Docket No. 24-2914

In the

United States Court of Appeals

For the

Eighth Circuit

ABIGAIL FARELLA, et al.,

Plaintiffs-Appellees,

v.

DISTRICT JUDGE A. J. ANGLIN,

Defendant-Appellant.

Appeal from a Decision of the United States District Court for the Western District of Arkansas - Fayetteville, No. 5:22-cv-05121-TLB · Honorable Timothy L. Brooks

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, AND NEW YORK UNIVERSITY SCHOOL OF LAW CENTER ON RACE, INEQUALITY, AND THE LAW IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae National Association of Criminal Defense Lawyers, National Legal and Defender Association, National Association for Public Defense, and New York University School of Law Center on Race, Inequality, and the Law are not-for-profit charitable organizations that have no parent organization and do not issue stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defense lawyers, the clients and communities they serve, and the criminal justice system as a whole. NACDL has a demonstrated, long-standing interest in ensuring that individuals facing criminal charges have access to qualified counsel at every stage of the criminal process, including at initial appearance.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence

[1] No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

in the delivery of legal services for those who cannot afford counsel. For over 100 years, NLADA has pioneered initiatives that promote access to justice and right to counsel at the national, state, and local levels. NLADA serves as a collective voice for our country's public defense providers, civil legal aid providers, and the clients they serve, and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused, both adults and youth.

The National Association for Public Defense (NAPD) is an organization of more than 25,000 practitioners and experts in public defense that span fifty states and three U.S. territories. NAPD provides training, networking, and advocacy support to its members in order to build public defense systems that fulfill the constitutional right to counsel. Timeliness of appointment is an essential feature of the right to counsel, since delay undermines the effectiveness of the lawyer and the legitimacy of the proceedings for the entirety of a criminal case. NAPD therefore has an interest in addressing the timeliness issues presented here.

The Center on Race, Inequality, and the Law at New York University School of Law ("The Center") was created to confront and challenge the laws, policies, and practices that lead to the oppression and marginalization of people of color across the country. Among the Center's top priorities is wholesale reform

of the criminal legal system, which since its inception has been infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate racial injustice and inequitable outcomes. The Center also currently serves as co-counsel in two cases seeking to protect the right to counsel for indigent defendants in Wisconsin and Oregon, respectively.

I. INTRODUCTION

The question before this Court is whether the District Court correctly ruled that (1) indigent defendants have a Sixth Amendment right to counsel at Appellant Judge Anglin's bail determinations, and (2) that right was violated when counsel was not appointed before plaintiffs' bail was set. *Amici curiae* offer this brief in support of the Appellees, to address the role defense counsel can and should play in connection with pretrial detention and bail setting proceedings.

The initial appearance, which in Arkansas is known as the "Rule 8.1 Hearing," is a substantive proceeding that can determine a defendant's qualification for pretrial release. At this point, the defendant is already "immersed in the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (citation omitted). Unrepresented defendants are ill-equipped to face these hearings without the

assistance of counsel. At the same time, judicial officers making decisions about pretrial detention and bail benefit from the presence of defense attorneys, who can provide useful information regarding the defendants that the defendants themselves may be unprepared or unable to provide.

Many jurisdictions have already recognized, either by court decisions, by statute or in practice, that the participation of defense counsel in bail hearings is necessary to protect defendants' constitutional rights and to ensure the integrity of the bail setting process. It is time for Benton County to catch up.

II. THE PRESENCE OF COUNSEL IS REQUIRED FOR THE DETERMINATION OF BAIL

A. The Structure of the Rule 8.1 Hearing[2]

In Arkansas, first appearances for criminal defendants are governed by Rules 8 and 9 of the Arkansas Rules of Criminal Procedure (hereinafter cited as "Rules"). Rule 8 is titled "Release by Judicial Officer at First Appearance." Rule 8.1, "Prompt First Appearance," provides that "[a]n arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay." Hence the first appearance is generally

[2] The question before this Court is limited to whether indigent criminal defendants have a constitutional right to attorney representation during Appellant Judge Anglin's bail proceedings. However, *amici* believe it is helpful, in addressing that question, to understand the structure of the first appearance (which includes the pretrial release inquiry and bail setting) under the applicable Arkansas rules.

referred to as a "Rule 8.1 Hearing."

The Supreme Court of Arkansas has explained:

> Rule 8.1 is designed and has as its purpose to afford an arrestee protection against unfounded invasion of liberty and privacy. Moreover, the person under arrest taken before a judicial officer without unnecessary delay will have the charges explained, will be advised of his constitutional rights and will have counsel appointed for him, if an indigent, and arrangements for bail can be made expeditiously. ***Such action may avoid the loss of the suspect's job and eliminate the prospect of the loss of income and the disruption and impairment of his family relationship. Indeed, these are basic and fundamental rights which our state and federal constitutions secure to every arrestee***.

Bolden v. State, 561 S.W.2d 281, 284 (Ark. 1978) (emphasis added); *see also Duncan v. State*, 726 S.W.2d 653, 656 (Ark. 1987) ("the rule insures that the accused is placed in early contact with a judicial officer so that … the right to counsel may be clearly explained and implemented upon the accused's request and … the accused is protected from being held incommunicado for protracted periods of time").

Rule 8.3, "Nature of First Appearance," provides that at the first appearance, the judicial officer must inform the defendant of the charges; that "he is not required to say anything, and that anything he says can be used against him"; that he has a right to counsel; and that he has a right to communicate with his counsel, family, or friends. Rule 8.3(a)(i)-(iii). These communications between the judge and the accused may have a "*critical impact* ... on the latter's

defense." *Landrum v. State*, 944 S.W.2d 101, 108 (Ark. 1997) (Newbern, J., dissenting) (emphasis added). No further steps in the proceeding "*other than pretrial release inquiry*" may be taken until the defendant and his counsel have had an opportunity to confer, unless the defendant has waived his right to counsel or refused the assistance of counsel. Rule 8.3(b). If the case is not resolved at the first appearance, the judicial officer proceeds "to decide the question of the pretrial release of the defendant." Rule 8.3(c).

Rules 8.4 and 8.5 govern the "Pretrial Release Inquiry," which is required in all cases where (1) the maximum penalty for the charged offense exceeds one year and the prosecutor has not stipulated to release on the defendant's own recognizance, or (2) the maximum penalty for the charged offense is less than a year and a law enforcement officer gives notice that they intend to oppose release on the defendant's own recognizance. Rule 8.4(a). If there is a pretrial release inquiry, it must take place at or before the first appearance. Rule 8.5(a).

Rule 9, "The Release Decision," provides that the defendant may be released on his own recognizance at the first appearance. Rule 9.1(a). "The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court." Rule 9.2(a). If the officer determines that bail should be set, the officer "should take into account *all facts relevant to the risk of willful nonappearance*," including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(vi) his prior criminal record;

(vii) the identity of responsible members of the community who vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating the defendant's roots in the community.

Rule 9.2(c) (emphasis added).

B. There Is No Dispute, and Courts Have Confirmed, that Unnecessary Pretrial Detention Is Harmful

The upshot of these rules is that pretrial release of a defendant in a criminal case, and the amount if any of his money bail, are determined at the Rule 8.1 Hearing. As a threshold matter, it is critical to understand that pretrial detention and bail have constitutional significance as well as significant practical implications for the defendant.

The U.S. Supreme Court has recognized that "any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198,

203 (2001); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter") (citation omitted). Indeed, this is the reason why the Sixth Amendment right to counsel attaches at the defendant's first appearance, where the defendant's "liberty is subject to restriction." *Rothgery*, 554 U.S. at 213.

Courts have also recognized the tangible harms to defendants from unwarranted pretrial detention, such as unnecessary and prolonged separation from family, loss of jobs and homes, interruption of education and services, inability to care for dependents, and higher probability of entering guilty pleas without regard for the consequences. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); *Argersinger*, 407 U.S. at 37 (imprisonment "may well result in quite serious repercussions affecting [the accused's] career and his reputation") (citation omitted); *Torres v. Collins*, No. 2:20-CV-00026-DCLC-CRW, 2023 WL 6166523, at *11 (E.D. Tenn. Sept. 21, 2023) ("erroneous pretrial detention can … result in … physical and psychological burdens that can obstruct trial preparation with counsel"); *Caliste v.*

Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019) ("[t]here is no question that the issue of pretrial detention is an issue of significant consequence for the accused") (citing *Coleman v. Alabama*, 399 U.S. 1, 10 (1970)); *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010) (the initial bail hearing involves defendants' "pretrial liberty interests . . . with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents"); *DeWolfe v. Richmond*, 76 A.3d 1019, 1023 (Md. 2013) ("Not only do the arrested individuals face health and safety risks posed by prison stays, but … they may be employed in low wage jobs which could be easily lost because of incarceration."); *State v. Fann*, 571 A.2d 1023, 1030 (N.J. Super Ct. Law Div. 1990) (the importance of the bail setting proceeding "to defendant in terms of life and livelihood cannot be overstated").[3] Moreover, pretrial detention can have a

[3] *See also* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31-SPG Crim. Just. 23, 26 (Spring 2016) ("Even one day in custody can cause a person to lose a job, miss school, or be unable to care for dependents."); Pamela R. Metzger and Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 Geo. Wash. L. Rev. 392, 408 (2020) ("[p]retrial detainees are at particular risk for suicide[] and adverse health outcomes" and can also lose their jobs and fall behind on rent, car payments, and other bills and face eviction from their homes); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. Rev. 1399, 1417 (2017) (analyzing private and social costs of pretrial detention); Elizabeth Swavola, Kristi Riely & Ram Subramanian, Vera Institute of Justice, *Overlooked: Women and Jails In an Era of Reform* 7 (2016) (discussing the specific impact that the incarceration of women has on families and communities), available at www.vera.org/overlooked-women-and-jails-report.

severe negative impact on the defendant's ability to prepare a defense, as the defendant is often the best resource defense counsel has for locating witnesses and identifying evidence. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (defendants detained before trial "are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense").

In short, "These longer-term consequences destabilize the accused, their families, and the communities where they live. Pretrial release has been found to have substantial benefits beyond protection of liberty, including better outcomes for accused individuals, their communities, and the functioning of the legal system." Michael Mrozinski & Claire Buetow, *Access to Counsel at First Appearance: A Key Component of Pretrial Justice*, National Legal Aid and Defender Association 5 (Feb. 2020).[4]

C. Defendants Require the Assistance of Counsel at the Bail Setting

1. Unrepresented Defendants Will Have Difficulty Addressing the Elements of the Bail Determination

In addition to the specific factors that judicial officers are directed to consider when setting bail, addressed below, *amici* ask this Court to keep in mind some important general considerations – particularly in light of the consequences of unwarranted pretrial detention outlined above.

[4] Available at https://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf.

First, the elements of the Rule 8.1 Hearing that *precede* the pretrial release inquiry and bail setting may make an unrepresented defendant scared or unwilling to say anything to the judicial officer, much less advocate for his own release. The defendant has just been warned that anything he says may be used against him. While this warning is familiar to many people from depictions of the *Miranda* warnings in television and films, the impact of the defendant hearing that warning read out to him in a courtroom setting cannot be underestimated, and may very well make the defendant reluctant to speak at all. The warning puts the defendant in a bind: he has been warned against speaking, but he has to speak in order to advocate for his release. Moreover, the judicial officer is an authority figure and no matter how sympathetic, many defendants will be hesitant to ask questions or express confusion, much less reveal what may be sensitive information. *See, e.g.*, *Booth v. Galveston County*, Civil Action No. 3:18-CV-00104, 2019 WL 3714455, at *12 (S.D. Tex. Aug. 7, 2019), *report and rec. adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019) ("the testimony in this case unmistakably demonstrates the stark reality that arrestees are hesitant to advocate for themselves without counsel present").

Conversely, a defendant who disregards the warning and does speak out to advocate for pretrial release may harm his own interests by raising irrelevant information which could irritate or frustrate the judge, or information that is

actually damaging to the defendant in the determination of bail or even more critically, in defending the underlying charges. In trying to explain their circumstances, defendants may unwittingly disclose incriminating information. Indeed, this is the very reason why Judge Anglin – contrary to the requirements of Rule 9.2, which directs the judicial officer to consider *all* facts "relevant to the risk of willful nonappearance" – deliberately *avoids* asking defendants about some of the Rule 9.2 factors. Judge Anglin himself testified that the assistance of counsel can help counteract this problem: "I feel a public defender could be helpful because the public defender would be able to maybe have a little more influence over whether the person is going to talk about the facts of the case." App. 540.

Finally, and as discussed more specifically below, an unrepresented defendant is unlikely to be aware of the Rule 9.2 factors or know that the judicial officer has been directed to consider all these factors as well as any other facts "relevant to the risk of willful nonappearance." An attorney who has conferred with the defendant pursuant to Rule 8.3 can advise the defendant regarding these factors and assist the defendant by using the relevant factors to advocate in favor of pretrial release.

Testimony from the Appellees bears out these concerns. At her deposition, Abigail Farella testified that had she been represented by an attorney during her

bail hearing, "I probably would have been able to understand the situation a lot better, probably would have been able to get out [of jail] faster, and probably wouldn't have lost my job, my house, and my car" as a result of her pretrial incarceration. App. 541. Logan Murphy testified that if he had an attorney present, they might have been "able to talk the judge down a little bit" because "it was my first offense" and "I had no criminal background or anything." App. 519. He also testified that he didn't ask Judge Anglin why he set the bail at $40,000 because he "didn't want to argue" or "make the bail go up more." App. 541.

Courts that have addressed the need for defense counsel to participate in initial appearances, and specifically to provide representation in connection with pretrial release determinations and bail setting, have also emphasized the ways in which counsel can assist defendants. *See, e.g.*, *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 660 (S.D. Tex. 1975) ("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"); *Booth*, 2019 WL 3714455, at *11 ("Unrepresented defendants . . . are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial. A lawyer would unquestionably provide invaluable guidance to a criminal defendant facing a bail

determination."); *DeWolfe*, 76 A.3d at 1024 (presence of counsel "surely can be of assistance to the defendant" in the bail determination process).

2. Review of the Rule 9.2 Factors Confirms that the Assistance of Counsel Is Essential

Length and character of defendant's residence in the community[5]

The question "Where do you live" may seem innocuous and easily answered. However, the defendant may be reluctant to answer for fear of incurring some dire consequences for himself or his family. For example:

- The defendant may be staying with a family member or friend and fear that the person may face eviction or other repercussions if it is disclosed that the defendant was living there and was arrested.
- The defendant may not want roommates or family members to know of their arrest, or be concerned about "involving them" with their legal problems.
- Without counsel to present the information, the defendant might not know to bring up facts regarding his residence in the community such as family ties, engagement with a local church or community organization, children attending local schools, ownership of property in the community, or life-long residency in the area.

[5] Rule 9.2(c)(i).

Employment status, history and financial condition[6]

Similarly, an unrepresented defendant may be reluctant to answer the question "Where do you work" for a variety of reasons that the advice of counsel would be helpful in addressing. As a result, the judicial officer may not know that the defendant has steady employment that he might lose if detained and that also lessens the risk of the defendant failing to appear for future proceedings. For example:

- If the defendant is getting paid in cash or working informally for an employer, he may be hesitant to address this factor.
- The defendant may be reluctant to disclose his employment out of fear that his job may be terminated due to his arrest or not wanting to get his employer "involved" in his legal situation.
- The defendant may not know to share with the court important details such as recent promotions and job duties that demonstrate his reliability and likelihood to appear for subsequent court dates.
- The defendant's employment may be seasonal or temporary, or he may be paid per day or per job while the number of jobs and days fluctuates. A lawyer can present this information in a clear and useful way, helping the judicial officer to make a fair bail decision.

[6] Rule 9.2(c)(ii).

- Counsel can help facilitate contacting an employer, letting them know why the defendant is not able to come to work and improving opportunities for the defendant to keep his job, or even gaining the employer's assistance in posting bail so the defendant can return to work.

Family ties and relationship[7]

- The defendant may not know to tell the court about family ties in the local area.
- An attorney would be able to advise the court, for example, that the defendant cares for dependents, is the primary caregiver for an elderly or medically fragile person, or is the sole breadwinner for a family. These facts would also be tremendously helpful to the judicial officer in deciding whether pretrial release is appropriate.

Reputation, character and mental condition[8]

- If the defendant has a mental illness or is suffering the effects of withdrawal, he may be unable to fully understand the nature of the proceeding, respond to the court's questions or process the information the judge is providing, or advocate effectively for himself. Defendants may also have learning, language, or communication disabilities that make it difficult for them to

[7] Rule 9.2(c)(iii).
[8] Rule 9.2(c)(iv).

understand, process, and respond to the complex information the judicial officer is relaying. The assistance of counsel is absolutely essential for such defendants.

- Defendants with disabilities or mental illness may be reluctant to disclose the fact out of embarrassment, fear, or lack of awareness, may not realize they are not fully understanding the events, or may not be able to fully articulate and explain their challenges or needs. Counsel can both help such defendants understand the proceedings, and help the judicial officer understand the defendant's circumstances.
- The defendant may be unaware that the bail setting presents an opportunity to advocate for a treatment program as an alternative to detention. Counsel can help to connect the defendant promptly to an appropriate treatment alternative, whether through advocating for treatment in lieu of pretrial detention, providing information about local programs and services, or requesting a psychological examination.
- Counsel may have access to expert support staff such as social workers who can identify alternatives to detention like shelters and group homes, as well as community-based services that can help ensure defendants have access to the supports they need to promote their appearance at court.

Past history of response to legal process / Prior criminal record[9]

- Counsel can highlight if the defendant has no criminal history (as Mr. Murphy's testimony indicates).
- The defendant may be reluctant to bring up any criminal history, even though prior compliance with legal process would be helpful in arguing for pretrial release. Counsel can highlight where a defendant's history demonstrates their appearance in court and compliance with court conditions.
- There may be instances in which a defendant's reported criminal history is inaccurate or incomplete, such as matter being reported as a felony when the charge was resolved as a misdemeanor, or where the record fails to show a charge was dismissed. An attorney will be able to identify, investigate, and correct any such errors.

Identity of responsible members of the community who vouch for the defendant's reliability[10]

- The defendant may not know to share information regarding family members or people in the community who can attest to his reliability. Even if aware of this factor, he may be reluctant to involve others in his case, not

[9] Rules 9.2(c)(v)-(vi).
[10] Rule 9.2(c)(vii).

knowing the consequences of providing such information. An attorney can help facilitate this information being presented to the court.

- The defendant may not have the ability to easily contact those individuals. Counsel can assist in both identifying and contacting individuals such as a pastor, friend, or family member who can attest to the defendant's reliability and help ensure that the defendant appears for future court dates.

Nature of charge, apparent probability of conviction, and likely sentence[11]

- Counsel can highlight if the defendant is eligible for certain types of diversion programs.
- Counsel will have a better idea than the defendant of the consequences of particular charges in that jurisdiction. For example, if the charge technically could carry jail time but defendants routinely receive probation for that charge, the attorney can point that out in advocating for pretrial release.
- An attorney can also identify for the court potential issues in the charging documents or factual allegations that undermine the likelihood of a conviction – issues that an unrepresented defendant would likely be unable to spot or raise.

[11] Rule 9.2(c)(viii).

Any other factors indicating the defendant's roots in the community[12]

- Counsel can identify and articulate connections such as participation in a local church, involvement with school or community activities, and extended family ties, that the defendant may not realize are relevant and helpful.
- As one public defender's office employee explained: "You can contextualize a person's role in the community by identifying them as veterans, sole support for kids, foster parents, mothers who homeschool her kids, or people with volunteer obligations that connect them to the community; you can also tell judges about very practical reasons that make them able to return to court, like whether they have a ride to court or a car or ability to take off work." The assistance of counsel both ensures that defendants understand and are able to exercise their rights with regard to pretrial detention, and that the court reaches the best possible decision.

III. BENTON COUNTY IS BEHIND

Many jurisdictions mandate the assistance of counsel at the initial appearance,[13] by statute and/or as a result of court decisions. *See, e.g.*, *Remick v. Utah*, Case No. 2:16-cv-00789-DN-DBP, 2018 WL 1472484, at *10 (D. Utah

[12] Rule 9.2(c)(ix).
[13] In most jurisdictions, bail setting takes place at the initial appearance. Accordingly, *amici* view these statutes and opinions as relevant even if not premised expressly on the need for the assistance of counsel specifically in the bail determination proceeding.

Mar. 23, 2018) (arraignment and bail hearing "are critical stages in a criminal proceeding"); *Hurrell-Harring*, 930 N.E.2d at 223 ("a bail hearing is a critical stage of the State's criminal process") (citation omitted); *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624, 637 (Conn. 2013) (defendant has right to counsel "at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred"); *Fann*, 571 A.2d at 1030 ("The setting of bail certainly is a 'critical stage' in the criminal proceedings."); *Walsh v. Commonwealth*, 151 N.E.3d 840, 860 (Mass. 2020) (defendant has the right to be represented by counsel at a bail hearing); *Valdex-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987 (Nev. 2020) (defendant is entitled to counsel when the state requests bail).[14]

The following lists 30 jurisdictions – 27 states, two U.S. territories, and the District of Columbia – that provide counsel at the first appearance by statute and/or court mandate:

Arkansas	Ark. R. Crim. P. 8.2 (West 2018)
Colorado	Colo. R. Crim. P. 44 (West 2019)
Connecticut	*Gonzalez v. Comm'r of Corr.*, 68 A.3d 624 (Conn. 2013)
Delaware	Del. Sup. Ct. Crim. R. 44 (West 2000); Del. Ct. Com. Pl. Crim. R. 44 (West 1995)
District of Columbia	D.C. Super. Ct. R. Crim. P. 5 (West 2017); D.C. Super. Ct. R. Crim. P. 44 (West 2016)

[14] *See also, e.g.*, *State v. Taylor*, 49 N.E.3d 1019, 1024 (Ind. 2016); *Tucker v. State*, 394 P.3d 54, 63 (Idaho 2017); *Lavallee v. Justs. in Hampden Superior Court*, 812 N.E.2d 895, 902 (Mass. 2004).

Florida	Fla. R. Crim. P. 3.130 (West 2018); Fla. R. Crim. P. 3.111 (West 2010)
Guam	Guam Code Ann. § 1.11 (West 2020)
Hawaii	Haw. Rev. Stat. § 804-7.5 (West 2019)
Idaho	Idaho Crim. R. 44 (West 2017); Idaho Code Ann. § 19-852 (West 2013)
Illinois	725 Ill. Comp. Stat. Ann. 5/109-1 (West 2018)
Iowa	Iowa R. Crim. P. 2.2 (West 2002); Iowa R. Crim. P. 2.61 (West 2001); Iowa R. Crim. P. 2.28 (West 2005)
Kansas	Kan. Stat. Ann. § 22-4503 (West 1996)
Maine	Me. R. U. Crim. P. 5 (West 2015)
Maryland	Md. Rule 4-213.1 (West 2018)
Massachusetts	Mass. R. Crim. P. 7 (West 2012)
Michigan	Mich. R. Crim. P. 6.104 (West 2022)
Nebraska	Neb. Rev. Stat. § 29-3902 (West 1972)
Nevada	Nev. Rev. Stat. Ann. § 178.397 (West 2019)
New Hampshire	N.H. Rev. Stat. Ann. § 604-A:3 (West 1965)
New Jersey	N.J. Ct. R. 3:4-2(b) (West 2004)
New Mexico	N.M. Stat. Ann. § 31-15-10 (West 2001)
New York	N.Y. Crim. Proc. Law §§ 170.10(3), 180.10(3); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010)
North Carolina	N.C. Gen. Stat. Ann. § 7A 451(b)
Ohio	Ohio Crim. R. 44 (West 2020)
Oregon	Or. Rev. Stat. Ann. § 135.040 (West 2001)
Tennessee	Tenn. R. Crim. P. 44 (West 2006)
U.S. Virgin Islands	V.I. R. Crim. P. 44 (West 2002); 5 V.I. Code Ann. § 3503 (West 2016)
Vermont	Vt. R. Crim. P. 5, 44 (West 2017)
West Virginia	W. Va. R. Crim. P. 44 (West 1995)
Wyoming	Wyo. R. Crim. P. 44 (West 2006)

Moreover, in practice, a number of jurisdictions provide counsel at initial appearances even if not mandated, because they believe that the practice improves the judicial process both for judges and for defendants. A partial list

includes Alameda County, San Jose, and San Francisco in California; New Orleans, Louisiana; Minneapolis, Minnesota; Philadelphia, Pennsylvania; and Austin, Houston, Cameron County, Fort Bend County, and San Antonio in Texas. Even within Arkansas, some counties provide counsel at the Rule 8.1 Hearing. In neighboring Washington County, for example, both prosecutors and public defenders are present for Rule 8.1 hearings, and a court reporter is also present to make a record. *See Farella v. Anglin*, 734 F. Supp. 3d 863, 871 (W.D. Ark. 2024), *appeal pending*.

The experience of those "on the ground" in state courts around the country confirms the value of having defendants represented at their first appearance, and particularly in connection with determinations regarding pretrial detention and bail. Judicial officers want and need to be fully informed when making these critical determinations. Attorneys can help. By bridging the gap between the court and the defendant, counsel can ensure that important and accurate information is gathered and presented, helping the judicial officer make more informed decisions. An employee of a public defender's office described the importance of counsel's role in the bail determination: "You're really talking about whether the person is part of a community that the judge values, and a defense lawyer is the only way to get at a lot of that information."

In Michigan and Texas, states that implemented pilot programs to provide defendants with counsel at first appearances, judges, court staff, prosecutors, defense counsel, and defendants have all expressed support for the programs and shared positive experiences:

- In Ingham County, Michigan, one magistrate judge said the presence of counsel at the initial appearance "makes the system work better both for the court and for the defendant," noting among the benefits decreases in docket size and the number of individuals who failed to appear for subsequent hearings. A chief judge in the same county celebrated the provision of counsel at first appearance for its impact on courtroom efficiency. *See* The Michigan Indigent Defense Commission, *Counsel at First Appearance and Other Critical States: A Guide to Implementation of the Minimum Standards for Delivery Systems* 9, 15 (2017).[15]
- The regional manager of Kent County's Public Defender Office highlighted how having counsel at first appearance helped streamline arraignments, and spoke of how grateful defendants were for the assistance of counsel. He concluded, "[T]he additional help [the program] provided defendants was an invaluable asset." *Id.* at 10.

[15] Available at https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf.

- Two judges in Kent County agreed, endorsing counsel at first appearance as "the right thing for Michigan" and a "protect[ion] [of] criminal defendants' constitutional rights." *Id.* at 11.
- In Huron County, Michigan, judges stated that bond decisions were better informed due to the presence of counsel, and defense attorneys and court administrators agreed that defendants had better experiences and felt "more comfortable," "less nervous," and "better prepared" because of the assistance of counsel. *See* The Michigan Indigent Defense Commission, *The Huron County District Court's Counsel at First Appearance Pilot Program* 5 (2017).[16]
- In Hays County, Texas, attorneys observed that "simply having a defense attorney present for the defendant makes a difference," helping "the defendant [be able to] earn a living and support their defense." Georges Naufal et al., *Counsel at First Appearance Evaluation* 49-50 (2023).[17]
- Judges in Texas also emphasized the benefits of the presence of defense counsel in helping to articulate factors bearing on the bail determination. In one jurisdiction, for example, the prosecutor requested a $15,000 bond;

[16] Available at https://michiganidc.gov/wp-content/uploads/2015/04/Huron-County-Counsel-at-First-Appearance-Report.pdf.
[17] Available at https://ppri.tamu.edu/wp-content/uploads/2024/04/230831_CAFA-Evaluation_Final-Report.pdf.

defense counsel requested a $5,000 bond, explaining that the defendant was a lifelong resident of the county, had a child and a job interview upcoming, and was working on his GED. Equipped with this information, the magistrate set bond at $7,500. *Id.* at 50.

- In Potter County, Texas, one judge noted that defense counsel helped defendants feel more comfortable and less intimidated, streamlined the process by allowing the court to save time and money, and helped the judge make better-informed decisions. For example, with a defense attorney present, the court was able to learn that the 17-year-old defendant lived with his mother, had other local relatives, and worked in the area, and accordingly set a low bond. *Id.* at 77.

Amici have spoken with defenders across the country who have also shared numerous examples of the impact of counsel at initial appearance. This anecdotal evidence confirms the importance and pragmatic benefits of representing defendants at their first appearances and in particular, in connection with bail determinations.[18] The Chief Public Defender for Harris County, Texas, submitted a declaration in the case of *Booth v. Galveston County*, *supra*, explaining some of the ways in which defense counsel can assist at initial bail settings. For example,

[18] With the exception of the Declaration of Alex Bunin, which was publicly filed, these anecdotes are recounted without identifying information or citations to specific sources in order to protect the confidentiality of attorneys and defendants.

attorneys can "highlight the individual characteristics that do not always lend themselves to a rote description in a pretrial report. A pretrial report noting that a defendant works as a janitor is not the same as a proffer by counsel that he or she will not be paid again for two weeks and has no immediate access to money." Declaration of Alex Bunin ¶ 13 (*Booth*, S.D. Tex. C.A. No. 3:18-CV-00104, Dkt. 205-4). He also noted that attorneys can "call family and friends of defendants for additional information. … Many times, we have called a parent to come take responsibility for a son or daughter who the hearing officer otherwise felt uncomfortable releasing without conditions." *Id.* ¶ 15.

Another public defender in Harris County recounted a story of a wrongly arrested defendant with a very common name. He was detained for ten days before defense counsel was able to conduct an intake interview and verify his claim that he was not the right person. If he had been represented earlier, the error might have been discovered and the unnecessary detention avoided. In another case of mistaken identity, a defendant in Staten Island, New York, was arrested on a misdemeanor charge and wrongly identified as the subject of an extradition warrant from another state for first degree murder, which would have required detention without bail for at least 30 days. Because he was provided counsel, his attorney was able to confirm that the extradition warrant was for an

individual with the same name but a different date of birth, and the defendant (who had no criminal history) was released on his own recognizance.

A public defender in New Mexico told the story of a client set for her first appearance on an extradition warrant; at her first appearance, she had to choose whether to waive or contest extradition. "She had three kids at home with nobody to take care of them and was terrified that an extended stint in jail would cause her to lose custody." Because she had counsel, she was able to discuss the options with her attorney and chose to contest the extradition. Her attorney was able to advocate for her and the court issued a reasonable bond. The other state ultimately declined to extradite the defendant and that case was dismissed. As the public defender explained, "Without an attorney, this client would very likely have been facing time in jail – away from her children – for a warrant that the requesting state did not even want to execute. Both the explanation of rights and options as well as having someone there to advocate for you are critical components of an initial appearance." Another public defender in New Mexico agreed, reporting, "Over the years, I've run into several incidents where having counsel at first appearance was crucial: criminal history reported incorrectly by the government; the government mistaking a defendant for their father (the father had a lengthy criminal history and the defendant had none); and in all circumstances, being able to provide the court with relevant information

regarding bond, like where they live, their support in the community, how long they've lived in the community, whether they're employed, etc."

IV. CONCLUSION

As a matter of policy and practice, the assistance of defense counsel at proceedings involving possible pretrial detention and bail setting is essential – both to protect the rights of defendants, and to assist courts in understanding defendants' circumstances and making informed decisions. *Amici* urge this Court to affirm the District Court's opinion.

Dated: February 28, 2025 By: /s/ Gia L. Cincone

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 and 32 because this brief contains 6,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

This brief complies with the requirement of 8th Cir. R. 28A(h)(2) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 28, 2025 By: /s/ Gia L. Cincone

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