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Arlington County's New Fast Track to Criminal Records  
for the Poor: Skip the Attorney

Effective March 1st, it will become significantly more convenient for the criminal justice system in Arlington County to establish criminal records for poor people charged with possession of marijuana: in many cases they won't be appointed a lawyer. The figurative means by which this will be achieved is as old as the hills and is best expressed in a phrase by the old Bard in Henry VI: "The first thing we do, let's kill all the lawyers." One of Shakespeare's most famous quotes, it is uttered by the rebel Dick the Butcher who thought that, if he disrupted the justice system facilitated by lawyers and judges, the ensuing chaos would pave the way to the overthrow of the King and consequent reign of tyranny.

While no doubt unintended, Arlington's new policy will send us down a slippery slope towards the same scenario for poor people: no lawyers for indigent persons charged with personal-use marijuana possession cases where the court or prosecutor exclude jail time as a sentencing option. But doesn't the Constitution require that counsel be appointed to poor people charged with criminal offenses?

Not always: in 1979, the Supreme Court, in *Scott v. Illinois*, ruled in a plurality opinion that the right to counsel only applied where actual imprisonment would be imposed upon a finding of guilt, not where it was merely a sentencing option. This despite the plain language of the Sixth Amendment that "in all criminal prosecutions the accused . . . shall have assistance of counsel for his defense." Nonetheless, since the *Scott* case, Arlington County and many other jurisdictions throughout our nation have continued to appoint counsel to those charged with misdemeanors where jail time is waived. Because it's the right thing to do. And Arlington County should continue to do the right thing.

So, why the new policy? Why not appoint the Office of the Public Defender to represent indigent people charged with possession of marijuana, as has been the practice for decades? Because we fight for our clients. Really hard. And when lots of people are fighting their marijuana cases in Arlington, it keeps judges and prosecutors busy. But the solution to clogged dockets and overworked prosecutors in regard to personal-use marijuana charges is not to dispense with counsel.

Due process is a noble concept which, when exercised vigorously, takes up judicial and prosecutorial resources. Nonetheless, it is a cornerstone of our free society where we hold true to the notion so well put by the famous jurist, Sir William Blackstone, that "It is better that ten guilty persons escape than that one innocent suffer." Enshrined in our Constitution, the Sixth and Fourteenth Amendments are not mere formalities. They make it hard for our government to take our liberty away. And liberty is not just a binary jail/no jail equation. Liberty includes freedom from the life altering consequences of a permanent criminal record.

Repercussions of a criminal record for personal-use marijuana possession, including charges dismissed for first offender dispositions, can entail loss of educational opportunities, jobs, public benefits, student loans, and the ability to drive a car legally. If you are not a citizen, consequences may include deportation, inability to become a citizen, and inability to reenter America if you leave to travel internationally. And many of these consequences are PERMANENT in our information age where data mining companies relentlessly scour criminal court databases and sell criminal records - which can include cases that have been expunged in government databases - to anyone with a credit card.

Yes, the impending new policy will give defendants a couple of weeks after arraignment to consult with an attorney, but as the shrewd Abraham Lincoln once said, "He who represents himself has a fool for a client." Assuming a typical indigent defendant can even get a free consultation with a private lawyer, how does that person parlay the attorney's advice into getting due process? If the consulted lawyer advises that the police stop or search were unlawful, what will the indigent defendant without an appointed attorney be able to do with this advice? What if the person charged is innocent? How does the mere advice of the attorney lead to a just result? If the attorney tells the accused person that the case is weak, but he may be deported if he is found guilty, how does that help? The answer is clear: it will help no more than a doctor advising an uninsured, cash-strapped patient how to remove his tonsils, set a broken leg or cure his cancer.

An effective criminal defense attorney has the knowledge, experience, and resources to investigate the case, file motions challenging the government's evidence, advise the client as an objective professional and, if necessary, try the case. The criminal defense attorney also serves as a buffer between the accused and the well-trained, professional prosecutor and court, communicating and negotiating on behalf of the client while preserving the client's confidences and right to remain silent.

Should this new and unfortunate Arlington County policy go into effect on March 1st, an ominous precedent will be set, paving the way for vulnerable populations to be processed through our criminal justice system without the benefit of counsel and effective due process. And it will erode the impact our community's Public Defender Office has as an effective defender of liberty for those most in need. To be an effective institutional advocate for our most vulnerable populations charged with criminal offenses in Arlington County, the Office of the Public Defender must be appointed by our General District Court to people charged with jailable offenses. No exceptions.

So, what can civic minded Arlingtonians and friends of Arlington do? Stand up. Speak out. Support our community's Public Defender Office. Contact our county board members, the Commonwealth Attorney's Office, the Chief of Police, and our local state representatives. Let them know that you want liberty and justice for all, not just those who can pay for it.