

DECLARATION

I, Robert C. Boruchowitz, declare, based upon my good faith knowledge and belief, as follows:

1. I am an attorney and a Professor of Practice at the Seattle University School of Law. I am the Director of The Defender Initiative at the School of Law. I have taught at the School of Law since January 2007, in the Youth Advocacy Clinic, in a seminar on Law and the Holocaust, and in a Criminal Procedure Adjudicative class. I taught for three years in the Clinic, which included class room training on trial practice and ethical considerations, discussion of related criminal procedure issues, representation of in-custody juvenile offender clients at first appearances, and representation of juvenile offender and juvenile truancy clients in King County Superior Court. I also have supervised students on independent study projects. I have taken one of the clinic cases to the Washington Court of Appeals, winning a recent decision establishing the right to counsel for children at first hearings in truancy cases. That case is pending review in the Washington Supreme Court after argument that I did in January, 2010.

2. I graduated from Kenyon College in 1970 with a degree in Political Science, and from Northwestern University School of Law in 1973.

3. I have been admitted to the Washington State Bar Association since 1974 and I am an inactive member of the California Bar. I was admitted to the bars of the Western District of Washington in 1974, the United States Court of Appeals, Ninth Circuit, in 1983, and the United States Supreme Court in 1996. I am certified under Washington Special Proceedings Rules as qualified to be appointed as counsel in capital appeals and post-conviction proceedings.

4. Prior to joining the faculty of the Seattle University School of Law in January, 2007, I served as Director of The Defender Association in Seattle, a non-profit public defender program, for 28 years. In that role, I administered an office of approximately 125 staff, including as many as 90 lawyers and a budget of approximately \$10 million per year. During my tenure as Director, I tried six felony jury trials and consulted on several aggravated homicide cases. My office had contracts with local government that included performance guidelines guided by King County Bar Association Guidelines, by Washington Defender Association Standards, by Washington State Bar Association Standards, by the National Legal Aid and Defender Association Performance Guidelines, and by Washington law RCW 10.101.

5. During my tenure as Director, I co-counseled the first King County "sexual predator" commitment jury trial under RCW 71.09 (1991), and the appeal in state supreme court (1991-1993), and the remand to superior court (1993-1994). I was

co-counsel on an initially successful Federal Habeas Corpus challenge to the "predator" law. Young v. Weston, 898 F. Supp. 744 (W.D. Wash.) (1995.) I argued the state's appeal of Young v. Weston in the Ninth Circuit (1996) and I argued the case on remand in Federal District Court (1998). I was lead counsel in a Ninth Circuit review ordering remand for hearing on punitive conditions. Young v. Weston, 192 F.3d 870(9th Cir. 1999), reversed and remanded, Seling v. Young, 531 U.S. 250 (2001). I argued the case in the U.S. Supreme Court (2000). I continued to monitor the "predator" practice in the office until I left the office in December, 2006.

6. As Director, I negotiated contracts with the City and County and State as well as with the union representing our staff. I hired staff and developed budgets for the office. I also established and for several years supervised the Racial Disparity Project at The Defender Association and I developed a successful proposal for a state capital defense assistance center funded by the Washington Office of Public Defense. I met frequently with the supervisors and periodically with the various divisions in the office. I met approximately once a month with the Board of Directors of the Association.

7. Before becoming Director, I worked for more than four and a half years as a staff attorney in misdemeanor, juvenile, felony, and appellate cases. I have handled cases at every level of state and federal court.

8. As Director, I was co-counsel in two hearings in King County Superior Court that resulted in increased payments to The Defender Association for work in RCW 71.09 cases.

9. I have participated in state and national efforts to develop public defender standards and a model defender services contract. For many years I have been a member of the American Bar Association Indigent Defense Advisory Group. I have served on other ABA committees and a working group and on a number of state and local committees relating to criminal justice and public defense. I was chairperson of the Washington State Bar Association, Criminal Law Section, 1981-1982, and 1984-1985, and Secretary, 1989-1993.

I worked on standards that have been published by the Washington State Bar Association, the American Bar Association, and the National Legal Aid and Defender Association. I helped to draft the Washington State law requiring local governments to develop standards for public defense (RCW 10.101). In 2007 I led an American Council of Chief Defenders committee that wrote a Statement on Caseloads and Workloads. For the last four years I have served on the Washington State Bar Committee on Public Defense and its successor Council on Public Defense. For the Council on Public Defense I been co-chair of a subcommittee assigned to review standards and to develop performance guidelines. In that role, I have led an effort to amend the WSBA Indigent Defense Standards and to recommend to the State Supreme Court standards it should

incorporate in a rule requiring counsel to certify compliance with standards. I also led the subcommittee in its development of performance guidelines. The Council on Public Defense has approved both the amended Standards and the new Performance Guidelines and recommended that the WSBA Board of Governors endorse them.

10. In 2003, I was a Soros Senior Fellow working on issues relating to access to counsel in misdemeanor and juvenile cases. I worked to improve access to counsel in misdemeanor cases in several local jurisdictions in Washington State and I wrote articles and presented continuing legal education and judicial education seminars on the right to counsel.

11. The first project of The Defender Initiative at Seattle University was a joint effort with the National Association of Criminal Defense Lawyers (NACDL) to conduct a comprehensive investigation of misdemeanor public defense in the United States. I organized a conference at the Open Society Institute in New York in May, 2008, and a second conference at Seattle University July 11, 2008. I was the primary researcher and drafter of a report published in 2009, "Minor Crimes, Massive Waste". For that project, I reviewed recent case law and ethical opinions relating to caseload. I conducted site visits in Pennsylvania, Arizona, and Washington State.

12. In 2009, The Defender Initiative received a grant from the Foundation to Promote an Open Society to advocate for counsel in misdemeanor courts. The Foundation has provided additional funding for 2010-2011 and I have continued that work in Washington, Kentucky, and New Hampshire. To date, five Washington State courts have agreed to provide counsel at either first appearance or arraignment hearings when they had not previously done so. One city established a diversion program as recommended by the Initiative. In January, 2011, I wrote and filed an amicus brief in Clallam County (Washington) District Court urging that a person whose income is above the statutory poverty guideline but has expenses greater than his income is entitled to a public defender. The Washington Defender Association co-signed the brief.

13. I have spoken frequently at continuing legal education seminars on ethical issues relating to defender caseloads and other issues including the right to counsel, racial disparity, sex offender commitment, mental illness and criminal law, public defender management, and the death penalty. Among recent examples, I spoke at a Public Defense Management Seminar on "Lessons Learned: Achieving and Maintaining High Lawyer Performance and Satisfaction" for the Oregon Criminal Defense Lawyers Association in October, 2008. I did a presentation on "Transitioning from Attorney to Supervisor/Management" for a defender training program conducted by the Texas Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association in San Antonio in June, 2009.

I have organized and spoken at the following seminars relating to the right to counsel in misdemeanor court:

A conference at the Open Society Institute in New York in May, 2008 as part of the NACDL misdemeanor study

A conference at Seattle University School of Law July 11, 2008 as part of the NACDL misdemeanor study

CLE seminar at Seattle University School of Law, November 6, 2009 entitled, "Why there should be lawyers in misdemeanor first appearances: What they should do for their clients and how to get resources to hire them."

Webinar entitled, "The Defender Initiative's Counsel at Arraignment Project: Building on Our Success," for The Washington Defender Association about the Misdemeanor Counsel project and the right to counsel at arraignment, on January 22, 2010.

I was a panelist at the National Public Defense Symposium sponsored by the American Bar Association at the University of Tennessee College of Law, on a panel on "Dealing with Excessive Caseloads without Litigation", Knoxville, Tennessee, May 20, 2010. I spoke at the Texas Indigent Defense Summit on March 1, 2011 about diversion and reclassification of misdemeanors. I spoke at a symposium at the University Of Illinois School Of Law about the history of the right to counsel with a focus on misdemeanors, on March 3, 2011.

I spoke at a Symposium on the 45th Anniversary of *Gideon v. Wainwright* at the Washington Supreme Court Temple of Justice on April 11, 2008. I spoke on "Ethical Practice With Limited Resources" at a Washington Defender Association Seminar December 17, 2004. I gave a presentation on Ethical Issues in Criminal Practice in Courts of Limited Jurisdiction for a Washington State Bar seminar in April, 2005. I have spoken at seminars for the Wisconsin Public Defender conference and the West Virginia Public Defender Conference. I have been invited to speak at the Kentucky Public Advocate annual conference June 13-14, 2011. I spoke at American Bar Association "Hearings on the Right to Counsel 40 Years After Gideon v. Wainwright," February 7, 2003, Seattle, WA.

14. I have been a guest speaker at the law schools of The University of Washington, Cornell University, New York University, and Northwestern University.

15. I completed a three week intensive trial advocacy program of the National Institute of Trial Advocacy, Reno, Nevada, 1974. I have been a trainer for NITA at programs at the University of Washington and Northwestern University.

16. I was on the faculty for the National Defender Leadership Institute in Chicago in May, 2004, and in Santa Rosa, California, in May, 2002.

17. I attended a federally funded training called Operating a Defender Office, in Portland, Oregon, in 1979. I have attended numerous other local and national seminars, including the Vera Institute National Defender Leadership Project seminars in Harriman, N. Y., in 1998 and 2000.

18. I was an expert witness in 2005 in a class action seeking injunctive relief from systemic ineffective assistance of counsel in Grant County, Washington. That litigation resulted in a settlement that established a per-attorney caseload limit and other requirements. The settlement agreement is available at <http://www.defender.org/files/archive/GrantCountyLitigationSettlementAgreement.pdf>.

19. In 2007, I was an expert witness in a King County Superior Court evidentiary hearing on effective assistance of counsel.

20. I have testified as an expert witness on effective assistance of counsel in death penalty cases and in a habeas corpus proceeding challenging a persistent offender conviction. I submitted an expert witness declaration in support of the motion filed by the Miami-Dade Public Defender to withdraw because of excessive caseload in Florida v. Bowens, available at <http://www.pdmiami.com/ExcessiveWorkload/Mo to Withdraw Exhibit D.pdf>.

I filed an affidavit as an expert witness in support of a summary judgment motion filed by the Kentucky Public Advocate in a declaratory judgment action involving excessive public defender caseloads. Available at <http://www.dpa.ky.gov/>.

21. I was a consultant in a study by the Spangenberg Group of the public defense system for conflicts of interest cases in Los Angeles in 1986.

22. Beginning in 2002, I have participated in site visit evaluations of defender programs for the National Legal Aid and Defender Association. I have helped to evaluate programs in Idaho, Michigan, Louisiana, Nevada, and Washington, D.C.

23. I served for twenty years as President of the Washington Defender Association, which I helped to found in 1983. I oversaw this membership organization representing more than 800 lawyers and staff representing indigent accused, and I appeared as amicus curiae in trial and appellate courts on right to counsel issues. I was counsel for amicus curiae on behalf of the Washington Defender Association in Mount Vernon v. Weston, 68 Wn. App. 411 (1992), in which the court held that denial of a motion to withdraw by over-worked trial counsel was abuse of discretion and new counsel should be appointed on appeal.

24. I have written numerous articles relating to public defense including the following:

"Defenders Spread Thin by Budget Crunch", King County Bar Bulletin, March 2011, at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=03&Year=2011&AID=article23.htm>.

["Diverting and Reclassifying Misdemeanors Could Save \\$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel"](#) (American Constitution Society, 2010).

["You \(might\) have a right to a lawyer..."](#), King County Bar Bulletin, July 2010.

[On Public Defenders and Excessive Caseloads](#), July 10, 2010 as a guest blogger for [CrimProf Blog](#), a member of the Law Professor Blogs Network.

["Citizen's Voice: Public defenders underfunded in Tennessee"](#), Knoxville News Sentinel, June 5, 2010.

["At 45, Gideon Right to Counsel Remains Elusive"](#), King County Bar Bulletin, March, 2008.

["Right to Counsel Remains Threatened in Washington,"](#) Washington Bar News, February, 2007.

Op Ed, ["Lawyers for juveniles not automatic"](#), Seattle Post Intelligencer, January 2, 2008.

["Enough is Enough! Defenders Act on Excessive Caseloads"](#), 29 NLADA Cornerstone, Jan-Apr 2008, at 12.

Op Ed, ["State has chance to provide equal justice"](#), January 25, 2006, with Anne Daly.

["How to Deal with the Denial of Counsel in Misdemeanor Cases Post-Shelton"](#), The Advocate, January, 2004.

["The Right to Counsel: Every Accused Person's Right"](#), Washington State Bar News, January, 2004.

25. In 2007-2008, I served as vice-chair of the Seattle Mayor's Police Accountability Review Panel. In 2010, I served as a member of the Seattle Mayor's Police Chief Search Advisory Committee.

26. The ABA Standards for Criminal Justice Defense Functions (ABA Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., 1993) and the National Legal Aid and Defender Association (NLADA) *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995; 4th Printing, 2007) are relevant national standards for lawyers representing criminal defendants and by analogy are relevant for lawyers representing defendants in RCW 71.09 cases.

27. I also rely on the American Bar Association Ten Principles of a Public Defense Delivery System (available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>)

28. Principle Three of the ABA Ten Principles, states, with commentary:

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

29. I have been consulting with Professor Albert Scherr of the University of New Hampshire School of Law for several months concerning the practice in misdemeanor courts in New Hampshire with regard to the lack of counsel in many of those courts at bail and arraignment hearings.

30. I have listened to recordings from Manchester District Court, Judge Champagne presiding, for January 6, 2011, January 10, 2011, and January 12, 2011.

31. At the hearings I reviewed, accused persons appeared without counsel for determination of bail and in some occasions for guilty pleas. At least one defendant was held without bail and told he would be able to come back the next day with a lawyer.

32. At the hearings I reviewed, while the court did advise accused persons that they could apply for a lawyer, it was clear that there was no way to have an appointed lawyer at the bail or arraignment hearing itself.

33. At the beginning of the hearings, a clerk read off the names of defendants, advised them briefly of the charges against them, and asked how they intended to plead. When the accused person said "guilty", she sometimes advised them that they would want to talk to the prosecutor "when they come in" to discuss fines and penalties. On some occasions the prosecutor already was present. The clerk did not advise the persons that they could have a lawyer to represent them in that discussion nor did she provide any other advice about the consequences of pleading guilty or of representing themselves. Some individuals

said they wanted to talk to the prosecutor when the clerk asked them how they would plead.

34. On the dates that I reviewed, it appeared that defendants had negotiated pleas with the prosecutor before the judge heard their cases and before the defendants had waived counsel. The judge asked people who pled guilty whether they had worked something out with the prosecutor and they said yes.

35. In my opinion, this practice of the court clerk advising people to negotiate their pleas with the prosecutor, of the prosecutor negotiating with unrepresented defendants who have not waived counsel, and of the judge accepting pleas negotiated in this fashion violates RPC 3.8 (c).

36. New Hampshire Rules of Professional Conduct 3.8 provides in pertinent part:

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;

37. The practice in Manchester District Court violates RPC 3.8 because the prosecutor is not assuring that the accused has been given reasonable opportunity to obtain counsel before the negotiation of a plea bargain and because the prosecutor is seeking to obtain from unrepresented accused persons waivers of important rights, including all pretrial motions that might challenge evidence to be admitted at trial, as well as the right to trial itself.

The report “Minor Crimes, Massive Waste” points out that the American Bar Association has taken a strong position on this issue.

The American Bar Association House of Delegates passed a resolution in August 2005, which addressed the ethical obligations of judges and lawyers to meet the constitutional guarantee of effective assistance of counsel. The resolution states, “Judges should, consistent with state and territorial rules and canons of professional and judicial ethics: ... (c) take appropriate action with regard to prosecutors who seek to obtain counsel and guilty pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel.”

“Minor Crimes, Massive Waste”, National Association of Criminal Defense Lawyers (2009) p. 18, citing American Bar Association House of Delegates Resolution 107, adopted August 9, 2005, *available at*

<http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf>.

38. In addition, this practice violates the clear holding of the United States Supreme Court that there is a right to counsel in negotiating a plea bargain. The Court wrote in Padilla v. Kentucky, “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, 130 S. Ct. 1473, 1486 (2010).

39. On the days of recordings that I reviewed, the court accepted guilty pleas from unrepresented defendants without conducting a valid waiver inquiry or making the necessary findings of a knowing, voluntary, and intelligent waiver of counsel. In addition, the court accepted guilty pleas from one defendant with an acknowledged mental disability and from another who had a tenth grade education without exploring either defendant’s ability to understand the legal terms used in the document the court had given them or whether they understood fully the proceedings in court. The court simply asked them whether they understood.

40. While the court did make sure that a defendant pleading guilty was advised of the maximum sentence for the offense, the court did not conduct a thorough inquiry before accepting waivers of counsel. In fact, because the court advised the accused persons that they could *apply* for court-appointed counsel, it was clear that there was no realistic right to counsel in that court for the sentencing itself. [Emphasis added.] As far as could be determined from listening to the recordings, no public defense counsel was in fact available in the courtroom to advise defendants when they entered guilty pleas and were sentenced.

41 The judge told defendants pleading guilty that they by doing so would give up certain rights, including the right to be represented by an attorney paid for by the state. In my opinion, this advice of rights was partly in error, as entering a guilty plea does not require waiving the right to counsel, but effectively in that court it had that result as no counsel was available and the court did not explain that it could appoint counsel for sentencing. In addition, the court did not make clear that the defendant has a right to remain silent and is presumed innocent.

42. The Manchester Court in the January 10, 2011, hearing accepted a guilty plea in a two-count domestic assault case of Amanda Vastine. This case presented several concerns.

Ms. Vastine told the court that she had stopped school at the tenth grade and was working on a G.E.D.

The court in discussing the rights she would give up by pleading guilty did not mention the right against self incrimination.

The court asked the defendant whether she had worked something out with the prosecutor and she said yes.

On several occasions the judge asked Ms. Vastine if she understood the rights she was giving up and the terms of the plea agreement. She said yes.

As outlined above, in my opinion the negotiation by the prosecutor with an unrepresented person who had not waived counsel violated the Rules of Professional Conduct.

In my opinion asking her whether she understood what was going on was not a sufficient question to address the issue of whether in fact she did have a knowing understanding of her rights or of the proceeding, which is for the court to decide. In determining whether a person has made a knowing, voluntary, and intelligent waiver, the court should consider the defendant's education and sophistication. See, Iowa v. Tovar, 541 U.S. 77, 88-9 (2004).

The sentence called for a domestic violence evaluation and following all recommendations of that evaluation, with six months in jail deferred, with the defendant to return to court in one year and at that time to be able to move to have the sentence suspended for two years.

While the judge was filling out the sentencing documents, he told the prosecutor that it would not be a bad idea "to have written agreements on these cases." The implication of that statement is that while there was some kind of document for the defendant to read about rights, there was no written plea agreement that set out the terms of the plea agreement.

In my opinion there was not a valid waiver of counsel before Ms. Vastine pled guilty, and the guilty plea and the sentence were invalid. I have outlined in paragraphs 44, 45, and 46 below a more complete analysis of the errors in the guilty pleas taken and in the sentences imposed in this court.

43. The Manchester Court in the January 12, 2011, hearing accepted a guilty plea in a shoplifting case of S K (Sp). This case presented several concerns.

The offense allegedly occurred in 2007. Nothing in the record indicated whether the witnesses were still available.

When the accused said she wanted to plead guilty, the court asked her whether she had read and understood the document she had been given and she said yes. The court asked her whether she had worked out something with the prosecutor and she said yes.

As outlined above, in my opinion the negotiation by the prosecutor with an unrepresented person who had not waived counsel violated the Rules of Professional Conduct.

The deal offered by the prosecutor was for a \$200 fine plus penalty with six months in the house of corrections suspended for two years on condition of good behavior and not going to the store in question.

The accused told the court that she was not able to work and received disability payments because of a mental disability. The court asked her whether the disability prevented her from knowing what was going on. She said it did not. At one point it seemed that she answered yes and then no, indicating at a minimum the need to explore further. She explained that her disability was “anxiety stuff”. The judge asked no questions about the nature of the anxiety disability, how long the accused had suffered from it, whether she took medication, or anything else that would help the court understand whether in fact the disability affected the accused’s ability to make a knowing, voluntary, and intelligent waiver of counsel or to enter a knowing, voluntary, and intelligent plea of guilty.

In my opinion asking her whether her disability prevented her from understanding what was going on was not a sufficient question to address the issue of whether in fact she did have a knowing understanding of her rights or of the proceeding, which is for the court to decide.

In the discussion with the defendant about her plea, the judge advised her of certain rights that she would be giving up, including the right to a lawyer and a trial. He did not advise her of her right to remain silent, her right against self-incrimination.

In addition, the court noted that the defendant had had a lawyer in 2007. No apparent effort was made to contact that lawyer and the court did not explore why the defendant wanted to go forward without a lawyer at this point. Whether the prosecutor when he negotiated the plea bargain with this defendant knew either about her disability or that she had been represented in the same case by counsel is not clear in the record. But if the judge had before him information that the defendant had been represented in the same case in 2007, one could infer that the prosecutor had access to that information.

New Hampshire Rule of Professional Conduct 4.2. Communication With Person Represented by Counsel states in relevant part:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

44. In my opinion there was not a valid waiver of counsel before Ms. K pled guilty. The court made no real effort to probe whether the accused understood the right to counsel or the dangers and disadvantages of waiving counsel. Ms. K told the court she had a mental disability, and the court did not seek to understand whether that disability affected either her ability to understand her rights and the disadvantages of representing herself or her ability to make a knowing waiver of her rights. The answers of the defendant were basically yes and no.

The judge also told the accused that if she pled guilty she gave up her right to counsel, which is not the law. She had a right to be represented at sentencing.

The United States Supreme Court has emphasized the importance of a thorough inquiry.

It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings.

Von Moltke v. Gillies, 332 U.S. 708, 722 (1948) [plurality opinion].

The Court also should consider the defendant's education and sophistication. See, Iowa v. Tovar, 541 U.S. 77, 88-9 (2004).

The waiver in this case does not meet the requirements of Faretta v. California, 422 U.S. 806,835 (1975), in which the Court wrote:

in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464-465. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

In this case, the yes and no answers do not affirmatively show that the accused was literate, competent, or truly understanding what was happening. In Tovar, supra, the Court wrote: "As to waiver of trial counsel, we have said that before a defendant may be allowed to proceed pro se, he must be warned specifically of the hazards ahead."

And the Court added:

Further, the State does not contest that a defendant must be alerted to his right to the assistance of counsel in entering a plea. See Brief for Petitioner 19 (acknowledging defendant's need to know "retained or appointed counsel can assist" at the plea stage by "work[ing] on the issues of guilt and sentencing").

Iowa v. Tovar, 541 U.S. 77, 91 (U.S. 2004).

The New Hampshire court has relied on a First Circuit case that emphasized the importance of a detailed inquiry.

it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement.

United States v. Proctor, 166 F.3d 396, 403 (1st Cir. 1999).

State v. Sweeney, 151 N.H. 666, 670 (2005)

There was no detailed inquiry or dialogue between the court and Ms. K.

The New Hampshire Court also has written:

it is incumbent upon the trial judge to ascertain whether the defendant has "knowingly and intelligently" relinquished "the traditional benefits associated with the right to counsel." *Faretta*, supra at 835. The court must "indulge in every reasonable presumption against waiver" of counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see *State v. Tapply*, 124 N.H. 318, 325, 470 A.2d 900, 904 (1983). The court must also make the defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, supra at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

State v. Barham, 126 N.H. 631, 637 (N.H. 1985).

In my view in the hearings discussed above the Manchester court did not comply with New Hampshire or United States Supreme Court case law on waiver of counsel.

45. In my opinion, Ms. K's guilty plea was not a valid plea. The judge did not advise her about her right to remain silent. And the judge did not make sure that she understood what she was doing. "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 ...must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. U.S. (1970).

This plea also did not meet the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), which held that a knowing and voluntary waiver of the right to trial cannot be inferred from a silent record. The Court wrote that "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-243.

The Boykin Court made clear that a waiver of the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth cannot be inferred from a silent record. The Judge in Manchester District Court did not discuss the right to remain silent with the defendants who pled guilty.

46. In my opinion, Ms. K's sentence was also invalid. In Alabama v. Shelton, 535 US 654, 658 (2002), the Supreme Court held that "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." Because there was no valid waiver of counsel, the suspended sentence also is invalid.

47. The court's practice of setting bail conditions without counsel raises concerns. In the January 12, 2011, hearings, the court on several occasions set bail conditions in domestic violence assault cases, prohibiting the defendant from going home. In at least two cases there was a dispute about whether the complaining witness remained at the home, and how the defendant could retrieve property or find a place to stay. In one case the prosecutor was able to call and confirm that the complainant did not live there anymore, but in the other case the prosecutor was not able to do so. Had counsel been available for the accused person, it might have been possible to arrange different conditions of release.

48. A case from January 10, 2011, is an example of the need for counsel at bail hearings. D M was in court for a domestic violence assault accusing him of punching his teenage daughter in July 2010. He told the court that she had been living in his house since July and that he had been taking her to school. He tried to tell the court where she could live, apparently either with her mother or a friend, but the court would not hear it. Despite the fact that he apparently had been living with his daughter without any alleged misbehavior by him, the court ordered him not to return home until he could get a lawyer to come to court to make a motion to change the bail conditions. Mr. M said he had brought a witness to court who could testify that on the date in question Mr. M's daughter actually had assaulted him. Mr. M also told the court that his daughter had been

arrested twice in the previous two months. The judge would not hear any motion to change the bail conditions until a lawyer could be present.

This demonstrates the need for counsel to be able to do some investigation and to present information to the prosecutor and the court to be able to provide the court a basis for ordering conditions different than the prosecutor requests. While the court said it wanted to hear “from both sides”, the court was unwilling to hear from the defendant without counsel, and focused on his not knowing what the complainant would say. The implication of comments from both the prosecutor and the court was that the issue could be addressed and the order possibly amended once counsel were available for Mr. M.

49. These cases demonstrate the importance of having counsel at the first appearance, bail setting, and arraignment hearings. The United States Supreme Court recognized that in 1972 when it held:

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.

Argersinger v. Hamlin, 407 U.S. 25 at 40 (1972)/

As the “Minor Crimes, Massive Waste” report recommends,

The simplest, most effective way to ensure that a defendant understands the charge(s) against him or her, receives a full explanation of the court’s procedures, makes informed decisions regarding whether to invoke or waive critical rights, and does not sit in jail unnecessarily on a minor charge is to provide representation by a defense attorney at the defendant’s first appearance.

“Minor Crimes”, supra, at p. 19.

The United States Supreme Court has made clear that there is a right to counsel at the first appearance.

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.

Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008).

The Court made clear that the right to counsel attaches “when the government has used the judicial machinery to signal a commitment to prosecute...” It added: “Once attachment occurs, the accused at least is entitled to the presence

of appointed counsel during any "critical stage" of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence." 554 U.S. 191, 211-212.

The Court defined critical stages "as proceedings between an individual and agents of the State ...that amount to "trial-like confrontations," at which counsel would help the accused "in coping with legal problems or . . . meeting his adversary." 554 U.S. 191, 212 (citation omitted).

In my opinion, the bail and arraignment hearings in Manchester District Court are critical stages because they are proceedings that amount to "trial-like confrontations" in which counsel would help the accused in coping with legal problems and meeting his adversary and in responding to questions and rulings by the court. Counsel should be provided in those hearings.

I CERTIFY UNDER PENALTY OF PERJURY UNDER OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.



Robert C. Boruchowitz
DATED AND SIGNED this 4th day of April, 2011.
Seattle, Washington