



When the Cheering (for *Gideon*) Stops: The Defense Bar and Representation at Initial Bail Hearings

By Douglas L. Colbert



early 50 years after the Supreme Court's ruling in *Gideon v. Wainwright*,¹ the criminal defense bar applauds the greater access to justice that indigent defendants enjoy today. Poor people accused of a crime can count on a lawyer's representation at trial and at critical pretrial stages of a criminal proceeding. Americans now think of legal representation as a birthright, helping to preserve "life, liberty, and pursuit of happiness" among their inalienable rights. But *Gideon's* promise of counsel to "any person haled into court,"² still holds unfulfilled guarantees of equal justice and an even playing field for an accused when first appearing at a judicial proceeding.

Throughout most of the country, assigned defenders are not present at the first bail hearing, leaving the accused indigent defendant without an attorney when liberty is at stake and a lawyer's advocacy could make the biggest difference in determining whether a judicial officer continues incarceration. Absent counsel, an accused is likely to receive an excessive or unreasonable bail. Those who cannot afford bail, including many charged with nonviolent crimes, will remain in jail between two and 70 days, waiting for their assigned lawyer's advocacy before a judicial officer. Taxpayers are left to pay the high cost of incarceration before trial.

This article suggests that the absence of representation at the beginning of a State criminal prosecution must come to a screeching halt. The criminal defense bar should take a leadership role and dedicate *Gideon's* anniversary to making certain that an accused's right to the effective assistance of counsel begins at the initial bail hearing. Indeed, guaranteeing vigorous representation should be the defense bar's number one priority.

***Gideon's* Gap: Assuring Representation at First Appearance**

Within the legal culture and social justice arena, few decisions illustrate more clearly the commitment to equal justice for a poor person accused of a crime than *Gideon v. Wainwright*, the Supreme Court's groundbreaking 1963 ruling. Before *Gideon*, it was commonplace for many local prosecutors to bring felony charges and to convict unrepresented criminal defendants in state court.³ In these jurisdictions, prosecutors knew that a defense lawyer would not be present and that an indigent defendant would represent himself or herself at trial. One can imagine the ease with which State prosecutors and judges could proceed without facing a defense lawyer's objections or challenges to their unbridled power.

Gideon's sweeping Sixth and Fourteenth Amendment right to counsel and due process right to liberty holdings transformed States' usual practice of prosecuting felony crimes without guaranteeing representation and replaced it with the newly created public defender or assigned defense counsel system. Within the next decade, the high Court extended the constitutional mandate of counsel to indigent defendants charged with misdemeanors,⁴ who comprise more than 90 percent of people entering local criminal court systems. By 1974, State criminal defendants could be assured of a public defender or an assigned counsel appearing at the relatively rare trial and at "critical"⁵ pretrial stages that the Supreme Court considered essential. The unanimous *Gideon* Court envisioned these evolutionary changes when it declared: "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.²⁶

The constitutional guarantee of counsel, however, has had little meaning for indigent defendants prosecuted in States and localities that have rejected the right to a lawyer's *immediate* representation at the initial judicial proceeding. Indeed, States relied upon the Supreme Court's 1974 rejection of counsel at the probable cause stage to justify nonrepresentation at the initial bail hearing when pretrial release is decided.⁷ The Court's ruling in *Gerstein v. Pugh* helped to muddy the constitutional waters of an accused's entitlement to counsel even further. Until the Supreme Court decided *Rothgery v. Gillespie County, Texas*,⁸ nearly 35 years later, confusion reigned over whether the right to counsel even attached at the initial appearance.⁹

Newly arrested defendants are likely to appear alone when initially facing a judicial officer in today's criminal court.¹⁰ Indeed, only 10 states guarantee counsel at the initial bail hearing;¹¹ the remaining states either fail to provide an assigned counsel at all¹² or do so on a county-by-county basis.¹³ Nonrepresentation becomes even more alarming when one realizes the substantial difference a lawyer's advocacy often makes. When counsel stands with the typical defendant charged with a nonviolent crime and offers an effective argument, the chance of a judicial officer ordering pretrial release or an affordable bail increases significantly.¹⁴

A lawyer's informed and compelling advocacy often makes the difference, particularly when the charge against the accused involves no violence or injury to another. Bail amounts will vary from judge to judge, but without the information and argument provided by the defense lawyer, judicial officers are likely to make many incorrect decisions and exercise discretion that appears harsh and punitive. Unrepresented low-income defendants remain

The Maryland Experience

Without a lawyer's presence and zealous advocacy at the initial bail hearing, unreasonable, and frequently inexplicable, bail amounts result. This is a problem all over the United States. To document the excessive and unlawful bail practices that have become common in local courts, students at the University of Maryland Frances King Carey School of Law recently observed what happened to unrepresented defendants when they first appeared before a judicial officer in Baltimore County, Md., during randomly selected days in March 2012.¹⁵ As happens elsewhere in Maryland, the county's indigent defendants had not been represented by a public defender when a court commissioner (similar to a magistrate) made the initial release or bail determination. The county was one of the 21 Maryland jurisdictions (out of 24) that also did not provide counsel when a reviewing judge subsequently examined the commissioner's rulings (one to four days later). Until recently, incarcerated defendants in these 21 counties remained without the benefit of counsel's in-court advocacy during the first 30 days after prosecution commenced.¹⁶ Consider examples of the extraordinary decisions that commissioners and reviewing judges rendered in Baltimore County — without a defense lawyer present — for people charged with nonviolent crimes.

Shannon Nanth,¹⁷ a 35-year-old destitute mother, appeared before a commissioner on a criminal truancy charge based upon her daughter's excessive absences from school. If convicted, she faced a maximum 10-day punishment. Aware that Nanth missed her prior order to show cause hearing and had two prior misdemeanor convictions and two pending misdemeanor charges, the commissioner ordered \$25,000 bail and postponed the case for 30 days. The reviewing judge then revised the bond to \$2,501. Why \$2,501? Maryland law allows a defendant to post a 10 percent refundable deposit for bonds of \$2,500 or less; a judge's \$2,501 bail requires the financially strapped defendant to pay a bail bondsman's *nonrefundable* 10 percent fee.

Paul Ballard, a financial manager, allegedly had been feuding with his neighbor, a police officer, who charged that Ballard damaged his car by "mule-kicking" it. Arrested for the misdemeanor crime of malicious destruction of property, the commissioner set bail at \$250,000. The reviewing judge indicated he was prepared to reduce the bail until Ballard complained about his neighbor. The judge explained his concern for the police officer's safety and maintained the \$250,000 bail amount. To regain freedom, Ballard paid the bondman's \$25,000 fee.

Eighteen-year-old **Jalon Long** appeared before a commissioner on drug possession and intent to sell charges related to possession of marijuana and four "small bags" of cocaine. The commissioner ordered \$250,000 bail. The reviewing judge reduced the amount to \$100,000. The accused had no prior convictions or failures to appear in criminal court.

A \$25,000 bail bond for a mother charged with her child's truancy. A \$250,000 bond for allegedly damaging a neighbor's car; a similar \$250,000 bond for a defendant engaged in a potential low-level drug transaction. Do these exceedingly high bail amounts sound familiar? Lawyers may be more accustomed to the "reasonable" bail amount that often is still considerably beyond the low-income defendant's limited resources. For instance, would a destitute parent find the reduced \$2,501 bond reasonable? Would most 18-year-olds be able to take advantage of a bail "lowered" to \$100,000? The prepared lawyer might have gained their release on recognizance or persuaded a judicial officer to order a "reasonably calculated"¹⁸ amount that considered the individual's financial circumstances. The represented defendant would likely have been spared paying the bail bondsman's nonrefundable 10 percent fee.

the most vulnerable to suffer the consequences of an erroneous bail decision because they lack the money to post a higher amount. When charged with nonviolent crimes, the arrest process becomes the punishment, and the taxpayer picks up the costly expense of unnecessary jailing. Counsel's advocacy and counsel's devotion to a client's liberty are necessary change agents for pretrial justice reform.

It is time for public outcry by the criminal defense bar. Since 2008, when the Supreme Court in *Rothgery* cited NACDL's valuable research,¹⁹ the organization has taken a visible role as amicus in asserting indigents' right to counsel at the initial appearance in crucial state court rulings.²⁰ Now it must go one step further and champion the *constitutional* right to counsel for indigent defendants when they first enter each state's judicial arena. NACDL members of the private bar need to take a public stand that explains a lawyer's essential role at the beginning of a criminal prosecution. Public defenders also are crucial in asserting the need for counsel; they must give the highest priority to defending clients' liberty and fair trial rights at the initial bail hearing. As the leading criminal defense organization, NACDL is in position to sound *Gideon*'s trumpet of equal justice and summon support from judges, prosecutors, corrections, and other criminal justice partners, as well as the communities the defenders serve. Together, the stakeholders can make clear that nonrepresentation of indigent defendants threatens the legitimacy, integrity, and efficiency of the justice system.

Gaining a client's release at the bail stage often results in a better case outcome. It also avoids an accused being dismissed from work, evicted from home, and unable to care for dependent children and elders while incarcerated.

Ensuring legal representation at the initial bail hearing will require a significant cultural shift in the administration of pretrial justice. For decades, the principal players have accepted the status quo and conducted initial bail proceedings without an assigned defender present to protect the rights of an accused and the interest of the public. While it may seem odd for the impartial judge and "minister of justice"²¹ prosecutor to administer fairness without guaranteeing a lawyer for the accused, it is even more perplexing that the criminal defense bar has not registered a louder protest. Defense attorneys know that a lawyer is a "necessity and not a luxury"²² for protecting poor people's freedom rights. *Gideon*'s basic maxim, delivered nearly a half-century ago, must now translate to defenders and to the private defense bar demanding legal representation for the poor.

Changing Culture: Assigned Lawyers Fighting the Good Fight

Every criminal defense lawyer knows the challenge of defending a person accused of a crime. It begins with the constant, exasperated refrain from friends, family, and colleagues: "How can you defend those people?" It continues with the lonely battles that the conscientious lawyer wages as the decided underdog against the State's formidable and well-resourced law enforcement and crime-fighting apparatus. The David and Goliath setting proves attractive to many private and public defenders. They enjoy the challenge of protecting the individual against the powerful government and of standing as a guardian of freedom for the politically powerless, while thwarting potential abuse of discretion by prosecutors, police, and judicial officers.

Public defenders face particular obstacles in seeking equal and fair justice for their indigent clientele. Elected officials and the media often vent their animus toward the accused, who are disproportionately poor and of color and who may be tied to an unpopular group, such as the immigrant population. The private defense bar is aware of the near-impossible professional demands placed on the typical public defender, who invariably has too many clients and too few investigators, staff, and resources to

meet the ethical standards of managing a caseload that stretches beyond accepted professional boundaries.

Few would quarrel with the notion that an even playing field for the accused requires the assigned counsel or public defender to present a well-argued, prepared, fact-supported, persuasive, and passionate argument. Caseload responsibilities and staffing limitations, however, make that a formidable challenge at the different stages of a criminal proceeding — particularly at the first appearance or judicial bail hearing. Logistics, for example, present different hurdles to overcome. Defenders require cooperation to locate and conduct a confidential interview of an incarcerated client before hearings begin. The attorney must attempt to verify information for the judicial officer's consideration — a difficult prospect considering a public telephone is not easily available and incarcerated defendants often do not have contact information for friends, relatives, and employers on hand. Additionally, a defender faces an uphill battle when seeking to persuade a judicial officer to order an indigent client's release or a meaningful bail reduction. Many judicial officers are known for deciding cases swiftly, limiting argument, being pro-prosecution, and setting high bails that are far from the "least onerous" option that the law requires and impossible for defendants to meet.²³

How then can a defender increase the likelihood of success? Consider the following suggestions and law reform ideas.

Defenders must plan and carry out advocacy that provides judicial officers with clear reasons for ordering pretrial release. Nothing less than the assigned lawyer's prepared and earnest effort will suffice. The reasons must be supported legally and with factual corroboration.

Defenders must be assured of access to interview clients and to verify essential information before the initial appearance. Without access, defenders do not stand much of a chance of influencing a judicial officer's ruling. Ideally, the defense attorney will conduct the interview; when that is not possible, defenders should employ paralegals or seek volunteers who can be trained to obtain and corroborate the necessary information.

When preparing arguments, defenders should reach out to experienced lawyers who have a reputation

and record of success. Veteran attorneys still remember the days when they were taught by the top lawyers in the profession. Now it is time for these veterans to model persuasive advocacy for colleagues who must face the difficult, cautious, or skeptical judicial officer at the outset of a criminal prosecution. The experienced advocate can teach younger colleagues ways to educate a judicial officer about a client's limited financial resources, the law's preference for release, and the consequences of pretrial incarceration. Most important, veterans can teach younger defense attorneys how to apply the skills of persuasive argument at the initial bail hearing.

The defense bar can help raise the competence of colleagues who often say little on behalf of indigent clients seeking to regain their liberty. Frequently, the problem lies with the defender not always having met or spoken to the client, and having little familiarity with the facts that judicial officers might find persuasive in determining whether to order pretrial release: a person's residence, family, employment, schooling, military service, and particularly, limited finances. That may explain why law student observers in Baltimore reported that defenders speak an average of 32 seconds when attempting to protect a client from losing his or her freedom for up to a month until next appearing in court. While not much can usually be accomplished in a 32-second argument, that is still far better than the absence of any argument in jurisdictions in which defenders decline to appear and leave the unrepresented accused baffled as to what to say and what not to say. Moreover, while some defenders make a valiant effort to use available information effectively, others refrain from making passionate, convincing arguments. General requests for "reasonable bail, Your Honor," or arguments couched with "we submit," are the verbal equivalent of nails on a chalkboard, especially when a judge would welcome a stronger argument. Effective assistance of counsel must become a professional imperative.

*The defense bar must make a cultural shift and acknowledge that the initial appearance is a critical, and perhaps the most important, stage of a criminal proceeding.*²⁴ Criminal defense lawyers are aware of the substantial difference that occurs when a client regains liberty before trial. With a client's early assistance, counsel is likely to conduct a successful investigation and prepare a solid

defense. An improved attorney-client relationship develops too, and the released defendant has the opportunity to present himself or herself more favorably when returning to court. Gaining a client's release at the bail stage often results in a better case outcome. It also avoids an accused being dismissed from work, evicted from home, and unable to care for dependent children and elders while incarcerated.

Representation at the defendant's first appearance means that defenders are seen and heard at the outset of a criminal prosecution rather than days, weeks, or months later. Defenders are no longer seen as "soft"; they approach the first appearance with a sense of urgency and collaboration. Spirit and morale are enhanced when colleagues bring their best arguments for persuading judicial officers. Sometimes, the "best" argument centers on the nonviolent charge or the client's nonviolent past. Other times it may focus on the client's consistent record of appearing in court, lack of prior or recent convictions, or current employment and student status. Frequently, the defender should point to the minimal resources available to low-income defendants and urge pretrial supervision, unsecured bonds, or the 10 percent refundable option to the full bond. Other occasions call for strenuous objections to exceedingly high and near-impossible financial conditions for a jailed defendant. Taken together, defenders ought to view liberty at the initial appearance as important as they view freedom at trial.

When judicial officers rule against a defendant who presented a compelling claim for release, counsel must consider legal challenges. Filing a writ of habeas corpus and seeking reconsideration from the judge who ordered the bail based on new evidence demonstrates persistence and a pro-active approach that represents a significant departure from the usual "do nothing until the next appearance" practice. Indeed, speaking to the prosecuting attorney about newly discovered information also may lead to a consensual agreement regarding bail, particularly for the nonviolent offender. Defenders should propose procedures for reviewing detainees' bail conditions at regularly scheduled weekly hearings.

In summary, counsel for an accused must deliver the same full effort at the initial appearance that is required whenever a client's freedom lies in the balance. While time is limited, the lawyer is still able to present a focused, planned, and targeted argument for pretrial release, especially when the outcome may (1) deprive an accused of liberty for lengthy periods until trial, (2) impact dependents who rely on the detainee's care and finances, and (3) lead to coerced pleas and harsher punishments. Because the consequences are so serious, defenders should receive additional training and supervision. The first appearance — the freedom hearing — ought to be given the highest attention.

Conclusion

The culture of passive acceptance of pretrial incarceration of unrepresented detainees must change. Defenders can no longer remain on the sidelines when an indigent client's liberty is being decided at the initial appearance before a judicial officer. Assigned defenders for the accused must embrace their role as advocates for protecting individual freedom that will reduce the excessive cost of pretrial incarceration at taxpayers' expense. In States' criminal justice systems to which few criminal cases are tried and virtually every local criminal defendant appears at a first appearance judicial hearing, the attitude and approach of defenders should undergo a dramatic shift. After a criminal prosecution commences, defenders must be present and apply the same competitive and adversarial approach that they apply as advocates at trial. Attorneys for accused indigents must be seen and heard vigorously protecting clients' liberty and fair trial rights at the initial judicial proceeding. While the focus of representation almost invariably is upon procuring a dismissal or not guilty verdict, defenders should highlight the importance of pretrial liberty to their clients and to their cases. Defenders must fully appreciate the consequences of a client remaining incarcerated before trial — "even for a brief time."²⁵

NACDL and the criminal defense bar will assume a pivotal role in determining whether *Gideon's* promise of equal justice to the indigent and low-income defendant becomes a reality. NACDL's creation of a Pretrial Justice Task Force will assist the organization in persuading public defenders to work with experienced counsel, deploy available staff to the initial bail hearing, and devote more attention to first appearance preparation and supervision. The task force will attempt to identify models that will allow public defenders to enhance representation, and show that the savings from pretrial supervision will offset the additional cost for public defenders'

advocacy at the initial bail hearing. Clients and taxpayers deserve as much.

NACDL's diverse membership of private and public defenders has an excellent opportunity to join forces and explain why the criminal justice community sees first appearance representation as necessary toward fulfilling *Gideon's* promise of equal justice. The organization's renewed commitment and outburst of energy should take advantage of the support expressed by U.S. Attorney General Eric Holder and the Department of Justice, the American Bar Association, the Pretrial Justice Institute, and the growing pretrial community that favors changing a legal culture. Recent Supreme Court and State high court rulings in New York and Maryland, for instance, point to increased judicial understanding of counsel's importance for detainees awaiting trial.²⁶ Building a criminal justice coalition that includes the judiciary, prosecutors, corrections, academics, researchers and data collectors, and analysts will add to a high court's appreciation when it considers the constitutional right to counsel at the initial appearance. *Gideon's* 50th anniversary is the ideal time for the criminal defense community to renew its vow and commitment to pretrial freedom and justice for poor people accused of crime.

Notes

1. 372 U.S. 335 (1963).

2. *Id.* at 344.

3. Since 1938, an accused's Sixth Amendment right to counsel guaranteed representation at a federal felony trial. *Johnson v. Zerbst*, 304 U.S. 458 (1938); see FED. R. CRIM. P.44(a) (stating that federal rules provide for representation at the accused's first appearance). Prior to *Gideon*, state court felony prosecutions typically proceeded without counsel for the indigent defendant. *Betts v. Brady*, 316 U.S. 455 (1942).

4. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

5. In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court identified the lawyer's presence at certain pretrial stages, such as a defendant's postindictment lineup, as critical to ensure a fair trial and "in coping with legal problems or meeting his adversary." *Id.* at 223. The Court recently explained that "what makes a stage critical is what shows the need for counsel's presence." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212 (2008). *Rothgery's* language suggests that a lawyer's advocacy at the initial bail hearing fits within the Court's critical-stage analysis.

6. 372 U.S. at 344.

7. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (reasoning that the probable cause determination is not a critical stage requiring counsel).

8. 554 U.S. 191 (2008) (affirming earlier rulings that held the right to counsel attaches at the initial appearance).

9. In *Rothgery*, Justice Souter's 8-1 majority opinion pondered why the Supreme Court was asked to rule on the same "twice settled" issue that previously had established an accused's right to counsel attached at the initial appearance. *Id.* at 344. See *Brewer v. Williams*, 430 U.S. 387 (1976); *Michigan v. Jackson*, 475 U.S. 625 (1986).

10. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 383-412 (2011).

11. *Id.* at 389-94.

12. *Id.* at 394-400 (showing 10 states deny representation uniformly within the state).

13. *Id.* at 400-12.

14. 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) (showing that represented defendants charged with nonviolent offenses are 2.5 times as likely to be released on recognizance and 2.5 times as likely to receive affordable bail).

15. Students noted the frequent success that private counsel encountered in persuading presiding judges to gain clients' release or a substantially reduced amount.

16. Earlier this year in *DeWolfe v. Richmond*, No. 34, 2012 WL 10853 (Md. Jan. 4, 2012), the Maryland Court of Appeals unanimously ruled that indigent defendants' statutory right to counsel per the statewide Public Defender Act guaranteed indigent defendants representation at the initial appearance and at the subsequent bail review hearing. Within months of this ruling from the state's highest court, the Maryland Legislature repealed the statute and maintained nonrepresentation at the initial appearance. Maryland indigent defendants are now guaranteed counsel at the bail review hearing. See House Bill 261 (2012).

17. Defendants' correct names and district court case numbers have been provided to *The Champion*.

18. *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (noting that requirement of bail bond or money deposit that could be lost serves to assure the accused's presence at trial, and that "[b]ail

set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment").

19. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 204 (2008).

20. See *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010) (concluding that bail is a critical stage of a criminal proceeding requiring New York judges to assign counsel to indigent defendants at the first judicial proceeding following arrest).

21. Colbert, *supra* note 10.

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

23. In *Salerno v. United States*, 481 U.S. 739 (1987), Chief Justice Rehnquist's majority opinion recognized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" that is reserved in situations in which no condition of release would ensure an accused's future court appearance or public safety. *Id.* at 755; see also ABA Standards for Criminal Justice: Pretrial Release, § 10-1.2.

24. *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (noting that the time from arraignment to the beginning of a trial is "perhaps the most crucial period" for defendants).

25. *DeWolfe v. Richmond*, No. 34, 2012 WL 10853, at *18 (Md. Jan. 4, 2012).

26. See *supra* text accompanying note 5, referring to the Supreme Court ruling in *Rothgery*. Further, see *supra* text accompanying notes 10 and 16, referring to the New York Court of Appeals ruling in *Hurrell-Harring* and the Maryland Court of Appeals decision in *DeWolfe v. Richmond*. ■

About the Author

Professor Douglas L. Colbert co-chairs

NACDL's Pretrial Justice Task Force. Since 1998, Professor Colbert and his Access to Justice students have focused on reforming states' pretrial systems to guarantee representation at the bail stage.



Professor Douglas L. Colbert

University of Maryland
Frances King Carey School of Law
500 W. Baltimore Street
Baltimore, MD 21201
410-706-0683
Fax 410-706-5856

E-MAIL dcolbert@law.umaryland.edu