

CrRLJ 4.1, The Right to Counsel, and the Impact on Court Budgets

District and Municipal Court Judges Association
Conference

Ocean Shores, Washington

June 7, 2011

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Director, Defender Initiative***



Seattle University School of Law
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Topics for Discussion

- Court rules and Case law relating to Right to Counsel at Arraignment
- Examples of troublesome “waivers”
- Why counsel at arraignment is important
- Examples of places that have found ways to add counsel when they had not had counsel
- Diversion as a way to free up resources

Open Society Defender Initiative Project

Washington

Kentucky

New Hampshire

Education and Advocacy to Increase Access to
Effective Assistance of Counsel in Misdemeanor
Cases



Start Time: 9:45:01

Judge: "K [REDACTED] J [REDACTED]"

Prosecutor: "Case # C6 [REDACTED]. Defendant is present without counsel. Miss Johnson, you represent (inaudible)"

Defendant: "(Inaudible) I was going to get a court appointed only because I was having problems with the collection agency but when I left here I found out I didn't have to deal with that collection agency so I went and got my license... yeah, I do have it."

Prosecutor: "I asked the court to confirm that she does and the state offers no jail time and \$300 fine, is that what you're wanting to do?"

Defendant: "Yeah, (inaudible)"

Prosecutor: "Your Honor, my understanding is that the defendant is re-licensed, she, with uh her license the state offered no jail time and \$300 fine and that Miss Johnson is indicating that is what she wishes to do.

Defendant: "I would have to make payments on it."

Judge: "How do you plead to this charge?"

Defendant: "Guilty."

Judge: "All right. Twenty-four months unsupervised probation, ninety days jail all suspended, \$1000.00 fine with \$700 suspended with a \$300 fine to pay, plus there's the \$150 monitoring fee and a \$43 assessment. Conditions: no driving in the next 24 months unless you have a valid license and insurance and no moving traffic violations filed against you in the next two years and have no, uh, criminal charges for any criminal filed against you in the next two years. Any questions?"

Defendant: "No."

Judge: "Okay you need to go out to the front counter."

End Time: 9:46:29

Total Time: 1 minute, 28 seconds

9:

9:46:35

3:

████████ Johnson”

Prosecutor:

“Mr. Johnson is represented (inaudible). You are or you’re not represented?”

Defendant:

“No, uh-uh.”

Prosecutor:

“I just need to find your file here (inaudible). Case # C7████████. Defendant is present without counsel. What did I talk to you about doing (inaudible)?”

Defendant:

(Inaudible)

Prosecutor:

“You want to enter your plea. Uh, Your Honor, my understanding from the defendant is he wishes to enter a plea on the charge and the state offers no jail time and \$150 fine.”

Judge:

“Well alright, Mr. Johnson, how do you plea to Driving While Suspended third degree?”

Defendant:

“Guilty, sir.”

Judge:

“All right. Twenty-four months unsupervised probation, ninety days jail, all suspended, \$1000.00 fine, \$850 suspended with \$150 fine to pay plus the \$150 monitoring fee and a \$43 assessment. Conditions: no driving in the next twenty-four months unless you have a valid license and insurance and no moving traffic violations or criminal charges are to be filed against you in the next two years. Exonerate bond.”

End Time:

9:47:52

Total Time:

1 minute, 17 seconds

Problems with these hearings

- No valid waiver of counsel
- Plea itself is not valid
- Ethical issue of prosecutors talking with unrepresented people who have not waived counsel.

Argersinger v. Hamlin(1972)

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.

Rothgery v. Gillespie County (2008)

This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.

In re Hammermaster, 139 Wn.2d 211 (1999)

“...a judge has a duty to ensure that guilty pleas are knowingly, voluntarily, and intelligently made.”

Other Key Cases

- *Faretta v. California*, 422 U.S. 806 (1975)
- *Iowa v. Tovar*, 541 U.S. 77 (2004)
- *State v. Chavis*, 31 Wn. App. 784 (1982)
- *Bellevue v. Acrey*, 103 Wn.2d 203 (1984)
- *Von Moltke v. Gillies*, 332 U.S. 708 (1948)
- *Padilla v. Kentucky*, 176 L. Ed. 2d 284 (2010)
- *Alabama v. Shelton*, 535 U.S. 654 (2002)
- *State v. ANJ*, 168 Wn.2d 91 (2010)

Invalid Waiver of Counsel

- Court did not advise the defendant of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case.
- Defendant must understand the risks of self-representation

Bellevue v. Acrey

Invalid Waiver of Counsel

- Court did not offer counsel and did not make a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice to proceed without counsel intelligently and understandably
 - *State v. Chavis*

Requirements for Valid Waiver Colloquy

- *State v. Chavis*, 644 P.2d 1202, 1205, 31 Wn. App. 784, 789, 790 (1982):

... the court should question the accused **in a manner designed to reveal *understanding*, rather than framing questions that call for a simple “yes” or “no” response.**

The court must make a thorough inquiry

Rule 4.1 (d)

- *Chavis, supra*, Wn. App. 784, 789,790:

But [a]n accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a *thorough inquiry* into the accused's comprehension of the offer and capacity to make the choice intelligently and understandably has been made....

Invalid Waiver of Counsel

- The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the *nature of the charges*, the *statutory offenses included within them*, the *range of allowable punishments thereunder*, *possible defenses to the charges and circumstances in mitigation thereof*, and all other facts essential to a broad understanding of the whole matter.
- *Von Moltke v. Gillies*, 332 U.S. 708 (1948), plurality opinion

Von Moltke v. Gillies

- A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a **penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.**

Invalid Waiver of Counsel

- The court did not make the defendant aware of the dangers and disadvantages of self-representation, so that the record established that he knew what he was doing.
– *Faretta v. California*.

Invalid Waiver of Counsel

- Court did not alert the defendant to his right to the assistance of counsel in entering a plea. The defendant needs to know retained or appointed counsel can assist at the plea stage by working on the issues of guilt and sentencing.

– *Iowa v. Tovar*

Invalid Waiver of Counsel

- Court did not allow the defendant counsel to help in a plea bargain.
- “In sum, we have long recognized that **the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.**”

– *Padilla v. Kentucky*

State v. ANJ, 168 Wn.2d 91 (2010)

- a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence....
- **we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.**

And Implications for Later Probation Hearings

- *Alabama v. Shelton*: A suspended sentence that may “end up in the actual deprivation of a person's liberty” may not be imposed unless the defendant was accorded “the guiding hand of counsel” in the prosecution for the crime charged.

Other Problems with the Plea

- *Brady v. U.S. (1970)*: “That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized....Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done **with sufficient awareness of the relevant circumstances and likely consequences.**”

And...

- *Boykin v. Alabama* (1969): Guilty plea involves waiver of privilege against self incrimination and of rights to trial by jury and to confront accusers.
- Court cannot presume a waiver of these rights from a silent record.

Key Court Rules

RULE CrRLJ 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

- (b) Stage of Proceedings. (2) **A lawyer shall be provided at every critical stage of the proceedings.** (c) **Explaining the Availability of a Lawyer. (1) When a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer. Such advice shall be made in words easily understood, and *it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.***

3.1

- (d) Assignment of Lawyer.
- (1) Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family. A lawyer shall not be denied to any person merely because his or her friends or relatives have resources adequate to retain a lawyer or because he or she has posted or is capable of posting bond.

Rule 4.1

- (c) Counsel. If the defendant appears without counsel, the court shall inform the defendant of his or her right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. **If the defendant is not represented and is unable to obtain counsel due to indigence, counsel shall be assigned to the defendant by the court, unless the defendant makes a knowing, voluntary and intelligent waiver of counsel.**

4.1 (d)

- (d) Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall determine on the record whether the waiver is made voluntarily, competently and with knowledge of the consequences. **The court shall make a thorough inquiry of the defendant's understanding before accepting the waiver.** If the court finds the waiver valid, an appropriate finding shall be entered in the record. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed.

Ethics Rule

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

- The prosecutor in a criminal case shall: (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

Why counsel is required at first appearances

- Accused persons generally cannot without help
- * understand the elements of the charge, possible defenses, or the full nature of the consequences of a conviction;
 - *challenge a finding of probable cause;
 - *advocate effectively for personal recognizance release or reduced bail;
 - *advocate effectively for sentencing alternatives.

Because of all of the foregoing...

- Accused persons generally cannot without help make a valid decision about waiving counsel or waiving trial.
- The fairness of the proceedings and the integrity of the court are at risk.

Who said this?

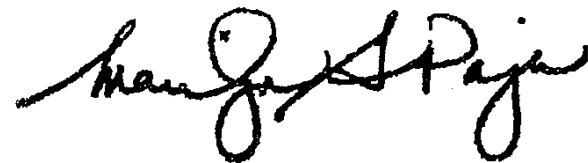
- **The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction.**

District and Municipal Court Judges' Association

April 6, 2009

Honorable Charles W. Johnson
Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia, Washington 98504-0929

Sincerely,

A handwritten signature in black ink, appearing to read "Marilyn Paja". The signature is fluid and cursive, with a large initial "M" and "P".

Judge Marilyn Paja
2008/09 DMCJA President

4. The final issue that I wish to address is really the question you mention in your letter whether “modifications to the guilty plea form to ensure defendants are aware of all of the ramifications of entering a plea of guilty” might satisfy the concerns that the DMCJA raises in the first place. We do not agree that unrepresented defendants at arraignment calendars can get the advice and assistance they need by adding yet more or different language to an already long and complicated guilty plea form explained to them only by a judge sitting up on a bench in the courtroom. The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction (including immigration consequences, state-to-state travel restrictions, mandatory minimum penalties, loss of student loan benefits, right to bear a weapon, loss of professional licenses or security clearance, no contact orders with their loved ones, and more).

Why Misdemeanors Matter

- **Huge Commitment of Resources When All Governments Are Struggling To Make Ends Meet.**
- ***Fairness—Fundamental rights are being denied to thousands of people in the places that should protect them the most.***
- **Perception of Justice—Most people who actually go to a court go to these courts. Their respect for American justice is shattered when they experience the problems discussed here.**

Economic Penalties

Increasing fines, costs, and other fees have become staggering. Cumulative impact of all of the economic obligations a significant problem for most defendants.

“Courts have demonstrated an almost total disregard for the ability of the defendants to afford the amounts assessed.”

Criminal convictions diminish employment prospects and eligibility for housing and other benefits.

McCormack, “Economic Incarceration”, Windsor Yearbook of Access to Justice, 2007.

Consequences

- The collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly.
- These consequences can be quite grave. The defendant can be **deported, denied employment, or denied access to a wide array of professional licenses**. A person convicted of a misdemeanor may be ineligible for **student loans** and even expelled from school. Additional consequences can include the **loss of public housing** and access to **food assistance**, which can be dire, not only for the misdemeanant but also for his or her family. Fines, costs and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.
- **“No criminal conviction should be regarded as minor or unimportant.”** *Minor Crimes, Massive Waste.*

1968: UW Professor John M. Junker Wrote

[A] large majority of the [people] annually charged with non-traffic misdemeanors must, if they are financially unable to hire an attorney, face the **bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system without the assistance of counsel.** The misdemeanor prosecution is the “Appalachia” of the criminal justice system.



Before you enter your plea

Consider the Possible Effects of Pleading Guilty

You have a right to see a defense attorney, even if you can't pay for one. Your attorney will explain what can happen because of your plea and help you decide what to do.

In addition to possible penalties such as jail time and fines, examples of issues you may want to discuss with an attorney include:



REMEMBER

- You have a **RIGHT** to an attorney right now.
- An attorney can explain the potential consequences of your plea.
- If you cannot afford an attorney, an attorney will be provided at **NO COST** to you.
- If you don't have an attorney, you can ask for one to be appointed and for a continuance until you have one appointed.



Antes de que usted se declare

Considere las consecuencias de admitir culpabilidad.

Usted tiene el derecho de consultar a un abogado, incluso si no tiene los recursos para pagar sus servicios. Su abogado le explicará lo que puede suceder a consecuencia de su declaración y le aconsejará a decidir lo que puede hacer.

Además de posibles condenas tales como encarcelamiento y multas, ejemplos de asuntos a discutir con un abogado incluyen los siguientes:



RECUERDE:

- Usted tiene derecho a los servicios de un abogado inmediatamente.
- Un abogado le puede explicar las consecuencias potenciales de su admisión.
- Si usted no puede pagar a un abogado, se le proporcionarán los servicios de uno.
- Si aún no tiene un abogado, puede pedir que se le asigne uno y que se le otorgue una "continuación" hasta que usted pueda contar con los servicios de un abogado.

Council on
Public
Defense
Form

What Counsel Should Be Doing at These Hearings

- Challenge probable cause
- Talk with client about rights, silence, ability to post bail, residence, work, references, time in community; assess any immediate needs of client
- Advocate for release
- Confirm appointment process beyond first appearance
- Consider appellate review and pursue as appropriate

Progress on the Open Society Defender Initiative Project

- **Sunnyside Municipal Court**—added lawyer at arraignment
- **Spokane District Court**—added lawyer to the DUI arraignment calendar that did not have one
- **Pasco Municipal Court** —added counsel at arraignment

And....

- **City of Spokane**
 - Added attorney at first appearances for in-custody defendants
 - Developed new diversion program
- **City of Yelm**
 - Added counsel at arraignments

Yelm Municipal Court

Judge's observation after providing counsel

- [i]t does seem that more cases are reduced/dismitted at 1st appearance, and that is, I believe, due to the presence of both the prosecutor and public defender.
- Since going all public defender, I have noticed two things: 1) many more defendants are represented by counsel, and 2) **As a result, things move more smoothly at both the arraignment and pre-trial stages....The presence of the public defender improves communication between the sides greatly.**

Pasco City Attorney Comments

Pasco Municipal Court Changes

- **Those accused are expressing more confidence in the system and the overall experience is less intimidating. The Court, Defenders, and Prosecutors have all expressed that the system seems to be working much better with more equitable results. It is going smoothly and there is a reduction in jail time, however, I do not have specific numbers to share at this time.**

Spokane Municipal Defender Observations

- We can identify immediately **mentally ill defendants** and either make a referral to mental health court or initiate a sanity commission process with a declaration by the first appearance attorney.
- We help the court in giving another side to the prosecutor's **bail request**, thus increasing the number of defendants OR'd over the prosecutor's objection or given reduced bond amounts.
- On **warrant cases**, we often give information to the defendant as to when he missed court so that he can better articulate why he missed court, increasing his chances for OR. We can quickly discuss **medical needs** with the inmate and the need for OR for upcoming surgeries or procedures, or identify high-risk pregnancies to support OR.
- We quickly gather information on **ties to the community**, so we can get people back to school or back to work without a lengthy interruption.
-

Spokane City Defender

- We **identify cases that can be easily resolved and set them for early hearings for dispositions.**
- We **challenge probable cause**, and when we win, the defendants are released.
- Defenders can **begin investigation immediately** as appropriate, particularly on DV cases and excessive force issues.
- We **coordinate the client's court dates** to reduce the chance of another warrant in case they bond out.
- We can more easily **determine that a defendant needs an interpreter**, and we move that defendant's case to the afternoon of the same day with an in-court appearance with some time for the court to arrange for an interpreter, even if only by the language line over the phone.
- Kathy Knox

What Judges Can Do

- Provide thorough advice to defendants on what counsel can do for them and the disadvantages of going pro se
- Do thorough inquiries on waivers of right to counsel and right to trial
- Make sure that people who plead guilty understand the elements of the charge and the consequences of a guilty verdict.
 - *Use the WSBA CPD form.*
- Provide counsel to eligible people.

Ways to Cut Caseload and Costs

- Diversion of Suspended Driver License Cases
- Re-Licensing programs
- Diversion of Marijuana Possession Cases
- Diversion of Minor in Possession of Alcohol Cases
- Diversion of Shoplifting Cases

DWLS 3rd Degree Strategy

Diversion for Relicensing



Spokane City Prosecutor's Office

Spokane City Prosecutor's Office
Community Relicensing Program
909 W. Mallon
Spokane, Washington 99201
(509) 835-5936

- From Mary Muramatsu, Spokane City Prosecutor

“Uncollectable” Money Now Paid

- January 2010 through present:
\$605,732.34
- Commencement of CRP through Present:
\$1,136,718.37

Courts Continue to be Congested

- 33% to 38% of criminal dockets consist of DWLS 3rd Degree Cases
- Public Defender Caseloads are challenged
- Negotiations slow down process
- Multiple continuances for a driver's license compound docket sizes
- Violations frustrate the flow of cases

Taking a New Direction on Suspended License Cases

- City and County Budgets facing tough challenges due to declining revenues
- Prosecutor's Offices have taken cuts to personnel and programming
- Police Arrests have not declined and workload remains steady
- Public Defender Caseloads must be reduced to meet anticipated standards

The City of Spokane's "3rd Degree Strategy"

- Addresses all cases for which DWLS 3rd Degree is the sole criminal charge
- A new Notice of Infraction is written to replace each criminal citation charging DWLS 3rd degree
- One of two infractions:
 - Possession of an Invalid License
 - Operating a Motor Vehicle Without a License

A “Diversion Strategy”

- For those eligible, finds them committed on infractions and sets time payment 180 days out.
- Gives 30 days to pay \$100 admin fee and enter the CRP
- Provides ample time for tier two and tier three to complete – 180 days from court date
- Obligation to pay all fines referencing this ticket evaporates upon completion of the Relicensing Program

Designed to Incentivize

- Allows driver to avoid stigma of a criminal charge
- Reaches out to those whose driving behavior can be corrected
- No further amendment of ticket: the deal is you avoid the fines by getting licensed and insured
- Insurance benefit
- Dismissal of case upon completion of CRP

Preserves Right to Challenge

- Those ineligible or not interested may have a contested hearing, pay the ticket or mitigate.
- The Information may be useful to these individuals the next time around.
- Eligibility factors made clear

Impact of program

- **(1) Taking these cases off of the arraignment dockets and avoiding the need for public representation,**
- **(2) Eliminating any possibility of jail on these cases as a sentencing outcome,**
- **(3) Eliminating the numerous court dates that result from these cases being on a criminal docket and the warrants that inevitably result from failures to appear.**
- **(4) Preventing what was often a chronic use of the jail for warrant stays prior to adjudication on these cases.**

Dramatic Impacts

- At an estimated cost of between \$1000 and \$1700 a year to prosecute a misdemeanor case, imagine the savings if hundreds or even thousands of cases were diverted out of court, with no need for judges, court clerks, prosecutors, defenders, or jailers to handle those cases.