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# The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court

Andrew Horwitz\*

In 1963, the United States Supreme Court ruled in the landmark case of *Gideon v. Wainwright*<sup>1</sup> that the constitutional right of criminal defendants to be represented by counsel, appointed by the court if the defendant is indigent, extended to state criminal proceedings. In the forty years that have passed since that decision, the Supreme Court has rendered any number of opinions that further expand upon and explore this critical constitutional right. The harsh reality of daily proceedings in Rhode Island District Court today, however, reveals that significant numbers of misdemeanor criminal cases are resolved by plea at the arraignment stage without adherence to the constitutional mandate of *Gideon* and its progeny. In this essay, I will briefly explore the parameters of the right to counsel, the critical importance of the right to counsel when a misdemeanor case is resolved by the entry of a plea, the findings required before a court may lawfully find that the right to counsel has been waived, and the inadequacies of current Rhode Island practice in this regard.

## I. THE SCOPE AND SIGNIFICANCE OF THE RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the

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1. 372 U.S. 335, 344 (1963).

right . . . to have the Assistance of Counsel for his defence.”<sup>2</sup> While there is some room for disagreement under current federal constitutional law about exactly when in the life of a criminal case the right to counsel first attaches, there can be no dispute that the right has plainly attached at the moment a defendant enters a guilty or nolo contendere plea to a criminal charge, whether at an arraignment or at some later stage of the proceedings.<sup>3</sup> Similarly, after the United States Supreme Court’s 2002 decision in *Alabama v. Shelton*,<sup>4</sup> there can no longer be any serious dispute under federal constitutional law about what class of criminal defendants is entitled to appointed counsel. In that case, the Supreme Court clarified that an indigent defendant’s right to appointed counsel is not limited to those cases in which he or she is imprisoned at the time of sentencing, but extends to the class of cases in which the defendant is left “vulnerab[le] to imprisonment.”<sup>5</sup> While *Shelton* involved a defendant who was given a suspended jail sentence, the logic of the case would clearly dictate that its holding extend equally to the imposition of a period of probation or, in the Rhode Island context, even to the imposition of a “filing”<sup>6</sup> on a complaint.<sup>7</sup> Indeed, the Court’s holding in *Shel-*

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2. U.S. CONST. amend. VI. A similar provision can be found in the Rhode Island Constitution. See R.I. CONST. art. I, § 10.

3. See *Iowa v. Tovar*, 124 S. Ct. 1379, 1382 (2004).

4. 535 U.S. 654 (2002).

5. *Id.* at 674.

6. Under R.I. GEN. LAWS § 12-10-12(c) (2003), a criminal complaint may be filed for a period of one year and, if no further action is taken on that complaint, the complaint will be “automatically quashed and destroyed” and all records concerning the complaint expunged. If a filing follows from a plea of guilty or nolo contendere, as it does in the vast majority of filed cases, and the court subsequently finds that the defendant has violated the terms and conditions of the filing, the court is authorized to sentence the defendant to a period of imprisonment. *Id.*

7. The premise of the Court’s holding in *Shelton* was that it would never be proper to impose actual incarceration in a case in which the right to counsel had not been scrupulously honored, even if counsel were provided at the violation hearing stage. The Court noted that in Alabama, just like in Rhode Island, the substantive and procedural rules in place at a violation hearing are far more limited than those in place at a trial. *Shelton*, 535 U.S. at 666. For that reason, the Court held that a violation hearing “cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.” *Id.* at 667.

ton would seem to squarely cover almost every case that is resolved by plea at the arraignment stage in Rhode Island.<sup>8</sup>

One need not dig very deep into United States Supreme Court case law to find clear expressions from that Court about the critical importance of the right to counsel. Perhaps the most famous of these expressions can be found in *Powell v. Alabama*,<sup>9</sup> in which the Court first established the right to appointed counsel in federal criminal cases:

The . . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.<sup>10</sup>

While it might have some superficial appeal to focus on the right to counsel as though it took on special significance only in felony cases or at the trial stage of a case, the Supreme Court has repeatedly and vigorously rejected each of these contentions.

In *Argersinger v. Hamlin*,<sup>11</sup> for example, in extending the right to appointed counsel to misdemeanor cases that lead to incarceration, the Court explicitly rejected the notion that there is any necessary relationship between the need for counsel and the possible sentence that might be imposed.<sup>12</sup> The Court noted its

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8. The one category of cases that the holding in *Shelton* probably would not cover would be cases that are resolved by the imposition of a fine without an accompanying filing or period of probation. Such a sentence is rarely imposed in Rhode Island except in cases alleging that the defendant was operating a motor vehicle without a valid driver's license.

9. 287 U.S. 45 (1932).

10. *Id.* at 68-69

11. 407 U.S. 25 (1972).

12. *Id.* at 33-34.

particular concern with “the guilty plea, a problem that looms large in misdemeanor as well as in felony cases,” holding that “[c]ounsel is needed so that the accused may know exactly what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he may be treated fairly by the prosecution.”<sup>13</sup> The Court explained its holding by pointing out that it is in the misdemeanor context, even more than in the felony context, that the sheer volume of cases can “create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>14</sup> In order to protect defendants from that sort of “assembly-line justice,” the Court held that counsel must be appointed even in misdemeanor cases if a term of imprisonment is imposed.<sup>15</sup> A number of lower courts have expressed the same view regarding the importance of counsel in misdemeanor cases, noting that alleged misdemeanants at the arraignment stage make particularly easy targets for injustice. As the Ninth Circuit suggested recently, “an innocent defendant, unaware of the potential consequences of a misdemeanor conviction, may be more likely to waive counsel and plead guilty simply to ‘get the whole thing over with,’ especially if the defendant suspects he will be sentenced to time served.”<sup>16</sup>

Just as the notion that the right to counsel is somehow more important in felony cases has been roundly rejected, so too has the notion that it has enhanced importance only at the trial stage. As early as 1948, in *Von Moltke v. Gillies*,<sup>17</sup> the United States Supreme Court recognized the central importance of representation at the moment a defendant enters a plea. In that case, the plurality opinion clarified that “the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial.”<sup>18</sup> The opinion went on to point out that, in complex cases, “Determining whether an accused is guilty or innocent . . . is seldom a simple and easy task for a layman, even though acutely intelligent.”<sup>19</sup> Just over twenty years later, citing *Von Moltke* with ap-

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13. *Id.* at 34.

14. *Id.*

15. *Id.* at 36-37.

16. *United States v. Akins*, 276 F.3d 1141, 1148 n.3 (9th Cir. 2002).

17. 332 U.S. 708, 721 (1948).

18. *Id.* at 721.

19. *Id.*

proval, the Court once again suggested that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney."<sup>20</sup> Perhaps the Third Circuit has said it best:

[A] hearing on a plea of guilty is a critical stage in the proceedings against the accused, one in which his need for counsel is most urgent. The exercise of judgment on the factual issues, the legal problems of evidence by which facts may be proven, the elements and ingredients of the crime charged, all these are matters which no layman, however intelligent or how often embroiled in legal proceedings, can be presumed to comprehend adequately, especially when, because his own freedom is at stake, it would be impossible to expect of him the detached, impersonal judgment which is the unique contribution of a professional advisor.<sup>21</sup>

In recognition of the fact that a layman who believes that he is guilty may be "willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime,"<sup>22</sup> the Ninth Circuit has declared that "[n]owhere is counsel more important than at a plea proceeding."<sup>23</sup>

## II. WAIVER OF THE RIGHT TO COUNSEL: ADEQUACY OF THE WARNINGS

Having accepted the propositions that one is constitutionally entitled to counsel, appointed by the court if necessary, for virtually every misdemeanor case, and that one is constitutionally entitled to have that counsel present at the stage at which a plea is entered, the next question is whether the defendant has somehow waived that right before entering a plea without counsel. As a matter of constitutional jurisprudence, deciding a question of waiver involves two distinct inquiries: was the defendant adequately informed of the right to counsel, and did the defendant ef-

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20. *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970).

21. *United States v. MacDonald*, 343 F.2d 447, 451 (3d Cir. 1965).

22. *United States v. Akins*, 276 F.3d 1141, 1148 (9th Cir. 2002) (quoting William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 830 (1989)).

23. *Id.* at 1147.

fectuate a knowing, intelligent, and voluntary<sup>24</sup> waiver of that right?

In the leading right to counsel case of *Patterson v. Illinois*,<sup>25</sup> the United States Supreme Court ruled on “the type of warnings and procedures that should be required before a waiver of that right will be recognized.”<sup>26</sup> There, the Court clearly held that an accused’s waiver of the right to counsel cannot be “knowing” unless he or she has been advised of “the usefulness of counsel to the accused *at the particular proceeding*, and the dangers to the accused of proceeding without counsel.”<sup>27</sup> In its most recent pronouncement on the right, *Iowa v. Tovar*,<sup>28</sup> the Court rejected the notion that the constitution requires any specific “formula or script to be read to a defendant who states that he wants to proceed without counsel.”<sup>29</sup> Instead, the Court noted, a determination of the adequacy of the “information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend upon a range of case-specific factors.”<sup>30</sup>

Few lower courts have discussed the significance of the *Patterson* Court’s holding in the context of a purported waiver of the right to counsel at a plea. One notable example is *United States v. Akins*,<sup>31</sup> in which the Ninth Circuit held that a defendant had not made a knowing waiver of the right to counsel at a plea even though he signed a document that stated that his plea of guilty

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24. A strong argument can be made that a good number of *pro se* misdemeanor pleas are entered each day in district court in which the purported waiver of the right to counsel is involuntary. As a matter of routine, defendants without attorneys are offered a “take-it-or-leave-it” disposition in which the choice is between pleading guilty or *nolo contendere* and being released from custody or asking for an attorney and being incarcerated. One case, in which a judge told a defendant that a plea offer he had conveyed would be revoked if the defendant sought time to speak with an attorney, has become the basis for an ethics charge against a district court judge. Tracy Breton, *Pirraglia Challenges Ethics Complaints*, PROVIDENCE J., May 21, 2003, at B1. In his defense, Judge Robert J. Pirraglia said that such “take-it-or-leave-it” offers are a “longstanding practice” of the district court. *Id.* The issue of voluntariness, however, is beyond the scope of this article.

25. 487 U.S. 285 (1988).

26. *Id.* at 298.

27. *Id.* (emphasis added).

28. 124 S. Ct. 1379, 1382 (2004).

29. *Id.*

30. *Id.*

31. 276 F. 3d 1141 (9th Cir. 2002).

was “a knowing and intelligent waiver” of his right “to an attorney, even at public expense.”<sup>32</sup> Quoting *Faretta v. California*,<sup>33</sup> the court noted that a waiver of the right to counsel “is knowing and intelligent only if it comes after the defendant has been ‘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.’”<sup>34</sup> The court went on to stress that most defendants, even those who are intelligent and those with lengthy criminal histories, are not well equipped to evaluate the validity of a criminal charge or the availability of legal or constitutional defenses to that charge.<sup>35</sup> Because a plea of guilty or nolo contendere “relieves the state of its burden of proof in a criminal case,” the court found that “ensuring the validity of the plea is of vital importance.”<sup>36</sup> As the written waiver in that case did not adequately “indicate the dangers and disadvantages of proceeding without counsel,” the court refused to find a knowing and intelligent waiver.<sup>37</sup>

Case law in Rhode Island suggests that the Supreme Court of Rhode Island has adopted, as it must, a similar standard for testing the adequacy of the warnings given to a defendant who seeks to waive the right to counsel. In *State v. Spencer*,<sup>38</sup> the court quoted from *Faretta* in holding that a defendant “must 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.’”<sup>39</sup>

### III. WAIVER OF THE RIGHT TO COUNSEL: ADEQUACY OF THE WAIVER

In a situation in which the defendant has been adequately warned about the “dangers and disadvantages” of proceeding at

32. *Id.*

33. 422 U.S. 806 (1975).

34. *Akins*, 276 F.3d at 1146 (quoting *Faretta*, 422 U.S. at 835). The Supreme Court of Rhode Island has quoted the same language from *Faretta* with approval. *See, e.g.*, *State v. Spencer*, 783 A.2d 413, 416 (R.I. 2001) (quoting *Faretta*, 422 U.S. at 835).

35. *Akins*, 276 F.3d at 1147-48.

36. *Id.* at 1147.

37. *Id.* at 1149.

38. 783 A.2d 413 (R.I. 2001).

39. *Id.* at 416 (quoting *Faretta*, 422 U.S. at 819 (internal quotation marks omitted)).



the plea stage without the assistance of counsel, the next inquiry becomes whether or not the defendant has understood those warnings sufficiently to execute a knowing and intelligent waiver. In determining whether the constitutional right to counsel has been waived in such a fashion, the United States Supreme Court has clearly held that it will “indulge every reasonable presumption against waiver.”<sup>40</sup> The American Bar Association, in its Standards for Criminal Justice related to Pleas of Guilty, suggests, “Before accepting a guilty plea from an uncounselled defendant, the court should require the defendant to meet with appointed counsel for consultation purposes.”<sup>41</sup>

In the absence of counsel appointed for that purpose, the Supreme Court has held, “The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”<sup>42</sup> In *Von Moltke v. Gillies*,<sup>43</sup> a plurality of the Supreme Court wrote at some length about the obligations of a trial judge in the face of a purported waiver of counsel at the plea stage:

We have said: ‘The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.’ To discharge this duty properly in light of the strong presumption against

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40. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

41. ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, Commentary to Standard 14-1.3(b) (3d ed. 1999); see also ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-8.2(b) (3d ed. 1992) (“If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted.”); UNIF. R. CRIM. P. 711(b) (1987) (“The court, in the case of a misdemeanor may and, in the case of a felony, shall refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel.”).

42. *Johnson*, 304 U.S. at 464.

43. 332 U.S. 708 (1948).

waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. 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. . . . 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. . . . [A] mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel – may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.<sup>44</sup>

Some lower courts have interpreted *Von Moltke* as imposing a mandatory colloquy with the defendant on the record in order to explore the knowing and intelligent nature of the purported waiver,<sup>45</sup> while the vast majority of others have said that an individualized colloquy, while not constitutionally mandated, is clearly preferred.<sup>46</sup>

In the absence of an individual colloquy, many courts have found that a waiver will rarely be upheld on appeal because the defendant's comprehension of the waiver cannot be established. In *Bellevue v. Acrey*,<sup>47</sup> for example, the Supreme Court of Washington expressed its clear preference for a colloquy on the record but suggested that, in the absence of a colloquy, it would "look at any evidence on the record that shows the defendant's actual awareness of the risks of self-representation."<sup>48</sup> The court was quick to point

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44. *Id.* at 723-24 (citations omitted).

45. *See Bellevue v. Acrey*, 691 P.2d 957, 961 (Wash. 1984) (listing several federal circuit courts that require an individual colloquy).

46. *See* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 11.3(b) (3d ed. 2000). This group of courts includes the Supreme Court of Rhode Island. *See, e.g., State v. Thornton*, 800 A.2d 1016, 1026 (R.I. 2002) (noting that an individual colloquy, "while preferable, is not constitutionally required"); *State v. Spencer*, 783 A.2d 413, 416 (R.I. 2001) (noting that "the simplest method to determine whether a waiver of counsel is knowing and voluntary may be a detailed colloquy between the trial court and the defendant").

47. 691 P.2d 957 (Wash. 1984).

48. *Id.* at 962.

out, however, that "in no case will mere evidence of the defendant's literacy, educational level, common sense, or prior experience with the criminal justice system be sufficient to show an awareness of these risks."<sup>49</sup> While a defendant's background may be "relevant" to the waiver determination, it is clearly not sufficient because the "fact that a defendant is well educated, can read, or has been on trial previously is not dispositive as to whether he understood the relative advantages and disadvantages of self-representation in a particular situation."<sup>50</sup> In reversing the defendant's conviction, the court noted that "only rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation."<sup>51</sup>

In *State v. DeRoche*,<sup>52</sup> the Supreme Court of Louisiana refused to find that a defendant made a knowing and intelligent waiver of the right to counsel at a guilty plea even in the face of a "printed waiver form advising him of his right to counsel and warning him of the danger of self-representation."<sup>53</sup> In that case, the record established that the trial judge "canvassed [the defendant] with regard to some of the trial rights he was waiving, but fail[ed] to show that the court also inquired into [the defendant's] *capacity* to waive his right to assistance of counsel in making the decision whether to go to trial."<sup>54</sup> Accordingly, the court held that the record did not "affirmatively establish a valid waiver of counsel."<sup>55</sup>

The Supreme Court of Utah, citing *Acrey* with approval, has likewise found that information about a defendant's background, while relevant, cannot answer the central question concerning the defendant's actual comprehension of the dangers and disadvantages of self-representation.<sup>56</sup> In that case, *State v. Frampton*,<sup>57</sup> the court noted that "[g]enerally, this information can only be elicited after penetrating questioning by the trial court."<sup>58</sup> In describing the kind of questioning that it envisioned as constitutionally

49. *Id.*

50. *Id.*

51. *Id.*

52. 682 So. 2d 1251 (La. 1996).

53. *Id.* at 1252.

54. *Id.* (emphasis added).

55. *Id.*

56. *State v. Frampton*, 737 P.2d 183, 188 (Utah 1987).

57. *Id.*

58. *Id.* at 187.

adequate, the court referred to the Bench Book for United States District Court Judges "as a guide."<sup>59</sup> After a long series of questions directed at the defendant's background, federal trial judges are encouraged to say "something to this effect" to a defendant who is attempting to waive the right to counsel: "I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. . . . I would strongly urge you not to try to represent yourself."<sup>60</sup>

Several recent decisions issued by the Supreme Court of Rhode Island suggest that, at least in theory, the court has adopted this same constitutional jurisprudence. In *State v. Chabot*,<sup>61</sup> the court reviewed a situation in which a defendant who suggested that he had been hospitalized for psychiatric reasons was permitted by the trial judge to waive his right to counsel at a probation violation hearing. The court noted the trial judge's obligation to determine whether the defendant's purported waiver was knowing and intelligent, finding that the following factors must be part of the court's determination:

- (1) the background, the experience, and the conduct of the defendant at the hearing, including his age, his education, and his physical and mental health;
- (2) the extent to which the defendant has had prior contact with lawyers before the hearing;
- (3) the defendant's knowledge of the nature of the proceeding and the sentence that may potentially be reimposed;
- (4) the question of whether standby counsel has been appointed and the extent to which he or she has aided the defendant before or at the hearing;
- (5) the question of whether the waiver of counsel was the result of mistreatment or coercion; and
- (6) the question of whether the defendant is trying to manipulate the events of the hearing.<sup>62</sup>

The trial judge in that case apparently engaged in a limited colloquy with the defendant, but failed to explore in any depth his

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59. *Id.* at 187 n.12 (quoting 1 BENCH BOOK FOR UNITED STATES DISTRICT COURT JUDGES §§ 1.02-2 to -5 (3d ed. 1986)).

60. *Id.*

61. 682 A.2d 1377 (R.I. 1996).

62. *Id.* at 1380.

“mental competency” to knowingly and intelligently waive his right to counsel.<sup>63</sup> “Because a defendant’s knowledge and understanding of what he or she is doing is essential to effectuate a voluntary waiver of the right to counsel,” the court held, “an inquiry into the matter must sufficiently establish that knowledge and understanding on the record.”<sup>64</sup> In reversing the trial court’s finding of a valid waiver, the court admonished trial judges in Rhode Island to “take the time to inquire into the voluntariness and intelligence of the waiver.”<sup>65</sup>

In subsequent decisions, the Supreme Court of Rhode Island has held that a “detailed colloquy between the trial court and the defendant,” while clearly preferable, is not constitutionally required.<sup>66</sup> In *State v. Spencer*,<sup>67</sup> the court held that “the factors set forth in *Chabot*, while mandatory in cases in which the mental competency of the defendant is questioned, remain relevant considerations” in the determination of whether a waiver is knowing and intelligent.<sup>68</sup> In *State v. Thornton*,<sup>69</sup> the court thoroughly and systematically reviewed each of the *Chabot* factors as part of its *de novo* review of the trial court’s ruling that a defendant knowingly and intelligently waived the right to counsel.<sup>70</sup> The court held in *Thornton* that it could find a knowing and intelligent waiver even in the absence of “an explicit colloquy” between the trial justice and the defendant, but only “when other evidence in the record clearly supports that conclusion.”<sup>71</sup> The court noted that the defendant in that case made “repeated references to the dangers of self-representation” during the course of the proceedings, thereby establishing that he was fully cognizant of those dangers,<sup>72</sup> and that “the trial justice repeatedly implored” the defendant to “accept the assistance” of an attorney.<sup>73</sup> In that context, and in com-

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63. *Id.* at 1380-81.

64. *Id.* at 1381.

65. *Id.* (quoting *Strozier v. Newsome*, 871 F.2d 995, 997 n.4 (11th Cir. 1989)).

66. *See, e.g.*, *State v. Thornton*, 800 A.2d 1016, 1026-27 (R.I. 2002); *State v. Spencer*, 783 A.2d 413, 416 (R.I. 2001).

67. *Id.*

68. *Id.* at 417.

69. 800 A.2d 1016 (R.I. 2002).

70. *Id.* at 1027-31.

71. *Id.* at 1027.

72. *Id.* at 1028.

73. *Id.* at 1028 n.13.

bination with a host of other facts on the record, the court upheld the trial justice's finding of a knowing and voluntary waiver of the right to counsel.<sup>74</sup>

#### IV. DAILY PRACTICE IN RHODE ISLAND DISTRICT COURT

On a daily basis in the arraignment courtrooms of the Rhode Island District Court, significant numbers of misdemeanor cases are resolved when a defendant, without counsel, enters a plea of guilty or *nolo contendere* to a criminal charge. In the majority of these cases, there is no individual colloquy with the defendant concerning the waiver of the right to counsel and no finding of facts on the record to adequately support a finding that the defendant has knowingly and intelligently waived that most sacred constitutional right. The absence of counsel for the defendant takes on added significance when one recognizes that the State is generally represented at arraignment by a police officer, not a licensed attorney, and that no licensed attorney has ever reviewed the charges or facts of the case at any time prior to the resolution of the case.

Any given day in the primary arraignment courtroom in Providence begins with the playing of a videotape to those then assembled in the audience.<sup>75</sup> It is important to note, however, that even if a defendant is present in the courtroom at that moment, his ability to hear or see the contents of the videotape may well be limited by the bluster of activity in the well of the courtroom. Those in custody are rarely, if ever, present in the courtroom when the videotape is played.<sup>76</sup>

The advisement in the videotape concerning the right to counsel provides in its entirety as follows: "[Y]ou have the right to be represented by an attorney. If you cannot afford an attorney, you may be referred to the public defender's office."<sup>77</sup> The advisement

74. *Id.* at 1031.

75. No such videotape is played in the secondary arraignment courtroom in Providence or in any of the other district court courtrooms.

76. The videotape is also apparently played at some point in the holding cells in the basement of the courthouse for those in custody. What percentage of those in custody actually have the opportunity to view the videotape is difficult to ascertain.

77. Transcript of Videotape (on file with author). The reference to a "public defender" may actually serve to confuse the average *pro se* defendant, who may not understand that a public defender is actually a licensed attorney.

does not explain that a defendant must plead not guilty in order to obtain that referral to a public defender. The significance of this lack of explanation is exaggerated by the "explanation" of the not guilty plea contained in the videotape: "You can plead 'not guilty.' You know what that means."<sup>78</sup> Because it does not explain that a not guilty plea at the arraignment is simply a means of exercising rights and can be changed after consultation with an attorney, the videotape almost certainly leaves most *pro se* defendants with the mistaken impression that a not guilty plea is actually an assertion of innocence.<sup>79</sup>

Once the videotape has been played and those defendants with retained counsel have been arraigned, the parade of *pro se* misdemeanor arraignments begins. Generally, a *pro se* arraignment begins with the judge informing the defendant of the charges on the complaint. In addition, if the defendant is being presented as a potential violator of bail on a pending case, or of a filing or term of probation that has been imposed in a prior case, the defendant will be informed of that fact. Next, the defendant is asked what plea he or she would like to enter. As suggested above, most *pro se* defendants undoubtedly believe that they are being asked whether or not they think they are guilty of the crime or crimes charged, and most probably believe that a not guilty plea is an assertion of actual innocence that will subject them to harsher penalties further on if determined to be untrue. What is particularly noteworthy about this critical juncture of the arraignment is that there has been absolutely no inquiry whatsoever about whether the defendant would like to assert or waive his or her constitutional right to be represented by counsel.<sup>80</sup> Frequently, there is

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Any lawyer who has ever practiced in a criminal court has heard a defendant, when asked whether he or she has an attorney, respond, "No, I have a public defender." See JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 101 (1972).

78. Transcript of Videotape, *supra* note 77.

79. This popular misconception about the meaning of the not guilty plea is shared even by some of the most well informed and well educated members of the media, who insist on reporting that a criminal defendant has "pleaded innocent" to a pending charge. No such plea exists in American jurisprudence.

80. Some courts have explicitly held that conducting an arraignment in this sequence is a violation of the right to counsel. For example, in *State v. Howard* the Supreme Court of Montana found that the practice of securing a waiver and a guilty plea simultaneously "does not offer the defendant the op-

also no advisement from the judge about what the sentence might be upon a plea of guilty or *nolo contendere*.

Only if the defendant has the wherewithal to enter a plea of not guilty will the judge ask the defendant whether he or she can afford to retain private counsel and, if the defendant says that he or she cannot, refer the defendant to the Department of the Public Defender. If the defendant enters a plea of guilty or *nolo contendere*, the judge will then most often ask the prosecuting police officer for a brief recitation of the factual allegations and for a sentencing recommendation. A pre-printed written form entitled "Request to Enter Plea of *Nolo Contendere* or Guilty," which is available in English and Spanish, is then handed to the defendant, who is asked to read it and sign it.

The form, much like the videotape, contains only the broadest possible language about the right to counsel. The form begins with a recitation of constitutional rights, including the right to remain silent and the right to a jury trial.<sup>81</sup> By signing the form, the defendant purportedly agrees that "the judge of the District Court has advised me . . . that I have reasonable time to consult with an attorney."<sup>82</sup> That advice appears nowhere on the videotape and is not, as suggested above, a part of the normal discourse with a defendant entering a plea.<sup>83</sup> The defendant further agrees, by signing the form, that the judge has advised him or her "that I have a right to be represented by an attorney of my own choice at my own expense and if I cannot afford to have an attorney the court will refer me to a public defender or other assigned attorney at no cost to me."<sup>84</sup> The defendant, through the pre-printed form, then purportedly asserts: "I wish to proceed without a lawyer representing

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portunity to expressly, affirmatively waive her right to counsel and consequently violates that right." 59 P.3d 1075, 1079 (Mont. 2002). The court held that the waiver of the right to counsel "must be express and must be secured *before* the entering of a guilty plea." *Id.* (emphasis added).

81. Request to Enter Plea of *Nolo Contendere* or Guilty (on file with author).

82. *Id.*

83. In fact, a defendant who is presented at an arraignment as a violator of bail in a pending case or as a violator of a previously imposed filing or period of probation will often be permitted to consult with counsel only if he or she is willing to spend the "reasonable time" described in the waiver form as an inmate at the Adult Correctional Institution. *See supra* note 24.

84. Request to Enter Plea of *Nolo Contendere* or Guilty, *supra* note 81.



me knowing the above rights."<sup>85</sup> Next comes the defendant's acknowledgment that, by pleading guilty or nolo contendere, he knows that he is giving up a variety of trial rights, including the right to trial by jury, the right to put the State to its burden of proof, the right to the presumption of innocence, the right against self-incrimination, the right to confront and cross-examine witnesses, and the right to testify and present evidence.<sup>86</sup> At the end of the two page form, the defendant, by signing his or her name, purportedly attests to the following language: "I have read and reviewed the entire contents of this paper and I have no questions as to what it states and means and I understand it completely. I wish to proceed without a lawyer representing me knowing the above rights."<sup>87</sup>

In some cases, the defendant signs the form the moment it is placed in front of him or her, visibly attesting to the falsity of the representation that the defendant has "read and reviewed the entire contents" of the document. In others, the defendant is asked to sit down and read the document, at which point the case is recalled. After the form is signed, the judge will generally ask the defendant in yes-or-no format whether he or she has read and understood the form and whether he or she has any questions about its contents. The judge will generally make no inquiry whatsoever into the defendant's background, the defendant's educational history, the defendant's mental or physical condition, or the defendant's prior dealings with attorneys.<sup>88</sup> It would be the rare defendant indeed who would be willing to risk the public humiliation or the perceived dangers involved in disrupting the proceedings by acknowledging that he or she is illiterate or that he or she did not understand the waiver form. After the formalities of securing pro forma answers to the judge's questions are dispensed with, the defendant is sentenced and the case is over.

As should be obvious from the preceding description, the daily practice in the Rhode Island District Court is a far cry from what

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85. *Id.*

86. *Id.*

87. *Id.*

88. There will often be a discussion of the defendant's prior criminal history for the purposes of determining the appropriate disposition of the case, but that discussion never reveals whether the defendant had been represented by counsel in any of his or her prior cases.

*Gideon* and its progeny require. Neither the contents of the videotape, even if one were to assume that the defendant heard and understood it, nor the contents of the pre-printed waiver form, even if one were to assume that the defendant read and understood it, are sufficient to make a defendant aware of “the dangers and disadvantages of self-representation”<sup>89</sup> in any meaningful way. While there is some information on the waiver form about the rights that attach at the trial stage, none of the information provided would meet the requirement set out by the United States Supreme Court in *Patterson v. Illinois*<sup>90</sup> that the defendant must be made aware of the usefulness of counsel “at the particular proceeding.”<sup>91</sup> The defendant is not told that an attorney might be aware of a legal defense to the charges that a layperson would be unlikely to recognize.<sup>92</sup> The defendant is not told that an attorney might find constitutional issues lurking in the case that might lead to the suppression of vital evidence or other advantageous legal rulings. The defendant is not told that an attorney might find that the factual allegations are legally insufficient to make out the charges in the complaint, or that the evidence might be so weak or the sentence so severe as to make a plea of guilty or *nolo contendere* inadvisable. The defendant is not told that an attorney can offer advice about the great many collateral consequences that can accompany a plea of guilty or *nolo contendere*, including loss of public housing, loss of public benefits and, for the non-citizen, removal from the United States. Perhaps most importantly, as it summarizes the situation most fairly, the defendant is not advised by the court that the waiver of the right to counsel is almost never advisable.<sup>93</sup>

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89. *State v. Spencer*, 783 A.2d 413, 416 (R.I. 2001) (quoting *Faretta v. California*, 422 U.S. 806, 836 (1975)).

90. 487 U.S. 285 (1988).

91. *Id.* at 298.

92. In *Iowa v. Tovar* the United States Supreme Court held that the Sixth Amendment did not compel this particular warning to be given in each and every case involving the waiver of the right to counsel; rather, the Court adhered to its previously espoused position that “the information a defendant must have to waive counsel intelligently will ‘depend, in each case, upon the particular facts and circumstances surrounding that case.’” 124 S. Ct. 1379, 1383 (2004) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

93. The rare situation in which the waiver of the right to counsel might be advisable is also the situation in which a purported waiver is most likely to be involuntary: when the defendant will be incarcerated if he or she elects

Even if one were to assume that the information and warnings given to each defendant in the form of the videotape and the pre-printed waiver form were constitutionally adequate, it is readily apparent that the record in these cases is not constitutionally adequate to establish a knowing and intelligent waiver of the right to counsel.<sup>94</sup> Indeed, the district court seems to be acting in defiance of the Supreme Court of Rhode Island's clearly established preference for an individual colloquy with the defendant about the waiver<sup>95</sup> and its admonition that trial judges must "take the time to inquire into the voluntariness and intelligence of the waiver."<sup>96</sup> The trial court's determination that a defendant has made a knowing and intelligent waiver must be based on the individual circumstances of the case before it, and the supreme court has set out certain factors that it deems relevant to that determination; these factors include the defendant's background, the defendant's experience with attorneys and with the criminal justice system, the defendant's age, the defendant's education, and the defendant's mental and physical health.<sup>97</sup> On a daily basis, in a significant number of cases, the district court finds a waiver of the right to counsel without even the most minimal inquiry into these factors. More importantly, there is no dialogue with the defendant in any of these cases to assure that he or she appreciates in any meaningful way the "dangers and disadvantages of self-representation."<sup>98</sup>

As the United States Supreme Court noted in *Johnson v. Zerbst*,<sup>99</sup> the "purpose of the constitutional guarantee of a right to counsel is to protect an accused from conviction resulting from his

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to be represented by counsel. See note 24 for a description of these circumstances.

94. In the secondary arraignment courtroom in district court in Providence, the proceedings are not recorded in any fashion. The absence of recording equipment would seem to be a clear violation of Rhode Island General Laws § 8-8-12(d), which requires the court to "appoint sufficient court recorders to enable *all* proceedings to be recorded by electronic means." R.I. GEN. LAWS § 8-8-12(d) (1999) (emphasis added).

95. *State v. Thornton*, 800 A.2d 1016, 1026 (R.I. 2002).

96. *State v. Chabot*, 682 A.2d 1377, 1381 (R.I. 1996) (quoting *Strozier v. Newsome*, 871 F.2d 995, 997 n.4 (11th Cir. 1989)).

97. *See State v. Spencer*, 783 A.2d 413, 417 (R.I. 2001).

98. *Id.* at 416 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

99. 304 U.S. 458 (1938).

own ignorance of his legal and constitutional rights.”<sup>100</sup> But it is just that ignorance that is preyed upon each and every day in the arraignment courtrooms. The “assembly-line justice” and the “obsession for speedy dispositions” that the Court decried in *Argersinger v. Hamlin* back in 1972 persist today in Rhode Island.<sup>101</sup> As Chief Justice Burger aptly noted some years later, the goal of achieving justice is “ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant’s ill-advised decision to waive counsel.”<sup>102</sup> Forty years after Clarence Gideon’s case was decided by the United States Supreme Court, it is time for his legacy to find its way into the arraignment courtrooms of the Rhode Island District Court.

#### AUTHOR’S ENDNOTE

Since I completed the initial draft of this article, the leadership of the Rhode Island District Court has expressed an interest in remedying some of the deficiencies I have noted here. In particular, and with no connection whatsoever to this article, the court has supported an effort on the part of the Department of the Public Defender to place two Assistant Public Defenders in an arraignment courtroom in Providence. Those two attorneys endeavor to speak with and then represent those defendants who seem to be at greatest risk of incarceration. In addition, the court has suggested that it may revisit the arraignment procedures that it employs, especially the videotape and the waiver form, with an eye toward improving those procedures with respect to purported waivers of the right to counsel.

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100. *Id.* at 465.

101. 407 U.S. 25, 34-36 (1972).

102. *Faretta v. California*, 422 U.S. 806, 839 (1975) (Burger, C.J., dissenting).

