



## The Right to Effective Assistance of Counsel in Washington

*A Reference Guide for the Bench and Bar*

### Topics covered in this pamphlet:

- ✓ The Defendant's Right to Counsel: Sources and Scope
- ✓ The Defendant's Right to Counsel: Criminal Proceedings
  - In Criminal Trials
  - In Capital Cases
  - On Appeal
  - Waiver
  - Indigent Defendants
  - The Right to Effective Assistance
- ✓ The Defendant's Right to Counsel: Other Proceedings
  - In Involuntary Commitment Proceedings
  - In Juvenile Court Proceedings and Dependency Cases
  - During Police Interrogations
- ✓ The Defendant's Right to Counsel: Other Services

### Sources of the Right

The U.S. Constitution demands that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. State prosecutions must meet minimum constitutional standards as defined by the U.S. Supreme Court.

The Washington Constitution requires that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ." Wa. Const. art. I, § 22. In certain situations, Washington law provides a greater right to counsel than the Federal Constitution mandates.

Various state statutes, court rules, and court decisions further strengthen this right.

### Scope of the Right

The state must appoint counsel for indigent defendants in, among others, the following types of proceedings:

- Criminal Trials
- Appeals of Right
- Involuntary Commitment Proceedings
- During Police Interrogations
- Dependency Cases
- Juvenile Proceedings

## THE DEFENDANT'S RIGHT TO COUNSEL IN OTHER TYPES OF PROCEEDINGS

### WHO, WHEN, and HOW

#### *The Defendant's Right to Counsel in Involuntary Commitment Proceedings*

#### **WHO** enjoys the right in involuntary commitment proceedings?

Any person detained for involuntary mental commitment has the right to an attorney. RCW 71.05.200(1)(b).

#### **WHEN** does the right attach in involuntary commitment proceedings?

A person detained for involuntary mental commitment has the right to an attorney at the commitment hearing. RCW 71.05.200(1)(b). In addition, defendants accused under the Sexually Violent Predator Act have the right to counsel during all stages of the commitment. RCW 71.09.050.

#### *The Defendant's Right to Counsel in Juvenile Court Proceedings and Dependency Cases*

#### **WHO** enjoys the right in juvenile court proceedings and dependency cases?

In juvenile offense proceedings, the minor defendant has the right to counsel in any case where the juvenile might be transferred to adult court or there is danger of confinement. RCW 13.40.140(2). A minor has the right to a lawyer in certain other juvenile court proceedings as well. These include:

- Dependency (abuse, neglect, or abandonment). RCW 13.32A.160(1)(c).
- Termination of parental rights. Juvenile Court Rule 9.2(c)(1).
- Child in need of services (placement in foster care). RCW 13.32A.160(1)(c).
- At-risk youth (status offenses, substance abuse, or uncontrollable child). RCW 13.32A.192(1)(c).

In addition, in a dependency or parental termination action, parents have the right to be represented by counsel and, if indigent, to have such counsel appointed by the court. RCW 13.34.090; Juvenile Court Rule 9.2(c)(2).

#### *The Defendant's Right to Counsel During Police Interrogation*

#### **WHEN** does the right attach during police interrogation?

Under the Fifth Amendment, a suspect is entitled to counsel, and must be informed of that right, before "custodial interrogation" begins. *Miranda v. Arizona*, 384 U.S. 436 (1966).

### Other Services: Interpreters, Psychiatrists, Experts, and Investigators

**Interpreters:** The right to counsel includes the right to an interpreter for defendants who do not speak English. *State v. Gonzalez-Morales*, 138 Wn.2d 374 (1999).

**Psychiatric examinations:** "[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

**Expert witnesses and investigative services:** An indigent defendant is entitled to publicly paid expert witnesses and investigative services, as necessary. Superior Court Criminal Rule 3.1(f)(1)-(2).

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**"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."**

U.S. Constitution, 6th Amendment

**"In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."**

Washington Constitution, Article I, § 22

**"An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.'"**

*United States v. Cronin*, 466 U.S. 648, 653 (1984) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963))



Washington State Bar Association  
Committee on Public Defense

## WHY, WHO, WHEN

### WHY is right to counsel important?

- Required by the U.S. Constitution, the Washington Constitution, statutes, and court rules.
- Prevents injustice by ensuring minimum standards of fairness.
- Prevents wrongful convictions, avoiding needless appeal and retrial costs.
- Ensures respect for courts and the judicial system.

### WHO enjoys the right in criminal trials?

If a defendant is facing a felony charge, the U.S. Constitution requires that he or she have access to a lawyer. *Gideon v. Wainwright*, 372 U.S. 335 (1963). If a defendant is facing a misdemeanor charge, the Washington Constitution requires that the defendant have access to a lawyer whenever the charged offense carries with it the possibility of a jail or prison sentence. *McInturf v. Horton*, 85 Wn.2d 704 (1975); Superior Court Criminal Rule 3.1(a); *see also Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the U.S. Constitution permits a sentence of incarceration only when the defendant has had access to a lawyer throughout the proceedings).

### WHEN does the right attach in criminal trials?

The defendant must have access to counsel (1) during all critical stages of the proceedings, and (2) once the judicial proceedings have begun.

#### At All Critical Stages of the Proceedings

According to the Washington State Supreme Court, access to a lawyer is required, absent the defendant's waiver, during all critical stages of the proceedings. *State v. Jackson*, 66 Wn.2d 24 (1995). Critical stages are those "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." *State v. Agtuca*, 12 Wn. App. 402, 404 (1974).

#### After Start of Judicial Proceedings

The Sixth Amendment holds that the right to counsel attaches "at or after the time that judicial proceedings have been initiated" against the defendant. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Washington's Criminal Court Rules further indicate that the right attaches "as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs first." Criminal Court Rule 3.1(b)(1).

#### Examples of critical stages include:

- Immediately after an arrest, including DUI arrests. *City of Tacoma v. Heater*, 67 Wn.2d 733 (1966).
- Arraignments. *Hamilton v. Alabama*, 368 U.S. 52 (1961).
- Preliminary bail hearings. *Coleman v. Alabama*, 399 U.S. 1 (1970).
- Post-indictment lineups. *United States v. Wade*, 388 U.S. 218 (1967).
- Probation revocation hearings. Superior Court Criminal Rule 7.6(b).
- Sentencing hearings. *State v. Bandura*, 85 Wn. App. 87, 97 (1997).

## HOW

### HOW must a court protect the right in criminal trials?

- If a defendant appears for arraignment without counsel, the court must inform the defendant of the right to counsel, and inquire into whether the defendant has a lawyer. Superior Court Criminal Rule 4.1(c).
- If the defendant chooses to waive counsel, the court must ascertain if the waiver is voluntary, competent, and with knowledge of the consequences. Superior Court Criminal Rule 4.1(d).
- Unless the waiver is valid, the court cannot continue without counsel. Superior Court Criminal Rule 4.1(d).
- Right to counsel does not, however, include the right to a particular lawyer. *United States v. Allen*, 789 F.2d 90, 92 (1st Cir. 1986).
- A judge may be disciplined for failing to protect the defendant's right to effective assistance of counsel. *In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159 (2003).

### The Defendant's Right to Counsel in Capital Cases

#### A Heightened Standard at Trial and on Appeal

In all capital cases, the right to counsel is expanded, requiring that the state appoint at least two lawyers for the trial and the direct appeal. At least one of the lawyers must be deemed qualified by selection from a list maintained by a panel created by the Washington State Supreme Court. Superior Court Special Proceedings Rules – Criminal 2. The state must, moreover, appoint a lawyer for collateral attacks against a capital conviction. RCW 10.73.150; 10.73.090.

### Indigent Defendants

A defendant who cannot afford a lawyer has the right to have one appointed by the court. An indigent is defined, by RCW 10.101.010(1), as a person who:

- Is receiving public assistance, be it general assistance, food stamps, Medicaid, supplemental Social Security, etc.;
- Is involuntarily committed to a public mental health facility;
- Earns 125 percent or less of the federal poverty level; or
- Is unable to pay the anticipated cost of retained counsel.

A defendant cannot be denied a public defender even though his or her family or friends might have resources, or the defendant is capable of posting bond. Criminal Court Rule 3.1(d)(1).

### Waiver

Criminal defendants have the constitutional right to waive counsel and represent themselves. *Faretta v. California*, 422 U.S. 806 (1975). However, a waiver must be made by the defendant in a timely manner and must be unequivocal. *State v. Stenson*, 132 Wn.2d 668, 737-38 (1997). A valid waiver in Washington requires:

(1) Competency to stand trial. *In re Fleming*, 142 Wn.2d 853 (2001); and

(2) A knowing and intelligent waiver with "eyes open," which includes an awareness of the dangers and disadvantages of the decision. *State v. Hahn*, 106 Wn.2d 885, 894-95 (1986).

Waiver of counsel at arraignment does not preclude a defendant from claiming the right to

counsel at later proceedings. Superior Court Criminal Rule 4.1(d). A judge, moreover, cannot promise a defendant no jail time in return for defendant foregoing right to counsel. "We reject the idea that a court can determine in advance of trial what the punishment will be. Such a procedure would violate every concept of due process." *McInturf v. Horton*, 85 Wn.2d 704, 706 (1975).

In any case, judicial examination into the validity of the waiver is best made on the record, and must be more than a "routine inquiry." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 210-11 (1984). Under the Sixth Amendment, however, it is sufficient that a court confirm that the defendant has made a "knowing and intelligent" waiver of counsel, not that the decision is wise or that it will not harm the defense. *Iowa v. Tovar*, 541 U.S. 77 (2004).

## WHO, WHEN, and HOW

### WHO enjoys the right on appeal?

In any proceeding, criminal or civil, where a litigant has the right to assistance of counsel, that right extends through any appeals of right. *In re Grove*, 127 Wn.2d 221 (1995).

### WHEN does the right attach on appeal?

Although the state is not constitutionally required to appoint a lawyer for filing discretionary appeals, it must appoint counsel for an indigent appellant if the Supreme Court accepts review. *State v. Mills*, 85 Wn. App. 286 (1997); RCW 10.73.150(6)-(7).

### HOW must a court protect the right on appeal?

Indigent defendants have the right to public payment of filing fees, transcripts, and the like, in order to file a proper appeal. *In re Grove*, 127 Wn.2d 221 (1995).

### The Right to Effective Assistance

It is not enough for a court to ensure that defendants enjoy access to counsel. The right to counsel serves no purpose unless it is the right to effective counsel. *McMann v. Richardson*, 397 U.S. 759 (1970).

Effective assistance of counsel requires the defense attorney's performance to be "reasonable . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668 (1984). The test in Washington is "after considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Thomas*, 71 Wn.2d 470, 471 (1967).

Counsel is ineffective if (1) a defendant is denied counsel at a critical stage of his trial, (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, (3) counsel labors under an actual conflict of interest, or (4) the circumstances are such that the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without further inquiry (e.g., governmental interference with defendant's attorney-client relationship). *See In re Davis*, 152 Wn.2d 647, 675 (2004); *see also Boulas v. The Superior Court*, 233 Cal. Rptr. 487 (Cal. Ct. App. 1986) (governmental interference). No showing of prejudice to the defendant is necessary under these circumstances. *Id.*

Otherwise, counsel is ineffective if (1) the rep-

resentation was deficient (that is, it fell below an objective standard of reasonableness based on consideration of all the circumstances), and (2) the deficiency prejudiced the defendant. *Id.* at 672. Indicia of deficiency include:

- Failure to discuss plea bargain offers with the defendant. *See State v. James*, 48 Wn. App. 353, 362 (1987) (failure to point out existence); *State v. S.M.*, 100 Wn. App. 401, 411 (2000) (failure to explain effects).
- Failure to explain to the defendant the direct consequences of a trial. *State v. Crawford*, 2005 WL 1620319 (Wn. App. Jul 12, 2005).
- Failure to make reasonable investigations into possible defense strategies. *In re Davis*, 152 Wn.2d at 742.
- Failure to adequately prepare for trial or to subpoena necessary witnesses. *In re Davis*, 152 Wn.2d at 742.
- Failure to allow enough time for reflection and preparation for trial. *State v. Jury*, 19 Wn. App. 256, 263 (1978).
- Failure to apprise court of defendant's possible incompetence to stand trial. *In re Fleming*, 142 Wn.2d 853, 866 (2001).
- Failure to explain the law correctly to the court or to the defendant. *See State v. Carter*, 112 P.3d 561 (2005) (regarding requested jury instructions); *State v. S.M.*, 100 Wn. App. 401 (2000) (regarding legal assistant's misstatement of law to defendant).
- Improper relations with defendant. *State v. Stough*, 96 Wn. App. 480, 486 (1999).