ROP v. Decherong, 2 ROP Intrm. 170 (1990)
REPUBLIC OF PALAU
Appellee,

v.

BENITA DECHERONG,
Appellant.

CRIMINAL APPEAL NO. 8-87
Criminal Case No. 130-86

Supreme Court, Appellate Division
Republic of Palau

Concurring opinion
Decided: August 15, 1990

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Ernestine K. Rengiil

NGIRAKLSONG, Associate Justice, Concurs.

While I agree that we should remand this case to the Trial Division and allow Appellant to withdraw her guilty pleas, I reach that conclusion for different reasons. In my view, Appellant, charged with felonies which carried a maximum term of 30 years confinement and a fine of $6,000.00, was denied her right to counsel because she was represented by trial counselors instead of an attorney. It was a "plain error" on the part of the Trial Court to have accepted Appellant's guilty pleas without requiring that Appellant was represented by an attorney. (Rule 52(b), ROP, Rules of Crim. Pro.). Further, I believe that this court should not establish "judicial policy" by memoranda regarding constitutional issues such as effectiveness of counsel. Finally, there is neither a speedy trial issue nor a record of Appellant's failure to demand for a speedy trial before us to ⊥171 review. I would leave that issue to a case that raises the issue properly.

Who is "Counsel"?

An accused has a "fundamental" right to assistance of counsel under the Palau Constitution. (Const. Article IV, Sec. 7). That fundamental right comes from the "right to counsel" itself, unlike the early interpretation of the right to counsel in the U.S. Constitution which initially had its origin under the due process clause. (See *Mr. Mann v. Richardson* , 397 U.S. 759, 90 S.Ct. 1441, 1970).

The purpose of this fundamental right is to "insure that the accused will not suffer an adverse judgment or lose benefit of procedural protection because of the ignorance of the law."

(See *U.S. v. Rad-o-Lite of Philadelphia* , 612 F.2d 740, at 743 and Generally, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 1932).

Given the purpose of the right to counsel and the fact that it is a fundamental right, I believe that, at least in this case, the Appellant's right to counsel can only be accorded by an attorney, instead of a trial counselor, representing her. "Counsel" in this instance means an attorney.

The Chief Justice's Memorandum of April 11, 1983

The majority opinion elevates the Chief Justice's Memorandum of April 11, 1983, to a judicial "policy" restricting Trial Counselors to handle only criminal cases with the maximum penalty of not more than 5 years of confinement. Art. X, Section 14 of the Constitution, however, gives the Court only the ⊥172 authority to promulgate "rules", not policies. The memorandum, as the majority opinion rightly points out, establishes a judicial "policy" which imposes practice restrictions on trial counselors.

I believe we should not establish judicial policy by way of memorandum, especially on a subject dealing with constitutional rights. The Olbiil Era Kelulau is the final arbiter of public policy, unless its acts contravene the Constitution. I would leave the issue of what trial counselors may handle consistent with defendant's constitutional right to counsel to the Olbiil Era Kelulau or to a case before this Court. Rather than relying on the Chief Justice's memorandum, this Court could have decided the issue in this case.

Presence of Speedy Trial Issue or Record?

Appellant does not claim that she was denied a right to speedy trial. In her notice of appeal filed on December 28, 1987 by her current attorney, she assigned, as errors, violations of her right to counsel and rights under due process clause. The Trial Court's decision denying Appellant's motion to dismiss for lack of speedy trial was not appealed.

Appellant's contention is that she was denied her right to effective assistance of counsel because, inter alia, she was represented by a trial counselor who ". . . should have moved to dismiss the case for lack of speedy trial when Appellee was not ready for the second time to prosecute the case." (Appellant's Brief, at page 11). However, the Trial Court's decision denying ⊥173 Appellant's motion to dismiss for lack of speedy trial was issued after the third and final time Appellee was not ready to go to trial.

Further, there is no record before us to review as to what Appellant's trial counselor could have done to protect her right to speedy trial. There is nothing for us to review. (See *U.S. v. Small*, 363 F.2d 417, 419 '2d Cir. 1966, *Cert. denied*, 385 U.S. 1027, 87 S.Ct. 755 (1967)). When a demand for speedy trial is not made, that right is "waived". *Id.*

Hence, I would concur with the majority for the reasons stated herein, rather than the reasons provided in the majority opinion.