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At 45, Gideon Right to Counsel Remains Elusive

By Robert C. Boruchowitz

You have a right to a lawyer.

If you cannot afford one,

one will be appointed for you.

In the 45 years since *Gideon v. Wainwright*, in which the U.S. Supreme Court made clear that accused persons in state courts have a right to a lawyer at public expense, those words of advice have become part of the culture.

They were the result of the *Miranda decision*, and television viewers now are familiar with various practices used by law enforcement officials to keep their suspects from "lawyering up." What they don't know is that the practices in some courts have the same effect — to keep defendants from having meaningful representation or even any lawyer at all.

Most lawyers believe that a person charged with a crime, who cannot afford to hire an attorney, will have a public defender provided by the court. But the harsh reality is that, in courts across Washington and the nation, thousands of people plead guilty without ever talking to any lawyer except the prosecutor. This is most dramatic in misdemeanor and juvenile courts.

This happens both because there is no public defender available at the first court appearance and because of a culture that regards misdemeanor and juvenile cases as not important enough to invest the money and the time necessary to have lawyers to help accused people.

The elements of the problem can be understood by reviewing three misdemeanor cases that happened last year in Washington.

In a central Washington court, a defendant went to an arraignment and asked for a lawyer. The prosecutor made her an offer that would expire that day. When the defendant asked if she could get a public defender before making any decisions, she was told that she would have to enter a plea of not guilty to receive a lawyer and that no

lawyer was present to help her. Because the offer expired that day, the defendant felt pressured to waive her right to counsel and enter a guilty plea.

The defendant called a lawyer who was representing her in another county and he asked if he could talk with the prosecutor about the terms of the offer. The lawyer overheard the client ask the prosecutor, who responded that he would not talk with the lawyer because the lawyer had not formally filed a notice of appearance. The prosecutor refused to hold open the offer, so that the lawyer could review it, along with the discovery.

In an eastern Washington county, a defendant asked for counsel, but when the judge discovered that the defendant, whose income was less than $1,000 a month, had equity in a house, the court denied the request. After the defendant presented a motion for reconsideration that a law professor had drafted for him, pointing out the statutory requirement that only liquid assets be considered in eligibility determinations, the court granted the request for counsel.

A King County municipal court denied counsel to a defendant because his monthly disability income of $1,400 was above the poverty level guideline the court consulted. After a professor sent an email to the prosecutor, pointing out that expenses and debts must be considered, as well as income, and that the defendant's expenses did not leave enough money to hire an attorney, the court appointed counsel.

Existing court rules call for the availability of lawyers at first appearances. For example, CrRLJ 3.1 states in part: "The right to a lawyer shall accrue as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest. A lawyer shall be provided at every critical stage of the proceedings." Case law is clear that before a judge can accept a waiver of the right to counsel there must be a thorough inquiry to establish a knowing, intelligent and voluntary waiver.

Ethics rules are clear that prosecutors should not be negotiating pleas with unrepresented defendants. RPC 3.8, Special Responsibilities of a Prosecutor, states in part:

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 ... .

Yet, in many courts, the prosecutor does negotiate guilty pleas with unrepresented defendants who have not waived counsel. In some courts, neither the prosecutor nor a defender attends the first appearance, putting the judge in an impossible position

because there are no lawyers to advocate either for determination of probable cause or to present information to help the judge decide whether to release an in-custody defendant.

The Washington Bar Committee on Public Defense has proposed rule changes that the Supreme Court is considering that would emphasize even more strongly the need for counsel at arraignments. The amended rule would read in part:

Requirement of 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, the court shall provide for a lawyer pursuant to CrRLJ 3.1. A defendant shall not be arraigned unless counsel is present to assist the defendant at the arraignment.

In courts in which lawyers are provided, the attorneys often have caseloads so large that it is difficult to provide effective assistance of counsel. This is particularly true in some courts that have for-profit contract law firms handling public defense.

In some places, misdemeanor attorneys are handling 800 or more cases per year, more than double the presumptive bar standard of 300. And in some counties, children are still pleading guilty to felony charges without an attorney.

There are some areas of strength as well. King County is nationally known for its organized defender system that relies on four non-profit offices. Those offices have contracts that include caseload limits, supervisory ratios and training requirements. The first caseload guidelines in the state were developed by the King County Bar in 1982, followed a few years later by standards established by the Washington Defender Association and endorsed by the State Bar Association.

In Seattle Municipal Court, which in 1969 — three years before the U.S. Supreme Court required lawyers in state misdemeanor cases in the *Argersinger* decision — first provided public defenders through The Defender Association, defenders by city law are limited to 380 cases per year. The City dismantled its nationally praised three-provider program three years ago in favor of a primary office and a tiny second office, but after much debate and review is about to move again to a three-office system. But in King County District Court, some defenders still handle more than 400 cases each per year.

The state bar standards, including felony caseload limits of 150 per attorney per year and juvenile limits of 250, and requirements for supervision, training and support resources, are not fully implemented in most counties. The state Office of Public Defense has begun providing funding to local governments on the condition that they move toward implementing standards. Among the benefits of this development is that King County has been able to reduce its juvenile defender caseloads from 330 per year to 250.

While many counties are at or near the 150-felony limit, changes in the practice, including diversion of many "simpler" cases to drug court and the drastic increase in sentences for sex offenses, cry out for that limit to be reduced.

In 1932, in *Powell v. Alabama*, the U.S. Supreme Court wrote that a person charged with crime "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Seventy-six years later, it is past time to follow those words. The bar has played a key role in advancing public defense. We need to increase these efforts so that when we commemorate Gideon's 50th anniversary, the promise of counsel for all accused persons will have been fulfilled.

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