Faulk, Camilla

From: Boruchowitz, Robert [boruchor@seattleu.edu]
Sent: Friday, April 25, 2008 4:25 PM
To: Faulk, Camilla
Subject: Proposed Changes to CrRLJ 4.1 - Arraignment

I am writing to support the WSBA-proposed changes to CrRLJ 4.1, which would make clear the existing requirement that there be counsel available at arraignment for indigent accused persons. Providing a lawyer to advise someone who is facing criminal charges and possible incarceration is the most basic element of fairness and due process. In far too many courts, judges rush through advisement of rights and take both waivers of counsel and guilty pleas in less than two minutes. It is unreasonable to expect a person who may be frightened, poorly educated, and unfamiliar with legal jargon to understand the proceedings, the elements of the offense charged, possible defenses, and the consequences of a conviction. Because many jurisdictions now fail to provide counsel at arraignment, the Court should make clear that they must do so.

The State Bar cover letter quoted one of my articles, so I will not repeat the points from that. I recently wrote an article in the King County Bar Bulletin, "At 45, Gideon Right to Counsel Remains Elusive", available at http://www.kcba.org/newsevents/barbulletin/archive/2008/08-03/article7.aspx. In that article I pointed out that thousands of people plead guilty without ever talking to any lawyer except the prosecutor. This is most dramatic in misdemeanor and juvenile courts.

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

In a recent case in a central Washington court, a defendant went to an arraignment and asked for a lawyer. The prosecutor made her an offer that would expire that day. When the defendant asked if she could get a public defender before making any decisions, she was told that she would have to enter a plea of not guilty to receive a lawyer and that no lawyer was present to help her. Because the offer expired that day, the defendant felt pressured to waive her right to counsel and enter a guilty plea.

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

Existing court rules call for the availability of lawyers at first appearances. For example, CrRLJ 3.1 states in part: "The right to a lawyer shall accrue as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest. A lawyer shall be provided at every critical stage of the proceedings." Case law is clear that before a judge can accept a waiver of the right to counsel there must be a thorough inquiry to establish a knowing, intelligent and voluntary waiver. State v. Chavis,31 Wn. App. 784 (1982).

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

The prosecutor in a criminal case shall: ...

* (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
* (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.... .

Yet, in many courts, the prosecutor does negotiate guilty pleas with unrepresented defendants who have not waived counsel. In some courts, neither the prosecutor nor a defender attends the first appearance, putting the judge in an impossible position because there are no lawyers to advocate either for determination of probable cause or to present information to help the judge decide whether to release an in-custody defendant.

Most people who go to court go to misdemeanor courts. The Court should adopt this rule to ensure fairness for the ligitants and to uphold the integrity of the courts.

Sincerely,

Robert C. Boruchowitz
Visiting Clinical Professor of Law
Seattle University School of Law

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

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

Bob Boruchowitz is visiting clinical professor of law and director of the Defender Initiative at Seattle University. He was director of The Defender Association for 28 years.

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