William Anderson
Thorndike
LD 576

Submission of Written Testimony
Before the Committee on Judiciary,
Maine State Legislature,
Concerning LD 576/S.P. 244:
"An Act To Facilitate Communication Between Pro Se Defendants and Assistant District Attorneys"

March 8, 2023 Public Hearing

Senator Carney, Representative Moonen, Distinguished Members of the Committee on Judiciary,

My name is William Anderson. I am a resident of Thorndike, Maine.

In my testimony, I am addressing LD 576/S.P. 244, which has the effect of repealing 15 M.R.S. § 815, a statute that prevents a prosecutor from communicating with a person charged with a crime unless the person has been properly arraigned and has waived the right to counsel. Before retiring three months ago, I had pursued a 43-year career as an Assistant District Attorney, homicide prosecutor, District Attorney, District Court Judge, and, finally, Superior Court Justice.

I have participated professionally in the conduct of tens of thousands of criminal arraignments in Maine.

Although the enactment of 15 M.R.S. § 815 was well intentioned, the Sixth Amendment rights of the accused were enforced in the courts of this State before its enactment and the statute's negative effects may outweigh its purported value in protecting the rights of the accused.

The Sixth Amendment in Maine

First, I would like to comment on the right to counsel secured by the Sixth Amendment. Criminal defendants have the right to hire an attorney and to be represented by that attorney in all criminal proceedings. For those unable to afford an attorney, no person can be sentenced to jail or probation unless provided a court-appointed lawyer or unless that defendant properly waives the right to counsel. Although a jail sentence is an authorized sentence for all misdemeanors, an overwhelming majority of people being arraigned are facing fines only. In order to implement these constitutional principles, a procedure has developed in Maine in which the prosecutor designates on the criminal complaint whether the State would be seeking jail or probation if the defendant were convicted. If an indigent defendant is facing jail or probation, the judge will appoint an attorney. If the indigent defendant is facing a fine only, the judge will not appoint an attorney. Obviously, if the prosecutor does not designate jail or probation, but the judge believes such a sentence is possible, the judge will appoint an attorney.

Arraignment

At arraignment, all people being arraigned view a recording that describes the arraignment procedures and the rights of the accused. Additionally, discovery is provided to the defendant and one or more "lawyers for the day" are present to consult with anyone who wants to speak with the attorney. Those attorneys focus on defendants who may be facing jail or probation and are stretched too thin to speak with all defendants. The judge clarifies whether those facing felony charges or misdemeanors for which the State may be seeking a jail sentence or probation will be hiring an attorney or is asking for a court-appointed attorney. Prior to the court-appointed attorney crisis, requests for court-appointed lawyers were processed promptly. Sometimes, defendants facing jail or probation don't want a court appointed lawyer and wish to plead guilty at arraignment. I know of no defendant who has pled guilty or no contest to a charge at arraignment and received a sentence of jail or probation without first consulting with an attorney for the day or without waiving counsel. Although those not facing jail or probation can confer with the

attorney for the day at arraignment, if the case is not resolved at that time the defendant will have to hire an attorney or go without, because one will not be appointed.

Although prosecutorial practices may have varied from place to place, prior to the enactment of 15 M.R.S. § 815, many prosecutors formerly sent offer letters to defendants describing the State's sentencing recommendation if the defendant were to plead guilty. Where I presided, this included offers of dismissal if the defendant completed a one-day diversion session or received a reinstated driver's license. At arraignment, many defendants wanted to talk with a prosecutor to discuss disposition. These practices ended with the enactment of 15 M.R.S. § 815.

Issues With Present Statute

Everyone wants to ensure that the rights of the accused are respected, but I would point out that there are existing judicial mechanisms in the form of dismissal, suppression, or sanctions that are employed to ensure that a defendant's Sixth Amendment rights are not violated. Remember, anyone facing jail or probation who cannot afford an attorney will have the services of an attorney for the day or of a court appointed attorney who will be negotiating with the prosecutor.

For those not facing jail or probation, banning contact between a prosecutor and an accused prevents the sending of offer letters prior to arraignment in which dismissal is offered if a program is attended or license reinstated. If a fine is offered, a conscientious defendant who has learned on-line that the misdemeanor charged can result in a 6-month jail sentence would certainly be relieved to find out the prosecutor only wants a $100 fine. For those who do not receive a sentencing recommendation in the mail, preventing the prosecutor from informing the defendant of the offer at arraignment also causes problems, preventing the defendant from becoming fully informed about a likely disposition. At best, judges now ask for the offer during the arraignment, usually without an attorney present. Concerning possible diversion dismissals, I formerly told defendants that if they contacted the prosecutor and the prosecutor agreed there was compliance, the defendant did not have to appear in court again.. This can no longer be done, necessitating further appearances by defendants to confirm compliance.

Finally, I wish to address two provisions of the statute that that were evidently designed to make it more user friendly. First, an accused can speak directly to a prosecutor if the accused waives the right to counsel. Because defendants facing jail or probation are steered to an attorney for the day for negotiation purposes, this provision comes into play in fine-only cases. Many judges, including me, do not inform defendants of this provision because it is inherently coercive: the defendant is required to waive the precious right to counsel in order, according to the beliefs of some, to exercise a First Amendment right. It is a bit ironic that an indigent defendant who is not facing jail or probation must waive the right to counsel in order to speak with a prosecutor when, in reality, the indigent defendant does not have a right to counsel because a request for a court appointed lawyer would be denied. Second, the provision that a prosecutor can contact a defendant to discuss dismissal upon completion of a pre-charge diversion program does not accomplish its goal. A person is charged with a crime when given the Uniform Summons and Complaint, before a prosecutor is involved in the case. I am not aware of the existence of any pre-charge diversion programs. At the very least, this provision should be expanded to include any discussion in which a dismissal is offered upon the defendant's completion of specified requirements.

Thank you for giving me this opportunity to submit my written testimony and I hope you find it useful in your consideration of this bill. I regret that I am paddling my canoe on the spring-fed waters of Florida which prevents me from appearing by video or in person.

William Anderson
Thorndike, Maine
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