The Wait for Counsel*

I. INTRODUCTION

An indigent person in Arkansas was arrested without a warrant at 5:00 PM on Monday, October 6 for felony possession of a controlled substance after the arresting officer observed a suspected illegal substance in the hands of the arrestee.[1] The officer then booked the arrestee into the county jail, and he spent the night there. Ordinarily, a felony defendant in Arkansas would then: (1) receive ex parte review of the officer's decision to arrest; (2) appear before a trial court judge for a decision on pretrial release; and (3) enter a plea at arraignment. At no point prior to the arraignment is the impoverished defendant provided with an opportunity to consult with counsel.

Consistent with that process, a judge reviewed the arresting officer's probable cause affidavit outside of the defendant's presence on Thursday, October 7 and agreed that probable cause supported the arrest. The judge set bail at $25,000 and scheduled the defendant's arraignment for Wednesday, November 6. The defendant could not pay the bail and was therefore unable to leave the county jail. The defendant also could not afford private defense counsel, and he spent the next thirty days sitting in jail without the benefit of representation. After thirty days of sleeping in a jail cell, the defendant met his public defender for the first time at arraignment. At this point, the public defender finally looked at the case file for the first time, and he advised the defendant on how to plead after only a few minutes of consideration. Not until *after* arraignment did the public defender have a meaningful opportunity to discuss the case with the defendant and advocate for his pretrial release.

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1. These facts are based loosely on three cases. *See* State v. Green, 524 N.W.2d 613 (S.D. 1994); Young v. State, No. 01-01-00259-CR, 2002 WL 1041333 (Tex. Ct. App. May 23, 2002); Hagerman v. State, 264 P.3d 18 (Wyo. 2011).

During those early stages of a criminal defendant's experience with the criminal justice system, known as the pretrial release decision and arraignment, two United States Supreme Court rulings collectively create the potential for gross violations of a defendant's constitutional rights under the Fourth, Fifth, and Sixth Amendments. In the 1975 case of *Gerstein v. Pugh*,[2] the Court required a judicial officer to make an ex parte finding of probable cause promptly following a defendant's warrantless arrest.[3] The holding sought to increase the protection provided to defendants by ensuring judicial review of an officer's decision to arrest, but the ruling did not require appointment of counsel for an indigent defendant.[4]

Twelve years later, in *United States v. Salerno*,[5] the Court declined to require appointment of counsel at the pretrial release decision when it held that pretrial detention is regulatory, rather than penal.[6] The holding implicitly permitted pretrial detention of unrepresented defendants charged with serious felonies.[7] Essentially, the *Salerno* decision allows for the indefinite pretrial jailing of a defendant charged with "allegations which are legally presumed to be untrue,"[8] so long as prosecutors demonstrate by clear and convincing evidence that the defendant is likely to commit another crime in the future.[9]

Current practices in Arkansas are consistent with *Gerstein* and *Salerno*, as judges usually do not appoint a public defender until the defendant's arraignment.[10] This allows many defendants to be held in jail until arraignment. Not until a defendant's arraignment, at the very earliest, will he receive counsel who could then seek a bail modification.[11] With most arraignments scheduled thirty days after arrest, and sometimes later, a defendant may sit in jail for a month or more before obtaining

2. 420 U.S. 103 (1975).
3. *Id.* at 126.
4. *Id.* at 122.
5. 481 U.S. 739 (1987).
6. *Id.* at 746.
7. *See id.*
8. *Id.* at 755 (Marshall, J., dissenting).
9. *See id.* at 751 (majority opinion).
10. Interview with Scott Parks, Deputy Pub. Defender, Washington Cnty., Ark., in Fayetteville, Ark. (Oct. 9, 2013) [hereinafter Parks Interview] (on file with author).
11. *See id.*

counsel and having a meaningful opportunity to obtain pretrial release.[12]

People often confuse the terms "arraignment" and "first appearance."[13] At a first appearance, a judicial officer must inform a defendant of the offenses charged, advise the defendant of his constitutional rights, and address the matter of pretrial release.[14] At an arraignment, on the other hand, a judge formally reads the information or indictment to the defendant and asks him to enter a plea.[15] Nonetheless, at least one Justice sitting on the Arkansas Supreme Court has recognized that "[t]here is no provision in our rules of criminal procedure that defines an arraignment or establishes when an arraignment should occur in relationship to the arrest, probable-cause determination, or first appearance."[16]

This comment argues that the legal framework established by the United States Supreme Court, the Arkansas Supreme Court, and the Arkansas Rules of Criminal Procedure violates the constitutional rights of criminal defendants in Arkansas. To solve this problem, this comment urges the Arkansas General Assembly to adopt legislation mandating the appointment of counsel at the ex parte judicial proceeding described by the Court in *Gerstein*.

Part II explores the current state of Arkansas law by analyzing relevant federal and state case law and applicable statutory provisions. Part III then explains the process by which an individual arrested without a warrant moves through the criminal justice system under current Arkansas procedural rules. Part III also compares Arkansas law with the laws of other jurisdictions which appoint counsel at an earlier stage in the criminal process. Following this comparison, this comment recommends that Arkansas adopt a rule that requires appointment of counsel to criminal defendants at a time prior to arraignment.

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12. *See id.*

13. *See* Landrum v. State, 328 Ark. 361, 371, 944 S.W.2d 101, 106 (1997) (Newbern, J., dissenting) ("It must be acknowledged that our opinions have been imprecise in the terminology used to describe three separate post-arrest procedures.").

14. *Id.* at 372-73, 944 S.W.2d at 107.

15. *Id.* at 374, 944 S.W.2d at 108.

16. *Id.*

II. CURRENT LAW

Both federal and state jurisprudence heavily influence Arkansas's practices regarding the right to counsel during pretrial detention. The *Gerstein* and *Salerno* decisions, along with their interpretation by lower federal courts, establish the minimum requirements of due process during early criminal proceedings and pretrial detention. Although a defendant's right to counsel is largely governed by several landmark United States Supreme Court decisions, Arkansas has developed its own process during pretrial detention through both case law and Arkansas Rules of Criminal Procedure 4.1(c), 8.1, and 9.1.

A. Federal Case Law

1. The Union of Gerstein *and* Salerno

The Fourth Amendment to the United States Constitution provides, in pertinent part, "no Warrants shall issue, but upon probable cause."[17] In the landmark case of *Gerstein*, the United States Supreme Court addressed whether a judicial determination of probable cause was constitutionally required following a defendant's warrantless felony arrest.[18] The petitioners in *Gerstein* challenged a Florida procedural rule that allowed any individual arrested without a warrant to be jailed or subjected to other restraints pending a trial, without any opportunity for a probable cause determination prior to detention.[19] At the time of the petitioners' arrests, an individual arrested in Florida could only obtain a judicial determination through a special law that permitted a preliminary hearing after thirty days or an arraignment, which often occurred a month or more after the arrest.[20] Thus, the Court considered whether petitioners, who were arrested without a warrant and held pending trial, were "entitled to a judicial determination of probable cause for detention."[21] The Court held that "a judicial determination of probable cause [was] a prerequisite to extended restraint of liberty following arrest," reasoning that "the detached judgment of a neutral magistrate [was] essential if the Fourth Amendment [was]

17. U.S. CONST. amend. IV.
18. Gerstein v. Pugh, 420 U.S. 103, 111 (1975).
19. *See id.* at 116.
20. *Id.* at 106.
21. *Id.* at 111.

to furnish meaningful protection from unfounded interference with liberty."[22] Accordingly, the standard for the newly created "*Gerstein* hearing" became probable cause—the same standard used for arrest.[23] However, the Court failed to provide clear guidance for trial courts and police departments as to the requirements of the *Gerstein* hearing. Instead, the court stated, "[t]he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing."[24]

Another procedural step that prolongs an indigent defendant's wait for counsel is pretrial detention. Pretrial detention is regulatory, not penal, according to the Court in *Salerno*.[25] The respondent in the case—reputed mafia member Anthony "Fat Tony" Salerno[26]—argued that the Bail Reform Act violated his substantive due process rights because the pretrial detention described in the Act amounted to "impermissible punishment before trial."[27] The Court, however, determined that "the mere fact that a person [was] detained d[id] not inexorably lead to the conclusion that the government ha[d] imposed punishment."[28] The Court defined substantive due process rights as those "implicit in the concept of ordered liberty" and rooted in the Fifth Amendment's Due Process Clause.[29] The Court then noted that government action that deprived a person of life,

22. *Id.* at 114.

23. *Gerstein*, 420 U.S. at 114.

24. *Id.* at 120.

25. United States v. Salerno, 481 U.S. 739, 746 (1987). The statute at issue in the case was a particular provision of the Bail Reform Act of 1984. *See* 18 U.S.C. § 3142(e) (2012). At the time the case was decided, the statute required a detention hearing at which a defendant had a right to counsel, could testify on his own behalf, could present information, and could cross-examine witnesses. 18 U.S.C. § 3142(f). A judicial officer then determined the appropriateness of the detention based on factors set forth in the statute, including the nature and circumstances of the charges, the weight of the evidence, the history and characteristics of the offender, and the danger posed by the offender to the community. *See* 18 U.S.C. § 3142(g). The government had the burden to prove each case by clear and convincing evidence. 18 U.S.C. § 3142(f). Finally, a judicial officer determined whether detention was warranted and included written findings of fact and a written statement of reasons for the decision. 18 U.S.C. § 3142(i).

26. In 1986, *Fortune* considered Salerno "the most powerful and wealthiest gangster in America." *See* James Dao, *Anthony (Fat Tony) Salerno, 80, A Top Crime Boss, Dies in Prison*, N.Y. TIMES, July 29, 1992, at D19.

27. *Salerno*, 481 U.S. at 746.

28. *Id.*

29. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted).

liberty, or property could "survive[] substantive due process scrutiny," but "it must still be implemented in a fair manner."[30] The implementation phase is referred to as "procedural" due process, and the Court addressed this phase when scrutinizing the constitutionality of the Bail Reform Act.[31]

The Court first reviewed the Act's legislative history, noting "Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals."[32] Instead, the Court found that Congress did not intend for pretrial detention to serve as punishment.[33] The Court cited one of its previous decisions that upheld a statutory requirement that detainees be housed in a separate facility from those who had already been convicted of their crimes.[34] Based primarily on the legislative history of the Bail Reform Act, the Court concluded, "the detention imposed by the Act falls on the regulatory side of the dichotomy."[35] Because of the regulatory purpose and the procedural protections of the Act, the Court ruled that the it was not facially invalid under the Fifth Amendment's Due Process Clause.[36]

2. Other Influential Decisions

The United States Court of Appeals for the Eighth Circuit has also examined the legislative history and statutory scheme of the Bail Reform Act of 1984. In *United States v. Orta*,[37] the court noted that the Act "continue[d] to favor release over pretrial detention."[38] In *Orta*, the court listed the four alternatives to posting bail, in their statutorily mandated order of progression, that a judicial officer must choose from when determining pretrial release for the criminally accused: "(1) release on personal recognizance or unsecured appearance bond, or (2) release subject to certain conditions, or (3) temporary detention to permit,

30. *Id.*

31. *Id.* at 746-47.

32. *Salerno*, 481 U.S. at 747.

33. *See id.*; *see also* S. REP. No. 98-225, at 8 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3190-91 (stating pretrial detention is not intended to promote the traditional aims of punishment, such as retribution or deterrence, but rather to prevent the detainee from committing other criminal offenses).

34. *Salerno*, 481 U.S. at 747-48 (citing Schall v. Martin, 467 U.S. 253, 270 (1984)).

35. *Id.* at 747.

36. *Id.* at 752.

37. 760 F.2d 887 (8th Cir. 1985).

38. *Id.* at 890.

among other things, revocation of conditional release, or (4) pretrial detention."[39] This mandatory progression should, in theory, result in few defendants being subjected to pretrial detention.[40]

The Eighth Circuit recently interpreted *Salerno* in *United States v. Stephens*,[41] a case in which a defendant challenged the constitutionality of a statute requiring a curfew and electronic monitoring.[42] A federal district court had held that the mandatory release conditions under the relevant statute, which included curfew and electronic monitoring, were facially unconstitutional.[43] On appeal, the Eighth Circuit recognized that "[n]owhere in *Salerno* . . . did the Supreme Court hold that, as a matter of procedural due process, mandatory conditions of release are always facially unconstitutional."[44] Concluding that the mandatory release conditions were constitutionally permissible, the court held that for the provisions of the Bail Reform Act of 1984 to be upheld, a court must only find the provisions "adequate to authorize the pretrial detention of at least some persons charged with crimes," even if the conditions may be unsatisfactory in certain circumstances.[45]

Another line of cases critical to Arkansas's current practices developed over several decades in the United States Supreme Court's right-to-counsel cases. In these cases, the Court determined that there are certain critical stages during which a criminal defendant has a constitutional right to counsel. When there is a potential for "substantial prejudice" to the defendant's rights that could be avoided by the appointment of counsel, even at a preliminary hearing, the United States Constitution mandates appointment.[46]

Powell v. Alabama,[47] a landmark decision issued by the Court in 1932, established the right to counsel from arraignment

39. *Id.* (footnotes omitted).
40. *Id.* at 891.
41. 594 F.3d 1033 (8th Cir. 2010).
42. *Id.* at 1035.
43. *Id.* at 1036.
44. *Id.* at 1039.
45. *Id.* at 1037-38 (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)) (internal quotation marks omitted).
46. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).
47. 287 U.S. 45 (1932).

until trial, a period during which consultation, investigation, and preparation are "vitally important."[48] However, the Court's holding in *Powell* was limited to capital cases.[49] Decades later, in 1967, witnesses identified the accused in *United States v. Wade*[50] during a standard police lineup.[51] Although counsel had been appointed for the defendant, police failed to notify the defendant's attorney of the lineup,[52] a proceeding deemed by the Court to be "a critical stage."[53] To further protect the defendant's right to counsel, the Court declared:

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[54]

The Court elaborated on this point, noting that counsel's presence at a critical stage ensures a meaningful defense[55] by avoiding a "substantial prejudice to defendant's rights."[56]

The Court further defined the right to counsel in 1972 when it held in *Kirby v. Illinois*[57] that Sixth Amendment guarantees were applicable at the point a "defendant f[ound] himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[58] The Court expanded that concept further in the 1973 case *United States v. Ash*,[59] in which it classified pretrial adversarial proceedings as "trial-like confrontations" that triggered the right to counsel.[60]

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48. *Id.* at 57.
49. *See id.* at 71.
50. 388 U.S. 218 (1967).
51. *Id.* at 220.
52. *Id.*
53. *Id.* at 236-37.
54. *Id.* at 226 (footnotes omitted).
55. *Wade*, 388 U.S. at 224-25.
56. *Id.* at 227.
57. 406 U.S. 682 (1972).
58. *Id.* at 689.
59. 413 U.S. 300 (1973).
60. *Id.* at 311-12. Although the Court determined that the "photographic display" at issue in *Ash* was not an adversarial proceeding because it was conducted by the prosecutor to determine whether witnesses would be able to make in-court identifications, the Court noted that the risks inherent in confrontations, such as taking fingerprints or blood samples and utilizing photographic displays, could be cured by defense counsel at trial. *Id.* at 315-16.

In 2008, the Court implicitly addressed possible delays to the appointment of counsel in *Rothgery v. Gillespie County, Texas*.[61] After a criminal background check erroneously stated that the defendant had a felony conviction, a police officer arrested him, and prosecutors charged him with felony possession of a firearm.[62] The officer took the defendant before a judge, who found probable cause supported the arrest and set bail.[63] The defendant then posted bond and was released.[64] The defendant could not afford an attorney, and he unsuccessfully requested appointed counsel several times.[65] Six months after his arrest, a grand jury indicted the defendant for unlawful possession of a firearm by a felon, and police arrested the defendant again.[66] A judge ordered an increased bail amount, and when the defendant could not afford to post a bond, he was sent to jail, where he remained for three weeks before the court finally appointed counsel to represent him.[67] The attorney convinced the judge to reduce the defendant's bail, which allowed the defendant to get out of jail.[68] The attorney quickly gathered proof that the defendant had never been convicted of a felony and presented this information to the prosecutor, who promptly had the indictment dismissed.[69]

Although the Court noted that its holding was narrow, it reaffirmed that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the Sixth Amendment right to counsel."[70] The Court stated, "the overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment,"[71] but in doing so it mistakenly assumed

61. 554 U.S. 191 (2008).
62. *Id.* at 195.
63. *Id.* at 195-96.
64. *Id.* at 196.
65. *Id.*
66. *Rothgery*, 554 U.S. at 196.
67. *Id.*
68. *Id.* at 196-97.
69. *Id.* at 197.
70. *Id.* at 213.
71. *Rothgery*, 554 U.S. at 203.

that Arkansas courts already appointed counsel at the *Gerstein* hearing.[72]

The decision by the United States Supreme Court in *Gideon v. Wainwright*[73] made the Sixth Amendment's right-to-counsel mandate applicable in state courts.[74] The *Gideon* decision applies to both capital and non-capital felony offenses.[75] Stated simply, *Gideon* created an automatic right-to-counsel requirement for all felony cases in the United States.[76]

B. Arkansas Law

The current practices regarding the right to counsel during pretrial detention in Arkansas are based on the Arkansas Rules of Criminal Procedure. This comment illustrates the right to counsel by describing the routine pretrial detention process used in Washington County, the state's third most populous county. The timeline for that process, crucial to the issues addressed in this comment, is derived from both Arkansas case law and the Arkansas Rules of Criminal Procedure. The discussion that follows illustrates Arkansas's current practices by telling the story of a typical defendant arrested in Arkansas. A discussion of Arkansas case law interpreting *Gerstein* and *Salerno* follows. Finally, the Arkansas Rules of Criminal Procedure and their application during the typical defendant's experience with the criminal justice system are examined.

1. Current Practices

Defendants in Arkansas generally share similar experiences prior to arraignment. The following scenario typifies a defendant's experience once arrested for a felony without a warrant in Washington County. A defendant's usual encounter with the criminal justice system begins with alleged criminal activity and subsequent arrest.[77] A police officer might then

72. *See id.* at 204 n.14 (mistakenly listing Arkansas among states that "appoint[] counsel 'before, during, or just after initial appearance'" (quoting App. to Brief for Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae Supporting Petitioner at 1a-7a, *Rothgery*, 554 U.S. 191 (No. 07-440), 2008 WL 218874)).

73. 372 U.S. 335 (1963).

74. *Id.* at 343-44.

75. *See id.* at 348-49 (Clark, J., concurring).

76. *Id.* at 349.

77. *See* Parks Interview, *supra* note 10.

observe or learn about the criminal offense and briefly investigate the alleged criminal conduct.[78] The officer would then determine if probable cause exists to arrest the person without a warrant; often, this involves calling a superior officer, relaying the facts of the incident to that officer, and discussing whether probable cause supports an arrest based on the facts at this early stage.[79] If probable cause is found, the officer arrests the suspect.[80] The officer transports the defendant to the county jail, where the defendant is read his *Miranda* rights.[81] At this point, officers may question the defendant; in fact, most interrogations occur at this point in the process.[82] If the defendant invokes his right to counsel, the police must stop questioning, but they do not have to call a public defender.[83] Officers will search the defendant, inventory any property on his person, and issue jail clothing to him.[84] Jail officials then place the defendant in a cell to await his "8.1 hearing."[85]

At the jail, the arresting officer drafts a probable cause affidavit detailing the charges, the defendant's biographical information, and the facts that led to the arrest and charge.[86] Each day, the jail sends a fax with all probable cause affidavits to the prosecuting attorney's office.[87] The office reviews the affidavits the next day and makes an independent determination of whether probable cause supports the charges.[88] The prosecuting attorney then confers with a circuit court judge who reviews each arrest and the surrounding facts.[89] The judge also makes the neutral determination of probable cause contemplated by *Gerstein*; if the judge finds probable cause supported the arrest, the prosecutor recommends a bond amount.[90] Information concerning bail is

78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See* Parks Interview, *supra* note 10.
83. *See id.*
84. *See id.*
85. *See id.* An "8.1 hearing" is the commonly used name for the defendant's first appearance before a judicial officer. *Id.*
86. *See* Interview with Matthew Durrett, Deputy Prosecuting Attorney, Washington Cnty., Ark., in Fayetteville, Ark. (Oct. 8, 2013) [hereinafter Durrett Interview] (on file with author).
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*

sent to the jail, where the defendant is informed of the bond amount.[91] The defendant may then make arrangements to pay the bond and "bond out" of jail.[92]

Three days per week, a magistrate judge goes to the jail and, pursuant to Arkansas Rule of Criminal Procedure 8.1,[93] meets with inmates who have yet to post bond.[94] As required by Arkansas Rule of Criminal Procedure 8.3,[95] the magistrate judge informs the defendant of the following: (1) he has a right to silence and that anything he says can be used against him at trial; (2) he has a right to counsel; and (3) he has a right to communicate with his counsel, family, and friends.[96] In the rare event that a circuit court judge has not yet made a determination of probable cause, the magistrate judge may make the probable cause determination during his visit to the jail.[97] Finally, either the circuit court judge or the magistrate judge informs the defendant of his next court date, usually the arraignment, at the time the bond is set.[98] Usually, the judge will schedule the arraignment for thirty days following the arrest.[99] If the defendant is able to post bond, he is released and ordered to appear in court on the arraignment date.[100] However, if the defendant is unable to post bond, he must await his arraignment, which generally lasts for only a few minutes, while sitting in jail.[101]

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91. *See* Durrett Interview, *supra* note 86.

92. *See id.*

93. *See* ARK. R. CRIM. P. 8.1 ("An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.").

94. Parks Interview, *supra* note 10.

95. *See* ARK. R. CRIM. P. 8.3 (imposing certain requirements on judges during the first appearance).

96. Parks Interview, *supra* note 10.

97. Durrett Interview, *supra* note 86. In Arkansas, circuit court judges preside over state circuit courts, which are trial courts of general jurisdiction. *See Circuit Courts*, ARK. JUDICIARY, http://courts.arkansas.gov/courts/circuit-courts (last visited Nov. 16, 2014). Magistrate judges preside over local district courts, which have limited jurisdiction. *District Courts*, ARK. JUDICIARY, http://courts.arkansas.gov/courts/district-courts (last visited Nov. 16, 2014). Generally, circuit court judges review probable cause affidavits, as they preside over felony cases. Durrett Interview, *supra* note 86.

98. *See* Durrett Interview, *supra* note 86.

99. *Id.*

100. *Id.*

101. *See* Parks Interview, *supra* note 10.

2. Arkansas Case Law

A defendant's pretrial experience with the criminal justice system has been shaped through several decisions handed down by the Arkansas Supreme Court, most notably *Otis v. State*,[102] *Britt v. State*,[103] and *Sutton v. State*.[104] The court addressed *Gerstein* in *Otis* and established a timeframe for the required hearing to occur.[105] In *Otis*, officers took the accused to the police station early in the evening to question him about an alleged murder.[106] At the time, the defendant was not a suspect, and officers told him that he was not under arrest.[107] During questioning, the defendant confessed to committing the crime while intoxicated.[108] Although the officers formally placed the defendant in custody around 9:00 P.M. and took him to look for evidence during the early morning hours of the next day,[109] he did not appear before a judge until 4:02 P.M. two days after his arrest.[110] The defendant's *Gerstein* hearing occurred within forty-eight hours of arrest, but the defendant argued the hearing was unreasonably delayed for the purpose of allowing the officers to obtain additional evidence.[111] Before determining whether there was an unreasonable delay between arrest and *Gerstein* hearing, the court noted that "it does not automatically follow that a probable cause determination will pass constitutional muster simply because it is provided within forty-eight hours."[112] Because the defendant confessed to the crime prior to his arrest, officers had sufficient evidence to justify his arrest, and the court held that the delay was not unreasonable.[113]

Just four years earlier, the Arkansas Supreme Court heard *Britt*, a case involving a defendant who received his probable cause hearing roughly forty-six hours after arrest.[114] Although

102. 364 Ark. 151, 217 S.W.3d 839 (2005).
103. 344 Ark. 13, 38 S.W.3d 363 (2001).
104. 262 Ark. 492, 559 S.W.2d 16 (1977) (en banc).
105. *See Otis*, 364 Ark. at 164-65, 217 S.W.3d at 846-47.
106. *Id.* at 157, 217 S.W.3d at 842.
107. *Id.*
108. *Id.* at 158, 217 S.W.3d at 842.
109. *Id.*
110. *Otis*, 364 Ark. at 164, 217 S.W.3d at 846-47.
111. *Id.*
112. *Id.* at 164, 217 S.W.3d at 847.
113. *Id.* at 165, 217 S.W.3d at 847.
114. *See* Britt v. State, 344 Ark. 13, 21-22, 38 S.W.3d 363, 369 (2001).

the defendant disputed the time of arrest, the trial court reviewed an arrest report that stated the arrest occurred less than forty-eight hours before the *Gerstein* hearing.[115] Therefore, the court held, "we cannot say the trial court clearly erred when it found that [the defendant] was afforded a reasonable-cause determination within forty-eight hours of his arrest."[116]

The Arkansas Supreme Court had first clarified the right to counsel's application in *Sutton*, a 1977 case in which the court held that the defendant "should have had an attorney appointed at his preliminary hearing, or the state should have shown that he specifically waived that right."[117] In response to whether the defendant waived his right to counsel, the court ruled that "[t]he burden [was] clearly on the state to establish that [defendant] waived his rights."[118]

The right to counsel found by the court in *Sutton* is rooted in the Sixth Amendment to the United States Constitution.[119] In addition to a defendant's right to a speedy trial by a jury of his peers, to be informed of the nature and cause of the accusation, to confront witnesses against him, and to call witnesses in his favor, the Sixth Amendment guarantees that "the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[120]

3. Arkansas Rules

Arkansas applies the mandate from *Gerstein* by using a trio of procedural rules. First, Arkansas Rule of Criminal Procedure 4.1(e) governs probable cause hearings.[121] It provides that probable cause hearings must occur no later than forty-eight hours after an arrest, "unless the prosecuting attorney demonstrates that a bona fide emergency or other extraordinary circumstance justifies a delay longer than forty-eight (48) hours."[122] Second, Rule 8.1 regulates first appearances.[123] The Rule dictates that an arrestee must be taken before a judicial officer "without

115. *Id.*
116. *Id.* at 22, 38 S.W.3d at 369.
117. Sutton v. State, 262 Ark. 492, 494, 559 S.W.2d 16, 17 (1977) (en banc).
118. *Id.* at 495, 559 S.W.2d at 18.
119. *See* U.S. CONST. amend. VI.
120. *See* U.S. CONST. amend. VI.
121. *See* ARK. R. CRIM. P. 4.1(e).
122. ARK. R. CRIM. P. 4.1(e).
123. *See* ARK. R. CRIM. P. 8.1.

unnecessary delay."[124] Third, Rule 9.1 governs a judge's release decisions.[125] Under Rule 9.1, "the judicial officer may release the defendant on his personal recognizance or upon an order to appear" at the first appearance.[126] The rule further explains a release "upon an order to appear," by using the following language:

> (b) Where conditions of release are found necessary, the judicial officer should impose one (1) or more of the following conditions:
>
> (i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;
>
> (ii) place the defendant under the supervision of a probation officer or other appropriate public official;
>
> (iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;
>
> (iv) release the defendant during working hours but require him to return to custody at specified times; or
>
> (v) impose any other reasonable restriction to ensure the appearance of the defendant.[127]

Rule 9.2 demonstrates the preference of release on personal recognizance by stating that "[t]he judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court."[128]

Rule 8.2 governs the appointment of counsel.[129] It states, "[a]n accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable."[130] In cases where the accused cannot afford an attorney, the Rule forces a court to "appoint counsel to represent the indigent" once the defendant is brought before the court.[131] Rule 8.3, which describes the nature of the first appearance, mandates that "[n]o further steps in the proceedings other than pretrial release inquiry may be taken until the

124. ARK. R. CRIM. P. 8.1.
125. *See* ARK. R. CRIM. P. 9.1.
126. ARK. R. CRIM. P. 9.1(a).
127. ARK. R. CRIM. P. 9.1(b).
128. ARK. R. CRIM. P. 9.2(a).
129. *See* ARK. R. CRIM. P. 8.2.
130. ARK. R. CRIM. P. 8.2(a).
131. ARK. R. CRIM. P. 8.2(b).

defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel."[132] In practice, however, public defenders are not appointed to represent indigent defendants until arraignment.[133] Finally, Arkansas codified the right of a defendant to choose his own counsel in Arkansas Code section 16-85-101, which provides in part that "[w]hile confined and awaiting trial in any prison or jail in this state, no prisoner shall be denied the right to . . . [c]onsult an attorney of the prisoner's own choosing."[134]

III. ANALYSIS

Although the current state of the law allows Arkansas to delay a defendant's right to counsel until arraignment, while simultaneously allowing the defendant to remain incarcerated, some jurisdictions have successfully overcome this problem. Maryland is one such jurisdiction. After successful implementation of the "LAB" project, the state's highest court recently addressed the problems caused by delayed appointment of counsel and acknowledged a defendant's constitutional right to counsel at the *Gerstein* hearing.[135] Given the problems inherent in Arkansas's status quo of allowing extended pretrial detention without counsel, the state should also adopt measures to protect every defendant's constitutional rights. This Part first describes a project at the University of Maryland School of Law that provides valuable information about the effects of appointing an attorney at the bail stage of pretrial proceedings. A discussion of the problems with the methods and practices currently utilized in Arkansas follows. This Part concludes by providing suggestions intended to improve Arkansas's system and protect the constitutional rights of defendants during pretrial detention.

A. The "LAB" Project

At least one study has shown that defendants represented by counsel were two and a half times more likely to be released from

132. ARK. R. CRIM. P. 8.3(b).

133. *See* Parks Interview, *supra* note 10.

134. ARK. CODE. ANN. § 16-85-101(a)(1) (Repl. 2005).

135. *See* DeWolfe v. Richmond, 76 A.3d 1019, 1031 (Md. 2013) ("[A]n indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner.").

pretrial custody on their own recognizance than unrepresented defendants.[136] Further, bail was reduced to an affordable amount for two and a half times as many represented defendants.[137] The study concluded that "[w]ithout counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual's ability to pay."[138] Delaying representation until after a judicial officer made a pretrial release decision was the single most important factor in the length of pretrial incarceration of individuals charged with nonviolent felonies.[139]

Only eight states and the District of Columbia routinely provide counsel for indigent defendants at the bail stage of a criminal case.[140] Of those nine jurisdictions, first consider Maryland's practices, rules, and case law regarding the right to counsel at the *Gerstein* hearing.[141] In 2013, Maryland's highest court decided that defendants have a constitutional right to state-appointed counsel at an initial appearance before the District Court Commissioner.[142] In the case before the court, the plaintiffs filed a lawsuit alleging that they were denied representation by a public defender at their initial appearance.[143] The plaintiffs claimed that the initial appearance constituted a "critical stage" of the criminal proceedings that required state-furnished counsel under the Maryland Public Defender Act.[144] The court decided

136. Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002).

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* CAL. PENAL CODE § 859 (West 2014); WIS. STAT. ANN. § 967.06 (West 2014); DEL. SUPER. CT. CRIM. R. 44; D.C. SUPER. CT. R. CRIM. P. 44; FLA. R. CRIM. P. 3.130(c)(1); MD. R.P. 4-214(b); MASS. R. CRIM. P. 8; N.D. R. CRIM. P. 44(a)(1)–(2); W. VA. R. CRIM. P. 44(a).

141. Maryland law refers to an "initial appearance," which is the same procedural step as the "8.1 hearing" in Washington County, Arkansas. Regardless of the terminology used, both are what this comment refers to as the "*Gerstein* hearing." *See* DeWolfe v. Richmond, 76 A.3d 1019, 1021 (Md. 2013).

142. *See id.* at 1031. In Maryland, a District Court Commissioner is a judicial officer responsible for reviewing charging documents and making pretrial release determinations. *Who Does What in District Court?*, DISTRICT CT. MD., http://www.courts.state.md.us/district/selfhelp/whodoeswhat.html (last visited Nov. 16, 2014).

143. *See DeWolfe*, 76 A.3d at 1021. Each plaintiff requested representation and informed a Commissioner that he was unable to afford an attorney, but the Commissioner in each case declined to appoint counsel and proceeded to set bail. *Id.* at 1023.

144. *Id.* at 1021.

the case based on an interpretation of the Maryland Constitution, which mandated "'[t]hat no man ought to be taken or imprisoned or disseized of his . . . liberties or privileges . . . or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.'"[145]

As the Maryland Court of Appeals recognized, at the time that a defendant initially appears before a Commissioner, "the defendant is in custody and, unless released on his or her personal recognizance or on bail, the defendant will remain incarcerated until a bail review hearing before a judge."[146] The court noted that the presence of counsel can surely be of assistance to the Commissioner when determining whether to release the defendant on his own recognizance.[147] The court importantly reaffirmed that the right to counsel existed in any proceeding that could result in a defendant's incarceration, including the initial appearance before a Commissioner.[148]

More than ten years before *DeWolfe*, the Maryland Court of Appeals issued a landmark decision on the right to counsel in *McCarter v. State*.[149] The defendant in *McCarter*, arrested for possession of marijuana and drug paraphernalia, waived his right to a jury trial at his initial appearance, which had occurred prior to appointment of counsel.[150] After the presiding judge appointed a public defender to represent the defendant, the public defender moved to schedule a jury trial by arguing that the defendant should not have been allowed to waive his right to a jury trial in the absence of counsel.[151] The trial court denied the motion and decided that the initial appearance was not a critical stage at which the defendant was entitled to representation.[152]

As in Arkansas, Maryland's procedural rules apply to the representation of criminal defendants. Maryland Rule of Procedure 4-214 governs defense counsel, and the Rule states that when a court appoints a public defender, "representation extends

145. *Id.* at 1027 (quoting MD. CONST. art. 24).
146. *See id.* at 1031.
147. *See id.* at 1030.
148. *DeWolfe*, 76 A.3d at 1029.
149. 770 A.2d 195 (Md. 2001).
150. *See id.* at 196-97.
151. *See id.* at 198.
152. *Id.*

to *all* stages in the proceedings."[153] In *McCarter*, the Maryland Court of Appeals ultimately held that Rule 4-214(b) gave a defendant a statutory right to counsel at his initial appearance.[154] The court did not need to address the issue of a constitutional right to counsel because of the unambiguous language in the Rule mandating representation at *all* stages in the proceedings.[155]

These decisions by the Maryland Court of Appeals forced the state's criminal justice system to undertake significant reform. In 1998, students at the University of Maryland School of Law participated in an "Access to Justice Clinic" where they represented indigent defendants at bail hearings in Baltimore.[156] Students first conducted client interviews with arrested individuals at the detention facility.[157] The day after their initial client interview, students appeared at the initial appearance with their clients and supplemented the information possessed by the judge about each detainee, including information about the client's family, employment, and personal reliability.[158] As the program began operation, Professor Douglas L. Colbert developed the "Lawyers at Bail" ("LAB") project in cooperation with the local judiciary.[159]

The LAB project launched in August 1998 and, despite some initial difficulties, substantially shifted the system towards a more collaborative model.[160] Paralegals initially interviewed the clients and communicated with LAB lawyers about the clients they would represent at bail hearings later in the day.[161] LAB

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153. MD. R.P. 4-214(b) (emphasis added). The Rule also explicitly lists several pretrial, trial, and post-trial stages during which defendants in Maryland are entitled to representation by a public defender:

> When counsel is appointed by the Public Defender or by the court, representation extends to all stages in the proceedings, including but not limited to custody, interrogations, preliminary hearing, pretrial motions and hearings, trial, motions for modification or review of sentence or new trial, and appeal.

MD. R.P. 4-214(b).

154. *See McCarter*, 770 A.2d at 199.

155. *See id.*

156. Colbert et al., *supra* note 136, at 1731.

157. *Id.* at 1734.

158. *Id.*

159. *Id.* at 1737-38.

160. *Id.* at 1739-40.

161. Colbert et al., *supra* note 136, at 1749. Paralegals also ensured that each defendant was eligible for the study, and eligibility was determined solely by whether the alleged crime was a non-violent offense. *Id.* Paralegals then placed each case into the "LAB

lawyers then presented beneficial and verified information concerning the appropriate bail during their clients' review hearings.[162]

Defendants represented by LAB lawyers fared far better at bail hearings than those without counsel.[163] They were substantially more likely to be released on their own recognizance, to have their initial bail reduced and for the bail to be reduced by a greater amount, to have affordable bails set, and to serve less time in jail.[164] The median number of days in jail for an arrestee represented by counsel at the hearing was two days, compared with nine days for unrepresented detainees.[165] The presence of LAB lawyers had the greatest effect on arrestees who would not have made bail without the intervention of counsel.[166] At the time of the study, the median number of days spent in Baltimore jail by those who could not afford to post bail was thirty-eight days.[167] Considering that three out of five defendants could ultimately receive a *nol pros*,[168] or an outright dismissal,[169] any length of time spent in jail was substantial. Ultimately, the study demonstrated the vital importance of representation at bail.

B. Problems with the Status Quo in Arkansas

Representation is the critical difference between release and extended incarceration prior to trial for indigent defendants in America's criminal justice system.[170] Indigent, unrepresented defendants who are incarcerated immediately following arrest face a number of disadvantages and difficulties compared to their represented counterparts.[171] For example, an indigent defendant is likely to have a low-paying job at the time of his arrest, without

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lawyer" experimental group or the "non-lawyer" control group. *Id.* Random assignment of cases ensured that the experimental group was as similar as possible to the control group. *Id.*

162. *See id.*

163. *See id.* at 1755-56.

164. *Id.* at 1756.

165. *Id.* at 1755.

166. Colbert et al., *supra* note 136, at 1756.

167. *Id.*

168. *See id.*

169. *See id.*

170. *See id.* at 1762.

171. *See* Colbert, *supra* note 136, at 1762; *see also* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

vacation time or other paid time off available for him to use; therefore, after thirty days of missed work, many indigent defendants lose their jobs.[172] Those indigent defendants may also lose their homes if they lack the financial resources to make rent or mortgage payments.[173] Additionally, prolonged detention may cause the displacement of dependent family members. An attorney's representation at the *Gerstein* hearing could easily prevent all of these collateral consequences by demonstrating to the presiding judge that the defendant is not a flight risk, which might result in the defendant's release on his own recognizance.

Indigent defendants may also be at a disadvantage in terms of collecting evidence when they are incarcerated pending trial and are unable to communicate with counsel.[174] The absence of early representation by an attorney prevents a prompt investigation.[175] For instance, although surveillance tapes are often useful for defense attorneys to provide an alibi for their client, many surveillance tapes are erased after thirty days.[176] Thus, if an arrestee sits in jail, without formal charges or an attorney, the surveillance tape that could establish an alibi or verify his narrative of the alleged crime may be deleted.[177] Witness statements are also crucial pieces of evidence for a defense attorney. Witnesses are more difficult to track down and interview as time passes; after thirty days or more, it can be impossible to locate new witnesses or to meet with witnesses living out of town.[178] Between the deletion of surveillance tapes and the difficulty or impossibility of locating witnesses, potentially vital pieces of the case may be irreparably destroyed during the defendant's pretrial incarceration without counsel.

The Arkansas Public Defender Commission favors appointment of a public defender within seventy-two hours of a defendant's arrest.[179] Moreover, public defenders in Washington County prefer appointment at or before the bail hearing in order to allow them to advocate for a reduced bail amount for their

172. *See* Interview with Gregg Parrish, Exec. Dir., Ark. Pub. Defender Comm'n, in Fayetteville, Ark. (Nov. 15, 2013) [hereinafter Parrish Interview] (on file with author).

173. *See id.*

174. *See id.*

175. *See* Colbert et al., *supra* note 136, at 1776.

176. *See* Parrish Interview, *supra* note 172.

177. *See id.*

178. *See id.*

179. *See id.*

clients.[180] However, such rapid appointment presents logistical hurdles in rural areas where judges' dockets consist of cases from multiple counties, complicating the timing of first appearances and appointment of public defenders.[181] To make matters worse, defendants arrested in Arkansas's rural counties are often transported to a jail in another county due to overcrowding or poor conditions at the jail in the county in which the arrest occurred. Relocating those defendants further hampers communication with defense counsel.[182]

The implementation of a program modeled after the University of Maryland's Access to Justice Clinic in counties surrounding Arkansas's two law schools would leave the rest of the state without aid.[183] While such a clinic could provide representation for some criminal defendants living near the law schools, it would be insufficient to meet the needs of criminal defendants statewide.[184] Thus, providing representation at *Gerstein* hearings in only a few counties would be detrimental, and unfair, to those arrested in other parts of the state.[185]

C. Recommendations

Other jurisdictions successfully facilitate the Sixth Amendment right to counsel earlier in the judicial process by appointing public defenders to indigent defendants prior to arraignment.[186] This comment contends that public defenders in Arkansas should be appointed at the *Gerstein* hearing to protect the constitutional rights of the criminally accused. The appointment of a public defender at the *Gerstein* hearing allows defense counsel to present the judge with information about the defendant's community ties and flight risk before a bond is set or the defendant is held until trial. The judge would then be more

180. *See id.*

181. *See* Parrish Interview, *supra* note 172.

182. *See id.* Law enforcement officers commonly hold a defendant in a detention facility located thirty to sixty miles away from the county in which he was arrested and where the public defender's office is located. *Id.* The defendant must then communicate with his attorney primarily through the jail's phone, where conversations can be recorded. *Id.* Fears that the defendant will make an incriminating statement stifles open and honest communication between the defendant and his attorney. *Id.*

183. *See id.*

184. *See id.*

185. *Id.*

186. *See supra* note 140 and accompanying text.

likely to set bond at an affordable amount or to release the defendant on his own recognizance, preventing an extended and unnecessary stay in jail.[187] Additionally, the public defender could promptly begin to investigate the case before witnesses and evidence becomes difficult or impossible to obtain.[188]

Alternatively, Arkansas courts should, at a minimum, appoint a public defender within seventy-two hours of a defendant's arrest. This solution, while not ideal, is logistically possible in Arkansas because it provides uniformity and fairness to defendants across the state without an inordinate increase in manpower. Although it may seem that appointing public defenders earlier would require more manpower, earlier representation would actually result in fewer cases proceeding through the entire course of criminal proceedings.[189] When appointed earlier, public defenders can better evaluate whether the particular facts support the particular charges and then relay that information to prosecutors and judges. In cases in which the facts do not support the charge beyond a reasonable doubt, an early dismissal will result in fewer manpower hours needed throughout the criminal justice system. In turn, defendants will receive an attorney to seek a bail reduction and begin a prompt investigation of the case. Ideally, Arkansas should appoint public defenders at the *Gerstein* hearing. At a minimum, appointment of a public defender within seventy-two hours would improve the current practice of waiting thirty days or more to make the appointment. A suggested revision to current Arkansas Rule of Criminal Procedure 8.2 is attached as Appendix A.

187. Colbert et al., *supra* note 136, at 1756 (noting that the presence of counsel resulted in an increase in the number of individuals released on their own recognizance and those who received a reduced bail).

188. *Id.* at 1763.

189. *See* Interview with Gregg Parrish, *supra* note 172.

IV. CONCLUSION

Before the problem of appointment of counsel can be adequately addressed and remedied, it must first be recognized. The Arkansas General Assembly should mandate the appointment of a public defender at the *Gerstein* hearing to protect a defendant's Sixth Amendment right to counsel at such a critical stage of the criminal proceedings against him. Doing so promises to protect a defendant's constitutional rights.

BRITTA PALMER STAMPS

APPENDIX A

Arkansas Rules of Criminal Procedure

Rule 8.2. Appointment of counsel.

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel, the court shall appoint counsel to represent the indigent, unless the indigent is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as part of the punishment if the indigent is found guilty. A suspended or probationary sentence to incarceration shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in the incarceration of the indigent without the opportunity to contest guilt of the offense for which incarceration is imposed.

(c) When the court appoints counsel to represent the indigent, the representation extends to all stages in the proceedings, including but not limited to custody, interrogations, preliminary hearing, pretrial motions and hearings, trial, motions for modification or review of sentence or new trial, and appeal.[190]

(d) Attorneys appointed by district courts may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered. Attorneys so appointed shall continue to represent the indigent accused until relieved for good cause or until substituted by other counsel.

190. Subsection (c) represents the proposed language to be added by the Arkansas General Assembly.