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CRIMINAL LAW

THE DILEMMA OF SEEKING BAIL AND PREPARING A DEFENSE IN MURDER CASES: PERSPECTIVES AND PRACTICES OF CHICAGO DEFENSE LAWYERS

J. A. GILBOY*

INTRODUCTION

The procedure by which a criminal defendant may attain pretrial liberty through the availability of bail is generally regarded as intended to prevent the infliction of punishment prior to conviction and to permit the defendant to assist his lawyer in the preparation of his defense.¹ The use of bail—that is,

the providing of financial security to assure the defendant's appearance at trial—is intended to strike a balance between the defendant's interest in pretrial freedom and society's interest in assuring his return appearance to court for trial.² In Illinois, at the time of this study, all defendants were guaranteed an absolute right to bail before conviction except in capital cases.³ A defendant charged with having committed the capital offense of murder, aggravated kidnapping or treason was not entitled to bail where "the proof is evident or the presumption great" that he was guilty of the offense.⁴ In capital cases a

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¹See *Stack v. Boyle*, 342 U.S. 1, 4 (1951), where the Court stated:

From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a) (1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.

Persons in custody may be detained under conditions worse than those suffered by committed prisoners. Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941 (1970). Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L.

REV. 693, 723-25 (1958) (hereinafter cited as *New York Bail Study*).

Detention may hinder a defendant's attempts to assist his lawyer in the preparation of his defense. Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1048, 1054-58 (1954) (hereinafter cited as *Philadelphia Bail Study*); *New York Bail Study*, *supra* at 725-26; Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L. J. 966, 969-70 n. 27 (1961).

²See *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002, 1004 (2d Cir. 1946), where the court stated: The purpose of bail before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect. The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint before conviction under the circumstances surrounding each particular accused.

³ILL. REV. STAT. ch. 38, § 110-4(a) (1973).

⁴*Id.* This research was subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972) and *Moore v. Illinois*, 408 U.S. 786 (1972), in which the United States Supreme Court decided that the death penalty as then provided was unconstitutional and could not be imposed. The effect of these cases on bail (that they would lead to all offenses being bailable in Illinois in the absence of an operable capital punishment statute) was immediately perceived by the Illinois legislature. The Criminal Code was amended and during the period of this research on bail (late 1972 through

defendant in Chicago who sought to have bail set could initiate judicial consideration of whether proof of guilt was evident or the presumption great by raising the issue through a bail hearing at which witnesses could be called by the defense and the

early 1974) an amended statute was enacted which provides:

(a) All persons shall be bailable before conviction, except when the offense charged is murder, aggravated kidnapping or treason and the proof is evident or the presumption great that the person is guilty of the offense.

(b) A person charged with murder, aggravated kidnapping or treason has the burden of proof that he should be admitted to bail.

ILL. REV. STAT. ch. 38, § 110-4(a) and (b) (1973). In the amended version the words "the offense charged is murder, aggravated kidnapping or treason" have been substituted in paragraph (a) for the words "death is a possible punishment for the offenses charged." Very similar changes were made in paragraph (b).

Subsequently, on May 20, 1974, in *People v. Anthony*, 57 Ill.2d 222, 311 N.E.2d 689 (1974), the Supreme Court of Illinois declined to reach the question of whether in light of *Furman* and its invalidation of capricious application of the death penalty, there no longer existed "capital" offenses for which bail could still be denied in Illinois within the meaning of the bail provisions of the Illinois Constitution which provided: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great." In view of the fact that the defendant Anthony had been tried, convicted and sentenced, and new Illinois state legislation again imposed the death penalty, the court found it unnecessary to pass on the merits of the question.

The new Illinois capital punishment statute, effective July 1, 1974, limited the imposition of capital punishment to fewer offenses than previously; e.g., aggravated kidnapping and certain forms of murder, such as a killing committed in the course of an argument or heated emotion, were no longer punishable by death. ILL. REV. STAT. ch. 38, § 1005-8-1A (1975). However, although during this research certain types of murder were no longer capital offenses, it was not until September, 1974, that a Cook County judge ruled that a defendant charged with a type of murder to which the Illinois death penalty statute did not apply could not be constitutionally denied bail. On January 30, 1975, in *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 322 N.E.2d 837 (1975), the aforementioned amended bail statute which permitted denial of bail for murder, aggravated kidnapping and treason was declared by the Illinois Supreme Court to be invalid and unconstitutional in part in that that statute rendered non-bailable a number of then noncapital offenses under the new capital punishment statute.

In *People ex rel. Rice v. Cunningham*, 61 Ill. 2d 353, 336 N.E.2d 1 (1975), the capital punishment statute was itself held unconstitutional. The noticeable effect of this sequence of opinions and statutes on Table 1 appears to be that, as of the July, 1975 compilation of statistics, one case still being prosecuted after *Hemingway* cites that opinion in its petition for bail.

prosecution or, without a hearing, through a written or oral motion for bail.

It might be expected that defense lawyers in capital cases generally would seek bail for their clients in order to prevent their physical and mental deterioration from the anxiety and the uncertainty involved in the wait in jail, to allow them to assist in the preparation of their defense,⁵ or to avoid their being pressured into taking the prosecution's offer on a guilty plea.⁶ Most observers of the criminal process have shared such an expectation.⁷ Interviews with public defenders and private defense law-

On the recent history of capital punishment in Illinois, see 1976 ILL. B. J. 366; Bakakos, *Bail in Capital Cases*, 1974 CHI. B. REC. 154; Comment, *Felony Murder in Illinois*, 1974 U. ILL. L. F. 685; 1974 U. ILL. L. F. 440.

See generally on the impact of *Furman* on bail in capital cases in other states, Comment, *Roll v. Larson: The Right to Bail in Capital Cases after Furman v. Georgia*, 1974 UTAH L. REV. 421; Comment, *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail after Abolition of the Death Penalty*, 10 SAN DIEGO L. REV. 349 (1973); Note, *Bail in Capital Cases After Furman: A Process Question*, 4 RUTGERS-CAMDEN L. J. 326 (1973); Note, *Furman v. Georgia: Will the Death of Capital Punishment Mean a New Life For Bail?* 2 HOFSTRA L. REV. 432 (1974).

⁵A growing number of studies, of varying research sophistication, suggest that pretrial freedom may be necessary to avoid the effects of detention itself on either the likelihood of conviction or the severity of the sentence on conviction. Several factors are posited as contributing to this relationship, including the hampering of the preparation of the defense where the defendant is in custody. See, e.g., Rankin, *The Effect of Pretrial Detention*, 39 N. Y. U. L. REV. 641 (1964); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N. Y. U. L. REV. 67, 84-87 (1963); *Philadelphia Bail Study at 1051-54*; FRIEDLAND, DETENTION BEFORE TRIAL: A STUDY OF CRIMINAL CASES IN THE TORONTO MAGISTRATES' COURTS 110-25 (1964).

One study reports that in some circumstances bail status may not affect the outcome of a case. In a study of youthful offenders the jail/bail status did not seem to alter case outcomes; almost 100 per cent were convicted regardless of their bail status. A. BLUMBERG, CRIMINAL JUSTICE 176-77 (1970) (hereinafter cited as BLUMBERG).

See generally the commentary on the effects of pretrial custody in the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE COURTS 37-41 (1967).

⁶That pretrial detention induces guilty pleas in cases that might otherwise have been tried is suggested by numerous authors. See H. PARKER, THE LIMITS OF CRIMINAL SANCTION 212-13 (1968); J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 66-68 (1972); BLUMBERG, *supra* note 5, at 68-69; *New York Bail Study at 725-27*.

⁷See notes 5 and 6, *supra*.

yers in Chicago, however, suggest a more complex picture.

Defense lawyers approach the seeking of bail in the broader context of their preparation of a trial defense for the client.⁸ Lawyers suggest that seeking

⁸The data for the study reported here are derived from a larger study of Chicago criminal defense lawyers conducted between 1972 and 1975. That larger study is reported in the author's dissertation entitled *Perspectives and Practices of Defense Lawyers in Criminal Cases*, June 1976 (unpublished dissertation on file at the Northwestern University Library). The research focused exclusively on the practice of law by defense lawyers in the state criminal courts in Chicago, Illinois. The principal research techniques of this more extensive study were: the longitudinal participant observation of criminal defense lawyers (seventeen defense lawyers were intensively interviewed about a small number of their felony cases during the entire period of their representation of the case); shorter interviews with these and another thirty defense lawyers concerning various subjects relating to defense work; and the analysis and compilation of statistics from defendants' files and judges' court sheets.

The study about bail applications reported here is based on: (1) Interviews with ten private defense lawyers and three public defenders (two who worked in Branch 66—"Murder Court"—during the research and one who worked in a criminal trial court); two state's attorneys working in Branch 66 and the presiding judge were also interviewed about their work and their observations about the practices of criminal defense lawyers. (2) I observed eleven full days of activities in Branch Court 66, and during another three days I was in court with private defense lawyers during the longitudinal research and had an opportunity to observe while waiting with them for their case to be called. These court observations permitted me to observe the bail application practices of defense lawyers I was not interviewing and provided an opportunity to compare whether they appear to practice similarly to those I did interview. (3) Statistics were collected from murder indictment files concerning the extent to which defense lawyers seek bail in murder cases and the method of seeking bail (bail hearings or bail motions). These statistics appear in Table 1.

The study of bail hearings offered certain challenges to conceptualization during the research. That lawyers did not initiate the bail hearing for fear of its damaging effects on the trial came to my attention first from interviews with defense lawyers. As the research proceeded, however, I observed an occasional bail hearing in Branch Court 66. This raised doubts about the original formulation of the views of defense lawyers—did other lawyers actually share a similar concern over the bail hearings usage? The researcher pursued the subject by (1) interviewing the few lawyers who were observed to raise bail hearings, (2) by interviewing other lawyers further about their usage of the bail hearing, and (3) by the collection of overall court statistics on initiation of bail hearings in order to have a broader view of defense activities. The interviews indicated that there are case preparation reasons to initiate the bail hearing and means to do so, as by controlling its content, which diminish its deleterious effects on the defense's case. It was a simple but important idea to the understanding of

a client's pretrial liberty in murder cases, particularly through the bail hearing, may actually in some circumstances hamper the preparation of a defense and thereby deprive a defendant of his ultimate freedom. When defense lawyers consider use of the bail hearing, it is primarily in terms of whether what can be gained at that hearing with regard to trial preparation outweighs what is lost to the preparation of the defense. Pretrial freedom for the defendant may not be an objective of the hearing at all. The decisions made by defense lawyers about the use of the bail hearing involve three choices: (1) whether to initiate the bail hearing, (2) its content if initiated, and (3) the timing of its initiation.

Fundamentally, this paper suggests that applications for bail in capital cases cannot be understood simply as proceedings to ascertain whether the defendant is entitled to pretrial release on bail while awaiting trial. Instead, applications for bail must be seen in the context of trial preparation in general.⁹ For a number of reasons an all out effort by an attorney to have bail set may be potentially harmful to the best possible defense at trial. Therefore, defense lawyers in capital cases will often decide not to seek bail at all (or they may choose to seek bail through methods that are likely to be less successful). No previous discussions of bail appear to have recognized and dealt with these characteristics of the process of bail application.

BAIL APPLICATION: BACKGROUND CHARACTERISTICS AND MODES OF APPLICATION

The bail application discussion in subsequent sections might be better understood by first considering the various means by which such applications are made along with their key characteristics, as defined by state statutes and court customs. In Chicago after a suspect is arrested for the offense of murder, the Cook County State's Attorney's Office reviews the case to ascertain whether there is sufficient evidence to hold that person for prosecution. If a complaint charging him or her with murder is lodged, the case is then placed on the docket of a felony branch court

bail hearings in murder cases that there are a variety of courses of action a lawyer may take in a case which may reflect similar ideas but are molded to the particular case.

⁹This procedural characteristic is not unique to bail application. It is well known that the preliminary hearing is also frequently used by the defense as a tool for preparing its case for trial. See generally, Graham and Letwin, *The Preliminary Hearings in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 636 (1971); Graham and Letwin, *The Preliminary Hearings in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 916 (1971).

and the defendant is brought immediately before the branch court judge. At this first appearance the case is transferred on the books to another branch court,¹⁰ commonly spoken of as "murder court,"¹¹ which devotes its time solely to preliminary matters in murder and manslaughter cases.¹² The second appearance of the case (its first in "murder court") is held ten days to two weeks later, and at this court appearance a public defender is appointed unless the defendant has a private lawyer or indicates his intent to hire one.¹³ The case is then continued to a future date and tentatively set for a preliminary hearing. The defendant may make application for bail at the initial court appearance or at any subsequent appearance in the branch court until the case is dismissed, discharged at a preliminary hearing,¹⁴ or bound over to the grand jury. If the defendant is indicted,¹⁵ the case will be set for trial in a trial court, where a bail application may be made at any of the court appearances. There does not appear to be any

limit to the number of times bail application may be made by the defendant in the branch or trial courts.¹⁶

In making application for bail the defendant in capital cases has the burden¹⁷ of introducing sufficient evidence to satisfy the court that proof is "not evident" that he has committed a capital offense nor is the "presumption great" that he is guilty of the offense.¹⁸ The prosecutor may present evidence of his own to rebut the defendant's contentions.

Procedurally there are a number of ways in which application for bail is made in the branch and trial court. One method is to submit a written motion during one of the defendant's appearances in the branch court prior to the preliminary hearing, or in the trial court after indictment. The written motion

¹⁰ Defense lawyers suggested that murder complaints were filed first in the general Branch Courts 24 or 44 rather than in Branch 66 or "Murder Court," as a means by the police and prosecutors to gain extra time to investigate their case; the transfer of the case to Branch 66 required a continuance.

¹¹ Besides "Murder Court" (Branch Court 66), there are numerous other "specialty" branch courts in Chicago (Rackets Court, Women's Court, Narcotics Court, Boys' Court, etc.) These courts reflect a method of organizing the court's administration of a large volume of criminal cases.

¹² These preliminary matters are bail applications and preliminary hearings.

¹³ During the period that data for this article was obtained (1972-1975), the Public Defender's Office assigned their lawyers to courts, not cases. This meant that a defendant could expect to be represented by different lawyers in the branch, arraignment and trial courts, as well as on post-conviction motions and appeal. In late 1974 the office began assigning lawyers to handle murder and manslaughter cases from beginning to disposition at trial, although post-conviction motions and appeals continued to be handled by other lawyers in the office.

¹⁴ Since the bulk of murder cases prosecuted in Cook County are initiated by complaint rather than by grand jury indictment, the opportunity for bail application in the branch court arises in most murder cases.

¹⁵ Currently in cases in which there has been a finding of probable cause at a preliminary hearing, the prosecutor is no longer required to present his case before the grand jury for indictment. Instead, after a finding of probable cause, cases are transferred to the Criminal Division of the Circuit Court of Cook County for immediate assignment to a trial court. While in use the grand jury in Cook County, Illinois, did not provide a significant screening function. See D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT: A STUDY OF CHICAGO AND COOK COUNTY* 44-45 (1968).

¹⁶ In most murder cases applications for bail were made no more frequently than once in each court.

¹⁷ "(b) A person charged with murder, aggravated kidnapping or treason has the burden of proof that he should be admitted to bail." ILL. REV. STAT., ch. 38, § 110-4(b) (1973).

There is no uniformity among states concerning who has the burden of proof. Some states, like Illinois, have placed the burden on the defendant when he has applied for bail. In summarizing the position of these states the court in *Commonwealth v. Stahl*, 237 Ky. 388, 389, 35 S.W.2d 563, 563 (1931), concluded:

In the jurisdictions where it is held that the burden of proof is on the defendant, the indictment in a capital offense is regarded as making out a *prima facie* case of guilt against him. The maxim that every man is presumed innocent until he is found guilty does not apply to the question whether or not defendant is entitled to bail in the jurisdictions where it is held the burden of proof, on motions for bail, is on the defendant.

Other states have placed the burden on the state and have argued that the indictment itself does not furnish *prima facie* evidence sufficient to demonstrate that in a capital case proof is evident or presumption great, which thus avoids shifting the burden of proof to the defendant. Moreover, the placing of the burden on the state is considered consistent with the "presumption of innocence" of the defendant before conviction. See generally *Commonwealth v. Stahl*, 237 Ky. 388, 35 S.W.2d 563 (1931); *State v. Konigsberg*, 33 N.J. 367, 164 A.2d 740 (1960).

¹⁸ ILL. REV. STAT. ch. 38, § 110-4(b) (1973).

Besides Illinois, another forty states guarantee defendants an absolute right to bail in all cases including capital cases, with the exception in capital cases "when the proof is evident or the presumption great" or in essentially identical words. Literature in this subject does not appear to contain descriptions of defense and prosecutorial bail application practices in capital cases in these states. For a list of states with bail statutes governing the right to bail which are similar to and different from Illinois', see Note, Furman v. Georgia: *Will the Death of Capital Punishment Mean a New Life for Bail*, 2 HOFSTRA L. REV. 432, 434 n.7-10, 435 (1974).

may list characteristics of the defendant which suggest that he is the type of person unlikely to flee from prosecution if released on bail; for example, a motion may contain information on the length of time the defendant has lived in Chicago, his family ties, employment record, age, and the willingness of his family or other persons to assure his appearance in court.¹⁹ In some of these written motions the defense may include a statement that if certain witnesses were called they would testify in a given manner; however, depositions or affidavits signed by witnesses are not submitted.²⁰ Such a written motion offers advantages for the defense in that neither the defendant nor any other defense witness must testify and thus no testimony is recorded and preserved for possible impeachment purposes.²¹ On the other hand, this mode of bail application is generally regarded as one with limited success in actually obtaining bail for a client. It may be used by defense lawyers in some cases as a means to satisfy a client that his attorney is active in his behalf without the risks involved in an actual bail hearing.

Another alternative is a motion for bail after the preliminary hearing in the branch court. This is usually an oral motion. At the preliminary hearing, the judge reviews the case in order to determine whether there is sufficient evidence to hold the accused for trial.²² The prosecutor at this hearing must introduce evidence sufficient to satisfy the judge that there is probable cause to believe a murder has been committed by the accused. At the conclusion of

the preliminary hearing the judge will hold the defendant for trial on either a charge of murder or manslaughter, or he will release the defendant for lack of probable cause. In Chicago, the preliminary hearing in murder cases is very seldom waived by the defendant;²³ defense lawyers consider the preliminary hearing not only an opportunity to test the prosecution's case but also an important forum for trial preparation.²⁴ In a typical case the police officer at the preliminary hearing will relate the circumstances leading up to the arrest of the defendant and will describe the nature of the arrest and any search conducted at the time and what it produced. Other witnesses will also be called by the prosecutor to give their account of the case. The defense may cross-examine the state's witnesses and almost always will do so. Although the defendant is also allowed to testify on his own behalf and to present witnesses at the preliminary hearing, in most cases the defendant chooses not to present any evidence of his own.

After a finding of probable cause at the preliminary hearing, the defense may make a motion for bail.²⁵ The preliminary hearing is thereby used as a substitute for a separate bail hearing, over which it possesses certain advantages from the defense point of view. Since the burden is on the prosecution to establish probable cause, the strength of the prosecution's case is exhibited through the testimony of some of the state's witnesses and through their cross-examination by the defense. Yet the defense does not have to come forward with its own case, as it does when it initiates a separate bail hearing. Another advantage is that applying for bail after the preliminary hearing is economical in terms of the lawyer's time. Discussions with lawyers suggest, however, that such a motion often goes unmade at this time in order to avoid what would be merely a futile exercise, given the strength of the case the prosecution has presented and the fact that the defense, having presented no evidence of its own, has rendered only an impression of the

¹⁹Information on written bail motions was obtained from a reading of bail motions located in the indictment files of murder defendants bound over to the grand jury from Branch 66, "Murder Court," in October, November, and December, 1973.

²⁰Depositions or affidavits signed by witnesses have been reported to be used for bail application purposes in some jurisdictions. Comment, *Determination of Accused's Right to Bail in Capital Cases*, 7 VILL. L. REV. 438, 446 (1962).

²¹In the Chicago branch and trial courts a court reporter is present and all court proceedings are recorded. In some other Illinois jurisdictions, however, a record of court proceedings is not made of branch court proceedings unless a private lawyer brings his own stenographer. See D. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 133 (1974). How this affects the bail application practices of defense lawyers in these jurisdictions is unknown.

²²On preliminary hearings in Illinois in general, See McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L. C. & P. S. 468 (1968); McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154 (1970); O'Shea, *The Preliminary Hearing in Illinois—Nature and Practice*, 57 ILL. B. J. 556 (1969).

²³Statistics on the rate of waiver of the preliminary hearing in murder cases were examined for the month of October, 1973. In no murder case in that month was a preliminary hearing waived by the defendant.

²⁴But see the contrasting views of defense lawyers in another Illinois city, D. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 132 (1974).

²⁵Applications for bail are made immediately following the preliminary hearing and not on a subsequent court date, since the defendant's case is bound over to the grand jury.

strength of its case through its cross-examination of the prosecution's witnesses.²⁶

Alternatively, the defendant charged with murder may seek to have bail set through a separate bail hearing, conducted before the preliminary hearing or before the trial court. Since the burden is on the defendant at such a bail hearing to present evidence, defense witnesses will be called and may be cross-examined by the prosecution. The prosecution may in turn call rebuttal witnesses.

In Chicago, all branch court proceedings, including the bail hearing, are made a matter of record. Testimony at a bail hearing is recorded by a court reporter and may be transcribed for the use of either the prosecution or defense for purposes of case preparation and future impeachment of witnesses. The characteristics of such bail hearings are described in detail below.

EXTENT AND PREFERRED MODE OF BAIL APPLICATION

Analysis of court files for a three-month period provides some statistical data concerning the extent to which application for bail in murder cases occurs and the mode of bail application selected by defense lawyers.²⁷

²⁶Normally the defense at the preliminary hearing is interested in exploring the prosecutor's case and prefers not to reveal at this time the defects in the testimony of prosecution witnesses but prefers to save the attack for trial. Moreover, given his interest in pinning the prosecution's witnesses down to a story, he prefers to reveal in his cross-examination as little as possible of his client's expected defense at trial in order to draw out more spontaneous and hence more truthful testimony than might be possible were prosecution witnesses sensitive to the importance of particular questions to the defendant's defense.

²⁷The analysis of defendants' court files provides statistical data concerning the extent of the use of bail hearings and bail motions in murder cases. A sample of murder cases was compiled using the daily court sheets from "murder court." The names of all defendants charged with the crime of murder who were bound over from the branch court to the grand jury during the months of October, November, and December, 1973, are included in the sample. Excluded from the sample are a small number of defendants initially charged with murder for whom there was subsequently a finding of probable cause for manslaughter or who were indicted by the branch jury for the offense of manslaughter. The indictment files for each of the defendants in the sample were located and in each file both the branch court and trial court "halfsheets" (a short narration about what took place at each court appearance) were examined for bail information. Files were also examined for copies of written bail motions to provide a greater chance of complete and accurate bail information in the event the halfsheet was incomplete in its record. The bail information in the case files was also supplemented by bail information in the

TABLE 1

BAIL HEARINGS AND BAIL MOTIONS IN MURDER CASES
IN CHICAGO, BRANCH COURT AND TRIAL COURT DATA,
OCTOBER, NOVEMBER, DECEMBER, 1973

	(a) Branch Court Bail Request		(b) Trial Court Bail Request*	
	No.	%	No.	%
Bail Hearings	2	2.02	6	6.74
Bail Motions	30	30.30	16	17.98
Bail Set†	5	5.05	0	0.00
No. Requests	60	60.61	67	75.28
No Information	2	2.02	0	0.00
	99	100.00	89	100.00

* Excludes ten cases for which bail was set after a bail motion or bail hearing in the Branch Court.

† It is not known whether bail was set after a bail hearing or bail motion.

Bail for defendants in murder cases is not sought in the branch or trial court (See Table 1). Specifically, in about 48 per cent of the cases there was no indication in the files or other sources²⁸ that bail had ever been sought in either the branch court or trial court. The relative infrequency of seeking bail at all, even through a bail motion, may reflect the inability of many defendants to afford the bond even if it is set. This is suggested by statistics showing the different rates for seeking bail by public defenders and private lawyers. Bail is less frequently sought for clients represented by public defenders or appointed counsel than by private lawyers. Where the defendant was represented by public defender or appointed counsel, bail was sought at the branch level in only 17 per cent of the cases and at the trial level in 23 per cent of the cases. Private lawyers, in contrast, sought bail for their clients in 46 per cent of the cases at the branch level and 26 per cent of the cases at the trial level.

The statistics in Table 1 indicate that when bail is sought, a bail motion rather than a bail hearing is the

branch court judges' daily court sheets. The statistics in Table 1 refer to whether a bail hearing or bail motion was requested in either the branch court or trial court (columns a and b). The statistics are calculated by defendant/indictment. That is, where a single defendant was involved in more than one indictment for murder, each indictment and its branch and trial court bail activity are treated separately in the statistics.

²⁸In some cases, motions for bail after the preliminary hearing were recorded on Branch Court 66's daily court sheets but not on the defendant's branch court "halfsheet." Where this occurred the daily court sheet information was used in compiling the statistics.

preferred mode of application. In only 15 per cent of the bail applications (8 cases) in the branch and trial courts was the bail hearing used, while in 85 per cent of the bail applications (46 cases) the bail motion was utilized. The extensive use of the bail motion for purposes of bail application—when bail is probably more likely to be set through a bail hearing—suggests the operation of other considerations in the selection of the mode of bail application. The ways in which trial preparation considerations enter into the decision to avoid the bail hearing are discussed in the next section.

AVOIDANCE OF THE BAIL HEARING

Protecting the Trial Defense

The defendant has a vital interest not only in avoiding lengthy pretrial detention but also in avoiding the undermining of his defense at trial.²⁹ It is the recognition of the potential conflict of these interests that accounts in part for defense lawyers' avoidance of the bail hearing. There are two features of the bail hearing which may stimulate adverse effects on a defendant's subsequent trial. They are: (1) the tran-

²⁹The reluctance of defense lawyers to predetermine the course of a murder case at the branch court stage is an important background piece of information about their views concerning the use of the bail hearing. Although some murder cases that have reached the trial court are not disposed of by a jury or bench trial, but by dismissals or pleas of guilty, lawyers are reluctant to define the ultimate course of disposition of the case at so early a stage of the case of the branch court level, but prefer instead to prepare cases in the branch court "as if" they were going to trial at some later date. In part this is explainable by the nature of the criminal process in Illinois where formal discovery—the gaining of access to police reports and case report supplements, copies of a defendant's confession, statements of witnesses, examination of physical evidence—occurs officially at the trial level. Moreover, at the branch level other aspects of the future of the case are unknown, such as to which trial court judge and prosecutor it will be assigned. The character of the judge and prosecutor assigned to the case may present different considerations as to whether it will be in the client's interest to plead guilty or pursue a trial. Further, the simple time lapse between branch court proceedings and the trial level (which may be as much as six to eight months or even a year or more) offer a range of possible events affecting the case, such as the death or a "change of heart" of a witness.

Defense lawyers' "bias against closure" on the course of a murder case is not completely explained, however, by the foregoing characteristics of criminal process. Even where a lawyer fully investigates his case at the branch court level and gains access to much of the important formal discovery in the branch court, such as police reports and supplements, there remains a reluctance to adjust one's practice in the branch level to an estimate as to how the case will be disposed of at the trial court level. Legal practice is concerned with the individual case and not the aggregate.

scribing of the testimony of witnesses at the bail hearing which provides for the perpetuation of that testimony for possible use by the prosecutor at the trial;³⁰ and (2) the placing of the burden of proof on the defendant that he be admitted to bail, thus requiring him to present some evidence of his own.³¹ From the standpoint of defense lawyers these features of the bail hearing create three problems for the preparation of their client's case for trial: (1) the potential impeachment of defense witnesses at the preliminary hearing and at trial; (2) the possible enhancement of the prosecution's case; and (3) a potential premature limiting of defense approaches to the case.

Impeachment of Defense Witnesses. At the bail hearing the defendant has the burden of proof that he be admitted to bail and may need to produce exculpatory evidence or show mitigating circumstances. For example, he may try to show that the homicide was accidental or committed in self-defense by calling one or more persons to testify in his behalf. The bail hearing testimony of even an honest and sincere witness may appear to conflict with his testimony at the preliminary hearing or trial. The time lapse, particularly between the bail hearing and trial, may be so lengthy as to make it difficult for most persons to remember details of the case. Moreover, lawyers fear that a shrewd prosecutor will provoke an answer from a defense witness which will have one meaning on paper and a different meaning to the witness as the witness gave it. In the following excerpt, a private lawyer discusses a murder case which he entered as counsel after another lawyer had conducted a bail hearing in the branch court. He describes how the trial defense might be damaged by the bail hearing testimony of a defense witness:

At the bond hearing, for example, the witness said, "I heard them; I was in my apartment. I live in the adjacent apartment. I heard the deceased and the defendant fighting," which is what she said in my office. She didn't hear them fighting, did she? No. She heard voices. She heard voices that were loud. She heard articles being moved about. And she's a defense witness. Had I talked to her before she went to the bond hearing, I wouldn't have had her change her story. I don't do that. But I would have had her change the description of what she heard. I wouldn't have had her say, "I heard them fighting" because my defense is self-defense and I don't want them fighting. Now what she means is she heard the husband beating on

³⁰Note 20, *supra*.

³¹Note 16, *supra*.

the wife. To her they're fighting. She heard the wife scream. As a matter of fact she said she heard her screaming on three or four occasions and the last of which was continuous. And here again language becomes important, and more important than language is pinning her down to that terminology. If the jury hears that, that at a bond hearing this witness said she heard the defendant and the deceased fighting, and she now says before the jury that she heard a noise and she heard the woman screaming, the laymen—the jury—will say, "Uh huh, attorney _____ got to her and had her change it." I haven't changed anything. I'm merely changing the description, the terminology about which she describes what she heard and saw, to more accurately fit what she heard and saw.³²

Even if a witness can be thoroughly prepared before the preliminary hearing or trial concerning his prior bail hearing testimony, many lawyers believe this may be inadequate to protect the defense case from problems of impeachment and doubt whether full precautions can be taken. The practice of waiting to investigate cases until the trial court level and the fact that formal discovery occurs at the trial and not the branch court level³³ make the impact of bail

hearing testimony difficult to anticipate, since the final defense strategy may not be definitely decided upon until a later stage. These factors vary with the individual lawyer. Some do conduct their investigation of the case at the branch court level and obtain "informal" discovery at that time. Presumably, these lawyers are clear as to the defense they will assert at trial, and in initiating a bail hearing feel confident they can direct testimony of defense witnesses to avoid ambiguities which may result in their impeachment at trial.

Enhancement of the Prosecution's Case. The bail hearing is seen by defense lawyers as an opportunity for the prosecution to elicit information and evidence in the possession of defense witnesses to be used as leads in the preparation of the prosecution's own case, to ascertain the strength of the defense case, and to plan better to refute the defense case.³⁴ Although by law formal notice of the trial defense must be given by the defense to the prosecution as part of formal discovery at the trial level,³⁵ there is great

³² Interview with a private defense lawyer, September 18, 1972.

³³ In Illinois the prosecution's pretrial disclosures to the accused are extensive. Illinois Supreme Court Rule 412 provides:

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports of statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

(b) The State shall inform defense counsel if there has been any electronic surveillance (including wire-tapping) of conversations to which the accused was a party, or of his premises.

(c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

³⁴ In jurisdictions where the state has the burden of proof, defendants may enhance their own case by cross-examination of the witnesses presented by the prosecution at a bail hearing and, at the close of the prosecution's case, decline to present witnesses of their own.

³⁵ Concerning pretrial disclosure of the defendant's defense to the prosecution, Illinois Supreme Court Rule 413 states:

(d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) the names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or sum-

disparity in the amount of knowledge the prosecution may actually have about that defense and its assertion at trial. Even if the prosecution assumes that the defense will call only some of its witnesses at the bail hearing and not the most important ones, the precise nature of these witnesses' testimony and their demeanor and articulateness may be assessed. Moreover, the strength of the defense case may be ascertained from further investigation of the testimony of these witnesses. Such aids to the prosecution's trial preparation may be limited by avoiding the bail hearing altogether.

In some cases, defense lawyers do not initiate bail hearings for fear that the prosecution and prosecution witnesses will actually fabricate a stronger case based upon their anticipation of the details of the defendant's defense at trial. One lawyer stated:

Be assured that you are now talking to a lawyer who cares less than a tinker's damn about my client's confinement in relation to what I am attempting to accomplish for him. I never allow his confinement to influence how I'm going to handle a case if his confinement prior to trial might upset the ultimate result of the case. He can sit there six months; it doesn't bother me in the least. I'm telling this as a fact. To give you an example, I tried a fellow by the name of _____ who was charged with killing a police officer. From the facts I knew the prosecution didn't have a case, but it was a highly publicized case; lots of glamour and a lot of fanfare and all of this sort. Had I gone in on a motion for bail I would have tipped the prosecutor off as to what in fact did occur at the time of the shooting, and I didn't want to do that. And all he would have done because of the publicity of the case would have gone out and shored up his case—got some witnesses, some witnesses to come in and tell a lie and they do that. So I just laid back and the man sat in jail like this six or eight months. And when I pulled on him [the prosecutor] what in fact did occur, it was too late for him to rewrite the script, too late for the witnesses to rewrite the script, and the man was acquitted. . . . Now had I gone in with a motion for bail, there's no question I would have gotten bail. But [a prosecution witness] would have gone out and got another of his wine-headed buddies to come in and say he was a witness to it, too. And it happened like I said. Inasmuch as [the prosecution witness] didn't know what we were going to say and inasmuch as the prosecutor is relying on what [the prosecution witness] said, not knowing what the truth is, he does not bring in a corroborating, fabricating wit-

ness. So _____ stayed in jail until such time as I was able to try the case, and I tried it and beat it.³⁶

Closure on the Range of Available Defense Approaches to the Case. Another closely related concern of lawyers is an inability completely to anticipate future variations in the case. An important factor is the wish to avoid unnecessarily limiting the directions from which they can present their case. A case at the branch level is in a particularly fluid state, since out-of-court investigation is often uncompleted and some defenses may not be apparent at that stage. The testimony of defense witnesses at the branch court, before the completion of investigation and discovery, may have a devastating effect on the later malleability of the facts of the case when attempting to refute the prosecution's contentions. Today's testimony of a witness at a bail hearing, which seems perfectly innocuous at the time, may later assume importance in the case. A lawyer uncertain of the defense he will assert at trial may at the bail hearing unwittingly close off or diminish the strength of various approaches. In the following quotation, a public defender working in one of the trial courts discusses his belief that much is unforeseeable about the defense of a case at the time of the bail hearing, and a client's testimony at the hearing can later play havoc with the way in which counsel would eventually like to proceed:

I have a case I really think the guy should be out—it's a murder case—and it bothers me, but to really get him out I have got to put him on the witness stand, and I don't want to submit him to cross examination; he's pinpointed to his story, right now, you know. It's just a bad policy to have your guy on paper like that—I think it's a bad policy, period, to have a guy, the defendant, testify on record at any time, before the trial. You don't know what nuances are going to develop. And problems develop from it. And he's pinpointed; he's locked into the statement. You've got to spend a lot of time coaching him, and it's difficult, sometimes it's better, you may not even want a guy to testify. Now he's given a statement under oath, a judicial admission. What if he can beat the case without his testimony? And now he's testified and he's supplied a vital element in the state's case. That's what you worry about.³⁷

There is one other significant aspect in a lawyer's decision not to use the bail hearing to seek his client's pretrial freedom in a murder case. A few lawyers

marizing their oral statements; any record of prior criminal convictions known to him; and (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial.

³⁶Interview with a private defense lawyer on September 18, 1972.

³⁷Interview with a public defender.

mentioned the client's freedom itself as a problem for three reasons: (1) clients may think less seriously about the case when out on bond and make poorer witnesses at trial; (2) the hostility of a complaining witness can be heightened by seeing the defendant out on the streets; and (3) in a close case a jury may resolve the question in favor of the defendant by virtue of his being in jail.

Lawyers' Fees and Time

In the course of interviews with defense lawyers, factors other than their concern with the bail hearing's impact on the trial were also mentioned as reasons for avoiding such hearings. Some private lawyers mentioned that they will not seek bail until their fees are paid by the client. In murder cases, bail may be set at a high amount and if posted may tie up part of a lawyer's fee. This is seen as risky, since a client may flee once on bond, leaving a lawyer with no recourse for collection of his expenses and for time spent on the case. Or the client may select a different lawyer during the course of the case and leave the predecessor lawyer with inadequate remuneration for his services. One lawyer's views on the subject are illustrative:

I wouldn't do anything until I had received part of the money from them [the family]. I used to take the bond for cash but not any more. You have to keep going in to have the bond reinstated on BFW's [bond forfeiture warrants] when your client forgets the court date or oversleeps. Then you might work on a case for a couple of months and they tell you they have another attorney; then you're out and you've put time into the case.³⁸

Public defenders may also not initiate bail hearings for their clients simply because of the extra time involved in putting on bail hearings in each case.³⁹

It should be pointed out that although the factors mentioned above provide other explanations for the statistical pattern of avoidance of the bail hearing, they do not provide a perspective contrary to that of the defense concern for protecting and preserving the case for trial. The same lawyers who mentioned the foregoing reasons for not pursuing bail also generally expressed their concern about the impact of the bail hearing on the outcome of the trial.

³⁸Interview with a private lawyer, February 16, 1973.

³⁹Interview with the public defender assigned to Branch Court 66.

INITIATING THE BAIL HEARING: MOTIVATION, TIMING AND CONTENT

Motivation and Timing

In addition to considering the factors which may cause defense lawyers to avoid a bail hearing, it is necessary to examine the reasons why bail hearings are initiated by defense lawyers apart from or in addition to the desire to obtain pretrial freedom for clients. The bail hearing may serve at least three additional defense objectives: (1) an opportunity to prepare for the preliminary hearing, (2) a means to explore subjects at the trial court level not examined previously at the preliminary hearing, and (3) a procedure to "interview" prosecution witnesses.

Preparing for the Preliminary Hearing. In the branch court the bail hearing⁴⁰ is used as a tool by defense lawyers to examine prosecution witnesses for the purposes of eliciting information as well as "locking" the witnesses into an account of the case and preserving that testimony for possible impeachment purposes at the preliminary hearing. This use of the bail hearing at the branch court level is of substantial significance in some cases because the prosecutor has not yet had the opportunity to prepare his witnesses' testimony as completely as he will at the time of the trial or even at the time of the preliminary hearing. This means the defense may be able to elicit more spontaneous testimony of witnesses as well as to proceed on lines of inquiry to which the prosecutor would otherwise object were he completely familiar with the case and aware of the relevance of questioning to the defendant's future defense.

In one case observed in the branch court, the defense had initiated a bail hearing and at the time of preliminary hearing produced a transcript of the hearing.⁴¹ When the prosecution called as one of its witnesses a person who had also testified at the bail hearing, the defense lawyer on cross-examination read sections of the witnesses' bail hearing testimony which sharply contradicted his present testimony. The result was a finding of "no probable cause" in the case. A defense lawyer will consider several factors in exercising his judgment con-

⁴⁰In "Murder Court" the prosecutor requires prior written notice from the defense of their intent to initiate a bail hearing. When the defense announces in court his intent to file a written motion the branch court judge usually sets the bail hearing for about a week to 10 days later.

⁴¹Observations of a preliminary hearing on May 25, 1973.

cerning the use of the bail hearing transcript to impeach a witness at the preliminary hearing. These will include the pertinence of the impeached testimony to the preliminary hearing decision (*i.e.*, whether the contradictions pointed out are really relevant and sufficient to cast doubt on the immediate issue at the preliminary hearing), the likelihood of the prosecutor feeling that the case is serious enough that despite a finding of no probable cause he will proceed to the grand jury for indictment,⁴² and the likely existence of other evidence not presented by the prosecutor at the preliminary hearing but which might be introduced by him at trial. Ultimately the defense lawyer must decide whether the use of the bail hearing testimony at the preliminary hearing is likely to result in a final disposal of the case at this stage.

There are additional reasons why the defense may fail to take full advantage of the bail hearing for impeachment purposes at the preliminary hearing. The defense may lack time or motivation for thorough case preparation at this stage. Private lawyers may not have received adequate fees to hire an investigator or feel adequately paid themselves to spend the time interviewing witnesses. In the case of the public defender, his time is sharply limited by the necessity of being in court each weekday afternoon until the court is adjourned (which may be late in the evening if there is a heavy court call), and while the public defender's office did have a number of investigators available for use by all office lawyers at the time of this study, their use was reported to require at least two weeks notice.

Exploring Subjects in the Trial Court. At the trial court level, defense lawyers obtain the preliminary hearing transcript, grand jury transcript and the prosecutor's answers to formal discovery motions, which will include copies of any police reports and a list of witnesses the prosecutor may call.⁴³ The grand jury transcript and formal discovery response are documents which a defense lawyer probably has not seen before. These new materials, along with an opportunity to read closely through testimony taken at the preliminary hearing, may suggest to the lawyer lines of inquiry he overlooked or was unaware of at the preliminary hearing. A bail hearing initiated at the trial court level may allow the defendant's lawyer to direct questioning to prosecu-

tion witnesses to elicit further evidence which may prove useful.⁴⁴ The defense lawyer may also be able to pin down witnesses concerning subjects which he intends to deal with at trial.⁴⁵

Another reason why a defense lawyer at the trial level may be interested in the discovery benefits of a bail hearing at this stage is that he may not have been the lawyer who represented the defendant at the branch court stage of the proceedings.⁴⁶ The former lawyer's approach or theory of the case may not be his own and therefore certain questions relevant to his own case preparation may not have been posed at the preliminary hearing. Moreover, the defense lawyer may wish to observe for himself the demeanor of prosecution witnesses in order to

⁴⁴ See discussion of the potential "conversion of the bail hearing into an unsanctioned pretrial criminal discovery procedure" in Note, *Determination of Accused's Right to Bail in Capital Cases*, 7 VILL. L. REV. 438, 445 (1962).

⁴⁵ The functioning of the preliminary hearing or grand jury transcript could be of substantial concern to defense lawyers who wish to raise a bail hearing in the trial court, because of the ever present possibility the prosecutor may choose to introduce the transcript in place of producing prosecution witnesses to testify at the bail hearing. This problem was mentioned by a private defense lawyer in a interview on February 16, 1973, in which he described a bail hearing he conducted in a trial court. In that particular case his objection to the prosecution's use of the preliminary hearing transcript in place of calling witnesses was sustained and the prosecution was forced to produce its witnesses for the hearing.

⁴⁶ In 56 per cent of the murder cases, the lawyer who represents the defendant at the trial stage is not the same lawyer who represented him in the branch court. In some cases this phenomenon involves shifts of cases from one public defender to another. Cases are also shifted between private lawyers because of client preferences to hire a different lawyer, lawyer preferences not to continue representing a defendant, or the appointment at trial of a different private lawyer due to a defendant's inability to continue paying for private legal services. Defendants may also be represented by the public defender's office at the branch court level and then a private lawyer later, or a defendant may be able to pay for the legal services of a private lawyer in the branch court, but be unable to do so at trial and a public defender is then appointed to the case.

In the murder cases bound over to the grand jury in October, November, and December, 1973, the following statistical patterns of what can be called "sequential representation" are apparent. The statistics are calculated by defendant/indictment and are based on the last lawyer to represent a defendant in the branch court or the trial court.

These statistics were compiled in July, 1975. At the completion of the file study, twenty-four murder cases were as yet undisposed of in the trial courts. In six of these cases the same lawyer who last represented the defendant in the branch court was still representing the defendant in the trial court. In sixteen cases there was already sequential representation. In two cases it is not known whether or not the same lawyer continued to represent the defendant in the

⁴² In Illinois the results of the preliminary hearing do not bind the grand jury in any way. If there is a finding of no probable cause at the preliminary hearing the prosecution may proceed to the grand jury for indictment.

⁴³ See note 32, *supra*.

better assess the strengths and weaknesses of his case at trial.⁴⁷

In-Court "Interviewing" of Prosecution Witnesses. In some cases the defense lawyer is forced to use the examination of prosecution witnesses at the bail hearing as a substitute for out-of-court interviews simply because the prosecution witnesses have been reluctant to allow the defense lawyer to discuss the case with them. The questioning at the bail hearing, as in an out-of-court interview, is directed generally to producing "leads" useful in further preparation of the defense case. In some cases, defense lawyers will use the bail hearing for purposes of general discovery, or as a substitute for out-of-court investigation even where it is not apparent that the witnesses are reluctant to talk to the lawyer out of court. Other lawyers commenting on

this practice suggest that they prefer an out-of-court investigation to a routine substitution of the bail hearing because it is possible that a prosecution witness will have a "change-of-heart" and later be more willing to provide an account of the incident at trial which is less detrimental to the defendant. They feel that once a prosecution witness has testified at a bail hearing, rather than simply having given an out-of-court statement, he may be unnecessarily curbed from doing so.

Generally speaking, the pretrial freedom of one's client is not the sole basis for seeking a hearing. The additional purposes of discovery, evaluation, and limiting flexibility in the prosecution's case will enter into the decision of whether or not to initiate a bail hearing.

The Content of the Hearing

In pursuing these additional aims at the bail hearing, the need for the protection and preservation of the defendant's own case for trial, discussed earlier,⁴⁸ remains a major concern of defense lawyers. The same concerns of lawyers that often lead them to avoid the bail hearing altogether arise when the bail hearing is pursued (for whatever reason) and appear to be dealt with by control over the content of the hearing itself.

At a bail hearing in capital cases in Illinois, as noted previously, the defendant has the burden of proof that bail be set and must introduce some evidence to raise the question as to whether proof is indeed "evident" or the "presumption great" that the defendant is guilty of the offense. The testimony of any witnesses produced by the defense will be perpetuated for subsequent court proceedings. To the extent that the defense presents some evidence at the bail hearing, the bail hearing provides an opportunity for the prosecution to obtain discovery and for the potential future impeachment of the defense witnesses as they themselves may be "locked" into an account of the case by the prosecutor. The efficacy of the bail hearing as a forum for the prosecutor's discovery of the defense case depends not only on the attitudes of judges (*e.g.*, towards questions evidently aimed less at rebutting the defendant's contentions than at seeking evidence for trial) but also on defense strategy in presenting the defense's own witnesses.

In some cases, the testimony of witnesses will be sharply restricted by the defense to matters not pertaining to the alleged offense. The defense, for ex-

⁴⁸See discussion of the avoidance of the bail hearing in text accompanying notes 28-37, *supra*.

EXTENT OF SEQUENTIAL AND UNITARY REPRESENTATION
IN MURDER CASES, CIRCUIT COURT OF COOK COUNTY,
ILLINOIS

	Cases (by Defendant/Indictment)	
	No.	%
I. Sequential Representation		
(a) Public defender to public defender	19	19.2
(b) Public defender to private lawyer	11	11.1
(c) Private lawyer to private lawyer	20	20.2
(d) Private lawyer to public defender	4	4.0
(e) (Unknown) to public defender	1	1.0
II. Unitary Representation	41	41.4
III. Incomplete Information	3	3.0
Total	99	99.9

trial court. By the time the six unitarily represented cases are disposed of, a different defense lawyer may yet represent the defendant. Thus, the frequency of sequential representation is probably slightly higher than in the table.

⁴⁷Bail hearings comprise about 6 per cent of the bail applications at the branch court stage and 27 per cent of the bail applications in the trial court. See Table I in text, *supra*. Perhaps the more extensive use of the bail hearing at the trial level is explainable by the existence of these additional circumstances and interests (receiving formal discovery, pursuing subjects missed at the preliminary hearing, or a lawyer's unfamiliarity with the case due to recently being hired or appointed) and the fact that at the trial court stage there is no counterpart to the use of the preliminary hearing in the branch court as a substitute for a bail hearing.

ample, will call on his client to testify, but the examination will be limited to such questions as name, age, address, length of time at present residence, place and length of employment, prior criminal record, number of children, medical problems of himself or his family, and other things which do not deal with the offense and which prevent the prosecution from cross-examining the defendant about the facts surrounding the offense. In one case in which a defense lawyer reported that he expected to conduct a bail hearing in this manner, the lawyer remarked that judges differ and the defendant may find a judge who is compassionate toward his personal situation.⁴⁹

Although hopeful that bail will be set at the bail hearing, a defense lawyer often does not offer the strongest evidence which he intends to use at trial. For example, in cases in which there are a number of alibi witnesses, the defense lawyer may initiate a bail hearing and use one of his weakest alibi witnesses, particularly one whom he does not expect to call at the trial stage. Obviously, this is only part of the defense's case and is less likely than the testimony of other witnesses to result in the setting of bail. In other cases, where the defense lawyer expects that he will not be calling the defendant at trial, he will call the defendant to the stand at a bail hearing. These actions of calling the weakest alibi witnesses and calling a witness the lawyer does not expect to call at trial spring from a desire to prevent disclosure of the defense's case and to protect defense witnesses from possible impeachment. Even here lawyers often entertain doubts about such practices, since a weak alibi witness may give the prosecutor "something to go on" which the prosecutor did not have before the hearing.

The defense may also limit the prosecutor's examination of defense witnesses by calling as a defense witness the police officer in the case.⁵⁰ For

example, in some murder cases the police officer may have been privy to a conversation with an occurrence witness who reported to the officer that the deceased was the aggressor. The defense does not want to produce the occurrence witness for the bail hearing, but in calling just the police officer to the stand may have enough testimony to raise doubt concerning proof of guilt in the case.

CONCLUSION: THE PROBLEM OF THE LAWYER-CLIENT RELATIONSHIP

The concern of defense lawyers is with the implications of their activities concerning bail application on the ultimate preparation and presentation of their client's case at trial. Lawyers may therefore view the more immediate interest of their clients in pretrial freedom as being transcended by the ultimate trial and its outcome. The observable and reported pattern of the use of the bail application process in the branch and trial courts—whether an application is made and, if it is made, how the application is carried out—are associated with this concern over the long-range implications on the client's trial. In general, the mode of bail application and its content are calculated to minimize the deleterious effects of the proceeding on the trial and to maximize any gains to the defense's own trial preparation.

These actions of defense lawyers sometimes conflict with their clients' immediate and possibly strong interest in release pending trial.⁵¹ Pressure from a client or from the client's family may diminish a private lawyer's freedom to treat the bail hearing as exclusively a matter of his decisional author-

⁴⁹Interview with a private defense lawyer, March 5, 1973.

⁵⁰During observations of defense lawyers at work in Branch Court 66, three bail hearings were observed. In two of these cases the defense lawyer called the police officer as a witness to describe the occurrence. In one of these two hearings this was the only witness called by the defendant. In the other case a character witness was also called to the stand, an individual who had no personal knowledge of the murder incident. In the third case the defense lawyer called his own client as a witness at the bail hearing and extensively examined the client as to what occurred. This examination of the client left the defendant open to extensive cross-examination by the prosecution and created a record which was used a few months later by the prosecution in cross-examining the defendant at the preliminary

hearing. The case was so unusual compared to all that had been heard from defense lawyers and observed up to that point in the research that the lawyer was sought out for an interview. In response to the general question as to how he had come to conduct a bail hearing, the lawyer stated that this was an unusual case for him. He believed his client was clearly innocent of the charges and he indicated concern over the possible impeachment of his client's testimony at trial, but he stated that the bail was so important to his client as to take precedence over these other concerns. He had told his client not to perjure himself and believed that his client's innocence would prevent inconsistencies. Interview with a private defense lawyer, May 29, 1973. See discussion of the problems of the lawyer-client relationship in deciding whether and how to use the bail hearing in text accompanying notes 51-53, *infra*.

⁵¹For a discussion of the problem of "client-control" experienced by defense lawyers, see Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 65-67 (1967).

ity. The freedom of a client to fire a private lawyer and hire another is an important factor the lawyer must consider in his work.

The following remarks of a defense lawyer are illustrative of these concerns:

He has relatives who want him out and they're paying me well. What I will do is call my client to testify tomorrow and he'll give an explanation as to what happened. We'll be stuck with what has been said at the bail hearing, but he'll be giving the same explanation the next time. I'll prepare him to testify. Lawyers are very hesitant to go in on a bail motion. But in this case the state knows about everything, except the explanation is new, and that will be our problem. In some cases I've had I put a witness on and said, "Were you at such and so place?" He says "Yes." "Did you observe a shooting?" and he'll say "Yes, five masked men rushed in and shot him." "Do you know [the defendant]?" "Yes." "Was he one of these men?" "No." Some judges allow the state to go into extensive cross-examination. I will have prepared his testimony for that if it occurs. Then they have to put on a witness, too, and I'll get to cross-examine their witness. Some lawyers use the bail hearing just for that purpose in the pretrial stage. There's always "double-discovery" in bail. In this case my investigator tells me that the prosecution witness isn't around so I can test that at the bail hearing. . . . My clients are well-paying clients, and I want to keep them. This is a business, too.⁵²

Since client satisfaction will often determine whether a defense lawyer remains on the case, an attorney must try to make the decision not to pursue bail at all (or to pursue it less rigorously than might be possible) a voluntary one on the part of the defendant. This will require transforming the client's short-term interest in being out on the streets into a perception of the long-range interest in avoiding the penitentiary. The problems involved in accomplishing this are illustrated in the comments of another private lawyer about his dealing with two co-defendants and their families.

The first thing is like, the families are rushing me, like, let's go to trial like next week. And I said no. I

⁵² Interview with private defense lawyer, undated, 1974.

told the boys we're not going to rush the trial. We're going to get the case prepared and then the bail hearing. They said, "Why don't we ask for bail?" Since I only got the case in August, I'm not going to bring it to trial right now. I told them four months, five months in the joint is not going to hurt them. Wait it out. We need to do more work on the case. They said, "Good," because I told them, they realize, that there's nothing to be gained by bail hearing at this point because the best thing is to get a trial. They said they were willing to wait four, five, six months [rather] than go down to the penitentiary for fifty years on a double murder. I told them, "We're not going to ask for bail. If we ask for bail I'm going to have to put up some type of evidence that the state's case is weak. And the main evidence I would have to put up is your relatives, and I don't want to expose them too prematurely. If I had a lot of people, alibi people, or people who witnessed the incident then I wouldn't expose my witnesses." ⁵³

This conflict between the lawyer's own interest in continuing representation and the ultimate interest of his client may be less acutely felt by public defenders whose salaries do not depend upon appeasing each client's demands for his freedom. Nonetheless it would be a distortion to say that those demands are not felt by public defenders, since they must still deal with their clients and try to maintain their trust and confidence.

The defense lawyers' perspectives on the bail process in capital cases outlined in this paper suggest generally the strains between immediate interests, which may be very evident to clients, and more complex and less evident long-range interests which a defense lawyer must reconcile in his work. Clients' interest and demands for freedom may lead to deviations by some lawyers from the desired defense strategy described earlier. The ideal for lawyers, however, is to achieve with clients a shared long-range perspective on the ultimate outcome, which will retain defendant's confidence about his choice of a lawyer and provide him with a rationale for accepting choices which may mean his continued detention pending trial.

⁵³ Interview with private defense lawyer, January 12, 1973.