4.2 Overview

A. Increased Reliance on Pretrial Detention

On an average day, there are approximately 440,000 unconvicted accused people in American jails awaiting action on criminal charges, accounting for approximately 60% of all jail inmates. Todd D. Minton & Daniela Golinelli, Bureau of Justice Statistics, *Jail Inmates at Midyear 2013—Statistical Tables*, 2014, at 1. Nationally, the number of people who remain in jail pretrial rather than obtain pretrial release is increasing, the number of people released on their own recognizance is decreasing, and the percentage of defendants with financial conditions attached to their conditions of pretrial release is on the rise. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 3 (2007). Defenders therefore need to be prepared to advocate for pretrial release on behalf of their clients. *See generally* Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012) (concluding that 25% more pretrial detainees could be released than are currently being released).

B. Race and Pretrial Detention

Historically, studies examining the relationship between race and pretrial decisions and outcomes showed differing results. *See, e.g.*, Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American, in* RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 137, 140–41 (Marvin D. Free Jr. ed., 2003) (of 25 studies on the role of race in bail determinations, 17 concluded that race influenced bail determinations and/or pretrial release decisions, but eight did not find evidence for the hypothesis that race influences such decisions). However, recent studies (discussed below), employing a variety of methodologies, have found that race plays a role in both pretrial release decisions and pretrial release outcomes. *See DeWolfe v. Richmond*, 76 A.3d 1019, 1023 (Md. 2013) (recognizing that "studies show that the bail amounts are often improperly affected by race"); *see also* Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American*, *in* RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS 137, 139 (Marvin D. Free Jr. ed., 2003) ("Studies using more recent data were more likely than those using older data to reflect racial disparities [in bail and pretrial release decision-making].").

A 2003 analysis of administrative data collected by the State Courts Processing Statistics (SCPS) program of the Bureau of Justice Statistics considered bail determinations in more than 30,000 cases and found that: (1) Black and Hispanic defendants were over 20% more likely to be denied bail—that is, to be subjected to preventive detention—than White defendants; (2) Hispanic defendants were 39% more likely than White or Black defendants to have financial requirements attached to the conditions of their release; (3) Black defendants were 66% more likely than White defendants to be detained pretrial; and (4) Hispanic defendants were 91% more likely than White defendants to be detained pretrial. Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions*

and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees, 41 CRIMINOLOGY 873, 894–96 (2003). This study concluded that Hispanic defendants suffer a "triple disadvantage at the pretrial release stage, [as] they are the group most likely to have to pay bail, the group with the highest bail amounts, and the group least able to pay bail." *Id.* at 899–900 (internal quotation omitted).

Another study using SCPS data from 1990 to 2000 also found racial and ethnic disparities in decisions to deny bail and impose secured bonds. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). This study concluded that, "when there is disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions." *Id.* at 186. Still another examination of SCPS data concluded that Latinos are placed on monetary bail at a higher rate than White and Black defendants. DAVID LEVIN, PRETRIAL JUSTICE INSTITUTE, PRETRIAL RELEASE OF LATINO DEFENDANTS (2008).

In a study of five large metropolitan counties, two researchers found "evidence of substantial judicial bias" against Black people in bail setting in two of the counties examined. SHAWN D. BUSHWAY & JONAH B. GELBACH, TESTING FOR RACIAL DISCRIMINATION IN BAIL SETTING USING NONPARAMETRIC ESTIMATION OF A PARAMETRIC MODEL 37 (Nat'l Sci. Found., Working Paper No. SES0718955, 2011). Researchers studying the bail bond market in New Haven, Connecticut concluded that courts routinely "overdeter" Black and male Hispanic defendants from fleeing after release on bail by setting bail at higher levels and that commercial bail bondsmen recognize this difference and charge lower rates for Black and male Hispanic defendants. Ian Ayers & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

Race also may play a role in a defendant's ability to access pretrial diversion programs. Generally, when an offender completes a pretrial diversion program, his or her charges are dropped. Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 211 (2013). Approximately 8% of the people arrested and charged with felonies each year are selected by prosecutors for pretrial diversion programs. *Id.* (citing Bureau of Justice Statistics data). A recent analysis of SPCS data uncovered racial disparities in pretrial diversions granted to men charged with felonies in metropolitan counties. According to the study, "[o]verall, prosecutors are more likely to grant pretrial diversions to White defendants than they are to grant these diversions to Black, Latino, or Asian and Native American defendants with similar legal characteristics." *Id*. at 228.

Studies such as these led one scholar to conclude: "[M]any of the problems in bail determinations that create dysfunction and arbitrariness in bail determinations—the lack of relevant background information on the defendant and the over-reliance on money bonds—also contribute to racial disparities in bail outcomes among African American and white defendants." Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 955 (2013).

C. The Relationship between Race and Other Factors (Socioeconomic Status, Age, Gender, Employment, and Homelessness) in Pretrial Release Decisions

Various factors may contribute to racial disparities in pretrial release decisions and outcomes. One factor identified by researchers is the use of secured bonds or other financial conditions of release. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15 (2012). Studies have found that secured bonds affect racial and ethnic minorities in particular because such defendants are more likely to be low-income.

> Among defendants required to pay bail, the odds of detention for black and Hispanic defendants are more than twice those for white defendants. That is, controlling for the amount of bail (and other legal and contextual factors), black and Hispanic defendants are significantly less able to post bail. These results suggest that bail is particularly prohibitive for minority defendants.

Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003). *See also* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under The Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 556 (2010) (noting that some wealthy defendants may avoid pretrial detention by paying for special conditions of release, while "defendants who pose equivalent risks, but who cannot afford to pay for extraordinary terms of in-home detention, are detained in conditions that are often worse than those in which convicted criminals are held").

In addition, where a bond is initially too high for a person to satisfy, a defendant with financial means is more likely to be able to retain private counsel to seek a bond modification and may even be able to secure release on the day of arrest. In contrast, a low-income person charged with the same offense may remain in jail because he or she cannot hire counsel to seek a modification right away. When a judge appoints counsel for an indigent defendant at the first appearance, the bond is typically not addressed until a subsequent court date. The defendant may wait in jail, for example, while the Office of the Public Defender assigns his case to a particular assistant public defender, the attorney has time to visit the jail to conduct an intake interview, and the attorney then moves for a bond modification. *See infra* § 4.4A, Enter the Case at the Earliest Possible Opportunity.

Other non-statutory factors, such as age, also may have an influence on racial disparities in pretrial release. For example, in Minnesota, one of the factors judicial officials once considered in determining whether a defendant was a flight risk was whether the defendant was under age 21 at the time of his arrest. Research revealed that this factor was not a significant predictor of pretrial offending or flight risk but *was* strongly correlated with race. In other words, judicial officials considering the age of defendants in setting pretrial release conditions were unknowingly contributing to racial disparities. ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE

CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 31 (2d ed. 2008).

Certain other factors considered in pretrial release decisions, such as a defendant's employment status, may be correlated with race. *See* G.S. 15A-534(c) (listing employment as factor for judicial officials to consider in determining conditions of release). For example, since African Americans generally have higher rates of unemployment than Whites, African American defendants may be at a disadvantage when employment status is a factor in a judicial official's pretrial release decision. At the end of 2012, the African American unemployment rate in North Carolina was 17.3 percent compared to 6.7 percent for Whites. MARY GABLE & DOUGLAS HALL, ECONOMIC POLICY INSTITUTE, ONGOING JOBLESSNESS IN NORTH CAROLINA: UNEMPLOYMENT RATE FOR AFRICAN AMERICANS FOURTH IN NATION, MORE THAN DOUBLE THE STATE'S WHITE RATE 1 (2013); *see also* United States Dep't of Labor, *Bureau of Labor Statistics Economic News Release*, Table A-2: Employment Status of the Civilian Population by Race, Sex, and Age, BLS.GOV (showing higher rates of unemployment among African Americans). Defenders therefore need to be prepared to present other indicia comparable to employment, such as community ties, ongoing responsibilities (such as caring for a child), and other factors.

Similarly, if homelessness is considered in making pretrial release decisions, minorities are at a disadvantage because of their higher representation in the homeless population. *See, e.g.*, Ralph De Costa Nunez, *Homelessness: It's About Race, Not Just Poverty*, CITY LIMITS, March 2012 (nationally, members of Black families are over seven times more likely to seek refuge in a homeless shelter than members of White families). Anecdotal evidence suggests that some judicial officials may be reluctant to release homeless defendants, perhaps in reliance on an assumed correlation between homelessness and flight risk.

Some studies have considered the ways in which race interacts with multiple factors in the pretrial release setting, such as age, gender, and socioeconomic status. One study found a correlation between race and pretrial release decisions when the interaction between race and such factors was considered. The study concluded that African Americans were at a disadvantage relative to White defendants in terms of bail amounts and likelihood of release on their own recognizance (the equivalent of a written promise to appear in North Carolina); and that African Americans males aged 18–29 received the highest bail amounts of all defendants. John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41 (2012).

Other studies have considered the relationship between gender and race. In one study, researchers concluded that White women were more likely than White men to receive bail below the amounts recommended in a bail schedule, but Black women were not treated any differently than Black men. E. Britt Patterson & Michael J. Lynch, *Biases in Formalized Bail Procedures, in* RACE AND CRIMINAL JUSTICE 365 (Michael J. Lynch & E. Britt Patterson eds., 1991). Another study concluded that White mothers benefited from having children for pretrial release determinations, while Black mothers who had

children did not obtain any advantage. Gayle S. Bickle & Ruth D. Peterson, *The Impact of Gender-Based Family Roles on Criminal Sentencing*, 38 SOC. PROBS. 372 (1991). A later study found that White female defendants received more advantageous pretrial release decisions than male, minority defendants and were the most likely to be released pretrial. Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222 (2004). Another study concluded that the odds of release for White women "were not significantly different than [those] of White and Black males," but that Black Women were the least likely group to be detained pretrial. Tina L. Freiburger & Carly M. Hilinski, *The Impact of Race, Gender, and Age on the Pretrial Decision*, 35 CRIM. JUST. REV. 318, 330 (2010) (suggesting that judicial consideration of family obligations might be responsible for the increased likelihood of release for Black women).

D. Defendants Detained Pretrial Achieve Worse Outcomes

The United States Supreme Court has described the pretrial process as "perhaps the most critical period of the [criminal] proceedings." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Defendants detained pretrial are at a number of disadvantages in comparison to those who are released pretrial.

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532–33 (1972) (addressing speedy trial rights).

Studies have found a link between pretrial detention and case outcomes. 78% of defendants detained pretrial—contrasted with 60% of defendants released pretrial—are ultimately convicted. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2008). Studies have also found that pretrial detainees are more likely to plead guilty, be convicted of a felony, receive a sentence of incarceration, and receive longer sentences compared with people who are released pretrial. *See* GERARD RAINVILLE & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 24 & Table 24 (2003) ("Seventy-seven percent of the defendants who were detained until case disposition were eventually convicted of some offense, compared to 55% of those released pending disposition"); *Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978) (noting that a defendant who is not incarcerated pending trial "stands a better chance of not being convicted or, if convicted, not receiving a prison sentence") (quotation omitted); *United*

States v. Gallo, 653 F. Supp. 320, 337–38 (E.D.N.Y. 1986) (citing studies indicating that detention likely increases the chances of conviction at trial); Cassia Spohn & Dawn Beichner, *Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment*, 11 CRIM. JUST. POL'Y REV. 149 (2000).

Defendants who are detained pretrial may feel pressure to accept a plea bargain because of the adverse consequences of remaining in jail. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 13 (2012). Jailed defendants who ultimately receive a non-custodial sentence or prevail at trial also experience the adverse consequences faced by defendants incarcerated following a conviction: difficulty keeping or finding a job, lower wages, greater likelihood of recidivism, and even lower likelihood of marriage. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). One scholar has suggested that there may be a link in some cases between pretrial detention and wrongful convictions. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005) (positing "a positive correlation between the falsity of the accusation and the suspect's need to assist in the defense. It might be precisely when the wrong person has been charged that factual development, alibis, and hard-to-find evidence are the most vital to the case.").

Given the influence of pretrial detention on ultimate case outcomes, the pretrial release determination may be one of the most important stages of a criminal case for addressing racial disparities. *See* Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 J. INST. JUST. & INT'L STUD. 261, 262 (2007) ("Focusing on sentencing decisions may obscure this important moment of disparate punishment.").

E. Other Factors that May Contribute to Racial Disparities in Bail Determinations

Delayed representation. The U.S. Supreme Court has recognized that counsel plays a vital role at bail hearings. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970) ("[C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as . . . bail."); *see also* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right To Counsel At Bail Proceedings*, 1998 U. ILL. L. REV. 1, 6 (1998) (observing that lawyers representing defendants in bail proceedings play a crucial role in "protecting [a client's] due process right against an unreasonable denial of liberty during pretrial detention"). Empirical studies have also demonstrated the importance of legal representation at this stage in a criminal case. In a comparison of indigent defendants accused of nonviolent offenses, the 4,000 people who were represented by counsel at bail hearings were over two and a half times more likely to be released on their own recognizance and over four times more likely to have their bail reduced than were unrepresented defendants. 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, 1752–53 (2002). A previous study found that early representation of defendants resulted in earlier pretrial release, less time spent in jail pretrial, and an increased likelihood of release on personal recognizance. ERNEST J. FAZIO

ET AL., U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD TEST: FINAL EVALUATION REPORT (1985).

The Maryland Court of Appeals recently observed that, even when an attorney represents a defendant at a first appearance held just a day or two after the defendant's initial appearance, the decision made when the defendant appeared pro se at his or her initial appearance often sets the course for subsequent pretrial decisions. *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (holding that the state constitution guarantees an indigent defendant's right to state-furnished counsel at an initial hearing before a District Court Commissioner). In an earlier proceeding in the same case, the Maryland Court of Appeals considered a study finding that, in roughly 50% of all cases in the analyzed sample, judges presiding over bail review hearings maintained bail conditions set at initial appearances. *DeWolfe v. Richmond*, 76 A.3d 962, 977 (Md. 2012).

Since defendants frequently are not represented by counsel at initial appearances, the judicial official (usually a magistrate in North Carolina) may not have all the facts relevant to the bail determination. The Maryland court observed about the process in that state:

> As numerous briefs to this Court pointed out, the failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

DeWolfe v. Richmond, 76 A.3d 1019, 1023 (Md. 2013); *see also* John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 JUST. Q. 41, 67 (2012) (observing that biases may influence "initial court appearances if judges attempt to assess an offender's risk for flight and dangerousness to the community with little available information at hand, leading to considerations of criminal stereotypes"). Since people of color are more likely to be represented by appointed counsel, they are more likely to be unrepresented at the initial appearance before a magistrate and first appearance before a judge. *See* CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 14 (2009) (reporting that African Americans are nearly five times as likely as Whites to rely on appointed counsel). G.S. 7A-453 states that for defendants who have been in custody for 48 hours without appointment of counsel, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS (the public defender in districts that have public defender offices) and the clerk of court in all other counties, who must then take steps to ensure appointment of counsel. This statutory provision may not be followed consistently, however. For a discussion of

possible strategies for counteracting these circumstances, see *infra* § 4.4, Pretrial Advocacy Strategies.

Wide discretion and limited information. Criminologists reviewing evidence of disparities in pretrial release have identified several factors that contribute to the phenomenon. In addition to those discussed in subsection D., above, scholars have considered the interaction of discretion, limited information, and implicit bias on such decisions. One scholar observed:

> Legal decision making is complex, repetitive, and often constrained by information, time, and resources in ways that may produce considerable ambiguity or uncertainty for arriving at a "satisfactory" decision. As an adaptation to these constraints, a "perceptual shorthand" for decision making emerges that allows for more simple and efficient processing of cases by court actors. . . . [L]egal agents may rely not only on the defendant's current offense and criminal history, but also on stereotypes linked to the defendant's race, ethnicity, gender, or social class. On the basis of these stereotypes, judges may project behavioral expectations about such things as the offender's risk of recidivism or danger to the community. Once in place and continuously reinforced, such patterned thinking and acting are resistant to change and may result in the inclusion of racial and ethnic biases in criminal case processing.

Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 880–81 (2003) (internal citation omitted).

These concerns, applicable to many decision-making stages of the criminal justice process, may be especially acute in the context of bail determinations, where officials making bail determinations may not be lawyers, defendants may not be represented by counsel, the decision-maker may have little information about the defendant, and the decision-maker generally does not have to record the reasoning for his or her pretrial release determination. Judges making pretrial release determinations at first appearances may be disinclined to modify bail conditions imposed by a magistrate because they also may have limited information. For example, if there is a high secured bond, a judge may assume the magistrate knew something worrisome about the case or the defendant and may not want to disturb the decision. One scholar opined:

> The lack of background information on the arrestee, the scant legal restrictions placed on bail determinations, and the overall lack of formality and accountability of the bail determination process create the "perfect storm" for arbitrary bail determinations and offer very little protection against the consideration of race or any other impermissible factor when making bail determinations.

Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 934 (2013).