



What Ensuring Legal Representation at Bail Hearings Could Do for Tuscaloosa

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In the state of Alabama, there is a concerning gap in legal representation for individuals who cannot afford a lawyer. There is no statewide law mandating that defendants who cannot afford a lawyer are still represented in their initial court appearances. This lack of legal assistance not only violates constitutional rights to counsel but also impacts the fairness of the justice system.

Research from Allegheny County, Pennsylvania, demonstrates the positive impact of having public defenders present at bail hearings. For starters, researchers found that the presence of a public defender at bail hearings decreased pretrial detention rates by 10%. Moreover, ensuring legal representation at these hearings leads to fairer outcomes, reduces the reliance on cash bail, and ultimately lessens the burden on the criminal justice system.

Given these findings, it is imperative for the Tuscaloosa City Council to adopt requirements for counsel representing disadvantaged defendants at preliminary hearings.

Legal Background

In the historic *Strickland v. State* case, the **Alabama Supreme Court ruled that** “an accused has a right to counsel beginning with the arraignment and at every stage of the proceeding, including the guilty plea, unless a competent, intelligent, and voluntary waiver is made.” Similarly, *Saunders v. State* upheld that a defendant must have the right to counsel “at all critical stages” of adjudication to be prosecuted.

These “critical stages” have been **defined** as any portion of the legal process in which an individual and an agent of the state or government are confronted in a “trial-like” manner, in which proper representation would aid the client’s case.

At the federal level, the *Gideon v. Wainwright* ruling of 1963 and the Bail Reform Act of 1966 solidified the implementation of due process, as defined in the Fourteenth Amendment, and reshaped how pretrial processes occurred. The former case **made it possible** for all defendants—including disadvantaged populations—the right to a state-appointed attorney for all criminal offenses. The latter act made it possible for defendants of all socioeconomic backgrounds to have a chance to fight for their freedom before the start of their trial.

Despite these inroads, the U.S. Constitution does not recognize the bail hearing as a “critical stage” in the judicial process, thus states are left to decide how and when to provide counsel to defendants before trial.

Due to a lack of funding and time, many jurisdictions at the state level have been hesitant to encourage the presence of counsel at bail hearings, especially since said hearings tend to be very brief—some are even conducted virtually—and mostly deal with crimes that are small in scale and severity.

The Research

As mentioned above, a field experiment conducted in Allegheny County, Pennsylvania found that **the presence of counsel at these pretrial hearings decreases the use of monetary bail and shortens pretrial detention periods.**

That said, the study also found that providing public defenders during a defendant's initial bail hearing, resulted in a short-term influx of rearrests for theft charges within the first 6 months of a bail hearing with counsel.

Although implementing requirements for counsel at bail hearings can lead to short-term increases in rearrest rates, these are outweighed by long-term benefits, including reduced incarceration rates. Cost-benefit analyses indicate that providing legal representation is not only ethically sound but also economically prudent. **It is far more cost-effective to appoint attorneys for bail hearings than to detain individuals in jail.**

Pretrial Detention

Based on **statistics** from 2015, 70% of the total jail population in Alabama constituted those awaiting bail hearings. Legal experts agree that state-set bail is often unattainable for defendants and their families, leading to unnecessary time spent in prison and other subsequent losses, such as employment, housing, and parental responsibilities. Further, **the bail set for unrepresented defendants is, on average, \$600 more than for represented individuals at a pretrial hearing.**

Not only does this come at a cost to the defendant, but also to the government. As of 2017, \$13.6 billion was spent on pretrial detention across the nation. By providing counsel at bail hearings, not only can the injustice of unattainable bail amounts be mitigated, but significant savings could also be realized at the state level, benefiting both defendants and taxpayers.

Policy Recommendations

Existing state and federal laws, along with research on pretrial detention and the societal costs of incarceration due to failure to make bail, all strongly support the need for providing legal counsel to defendants at every stage of adjudication. While short-term increases in rearrest rates may occur initially in Tuscaloosa County following policy implementation, overall incarceration rates are projected to decline. **By recognizing bail hearings as a "critical stage" of the legal process, the Tuscaloosa City Council can significantly impact pretrial proceedings.** A policy change like this has the potential to decrease monetary bail amounts, alleviate pretrial detention, reduce unnecessary incarceration costs, and foster more equitable adjudication processes across Alabama.

Read more in Charlie Gerstein, "Plea Bargaining and the Right to Counsel at Bail Hearings," *Michigan Law Review* 111, (2013): 1513-1534; John P. Gross, "The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release," Alabama Law Scholarly Commons, June 2018.