EARLY APPOINTMENT OF COUNSEL

THE LAW, IMPLEMENTATION, AND BENEFITS

6AC SIXTH AMENDMENT CENTER

pji PRETRIAL JUSTICE INSTITUTE

ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

ABOUT THE PRETRIAL JUSTICE INSTITUTE

The Pretrial Justice Institute is a nonprofit that works toward safe, fair and effective pretrial justice by promoting reforms in arrest, bail and diversion decision-making. PJI aims for data-driven and informed policies across juvenile and adult pretrial justice systems to diversify outcomes influenced by demographics. PJI only supports pretrial detention in cases where defendants are a threat to community safety or demonstrate failure to appear in court.

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INTRODUCTION

The Sixth Amendment to the United States Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."[1]

Since *Gideon v. Wainwright* in 1963, it has been clear that the right "to have the Assistance of Counsel for his defence" means that a person accused of a crime, in both federal and state courts, who cannot afford to hire his own attorney, is entitled to have an attorney provided at government expense to defend him against that criminal prosecution.[2] Additionally, the "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," including those that occur before trial.[3]

What remains an open question is the precise *moment* in a criminal prosecution when counsel *must* be appointed to an indigent defendant in order to fulfill the promise of the Sixth Amendment. This paper suggests that the justice goals of the criminal court systems will be best served where every indigent defendant has appointed counsel from the earliest moment that the indigent defense system learns the defendant is being investigated, has received a summons to appear, is arrested, or has a charging document filed against him.

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1 U.S. Const. Amend. VI.

2 372 U.S. 335 (1963). *Gideon* was presumed to apply only to state court felonies. This right to appointed counsel has been expressly found applicable to juvenile delinquency cases, *In re Gault*, 387 U.S. 1 (1967), and to misdemeanors, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Alabama v. Shelton*, 535 U.S. 654 (2002).

3 *Missouri v. Frye*, 566 U.S. ___, No. 10-444 at 3 (March 21, 2012) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228 (1967))).

I. THE RIGHT TO COUNSEL

THE DIFFERENCE BETWEEN ATTACHMENT OF THE RIGHT TO COUNSEL, AND CRITICAL STAGES THAT CANNOT OCCUR WITHOUT COUNSEL PRESENT

In 2008, the United States Supreme Court said in *Rothgery v. Gillespie County*, as it had said many times before, that the right to counsel attaches when "formal judicial proceedings have begun."[4] The Court carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a "critical stage" at which counsel must be present as a participant.[5]

"Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . .".[6] In other words, according to the Court, the Constitution does not seem to necessarily require that defense counsel be present at the moment that the right to counsel attaches, but from that moment forward, no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

If the event that triggers attachment of counsel is not itself a critical stage, then that event can theoretically occur without counsel being appointed or being present; attachment of the right to counsel triggers the need to appoint counsel to represent the defendant at *future* critical stages. On the other hand, if the event that triggers attachment of counsel is itself a critical stage, then that event cannot occur unless the defendant is represented by counsel during the critical stage or has waived the right to counsel. And in theory at least there can be an event that is a critical stage, *during* which counsel must be present, but that does not trigger the attachment of the right to counsel beyond the event itself.

The Supreme Court has never set out a specific formula for how or how quickly counsel should be appointed once the right to counsel has attached.[7] What *Rothgery* makes clear is that there is a moment when the right to counsel attaches, and "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself."[8]

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4 *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 19 (June 23, 2008). See e.g., *Brewer v. Williams*, 430 U.S. 387, 388-899 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

5 *Rothgery*, at 19.

6 *Id*.

7 "We do not here purport to set out the scope of an individual's post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis." *Rothgery*, at 19 n.15.

8 *Id*. at 19.

II. APPLYING THE LAW

ATTACHMENT OF THE RIGHT TO COUNSEL AND CRITICAL STAGES IN EVERY-DAY CRIMINAL CASES

The right to counsel attaches, according to the Supreme Court, at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction."[9] The event triggering the attachment of the right to counsel may be the custodial appearance of the defendant before a magistrate who informs him of the charges upon which he has been arrested and determines the conditions of his liberty, without regard to whether a prosecutor is aware of the arrest;[10] or it may be the institution of prosecution "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," without regard to whether the defendant is in jail or at liberty.[11]

Over the decades, the Supreme Court has inch-by-inch delineated many criminal case events as being *critical stages*, though it has never purported to have capped the list of events that might potentially fall into this category. Events that are definitely critical stages are: custodial interrogations both before and after institution of prosecution;[12] preliminary hearings prior to institution of prosecution where "potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation;"[13] lineups and show-ups at or after initiation of prosecution;[14] during plea negotiations and at the entry of a guilty plea;[15] arraignments;[16] during the pre-trial period between arraignment until the beginning of trial;[17] trials;[18] during sentencing;[19] direct appeals as of right;[20]

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[9] *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 20 (June 23, 2008). *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

[10] *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 5-6 (June 23, 2008).

[11] *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)); see also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

[12] *Massiah v. United States*, 377 U.S. 201 (1964); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

[13] *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970).

[14] *United States v. Wade*, 388 U.S. 218, 236-38 (1967); *Moore v. Illinois*, 434 U.S. 220, 231 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).

[15] *Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

[16] *Hamilton v. Alabama*, 368 U.S. 52 (1961).

[17] *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).

[18] *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 37, 40 (1972); *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *In re Gault*, 387 U.S. 1, 36-37 (1967).

[19] *Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 6 (March 21, 2012); *Glover v. United States*, 531 U.S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003).

[20] *Douglas v. California*, 372 U.S. 353, 357 (1963); *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

probation revocation proceedings to some extent;[21] and parole revocation proceedings to some extent.[22]

If it were always the case that the right to counsel attached before any critical stage occurred, then it would be a fairly simple and straight-forward matter for the magistrate before whom a defendant appears to appoint counsel for an indigent defendant and that counsel could then be prepared for and present at the first critical stage following. But things are not so clearly ordered in our criminal justice systems and there are wide variations among jurisdictions in the procedures they follow.

A defendant may be arrested before or after the formal institution of prosecution. A defendant may be in custody or may be at liberty at the time of the first appearance before a magistrate. Law enforcement may arrest a defendant and wish to interrogate him, giving rise to the critical stage of custodial interrogation, before he is brought before a magistrate for the first appearance. A prosecutor may desire to offer a plea bargain to a defendant who is under investigation prior to that defendant ever being arrested or brought before a magistrate for the first appearance. The events in a criminal case proceeding can and do occur in almost any order at all.

To further complicate matters, there are complex logistics involved in determining whether a particular defendant is entitled to the appointment of counsel.

First, only a defendant who is indigent is entitled to receive counsel at government expense. Different officials in different jurisdictions make the determination about whether a defendant is indigent – in some jurisdictions this is decided by the magistrate; in some, by a court administrator or official; in some, by a pre-trial services division; and in some, by the public defense system. Additionally, every jurisdiction throughout the country follows its own rules about what constitutes indigence, with some appointing counsel to anyone who requests an attorney, in others basing the indigency determination on information provided by the defendant and accepted as true, and in still others only after rigorous verification of the information provided. But, however indigency is defined and whomever is making the determination, that person or system must be aware that there is a defendant who has a right to counsel and is requesting the appointment of counsel before the initial steps toward appointment of counsel will ever occur.

Second, once a defendant is determined to be indigent and therefore entitled to receive counsel at government expense, a particular attorney must be identified and designated as the defendant's attorney. Like the indigency determination, the manner in which the identification and designation of a specific attorney occurs varies widely. And again, the person or system responsible for this procedure must be aware that there is a defendant entitled to the appointment of counsel.

Finally, before an attorney can actually begin work on behalf of a defendant, that attorney must ensure that he or she is free of conflicts of interest in the particular defendant's case, else the attorney cannot accept the appointment to represent that defendant. Generally, this means the

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[21] *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

[22] *Id.*; *cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (leaving open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent").

attorney must be sure that he is not representing a person who will be a witness in the case and that he is not representing another codefendant charged in the same case.[23] So the attorney must learn at least the basic facts, as alleged by the government, and check this information against his current list of clients, all before accepting the appointment. Even after this initial conflict-check, the attorney may learn during the course of an independent investigation of the case that he represents previously unidentified witnesses or the actual perpetrator of the crime, necessitating the appointment of new, unconflicted counsel for the defendant.

All of this might seem to suggest that criminal justice systems need wide latitude in the amount of time allowed to appoint counsel, but in fact the contrary is true. Many indigent defense systems throughout the country have been able to effectively implement early appointment of counsel procedures that provide counsel within hours of a defendant's arrest and at the moment of arraignment. A few of these systems are discussed in Part III below. Perhaps more importantly, though, the amount of time required to carry out the logistics of appointment militates in favor of courts and indigent defense systems aiming to commence the appointment of counsel process as early as possible in a criminal case, even before the right to counsel attaches or a critical stage occurs, so that unconflicted counsel can be actively engaged in securing the speedy, cost-effective, accurate, and just resolution of the criminal investigation and/or prosecution.

Many defendants who know themselves to be guilty of having committed a criminal offense desire to accept responsibility, admit guilt, and begin down the road toward rehabilitation and making recompense to any victim as quickly as possible. Because a plea negotiation is a critical stage that requires the involvement of defense counsel,[24] this cannot occur until defense counsel is appointed and actively involved in the case.[25] On the other side of the coin are those defendants who believe themselves to be innocent of the offense for which they are being investigated or prosecuted.

But whether the defendant being represented desires to plead guilty or be exonerated of a crime he has not committed, the duty of the appointed defense attorney remains the same. Defense counsel are required under the Sixth Amendment to provide *effective representation*, which means providing the legal knowledge, skill, thoroughness, and preparation that a prudent and competent criminal defense lawyer would believe is necessary for the representation of the particular defendant in the particular case.[26] This takes time. For the benefit of victims, defendants, and the larger community, counsel should be appointed at the earliest possible moment.

On occasion (and more frequently in federal proceedings than in state proceedings), a defendant is aware that he is being investigated in connection with a crime in advance of either being arrested for that crime or having formal prosecution instituted against him. Also making up a relatively

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[23] See e.g., *Wheat v. United States*, 486 U.S. 153 (1988); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

[24] *Lafler v. Cooper*, 566 U.S. ___, No. 10-209 at 3-4 (March 21, 2012); *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651 at 16 (March 31, 2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

[25] "[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler*, at 11.

[26] *Strickland v. Washington*, 466 U.S. 668 (1984).

small number of criminal cases requiring appointment of counsel are those instances where a defendant receives a summons to come to court to defend a criminal prosecution, rather than being arrested, such as when receiving a ticket for a traffic-related offense that can carry jail-time as a penalty. In both of these situations, the defendant is aware of an impending criminal prosecution and, if that defendant is indigent, allowing appointment of counsel prior to arrest or institution of prosecution would militate in favor of a quicker, less-costly, and more accurate outcome.

Far more commonly, however, the defendant learns of the criminal prosecution against him at the time of his arrest,[27] which, as the *Rothgery* Court explained, triggers the attachment of the right to counsel. Part of the appearance before the magistrate following arrest will be the magistrate's determination as to whether and under what conditions the defendant can be released from jail, commonly known as a bail hearing.

As the American Bar Association explains, "[t]he purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present."[28] And this was indeed the case until the Bail Reform Act of 1984, when the federal government and most states added a component to their laws that allows detention without bail where no combination of conditions can ensure the safety of the community if the defendant is released during the time before his trial. So today, those defendants who are deemed to pose an imminent threat to public safety are typically detained without any bail being set. For the greatest number of defendants, however, the magistrate will set conditions of bail that include the payment of some amount of money by the defendant; if the defendant can pay the money, he will be released until his case is concluded, but if the defendant cannot pay the money, he will have to stay in jail until the criminal case is resolved – with the purpose of the bail money once again being to ensure that the defendant will appear in court.[29]

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[27] Although the exact number of arrests made by state and local law enforcement agencies in any year is unknown, "the FBI estimated that the state and local law enforcement agencies covered by the UCR [Uniform Crime Reporting Program] made 13,687,000 arrests in 2009." Howard N. Snyder, Bureau of Justice Statistics, *Arrest in the United States, 1980-2009*, at 1 (September 2011). Also unknown is the number of arrests that are for misdemeanors as opposed to felonies. What is known is that the number of misdemeanor prosecutions consistently far outweighs the number of felony prosecutions. In its 1972 decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1974), the Court observed in footnote 4:

> In 1965, 314,000 defendants were charged with felonies in state courts, and 24,000 were charged with felonies in federal courts. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 55 (1967). Exclusive of traffic offenses, however, it is estimated that there are annually between four and five million court cases involving misdemeanors. *Ibid*. And, while there are no authoritative figures, extrapolations indicate that there are probably between 40.8 and 50 million traffic offenses each year. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L.Rev. 1249, 1261 (1970).

[28] American Bar Association, Division for Public Education, *How Courts Work, Steps in a Trial, Bail*. Available at http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.html. (Last visited February 6, 2014.)

[29] At least one study has shown that there is no difference in the likelihood of a defendant appearing for court based on whether he pays bail money for his release or is released without being required to make a payment. Mary T. Phillips, New York City Criminal Justice Agency, Research Brief No. 27, *How Release Type Affects Failure to Appear*, at 3 (Sept. 2011) (demonstrating that the failure to appear (FTA) rate for all cases with a defendant who was released pretrial for the combined New York City boroughs was 16 percent).

Anecdotally, those who work in criminal justice systems report that "bail can sometimes be set very high. Defendants incarcerated pretrial with no chance of posting bail will sometimes plead guilty to get out of jail and avoid losing their children or jobs."[30] The question of guilt or innocence is set aside in the face of far more real-life and practical concerns, giving rise to serious questions about whether our court systems are achieving accuracy or justice.

For those defendants who cannot make bail, taxpayers pay the cost of keeping them in jail while they wait for trial. This is, mind you, a defendant who is presumed to be innocent of any offense, and the magistrate has determined that his release is not an unreasonable threat to public safety.

According to the Bureau of Justice Statistics, about 6 in 10 of those held in local jails across the nation at mid-year 2012 were unconvicted and awaiting court action, and this rate has held true since 2005.[31] With an average daily population of 735,983,[32] this means that taxpayers are paying daily for over 440,000 people to sit unproductively in jail. The daily cost to taxpayers of housing a person pretrial varies from jail to jail. Just to get an idea, the U.S. Department of Justice explains that, in Fiscal Year 2011, more than half of its pretrial detainees were housed "in more than 774 different facilities located throughout the United States" and "owned and operated by state and local governments." According to the DOJ, "[on] average, the highest per diem rate was paid for facilities located in the Northeast," at $100.05 per detainee per day, "and the lowest for facilities located in the Southeast," at $58.61 per detainee per day.[33] Particularly for defendants charged with misdemeanors, they may end up sitting in jail for longer than the maximum sentence that can be imposed upon them,[34] all at taxpayer expense.

Yet magistrates can only make pre-trial release determinations on the basis of the evidence put before them. And, where 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. Without regard to whether the Constitution *requires* the presence and active participation of defense counsel at a bail hearing, it is surely in the interest of taxpayers, victims, and defendants that counsel nonetheless be made available for

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[30] Joel M. Schumm, Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *National Indigent Defense Reform: The Solution is Multifaceted*, at 26 (2012).

[31] Todd Minton, Bureau of Justice Statistics, Jail Inmates at Midyear, 2012 – Statistical Tables (NCJ 241264), at 1 (May 2013). See also, Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW.J.L. & SOC. POL'Y. 42, 46 (2012), reporting that "[i]n December 2010, about half of the persons in Harris County [Houston, Texas] jails were pretrial detainees. About 20% of those pretrial detainees were charged with misdemeanor offenses or held for other non-felony reasons." Citing Statistics, Office of Criminal Justice Coordination, Harris County Comparison of Daily Average Jail Population (Mar. 7, 2011).

[32] *Minton*, at 1.

[33] The United States Department of Justice Archives, *Statistics*, available at www.justice.gov/archive/ofdt/statistics.htm. (Last checked February 6, 2014.) More detailed information on the average per diem rate paid by the federal government for housing its pretrial detainees is available at www.justice.gov/archive/ofdt/perdiem-paid.htm.

[34] Human Rights Watch, *The Price of Freedom*, at 30 (Dec. 2010) (In 2009 in New York City, the average length of pretrial incarceration for people charged with misdemeanors was 15 days; yet in 48 percent of such cases resulting in a conviction and jail sentence, the sentence was less than 15 days).

these hearings, to ensure that the innocent are not convicted, that taxpayers are not needlessly paying to incarcerate defendants who pose no threat to public safety, and that guilty defendants do not serve more time in jail than the maximum sentence allowed by law.[35]

Bail hearings are but the first of many steps in most criminal cases. The need for complete information from both the prosecution and defense that is illustrated by the bail hearing continues throughout the life of the criminal case prosecution. If counsel is appointed quickly after a criminal offense occurs and a defendant is alleged as the perpetrator of that offense, then counsel can far more quickly investigate both the circumstances of the defendant and the facts of the crime. If, on the other hand, many months have passed before counsel is appointed, it may be difficult to locate witnesses and evidence necessary to complete the investigation, slowing down the criminal case process for all involved. Again, the earlier counsel is appointed, the more quickly the case can be concluded for the benefit of victims, defendants, and the community.

Speed in reaching an outcome is not, however, the only or even the primary concern. The goal of every criminal court system is to provide justice to all. Black's Law Dictionary defines justice as: "Proper administration of laws. In Jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his due."[36] In our criminal courts, this means we strive to produce an impartial, fair, and accurate outcome, and to do so in a timely fashion in every case.[37]

No one component of justice can be separated from the others. If we achieve accurate outcomes, but it takes years or decades to do so, then we do not produce justice. If we reach outcomes quickly, but they are inaccurate so that the innocent are convicted and the guilty go free and the community is not safe, then justice is surely not served. And, if timely and accurate outcomes are achieved in those cases where the victims are powerful and the defendants can afford to hire their own attorneys, but not in those cases where defendants receive court-appointed counsel or victims are without a voice, then our courts are most assuredly not delivering justice.

The early appointment of counsel aids in achieving the overarching goal of providing justice in our criminal courts. It helps to prevent inefficiency and delay. It contributes to the vindication of the legal rights of victims, defendants, and the community by providing the adversarial testing

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[35] At least one state's high court has held that counsel is required at the initial bail hearing under that state's Constitution. In *DeWolfe v. Richmond*, No. 34 (Sept. 25, 2013), the Maryland Court of Appeals held that the due process clause of Maryland's Constitution Article 24 requires that "an indigent defendant has a right to state-furnished counsel at an initial appearance before a District Court Commissioner," which is the initial appearance following arrest at which bail is first set, because the proceeding may result in the defendant's incarceration. See also *Schumm*, at 40 n.3, "ABA policy AM98-112D supports the provision of counsel at initial appearance."

[36] Black's Law Dictionary 447 (abr. 5th ed., West 1983) (1891).

[37] According to Chief Justice Warren Burger, in his address to the American Bar Association on August 10, 1970: "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets." Burger, *What's Wrong With the Courts: The Chief Justice Speaks Out*, U.S. News & World Report (vol. 69, No. 8, Aug 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

needed to ensure that the innocent are acquitted and only the guilty are convicted. And it gives equal protection of the law to the poor (just as the more affluent are able to achieve on their own); to those without power or voice (just as the more powerful are able to achieve on their own).

III. METHODS
IMPLEMENTING EARLY APPOINTMENT OF COUNSEL

Like so many other aspects of the appointment of counsel, the manner in which jurisdictions provide attorneys to indigent defendants varies wildly across the country. Many states have state-funded indigent defense services administered by a single state organization. These state systems may be predominantly contract systems (e.g., Oregon), assigned counsel systems (Massachusetts), or staffed public defender offices (e.g., Connecticut), or a combination of all of the above. In other states, the individual counties may shoulder all (e.g. Pennsylvania and Utah) or the majority of (e.g., Arizona, Idaho) the constitutional obligation to fund and provide attorneys to the indigent; and some counties, in turn, pass the buck onto their municipalities (e.g., Mississippi). Still other states will fund representation in felonies, but require counties to pay for and administer services in misdemeanor representation (e.g., Kansas); and yet others have constructed hybrid systems in which counties get reimbursed a portion of their indigent defense expenditures by the state, based on meeting state-sponsored standards (e.g., Indiana), or approved service plans (e.g., Texas), or a straight mathematical formula (e.g., Ohio).

The early appointment of counsel does not necessitate that states have a one-size-fits-all approach to indigent defense. Though it is certainly easier to have statewide uniformity in specifying when counsel is appointed where there is statewide oversight, there are examples of county systems too that manage to provide for early appointment of counsel.

A. MASSACHUSETTS

Massachusetts has a state-funded, state-administrated right to counsel agency called the Committee for Public Counsel Services (CPCS). A 15-member independent board of directors oversees CPCS. Though CPCS has staffed public defender offices for representation in more serious felony and delinquency cases, private counsel handle all other cases at both trial and appeal. CPCS requires rigorous training and qualification standards for all assigned counsel attorneys.

When a person is arrested in Massachusetts, the defendant's first appearance will ordinarily occur in district court, the only exception being secret indictments that are arraigned in superior court. Because CPCS keeps detailed historical records of the number and severity of assignments received in each of the district courts across the state, an assigned counsel administrator can accurately predict the number and qualifications of attorneys needed to staff any particular bail hearing/arraignment proceedings anywhere in the state on any given day. For example, Mondays or the day after holidays may require more attorneys than a Wednesday in any one particular district court. Private bar attorneys alert the assigned counsel coordinator as to their availability to staff the bail hearing/arraignment parts (known colloquially as "duty days"). The coordinator

then matches attorneys with courts. There are standards regarding how many duty days an attorney can handle in a given month (2), the proximity of the courts they may staff, and the number of cases they are allowed to take during any single duty day. The coordinator will also estimate the number of staff public defenders needed as well in any one court (though decisions about which public defender staff attorneys will handle early representation is left to public defender supervisors). CPCS also keeps a calendar of attorneys willing to fill in, should an assigned attorney be sick or otherwise unable to fulfill their duty day. Finally, assigned counsel attorneys will be paid for staffing a duty day on which they receive no cases, as they are permitted to bill by the hour for the number of hours that they waited that day at the court.

CPCS-promulgated standards for contractors require attorneys to get to court ahead of time to speak with defendants before the court session begins. In Massachusetts, the probation department conducts the indigency screening, so by the time attorneys arrive they know which defendants meet the indigency requirement and thus need the services of a publicly paid lawyer. Generally, attorneys are good about dividing up the cases evenly amongst themselves, but ultimately the judge can decide between lawyers if there is any lingering debate about who is representing a particular client. Because of this, Massachusetts has been able to institute vertical representation – i.e., the same attorney provides continuous representation – from the bail hearing/arraignment through disposition of the case.

B. CONNECTICUT

Similar to CPCS in Massachusetts, the Division of Public Defender Services in Connecticut is a state-funded agency that oversees both primary and conflict defender services throughout the state. The independence of Connecticut's public defense system is ensured through an independent seven-person commission. Unlike services in Massachusetts, staff public defenders are the primary providers of indigent defense services in Connecticut.

Trial-level services are provided throughout the state by branch offices staffed with full-time attorneys serving the state's 13 judicial districts, 13 juvenile venues, and 20 geographic area courts. Each public defender office is allowed some flexibility about how best to provide services at initial appearance, with some electing to assign staff public defenders by day, by week, or by some other rotational basis. The Division of Public Defender Services provides representation at bail hearings for all indigent clients. Conflict representation is handled by a panel of private attorneys, which is also administered statewide by the Division of Public Defender Services. If an immediate conflict arises and a panel attorney is in the courtroom, the private attorney may take the case, but as a rule the staff public defenders will argue bail for all clients. Indeed, the Division of Public Defender Services handles a significant number of "bail only" clients who are able to secure private counsel sometime after the initial appearance before a magistrate. Having the staff attorneys as the primary lawyers at these early appointment calendars lets the system also provide staff investigators and social workers who are available to the attorneys and clients for any issues identified immediately where such services could lead to a reduction in charges or access to social services or some other benefit to clients.

C. MIAMI-DADE COUNTY, FLORIDA

In each of Florida's 20 judicial circuits (covering 67 counties), public defender offices staffed with full-time employee attorneys provide primary representation to indigent defendants. Each office is overseen by a popularly elected chief public defender, to ensure independence from the judiciary and other government agencies. When a circuit public defender has a conflict (for example, when there are multiple co-defendants in a case or in instances of attorneys having too many cases), secondary representation is provided by five regional conflict defender offices covering each of the state's five appellate jurisdictions.

A defendant's first appearance in Florida occurs within 24 hours of arrest, at which time the court advises the defendant of the charges upon which he has been arrested and decides issues of bail or release prior to arraignment. In Florida, an arraignment for in-custody defendants generally does not occur for 21 days after the first appearance, with out-of-custody defendants generally being arraigned within 30 days. Because of this delay between initial appearance and arraignment, the defendant would suffer greatly if representation was delayed until the formal arraignment. Perhaps more importantly, because a defendant might otherwise linger in jail for three weeks, it is critical that representation initiate with the first court appearance.

Florida's 11th Judicial Circuit is a single-county district covering Miami-Dade County. There, the elected public defender created an early intervention unit that handles the defendant's case from initial appearance through arraignment, including any plea negotiations that may occur pre-arraignment (and particularly negotiations related to reduction or dismissal of charges all together). The attorneys in the early intervention unit are solely dedicated to this function and therefore staff the courtrooms as part of their duties. For cases that are not resolved by this unit, the office will assign attorneys based on the severity of the charge, so that the attorney is appropriately skilled to handle the complexity of the case. These attorneys will provide continuous representation from arraignment through disposition of the case. Office policies require both the early representation and the post-arraignment attorneys to interview and consult with clients before their court hearings.

D. KING COUNTY (SEATTLE), WASHINGTON

Washington's 39 counties are primarily responsible for the funding and administration of indigent defense services. King County (Seattle) currently provides services through four independent non-profit public defender agencies that contract with the county's Office of Public Defense Services. The four agencies handle conflict cases for the attorneys of the other agencies, and a limited assigned counsel panel provides services for cases where the non-profit agencies need to offload cases due to multiple co-defendants or case overload.

The Office of Public Defense Services is housed with the county's Department of Community and Human Services. It conducts initial client screening, makes determinations on indigency, checks

conflicts, assigns cases to the four public defender agencies, handles all client complaints, and serves as the public defense advocate with the County.

At a defendant's initial appearance, where bail is set and probable cause is determined, OPD staff will conduct indigency screenings in the courtroom. Certain of the non-profit defender agencies contract with OPD to provide attorneys at the initial appearance courts. Except for the most obvious conflict of interest cases (i.e. obvious co-defendants), the contracting agency provides representation to all indigent defendants at first appearance in the particular court. OPD later determines which organization will eventually be assigned to the case and determines all other conflicts after the initial appearance but in advance of the arraignment.[38]

[38] The King County system is undergoing a major reorganization at the time of the publication of this paper with the four non-profits being merged into two staffed public defender government agencies. The authors of this paper note that even before the reorganization, the King County system did not adhere to national standards related to the continuous representation of defendants by the same attorney. We use this example to note simply that counties have found ways to prioritize the provision of attorneys at the clients' initial appearances. The King County system is not held up as the ideal model for providing counsel at such hearings.

IV. CONCLUSION

Anecdotal evidence[39] indicates that most court systems in most jurisdictions have historically commenced the process of determining who desires and is entitled to the appointment of counsel at the formal arraignment following formal institution of prosecution. In other words, most jurisdictions (at least prior to *Rothgery*) did not consider the right to counsel to have attached until the prosecutor had made a formal charging decision and acted on that decision. Since *Rothgery*, of course, we now know that the right to counsel attaches in many cases long before the formal arraignment.[40]

As discussed in Part II *supra*, the overarching goal of our criminal court systems is to provide justice. Components of justice include timeliness, accuracy, community safety, impartiality and fairness, and the cost paid by the community to achieve this justice. But no one of these components standing alone can ensure that justice will be done. Instead, it takes all of these components combined together to bring about the full measure of justice that we all expect and to which we are entitled.

It is beyond question that our American system of criminal justice believes counsel is a necessity, such that every person is entitled to an attorney when facing a criminal prosecution, even or especially where they cannot afford to hire that attorney for themselves. Jurisdictions throughout the country have experimented with denying counsel and with delaying the provision of counsel for as long as possible, all of which has resulted in the decisions of *Gideon*, *Argersinger*, *Shelton*,

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[39] Unfortunately, anecdotal evidence is all that is available. No comprehensive data exists regarding the timing of appointment of counsel in state courts, or the identity or number of the clients who receive appointed counsel or the attorneys who provide that indigent defense representation. In September 2010, the Bureau of Justice Statistics (BJS) released two reports derived from the *Census of Public Defender Offices* it had conducted for the year 2007. The *Census* gathered information only from offices that provided representation "through a salaried staff of full-time or part-time attorneys who are employed as direct government employees or through a public, nonprofit organization." Bureau of Justice Statistics, Public Defender Offices, 2007 - Statistical Tables. Though this was the most comprehensive study of indigent defense service providers ever conducted by the federal government, it wholly excluded the great majority of indigent clients who are represented by assigned counsel and appointed or contract attorneys, rather than by attorneys employed in public defender offices. The only information reported about timing of appointment of counsel was: "Five state programs had a written policy that an attorney should be appointed within 24 hours of client detention," Bureau of Justice Statistics, *State Public Defender Programs, 2007*, at page 8; and 28% of county-based public defender office had a policy related to appointing an attorney within 24 hours of client detention, Bureau of Justice Statistics, *County-based and Local Public Defender Offices, 2007*, Table 5 at page 6.

[40] This is precisely the distinction that is addressed and put to rest in *Rothgery*. There the Court made clear that the "first time before a court, also known as the 'preliminary arraignment' or 'arraignment on the complaint,'" does indeed trigger the attachment of the right to counsel. *Rothgery v. Gillespie County*, 554 U.S. 191, No. 07-440 at 6 (June 23, 2008) (quoting 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §1.4(g), p. 135 (3d ed. 2007) (internal quotes omitted)). Again, as it had done in *Brewer* and *Jackson*, the Court "flatly rejected the distinction between initial arraignment and arraignment on the indictment, the State's argument being 'untenable' in light of the 'clear language in our decisions about the significance of arraignment.'" *Id*. at 9.

Rothgery, and on, but has not necessarily ensured greater justice in our criminal courts. It is time that we experiment with providing counsel early and often, because this may well save both time and money overall, while ensuring greater accuracy, and most importantly it will achieve justice.

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