

DEFENDER RESOURCE PACKET

Defender Advocacy for Pretrial Release



November 2019 | Contact: CPD@wsba.org

WASHINGTON STATE
BAR ASSOCIATION
Council on Public Defense

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Defenders,

The Pretrial Reform Committee of the WSBA Council on Public Defense (“committee”) is working to support bail reform in Washington. The committee has drafted the attached client interview form and compiled packet as a resource for defenders preparing for initial appearance and detention hearings. The form identifies categories of relevant client information pursuant to CrR 3.2 to be presented to the court in support of arguments for a client’s release. A comprehensive knowledge of the client and her background is the most important tool a lawyer possesses when litigating for release.

The pretrial detention population is approximately **60-70%** of the jail population in counties across Washington. Thousands of clients who have not been convicted of a crime are locked in jail because they cannot afford to pay the bail set by the judge. Racial disparities are significant and clients of color are disproportionately in jail before trial at a higher rate, and often assigned higher bail amounts, than white clients.

A movement for pretrial and bail reform has been building across Washington. Significant work is underway to reform bail practices, significantly reduce pretrial detention rates and the use of money bail, and to improve case outcomes for clients. Defenders have a critical role in these reforms and the necessary culture changes. The CPD is working to support defenders in these efforts.

As defenders know best, the pretrial detention decision is one of the most important made in a case. When a client is detained pretrial, they are pressured to plead guilty to get out of jail and avoid losing their jobs, housing, child custody, medications, among other consequences. Many clients detained pretrial are also more likely to be sentenced to jail and to face longer sentences. Lawyers make a significant difference at bail hearings. Litigating pretrial release is important because it affects both short-term and long-term outcomes for the client.

We have a strong court rule in Washington that generally *mandates the release of people accused of crimes before trial without financial conditions*, but it is routinely not followed or implemented consistently in courts around the state. CrR 3.2 and CrR(LJ) 3.2 start with a **presumption of release** for all clients and require that money bail only be imposed as a last resort *after* a court finds no less restrictive conditions can be imposed to assure court appearance, prevent the likely commission of a violent crime, and/or noninterference with justice. The rule also requires the court to consider a client’s financial resources and ability to pay when setting any bail amount. The use of money bail is supposed to be the last resort, not the first and only resort, as is common practice in many courts. Statewide advocacy efforts are underway to enforce the rule and change court practices to guarantee a meaningful presumption of release.



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The committee is also working to support defenders' efforts to tackle the structural barriers that often prevent defenders from meeting with clients and being prepared for court before the docket begins. These barriers such as having sufficient access to clients and case information, as well as adequate time to meet with clients and prepare structured release plans are widespread throughout the state.

This defender resource packet includes the following documents: 1) client interview form to prepare for the First Appearance hearing; 2) CrR(LJ) 3.2 defender advocacy sheet; 3) sample CrR(LJ) 3.2 release order to request the judge to issue in every case; 4) list of structural barriers identified by defenders in some jurisdictions around the state; and 5) a recent CrR(LJ) 3.2 bench card that was distributed to judges statewide.

If you have feedback or suggestions to improve these resources or would like to be involved in this pretrial reform work, please contact the committee at CPD@wsba.org. We would love to hear from you.

Onward!



DEFENDER RESOURCE PACKET

Defender Advocacy for Pretrial Release

“In our society,
liberty is the norm,
and detention prior to trial
or without trial is the
carefully limited
exception.”

United States v. Salerno
481 U.S. 739, 755 (1987)

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ATTACHMENT A

Client Interview Form

Client Name: _____ Alternate person: _____
 Address: _____ Address: _____
 Phone #: _____ Phone: _____
Cause #: _____ **PC for:** _____
 _____ **CW:** _____

CrR 3.2 & CrRLJ 3.2 PRESUMPTION OF RELEASE without conditions

1 - CLIENT IS NOT A FLIGHT RISK - court required to impose least restrictive (3.2(b))

RELEVANT FACTORS INCLUDE:	
Community Ties (family, people who support you, how long in this community)?	
Alternate housing options for DV or violent crime?	
Work, school, volunteer? Student: athletics, clubs, other extracurricular?	
Financial situation & inability to pay bail (TANF/SNAP, food assistance, cash assistance, SSI/SSD)?	
Health and social welfare issues (community support services)?	
Medical/dental/psych appointments, treatment or medications? Diagnoses (physical/mental)?	
Family responsibilities (minor children, special needs child, care for elderly)?	
Transportation plan? Community/Social engagement?	
Who can help you with release conditions/appearances? (get address and phone number)	
Court Appearance history? Current PC relevant to flight risk? Minimal conviction history, <i>de minimus</i> ?	
Other holds? (probation, DOC, other courts/jurisdictions, extradition, etc.)	
FTA/Warrant Explanation? (summons - not receive/mail returned; i/c somewhere else; in-patient; not just LFOs)	

2 - No *substantial* danger client will interfere with witnesses or commit violent crime

<i>State argues "COMMUNITY SAFETY"</i>	<i>Consider offering/agreeing to conditions of release:</i>
<p>State argues violent criminal history:</p> <p><input type="checkbox"/> Class A <input type="checkbox"/> Assault</p> <p><input type="checkbox"/> Manslaughter <input type="checkbox"/> Extortion</p> <p><input type="checkbox"/> Indecent w/forcible <input type="checkbox"/> Robbery</p> <p><input type="checkbox"/> Kidnapping <input type="checkbox"/> Drive-by</p> <p><input type="checkbox"/> Arson <input type="checkbox"/> Veh. Hom/Asslt.</p>	<p>Client agrees to report regularly and remain under supervision of:</p> <p><input type="checkbox"/> officer of the court (PTS);</p> <p><input type="checkbox"/> other person (family member or employer [#7]); or</p> <p><input type="checkbox"/> agency (private EHM/GPS company); AND/OR</p> <p><input type="checkbox"/> Client agrees not to possess dangerous weapons/firearms</p>
<p>State argues lengthy criminal history</p>	<p>Is the conviction history relevant? (i.e., similar)</p> <p>Is the conviction history OLD?</p>
<p>State argues past and present <i>threats to</i> and/or <i>interference with</i> CW/Witnesses</p>	<p>Client agrees to:</p> <p><input type="checkbox"/> Stay at least 1,000 feet away from person/location;</p> <p><input type="checkbox"/> Not contact (person/business);</p> <p><input type="checkbox"/> Not possess dangerous weapons/firearms</p>
<p>State argues client will commit new crimes while on PTR/probation/DOC?</p>	<p>Client agrees to:</p> <p><input type="checkbox"/> Maintain law abiding behavior</p> <p><input type="checkbox"/> Report to PTS/probation/DOC w/in 48 business hrs. of release</p> <p><input type="checkbox"/> Update her contact information with PTS/probation/DOC w/in 48 business hours of release</p>
<p>State argues past and/or present use <i>or</i> threat to use deadly weapon/firearm?</p>	<p>Client agrees not to possess dangerous weapons and/or firearms.</p> <p>• How <i>old</i> is the past use/threat? •</p>
<p>State argues client is on Probation or DOC at the time of alleged offense - already supervised and cannot follow the rules.</p>	<p>Client agrees to:</p> <p><input type="checkbox"/> Not consume alcohol or non-Rx drugs;</p> <p><input type="checkbox"/> Report within 48 business hours of release;</p> <p><input type="checkbox"/> Update her contact information with probation/DOC w/in 48 business hours of release</p>

ATTACHMENT B

Using CrR(LJ) 3.2 in Practice

Using CrR(LJ) 3.2 in Practice

The Presumption of Innocence means a Presumption of Pretrial Release

CrR(LJ) 3.2 provides that “[a]ny person, other than a person charged with a capital offense, **shall... be ordered released** on the accused’s personal recognizance pending trial...”

This presumption can only be defeated if the Court finds either

- (1) the accused’s personal recognizance will not “reasonably assure” their appearance at future court dates,
or
- (2) “there is shown” by the Prosecutor “a likely danger* that the accused
 - (a) will commit a **violent** crime⁺, or
 - (b) will seek to intimidate witnesses, or... unlawfully interfere with the administration of justice.”

While the Prosecutor bears the burden of presenting evidence to overcome the presumption of pretrial release, CrRLJ 3.2 requires the Court to consider all relevant factors, most of which are mitigating:

Mitigating Factors for Future Appearance:

- History of response to legal process, particularly court orders to appear;
- Community ties, especially:
 - Length of residence;
 - Family ties and relationships;
 - Employment status and history;
 - Enrollment in school or job training;
 - Participation in counseling program;
 - Participation in cultural activities;
 - Receipt of government assistance;
- Reputation, character, and mental condition;
- Willingness of responsible community members to vouch for the accused’s reliability and assist the accused in complying with any conditions of release;
- Any other factors indicating the accused’s ties to the community.

Other Factors for Future Appearance:

- Criminal record, if any;
- Nature of the charge, if relevant to the risk of nonappearance.

Mitigating Factors for Showing of Substantial Danger:

- Reputation, character, and mental condition;
- Willingness of responsible community members to vouch for the accused’s reliability and assist the accused in complying with any conditions of release;
- History of compliance with pretrial conditions, probation, or parole;
- Nature of the charge (if nonviolent);
- Nonviolent criminal record.

Other Factors for Showing of Substantial Danger:

- History of committing offenses while on pretrial release, probation, or parole;
- Nature of the charge (if violent);
- Violent criminal record;
- Any evidence of threats to victims or witnesses, either past or present;
- Record of using deadly weapons or firearms, especially to victims or witnesses.

*A likely danger means the accused is more likely than not to commit a violent crime or interfere with the administration of justice. The mere possibility they will do so is not enough for the judge to impose conditions on pretrial release.

+Any likelihood the accused will commit a nonviolent crime—other than witness intimidation—is irrelevant.

Using CrR(LJ) 3.2 in Practice

Defense attorneys can and should use every mitigating factor to demonstrate their client does not pose either a risk or nonappearance or a risk of committing a violent crime, intimidating witnesses, or otherwise interfering with the administration of justice. The Court should consider each of these factors on the record before setting any conditions of pretrial release.

If the Court—upon full consideration of all relevant factors—finds that pretrial release on the accused’s personal recognizance will be insufficient, the Court may impose conditions on pretrial release.

If the accused poses a flight risk, the Court **must impose the least restrictive** of the following conditions (or combination of conditions) necessary to reasonably assure their future appearance:

- Place the accused in the custody of a designated person or organization agreeing to supervise the accused pretrial;
- Place restrictions on the travel, association, or living arrangements of the accused pretrial;
- Require the accused to return to custody during specified hours (day release);
- Require the accused to be placed on electronic monitoring, if available;
- Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

If the accused poses a likely danger of committing violent crime or interfering with the administration of justice, the **Court may impose any or all** of the following conditions necessary to mitigate that risk:

- Place the accused in the custody of a designated person or organization agreeing to supervise the accused pretrial;
- Place restrictions on the travel, association, or living arrangements of the accused pretrial;
- Require the accused to return to custody during specified hours (day release);
- Require the accused to be placed on electronic monitoring, if available;
- Prohibit the accused from:
 - approaching or communicating with particular persons or classes of persons (no contact);
 - going to certain geographical areas or premises (no entry);
 - possessing any dangerous weapons or firearms, or engaging in certain described activities (no weapons);
 - possessing or consuming any intoxicating liquors or drugs not prescribed to the accused (no drugs/alcohol);
 - committing any violations of criminal law;
- Require the accused to report regularly to and remain under the supervision of an officer of the court or other person or agency;
- Impose any condition other than detention deemed reasonably necessary to assure noninterference with the administration of justice and reduce danger to others or the community.

Using CrR(LJ) 3.2 in Practice

MONEY BAIL IS A CONDITION OF LAST RESORT.

The Court may impose bail **ONLY IF** the Court finds no less restrictive condition or combination of conditions are sufficient to reasonably assure the accused's appearance or mitigate the likelihood the accused will commit a violent crime or otherwise interfere with the administration of justice.

Bail should be determined by the accused's ability to pay, not by the nature of the charge.

The Court **MUST consider the accused's financial resources** for the purposes of setting a bail amount that will reasonably assure future appearance and the safety of the community. No one is supposed to be held on bail they cannot afford. For indigent defendants, this may mean any amount of bail is inappropriate.

Bail is not a punishment and is not meant to keep the accused detained pretrial.

The purpose of bail is to guarantee the accused will comply with all other conditions of their pretrial release and ensure their future appearance when required by the Court. **The accused remain innocent until proven guilty.**

ATTACHMENT C

Model Pretrial Release Order

IN THE MUNICIPAL COURT OF THE CITY OF _____

CITY OF _____, PLAINTIFF)
v.) Case # _____
DEFENDANT) ORDER ON RELEASE

Under CrRLJ 3.2(a), any person, other than a person charged with a capital offense, shall... be ordered released on the accused's personal recognizance pending trial unless the court makes at least one of three findings: a) personal recognizance will not reasonably assure the accused's appearance when required, b) there is a likely danger the accused will commit a violent crime, or c) there is a likely danger the accused will seek to intimidate witnesses or will unlawfully interfere with the administration of justice.

- 1. Will recognizance reasonably assure the accused's appearance when required?
Does the accused have ties to the community?
Is the accused connected with social services, treatment, or counseling?
Is the accused employed, enrolled in school, or engaged in treatment or social services?
Is there someone who will assist the accused in complying with conditions?
Other:
2. Has there been shown a likely danger the accused will commit a violent crime, will seek to intimidate witnesses, or will unlawfully interfere with the administration of justice?
Does the accused have a record of threats to victims or witnesses?
Does the accused have a record of interference with the administration of justice?
Is there evidence of present threats to or intimidation of witnesses?
Other:

The accused is to be released: without conditions upon promise to appear with conditions.

Under CrRLJ 3.2(b), if conditions are to be imposed, the "least restrictive" conditions shall be imposed.

Are financial conditions more restrictive for this accused than non-financial conditions?

Yes - The Court will impose non-financial conditions. No - The Court will impose financial conditions.

Non-Financial Conditions (listed in order of restrictiveness)

- No criminal law violations
Possess of no weapons
Surrender of weapons
No blood or BAC refusal if requested by a law enforcement officer
Abstain from alcohol
Day reporting:
Detention by electronic home monitoring
Other conditions reasonably necessary:
Restrictions on travel, association, or place of abode
Placement of accused in the custody of a person or organization
No driving without a valid operator license and insurance
Abstain from marijuana
telephone - 1, 3, or 5 times/week
in person - 1, 3, or 5 times/week
Random breathalyzers or urinalysis
Scram or BA/RT

Financial Conditions (listed in order of restrictiveness)

- \$500 bail for a misdemeanor: unsecured bond appearance bond secured bond
\$1000 bail for a gross misdemeanor: unsecured bond appearance bond secured bond
\$ bail: unsecured bond appearance bond secured bond

Good cause for amount exceeding \$500/\$1000:

Date: Judge

ATTACHMENT D

List of Structural Barriers

Structural Barriers

- 1) Lack of defense counsel present at initial appearance hearings
- 2) Inadequate access to clients and insufficient time for defenders to prepare for hearings
- 3) Inconsistent implementation and enforcement of CrR(LJ) 3.2 statewide
- 4) No access to police reports or pre-trial services reports
- 5) Early morning scheduling of initial appearance dockets (schedule hearings in the afternoon to allow for more preparation and time to meet with clients)
- 6) Defender offices not being promptly notified of new arrests and provided client names so defenders can meet clients in custody and prepare for court sooner
- 7) Lack of least restrictive and money bail alternatives offered
- 8) Failure of court to make ability to pay determination to post bail or to impose unsecured or appearance bonds that don't require collateral or the loss of money to bail agents
- 9) Lack of pre-trial and community-based services offered
- 10) Limited resources and staff support for defenders to interview clients and gather relevant information to support release arguments to the court
- 11) Assigning new and less experienced attorneys to initial appearance dockets (best practice is having skilled/highly trained attorneys handling these hearings)
- 12) Lack of automated text messaging systems that remind clients of their court dates and reduce FTAs and warrants
- 13) Use of pretrial risk assessment tools

ATTACHMENT E

CrR(LJ) 3.2 Bench Card Distributed to Judges

Washington Bail Law

Washington is a right to bail state. Article I, section 20: criminal defendants “shall be bailable by sufficient sureties.” Except if:

- charge is a capital crime (“when the proof is evident or the presumption great”) OR:
- crime punishable by possibility of life (if “clear and convincing evidence of a propensity for violence”)

Criminal Rule (CrR) 3.2 and Criminal Rule for Limited Jurisdictions (CrRLJ) 3.2 were amended in 2002, due to concerns that the prior court rule had disparate racial and economic impacts.

PRESUMPTION OF RELEASE under CrR 3.2(a) and CrRLJ 3.2(a) unless:

- Likelihood of court nonappearance(FTA); OR
- Likely interference with witnesses, administration of justice; OR
- Likely commission of a violent crime
 - “violent crime” not limited to SRA definition, RCW 9.94A.030
 - but see Blomstrom v. Tripp, 189 Wn.2d 379 (2017) – DUI is not a “violent crime”

Showing of likely failure to appear (FTA)

Relevant factors under CrR 3.2(c) and CrRLJ 3.2(c) for assessing likely FTA:

- Prior bench warrants
- NOTE: The number could include warrants unrelated to court FTA, i.e., DOC warrants for noncompliance, warrants issued to ensure transport from another jurisdiction, arrest warrants for new charge when defendant is already in custody
- Employment, family/community ties
 - Enrollment in school, counseling, treatment, or volunteer activities
 - Reputation, character, mental condition
 - Length of residency
 - Criminal record
 - Willingness of responsible community member to vouch for reliability and assist in compliance with release conditions
 - Nature of the charge if relevant to risk of nonappearance

If FTA risk found, CrR 3.2(b) and CrRLJ 3.2(b) require least restrictive conditions:

- Placement with designated person or organization agreeing to supervise accused
 - No contact orders with persons, places, geographical areas
 - Restrictions on travel or place of abode
 - Pretrial supervision- e.g., day reporting, work release, electronic monitoring, etc.
 - Any condition other than detention to reasonably assure appearance
 - Bond with sufficient solvent sureties or cash in lieu thereof
 - But no “cash only” bail – State v. Barton, 181 Wn.2d 148 (2014)
 - NOTE: Bond can be forfeited only for FTA - State v. Darwin, 70 Wn. App. 875 (1993)
 - Bonding company keeps fee
 - Appearance bond - bond in specified amount, and deposit in the court registry in cash or other security. Deposit:
 - not to exceed 10% of bond amount
 - can be forfeited for noncompliance with any condition, i.e., a new crime
 - returned upon performance of conditions
 - Unsecured bond - basically a written promise to appear, without any security
- NOTE ON MONEY BAIL: Court must consider accused’s financial resources in setting a bond that will reasonably assure appearance. CrR 3.2(b)(6), CrRLJ 3.2(b)(6)

Showing of substantial danger

Relevant factors under CrR 3.2(e), CrRLJ 3.2(e) for assessing substantial risk of violent reoffense or interference with administration of justice:

- Nature of charge
- Criminal record
- Past or present threats or interference with witnesses, victims, administration of justice
- Past or present use or threatened use of deadly weapon, firearms
- Record of committing offenses while on pre-trial release, probation or parole
- Reputation, character and mental condition
- Willingness of responsible community member to vouch for reliability and will assist in compliance with conditions



This Benchcard was created by Washington’s Pretrial Reform Task Force, a group led by the Minority and Justice Commission, the Superior Court Judges’ Association, and the District and Municipal Court Judges’ Association. May 2018.

Accord RCW 10.21.050

If court finds substantial risk of violent re-offense or interference with justice, CrR 3.2(d), CrRLJ 3.2(d) allow:

- Placement with designated person or organization agreeing to supervise accused
- No contact order with persons, places, geographical areas
- Restrictions on travel or place of abode
- No weapons or firearms, abstain from alcohol or non-prescribed drugs
- Pretrial supervision- e.g., day reporting work release, electronic monitoring, etc.
- No criminal law violations
- Any condition other than detention that will assure justice noninterference, reduce danger
- Unsecured bond – basically a written promise to appear, without security
- Bond with sufficient solvent sureties or cash in lieu thereof
 - No “cash only” bail – State v. Barton, supra
 - NOTE: Bond be forfeited only for FTA - State v. Darwin, supra
 - Bonding company keeps fee
- Appearance bond – bond in a specified amount, and deposit in court registry cash or other security. Deposit:
 - not to exceed 10% of bond amount
 - can be forfeited for noncompliance with any condition, i.e., a new crime
 - returned upon performance of conditions

NOTE ON MONEY BAIL: Court must consider accused’s financial resources in setting bond that will reasonably assure community safety, prevent justice interference. CrR 3.2(d)(6), CrRLJ 3.2(d)(6); accord RCW 10.21.050(3)(a)

The court must find no less restrictive condition(s) than money bail will assure public safety and/or noninterference with justice. CrR 3.2(d)(6), CrRLJ 3.2(d)(6).

Delay of release authorized when:

- Person is intoxicated and release will jeopardize safety or public safety.

- Person has mental condition warranting possible commitment. CrR 3.2(f), CrRLJ 3.2(f)

Review of Conditions

Right to reconsideration after preliminary appearance if unable to post bail. CrR 3.2(j)

NOTE: There is no parallel CrRLJ to CrR 3.2(j).

Revoking or Amending Release Order

Change of circumstances or new information or good cause. CrR 3.2(j)(k), CrRLJ 3.2(j)(k); accord RCW 10.21.030

- Revocation requires clear and convincing evidence. CrR 3.2(k)(2), CrRLJ 3.2(k)(2)

Cases and Statutes

- Individualized determination; no blanket conditions - State v. Rose, 146 Wn. App. 439 (2008); accord RCW 10.19.055 (individualized basis for class A, B felonies)
- Condition must relate to CrR 3.2, CrRLJ 3.2 goals, preventing FTA or violent crime or justice interference - State v. Rose, supra (random UAs not causally connected to court appearance); cf., “Blomstrom “fix” below
- Condition must not authorize unlawful search - Blomstrom v. Tripp, 189 Wn.2d 379 (2017)-random UAs as a first-time DUI condition is unlawful search; not authorized by CrRLJ 3.2 or statute. But see “Blomstrom “fix”- RCW 10.21.030 authorizes UAs as pretrial condition for misdemeanors, gross misdemeanors (DUI), felonies.
- Condition must be least restrictive condition - Butler v. Kato, 137 Wn. App. 515 (2007) (alcohol treatment and sobriety meetings not least restrictive condition to assure court appearance and hence violate CrRLJ 3.2; also unconstitutional search and violated Fifth Amendment)
- RCW 10.21.015 – no work release, electronic monitoring, day monitoring or other pretrial supervision program if violent or sex offense and violent or sex offense in last 10 years, unless person has posted bail
- RCW 10.21.055 – ignition interlock or SCRAM required where charge is DUI, physical control, vehicular homicide or vehicular assault and prior conviction that involved alcohol

ATTACHMENT F

Considering the Possible Effects of Pleading Guilty

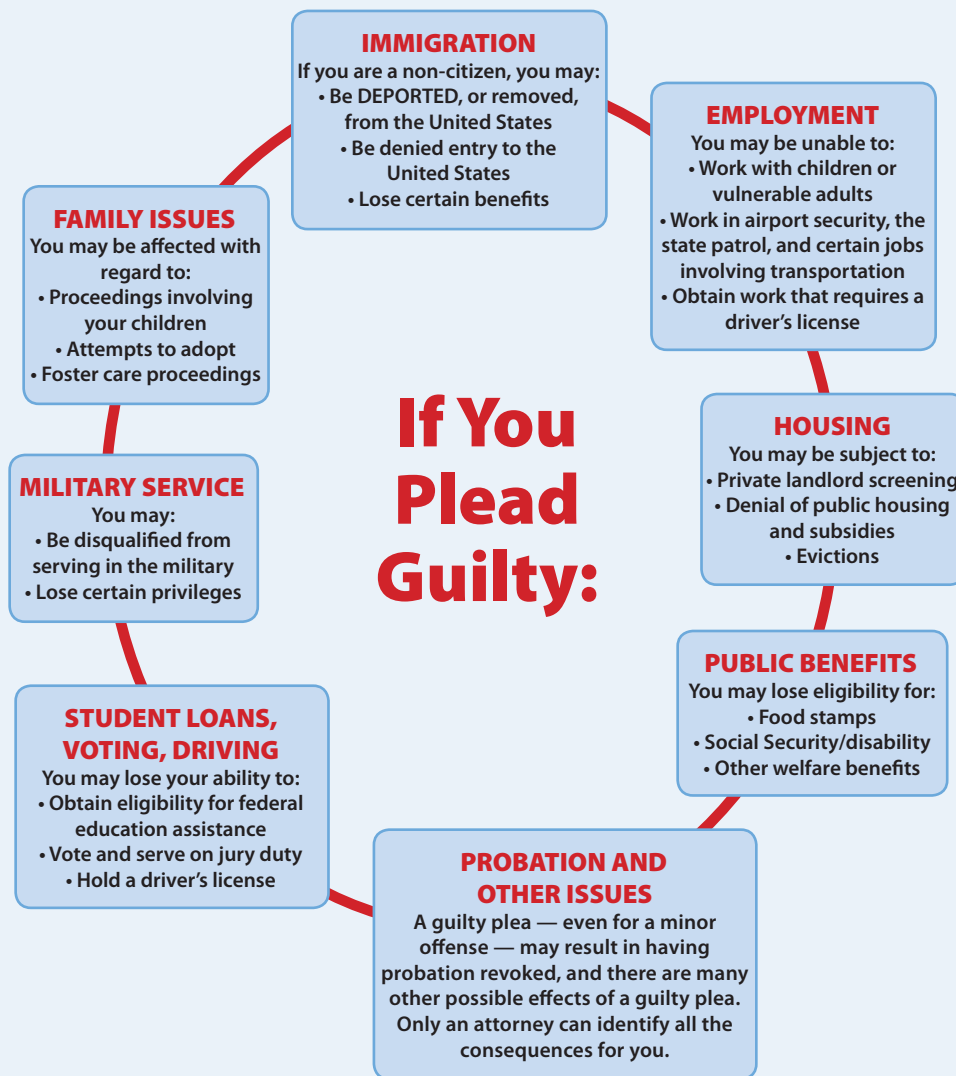


Before you enter your plea

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.