

# Don't I Need A Lawyer?



## Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing

A Report of The Constitution Project  
National Right to Counsel Committee

**March 2015**

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Counsel Committee

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**This report is dedicated to Hofstra Law Professor Monroe Freedman, who passed away shortly before its publication. Professor Freedman was a member of the National Right to Counsel Committee from its inception. He was a giant of the legal profession, who was fearless about ensuring that lawyers pursue an ethical path and unstinting in his insistence that they fulfill their duty of vigorous representation to the less fortunate. We are grateful to have had the privilege to work with Professor Freedman and for his contributions to our Right to Counsel Committee.**

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**Douglas L. Colbert**

Professor of Law, University of Maryland Francis King Carey School of Law; Founder, Lawyers at Bail Project

## FROM THE CONSTITUTION PROJECT

***“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”***

*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

For more than a decade, The Constitution Project National Right to Counsel Committee (“Committee”) has examined the state of indigent defense in our country, determined to assist governments in realizing the promise of *Gideon v. Wainwright* that any person accused of a crime – regardless of his or her ability to afford a lawyer – has the right to effective legal representation under the Sixth Amendment to the United States Constitution. In 2009, the Committee issued a landmark report, *Justice Denied*, which documents the structural and financial impediments jurisdictions face in ensuring that any person accused of a crime receives effective assistance of counsel. In 2013, we commemorated the 50<sup>th</sup> anniversary of the *Gideon* decision with production and release of *Defending Gideon*, a short, publicly available film that weaves the story of Clarence Gideon into contemporary portraits of legal injustice, highlighting the importance of a system that guarantees representation for all—and the dire consequences when that system fails.

The Committee’s newest report, *Don’t I Need a Lawyer?*, addresses one of the most common and overlooked deprivations of this constitutionally-guaranteed right experienced by poor criminal defendants across the United States: the denial of counsel when a judge or magistrate determines whether someone accused of a crime will be incarcerated or will remain free prior to trial.

This report begins with a discussion on the current state of the law concerning access to counsel for criminal defendants, reminding us that because the law presumes everyone innocent unless proven guilty, the law favors pretrial release. It describes the far-reaching and well-documented adverse effects of denying counsel at the earliest stages of a criminal prosecution, a situation that presents numerous constitutional concerns. Without a lawyer at these preliminary stages to marshal resources and advocate on the accused’s behalf, judges are more likely to order a financial condition on release before trial, which results in low income and poor defendants – who are disproportionately people of color – remaining incarcerated, and for longer periods of time. In addition, without the advice of a lawyer, an unrepresented defendant who is unaware of and untrained in the law may speak or remain silent at a bail hearing to his or her later detriment. Defendants incarcerated from the point of arrest also experience substantial prejudice in their ability to conduct an immediate investigation, prepare for trial and build a defense. Collateral consequences also flow from unnecessary pretrial incarceration: the accused may lose a job, his or her home, and the ability to support loved ones. A lawyer’s effective advocacy is a vital safeguard against bail-setting practices that often are excessive for economically disadvantaged people.

The impact is felt not only by the individual, but by society as a whole. State and local governments needlessly add to the taxpayer’s burden by, prior to trial, incarcerating many individuals who pose no public safety risk, but who were simply unable to effectively advocate for themselves. In short, there is no question that early assignment of counsel not only has a significant and positive impact on individual cases, but also promotes better societal outcomes. Thus, when a poor person about to go before the court for the first hearing after arrest asks, “Don’t I need a lawyer?” the unequivocal answer is “Yes.”

Although early access to counsel has taken hold in some jurisdictions, too many indigent defendants across the country face the daunting specter of representing themselves when courts fail to appoint counsel and then determine whether an accused will remain free or incarcerated in the days, weeks, or months before trial. Accordingly, this report recognizes that a concerted effort from all branches of government

is needed to make the early availability of counsel a reality. The report is intended to inform and guide judges, defenders and prosecutors as they carry out their duties to safeguard the rights found in our Constitution. It is also meant to assist policymakers in developing solutions to the problem of absent counsel in first judicial appearances, and sets out six pragmatic recommendations for the local, state and federal governments to bring the promise of effective counsel at the first judicial bail hearing to fruition.

The Committee and The Constitution Project owe extraordinary thanks to our Reporter, Professor Doug Colbert of the University of Maryland Francis King Carey School of Law. Professor Colbert's scholarship, expertise and enthusiasm for this project have made this report possible and we are grateful for the many hours he spent researching, drafting and assisting the Committee in crafting its recommendations.

I hope that the reforms recommended in this report will not only improve the availability and quality of counsel available at bail hearings, but will also contribute to a fairer, less discriminatory, less costly and more rational criminal justice system.

Sincerely,

A handwritten signature in cursive script that reads "Virginia E. Sloan". The signature is written in black ink and is positioned below the word "Sincerely,".

Virginia E. Sloan  
March 2015



## **BLACK LETTER RECOMMENDATIONS**

**Recommendation 1: Jurisdictions should appoint counsel in a timely manner prior to initial bail and release hearings.**

**Recommendation 2: The first appearance hearing should be held in public and should provide the opportunity for defense counsel, pretrial release services representatives and family members to present information supporting the least onerous pretrial release conditions appropriate.**

**Recommendation 3: A pretrial release representative should present an objective risk assessment that measures a defendant's flight risk and danger to the community. The judicial officer should consider the risk assessment's recommendation at the defendant's first appearance and should make the risk assessment available to the prosecutor and defense counsel, who also should be given an opportunity to be heard.**

**Recommendation 4: Judicial officers should order the "least onerous" condition of pretrial release, taking into consideration enumerated factors, including indigent and low-income defendants' financial resources.**

**Recommendation 5: Jurisdictions should use savings realized through reduction in jail populations to provide the necessary resources for public defenders and appointed counsel to effectively represent defendants at initial bail hearings.**

**Recommendation 6: The federal government and state governments should engage in greater data collection regarding pretrial representation and case outcomes.**

## INTRODUCTION

*“[W]hat makes a stage critical is what shows the need for counsel’s presence.”<sup>1</sup>*

*“[C]ases have defined critical stages as proceedings between an individual and agents of the State [w]hether ‘formal or informal, in court or out,’ . . . at which counsel would help an accused ‘in coping with legal problems or . . . meeting his adversary.’”<sup>2</sup>*

In our criminal justice system, defense counsel’s zealous representation is necessary for a defendant to successfully enforce his or her rights, defend his or her own liberty, and effectively respond to prosecutorial action. The value of counsel comes as no surprise to anyone who has been arrested or knows a person who has been incarcerated after being accused of a crime. Denying poor and low-income defendants the advocacy of a qualified lawyer at their first appearance before a judicial officer – whether a judge, magistrate, or other official charged with determining conditions of pretrial release – significantly impairs the likelihood of an accused obtaining liberty before trial<sup>3</sup> and substantially increases the likelihood of a harsher outcome.<sup>4</sup> Because of the irrevocable and often detrimental effects that result from denial of counsel after arrest, The Constitution Project National Right to Counsel Committee (“Committee”) recommended in its 2009 report, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, that counsel be provided “as soon as feasible after accused persons are arrested, detained, or request counsel.”<sup>5</sup>

<sup>1</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

<sup>2</sup> *Id.* at 212, n.16 (quoting *United States v. Wade*, 388 U.S. 216, 226 (1967); *United States v. Ash*, 413 U.S. 300, 312-13 (1973)). In his concurrence, Justice Alito reinforced the Court’s analysis, stating, “[W]e have held that an indigent defendant is entitled to the assistance of appointed counsel at a preliminary hearing if ‘substantial prejudice . . . inheres in the . . . confrontation’ and ‘counsel [may] help avoid that prejudice.’” *Id.* (quoting *Coleman v. Alabama*, 399 U.S. 1, 9 (1970)).

<sup>3</sup> Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002) (“Indeed, delaying representation until after the pretrial release determination was the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes. Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual’s ability to pay”).

<sup>4</sup> See, e.g., CHRISTOPHER T. LOWENKAMP, ET AL., ARNOLD FOUNDATION, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (2013), available at [http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_state-sentencing_FNL.pdf) (finding that, “[l]ow-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.”); GERALD R. WHEELER & GERALD FRY, PROJECT ORANGE JUMPSUIT: EVALUATION OF EFFECTS OF PRETRIAL STATUS ON CASE DISPOSITION OF HARRIS COUNTY FELONY & MISDEMEANOR A/B DEFENDANTS 4 (2013) (finding that in Harris County, Texas “[s]tatistically identical defendants who make bond experience: 86% fewer pretrial jail days; 33.3% better chance of getting deferred adjudication; 30% better chance of having all charges dismissed; 24% less chance of being found guilty; and 54% fewer jail days sentenced.”).

<sup>5</sup> THE CONSTITUTION PROJECT NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 197 (2009) [hereinafter JUSTICE DENIED], available at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

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This recommendation also mirrors the American Bar Association's long-standing policy that counsel be "provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first."<sup>6</sup>

The first appearance, which is also known as an initial bail or pretrial release hearing, is the first instance in which a judicial officer will determine whether and under what conditions the accused will be released pending trial. Guaranteeing a defense lawyer's presence and effective advocacy at first bail hearings – the central premise of this report – is essential to protecting the pretrial freedom and fair trial rights of people accused of crimes. Effective representation makes the crucial difference in judicial officers' release rulings for most bailable offenses and provides an effective safeguard against denying bail except in "carefully limited exceptions" in which a government prosecutor meets his or her burden in demonstrating that the defendant's release poses a significant danger or flight risk.<sup>7</sup> Throughout the nation, unrepresented low-income and indigent defendants – who are typically and disproportionately people of color accused of non-violent crimes – remain in jail for lengthy periods, ranging from three to 70 days in some cases, solely because they cannot afford money bail.<sup>8</sup> Delaying counsel's appearance at this crucial beginning stage also delays and may irreparably damage an accused's ability to investigate, speak to witnesses, evaluate the charges in a timely manner, and prepare a defense.

This report addresses the history and import of representation at first judicial appearances, as well as the Committee's recommendations to support effective representation at bail hearings, in eight brief parts. **Part 1, *The Struggle for a Meaningful Right to Counsel***, provides a brief historical overview of the constitutional right to counsel and posits the need for counsel at first bail hearings. **Part 2, *Overview of Pretrial Release and Bail Proceedings***, describes the process in which a judicial officer assesses whether pretrial release is appropriate for an individual accused of a crime. This section discusses the factors a judicial officer must consider in determining pretrial release options, beginning with the least onerous release on recognizance and non-financial condition of supervised release to the harshest condition of requiring indigent defendants and people with limited financial resources to meet a money or financial collateral bond.

**Part 3, *The Development of Pretrial "Critical Stage" Analysis***, outlines the United States Supreme Court's development of "critical stage" pretrial jurisprudence, a period during which the Court attempted

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<sup>6</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-6.1 (3d ed. 1992).

<sup>7</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>8</sup> In 2008, a national survey revealed detainees remained in pretrial detention for lengthy periods before an assigned counsel first appeared and provided in-court advocacy. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 429-453 (2011).

to address when, during the pretrial process, states have a constitutional obligation to provide counsel for eligible defendants unable to afford their own representation.

**Part 4, *First Bail Hearings: A Critical Stage That Entitles Indigent Defendants to Counsel***, examines Supreme Court constitutional due process and right to counsel critical stage rulings. It concludes that bail is a critical stage requiring every state to provide counsel at first appearance hearings.

**Part 5, *The Law Favors Pretrial Release***, explains the doctrinal law of pretrial release where “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>9</sup> It describes the theory of an accused’s constitutional procedural protections against pretrial incarceration: the time-honored presumption of innocence,<sup>10</sup> the due process right against unnecessary loss of liberty<sup>11</sup> for defendants not representing a clear and convincing risk of danger,<sup>12</sup> and the prohibition against an excessive bail amount.<sup>13</sup> Part 5 also examines state laws favoring the least onerous conditions of release before trial.

**Part 6, *Pretrial Release in Practice***, examines how pretrial release operates in reality. It examines the unavailability of counsel for indigent and low-income defendants and the difficulty for the criminally accused to navigate the pretrial process without the assistance of defense counsel. Part 6 concludes by considering the discriminatory effect and widespread use of financial and money bond conditions for indigent, low-income and minority defendants.

**Part 7, *Lawyers Make a Difference at First Bail Hearings***, examines the impact that defense counsel has when actively engaged during the earliest stage of the pretrial process. It reviews the empirical data that supports making defense counsel available at first bail hearings to achieve a fair and cost-effective outcome. It also describes the practice of judicial officers’ pretrial rulings, the required statutory factors that judicial officers often overlook or minimize when deciding which defendants are entitled to regain liberty on recognizance, the relatively infrequent use of non-financial options, judicial reliance on money bond, and the cost-savings that would result from releasing eligible defendants.

**Part 8, *Recommendations and Commentary***, concludes with a series of recommendations for ensuring counsel’s effective representation of indigent and low-income defendants at initial appearances and for promoting a fair and cost-efficient pretrial justice system.

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<sup>9</sup> *Salerno*, 481 U.S. at 755.

<sup>10</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>11</sup> “No person shall be held . . . nor be deprived of life, liberty, or property, without due process of the law. “ U.S. CONST. amend. V. The Fourteenth Amendment prohibits each state from the same deprivation. “. . . Nor shall any state deprive a person of life, liberty, or property, without due process of the law . . .” U.S. CONST. amend. XIV, § 1.

<sup>12</sup> *Salerno*, 481 U.S. at 751-752 (requiring clear and convincing burden of proof regarding danger and flight risk).

<sup>13</sup> U.S. CONST. amend. VIII.

## PART 1. THE STRUGGLE FOR A MEANINGFUL RIGHT TO COUNSEL

Most people would be hard-pressed to name a human right they regard more highly than their personal freedom. This cherished value becomes particularly salient at the time of arrest, when law enforcement officials deprive an individual of liberty. The nation's founding fathers understood this and, accordingly, included in the Bill of Rights constitutional safeguards against the unreasonable deprivation of an accused person's freedom following arrest and prior to conviction, which the Supreme Court has honored: the arrest must be based on probable cause;<sup>14</sup> the accused must be brought promptly before a judicial officer;<sup>15</sup> the justice system presumes the accused is innocent, which helps protect most arrestees from remaining incarcerated prior to trial;<sup>16</sup> and judicial officers are prohibited from ordering an excessively high bail.<sup>17</sup> Post-revolutionary America valued securing people's liberty against unreasonable arrest, bail, detention, and prosecution.

The Sixth Amendment's guarantee of counsel gives meaning to each of these pretrial freedoms and fair trial rights. The Sixth Amendment's broad language, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence [sic],"<sup>18</sup> strongly indicates that the public viewed a lawyer for the accused as a necessary shield against prosecutorial abuse.

For most of the Sixth Amendment's history, however, only people who could afford private counsel could be certain of enjoying the right to legal representation in a criminal prosecution. Within the federal court system, indigent defendants could not be assured of the right to counsel in felony prosecutions until 1938.<sup>19</sup> In the states, guaranteeing counsel for defendants unable to afford a private lawyer in criminal

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<sup>14</sup> U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause . . .").

<sup>15</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (following arrest, a defendant must be brought before a judicial officer as soon as reasonably possible but not later than 48 hours).

<sup>16</sup> *Stack v. Boyle*, 342 U.S. 1, 3-6 (1951) (holding that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); see also *Hudson v. Parker*, 156 U.S. 277 (1895) (right to bail for non-capital crime based on presumption of innocence and not inflicting punishment prior to conviction).

<sup>17</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required . . ."); see *Stack*, 342 U.S. at 5-6 (an accused's bail must be "reasonably calculated" and cannot be set at an amount greater than necessary to reasonably ensure the defendant's presence at trial); see also *State v. Brown*, No. 34,531 (N.M. Nov. 6, 2014) (providing an excellent historic review of money bond, the constitutional prohibition of excessive bail, and the "least restrictive" standard applied to a defendant charged with murder and his release on personal recognizance).

<sup>18</sup> U.S. CONST. amend. VI.

<sup>19</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing indigent federal defendants' constitutional right to court-assigned lawyer at felony trials). On some occasions, a federal judge appointed counsel in a serious felony case and asked the lawyer to accept the assignment pro bono. WILLIAM M. BEANY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 205-207 (1955).

prosecutions proved even more problematic.<sup>20</sup> With respect to capital crimes, it was not until 1932 that the Supreme Court ruled that when an accused poor person’s life was at stake, the constitutional due process right to counsel could be triggered upon a showing of “special circumstances.”<sup>21</sup> While individual states could decide whether or not to assign a lawyer in a felony prosecution,<sup>22</sup> by and large, impoverished defendants waited until 1963 – nearly 175 years after ratification of the Constitution – before being constitutionally guaranteed counsel when charged with a felony<sup>23</sup> and another nine years before being guaranteed counsel when charged with a misdemeanor.<sup>24</sup>

The Court’s unanimous decision in *Gideon v. Wainwright*<sup>25</sup> changed the landscape of states’ prosecution of the accused without counsel. For the first time, the nation’s high court mandated that every state must provide representation in felony prosecutions to “[a]ny person haled into court who is too poor to hire a lawyer and cannot be assured a fair trial unless counsel is provided for him.”<sup>26</sup> The *Gideon* decision embraced the importance of counsel’s assistance “at every step in the proceedings.”<sup>27</sup> Within the next decade, the Supreme Court also extended *Gideon*’s declared right to counsel to state court misdemeanors.<sup>28</sup>

Criminal trials, however, are relatively rare and occur at the end of the adjudicatory process. While the federal rules of criminal procedure incorporated the right to counsel at the first appearance,<sup>29</sup> *Gideon* left unanswered the question that resonates for indigent state court defendants today when a prosecution first begins and an accused appears before a judicial officer with liberty at stake: *Where is my lawyer?*

<sup>20</sup> BEANY, *supra* note 19, at 32 (“There was no feeling before 1938 that defendants who pleaded guilty or those who failed to request counsel have a constitutional right to be advised or offered counsel or that a conviction without counsel was void.”).

<sup>21</sup> *Betts v. Brady*, 316 U.S. 455, 470-72 (1942) (finding no special circumstances in a felony robbery prosecution to grant indigent state defendants’ constitutional claim to counsel). Ten years earlier in *Powell v. Alabama*, the Supreme Court reversed defendants’ capital conviction and found special circumstances that entitled the Scottsboro defendants to counsel and to a new trial based upon their age, illiteracy and mental health. 287 U.S. 45, 71 (1932). In *Powell*, Justice Sutherland suggested that it was “the duty of the court, whether requested or not, to assign counsel for him as a necessary condition of due process of law.” *Id.* at 71.

<sup>22</sup> State courts in Illinois, Indiana, Michigan, New York and New Jersey appeared to assign pro bono lawyers for indigent defendants charged with serious felony crimes. See BEANY, *supra* note 19, at 205-207.

<sup>23</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, the Court held that indigent state defendants’ constitutional right to counsel includes appointment of trial counsel at a felony trial).

<sup>24</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *But see Scott v. Illinois*, 440 U.S. 367, 369-370 (1979) (holding that the Constitution does not require a state trial court to appoint counsel “where a criminal defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed upon the defendant.”). The Constitution Project National Right to Counsel Committee published an overview of the Supreme Court’s right to counsel rulings between 1932 (*Powell v. Alabama*) and 1972 (*Argersinger v. Hamlin*) in JUSTICE DENIED, *supra* note 5, at 18-27.

<sup>25</sup> *Gideon*, 372 U.S. at 335.

<sup>26</sup> *Id.* at 344.

<sup>27</sup> *Powell*, 287 U.S. at 71.

<sup>28</sup> *Argersinger*, 407 U.S. at 25 (holding that there is a right to counsel at misdemeanor trials and pretrial plea negotiations when the defendant faces a sentence of incarceration).

<sup>29</sup> FED. R. CRIM. P. 44(b).

## PART 2. OVERVIEW OF PRETRIAL RELEASE AND BAIL PROCEEDINGS

People aware of *Gideon's* constitutional guarantee of a right to appointed counsel for indigent defendants may naturally assume that counsel's representation commences when a defendant first appears before a judicial officer. After all, *Gideon's* reference to a lawyer as "a necessity, not a luxury"<sup>30</sup> could not be of greater import than when a judicial officer makes the crucial ruling about a person remaining incarcerated or being allowed to be free for the days, weeks and months before the scheduled trial date. Data shows that a lawyer's effective representation is the single most important factor for ensuring that judicial officers render informed and non-discriminatory decisions about pretrial release for poor and low-income defendants.<sup>31</sup> Yet throughout the nation, states and localities continue to conduct first appearance hearings without lawyers for the poorest people entering states' pretrial justice systems, at a substantial cost to the taxpayer.

To understand the critical role counsel can play at an accused's first appearance, one need only imagine the experience of being arrested and charged with a crime. Handcuffed and taken into police custody, a defendant soon arrives at a local jail for booking and intake. Here the defendant provides a medical history, is subject to a full body search, and is then fingerprinted before being placed in the general pretrial population. Jail capacity and the volume of people entering local jails vary, but a defendant in a populated city or county can expect to be placed in a crowded holding cell and wait 24 to 48 hours prior to being brought before a judicial officer.<sup>32</sup> While the arresting officer completes the charging papers that include a sworn, detailed account of events preceding arrest, the defendant looks for an empty seat on the metal bench located in the cell, and likely settles for floor space. Security and safety issues abound as people charged with various crimes and in different states of mind share the very limited area of a holding cell.<sup>33</sup> Eventually, each detainee moves to a different cell, typically smaller than the first, as the queue moves closer to the judicial official who will determine the accused's fate: future liberty or continued incarceration. Many detainees, though, will find no public defender or assigned lawyer waiting to represent them at the first bail hearing. They are completely on their own. In most states, a lawyer's advocacy before a judicial officer begins much later in the process.

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<sup>30</sup> *Gideon*, 372 U.S. at 344.

<sup>31</sup> Colbert, et al., *supra* note 3, at 1720.

<sup>32</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

<sup>33</sup> See RAM SUBRAMANIAN, ET. AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 12 (Feb.2015), available at <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf> [hereinafter INCARCERATION'S FRONT DOOR] (estimating that the rates of mental illness for men and women in jail are "four to six times higher than in the general population").

At the initial hearing following their arrest, unrepresented defendants are left on their own to figure out what to say. Untrained in the law that entitles most defendants to release on recognizance or on the least onerous conditions,<sup>34</sup> unrepresented defendants often choose to limit their responses to a judge's or magistrate's questions. Those who venture into the uncertain territory of self-advocacy are usually unable to influence the judicial decision and may do grave harm to their fair trial rights, such as when they offer an inculpatory statement that assists the prosecution's case.<sup>35</sup> Having spent one or two sleepless nights in a jail cell and having no knowledge of the legal alternatives to the unaffordable financial bond, detainees' self-advocacy typically proves ineffective.

Judicial officers must consider a number of factors and alternative pretrial outcomes that the law provides. As a starting point, state law entitles most people accused of a crime to pretrial release, either on recognizance or on the least onerous conditions. Absent counsel representing a defendant, however, judicial officers frequently move "in haste"<sup>36</sup> when making bail or release decisions and rarely inform unrepresented indigent and low-income defendants about less onerous options, such as supervised release to a family member or a pretrial release agency or unsecured bonds.<sup>37</sup> Nor do judicial officers regularly consider other non-financial conditions, such as a home curfew that allows an employed defendant to keep a job and continue supporting his or her family members, or that permits a high school defendant to return to school pending trial. Furthermore, without a lawyer, *pro se* incarcerated defendants are unable to present a residential or out-patient substance abuse or diversion program as an alternative to continuing incarceration.

Consequently, judicial officers' decisions for defendants lacking legal representation rely heavily on three primary factors when reaching a decision: the nature of the charge, the defendant's prior convictions and perceived risk of danger to the public, and the person's previous record for returning to court or potential as a flight risk. Many officials pay little heed and give considerably less weight to an accused's limited financial resources and to other pretrial release factors for which the law usually requires consideration in determining the necessity and amount of bail, such as an accused's community ties, family, residence, employment, and current schooling. Officials often ignore these important considerations for one reason: absent a lawyer's

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<sup>34</sup> See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3d ed. 2007) [*hereinafter* ABA STANDARDS FOR CRIMINAL JUSTICE] (Standard 10-1.2. "Release under least restrictive conditions; diversion and other alternative release options").

<sup>35</sup> Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006).

<sup>36</sup> *Stack v. Boyle*, 342 U.S. 1, 11 (1951).

<sup>37</sup> An unsecured bond does not require the posting of a financial or money bond. If the defendant breaches his promise to return to court, he is personally liable for the amount of the unsecured bond. See Patrick Brown & Mary Kate Healy, *Unsecured Bond is an Underused Option*, BALT. SUN, April 24, 2014, [http://articles.baltimoresun.com/2014-04-24/news/bs-ed-unsecured-bail-20140424\\_1\\_better-bond-bail-system-pretrial-release-system](http://articles.baltimoresun.com/2014-04-24/news/bs-ed-unsecured-bail-20140424_1_better-bond-bail-system-pretrial-release-system).



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verification, judicial officers consider the defendant's representations – if any are made at all – unreliable. As a result, judicial officers typically order a financial condition on release, which requires the defendant or his or her family either to post the full bond amount or to pay a bail bondsman a non-refundable, ten percent fee and be responsible for the remaining debt if the defendant fails to appear.<sup>38</sup> Alternatively, instead of the family paying the bail bondsman's \$500 fee for a \$5,000 bond, the court could allow the defendant to deposit the same amount of money bail with the court, which the court will refund at the end of the proceedings.

Intuitively, people appreciate that a defense attorney's advocacy will make a substantial difference on judicial rulings and not surprisingly, they are correct. As discussed in greater detail below, empirical data confirms that counsel's effective advocacy and offering of credible information has succeeded in gaining pretrial release on recognizance for two and a half times as many defendants charged with misdemeanors and non-violent crimes than those defendants without a lawyer.<sup>39</sup> With a lawyer's forceful argument, judicial officers are more likely to be persuaded to consider the less onerous, non-financial conditions of release. When bail must be imposed, defense counsel's effective representation has resulted in the ordering of an affordable amount for two and a half times as many represented defendants as those who lacked a lawyer.<sup>40</sup>

**...empirical data confirms that counsel's effective advocacy and offering of credible information has succeeded in gaining pretrial release on recognizance for two and a half times as many defendants charged with misdemeanors and non-violent crimes than those defendants without a lawyer.**

For more serious crimes, counsel stands a better chance of convincing a judicial officer to reject ordering an excessively high bail and meet the constitutional requirement of a "reasonably calculated," non-excessive amount, or to overcome a judge's inclination to deny bail and remand the defendant to jail pending trial.<sup>41</sup> A lawyer's presence also protects unrepresented defendants from making damaging disclosures and provides the opportunity for counsel to commence an investigation and evaluate the strength of the government's case.

Indigent defense counsel's advocacy can change a judicial culture that now relies heavily upon financial bond and paying the commercial bail bondsman a non-refundable ten percent fee. In place of the

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<sup>38</sup> BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – Statistical Tables 15 (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (finding that "[a]bout 3 in 5 pretrial releases in 2009 included financial conditions. About 4 in 5 financial releases, and about half (49%) of all releases, used private surety bonds, which was the most common method of pretrial release in 2009. Other types of financial release included deposit bond (7% of all releases) and full cash bond (5% of all releases).").

<sup>39</sup> See Colbert, et al., *supra* note 3, at 1720.

<sup>40</sup> *Id.*

<sup>41</sup> *Stack*, 342 U.S. at 5-6.

reliance on “bail for profit” – a practice which is now prohibited in four states – defense counsel would advocate for an unsecured collateral bond, which can be particularly helpful for indigent defendants and their families lacking the necessary income to pay a cash deposit, since they need only promise to be responsible in the event of a failure to appear.<sup>42</sup> Public defenders would also seek supervised release for clients who pose no significant safety risk and who present a bleak financial situation.

**Indigent defense counsel’s advocacy can change a judicial culture that now relies heavily upon financial bond and paying the commercial bail bondsman a non-refundable ten percent fee.**

The present system tilts the scales of justice, as state and local prosecutors gain a significant advantage at the outset of prosecution when poor people appear alone, receive unaffordable bail or are remanded into custody, and then wait in jail for assigned counsel to appear. There are countless instances across the country in which a poor defendant languishes in jail, often for a minor offense, and subsequently pleads guilty in exchange for regaining liberty.<sup>43</sup> In more serious cases, others will maintain innocence and pursue their right to trial, only to lose hope in the one-sided proceeding and in their inability to overcome the government’s substantial and formidable resources. Eventually, they will also opt to plea bargain rather than suffer a substantial jail stay while waiting for a trial. Impartial justice also suffers when judicial officers rule without counsel present to challenge a bail

**There are countless instances across the country in which a poor defendant languishes in jail, often for a minor offense, and subsequently pleads guilty in exchange for regaining liberty.**

amount that is far beyond many indigent defendants’ reach. The judicial officer’s decision only adds to the unrepresented individual’s isolation and feeling of futility.

The lack of representation by counsel at first “freedom hearings” and thereafter is a glaring gap in the nation’s pretrial justice system. Too many states and localities continue to conduct these hearings as pre-*Gideon* proceedings inside of a police precinct, a jail, or via video to court. The public is often not permitted at the hearings, which are conducted by judicial officers who frequently overlook the law’s preference for release before trial; meanwhile, indigent defendants cannot avail themselves of counsel to persuade judicial officers of the application of the myriad pretrial release options

<sup>42</sup> The four states that prohibit commercial bail bonding are Illinois, Kentucky, Oregon, and Wisconsin. *See* National Conference of State Legislatures, Bail Bond Agent Business Practices (Apr. 23, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-business-practices.aspx>; *see also* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 4 (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

<sup>43</sup> JUSTICE DENIED, *supra* note 5, at 85-86 (“The practices surrounding pretrial release place great pressures on detained defendants to enter guilty pleas without the assistance of counsel.”).

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available. Less onerous, non-financial options to pretrial incarceration will become meaningful only when the Supreme Court and federal and state legislatures recognize that the first judicial bail hearing is a critical stage that requires a lawyer's vigorous representation to uphold equal justice for accused poor people.

### PART 3. DEVELOPMENT OF PRETRIAL “CRITICAL STAGE” ANALYSIS

Under current Supreme Court precedent, an indigent defendant is constitutionally entitled to appointed counsel at the initial appearance when two criteria are met. First, the right to counsel must have “attached,” i.e., a formal, adversarial proceeding has commenced against the defendant.<sup>44</sup> Second, a defendant must have a crucial “need for counsel’s presence” at the initial judicial proceeding or in-court confrontation.<sup>45</sup> As one scholar appropriately declared, “In short, the Sixth Amendment right to counsel requires the effective assistance of counsel, as well as his or her mere presence, *at all critical stages*.”<sup>46</sup> This section explores the development and implications of the critical stage analysis doctrine for indigent defendants’ first judicial appearances.

**Less onerous, non-financial options to pretrial incarceration will become meaningful only when the Supreme Court and federal and state legislatures recognize that the first judicial bail hearing is a critical stage.**

#### ***Developing Doctrine: 1960-1973***

The Supreme Court’s landmark ruling in *Gideon* compelled each state to reexamine its pretrial and trial justice system, which, in many states, had long functioned without counsel for poor people after a criminal prosecution commenced. In the 1960s and early 1970s, the Court delivered a series of rulings that first delineated a right to representation at the pretrial, post-indictment stage for the small population of indigent defendants formally charged with a felony crime.<sup>47</sup> Supreme Court critical stage<sup>48</sup> findings required each state to guarantee counsel to an indicted defendant when appearing before the arraignment judge, at

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<sup>44</sup> See *Rothgery v. Gillespie County*, 554 U.S. 191, 194-95 (2008).

<sup>45</sup> *Id.* at 212.

<sup>46</sup> Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1514 (2013).

<sup>47</sup> Nearly “one million felony convictions are entered in the U.S. each year” while “an estimated ten million misdemeanor cases are filed annually.” Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-15 (2012).

<sup>48</sup> The critical stage determination requires every state to guarantee counsel to indigent defendants at a pretrial proceeding or confrontation where “potential substantial prejudice to defendant’s rights” may occur. See *Wade v. United States*, 388 U.S. 218, 227 (holding that counsel’s presence in the police arranged, post-indictment lineup “inheres in the particular confrontation and the ability of counsel to help avoid that practice.”). In *Rothgery*, the Supreme Court applied similar reasoning to the importance of counsel at a defendant’s first bail hearing: “what makes a stage critical is what shows the need for counsel’s presence.” 554 U.S. at 212.

which time the defendant typically enters a plea,<sup>49</sup> and then at post-indictment police identification lineup procedures.<sup>50</sup> By 1970, the Supreme Court held that the pre-indictment, preliminary felony hearing also constituted a critical stage requiring counsel's presence.<sup>51</sup> At a public courtroom hearing, an assigned defense counsel could challenge the State's evidence that probable cause existed to believe the defendant committed the felony crime, seek a reduction or dismissal of charges, and argue for a reduced bail and pretrial release. When a prosecutor proceeded by way of a preliminary hearing rather than by grand jury indictment, indigent defendants gained access to an assigned lawyer sooner, typically 30 days after arrest.<sup>52</sup> In many jurisdictions, that would be as close as the Supreme Court's critical stage jurisprudence would bring an assigned lawyer to an indigent defendant at a courtroom proceeding before trial, until decades later in *Rothgery v. Gillespie County* in 2008.<sup>53</sup>

Critical stage analysis that developed between 1960 and 1973 created a promising opening for indigent defendants' argument that they were constitutionally entitled to legal representation at first judicial bail hearings held shortly after arrest. In practice, though, most states and local jurisdictions did not assign counsel unless it was required.<sup>54</sup> Consequently, detainees unable to afford the bail amount remained in jail for periods ranging from three to 70 days before a court-assigned lawyer appeared in court.<sup>55</sup> Additionally, prosecutors easily bypassed the felony preliminary hearing by choosing to present evidence directly to the closed grand jury and thereby added considerable delay to defense counsel's courtroom appearance. In certain instances, a prosecutor might prefer the secretive grand jury process for indictment rather than exposing a witness to a defense lawyer's cross examination and additional discovery. In misdemeanor cases, which comprise the bulk of arrests entering a state's criminal justice system,<sup>56</sup> indigent defendants are not

<sup>49</sup> *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (holding that a post-indictment arraignment was a critical stage because "[w]hat happens there may affect the whole trial. Available defenses may be [] irretrievably lost, if not then and there asserted. . .").

<sup>50</sup> *See United States v. Wade*, 388 U.S. 218 (post-indictment lineup held a critical stage that required counsel's assistance); *cf. United States v. Ash*, 413 U.S. 300, 313 (1973) (holding that a police photographic display did not require counsel's presence since it did not involve the defendant "coping with legal problems or assistance in meeting his adversary.").

<sup>51</sup> *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>52</sup> *Gerstein v. Pugh*, 420 U.S. 103, 106 (1974) (Florida criminal procedure provides a preliminary hearing approximately 30 days after arrest).

<sup>53</sup> 554 U.S. 191 (2008) (affirming *McNeil v. Wisconsin*, 501 U.S. 171, 180-181 (1991), in which the Supreme Court held that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against the accused," and where "free counsel is made available at that time." Wisconsin is one of the 10 states to guarantee representation at first bail hearings.).

<sup>54</sup> Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 ILL. L. REV. 1, 3 (1998).

<sup>55</sup> *See Colbert, supra* note 8.

<sup>56</sup> In the usual two-tier state criminal justice system, the lower criminal court maintains jurisdiction over misdemeanor crimes. Fewer than 10% of arrestees face a felony indictment that is prosecuted in a state's higher criminal court. Natapoff,

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entitled to a preliminary hearing. Detainees unable to post bail often wait in jail for a lawyer's in-court advocacy until the scheduled trial date or when a plea disposition draws near.

### ***Post-Gerstein: 1974-2008***

The Supreme Court's expanding "critical stage" jurisprudence shifted considerably in 1974, in *Gerstein v. Pugh*, a case in which the Court refused to extend the right to counsel analysis to probable cause, first appearance hearings.<sup>57</sup> The Court also encouraged states to engage in "experimentation" as it "may be found desirable . . . to make the probable cause determination at the suspect's first appearance before a judicial officer . . ." <sup>58</sup> Following *Gerstein*, most states accepted the high court's invitation to determine bail at the 24- or 48-hour probable cause hearing, but did not provide counsel at this stage.<sup>59</sup> A national survey in 1998 revealed that poor and low-income defendants in 19 states faced first bail hearings without a lawyer's representation after a criminal prosecution commenced,<sup>60</sup> and that only eight states guaranteed counsel.<sup>61</sup> In the remaining 23 states, representation by counsel was inconsistent – found in some counties and not others. In the majority of these "hybrid" states, it was the rare local jurisdiction that provided counsel at first appearances.<sup>62</sup>

During the nearly 35-year, post-*Gerstein* period, the Supreme Court did not further expand upon the critical stage doctrine. Then in 2008, in *Rothgery v. Gillespie County*, the Justices addressed the significance of guaranteeing counsel to unrepresented indigent defendants at first appearances, delivering a message to states and localities that they must take steps to ensure counsel's early presence and advocacy.<sup>63</sup>

### ***Rothgery v. Gillespie County***

As the first decade of the twenty-first century concluded, the Supreme Court returned to the overlooked first appearance hearing and invited closer scrutiny of the "critical stage" doctrine with its holding in *Rothgery*.<sup>64</sup> The Court examined Texas's practice of not providing an indigent defendant with counsel

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*supra* note 47, at 1314-15.

<sup>57</sup> 420 U.S. at 122 ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

<sup>58</sup> *Id.* at 123.

<sup>59</sup> *Id.* at 123-24.

<sup>60</sup> Colbert, *supra* note 54, at 8-9.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Id.*

<sup>63</sup> *Rothgery*, 554 U.S. at 194-195. For a full analysis of the Supreme Court's *Rothgery* ruling, see Colbert, *supra* note 8, at 338-383.

<sup>64</sup> *Id.*

at the initial bail hearing, at which time probable cause for any warrantless arrest of a suspect was also determined.<sup>65</sup> Texas delayed representation until after indictment, which resulted in denial of assignment of counsel to petitioner Walter Rothgery until nine months after his arrest.<sup>66</sup> The Supreme Court confirmed that the right to counsel “attaches at a criminal defendant’s initial court appearance where he learns of the charges against him and his liberty is subject to restriction, regardless of whether the prosecutor is aware of the proceedings.”<sup>67</sup> The attention given to *Rothgery* illuminated a sharp decline in the number of states now

***Rothgery* highlighted Texas’s and other states’ practice of prosecuting unrepresented defendants and rejecting requests for a lawyer at first appearances before a magistrate judge.**

denying representation at the bail stage – from 19 to 8.<sup>68</sup> A post-*Rothgery* 2011 survey revealed a dramatic change in many hybrid states where counsel had previously been provided only in token localities: since the Court’s ruling, many more states have extended counsel’s representation to more local jurisdictions.<sup>69</sup> Furthermore, six additional states now guarantee counsel statewide at first appearances.<sup>70</sup>

*Rothgery* highlighted Texas’s and other states’ practice of prosecuting unrepresented defendants and rejecting requests for a lawyer at first appearances before a magistrate judge. Had Texas assigned counsel, Rothgery would likely have had the erroneous weapons charge against him dismissed much sooner and been spared the cloud of a criminal charge hanging over him for nine months and spending the last three weeks of that time in jail.<sup>71</sup> That fact was not lost upon eight Supreme Court Justices, who agreed that states could not unreasonably delay counsel’s in-court representation for detainees already incarcerated.<sup>72</sup> While the Supreme Court did not order Texas and every state to provide first

<sup>65</sup> *Rothgery*, 554 U.S. at 195-196.

<sup>66</sup> *Id.* at 196-197.

<sup>67</sup> JUSTICE DENIED, *supra* note 5, at 26 (citing *Rothgery*, 554 U.S. at 191).

<sup>68</sup> Colbert, *supra* note 8, at 429-453 (Alabama, Kansas, Michigan, Mississippi, Oklahoma, South Carolina, Tennessee and Texas).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The six post-*Rothgery* States include Hawaii, Kentucky, Maryland, New Hampshire, New York and Vermont. The total of 14 states, as well as the District of Columbia, that now guarantee counsel at first bail hearing are California, Connecticut, Delaware, Florida, Hawaii, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, North Dakota, Vermont and Wisconsin. *Id.* at 389. Maryland’s and New York’s highest courts declared that indigent defendants’ state constitutional due process right to counsel ensured counsel at initial appearances. See *DeWolfe v. Richmond*, 76 A.3d 1019 (2013); *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010).

<sup>71</sup> After reviewing Rothgery’s criminal rap sheet, the arresting police officer mistakenly identified a prior California felony conviction and charged him with being a felon in possession of a loaded weapon. Rothgery maintained he had no prior felony conviction but the magistrate rejected his plea for a lawyer, per Texas law which guaranteed counsel only after indictment. Nine months later, Rothgery was indicted for the crime. The presiding judge assigned him a lawyer but also increased the bail three-fold. Rothgery could not afford the amount and remained in jail for nearly three weeks until his lawyer completed a lengthy trial. Rothgery’s lawyer notified California authorities, who confirmed his lack of a felony conviction. The prosecutor consented to his release and several weeks later, dismissed the weapons charge. *Rothgery*, 554 U.S. at 195-197.

<sup>72</sup> Justice Thomas was the lone dissenting judge in *Rothgery*.

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appearance representation, the Court cited 43 states that assigned counsel before, at or shortly after the bail determination.<sup>73</sup>

The *Rothgery* Court's critical stage analysis encourages defense counsel to explain why first appearance representation "shows the need for counsel's presence"<sup>74</sup> to defend against the immediate threat to the defendant's liberty and to prepare a meaningful defense. In light of *Rothgery's* emphasis on the importance of early assignment of counsel, there is minimal, if any, justification for delaying counsel's representation beyond the first 48 hours following arrest.

## PART 4. FIRST BAIL HEARINGS: A CRITICAL STAGE THAT ENTITLES INDIGENT DEFENDANTS TO COUNSEL

In *Rothgery*, the Supreme Court took a significant step toward ending several decades of uncertainty and indecisiveness over indigent defendants' right to counsel at the first bail hearing. The Court's clarifying language paves the way for a definitive ruling that *Gideon's* constitutional right to counsel commences when an accused initially appears before a judicial officer.

**The Court's clarifying language paves the way for a definitive ruling that *Gideon's* constitutional right to counsel commences when an accused initially appears before a judicial officer.**

Affirming prior decisions of the Court,<sup>75</sup> eight Justices had little difficulty finding that Walter Rothgery's right to an assigned lawyer "attached" after the arresting officer filed a criminal complaint charging him with being a felon in possession of a loaded weapon and he was then brought before a magistrate judge. The Justices rejected Texas's formalistic argument that a criminal prosecution had not yet begun and the right to counsel had not attached because the local prosecutor had not been involved in the filing of the criminal accusation.<sup>76</sup> Instead, the *Rothgery* Court stated that the "government's commitment to prosecute is sufficiently concrete [] when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate prosecution."<sup>77</sup> *Rothgery* provided notice

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<sup>73</sup> *Rothgery*, 554 U.S. at 205, n.14.

<sup>74</sup> *Id.* at 212.

<sup>75</sup> See *Brewer*, 430 U.S. 387; *Jackson*, 475 U.S. 625; *McNeil*, 501 U.S. 191.

<sup>76</sup> The Court noted that "an attachment rule that turned on determining the moment of the prosecutor's first involvement would be wholly unworkable and impossible to administer," and would be "guaranteed to bog the courts down in prying inquiries in to the communication between the police . . . and the State's attorneys . . ." in addition to "resting attachment on . . . absurd distinctions" such as the date and time of arrest or the sophistication of a particular county's computer intake system. *Rothgery*, 554 U.S. at 206 (internal citations omitted).

<sup>77</sup> *Rothgery*, 554 U.S. at 207 (emphasis added).

to Texas and sister states that once the criminal prosecution commenced, whether through an indictment, formal charge, preliminary hearing, information or arraignment – and irrespective of the involvement of the prosecutor – the right to counsel attached and the practice of denying counsel to incarcerated indigent defendants under these circumstances would no longer be permissible.<sup>78</sup>

The Court’s ruling, however, did not answer the question that many Justices believed would be resolved when they accepted the case for judicial review.<sup>79</sup> Once the right to counsel attached at the first bail hearing, must states provide counsel to advocate on behalf of an accused? In view of the guarantees provided in the Sixth and Fourteenth Amendments, was the bail and release determination a “critical stage” that required every state to guarantee representation to indigent defendants at their first judicial proceeding?

Critical stage jurisprudence had remained at a standstill since the Court’s 1974 ruling in *Gerstein v. Pugh*.<sup>80</sup> States opposed to providing counsel at first appearances had followed a variety of strategies to delay a defense counsel’s representation. Applying a bright-line test, states asserted that the right did not attach at first appearances but only “by way of formal charge, preliminary hearing, indictment, information or arraignment.”<sup>81</sup> States argued that the “critical stage” doctrine only applied to counsel’s presence at pretrial proceedings that would ensure a fair trial and not to protect an accused’s freedom or rights generally. As the Court explained in *Wade v. United States* in 1967, “[a]n accused need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, *where counsel’s absence might derogate from the accused’s right to a fair trial.*”<sup>82</sup> Under this view, a defendant must demonstrate that counsel’s absence at the bail hearing diminished his or her guarantee of a fair trial to be considered a critical stage requiring counsel’s presence.

*Wade* and other Supreme Court rulings reinforced the argument that a pretrial confrontation between a defendant and a judicial officer requires counsel’s presence. At such proceedings, the *Wade* Court referred to the “potential substantial prejudice to a defendant’s right [that] inheres in the . . . confrontation and the

<sup>78</sup> *Id.* at 202 (“By the time a defendant is brought before a judicial officer, informed of a formally lodged accusation, and has restrictions imposed on his liberty in the aid of the prosecution, the State’s relationship with the defendant has become solidly adversarial.”). Texas indigent defendants waited up to 30 days in several counties before counsel appeared. Colbert, *supra* note 8, at 398. Texas criminal procedure provided counsel after indictment for felony charges and at scheduled trials for misdemeanor crimes. TEX. CODE CRIM. PROC. art. 1.051(j) (2007).

<sup>79</sup> Colbert, *supra* note 8, at 375 (quoting Justice Kennedy at oral arguments as stating, “But what we’re looking for here, at least one of the things we might look for in this case, is a specific rule to give to the States so the State knows when counsel has to be appointed.”).

<sup>80</sup> 420 U.S. 103 (1974).

<sup>81</sup> See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

<sup>82</sup> 388 U.S. 216, 226 (1967) (emphasis added). *Wade* involved a police arranged lineup where the indicted defendant appeared without a lawyer. The critical importance of the identification evidence at trial and potential for the police suggestiveness in arranging the lineup itself led the Supreme Court to mandate a right to counsel to ensure the defendant would not face substantial prejudice at the identification procedure and an unfair trial. *Id.* at 218.



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ability of counsel to help avoid that prejudice.”<sup>83</sup> Under this analysis, a first bail hearing would be considered a critical stage if the defense lawyer’s presence was necessary to overcome the “substantial prejudice” resulting from the unrepresented defendant appearing alone. Might the unrepresented defendant remain silent, thereby hurting the opportunity to regain liberty? Or might he choose to speak and make damaging and incriminating statements that would not have occurred had a lawyer been present? Are the lawyer’s professional training and resources needed to advocate for pretrial freedom and to avoid uttering a single harmful statement in an attempt to regain liberty before trial?

*Rothgery* provided answers to these questions and to the meaning of “critical” stage. The particular pretrial confrontation might require counsel’s presence to ensure a fair trial, as well as protect the accused’s freedom before trial. “What makes a stage critical,” said the *Rothgery* Court, “is what shows the need for counsel’s presence.”<sup>84</sup>

The Court’s language breathed new life into the lawyer’s crucial role at the first bail hearing, making clear that only the lawyer’s training and experience can avoid the “potential substantial prejudice” that occurs when unrepresented defendants appear alone, communicate with the court, and risk saying something – or perhaps even failing to say something – that may increase the likelihood of pretrial incarceration and conviction.

**...only the lawyer’s training and experience can avoid the “potential substantial prejudice” that occurs when unrepresented defendants appear alone, communicate with the court, and risk saying something – or perhaps even failing to say something – that may increase the likelihood of pretrial incarceration and conviction.**

## PART 5. THE LAW FAVORS PRETRIAL RELEASE

Most unrepresented indigent and low-income defendants do not know that constitutional and state law provide strong support for pretrial release for people accused of crimes. Aside from the “carefully limited exception”<sup>85</sup> of the defendant denied bail for posing a “clear and convincing”<sup>86</sup> risk of danger or probability of flight, defendants are entitled to the benefit of a presumption of innocence,<sup>87</sup> liberty before trial,<sup>88</sup> and the constitutional right to a non-excessive bail amount.<sup>89</sup> With counsel’s representation, a defendant can

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<sup>83</sup> *Id.*

<sup>84</sup> *Rothgery*, 554 U.S. at 212.

<sup>85</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>86</sup> *Id.* at 741.

<sup>87</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>88</sup> *Salerno*, 481 U.S. at 755.

<sup>89</sup> U.S. CONST. amend. VIII.

insist upon government prosecutors meeting their heavy burden to justify a higher, usually unaffordable bail amount. Indeed, when a judicial officer considers financial bail as a necessary condition of release, defense counsel will argue that the constitutional prohibition on an excessive bail amount requires the judicial officer to arrive at a “reasonably calculated”<sup>90</sup> figure, one fitting the individual defendant’s charge, financial resources and background. States’ pretrial laws also reinforce most defendants’ entitlement to release on the least onerous conditions,<sup>91</sup> particularly when the accused is facing non-violent charges.

**...*Stack v. Boyle* represents the rare Supreme Court ruling where the Justices appeared determined to speak directly to trial judges and magistrates presiding over bail hearings...**

Defense counsel can bring judicial officers’ attention to the Supreme Court’s two leading constitutional rulings that prohibit an excessive bail<sup>92</sup> and establish pretrial freedom as the norm and detention before trial as a “carefully limited exception.”<sup>93</sup>

### ***Legal Principles of Non-Excessive, Reasonably Calculated Bail***

Decided more than 60 years ago, *Stack v. Boyle* represents the rare Supreme Court ruling where the Justices appeared determined to speak directly to trial judges and magistrates presiding over bail hearings and addressed the importance of adhering to constitutional principles while deciding the proper amount of a non-excessive bail. Justice Jackson’s concurring opinion explained the Court’s intervention in matters usually left to judicial officers’ discretion by noting that the bail decisions in *Stack* required providing direction to judges to “correctly appl[y]” legislative bail factors and “principles governing allowance of bail [which] have been misunderstood or too casually applied.”<sup>94</sup>

Speaking to the judicial officers who often exercise discretion “in haste [and] without the full inquiry and consideration which the matter deserves,”<sup>95</sup> Justice Jackson acknowledged that “there is little in our books to help guide federal [and state] judges in bail practice.”<sup>96</sup> Justice Jackson suggested that receiving guidance from the nation’s highest court about the “extraordinary and recurring nature of this particular problem

<sup>90</sup> *Stack*, 342 U.S. at 755.

<sup>91</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 34 (Standard 1-1.2: “In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release.”).

<sup>92</sup> *Stack*, 342 U.S. 1.

<sup>93</sup> *Salerno*, 481 U.S. 739.

<sup>94</sup> *Stack*, 342 U.S. at 7, 9.

<sup>95</sup> *Id.* at 11.

<sup>96</sup> *Id.* at 13.

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seems to warrant a discussion of the merits in which we would not ordinarily engage.”<sup>97</sup> *Stack*'s poignant analysis speaks as well to prosecuting and defense lawyers about their essential role in assisting courts reach correct bail decisions in the face of public pressure.

In *Stack*, the Court revisited the trial judge's ordering of \$50,000 bail – equivalent to nearly \$500,000 today<sup>98</sup> – to each of the twelve defendants facing a low-level felony charge for allegedly being a member of the Communist Party. Occurring at the height of the “Red Scare” and public fear of the Communist threat during the post-World War II “McCarthyism” period, the Supreme Court criticized the trial and appellate courts for setting a “sum much higher than that usually imposed for offenses with like [five-year maximum] penalties,”<sup>99</sup> and for then accepting “[g]overnment demands and public opinion support [for] a use of the bail power to keep Communist defendants in jail before conviction.”<sup>100</sup> The Justices rejected the lower courts' calculation of a \$50,000 bail amount for each defendant.

The Supreme Court explained that the uniform bail had neither been “fixed by proper methods” nor decided “upon standards relevant to the purpose of assuring the presence of the defendant.”<sup>101</sup> The Court explained that statutory considerations should have led the trial judge to consider “the nature and circumstances of the offense charged, the weight of the evidence against [the defendant], the financial ability of the defendant to give bail and the character of the defendant.”<sup>102</sup> Instead,

The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.<sup>103</sup>

The *Stack* Court unanimously rejected the trial judge's embrace of the government's sweeping assertions, viewing the setting of a \$50,000 bail as an unlawful and “arbitrary act [that] would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against.”<sup>104</sup> The Supreme Court reminded lower court judges to stay true to the main “principles governing allowance of bail”<sup>105</sup> which prohibit excessive bail for the purpose of incarceration.

*Stack* advised that government prosecutors must produce specific evidence of a defendant's risk of

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<sup>97</sup> *Id.*

<sup>98</sup> U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX (CPI) INFLATION CALCULATOR <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited March 5, 2015).

<sup>99</sup> *Stack*, 342 U.S. at 7.

<sup>100</sup> *Id.* at 10.

<sup>101</sup> *Id.* at 5-6.

<sup>102</sup> FED. R. CRIM. P. 46(c).

<sup>103</sup> *Stack*, 342 U.S. at 5-6.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 7.

flight to justify “bail in an amount greater than usually fixed for serious charges of crimes.”<sup>106</sup> Second, *Stack* set forth that defendants’ constitutional right to bail for a non-capital crime is part of an accused’s “traditional right to freedom before conviction.”<sup>107</sup> Third, the Court advised that the tradition of pretrial release protects an accused’s right to a fair trial as it “permits the unhampered preparation of a defense,” “prevent[s] the infliction of punishment prior to conviction,” and reinforces the accused’s presumption of innocence.<sup>108</sup>

**“Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [of appearance] is ‘excessive’ under the Eighth Amendment.”**

The Supreme Court then addressed the vital question that every judge must answer after determining that money bail is required to secure a defendant’s re-appearance: How to determine a non-excessive amount? The Justices explained the rationale for demanding the deposit of a “sum of money” is that it would provide “adequate assurance that he will stand trial.”<sup>109</sup> The Court then defined the contours of excessiveness. “Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [of appearance] is ‘excessive’ under the Eighth Amendment.”<sup>110</sup>

Justice Jackson explained it was not the Supreme Court’s role to compute the “reasonably calculated” figure to ensure the defendant’s presence at trial. That would be left to the lower trial court or judicial officers. He did, however, caution that judges were “not free to make the sky the limit”<sup>111</sup> or to choose a high bail amount in order that the defendant “remain in jail.”<sup>112</sup> At the other end of the spectrum, defendants were not “entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.”<sup>113</sup> Justice Jackson spoke for the high court’s belief that a judge’s balanced consideration of statutory factors and of constitutional bail policy would lead to reaching a “reasonable” amount that would ensure the defendant’s appearance without being excessive. Justice Jackson emphasized that granting bail “always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.”<sup>114</sup>

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<sup>106</sup> *Id.* at 6.

<sup>107</sup> *Id.*

<sup>108</sup> *Stack*, 342 U.S at 4.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 5.

<sup>111</sup> *Id.* at 8.

<sup>112</sup> *Id.*

<sup>113</sup> *Stack*, 342 U.S at 10.

<sup>114</sup> *Id.* at 8.

### ***Legal Principles of Assessing Dangerousness***

*Stack v. Boyle* informs today's judges, prosecutors and defense lawyers that when judicial officers find it necessary to condition pretrial release on a money bail, they must abide by constitutional principles that prohibit excessive bail and require a "reasonably calculated" amount for the individual defendant. Thirty-six years later in *United States v. Salerno*,<sup>115</sup> the Supreme Court reviewed the constitutionality of an additional factor that judicial officers can consider to deny bail: the defendant's "dangerousness."

The Supreme Court's 5-4 ruling in *Salerno* provided federal prosecutors and judges with the power to incarcerate before trial a select group of violent-prone defendants for whom the government established by clear and convincing evidence that *no* condition of release "will reasonably assure . . . the safety of any other person and the community."<sup>116</sup> The Court ruling rejected the defense argument that a no-bail judicial order for defendants considered dangerous constituted an excessive bail. The majority relied on an accused's guaranteed right to counsel to protect defendants, like Salerno, against prosecutors or judges unjustly depriving him or her of bail and hence liberty before trial.<sup>117</sup> In the Court's view, the assigned lawyer's ability to cross-examine prosecution witnesses, proffer evidence and call the defendant to testify was sufficient procedure to rebut the government's assertion of dangerousness.<sup>118</sup>

*Salerno* reaffirmed *Stack's* definition of the excessive bail clause – it must be "reasonably calculated" in an amount to prevent the defendant from fleeing the jurisdiction. A bail amount is excessive, said the *Salerno* Court, "if set at a sum greater than that necessary to ensure the defendant's presence at trial."<sup>119</sup> When the government established a clear and convincing interest in the threat to public safety, a judge could remand and hold a defendant represented by counsel in jail without bail.

**"[i]n our society liberty is the norm and detention prior to trial or without trial is the carefully limited exception."**

Chief Justice Rehnquist's majority opinion demonstrated deference to *Stack's* most essential principle – pretrial freedom – affirming that "[i]n our society liberty is the norm and detention prior to trial or without trial is the carefully limited exception."<sup>120</sup>

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<sup>115</sup> 481 U.S. 739 (1987).

<sup>116</sup> *Id.* at 743.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 751-52.

<sup>119</sup> *Id.* at 753.

<sup>120</sup> *Id.* at 755.

## PART 6. PRETRIAL RELEASE IN PRACTICE

While the law sets forth a clear preference for granting release on personal recognizance or on the least onerous conditions for people accused of committing crimes,<sup>121</sup> many judicial officials adhere to the customary practice of ordering a money bond as a condition of pretrial release for poor and low-income defendants.<sup>122</sup> In jurisdictions that do not provide counsel at the first bail hearing, these judicial decisions go unchallenged.<sup>123</sup> As a result, many low-income and indigent defendants with limited personal or family financial resources are left with two choices: scrape together the necessary money to pay a bondsman's ten percent fee or stay in jail until the case concludes. Availability of counsel at bail hearings, therefore, is indispensable in protecting pretrial liberty.

While *Rothgery* persuaded considerably more states and localities to guarantee legal representation,<sup>124</sup> today's public defenders and assigned lawyers still remain missing from first bail hearings in numerous state courts. Lawyers are never present at the first bail hearing in eight states,<sup>125</sup> while defenders appear infrequently or in token jurisdictions in 17 states.<sup>126</sup> In 11 other states, a poor person stands a 50% or better chance of obtaining an assigned lawyer's representation, depending upon where the arrest occurred.<sup>127</sup> In these hybrid states, however, unrepresented defendants still appear alone at "freedom hearings" conducted in many counties where counsel is not present.

**Lawyers are never present at the first bail hearing in eight states, while defenders appear infrequently or in token jurisdictions in 17 states.**

### ***The Necessity of Counsel at First Appearance and at the Pretrial Stage***

Without counsel, an accused's chances of regaining liberty are substantially prejudiced. Empirical data

<sup>121</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 34 (Standard 1-1.2: "In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release.).

<sup>122</sup> See COHEN & REAVES, *supra* note 42, at 1 ("Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases.").

<sup>123</sup> See Colbert, et al., *supra* note 3, at 1720 (data showing that "the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing").

<sup>124</sup> See *supra* notes 64-74 and accompanying text.

<sup>125</sup> The eight states include Alabama, Kansas, Michigan, Mississippi, Oklahoma, South Carolina, Tennessee and Texas. Colbert, *supra* note 8, at 432-436.

<sup>126</sup> Assigned defenders for an accused poor person appear at the first appearance only in a minority of local jurisdictions in Alaska, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, West Virginia and Wyoming. *Id.* at 443-453.

<sup>127</sup> The 11 states include Idaho, Kentucky, Louisiana, Minnesota, Montana, Ohio, Oregon, Rhode Island, Utah, Virginia and Washington. *Id.* at 436-443.

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supports the conclusion that a lawyer's advocacy is essential and makes a significant difference in judicial bail outcomes.<sup>128</sup> As discussed in greater detail in Part 7, studies confirm that a higher proportion of represented detainees charged with non-violent and serious offenses are released on recognizance or at significantly lower bail amounts.<sup>129</sup> A lawyer's representation is critical for gathering and presenting verified information, bringing family witnesses to court, and arguing successfully for a pretrial release option that allows poor and low-income defendants to regain liberty pending trial.

The need for counsel's presence at first bail hearings also connects to protecting an accused's right to a fair trial and ability to prepare a meaningful defense. Defense lawyers know they are needed at the beginning of a criminal prosecution to conduct an immediate investigation, build a trusting client relationship, and to spare clients the adverse trial consequences of pretrial incarceration. The longer the delay in meeting a client, the greater the substantial prejudice to an incarcerated defendant's opportunity to conduct a meaningful investigation, prepare for trial and build a defense. Without counsel, an accused's ability to interview witnesses, gather evidence, challenge the State's case, and make an informed decision whether to go to trial or plead guilty is severely impaired.<sup>130</sup> Additionally, an unrepresented detainee is much more vulnerable to remaining in jail pending trial and suffering the collateral consequences of incarceration, such as losing a job, failing to support his or her family, defaulting on loans, being evicted from a home, and ultimately receiving a harsher sentence.<sup>131</sup> As the *Rothgery* Court explained, "certain pretrial events . . . may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at these events in order to enjoy genuinely effective assistance at trial."<sup>132</sup> First bail hearing representation is one of these critical pretrial events.

Despite developments since *Gideon*, today's indigent defendants face significant obstacles in obtaining access to counsel at first bail hearings and thereafter.<sup>133</sup> Often they do not find a public defender or assigned counsel present to advocate and influence a judicial officer's decision to order freedom or affordable bail. Unrepresented detainees unable to afford bail will remain incarcerated for substantial periods in local

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<sup>128</sup> Colbert, et al., *supra* note 3, at 1752-1759.

<sup>129</sup> *Id.*

<sup>130</sup> *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (finding that the most critical period for a defendant is "from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important.").

<sup>131</sup> See OPEN SOCIETY JUSTICE INITIATIVE, THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION 28-32 (2011), available at <http://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pretrial-detention-02012011.pdf>; LOWENKAMP, ET AL., *supra* note 4, at 4 (finding those in pretrial detention received harsher sentences).

<sup>132</sup> *Rothgery*, 554 U.S. at 217 (2008).

<sup>133</sup> Colbert, *supra* note 8, at 429-453.

jails before an assigned lawyer’s scheduled courtroom appearance at trial<sup>134</sup> or until an earlier “critical stage” occurs.

The present state of initial appearance representation likely comes as a surprise to many members of the bar who consider defense counsel necessary to protect individual liberty. Indeed, many may assume counsel is present at the first bail hearing and mistakenly conflate a court’s *assignment* of counsel to the lawyer’s actual *presence and argument*. In reality, a lawyer’s assignment and advocacy are often two separate events: an assigned defense counsel may receive court notice of being appointed a person’s lawyer at or after the first bail ruling, but will often only appear at the next scheduled court date which is days, weeks or even months after the bail hearing.<sup>135</sup> The delay in counsel’s arrival may also be confusing to a public familiar with *Miranda* rights – as popularized by film and television – that entitle a defendant to consult with a lawyer during police interrogation.<sup>136</sup> As a result, people generally expect that a defendant has already obtained advice to remain silent or to speak before the first bail hearing.

People need only enter most state criminal courtrooms across the country that conduct first bail hearings to observe poor and low-income defendants appearing in court without counsel, either coming from jail or appearing on a video broadcast. Many unrepresented detainees speak without knowing the appropriate words to say to improve their chances for pretrial release. Others remain silent after hearing a judge warn that their words may be used against them at trial.

**People need only enter most state criminal courtrooms across the country that conduct first bail hearings to observe poor and low-income defendants appearing in court without counsel**

Hearings move quickly and may conclude in a moment or two, despite the severe collateral consequences to detainees of remaining in jail and risking “lost wages, worsening physical and mental health, possible loss of custody of children, a job, or a place to live . . .”<sup>137</sup> While judicial officers release a percentage of unrepresented defendants on recognizance or with supervision, many receive a money bail as a condition of release in many jurisdictions. With legal representation, defendants charged with non-violent crimes would stand a very good chance of being released without, or at a substantially reduced, money bail. One study reported that two and a half times as many represented defendants had regained liberty on recognizance compared to unrepresented defendants; an equal number received reduced and affordable bail.<sup>138</sup> The study

<sup>134</sup> *Id.*

<sup>135</sup> *See generally Rothgery*, 554 U.S. 191.

<sup>136</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that once a defendant requests a lawyer, the police interrogation ceases).

<sup>137</sup> INCARCERATION’S FRONT DOOR, *supra* note 33, at 12-13.

<sup>138</sup> Colbert, et al., *supra* note 3, at 1752-1753.



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also found that early representation results in substantial cost savings to taxpayers.<sup>139</sup> In 2000, the Department of Legislative Services of the Maryland General Assembly projected \$4.5 million in savings for the city of Baltimore as a result of providing representation at bail hearings.<sup>140</sup>

Representation at the first appearance facilitates a trusting attorney-client relationship and increases the likelihood of obtaining a favorable pretrial release outcome for indigent defendants. Encouragingly, among the 50 states, there is a distinct trend toward representation of indigent defendants when they first appear on a felony or misdemeanor charge and their liberty is at stake.

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### ***Unrepresented, Pro Se Defendants at First Bail Hearings***

Unrepresented defendants entering the legal system, however, are rarely aware and able to take advantage of the law's constitutional protections concerning pretrial release. Defendants appearing alone before a judicial officer lack the knowledge and skill to identify the statutory factors that would be persuasive in arguing for pretrial release on personal recognizance<sup>141</sup> or an affordable money bail. A state's general bail law, for instance, typically requires judicial consideration of an accused's residential and family ties within the community, current (or recent) employment or status as a full-time student, financial resources and care for dependents, character (including military service), previous appearances in court and prior convictions. Each factor can form the basis of a skilled lawyer's convincing argument that refutes a defendant's risk of non-appearance and significant danger to others and can affirm the individual's sense of responsibility for returning to court. A lawyer for an indigent person might emphasize that a client's limited financial resources impair his ability to pay an ordered bail amount, and instead point to factors that demonstrate sufficient trust to be supervised by a pretrial agent or receive an unsecured financial bond.

Few unrepresented defendants know, too, that the law provides a variety of *non-financial* options for judicial officers to consider when determining pretrial release, beginning with choosing the least onerous condition to return to court and respect public safety. These legally mandated alternatives include supervision by a reliable family member or by a court's pretrial agency to a judicial officer opting for the poor person's most daunting hurdle, the money bond. Unrepresented low-income defendants rarely know to ask for the less

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<sup>139</sup> *Id.* at 1757.

<sup>140</sup> *Id.* at n.122.

<sup>141</sup> The defendant promises to return to court; bail is not required. Should the defendant fail to appear, the defendant may be prosecuted for committing a new crime.

harsh financial condition of an unsecured bond. Unsecured bonds do not require collateral of value but places liability for the full amount of the bond on the defendant if he or she breaches his or her promise to reappear in court. This provides incentive for the defendant to reappear by providing for liability in the full amount of the bond in the event of non-appearance. A judicial officer also may allow defendants to provide a refundable ten percent cash deposit bond with the court, instead of paying the same amount to meet a bondsman's non-refundable ten percent fee. Competent defense lawyers would present these less onerous alternatives and educate judicial officers about clients' dire economic circumstances.

Every first bail hearing calls for the effective assistance of a lawyer, a trained and educated professional, who has the knowledge and legal expertise to apply favorable law, offer verified and relevant information and present persuasive reasons for the least onerous option to a judicial officer ordering pretrial release. For more than 80 years, the Supreme Court has recognized the difference between a skilled lawyer's advocacy from that of the *pro se*, "unaided layman [who] ha[s] little skill in arguing the law or coping with an intricate procedural system."<sup>142</sup> An accused standing alone is virtually defenseless, disadvantaged, and often silenced when a judicial officer orders an unaffordable financial bond as a condition of pretrial release. Guaranteeing poor and low-income people a meaningful right to be heard led the *Gideon* Court to recognize the importance of a lawyer's presence "at every stage of a criminal proceeding."<sup>143</sup>

**An accused standing alone is virtually defenseless, disadvantaged, and often silenced when a judicial officer orders an unaffordable financial bond as a condition of pretrial release.**

### ***Disparate Impact of Failure to Guarantee Counsel at First Bail Hearings***

African Americans and other people of color comprise the majority of the pretrial jail population. Studies reveal that "bail amounts set for black male defendants were 35 percent higher than those set for their white male counterparts."<sup>144</sup> Paying the bondsman's fee is onerous and unaffordable for many, and such income disparities make African Americans more likely to remain in jail because they are less likely able to afford bail.<sup>145</sup>

Counsel's advocacy at the initial appearance is essential to the fair administration of our system of justice. *Gideon's* main quest for equal and fair justice for indigent defendants rested upon the guarantee of counsel to create a more even playing field for low-income people entering the criminal justice system.

<sup>142</sup> *Powell*, 287 U.S. at 70.

<sup>143</sup> *Gideon*, 372 U.S. at 345 (quoting *Powell*, 287 U.S. at 68-69).

<sup>144</sup> Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994).

<sup>145</sup> Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 181 (2005).

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The lack of representation at first bail hearings helps explain the grossly disproportionate racial and class composition of today's pretrial jail population. African Americans, Latinos and low-income whites are the groups most likely to be found among detainees unable to afford money bail and a bail bondsman's fee.<sup>146</sup> Income and wealth disparities mean that these groups bear the brunt of states' failure to provide counsel at initial appearances and at the early stages of a criminal prosecution.

**The lack of representation at first bail hearings helps explain the grossly disproportionate racial and class composition of today's pretrial jail population.**

Nearly one out of four people who live below the poverty line are African American, making it more likely that an African American defendant will rely upon public defenders' or assigned counsel's representation.<sup>147</sup> Absent a lawyer's effective advocacy, unrepresented African American and Latino defendants experience less favorable outcomes at bail hearings than white defendants. "Blacks and Latinos have odds of making bail that are less than half those of whites with same bail amounts and legal characteristics."<sup>148</sup> Yet, the outcomes are considerably different and more favorable when defense counsel provide immediate, effective advocacy.<sup>149</sup> These data demonstrate the critical need for counsel's presence at first bail hearings as indispensable to a fair and just pretrial system.

Further, in drug offenses, African American and Latino defendants are 96% and 150% more likely, respectively, to be incarcerated before trial than white defendants. In property crime arrests, African American and Latino defendants are 50% and 61% more likely, respectively, to remain in jail than their white counterparts.<sup>150</sup> Scholars have concluded that African Americans and Latinos are "more likely to be

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<sup>146</sup> *Id.*; Lila Kazemian, et al., *Does law matter? An old bail law confronts the New Penology*, 15 PUNISHMENT & SOC'Y 43, 52 (2013). Other studies also have found significant racial disparities in pretrial detention. *See e.g.*, WASH. STATE MINORITY & JUSTICE COMM'N, A STUDY ON RACIAL AND ETHNIC DISPARITIES IN SUPERIOR COURT BAIL AND PRE-TRIAL DETENTION PRACTICES IN WASHINGTON, FINAL REPORT 7 (1997) ("Minority defendants . . . were less likely to be released on their own recognizance than others even after adjusting for differences among defendants in the severity of their crimes, prior criminal records, ties to the community and the prosecuting attorney's recommendation."); Charles M. Katz & Cassia C. Spohn, *The Effect of Race and Gender on Bail Outcomes: A Test of an Interactive Model*, 19 AM. J. OF CRIM. JUST. 161, 172, 179 (1996) (African Americans in Detroit were less likely to be released pending trial than whites, after controlling for prior felony conviction, probation status, other pending charges and variables measuring the seriousness of the crime); MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 23 (1993) ("Race of the defendant is a statistically significant factor when offense severity level is held constant in the setting of bail and pretrial release in Hennepin County," Minnesota's most populous jurisdiction.).

<sup>147</sup> U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011 (2013), available at <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

<sup>148</sup> Schlesinger, *supra* note 145, at 181; Kazemian, et al., *supra* note 146, at 52 ("Black and Latino defendants were . . . more likely to be incarcerated during the pretrial period than white defendants."). Studies conducted in other jurisdictions have found that White defendants typically receive better pretrial decisions and outcomes when compared to Black and Hispanic defendants. *See e.g.*, Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROB. 222, 238 (2004); Katz & Spohn, *supra* note 146.

<sup>149</sup> Colbert, et al., *supra* note 3, at 1752-1759.

<sup>150</sup> Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of*

preventively detained, to receive a financial release option, to post a higher bail, and to be unable to post bail to secure their release.”<sup>151</sup>

Racial biases, even if unconscious, may influence judicial officers’ decision-making at pretrial release determinations. “Research on labeling and stereotyping of black male and Hispanic offender reveals that court officials (and society-at-large) often view them as violent-prone, threatening, disrespectful of authority and more criminal in their lifestyles.”<sup>152</sup> Counsel’s assistance and advocacy is essential to challenge and overcome these stereotypes by providing a contrasting picture and presenting evidence.

African American detainees spend a longer time in detention, are convicted at higher rates, and receive harsher sentences. Empirical studies show that the longer a defendant spends in jail before trial, the more likely he or she is to be convicted and receive a more severe sentence.<sup>153</sup> Defendants released before trial are likely to obtain more favorable pleas and outcomes.

Honoring the right to counsel at the initial bail proceeding reinforces *Gideon’s* equal justice principle for society’s most vulnerable populations, who otherwise are likely to stay in jail for much longer periods. A prepared public defender or assigned lawyer is able to provide effective and zealous representation and utilize the law’s preference for pretrial release.

## PART 7. LAWYERS MAKE A DIFFERENCE AT FIRST BAIL HEARINGS

### *Defense Counsel’s Unique and Critical Role*

In our constitutional system of checks and balances, the criminal defense lawyer assumes the essential role of curbing judicial officers’ and prosecutors’ improper use of bail to keep an accused person in jail until trial or final disposition. No other party is charged with the ethical duty to challenge a bail amount that appears to be higher than necessary to ensure a defendant’s appearance in court. Defense counsel can object to bail that is so far outside a defendant’s means that it appears to have been determined without consideration of the “reasonably calculated” model for reaching a constitutional amount that the *Stack* Court mandated more than 60 years ago.<sup>154</sup> Unrepresented defendants are left bewildered and frustrated when judicial officers condition personal freedom on available money, rather than upholding the lofty principles of

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*Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 898 (2003).

<sup>151</sup> Demuth & Steffensmeier, *supra* note 148, at 238; Schlesinger, *supra* note 145, at 173-74 (summarizing literature).

<sup>152</sup> Demuth & Steffensmeier, *supra* note 148, at 226 (internal citations omitted).

<sup>153</sup> LOWENKAMP, et al., *supra* note 4, at 4.

<sup>154</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

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presuming innocence and favoring pretrial release.

Only a defense lawyer can provide the critical protection against unreasonable bail and respond with the vigor needed to educate judicial officers and prosecutors about indigent defendants' economic realities. This is especially true when an accused poses no "clear and convincing"<sup>155</sup> safety risk and the bail set will keep the poor person in jail "until it is found convenient to give them a trial."<sup>156</sup>

When the presence and strong advocacy of a public defender or assigned lawyer is missing, judicial officers can engage in bail-setting practices without concern that they will be challenged or reviewed by a higher court. Judges, magistrates and bail commissioners who are of a mindset to order an excessive bail can do so without any check on judicial discretion. Prosecutors, too, can use their influence and recommend an exceedingly high bail without facing objections from the absent defense lawyer.

**When the presence and strong advocacy of a public defender or assigned lawyer is missing, judicial officers can engage in bail-setting practices without concern that they will be challenged or reviewed by a higher court.**

Defense counsel's presence alone, though, will not be adequate to enforce pretrial release laws and constitutional principles intended to limit pretrial incarceration to "carefully limited exceptions."<sup>157</sup> As Justice Jackson explained years ago, bail was never designed to be a "device for

**Prosecutors, too, can use their influence and recommend an exceedingly high bail without facing objections from the absent defense lawyer.**

keeping persons in jail upon mere accusation . . . [but] [o]n the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty."<sup>158</sup> For these words to become accepted practice, defense counsel must be prepared and provide fervent representation in favor of release on recognizance with or without supervised conditions, or an affordable bail.

Defense counsel can begin advocating for a client's release by providing a judicial officer with verified information about where the person will live if released, existing family support for returning to court, and whether the defendant is employed, attends school, cares for family or is engaged in other productive activities that demonstrate responsibility and dependability. Verification requires sufficient time before the calling of the case docket to allow defense counsel to communicate with family, employers, school personnel and others. To be an effective advocate, defense counsel must be appointed sufficiently in advance of the first bail hearing and given opportunity to verify essential information.

<sup>155</sup> *United States v. Salerno*, 481 U.S. 739, 750 (1987).

<sup>156</sup> *Stack*, 342 U.S. at 8 (Jackson, J., concurring).

<sup>157</sup> *Salerno*, 481 U.S. at 755.

<sup>158</sup> 342 U.S. at 7-8 (Jackson, J., concurring).

Most importantly, defense counsel must confront judicial officers’ over-reliance on money bail rather than employing appropriate non-financial conditions for indigent and low-income defendants posing no significant risk to public safety. Defense counsel’s argument should highlight a low-income or poor client’s limited financial resources and point to state law that typically requires judicial officers to consider this factor in determining a reasonably calculated bail amount. While judicial discretion permits a range of “reasonable” amounts, judicial officers should always consider non-financial conditions first because of the discriminatory impact on economically-disadvantaged defendants. When a money bail must be imposed, judicial officers should avoid selecting a number that is so high that it is not a realistic option for a defendant. Judicial officers will need defense lawyers’ input to appreciate indigent and low-income clients’ living situations and evaluate what constitutes an excessive bail for each individual. For defendants living on a fixed income, government benefits or earning minimal wages, a judge may order a seemingly reasonable \$2,500 bond for non-violent offenses without realizing that it is unrealistic to expect the defendant to use such a large portion of limited financial resources, which are otherwise designated for basic expenses such as food, rent and utilities. For other defendants – like the 19-year old, unemployed African American young man living with his grandmother and charged with marijuana possession and who had no prior convictions and no prior arrests – a court’s insistence upon a \$3,000 bond or \$300 cash bail effectively denies the defendant any chance of regaining liberty for the duration of his case.<sup>159</sup> In this case, neither he nor his grandmother, who worked as a housekeeper, could obtain the \$300 bail amount needed to avoid spending 24 days in jail before a Maryland student-lawyer gained his release.<sup>160</sup>

**To be an effective advocate, defense counsel must be appointed sufficiently in advance of the first bail hearing and given opportunity to verify essential information.**

As zealous advocates, defense lawyers must inform judicial officers about low-income clients’ financial resources in order to ensure that they are educated to make accurate, “reasonably calculated” bail decisions. Defense counsel’s presence and forceful argument at first bail hearings is the game changer that will allow judicial officers to make judicious, selective use of money bail in an amount that is sufficient but not excessive for ensuring defendants’ future court appearances.

### ***Empirical Data Supports Defense Counsel’s Critical Role***

Empirical data shows that a lawyer’s effective advocacy at the bail stage makes a substantial

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<sup>159</sup> See *State v. Dante Williams*, Case No. 4B02193510, District Court of Baltimore City, Maryland (October 2012).

<sup>160</sup> *Id.*

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difference in judicial outcomes for many defendants at pretrial release and bail hearings. In the mid-1960s, the Manhattan Bail Project studied pretrial release of defendants in New York City charged with non-violent crimes, which demonstrated the value of providing judicial officers with dependable information about defendants' community ties at first bail hearings.<sup>161</sup> Law students interviewed detainees prior to the first hearing and obtained verified information about each defendant's residence, length of time living in the same place, family, employment/student status, financial resources, prior convictions and failure to appear in court. The law students and their supervising attorney then developed an argument that they presented to the precinct desk officer, who agreed to release the low-income defendants on recognizance by issuing a summons rather than requiring the posting of bail or remaining in jail pending trial.<sup>162</sup> Released defendants returned to court at a similarly high rate as defendants released on money bond.

In 1985, the National Institute of Justice ("NIJ") funded a study in three different localities that measured the effect of counsel's representation at first appearances.<sup>163</sup> In Passaic, New Jersey, Shelby County, Tennessee and Palm Beach, Florida public defenders were randomly assigned to represent people arrested within the previous 24 hours at pretrial release and bail hearings before a magistrate.<sup>164</sup> The NIJ study concluded that first appearance representation "had an interesting and important impact upon pretrial detention at each site," and that "test defendants obtained pretrial release much sooner," which also resulted in less onerous conditions of release and enhanced the overall likelihood of release.<sup>165</sup>

Public defender clients in Passaic, for instance, regained their freedom more than seven days sooner than unrepresented defendants who were included in the control group.<sup>166</sup> Shelby County and Palm Beach judges ordered release on recognizance considerably more for represented defendants as compared to unrepresented defendants, who typically received a financial or cash money bond.<sup>167</sup> Judicial officers' preference for release on recognizance meant fewer public defender clients received a financial bond and

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<sup>161</sup> DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES: 1964: A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE*, 9-21 (1964).

<sup>162</sup> *Id.* at 9-21; MALCOLM FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* 46 (1983).

<sup>163</sup> ERNEST J. FAZIO, ET AL., U.S. DEP'T OF JUSTICE, *EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD TEST: FINAL EVALUATION REPORT* (1985).

<sup>164</sup> *Id.* at 4.

<sup>165</sup> *Id.* at i-ii.

<sup>166</sup> *Id.* at 210. Passaic public defender clients waited a mean of 5.3 days until regaining their freedom, compared to 12.8 days for defendants without counsel. Shelby County indigent defendants reduced waiting time from arrest to release from 5.9 days to 3.4 days. In Palm Beach, public defender clients had jail time decreased from 6.9 to 5.4 days. The National Institute of Justice concluded that first bail hearing representation reduced jail time by almost 40% in Passaic, 16% in Palm Beach and 5% in Shelby County. *Id.*

<sup>167</sup> In Palm Beach, more than half (50.8%) of public defender clients were released on recognizance (ROR) compared to 39.5% of unrepresented control group defendants. In Shelby County, nearly 57% of represented defendants gained ROR compared to 44.2% of the control group. *Id.*

avoided paying the bondsman’s non-refundable fee.<sup>168</sup> Public defenders’ first appearance representation also led their clients to express more confidence in, and satisfaction with, the fairness of the criminal justice process.<sup>169</sup>

In 2002, the Baltimore City Lawyers at Bail Project (“LAB”) built on these previous studies and published the findings of an 18-month advocacy pilot project in which practicing criminal defense attorneys, paralegals and law students joined and represented 4,000 detainees at bail review hearings.<sup>170</sup> The detainees, all charged with non-violent crimes, had been held in jail on an unaffordable bail.<sup>171</sup> LAB’s efforts demonstrated the influence of a lawyer’s effective assistance of counsel. Baltimore City defendants charged with non-violent crimes who had been unrepresented at their first bail hearing, who subsequently appeared with counsel at a bail review hearing, gained release on recognizance two and a half times (34 percent to 13 percent) more often than similarly situated, unrepresented defendants.<sup>172</sup> Additionally, the lawyers succeeded in obtaining a reduced and more affordable \$500 bond for four times as many indigent clients (13 percent to 3 percent)<sup>173</sup> and gained a significant bail reduction that was more than six times as great as for unrepresented detainees.<sup>174</sup> Seen from a different perspective, LAB representation resulted in defendants remaining in jail for a median period of two days, compared to the nine days that similarly-situated defendants served without counsel.<sup>175</sup> LAB clients also were almost twice as likely as those without lawyers to be released on the same day they were represented by counsel (39 percent to 21 percent).<sup>176</sup>

**A legislative fiscal note for legislation proposing a statewide right to counsel at bail hearings projected savings of \$4.5 million in Baltimore City.**

Scholars’ research also revealed that LAB’s early representation resulted in significant cost-saving benefits and 6,000 bed-days saved in Baltimore City’s overcrowded pretrial justice system.<sup>177</sup> A legislative fiscal note for legislation proposing a statewide right to counsel at bail hearings projected savings of \$4.5 million in Baltimore City.<sup>178</sup>

<sup>168</sup> One out of three (33%) Shelby County defendants received a cash bond, while judicial officers relied on cash bond 54% of unrepresented defendants. In Palm Beach, judicial officers ordered cash bail for more than three out of five unrepresented defendants (60.5%) compared to less than half of public defender clients (49%). *Id.*

<sup>169</sup> *Id.* at 180-240; Colbert, *supra* note 3, at 1748.

<sup>170</sup> Colbert, *supra* note 3, at 1720.

<sup>171</sup> *Id.* at 1728-29.

<sup>172</sup> *Id.* at 1752.

<sup>173</sup> *Id.* at 1755.

<sup>174</sup> *Id.* at 1754.

<sup>175</sup> Colbert, *supra* note 3, at 1755.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1757.

<sup>178</sup> *Id.* at n.122.



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None of these findings showing the benefits of first appearance representation should come as a surprise. Defense counsel's effective and vigorous representation at first bail hearings provides judicial officers with the information they need to make informed, reasoned decisions. This reduces the likelihood of judicial error resulting in the ordering of a high, unaffordable bail that in turn leads to unnecessary pretrial incarceration and unnecessary financial and personal costs to an accused. Most criminal arrests involve less serious, non-violent charges that do not raise an issue of a defendant's dangerousness or risk of injury to another person or the community generally. In deciding bail for a defendant facing non-violent charges, judicial officers review the defendant's criminal history for prior convictions for crimes of violence or dangerousness. Once satisfied that the government has not proven by clear and convincing evidence that the accused poses a threat to public safety, judicial officers consider whether the defendant is a significant flight risk or whether the evidence of community ties indicates he or she cannot be trusted to return to court. Most judicial officers will welcome information showing that the defendant has strong community ties, including family and close friends to remind the accused about the scheduled court date or to accompany the accused to court. Reliable information about an indigent defendant's non-existent or limited financial resources is also indispensable in helping a judicial officer determine that pretrial supervision may be more appropriate than ordering a "reasonable" bail amount that is beyond the accused's ability to pay.

**The stakes for pretrial release are high: defendants gaining release can assist in the investigation, find witnesses, help prepare a defense, and present themselves in a more favorable light to the jury who decides guilt or acquittal or to the sentencing judge.**

For serious felonies involving a crime of violence or one that carries a substantial punishment if convicted, defense counsel's representation can be the difference in persuading a judicial officer that the government failed to meet its burden to justify the denial of bail and to order a reasonably calculated bail that makes it possible to regain liberty pending trial, rather than ensuring the defendant's incarceration until the case concludes. The stakes for pretrial release are high: defendants gaining release can assist in the investigation, find witnesses, help prepare a defense, and present themselves in a more favorable light to the jury who decides guilt or acquittal or to the sentencing judge. Data demonstrate that a lawyer's representation at first appearance results in a greater likelihood of a defendant gaining pretrial release<sup>179</sup> and receiving a less harsh sentence and favorable jury verdict.<sup>180</sup> That, too, is predictable – an unwritten courthouse maxim is that defendants coming from jail are more likely to return to jail and defendants coming

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<sup>179</sup> *Id.* at 1719.

<sup>180</sup> *Id.* at 1752-56.

to the court from home are more likely to return home.

Not everyone will agree that lawyers are a necessity at first bail hearings. Some prosecutors, judges and even defenders take the position that detainees are in jail for good reason, and insufficient justification exists for adding to the cost of public defenders' early representation in an already under-resourced system. The current culture of no representation or ineffective advocacy reflects the logistical obstacles that public defenders confront when they look for jail space to interview detainees, telephones to verify information, and available time to prepare an argument before a bail hearing is held. Unquestionably, change will require collaboration and a cooperative effort among the principal pretrial players for the system to realize the substantial cost benefits of early representation of counsel. These include a reduced pretrial population, added public confidence in a more just system that provides an equal opportunity for poor people facing non-violent charges to regain liberty, and a renewed focus on serious and violent crime that continue to plague cities and localities.

Additional studies and data collection would further reveal the benefits and cost justification for extending counsel's representation to the first bail hearing both for the individual accused of a crime and for creating a more efficient and less expensive pretrial justice system.

## **PART 8. RECOMMENDATIONS AND COMMENTARY**

**Based upon the foregoing report and prior ground-breaking scholarship and studies, The Constitution Project National Right to Counsel Committee has concluded that several important reforms are needed in order to make the promise of effective counsel during the first judicial bail hearing a reality.**

### **Recommendation 1: Jurisdictions should appoint counsel in a timely manner prior to initial bail and release hearings.**

Jurisdictions should ensure, whether through legislative or judicial action, that a public defender or appointed counsel represents every eligible defendant at the defendant's first appearance before a judicial officer who will decide a defendant's pretrial release and the terms of that release, or the necessity of bail. This is consistent with Recommendation 9 in the National Right to Counsel's 2008 report, *Justice Denied*, and the American Bar Association's 1998 national resolution calling for a lawyer's guarantee at the first judicial hearing at which bail is set.<sup>181</sup> Furthermore, such pretrial release hearings should be held within the first 24

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<sup>181</sup> Recommendation 9 of *Justice Denied* provides that "Prompt eligibility screening should be undertaken by individuals who are independent of any defense agency, and defense lawyers should be provided as soon as feasible after accused person are arrested, detained, or request counsel." JUSTICE DENIED, *supra* note 5, at 197. See also AM. BAR ASS'N., Res.

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hours following arrest, but in any case not later than 48 hours after arrest, for each criminal defendant in custody who faces the possibility of imprisonment.

An assigned defense lawyer should be appointed at the earliest possible time to ensure that he or she has the opportunity to interview the defendant prior to the first appearance hearing and to provide adequate opportunity to prepare an argument. Preparation includes access to a telephone to call family members, friends and other individuals who can verify information needed to establish a defendant's community ties, and access to a defendant's prior criminal history and appearance in court.

In addition, where possible, the same attorney who will handle representation at the trial stage should represent the defendant at the initial pretrial release hearing. In many jurisdictions, newly-hired junior attorneys are expected to handle pretrial bail hearings while more senior and experienced attorneys handle trials or plea negotiations, particularly in felony cases. To the extent possible, staffing at first appearance hearings should include both the senior and experienced lawyer and the newly-hired attorney. Each should be expected to continue representation and commence investigation and trial preparation in order to develop enhanced trust and an improved attorney-client relationship.

Public defender offices should also forge relationships with clinical programs at local law schools to expose law students to the issues surrounding early representation and to provide students with experiential learning opportunities. While students participating in such clinics can help address some staffing needs within a public defender's office, use of clinic students should not, however, substitute for the funding of public defenders' or assigned counsel's representation at first appearances. Jurisdictions should provide public defenders and indigent defense representatives with sufficient resources to meet their obligation to effectively represent indigent detainees at initial bail hearings.

### **Recommendation 2: The first appearance hearing should be held in public and should provide the opportunity for defense counsel, pretrial release services representatives and family members to present information supporting the least onerous pretrial release conditions appropriate.**

First appearance hearings should be held in public courtrooms and provide the opportunity for counsel, pretrial release services and the defendant's immediate family to attend and provide relevant information to the presiding judicial officer. Judicial officers must be informed about defendants' limited financial resources. In preparation for the hearing, counsel should develop arguments to persuade the judicial

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112D (Aug. 1998), recommending "that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set. . .".

officer to order the least onerous pretrial release conditions appropriate.

The financial and emotional health of a defendant's family situation can be irreparably harmed by the failure to obtain pretrial release. In addition, the presence of family ties can have a considerable impact on a defendant's likelihood of adhering to the conditions of his or her pretrial release and to his or her appearance at trial. For these reasons, a family's participation in the pretrial release hearing should be encouraged and taken into account.

**Recommendation 3: A pretrial release representative should present an objective risk assessment that measures a defendant's flight risk and danger to the community. The judicial officer should consider the risk assessment's recommendation at the defendant's first appearance, and should make the risk assessment available to the prosecutor and defense counsel, who also should be given an opportunity to be heard.**

A pretrial agency's recommendation, based upon verified information and factors contained in a validated risk assessment instrument, assists a judicial officer to make an informed pretrial release determination. A recent study from the Arnold Foundation suggests that courts can rely on "factors [] drawn from the existing case (e.g., whether or not the current offense is violent) and from the defendant's prior criminal history" to predict the likelihood that a defendant will pose a significant risk to public safety or failure to appear at trial.<sup>182</sup> The Foundation touts this model – the Public Safety Assessment Court – as a user-friendly risk assessment tool that will help courts "easily, cheaply, and reliably quantify defendant risk."<sup>183</sup>

Providing judges with a reliable risk assessment tool, coupled with the assignment of defense counsel who can add further insight and relevant information into the appropriateness of a defendant's pretrial release, is a path to embracing constitutional representation within a cost-effective, and cost-saving, objective release determination. The benefits and pitfalls of such a model, however, require continuous evaluation, including examination of potential disparate outcomes.<sup>184</sup>

<sup>182</sup> THE ARNOLD FOUND., RESEARCH SUMMARY: DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 4 (NOV. 2013).

<sup>183</sup> *Id.* at 5.

<sup>184</sup> See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 66 (2014) (arguing that some risk-prediction instruments may violate the Equal Protection Clause and demonstrate racially disparate outcomes).

**Recommendation 4: Judicial officers should order the “least onerous” condition of pretrial release, taking into consideration enumerated factors, including indigent and low-income defendants’ financial resources.**

A judicial officer should give full consideration to a non-financial condition, including unsecured collateral bond, before requiring that a defendant post money or collateral bond as a condition of release. As discussed in Part 5 of this Report, the Supreme Court has found that the Constitution requires a judicial officer to reasonably calculate conditions of release based on the criminal charge(s) in the case and in consideration of the financial resources and background of the individual. With this in mind, judicial officers should order the “least onerous” condition of release.

For most poor and low-income defendants, financial bond and money bail should be considered a harsh condition and used sparingly. A financial condition for pretrial release discriminates against defendants who lack resources and favors economically advantaged defendants. With the assistance of defense counsel, a risk assessment, pretrial release services and the defendant’s family, judicial officers should first consider non-financial conditions of release before considering and insisting upon a financial condition. Similarly, when considering a financial condition of release, judicial officers should look first to the unsecured bond, since it poses significantly less burden on poor and low-income people than a collateral bond secured by a bail bondsman, commercial surety or cash bond.

When judicial officers find a money bond necessary, they must determine a reasonably calculated amount. In such instances, judicial officers must inquire and consider information about a defendant’s financial circumstances. Financial and cash bond should generally be considered the most burdensome condition for an indigent and low-income defendant to meet, and should be used only when necessary to ensure a defendant’s appearance in court or to protect the public safety.

For pretrial release conditions to be “reasonably calculated,” judicial officers must be aware of the required factors that must be considered, as well as alternatives to traditional financial conditions such as diversion, pretrial supervision programs and unsecured bonds. To this end, states should provide all judicial officers adequate training regarding current precedent on pretrial release and how to weigh relevant factors for each individual defendant.

## **Recommendation 5: Jurisdictions should use savings realized through reduction in jail populations to provide the necessary resources for public defenders and appointed counsel to effectively represent defendants at initial bail hearings.**

The expansion of indigent representation to the initial pretrial release hearing is not without cost. Too many states and counties already fail to provide adequate resources to public defenders and appointed counsel who represent poor defendants.<sup>185</sup> Requiring counsel to be present and adequately trained, resourced and prepared for all initial pretrial release hearings will have an impact on state and county budgets. However, as Part 6 details, pretrial detention also represents a substantial cost for states and counties. It is estimated that states and counties spend more than \$9 billion annually to incarcerate defendants who are awaiting trial.<sup>186</sup> By providing counsel at initial pretrial release hearings, states and counties can avoid unnecessary and costly pretrial detention. For instance, it was estimated in 2000 that providing representation to defendants in the city of Baltimore, Maryland would save the state \$4.5 million in annual incarceration costs.

The federal Justice Reinvestment Initiative convenes states justice system stakeholders and policy leaders to devise data-driven approaches to criminal justice reform designed to generate cost savings that can be reinvested in high-performing public safety strategies.”<sup>187</sup> By using the Justice Reinvestment model and increasing the availability of pretrial release to those defendants who do not pose significant public safety or flight risks, states and municipalities can apply savings realized through reduction in pretrial incarceration costs to fund indigent defense services. There are currently 17 states participating in the Justice Reinvestment Initiative with an anticipated savings of \$3.3 billion over ten years, of which a projected \$374 million will be reinvested in some type of enhanced representation and public safety initiative.<sup>188</sup> Cost savings realized through such a model must flow to all segments of the criminal justice system, including indigent defense, and achieving even a fraction of such savings through a reduction in jail populations could provide the resources necessary to expand constitutionally required pretrial hearing representation.

Beyond the expenditures saved, there will also be significant secondary benefits to increased representation resulting in the reduction in unnecessary pretrial detention. Defendants who would otherwise be incarcerated can continue to hold their jobs and support their families. They will be better able to keep current on rent and mortgage payments and avoid eviction. Families will not have to arrange for alternative

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<sup>185</sup> JUSTICE DENIED, *supra* note 5, at 59.

<sup>186</sup> THE ARNOLD FOUNDATION, *supra* note 182, at 1.

<sup>187</sup> URBAN INST., THE JUSTICE REINVESTMENT INITIATIVE: EXPERIENCES FROM THE STATES 1 (July 2013), available at <https://www.bja.gov/Publications/UI-JRI-State-Experiences.pdf>.

<sup>188</sup> *Id.* at 4.

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child care or rely on social services while the breadwinner is incarcerated. These additional savings could further relieve burdens on state budgets caused by unnecessary pretrial detention.

### **Recommendation 6: The federal government and state governments should engage in greater data collection regarding pretrial representation and case outcomes.**

One of the challenges in confronting the lack of access to counsel at initial pretrial release hearings is a scarcity of data about the extent of representation and the outcomes for represented, compared with unrepresented, defendants. For this reason, states and counties should track and make publicly available data related to pretrial representation. This recommendation builds upon the National Right to Counsel Committee's Recommendation 11 of *Justice Denied*, which recommends that jurisdictions develop case reporting systems for all criminal and juvenile delinquency cases, which provide accurate data on the number of new appointments for counsel by case type, number, dispositions and the number of pending cases.<sup>189</sup> Such data should also include the time between arrest and counsel's assignment and the time between assignment of counsel and the initial pretrial release hearing. Governments should also track the results of the hearing, whether or not counsel was assigned, length of pretrial detention, amount of any bail or bond required, the ultimate resolution of the case, the sentence length, if applicable, and the defendant's race. To make such data collection possible, the federal government should provide grants to support state data collection.

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<sup>189</sup> JUSTICE DENIED, *supra* note 5, at 199-200.

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