Right to Counsel for DUI in Nevada: A New Tune for Gideon's Trumpet

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Right to Counsel for DUI in Nevada: A New Song for Gideon's Trumpet

Nevada has become MADD.\(^1\) Increased public attention has been drawn to the problem of driving while under the influence of intoxicants. The Nevada Legislature has developed stringent penalties for all convictions for driving under the influence in an attempt to deter this activity.\(^2\) The major mechanism used to implement the legislative intent to deter drunk driving is the mandatory imposition of imprisonment for a second conviction\(^3\) or, in specified circumstances, a felony conviction.\(^4\)

Generally, the first conviction for driving under the influence results in a minimum fine of $100 and possible imprisonment for up to six months.\(^5\) A second conviction within five years, after having been convicted in any jurisdiction,\(^6\) results in mandatory imprisonment for not less than 10 days nor more than six months and a fine of not less than $500.\(^7\) Any subsequent conviction within five years results in imprisonment in the state prison for not less than one year nor more than six years and results in a minimum fine of $2,000.\(^8\) The intent of the Nevada Legislature to deter drunk driving, therefore, is demonstrated best by the imposition of mandatory sentences of imprisonment.\(^9\) The ultimate concern of this comment is whether the procedures used by the

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1. Acronym for the organization Mothers Against Drunk Drivers.
2. See N.R.S. §484.379.
3. See Nevada Revised Statutes Section 484.379(4) which provides in part: Any person who violates the provisions of subsection 1 or 2 within 5 years after having once been convicted in any jurisdiction of a violation of subsection 1 or 2, NRS 484.3795 or a law which prohibits the same conduct is guilty of a misdemeanor . . . . the court shall sentence him to imprisonment for not less than 10 days nor more than 6 months in the county jail, fine him not less than $500 and direct the department of motor vehicles to suspend his driver's license for a period specified in the order which must be not less than 6 months.
4. See Nevada Revised Statutes Section 484.379(5) which provides in part: any person who violates the provisions of subsection 1 or 2 within 5 years after having been convicted more than once in any jurisdiction . . . . shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years and must be further punished by a fine of not less than $2,000 nor more than $5,000.
5. See N.R.S. §484.379(3).
6. See notes 160-176 and accompanying text infra (discussion of the propriety of using prior convictions from other jurisdictions for the purpose of enhancement).
7. See N.R.S. §484.379(4).
8. See N.R.S. §484.379(5).
9. The Legislature also has demonstrated the seriousness it attaches to deterring drunk driving by restricting a prosecuting attorney from dismissing a charge under Section 484.3795 of the Nevada Revised Statutes in exchange for a favorable plea to a lesser charge. See N.R.S.
misdemeanor courts to ascertain the existence of a valid waiver of the right to counsel are sufficient to enable the courts to enforce the legislatively enacted penalties. The problem is significant because prior uncounseled convictions cannot be used for enhancement purposes unless they are valid under the sixth amendment.10

Overriding the legislative mandate of imposing imprisonment is the pronouncement by the United States Supreme Court that “incarceration [is] so severe a sanction that it should not be imposed . . . unless an indigent defendant [has] been offered appointed counsel to assist in his defense.”11 Because imprisonment is the result of convictions for driving under the influence, the procedures used by the Nevada courts, when a defendant is permitted to proceed pro se, must be analyzed to determine whether the original conviction is in conformance with the right to counsel as guaranteed by the United States12 and Nevada constitutions.13

The purpose of the comment is to analyze the procedural deficiencies that may exist, which could foreclose the use of prior uncounseled convictions to enhance the penalties, and will, therefore, have the effect of denying Nevada courts the power to impose imprisonment. The denial of the power to imprison would frustrate realization of the goal of the legislature to deter drunk driving by removing the major enforcement mechanism in the statute. A discussion of the right to counsel under federal law and under Nevada, will precede an analysis of the procedural deficiencies that may exist within the Nevada misdemeanor court systems, namely the municipal courts, as they pertain to safeguarding an accused’s right to counsel. The major emphasis will be on the existence of a valid waiver of the right to counsel when a defendant attempts to proceed pro se or enters an uncounseled plea of guilty or nolo contendere. Incident to this discussion is the question of the burden on the state to make the required showing of a waiver before the waiver can be accepted by a reviewing court.

Finally, present proposals will be discussed and specific procedures will be suggested that will aid the courts in developing procedures pertaining to the right to counsel in misdemeanor courts. The adoption of these procedures should result in a fair proceeding for those accused of driving under the influence and ensure the propriety of prior uncounseled convictions. Before determining deficiencies in Nevada proce-

484.3795(2). A prosecutor can dismiss or lower the charge only if he knows “the charge is not supported by probable cause or cannot be proved at the time of trial.” Id.

12. U.S. CONST. amend. VI.
dures, it is important first to understand the basis of the right to counsel as developed and applied to misdemeanants.

**MISDEMEANT'S RIGHT TO COUNSEL: BACKGROUND**

The sixth amendment has been acknowledged to represent rights so fundamental it has been made obligatory on the states by the due process clause of the fourteenth amendment. The primary concern of the courts is best expressed in the oft quoted opinion in *Powell v. Alabama*:

The right to be heard would be, in many courts, of little avail if it 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. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He 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.

The right to counsel developed around the basic concept verbalized in *Powell*, that is, the assistance of counsel may be a necessary element of a fair trial and has been applied to an expanding array of judicial proceedings. Initially the right to counsel was limited by the fact that *Powell* was a capital case. Six years later the right was extended to encompass all federal felony cases; but the right was expressly determined inapplicable to the states through the fourteenth amendment. Finally, in *Gideon v. Wainwright*, the Court overruled earlier cases and held that the right to counsel, as embodied in the sixth amendment, was applicable to the states.

The sixth amendment provides that the right to counsel shall attach "in all criminal prosecutions," but the literal meaning of this phrase

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15. 287 U.S. 45 (1932).
16. *Id.* at 68-69.
17. *See id.* at 48.
21. *Id.* at 340.
22. U.S. CONST. amend. VI (emphasis added).
has not been accepted as the definitive analysis of the right to counsel, as evidenced by the slow development of the right to counsel, even in felony trials. The states were not required to extend the right to counsel to accused felons until 1963—ninety-five years after the adoption of the fourteenth amendment—when the Court in *Gideon* concluded that the sixth amendment is fundamental and essential to a fair trial.23 The following discussion illustrates that the evolution of the right to counsel as it pertains to *misdemeanors* parallels the slow federal development of the right. The nature and requirements of a valid waiver will then be considered, succeeded by an analysis of the right to counsel as developed by the Nevada courts.

A. *Misdemeanor's Right to Counsel*

Historically, the development of the right to counsel has been similar in rationale to the right to trial by jury, i.e., generally limited to serious crimes.24 Not until 1972, in *Argersinger v. Hamlin*,25 did the Court first address any issue pertaining to the right to counsel for misdemeanor trials. The defendant in *Argersinger* was an indigent charged with carrying a concealed weapon. The offense was punishable by imprisonment for up to six months and a $1,000 fine. Argersinger, however, was sentenced only to serve ninety days in jail.26

The potential punishment was the standard accepted by the Florida Supreme Court27 for determining whether a misdemeanor was entitled to the assistance of counsel. The court based affirmance of the defendant's uncounseled conviction by analogizing to *Duncan v. Louisiana*,28 wherein the Supreme Court held that the right to trial by jury attaches only for non-petty offenses punishable by more than six months imprisonment.29 In *Argersinger* the United States Supreme Court refused to adopt this standard and stated:

While there is historical support for limiting the "deep commitment" to trial by jury to "serious crimes", there is no such support for a similar limitation on the right to assistance of counsel . . .

We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried

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23. [See 372 U.S. at 342.](#)
26. [See id. at 26.](#)
29. [See id. at 159.](#)
without a jury, they may also be tried without a lawyer.\textsuperscript{30}

The Court in \textit{Argersinger} addressed the issue of whether the right to counsel attaches to prosecutions for misdemeanor offenses, but the Court did not delineate the exact limitations of the right.\textsuperscript{31} The Court emphasized the importance of the assistance of counsel when a loss of liberty is involved\textsuperscript{32} and noted that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."\textsuperscript{33} The Court, however, drew the line not at whether due process demands the right, but rather, at whether the person is \textit{actually} imprisoned.\textsuperscript{34} Given the recognition of the importance of the assistance of counsel, this limitation by the Court has been criticized as being doctrinally inconsistent.\textsuperscript{35}

This criticism is leveled at \textit{Argersinger} because the limitations impliedly imposed ignore the basic constitutional value embodied in the right to counsel, namely, the interest of fairness guaranteed by the due process clause of the fourteenth amendment.\textsuperscript{36} The line drawn by the Court has resulted in the view that \textit{Argersinger} is merely a sentencing restriction.\textsuperscript{37} By avoiding the imposition of imprisonment, a state would be permitted to use uncounseled convictions. The Court, in effect, determined that anything less than actual imprisonment did not warrant constitutional protection. This distinction is a limitation on the due process clause and results in inconsistency in analysis between the right to counsel generally and a misdemeanant's right to counsel.

Although doctrinal criticism may be well founded, the importance that social costs play in expanding the right to counsel must be acknowledged.\textsuperscript{38} Hindsight, therefore, would suggest the decision in \textit{Argersinger} did not unduly burden the states by extending the right too far too fast.\textsuperscript{39} By refusing to identify the parameters of the right, the Court deferred developing the nuances of the right. Subsequent judicial evaluation would be required to resolve the exact limits on the misdemeanor's right to counsel. The Court eventually reinforced the

\begin{itemize}
  \item \textsuperscript{30} 407 U.S. at 30-31 (footnote omitted).
  \item \textsuperscript{31} \textit{See} id. at 37. The Court reasoned that since Argersinger was actually imprisoned they did not need to address the issue of whether the right attaches to those proceedings in which loss of liberty is not involved. \textit{Id.}
  \item \textsuperscript{32} \textit{See} id. at 31-37.
  \item \textsuperscript{33} \textit{Id.} at 31.
  \item \textsuperscript{34} \textit{Id.} at 37.
  \item \textsuperscript{35} \textit{See generally} L. HERMAN, \textit{THE RIGHT TO COUNSEL IN MISDEMEANOR COURT} 11-30, 32-35, 33-84 (1973) [hereinafter cited as HERMAN]; \textit{Note, Argersinger v. Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial, 35 OHIO ST. L.J. 168} (1974) [hereinafter cited as \textit{Collateral Use}].
  \item \textsuperscript{36} Herman & Thompson, \textit{Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?}, 17 AM. CRIM. L. REV. 71, 77 (1979) [hereinafter cited as Herman & Thompson]; \textit{see Collateral Use, supra} note 35, at 173.
  \item \textsuperscript{37} \textit{See} Herman & Thompson, \textit{supra} note 36, at 77.
  \item \textsuperscript{38} \textit{See} Herman & Thompson, \textit{supra} note 36, at 77.
  \item \textsuperscript{39} \textit{See} Herman & Thompson, \textit{supra} note 36, at 77.
\end{itemize}
“actual imprisonment” standard in *Scott v. Illinois.*

In *Scott*, Ambrey Scott was found guilty of shoplifting, punishable by up to a year imprisonment, and fined fifty dollars. Because of the “potential imprisonment” involved, Scott argued that the right to counsel should attach to any offense punishable by imprisonment. Adoption of this standard would avoid the predeterminative effect of the holding in *Argersinger* and parallel more closely the constitutional value embodied in the right to counsel. The Court, however, rejected this analysis and expressly limited the right to “actual imprisonment.”

The right to counsel attaches under the Nevada drunk driving statute (hereinafter referred to as DUI statute) because of the mandatory terms of imprisonment, the event that is the threshold inquiry as delineated in *Scott* and *Argersinger*. The Court in *Argersinger* stated that:

> Under 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.

The court also held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, or felony, unless he was represented by counsel.” If the state desires to impose the authorized penalties of the DUI statute on an uncoached defendant by enhancing the penalties, then the state must determine what standards must be used to ascertain the existence of a “knowing and intelligent” waiver as required by the Court in *Argersinger*.

**B. “Knowing and Intelligent” Waiver**

A waiver most often has been defined as “an intelligent relinquishment or abandonment of a known right or privilege.” This formulation by the Court in *Johnson v. Zerbst* has resulted in three requirements for a valid waiver. The waiver must be voluntary, knowing and intelligent. These requirements are present even in situations,

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41. See Herman & Thompson, supra note 36, at 82-85.
42. See Herman & Thompson, supra note 36, at 83.
43. See Herman & Thompson, supra note 36, at 80-81.
44. See Scott v. Illinois, 440 U.S. 367, 368 (1979). The Court read *Argersinger* to mean actual imprisonment is the line defining the constitutional right to appointment of counsel. *Id.* The Court understood that *Argersinger* held actual imprisonment is a penalty different in kind from fines and the threat of imprisonment. *Id.*
45. See notes 3-9 and accompanying text supra.
47. *Id.* at 40.
49. 304 U.S. 458 (1937).
50. See *Brady v. United States*, 397 U.S. 742, 748 (1969). The Supreme Court stated:
to be discussed later, in which an accused asserts his independent right to self-representation.

The requirement that a waiver be voluntary is explained best by merely stating that the defendant must make the waiver of his own free will.\(^5\) The more difficult problem surrounds the determination of whether there was a knowing and intelligent act. The knowing and intelligent requirements reflect an initial concern that the accused have sufficient mental competence\(^2\) to understand the situation and the questions asked him on the subject of his waiver.\(^5\) The ultimate concern, therefore, is with the accused’s awareness of the consequences of his decision to waive his right to counsel.\(^5\) The importance of determining the defendant’s awareness has resulted in the common statement that a waiver does not, nor could not, depend on a request for counsel.\(^5\) Before there can be a waiver the record must show that the defendant was offered counsel and that the refusal of the assistance of counsel was made with understanding and intelligence.\(^5\) “Anything less is not waiver.”\(^5\) In addition to these requirements, courts are concerned with how well-informed the defendant must be.

In *Von Moltke v. Gillies*,\(^5\) the Supreme Court outlined specific requirements that had to be found before the waiver could be accepted. The Court required that the defendant *know*:

> [T]he nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all facts essential to a broad understanding of the whole matter.\(^5\)

The requirement that the accused *know* all of the included offenses, as well as the other factors required by the *Von Moltke* Court, has not been accepted by all federal circuits.\(^6\) Thus, the plurality decision in *Von Moltke* has not been followed; but instead, most courts have only required that the defendant *understand* the benefits of counsel and the

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\(^{52}\) See *Krantz*, supra note 51, at 107.


\(^{54}\) See *Krantz*, supra note 51, at 107.


\(^{56}\) See id. at 516.

\(^{57}\) Id.

\(^{58}\) 332 U.S. 708 (1948).

\(^{59}\) Id. at 724.

\(^{60}\) See, e.g., Spanbauer v. Burke, 374 F.2d 67, 71-74 (7th Cir. 1966); Collins v. United States, 206 F.2d 918, 922 (8th Cir. 1953).
disadvantages of pro se representation.\(^{61}\)

To determine whether the defendant fully understands the consequences of his refusal of the assistance of counsel, the trial judge must consider the facts and circumstances of each case;\(^{62}\) furthermore, the judge is imposed with a heavy responsibility in making these determinations.\(^{63}\) The Supreme Court has dictated that the right to counsel is of such importance "that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"\(^{64}\) As a result, an improper determination of a waiver will result in a jurisdictional bar to a valid conviction.\(^{65}\)

The importance of a constitutional right makes a waiver of that right more significant, and therefore, a judge should not take the acceptance of a waiver lightly.\(^{66}\) The Court should indulge in every reasonable presumption against waiver.\(^{67}\) The determination of a waiver is of special importance, particularly in light of the Supreme Court's ruling that the right to proceed pro se has a constitutional basis.\(^{68}\)

In *Faretta v. California*,\(^ {69}\) the Supreme Court described the sixth amendment right to counsel as contemplating not merely the right to the assistance of counsel, but also as granting to the accused the personal right to make his defense.\(^ {70}\) Anthony Farretta's original request to be permitted to represent himself was granted, subject to a later reversal, if it appeared Faretta was "unable to adequately represent himself."\(^ {71}\) The judge accepted his request based on the fact that Faretta had once before represented himself, had a high school education,\(^ {72}\) and was made aware of the possible "mistake" he was making.\(^ {73}\) Several weeks later, following a colloquy on Faretta’s knowledge of technical legal procedures and principles,\(^ {74}\) the judge determined that Faretta

\(^{61}\) See *Krantz, supra* note 51, at 107-09.


\(^{63}\) See *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973). The court held the district court could not accept a waiver without addressing the accused personally and determining on the record whether the defendant's decision to proceed pro se was competent and intelligently made with an understanding of the nature of the charge and the penalties involved. *Id.*; see also *Boyd v. Dutton*, 405 U.S. 1, 3 (1972) (waiver will not lightly be presumed).

\(^{64}\) 304 U.S. at 462 (footnote omitted).

\(^{65}\) Id. at 468.


\(^{68}\) See *Faretta v. California*, 422 U.S. 806, 807 (1975).

\(^{69}\) 442 U.S. 806 (1975).

\(^{70}\) Id. at 819.

\(^{71}\) Id. at 808.

\(^{72}\) See id. at 807-08.

\(^{73}\) See id. The judge informed Faretta that he would be expected to conduct a trial as any competent lawyer and he would be given no special favors. *Id.* at 808 n.2.

\(^{74}\) See id. at 808 n.3.
had not made a knowing and intelligent waiver. The Supreme Court reversed stating that the accused's technical legal knowledge is not relevant to an assessment of whether he has exercised a knowing and intelligent waiver and held that forcing an accused to accept counsel against his will, "deprived him of his constitutional right to conduct his own defense."

If the holding that counsel cannot be forced on an unwilling defendant is viewed in isolation, as being independent of any reference to the recognized ability of a defendant to waive his right to counsel, this rationale would appear to limit the discretion of the trial court in denying a defendant's right to proceed pro se. This view, however, ignores the basic premise of the right to counsel as expressed in Faretta.

The issue confronted in Faretta was whether counsel could be forced on an unwilling defendant, but, this right was not created in isolation of the expressed restriction that the accused must "knowingly and intelligently" forego the benefits of having the assistance of counsel. The conclusion must be reached that while recognizing that the right to proceed pro se has a constitutional basis, this does not limit the discretion of the trial court because of the necessity of finding a proper waiver. The importance of the right to counsel as ensuring fairness in the judicial system cannot be ignored. Thus, a trial judge must be primarily concerned with the existence of a knowing and intelligent waiver. Only after this determination may a defendant be allowed to proceed pro se.

In light of the right to proceed pro se and the possibility of reversal for unduly imposing counsel on an unwilling defendant, the trial judge must carefully scrutinize the accused's purported waiver within the guidelines established by Johnson and Von Moltke. These standards require the defendant's decision be made with an adequate level of understanding.

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75. See id. at 809-10.
76. See id. at 836.
77. Id.
79. 442 U.S. at 807.
80. Id. at 835 (citing Zerbst and Von Moltke).
81. The Faretta court could have been justified in holding that the right to counsel is too fundamental to the fairness of a criminal proceeding. See Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); see also Singer v. United States, 380 U.S. 24, 34-35 (1965); Comment, Faretta v. California: An Examination of Its Procedural Deficiencies, 7 COLUM. HUM. RTS. L. REV. 553, 555-56 (1975). The importance of the possible conflict between the sixth amendment right to counsel and the fifth amendment due process clause should be recognized. See Comment, supra, at 556. See generally Uvegis v. Pennsylvania, 335 U.S. 437 (1948); Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).
82. See 422 U.S. at 835.
of understanding and intelligence. A defendant need not possess the expertise of a lawyer, but should be made aware of the dangers and disadvantages of self-representation, as well as the benefits of the assistance of counsel. The discretion given to judges to determine a waiver based on the particular facts and circumstances of each case also carries with it the responsibility to provide a proceeding that is consistent with the values of an adversarial system.

The above-mentioned principles outline the basic federal approach for determining a proper waiver. Nevada judicial activity in this area has closely paralleled the federal developments.

C. Nevada Right to Counsel

The Nevada Constitution provides that "the party accused shall be allowed to appear and defend in person and with counsel . . . ." Much like the judicial interpretation given the sixth amendment, the right to counsel in Nevada has not been extended to all criminal prosecutions. Although Nevada statutory development of the right to counsel has not kept pace with federal case law advancements, the actual practice parallels these federal developments.

In Garnick v. Miller, the Nevada Supreme Court appeared to accept the Von Moltke standard by adopting the specific requirements therein. The Court, however, also stated that the right to counsel may be waived if the waiver is knowingly and intelligently made, implyingly adopting the more general standard. The general acceptance of the standard that focused on whether the defendant comprehends the consequences of the waiver, not measured by the detailed guidelines established in Von Moltke, can explain any inconsistencies that exist in Nevada case law. The widespread acceptance of the general Johnson

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84. See Barnes v. State, 528 S.W.2d 370, 374 (Ark. 1975); 76 Cal. App. 3d at 307, 142 Cal. Rptr. at 809.
85. See United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).
86. 304 U.S. at 464.
88. NEV. CONST. art. I, §8.
89. See Nevada Revised Statutes Section 178.397 which states: Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate or through appeal, unless he waives such appointment.
90. Nevada Revised Statutes Section 178.397 was last amended in 1967 without an allowance for Argersinger.
92. See notes 58-60 and accompanying text supra.
93. 81 Nev. at 372, 403 P.2d at 850; see also Lawrence v. Warden, 84 Nev. 554, 555, 445 P.2d 156, 157 (1968).
94. See 81 Nev. at 376, 403 P.2d at 853.
standard can suggest that Nevada has likewise adopted this more flexible standard. This conclusion can be reached by examining recent Nevada cases. 

In *McGeehan v. State*, the Nevada Supreme Court stated that it would not “blindly presume a knowing and intelligent waiver of a constitutionally protected right from a deficient record.” Additionally, when presented with the issue of whether a person may refuse appointed counsel when facing a death sentence, the Nevada Supreme Court cited *Faretta* and held that an accused has the right to self-representation when it has been demonstrated that he voluntarily and intelligently waived his right to counsel. Finally, the court has made the observation that “the accused must be made aware of the danger and disadvantages of self-representation and make his choice with his eyes open.” These decisions properly could be interpreted as adopting the standard as generally accepted.

The Nevada Supreme Court additionally has sought to protect an accused’s right by imposing a duty on the trial judge to inquire into the background and circumstances surrounding the case and thus, to determine whether the defendant truly understands the consequences of his waiver. The court in *Bundrant v. Fogliani* noted:

> Though accused may tell the judge that he is informed of his right to counsel and desires to waive his right, [the] judge’s responsibility [to determine whether intelligent waiver has been made] does not automatically terminate.

In addition, this inquiry must appear in the record, unsupported by any affidavit.

Although the Nevada Supreme Court has developed the right to counsel consistent with federal standards, no case has been decided that

100. *Id.* at 389, 419 P.2d at 294.
102. *See McGeehan v. State*, 95 Nev. 157, 591 P.2d 265 (1979); 81 Nev. at 377, 403 P.2d at 853. The prosecution in *Garnick* suggested that the court record be supplemented by affidavits. The Nevada Supreme Court rejected this claim and required the waiver appear from the court record. *Id.* But cf. *Miller v. State*, 86 Nev. 503, 471 P.2d 213 (1970). In *Miller* the court stated that “the record does not intimate that the defendant should not be allowed to decline counsel and represent himself.” *Id.* at 506, 471 P.2d at 215. The unfortunate wording may suggest that a defendant must prove a lack of a showing in the record instead of the state having the affirmative burden of proof.

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pertains to the right to counsel as it applies to misdemeanor prosecutions. Because of the serious nature of a misdemeanor prosecution for driving under the influence and the consequences of subsequent convictions, the likelihood of a challenge of any uncounseled conviction is imminent. Whether the same record showing is required for misdemeanor cases as is required for felony cases remains to be discussed. Nevertheless, a general conclusion can be stated that some responsibility will remain with the trial judge to determine whether there has been a valid waiver. This responsibility remains even though the nature of the offense, being a relevant factual circumstance in determining a waiver, may justify a lesser showing. A judge will still be required to “investigate as long and as thoroughly as the circumstances before him demand.”

The lack of decisions regarding the right to counsel for misdemeanor prosecutions and the applicable standards of waiver hampers the ability of any lawyer to forecast the development of the right to counsel. The Nevada courts must recognize the importance of developing standards for determining the validity of waivers at the misdemeanor court level. Standards are helpful to courts reviewing a challenged waiver in retrospect. Equally important, standards are useful for developing procedures that will ensure defendants have notice of their rights. Conversely, the lack of standards may explain the absence of procedures that are used by misdemeanor courts for determining waivers of the right to counsel.

The importance given the right to counsel, especially when loss of liberty is involved, necessitates careful scrutiny of an alleged waiver. The following sections will analyze present procedures followed by Nevada misdemeanor courts and possible grounds for attack on prior uncounseled convictions. These attacks may result in the inability of the courts to impose imprisonment, particularly if proper procedures are not implemented.

**NEVADA CONVICTIONS AND ASSEMBLY-LINE JUSTICE**

Misdemeanor courts are designed for speedy justice at the lowest cost to the taxpayer. Considering the large number of petty offenses that are disposed of daily, the system works effectively and efficiently. This same system, however, has characteristics not suitable for disposition of more serious crimes, for example drunk driving. An accused’s right to

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104. See notes 179-198 and accompanying text infra.
105. 86 Nev. at 944, 478 P.2d at 576.
106. See KRANTZ, supra note 51, at 109.
counsel may be overshadowed by the very nature of this system. In misdemeanor trials the sheer volume of cases alone results in speedy dispositions, regardless of the fairness of the result.\textsuperscript{108} The harsh realities of an overcrowded judicial system prompted one commentator to state that a "[m]ere expansion of the right to counsel will not remedy the problems of assembly-line justice;"\textsuperscript{109} however, counsel can help guarantee a fair trial.\textsuperscript{110} The problem in Nevada becomes one of whether the integrity of the judicial system can be guaranteed by ensuring that the accused is reliably provided counsel. The imminent possibility of imprisonment faced by an uncounseled defendant accused of driving under the influence is the most illustrative example of the necessity of providing for and guaranteeing the right to counsel. The municipal court is the forum where an unjust result is apt to occur, and for that reason, the procedures followed by the municipal courts will be discussed to provide insight into the existing deficiencies.

The entire concern of this comment is with possible constitutional challenges that may render a prior valid conviction void, which will have the effect of denying the courts the power to impose imprisonment as a possible sentence for a subsequent conviction.\textsuperscript{111} For this reason, many times the question will become a practical one of whether a valid waiver can be shown, regardless of the fact that an accused's right was scrupulously honored.

The procedures provided by legislative enactment or followed by misdemeanor courts are designed for summary disposition of the cases. For example, no trial record is provided at the municipal court level.\textsuperscript{112} Likewise, although a record is provided at the justice court level,\textsuperscript{113} the practical effect of entering a guilty plea is that no adequate record will be kept to enable a reviewing court to determine independently the existence of a valid waiver. The lack of a record alone may effectively foreclose the ability to ascertain the fairness of the action taken by the trial judge.\textsuperscript{114} Furthermore, no provision exists that mandates uniformity of procedure between the various municipal courts.\textsuperscript{115} The effect of divergent procedures can lead one to suggest that in any given

\textsuperscript{110} See 407 U.S. at 36-37.
\textsuperscript{111} See notes 131-134 and accompanying text infra.
\textsuperscript{112} Municipal courts are not courts of record as provided for in Nevada Revised Statutes Section 1.020.
\textsuperscript{113} See N.R.S. §1.020.
\textsuperscript{114} Although the Nevada Supreme Court has required a record showing to determine the existence of a valid waiver, no misdemeanor case has been decided either validating or invalidating the misdemeanor procedure.
\textsuperscript{115} See N.R.S. §5.075 (expressly allows variations in the official dockets between courts).
case there may be reasonable doubt as to whether the defendant was properly informed of his right or apprised of the consequences of his action.

Without established procedures, and in light of the absence of a record, the question arises whether the validity of a conviction should be presumed. If an alleged constitutional infringement is raised concerning the conduct of the prior uncounseled conviction, the issue becomes whether Nevada’s procedure permits a reasonable inference that the accused waived his right to counsel. In focusing on the procedure alone, if a reasonable inference cannot be drawn that the accused waived his right to counsel, then that procedure should not be allowed to continue.

A reviewing judge has no means of ascertaining the validity of a conviction imposed by a municipal court. Aside from the duty imposed by statute that requires the notification of the defendant’s right to counsel when arraigned, no provision mandates an affirmative duty to inquire into the defendant’s decision to waive his right to counsel. A presumption that a defendant waived his right would arise only from the mere fact of notification and absence of a request for counsel. These two factors alone cannot justify a finding that there was a knowing and intelligent waiver. These procedural deficiencies cannot be cured by providing a trial de novo.

The two-tiered system provided by Nevada law gives the accused the right to “appeal” a conviction to a district court and retry the case on a clean slate. In effect, a defendant has two chances at acquittal. The problem is whether a second trial, totally independent and unbiased by the first trial, will remedy a defective conviction even if counsel is then provided, having been previously denied at the municipal court.

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117. See Duke, supra note 87, at 625.
118. Within the context of this comment, a reviewing judge refers to either an appellate court, or a subsequent lower court that must also view the validity of the uncounseled conviction, for the purpose of enhancing the penalty.
119. See N.R.S. §171.188.
121. See Nevada Revised Statutes Section 266.565 which provides in part that “an appeal perfected transfers the action to the district court for trial anew.” Id.
122. The United States Supreme Court in Colton v. Kentucky, 407 U.S. 104 (1972), held that increasing the punishment at a second trial in a system of trial de novo did not violate due process or double jeopardy. The Court determined that the trial courts are sufficiently independent and that it was not reasonable to assume that the judges at the second trial would have any reason to be vindictive against the accused for perfecting an appeal. 407 U.S. at 116-17.
123. See Krantz, supra note 51, at 80. The commentator suggests that “a defendant . . . who did not receive counsel at his original trial and who seeks review by way of a trial de novo, cannot
There are possibilities that although the slate is clean the defendant may be detrimentally harmed because he was unrepresented at the first trial. Even though the second trial is heard in front of a different judge, it remedies only one prejudice that may occur in a system of trial de novo. Because of the “smallness” of Nevada’s judicial system, the accused may have the same prosecutor at the second trial, or if not the same, the prosecutor would be privy to details of the first prosecution. This situation can result in a distinct advantage for the prosecution since it will have forewarning of the mistakes made and the weaknesses of the defendant’s case. These advantages could have a detrimental effect at the trial de novo.

A close analogy exists between requiring counsel at a preliminary hearing and also at the first trial in a trial de novo system. The importance of counsel at a preliminary hearing can be instrumental in protecting the constitutional rights of the accused and additionally “[in obtaining] the incidental opportunity for discovery to aid in preparing the trial. Both these needs exist in the first step of a trial de novo, as well.” Thus, if the proposition is accepted that counsel is required for the first trial even though a trial de novo is provided, there would be a sentencing restriction if counsel were not provided at the first step of the two-tiered system.

Although those uncounseled convictions that do not result in a sentence of imprisonment are valid, the existence of a recidivist statute compounds the problem. The discussion will now shift to the collateral use of these uncounseled convictions and whether they can be used to impose imprisonment for subsequent convictions under a recidivist statute.

**Baldasar and Beyond**

In *Baldasar v. Illinois*, the United States Supreme Court was presented with the issue of whether an uncounseled conviction “may be used under an enhancement penalty statute to convert a subsequent
misdemeanor into a felony with a prison term.” The Court determined that an uncounseled conviction is invalid for the purpose of imposing imprisonment and remains invalid for a subsequent conviction. The clear result of Argersinger, Scott, and Baldasar is that imprisonment cannot be imposed when the uncounseled conviction arises from an ineffective waiver and, furthermore, that conviction cannot be used to imprison under an enhancement statute. The mandatory sentence of imprisonment for a second conviction of a violation of the DUI statute will require a determination by the trial judge of whether the defendant waived his right to counsel at the time of the first trial. Succeeding sections will discuss special problems that relate to entries of pleas, and enhancing the penalties for convictions from other jurisdictions and for convictions prior to the enactment date of the new DUI statute.

A. Measuring Valid Waivers

While first convictions are constitutionally valid because imprisonment is not imposed, this does not mean they are valid for all purposes. Permitting a state the opportunity to imprison for a subsequent violation will indirectly allow what the previous conviction could not achieve alone. The mandatory sentence of imprisonment under the DUI statute would not have been authorized but for the previous conviction, and thus the desired punishment is a direct consequence of the uncounseled conviction. To invoke the desired punishment, the state must, therefore, validate the uncounseled conviction by showing a waiver of the right to counsel.

The facts and circumstances of each case will determine whether the defendant waived his right to counsel. Furthermore, the character of the defendant’s decision to proceed pro se will control—not the specific procedures that are followed. The procedure followed by the courts, however, will be an element of the factual circumstances. In this manner, the absence of documented evidence of waiver and the uncertainty of what transpired at the previous trial must be considered when it is determined whether the defendant knowingly and intelligently waived his right to counsel.

The issue of the sufficiency of the waiver will arise when the defend-
ant affirmatively alleges that he was not informed of his right or that he did not understand the consequences of his action. A presumption that a conviction is valid would necessitate such an affirmative allegation, however, the problem then faced by the state is rebutting that allegation. The standard used in felony cases is that a presumption of waiver cannot be found from a silent record. Thus, the state has the burden of showing there was a valid waiver.

The nature of misdemeanor courts in Nevada does not suggest that defendants are actually denied representation without a proper waiver, but, that the methods used indicate that the state is limited in its ability to rebut an alleged constitutional infirmity. The most important means by which the state could effectively rebut these allegations would be with a court record. The court record can be illustrative of the extent of the notification of the defendant's rights, the degree to which the defendant understands his action measured by the conduct and responses of the defendant, and, more importantly, the basis on which the trial judge made his determination. Without a record a reviewing court can only assume what should have occurred. The clear weight of authority is that this assumption is invalid when unsupported affirmatively in the record. The judicial system should not maintain procedures that fail to support a reasonable inference of an informed intelligent waiver.

The nature of misdemeanor courts on a nationwide basis also leads to the conclusion that strict procedures should be used to ensure adequate representation to preserve fairness. The pressures of time and resources of misdemeanor courts lessen the logic of accepting the presumed validity of an uncounseled conviction. One commentator has suggested that a trial judge in a misdemeanor case is more likely to disregard the defendant's interest because of these pressures and also because there is "far less reason for a judge to anticipate that his decision will be reviewed." This indifference can no longer be the rule,

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141. The California courts have adopted a procedure for testing the sufficiency of an alleged constitutional infringement of a prior conviction. See People v. Coffey, 67 Cal. 2d 204, 217, 430 P.2d 15, 24, 60 Cal. Rptr. 457, 466 (1967). The defendant must first produce evidence tending to show there was not a valid waiver. Id. The courts, however, have found the burden to be met merely from the defendant's own testimony. See People v. McFarland, 108 Cal. App. 3d 211, 221, 166 Cal. Rptr. 429, 435 (1980). After the defendant has met his burden the state then has the burden of rebuttal which cannot be met with a silent record. See Boykin v. Alabama, 395 U.S. 238, 242 (1969); In re Tahl, 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rptr. 577, 584 (1969).
142. See 369 U.S. at 516; 486 F.2d at 186; 81 Nev. at 377, 403 P.2d at 853.
143. See Duke, supra note 87, at 625.
144. See Duke, supra note 87, at 625.
145. See Duke, supra note 87, at 625.
especially when imprisonment is sought to be a deterrent to driving under the influence. The consequences of previously unimportant convictions can now result in imprisonment. The rule expressed in *Baldasar* and the purpose behind *Argersinger* mandate judicial awareness of the significance of the right to counsel for misdemeanants who are likely to be imprisoned. Counsel is also important for those persons who choose to plead guilty or *nolo contendere*.

**B. Uncounseled Pleas**

An uncounseled plea of guilty does not necessarily constitute a waiver of counsel; however, under limited circumstances, it may be so construed. The determination whether a defendant waived his right to counsel when he attempted to enter an uncounseled plea has been held to depend on the same considerations that are required for a determination of whether he waived his other sixth amendment rights. The same standard, therefore, must be imposed on the state to show affirmatively that the uncounseled plea was entered intelligently and voluntarily.

The acceptance of an uncounseled guilty plea is likely to be accepted more readily without regard to the nature of the waiver because such an admission of guilt may be inherently more reliable than ordinary convictions. This reliability also suggests the importance of providing a fair hearing. The obvious ramifications of an admission led one court to state that a plea “cannot be truly voluntary unless the defendant possesses an *understanding of the law in relation to the facts*.150” An understanding of the law goes beyond a mere determination of guilt or innocence.

The benefit of counsel could guarantee that all relevant factors are considered by the court because of the existence of “substantial reasons which justified or mitigated the violations” and, which would not be within the understanding of a layperson. As Justice Douglas recog-

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147. *See* Carter v. Illinois, 329 U.S. 173, 177-80 (1946). The defendant was informed of consequences after requesting to enter a plea. Admittedly, nothing was presented tending to bear on the intelligence of his action, as the court stated, “[w]e have only the fact that the trial judge explained what the plea of guilty involved.” *Id.* at 178.
150. 394 U.S. at 466.
nized, counsel should be provided to protect the accused from an overzealous prosecutor, the complexity of the law, or even his own bewilderment and ignorance of a system that now threatens the deprivation of his liberty.\(^{153}\)

A capsule argument may be helpful to an understanding of the problems faced by Nevada in attempting to enforce the mandatory imprisonment provision in the DUI statute. The triggering device for the attachment of the right to counsel is the imposition of imprisonment.\(^{154}\) The holding in \textit{Baldasar} requires every trial that contributes to the imposition of imprisonment under an enhancement statute to likewise result from a valid conviction, i.e., the defendant must waive his right.\(^{155}\) The ruling in \textit{Baldasar}, therefore, necessitates a determination of waiver at every trial for a violation of driving under the influence. The underlying basis, as provided in \textit{Argersinger} is that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.”\(^{156}\)

Thus far, the discussion of what is waiver has centered on whether the defendant has understood or appreciated the consequences of proceeding \textit{pro se}.\(^{157}\) Of equal importance, also embodied in the requirements for a waiver, is the notion of what information need be provided the defendant so he can make a knowledgeable decision. The informational process goes beyond the mere recitation of a defendant’s rights\(^{158}\) because each defendant also must be made aware of all “facts essential to a broad understanding of the whole matter.”\(^{159}\) Enhancement statutes raise the unique question of whether a defendant must be apprised of the possibilities of enhancement for subsequent convictions.

C. Notice of Possibility of Enhancement

A prior conviction cannot be used to enhance the penalty if it is obtained in violation of the accused’s constitutional rights.\(^{160}\) Thus, the implication is that a valid constitutional conviction \textit{can} be used for the purpose of enhancement. Because misdemeanors do not trigger the


\(^{153}\) See id. (Douglas, J., dissenting).


\(^{157}\) See notes 56-88 and accompanying text supra.

\(^{158}\) See N.R.S. §171.188.


right to counsel until imprisonment is to be imposed, a special concern is present. Although a prior misdemeanor conviction is valid because it did not result in imprisonment, it is invalid for the collateral purpose of enhancing the penalty so imprisonment can be imposed. If it is assumed that a first conviction is valid per Scott requirements then the validity of that conviction should be judged frozen in time and not modified by subsequent conduct. The inquiry must, therefore, focus on whether notice of the possibility of future imprisonment is necessary for the defendant to appreciate the consequences of his action. In other words, is this information necessary to validate the first conviction?

A recent New York court, when presented with the situation in which a defendant was not imprisoned for the first offense and was not told of the possibilities of future imprisonment for subsequent conduct, ruled there was not a valid waiver. The court stated that without information pertaining to the possibility of imprisonment for future convictions, there could not be a knowing relinquishment of the defendant's rights. The court expressly relied on Baldasar.

Baldasar holds only that the first conviction cannot be used to impose imprisonment if it resulted from a conviction in which imprisonment was not a possible punishment because of a denial of the defendant's right to counsel. Baldasar is not a case that establishes the standard to be used in determining a valid waiver for the first conviction. The New York court's reliance on Baldasar may indicate that there was not otherwise a valid waiver, rather than whether the information was necessary for a valid waiver.

Justice Powell, dissenting in Baldasar, argued that the sentence imposed on the defendant was solely a penalty for the second theft. Justice Powell attempted to use this argument as a basis for his claim that a valid conviction, because it did not result in imprisonment, is valid for all purposes, including enhancement of the penalty so as to imprison. Although Justice Powell was in the minority, the logic of his classification of the punishment is based on accepted views of habit-

162. See 446 U.S. at 222-23.
164. See id. at —, 440 N.Y.S.2d at 990.
165. See id. —, 440 N.Y.S.2d at 990.
166. See id., 440 N.Y.S.2d at 990. (citing Baldasar v. Illinois 446 U.S. 222 (1980)).
167. 446 U.S. at 222-24.
168. See id. at 232 (Powell, J., dissenting).
169. See id. at 232-33.
Habitual criminal statutes have been construed to penalize only the last offense committed, unrelated to any previous convictions, and have been held valid. Habitual criminality is considered a status rather than a crime in itself. This simply means that a person is punished for a behavior of repeated criminality. The only concern is the fact of multiple offenses, and in this sense notification of the possibility of future imprisonment will not make the waivers more reliable. The courts simply require that those prior convictions be valid in their own right. Future conduct should, therefore, be irrelevant at the time the consequences of the first conviction are contemplated.

If Nevada were to adopt the standard used by the New York court, all convictions for driving under the influence that occurred before the enactment date of July 1, 1981, and those convictions that resulted from trial in other jurisdictions, could not be used for enhancement. The rationale of the New York case is that no intelligent waiver can result unless the defendant has been apprised of the possibilities for enhancement; therefore, it could never be said that a defendant was aware that an Indiana conviction, for example, could result in imprisonment in Nevada for a subsequent offense of driving under the influence. This result would not coincide with established judicial doctrine that allows for the use of convictions from other jurisdictions. Additionally, out-of-state felony convictions could be used under a recidivist statute, yet, under the reasoning of the New York decision misdemeanor convictions could not.

The general acceptance of habitual criminal statutes suggests that a

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170. See id. at 232.
172. Generally habitual offenders statutes are valid and held not to abridge constitutional rights if they are applied fairly and without discrimination. See 368 U.S. at 454-57.
175. See Hartman v. Municipal Court, 35 Cal. App. 3d 891, 893, 111 Cal. Rptr. 126, 127 (1973). The court determined that at the time of the entry of plea, the defendant was adequately advised of penalties for the first conviction. To advise of consequences for second conviction would have been premature. Id.; see also People v. Andrews, 170 Cal. App. 2d Supp. 840, 841-42, 339 P.2d 648, 649 (1959). The first conviction occurred before the enactment of the new law. Mandating jail sentence for the second offense did not increase the penalty for the first violation,
valid conviction, even if imprisonment is not imposed because there was a valid waiver, should likewise be valid for the purpose of enhancement. If this standard is used, then the concern of Baldasar, that a conviction should not do indirectly what it could not do directly, would not be violated. The validity of waivers at the first trial should not be dictated by what hypothetically might occur in the future.

The seriousness attached to a violation of drunk driving will necessitate an evaluation of waivers at prior trials and, consequently, an evaluation of the entire scope of the right to counsel as it applies to misdemeanants. The following section will outline some suggestions that will alleviate the problems faced by prosecutors.

RIGHT TO COUNSEL: PROPOSED STANDARDS AND PROCEDURES

The inability of Nevada courts to show whether a defendant waived the right to counsel at a misdemeanor hearing must be addressed either through judicial determination or legislative mandate. If Nevada desires to implement the strict terms of its drunk driving statute and impose mandatory sentences of imprisonment and felony penalties for repeat offenders, the courts must develop procedures that will not violate the sixth amendment and will facilitate the process of ensuring valid convictions. Facilitating valid waivers will not result in more reliable convictions, but will protect those successful uncounseled convictions that are obtained.

The prohibitions against involuntary or unintelligent pleas (or waivers) should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counter-productive and put in jeopardy the very human values they were meant to preserve.177

The next section will recommend standards that should be used for measuring valid waivers, followed by a discussion of present proposals. The ultimate purpose is to suggest procedures that, if followed, would help guarantee the validity of prior convictions for the purpose of imposing imprisonment under the DUI statute.

A. Recommendations

The Supreme Court decisions in Scott and Baldasar are clear in their requirements and intent. But a determination that rights exist does

[Notes]

176. 446 U.S. at 224 (Stewart, J., concurring).
178. See notes 40-44 and 131-134 and accompanying text supra.
not conclude a court’s responsibility. The Nevada courts must struggle with unanswered questions relating to the right to counsel for misdemeanants, namely: what standard should be used in determining the existence of a waiver, and what procedures need to be adopted to ensure the sixth amendment is not violated?

1. Waiver Standard

The United States Supreme Court has not passed on the legitimacy of less formal methods of determining a waiver for misdemeanor cases. Nevertheless, the Nevada courts need not await federal guidance to establish whether the same record showing required for felony cases is also required for misdemeanor offenses.

In United States v. Dujanovic, the Ninth Circuit Court of Appeals established as a minimum requirement that the district court may not grant a request of waiver without first addressing the accused personally and determining on the record whether counsel was waived. The California Supreme Court, however, in In re Johnson held that for misdemeanor cases the oral examination is not needed to show an affirmative waiver in the record. The court in Johnson viewed these inquiries as an “idle and time-wasting ritual.” The California Supreme Court and some commentators have instead granted judicial convenience considerable weight when declaring necessary standards.

Because Johnson is a pre-Argersinger decision the importance of the case may be lessened. The Argersinger decision implies that the standard for determining waivers for misdemeanors should be the same as in felony cases. The Court has not recognized a lesser right, only a lower threshold for when the right attaches. This awareness was an application of established standards for measuring waivers in felony cases.

The constitutional right to be provided counsel in the Argersinger situation is merely an extension of the same Sixth Amendment man-

179. See Duke, supra note 87, at 624.
180. 486 F.2d 182 (9th Cir. 1973).
181. See id. at 186.
183. Id. at 336, 398 P.2d at 427, 42 Cal. Rptr. at 235.
184. Id. at 336, 398 P.2d at 427, 42 Cal. Rptr. at 235.
185. See id. at 336, 398 P.2d at 427, 42 Cal. Rptr. at 235; see also Duke, supra note 87, at 624.
186. Argersinger v. Hamlin, 407 U.S. 25, 32 (1972). The Supreme Court stated “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” Id.
187. See id.
date previously applied to felony prosecutions by *Gideon v. Wainwright*. The constitutional requirements for a valid waiver are therefore the same.\textsuperscript{189}

Although the state has a fiscal interest in minimizing the administrative burdens of its judicial system,\textsuperscript{190} the state also has an obligation to provide a fair system for the adjudication of claims. One rationale derived from *Argersinger, Scott,* and *Baldasar* is that imprisonment, regardless of the term, is not *de minimis.*\textsuperscript{191} In addition to resulting in imprisonment, misdemeanor convictions can have serious collateral consequences.

Misdemeanor convictions can justify revocation of parole,\textsuperscript{192} probation,\textsuperscript{193} or a suspended sentence. Furthermore, they can be used in the impeachment of the defendant's testimony and create social and economic stigma that can result from a conviction for drunken driving.

The right to counsel has been described as essential to fairness in the American criminal system,\textsuperscript{194} yet acceptance of these basic civil liberties has not been quick.\textsuperscript{195} The dichotomy produced by *Scott's* outcome-determinative test is but one example of this slow development.\textsuperscript{196} "*Scott's* holding implicitly assumes a fair trial is only important when imprisonment results."\textsuperscript{197} Because imprisonment will directly result from a second conviction, the impact of the importance of counsel to a fair trial must be realized, if not the notion that counsel is essential for all misdemeanor trials. The inescapable sentence of imprisonment for two or more violations of the DUI statute suggests the imposition of similar standards for misdemeanor cases.

The use of a similar standard will not impose identical burdens on a trial judge because that standard expresses the notion that a waiver will depend on the facts and circumstances of each case.\textsuperscript{198} The circumstances may not necessitate a lengthy colloquy by the court with the defendant or require a full court record. All that is required is sufficient recorded evidence that the defendant voluntarily, and with understanding and intelligence, waived his right to counsel. Once this standard is adopted, it can be used to develop procedures for notifying defendants of their rights.

\begin{itemize}
\item \textsuperscript{189} *Krantz*, supra note 51, at 106.
\item \textsuperscript{190} See *Herman & Thompson*, supra note 36, at 104-07.
\item \textsuperscript{192} See *N.R.S. §§213.150-213.1519*.
\item \textsuperscript{193} See *N.R.S. §176.185*.
\item \textsuperscript{194} See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).
\item \textsuperscript{195} See notes 17-23 and accompanying text *supra*.
\item \textsuperscript{196} See notes 40-42 and accompanying text *supra*.
\item \textsuperscript{197} 48 U. CIN. L. Rev. 922, 926 (1979).
\item \textsuperscript{198} See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937).
\end{itemize}
2. **Necessary Procedures**

The importance of proper procedures cannot be over emphasized. Use of proper procedure can "eliminate wasteful appellate adjudication as well as safeguard the rights of the accused." The goal of setting out procedures should be to provide the maximum protection for the defendant without a concern about whether the procedure is constitutionally required. The process of ensuring that the defendant has sufficient knowledge of his rights and that he is apprised of the reasonable consequences of his action can be satisfied best by requiring the trial judge to read a checklist of information. This information should include, but not be limited to:

1. a plain statement of the nature of the charge;
2. all statutorily included lesser offenses;
3. the possible range of allowable punishment;
4. all allowable defenses, including what the prosecution is required to prove;
5. any mitigating circumstances the facts may indicate; and,
6. in the interest of providing "all facts essential to a broad understanding of the whole matter," the accused should be advised of the possibilities of enhancement or other collateral consequences.

Once a procedure is adopted that ensures an adequate level of notification, the trial court must consider what steps should be taken for the waiver to meet the substantive standard. One element that should be used is an open colloquy with the defendant. In-court examinations will aid in the determination of whether there is a knowing and intelligent waiver. A simple recitation of the defendant's right and a mere request to proceed pro se is not an indication that the defendant knows what he is doing or that he appreciates the consequences of his action. Many defendants can be subjected to subtle intimidation or base their waiver on thoughtless rationalizations. This can be true in the case of an uncounseled trial or with the entry of a plea. The judge should inquire into the educational background of the accused, as well as any relevant experiences, and note the conduct of the accused during the examination. Additionally, the judge must ascertain whether the ac-

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199. Id.
200. See id.
202. Although the accused should be advised of the possibilities of enhancement, the Nevada courts should not reverse if this information is not given. If a rule of reversal is adopted it would foreclose the use of convictions from any other jurisdiction and those convictions prior to July 1, 1981. See notes 160-176 and accompanying text supra.
203. See notes 178-198 and accompanying text supra.
cused has been threatened or promised anything in return for the un-
counseled appearance or plea and must emphasize the possibilities that a lawyer could discover the existence of defenses or mitigating circum-
stances not apparent to the layperson. Only after this investigation, and to the judge’s satisfaction that there is a knowing and intelligent waiver, should the waiver or plea be accepted.

The final problem to be addressed is how the state can affirmatively show this valid waiver. The best method would be to require a court record be kept for this class of cases. The obvious costs involved would not justify the imposition of these measures if less formal but sufficiently reliable alternatives were available. The prohibitive cost involved with court records could have the effect of forcing the courts to forego the possibility of imprisonment.

At a minimum, the trial judge should be required to file in the official docket, along with the final judgment, a document which explains:

1. the procedure followed;
2. the information provided the accused; and
3. a brief summary of the investigation by the judge, including questions asked and the accused’s responses.

The ultimate concern should be to guard against conclusory statements and stilted formal conversation. This document, which would become part of the official record, would provide a reviewing court the opportunity to ascertain independently the existence or nonexistence of a valid waiver and, as such, facilitate the successful use of the prior conviction.

One problem that has been hinted at, but not explored, pertains to the method of implementing the procedures set out above. At a minimum, counsel must be extended to all defendants accused of violating the DUI statute or a similar offense that may result in imprisonment either directly or indirectly. A more desirable method, however, may be to offer the assistance of counsel to all defendants who are charged with an offense for which there is the potential of imprisonment. As noted, the procedures as set out above may not be mandated constitutionally, yet they are proposed as an attempt to ensure the maximum protection of defendants’ rights. For this reason, one current proposal suggested by the Washoe County District Attorney’s Office should

206. See Smith v. United States, 238 F.2d 925, 930-31 (5th Cir. 1956). The accused executed a formal written waiver which contained no definitive statement of his right to counsel. The court had brief formal conversation with the accused and gave only dilactic observations that he could be sent to prison for a long time. Id.
207. See KRANTZ, supra note 51, at 104.
208. See Appendix infra.
be analyzed in light of the standards set out above.

B. Present Proposals

The Washoe County District Attorney’s proposed waiver form is a well-intended document attempting to cope with the problem of deficient records and procedures at misdemeanor courts. The form, however, has basic deficiencies. Initially, the form by its title—“WAIVER ON PLEA OF GUILTY/No CONTEST”—ignores any problems that arise when a defendant asserts the right of self-representation at a trial.\(^\text{209}\)

The assumption must be drawn that either no defendant will proceed \textit{pro se} when faced with a drunk driving charge or that there are no deficiencies in convictions that result from a misdemeanor trial. Both are false.\(^\text{210}\) The form also appears to be based on the assumption that signing the form alone, without some meaningful inquiry, is of itself sufficient to support a finding that there was a knowing and intelligent waiver. The length and complexity of the form would suggest a contrary result.\(^\text{211}\)

The form may be an effective tool in \textit{informing} the accused of the charges against him and the allowable punishments under the law; however, it is difficult to accept after reading this lengthy form and merely checking a box, that a reviewing court could conclude the accused offered his plea “freely and voluntarily understanding the nature of the charge against [him] and this waiver.”\(^\text{212}\) These conclusionary statements, without some other indication, should not satisfy the requirements of a valid waiver. The right to counsel as protected by this form will result in a superficial right because the protections are not meaningful.

Use of this form may result in more of an indication of a waiver than is present today; however, a reasonable presumption of an understanding waiver is not promulgated. Furthermore, a judge’s responsibility should extend past handing the form to the accused and simply signing his own statement about the “voluntariness” of the plea or waiver. Without mandating some uniform process of discussion between the judge and the defendant, a reviewing court would be faced with the same dilemmas posed by the current system. The absence of this colloquy results in only one conclusion—the judge’s determination is based

\(^{209}\) Most of the uncounseled problems probably will arise in situations surrounding a plea; however, the possibilities of uncounseled waivers at a trial are too real to be ignored.

\(^{210}\) One who wishes to proceed \textit{pro se} when facing the death penalty will not be less likely to proceed \textit{pro se} when facing ten days imprisonment. \textit{See} Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979).

\(^{211}\) See Appendix \textit{infra}.

\(^{212}\) See Appendix paragraph 11 \textit{infra} (emphasis added).
solely on the completion of the form. A right to counsel consistent with the seriousness of the crime involved requires a more rigid standard. Fairness dictates nothing less.

Conclusion

This comment has illustrated the methods currently being used by the Nevada courts to determine waivers at misdemeanor trials. The methods are deficient in that no record, or affirmative indication, is kept that evidences a defendant's knowing and intelligent waiver. This deficiency prevents a reviewing judge from ascertaining independently the existence of the waiver.

This comment has illustrated the importance of the ability of the reviewing judge to ascertain whether the defendant knowingly and intelligently waived the right to counsel. Without this determination the prior conviction cannot be used to enhance the penalty that will now result in imprisonment. Uncoinedealed pleas of guilty and *nolo contendere* are of equal importance. Additionally, this comment has discussed the special problems concerning notifications of the possibility of enhancement at the time of the first trial and why this notification should not be essential to a knowing and intelligent waiver. Finally, procedures and standards have been proposed that will ensure that the defendant's rights are safeguarded and that will foreclose the possibilities of collateral attack.

Nothing can be done to permanently rid the judicial system of collateral attacks. The goal can only be to find a practical means to facilitate an orderly and reliable presentation of evidence to aid the truth-finding process. Viewing the problems of this relatively simply constructed statute can lead to the adoption of procedures that will ensure the presentation of helpful evidence while safeguarding the rights guaranteed under the United States and Nevada constitutions.

*Brian T. Kunzi*
APPENDIX

WAIVER ON PLEA OF GUILTY/NO CONTEST

1 - DEFENDANT: My full true name is ____________________ □

Date of birth: ____________________ □

2a- I understand that I am charged with the following offense: □

Driving or Being in Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicants, a violation of NRS 484.379.

b- I have*/have not previously been convicted of this offense in this or another jurisdiction. □

*explain dates and jurisdiction of priors:

3a- I understand that if a jail sentence is to be imposed upon conviction, I am entitled to be represented by an attorney before, during, and after trial, and if I cannot afford an attorney the Court will appoint one to defend me. □

b- I am represented by an attorney. □

or

c- I waive and give up the right to have a lawyer represent me and I exercise my right to represent myself. □

4a- I understand that I have a constitutional right to a speedy and public trial by jury or by the court (judge). □

b- It is my desire to enter a guilty plea/plea of no contest and I give up the right to a trial by jury and a trial by the court (judge). □

5a- I understand that I have the right to confront the witnesses against me and to cross-examine them either by myself or through my lawyer. □

b- It is my desire to enter a guilty plea/plea of no contest, and I give up the right to confront the witnesses against me and to cross-examine them. □

6a- I understand that I have the right to testify on my own behalf, but I cannot be compelled to be a witness against myself. I may remain silent if I so choose. □
b- I desire to enter a guilty plea/plea of no contest, and I give up the right not to testify and the right to remain silent.

7a- I understand that the penalties provided upon a first conviction for this offense are:

1) a mandatory fine of not less than $100.00 and no more than $1,000.00; and

2) a possible jail sentence of not more than six months; and

3) my mandatory attendance at an alcohol/substance abuse course approved by the Department of Motor Vehicles, at my own expense; and

4) a possible suspension of my driver's license from thirty days to one year.

b- I understand that the penalties provided upon a second conviction in any jurisdiction within five years for this offense are:

1) a mandatory fine of not less than $500.00 and not more than $1,000.00; and

2) a mandatory jail sentence of ten days to six months. Probation is not available; and

3) mandatory suspension of my driver's license for not less than six months.

c- I understand that if I have two or more prior convictions in any jurisdiction for this offense within five years, the penalties are:

1) a mandatory prison sentence of not less than one year and not more than six years. Probation is not available; and

2) a mandatory fine of not less than $2,000.00 and no more than $3,000.00; and

3) mandatory revocation of my driver's license for one year.

8- I understand that as an alternative to the above penalties I may elect only once in a five year period to undergo alcoholism/drug abuse treatment, approved by the Court, for at least one year, under terms and conditions set forth by the court.
9 - I understand that if I am not a citizen of the United States, a conviction of the offense for which I have been charged may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

10 - I understand that the elements of this offense, which the State would have to prove beyond a reasonable doubt at trial are:

   That on the date alleged in the complaint against me, in the County of Washoe, State of Nevada, I willfully and unlawfully did operate/was in actual physical control of a motor vehicle while being under the influence of intoxicants.

11 - I offer my plea of (guilty) (no contest) freely and voluntarily, understanding the nature of the charge against me and this waiver.

12 - I have personally initialed each of the above boxes and I understand each and every one of the rights above and I hereby waive and give up each of them as I have indicated in order to enter my plea of (guilty) (no contest).

   Dated:____________________

   Signed:____________________

   (Defendant)

13 - DEFENDANT'S ATTORNEY ONLY: I am attorney of record and I have explained each of the above rights to the defendant, and having explored the facts with him/her, studied his/her possible defenses to the charge and the possible consequences of a plea of (guilty) (no contest). I further stipulate that this document may be received by the Court as evidence of the defendant's intelligent waiver of these rights and that it shall be filed by the Clerk as a permanent record to that waiver. I have witnessed the reading of the form by the defendant and his/her initialings and signature upon it.

   Dated:____________________

   Signed:____________________

   (Attorney for Defendant)
ORDER

I find in open court that the defendant has been fully advised of his/her constitutional rights and understands them, the nature of the charge and the consequences of his/her plea. Further, I find the defendant understandingly and voluntarily pleads guilty or nolo contendere and waives his/her constitutional rights. IT IS ORDERED that the defendant's plea be accepted and entered into the minutes of the court. IT IS FURTHER ORDERED that the following sentence be imposed:

__________________________
__________________________
__________________________

Dated:_____________________

__________________________
Judge of the Justice Court