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A “Critical” Question of State Law: Georgia’s Ambiguous Treatment of Initial Appearance Hearings and Implications of Bail Reform

Anne Miller Reynolds

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A "CRITICAL" QUESTION OF STATE LAW: GEORGIA'S AMBIGUOUS TREATMENT OF INITIAL APPEARANCE HEARINGS AND THE IMPLICATIONS OF BAIL REFORM

*Anne Miller Reynolds**

The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to counsel at critical stages of a proceeding. While the U.S. Supreme Court has not addressed whether initial bail hearings are critical stages of a proceeding, several states have elected to provide greater protection for criminal defendants by holding that bail hearings are critical stages. However, Georgia has avoided this question, as Georgia has held that initial appearance hearings, in which questions of bail are often decided, are "not often" critical stages of a proceeding. Logically, it follows that initial appearance hearings must sometimes be critical stages of a proceeding. This Note argues that initial appearance hearings, insofar as they encompass questions of bail, should be considered critical stages. In so doing, this Note examines Georgia's history of providing greater protection to criminal defendants than the federal government and the implications of bail reform.

* J.D. Candidate, 2020, University of Georgia School of Law; B.A., 2016, Emory University.
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I. INTRODUCTION

A criminal defendant in Georgia enters the courtroom for her initial appearance. During this appearance, a judicial officer will address issues of bail and schedule a date for a commitment hearing.[1] If the crime that the accused is charged with is not one for which bail must be set by a superior court judge, then the judicial officer will set bail.[2] The setting of this defendant's bail is crucial; although some defendants may find it easy to post whatever bail the judicial officer sets, this particular defendant may not be able to afford a bond that is too high and may consequently be forced to stay in jail for a much longer period of time.

Situations such as these are far too common in the United States today.[3] For some criminal defendants, bail hearings pose little problem—these defendants may not be wealthy, but they have the means to post whatever bail the judge may set. However, for many indigent defendants, bail can be unaffordable.[4] Thus, bail hearings can determine whether these defendants will have to remain imprisoned for even relatively minor charges, such as drug possession, or if they can go free, as do many other defendants at this stage of a criminal proceeding.[5] Very few jurisdictions currently ensure representation at bail hearings, which means that most of

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[1] *See* O.C.G.A. § 17-4-26 (2019) (describing the required actions of officers and the required sequence of procedures after arresting individuals). A "commitment hearing" in Georgia is essentially another term for a preliminary hearing. *See id.* § 17-7-20 (explaining that a judicial officer determines the time and place of a court of inquiry).

[2] *See* O.C.G.A. § 17-6-1 (2019) (listing offenses for which only a superior court judge can set bail, and providing that all other offenses are bailable by a judicial officer); 9A LONNIE E. GRIFFITH, JR., GEORGIA PROCEDURE CRIMINAL PROCEDURE § 7:24 (2019) (describing the various steps and procedures in a criminal defendant's initial appearance).

[3] *See* Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), https://www.prisonpolicy.org/blog/2018/08/15/pretrial/ ("Every day, 465,000 people are held in local jails even though they have not been convicted.").

[4] *See* Rhonda Cook, *Atlanta Mayor Signs New Ordinance Changing Cash Bail System in a Nod to the Needy*, ATLANTA J. CONST. (Feb. 6, 2018, 3:45 PM), https://www.myajc.com/news/local/atlanta-council-oks-changes-cash-bail-system-nod-the-needy/SW50dABJAtWgBwpB4vtgBN/ ("There are poor people who don't have resources to get out of jail.").

[5] *See id.* (describing how, prior to the City of Atlanta's elimination of the cash bond requirement for some low-level offenders, individuals had to stay in jail when they could not afford bail).

the time these defendants must navigate this critical bail process alone.[6]

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to counsel in all adversarial proceedings[7] but only once "formal judicial proceedings" have actually begun.[8] And, even after such proceedings begin, a criminal defendant is only entitled to the assistance of counsel at "critical" stages of judicial proceedings.[9] Likewise, the Constitution of the State of Georgia guarantees criminal defendants the right to the assistance of counsel.[10] Georgia courts have applied an analysis similar to that of federal courts in determining when this constitutional provision is applicable. In applying that analysis, courts typically find that defendants only possess the right to have counsel present at "critical" stages of a criminal proceeding.[11] Although the right to counsel is guaranteed at both the state and federal level, this right does not automatically attach upon the moment of arrest; instead, it attaches when certain conditions in criminal proceedings have been satisfied.[12] And, unfortunately for our hypothetical defendant, it is unclear whether she is entitled to the right to have counsel present during bail hearings. Her right to counsel may entirely depend on the jurisdiction in which she is initially brought before a judicial officer or magistrate.

Currently, it is unclear whether criminal defendants are entitled to representation at bail hearings pursuant to either the Sixth Amendment or the Georgia Constitution. This Note will argue that Georgia courts' application of the right to counsel is unacceptably (and perhaps unconstitutionally) vague with respect to bail

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[6] *See* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 23 (2016) (discussing the few jurisdictions that provide counsel at the initial bail hearing).

[7] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[8] *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 211 (2008) (noting that the point at which the right to counsel attaches is when formal judicial proceedings have begun).

[9] *See* Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (noting that the right to counsel only applies to "critical" stages of a proceeding).

[10] *See* GA. CONST. art. I, § I, para. XIV ("Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.").

[11] *See, e.g.*, O'Kelley v. State, 604 S.E.2d 509, 511 (Ga. 2004) (explaining that the presence of counsel is required during critical stages of criminal proceedings).

[12] *See Rothgery*, 554 U.S. at 213–14 (Alito, J., concurring) (explaining the U.S. Supreme Court's description of the dichotomy between the attachment of the Sixth Amendment right and the actual right to have counsel present).

hearings and initial appearances. As a solution, this Note urges Georgia to affirmatively rule that an initial appearance hearing, insofar that questions of bail are decided during the hearing, is a critical stage. This Note will further argue that adopting a risk-based approach to bail reform would help alleviate the concerns governments may have about providing such additional representation. In coming to these conclusions, this Note will examine right-to-counsel jurisprudence both in states finding that initial appearances are critical stages of a proceeding and in states that find they are not. Additionally, this Note will explore alternative bases for arguing that Georgia's right to counsel extends to bail hearings, such as examining whether Georgia has provided broader constitutional protections to criminal defendants than are available under federal law. In the course of developing its conclusion, this Note will gather data regarding representation at initial appearances in Georgia in various counties across the state.

Part I of this Note will provide a brief overview of the current state of the Sixth Amendment right to counsel, what constitutes a "critical stage" of a proceeding at the federal level, and Georgia's critical stage jurisprudence. Part II of this Note will argue that initial appearance hearings, at least so far as they involve questions of bail, should be considered critical stages. In so doing, Part II will examine empirical data and the approaches of other states. Part II will additionally rely upon Georgia's expanded protections in other areas of criminal law and will propose solutions to this question. Finally, Part III will conclude that Georgia should affirmatively decide which initial appearance hearings are critical stages.

A. THE SIXTH AMENDMENT RIGHT TO COUNSEL: WHERE'S MY LAWYER?

Although the Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to counsel, it only does so for "critical stages."[13] Further, the U.S. Supreme Court has not ruled on whether bail hearings are critical stages, leaving this area of law unclear at the federal level.[14]

1. The Basic Prerequisites and Philosophy of Representation under the Sixth Amendment.

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[13] *See* discussion *infra* Sections I.A.1–2.
[14] *See* discussion *infra* Section I.A.3.

The Sixth Amendment of the U.S. Constitution mandates that defendants "[i]n all criminal prosecutions" are entitled to counsel to help with preparing a defense.[15] The U.S. Supreme Court has acknowledged that this right to counsel "attaches at the first formal proceeding" against a criminal defendant.[16] The Court has indicated that such "attachment" occurs when the government uses "judicial machinery to signal a commitment to prosecute."[17] However, this enumeration is deceptively broad—although the general right to counsel in criminal proceedings may "attach" during certain proceedings, the actual right to have counsel present does not necessarily coincide with this attachment.[18] Rather, the Court has made it clear that the attachment of the right to counsel only means that adversarial proceedings have been initiated, whereas the actual right to the presence of counsel does not occur until a "critical stage" of a criminal proceeding.[19]

2. Critical Stage Jurisprudence.

It is not precisely clear which proceedings are "critical" and which are not. The factors that determine whether a proceeding is a critical stage are the factors that demonstrate a "need for counsel's presence."[20] More directly, the Court has held that critical stages are those that may "settle the accused's fate" and essentially make the rest of the defendant's trial a "mere formality."[21] Essentially, critical stages are those stages at which counsel must be present in order to preserve the fairness of the trial to the defendant.[22] Various

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[15] U.S. CONST. amend. VI.

[16] McNeil v. Wisconsin, 501 U.S. 171, 181 (1991).

[17] *Rothgery*, 554 U.S. at 211; *see also* Brewer v. Williams, 430 U.S. 387, 399 (1977) (noting how the issuance of a warrant, arraignment, and commitment to jail confinement left "no doubt" that "judicial proceedings" had been initiated against the defendant).

[18] *See* John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 865 (2017) (citing *Rothgery*, 554 U.S. at 212) (describing generally when the Sixth Amendment right to counsel is applicable).

[19] *See Rothgery*, 554 U.S. at 212 n.16 ("[C]ritical stages [are] proceedings between an individual and agents of the State . . . that amount to 'trial-like confrontations,' [during] which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary' . . . ." (internal citations omitted)).

[20] *See id.* at 212 (describing when a stage is "critical").

[21] *See* United States v. Wade, 388 U.S. 218, 224–25 (1967) (defining what is meant by a "critical stage" of a criminal proceeding); *see also* Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings,* 111 MICH. L. REV. 1513, 1517–18 (2013) (discussing *United States v. Ash*, 413 U.S. 300 (1973)).

[22] *Ash*, 413 U.S. at 322 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 239 (1973)).

U.S. Supreme Court cases have defined the "critical stage" of a trial in differing ways. The Court in *United States v. Wade* expressed a broad view in asking "whether counsel is necessary . . . to secure the defendant's trial rights," while the Court in *United States v. Ash* asked if "counsel is necessary because the stage is sufficiently trial-like and tricky."[23] But all of the Court's cases have ultimately been concerned with whether the effect of withholding the presence of counsel would result in an "unfair outcome" at trial.[24]

However, simply saying that a critical stage is any stage at which the absence of counsel could ultimately affect the fairness of a trial does not clarify which precise stages of a trial are "critical." That is not a bright-line test. Rather, in determining whether particular stages of a trial are critical, the Court has often had to look at individual stages of a trial in order to determine whether that specific stage was "critical" and thus essential to a fair trial.[25] For example, in *Wade*, the Court found that post-indictment lineups were a critical stage, while in *Missouri v. Frye*, the Court found that the negotiation phase of a plea bargain was a critical stage.[26] The Court has also deemed arraignments and post-indictment interrogations to be "critical."[27]

3. Bail Hearings and Critical Stages: The Federal Question.

The U.S. Supreme Court has not yet addressed the question of whether bail hearings are critical stages requiring the presence of counsel.[28] In *Rothgery,* the Court acknowledged that the right to counsel attaches upon "a criminal defendant's initial appearance before a judicial officer."[29] However, the defendant in *Rothgery* did

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[23] *See* Gerstein, *supra* note 21, at 1517–18 (discussing both cases).

[24] *See id.* (synthesizing the Court's perspective from *Wade* and *Ash*).

[25] Bunin, *supra* note 6, at 24–25.

[26] *See Wade*, 388 U.S. at 237 (finding that the post-indictment stage is a critical stage); Missouri v. Frye, 566 U.S. 134, 143 (2012) ("The reality is that plea bargains have become so central . . . that defense counsel have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires . . . at critical stages.").

[27] *See* Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (finding that an arraignment is a critical stage of a prosecution); Massiah v. United States, 377 U.S. 201, 206 (1964) (finding that post-indictment interrogations were critical stages); *see also Frye*, 566 U.S. at 140 (describing generally the U.S. Supreme Court's critical stage jurisprudence). *But see* Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (noting that the right to counsel can be waived voluntarily by a defendant after she is read her *Miranda* rights).

[28] Bunin, *supra* note 6, at 24–25.

[29] Rothgery v. Gillespie Cty., 554 U.S. 191, 213 (2008).

not complain that his bail was unreasonable and did not complain about lacking counsel when his bail was originally decided.[30] Thus, the Court did not decide whether bail hearings (or initial appearances during which questions of bail were addressed) constituted critical stages for the purposes of the Sixth Amendment.[31]

There are certainly avenues for arguing that bail hearings should be considered critical stages.[32] In *Coleman v. Alabama,* the Court determined that preliminary hearings, during which a court (1) determined if there was "sufficient evidence . . . to warrant presenting [the accused's] case to the grand jury" and (2) set bail, constituted a critical stage.[33] The Court determined that a number of factors were influential in finding that there would be "substantial prejudice to [the] defendant's rights" without the assistance of counsel, including an attorney's ability to cross-examine and impeach witnesses and prepare a case for defense at trial.[34] Additionally, the Court noted that the presence of counsel during these hearings would allow the defendant to make more compelling arguments "on such matters as . . . bail."[35] Thus, the Court seemed to indicate that assistance on bail issues is a factor weighing in favor of finding that a particular stage is a critical stage.[36] However, because the issue of representation at bail hearings has yet to present itself directly to the U.S. Supreme Court, the question of whether the Sixth Amendment offers a right to counsel at bail hearings remains unanswered.

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[30] Bunin, *supra* note 6, at 24–25.

[31] *See Rothgery*, 554 U.S. at 213 ("[A] criminal defendant's initial appearance . . . where he learns the charge against him and his liberty is subject to restriction . . . marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."); *see also* Bunin, *supra* note 6, at 24.

[32] *See* Gerstein, *supra* note 21, at 1523 (arguing that bail hearings can negatively influence and prejudice plea bargains and thus should be considered critical stages for the purposes of the Sixth Amendment right to counsel).

[33] 399 U.S. 1, 8 (1970).

[34] *Id.* at 7 (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).

[35] *Id.* at 9.

[36] The Court seemed to push back on its *Coleman* holding in *Gerstein v. Pugh*, noting that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' of the prosecution that would require appointed counsel." Gross, *supra* note 18, at 864 (quoting Gerstein v. Pugh, 420 U.S. 103, 122, 125 (1975)). However, the situation in *Gerstein* "involved only a determination regarding probable cause" and did not consider issues of bail. *Id.* at 865.

B. THE RIGHT TO COUNSEL IN GEORGIA

Like many states, Georgia incorporated several fundamental rights—including a general right to counsel—into its state constitution.[37] Article 1, Section 1, Paragraph XIV of the Georgia Constitution states that “[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel.”[38] Although Georgia’s constitutional provision is worded somewhat differently than the Sixth Amendment of the U.S. Constitution, Georgia courts analyze the state-level right to counsel with a framework similar to that used by federal courts.[39] Like federal courts, Georgia courts typically first ask if the right to counsel has “attached.”[40] Next, Georgia courts ask whether a particular stage is a critical stage of a proceeding—if it is, then a defendant is entitled to the presence of counsel.[41]

C. GEORGIA’S CRITICAL STAGE JURISPRUDENCE

1. What Is a Critical Stage?

The Georgia Supreme Court follows the reasoning of federal courts and has found that the right to counsel attaches “at the first formal proceeding against an accused.”[42] Thus, the Georgia Supreme Court found that the right to counsel attaches at proceedings such as initial appearance hearings.[43] Additionally, the Georgia Supreme Court separates the period of attachment and the period at which the presence of counsel is required—the right to actually have counsel present does not attach just because the right

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[37] *See* GA. CONST. art. I, § I, para. XIV (detailing Georgia’s constitutional right to counsel).

[38] *Id.*

[39] Oddly enough, Georgia courts sometimes analyze the state’s version of the right to counsel with little or no reference to the state’s own constitutional provision; instead, Georgia courts tend to analyze the right to counsel in terms of the rights provided by the Sixth Amendment. *See, e.g.*, Stone v. State, 674 S.E.2d 31, 33 (Ga. Ct. App. 2009) (discussing the plaintiff’s Sixth Amendment rights but describing attachment in terms of what the Georgia Supreme Court has declared). Nonetheless, Georgia is clearly developing its own unique right to counsel jurisprudence through the foundation of the Sixth Amendment and the basic right provided by the state constitution.

[40] *See id.* (noting that “attachment” does not necessarily make a stage “critical”).

[41] *See id*. (citing O’Kelley v. State, 604 S.E.2d 509, 512 (Ga. 2004)) (describing how critical stages of a proceeding require the presence of an attorney).

[42] *O’Kelley*, 604 S.E.2d at 511 (quoting McNeil v. Wisconsin, 501 U.S. 171, 181–82 (1991)) (internal quotations omitted).

[43] *See id.* at 512 (“[An] initial appearance hearing . . . is a formal legal proceeding wherein the Sixth Amendment right to counsel attaches.”).

to counsel attaches during a proceeding.[44] Rather, much like at the federal level, the right to have counsel present arises during critical stages of a criminal proceeding.[45] Under Georgia law, a "critical stage" of a criminal proceeding is "one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way."[46]

Several of the factors that Georgia considers in determining whether a proceeding is "critical" are similar to factors utilized by federal courts. For example, in holding that preliminary hearings were critical stages, the court in *State v. Houston* noted that cross-examination of the state's witnesses occurs during these hearings and that these hearings were conducted with the purpose of "authoriz[ing] the keeping in custody of one accused with probable cause of committing a crime."[47] A finding that there was no probable cause could mean that the defendant would not go to trial, while the court noted that the inability to effectively "confront and cross examine prosecution witnesses" would severely compromise the defendant's case "on the merits" in a way that would not happen if there were no witnesses to cross-examine.[48]

The Georgia Supreme Court has also held that a plea withdrawal proceeding is a critical stage at which a defendant is entitled to the presence of counsel.[49] In *Fortson v. State*, the court reasoned that this proceeding "clearly affected [the defendant's] substantial

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[44] *See id.* ("[T]he attachment of the right to counsel during critical stages of trial proceedings should not be confused with the right to have counsel actually present at the hearing wherein the defendant's desire for counsel is determined.").

[45] *See id.* (recalling the Supreme Court's holding that the Sixth Amendment right to counsel, once attached, applies to critical stages of criminal proceedings).

[46] Brewner v. State, 804 S.E.2d 94, 99 (Ga. 2017) (quoting Fortson v. State, 532 S.E.2d 102, 103–04 (Ga. 2000)). Georgia courts define critical stages most frequently in the context of two situations: (1) when the presence of counsel is required and (2) when the presence of the defendant is required. *See* Hammond v. State, 625 S.E.2d 503, 504 (Ga. 2005) (finding "no harm" with the defendant's absence from a resentencing hearing). The state's overall definition of what a critical stage is, as stated in *Brewner*, does not seem to change based on whether the presence of the defendant or counsel is at issue. However, it is possible that the court's reasoning for what a "critical stage" is may differ somewhat for cases dealing with each. Thus, this Note will be careful to distinguish between the two when discussing Georgia jurisprudence.

[47] 218 S.E.2d 13, 14–15 (Ga. 1975) (quoting Phillips v. Stynchcombe, 202 S.E.2d 26 (Ga. 1973)).

[48] *Id.* at 15.

[49] *See Fortson*, 532 S.E.2d at 104 (holding that plea withdrawal proceedings are critical stages).

rights” because it “included [the] introduction of evidence, advocacy by the prosecutor, and a determination of whether a guilty plea was valid.”[50] The court additionally noted that these proceedings involve “intricacies of the law and advocacy by the State against the defendant.”[51] In coming to this conclusion, the Georgia Supreme Court parted ways with some other states, such as Kansas, suggesting a willingness to interpret Georgia’s right to counsel more broadly than how other jurisdictions have interpreted their own.[52]

Additionally, Georgia courts have held that closing arguments and the verdict, sentencing, and re-sentencing phases of a trial are critical stages at which a defendant has the right to the assistance of counsel.[53] In determining whether re-sentencing is a critical stage, the Georgia Supreme Court considered whether the particular re-sentencing at issue was a “ministerial act.”[54] It held that those re-sentencing proceedings in which “the trial court has full discretion to reconstruct the sentence and impose a more lenient punishment” typically preserve the defendant’s right to have counsel present.[55] However, the right to counsel may not be preserved if a re-sentencing proceeding is “purely ministerial.”[56] A court may find that a re-sentencing proceeding is “purely ministerial” if “the defendant’s sentence is mandatory or fixed” in some way.[57] For example, in *Hammond v. State*, the Georgia Court of Appeals held that re-sentencing the defendant was ministerial in nature because the defendant’s sentence was not increased as a result of the merger of several counts of conspiracy.[58]

Georgia courts have, in particular instances, shown a willingness to expand the definition of a “critical stage” beyond that afforded by

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[50] *Id.*

[51] *Id.*

[52] *See id.* (citing State v. Jackson, 874 P.2d 1138, 1141–42 (Kan. 1994)) (describing persuasive authority from other jurisdictions).

[53] *See* Tyner v. State, 780 S.E.2d 494, 499 (Ga. Ct. App. 2015) (holding that stages such as closing arguments and sentencing proceedings are critical); *see also* Robertson v. State, 635 S.E.2d 138, 139–40 (Ga. 2006) (discussing the history of sentencing and re-sentencing as a critical stage of a proceeding).

[54] *See Robertson*, 635 S.E.2d at 140 (discussing when re-sentencing is and is not a critical stage requiring the presence of counsel).

[55] *See id.* (describing a situation in which a defendant retains the right to counsel).

[56] *See id.* (describing a situation in which a defendant does not retain the right to counsel).

[57] *See id.* (noting that a hearing is “purely ministerial” when “the trial court is without discretion”).

[58] 625 S.E.2d 503, 504 (Ga. Ct. App. 2005) (discussing the nature of the merging proceedings).

federal critical stage jurisprudence at that point in time.[59] In *Gibson v. State*, the Georgia Court of Appeals held in a matter of first impression that restitution hearings were a part of sentencing proceedings and thus were critical stages of a proceeding so long as they were not "ministerial."[60] In doing so, the court considered persuasive authority from a number of other states, ultimately choosing to adopt the reasoning employed by those courts as its own.[61] In *State v. Guadagni*, an Arizona case that the court in *Gibson* cited as persuasive authority, the Arizona Court of Appeals noted that a failure to make mandated restitution payments "could constitute a probation violation and result in jail time or imprisonment" for the defendant.[62] Thus, denying a defendant the assistance of counsel at these hearings could result in a "potential loss of liberty."[63] Likewise, in *State v. Alspach*, the Iowa Supreme Court held that restitution hearings were critical stages.[64] The *Alspach* court noted that restitution hearings could result in "court costs," "attorney fees," and "compensation funds" and that the defendant believed that the restitution in this case was excessive and that counsel would have allowed him to present a better argument against such excessive restitution.[65]

2. What Is Not a Critical Stage?

Georgia courts have limited Georgia's critical stage jurisprudence in some instances. For example, habeas corpus proceedings are not critical stages in Georgia.[66] The Georgia Supreme Court has reasoned that habeas proceedings are

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[59] Georgia's decision to define restitution hearings as critical stages came before the decision of several federal circuits to do so. *See* Gibson v. State, 737 S.E.2d 728, 730 (Ga. Ct. App. 2013) (finding that restitution hearings were critical stages); *cf.* United States v. Pleitez, 876 F.3d 150, 161 (5th Cir. 2017) (holding, as a matter of first impression, that "[t]he entry of a final restitution order that imposes a more onerous award . . . constitutes a 'critical stage' of proceedings").

[60] *See Gibson*, 737 S.E.2d at 729 (discussing the court's reasoning for finding that these hearings were critical stages).

[61] *See id.* at 730 (describing reasoning from courts in Iowa, Arizona, Arkansas, Kansas, and California, among others).

[62] 178 P.3d 473, 479 (Ariz. Ct. App. 2008).

[63] *Id.*

[64] 554 N.W.2d 882, 884 (Iowa 1996).

[65] *Id.*

[66] *See* Fortson v. State, 532 S.E.2d 102, 104 (Ga. 2000) (citing Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1999)) (noting that "the right to counsel does not attach" to applications for habeas corpus).

considered to be "civil" in nature, rather than criminal, and are more of a "collateral" attack than "a means for re-litigating a prisoner's case."[67] A DUI defendant's decision whether or not to take a "breath test" is also not a "critical stage" because officers administering the test must "advise the driver of his implied consent rights" and "there is very little that a lawyer could add that would substantially affect the fairness of the trial."[68]

3. Bail Hearings.

In Georgia, initial questions of bail typically arise during the initial appearance hearing, where the magistrate judge will make the first decisions regarding whether to set bail or not.[69] Although the right to counsel clearly attaches during initial appearance hearings, it does not necessarily entail the right to have counsel present at these hearings.[70] Georgia law does address whether initial appearance hearings are critical stages, but that answer is unsatisfactory. Georgia courts note that initial appearance hearings are "not often" critical stages, but the Georgia courts do not say that they are never critical stages for the purposes of the right to counsel.[71] Otherwise, Georgia courts have not directly addressed the question of whether a bail hearing is a "critical stage."[72] *O'Kelley v.*

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[67] *See Turpin*, 513 S.E.2d at 188–89 (describing procedures associated with seeking a writ of habeas corpus).

[68] Rackoff v. State, 637 S.E.2d 706, 708–09 (Ga. 2006) (citing State v. Jones, 457 A.2d 1116, 1119 (Me. 1983)).

[69] *See First Appearance Hearings (Bond Hearings)*, ATHENS-CLARKE COUNTY UNIFIED GOV'T, https://www.athensclarkecounty.com/684/First-Appearance-Hearings (last visited Sept. 22, 2019) (noting how in Athens-Clarke County "first appearance hearings" are known as "bond hearings"); *First Appearance Hearings*, MAGISTRATE CT. OF DEKALB COUNTY, GA., http://www.dekalbcountymagistratecourt.com/criminal/first-appearance-hearings.asp (last visited Sept. 22, 2019) (noting how in Dekalb County, judges will set a defendant's bond when they are authorized to do so). Magistrate judges are not able to set bond for every offense as some offenses must have bond set by a superior court judge. Interview with Russell Gabriel, Professor, University of Georgia School of Law, in Athens, Ga. (Feb. 11, 2019). Many Georgia counties employ a "bail schedule," which is a list of pre-set bail amounts for certain offenses. *Id.* Individuals may pay this pre-set amount immediately, but if they cannot, they will usually see a magistrate judge, who can typically raise or lower the bail amount based on factors such as the charges and the person's criminal record. *Id.* This usually happens at the initial appearance hearing. *Id.* Despite this, it is important to remember that each Georgia county will likely run criminal trials somewhat differently, so this may not be the precise process each county follows. *Id.*

[70] *See* O'Kelley v. State, 604 S.E.2d 509, 511 (Ga. 2004) ("[An] initial appearance hearing [is not] often a critical stage of a criminal proceeding . . . .").

[71] *See id.* (noting that these hearings are "not often" critical stages).

[72] *See id.* (declining to affirmatively decide whether bail hearings are critical stages).

State is the only Georgia Supreme Court case discussing this issue in any depth.[73] However, in *O'Kelley*, the court noted that, because the right to counsel attaches during initial appearance hearings, a defendant can exercise his or her right to counsel and thus limit the magistrate's ability to "conduct further proceedings that would constitute critical aspects" of the trial.[74] Thus, after a defendant exercises his or her right to counsel, a magistrate can only perform functions such as scheduling and other "housekeeping" measures.[75]

4. Georgia Counties Currently Do Not Guarantee the Right to Counsel at Initial Appearance Hearings.

Under Georgia law, a defendant is entitled to the services of counsel no later than three business days after the defendant is arrested or after service is made and the defendant has applied for counsel.[76] It does not appear that many Georgia counties—if any at all—currently guarantee the right to representation at initial appearance hearings. In DeKalb County, for example, the first appearance hearing is held before a magistrate judge, who will set bond if they are authorized to do so.[77] At this hearing, defendants are informed of their right to counsel and how to apply for legal representation.[78] Bail is set in a similar manner in Athens-Clarke County.[79] In Decatur County, public defenders will typically receive applications for representation within twenty-four to forty-eight hours of a defendant's arrest but do not typically appear to represent the defendant during the initial setting of bail before a magistrate.[80] In Morgan County, public defenders typically do not see their assigned defendants until after bond is set.[81] Put simply,

[73] *Id.* No lower courts cases appear to have applied *O'Kelley* in determining that initial appearance hearings were or were not a "critical stage" of a proceeding.

[74] *Id.* at 512. Presumably, other "critical aspects" of the trial, though not enumerated directly in *O'Kelley*, would include those identified in Georgia case law such as those discussed *infra* Section II.B.1.

[75] *O'Kelley*, 604 S.E.2d at 512.

[76] O.C.G.A. § 17-12-23(b) (2016). A "petition, notice, or other initiating process" can also trigger the provisions of this statute. *Id.*; *see also* Gross, *supra* note 18, at 842.

[77] *See First Appearance Hearings*, *supra* note 69.

[78] *Id.*

[79] *See First Appearance Hearings (Bond Hearings)*, *supra* note 69 (describing the process of setting bail).

[80] Telephone Interview with Patrick Chisholm, Assistant Public Defender, South Georgia Judicial Circuit (Oct. 19, 2018).

[81] Telephone Interview with Darel Mitchell, Assistant Public Defender, Ocmulgee Judicial Circuit (Jan. 14, 2019). Some misdemeanor offenses in this county have pre-set bond

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there does not seem to be any uniform method to how Georgia counties approach indigent representation.[82]

II. ARGUMENT

As Georgia has left open the question of which initial appearance hearings are critical stages, this Note argues that Georgia should hold that initial appearance hearings encompassing questions of bail are critical stages. First, this Note will argue that Georgia's current approach inevitably leaves some defendants without constitutionally-required counsel. Next, this Note will look at approaches employed by other jurisdictions. This Note then argues that Georgia should find that bail hearings are critical stages.

A. GEORGIA'S CRITICAL STAGE JURISPRUDENCE IS UNACCEPTABLY VAGUE

Georgia's critical stage jurisprudence is alarming for a number of reasons, but the most concerning reason is that *O'Kelley* suggests that sometimes initial appearances are critical stages at which the presence of counsel is required.[83] However, there does not appear to be any discernable process by which Georgia courts determine when these initial appearances are critical stages and when they are not. As there is no blanket rule requiring the presence of counsel at initial appearances, it is highly likely that some defendants are unconstitutionally denied the presence of counsel in those counties that decline to provide counsel in some initial appearance hearings.

B. AREAS OF PERSUASIVE AUTHORITY

Although Georgia has not ruled on which initial appearance hearings are critical stages, persuasive authority suggests that initial appearance hearings dealing with discretionary bail questions should be considered critical stages. For example, Georgia has, in the past, provided greater protections to defendants than the

amounts. If it is not within the judge's power to set bond for a particular offense, a separate hearing may be required. *Id.*

[82] *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 405 n.371 (2011) (noting that defendants in Butts County could wait as long as twenty-one days, while those in Rockdale County could wait as few as two days).

[83] O'Kelley v. State, 604 S.E.2d 509, 512 (Ga. 2004).

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federal government.[84] Additionally, the approaches of other states and data regarding bail hearings support finding that initial appearance hearings encompassing questions of bail are critical stages.[85] Finally, current Georgia case law already indicates that initial appearances hearings are, when dealing with bail, critical stages.

1. Georgia Provides More Protections in Other Areas of Criminal Law than the Federal Government.

Although it is unclear whether Georgia provides a right to counsel during questions of bail at initial appearances, it is clear that Georgia provides greater protection than the federal government in other substantive areas of criminal law.[86] Thus, federal law is not a ceiling for Georgia's state-level protections—rather, it is a floor, and a floor from which Georgia has a history of rising above.[87]

For example, Georgia law provides greater protections against self-incrimination than the federal government does.[88] In *Brown v. State,* the Georgia Supreme Court held that defendants accused of murder were not required by the state constitution to provide handwriting exemplars.[89] That is not the case in federal law, which provides less protection in this area.[90] Additionally, pursuant to decisions rendered by the U.S. Supreme Court, a defendant's privileges against self-incrimination are not violated when the defendant is forced to give blood or voice samples.[91]

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[84] *See* discussion *infra* Section II.B.1.

[85] *See* discussion *infra* Sections II.B.1–2.

[86] *See* Jorge G. Valdes, *Developments in State Constitutional Law: 1993; D. Self-Incrimination,* 25 RUTGERS L.J. 1150, 1150 (1994) (discussing Georgia's deviation from federal law in certain circumstances).

[87] *See id.* (naming Georgia as a state that has "clearly deviated from federal constitutional law").

[88] *See id.* (discussing Georgia's deviation from federal law in self-incrimination jurisprudence).

[89] 426 S.E.2d 559, 562 (Ga. 1993).

[90] *See* Valdes, *supra* note 86, at 1150. *See also* Olevik v. State, 806 S.E.2d 505, 516 (Ga. 2017) ("Thus, although Paragraph XVI [of the Georgia State Constitution] refers only to testimony, its protection against compelled self-incrimination . . . is more extensive than the Supreme Court of the United States's interpretation of the right against compelled self-incrimination guaranteed by the Fifth Amendment.").

[91] *See* Valdes, *supra* note 86, at 1150 n.97 (citing Schmerber v. California, 384 U.S. 757, 757 (1966); United States v. Dionisio, 410 U.S. 1, 2 (1973)).

2. Other States Have Found that Bail Hearings Are Critical Stages.

Although the Sixth Amendment question of whether criminal defendants have a right to counsel at bail hearings remains unanswered by the U.S. Supreme Court, several states have taken the initiative to offer a guaranteed right to counsel at bail hearings. For example, in interpreting the Supreme Court's decision in *Rothgery*, courts in both New York and Connecticut concluded that bail hearings were critical stages.[92] Even before *Rothgery* was decided, courts in states such as Pennsylvania, New Jersey, and North Carolina also determined that bail hearings were critical stages.[93]

In *Hurrell-Harring v. State*, the New York Court of Appeals, in holding that several counties in the state had likely been unconstitutionally denying indigent defendants the right to have counsel present, proclaimed that "[t]here is no question that 'a bail hearing is a critical stage of the State's criminal process.'"[94] The defendants filed a class action lawsuit against the State of New York, alleging that the public defense system was deficient and deprived defendants within the state of "constitutionally and statutorily guaranteed representational rights."[95] In particular, in determining what constitutes a critical stage, the court considered the defendant's "loss of employment and housing" and an "inability to support and care for particularly needy dependents."[96]

In ordering a defendant's bail to be reviewed subject to new procedural conditions, a New Jersey court in *State v. Fann* held that the setting of bail was a critical stage which requires the presence of counsel in criminal proceedings.[97] Fann was arrested for

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[92] *See* Bunin, *supra* note 6, at 24 (describing the various states concluding that counsel is necessary at bail hearings).

[93] *Id.*

[94] 930 N.E.2d 217, 223, 227 (N.Y. 2010) (quoting Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007)); *see also* Bunin, *supra* note 6, at 24.

[95] *Hurrell-Harring*, 930 N.E.2d at 219.

[96] *Id.* at 223.

[97] *See* State v. Fann, 571 A.2d 1023, 1024 (N.J. Super. Ct. Law Div. 1990); *see also* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 38 (1998) (describing New Jersey's right to counsel jurisprudence and the court's reasoning in *State v. Fann*). New Jersey's system has been under attack in the federal court system but has remained in place so far. *See Appeals Court Rules in Favor of New Jersey's Bail Overhaul*, NPR (July 10, 2018, 5:06 AM), https://www.npr.org/2018/07/10/627588135/appeals-court-rules-in-favor-of-new-jerseys-bail-

aggravated assault and weapons charges, and the lower court set bail at $25,000 during his first appearance.[98] In determining that bail hearings were critical stages, the court explicitly noted the significance of the consequences of pretrial detention faced by those defendants who could not afford bail.[99] Pretrial detention, the court reasoned, could result in the defendant losing his job or facing the severe psychological consequences resulting from imprisonment, and it could detrimentally affect the defendant's dependent family members.[100] Additionally, the court noted that the pretrial detention of defendants is linked to an increased chance of the defendant receiving a criminal conviction or time in jail and that such pretrial detention was also related to an increased severity in the defendant's final sentence.[101]

3. Data Suggests that Initial Bail Hearings Are Critical Stages.

Several persuasive arguments relying on both policy and data suggest that bail hearings should be considered critical stages for purposes of the Sixth Amendment right to counsel. For example, attorneys at bail hearings can "expose fatal weaknesses in the State's case," learn new information about the state's accusations in order to better prepare a proper defense, and effectively advocate for "early psychiatric examination or bail."[102] Likewise, representation at bail hearings is vital when considered in the context of the rise in plea bargaining at this stage of a trial. Data suggests that "pretrial detention puts defendants at a profound

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overhaul ("A federal judge Monday ruled in favor of the new system, against the wishes of the bail bonds industry.").

[98] *Fann*, 571 A.2d at 1024.

[99] *See id.* at 1026 (discussing the "grave" consequences of pretrial detention).

[100] *Id.* at 1026–27 (citing ABA, STANDARDS RELATING TO PRETRIAL RELEASE 2–3 (Approved Draft 1968)).

[101] *See id.* at 1026 (citing State v. Johnson, 294 A.2d 245, 251 n.6 (N.J. 1972)). Note, however, that although New Jersey found the bail hearings were critical stages, the *Fann* court thought that "immediate arrangements for representation . . . in connection with the setting of bail [were] impossible." *Id.* at 1030; *see also* Gross, *supra* note 18, at 844 n.87.

[102] Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 775 (2017) (internal quotations omitted) (quoting Coleman v. Alabama, 399 U.S. 1, 9 (1970) (plurality opinion)) (discussing the benefits of having counsel at bail hearings). In fact, the U.S. Supreme Court's reasoning behind extending its critical stage jurisprudence to preliminary hearings in *Rothgery* easily extends to bail hearings. *See id.* at 774–75 (discussing the applicability of the U.S. Supreme Court's reasoning in *Rothgery* to bail hearings).

disadvantage in plea negotiations vis-à-vis the position they would be in if negotiating from freedom."[103]

Further, research suggests that the presence and assistance of counsel at initial bail hearings can have a positive effect on the defendant's ultimate outcome and can help reduce the defendant's chances of incarceration.[104] Empirical research indicates that judges are more likely to set bail at unaffordable levels when there is no counsel present.[105] It is unlikely that most defendants, particularly indigent defendants, understand the intricacies of the legal and factual issues that arise during these hearings.[106] Additionally, hearings for the reconsideration of bail do not necessarily fix the problem of excessive bail for indigent defendants, as most of the harm caused by excessive bail stems from immediate issues such as the defendant's loss of employment, educational opportunities, and ability to provide for dependent family members due to the initial incarceration.[107]

It is possible that states that have declined to ensure representation at bail hearings have done so because of a fear of potentially prohibitive costs and strains on their state budget and public defense system. However, research indicates that unnecessary and extended pretrial detention may actually be more costly for taxpayers than ensured legal representation.[108] A 2018 study examined a New York state program that aimed to provide counsel at initial appearances for misdemeanor offenders and found that the assistance of counsel can positively influence the decisions that judges make at these hearings.[109] The study found that judges (1) released individuals with fewer conditions attached and (2)

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[103] *Id.* at 776. The authors found, on the basis of an empirical study, that "approximately 17% of the detained misdemeanor defendants who pleaded guilty would not have been convicted at all but for their detention." *Id.*

[104] *See id.* at 776–77 (describing research findings on the presence of counsel at bail hearings).

[105] *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) (discussing results from the Baltimore City Lawyers at Bail Project).

[106] Bunin, *supra* note 6, at 26.

[107] *Id.*

[108] *See* Andrew L. B. Davies et al., *Guaranteeing Representation at First Court Appearances May Be Better for Defendants, and Cheaper for Local Governments*, LSE US CENTRE (Aug. 28, 2018), http://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/ (studying the financial impact of pretrial detentions).

[109] *See id.* (discussing the results of the study on pretrial detention).

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imposed fewer "financial barriers" on those who were required to pay bail, ultimately resulting in fewer pretrial detentions.[110] The authors concluded that lower rates of pretrial detention could ultimately result in lower costs to taxpayers, as detaining just one individual could cost upwards of $100 per day.[111]

C. GEORGIA SHOULD FIND THAT BAIL HEARINGS ARE CRITICAL STAGES

For Georgia to avoid unconstitutionally denying some criminal defendants the presence of counsel during certain initial appearance hearings, Georgia courts should affirmatively hold that initial appearance hearings are critical stages, insofar that these hearings entail questions of bail. In the alternative, the Georgia Supreme Court should enumerate a clear and concise list of factors that courts can easily use to determine whether a particular initial appearance hearing is a critical stage. Regardless, this question needs an answer because it does not appear that Georgia counties currently guarantee any right to representation at initial appearance hearings. It also does not appear that Georgia counties are uniform in their approach to this problem and in how soon defendants may see an attorney.[112] Thus, a defendant may be in jail for weeks or mere days depending on the county in which he is arrested.[113]

1. Georgia Case Law Indicates that Those Stages at Which Bail Questions Arise Should Be Considered Critical Stages.

Although Georgia has yet to expressly determine whether stages encompassing bail questions are critical stages, there is room to argue under existing Georgia case law that bail questions are encompassed under the critical stage framework laid out in prior decisions.[114] In fact, the Georgia Supreme Court has already acknowledged that some initial appearances are critical stages,

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[110] *Id.*

[111] *See id.* (referring to the data collected and charts compiled by the authors which support the stated conclusions).

[112] *See* discussion *supra* Section I.C.4.

[113] *See* discussion *supra* Section I.C.4.

[114] *See, e.g.*, O'Kelley v. State, 604 S.E.2d 509, 512 (Ga. 2004) ("[A]n initial appearance hearing [is] often not a critical stage of a criminal proceeding in its own right . . . .").

although it has declined to define when exactly that occurs.[115] Chief among the reasons suggesting that Georgia courts may be willing to extend Georgia’s critical stage jurisprudence is their willingness to depart from the federal framework in several key aspects.[116] For instance, the Georgia Court of Appeals declared restitution hearings to be critical stages earlier than several federal courts did.[117]

Additionally, several factors that Georgia courts have looked at in order to determine what a critical stage is support finding that initial appearance hearings that include questions of bail are critical stages. In particular, Georgia’s emphasis on discretion in finding that re-sentencing hearings were critical stages is useful, as initial appearance hearings often involve discretion on the part of the judge in order to determine when bail is set and at what amount.[118] Further, Georgia’s reliance on U.S. Supreme Court authority that is favorable to the argument that bail hearings are critical stages is also telling. Specifically, in deciding that preliminary hearings were critical stages, Georgia relied heavily on *Coleman v. Alabama*, a U.S. Supreme Court case which contains reasoning that is favorable towards arguing that bail hearings are critical stages.[119]

However, the evolution of Georgia’s critical stage jurisprudence seems to closely mirror that of the federal government—both in the critical stages it has embraced and in those instances in which it has scaled back protections.[120] This suggests that Georgia is somewhat tentative in the expansion of its critical stage jurisprudence and is hesitant to expand too far beyond the scope of federal protections. Despite this, Georgia’s declaration that initial appearance hearings are “often not” critical stages is a step beyond the federal court system’s critical stage jurisprudence and suggests that Georgia is willing to venture beyond the scope of federal protections in some instances.[121]

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[115] *See id.* (acknowledging an initial appearance is “a formal legal proceeding wherein the Sixth Amendment right to counsel attaches”).

[116] *See* discussion *supra* Section II.B.1.

[117] *See* discussion *supra* Section II.B.1.

[118] *See supra* Section I.C.1.

[119] *See* State v. Houston, 218 S.E.2d 13, 14–16 (Ga. 1975) (holding that preliminary hearings are critical stages).

[120] *See* discussion *supra* Section II.B.1.

[121] *See* O’Kelley v. State, 604 S.E.2d 509, 511–12 (Ga. 2004) (declining to definitively hold that these hearings are critical stages).

2. Potential Solutions to Georgia's "Critical" Problem.

One solution to Georgia's problem may be to rule that all initial appearance hearings are critical stages. However, despite the evidence suggesting that universal representation at these hearings may be beneficial for states, Georgia may be hesitant to declare that all initial appearance hearings are critical stages.[122] Another potential way for Georgia to solve this problem would be to implement bail reform through the use of risk assessment models which dictate that those defendants at low and moderate risks of reoffending should be released while those at high risk should be detained.[123] These models are quickly growing in popularity across the country. For example, a version of a risk assessment model is currently in use today in Kentucky and a few other states.[124] Although there may be some concerns about the need for "costly and time-consuming interviews" in conjunction with these tools, these tools are becoming more refined as they receive heightened levels of attention.[125] Any concerns about the use of these tools can easily be offset by the potential benefit in using them: detaining fewer individuals will naturally result in lower amounts spent on detention.[126] Additionally, Georgia may consider adopting New Jersey's approach to bail reform,[127] which has been attributed with a significantly lower rate of incarceration among indigent defendants.[128] For Georgia, using a tool such as that used in New Jersey would present a natural solution to the "critical stage" question—if fewer defendants are being detained, then it is far more

[122] *Id.* at 512.

[123] *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 510–13 (2018) (discussing the growing popularity of risk assessment models and the bail reform movement).

[124] *See id.* at 510, 517 (explaining the increase in popularity and adoption).

[125] Gross, *supra* note 18, at 863; *see also* Mayson, *supra* note 123, at 516–18.

[126] Despite the potential benefits of pretrial risk assessment, the practice is not without controversy. There is concern that risk assessment algorithms can lead towards racial bias because of the factors used in calculating risk. *See generally* Vincent Southerland, *With AI and Criminal Justice, the Devil Is in the Data*, ACLU (April 9, 2018, 11:00 AM), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data.

[127] New Jersey uses a "public-safety assessment" tool to help judges "make a reasoned decision about detention or release." *Pretrial Justice Reform*, ACLU N.J., https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform (last visited Nov. 12, 2019).

[128] Such results include a "20.3 percent decline in the pretrial jail population" attributed to the first year of the state's use of the new bail program. *Id.*

feasible to provide representation for all of these individuals at the initial appearance.

III. CONCLUSION

The answer to whether initial appearance hearings are a critical stage in Georgia is unclear under current Georgia law.[129] In Georgia, bail is first set during initial appearances, and the Georgia Supreme Court has acknowledged that initial appearances are sometimes critical stages requiring entitlement to the presence of counsel.[130] However, there does not appear to be any current system in place to determine when initial appearance hearings are critical stages. Thus, it is likely that some defendants proceed through these hearings without the presence of counsel to which they are entitled.

There are several convincing reasons favoring the argument that initial appearances are critical stages in Georgia. Georgia's critical stage jurisprudence exhibits a tentative willingness to extend right to counsel protections beyond those currently afforded by federal jurisprudence.[131] Likewise, in the past, Georgia has been willing to extend broader protections than are afforded by the federal government in other substantive areas of criminal law.[132] Finally, data suggests that the presence of counsel at the initial bail hearing significantly improves defendants' chances of a positive final outcome—showing, as required by *Rothgery*, a "need for counsel's presence."[133]

The national spotlight has turned to issues of bail reform,[134] and it is only a matter of time before Georgia will have to deal with the

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[129] *See* O'Kelley v. State, 604 S.E.2d 509, 512 (Ga. 2004) (declining to definitively answer this question).

[130] *Id.* While bail may technically first be "set" by a bail schedule in some counties, magistrate judges typically have discretion to alter this bail in initial appearance hearings. Interview with Russell Gabriel, Professor, University of Georgia School of Law, in Athens, Ga. (Feb. 11, 2019).

[131] *See* discussion *supra* Section II.B.1.

[132] *See* discussion *supra* Section II.B.1.

[133] *See Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing*, CONST. PROJECT NAT'L RIGHT TO COUNS. COMMITTEE 17 (2015) https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf (quoting Rothgery v. Gillespie Cty., 554 U.S. 191, 212 (2008)). *Rothgery*, as discussed previously, suggested that those factors which make a stage "critical" are those that show a "need for counsel's presence." 554 U.S. at 212.

[134] *See* Mayson, *supra* note 123, at 492.

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"critical stage" question created by *O'Kelley*.[135] Georgia has already decided that some initial appearances are critical stages. The only issue, then, is how to decide which of these appearances are critical stages. One solution may be to decide that all initial appearances are critical stages, and there is plenty of evidence to suggest that they are. Another solution may be to adopt risk-based bail reform, which would allow Georgia to decrease the number of pretrial detainees and perhaps make it easier to provide counsel for those defendants who are actually detained. This Note acknowledges the benefits of both options but, primarily, concludes that Georgia simply cannot leave its "critical stage" question unanswered much longer. Georgia has acknowledged that some initial appearances are critical stages—now, it must decide how many, and take actions to provide defendants the counsel to which they are entitled.

[135] *O'Kelley*, 604 S.E.2d at 512.