

# The Constitutional Right to Counsel at Bail Hearings



BY ALEXANDER BUNIN

A judge or magistrate will decide whether an arrested person may be released while his or her criminal case is pending. This is true in each state and federal district in the United States. Some laws prohibit release. Others give a judicial officer discretion to detain a defendant. There are also various conditions for release. The initial hearing can have different names, but they all derive from the common-law practice of setting bail—traditionally an amount of money pledged by a surety—to ensure the defendant’s appearance at future proceedings. For uniformity, these myriad proceedings will be called “bail hearings.”

Whether a defendant receives a free lawyer to

advocate for his or her release at the initial bail hearing has been a function of statute or rule. Jurisdictions like Florida, Maryland, Colorado, Kentucky, and the federal courts all require defendants to be appointed a lawyer in time to advocate for bail. However, most states do not.

Hypothetically, persons can hire a lawyer to represent them at their initial appearance, but these proceedings often occur only hours after arrest, before the defendant or family members can retain counsel. Yet, because they have money, those persons are still much more likely to get released. In many jurisdictions, cash bail is set by a schedule, allowing release for payment before any court action takes place. Whether the decision to release is measured by money or by risk, financial wherewithal always helps. Generally, it is the poor who suffer most.

## The Sixth Amendment

Unanswered by the United States Supreme Court is whether the Sixth Amendment to the United States Constitution mandates a right to an appointed lawyer

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at bail hearings. When the Supreme Court upheld the federal Bail Reform Act of 1984, part of the basis was that the statute provided a right to counsel. (*United States v. Salerno*, 481 U.S. 739, 751 (1987).) Since *Salerno* (and a later case interpreting the Bail Reform Act), there have been no Supreme Court cases addressing the right to bail or the procedures accompanying that right. The closest, and the one that may ultimately lead to a constitutionally recognized right to counsel at bail hearings, is *Rothgery v. Gillespie County, Texas*. (554 U.S. 191 (2008).)

Walter Rothgery brought a civil rights lawsuit against a Texas county that refused to appoint him a lawyer until six months after his initial appearance in court. At initial appearances in Texas, magistrates must tell defendants their legal rights, ask whether they are requesting appointed counsel, and review probable cause. (TEX. CODE CRIM. PROC. ANN. art. 15.17.) If allowed by law, they must admit each person to bail. However, Rothgery did not complain that he was denied

The New York Court of Appeals stated, “There is no question that ‘a bail hearing is a critical stage of the State’s criminal process.’” (*Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010).) The Connecticut Supreme Court also found that the defendant’s bail hearing is a critical stage. (*Gonzalez v. Comm’r of Correction*, 68 A.3d 624, 63536 (Conn.), *cert. denied*, 134 S. Ct. 639 (2013).) Even before *Rothgery*, bail hearings were found to be critical stages of trial by courts in Pennsylvania, New Jersey, and North Carolina. (*See Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007); *State v. Fann*, 571 A.2d 1023, 1026 (N.J. Super. Ct. Law Div. 1990); *State v. Detter*, 260 S.E.2d 567, 583 (N.C. 1979).)

This makes sense. Critical stages of trial include all pretrial proceedings where a lawyer’s presence can assist the defendant. (*See Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (plea negotiations); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *United States v. Wade*, 388 U.S. 218 (1967) (postindictment lineup); *Hamilton v. Alabama*, 368 U.S. 52 (1961)

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reasonable bail, and he did not object that he lacked counsel when bail was initially set.

The importance of *Rothgery* is that the Supreme Court held that his right to counsel “attached” at the initial appearance in court. *Rothgery*, and previous Supreme Court cases, held that once the right to counsel has attached, the Sixth Amendment requires that defendants be represented by counsel at any “critical stage of trial.” The unanswered question—because bail was not contested in *Rothgery*—is whether an initial bail hearing is a critical stage of trial.

Clearly, the mere finding of probable cause does not make an initial appearance a critical stage of trial. (*Gerstein v. Pugh*, 420 U.S. 103 (1975).) Prior to *Rothgery*, Texas courts of appeal found counsel was unnecessary at an initial appearance, but were careful to add that bail was not an issue in those cases. (*See, e.g., Green v. State*, 872 S.W.2d 717, 718 (Tex. Crim. App. 1994).)

### **A Critical Stage of Trial**

Since *Rothgery*, two states’ highest courts have found a bail proceeding to be a critical stage requiring counsel.





(arraignments.) The Court in *Rothgery* held that “[t]he cases have defined critical stages as proceedings between an individual and agents of the State (whether ‘formal or informal, in court or out’) that amount to ‘trial-like confrontations,’ at which counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’” (554 U.S. at 212 n.16 (citation omitted).)

Forty years ago, in a lawsuit over conditions and procedures at the Harris County jail in Houston, Texas, a United States district judge provided an explanation of why counsel is necessary at bail hearings:

[I]f counsel can review and cogently represent his incarcerated client, a court might reduce or eliminate a money bond, permitting the client to be released from incarceration pending trial. . . . The accused are frequently ignorant of their legal rights and unaware of the steps which must be taken to trigger prompt processing of the case pending against them. It must also be recognized that courts are more readily able to communicate with attorneys than prisoners and are more likely to rely upon the representations of an attorney in deciding whether to release a defendant pending trial or to dismiss the charges against him.

(*Alberti v. Sheriff of Harris Cnty., Tex.*, 406 F. Supp. 649, 660 (S.D. Tex. 1975).)

Recently, many persons studying this issue have agreed.

### Policy Support

The Constitution Project is a bipartisan, blue-ribbon panel of criminal justice system experts including current and former judges, prosecutors, defense counsel, police, and victim advocates. In March 2015, it issued its report *Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing*. (See <http://tinyurl.com/hsbrh4d>.) The committee included former FBI Director William S. Sessions, Former Deputy Attorney General Larry D. Thompson, prominent law professors, and policy analysts. The report made six recommendations, the first being: “Jurisdictions should appoint counsel in a timely manner prior to initial bail and release hearings.” (*Id.* at 36–37.)

In 2014, the Sixth Amendment Center and the Pretrial Justice Institute issued *Early Appointment of Counsel: The Law, Implementation, and Benefits*. (See <http://tinyurl.com/j7cnefr>.) The report stated:

[W]here no attorney is present to represent the indigent defendant, there is no one who can present evidence to the magistrate to demonstrate that the defendant is not a threat to public safety and should be released pending trial, or that the

defendant has ties to the community such that he will most assuredly appear at all court proceedings, or that the defendant does not have any resources with which to pay bail money.

(*Id.* at 9.)

In the March 2013 issue of the *Champion*, the magazine of the National Association of Criminal Defense Lawyers, NACDL President Jerry Cox and John Gross wrote in “The Cost of Representation Compared to the Cost of Incarceration: How Defense Lawyers Reduce the Costs of Running the Criminal Justice System”:

Several studies demonstrated the importance of providing counsel at a defendant’s first appearance before a judicial officer who has the power to take away the defendant’s liberty. It is at this critical stage of the proceeding where representation can influence the outcome of a case and where effective representation leads to greater efficiency and more accurate results.

Referring to studies in Baltimore and New York City, the article asserted that delaying the appointment of counsel makes no sense either financially or as a matter of justice. The Baltimore study found that advocacy by law students at initial bail hearings for unrepresented defendants increased the number of personal recognizance bonds and reduced the time defendants spent in jail. (Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *CARDOZO L. REV.* 1719, 1720 (2002).) The New York City study determined that case outcomes for detained defendants were much worse than for those who were released pending trial, leading to more costs for incarceration. (MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* (2012).) These deficiencies have been known for at least 50 years. (See Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 *U. PA. L. REV.* 959 (1965).)

### Advocacy Is Necessary

Many jurisdictions have become complacent about the importance of initial bail hearings because they have instituted “bail schedules.” These devices are implemented by standing orders or local rules. They set fixed amounts or ranges based upon the crime charged and sometimes defendants’ criminal histories. They generally do not take into account any other individual characteristics of defendants (employment, school, community ties, etc.), or defendants’ ability to pay a financial condition of release.

Issues of due process and equal protection arise

when a bail schedule is the de facto basis for release, without consideration of defendants' ability to pay, their likelihood to appear, or whether they can abide by conditions of release. Recently, a federal court held that strict adherence to a bail schedule, without regard to defendants' ability to pay, and without considering their individual characteristics, violates the due process clause of the Fourteenth Amendment. (*Jones v. City of Clanton*, No. 2:15-cv-00034-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015).) United States District Judge Myron Thompson wrote: "[T]he use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment." (*Id.*)

The United States Department of Justice (DOJ) filed a "statement of interest" in support of the plaintiffs in that case. The DOJ pleading asserted:

It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.

(Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-00034-MHT (M.D. Ala. Feb. 13, 2015), ECF No. 26.)

In other words, a way to ensure due process of law and equal protection is to address factors that do not automatically fix cash bail at rigid levels. If individual attributes of defendants were actually reviewed, and indigence was considered, the constitutional violations would be resolved.

Defendants' individual characteristics can highlight either mitigating or aggravating evidence, depending on the facts and how they are interpreted. Unlike the simplistic application of a formula (offense = amount of cash bail), defendants would benefit from a lawyer's advocacy. Defendants are unfamiliar with the issues at stake. Few understand which facts favor release and how to emphasize them to a judge. The poor suffer because their inability to pay money is not addressed. Persons of color are disproportionately affected. All suffer when their individual circumstances are not considered.

The result of this lack of advocacy is dramatic. Even one day in custody can cause a person to lose a job, miss school, or be unable to care for dependents. That is why although defendants can urge a reconsideration of their bail when counsel is appointed in the court of jurisdiction, it does not obviate the harm. Ultimately, any pretrial detention drastically increases defendants'

likelihood of a jail or prison sentence, increases potential recidivism, and decreases the chance for dismissed charges, an acquittal, or a noncustodial sentence. (*See* CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION* (2013).) Additionally, a reconsideration of the bail decision still denies the Sixth Amendment right to counsel at a critical stage of trial—the initial bail hearing. As the Supreme Court stated, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Salerno*, 481 U.S. at 755.)

### Recent Litigation

The road to recognizing a constitutional right to counsel at initial bail hearings is not yet paved. Unrepresented defendants are not likely to request appointed counsel at initial appearance, unless they are actually told they have that right. In most cases, no request is made and the issue is not preserved. Even if it was preserved, relief is not guaranteed. In some cases, a claimed violation of the right to counsel requires an analysis of prejudice. (*See* *Mickens v. Taylor*, 535 U.S. 162 (2002).) In other cases it does not. (*See* *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).) Actual prejudice may be difficult to attribute because causation between pretrial detention and an unfavorable disposition—while statistically significant—is difficult to show in any particular case.

For pretrial proceedings, there is the additional hurdle of showing that the deprivation affected the defendant's ability to get a fair trial. (*See* *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012).) For example, racial discrimination in the formation of the grand jury was held to preclude a fair trial. (*Vasquez v. Hillery*, 474 U.S. 254 (1986).) On the other hand, failure to dismiss an indictment for a lack of probable cause was deemed cured by a jury's verdict. (*United States v. Mechanik*, 475 U.S. 66 (1986).) Standing alone, denying counsel at a pretrial bail hearing is unlikely to be held as a basis to presume a defendant did not get a fair trial.

For those reasons, very little constitutional litigation over the denial of counsel at bail hearings is likely to occur in the trial or appeal of the average criminal case. This is why much of the work in this area comes from civil rights lawsuits. *Rothgery*, *Hurrell-Harring*, and *Jones* were all lawsuits attacking systemic violations, not individual defendants appealing criminal convictions. Those lawsuits were brought by nonprofit legal organizations, such as the Texas Fair Defense Project (*Rothgery*), New York Civil Liberties Union (*Hurrell-Harring*), and Equal Justice Under Law (*Jones*).

Equal Justice Under Law are young lawyers who have gone around the United States seeking litigation on behalf of poor unrepresented persons. (Shaila Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES, Oct. 23, 2015.) One of the organization's lawyers, Alec Karakatsanis, said, "Almost every state law already says that you have to consider

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a person's finances when you're setting bail." He went on, "It's not just that you have to consider it, it's that you can't keep someone in a cage just because they can't pay." (*Id.*)

### **Conclusion**

The United States Supreme Court has held that the right to counsel attaches at a defendant's initial appearance in court to face charges. Once that right attaches, counsel must represent the defendant at every critical stage of trial. The initial bail hearing is a critical stage of trial because a lawyer can show the magistrate why the defendant is likely to appear at future proceedings, why the defendant is unlikely to be a danger, and why conditions of release are suitable and do not punish the defendant for lack of money. This is not something unrepresented defendants can do. As in all other pretrial proceedings that the Supreme Court has applied the Sixth Amendment right to counsel, lawyers are necessary at initial bail hearings. ■