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The Consequences of Criminal Convictions for Misdemeanor or Felony Offenses

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Introduction

Many of the lawyers reading this article and sitting in the room are not criminal lawyers. Many may dabble in criminal law and some will never be

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caught in a criminal court except as a witness. However, every one of us, each member of the bar, is continually deluged with every manner of question concerning every aspect of law; friends, neighbors, acquaintances, workers, maids, strangers in a bar, family members, or anyone else looking for a free consultation will ask you about criminal cases. Maybe someone's kid got busted. Maybe someone's wife committed some error in judgment. Everyone assumes that because you are a lawyer, you can answer any question about the law. I would swear it is akin to expecting my brain surgeon to know about the resolution of my dental problems.

Once, when I did a week in jail for contempt, for every inmate who sought free advice from the lawyer in the next cell, there were four deputies asking me about divorce and child support. I know nothing about divorce or child support. I have never represented anyone, during my thirty-five years of practice, in a divorce. I was, once, while on a planet many cultural light years away called Texas, asked to aid in a case by cross-examining (my forte) a particularly obnoxious opponent in a divorce case. I have had a divorce, but never done one. I refer all of my potential domestic relations clients out to certain lawyers whom I would personally hire if I got divorced, and did hire during my own divorce.

However—back to reality—it is only a matter of time, if it has not happened already, that some acquaintance calls and informs you that Junior or Sissy has been busted for a "hot check," misdemeanor pot, shoplifting, or under-aged drinking. They will ask you what should they do and if they need a lawyer. This article will tell you what to tell them and how to explain what should or must happen.

I. The Issue

Every day in this nation, thousands and thousands of criminal cases are charged, pled, or tried to verdict. From small town traffic courts in remote jurisdictions to lofty and imperial federal courthouses, men and women face the awful "Day of Judgment" and their liberties are subject to suspension.

Some of those cases, sometimes without even carrying the most remote possibility of active incarceration, are resolved with guilty pleas. These people—young, old, African-American, Hispanic, White, educated, uneducated, citizens from every tier of society, some facing punishment in the form of a fine or time in jail or prison, and many facing the only real jeopardy of suspended time or probation—go into court to answer the charges. The criminal charges faced can be as seemingly insignificant as a

"hot check," reckless driving, shoplifting some trinket, simple possession of misdemeanor amounts of marijuana or as serious felony drug charges, up to grand larceny, assault, or murder.

By the end of 2003, the United States prison population, already the world's largest, almost doubled from the prison population in 1990.[1] There were over two million men and women being held in custody.[2] As great as this number is, it does not include juveniles under the age of 18 held in adult prisons and jails at that time. It is estimated that nearly 10,000 additional juveniles were being held and charged as adults.[3]

Amazing as it may sound, 10.4 percent of the entire African-American male population of the United States aged twenty-five to twenty-nine was held in jail or prison in 2003.[4] By comparison, while 10.4 percent of the entire Black male population in that age group were serving sentences in prisons or jails, only 2.4 percent of the Hispanic male population from the same age group were incarcerated and only 1.2 percent of the White male population from the same age group served sentences.[5] By the start of 2003, the number of Black men in prison had grown to three times the rate it was in 1980.[6] That bears repeating: the number of African-American men in prison in 2003 grew three times—or three hundred percent higher—since 1980.

In 1980, there were 143,000 Black men in prison and 463,700 enrolled in colleges.[7] There were three times as many Black men in college as there

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1. *Compare* Darrell K. Giliard, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin: Prison and Jail Inmates at Midyear 1998, at 2 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim98.pdf (stating that in 1990, the total number of persons held in State and Federal prisons or in local jails was 1,148,702), *with* Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin: Prisoners in 2002, at 2 (2003), *available at* http://www.prisonpolicy.org/scans/bjs/p02.pdf (stating that in 2002 the total number of persons held in State or Federal prisons or in local jails was 2,033,331).

2. Harrison & Beck, *supra* note 1, at 2.

3. Howard N. Snyder & Melissa Sicklund, U.S. Dep't of Justice, Juvenile Offenders and Victims: 2006 National Report 236–38 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf.

4. Harrison & Beck, *supra* note 1, at 1.

5. *Id*.

6. *Compare id*. at 9 (stating that 586,700 Black men were sentenced prisoners in 2002), *with* JUSTICE POLICY INST., CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 10 (2002) *available at* http://www.justicepolicy.org/images/upload/02-09_REP_Cellblocks Class rooms_BB-AC.pdf (stating that in 1980 there were approximately 143,000 African-American men in state and federal prisons).

7. JUSTICE POLICY INST., supra note 6, at 10.

were in prison in 1980. By 2000, there were 791,000 Black men in prison and only 603,032 enrolled in college.[8] There were almost 200,000 *more* Black men in prison than in colleges; 200,000 more Black men in prison than all of the Black men in colleges and universities in the entire nation. While the Black male prison population has grown by almost 300 percent, the number of Black men in colleges has grown by approximately thirty percent in that period.

The figures above address only those defendants serving active jail sentences; there is no reference to those arrested and receiving probation or those on parole— having been released from prison. A criminal conviction, even without active incarceration, has tremendous ramifications on the likelihood of incarceration for another offense. If someone is arrested and given probation or a suspended sentence, there is a greater likelihood if re-arrested he will receive an active prison sentence. The existence of the first conviction virtually guarantees active jail time if arrested again.

Many times, a second arrest without a second conviction, can trigger active jail time. A defendant on probation or with a suspended sentence can have that probation or suspended sentence revoked and be placed into jail or prison without even a second conviction.

In 1999, one out of every three Black males, age 20–29, in the entire nation was either serving time in prison, on probation, or on parole.[9] While ten percent of the population were in prison, thirty-three percent were burdened with convictions for crimes.[10] Take a moment to reflect on that number. Out of every three African-American men age 20–29, one is either in jail, prison, or in the legal limbo of probation or parole.

One glaring reason for so many Black males being in prison is the reality that an arrested person with a prior criminal record, even if they only received probation or a fine for that previous conviction, is more likely to receive active jail time with a second or subsequent conviction. Why this disparity? Are the police targeting Black males disproportionally? In part, yes; however, there is another factor influencing this population size. That factor is the lawyer in those cases. Lawyers are telling and encouraging

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8. *Id*.

9. See MARC MAUER & TRACY HULING, THE SENTENCING REPORT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1999) ("Almost one in three (32.2%) young Black men in the age group 20–29 is under criminal justice supervision on any given day—in prison or jail, on probation or parole.").

10. JAMIE FELINER, HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 5, 16 (Mar. 2009), *available at* http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf.

defendants to plead guilty and shoulder a burden that will be with them for the remainder of their lives.

In recent years, Black males represent only thirty-three to thirty-six percent of drug arrests, but they constitute forty-six percent of the convictions in state courts.[11] Among the Black defendants actually convicted of drug offense, among that forty-six percent of the convictions, seventy-one percent received sentences of incarceration.[12] The organization Human Rights Watch determined that a Black defendant was 10.1 times more likely to be sent to prison for a drug offense than a White defendant;[13] a Black male defendant is 10 times more likely to be sent to prison for a drug offense than a White defendant. Much of this is due to the White defendants not having a prior arrest. They are arrested and convicted once. More times than not a Black defendant, being more likely arrested on a previous occasion than White defendants, has a prior conviction, even without active jail time for the first arrest.

Too many young Black men are pleading guilty or being found guilty in comparison to the remaining populations.

II. Blame

There are many influences impacting, causing, or increasing these numbers. Discrimination and unequal treatment is one likely culprit. That problem is as old as discrimination. It would appear that there is no likely cure for that imbalance. However, one influence bearing directly on the disparity in numbers is the defendant's fear of going to jail that compels them to plead guilty for a suspended sentence rather than risking trial—regardless of actual guilt. This fear of incarceration is encouraging or forcing these men to accept findings of guilt; it is exacerbated and increased by the number of attorneys willing to recommend, directly or indirectly, that a defendant accept a conviction so long as jail is avoided.

Even defendants not guilty of the offense are being encouraged to plead guilty to avoid incarceration. Many more defendants, possibly morally guilty of the offense, are pleading guilty when the government could never obtain a conviction. The fear of jail and the laziness of lawyers motivate these actions and consequences.

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11. *Id.* at 16.
12. *Id.*
13. *Id.*

It should be noted—and I have no statistics to back my statement, just thirty-five years of experience and, literally, thousands of days in participating and observing in criminal courtrooms—among many African-American communities and neighborhoods a criminal conviction on one's record is just a rite of passage, bearing no stigma. It is natural and accepted. There is no shame for being arrested and convicted. There is little shame for being imprisoned—only regret—but no shame. It is usual and expected. It is accepted that young Black men have criminal convictions.

Every, and I mean every, criminal defense attorney in any urban area when asking his or her client about there prior criminal record has heard this: "I wasn't convicted. I only got a fine." You cannot get a fine unless you are convicted. It is the state of conviction which is not even noticed. The only objective is to avoid jail. Having a conviction means nothing. Everyone has one.

In this country, particularly in Virginia, a criminal record may last forever. Every effort must be made to prevent the criminal record or, at least, the felony record.

Every effort must be made to prevent the creation of a criminal record or, at least, a felony record.

III. Issues and Caveats

As a trial lawyer, representing anyone, you have to do that which your client desires, subject to the law and the canons of ethics. Many lawyers, and most civilians, believe that an attorney must do that which is in the best interests of the client. Put that out of your mind. If the defendant wants to plead guilty, but in your assessment there is insufficient evidence or the evidence is weak, the attorney is required to permit his guilty plea. The same is true as to decisions as to whether or not to elect trial by jury versus elect a bench trial or the decision as to whether the defendant should take the stand in his defense.

Juveniles and juvenile cases generate a different assessment. Do not be mistaken. The same standard applies: the client gets the vote and you are not permitted to "do what is best for the client."

Having noted that the client directs all decisions, and not the attorney, this does not mean that the attorney cannot or should not advocate a given position for the client to take. Part of the advocacy in a case is between the

client and the attorney. The attorney must pitch and convince his or her client to take what is best for the long run. At the very least, that best effort includes preventing a conviction and a criminal record. Jail is not the enemy, the enemy is the record, the statistical "reputation" that one has to live with forever.

By example, if the prosecutor offers jail time and a misdemeanor conviction or a totally suspended felony conviction, most young people (and their mothers) will elect no jail time. That client (and his mother) must be told and, if possible, influenced to look at the long-range implications. A misdemeanor conviction with sixty days in jail will end at the conclusion of the sixty days. There is a conviction, but there is no loss of civil rights. Any felony conviction will be on that person's criminal record for the rest of their lives—actually that record is there forever.

With a felony conviction, your client can never vote, can never serve on a jury, can never own a firearm. If there is a second and subsequent conviction there is an increased likelihood he was will receive a more significant jail sentence, added to the additional sentence he will receive when the probation or suspended conviction is revoked due to the second arrest or conviction.

If found in possession of a firearm as a convicted felon, he or she has committed another felony: state or federal. A felon in possession of a firearm is one of the easiest convictions a prosecutor can get: "Here is the criminal record showing the defendant is a convicted felon, and here is the gun. We rest." That is all that need be offered into evidence: a piece of paper and a gun, neither of which can be cross-examined.

Although not a creature of law, but nevertheless a truism, a felony conviction record will probably limit the client's ability to ever obtain meaningful employment. With a felony conviction, most young people are limited to jobs involving burgers and fries.

There is a special caveat concerning drug convictions—even misdemeanors. If convicted of a misdemeanor drug offense, a client cannot get a federally insured student loan. Even though a misdemeanor marijuana conviction in Virginia carries a maximum period of incarceration of only thirty days—only thirty days at the maximum—that client cannot get a federally insured student loan.

Anyone representing any defendant should also be aware that certain misdemeanor convictions can have a greater impact on a person's future than others.

"Hot check" convictions, charging someone with writing an insufficient funds check—a frequently violated statute—carry with them a

designation of moral turpitude. A conviction for an offense, even a misdemeanor, involving moral turpitude can deny a defendant from ever being in a bonded position or position involving the public trust, including medical professions or working at a bank.

IV. Rules of the Game: For Someone Representing Defendants, Particularly Those With No Criminal Records

It is quite simple: No conviction is best. If conviction is inevitable, get convicted of a misdemeanor, even if there is jail time. A felony conviction, even with a suspended sentence, is the last resort. If all negotiating tricks fail, a felony can be entertained.

By example, you represent a defendant charged with misdemeanor shoplifting. There is no factual defense, he or she was caught red handed and then confessed. The prosecutor, mindful that this is the first offense, offers probation or a suspended sentence. He or she might even offer just a fine without any suspended sentence, but that is unlikely. As the lawyer, and with the permission of the client, offer a weekend in jail and a dismissal of the charge, i.e. no conviction, before taking the misdemeanor, no-jail-time plea. With the weekend in jail and no conviction, at the end of the weekend or the dismissal, that case, and thus the taint of the case, is gone. Assuming the defendant was issued a summons, he or she has no record. They are virgins—criminally speaking—again.

If you cannot get the defendant into jail for a weekend, send the defendant to community service for *x* number of hours. Have them read to kids in hospitals, work in the library, cut grass, anything in consideration to negate or prevent a conviction.

Very often in arranging alternatives to a conviction and a criminal record, the greatest opponent to working out a resolution without a conviction are the loved ones—often the mothers of the defendants. One relevant anecdote serves as an excellent example. I once represented a Virginia Commonwealth University student charged with felony theft—shoplifting. She had shoplifted over $800 in clothing from an area store. I was able to get the prosecutor to agree to continue the case, revoke her bond, put her in jail for one month and, on her next court appearance, dismiss the case. Under this agreement, having committed a felony, she would walk away without a conviction. She could even have the arrest removed from her record and therefore be able to legally state, for the

purpose of employment, that she had never been arrested.[14] After I explained to the prosecutor that I wanted to prevent the client from becoming burdened with a criminal record, he allowed my client to serve her sentence over Christmas break. While the client's mother was disappointed that her daughter would be incarcerated over the holidays, this alternative allowed the client to serve her sentence in a manner that would prove minimally invasive to her education. Some fifteen years later, that young woman still has a clean record,

Most lawyers consider it a victory when the defendant is charged with a felony and the prosecutor offers a guilty plea with a suspended sentence. A better alternative for the client would be a misdemeanor conviction and active jail time. Jail is not the enemy; the criminal record is the enemy. Believe it and convince the client. If he or she ever wants to achieve the "American Dream," avoid the record.

A. Changing the Offense

Another recent example is of a young man charged with grand larceny. He had been through an emotionally upsetting time in his life and he stole a large appliance from an area store. He was apprehended less then 100 yards from the door and was quickly released from jail on a bond. The victim was a nice older woman who owned the store. To compound the situation, the defendant confessed to the crime in great detail.

I immediately encouraged him to write a letter to apologize to the victim. His letter was without mention of mercy, as his goal was to express his embarrassment and to say that he had not been raised to steal. He wanted the victim to know that his mother would never forgive him for disregarding all of her teachings and becoming the first member of the family to be incarcerated.

The letter did not detail all of the tumult in the young man's life; he did not discuss his depression that developed as the result of the loss of a loved one. He just wanted to apologize and pray she would not think that his behavior, in any way, was a testament to the inability of his parents to parent and educate him.

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14. *See* VA. CODE ANN § 19.2-392.2 (providing for the expungement or destruction of an arrest record, when there is no conviction); VA. CODE ANN § 19.2-392.4 (providing that: "An [employment] applicant need not . . . include a reference to information concerning arrests or charges that have been expunged").

When I got to court, the prosecutor informed me that the victim did not want the young man to go to jail, and he offered me a suspended sentence. After he reduced the case from grand larceny to petit larceny, the felony was reduced to a misdemeanor.

At my suggestion, the prosecutor reduced the offense further from petit larceny to disturbing the peace. Petit larceny involves moral turpitude, disturbing the peace does not. As the client proceeds though life, if he were to ever have a background or record check, the disturbing the peace charge would not carry with it the weighty consequences of the larceny conviction.

If the defendant has to get a misdemeanor record, make sure it is for something other than an offense of moral turpitude. Disturbing the peace, trespassing—all of the "reckless youth" offenses—are better than a record for a crime involving moral turpitude.

B. Drug Offenses

Every parent of every kid arrested for misdemeanor marijuana charges fears jail time above all else. A misdemeanor conviction for simple possession of marijuana can prohibit the appointment to the bench or any Presidential appointment.[15] It is strange that a member of the United States Senate, during the questioning stage prior to approving a judicial candidate, often asks about drug convictions, including marijuana offenses, but not about adultery or other immoral acts.

Possession of less than four ounces of marijuana carries only a fine of $500.00 and/or thirty days in jail, under Virginia Code Ann. § 18.2-251, expungement is available to the defendant.[16] Without the expungement, a finding of guilt can prevent a student from ever getting a federally insured student loan.[17]

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15. *See e.g.,* DENNIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE (2010), *available at* http://www.fas.org/sgp/crs/misc/RL31989.pdf (last visited Dec. 21, 2011) (noting that nominees to the Supreme Court must fill out a questionnaire as part of the screening process, part of which seeks information regarding violations of criminal statutes).

16. *See* VA. CODE ANN § 18.2-251 (2011) (providing that a person with a first offense narcotics charge can, upon the fulfillment of certain terms and conditions of the court, be discharged and dismissed without an adjudication of guilt).

17. Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Apr. 17, 2006, at A3 (reporting that some students applying for federal financial aid for college are rejected because of a drug conviction).

Keeping a defendant out of jail for a misdemeanor marijuana conviction is not a win. It is a serious loss. If you cannot get an out-and-out dismissal, or some other resolution short of a finding of guilt, appeal the case and take it to a jury. The jury cannot give more than thirty days and/or a fine of $500.[18]

Appeal and set it for a jury. No court will have the time to try a misdemeanor marijuana case and, if it does, the finding cannot be more than thirty days; you have a better chance of working the case out in circuit court. Some prosecutor may think that misdemeanor prosecution in general district court is a big thing. It is not so big in circuit court. It is likely any circuit court judge having his or her courtroom hung up for an entire day and a jury called will practically choke a prosecutor failing to work that case out.

Never willingly take a record from an offense with this much significance.

C. The Mentality of Many Prosecutors (Not All)

"The guilty must suffer." Such a notion is probably a consequence of the Christian-Judeo philosophy that all offenders or sinners must suffer some negative consequence to provide them the will and stamina to resist further sin.[19] Punishment must be meted out and pain endured to change behavior. Can you say Purgatory?

It is sad to say, but many prosecutors are not concerned about your young defendant's future. There is genuine animosity towards these kids and a desire to hurt them. There is also a mentality shared by many in the legislature that the only way to reform someone is to hurt them enough. They are very judgmental and they genuinely believe they are helping to mold this child by making him or her suffer.

I have no doubt that if former Virginia Governor George Allen, the advocate of "truth in sentencing,"[20] had a daughter who was bulimic, he

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18. *See* VA. CODE ANN § 18.2-250.1 (2011) (stating that anyone convicted for misdemeanor possession of marijuana shall "be confined in jail not more than thirty days and [pay] a fine of not more than $500, either or both . . .").

19. *See* THE HOLY BIBLE, *Matthew* 25:46 (New International Version) ("Then they [sinners] will go away to eternal punishment, but the righteous to eternal life.").

20. *See* BRIAN J. OSTROM ET AL., NAT'L INST. OF JUSTICE, TRUTH-IN-SENTENCING IN VIRGINIA 17 (2001) https://www.ncjrs.gov/pdffiles1/nij/grants/187677.pdf (describing how Governor George Allen "made parole abolition and [Truth-in-Sentencing] his primary public safety, if not his overall, campaign theme" and how "Truth-in-Sentencing" was "one of his

would attempt to cure her behavior by standing over her with a two-by-four board and hitting her until she sucked down a quarter-pounder.

Following that tirade, I will advise you that one of your most important negotiating tools will be to understand that the defendant will please the prosecutor if he or she "suffers."

Jail during bond is one form of suffering. Another is community service and any other significant sacrifice on the part of the defendant. Community service—the dirtier the better—with long hours spent helping the seriously less able or those suffering can make a deal work.

On more than one occasion, I have reminded the prosecutor of the detrimental impact on the defendant brought about by my fee: "my fine."

D. Attacking Prior Convictions and Records

By example, suppose you have a client charged with an offense and he or she has a prior misdemeanor conviction. Challenge that conviction by *motion in limine*.

Read this and write it down. Burn it into your brain.

NO (OR A DAMNED FEW) VIRGINIA GENERAL DISTRICT JUDGE HAS EVER TAKEN A VALID GUILTY PLEA OR GIVEN A VALID CONVICTION IN A MISDEMEANOR CASE.

Re-read that. Now read it again.

NO (OR A DAMNED FEW) VIRGINIA GENERAL DISTRICT JUDGE HAS EVER TAKEN A VALID GUILTY PLEA OR GIVEN A VALID CONVICTION IN A MISDEMEANOR CASE.

Most lawyers reading this article will be younger lawyers or lawyers with little experience in criminal court.

For those of you who have ever seen a felony guilty plea, you will notice that the judge goes into great detail. They even do so following a not guilty plea, to explain to the defendant his rights. This is true even when the defendant has a lawyer. The judge will take time to explain the defendant's rights, make sure the defendant understands the rights, and inform the defendant that he will waive these rights should he plead guilty.

This is because a plea of guilty is not merely admitting that the facts necessary for conviction were committed. A plea involves many significant constitutional rights.[21]

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first major actions after taking office").

21. *See infra* note 30 and accompanying text (discussing how a guilty plea involves the waiver of rights found in the Bill of Rights).

A defendant has the right (1) to an attorney,[22] (2) to a trial by jury,[23] (3) to cross examination and confrontation,[24] (4) to proof beyond a reasonable doubt,[25] (5) to the presumption of innocence,[26] and (6) to the right to testify in his own behalf even if his lawyer, judge, or momma thinks he is brain damaged.[27] He also has the right to (7) compulsory service of process: to compel anyone served with a subpoena to come to court and to testify truthfully.[28]

A plea is not just an admission of factual guilt. It is a waiver of each of these sacred rights.[29] Yes, I said sacred, but that is another story. A plea of guilty involves the waiver of the constitutional rights found in the Bill of Rights.[30]

No right can be waived unless, note *unless*, there is evidence that the person waiving (1) was advised of the existence of the right, (2) was advised as to the consequences of a waiver of those rights, and (3) armed

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22. *See* VA. CODE. ANN. § 19.2-183(A) (2005) ("[T]he the judge shall advise the accused of his right to counsel and, if the accused is indigent and the offense charged be punishable by confinement in jail or the state correctional facility, the judge shall appoint counsel as provided by law.").

23. *See* VA. CONST. ART. 1, § 8 ("That in criminal prosecutions a man hath a right . . . to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.").

24. *See* VA. CODE. ANN. § 19.2-183(B) (2005) ("[T]he accused . . . may cross-examine any witness who testifies on behalf of the Commonwealth or on behalf of any other defendant . . . .").

25. *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

26. *See* Coffin v. United States, 156 U.S. 432, 453 (1985) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

27. *See* VA. CODE. ANN. § 19.2-183(B) (2005) ("[T]he accused . . . may . . . introduce witnesses in his own behalf, and testify in his own behalf.").

28. *See* VA. CONST. ART. 1, § 8 ("That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor . . . .").

29. *See* Ronald J. Bacigal, *Arraignment, Pleas, and Plea Bargaining*, VA. PRAC. CRIMINAL PROCEDURE § 15:3 (2010) ("A valid plea of guilty waives many important constitutional rights . . . .").

30. *See* Allen v. Virginia 501 S.E.2d 441, 443 (Va. App. 1998) ("One who voluntarily and intelligently pleads guilty waives . . . his right to trial by jury, his right against self-incrimination, his right to confront his accusers, his right to demand that the Commonwealth prove its case beyond a reasonable doubt, and his right to object to illegally obtained evidence.").

with the knowledge of the existence of the right or rights, made a free and voluntary, informed and knowing waiver of those rights.[31]

The Miranda rights[32] are an example often portrayed on television. The suspect is informed of the rights to remain silent and to an attorney, then the suspect is advised of the consequences of waiver:

> You have the right to remain silent; anything you say can and will be used against you in a court of law. You have the right to have an attorney and if you cannot afford one, one will be appointed to you by the court. You may waive your right to counsel and talk to us now.[33]

Next, the officer determines if the suspect understands the rights: "Do you understand each of the rights I have just read to you?" Finally, the officer tells the suspect, "if you understand these rights, sign this form, it is not an admission of anything, it merely states I read you what I read you." This is a ploy. The form *is* only an acknowledgement, but once the officer gets compliance with the signing, he will immediately act as if the signature waived the suspect's rights. Nine times out of ten, the suspect will begin talking, almost as if in response to momentum. Unless the defendant affirmatively and expressly states that he is invoking his rights, there is a legally binding waiver and the officer can continue interrogation.

A guilty plea is not merely an admission of fact, it is a waiver of constitutional rights. If a judge does not question as to these rights, the guilty plea is invalid.[34] A judge must ensure that the defendant understands his or her rights before a guilty plea can be taken, no matter if the charge is a misdemeanor or a felony.[35]

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31. *See* Jackson v. Virginia, 587 S.E.2d 532, 540 (Va. 2003) ("Longstanding principles of federal constitutional law require that a suspect be informed of his constitutional rights to the assistance of counsel and against self-incrimination."). "These rights can be waived by the suspect if the waiver is made knowingly and intelligently." *Id.*

32. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"). The Court then detailed the measures required to employ the procedural safeguards. *Id.* at 444–45.

33. *See* Oregon v. Elstad, 470 U.S. 298, 314–15 n.4 (1985) (noting that police officers often read these rights to arrestees from a card containing this standard Miranda language).

34. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("It was error . . . for the trial judge to accept [a defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary.").

35. *See* Hunt v. State, 487 N.E.2d 1330, 1333 (Ind. Ct. App. 1986) ("We thus conclude the rights enumerated in *Boykin v. Alabama* are applicable to persons accused of misdemeanors as a matter of state and federal constitutional law."); United States v.

"[A] guilty plea is a grave and solemn act to be accepted only with care and discernment . . . . Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[36] A guilty plea is not merely saying, "I did it." A guilty plea is a surrender of rights so sacred and special, that the courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'not presume acquiescence in the loss of fundamental rights.'"[37] A plea must be accompanied by a series of questions and answers as to the knowledge of those rights; "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."[38]

Those rights are so sacred and special that the courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"[39]

If a guilty plea must be proceeded with, something must indicate that the defendant is aware of his rights. If the record is silent as to whether or not he was made aware, the plea is no good, void, crap.

> A defendant who enters . . . a plea . . . waives several constitutional rights . . . . For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.[40]

Please note, the plea is void. It is not voidable. It is not weak or without sufficient viability to withstand challenge—it is void as if it never happened.

Toothman, 137 F.3d 1393, 1400–01 (9th Cir. 1998) (concluding that the defendant did not intelligently plead guilty to a misdemeanor crime and allowing the plea to be withdrawn).

36. Brady v. United States, 397 U.S. 742, 748 (1970).

37. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

38. McCarthy v. United States, 394 U.S. 459, 466 (1969).

39. *Johnson*, 304 U.S. at 464 (citing Ohio Bell Telephone Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

40. McCarthy v. United States, 394 U.S. 459, 466 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

What does this mean for defense counsel? If you represent a defendant with a prior conviction, particularly a misdemeanor conviction, you should file a motion *in limine* against that conviction. It is void. You contact his lawyer from that prior proceeding and you prove there was no admonition in that instance.

I will warn you that a judge may say, "Hell, he had a lawyer. I expect that lawyer advised him of his rights." The lawyer's knowledge of his client's rights, without informing the defendant, is not sufficient.

The *court* must be satisfied that the defendant understands his rights, *not* the lawyer.[41] That is akin to the lawyer taking the guilty plea and then telling the judge about it.

If your client has a misdemeanor conviction in Virginia, the validity of that conviction should always be attacked and nullified, if by no other avenue than by a motion *in limine*.

E. A Caveat Concerning Talking to Authorities

If you are an attorney and anyone close to you knows it, it is likely that someone will call you and ask, "The police want to talk to Junior or Uncle Milt. Should we talk to them?" The answer is always "NO."

Unless you are filing a complaint, never talk to the police. If the authorities want to talk to you, there is likely a reason you do not want to talk to them.

If you do not know why they want to talk to you, it is more imperative you do not speak. One way to duck talking to the police is to tell them, "I have talked to an attorney. He or she says that if I talk to you my fee will be doubled." It is probably true, but the short and sweet answer is: *Do not talk*.

Regarding the question of whether a defendant should speak to authorities or not, attorney Harry Cohn, a great lawyer in Richmond, Virginia, notes that all fish on the wall have their mouths open because, "No fish gets caught until he opens his mouth." Keep your mouth shut.

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41. *See id.* 465–72 (noting that the 1966 amendment to Rule 11 of the Federal Rules of Criminal Procedure created a requirement that the judge personally interrogate the defendant to determine if his guilty plea is voluntarily and intelligently made).

V. Conclusion

Regardless of whether you are the attorney on the case or you consult a friend about Little Johnny getting busted, you must protect the kid's record. Do anything to keep that kid from getting any record.

A criminal record, either for a misdemeanor or a felony, is a blemish for life. No one can ever reach his or her full potential to contribute to society or to reach some level of self-satisfaction and fulfillment with a criminal record. A jail sentence can last for months or years; a criminal record is a restriction on a person's future that lasts for life.

Make every effort to prevent a record. As I stated above, sometimes the pressure for the quick fix, in the form of some non-trial resolution involving a conviction without incarceration, will come from the parents of the defendant. It is to be expected to come from the defendant. The attractiveness of the "quick fix" is most prevalent among younger defendants, unaware of the lifelong impediment of any criminal record. Clients and their parents must be counseled on the far reaching and life-long consequences of having a criminal record.

An attorney providing the most effective assistance of counsel in discharge of his or her duties to a client must be ever aware of the lifelong consequences and impediments of a criminal conviction and oppose it whenever possible.

We, minority members of the legal profession and those who truly believe in the law as a tool for the betterment of all, have a special obligation to young people and citizens in general. One aspect of that obligation is to get them through life with as few life altering marks on them and their records as possible. Be mindful of that and you can make a difference to your clients, your friends, and the nation.

Go get 'em.