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Why hasn't the Supreme Court addressed this?

Criminal Procedure

By Timothy P. O'Neill

O'Neill is a professor at The John Marshall Law School. He was a Finalist for the 2010 Peter Lisagor Award for Exemplary Journalism in the area of Commentary. Readers are invited to visit his Web log and archives at www.jmls.edu/oneill.

Here's something I don't understand.

Back in the 1950s, Chuck Berry recorded a song called "30 Days." A couple years later Ronnie Hawkins released a cover of the record. But he changed the title to "40 Days."

Why? I haven't a clue.

You know what else I don't understand?

Why we do not have a simple, explicit Illinois Supreme Court rule that explains how a jury waiver should be tendered in criminal cases.

Why don't we have one? I haven't a clue.

I was reminded of this most recently by yet another reversed conviction resulting from the lack of a uniform system that tells trial judges how to deal with jury waivers. The 2nd District Appellate Court case is *People v. Robert Hernandez,* 2011 Ill. App. LEXIS 356, decided April 18, 2011.

First, let's review some background on the law of jury waivers.

Obviously, the right to a jury trial is guaranteed by both the U.S. and Illinois Constitutions. The Illinois Supreme Court has rhapsodically described the right to trial by jury as "one of the most revered of all rights acquired by a people to protect themselves from the arbitrary use of power by the state." *People ex rel. Daley v Joyce,* 126 Ill.2d 209 (1988). For a defendant to waive the right, the waiver must be made voluntarily, knowingly and intelligently.

But how can a court guarantee that a jury waiver is made with this level of awareness?

Compare how Illinois deals with waivers of the right to counsel, which must also be made voluntarily, knowingly and intelligently. Illinois Supreme Court Rule 401 deals solely and specifically with waivers of counsel. It provides that such a waiver must be made in open court.

It states that a trial judge must personally address the defendant. The judge must not only inform the defendant about the nature of the charge, the maximum and minimum sentence and that if he is indigent an attorney will be provided to him; the judge must also make sure the defendant actually understands these points.

The rule also provides that this colloquy must be taken verbatim and made part of any future trial transcript.

Compare these detailed provisions with the Illinois Supreme Court's jury waiver "guidelines" set out in *People v. Bracey,* 213 Ill.2d 265 (2004). While Rule 401 establishes carefully defined procedures, *Bracey* deals only in vague aspirations.

It holds that a valid jury waiver "cannot be determined by application of a precise formula, but rather turns on the particular facts and circumstances of each case."

A written waiver, "while recommended, is not always dispositive of a valid waiver." In addition, the lack of a written waiver is not fatal as long as the defendant understandingly waived his right to a jury trial. And there is no duty on the part of a trial judge to impart to the defendant any set admonition or advice. At 269-270.

The Illinois Supreme Court's failure to set out precise rules for jury waivers has fomented nothing but confusion.

For example, in the 2nd District's recent decision in *Hernandez*, the defendant was originally charged with two counts of domestic battery. At a hearing in November 2008, he waived his right to a jury trial by reading and signing a written waiver in open court. But the state later filed a motion to amend the complaint to add two counts of "obstructing a peace officer." Over an objection by the defense, a different trial judge granted the motion and a bench trial was conducted. Nothing else was said about a jury waiver. The judge entered a directed finding in favor of Hernandez on the original charges, but found him guilty of the two added charges.

On appeal, the 2nd District reversed and remanded, finding it "axiomatic that a [knowing jury] waiver can apply only to existing charges."

The jury waiver Hernandez made when only facing the domestic battery charges cannot be mindlessly applied to the "obstructing a peace officer" charges of which he was not aware at the time of the waiver.

Why at this late date are we still seeing jury waiver reversals in cases such as *Hernandez*?

Notice how the case would never have had to be appealed if the Illinois Supreme Court had adopted a rule for jury waivers similar to its rule for waiving counsel.

Rule 401 says a valid waiver of counsel is contingent upon a judge explaining to the defendant in open court what are the maximum and minimum sentences he is facing.

Obviously, if the state has added new charges, a defendant must be given the opportunity to rethink his prior waiver of counsel. Rule 401 is explicit and unambiguous.

But Illinois' "let's not bother with rules" approach to jury waivers makes cases like *Hernandez* all too predictable. Trial judges are not given enough guidance.

A Supreme Court rule for jury waivers similar to the rule for waiver of counsel would guarantee in black and white that a defendant can only waive a risk of which he is actually aware. And a trial judge would be given fair warning of what he or she should be looking for.

Drafting such a Supreme Court rule is hardly inventing the wheel. (For just one example, take a look at Ohio's system for jury waivers as described in *State v. Burnside,* 186 Ohio App.3d 733 (2010).) Illinois has delayed for far too long in this vital area. If the Illinois Supreme Court really believes that the right to a jury trial is "one of the most revered of all rights," then it is time to promulgate a rule that strictly enforces the waiver of this right.