenders.

After thirty days pass from the imposition of the court debt or the date of nonpayment, a private firm hired by the State of Iowa can attempt to collect the debt. Court Debt Collection. This firm is also permitted to charge a 25% “add-on fee” to delinquent (non)payments. *Id.* These add-on fees operate as penalties on the poor, who often cannot make the payments to satisfy their court debts in the first instance.

Court debt has additional consequences. Nonpayment of these debts can lead to wage garnishment, contempt, and even jailtime. *See Rood, Overdue Court Debt.* Counties can impose vehicle registration moratoriums, license application freezes, and license suspensions. *See Court Debt Collection.* These consequences self-evidently punish the indigent more severely than the wealthy; in fact, the imposition of court debt on the indigent is a form of “poverty trap” because it keeps them impoverished by hampering their abilities to earn a livelihood, thus defeating any realistic way to repay the court debt. *See Confronting Criminal Justice Debt: A Guide for Policy Reform, Criminal Justice Policy Program, Harvard Law School 15–16 (September 2016),* cjpp.law.harvard.edu/publications/confronting-cjdebt. For example, suspending a driver’s or professional license is “hugely counterproductive” to helping people obtain or regain financial independence. *Id.* at 16. This consequence is “one of the most pervasive poverty traps” because low-income people simply cannot pay their court debt when they are blocked from making a living. *Id.* at 15; *cf. James v. Strange*, 407 U.S. 128, 139–40 (1972) (depriving indigent defendant of

statutory exemptions for wages and certain personal property “discourages the search for self-sufficiency which might make of the criminally accused a contributing citizen”).

The modern-day debtor’s prison created by the mechanisms to collect charges for court-appointed counsel and other court debt is not limited to Iowa. See *Confronting Criminal Justice Debt: A Guide for Policy Reform*, Criminal Justice Policy Program, Harvard Law School 15–16 (September 2016); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 534 n.6 (2010) (noting the “emerging parallel issue” of “various court-related monetary obligations that states are increasingly imposing against individuals with criminal records”).

The current collection mechanisms in place, which have a disparate impact on the poor, are part of a widespread, nationwide, unaddressed problem with the court debt system that charges indigent defendants for the cost of court-appointed counsel. If left unchecked, the burden of this debt may become insurmountable, especially for indigent defendants stuck in a cycle of poverty with seemingly no escape hatch.

II. Iowa Code Section 815.9(6) Violates the Excessive Fines Clause so Iowa Code Section 901c.2(1)(a)(2) Constitutes an Unconstitutional Condition.

Requiring indigent defendants repay the cost of their defense under Iowa Code section 815.9(6) imposes a *per se* unconstitutional burden on indigent, innocent defendants, because that is exactly what they are—*innocent*. The cornerstone of American criminal jurisprudence is that “every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt.” *Coffin v. United States*, 156 U.S. 432, 459 (1895) (collecting authority tracing this principle back to Greco-Roman law). Yet Iowa’s current statutory scheme exacts a toll from its citizens who have merely been *charged* with a crime without conviction, which works a special and unconstitutional harm.

Conditioning the expungement of an innocent person’s criminal charges upon the payment of costs to the state implicates the Excessive Fines Clause and its related civil applications (only recently incorporated into the Fourteenth Amendment, *see Timbs v. Indiana*, 139 S. Ct. 682, 687–91 (2019)).² This Court adopted “the

² The *Timbs* decision was announced on February 20, 2019, after all briefing by the parties in the Iowa Supreme Court had been completed. Because *Timbs* is intervening authority that for the first time permits a federal Excessive Fines Clause challenge to a state statute, Petitioner was not required to raise this argument below, and the PDAI is thus not precluded from doing so now, as the appellate waiver doctrine only applies to a “known right or privilege.” *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967) (“[T]he mere failure to interpose [a constitutional] defense

standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents” in weighing the excessiveness of a fine under the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). This same standard also applies to civil *in rem* proceedings seeking forfeiture based on criminal action. *See Timbs*, 139 S. Ct. at 691.

To that end, the inquiry here is simple: any fine or forfeiture imposed upon a person without a related finding of culpability is *per se* grossly disproportionate.³ *See, e.g., Austin v. United States*, 509 U.S. 602, 617 (1993) (“[F]orfeiture of a truly innocent owner’s property would raise ‘serious constitutional questions’”) (*quoting Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688–89 (1974)); *United States v. Ferro*, 681 F.3d 1105, 1116 (9th Cir. 2012) (holding with respect to the Excessive Fines Clause analysis under *Bajakajian*, “it is the individual culpability of . . . the person who is actually punished by the ‘fine’ [] which

prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.”).

³ Statutes authorizing recoupment of attorney costs from indigent defendants (innocent or otherwise) also fall within the letter of “punishment” subject to Eighth Amendment protections, as defined by this Court’s precedent. *See Austin*, 509 U.S. at 621 (“A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.” (emphasis in original; internal citations and marks omitted)); *James*, 407 U.S. at 141–42 (noting that a statute calling for appointed-counsel cost recoupment from innocent indigent defendants “embodies elements of punitiveness”).

must be considered in the excessiveness analysis”) (*cit- ing von Hofe v. United States*, 492 F.3d 175, 188-91 (2d Cir. 2007)); *accord Galloway v. City of New Albany*, 735 So. 2d 407, 413 (Miss. 1999) (interpreting identical ex- cessive fines prohibition in the Mississippi Constitu- tion, and holding civil forfeiture “would certainly be disproportionate, where, as here, the property owner was acquitted” of the underlying charges). Put simply, no innocent United States citizen may be charged a fee to maintain his or her own freedom.

Under this standard, Iowa Code section 815.9(6) is unconstitutional under the Excessive Fines Clause of the Eighth Amendment, as it permits the imposition of court costs, including a charge for court-appointed counsel, on an indigent defendant where the defendant is acquitted or is actually innocent, and is thus grossly disproportionate to the defendant’s *entirely lawful* conduct. Accordingly, Iowa Code section 901C.2(1)(a)(2) constitutes an unconstitutional condition, as it predi- cates expungement to which the defendant would otherwise be entitled on the satisfaction of an uncon- stitutional debt. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests[.]”).

III. Relief from the Collateral Consequences of Criminal Charges and/or Conviction Should Not Be Conditioned Upon an Indigent Defendant's Ability To Satisfy His or Her Court Debt.

Regardless of whether expungement statutes constitute sound public policy in general, Iowa's decision to subject indigent defendants to the continuing harms associated with criminal charges or a misdemeanor conviction, based on nothing more than their inability to pay their outstanding court debt, has no rational basis under the law. Such a policy unnecessarily imposes these harms upon the members of society least equipped to bear them, and who most desperately need to be free of them. *See James*, 407 U.S. at 139–40, 141–42.

A. Criminal charges are themselves harmful.

To begin, mere *charges* of criminal activity work real harms to indigent individuals, particularly hampering access to equal employment opportunities. An estimated 97% of employers conduct a background check for county/statewide criminal records as part of their hiring processes. *See* National Association of Professional Background Screeners, *How Human Resource Professionals View the Use and Effectiveness of Background Screening Methods* 9 (2018) <https://pubs.napbs.com/pub.cfm?id=9E5ED85F-C257-C289-9E8E-A7C7A8C58D00>. And arrests appear on criminal background checks. *See* Roberto Concepción Jr., *Need Not Apply:*

The Racial Disparate Impact of Pre-Employment Criminal Background Checks, 19 *Georgetown J. Poverty L. & Pol.* 231, 238–39 (Spring 2012).

Iowa has no specific protections against employers inquiring into the criminal records of job applicants, so employers may rely on those records to deny employment based on a criminal charge, *even absent a conviction*. See Christopher Uggen & Robert Stewart, *Piling on: Collateral Consequences and Community Supervision*, 99 *Minn. L. Rev.* 1871, 1877 (2015) (“Any interaction with the criminal justice system, *including a single arrest*, can have long-term repercussions on one’s economic future.” (emphasis added)); see also Kelsey Sullivan, *Risky Business: Determining the Business Necessity of Criminal Background Checks*, 2014 *U. Chi. Legal F.* 501, 529 (2014) (observing that an employer would choose an applicant without a criminal history over another with any criminal history where both applicants are equally qualified).

Indeed, although the Iowa Workforce Development Department and the Equal Employment Opportunity Commission (“EEOC”) both issued guidance decrying such practices due to the potential for discriminatory impact, these regulatory admonitions do not prohibit employers from inquiring into the conduct underlying a criminal record and from refusing employment based ostensibly upon that conduct. See EEOC Enforcement Guidance 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (April 25, 2012), <https://www.eeoc.gov/laws/guidance/>

arrest_conviction.cfm; Iowa Workforce Dev. Dept., *Successful Interviewing Guide* (October 2011), https://www.iowaworkforcedevelopment.gov/sites/search.iowaworkforcedevelopment.gov/files/Successful%20Interviewing%20Guide_70-0006.pdf.

Under Iowa's expungement system indigent defendants have no choice but to remain so: the criminal record prevents them from obtaining employment. Without employment, they cannot satisfy their outstanding court debt. While that debt remains outstanding, they cannot get their criminal record expunged. The cycle of poverty is perpetuated.

B. Juvenile defendants are uniquely burdened.

Moreover, criminal charges work a special harm upon a particular class of indigent "dependents": juveniles. *See* Internal Revenue Code, 26 U.S.C. § 152(a)(1), (c) (generally defining "dependent" as a "qualifying child" under the age of 19 receiving more than half of his or her support from the taxpayer wishing to claim him or her); Black's Law Dictionary 222 (4th pocket ed. 2011) (defining "legal dependent" as "a person who derives principal support from another and usu[ally] may invoke laws to enforce that support"). This is because Iowa Code section 815.9(6) permits the imposition of court costs upon a minor charged as an adult; section 815.9(9) only applies to minors charged as juvenile offenders, but it too reserves the court's right to seek reimbursement from juveniles (or their parents)

pursuant to Chapter 232 of the Iowa Code. *See id.* § 232.141(1) (“Except as otherwise provided by law, the court shall inquire into the ability of the child or the child’s parent to pay expenses incurred” by court-appointed counsel).

In general, juveniles are accorded a special status in our criminal justice system. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012) (holding life without the possibility of parole is unconstitutional but leaving open the question of imposing this sentence in homicide cases); *Graham v. Fla.*, 560 U.S. 48, 68, 82 (2010) (holding life without the possibility of parole is unconstitutional in nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding the death penalty unconstitutional in all cases “no matter how heinous the crime”). But requiring juveniles to satisfy their outstanding court debt prior to expungement diminishes their life chances as adults, thwarting the rehabilitation goal of the juvenile justice system. For example, absent expungement or sealing, Iowa criminal records are available to the public—including juvenile delinquency records. Iowa Code § 22.7.9; *id.* § 232.147; *but see also id.* § 232.150 (permitting sealing of juvenile records two years after delinquency determination on court’s motion, *if* the individual is now an adult *and* has no other pending criminal charges or convictions). These records are thus accessible to any employer or university conducting a background check, which both are likely to do as part of the application process. *See generally* Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal*

and Policy Considerations, 34 J. Coll. & Univ. L. 420, 431-35 (2008).

And even if the records are not themselves accessible, the University of Iowa, Iowa State University, and the University of Northern Iowa *all* include criminal history questions on their undergraduate enrollment applications. See Vanessa Miller, *University of Iowa to Add Criminal Background Check to Application*, *The Gazette* (June 1, 2015), <https://www.thegazette.com/ui-to-add-criminal-background-check-to-application-20150601>; Iowa State University, *Undergraduate Application for Admission and Scholarships 4* (December 2018), https://www.admissions.iastate.edu/apply/pdf/us_ug_app.pdf (noting that “charges which have been expunged pursuant to applicable law are exempt” with respect to criminal background questions). And even if a convicted juvenile obtains admission to a university, his or her criminal record is legitimate grounds to deny federal student aid such as scholarships and loans. 5 CFR § 919.340.

To put it bluntly, under this statutory scheme, even for Iowa’s children, freedom costs extra.

C. Indigent misdemeanants also endure disproportionate harms, based on nothing more than their financial means.

An indigent person’s inability to expunge a misdemeanor conviction because it is cost-prohibitive delivers a “one-two punch” to that person’s ability to climb out of poverty.

Misdemeanants start by losing their basic social-safety net. Under Iowa and federal law, a misdemeanor conviction may be sufficient grounds to deny unemployment benefits (Iowa Code § 96.5(2)(c); 871 IAC 24.32(1), (3)), public assistance housing (24 CFR § 5.855; *id.* § 982.306(c)), or even food stamps (441 IAC 41.25(10)).

A misdemeanor record may also have a significant adverse effect on employment prospects, even more so than an arrest or charge. For instance, Iowa reserves the right to deny operating licenses based on a criminal record to virtually all regulated vocations, including for trades such as barber (645 IAC 25.2(11)), tattoo artist (641 IAC 22.7(2)), cosmetologist (645 IAC 65.2(12)), athletic trainer (*id.* at 353.2(12)), and *any* employment whatsoever in a hospital, right down to the janitor (481 IAC 51.41). Misdemeanants may even lose one of the most critical mediums to help create and/or maintain financial independence: their vehicle. Iowa Code § 321A.17(1).

Moreover, although the consequences are not as severe as for felony convictions, both state and federal rights and privileges of citizenship may evaporate with a misdemeanor record. For example, under Iowa law, misdemeanants are restricted in their possession of firearms (*id.* § 724.15, .26.2(a)), cannot hold public office (*id.* § 69.2), and cannot adopt a child (*id.* § 600.8; 441 IAC 107.8; *id.* at 200.4). And under federal and international law, misdemeanants may not be able to obtain a passport (22 U.S.C. § 2714(b)(2)), and even if they do, certain nations (such as Canada) prohibit

entry to those with a criminal record. *See* Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.), § 36(2)(b), (c) (denying entry on grounds of “criminality” to foreign nationals who have “been convicted outside Canada” of an offence that “if committed in Canada, would constitute an indictable offence under an Act of Parliament”).

Finally, beyond these tangible losses tied to misdemeanor convictions (and even arrests that do not lead to convictions), there are also incalculable intangible harms. For instance, as a “social outcast,” ex-offenders may have a difficult time finding a spouse and may not be welcomed or outright banned from various clubs or even religious organizations. Murat C. Mungan, *Gateway Crimes*, 68 Ala. L. Rev. 671, 680 (2017); *see also* Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa’s Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 Iowa L. Rev. 1275, 1293 (2013) (discussing the negative public perception of individuals who have been arrested or charged and noting the adverse psychological effects). Similarly, school districts restrict parents with criminal records from volunteering at their children’s school for various types of events. *See* Christopher Uggen & Robert Stewart, *Piling on: Collateral Consequences and Community Supervision*, 99 Minn. L. Rev. 1871, 1892–93 (2015).

To be clear, the PDAI is not arguing that these collateral consequences of conviction are *per se* unconstitutional. Rather, it is the conditioning of

expungement—without which leads to these collateral consequences—upon nonpayment of appointed-counsel costs that is so troubling, because only *indigent* misdemeanants unable to pay this debt are also unable to escape these continuing burdens on their livelihood.



CONCLUSION

By unavoidably conditioning expungement of a defendant's criminal record upon the satisfaction of his or her statutory court debt, the Iowa expungement statutes work an unconstitutional and unconscionable harm upon the indigent, especially one who has never even been found guilty of a crime. The PDAI thus respectfully requests that this Court grant Doe's petition for certiorari, reverse the holding of the Iowa Supreme Court, and hold that Iowa Code section 901C.2.1 is unconstitutional as applied to the indigent under the Equal Protection Clause of the Fourteenth Amendment and/or constitutes an unconstitutional condition. The imposition of such costs in the first instance under Iowa Code section 815.9(6) violates the Excessive

Fines Clause of the Eighth Amendment, as incorporated by the Fourteenth Amendment.

Respectfully submitted,

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