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STATE OF WASHINGTON

No. 42461-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

STEPHEN CHRISS JOHNSON,

Petitioner,

PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONER

Stephen Johnson, Defendant below, requests discretionary review.

II. DECISION BELOW

Mr. Johnson seeks review of the Court of Appeals, Division II, Order Denying Motion to Modify, entered December 7, 2011. The commissioner's ruling denied review by the court of appeals of the Lewis County Superior Court ruling on RALJ appeal from District Court.

III. ISSUES PRESENTED FOR REVIEW

Did the Superior Court err in ruling that the crime of Driving While License Suspended in the Third Degree, as defined in RCW 46.20.342(1)(c)(iv), includes driving with a license suspended for the sole reason of failure to pay a fine, when the plain language of the statute includes only failure to respond, failure to appear, or failure to comply with the terms of a notice of infraction?

Did the Superior Court err in ruling that a suspension for failure to pay does not violate Equal Protection, as applied to indigent defendants?

IV. STATEMENT OF THE CASE

Stephen Chriss Johnson is an indigent resident of Lewis County. He has not held a regular job since 1976, subsisting on occasional income from odd jobs. (App. at 34-35.) He lives in a dilapidated home which he

has been unable to sell. (App. at 35, 37.) He receives food stamps, energy assistance, and medical assistance. (App. at 34, 38.) He owns a 1985 Toyota truck. (App. at 37; *see* App. at 3.)

On April 14, 2007, Mr. Johnson was pulled over and issued a notice of infraction for driving without a valid operator's permit. (App. at 3-4.) The terms of the notice gave Mr. Johnson three options: 1) pay a fine of $538; 2) request a contested hearing and appear in court; or 3) request a mitigating hearing and appear in court. *Id.* Mr. Johnson requested a contested hearing and appeared in court. (App. at 144-46.) The court found Mr. Johnson had committed the infraction and ordered him to pay a penalty of $260. (App. at 3, 146-47.) Mr. Johnson was unable to pay the fine, which is still outstanding. (App. at 60, 144.)

On September 17, 2007, DOL issued a notice of suspension for failure to pay the fine. (App. at 2.) The suspension became effective November 1, 2007. *Id.*

On September 19, 2008, Mr. Johnson was pulled over and arrested for Driving With License Suspended in the Third Degree. (App. at 96.) He spent four days in custody. (App. at 184.)

At trial, the State presented evidence that Mr. Johnson knowingly drove while his privilege was suspended. Mr. Johnson did not contest this

evidence, but argued that he could not be convicted of the crime charged because his suspension was not for failure to respond, failure to appear, or failure to comply with the terms of the notice of infraction. The District Court found Mr. Johnson guilty.

On RALJ appeal, the Superior Court affirmed the conviction. Mr. Johnson sought discretionary review of the Superior Court's ruling. The commissioner of the Court of Appeals denied review, and a panel of judges denied Mr. Johnson's motion to modify that ruling. Mr. Johnson requests this court accept review.

V. ARGUMENT

Under RAP 13.3(a)(2), the decision of the Court of Appeals is an interlocutory decision. This Court should accept review pursuant to RAP 13.5(b)(1) or (2) because the Court of Appeals committed obvious or probable error which rendered further proceedings useless or substantially limited the freedom of a party to act.

The second prong of these tests is satisfied because the decision of the Court of Appeals terminates Mr. Johnson's ability to obtain review of the Superior Court's erroneous decision. Unless this Court accepts review, Mr. Johnson cannot obtain relief. His freedom to act would be substantially limited and further proceedings would be impossible.

The first prong is satisfied because The Court of Appeals committed at least probable error in denying review under RAP 2.3(d)(2) and (3). The case involves "an issue of public interest that should be determined by an appellate court." *See* RAP 2.3(d)(3). It also involves "a significant question of law under the Constitution of the State of Washington or of the United States." *See* RAP 2.3(d)(2).

This case revolves around Mr. Johnson's conviction of Third Degree Driving While License Suspended ("DWLS 3rd").The proper interpretation of the DWLS statute is a matter of great public interest that should be resolved by this Court. DWLS 3rd, by its plain language, does not include driving with a license suspended for failure to pay a fine, yet the district courts convict drivers every day for just that.

The case also involves significant constitutional questions. Conviction of a crime that does not exist is a deprivation of liberty and property without Due Process of law. In addition, suspension for inability to pay a fine violates Equal Protection, as applied, by attempting to coerce payment from indigent persons who, by definition, are unable to pay.

A. The Interpretation of the DWLS Statute Is an Issue of Public Interest That Should Be Resolved By This Court.

Nearly 300,000 Washington drivers currently have their licenses

suspended for failure to pay their tickets.[1] Many feel compelled to continue driving in order to earn a living.[2] If these drivers were to consult the DWLS statute to determine what penalties they face, they would find a lengthy mess of difficult language and cross references that even the District Court described as "confusing," "extremely complicated," and "not a good situation at all." (App. at 177.) The drivers would not find any language in RCW 46.20.342 to put them on notice that there is a criminal penalty for driving with a suspension based solely on failure to pay.[3] Yet the State is prosecuting and the District Courts are convicting drivers like Mr. Johnson for that very thing. The difference between the plain language of the statute and the way it is being applied is a matter of great public interest that should be resolved by this court.

The court's consideration of public interest includes "the public or private nature of the question, the need for future guidance provided by an

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[1] Austin Jenkins, Northwest News Network, *Nearly 300,000 Wash. drivers suspended for failure to pay tickets*, KPLU radio broadcast (12:13 p.m., July 23, 2011) *available at* http://www.kplu.org/post/nearly-300000-wash-drivers-suspended-failure-pay-tickets (last visited August 4, 2011) (App. at 307). Entire article reproduced in Appendix at 307-10.

[2] *See Id.* (App. at 307-10.)

[3] This lack of notice is also a constitutional infirmity. "A law that fails to give fair notice of what acts will be punished is violative of due process." *City of Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522 (1967). A person of reasonable understanding cannot be left to guess at the meaning of a statute. *Id.* The DWLS statute gives *no notice* of criminal punishment based on a suspension solely for failure to pay a fine.

authoritative determination, and the likelihood of recurrence." *Eide v. Dept. of Licensing*, 101 Wn. App. 218, 223, 3 P.3d 208 (2000). The public nature of the issue and its likelihood of recurrence can be demonstrated by the number of pending cases involving the same issue. *In re A.D.F.*, 88 Wn. App. 21, 24, 943 P.2d 689 (1997).

In 2010, out of 294,474 misdemeanor cases filed statewide,[4] over 98,000,[5] or about one-third, were for DWLS 3rd.[6] In Lewis County, *64 percent* of district court criminal cases are DWLS. (App. at 425.) This same issue recurs daily in the district courts of the state, directly affecting the lives of thousands of Washington residents. There is no published opinion to guide the people or the district courts in interpreting this statute. Hundreds of thousands of Washington residents may wrongly be in jeopardy of criminal punishment for DWLS 3rd, including jail time.

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty'

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[4] Caseloads of the Courts of Washington 2010 Annual Report, Cases Filed (App. at 298).

[5] Statewide DWLS filings for 2010, JIS report compiled by the Administrative Office of the Courts (App. at 299-304).

[6] Jenkins (App. at 309) (one-third); Robert C. Burochowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, National Association of Criminal Defense Lawyers, p. 25-26, 29 (April 2009) *available at* http://www.law.seattleu.edu/Documents/lawclinic/DefInitReport.pdf (App. at 337-38, 341; the full report is reproduced in the Appendix at 311-74) (more than one-third).

> matter and may well result in quite serious repercussions affecting his career and his reputation.

Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). The public needs to know the correct interpretation of the statute.

There is great need for guidance from this court. The high volume of misdemeanor cases creates a preoccupation in the district courts with the movement of cases–speed is substituted for care. *See Argersinger*, 407 U.S. at 34. "The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court." *Id.* at 35. All too often in misdemeanor cases, "judges emphasize expediency over justice."[7] The district courts have become accustomed to applying their erroneous interpretation of the DWLS 3rd statute, like a rubber stamp. This court is best positioned to take the time to analyze the issue and announce the correct rule for the district courts to follow.

The proper interpretation of statutes has often been held to be a matter of sufficient public interest to merit discretionary review. *E.g.*, *State v. Alfonso*, 41 Wn. App. 121, 702 P.2d 1218 (1985) (interpretation of other portions of the DWLS statute); *see also In re Swanson*, 115 Wn.2d 21, 804

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[7] Burochowitz at 44 (App. at 356).

P.2d 1 (1990) (civil commitment statutes); *City of Spokane v. Ward*, 122 Wn. App. 40, 92 P.3d 787 (2004) (conflict between statute and court rule); *In re A.D.F.*, 88 Wn. App. 21, 943 P.2d 689 (1997) (civil and criminal contempt statutes); *State v. Hazzard*, 43 Wn. App. 335, 716 P.2d 977 (1986) (DWI and physical control statutes); *Lowery v. Nelson*, 43 Wn. App. 747, 719 P.2d 594 (1986) (forfeiture statute).

In *City of Spokane v. Ward*, the issue of public interest was whether a person who successfully challenges a traffic infraction judgment by appealing to superior court is entitled to an award of costs on appeal. *Ward*, 122 Wn. App. at 43. In 2002, the year Mr. Ward prevailed in his appeal to superior court, there were 169 such RALJ appeals,[8] only a few of which could have been successful. If less than 169 cases per year was a sufficient public interest to warrant discretionary review, nearly 300,000 suspensions and over 98,000 cases of DWLS 3rd per year should compel discretionary review of this case. This Court should accept review of this important public issue.

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[8] The Courts of Limited Jurisdiction 2002 Annual Caseload Report, Infraction Activity (App. at 305).

B. The Lower Courts Applied an Erroneous Interpretation of the DWLS 3rd Statute, RCW 46.20.342(1)(c).

"When interpreting a criminal statute, a literal and strict interpretation must be given." *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). The rule of lenity requires that ambiguity in a criminal statute be resolved in favor of the defendant. *See In re Cruze*, 169 Wn.2d 422, 427-28, 237 P.3d 274 (2010).

The DWLS statute, RCW 46.20.342, provides in pertinent part:

> A person who violates this section when his or her driver's license or diving privilege is, at the time of the violation, suspended or revoked solely because . . . (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289 . . . is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

RCW 46.20.342(1)(c).

Under a strict interpretation of the plain language of the statute, a person cannot be convicted of DWLS 3rd based on a suspension for failure to pay a fine. Failure to pay is not one of the elements enumerated in the statute. The statute's cross-reference to RCW 46.20.289 does not bring failure to pay within the meaning of the crime. The phrase "has failed to comply with the terms of a notice of traffic infraction or citation" does not

include failure to pay.

1. Failure to pay is not one of the elements enumerated in RCW 46.20.342.

The reason for the underlying suspension is an essential element of the crime, which the State must prove beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502-04, 120 P.3d 559 (2005). The statute provides four possible reasons (hereafter, the "Four Reasons"): 1) the person failed to respond to a notice of infraction; 2) the person failed to appear at a hearing; 3) the person violated a written promise to appear; or 4) the person failed to comply with the terms of a notice of traffic infraction or citation. Failure to pay a fine is not one of these Four Reasons.

Ultimately, the analysis is that simple: a suspension for failure to pay cannot support a conviction of DWLS 3rd because failure to pay is not found in the statute. However, the court must also consider the effect of the phrase "as provided in RCW 46.20.289."

Note the placement of commas and the word "or" in clause (iv). The placement of the "or" restricts the list to the Four Reasons, ending with "failed to comply with the terms of a notice of traffic infraction or citation." Because of this, the phrase "as provided in RCW 46.20.289" cannot be a fifth reason. In addition, the comma separates the phrase from

the last Reason in the list, making the phrase "as provided in RCW 46.20.289" a condition that modifies the entire list of Four Reasons.

"As provided in" is a form of reference used frequently in statutes, generally meaning "in the manner described in the referenced section." It can expand or, more often, limit the meaning of the term it modifies. Here, the phrase "as provided in RCW 46.20.289" means that its antecedents, the Four Reasons, are limited in the manner described in Section 289. To convict for DWLS 3rd, the reason for suspension must be one of the Four Reasons, as those Four Reasons are described in Section 289.

The commissioner of the court of appeals erroneously relied on this reference as a fifth reason, holding that "because [the Department] suspended [Mr. Johnson's] license 'as provided in RCW 46.20.289,' the district court did not err in finding that he was guilty." (Ruling Denying Review at 4.) However, the DWLS statute does not say a person whose license was "suspended as provided in RCW 46.20.289." It says a person whose license was suspended for one of the Four Reasons, as those Four Reasons are set forth in Section 289. The commissioner erred in his interpretation of the statute.

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2. "[A]s provided in RCW 46.20.289" does not bring failure to pay within the meaning of the enumerated elements.

In order to determine how the reference to Section 289 qualifies or explains the Four Objects in the DWLS statute, the court should examine the text of Section 289. It provides, in pertinent part:

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, *other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1, 2005.*

RCW 46.20.289 (emphasis added).

The cross-reference here to "RCW 46.63.070(6), 46.63.110(6), or 46.64.025" neither adds to nor subtracts from the meaning of the Four Reasons. The cross-reference relates to one of two elements required to trigger the Department's ability to suspend, namely: receiving a notice from a court under one of the cross-referenced sections. The second required element is that the notice describes conduct matching one of the Four Reasons, as described. These cross-referenced sections do not change the meaning of the DWLS statute because they do not describe or modify

the Four Reasons.[9]

However, after reciting the Four Reasons, Section 289 provides a limiting exception (in italics above) that *does* modify the Four Reasons. In Section 289, the Four Reasons are limited, in that the person's failure must be related to a violation other than a standing, stopping, or parking violation, and the violation must have been committed on or after July 1, 2005. This exception, carved out of Section 289, also applies to the DWLS statute by way of the phrase "as provided in RCW 46.20.289."

This is the only effect, under the plain language of the statutes, that "as provided in RCW 46.20.289" has on the meaning of the DWLS statute. Section 289 does not expand the meaning of the Four Reasons. Rather, it limits them to exclude standing, stopping, or parking violations, and violations committed before July 1, 2005. It does not add failure to pay. Thus, under the plain language of the statutes, failure to pay is not punishable under DWLS 3rd.

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[9] Note that this interpretation does not render the cross-reference meaningless. The cross-reference in RCW 46.20.289 does not change the meaning of the DWLS statute, but it does have meaning within its own section, in relation to the Department's ability to suspend.

The district court's interpretation, in contrast, would render the Four Objects meaningless everywhere they appear. Under the district court's interpretation, any notice from a court under any of the three cross-referenced sections would be the basis of a suspension supporting a conviction of DWLS 3rd, regardless of whether the person's conduct fell under one of the Four Objects. The Four Objects would have no meaning. Mr. Johnson's interpretation would give meaning to all of the words in the statutes.

This interpretation is also consistent with the text on the back of the defendant copy of a citation, which was written under the authority of this Court.[10] The back of the citation presents an abridged version of DWLS 3rd, in ordinary language. The rendering of clause (iv) leaves out the reference to Section 289 and says nothing about failure to pay a fine. This rendering indicates to the public that Section 289 does not add to the meaning of DWLS 3rd and that failure to pay a fine is not included. The lower courts erred in their interpretations of the DWLS statute.

3. "[Failure] to comply with the terms of a notice of traffic infraction or citation" does not include failure to pay.

The State has argued at every level that "fail[ure] to comply with the terms of a notice of traffic infraction" includes failure to pay, despite the fact that the terms printed on a notice of infraction do not require the driver to pay. The State has never been able to produce any authority for its twisting of the plain meaning of "failed to comply with the terms of a notice of traffic infraction". The correct meaning is found in the usage of the same language in the Nonresident Violator Compact, RCW 46.23.010.

The bill that added clause (iv) to RCW 46.20.342(1)(c) was

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[10] A copy of the defendant copy of a citation is found in App. at 423-24.

enacted to fully implement the Nonresident Violator Compact.[11] The Compact requires license suspension for "*failure* of a motorist *to comply with the terms of a traffic citation.*" RCW 46.23.010, Art. III (emphasis added). The Compact defines "terms of the citation":

> (1) "Citation" means any summons, ticket, *notice of infraction,* or other official document issued by a police officer for a traffic offense containing an order which requires the motorist to respond.
> . . .
> (11) "Terms of the citation" means *those options expressly stated upon the citation.*

RCW 46.23.010, Art. II (emphasis added).

The legislature used this same language in clause (iv): "failed to comply with the terms of a notice of traffic infraction or citation." The phrase means the same thing as it does in the Compact: a failure to comply with "those options expressly stated upon the [notice of infraction]."

The notice of infraction Mr. Johnson received did not expressly state that he must pay the fine. (*See* App. at 3-4.) It only stated that the "case may be sent to a collection agency" if he did not pay. The notice did not mention any possibility of suspension for failure to pay. Mr. Johnson's

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[11] Laws 1993 Chapter 501 (Substitute House Bill 1741) (App. at 270-83) enacted RCW 46.20.289, added subsection (5) to RCW 46.20.291, and added clause (iv) to the definition of DWLS 3rd. The purpose of these changes, according to the House Bill Report (App. at 285), was to meet the requirements of the Nonresident Violator Compact, which Washington had adopted, to obtain the full benefits of the Compact.

failure to pay was not a failure to comply with the options expressly stated on his notice of infraction. Mr. Johnson responded, appeared, lived up to his promise to appear, and complied with the terms expressly stated on his notice of infraction. His conduct fell outside the definition of DWLS 3rd. His conviction, as well as the underlying suspension, should be reversed.

A suspension for failure to pay cannot support a conviction of DWLS 3rd because failure to pay is not one of the four reasons enumerated in the statute. The lower courts applied an erroneous interpretation of the statute.[12] A literal and strict interpretation of the statute *cannot* include suspension for failure to pay. The court of appeals committed probable error when it denied review. This court should accept review.

C. Whether the Underlying Suspension Violated Equal Protection Is a Significant Constitutional Question That Should Be Reviewed by This Court.

A driver cannot be convicted of DWLS when the underlying suspension was unconstitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004); *State v. Dolson*, 138 Wn.2d 773, 782, 982

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[12] App. at 242 (Judge Brosey held that failure to comply with the terms of a notice of infraction "refers in clear and unequivocal language to non-compliance by [not] doing what the *adjudicated* infraction requires" (emphasis added), rather than what the *notice of infraction* requires.); App. at 182 (Commissioner Tripp held that failure to comply "still encompasses the failing to pay because payment on a committed infraction is part of the infraction process.")

P.2d 100 (1999). In *Dolson*, the defendant had been convicted of DWLS 1st. He challenged the underlying revocation as violating due process, and this Court reversed the conviction. "An invalid revocation cannot later support a conviction for driving with a revoked license, even if Dolson had knowledge of the underlying revocation." *Dolson*, 138 Wn.2d at 782.

Mr. Johnson's underlying suspension was invalid because coercive suspension of an indigent driver offends equal protection. In *Tate v. Short*, 401 U.S. 395 (1971), The United States Supreme Court held that imprisonment for the sole reason that the offender was unable to pay a fine was an unconstitutional violation of Equal Protection. This same principle can be applied to suspension of an indigent driver.

In *Tate*, the Court reasoned:

> [The statutory scheme] cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues [by coercing payment of the fine] but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment [does not lead to] collection of the revenue.

Tate, 401 U.S. at 399. The statutory scheme violated equal protection as applied to the indigent because imprisoning indigent defendants was not

rationally related to the government purpose of collecting the fines.

Similarly, in the present case, the statutory scheme limits the punishment for traffic infractions to payment of the fine if one is able to pay, yet imposes the additional penalty of suspension on a driver who cannot pay. The suspension is not imposed for any penal objective, but merely to coerce payment of the fine.

Coercive imprisonment may be appropriate for defendants who are able, *but unwilling,* to pay a fine. *Tate*, 401 U.S. at 400-01. Similarly, suspension of a driver who is able, but unwilling, to pay a fine may also be appropriate. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 227 (2006). But it is offensive to equal protection to impose the additional penalty of coercive suspension on a person who is *unable* to pay a fine. It is irrational to think that suspension will ever lead to payment of the fine by a person who simply does not have the means to pay. Suspension of an indigent driver bears no rational relationship to the purpose of collecting the fine, so it is unconstitutional as applied to indigent drivers like Mr. Johnson.

Suspensions for actual crimes have limited duration. Vehicular assault carries a one year suspension; vehicular homicide, two years; DUI, from 90 days to four years. RCW 46.20.285. But an indigent driver suspended only for failure to pay a fine on an infraction will never get his

license back. At the same time, a wealthy driver can pay the fine and be back on the road the same day. This is not equal protection.

This never-ending suspension has devastating impacts on drivers. Mr. Johnson used to subsist on occasional income from odd jobs, but cannot do so without driving. (*See* App. at 34-35.) He must now rely on government programs such as food stamps, energy assistance, and medical assistance. (App. at 34, 38.) His story is not unusual. (*See* App. at 306-09, 425-26.) The statutory scheme makes criminals out of poor people.

In addition, the statutory scheme imposes costs on the State that far outweigh the fines it hopes to collect. Mr. Johnson now receives over $3,000 per year in public assistance as a result of his suspension, which was imposed to collect a $260 fine. In addition, the State economy loses the productivity of suspended drivers who can no longer travel to work. Police, prosecutors, and the courts spend countless hours dealing with DWLS 3rd instead of crimes that actually threaten public safety.

Just as imprisonment for civil contempt must end when it is clear that the contemnor cannot comply with the court's order,[13] coercive

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[13] *King v. Dep't of Soc. & Health Services*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988) ("To continue one's incarceration for contempt for omitting an act he is powerless to perform would make the sanctions purely punitive. As soon as it becomes clear to the court that the contemnor cannot obey its original order, the court must release him.")

suspension of the driving privilege should not even begin when it is clear that the defendant cannot pay the fine that is the reason of the suspension.

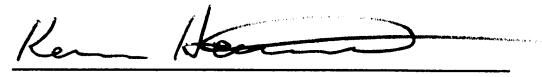
Coercive suspension of indigent drivers is wasteful, immoral, and offensive to equal protection. The court of appeals committed probable error in denying review of this significant constitutional question.

VI. CONCLUSION

The correct interpretation of the DWLS statute is a matter of public interest that could impact hundreds of thousands of Washington residents. The public would greatly benefit from an authoritative determination by this court. The case also involves significant constitutional questions that should be resolved by an appellate court. The court of appeals erred in denying review, rendering further proceedings impossible. This court should accept review.

Respectfully Submitted this 6th day of January, 2012.

CUSHMAN LAW OFFICES, P.S.



Kevin Hochhalter, WSBA #43124
Attorney for Stephen Johnson

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 10 2012, I caused to be served a true copy of the foregoing Motion, by the method indicated below, and addressed to each of the following:

original:	Supreme Court Temple of Justice 415 12th Avenue SW Olympia, WA 98504	____ ____ _X_ ____ ____	U.S. Mail, Postage Prepaid Legal Messenger Hand Delivery Facsimile Electronic Mail
copy:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	____ _X_ ____ ____ ____	U.S. Mail, Postage Prepaid Legal Messenger Overnight Mail Facsimile Electronic Mail
copy:	Shane Michael O'Rourke 345 W. Main St, 2nd Floor Chehalis, WA 98532 appeals@lewiscountywa.gov	_X_ ____ ____ ____ _X_	U.S. Mail, Postage Prepaid Legal Messenger Overnight Mail Facsimile Electronic Mail

DATED this 10 day of January, 2012 in Olympia, Washington.

M. Katy Kuchno
Paralegal to Kevin Hochhalter

86885-9

APPENDIX

To motion for Discretionary Review

Part 1.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
P. O. Box 9030 • Olympia, Washington 98507-9030

July 23, 2009 sls

The information in this report pertains to the driving record of:

Lic. #: JOHNSSC526P3
Name:JOHNSON, STEPHEN CHRISS
PO BOX 13
RANDLE WA 98377

Birthdate: October 23, 1948
Eyes: GRN Sex: M
Hgt: 5 ft 07 in Wgt: 197 lbs
License Issued: October 23, 1997
License Expires: October 23, 2001

After a diligent search, our official record indicates that the status on September 19, 2008, was:

Personal Driver License Status:
- Suspended in the third degree

Commercial Driver License Status:

The following also applied:

PDL Attachments:
- Notice of Suspension November 01, 2007

CDL Attachments:

PLFF. IDENT. 1 EX 1
LEWIS COUNTY
DISTRICT COURT
CASE No. C85203
DEFT. IDENT. ___ EX ___

STATE OF WASHINGTON · OFFICIAL · DEPARTMENT OF LICENSING · SEAL

Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing.

Shannon Smiley

Custodian of Records
Place: Olympia, Washington
Date: July 23, 2009

The Department of Licensing has a policy of providing equal access to its services.
If you need special accommodation, please call (360) 902-3900 or TTY (360) 664-0116.

JOHNSSC526P3 20070414 072585520

ABFT

STATE OF WASHINGTON Department of LICENSING

PO Box 9030, Olympia, WA 98507-9030

I00038445

September 17, 2007

File Copy

JOHNSON,STEPHEN CHRISS
144 ABBY RD PO BOX 13
RANDLE WA 98377

DP

License #: JOHNSSC526P3
Birthdate: 10-23-1948

On 11-01-2007 at 12:01 a.m. your driving privilege will be suspended. The Court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below:

Citation Number	Violation Date	Reason for Citation
I00038445	04-14-2007	NO VALID LICENSE/I

What do I have to do to avoid suspension of my driving privilege?

1. Contact this court to find out how to take care of this citation:
   LEWIS CO. DIST CRT
   345 WEST MAIN/PO BOX 336
   CHEHALIS, WA 98532-0336
   (360) 740-1203
2. Provide proof that you have satisfied the court's requirements. Once the requirements are met, the court will send us notice. Because this may take several days, you may take your copy of the Notice of Adjudication form from the court to any driver licensing office to speed up the process.

What will happen if my driving privilege is suspended?
Make sure that we have received notice that this matter is settled before the date shown above. If we have not, it will be illegal for you to drive and you must surrender your license to any driver licensing office. You must pay a reissue fee and any other applicable licensing fees before a new license can be issued.

May I appeal this action?
Yes. To request an administrative review return the enclosed form or submit a written request to: Department of Licensing, Hearings & Interviews, PO Box 9031, Olympia, WA 98507-9031 or fax to (360)664-8492. Requests must be postmarked within 15 days from the date of this notice. If you have questions, please call (360)902-3878.

If you have other questions after contacting the court, call Customer Service at (360) 902-3900 or visit our website, at www.dol.wa.gov.

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 902-3900 or TTY (360)664-0116.

I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record, postage prepaid, on September 17, 2007.

Agent for the Department of Licensing

Authority: RCW 46.20.289

A 2

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF [redacted] COUNTY , WASHINGTON
STATE OF WASHINGTON ,PLAINTIFF VS. N[redacted] [redacted] FENDANT
COUNTY OF LEWIS
CITY/TOWN OF

COLLECTION

07C4242 F

L.E.A. ORI #: WA0210000 COURT ORI #: WA021013J

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	PHOTO I.D. ON PERSON
JOHNSSC526P3	WA	2001	☒ YES ☐ NO

NAME: LAST JOHNSON, FIRST STEPHEN MIDDLE CHRISS

☐ IF NEW ADDRESS ☐ PASSENGER

ADDRESS PO BOX 13/ US HWY. 12

CITY RANDLE STATE WA ZIP CODE 98377 EMPLOYER LOCATION

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	EYES	HAIR
10-23-48	W	M	5-07	197	GRN	BRO

RESIDENTIAL PHONE NO. ( ) CELL / PAGER NO. ( ) WORK PHONE NO. ( )

VIOLATION DATE ON OR ABOUT MONTH 04 DAY 14 YEAR 07 TIME 24 HOUR 1645 ☐ INTERPRETER NEEDED LANG:

AT LOCATION US HWY. 12 M.P. 111 CITY COUNTY OF LEWIS

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
A91679L	WA	03-08	1985	TOYT		PU	WHITE

TRAILER #1 LICENSE NO.	STATE	EXPIRES	TR. YR.	TRAILER #2 LICENSE NO.	STATE	EXPIRES	TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER SAME AS ABOVE

ADDRESS CITY STATE ZIP CODE

ACCIDENT (NO) NR R I F | COMMERCIAL VEHICLE ☐ YES ☒ NO | HAZARD PLACARD ☐ YES ☒ NO | EXEMPT VEHICLE ☐ FARM ☐ R.V. ☐ FIRE ☒ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

1. VIOLATION/STATUTE CODE	VEHICLE SPEED	IN A	ZONE	☐ SMD ☐ PACE ☐ AIRCRAFT
RCW 46.20.015				

NO VALID DRIVER'S LICENSE WITH VALID ID

FILED
LEWIS CO. DIST. COURT
OCT 1 6 2007

2. VIOLATION/STATUTE CODE

3. VIOLATION/STATUTE CODE

PENALTY U.S.$ 538.00

RELATED # DATE ISSUED 04-14-07

WITHOUT ADMITTING TO HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), BY SIGNING THIS DOCUMENT I ACKNOWLEDGE RECEIPT OF THIS NOTICE OF INFRACTION AND PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

COPY PROVIDED TO X DEFENDANT

DEFENDANT'S SIGNATURE

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENBE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT OR ATTACHED TO THIS INFRACTION IS TRUE AND CORRECT.

OFFICER C. SPAHN 236

OFFICER

INFRACTION

ABSTRACT OF JUDGMENT

INF	RESPONSE	DISPOSITION	PENALTY	SUSPENDED	SUB-TOTAL
1	C (NC)	(C) NC D P DF	$ 250	$	$ 250
2	C NC	C NC D P DF	$	$	$
3	C NC	C NC D P DF	$	$	$
			$10 ITP	TOTAL COSTS $	260

FNDG/JDGT DATE 10/19/7

ABSTRACT MLD TO OLYMPIA

WASHINGTON UNIFORM COURT DOCKET - COURT COPY January 2003

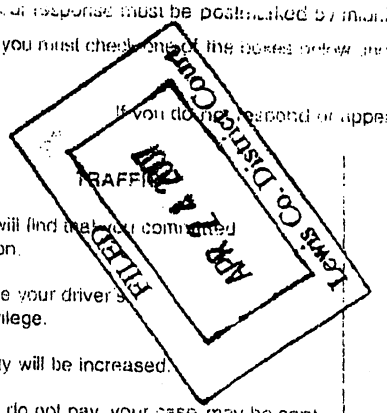
PLFF. IDENT. ___ EX ___
LEWIS COUNTY
DISTRICT COURT
CASE No. C85203
DEFT. IDENT. 2 EX 2

IS 38445

YOU MUST RESPOND WITHIN [illegible] FROM THE DATE ISSUED

Your response must be postmarked by midnight on the day it is due at the court.

To respond, you must check one of the boxes below and return this form to the court listed on the front.



If you do not respond or appear for court hearings:

TRAFFIC

The court will find that you committed the infraction.

You will lose your driver's license/privilege.

Your penalty will be increased.

Also, if you do not pay, your case may be sent to a collection agency.

NON- TRAFFIC

The court will find that you committed the infraction.

It is a crime and will be treated accordingly.

Your penalty will be increased.

Also, if you do not pay, your case may be sent to a collection agency.

Here are the three ways you can respond.
Check one box, then sign and date the bottom of the ticket.

☐ **I have enclosed a check or money order, in U.S. funds, for the amount listed on the front.** I understand this will go on my driving record if "traffic" is checked on the front. DO NOT SEND CASH. NSF checks will be treated as a failure to respond.

☐ **Mitigation Hearing.** I agree I have committed the infraction(s), but I want a hearing to explain the circumstances. Please send me a court date and I promise to appear on that date. I know I can ask witnesses to appear but they are not required to appear. I understand this will go on my driving record if "traffic" is checked on the front. In some cases the court may allow time payments or reduce the penalty. The court may allow time payments or reduce the penalty where allowed by law.

☒ **Contested Hearing.** I want to contest (challenge) this infraction. I did not commit the infraction. Please send me a court date, and I promise to appear on that date. The state must prove by a preponderance of the evidence that I committed the infraction. I know I can require (subpoena) witnesses, including the officer who wrote the ticket, to attend the hearing. The court will tell me how to request a witness's appearance. I understand this will go on my driving record if I lose and "traffic" is checked on the front.

My mailing address is: (PLEASE PRINT)

Name: Stephen C Johnson

Street: [illegible] Apt: _____

City: [illegible] State: _____ Zip Code: _____

☐ Interpreter Language _____

X _____ _____
(SIGNATURE) (DATE)

January [illegible]

In the District Court of the State of Washington
For Lewis County

Filed In Courtroom
SEP 18 2009
Lewis Co. District Court

[ ] State of Washington,
[ ] County of Lewis,
[ ] City of _____,
Plaintiff,

vs.

Stephen Chriss Johnson
Defendant.

Cause No. C85203

JUDGMENT AND SENTENCE
GENERAL

This matter having regularly come before the Court for sentencing and the Defendant personally appearing, [ ] having waived counsel [X] with counsel of record Atty Gray (standby) and the Defendant's guilt having been fully adjudicated on the 18th day of September 2009, by: Appeared 2/27/09
ARRAIGNMENT DATE 9/22/08 Atty Gray appeared 10/1/08 W/D 12/17/08, D pro se 12/17/08-
[ ] a plea of guilty [X] a trial resulting in a verdict of guilty [ ] a stipulated finding of guilt
PARTIES PRESENT - D Johnson, Atty Gray, P/A O'Rourke, Deputy McKnight, Pro Tem Tepp
Now Therefore, It is Ordered, Adjudged and Decreed that the Defendant is guilty of the charge(s):

Count	Crime	RCW or Ordinance (with subsection)
1.	DWLS 3rd Degree	46.20.342.1C
2.		

☐ In count _____, the defendant committed the offense against another family or household member as defined in RCW 10.99.020.
see docket for prior hearings
It is Further Ordered and Adjudged that the defendant be sentenced as follows:
Count 1: Sentenced to serve 90 days in jail and to pay $ 300 in fines.
CS 4 86 days in jail and $_____ in fines are suspended and deferred for 24 months upon the conditions set forth below.

Count 2. Sentenced to serve _____ days in jail and to pay $_____in fines.
_____ days in jail and $_____ in fines are suspended and deferred for _____ months upon the conditions set forth below.

WARNING: **Failure to comply with any of the conditions set forth below during the period of suspension could result in the imposition of some or all of the suspended jail time.**

Conditions of Sentencing: The balance of the jail term is suspended on the following conditions:

[X] Serve 4 days in jail. CS 4
[ ] Be on probation supervision for _____ months or until treatment requirements are met.
[ ] Enter into an [ ] alcohol [ ] drug [ ] DV treatment program within _____ days, provide proof of same to the Court, and complete same.

[ ] Complete current [ ] alcohol [ ] drug [ ] DV treatment program with _____.

[ ] Pay fines and assessments in the sum of $ _____.

[✓] Reimburse the State of Washington, the County of Lewis or the named City for:

Public Defender Fees $ 360 Warrant Fees $ _____ Jail Costs $ _____

DV Assessment $ _____ (County Domestic Violence Penalty)

TPC Assessment $ 102.50 (Criminal Traffic Penalty)

CFT Assessment $ 43 (Criminal Conviction Fee-Traffic)

CFN Assessment $ _____ (Criminal Conviction Fee-Non-Traffic)

CAS/CAL Drug Analysis Fee $ _____ (CAS-Crime Lab Analysis Fee / CAL-Crime Lab Analysis Fee)

Other: $ _____

[ ] Pay a probation supervision fee of $_____.

[ ] Complete Alcohol Drug Information School within _____ days.

[ ] Complete a [ ] Domestic Violence VIP and/or a [ ] DUI VIP within _____ days.

[ ] Do not possess or consume alcohol or controlled substances unless prescribed by a physician.

[ ] Your right to drive is suspended/revoked for _____ days.

[✓] Do not drive unless you are both licensed and insured.

[ ] Clear all warrants and provide written proof to the Court within _____ days.

[ ] Furnish the court with written proof of valid driver's license by _____.

[✓] Have no ~~criminal charges or~~ major traffic WSR convictions during the next two years.

[ ] Pay restitution into the Court registry in the amount of $ _____.

[ ] **This crime involves a sex offense, or a kidnapping offense involving a minor**, as defined in RCW 9A.44.130. The defendant is required to register with the county sheriff as described in the "Offender Registration" Attachment.

[ ] Other: _____

Total number of days to be served by imprisonment in Jail or by Confinement: 4 w/ GS 4

(See Jail Commitment form for details as to commencement date and alternative sanctions)

Total Fines, Assessments, and Costs to be paid: $ 805.50

Payment shall be made as follows: — D Request to collections

Send payments to: ***Lewis County District Court, PO Box 600, Chehalis WA 98532-0600***

Dated: 9/18/9

Pro Pro **Judge/~~Commissioner~~**

I have read the terms, conditions, and warnings and have received a copy of this document.

Dated: 18 Sept 09

Defendant Signature and Date of Birth

(Your rights on appeal of this decision are on the back of this page)

Distribution: White - Court Canary - Defendant Pink - Prosecutor Gold – Defense Attorney

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

State of Washington,
City of _____,

State of Washington,
~~Plaintiff,~~ Respondent

vs.

Stephen C. Johnson,
~~Defendant~~ Appellate

District Court No. C 85203

Superior Court No. 09-1-00586-3

Notice of Appeal

Filed
OCT 6 2009
Lewis Co. District Court

The Appellant *(Please Print Your Name)* Stephen C. Johnson seeks review by the Lewis County Superior Court of the decision rendered in the Lewis County District Court under Case No. C 85203 entered on 18 Sept 09.

Received & Filed
LEWIS COUNTY, WASH
Superior Court
OCT 06 2009
Kathy A. Brack, Clerk
By _____ Deputy

Type of Case Appealed:

☒ Criminal (RALJ) DWS 3rd
(include charge description)

☐ Civil (RALJ) ☐ Infraction (RALJ)

Designate each decision to be reviewed:

Motion To Dismiss, motion for Reconsideration
Interlectory Appeal, Trial.

Dated this 6 day of October, 2009.

Stephen C. Johnson
Appellant

Appellant or Attorney for Appellant

Name: _____

Address: _____

_____

_____

Telephone: (___) _____

Bar No. _____

Attorney for Respondent

Name: _____

Address: _____

_____

_____

Telephone: (___) _____

Bar No. _____

Appeal –Notice of– 2005/f

RECEIVED

AUG 15 2011

CUSHMAN LAW OFFICES

☐ Hearing is set
Date:
Time:
Judge/Calendar:

Received & Filed
LEWIS COUNTY, WASH
Superior Court
NOV 03 2010
Kathy A. Brack, Clerk
By Deputy

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

STATE OF WASHINGTON

Respondent,

v.

STEPHEN C. JOHNSON,

Appellant.

District court case no. C85203

Superior court case no. 09-1-00586-3

APPELLANT'S BRIEF

Appellant Stephen Johnson was convicted on September 19, 2009, of Driving While License Suspended in the Third Degree under RCW 46.20.342(1)(c) in the Lewis County District Court. Mr. Johnson appeals that conviction because the state failed to prove every element of the crime charged and for Constitutional infirmities in the motor vehicle licensing statutes.

SUMMARY OF FACTS

Mr. Johnson is an indigent resident of Lewis County. He is disabled and has not held a job since 1976. Transcript of Hearing on Motion for New Counsel, June 2, 2010 (**EXHIBIT A**), at 16:20-17:4. He lives in a dilapidated home which he has been unable to sell. Id. at 17:11-23. He receives food stamps and medical assistance. Id. at 20:10-20. He owns a 1985 Toyota truck, the vehicle he has driven at all times pertinent to this case. Id. at 19:3-5; *see* Defendant's Exhibit 2. Mr. Johnson's conviction in this case is the result of a string of events that began years ago.

Mr. Johnson used to hold a valid Washington driver's license. Transcript of Hearing on Motion for Reconsideration, March 19, 2009 (**EXHIBIT B**), at 11:14-20. At that time he had a clean driving record. Id. at 12:14. A few years ago, Mr. Johnson applied to renew his driver's license. Id.

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ATTORNEYS AT LAW

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OLYMPIA, WASHINGTON 98501
(360) 534-9183 FAX: (360) 956-9795

at 11:14-20. The Department of Licensing ("DOL") refused to renew his license for failure to provide a residence address. Id. at 12:3-4, 15-17. At the time, Mr. Johnson did not have a primary residence. Id. at 13:5-6.

Mr. Johnson continued to exercise his driving privilege. On April 14, 2007, he was pulled over and issued a notice of infraction for driving without a valid operator's permit. Defendant's Exhibit 2. The terms of the citation gave Mr. Johnson three options: 1) pay a fine of $250; 2) request a contested hearing and appear in court; or 3) request a mitigating hearing and appear in court. Id. Mr. Johnson requested a contested hearing and appeared in court. Transcript of Trial, September 18, 2009 (hereafter, "Trial"), at 56:21-25, 58:16-24. The court upheld the citation and ordered Mr. Johnson to pay a monetary penalty. Id. at 59:5-60:1. Mr. Johnson was unable to pay the fine, which is still outstanding. Reconsideration at 16:8-12; *see* Trial (**EXHIBIT C**) at 56:21.

On September 17, 2007, DOL issued a notice of suspension for failure to pay the fine. Plaintiff's Exhibit 1. The suspension became effective November 1, 2007. Id.

On September 19, 2008, Mr. Johnson was again pulled over and this time was arrested for Driving With License Suspended in the Third Degree. Citation; *Exhibit C* at 8:8-16; He spent four days in custody. See *Exhibit C* at 96:7-8.

Before trial, Mr. Johnson filed a motion to dismiss, arguing that the underlying suspension of his driving privilege was unconstitutional on due process and equal protection grounds. The District Court denied his motion on February 5, 2009. Mr. Johnson filed a motion for reconsideration of that decision, which the District Court denied on March 19, 2009. At the hearing on that motion, the District Court allowed Mr. Johnson to present limited testimony on the record for the purpose of appeal. Mr. Johnson made an interlocutory appeal of denial of his motion to dismiss, but the appeal was dismissed and the case proceeded to trial.

At trial on September 18, 2009, the State presented evidence that Mr. Johnson was driving on the public highways while his driving privilege was suspended and that Mr. Johnson knew his privilege was suspended. Mr. Johnson did not contest this evidence, but argued that he could not be convicted of the crime charged because it does not apply to a suspension for nonpayment of fines. The District Court found Mr. Johnson guilty and Mr. Johnson has appealed to this Court.

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ARGUMENT

This Court should reverse Mr. Johnson's conviction for Driving While License Suspended ("DWLS") in the Third Degree because the State failed to prove every element of the crime charged and because the underlying suspension was unconstitutional.

I. This Court Should Reverse Mr. Johnson's Conviction Because the State Failed to Prove Every Element of the Crime Charged.

In order to convict a criminal defendant, the State must prove every element of the crime charged beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). The reason for suspension is an essential element of the crime of DWLS. Smith, 155 Wn.2d at 502-04 (reversing a conviction for DWLS in the First Degree for the State's failure to prove the underlying suspension was for being a habitual traffic offender). The State must also prove that the underlying suspension complied with due process. State v. Storhoff, 133 Wn.2d 523, 527, 946 P.2d 783 (1997).

Questions of statutory construction are reviewed de novo. Smith, 155 Wn.2d at 501. "When interpreting a criminal statute, a literal and strict interpretation must be given." State v. Wilson, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). The legislature means exactly what it says; a court "cannot add words or clauses when the legislature has chosen not to include that language." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). This Court must engage in a literal and strict reading of the statutes involved and should refuse to entertain words or phrases that the legislature did not write.

DWLS in the Third Degree is defined in RCW 46.20.342(1)(c). The State attempted to prove that Mr. Johnson fell under alternative (iv). The statute provides:

> A person who violates this section when his or her driver's license or diving privilege is, at the time of the violation, suspended or revoked solely because . . . (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 42.20.289 . . . is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

RCW 46.20.342(1)(c). This statute simply does not apply to Mr. Johnson. Mr. Johnson presented uncontroverted testimony at trial that he responded to the underlying notice of traffic infraction (driving without a valid operator's permit) by requesting a contested hearing and that he never failed to appear in court. The only alternative that remains, and on which the conviction relies, is the allegation that Mr.

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Johnson failed to comply with the terms of the notice of traffic infraction.

But Mr. Johnson presented competent evidence at trial that he did comply with the terms of the notice. The District Court admitted the original notice as evidence. The notice provides:

> **YOU MUST RESPOND WITHIN FIFTEEN (15) DAYS FROM THE DATE ISSUED.**
>
> . . .
>
> To respond, you must check one of the boxes below and return this form to the court listed on the front.
> If you do not respond or appear for court hearings: [list of consequences]
>
> **Here are the three ways you can respond.**
> **Check one box, then sign and date the bottom of the ticket.**
>
> __ **I have enclosed a check or money order, in U.S. funds, for the amount listed on the front. . . .**
>
> __ **Mitigation Hearing. . . .**
>
> __ **Contested Hearing.** I want to contest (challenge) this infraction. I did not commit the infraction. Please send me a court date, and I promise to appear on that date. The state must prove by a preponderance of the evidence that I committed the infraction. I know I can require (subpoena) witnesses, including the officer who wrote the ticket, to attend the hearing. The court will tell me how to request a witness's appearance. I understand this will go on my driving record if I lose and "traffic" is checked on the front.

Defendant's Exhibit 2 (emphasis in original). Mr. Johnson complied with the terms of the notice by requesting a contested hearing.

Neither the statute nor the terms of the notice require payment of a fine imposed by the court after a contested hearing. The statute only requires that the person respond to and comply with the terms of the notice, and that the person appear in court. The terms of the notice, under the option elected by Mr. Johnson, only require the request for a contested hearing, nothing more. Suspension for reason of nonpayment of a fine does not qualify for DWLS in the Third Degree under the plain language of the statute under which Mr. Johnson was charged. The State's argument that nonpayment of fines is included requires this Court to give meaning to additional words or clauses that the legislature did not include in the statute. A literal and strict interpretation of the statute **cannot** include suspension for nonpayment of fines because those words do not appear in the statute.

An examination of RCW 46.20.289, referenced by Section 342, is of no avail in attempting to bring Mr. Johnson under the definition of DWLS in the Third Degree. Section 289 directs DOL to suspend driving privileges under the same conditions listed in Section 342:

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> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 **that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation** . . . .

RCW 42.20.289 (emphasis added). The references to RCW 46.63.070(6), 46.63.110(6), and 46.64.025 simply specify the conditions under which a court will send notice to DOL. The words that follow ("that the person has . . . .") specify the conditions under which DOL "shall suspend all driving privileges." Once again, failure to pay a fine is not one of the listed conditions. Section 289 adds nothing to the meaning of the language of Section 342.

The State has failed to prove an essential element of the crime charged. The reason for the underlying suspension is an essential element of DWLS. Mr. Johnson's driving privilege was not suspended for any of the reasons provided in RCW 46.20.342(1)(c). It was suspended for nonpayment of a fine. Nonpayment of a fine is not "fail[ure] to comply with the terms of a notice of traffic infraction" where the terms of that notice did not require compliance with any court order following the contested hearing. If the Legislature had intended suspension for nonpayment of fines to qualify a defendant for DWLS in the Third Degree, it could easily have said so, but it did not. For this Court to hold that suspension for nonpayment of fines subjects a person to criminal sanctions under RCW 46.20.342(1)(c) would be adding words or clauses that the legislature plainly did not write. According to the plain language of the statute and the notice, Mr. Johnson cannot be convicted of the crime charged. The State has failed to prove a reason for Mr. Johnson's suspension that brings him under the force of RCW 46.20.342(1)(c). This Court should reverse the conviction.

The State erroneously argues that this strict interpretation of the statute leads to absurd results that would allow an offender to escape punishment for failure to pay a fine. But the State has failed to fully understand the statutory scheme. RCW 46.63.110(6) still requires DOL to suspend the license of a person who fails to pay a fine ordered by a court after a hearing. RCW 46.63.020 provides that any violation of Title 46 not specifically listed in that section as a criminal offense is an infraction. Driving with privilege suspended for any reason is a violation of RCW 46.20.342(1), but a suspension for failure to pay a fine is not a basis for any criminal offense listed in RCW 46.63.020, so it must be an infraction. A person who fails to pay a fine would still have his or her driving privilege suspended and could be

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subject to further fines for the infraction of driving while license suspended for failure to pay a fine (subject to civil infractions, not criminal jeopardy). Here the State is seeking criminal penalties that are contrary to the plain language of the statutes. This Court should reverse Mr. Johnson's conviction.

II. This Court Should Reverse Mr. Johnson's Conviction Because the Underlying Suspension Was Unconstitutional.

A driver cannot be convicted of DWLS when the suspension was unconstitutional. City of Redmond v. Moore, 151 Wn. 2d 664, 670, 91 P.3d 875 (2004). Mr. Johnson's conviction in this case is the result of an unconstitutional refusal by DOL to renew Mr. Johnson's license. The conviction rests on the suspension of Mr. Johnson's driving privileges by DOL on November 1, 2007. DOL suspended Mr. Johnson's driving privileges because he did not pay a fine. Mr. Johnson incurred the fine for the infraction of driving without a valid operator's permit on April 14, 2007. Mr Johnson did not have a valid license because DOL refused to renew his license on the grounds that he did not provide a residence address as required under RCW 46.20.091(1)(d). This requirement violates the Equal Protection clause of the U.S. Constitution and Article 12 of the Washington State Constitution by denying homeless persons the right to obtain a driver's license, without any rational basis for doing so. Thus Mr. Johnson has now been convicted of a crime for the sole reason that he was homeless when he attempted to renew his driver's license and too poor to pay the fine for the resulting traffic infraction.

A. Requirement of residence address to obtain a driver's license is unconstitutional on its face.

Regulation of driver's licenses must be rationally related to a legitimate government interest. *See* City of Spokane v. Port, 43 Wn. App. 273, 275-76, 716 P.2d 945 (1986) (driving privilege is subject to reasonable regulation). In the equal protection context, the **classification** that is drawn must be rationally related to the government purpose. State v. Osman, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

RCW 46.20.091(1)(d) draws a classification between persons with a residence address and persons without. A homeless person cannot qualify for a driver's licence because the person will be unable to provide a residence address on the application. In order to pass the rational basis test, there must be some rational relationship between this exclusion of the homeless and some legitimate government purpose.

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The District Court indicated that the government interest served by this requirement is the need of law enforcement to be able to locate violators of motor vehicle regulations, especially when the violators seek to evade penalties. But the exclusion of homeless persons without an actual residence address is not rationally related to accomplishing this purpose.

Most violations are detected firsthand by law enforcement officers who give notice of infraction or citations directly to the offending drivers. In such cases, a homeless person is as easy to locate as one with an actual residence address, since the violator is physically present. Other violations are detected under circumstances where only the vehicle registration is observable (a parked car or toll cameras, for example). In these cases, notice is sent to the person indicated on the vehicle registration, not to the address on a driver's license, so it makes no difference if the driver provided a residence address.

When DOL is required by law to suspend a license, such as when a person fails to respond or appear in court, DOL follows the procedures of RCW 46.20.245, which requires that notice of suspension be **mailed** to the address of record, which is often the address given when applying for (or renewing) a driver's license. For this purpose, any valid mailing address would be sufficient; an actual residence address is not necessary. A homeless person who provides a mailing address will be just as easily located as a person who provides an actual residence address. In the rare instance that an arrest warrant is issued to compel a criminal defendant to appear in court, a homeless defendant is not any more difficult to locate, when the defendant is seeking to evade capture. And since proof of residence is not required under the statute, a homeless person is no more likely to provide a false address than is any other person.

There is no rational relationship between the exclusion of homeless persons and the purpose of locating offenders. It is unreasonable for the state to deny a person the privilege of a driver's license for the sole reason that the person is homeless and unable to provide a residence address. This Court should hold RCW 46.20.091(1)(d) invalid as a violation of the Equal Protection clause of the U.S. Constitution and Article 12 of the Washington State Constitution, and reverse Mr. Johnson's conviction that resulted from DOL's unconstitutional refusal to renew his license.

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B. Suspension for nonpayment of fines is unconstitutional as applied to indigent defendants.

In Tate v. Short, 401 U.S. 395 (1971), The United States Supreme Court held that imprisonment for the sole reason that the offender was unable to pay a fine was a violation of equal protection. Mr. Johnson's situation is analogous because the original infraction, the suspension, and the criminal conviction are all for the sole reason of his indigency.

The Court in Tate held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Tate, 401 U.S. at 398. The court reasoned:

> [The statutory scheme] cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues [by coercing payment of the fine] but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment[does not lead to] collection of the revenue.

Tate, 401 U.S. at 399. The statutory scheme failed the rational basis test because imprisoning those unable to pay fines was not rationally related to the government purpose of collecting the fines.

Similarly, in the present case, the statutory scheme creates an additional coercive penalty of suspension for those unable to pay fines for traffic infractions, which penalty is not rationally related to the government purpose of collecting the fines. Suspension of the driving privilege for inability to pay a fine is an automatic result; it is not punishment for a separate infraction. This suspension is not related to any penal objective, nor is it related to public safety since failure to pay a fine creates no danger on the roadways. *See* Moore, 151 Wn. 2d at 677. It is a penalty imposed solely to coerce the payment of the fine. It should be just as obvious here as it was to the Court in Tate that this coercive suspension cannot serve its purpose when a defendant is indigent. The defendant cannot pay because he is indigent, and no length of suspension will ever be able to coerce him into paying when he is unable. The statutory scheme creates an invidious discrimination against indigent defendants and violates equal protection by imposing a coercive punishment for the sole reason that the defendant is unable to pay the fine.

Just as imprisonment for coercive civil contempt must end when it is clear that the contemnor cannot comply with the court's order, King v. Dep't of Soc. & Health Services, 110 Wn.2d 793, 804, 756

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P.2d 1303 (1988) ("To continue one's incarceration for contempt for omitting an act he is powerless to perform would make the sanctions purely punitive. As soon as it becomes clear to the court that the contemnor cannot obey its original order, the court must release him."), coercive suspension of the driving privilege should end, or rather, not even begin, when it is clear that the defendant **cannot pay** the fine that is the reason of the suspension.

The Court in Tate left open the possibility that coercive imprisonment may be appropriate for defendants who are able, but unwilling, to pay a fine. Tate, 401 U.S. at 400-01. Similarly, suspension of the driving privilege of a defendant who is able, but unwilling, to pay a fine may be appropriate. But it is offensive to equal protection to impose such a suspension for the sole reason that a person is unable to pay a fine. Thus the statute is unconstitutional as applied to Mr. Johnson. The suspension of his driving privilege for the sole reason that he is unable to pay his fine should be lifted and the resulting conviction for DWLS reversed.

III. Mr. Johnson Received Ineffective Assistance of Counsel at Trial.

The conviction should be overturned because Mr. Johnson received ineffective assistance of counsel at trial. Mr. Jerry Gray was appointed to represent Mr. Johnson, an indigent defendant. Reconsideration at 5:25. Mr. Gray refused to propound Mr. Johnson's constitutional and statutory arguments and insisted that Mr. Johnson proceed pro se. *Exhibit B* at 6:2-4 ("It has become clear to me that my appropriate role would be to be stand-by counsel and I have informed Mr. Johnson of that.").

Mr. Gray's actions were unreasonable. There was no reason to refuse to make Mr. Johnson's constitutional and statutory arguments. These arguments, as propounded above, are not frivolous and are based in law and fact, including a good faith argument for the modification of existing (and erroneous) statutory interpretation. *See* RPC 3.1. Rather than make these reasonable arguments, Mr. Gray pressured Mr. Johnson into proceeding pro se against his will. Mr. Gray's insistence on the role of stand-by counsel unreasonably deprived Mr. Johnson of effective assistance of counsel. Any assistance of competent counsel in making the constitutional and statutory arguments would have a reasonable probability of leading to a different result.

Because Mr. Johnson was deprived of his Constitutional right to effective assistance of counsel,

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the conviction should be reversed.

IV. **The Trial Court Violated Procedural Due Process In Its Finding of No Indigency And Denial of Counsel on Appeal.**

On June , 2010, the District Court held a hearing on Mr. Johnson's motion to substitute counsel for his appeal. At that hearing, without any prior notice or opportunity to prepare evidence or argument, the court sua sponte raised the issue of whether Mr. Johnson qualified as indigent for purposes of appointed counsel. *Exhibit A* at 14:14-22. The court questioned Mr. Johnson at length about his financial status. *Exhibit A* at 15-23. Throughout the entire proceeding, counsel for the prosecution was present. *See Exhibit A* at 5-6 and 23.

Presence of counsel for prosecution during this impromptu indigency hearing violated Mr. Johnson's due process rights and confidentiality protected by statute and court rules. *See* RCW 10.101.020(3) ("Any information given by the accused under this section or sections shall be confidential and shall not be available for use by the prosecution in the pending case."); CrRLJ 3.1(d)(3) ("Information given by a person to assist in the determination of whether he or she is financially able to obtain a lawyer . . . shall not be available for use to the prosecution.").

The surprise hearing on indigency violated procedural due process requirements of notice and a fair opportunity to be heard. Without any notice that the court would raise the issue at the hearing, Mr. Johnson had no opportunity to prepare an argument for his position that he was indigent.

The court erroneously found that Mr. Johnson was not indigent. Under RCW 10.101.010, a person is indigent if one of four conditions is met. RCW 10.101.010(1) (note the use of the disjunctive "or" in listing the conditions). One of those conditions is receiving one of an enumerated list of types of public assistance, which includes food stamps. RCW 10.101.010(1)(a). Mr. Johnson testified at the hearing that he receives food stamp benefits. *Exhibit A* at 16:4. Because the statutory list is disjunctive, failure to meet any of the other criteria does not disqualify Mr. Johnson from being indigent. Since he meets the qualification of receiving food stamps, all other considerations are irrelevant.

Due to this unconstitutional and erroneous deprivation of Mr. Johnson's right to appointed counsel, Mr. Johnson was forced to obtain private counsel. To correct this error, this Court should order Mr. Johnson's attorney fees be paid out of public funds.

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CONCLUSION

This Court should reverse Mr. Johnson's conviction because the State failed to prove every element of the crime charged and because the underlying suspension was unconstitutional. The statute defining the criminal offense of DWLS in the Third Degree, RCW 46.20.342(1)(c), does not, by its terms, include a suspension for failure to pay a fine. Neither does RCW 46.20.289, referenced by Section 342, grant DOL authority to suspend for failure to pay a fine. DOL may suspend under RCW 46.63.110(6) for failure to pay a fine, but that suspension does not form the basis for any crime under RCW 46.63.020, so DWLS for failure to pay a fine must be a mere infraction. This Court should reverse the conviction.

Further, suspension of Mr. Johnson's driving privilege was unconstitutional. The people have the right to use public roads in an ordinary and customary manner. The state's interest in regulating the people's use of the roads is to promote public safety and welfare. The requirement of a residence address for issuance of a driver's license draws an unconstitutional classification that burdens the homeless without any rational relationship to the purpose of promoting public safety and welfare. Suspension of driving privileges for nonpayment of a fine is an automatic coercive penalty for purposes of collecting revenue that unconstitutionally punishes indigent people without any rational basis for expecting the suspension to lead to collection of the fine. Suspension cannot coerce payment from a person who cannot pay. This Court should reverse the conviction and the underlying, unconstitutional suspension. This Court should further hold that the requirement of a residence address, as opposed to a mailing address, is unconstitutional on its face.

DATED this 28 day of October, 2010.

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LEWIS COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	NO. C85203
Plaintiff,	)	
vs.	)	
STEPHEN C. JOHNSON,	)	
Defendant.	)	

COPY

VERBATIM REPORT OF TAPE-RECORDED PROCEEDINGS
Before
THE HONORABLE R.W. BUZZARD
June 2, 2010

Transcribed By:

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MS. CHRISTINE E. NEWBRY	ATTORNEY AT LAW
MS. CAILEN WEVODAU	PROSECUTING ATTORNEY
MR. STEPHEN C. JOHNSON	PRO SE

GLOSSARY OF PARENTHETICALS

(Indiscernible):	Words were heard, but not understood.
(Inaudible):	Sounds were heard, which was an apparent response, but could not be understood.
(No audible response):	There was no sound.

PROCEEDINGS

THE COURT: Is that working okay?

MR. JOHNSON: Yes, sir.

THE COURT: All right. Thank you. This is C85203, State of Washington versus Stephen Chris Johnson, who is present, not in custody, at this point represented by Ms. Newbry. The State is represented by Ms. Wevodau.

The matter is before the Court on the Superior Court's order extending the district court order's jurisdiction to determine the issue of counsel.

Is that correct?

MR. JOHNSON: I believe so, yes.

MS. NEWBRY: That is correct.

THE COURT: Okay. Thank you for your patience because we kind of combined calendars. I appreciate that.

And I will let all parties know that I have read everything that has been submitted, both Mr. Johnson's motion for new counsel as well as Ms. Newbry's response

to Appellant's request for new counsel, so I understand both party's positions.

Mr. Johnson, this is your motion. I will hear from you.

MR. JOHNSON: Your Honor, first I'm asking to exclude the prosecutor. This is an issue between me and counsel and I believe that there could be things discussed here today that would be prejudicial to my case, and the State has no interest in being here at this point.

THE COURT: Ms. Wevodau, would you like to be heard in response to that.

MS. WEVODAU: Yes. If the State would be excluded from this motion, it would be an improper ex parte communication between the Defendant and the Court and it would not be proper and the State would ask that that not be ordered.

THE COURT: Okay. Anything further on that issue, Mr. Johnson?

MR. JOHNSON: Well, I have read some cases and it - it seems that this case and the issue of indigency is something that is sealed and is not privy to the State. And I am here today adverse to my counsel and as such she is not effectively representing me. And I'm here without representation and I (inaudible) waive my

right to that.

I do believe that the State has no interest in this. And my case could be prejudiced by having the State present here today.

THE COURT: Thank you. Mr. Johnson, the factual matters - you filed with the Court your allegations?

MR. JOHNSON: Yes.

THE COURT: All right. That's public record. The State likely has a copy of that already because you filed it with the Court. I don't intend or - I don't see as necessary anything other than what you filed to be argued. It would not be proper for me to exclude the State. I will not. That motion is denied.

MR. JOHNSON: Thank you.

THE COURT: Any other preliminary matters?

MR. JOHNSON: Well, I'm in a position here that I'm adverse to my counsel and I'm not being effectively related - or represented here today and I should be represented by counsel that is not adverse to my position.

In other words, there is going to be things said here today that are going to be denied by counsel or by me and it is - it is a position where I'm not being represented here.

THE COURT: Mr. Johnson, it is my understanding

that it is your belief that you have set forth in your motion that, first of all, you don't believe that Ms. Newbry is pursuing your appeal in a timely fashion.

MR. JOHNSON: That's correct.

THE COURT: And you are also alleging that she is not willing to pursue the issues on appeal that you wish her to pursue.

MR. JOHNSON: That is correct.

THE COURT: It is my understanding also that you are asking the Court not only to remove Ms. Newbry - Newbry but to allow you to interview all of the attorneys that are available for appointment by the county commissioners to be able to choose one that you believe would best suit you.

MR. JOHNSON: I think it would be better described as to not walk in with my brief and have an attorney say, "I don't want to do this," is a better way to describe that; to find an attorney that is understanding of what my case is and is willing to proceed with it rather than have you assign a counsel, me walk in and have them say that they are not willing to do this.

THE COURT: Okay. You understand that we are working off of the bas- - basic premise, Mr. Johnson - and I'm sure you have come across this in your research

that if you are found to be indigent by the Court, you are entitled to competent representation, but not competent representation of your choosing.

MR. JOHNSON: I understand that.

THE COURT: Okay.

MR. JOHNSON: But what I'm saying is I don't want to have to come back here again with another attorney that says, "I don't want to do this." And I think part of the issue there lies in their compensation in the fact that they are limited to $1,300 by their contract including costs, and I don't think anybody can effectively represent me on that amount of money.

THE COURT: So you don't think that if that is, in fact, their contractual basis with the county commissioners and that's the only remuneration that they will receive regardless of the issues on their appeal, are you telling me that there is nobody that we could appoint that would be able to adequately represent you based on their contract?

MR. JOHNSON: I believe that so. I don't know whether Superior Court has different attorneys on different contracts. I have only read a copy of the district court counsel's (inaudible) to be district court counsel's contract and so I'm not sure there.

Now, I have here a copy of RCW 10.10.120 and it

discusses what the court must determine when determining indigency. And one of the issues there that they have to do is the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charge of an attorney in the community for rendering services.

THE COURT: Mm-hmm.

MR. JOHNSON: And that - I just don't think that - I think that the State is limiting the amount of defense that I get by that amount.

THE COURT: Now, you are misinterpreting the essence of that statute, Mr. Johnson. And this is besides the point, but to give you some clarification as to my, and I believe the entire judiciary's, interpretation of that statute is that if the guidelines say that the cutoff is $1,100 for an individual as far as 125 percent of the base poverty guidelines - so if somebody comes in and says they make $1,500 a month, but the cutoff is $1,100 a month, so theoretically, they have some disposable income, I'm to take into consideration whether or not that $300 or $400 is sufficient to hire somebody for that same representation in appointing counsel.

So I don't arbitrarily say, "Oh, you are above the cutoff. You can't have counsel." That's the

consideration I make, not whether or not our court-appointed counsel need - they all work for the county commissioners on a contract basis. They don't limit the effort they put in. But that's besides the point. That's just a little insight to my interpretation of that statute.

To the essence of your motion, Mr. Johnson, you said that you don't believe that she is representing you timely and that she is not pursuing the issues that you wish. Please tell me how she is not competent to represent you.

MR. JOHNSON: Well, by statute there is 45 days to file a brief after the filing of the appeal. She didn't file a brief within the 45 days and to this date I have not seen a brief from her.

I have my own brief and I have worked on that, but she said she wanted to rewrite that brief. And then later on she said she wanted to limit it to one issue rather than the issues that I had brought up.

I have a draft of the brief here, if you would like to review it. It is confidential at this point and it has not been filed, but it is for --

THE COURT: Well, if you hand it up to the Court, it is not confidential anymore.

MR. JOHNSON: I understand.

THE COURT: Is your appeal still pending?

MR. JOHNSON: Yes, sir.

THE COURT: It has not been dismissed?

MR. JOHNSON: As far as I know. It is my understanding that Mr. O'Rourke (phonetic) indicated that he was going to bring a motion to dismiss for (inaudible) of prosecution.

THE COURT: Has that been done?

MR. JOHNSON: Well, I started this procedure and he has put that off --

THE COURT: Okay.

MR. JOHNSON: -- pending the outcome of this.

THE COURT: Do you have a mailing address?

MR. JOHNSON: No.

THE COURT: All right. Perhaps you need to get a mailing - we have sent you mail, but it has been returned as "Refused." That's just - I'm trying to get as to whether or not you are receiving information that your attorney may be sending to you because you are obviously not getting information that we are sending to you regarding your appeal.

MR. JOHNSON: I have a telephone number and --

THE COURT: Well, we are not going to call you, Mr. Johnson.

MR. JOHNSON: I --

THE COURT: The Court will not call you.

MR. JOHNSON: I understand.

THE COURT: Okay.

MR. JOHNSON: But I also have an attorney that is representing me and I would assume that things from the Court would be sent to her --

THE COURT: They are.

MR. JOHNSON: -- and not to me.

THE COURT: They are.

MR. JOHNSON: Okay. And she hasn't communicated that to me.

THE COURT: Okay. Ms. Newbry, as to the issues that Mr. Johnson has brought up to timeliness and to the issues?

MS. NEWBRY: Well, timeliness, Your Honor, is simply a matter of - it took - definitely took a while to get the transcript in this case. As the Court knows, (inaudible) appeals are unique in that we are not really allowed to request the whole transcript. We are only allowed to request the portions of the transcript necessary for the appeal, which required listening to the trial CD.

And after Mr. Johnson came into my office with his - I will say his pre-prepared brief and issues, it became clear that I would probably need the entire transcript

because he had many issues. So it took a while to get that done.

Mr. Johnson has, as I recall, 10 or 15 - maybe seven, eight issues that he wanted me to research, many of which I don't - didn't believe were pertinent to the subject. He also wanted discovery requested from DOL that I didn't believe was in existence nor did we have the right to have that discovery.

When Mr. Johnson first came in, I thought that we would maybe be able to come to an agreement regarding his brief. He said that he was going to allow - I said I wouldn't be signing it. He said he (inaudible) allow me to edit it. I said I wouldn't be putting my signature on anything that I didn't agree with.

As we went on, it became clear that he wanted to submit that brief as was. So I told him that he could submit that pro se and that I would go ahead and submit my own brief and then he could submit his brief pro se. And, at that time, he filed for new counsel.

THE COURT: Okay. Ms. Wevodau, do you want to be heard on anything.

MS. WEVODAU: No, Your Honor.

MR. JOHNSON: Your Honor?

THE COURT: Yes.

MR. JOHNSON: The request for this transcript was

not made until December 12th. The court appointed her, I think, October 4 and she did not get the transcript to me until March. I believe that that is - and as far as I know, there has been nothing else done.

THE COURT: Okay. Before we go any further, Mr. Johnson, I think I fully understand your position, is that you are not happy with how she is pursuing this as far as timeliness and you are not happy with her - how she is pursuing this as far as not willing to adopt the issues that you think she should be adopting and pursuing the issues on appeal that you believe are pertinent.

MR. JOHNSON: Mm-hmm.

THE COURT: Okay. Before we go any further, I pulled your - your most recent - it is from October 6th, 2009, which is the financial affidavit to determine indigency as to whether or not you are entitled to court-appointed counsel. It is - it is pretty much - it is barren. It is blank.

I wanted to go through it with you again real quick to see whether or not this issue is still even an issue. So, Mr. Johnson, please raise your right hand.

STEPHEN C. JOHNSON, having been first duly sworn by the Judge, testified as follows:

THE COURT: Thank you. All right. And you signed the other one under penalty of perjury, so I'm just going to ask you pretty much the same questions that form has, but now.

EXAMINATION

BY THE HONORABLE R.W. BUZZARD:

Q Do you have any income?

A No.

Q No - no income of any - not any employment income?
A No.
Q Any sort of public assistance income?
A Yes. I'm now receiving food stamps at $200 a month, which I wasn't receiving at the time that that was made. And in addition to that, I received a check for $560 for energy assistance, which I have never received before.
Q Is that monthly?
A No, that's --
Q Just the one time?
A One time. And I'm in the process of suing Community Development and Timberland Bank for issuing me a check that I can't cash, so I haven't been able to use those funds because the check has not been cashed.
Q The energy assistance check?
A Yes.
Q Okay. So that's the only income that you have received over what amount of time?
A Two-and-a-half years.
Q Okay. Are you disabled?
A Yes.
Q And you have a - a court - or an adjudication determining you 100 percent disabled and unable to work?
A No, I have nothing.
Q Partial disablement or is that a self-diagnosis that you

are disabled?

A Self diagnosis.

Q Okay. When is the last time you sought work?

A '76.

Q Okay. Do you have a spouse that has any income?

A No.

Q Do you have any interest, dividends or other earnings from any other holding or investments?

A No. No bank accounts. Nothing.

Q Okay.

A I have a house. I'm two years delinquent on the property taxes because I'm basically housebound now. I can't get out and leave. Next year they are going to sell my house at a share sale for nonpayment of property taxes.

Q All right.

A And --

Q Is the house owned free and clear --

A Yes.

Q -- by you?

A Yes.

Q What is the value of the house?

A I have no idea. It has been for sale for 15 years.

Q Okay. What are you asking for it?

A Right around $300,000.

Q Okay. So you are asking $300,000 and you own it free and clear?
A Yes.
Q Okay. Because that wasn't put on your previous affidavit.
A It wasn't asked. They don't ask for anything on the back.
Q It says, "Section 7 (inaudible) equity and real estate." It is blank.
A They --
Q You signed it under affidavit of penalty of perjury that the above information is true and correct, Mr. Johnson.
A The gal at the counter handed it to me and said, "Sign it."
Q Okay.
A She asked me all the questions on the front and said, "That's all we need," and, "Sign it."
Q And you signed it?
A Yes.
Q All right. So you certified under penalty of perjury that the information on here was true and correct?
A Yes.
Q Okay. But you do have what you believe is $300,000 in equity in a house?
A Yes.

Q Okay.
A You want to buy it?
Q I'm asking questions, Mr. Johnson. Do you have any vehicles that you own?
A 1985 Toyota pickup.
Q Do you own that free and clear?
A Yes.
Q What do you believe the value of that is?
A $500.
Q Do you own any additional vehicles such as helicopters, planes, boats, recreational vehicles?
A (No audible response.)
Q I need you to answer out loud.
A No.
Q Thank you. It is just because I can't record your headshakes.
A I understand.
Q Thank you. Any personal property that you own such as jewelry, stereos, TVs, that sort of thing?
A No. I have no electricity in the house. I have - basically live in a shack.
Q Stocks, bonds, certificates of deposits, anything like that?
A Nothing.
Q Any interest in any public or private entities?

A No.
Q Any cash savings?
A No.
Q Not necessarily in a bank but perhaps in a can or a jar in your yard or in your mattress?
A No, sir.
Q All right. What do you spend per month on living expenses such as utilities?
A I have no utilities.
Q What do you spend per month on food?
A $200 a month I get in food stamps.
Q What do you spend on clothing?
A Nothing.
Q Healthcare?
A That's paid for by the State, I believe. I don't know.
Q What do you mean?
A Well, I go down to Cascade - or not Cascade, but --
Q Is it Valley View?
A Valley View and pay them $20 when I need to see a doctor and that's as much as I know.
Q Okay. Where do you get the $20 from if you have no income? And you spend - you have $200 in food stamps. I'm not seeing any disposable income here.
A There is none.
Q So where do you get the $20 to pay a co-pay at Valley

View?
A I borrow it.
Q Okay. Do you spend anything per month on transportation?
A No.
Q Do you have any obligations that you pay for any other loans?
A No. Well, excuse me, sir. I have about a $50,000 lien - I'm not sure exactly what it is - of attorney fees on a civil case.
Q Contingent fees?
A No.
Q All right. So you are going to owe the fees whether you win or lose?
A We already won.
Q What do you mean you have already won?
A Well, the trial is over.
Q And what were the results?
A I was awarded 2.5 million dollars against by neighbors under the tort of outrage and $420,000 in actual damages.
Q How long ago was the trial?
A I think we got the jury decision October 1st last year, 2009.
Q Do you know if there is any appeal pending?

A No. There is --
Q There is no appeal pending?
A There is no appeal pending.
Q So you have a judgment in your favor for two-and-a-half million dollars?
A Actually, it is 2.928 at 12 percent interest.
Q 2.928?
A 2.928 and that pays 12 percent interest, which is about $960 a day.
Q Have you realized any income from that judgment --
A No.
Q -- or from the $420,000 judgment?
A No. They are the same judgment.
Q All right. So the 2.928 includes the $420,000?
A Yes.
Q Thank you. What county was that in?
A Lewis.
Q What steps have you taken to collect upon that judgment?
A The attorney is working on it and he is coming to the conclusion - we were going to sue his attorney for malpractice, but we have decided pretty much we can't do that. And, at this point, he is of the belief that we can collect no income.
Q What leads him to that belief? I mean --
A We can't take his house because it is worth less than

$128,000 on a homestead exemption, which means he still lives next door to me. And because his house and property is less than $128,000, his personal property is also covered. He has - he has disposed of anything that we could take. Basically it is more expensive to try and collect and he is going to fight all the way.

Q I understand.

A So I don't anticipate receiving anything at that point.

Q Okay. Thank you.

THE COURT: Anything further on the issue of counsel?

MS. WEVODAU: Nothing from the State.

THE COURT: Ms. Newbry, anything further?

MS. NEWBRY: No, Your Honor.

THE COURT: Mr. Johnson, it is your motion. You have final say. Anything further on this issue?

MR. JOHNSON: No, sir, I believe it is all said here.

THE COURT: Okay. Thank you. As you mentioned before, Mr. Johnson, you are entitled to competent counsel. Ms. Newbry is competent counsel. Your appeal is still pending. I'm not removing her from the case. You are not entitled to counsel of your choice, which means that I - there is absolutely no way that you are going to be able to interview those that are on the

contract to see which one is willing to take your case based on your terms.

You have requested counsel. The Court has appointed you counsel. As Ms. Newbry has stated to you, she will pursue the appeal in the way she sees fit with your input. And you are also free, as she gave you correct advice, to file a pro se brief in addition to its additional grounds - in addition to what the attorney has filed. I'm sure you are aware of that.

MR. JOHNSON: Mm-hmm.

THE COURT: So at this point, Ms. Newbry is not allowed to be removed from the case. You are not allowed to have other counsel. And I will get back to you on whether or not Ms. Newbry stays on the case based on the information of indigency. Until I rule on that though, which . . .

(End of recording.)

CERTIFICATE

I, KRISTIN D. MANLEY, a certified court reporter of the State of Washington, do hereby certify that the foregoing proceedings were tape recorded; that I was not present at the proceedings; that I was requested to transcribe the tape-recorded proceedings; that the tape recording was transcribed stenographically and reduced to typewriting under my direction.

I further certify that the foregoing transcript of the tape-recorded proceedings is a full, true, and accurate transcript of all discernible and audible remarks.

DATED AND SIGNED this 17th day of June, 2010.

KRISTIN D. MANLEY

CCR NO. 2211

KRISTIN D MANLEY NOTARY PUBLIC STATE OF WASHINGTON Feb 1 2012

LEWIS COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Plaintiff,	)	NO. C85203
vs.	)	
STEPHEN JOHNSON,	)	
Defendant.	)	
	)	ORIGINAL

VERBATIM REPORT OF TAPE-RECORDED PROCEEDINGS
Before
JUDGE MICHAEL P. ROEWE
March 19,2009

Transcribed By:

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TO: Jerry Gray
Stephen Johnson
For the Defendant

DATE: May 13, 2009

Shane O'Rourke
For the State

FROM: Tamara Jensen
Production Manager

RE: State of Washington vs. Stephen Johnson
Lewis County Cause # C85203

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Verbatim Report of Tape-Recorded Proceedings Taken February 5 and March 19, 2009
Reported by: Kris Manley, CCR #2211

__X__ Served upon: Jerry Grav Date mailed for Service : 5/13/09

Tamara Jensen, Production Manager

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I N D E X

PAGE:

State's Witnesses:

(None)

Defense Witnesses:

Direct by Mr. Gray 11

Cross by Mr. O'Rourke 14

GLOSSARY OF PARENTHETICALS

(Indiscernible):	Words were heard, but not understood.
(Inaudible):	Sounds were heard, which was an apparent response, but could not be understood.
(No audible response):	There was no sound.

PROCEEDINGS

THE COURT: . . . cause number is CS85203, a charge of driving while license suspended in the third degree from September 19th of 2008. This matter comes back before the Court on a motion for reconsideration of the Court's ruling on a previous motion to dismiss.

Mr. Johnson is present with his attorney of record, Mr. Gray. The state is represented by Mr. O'Rourke.

Gentlemen, I will hear from the defense.

MR. JOHNSON: Your Honor, before we start I have a question for the Court, please.

THE COURT: Yes, sir.

MR. JOHNSON: Is there any evidence that the Court may be aware of outside of this case which could be construed to prejudice the case before you?

THE COURT: I haven't got a clue what you mean, sir.

MR. JOHNSON: Thank you.

MR. GRAY: Your Honor, to clarify some things on my side. I was appointed to the case. I wasn't sure

whether or not Mr. Johnson wanted me to be the attorney of record or a stand-by counsel. It has become clear to me that my appropriate role would be to be stand-by counsel and I have informed Mr. Johnson of that. And I believe that we are prepared to proceed today with that arrangement, but I wanted to make that for the record.

I believe the procedure that we will have today - and obviously Mr. Johnson will be at the forefront here - but would be asking the court to reconsider some of the arguments that were laid out before and possibly to offer some testimony on the record for preservation of any kind of appeal. So that's basically what I have so far.

THE COURT: Well, Mr. Johnson, it is your motion. The record will reflect that Mr. Gray is designated, as I suspected he would be, as stand-by counsel.

MR. JOHNSON: I guess first I would like to be sworn and make a statement for the record, please.

THE COURT: For what purpose?

MR. JOHNSON: To state certain facts about my going to the Department of Licensing and attempting to get a license.

THE COURT: Mr. Johnson, this is a motion for reconsideration of the Court's earlier ruling. All the facts that the Court has to consider were filed by you

at the time of the original motion. What purpose does testimony at this stage serve?

MR. GRAY: If I may jump in, Your Honor. I wasn't at the first hearing. I suggested to Mr. Johnson if he is going to have a record that he wants appealed - and one of his issues that he is asking the Court to consider is that his underlying suspension was unlawful - that he needs to have some sort of record of how the license was suspended previously.

And I believe if he was sworn in, he would testify briefly about how he went to the Department of Licensing, asked to get his license renewed and they denied it based on a lack of primary residence. And so that's what he would want to, I think, be sworn in on.

THE COURT: Isn't that what he asserted in his original motion and the affidavits?

MR. GRAY: He may have, Your Honor. I wasn't clear on that.

MR. JOHNSON: I believe it is in the motion, yes.

THE COURT: Page 2 of the motion to dismiss, which was prepared - well, I guess it isn't his testimony. It is a statement of facts contained in the Cushman Law Office motion. They then withdrew. And then Mr. Johnson filed a brief in support of a motion to dismiss in which he asserts those same facts.

But on a motion to dismiss, I'm not sure those are not the appropriate - or that the testimony would not be more appropriate at the time of trial, but if he wishes to put it on the record, I have no objection. What is the State's position?

MR. O'ROURKE: Well, I guess the issue is if this is going to be some kind of interlocutory appeal or something like that, I guess we would have to have something. But I thought the same thing as the Court, that this would be reconsidered today, either reversed and dismissed or - and then it falls back in the state's court, or affirmed and proceed to trial and then maybe acquittal and no issue at all or a conviction and then an appeal based on the testimony elicited there.

Because I don't have a trooper or anything - or a deputy. I'm not sure how a fact-finding would take place right now. But I suppose if the Court wants to hear something on the record, I --

THE COURT: Well, I have those allegations before the Court. I'm not sure what the purpose of the testimony is unless you are not going to be going to trial, Mr. Johnson. Is that your intention?

MR. JOHNSON: Well, my intention is to appeal today's decision if it is not satisfactory.

THE COURT: Sir, the decision of today is whether

I'm going to grant a motion for reconsideration. If you are appealing a decision, you are appealing the decision that I made back in February, which is the decision of the Court --

MR. JOHNSON: Mm-hmm.

THE COURT: -- at the moment and will stand as the decision of the Court unless you can convince me that there is some grounds for reconsideration.

I'm not sure what presenting testimony is - purpose will serve, but if you wish to present testimony about the fact that they won't give you a driver's license because you don't have a residential address - you have argued that at length and put it in two different briefs - but if you want to testify to that here today, that's fine.

MR. GRAY: Your Honor, do you want him to stay here or go up there?

THE COURT: Well, he needs to come forward and be sworn just like any other witness. And you need to question him, Counsel, because he is not able to question himself.

MR. JOHNSON: This is from the Department of Licensing when I went down to renew title, that's the date --

MR. GRAY: Okay. I'm going to ask you about

these questions.

MR. JOHNSON: I understand, but I'm - that's what I'm telling you (inaudible); two trips to get a driver's license renewed, two trips to get an ID card.

MR. GRAY: Okay.

MR. JOHNSON: Okay.

THE COURT: Come right up here, sir, and raise your right hand.

STEPHEN JOHNSON, having been first duly sworn by the Judge, testified as follows:

THE COURT: Thank you. Please be seated. You may inquire, Mr. Gray.

DIRECT EXAMINATION

BY MR. GRAY:

Q Please state your full name for the record.

A Stephen Chris Johnson.

Q Spell your last name.

A J-O-H-N-S-O-N.

Q Where do you live?

A Randle, Washington.

Q Let me direct your attention to a couple years back. Have you tried to renew your driver's license - your Washington driver's license in the last couple of years?

A About two years ago I went in on two occasions - two, three years ago on two occasions ago and attempted to renew my driver's license. They had refused to renew it on the grounds that I didn't have a residence address.

Q Do you know what date that occurred on?

A I do not.

Q When you say they refused to renew it on the grounds that you did not have a residence address - is that correct --

A That's correct.
Q -- what do you mean by that?
A A - a formal street address was what they wanted and without that, they weren't going to renew my license.
Q Did they tell you that you could provide to them any other form of getting any kind of mail in lieu of a primary residence?
A Well, they - we weren't there regarding a mailing address. We - that was not in dispute. It was a physical address of where I lived.
Q Okay. And you say this occurred two to three years ago?
A Yes.
Q Is that the reason why your license was not renewed?
A Yes, it is. At that time, I had no tickets.
Q Was that the only reason, as far as your understanding, that your license wasn't renewed?
A That is correct.
Q Are you aware of the requirements for renewing your driver's license --
A Yes, I am.
Q -- in the State of Washington?
And it is your understanding that you need a residence address to get your license?
A Yes, it is.
Q And just to be clear for the record, you were trying to

renew your Washington driver's license to be able to operate a vehicle legally in the State of Washington; correct?

A That is correct.

Q Did you have a primary residence at that time?

A No.

Q In terms of that limited issue, Mr. Johnson, are there any - are there any other restrictions that you believe are - you believe are something that needs to be made of the record in terms of your license being - the denial of your license to be renewed?

A Yes. Without a residence address, I'm not entitled to either a driver's license or a state ID card. Without a state ID card, I'm unable to renew or transfer registration from a vehicle that I buy without a valid license. I'm unable to open a bank account or cash a check.

I went to Ritchie Brothers auction yesterday to register and the only way I was able to register is my personal knowledge of the manager of Ritchie Brothers. Otherwise, with my expired driver's license, they weren't going to accept my identification and allow me to register.

Q What - what office did you go to for this transaction? What Department of Licensing office?

A Morton, Washington.
Q On all occasions?
A On all occasions.
Q Okay. Do you recall who you spoke to that day?
A I don't recall who I spoke to. I talked to Mr. Seymour at one point when I was trying to register a vehicle I purchased.
Q Who is Mr. Seymour?
A He is an agent working at the Department of Licensing.

MR. GRAY: I don't think I have any further questions.

THE COURT: Does the State wish to inquire?

CROSS-EXAMINATION

BY MR. O'ROURKE:

Q Mr. Johnson, you - your license was suspended for failing to pay civil traffic infractions in the State of Washington at some point in time; correct?

MR. GRAY: Your Honor, I would object to that.

think that's outside the scope of the direct examination.

THE COURT: Well, it has been his testimony that the only reason he didn't get a driver's license was that he didn't have a residential address. I think the question is appropriate.

You may - you may answer the question, if you can, Mr. Johnson.

Q (BY MR. O'ROURKE) So isn't it true that you were issued a civil infraction, which you failed to pay, which thereby suspended your license in Washington State in 2007; correct?

A I believe that's correct.

Q And subsequent to that point in time, one of the additional requirements by the - that the Department of Licensing imposed upon you for getting a new license would be to take care of that unpaid civil infraction; isn't that also true?

A I believe that's the terms.

Q In - in other words, the - the address wasn't - prior in time to this incident, the address wasn't the only reason your license was suspended; initially it was suspended because of unpaid tickets; correct?

A Prior to - prior to getting any tickets and being suspended, I did attempt to renew it and was told I

wasn't eligible.

Q Right. But after - subsequent to that, you incurred a ticket which further suspended your license? You already testified to that, right?

A Yes.

Q And so then you had to pay that back; correct?

A I had to.

Q And did you do that?

A No.

Q So the ticket remains unpaid at this point in time; correct?

A Yes, sir.

MR. O'ROURKE: For the purposes of the record, I'm going to ask to admit - I'm going to ask to admit the State's - I'm having it marked now.

THE COURT: We are getting a little far afield here.

MR. O'ROURKE: Well, I'm going to ask for the abstract of the driving record to be marked as State's ID 1 and then admitted into evidence as State's identification - or - well, if I can ask questions with regard to that, then have that marked and entered into evidence as State's Exhibit 1 for this hearing.

MR. GRAY: Your Honor, I would object to that and renew my objection to this line of questioning. The

purpose of the record was a possible appeal before trial, so the issues presented by the prosecutor are stretching, for lack of a better word, what is before the Court. So I would object to any admissibility there.

MR. O'ROURKE: Your - Your Honor, the whole essence of what Mr. Johnson testified to Mr. - to Mr. Gray's questions was that the sole reason why he is being denied a right to a license is because he didn't give an address and if that's not the case, then that is entirely relevant to whether this gets appealed or not because if - if it is actually suspended because of failure to pay fines, that's a totally different set of circumstances.

THE COURT: Well, we are getting far afield, as I indicated. I have allowed the question as a proper cross-examination because of the allegations made in the testimony of Mr. Johnson. I'm not admitting the documentation. We are not at trial. We are not proving the facts of the case at this stage. This is a motion for reconsideration and I only allowed what testimony I have allowed --

MR. O'ROURKE: Fair - fair enough.

THE COURT: -- as an accommodation to Mr. Johnson, more than anything else.

MR. O'ROURKE: Okay. I will withdraw it then, Your Honor. And with that, I think there is sufficient testimony on the record from my standpoint.

THE COURT: Thank you. Any other questions of Mr. Johnson, Mr. O'Rourke?

MR. GRAY: No, Your Honor.

MR. O'ROURKE: Oh.

THE COURT: Mr. Gray, any questions?

MR. GRAY: No, Your Honor.

THE COURT: All right. Mr. Johnson, it is your motion.

MR. JOHNSON: Oh, boy, where do I start here? I brought a motion to dismiss this on an allegation that the issues of RCW 6 - 46.63.110(6)(b) and - was unconstitutional and also 46.90.91(1)(d) was unconstitutional.

In the 46.63.110(6)(b), fail to consider my interest in suspension, I have also since become aware that the RCW 46.20.291 . . .

(Inaudible.)

THE COURT: No, but you can mark it as an exhibit to your argument, sir.

MR. JOHNSON: Okay.

THE COURT: We are not here to file things.

MR. JOHNSON: Thank you. It gives no

authorization, that I can see, to suspend a license for nonpayment. This is the authority to suspend and the grounds. And according to this, there is no authority here to suspend. I have looked through the - cross-referenced all the statutes in this and at no place does it say failure to pay as a grounds for suspension of a driver's license.

THE COURT: Anything else?

MR. JOHNSON: Yes. The operation of a motor vehicle is very important in this day's society. We use this almost exclusively for travel today. In the old days we were given the option of a horse or foot or a horse and wagon.

As times have changed, the motor vehicle has become more and more important and the roads have been custom built exclusively for automobile traffic. In that the importance of it has had a value to a driver's license. That is stated pretty clearly in Moore, that a driver's interest in his license is substantial, and terms of a valuable interest or valuable property interest are used regularly.

In addition to that, in Moore it says that you have to consider the length of a suspension when determining the value of that interest. That is further inference that there is a value there. The --

THE COURT: What case are you quoting, sir? Moore?

MR. JOHNSON: Redmond, City of Redmond.

THE COURT: Redmond versus Moore?

MR. JOHNSON: Moore, yes. In Rawson - as I read Rawson, I got the feeling that the (inaudible) you gave tended to indicate that there was no value to that whereas the court has now determined that there is a value to that.

THE COURT: With all due respect, sir, the Court of Appeals, which is Redmond versus Moore, doesn't overwhelm or overturn the Supreme Court of the state. So unless you have got something from the Supreme Court of this state that says that the Rawson case is no longer good law, there is really not much of an argument here. And I was unable to find any new law that says the Supreme Court has overturned its decision from 1942 yet.

MR. JOHNSON: Okay. I'm misunderstanding something here.

(Conversation in the background between Mr. Johnson and Mr. Gray.)

MR. JOHNSON: Okay. I'm sorry, Your Honor. I had a misunderstanding of the law.

THE COURT: That's fine, sir.

MR. JOHNSON: I guess I'm of the belief that from other U.S. Supreme Court state cases where this stuff has come from, in Mackey and Monthrym - Mackey versus Monthrym, U.S. - 443 US 1, and in Fusari that upheld that a license is a valuable property interest and a valuable interest in those (inaudible) cases - correct me if I'm wrong, I believe U.S. Supreme Court law would overturn Washington State case law.

Now, where is my brief?

(Conversation in the background between Mr. Johnson and Mr. Gray.)

THE COURT: Anything else, sir?

MR. JOHNSON: Yes. I'm asking you to reconsider the issues in - on Page 2 of my brief as to whether the . . .

(Conversation in the background between Mr. Johnson and Mr. Gray.)

MR. JOHNSON: Yeah. Did the court fairly consider the issues before the court? Did the state present evidence of a compelling interest in RCW 46.63.110(6)(b) and is RCW 46.63.110(b) unconstitutional? Did the state present evidence of a compelling interest in RCW 46.20.091(1)(d) and is RCW 46.20.091(1)(d) unconstitutional?

I do believe that there is statutory authority to consider the issue of the balance in RCW 46.63.110(6)(b), whether it considers my interest. Those are laid out in a number of cases, Matthews, Bell,

Mackey, Dollson (phonetic), to name a few in my brief. In addition --

THE COURT: Why don't you define for me what you mean by fail to consider your interest? That seems to be a continuing theme throughout all of your pleadings and your argument.

MR. JOHNSON: Well, you suspended my license --

THE COURT: Sir, I didn't suspend your license.

MR. JOHNSON: I'm sorry. The state has suspended my license - I'm sorry - for failing to pay a fine, which is a penalty. They imposed a more strict penalty of a suspension until that fine is paid.

I'm financially unable to pay that fine. And I'm being forced not to have a driver's license for the rest of my life basically for a $250 fine that has nothing to do with my ability to drive and operate a motor vehicle.

I'm saying that the state has failed when casting this law to consider my interest or the length of my suspension in suspending it. In most cases, a suspension is defined as up to a year except in the case of suspension for nonpayment of a ticket, which is forever. This is basically a penalty that has no end. And it is worse than most of them.

I would like to call your attention to Tate, which is a case - and I'm going to also bring Williams, which is

another case that was used to overturn 30 days and 30 dollars, which was when they used to put you in jail for not having the money to pay a fine.

In Tate, on Page 1 here, held it is denial of equal protection to limit punishment to payment - punishment to payment of a fine for those who are able to pay but converted to the fine of imprisonment for those who are unable to pay. This is basically the same thing.

THE COURT: You have been - you have been imprisoned?

MR. JOHNSON: I have been thrown in jail, yes. I spent three days in jail.

THE COURT: You have been imprisoned for the fact that you didn't pay your traffic infraction?

MR. JOHNSON: That's correct.

THE COURT: And how --

MR. JOHNSON: Because I have been denied the ability to operate a motor vehicle.

THE COURT: Not denied the ability, sir; you are denied the license or the privilege to do so.

So what does that - how does Tate play into that? You were charged with a crime, you were placed in jail. Why were you placed in jail, Mr. - Mr. Johnson?

MR. JOHNSON: I think that's not relevant here today.

THE COURT: Well, you just said you were placed in jail because you couldn't pay a traffic infraction.

MR. JOHNSON: Yes.

THE COURT: I --

MR. JOHNSON: I'm sorry.

THE COURT: I guess what I'm asking is I don't think that is legally or physically possible. Did you fail to - to appear at a court hearing?

MR. JOHNSON: I have not missed a court hearing.

THE COURT: Then how was a - how were you placed - what case were you placed in jail on, sir? That's what I guess I'm trying to get to.

MR. JOHNSON: On a --

THE COURT: This one?

MR. JOHNSON: On a suspension on driving - on a driving suspended and I was suspended for nonpayment of a fine.

THE COURT: So you were placed in jail on this charge for three days?

MR. JOHNSON: Yes.

THE COURT: So when you were arrested back in September, they booked you into jail?

MR. JOHNSON: Yes.

THE COURT: All right. I guess I'm understanding you. I'm not tracking how Tate applies, but go ahead.

MR. JOHNSON: I - I guess what I'm saying with regard to Tate is that I was fined and I'm unable to pay that fine, so now I'm suspended forever. And I do not believe that that is reasonable.

It is not relevant under equal protection as stated in Tate. A person that has the money to pay a fine can drive, and a person that doesn't cannot. There are no other alternatives with this.

At some point, I should be able to drive again is what I'm saying. And under this law, I can't. Under this law, now I'm indigent. And the state is getting to the point - it is getting to the point that the state is going to have to start supporting me.

The next issue would be the issue of the driver's license and the residence address. The protection guaranteed under the Fourth and Fifth Amendments are much broader in scope. The makers of the constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of men's spiritual nature, of his feelings of intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things.

They sought to protect Americans in their belief, their thought, their emotions, their sensations. They

conferred as against the government the right to be let alone, the most comprehensive of rights and the most valued by civilized men. That is Ohmstead (phonetic) versus the United States as quoted in Griswald (phonetic) versus State of Connecticut.

(Inaudible) a long series of cases the court has held where fundamental personal liberties are involved there may not be abridged - be abridged by the state simply showing that a regulatory statute or some rational relationship through the effectuation of a proper state purpose where there is a significant encroachment upon personal liberty. The state may prevail only on a showing of a subordinary - subordinating interest, which is compelling. That was Bates versus City of Littlerock.

The law must be shown necessary and not merely rationally related to the accomplishment of a permissible pol- - policy. That is quoted in Griswald versus State of Connecticut.

The court considered similar (inaudible) residence requirements for welfare assistance in Shapiro versus Thompson. The court observed that those requirements created two classes of needy residents indistinguishable from each other except that one is composed of residents who have resided a year or more and the second of

residents who have resided less than a year in the juris- - in the jurisdiction.

On the basis of this sole difference, the first class was granted and the second class was denied welfare aid upon may - welfare aid upon which may depend the ability to obtain the very means to subsist, food, shelter and other necessities of life.

The court found that because the classification impinges upon a constitutional guaranteed right of interstate travel, it was to be judged by the standard of whether it promoted a compelling state interest. Finding such an interest wanting, the court held the challenged residence requirements unconstitutional.

Appellees argue that the resident requirement before is distinguishable from those in Shapiro, which appellates - Shapiro was controlling. We agreed with the appellant that (inaudible) residence requirements for free medical care must be justified by compelling state interest and that such interest being lacking, the requirement is unconstitutional. That's Memorial Hospital versus Maricopa (phonetic).

THE COURT: Do you have any case law, sir, that deals with driving licenses? Do you have any case law that says anywhere that the State of Washington doesn't have the ability to determine who may drive and who may

not drive and the circumstances under which they may do so? Or do you have any case law that says that drivers' license statutes which create more than one class of people - which they certainly do, those who can drive and those who can't - are unconstitutional?

MR. JOHNSON: In all the cases that I have read - and I'm looking for Tate.

THE COURT: Tate had to do with jail time. It didn't have to do with --

MR. JOHNSON: Tate --

THE COURT: -- a driver's license.

MR. JOHNSON: Ta- - I'm sorry, not Tate. Port (phonetic).

THE COURT: Port. Yes, I have Port here, which at least is a Washington case.

MR. JOHNSON: Thank you.

MR. O'ROURKE: I got that, yeah. Port.

THE COURT: How does Port support your position?

MR. JOHNSON: In Port it clearly states that the state's authority to issue a license is based on safety.

THE COURT: Well, that's not all it says, sir.

MR. JOHNSON: I understand that's not all it says.

THE COURT: What Port says is that requiring an operator's license to operate a motor vehicle on a

public highway is a justifiable exercise of the police power of the state. That's what Port says.

MR. JOHNSON: It does, but it also goes on to say that for the purposes of safety --

THE COURT: That's one of the reasons.

MR. JOHNSON: I --

THE COURT: With all do you respect --

MR. JOHNSON: I have found others.

THE COURT: -- Mr. Johnson, we have now gone on into this for 45 minutes. Do you have anything that applies directly to your motion for reconsideration?

I have heard testimony. I have heard arguments on topics that were not argued to the Court the first time. Have you got anything that goes to the issue of the reconsideration of my ruling from February --

MR. JOHNSON: Only what --

THE COURT: -- except the same arguments that you made the first time, sir?

MR. JOHNSON: I guess they are the same arguments.

THE COURT: All right. Mr. O'Rourke?

MR. O'ROURKE: Well, with regard to the same arguments, I guess I'm primarily just going to rely on my record I made then. And with regard to - yet the Court did hear some argument about testimony and I think

initially - I mean, there might be a different type of case before the Court if it was a situation where a person goes and tries to get a license and they can't simply because of the fact that they are indigent and don't have a physical address. I think that's kind of been alluded to here and that might be a different type of scenario than what is before the Court.

But what is before the Court I think arises out of - through Mr. Tate's - excuse me - through Mr. Johnson's own testimony was because of nonpayment of fines. And I think that's the thrust of the issue. I mean, I don't think they are standing here to even get (inaudible) point where you are dealing with a situation where Mr. Johnson was suspended because he didn't have an address or a physical address. That's not what the Court is here to consider. That would be a different case.

As for nonpayment of fines, I mean, I think 46.20.291 says under Subsection 5 that failing to respond properly to a traffic infraction, which can include - by my understanding, can include just nonpayment, not actually addressing or resolving that infraction - so if you are issued an infraction and you don't resolve it for speeding or whatever it might be, the Department of Licensing has the ability to suspend your license.

And I think that Mr. Johnson testified that that happened to him. He has yet to pay those off. I think in this particular case it is clear that that didn't occur. And whether there is a relationship to driving, the police power says they can decide who gets a license and in the same vein, the state can decide who gets it taken away.

And when there is an issue of safety, if traffic codes are in place to keep the roads safe, speed, operating at a certain age is defined by the state in a serious fashion and a certain (inaudible), operating your vehicle properly.

If you don't do these things, the police power applies; in the same way that you are authorized a license, it can been taken away at - 46.20.291 says that.

And in this case Mr. Johnson didn't pay the traffic infraction. The state has the ability to use its power to take the license away. Whether Mr. Johnson believes it is fair or not is not the question.

And then there is means to get that license back. It is not like - I mean, the courts have analyzed these in Moore and all these cases. It is not a lifetime prohibition against driving. It is a prohibition against driving until you resolve these matters with the

State of Washington. You can't rack up 20, 30, 40 tickets and then not have any kind of sanction as to your ability to operate a motor vehicle. That's a balancing interest. We want the roads to be safe.

So if you speed - if you do - if you operate a motor vehicle improperly, your right to do that is going to be denied. If you don't properly respond to being sanctioned, in this case by civil infractions - so that's been balanced. Mr. Johnson hasn't resolved that and his license remains, you know, suspended.

And there are also channels for indigent individuals. I mean, there is bankruptcy, there is Chapter 13. I mean, I have heard the Court allude to it a number of times here. I don't - I don't necessarily understand all the means that you can use to go about getting your license back, but it would be my understanding that it is not a lifetime type of suspension where - where Mr. Johnson is permanently deprived of a right to property and his license.

He has the right to travel amongst the states. There is no equal protection violation because those two classes of people are properly defined and they are not protected classes under the 14th Amendment or the Washington Constitution.

And with that said, I think this is a pretty

cut-and-dried case of a suspended license that was properly suspended and hasn't been taken care of.

So we have a criminal cause of action. Once you drive under the State's law without a license, you are committing a crime. So here we are. I ask the Court to affirm its prior ruling and either we proceed to trial or Mr. Johnson, I think, can try to appeal this.

I don't know what we are going to do after that, but I just ask the Court to affirm it for the time being, and keep the dates until we decide what we want to do.

THE COURT: Well, the motion for reconsideration, which for the record is some 15 pages in length, sums up the basis of this motion for reconsideration at Page 2. Did the Court fairly consider the issues before the Court?

Well, I'm sure from Mr. Johnson's point of view he doesn't think so. Let me reiterate what I said at the time of the first hearing, and it is still the same position of this court. I am bound by the Supreme Court decisions of the State of Washington. I have asked for a number of times any Supreme Court decision that supports Mr. Johnson's position.

I have not heard from Mr. Johnson any Supreme Court decisions. I have heard him rely on one Court of Appeals decision, which, quite frankly, I think he

misinterprets for his positions. But the law in the State of Washington - in the State of Washington has been and remains the same since 1942. A license is neither a contract nor a right of property. It is no more than a temporary permit to do that which would otherwise be unlawful. Hence, the authority which granted a license always retains the power to revoke it either for due cause of forfeiture upon a change of policy or legislation in regard to that subject. Such revocation cannot be pronounced unconstitutional either as an impairment of contract obligation or as unlawfully divesting persons of their property rights.

As a general rule, the jurisdiction for the revocation of a license is vested in the same board, court or officer who granted the license. That's State versus Rawson.

Rawson goes on to say, "We hold that the Superior Court properly construed the act in upholding the order of the director of the Department of Licensing cancelling appellant's operator's license and that the act, as so construed, is not open to the objections urged by the appellant on constitutional grounds."

Subsequently in State versus Port - or pardon me - Spokane versus Port, a 1986 decision of the Court of Appeals - and I quote from the second paragraph: "The

privilege is always subject to such reasonable regulation and control as the proper authorities see fit to impose under the police power in the interest of public safety and welfare."

That's citing State versus Sheffle (phonetic) 82 Wn.2d 872, a 1973 decision of the Supreme Court of this state.

Mr. Johnson, this whole topic has been hashed out since 1915. The U.S. Supreme Court's first decision on the right to drive without a driver's license was in a case called Hendrick versus Maryland, 235 US 610, 1915. "States may rightfully prescribe uniform regulations necessary for public safety and order in the operation of - upon its highways of motor vehicles and may require the licensing of drivers."

That was cited in State - or also in Wright (phonetic) versus Mealy (phonetic), 80 - or 314 US 33, a 1941 decision of the U.S. Supreme Court.

I have asked, again, for cases today where the U.S. Supreme Court or the state Supreme Court has overruled these ancient decisions and have heard nothing. Thus, as I indicated, did I fairly consider the issues before the Court?

The issues before the Court were whether I should dismiss a charge of driving while suspended in the third

degree because it was unconstitutional. I find no support in any of the arguments made then or now by Mr. Johnson as to the lack of constitutionality.

He raises a new argument today that there is no authority for suspending a driver's license for not paying monetary fines. I would refer you, sir, to RCW 46.63.110(6)(a) and (b) --

UNIDENTIFIED SPEAKER: (No audible response.)

THE COURT: -- no, not 46.20, 46.63 --

UNIDENTIFIED SPEAKER: That's it right here.

THE COURT: -- which says, and I quote, "The department - if a person has not entered into a payment plan with a court and has not paid the monetary obligation in full on or before the time established for payment, the court shall notify the department of the delinquency. The department shall suspend the driver's - the person's driver's license or driving privilege until all monetary obligations have been paid, including those imposed under Sections 3 and 4 of this section or until the person is entered into a payment plan under this section."

46.53.110(6) certainly allows in a variety of different circumstances for the department - requires the department to suspend the license of people who have not paid the fines that have been imposed upon them for

traffic infractions.

You have argued, again, in your brief did the state present evidence of a compelling issue for 46.63.110(6)(b)? Well, it would appear that once - I'm not even sure how that argument is being made, but basically does the state have a compelling issue to collect the fines imposed?

It absolutely does. I - I'm not tracking your argument on that at all. It does have a compelling issue to collect the fines that are - and monies owed to the state. That's what the state government has been designed for. The money belongs to the people of the State of Washington. There is no more compelling issue than that.

And, finally, did the state present evidence of a compelling interest in 46.20.091(1)(d), which is the part that requires Mr. Johnson to provide a residential address? Well, there isn't an argument that can be made - or not an argument. There is a fact of life, Mr. Johnson, that has to be applied and that is that when people are involved in the operation of a motor vehicle, they can be charged with a crime.

They generally are charged with a crime by the issuance of citations. People who fail to appear have warrants issued for their criminal charges. They fail

to appear, the officer generally is under an order from a court to issue - or to arrest the person on a warrant.

If you don't know where their residential address is, there is not much way that anybody can effectuate those warrants. That provides a compelling state interest in knowing where you can be located beyond your mailing address.

So in answer to your question is it unconstitutional because there is no compelling interest? There is an absolute compelling interest in the enforcement of the criminal laws of this state, which require, among other things, if you are going to operate a license - or operate a motor vehicle, that they know what your residential address is.

Going back to the bigger question. The case law from all the states, the case law from the U.S. Supreme Court, the case law from the State of Washington is absolutely clear. This is a privilege, it is not a right.

The authority issuing the license has the right to enact those laws and those regulations that are appropriate in the mind of the legislative body to the safe operation and the efficient and orderly operation of the traffic system. They have done that. They have the right to do that. They have the authority to do

that and they have done that in your case.

And the fact of the matter is that there is nothing unconstitutional about any of the statues that you have challenged here or even the general concept. Based upon that, your motion to reconsider is denied.

Any questions?

MR. O'ROURKE: No.

MR. JOHNSON: No. Do you have any questions?

THE COURT: Thank you, gentlemen. That is all for the day.

MR. GRAY: Your Honor, I guess I do have one side question. What is the expiration date on this case?

THE COURT: Speedy trial expiration is March 31st. He is set - oh, pardon me. Let me double-check that before I make that statement, if I can find the right documents. The file has become so chockablock with pleadings. What is the - what is the trial date on this one?

MR. O'ROURKE: July - or March 30th.

THE COURT: 30th. And we are showing a speedy trial expiration is March 31st.

MR. GRAY: Well, Your Honor, I need to throw this out there. I had a matter in Superior Court that was set for trial tomorrow, but was bumped to the 30th today. I have talked to Mr. Johnson about what we want

to do or what he wants to do in terms of appeal. I believe he wants to appeal this decision today and not proceed to trial; however, I don't know what the outcome is for that at this point. So I guess my request would be to strike the trial date today, if the Court would accept a speedy trial waiver, if Mr. Johnson wants to proceed like that knowing that he will probably appeal today's decision, but just in case, just because I have had this matter come up in Superior Court and I cannot be here on the 30th for trial if it, in fact, got that far.

THE COURT: Well, that's up to Mr. Johnson, Counsel.

MR. GRAY: Is that okay with you?

THE COURT: It is currently set to go to trial on the 30th.

MR. JOHNSON: (Inaudible.)

MR. GRAY: To wave your speedy trial right?

MR. JOHNSON: Yes. Yes.

MR. GRAY: Do you want to reset the trial date or do you want a pretrial date?

THE COURT: Well, if he is going to file an interlocutory appeal, what is his timeline on that, Mr. Gray?

MR. JOHNSON: Thirty days on that, I believe.

THE COURT: No, that's when you have to file it.

MR. JOHNSON: Right.

THE COURT: I'm talking about how long is it going to take them to hear and decide the interlocutory appeal.

MR. O'ROURKE: Maybe if we have a pretrial date so with it like in 31 days or whatever to make sure that something has been filed and then we can decide if we need to set trial.

THE COURT: That's what I would suggest, go about five weeks down the road.

MR. JOHNSON: Okay.

MR. GRAY: Okay. So we are going to start your (inaudible) 90 days over on May 1st just to give enough time for the appeal.

MR. JOHNSON: Yeah (inaudible).

MR. GRAY: Okay.

MR. O'ROURKE: What was - what was (inaudible).

MR. GRAY: May 1st (inaudible) speedy commencement.

MR. O'ROURKE: Commencing May 1st?

MR. GRAY: Yeah.

THE COURT: All right. Mr. Johnson, since you are your own primary attorney, do I understand correctly you are asking the Court to strike the trial date for

March 30th and reset this matter down the road approximately five weeks for a pretrial hearing so you can initiate an interlocutory appeal?

MR. JOHNSON: That's correct.

THE COURT: The record will so reflect. We will move the matter over to - let's move it over to - pro se pretrial --

THE CLERK: (Inaudible) Wednesday.

THE COURT: How about the 22nd of April?

MR. GRAY: Would I still be stand-by counsel at that point?

THE COURT: You are still stand-by counsel.

MR. GRAY: 22nd of April?

THE COURT: Wednesday, April 22nd at 1:30.

MR. GRAY: Sounds good.

THE COURT: All right. Thank you, gentlemen. Court is in recess.

MR. O'ROURKE: Thank you, Your Honor.

MR. GRAY: Thank you, Your Honor.

(End of proceedings.)

CERTIFICATE

I, KRISTIN D. MANLEY, a certified court reporter of the State of Washington, do hereby certify that the foregoing proceedings were tape recorded; that I was not present at the proceedings; that I was requested to transcribe the tape-recorded proceedings; that the tape recording was transcribed stenographically and reduced to typewriting under my direction.

I further certify that the foregoing transcript of the tape-recorded proceedings is a full, true, and accurate transcript of all discernible and audible remarks.

DATED AND SIGNED this 11th day of May, 2009.

KRISTIN D. MANLEY
CCR NO. 2211

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,

Plaintiff,

Vs.

STEVEN C. JOHNSON,

Defendant.

COPY

NO. C85203

VERBATIM REPORT OF PROCEEDINGS
September 18, 2009
(Trial, Sentencing)

A P P E A R A N C E S

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Presiding Judge: WENDY TRIPP

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EXHIBIT C

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September 18, 2009

* * * * * * * * * *

THE COURT: Okay. Today we're scheduled for a bench trial on State versus Steven Johnson. Mr. Johnson is present with I believe Mr. Gray as standby counsel.

MR. GRAY: Yes, your Honor.

THE COURT: Mr. Johnson is representing himself. Are you able to hear me okay, Mr. Johnson?

MR. JOHNSON: This is breaking up a little bit, basically I can hear you, that's fine.

THE COURT: If there is anything said by anybody that you don't hear, just make me aware of that, okay?

MR. JOHNSON: I will, okay, yes.

THE COURT: Because we can talk louder or repeat or whatever we need to do to make sure you're hearing everything that's happening. Are the parties ready to proceed on this bench trial with this driving on suspended charge?

MR. O'ROURKE: Yes, your Honor.

THE COURT: State is ready, is the defense ready?

MR. JOHNSON: Yes.

THE COURT: Are there any preliminary issues that we should take up before we get started with the

trial?

MR. O'ROURKE: No, I don't have any.

MR. JOHNSON: No.

THE COURT: Okay. Do the parties want to make opening statements?

MR. O'ROURKE: This is a driving suspended case. State is going to show that on September 19th, 2008, Mr. Johnson was driving in Lewis County suspended in the third degree.

THE COURT: Mr. Johnson, did you want to make an opening statement?

MR. JOHNSON: I don't believe I need to do that.

THE COURT: Okay. State want to proceed with presenting its evidence?

MR. O'ROURKE: Yes, thank you. State calls Deputy McKnight.

MATTHEW MCKNIGHT, having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION

BY MR. O'ROURKE:

Q Deputy McKnight, could you please state your name and spell the last for the record?

A Matthew McKnight, M-c-K-n-i-g-h-t.
Q What's your current occupation?
A I'm a deputy with the Lewis County Sheriff's Office.
Q Were you working as a deputy on September 19th, 2008?
A Yes, I was.
Q How long have you been a deputy at the sheriff's office?
A Approximately two years now.
Q Do your duties with the -- have you been trained in making traffic stops prior to working at the sheriff's office?
A Yes, I have.
Q Is it a regular part of your work with the sheriff's office over the course of that time to conduct traffic stops?
A Yes, it is.
Q And have you conducted traffic stops for driving suspended in the past?
A Yes, I have.
Q A number of times?
A Yes.
Q And I want to direct your attention to September 19, 2008. On that day in particular, were you working in your capacity as a deputy with the sheriff's office?
A Yes, I was.
Q Were you dressed in full attire and in a marked patrol

vehicle similar to what you're dressed in today?
A Yes, I was.
Q Specifically, I want to direct your attention to around 11:00 a.m., September 19, 2008, what if anything were you doing at that time?
A At that time I was on random patrol on the east half of Lewis County.
Q And what, if anything, happened with regard to this case?
A I observed a vehicle drive by me, it was a white Toyota, had no rear bumper and no mud flaps.
Q Where in particular did it drive by, what road, of what part of the road?
A Right around the 100 block of Falls Road.
Q Is that within Lewis County?
A Yes, it is, it is in Randle.
Q Did you make -- did you stop the vehicle?
A Prior to stopping the vehicle, I performed a driver's check using my MVC -- I'm sorry, performed a registration check using my MVC. During the registration check, I checked the owner's registration of the vehicle, discovered him to be suspended.
Q Who did the registrar of the vehicle come back as?
A A Mr. Steven Johnson.
MR. O'ROURKE: And given that Mr. Johnson's

pro se in these proceedings, I would indicate for the court that that last portion of the testimony by the deputy is for foundation purposes and not submitted to the court for any other purposes, it constitutes hearsay.

Q (By Mr. O'Rourke) So based upon that, what if anything did you do?

A I attempted to perform a traffic stop on the vehicle.

Q And were you successful in stopping the vehicle?

A Initially, no. Eventually, the vehicle did stop.

Q And did you activate your lights and follow it for a while, is that what you're referring to?

A I did, I activated my lights near the end of the 100 block of Falls Road.

Q Did it continue to drive down the county road?

A Yes, it did.

Q And that still remained in Lewis County?

A Yes, it did.

Q You said you eventually stopped the vehicle, what did you do upon stopping the vehicle?

A Upon stopping the vehicle, the driver immediately exited the car. I asked him to step back in the vehicle. He refused to do so.

Q Do you recognize the driver of the vehicle in the courtroom here today?

A Yes, I do.

Q Do you recognize the driver of the vehicle as Mr. Steven C. Johnson seated to my left?

A Yes, I do.

MR. O'ROURKE: Have the record reflect the witness has identified the defendant.

THE COURT: So noted.

Q By Mr. O'Rourke) Based upon the information you obtained from your registration check, did you cite Mr. Johnson for any offense?

A Yes, I did.

Q What did you cite him for?

A Driving on Suspended License in the Third Degree.

Q Would that be a citation issued in Lewis County on September 19th 2008?

A Yes, it was.

MR. O'ROURKE: I'm just showing Mr. Johnson what's marked as Plaintiff's ID 1. Permission to approach the witness?

THE COURT: Granted.

Q (By Mr. O'Rourke) Deputy McKnight, I'm showing you what's marked as Plaintiff's Identification Number 1, can you review the two-page document, let me know when you have had a chance to review it.

A I've reviewed it.

Q Do you recognize the document?
A Yes, I do.
Q What is it?
A Appears to be a document, a notice of suspension from the Department of licensing.
Q And does this page one have identified information for the defendant?
A Yes, it does.
Q Does it identify Steven C. Johnson as the defendant in this particular case?
A Yes, it does.
Q Does it --

MR. JOHNSON: I guess I would like to object at this point, your Honor. This is hearsay information and he has no firsthand knowledge of this document other than that it's been laid in front of him.

THE COURT: Okay. The state hasn't moved to at admit it yet, so we will get to that in just a minute. I assume -- are you moving to admit it right now?

MR. O'ROURKE: Not yet, just laying the foundation.

THE COURT: Okay. When we get to them moving to admit it, then we can discuss the objection.

Q By Mr. O'Rourke) Does it appear to have identifying

information from Mr. Johnson, the defendant?

A Yes, it does.

Q Does that match the information that you received in the field as far as his name, et cetera?

A Yes, it does.

Q Does the document -- is it from the Department of Licensing of the State of Washington?

A Yes, it is.

Q Does the document bear the seal of the State of Washington?

A Yes, it does.

Q And does it indicate that there is in fact an attachment for notice of suspension from the Department of Licensing?

A Yes, it does.

Q Is that attached to the document, page two?

A Yes, it is.

MR. O'ROURKE: At this time, I move to admit Plaintiff's ID 1 as State's Exhibit 1.

THE COURT: Okay. Now we can talk about your objection.

MR. JOHNSON: Yes.

THE COURT: Do you want to elaborate on your objection, is there anything more that you want to say?

MR. JOHNSON: This is basically hearsay here.

Today there is no -- nothing, nobody here to testify as to what this document is and how it was created. And Mr. McKnight I don't believe is qualified to do that.

THE COURT: Okay, does the state want to respond?

MR. O'ROURKE: This is a self-authenticating document from the State of Washington Department of Licensing.

THE COURT: Any other argument?

MR. JOHNSON: No, ma'am.

THE COURT: Okay, as I understand it, the case law in Washington at this point is that records from the Department of Licensing are allowed to be admitted. I think the most recent case on that in Washington is State v. Kronich, I'm not sure I'm pronouncing that right, it's a case from I believe 2007 which deals with this exact issue. I've read the case, and the Supreme Court in that case, with one justice dissenting, ruled that the information contained on a Department of Licensing record regarding license suspension is non-testimonial for purposes of hearsay so that it would fall within best records and not require that a person from the Department of Licensing come to court to testify. That's distinguishing that from like a lab report from a drug case where a lab technician has done

testing and that is considered testimonial and that person is required to be in court to testify. So far, the law in Washington allows the Department of Licensing to submit this record and the court to admit and consider that record without a person bringing that to court and testifying and allowing you to cross examine that person because they're considered to be reliable and part of the business records of the Department of Licensing. So at this point in time, following current Washington law, I'm going to overrule the objection and admit the document.

(WHEREUPON, Plaintiff's Exhibit 1 admitted)

MR. O'ROURKE: Thank you. Just one moment.

Q (By Mr. O'Rourke) Just to be clear, Deputy McKnight, Mr. Johnson is the defendant seated to my left, that's the individual who you stopped for driving with suspended license in Lewis County on September 19th, 2008?

A Yes.

MR. O'ROURKE: No further questions.

THE COURT: Mr. Johnson, do you have any questions for the deputy?

MR. JOHNSON: Yes, ma'am.

THE COURT: Go ahead.

MR. JOHNSON: Thank you. May I approach the witness, please?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. JOHNSON:

Q The state has amended the citation, are you familiar with this, this is the amended citation?

A I'm not familiar with it.

Q You're not. This is what I have been charged with at this point, and I'd like to go over this with you to see what supposedly I had done in this charge.

A If I can have some time to review this.

Q Would you like time to review it?

A Yes.

THE COURT: Why don't you just give him a minute to look it over then you can continue your questioning.

THE WITNESS: I've reviewed it.

Q (By Mr. Johnson) Now, there is a list of items here that I have supposedly done, I would like to know basically what evidence you have would show that I've done this. First one here says, because the defendant (a) failed to furnish proof of the satisfactory progress in a required alcoholism or drug treatment program, do you have any

evidence to show that?

A I don't know.

Q Is there any evidence that you might be aware of or could be aware of of my failure to do that?

A Not that I'm aware of.

Q Thank you. (B) failed for any proof of financial responsibility for the future as provided by RCW Chapter 46.29, do you have any evidence to show that?

MR. O'ROURKE: I object to -- he's being asked to make a legal conclusion and also to speculate beyond what he's actually aware of whether or not he -- whether or not Mr. Johnson's properly cited under this amended citation is a question for the court, not Deputy McKnight.

THE COURT: Well, I think he can ask the deputy if he has any information regarding the information that charges -- I'll allow that. If the deputy doesn't, he can say he doesn't, if he does, he can give that information to Mr. Johnson. Go ahead.

MR. JOHNSON: Thank you.

Q (By Mr. Johnson) Do you have any -- (b) failed to furnish proof of financial responsibility for the future as provided by RCW Chapter 46.29, do you have any information to that?

A Nope.

Q Now, the next one here -- excuse me, that's one more, failed to comply with the provisions of RCW Chapter 46.29 related to uninsured accidents, do you have any evidence to show that?

A I do not.

Q Failed to respond to notice -- this is four quarters, I'm going to read the whole thing -- failed to respond to a notice of traffic infraction, failed to appear to requested hearing, violated a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction or citation as provided in RCW 46.20.289?

A I believe that's on the notice of suspension document. If I can review it, I could be sure.

THE COURT: It is right here.

THE WITNESS: On this document it says on 11/01/07 at 12:01 a.m. your driving privileges will be suspended. The court has notified us that you failed to respond, appear, pay, or comply with the terms of the following citation listed below, has citation number I00038445, a violation date of 01/14/2007, and then the reason for citation was that it is no valid license.

Q (By Mr. Johnson) Now, do you see failure to pay listed anywhere in this document?

MR. GRAY: Your Honor, I would request that

Mr. Johnson identify which document he's referring to for the record.

MR. JOHNSON: This is the order amending citation.

MR. GRAY: Thank you.

THE WITNESS: I don't see failure to pay, I do see failure to respond, appear, pay, or comply in the suspension document and several of those are listed in the charging document.

Q (By Mr. Johnson) But you have no information to show that I failed to respond?

A Just the letter of suspension from the Department of Licensing.

Q Okay. And that you have no information that I failed to appear?

A Again, just based on the letter of suspension from Department of Licensing.

Q And you have no information that I violated a written promise to appear in court?

A Just the letter of suspension from the Department of Licensing.

Q And you have no information that I failed to comply with the terms of a notice of traffic infraction or citation?

A Again, just the letter from Department of Licensing.

Q Thank you. (E) admitted an offense in another state

that if admitted in this state would not be grounds for suspension or revocation of the person's driving license. I really don't understand that one, I'm sorry, but do you have any evidence to show that?

A No.

Q Received traffic citations or notice of traffic infractions that have resulted in suspension under RCW 46.20.267, in other words, do I have a prior conviction for driving on suspended?

A I'm not sure that's what that says.

Q Well --

A There is a comma, says, relating to intermediate driver's license.

Q Yes.

A I would understand that as --

Q Okay.

A -- a violation of intermediate driving status.

Q Okay, thank you. By reason of the --

MR. O'ROURKE: Your Honor, I object. If we're going to go through that, I'd like that document marked and for identification purposes so we can have that on the record for any further proceedings after today. I didn't ask for that before, but I think that's appropriate if we're reading from a document and they're both referring to it.

THE COURT: Which document are you talking about?

MR. O'ROURKE: The order amended citation. I know this is already in the court file as part of the court's charging document, but if it is used in this proceeding separately by Mr. Johnson and they're both reading from it and utilizing it, I would like to have it marked and retained by the court.

MR. JOHNSON: It is already in the court record, your Honor.

MR. O'ROURKE: Right, but Mr. Johnson is reading something off -- reading off something in his hand that I want to have marked and put in the court's record.

THE COURT: Well, it doesn't really change anything, but you want his copy that he is reading from marked?

MR. O'ROURKE: Right, whatever they're using to elicit testimony, evidence.

THE COURT: Okay.

MR. JOHNSON: I don't believe I have a signed copy here. I do not have a signed copy here. Is that -- I don't have a signed copy, I never received one.

MR. O'ROURKE: That's fine. I mean, I just wanted whatever they're using marked and put into the

record.

MR. JOHNSON: I did not bring copies of it other than these two, mine and my attorney's copy, and I don't think either one of us have a signed copy. We were never served a signed copy or given a signed copy.

THE COURT: The original that's in the court file is signed. It was signed by the prosecutor and by the judge. But if you're just wanting to have this marked to somehow be preserved, I guess in case there is some difference between that and this copy, I don't know, but --

MR. JOHNSON: There shouldn't be.

THE COURT: No, but if you don't have any objection to that, you can hand it to the clerk and she will just stamp it and mark it.

MR. JOHNSON: I'll trade you here.

THE COURT: Are you moving to admit it?

MR. O'ROURKE: No, I'm just asking for them both to be marked and retained by the court.

THE COURT: Okay, go ahead, Mr. Johnson.

Q (By Mr. Johnson) Committed an offense in another state that if admitted in this state would not be grounds for a suspension or revocation of the person's driver's privilege or driver's license?

A I believe I already answered that one.

THE COURT: I think you were a little bit further down there because we just talked about the intermediate driver's license which was F.

Q (By Mr. Johnson) Okay, (f) and you answered negative to that, the intermediate driver's license portion?

A Right.

Q Number two, by reason of a conviction of (a) a conviction of a felony in the commission of which a motor vehicle was used, do you have any evidence to show that?

A Not that I'm aware of.

Q (B) a previous conviction for violating RCW 46.20.342 related to driving while a license is suspended or revoked, do you have any evidence to show that?

A Not that I'm aware of, although I don't have your driver's abstract in front of me.

Q Okay. A notice received by the Department of Licensing from a court or diversion unit as provided by RCW 46.20.265 relating to a minor who has committed or who has entered a diversion unit concerning the offense and offense related to alcohol, legend drugs, or controlled substances or imitation controlled substance, do you have any evidence to show that?

A No, I do not.

Q A conviction for violating RCW 46.20.410 relating to the

violation of restrictions of an occupational driver's license, do you have any evidence to show that?

A No, I do not.

Q (E) a conviction for violating RCW 46.20.345 relating to the operation of a motor vehicle with a suspended or revoked license?

A I'm not sure I understand that one. If my understanding of it is right and it means you have been convicted prior for suspended, then, no, I don't have any evidence of convicted prior for suspended.

Q Okay, thank you. A conviction for violating RCW 46.52.020 relating to duty in case of injury or death of a person or damage to an attended vehicle, do you have any evidence to show that?

A No, I do not.

Q (G) a conviction for violating RCW 46.61.024 relating to attempting to elude police officer, do you have any evidence to show conviction for that?

A No, I do not.

Q (H) a conviction for violating RCW 46.61.500 related to reckless driving, do you have any evidence to show that?

A No, I do not.

Q A conviction for violating RCW 46.61.502 or 46.61.504 relating to a person driving or being in actual physical control while under the influence of intoxicating liquor

or drugs, do you have any evidence to show that?

A No.

Q A conviction for violating RCW 46.61.520 relating to vehicular homicide?

A No.

Q A conviction for violating RCW 46.61.522 relating to a to vehicular assault, do you have any evidence to show that?

A No.

Q A conviction for violating RCW 46.61.527(4) relating to reckless endangerment of roadway workers?

A No.

Q (M) a conviction for violating RCW 46.61.530 relating to racing of vehicles on highways, do you have any evidence to show that?

A No.

Q. A conviction for violating RCW 46.61.685 relating to leaving children in an unattended vehicle with the motor running, do you have any evidence to show that?

A No.

Q A conviction for violating RCW 46.61.740 relating to theft of a motor vehicle fuel, do you have any evidence to show that?

A No.

Q A conviction for violating RCW 46.64.048 relating to

attempting, aiding, abetting, coercing, or committing crimes, do you have any evidence to show that?

A No.

Q (Q) an administrative action taken by the Department of Licensing under chapter 46.20 RCW, do you have any evidence to show that?

A The letter sent from Department of Licensing, I don't know if that would be considered an administrative action or not.

Q That's the only thing that you have then under RCW 46 --

A Yes, I'm not familiar with all of 46.20.

Q There is 237 pages there.

A Like I said, I'm not familiar with all of the administrative actions, however, I do have the letter from Department of Licensing stating suspension.

Q Would you say then, other than the statute cited there, that there are no other reasons under RCW 46.20 that I would be suspended?

A I'm not sure I understand your question.

Q Is there anything else besides the one listed in that letter, the RCW 46.20.289, that I would be suspended for under 46.20?

A As far as I know, if the one you're referring to is whether you're to -- failure to respond, appear, pay, or comply with the terms of a citation, then that and the

administrative action, again, the letter from Department of Licensing, I don't know if that's considered an administrative action or not so.

Q Okay. Do we need to go through 46.20 in it's entirety to make sure there is nothing else in there or will you say there is nothing else in there?

MR. JOHNSON: Does the state want to stipulate that there is nothing other than 46.20.289 and 46.20 that I'm charged with?

MR. O'ROURKE: No, I don't want to stipulate to anything, and he's answered the question I believe to the best of his ability, and anything else is irrelevant.

MR. JOHNSON: Thank you.

Q (By Mr. Johnson) I'm going to come back to this. (R) a conviction of a local law ordinance or regulation or resolution of a political subdivision of this state, federal government, or any other state of an offense similar to violating RCW 46.20.342(1)(b), do you have any evidence to show that?

A I'm not familiar with that RCW so I can't answer that question.

Q Page 555 to 563, can you find something in there that I'm suspended?

MR. O'ROURKE: I'm objecting again, your

Honor. I don't know the relevance, there is no relevance to -- well, again, I'll object, there is no relevance to any of the questioning. But he doesn't need to find -- he doesn't need to be familiar with the statute that I've cited or alleged as one of the possible reasons why Mr. Johnson could be suspended. So for him to read eight pages of the statute is not relevant at this point.

THE COURT: What are you trying to get at?

MR. JOHNSON: Well, I don't see anything in here that I've done to be suspended is simply what I'm getting at, and I want to know what evidence the state has under what law I'm suspended for.

THE COURT: Well --

MR. JOHNSON: And if that is in this document.

THE COURT: The deputy is testifying as to the evidence that he has, that he is not a lawyer, at least to my knowledge, and so the legal aspects of what you're asking for I think you're going beyond what this witness can testify to.

MR. JOHNSON: This is the witness that has issued the citation and brought me here.

THE COURT: Right, he cited you for driving while license suspended.

MR. JOHNSON: And this is the amended

citation.

THE COURT: And that was done by the prosecutor's office, they amended it to add detail which is information from the statute. But I think what you're getting at is asking the deputy to somehow put the facts of this case into the statute and I think that's getting beyond what this witness is competent to testify to.

MR. JOHNSON: Well, I think that this witness is arresting people, he's a law enforcement officer, he should be familiar with the laws and he should be able to tell me what this document is and what's in it. I have a right to know what's in here I have done to be suspended. And if it's not in here, I haven't been charged with it, and if I'm not charged with it, why am I here?

THE COURT: Well, you're getting into what your legal argument is, or one of them anyway, so --

MR. JOHNSON: Somebody needs to answer.

THE COURT: But the questions you're asking him I think are getting beyond what he is competent to testify to. Because you're asking him to read a statute and then say what in that statute applies to you, is that what you're asking him to do?

MR. JOHNSON: Well, I'm asking him what

evidence he has to show that I violated any of these charges in here. If the state has no evidence to show that I violated these charges, there is no case. And somebody has to testify as to what I did to be suspended and have some proof.

THE COURT: Okay. Well, I think he's given the testimony that he's got, so going beyond that, I think we're sort of wasting time. If you want to ask him is there anything else that you intend to -- any other part of this statute that you're intending to refer to regarding these charges against me or something like that, but to make him read page after page of statute when he's already testified as to the charge --

MR. JOHNSON: Well, the state brought these two pages of charges, and some of them are pretty onerous. I don't drink and I don't do drugs. I've never left the scene of an accident, I'm a boy scout.

THE COURT: The charging document is the nature of this or this or this or this, and they do that because when they tried to make it be just something lesser than that, then everybody, other people, not you, but other people in other cases that have said, no, you have to give us more specific information, and so they were giving all of this.

MR. JOHNSON: Well, that's the thing, giving

you this information, I need to --

THE COURT: But, apparently, most of that -- I haven't heard the whole case, but so far most of what's in that doesn't apply to you, they're only saying one small section of it applies to you.

MR. JOHNSON: Well, I've asked the state to stipulate to that and they said they aren't stipulating to anything.

THE COURT: Right, but if they're not presenting any evidence to anything else, then it is not going to be part of the case.

MR. JOHNSON: I want to make sure --

THE COURT: The state is required to present the evidence.

MR. JOHNSON: -- that this is understood that this doesn't stand because the way this is written it is indicating that --

THE COURT: If there's any other evidence as to anything else comes in, then I'll allow you to question as much as you want about that evidence. But at this point, we have no further evidence of anything else that's been mentioned.

MR. JOHNSON: Okay.

THE COURT: I don't know if the state's calling any other witnesses, but if this is their only

witness, then I think there is no point in getting into a lot of other things that have nothing to do with this case.

MR. JOHNSON: Well, I don't know.

THE COURT: That's what I'm saying, we will know soon because when the state's done with their evidence, then we will know whether they're alleging that you've been involved in a vehicular homicide in New Jersey and that that's the reason that they're citing you. There's been no evidence to anything like that so it is not part of this case. There is just nothing here that has to do with that.

MR. JOHNSON: Okay.

MR. GRAY: So, your Honor, for clarity sake for Mr. Johnson, you sustained the state's objection so he can't continue the questions in that realm, is that correct?

THE COURT: Well, I think the last question that he asked was the only thing I was referring to where he was asking him to start reading through pages of statute to see whether there was any other evidence that he had relating to any other statute, and I think that's beyond what is relevant to this case.

MR. GRAY: Okay.

MR. JOHNSON: Does the state intend to show

what exactly it is that I'm suspended and accused of doing or do we need to continue narrowing this down?

MR. O'ROURKE: I don't think I can respond to that unless there is an objection, if the court wanted to hear from me.

MR. JOHNSON: I'm just saying there is the next one coming up here, RCW 46.20, an administrative --

MR. GRAY: I believe we have gone over that one.

MR. JOHNSON: I understand and I said I would come back to that one. It's 237 pages and I need to get at which of those and what it is exactly and nothing else, but I'm defending myself and do I need to go through those 237 pages here today. And the court's already said no. I believe if the state's not going to tell me beyond what's in this document, what's here, I think I have a right to question each and every part of it.

THE COURT: Well, the thing that I'm struggling with is that when you have a criminal case, the state is required to come into court and to prove beyond a reasonable doubt the facts that are the bases for the charge. And they have to present that evidence and then you respond to that evidence and present any evidence that you have. But what you're doing, as far

as I can tell, is trying to go through a lot of things that aren't part of what the state is presenting as their evidence.

MR. JOHNSON: The state has presented --

THE COURT: Because you're trying to say that these things don't apply, that you aren't -- there is no reason to do that when the state has to prove, in the first place, their allegations, they have to prove them. So if they aren't presenting evidence as to those things, then they're out, they're nothing to do with this case. Without evidence of those allegations, they're not part of this case. And so to go through and say, well, this isn't part of it and this isn't part of it, well, this isn't part of it, when they aren't part of it because the state hasn't presented them, is just not relevant to what we're doing today. If the state doesn't prove it, it is not part of the case against you. So the only thing that you need to consider is what the state has presented as their evidence and then any evidence that you want to present on your behalf. But you don't have to disprove things that haven't been proven.

MR. JOHNSON: Okay.

MR. GRAY: Your Honor, if at all possible, since Mr. Johnson is representing himself and I'm

standby counsel, I would ask the court to consider giving us like a three-minute break so I can discuss with Mr. Johnson the case. I believe at this point there may be no further questions, but I just wanted to make sure of that.

THE COURT: Certainly, we will take a recess until 9:40.

MR. GRAY: Thank you, your Honor.

(Recess taken)

THE COURT: Mr. Johnson, do you have any further questions for the witness?

MR. JOHNSON: I have no further questions.

THE COURT: Anything from the state?

MR. O'ROURKE: No, your Honor, state rests.

THE COURT: You can step down. Okay, the state has no further evidence, the state has rested. So, Mr. Johnson, do you have any evidence that you would like to present?

MR. JOHNSON: Well, I would like to make a motion to dismiss. The state has not shown it's point, that is that I've been driving while suspended under any of the laws listed in the statute or under any of the terms of the statute. It says, RCW 46.20.289, and if you read that statute, it says the Department shall suspend all driving privileges of the person when the

Department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025, that the person has failed to respond to notice of traffic infraction, failed to appear as requested -- failure to appear at required requested hearing, violate a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction. And the way that sentence is written, the three RCWs can be limited to those four objects after them. And nowhere in this does it say failure to pay. So I have made all court appointed hearings in front of you a year ago. I've complied with the terms of notice of traffic infraction, and I have not done anything under this statute.

THE COURT: Okay, does the state want to respond?

MR. O'ROURKE: Well, yeah, there is only one piece of this -- the court hit it right on the head, the court appears to understand better than others why the orders amending now include every piece of language, because of a select few defense counsel in this county who will, I guess, line the weeds and claim they don't know what they're charged -- their client's charged with even when the specific RCW is there and the title of the crime. If all the elements aren't there, then they claim they don't know what they're charged with. And

some of it, sometimes the court has entertained dismissal of the action because of a lack of the entire charging document.

I don't necessarily think that everything that's here is necessary under the law. I don't agree with some of those rulings that have come down, but the bottom line is that the court hit the nail on the head. If I'm going to have cases dismissed because it doesn't have every single word of the statute in it, then I'm willing to put every word of statute on the complaint in front of the court. So that's what you have here. And as the court knows, the charging document I think here is a literal word-for-word recitation of 342 or 46.342, 46.20.342 and (1)(c). And so there is a number of ways you can be driving suspended in the third degree.

In this case, Mr. Johnson, his license is suspended. Now, whether he agrees with it or not, that Exhibit 1 in front of the court indicates through the Department of Licensing that his license is suspended for fail to respond to traffic infraction which includes -- again, Mr. Johnson may not want to pay his traffic infractions, but this court deals with them every day and has quite a bit of familiarity with what it actually takes to suspend a driver's license. And if you do fail to respond, appear, pay, or comply with any of the terms

of the citation, the Department of Licensing can revoke or can suspend your license. So that's what's happened here. If the charging document sufficiently sets forth what 46.20.342 stands for and Exhibit A matches one of the bases -- excuse me, Exhibit 1 matches one of the bases why you can be suspended and why this particular defendant, Mr. Johnson, is suspended. This is the same process that takes place in court's across the state, ten of thousands of times in here, and I don't have anything to add besides exactly what's in front of the court.

THE COURT: Do you want to say anything more, Mr. Johnson?

MR. JOHNSON: Yes, ma'am. In 46.20.342 there is nothing said about failure to pay. This is a quote, the charging document is mostly of 46.23, it specifically limits 46.20.289 to those four objects we read earlier a few minutes ago and listed, that would be failure to respond to a notice of traffic infraction, failure to appear to requested hearings, violation -- violated a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction or citation. All of those are very specific things. I mean, nowhere does it say failure to pay, it's just a few words that aren't in the RCW. We both

know that there is an RCW that does suspend your license for nonpayment of the ticket, but it is not charged.

THE COURT: Well, the statute that -- the evidence that the state has provided here with regard to your license was contemplating 46.29(d), fail to respond to a notice of traffic infraction, fail to appear at requested hearing, violated a written promise to appear in court, or failed to comply with the terms of a notice of infraction or citation as provided in RCW 46.20.289.

And if you look at 46.20.289, suspension for failure to respond, appear, et cetera, it says, the Department shall suspend all driving privileges of a person when the Department receives notice from a court under RCW 46.63.070(6) or 46.63.110(6) or 46.64.025 that a person has failed to respond to a notice of infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of the notice of traffic infraction or citation other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1st, 2005. A suspension under this section takes effect pursuant to the provisions of RCW 26 or 46.20.245 and remains in effect until the Department has received a certificate from the court showing that the

case has been adjudicated and until the person meets the requirements of RCW 46.20.311. In the case of failure to respond to a traffic infraction issued under RCW 46.55.105, the Department shall suspend all driving privileges until the person provides evidence from the court that all penalties and restitution have been made.

MR. JOHNSON: State has presented no evidence under 46.55.105, which is abandoned vehicle, which the bottom sentence covers. 46.20.311 has to do with proof of insurance, 46.20.245 has to do with a hearing, and the sentence above which lists 46.63.110(6), is limited to those four objects after it. It says that the person has failed, it is very specific as to what it says. It does not say the fail to pay, it does not say or after the three RCWs, it doesn't even have a comma or a period. So those three RCWs are limited to those four objects after it.

THE COURT: Well, I guess what this comes down to is the language of RCW 46.20.289 that says -- because I don't have any other place to look, that nobody has mentioned to me -- fail to appear to requested hearing, Mr. Johnson is alleging that is not the case here; violated a written promise to appear in court, he's saying that's not the case; has failed to comply with the terms of a notice of traffic infraction or citation,

so complying with the terms of a notice of traffic infraction or citation.

I guess the allegation is here that the Department of Licensing has notice from the court, and I think if I remember correctly it said it was from this court, Mr. Johnson, I believe said it was a case out of this court, that failed to comply with the terms of a notice of traffic infraction. The terms of a notice of traffic infraction, the traffic infraction tells you that you have three options, you can pay it, you can request a contested hearing, or you can request a mitigation hearing. And, of course, if you appear, that you have the further option of asking for deferral of a ticket, but the ticket itself just gives these three options.

If you request a hearing then you must appear at that hearing, and if you contest it and it is found committed, then you're required to pay the ticket and you might be ordered -- some people pay it that day and some people ask for time to pay, but judgment is entered upon a finding of committed on a contested ticket.

On a mitigation, judgment is entered and sometimes people are given time to pay and sometimes people say they will pay that day. But once that judgment is entered on a traffic infraction, then the infraction itself, the person signs it generally saying that

they're going to pay it either today, or I mean that day of the hearing, or at some future date. And the notice also says that if they fail to do that, then their driving license will be suspended. That's the language that's on the judgment on infraction that says that you have been -- it's been found committed either after mitigation or after a contested hearing and that the person has to pay it, and if it isn't paid, then their driver's license will be suspended. So part of the complying with the terms of a notice of infraction is requesting a hearing, appearing at that hearing, and then if it's found committed, paying that. That's all part of complying with the notice of infraction which gives those options. It's all part of the process.

MR. JOHNSON: Is it stated somewhere in this?

THE COURT: In where?

MR. JOHNSON: That I have to pay. It tells me that I can ask for the three options, I don't see where anywhere it says I have to pay judgment on this citation.

THE COURT: On the citation itself?

MR. JOHNSON: That's right, and that's a notice of infraction.

THE COURT: I think the options that are given are -- I don't have them right in front of me, but --

MR. JOHNSON: I have a copy, your Honor.

THE COURT: -- but what the defendant is handed generally is a --

MR. JOHNSON: I have a copy here, your Honor.

THE COURT: -- the green part of the ticket that the person sends in requesting a hearing.

MR. JOHNSON: Yes.

THE COURT: Or sending in the payment or whatever is being done.

MR. JOHNSON: Yeah.

THE COURT: That has those three options and you mark a box --

MR. JOHNSON: Yes.

THE COURT: -- I'm sending in payment, I'm requesting a contested hearing, or I'm requesting to mitigate.

MR. JOHNSON: Yes.

THE COURT: And you mark the box. You're given those three options, and I believe it says on there that if you don't do that then your driving license will be suspended.

MR. JOHNSON: It's been done.

THE COURT: But that's just the first step.

MR. JOHNSON: Well, that's the entire terms of this citation, the rest is showing up in court.

THE COURT: Right, showing up, that's if you request a hearing, then you have to show up in court.

MR. JOHNSON: Right.

THE COURT: If you don't show up in court, then you haven't complied. And then once you've shown up in court, then depending on what happens in court, you have -- you're ordered -- either the case is dismissed, or if the person mitigates or if they contest it and it's found committed, then they're required to pay, there's a judgment that's entered, the judgment is signed by the defendant, it is signed by the judge. It's signed by the defendant and it says that you're going to pay it either that day or some date in the future. If it isn't paid, then it says, if this is not complied with, then your driving license will be suspended for noncompliance. It is all part of a process that you go through with a traffic infraction.

MR. JOHNSON: Where does it say that on this piece of paper?

THE COURT: Well, that just starts the process.

MR. JOHNSON: Well this --

THE COURT: That paper.

MR. JOHNSON: The law is specific to this piece of paper only, and that whole law is written for

people that don't appear, somebody that takes the ticket, balls it up, and throws it on the ground, that's what that law is about. There is nothing on the back of this ticket or on the front of this ticket that says I have to comply with the orders of the court. It says I have to appear, that's my promise to appear. I signed it, I sent it back to the court in a timely manner, it was filed. I have complied with the terms of this notice in its entirety. Nowhere in this notice says that I have to pay or comply with an order of the court.

THE COURT: Well --

MR. JOHNSON: 46.20.289 is very specific about what it says. It doesn't say comply with the notice of the terms of a court order, it says comply with the terms of a notice of infraction. This does not say pay, it gives an option, it is an option, but that's an or function, there is three ors here. As long as I selected one of them and do what that one says, I've complied with this notice. This is issued solely to bring me to court or to collect money.

MR. O'ROURKE: Objection, your Honor, I'll withdraw it.

MR. JOHNSON: All this is is something to bring me to court I'm being charged. I can, may, and not come, I can ask for a mitigating hearing and plead

guilty or I can ask for a contested hearing and plead not guilty. That's the sole function of this and it doesn't say any more. Says if I give a bad check I believe that I can lose my license. State has no bad checks from me.

MR. O'ROURKE: I'm objecting to the -- well, there is no -- first of all, there is no evidence as to this document Mr. Johnson is referring to, that's not on the record. There is Exhibit 1 and there is the testimony of the deputy. And the statute reads as this notice of suspension reads, if you fail to respond, appear, pay, or comply with the terms of the citation listed below, and the statute says complies with the terms of a notice of traffic infraction or citation.

It is ludicrous to propose that you are complying with the terms of a citation issued in this state -- and this has been dealt with before, this is not the first time these arguments have been made, they're not novel -- it's ludicrous to suggest here you're complying with the terms of a citation by simply walking into court, having a hearing, and which there is no evidence of anyway, but for sake of argument, and refusing to pay traffic infractions. It would be naive to think that the legislature crafted this statute with this gaping loophole where you could simply avoid suspension of your

license under this 46.20.342 by simply not paying your traffic infractions.

The whole purpose of this statute is so you don't have the ability to be cited 20, 30, 40, 100 times and simply fail to pay your infractions and then be able to say, well, there is going to be absolutely no repercussions as far as my license being suspended. Not paying a traffic infraction is failure to comply with the citation. To suggest that just reading the face of it and doing something off the face of it and then not following up, not complying with the court's orders, a court order, that is part of what the citation is crafted for, you're not complying with the terms of the citation by not following the court orders. But beyond that, there is no evidence to suggest that.

All we have is Exhibit 1 and the testimony of the deputy. Exhibit 1 says Mr. Johnson failed to do what the statute says, and the statute says if you fail to comply with what the statute says here, and what's in Exhibit 1 here, found guilty of driving suspended in the third degree. So these aren't novel arguments and there is no merit to them. And this document indicates that Mr. Johnson's license is suspended per this statute. And the motion has to be denied.

THE COURT: Are you alleging, Mr. Johnson,

that there is another statute that would have been more on point to this that the state didn't cite you under?

MR. JOHNSON: Yes, 46.63.110(6)(b) and I'm not suspended under that statute.

THE COURT: Say that again.

MR. JOHNSON: 46.63.110(6)(b).

MR. O'ROURKE: Just in case the court's to look up and take notice of what I'm doing, I'm not text messaging or something in court, I'm just looking up the statute in my phone. Just so the court doesn't think I'm being disrespectful enough to start talking to my friends in court.

MR. GRAY: I would ask to verify that.

MR. O'ROURKE: Judge Roewe heard argument on this issue already, I recall this statute now.

THE COURT: Okay. So 46.63.110 is talking about the penalties on infractions. So it says that if somebody doesn't pay an infraction then their license is suspended. So you said that's not what you did.

MR. JOHNSON: No, I'm saying that's not what I've been charged with.

THE COURT: Right, because --

MR. JOHNSON: I've been charged with violating 46.20.289 which has nothing to do with --

MR. O'ROURKE: I object to that, that's not

what he's been charged with, he's charged with 46.20.342, I want to make that really clear. But what I've done here, and I read while we were taking that short break the entire statute 46.20.342, driving suspended in the third degree which is the only crime Mr. Johnson could be charged with.

These other statutes referencing -- we have dealt with this in a motion and a motion to reconsider in front of Judge Roewe this 46.63.110, that's monetary penalties associated with an infraction. This citation has the entire driving suspended third statute, that's what Mr. Johnson is charged with. He's not charged with the crime under 46.20.289, he's charged with a crime under 46.20.342 for failing to respond to a traffic infraction. And the Department of Licensing had his license suspended for such failure.

I guess I'm not sure what we're looking at at this point. If the failure to fully comply with a citation -- there is no other crime he can possibly be charged with other than 46.20.342. I mean, if we decriminalize driving suspended for not failing to pay a traffic infraction, that will be one thing. But clearly, the case law, the evidence, the statute, they all suggest that if you fail to comply with a traffic infraction by failing to respond to it, failing to pay

for it, failing to comply with it in total, then the Department of Licensing has the ability to suspend your license and they do, and they have done that here because Mr. Johnson failed to comply with the terms of I38445. That's what he's charged with, and it is a criminal offense, and there is no evidence in the record to suggest to the contrary.

THE COURT: Okay. Well, if I understand the argument then, the defendant's motion to dismiss is based upon his reading of the statute that he was charged under, which refers back to RCW 46.20.289, and his argument is that he didn't -- that the reason that the state is alleging that his license was suspended is that he failed to respond to a notice of infraction. He says that he did not fail to respond. That it alleges or that he failed to appear at a hearing, he says that he did not fail to appear. Violated a written promise to appear, he's saying he didn't violate a written promise to appear, or failed to comply with the terms of a notice of infraction, and he's saying, well, the notice of infraction just says here are your options, check the box, and send it in. It doesn't say that once you appear in court and the judge perhaps orders judgment and orders you to pay it, that that is what is set forth here in this statute. Have I got that right?

MR. JOHNSON: Yes, ma'am.

THE COURT: And the state is alleging that -- the state's argument here is that failing to comply with the terms of a notice of traffic infraction includes, if it is found committed, paying that infraction, is that right?

MR. O'ROURKE: I'm arguing he's failed to comply with the terms of his citation --

THE COURT: Because he didn't pay it.

MR. O'ROURKE: -- without a valid operator's license.

THE COURT: That's the allegation.

MR. O'ROURKE: I don't know, but what I'm saying is that, number one --

THE COURT: I don't think the evidence that we actually have in this case differentiates between -- or I don't have the exhibit, do I?

MR. O'ROURKE: I don't have it either, but the issue I'm having is that there is no evidence from Mr. Johnson. What he's saying in his argument is not evidence, there is no evidence on the record of any of these things that he is talking about. He hasn't testified and he hasn't admitted a citation or anything. What we have is a document, certified document from the Department of Licensing saying that Mr. Johnson has

failed to respond, appear, pay or comply with the terms of the citation listed below, I38445, no valid operator's license. That's the evidence we have. So when he's saying he didn't do these things, he hasn't been sworn under oath, he hasn't testified, he hasn't admitted any documents, so there is no evidence of any of this stuff. What we have for a motion to dismiss is Exhibit 1, and Exhibit 1 matches the terms of the statute for driving suspended and he's properly suspended, that's all we have to consider at this juncture.

THE COURT: Okay. Well, the state's point is that there is no evidence that's been admitted into court today that says that you did any of these things that are alleged in this suspension, because the letter of suspension says your driving privilege will be suspended, the court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below.

MR. JOHNSON: The state has not put into evidence any facts as to what that is. They have not proven their case here.

THE COURT: Well, what the state has to prove is that you were driving a motor vehicle in Lewis County Washington, which the deputy has testified that he

observed you driving a vehicle in Lewis County Washington, while your license was suspended, and that you were sent notice of that suspension. And they have a document from the Department of Licensing saying that after a diligent search, our official record indicates that the status on September 19th, 2008 was personal driver's license status suspended in the third degree.

And then a copy of a letter that -- you were mailed a letter on September 17, 2007, telling you that your license was going to be suspended because of this infraction, this no valid driver's license infraction that was here in Lewis County District Court. And the letter that was sent to you is the one that says the court has notified us that you failed to respond, appear, pay or comply. That's the Department of Licensing sending you notice. They say they sent you this notice telling you that you were going to be suspended for that reason.

And then they have a document saying that as of September 19th, 2008, your license status was suspended. So that's the evidence that I have, the officer's testimony as to observing you driving, in Lewis County, and the document that's been admitted from the Department of Licensing saying that as of that date your license was suspended, and a document sent to you saying

this is why you're being suspended. That's all the evidence that I have at this point. So with that evidence, without anything else, then I have to deny your motion to dismiss because this evidence that's been presented by the state is sufficient evidence to prove the allegation of driving while suspended. It meets the elements of that charge. If you want to present any evidence on your behalf, then you have the opportunity to do that at this point. Do you have evidence that you wanted to present?

MR. JOHNSON: Yes, ma'am.

THE COURT: Okay, go ahead.

MR. JOHNSON: Thank you. Do you want to swear me in?

THE COURT: Are you going to testify?

MR. JOHNSON: Yes.

STEVEN JOHNSON, having been first duly sworn on oath, testified as follows:

MR. GRAY: Your Honor, I'm guessing Mr. Johnson would like me to elicit his responses by questioning him.

MR. JOHNSON: Yes.

THE COURT: Okay, go, ahead Mr. Gray.

DIRECT EXAMINATION

BY MR. GRAY:

Q Mr. Johnson, can you please state your name for the record and spell the last name.

A Steven Chris Johnson, J-o-h-n-s-o-n.

Q Where do you live?

A Randle, Washington.

Q Mr. Johnson, on the date of September 19th, 2008, what were you doing on that day?

A I was going to see a friend on the Falls Road and to find out about having him come to court to testify on behalf of me in a civil lawsuit.

Q Were you pulled over by an officer?

A Yes, sir.

Q What happened after that?

A I was arrested and put in jail, stayed in jail from Friday morning until Monday morning, Monday afternoon.

Q What were you arrested for?

A Driving on suspended in the third degree.

Q As far as you know, why would your license be suspended?

MR. O'ROURKE: Objection, speculation.

THE COURT: I think he can testify as to that, go ahead.

THE WITNESS: I believe my license was

suspended for not paying a fine.

Q (By Mr. Gray) What fine were you alleged to not pay?

A Traffic ticket that I received 4/14/07.

MR. O'ROURKE: Objection, hearsay.

THE COURT: What's the hearsay?

MR. O'ROURKE: That there is some kind of citation or that he is alleged to have done something, it is not his own statement. That would have to be from an out of court statement, out of court source, so there is no evidentiary value to it. That's in the form of an out of court statement.

MR. GRAY: Your Honor, I believe --

THE COURT: Can you rephrase?

MR. GRAY: I'm sorry, what was your Honor's ruling on that?

THE COURT: I need to hear the question again.

Q (By Mr. Gray) Mr. Johnson, what ticket were you allegedly -- did you allegedly fail to pay?

THE COURT: I think he can testify as to a ticket that he --

MR. O'ROURKE: That question, that's fine.

THE COURT: Okay.

MR. O'ROURKE: That's not what the question was before.

THE COURT: Okay, go ahead.

Q (By Mr. Gray) Go ahead.
A A ticket that was issued to me a 4/14/07 by Deputy Spawn. The number on it was 07C --

MR. O'ROURKE: Objection, hearsay, now it's an out of court statement that hasn't been admitted into evidence. It is not through Mr. Johnson. He can state that he believes he was alleged to have been suspended for a certain reason, but when he starts to read hearsay documents into the record, that's inadmissible evidence.

MR. GRAY: Your Honor, it's a ticket out of Lewis County District Court, I think it would be self-authenticating. He has a copy in his hand, we can mark it for identification purposes.

Your Honor, I'm passing to Mr. Johnson what's been marked as Defendant's Identification Number 2. I guess in terms of the court's ruling on whether or not that's hearsay --

THE COURT: Well, if he's giving the citation number, that's already been -- it's already in the letter of suspension, that's been admitted from the state, so I don't see any problem in him giving a number that's already part of the evidence. Go ahead.

Q (By Mr. Gray) Go ahead, Mr. Johnson.
A Thank you. A citation issued 4/14/07. The citation number is 07C4242, and the stamp number at the top is

38445.

MR. O'ROURKE: Objection, hearsay as to all that.

MR. GRAY: Your Honor, I believe he's just eliciting, as your Honor pointed out, the ticket that he is alleged to have failed to comply with which is the basis of the suspension and the state's original exhibit.

MR. O'ROURKE: And I have admitted a certain piece of evidence and it might have an infraction number. What he's reading from is an out of court document, a statement that hasn't been admitted, there is no foundation laid for it, he's reading out of the court statement onto the record. That's hearsay until he can lay some foundation that it comes in otherwise. Whether or not it might be the same infraction that I'm referring to, that's fine, but right now, procedurally, it's hearsay and it's inadmissible.

THE WITNESS: I believe that I was asked and answered what ticket do I believe that I was suspended for.

MR. O'ROURKE: And he's answered that. Now he's reading from the document, that's hearsay.

THE COURT: He gave the citation number. I don't have a problem with him giving a citation number,

it's foundational in nature anyway. But we already have it in evidence that citation number and that date, the violation date.

Q (By Mr. Gray) Mr. Johnson, did you fail to comply with your previous ticket that you're alleging led to your suspension?

MR. O'ROURKE: Objection, that question calls for speculation. If there is a particular thing he may or may not have done, he can testify about that, but he can't testify as to whether he legally failed to comply with this under the statute, that's speculative on his part.

MR. GRAY: Of course he can, your Honor, that's his own response to it. He's not speculating, he's either saying yes or no.

THE COURT: He can answer the question, go ahead.

THE WITNESS: Can you repeat it?

Q (By Mr. Gray) One more time, to your recollection, did you fail to comply with that ticket?

A I didn't have any money to pay the fine, otherwise, I complied with the notice of traffic infraction and filed it in a timely manner. I did appear in court and gave testimony, and, therefore, I think I've complied with the terms of the law and with this citation.

Q Mr. Johnson, in connection with this case, is there anything else that happened on that day or with the ticket that you want to testify about?

A I think I would like to deal with this a little bit. This is --

Q What are you referring to?

A It says I gave testimony here, defendant testified.

Q Okay, you've already testified to that fact. So you had a hearing on the underlying ticket and you testified at that hearing, is that correct?

A Yes.

Q Okay. Is there anything else about that hearing you want to explain to the court?

A No, just that I did appear and that I did give testimony at the trial.

Q Is there anything else you want to testify to as to when you were pulled over on this case?

A No.

MR. GRAY: I don't have anything further.

MR. O'ROURKE: I'm asking for a half hour recess so I can prepare for my examination of Mr. Johnson and rebuttal witnesses for evidence that I have to present.

THE COURT: Any objection?

MR. JOHNSON: No.

THE COURT: Okay, we will reconvene at 11:05.

(Recess taken)

THE COURT: Okay. I think Mr. Johnson was on the witness stand and it was the state's cross examination. Go ahead, Mr. O'Rourke.

CROSS EXAMINATION

BY MR. O'ROURKE:

Q Mr. Johnson, your testimony is that you were in fact issued infraction I38445? I have that if you want to refresh your memory as to it.

A Yes.

Q That would be accurate? Okay, and you were cited for no valid operator's license, is that correct?

A That's correct.

Q And it's your contention that you complied with the requirements of the notice of infraction and citation under the law, correct?

A That's correct.

Q And you are claiming that because you did in fact check one of the boxes for contested hearing, correct?

A Yes.

Q And you mailed and sent it to the court, right?

A Yeah, yes.

Q And is it in fact true that you had a contested hearing,

correct, according to you?

A That's correct.

Q And you gave testimony according to you?

A Yes.

Q And isn't it also in fact true that at the hearing, the contested hearing for this infraction that you have here in front of you, you were found to have committed the violation, correct?

A That's correct.

Q And isn't it also true that at that hearing you were ordered to pay a monetary sanction for having been found to have committed that, correct?

A That's correct.

Q And you received an order to that effect, correct?

A I believe so.

Q And the court told you that you in fact had to pay that infraction within a certain period of time, correct?

A That's correct.

Q And you were given no alternatives other than payment of the fine, correct?

A Yes, sir, that's correct.

Q And so you didn't pay it, correct?

A That's correct.

Q And you never made efforts to pay it, you simply didn't pay it for whatever reason?

A That's correct.
Q And you weren't set up with any other conditions or any other sort of terms by which you could avoid payment of this, it simply wasn't paid, correct?
A I don't know that there are any other terms available.
Q Right. So there would be no other terms known to you, none that were set forth to you, correct?
A That's correct.
Q In fact, whether mistakenly or wrongly in your estimation or not, your driver's license is in fact suspended, correct, by the Department of Licensing?
A I don't think it's legally suspended.
Q But you are aware in fact that the Department of Licensing, whether in your estimation is legally suspended or not, has suspended your license, correct?
A I'm aware of that.
Q And you're also aware that in fact, whether legally or not, on September 18th of 2009, the Department of Licensing had in fact suspended your license, correct?
A Was I aware of it?
Q You were aware of that fact on September 19th, 2008, okay. And you're also aware that the basis, whether in your estimation it is legal or not for that suspension, was because of failure to pay that infraction I38445, isn't that correct?

A Yes.

Q And you were the operator of the motor vehicle that deputy McKnight stopped on September 19th, 2008, correct?

A Yes.

Q And you were driving it within the county limits of Lewis County, correct?

A That's correct.

MR. O'ROURKE: Unless there is objection from you, I'm going to move to admit what you marked as your Defendant's Identification 2 as well. I guess I'm going to move to admit that document we have been referencing, that Mr. Johnson has been referencing, into evidence.

THE COURT: Which is what, a copy of the original infraction?

MR. O'ROURKE: Right.

MR. GRAY: Do you have any objection to that, Mr. Johnson?

MR. JOHNSON: I have no objection.

THE COURT: Okay, that will be admitted.

(WHEREUPON, Defendant's Exhibit 2 admitted)

MR. JOHNSON: I have no other copy of that, I would like to get a copy of it.

MR. O'ROURKE: We can ask the court to get you

a copy of that.

MR. JOHNSON: Thank you.

MR. O'ROURKE: And also the other document I have had marked, just for the record we can get those for you also.

Permission to approach the witness again, your Honor.

THE COURT: Granted.

Q By Mr. O'Rourke) I'm going to hand you what's been marked as Plaintiff's Identification Number 2. I think this may be something that you had a copy of yourself originally or looking at, but I want to give you a chance to look at that and tell -- let me know if you've seen it before.

A Yes.

Q Not that specific one, but the contents of it, correct?

A Yes.

Q That's the court docket from the infraction you were issued that we have been referring, that's Exhibit -- I think Defense Exhibit 1 now?

A Yes.

Q Okay. And does that -- have you reviewed that sufficiently to be able to tell me whether or not that in your estimation, not whether you agree with it or whether it's legally sound, but that in fact adequately

that it represents the proceedings for that particular infraction of this court, Lewis County District Court?

A To the best of my knowledge it does.

Q Okay.

MR. O'ROURKE: I have no further questions for Mr. Johnson.

THE COURT: Mr. Gray, do you have anything further?

REDIRECT EXAMINATION

BY MR. GRAY:

Q Mr. Johnson, based on the prosecuting attorney's cross examination questions, do you have response to those questions?

A The only thing I would respond is that that document showed that I did appear in court and that I did comply with the terms of the notice of traffic infraction. That's all I have to say.

MR. GRAY: Nothing further from me, your Honor.

MR. O'ROURKE: I have no questions for this witness. I would like to call Pamela Shirer of Lewis County District Court as a rebuttal witness.

MR. GRAY: Your Honor, the defense hasn't rested at this point, so I'm assuming that's what Mr.

Johnson wants, but --

MR. O'ROURKE: Okay.

MR. GRAY: Mr. Johnson does, the defense rests at this point.

MR. JOHNSON: Yes.

THE COURT: Okay.

MR. O'ROURKE: I apologize for that, with that I would like to make the same request.

THE COURT: To call Pam Shirer as a witness?

MR. O'ROURKE: Yes.

THE COURT: Is there any objection to that?

MR. JOHNSON: Well, we have had no notice of this witness.

MR. O'ROURKE: It is a rebuttal witness.

MR. GRAY: Rebuttal, we would ask the court to clarify what the rebuttal would be, what the information will be.

MR. O'ROURKE: Mr. Johnson has called into question whether he's properly complied with the notice of traffic infractions. The court needs all the documents relevant to that infraction in front of it, including what he's referenced previously as the court docket in this particular case, and I would like that evidence to be submitted to the court. So I'm going to ask that she be able to testify to that limited extent

to be able to submit this court docket of Mr. Johnson's infraction that I believe will help rebut his claim that he hasn't been, I guess, charged properly or brought through the process of suspension properly, or legally whether the evidence presented is sufficient to convict him of driving suspended in the third degree. That's what he's claimed thus far in his testimony and this piece of evidence will help in the argument to rebut that claim.

THE COURT: Okay. So you're bringing her in for the sole purpose of admitting the docket?

MR. O'ROURKE: Yes.

THE COURT: Do you have any objection to the docket being entered into evidence?

MR. JOHNSON: I have no objection to the document being entered into evidence. I don't know what this can testify to, which this witness can testify to. We haven't sat here and argued about.

MR. GRAY: If he admits to the evidence, I don't know if the --

MR. O'ROURKE: I don't need her, that's fine.

MR. GRAY: Just to clarify, Mr. Johnson, you have no objection to the admitting --

MR. JOHNSON: I have no objection.

MR. O'ROURKE: I move to admit Plaintiff's ID

2 as State's Exhibit 2.

(WHEREUPON, Plaintiff's Exhibit 2 admitted)

THE COURT: Okay.

MR. O'ROURKE: And I don't have any more rebuttal evidence or witnesses.

THE COURT: Mr. Johnson, do you have any other evidence?

MR. JOHNSON: I have no more.

THE COURT: Okay. Argument.

MR. O'ROURKE: Yeah. Your Honor, the claim that appearing in court at a contested hearing after you checked a box and showed up for the hearing and then failing to follow the court order as far as payment of that doesn't constitute a valid or legal basis to suspend a person's license is totally contrary to any law and to the statutes that Mr. Johnson has been reading. Now, I have read the statute in the half hour recess that I asked for to determine whether or not there is even sort of -- I guess there is no merit to the argument whatsoever in my mind, but I wanted to read these statues just to see I guess where the attempt of the logic is coming from. And, again, it goes back to this RCW 46.20.289.

Now, the argument here in a nutshell, and the court

recited that back to me, was under RCW 20.289, we have charged as RCW 46.20.342, has Mr. Johnson failed to comply with his notice of infraction. Now, again, if the court looks at RCW 46.20.342, I have charged Mr. Johnson with -- the state has charged Mr. Johnson with the entire language of that statute. So essentially what Mr. Johnson is asking this court to find today is that when he is issued a traffic infraction, fails to pay that traffic infraction, that he cannot be charged with driving suspended, that's what he's asking the court to find. That's what this court must find, that's the essence of his argument. Because if he's been charged with the entire statute, there is no other alternative means for him to be charged under.

So essentially, if his conduct doesn't match the statute, he's arguing that if anybody in this state simply comes into this courtroom in front of your Honor on a traffic infraction, on a contested hearing, because they have checked the box and because they have appeared, they can just simply fail to pay dozens, countless traffic infractions and be held by a court of law to still have complied with the requirements of RCW 20.342. That's not right. And it's not only right, not because I'm saying it's not right, that's not the argument, it just defies logic, it actually defies the

language of the statute.

If we read it more carefully, 46.20.342, it's been glossed over so far in the defendant's motion. 46.20.342 states you can't have your license suspended or revoked for a number of reasons. And if we jump, cut right to the chase, one of those reasons, like the court referenced, is RCW 46.20.289, and that's specifically referenced in the state's charging document. Now, that reads -- that doesn't read that Mr. Johnson has failed to enter his ticket with the court in a timely fashion, whether or not he's failed to respond, or whether or not he's failed to show up to court. What it says is fail to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated written promise to appear in court.

Now, those three, I don't necessarily think there is evidence in the record to suggest he's done those. But this term, to just say that we can look at this and gloss over it, fail to comply with the terms of a notice of traffic infraction or citation and it says as provided in RCW 46.20.289. Now, it doesn't say fail to comply with the terms of a notice on or traffic infraction or citation as listed on the back of the document as checked in a box. It doesn't matter there is no mention required in this crime it doesn't matter

what Mr. Johnson knows he has to do based upon the back of the citation. What matters is whether or not he's complied with the terms of 46.20.289.

And what he's asking the court to find is that he has complied with the notice of traffic infraction or citation by simply appearing in court at a contested hearing, being found committed, and then not paying the traffic infraction. That's the gross misreading of what it means. When the statute says failed to comply with the terms of a notice of traffic infraction or citation, that's not what it means. We know that's not what it means not only because it defies all logic and reason and defies everything, that's defies any practice that goes on throughout courts in this state, and defies the law, it actually defies the plain meaning of the statute.

Now, 46.20.342, we have already read that, it references us to 46.20.289. The Department shall suspend all driving privileges of a person when the Department receives notice from a court under one of three RCWs, RCW 46.63.070(6), RCW 46.63.110.(6), or RCW 46.64.025 that the person has failed to respond to a notice of traffic infraction.

THE COURT: What are you reading from right now?

MR. O'ROURKE: 46.20.289, and it is referencing those three statues within there. There is three of them. Again, it goes on to say after the three of these, the person has failed to respond to notice of traffic infraction, well, we know what that means because 46.64.025 deals with failure to appear, notice to Department, we're not operating under that. 46.63.070 contesting the termination hearing, failure to respond, we're not necessarily objecting under that.

But what 46.20.289 specifically references, and what Mr. Johnson wanted the court to overlook, is 46.20.289 states that the Department shall suspend the driving privileges of a person if they don't comply with 46.63.110(6). Now, 110(6), I'm going to read this all, not to take up any more of the court's time, but because I think it's patently clear here what we're dealing with, whenever a monetary penalty, fee, cost, assessment, or other monetary obligation is imposed by a court under this chapter, it is immediately payable.

Now, your Honor knows what that's about because you deal with hundreds of these, if not on a daily basis at least on a weekly basis. When a fine is imposed, the court makes that immediately payable by the defendant. And how do we deal with that if they can't pay it right away, well, there is a $10 time pay that can be set up

on something like that or maybe there is other remedies and the statute goes on to talk about those. If the court determines in its discretion that a person is not able to pay a monetary obligation in full, and not more than one year has passed since the last of July 1st, 2005, or the date the monetary obligation initially became due and payable, the court shall enter into a payment plan with the person unless the person has previously been granted a payment plan with respect to the same monetary obligation, or unless the person is in noncompliance of any existing or prior payment plan in which case the court may at its discretion implement a payment plan.

Now, that's what the court does on these. If he doesn't pay the infraction immediately, he's issued a $10 time pay, he's put on a payment plan. That didn't happen here. Mr. Johnson said he simply failed to respond to it. So again, 289, which Mr. Johnson relies entirely on for his argument, is saying he has complied with, goes directly to the heart of this issue.

And we continue to read on, if the court is notified the defendant, that is the person, has failed to pay or comply, and the person has subsequently entered into a payment plan and made initial payment plan, the court shall notify the defendant the

infraction has been adjudicated and the Department shall rescind any suspension of the person's driving license or driver privilege based upon a failure to respond to that infraction.

Now, that statute is saying if you don't pay the infraction, you fail to respond properly to it, which RCW 46.20.342 specifically addresses, so we deal with this every day. People's licenses get suspended and then they make payments on their infractions that have been sent to collections or otherwise and they get unsuspended.

So to suggest that nonpayment of an infraction that you've been found to have committed and ordered to pay is not a basis for suspension defies the entire statute. Why, we have a statute that Mr. Johnson is relying on and that's been specifically referenced that deals with time payment of these things and court orders to pay them, and deals specifically with legal fees, it is for suspension yet Mr. Johnson can claim that well he checked the box, he showed up in court, so the DOL invalidly suspended his license. It is preposterous, it doesn't make any sense, and it doesn't match the statute.

When you continue to read on, it talks about it even more, it talks about payment plan using the section

means using a plan that requires reasonable payment based upon the potential ability of the person to pay, the person may voluntarily pay an amount at any time in addition to those payments required under the payment plan.

Now, here's the specific portion that we need to look at, RCW 46.63.110, section 6, which again, I direct the court's attention back to 46.20.289 that's specifically referenced as the basis for which Mr. Johnson has been charged under, 46.63.110(6)(a) states if a payment required to be made under the payment plan is delinquent, or the person fails to complete a community restitution program on or before the time established under the payment plan, unless the court determines good cause therefor, and adjusts the payment plan or the community restitution plan accordingly, the court shall notify the Department of the person's failure to meet the conditions of the plan and the Department shall suspend this person's driver's license or driving privilege until, and I'm adding emphasis here, all monetary obligations, including those imposed under subsection 3 and 4 of this section have been paid and the court authorized community restitution has been completed.

Now, again, 3 and 4 state the supreme court shall

prescribe by rule a schedule of monetary penalties for designated traffic infractions. So what that statute is telling us is that if Mr. Johnson is deemed to have committed an offense, there is a particular monetary penalty. If he doesn't pay it, he gets suspended. If he's suspended and he makes payment and repays that, his license is unsuspended.

What we know is that the evidence in Exhibit 1 shows that Mr. Johnson -- and he's told us that he hasn't paid that, he doesn't believe there is a basis to suspend his license. The evidence suggests that on November 1st of 2007, at 12:01 a.m. his driving privilege is going to be suspended. Now the reason listed is this infraction, because he committed it and he hasn't paid it. Then it says September 19th, 2008, he's still suspended. Why is he still suspended, because the Department of Licensing is complying with the requirement of law in the statute by leaving him suspended until he repays his monetary obligations. I mean the basis for suspension can and should be under the statute, failure to pay for an infraction. And the only argument Mr. Johnson has made is he hasn't been charged with the proper statute. Well, there is no other statute that could be proper because this is exactly the statute he's supposed to be charged under.

He's supposed to be charged under 46.20.342 because he's disregarded the court's orders for over a year or more to pay an infraction and we have these statutes for a reason. Otherwise, again, as a matter of policy, people come in here and say, I checked the box, done everything I'm going to, disregard the judges and the court's order to pay this infraction because, guess what, you can't do anything to me. Well, that's wrong, it is flat wrong. The legislature has recognized that and Mr. Johnson's failed to comply with the statute. There is no argument that can be made here in a plain reading of the statute. As a matter of logic it simply can't be upheld, his argument can't hold any water.

He needs to be found guilty because, again, and I'll just do a brief recitation of the evidence because we have been arguing strictly about the statutory interpretation. He has a notice of suspension. He's admitted that, everything in the notice of suspension and the actual Exhibit 1 makes sense. He's said he knew on September 19th, 2008, he was suspended, but he doesn't agree with it because he doesn't think it is a lawful basis for a suspension. Why doesn't he believe it's lawful, I don't know because there is absolutely no legal basis for him to contest that. And the notice of suspension says in fact the very reason he's being

suspended is for a lawful reason under 46.20.289.

So the court has Deputy McKnight's testimony, Mr. Johnson's testimony corroborates that yes, I was driving, yes, I was in Lewis County, yes, it was in September 19th of 2008, yes, my license was suspended, yes, I knew about it. Exhibit 1 there hasn't been any objection to and the Exhibit 1 shows a lawful basis for him being suspended. It is the only evidence of suspension. His only argument is that it is unlawful, and it doesn't hold any water.

So based upon that evidence, the reading of the statutes, and the laws of the State of Washington, I'm asking the court to find Mr. Johnson guilty of driving suspended in the third degree.

THE COURT: Mr. Johnson.

MR. JOHNSON: Yes. The notice of traffic infraction is a specific document with specific requirements. There is no requirement in that document that says I have to comply with the terms of the court. The purpose of that is to charge me with a crime or an infraction. That's all it is. In this country we're innocent until proven guilty. The money's owed until the gavel comes down. There is nothing in that citation that says I have to pay a fine unless I choose to do that.

In the first option, that would be to forfeit a bail. The other two options I have, and there is an or in that, an or in that citation which specifically is different from and, to have a mitigating hearing or a contested hearing. I chose a contested hearing and I appeared in this court before you. I gave testimony. I have complied with the terms of the notice of traffic infraction.

RCW 46.20.289 does not reference failure to pay. If the legislature chose to do that, they can put those words in there, they have not. We're not here to presume what the legislature intended to do, we are here to follow their instructions. If the DOL wanted to suspend me under 46.63.110, they could have done that. They did not. They suspended me under 46.20.289, and there is no proof to show that.

The state would have you believe that there is no consequence if I got 40, 50, or 100 tickets, I would be before you in prison garb and not walking around on the street with no repercussion. There is one moving violation on my record. Nine years ago in Oregon in an unfamiliar place failure to yield, a minor traffic accident. There are no other tickets other than the one with you, a nonmoving violation for driving on an expired license.

Now, the 46.20.289 limits the scope of those three RCW to those four options that follow it. It's quite clear on that because there is no or, no period. After that third RCW, it says, if I might read it, when the defendant receives notice from a court under RCW, RCW, and RCW that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction, all they would have had to do was add a fifth item, failure to pay a traffic ticket. They did not do that. They did not allow those three RCWs to stand by themselves. They put them in there in such a way that those RCWs are limited to the four following options. And that's all it says.

The state has not shown in addition any order suspending me. They have provided a copy of the letter sent to me threatening suspension, and they have provided you with a copy of the letter saying that at that date I was suspended. But there is no order, no authorized person has signed any document that says I'm official ly suspended. There is nothing, and they have not prepared any such document. Nothing in their computer, there is no information available as to what was sent from this court to DOL, there is no document

signed by anybody in this county of any information sent to DOL. I have no idea what this county said to DOL. I do not know what was done. The DOL has not signed any order or no authorized person has signed any order suspending me.

I don't think this law stands. This is one of the most enforced laws in the state. Singularly, I don't think there is any law that gets more charged than this law. And yet it is written in such a way that you have to go through page after page after page to try and understand what it says. And you get this wording that is interpreted quite differently from what it says by the prosecution and the state, it doesn't say anything in this 289 about failure to pay. It cites page -- RCW, that does, but then it proceeds to limit that RCW to those four objects.

Again, if they wanted this RCW to do what they think it does, it should have a period and then say after the last RCW on there and then continue with the sentence that says or which would then include those three objects. It does not say that. And we're not here to second guess what the legislature has written. Or they could have added fail to pay as a fifth option in this law. They did not do that. It is not here.

There is nothing in 46.20 other than this that has

anything to do with failure to pay, 342 doesn't even mention it. It's not there. I can't find it. I don't think the state presented evidence that it's there. And yet half a million people in this state are probably suspended under the third degree. A hell of a burden on this state because those people can't earn a living. That's citing City of Redmond versus Moore, 151 wash two did page 664. Those people need to be fed, housed, and paid for because they can't earn a living without a driver's license.

Thank you, I have nothing more.

THE COURT: Mr. O'Rourke.

MR. O'ROURKE: Your Honor, it's sounds like a novel argument, it is just simply not supported by anything, absolutely nothing supports it. And it is totally glossing over everything to say the fail 46.20.342, yes, it's been dealt with a half -- maybe even a half million times and it encompasses all these things that Mr. Johnson has done here. Failure to pay a traffic infraction is failure to comply with a notice of traffic infraction or a citation.

Now, the courts -- I can tell the court's going to review the statute and say why doesn't it say in particular failure to pay. Mr. Johnson, again, asked the court to rely on the back side of the document which

tells him certain things. Well, the document, letter which the court has in evidence, actually references the fact that your license can be suspended and that it can be -- or that it can be a criminal action if you don't fail to respond to these things. But the back side of the citation has nothing to do with it. It's what the law says you can and can't do with regard to the issuance of these infractions. And the law doesn't allow for you to disregard them.

I'm going to ask the court -- this was decided July 9th, 2009, it's Supreme Court of Washington and City of Bellevue, petitioner, versus Shin H. Lee, number of other defendant's. Now this case, I'm going to hand it up to the court, says administrative procedures used by the Department of Licensing to suspend the driver's licenses of motorists for nonpayment, nonpayment of traffic citations, did not violate the motorist's due process rights. The court continually recognizes this as a valid practice and legal practice. You can and must suspend a person's driver's license when they don't pay their infractions.

And Mr. Johnson says, well, this isn't constitutional. This isn't the court to be arguing that. If Mr. Johnson wants to take this case up to the court of appeals, to the supreme court of this county,

to the supreme court of this state of Washington, and wherever else beyond that he wanted to take it, that's fine. But this court is not in a position, with all due respect to this court, and I'm not suggesting that this court isn't able to have its own opinions as to whether the statute is constitutional or whether this court couldn't articulate a basis why it might not be, but this is not an appellate court. This is not a court where Mr. Johnson can come in here and say, well, I think this is unjust and half a million people can't pay these and they shouldn't be suspended. Well, that's a novel argument -- it's not a novel argument, it's been made before and it's been flatly refuted throughout the history of the case law of the State of Washington, and, again, here, on July 9th of 2009 where it was once again challenged and the court in it is opinion specifically referenced the basis for which Mr. Johnson here today has been suspended as being a constitutionally sound one under the Washington constitution and it is sound.

And these half million people that can't pay, well, there is a burden on the State of Washington when people commit multiple violations of traffic infractions and don't pay them. And the legislature specifically recognized it as a public policy consideration and has for the longest time suspended people's licenses for

that. So if you want to take into account what's a matter of good public policy or not, there are arguments to be made on both sides of the coin, but this isn't the proper court to be doing that, it's just not. We're supposed to be looking at the law and whether or not it says something. And Mr. Johnson wants to suggest because 46.20.342 doesn't say fail to pay that it's not there. It specifically references three things that Mr. Johnson is not supposed to do, then goes on to say in broad terms, fails to comply with a notice of traffic infraction or citation. And this court, the Supreme Court in the City of Bellevue, they actually specifically reference 289.

Now, Mr. Johnson, again, says that this 46.63.110, he should have been charged under that. As the court knows, not all statutes are statutes under which you can criminally charge someone. You can't charge Mr. Johnson under 46.63.110. 46.63.110 is a statute that lays out the administrative guidelines for the Department of Licensing. So what they do is they go under 46.63.110, they say, well, you haven't paid under that so we will suspend you. And then under 46.20.289 that becomes a basis for your failure to respond. And then that goes to 46.20.342. 342 says 289, 289 says 46.63.110. So for Mr. Johnson to suggest that he hasn't had the statute

properly applied to him is flat out wrong. He has all of these statutes applied to him. He's been cited under 46, he's been cited under the entire statute for 46.20.342 in that does reference what the state's presented to the court, 289, and then 289 encompasses 46.63.110.

I don't know whether the court had a chance to look at it, I'm going to hand up those statutes that specifically reference one another. All three of them say that a person's license can be properly suspended for failure to pay monetary assessments on a traffic infraction and that case specifically references 289. The court turns to I think the second or page third page or maybe the first page of the actual opinion, it says they challenge the validity of a suspension under 289 and that wasn't upheld.

And for these cases to continually -- if the court wants to take its own time to research this before issuing a ruling -- for these cases to continually reference a basis for suspension as being failure to pay costs, it would make absolutely no sense for people to continually throughout all the case law in this state to be challenging the constitutional basis. How can Mr. Johnson be charged under 46.20.342 improperly when the state's presented the entire statute. And then you have

case law saying when you don't pay an infraction that's a constitutionally sound basis to suspend you. Clearly, this argument has been made before, it doesn't need to explicitly reference failure to pay because he has failed to comply with the traffic infraction.

If we look at the WPICs, the WPICs say the exact same thing. The WPICs don't even talk about this. What Mr. Johnson is arguing is premised on is whether or not the basis under which he's suspended is constitutionally sound. It is not for this court. The WPICs don't even say you need to be particularly suspended in a certain fashion. The WPICs say you need to have been driving a motor vehicle while there is an order in effect suspending or revoking your license in the third degree.

There is a copy of the WPICs, but this is an order from the Department of Licensing it's been recognized consistently throughout court's in this state and by this court as being a valid order of suspension. So for Mr. Johnson to suggest that there is no order is patently false. Exhibit A is an order suspending him and a notice of suspension, he knew about a suspension. He is suspended and he was suspended on the violation date. Then he says add a fifth item to the charge, fail to pay. Fail to comply again encompasses that. Item number four under the statute under 342 encompasses that

as part of 289.

The WPICs say Mr. Johnson is guilty of the offense, the statute says it, the case law says it. The only basis that Mr. Johnson has to make an argument before this court is he doesn't believe that because the citation, back side of the citation, doesn't address that issue, that's unconstitutional. Well, that may be a novel -- that may be a novel argument for an appellate court for him to say, well, the back side of my citation didn't say something that the statute says, so that's a basis for me to challenge the constitutionality of this case. But as for what this court needs to find, this court needs to find whether these statutes match that order and Mr. Johnson's conduct, and there is absolutely no way to find anything to the contrary. And because of that and that alone, I'm again asking the court to find Mr. Johnson guilty as charged.

MR. JOHNSON: Your Honor, I would like to make an objection here.

THE COURT: Okay.

MR. JOHNSON: He's presented a document which I'm not familiar with and have had no chance to rebut or review. I don't know what it says and I would like to have some time or ask the court not to consider it.

THE COURT: Well, he gave me a sort of a copy

of a supreme court case that I have actually already read because it is a recent one that came out. That is a challenge following the Redmond case.

MR. JOHNSON: Moore?

THE COURT: Right when the supreme court said the process that the state was using didn't give due process regarding suspension of license, that legislature then changed the law and it is the new law has been in effect since July of '05. And this case, City of Bellevue versus Lee, I guess is the case, just came out recently saying that the majority of supreme court said that the new process that's in effect in the current statute does meet due process. So the suspension statute or the process of suspending licensing is now okay whereas before it was not okay.

MR. JOHNSON: Yes.

THE COURT: So that's what this is and I have already read the case.

MR. JOHNSON: Okay, I'd like a little say on that.

THE COURT: About the statute?

MR. JOHNSON: This case and the case law involved and Moore.

THE COURT: Well, Moore is not -- it's done because now --

MR. JOHNSON: I know, but Moore said a whole lot more than just the hearing, and I have not contested the states granting a hearing by DOL.

MR. O'ROURKE: I'm objecting to all this, the case is over, arguments have been made.

THE COURT: Right. Final argument is the state gets a chance to make argument and you get a chance to make argument, then the state gets a chance to respond. Since they had the burden of proof, they get the final say and that's the end of argument. I don't -- that's just the process with a trial.

The other things that he handed me was looks like a copy of the statute, driving while suspended statute, 46.20.342 which we already have and 46.20.289 which we have already been talking about, and 46.63.110 which we've already been talking about, and 46.63.070 which is all referenced in here as well. So that's what he handed me. If you want to see any of that.

Okay, well the first thing that I'm going to say is that, Mr. Johnson, you should have gone to law school. You argue very well, you have the mind of a lawyer.

MR. JOHNSON: I was a D student and my parents were told that I was retarded.

THE COURT: Oh, well, they were way off the mark with that. I think you speak very well and you

have argued your case very well. I think your argument is a very interesting one. And the problem with it, though, is that there is a lot of case law that says that when you are reading statute you have to read them to have some meaning, that they're -- I'm probably not saying this very well, but the nonsensical interpretation of a statute, if there is another way to read it, then you don't read it to be nonsensical or to not make sense.

And the whole scheme of this driving while suspended, I completely agree with you that it is extremely complicated, and I'm sure that somebody looked at it and saw that you have to go from here to here to here to here to figure this all out. It is not a good situation at all, not for defendants, not for lawyers, not for judges, not for anybody to have it be this confusing.

But the statute that you're cited under, 46.20.342, talks about driving while suspended, that it's unlawful in the State of Washington to drive while your license is suspended. And it references 46.20.289 which says that one of the reasons that you can be suspended is for this, if the Department receives notice from the court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that a person has failed to respond to a notice of

infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of the notice of traffic infraction for a citation. That is the statute.

So it then references 46.63.110(6), which 46.63.110(6) says that the Department must suspend somebody who fails to pay. So if you had 46.63.110(6) saying that somebody fails to pay they must be suspended, then the Department of Licensing must suspend you. So then, if by your interpretation of this statute, somebody would be suspended but it would be impossible to prosecute them successfully for driving while suspended because while the Department was required to suspend them, a person could not be convicted of driving while suspended because of the wording of the statute. It sites that statute, but saying with the wording that saying all the other things that I don't need to read for the fifth or sixth time.

So with that argument, that whole statutory scheme that a court notifies the Department of Licensing, the Department of Licensing is required to suspend you, it would just be nonsensical because a person would be suspended but there would be no consequences to that. Whereas, the state has said if your license is suspended, you're not allowed to drive. And so I can't

read it that way because it just makes the whole scheme have a big nonsensical component to it that I can't find was intended nor was a full reading of all of these different laws that you have to read together to make any sense out of this.

And so reading them together, because they do reference each other, 46.20.342 reference 46.20.289, 46.20.289 references 46.63.110(6), and 110(6) does say if you're suspended for nonpayment. I mean, if you don't pay, then you're suspended and you are -- it is not legal to drive while your license is suspended under 46.20.342. So reading those in conjunction with each other, I can't just pick that one part of the statute out and say that it doesn't say fail to pay. Because how I'm reading this is violating or failing to comply with the terms of a notice of infraction.

As I said earlier, a notice of infraction tells you you've been cited for this, here's the penalty, you can pay it, you can request a hearing. That starts that process. You request a hearing, which is the evidence we have that happened here, you requested a hearing and you showed up for the hearing and you testified at the hearing and judgment was entered. And I have in evidence the docket now that shows that judgment was entered and you were given time to pay. There was a

date set in the future for you to pay and that it was not paid by that date, or a couple weeks after when they reviewed it, it hadn't been paid. So the FTA processing delay was removed, the FTR was ordered, the FTR was issued, and the shorthand of that is that it was referred to Department of Licensing because FTR is the code for failing to pay the ticket and comply with the ticket.

And so requesting a hearing delays the dealing with a ticket, but it doesn't negate the dealing of a ticket, it's still there. The dealing with the ticket requires what every steps go beyond that, it still requires that either the ticket be dismissed or the ticket be paid. And so the ticket wasn't dismissed, there was judgment entered, so that requires in complying with the infraction requires that in this case the ticket be paid. And since it wasn't paid, you didn't comply with the infraction and that's -- it requires under 46.20.289 that if you don't comply with it, then your license is suspended.

So when you got the notice of suspension, you were given a chance to appeal that. I don't know, we heard no testimony regarding that process. You had administrative remedy there to appeal that, and I'm not familiar with how all that works through the Department

of Licensing, but there is -- I know there is an appeal process that you can go through and the notice advising you that your license would be suspended in the future does reference what you can do to appeal it. And so you have a process there once you get that notice, which now the supreme court just recently, as we said, in Bellevue versus Lee has ruled that process is adequate and meets due process.

So we're back to the facts of the case that are not in dispute are that you were driving a motor vehicle in Lewis County on September 18th of 2008, that your license was suspended, you testified that you were aware of the suspension and the state has admitted the evidence that you were in fact suspended on that date and that you were given notice of that suspension. There was no -- basically all of that are agreed facts.

And so the only question is what I've just been talking about whether the statute applies to you. And I agree that there obviously can be a lot more artful wording of all this, it could be hopefully simplified greatly from how it is at this point in time, but we have to go obviously with how the statutes read right now. I can't read it to have that nonsensical component to it because I don't think that's the right way to legally interpret the statute. But on the other hand,

without that part to it, the failing to comply, I find still encompasses the failing to pay because payment on a committed infraction is part of the infraction process. It is not a different, new thing, it's either pay it or it gets dismissed. Those are the two things that happen. It didn't get dismissed, so paying it is part of complying with the infraction itself. So on that basis, I do find that the state has shown by a -- has proven beyond a reasonable doubt the driving while license suspended occurred and find you guilty of the charge.

Do the parties want to proceed to sentencing today or did you want to set that?

MR. O'ROURKE: Yes.

MR. JOHNSON: Your Honor, I plan on appealing, I'm only here to get final decision.

THE COURT: Okay, I'll read you your appeal rights. Does the state have a -- are you ready to be sentenced today?

MR. JOHNSON: Yes.

THE COURT: Okay, does the state have a recommendation?

MR. O'ROURKE: I do, and despite the fact this is a first offense, and despite the novel arguments made here today, and they were made in a compelling fashion,

the bottom line is that Mr. Johnson continues to show an absolute disregard for the law. His license remains suspended from this infraction from 2007, it's been suspended, it's been suspended for more than two years, he's not going to get it back.

First, I'm asking the court as part of the judgment and sentence to explicitly order him not to drive a motor vehicle while his license is suspended, whether it be when he leaves the courtroom today, or at any point at any time in the State of Washington. I'm asking it to be a condition of his judgment and sentence that he not have any further criminal law violation or that jail time on this can be unsuspended.

I am asking the court to impose jail time in this case, notwithstanding the fact it's a first offense, because, again, his license remains suspended. He's disregarded the laws of the State of Washington whether he agrees with them or not by continuing to leave it suspended. And I'm asking the court to impose 90 days, suspend 87 of them, require three days to be served in custody. I'm asking, because of the facts of this case and because of the fact --

THE COURT: How much jail time were you asking for?

MR. O'ROURKE: Three days.

THE COURT: He's already served four.

MR. O'ROURKE: Well, then --

MR. JOHNSON: Three, I believe.

MR. GRAY: Credit for time served is three according to what he says, your Honor. I believe it might be almost four.

THE COURT: He was cited on the 18th and released on the 22nd.

MR. O'ROURKE: That's fine, four days credit for time served. I'm asking the court to impose $1,000 fine because of the nature of the facts of this case and because he remains suspended and in disregard of the laws of the State of Washington. Nothing further.

THE COURT: Mr. Johnson, do you have anything you would like to say before I impose sentence on this charge?

MR. GRAY: Your Honor, on Mr. Johnson's behalf, he doesn't have any other criminal history as far as I know. He did serve up to four days in custody. I would ask the court to grant him credit for time served, impose the usual fine which is $500. There is a court appointment attorney fee which is usually $240, but I request $360, for it to be a half unit according to the bench trial. The other fines and fees, and set Mr. Johnson a payment plan of $25 a month starting next

month some time. Nothing further.

THE COURT: Do you want to say anything, Mr. Johnson?

MR. JOHNSON: Yes. I'm not interested in paying the fine, I have no income and no ability to make any payment, I'm disabled.

THE COURT: Okay. I'm going to sentence you to 90 days in jail. I'm going to suspended 86 days and give you credit for four days served. This appears to me that you served four days. I think to impose a fine of -- state's asking for $1,000, but that's way beyond what we normally would impose on a first offense driving while license suspended. And I understand the argument that you're sort of unrepentant and don't intend to change and all that, but that's something that may cause problems in the future for you, unfortunately, but I'm not going to impose a larger fine because of that and because of your financial situation. I'm going to impose the fine of $300, the attorney fee recoupment of $360, the traffic penalty assessment of $102.50, the $43 assessment, and I think I don't have anything else, fees, or anything like that here.

So the other things that I'm going to order is that you not drive without a valid license and insurance, you have no major traffic violations for the next two years.

The rest of the jail time, the 86 days in jail, are suspended on those conditions that you have no similar law violations, that you not drive without valid insurance, no major traffic violations. And those are standard conditions of a conviction for driving while license suspended in the third degree.

And do you just want it sent to collections, you don't want to pay it, you don't want a time pay?

MR. JOHNSON: I don't have any money.

MR. O'ROURKE: I ask it be sent to collections.

THE COURT: I mean, I can try to do something, but if you don't want to attempt to do that, then it just gets sent to collections. On the -- is that the most recent --

MR. O'ROURKE: No, it is the 2008, but I'm going to ask that there is some requirements I've been talking about the court that are requisites to be entered on the judgment and sentence such as the arraignment date. I'm going to ask that all those be -- I'll look them up to see if they're not denoted already, but sometimes they get left off in a case like this. I'm going to ask that they all explicitly be referenced.

THE COURT: Okay. I'm going to read you your rights to appeal and then you're going to get a copy of

this. And the appeal, if you have any questions about it, we can talk about it and then also of course Mr. Gray can speak to you about it. And out at the counter they have forms and such for filing a notice of appeal.

You have the right to appeal this conviction pursuant to the rules of appeal for decisions of courts of limited jurisdiction or pursuant to the rule 9.1 of the criminal rules for courts of limited jurisdiction. Unless a notice of appeal is filed in the Lewis County District Court within 30 days after entry of this judgment and sentence or order appealed from, the right to appeal is waived, so 30 days from today. The notice of appeal must be served on all other parties, that means the Prosecutor's Office. The Lewis County District Court will, if requested by you and you are appearing without a lawyer, supply a notice of appeal form, and they have those out at the counter. You have a right to have a lawyer on appeal, and if unable to pay the cost thereof, to have a lawyer appointed and portions of the trial record necessary for review of assigned errors prepared at public expense for an appeal.

And you have the right to file a petition or motion seeking to collaterally attack this judgment only as provided by the Revised Code of Washington RCW 10.73.090

and Revised Code of Washington RCW 10.73.110, or 10.73.090, collateral attack one year time limit. No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. For purposes of this section, collateral attack means any form of post conviction release other than a direct appeal. Collateral attack includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, and a motion for a new trial, and a motion to arrest judgment. For the purposes of this section a judgment becomes final on the last of the following dates, (a) the date that it is filed with the clerk of the trial court, (b) the date that an appellate court issues it's mandate disposing of a timely direct appeal from the conviction, or (c) the date that the United States Supreme Court denies the timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of a certiorari does not prevent a judgement from becoming final.

Then 10.73.100, collateral attack, when one year

limit not applicable, the time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: Number one, newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion, number two, the statute that the defendant was convicted of violating was unconstitutional on it is face or as applied to the defendant's conduct, and, number three, the conviction was barred by double jeopardy under Amendment Five of the United States Constitution, or Article I Section 9 of the State Constitution, the defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction, or, number five, the sentence imposed was in excess of the court's jurisdiction, or, six, there's been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government and either the legislature has expressly provided that the change in the law is to be applied retroactively or a court in interpreting a change in the law that lacks express legislative intent regarding retroactive application determines that sufficient reasons exist to

require retroactive application of the changed legal standard. We're going to give this all to you so you don't have to remember all that.

MR. O'ROURKE: Judge --

THE COURT: Yes.

MR. O'ROURKE: CrRLJ 7.3 references that any judgment after sentencing include, there is a list of them here, defendant's name, defendant's ID number, I think both of those are there, the charge as well as any amendments, driving suspended will be in there, but it also requires, and these are requisites, it says, and I know that sometimes doesn't get put on judgments here, but we're working on that now with court, but I would ask the court to include, says 7.3(d) here, the arraignment date, plea and the date entered, that's not the case here, but it says, Representation by or waiver of lawyer, as well as date of lawyer's appearance or waiver, parties present, including but not limited to the judge, attorney, prosecutor, defense counsel, witnesses, findings, which we're going to have, adjudication of the sentence, which we'll have, the conditions, which we have had, then consideration, outcome of any hearings held on the case, including but not limited to any compliance reviews, I'm not sure whether that is subsequent to this judgment or if it

means that it has to include the hearings that occurred prior to this. If that's the case and the court reads it that way, I would ask for a copy of the docket to be attached to the judgment. I would ask the court here do that for those all to be indicated on the judgment and sentence so there is no collateral attack to it after the fact.

MR. GRAY: Your Honor, I would request to be released at this point, I have a hearing in Pacific County at 1:30. It's going to take about an hour for me to get there. I think Mr. Johnson can handle verifying the judgment and sentence from here.

THE COURT: Okay. Do you have any objection to Mr. Gray leaving?

MR. JOHNSON: No.

THE COURT: Okay. So what all are you wanting me to add that's not part of the form?

MR. O'ROURKE: Well, I think there is a couple of things that aren't, and this is something I would address with the court in general because it comes up on DUIs on proving priors felonies. 7.3, procedures following conviction, says judgment shall at a minimum, the judgment and record of the sentencing proceedings shall include, then here's the list (a) through (k). So there is a number of those that don't show up on

judgments in this court. Now, whether or not it renders them definitively, I don't know, but it seems pretty clear that it says that it is a shall.

THE COURT: What are ID numbers?

MR. O'ROURKE: I don't know and I read that as being the case number, et cetera. I think the case number and the defendant's name are on there, so I don't think that's the issue. The arraignment date, I don't think appears on there, which is (c). I know in the past Judge Buzzard, or whoever it might have been, just shorthanded it, it's written in.

THE COURT: Okay, I show arraignment was on September 22nd of '08.

MR. O'ROURKE: That's correct.

THE COURT: Okay, date of lawyer's appearance, he had a prior attorney it looks like.

MR. O'ROURKE: Yeah, there was an attorney.

MR. JOHNSON: I think it's in the record with notice of withdrawal and the notice of appearance.

THE COURT: He appeared on October 1st.

MR. O'ROURKE: I don't think Mr. Gray ever appeared. I think he -- well, Mr. Johnson filed a notice of appearance pro se on January 2nd or January 5th of 2009. And then I believe Mr. Gray was just appointed standby counsel after that.

THE COURT: Arraignment date 9/22/08, attorney then appeared 10/1/08, went through 12/17/08 attorney Gray appeared 2/27/09. The parties that were present, defendant Johnson, attorney Gray, the prosecuting attorney O'Rourke, Deputy McKnight, and myself. Those are the only things that I see that are not already on the form that it specifies should be included.

MR. O'ROURKE: Does the court -- do we need to put Mr. Johnson's own, under that reading of the rule, appearance in January or whatever it was, January 5, '09, Mr. Johnson appeared pro se prior to Mr. Gray. Then as far as any proceedings prior to this, I don't know how to read that. So if the court reads that as what we have sufficient then --

MR. JOHNSON: I think there is a court docket.

THE COURT: What's the other thing?

MR. O'ROURKE: The only thing that's left is the notation as to prior hearing, any and all prior hearings, but I wouldn't expect that to have to be written out. All, I think Mr. Johnson agrees, all that would require would be the docket being affixed to it. So we believe that to be the case.

THE COURT: Okay. I put, see docket for prior hearings. Okay, there is the judgment and sentence. Mr. Johnson need to come up here and review that. There

is a place for your signature then we will get you a copy of that and copy to the prosecutor and a copy for Mr. Gray.

MR. JOHNSON: I have a question, he put no major traffic convictions during the next two years.

THE COURT: Um-hmm.

MR. JOHNSON: That would be moving violations only?

THE COURT: Major traffic is criminal convictions.

MR. JOHNSON: Driving on a suspended included, that's a nonmoving violation?

THE COURT: Well, when you talk about moving violations you're talking about traffic infractions, and I'm talking about criminal convictions. Major traffic violations are a DUI, a reckless driving, a driving while revoked as a habitual traffic offender, driving suspended while you're under a term of suspension, not driving suspended third, but driving suspended second, any --

MR. JOHNSON: I've been suspended third, would that be considered major traffic?

THE COURT: But I already said you can't drive without a valid license and insurance. So if you get a driving suspended then that would be in violation of

that, but major traffic or criminal traffic, gross misdemeanor criminal traffic. There is a signature line for us to give you a -- that you have read it and that we give you a copy of it. You don't have to agree to it, you can just sign it saying that you have read it and that we're giving you a copy of it. There is nothing about signing it that says you agree with it.

Okay, we're adjourned.

MR. O'ROURKE: Thank you.

(Conclusion of Trial and Sentencing)

* * * * * * * * *

CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Kathleen Mahr, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the foregoing Verbatim Report of Proceedings consisting of 104 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

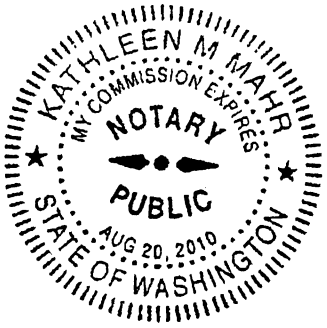
That said transcript is a full, true, and correct transcript of my shorthand notes of the proceedings heard before Judge Wendy Tripp on the 18th day of September 2009, at the Lewis County District Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 25th day of January, 2010.

KATHLEEN MAHR

Notary Public in and for the State of Washington, residing at Olympia.



SUPERIOR COURT
LEWIS COUNTY, WASH
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BY 112
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ORIGINAL

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN C. JOHNSON,

Appellant.

SUPERIOR COURT NO. 09-1-00586-3

DISTRICT COURT NO. C85203

RESPONDENT'S BRIEF

COMES NOW, the Respondent, State of Washington, to request that this Court deny every part of Appellant's requested relief for the reasons set forth below.

SUMMARY OF FACTS

On September 19, 2008, Deputy McKnight of the Lewis County Sheriff's Office stopped the Appellant while he was driving a motor vehicle within Lewis County, State of Washington. After making contact with the Appellant, Deputy McKnight ran a driver's check and found that the Appellant's driver's license was suspended in the third degree. Based upon this information, the Appellant was arrested and issued an officer citation charging him with Driving While License Suspended in the Third Degree, a misdemeanor offense.

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On September 22, 2008, the Appellant was arraigned in Lewis County District Court. The Appellant was represented by court appointed attorney Robert Schroeder, waived formal arraignment, entered a plea of not guilty after a finding of probable cause, and requested court appointed counsel. Appellant did not qualify for court appointed counsel and on October 1, 2008, attorney Ryan Gunn entered a Notice of Appearance to represent the Appellant. On October 28, 2008, a pretrial conference was held and trial dates were set. On December 4, 2008, the Appellant filed a motion to dismiss and waived speedy trial to allow for setting of a motion hearing and new trial dates. On December 17, 2008, attorney Ryan Gunn filed a Notice of Withdrawal and Substitution of Counsel indicating that the Appellant would be representing himself. On January 5, 2009, the Appellant filed a pro-se Notice of Appearance and Notice of Intent to file a new brief (which was filed on January 13, 2009). On February 4, 2009, the court asked Mr. Johnson if he wished to proceed with his case pro-se from that point forward. The Appellant indicated that he did wish to proceed pro-se and his motion to dismiss was denied.

On February 24, 2009, the Appellant came before the court with a motion to reconsider its ruling of February 4, 2009. The court again advised the Appellant of his right to counsel and also that he could be appointed stand-by counsel if necessary. The Appellant requested court appointed stand-by counsel and attorney Jerry Gray was appointed as stand-by counsel. On March 19, 2009, the Appellant appeared with his stand-by counsel and his motion for reconsideration was denied and a speedy trial waiver was entered in order to set new dates. On April 16, 2009, the Appellant filed a Notice of Interlocutory Appeal with the Lewis County District Court and commenced such an appeal in the Lewis County Superior Court under cause number 09-1-00239-2. Attorney Jerry Gray was appointed to be the Appellant's counsel for purposes of his appeal. The appellant's interlocutory appeal was subsequently dismissed by the Lewis County Superior Court.

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On July 23, 2009, the Appellant's request to reset trial was granted and the State filed a motion to amend the charging document to incorporate all of the statutory language of RCW 46.20.342(1)(c). On August 26, 2009, the State's motion was granted.

On September 18, 2009 a bench trial was held in Lewis County District Court. The court considered the testimony of Deputy McKnight of the Lewis County Sheriff's Office, the testimony of the Appellant, and all of the exhibits admitted into evidence. The defendant was found guilty of Driving While License Suspended in the Third Degree and a Judgment and Sentence to that effect was entered.

ISSUE I

DID THE STATE PROVE EVERY ELEMENT OF THE CRIME CHARGED?

At trial, the State proved every element of the crime of Driving While License Suspended in the Third Degree under RCW 46.20.342(1)(c). This included proving that the Appellant "failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289." *See:* RCW 46.20.342(1)(c)(iv).

Appellant's argument is premised on the theory that all one has to do to comply with a traffic infraction in Washington State is request a contested hearing, show up to the hearing, have an adverse finding made against them where a monetary penalty is ordered, and then ignore the court's order entirely by refusing to pay the monetary penalty. Appellant's argument not only defies logic and the plain meaning of the word "comply", but also overlooks the distinction between "responding" to a traffic infraction and "complying" with one.

RCW 46.20.289 states that the department of licensing may suspend a person's driver's license when the person has failed to "respond to a notice of traffic infraction", or has "failed to comply with the terms of a notice of traffic infraction or citation, other than for a standing, stopping, or parking violation."

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Appellant correctly asserts that a person properly "responds" to a notice of traffic infraction when they answer to the proper court within fifteen days by paying the infraction, requesting a mitigation hearing, or contesting the infraction. In fact, as Appellant notes, the word "respond" is used on the back of the citation above where these options are provided to the cited party. However, Appellant fails to explain why the legislature carved out the language "failed to comply with the terms of a notice of traffic infraction or citation", if all that is necessary is an initial response.

If Appellant is correct in stating that all a person has to do to comply with a notice of traffic infraction is to respond to it, then the legislature has written into RCW 46.20.289 an additional basis for suspension of a license that is exactly the same for absolutely no reason. This is not the case. Instead, the department is authorized to suspend a license in situations where a person either a) ignores their infraction completely and never responds, or, b) does respond and is ordered to pay a monetary penalty, but never does comply with the terms of that judgment against them.

One of the "terms" of a notice of traffic infraction or citation is that in the event that the infraction is resolved unfavorably for the citing party, that they pay the fine. RCW 46.20.289 cites three ways in which the department may receive notice from a court that a person's license may be suspended. RCWs 46.63.070(6) and 46.64.025 deal with situations where the person fails to appear. RCW 46.63.110 addresses situations where the person fails to comply with their traffic infraction by failing to pay the monetary penalty. That statute states that "a person found to have committed a traffic infraction shall be assessed a monetary penalty" and goes on to say in subsection (6) that if the person fails to pay the monetary penalty, the department shall "suspend the person's driver's license or driving privilege until all monetary obligations... have been paid."

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Appellant suggests that the suspension of a driver's license for non-payment of a monetary obligation on a civil infraction under RCW 46.63.110 should result in yet another civil infraction. Not only is such a theory counterintuitive, it is not supported by any part of the statutory scheme or by any case law. RCW 46.63.020 does state that anything not specifically proscribed in that section is not a criminal offense. However, subsection (13) specifically enumerates RCW 46.20.342 as one of the statutes that must be treated as a criminal offense and does not exclude suspensions for non-payment of monetary obligations.

Finally, in construing a statute, a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Appellant suggests that this Court read the statutes relating to license suspension in a way whereby a person could be cited for a civil traffic infraction, show up at court, fail to comply with the court's order to pay the infraction, and then at most they would receive another civil traffic infraction, which they would presumably show up for, fail to pay, and thus the merry go round of counterproductive reasoning would continue. This is not the way any court of limited jurisdiction in this state operates, because it is not what the statute calls for, and such a reading of the statute leads to an absurd result. Instead, RCW 46.20.342 was created by the legislature to address the very problem Appellant seeks to perpetuate. Namely, the driving suspended statutes serve the purpose of creating a criminal disincentive to refusing to obey the civil traffic laws of this state. When a person is cited for a civil traffic infraction and fails to pay the penalty, their license is suspended until they pay their monetary obligation. If the person continues to drive while having failed to obey their civil obligation, they don't merely receive another meaningless civil infraction, but rather, they are then criminally punished. This is the plain meaning of RCW 46.20.342 and its related statutes, and any other reading would lead to an absurd result.

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ISSUE II

WAS THE SUSPENSION OF APPELLANT'S LICENSE UNCONSTITUTIONAL?

A. APPELLANT'S LICENSE WAS NOT SUSPENDED FOR FAILURE TO PROVIDE A RESIDENTIAL ADDRESS

Appellant's claim that his license was suspended for failing to provide a residential address is inaccurate and is not supported by the record below. The record below indicates that the defendant's license was suspended for failure to comply with the terms of a civil traffic infraction. This is the only evidence of suspension on the record, and there is absolutely no evidence that the license suspension was the result of anything to do with a residential address. Appellant attempts to avoid the lack of any record from below by injecting into his brief the claim that he lost his license in the first place for failing to provide a residential address to the Department of Licensing. However, in the record below, the notice of suspension and certified copy of driving record admitted into evidence prove a suspension based on the non-payment of a civil infraction. Appellant also testified at trial that this, and not the lack of a residential address, was the reason his license was suspended. There is simply no record to support a claim that the Appellant's license was suspended for failing to provide a valid address.

B. THE LEWIS COUNTY SUPERIOR COURT IS AN IMPROPER FORUM TO RAISE A CONSTITUTIONAL CHALLENGE TO RCW 46.20.091(1)(d)

Even if it is true that Appellant was unable to obtain a driver's license because he lacked a residential address, a criminal case is an improper forum to challenge the constitutionality of the initial denial of a driver's license. The criminal case arose because Appellant subsequently decided to operate a motor vehicle without a license, then failed to pay his civil infraction, and then operated his vehicle on a suspended license. The initial denial of his driver's license should have been challenged in an administrative action against the Department of Licensing.

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C. APPELLANT HAS NO STANDING TO CLAIM AN EQUAL PROTECTION VIOLATION

A party may have standing in a case in either a personal or representative capacity. *City Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985). Again, there is no evidence in the record that Appellant has been affected by the requirement that he provide a residential address prior to obtaining a license. There is no evidence in the record that Appellant is either homeless or that he represents the class of people he seeks to protect, which would be homeless people. Accordingly, Appellant has no standing to raise his equal protection claim.

D. RCW 46.20.091(1)(d) IS NOT UNCONSTITUTIONAL

Suspension of a driver's license does not demand intermediate or heightened scrutiny for equal protection purposes. *Merseal v. State Department of Licensing*, 99 Wn.App. 414, 994 P.2d 262 (2000). There are no cases that recognize the homeless as a protected class for Fourteenth Amendment analysis. *City of Seattle v, Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990). Driving an automobile on the state's public highways is a privilege and not a right because the activity is limited to a certain class of individuals. *City of Spokane v. Port*, 43 Wn.App. 273, 716 P.2d 945 (1986). The privilege to drive on the state's highways is subject to reasonable regulation. *Id.*

First, RCW 46.20.091(1)(d) does not discriminate against homeless people as a class because the law applies with equal force to all citizens of Washington State. All persons applying for a Washington State driver's license must provide proof of residence, not just indigent or homeless people. The mere fact that the law may adversely affect homeless people more often than those with homes does not render it immediately unconstitutional if it is applied equally on its face. *Webster, supra*.

Even if the Court finds that the law is applied differently to homeless people, all the State needs to show in order to survive an equal protection challenge is that RCW

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46.20.091(1)(d) is rationally related to a legitimate state interest. Appellant focuses on apprehension of criminals as the sole purpose for the requirement of a residence. However, one of the primary reasons the State requires a residence be provided is so that it may limit the privilege to drive motor vehicles to residents of Washington. If all that was required to obtain a valid license was to possess a PO Box in this state, the State would have no ability to limit licenses to those who actually live in the state. Instead, one could just pick up a PO Box and a valid license even though they were a resident of California.

Additionally, the State has an interest in maintaining information as to where its licensed driver's reside. This information is used to make certain drivers receive appropriate notices at their residence, and to be able to locate drivers should it become necessary for criminal prosecution of traffic violations as noted by Appellant. Finally, it is important to note that driving is a privilege and not some form of property right or other constitutional right. The requirement of providing a valid address is an appropriate regulation of the privilege to drive.

E. SUSPENSION FOR NON-PAYMENT OF FINES IS NOT UNCONSTITUTIONAL

There is no case law whatsoever to support Appellant's theory that suspending a driver's license for non-payment of fines is unconstitutional. Instead, Appellant claims that this case is analogous to automatically converting non-payment of fines into jail terms. Such an analysis requires unreasonable leaps in reasoning. Appellant is essentially claiming that when a person fails to pay the monetary penalty on a civil infraction, that they are effectively being sentenced to a jail term, because if they can't pay the infraction, they have no alternative but to be imprisoned. This completely overlooks the fact that in order to ever face the potential for being incarcerated, a person must not only fail to pay their civil infraction penalty, but they also must drive a motor vehicle on a public highway in this state after allowing their license to become suspended.

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Appellant's criminal conviction is not a result of his indigence; it is a result of his disregard for the laws of the state of Washington, specifically his decision to continue to operate a motor vehicle after he was notified that his privilege to do so had been suspended.

The law does not violate equal protection because there is no basis for claiming that on its face it is applied differently or disparately to people who are indigent. Every person who fails to pay their civil traffic infractions will have their license suspended under the law regardless of their income or social status. Furthermore, there is a legitimate state interest for suspending a person's license for non-compliance with civil infractions. Appellant argues that there is no public safety consideration when it comes to non-payment of monetary penalties on civil infractions. However, without there being some criminal liability for continuing to drive after non-payment of civil traffic infractions, there would be no incentive for individuals in this state to follow any rule of the road. If a person is cited for speeding and issued a civil infraction that they can essentially throw in a pile to be sent to a collection agency, there is absolutely zero punitive deterrent to their ignoring the driving infraction, which only encourages future violations. Conversely, if that person decides to fail to comply with their civil infraction, the state should be able to remove their privilege to drive in this state until they choose to come into compliance.

ISSUE III

DID APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL?

Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, and also have the right to represent themselves at trial under the Sixth Amendment. In general, a criminal defendant who exercises his constitutional right to self-representation cannot later claim ineffective assistance of counsel, because the defendant has assumed complete responsibility for his own representation. *State v. McDonald*, 143 Wn.2d 506, 22 P.3d 791 (2001). However, this does not mean standby

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counsel has no obligations or duties to the defendant when standby counsel has been appointed by the court. *Id.*

A criminal defendant may claim ineffective assistance of standby counsel if standby counsel violated a limited duty or obligation owed to the pro-se defendant. *State v. Pugh*, 153 Wn.App. 569, 222 P.3d 821 (2009) citing *McDonald, supra*. A standby counsel's role is not to represent the pro-se defendant; instead, a standby counsel's role is to provide technical information and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. *Pugh*, citing *State v. Bebb*, 108 Wn.2d 515, 740 P.2d 829 (1987). The role of the standby counsel must first be determined and examined before deciding if there was ineffective assistance of counsel. Once the role of counsel is examined, the same standard for ineffectiveness applies, namely, (1) was trial counsel's performance so deficient that it fell below an objective standard of reasonableness, and (2) did counsel's deficient performance prejudice the defendant in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

In this case, it is clear from the record below that attorney Jerry Gray was not appointed as full counsel, but was instead appointed as standby counsel to the Appellant after he chose to proceed pro-se. First, Appellant was represented by court appointed counsel at his arraignment and made aware of his right to indigent defense counsel prior to waiving a formal arraignment (at that time he did not qualify for court appointed counsel). Subsequently, the Appellant filed a notice of appearance and intent to proceed pro-se on his own behalf with the District Court after he terminated representation of attorney Gunn. When Appellant appeared before the court on February 24, 2009, the District Court confirmed that Appellant understood that he had a right to be assisted by counsel. Subsequent to that advisement, Appellant sought the assistance of

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counsel and was appointed standby counsel Jerry Gray at his request. At the March 19, 2009 Motion for Reconsideration, the District Court again clarified with Appellant on the record that Mr. Gray was his standby counsel and that he would assist him as a pro-se defendant.

Mr. Gray's performance as counsel at trial was not deficient in any way. Contrary to what Appellant asserts in his brief, Mr. Gray facilitated Appellant's ability to propound his legal arguments at trial. It is clear from the record below that Appellant was fully assisted in making his arguments patently clear to the court. This is not only evidenced by the fact that the same arguments that are being made on appeal were made at the trial court, but also by the fact that what would normally have been a twenty minute bench trial, lasted approximately four hours. Mr. Gray also assisted Appellant in examining witnesses (including Appellant), admitting exhibits into evidence, addressing the State's objections at trial, and navigating Appellant through the other procedural aspects of the trial.

Even if this Court somehow found that Mr. Gray's performance was deficient, there is not a reasonable probability that the outcome of the trial would have been different. The trial was not complex and involved the question of whether or not Appellant was driving on a suspended license in Lewis County. The evidence was undisputed by both parties that Mr. Johnson's license was suspended by the Department of Licensing when he was stopped while driving in Lewis County. The only arguments Appellant had at the trial court level were that the State didn't prove that he failed to comply with a notice of traffic infraction which led to his suspension, and that his suspension was unconstitutional. Both of these arguments were made in great detail at the trial court level, and after much discussion, the trial court rejected these arguments and found Appellant guilty. No counsel would have had a reasonable probability of changing the outcome of the trial.

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ISSUE IV

DID THE TRIAL COURT VIOLATE PROCEDURAL DUE PROCESS?

The purpose of RCW 10.101.020(3) is to prevent the prosecution from acquiring any information from a person that could be used against them in a pending case. Although the District Court did question Appellant as to the issue of indigence in the presence of the prosecution, there was no information elicited that was used in a pending proceeding, specifically this appeal. Accordingly, no harm came to Appellant as a result of the information elicited at the hearing.

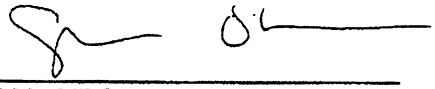
Appellant was not improperly denied indigent defense counsel for purposes of appeal. Appellant was appointed Christine Newbry as his defense counsel on appeal. Appellant did not agree with the manner in which he was being represented and sought to have Ms. Newbry removed from the case and be appointed some other counsel. The District Court properly rejected Appellant's motion for new counsel on appeal as indigent defendants have a right to competent counsel, but not counsel of their choosing.

CONCLUSION

The Court should deny every part of Appellant's requested relief for the reasons set forth above.

DATED this 1st day of February, 2011

By:



SHANE M. O'ROURKE
Deputy Prosecuting Attorney

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

☐ Hearing is set
Date:
Time:
Judge/Calendar:

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED
2011 MAR 14 PM 12:46
KATHY BRACK, CLERK
BY [signature]
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

STATE OF WASHINGTON

Respondent,

v.

STEPHEN C. JOHNSON,

Appellant.

District court case no. C85203

Superior court case no. 09-1-00586-3

APPELLANT'S REPLY BRIEF

This court should reverse the conviction of Appellant Stephen Johnson for Driving While License Suspended ("DWLS") in the Third Degree. The plain language of RCW 46.20.342(1)(c) does not include driving with a license suspended for failure to pay a fine. Mr. Johnson cannot be convicted under that statute.

CLARIFICATION OF FACTS

Respondent erroneously argues on multiple occasions that Appellant's arguments are not supported by evidence in the record. As a matter of clarification, Appellant refers the court to the Summary of Facts in Appellant's Brief, wherein the facts relied upon in that brief are all supported by citations to the transcripts and other documents in the record.

ARGUMENT

I. Failure to Pay a Fine Is Not Failure to Comply With the Terms of a Notice of Infraction.

The central issue in this case is: What does it mean to "fail to comply with the terms of a notice of traffic infraction" under RCW 46.20.342(1)(c)? Mr. Johnson argues that the statute means exactly what it says by its plain language: to fail to do those acts required by the terms that appear on the notice

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of traffic infraction. The terms on the notice of traffic infraction do not require payment of a fine imposed by the court after a contested hearing. Thus failure to pay a fine is not a failure to comply with the terms of the notice and cannot form the basis for a conviction under RCW 46.63.342(1)(c). Respondent attempts to convince the court that payment of a fine is somehow "[o]ne of the 'terms' of a notice"[1], despite the fact that no such language appears in either the statute or the notice of traffic infraction itself.

This court must engage in a literal and strict reading of the statutes involved and should refuse to entertain words or phrases that the legislature did not write. *See* State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); State v. Wilson, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). Similarly, this court should not look beyond the four corners of the notice of infraction to find its terms. Respondent's interpretation of the terms cannot stand because it is not supported by a literal and strict reading of the statutes or by the plain language of the notice of traffic infraction.

The notice of infraction that is the basis of Mr. Johnson's conviction is before the court. The terms found on that infraction are straightforward. Those terms require the defendant to respond within fifteen days by checking one of three boxes and returning the form to the court. The terms include listed consequences for failure to respond or appear in court (which do not apply here, as Mr. Johnson both responded and appeared in court). Next to each of the three check-boxes are additional terms applicable to each of the three options for responding. Mr. Johnson chose a contested hearing.

The terms for a contested hearing include information on the defendant's rights, a promise to appear in court, and the defendant's understanding that the infraction will go on his driving record if he loses at the contested hearing. Nowhere on the notice of infraction does it require the defendant to pay a fine that results from the contested hearing.

Respondent asks why the legislature would have included the phrase "fail to comply with the terms of a notice of traffic infraction" when all that is required by the terms is a response and appearance in court. The answer is not that the legislature really meant "fail to pay a fine." If the legislature had meant failure to pay a fine or failure to comply with a judgment or determination that the infraction was

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[1]Respondent's Brief, at 4:15-17. Note Respondent's use of quotes on the word "terms", demonstrating that Respondent knows it is inventing a term that does not actually appear on the notice of infraction.

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committed, it could easily have said so. It did not. The true answer lies in the fact that the legislature does not directly control the terms of the notice of infraction. *See* RCW 46.63.060 (supreme court prescribes the form of the notice by court rule); IRLJ 2.1 (Administrative Office of the Courts prescribes the form of the notice). By including failure to comply with the terms of a notice, the legislature expands the reach of DLWS beyond the minimum requirements of response and appearance to any other terms that the Courts administratively determine to include in the prescribed form of notice.

As an example, Mr. Johnson has a notice of infraction from1982 with terms different from those on the notice of infraction in this case.[2] On the back side of the defendant's copy, this previous form states: "This notice represents a determination that you have committed this infraction *and owe the appropriate penalty.*" (emphasis added) This is a term that requires payment of the fine. Failure to comply with this term could support a conviction of DWLS in the Third Degree. The notice of infraction in this case, however, did not contain any term that would similarly require payment of the fine.

Respondent attempts to appeal to RCW 46.20.289 and RCW 46.63.110 to bootstrap failure to pay a fine into the definition of DWLS. As shown in Appellant's Brief, this line of reasoning must fail. RCW 46.20.289 adds nothing to the definition of DWLS. It simply orders the Department of Licensing to suspend a person's license when it receives notice from the court of failure to respond, failure to appear, or failure to comply with the terms of a notice of infraction. RCW 46.63.110 makes fines imposed by the court immediately payable, orders the courts to send notice to the Department of Licensing for a person's failure to pay, and orders the Department to suspend the person's license for failure to pay. It does not say anything about the terms of a notice of infraction, nor about how a person complies or fails to comply with those terms.

Failure to pay the fine imposed under RCW 46.63.110, while punishable by suspension, can only be punished criminally as DWLS if the terms of the notice of infraction require that payment. The terms of the notice received by Mr. Johnson did not require payment. Mr. Johnson did not "fail to comply with the terms of a notice of traffic infraction." Mr. Johnson's conviction must be reversed.

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[2]Mr. Johnson has attempted to obtain an official copy of the form of this notice from public sources but has not yet been successful. Mr. Johnson asks that the court take judicial notice of this previous form, titled "Washington Uniform Notice of Infraction". A true and correct copy of the defendant's copy is attached as Exhibit A to this brief.

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II. The Legislature Did Not Intend Criminal Penalties for Failure to Pay a Fine.

It is the role of the Legislature to determine what conduct deserves punishment as a crime and what warrants only civil penalties like suspension or fines. The Legislature has determined that many reasons for suspension of a license merit criminal penalties for DWLS, but not all. *Compare* RCW 46.20.291 *with* RCW 46.20.342. Those that merit criminal punishment are enumerated in the DWLS definitions. Failure to pay a fine is not one of those enumerated reasons. It follows that the Legislature has determined it warrants only civil penalties. Far from being an absurd result, as Respondent contends, this is a policy determination made by the Legislature. Until such time as the legislature acts to change that determination, this court should give effect to the statute as written and overturn Mr. Johnson's erroneous conviction.

The Legislature has made a similar determination regarding other reasons for suspension. For example, RCW 46.20.291(8) gives the department authority to suspend the license of a person who is not in compliance with a child support or visitation order. Such a suspension is not found in the definitions of DWLS. This authority to suspend was added to § 291 in 1997. *See* West's RCWA 46.20.291 (2008). The definitions of DWLS have been amended six times since 1997, but a suspension under § 291(8) for failure to comply with a child support or visitation order has never been added to any of the DWLS definitions. *See* West's RCWA 46.20.342 (2008). Clearly, the legislature intended that such a suspension should not be followed by criminal sanctions, otherwise it would have amended the DWLS definition to include it.

Similarly, § 291(7) gives the department authority to suspend the license of a person who has violated RCW 46.20.0921, which deals with fake IDs or licenses. This authority has been in § 291 since before 1990. *See* West's RCWA 46.20.291 (2008). But a suspension for reason of a violation of RCW 46.20.0921 is not found in any of the definitions of DWLS. Again, the legislature must have intended that such a suspension should not be followed by further criminal sanctions, otherwise it would have amended the DWLS definitions to include it.

The legislature has determined in these other contexts that criminal sanctions for DWLS are not warranted. It is perfectly reasonable, then, to conclude that the legislature intended the same result for failure to pay a fine.

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Respondent's fear of an absurd "merry-go-round" is founded in a failure to appreciate the real impact of fines and suspensions. A person cannot simply collect repeated infractions without consequences. Suspension itself is a devastating financial burden, impacting a person's ability to earn a living. Repeated fines will add up. They will be sent to collections and eventually reported to credit bureaus, with wide-ranging impacts. Twenty infractions in a period of five years will make the person a habitual offender under RCW 46.65.020, after which he would be subject to criminal penalties for DWLS in the First Degree. A person who insists on driving regularly while suspended will quickly accrue the twenty infractions, especially where law enforcement personnel are aware of the repeated violations. The statutory scheme does not leave the state without a deterrent for failure to pay fines.

Even if the court is inclined to think that the statutory scheme as written and enacted by the legislature creates bad policy, to ignore the plain language of the statute, as urged by the State, is not the proper solution. This court should give effect to the plain language of the statute and the notice of infraction, and overturn Mr. Johnson's erroneous conviction.

III. The Underlying Suspension Was Unconstitutional.

The "ordinary right of a citizen to use the streets in the usual way" is "a common right." Hadfield v. Lundin, 98 Wn. 657, 662 (1917). The legislative power over that right is confined to reasonable regulation and does not extend to absolute prohibition. Hadfield, 98 Wn. at 662. A driver's license is a valuable property interest protected by procedural due process. City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). Thus the right to drive a motor vehicle on the public roadways is not a mere "privilege" that the State can revoke at will. Any regulation that would suspend or revoke that right must have a rational relationship to a legitimate government purpose, that being public safety.

A. The residence address requirement is unconstitutional on its face.

Respondent oversimplifies the equal protection analysis, asking only if the law "applies with equal force to all citizens."[3] But application with equal force is beside the point if the law on its face draws a classification that is not rationally related to the government purpose behind the law. *See* State v.

[3]Respondent's Brief at 7:19. Respondent supports its argument by citing City of Seattle v. Webster, 115 Wn.2d 635 (1990). Webster involved a Seattle city ordinance that was facially neutral, making no mention of economic circumstances or residential status. The statute at issue here, in contrast, draws an explicit classification based on residential status.

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Osman, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

RCW 46.20.091(1)(d) draws a classification between persons with a residence address and persons without. In order to pass the rational basis test, there must be some rational relationship between this exclusion of persons without a residence address and some legitimate government purpose.

Mr. Johnson has already shown that this exclusion bears no rational relationship to the government purpose of locating offenders. Respondent still asserts the purpose of locating drivers and sending appropriate notices, but fails to show how a mailing address would not serve the same purpose.

B. Suspension for nonpayment is unconstitutional as applied to indigent defendants.

Just as imprisonment to coerce payment in Tate was unconstitutional as applied to defendants who could not pay, so suspension of a license to coerce payment of a fine[4] is unconstitutional as applied to defendants like Mr. Johnson who *cannot* pay. The coercive penalty of suspension may be effective as applied to defendants who are able, but unwilling, to pay. *See* Tate v. Short, 401 U.S. 395, 400-01 (1971); Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 227 (2006). However, it is irrational to think that suspension will ever lead to payment of the fine by a person who does not have the means to pay.

The Washington Supreme Court has a history of standing up for the rights of the economically powerless. Amunrud, 158 Wn.2d at 229. Both the courts and the legislature have shown sensitivity and concern for the ability of indigent defendants to pay fines and costs imposed on them. *See* RCW 10.01.160(3) (prohibiting imposition of costs and fees on defendants unable to pay); RCW 10.01.180(4) (court may reduce or revoke a fine if failure to pay is not wilfull); Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002) (requiring court to inquire into ability to pay); State v. Wimbs, 74 Wn. App. 511, 516, 874 P.2d 193 (1994) (prohibiting imposition of attorney fees where the indigent defendant is unable to pay).

It offends equal protection to allow the wealthy to escape suspension by paying a fine, while indigent defendants are forced into suspension because they cannot pay. Mr. Johnson's conviction must be overturned because the underlying suspension was unconstitutional. *See* Moore, 151 Wn.2d at 670.

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[4]Respondent admits on p. 9 of Respondent's Brief that suspension for nonpayment is a penalty imposed solely to coerce payment: "the state should be able to remove their privilege to drive in this state *until they choose to come into compliance.*" (emphasis added)

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IV. Mr. Johnson Received Ineffective Assistance of Counsel at Trial and Sentencing.

Far from establishing that Mr. Gray was appointed as standby counsel, the record actually supports an inference that Mr. Gray imposed standby status against Mr. Johnson's wishes. Respondent's Transcript shows that after the February 24, 2009, hearing, Mr. Johnson "goes to probation office and qualifies for court appointed counsel. Subsequently returns to court and is appointed counsel." At his first appearance, on March 19, 2009, Mr. Gray notified the court of his unilateral decision to be standby, rather than full counsel. He said, "It has become clear to me that my appropriate role would be to be stand-by counsel and I have informed Mr. Johnson of that." (Appellant's Brief, Exhibit B, at 6:2-4.)

Mr. Johnson authorized Mr. Gray to represent him at sentencing, but Mr. Gray utterly failed to protect Mr. Johnson's interests. Despite statutory and case law prohibitions against assessing fees and costs to indigent defendants, *see* RCW 10.01.160(3) and Wimbs, 74 Wn. App. at 516, Mr. Gray requested additional attorney fees and failed to object or make any argument when the court imposed those fees and other costs on Mr. Johnson. (Appellant's Brief, Exhibit C, at 96:21-24, 97-98.) Mr. Gray also requested a payment plan against Mr. Johnson's wishes.

V. The District Court Violated Procedural Due Process.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976). On June 2, 2010, the District Court held a hearing on Mr. Johnson's motion to substitute counsel. Appointed counsel on appeal, Ms. Newbry, had failed to timely prepare and file a brief on Mr. Johnson's behalf. (Appellant's Brief, Exhibit A, at 10:12-15.) As a result, Mr. O'Rourke had threatened a motion to dismiss for lack of prosecution. (Appellant's Brief, Exhibit A, at 4-7.) After hearing arguments from Mr. Johnson and Ms. Newbry, the District Court *sua sponte* and without warning decided to hold a hearing on Mr. Johnson's indigency status. Without proper notice, Mr. Johnson was unable to prepare any defense of his indigency. As a result, the District Court, instead of simply rejecting the motion to substitute counsel, made the erroneous determination that Mr. Johnson was not indigent and deprived him of his right to appointed counsel. This deprivation without notice and a meaningful opportunity to be heard violated Mr. Johnson's due process rights.

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CONCLUSION

This court should reverse Mr. Johnson's erroneous conviction and the underlying, unconstitutional suspension. The conviction was erroneous because failure to pay a fine after a contested hearing is not "failure to comply with the terms of a notice of infraction" under RCW 46.20.342(1)(c). The people have the right to use the roads in an ordinary and customary manner. Coercive suspension for nonpayment of fines unconstitutionally punishes indigent people without any rational basis for expecting the suspension to lead to collection of the fine. An unconstitutional suspension cannot form the basis for a conviction for DWLS. To correct the District Court's breach of due process, this court should order Mr. Johnson's private attorney fees be paid from public funds.

DATED this 14th day of March, 2011.

CUSHMAN LAW OFFICES, P.S.

Kevin Hochhalter

Jon E. Cushman, WSBA# 16547
Kevin Hochhalter, WSBA# 43124
Attorneys for Appellant

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☐ INFRACTION - NON TRAFFIC — To be Mailed

STATE OF WASHINGTON, PLAINTIFF VS. NAMED DEFENDANT

178

2548482

IN THE ____ COURT OF ____, WASHINGTON

STATE OF WASHINGTON COUNTY OF — I.E.A. NCIC NO. WAWSP 00 — COURT NCIC NO.

THE UNDERSIGNED CERTIFIES AND SAYS

NAME: LAST ____ FIRST ____ INITIAL ____

ADDRESS ____ ☐ IF NEW ADDRESS

CITY ____ STATE ____ ZIP CODE ____ EMPLOYER ____

SEX ____ RACE ____ DATE OF BIRTH ____ HEIGHT ____ WEIGHT ____ EYES ____ HAIR ____

DRIVER'S LICENSE NO. ____ STATE ____ EXPIRES ____ RESIDENCE PHONE NO. ____

VIOLATION DATE ____ MO ____ DAY ____ YR ____ TIME ____ A.M. P.M. M.P.

DID OPERATE THE FOLLOWING VEHICLE

VEHICLE LICENSE NO. ____ STATE ____ EXPIRES ____ VEH YR ____ MAKE ____ MODEL ____ STYLE ____ COLOR ____

OWNER IF OTHER THAN DRIVER ____ ☐ RADAR ☐ PACE ☐ IF DRIVING COMMERCIAL VEHICLE AS AN EMPLOYEE OF ANOTHER.

VEHICLE SPEED ____ TRAFFIC ____ WEATHER ____ STREET ____ LIGHT ____ ACCIDENT ____

IN A ____ ZONE LK MD HV CL RN FG SN D W I S DWN DSK DK NO YR I F

AND DID THEN AND THERE COMMIT EACH OF THE FOLLOWING INFRACTIONS

VIOLATION CODE ____ DESCRIPTION ____

1. ____

VIOLATION CODE ____ DESCRIPTION ____

2. ____

PENALTY $ ____

YOU MUST RESPOND WITHIN 7 DAYS OF THIS DATE ➔ DATE NOTICE ISSUED ____

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE INFRACTIONS I PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

I CERTIFY UNDER PENALTIES OF PERJURY THAT I HAVE REASONABLE GROUNDS TO BELIEVE AND DO BELIEVE THE ABOVE PERSON COMMITTED THE ABOVE INFRACTIONS CONTRARY TO LAW.

OFFICER ____ NO. ____

X ____ DEFENDANT'S SIGNATURE

YOU MUST RESPOND TO THE COURT BELOW ACCORDING TO THE INSTRUCTIONS ON THE REVERSE SIDE OF THIS NOTICE.

COURT ____ TELEPHONE ____

ADDRESS ____ CITY ____ STATE ____ ZIP CODE ____

DISTRICT COURT NO. 3

P. O. Box 305

Bothell, WA 98011

2548482

This is a notice of infraction. An infraction is not a crime. The penalty for an infraction **does not** include a jail sentence but can include a monetary penalty and may result in suspension, revocation or denial of your driver's license. This notice represents a determination that you have committed this infraction and owe the appropriate penalty. If you believe you did not commit the infraction, follow the instructions listed in #3 below.

YOU MUST RESPOND TO THIS NOTICE IN ONE OF THE WAYS LISTED BELOW WITHIN SEVEN (7) DAYS OF THE DATE THIS NOTICE IS ISSUED. FAILURE TO RESPOND IS A CRIME (MISDEMEANOR). Failure to respond will carry an additional monetary penalty and/or jail time and your driver's license will not be renewed until you have paid all the penalties required by law.

Please check **one, and only one**, of the boxes below and return to the court, listed on the other side of this notice, in person or by mail within seven (7) days.

☐ 1. **I CHOOSE TO PAY THE MONETARY PENALTY AND HAVE ENCLOSED FULL PAYMENT**

You may pay the full amount of the penalty listed to the court indicated on the other side. The amount of the penalty has been set by court rule. This will close the case.

☐ 2. **I REQUEST A HEARING TO EXPLAIN THE CIRCUMSTANCES**

If you agree that you committed the infraction but would like to explain the circumstances, the court will notify you in writing of the hearing date. You may not require witnesses to appear at the hearing but they may attend voluntarily.

I PROMISE TO APPEAR _____ (Your Signature)

☐ 3. **I REQUEST A HEARING TO CONTEST THIS INFRACTION NOTICE**

If you believe you did not commit the infraction, you may request a hearing. At the hearing, the state must prove by a preponderance of the evidence (more likely than not) that you committed the infraction. You may require witnesses, including the officer who issued the notice, to appear at this hearing. The court will notify you in writing of the hearing date and how to request that witnesses be present.

I PROMISE TO APPEAR _____ (Your Signature)

FAILURE TO RESPOND TO THIS NOTICE OR FAILURE TO APPEAR AT ANY COURT HEARING YOU REQUEST IS A CRIME WHICH COULD RESULT IN AN ADDITIONAL CHARGE OF "FAILURE TO APPEAR" BEING FILED AGAINST YOU AND THE ISSUANCE OF A WARRANT FOR YOUR ARREST. The court must notify the Department of Licensing of your failure to appear and your driver's license will not be renewed until you have paid all of the penalties.

ALL TRAFFIC INFRACTIONS MUST BE REPORTED TO THE DEPARTMENT OF LICENSING.

If your address on the other side is not correct, please print the correct one below:

_____

_____

RECEIVED

MAY 18 2011

ZUMAN LAW OFFICES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON, Respondent, vs. STEPHEN CRISS JOHNSON, Appellant.	SUPERIOR COURT NO. 09-1-00586-3 DISTRICT COURT NO. NO. C 85203

VERBATIM REPORT OF PROCEEDINGS

April 27, 2011

(ORAL ARGUMENT)

A P P E A R A N C E S

For the Respondent:	MR. SHANE O'ROURKE DEPUTY PROSECUTOR Chehalis, Washington
For the Appellant:	MR. KEVIN HOCHHALTER ATTORNEY AT LAW Chehalis, Washington
Presiding Judge:	RICHARD L. BROSEY DEPARTMENT 3

JANE WESTLUND, RPR #813626, CSR #2038
OFFICIAL COURT REPORTER LEWIS COUNTY SUPERIOR COURT
CHEHALIS, WASHINGTON 98532

COPY

1800.007
w/c JEC, KH file

THE COURT: We're here this afternoon on 09-1-00586-3 State of Washington Respondent vs. Steven C. Johnson Appellant. The matter is on for argument on a RALJ appeal from District Court. You are Mr. --

MR. HOCHHALTER: Kevin Hochhalter.

THE COURT: Mr. Hochhalter is here for the appellant and Mr. O'Rourke for the State.

Mr. Hochhalter, it's your motion.

MR. HOCHHALTER: Your Honor, it's my understanding that we're scheduled for ten minutes per side.

THE COURT: That's right. It's an appeal on the record. You get a written decision, so you don't get a decision today. You get a written opinion is what you get. I've read your briefs.

MR. HOCHHALTER: Your Honor, rather than recite my brief over, again, I'd like to address things -- focus on two issues: First, the District Courts in this state are not following the law as written by the legislature, and, then, second, that suspension of indigent defendants for failure to pay a fine is offensive to equal protection.

On the first point, it's the role of the legislature --

THE COURT: It isn't just indigent defendants, is it? If it were the rule that the State could not suspend

somebody's driving privilege for failure to pay a traffic fine that's been imposed, whether somebody is indigent or not really makes no difference. It would really be an invitation to anarchy, wouldn't it? What recourse would the state have? You get a traffic infraction or you get a ticket. You go to Court, you respond, the judge says I'm fining you X number of dollars, you blow it off and don't pay it, what remedy would the State have?

MR. HOCHHALTER: Well, your Honor, the constitutional infirmity is similar to that which the U.S. Supreme Court pointed out in *Tate vs. Short*. The problem is that the scheme allows the wealthy to get off by paying their fine and not being suspended or in *Tate* it was imprisonment, whereas an indigent defendant doesn't have that option at all. As applied to the indigent defendant, it is unconstitutional.

THE COURT: There's no constitutional right to drive, so he doesn't have to drive. If he doesn't drive, again, then, there's no penalty, right?

MR. HOCHHALTER: Right, there would be no crime of driving while suspended, but the issue -- the constitutional issue with the suspension is it's not separate from the crime, so my first point is focused on the elements of the crime. The second issue is the suspension itself, the underlying suspension, which a

conviction under the crime of driving with license suspended cannot be supported by an unconstitutional suspension, so the underlying suspension here was invalid because Mr. Johnson as an indigent defendant and had no means to pay the fine.

THE COURT: How do I know that the situation with Mr. Johnson in not paying the fine is any different from somebody who basically said, I don't care if I can pay this or not, I'm not going to do it, so they choose not to do it? They are in the same position that Mr. Johnson is in, which is one of the problems that I see with your argument.

Somebody can by their own volition decide I'm not going to pay a traffic fine, but I'm going to keep on driving, so the State then stops them, arrests them and prosecutes them for driving suspended. The situation is really no different. The only difference is that the person, who has money has decided by his own volition not to pay it, where you claim Mr. Johnson is indigent and can't pay it. I don't see a distinction.

MR. HOCHHALTER: Well, your Honor, again, the situation is the same as that in *Tate*. In *Tate* a hypothetical defendant with the ability to pay could just decide as you said not to pay and then he would be imprisoned, but the Court in *Tate* distinguished that from

the situation, where you cannot pay. The penalty in *Tate* of imprisonment is with a coercive purpose for the purpose of obtaining payment of a fine and with a person who is able to pay it may be a good and effective method to get them to pay, but the Court said when you have a person who is indigent and has no way to pay, then, you can't squeeze blood from a stone. You will never accomplish the purpose of coercing payment of that fine, because the person simply cannot pay.

THE COURT: He can also stop driving. There's no constitutional right to drive. The case law says that.

MR. HOCHHALTER: Right, but as I said, your Honor, we're not talking about right now whether he's going to drive later or not. We're talking about the penalty imposed for failing to pay the original infraction.

THE COURT: No, your argument is it's unconstitutional for the State to arrest and prosecute and fine somebody for driving -- for a conviction for driving suspended, because they are indigent and can't pay the fine. My response to that is all you have to do to avoid a conviction for driving suspended is not drive, and Mr. Johnson apparently chooses to drive, but he doesn't want to pay the fine imposed for his original conviction for Driving while License Suspended.

MR. HOCHHALTER: Your Honor, I see your point that

Mr. Johnson did make the choice to drive knowing that he was suspended.

Now, it goes to the issue of what the statute defining that crime is intended to punish. The legislature has decided that ignoring your traffic tickets, failing to respond, failing to appear, failing to comply with the terms on the notice is one type of conduct that warrants criminal punishment, if you then choose to drive.

THE COURT: That's the second question that I have for you: Is failure to comply with the terms and conditions of a traffic offense, is that failure to comply with the terms and conditions of what's on the notice or is that in fact what it is encompassed here? You are arguing that the State didn't prove its case beyond a reasonable doubt, because among other things you are suggesting that the statute doesn't penalize somebody who doesn't pay, because it's not failure to comply; but my question for you is if you already have a separate category failure to respond and you already have a separate category of failure to show up for your hearing, which are separate categories of the subsection of the statute 342, and you also have the subsection of failure to comply, if failure to pay is not failing to comply what is failure to comply?

MR. HOCHHALTER: Failure to comply would be a failure to comply, with any of the terms that appear on the piece of paper. The plain meaning of that phrase failure to comply with the terms of a notice of infraction, how can it mean anything but failure to do what the paper told you to do?

THE COURT: Because there's two other categories in the statute, which is failure to respond and failure to show up for your hearing which cover the failure to do what's ordered to be done on the back of the ticket itself or the citation or notice of infraction itself.

Again, it comes down to didn't the legislature really mean when they say failure to comply, if the judge tells you to go to for example a defensive driving course, if the judge tells you to go to a DWI class, if the judge tells you to pay a fine and you blow it off, you're failing to comply with the terms and conditions of what's on the infraction, what's on the notice, what came out of the court case, how can it be anything else?

MR. HOCHHALTER: Your Honor, I think that those are two different things. Failure to comply with the terms of the notice is talking about what terms appear on the notice.

Now, if the legislature wanted to include failure to comply with the court's order to attend a traffic

course or to pay a fine -- if the legislature wanted it to be failure to comply with the judgment of the District Court it could have said so. It's very easy to write those words into the statute. It didn't. It says failure to comply with the terms of the notice of infraction. The plain language of that is clear: It's the terms written on the piece of paper, which the legislature itself doesn't control the terms on the paper that's given to the courts. The courts for whatever reason have not chosen to include on that paper you must comply with the orders of the court.

Now, we know obviously that the defendant has to comply with the orders of the court --

THE COURT: Apparently not.

MR. HOCHHALTER: -- but that is not one of the terms on the notice of infraction, so it can't be the basis of a conviction under a statute that requires compliance with the terms on the notice of infraction.

THE COURT: The problem I have with that argument, counsel, is that by failing to comply with the terms of the court's directive, which is to pay the fine as ordered, then, somebody like Mr. Johnson puts himself right back and continuing to drive puts himself right back into the same condition that he's in right now, which again to my mind the way you are arguing it is an

invitation to basically anarchy, because you are basically saying you get a ticket for driving suspended, because your license is suspended -- and I'm not even going to go into why his license is suspended and why the State is arguing that this is not the proper forum for that to be litigated, but your client's license is suspended, so he gets stopped, he's charged with driving suspended, because his privilege is suspended, he comes to Court, he's convicted, the judge imposes a fine, he blows off the fine, and he keeps on driving, so that's anarchy. There's no compliance there whatsoever with the court's order, no effort whatsoever to comply with the court's order, and you are telling me the court can do nothing about that?

MR. HOCHHALTER: No, your Honor, respectfully, I'm not saying that there's nothing that the court or the state can do about it, but what I'm saying is that conviction of the crime of Driving with License Suspended in the Third Degree does not include that situation.

The Court must strictly construe criminal statutes. It's not in there. The statute section 342 indicates that driving with a suspended license is unlawful, so clearly there's some punishment contemplated by the legislature, but failure to pay does not fall under the enumerated reasons in the third degree. It doesn't fall under the second degree. It doesn't fall under the

first degree and so it's something else and it must be an infraction.

Another example is dealing with child support: The department has the authority to suspend a person for failing to make their child support payments, but suspension for failure to pay child support does not appear anywhere in the driving with license suspended statute. It's not in the first degree, it's not in the second and it's not in the third, so it must be something else. It must be an infraction. He can get cited for another infraction and get another fine.

THE COURT: Which he doesn't pay, and then we're right back in the same circle that we're apparently chasing our tail in right now.

MR. HOCHHALTER: Yes, but --

THE COURT: There's no authority whatsoever for the position that you are adopting in the State of Washington, is there? There isn't any case that stands for the proposition that you are arguing?

MR. HOCHHALTER: There's no case that stands for either side, your Honor.

THE COURT: Mr. O'Rourke.

MR. O'ROURKE: Well, it would be our position that the authority that stands for our proposition would just be the statute itself and the construction of the driving

suspended statutes and we don't actually need authority for our position, because what's being proposed here is to basically overhaul the entire system.

The majority of what I wanted to argue is already in my brief, but -- and I understand the Court doesn't want to get into a lot of whether or not this is the proper forum, but just for the record really the appellant is not arguing, whether or not what happened at the trial court level meets the elements of the crime, because he was convicted for failing to comply with a notice of traffic infraction. The evidence at trial was through that certified copy of the driving record, which just indicated that he did in fact fail to comply with one.

I guess what appellant is trying to do is move a step back beyond that and challenge this notion of what constitutes failure to comply, because at the trial court level the evidence was that there was a certified copy of the driving record, that the officer stopped him in Lewis County on the date in question, he was driving, and that the certified copy of his driving record indicated that on that day he was suspended for failure to comply, so you have all the evidence before you, and it was enough to convict him beyond a reasonable doubt so now what is happening is we have a challenge to what the notion of failure to comply includes.

THE COURT: No. What I referred to earlier about the underlying basis was I understood that there was some argument as to whether he was or was not properly denied the ability to renew his driver's license in the first place, and I understood your argument to be this was not the proper forum for that. If Mr. Johnson can't challenge the underlying basis for finding that he's failed to comply in this forum, how does he ever challenge it?

MR. HOCHHALTER: Well, I think that when he's given notice in the first instance of whether or not he's going to be suspended, he had to have that here. There was an attachment to the documents presented at trial that indicated that he was given a certain amount of time to respond, prior to his license actually becoming suspended. Now, he didn't do anything about that and then he does enter the criminal arena, but there is my understanding of the process through the Department of Licensing is that when you are given that -- I believe it's a 90 day period when you are given that period of however many months, where you are notified your license will be suspended, you can contact the Department of Licensing and challenge that through an administrative hearing.

We know that these cases have made their way up through the appellate process, because there is other case law, not on this issue, but things upon like *Redmond vs.*

Moore, and other issues that make their way through the appellate process through the administrative course of action. But here he's challenging the basis for the suspension. We don't think that's the appropriate forum, but even if it is, failing to comply, if it doesn't include -- an invitation to anarchy is a good way to put it.

Another way to look at it is to read a statute in a way that would lead to an absurd result, because that's the only way to read it. If he doesn't pay and he's suspended and then he just continues to drive and the state can't enforce it, then, he could accrue 100 infractions and what's his disincentive at that point? There's no incarceration, if there's no criminal convictions. What is his disincentive to driving and committing several infractions? There is none.

THE COURT: The bottom line from your perspective is failure to pay the amount that's ordered to be paid, pursuant to a conviction is in fact failure to comply with the terms and conditions of the traffic infraction.

MR. O'ROURKE: Right, and the legislature could have written failure to comply by showing up to a contesting hearing, which you have an option for being ordered to pay and not paying, perhaps that could be written there. We understand you could argue, well, the

rule of brevity (sic) suggests that if it doesn't indicate one way or the other you have to side with -- we are not saying it's not suggested in that language. As we know in our brief and your Honor notes failure to respond is listed and there's another option listed and then we have failure to comply, on the ticket itself if we're talking about the context of the citation, it lists one of your options as mitigation, deferment or a contested hearing and it talks about a contested hearing.

If complying with the process of going through a contested hearing doesn't include following a judge's order to pay the amount ordered, if you don't win that contested hearing, then, that leads to essentially an absurd result. We don't believe there's any issue with that. The equal protection seems to be a non-issue.

Again, there's no difference in the way this law is applied to indigent defendants. There may be different effects for them in certain circumstances, but it's not affecting them differently in the essence of the statute. *Tate* is just not really relevant, because we're skipping a leap in logic here. In *Tate* you have an automatic conversion of a fine into jail. As your Honor notes here, there's a huge element that's being overlooked by the appellant and that's if you don't pay that fine, okay, the state suspends you. No one is sending you to jail but

yourself by getting in a vehicle and driving. Nobody is coming to your door and saying you didn't pay the civil infraction and now we're converting that to jail time. Nobody is saying that if you get convicted of driving suspended and you don't pay your fine that there's an automatic conversion to jail time as there was in *Tate*.

There's this huge missing piece in appellant's argument, where you have to actually continue to violate a court's order -- the Department of Licensing's order so we don't think there's an equal protection violation and we believe the record shows that the elements of the crime are proven beyond a reasonable doubt.

Thank you.

THE COURT: You get the last word.

MR. HOCHHALTER: Your Honor, Mr. O'Rourke indicates that what we're looking to do is overhaul the system and there's some truth in that. The system as it exists as people are repeatedly convicted for Driving with License Suspended in the Third Degree for failure to pay the fine is contrary to the law the legislature wrote and it is only persisting, because of custom and this institutional momentum to continue to prosecute and convict for what is not actually a crime under the written statute and so to that extent, yes, the system needs to be changed. Your Honor can begin that change today by

correctly interpreting the statute and reversing Mr. Johnson's conviction.

The issues come up about whether there would be any disincentive, if this crime isn't there hanging over someone's head and the fact is that there is a disincentive even without the crime. Suspension itself is a great disincentive. It can greatly deter someone's ability to provide for themselves financially. Many people end up applying for welfare benefits.

THE COURT: What about his argument that in essence all I can do is look at the fact that Mr. Johnson was in fact suspended on the date and time in question and that the forum for challenging the basis on which he was initially suspended is not here, but elsewhere administratively?

MR. HOCHHALTER: Your Honor, this is the proper forum for him to contest the underlying suspension, because the underlying suspension and the reasons for it are an essential element of the crime, which he was charged with, and so in order to make his defense to that criminal charge he needs to be able to challenge the constitutionality of that underlying suspension.

In addition to that, the administrative procedures that Mr. O'Rourke brings up are extremely limited. The statute only allows for a very limited review. It's not a

hearing. The Department of Licensing looks over its records to make sure there are no clerical errors and that's it. That's the full extent of the pre-suspension appeal rights and that's not sufficient to be able to challenge the constitutionality of that suspension and so we need a forum such as this one to do that.

THE COURT: Okay, anything else?

MR. HOCHHALTER: I did also just want to bring up Mr. O'Rourke mentioned that the evidence that was submitted at trial was this Department of Licensing letter, the notice of suspension, which says -- this is all it says about the reasons for the suspension, "You failed to respond, appear, pay or comply with the terms of the citation." Now, that doesn't match the language of the statute. The statute doesn't say that word "pay," so if pay was the reason that he was suspended here this is insufficient to prove that he's guilty of Driving with License Suspended in the Third Degree, because pay is not a part of that crime and so there was not sufficient evidence to convict Mr. Johnson beyond a reasonable doubt.

THE COURT: All right. A written decision will be entered by the Court in due course on this RALJ.

MR. HOCHHALTER: Thank you.

(WHEREUPON THE PROCEEDING WAS CONCLUDED.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF LEWIS)

I, Jane Westlund, Official Court Reporter for Lewis County and Notary Public in and for the State of Washington, residing at Chehalis, do hereby certify:

That the foregoing Verbatim Report of Proceedings consisting of 19 pages was reported to me and reduced to typewriting by means of computer-aided transcription;

That said transcript is a full, true and correct transcript of my shorthand notes of the proceedings heard before Judge Richard L. Brosey on the 27th day of April, 2011, at the Lewis County Superior Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 13th day of May, 2011.

Jane Westlund, CSR, RPR
Official Court Reporter
Notary Public

Notary Public
State of Washington
JANE ANNE WESTLUND
My Appointment Expires
December 11, 2013

SUPERIOR COURT
LEWIS COUNTY, WASH.
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON Plaintiff / Respondent vs. STEPHEN C. JOHNSON Defendant/ Appellant	No. 09-1-00586-3 RULING ON APPEAL FROM DISTRICT COURT (RALJ)

I.

FACTS

On September 19, 2008, Appellant Stephen C. Johnson was stopped while driving in the 100 block of Falls Road in the Randle area of Lewis County. At the time of the stop, Mr. Johnson's driver's license and privilege to drive was suspended in the third degree. (RP 6-8, RP 12), (exhibit #1) According to the notice given by the Department of Licensing to Appellant, the suspension was due to his failure to respond to, appear, pay or comply with a citation for driving without a valid license, which citation was issued April 14, 2007. (Exhibit #1). In actuality, on April 14, 2007, Appellant, who had been a licensed driver but whose license the Department of Licensing had declined to renew, had been stopped while driving and issued a notice of infraction for driving without a valid driver's license. Appellant unsuccessfully contested the notice of infraction and a monetary penalty was imposed, which he failed to pay, claiming indigency.

Failure to pay the infraction resulted in the Department of Licensing suspending his driver's license and his privilege to drive in this state. (RP 58-63) (Exhibit #2)

As a result of the stop, Appellant was arrested for Driving while suspended in the Third Degree and transported to the Lewis County Jail. Appellant appeared for arraignment on September 22, 2008, at which time he waived formal arraignment, entered a plea of not guilty, and requested court appointed counsel. Despite claiming to be indigent, Appellant was found at that time to not qualify for court appointed counsel. Thereafter, attorney Ryan Gunn appeared as counsel for him. On December 4, 2008, a pretrial hearing was held and, a date for trial was set. That same day, Appellant filed a motion to dismiss the charge, and waived speedy trial to allow for setting of the motion to dismiss. On December 17, 2008, Attorney Gunn filed a notice of withdrawal as counsel for Appellant, indicating in the notice that Appellant would be representing himself, pro se. Appellant filed a pro se notice of appearance and a new brief on January 13, 2009. During a colloquy with the court on February 4, 2009, appellant stated that he desired to proceed pro se, did so and his motion to dismiss the charge was denied. (Brief of respondent page 2, lines 1-14) Thereafter, appellant filed a motion for reconsideration of the ruling denying his motion to dismiss. At that hearing, Appellant was apparently directed to file a new affidavit relative to his financial status, as the District Court determined that he then did qualify for court appointed counsel and after a colloquy with the Appellant, during which he reiterated his desire to represent himself, appointed attorney Jerry Grey as Standby counsel. On March 19, 2009, Appellant's motion to reconsider the denial of his motion to dismiss the charge was denied. Thereafter Appellant filed an interlocutory appeal to Superior court, which was dismissed.

The matter came on for trial September 18, 2009, before Court Commissioner Wendy Tripp. During the trial Appellant admitted in answer to various questions from the deputy prosecutor that he had received a notice of infraction, which he unsuccessfully contested, resulting in an adjudication being made that he owed a monetary penalty; had failed to pay the monetary penalty; had received notice that his driver's license would be suspended as a result of failing to pay the monetary penalty; knew that his driver's license was in fact suspended by the Department of Licensing for non-payment of the monetary penalty; and after such suspension drove his

motor vehicle on a public highway, which resulted in his being stopped and charged with driving while suspended. (RP pages 58-63). From a guilty verdict, the Appellant now appeals.

During the pendency of the appeal, Appellant, being dissatisfied with his appointed counsel for appeal, brought a pro se motion for new counsel on the appeal, which was first addressed to Superior Court where the appeal was then pending. Determining that the obligation to consider appointment of new counsel was properly a decision of the District Court, the request was referred to the District Court for a decision on the issue. Subsequently a hearing on the issue was held on June 2, 2010 before Judge Buzzard of the District Court. (RP hearing of June 2, 2010 12-23). During that hearing, inasmuch as he had examined the last affidavit of financial resources filed by Appellant in October of 2009 and determined that it was mostly blank, Judge Buzzard inquired of the Appellant relative to his finances, during which Appellant revealed that he owned a home, which he valued at $300,000. And which was free and clear. He also disclosed that he was the judgment creditor in a civil lawsuit in Lewis County Superior Court, wherein he was awarded 2.5 million dollars for the tort of outrage and $420,000.00 in actual damages, for a total of 2.928 million dollars. Appellant further disclosed that the interest on the judgment, which had not been appealed, was $960.00 per day and that no effort had been made by Appellant to collect upon or realize upon the judgment. Judge Buzzard declined the request to replace his then counsel and stated that Appellant did not get counsel of his choice at public expense. The record is thereafter silent on the issue of his request for "new" court appointed counsel, although appointed counsel thereafter took no further action relative to the appeal and present counsel, who was apparently retained for the purposes of appeal, appeared for Appellant on August 2, 1010.

II.

ISSUES ON APPEAL

The Appellant has raised several issues on appeal, including the following:

1. The state failed to prove all of the elements of the crime charged;

2. The suspension of the Appellant's driver's license was unconstitutional;

3. The suspension of a driver's license for non-payment as applied to indigent defendants is unconstitutional;

4. Appellant received ineffective assistance of counsel at trial and

5. The court violated procedural due process in determining that the Appellant was not indigent for the purpose of appointment of counsel on appeal.

III.

AUTHORITY AND DECISION

1. R.C.W. 46. 20.342 provides in part "That it is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status." Subsection (c) of the same statute provides in part "A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because...(iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of a traffic infraction or citation, as provided in R.C.W. 46.20.289... is guilty of driving while license suspended or revoked in the third degree." R.C.W. 46.20.289 provides in part, "the department shall suspend all driving privileges of a person when the department receives notice from a court under R.C.W. 46.63.070(6), 46.63.110 (6), or 46.64.025, that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a traffic infraction or citation." R.C.W. 46.63.110 (the version in effect at the time Appellant was stopped) provides in part: "(1) A person found to have committed a traffic infraction shall be assessed a

monetary penalty." The statute further provides in subsection (6): "Whenever a monetary penalty, fee, cost, assessment, or other monetary obligation is imposed by the court under this chapter it is immediately payable... (b) If a person has not entered into a payment plan with the court and has not paid the monetary obligation in full on or before the time established for payment, the court shall notify the department of the delinquency. The department shall suspend the person's driver's license or driving privilege until all monetary obligations have been paid."

Appellant claims that the state failed to prove all of the elements of the charge, driving while suspended third degree because the statute does not apply to Appellant, as he did "respond to the traffic infraction" in that he complied with the terms of the notice of infraction by requesting a hearing. Such an argument ignores the plain language and the interrelationship of the statutes referred to above, governing the issuance of traffic infractions and response to them. By the plain language of R.C.W. 46.73.070 when a person, such as Appellant receives a notice of traffic infraction, that person must "respond" by either paying the monetary penalty, asking for a mitigation hearing or asking for a contested hearing. There is no dispute that Appellant did initially "respond" to the notice of infraction and request a contested hearing. Appellant's driver's license and privilege was not suspended as a result of that response, rather Appellant's license and privilege was suspended for what came after that contested hearing, namely not paying the monetary penalty when the infraction was found to have been committed. As clearly set forth in the above in R.C.W. 46.63.110, when an infraction is found committed, a monetary penalty is imposed and a date by which it is to be paid is set. Someone in the position of Appellant who has contested an infraction and lost the contest can request a payment plan, which Appellant did not do, but in the event that the infraction is not paid by the due date or if there is a

failure of the payment plan, pursuant to R.C.W. 46.63.110, the court notifies Department of Licensing (DOL), which after notice, suspends the driver's license or privilege of the non-paying party. In the event that the non-paying party continues to drive and is stopped by law enforcement, pursuant to R.C.W. 46.20.342 and R.C.W. 46.20.289, which must be read together, that party is properly chargeable with driving suspended in the third degree since the non-paying party has failed to comply with the terms of the notice of infraction, specifically by not paying it. The "failure to comply with the terms of a traffic infraction as provided in R.C.W. 46.20.289" does not mean failing to respond to the initial notice of traffic infraction as set forth in R.C.W. 46.63.070 rather; it refers in clear and unequivocal language to non-compliance by doing what the adjudicated infraction requires, such as by not paying the monetary penalty.

In the case at bar, the evidence produced at trial showed that Appellant, when stopped by the deputy Sheriff on September 19, 2008, was driving his vehicle on a public highway, in Lewis County, State of Washington, during a period when his driver's license or privilege was suspended due to his failure to pay a monetary penalty imposed for an infraction for driving without a valid driver's license. Appellant knew his license was suspended and exhibit #1 clearly showed that he had received notice dated September 17, 2007, that his driver's license would be suspended on November 1, 2007, due to his failure to pay the infraction. The state proved all of the elements of the crime of driving while suspended and the claim to the contrary is without merit.

2. Appellant, with scant citation to relevant authority claims that the underlying suspension of his driver's license and privilege was unconstitutional, and that as a result the conviction for driving while suspended should be reversed. Appellant further claims that

suspension of a driver's license of non-payment of a monetary obligation is unconstitutional as applied to individuals who are indigent. Appellant acknowledges that his driver's license and privilege were suspended due to his non-payment of a fine (monetary penalty) incurred for committing the infraction of driving without a valid license, and claims that he did not have a valid license because of the refusal of the Department of Licensing to renew his driver's license due to his failure to provide a residence address in his application, as required by R.C.W. 46.20.091 (1) (d). Appellant asserts that the requirement of a residential address by R.C.W. 46.20.091 (1) (d) is unconstitutional. (Brief of Appellant pages 6-8)

In making this argument, Appellant ignores the underlying fact that his driver's license and privilege was not suspended due to anything concerning his application or address, but rather because he failed to pay the monetary penalty incurred due to the infraction of driving without a valid license. Both the infraction and the subsequent charge of driving while suspended share the same fact, that the Appellant was driving on a public highway with knowledge that he was unlicensed and in the latter circumstance suspended. In either event, both the infraction and the criminal charge could have been avoided by simply not driving. With regard to the claim regarding the unconstitutionality of R.C.W. 46.20.091 (1) (d), Washington requires that a statute must be shown to be unconstitutional beyond a reasonable doubt, City of Redmond v. Moore, 151 Wn. 2d 664, 91 P.2d875 (2004) A facial challenge to the constitutionality of a statute requires that it be shown beyond a reasonable doubt that there are no set of circumstances where the statute can be constitutional. Washington State Republican Party v. Public Disclosure Commission, 141 Wn. 2d 245, 282, 4 P.3ed808 (2000) Assumptions or hypotheses about the potential unconstitutionality of a statute are not enough. R.C.W. 46.20.091 establishes the criteria for an application for an original driver's license and requires at a minimum, name, verified by

evidence; date of birth, verified by evidence; sex; Washington residence address; description; driving record and any other information required by the department. Nothing in the statute on its face distinguishes among applicants or classes of applicants, as the same information is sought from all. Appellant claims the statute denies equal protection as it denies homeless persons the right to obtain a driver's license. Such a claim is wholly unsubstantiated by any evidence in the record, and assumes that homeless applicants do not have a residence address, and have a "right" to a driver's license neither of which contentions has been shown to be true or accurate. Moreover, the Washington Supreme Court has rejected equal protection challenges to ordinances because they apply equally to all persons. State v. Webster 115 Wn.2d 635, 646, 802 P.2d 1333 (1990) In the same case, in dicta, the court pointed out that in no case had the "homeless" been declared to be a protected class for the purpose of Fourteenth Amendment analysis.

The claim that R.C.W. 46.20.091 is unconstitutional is irrelevant to these proceedings in any event as Appellant admitted that he had no valid driver's license when the infraction was issued and, knew he was suspended when stopped on September 19, 2008. Moreover there is no evidence in the record that Appellant is "homeless" and a member of the "homeless" class of individuals if such class exists or, other than his own self-serving claim, that the reason he could not renew his driver's license was due to his failure to furnish a residence address in his application. The proper forum for Appellant to litigate a claim that he is should be entitled to obtain a driver's license without proving residence within the State of Washington should be in a civil proceeding with the Department of Licensing, not this appeal of a conviction for driving while license was suspended.

Appellant also appears to argue that there is no rational basis for requiring applicants for driver's licenses to furnish a residential address within this state, which ignores the requirement

of R.C.W. 46.20.001 that a driver within this state, unless subject to one or more of the exemptions listed, must obtain a driver's license issued to residents of this state to drive upon its highways. As pointed out in Spokane v. Port, 43 Wn. App.273, 275, 716 P.2d 945 (1986) driving on the highways of this state is a privilege, not a right, and always subject to such reasonable regulation and control as the proper authorities see fit under the police powers in the interest of public safety and welfare, See also Hendrick v. Maryland,235 U.S. 610, 59 L.Ed.385, 35 S. Ct. 140 (1915), where the U.S. Supreme Court held that states may rightfully prescribe uniform regulations necessary for public safety and order in the operation upon its highways of motor vehicles and it may require the licensing of drivers. The State of Washington certainly has an interest in seeing that those to whom driver's licenses are issued are not only competent and skilled but are actual residents of this state, and to require such an address is a valid regulation under the police powers of the state. Appellant has not shown that the underlying suspension of Appellant's driver's license or privilege was unconstitutional or that the requirement that a residential address be furnished to obtain a driver's license is unconstitutional on its face and his claims with respect thereto are without merit.

3 & 5. Appellant in his third assignment of error claims that Suspension of a driver's license for non-payment of a monetary obligation is unconstitutional as applied to indigents. In his fifth assignment of error he claims that the District Court Judge denied Procedural Due Process to Appellant in finding that he was not indigent and denying him appointed counsel for appeal. As both of these claims relate to the financial circumstances of the Appellant, they will be discussed here. Unfortunately the record before this court does not contain any documentation of Appellant's financial circumstances, other than a partial transcript of a hearing held before

Judge Roewe on February 24, 2009, and a partial transcript of a hearing held before Buzzard of the district Court on June 2, 2010. Other than those two partial transcripts of hearings actually held, the only other items in the record for consideration as to the financial status of Appellant are the statements contained in Appellant's brief.

Appellant argues that suspension of a driver's license for failure to pay a monetary penalty is unconstitutional as applied to the indigent. As pointed out above, pursuant to R.C.W. 46.63.110 (1), a person found to have committed a traffic infraction shall be assessed a monetary penalty. Pursuant to subsection 6 of the same statute, when a monetary penalty is imposed it is immediately payable. In the event that the person against whom the penalty has been assessed is not able to pay it in full, and not more than a year has elapsed since the penalty was assessed, the court may enter into a payment plan with the person owing the monetary penalty. Pursuant to the same subsection of the statute, in the event that payments are not made, the court notifies DOL and pursuant to statute, DOL suspends the driver's license or privilege of the non-paying person. By statute, monetary penalties imposed are civil in nature; hence non-payers may not be imprisoned for non-payment, although other consequences such as suspension of driver's license may follow. No authority for the claim that suspension of a driver's license for non-payment of a financial penalty is unconstitutional has been provided by Appellant and as imprisonment does not directly result from non-payment, Appellant's reliance upon Tate v. Short, 401 U.S. 395, 28 LED 2ed 130, 91 S Ct. 668 (1971) for support for the claim that it is unconstitutional is misplaced. The possibility of incarceration is remote and triggered not by non-payment of the monetary penalty but rather by driving subsequent to being notified of the suspension of a driver's license for non-payment, which may lead to prosecution for the criminal traffic offense of driving while suspended. Suspension of a driver's license has no direct or criminal

consequence absent driving while in that status. Again, the consequence of failing to pay a monetary penalty is the same for all classes of licensed drivers, namely suspension of driver's license and privilege after notice, it is not a consequence reserved for someone who claims to be indigent. Moreover, there is no distinction made between one who does not pay a monetary penalty due to a claim of inability to pay and one who does not pay merely because he or she decided not to do so. Suspension due to non-payment of a monetary penalty is not unconstitutional.

R.C.W. chapter 10.101.005 et. Sequence deals with services which may be provided to persons who are determined to be indigent. R.C.W. 10.101.020 (3) deals with determination of indigency and provides in part that the determination is to be made at the initial contact with defendant or at the earliest time circumstances permit. The statute also provides that the information furnished by the defendant is confidential and shall not be available for use by the Prosecution in the pending case. CrRLJ 3.1 follows the statute in that it provides in subsection (3) that information given by a person to assist in the determination of whether he or she is financially able to obtain a lawyer shall be on oath and shall not be available to the prosecution in the pending case in chief. R.C.W. 10.101.020 (4) provides in part that if the court subsequently determines the person receiving services is ineligible, the court shall notify the person. As stated above, none of the information furnished by Appellant to the District Court relative to his financial status was included in the "record" of the case filed in Superior Court, other than the two partial transcripts of hearings held on February 24, 2009 and June 2, 2010. At the hearing before Judge Roewe on February 24, 2009, in response to inquiry from the Court as to whether he had sought appointment of a public defender, Appellant initially responded, "I don't think I qualify." Appellant thereafter went to the District Court Probation Office and subsequently

qualified, and stand by counsel was appointed. In June of 2010, after Appellant expressed dissatisfaction with his the court appointed counsel, Judge Buzzard held a hearing to consider allowing his then counsel to withdraw and appointing new counsel and observing that the financial documents filed by Appellant were mostly blank, inquired on the record as to Appellant's financial status. During that hearing Appellant revealed that he owned a house, free and clear, which he valued at $300,000, and that he had left the paragraph describing his interest in real estate on the financial declaration blank. (RP June 2, 2010, page 18) In response to further questioning Appellant disclosed that he was the judgment creditor in a suit against his neighbor, which judgment totaled 2.928 Million dollars, and was accruing interest at the rate of $960.00 per day and had not been appealed. (RP June 2, 2010 page 21-22) Although the record of what transpired thereafter is not before the court, apparently Judge Buzzard determined that the Appellant was not indigent, and declined to appoint new counsel for him on appeal.

While it is true that Pursuant to above-cited statute and court rule, the information pertaining to the financial resources of Appellant is confidential and not to be used by the prosecution in the case or used in the prosecution's case in chief, there is no evidence that the information obtained by Judge Buzzard was so used. Moreover, it appears that full disclosure of assets was not done at the time the initial application for a determination of indigency was made and absent inquiry by Judge Buzzard disclosure of either the 2.928 million dollar judgment in Appellant's favor or his $300,000 unencumbered home would not have been forthcoming. Given the disclosure of Appellant's assets at the June 2, 2010 hearing, it does not appear that the determination, assuming that it was made, that Appellant was not indigent for the purpose of court appointed counsel for his appeal was error or erroneously made. Contrary to the claim of Appellant, there was nothing violative of due process by Judge Buzzard in conducting the inquiry

as it appears to be allowed by R.C.W. 10.101.020 (4) and Appellant does not appear to be entitled to counsel paid for by the taxpayers in prosecuting his appeal.

Contrary to the claims made by Appellant, it is not unconstitutional for the state to suspend a driver's license for failure to pay a monetary penalty, regardless of whether the person whose license is suspended is indigent or claims that he or she can't pay the monetary penalty. It does not appear that by any reasonable standard, Appellant is indigent and could not pay the monetary penalty imposed for the infraction found committed. It was not error for Judge Buzzard to conduct an under oath, on the record examination of Appellant relative to his financial assets and the determination that Appellant was not indigent was not in error. Appellant was not entitled to counsel paid for by the taxpayers in the prosecution of his appeal, and his claim to the contrary is without merit.

4. The final claim of Appellant pertains to his assertion that his standby counsel provided ineffective assistance at trial. A criminal defendant has a constitutional right to the assistance of counsel. U.S. Constitution amendment 6, 14; Washington Constitution article 1, section 3, and 22. The right to counsel necessarily includes the right to effective assistance of counsel. Kimmelman v. Morris, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed. 2ed 305 (1986). The "landmark" case involving a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668, 104 S.CT. 2052, 80 L.ED. 2ed 674 (1984). As held by the United States Supreme Court in Strickland, supra and in Washington cases following it, State v. Bradbury, 38 Wn. App. 367, 685 P.2d.623 (1984), in examining a claim that trial counsel was ineffective, appellate courts utilize a two part test, namely (1) was counsel's performance below objective standards of reasonable representation, and if so (2) did counsel's performance

prejudice the defendant. Strickland, supra at 687-88 and Bradbury, supra at 370. See also State v. Thomas, 109 Wn. 2d 222, 749 P.2d. 816 (1987). With respect to the first prong of the Strickland, supra, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. See State v.McNeal, 145 Wn.2d 352, 362, 37 P.3ed 280 (2002). With regard to the second prong, the defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland at 694, Thomas, supra at 226. In order to prevail on an ineffective assistance of counsel claim, the Appellant must show that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) counsels' deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel's errors the outcome of the proceeding would have been different. State v. Pugh, 153 Wn. App 569, 222P.3d 821 (2009) citing State v. Hendrickson, 129 Wn. 2d 61, 917 P.2d 563 (1996). If either part of the test is not satisfied, the inquiry need go no further.

The role of "stand-by" counsel is not to represent a pro-se defendant, but rather to provide the pro-se defendant with technical information and to "be available to represent the accused in the event that termination of the defendant's self-representation is necessary." State v. Pugh, supra at 580, citing State v. Bebb, 108 Wn.2d 515,740 P.2.2d 829 (19087)

In the case at bar, Appellant, pro-se, filed a 7 page motion to dismiss the driving while suspended charge, followed by a 14 page motion to reconsider the refusal of the District Court to grant the initial motion. On March 19, 2009 Appellant, pro-se, argued the motion to reconsider before Judge Roewe with the assistance of stand-by counsel Mr. Grey. When the District Court denied the motion to reconsider, Appellant acting pro-se sought discretionary review in the Superior Court, which after argument by Appellant was denied. Mr. Grey was appointed by the

court as stand-by counsel only and functioned as standby counsel, although he did question Appellant at trial and raised numerous objections to actions of the state not only at trial by at pre-trial proceedings as well. No evidence in the record shows that Appellant ever requested a change in Mr. Grey's status from stand-by to full counsel. No evidence in the record supports the argument made by Appellant in his brief that Mr. Grey refused to make constitutional and statutory arguments for and on behalf of Appellant. Nothing in the record suggests that Mr. Grey, as claimed in Appellant's brief, somehow pressured Appellant to proceed pro-se, especially given Appellant's record of representing himself, pro-se on numerous occasions. Moreover, several of the arguments made by the Appellant in his initial motion to dismiss and in his motion to reconsider denial of that motion, specifically about his "right to drive", the claimed unconstitutionality of the statutes and that the statutes somehow do not apply to him and his situation are the same arguments made in his appeal. There is no showing that the outcome of the trial in District Court would have been any different, regardless of how or by whom Appellant was represented or assisted. The claim of ineffective assistance of counsel is without merit.

Considering all of the issues raised by Appellant in his appeal, there is no merit to his contention that the state failed, at trial to prove all of the elements of the offense; no merit to his contention that the underlying suspension of his driver's license and his privilege was unconstitutional; no merit to his contention that the requirement to furnish a residential address to obtain a driver's license is unconstitutional; suspension of a driver's license for non-payment of a monetary obligation or fine is not unconstitutional as to indigent defendants; Appellants stand-by counsel was not ineffective; and the examination of Appellant's financial status in determining that he was apparently not entitled to appointed counsel on appeal did not violate

due process of law. The conviction of Appellant for driving while suspended shall be affirmed and the matter remanded to District Court for imposition of costs, which are awarded to the respondent, State of Washington.

IT IS ORDERED, ADJUDGED AND DECREED THAT THE DECISION AND JUDGMENT OF THE LEWIS COUNTY DISTRICT COURT IS AFFIRMED. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT THIS MATTER IS REMANDED TO THE LEWIS COUNTY DISTRICT COURT FOR ENFORCEMENT OF THE JUDGMENT AND FOR IMPOSITION OF COSTS OF APPEAL AWARDED TO RESPONDENT STATE OF WASHINGTON

DATED THIS 12TH DAY OF JULY, 2011

RICHARD L. BROSEY, JUDGE

West's Revised Code of Washington Annotated

Title 46. Motor Vehicles (Refs & Annos)

Chapter 46.20. Drivers' Licenses--Identicards (Refs & Annos)

Driving or Using License While Suspended or Revoked

West's RCWA 46.20.342

46.20.342. Driving while license invalidated--Penalties--Extension of invalidation

Currentness

(1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state. Any person who has a valid Washington driver's license is not guilty of a violation of this section.

(a) A person found to be an habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor. Upon the first such conviction, the person shall be punished by imprisonment for not less than ten days. Upon the second conviction, the person shall be punished by imprisonment for not less than ninety days. Upon the third or subsequent conviction, the person shall be punished by imprisonment for not less than one hundred eighty days. If the person is also convicted of the offense defined in RCW 46.61.502 or 46.61.504, when both convictions arise from the same event, the minimum sentence of confinement shall be not less than ninety days. The minimum sentence of confinement required shall not be suspended or deferred. A conviction under this subsection does not prevent a person from petitioning for reinstatement as provided by RCW 46.65.080.

(b) A person who violates this section while an order of suspension or revocation prohibiting such operation is in effect and while the person is not eligible to reinstate his or her driver's license or driving privilege, other than for a suspension for the reasons described in (c) of this subsection, is guilty of driving while license suspended or revoked in the second degree, a gross misdemeanor. For the purposes of this subsection, a person is not considered to be eligible to reinstate his or her driver's license or driving privilege if the person is eligible to obtain an ignition interlock driver's license but did not obtain such a license. This subsection applies when a person's driver's license or driving privilege has been suspended or revoked by reason of:

(i) A conviction of a felony in the commission of which a motor vehicle was used;

(ii) A previous conviction under this section;

(iii) A notice received by the department from a court or diversion unit as provided by RCW 46.20.265, relating to a minor who has committed, or who has entered a diversion unit concerning an offense relating to alcohol, legend drugs, controlled substances, or imitation controlled substances;

(iv) A conviction of RCW 46.20.410, relating to the violation of restrictions of an occupational driver's license, a temporary restricted driver's license, or an ignition interlock driver's license;

(v) A conviction of RCW 46.20.345, relating to the operation of a motor vehicle with a suspended or revoked license;

(vi) A conviction of RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(vii) A conviction of RCW 46.61.024, relating to attempting to elude pursuing police vehicles;

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(viii) A conviction of RCW 46.61.212(4), relating to reckless endangerment of emergency zone workers;

(ix) A conviction of RCW 46.61.500, relating to reckless driving;

(x) A conviction of RCW 46.61.502 or 46.61.504, relating to a person under the influence of intoxicating liquor or drugs;

(xi) A conviction of RCW 46.61.520, relating to vehicular homicide;

(xii) A conviction of RCW 46.61.522, relating to vehicular assault;

(xiii) A conviction of RCW 46.61.527(4), relating to reckless endangerment of roadway workers;

(xiv) A conviction of RCW 46.61.530, relating to racing of vehicles on highways;

(xv) A conviction of RCW 46.61.685, relating to leaving children in an unattended vehicle with motor running;

(xvi) A conviction of RCW 46.61.740, relating to theft of motor vehicle fuel;

(xvii) A conviction of RCW 46.64.048, relating to attempting, aiding, abetting, coercing, and committing crimes;

(xviii) An administrative action taken by the department under chapter 46.20 RCW; or

(xix) A conviction of a local law, ordinance, regulation, or resolution of a political subdivision of this state, the federal government, or any other state, of an offense substantially similar to a violation included in this subsection.

(c) A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because (i) the person must furnish proof of satisfactory progress in a required alcoholism or drug treatment program, (ii) the person must furnish proof of financial responsibility for the future as provided by chapter 46.29 RCW, (iii) the person has failed to comply with the provisions of chapter 46.29 RCW relating to uninsured accidents, (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289, (v) the person has committed an offense in another state that, if committed in this state, would not be grounds for the suspension or revocation of the person's driver's license, (vi) the person has been suspended or revoked by reason of one or more of the items listed in (b) of this subsection, but was eligible to reinstate his or her driver's license or driving privilege at the time of the violation, or (vii) the person has received traffic citations or notices of traffic infraction that have resulted in a suspension under RCW 46.20.267 relating to intermediate drivers' licenses, or any combination of (c)(i) through (vii) of this subsection, is guilty of driving while license suspended or revoked in the third degree, a misdemeanor. For the purposes of this subsection, a person is not considered to be eligible to reinstate his or her driver's license or driving privilege if the person is eligible to obtain an ignition interlock driver's license but did not obtain such a license.

(2) Upon receiving a record of conviction of any person or upon receiving an order by any juvenile court or any duly authorized court officer of the conviction of any juvenile under this section, the department shall:

(a) For a conviction of driving while suspended or revoked in the first degree, as provided by subsection (1)(a) of this section, extend the period of administrative revocation imposed under chapter 46.65 RCW for an additional period of one year from and after the date the person would otherwise have been entitled to apply for a new license or have his or her driving privilege restored; or

(b) For a conviction of driving while suspended or revoked in the second degree, as provided by subsection (1)(b) of this section, not issue a new license or restore the driving privilege for an additional period of one year from and after the date the person would otherwise have been entitled to apply for a new license or have his or her driving privilege restored; or

(c) Not extend the period of suspension or revocation if the conviction was under subsection (1)(c) of this section. If the conviction was under subsection (1)(a) or (b) of this section and the court recommends against the extension and the convicted person has obtained a valid driver's license, the period of suspension or revocation shall not be extended.

Credits

[2010 c 269 § 7, eff. Jan. 1, 2011; 2010 c 252 § 4, eff. Jan. 1, 2011; 2008 c 282 § 4, eff. Jan. 1, 2009; 2004 c 95 § 5, eff. June 10, 2004; 2001 c 325 § 3; 2000 c 115 § 8; 1999 c 274 § 3; 1993 c 501 § 6; 1992 c 130 § 1; 1991 c 293 § 6. Prior: 1990 c 250 § 47; 1990 c 210 § 5; 1987 c 388 § 1; 1985 c 302 § 3; 1980 c 148 § 3; prior: 1979 ex.s. c 136 § 62; 1979 ex.s. c 74 § 1; 1969 c 27 § 2; prior: 1967 ex.s. c 145 § 52; 1967 c 167 § 7; 1965 ex.s. c 121 § 43.]

Notes of Decisions (38)

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West's Revised Code of Washington Annotated

Title 46. Motor Vehicles (Refs & Annos)

Chapter 46.20. Drivers' Licenses--Identicards (Refs & Annos)

Restricting the Driving Privilege

West's RCWA 46.20.289

46.20.289. Suspension for failure to respond, appear, etc.

Currentness

The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1, 2005. A suspension under this section takes effect pursuant to the provisions of RCW 46.20.245, and remains in effect until the department has received a certificate from the court showing that the case has been adjudicated, and until the person meets the requirements of RCW 46.20.311. In the case of failure to respond to a traffic infraction issued under RCW 46.55.105, the department shall suspend all driving privileges until the person provides evidence from the court that all penalties and restitution have been paid. A suspension under this section does not take effect if, prior to the effective date of the suspension, the department receives a certificate from the court showing that the case has been adjudicated.

Credits

[2005 c 288 § 5, eff. July 1, 2005; 2002 c 279 § 4; 1999 c 274 § 1; 1995 c 219 § 2; 1993 c 501 § 1.]

Notes of Decisions (16)

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West's Revised Code of Washington Annotated

Title 46. Motor Vehicles (Refs & Annos)

Chapter 46.63. Disposition of Traffic Infractions (Refs & Annos)

West's RCWA 46.63.110

46.63.110. Monetary penalties

Currentness

(1) A person found to have committed a traffic infraction shall be assessed a monetary penalty. No penalty may exceed two hundred and fifty dollars for each offense unless authorized by this chapter or title.

(2) The monetary penalty for a violation of (a) RCW 46.55.105(2) is two hundred fifty dollars for each offense; (b) RCW 46.61.210(1) is five hundred dollars for each offense. No penalty assessed under this subsection (2) may be reduced.

(3) The supreme court shall prescribe by rule a schedule of monetary penaltics for designated traffic infractions. This rule shall also specify the conditions under which local courts may exercise discretion in assessing fines and penalties for traffic infractions. The legislature respectfully requests the supreme court to adjust this schedule every two years for inflation.

(4) There shall be a penalty of twenty-five dollars for failure to respond to a notice of traffic infraction except where the infraction relates to parking as defined by local law, ordinance, regulation, or resolution or failure to pay a monetary penalty imposed pursuant to this chapter. A local legislative body may set a monetary penalty not to exceed twenty-five dollars for failure to respond to a notice of traffic infraction relating to parking as defined by local law, ordinance, regulation, or resolution. The local court, whether a municipal, police, or district court, shall impose the monetary penalty set by the local legislative body.

(5) Monetary penalties provided for in chapter 46.70 RCW which are civil in nature and penalties which may be assessed for violations of chapter 46.44 RCW relating to size, weight, and load of motor vehicles are not subject to the limitation on the amount of monetary penalties which may be imposed pursuant to this chapter.

(6) Whenever a monetary penalty, fee, cost, assessment, or other monetary obligation is imposed by a court under this chapter it is immediately payable. If the court determines, in its discretion, that a person is not able to pay a monetary obligation in full, and not more than one year has passed since the later of July 1, 2005, or the date the monetary obligation initially became due and payable, the court shall enter into a payment plan with the person, unless the person has previously been granted a payment plan with respect to the same monetary obligation, or unless the person is in noncompliance of any existing or prior payment plan, in which case the court may, at its discretion, implement a payment plan. If the court has notified the department that the person has failed to pay or comply and the person has subsequently entered into a payment plan and made an initial payment, the court shall notify the department that the infraction has been adjudicated, and the department shall rescind any suspension of the person's driver's license or driver's privilege based on failure to respond to that infraction. "Payment plan," as used in this section, means a plan that requires reasonable payments based on the financial ability of the person to pay. The person may voluntarily pay an amount at any time in addition to the payments required under the payment plan.

(a) If a payment required to be made under the payment plan is delinquent or the person fails to complete a community restitution program on or before the time established under the payment plan, unless the court determines good cause therefor and adjusts the payment plan or the community restitution plan accordingly, the court shall notify the department of the person's failure to meet the conditions of the plan, and the department shall suspend the person's driver's license or driving privilege until all monetary obligations, including those imposed under subsections (3) and (4) of this section, have been paid, and court authorized

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community restitution has been completed, or until the department has been notified that the court has entered into a new time payment or community restitution agreement with the person.

(b) If a person has not entered into a payment plan with the court and has not paid the monetary obligation in full on or before the time established for payment, the court shall notify the department of the delinquency. The department shall suspend the person's driver's license or driving privilege until all monetary obligations have been paid, including those imposed under subsections (3) and (4) of this section, or until the person has entered into a payment plan under this section.

(c) If the payment plan is to be administered by the court, the court may assess the person a reasonable administrative fee to be wholly retained by the city or county with jurisdiction. The administrative fee shall not exceed ten dollars per infraction or twenty-five dollars per payment plan, whichever is less.

(d) Nothing in this section precludes a court from contracting with outside entities to administer its payment plan system. When outside entities are used for the administration of a payment plan, the court may assess the person a reasonable fee for such administrative services, which fee may be calculated on a periodic, percentage, or other basis.

(e) If a court authorized community restitution program for offenders is available in the jurisdiction, the court may allow conversion of all or part of the monetary obligations due under this section to court authorized community restitution in lieu of time payments if the person is unable to make reasonable time payments.

(7) In addition to any other penalties imposed under this section and not subject to the limitation of subsection (1) of this section, a person found to have committed a traffic infraction shall be assessed:

(a) A fee of five dollars per infraction. Under no circumstances shall this fee be reduced or waived. Revenue from this fee shall be forwarded to the state treasurer for deposit in the emergency medical services and trauma care system trust account under RCW 70.168.040;

(b) A fee of ten dollars per infraction. Under no circumstances shall this fee be reduced or waived. Revenue from this fee shall be forwarded to the state treasurer for deposit in the Washington auto theft prevention authority account; and

(c) A fee of two dollars per infraction. Revenue from this fee shall be forwarded to the state treasurer for deposit in the traumatic brain injury account established in RCW 74.31.060.

(8)(a) In addition to any other penalties imposed under this section and not subject to the limitation of subsection (1) of this section, a person found to have committed a traffic infraction other than of RCW 46.61.527 or 46.61.212 shall be assessed an additional penalty of twenty dollars. The court may not reduce, waive, or suspend the additional penalty unless the court finds the offender to be indigent. If a court authorized community restitution program for offenders is available in the jurisdiction, the court shall allow offenders to offset all or a part of the penalty due under this subsection (8) by participation in the court authorized community restitution program.

(b) Eight dollars and fifty cents of the additional penalty under (a) of this subsection shall be remitted to the state treasurer. The remaining revenue from the additional penalty must be remitted under chapters 2.08, 3.46, 3.50, 3.62, 10.82, and 35.20 RCW. Money remitted under this subsection to the state treasurer must be deposited in the state general fund. The balance of the revenue received by the county or city treasurer under this subsection must be deposited into the county or city current expense fund. Moneys retained by the city or county under this subsection shall constitute reimbursement for any liabilities under RCW 43.135.060.

(9) If a legal proceeding, such as garnishment, has commenced to collect any delinquent amount owed by the person for any penalty imposed by the court under this section, the court may, at its discretion, enter into a payment plan.

(10) The monetary penalty for violating RCW 46.37.395 is: (a) Two hundred fifty dollars for the first violation; (b) five hundred dollars for the second violation; and (c) seven hundred fifty dollars for each violation thereafter.

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[2010 c 252 § 5, eff. Jan. 1, 2011; 2009 c 479 § 39, eff. July 1, 2009. Prior: 2007 c 356 § 8, eff. July 22, 2007; 2007 c 199 § 28, eff. July 22, 2007; prior: 2005 c 413 § 2, eff. July 24, 2005; 2005 c 320 § 2, eff. July 24, 2005; 2005 c 288 § 8, eff. July 1, 2005; 2003 c 380 § 2, eff. July 27, 2003. Prior: 2002 c 279 § 15; 2002 c 175 § 36; 2001 c 289 § 2; 1997 c 331 § 3; 1993 c 501 § 11; 1986 c 213 § 2; 1984 c 258 § 330; prior: 1982 1st ex.s. c 14 § 4; 1982 1st ex.s. c 12 § 1; 1982 c 10 § 13; prior: 1981 c 330 § 7; 1981 c 19 § 6; 1980 c 128 § 4; 1979 ex.s. c 136 § 13.]

Notes of Decisions (6)

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Title 46. Motor Vehicles (Refs & Annos)

Chapter 46.20. Drivers' Licenses--Identicards (Refs & Annos)

Restricting the Driving Privilege

West's RCWA 46.20.291

46.20.291. Authority to suspend--Grounds

Currentness

The department is authorized to suspend the license of a driver upon a showing by its records or other sufficient evidence that the licensee:

(1) Has committed an offense for which mandatory revocation or suspension of license is provided by law;

(2) Has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury to any person or serious property damage;

(3) Has been convicted of offenses against traffic regulations governing the movement of vehicles, or found to have committed traffic infractions, with such frequency as to indicate a disrespect for traffic laws or a disregard for the safety of other persons on the highways;

(4) Is incompetent to drive a motor vehicle under RCW 46.20.031(3);

(5) Has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289;

(6) Is subject to suspension under RCW 46.20.305 or 9A.56.078;

(7) Has committed one of the prohibited practices relating to drivers' licenses defined in RCW 46.20.0921; or

(8) Has been certified by the department of social and health services as a person who is not in compliance with a child support order or a residential or visitation order as provided in RCW 74.20A.320.

Credits

[2007 c 393 § 2, eff. July 22, 2007; 1998 c 165 § 12; 1997 c 58 § 806; 1993 c 501 § 4; 1991 c 293 § 5; 1980 c 128 § 12; 1965 ex.s. c 121 § 25.]

Notes of Decisions (20)

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Title 46. Motor Vehicles (Refs & Annos)

Chapter 46.23. Nonresident Violator Compact (Refs & Annos)

West's RCWA 46.23.010

46.23.010. Compact established--Provisions

Currentness

The nonresident violator compact, hereinafter called "the compact," is hereby established in the form substantially as follows, and the Washington state department of licensing is authorized to enter into such compact with all other jurisdictions legally joining therein:

NONRESIDENT VIOLATOR COMPACT

Article I--Findings, Declaration of Policy, and

Purpose

(a) The party jurisdictions find that:

(1) In most instances, a motorist who is cited for a traffic violation in a jurisdiction other than his home jurisdiction: Must post collateral or bond to secure appearance for trial at a later date; or if unable to post collateral or bond, is taken into custody until the collateral or bond is posted; or is taken directly to court for his trial to be held.

(2) In some instances, the motorist's driver's license may be deposited as collateral to be returned after he has complied with the terms of the citation.

(3) The purpose of the practices described in paragraphs (1) and (2) above is to ensure compliance with the terms of a traffic citation by the motorist who, if permitted to continue on his way after receiving the traffic citation, could return to him [his] home jurisdiction and disregard his duty under the terms of the traffic citation.

(4) A motorist receiving a traffic citation in his home jurisdiction is permitted, except for certain violations, to accept the citation from the officer at the scene of the violation and to immediately continue on his way after promising or being instructed to comply with the terms of the citation.

(5) The practice described in paragraph (1) above, causes unnecessary inconvenience and, at times, a hardship for the motorist who is unable at the time to post collateral, furnish a bond, stand trial, or pay the fine, and thus is compelled to remain in custody until some arrangement can be made.

(6) The deposit of a driver's license as a bail bond, as described in paragraph (2) above, is viewed with disfavor.

(7) The practices described herein consume an undue amount of law enforcement time.

(b) It is the policy of the party jurisdictions to:

(1) Seek compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles in each of the jurisdictions.

(2) Allow motorists to accept a traffic citation for certain violations and proceed on their way without delay whether or not the motorist is a resident of the jurisdiction in which the citation was issued.

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(3) Extend cooperation to its fullest extent among the jurisdictions for obtaining compliance with the terms of a traffic citation issued in one jurisdiction to a resident of another jurisdiction.

(4) Maximize effective utilization of law enforcement personnel and assist court systems in the efficient disposition of traffic violations.

(c) The purpose of this compact is to:

(1) Provide a means through which the party jurisdictions may participate in a reciprocal program to effectuate the policies enumerated in paragraph (b) above in a uniform and orderly manner.

(2) Provide for the fair and impartial treatment of traffic violators operating within party jurisdictions in recognition of the motorist's right of due process and the sovereign status of a party jurisdiction.

Article II--Definitions

As used in the compact, the following words have the meaning indicated, unless the context requires otherwise.

(1) "Citation" means any summons, ticket, notice of infraction, or other official document issued by a police officer for a traffic offense containing an order which requires the motorist to respond.

(2) "Collateral" means any cash or other security deposited to secure an appearance for trial, following the issuance by a police officer of a citation for a traffic offense.

(3) "Court" means a court of law or traffic tribunal.

(4) "Driver's license" means any license or privilege to operate a motor vehicle issued under the laws of the home jurisdiction.

(5) "Home jurisdiction" means the jurisdiction that issued the driver's license of the traffic violator.

(6) "Issuing jurisdiction" means the jurisdiction in which the traffic citation was issued to the motorist.

(7) "Jurisdiction" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) "Motorist" means a driver of a motor vehicle operating in a party jurisdiction other than the home jurisdiction.

(9) "Personal recognizance" means an agreement by a motorist made at the time of issuance of the traffic citation that he will comply with the terms of that traffic citation.

(10) "Police officer" means any individual authorized by the party jurisdiction to issue a citation for a traffic offense.

(11) "Terms of the citation" means those options expressly stated upon the citation.

Article III--Procedure for Issuing Jurisdiction

(a) When issuing a citation for a traffic violation or infraction, a police officer shall issue the citation to a motorist who possesses a driver's license issued by a party jurisdiction and shall not, subject to the exceptions noted in paragraph (b) of this article, require the motorist to post collateral to secure appearance, if the officer receives the motorist's personal recognizance that he or she will comply with the terms of the citation.

(b) Personal recognizance is acceptable only if not prohibited by law. If mandatory appearance is required, it must take place immediately following issuance of the citation.

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(c) Upon failure of a motorist to comply with the terms of a traffic citation, the appropriate official shall report the failure to comply to the licensing authority of the jurisdiction in which the traffic citation was issued. The report shall be made in accordance with procedures specified by the issuing jurisdiction and insofar as practical shall contain information as specified in the compact manual as minimum requirements for effective processing by the home jurisdiction.

(d) Upon receipt of the report, the licensing authority of the issuing jurisdiction shall transmit to the licensing authority in the home jurisdiction of the motorist the information in a form and content substantially conforming to the compact manual.

(e) The licensing authority of the issuing jurisdiction may not suspend the privilege of a motorist for whom a report has been transmitted.

(f) The licensing authority of the issuing jurisdiction shall not transmit a report on any violation if the date of transmission is more than six months after the date on which the traffic citation was issued.

(g) The licensing authority of the issuing jurisdiction shall not transmit a report on any violation where the date of issuance of the citation predates the most recent of the effective dates of entry for the two jurisdictions affected.

Article IV--Procedure for Home Jurisdiction

(a) Upon receipt of a report of a failure to comply from the licensing authority of the issuing jurisdiction, the licensing authority of the home jurisdiction shall notify the motorist and initiate a suspension action, in accordance with the home jurisdiction's procedures, to suspend the motorist's driver's license until satisfactory evidence of compliance with the terms of the traffic citation has been furnished to the home jurisdiction licensing authority. Due process safeguards will be accorded.

(b) The licensing authority of the home jurisdiction shall maintain a record of actions taken and make reports to issuing jurisdictions as provided in the compact manual.

Article V--Applicability of Other Laws

Except as expressly required by provisions of this compact, nothing contained herein shall be construed to affect the right of any party jurisdiction to apply any of its other laws relating to licenses to drive to any person or circumstance, or to invalidate or prevent any driver license agreement or other cooperative arrangement between a party jurisdiction and a nonparty jurisdiction.

Article VI--Compact Administrator Procedures

(a) For the purpose of administering the provisions of this compact and to serve as a governing body for the resolution of all matters relating to the operation of this compact, a board of compact administrators is established. The board shall be composed of one representative from each party jurisdiction to be known as the compact administrator. The compact administrator shall be appointed by the jurisdiction executive and will serve and be subject to removal in accordance with the laws of the jurisdiction he represents. A compact administrator may provide for the discharge of his duties and the performance of his functions as a board member by an alternate. An alternate may not be entitled to serve unless written notification of his identity has been given to the board.

(b) Each member of the board of compact administrators shall be entitled to one vote. No action of the board shall be binding unless taken at a meeting at which a majority of the total number of votes on the board are cast in favor. Action by the board shall be only at a meeting at which a majority of the party jurisdictions are represented.

(c) The board shall elect annually, from its membership, a chairman and a vice chairman.

(d) The board shall adopt bylaws, not inconsistent with the provisions of this compact or the laws of a party jurisdiction, for the conduct of its business and shall have the power to amend and rescind its bylaws.

(e) The board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services, conditional or otherwise, from any jurisdiction, the United States, or any other governmental agency, and may receive, utilize, and dispose of the same.

(f) The board may contract with, or accept services or personnel from, any governmental or intergovernmental agency, person, firm, or corporation, or any private nonprofit organization or institution.

(g) The board shall formulate all necessary procedures and develop uniform forms and documents for administering the provisions of this compact. All procedures and forms adopted pursuant to board action shall be contained in the compact manual.

Article VII--Entry into Compact and Withdrawal

(a) This compact shall become effective when it has been adopted by at least two jurisdictions.

(b) Entry into the compact shall be made by a resolution of ratification executed by the department of licensing and submitted to the chairman of the board. The resolution shall be in a form and content as provided in the compact manual and shall include statements that in substance are as follows:

(1) A citation of the authority by which the jurisdiction is empowered to become a party to this compact.

(2) Agreement to comply with the terms and provisions of the compact.

(3) That compact entry is with all jurisdictions then party to the compact and with any jurisdiction that legally becomes a party to the compact.

(c) The effective date of entry shall be specified by the applying jurisdiction, but it shall not be less than sixty days after notice has been given by the chairman of the board of compact administrators or by the secretariat of the board to each party jurisdiction that the resolution from the applying jurisdiction has been received.

(d) A party jurisdiction may withdraw from this compact by official written notice to the other party jurisdictions, but a withdrawal shall not take effect until ninety days after notice of withdrawal is given. The notice shall be directed to the compact administrator of each member jurisdiction. No withdrawal shall affect the validity of this compact as to the remaining party jurisdictions.

Article VIII--Exceptions

The provisions of this compact shall not apply to parking or standing violations, highway weight limit violations, and violations of law governing the transportation of hazardous materials.

Article IX--Amendments to the Compact

(a) This compact may be amended from time to time. Amendments shall be presented in resolution form to the chairman of the board of compact administrators and may be initiated by one or more party jurisdictions.

(b) Adoption of an amendment shall require endorsement of all party jurisdictions and shall become effective thirty days after the date of the last endorsement.

(c) Failure of a party jurisdiction to respond to the compact chairman within one hundred twenty days after receipt of the proposed amendment shall constitute endorsement.

Article X--Construction and Severability

This compact shall be liberally construed so as to effectuate the purposes stated herein. The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any party jurisdiction or of the United States or the applicability thereof to any government, agency, person, or circumstance,

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the compact shall not be affected thereby. If this compact shall be held contrary to the constitution of any jurisdiction party thereto, the compact shall remain in full force and effect as to the remaining jurisdictions and in full force and effect as to the jurisdiction affected as to all severable matters.

Article XI--Title

This compact shall be known as the nonresident violator compact.

Credits

[1982 c 212 § 1.]

Current with 2011 Legislation effective through May 9, 2011

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West's Revised Code of Washington Annotated

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.101. Indigent Defense Services

West's RCWA 10.101.010

10.101.010. Definitions

Currentness

The following definitions shall be applied in connection with this chapter:

(1) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or

(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

(2) "Indigent and able to contribute" means a person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.

(3) "Anticipated cost of counsel" means the cost of retaining private counsel for representation on the matter before the court.

(4) "Available funds" means liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply:

(a) "Liquid assets" means cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. A motor vehicle necessary to maintain employment and having a market value not greater than three thousand dollars shall not be considered a liquid asset.

(b) "Income" means salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistance programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is helping to defray the defendant's basic living costs.

(c) "Disposable net monthly income" means the income remaining each month after deducting federal, state, or local income taxes, social security taxes, contributory retirement, union dues, and basic living costs.

(d) "Basic living costs" means the average monthly amount spent by the defendant for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.

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[2011 1st sp.s. c 36 § 12, eff. June 15, 2011; 2010 1st sp.s. c 8 § 12, eff. March 29, 2010; 1998 c 79 § 2; 1997 c 59 § 3; 1989 c 409 § 2.]

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West's Revised Code of Washington Annotated

Title 10. Criminal Procedure (Refs & Annos)

Chapter 10.101. Indigent Defense Services

West's RCWA 10.101.020

10.101.020. Determination of indigency--Provisional appointment--Promissory note

Currentness

(1) A determination of indigency shall be made for all persons wishing the appointment of counsel in criminal, juvenile, involuntary commitment, and dependency cases, and any other case where the right to counsel attaches. The court or its designee shall determine whether the person is indigent pursuant to the standards set forth in this chapter.

(2) In making the determination of indigency, the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bond.

(3) The determination of indigency shall be made upon the defendant's initial contact with the court or at the earliest time circumstances permit. The court or its designee shall keep a written record of the determination of indigency. Any information given by the accused under this section or sections shall be confidential and shall not be available for use by the prosecution in the pending case.

(4) If a determination of eligibility cannot be made before the time when the first services are to be rendered, the court shall appoint an attorney on a provisional basis. If the court subsequently determines that the person receiving the services is ineligible, the court shall notify the person of the termination of services, subject to court-ordered reinstatement.

(5) All persons determined to be indigent and able to contribute, shall be required to execute a promissory note at the time counsel is appointed. The person shall be informed whether payment shall be made in the form of a lump sum payment or periodic payments. The payment and payment schedule must be set forth in writing. The person receiving the appointment of counsel shall also sign an affidavit swearing under penalty of perjury that all income and assets reported are complete and accurate. In addition, the person must swear in the affidavit to immediately report any change in financial status to the court.

(6) The office or individual charged by the court to make the determination of indigency shall provide a written report and opinion as to indigency on a form prescribed by the office of public defense, based on information obtained from the defendant and subject to verification. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided by this chapter.

Credits

[1997 c 41 § 5; 1989 c 409 § 3.]

Notes of Decisions (3)

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Passed the House April 20, 1993.
Passed the Senate April 1, 1993.
Approved by the Governor May 18, 1993, with the exception of certain items which were vetoed.
Filed in Office of Secretary of State May 18, 1993.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to section 10, Substitute House Bill No. 1528 entitled:

"AN ACT Relating to cash management;"

Section 10 of Substitute House Bill No. 1528 requires the State Treasurer to prepare and submit to the Legislature a cost-benefit report on the implementation of this act. While I agree the information generated by such an analysis would be useful, I question the need for a specific statutory requirement for the Treasurer to perform this duty. Of primary concern is that no additional funds were provided to the Treasurer for this function. With agencies facing severe funding and staffing limitations in the coming biennium, the resources available to carry out these kinds of duties will be in short supply.

Also, some of the required study items in section 10 relate to functions assigned to the Office of Financial Management, so the requirement that the State Treasurer submit the report is somewhat misdirected. Much of the information should be developed and submitted jointly by the State Treasurer and the Office of Financial Management. I have, therefore, directed the Office of Financial Management to work with the State Treasurer's office to provide the legislative fiscal committees with progress reports, as needed, on the implementation of this act.

For these reasons, I have vetoed section 10 of Substitute House Bill No. 1528.

With the exception of section 10, Substitute House Bill No. 1528 is approved."

CHAPTER 501

[Substitute House Bill 1741]

TRAFFIC LAW ENFORCEMENT—REVISIONS

Effective Date: 7/25/93

AN ACT Relating to enforcement of traffic laws; amending RCW 46.20.031, 46.20.207, 46.20.291, 46.20.311, 46.20.342, 46.61.515, 46.63.020, 46.63.060, 46.63.070, 46.63.110, and 46.52.120; adding a new section to chapter 46.20 RCW; repealing RCW 46.64.020 and 46.64.027; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** A new section is added to chapter 46.20 RCW to read as follows:

The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(5) or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, other than for a notice of a standing, stopping, or parking violation. A

suspension under this section takes effect thirty days after the date the department mails notice of the suspension, and remains in effect until the department has received a certificate from the court showing that the case has been adjudicated, and until the person meets the requirements of RCW 46.20.311. A suspension under this section does not take effect if, prior to the effective date of the suspension, the department receives a certificate from the court showing that the case has been adjudicated.

Sec. 2. RCW 46.20.031 and 1985 c 101 s 1 are each amended to read as follows:

The department shall not issue a driver's license hereunder:

(1) To any person who is under the age of sixteen years;

(2) To any person whose license has been suspended during such suspension, nor to any person whose license has been revoked, except as provided in RCW 46.20.311;

(3) ((~~To any person when the department has been notified by a court that such person has violated his written promise to appear in court, unless the department has received a certificate from the court in which such person promised to appear, showing that the case has been adjudicated. The deposit of bail by a person charged with a violation of any law regulating the operation of motor vehicles on highways shall be deemed an appearance in court for the purpose of this section;~~

~~(4)~~)) To any person who has been evaluated by a program approved by the department of social and health services as being an alcoholic, drug addict, alcohol abuser and/or drug abuser: PROVIDED, That a license may be issued if the department determines that such person has been granted a deferred prosecution, pursuant to chapter 10.05 RCW, or is satisfactorily participating in or has successfully completed an alcohol or drug abuse treatment program approved by the department of social and health services and has established control of his or her alcohol and/or drug abuse problem;

((~~(5)~~)) (4) To any person who has previously been adjudged to be mentally ill or insane, or to be incompetent due to any mental disability or disease, and who has not at the time of application been restored to competency by the methods provided by law: PROVIDED, HOWEVER, That no person so adjudged shall be denied a license for such cause if the superior court should find him able to operate a motor vehicle with safety upon the highways during such incompetency;

((~~(6)~~)) (5) To any person who is required by this chapter to take an examination, unless such person shall have successfully passed such examination;

((~~(7)~~)) (6) To any person who is required under the laws of this state to deposit proof of financial responsibility and who has not deposited such proof;

((~~(8)~~)) (7) To any person when the department has good and substantial evidence to reasonably conclude that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways; subject to review by a court of competent jurisdiction.

Sec. 3. RCW 46.20.207 and 1991 c 293 s 4 are each amended to read as follows:

(1) The department is authorized to cancel any driver's license upon determining that the licensee was not entitled to the issuance of the license, or that the licensee failed to give the required or correct information in his or her application, or that the licensee is incompetent to drive a motor vehicle for any of the reasons under RCW 46.20.031 ((~~(5) and (8)~~)) (4) and (7).

(2) Upon such cancellation, the licensee must surrender the license so canceled to the department.

Sec. 4. RCW 46.20.291 and 1991 c 293 s 5 are each amended to read as follows:

The department is authorized to suspend the license of a driver upon a showing by its records or other sufficient evidence that the licensee:

(1) Has committed an offense for which mandatory revocation or suspension of license is provided by law;

(2) Has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury to any person or serious property damage;

(3) Has been convicted of offenses against traffic regulations governing the movement of vehicles, or found to have committed traffic infractions, with such frequency as to indicate a disrespect for traffic laws or a disregard for the safety of other persons on the highways;

(4) Is incompetent to drive a motor vehicle ((~~for any of the reasons enumerated in subsection (4) of~~)) under RCW 46.20.031(3); or

(5) Has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in section 1 of this act; or

(6) Has committed one of the prohibited practices relating to drivers' licenses defined in RCW 46.20.336.

Sec. 5. RCW 46.20.311 and 1990 c 250 s 45 are each amended to read as follows:

(1) The department shall not suspend a driver's license or privilege to drive a motor vehicle on the public highways for a fixed period of more than one year, except as permitted under RCW 46.20.342 or 46.61.515. Except for a suspension under section 1 of this act and RCW 46.20.291(5), whenever the license or driving privilege of any person is suspended by reason of a conviction, a finding that a traffic infraction has been committed, pursuant to chapter 46.29 RCW, or pursuant to RCW 46.20.291, the suspension shall remain in effect until the person gives and thereafter maintains proof of financial responsibility for the future as provided in chapter 46.29 RCW. The department shall not issue to the person a new, duplicate, or renewal license until the person pays a reissue fee of

twenty dollars. If the suspension is the result of a violation of RCW 46.61.502 or 46.61.504, the reissue fee shall be fifty dollars.

(2) Any person whose license or privilege to drive a motor vehicle on the public highways has been revoked, unless the revocation was for a cause which has been removed, is not entitled to have the license or privilege renewed or restored until: (a) After the expiration of one year from the date the license or privilege to drive was revoked; (b) after the expiration of the applicable revocation period provided by RCW 46.61.515(3) (b) or (c); (c) after the expiration of two years for persons convicted of vehicular homicide; (d) after the expiration of one year in cases of revocation for the first refusal within five years to submit to a chemical test under RCW 46.20.308; (e) after the expiration of two years in cases of revocation for the second or subsequent refusal within five years to submit to a chemical test under RCW 46.20.308; or (f) after the expiration of the applicable revocation period provided by RCW 46.20.265. After the expiration of the appropriate period, the person may make application for a new license as provided by law together with a reissue fee in the amount of twenty dollars, but if the revocation is the result of a violation of RCW 46.20.308, 46.61.502, or 46.61.504, the reissue fee shall be fifty dollars. Except for a revocation under RCW 46.20.265, the department shall not then issue a new license unless it is satisfied after investigation of the driving ability of the person that it will be safe to grant the privilege of driving a motor vehicle on the public highways, and until the person gives and thereafter maintains proof of financial responsibility for the future as provided in chapter 46.29 RCW. For a revocation under RCW 46.20.265, the department shall not issue a new license unless it is satisfied after investigation of the driving ability of the person that it will be safe to grant that person the privilege of driving a motor vehicle on the public highways.

(3) Whenever the driver's license of any person is suspended pursuant to Article IV of the nonresident violators compact or RCW 46.23.020 or section 1 of this act or RCW 46.20.291(5), the department shall not issue to the person any new or renewal license until the person pays a reissue fee of twenty dollars. If the suspension is the result of a violation of the laws of ((~~another~~)) this or any other state, province, or other jurisdiction involving (a) the operation or physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor or drugs, or (b) the refusal to submit to a chemical test of the driver's blood alcohol content, the reissue fee shall be fifty dollars.

Sec. 6. RCW 46.20.342 and 1992 c 130 s 1 are each amended to read as follows:

(1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state. Any person who has a valid Washington driver's license is not guilty of a violation of this section.

(a) A person found to be an habitual offender under chapter 46.65 RCW, who violates this section while an order of revocation issued under chapter 46.65

RCW prohibiting such operation is in effect, is guilty of driving while license suspended or revoked in the first degree, a gross misdemeanor. Upon the first such conviction, the person shall be punished by imprisonment for not less than ten days. Upon the second conviction, the person shall be punished by imprisonment for not less than ninety days. Upon the third or subsequent conviction, the person shall be punished by imprisonment for not less than one ((~~year~~)) hundred eighty days. If the person is also convicted of the offense defined in RCW 46.61.502 or 46.61.504, when both convictions arise from the same event, the minimum sentence of confinement shall be not less than ninety days. The minimum sentence of confinement required shall not be suspended or deferred. A conviction under this subsection does not prevent a person from petitioning for reinstatement as provided by RCW 46.65.080.

(b) A person who violates this section while an order of suspension or revocation prohibiting such operation is in effect and while the person is not eligible to reinstate his or her driver's license or driving privilege, other than for a suspension for the reasons described in (c) of this subsection, is guilty of driving while license suspended or revoked in the second degree, a gross misdemeanor. This subsection applies when a person's driver's license or driving privilege has been suspended or revoked by reason of:

(i) A conviction of a felony in the commission of which a motor vehicle was used;

(ii) A previous conviction under this section;

(iii) A notice received by the department from a court or diversion unit as provided by RCW 46.20.265, relating to a minor who has committed, or who has entered a diversion unit concerning an offense relating to alcohol, legend drugs, controlled substances, or imitation controlled substances;

(iv) A conviction of RCW 46.20.410, relating to the violation of restrictions of an occupational driver's license;

(v) A conviction of RCW 46.20.420, relating to the operation of a motor vehicle with a suspended or revoked license;

(vi) A conviction of RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(vii) A conviction of RCW 46.61.024, relating to attempting to elude pursuing police vehicles;

(viii) A conviction of RCW 46.61.500, relating to reckless driving;

(ix) A conviction of RCW 46.61.502 or 46.61.504, relating to a person under the influence of intoxicating liquor or drugs;

(x) A conviction of RCW 46.61.520, relating to vehicular homicide;

(xi) A conviction of RCW 46.61.522, relating to vehicular assault;

(xii) A conviction of RCW 46.61.530, relating to racing of vehicles on highways;

(xiii) A conviction of RCW 46.61.685, relating to leaving children in an unattended vehicle with motor running;

(xiv) A conviction of RCW 46.64.048, relating to attempting, aiding, abetting, coercing, and committing crimes; or

(xv) An administrative action taken by the department under chapter 46.20 RCW.

(c) A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because (i) the person must furnish proof of satisfactory progress in a required alcoholism or drug treatment program, (ii) the person must furnish proof of financial responsibility for the future as provided by chapter 46.29 RCW, (iii) the person has failed to comply with the provisions of chapter 46.29 RCW relating to uninsured accidents, (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in section 1 of this act, (v) the person has committed an offense in another state that, if committed in this state, would not be grounds for the suspension or revocation of the person's driver's license, or ((~~(v)~~)) (vi) the person has been suspended or revoked by reason of one or more of the items listed in (b) of this subsection, but was eligible to reinstate his or her driver's license or driving privilege at the time of the violation, or any combination of (i) through ((~~(v)~~)) (vi), is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

(2) Upon receiving a record of conviction of any person or upon receiving an order by any juvenile court or any duly authorized court officer of the conviction of any juvenile under this section, the department shall:

(a) For a conviction of driving while suspended or revoked in the first degree, as provided by subsection (1)(a) of this section, extend the period of administrative revocation imposed under chapter 46.65 RCW for an additional period of one year from and after the date the person would otherwise have been entitled to apply for a new license or have his or her driving privilege restored; or

(b) For a conviction of driving while suspended or revoked in the second degree, as provided by subsection (1)(b) of this section, not issue a new license or restore the driving privilege for an additional period of one year from and after the date the person would otherwise have been entitled to apply for a new license or have his or her driving privilege restored; or

(c) Not extend the period of suspension or revocation if the conviction was under subsection (1)(c) of this section. If the conviction was under subsection (1) (a) or (b) of this section and the court recommends against the extension and the convicted person has obtained a valid driver's license, the period of suspension or revocation shall not be extended.

Sec. 7. RCW 46.61.515 and 1985 c 352 s 1 are each amended to read as follows:

(1) Every person who is convicted of a violation of RCW 46.61.502 or 46.61.504 shall be punished by imprisonment for not less than twenty-four

consecutive hours nor more than one year, and by a fine of not less than two hundred fifty dollars and not more than one thousand dollars. Unless the judge finds the person to be indigent, two hundred fifty dollars of the fine shall not be suspended or deferred. Twenty-four consecutive hours of the jail sentence shall not be suspended or deferred unless the judge finds that the imposition of the jail sentence will pose a substantial risk to the defendant's physical or mental well-being. Whenever the mandatory jail sentence is suspended or deferred, the judge must state, in writing, the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. The court may impose conditions of probation that may include nonrepetition, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The convicted person shall, in addition, be required to complete a course in an alcohol information school approved by the department of social and health services or more intensive treatment in a program approved by the department of social and health services, as determined by the court. A diagnostic evaluation and treatment recommendation shall be prepared under the direction of the court by an alcoholism agency approved by the department of social and health services or a qualified probation department approved by the department of social and health services. A copy of the report shall be forwarded to the department of licensing. Based on the diagnostic evaluation, the court shall determine whether the convicted person shall be required to complete a course in an alcohol information school approved by the department of social and health services or more intensive treatment in a program approved by the department of social and health services. Standards for approval for alcohol treatment programs shall be prescribed by rule under the administrative procedure act, chapter 34.05 RCW. The ((~~courts~~)) department of social and health services shall periodically review the costs of alcohol information schools and treatment programs ((~~within their jurisdictions~~)) as part of the approval process.

(2) On a second or subsequent conviction for driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs within a five-year period a person shall be punished by imprisonment for not less than seven days nor more than one year and by a fine of not less than five hundred dollars and not more than two thousand dollars. District courts and courts organized under chapter 35.20 RCW are authorized to impose such fine. Unless the judge finds the person to be indigent, five hundred dollars of the fine shall not be suspended or deferred. The minimum jail sentence shall not be suspended or deferred unless the judge finds that the imposition of the jail sentence will pose a substantial risk to the defendant's physical or mental well-being. Whenever the mandatory jail sentence is suspended or deferred, the judge must state, in writing, the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. If, at the time of the arrest on a second or subsequent ((~~conviction~~)) offense, the driver is without a license or permit because of a previous suspension or revocation for a reason listed in RCW 46.20.342(1) (a) or (b), or because of a previous suspension or revocation

for a reason listed in RCW 46.20.342(1)(c) if the original suspension or revocation was the result of a conviction of RCW 46.61.502 or 46.61.504, the minimum mandatory sentence shall be ninety days in jail and a ((~~two~~)) five hundred dollar fine. The penalty so imposed shall not be suspended or deferred. The person shall, in addition, be required to complete a diagnostic evaluation by an alcoholism agency approved by the department of social and health services or a qualified probation department approved by the department of social and health services. The report shall be forwarded to the department of licensing. If the person is found to have an alcohol or drug problem requiring treatment, the person shall complete treatment at an approved alcoholism treatment ((~~facility~~)) program or approved drug treatment center.

In addition to any nonsuspendable and nondeferrable jail sentence required by this subsection, whenever the court imposes less than one year in jail, the court shall ((~~sentence a person to a term of imprisonment not exceeding one hundred eighty days and shall~~)) also suspend but shall not defer ((~~the sentence~~)) a period of confinement for a period not exceeding two years. The suspension of the sentence may be conditioned upon nonrepetition, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of suspension during the suspension period.

(3) The license or permit to drive or any nonresident privilege of any person convicted of driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs shall:

(a) On the first conviction under either offense, be suspended by the department until the person reaches age nineteen or for ninety days, whichever is longer. The department of licensing shall determine the person's eligibility for licensing based upon the reports provided by the designated alcoholism agency or probation department and shall deny reinstatement until enrollment and participation in an approved program has been established and the person is otherwise qualified;

(b) On a second conviction under either offense within a five-year period, be revoked by the department for one year. The department of licensing shall determine the person's eligibility for licensing based upon the reports provided by the designated alcoholism agency or probation department and shall deny reinstatement until satisfactory progress in an approved program has been established and the person is otherwise qualified;

(c) On a third or subsequent conviction of driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs, vehicular homicide, or vehicular assault, or any combination thereof within a five-year period, be revoked by the department for two years.

(4) In any case provided for in this section, where a driver's license is to be revoked or suspended, the revocation or suspension shall be stayed and shall not take effect until after the determination of any appeal from the conviction which may lawfully be taken, but in case the conviction is sustained on appeal the

revocation or suspension takes effect as of the date that the conviction becomes effective for other purposes.

Sec. 8. RCW 46.63.020 and 1992 c 32 s 4 are each amended to read as follows:

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified as a criminal offense, except for an offense contained in the following provisions of this title or a violation of an equivalent administrative regulation or local law, ordinance, regulation, or resolution:

(1) RCW 46.09.120(2) relating to the operation of a nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance;

(2) RCW 46.09.130 relating to operation of nonhighway vehicles;

(3) RCW 46.10.090(2) relating to the operation of a snowmobile while under the influence of intoxicating liquor or narcotics or habit- forming drugs or in a manner endangering the person of another;

(4) RCW 46.10.130 relating to the operation of snowmobiles;

(5) Chapter 46.12 RCW relating to certificates of ownership and registration;

(6) RCW 46.16.010 relating to initial registration of motor vehicles;

(7) RCW 46.16.011 relating to permitting unauthorized persons to drive;

(8) RCW 46.16.160 relating to vehicle trip permits;

(9) RCW 46.16.381 (6) or (8) relating to unauthorized use or acquisition of a special placard or license plate for disabled persons' parking;

(10) RCW 46.20.021 relating to driving without a valid driver's license;

(11) RCW 46.20.336 relating to the unlawful possession and use of a driver's license;

(12) RCW 46.20.342 relating to driving with a suspended or revoked license or status;

(13) RCW 46.20.410 relating to the violation of restrictions of an occupational driver's license;

(14) RCW 46.20.420 relating to the operation of a motor vehicle with a suspended or revoked license;

(15) RCW 46.20.750 relating to assisting another person to start a vehicle equipped with an ignition interlock device;

(16) RCW 46.25.170 relating to commercial driver's licenses;

(17) Chapter 46.29 RCW relating to financial responsibility;

(18) RCW 46.30.040 relating to providing false evidence of financial responsibility;

(19) RCW 46.37.435 relating to wrongful installation of sunscreening material;

(20) RCW 46.44.180 relating to operation of mobile home pilot vehicles;

(21) RCW 46.48.175 relating to the transportation of dangerous articles;

(22) RCW 46.52.010 relating to duty on striking an unattended car or other property;

(23) RCW 46.52.020 relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(24) RCW 46.52.090 relating to reports by repairmen, storagemen, and appraisers;

(25) RCW 46.52.100 relating to driving under the influence of liquor or drugs;

(26) RCW 46.52.130 relating to confidentiality of the driving record to be furnished to an insurance company, an employer, and an alcohol/drug assessment or treatment agency;

(27) RCW 46.55.020 relating to engaging in the activities of a registered tow truck operator without a registration certificate;

(28) RCW 46.55.035 relating to prohibited practices by tow truck operators;

(29) RCW 46.61.015 relating to obedience to police officers, flagmen, or fire fighters;

(30) RCW 46.61.020 relating to refusal to give information to or cooperate with an officer;

(31) RCW 46.61.022 relating to failure to stop and give identification to an officer;

(32) RCW 46.61.024 relating to attempting to elude pursuing police vehicles;

(33) RCW 46.61.500 relating to reckless driving;

(34) RCW 46.61.502 and 46.61.504 relating to persons under the influence of intoxicating liquor or drugs;

(35) RCW 46.61.520 relating to vehicular homicide by motor vehicle;

(36) RCW 46.61.522 relating to vehicular assault;

(37) RCW 46.61.525 relating to negligent driving;

(38) RCW 46.61.530 relating to racing of vehicles on highways;

(39) RCW 46.61.685 relating to leaving children in an unattended vehicle with the motor running;

(40) RCW 46.64.010 relating to unlawful cancellation of or attempt to cancel a traffic citation;

(41) ((~~RCW 46.64.020 relating to nonappearance after a written promise;~~

~~(42) RCW 46.64.027 relating to failure to comply;~~

~~(43)~~)) RCW 46.64.048 relating to attempting, aiding, abetting, coercing, and committing crimes;

(((~~(44)~~))) (42) Chapter 46.65 RCW relating to habitual traffic offenders;

(((~~(45)~~))) (43) Chapter 46.70 RCW relating to unfair motor vehicle business practices, except where that chapter provides for the assessment of monetary penalties of a civil nature;

(((~~(46)~~))) (44) Chapter 46.72 RCW relating to the transportation of passengers in for hire vehicles;

(((~~(47)~~))) (45) Chapter 46.80 RCW relating to motor vehicle wreckers;

(((~~48~~))) (46) Chapter 46.82 RCW relating to driver's training schools;

(((~~49~~))) (47) RCW 46.87.260 relating to alteration or forgery of a cab card, letter of authority, or other temporary authority issued under chapter 46.87 RCW;

(((~~50~~))) (48) RCW 46.87.290 relating to operation of an unregistered or unlicensed vehicle under chapter 46.87 RCW.

Sec. 9. RCW 46.63.060 and 1984 c 224 s 2 are each amended to read as follows:

(1) A notice of traffic infraction represents a determination that an infraction has been committed. The determination will be final unless contested as provided in this chapter.

(2) The form for the notice of traffic infraction shall be prescribed by rule of the supreme court and shall include the following:

(a) A statement that the notice represents a determination that a traffic infraction has been committed by the person named in the notice and that the determination shall be final unless contested as provided in this chapter;

(b) A statement that a traffic infraction is a noncriminal offense for which imprisonment may not be imposed as a sanction; that the penalty for a traffic infraction may include sanctions against the person's driver's license including suspension, revocation, or denial; that the penalty for a traffic infraction related to standing, stopping, or parking may include nonrenewal of the vehicle license;

(c) A statement of the specific traffic infraction for which the notice was issued;

(d) A statement of the monetary penalty established for the traffic infraction;

(e) A statement of the options provided in this chapter for responding to the notice and the procedures necessary to exercise these options;

(f) A statement that at any hearing to contest the determination the state has the burden of proving, by a preponderance of the evidence, that the infraction was committed; and that the person may subpoena witnesses including the officer who issued the notice of infraction;

(g) A statement that at any hearing requested for the purpose of explaining mitigating circumstances surrounding the commission of the infraction the person will be deemed to have committed the infraction and may not subpoena witnesses;

(h) A statement that the person must respond to the notice as provided in this chapter within fifteen days or the person's driver's license or driving privilege will ((~~not~~)) be ((~~renewed~~)) suspended by the department until any penalties imposed pursuant to this chapter have been satisfied;

(i) A statement that failure to appear at a hearing requested for the purpose of contesting the determination or for the purpose of explaining mitigating circumstances will result in the ((~~refusal of the department to renew~~)) suspension of the person's driver's license or driving privilege, or in the case of a standing, stopping, or parking violation, refusal of the department to renew the vehicle license, until any penalties imposed pursuant to this chapter have been satisfied;

(j) A statement, which the person shall sign, that the person promises to respond to the notice of infraction in one of the ways provided in this chapter((~~:~~

~~(k) A statement that failure to respond to a notice of infraction as promised is a misdemeanor and may be punished by a fine or imprisonment in jail~~)).

Sec. 10. RCW 46.63.070 and 1984 c 224 s 3 are each amended to read as follows:

(1) Any person who receives a notice of traffic infraction shall respond to such notice as provided in this section within fifteen days of the date of the notice.

(2) If the person determined to have committed the infraction does not contest the determination the person shall respond by completing the appropriate portion of the notice of infraction and submitting it, either by mail or in person, to the court specified on the notice. A check or money order in the amount of the penalty prescribed for the infraction must be submitted with the response. When a response which does not contest the determination is received, an appropriate order shall be entered in the court's records, and a record of the response and order shall be furnished to the department in accordance with RCW 46.20.270.

(3) If the person determined to have committed the infraction wishes to contest the determination the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to the court specified on the notice. The court shall notify the person in writing of the time, place, and date of the hearing, and that date shall not be sooner than seven days from the date of the notice, except by agreement.

(4) If the person determined to have committed the infraction does not contest the determination but wishes to explain mitigating circumstances surrounding the infraction the person shall respond by completing the portion of the notice of infraction requesting a hearing for that purpose and submitting it, either by mail or in person, to the court specified on the notice. The court shall notify the person in writing of the time, place, and date of the hearing.

(5) (((~~(a)~~))) If any person issued a notice of traffic infraction:

(((~~(i)~~))) (a) Fails to respond to the notice of traffic infraction as provided in subsection (2) of this section; or

(((~~(ii)~~))) (b) Fails to appear at a hearing requested pursuant to subsection (3) or (4) of this section;

the court shall enter an appropriate order assessing the monetary penalty prescribed for the traffic infraction and any other penalty authorized by this chapter and shall notify the department in accordance with RCW 46.20.270, of the failure to respond to the notice of infraction or to appear at a requested hearing.

(((~~(b) The department may not renew the driver's license, or in the case of a standing, stopping, or parking violation the vehicle license, of any person for whom the court has entered an order pursuant to (a) of this subsection until any penalties imposed pursuant to this chapter have been satisfied. For purposes of~~

~~driver's license nonrenewal only, the lessee of a vehicle shall be considered to be the person to whom a notice of a standing, stopping, or parking violation has been issued for such violations of the vehicle incurred while the vehicle was leased or rented under a bona fide commercial lease or rental agreement between a lessor engaged in the business of leasing vehicles and a lessee who is not the vehicle's registered owner, if the lease agreement contains a provision prohibiting anyone other than the lessee from operating the vehicle. Such a lessor shall, upon the request of the municipality issuing the notice of infraction, supply the municipality with the name and driver's license number of the person leasing the vehicle at the time of the infraction.~~))

Sec. 11. RCW 46.63.110 and 1986 c 213 s 2 are each amended to read as follows:

(1) A person found to have committed a traffic infraction shall be assessed a monetary penalty. No penalty may exceed two hundred and fifty dollars for each offense unless authorized by this chapter or title.

(2) The supreme court shall prescribe by rule a schedule of monetary penalties for designated traffic infractions. This rule shall also specify the conditions under which local courts may exercise discretion in assessing fines and penalties for traffic infractions. The legislature respectfully requests the supreme court to adjust this schedule every two years for inflation.

(3) There shall be a penalty of twenty-five dollars for failure to respond to a notice of traffic infraction except where the infraction relates to parking as defined by local law, ordinance, regulation, or resolution or failure to pay a monetary penalty imposed pursuant to this chapter. A local legislative body may set a monetary penalty not to exceed twenty-five dollars for failure to respond to a notice of traffic infraction relating to parking as defined by local law, ordinance, regulation, or resolution. The local court, whether a municipal, police, or district court, shall impose the monetary penalty set by the local legislative body.

(4) Monetary penalties provided for in chapter 46.70 RCW which are civil in nature and penalties which may be assessed for violations of chapter 46.44 RCW relating to size, weight, and load of motor vehicles are not subject to the limitation on the amount of monetary penalties which may be imposed pursuant to this chapter.

(5) Whenever a monetary penalty is imposed by a court under this chapter it is immediately payable. If the person is unable to pay at that time the court may, in its discretion, grant an extension of the period in which the penalty may be paid. If the penalty is not paid on or before the time established for payment the court shall notify the department of the failure to pay the penalty, and the department ((~~may not renew~~)) shall suspend the person's driver's license or driving privilege until the penalty has been paid and the penalty provided in subsection (3) of this section has been paid.

Sec. 12. RCW 46.52.120 and 1992 c 32 s 3 are each amended to read as follows:

(1) The director shall keep a case record on every motor vehicle driver licensed under the laws of this state, together with information on each driver, showing all the convictions and findings of traffic infractions certified by the courts, together with an index cross-reference record of each accident reported relating to such individual with a brief statement of the cause of the accident. The chief of the Washington state patrol shall furnish the index cross-reference record to the director, with reference to each driver involved in the reported accidents.

(2) The records shall be for the confidential use of the director, the chief of the Washington state patrol, the director of the Washington traffic safety commission, and for such police officers or other cognizant public officials as may be designated by law. Such case records shall not be offered as evidence in any court except in case appeal is taken from the order of the director, suspending, revoking, canceling, or refusing a vehicle driver's license ((~~or to provide proof of a person's failure to appear under RCW 46.64.020 or failure to comply under RCW 46.64.027~~)).

(3) The director shall tabulate and analyze vehicle driver's case records and suspend, revoke, cancel, or refuse a vehicle driver's license to a person when it is deemed from facts contained in the case record of such person that it is for the best interest of public safety that such person be denied the privilege of operating a motor vehicle. Whenever the director orders the vehicle driver's license of any such person suspended, revoked, or canceled, or refuses the issuance of a vehicle driver's license, such suspension, revocation, cancellation, or refusal is final and effective unless appeal from the decision of the director is taken as provided by law.

NEW SECTION. Sec. 13. The following acts or parts of acts are each repealed:

(1) RCW 46.64.020 and 1992 c 32 s 1, 1990 c 250 s 61, 1990 c 210 s 1, 1988 c 38 s 1, 1987 c 345 s 1, 1986 c 213 s 1, 1980 c 128 s 8, & 1961 c 12 s 46.64.020; and

(2) RCW 46.64.027 and 1992 c 32 s 2.

Passed the House March 11, 1993.
Passed the Senate April 20, 1993.
Approved by the Governor May 18, 1993.
Filed in Office of Secretary of State May 18, 1993.

NOTE: ***The information on this page is current as of 11:00 AM Pacific Time on 5/19/2011, but is subject to change.***
Check online for the latest information.

HISTORY OF BILL: HB 1741
Thursday, May 19, 2011 11:00 AM

Revising penalties for ignoring traffic tickets.

Sponsors: Representatives Appelwick, Ludwig, Johanson, Orr

1993 REGULAR SESSION

Feb 8	First reading, referred to Judiciary.
Mar 2	**JUD - Majority; 1st substitute bill be substituted, do pass.**
Mar 3	Passed to Rules committee for second reading.
Mar 10	Placed on second reading suspension calendar by Rules Committee.
Mar 11	**Committee recommendations adopted and the 1st substitute bill substituted (JUD 93).**
	Placed on third reading.
	Third reading, passed; yeas, 98; nays 0, absent, 0.

IN THE SENATE

Mar 13	First reading, referred to Law & Justice.
Apr 2	LAW - Majority; do pass with amendment(s).
	Passed to Rules committee for second reading.
Apr 6	Made eligible to be placed on second reading.
Apr 8	Placed on second reading by Rules committee.
Apr 14	Committee amendment partially adopted.
	Rules suspended. Placed on Third Reading.
	Third reading, passed; yeas, 47; nays 0, absent, 2.

IN THE HOUSE

Apr 19	House refuses to concur in Senate amendments. Asks Senate to recede from amendments.

IN THE SENATE

Apr 20	Senate receded from amendments.
	Passed final passage; yeas, 47; nays 0, absent, 2.

IN THE HOUSE

Apr 25	Speaker signed.

IN THE SENATE

	President signed.

OTHER THAN LEGISLATIVE ACTION

	Delivered to Governor.
May 18	Governor signed.
	Chapter 501, 1993 Laws

HOUSE BILL REPORT

HB 1741

As Reported By House Committee On:
Judiciary

Title: An act relating to enforcement of traffic laws.

Brief Description: Revising penalties for ignoring traffic tickets.

Sponsors: Representatives Appelwick, Ludwig, Johanson and Orr.

Brief History:
Reported by House Committee on:
Judiciary, March 2, 1993, DPS.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Schmidt; Scott; Tate; and Wineberry.

Staff: Bill Perry (786-7123).

Background: Many traffic laws have been "decriminalized" and made civil infractions instead of crimes. For these infractions, no jail time may be imposed, but civil punishment includes fines and in some instances loss of driving privileges. Although infractions themselves are not crimes, failing to respond to a notice of infraction is a crime.

Under the "Nonresident Violator Compact," a state may agree to release motorists from another state who are cited for traffic law violations without requiring the motorists to post appearance bonds. Such an agreement is dependent, however, on the home state of a cited motorist having a law which requires driver's license suspension for failing to comply with a traffic citation. Washington has adopted the compact, but does not have a law that would require license suspension for Washington drivers who fail to comply with citations issued by other participants in the compact.

Washington does have a law that prohibits renewal of a license for a person who has failed to comply.

The state's motor vehicle code has various escalating penalties for driving without a license and for DWI. The crime of driving while a license is suspended or revoked may be committed in any one of three degrees, depending on the offense for which the license was suspended or revoked. Driving without a license that was suspended for being an habitual traffic offender is first-degree driving while suspended or revoked. The second-degree offense involves driving following the loss of a license for DWI and other relatively serious traffic offenses for which a license may be suspended or revoked. The third-degree offense involves driving after a license has been suspended or revoked solely for secondary reasons such as failure to furnish proof of financial responsibility, or failure to renew a license after a period of suspension has expired.

Summary of Substitute Bill: Crimes relating to failure to respond to a traffic infraction and failure to comply with a traffic citation are repealed. The offenses are made infractions for which the Department of Licensing (DOL) is to suspend a driver's license. The suspension continues until the driver responds or complies, shows proof of financial responsibility, and pays a $20 reinstatement fee.

The mandatory minimum jail term for first-degree driving while suspended or revoked as the result of being an habitual offender is reduced from one year to 180 days. The crime of driving while suspended or revoked in the third degree is amended to include persons who drive while their licenses are suspended as the result of failing to respond to a notice of a traffic infraction or failing to comply with a citation.

Several changes are made with respect to the crime of DWI:

First, the ground for suspending the otherwise mandatory jail time for DWI is changed. The required risk to a defendant's physical or mental well-being must be "substantial."

Second, the Department of Social and Health Services, instead of the court, is to review periodically the alcohol information schools attended by DWI offenders.

Third, for persons convicted of DWI while they were driving with a suspended or revoked license in the first or second degree, the minimum mandatory fine is raised from $200 to $500. This fine, and its accompanying mandatory 90 days in jail, no longer apply to persons

convicted of DWI while driving without a license as a result of third-degree driving while suspended or revoked.

Fourth, a change is made to the requirement that a court impose, in addition to the mandatory jail time for DWI, a suspendible term of imprisonment of up to 180 days "for a period not exceeding two years." This provision is changed to require that the additional suspendible term of confinement be for up to two years.

Various changes are made to the form requirements for notices of traffic infractions and citations in order to reflect the changes made in the substantive provisions described above.

Substitute Bill Compared to Original Bill: The original bill would have raised the maximum fine for a DWI to $5,000. The substitute bill also makes a number of technical corrections.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill allows Washington to take advantage of an interstate compact. The bill also makes important clarifications in ambiguities in current law.

Testimony Against: Decriminalizing failure to respond, appear, or comply may hamper enforcement.

Witnesses: Judge Robert McBeth, Washington State District and Municipal Court Judges Association (pro); and Matt Thomas, Washington Association of Prosecuting Attorneys.

HOUSE BILL REPORT

SHB 1741

As Amended by the Senate

Title: An act relating to enforcement of traffic laws.

Brief Description: Revising penalties for ignoring traffic tickets.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Appelwick, Ludwig, Johanson and Orr.)

Brief History:
Reported by House Committee on:
Judiciary, March 2, 1993, DPS;
Passed House, March 11, 1993, 98-0;
Amended by Senate.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Schmidt; Scott; Tate; and Wineberry.

Staff: Bill Perry (786-7123).

Background: Many traffic laws have been "decriminalized" and made civil infractions instead of crimes. For these infractions, no jail time may be imposed, but civil punishment includes fines and in some instances loss of driving privileges. Although infractions themselves are not crimes, failing to respond to a notice of infraction is a crime.

Under the "Nonresident Violator Compact," a state may agree to release motorists from another state who are cited for traffic law violations without requiring the motorists to post appearance bonds. Such an agreement is dependent, however, on the home state of a cited motorist having a law which requires driver's license suspension for failing to comply with a traffic citation. Washington has adopted the compact, but does not have a law that would require license suspension for Washington drivers who fail to comply with

citations issued by other participants in the compact. Washington does have a law that prohibits renewal of a license for a person who has failed to comply.

The state's motor vehicle code has various escalating penalties for driving without a license and for DWI. The crime of driving while a license is suspended or revoked may be committed in any one of three degrees, depending on the offense for which the license was suspended or revoked. Driving without a license that was suspended for being an habitual traffic offender is first-degree driving while suspended or revoked. The second-degree offense involves driving following the loss of a license for DWI and other relatively serious traffic offenses for which a license may be suspended or revoked. The third-degree offense involves driving after a license has been suspended or revoked solely for secondary reasons such as failure to furnish proof of financial responsibility, or failure to renew a license after a period of suspension has expired.

Summary of Bill: Crimes relating to failure to respond to a traffic infraction and failure to comply with a traffic citation are repealed. The offenses are made infractions for which the Department of Licensing (DOL) is to suspend a driver's license. The suspension continues until the driver responds or complies, shows proof of financial responsibility, and pays a $20 reinstatement fee.

The mandatory minimum jail term for first-degree driving while suspended or revoked as the result of being an habitual offender is reduced from one year to 180 days. The crime of driving while suspended or revoked in the third degree is amended to include persons who drive while their licenses are suspended as the result of failing to respond to a notice of a traffic infraction or failing to comply with a citation.

Several changes are made with respect to the crime of DWI:

First, the ground for suspending the otherwise mandatory jail time for DWI is changed. The required risk to a defendant's physical or mental well-being must be "substantial."

Second, the Department of Social and Health Services, instead of the court, is to review periodically the alcohol information schools attended by DWI offenders.

Third, for persons convicted of DWI while they were driving with a suspended or revoked license in the first or second degree, the minimum mandatory fine is raised from $200 to $500. This fine, and its accompanying

mandatory 90 days in jail, no longer apply to persons convicted of DWI while driving without a license as a result of third-degree driving while suspended or revoked.

Fourth, a change is made to the requirement that a court impose, in addition to the mandatory jail time for DWI, a suspendible term of imprisonment of up to 180 days "for a period not exceeding two years." This provision is changed to require that the additional suspendible term of confinement be for up to two years.

Various changes are made to the form requirements for notices of traffic infractions and citations in order to reflect the changes made in the substantive provisions described above.

EFFECT OF SENATE AMENDMENT(S): The Senate amendment adds two provisions to the bill.

1. On a person's second DWI conviction within five years, the court is directed to confiscate the Washington State vehicle registration and license plates of the vehicle that the person was driving at the time of the offense, if the convicted person was driving his or her own vehicle. If the person was not driving his or her own vehicle, then the court is to confiscate the registration and plates of a vehicle owned by the person, if any. The plates and registration are to be held for 90 days from the date of surrender. The department of licensing may not reissue vehicle registration or license plates to that person for that vehicle during the 90 days.

2. On a person's third or subsequent DWI conviction within a five-year period, the vehicle the person was driving at the time of the offense is to be seized, if it is owned by that person. The seized vehicle is subject to forfeiture under procedures similar to those that apply to personal property forfeitures under the state's drug laws. Notice is to be served on the owner and any person having any known right or interest in the vehicle, including a person with a community property interest. The vehicle is deemed forfeited if no one notifies the law enforcement agency of a claim within 45 days of seizure. A person who claims ownership or right to possession of the vehicle is entitled to a hearing and the vehicle will be returned to the claimant if the court or administrative law judge determines that the person has a lawful right to possession. If the value of the vehicle is more than $500, the claimant has a right to remove the hearing to a court. Otherwise, the hearing is before the seizing agency. The seizing agency may keep a

forfeited vehicle or all of the proceeds of the sale of a forfeited vehicle.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill allows Washington to take advantage of an interstate compact. The bill also makes important clarifications in ambiguities in current law.

Testimony Against: Decriminalizing failure to respond, appear, or comply may hamper enforcement.

Witnesses: Judge Robert McBeth, Washington State District and Municipal Court Judges Association (pro); and Matt Thomas, Washington Association of Prosecuting Attorneys.

VOTE ON FINAL PASSAGE:

Yeas 98

SENATE BILL REPORT

SHB 1741

AS REPORTED BY COMMITTEE ON LAW & JUSTICE, APRIL 1, 1993

Brief Description: Revising penalties for ignoring traffic tickets.

SPONSORS: House Committee on Judiciary (originally sponsored by Representatives Appelwick, Ludwig, Johanson and Orr)

HOUSE COMMITTEE ON JUDICIARY

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended.
Signed by Senators A. Smith, Chairman; Quigley, Vice Chairman; Hargrove, McCaslin, Nelson, Rinehart, Roach, and Spanel.

Staff: Lidia Mori (786-7755)

Hearing Dates: March 29, 1993; April 1, 1993

BACKGROUND:

Many traffic laws have been "decriminalized" and made into civil infractions instead of crimes. For these infractions, no jail time may be imposed, but civil punishment includes fines and in some instances loss of driving privileges. Although infractions themselves are not crimes, failing to respond to a notice of infraction is a crime.

Under the "Nonresident Violator Compact," a state may agree to release motorists from another state who are cited for traffic law violations without requiring the motorists to post appearance bonds. Such an agreement is dependent, however, on the home state of a cited motorist having a law which requires driver's license suspension for failing to comply with a traffic citation. Washington has adopted the compact, but does not have a law that would require license suspension for Washington drivers who fail to comply with citations issued by other participants in the compact. Washington does have a law that prohibits renewal of a license for a person who has failed to comply.

The state's motor vehicle code has various escalating penalties for driving without a license and for DWI. Driving without a license that was suspended for being an habitual traffic offender is first-degree driving while suspended or revoked. The second-degree offense involves driving following the loss of a license for DWI and other relatively serious traffic offenses for which a license may be suspended or revoked. The third-degree offense involves driving after a license has been suspended or revoked solely for secondary

reasons such as failure to furnish proof of financial responsibility, or failure to renew a license after a period of suspension has expired.

SUMMARY:

Crimes relating to failure to respond to a traffic infraction and failure to comply with a traffic citation are repealed. The offenses are made infractions for which the Department of Licensing (DOL) is to suspend a driver's license. The suspension continues until the driver responds or complies, shows proof of financial responsibility, and pays a $20 reinstatement fee.

The mandatory minimum jail term for first-degree driving while suspended or revoked as the result of being an habitual offender is reduced from one year to 180 days. The crime of driving while suspended or revoked in the third degree is amended to include persons who drive while their licenses are suspended as the result of failing to respond to a notice of a traffic infraction or failing to comply with a citation.

Several changes are made with respect to the crime of DWI:

First, the ground for suspending the otherwise mandatory jail time for DWI is changed to require a finding by the judge that jail time would pose a substantial risk to the defendant's physical or mental well-being.

Second, the Department of Social and Health Services, instead of the court, is to periodically review the alcohol information schools attended by DWI offenders.

Third, for persons convicted of DWI while they were driving with a suspended or revoked license in the first or second degree, the minimum mandatory fine is raised from $200 to $500. This fine, and its accompanying mandatory 90 days in jail, no longer apply to persons convicted of DWI while driving without a license as a result of third-degree driving while suspended or revoked.

Fourth, a change is made to the requirement that a court impose, in addition to the mandatory jail time for DWI, a suspendible term of imprisonment of up to 180 days "for a period not exceeding two years." This provision is changed to require that the additional suspendible term of confinement be for up to two years.

Various changes are made to the form requirements for notices of traffic infractions and citations in order to reflect the changes made in the substantive provisions described above.

SUMMARY OF PROPOSED SENATE AMENDMENT:

When a person is convicted of a second charge of driving while under the influence of intoxicating liquor or drug within a five-year period, the court is directed to confiscate the

Washington State vehicle registration and license plates of the vehicle that the person was driving at the time of the offense. The plates and registration will be held for 90 days from the date of surrender. No Washington State vehicle registration or license plates may be reissued to that person for the vehicle by the department.

On a third or subsequent conviction for driving while under the influence of intoxicating liquor or drug within a five-year period, a law enforcement officer is directed to seize the vehicle the person was driving at the time of the offense, if owned by that person. Notice is required to be served on the owner and any person having any known right or interest in the vehicle, including a community property interest. The vehicle is determined to be forfeited if no one notifies the law enforcement agency within 45 days of seizure. A person who claims ownership or right to possession of the vehicle is entitled to a hearing and the vehicle will be returned to the claimant if the court or administrative law judge determines that the person has a lawful right to possession.

The Department of Licensing is directed to revoke the driver's license for one year of any person who is convicted of either a state or federal drug offense. If the person's license is suspended at the time of conviction or the person does not have a driver's license, the department will not reissue the license for a period of six months after application is made for a new license.

Appropriation: none

Revenue: none

Fiscal Note: requested

TESTIMONY FOR:

This bill follows the move to decriminalize minor traffic crimes.

TESTIMONY AGAINST: None

TESTIFIED: Melanie Stewart, Washington State District Court Judges; Clark Holloway, Department of Licensing

FINAL BILL REPORT

SHB 1741

Synopsis as Enacted
C 501 L 93

Brief Description: Revising penalties for ignoring traffic tickets.

By House Committee on Judiciary (originally sponsored by Representatives Appelwick, Ludwig, Johanson and Orr).

House Committee on Judiciary
Senate Committee on Law & Justice

Background: Many traffic laws have been "decriminalized" and made civil infractions instead of crimes. For these infractions, no jail time may be imposed, but civil punishment includes fines and in some instances loss of driving privileges. Although infractions themselves are not crimes, failing to respond to a notice of infraction is a crime.

Under the "Nonresident Violator Compact," a state may agree to release motorists from another state who are cited for traffic law violations without requiring the motorists to post appearance bonds. Such an agreement is dependent, however, on the home state of a cited motorist having a law which requires driver's license suspension for failing to comply with a traffic citation. Washington has adopted the compact, but does not have a law that would require license suspension for Washington drivers who fail to comply with citations issued by other participants in the compact. Washington does have a law that prohibits renewal of a license for a person who has failed to comply.

The state's motor vehicle code has various escalating penalties for driving without a license and for driving while intoxicated (DWI). The crime of driving while a license is suspended or revoked may be committed in any one of three degrees, depending on the offense for which the license was suspended or revoked. Driving without a license that was suspended for being an habitual traffic offender is first-degree driving with a suspended or revoked license. The second-degree offense involves driving following the loss of a license for DWI or other relatively serious traffic offenses. The third-degree offense involves driving after a license has been suspended or revoked solely for secondary reasons such as failure to furnish proof of

financial responsibility, or failure to renew a license after a period of suspension has expired.

Summary: Crimes relating to failure to respond to a traffic infraction and failure to comply with a traffic citation are repealed. The offenses are made infractions for which the Department of Licensing (DOL) is to suspend a driver's license. If a Washington driver fails to respond or comply in the case of an out-of-state offense, DOL will also suspend the driver's license. A suspension continues until the driver responds or complies, shows proof of financial responsibility, and pays a $20 reinstatement fee.

The mandatory minimum jail term for first-degree driving with a suspended or revoked license as the result of being an habitual offender is reduced from one year to 180 days. The crime of driving with a suspended or revoked license in the third degree is amended to include persons who drive while their licenses are suspended as the result of failing to respond to a notice of a traffic infraction or failing to comply with a citation.

Several changes are made with respect to the crime of DWI:

(1) The ground for suspending the otherwise mandatory jail time for DWI is changed. The required risk to a defendant's physical or mental well-being must be "substantial."

(2) The Department of Social and Health Services, instead of the court, must periodically review the alcohol information schools attended by DWI offenders.

(3) For persons convicted of DWI while they were driving with a suspended or revoked license in the first or second degree, the minimum mandatory fine is raised from $200 to $500. This fine and its accompanying mandatory 90 days in jail no longer apply to persons convicted of DWI while driving without a license as a result of third-degree driving with a suspended or revoked license.

(4) A change is made to an ambiguous requirement that a court impose, in addition to the mandatory jail time for DWI, a suspendible term of imprisonment "not exceeding 180 days" that is suspendible but not deferrable "for a period not exceeding two years." This provision is changed to require that the additional suspendible term of confinement be for a period of up to two years.

Various changes are made to the form requirements for notices of traffic infractions and citations in order to reflect the changes made in the substantive provisions described above.

Votes on Final Passage:

House	98	0	
Senate	47	0	(Senate amended)
House			(House refused to concur)
Senate	47	0	(Senate receded)

Effective: July 25, 1993

Caseloads of the Courts of Washington

Cases Filed - 2010 Annual Report

	----- Infraction -----		------ Misdemeanors - ------								
	Traffic	Non-Traffic	DUI/ Phy Control	Other Traffic	Non-Traffic	Domestic Viol.(1)	Civil	Small Claims	Felony Complaints	Parking(2)	Total
District Courts											
.State/County	572,973	15,732	23,730	47,681	42,339	10,071	117,505	19,003	5,485	125,482	980,001
.Municipal	100,881	2,036	3,363	17,510	19,840	0	1	1	7	39,320	182,959
Municipal Courts	328,083	15,061	11,098	59,540	69,373	253	219	1	0	802,410	1,286,038
State Total	1,001,937	32,829	38,191	124,731	131,552	10,324	117,725	19,005	5,492	967,212	2,448,998
Adams County											
.Othello D	2,051	8	58	301	192	42	397	17	0	1	3,067
...Othello M	603	45	46	227	210	0	0	0	0	15	1,146
.Othello D Total	2,654	53	104	528	402	42	397	17	0	16	4,213
.Ritzville D	7,532	28	53	286	156	12	129	6	0	0	8,202
...Ritzville M	118	3	5	18	25	0	0	0	0	0	169
.Ritzville D Total	7,650	31	58	304	181	12	129	6	0	0	8,371
Adams County	10,304	84	162	832	583	54	526	23	0	16	12,584
Asotin County											
.Asotin D	973	63	56	150	255	92	685	0	0	0	2,274
...Asotin M	354	2	6	32	16	0	0	0	0	0	410
...Clarkston M	661	10	39	248	403	0	0	0	2	5	1,368
.Asotin D Total	1,988	75	101	430	674	92	685	0	2	5	4,052
Asotin County	1,988	75	101	430	674	92	685	0	2	5	4,052
Benton County											
.Benton D	15,237	202	622	1,614	1,089	29	4,808	461	148	7	24,217
...Kennewick M	6,868	183	202	961	2,110	0	0	0	0	26	10,350
...Prosser M	388	17	29	95	73	0	0	0	0	1	603
...Richland M	3,741	218	237	868	1,039	0	0	0	1	88	6,192
...W. Richland M	849	33	49	79	123	0	0	0	0	0	1,133
.Benton D Total	27,083	653	1,139	3,617	4,434	29	4,808	461	149	122	42,495
Benton County	27,083	653	1,139	3,617	4,434	29	4,808	461	149	122	42,495

Statewide DWLS filings for 2010

RCW	Disposition		Total Count
46.20.342.1A.C - DWLS 1ST DEGREE AID/ABET	-		1
	AM - Amended		3
	CV - Change of Venue		1
	D - Dismissed		1
	G - Guilty		2
46.20.342.1A.C - DWLS 1ST DEGREE AID/ABET		Sum:	8

RCW	Disposition		Total Count
46.20.342(1)(A) - DRIVING WHILE LICENSE SUSPENDED-1	-		16
	D - DISMISSED		45
	G - GUILTY		49
	NG - NOT GUILTY		1
46.20.342(1)(A) - DRIVING WHILE LICENSE SUSPENDED-1		Sum:	111

RCW	Disposition		Total Count
46.20.342.1A - DWLS 1ST DEGREE	-		608
	AM - Amended		461
	AS - Awaiting Sentencing		11
	CV - Change of Venue		7
	D - Dismissed		236
	DO - Dismissed W/O Prejudice		100
	DP - Deferred Prosecution		41
	DW - Dismissed W/Prejudice		88
	GD - Guilty Defrd Pros Revoked		7
	G - Guilty		1,498
	GO - Guilty Oth Defrl Revoked		2
	NG - Not Guilty		7
	OD - Other Deferral		33
	V - Vacated		1
46.20.342.1A - DWLS 1ST DEGREE		Sum:	3,100

The Administrative Office of the Courts, the Washington Courts, and the Washington State County Clerks: 1) Do not warrant that the data or information is accurate or complete; 2) Make no representations regarding the identity of any persons whose names appear in data or information; and 3) Do not assume any liability whatsoever resulting from the release or use of the data or information. The user should verify the information by personally consulting the "official" record reposing at the court of record.

Statewide DWLS filings for 2010

RCW	Disposition	Total Count
46.20.342.1B.C - DWLS 2ND DEGREE AID/ABET	-	1
	AM - Amended	2
	D - Dismissed	2
	DO - Dismissed W/O Prejudice	1
	OD - Other Deferral	1
46.20.342.1B.C - DWLS 2ND DEGREE AID/ABET	Sum:	7

RCW	Disposition	Total Count
46.20.342(1)(B) - DRIVING WHILE LICENSE SUSPENDED-2	-	23
	D - DISMISSED	44
	G - GUILTY	67
46.20.342(1)(B) - DRIVING WHILE LICENSE SUSPENDED-2	Sum:	134

RCW	Disposition	Total Count
46.20.342.1B - DWLS 2ND DEGREE	-	1,282
	AM - Amended	2,586
	AS - Awaiting Sentencing	29
	BF - Bail Forfeiture	14
	CV - Change of Venue	13
	D - Dismissed	736
	DO - Dismissed W/O Prejudice	221
	DP - Deferred Prosecution	161
	DW - Dismissed W/Prejudice	317
	GD - Guilty Defrd Pros Revoked	13
	G - Guilty	3,048
	GO - Guilty Oth Defrl Revoked	2
	NG - Not Guilty	4
	OD - Other Deferral	147
	V - Vacated	1
46.20.342.1B - DWLS 2ND DEGREE	Sum:	8,574

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Statewide DWLS filings for 2010

RCW	Disposition		Total Count
46.20.342.1C.C - DWLS 3RD DEGREE AID/ABET	-		1
	AM - Amended		6
	D - Dismissed		5
	DO - Dismissed W/O Prejudice		4
	DW - Dismissed W/Prejudice		3
	G - Guilty		4
46.20.342.1C.C - DWLS 3RD DEGREE AID/ABET		Sum:	23

RCW	Disposition		Total Count
46.20.342(1)(C) - DRIVING WHILE LICENSE SUSPENDED-3	-		58
	D - DISMISSED		175
	G - GUILTY		74
	NG - NOT GUILTY		1
	P - PENDING		1
46.20.342(1)(C) - DRIVING WHILE LICENSE SUSPENDED-3		Sum:	309

RCW	Disposition		Total Count
46.20.342.1.C - DRIVING WHILE SUSPENDED 3RD	AM - Amended		3
46.20.342.1.C - DRIVING WHILE SUSPENDED 3RD		Sum:	3

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Statewide DWLS filings for 2010

RCW	Disposition	Total Count
46.20.342.1C - DWLS 3RD DEGREE	-	11,669
	AM - Amended	34,444
	AS - Awaiting Sentencing	492
	BF - Bail Forfeiture	2,009
	CV - Change of Venue	113
	D - Dismissed	9,083
	DO - Dismissed W/O Prejudice	2,898
	DP - Deferred Prosecution	300
	DW - Dismissed W/Prejudice	3,383
	GD - Guilty Defrd Pros Revoked	14
	G - Guilty	28,953
	GO - Guilty Oth Defrl Revoked	114
	NG - Not Guilty	14
	OD - Other Deferral	792
	V - Vacated	3
46.20.342.1C - DWLS 3RD DEGREE	Sum:	94,281

RCW	Disposition	Total Count
46.20.342.1CRP - RELICENSING PROGRAM - DWLS3	-	141
	AM - Amended	1,206
	D - Dismissed	2,451
	DO - Dismissed W/O Prejudice	102
	DW - Dismissed W/Prejudice	191
	V - Vacated	1
46.20.342.1CRP - RELICENSING PROGRAM - DWLS3	Sum:	4,092

RCW	Disposition	Total Count
46.20.342.2 - DWLS 2ND DEGREE	G - Guilty	1
46.20.342.2 - DWLS 2ND DEGREE	Sum:	1

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Statewide DWLS filings for 2010

RCW	Disposition	Total Count
46.20.342.3 - DWLS 3RD DEGREE	-	2
	AM - Amended	7
	D - Dismissed	1
	DW - Dismissed W/Prejudice	2
	G - Guilty	1
46.20.342.3 - DWLS 3RD DEGREE	Sum:	13

RCW	Disposition	Total Count
46.20.342AA - AID/ABET DRIVING W/SUSPENDED LICENS	AM - Amended	1
	D - Dismissed	1
46.20.342AA - AID/ABET DRIVING W/SUSPENDED LICENS	Sum:	2

RCW	Disposition	Total Count
46.20.342 - DRIVING WHILE SUSPENDED OR REVOKED	-	2
	AM - Amended	8
	BF - Bail Forfeiture	1
	D - Dismissed	4
	DO - Dismissed W/O Prejudice	2
	DP - Deferred Prosecution	1
	G - Guilty	3
46.20.342 - DRIVING WHILE SUSPENDED OR REVOKED	Sum:	21

The Administrative Office of the Courts, the Washington Courts, and the Washington State County Clerks: 1) Do not warrant that the data or information is accurate or complete; 2) Make no representations regarding the identity of any persons whose names appear in data or information; and 3) Do not assume any liability whatsoever resulting from the release or use of the data or information. The user should verify the information by personally consulting the "official" record reposing at the court of record.

Statewide DWLS filings for 2010

RCW	Disposition		Total Count
46.20.342 - DRIVING WITH INVALIDATED LICENSE	-		59
	AM - Amended		109
	BF - Bail Forfeiture		6
	D - Dismissed		77
	DO - Dismissed W/O Prejudice		10
	DP - Deferred Prosecution		2
	DW - Dismissed W/Prejudice		12
	G - Guilty		51
	GO - Guilty Oth Defrl Revoked		1
	OD - Other Deferral		3
46.20.342 - DRIVING WITH INVALIDATED LICENSE		Sum:	330
		Sum:	111,009

The Administrative Office of the Courts, the Washington Courts, and the Washington State County Clerks: 1) Do not warrant that the data or information is accurate or complete; 2) Make no representations regarding the identity of any persons whose names appear in data or information; and 3) Do not assume any liability whatsoever resulting from the release or use of the data or information. The user should verify the information by personally consulting the "official" record reposing at the court of record.

The Courts of Limited Jurisdiction
Infraction Activity, 2002

	Traffic	Non-Traffic	Subtotals	Parking	Totals
FILINGS					
Notices of Infraction Filed	984,587	41,292	1,025,879	566,131	1,592,010
Number of Violations Charged	1,181,424	44,967	1,226,391	576,677	1,803,068
CHARGE DISPOSITIONS					
Paid	424,925	17,894	442,819	105,482	548,301
Committed - Failure to Appear/Respond	271,898	7,536	279,434	186,917	466,351
Committed	324,397	12,870	337,267	92,195	429,462
Not Committed	18,419	523	18,942	1,168	20,110
Dismissed	144,383	5,058	149,441	11,630	161,071
Total Charge Dispositions	1,184,022	43,881	1,227,903	397,392	1,625,295
PROCEEDINGS					
Mitigation Hearings	195,538	3,897	199,435	22,618	222,053
Contested Hearings	116,126	3,143	119,269	14,660	133,929
Show Cause Hearings	6,860	175	7,035	1,858	8,893
Other Hearings on the Record	76,917	2,954	79,871	1,220	81,091
Total Proceedings	395,441	10,169	405,610	40,356	445,966
Appeals to Superior Court	169	10	179	4	183
Total Revenue	$97,431,967	$1,328,360	$98,760,327	$15,137,177	$113,897,504

FOOD AND DIET
Healthy food costs is barrier to a better diet among poor

FOOD FOR THOUGHT
Stein's sturgeon smackdown, and preparation for leviathan feast

LAW

Nearly 300,000 Wash. drivers suspended for failure to pay tickets

By Austin Jenkins (/people/austin-jenkins)

(http://mediad.publicbroadcasting.net/p/kplu/files/201107/072211AJ_PriceyTickets.jpg)

Relicensing court client Brandon Stowers is trying to get his driver's license back after not paying multiple traffic tickets.

Austin Jenkins / Northwest News Network

Enlarge image (javascript:void(0);)

Listen (http://pd.npr.org/anon.npr-mp3/148/ingest/2011/07/20110725_ingest_151343261.mp3?orgId=148&ft=3&f=138682145)

BURIEN, Wash. – In Washington, nearly 300,000 drivers currently have suspended licenses – not because they've driven drunk or committed a hit-and-run, but because they failed to pay their traffic tickets.

You're about to meet three of them. Like a lot of people in their situation, they continued to drive. And that has led to more tickets, more debt and even jail.

But drivers who want to clear their debts and get their licenses back must run a gauntlet that includes collection agents and a patchwork system of courts.

Brandon Stowers sits on a wooden bench outside a King County District courtroom in Burien. He's here for relicensing court. It's a special court for people who have lost their driver's license because of unpaid traffic tickets.

Stowers says his troubles started when he stuffed a ticket in his glove box.

"That's exactly what happened," Stowers says. "I put it in my glove compartment and forgot all about it."

That was several years — and several tickets — ago. Now Stowers -- an unemployed father of three -- has come to relicensing court to begin to dig out from a mess he admits he got himself into.

"It's very, very, very important (that you get your license back)," Stowers stresses. "I need my license back bad."

Relicensing Court is Stowers' best hope. Like drug court, it's a diversion program for people who have been stopped by a cop while driving on a license that was suspended for failure to pay traffic tickets.

It's called driving while suspended in the third degree. The prosecutor agrees to hold off filing a criminal charge if the defendant agrees to a repayment plan.

"We understand that some people get themselves so far into debt that getting out of debt is extremely difficult," says Maggie Nave, head of the District Court unit of the King County Prosecutor's office.

She says relicensing court frees up prosecutors for more serious cases. But it also gives a suspended driver a way to get their license back sooner.

"After he has started to make some payments, then the holds on his license are released by the court," Nave explains. "And that means he can get his license reissued while he's paying off his tickets."

That's exactly what 22-year old Sandy Seak is counting on. She recently got stopped for driving on a suspended license and for no insurance.

"The tickets are just stacking up and having to drive and look over my shoulder is just uncomfortable," she says.

Seak says her troubles began when she was 17. She got a ticket for a car accident, but never paid the fine.

Seak admits she was young and irresponsible then. Now she's a mother and wants to clear her record. The problem is she owes nearly $3,000 on half-a-dozen outstanding tickets.

But her only income is about $800 a month in unemployment.

"My situation is because I'm poor," Seak says. "If I had that money then it would be the first thing that I take care of and I would have my license back."

Seak hopes she can work off some of her fines through community service.

So how many Sandy Seaks there are out there? And what percentage of traffic tickets go unpaid?

That's what I asked the court administrators in Washington's two most populous counties — King and Pierce. They ran a special report and the results were strikingly similar. In any given year, up to 25 percent of tickets end up in collections.

Tim is another relicensing court defendant. He doesn't want us to use his last name. But he's a married father of two, an out-of-work union electrician who's already on the verge of losing his house.

And he's just gotten sticker shock from a collection agency representative. He owes nearly $10,000 in fines, fees and interest.

"Here I sit with $10,000 in frigging traffic fines, he says. "It's just a nightmare."

Tim admits taking care of his 15 unpaid tickets just wasn't a priority until he got stopped in Montana and thrown in jail. Standing outside the courthouse, he tells me he had to ask his mom for bail money.

"I'm a 50 year old man almost," he says. "Wouldn't it make you feel pretty dismal if you had to ask your mother for something of that nature?"

These three drivers you've just met are actually the lucky ones. They live in a county with a relicensing court. But only a handful of Washington jurisdictions offer this option – most do not.

Court officials tell me relicensing court clients tend to gain a significant advantage because they can get better repayment terms from the collection agencies.

But even relicensing courts have their limitations. Court jurisdictions are like a patchwork across the state.

Take Judge Mark Eide. He presides over King County relicensing court. But he has no authority to reduce and consolidate fines from most of the county's 39 cities, much less another county.

"It is rather inefficient to have people go to multiple different courts to try to take care of getting their license back," Eide says.

Yet that's often what happens. These cases also consume a lot of court resources. One-third of misdemeanor court filings in Washington — one-third -- are for driving while suspended for failure to pay citations. That's according to a 2008 study by Washington's Office of Public Defense.

"It's a victimless crime and it's a crime of poverty," says Bob Boruchowitz a former longtime public defender turned law professor at Seattle University.

He also says there's evidence that minorities are more likely to have their licenses suspended for not paying their traffic fines.

Boruchowitz argues it's time for Washington to decriminalize driving while suspended in the third degree.

"It's not a good thing to ignore the ticket, but it shouldn't be a crime," he argues. "Why should we put somebody in jail for ignoring a ticket? What we ought to do is educate people that they have options."

Like working off the ticket through community service. Or getting on a payment plan.

Don Pierce heads the Washington Association of Sheriffs and Police Chiefs (http://www.waspc.org/). He supports diversion programs, but disagrees with Boruchowitz on decriminalization.

"I think he's wrong," Pierce retorts. "It isn't just a crime of poverty."

Pierce says there are scofflaws out there who need the threat of jail.

"If we totally decriminalize they can simply tear the ticket up right in front of the officer's face and drive away and there's nothing we can do about it and I don't think that serves the general public."

The Washington legislature has so far rejected the idea of decriminalization. But this year did pass two related laws.

One requires that all traffic tickets include a notice that says if you can't afford to pay the ticket you can get on a payment plan. The other clarifies that prosecutors can send these cases to diversion.

As for the three drivers we met earlier. I recently checked in with them. All three tell me relicensing court has put them on the road to getting out of debt and getting back their license to drive.

On the Web:

King County Relicensing Program:
http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx
(http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx)

Traffic Tickets in Washington:
http://www.dmv.org/wa-washington/traffic-tickets.php (http://www.dmv.org/wa-washington/traffic-tickets.php)

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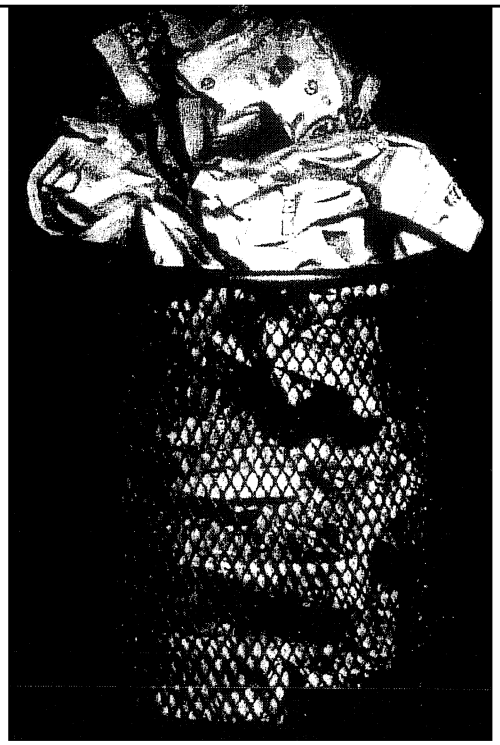
Minor Crimes, Massive Waste

The Terrible Toll of America's Broken Misdemeanor Courts



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

April 2009

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Minor Crimes, Massive Waste

The Terrible Toll of America's Broken Misdemeanor Courts

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ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, amicus advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's 12,000 direct members — and more that 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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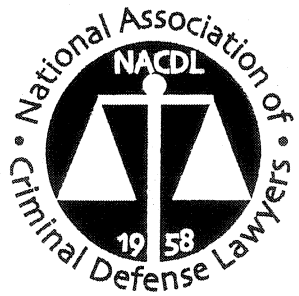

ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America's justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and assistance of effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession to the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

5

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EXECUTIVE SUMMARY

The explosive growth of misdemeanor cases is placing a staggering burden on America's courts. Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented. As a result, constitutional obligations are left unmet and taxpayers' money is wasted.

NACDL's comprehensive examination of misdemeanor courts, including a review of existing studies and materials, site visits in seven states, an internet survey of defenders, two conferences, and a webinar, demonstrated that misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution. As a result, every year literally millions of accused misdemeanants, overwhelmingly those unable to hire private counsel, and disproportionately people of color, are denied their constitutional right to equal justice. And, taxpayers are footing the bill for these gross inefficiencies.

Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.

This report explains, in depth, these and other problems observed in misdemeanor courts and offers recommendations for reform, while highlighting best practices from across the country. The recommendations include:

1 ***Divert misdemeanors that do not impact public safety to penalties that are less costly to taxpayers.***

Defenders and judges across the country noted that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers expend on average $80 per inmate per day[1] to lock up misdemeanants accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, dog leash violations, driving with a suspended license, pedestrian solicitation, and feeding the homeless. These crimes do not impact public safety, but they do have a huge impact on state and local budgets across the country.

Continued on next page

Continued from previous page

A number of jurisdictions have had success diverting some of these offenses to less costly penalties and reducing the caseloads of misdemeanor courts, thereby freeing up resources for other pressing needs. For example, in King County, Washington, a relicensing program allows individuals who have had their driver's license suspended pay the fines that led to the suspension through community service. The program is open to individuals regardless of whether they have a criminal charge pending, and, if completed, any pending charges of driving with a suspended license (DWLS) are dropped. An evaluation of the program found that it not only resulted in a dramatic decrease in the number of DWLS cases bogging down misdemeanor courts, but also generated net revenue.

Reduce pressure on defendants to plead guilty, particularly at first appearance.

2 The overwhelming caseloads in misdemeanor court put pressure on everyone in the court system — defenders, prosecutors and judges — to resolve cases quickly. Prosecutors use one time only plea offers to force early pleas. Judges utilize bail determinations and the threat of pretrial incarceration to encourage early pleas. Defenders, if they are even involved, note that a better deal might not come along and that they have no time to fully investigate the client's case. As a result, an extraordinary number of misdemeanor defendants plead guilty at their first appearance in court, whether or not they committed the crime. Not only is such coercion in stark violation of the Constitution, it also means taxpayers are footing the bill to imprison the innocent, as well as other defendants, whose situation might be better served by alternatives to incarceration.

- In New York City in 2000, almost 70 percent of misdemeanor cases were disposed of at the first appearance — most through a guilty plea.
- Site team members in Washington State observed two defenders advise as many as 132 defendants on an arraignment calendar in under four hours. Most stipulated to the police report, which resulted in a finding of guilt.

Enforce ethical obligations of all participants in misdemeanor adjudications.

3 Misdemeanor courts are rife with violations of professional ethical standards. Defenders countenance caseloads that prohibit them from providing competent representation to their clients. Prosecutors talk directly with defendants and convince them to waive their constitutional rights. Judges encourage defendants to proceed without counsel and plead guilty quickly in order to move dockets. Ethical obligations for all professionals in misdemeanor court should be vigorously enforced to ensure that every defendant receives a fair and unbiased proceeding.

Provide counsel for any defendant facing the possibility of incarceration.

4

Often in misdemeanor courts, defendants are not informed of their right to counsel under the Sixth Amendment, or are coerced into waiving counsel to avoid having to spend additional time in jail awaiting the appointment. Sometimes they are even required to pay an application fee in order to obtain the counsel that is guaranteed by the Constitution.

- Time and time again site team observers watched individuals plead guilty without counsel.
- Judges actually acknowledge the widespread violation of Sixth Amendment rights. For example, Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina told a group of attorneys at a state bar meeting, "*Alabama v. Shelton* is one of the more misguided decisions of the United States Supreme Court ... so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."[2]
- Judges and prosecutors routinely speak directly to defendants and seek waivers of counsel in order to resolve the case more quickly. In Colorado, a state statute provides that a misdemeanor defendant must engage in plea negotiations with a prosecutor before the defendant can receive appointed defense counsel.[3]

It is indefensible that, despite longstanding constitutional precedent, a significant percentage of defendants in misdemeanor courts proceed without an attorney. The absence of counsel in these cases undermines the fairness and reliability of the criminal justice system and violates the Constitution, opening state and local governments up to costly lawsuits.

Provide public defenders with the resources necessary to effectively represent their clients.

Across the country, misdemeanor defenders report caseloads six and seven times greater than the national standards. In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year.[4] With these massive caseloads, defenders have to resolve approximately 10 cases a day — or one case every hour — not nearly enough time to mount a constitutionally adequate defense.

5

Defender offices, contract defender offices, and assigned counsel lists must have sufficient attorneys to permit the maintenance of ethical caseload standards. Additionally, defenders should have access to resources necessary to provide effective assistance, including legal research services, investigators, experts, social workers, and mental health support services.

The consequences for the accused individuals involved, no less for the Constitution, demand that misdemeanor courts provide due process and equal justice for all those who appear in them. All across America, misdemeanor courts are failing to meet this critical standard. Implementation of the recommendations of this report will save taxpayers much needed resources while making these courts, and our justice system, reliable for all Americans.

INTRODUCTION

The vast majority of accused individuals first come into contact with the criminal justice system through a minor offense, known as a misdemeanor. Yet remarkably little attention has been devoted specifically to understanding what happens to defendants at the misdemeanor level.

Criminal justice reform studies have often noted that extensive problems exist in misdemeanor courts, but have rarely focused sharply on these courts. For this reason, NACDL decided to investigate misdemeanor courts throughout the country, document the strengths and weaknesses, and identify ways to improve the operations of these courts. Drawing upon existing literature and research, on-site visits in a number of jurisdictions, interviews and survey results from defenders across the country, and the input of diverse participants at two conferences and a webinar, this report details existing problems in misdemeanor courts, highlights best practices, and makes a series of recommendations for change.

Methodology

Over the course of a year, NACDL, together with Professor Robert C. Boruchowitz of Seattle University School of Law, gathered a wide range of existing studies, reports, and statistics on misdemeanor courts and misdemeanor defense, including law review articles, news coverage, governmental studies, and expert reports, as well as information from other organizations working on indigent defense reform, including reports and manuals on misdemeanor practice.

After reviewing these materials, the authors organized site visits to misdemeanor courts in a number of jurisdictions. Prior to the visits, NACDL representatives conducted interviews with key criminal justice personnel to understand the operation of the local misdemeanor courts, as well as perceived strengths and weaknesses. On the visits, NACDL representatives observed the operation of the misdemeanor courts, and conducted additional interviews with key players in misdemeanor proceedings, including judges, defense counsel, prosecutors, and accused persons. Where possible, site teams gathered data on misdemeanor prosecutions, public defender caseloads, and other relevant statistics.

The authors selected locations for site visits based on a preliminary assessment of problems by NACDL's staff and Professor Boruchowitz, in consultation with experts on indigent defense around the country. Geographical diversity and the type of public defense system were also considered. Site visits occurred in Arizona, Florida, Illinois, North Dakota, Pennsylvania, Texas, and Washington. In many of these states, public defense[5] is organized on a county-by-county basis, and, when possible, a number of counties were visited.

The authors conducted an Internet survey of defenders across the country seeking information on misdemeanor practice in each respondent's jurisdiction, as well as respondent's impressions of the operation of misdemeanor courts. In total, 185 individuals responded to the Internet survey. The respondents reported practicing in 26 states and two tribal courts.[6]

Additionally, NACDL held two conferences for the purpose of seeking input on the problems associated with misdemeanor courts, as well as possible solutions. The first conference was held in New York in May 2008, and the second took place in Seattle in July 2008. Over 150 public defenders, prosecutors, judges, and reform activists from across the country attended the conferences. Finally, NACDL hosted a webinar on the preliminary findings of the report with experts from across the country to seek additional input.

The report documents the findings of this extensive research effort.[7] The report first provides an introduction to misdemeanor courts, reviewing the charges brought in misdemeanor courts, as well as the rights of the misdemeanor defendant. It then outlines the common problems observed and reported in misdemeanor courts throughout the country. At the conclusion of each section, the report enumerates policy reform recommendations that would address the problems described, highlighting best practices observed around the country.

The Misdemeanor Courts

In most states, crimes are divided into two categories — felony and misdemeanor. Misdemeanors are the less serious offenses, for which punishment is generally limited to one year in jail.[8] Common misdemeanor offenses include petty theft, disorderly conduct, public drunkenness, curfew violations, loitering, prostitution-related offenses, driving under the influence, driving with a suspended license, resisting arrest, minor assault, under-age possession of alcohol, and minor controlled substance and paraphernalia offenses.

Misdemeanors are commonly adjudicated in separate courts from felony cases. These courts often adjudicate minor civil offenses as well as misdemeanor criminal offenses. In a number of states, such as Arizona, Missouri, New York and Pennsylvania, some of the judges in these courts are not lawyers.[9]

The Volume of Misdemeanor Offenses

Most people who go to court in the United States go to misdemeanor courts. The volume of misdemeanor cases is staggering. The exact number is not known, as states differ in whether and how they count the number of misdemeanor cases processed each year. The National Center for State Courts collected misdemeanor caseload numbers from 12 states in 2006. Based on these 12 states, a median misdemeanor rate of 3,544 per 100,000 was obtained.[10] If that rate held true across the states, the total number of misdemeanor prosecutions in 2006 was about 10.5 million, which amounts to 3.5 percent of the American population.[11] While this overplays the actual prosecutions by population, because of individuals charged multiple times and non-citizen prosecutions, it is a startling reminder of the breadth of the impact of these courts.[12]

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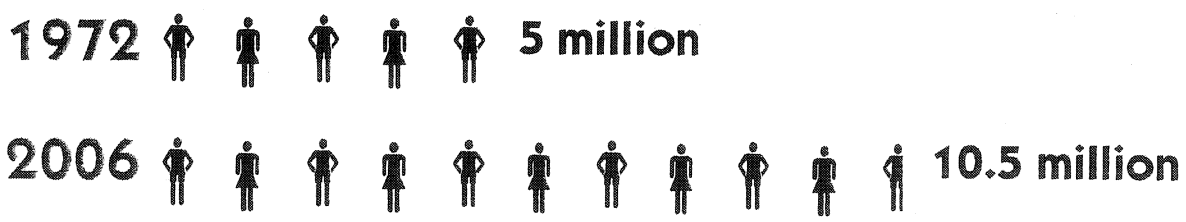
Rights of Defendants in Misdemeanor Cases

Misdemeanor defendants, like all those accused of crimes, are entitled to due process.[13] They have the right to receive the evidence against them and present evidence in their defense. They have a right to confront witnesses. And, they have the right to have their guilt proven beyond a reasonable doubt. Not all misdemeanor defendants are entitled to a jury trial, however. The federal constitutional right to a jury trial has been interpreted to apply only when a defendant is facing more than six months in prison.[14]

Right to Counsel in Misdemeanor Cases

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, the U.S. Supreme Court interpreted this right to require the state to provide counsel to a defendant charged with a felony who could not afford to hire his own counsel. The Court stated, "reason and reflection require us to recognize that, in our adversary system of justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[15]

Volume of Misdemeanor Cases



Even after *Gideon*, persons charged with misdemeanor offenses were not guaranteed appointed counsel, and the misdemeanor courts were rife with abuse. In 1968, five years following *Gideon*, Professor John M. Junker observed:

> [A] large majority of the [people] annually charged with non-traffic misdemeanors must, if they are financially unable to hire an attorney, face the bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system without the assistance of counsel. The misdemeanor prosecution is the "Appalachia" of the criminal justice system.[16]

It is for this reason that, in *Argersinger v. Hamlin*, the U.S. Supreme Court extended the right to counsel to misdemeanor defendants.[17] The Court further protected the right to counsel in *Alabama v. Shelton*, holding that a defendant must have had counsel in the underlying adjudication for incarceration to be imposed for a violation of misdemeanor probation.[18] The Court reasoned:

> Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant ... faces incarceration on a conviction that has never been subjected to "the crucible of meaningful adversarial testing."[19]

Why Are Lawyers Needed in Misdemeanor Cases?

No one should underestimate the importance of counsel advising a person of his or her rights in any criminal case. Even in a simple case, the law can prove complex.

The law is not a fixed set of rules. It is always affected by the individual circumstances of a case. For example, one might think the law regarding murder is simple — one person cannot kill another. But, if the circumstances surrounding the killing show that the person who was killed was, in fact, the aggressor, the law becomes far less black and white, and the case becomes considerably more complex.

This is no less true of misdemeanors. The law of trespass may seem obvious — either a person was on private property or the person was not. But, there are a number of factors that can complicate a trespass case: Was the property obviously private or was there some reason to believe it was public property? Was there a warning, either posted or verbal? Was an event occurring that was open to the public? The answer to these questions can mean the difference between innocence and guilt. Without an attorney to sort through all the facts and assess what is legally important, these critical distinctions too easily can be overlooked.

In addition, the sentence and the collateral consequences can be quite different depending on which crime is found to have been committed. A lawyer also is needed to help the accused person sort out the implications of plea bargains offered by the prosecutor.

As the Court stated in its decision in *Argersinger*:

> The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment are any less complex than when a person can be sent off for six months or more.[20]

Attentive defense counsel is particularly important in misdemeanor courts because the volume of cases means that prosecutors and judges too often and too easily can overlook factual issues. Indeed, the Supreme Court observed that the volume of misdemeanors[21] results in pressure for "speedy dispositions," and stated that there is significant evidence of "prejudice" resulting from "assembly-line justice" in misdemeanor courts.[22]

Consequences of a Misdemeanor Conviction

There is a prevailing misconception that misdemeanor convictions do not truly affect a person. In fact, a common question received during the research for this project was, "Why are you spending time on misdemeanors?" Underlying this comment is the belief that it matters less whether the justice system is accurate in misdemeanor cases. But, the consequences of a misdemeanor conviction can be dire. As the Supreme Court noted in deciding *Argersinger*, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[23] Indeed, a wrongful conviction, even in a minor case, is pernicious. If the constitutionally mandatory processes of our criminal justice system cannot determine accurately a person's guilt or innocence of a minor criminal charge, court outcomes are subject to question in all cases.

In the years since the *Argersinger* decision, the collateral consequences[24] that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave. The defendant can be deported,[25] denied employment, or denied access to a wide array of professional licenses.[26] A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school.[27] Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family.[28] Fines, costs and other fees associated with convictions can also be stagger-

ing and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.[29]

As Rick Jones, the Executive Director of the Neighborhood Defender Service of Harlem, noted:

> Standing in the courtroom, it may seem like a wise thing just to get the criminal charge over with by pleading guilty, but a criminal conviction, even for a minor offense, has an enormous impact on a client's life. She may lose her housing, her job, her health or food benefits. It can impact the custody of her children. She may face deportation. No criminal conviction should be regarded as minor or unimportant.

Misdemeanor convictions also have serious consequences with regard to any future criminal charges faced by the same defendant. A minor conviction can limit a person's ability to vacate, set aside or dismiss an earlier, more serious conviction. It can also greatly increase the punishment for any future offense and reduce opportunities for sentencing reductions. One example is the inability of a person with a prior misdemeanor conviction to utilize the controlled substances "safety valve" statute and related provision in the federal sentencing guidelines.[30] A defendant who was previously convicted of a misdemeanor and received 30 days or more in jail or more than one year of probation, and who later faces a federal drug crime charge, is ineligible for a reduction of sentence under a provision that permits federal judges to sentence below the mandatory minimum set forth in the statute.[31]

PROBLEMS IN MISDEMEANOR COURTS

14

More than 35 years ago, Professor William Hellerstein of the Brooklyn Law School wrote "the criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about ... American criminal justice."[32] The statement could just as easily have been made today.

The research, surveys, site visits, and interviews conducted by NACDL confirmed that the operation of misdemeanor courts in this country is grossly inadequate and frequently unjust. Witnesses overwhelmingly described programs bereft of the funding and resources necessary to afford even the most basic tools essential for fair adjudications. As a result, literally millions of accused misdemeanants, particularly those unable to hire private counsel, and disproportionately people of color, routinely are denied the due process to which the Constitution entitles them.

Almost 40 years later, the misdemeanor criminal justice system is rife with the same problems that existed prior to the *Argersinger* decision. Legal representation for indigent defendants is absent in many cases. Even when an attorney is provided to defend a misdemeanor case, crushing workloads make it impossible for many defenders to effectively represent clients. Too often, counsel is unable to spend sufficient time on each of their cases. This forces even the most competent and dedicated attorneys to run afoul of their professional duties. Frequently, judges and prosecutors are complicit in these breaches, pushing defenders to take action with inadequate time, despite knowing that the defense attorney lacks appropriate information about the case and the client.

"[T]he criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about ... American criminal justice."

— Professor William Hellerstein, Brooklyn Law School.

Absence of Counsel

Despite the clear ruling by the U.S. Supreme Court that persons accused of misdemeanors have a right to court-appointed counsel, a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them. A Bureau of Justice Statistics Special Report in 2000 cited a survey of jail inmates conducted in 1989 and 1996. In the survey, 28.3 percent of jail inmates charged with misdemeanors reported having had no counsel.[33]

Site team observations in several states indicated that the percentage of misdemeanor defendants without counsel is greater than the BJS study suggested.[34] Time and time again site team observers watched individuals plead guilty without counsel.

In North Dakota, the observer noted that counsel was not appointed or present at arraignment for misdemeanor cases, despite the fact that most defendants pled guilty at that hearing and many were sentenced to jail time. The judge never informed the defendants of their right to counsel. Instead, the judge asked each defendant, "Did you speak to a lawyer?" When the defendant indicated that he or she did not, the judge asked, "Are you going to?" The defendants universally answered in the negative, and the judge proceeded to accept the plea and sentence the defendant.

In numerous other jurisdictions, as in North Dakota, site teams observed judges who failed to inform defendants of their right to have counsel appointed if they could not afford to hire counsel. In fact, frequently the disregard for the Supreme Court's right to counsel rulings was blatant. For example, at a meeting of the State Bar, the Chief Justice of the South Carolina Supreme Court publicly stated that she instructed misdemeanor court judges to ignore a Supreme Court Sixth Amendment ruling:

> *Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably ... by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.[35]

Documentation and reports from across the country confirm the frequency with which the right to counsel is completely disregarded in misdemeanor courts:

- **TEXAS:** "Three-quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases. The vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas."[36]

- **CALIFORNIA:** In Riverside County, California, more than 12,000 people pled guilty to misdemeanor offenses without a lawyer in a single year.[37]

- **MICHIGAN:** "People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases."[39]

"The dirty little secret of the criminal justice system is that most eligible people do not get defenders."

— Edward Monahan, Deputy Public Advocate, Kentucky Department of Public Advocacy.[38]

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Uninformed Waiver of Counsel

How is it that so many people go without counsel in misdemeanor court? As noted above, in some jurisdictions, the defendant's constitutional rights are simply disregarded and never acknowledged. More often, however, the constitutional rights are acknowledged, but hastily disposed of with a "waiver."

Waivers, even of constitutional rights, are not illegal. The U.S. Supreme Court has concluded that an adult defendant has the right to waive counsel, but first the judge must: (1) inform the defendant of his or her right to appointed counsel;[40] and (2) make the defendant "aware of the dangers and disadvantages of self-representation."[41] The inquiry by the judge should be thorough.[42] In other words, the judge must confirm that the defendant voluntarily, knowingly, and intelligently decided against using a lawyer and in favor of self-representation. Similarly, national performance standards provide that indigent defendants should not be called upon to plead guilty until counsel has been appointed or properly waived.[43]

In a number of jurisdictions, site teams observed judges ignoring the rules regarding waiver. Time after time, courts made clear to defendants that they must waive counsel to proceed. There were no inquiries into the education or sophistication of the defendants and very few efforts to warn defendants regarding the dangers of self-representation or the kind of assistance counsel could provide. Often the waiver was incorporated into the first part of the proceeding and was presented as a rhetorical, compound question directed at whether the defendant wanted to dispose of the case quickly. The judge asked the defendant something like, "You are waiving counsel and wish to proceed now, right?" and the defendant responded, "Yes."

In Maricopa County, Arizona, the site team observed a judge practically instructing defendants to waive their right to counsel. For example, the judge said the following:

> You are charged with reckless driving. So, I guess basically before we talk about it, let me do a couple preliminaries. ... I want you to waive your right to an attorney. You have a right to have an attorney, but I'm not going to give you the public defender. You would have to go and hire one and I don't think you're going to do that. I think you and I are going to talk about this right here, right now, right?

The defendant then signed a form waiving his right to counsel.

As in Maricopa County, the right to counsel and the warnings regarding waiver of counsel are frequently enumerated in a written form. In many instances, the court handed the form to a defendant with no explanation and said, "Sign here," and the defendant signed. The court did not conduct a thorough inquiry of the defendant as to his or her ability to read or whether the defendant understood what he or she signed.

"The defendant is usually told he must first talk to a prosecutor about his case and get a plea offer before he is allowed to have a lawyer appointed."

— A Tennessee public defender.[44]

In Tampa, Florida, when a member of the site team entered the misdemeanor courtroom, a court official immediately presented her with a form that combined a waiver of counsel with a plea of guilty. She was told to take a seat and fill out the form. Among other things, the form asked her to attest that, "I am of sound mind and body and hereby freely and voluntarily waive my right to an attorney in the case(s) above in accordance with Florida Rules of Criminal Procedure 3.160(e)." Although the form described at the outset the dangers of waiving counsel, at the point of asking for waiver of the rights under the rule, the form neither quoted the language of the rule nor did it explain that the rule describes the rights of all defendants to court-appointed counsel.[45]

Eligibility Limitations for Counsel

In some jurisdictions, counsel is not appointed due to restrictive financial eligibility guidelines. In *Gideon*, the Supreme Court provided that counsel should be appointed for those "financially unable to obtain counsel," or "too poor to hire a lawyer."[46] Problematically, the Supreme Court did not establish a threshold or process for determining that financial eligibility.

As a result, practices and policies for determining eligibility for public defense services differ widely from state to state. Indeed, frequently these practices and policies differ from county to county, and courtroom to courtroom.[47] Defenders across the country noted that many defendants who are financially incapable of retaining counsel are denied appointed counsel.

For example, in Lower Kittitas, Washington, approximately 16 percent of people who apply for defenders are denied. During the observation visit, the commissioner suggested to defendants that they might want to talk to the prosecutor before getting a lawyer. The commissioner made no inquiry into whether the defendant could afford to retain counsel. As a result, defendants who proceed without counsel may be doing so despite being unable to hire an attorney.

Conferring Directly with Prosecutors

Often defendants are encouraged, or even required, to discuss their cases directly with prosecutors. Ethically, this is problematic, particularly if the prosecutor is aware that the waiver of counsel, if there was one, was not sufficiently informed and voluntary.

Ethics rules generally prohibit a lawyer from giving advice to an unrepresented person whose interests may be adverse.[48] In fact, the model ethical rules specifically require prosecutors to "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."[49] Further, the rules forbid a prosecutor from seeking to obtain waivers of important pretrial rights from unrepresented accused persons.[50] Despite these clear prohibitions, site visits and research demonstrated that it is common for prosecutors to confer directly with defendants, frequently requesting and processing the defendants' waiver of counsel, and then negotiating guilty pleas.

In Hays County, Texas, for example, court staff directed misdemeanor defendants to confer with the prosecutor about a possible plea before the defendants had a meaningful opportunity to request the appointment of counsel. In fact, the site team observed that no defense attorney was present in the courtroom, nor was a judge. Two prosecutors sat at counsel table — one at each table. They called a defendant's name and then negotiated a plea directly with the defendant. The judge waited in another courtroom. After

pleas were negotiated, the defendant would proceed to the courtroom where the judge was located, and a different prosecutor would inform the judge of the plea agreement. Only in some of the cases where the plea involved a jail sentence did the prosecutor inform the defendant that he or she must sign up for a court-appointed lawyer. Unfortunately, not all defendants pleading to jail time were informed of the right to receive counsel.

The site team witnessed a similar process in a northeastern Pennsylvania county. Defendants on the misdemeanor docket were told to go to a room in the basement before their cases were called. When observers went down to the basement to observe what was happening, they discovered a prosecutor in a conference room. The prosecutor was negotiating plea deals directly with defendants who would then go back up to the courtroom to plead guilty and be sentenced.

In Kittitas County, Washington, the commissioner presiding over misdemeanor arraignments dealt directly with all defendants. Neither a prosecutor nor a defense attorney was present. The commissioner frequently advised defendants that they might be able to work something out directly with the prosecutor. The court's practice was to provide the defendant with a form that had the phone number of the prosecutor at the top of the form, and information about contacting the contract defender at the bottom of the form. During the site team's observations of the court, a number of defendants asked to speak with the prosecutor. There was no colloquy on waiver of counsel. Rather, the court warned defendants that "once you have an attorney, the prosecutor can't talk to you directly."

In Colorado, the standard practice is for a misdemeanor defendant to speak directly with the prosecutor. Indeed, a statute specifically directs the prosecutor to speak directly with the defendant and come to a plea agreement. Colo. Rev. Stat. §16-7-301(4) states:

> In misdemeanors, petty offenses, or offenses under title 42, C.R.S., the prosecuting attorney is obligated to tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time. The defendant and the prosecuting attorney may engage in further plea discussions about the case, but the defendant is under no obligation to talk to the prosecuting attorney. The prosecuting attorney shall advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel. The application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4). Upon completion of the discussions, the prosecutor shall inform the court of whether a plea agreement has been reached[.]

"*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say ... so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."

— Chief Justice Jean Hoefer Toal, Supreme Court of South Carolina.

In practice, most misdemeanor defendants in Colorado never see a public defender. The practice is not only ethically problematic, it also violates the most recent pronouncement of the U.S. Supreme Court on the appointment of counsel, which provides that counsel must be appointed before or at the defendant's first appearance before a judicial officer.[51]

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Recommendations — Absence of Counsel

1. *The right to counsel should be observed in accordance with Argersinger v. Hamlin and Alabama v. Shelton.*

As the Supreme Court stated in *Argersinger*, "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel ... and therefore know when to name a lawyer to represent the accused before the trial starts."[52] Despite this pronouncement, more than 35 years later, the Court's ruling is widely ignored.

It is indefensible that, despite *Gideon*, *Argersinger* and *Shelton*, a significant percentage of defendants in misdemeanor courts do not have a lawyer represent them. The U.S. Supreme Court has time and again acknowledged that defense counsel is an integral part of the adversary system, and necessary to ensure accurate outcomes in court. The absence of counsel in misdemeanor cases fundamentally undermines the fairness and reliability of the criminal justice system.

2. *Waivers of counsel should be handled carefully, with judges ensuring that the defendant fully understands his or her right to counsel, as well as the dangers of waiving counsel.*

"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."[53] A judge should "never attempt to encourage persons to waive their right to counsel, and accept no such waivers unless they are knowing, voluntary and intelligent, and on the record[.]"[54] The dangers of waiving the right to counsel must be fully explained to each defendant, before the waiver of counsel is permitted, and the judge must question the defendant fully to ensure that he or she understands the right to counsel and the implications of a waiver.

A waiver form is not a substitute for a colloquy. If a waiver form is used, the colloquy must still ensure that the defendant fully understands the right to counsel and the dangers of waiving the right. The form should serve merely to reinforce the important conversation that the judge has with the defendant.

Additionally, a defendant should be encouraged to consult with counsel before effectuating a waiver. Only by consulting with a defense attorney can a defendant be fully confident that waiver is appropriate in his or her case.

3. *Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.*

Counsel must be appointed to any defendant who is financially unable to hire counsel.[55] In other words, if a person cannot afford to hire an attorney without substantial financial hardship, counsel should be appointed.[56] Substantial hardship should be determined by looking at the typical cost of hiring counsel for the type of charge the defendant is facing. Moreover, the individual's ability to pay must not only assess his or her income and available resources, but also his or her expenses, including family support obligations and debts.[57]

The assessment of whether an individual can afford to hire counsel should be made through a formalized process that ensures uniformity and avoids conflicts of interest.[58] Jurisdictions should "[e]rr on the side of providing counsel, and avoid overly stringent screening criteria that chill the exercise of the right to counsel."[59] A default in favor of the appointment of counsel encourages authorities to undertake screening quickly and efficiently. Indeed, if attorneys are provided to all defendants who appear without counsel at first appearance, screening should be completed in advance of any subsequent hearing, so that the defendant is never forced to appear without counsel. Additionally, prosecutors should be excluded from participating in the eligibility determination process.[60]

4. *Ethical prohibitions on prosecutors speaking with defendants should be strictly enforced.*

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 cannons 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."[61]

In criminal cases, given that all defendants who cannot afford counsel are entitled to appointed counsel, it should be assumed that each defendant is or will be represented by defense counsel until and unless a waiver of counsel, with a full and appropriate colloquy, is processed by the court. Until that time, no defendant should be encouraged or required to talk to a prosecutor. Indeed, prosecutors should be strictly forbidden from communicating directly with defendants, and breaches of this rule should be addressed through the regular bar disciplinary authority.

Deterrents to Asking For Counsel

Even when the judge informs the defendant that he or she has a right to counsel, frequently other factors, such as delay or the cost of court processes, compel the defendant to waive counsel.

Delay

Judges often make it clear to defendants that there are no defense lawyers present in the courtroom to assist at that time, but, if they want the case to proceed that day, they can proceed without counsel. From observation visits across the country, site team members reported many judges saying to defendants, "You can wait for counsel, or you can proceed now without counsel."

For defendants, delay can cause significant problems. There is the ongoing burden of having a criminal charge pending. There is also the burden of multiple court dates. Often, this obligation requires a person not only to miss several days of work, but also to find alternate child care. These inconveniences can significantly strain a defendant's resources, particularly someone who is indigent.

The threat of delay is particularly acute for those defendants who are in custody. It is a frequent misunderstanding that people accused of misdemeanors,

particularly non-violent misdemeanors, do not remain in jail during their case. In fact, people charged with misdemeanors frequently are detained pending trial, particularly if they are indigent. In these situations, further delaying adjudication to wait for counsel means additional time in jail. Sometimes, defendants spend more time in jail waiting for their day in court than they would if they pled guilty and were sentenced.

A couple of recent cases, documented by law professors, aptly demonstrate these problems:[62]

- **GEORGIA:** Tony Humphries was charged with jumping a subway turnstile in Atlanta. He sat in jail for 54 days before a lawyer was appointed, far longer than the sentence he would have received if convicted. His incarceration cost the taxpayers $2330.

- **MISSISSIPPI:** A woman accused of a shoplifting offense spent a year in jail, before any trial, without even speaking to her court appointed lawyer.

In Allegheny County, Pennsylvania, cases are assigned to an attorney a day or two before the pretrial conference, which is held six weeks after the "formal arraignment." During that six-week period, there is no actual representation. Up to 10 weeks can pass before an attorney actually works on the case. During the site visit, one of the senior managers in the defender office described this as "the chief weakness" of the office. Another attorney noted that the court rules require motions to be filed within 30 days of the formal arraignment, which is impossible because the lawyer is not assigned to the case at that point.

Application Fees

To receive public defense services in some jurisdictions, a defendant must submit an application and pay an application fee.[63] In the early 1990s, the use of application fees for those who sought appointed counsel proliferated.

In South Carolina, for example, an indigent defendant must pay a $40 fee to be eligible for a public defender.[64] Although authorized, waiver of the fee does not occur often. A defender from South Carolina, in response to the survey, reported that the fee "keeps many misdemeanor level clients from seeking ... services."

In Washington, one attorney stated that about half of her clients are college students. They are required to pay a fee of $200, which many cannot afford. New Jersey allows application fees of up to $200, and some municipalities charge the maximum amount.[65]

Application fees have a deterrent effect on the exercise of a defendant's right to counsel. This deterrent effect can be stronger in misdemeanor cases where the defendant may erroneously view a conviction as minor or unimportant. "The potential chilling effect of application fees is particularly troubling given recent reports of judges accepting and even encouraging invalid waivers of counsel and guilty pleas from unrepresented indigent defendants charged with misdemeanors, in efforts to move cases through their overburdened dockets as quickly as possible."[66] When they learn of the fee, defendants frequently choose to waive the right to counsel to avoid the charge.

Recommendations — Deterrents To Asking for Counsel

1. Defense counsel should be available to represent an accused person at the first appearance.

The Supreme Court frequently has acknowledged that most defendants are not capable of effectively representing themselves in criminal judicial proceedings. As the Court stated in *Powell v. Alabama*, "[t]he right to be heard would be, in many cases, of little avail if we did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."[67] 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.

The first appearance is critical, particularly in misdemeanor cases. Not only are bail determinations made, but because so many misdemeanor cases are resolved at first appearance, pleas are entered and sentences imposed. Proceeding without counsel can have a significant prejudicial effect on the defendant. The defendant may not understand the effect of speaking to the judicial officer and may incriminate himself. He may be forced to make difficult assessments about what he should and should not tell the judicial officer. For example, imagine the defendant is a domestic worker who is paid in cash by her employer. If the judge asks the defendant whether she is employed — the defendant has to decide, without counsel, whether to say yes or just not reply. She likely will worry that saying yes will result in her employer being reported to the Internal Revenue Service, and that she will lose her job if that happens. Similarly, a defendant asked about family in the area may be hesitant to answer if the family members are in the country illegally.

When a defendant stands silent with regard to these major factors in bail determination, he or she is often jailed pending trial, which gives rise to horror stories of persons in jail,

pretrial, for longer than the maximum punishment for the crime. Such detentions are not only unnecessary, but also extremely expensive, and the costs accrue directly to taxpayers.

The potential prejudicial effects become even more serious when the defendant is considering pleading guilty at first appearance, not simply addressing the issue of bail. Too often, misdemeanor defendants are pushed, for expedience and convenience — for them as well as for the court — to accept a small punishment quickly and resolve the case.[68] Too many defendants plead guilty without understanding whether they had a defense to the charge, the collateral consequences of the conviction, the conditions of probation, or the consequences of violating probation, including incarceration.[69] It is the role of the defense lawyer to provide this information, a role that the defense lawyer can only fulfill if he or she is present when the critical decisions are being made. Particularly in misdemeanor court, the first appearance is that critical time.

2. *No application fee should be charged for public defense services.*

On its face, a non-waivable application fee is anathema to the right to counsel. The Minnesota Supreme Court has held that a "co-payment" required of all public defense clients was unconstitutional because it made no provision for "the indigent or for those for whom such a co-payment would impose a manifest hardship."[70] Similarly, a New Jersey court reversed a conviction for driving with a suspended license because the trial judge had refused to waive the $50 application fee or consider the defendant's ability to pay the fee. The court wrote:

> [A] trial judge must be more than an unyielding revenue officer. When the concern for collecting a fifty dollar application fee is weighed against a defendant's right to counsel and a fair trial, the scales of justice shift dramatically in favor of the defendant. Given the serious nature of the charge, as well as the apparent bona fide indigent status of the defendant, as demonstrated by the appointment of counsel on other charges, there were compelling reasons to carefully evaluate the defendant's request for the appointment of counsel. Unfortunately, the trial judge's preoccupation with the payment of the application fee foreclosed the defendant's opportunity to obtain assigned counsel.[71]

Application fees can discourage an accused from seeking court-appointed counsel, particularly where waiver of the fee is unavailable, not understood by the clients, or rarely utilized. Those seeking counsel at public expense are doing so because they lack the funds to hire private counsel. In many jurisdictions, to be eligible to receive appointed counsel, the defendant must be at or below the poverty line, or some small multiple thereof.[72] If a defendant cannot pay the fee and does not understand that the fee may be waived, she may feel she has no other choice but to proceed without counsel. For this reason, no application fee should be charged to access counsel in misdemeanor cases.

If a fee must be charged for public defense services, it should be a contribution fee subject to waiver and the procedure for waiver should be well publicized and easily invoked. In 2004, the American Bar Association adopted Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases. Guideline 2 addresses the Determination of Ability to Afford a Contribution Fee, and states:

> An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford. Whenever an order for a contribution fee is under consideration, the accused person or counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded. If a contribution fee is ordered prior to providing counsel to the accused person, the decision to require a contribution fee should be subject to review at the request of counsel and counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded.[73]

Further, the ABA Guidelines require that notice be provided in advance that a contribution fee may be required "if the person has the ability to do so without substantial financial hardship."[74] The notice should state "that counsel will be provided at all stages of the proceedings regardless of whether the person actually pays the fee."[75]

"[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."

— U.S. Supreme Court, *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

Misdemeanor Caseloads

No matter how brilliant and dedicated the attorney, if the attorney is given too large a workload, he or she will not be

able to provide clients with appropriate assistance. The National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.[76] Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged. Similarly, in 2007, the American Council of Chief Defenders ("ACCD") issued a "Statement on Caseloads and Workloads" recommending that defenders handle no more than 400 misdemeanors per year.[77]

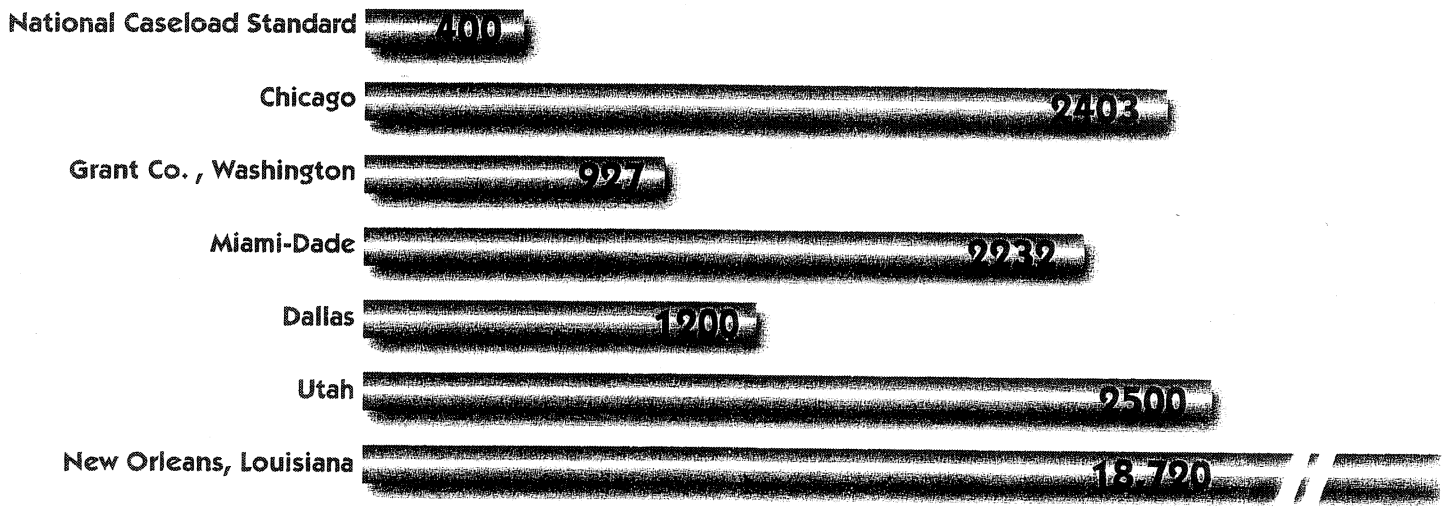
Caseloads should never surpass the maximum caseload standards. In fact, there are a variety of reasons that caseloads should be lower than the standards propose. For example, the standards assume that the defender is a full-time litigator. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. Similarly, the caseload standards assume a relatively close proximity between the defender and the courthouse. Any significant distances that must be traveled by the defender in the course of his or her work should reduce the expected caseload.

The caseload standards also assume appropriate levels of support services. In other words, they assume that the attorney has access to secretarial assistance, paralegal assistance, basic workplace technology, legal research, and investigatory services. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be approximately one paralegal, one secretary, and one investigator for every four attorneys. Offices that do not maintain the recommended ratios of support staff to attorneys must reduce their workload expectations for attorneys.[78] For these reasons, the ACCD further recommended that each jurisdiction review its situation and amend the standards as necessary, noting that "the increased complexity of practice in many areas will require lower caseload ceilings."[79]

Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case:

- During the webinar, the acting director of the office reported that, in New Orleans, part-time defenders are handling the equivalent of almost 19,000 cases per year per attorney, which literally limits them to seven minutes per case.
- In at least three major cities, Chicago, Atlanta, and Miami, defenders have more than 2,000 misdemeanor cases each per year.[80]
- According to a response to the survey, in Dallas, Texas, misdemeanor defenders handle 1,200 cases per year.
- One attorney working in federal magistrate court in Arizona reported in a survey response that misdemeanor attorneys there carry 1,000 cases per year.
- In response to the survey, one Tennessee defender reported that the average misdemeanor caseload per attorney in his office was 1,500 per year. Two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards.
- In Kentucky, the defenders were assigned an average of 436 cases per lawyer in fiscal year 2007, of which 61 percent were misdemeanors.[81] In other words, each defender had 170 felonies, which is more than a full caseload for one attorney, plus 266 misdemeanors, which by itself is two-thirds of a full-time caseload under the national standard.

Misdemeanor Caseloads By Jurisdiction



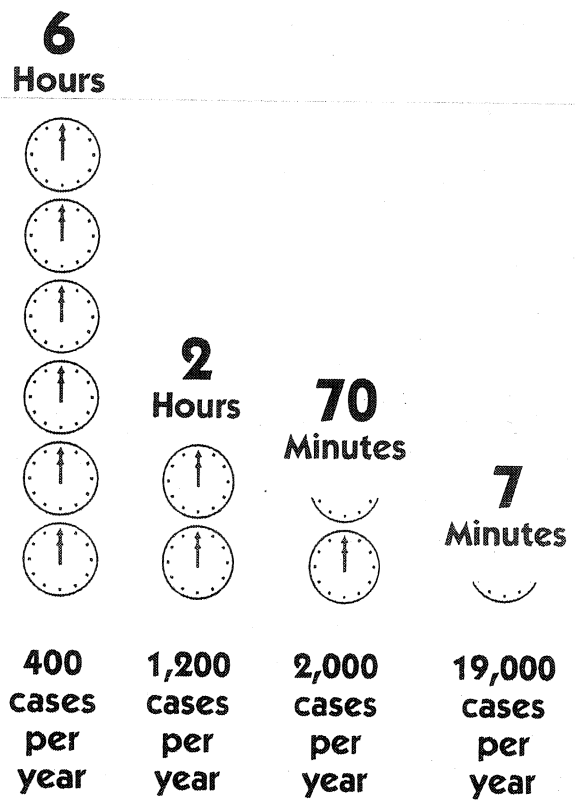
- An attorney from Utah reported that misdemeanor public defenders in that state carry caseloads of 2,500.
- In Grant County, Washington, in 2006, the four defenders in county misdemeanor court averaged 927.25 cases each.[82]

The Meaning of the Caseload Numbers

A lawyer who takes three weeks of vacation and 10 holidays a year has 47 weeks available to work for clients. If he or she never takes a day of sick leave and works 10 hours a day, five days a week,[83] the attorney's schedule would allow about one hour and 10 minutes per case if the lawyer had a caseload of 2,000 cases per year. A lawyer with a caseload of 1,200 would have less than two hours to spend on each case.

The time per case has to cover the client interview, talking with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing motions and memoranda, including sentencing memoranda, and attending court hearings. There would be no allotted time for training, reading new appellate cases, or attending meetings at the courthouse or the local bar association related to misdemeanor practice.

A Kentucky columnist aptly summed up the crisis of excessive caseloads, stating: "The Sixth Amendment to the U.S. Constitution guarantees the right to an attorney, not the right to three hours of a grossly overloaded public defender's time."[84]



Approximate Time Per Case

"I think there has been a sharpening awareness of the ethical considerations for public defenders. ... Public defenders have handled caseloads few private lawyers would have ever thought of handling. Poor people have a right to a lawyer who is just as ethical as people of means do."

— Ernie Lewis, former Public Advocate, state of Kentucky.[85]

Excessive Caseloads Put Lawyers in Jeopardy

In most state ethical rules, as in the Model Rules of Professional Conduct, the very first substantive rule states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[86] A number of ethical opinions have concluded that if her caseload is threatening her ability to competently defend current clients, a public defender must refuse to accept further cases. Additionally, if refusing future cases is insufficient, the public defender has a duty to seek to withdraw from existing cases to ensure competent representation for other defendants.

In 1990, the Arizona state bar issued an ethics opinion stating "when a Public Defender has made a factual determination that his or her Office cannot competently and diligently represent the number of persons assigned to it, the Public Defender must take action so that 'A lawyer's workload should be controlled so that each matter can be handled adequately.'"[87] The opinion observed that this "will require the Public Defender to seek to decline appointments or withdraw from appointments already made until caseloads are manageable."[88]

A Public Defender Stands Up, and Faces Contempt[89]

On August 15, 2007, a young public defender in Portage County, Ohio, named Brian Jones was assigned to represent a defendant charged with misdemeanor assault. The case was set for trial the following day.

Because of his caseload, the defender had to meet with six other clients the next day, before even looking at the defendant's file. He then met with the defendant for twenty minutes.

When the case was called for trial, the defender explained to the judge that he would need a continuance in order to prepare for trial. The judge responded that the defender could have the lunch hour to prepare. The defender attempted to argue that he needed to speak with witnesses other than those the state had subpoenaed, but the judge refused the postponement. When court reconvened, the defender argued again that he should be permitted time to prepare, but the judge ordered the trial to commence.

The defender waived opening statement, informing the judge that he would not be able to participate in the trial because he was not sufficiently prepared. The judge held the defender in contempt and ordered him taken into custody. A hearing was later held on the contempt, and an ethics expert testified that the defender would have been in violation of his ethical obligations had he agreed to proceed to trial unprepared. Despite this testimony, the judge upheld the contempt citation. In upholding the decision, the judge noted that defenders plead cases and take cases to trial with minimal preparation all the time.[90]

The defender appealed, and the Court of Appeals reversed the conviction, stating:

> Under these circumstances, effective assistance and ethical compliance were impossible as appellant was not permitted sufficient time to conduct a satisfactory investigation as required by Disciplinary Rules 6-101 and 7-101 of the Code of Professional Responsibility, Rule 1.1 of the Ohio Rules of Professional Conduct, and the Sixth Amendment of the United States Constitution. It would have been unethical for appellant to proceed with trial as any attempt at rendering effective assistance would have been futile. Appellant properly refused to put his client's constitutional rights at risk by proceeding to trial unprepared.[91]

More recently, the ABA issued a similar ethics opinion, finding:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. ...[L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.[92]

The ABA Opinion further concluded that if a supervisor fails to relieve an individual defender of an overwhelming caseload, the individual defender must pursue the matter further, including seeking relief directly from the court.[93]

"There can be no question that taking on more work than an attorney can handle adequately is a violation of a lawyer's ethical obligations. ... No one seriously questions that a lawyer's staggering caseloads can result in a breach of a lawyer's duty of competence."

— Arizona Ethics Opinion 90-10.[94]

In a number of states, public defense attorneys have been disciplined for violating ethical rules by handling excessive caseloads and neglecting their clients. The California Supreme Court, for example, suspended two defenders for failures related to excessive caseloads. San Benito County hired a contract defender to do the bulk of its public defense work. The contract provided that the contractor could hire a subcontractor. The contract defender handled approximately 1,000 lower level cases per year, plus some felony cases, while the subcontract lawyer hired by the contract defender handled approximately 250 felony cases.[95] According to the bar discipline case against the supervisor, the subcontract lawyer "did not provide adequate legal services and was frequently not adequately prepared for court."[96] The contract defender was suspended for one year for the failure to properly supervise the subcontract lawyer. The subcontract lawyer was suspended for three years after admitting that she conducted "no discovery, conducted virtually no investigation, failed to obtain the victim's rap sheet, filed no motions in limine, submitted no jury instructions and was unable to concentrate during the trial" of a man who was charged with rape.[97]

Similarly, the Washington Supreme Court disbarred a former public defender from Grant County. The state bar disciplinary notice regarding disbarment cites as one of the reasons for the disbarment the fact that the attorney was "voluntarily maintaining an excessive caseload while one of the lawyers under contract to provide indigent criminal defense in Grant County."[98] The hearing officer found that the attorney's "excessive caseload was prejudicial to the administration of justice."[99]

Recommendations — Excessive Caseloads

1. ***All persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.***

Excessive caseloads dramatically diminish the effectiveness of representation. For this reason, as noted above, national legal practice standards and ethical guidelines universally call for defender workload to be controlled. As one Tennessee respondent to the survey stated, "a better system would allow us to ... have fewer clients, so we could focus more and earlier on the needs of each client."

A number of defender offices successfully set and maintain caseload standards. The Defender Association in Seattle, Washington, for example, maintains a caseload maximum of 380 cases per year per attorney in the Seattle Municipal Court. This limit is imposed both by city ordinance, which the Defenders helped to draft, and by collective bargaining agreement.[100] Similarly, the King County District Court lawyers have an annual ceiling of 450, and the county budgeting process is based on that number. The Defender Director noted that in the last several years her office has managed to keep the district court caseloads lower than the 450 case credit ceiling.[101]

In Massachusetts, the Committee for Public Counsel Services uses assigned counsel to handle most of its misdemeanor cases. The lawyers are limited to 300 cases a year and "[a]ny counsel who is appointed or assigned to represent indigents within the private counsel division is prohibited from accepting any new appointment or assignment to represent indigents after he has billed 1,400 billable hours during any fiscal year."[102]

In Wisconsin, caseload limits for public defenders are set by statute.[103] The standards were, in part, based on a case-weighting study conducted in the early 1990s by The Spangenberg Group.[104] The statute acts as a "safety-valve."[105] When caseloads reach the standards set forth in the statute, the public defender can obtain relief, and overflow cases are assigned to private counsel by the courts.

2. ***When caseloads become burdensome, defenders, pursuant to their ethical obligations, should seek to discontinue assignments and/or withdraw from cases until the caseloads become manageable.***

To avoid a breach of the attorney's ethical duty, a defender office or individual defender confronting an excessive caseload is obligated to move the court to cease appointment of new cases and, if necessary, move to withdraw from existing cases.[106] In the past few years, a number of public defender offices have successfully petitioned courts to reduce their caseloads to prevent violations of the attorneys' ethical obligations and ineffective assistance. These cases provide ample precedent for the duty of defenders to reduce caseloads to prevent breaches of their ethical obligations.

In 2008, the public defender in Mohave County, Arizona, won a motion to withdraw from a series of felony cases.[107] The order granting the motion stated:

> The evidence presented at the hearing leaves the court with no doubt whatsoever that the attorneys in the Public Defender's Office cannot continue representing the Defendants in these cases in light of their already existing caseload. ... Requiring or even allowing the Public Defender's Office to remain as appointed counsel in these cases would likely compromise them from an ethical standpoint and deprive the Defendants in these cases of their rights to effective representation.[108]

The Miami-Dade County Public Defender also recently moved for appointment of other counsel in non-capital felony cases because he did not have enough attorneys to

represent the clients effectively.[109] In granting the motion, in part, the judge stated, "the evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused."[110] The court concludes, "the testimonial, documentary and opinion evidence shows that [the public defenders'] caseloads are excessive by any reasonable standard."[111] The state's attorney immediately appealed the order, and the appeal is now pending before the Third District Court of Appeals of the State of Florida.[112]

In California, public defenders have an established practice of declaring that they are unavailable to take cases when the caseload reaches whatever limit the office has set. The origin of this practice is a 1970 court case, in which a California appellate court stated, "When a public defender reels under a staggering workload ... [he or she] should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense."[113]

Why Are Misdemeanor Caseloads So High?

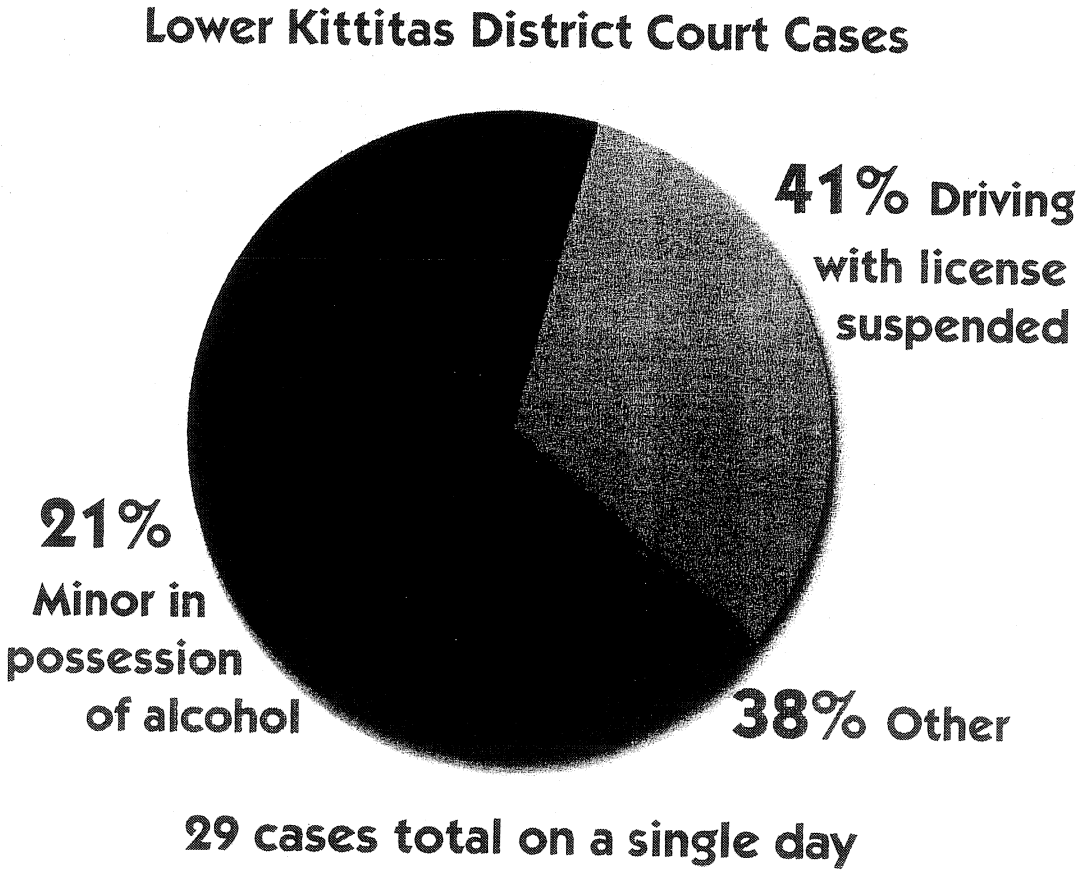
The need to reduce caseloads to ensure that indigent defendants across the country receive competent representation is obvious. It therefore requires an examination of the factors that lead to excessive caseloads.

Overcriminalization

One issue noted by both researchers and conference attendees concerning misdemeanor courts was the ardent enforcement of crimes that were once simply deemed undesirable behavior and punished by societal means or a civil infraction punishable by a fine. Conferees gave examples from around the country, including unleashed pet laws, seatbelt laws, laws prohibiting people from putting their feet on subway seats or lying down across two subway car seats, and laws against riding bicycles on the sidewalk.

- The offense of sleeping in a cardboard box is criminalized in New York under the New York City Administrative Code § 16-122(b). It is punishable by a fine of not less than $50 or more than $250, imprisonment for not more than 10 days, or both.[114]
- It is also a crime in New York to occupy more than one seat, sleep, or litter on a subway.[115] Each of these crimes is punishable by a fine of up to $25, imprisonment for not more than 10 days, or both.[116]
- In Orlando, Florida, it is a crime to feed the homeless.[117]

A number of defenders noted that their dockets are clogged with crimes that they do not think should be punishable by jail, including underage possession of alcohol, turnstile



jumping, fish and game violations, driving with a suspended license, and pedestrian solicitation. In Tampa, the site team observed defenders preparing to try a case for solicitation of alcohol, which involved an exotic dancer accused of improperly soliciting a patron to purchase an alcoholic beverage.

On the day of the site visit to the Lower Kittitas District Court in Washington, 29 cases were heard. Twelve were driving with license suspended, third degree cases. Six were minor in possession of alcohol cases. Another Washington court, Lynnwood Municipal Court, has similar statistics. In January 2008, 104 cases were assigned to the contract public defender. Of these, 36, or more than one-third, were driving with suspended license, third degree, cases.

In fact, driving with a suspended license charges make up a significant part of the caseload in many jurisdictions. Most of these charges result from the failure to pay fines or fees, such as tickets for a broken tail light or not having insurance, parking tickets, or even failure to pay child support.[118] Many defenders observed that criminalizing driving with a suspended license is problematic because the charge usually results from a license suspension for failure to pay fees or fines. The charge thus frequently criminalizes the inability of a defendant to pay, which creates an unbreakable cycle. A North Carolina defender who handled 600 misdemeanor cases last year noted in a survey response:

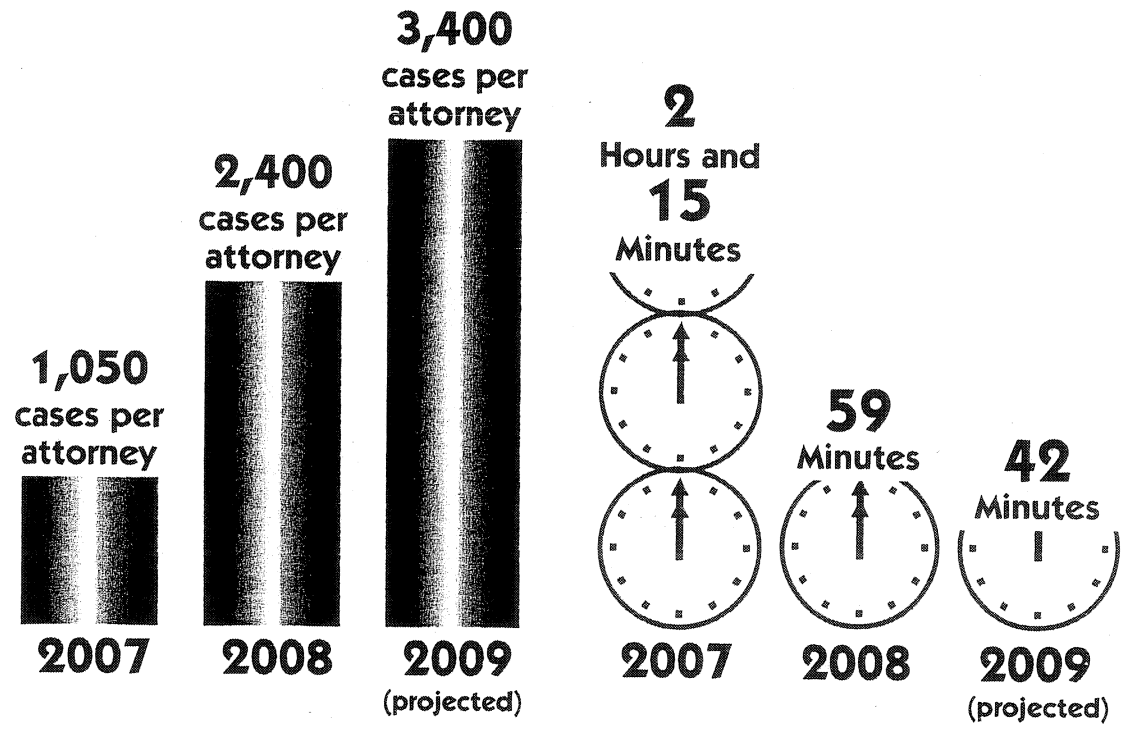
> One of the most common charges is driving while license revoked. Since we have no public transportation, it is unrealistic to expect that people will not drive. Licenses are revoked for non-payment of child support, failing to pay fines, and failure to appear in court. Once a license is revoked, any moving violation convictions suspend the license even longer, which usually leads to more revoked driving charges.

An NLADA report similarly observed that in Grand Traverse County, Michigan, "approximately 10 percent of all cases are for driving with a suspended license (DWSL). ... The prosecutor also noted that DWLS needs to be addressed, that 'it's an economic issue,' and that most of the defendants have no other criminal record."[119]

Misdemeanor Indigent Defenders Take Brunt of Budget Shortages

Experts have observed innumerable times that public defender offices across the country are underfunded.[120] What is essentially unreported is how this underfunding disparately impacts those accused of misdemeanors. Indigent defenders facing budget shortages almost always prioritize felony cases, to the detriment of persons accused of misdemeanors. It is simple triage. The funding is not there to adequately staff both misdemeanor and felony cases. Indigent defenders scramble to provide the best defense to those in the most dire need. Thus, they prioritize clients

Atlanta City Public Defender Office Caseloads



who are at-risk for the lengthiest incarceration or death sentences.

A Cook County defender reported that there is undoubtedly a choice to prioritize serious felonies. The office has a specialty division for homicide cases in which caseloads are closely controlled. The misdemeanor caseload, however, is more than five times the national standard.

In Allegheny County, Pennsylvania, one lawyer observed that a felony is more likely to go to trial than a misdemeanor. Another attorney in the office told a site team member that, with as many cases as they have, they have to set priorities, and they are going to be "more concerned about the guy going up the river than one looking at probation." A supervising defender in Missouri, whose 19 lawyers handled 3,487 cases in the past year, bluntly reported, "The clients who are cheated attorney time are those with misdemeanors or lower-grade felonies."[121]

When budgets are cut, misdemeanor public defense is often among the first services to be adversely affected. In Atlanta, for example, when the city faced a shortfall, among the first cuts was the city court's defender. The Atlanta City Public Defender Office, which handles the low level city court cases, was already overburdened. In 2007, the office had 20 lawyers who together represented clients in about 21,000 cases (1,050 cases per attorney).[122] After budget cuts, the director reported that in addition to having to lay off six lawyers, four other attorneys had resigned, leaving her with 10 attorneys to handle an estimated 24,000 cases this year (2,400 per attorney, or six times the national standards). According to press reports, additional cuts may require reduction to only seven attorneys. These cuts would bring caseloads to over 3,400 per lawyer or more than eight times the national standards. Each lawyer would have to handle more than 13 cases each work day. The defender observed, "It's an unfortunate situation that because of the city's budget difficulties, we have to take our share."[123]

Budget cuts also often lead to the increased use of flat-fee contracts for public defense services. A flat-fee contract is one in which a defender receives a fixed amount of money to handle a percentage or all of the public defense cases in a jurisdiction or court, or a defender is given a flat-fee per case without limit on the number of cases the defender can accept (or a limit that exceeds national standards).[124] Recently, the use of flat-fee contracts for public defense services has expanded dramatically.[125] A report in California noted that "[c]ontract defenders are the primary provider of indigent felony and misdemeanor representation in 24 counties (41 percent). ... The amount of compensation afforded by these contracts is often based upon a fixed fee per case or a flat-fee for the expected annual caseload."[126] Flat-fee contracts put enormous pressures on defenders, particularly when the caseload rises above expected levels and the defender does not have access to additional resources to handle the increase. The defender then is forced to decide that some cases will receive little or no attention, creating a conflict of interest.

Recommendations — Causes Of Excessive Caseloads

1. Offenses that do not involve a significant risk to public safety should be decriminalized.

As the Supreme Court observed in *Argersinger*, "[o]ne partial solution to the problem of minor offenses may well be to remove them from the court system."[127] Many misdemeanor crimes do not involve significant risks to public safety, yet they result in high numbers of arrests, prosecutions, and people in jail. In fact, many do not involve any risk to public safety. The criminal justice system would operate far more efficiently if these crimes were downgraded to civil offenses.

The state of Hawaii has undertaken a comprehensive effort "to make resolution of minor criminal offenses, including traffic violations, as simple as possible for the average citizen and to ensure that police, prosecutor, and judicial resources are focused on the most serious criminal offenses."[128] The legislature passed an act requiring the Legislative Reference Bureau, a non-partisan governmental research institution, "to identify minor criminal offenses for which typically only a fine is imposed and which may be decriminalized without undermining the ability of government to enforce laws within its jurisdiction."[129] The Legislative Reference Bureau published the report entitled "Decriminalization of Nonserious Offenses: A Plan of Action," in January 2005.[130]

The report found that "numerous criminal offenses remain on the books outside the Penal Code that are routinely disposed of by a fine but which, because they are technically criminal, require at least one court appearance and all of the time and expense that goes with it. Some of these are traffic offenses but many are offenses that have become arcane, sometimes perceived as being irrelevant with the passage of time."[131]

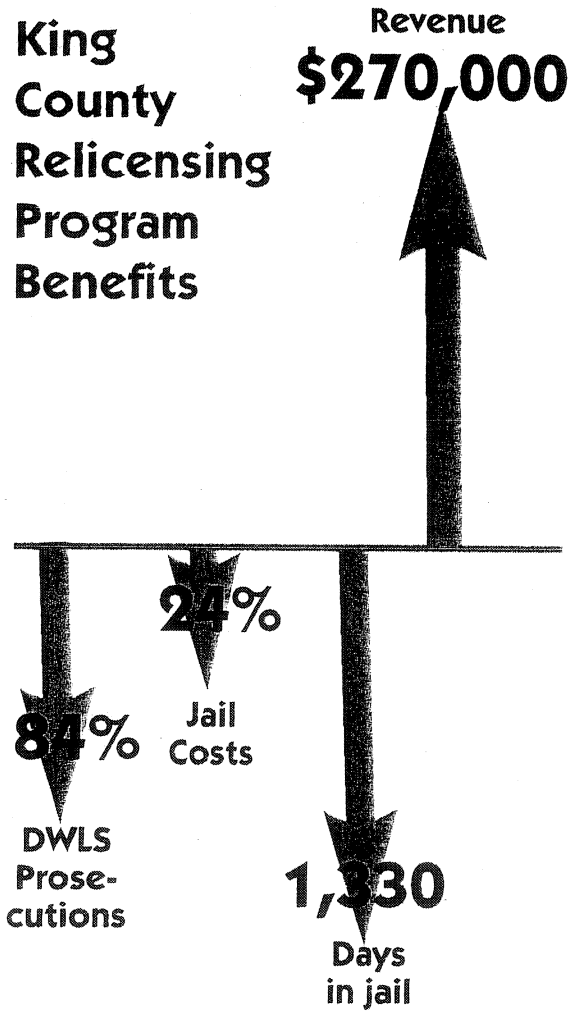
The report recommended identifying and considering for decriminalization "those offenses that, despite the possibility of serious penalties, are routinely and consistently being disposed of with fines."[132] In the 2008 legislative session, the Hawaii legislature, following the recommendations of the report, passed a law decriminalizing, among other things, a number of agricultural and conservation-related offenses, as well as transportation and boating offenses.[133] The legislature also established a procedure for proposing the decriminalization of other offenses in the future,[134] and it is expected that additional statutes will be reviewed in coming legislative sessions.

Similarly, the Massachusetts legislature, in response to the rising costs of indigent defense services, established a commission "to identify all violations of the general laws that are currently classified as a misdemeanor," determine how often each such law is charged, and determine how the cases are resolved.[135] Based upon this information, the commission is to

"determine the feasibility of classifying misdemeanor offenses as either 'class A' misdemeanors or 'class B' misdemeanors ... [such that] 'class B' misdemeanors would be criminal offenses deemed non-serious and warrant assessment of a civil fine with no possibility of incarceration."[136] Although the work of this commission has not yet begun, decriminalization efforts are proceeding in Massachusetts. By general election ballot measure, the citizens of Massachusetts recently voted overwhelmingly to decriminalize possession of small quantities of marijuana. The punishment for possession of less than one ounce of marijuana is now a fine of up to $100 and forfeiture of the drug.[137]

In Lincoln, Nebraska, a formal assessment of the public defender office found the office was handling excessive caseloads and recommended that the city council undertake a review of ordinances to re-evaluate appropriate punishment.[138] Thereafter, the public defender proposed decriminalization of a number of misdemeanor offenses, including dog leash and trespass offenses, to address rising caseload and budget challenges.[139]

The state criminal codes are clogged with offenses that have little to no impact on public safety, but are nonetheless punishable by imprisonment, triggering the full panoply of due process rights. Such crimes include feeding the homeless, riding a bicycle on the sidewalk, fish and game violations, and public urination. Every state should undertake a systematic review of misdemeanor offenses for the purpose of identifying offenses that can be decriminalized without substantially impacting public safety.



If it is determined that an offense should be switched from a misdemeanor to a violation, it is critical to also review the collateral consequences that can result from a conviction. Often, the collateral consequences are worse for the defendant than the punishment for the offense. For a violation, a defendant does not have access to a defender to instruct him or her on the collateral consequences of a conviction. Under these circumstances, to impose harsh collateral consequences, like housing limitations, deportation, and employment limitations would be fundamentally unfair.

2. *Diversion programs should be expanded.*

Increasingly, diversion is seen as a practical alternative to full criminal court prosecution of minor offenses. The American Bar Association has urged "federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision[.]"[140]

As noted above, driving offenses, particularly the offenses equivalent to driving with a suspended license, make up an extraordinary proportion of the misdemeanor caseloads in many jurisdictions. For this reason, Miami-Dade County, Florida began a diversion program called Drive Legal, which permits an individual to pay down the fines that resulted in the suspension of his or her driver's license over time and/or through community service.[141]

Similarly, King County, Washington, has a diversion and relicensing program. The creation of the program was a combined effort of The Defender Association, the King County prosecutor, the district court, and the county executive and county council. In the relicensing program, which is available to individuals whose license has been suspended regardless of whether they have charges pending, the person is given an opportunity to pay the underlying fines that led to the suspension through community service or work crew.[142] If completed, the prosecutor dismisses the pending charges.

In 2004, a consultant analyzed the program and concluded that, in the first nine months of operation, there was an 84 percent reduction in prosecution filings in driving with a suspended license cases and a 24 percent reduction in jail costs, with 1,330 fewer jail days. In addition, the program generated twice as much revenue than it cost, both in producing payments on tickets and in savings for prosecution and defense as well as jail.[143]

Spokane, Washington, recently re-instituted a relicensing program. It had 340 graduates in the first three months of

operation. The city prosecutor described the program in an email as follows:

> It helps all but the most violent offenders who have lost their driver's license for failure to pay tickets get into a structured repayment program in a non-collection agency status. Said another way, we help people with a program that allows them to pay down the original debts free of interest and collection fees. The twist that really makes this work is that we lift their license holds and allow them to get their license BEFORE the debts are paid in full.

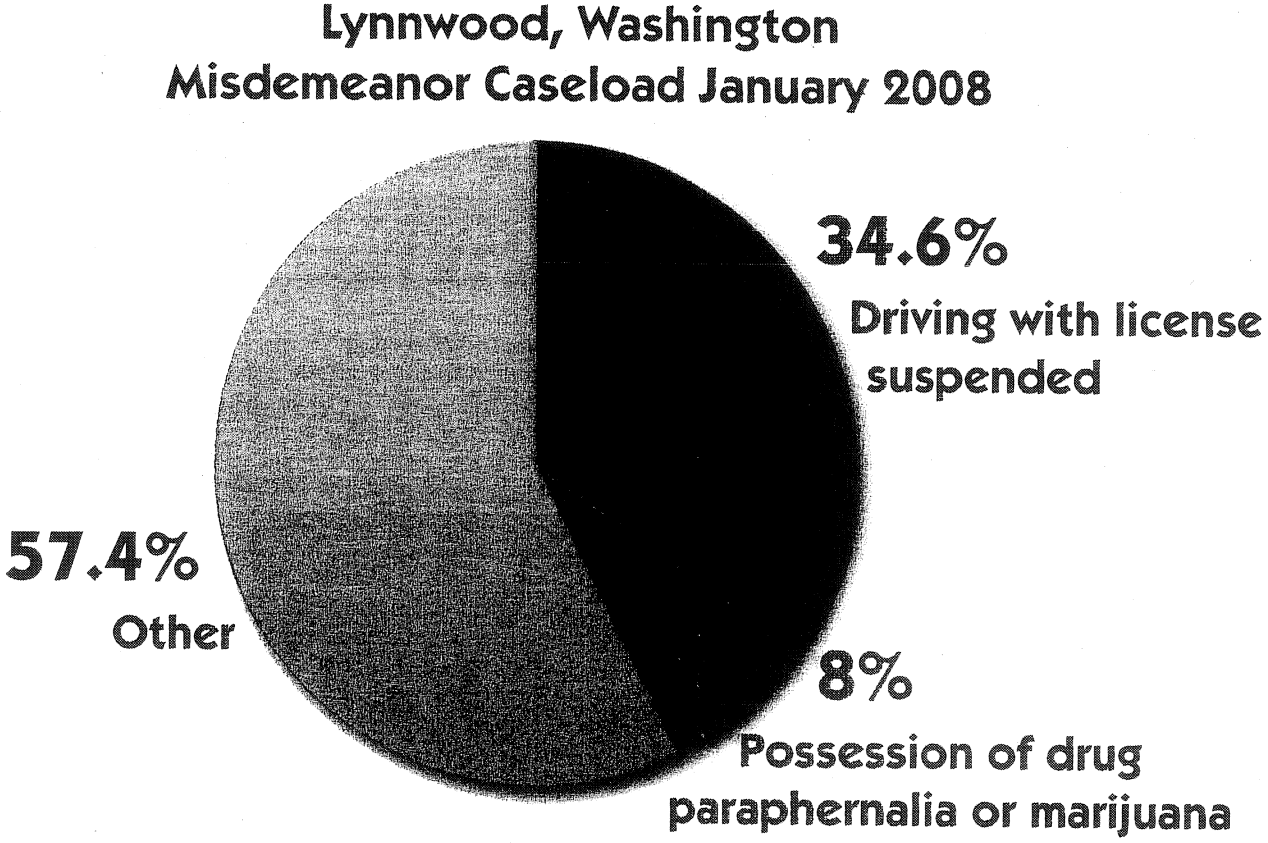
Like the program in King County, an individual does not have to have a pending charge to enter the program.[144] The potential impact of this program on the overall caseload is significant, as the Spokane County public defender reported that one-third of his misdemeanor cases are DWLS 3. The state Office of Public Defense is funding a half-time position in the Defender office to assist clients to enter and complete the program.

The Sacramento public defender reported in an email that, in addition to statutorily created diversion programs, they have established others as the result of negotiations with the district attorney's office:

> We have the standard drug diversion. ... If the counseling classes are completed[,] then the case is dismissed and the client can report that he has never been arrested or convicted of a drug offense. ... We [also] have diversion for theft, battery, vandalism, and other low end misdemeanors.

These examples demonstrate that not only are diversion programs successful, they also can be cost effective, and provide benefits to the public. Indeed, the impact on the defendant, the court system, the taxpayer, and the community can be profound.

Consider Lynnwood Municipal Court in Washington State. As noted above, in January 2008, 104 cases were assigned to the contract defender. Of these, 36, or 34.6 percent, were DWLS 3 cases. Eight were possession of drug paraphernalia or marijuana. Pre-filing diversion of those 48 cases would have reduced the defender caseload by 46 percent, as well as drastically reducing the court docket. Instead, according to the contract defender, most defendants stipulate to the police report and are found guilty. The court then gives them up to 90 days to address the problem and return with a license. Less than half return, and often, the court issues warrants. This results in new arrests, which the public defender and courts must then handle.



3. *Funding for misdemeanor defense should permit the maintenance of appropriate caseloads.*

To the extent misdemeanor offenses carry a possibility of incarceration, the legislative body with responsibility for funding the public defender program must appropriate funds that permit defenders to maintain reasonable caseload limits. Funding should be based on estimates of the number and types of cases the program is expected to handle in the upcoming year, with the expectation that each defender will have a caseload appropriate for the jurisdiction while not exceeding national standards.[145] In the event that the caseload increases, the program should be permitted to seek supplemental funds, or be permitted to stop accepting cases in order to maintain appropriate caseloads.

A number of jurisdictions have been able to maintain caseload limits by tying funding to the number of cases to which the public defender is assigned. As previously noted, in Washington, the King County district court lawyers have an annual caseload limit of 450 cases, and the county budgeting process is based on that number.[146] In Colorado, the limits are based on a comprehensive, jurisdiction-specific case weighting study that occurred in the mid-1990s, which has been periodically updated.[147] "The Colorado legislature has accepted the formula for purposes of both budgeting and analyzing the fiscal impact of proposed legislation."[148]

4. *Counties and states should discontinue the use of flat-fee contracts as a means of providing indigent defense services.*

The primary goal of flat-fee or fixed price contracting is not quality representation but cost limitation. These contracts require an attorney to handle an undefined number of cases for a fixed price, or establish a fixed price per case and allow an attorney to accept an unlimited number of cases. In both instances, flat-fee contracts encourage attorneys to process cases quickly. If an attorney gets to count the case — and receive payment — once the case is arraigned, the attorney is motivated to dispose of the case as quickly thereafter as possible to maximize profit. These contracts discourage investigation, consultation of experts or specialists, and taking cases to trial. Accordingly, flat-fee contracts create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions.[150] Taking the lowest bidder in a flat-fee contract process serves only to emphasize that the primary concern is cost containment and not the constitutional obligation to the defendants.[151]

Recently in Grant County, Washington, a defendant who was wrongly convicted received a $3 million verdict after a federal court jury found that his attorney's representation was inadequate.[152] The attorney had a flat-fee contract to handle indigent defense cases in the county and carried a caseload of more than 500 felony cases a year. He refused to hire an investigator or other experts, or to pay for a polygraph in the defendant's case.[153]

In part because of the kind of conduct involved in this case, the Washington Supreme Court, in September 2008, amended the Rules of Professional Conduct regarding conflicts of interest with current clients to specifically bar flat-fee contracts where the contract requires the attorney to pay for any conflict attorney, investigative costs, or expert fees out of the contract.[154] The explanation of the new rule stated:

> An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of conflict counsel. For this reason, such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so.[155]

According to the press report following the verdict, as a result of the new ethics rule, "17 other rural Washington counties began dumping their 'flat-fee' contracts with contractor public defenders."

"The 'Rawhide'[149] imagery [of cattle being herded] is perfect. If you turn off the sound and watch Manhattan Criminal Court, there is no way you don't think it is a cattle auction."

— A veteran New York attorney.

Misdemeanor Defense In Practice

The extraordinarily high caseload numbers in misdemeanor practice inevitably require lawyers to cut corners. Site teams witnessed and were told the same things across the country: defenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal

research required or prepare appropriate motions, and their ability to take cases to trial is compromised.

In Allegheny County, Pennsylvania, for example, a lawyer who had about six months of experience told a site team member that generally the lawyers have reviewed the file before coming to court for the preliminary hearing, and they arrive early and talk to the officers and the prosecutor. Another lawyer explained that she will review the files for a few minutes each the night before, then meet with the client for about five minutes in court, negotiate a possible deal with the police officer, and discuss the deal with her client. One attorney described the process as a scramble, and another mentioned that with seven clients, seven officers, and seven DAs in one morning, "[y]ou have to be on your toes the whole session."

A law professor recently spoke with a lawyer working in a defender office with crippling caseloads, who "candidly reported that, prior to the increase in cases in her office, she had conceived of her role as looking for the single issue that would give her client a plausible argument to make in her defense." With case overload, the same lawyer "now looked for the one issue that she could identify to convince her client to resolve the case short of trial."[156]

A respondent to the survey from Nassau County, New York, admitted, "[m]ost interviews happen on court days in the courthouse. Motions are filed but are discouraged by the court and by the fiscal restraints." The Spangenberg Group report on indigent defense in New York[157] also noted deficiencies in how misdemeanor cases are handled:

> In the city court, one public defender reported an open caseload of 800 misdemeanors; she has so many clients that her voice mail cannot hold all of their messages. Another reported 800-850 open cases in the arraignment part in that court. We were told that the city court cases are "triaged" and not all are fully investigated. The Monroe County Public Defender described the situation to the Commission as "outrageous."[158]

Crippling caseloads make it all but impossible to take cases to trial. As one supervising lawyer in Cook County, Illinois, noted, her attorneys "do go to trial, but not as often as they could if the numbers were lower. ... [M]ost trials are bench [trials] and only last a couple of hours." A line defender in Cook County confirmed her assessment, stating, "You can try cases [but only] with severe triaging." One of the Chicago supervisors stated at the May 9 conference in New York that most of the attorneys fresh out of law school want to take cases to trial, but "they tend to get beaten down by the system."

- One defender in Washington reported handling 900 cases in a year. Of those 900, he performed only eight jury trials and one bench trial (a trial rate of 1 percent).
- A Texas defender from a small city who reported having 100 misdemeanor cases and 300 felony cases last year, reported, there are "only 1-2 misdemeanor trials a year for the entire county."

Across the country, over burdened defenders reported taking approximately one in every hundred cases to trial or even less. If a defender does take a case to trial, it cuts even further into the amount of time available for the remainder of her cases. Even a trial that lasts a day or two severely affects the lawyer's ability to prepare the other cases.

Meet and Plead

In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, "legal advice" often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant's case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken. This process is known as meet-and-plead or plea at arraignment/first appearance.

"[C]lients are forced to make VERY difficult decisions with very little investigation or discussion ... due to the number of clients and the short notice we have when appointed."

— A Tennessee public defender.

According to Professor Adele Bernhard, "In 2000 in New York City, assigned counsel lawyers handled 177,965 new defendants in the Bronx and Manhattan. 124,177 of those cases were disposed of at the first appearance — most by a plea of guilty entered after no more than a 10-minute consultation with their lawyers."[159] Similarly, Professor Steven Zeidman, who directs the defender clinic at the CUNY School of Law, reported that "somewhere in the vicinity of two-thirds of all misdemeanor cases are 'disposed of' at the accused's very first court appearance."[160]

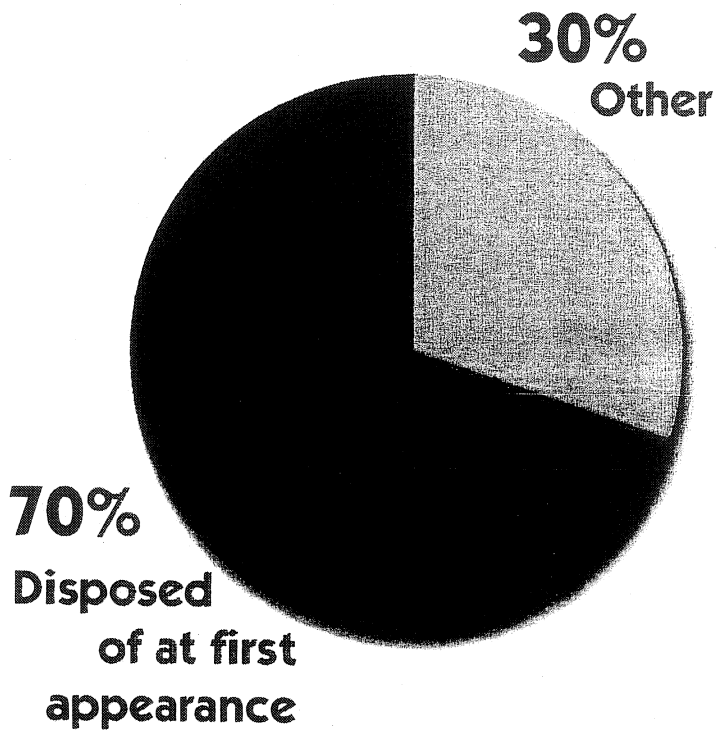
The Justice Department published a story about a rural California county contract defender who assigned all misdemeanor cases to one associate.[161] "She carried a caseload of between 250 and 300 cases per month. She was expected to plead cases at the defendant's first appearance

in court so she could move on to the next case."[162] The misdemeanor associate was fired for seeking a continuance to address pretrial suppression issues in a case.[163]

Site team members observed similar pleas at arraignments in a municipal court in Lynnwood, Washington. Two contract defenders advised as many as 132 defendants on an arraignment calendar in a three and a half hour period. Frequently, the defense lawyer was talking with other defendants in the audience gallery while another of his clients was at the podium talking to the judge.

Once in front of the judge, the total time from presentation of charges to sentencing took about five minutes. While some defendants opted for continuances in order to meet with an attorney or negotiate further with a prosecutor, many did not. Instead, they stipulated to the admission of the police report, which resulted in a finding of guilt. There was no colloquy regarding the rights being waived — including the right to a jury trial and the right to confront witnesses. The judge simply proceeded to sentencing. One defendant appeared and was sentenced to 10 days in jail and a $500 fine for marijuana possession in less time than it takes to get a hamburger from a McDonald's drive-through window.

New York City Misdemeanor Guilty Pleas at First Appearance



In Maricopa County, Arizona, one of the more experienced defenders explained that, having advised a client and negotiated a guilty plea, defenders do not always go to court with the clients for plea and sentencing because of the long wait time in court. The defenders prepare the client, often spending a couple of hours on preparation, but they rely on the court to ensure that the plea and sentence is fair. By way of explanation the defender noted that the judges "are supposed to bring us in if there is a question."

There is a growing body of evidence that suggests that innocent people frequently plead guilty. As early as the 1960s, scholars observed the likelihood that pressures to plead were resulting in innocent people pleading guilty.[164] Innocent defendants often plead guilty because the punishment offered by the prosecutor in the plea agreement sufficiently outweighs the risk of greater punishment at trial.[165] In the misdemeanor context, this pressure can be even more compelling because the punishment in the plea offer, frequently time served or probation, appears minimal, and the prospect of fighting the charge has not only the risk of more substantial punishment, but also tremendous inconvenience, including possible ongoing pretrial detention, missing additional days of work, and having to find alternate child care, among others.[166] Adding to this pressure is the demonstrable fact that the assigned defense attorney has neither the time nor the resources to adequately prepare a trial defense.

Denial of Bond/Inability to Make Bail and the Pressure to Plead

At the New York conference held on misdemeanor courts, attendees noted that the meet and plead situation is partially driven by defendants. In misdemeanor cases, the difference between pleading guilty at arraignment and further investigation pending trial is often related to the defendant's custodial status. A client will plead guilty at arraignment, even against counsel's rigorous advice, because it means he or she will be released that day or soon thereafter. A client will waive a compelling suppression motion or a viable defense in order to avoid another day in custody, particularly when that time might affect her job or the care of her children.

"Most of the PDs do not have enough time to do thorough investigations, meet with the clients at length, research all of the potential issues, and file all potential motions specifically tailored to each case."

— A Florida public defender.

A Phoenix defender observed during the site visit, "If you can bond yourself out, your perception of our justice system is completely different. ... The system uses in-custody status as a way to coerce pleas." It was evident at the New York conference that defenders, as well as clients, feel great pressure from the volume of in-custody clients who cannot make bail. One survey respondent from New York wrote, "[b]ail is set (so high) which forces us to give up on cases in order to get the client out." Another New York defender summed it up perfectly, stating that it is hard to fight against the excessive bonds and in-custody status. "Clients want to be home."

A Philadelphia defender reported that they have a chronic problem with homeless and/or poverty-stricken individuals who remain in custody on minor misdemeanor charges such as public urination or disorderly conduct because they cannot pay bail amounts as low as $100. When they finally get an opportunity to appear in court, they all plead guilty to time served, which by then is frequently longer than they would have served if found guilty of the offense.

A veteran New York defender, in a survey response, noted that the pressure to plead due to failure to make bail is often greater on defendants of color. Judges often set bails equally across defendants, but those bails are, in his experience, harder for minority defendants to pay. "Black kids and to a lesser extent Latino kids are held on bails that they are far less likely to meet ... A judge may hold ... client A to a $1000 bail and ... client B to the same, but for A it is a weekend in the city, for B it is two weeks salary or two months of public assistance."

Prosecutorial Pressure to Plead

Often, prosecutors put pressure on defendants to plead guilty at the first court appearance by offering a more favorable plea bargain if, and only if, the client pleads guilty that day. Time and time again, defenders reported getting plea bargain offers just before the first hearing that would allow the client to go home, if they accepted the plea that day. Such plea offers place enormous pressure on the clients, who, as noted above, want nothing more than to go home. One blogger from Texas described an experience that is consistent with the reports from around the country:

> **My First Job**...was with the Wichita County Public Defender. It did not prove satisfactory for a few reasons. First of all, the misdemeanor prosecutor would offer time served and no fine to 90 percent of my clients. The Sheriff had a policy of giving 2 for 1 credit for time spent in jail.
>
> Typically I would be assigned a defendant who had spent 21 days in jail. Defendant would be placed on the jail chain and dragged into court. The DA would offer 42 (21x2) days time served, with fine and court costs paid for. The defendant had a decision to make — Get out of jail with no fine, or fight the case and stay in jail. Hmmmmm..... Tough choice.
>
> It was a no brainer for defendant's [sic] to accept the plea bargain. I spent most of my time explaining plea papers and guilty plea consequences.[168]

"A system of 'meet'em, greet'em, and plead'em' ... where overworked defense attorneys actually don't even meet clients before disposition hearings — is a recipe for wrongful convictions and a pervasive lessening of respect for the rule of law."

— Judge Joseph Bellacosa, New York.[167]

Similarly, a lawyer responded to a survey question concerning whether effective assistance is possible given the caseload as follows:

> It's a complicated question. On regular dockets, I think we do provide effective counsel, but we have a "review docket," which is usually within 24 hours of arrest. On a review docket, there is a non-negotiable offer from the DA that we convey. We have no prior knowledge of the case and do not have time to talk to the defendant before getting offers from the DA. We have a very, very short time with each defendant. In my opinion, we do not usually provide effective assistance on the review docket. You cannot represent 30-40 people in a two-to three-hour period effectively.

"There is no question a lot of those folks are pleading guilty to get out."

— A judge in the City of Phoenix court.

As this story demonstrates, plea bargains received just before the first hearing, which will expire just after the hearing, also place extraordinary pressure on defenders. They must either stand up with the client as he or she accepts the plea without knowing whether a factual or legal investigation would lead to a better result or convince the client to allow further investigation even though it would require the client to remain in jail and might not lead to a better result.

Impact of Increased Collateral Consequences on Misdemeanor Caseloads

The secondary impact of a criminal conviction, particularly a minor criminal conviction, has expanded significantly since the caseload standards were created in the 1970s. As Seymour James of the New York Legal Aid Society observed at the conference in New York, even a disorderly conduct conviction can result in harsh civil penalties, including losing eligibility for public housing, deportation, and suspension of college student aid. As discussed in the introduction, a conviction for a misdemeanor can affect all aspects of life from child custody arrangements to employment.

This vast array of collateral consequences has a dramatic impact on the work of the defender: (1) it adds to the research and advocacy that must be done in each case, thus decreasing the number of cases that a defender can effectively handle in any given period of time; (2) it changes the cost-benefit analysis of accepting a plea bargain; and (3) it places the client at greater risk of unforeseen harm if the defender is too overburdened by his caseload to properly advise the client of the impact of the decision to plead guilty or proceed to trial. Additionally, defenders often cannot accurately advise their clients regarding future collateral consequences that might be imposed because there is no uniform enforcement of collateral consequences.

As David Newhouse of the Spangenberg Group pointed out in an email, "Even where misdemeanor caseloads may not have increased over time, workload has due to collateral consequences [and] enhanced sentences[.]" Defenders need to spend considerable time researching the possible collateral consequences for a particular defendant and then develop evidence to challenge any conditions precedent to the consequence. For example, one of the most common types of collateral consequence is a sentencing enhancement for prior convictions, meaning the defendant will get a greater penalty if she previously has been convicted of certain types of crimes. To try to avoid the sentencing enhancement, the defender must assess any past convictions the defendant may have and develop an argument to challenge the applicability of the enhancement.

"A lot of the problems with the public defense system are structural. We can't expect an attorney to function properly with the caseloads they have."

— Cory Stoughton, New York Civil Liberties Union.

Professor Zeidman observed that, with the rise of collateral consequences, one should see trial rates increase, particularly for low-level offenses, where the direct consequences of the conviction are not as severe. "In these days of burgeoning collateral consequences, when arrests and pleas can result in deportation, eviction, loss of government benefits, mandatory DNA samples, etc., one would expect to see defense attorneys impelled to aggressively contest the legality of their clients' arrests."[169] In other words, the increase in collateral consequences should increase not just the amount of research and training needed by misdemeanor attorneys but also the amount of in-court advocacy they are doing.

To the contrary, no person interviewed related an increase in the number of trials conducted in misdemeanor courts as a result of the expansion of collateral consequences. In fact, the overwhelming evidence reveals that trials are nearly non-existent in misdemeanor courtrooms.[170]

This lack of trial activity may be due to the fact that defenders, particularly those overburdened by excessive caseloads, do not have time to research the impact of collateral consequences on their clients. At the New York conference, many defenders acknowledged that they do not know the range of collateral consequences in their jurisdictions. A district attorney in attendance noted that prosecutors do not know of all the consequences either. Attendees also stated they believe most judges do not understand the collateral consequences.

Early Disposition Projects

In response to overwhelming caseloads, a number of jurisdictions have established early disposition projects. Intended to assist clients by resolving cases quickly, these projects have some very positive features, such as the integration of social service organizations into the adjudication process. However, they also often require defenders to carry overwhelming caseloads and frequently demonstrate how the pressure to move cases quickly results in an assembly line plea process.

In Pittsburgh, the site team observed the Allegheny County Early Disposition Project. The project was intended to benefit clients by promoting coordination between the courts and social service agencies to help clients get out of jail and resolve their cases earlier. One of the supervisors noted that the program accepts cases with minimal or no trial issues and can

resolve the case within a week, as opposed to four or five months. He observed that the program's efficiency provides the defendant with more of a connection between the punishment and the behavior.

However, because of the emphasis on speed and the failure to allocate sufficient resources to the project, defense lawyers have defaulted to a meet and plead system. One assistant public defender reported that, in the first year of the Early Disposition Project (EDP), he represented defendants in 1,800 guilty pleas. He reported spending far less than one hour on each client's case. He stated that he spent 10 to 15 minutes with the client, reviewing the allegations, the client's version of events, the prosecutor's offer, and the likely sentence. The EDP attorney estimated that about 100 of the 1,800 received jail time, often concurrent with some other case.

The EDP attorney noted that it is impossible to meet clients the day before the hearing. He also stated that he does not receive the offers from the district attorney until the night before the hearing. The office recently assigned him a legal assistant, but not the additional attorney he felt was needed "to make sure bases are covered and get a bit of a break once in a while."

The spectrum of cases resolved on the EDP calendar included possession of drugs, drunk driving, retail theft, and prostitution. The defender reported typically doing no research or fact investigation, stating, "[t]hese are not situations that necessitate that." But, one observer told a site team member that the prosecutor sends some drug possession cases to EDP because they involve questionable arrests, which raises the possibility that if the facts and law were investigated properly the court might conclude that the cases should be dismissed. And, another defender reported that, contrary to the EDP attorney's assertion, a DUI case requires a lot of preparation.[171]

A different early disposition project in Washoe County (Reno), Nevada, suffered from similar problems. The Early Case Resolution (ECR) project was originally intended to eliminate many non-serious cases from the court docket. The program was examined by the Supreme Court Task Force on the Elimination of Racial, Gender, and Economic Bias in 2000, which raised serious questions about whether the defendants in the program were receiving appropriate advice. The Task Force Report suggested that defendants in the program felt coerced to accept pleas, whether or not they were guilty of the crime charged. The report noted that public defenders routinely advised clients to plead, despite "not always hav[ing] the state's discovery in the client's file before discussing the plea with him or her." The report further observed that "one of the most notable effects of the ECR program is that the Washoe County Public Defender office takes only approximately 30 cases to trial each year" out of approximately 6,300: a trial rate of less than half a percent.[172]

In January 2008, the Nevada Supreme Court issued an order establishing performance standards for public defenders, intended to ensure appropriate representation for all persons charged with criminal offenses.[173] Although the standards did not include formal caseload limits, they require the defense lawyer to "make available sufficient time, resources, knowledge, and experience to afford competent representation."[174] The standards go on to require counsel to prepare for and conduct an initial client interview, which must be held before any court proceeding.[175]

"Clients feel like they are a cog in a large wheel and attorneys are unable to provide the quality time they need."

— An Oregon public defender.

After the adoption of the performance standards, Washoe County immediately suspended the ECR project, noting that practices in the program may not comply with the performance standards.[176]

Effect of Excessive Caseloads On the Clients

When caseloads are unmanageable and defenders are unfairly forced to skip steps, they render less than adequate services. One-third of the respondents to the survey fully acknowledged that the caseload of the public defense lawyers in their jurisdiction does not allow them to provide effective assistance of counsel. As one former Miami public defender recently noted, "[W]e don't know our cases through and through. The potential to make a mistake is enormous."[177]

The rush caused by excessive caseloads has a substantial negative effect on the clients. One Miami defender, testifying tearfully at a hearing on a motion to obtain caseload relief, gave a compelling example of the harm caused to a client. She stated that, stressed with 13 cases set for trial in one week, "she failed to convey a prosecutor's plea offer to her client. As a result, the state revoked the offer of 364 days in county jail, and the defendant was stuck accepting the state's subsequent offer of five years in state prison."[178]

One Oregon attorney summed up the client experience in this scheme of excessive caseloads:

> Clients feel like they are a cog in a large wheel and attorneys are unable to provide the quality time they need. Many of the clients are first time offenders — they need an attorney who will guide them through the process in a respectful man-

ner and build a relationship of mutual trust and understanding. The high caseloads prevent this from happening.

Recommendations — Misdemeanor Defense in Practice

1. ***Guilty pleas should not be accepted at first appearance unless the attorney has fully informed the defendant of the options, the potential defenses, the potential outcomes, the consequences of foregoing further investigation and discovery, the possible sentences, and the collateral consequences of conviction, and the defendant understands and chooses to plead guilty. In addition to conducting a full and vigorous colloquy, judges should require defense attorneys to aver, on the record, that these steps have been taken.***

Although the decision of whether or not to plead guilty resides squarely and exclusively with the defendant, the judge has the obligation to ensure that a plea of guilty is entered knowingly and voluntarily. A plea entered upon first appearance should be inherently suspect under this standard. The defense attorney has the obligation to ensure that the defendant has been fully informed of all options and risks, including potential defenses, potential outcomes, sentences, and collateral consequences. Accordingly, the defense attorney should be willing to state, on the record, that the defendant has received full and appropriate counseling in these areas before the plea is accepted.

The plea colloquy performed prior to a guilty plea being accepted at first appearance should be more probing and vigorous. Judges should not merely ask the defendant to confirm that they were fully informed of their options and the consequences of the plea. They should ask open-ended, probing questions that require the defendant to demonstrate an understanding of the information provided. For example, the judge should ask what the defendant understands to be the collateral consequences of the plea. Only after a defendant demonstrates some understanding and the defense attorney states that all options and consequences have been fully explained should the judge proceed to allocution.

"The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant ... must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.

— U.S. Supreme Court, *Powell v. Alabama*, 287 U.S. 45 (1932).

2. ***The impact of bail and bond determinations on the pressure to plead should be considered with regard to each defendant.***

As the American Bar Association has declared, "The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."[179] Accordingly, "[i]t should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense."[180] To justify pretrial detention, a prosecutor must show substantial evidence that the defendant is a risk for non-appearance, or a threat to the community or an individual.[181]

Under these standards, pretrial incarceration is usually inappropriate for alleged misdemeanants. The relatively minor nature of the charges generally means that the defendant does not pose a risk to society if released. However, defendants accused of misdemeanor offenses are often jailed pretrial. This frequently occurs because a judge sets bail or bond to ensure that the defendant appears at a subsequent hearing, and the defendant cannot pay the amount necessary to obtain release.

Factors considered in bail and bond determinations are broad, ranging from seriousness of the pending charge, to previous criminal convictions, to employment, to family and the role the defendant plays in supporting a family, to other ties to the community. Among the considerations that judges should take into account when looking at bail and bond is the coercive effect that the amount may have in pressuring the defendant to plead guilty.[182]

For misdemeanor defendants, a recognizance bond should be considered in every case. As Professor Zeidman observed, defenders "have to attack the premise that someone pleading not guilty stays in jail, and the guilty person goes home."

Cash or security bail and bond should be set only if there is evidence of danger to the community or evidence of risk failure to appear at the subsequent hearing. Then, the misdemeanor defendant should be questioned regarding whether he or she can afford the bail or bond contemplated before it is set. Even if a judge concludes that a misdemeanor defendant needs intensive supervision, the judge should take steps to alleviate the pressure to plead that might be created by pretrial incarceration, including granting work release during pretrial detention, and ensuring that the detention is minimized through a speedy trial.

Defenders should be permitted the time and resources necessary to gather information relevant to bail and bond determination, and present the information the court. Counsel should insist that the court review whether probable cause exists to believe that the defendant committed the alleged crime. If probable cause does not exist, the defendant should be released.

If, after learning of bail and bond, a defendant says that he or she would like to plead guilty, the defendant should be carefully questioned regarding motivations. Judges should refuse to accept pleas if, after colloquy, it appears the defendant is pleading guilty for expediency and without a full understanding of the potential consequences of the plea.

An example of a thoughtful approach to the court's bail decision process is the Washington State court rule on release.[183] The rule has a presumption of release on personal recognizance. "If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of" a number of conditions including restrictions on travel that the court finds are likely to ensure appearance.[184]

3. *Prosecutors should not utilize time limits on plea bargains to coerce early pleas, particularly when the time limit does not permit defense counsel to fully assess the appropriateness of the plea and advise the client.*

Often, particularly in misdemeanor court, a prosecutor arrives at a hearing and says to the defense attorney something like "If your client pleads today, I will recommend time served, or probation, but she has to plead today." The defense attorney has a matter of hours, or sometimes minutes, to help the defendant make a decision. These time-limited plea offers serve only to coerce defendants to act quickly, regardless of whether he or she is fully informed. In essence, these plea offers present defense attorneys with a Hobson's choice. They can recommend against the plea bargain because they cannot fully assess its appropriateness for the client in the time allotted for decision-making, in which case they run the risk of having lost a significant opportunity for a reduced sentence for the client. Alternatively, they can accept the plea without having done the necessary investigation, and run the risk that they have encouraged a client to plead guilty who may have had a successful defense to the charge. Moreover, without time to assess the possible collateral consequences, the attorney cannot advise the client on the consequences of the choice and may be foregoing an opportunity to negotiate a plea that would have fewer consequences. Arguably, the defense attorney may provide ineffective assistance regardless of the choice he or she makes.

Additionally, foregoing an investigation in a case where one might prove useful is a violation of national performance standards, as well as the performance standards of many states.[185] The American Bar Association Criminal Justice Section's Standards on the Defense Function require defense counsel to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."[186] The standard specifically states that the duty to investigate exists even if the defendant states that he or she is guilty or expresses a desire to plead guilty.[187]

The only appropriate solution is to remove the necessity of defense counsel making this Hobson's choice. Prosecutorial offices should require early plea offers to be valid for a period of days to permit the defense attorney to comply with his or her obligation to fully assess the plea and make a recommendation to the client.[188]

Moreover, as the practice frequently places defenders in the position of having to violate their performance obligations, the use of time-limited plea offers should not be countenanced by judges or court administrators. Too often, judges and administrators are tacitly complicit, if not actively encouraging, in the use of coercive tactics, like time-limited plea offers, to resolve cases because it helps move dockets. Such complicity has led to the overall prioritization of expediency above compliance with ethical and performance standards, as well as justice. This must be reversed, and prosecutors who do not engaged in one time only pleas should be supported.

Once freed of the pressure of a time-limited plea, defenders can seek, when advisable, to convince defendants to permit them the time to adequately research, investigate and assess the case, even if it means that they have to return to court again. Professor Zeidman observed at the New York conference that there are "very few clients who say 'absolutely not' when you ask for one adjournment." Professor Babe Howell agreed, stating "I can convince just about anyone to give me a change to fight for [his or her] case." Convincing defendants to allow defenders to appropriately investigate the case is significantly easier when the defendants know that, if the defenders assessment of the case turns out poorly, the plea deal will still be available.

4. *When setting the caseload standards for a jurisdiction, particular attention should be paid to the collateral consequences of convictions in that jurisdiction and the time needed by the defender to research, understand, and advise clients with regard to collateral consequences.*

While caseloads should never exceed the national standards, there are a variety of jurisdiction-specific reasons that caseloads should, in fact, be lower. If, for example, the defender office serves defendants in two courthouses separated by 100 miles, the defender caseloads should be lowered to account for the travel time required. Similarly, if the scheme of collateral consequences is particularly complicated in a jurisdiction, the defender caseload should be lowered to account for the amount of time a defense attorney will have to spend researching the potential effects of a con-

viction for each defendant and advising the defendant on these consequences. In a number of jurisdictions, collateral consequences are not just located in the state criminal statutes, but also in various administrative codes, as well as county and city ordinances. Defense attorneys are often unfamiliar with these laws and the research to uncover potential consequences for the clients is, as a result, time intensive. Finding them may require consulting with attorneys who specialize in areas in which collateral consequences arise, such as housing, immigration, employment, and benefits. This time must factor into the number of cases the defense attorney is assigned.

5. *Early disposition projects should not be exempted from caseload limits.*

There is nothing in the national standards that permits an exception to ethical obligations, performance standards, or the national caseload standards for early disposition projects. To the contrary, the Commentary to the ABA Ten Principles states clearly: "Counsel's workload ... should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations. ... National caseload standards should in no event be exceeded."[189] While efforts to assist defendants in accessing social services and resolving cases quickly are to be applauded, they cannot come at the expense of effective representation.

"I get calls all day from lawyers who don't have time to punch up Lexis."

— A supervising attorney in Chicago.

Misdemeanor Defenders Lack Access to Support Services

To defend a client effectively, certain support services, such as the access to computers and legal research to prepare and file motions, are essential. Investigation services and expert witnesses can help defense attorneys to understand fully the facts of a case, and, depending on the case, are critical to determining what occurred and whether the defendant is properly charged. Social workers can help assess mental health and addiction needs, which can assist defenders in evaluating the intentions of their client as well as in advocating for diversion or probation.

Despite the critical nature of these support services to their work, in a number of jurisdictions, misdemeanor defenders do not have regular access to legal research, investigators, experts, or social workers. In Washington State, for example:

- In Lower Kittitas District Court, by contract the court sets aside $5,000 per year for these services, but nine months into the new contract, the court was not aware of any requests for these funds.
- Grant County contract defenders did not make any requests for expert services in a two-year period in which they handled 7,700 cases. In the same period, they made only five investigation requests.
- Another Washington defender who worked in four counties noted that courts discourage the use of investigators. The lawyer reported using an investigator in only one case and an expert in only two.

An Oklahoma defender reported that the use of investigators required approval from state headquarters, but that it is "[n]ot even worth asking." And a supervising attorney from Chicago said at the New York conference that, due to excessive caseloads in Cook County, the public defenders "don't have time to do research and investigation. I get calls all day from lawyers who don't have time to punch up Lexis."

Among the survey respondents, 11 percent did not have investigation services available at all, and two percent reported having investigation only if they paid for the services out of their salary.

The lack of mental health evaluation assistance for misdemeanor defenders is particularly problematic. A significant percentage of misdemeanor defendants are mentally ill and end up in jail because there are inadequate mental health services available.[190] A Justice Department study found that in 2005, 64 percent of state jail inmates had a mental health problem. Compounding that, 49 percent of inmates in local jails were found to have both a mental health problem and substance dependence or abuse.[191]

Despite the obvious utility of providing mental health support services to assist defenders in identifying and addressing clients' mental health issues, 48 percent of respondents reported no social work resources at all, with two percent reporting that they could have social work assistance, but only if they paid for it out of their salary. An Oregon defender wrote that one of the greatest challenges in misdemeanor practice is "[c]lients with mental health issues that are aggravated by being in the system. There is no point to them being in the system for such minor offenses when it just makes them worse."

Recommendations — Lack of Support Services

1. ***Misdemeanor defenders should have access to legal research tools, investigative resources, and expert witnesses.***

The ABA Criminal Justice Standards, Providing Defense Services, provide that investigation, expert witness, and other necessary services should be available for defenders:

> The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.[192]

To comply with this standard, every defender should have access to legal research services, investigators, and experts. If the defender has to pay for these services out of his or her own pocket or contract amount, it creates a conflict of interest between lawyer and client. The lawyer may be motivated not to use investigators or experts to preserve funds for himself, even when the case warrants the use of outside services. To prevent this conflict of interest, the costs of these services should not be borne by the defender. For contract defenders and appointed counsel, the administrators of the program should have a separate fund to pay for services.

2. ***Social workers or other mental health support services should work in tandem with defenders to screen clients for mental health issues.***

Given the extraordinary number of defendants with mental health issues, all defenders should receive training to assist them in spotting possible mental health issues in their clients and have access to social workers, counselors or psychologists, specific to the defense, to evaluate clients whenever appropriate. Like other expert services, the costs of these consultations should not be borne by the defender. Identifying mental health issues in defendants early may help combat recidivism by identifying, and, ideally, obtaining treatment for, underlying causes of criminal behavior. Defenders should not have to rely on government social workers to develop release or dispositional alternatives for their clients.

Inexperienced Counsel In Misdemeanor Courts

Many public defenders start in misdemeanor courts after being hired right out of law school. They are handed a stack of case files and told their courtroom assignment. No supervisor accompanies them and there is no training before they begin. On their first day, they will talk to clients, negotiate plea deals, appear before a judge and, frequently, advise clients to plead guilty.

"Many times I don't have time to reflect on what advice to give clients"

— A Tennessee public defender who reported handling approximately 3,000 misdemeanor cases a year.

Former Miami-Dade Chief Defender Bennett Brummer explained that his office is forced to hire attorneys straight from law school with no trial and very little other experience "because we can't pay a competitive salary ... so we need to train them." That training is what Brummer described as "the farm system." Defenders start at the "little league" misdemeanor court before moving up to felony cases.[193]

One Washington attorney wrote that one of the greatest challenges is the "learning curve." The attorney added, "I am a recent graduate and have been a misdemeanor attorney for 6 months. There's a lot one needs to know to effectively counsel a client and to effectively advocate for them. I feel that both the load itself and the fact that a lot of the learning is concurrent with its practice is challenging and very time intensive."

Another defender observed, "Often misdemeanors is how attorneys start their public defense practice and law school does not do a good job at teaching the actual practice or mechanics of law. I even took a public defense clinic where I represented someone during my third year in district court and there was a lot that was unfamiliar to me."

Lack of Training

Appropriate training is critical to practice, regardless of level. Misdemeanor practice, like felony practice, involves trials. To be effective, lawyers must understand, among other things, how to conduct a direct examination and a cross-examination of a witness, how to navigate the rules of evidence, how to give an opening and closing argument, and how to authenticate evidence. Attorneys representing clients in driving while intoxicated cases need to understand the forensic evidence, such as how breath tests work, to be able to assess whether there is an appropriate challenge to the test, and how to bring it. And, in any number of crimes, defenders need to understand police identification procedures and the science behind eyewitness identification in

order to understand the reliability of the evidence offered against their clients. Attorneys also need to understand sentencing options, including, for example, what is involved in domestic violence treatment, to be able to advise and advocate effectively for their clients.

Most of the survey respondents said that they have training appropriate to their practice, and 76 percent said that they have funding for it. Some defenders noted, however, that training was superficial or minimal. For example, 31 percent had no training on immigration issues.

In some jurisdictions, training, particularly training relevant for misdemeanor courts, remains elusive. One South Carolina attorney wrote that there was no training for misdemeanor practice, saying, "This area of training is completely ignored by the state bar and the state indigent defense system[, although t]here are some private DUI seminars."

In Allegheny County, Pennsylvania, the defender provides mentoring in the first few months, but within five months attorneys are doing felonies as well as misdemeanors. One of the supervisors said that "within six months our lawyers are seasoned."

"[There are] simply too many cases for inexperienced lawyers to provide effective assistance."

— A Colorado lawyer who stated that the caseload of the local defenders did not allow effective representation.

Lack of Supervision

As in other professions, before undertaking something independently, lawyers should be supervised. A homeowner would not allow a plumber to remove the water heater if he had never done it before and there was no experienced plumber around to make sure he did it correctly. Supervision is critical to ensuring that attorneys just out of law school, new to the jurisdiction, or just starting to practice criminal law, do not make a mistake. For this reason, the American Bar Association's Ten Principles of a Public Defense Delivery System require defense counsel to be "supervised and systematically reviewed for quality and efficiency."

Supervision of misdemeanor defenders is sorely lacking, and, often, performance reviews are non-existent. Many defenders report that supervision in their offices is informal. One former Florida public defender noted that, officially, there were two senior attorneys assigned to supervise the approximately 30 misdemeanor attorneys in the office. However, the supervising attorneys had active felony caseloads. If a misdemeanor lawyer wanted assistance, he or she had to seek out a senior attorney and ask for assistance. She noted that, when one did this, the attorneys were happy to help when they could. When asked about a supervisor coming to court with her, the defender said, "Occasionally you could get a senior public defender to come with you if you needed to pressure the prosecutor to offer a plea."

Recommendations — Inexperienced Counsel in Misdemeanor Courts

1. ***Public defense attorneys should be required to attend training on trial skills, substantive and procedural laws of the jurisdiction, and collateral consequences before representing clients in misdemeanor court. Thereafter, regular training on topics relevant to the practice area should be required on an ongoing basis.***

Misdemeanor practice cannot itself be considered training. Defense attorneys must receive training prior to taking on misdemeanor cases. National standards require that "defender organizations ... provide training opportunities that insure the delivery of zealous and quality representation to clients."[194]

In an institutional defender office, the office should provide an extensive training program that covers the practices and procedures in the specific jurisdiction, as well as basic pretrial and trial skills, before the attorney is ever sent to a courtroom alone. In assigned counsel and contract programs, trainings should be required before a defense attorney can join the misdemeanor assigned counsel list or receive a contract.

A number of defender offices have exceptional training programs. In Philadelphia, for example, all new attorneys complete a three-week training program before ever representing a client. Topics covered include substantive law topics such as search and seizure law, drug statutes, the sentencing scheme, identification law, procedural law topics including evidence, discovery and motions practice, and trial advocacy skills such as interviewing techniques and direct and cross-examination.[195] After the training, a senior lawyer goes to court with the new attorney for a week. Thereafter, lawyers attend weekly training and consultation sessions for the remainder of the first year.

Similarly, in Kentucky, the Department of Public Advocacy conducts three week-long training programs that all attorneys who join the public advocate's office must complete. For attorneys just graduating from law school, the first two weeks of the program occur shortly after they

enter the office. The training is intensive, interactive, and limited to only 20 participants per session. In the first week of training, the attorneys become familiar with all aspects of misdemeanor practice by working through 32 common scenarios in district court. Each attorney researches and analyzes the legal issues, and then participates in mock events based on the scenarios, including client and witness interviews, bond hearings, negotiations sessions with the prosecutor, and motion arguments. The second week is a trial skills institute, and the third week covers a variety of relevant substantive and procedural law topics. Additionally, the department holds several other training events every year, including several on misdemeanor practice. A number of these trainings are held through a distance learning module, which permits replay of the training at a later date for defenders who could not attend or for defenders who wish to watch a portion of the training again.[196]

In Massachusetts, the Committee on Public Counsel Services hosts a variety of training events monthly, including certification events, which an attorney must complete before being qualified to serve as appointed counsel.[197] Similarly, the Public Defender Service in the District of Columbia provides training not only for its own staff attorneys, but also for assigned counsel.[198]

2. *Public defenders and assigned counsel in misdemeanor court should be actively supervised by experienced trial attorneys.*

It is inevitable that defender programs will continue to utilize relatively inexperienced attorneys in misdemeanor courts. For this reason, it is essential for misdemeanor defenders to have active supervision. Where possible, new attorneys should be partnered with experienced trial attorneys in the same courtroom to provide ongoing supervision. To achieve this, experienced attorneys should rotate back through misdemeanor practice. Such rotations not only serve to provide junior attorneys with supervision, but may also benefit senior attorneys by combating burnout.

In court appointed counsel and contract programs, defenders should be regularly subject to review by an experienced panel of defense attorneys who observe the defender in court, review any complaints filed, and review defender files. In New York's First Department, a comprehensive application is reviewed by a member of a Central Screening Committee before the attorney can join the assigned counsel list.[199] The screening committee also investigates client complaints, and conducts recertification reviews.[200]

Lack of Standards

Performance standards serve to guide a defense attorney through every step of litigating a criminal case. For example, national performance standards address preparing and conducting the initial client interview, preparing for arraignment, conducting investigations, obtaining discovery, filing pretrial motions, negotiating with the prosecutor, preparing for trial, conducting *voir dire*, making opening statements, confronting the prosecution's case, presenting the defense case, making closing statements, drafting jury instructions, and preparing post-trial motions.[201]

While each step need not be undertaken in every case, the standards set out what steps should be considered by the defense attorney, how the attorney should evaluate whether the step is necessary, and, if the attorney decides the step is necessary, how the attorney should proceed. As one set of state standards notes, "These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate, and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for criminal defendants."[202]

Enacting performance standards establishes an expectation about the thought process that will be used to evaluate the case of each accused defendant. They also serve to synthesize the ethical obligations with the actual practice of public defense, and provide support for defenders when they seek continuances or caseload reductions in order to ensure that all clients receive adequate representation.

The absence of standards too often has the opposite effect of confirming that there should be no expectations with regard to services. The lack of standards can lead to excessive caseloads, inadequate compensation, and ineffective representation.

Nearly 70 percent of the survey respondents said that there was no limit on caseload by standards in their jurisdiction. Moreover, some of the respondents who noted an applicable standard referred not to a standard in their jurisdiction, but to the National Advisory Commission Criminal Justice Standards and Goals or NLADA recommendations. Sixty-three percent said there was no limit by internal office policy.

Recommendations — Lack of Standards

1. *Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.*

As noted above, standards establish an expectation that certain steps are considered with regard to every criminal case. In so doing, they assure defendants, as well as the governmental bodies that fund the indigent defense system, that each criminal case is evaluated appropriately, based upon its particular facts and circumstances.

A number of jurisdictions have adopted performance standards:

- The Washington Defender Association has comprehensive Standards for Public Defense Services, most of which have been adopted by the Washington State

Bar Association. The standards address caseload, supervision, support services, training, evaluation, accountability, qualifications, client complaints, compensation, and guidelines for awarding defense contracts.[203]

- In Massachusetts, which is primarily an appointed counsel system, the Committee for Public Counsel Services has adopted Performance Guidelines, which apply to all representation of indigent persons in criminal cases.[204]
- The Nevada Supreme Court adopted comprehensive performance standards earlier this year by order.[205]
- The New York State Bar Association House of Delegates adopted Standards for Providing Mandated Representation intended to "establish the minimum requirements for a mandated representation system."[206]

2. *Jurisdictions should have an active process for enforcement of standards.*

In addition to adopting standards, jurisdictions should have a process for reviewing the performance of indigent defense practitioners against the performance standards, as well as receiving and addressing complaints from clients. As noted above, not each step addressed in the performance standards should be undertaken automatically in every case. "Steps actually taken must be tailored to the requirements of a particular case."[207] However, standards do provide a set of guideposts for the evaluation of performance. For example, when standards call for prompt client interviews, and a review of a defender shows that his or her practice is not to interview clients until the day before a preliminary examination, that practice should be addressed. Similarly, standards call for considering, in each case, the utility of a variety of pretrial motions. If a defender or defender office never files pretrial motions, that practice should be addressed.

A number of states have instituted formalized processes for defender review, including receiving and addressing client complaints. In both Louisiana and Virginia, legislators seeking further funding and reform of the state's indigent defense system viewed the establishment of a review program or compliance officer as critical to ensure accountability and the wise use of taxpayer dollars. In Virginia, the Virginia Indigent Defense Commission (VIDC), which oversees all court-appointed counsel and public defender offices in the state, is responsible for enforcement of the state's performance standards. The VIDC has a formal process for receiving and investigating complaints from clients, after which a panel of VIDC staff attorneys holds an informal hearing to try to achieve resolution of the complaint. If resolution cannot be achieved at the informal hearing, the matter goes to formal hearing before three members of the Virginia State Bar.[208]

Inadequate Compensation For Defenders in Misdemeanor Courts

Senator Dick Durbin recently noted that "the median starting salary for state and local prosecutors and public defenders is approximately $45,000."[209] This may seem like a decent salary, but, the average debt for graduates of private law schools is nearly $88,000, and the average debt for graduates of public law schools is $57,000.[210] And, by comparison, the median starting salary at law firms is $95,000.[211]

Public defenders are often on the lower side of the median, as they are frequently paid less than their colleagues in the prosecutor's office.[212] More than two-thirds of survey respondents (81 of 121) report that their salaries are different from the salaries of prosecutors. While a few report that they are paid more than prosecutors, the bulk of respondents reported salaries that are between 10 percent and 50 percent lower than prosecutors. One Oregon defender reported that at the top of the scale, prosecutors make double what defenders receive.

In the City of Phoenix, the contract attorneys are paid $57,120 for a caseload of 270 per year, with the possibility of an additional $5,000 in extraordinary compensation. They do not receive any benefits. By contrast, the starting salary for prosecutors is approximately $64,000. The prosecutors also have benefits, including retirement.

Having competitive salaries is essential to keeping experienced attorneys in the public defender office. One Illinois defender noted, "Turnover in my office is quite high and we've lost some great attorneys as a consequence." The attorney reported that the bulk of the turnover is attorneys leaving for higher salaries in private practice.

One Oregon defender wrote:

> Pay needs to be increased to (at least) parity with the state. We need to attract and retain good, talented attorneys who are dedicated to helping our clients. Public defenders shouldn't have to choose between paying their mortgage or paying their student loans — a choice I make every month.

Another wrote:

> After practicing for two years, I feel like I've really become a good attorney. But, now that I have a husband and baby to support, I find it nearly impossible to continue as a public defender. It's frustrating to come out of law school with $150,000 in school debt and begin working a difficult job that barely pays the loan bills.

In Allegheny County, Pennsylvania, turnover among lawyers is high, which many people attributed to the low salaries. In July 2008, the Defender was advertising an attorney position with a maximum salary of $3,208.33 per month, or $38,499.96 per year.[213]

One Allegheny defender reported that he takes home $24,000 per year, and noted that a lot of the lawyers in the office have second jobs. He said that he planned to get a job waiting tables, which would allow him to make $500 a weekend. Another attorney said that "what we're paid is barely enough to get by, let alone pay debt." One of the supervisors stated that if they could pay more, they could keep lawyers longer. He said that it is disheartening to come to court every day and be the lowest paid person in the room. It is noteworthy that the starting salary for deputy sheriffs is $60,000, more than $20,000 greater than a public defender.[214]

"Public defenders shouldn't have to choose between paying their mortgage or paying their student loans — a choice I make every month."

— An Oregon defender.

In Miami-Dade County, Florida, the Chief Defender recently pointed out that for non-capital felony attorneys, the starting salary of $42,000 is well below the median starting salary of new lawyers in the region, and, in some instances, half of the starting salary offered by non-state, governmental entities in the area.[215]

Inadequate compensation is also a problem for court-appointed counsel. As a Nassau County, New York, lawyer wrote in a survey responses:

> Attorneys need to be paid far better. I cannot believe that a private lawyer gets 60 dollars an hour. That is not close to what it costs just to keep an office open in this neighborhood, forget make a living wage.

Recommendation — Inadequate Compensation

1. Misdemeanor public defense counsel should receive fair compensation, including medical and retirement benefits.

Defenders should be compensated at a level that reflects the importance of their work to the efficacy of the criminal justice system. A defender salary should be ample enough to attract and retain qualified lawyers. Principle 8 of the ABA Ten Principles of a Public Defense Delivery System states that there must be "parity between defense counsel and the prosecution with respect to resources."[216] The comment to the principle notes that there "should be parity of workload, *salaries and other resources (such as benefits[])*."[217] It further states that "assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses."[218]

Judicial Conduct in Misdemeanor Courtrooms

Judges set the tone for what happens in the courtroom. While not true of all judges, often in misdemeanor courts, judges emphasize expediency over justice, to the detriment of defendants and their attorneys. Some courts advise defendants of their right to counsel, but do not provide counsel at initial appearances. Others will encourage defendants to talk with the prosecutor before obtaining a lawyer. Still others permit counsel, but push docket movement so much that defendants and their attorneys feel extraordinary pressure to enter guilty pleas.

One judge observed for this report told defendants that, despite defendants' right to counsel, he would not appoint a lawyer. Another judge, in the city of Phoenix, noted that by convincing people to proceed without counsel, he can deal with a lot of cases faster. He observed that without lawyers on either side, "[o]n a good day, I can take 35 suspended license pleas."

One veteran Massachusetts lawyer asserted that the greatest challenge to the misdemeanor practice is "[p]ressure from courts to turn cases over quickly instead of preparing the defense of them." Similarly, an Oklahoma lawyer, responding to a question about recommendations for change, wrote, "Teach judges that just because they are misdemeanors doesn't mean they are not important. Judges here convince defendants every day to go *pro se* and plead just to speed up the process without regard for the consequences to these peoples' lives."

One Oregon defender observed:

> Many courts treat misdemeanors like nuisances and fail to appreciate the complexity of the cases and the fact that both the public defender and the client are human beings, deserving of respect. Comments from the bench (on the record) make it clear that some judges think all of these clients should just plead out and do not deserve a trial.

In the ABA hearings, then chief criminal Judge Michael Spearman from King County, Washington, said:

> In dealing with large calendars and *pro se* defendants inexperienced with the law and legal process, it's easy for judges to let their frustration get the best of them and look for ways to move the calendar along. There has been more than one documented case in Washington where judges have not fully advised defendants of their right to counsel and to trial by jury or have explicitly encouraged defendants to waive those rights in the name of efficiency.

"[I]t's easy for judges to let their frustration get the best of them and look for ways to move the calendar along."

— Judge Michael Spearman, King County, Washington.

In 2006, the *New York Times* did an extensive investigation of the town and village courts in New York State, which handled more than 300,000 low-level criminal matters annually. Nearly three-fourths of the judges in those courts were not lawyers. The investigation "found overwhelming evidence that decade after decade and up to this day, people have often been denied fundamental legal rights. Defendants have been jailed illegally. Others have been subjected to racial and sexual bigotry so explicit it seems to come from some other place and time. People have been denied the right to a trial, an impartial judge, and the presumption of innocence."[219]

Disparate Treatment Of Indigent Defendants

In many court systems, defendants represented by public defense attorneys are treated more harshly than defendants who have retained private counsel. In fact, more than two-thirds of the survey respondents said that both the judges and the prosecutors treat defenders and their clients differently than they treat the clients of retained attorneys.

One of the Tennessee respondents to the survey explained:

> Courts hear private attorneys first and give them more leeway in continuances. Prosecutors give better offers to private attorneys. There is definitely favoritism towards college students and affluent defendants — there is a HUGE disparity in offers between clients who have the means to make bond and those who do not. Many of the judges treat the privately represented clients with more respect. Judges tend to sentence clients who are on bond to probation and clients who have not been able to make bond to more jail time.

Another Tennessee respondent confirmed:

> Often times, judges will take retained counsel cases earlier. ... Judges and DAs are often more respectful of private counsel, and more willing to believe that de-

> fendants who have hired counsel are more deserving of a break. I think there is often a presumption that PD clients are lazy, good-for-nothings whose futures are irrelevant to them.

A Colorado lawyer, who was a defender and is now in private practice, responded in the survey: "Often [you] get better deals on private cases [because] prosecutors view clients in a different light. Also, [the] PD does not generally have resources for investigation and expert assistance as described above, so [they] cannot present as persuasive a negotiation to [the] prosecutor."

"Judges here convince defendants every day to go *pro se* and plead just to speed up the process without regard for the consequences to these peoples' lives."

— An Oklahoma defender.

Judges Face Discipline for Not Honoring Right to Counsel

Judges can be disciplined for failing to protect the right to counsel. Although it is not clear how often this occurs, because frequently the records are not public, the examples below bring into stark relief the level of abuse that can occur in misdemeanor courtrooms.

In recent years, a number of judges have been disciplined in Washington State for not meeting their obligations regarding counsel for the indigent. In one case suspending a municipal court judge, the Washington Supreme Court wrote:

> People appearing *pro se* and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges. The conduct here denigrates the public view of municipal courts as places of justice.[220]

The same judge was subsequently charged with misconduct, which again included consistently failing to advise defendants that they have a right to counsel, requiring defendants who pleaded not guilty to waive their right to counsel and to a jury trial, and failing to appoint counsel. The judge stipulated to his ineligibility to hold office.[221]

In 2004, the Washington State Commission on Judicial Conduct censured a district court judge for failing to observe defendants' fundamental due process rights.[222] After a warning in 2002, the judge had continued to advise defendants improperly prior to requiring them to enter a plea. She "routinely failed to advise unrepresented defendants of various rights, including but not limited to: (i) the perils of proceeding without counsel, (ii) the right to remain silent, and that anything the accused says may be used against him or her."[223]

The Commission noted, "Because the practices implicate the constitutional rights of the defendants involved, the nature of the violations cannot be overstated." The Commission added: "Protecting the rights of accused individuals is one of the highest duties of any judicial officer. Respondent's failure to adequately perform that duty calls into question the integrity of her office."[224]

In 2006, following a new proceeding in the Commission, the state Supreme Court suspended the judge for 30 days.[225] Among the problems identified in the new complaint, the judge, in many cases, advised criminal defendants of their right to counsel after they entered a plea. In every case, there was a waiver of counsel in the file. The commission pointed out that the intent to plead was entered before a waiver of attorney had been obtained. In addition, the judge failed to reiterate adequately to defendants at probation review hearings that they have a right to counsel and failed adequately to obtain waivers of counsel.

In 2006, an investigative report by the *New York Times* found that 1,140 of the district justices in New York State "received some sort of reprimand over the last three decades — an average of about 40 a year, either privately warned, publicly rebuked, or removed" by the Commission on Judicial Conduct.[226]

Recommendations — Judicial Conduct in Misdemeanor Cases

1. ***All judges handling misdemeanor cases should receive extensive training on the importance of criminal charges and the direct and collateral impact of pleading guilty on the defendant.***

Judges should receive regular training on the effects of criminal judgments on a defendant. Not only would such training ensure that proper respect for the proceedings is maintained, regardless of the level of charge faced by the defendant, but it would also ensure that judges can verify that defendants have received sufficient information regarding the consequences of a conviction before agreeing to plead guilty.

Judges should be equally respectful of all defendants, regardless of their ability to pay for counsel, and of all attorneys, regardless of whether they represent the people or the

defendant, as well as whether they are being paid by the jurisdiction or the client.

The Code of Judicial Conduct requires that a judge "be patient, dignified, and courteous to litigants," and that a judge "perform judicial duties without bias or prejudice ... including, but not limited to, bias or prejudice based upon ... socioeconomic status."[227] It is a central principle of the American legal system that every individual is equal before the law. This principle is grossly undercut when judges treat defendants who are represented by publicly funded defense attorneys differently from defendants who can afford private counsel. Judicial training should include the importance of equal treatment for all defendants, and attorneys who witness disparate treatment by judges should report that treatment to presiding judges and other authorities as appropriate.

2. ***Judges should be disciplined for failing to enforce the constitutional rights of defendants.***

Judges must refrain from pressuring indigent defendants to waive counsel, and they must refuse to accept waivers of counsel that are not entered into knowingly, voluntarily, and intelligently.[228] A judge's failure to honor the basic rights of defendants constitutes judicial misconduct.[229] Accordingly, disciplinary action should be pursued whenever a judge fails to enforce the constitutional rights of a defendant.

"I do not believe that there is any relief in sight and I am looking for another job."

— A defender in a rural, southern area.

Lawyer Burnout in Misdemeanor Courts

The impact on defenders of excessive caseloads, lack of access to support services, supervisors or mentors, and a court that is constantly applying pressure to move the docket can be overwhelming both mentally and physically. One former public defender recalled the following:

> I was a brand new appointed assistant PD in a division that moved rapidly (rocket docket). I remember on my third day in the courtroom, the Judge, from the bench, publicly screamed at me in front of my clients something like, "You don't know what you are doing, let me plea these clients." Although there were two defenders in the courtroom, we both had an excessive amount of cases and could barely handle our own. I ended up getting a serious ... infection which landed me in the ER. ... For almost 6 months of my life I could not get better.

A public defender in a county in central Washington State reported that she works 10 hours a day, goes to the jail every day to visit her clients, and is a firm believer in public defense. This lawyer, who serves part time as a *pro tem* judge in another court, said that she was in "a burnout mode." Before taking a couple days off in April, she had gone 17 months without a vacation.

One survey respondent wrote that the biggest challenge was "staying motivated with little to no support, little guidance/supervision or feedback as to performance. Minimal pay and benefits; lack of paralegals, resources (*i.e.*, books, etc.) and frequently being short staffed."

Recommendation — Lawyer Burnout

1. ***Defender programs should have an active plan for combating attorney burnout.***

> It pays employers to address burnout as soon as they see it because burnout has tremendous economic cost for legal employers. ... Burnout can result in absenteesism, job turnover, low productivity, decreased job satisfaction, and reduced commitment to the job. Burned out attorneys work a suboptimal pace and produce work inferior to their capabilities. ... Ultimately, the lawyer will quit the work environment[.] [230]

The costs of burnout in public defender offices, in lack of efficiency and frequent turnover, accrue directly to the taxpayers. And, the cost to clients can be high. For these reasons, defender program administrators should be proactive in combating burnout.

Every state bar association, and most local and county bar associations, have a lawyers' assistance program that can help individual defenders, and often defender programs, to combat burnout. The programs help lawyers combat a number of the aspects of burnout including depression, anxiety, stress, financial problems, work-life balance issues, as well as substance abuse, gambling, eating disorders, and other mental health issues. Lawyer assistance programs are staffed by social workers and psychologists who may be able to help defender administrators develop programs to combat burnout. Additionally, every public

defender, contract defender, and private attorney accepting court appointments should be made aware of the lawyers' assistance programs available in the jurisdiction.

Fair compensation, reasonable caseloads, adequate training, and provision of support services are necessary to recognizing the importance of the work and what is needed to provide effective representation to clients. But, there are also other things that are less dependent upon the availability of funds that defender program administrators can do to combat burnout. Recognition programs that honor victories, promotions, and longevity in the office are helpful in reducing burnout. Rotation of attorneys into other areas of practice can also be helpful.

Attorneys choose public defense work because they believe in certain principles — the importance of protecting constitutional rights and ensuring that only the guilty are punished, for example. Regular events, even CLE or other education events, at which these positive principles are celebrated and the unity of purpose is venerated will also help to eliminate burnout. Several state defender organizations, including those in California, Wisconsin, New York, and Washington, have annual conferences that provide training for CLE credits, as well as offer inspiration and networking opportunities for defenders.

Disproportionate Effect On Minority Communities

Criminal defendants of color are more likely to utilize publicly funded defense services than white defendants. For example, in Alabama in 2001, nearly 60 percent of the defendants using the indigent defense system were Black, despite the fact that African Americans only make up 26 percent of the state's population.[231] Although actual statistics are rare, public defenders across the country report that their clients are almost entirely Black or Hispanic. For example, in response to a survey of public defenders conducted for this report, a Tennessee respondent wrote: "People arrested for and charged with simple possession are by and large from poor, minority communities." Similarly, a New York lawyer wrote: "Over 90 percent of the people arrested in Brooklyn are Black or Hispanic."

In Lynnwood, Washington, during one of the site visits for this report, four out of seven men (57 percent) on the in-custody calendar were observably men of color. Lynnwood, Washington, is a city of about 35,000 people, which, according to the 2000 census has a racial makeup that is 74 percent White, 14 percent Asian, seven percent Latino, three percent African American, and one percent Native American.

One reason African Americans and Latinos utilize indigent defense services more often is that they are more likely to live in poverty. In 2002, the percentage of non-Hispanic Whites living in poverty was eight percent. By comparison, the percentage of non-Hispanic Blacks living in poverty was 23 percent and the percentage of Hispanics living in poverty was 22 percent.[232]

Another reason people of color make up such a high percentage of the defendants utilizing public defense services is that minority communities are disproportionately policed, so minorities are disproportionately arrested and charged.

- Eighty six percent of those stopped and searched in New York City are black or Latino.[233]
- A Florida lawyer responded to a racial disparity question in the survey by stating: "It is quite obvious. Black people are ... more likely to be arrested and have charges filed."
- A Tennessee defender wrote: "Obviously, young black men get arrested more often for drug charges. Cops go into black neighborhoods and approach folks asking if they have crack or pipes on them."

A number of investigative reports have demonstrated the enormous disparity in arrests in Seattle. African Americans make up approximately eight percent of the population of Seattle. Yet, a recent six-month study of drug arrests showed that more than half of the people arrested for drug crimes in Seattle were African American.[234] Similarly, a recent report concluded that African Americans in Seattle are also disproportionately arrested for obstruction, a misdemeanor often called "contempt of cop." Indeed, "African Americans are arrested solely for the crime of obstruction eight times as often as whites when population is taken into account."[235]

Because of the higher rates of minority poverty and the higher rates at which minorities are arrested, public defenders and court-appointed counsel have a disproportionate number of minority clients. As a result, the crisis in America's public defense system has a much more acute impact on communities of color. The dramatic under-funding and lack of oversight of America's indigent defense services, described at length above, has placed people of color in a second class status in the American criminal justice system.

Given the state of public defense services and the frequency with which those services are used by minority defendants, it is not surprising that minority defendants make up a disproportionate number of the wrongfully convicted. In fact, 64 percent of the people who have been wrongfully convicted of rape and then exonerated through DNA are Black, even though African Americans make up only 12 percent of the U.S. population.[236]

Recommendations — Disproportionate Impact on Minority Communities

1. ***Defender offices should gather data regarding racial and ethnic disparities.***

Most defender offices do not keep statistics on the race of the clients assigned to them. Others collect the data haphazardly, through defender reporting based on appearance. Systematic collection of racial and ethnic data can assist jurisdictions to uncover disproportionate arrest trends, as well as other incidents of racially disparate treatment in the criminal justice system. For this reason, each institutional defender office, as well as each administration overseeing assigned counsel and contract defender programs, should find a systematic way to ensure that such data is collected from every defendant to whom a public defense attorney is assigned.

2. ***Defenders should make efforts to address racial disparities in the criminal justice system.***

Once it is demonstrable, disparate treatment — or lack of equality — is a powerful agent for reform. Too often, defenders observe racial disparity without seeking to address it. For example, a New York attorney observed in response to a survey question that there appears to be disparate application of bail guidelines. "Black kids and, to a lesser extent, Latino kids are held on bails that they are far less likely to be able to make." This is the type of practice that, if organized, a defender system can document and bring to the attention of the judiciary.[237]

Some defenders have been enormously successful at addressing racial disparities in the criminal justice system, including in the context of racial profiling, selective enforcement, and sentencing issues, as well as in amending facially neutral programs that have a disparate impact on minority communities. In New Jersey, defenders were recognized for their groundbreaking work in challenging racially disparate police practices.[238] The defenders were instrumental in bringing a civil rights lawsuit that brought to light the New Jersey state police practice of racial profiling. Their work sparked a Department of Justice investigation, as well as other lawsuits, which together led to significant changes in law enforcement practices in the state, as well as ongoing monitoring.

In Seattle, the Defender Association established a Racial Disparity Project in 1999.[239] The project initially focused on helping people charged with driving with a suspended license because of the disproportionate number of people of color facing this charge. It then helped to obtain repeal of an ordinance requiring cars driven by drivers with a suspended license to be impounded. Since its formation, project staff have "participated in many discussions with community based organizations, courts and prosecutors, and local law enforcement authorities, and have participated in discussions with local and state legislators on a variety of issues" related to disproportionate treatment in the criminal justice system.[240] The project was initially funded by a grant from the Justice Department and has been maintained through grants from private foundations.

CONCLUSION

This report demonstrates that the misdemeanor courts in America are in an alarming state of disrepair. The problems identified in this report significantly compromise the reliability of the criminal justice system, and, in turn, the public confidence in courts. Worse, the assembly line production of misdemeanor convictions is permanently disadvantaging huge swaths of the American public at incalculable societal cost. The recommendations in the report are intended to serve as guideposts for judges, lawyers, and policymakers who must address these problems.

The problems of misdemeanor courts, and their solutions, are related and interdependent. It is unlikely that the adoption of any one recommendation alone will solve a problem. But viewed holistically, the recommendations, if adopted, will dramatically improve the functioning of misdemeanor courts, and ensure that all defendants receive justice, regardless of the seriousness of the crime with which they are charged, and regardless of socioeconomic, racial, or ethnic background.

Endnotes

1. Pew Center on the States, *One in 31: The Long Reach of American Corrections,* The Pew Charitable Trusts (March 2009), at 12.

2. Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007).

3. COLO. REV. STAT. § 16-7-301(4) (2008).

4. Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders,* CHICAGO SUN TIMES, (July 24, 2006); Erik Eckholm, *Citing Workload, More Public Defenders Are Refusing Cases,* N.Y. TIMES (Nov. 8, 2008) (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-2007. By the 2006-2007 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

5. The authors use the term "public defense" to cover any publicly funded defense service, whether provided by an institutional public defender office with attorneys on salary, a contract defender, or private defense attorney accepting appointment from the court. Similarly, we use the term public defense attorney to refer to all attorneys who accept public defense work, whether as part of a public defender office, through a contract, or by appointment.

6. The questionnaire was distributed to defense attorneys. The goal was to learn what was happening in as many jurisdictions around the country as possible. The goal was not to secure statistically accurate responses. Individuals who participated in the survey were assured that their identities would be kept confidential. Full results, with the exception of identifying information, are available upon request from Indigent Defense Counsel at the National Association of Criminal Defense Lawyers.

7. This project focuses on state courts and will not discuss either federal or tribal courts.

8. In some states, including Iowa, Massachusetts, North Carolina, Colorado, and Maryland, the sentence can be two years, or even longer.

9. A recent *New York Times* article examining New York's town and village courts, which are frequently presided over by non-lawyer judges, reported that 30 states continue to use non-lawyer judges. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power,* N.Y. TIMES (Sept. 25, 2006), at A1.

10. National Center for State Courts, 2007 Criminal Caseloads Report at 45, *available at* http://www.ncsconline.org/D_Research/csp/2007_files/Examining percent20Final percent20- percent202007 percent20- percent207 percent20- percent20Criminal.pdf (last visited Mar. 2, 2009).

11. Other experts have presented similar estimates. Testifying in Congress on June 25, 1997, Chief Judge George P. Kazen of the U.S. District Court for the Southern District of Texas stated that in 1996 there were 9.4 million misdemeanors filed in state courts. *See* Transcript, House Judiciary Committee Hearing (June 25, 2007), *available at* http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386_0f.htm (last visited Mar. 2, 2009).

12. The volume of misdemeanors in federal court is much lower than in state court, but it is growing. A recent federal court newsletter reported: "The Border Patrol has proposed filing 26,000 petty and misdemeanor offenses a year in the Tucson division at this time, or 100 per work day added to the court's normal daily docket. Ultimately, the goal of the Border Patrol is to prosecute an additional 700 defendants a week, or 36,000 new cases a year." *Federal Courts Hit Hard by Increased Law Enforcement on Border,* THE THIRD BRANCH (July 2008).

13. *See, e.g., District of Columbia v. Clawans,* 300 U.S. 617 (1937); *Smith v. Illinois,* 380 U.S. 129 (1968).

14. *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Baldwin v. New York,* 399 U.S. 117 (1970). Some states provide for a jury trial in all cases in which a jail sentence is possible. *See, e.g.,* CAL. PEN. CODE § 689 (2008).

15. *Gideon v. Wainwright,* 372 U.S. 225, 244 (1963).

16. John M. Junker, *The Right to Counsel in Misdemeanor Cases,* 43 WASH. L. REV. 685, 685 (1968) (citations omitted).

17. *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

18. *Alabama v. Shelton,* 535 U.S. 654 (2002).

19. *Id.* at 667 (quoting *United States v. Cronic,* 466 U.S. 648, 656 (1984)).

20. 407 U.S. at 33.

21. It is interesting to note that, at the time of the *Argersinger* decision, annual misdemeanor caseloads across the country were estimated at between four and five million court cases, approximately half of the estimated annual caseload today. *Id.* at 34.

22. *Id.* at 34-35.

23. *Id.* at 38 (citations omitted).

24. "The term 'collateral sanction' means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence." *Collateral Sanctions and Discretionary Disqualification of Convicted Persons,* American Bar Association Criminal Justice Section Standards, Standard 19-1.1.

25. For a summary of New York law concerning criminal convictions and deportation, *see* Manuel Vargas, *Immigration Consequences of New York Criminal Convictions, available at* http://blogs.law.columbia.edu/4cs/immigration/ (last visited Mar. 16, 2009).

26. *See* Clyde Haberman, *Ex-inmate Denied Chair (and Clippers),* N.Y. TIMES (Feb. 25, 2003) at B1; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences,* 11 STAN. L. & POL'Y REV. 153, 156 (1999)

(noting that professional licenses for which ex-offenders can be ineligible "range from lawyer to bartender, from nurse to barber, from plumber to beautician").

27. *See* Editorial, *Marijuana and College Aid,* N.Y. TIMES (Nov. 2, 2007) at A26.

28. Most collateral consequences are established by state and local law, and thus the impact of a conviction varies widely by jurisdiction. There are a couple of guides that index the collateral consequences for specific jurisdictions. The New York State Unified Court System, in conjunction with Columbia University, created a Web site that summarizes collateral consequences in New York State. The Web site, Collateral Consequences of Criminal Charges – New York State, is hosted by Columbia University and is *available at* http://www2.law.columbia.edu/fourcs/ (last visited Mar. 16, 2009). The Washington Defender Association publishes a guide for defenders entitled *Beyond the Conviction*, *available at* http://www.defensenet.org/publications.byond-conviction (last visited Mar. 2, 2009).

29. *See* Bridget McCormack, *Economic Incarceration*, WINDSOR Y.B. ACCESS TO JUST. 25, no. 2, 223-46 (2007).

30. *See* 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2.

31. *See id.*

32. William Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal,* 28 THE LEGAL AID BRIEFCASE 151, 155 (April 1970).

33. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, NCJ 179023 (Nov. 2000) at 6, Table 13. In federal court in fiscal year 1998, 38.4 percent of people charged with misdemeanors did not have counsel. *Id.* at 3, Table 2.

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34. The BJS study was only of in-custody defendants. Many misdemeanor defendants do not receive jail sentences, particularly on the first conviction, so it is likely that the percentage is far higher. The ABA has also documented the widespread failure to provide counsel in misdemeanor cases. *See* American Bar Association Standing Committee on Legal Aid and Indigent Defense, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Dec. 2004), at 22-23, *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/ (last visited Mar. 16, 2009).

35. Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007). Similarly, in North Dakota, judges appeared to be under the impression that if they sentenced the defendant to jail time, but suspended that portion of the sentence, appointment of counsel was not required. This stands in direct contradiction to the Supreme Court's holding in *Alabama v. Shelton,* 535 U.S. 654 (2002).

36. Texas Fair Defense Project Web site, http://www.fairdefense.org/about.php (last visited Mar. 16, 2009).

37. National Legal Aid and Defender Association, *Evaluation, Report & Recommendations, Riverside County Public Defender* (Dec. 2000). Since the publication of the NLADA report, Riverside County has changed its practices.

38. Cait Clarke, *Taking Alabama v. Shelton to Heart,* THE CHAMPION (Jan/Feb 2003), at 25.

39. National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* (June 2008), at 15, *available at* http://www.mynlada.org/michigan/michigan_report.pdf (last visited Mar. 16, 2009).

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

41. *Faretta v. California*, 422 U.S. 806, 835 (1975).

42. *See, e.g., State v. Chavis*, 644 P.2d 1202, 1205 (Wash. 1982) (citing *Von Moltke v. Gilles*, 332 U.S. 708 (1948)).

43. American Bar Association, Pleas of Guilty, Standard 14-1.3(a).

44. Brennan Center for Justice at NYU Law School, *Eligible for Justice* (2008), at 11, *available at* http://www.brennancenter.org/content/resource/eligible_for_justice (last visited Mar. 16, 2009).

45. Rule 3.160(e) states:

> **Defendant Not Represented by Counsel.** Prior to arraignment of any person charged with the commission of a crime, if he or she is not represented by counsel, the court shall advise the person of the right to counsel and, if he or she is financially unable to obtain counsel, of the right to be assigned court-appointed counsel to represent him or her at the arraignment and at all subsequent proceedings. The person shall execute an affidavit that he or she is unable financially or otherwise to obtain counsel, and if the court shall determine the reason to be true, the court shall appoint counsel to represent the person. If the defendant, however, understandingly waives representation by counsel, he or she shall execute a written waiver of such representation, which shall be filed in the case. If counsel is appointed, a reasonable time shall be accorded to counsel before the defendant shall be required to plead to the indictment or information on which he or she is to be arraigned or tried, or otherwise to proceed further.

46. *Gideon,* 372 U.S. at 340, 344.

47. *See Eligible for Justice*, *supra.* n. 44, at 7-8.

48. MODEL RULES OF PROFESSIONAL CONDUCT 4.3 (2004).

49. *Id.* at 3.8(b).

50. *Id.* at 3.8(c).

51. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

52. *Argersinger,* 407 U.S. at 40.

53. *Id.* at 34.

54. American Bar Association House of Delegates Resolution 107, adopted August 9, 2005, *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf.

55. ABA Criminal Justice Standards, Providing Defense Services, Standard 5-7.1 and Commentary:

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

56. *See id.*

57. *See, .e.g,* Rev. Code of Wash. 10.101.020 (2) ("In making the determination of indigency, the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bail.").

58. *See generally Eligible for Justice*, *supra*. n. 44.

59. *Id.* at 19.

60. *Id.* at 9. Prosecutors should also be prohibited from participating in the selection of defenders. The independence of the defense function cannot be maintained if the prosecutor, the adversary of the defender, has a role in selecting the defender. *See* American Bar Association, Ten Principles of a Public Defense Delivery System (Feb. 2002), at Principle 1 and Commentary (noting the importance of the independence of the defense), available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf (last visited Mar. 16, 2009). For this reason, an ethics opinion drafted by NACDL ethics counsel forbids a district attorney from having any involvement in the operation or administration of the public defender's office. *See* NACDL Ethics opinion 95-1, available upon request from NACDL.

61. American Bar Association Resolution 107, *supra*. n. 54.

62. Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1032 & 1035 (2006).

63. Application fees must be distinguished from reimbursement or recoupment. An application fee is a flat rate fee for use of publicly funded defense service that is assessed at the outset of the criminal proceeding, often before any representation is provided. Reimbursement or recoupment is generally charged at the conclusion of a representation and the amount of the charge generally represents the cost of the particular representation or a portion thereof. ABA policy is to forbid the use of a reimbursement charge unless the defendant engaged in fraud to obtain the public defense services. *See* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-7.2(a) ("Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.").

64. S.C. CODE ANN. § 17-3-30 (2008).

65. *See, e.g.*, Freehold Township Web site, http://www.twp.freehold.nj.us/departments/Municipal-Court/public-defender.asp; For a summary of statewide fee programs, *see also* The Spangenberg Group, *Public Defender Application Fees: 2001 Update* (2001), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/pdapplicationfees2001-narrative.pdf.

66. ABA Standing Committee on Legal Aid and Indigent Defense, Report to Board of Governors in Support of Adoption of Guidelines (Aug. 2004), at 5, *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf.

67. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) ("[T]he obvious truth [is] that the average defendant does not have the professional legal skills to protect himself."); *Argersinger*, 407 U.S. at 32 n.3 ("That which is simple, orderly and necessary to the lawyer – to the untrained laymen – may appear intricate, complex and mysterious.").

68. *See* Misdemeanor Defense in Practice, *infra*. notes 156-168 and accompanying text.

69. It is for this reason that ABA standards require an attorney to investigate a case before the defendant enters a guilty plea. *See* ABA Criminal Justice Section, Standards on the Defense Function, § 4-4.1, *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (last visited Mar. 2, 2009):

> **Standard 4-4.1 Duty to Investigate:** Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

70. *State v. Tenin*, 674 N.W.2d 403, 410-11 (Minn. 2004).

71. *State v. Jolicoeur*; 327 N.J. Super Ct. 91, 95-96 (N.J. Super. Ct. 1999). By contrast, an application fee that is subject to waiver for inability to pay has been upheld. *See Stephen Cameron v. Justice of the Taunton District Court*, Slip Op. (Supreme Judicial Court for Suffolk County, June 5, 1992).

72. *See, e.g.*, OHIO ADMIN. CODE § 120-1-03(B)(2) ("Applicants with an income over 187.5 percent of the federal poverty level shall be deemed not indigent."). Federal poverty level for a single person in the lower 48 states and the District of Columbia is $10,400. *See* Federal Register, Vol. 73, No. 15 (Jan. 23, 2008), at 3971-72. Accordingly, an individual making greater than $19,500 per year is ineligible for public defense services in Ohio, regardless of the charge they are facing. For recommendations on how indigent defense eligibility guidelines should be structured, *see Eligible for Justice, supra*. n. 44.

73. ABA, Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases, Guideline 2, *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/rec110.pdf (last visited Mar. 2, 2009).

74. *Id.* at Guideline 6.

75. *Id.*

76. A number of states also have established caseload standards. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable* (Jan. 2001), *available at* http://www.ncjrs.org/pdffiles1/bja/185632.pdf (last visited Mar. 2, 2009).

77. Statement *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf (last visited Mar. 2, 2009).

78. *See Keeping Defender Workloads Manageable*, *supra*, n. 76, at 10.

79. *See* ACCD Statement, *supra.* n. 76.

80. Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHI. SUN TIMES (July 24, 2006), at 18; Erik Eckholm, *Citing Workload Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), at A1 (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-07. By the 2006-07 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

81. Kentucky Department of Public Advocate, *Realizing Justice, Defender Caseload Report Fiscal Year 2007*, at 5, *available at* http://apps.dpa.ky.gov/library/DefenderCaseloadReport07.pdf (last visited Mar. 2, 2009).

82. Grant County's public defense services have been under the supervision of the court system following the settlement of a lawsuit alleging systemic deficiencies in felony representation. The caseload information is derived from monthly reports to the county commissioners by the attorney who supervises the defense contractors pursuant to the settlement. Reports were made available through a public disclosure request.

83. This schedule would require working more than 2,300 hours per year, far in excess of even the billable hours required by large civil defense law firms in most major cities. National Association for Law Placement, *Billable Hours Requirements at Law Firms*, NALP BULLETIN (May 2006) ("Although billable hour requirements ranged from 1,400 to 2,400 hours per year in 2004, most offices reporting a minimum require either 1,800 or 1,900 hours (24 percent and 21 percent of offices, respectively)."). The Washington Defender Association standards recommend 1,650 billable hours per year. *See* Washington Defender Association, Standards for Public Defense Services, Standard Three, Commentary. The Office of Management and Budget (OMB) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. *Performance of Commercial Activities*, OMB Cir. No. A-76 (Revised) (Aug. 1983), at p. IV-8.

84. Opinion, *It's a Fiction that Secrecy Is Good in Dealing with Kids,* THE COURIER-JOURNAL (July 16, 2008).

85. Brandon Ortiz, *Public Defenders Sue State Over Funding,* LEXINGTON HERALD-LEADER (July 1, 2008).

86. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1; *see also* ARIZ. ETHICAL RULE, Rule 1.1.; ARK. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, Rule 1.1.

87. Ariz. Ethics Op. 90-10 (1990), at 6, *available at* http://www.myazbar.org/ethics/pdf/90-10.pdf.

88. *Id.* at 8.

89. Unless specifically cited, facts for this story were taken from the Ohio Court of Appeals decision. *Ohio v. Jones*, Case No. 2008-P-0018 (Ohio Ct. App. Dec. 31, 2008), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/11/2008/2008-ohio-6994.pdf (last visited Mar. 16, 2009).

90. Milan Simonich, *Contempt Upheld for Ohio Public Defender,* PITTSBURGH POST-GAZETTE (Aug. 25, 2007).

91. *Ohio v. Jones*, *supra.* n. 89.

92. ABA Ethics Op. 06-441, *available at* http://www.abanet.org/cpr/pubs/ethicopinions.html#06441 (last visited Mar. 2, 2009). The American Council of Chief Defenders came to a similar conclusion in 2003:

> A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

ACCD Ethics Opinion 03-01 (2003), *available at* http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf (last visited Mar. 16, 2009).

93. *See id.* at 6.

94. Ariz. Ethics Op. 90-10, *supra.* n. 87.

95. *In re Matter of Robert Pinto Public Defender San Benito County* (Cal. State Bar Court Case No. 93-O-10027).

96. *Id.*

97. Attorney Discipline, CAL. BAR J. (Feb. 1996), *available at* http://calbar.ca.gov/calbar/2cbj/96feb/2cbj29.htm (last visited Mar. 2, 2009).

98. Washington State Bar Association, Discipline Notice for Thomas Jay Earl, *available at* http://pro.wsba.org/PublicView-Discipline.asp?Usr_Discipline_ID=594 (last visited Mar. 14, 2009). Mr. Earl abandoned his appeal, so there is no Supreme Court opinion.

99. *Id.*

100. *See* City of Seattle Ordinance 121501 (June 14, 2004).

101. Even though the 380 level is one of the lowest in the country, some defenders feel it still is too high. A lawyer from one of the other King County defender offices noted that the 380 caseload standard did not allow effective representation, and stated in her survey response: "The caseload standard is too high, and it results in us very often not being able to do as much for each client as we'd like to do." She added that the greatest challenge in the practice is "doing justice to each case when there is such an overwhelming caseload."

102. MASS. GEN. LAWS ANN., Ch. 211D, §11 (2008).

103. WIS. STAT. ANN. § 977.08(bn) (2008).

104. *See Keeping Public Defender Caseloads Manageable*, *supra*, n. 76. at 13-14.

105. *Id.* at 14.

106. *See, e.g.*, ABA Ethics Opinion 06-411, *supra.* n. 92; ACCD Ethics Opinion 03-01, *supra.* n. 92.

107. *See* Jim Seckler, *Judge Allows Public Defender to Withdraw from 39 Felony Cases*, MOHAVE DAILY NEWS (Dec. 18, 2007).

108. A copy of this order is available in the online appendix at www.nacdl.org/misdemeanor.

109. *See* Pleadings, *available at* http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm (last visited Mar. 2, 2009).

110. *See* Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Non-capital Felony Cases, Circuit Court of Eleventh Judicial Circuit, Miami-Dade County Florida (Sept. 3, 2008), at 4, *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf (last visited Mar. 2, 2009).

111. *Id.* at 6.

112. Other offices have motions pending. Beginning in 2007, the Knoxville, Tennessee, public defender asked the court to cease appointing his office to any further misdemeanor cases so that he could reassign attorneys to handle a large backlog of felony cases. *See* Jamie Satterfield, *Public Defender Battles Load*, KNOXVILLE NEWS SENTINEL (July 19, 2007). The battle has continued for more than a year, with the state attorney general and court administrator's office opposing the effort. *See* Jamie Satterfield, *Staffing Again an Issue for Defender*, KNOXVILLE NEWS SENTINEL (June 30, 2008). In 2007, the defenders office had 22 attorneys handling a caseload of approximately 12,500 per year (or 568 cases per attorney). *See* Caseload Data 2007, Knoxville County Public Defender Office, *available at* http://www.pdknox.org/800main.htm (last visited Mar. 2, 2009). Assuming the caseload was exclusively misdemeanors, the caseloads would have been approximately one and a half times national standards. In actuality it was much worse. Almost one-fourth of the caseload was felony cases. *See id.*

A misdemeanor public defender in the office filed an affidavit in connection with the motion that stated:

> In misdemeanor court, my caseload assignment is determined by the docket on the particular day I am in court. ... I do not personally count the number of cases I have on a given day. Over the course of the last few years, I have been in court representing as few as 8 and as many as 50 defendants on a given day. Some defendants have only one charge, others have multiple charges. ... [A]ccording to [our computer case counting system] between January 7, 2008, and February 6, 2008, I closed approximately 107 cases. According to [the same program], between January 7, 2008 and February 6, 2008, I was assigned 120 new misdemeanor cases[.]

Affidavit of Joseph W. Ramsey, *available at* http://www.pdknox.org/800main.htm (last visited Mar. 2, 2009). As of March 2, 2009, the court still has not issued a ruling on the public defender's motion.

113. *Ligda v. Superior Court of Solano County,* 85 Cal. Rptr. 744, 754 (1970).

114. *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2nd Cir. 2006), *cert. denied* 2006 U.S. Lexis 8666 (2006) (upholding arrest for sleeping in a cardboard box against constitutional vagueness challenge).

115. *See* 21 N.Y.C.R.R. § 1050.7; *see also Man Hauled Off by Cops for Using 2 Subway Seats*, WORLD NET DAILY (July 19, 2003), *available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33662 (last visited Mar. 2, 2009).

116. 21 N.Y.C.R.R. §1050.10.

117. *See* AP, *In Orlando, a Law Against Feeding Homeless — and Debate Over Samaritans' Rights*, Associated Press (Feb. 3, 2007), *available at* http://www.iht.com/articles/ap/2007/02/04/america/NA-FEA-GEN-US-Do-Not-Feed-the-Homeless.php (last visited Mar. 16, 2009). The same AP article reported, "In Fairfax County, Virginia, homemade meals and meals made in church kitchens may not be distributed to the homeless unless first approved by the county. ... 'We've seen cities going beyond punishing homeless people to punishing those trying to help them, even though it's clear that not enough resources are being dedicated to helping the homeless or the hungry,' said Maria Foscarinis, Executive Director of the National Law Center on Homelessness and Poverty, a non-profit in Washington, D.C." *See also* National Law Center on Homelessness and Poverty, *Feeding Intolerance* (Nov. 2007), *available at* http://www.nlchp.org/content/pubs/Feeding_Intolerance.07.pdf (last visited Mar. 16, 2009); Las Vegas City Code § 13.36.055.

118. Such charges should be distinguished from license suspensions that result from reckless driving or excessive speeding, which can be viewed as threatening public safety.

119. *See Race to the Bottom*, *supra*. n. 39, at 91.

120. *See, e.g., Gideon's Broken Promise*, *supra*. n. 34, at 7-9; Barbara Mantel, *Public Defenders: Do Indigent Defendants Get Adequate Legal Representation?*, CQ RESEARCHER, Vol. 18, No. 15 (Apr. 18, 2008), at 340-41.

121. Associated Press, Missouri Public Defenders to Begin Refusing Clients, JOPLIN GLOBE (Sept. 29, 2008).

122. *See* Eric Stirgus, *Mayor Urges Cutting City Lawyers' Jobs*, ATLANTA JOURNAL-CONSTITUTION (Apr. 23, 2008).

123. *Id.*

124. It is possible to build a budget for a full time defender office or non-profit defender association that is based on a per attorney caseload limit no greater than national standards and that addresses other principles such as supervision, training, and support services including expert witnesses. There also needs to be flexibility to respond to the needs of unusual cases, and provisions for additional funding when the caseload exceeds an agreed upon level. Contracts that are designed as described here are not "fixed fee" as contemplated in this report.

125. *See Gideon's Broken Promise*, *supra*. n. 34, at 11-12.

126. California Commission on the Fair Administration of Justice, *Final Report and Recommendations* (Aug. 2008), at 101, *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (last visited Mar. 2, 2009).

127. *Argersinger*, 407 U.S. at 38, fn. 9.

128. S.B. 2400, Hawaii Legislature 2008 General Session, *available at* http://www.capitol.hawaii.gov/session2008/Bills/SB2400_CD1_.pdf (last visited Feb. 24, 2009).

129. Act 124, Hawaii Legislature, 2004 General Session, *available at* http://www.capitol.hawaii.gov/session2005/bills/HB1749_sd2_.htm (last visited Feb. 24, 2009).

130. *See* Edwin L. Baker, *Decriminalization of Nonserious Offenses: A Plan of Action*, Legislative Reference Bureau, Report No. 3, 2005, *available at* http://www.state.hi.us/lrb/rpts05/decrim.pdf (last visited Feb. 24, 2009).

131. *Id.* at v.

132. *Id.*

133. *See* Senate Bill 2400, Hawaii Legislature, 2008 General Session, *available at* http://www.capitol.hawaii.gov/session2008/Bills/SB2400_CD1_.pdf (last visited Feb. 24, 2009).

134. *See id.*

135. An Act Providing Counsel to Indigent Persons, Chapter 54 of the Acts of 2005, § 6, *available at* http://www.publiccounsel.net/administration/pdf/Chapter percent2054 percent20of percent20the percent20Acts percent20of percent202005.pdf (last visited Mar. 2, 2009).

136. *Id.*

137. David Abel, *Mass. Voters OK Decriminalization of Marijuana*, BOSTON GLOBE (Nov. 4, 2008).

138. *See* Elizabeth Neely, *Lancaster County Public Defender Workload Assessment*, University of Nebraska Public Policy Center, at 17 (July 2008), *available at* http://ppc.unl.edu/userfiles/file/Documents/projects/Public percent20Defender/Public percent20Defender percent20Workload percent20Assessment.pdf (last visited Feb. 24, 2009).

139. *See* Kendra Waltke, *Public Defender's Office Stretched Thin*, LINCOLN JOURNAL STAR (July 27, 2008).

140. ABA Commission on Effective Criminal Sanctions, Report I: Alternatives to Incarceration (Feb. 2007), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf.

141. *See* Program Description, *available at* http://www.jud11.flcourts.org/programs_and_services/DLFAQFINAL.pdf (last visited Mar. 17, 2009).

142. *See* Program Description, *available at* http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx.

143. Costs & Benefits of the King County District Court Relicensing Program: Christopher Murray & Associates, 2004, Powerpoint Presentation, available upon request from author.

144. *See* Relicensing Program Web site, *available at* http://www.spokanecity.org/government/legal/prosecuting/relicensing/.

145. *See* Recommendations – Excessive Caseloads, *supra*. notes 100-105 and accompanying text.

146. *See id.*

147. *Keeping Public Defender Caseloads Manageable*, *supra*. n. 76, at 9.

148. *Id.*

149. Rawhide was a 1960's television show about a cattle drive. The lyrics of the show's theme song read in part as follows: "Keep movin', movin', movin'; Though they're disapprovin'; Keep them dogies movin'; Rawhide!" *See* Lyrics on Demand, *available at* http://www.lyricsondemand.com/tvthemes/rawhidelyrics.html.

150. *See* National Legal Aid & Defender Association, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1984), *available at* http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts (last visited Mar. 16, 2009); *see also* U.S. Department of Justice, Bureau of Justice Assistance, *Contracting for Indigent Defense Services* (Apr. 2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/181160.pdf (last visited Mar. 16, 2009).

151. *See* Ten Principles of a Public Defense Delivery System, *supra*. n. 60, at Principle 8 ("Contracts with private attorneys for public defense services should never be set primarily on the basis of cost; they should ... provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.

152. *See* Bill Morlin, *Verdict Rebuffs Flat-Fee Defender Contracts*, SPOKESMAN-REVIEW (Jan. 30, 2009).

153. *See id.* The federal judge told the jury after its verdict:

> It is the responsibility of the officials such as county commissioners in those counties to see that persons who are charged with serious offenses have the effective assistance of counsel. You have found responsibility on the part of Mr. Earl, but there is responsibility by others to see that the criminal justice system comports with our constitutional protections. Not only by this action, but by reason of the problems that have existed in these other counties coming to the fore, it is my belief that this case will serve as a catalyst for other counties, not only in the State of Washington, but probably throughout the country, to reevaluate their system of providing effective assistance of counsel.

Comments of Judge Quackenbus in *Vargas v. Earl*, Case No. CV 06-146-JLQ, Spokane, Washington (Jan. 29, 2009).

154. *See* WASH. RULES OF PROFESSIONAL CONDUCT, Rule 1:8 Conflict of Interest: Current Client: Specific Rules (2008), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC (last visited Mar. 16, 2009).

155. Board of Governors, Washington State Bar Association, Suggested Amendment to Washington Rules of Professional Conduct, Rule 1:8 Conflict of Interest: Current Client: Specific Rules, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=137 (last visited Mar. 16, 2009) (citing WSBA Informal Ethics Opinion No. 1647 (conflict of interest issues under RPC 1.7 and 1.9 exist in requiring public defender office to recognize a conflict and hire outside counsel out of its budget); ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include "a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses"); *People v. Barboza*, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates "inherent and irreconcilable conflicts of interest")). As noted above, the amendment was adopted and became effective on September 1, 2008.

156. Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1509 (2003).

157. Then-Chief Judge of the New York Court of Appeals, Judith Kaye, created The New York State Commission on the Future of Indigent Defense Services, which was charged with performing a top-to-bottom examination of the state's criminal indigent defense system and developing a blueprint for reform. Chaired by Judge Burton Roberts and Professor William Hellerstein, the commission held statewide hearings beginning in 2005. The Commission also hired The Spangenberg Group, a research firm nationally recognized for its expertise in indigent defense, to study and report on the current operations of public defense in the state of New York. The comprehensive report was submitted to the commission, and became an appendix to the commission's recommendations for change published at the same time.

158. Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services (June 16, 2006), at 45, *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf (last visited Mar. 10, 2009).

159. Adele Bernhard, *Take Courage: What Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002).

160. A Statement by Kaye Commission Member Professor Steven Zeidman, *available at* www.nyclu.org/node/1482 (last visited Mar. 16, 2009).

161. U.S. Department of Justice, Bureau of Justice Administration, *Contracting for Indigent Defense Services* (2000), at 1-2, available at http://www.ncjrs.org/pdffiles1/bja/181160.pdf (last visited Mar. 16, 2009).

162. *Id.*

163. The California Commission on the Fair Administration of Justice reported that the fired associate subsequently filed a federal lawsuit against the contract defender and received a settlement. The commission noted, "In a deposition for that lawsuit, the contract attorney boasted that he pled 70 percent of his clients guilty at the first court appearance, after spending 30 seconds explaining the prosecutor's 'offer' to the client." California Commission on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California* (Apr. 14, 2008), at 9, *available at* http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf (last visited Mar. 16, 2009).

164. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968) (offering anecdotal evidence that plea bargaining induces innocent defendants to plead guilty); *see also* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practice in the Federal Courts*, 89 HARV. L. REV. 293 (1975).

165. *See, e.g.*, John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants*, 126 U. PA. L. REV. 88 (1977).

166. *Cf. id.* at 96-97 (noting that an innocent defendant might plead guilty because of: "the disparity in punishment between conviction by plea and conviction at trial; ... a desire to protect family or friends from prosecution; ... the conditions of pretrial incarceration; ... desire to expedite the proceedings, among other reasons").

167. Joseph Bellacosa, *In Defense of a Need to Remedy Public Defense*, NEWSDAY (July 28, 2008).

168. Robert Guest (Feb. 27, 2008), blog *available at* http://www.dallascriminaldefenselawyerblog.com/kaufman_county/ (last visited Mar. 16, 2009).

169. A Statement by Kaye Commission Member Professor Steven Zeidman, *supra*. n. 160.

170. *See* Misdemeanor Defense in Practice, *supra*. notes 156-166 and accompanying text.

171. In fact, these types of cases produce active motions and jury trial practice in many other jurisdictions. *See, e.g.*, Ted Vosk, *DWI*, THE CHAMPION (May/June 2008), at 54 (about unreliable lab testing); Mimi Coffey, *DWI*, THE CHAMPION (Jan./Feb. 2008), at 5 (arguing that field sobriety tests are not reliable). In King County District Court in Washington State, for example, in 2007, there were

4,256 DUI/physical control filings. There were 153 trials, resulting in 31 acquittals, representing a trial rate of approximately 3.6 percent and an acquittal rate of approximately 20 percent. *See* Courts of Limited Jurisdiction, Annual Caseload Report 2007, *available at* http://www.courts.wa.gov/caseload/clj/ann/2007/annualtbls07_wo_staffing.pdf (last visited Mar. 16, 2009).

172. Nevada Supreme Court Task Force Implementation Committee for the Elimination of Racial, Economic and Gender Bias in the Justice System, *Indigent Defense Services in Nevada: Finding and Reccomendations* (2000).

173. Nevada Supreme Court Order, *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf (last visited Mar. 16, 2009).

174. Nevada Performance Standards, Felony and Misdemeanor Trial Cases, Standard 3, *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411Order01_04_08.pdf (last visited Mar. 16, 2009).

175. *Id.*, Standard 4.

176. Opinion, *Upholding Our Standards Will Mean Reaching Into Our Wallets*, RENO GAZETTE-JOURNAL (May 7, 2008).

177. *The Thin Line of Defense*, N.Y. TIMES, Video Report, produced by Kassie Bracken and Erik Eckholm, *available at* http://www.nytimes.com/2008/11/09/us/09defender.html?ex=1383973200&en=69517a39c4d1aefb&ei=5124&partner=digg&exprod=digg (last visited Mar. 16, 2009).

178. Jan Pudlow, *Judge Allows 11th PD to Stop Taking Cases*, Florida Bar News (Sept. 15, 2008).

179. ABA Criminal Justice Standards on Pretrial Release, Standard 10-1.1, adopted by the ABA House of Delegates in February 2002, available at http://www.abanet.org/crimjust/standards/pretrialrelease_toc.html (last visited Mar. 2, 2009).

180. *Id.* at Standard 10-5.1.

181. *See id.*

182. *Id.* at Standard 10-5.3 ("Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.").

183. WASH. CRIM. RULES FOR COURTS OF LIMITED JURISDICTION, Rule 3.2.

184. *Id.*

185. *See, e.g.*, Massachusetts Committee for Public Counsel Services, Performance Standards and Complaint Procedures, Criminal District Court Jurisdiction, § 4.1; § 5.1 (describing duty to investigate and noting that plea negotiations should not occur until "after interviewing the client and developing a thorough knowledge of the law and facts of the case"), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_4_criminal.pdf (last visited Mar. 2, 2009).

186. ABA Criminal Justice Section, Standards on the Defense Function, § 4-4.1, *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (last visited Mar. 2, 2009).

187. *See id.* ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

188. Prosecutors are under tremendous pressure to generate convictions. Conviction percentages, or win/loss records, both for individual prosecutors and for offices, are often used as performance measures, which are reviewed by county and state authorities when considering prosecutorial performance and budgets, and which are also used by individual offices for review and promotion purposes. *See, e.g.*, George Fisher, *What Prosecutors Can't Hold Back,* NEW YORK TIMES (May 19, 2001), at A13 (noting the "widespread suspicion" that win loss statistics are used to grant promotions and pay raises); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471-72 (2004) (emphasizing that "prosecutors want to ensure convictions" and that the "statistic of conviction ... matters much more than the sentence"). This pressure is, in part, to blame for the pressure to plea bargain, as a plea bargain counts as a conviction or win, whereas the dismissal of a case counts as a loss. As one prosecutor noted, "When we have a weak case ... we'll reduce to almost anything rather than lose." Alschuler, *The Prosecutor's Role in Plea Bargaining, supra* n. 164, at 59. In misdemeanor court, the prosecutor can actually reduce the charge to almost nothing, in the form of probation, without being criticized, because the nature of the charge is minimal. The defendant, in turn, even if innocent, is under tremendous pressure to accept the plea because, as noted above, the costs of continuing to challenge the charge appear incredibly high in comparison to accepting the small punishment. To fully address the problem, the pressure on prosecutors to avoid dismissals must be alleviated. *See* American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* (2004), at 1-3 (disavowing the use of conviction rates as a performance measure), *available at* http://www.ndaa.org/pdf/prosecution_21st_century.pdf (last visited Mar. 2, 2009).

189. Ten Principles of a Public Defense Delivery System, *supra* n. 60, at Commentary to Principle 5.

190. In some cases, defendants arrested for petty crimes are held in jail even when they are incompetent to stand trial because there is no hospital bed available. *See* Abby Goodnough, *Officials Clash Over Mentally Ill in Florida Jails*, N.Y. TIMES, (Nov. 15, 2006), at A1.

191. Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Special Report (Sept. 2006), *available at* http://ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf (last visited Mar. 16, 2009).

192. ABA Criminal Justice Standards, Providing Defense Services, Standard 5-1.4.

193. Lee Molloy, *A Class C Defense,* THE SUNPOST (Sept. 11, 2008).

194. NLADA Defender Training and Development Standards, Standard 1:1, *available at* http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards#oneone (last visited Mar. 2, 2009). Similarly, national performance standards provide:

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

NLADA Performance Guidelines for Defense Representation, Guideline 1.2: Education, Training and Experience of Defense Counsel, *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#oneone (last visited Mar. 2, 2009).

195. *See* Program Description, *available at* http://www.phila.gov/defender (last visited Mar. 16, 2009).

196. For more information on the Kentucky training program, *see* http://dpa.ky.gov/ed/ (last visited Mar. 16, 2009).

197. For more information on the Massachusetts training program, *see* http://www.publiccounsel.net/Training/training_index.html (last visited Mar. 16, 2009).

198. *See* Program Description, *available at* http://www.pdsdc.org/LegalCommunity/TrainingSummerSeries.aspx (last visited Mar. 16, 2009).

199. *See* N.Y. RULES OF THE COURT, APP. DIV., FIRST DEPT., Rules 612.0-612.12; *see also* Assigned Counsel Application, *application at* http://www.courts.state.ny.us/courts/ad1/18BAPPLICATION.1stDept.FINAL.pdf. Attorney reviews should involve attorney-client privileged material only when a client files a complaint concerning an attorney and a waiver, therefore, can be obtained. Review files should then be confidential, unless subpoenaed as part of a legal proceeding. *See, e.g.*, Washington State Bar Association, Informal Opinion 2035 (2003) (holding that privileged and confidential material should not be turned over to funding agencies); D.C. Bar Opinion 222, Nondisclosure of Protected Information to Funding Agency (Dec. 17, 1991), *available at* www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion223.cfm (last visited Mar. 25, 2009) (same).

200. *See* N.Y. RULES OF THE COURT, APP. DIV., FIRST DEPT., Rule 612.9 ("The Central Screening Committee may continue to process complaints against panel attorneys which relate to the discharge of an attorney's duties under the panel plan.").

201. *See generally* NLADA Performance Guidelines for Criminal Defense Representation, *supra*. n. 194.

202. Nevada Indigent Defense Standards of Performance, Standards 1(b), *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf (last visited Mar. 16, 2009).

203. *See* Washington State Bar Association Standards for Indigent Defense Services, *available at* http://www.opd.wa.gov/Trial percent20Defense/080721 percent20wsbastandards408.pdf (last visited Mar. 16, 2009.

204. The Massachusetts Performance Guidelines, *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/criminal/criminal_district_court_superior_court_murder_(trial_level).pdf (last visited Mar. 16, 2009).

205. The Nevada Performance Standards, *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf (available at Mar. 16, 2009).

206. New York State Bar Association, Standards for Providing Mandated Representation, adopted by the House of Delegates on April 2, 2005, *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726 (last visited Mar. 16, 2009).

207. Nevada Indigent Defense Performance Standards, Standard 1(c), *supra*. n. 202.

208. For more on this process, see Standards of Practice Enforcement Web site at http://www.indigentdefense.virginia.gov/StandofPracEnf.htm (last visited Mar. 2, 2009).

209. Press Release, *Congress Passes Durbin Bill Providing Student Loan Relief for Young Prosecutors and Public Defenders* (Aug. 4, 2008), *available at* http://durbin.senate.gov/showRelease.cfm?releaseId=301775 (last visited Mar. 16, 2009).

210. *See id.*

211. *See* National Association of Law Placement, *What Do New Lawyers Earn? A 15-Year Retrospective as Reported by Law School Graduates*, NALP BULLETIN (Sept. 2007).

212. Inadequate compensation frequently afflicts both prosecutors and defenders. In many cases, both sides are paid inadequately. *See, e.g.*, Crocker Stephenson, *State Assistant Prosecutors Quitting Over Pay, Caseloads*, JOURNAL-SENTINEL (Oct. 27, 2008).

213. *See* Job Announcement, *available at* http://www.alleghenycounty.us/jobs/OPDdefat.aspx (last visited Feb. 24, 2009).

214. The District Attorneys in Allegheny County are also paid poorly, although their pay increases more with experience than that of the public defenders. The starting salary in the District Attorney's office is about $1,000 higher than the public defender at $39,625 per year. It increases to $44,932 at five years, $59,885 at eight to 10 years, $67,663 at 11-15 years, and $71,452 at more than 15 years. The elected District Attorney salary in 2007 was $151,115. By contrast, the defenders are lagging behind. The Chief Defender's salary is $93,000. One of the senior managers receives $62,000. One of the defender attorneys who had 10 years' experience reported that last year he received a raise from $48,000 to $58,000 per year.

215. *See* Memorandum of Law In Support of Motion to Appoint Other Counsel (citing a Florida Bar survey), *available at* http://www.pdmiami.com/ExcessiveWorkload/Memorandum_of_Law_in_Support_of_Motion_to_Appoint_Other_Counsel-Oscar_Munoz.pdf (last visited Mar. 2, 2009).

216. Ten Principles of a Public Defense Delivery System, *supra* n. 60, at Principle 8.

217. *Id.* at Commentary to Principle 8 (emphasis added).

218. *Id.*

219. *See In Tiny Courts of New York, Abuses of Law and Power, supra*. n. 9.

220. *In re Hammermaster*, 985 P.2d 924 (1999) [citation omitted].

221. *See* Case Summary, *available at* http://www.cjc.state.wa.us/search/searchResultListSpecificCJC.php?id=3210 (last visited Mar. 2, 2009); see also *In re Michels*, 75 P.3d 950 (2003) (disciplining a judge for violating the basic responsibility to make sure eligible people have counsel).

222. *In re Ottinger*, CJC no. 3811-F-110, *available at* http://www.cjc.state.wa.us/Case percent20Material/2004/3811/3811 percent20Ottinger percent20Stipulation percent20Final.pdf (last visited Mar. 2, 2009).

223. *See id.*

224. *See id.*

225. *In re Ottinger,* No. 203,389-3, Wash. Supreme Court (July 20, 2006), *available at* http://www.cjc.state.wa.us/Case%20Material/2006/4475%20Supreme%20Court%20Decision.pdf (last visited Mar. 16, 2009).

226. *In Tiny Courts of N.Y., Abuses of Law and Power, supra*. n. 9.

227. MODEL CODE OF JUDICIAL CONDUCT at Cannon 3(B)(4)-(5), *available at* http://www.abanet.org/cpr/mcjc/toc.html (last visited Mar. 2, 2009).

228. *Johnson v. Zerbst,* 304 U.S. 458, 464-65 (1938).

229. *In re Hammersmith,* 985 P.2d 92 (1999) (citing *In re Reeves,* 469 N.E.2d 1321(1984); *In re Field*, 576 P.2d 348 (1978); *Ryan v. Comm'n on Judicial Performance,* 754 P.2d 724 (1988)).

230. David M. Bateson & Tim Hart, *Combating Attorney Burnout*, BENCH & BAR OF MINNESOTA Vol. 64, No. 11 (Dec. 2007).

231. David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Toward Change*, 52 ALA. L. REV. 975, 994 (2001).

232. Mark Levitan, *Poverty in 2002: One-Fifth of the City Lives Below the Federal Poverty Line* (Sept. 30, 2003) *available at* http://www.cssny.org/userimages/downloads/2003_09poverty.pdf (last visited Mar. 16, 2009).

233. Steven Zeidman, *Time to End Violation Pleas*, N.Y.L.J. (Apr. 1, 2008), at 2.

234. Sam Skolnik, *Drug Arrests Target Blacks Most Often*, SEATTLE POST-INTELLIGENCER (May 15, 2001), at B1.

235. Eric Nalder, Lewis Kamb and Daniel Lathrop, *Blacks Are Arrested on 'Contempt of Cop' Charge at Higher Rate*, SEATTLE POST-INTELLIGENCER (Feb. 28, 2008), at A1.

236. Press Release, *200 Exonerated, Too Many Wrongfully Convicted*, Innocence Project, *available at* http://www.innocenceproject.org/Content/530.php (last visited Mar. 16, 2009).

237. Defenders may also be able to address practices that unnecessarily humiliate defendants based, in part, on the disproportionate way in which these practices apply to defendants of color. One such practice is the shackling of defendants accused of misdemeanor crimes. In many courts, all in-custody defendants appear in court in handcuffs and/or leg chains. As observed above, most such defendants are people of color. Shackling of defendants is not commonly challenged by defense attorneys, despite the profound effect that the practice has on clients and despite precedent requiring a showing that restraint is necessary for the safety of the defendant or others. *See, e.g., In re Staley*, 364 N.E.2d 72, 73-74 (Ill. 1977) ("Physical restraints should not be permitted unless there is a clear necessity for them."); *State v. Williams*, 18 Wash. 47, 51 (1897) ("The right here declared is the right to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty."

238. *See* Press Release, *Gloucester County Defenders Win National Award for Profiling Work*, State of New Jersey, Office of the Public Defender (June 6, 2001), *available at* http://nj.gov/defender/news/p010607b.html (last visited Mar. 2, 2009).

239. *See* Program Description, *available at* http://www.defender.org/projects/rdp/ (last visited Mar. 2, 2009).

240. *Id.*

SUMMARY OF RECOMMENDATIONS

Recommendations — Absence of Counsel

- *The right to counsel should be observed in accordance with Argersinger v. Hamlin and Alabama v. Shelton.*
- *Waivers of counsel should be handled carefully, with judges ensuring that the defendant fully understands his or her right to counsel, as well as the dangers of waiving counsel.*
- *Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.*
- *Ethical prohibitions on prosecutors speaking directly with defendants should be strictly enforced.*

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Recommendations — Deterrents to Asking for Counsel

- *Defense counsel should be available to represent an accused person at the first appearance.*
- *No application fee should be charged for public defense services.*

Recommendations — Excessive Caseloads

- *All persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.*
- *When caseloads become burdensome, defenders, pursuant to their ethical obligations, should seek to discontinue assignments and/or withdraw from cases until the caseloads become manageable.*

Recommendations — Causes of Excessive Caseloads

- *Offenses that do not involve a significant risk to public safety should be decriminalized.*
- *Diversion programs should be expanded.*
- *Funding for misdemeanor defense should permit the maintenance of appropriate caseloads.*
- *Counties and states should discontinue the use of flat-fee contracts as a means of providing indigent defense services.*

Recommendations — Misdemeanor Defense in Practice

- *Guilty pleas should not be accepted at first appearance unless the attorney has fully informed the defendant of the options, the potential defenses, the potential outcomes, the consequences of foregoing further investigation and discovery, the possible sentences, and the collateral consequences of conviction, and the defendant understands and chooses to plead guilty. In addition to conducting a full and vigorous colloquy, judges should require defense attorneys to aver, on the record, that these steps have been taken.*
- *The impact of bail and bond determinations on the pressure to plead should be considered with regard to each defendant.*

- *Prosecutors should not utilize time limits on plea bargains to coerce early pleas, particularly when the time limit does not permit defense counsel to fully assess the appropriateness of the plea and advise the client.*

- *When setting the caseload standards for a jurisdiction, particular attention should be paid to the collateral consequences of convictions in that jurisdiction and the time needed by the defender to research, understand, and advise clients with regard to collateral consequences.*

- *Early disposition projects should not be exempted from caseload limits.*

Recommendations — Lack of Support Services

- *Misdemeanor defenders should have access to legal research tools, investigative resources, and expert witnesses.*

- *Social workers or other mental health support services should work in tandem with defenders to screen clients for mental health issues.*

Recommendations — Inexperienced Counsel in Misdemeanor Courts

- *Public defense attorneys should be required to attend training on trial skills, substantive and procedural laws of the jurisdiction, and collateral consequences before representing clients in misdemeanor court. Thereafter, regular training on topics relevant to the practice area should be required on an ongoing basis.*

- *Public defenders and assigned counsel in misdemeanor court should be actively supervised by experienced trial attorneys.*

Recommendations — Lack of Standards

- *Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.*

- *Jurisdictions should have an active process for enforcement of standards.*

Recommendation — Inadequate Compensation

- *Misdemeanor public defense counsel should receive fair compensation, including medical and retirement benefits.*

Recommendations — Judicial Conduct in Misdemeanor Cases

- *All judges handling misdemeanor cases should receive extensive training on the importance of criminal charges and the direct and collateral impact of pleading guilty on the defendant.*

- *Judges should be disciplined for failing to enforce the constitutional rights of defendants.*

Recommendation — Lawyer Burnout

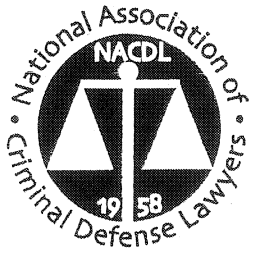
- *Defender programs should have an active plan for combating attorney burnout.*

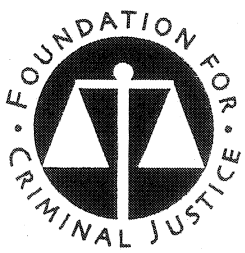
Recommendations — Disproportionate Impact on Minority Communities

- *Defender offices should gather data regarding racial and ethnic disparities.*

- *Defenders should make efforts to address racial disparities in the criminal justice system.*

Appendix available at www.nacdl.org/misdemeanor





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Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States[1]

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The expansion of the U.S. penal system has important consequences for poverty and inequality, yet little is known about the imposition of monetary sanctions. This study analyzes national and state-level court data to assess their imposition and interview data to identify their social and legal consequences. Findings indicate that monetary sanctions are imposed on a substantial majority of the millions of people convicted of crimes in the United States annually and that legal debt is substantial relative to expected earnings. This indebtedness reproduces disadvantage by reducing family income, by limiting access to opportunities and resources, and by increasing the likelihood of ongoing criminal justice involvement.

INTRODUCTION

The massive expansion of the U.S. penal system is an unparalleled institutional development, one that has given rise to substantial bodies of sociological scholarship. The U.S. incarceration rate is 6–12 times higher than those found in Western European countries and is now the highest

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in the world (Western 2006). As a result, the lives of a large and growing number of U.S. residents are profoundly shaped by criminal justice institutions. Between 1980 and 2007, the total number of people under criminal justice supervision—which includes the incarcerated and those on probation and parole—jumped from roughly 2 million to over 7 million (Bureau of Justice Statistics 2008). More than one in every 100 adult residents of the United States now lives behind bars (PEW Center on the States 2008). Yet penal expansion has affected various demographic groups quite differently. An estimated one-third of all adult black men, for example, have been convicted of a felony offense (Uggen, Manza, and Thompson 2006), and nearly 60% of young black men without a high school degree have spent time behind prison bars (Pettit and Western 2004). Criminal punishment is also overwhelmingly concentrated in poor urban neighborhoods (Clear, Rose, and Ryder 2001; Fagan, West, and Holland 2003; Travis and Waul 2004; Travis 2005; Clear 2007).

The unprecedented growth of the penal system has important consequences with which sociologists increasingly grapple. For example, mass incarceration has unprecedented demographic reach and implications, fundamentally altering the institutions with which key segments of the population come into contact over the life course (Pettit and Western 2004; Uggen et al. 2006). Penal expansion also affects measures of sociologically important phenomena such as voter turnout (McDonald and Popkin 2001) and unemployment rates (Western and Beckett 1999). And the expansion of the "carceral state" (Gottschalk 2008) has had a significant impact on important democratic institutions such as voting (Manza and Uggen 2006) and census taking (Lotke and Wagner 2005).

Another body of research highlights the connection among penal expansion, the contraction of the welfare state, and social inequality (Sutton 2000, 2004; Beckett and Western 2001; Crutchfield and Pettinicchio 2009; Wacquant 2009). The association between penal expansion and welfare retrenchment is most evident in the United States, where Braithwaite's observation that the "punitive state stands alone as the major exception to 'the hollowing out of the state'" (2000, p. 227) is most apt. This transformation of state institutions and practices has important consequences for studies of urban poverty and social inequality. As Western puts it, "the penal system has emerged as a novel institution in a uniquely American system of social inequality" (2006, p. 8; see also Wacquant 2009).

Indeed, the growth of the criminal justice system has been so consequential that punishment, urban poverty, and social inequality are increasingly treated as overlapping rather than distinct areas of inquiry (see Hagan and Dinovitzer 1999; Western and Beckett 1999; Western and McLanahan 2000; Travis and Petersilia 2001; Braman 2003; Mauer and Chesney-Lind 2003; Pager 2003, 2005, 2007; Pettit and Western 2004;

Western and Pettit 2005; Manza and Uggen 2006; Uggen et al. 2006; Western 2006; Comfort 2007; Foster and Hagan 2007; Massoglia and Schnittker 2009; Wacquant 2009). These studies indicate that the U.S. penal system is implicated in the accumulation of disadvantage and the reproduction of inequality for a number of reasons: the growing number of (mainly poor) people whose lives it touches, the impact of criminal conviction on employment and earnings, the effects of confinement on inmates' mental and physical health, mass incarcerations' destabilizing effects on families and urban communities, and the widespread imposition of "collateral" or "invisible" sanctions that transform punishment from a temporally limited experience to a long-term status.

We refine the theoretical and empirical understanding of the processes by which penal institutions reproduce inequality by examining a previously ignored dimension of penal expansion: the imposition of monetary sanctions. Although the causes and consequences of mass incarceration have been extensively studied, we are aware of no previous studies of the prevalence, extent, accumulation, or consequences of monetary sanctions in the contemporary United States. Criminological discussions of fines and other monetary penalties focus instead on the advantages of using monetary sanctions as an alternative to incarceration and criminal justice supervision, a common practice in many Western European countries (Hillsman and Greene 1992; Vera Institute 1996; Tonry 1998; Ruback and Bergstrom 2006; Nagin 2008; O'Malley 2009). The implicit—and sometimes explicit—assumption in this literature is that monetary sanctions are (or ought to be) alternatives to confinement and criminal justice supervision; the U.S. commitment to incarceration therefore means that monetary sanctions are "rarely imposed for felonies" (Nagin 2008, p. 38).

At the same time, many observers note that federal authorities, states, counties, and cities have authorized criminal justice decision makers to impose a growing number of monetary sanctions on people who are convicted—and sometimes merely accused—of crimes (McLean and Thompson 2007; Rosenthal and Weissman 2007; Levingston 2008; Anderson 2009).[2] Although it is clear that the number of monetary sanctions potentially imposed has increased, the imposition of monetary sanctions by criminal justice actors is often discretionary and sometimes limited statutorily to those who are determined to be "able to pay." Because levels of indigence among felons are high, and because data regarding the actual

[2] In Washington State, e.g., some jails assess booking fees and charge inmates up to $100 a day for the cost of their detention even before adjudication. Sentencing judges are also allowed to assess a fee for indigent defense counsel and may not waive this fee if the defendant is not convicted or if his or her conviction is reversed on appeal (Anderson 2009).

imposition of monetary sanctions are scarce, it is not clear how frequently the criminal justice actors who are increasingly allowed to impose monetary sanctions actually do so. Nor do we know much about the magnitude of the monetary sanctions that are imposed, how legal debt accumulates over time in the lives of people with criminal histories, or how it affects those who possess it.

We explore these questions here. Our findings indicate that monetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year. We also present evidence that legal debt is substantial relative to expected earnings and usually long term. Interviews with legal debtors suggest that this indebtedness contributes to the accumulation of disadvantage in three ways: by reducing family income; by limiting access to opportunities and resources such as housing, credit, transportation, and employment; and by increasing the likelihood of ongoing criminal justice involvement.

These findings have important implications for theoretical understanding of the role of the penal system and debt in the reproduction of poverty and inequality. Sociological research shows that people who are convicted of crimes are, as a group, highly disadvantaged before their conviction; criminal conviction and incarceration exacerbate this disadvantage, most directly by reducing employment and earnings (Western and Beckett 1999; Pager 2003, 2005, 2007; Western and Pettit 2005; Western 2006). Criminal justice involvement, then, is recognized as both consequence and cause of poverty. However, because the prevalence and consequences of monetary sanctions have not been systematically explored, the extent to which penal expansion contributes to inequality, and the full array of mechanisms by which it does so, has not been fully recognized. Similarly, although consumer debt is widely understood to be both a measure and a cause of poverty (Oliver and Shapiro 1995; Conley 1999, 2001; Keister 2000, 2005; Shapiro 2004), analyses of the role of debt in the stratification system have not considered the impact of legal debt. Our findings indicate that penal institutions are increasingly imposing a particularly burdensome and consequential form of debt on a significant and growing share of the poor.

Monetary Sanctions, Past and Present

Monetary sanctions, sometimes called legal financial obligations (LFOs), include the fees, fines, restitution orders, and other financial obligations that may be imposed by the courts and other criminal justice agencies on persons accused of crimes. Although a few case studies shed light on the magnitude of the monetary sanctions imposed in a particular juris-

diction for a particular category of cases,[3] monetary sanctions have not generally been recognized as an important part of criminal sentencing in the United States. For example, analysts of contemporary U.S. penal practices do not mention monetary sanctions when discussing the trend toward penal severity in the United States (e.g., Beckett 1997; Garland 2001; Western 2006; Wacquant 2009). Similarly, the sentencing literature largely ignores monetary sanctions, assuming that "monetary sanctions for nontrivial crimes have yet to catch on in the United States" (Tonry 1996, p. 124; see also Nagin 2008).

The claim that monetary sanctions are rarely imposed in felony cases may rest on the idea that monetary sanctions other than fines are neither intended as punishment nor legitimated in traditional penological terms and are therefore better understood as civil penalties than as monetary "sanctions" (see Harland 1992).[4] By contrast, we treat all financial penalties as a group, for two reasons. First, legislatures sometimes justify the imposition of all LFOs (not just fines) in traditional penological terms. For example, Washington State's statutory framework emphasizes the role of all monetary sanctions in enhancing offender "accountability," a goal that is difficult to distinguish from the most venerable of penal objectives, retribution.[5] In other states, restitution is justified in terms of its alleged rehabilitative effects on offenders (Ruback and Bergstrom 2006), also a traditional penological objective. Moreover, for our more sociological purposes, the significance of monetary sanctions lies not in the intentions of the policy makers who authorize them but rather in their implications for the sociological analysis of punishment and social in-

[3] See Ruback and Bergstrom (2006) for a useful overview of this literature. Researchers have also analyzed the offense and offender characteristics associated with receipt of monetary sanctions in misdemeanor cases (e.g., Gordon and Glaser 1991), the sanctioning practices most likely to result in payment of monetary sanctions (e.g., Raine, Dunstan, and Mackie 2004; Weisburd, Einat, and Kowalski 2008), and jurisdictional variation in the imposition of restitution orders (Ruback, Shaffer, and Logue 2004).

[4] Many other "collateral sanctions" are similarly defined as civil rather than criminal penalties. The courts have generally upheld this distinction, although some recent rulings do recognize the possibility that a "civil" penalty may be so punitive in its effect that what was intended to be a civil penalty is in fact a criminal penalty (see, e.g., *Students for Sensible Drug Policy Foundation v. Spellings*, 460 F. Supp. 2d 1093, 1105 (D.S.D. 2006).

[5] The Washington State Sentencing Reform Act identifies the goals of legislation that guide the assessment of LFOs as follows: "The purpose of this act is to create a system that: (1) Assists the courts in sentencing felony offenders regarding the offenders' LFOs; (2) *holds offenders accountable* to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior" (*Revised Code of Washington* [*RCW*] 9.94A.760; emphasis added).

equality. We therefore treat all LFOs as a group and refer to them as monetary sanctions.

The use of monetary sanctions in the criminal process is not new. In many European countries, restitution was the primary criminal penalty for centuries (Mullaney 1988). In the United States and its colonial territories, fees and fines have sometimes been imposed since the aftermath of slavery (Adamson 1983; Oshinsky 1996; Merry 2000; Blackmon 2008). Indeed, the imposition of monetary sanctions was the foundation of the convict lease system in the southern United States through the 1940s. Charged with fees and fines several times their annual earnings, many southern prisoners were leased by justice officials to corporations who paid their fees in exchange for inmates' labor in coal and steel mines and on railroads, quarries, and farm plantations (Adamson 1983; Blackmon 2008; Perkinson 2008). Collected fees and fines were used to pay judges' and sheriffs' salaries (Blackmon 2008). Monetary sanctions were thus integral to systems of criminal justice, debt bondage, and racial domination in the American South for decades.

Although the use of monetary sanctions receded in the United States by World War II, it was not entirely eradicated. By 1974, only 11 years after *Gideon v. Wainright*, the U.S. Supreme Court upheld an Oregon statute that allowed courts to require that indigent defendants be assessed a fee for the legal representation provided to them by the state because they could not afford private representation.[6] By the late 1980s, the author of a national government survey of correctional institutions concluded that "the types and total number of user fees [that exist] in criminal justice have grown dramatically" (Mullaney 1988, p. iv). And in recent years, a number of observers have noted that the range of monetary sanctions potentially imposed in criminal cases has continued to proliferate (Mullaney 1988; Butterfield 2004; California Performance Review 2005; Liptak 2006; McLean and Thompson 2007; Rosenthal and Weissman 2007; Levingston 2008).

For example, in Washington State, superior court judges may now impose up to 17 fees and fines on felony defendants at the time of sentencing; one of these sanctions is mandatory. In New York State, judges may now impose 19 statutorily authorized fees (Rosenthal and Weissman 2007). Yet it is not just the courts that may impose monetary sanctions; a variety of criminal justice agencies are now authorized to levy such

[6] *Gideon v. Wainwright*, 372 U.S. 335 (1963): in this decision, the U.S. Supreme Court unanimously ruled that state courts are required under the Sixth Amendment of the Constitution to provide defense counsel to criminal defendants who are unable to afford their own attorneys. *Fuller v. Oregon*, 417 U.S. 40 (1974): for a legal discussion of this practice, see Anderson (2009).

fees. State departments of corrections and the private companies often responsible for supervising probationers, for example, are increasingly authorized to charge inmates for the cost of their imprisonment, supervision, and court-mandated tests (Liptak 2006; Levingston 2008; Perry 2008). Jail fees are also increasingly permitted and, to the extent that they are imposed, would supplement the fees and fines imposed by the courts (Gordon and Glaser 1991; Levingston 2008).

Unpaid LFOs may also be subject to interest, surcharges, or collection fees. Many states have authorized county clerks or collection agencies to charge interest and collection fees in addition to the initial court LFO sentence. In California, there are now more than 3,100 separate fines, fees, surcharges, penalties. and assessments that may be levied against criminal offenders (California Performance Review 2005). The interest rates to which unpaid legal debts are subject vary. Financial obligations assessed by Washington State criminal courts are subject to an interest rate of 12%.[7] California recently allowed the Department of Revenue and Recovery to charge 15% interest on accounts that are delinquent for more than 30 days.[8] Some states have adopted "collection improvement programs" that authorize county clerks and private collection agencies to charge interest and collection fees. In Florida, for example, collection agencies may now charge up to 40% of the assessed LFO as a collection fee (Florida Office of Program Policy Analysis and Government Accountability 2004). These reports suggest that if imposed, monetary sanctions may accumulate considerably over time.

Collection tactics appear to vary across jurisdictions. In some locales, probation offices and correctional agencies are responsible for the collection of some or all legal debt. Where this is the case, probation revocation and the incarceration of violators appear to be the main tools available to debt collectors (Weisburd et al. 2008). In some states, including Washington, responsibility for the collection of legal debt transfers to county clerks or private collection agencies on completion of confinement or supervision sentences. These agencies possess an increasing array of civil tools to facilitate their collection efforts.

In sum, the number and type of monetary sanctions potentially imposed on those accused and convicted of crimes have clearly proliferated in recent years. Yet little is known about the frequency with which monetary

[7] In Washington State, LFOs ordered in criminal proceedings are subject to the greater of two interest rates: 12% or four points above the 26-week Treasury-bill rate. For at least the past decade, the greater of these two has been 12% (*RCW* 10.82.090 and 4.56.110[4]).

[8] California Revenue and Taxation Code, sec. 19280.

sanctions are actually imposed across the United States, their magnitude and accumulation, or their consequences for those who possess them.

Penal Expansion and Social Inequality

As noted previously, the number of people whose lives are affected by the criminal justice system has grown dramatically. More than 2 million of these U.S. residents currently live behind bars, and recent estimates suggest that over 16 million people—7.5% of the adult population—possess at least one felony conviction (Uggen et al. 2006). But even these impressive figures do not capture the reach of the U.S. criminal justice system. In 2007, there were also an estimated 10.5 million misdemeanor prosecutions in the United States (Boruchowitz, Brink, and Dimino 2009), and roughly 13 million people are now admitted to jail annually (Sabol and Minton 2008). Each year, nearly 10 million people leave jail or prison; millions more are released from criminal justice supervision (McLean and Thompson 2007).

Recent studies indicate that the increasingly massive U.S. criminal justice system has important consequences for labor markets and social inequality. For example, conviction and incarceration reduce the employment prospects and earnings of those with criminal records (Western and Beckett 1999; Pager 2003, 2005, 2007; Western and Pettit 2005; Western 2006). The federal government and some states have adopted policies that ensure that felony conviction (even in the absence of incarceration) entails additional adverse consequences, including the loss of occupational opportunities, eligibility for student loans, public assistance, public housing, the right to reside in the United States, and other civil rights (Uggen et al. 2006, table 4). Poor people, people of color, and men are more likely to be involved in the criminal justice system and therefore to incur these direct and collateral costs.

Yet the adverse effects of criminal conviction are not limited to the legally guilty (Comfort 2007; Foster and Hagan 2007). For example, incarceration worsens health outcomes not only for inmates but also for their families and communities (Farmer 2003; Johnson and Raphael 2006; Massoglia 2008; Massoglia and Schnittker 2009; Sykes and Piquero 2009). Most of those convicted of crimes in the United States are parents of minor children, and many are obligated to pay child support.[9] Mass in-

[9] Roughly 70% of male state prison inmates ages 33–40 are fathers (Western 2006, p. 137); approximately the same proportion of female prisoners are mothers of young children (Greenfield and Snell 1999). In the United States more than 1.5 million children under age 18 have a parent in prison (Mumola 2000). A recent study found that people released on parole owed an average of $16,600 in child support payments.

carceration harms families by reducing child well-being, increasing the likelihood of divorce and separation, and reducing family income (Western and McLanahan 2000; Braman 2003; Western 2006; McLanahan 2009). The perennial removal and return of large numbers of young men destabilizes communities by exacerbating residential instability and diminishing the well-being and earning power of residents (Clear et al. 2001; Travis 2005; Clear 2007).

In short, a substantial body of scholarship indicates that the U.S. penal system plays an important role in the accumulation of disadvantage over the life course, across generations, and at the community level (Hagan and Foster 2003; Mirowsky and Ross 2003; Foster and Hagan 2007). Yet if the imposition of monetary sanctions is also considered, the impact of penal expansion on the stratification system may be far greater than these studies suggest, and the mechanisms by which poverty and inequality are reproduced are even more numerous. Similarly, many sociologists have noted that people with a criminal conviction are at high risk of reoffending and that rearrest and reincarceration reproduce poverty (Hagan and Dinovitzer 1999; Austin 2001; Hagan and Coleman 2001; Travis and Petersilia 2001; Roberts 2004; Council of State Governments 2005; Travis 2005; Clear 2007). Yet the fact that nonpayment of monetary sanctions may trigger a warrant, arrest, or incarceration has not been widely recognized. Indeed, warrants may be issued, and arrests and confinement may occur, solely due to nonpayment of legal debt (Bonczar 1997; McLean and Thompson 2007; Rhode Island Family Life Center 2007; *New York Times* 2009). Although some researchers claim, perhaps rightly, that "it is unconstitutional to imprison offenders for nonpayment of debt" (Ruback and Bergstrom 2006, p. 243), this does not mean that it does not occur, as the U.S. Supreme Court has ruled that debtors may be incarcerated for "willful" nonpayment of legal debt.[10]

Even if it does not lead to arrest or incarceration, having a warrant issued—that is, being "wanted" by the police—has important social and economic consequences for people with warrants and their families. On the basis of six years of fieldwork in a poor, black Philadelphia neighborhood, Goffman (2009, p. 353) concludes that "young men who are wanted by the police find that activities, relations, and localities that others rely on to maintain a decent and respectable identity are transformed into a system that the authorities make use of to arrest and confine them. The police and the courts become dangerous to interact with, as does showing up to work or going to places like hospitals." Goffman's findings thus indicate that being wanted by the police shapes the lives of many of the urban poor, often in adverse ways. Moreover, federal welfare legislation

[10] *Bearden v. Georgia*, 461 U.S. 660 (1983).

adopted in 1996 prohibits states from providing Temporary Assistance for Needy Families, Supplemental Security Income, general assistance, public and federally assisted housing, and food stamps to individuals who are "fleeing felons" (i.e., have a bench warrant stemming from a felony conviction) or are in violation of any condition of probation or parole.[11] The Social Security Administration (SSA) database is now linked to state warrant databases, so that the cessation of benefits occurs automatically on issuance of an arrest warrant (provided that warrant appears in the state database).[12] People who have a warrant for their arrest are also unable to obtain or renew driver's licenses; this barrier to transportation reduces their employment prospects (Pawasarat 2000, 2005). Warrants are thus a unique and consequential aspect of legal debt.

In short, the sociological literature recognizes that criminal convictions and mass incarceration exacerbate inequality. Yet monetary sanctions' additional stratifying effects have not been recognized. Similarly, sociological studies show that debt is both a cause and a consequence of poverty but have not previously recognized that penal institutions are an important source of a particularly deleterious form of debt.

Debt, Poverty, and Social Inequality

In the sociological literature, debt is generally understood to be the consequence of consumer borrowing (Keister 2000; Sullivan, Warren, and Westbrook 2000) or racial inequality in the credit and mortgage markets (Blau and Graham 1990; Oliver and Shapiro 1990; Horton 1992; Massey and Denton 1993; Conley 1999; Shapiro 2004). This literature indicates that debt has important consequences for the measurement and reproduction of poverty and social inequality. For example, consumer debt—and the poor credit ratings that result from it—may negatively influence job prospects, as employers increasingly check credit reports when making hiring decisions (Bayot 2004). Apartment managers often check credit histories in determining eligibility for housing.[13] Banks and other lending agencies also routinely check credit histories before opening new accounts.

[11] 42 U.S.C. § 608 (a)(9)(A)(ii); Szymendera (2005).

[12] States now send the SSA's Office of Inspector General the name and identification of all of those in their warrant database; the SSA matches "wanted persons" files provided by the participating law enforcement agency against SSA's computer files of individuals receiving Title XVI payments or Title II benefits or serving as representative payees, in order to ensure that benefits are stopped in such cases (see http://www.socialsecurity.gov/oig/organization/investigations.htm).

[13] Under the Fair Credit Reporting Act, lenders, insurance companies, landlords, credit card companies, potential employers (with the applicant's written consent), child support enforcement agencies, and others may access credit reports.

As a result, individuals with debt and poor credit ratings often cannot open traditional bank accounts and may be compelled to borrow on less favorable terms (Caskey 1994; Elliehausen and Lawrence 2001). In such circumstances, debtors are not able to build or raise their credit scores and often pay more for loans, services, and goods (Squires 2004).

For all of these reasons, debt reduces household wealth and reproduces poverty over time. Yet the sociological literature has not yet recognized that the penal system may be an important source of an even more damaging form of debt. Indeed, legal debt is particularly injurious: unlike consumer debt, it is not offset by the acquisition of goods or property, is not subject to relief through bankruptcy proceedings, and may trigger an arrest warrant, arrest, or incarceration. Assessing monetary sanctions' prevalence, magnitude, and consequences is therefore essential to the development of a comprehensive understanding of how penal expansion fuels poverty and inequality.

DATA AND METHOD

Our analysis draws on national and state-level data to address these issues. First, to assess the frequency with which monetary sanctions are imposed nationally, we analyze data from the nationally representative Survey of Inmates in State and Federal Correctional Facilities and from Bureau of Justice Statistics sentencing data. While the former pertain only to felons sentenced to state or federal prison, analysis of the latter allows us to identify trends among persons who are convicted of felonies but are sentenced to less than one year of confinement time (and therefore serve their confinement sentence in jail), felons who are sentenced to probation but not confinement, and misdemeanants.

Although useful for assessing the prevalence with which monetary sanctions are imposed, these national-level data do not shed light on the magnitude of the monetary sanctions assessed. In order to assess the magnitude and accumulation of legal debt, we analyze data regarding the dollar value of the monetary sanctions imposed by Washington State superior courts for all felony cases sentenced in the first two months of 2004 (n = 3,366). This sample was drawn from the Washington State Sentencing Guidelines Commission (WSSGC) database, which summarizes information entered from individual judgment and sentence forms submitted each month by every superior court in the state to the Washington State Administrative Office of the Courts (WSAOC). The unit of analysis in this data set is convictions rather than individuals. These data include only the monetary sanctions assessed by Washington State superior courts. Although Washington State courts may now impose an impressive range

of monetary sanctions (see table 1), these court data omit other potential sources of legal debt, including jail fees, department of corrections (DOC) fees, and the accumulation of interest on unpaid legal obligations. In addition, these data capture the sanctions imposed for a single felony charge, yet many of those convicted of a felony offense are convicted of multiple charges; many also acquire multiple criminal convictions over time. These court conviction data thus shed light on the magnitude of the monetary sanctions associated with a single felony charge only.

Ideally, our assessment of the magnitude of the monetary sanctions imposed by the penal system would be based on national rather than state-level data. However, the imposition of monetary sanctions is largely a state and local affair; the acquisition of empirical information about this practice will necessarily be an incremental process.[14] Given the absence of data regarding the magnitude of the LFOs imposed on criminal defendants in other states, it is not currently possible to ascertain whether the magnitude of the LFOs imposed by Washington State criminal justice agencies is typical. However, reports from other states suggest that the monetary sanctions imposed in Washington State are broadly similar to those that may be assessed in other states (see, e.g., McLean and Thompson 2007; Rosenthal and Weissman 2007).

In order to assess how legal debt imposed by a broader range of criminal justice agencies accumulates over time in the lives of persons with criminal histories, we randomly selected 500 individuals from among those convicted of a felony in Washington State superior courts in January or February 2004. We then compiled and analyzed data provided by the WSAOC regarding all monetary sanctions that had been imposed on these 500 individuals by juvenile, state, and local courts over their lifetimes as of May 2008. These data also include information about the amount of legal debt these same 500 individuals owed to the courts and to the DOC as of May 2008. Unlike the cross-sectional data from which this subsample was drawn, these longitudinal data provide a sense of how legal debt imposed by a broader range of criminal justice agencies accumulates in the lives of persons with criminal histories. Nonetheless, these data still underestimate the magnitude of the legal debt possessed by people with criminal histories, as they omit monetary sanctions potentially imposed by federal courts, jails, county clerks, private collection agencies, and offices of public defense or assigned counsel. Our results therefore underestimate the size of the legal debt possessed by Washington State residents with criminal histories.

[14] Over 94% of all convicted felons are sentenced in state courts; only 5.8% are sentenced in federal courts (Durose 2004, table 1.10). Those accused of misdemeanors are sentenced in lower, or local, courts.

TABLE 1

AUTHORIZED MONETARY SANCTIONS: WASHINGTON STATE SUPERIOR COURTS

Obligation Type	Amount Specified	Applicable Cases	*RCW*
Payments to victims:			
Victim penalty assessment	$500	Mandatory for all felony convictions	7.68.035
Restitution	Up to twice the offender's gain or victim's loss	Felony convictions involving injury to person or loss of property	9.94A.753
Fees:			
Bench warrant*	$100	Bench warrant issued	10.01.160
Filing/clerk's fee*	$200	All felony convictions	36.18.00
Court-appointed attorney fee	Not specified	Defense attorney provided by state	9.94A.00
Deferred prosecution*	$150	Prosecution deferred	10.01.10
Crime lab analysis fee	$100	Lab work performed	43.43.60
DNA database fee	$100	DNA entered into database	43.43.74
Jury fee	$125 6 person/$250 12 person	Cases adjudicated at jury trial	10.46.10
Interlocal drug fund	Variable	Most felony drug convictions	69.50.41
Incarceration costs	$50 per prison/$100 per jail day	Convictions resulting in confinement sentence; cost of pretrial supervision	9.94A.70
Emergency response	Actual costs	Vehicular assault and homicide	38.52.40
Extradition costs	Actual costs	Extradition involved	9.95.210
Extension of judgment fee	$200	Judgment after 10 extended years	6.17.020
Fines:			
VUCSA fine	$1,000/$2,000	Drug convictions	69.50.430
Domestic violence penalty	Up to $100	Domestic violence convictions	10.99.00
Other fines	Not specified	All	9.94A.50

NOTE.—*RCW* = *Revised Code of Washington*; VUCSA = violation of the Uniform Controlled Substance Act. Only legal financial obligations that may be assessed by Washington State superior courts are listed; other fees assessed by clerks, collection agencies, jails, municipal courts, district courts, and the department of corrections are not shown.

* Fee may be imposed absent conviction: "Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear" (*RCW* 10.01.160). Incarceration costs and attorney fees cannot be imposed by the court without a conviction, although jails and offices of public defense may charge their own separate fees independent of conviction status.

The WSSGC database from which the cross-sectional and longitudinal data were drawn includes information about defendants' race/ethnicity, gender, and age, as well as their case characteristics. Although some Hispanic defendants were identified as such in the WSSGC database, some state courts identify defendants by race only, ignoring ethnicity/Hispanicism. As a result, some Hispanic defendants were not classified as such in the WSSGC database. We used Hispanic Surname Analysis to estimate the proportion of white, black, and other defendants who are Hispanic. This program uses the U.S. Census Spanish Surname database and assigns a numeric value between 0 and 1 to all surnames in that database. These numeric values are provided by the U.S. Census Department and represent the probability that a given surname corresponds to persons who identified themselves as Hispanic/Latino in the 1990 U.S. census (Word and Perkins 1993; Perkins 1996). The list used to identify defendants of Hispanic origin in the WSSGC data included only Spanish surnames that are classified by the Census Bureau as "heavily Hispanic."[15] The demographic characteristics of the full sample and subsample are very similar, as shown in table 2.

Finally, we draw on interviews with 50 Washington State residents living with a felony conviction to assess how legal debt affects those who possess it and to analyze whether and how monetary sanctions may contribute to the accumulation of disadvantage. We interviewed and surveyed 50 people who had at least one felony conviction from one or more of four Washington State counties (King, Pierce, Yakima, and Clark). These interviews were supplemented by informational interviews with at least one correctional officer and one defense attorney working in each of these four counties and three county clerks; seven superior court judges were also interviewed.

The four counties in which we recruited these interview subjects were selected to maximize variation in LFO assessment and demographic composition. Respondents with felony convictions were recruited through flyers posted in a variety of clerk, court, social service, and DOC offices and by word of mouth. The flyers indicated that our study would investigate the personal and financial effects of LFOs. Approximately 50 flyers were posted over two months. The sample obtained from this recruitment effort is a convenience rather than a probability sample and is not representative

[15] It is possible that applying this methodology led to the misidentification of some (mainly white) defendants as Hispanic. It is also possible that some Hispanics remain unidentified as such, as many Hispanics do not have surnames that are on the list generated by the Census Bureau. However, by classifying only those with surnames considered to be "heavily Hispanic," we have presumably erred on the side of undercounting Hispanics.

TABLE 2
DEMOGRAPHIC CHARACTERISTICS OF SENTENCED FELONS: WASHINGTON STATE SUPERIOR COURTS (%)

	Full Sample (n = 3,366)	Subsample (n = 500)
Race/ethnicity:		
Black	13	12
White	68	70
Latino/Hispanic	11	9
Native American	2	2
Asian/Pacific Islander	2	2
Other	4	3
Gender:		
Male	81	83
Female	19	17
Age (median years)	33	32

SOURCE.—Washington State Guideline Commission and Administrative Office of the Courts.

of all persons convicted of felonies.[16] Although the gender composition of our interviewees is nearly identical to the gender composition of Washington State and U.S. felons, blacks are overrepresented, and whites underrepresented, in our interview sample (see table 3).

Because of the nonrandom nature of the interview sample, the interview results may not capture the experience of persons convicted of felonies across Washington State or the United States. However, our interview sample includes people with fairly typical LFOs. Specifically, the amount assessed to those we interviewed ranged from $500 to approximately $80,000, with a median LFO of $9,091. Similarly, in our subsample of 500 drawn from the court records, assessments ranged from $500 to $305,145, with a median debt of $7,234. Thus, the median legal debt reported by our interviewees was only slightly larger than possessed by Washington State felons generally. Neither does the overrepresentation of blacks among our interviewees appear to have led our sample to be notably poorer than felons generally. Specifically, just over half of those we interviewed reported monthly household incomes that placed them under the federal poverty line; nationally, 80% of those charged with a felony offense are indigent (New York State Bar Association 2006). Our interviews thus provide a window into the financial lives of felons with fairly typical incomes and LFOs.

The interviews lasted from one to two and a half hours and were conducted individually in a variety of public spaces, including DOC of-

[16] As a result, there is no response rate.

TABLE 3
DEMOGRAPHIC CHARACTERISTICS OF INTERVIEW SAMPLE: WASHINGTON STATE FELONS AND U.S. FELONS (%)

	Legal Financial Obligations Interview Sample (2007)	Washington State Felons (2004)	U.S. Felons (2004)
Race/Ethnicity:			
Black	52	13	36
White	36	72	59
Other	12	5	3
Gender:			
Male	82	81	82
Female	18	19	18
Age (median years)	37	31	32

SOURCES.—Authors' analysis; Washington State Guideline Commission and Administrative Office of the Courts; U.S. Department of Justice, Bureau of Justice Statistics, National Judicial Reporting Program, 2004.

NOTE.—National data include those convicted of felonies in state superior courts across the United States. Hispanicism is not systematically reported in either data set but was inferred in the Washington State database using Hispanic Surname Analysis.

fices, coffee shops, churches, and shelters. Participants were paid $20 for their time. Each interview began with a survey questionnaire that included questions regarding the year of the last felony conviction, the number of felony convictions, estimated legal assessment and debt, monthly income, demographic characteristics, housing situation, marital status, and number of children. After the surveys were administered, interviewers posed more open-ended questions designed to assess how legal debt affected our respondents. Specifically, the interview questions explored how the interviewees acquired information about their LFOs, how and by whom their monthly minimum payments were determined, whether they made regular payments, why they did or did not make regular payments, and the consequences or making or not making regular payments.

The open-ended portion of the interviews was digitally recorded and transcribed for analyses. We used a grounded theory approach to analyze these qualitative data. We met frequently throughout the time in which the interviews were collected to discuss emerging and salient themes (see Glaser and Strauss 1967; Miles and Huberman 1984; Strauss 1987; Lofland et al. 2006). We then coded the transcriptions for main themes, concepts, and events. This inductive analytic approach allowed us to investigate the "meanings, intentions and actions of the research participants" (Charmaz 2001, p. 337). Once the codes were created, memos on key themes were developed (Emerson, Fretz, and Shaw 1995). Contrary or diverging findings were also noted and allowed us to highlight potential

variation in informants' experiences or understandings. Representative excerpts from the interviews were then identified and are used below to illustrate these key themes.

FINDINGS

Monetary Sanctions: Prevalence and Trends

The Survey of Inmates in State and Federal Correctional Facilities provides nationally representative data regarding state and federal prison inmates (who, by definition, were convicted of at least one felony offense). The survey asks inmates about any monetary sanctions imposed by the courts; the results do not include monetary sanctions imposed on prisoners by departments of corrections, jails, or other noncourt agencies. These data therefore understate the prevalence with which monetary sanctions are imposed on felons sentenced to prison. Nonetheless, the results indicate that two-thirds (66%) of the prison inmates surveyed in 2004 had been assessed monetary sanctions by the courts, a dramatic increase from 25% in 1991 (see fig. 1).

These survey results thus indicate that the proliferation of authorized fees and fines has in fact led to the increased imposition of monetary sanctions in the federal and state courts. Although fees are the most common type of monetary sanction imposed on felons sentenced to prison, the percentage of prison inmates who received fines and restitution orders

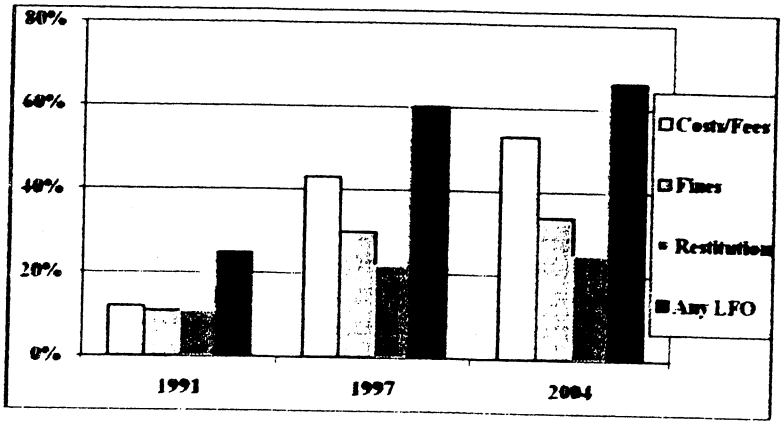


FIG. 1.—Percentage of prison inmates with court-imposed monetary sanctions by type of sanction, 1991–2004. Sources: Authors' compilations; data from U.S. Department of Justice, Bureau of Justice Statistics; Survey of Inmates in State and Federal Correctional Facilities, Ann Arbor, Mich. (Interuniversity Consortium for Political and Social Research [producer and distributor], 2007-02-28, nos. 6068, 2598, 4572).

as part of their court sentence has also jumped notably, from 11% to 34% and 25%, respectively. Thus, although fees are most frequently imposed by the courts on felons sentenced to prison, one-third of all felons sentenced to prison are also fined, and one-quarter are obligated to pay restitution by the courts.

When disaggregated by jurisdiction, the results of the inmate survey indicate that the use of monetary sanctions is now common in the majority of U.S. states and in the federal system (see table 4). Specifically, in 2004, a majority of inmates reported that they had been assessed monetary sanctions by the courts in 36 of the 51 jurisdictions listed in table 4.

These prison inmate survey data include only felons sentenced to prison. Yet 30% of felons are sentenced to probation rather than confinement, and some felons serve their confinement sentence in jail (Bureau of Justice Statistics 2004). Moreover, misdemeanants are not sentenced to prison. As a result, the prison inmate survey results do not shed light on the frequency with which monetary sanctions are imposed on either felons not sentenced to prison or misdemeanants.

Court and survey data collected by the Bureau of Justice Statistics help to fill these lacunae. These data indicate that misdemeanants and felons not sentenced to prison are even more likely than felons who are sentenced to prison to receive monetary sanctions. Specifically, 84.2% of felons sentenced to probation were ordered by the courts to pay fees or fines in 1995; 39.7% were also required to pay restitution to victims. Similarly, 85% of misdemeanants sentenced to probation were assessed fees, fines, or court costs; 17.6% were also assessed restitution. It thus appears that felons sentenced to probation and misdemeanants are more likely than felons sentenced to prison to receive monetary sanctions.

The data shown in figure 2 provide additional evidence that the frequency with which fines are imposed on persons convicted of felony offenses in state courts has increased.[17] For example, the percentage of felons sentenced to jail who were also fined rose from 12% in 1986 to 37% in 2004. The share of felons sentenced to probation and prison who also receive fines has also increased since 1986 (see fig. 2). These data thus challenge the claim that fines are rarely imposed for felonies in the United States (Nagin 2008, p. 38); it appears instead that monetary sanctions are now a common supplement to confinement and criminal justice supervision.

In sum, the national inmate survey and court data support three conclusions regarding the use of monetary sanctions. First, the imposition of monetary sanctions is increasing, and a majority of felons and misdemeanants now receive monetary sanctions as part of their criminal sen-

[17] Unfortunately, this longitudinal survey does not specifically ask about fees.

tence. Insofar as these data include only information about monetary sanctions imposed by the courts, the true prevalence of monetary sanctions is likely even greater than indicated by our findings. Second, misdemeanants and felons sentenced to probation are even more likely than felons sentenced to prison to be assessed monetary sanctions by the courts. Finally, although fees are the most frequently imposed monetary sanction, the use of fines has also increased over time.

Given estimates of the number of people who are sentenced as felons and misdemeanants each year, these findings suggest that millions of mainly poor people living in the United States have been assessed monetary sanctions by the courts. Below, we analyze data provided by the WSAOC to empirically assess the dollar value of the monetary sanctions imposed and to analyze their accumulation over time.

The Magnitude and Accumulation of Monetary Sanctions

The results described in this section shed light on the magnitude and accumulation of the monetary sanctions imposed in Washington State. Table 5 provides descriptive statistics regarding the monetary penalties assessed for all felony cases sentenced in Washington State superior courts during the first two months of 2004. The minimum and maximum amounts shown indicate that there is wide variation in LFO assessment. Specifically, the minimum amount assessed for conviction of a single felony charge was $500; the maximum was a surprising $256,257. As a result of this variation, the median and mean dollar values were quite disparate. Specifically, the median dollar value of the LFOs assessed per felony conviction was $1,347; the mean LFO assessment was $2,540.

These data illuminate the nature of the monetary penalties imposed by Washington State courts for conviction of a single felony charge. However, they do not include other sources of legal debt or show how legal debt accumulates over the life course of persons with criminal histories. Toward these ends, table 6 shows the total LFO amounts assessed to, and owed by, 500 of the (randomly selected) defendants sentenced by the Washington State superior courts in the first two months of 2004. In this table, the value of LFOs assessed includes monetary sanctions imposed by juvenile, district, and superior courts over the life course as of May 2008; legal debt refers to the amount currently owed and also includes fees assessed by the Washington State DOC and the accumulation of interest over time.[18] Neither of these two categories includes any fees potentially as-

[18] In Washington State, fees and fines assessed by the courts are subject to interest, but costs charged by the DOC are not. The Washington State DOC charges inmates for the cost of their imprisonment, supervision, and court-mandated tests (unless

TABLE 4

PRISON INMATES WITH COURT-IMPOSED MONETARY SANCTIONS BY JURISDICTION, 2004

Jurisdiction	Percentage with Court-Imposed Monetary Sanctions	Number of Inmates Surveyed
Alabama	69	54
Alaska	84	295
Arizona	42	162
Arkansas	56	418
California	82	1,729
Colorado	86	218
Connecticut	7	188
Delaware	75	116
District of Columbia	0	1
Florida	60	826
Georgia	42	549
Hawaii	35	34
Idaho	26	464
Illinois	52	299
Indiana	91	161
Iowa	67	51
Kansas	68	143
Kentucky	28	170
Louisiana	14	209
Maine	55	141
Maryland	29	249
Massachusetts	0	1
Michigan	48	425
Minnesota	78	59
Mississippi	85	478
Missouri	72	188
Montana	71	79
Nebraska	58	38
Nevada	52	410
New Hampshire	91	321
New Jersey	54	107
New Mexico	76	758
New York	86	7
North Carolina	43	49
North Dakota	69	49
Ohio	34	520
Oklahoma	83	271
Oregon	59	124
Pennsylvania	80	460
Rhode Island	66	56
South Carolina	25	214
South Dakota	83	48
Tennessee	55	239

TABLE 5
MONETARY SANCTIONS ASSESSED BY WASHINGTON STATE SUPERIOR COURTS PER CONVICTION, 2004 ($)

	Median	Mean	Min	Max
Violent offenses (n = 295)	935	5,444	500	256,257
Drug offenses (n = 1,111)	1,647	2,069	500	33,770
Other offenses (n = 1,960)	1,010	2,536	500	185,346
Total legal financial obligations, all offenses (n = 3,366)	1,347	2,540	500	256,257

SOURCE.—Washington State Guideline Commission and Administrative Office of the Courts.

viduals had been assessed $11,471 by the courts by 2008; the mean amount these same individuals owed was similar, at $10,840. Overall, the mean ratio of LFO assessments to LFO debt is 0.77, meaning that in 2008, felons in our subsample owed 77% of what they had been assessed by the courts over their lifetime. If we focus on median LFO assessment and legal debt, the pattern is similar: felons included in the sample had typically been assessed $7,234 and owed $5,254, with a median ratio of 0.77. It thus appears that legal debt is sustained over time for many of those who receive monetary sanctions.

The significance of these LFOs may be best appreciated by placing them in the context of expected earnings. The following analysis draws on Western's (2006) estimates of the annual earnings of formerly incarcerated men to illustrate the significance of average and typical legal debts in relation to estimated earnings.[19] We use Western's estimates because they are based on a nationally representative sample of formerly incarcerated men. Because he analyzed the earnings of men who served time in jail or prison, the LFO data shown below are also limited to men who were sentenced to confinement.[20]

[19] Western's estimates are based on analysis of National Longitudinal Survey of Youth data and refer to the annual earnings of a 27-year-old who was previously incarcerated (2006, p. 116). His income measure is based on self-reported earnings, which exclude transfer payments from general assistance or unemployment insurance. Although general assistance may enhance income for some men, most formerly incarcerated men have not worked enough to qualify for unemployment insurance (Western 2006). In some states, felons are disqualified from general assistance (Uggen et al. 2006). General assistance was recently terminated in Washington State.

[20] Although felons sentenced to probation rather than prison may be slightly less disadvantaged than felons sentenced to jail or prison, this difference appears to be relatively small. In 1995, 54.4% of felony probationers had a high school diploma or GED (General Equivalence Degree), compared to 30.6% of prisoners and 87.3% of young adult males living in the United States (Uggen et al. 2006, table 3). Overall, 80% of those charged with a felony offense are indigent (New York State Bar Association 2006).

TABLE 4 (*Continued*)

Jurisdiction	Percentage with Court-Imposed Monetary Sanctions	Number of Inmates Surveyed
Texas	43	1,997
Utah	57	81
Vermont	82	353
Virginia	50	16
Washington	92	205
West Virginia	86	228
Wisconsin	100	2
Wyoming	0	1
Federal prisons	90	3,541
All jurisdictions	66	17,802

SOURCES.—U.S. Department of Justice, Bureau of Justice Statistics; Survey of Inmates in State and Federal Correctional Facilities, Ann Arbor, Mich. (Interuniversity Consortium for Political and Social Research [producer and distributor], 2007-02-28, nos. 6068, 2598, 4572).

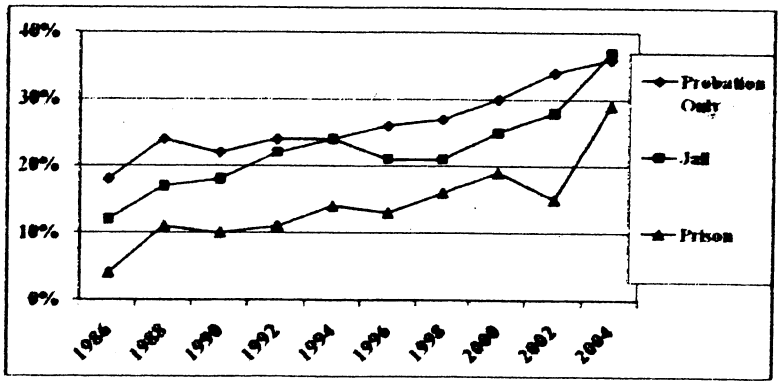


FIG. 2.—Percentage of convicted felons with fines by sentence type, 1986–2004. Sources: Authors' compilations; data from the Bureau of Justice Statistics, Felony Sentences in State Courts, 1986–2004.

sessed by jails, clerks, private collection agencies, or offices of public defense/assigned counsel. The results therefore underestimate the accumulation of legal debt in the lives of people with criminal histories.

Nonetheless, the results shown in table 6 indicate that average LFO assessments to, and the average legal debt possessed by, persons convicted of a felony offense in 2004 are substantial. On average, these 500 indi-

waived by the court or by the DOC). It collects payments for these costs during the time of confinement and supervision but does not actively collect payments for DOC fees once a person has been released from supervision.

TABLE 6

MEDIAN AND MEAN ASSESSED AND OWED LEGAL FINANCIAL OBLIGATIONS: WASHINGTON STATE FELONS, 2008

Race/Ethnicity (*n*)	Median LFOs Assessed by 2008 ($)	Median Legal Debt by 2008 ($)	Ratio: Median Legal Debt/Assessed LFO	Mean LFOs Assessed by 2008 ($)	Mean Legal Debt by 2008 ($)	Ratio: Mean Legal Debt/Assessed LFO
Black (64):	5,369	3,802	.72	11,879	15,641	.76
Men (55)	5,733	3,970	.73	13,201	17,769	.75
Women (9)	3,610	2,750	.64	3,799	2,635	.78
Hispanic (45):	4,440	3,734	.86	10,477	9,194	.82
Men (38)	4,350	3,704	.86	8,975	7,149	.77
Women (7)	7,724	9,845	1.22	18,635	20,293	1.05
White (351):	7,877	5,897	.78	11,692	10,532	.76
Men (278)	9,044	6,672	.79	12,664	11,518	.76
Women (73) ...	5,631	3,333	.72	7,991	6,774	.75
Other (40):	8,372	6,117	.81	10,005	7,723	.80
Men (34)	6,810	5,697	.69	9,216	6,641	.77
Women (6)	13,045	12,432	.96	14,478	13,855	.98
All (500)	7,234	5,254	.77	11,471	10,840	.77

SOURCE.—Washington State Administrative Office of the Courts.

NOTE.—Legal financial obligation (LFO) assessment includes monetary sanctions imposed by state and district (local) courts. LFOs owed also include any department of corrections charges outstanding in 2008 and the accrual of interest on court-imposed sanctions but also reflect payments made. Individuals included in the sample had an average of five court convictions by May 2008; $n = 500$.

TABLE 7
MEDIAN AND MEAN LEGAL DEBT IN RELATION TO ESTIMATED ANNUAL EARNINGS: FORMERLY INCARCERATED BLACK, HISPANIC, AND WHITE MEN

	Black Men	Hispanic Men	White Men
Estimated average annual earnings (2008 dollars)	8,012	10,432	11,140
Legal debt by 2008 ($):			
Median	3,970	3,704	6,672
Mean	17,769	7,149	11,518
Legal debt as a percentage of expected annual earnings:			
Median	49.6	35.5	59.9
Mean	222	69	103

SOURCES.—Washington State Administrative Office of the Courts; Western 2006, table 5.2.
NOTE.—Western's (2006) estimates of average annual earnings of formerly incarcerated men were provided in 2004 dollars; these have been converted to 2008 dollars; $n = 500$.

Western's findings indicate that formerly incarcerated white men earned an annual average of $11,140; Hispanic men earned $10,432, and black men earned $8,012.[21] If we compare these expected earnings to median legal debt, it appears that formerly incarcerated white, Hispanic, and black men owed 60%, 36%, and 50%, of their annual incomes in legal debt, respectively (see table 7). If we compare expected earnings to average (mean) legal debt, the results indicate that formerly incarcerated white men had, by 2008, been assessed monetary sanctions roughly equivalent to their expected annual earnings. The average legal debt of formerly incarcerated Hispanic men is equivalent to 69% of their expected earnings. For black felons, however, average legal debt was equivalent to more than twice (222%) their expected earnings. These findings indicate that typical legal debt is quite substantial relative to the expected earnings of formerly incarcerated men.

Table 8 takes into account the accumulation of interest on court-imposed monetary sanctions and helps to explain why legal debt tends to be long term. The results show that even felons who make payments of $100 a month (11% of the expected monthly earnings for formerly incarcerated white men, 12% for formerly incarcerated Hispanic men, and 15% for formerly incarcerated black men) toward a typical (median) legal debt will still possess legal debt 10 years later because of the accumulation of interest. Felons who consistently pay $50 a month will still possess legal debt after 30 years of regular monthly payments.

In summary, Washington State court data indicate that the dollar value of the monetary sanctions levied against, and owed by, persons convicted

[21] Western's results have been converted to 2008 dollars.

TABLE 8
LEGAL FINANCIAL OBLIGATION AMOUNT OWED IN 5, 10, 15, AND 30 YEARS BY MONTHLY PAYMENT FOR MEDIAN WASHINGTON STATE LEGAL ASSESSMENT

	MONTHLY PAYMENT ($)			
LEGAL DEBT	$10	$25	$50	$100
5 years later	12,325	11,100	9,059	4,975
10 years later ...	21,575	18,124	12,373	871
15 years later ...	38,378	30,884	18,395	0
30 years later ...	225,110	172,686	85,311	0

NOTE.—Typical (median) LFO amount assessed by the courts by individuals included in our subsample of 500 was $7,234 in 2008.

of a felony offense is substantial relative to expected earnings. Even those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later, and it will take more than a decade for those who regularly pay $100 a month to eradicate their legal debt, even assuming no additional monetary sanctions are imposed. These findings suggest that monetary sanctions create long-term legal debt and significantly extend punishment's effects over time. Below, we draw on our interview data to identify the consequences that flow from the often long-term possession of legal debt.

The Consequences of Legal Debt

Our interview findings suggest that legal debt has three sets of adverse consequences. First, respondents who made LFO payments lose income and experience heightened financial stress. This drain on their income represents an additional economic liability that compounds the challenge of securing employment. Second, possession of legal debt—and resulting poor credit ratings—constrains opportunities and limits access to status-affirming institutions such as housing, education, and economic markets. Third, when respondents do not make regular payments, they often experience criminal justice sanctions, including warrants, arrest, and reincarceration. As a result, our interviewees conveyed a strong sense that they were unable to disentangle themselves from the criminal justice system and, in addition to carrying the stigma of a felony conviction, were burdened with an economic punishment that constrained their daily lives and future life chances. Each of these findings is described below. First, however, we briefly summarize our survey findings, which shed light on our interviewees' financial circumstances.

Financial context.—Like most felons, our interviewees reported living under adverse social and financial circumstances (see table 9). Fewer than

TABLE 9
LEGAL FINANCIAL OBLIGATIONS INTERVIEW SAMPLE: SOCIAL AND FINANCIAL CHARACTERISTICS (n = 50)

Characteristic	Percentage
Employed (full or part time)	48
Less than a high school education	26
High school degree or General Equivalence Degree only	40
Unstably housed/homeless	26
Supporting minor children	58
Below federal poverty line	51
On community supervision	60
Formerly incarcerated	100

half (48%) were employed at the time of the interview. One-quarter (26%) of those interviewed were unstably housed (e.g., living in transitional housing or temporarily with a friend/family member) or were homeless. Over half (58%) were supporting children either by raising a child in their home or by providing child support payments. Most (60%) were under community supervision at the time of the interview, and all had previously been incarcerated. Just over one-quarter (26%) had less than a high school education; another 40% had only a high school diploma or a GED. Over half (51%) of those interviewed were living on incomes that fell below the federal poverty line. (Poverty rates were estimated on the basis of reported household income, marital status, and the number of dependent children.) Although the interview sample was not randomly drawn, the social and financial circumstances reported by our respondents were thus similar to those found in national studies.

Reduced income and wealth.—Legal debt reduced our respondents' income and their capacity to accumulate wealth. The most obvious impact was a reduction in take-home pay after monthly LFO payments were made. In some instances these payments were made voluntarily; in other cases, they resulted from court-mandated wage garnishment. In either case, making LFO payments reduced household income and decreased opportunities to accumulate savings, make investments, or purchase assets—all of which are vital to building wealth.

A minority (20%) of those we interviewed indicated that making payments toward their legal debt was not unduly burdensome. Yet the vast majority did not find themselves in such fortuitous circumstances. Living on limited incomes and in precarious housing situations meant that making even small payments was a significant burden for most of our respondents. Respondents who made regular payments were less able to meet other pressing needs, such as paying for rent, medicine, and food, or to financially support their children. Many described making difficult

decisions about which bills to pay and which needs to meet in the face of a financial shortfall each month. As Darrell explained:

> I take it [the LFO payment] out of my Social Security check, it's part of my budget, so at the beginning of the month, I make my budget, I pay my rent, I pay my house fees, because there's a fee to stay at the house where I'm at, for toilet paper, laundry soap, stuff like that, and then I also put money, I get the money orders for paying my LFOs. But sometimes, if I pay my LFO, I don't have enough left over for food.

Respondents often provided a careful accounting of every dollar that comprised their monthly budget. Many indicated that after making payments toward their obligations, including legal debt, they would not have enough money left over to pay for food. In some cases, as Jose describes below, making LFO payments would force them to downgrade their housing situation:

> I got my Section 8 voucher. . . . If I [got] a one-bedroom apartment, my part would only be $216 a month, but I don't have $216 a month. Cause I gotta pay $50 a month on the LFOs. If I did pay the $216, I couldn't feed myself, I couldn't pay LFOs and utilities. So I gotta stay in this shelter.

Many respondents expressed great difficulty in making ends meet while also paying their LFOs. In attempting to resolve this dilemma, some reported borrowing money. Chris describes such circumstances in the following excerpt:

> A lot of the things that I have bills for are personal loans, people who help me to make it through the month. So I pay them back at the end of the month. For me, paying people [that I borrow from] is a priority more than it is paying these things [LFOs] that I have been paying for a long time.

Some respondents stressed the importance of making regular payments toward their LFOs, even if it meant other areas of their lives would be negatively affected. Even in such cases, though, interviewees feared that they would never be able to rid themselves of their legal debt. Indeed, all but one of our respondents described their legal debt as long term and predicted that it would hang over their heads for many years to come. Below, Jeff describes the frustration he feels because his legal debt accumulates despite his regular payments:

> My biggest question is like uh, you know, am I ever going to pay this amount off? At the rate I'm going now, I'll never pay it off. That amount now is about $44,000. Because of the interest, and in spite of me paying the payments pretty religiously.

Indeed, as Ross describes below, many of our respondents noted that their legal debt would hang over their heads for the long haul.

> I figured out that like all the funds I owed, going on the current payment plans, I figure out I'll be paying till I'm past 30 years old. And I've been doing it [paying] since I was 18.

The fact that legal debt often grew despite regular payments led some to feel so frustrated that they eventually stopped paying. Gary illustrates this sentiment in the follow excerpt:

> I mean, if you have a normal job, you can't really gain no headway. I mean, the bottom line is if I go pay on it, and $50 a month ain't covering it, and I'm still, you know I'm still tolling forward, then why would you want to pay on something without seeing any deduction in the debt?

In summary, our respondents, like felons nationally, reported living on quite limited incomes. As a result, respondents who attempted to make regular payments were compelled to choose between competing financial obligations and pressing needs, including housing and food. While some borrowed, scrimped, and juggled money to make payments toward their LFOs, others told us that they did not make payments. Whether paying or not, legal debt was reported to be long term by all but one of our respondents.

Legal debt as opportunity constraint.—Even aside from the potential loss of income it entailed, legal debt was experienced by most of our respondents as a significant constraint that compounded the difficulty of securing housing, employment, occupational opportunities, and credit on favorable terms. For example, many of our respondents reported that their unpaid legal debt affected their credit ratings, which impaired their ability to find stable housing. As Thomas put it, "I couldn't get an apartment. They just said your credit's no good and we don't want to rent to you. 'You're a liability,' pretty much."

Our respondents' inability to pay off their legal debt also constrained their efforts to enhance their education, keep necessary licenses, or otherwise improve their occupational situation. In the excerpt below, Michael describes the tension between his desire to further his education and the economic constraints his LFO payments represented:

> I got my undergraduate degree prior to my conviction. I would like to do graduate school. I have not yet looked into, uh, what the finances of that is going to be, but um, yeah, $200 [in LFOs] a month is going to have quite an impact on whether or not I can go to school full time, whether or not I can go to school at all.

Some told us that legal debt constrained occupational options. Charles describes below how he lost his truck driver's license as a result of his outstanding LFOs:

> Well, I've been a fisherman for a long time, and I've been a laborer, and now I'm truck driving. I can't do it [truck driving] no more. Because the state took my license away. I'm in noncompliance because I can't pay.

Legal debt also prevents some from accessing bank loans to support business endeavors or purchase assets. For example, Lisa, now working as a case manager in a reentry program, reported that she still is unable to secure bank loans more than a decade after her last conviction:

> It [my legal debt] jammed my credit, shows up on my credit. . . . So my name can't be on the house, because, you know, I don't have any credit. And so, well we first had to get the loan through [her husband's] mother, and so now she's a co-borrower. . . . But even though I'm still a home-owner, but it's kind of like I'm really not because my name is not on anything, just because I pay for everything every month. . . . And then we have our own business, and so that's a, we um, have a couple transitional houses, and it's really hard for me to like get loans and stuff. So that's made it really hard.

For others legal debt created a disincentive to find work. For example, Sam reports that his legal debt encouraged him not to find a job but instead remain dependent on state benefits:

> Cause as soon as I get off of DSHS, and I'm self-supporting, they will come in, each little outfit, and say, well we want this much, we want this much. They'll take it out of your check. And by that time, you were better off to stay on welfare.

Similarly, in the following excerpt, Jerry, a veteran, vacillates between struggling to make ends meet or enrolling in the local veterans retirement home:

> I'm tempted to just go to the Old Soldier's Home and let the VA take care of me for the rest of my life. . . . It's, it's like a retirement home for veterans, but even though I'm only 50, I can go there. I'm eligible to go there, let them take care of me. . . . I don't want to give up—goin' to the Old Soldier's Home is kinda givin' up, you know—but I don't think I have a choice about it.

These reports are consistent with Holzer, Offner, and Sorensen's (2005) and Holzer's (2009) conclusions that child support payments impose a debilitating debt that discourages legitimate earnings, which would in

many cases be garnished. Indeed, many of those with legal debt are also obligated by the courts to make child support payments and would therefore be subject to garnishment for both purposes. Moreover, several community corrections officers (CCOs) interviewed for this study reported that employers generally dislike hiring those whose wages are garnished because of the cumbersome bureaucratic processes garnishment entails. To the extent that this is the case, people with either child support obligations or LFOs are additionally disadvantaged in the labor market.

Criminal justice consequences.—As noted previously, many of those interviewed for this study did not make regular LFO payments, a pattern that appears to be widespread (Ruback and Bergstrom 2006; Weisburd et al. 2008).[22] In the following excerpt, Rhonda described feeling overwhelmed by the size her legal debt and her decision to try to ignore it

> *Interviewer:* You don't really know how much you owe?
> *Rhonda:* Mm-mmm. Cuz it started off with a four and then a comma, so, that's too much. [Baby cries.] So, from the beginning I was like, there's no way I can pay that. I was a kid without a job.

Many interviewees who did not make regular payments reported that this decision led to ongoing entanglement with the criminal justice system. Walter described waiting until he was arrested for nonpayment to find out how much he owes:

> *Interviewer:* So it sounds like you don't know exactly how much you owe, but it's still in the thousands.
> *Walter:* I don't have a clue.
> *Interviewer:* You don't get any monthly statements?
> *Walter:* No. I get arrested. And then they tell me.

Some of our respondents reported that their fear of being sanctioned for nonpayment led them to hide from the authorities. Here, Sam reports that he stopped making payments after he lost his job and, as a result, subsequently decided to evade the criminal justice system:

> Well I was paying $20 until I lost my job and I decided to just cut and run on these people, and then they caught up with me, and I just—he wanted me to send $20 or $40 a month—I said, [DOC officer's name], the money's not there! So I'm on the run again.

As a result of their nonpayment and decision to go "on the run," many

[22] These reports are generally confirmed by the court data, which indicate that a majority of those with felony convictions make no LFO payments in the 2–3 years after completion of their confinement sentence.

of our respondents continued to be ensnared in the criminal justice system. Some of these individuals were still serving a community supervision sentence at the time of our interview and reported that their failure to make regular LFO payments was the basis of a warrant, violation, rearrest, or reincarceration by the DOC.[23] As Steve explained,

> If you miss a payment, then you get a probation violation. And that means like you go back to jail, you know, or they give you some time: it depends on who your probation officer is. . . . And so like, if, say I don't pay this much, they'll send something in the mail saying that if I don't make the payment then they'll issue a probation warrant out for my arrest.

Some respondents no longer under DOC supervision similarly reported that the courts issued a bench warrant for their arrest in response to nonpayment.[24] Robert, no longer under DOC supervision, described his recent arrest for nonpayment:

> *Interviewer:* Have they ever picked you up for nonpayment?
> *Robert:* Oh yeah, they came right to my door in the middle of the night.
> *Interviewer:* And what happened then?
> *Robert:* Oh, well they were real nice to me; they came and knocked on the door; they let me get my shoes and socks on. . . . They said you haven't made payments so you're under arrest.

Given the absence of any reference to the incarceration of legal debtors in the criminological literature, we were surprised that nearly one in four of our respondents reported having served time in jail as a sanction for nonpayment. Even more surprisingly, some of those we interviewed reported that their legal debt increased when they were reincarcerated for nonpayment because they were charged by the jail for the cost of their

[23] According to officials we interviewed, the DOC recently altered its policy and no longer responds to failure to pay LFOs by issuing warrants or incarcerating violators when failure to pay is the sole violation. Yet some of those interviewed for this study indicated that they had been sanctioned by their correctional officer solely for nonpayment. There appear to be four possible explanations for this discrepancy. First, it may be that our respondents were describing incidents that took place before the shift in DOC policy. Second, it may be that the DOC's new policy has not been fully assimilated and implemented across all counties. Third, our respondents may have had other violations in addition to failure to pay but did not realize, recall, or report this. Fourth, respondents may have thought their CCO issued the warrant but in fact the warrant was issued by the courts (which are authorized to issue warrants for any violation of any condition of sentence).

[24] This practice is allowed under state law: "If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section" (*RCW* 9.94A.760)

reincarceration. Below, Pete describes being ill in jail yet not seeing a doctor for fear of the resulting fee:

> And so I go back to jail, and by the time I left I owed $261 to the jail. OK? Do you know when I went in I owed $11. I stayed there one week, and by the time I checked out I owed $261, and I didn't see the doctor; I didn't dare see the doctor even though I needed medication and I had withdrawals from being on lithium . . . because that would cost me another $10 for the doctor visit. And I still racked up $261.

Thus, some of those who told us that they were jailed for nonpayment reported that they were charged for these jail stays. By contrast, other respondents reported that spending time in jail was a means of reducing or eliminating debt. This, we learned, is officially known as the "pay-or-stay" option. Bob describes this process:

> And then you go in front of the judge, and they say, well you have a probation warrant, a no-bail warrant, because you didn't pay your fines. . . . And then you say, well I can't pay, your honor; I'm not going to pay. I don't have the money to pay. He said, OK, 60 days. To wipe off your debt. You either pay, or you do 30–60 days to wipe off your debt.

CCOs working in the counties in which respondents reported being incarcerated for nonpayment confirmed that this pay-or-stay option was frequently used. The pay-or-stay option is authorized by state statute.[25]

Some of our interviewees also told us that their legal debt had the effect of extending the time during which they were officially identified as criminally involved. Below, Susan reports that official court records identified her as still under community supervision, despite having completed that requirement:

> So when they do your criminal history record, that stuff [LFOs] pops up. . . . So it pops up, because I know when I applied there they said, "Oh, you're still on active supervision." . . . I told her I haven't been on active supervision for a long time; she was like well . . . she showed me the paper when they do your criminal history background, and it pops up as you still being on probation.

[25] Under *RCW* 9.94A.634(3)(c) and (d), incarceration for nonpayment of LFOs is permitted, but "before converting a defendant's legal financial obligations to jail time, for failure to make timely payments toward those obligations, the court must find that the defendant's failure to make payments was willful" (see also *State v. Curry*, 118 Wn.2d 911, 917–18, 829 P.2d 166 [1992]). It is not clear whether or how this determination was made or what circumstances constitute willful nonpayment. Washington State is not alone: a recent survey found that incarceration for nonpayment of monetary sanctions is authorized in all of the 10 states included in the study (Brennan Center for Justice, n.d.).

Similarly, others reported that their LFOs prevented them from getting their criminal records sealed. Paul describes the long-term consequences of this process:[26]

> Well . . . after a certain amount of time your crime can get sealed, but if you haven't paid off the legal financial obligations off them, they can't get sealed. So like if I got 10 years on a felony without getting another one, then automatically it's sealed, but if I haven't paid my legal financial obligations, it won't.

Finally, several respondents indicated that LFOs encourage them to return to crime. Although only a few of our respondents raised this issue, it is conceivable that legal debt creates an incentive to seek illegal means to support themselves and, ironically, to make LFO payments, a pattern that would further increase the risk of criminal justice involvement. Justice describes this dilemma in the following excerpt:

> And my last PO, I asked her for a bus ticket to get to my appointments; she's like, oh, we don't do that anymore. It's like, oh, OK, I'm not supposed to do any crime, I'm not supposed to . . . and frankly, I mean, I'm not trying or wanting to do any crime, and I still can't quite commit myself to do prostitution, but I think about it sometimes . . . at least that way I could pay some of these damn fines.

In summary, our respondents, like felons nationally, reported living on quite limited incomes. While some borrowed, scrimped, and juggled money to make payments toward their LFOs, others told us that they did their best to ignore their legal debt and did not make payments toward their LFOs. Many of our respondents indicated that legal debt reduced either their income or life chances, or both. Together with the increased risk of a warrant, arrest, and incarceration, these consequences added a significant additional burden to those already struggling to overcome multiple forms of disadvantage.

DISCUSSION

Summary of Findings

The data analyzed for this study support three main conclusions. First, the courts now routinely impose monetary sanctions on millions of people

[26] Washington State felons may request that their record is sealed after completion of all of the conditions of their sentence. This means that prospective employers and others will not see their conviction in the criminal record database. However, completion of all sentencing conditions, including payment of legal debt, is a prerequisite for expunction (*RCW* 10.97.060).

across the United States each year. Nationally, two-thirds of felons sentenced to prison, and more than 80% of other felons and misdemeanants, were assessed monetary sanctions by the courts in 2004. Contrary to popular perception, the use of monetary sanctions for nontrivial crimes has indeed caught on in the United States but as a supplement rather than alternative to other criminal punishments.

Because monetary sanctions are increasingly employed, and because the number of people convicted of criminal offenses in the United States has reached a record high, we can infer that the number of people who possess legal debt is significant and rapidly increasing. Indeed, the figures reported above suggest that over 1 million people sentenced as felons in 2004 received monetary sanctions from the courts; millions more received monetary sanctions from the misdemeanor courts that year. Yet even these figures dramatically understate the number of people who acquire legal debt, as many other criminal agencies also impose monetary sanctions. In Ohio and Texas, for example, 58% and 39% (respectively) of inmates exiting prison owe DOC supervision fees (McLean and Thompson 2007, p. 7). Although estimating the precise number of U.S. residents who possess legal debt is beyond the scope of this article, it appears likely that tens of millions of mainly poor people have received monetary sanctions and currently possess legal debt.

Second, Washington State data suggest that legal debt is substantial relative to the earning power of people with criminal histories. As a result, and because unpaid LFOs are often subject to interest and other collection fees, legal debt tends to be long term in nature. Our findings indicate that even if formerly incarcerated male debtors manage to pay $100 a month—10%–15% of their expected monthly earnings—toward a typical legal debt, they will continue to possess substantial legal debt 10 years later. Because our data omit some potential sources of legal debt, these results almost certainly understate the magnitude of a typical Washington State legal obligation. Monetary sanctions imposed by the criminal justice system thus constitute an additional and substantial long-term financial liability for people living with a criminal conviction.

Finally, interviews with legal debtors suggest that legal debt contributes to the accumulation of disadvantage and the reproduction of inequality in three ways. First, if payments are made, the legal debt substantially reduces household income and compels people living on very tight budgets to choose between food, medicine, rent, child support, and legal debt. This financial effect is over and above the decline in employment and earnings that results from criminal conviction. Second, whether people make regular payments or not, monetary sanctions often create long-term debt, which in turn may reduce access to housing and employment, extend one's criminal status, limit possibilities for improving one's educational

or occupational situation, and worsen credit ratings. Legal debt also creates disincentives to find work and encourages some to go on the run. Third, legal debt heightens the risk of having an arrest warrant issued, which further destabilizes the lives of the wanted and their families and may lead to the termination of federal benefits, arrest, or incarceration.[27]

Sociologists analyzing the role of debt and penal expansion in the stratification system have not recognized these potential effects. Below, we explore the implications of these findings for the study of criminal punishment, as well as for our theoretical understanding of how debt and penal expansion contribute to poverty and inequality.

Implications for Sociological Research and Theory

The study of criminal punishment.—These findings have two important implications for the study of criminal punishment. First, analysis of the dynamics surrounding the collection of LFOs may help to explain the ongoing expansion of the criminal justice system in the context of falling crime rates. Although our interviewees' claims that nonpayment-triggered criminal sanctions derive from just four Washington State counties, there is evidence that warrants are issued in response to nonpayment in other locales as well and that both correctional and bench warrants for nonpayment often lead to reincarceration. Nonpayment of legal debt appears to account for a nontrivial portion of probation and parole violations nationally. In 1991, 12% of the probation violations among probationers sent to state prison for technical violations involved failure to pay monetary sanctions (Cohen 1995, p. 3; see also McLean and Thompson 2007). In 1995, 34.1% of adult felony probationers had a disciplinary hearing as a result of failure to pay monetary sanctions; 29.1% of all disciplinary hearings resulted in incarceration (Bonczar 1997, tables 12 and 13). Approximately 15% of those serving time in a Washington State county from which our interview respondents were not drawn are behind bars as a result of their failure to make regular payments toward their legal debt (Lawrence-Turner 2009). Similarly, "incarcerations for court debt currently comprise 17% of all pre-trial commitments in the state of Rhode Island" (Rhode Island Family Life Center 2007, p. 16). And in her ethnographic study of a poor Philadelphia neighborhood, Goffman (2009) recounts several incidents of reincarceration (for up to a year) for failure to pay LFOs among the roughly 15 young men included in her study (see also *New York Times* 2009; Schwartz 2009). It thus appears that non-

[27] None of our felon interviewees told us that the issuance of a warrant for their arrest had triggered the cessation of benefits. However, defense attorneys with whom we spoke reported that they were aware of this occurring with some regularity.

payment of monetary sanctions may lead to a nontrivial number of warrants, arrests, probation revocations, jail stays, and even prison admissions in locales across the country.

Second, the fact that legal debtors are sometimes incarcerated for nonpayment illuminates some important historical parallels, which in turn invite sociological analysis. In particular, the incarceration of legal debtors raises the specter of the return of "debtor's prisons," in which debtors were routinely imprisoned across the United States (and elsewhere) through the 19th century (Coleman 1974; Mann 2002; Blackmon 2008; *New York Times* 2009; Schwartz 2009). Although the adoption of bankruptcy and usury laws purportedly put an end to this practice, legal debt created by monetary sanctions still cannot be eradicated through bankruptcy proceedings, and the Supreme Court has ruled that debtors whose nonpayment is "willful" may constitutionally be incarcerated for failure to pay off their debts. "Willful," it appears, is a highly elastic concept.[28] Although little noticed, the incarceration of debtors continues and has been condoned by the Supreme Court as a legitimate state practice under some circumstances.

The impact of penal expansion on social inequality.—Our findings also have two important implications for our understanding of the role of U.S. penal institutions in the stratification system. The first of these pertains to our theoretical understanding of the process by which penal institutions reproduce poverty and inequality. Existing studies suggest that criminal conviction reproduces social disadvantage for several reasons. First, it creates a stigmatized status that constrains efforts to secure employment and reduces earnings. Second, the punished are physically separated from their families and communities and confined in circumstances that have been shown to worsen social, mental, and physical well-being. These outcomes affect not just the criminally convicted but their families and communities.

Yet our findings suggest that criminal punishment fuels poverty and inequality in other ways as well. Specifically, the widespread imposition of monetary sanctions creates long-term legal debt, which often has several adverse consequences: reduced household income, constrained opportunities, and ongoing criminal justice entanglement, even in the absence of repeated criminal conduct. These effects, like those of incarceration, are not limited to the legally guilty. In Washington State, for example, county clerks may impose additional collection fees; garnish of up to 25% of the wages of the debtor or his or her spouse; and seize bank assets, home

[28] For example, one CCO interviewed for this study told us that all nonpayment is willful because felons "can always go out and get a day job." The relevant statutes do not specify how judges are to determine whether nonpayment is willful or nonwillful.

equity, and tax refunds (Beckett, Harris, and Evans 2008; see also Lawrence-Turner 2009). These effects have not been included in previous accounts of the impact of penal expansion on social inequality.

Figure 3 shows how monetary sanctions create additional mechanisms by which criminal conviction contributes to the reproduction of poverty and inequality; those that are specific to legal debt are highlighted. As this diagram makes evident, a comprehensive theoretical understanding of how penal expansion contributes to social inequality requires recognition of the frequency with which penal institutions now impose a particularly debilitating and consequential form of debt on millions of poor people each year.

Although we have emphasized legal debt's unique consequences, these effects coexist with many other sources of disadvantage and are best understood as cumulative and interactive rather than discrete causes of inequality. As Sampson and Laub (1997, p. 153) explain in their discussion of cumulative disadvantage, "Among the disadvantaged, things seem to work differently. Deficits and disadvantages pile up faster, and this has continuing negative consequences for later development. . . . Perhaps most problematic, the process of cumulative disadvantage restricts future options in conventional domains that provide opportunities for social 'inter-dependence' (e.g. stable employment)."

Our data suggest that monetary sanctions are significantly involved in this interactive and cumulative process. For example, having an arrest warrant leads some to opt out of the legal employment market and go on the run; it also makes it impossible to obtain a driver's license, which has been shown to reduce employment prospects (Pawasarat 2000, 2005). As noted previously, possession of an arrest warrant now leads to the cessation of many federal benefits in most states. Similarly, the short-term jail stays that may result from failure to pay LFOs have been found to further diminish employment, income, and housing stability (Council of State Governments 2005; Solomon et al. 2006). In short, our findings indicate that monetary sanctions interact with and compound other deficits in ways that lead to the accumulation of disadvantage and to the reproduction of inequality over time. As one of our interviewees explained,

> *Interviewer:* So how do you manage the payments?
> *John:* I rob Peter to pay Paul.
> *Interviewer:* What do you mean by that?
> *John:* Gypping other obligations that I should have been responsible for.
> *Interviewer:* What were the other responsibilities?
> *John:* Rent, and car payments, insurance payments, and um, well you think it's only a couple days, but you get pulled over, and then you've got no insurance, so then you get another ticket, another court, another fine added on to that, and you know, it just snowballs.

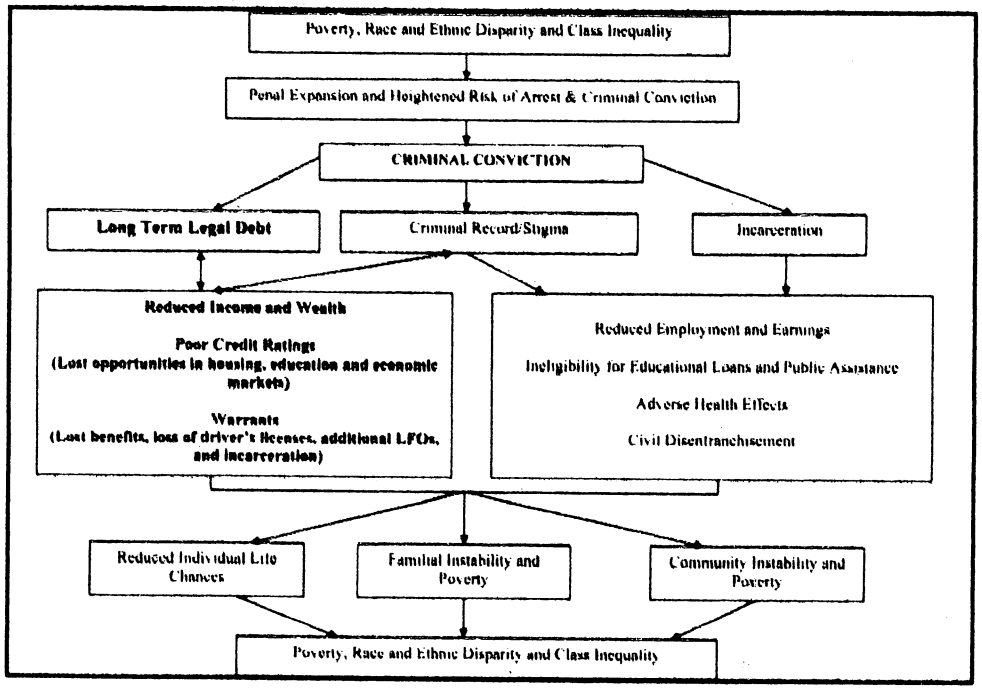


FIG. 3.—Impact of penal expansion on poverty and inequality

Our findings are relevant to the stratification literature for another reason as well: monetary sanctions may contribute to, and help to explain, racial inequality in household wealth. Many sociologists have emphasized the importance of wealth as a measure of inequality and as a mechanism by which it is created (Oliver and Shapiro 1995; Conley 1999, 2001; Keister 2000, 2005; Shapiro 2004). Wealth—total assets minus total liabilities (Keister 2000, p. 7)—is much more unevenly distributed than either income or education (Keister 2005; Neckerman and Torche 2007). Moreover, racial inequality in the distribution of wealth is quite large and has not been reduced by rising earnings and educational achievement among blacks (Oliver and Shapiro 1995; Conley 1999; Shapiro 2004). Although parental wealth, inheritance, and investment decisions help to explain the racial gap in household wealth, some of the black-white wealth gap remains unexplained (Conley 2001). The growing and racially disparate imposition of monetary sanctions may help to explain the persistence of large and unexplained race differences in household wealth.[29]

CONCLUSION

A particularly unproductive and unyielding source of debt is now imposed on millions of mainly poor people each year by the increasingly massive penal system. Although the criminally punished are no longer leased to corporations if they cannot pay their fees and fines, they are nonetheless saddled with a substantial financial debt, one that enhances their poverty and impairs their ability to extract themselves from the reach of the criminal justice system. By reducing income; limiting access to housing, credit, transportation, and employment; and increasing the chances of ongoing criminal justice involvement, monetary sanctions significantly expand the duration and intensity of penalties associated with a criminal conviction. Like other "collateral" consequences, the imposition of monetary sanctions affects not only those convicted of crimes but all of those embedded in their familial and social networks. The prevalence and magnitude of the monetary sanctions now routinely imposed by criminal justice institutions have important implications for sociological understand-

[29] It appears that legal debt among nonincarcerated felons is reflected in some but not all estimates of household wealth. Specifically, the U.S. census survey questions about household debt do not specifically mention legal debt but include the following question: "How much do you owe for *any other debt* we have not yet mentioned? (U.S. Census Bureau 2004 Survey of Income and Program Participation, AL03A; emphasis added). Other surveys, including the Survey of Consumer Finances, do not appear to include legal debt. Survey-based estimates of household wealth that do not include legal debt overestimate household wealth but underestimate the racial gap in household wealth.

ing of the role of penal expansion and debt in the reproduction of poverty and inequality.

From a policy perspective, it might be argued that criminal justice costs are appropriately borne by convicted criminals and that victims and governments should be reimbursed for the costs of offenders' felonious behavior. Yet few victims actually receive compensation through court-ordered restitution (Ruback et al. 2006). Indeed, some might argue that requiring that offenders financially restore victims will inevitably fail and that this approach is a predictably ineffective way of ensuring that crime victims' needs are met. In addition, it is not clear whether government efforts to recoup funds are actually a net gain for the state (Beckett et al. 2008). Moreover, our data indicate that the widespread imposition of substantial legal debt may encourage antisocial rather than prosocial outcomes. In particular, our respondents reported that possession of legal debt created a disincentive to work and encouraged going on the run. If the policy goal is to improve the lives of victims, recoup state expenditures, and reduce crime, our findings suggest that the imposition of monetary sanctions is very likely a policy failure.

At a more theoretical level, the pervasiveness of monetary sanctions indicates that the transformation of poverty management in the United States may be more profound than has been previously recognized. The imposition of monetary sanctions—particularly the "fees" imposed on defendants and inmates for the cost of their own arrest, incarceration, supervision, and even legal representation (Anderson 2009)—rests on the idea that persons accused or convicted of crimes are obligated to pay, financially, for the cost of their own court proceedings and punishment. The frequency with which monetary sanctions are now imposed suggests that the recent transformation of governance in the United States goes beyond the "hollowing out" of redistributive welfare programs and simultaneous expansion of the penal apparatus. Rather, the U.S. penal system itself is being rapidly divested of any redistributive elements. Although U.S. criminal justice institutions have become an important, if inadequate, supplier of social services for the poor (Comfort 2007; Sykes and Piquero 2009), recipients of these services are now often charged for them, and these fees are subject to interest. The reach and impact of neoliberal ideas on state practices and institutions thus appears to be deeper and more profound than has been previously recognized.

This study also highlights the need for additional research. Our results lead us to expect that monetary sanctions, like incarceration and felony conviction, are a critical component of the process by which disadvantage accumulates over the life course among many of the urban poor. Long-term ethnographic research may help to disentangle the ways in which monetary sanctions interact with and compound other sources of social

Bonczar, T. P. 1997. *Characteristics of Adults on Probation, 1995*. Washington, D.C.: U.S. Department of Justice.

Boruchowitz, Robert C., Malia N. Brink, and Maureen Dimino. 2009. "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." Report. National Association of Criminal Defense Lawyers and Foundation for Criminal Justice, Washington, D.C. http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

Braithwaite, John. 2000. "The New Regulatory State and the Transformation of Criminology." *British Journal of Criminology* 40:228–38.

Braman, Donald. 2003. "Families and Incarceration." Pp. 117–35 in Mauer and Chesney-Lind 2003.

Brennan Center for Justice. N.d. "The State Survey on Enforcement Mechanisms for Collecting Fees." Report. Brennan Center for Justice, New York.

Bureau of Justice Statistics. 2008. "Adult Correctional Populations." Report. U.S. Department of Justice, Washington, D.C. http://www.ojp.usdoj.gov/bjs/glance/corr2.htm.

Butterfield, F. 2004. "Many Local Officials Now Make Inmates Pay Their Own Way." *New York Times*, August 13.

California Performance Review. 2005. "Issue Recommendation GG34: Simplify and Consolidate Court-Imposed Fines." In *Creating the First 21st Century Government in America*. Sacramento: California Performance Review.

Caskey, John P. 1994. *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor*. New York: Russell Sage Foundation.

Charmaz, Kathy. 2001. "Grounded Theory." Pp. 335–52 in *Contemporary Field Research: Perspectives and Formulations*, edited by Robert Emerson. Prospect Heights, Ill.: Waveland.

Clear, Todd R. 2007. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. New York: Oxford University Press.

Clear, Todd R., Dina R. Rose, and Judith Ryder. 2001. "Incarceration and the Community: The Problem of Removing and Returning Offenders." *Crime and Delinquency* 47 (3): 335–51.

Cohen, Robyn. 1995. *Probation and Parole Violation in State Prison, 1991*. Washington, D.C.: Bureau of Justice Statistics.

Coleman, Peter J. 1974. *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900*. Madison: State Historical Society of Wisconsin.

Comfort, Megan. 2007. "Punishment beyond the Legal Offender." *Annual Review of Law in the Social Sciences* 3:271–96.

Conley, Dalton. 1999. *Being Black, Living in the Red: Race, Wealth and Social Policy in America*. Berkeley and Los Angeles: University of California Press.

———. 2001. "Decomposing the Black-White Wealth Gap: The Role of Parental Resources, Inheritance and Investment Dynamics." *Sociological Inquiry* 71 (1): 39–66.

Council of State Governments. 2005. *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*. New York: Council of State Governments, Re-entry Policy Council.

Crutchfield, Robert, and David Pettinicchio. 2009. "'Cultures of Inequality': Ethnicity, Immigration, Social Welfare and Imprisonment." *Annals of the American Academy of Political and Social Sciences* 623:134–47.

Doniach, Alex. 2008. "Commission Asking General Assembly to Change Collection Laws." *Memphis Commercial Appeal*, May 26.

Durose, Matthew. 2007. "State Court Sentencing of Convicted Felons, 2004: Statistical Tables." Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics.

Elliehausen, Gregory, and Edward C. Lawrence. 2001. *Payday Advance Credit in America: An Analysis of Customer Demand*. Monograph no. 35, Credit Research Center, Georgetown University.

disadvantage; statistical analyses may usefully isolate the impact of legal debt on specified outcomes such as the loss of Social Security benefits and incarceration. Additional research is also needed to assess the magnitude of the legal debt that is created by all components of the criminal justice system, and in states other than Washington. And although our findings clearly establish that the courts impose monetary sanctions on nearly all of those convicted of crimes, this trend—and variations within it—remains unexplained.[40]

Nonetheless, it is clear that a comprehensive analysis of punishment, urban poverty, and inequality in the United States is incomplete without reference to the imposition of a particularly noxious form of debt by the expanding penal system. Understanding the degree to which, and mechanisms by which, criminal punishment fuels poverty and inequality requires consideration of the imposition and consequences of monetary sanctions. These findings are of obvious relevance to scholars seeking to understand and account for inequality, as well as for those seeking to reduce the costs associated with entrenched urban poverty and crime—costs that are borne by all of us.

REFERENCES

Adamson, Christopher R. 1983. "Punishment after Slavery: Southern State Penal Systems, 1865–1890." *Social Problems* 30 (June): 555–69.

Anderson, Helen A. 2009. "Penalizing Poverty: Making Criminal Defendants Pay for the Court-Appointed Counsel through Recoupment and Contribution." *University of Michigan Journal of Law Reform* 42 (2): 323–80.

Austin, James. 2001. "Prisoner Re-entry: Current Trends, Practices and Issues." *Crime and Delinquency* 47 (3): 314–34.

Bayot, Jennifer. 2004. "Use of Credit Records Grows in Screening of Job Applicants." *New York Times*, March 20.

Beckett, Katherine. 1997. *Making Crime Pay*. New York: Oxford University Press.

Beckett, Katherine, Alexes Harris, and Heather Evans. 2008. *The Assessment and Consequences of Legal Financial Obligations in Washington State*. Olympia, Wash.: Washington State Minority and Justice Commission.

Beckett, Katherine, and Bruce Western. 2001. "Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy." *Punishment and Society* 3 (1): 43–59.

Blackmon, Douglas A. 2008. *Slavery by Another Name: The Re-enslavement of Black People in America from the Civil War to World War II*. New York: Doubleday.

Blau, F. D., and J. W. Graham. 1990. "Black-White Differences in Wealth and Asset Composition." *Quarterly Journal of Economics* 105:321–39.

[40] Although it is clear that the escalation in the use of monetary sanctions predates the current recession, there is some speculation that financial pressures are encouraging reliance on monetary sanctions (Schwartz 2009). Currently, the state of Texas is reportedly considering offering judges financial incentives (of $50,000) to encourage the aggressive collection of delinquent LFOs (Doniach 2008).

Bonczar, T. P. 1997. *Characteristics of Adults on Probation, 1995*. Washington, D.C.: U.S. Department of Justice.

Boruchowitz, Robert C., Malia N. Brink, and Maureen Dimino. 2009. "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." Report. National Association of Criminal Defense Lawyers and Foundation for Criminal Justice, Washington, D.C. http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

Braithwaite, John. 2000. "The New Regulatory State and the Transformation of Criminology." *British Journal of Criminology* 40:228–38.

Braman, Donald. 2003. "Families and Incarceration." Pp. 117–35 in Mauer and Chesney-Lind 2003.

Brennan Center for Justice. N.d. "The State Survey on Enforcement Mechanisms for Collecting Fees." Report. Brennan Center for Justice, New York.

Bureau of Justice Statistics. 2008. "Adult Correctional Populations." Report. U.S. Department of Justice, Washington, D.C. http://www.ojp.usdoj.gov/bjs/glance/corr2.htm.

Butterfield, F. 2004. "Many Local Officials Now Make Inmates Pay Their Own Way." *New York Times*, August 13.

California Performance Review. 2005. "Issue Recommendation GG34: Simplify and Consolidate Court-Imposed Fines." In *Creating the First 21st Century Government in America*. Sacramento: California Performance Review.

Caskey, John P. 1994. *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor*. New York: Russell Sage Foundation.

Charmaz, Kathy. 2001. "Grounded Theory." Pp. 335–52 in *Contemporary Field Research: Perspectives and Formulations*, edited by Robert Emerson. Prospect Heights, Ill.: Waveland.

Clear, Todd R. 2007. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. New York: Oxford University Press.

Clear, Todd R., Dina R. Rose, and Judith Ryder. 2001. "Incarceration and the Community: The Problem of Removing and Returning Offenders." *Crime and Delinquency* 47 (3): 335–51.

Cohen, Robyn. 1995. *Probation and Parole Violation in State Prison, 1991*. Washington, D.C.: Bureau of Justice Statistics.

Coleman, Peter J. 1974. *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900*. Madison: State Historical Society of Wisconsin.

Comfort, Megan. 2007. "Punishment beyond the Legal Offender." *Annual Review of Law in the Social Sciences* 3:271–96.

Conley, Dalton. 1999. *Being Black, Living in the Red: Race, Wealth and Social Policy in America*. Berkeley and Los Angeles: University of California Press.

———. 2001. "Decomposing the Black-White Wealth Gap: The Role of Parental Resources, Inheritance and Investment Dynamics." *Sociological Inquiry* 71 (1): 39–66.

Council of State Governments. 2005. *Report of the Re-entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*. New York: Council of State Governments, Re-entry Policy Council.

Crutchfield, Robert, and David Pettinicchio. 2009. "'Cultures of Inequality': Ethnicity, Immigration, Social Welfare and Imprisonment." *Annals of the American Academy of Political and Social Sciences* 623:134–47.

Doniach, Alex. 2008. "Commission Asking General Assembly to Change Collection Laws." *Memphis Commercial Appeal*, May 26.

Durose, Matthew. 2007. "State Court Sentencing of Convicted Felons, 2004: Statistical Tables." Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics.

Elliehausen, Gregory, and Edward C. Lawrence. 2001. *Payday Advance Credit in America: An Analysis of Customer Demand*. Monograph no. 35, Credit Research Center, Georgetown University.

Emerson, Robert, Rachel Fretz, and Linda Shaw. 1995. *Writing Ethnographic Fieldnotes*. Chicago: University of Chicago Press.

Fagan, Jeffrey, Valerie West, and Jon Holland. 2003. "Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods." *Fordham Law Journal* 94:857–953.

Farmer, Paul. 2003. "The House of the Dead: Tuberculosis and Incarceration." Pp. 239–57 in Mauer and Chesney-Lind 2003.

Florida Office of Program Policy Analysis and Government Accountability. 2004. "Information Brief: Court Fine and Fee Collections Can Increase." Report no. 04-07, January. Florida Office of Program Policy Analysis and Government Accountability, Tallahassee.

Foster, Holly, and John Hagan. 2007. "Incarceration and Intergenerational Social Exclusion." *Social Problems* 54 (4): 399–433.

Garland, David. 2001. *The Culture of Control: Crime and Social Order in Contemporary Society*. Chicago: University of Chicago Press.

Glaser, Barney, and Anselm Strauss. 1967. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. New York: Aldine.

Goffman, Alice. 2009. "On the Run: Wanted Black Men in a Philadelphia Ghetto." *American Sociological Review* 74 (June): 339–57.

Gordon, Margaret A., and Daniel Glaser. 1991. "The Use and Effects of Financial Penalties in Municipal Courts." *Criminology* 29 (4): 651–76.

Gottschalk, Marie. 2008. "Hiding in Plain Sight: American Politics and the Carceral State." *Annual Review of Political Science* 11:235–60.

Greenfield, L. A., and T. L. Snell. 1999. "Women Offenders." Report NCJ 175688. U.S. Department of Justice, Washington, D.C.

Hagan, John, and Juleigh Petty Coleman. 2001. "Returning Captives of the American War on Drugs: Issues of Community and Family Re-entry." *Crime and Delinquency* 47 (3): 352–67.

Hagan, John, and Ronit Dinovitzer. 1999 "Collateral Consequences of Imprisonment for Children, Communities and Prisoners." *Crime and Justice* 26:121–62.

Hagan, John, and Holly Foster. 2003. "S/he's a Rebel: Toward a Sequential Stress Theory of Delinquency and Gendered Pathways to Disadvantage in Emerging Adulthood." *Social Forces* 82:53–86.

Harland, Alan. 1992. "Toward the Rational Assessment of Economic Sanctions." Pp. 2–9 in *Topics in Community Corrections* (Summer). Washington, D.C.: U.S. Department of Justice, National Institute of Corrections.

Hillsman, S., and J. A. Greene. 1992. "The Use of Fines as an Intermediate Sanction." Pp. 123–41 in *Smart Sentencing: The Emergence of Intermediate Sanctions*, edited by J. M. Byrne, A. J. Lurigio, and J. Petersilia. Newbury Park, Calif.: Sage.

Holzer, Harry J. 2009. "The Labor Market and Young Black Men: Updating Moynihan's Perspective." *Annals of the American Academy of Political and Social Sciences* 621:47–69

Holzer, Harry J., Paul Offner, and Elaine Sorensen. 2005. "Declining Employment among Young Black Less-Educated Men: The Role of Incarceration and Child Support." *Journal of Policy Analysis and Management* 24 (2): 581–98.

Horton, H. D. 1992. "Race and Wealth: A Demographic Analysis of Black Home Ownership." *Sociological Inquiry* 62 (4): 480–89.

Johnson, Rucker C., and Steven Raphael. 2006. "The Effects of Male Incarceration Rates on AIDS Infection Rates among African American Women and Men." National Poverty Center Working Paper Series no. 06-22, University of Michigan, Ann Arbor.

Keister, Lisa A. 2000. *Wealth in America: Trends in Wealth Inequality*. New York: Cambridge University Press.

———. 2005. *Getting Rich: America's New Rich and How They Got That Way*. New York: Cambridge University Press.

Lawrence-Turner, Jody. 2009. "Debt to Society: Unpaid Court Fees Can Land Released

Convicts Back in Jail." *Spokesman-Review*, May 24. http://www.spokesman.com/stories/2009/may/24/debt-to-society/.
Levingston, Kirsten D. 2008. "Making the Bad Guy Pay: Growing Use of Cost Shifting as an Economic Sanction." *Prison Legal News*, April.
Liptak, Adam. 2006. "Debt to Society Is Least of Costs for Ex-Convicts." *New York Times*, February 23.
Lofland, John, David Snow, Leon Anderson, and Lyn H. Lofland. 2006. *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis*. Belmont, Calif.: Wadsworth.
Lotke, Eric, and Peter Wagner. 2005. "Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From." *Pace Law Review* 24 (2): 587–607.
Mann, Bruce H. 2002. *Republic of Debtors: Bankruptcy in the Age of American Independence*. Cambridge, Mass.: Harvard University Press.
Manza, Jeff, and Christopher Uggen. 2006. *Locked Out: Felon Disenfranchisement and American Democracy*. New York: Oxford University Press.
Massey, Douglas, and Nancy Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, Mass.: Harvard University Press.
Massoglia, Michael. 2008. "Incarceration, Health and Racial Disparities in Health." *Law and Society Review* 42 (2): 275–306.
Massoglia, Michael, and Jason Schnittker. 2009. "No Real Release: The Health Effects of Incarceration." *Contexts* 8:39–42.
Mauer, Marc, and Meda Chesney-Lind, eds. 2003. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: New Press.
McDonald, Michael P., and Samuel Popkin. 2001. "The Myth of the Vanishing Voter." *American Political Science Review* 95 (4): 963–74.
McLanahan, Sara. 2009. "Fragile Families and the Reproduction of Poverty." *Annals of the American Academy of Political and Social Sciences* 621:111–31.
McLean, Rachel L., and Michael D. Thompson. 2007. *Repaying Debts*. New York: Council of State Governments Justice Center.
Merry, Sally Engle. 2000. *Colonizing Hawai'i: The Cultural Power of Law*. Princeton, N.J.: Princeton University Press.
Miles, Matthew, and Michael Huberman. 1984. *Qualitative Data Analysis: A Sourcebook of New Methods*. Beverly Hills, Calif.: Sage.
Mirowsky, John, and Catherine E. Ross. 2003. *Education, Social Status and Health*. New York: Aldine de Gruyter.
Mullaney, Fahy G. 1988. *Economic Sanctions in Community Corrections*. Washington, D.C.: U.S. Department of Justice, National Institute of Corrections.
Mumola, Christopher J. 2000. "Incarcerated Parents and Their Children." Special Report NCJ 182335. U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C.
Nagin, Daniel S. 2008. "Thoughts on the Broader Implications of the 'Miracle of the Cells.'" *Criminology and Public Policy* 7 (1): 37–42.
Neckerman, Kathryn M., and Florencia Torche. 2007. "Inequality: Causes and Consequences." *Annual Review of Sociology* 33:335–57.
New York State Bar Association. 2006. "Re-entry and Reintegration: The Road to Public Safety." Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings, May. New York State Bar Association, Albany. http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&CONTENTID=11415&TEMPLATE=/CM/ContentDisplay.cfm.
New York Times. 2009. "The New Debtor's Prisons." *New York Times*, April 6.
Oliver, Melvin L., and Thomas M. Shapiro. 1990. "Wealth of a Nation: At Least One-Third of Households Are Asset Poor," *American Journal of Economics and Sociology* 49 (2): 129–51.

———. 1995. *Black Wealth/White Wealth*. New York: Routledge.
O'Malley, Pat. 2009. "Theorizing Fines." *Punishment and Society* 11:67–83.
Oshinsky, David M. 1996. *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. New York: Simon & Schuster.
Pager, Devah. 2003. "The Mark of a Criminal Record." *American Journal of Sociology* 108:937–75.
———. 2005. "Walking the Talk: What Employers Say versus What They Do." *American Sociological Review* 70 (3): 355–80.
———. 2007. *Marked: Race, Crime and Finding Work in an Era of Mass Incarceration*. Chicago: University of Chicago Press.
Pawasarat, John. 2000. "Removing Transportation Barriers to Employment: The Impact of Driver's License Suspension Policies on Milwaukee County Teens." Report. University of Wisconsin—Milwaukee, Employment and Training Institute.
———. 2005. "The Driver License Status of the Voting Age Population in Wisconsin." Report, June. University of Wisconsin—Milwaukee, Employment and Training Institute.
Perkins, R. Colby. 1993. "Evaluating the Passel-Word Spanish Surname List: 1990 Decennial Census Post Enumeration Survey Results." Working Paper no. 4. U.S. Bureau of the Census, Population Division, Washington, D.C.
Perkinson, Robert. 2008. *Texas Tough: The Rise of a Prison Empire*. New York: Metropolitan.
Perry, Celia. 2008. "Probation for Profit: In Georgia's Outsourced Justice System, a Traffic Ticket Can Land You Deep in the Hole." *Mother Jones* 33 (4): 57–58.
Pettit, Becky, and Bruce Western. 2004. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69: 151–69.
PEW Center on the States. 2008. "One in 100: Behind Bars in America 2008." Report. PEW Center on the States, Washington, D.C. http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf.
Raine, John, Eileen Dunstan, and Alan Mackie. 2004. "Financial Penalties: Who Pays, Who Doesn't, and Why Not?" *Howard Journal* 43 (5): 518–38.
Rhode Island Family Life Center. 2007. "Court Debt and Related Incarceration in Rhode Island." Report. Rhode Island Family Life Center, Providence.
Roberts, Dorothy. 2004. "The Social and Moral Cost of Mass Incarceration in African American Communities." *Stanford Law Review* 56:1271–1305.
Rosenthal, Alan, and Marsha Weissman. 2007. *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction*. Syracuse, N.Y.: Center for Community Alternatives, Justice Strategies.
Ruback, R. Barry, and Mark Bergstrom. 2006. "Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications." *Criminal Justice and Behavior* 33 (2): 242–73.
Ruback, R. Barry, Stacy N. Hoskins, Alison C. Cares, and Ben Feldmeyer. 2006. "Perception and Payment of Economic Sanctions: A Survey of Offenders." *Federal Probation* 73 (3): 26–31.
Ruback, R. Barry, Jennifer N. Shaffer, and Melissa A. Logue. 2004. "The Imposition and Effects of Restitution in Four Pennsylvania Counties: Effects of Size of County and Specialized Collection Units." *Crime and Delinquency* 50:168–88.
Sabol, William J., and Todd D. Minton. 2008. "Jail Inmates at Mid-year 2007." Washington, D.C.: Department of Justice, Bureau of Justice Statistics.
Sampson, Robert, and John H. Laub. 1997. "A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency." Pp. 133–61 in *Developmental Theories of Crime and Delinquency*, edited by Terence P. Thornberry. New Brunswick, N.J.: Transaction.

Schwartz, John. 2009. "Pinched Courts Push to Collect Fees and Fines." *New York Times*, April 7.

Shapiro, Oliver. 2004. *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality*. New York: Oxford University Press.

Solomon, Amy L., Christy Visher, Nancy G. La Vigne, and Jenny Osborne. 2006. "Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio." Report. Urban Institute Justice Policy Center, Washington, D.C.

Squires, Gregory, ed. 2004. *Why the Poor Pay More: How to Stop Predatory Lending*. Westport, Conn.: Praeger.

Strauss, Anselm. 1987. *Qualitative Analysis for Social Scientists*. New York: Cambridge University Press.

Sullivan, Teresa A., Elizabeth Warren, and Jay Lawrence Westbrook. 2000. *The Fragile Middle Class: Americans in Debt*. New Haven, Conn.: Yale University Press.

Sutton, John R. 2000. "Imprisonment and Social Classification in Five Common-Law Democracies, 1955–85." *American Journal of Sociology* 106 (2): 350–86.

———. 2004. "The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990." *American Sociological Review* 69 (April): 170–89.

Sykes, Bryan L., and Alex R. Piquero. 2009. "Structuring and Re-creating Inequality: Health Testing Policies, Race, and the Criminal Justice System." *Annals of the American Academy of Political and Social Science* 623:214–27.

Szymendera, Scott. 2005. *Social Service Administration Suspension of Benefits for Fugitive Felons*. Washington, D.C.: Congressional Research Service, Library of Congress.

Tonry, Michael H. 1996. *Sentencing Matters*. New York: Oxford University Press.

———. 1998. "Intermediate Sanctions." Pp. 683–711 in *The Handbook of Crime and Punishment*, edited by Michael Tonry. New York: Oxford University Press.

Travis, Jeremy. 2005. *But They All Come Back: Facing the Challenges of Prisoner Reentry*. New York: Urban Institute.

Travis, Jeremy, and Joan Petersilia. 2001. "Re-entry Reconsidered: A New Look at an Old Question." *Crime and Delinquency* 47:291–313.

Travis, Jeremy, and Michelle Waul, eds. 2004. *Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families and Communities*. Washington, D.C.: Urban Institute.

Uggen, Christopher, Jeff Manza, and Melissa Thompson. 2006. "Citizenship, Democracy and the Civic Reintegration of Criminal Offenders." *Annals of the American Association of Political Science Studies* 605:281–310.

Vera Institute of Justice. 1996. "The Unintended Consequences of Incarceration." Report, January. Vera Institute of Justice, New York. http://www.vera.org/download?file=231/uci.pdf.

Wacquant, Loic. 2009. *Punishing the Poor: Neoliberal Government of Social Insecurity*. Chapel Hill, N.C.: Duke University Press.

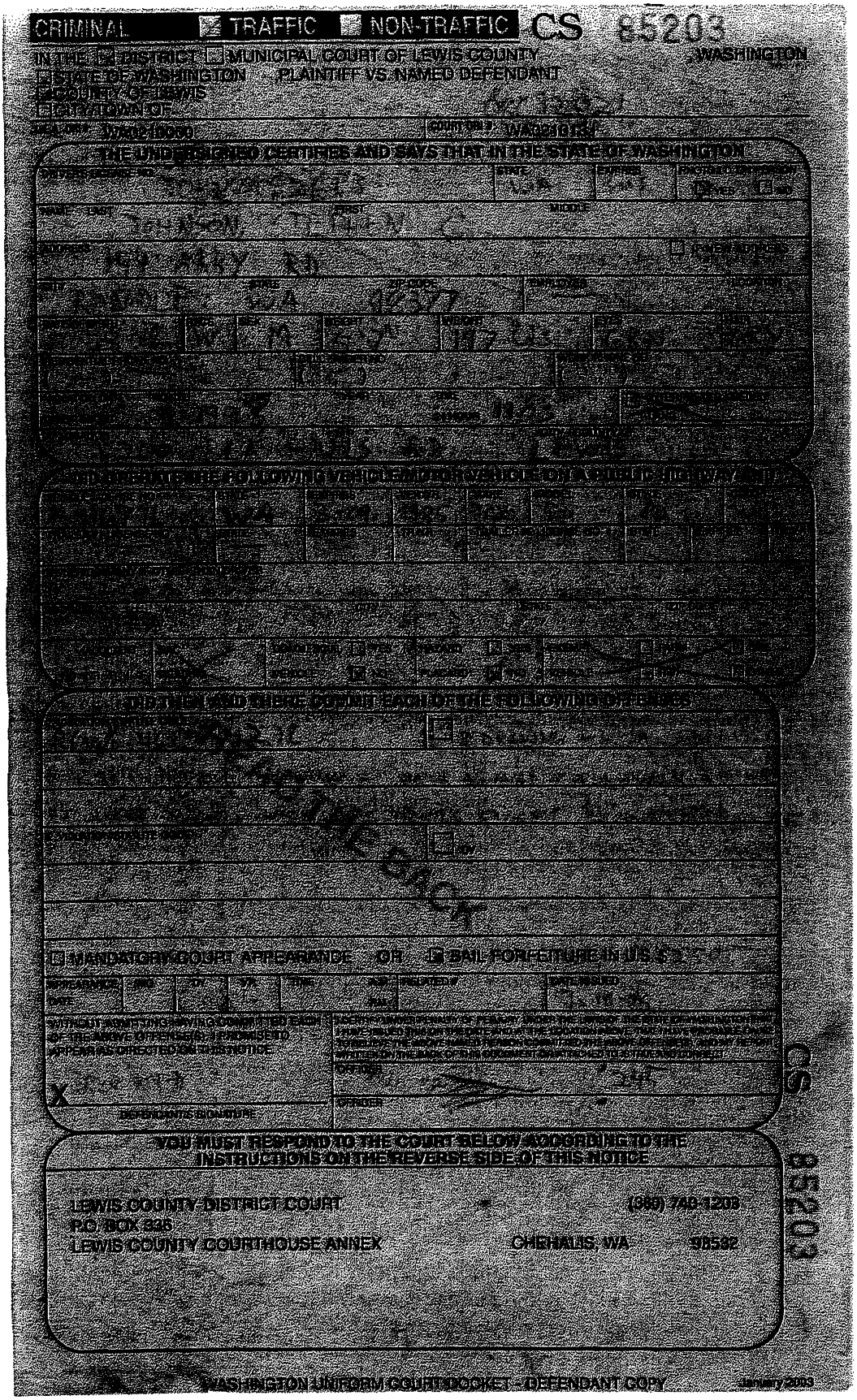
Weisburd, David, Tomer Einat, and Matt Kowalski. 2008. "The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court-Ordered Financial Obligations." *Criminology and Public Policy* 7 (1): 9–36.

Western, Bruce. 2006. *Punishment and Inequality in America*. New York: Russell Sage Foundation.

Western, Bruce, and Katherine Beckett. 1999. "How Unregulated Is the U.S. Labor Market? Penal System as Labor Market Institution, 1980–1995." *American Journal of Sociology* 104 (3): 1030–60.

Western, Bruce, and Sara McLanahan. 2000. "Fragile Families: Young Fathers with Incarceration Experiences." Pp. 309–24 in *Families, Crime, and Criminal Justice*, edited by Greer Litton Fox and Michael L. Benson. New York: JAI.

Western, Bruce, and Becky Pettit. 2005. "Black-White Wage Inequality, Employment Rates, and Incarceration." *American Journal of Sociology* 111:553–78.
Word, David L., and R. Colby Perkins Jr. 1996. "Building a Spanish Surname List for the 1990s: A New Approach to an Old Problem." Technical Working Paper no. 13. U.S. Bureau of the Census, Population Division, Washington, D.C.



CRIMINAL ☒ TRAFFIC ☐ NON-TRAFFIC CS 85203

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF LEWIS COUNTY, WASHINGTON
☐ STATE OF WASHINGTON, PLAINTIFF VS. NAMED DEFENDANT
☐ COUNTY OF LEWIS
☐ CITY/TOWN OF

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

AND THEREAFTER THE FOLLOWING VEHICLE/MOTORVESSEL ON A PUBLIC HIGHWAY

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

☐ MANDATORY COURT APPEARANCE OR ☐ BAIL FORFEITURE IN U.S. $

WITHOUT ADMITTING ANY LIABILITY I PROMISE TO APPEAR AS DIRECTED ON THIS NOTICE.

X
DEFENDANT'S SIGNATURE

OFFICER

YOU MUST RESPOND TO THE COURT BELOW ACCORDING TO THE INSTRUCTIONS ON THE REVERSE SIDE OF THIS NOTICE

LEWIS COUNTY DISTRICT COURT (360) 748-1208
P.O. BOX 336
LEWIS COUNTY COURTHOUSE ANNEX CHEHALIS, WA 98532

85203

WASHINGTON UNIFORM COURT DOCKET - DEFENDANT COPY

CRIMINAL CITATION

You are charged with the crime(s) described on the other side of this form. You must respond in one of the two ways listed below. Your response will depend on what is printed in the MANDATORY or BAIL box on the front of this form.

DOLLAR AMOUNT ($) - Bail Forfeitable Offenses

If a dollar ($) amount appears in the box marked BAIL you do not have to appear in court. Instead, send a check or money order, in U.S. funds, for the full amount to the court listed on the front.

You must do this within fifteen (15) days.

Be sure to enclose this form.

This will close your case.

Traffic citations may go on your driving record.

If you would rather appear in court, follow the directions for "Mandatory Appearance Offenses" below.

MANDATORY APPEARANCE OFFENSES

If the Mandatory Box is checked on the front of the form, one of the following [illegible]

1. If there is a date in the appearance date box you must appear in court at that date [illegible]
2. [illegible]
3. [illegible]

[illegible]

IF YOU DO NOT APPEAR

[illegible] WILL BE TREATED AS A FAILURE TO PAY.

[illegible] IF "THAFFIC" IS CHECKED ON THE FRONT YOU WILL LOSE YOUR DRIVER'S LICENSE PRIVILEGE.

IF RCW LISTED ON FRONT APPEARS BELOW PLEASE READ

RCW 46.61.502 Driving Under the Influence (DUI) - drive a motor vehicle and [illegible] liquor, any drug, or a combination of liquor and any drug.

RCW 46.20.342(1) First Degree Driving While Suspended/Revoked (DWLS) - be an habitual traffic offender and drive a motor vehicle while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect.

RCW 46.20.342(2) Second Degree Driving While Suspended/Revoked (DWLS) - drive a motor vehicle while an order of suspension or revocation prohibiting such operation is in effect, and not be eligible to reinstate the license of driving privilege.

RCW 46.20.342(3) Third Degree Driving While Suspended/Revoked (DWLS) - drive a motor vehicle while the license or privilege to drive is suspended or revoked for (1) failure to furnish proof of satisfactory progress in a required alcoholism or drug treatment program; or (2) failure to furnish proof of financial responsibility pursuant to chapter 46.29 RCW; or (3) failure to comply with chapter 46.29 RCW relating to uninsured accidents; or (4) failure to respond to a notice of traffic infraction, failure to appear at a requested hearing, violation of a written promise to appear in court, or failure to comply with the terms of a notice of traffic infraction or citation; or (5) suspension or revocation in another state that would not result in suspension or revocation in this state; or (6) failure to reinstate the driver's license or privilege after suspension or revocation in the second degree; or (7) any combination of the above.

Traffic citations may go on your driving record.

PLEASE NOTIFY THE COURT IMMEDIATELY IF YOUR MAILING ADDRESS HAS CHANGED OR IS INCORRECT.

[illegible]

Citing economic challenges in the region and country, of Western Washington's largest hospital systems announced care system in the state.

The new entity would include Swedish Health Services in Washington, which operates es operations in King, Snohomish, Thurston and Lewis counties.

In those counties, Providence operates three hospitals homes, [illegible] and senior housing.

In a conference call Wednesday, the CEOs of Swedish and

Life Without a License

Fines, Difficulties Getting to Work Are the Costs When Driving Becomes Illegal

Chris Geier / [illegible]

Bob Rice, who has not had a valid driver's license for more than eight years, relies on the bus for transportation. Rice estimates that over a six-year span, he was pulled over and cited 14 times for driving with a suspended license.

Unemployment, Lack of Diversion Program Cited for Lewis County's Higher Than Average Rate

By Adam Pearson

apearson@chronline.com

There are 4,616 people in Lewis County who have had their driver's licenses suspended or revoked, according to the state Department of Licensing.

If caught driving, some face jail time.

For Bob Rice, it was 36 days last January.

This summer a cop recognized Steven Clokey as he was behind the wheel of an old Honda Accord. He was pulled over and arrested.

Clokey now bikes to work and hopes he can talk the judge into home monitoring when he goes to court for sentencing.

"I do jail time once a year," Clokey, 40, said.

Due to a suspended driver's license, Steven Clokey catches rides from his co-workers to get to his construction job. Clokey has been without a valid driver's license for the last three years, and when not hitching rides, he relies heavily on his bicycle for transportation.

Of the 62,684 driver's licenses issued in Lewis County, 6.3 percent are suspended or revoked.

The state average is 5.7 percent.

The high rate jams up Lewis County District Court. There, 64 percent of criminal cases are related to suspended and revoked driver's licenses.

please see LICENSE, *back page*

License

Continued from front page

The state average is 33 percent.

Unemployment, not just criminality, may play a large role in the high rate of driving scofflaws in the county.

"More people are out of work," Lewis County Deputy Prosecutor Eric Eisenberg said.

Rice, a 27-year-old unemployed father of four, pays both the city of Bonney Lake and Mason County $50 each month for prior arrests on driving with a suspended license. The payments stop new arrest warrants from being issued.

"It'll be years before I can pay all that stuff and get a license," said Rice, of Chehalis. "At this point, I'm just interested in staying out of jail."

There are three typical ways a driver can lose his or her license. The first, and most common, is to ignore a traffic ticket and never pay it. The second is to have three major traffic violations — driving while intoxicated or attempting to elude, for example — within five years. And the third is a penalty for not paying child support or adhering to probation guidelines.

Driving while intoxicated can garner a suspension of about 90 days.

Driving with a suspended license is a criminal offense. But first-time offenders can typically work it down to an infraction if they obey the judge's orders.

Bigger Counties, More Slack

Unlike Lewis County, larger counties such as Pierce and King have relicensing courts where repeat offenders are allowed to do community service and knock down their fines.

Chad Garlet /cgarlet@chronline.com

Bob Rice walks from his Chehalis home to the nearest Twin Transit bus stop. Rice has not had a valid driver's license for more than eight years, and estimates that over a six-year span, he was pulled over and cited 14 times for driving with a suspended license.

Relicensing courts are diversion programs that work like drug court.

In some cases, clients of such courts get their licenses reinstated while they have a remaining balance — as long as they have a proven track record of making payments.

A fine for driving with a suspended license is about $1,500. If not paid, fines can double when they go to collections.

Clokey figures he owes at least $6,000 to district court for driving fines, not counting collection fees.

However, his driving fines are not a top priority. Child support garnishes about 50 percent of Clokey's wages because he had fallen in arrears a couple of years ago.

"I know I'm not getting my license back," said Clokey, who considers himself homeless and gets about seven to eight months' work a year framing houses.

Authorities in Lewis County say a relicensing court is unnecessary.

"We work exhaustively for people to get their license back," Judge R.W. Buzzard said.

For example, if a person's fines go to collections, and that person has medical bills in collections too, Buzzard said the court can contact the collections agency and request a deferment on the medical bills so the driving fines can be paid first.

Judges and prosecutors also work to arrange repayment plans with offenders, Buzzard said.

But there's a common refrain among offenders when such arrangements are made: "I'm unemployed and I can't afford it," according to Eisenberg.

Decriminalization

Rice, who takes the bus to the occasional landscaping job, said he agrees it should be criminal to have multiple driving offenses. He's had several.

But Rice argues for decriminalizing the first offense. Make it a ticket infraction, he says — people still have to get around.

"How are you supposed to pay (the fine) if you have no way to get to work?" Rice said.

Judges and prosecutors bristle at the notion. Besides it being a state law, they say, maintaining the first driving offense as a criminal one is the only leverage they have to encourage people to pay their traffic tickets.

Otherwise, they'd just get tossed out of windows.

"It's a coercive thing to make you comply with (the Department of Licensing's) rules," Eisenberg said.

Even two public defenders who were approached for their views on decriminalization of the first offense share no sympathy for those who lose their driving privileges. It takes several notices from the court and the Department of Licensing to reach that low.

"I don't think it's a financial issue. I think it's a responsibility issue," Buzzard said.

Even Rice and Clokey agree on the responsibility point.

But for Clokey, child support came first when he got two tickets in 2006 for speeding and no insurance.

"I just stopped paying on the tickets — call me irresponsible," Clokey said. "But once you get in (collections), it's hard to get out."

•••

Adam Pearson: (360) 807-8208

THE DETAILS ON DRIVING WHILE LICENSE SUSPENDED

By Adam Pearson

apearson@chronline.com

For the 373,563 people in Washington who have had their driver's license suspended or revoked, losing their driving privileges was a circuitous route.

Traffic tickets can be contested or mitigated in court hearings, and payment plans are optional for those who can't afford fines up front.

However, stopping payment on a traffic ticket is just as detrimental as disregarding a ticket altogether. The end result invalidates a driver's driving privileges and that person — whenever he or she is behind the wheel — is then considered by the state as Driving While License Suspended 3rd Degree.

It also takes several mailed notices, both from court and the Department of Licensing, to get to that point.

Driving with a suspended license in the third degree, commonly referred to as DWLS3, can also be a penalty for failure to pay child support. The charge comes about when the driver is still eligible to have his driver's license reinstated.

More severe is driving with a suspended license in the second degree. This charge typically comes after a driver who has had his license suspended for a court sanction or driving offense, like driving while intoxicated, is found driving again while he is not eligible to have his driver's license reinstated.

Then there's driving with a suspended license in the first degree. This charge is for habitual offenders and carries a mandatory jail sentance of 10, 90 or 180 days — depending on number of convictions.

Market

Continued from front page

month, NWMLS reported a median price of $149,522. That figure is higher than the previous month's $134,750 median price.

Active listings are down 11.3 percent, with 774 homes on the market as compared to 873 in Sept. 2010.

Dan Keahey, associate broker with Coldwell Banker Kline & Associates in Centralia, said the usual summer jolt in home and property sales happened a bit later than normal, somewhat reflective of the late summer weather that tended to draw more traffic.

"The normal seasonal adjustment we normally see in the summer didn't seem like it started until August," Keahey said. "It was particularly nice to see the level of activity we saw in September as we head toward a generally slower time of year."

Keahey said while September's numbers are an increase from a sluggish end to 2010 that was brought on partially by the expiration of the federal homebuyers' tax credit last May, the numbers aren't exactly stabilizing just yet. The late fall and winter months of 2010 brought about a slowdown to the housing market that not only saw fewer homes sold, but the median price went down each month as well.

Realtors have also reported an increasing number of homeowners who have had their properties listed for an extended time — some as long as two years — that are reducing the prices on those homes in an effort to sell them and gain what cash they can.

"Last year's numbers were artificially deflated because of the end of the tax credit; this year looks a little bit better but we're still off the pace in terms of where we'd like to be," Keahey said. "It is helping that we're having some people come in whose homes have been on the market for a year or two and saying they just want to get it sold. The market's being dictated by the buyers and what's the best deal for their money."

One trend Keahey notices is fewer homebuyers who are willing to commute to and from Olympia or points north for work, as those with jobs in Olympia tend to search more in the Thurston County area rather than commuting from the Twin Cities, as was once a standard practice for many. Rather, many people who purchase homes in the Twin Cities are doing so to live and work in the area, Keahey said.

"People are finding out Chehalis and Centralia are a great place to live and raise a family, and the word's getting out there," Keahey said. "I think it'll be about a year or so before we see things really get better on the homebuying front, but I see a lot of effective ports and other organizations that are working hard to bring new jobs to the area."

Keahey is one of three elected commissioners leading the Port of Centralia.

In neighboring counties, NWMLS said Thurston County's home sale numbers dipped slightly, with a 1.5 percent drop year-to-year in pending sales and a 0.4 percent decrease in closed sales. In Grays Harbor County, pending sales were up 20 percent with a 17 percent gain year-over-year in closed sales in September.

•••

Christopher Brewer: (360) 807-8235

LEWIS COUNTY'S HOUSING MARKET, BY THE NUMBERS

Month	New Listings	Pending Sales	Closed Sales	Median Price
Sept. 2011	114	74	56	$149,522
Aug. 2011	124	89	60	$134,750
Sept. 2010	110	65	34	$170,450

The Weather Almanac

5-Day Forecast for the Lewis County Area

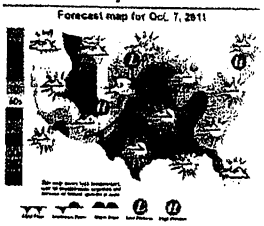
Tonight	Friday	Saturday	Sunday	Monday
Mostly Cloudy 48°	Scat'd Rain 52° 48°	Scat'd Rain 64° 48°	Showers Likely 60° 44°	Rain Likely 58° 48°

River Stages

Gauge Height	Flood Stage	24 hr. Change
Chehalis at Mellen St.		
49.36	55.0	+0.01
Skookumchuck at Pearl St.		
74.40	86.0	+0.09
Cowlitz at Packwood		
3.20	18.5	0.06
Cowlitz at Randle		
6.48	19.0	+0.11
Cowlitz at Mayfield Dam		
4.53		-0.02

National Map

Forecast map for Oct. 7, 2011



Centralia

Data reported from Centralia

Temperature

Yesterday's High	70
Yesterday's Low	48
Normal High	68
Normal Low	48
Record High	88 in 1960
Record Low	33 in 1974

Regional Weather

Sun and Moon

Sunrise tomorrow	7:15 a.m.
Moonset	2:59 a.m.

Full Last New First

National Cities

City	Fri. Hi/Lo	Fri. Wx	Sat. Hi/Lo	Sat. Wx
Anchorage	46/36	rain	45/36	rain
Boise	82/41	s	68/43	s

CASE: C00085203 LCS
Criminal Traffic
Agency No.

DEFENDANT
JOHNSON, STEPHEN CHRISS
144 ABBY RD
RANDLE WA 98377

Home Phone: 3608804839

AKA No aliases on file.

*** FTA ISSUED ***

OFFICER
00245 LCS MCKNIGHT, MATT

CHARGES

	Violation Date: 09/19/2008		DV Plea	Finding
1	46.20.342.1C	DWLS 3RD DEGREE	N Not Guilty	Guilty

TEXT

S	09/22/2008	Case Filed on 09/22/2008	KLD
		DEF 1 JOHNSON, STEPHEN CHRISS Added as Participant	
		OFF 1 MCKNIGHT, MATT Added as Participant	
		ARR MAND Set for 09/22/2008 01:15 PM	
		in Room 4 with Judge WST	
U		PDFD PROVIDED WITH DOCUMENTS.	
S		Plea/Response of Not Guilty Entered on Charge 1	TDJ
U		WST CTRM 4 DEF FROM JAIL, PDFD SCHROETER, PA WEVODAU. FORMAL ARR WVD. REQ CAC, CONT PTR. PC ESTABLISHED. PRD DETERMINATION FOR PROBABLE CAUSE ESTABLISHED.	
S		ARR: Held	
U	09/23/2008	DEF NEEDS TO REPORT TO PROB FOR FIN AFFID.	KLD
S	09/25/2008	PCN added to case	CAT
U	09/26/2008	DEF HAS NOT REPORTED TO PROBATION FOR FIN AFFID	BCS
		FILE TO VAA TO SET HEARING.	KLD
S	09/30/2008	PTR Set for 10/22/2008 03:00 PM	VAA
		in Room 1 with Judge MPR	
		Notice Issued for PTR on 10/22/2008 03:00 PM	
U	10/01/2008	N/A FILED BY RYAN GUNN FOR DEFENDANT	
S	10/03/2008	ATY 1 GUNN, RYAN WILLIAM Added as Participant	
U		COPY OF 10/22/08 PRE-TRIAL HRG NOTICE MAILED TO ATTY GUNN	
	10/06/2008	MAIL RETURN: NOTICE OF CASE SETTING - NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD	SRE
	10/08/2008	ATTY GUNN CLD AND ASKED FOR RESET OF 10/22/08 PTR - DEF IS NOT AVAILABLE. RESET TO 10/28/08 AT 3:00 PM. NOTIFIED HOLLY IN LCPA OF RESET.	VAA
S		PTR Rescheduled to 10/28/2008 03:00 PM	
		in Room 4 with Judge RWB	
	10/14/2008	Notice Issued for PTR on 10/28/2008 03:00 PM	
U	10/15/2008	DEF ATTY CALLED FOR PTR DATE/TIME.	DJS
	10/23/2008	MAIL RETURN TO ATTY GUNN: NOTICE OF CASE SETTING - NO MAIL RECEPTACLE, UNABLE TO FORWARD	SRE
		REMAILED NOTICE OF PTR TO ATY GUNN - INCORRECT ADD ON ENV.	VAA
	10/28/2008	RWB CTRM 4, DEF, ATTY GUNN, PA O'ROURKE. JURY TRIAL 12/9/08, CONF HR 12/4/08. DEF ATTY MAY FILE MOTION LATER	PJH
S		PTR: Held	

Docket continued on next page

)EFENDANT
JOHNSON, STEPHEN CHRISS

CASE: C00085203 LCS
Criminal Traffic
Agency No.

TEXT - Continued

S	10/30/2008	OTH CONFA Set for 12/04/2008 02:00 PM in Room 4 with Judge RWB JTR MAND Set for 12/09/2008 08:45 AM in Room 1 with Judge MPR		VAA
U	11/07/2008	WITNESS LIST FILED BY LCPA		
	11/24/2008	RECD CALL FROM ATTY GUNN - WANTED TO KNOW HOW TO GET MOTION TO DISMISS HRG SCHEDULED? ADVISED SHOULD FILE HIS MOTION AT TCH, STRIKE JURY AND RESET FOR MOTION HRG AND NEW TRIAL DATE.		
	12/04/2008	MPR CTRM 1 DEF, ATY GUNN, PA O'ROURKE. DEFENSE MOTION TO DISMISS FILED. W TIME FOR TRIAL 3/31/09. JTR RESET 2/24/09, TCH 2/19/09, MOTION 2/4/09 1:30 PM. STRIKE TRIAL		TDJ
S		OTH CONFA: Held JTR MAND on 12/09/2008 08:45 AM in Room 1 with Judge MPR Canceled MOT Set for 02/04/2009 01:30 PM in Room 1 with Judge MPR OTH CONFA Set for 02/19/2009 02:00 PM in Room 4 with Judge RWB JTR MAND Set for 02/24/2009 08:45 AM in Room 1 with Judge MPR		VAA
U	12/11/2008	WITNESS LIST FILED BY LCPA		
	12/17/2008	ORIGINAL NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL FILED. CONFORMED COPY RETURNED IN SSAE PROVIDED.		
S		ATY 1 GUNN, RYAN WILLIAM Removed		
U		DEFENDANT APPEARS PRO-SE FOR TRIAL.		
	01/05/2009	PRO SE N/A AND NOTICE OF INTENT TO FILE NEW BRIEF FILED BY BY DEF.		CAT
	01/13/2009	BRIEF IN SUPPORT OF MOTION TO DISMISS FILED BY DEFENDANT		VAA
	01/26/2009	AT REQUEST OF HOLLY IN LCPA, SENT COPY OF BRIEF FILED BY DEF 1/13/09.		
	02/02/2009	STATE'S RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS FILED		
	02/04/2009	MPR CTRM 1 DEF, PA O'ROURKE. DEFENSE MOTION TO DISMISS DENIED		TDJ
S		9036200235 Miscellaneous Payment Received for COPY/TAPE FEES	10.00	PKS
		MOT: Held		TDJ
U	02/19/2009	RWB CTRM 4, DEF, PA WEVODAU. MOTION FOR RECONSIDERATION FILED BY DEF. DEF MOTION TO CONTINUE TRIAL DENIED. CONFIRMED FOR TRIAL. JUDGE ROEWE TO REVIEW AND RULE ON DEF MOTION TO RECONSIDER		PJH
S		OTH CONFA: Held		
U	02/24/2009	DEF UPDATED ADDRESS AT PROB WINDOW - SD DOES NOT HAVE A MAILING ADDRESS - ADV MUST KEEP IN CLOSE CONTACT W/CRT.		MAQ
		MPR CTRM 1 DEF, PA WEVODAU. JTR RESET 3/30/09, TCH 3/26/09, MOTION FOR RECONSIDERATION 3/19/09 3:30 PM(1 HR). TRIAL RESET BECAUSE PRIORITY CASE WENT TO TRIAL		TDJ
		DEF BACK BEFORE CT FILLED OUT CAC AFFIDAVIT & QUALIFIED		
S		JTR MAND: Not Held, Hearing Canceled OTH: Held		

)ocket continued on next page

)EFENDANT
JOHNSON, STEPHEN CHRISS

CASE: C00085203 LCS
Criminal Traffic
Agency No.

TEXT - Continued

S	02/24/2009	ATY 2 GRAY, JERRY M Added as Participant		KLD
		MOT Set for 03/19/2009 03:30 PM		VAA
		in Room 4 with Judge MPR		
		OTH CONFA Set for 03/26/2009 02:00 PM		
		in Room 4 with Judge MPR		
		JTR MAND Set for 03/30/2009 08:45 AM		
		in Room 2 with Judge RWB		
U		COPY OF HAND-WRITTEN NOTICE OF MOT/TCH/JTR SENT TO ATTY GRAY.		
	02/27/2009	NOTICE OF APPEARANCE FILED BY GRAY		
	03/19/2009	DEF AT COUNTER TO VERIFY COURTROOM & TIME		SRB
		DEF AT COUNTER FOR COPY OF 3/19 HEARING. PAID $10.00 FOR CD OF HEARING		
		MPR CTRM 4 DEF, STAND-BY COUNSEL GRAY, PA O'ROURKE. MOTION FOR RECONSIDERATION DENIED. W TIME FOR TRIAL 7/30/09. RESET PTR 4/22/09. STRIKE TRIAL. DEF WILL BE FILING AN INTERLOCUTORY APPEAL		TDJ
S		JTR MAND on 03/30/2009 08:45 AM		VAA
		in Room 2 with Judge RWB Canceled		
		OTH CONFA on 03/26/2009 02:00 PM		
		in Room 4 with Judge MPR Canceled		
		MOT: Held		TDJ
	03/20/2009	PTR MAND Set for 04/22/2009 01:30 PM		VAA
		in Room 1 with Judge MPR		
		9082200089 Miscellaneous Payment Received for COPY/TAPE FEES	10.00	PAZ
U		CD FOR 3/19 HEARING DATE PLACED IN RED FILE		SRB
	04/16/2009	DEF AT PROB COUNTER FOR NEW CAC FOR APPEAL - DEF APPROVED FOR NEW CAC - ADV DEF UNTIL HIS APPEAL IS SHOWN IN DOCKET I WILL KEEP HIS FIN AFFID IN CRT FILE. ADV DEF ATY GRAY IS STILL HIS ATTORNEY FOR 4-22 HRG.		MAQ
		NOTICE OF INTERLOCUTORY APPEAL, NOTICE OF APPEAL AND DESIGNATION OF THE RECORD ON APPEAL FILED BY DEFENDANT.		VAA
		COPY OF FILINGS PLACED IN ATTY GRAY'S BOX.		
		FILE TO CRT ADMINISTRATOR		
		RWB REVIEWED. PUBLIC DEFENDER FOR INTERLOCUTORY APPEAL TO BE J. GRAY.		PAZ
		COPY NOTICE OF APPEAL FILED WITH LEWIS COUNTY CLERK.		
		SUPERIOR CRT CASE NO. 09-1-00239-2.		
	04/20/2009	TRANSMITTAL OF RECORD ON APPEAL FILED WITH LC CLERK. CC OF TRANSMITTAL LETTER AND ALL REQ DOCUMENTS FORWARDED TO ATY CLARK AND LCPA.		
		ALSO MAILED COPY OF TRANSMITTAL OF RECORD ON APPEAL AND REQUESTED DOCUMENTS TO DEF.		
S		Case Set on Appeal Tracking		
		Case Set on Appeal Tracking		VAA
U	04/22/2009	MPR CTRM 1 DEF, ATY GRAY, PA WEVODAU. JTR 7/27/09, TCH 7/23/09. 3.5 HEARING NOT REQUESTED		TDJ
S		PTR MAND: Held		
	04/23/2009	Case Removed from Appeal Tracking		VAA

)ocket continued on next page

DEFENDANT
JOHNSON, STEPHEN CHRISS

CASE: C00085203 LCS
Criminal Traffic
Agency No.

TEXT - Continued

S	04/23/2009	OTH CONFA Set for 07/23/2009 02:00 PM in Room 4 with Judge MPR JTR MAND Set for 07/27/2009 08:45 AM in Room 2 with Judge RWB	VAA
U		PUT CASE BACK ON APPEAL TRACKING AFTER SETTING TCH/JTR DATES	
	06/10/2009	DPA O'ROURKE FILED A COPY OF STATE'S RESPONSE TO APPELLANT'S INTERLOCUTORY APPEAL, MOTION REQUESTING DENIAL OF DISCRETIONARY REVIEW AND DISMISSAL OF APPELLANT'S INTERLOCUTORY APPEAL THAT HAVE BEEN FILED WITH LC SUPERIOR COURT.	PAZ
	07/16/2009	FAXED WAIVER OF JURY TRIAL FILED.	CAT
	07/21/2009	AMENDED STATE'S WITNESS LIST FILED	VAA
	07/23/2009	MPR CTRM 4 DEF, STAND-BY COUNSEL GRAY, PA O'ROURKE. DEFENSE MOTION TO CONTINUE TRIAL GRANTED. STATE'S MOTION & AFFIDAVIT AMEND CITATION FILED. STATE'S PTR MOTION TO ADMIT CERTIFIED COPY OF DEF'S DRIVING RECORD & NOTICE OF SUSPENSION W/O THE NECESSITY OF LIVE TESTIMONY FILED. W TIME FOR TRIAL 10/21/09 CONT PTR/MOTION 8/26/09 2 PM(SPECIAL SET 1 HR). CT NEEDS A COPY OF ORDER DISMISSING INTERLOCUTORY APPEAL. STRIKE TRIAL	TDJ
S		Case Removed from Appeal Tracking JTR MAND on 07/27/2009 08:45 AM in Room 2 with Judge RWB Canceled MOT Set for 08/26/2009 02:00 PM in Room 4 with Judge RWB OTH CONFA: Held	VAA TDJ
U	07/24/2009	CERTIFIED COPY OF ORDER DISMISSING INTERLOCUTORY APPEAL FILED	PAZ
	08/21/2009	ATTY GRAY AT COUNTER AND ASKED IF CASE CAN BE PUT ON HIS 10:00 AM CAL 8/26/09 - SP SETTING AT 2:00 PM NO LONGER NEEDED ADVISED WILL ASK RWB. PER RWB, OKAY TO RESET TIME OF 8/26/09 HRG TO 10:00 AM. NOTIFIED ATTY CLARK AND HOLLY IN LCPA.	VAA
S		MOT Rescheduled to 08/26/2009 10:01 AM in Room 4 with Judge RWB	
U		CASE WILL BE HEARD AT END OF ATTY GRAY'S CALENDAR.	
	08/26/2009	RWB CTRM 4, DEF, STAND-BY ATTY GRAY, PA O'ROURKE. STATE'S MOTION TO AMEND CITATION TO INCORPORATE STATUTORY LANGUAGE GRANTED. COURT ALLOWS STATE TO ATTEMPT TO ADMIT DOCUMENTS DURING TRIAL, BUT DOES NOT PRE-ADMIT AT THIS TIME. STATE'S MOTION TO WITHDRAW SUBPOENA FOR WITNESS ALLOWED. BENCH TRIAL 9/18/09, CONF HR 9/15/09	PJH
S		OTH CONFA Set for 09/15/2009 02:00 PM in Room 4 with Judge MPR NJT MAND Set for 09/18/2009 08:45 AM in Room 2 with Judge RWB NJT MAND on 09/18/2009 08:45 AM Changed to Room 2 with Judge PRO MOT: Held	VAA
U	08/31/2009	AMENDED STATE'S WITNESS LIST FILED	PJH
	09/15/2009	MPR CTRM 4 DEF, STAND-BY COUNSEL GRAY, PA O'ROURKE. CONFIRM-	VAA TDJ

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DEFENDANT
JOHNSON, STEPHEN CHRISS

CASE: C00085203 LCS
Criminal Traffic
Agency No.

TEXT - Continued

U	09/15/2009	ED FOR TRIAL		TDJ
S		OTH CONFA: Held		
	09/17/2009	NJT MAND on 09/18/2009 08:45 AM		GAR
		Changed to Room 3 with Judge WST		
	09/18/2009	Finding/Judgment of Guilty for Charge 1		HXD
		Case Heard Before Judge TRIPP, WENDY S		
		Judge TRIPP, WENDY S Imposed Sentence		
		Court Imposes Jail Time of 90 Days on Charge 1		
		with 86 Days Suspended, and		
		4 Days Credit for time served		
		Charge 1: Def. complied with Jail Sentence		
		Total Imposed on Charge 1:	300.00	
		with 0.00 Suspended		
		And 505.50 Other Amount Ordered		
U		PROTEM TRIPP, CTRM 3, DEF, STAND-BY COUNSEL GRAY, DPA O'ROURKE. STATE WITNESS: DEPUTY MCKNIGHT. DEF WITNESS: STEPHEN C. JOHNSON. FINDING OF GUILTY. SENTENCING HELD. APPEAL RIGHTS READ. $300 FINE, $360 ATY, $102.50 TPC, $43 CFT, 90/86 CTS 4 DAYS/SUSP 24 MTHS. NO DRIVING W/O LIC & INS, NO MAJOR CRIMINAL TRAFFIC CONVICTIONS. DEF DID NOT WANT TP PLAN, SEND TO COLLECTIONS AT HIS RQST. COPY OF J&S W/ATTACHED DOCKET MAILED TO DEF & SENT TO ATY GRAY & DPA O'ROURKE.		
S		NJT MAND: Held		
		SEN: Held		
		NLI : No Driving w/o License and Ins		DSH
		NCR : No Criminal Violations		
		RVW : Review Date		
		RVW Review Set for 09/18/2011		
		Accounts Receivable Created	805.50	
U		FINES TO COLLECTIONS PER JUDGMENT.		
S		ATY 2 GRAY, JERRY M Removed		
	09/24/2009	9268100032 Miscellaneous Payment Received for COPY/TAPE FEES	35.00	PKS
U	09/25/2009	TO COLLECTIONS		SRB
S		FTA Ordered		
		Case Obligation Selected for Collections		
		Collections: 1st Notice Prepared		
		FTA Issued, Amount Due	805.50	SYS
U	10/06/2009	DEF AT COUNTER, PICKED UP APPEAL PAPERWORK		SRB
		COPY OF NOTICE OF APPEAL FILED WITH LC CLERK.		PAZ
		SUPERIOR CRT NO. 09-1-00586-3		
		DEF COMPLETED FINANCIAL AFFID FOR CRT APPT ATY. JUDGE RWB ORDERED ATY BE APPOINTED RE APPEAL.		
	10/07/2009	LAW FIRM ENBODY/ARCURI/NEWBRY APPOINTED		PJH
		COPY OF COURT-APPT PAPERWORK MAILED TO DEF		
	10/12/2009	DEF CLD - CONFIRMED E/A/N LAW FIRM APPTD AND PPWORK MAILED TO HIM.		VAA
		DEF AT COUNTER FOR COPY OF NOTICE OF APPEAL AND DESIG OF		DJS

Docket continued on next page

DEFENDANT
JOHNSON, STEPHEN CHRISS

CASE: C00085203 LCS
Criminal Traffic
Agency No.

TEXT - Continued

U	10/12/2009	RECORD. COPIES GIVEN.		DJS
S		9286100216 Miscellaneous Payment Received for INTEREST INCOME	0.50	PKS
U		NOTICE OF APPEARANCE FILED BY NEWBRY		VAF
S		ATY 3 NEWBRY, CHRISTINE E Added as Participant		
U	10/13/2009	MAIL RETURN: NOTICE OF CAC - NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD		SRE
	10/14/2009	REMAILED NOTICE OF CAC TO PO BOX 13, RANDLE WA		PJH
	10/19/2009	TRANSMITTAL OF THE RECORD ON APPEAL FILED WITH LC CLERK. CC OF TRANSMITTAL LETTER AND REQ DOCUMENTS FORWARDED TO ATY NEWBRY, LCPA.		PAZ

ACCOUNTING SUMMARY

	Total Due	Paid	Credit	Balance
Timepay: N	806.00	0.50		805.50

COLLECTION STATUS

Status Date	Status Description	Cln Amt
09/25/2009	1st Notice Prepared	805.50

ADDITIONAL CASE DATA

Case Disposition
Disposition: OPEN

Parties
Attorney NEWBRY, CHRISTINE E

Personal Description
Sex: M Race: W DOB: 10/23/1948
Dr.Lic.No.: JOHNSSC526P3 State: WA Expires:
Employer:
Height: 5 7 Weight: 197 Eyes: GRN Hair: BRO

Hearing Summary

Held	ARRAIGNMENT	ON 09/22/2008 AT 01:15 PM IN ROOM 4	WITH WST
Schedule	ARRAIGNMENT	ON 09/22/2008 AT 01:15 PM IN ROOM 4	WITH WST
Held	PRE-TRIAL HEARING	ON 10/28/2008 AT 03:00 PM IN ROOM 4	WITH RWB
Held	TRIAL CONFIRMATION	ON 12/04/2008 AT 02:00 PM IN ROOM 1	WITH MPR
Held	MOTION TO DISMISS	ON 02/04/2009 AT 01:30 PM IN ROOM 1	WITH MPR
Held	TRIAL CONFIRMATION	ON 02/19/2009 AT 02:00 PM IN ROOM 4	WITH RWB
Held		ON 02/24/2009 AT 08:45 AM IN ROOM 1	WITH MPR
Held	MOT TO RECONSIDER	ON 03/19/2009 AT 03:30 PM IN ROOM 4	WITH MPR
Held	PRE-TRIAL HEARING	ON 04/22/2009 AT 01:30 PM IN ROOM 1	WITH MPR
Held	TRIAL CONFIRMATION	ON 07/23/2009 AT 02:00 PM IN ROOM 4	WITH MPR
Held	DEF & STATE MOTIONS	ON 08/26/2009 AT 10:01 AM IN ROOM 4	WITH RWB
Held	TRIAL CONFIRMATION	ON 09/15/2009 AT 02:00 PM IN ROOM 4	WITH MPR
Held	BENCH TRIAL	ON 09/18/2009 AT 08:45 AM IN ROOM 3	WITH WST
Held	SENTENCING	ON 09/18/2009 AT 12:20 PM IN ROOM 3	WITH WST

Case Review Status

	Review Date	Complied
CHARGE 50 - Review Date	09/18/2011	N

End of docket report for this case

Filed
JAN 13 2009
Lewis Co.

IN THE DISTRICT COURT FOR LEWIS COUNTY

IN AND FOR THE STATE OF WASHINGTON

State of Washington, Plaintiff, vs. Stephen C. Johnson, Defendant.	NO. C85203 BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

On December 19, 2008, Defendant was charged for driving with a suspended license in the 3rd degree, a misdemeanor, pursuant to RCW 46.20.342(1)(c). Under (iv) of that section, one is referred to RCW 46.20.289 for the definition of "failure to comply" which in turn refers one to RCW 46.63.110(6), which says, in pertinent part, under (b):

> "(b) If a person has not entered into a payment plan with the court and has not paid the monetary obligation in full on or before the time established for payment, the court shall notify the department of the delinquency. The department shall suspend the person's driver's license or driving privilege until all monetary obligations have been paid, . . ."

Defendant's license was suspended because he did not pay a fine imposed for driving with an expired license. Before receiving that first citation for driving with an expired license, Defendant had attempted to renew his driver's license with the Washington State Department of Licensing. The Department of Licensing refused to renew Defendant's driver's license (or even

Stephen C. Johnson
Randle, WA 98377
360-880-4839

to issue him a Washington State Identification Card) because it would no longer accept the address denoted on his previous license (Exhibit A). Defendant is asking the Court to dismiss the charge of driving while license suspended on constitutional grounds under its authority to grant motions to dismiss in *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

ISSUES

1. Whether RCW 46.63.110(6)(b), which suspends driver's licenses indefinitely for nonpayment of fines, is constitutional—that is, whether the substantial liberty interest in a driver's license is outweighed by the State's monetary interest in collecting fines.

2. Whether RCW 46.20.091, which requires a driver's license applicant to supply an residence address, is an unconstitutional violation of an applicant's fundamental rights to privacy and to travel, and whether the statute and statutory exceptions to the address requirement deny equal protection of law.

ARGUMENT – ISSUE 1

The driver's interest in the continued possession and use of his or her license is a "substantial" one. *Mackey v. Montrym*, 443 U.S. 1, 11-12, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). Further, the length of the suspension is a factor to be considered in determining the strength of the interest. *Id.*, at 11-12. Under RCW 46.63.110(6)(b), the length of the suspension is not fixed and suspends a driver's license indefinitely, or until the driver pays the fine.

The "substantial" interest in a driver's license is balanced against the State's interest.

> "The State's interest in suspending an individual's driver's license for failing to appear, pay, or comply with a notice of traffic infraction is in the efficient administration of traffic regulations and in ensuring offending driver's appear in court, pay applicable fines, and comply with court orders. Although undoubtedly important, this interest does not rise to the level of the State's compelling interest in keeping unsafe drivers off the roadways. Simply put, failing to resolve a notice of traffic infraction does not pose the same threat to public safety as habitually unsafe drivers do." *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004)

Stephen C. Johnson
Randle, WA 98377
360-880-4839

In the statutory scheme cited above (RCW 46.20.289, RCW 46.20.342(1)(c) and 46.63.110(6)(b), which suspend driver's licenses indefinitely for nonpayment, the individual interest in a driver's license is substantial and not outweighed by the State's interest, which is not a compelling one.[1]

ARGUMENT – ISSUE 2

RCW 46.20.091 states:

> "(1) Application. In order to apply for a driver's license or instruction permit the applicant must provide his or her:
>
> . . . .
>
> (d) Washington residence address; . . ."

There is a fundamental right of privacy. *Griswold v. State of Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678 (1965). Defendant's expired license contained both a mailing address and a physical description of property where he often parks the motor home that is his domicile. Defendant believes that the requirement that he provide a new and different residence address in order to renew his driver's license is unreasonable, and to require him to obtain and report a street address violates his right to privacy. Although it may be a convenience to state and federal law enforcement that the Department of Licensing provides proof of the identity and home location of Washington State citizens, once that convenience requires that we all have verifiable

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[1] *City of Redmond v. Moore, supra,* found the previous version of RCW 46.20.289 to be unconstitutional because it denied procedural due process, in that no right to hearing was preserved. But the 2005 version of RCW 46.20.289 says a suspension now takes effect pursuant to the provisions of RCW 46.20.245. And RCW 46.20.245(b) provides for telephonic administrative review:

> (b) The only issues to be addressed in the administrative review are:
>
> (i) Whether the records relied on by the department identify the correct person; and
>
> (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.

The limited administrative review is futile and meaningless, especially in this case where the issues revolve around the constitutional issues and reasons why Defendant's license was expired, and not simply whether or not the court correctly reported nonpayment of a fine imposed for driving with an expired license.

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residence addresses, it unreasonably burdens our State citizens' substantial interest in being licensed drivers, and our rights to privacy.

In addition to the right of privacy, there is a fundamental right to travel, *Saenz v. Roe*, 526 U.S. 489 (1999). A law that burdens a fundamental right such as those of privacy and travel must meet strict scrutiny. *City of Seattle v. McConahy*, 86 Wn.App. 557, 571, 937 P.2d 1133 (1997). And as stated above, a "driver's interest in his or her driving privilege is a substantial one." *City of Redmond v. Moore, supra*, at 670-671.

The State has recognized the right of privacy of address and created a separate class of people. The Washington State Secretary of State has implemented an address confidentiality program for persons who swear they believe they are at risk of domestic violence, sexual assault, trafficking, or stalking. RCW 40.24.030.

RCW 46.20.091 also creates two classes of persons: persons with an address and persons without an address. People who do not own or rent a residence are unable to receive a driver's license or State ID card and are being treated differently under this law than people who do own or rent a residence. The State of Washington lacks a compelling interest to treat these classes of individuals differently under this law, especially where fundamental rights are at stake. "The principal of equal protection requires that all persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." *Spence v. Caminski*, 103 W.App. 325, 335, 12 P.3d 1030 (2000).

There are several groups of people who do not have a Washington residence address. These groups include people who live in motor homes without a residence address, and homeless people. Under RCW 46.20.091, such individuals cannot legally obtain a Washington driver's license.

When it comes to a different fundamental right, the right to vote, RCW 29A.08.010 and 29A.08.112 properly allow for voter registration and identification recognizing a combination of

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a nontraditional residential address and a mailing address (as was previously allowed by the Department of Licensing and was done on Defendant's prior driver's license, Exhibit A). The failure of RCW 46.20.091 or other statutory law to make similar provision for driver's licenses violates the constitutional guarantee of equal protection under the law.

CONCLUSION

Defendant is before the court because he was driving while his license was suspended. Defendant's license was suspended for failure to pay a fine that was imposed upon him by the Department of Licensing solely due to its own refusal to renew Defendant's driver's license. The Department refused to renew Defendant's license solely because he does not have a traditional residence address. The suspension is therefore based on unconstitutional grounds, and the within matter should be dismissed.

Dated this 9 day of January, 2009.

STEPHEN C. JOHNSON
Defendant

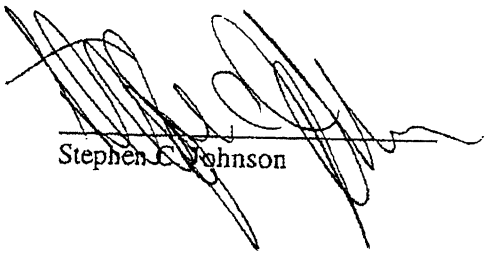
Stephen C. Johnson
Randle, WA 98377
360-880-4839

DECLARATION OF MAILING

I, Stephen C. Johnson, am the Defendant in this action. On the date written below, I mailed by first-class mail of the US Postal Service, postage prepaid, a true and correct copy of this BRIEF IN SUPPORT OF MOTION TO DISMISS to:

Lewis County Prosecuting Attorney
345 W Main Street
Chehalis, WA 98532

Dated this 12 day of January, 2009.



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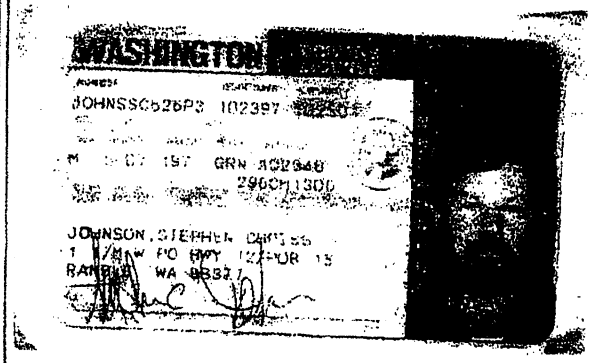

Exhibit A: Copy of Stephen Johnson's driver's license dated 10/23/1997

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IN THE DISTRICT COURT FOR LEWIS COUNTY

IN AND FOR THE STATE OF WASHINGTON

State of Washington, Plaintiff, vs. Stephen C. Johnson, Defendant	NO. C85203 **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

FACTS

On February 4, 2008 this court heard a motion to dismiss. The motion was based on a constitutional challenge of RCW 46.63.110 (6) (b) and RCW 46.20.091 (1) (d).

Defendant presented at the hearing evidence and argument using the following cases:

1. City of Redmond v. Moore, 151 wn 2d, 664, 91P.3d875
2. Macky v. Monthryn, 443 US 1, 11-12
3. Griswold v. State of Connecticut, 381 US 479, 484
4. City of Seattle v. McConahy, 86 WN. APP. 557, 571
5. Spence v. Caminski, 103 WN. App. 325, 335
6. Bell v. Burson, 402 U.S. 535 (1971)
7. Fusari v. Stienberg, 419 U.S. 379 (1975)

and Section 12 of Washington State Constitution.

The State argued 3 issues

1. Is the defendant's motion properly before the Court as a Knapstad motion
2. Is RCW 46.63.110 (6) (b) unconstitutional?

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3. Is RCW 46. 20. 091 unconstitutional?

The Court denied the motion. Court rendered no opinion on Knapsted.

ISSUES

1. Did the Court fairly consider the issues before the Court?
2. Did the State present evidence of a compelling interest in RCW 46.63.110 (6) (b) and is RCW 46.63.110 (6) (b) unconstitutional?
3. Did the State present evidence of a compelling interest in RCW 46.20.091 (1) (d) and is RCW 46.20.091 (1) (d) unconstitutional?

ARGUMENT – ISSUE #1

I came before the court on February 4, 2009 to request RCW 46.63.110 (6) (b) be declared unconstitutional. One, it fails to balance my interst with the State's. two, the State's interest does not rise to the level of my interest. Therefore, the state has no compelling interest for having this law.

"An important corollary to this **879* rule is that a driver cannot be convicted of driving while his or her license is suspended or revoked if the suspension or revocation violates due process. *State v. Dolson*, 138 Wash.2d 773, 783, 982 P.2d 100 (1999)" as cited in Moore.

"To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the

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Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893, *cited in* *Tellevik v. Real Property*, 120 Wash.2d 68, 78, 838 P.2d 111 (1992)" as cited in Moore.

The Court failed to provide any reasonable answer other than the State can do what it wants, and I have no right to drive a motor vehicle. Two issues not before the Court.

The second issue whether RCW 46.20.091 (1) (d) is unconstitutional. This RCW refers to a residential address. This is not a mailing address. WAC 308-104-014 (1) states: "current mailing address, residence address and telephone number."

Court said the State's compelling interest was to provide notice. I have not challenged the issue of notice or mailing address, only the requirement to provide a residence address. At this point we have no compelling interest. The court indicated that I was not a protected class. I need not be a protected class to be discriminated against, and I have a right to be protected.

Article 12 of the Washington State Constitution: "**Special privileges and immunities prohibited.** No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

ARGUMENT - ISSUE #2

In order for a law to be constitutional the State must have a compelling interest.

"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be ***1689* abridged by the States simply on a showing that a

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regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the Sate may prevail only upon showing a subordinating interest which is compelling,' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 417, 4L.Ed.2d 480. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' McLaughlin v. State of Florida, 379 U.S. 184, 196, 85 S. Ct. 283, 290, 13 L.Ed. 2d 222. See Schneider v. Sate of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L.Ed. 155." Griswold 381 U.S. 479, 85 S.Ct. 1678 14 L.Ed.2d 510

In addition, as cited in Moore:

"It is well settled that driver's licenses may not be suspended or revoked 'without that procedural due process required by the Fourteenth Amendment.' *Dixon v. Love*, 431 U.S. 015 112 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) (quoting *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *City of Redmond v. Arroyo-Murillo*, 149 Wash.2d 607, 612, 70 P.3d 947 (2003). An important corollary to this ***879** rule is that a driver cannot be convicted of driving while his or her license is suspended or revoked if the suspension or revocation violates due process. *State v. Dolson*, 138 Wash.2d 773, 783, 982 P.2d 100 (1999). Though the procedures may vary according to the interest at stake, "'[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

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To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893, *cited in* *Tellevik v. Real Property*, 120 Wash.2d 68, 78, 838 P.2d 111 (1992).

The first *Mathews* factor requires identification of the nature and weight of the private interest affected by the official action challenged. The private interest in this case is the driver's interest in the continued use and possession of a driver's license. Depriving a person of the use of his or her vehicle can significantly impact that person's ability to earn a living. *See Bell*, 402 U.S. at 539, 91 S.Ct. 1586. Moreover, the State "will not be able to make a driver whole for any personal ***671*** inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post suspension review procedures." *Mackey v. Montrym*, 443 U.S. 1, 11, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). As such, the United States Supreme Court has made clear that a driver's interest in his or her driving privileges "is a substantial one." *Id.*; *Dolson*, 138 Wash.2d at 776-77, 982 P.2d 100 (recognizing "[a] driver's license represents an important property interest").

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Additionally "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved. *Mackey*, 443 U.S. at 12, 99 S.Ct. 2612." As cited in City of Redmond v. Moore

The State provides no compelling interest that would elevate its interest above my substantial interest in my driving privilege: "The driver's substantial interest in the continued possession and use of his or her license is a substantial one." (Mackey as quoted in Moore) Moore held,

> "The State's interest in suspending an individual's driver's license for failing to appear, pay, or comply with a notice of traffic infractions is in the efficient administration of traffic regulations and in ensuring offending driver's appear in court, pay applicable fines, and comply with court orders. Although undoubtedly important, this interest does not rise to the level of the State's compelling interest in keeping unsafe drivers off the roadways. Simply put, failing to resolve a notice of traffic infraction does not pose the same threat to public safety as habitually unsafe drivers do." *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004)

Moore places the State's compelling interest in issuing or suspending a driver's license only in the realm of safety:

1. Testing to insure minimum competence
2. Insure safety on the highway by removing unsafe drivers

This is the State's substantial interest. Collection of a fine "is in the efficient administration of traffic regulations" (Moore). For a person like myself, RCW 46.63.110.(6) (b) means I will never have a driver's license again.

The last income I had was six months ago. Any income I receive is necessary for my subsistence and paying tax. Entering into a payment plan with the county is not an option as the penalties and requirements are unreasonable. In Mackey as cited in Moore,

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"[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved. *Mackey*, 443 U.S. at 12, 99 S.Ct. 2612." City of Redmond v. Moore

In this case my suspension is forever without any possibility of reinstatement. Under any test of balance my interest in my driving privilege is infinite and the State's is $250.

The State has indicated in oral arguments that suspending for non payment was in the realm of safety:

> "The law is that traffic infractions which are put in place for the purpose of keeping drivers on the roadways safe, speeding and other infractions are put there to keep motorists safe. That inherently is a safety issue, and the non-payment of those fines essentially, if one were to look at what was the recourse at that point, if we don't have suspension of a privilege to drive, the fines just go straight to collections and if they're never paid, essentially there is no action ever taken on the ticket, so in essence accumulate under the thousands of tickets without any other real repercussion other than to have a massive amount of debt piled up in collections, when in reality, they never pay that there's really no repercussions for the drivers, so it's clear that the state did create a balancing test by saying rather than having these fines just be sent to collections, we're going to have a process by which if the motorist operates their vehicle in an unsafe fashion, does have to be issued a citation, and if they're not going to pay it, then we're going to suspend their license, and that is in the state's interest because they remove the privilege which is substantial but that, in essence, is the proper procedure according to the state of Washington if the individual is not going to make payment fines, and I don't believe there is anything cited in the brief or there is any case law or statute that exists that would render a suspension of a license as unconstitutional for non-payment of fines."

The State's position is clearly in opposition to Moore which places the collection fines not as a safety issue but in the "efficient administration of traffic regulations."

The State has provided no compelling interest that would outweigh my driving privilege.

RCW. 46.63.110 (6) (b) is unconstitutional.

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RCW. 46.63.110 (6) (b) does not provide a method for balancing my interest and the State's interest and fails to consider the length of the suspension when determining my interest in my driving privilege.

Which further makes RCW. 46.63.110 (6) (b) unconstitutional.

ARGUMENT – ISSUE #3

"The protection guaranteed by the (Fourth and Fifth) amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (Olmsted v. United States as quoted in Griswold v. State of Connecticut)

"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be ***1689* abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 417, 4L.Ed.2d 480. The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.'" McLaughlin v. State of Florida, 379 U.S. 184, 196, 85 S.Ct, 283, 290, 13 L.Ed.2d 222. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155. (Griswold v. State of Connecticut)

"The Court considered similar durational residence requirements for welfare assistance in *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court observed that those requirements created two classes of needy residents 'indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference, the first class [was] granted and the second class [was] denied welfare aid upon which may depend the ability . . . to obtain the very means to subsist – food, shelter, and other necessities of life.'
Id. At 394 U.S. 627. The Court found that because this classification impinged on the constitutionally guaranteed right of interstate travel, it was to be judged by the standard of whether it promoted a compelling state interest. [Footnote 6] Finding such an interest wanting, the Court held the challenged residence requirements unconstitutional.

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Appellees argue that the residence requirement before us is distinguishable from those in *Shapiro*, while appellants urge that *Shapiro* is controlling. We agree with appellants that Arizona's durational residence requirement for free medical care must be justified by a compelling state interest, and that, such interests being lacking, the requirement is unconstitutional." (Memorial Hospital v. Maricopa County)

The State has created two classes of residents, one with a resident address and one without. Those with can receive a driver's license or state ID. Those without are not entitled to a driver's license or state ID. The government has created rules, laws, and regulations that punish people without valid ID. Without valid ID, I cannot cash a check. I cannot open a bank account or travel by air. Those are just a few issues I am personally aware of.

The State must have a compelling interest in creating two classes of otherwise identical residents whose only difference is a residential address.

"This is an appeal from a decision of the Arizona Supreme court upholding the constitutionality of an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense.

"*Held:* The durational residence requirement, in violation of the Equal Protection Clause, creates an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life.' *Shapiro v. Thompson,* 394 U.S. 618. Pp. 415 U.S. 253-270.

(a) Such a requirement, since it operates to penalize indigents for exercising their constitutional right of interstate migration, must be justified by a compelling state interest. *Shapiro v. Thompson, supra; Dunn v. Blumstein,* 405 U.S. 330. Pp. 415 U.S. 253-262.

(b) The State has not shown that the durational residence requirement is 'legitimately defensible' in that it furthers a compelling state interest, and one of the purposes asserted as justification for the requirement -- fiscal savings, inhibiting migration of indigents generally, deterring indigents from taking up residence in the county solely to utilize the medical facilities, protection of longtime residents who have contributed to the community particularly by paying taxes, maintaining public support of the county hospital, administrative convenience in determining *bona fide* residence, prevention of fraud, and budget predictability -- satisfies the State's burden of justification and insures that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily impinge on constitutionally protected interest. Pp. 415 U.S. 262-269. 108 Ariz. 373, 498 P.2d 461." (Memorial Hospital v. Maricopa County) 415 U.S. 250 (1974)

Reversed and remanded.

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The State must show a compelling interest in RCW 46.20.091 (1) (d) with no compelling interest there is no law.

RCW 46.20.091 (1) (d) is unconstitutional.

ADDITIONAL DISCUSSION

WA State Constitution Section 12: "**Special privileges and immunities prohibited.** No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Driving without license is a civil infraction not criminal –Fines are civil not criminal. The State makes it a crime to drive for nonpayment of a civil debt. We long ago abolished debtor prisons and the State here attempts to revive it. The State alleges that fines sent to collection and never paid, a real problem with civil judgements but won't allow me the same tool to collect a civil judgement. The issue here is revenue enhancement and not "the least severe punishment to elicit a change in behavior."

An example: Child safety program a 100% surcharge on all fines.

A misunderstanding by the court residence address v. mailing address. RCW 46.20.091 (1) (d) requires residence address that is a physical place where I live. The state has no compelling interest in that information.

Wac 308-104-014 (1) requires both physical and mailing address and telephone.

I have only challenged statutes requiring a physical address and not a mailing address. Since the court brought notice as a compelling interest I wish to respond: I have a right to be left alone. I have a right to be free from government interference.

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State law provides a method to update my address and that notice of suspension will be sent by US First Class mail to the address of record. It further states that the suspension takes effect 30 days after notice sent, whether notice is received or not. In addition, it gives notice of available limited hearing. See my motion to dismiss footnote.

At my discretion I may elect not to receive that notice. That may be done by throwing the notice away or not providing DOL with a mailing address. That is my choice, not the state's. The state has no compelling interest.

Where the state has no compelling interest, the law is unconstitutional. In rural Lewis County 99% of constitutionally protected travel is by automobile. The only people walking are those with suspended license of which most are only for non-payment of fines. Rural Lewis County spends no road money on provisions for walking. 100% money is spent for auto travel. In the 1950s, President Dwight D. Eisenhower started construction of the interstate highway system. At the beginning of that system, when one enters that system, a sign exhibits 3 words: "Motor Vehicles Only." In Washington State to a person without a residence address that road sign is just like an earlier version that has been ruled unconstitutional, that being: "Whites Only."

The state has created two classes of citizens, one with a residence address and one without a residence address. Those with can use the public roads as they are designed, built, and maintained. All others are relegated to an impossible position of walking in an inherently dangerous environment.

The state has no compelling interest in creating these two classes of citizens.

Moore: 1. State failed: no compelling interest

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	2.	P3	3 Factors
	3.	P4	My interest v. State
	4.	P4	Duration
	5.	P7	Ability to earn living
	6.	P7	Mathews Factor . . . "action challenged"
	7.	P7	Duration
	8.	P9	# of suspension notices 1999 401,471
	9.	P10	Efficient administration of traffic regulations

Mackey:	1.	State prevailed on showing of substantial interest – "safety"
	2.	Duration

Fusari:	1.	State failed; excessive delays
	2.	Denied property interest
	3.	Official act on private interest
	4.	Length of deprivation

Drew:	1.	It is fundamental
	2.	Move about or stand still
	3.	Right to be left alone is inviolate
	5.	Is to be tolerated only to protect rights and welfare of others

Yates:	1.	Over breath

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2. Free from governmental interference

3. Privacy – left alone

4. Individuals constitutional right to move about not commit crime

McConatly:

1. Power from the people

2. Move about (Memorial Hospital v. Maricopa County)

3. Impossible to live in city (or country?) (Pottinger v. City of Miami 810 F Supp 1551 SD Fla 1992)

Memorial Hospital v. Maricopa County:

1.	P1	Furthers a compelling state interest
2.	P1	Penalize "indigents"
3.	P1	Interstate travel
4.	P3	2 classes of needy residents
5.	P3	Necessities of life
6.	P3	Compelling interest lacking
7.	P7	Ye shall have one manner of law
8.	P7	Unless own to be necessary . . . .
9.	P8	Conservation of taxpayer purse
10.	P9	Bar from schools, parks, . . .
11.	P24	Right to travel (Crandal v. Nevada 6 wall 35) (1868)

Griswold:

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1. P11 Pursuit of happiness

2. P11 Left alone

3. P11 Most valued by civilized men

4. P13 Long series of cases

5. P12 Law must be shown necessary

6. P13 Reaching beyond the evil

7. P15 Encroachment upon personal liberty

8. P17 Unceremonious public arrest

9. P10 So rooted as to be ranked as fundamental

CONCLUSION

Over the last 100 years the motor vehicle has become ever more important as other modes of travel have faded. Today it is a novelty to see a horse and wagon on the road. It is no longer practical nor feasible to travel on foot or horse. Each step we have taken along the path has weakened the term privilege. The courts now hold the driving privilege to a much higher standard "valuable property interest" and "substantial interest" are examples used commonly in the courts. The highways of this nation are built exclusively for "motor vehicles only." All rural roads are designed and built only for motor vehicles. The state must have a compelling interest or the law is unconstitutional period. That compelling interest must rise above my substantial interest. It must be compelling.

The state failed to provide a compelling interest with RCW 46.63.110 (6) (b) and RCW 46.20.091 (1) (d) are unconstitutional.

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RCW 46.63.110 (6) (b) fails to balance my interest and the state's interest. It is unconstitutional.

"A right to be heard at a meaningful time and in a meaningful manner." (City of Redmond v. Moore.

Dated this 19 day of February, 2009

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Stephen C. Johnson, pro se

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II
11 OCT -6 AM 9:06
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN CHRISS JOHNSON,

Petitioner.

No. 42461-4-II

RULING DENYING REVIEW

Stephen Johnson seeks discretionary review of the superior court's decision affirming his district court conviction for third degree driving while license suspended.

On April 14, 2007, Johnson was cited for driving without a valid driver's license. He requested a contested hearing. The district court found him guilty and imposed a penalty of $260. He did not pay the penalty. On September 17, 2007, the Department of Licensing issued a notice of suspension of Johnson's driver's license because of his failure to pay the penalty. His suspension became effective on November 1, 2007.

On September 19, 2008, Johnson was cited for third degree driving while license suspended. He appeared at trial pro se, with standby appointed counsel. He argued that the suspension of his license was invalid because RCW 46.20.289, the suspension statute, does not provide for suspensions of driver's licenses for failures to pay penalties imposed after a contested hearing. The district court concluded otherwise and found him guilty.

Johnson appealed to superior court. He was appointed counsel on grounds of indigency but moved to substitute counsel on grounds that his appointed counsel was not timely prosecuting his appeal and would not argue theories that he wanted argued. Before addressing the substitution of counsel argument, the district court judge examined Johnson's financial affidavit, upon which his indigency status was based, and found it to be blank. The court put Johnson under oath, examined him about his assets, learned he owned a $300,000 house free and clear, and learned he had an uncollected judgment for almost $3,000,000. The court denied Johnson's request to substitute counsel and apparently found him not to qualify for appointed counsel. Johnson was represented by counsel during his appeal to superior court. He renewed his argument that his license suspension was invalid because RCW 46.20.289 does not provide for suspensions of driver's licenses for failures to pay penalties imposed after a contested hearing. Next, he argued that the Department denied him equal protection because it would not renew his driver's license because he did not have a mailing address and because it suspended his license even though he could not pay the penalty. Next, he argued he was denied effective assistance of counsel at trial because his appointed counsel would serve only as standby counsel. Finally, he argued that the district court denied him due process when it found he was not qualified for appointed counsel. In a lengthy ruling, the superior court rejected each of Johnson's arguments and affirmed his conviction.

Johnson seeks discretionary review under RAP 2.3(d)(2) and (3), which allow this court to grant discretionary review of a superior court decision reviewing the decision of a court of limited jurisdiction:

> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court . . . .

First, Johnson argues that the district court erred in finding him guilty of third degree driving while license suspended under RCW 46.20.342(1)(c), which provides in pertinent part that:

> A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because . . . (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289 . . .(vii) . . . is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

He contends that he has not "failed to comply with the terms of a notice of traffic infraction or citation." He notes that his notice of infraction provided that if he requested a contested hearing, he promised to appear on the date set by the court. He contends that because he did so, and because RCW 46.20.342(1)(c)(iv) does not address a driver who has requested a contested hearing, was found guilty at the hearing, was assessed a penalty and did not pay it, the district court erred in finding him guilty of third degree driving while license suspended. And he contends that this an issue of public interest that this court should address.

However, RCW 46.20.289 provides in pertinent part that:

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1, 2005.

And RCW 46.63.110(6) provides in pertinent part that:

> Whenever a monetary penalty, fee, cost, assessment, or other monetary obligation is imposed by a court under this chapter it is immediately payable. If the court determines, in its discretion, that a person is not able to pay a monetary obligation in full, and not more than one year has passed since the later of July 1, 2005, or the date the monetary obligation initially became due and payable, the court shall enter into a payment plan with the person, unless the person has previously been granted a payment plan with respect to the same monetary obligation . . . .
>
> . . . .
>
> (b) If a person has not entered into a payment plan with the court and has not paid the monetary obligation in full on or before the time established for payment, the court shall notify the department of the delinquency. The department shall suspend the person's driver's license or driving privilege until all monetary obligations have been paid, including those imposed under subsections (3) and (4) of this section, or until the person has entered into a payment plan under this section.

Thus, by failing to pay the monetary penalty imposed after the contested hearing Johnson requested, the Department had the authority to suspend his driver's license under RCW 46.63.110(6)(b) and RCW 46.20.289. And because it suspended his license "as provided in RCW 46.20.289," the district court did not err in finding that he was guilty of third degree driving while license suspended under RCW 46.20.342(1)(c)(iv). He does not show an issue of public interest.

Second, Johnson argues that his conviction should be reversed because his license suspension was unconstitutional. He asserts that his license suspension was

the result of his indigency because he could not afford to pay the penalty for his April 2007 citation for driving without a valid driver's license. He analogizes the suspension of his driver's license because of his non-payment to the imprisonment for non-payment of fines held unconstitutional in *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971). And he contends that this is a significant issue of constitutional law. But Johnson was not found guilty for not paying the penalty. He was found guilty for continuing to drive after being notified that his license had been suspended. He could have avoided conviction either by paying the penalty and getting his license reinstated or by not driving. While he has a property interest in his driver's license that entitles him to procedural due process in suspending it, *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004), that interest does not give him the right to drive while that license is suspended. *City of Spokane v. Port*, 43 Wn. App. 273, 278, 716 P.2d 945, *review denied*, 106 Wn.2d 1010 (1986). He does not demonstrate a significant issue of constitutional law.

Finally, Johnson argues that the district court deprived him of due process when it, sua sponte, inquired into his indigency status and without prior notice, found that he was not indigent for purposes of appointment of counsel. But the record presented is insufficient to determine whether an earlier finding of indigency had been made or whether indigency had been assumed. Further, it does not appear that Johnson suffered any prejudice for the removal of his appointed counsel, as counsel represented him in his appeal to the superior court. He does not show that discretionary review of this issue is warranted.

Johnson does not demonstrate that discretionary review is appropriate under RAP 2.3(d). Accordingly, it is hereby

ORDERED that Johnson's motion for discretionary review is denied.

DATED this 6TH day of October, 2011.

Eric B. Schmidt
Court Commissioner

cc: Jon E. Cushman
Kevin Hochholter
Shane O'Rourke
Hon. Richard L. Brosey
Hon. Wendy Tripp

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN CHRISS JOHNSON, Petitioner.	No. 42461-4-II ORDER DENYING MOTION TO MODIFY

Petitioner filed a motion to modify a Commissioner's ruling dated October 6, 2011, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 7th day of December, 2011.

PANEL: Jj. Penoyar, Quinn-Brintnall, Van Deren

FOR THE COURT:

CHIEF JUDGE

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