

DO ATTORNEYS REALLY MATTER? THE EMPIRICAL AND LEGAL CASE FOR THE RIGHT OF COUNSEL AT BAIL

Introduction

Contrary to common belief, our legal system does not guarantee a lawyer to every person whose freedom is at stake. Instead, the indigent accused usually stands alone, without counsel to protect his liberty when first appearing at a bail hearing. Most states do not consider the right to counsel to apply until a later stage of a criminal proceeding--days, weeks or months after the pretrial release determination. During this time, many unrepresented detainees accused of nonviolent crimes languish in jail. Would legal representation at the bail stage make a difference? Is there an objective yardstick that would measure the value of counsel at this stage? Can the constitutional right to counsel be evaluated to demonstrate its value to the criminal justice system?

A social science study recently completed in Baltimore, Maryland answered these questions. The project was unique, in that it was designed not only to provide counsel to suspects at an important decision point in the criminal justice process, but also to provide a rigorous empirical examination of the effect of such representation. The study presented convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing. Moreover, the study revealed that early representation enhances defendants' respect for the system's overall fairness and confidence in assigned counsel.

For eighteen months at bail hearings, the Baltimore City Lawyers at Bail Project ("LAB") defended the liberty of nearly 4,000 lower-income defendants accused of nonviolent offenses. The study showed that more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount. 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.

This is no trifling matter, considering the consequences of pretrial incarceration. As jail populations continue to swell, correction officials must deal with the added dangers of severe overcrowding, while taxpayers pay the prohibitive costs of pretrial detention and new jail construction. At the same time, incarcerated detainees often lose jobs and face eviction from their homes; and families suffer the absence of an economic provider or child caretaker. Moreover, the delay in defense investigations and witness interviews caused by pretrial incarceration, impedes preparation of a defense and is a sure-fire prescription for miscarriages of justice and convicting innocents at trial. In brief, denying representation at the bail stage makes a mockery of the claim to protect individual liberty and provide justice. Without an attorney at bail, the pretrial release hearing becomes little more than a public relations gimmick. Lower-income pretrial detainees, who are disproportionately people of color,¹ continue to be likely to stay in jail, unable to make bail until their next court appearance.

The LAB study offers a national blueprint for improving pretrial release systems. If the right to counsel at bail became a reality in this country, the criminal justice community's players would pay greater attention to the front end of the process, where most arrestees face minor, lower court misdemeanor charges. Immediate decisions would be made to dismiss, to refrain from prosecution, or to offer diversion after arrest. At a time when many jurisdictions are seeing an increase in misdemeanor arrests because of "no tolerance police practices" and an increase in local pretrial jail populations, this representation model becomes essential for managing and reducing the costs of overburdened jail and court systems and for enhancing respect for those systems. . .

The study confirmed the remarkable results obtained when attorneys represented people at bail review hearings and showed the significant decrease in pretrial jail overcrowding at the new Baltimore Centralized Booking and Intake Facility. During the first nine months of the project, the detention population plummeted from 50 percent over capacity to 20 percent below capacity, resulting in substantial cost savings. . .

V. The Strategy For Change

The LAB study confirms that a lawyer's advocacy is the critical difference for determining whether indigent defendants will be released or will spend substantial periods of time in pretrial incarceration. The difference in this initial outcome has serious ramifications. Many nonviolent charges are ultimately dismissed or not prosecuted.¹²⁶ During pretrial incarceration, detainees' loss of freedom results in many losing jobs and homes. Taxpayers are left to pay the rising costs of detention, while absorbing the social and financial impact of newly dislocated family members. When criminal charges are prosecuted, delaying lawyers' immediate entry jeopardizes the right to a fair trial by severely impairing the opportunity to conduct a prompt investigation, interview prosecution witnesses, and prepare a meaningful defense. Pretrial detainees are more likely to be convicted and to receive a harsher sentence than people freed pending trial.¹²⁷ The right to counsel at bail hearings should be a reality in every state criminal court. The data is conclusive and it reveals manifest injustice, as well as costly inefficiency. Change in American law is likely to occur through two avenues: legislative enactment and funding, or judicial decision-making. . .

1. Bail As a Critical Stage

In the absence of a United States Supreme Court ruling¹⁵⁶ or a state court ruling¹⁵⁷ that bail is a critical stage of a criminal case, state governments have felt free to deny counsel to indigents for judicial pretrial release determinations. To achieve recognition that the right to counsel, as guaranteed by the Sixth and Fourteenth Amendments, requires lawyers at these proceedings, one must revisit the Supreme Court's 1974 decision in *Gerstein v. Florida*,¹⁵⁸ and address the reality of lawyers' absence from the early stages of the typical state criminal proceeding.

As previously detailed,¹⁵⁹ the doctrinal underpinnings for a constitutional right to counsel at bail hearings began in *Powell v. Alabama*,¹⁶⁰ where the Supreme Court reversed the defendants' capital convictions because they had been denied a lawyer until the actual day of trial. In holding that delayed representation deprived the defendants of a fair trial, the Court emphasized that an accused's due process

right required counsel's assistance during the "most critical period of the proceedings . . . the time of . . . arraignment . . . until the beginning of trial when consultation, thoroughgoing investigation and preparation [are] vitally important."¹⁶¹ Powell's unmistakable clear understanding of the lawyer's essential role from the moment charges are initiated until trial is the foundation from which to build a successful argument for the right to counsel at bail. However, the holding in Powell was limited to capital cases.¹⁶²

Powell's due process analysis was applied to the Sixth Amendment guarantee to counsel in *Gideon v. Wainwright*,¹⁶³ where the Court emphasized the importance of a lawyer's advocacy to achieve "a fair system of justice"¹⁶⁴ and to give substance to a poor person's right to be defended at felony trials. *Gideon* reiterated Powell's conclusion: every person accused of a serious crime must have "the guiding hand of counsel at every step in the proceedings to ensure that the trial right is meaningful."¹⁶⁵ Within the next decade, Court decisions extended an accused indigent's right to counsel to the pretrial,¹⁶⁶ as well as trial,¹⁶⁷ stages of misdemeanor and felony charges. *Gideon* and its progeny recognized that "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."¹⁶⁸

The Supreme Court formalized Powell's general reference to the "critical" arraignment-to-trial stage by mandating that states provide lawyers for indigent defendants at specific pretrial proceedings. In *United States v. Wade*¹⁶⁹ and in *United States v. Ash*,¹⁷⁰ the Court elaborated on criteria used in determining what constituted a critical stage. In *Wade*, the Court declared that counsel was needed to ensure that an accused "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."¹⁷¹ The Court added that counsel's presence at such a critical stage would "assure a meaningful 'defen[s]e,'"¹⁷² and "help avoid a potential substantial prejudice to defendant's rights."¹⁷³

In *United States v. Ash*,¹⁷⁴ the Supreme Court explained that states must provide counsel for indigent defendants "at trial-like confrontations," where the lawyer is needed "to act as a spokesman for, or advisor to, the accused."¹⁷⁵ The Court identified arraignment and preliminary felony hearings as such confrontations. At these proceedings, "[t]he function of the lawyer has remained essentially the same as his function at trial"--to guarantee that the accused had "counsel acting as [her] assistant."¹⁷⁶ These proceedings triggered a right to counsel because the "unaided layman [defendant] had little skill in arguing the law or in coping with an intricate procedural system."¹⁷⁷ A lawyer's presence was critical to balance "inequality in the adversarial process"¹⁷⁸ for the unrepresented accused.

Representation at bail fits within the Court's critical stage analysis under *Wade* and *Ash*. A lawyer's presence at bail "avoids substantial prejudice to defendant's trial rights"¹⁷⁹ by providing the opportunity for counsel to commence an immediate "thorough-going investigation"¹⁸⁰ and to prepare an adequate defense. The lawyer's advocacy also guards against an accused inadvertently making an incriminating statement in an effort to regain freedom.¹⁸¹ As the LAB study revealed, legal representation at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial.¹⁸² Since pretrial detention leads to higher conviction rates and longer sentences, the potential for substantial prejudice and to "derogate from the accused's right to a fair trial"¹⁸³ is great for unrepresented detainees. The LAB study will be an important tool in meeting *Ash*'s showing that a lawyer's advocacy is necessary to level the playing field for unrepresented indigent defendants. Unrepresented indigent defendants are rarely able to respond effectively to a prosecutor's bail argument that places great weight

on allegations of guilt and other considerations in seeking pretrial incarceration.¹⁸⁴

In *Gerstein v. Pugh*,¹⁸⁵ by a five-vote majority, the Court rejected counsel's necessity at the probable cause hearing, based on its mistaken belief that a lawyer would soon appear to represent the accused.¹⁸⁶ In fact, many jurisdictions deny representation at bail and do not guarantee counsel during significant portions of the pretrial stage.¹⁸⁷ The Court compounded its error when it inadvisably suggested that states could combine bail with probable cause determinations, thereby implying that bail determinations were not critical stages.¹⁸⁸ Consequently, it is easy to understand states' reliance upon *Gerstein* to authorize their refusal to assign counsel for poor people at bail hearings.¹⁸⁹

More than twenty-five years later, it is time for the Court to revisit *Gerstein* and to acknowledge the failure of states' experimentation with lawyerless bail/probable cause hearings. In the absence of defense counsel, too many judges are making incorrect pretrial release decisions, factual investigations are being significantly delayed, and detainees are spending inordinate time in overburdened jails at great social cost. While *Gerstein* did not find that a lawyer's absence at a probable cause determination "impair[ed] a defense on the merits",¹⁹⁰ it is doubtful that the Court would have reached a similar conclusion had it known that counsel would make such a tardy appearance.

Bail proceedings have much in common with the formal felony arraignment, which has long been recognized as a critical stage requiring counsel. At each proceeding, an accused is informed of the charges, enters a plea, is given notice of statutory and constitutional rights, faces the loss of pretrial liberty, and must cope with the "intricacies of substantive and procedural law."¹⁹¹ Since *Gerstein*, court decisions have blurred the distinction between an accused's Sixth Amendment right to counsel at arraignment of a felony indictment and at a lower criminal court arraignment. Once adversarial proceedings commence, said the Supreme Court, "a suspect has become an accused within the meaning of the Sixth Amendment"¹⁹² and he is entitled to the assistance of counsel. Recognizing that there is no perceptible difference between the lawyer's critical role at the arraignment stage, the Court need take but a short step to recognize that lawyers' presence at the outset is essential for protecting an accused's right to a fair trial and ensuring accurate pretrial release outcomes.

2. Fourteenth Amendment Due Process Right To a Fair Trial

In jurisdictions where the practice in state courts significantly delays the lawyer's entry for a significant period following the bail determination, a Fourteenth Amendment due process argument should succeed in revealing the damage to an accused's right to obtain a fair trial. Indeed in *Powell v. Alabama*, decided sixty-five years ago, the Supreme Court recognized that an accused is denied the fundamental right to be heard and to present a defense where a local court's "designation of counsel . . . was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid."¹⁹³ *Powell's* experience of meeting his lawyer on the day of trial will resonate with many current detainees, who do not learn their appointed lawyer's identity or confer with trial counsel until long after the bail hearing, and frequently in misdemeanor charges not until the day their case is scheduled for trial or resolved by plea.

As described above, lawyers' early representation is necessary to conduct a prompt investigation and to locate and interview witnesses necessary to build a successful defense. The longer an accused is without counsel, the less likely important witnesses will be available or willing to speak. Moreover, the

defense's ability to locate witnesses is greatly enhanced when a lawyer's advocacy succeeds in gaining a client's pretrial release. Many potential witnesses are more likely to cooperate and provide information when the lawyer, an unfamiliar face and frequently from a different race and class background, is accompanied by someone they know.

Pretrial detention also undermines the attorney-client relationship. Unrepresented detainees will usually have little confidence in a lawyer with whom they have not spoken, nor heard argue in court, and indeed often meet for the first time on the date of trial. Lawyers who remain passive sideline observers during the crucial stage following arrest add to an accused's doubt of counsel's ability to mount a meaningful defense. In practical terms, a lawyer's late appearance increases the probability that an accused will opt to plead guilty, rather than risk conviction at trial with an apparently unprepared lawyer. Incarceration without representation saps many people's will to fight, including detainees who steadfastly maintain their innocence. Consequently, a due process challenge, based upon a detainee remaining in jail and without counsel for a lengthy pretrial duration, may succeed in some jurisdictions.

3. Procedural Due Process

An accused's right to procedural due process protection should be triggered whenever a state's criminal procedure practices denies counsel to an accused at the bail stage where individual liberty interests are at stake. The LAB study shows that the risk of an erroneous pretrial release decision is unacceptably high for unrepresented detainees.¹⁹⁴ In such circumstances, the adversarial due process safeguard of guaranteeing counsel to poor people would appear necessary to constrain government action which otherwise would wrongly deprive an individual of personal liberty prior to trial. Indeed, if a court were to apply the Supreme Court's three-prong procedural due process balancing analysis in *Matthews v. Eldridge*,¹⁹⁵ it would surely tip the scales in favor of the accused: guaranteeing counsel would reduce the likelihood of an erroneous judicial bail decision and would protect the individual's weighty liberty interest against unjust pretrial incarceration at an insubstantial cost to the government. Litigation reformers, however, would soon discover a major obstacle blocking its reliance on *Matthews*. . .

Denying an accused access to an attorney at the bail stage deprives an accused meaningful participation in a judicial pretrial release decision that determines whether the individual remains incarcerated or is freed. In addition, the lawyer's absence during the crucial early stage of a criminal prosecution would be fundamentally unfair when it severely restricts an accused's ability to mount an adequate defense at trial. In many instances, a court could conclude that requiring an accused to appear alone at a bail hearing is one of those prohibited situations where "the State proceeds against an indigent defendant without making certain that he has access to the raw materials [namely an attorney] integral to the building of an effective defense." . . .

4. Best Bet: State Mandate to Provide Counsel

The most straightforward strategy for ensuring representation at bail would seek judicial enforcement of state statutes that require a public defender or assigned counsel to represent indigent defendants who face felony or misdemeanor charges. Following Supreme Court rulings in *Gideon v. Wainwright*²⁰⁸ and *Argersinger v. Hamlin*,²⁰⁹ every state legislature acknowledged government's constitutional duty to represent indigent defendants who are charged with a crime, and made explicit provision for some type of defender system that ensures counsel for the poor.²¹⁰ Often, a state's statute guaranteeing counsel

contains broad and sweeping language which would include representation at bail proceedings.

Maryland's public defender statute, for example, requires that legal representation be provided for every indigent defendant who faces a criminal or juvenile charge in its trial and appellate courts.²¹¹ The "primary duty" of Maryland's public defenders mandates that they "shall provide legal representation for any indigent defendant eligible for services. . . ." ²¹² Legal representation includes criminal and juvenile proceedings where a person is charged with a serious criminal offense in Maryland's misdemeanor and felony courts.²¹³ The Public Defender's duty to represent "shall extend to all stages of a criminal proceeding including but not limited to custody, interrogation, preliminary, arraignment and trial."²¹⁴

A judge would be hard-pressed to construe the statute's "all stages of a criminal proceedings" language as meaning anything other than including the public defender's duty to represent poor people at the bail stage. A court could easily construe the public defender's specific obligation to represent arrestees at the custody stage as requiring that they represent detainees at a pretrial release proceeding. Or a court could interpret the public defender's duty to defend people charged with criminal offenses at the arraignment stage as including representation at an accused's initial lower court appearance where a judge reviews bail and ensures that an accused is aware of the charges and is informed of specific rights.²¹⁵

Indeed Maryland's Court of Appeals recently followed the statutory construction in ruling that an unrepresented defendant had a statutory right to counsel at his initial appearance and could not waive his right to a jury trial in counsel's absence. In *McCarter v. State*,²¹⁶ the Court declared the public defender's statutory duty to represent indigent defendants "extends to all stages of a criminal proceeding."²¹⁷ In ruling that *McCarter* had the right to a public defender at his initial appearance, the Court explicitly noted that "the right to counsel under the Public Defender Act is significantly broader than the constitutional right to counsel."²¹⁸ The Court's sweeping language appeared to embrace indigent defendants' right to counsel at the bail stage.²¹⁹

A litigation strategy would seek a court's mandamus order to require public defender representation. Mandamus is appropriate when a government's administrative agency fails to carry out its explicit statutory responsibility.²²⁰ Mandamus is limited to enforce acts which are ministerial, rather than discretionary.²²¹ The *mandated act also must not involve a court ordering additional funding.²²² Here the Public Defender's duty is clear and non-discretionary: they must defend the poor at all stages of a criminal proceeding. The legislature provides general funding for this purpose, not specific appropriations for particular stages of a criminal proceeding. Consequently, additional funds are not required to begin redeployment.²²³ The Public Defender need only require its staff to commence representation at bail, rather than at the next scheduled court appearance. It may do so, for instance, by scheduling public defenders on a rotating basis to staff the bail review court. If the Public Defender should find that this redeployment necessitates additional staffing, it can request increased funding in its next budget to the legislature. It may very well be that redeployment and diversion and resolution of numerous cases at the front end will, in the long run, reduce the burden on the Public Defender and make increases in funding unnecessary.

Mandamus provides the judiciary with the opportunity to enforce poor peoples' right to counsel at all stages of a criminal proceeding. As such, reformers should seriously consider a mandamus petition when formulating a litigation strategy. Reformers also will want to consider, as a practical matter, whether its

state judiciary is willing to use this “extraordinary remedy”²²⁴ to protect the right to counsel for indigent defendants.

Conclusion

Throughout this nation hundreds of thousands of poor people, many charged with nonviolent offenses, languish in jail for days, weeks, and months because they had no lawyer at the crucial bail stage. No doubt the denial of counsel comes as a jolt to most Americans, including the legal profession, who share the mistaken belief that every accused currently receives the benefit of a lawyer’s advocacy when liberty is threatened.

Lawyers do make a difference. The randomized controlled experiment conducted by the Lawyers at Bail Project in Baltimore supports the conclusion that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense. The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting savings in taxpayer dollars. The Lawyers at Bail Project’s empirical data shows these benefits are real and not speculative.

We hope the odyssey of the Baltimore reformers will spur similar efforts--from bar associations and law school clinics to legislative and litigation initiatives--in other jurisdictions throughout the country. Such endeavors may well begin the same way as this one: with shock at the realization that a lawyer is often not provided to accused indigents at this initial stage. We hope that the fierce determination that fueled the efforts of all those who collaborated to achieve successes in Baltimore will inspire and instruct others to persist in the face of resistance from vested interests and prevail to vindicate the rights of the accused, and for the good of the criminal justice system and the public.

Our country prides itself on guaranteeing equal justice. Providing lawyers at bail is a fundamental step toward achieving this goal. Our ethical duty as a people and the legitimacy of our criminal justice system require that we make the guarantee of counsel at bail a reality for all.