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New Report Confronts Lack of Lawyers at Bail Hearings

Marcia Coyle, Legal Times

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Virginia Sloan.
Photo: Diego M. Radzinski/NLJ

Jurisdictions throughout the country should appoint lawyers for poor defendants in publicly held, initial bail and release hearings, a bipartisan panel of criminal justice experts recommended Wednesday.

"Our country's problem with mass incarceration begins long before a convicted defendant is sentenced," said Virginia Sloan, president of The Constitution Project, whose National Right to Counsel Committee [made the recommendation in a new report](#). "Without effective representation at a pretrial release hearing, all too often poor defendants remain locked in jail at great cost to themselves, their families and society as a whole, and too frequently innocent people plead guilty to lesser crimes they did not commit simply to gain their freedom."

The report found that unrepresented low-income and indigent defendants—disproportionately persons of color accused of nonviolent crimes—remain in jail for periods ranging from three to 70 days solely because they do not have money for bail.

"Delaying counsel's appearance at this crucial beginning stage also delays and may irreparably damage an accused's ability to investigate, speak to witnesses, evaluate the charges in a timely manner, and prepare a defense," the report said.

The presence of an effective lawyer "makes the crucial difference in judicial officers' release rulings for most bailable offenses and provides an effective safeguard against denying bail except in 'carefully limited exceptions' in which a government prosecutor meets his or her burden in demonstrating that the defendant's release poses a significant danger or flight risk."

The U.S. Supreme Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation. In *Rothgery v. Gillespie County*, [the high court held in 2008](#) that a public prosecutor does not have to be aware of or involved in that initial proceeding for the right to attach.

The new report finds that despite those rulings, public defenders and assigned lawyers still remain missing from first bail hearings in numerous state courts.

"Lawyers are never present at the first bail hearing in eight states, while defenders appear infrequently or in token jurisdictions in 17 states. In 11 other states, a poor person stands a 50 percent or better chance of obtaining an assigned lawyer's representation, depending upon where the arrest occurred. In these hybrid states, however, unrepresented defendants still appear alone at 'freedom hearings' conducted in many counties where counsel is not present."

In addition to the appointment of counsel, the report recommends:

- "The first appearance hearing should be held in public and should provide the opportunity for defense counsel, pretrial release services representatives and family members to present information supporting the least onerous pretrial release conditions appropriate."
- "A pretrial release representative should present to all parties an objective risk assessment that measures a defendant's flight risk and danger to the community."
- "Judicial officers should order the 'least onerous' condition of pretrial release."
- "Jurisdictions should use savings realized through reduction in jail populations to provide the necessary resources for public defenders and appointed counsel to effectively represent defendants at initial bail hearings."
- "The federal government and state governments should engage in greater data collection regarding pretrial representation and case outcomes."

Doug Colbert of the University of Maryland Francis King Carey School of Law was the reporter for the committee whose members include current and former judges, prosecutors, defense counsel, police and victim advocates.

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