

Michigan Law Review

Volume 111 | Issue 8

2013

Plea Bargaining and the Right to Counsel at Bail Hearings

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Recommended Citation

Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013). Available at: <https://repository.law.umich.edu/mlr/vol111/iss8/4>

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NOTE

PLEA BARGAINING AND THE RIGHT TO COUNSEL AT BAIL HEARINGS

Charlie Gerstein*

A couple million indigent defendants in this country face bail hearings each year, and most of them do so without court-appointed lawyers. In two recent companion cases, Lafler v. Cooper and Missouri v. Frye, the Supreme Court held that the loss of a favorable plea bargain can satisfy the prejudice prong of an ineffective assistance of counsel claim. If the Constitution requires effective assistance of counsel to protect plea bargains, it requires the presence of counsel at proceedings that have the capacity to prejudice those bargains. Pretrial detention has the capacity to prejudice a plea bargain because a defendant held on bail will plead guilty when faced with any deal that promises he will serve less time than he expects to wait in jail. Because a bad outcome at a bail hearing can prejudice the defendant in subsequent plea bargaining, bail is now a critical stage.

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* J.D. Candidate, December 2013, University of Michigan Law School. I would like to thank Professors David Moran, J.J. Prescott, Nicholas Bagley, Eve Brensike Primus, and Alexandra Natapoff for their thorough and helpful comments on early drafts; Robert O'Loughlin and Margaret Mettler, my editors, for their utterly invaluable help; Kate Gilbert, for more than I can describe; and my parents, for, literally, everything else.

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INTRODUCTION

Imagine a prosecution in Texas for, say, disorderly conduct. The facts of the case are simple: the defendant was arrested while waiting for a friend in the lobby of a housing project. The only issue in the case is legal: Did the defendant's conduct "tend[] to incite an immediate breach of the peace"?¹ The defendant is brought before a magistrate and, without counsel, held on bail that he cannot pay. A few days later, the prosecutor calls with a plea deal to time served. The defendant is constitutionally entitled to counsel in accepting or rejecting that plea deal,² but the prosecutor reminds him that appointing counsel can take quite a long time—and, don't forget, if he takes the deal, he gets out today. The defendant takes the deal without counsel,³ although his conduct could not possibly have tended to incite a breach of the peace: there was no one else around.

When the defendant was brought before the magistrate and held on bail, was he denied the assistance of counsel at a critical stage of his proceedings?

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."⁴ But the defendant only actually gets a lawyer when two criteria are met. First, the right to counsel must have "attached." "Attachment" occurs at the first formal, adversarial proceeding against the defendant, even if that procedure does not involve a prosecutor.⁵ Second, the proceeding at which the defendant seeks assistance of counsel must be a "critical stage" of the prosecution.⁶ Critical stages are pretrial procedures so dangerous to the defendant, or so similar to a trial itself, that they require the presence of counsel to protect the defendant's trial rights.⁷

The Sixth Amendment right to counsel requires the effective assistance of counsel, as well as her mere presence, at all critical stages. For an attorney's performance to qualify as *ineffective*, it must be both constitutionally

1. TEX. PENAL CODE ANN. § 42.01(a)(1) (West 2011).

2. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

3. One can waive the right to counsel attendant to a guilty plea. *E.g.*, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

4. U.S. CONST. amend. VI.

5. *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194–95 (2008); *see also* *United States v. Gouveia*, 467 U.S. 180, 188 (1984) ("[The right attaches] at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (citation omitted) (internal quotation marks omitted)); *Brewer v. Williams*, 430 U.S. 387, 398–99 (1977).

6. *United States v. Wade*, 388 U.S. 218, 224–25 (1967); *Rothgery*, 554 U.S. at 217 (Alito, J., concurring).

7. *See, e.g.*, *United States v. Ash*, 413 U.S. 300, 307–14 (1973).

deficient and prejudicial.⁸ The prejudice prong of the inquiry requires that the result in the case absent the attorney's errors and omissions would have been better for the defendant.⁹ In two recent companion cases, *Lafler v. Cooper*¹⁰ and *Missouri v. Frye*,¹¹ the Supreme Court held that a plea bargain is a "result" that can be the basis for an ineffective assistance of counsel claim: if your lawyer's deficient representation causes you to reject a plea bargain that you would have otherwise taken, and the actual result at trial is worse than what was offered during the plea bargain, your Sixth Amendment right to the effective assistance of counsel has been violated.

Among other adverse consequences,¹² a bad outcome at a bail hearing can force an indigent defendant to plead guilty. Many indigent defendants cannot post even minimal bail.¹³ Defendants who are required to post bail that they cannot afford may end up pleading guilty to avoid waiting in jail.¹⁴ If the sentence offered by the prosecutor in a plea deal is shorter than the expected wait for trial or bail review,¹⁵ all but the most stubborn of defendants would plead guilty. For a defendant charged with a relatively minor offense, the bail hearing can be the main event; a bad outcome can seal his fate. Because the bail determination is likely unrelated to the defendant's culpability, its effect on his plea decision is *prejudicial*.¹⁶ It does not cause him to plead guilty because he is guilty; it causes him to plead guilty because he has been held on bail.

8. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

9. *Id.*; see also discussion *infra* Part II.

10. 132 S. Ct. 1376 (2012).

11. 132 S. Ct. 1399 (2012).

12. See, e.g., *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) ("[I]n the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of his sentence under an erroneous judgment." (citation omitted)).

13. In 2010, in New York City alone, 16,649 defendants were unable to make bail set at one thousand dollars or less. Daniel Beekman, *New Version of Charitable Bond Bill Headed to Cuomo's Desk Could Free Thousands of Poor Bronx Defendants*, DAILY NEWS (June 27, 2012, 6:00 AM), <http://www.nydailynews.com/new-york/bronx/new-version-charitable-bond-bill-headed-cuomo-desk-free-thousands-poor-bronx-defendants-article-1.1102795>.

14. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) [hereinafter Natapoff, *Misdemeanors*]; Alexandra Natapoff, *Misdemeanors Are Far from Minor*, DALLAS MORNING NEWS (May 18, 2012, 8:20 PM), <http://www.dallasnews.com/opinion/sunday-commentary/20120518-alexandra-natapoff-misdemeanors-are-far-from-minor.ece>. See generally Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 348–52 (2011) [hereinafter Colbert, *Prosecution Without Representation*]. A defendant can expect the wait in jail to be up to two months long. Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 3 n.6 [hereinafter Colbert, *The Illusory Right*].

15. Defendants can, of course, petition the court for review of their initial bail determination

16. See *infra* Part I.

Surprisingly, there is no federal right to appointed counsel for indigent defendants at bail hearings,¹⁷ and most states do not appoint counsel at all in such hearings.¹⁸ So most indigent defendants (who represent the overwhelming majority of criminal defendants in this country)¹⁹ face bail hearings without counsel. But, according to a study in Baltimore, defendants with counsel are more than twice as likely to be released on their own recognizance.²⁰ And, when represented defendants are granted bail, it is on average around six hundred dollars less than what is set for unrepresented defendants.²¹ Appointing counsel at bail hearings, then, will substantially reduce the amount of time a substantial number of indigent defendants spend in jail awaiting their trials. And that will cut down on the number of plea deals those defendants have to take just to get out of jail—regardless of their guilt or innocence.

The right to the presence of counsel and the right to her effective assistance are coterminous—if you get one, you get the other. The Constitution requires the presence of counsel at all stages that can prejudice the “outcome” of a criminal proceeding, and the Supreme Court recently held that plea bargains are protected “outcomes” for ineffective assistance of counsel purposes. So, if the Constitution requires effective assistance of counsel to protect plea bargains, it requires the presence of counsel at proceedings with the potential to substantially prejudice those bargains.

This Note argues that a bail hearing is a critical stage because it can prejudice the outcome of a plea negotiation. Part I summarizes critical-stage jurisprudence and concludes that, because it is concerned with a stage’s potential to affect the outcome of the criminal prosecution, critical-stage analysis is conceptually linked to the prejudice inquiry for an ineffective assistance of counsel claim. Part II explains that the Court has recently expanded ineffective assistance of counsel claims to include the loss of a favorable plea bargain. Part III argues that the Court should make bail hearings a critical stage because bail has the potential to irrevocably prejudice the outcome of a plea negotiation. This Part also argues that a bail hearing triggers the attachment of the right to counsel. Part IV addresses some pos-

17. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 214 (2008) (Alito, J., concurring). Of course, a defendant may bring a lawyer if he can afford one.

18. Although these statistics are significantly complicated by procedural variance within states, less than half of U.S. states provide lawyers for indigent defendants at all bail determinations held within forty-eight hours of arrest. See Colbert, *Prosecution Without Representation*, *supra* note 14, at 386 & n.291 (citing a 2008–2009 survey).

19. See STEVEN K. SMITH & CAROL J. DEFRAnces, U.S. DEP’T OF JUSTICE, INDIGENT DEFENSE 1 (1996), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf> (citing 1991 data indicating that about 75 percent of state prison inmates were represented by appointed counsel).

20. See 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) [hereinafter Colbert, *Do Attorneys Really Matter?*] (describing the results of a controlled study on the effects of counsel at bail determinations in Baltimore).

21. *Id.* at 1753–54.

sible concerns with labeling bail a critical stage and concludes that they are misplaced.

I. THE LINK BETWEEN PREJUDICE ANALYSIS AND CRITICAL STAGES

Although the right to appointed counsel and the right to the effective assistance of that counsel are separate doctrinal areas of law, the two rights are conceptually linked and most likely coterminous.²² This Part argues that critical-stage analysis (by which the right to counsel is determined) and the prejudice prong of *Strickland v. Washington*²³ (by which the right to effective assistance is enforced) should be analyzed similarly because they each ask the same essential question: Does the denial of a given right have the potential to work an unfair outcome for the defendant? Because of this link, a bail hearing's ability to prejudice a plea bargain makes it a critical stage. Section I.A asserts that all judicial inquiries into critical stages have been concerned with the potential of a stage to prejudice the trial. Section I.B argues that *Strickland* asks the same question; the only relevant difference is that *Strickland* asks the question in the context of a defendant's specific trial. Section I.C concludes that, since these questions are conceptually linked, courts should analyze them similarly.

A. Critical Stages: A General Prejudice Inquiry

Critical-stage analysis²⁴—in all its incarnations—asks whether denying counsel at a given stage has the potential to work an unfair outcome at the ultimate criminal trial. It asks, hypothetically, considering the possible outcomes of the stage, whether that stage is sufficiently likely to produce results that derogate from trial rights. This question can be framed in two ways: whether counsel is necessary at the stage to secure the defendant's trial

22. See Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1174–75 (2012) (arguing that if *Coleman v. Alabama*, 399 U.S. 1 (1970) (plurality opinion), remains good law, it would be absurd to deny defendants meaningful claims to ineffective assistance of counsel at a preliminary hearing). *But see* *Custis v. United States*, 511 U.S. 485, 496 (1994) (“[F]ailure to appoint counsel for an indigent defendant [is] a unique constitutional defect.”). *Custis*, however, concerned the right of a federal defendant to collaterally attack prior state convictions used to enhance his federal sentence. *Id.* at 490–97. Its unique procedural context renders the case easily distinguishable; the portion of the opinion asserting that the right to appointed counsel is unique rests in large part on the ability to discern its violation from the face of a prior conviction. *Id.* at 496 (“Ease of administration also supports the distinction.”).

23. 466 U.S. 668 (1984).

24. Some examples may be helpful. A post-attachment corporeal lineup is a critical stage, *United States v. Wade*, 388 U.S. 218, 237 (1967), but taking a handwriting exemplar for future comparison is not, *Gilbert v. California*, 388 U.S. 263, 267 (1967). Post-attachment photo arrays are not critical stages. *United States v. Ash*, 413 U.S. 300, 325 (1973). Arraignments and post-indictment interrogations are critical stages. *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201, 205 (1964) (post-indictment interrogation). However, judicial determinations of probable cause are not. See *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (no relation to the author).

rights—as exemplified by *United States v. Wade*²⁵—or whether counsel is necessary because the stage is sufficiently trial-like and tricky—as exemplified by *United States v. Ash*.²⁶ Both methods, however, are concerned with derogating from the ultimate right: a fair trial.

The *Wade* method obviously considers the effects at the ultimate trial: it simply asks if the “stage of the prosecution, [whether] formal or informal, in court or out, [is one] where counsel’s absence might derogate from the accused’s right to a fair trial.”²⁷ The critical inquiry under *Wade* is whether the stage is one that may “settle the accused’s fate” and render the ultimate trial “a mere formality.”²⁸ Its coverage is expansive—it allows the right to counsel to protect confrontations that do not directly bear on determining the defendant’s guilt or innocence.

The *Ash* method is concerned with the ultimate outcome at trial as well, although perhaps not as directly.²⁹ The critical inquiry under *Ash* is whether the stage is a sufficiently “trial-like confrontation”³⁰ and whether counsel’s later assistance can overcome the losses sustained at this confrontation.³¹ *Ash*’s concern with the effects of a later appointment of counsel reveals its ultimate concern with protecting the outcome at trial. The case actually inquires into the effects of counsel’s absence on the ultimate trial: Is the stage sufficiently adversarial and tricky to require the assistance of counsel to protect against a bad result later in the proceedings? Were it merely asking a formalist question—does this stage look like a trial?—counsel’s later appointment would be immaterial.

B. Strickland: A Specific Prejudice Inquiry

This Section argues that ineffective assistance of counsel jurisprudence and critical stages jurisprudence ask essentially the same question. The ineffective assistance of counsel inquiry, articulated in *Strickland v. Washington*,³² asks whether counsel’s performance may have worked an unfair outcome on the defendant’s case. To establish ineffective assistance of counsel, a defendant must make two showings. First, he must show that

25. 388 U.S. at 223–25.

26. 413 U.S. at 310–12.

27. 388 U.S. at 226.

28. *Id.* at 224.

29. *See Ash*, 413 U.S. at 311 (“The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting *the same dangers that gave birth initially to the right itself*.” (emphasis added)).

30. *Id.* at 312.

31. *See id.* at 325 (noting that cross-examination is sufficient to overcome any prejudice sustained during a photo array).

32. 466 U.S. 668, 692 (1984). *Hill v. Lockhart*, 474 U.S. 52 (1985), governs ineffective assistance that results in foregoing the right to a trial by pleading guilty. The inquiry is essentially the same: But for counsel’s deficient advice, is there a reasonable probability that the defendant would not have waived his right to go to trial? *Id.* at 59.

his lawyer's performance was constitutionally deficient because it fell below an objective standard of reasonableness.³³ In establishing whether counsel's performance was objectively unreasonable, the defendant must overcome a strong presumption that his counsel's conduct was part of a legitimate trial strategy.³⁴ Only the most egregious conduct will satisfy this prong.³⁵

Second, the defendant must show that he was prejudiced by his counsel's deficient performance.³⁶ That is, the defendant must show that there is a reasonable probability that, but for his counsel's specific errors and omissions, the "result" of his proceeding would have been different. "Result," in this context, contemplates at least the verdict and the sentence. To successfully make this claim, the defendant must point to specific errors and omissions and show that there is a reasonable probability that, but for those mistakes, he would have been acquitted or received a lesser sentence.³⁷

The *Strickland* question is essentially the same as the *Ash* and *Wade* question, only more specific. It asks about actual prejudice to *this* trial, not hypothetical prejudice that could result from a given confrontation. But apart from this difference in specificity, the two questions are materially indistinguishable. Under *Strickland*, courts inquire into counsel's specific errors and their specific effects. Under *Ash* and *Wade*, courts inquire into the general potential of the stage to foul trial rights. While these analyses are very similar, for completeness's sake, this Note will consider bail under both formulations.

C. Critical-Stage Analysis and Strickland Prejudice

The conceptual link between ineffective assistance of counsel's prejudice prong and critical-stage analysis³⁸ suggests that the Court ought to treat the two inquiries similarly. If one has the right to counsel at a critical stage, one ought to have the right to effective assistance from that counsel. Otherwise, the right to counsel would be meaningless.³⁹

33. *Strickland*, 466 U.S. at 688.

34. *Id.* at 689.

35. *Compare, e.g.,* *Muniz v. Smith*, 647 F.3d 619, 623–24 (6th Cir. 2011) (upholding a defendant's conviction on habeas corpus review because his attorney, although he slept through some of the trial, "was [not] asleep for a substantial portion of his trial"), *cert. denied*, 132 S. Ct. 1575 (2012), *with* *Burdine v. Johnson*, 262 F.3d 336, 340–41 (5th Cir. 2001) (en banc) (concluding that a defendant's counsel was deficient when he was "repeatedly unconscious through not insubstantial portions of the defendant's capital murder trial"), *and* *Tippins v. Walker*, 77 F.3d 682, 685, 690 (2d Cir. 1996) (holding defense counsel deficient when he was asleep for "numerous extended periods of time").

36. *Strickland*, 466 U.S. at 691–92.

37. *Id.* at 693.

38. See Marceau, *supra* note 22, at 1174–75, for the argument that the right to counsel and the right to effective assistance inquiries should not be disaggregated.

39. *Strickland*, 466 U.S. at 686 ("For that reason, the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))).

The Court has discussed the two inquiries in similar language and has blended the questions, employing a similar analysis in both. “[W]e have recognized that certain pretrial events may so *prejudice the outcome* of the defendant’s prosecution,” Justice Alito wrote in *Rothgery v. Gillespie County* “that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial.”⁴⁰ Justice Alito found the right to appointed counsel at certain critical stages within the right to *effective assistance* at trial and described critical stages as employing a “prejudice” inquiry.

Were the Court to hold that the right to counsel and the right to effective assistance of counsel are not coterminous, it could produce bizarre results.⁴¹ If the Court held that any prejudice from ineffective assistance of counsel at a pretrial proceeding was cured by a subsequent fair trial, the Court would have to hold that some defendants have a constitutional right to a lawyer, but they have no enforceable claim to effective assistance.⁴² Forcing states to appoint attorneys but not giving defendants any assurance that they will be remotely effective would be absurd.⁴³

II. EXPANDING *STRICKLAND*’S PREJUDICE PRONG TO INCLUDE PLEA BARGAINS

In *Lafler v. Cooper*⁴⁴ and *Missouri v. Frye*,⁴⁵ the Supreme Court expanded *Strickland*’s prejudice prong to include the loss of a favorable plea bargain that the defendant would have taken absent his attorney’s deficient assistance. Before those cases, there were two divergent conceptions of cognizable prejudice under *Strickland*, one recognizing an outcome-oriented approach and another recognizing a process-oriented approach. This Part explains the divergence and concludes that the Court in *Cooper* and *Frye* endorsed a process-oriented approach to ineffective assistance of counsel claims.

The right to effective assistance of counsel was born in *Strickland* and with it was born confusion: Does the right protect only the fairness of the

40. 554 U.S. 191, 217 (2008) (Alito, J., concurring) (emphasis added).

41. Marceau, *supra* note 22, at 1173–75 (arguing that were the Court to deny the right to effective assistance at a preliminary hearing, it would have to trifurcate the counsel right in an unfair and unusual manner).

42. *Id.*

43. Doing so would still leave constructive denial of counsel claims open, but would foreclose relief from all but the utterly absent or incompetent representative who has ceased to be a lawyer in the eyes of the law. Compare *Bell v. Cone*, 535 U.S. 685, 697 (“For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, th[e] difference is not of degree but of kind.”), with *United States v. Cronic*, 466 U.S. 648, 659 (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”).

44. 132 S. Ct. 1376 (2012).

45. 132 S. Ct. 1399 (2012).

verdict, or does it protect something more? On the one hand, *Strickland* stressed that the right to counsel exists “to ensure a fair trial” and that a fair trial is one that produces “just result[s]” or one “whose result is reliable”—the outcome approach.⁴⁶ On the other hand, *Strickland* noted the right’s importance in assuring the “fundamental fairness of the . . . adversarial process”—the process approach.⁴⁷ These two approaches, while not fundamentally at odds with one another, have produced divergent interpretations of what *Strickland* meant by “result.”

The two readings of *Strickland* presented the Court with a choice in *Cooper* and *Frye*. The Court chose a robust approach to fairness and a broad interpretation of “results.” By incorporating plea negotiations that do not affect the outcome of a trial into *Strickland* prejudice, *Cooper* and *Frye* effectively endorsed a process-oriented meaning of “results.”

The facts in *Cooper* were uncontested. Anthony Cooper shot Kali Mundy in the buttocks as she was running away from him.⁴⁸ Cooper was charged with assault with intent to murder.⁴⁹ The local Michigan prosecutor offered to recommend a sentence of 51 to 85 months in prison in exchange for Cooper’s guilty plea.⁵⁰ But Cooper chose to go to trial because his attorney, Brian McClean, advised him that he could not possibly be convicted of assault with intent to murder because he shot Mundy below the waist.⁵¹ This advice was wrong. Cooper was convicted in a constitutionally flawless trial.⁵² He was sentenced to 185 to 360 months in prison—roughly three times longer than he would have faced had he taken the deal.⁵³

All agreed that McClean’s performance had been woefully deficient.⁵⁴ But the State of Michigan argued that Cooper had not been prejudiced because—to put it simply—he was guilty. At oral arguments, the solicitor general for Michigan said that “[one is] entitled to effective counsel at every critical stage; however, it is not a Sixth Amendment violation unless it casts doubt on the reliability of the adjudication of guilt.”⁵⁵ Because Cooper had been convicted in a full and fair jury trial, the State argued, he could not conceivably have been prejudiced by his attorney’s error. The results of a

46. *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

47. *Id.* at 696.

48. *Cooper*, 132 S. Ct. at 1383.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1384 (“In this case all parties agree the performance of respondent’s counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.”).

55. Transcript of Oral Argument at 15, *Cooper*, 132 S. Ct. 1376 (No. 10-209); see also Marceau, *supra* note 22, at 1175 n.60.

plea bargain, the State argued, cannot be prejudiced under *Strickland* because one does not have a right to a plea bargain.⁵⁶

The Court disagreed. First, the Court observed that “the constitutional rights of criminal defendants . . . are granted to the innocent and the guilty alike.”⁵⁷ Cooper’s guilt did not foreclose him from relief for ineffective assistance of counsel. Second, the Court acknowledged the overwhelming importance of plea bargaining to the criminal justice system⁵⁸ and observed that it has become the ordinary course of criminal justice.⁵⁹ Third, the Court noted that the right to counsel protects at least some procedures to which one does not have a constitutional right.⁶⁰ So, even though one does not have a right to a plea bargain, because plea bargains are so pervasive and important, one has “the right to effective assistance of counsel in considering whether to accept it,”⁶¹ whether or not one is guilty. And “[i]f that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in . . . a more severe sentence.”⁶²

In *Cooper’s* companion case, *Missouri v. Frye*, the Court found ineffective assistance of counsel where the defendant failed to accept a favorable plea bargain because his attorney, Michael Coles, simply failed to communicate those offers to him.⁶³ Ultimately, Galin Frye pleaded guilty to a more serious charge without the benefit of the plea bargain he would have accepted had he known about it.⁶⁴ Pleas, the Court held in both of these cas-

56. Transcript of Oral Argument, *supra* note 55, at 4 (“[W]hen asserting an ineffective assistance claim, a defendant must show deprivation of a substantive or procedural right, and this Court has already held that a defendant has no right to a plea bargain.”).

57. *Cooper*, 132 S. Ct. at 1388 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)) (internal quotation marks omitted).

58. See *id.* (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”); cf. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” (alterations in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)) (internal quotation marks omitted)).

59. See *Cooper*, 132 S. Ct. at 1387 (“The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.”); see also Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”), cited with approval in *Cooper*, 132 S. Ct. at 1387.

60. See *Cooper*, 132 S. Ct. at 1385 (“[D]efendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial.”). See generally *Halbert v. Michigan*, 545 U.S. 605, 610 (2004) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.”).

61. *Cooper*, 132 S. Ct. at 1387.

62. *Id.*

63. 132 S. Ct. 1399, 1404–05, 1410 (2012).

64. *Frye*, 132 S. Ct. at 1404–05.

es, can be prejudiced when the defendant either loses a plea bargain altogether or ends up with a less favorable one than he would have received absent his attorney's deficient performance.

III. EXPANDING CRITICAL STAGES TO INCLUDE BAIL BECAUSE BAIL CAN PREJUDICE PLEA BARGAINS

This Part argues that the Court ought to expand critical-stage analysis to include a stage's potential to affect the outcome of a plea bargain and that a bail hearing is, therefore, a critical stage. Section III.A argues that bail hearings have the potential to prejudice plea negotiations for criminal defendants and that they necessarily trigger the attachment of the right to counsel. Section III.B contends that critical-stage analysis should be expanded to include prejudice to plea bargains under the reasoning of *Cooper* and *Frye*. Section III.C concludes that bail determination is therefore now a critical stage under the reasoning of *Wade* and *Ash*.

A. Bail Hearings' Prejudicial Effect on Plea Bargains

This Section describes the effects of a bail hearing and concludes that it requires the presence of counsel. Section III.A.1 argues that bail hearings, although highly varied in form, always trigger the attachment of the right to counsel. Section III.A.2 argues that bail hearings, no matter their form, can prejudice plea bargains because of their ability to force a defendant to plead guilty.

1. Attachment at a Bail Hearing

Bail hearings are sufficiently formal and judicial to trigger attachment of the right to counsel.⁶⁵ The *Rothgery* Court 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 against him and restrictions are imposed on his liberty," regardless of whether the public prosecutor knew about the case.⁶⁶ This Section asserts that even less formal bail hearings should trigger the attachment of the right to counsel because the point when "restrictions are imposed on [the defendant's] liberty"⁶⁷ must be the focal point of the attachment inquiry.

Pretrial detention is considered nonpunitive, or at least noncriminal,⁶⁸ so there is an argument that some bail procedures do not trigger attachment of the right to counsel. In *United States v. Salerno*, the Court found the Bail

65. Compare *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194–95 (2008) (right attaches at first formal appearance), and *Brewer v. Williams*, 430 U.S. 387, 398–99 (1977) (same), with *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (administrative detention of already-incarcerated defendants does not constitute an accusation for Sixth Amendment purposes).

66. *Rothgery*, 554 U.S. at 194–95.

67. *Id.* at 194.

68. See *United States v. Salerno*, 481 U.S. 739, 746–48 (1987).

Reform Act—which allows pretrial detention of a criminal defendant based on a finding of his *future* dangerousness⁶⁹—constitutional because pretrial detention is not punishment.⁷⁰ “Punishment,” for constitutional purposes, is defined by the putative punisher’s intent.⁷¹ When that intent is not clear from the text of the putatively punitive statute, courts are to look to the purposes of the act and compare them with the severity of the nonpunishment. If it seems like the nonpunishment fits the noncrime—that is, if the detention seems within the bounds of society’s reasonable interest in regulating behavior⁷²—the defendant is not being punished. Thus, freed from the shackles of the Constitution, the government need only show that its pretrial detention is not excessive in relation to its goals.⁷³

Yet even comparatively informal⁷⁴ bail procedures—for example Maryland’s, where the defendant is brought before a bail commissioner and, perhaps, not formally read the charges against him⁷⁵—are sufficiently adversarial to render the defendant an “accused” and are distinguishable from other cases in which the Court found that certain procedures did not trigger attachment. In *United States v. Gouveia*, for example, the Court held that separating already-incarcerated inmates from the general population while awaiting trial did not count as an accusation for Sixth Amendment purposes and did not, therefore, trigger the attachment of the right to counsel.⁷⁶ But *Gouveia* is too narrow to support the argument that noncriminal detentions never trigger the attachment of the right to counsel. First of all, *Gouveia*’s reasoning rested, in part, on the Court’s fear that a different result would begin the march of a parade of horrors: an in-prison punishing unit, such as solitary confinement, could trigger the right to counsel and the right to a formalized hearing.⁷⁷ This fear is not applicable to an informal bail proceeding: Regardless of the character of the proceeding, a criminal prosecution is on its way and that is the only purpose of the proceeding. In addition, the defendants in *Gouveia* were already subject to significant restrictions on their liberty before the administrative detention of which they complained

69. See 18 U.S.C. § 3142(e) (Supp. 2011).

70. *Salerno*, 481 U.S. at 748.

71. *Id.* at 747 (“To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.”).

72. *Id.* (“Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’” (alterations in original) (quoting *Schall v. Martin*, 467 U.S. 253, 269 (1984)) (internal quotation marks omitted)).

73. *Id.*

74. That is, less traditionally adversarial and trial-like.

75. Colbert, *The Illusory Right*, *supra* note 14, at 2 n.4.

76. 467 U.S. 180, 192 (1984).

77. See *Gouveia*, 467 U.S. at 191 (noting that the Sixth Amendment does not protect all the same concerns of the Fifth Amendment’s due process guarantee and that to hold otherwise would dramatically expand the Sixth Amendment right into novel contexts).

had begun (they were in prison).⁷⁸ This is not the case when a free defendant is brought into jail and held on bail by a nonjudicial officer.

Similarly, bail proceedings are sufficiently “judicial,” under recent Supreme Court jurisprudence, to trigger attachment. *Rothgery*, the Court’s most recent pronouncement on the issue of attachment, spoke of a defendant’s “first appearance before a *judicial officer*.”⁷⁹ Nonetheless, that a bail commissioner may not be a judge should not be preclusive in the inquiry. An officer with the power to deprive a defendant of his freedom of movement for a significant period of time is sufficiently powerful to count as “judicial” for this narrow purpose.⁸⁰ Either way, significant restrictions are placed on the defendant’s liberty as a result of the proceeding and that alone ought to trigger attachment of the right to counsel. Were the Court to hold otherwise, it would invite states to design bail procedures such that they would not have to appoint counsel.

2. Bail Hearings’ Potential to Prejudice Plea Bargains

When bail is set by the state, there is always a risk that it will be set at an amount that the defendant cannot pay. When that happens—and it happens an awful lot⁸¹—the defendant will be forced to wait in jail until his trial, or until he gets a lawyer and petitions for bail review. He can expect to wait around a month,⁸² often much more, during which time he may lose his job, his house, and anything else for which he has recurring financial responsibilities.⁸³ For petty offenses, either period of detention will often

78. *Id.* at 180.

79. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194 (2008) (emphasis added).

80. *Cf.* Adam Teitelbaum, Note, *Dubious Delegation: Article III Limits on Mental Health Treatment Decisions*, 110 MICH. L. REV. 1553, 1568, 1572–77 (2012) (advocating a “liberty-centered” framework for determining if a “judicial act” has occurred for nondelegation purposes).

81. In New York, for example, 25 percent of nonfelony defendants are held on bail. In Baltimore, that number is closer to 50 percent. Natapoff, *Misdemeanors*, *supra* note 14, at 1321–22. In New York, the vast majority of such defendants cannot pay their bail. *See id.* at 1322. There were approximately 10.5 million nontraffic misdemeanor prosecutions in this country in 2006. ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 11 (2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) (estimating based on a sample of twelve states). If the whole country behaves about as well as New York State does, approximately 2.5 million people nationwide are held on bail they cannot pay for misdemeanor charges each year.

82. *See* Colbert, *Prosecution Without Representation*, *supra* note 14, at 383–84 (“[M]any states’ jurisdictions delay counsel’s courtroom advocacy for five, ten, twenty, or thirty or more days beyond an accused’s first appearance before a judicial officer.”); Natapoff, *Misdemeanors*, *supra* note 14, at 1322 (“Over half of unconvicted inmates spend at least a month in jail, and one-quarter of unconvicted inmates spend between two and six months [before a determination of their guilt].”).

83. *See generally* Natapoff, *Misdemeanors*, *supra* note 14, at 1323–27 (discussing collateral consequences of misdemeanor convictions).

exceed that in the government's plea offer. Many defendants, therefore, plead guilty to avoid spending further time in jail, regardless of their guilt or innocence.⁸⁴

Bail hearings come in many different shapes, but all do the same thing—decide whether to grant bail, determine its appropriate amount, and set conditions of release. Some jurisdictions combine bail hearings with arrests at a central booking facility (e.g., Baltimore);⁸⁵ others combine bail hearings with probable cause hearings (e.g., New York).⁸⁶ Regardless of the specific procedures, all bail hearings share one function—determining the defendant's freedom pending trial.

Although bail procedures vary from state to state, this Note argues that a bail hearing is always a critical stage. Under current jurisprudence, whether a particular stage of criminal proceedings is critical, and therefore whether a defendant has the right to the presence of counsel, is a fact-specific inquiry.⁸⁷ But no matter what the specific bail procedure is, it affects the defendant's pretrial liberty. It is this feature that can all but force the defendant to plead guilty;⁸⁸ any proceeding at which the defendant's liberty before trial is at stake, no matter what it is called, risks severely prejudicing the defendant's plea decision. This fact renders the stage critical in light of the Court's recent expansion of ineffective assistance of counsel jurisprudence to include lost favorable plea bargains.

Under the trial-centric model that arguably prevailed before *Cooper* and *Frye*, bail may not have been a critical stage because bail hearings do not directly implicate the defendant's culpability. The parties at a bail hearing argue about whether the defendant is a flight risk⁸⁹ or a risk to his community,⁹⁰ not about whether the defendant is guilty or innocent. But now that the Court has recognized the importance of plea bargains to the administration

84. *Id.* at 1322, 1346–47; see also Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989).

85. Colbert, *Do Attorneys Really Matter?*, *supra* note 20, at 1733.

86. See *Fitzpatrick v. Rosenthal*, 809 N.Y.S.2d 729, 731–32 (App. Div. 2006) (explaining New York's "reasonable cause" determination and noting that "reasonable cause is the equivalent of probable cause"); see also Colbert, *The Illusory Right*, *supra* note 14, at 2 n.4, 4 n.12 (describing other variations in initial bail hearings).

87. See *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality opinion) (holding that Alabama's preliminary hearing is a critical stage after examining its specific functions).

88. Why not argue that these pleas are, by virtue of this capacity, involuntary? Maybe they are. That question is beyond the scope of this Note but is a promising subject for future research.

89. *Stack v. Boyle*, 342 U.S. 1, 5–6 (1951) (“[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. . . . If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved.”).

90. *United States v. Salerno*, 481 U.S. 739, 751 (1987) (holding pretrial detention based on “future dangerousness” constitutional).

of criminal justice, it can recognize that bail hearings can prejudice the plea bargaining process. That makes bail a critical stage.

B. Critical-Stage Analysis After *Cooper* and *Frye*

Cooper and *Frye* suggest that the Court should expand critical-stage analysis to include a stage's potential to affect the outcome of a plea bargain. Under this framework, bail would qualify as a critical stage. *Cooper* and *Frye* reason that (1) plea bargains represent the overwhelming majority of criminal convictions in this country,⁹¹ (2) the right to counsel protects at least some things to which one does not have a constitutional right,⁹² and (3) a later, constitutionally pristine jury trial does not cure the prejudice incurred at the plea bargain.⁹³ A bail hearing fits neatly into each of these three arguments.

Pretrial detention is a big problem in this country. Approximately 7.8 million people are held before trial in our nation's jails each year.⁹⁴ For many of these people, the moment when bail was determined was the moment when their fate was sealed. While the bail hearing may not be the criminal justice system, neither is it some embarrassing adjunct; indeed, a substantial portion of criminal punishment in this country is determined at bail hearings. In *Cooper* and *Frye*, the Court expressed a willingness to consider plea bargains as the subject of *Strickland* prejudice in large part because of their pervasive importance to the administration of criminal justice. Bail shares this pervasive importance.

A criminal defendant does not have a constitutional right to bail,⁹⁵ but bail, once offered, can nonetheless occasion the right to counsel. First of all, if bail is offered, it may only be set at "an amount reasonably calculated [to ensure the defendant's presence at trial]."⁹⁶ Any higher amount is "excessive" under the Eighth Amendment's bail clause.⁹⁷

Second, substantive due process—which requires that restrictions on fundamental liberties be narrowly tailored to suit a compelling state interest—applies to the literal freedom of movement taken by pretrial

91. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("[P]lea bargaining . . . is the criminal justice system." (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1912 (1992)) (internal quotation marks omitted)).

92. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) (citing *Halbert v. Michigan*, 445 U.S. 605 (2005) (right to counsel on petition for leave to file first appeal even if discretionary)).

93. See *id.* at 1387 ("[P]rejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.").

94. Natapoff, *Misdemeanors*, *supra* note 14, at 1321–22 (around thirteen million people enter U.S. jails each year and around 60 percent of those are in jail pending trial).

95. *Salerno*, 481 U.S. at 752 ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all." (alteration in original)).

96. *Id.* (alteration in original) (quoting *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

97. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

detention.⁹⁸ Bail, therefore, also presents a risk of violating the Due Process Clause. Like guilty pleas, bail poses the risk of significant unfairness once it is granted, even though it is at least possible that there is no constitutional infirmity in denying it altogether.⁹⁹ So, under the logic of *Cooper* and *Frye*, a constitutional right to counsel at a bail hearing is not foreclosed by the lack of a constitutional right to bail in the first place.¹⁰⁰

Lastly, the prejudice from a bad bail hearing is not cured by a subsequent determination of guilt. Many convictions following pretrial detention are guilty pleas made only to get out of jail pretrial. For these pleas, guilt has not been reliably determined at all. Moreover, the critical-stage inquiry asks its questions in the abstract.¹⁰¹ Although an individual bail hearing may be flawless even without counsel, and although a later jury trial may confirm that the defendant is guilty, many bail hearings may have reached a different and more defendant-friendly result if the defendant had counsel. These many bail hearings are sufficient to make bail a critical stage.

C. A Bail Hearing Is Now a Critical Stage

As explained in Section I.A, there are two basic methods of critical-stage inquiry. The *Wade* approach emphasizes a stage's potential to foul the future trial. The *Ash* approach focuses on the similarity of the stage to a trial. Considering the conceptual link between critical-stage jurisprudence and prejudice analysis under *Strickland*,¹⁰² as well as the Court's expansion of prejudice in *Cooper* and *Frye* to include pleas, both of these strands support finding bail to be a critical stage.

The *Wade* method, in light of *Cooper* and *Frye*, fairly obviously renders bail a critical stage. *Wade* asks about the potential for a stage to render the subsequent trial a "mere formality" by predetermining its outcome.¹⁰³ *Cooper*

98. See *Salerno*, 481 U.S. at 749–51.

99. With respect to the substantive due process inquiry under *Salerno*, it seems very unlikely that the Court would find the complete denial of pretrial release narrowly tailored to a compelling state interest. But because it seems almost impossible that a state would hold all accused defendants in jail until their trials, we will likely never know the answer.

100. There is a line of cases recognizing the right to certain procedural devices as protectors of things to which one does not have a constitutional right. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (right to subsidized trial transcript on felony appeal); *Douglas v. California*, 372 U.S. 353, 355 (1963) (right to counsel on direct appeal); *Mayer v. City of Chicago*, 404 U.S. 189, 196–97 (1971) (right to a subsidized transcript for a fine-only misdemeanor); *Evitts v. Lucey*, 469 U.S. 387, 391 (1985) (right to effective assistance of counsel on direct appeal); *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (right to an attorney on petition to file first appeal from a guilty plea even though discretionary). Analogously, the Court has also recognized that a due process right attaches to the removal of welfare benefits even though the Constitution imposes no affirmative obligation on the government to provide those benefits. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

101. See *supra* Section I.A.

102. See *supra* Section I.B.

103. *United States v. Wade*, 388 U.S. 218, 224 (1967).

and *Frye* expand the object of prejudice to include plea bargains.¹⁰⁴ So, because bail has the potential to make plea bargains a “mere formality,”¹⁰⁵ bail is a critical stage under *Wade*.

The argument under *Ash* is slightly more involved. *Ash* remains concerned with the ultimate outcome of the criminal proceedings.¹⁰⁶ Its concern manifests in two questions: First, is the stage sufficiently trial-like to render the presence of counsel necessary to protect the defendant’s rights?¹⁰⁷ And second, would the later appointment of counsel at trial be insufficient to cure any problems her earlier absence may have caused?¹⁰⁸

Given *Cooper* and *Frye*’s expansion of prejudice, both of these questions are answered in the affirmative with respect to bail. Counsel at a bail hearing is effective at protecting a defendant’s rights¹⁰⁹ and—given the possibility for constitutional violations at a bail hearing—counsel is necessary to protect those rights.¹¹⁰ Furthermore, the prejudice worked by a bad bail hearing cannot always be undone by the later appointment of counsel. While a defendant who is convicted may be able to have the time he spent in jail taken off his sentence as time served, that prospect seems exceedingly rare given recent jurisprudence on bail.¹¹¹ It would do nothing for a defendant who is ultimately acquitted. And further still, many bad bail hearings result in the types of guilty pleas described above where the defendant’s sentence is less than the amount of time spent in jail preconviction anyway.

IV. A NARROW BUT VALUABLE RIGHT

This Part argues that defendants should enjoy the right to appointed counsel at a bail proceeding because that proceeding is a unique post-attachment critical stage whose maladministration can cause serious problems to the criminal justice system. Section IV.A asserts that bail is unique in its capacity to prejudice pleas but not trials. Section IV.B concludes that the bail system described above is broken, that appointing counsel will help improve it, and that the savings to states from increasing the pretrial release rate may outweigh the costs in additional lawyers.

104. See *supra* Part II.

105. See *supra* Section III.A.2.

106. See *supra* Section I.A.

107. See *supra* Section I.A.

108. See *supra* Section I.A.

109. See Colbert, *Do Attorneys Really Matter?*, *supra* note 20, at 1720.

110. See Colbert, *The Illusory Right*, *supra* note 14, at 5–6.

111. Compare, e.g., *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 659–61 (9th Cir. 2007) (holding constitutional an increase in the amount of monetary bail because the defendant was found to be dangerous), with *Stack v. Boyle*, 342 U.S. 1, 4–6 (1951) (asserting that the *only* permissible purpose of bail is to assure the defendant’s presence at trial).

A. Direct and Indirect Prejudice: Bail Is Unique

Bail is the only post-attachment stage that works its prejudice on the plea bargaining process directly, and not by changing the probability of conviction at trial. This unique capacity means that the Court can find bail to be a critical stage without overturning prior cases or finding earlier stages of the criminal process to be critical stages as well.

Prejudice to a plea negotiation can come in at least two forms. An event can either change the likelihood of conviction at trial, and thus the bargained-for sentence of a plea deal, or it can directly affect the likelihood that the defendant will plead guilty—or both. A corporeal lineup is a good example of the former. A bad outcome at a lineup changes the outcome of a plea negotiation, but *only* because it changes the likely outcome of the trial, and that change is reflected in the bargained-for sentence. Bail is different. Although bail likely does have an effect on the outcome at trial,¹¹² it has an independent effect on the outcome of a plea negotiation. If a defendant must wait in jail pending trial or bail review, he becomes much more likely to plead guilty even if his chances at trial are unchanged.

This effect is fundamentally different from a change in the likely outcome at trial and therefore requires a different analysis. Other stages that prejudice plea negotiations via prejudice to the likely outcome at trial can be handled under existing critical stages jurisprudence.¹¹³ Their capacity to affect plea results is more or less identical to their capacity to affect trials. But bail is different. Bail's strongest effect may be on pleas and not trials.¹¹⁴ Because bail's effects are fundamentally different from the effects of other stages, bail needs to be analyzed under a different rubric.

Due to this unique feature of the bail stage, finding it to be a critical stage will not require overturning prior case law. Imagine a stage other than bail that affects the outcome of a plea negotiation but does not do so by affecting the outcome of a would-be subsequent trial. Such a stage would have to have an effect mostly unrelated to a defendant's likely outcome at trial but

112. See Colbert, *Do Attorneys Really Matter?*, *supra* note 20, at 1749–62 (citing results of a controlled study for the proposition that adverse bail determinations detrimentally affect the outcome of a criminal case, *ceteris paribus*).

113. A preliminary hearing—at which a judge determines whether there is sufficient evidence to continue a felony prosecution—can affect the outcome of a plea bargain but only by affecting the outcome of the ultimate trial, either by the result or by whatever evidence may come to light during the hearing. See *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality opinion). The same can be said of post-indictment interrogations. *Massiah v. United States*, 377 U.S. 201, 206 (1964). Preventive detention hearings of the type contemplated by *Salerno* already occasion the presence of counsel. See Bail Reform Act, 18 U.S.C. § 3142(f) (Supp. V 2011) (“At the hearing, [the defendant] has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed.”). Therefore, finding bail to be a critical stage would not change the analysis.

114. There are, of course, times where the converse would be true. Imagine, say, a serious felony prosecution where the sentence on offer is almost certainly greater than the expected wait for a trial. Whether the defendant is or is not released pretrial will make very little difference on his bargaining position.

nonetheless provide him with an incentive to plea. The only pretrial procedures that can conceivably meet both of these conditions involve events external to the progress of the criminal proceeding altogether. One example may be a threat by the government to prosecute a loved one: such a threat can induce a guilty plea but is totally unrelated to the outcome of the defendant's trial.

Procedures besides bail hearings that meet these criteria are almost certainly pre-attachment. Pre-indictment plea bargaining, for example—at which one does not currently have the right to counsel¹¹⁵—is distinguishable from a bail hearing. Imagine a prosecutor approaches a defendant with a plea deal before even charging or arresting him. Pre-charge plea bargaining of this type occurs before the attachment of the right to counsel and, therefore, does not trigger critical-stage analysis. There have been no restrictions on the defendant's liberty, no formal appearances before judicial officers, and no accusations for Sixth Amendment purposes. Furthermore, this charge-bargaining would likely affect the outcome of any subsequent trial. The more serious and more numerous the charges, the greater the likely sentence at trial. This is not necessarily true of bail.

B. *The Broken Bail System*

Our criminal justice system is replacing trials with plea bargains.¹¹⁶ Plea bargaining is only conceivably legitimate insofar as it reliably separates the innocent from the guilty.¹¹⁷ When the bargaining process is functioning well, the bargained-for sentence approximates the expected sentence if the parties had gone to trial, with a discount for avoiding the time, hassle, and risk a trial imposes.¹¹⁸ During a healthy plea negotiation, the government and the defendant may exchange information about the relative merits of their cases and come to a mutually beneficial agreement—one that simultaneously

115. *E.g.*, *United States v. Moody*, 206 F.3d 609, 616 (6th Cir. 2000) (pre-indictment plea bargaining does not require the assistance of counsel).

116. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (alterations in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1912 (1992)) (internal quotation marks omitted)).

117. There is abundant literature on guilty pleas. Pleas are defended insofar as they accurately reflect guilt or innocence at trial. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464, 2531 (2004); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 *CALIF. L. REV.* 1117, 1132 (2011); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *YALE L.J.* 1969, 1970–71 (1992); Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 *WASH. U. L.Q.* 1 (2002); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909 (1992). *But see* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1981 (1992).

118. *See, e.g.*, Lain, *supra* note 117, at 23–26 (arguing that in a perfect-information plea bargain, the agreed-upon sentence will equal the expected sentence at trial with a discount for avoiding the trial rigmarole).

reflects a reasonable administration of punishment and minimizes the downside risk for both the defendant and the government.

When a defendant pleads guilty to avoid sitting in jail before trial, this process breaks down. The defendant's guilty plea no longer reflects an admission that he is, in fact, guilty. Rather, it is a simple and unavoidable consequence of the bail hearing. When an incarcerated defendant is offered a plea deal that allows him to go home, he would plead not guilty if and only if the collateral consequences of a misdemeanor conviction were more important to him than the time he will spend in jail, or if he stands on the principle that one should not plead guilty to a crime he did not commit. Many defendants do not fall into these categories.

Even if they did, the bargaining process between the defendant and the state would cease to function like an ordinary plea negotiation. The discussion would no longer be about how much punishment the defendant deserved or even the odds of his conviction at trial. Instead, the plea bargain would become a simple take-it-or-leave-it offer wholly unrelated to the strength of the evidence against him. In the way that an unfavorable outcome at a corporeal lineup can render a later trial a "mere formality,"¹¹⁹ a bad bail hearing can render the outcome of a subsequent plea negotiation a mere formality. Rather than sit in jail, the defendant will plead guilty to any offer that lets him go free.

A significant number of criminal convictions are the direct results of bail hearings without counsel. These convictions do not reflect the defendant's culpability.¹²⁰ Rather, they are the results of proceedings designed to inquire into the likelihood that the defendant will appear for trial on his own recognition. That procedure may leave the defendant with no reasonable choice but to plead guilty, regardless of his guilt or innocence. This is bad.

Although innocent defendants may plead guilty to avoid the risk of a worse result at trial,¹²¹ those who plead guilty to escape pretrial detention do so for reasons of a different kind. The innocent defendant who balances the risk of conviction at trial with the certainty of a lesser sentence at least does so because there is *some* risk of conviction. In part, his decision is related to his odds at trial, and those odds are the criminal justice system's best proxy for his likely guilt or innocence. The defendant who pleads guilty to escape pretrial detention does so for reasons *entirely apart* from his culpability. He does so because, no matter what the outcome at trial, he is better off admitting false guilt than asserting true innocence. This is unacceptable.

Even for guilty defendants, pleas made to avoid pretrial detention are unacceptable. Although it may be easier to administer punishment for petty offenses without meaningful proof of guilt, doing so erodes the foundation

119. *United States v. Wade*, 388 U.S. 218, 218 (1967).

120. Although, of course, the judge must be satisfied that a factual basis exists for the defendant's guilty plea, this requirement is very lax. *See, e.g.*, *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (holding sufficient a guilty plea even where the defendant says in open court that he did not commit the crime charged).

121. *Id.* at 31.

on which criminal judgments rest—a determination of fact leading to a belief that someone is worthy of condemnation and punishment.¹²²

Some may argue that pleas to time served avoid the hassle, risk, and taxpayer expense of trials for relatively minor offenses. To this, I offer two responses. First, this Note discusses the potential of bail to affect the outcome of a plea negotiation in the *abstract*. While sometimes pretrial detention may not prejudice the outcome of a plea bargain, and although some pleas may be just and expedient, many times this is just not the case. These many instances make bail a critical stage.

Second, providing counsel at a bail hearing will not render fast and convenient guilty pleas impossible. Doing so will only assure that there are adequate procedural protections to make sure these pleas are not forced on defendants who should not be held before trial in the first place.

Counsel at bail hearings will help solve this problem. Although some defendants will continue to be held on bail pending trial, and although some will continue to plead guilty to avoid the wait, fewer will do so. And those who do will have, at least, had an opportunity to fairly contest their pretrial detention and to have had the advice of counsel in accepting or rejecting the plea offer.

Indeed, because the forced pleas described almost exclusively arise in the context of low-level misdemeanor charges, counsel will likely be even more effective at securing the defendant's release before trial. Since defendants facing more serious charges are more likely to flee before trial, courts are permitted to use the seriousness of the alleged offense as a factor in setting appropriate bail.¹²³ Facing prosecution for a low-level offense, therefore, a defendant with a lawyer should be able to get the judge to set bail in a reasonable amount, barring an extraordinary criminal history.¹²⁴

Most constitutional criminal procedure rules come at a cost, be it in guilty defendants set free, trials slowed, bureaucracy burdened, or the public reputation of the proceedings tarred with the epithets of "technicalities."¹²⁵ But the new rule this Note proposes might actually be a net winner. The costs saved by states in reducing pretrial detention will likely suffice to offset the added costs for additional lawyers to represent indigent defendants in bail hearings.¹²⁶ And there is good reason to believe that substantially lowering the rate of pretrial detention will do little to increase the rate at which

122. For a discussion of the procedural and funding reasons that may drive non-merit-based resolution of criminal adjudications, see generally Willam J. Stuntz, *The Uneasy Relationship Between Criminal Justice and Criminal Procedure*, 107 *YALE L.J.* 1, 37–45 (1997) [hereinafter Stuntz, *The Uneasy Relationship*]. See also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

123. See *Stack v. Boyle*, 342 U.S. 1, 4 n.3 (1951) (citing FED. R. CRIM. P. 46(c)).

124. See *id.*

125. Stuntz, *The Uneasy Relationship*, *supra* note 122, at 56.

126. See Colbert, *Do Attorneys Really Matter?*, *supra* note 20, at 1757 n.122 (citing Md. Gen. Assem., Dep't of Legislative Servs., Fiscal Note to S.B. 138 (2000)) (projecting cost savings of 4.5 million dollars if the State appoints lawyers at bail hearings).

defendants on bail fail to appear or are apprehended for other violations.¹²⁷ Either way, counsel will likely only be securing the release of marginal defendants who may have gotten out pretrial anyway; the most apparently dangerous defendants remain unlikely to be released. Therefore, there is scant reason to believe that counsel will substantially increase socially bad outcomes pretrial. And that means there is scant reason to believe that it will substantially increase costs. So, recognizing a constitutional obligation on the part of states to provide counsel at bail hearings will likely reduce their criminal justice budgets.

CONCLUSION

Critical stages jurisprudence and prejudice jurisprudence under *Strickland* share a similar goal and deserve similar treatment by the Court. Because the Court has recently expanded *Strickland* prejudice to encompass a lost plea bargain, the Court, therefore, ought to expand critical stages to include those with the potential to foul future plea bargains. A bail hearing is the only stage of any state's criminal proceeding that has the ability to prejudice a plea negotiation by any mechanism other than changing the likely outcome at trial. As such, a bail hearing is now a critical stage, and defendants have the attendant right to counsel at these hearings.

127. Cf. Susan Dely, *Implementing STARR in Federal Pretrial Services*, NEWS AND VIEWS: A BI-WEEKLY NEWSLETTER OF THE UNITED STATES PROBATION AND PRETRIAL SERVICES SYSTEM, April 11, 2011, at 4 (“[The Eastern District of Michigan] has one of the *highest* release rates and one of the *lowest* failure-to-appear rates in the country . . .” (emphases added)).