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Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process

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CHARM CITY TELEVISED & DEHUMANIZED: HOW CCTV BAIL REVIEWS VIOLATE DUE PROCESS

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INTRODUCTION

On May 28, 2013, Torrey Johnson[5] struggles to raise both his hands, handcuffed and seated shoulder-to-shoulder between two other defendants in the first row of the closed circuit television ("CCTV" or "videoconference") bail review hearing room within the Baltimore Central Booking and Intake Center ("Centeral Booking"). There are two more rows of defendants behind Mr. Johnson, all in yellow jumpsuits, being watched by correctional officers. Separated by a three-foot wall, Mr. Johnson's public defender sits out of sight from the video camera's field of view, about ten feet away from her client. The judge quickly reads through Mr. Johnson's rights. A representative from the Pretrial Release Services Program ("Pretrial Release") makes a recommendation that is broadcasted meekly from the courtroom. As the judge looks down at his desk to take notes, Mr. Johnson looks down and shakes his head. He disagrees with something the Pretrial Services representative said, and starts to speak. No one seems to hear Mr. Johnson's voice in his own bail review hearing.

Mr. Johnson's experience demonstrates the constitutional violations that many indigent defendants in Baltimore City disproportionately face as

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[1] The views expressed herein are those held by the authors' alone, and do not represent the position of the *University of Baltimore Law Forum*, its editorial board and staff, or any other entity.

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[5] The defendant's name has been changed to protect client confidentiality.

Maryland conducts bail review hearings on a television screen, not in person. Speed and convenience are the driving factors behind the state's decision to hold bail hearings through videoconference systems. Mr. Johnson's case is an example of the procedural problems raised when CCTV is used in bail review hearings, both in district and circuit courts.[6]

Many of Mr. Johnson's rights were stripped away during his bail review hearing. Denied the right to be physically present before a judge, Mr. Johnson's face was grainy and unrecognizable, while his bright yellow jumpsuit fluoresced. Separated from his attorney by correctional officers, he was unable to challenge the facts that the Pretrial Services representative presented against him. He was disoriented without the guidance of his attorney, who should have been within a whisper's distance. In less than two minutes, Mr. Johnson, unable to make the $50,000 bail, was denied the opportunity to be released before his case is decided.

By contrast, Carl Gibson[7] was granted a bail review hearing in circuit court, the trial court for his felony charge, approximately six months after he was initially incarcerated. He was physically present in the courtroom during his bail review hearing, accompanied by his attorney and his girlfriend, who was nine months pregnant at the time. Mr. Gibson communicated with his attorney throughout the hearing, providing information to counter the representations made by Pretrial Services. His attorney made arguments regarding his ties to the community and the weakness of the case against him. Ultimately, Mr. Gibson was granted a substantial reduction in money bail.

This article will discuss CCTV bail hearings that take place in district and circuit courts. First, using Baltimore City as a case study, we will detail the importance of pretrial release for trial outcomes and how lengthy pretrial incarceration disproportionately affects both the poor and African-American population. We will then argue that CCTV violates a defendant's right to be physically present within a courtroom, his Sixth Amendment right to confront the witnesses against him, and his Sixth Amendment right to counsel. These constitutional violations, when combined, deprive defendants of their liberty without the due process of law.

I. RIGHT AGAINST EXCESSIVE BAIL

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[6] *See* Md. R. 4-231 (permitting the use of videoconference systems in bail review hearings that are held in *district court*). From August 2013 to submission of this article for publication, bail review hearings and petitions for writs of habeas corpus were being conducted in circuit court via CCTV. Any use of CCTV equipment in bail review hearings before the Circuit Court for Baltimore City is not permitted by the express language of Maryland Rule 4-231.

[7] The defendant's name has been changed to protect client confidentiality.

A. Lengthy Pretrial Incarceration Disproportionately Affects the Poor and African-American Population

In *Ake v. Oklahoma*, Justice Marshall stated that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[8] Justice Marshall's words are strikingly relevant to the effects that CCTV has on indigent defendants in Baltimore City, where pretrial detainees are overwhelmingly African-American and poor.[9] Surety bail amounts are acutely significant to poor defendants.[10] When money for food and rent is unsure, the extra expense of paying bail to a corporate bondsman will be an extreme hardship.[11] In most situations, bail is paid by the detainee's friends and family. For the multigenerational poor, when the bail amount skyrockets into the hundreds of thousands, or even millions, of dollars, freedom is out of reach.[12] Although loved ones may dearly want to bring a detainee home, the money is just not there.[13] To an affluent

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[8] Ake v. Oklahoma, 470 U.S. 68, 76 (1985).

[9] *See* Nastassia Walsh, *Baltimore Behind Bars*, JUSTICE POLICY INST. 15 (2010), *available at* http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-ac-rd.pdf (almost ninety percent of Baltimore City detainees are African-American). *See also* 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, 1721 (2002) (lower income defendants tend to be disproportionately African-American); *Exectuive Summary* to THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND'S PRETRIAL RELEASE AND BAIL SYSTEM, ABELL FOUND. ii n.5 (Sept. 12, 2001) (hereinafter "ABELL FOUND."), *available at* http://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01%281%29.pdf ("Seventy percent of interviewed arrestees for this Study reported that the expense of the bondsmen's fee would result in a delay paying rent and utilities and in buying less food.").

[10] NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, NAPSA STANDARDS ON PRETRIAL RELEASE 18 (3d ed. 2004), *available at* http://www.napsa.org/publications/2004napsastandards.pdf (stating surety bail systems "discriminate unfairly against the poor and middle-class persons who cannot afford the non-refundable (and often very high) fees that the bondsman requires as a condition of posting the bond").

[11] *See* ABELL FOUND., *supra* note 9. *See also* Walsh, *supra* note 9.

[12] In advocating for the abolition of compensated sureties, the National Association of Pretrial Services Agencies notes "[t]here is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges) . . . ." *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 19.

[13] *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES: 1994, (1998), *available at* http://www.bjs.gov/content/pub/pdf/fdluc94.pdf (study demonstrating the inverse relationship between increasing bail amounts and the decreasing probability of

defendant, the dollar amount of bail is less significant.[14] To avoid spending even one night in Central Booking, most would consider paying a hefty sum well worth it.[15]

Unfortunately, a defendant's ability to pay bail is rarely taken into account by judges. Typically, a "reasonable bail" is assessed solely on the allegations, a defendant's criminal history, and his ties to the community.[16] However, under *Stack v. Boyle*,[17] the amount set for bail should be no more than is necessary to assure the defendant's presence at trial. Bail is collateral to ensure court appearances, and should not be punishment for crimes yet to be proven. The same dollar amount will be more important to recoup for an indigent defendant than an affluent one; as such, indigence itself should be a factor in favor of lower bail.[18] Because this connection often escapes recognition,[19] it is all the more important that indigent defendants are granted the full spectrum of their rights during bail review hearings.[20]

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release). *See also* BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES: 1992 (1995), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4120.

[14] *See Executive Summary* to ABELL FOUND., *supra* note 9, at v n.15 ("According to the 1995 national census, the median ([fiftieth] percentile) income for the typical household in Baltimore ($42,021), Frederick ($51,220), Harford (48,467) and Prince George's ($45,281) counties was 75 to 100% higher than for Baltimore City ($25,918) . . . . Consequently, the same dollar amount is likely to represent a greater financial hardship for individuals and families in Baltimore City.").

[15] *See* Sadhbh Walshe, *America's Bail System: One Law for the Rich, Another for the Poor*, THE GUARDIAN (Feb. 14, 2013), http://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor ("Until we have the courage to change it, we should at least call bail by its real name: a get-out-of-jail pass for those who can pay, and jail-time for those who can't.").

[16] *See* Cynthia Jones, *Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 935 (2013).

[17] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[18] *See* United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988). *See also* State *ex rel*. Bardina v. Sandstrom, 321 So. 2d 630, 631 (Fla. Dist. Ct. App. 1975); Mendenhall v. Sweat, 158 So. 280, 281-82 (Fla. 1934) (stating that a defendant's financial condition must be considered when instating a bail amount required to assure the presence of the defendant).

[19] During a bail review hearing on May 28, 2013, after argument by defense counsel, Edie Cimino, that the defendant could not post the set amount of money bail, the judge noted that the duty to set a reasonable bail, does not impose upon a judge a duty to consider what bail amount the defendant could make.

[20] Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 197-98 (1993) ("Criminal defendants, especially minorities, often feel they are 'outsiders' rather than participants in the adjudication of justice. Given the reality that most racial minorities, especially Blacks, may already distrust and feel intimidated by the criminal justice system, CC[TV]s provide another bar to their full

Videoconference bail review hearings forsake the rights of the poor in the name of convenience and efficiency.

B. Importance of Pretrial Release for Trial Outcomes

When an accused is incarcerated prior to his trial, he is held for a crime of which he is presumed innocent, and forced to live in squalid conditions that are worse than those where convicted criminals are held.[21] Pretrial incarceration involves sleep deprivation, shockingly unsanitary conditions, and violence.[22] A defendant's countenance and posture will reflect those experiences and convey a message to the court and jurors. The state system has determined that he is guilty enough to keep locked up, and he wears that badge of guilt when presented to the court via video during various pretrial proceedings.[23]

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understanding of the proceedings and reinforce their distrust of the system. CC[TV]s only further magnify this distrust and alienation.").

[21] Jonathan Zweig, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 556 (2010) (*citing* Pugh v. Rainwater, 557 F.2d 1189, 1198 (5th Cir. 1977) ("[I]n a system that prides itself on a devotion to 'equal justice under the law', [sic] it is difficult to maintain that conditions common in pretrial detention centers do not punish defendants presumed innocent but that the more wholesome conditions of minimum security prisons do punish convicted criminals.") (citations omitted) (quoting another source)).

[22] James MacArthur, *Jailed Journalist Reports Inhumane Conditions for Pre-Trial Detainees*, INDYPENDENT READER (Apr. 29, 2013), https://indyreader.org/content/court-date-jailed-journalist-reports-inhumane-conditions-pre-trial-detainees.

[23] *See* MICHAEL J. KELLY & EFREM LECY, MAKING THE "SYSTEM" WORK IN THE BALTIMORE CRIMINAL JUSTICE SYSTEM: AN EVALUATION OF EARLY DISPOSITION COURT 13 (2002), *available at* http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/004000/004607/unrestricted/20071518e.pdf ("The defendant threatens to burden the court with a jury trial in order to negotiate a more favorable outcome through a plea bargain. The prosecutor seeks to game the system as well, through increasing the penalties at each new stage in the process, in order to negotiate a more severe penalty for the defendant for burdening the system"). *See also* Commonwealth v. Bethea, 379 A.2d 102, 105 n.8 (Pa. 1977) ("Judge David Bazelon, speaking for the Court of Appeals for the District of Columbia, has suggested the shortcomings of these contentions: 'Repentance has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentance comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.'"). *See also* Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101 (2005) (proposing a solution for and argues that differential sentencing of criminal defendants who plead guilty and those that go to trial is a punishment for the defendants exercising their right to trial).

At the most basic level, a defendant's decision-making process is fueled by his traumatic experience in jail. In pretrial detention the defendant has gone sleepless, unshowered, and scared for months. These conditions present the defendant with an added incentive to plead guilty and accept a sentence certain to result in his transfer to a classified institution.[24] There the defendant can begin to count down the days to freedom. This certainty brings a defendant relative peace of mind and ends the waiting, fearing the worst, and hoping for finality.

While incarcerated, the accused cannot fully participate in preparing his defense for trial. The defendant is unable to investigate his case, do legal research, or even call his lawyer at a time of his choosing.[25] He can read only what is provided to him and he cannot assist in locating witnesses.[26] Rather, he must wait for his attorney to visit him and, when she does, chances are their meeting will not be confidential.[27] From his cell, the defendant cannot assist in finding witnesses or accompany his lawyer on crime scene investigations to show her where the incident occurred. Often times, a client can educate their lawyer about the particular locations, such as alleyways, backyards, and hangout spots, that are the subjects of the police reports; however, without the defendant's presence, the attorney must often rely on guesswork and a hand-drawn map from her client.[28] Finding witnesses is not always an exact science. For example, an accused may know that there was a lady on her porch who saw the event, but not know her name, address, or phone number. While the accused may recognize her face or her house, the lawyer does not.

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[24] KELLY & LECY, *supra* note 23, at 13.

[25] Interview with the Honorable Robert Cooper, J., Baltimore City District Court (June 12, 2013) (Judge Cooper acknowledged that some witnesses in "Baltimore City are very transient." In the district court a trial must occur within thirty days of arrest. Judge Cooper noted that this is a very limited time frame. If a defendant is not on the streets looking for his potential witness because the defendant does not make bail and remains incarcerated pending trial, then "[the defendant] will never get him.").

[26] *Id.*

[27] Jack Rubin, Letter to the Editor, *Central Booking and Jail are Failing*, BALT. SUN (Aug. 7, 2012), *available at* http://articles.baltimoresun.com/2012-08-07/news/bs-ed-jail-letter-20120807_1_deplorable-conditions-baltimore-city-detention-center-interviews.

[28] NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10 ("Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer who entered an order of pretrial detention . . . may permit the temporary release of a pretrial detained person to the custody of a law enforcement or other court officer . . . [t]he burden is clearly on the defense to prove the need for such release, which may be for matters relating to preparation of the defendant's case (for example, a site visit to a particular location, providing an opportunity to review the scene with counsel) . . . .").

If a defendant is convicted after trial, the State's sentencing recommendation, and the one actually imposed, will be considerably higher than if he were to accept a plea.[29] Nearly every time a guilty verdict is rendered, a "trial tax" is imposed by the sentencing judge. This is, in part, due to the legislature's enactment of various mandatory penalties that take away judicial discretion, which the prosecutor may unilaterally invoke.[30] It is also partly due to the personal and philosophical beliefs held by some members of the bench, and may be an attempt to discourage jury trials to prevent overcrowding an already crowded docket. Whatever the reason, a defendant is not likely to gamble with his liberty by demanding a jury trial.[31]

In addition to the pressures to plead guilty, applicable to all defendants, pretrial incarceration creates further inducements for an accused to give up his trial rights.[32] Several studies have demonstrated that "released defendants tend to fare far better than those who are held in detention."[33] Specifically, research shows that those "detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period."[34] Put another way, those who are not jailed pending trial have much more favorable outcomes.[35]

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[29] KELLY & LECY, *supra* note 23, at 12.

[30] For example, fourth time drug offenders are subject to a forty-year mandatory minimum if they have previously served three or more separate terms of confinement as a result of three or more separate convictions. *See generally* Grossman, *supra* note 23, at 110–15.

[31] *See* Grossman, *supra* note 23, at 101 (citations omitted) ("The process by which criminal convictions come about through guilty pleas in exchange for sentencing considerations carries with it the almost inevitable result that those who refuse a plea bargain are punished for exercising the right to trial. This punishment for exercising the right to trial, and the deterrent impact that such a punishment creates for criminal defendants considering whether to go to trial, take place not in rare instances but in the overwhelming number of cases disposed of in federal and state criminal court systems.").

[32] *See* Walshe, *supra* note 15 (quoting NORMAN REIMER, EXEC. DIR., NAT'L ASS'N FOR CRIM. DEF. LAWYERS ("Bail is used as ransom to extract a guilty plea. Fact.")).

[33] *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 9 ("Deprivation of liberty pending trial . . . subjects the defendant to economic and psychological hardship, interferes with their ability to defend themselves, and, in many circumstances, deprives their families of support.").

[34] KRISTIN BECHTEL ET AL., DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH, PRETRIAL JUSTICE INST. (2012), *available at* http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf. *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10; Stevens H. Clarke & Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 503, 505 (1983) (A study of urban felony cases in North Carolina "measured the effects of pretrial detention, *controlling for*

II. THE CASE STUDY: BALTIMORE CITY

A. The Long Road to Circuit Court for a Felony Case

An individual faced with the unlucky experience of being arrested in Baltimore City is physically presented to a district court commissioner for a one-on-one interview within twenty-four hours of their arrest.[36] Initially, bail is set by a commissioner, who is appointed by the Chief Judge of the District Court of Maryland, but who is not necessarily a judge herself.[37] The commissioner communicates with the defendant through a glass partition in Central Booking, and decides whether to set bail, and if so, the appropriate monetary value.[38]

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seriousness of charge, prior convictions, evidence against the defendant, and other variables that might possibly affect both pretrial detention and court disposition . . . . [T]he regression analysis [shows] that when two defendants and their cases were alike, but one defendant spent more time in pretrial detention than the other, the former defendant was less likely to have his charges dismissed than the latter and was also more likely to receive a stiffer sentence if convicted."); JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 199 (1979) (In a multivariate regression analysis, the author found a "rather pronounced relationship between defendants' pretrial statuses and their sentences . . . ." The study included 8,171 defendants in Philadelphia. Of those who were convicted, whether in jail or out, 60% were placed on probation or given other non-jail sentences, while 26% of those who were detained until conviction were spared jail sentences.).

35 *See* Walshe, *supra* note 15 (quoting Robin Steinberg, Executive Director of the Bronx Defenders: "If they have you in jail, the power has shifted to the prosecutorial arm of the system, and they can force you to make a plea. If you are out of jail, the power dynamic is completely different. Our research shows that when bail is posted, at least half the cases are going to be dismissed outright and most will result in no jail time at all. This is why prosecutors fight so desperately for bail.").

36 *See* Press Release, Md. Dep't of Pub. Safety and Corr. Servs., Public Defender's Office Drops Suit Against Central Booking and Intake Center: Agency Acknowledges "24-hour rule" Violations Virtually Eliminated (Sept. 15, 2006), *available at* http://dpscs.maryland.gov/publicinfo/pdfs/pressreleases/20060915.pdf (dismissing the Baltimore City Public Defender's Office's class action suit against Baltimore's Central Booking and Intake Center for detaining arrestees for longer than twenty-four hours before seeing a commissioner).

37 *See* ABELL FOUND., *supra* note 9, at n.75 (commissioners are not required to achieve legal degrees; more than three of four Commissioners interviewed stated that their legal training included a paralegal education; about 15% graduated from law school, and one of five commissioners had taken some law school courses).

38 *See Understanding the System*, MD. OFFICE OF THE PUB. DEFENDER, http://www.opd.state.md.us/Districts/Dist1/YDUHome/ClientFamilyResources/FAQs.aspx (last visited Sept. 28, 2014).

A charging document is issued to the defendant, which is frequently prepared by the Baltimore City Police Officer who made the on scene arrest and filed an affidavit describing the alleged illegal act.[39] Thus, it is the arresting officer who initially decides what crimes to charge the defendant with, including whether they are misdemeanors or felonies.[40] An individual could also be arrested because of a complaining witness' sworn, handwritten claim alleging that the individual committed a crime.[41] In that situation, a

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[39] Unfortunately, there are several documented instances of alleged and confirmed dishonesty of members of the police force in Baltimore and nationally. *See* Michelle Alexander, Opinion, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), *available at* http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?pagewanted=all. *See also* Justin Fenton, *Baltimore Police Officer Charged in Drug Corruption Case*, BALT. SUN (May 31, 2013), *available at* http://articles.baltimoresun.com/2013-05-31/news/bs-md-ci-police-corruption-indictment-20130531_1_drug-dealer-baltimore-police-officer-west-baltimore; Theo Emery, *Baltimore Police Scandal Spotlights Leader's Fight to Root Out Corruption*, N.Y. TIMES (May 9, 2012), *available at* http://www.nytimes.com/2012/05/09/us/baltimore-police-corruption-case-tests-commissioner.html?_r=0; Jeff Hager, *Baltimore's Top Cop Turns to Outsiders to Clean up Corruption Inside Police Department*, ABC NEWS (Jan. 27, 2012), *available at* http://www.abc2news.com/dpp/news/baltimores-top-cop-turns-to-outsiders-to-clean-up-corruption-inside-police-department; Patrick R. Lynch, *Police Misconduct: Signs of a Breakdown of Civil Society*, BALT. SUN (Aug. 19, 2011), *available at* http://articles.baltimoresun.com/2011-08-19/news/bs-ed-police-shooting-letter-20110819_1_police-misconduct-police-officer-civil-society; Justin Fenton, *Lead Detective in Barnes Case Charged in 2012 Incident*, BALT. SUN (Apr. 29, 2013), http://articles.baltimoresun.com/2013-04-29/news/bal-lead-detective-in-phylicia-barnes-case-criminally-charged-in-2012-incident-20130429_1_phylicia-barnes-detective-daniel-t-detective-nicholson; Justin Fenton, *Baltimore Officer Pleads Guilty to Armed Drug Conspiracy*, BALT. SUN (Mar. 11, 2013), *available at* http://articles.baltimoresun.com/2013-03-11/news/bs-md-ci-police-officer-plea-richburg-20130311_1_kendell-richburg-informant-baltimore-officer; Justin Fenton, *Baltimore Police Officer Charged with Lying in Search Warrant*, BALT. SUN (Nov. 2, 2012), *available at* http://articles.baltimoresun.com/2012-11-02/news/bs-md-ci-city-officer-perjury-20121101_1_search-warrant-misconduct-charges-baltimore-police-officer.

[40] MD. RULE § 4-211 (outlining the methods of charging).

[41] *Id.; Who Does What in District Court*, MDCOURTS.GOV, http://www.courts.state.md.us/district/selfhelp/whodoeswhat.html (last visited Sept. 26, 2014) **(**many people are surprised to learn that, in Maryland, a private citizen, without any police involvement, can appear before a district court commissioner, any time of day or night, to apply for criminal charges to be issued against another individual; the commissioner decides whether a warrant or summons will issue: "If warrant is issued, the document will be given to a law enforcement agency, which is responsible for finding and arresting the accused person."). This system arguably sets up a mechanism for private persons to use the criminal justice system as a weapon in interpersonal relationships. *See* State v. Smith, 305 Md. 489, 505 A.2d 511(1986) (holding that a district court commissioner, acting on an affidavit of a

district court commissioner will "review the application to determine whether a crime has been committed and if there is reason to believe that the . . . accused committed the crime. If the commissioner determines that there is probable cause, a charging document is issued."[42]

When a commissioner approves the misdemeanor charges issued against an individual, the trial date will be set approximately thirty days after the arrest. At that time the individual would receive the State's offer and have the opportunity to have a trial before a district court judge, pray a jury trial,[43] or accept a guilty plea.[44]

When charged with certain felonies,[45] Maryland law prohibits and individual from being tried in district court, the court in which bail was set.[46] Under these circumstances, the district court has no jurisdiction. After a preliminary hearing or an indictment by a grand jury, the felony case would be heard in circuit court, where the defendant is afforded the right to a jury trial.[47]

The Maryland Rules require that a preliminary hearing, where live witnesses are required to testify before a judge in support of the State's case, must take place within thirty days of a defendant's timely request.[48] At that time, a judge must decide if probable cause exists to support the felony charge. If the district court judge finds probable cause, the State must file a charging document in circuit court within thirty days.[49]

The State's Attorney for Baltimore City seems to have adopted a policy of indicting felony cases in lieu of presenting live witnesses at preliminary hearings.[50] There is no time requirement for the filing of an indictment

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private citizen, was authorized to issue a warrant, and that such an issuance did not violate the defendant's due process rights).

[42] *Who Does What in District Court*, *supra* note 41.

[43] MD. CODE ANN., CTS. & JUD. PROC. § 4-302(e)(2)(i)-(ii) (stating someone who is charged with a misdemeanor which carries more than ninety days of incarceration as a maximum penalty has the option of praying a jury trial, in which case the case would be forwarded to the circuit court).

[44] Md. R. 4-211(b)(1).

[45] MD. CODE ANN., CTS. & JUD. PROC. § 4-302(a).

[46] *Id.* § 4-302(e)(2)(i).

[47] MD. CODE ANN., CRIM. PROC. § § 4-102, 103.

[48] Md. R. 4-211(b)(1); MD. CODE ANN., CRIM. PROC. § 4-103.

[49] Md. R. 4-221(f)(1).

[50] This has been the experience of the Authors of this Article. *See also* MD. CODE ANN., CRIM. PROC. § 4-103(c)(2) ("If the defendant is charged by grand jury indictment, the right of a defendant to a preliminary hearing is not absolute but the court may allow the defendant to have a preliminary hearing."). *See also* United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005) (explaining that a grand jury acts as a "rubber stamp" and "affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor 'submits' that it should" (quoting Marvin E. Frankel & Gary Naftalis, *The Grand Jury: An Institution on Trial*, 9, (Farrar Straus

under Maryland statutory law. In fact, the Maryland Rules and the Criminal Procedure Article are both relatively silent on the subject of indictment—no guideposts exist for how the grand jury is convened, what the standard of proof is, or any filing deadlines.[51]

If your case is in felony status, then by the time you have wend your way through the process to arrive in circuit court, more than ninety days will have typically passed.[52] The video bail review hearing in district court will determine the amount of money necessary to gain your freedom. An individual unable to post the designated amount of bail, as set by the district court during the video bail proceeding, may lose his liberty before the government has even "committed itself to prosecute" by filing an indictment (the charging document on which a defendant is "subject to be tried . . . ").[53]

B. The Importance of a Bail Review Hearing for Felony Cases in a General Jurisdiction Court:[54] Speedy Trial Concerns

The Sixth Amendment guarantees criminal defendants a speedy trial. One of the primary purposes of this right is "to prevent undue and oppressive

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Giroux) (1977))); People v. Carter, 566 N.E.2d 119, 124-25 (1990) (Titone, J., dissenting) (Arguing that the prosecutor who presented the case to a grand jury was unlicensed but the majority held that this did not undermine the underlying prosecutorial jurisdiction; Titone, J., dissenting, notes that "a Grand Jury can indict *anyone* or anything—even a ham sandwich. Now, under the majority's holding, apparently *anyone* can present the People's case to the Grand Jury—even an unadmitted layperson masquerading as an attorney.").

[51] Clark v. State, 364 Md. 611, 643, 774 A.2d 1136, 1155 (2001) ("Maryland has no statute prescribing a time limit for seeking an indictment for felonies and penitentiary misdemeanors."). *But see* ABA STANDARDS FOR CRIMINAL JUSTICE, SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES 8 (3d ed. 2006) ("An indictment, information, or other formal charging instrument should be filed within thirty days after the defendant's first appearance in court after either an arrest or issuance of a citation or summons . . . .").

[52] *See* Walsh, *supra* note 9, at 40.

[53] State v. Gee, 298 Md. 565, 574-75, 471 A.2d 712, 716 (1984). *But see* Vernon's Ann.Texas C.C.P. Art. 12.01, 17.151 (2013) (requiring that a "defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within . . . [ninety] days from the commencement of his detention if he is accused of a felony . . . "; Texas also outlines time limits within which a case must be indicted, even when the accused is released on his own recognizance).

[54] Md. Code Ann., Cts. & Jud. Proc. §1-501 (explaining that the Circuit Court is also referred to as a court of original jurisdiction and that "[t]he circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State."); Walsh, *supra* note 9, at 39 (describing the unlimited jurisdiction).

incarceration prior to trial . . . ."[55] The four-factor test of *Barker v. Wingo*[56] is used to determine whether a case should be dismissed for the lack of a speedy trial.[57] The "speedy trial clock" starts upon "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . ."[58] As discussed, the district court does not have jurisdiction over felony cases.[59] The defendant cannot be tried on a statement of probable cause, which is "an accusation made by a peace officer or other person."[60] Therefore, the speedy trial clock for a felony does not start upon filing of a statement of probable cause alone, but upon the arrest alleged in the charging document.[61]

Multiple postponements in felony cases are common in the Circuit Court of Maryland for Baltimore City.[62] Frequently, cases are postponed due to a lack of court availability, despite neither party requesting additional time.[63] In analyzing a constitutional speedy trial claim, overcrowded courts are considered a more neutral reason, but "nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."[64] Many times, the State or the defense requests a postponement to complete more investigation, which sometimes is a result of high caseloads faced by both sides.[65]

In addition to the constitutional right to a speedy trial, Maryland Rule 4-271 requires that a trial be granted within one hundred eighty days of

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[55] United States v. Marion, 404 U.S. 307, 320 (1971) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).
[56] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).
[57] United States v. Gouveia, 467 U.S. 180, 190 (1984) (quoting United States v. MacDonald, 456 U.S. 1, 8 (1982)). *See* Part VI, *infra*, for a discussion of other due process violations in the context of video bail review hearings (arguing that the defendant has a due process right to a speedy trial, which is implicated when the defendant appears on video for his bail review hearing, since (1) video bail hearings increase the risk of pretrial incarceration and (2) as the Supreme Court has stated, the "speedy trial right exists primarily to protect an individual's liberty interest, 'to minimize the possibility of lengthy incarceration prior to trial . . . '").
[58] United States v. Marion, 404 U.S. 307, 320 (1971).
[59] *See supra* Part II.A.
[60] State v. Gee, 298 Md. 565, 572, 471 A.2d 712, 715 (1984).
[61] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 8.
[62] *See* Walsh, *supra* note 9, at 39.
[63] *See id.*
[64] Barker v. Wingo, 407 U.S. 514, 531 (1972).
[65] Wilson v. State, 44 Md.App. 1, 10-11, 408 A.2d. 102, 108 (1979) ("[D]elay caused by the reasonable preparation and orderly process of the case for some undetermined period will not be weighed against the State."). *But see Barker*, 407 U.S. at 531 ("[O]vercrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.").

arraignment[66] or the date that counsel for defendant filed their written appearance.[67] For a case to be postponed past the one hundred eighty day deadline, or the "*Hicks* date," an administrative judge must find good cause for the delay.[68] In enacting Maryland Rule 4-271, the Maryland "Legislature intended [to] prevent *chronic* delay," but when the delay is due to "an isolated instance rather than a recurring problem" a finding of good cause is within the administrative judge's discretion.[69] Few practitioners would disagree that the court is chronically congested, and defense lawyers must warn their clients about the possibility of no court being available resulting in a postponement.[70] Regardless of the chronic congestion against which Maryland Rule 4-271 was designed to protect, judges in Baltimore City will routinely find good cause for a postponement when there is no court available.[71]

The Circuit Court of Maryland for Baltimore City sporadically operates under a "Differentiated Case Management System" ("DCM") that outlines the prescribed length of delay from arraignment to trial date for different categories of cases.[72] The focus of the DCM system is the anticipated length of the trial. Under the DCM, if the trial is expected to take less than three

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[66] Md. R. § 4-271.
[67] *Id.*
[68] State v. Hicks, 285 Md. 310, 318, 403 A.2d 356, 360 (1979) (holding that dismissal of criminal charges is the appropriate sanction where the State fails to bring the case to trial within the one hundred twenty day period prescribed by the rule and where "extraordinary cause" justifying a trial postponement has not been established).
[69] State v. Toney, 315 Md. 122, 134, 553 A.2d 696, 702 (1989) (quoting State v. Frazier, 298 Md. 422, 463, 470 A.2d 1269, 1290 (1984)(emphasis added)). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 50 ("Delay resulting from chronic congestion of the docket or from failure of the prosecutor to be prepared to go to trial within the allowable period should not be excused.").
[70] Dennis Laye, an experienced defense attorney practicing in Baltimore City, remarked, "I advise my incarcerated clients that they will wait at least a year, quite possibly two, before they get a jury trial." Personal Interview, August 9, 2013. *But see Frazier*, 298 Md. at 458, 470 A.2d at 1288 (explaining that Baltimore City at the time of the trial was not "chronically congested" as the "average disposition time for a criminal case [was] 139 days after *filing*" and, "the proportion of criminal cases which must be postponed by the administrative judge beyond the 180-day deadline, and in which the defendant did not seek or expressly consent to such postponement, [was] less than two percent."). At the time of publication, officials from the Circuit Court for Baltimore City and Judicial Information Systems in Annapolis, Maryland both indicated that the complete data of the sort cited in *Frazier* was not available. The circuit court did provide the statistic that the average time from filing to disposition was 228 days.
[71] State v. Bonev, 299 Md. 79, 81, 472 A.2d 476 (1984).
[72] CIRCUIT COURT OF MARYLAND FOR BALTIMORE CITY, http://www.baltocts.state.md.us/criminal/crim-pract.htm (last visited Sept. 19, 2014).

days, the first trial date should be set within sixty days after the arraignment, while cases that involve "serious personal injury or death" should have a trial date set within one hundred twenty days after the arraignment.[73] Despite standards implemented by both the American Bar Association and the National Association of Pretrial Service Agencies distinguishing detained defendants from those on bail for purposes of scheduling, Baltimore City's DCM system does not consider a defendant's incarceration as a factor.[74]

Regardless of the reasons for the delay, a defendant who cannot post bail is likely to wait a year or more before being given a trial. Maryland has a two-tier system, "with a limited jurisdiction court responsible for initial proceedings in felony cases and a general jurisdiction court receiving the case only after an indictment or other formal charging instrument has been filed . . . ."[75] In this system, "issues related to the defendant's custody status are typically addressed first in a limited jurisdiction court (at the defendant's first appearance following arrest) and again at the formal arraignment on a felony indictment or information in the original jurisdiction court."[76]

These "re-reviews" of custody status only occur in the Circuit Court of Maryland for Baltimore City upon a written motion by the defendant.[77] In

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[73] *Id.*

[74] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 2("In establishing statutes or rules for speedy trial and goals and practices for timely resolution of criminal cases, jurisdictions should . . . distinguish between defendants in detention and defendants on pretrial release. The time limits concerning speedy trial for detained defendants should ordinarily be shorter than the limits applicable to defendants on pretrial release."). *See also* THE NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 3 ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant.").

[75] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 58.

[76] THE NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 3.

[77] Md. R. § 4-216.1(c) **(**"[s]upervision of detention pending trial. In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.").

practice the onus is placed on the defendant to rebut an unspoken presumption of lengthy pretrial incarceration.[78]

The strain on the right to a speedy trial makes the need for a meaningful initial appearance even more pronounced. For reasons discussed below, CCTV bail review hearings lack the necessary safeguards and, therefore, result in erroneous deprivation of liberty.

III. DEHUMANIZING EFFECTS OF CCTV ON THE ACCUSED

A. How CCTV Communication Affects Perception

Videoconferencing has been proven to negatively affect perceptions of those depicted in several arenas both inside and outside of the criminal justice system. This section will discuss concepts in social science that explain how personal interactions, from brief encounters to relationships that develop over the course of a lifetime, are based on the ability to experience another's identity and allow people to form judgments of one another. Creating a social interaction in which one can perceive another's identity is what "engenders feelings of engagement or connectedness."[79] Social interactions are most authentic when individuals can experience one another's identity in a way that reminds them of their own humanity or when they are able to form an attachment to another.[80]

Videoconferencing, as a vehicle for communication, cannot replicate face-to-face communication in real time, despite constant innovation.[81] A technology-based mode of communication creates distance between the interactants, which deprives them of "the richness of social and sensory information that is available face to face."[82]

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[78] Md. R. § 4-252 ("[M]atters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise.").

[79] Bjorn Bengtsson et al., *The Impact of Anthropomorphic Interfaces on Influence, Understanding, and Credibility*, 32 ANN. HAW. INT'L. CONF. SYSTEMS SCI. 1, 3 (1999) ("Normal interaction is comprised of the identities of individuals involved in interaction. Identity creates an impression of the social, which in turn engenders feelings of engagement or connectedness.").

[80] *Id.* at 5 ("Social interaction with technology seems to arise from the general psychological tendency of people to response socially in situations in which they are reminded of their own humanity or social selves, or in which they form an attachment to another.").

[81] *See* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 267–69 (2008).

[82] Bengtsson et al., *supra* note 79, at 3 (Researchers found that "despite technological advances that are constantly expanding the frontiers of what is feasible, at present computes still interact awkwardly. They are unable to supply the kind of contingent and fully synchronous interaction that is present in face-to-face

This concept applies to the interaction that occurs when a defendant comes before a judge. The judge's social interaction with the defendant will influence the defendant's perceived credibility, truthfulness, and dangerousness.[83] If the interaction between the judge and defendant fails to develop or is critically impaired, they will be unable to adequately experience each other's humanity. In-person interactions are crucial to making these determinations because the synchronistic nature of interaction allows individuals to continuously tailor their speech and conduct to increase their appearance of credibility.[84] Therefore, it is essential that "the judge [] come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial."[85]

A psychological study found that participants who communicated through a computer program, as opposed to in-person, perceived the computer-based communication to be significantly less credible.[86] This study also found that in-person interactions were seen as "more sociable, likeable, dynamic, and truthful."[87] In another study, researchers found that mock jurors, who rated the testimony of child witnesses testifying in court against testimony via closed-circuit video, found the in-court testimony to be more believable, despite the fact that the closed-circuit video testimony was actually more accurate.[88] Child witnesses who testify in court have also been found to be more accurate, intelligent, attractive, and honest than closed-circuit video testimony.[89] The same study found that jurors were more likely to render a

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conversation. Moreover, the sheer interjection of an electronic medium may 'distance' interactants relative to face-to-face interaction. And computer agents, even in multimedia form, do not supply the richness of social and sensory information that is available face-to-face.").

[83] *See id.* at 266 ("All aspects of the witness's demeanor-including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other nonverbal communication-may convince the observing trial judge that the witness is testifying truthfully or falsely.").

[84] Bengtsson et al., *supra* note 79, at 4 ("It is plausible that humans have more behavioral resources at their disposal to achieve an appealing and credible demeanor and that they are better able to adapt their conversation if there are indications that their image is suffering.").

[85] United States v. Stanley, 469 F.2d 576, 582 (D.C. Cir. 1972).

[86] *Id.* at 12.

[87] *Id. at* 11 ("Consistent with the argument that social identification is a key consideration in assessing communication formats, partners were seen as more sociable, likeable, dynamic, and truthful when participants engaged in face to face than human-computer interaction.").

[88] Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 221 (2006).

[89] *Id.*

guilty verdict when the child witness testified in court.[90] Across disciplines, studies have found that real time interactions are more impactful than the video facsimile and the fact-finder's ability to assess characteristics of the defendant via video are critically impaired.[91]

Social interaction is comprised of infinite verbal and nonverbal cues. Videoconference bail reviews limit the amount of available information that would be useful to the judge in making a pretrial release determination.[92] Face-to-face communication allows participants to incorporate nonverbal expression into the interpersonal exchange.[93] A defendant's eye contact, posture, and gestures may not be accurately transmitted to the judge, yet these signals provide valuable insight into the defendant's character.[94] Research suggests that viewing gestures and other nonverbal communication can aid the viewer's comprehension and increase the likeability of the speaker.[95]

Specifically, research has found that eye contact influences the speaker's perceived credibility and trustworthiness.[96] Eye contact is one of the most important nonverbal gestures that can foster feelings of connectedness.[97] Witnesses who maintain continuous eye contact with their communication target were considered more credible than the witnesses who held a downward gaze.[98] Some individuals even associate a downward gaze with deception or distrust.[99] The logistics of a videoconference interaction makes eye contact impossible, further aggravating the judge's ability to form an adequate assessment of the defendant on the other end of the camera.[100]

Voice cues, as well as nonverbal expression, are also altered by the use of videoconference technology.[101] Video technology can diminish or amplify the defendant's affect, thus impacting the judge's perception of the

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[90] *Id.* at 221-22.
[91] *See* Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 879 (2010).
[92] Walsh & Walsh, *supra* note 81, at 268.
[93] Bengtsson et al., *supra* note 79, at 6 ("Additionally, humans have greater ability to be nonverbally expressive and energetic, which may gain them benefits in terms of dynamism.").
[94] Treadway Johnson & Wiggins, *supra* note 88, at 215.
[95] *Id.* at 222.
[96] *Id.* at 268–69.
[97] *Id.*
[98] *Id.* at 222 ("These findings are relevant in that a defendant participating in a videoconferenced proceeding might naturally direct his attention to the terminal present at his location, rather than directly into the camera, thus making him appear to be averting his gaze.").
[99] *Id.*
[100] Treadway Johnson & Wiggins, *supra* note 88, at 222; *see also* Walsh & Walsh, *supra* note 81, at 268–69.
[101] Treadway Johnson & Wiggins, *supra* note 88, at 216.

defendant.[102] Emotion is often conveyed in the lowest and highest vocal frequencies, which is partially lost in video transmission.[103] This hinders the defendant's ability to show remorse or demonstrate credibility.[104] A psycho-social study concluded: "Overall, it would appear that face-to-face interaction is best for generating positive social judgments and interpersonal relationships."[105]

The most troubling aspect of videoconference bail hearings is the physical distance between the judge and the defendant that causes the defendant to be dehumanized.[106] Impaired perception, diminished credibility, and inability to view nonverbal cues diminish the social interaction between the judge and defendant. Psychologists have found that "perceive[ing] another in terms of common humanity activates empathetic emotional reactions through perceived similarity and a sense of social obligation."[107] If "[m]oral actions are the products of the reciprocal interplay of personal and social influences[,]" then a judge, his perception of the defendant as a full, social person now impeded, is less likely to take the "moral action."[108] With CCTV, a judge will be less likely to consider an accused's life circumstances or the impact that incarceration will have on him, reducing his chance of pretrial release.[109]

B. Filling in the Gaps of Larose:[110] Empirical Evidence from the Cook County and Asylum Hearings

Others have argued that video bail reviews deny defendants due process.[111] *Larose*, a 1997 case, is the only opinion in the United States that deals with the constitutionality of video bail reviews.[112] The *Larose* court held that "bail hearings concern a legally protected interest," but reasoned that the petitioners failed to show that the video bail procedure resulted in a

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[102] *Id*.; *See also* Walsh & Walsh, *supra* note 81, at 268.
[103] Treadway Johnson & Wiggins, *supra* note 88, at 216.
[104] *Id*.
[105] Bengtsson et al., *supra* note 79, at 13–14.
[106] *See* Seidman Diamond, *supra* note 91, at 879. *See also* Walsh & Walsh, *supra* note 81, at 269.
[107] Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 200 (1999).
[108] *Id.* at 207.
[109] Walsh & Walsh, *supra* note 81, at 269.
[110] Larose v. Superintendent, Hillsborough Cnty. Corr. Admin., 702 A.2d 326 (N.H. 1997).
[111] Treadway Johnson & Wiggins, *supra* note 88, at 215 ("Some commentators have argued that, because of the effects of videoconferencing on the behavior and perceptions of participants in a criminal proceeding, its use amounts to a denial of due process for the defendant.").
[112] *Larose*, 702 A.2d 326.

"greater risk of erroneous deprivation of that liberty" as enumerated in the *Matthews v. Eldridge* test.[113] No data was presented to demonstrate that technology based hearings adversely affected the defendant's liberty interest.[114]

The *Larose* court considered the testimony of the petitioners' expert witness, a psychologist, who opined that "teleconferencing procedure would adversely bias a judge's opinion of a defendant" even though "he testified that he had never seen a tape of a video bail hearing, [] none of the articles to which he referred related directly to the issue, and that he had never spoken with either a judge or a defendant who had participated in such a hearing."[115] The court considered a defense attorney's testimony that "conducting a bail hearing by video affected his ability to be an effective advocate for a client 'to some extent[,]'" but that "he had no knowledge of how the video bail hearings were currently being conducted . . . ."[116]

A subsequent study demonstrates that videoconference bail review hearings result in significantly higher bails than live hearings.[117] In 1999, the Circuit Court of Cook County, Illinois issued a general order requiring that bail reviews, with limited cases excepted, "be conducted by means of closed circuit television."[118] In 2006, Locke Bowman of the MacArthur Justice Center filed a class action lawsuit, and a study was later conducted to analyze how video bail hearings affected outcomes.[119] Locke Bowman and Shari Diamond gathered information from the Cook County Clerk's Office regarding cases eight and one half years prior to the video bails and eight and one half years after.[120] A study of 645,117 cases revealed "average bond amount for the offenses that shifted to televised hearings increased by an average of 51% across all of the CCTV cases."[121] The same study noted that "increases of between 54% and 90% occurred for six major felonies subjected to the CCTV."[122] Through statistical analysis, the researchers concluded that the "change cannot be attributed to general trends or seasonal variations."[123] Cook County voluntarily halted its use of CCTV bond hearings on December 15, 2008.[124] One observer noted:

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[113] *Id.* at 329. *See infra* notes 225–26 and accompanying text.
[114] *Larose*, 702 A.2d at 329
[115] *Id.*
[116] *Id*. at 328–29.
[117] *See* Diamond, *supra* note 91, at 870.
[118] *Id.* at 883.
[119] *Id.* at 886.
[120] *Id.*
[121] *Id.* at 897.

[122] *Id*.
[123] Diamond, *supra* note 91, at 897 ("Indeed, results show that immediately after the [closed circuit television procedure] went into effect, the average bond amount for

> The substantial increases in bail levels that immediately followed the implementation of videoconferenced bail hearings in Cook County, and which occurred only for the offenses that shifted to videoconferenced hearings, provide precisely the evidence that was missing in *Larose*[125] and should raise questions about the harmful effects of videoconferenced hearings on defendants.[126]

In the context of immigration court, CCTV hearings have yielded similar results. A statistical analysis of the outcome of over 500,000 asylum removal hearings showed that in-person litigants fare substantially better than those who appear on camera.[127] Data from the Executive Office for Immigration Review indicated that the "grant rate for asylum applicants whose cases were heard in-person is roughly double the grant rate for the applicants whose cases were heard via [CCTV]."[128] It should be noted that even when controlling for the variable of counsel, there was still a statistically significant difference in outcome between live and televised asylum hearings.[129] Represented applicants who appeared in person showed a 38% chance of having their application granted, while those represented applicants who appeared via video had only a 23% chance of gaining asylum.[130]

IV. DUE PROCESS ARGUMENTS AGAINST CCTV FOR BAIL REVIEWS OF FELONY CASES

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the

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the non-treated felonies rose an insignificant 13% (see Figure 8 and Table 1), while the average for treated felonies rose a significant 51%.").

[124] *Id.*

[125] Larose v. Superintendent, Hillsborough Cnty. Corr. Admin., 702 A.2d 326, 329 (N.H. 1997) (holding that videoconference bail review hearings did not violate due process, as "[n]o evidence was offered to suggest that judges set bail at a higher amount for defendants who were arraigned by the video procedures than by in-person procedures.").

[126] Diamond, *supra* note 91, at 898.

[127] Walsh & Walsh, *supra* note 81, at 259.

[128] *Id.* at 271.

[129] *Id.* at 271–72.

[130] *Id.* at 272.

> Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[131]

Bail review hearings are intended to secure the accused's appearance at trial. Modern day conveniences are transforming the culture of bail review hearings, minimizing the role the defendant plays in one of the most crucial stages preceding his trial. At a videoconference bail review hearing, many defendants lose their freedom without being afforded procedural safeguards guaranteed by the Due Process Clause.[132] Without these necessary protections, the risk that defendants are deprived of liberty without due process of law increases. Pretrial incarceration impacts the financial, emotional, and physical well-being of detainees and undermines their confidence in the criminal justice system.[133]

This section will discuss the constitutional violations of CCTV bail review hearings, including the Sixth Amendment right to counsel, defendants' right to be *physically* present at the hearing, and their right to confront the witnesses against them. Videoconference hearings erode the safeguards inherent in live hearings, thereby denying the accused their right to due process of law when their liberty is on the line.

Not every defendant's experience is identical. Therefore, it is important to note that, while all of the violations identified are relevant, they exist collectively in varying degrees based on the particular circumstances surrounding the administration of the hearing. Due Process is a prism through which these constitutional and common law rights will be viewed. The rights discussed exist to protect liberty. When they are violated, the risk of erroneous deprivation of liberty increases.

A. The Sixth Amendment Right to Counsel and Ethical Considerations

Representing indigent defendants in their first appearance in Baltimore City is a task that takes on a frenzied pace. Public Defender Management arrives at Central Booking at around 7:15 a.m. to prepare the docket for the attorneys, who arrive shortly thereafter. Each docket consists of ten or more felony and misdemeanor cases. The attorneys study the charging documents, manually research their clients' criminal history; and attempt to call family and employers to verify defenses, ties to the community, and to inquire if bail will be posted on the defendants' behalf. By 11:00 a.m., the attorney is ready to meet with her clients and begin the interviews. A meaningful

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[131] McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).
[132] Walsh & Walsh, *supra* note 81, at 273.
[133] *See generally* Walsh, *supra* note 9, at 27 ("Even a short stint in jail can disrupt a person's employment, education, and housing and exacerbate existing health conditions (or create new ones) . . . ."). *See also* Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C. R.- C. L. L. REV. 259 (2013).

interview lasts about fifteen minutes, yet if the attorney expects to reach the courthouse from the jail before the docket begins, fifteen minutes per client is too much time spent.[134]

The time constraints CCTV imposes on an attorney undoubtedly have a critical impact on the effectiveness of his representation.[135] Every day public defenders in Baltimore City face a reoccurring dilemma: Whether to sacrifice time with their client[136] or their physical presence before the judge.[137] Neither situation is adequate. Once the initial client interview is over, the accused is banished from his attorney's side and denied access to counsel.

i. CCTV Denies the Accused Assistance of Counsel

The Sixth Amendment guarantees that a defendant has a right to the effective assistance of counsel,[138], and "unrestricted access"[139] thereof. In *Gideon v. Wainwright*, the Supreme Court guaranteed indigent defendants the right to appointed counsel; this right is extended to the states by the Due

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[134] CCTV bail review dockets occur in two courthouses: John R. Hargrove, Sr. Building (Southern), which is approximately 5 miles from Central Booking, and Borgerding District Court Building (Wabash), which is approximately 9 miles from Central Booking. The Southern docket is comprised of women, and begins at 1:00 p.m. . The Wabash docket begins at 2:00 p.m.

[135] In a private interview with Judge Braverman, he discussed a common perception: that private attorneys can often be more effective than public defenders in the bail review setting because they are only committed to a single client. A private attorney has more resources and time to verify the client's facts and is more likely to present compelling information that may appeal to the judge during the hearing. Interview with the Honorable Judge Nathan Braverman, District Court of Maryland for Baltimore City (June 18, 2013).

[136] Zachary M. Hillman, *Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference?*, 7 J. HIGH TECH. L. 41, 63 (2007). ("One public defender summed up the situation succinctly: 'An attorney can't be two places at once; we don't want to leave the client alone.'").

[137] Public Defenders are not mandated to be present at the accused's case before a judge. The decision to remain in Central Booking is purely one for the attorney to decide. *See* Thaxton, *supra* note 20, at 192 (footnotes omitted) ("[P]lacing the defense counsel in the jail with the defendant denies counsel the opportunity for a full exchange with the judge and the prosecuting attorney.").

[138] Strickland v. Washington, 466 U.S. 668, 687 (1984). The Supreme Court has not explicitly extended Sixth Amendment right to counsel to an initial bail review hearing. Rothgery v. Gillespie Cnty, 554 U.S. 191, 199 (2008) (requiring states to not unreasonably delay the assigning of counsel, not necessarily establishing a U.S. Constitutional right to counsel at bail reviews).

[139] Perry v. Leeke, 488 U.S. 272, 284 (1989) ("It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess."). *See generally* Geders v. United States, 425 U.S. 80 (1976).

Process Clause of the Fourteenth Amendment.[140] Effectiveness of counsel is interdependent on the defendant's presence, and as such, the defendant's right to counsel, explicitly provided for by Maryland Rule 4-216(e) et seq., will not be fulfilled during a video bail conference.[141]

The right to counsel first attaches upon the "initiation of adversarial judicial criminal proceedings . . . ," and then, only during a critical stage.[142] In 2012, the Court of Appeals of Maryland held in *DeWolfe v. Richmond* ("*DeWolfe* I") that the Public Defender Act mandates that the Maryland Office of the Public Defender provide representation to indigent defendants at bail review hearings, in addition to initial appearances.[143] Immediately after *DeWolfe* I[144] was decided, the Maryland General Assembly amended

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[140] Gideon v. Wainwright, 372 U.S. 335 (1963).

[141] The Supreme Court, in *Halbert v. Michigan*, highlighted data to support its conclusion that if indigent defendants, convicted after guilty pleas, did not have counsel to guide them through the State's complex appellate process, their right to appeal would be meaningless:

> [Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. . . . [S]even out of ten inmates fall in the lowest two out of five levels of literacy-marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article.

545 U.S. 605, 621 (2005) (holding that the Due Process and Equal Protection Clauses required the state to provide counsel for defendants who wanted to appeal to the state appellate court) (citing A. BECK & L. MARUSCHAK, *Mental Health Treatment in State Prisons*, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, pp. 3–4 (Jul. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf.); *see also* MD. CODE ANN., CRIM. PROC. § 16-209(a) ("Communications between an indigent individual and an individual in the Office or engaged by the Public Defender are protected by the attorney-client privilege to the same extent as though an attorney had been privately engaged.")).

[142] Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding the Sixth Amendment right to counsel did not attach in an identification that took place before the initiation of adversary judicial proceedings).

[143] DeWolfe v. Richmond, 434 Md. 403, 430-31, 76 A.3d 962, 978 (2012) (hereinafter "*DeWolfe* I"); Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i) (stating that representation shall be provided to an indigent individual in all stages of a proceeding, including a bail hearing before a district court or circuit court judge). This paper will not analyze whether, in fact, bail review is a critical stage, but it is assumed that the Maryland State Legislature found it critical enough to deem representation by counsel necessary during this stage.

[144] *See generally DeWolfe* I, 434 Md. 403, 76 A.3d 962; Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i).

the Public Defender Act to exclude the guarantee of counsel from the defendant's initial appearance before a commissioner.[145] The legislature, however, left intact the guarantee to assistance of counsel during the bail review stage.[146]

While the Supreme Court has not held bail review hearings to be a critical stage, in a recent 2013 case superseding *DeWolfe* I,[147] the same court found that Maryland criminal defendants have a due process right under the due process component of the Maryland Declaration of Rights to counsel at their initial bail hearings.[148] The decision holds significant implications for ensuring indigent defendants retain all constitutional safeguards guaranteed during all stages of the trial.[149] Early intervention by an attorney, such as during the bail review stage, has a substantial impact on the outcome of the pretrial hearing, as well as the outcome of the trial.[150]

In most cases "if the defendant has a constitutional right to be present . . . undoubtedly he has a constitutional right to . . . counsel at such time."[151] The case in Baltimore City poses a unique situation. The Maryland Legislature has implicitly reaffirmed its belief that bail review hearings are a critical stage. Just as the right to counsel flows from the right to presence, so does the right to presence flow from the right to counsel. Case law supports the inference that "an essential concomitant of a defendant's right to effective

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[145] Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(ii).

[146] *Id.*

[147] *DeWolfe*, 434 Md. 403, 76 A.3d 962, *on reconsideration by* DeWolfe v. Richmond, 434 Md. 444, 456, 76 A.3d 1019, 1026 (2013)(hereinafter "*DeWolfe* II") (further holding that indigent defendants are entitled to counsel before a commissioner).

[148] *DeWolfe* II, 434 Md. at 456, 76 A.3d at 1026.

[149] Steven Lash, *Hearing: Judges, Not Commissioners, Would Set Bail on Work Days*, MD. DAILY RECORD, Jan. 6, 2014. ("Del. Joseph F. Vallario Jr., who chairs the influential House Judiciary Committee, said Monday that he prefers the current bifurcated system of a bail hearing and review. But he added he recognizes the financial strain maintaining the two-tier system would have on the state's coffers following the high court's decision in *DeWolfe v. Richmond* . . . Vallario, however, said he remains deeply opposed to holding bail hearings by videoconference…. The justice system must make 'sure that a defendant has the ability to face a judge when he is being detained,' added the delegate, who also handles criminal defense work as an attorney in private practice.").

[150] Colbert, *supra* note 9 at 1758–61.

[151] Leckliter v. State, 75 Md. App. 143, 153, 540 A.2d 847, 852-53 (1988) (holding that the process of jury separation was merely a housekeeping measure and the defendant was not entitled to be present during that time and accordingly, not entitled to counsel at that time).

assistance of counsel" is the presence of the defendant.[152] The U.S. Supreme Court has recognized:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel…. [A defendant] is unfamiliar with the rules of evidence…. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[153]

The defendant is presumed innocent, but because he is incarcerated, he suffers from a deficiency of that presumption.[154] He will be presented to the court in an ill-fitting bright yellow jumpsuit. In the courtroom, he would be able to have counsel next to him to humanize him. An attorney cannot stand up next to the client when he is in the detention center.[155] The defendant becomes a miniature character on a screen instead of a human being.[156]

While the defendant is in a remote location, his lawyer cannot answer questions, and, perhaps most importantly, she cannot hear any variances her client has to the information provided by the Pretrial Services Representative

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[152] United States v. Washington, 705 F.2d 489, 497–98 (D.C. Cir. 1983) (defendant had the right to be present during voir dire, and it was error, albeit harmless, to exclude him from the process).

[153] Geders v. United States, 425 U.S. 80, 88–89 (1976) (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)). *See also* Hillman, *supra* note 136, at 63 ("One can scarcely imagine a more ineffective situation regarding counsel-client private matters than when the defendant and counsel are in different locations. The defendant relies upon his or her attorney to offer sound advice and to argue their case as effectively as possible. When a defendant is separated from his or her attorney, the situation changes dramatically. The reliance and trust created during the attorney client relationship may become suspended by the technology. If . . . the situation serves to 'chill' communications, the attorney may not be able to adequately argue on behalf of his or her client, thus rendering the defendant's situation less fair and just.").

[154] Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 50 (2005) ("There is a strong correlation between pretrial detainment and conviction."). *See also* BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 16, tbl. 13 (Dec. 2000), *available at* http://www.bjs.gov/content/pub/pdf/fdluc00.pdf.

[155] Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1130 (2004) ("The defense attorney cannot provide the kind of support that positioning in the courtroom offers, such as standing up with and next to the client when the client stands"). *See also* Hillman, *supra* note 136 ("One public defender summed up the situation succinctly: 'An attorney can't be two places at once; we don't want to leave the client alone.'").

[156] *See supra* Part IV (for a discussion of the psychological impact of video communication and the dehumanizing effects of CCTV on the accused).

or the Assistant State's Attorney.[157] The attorney renders assistance at bail review hearings by listening to her client's input and forming proffers and arguments based on the information he provides. Counsel may be familiar with the case and the anticipated arguments at the hearing, but the client frequently has firsthand information about the nuances of the information the judge is to consider, such as his "family ties, employment status and history, financial resources, . . . length of residence in the community, and length of residence in [the s]tate."[158] Even if the attorney is able to consult with the defendant in person prior to the hearing, the advocate will not know the Pretrial Services representative's or the State's recommendation until moments before the hearing, or, more likely, during the hearing itself.

District court judges in Baltimore City weigh the factors in determining a defendant's likelihood of returning to trial and his risk to public safety. One district court judge likened the situation to a "crystal ball," noting that "you can never know if a defendant will make bail, if in fact they will return to trial, or be a risk to the community."[159] This judge continued, "It is about balancing these factors and an attorney standing next to the defendant will not change the information that is provided."[160]

The issue we face is not whether counsel can "change" the information that is provided, but whether counsel can render effective assistance by eliciting helpful and relevant information from the client and contextualizing the facts in light of applicable law. CCTV in bail review hearings denies communication between the accused and his attorney. The affirmative act of administering CCTV hearings is a form of governmental interference directly related to the denial of counsel. Therefore, the principle established in

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[157] The Baltimore defendant would be located at the Central Booking at 300 E. Madison Street, which is 1.7 miles from the Eastside District Court, 5.3 miles from the John R. Hargrove, Sr. District Court, or 8.8 miles from the Borgerding District Court. In light of the proximity from the court to the holding facility, no argument can be made that videoconferencing eases the burden of transporting inmates over long distances. *See* Poulin, *supra* note 155, at 1162 ("Courts may employ videoconferencing even when it seems unnecessary. In some jurisdictions where the detention facility is close to the court, the court nevertheless employs videoconferencing.") (footnote omitted). *But see* Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 190-191 (2000) ("A notable example of how remote appearances can save time and money was the arraignment in New Jersey federal court of the alleged Unabomber on charges of, inter alia, first-degree murder. 'The problem was that Theodore J. Kaczynski was being held in Sacramento, California. Estimated costs of transporting the defendant were $30,000. Using [videoconferencing] the court conducted the arraignment at a cost of about $45.00'") (footnotes omitted).

[158] Md. R. § 4-216.

[159] Interview with the Honorable Judge John R. Hargrove, District Court of Maryland for Baltimore City, June 13, 2013.

[160] Interview with the Honorable Judge John R. Hargrove, District Court of Maryland for Baltimore City, June 13, 2013 (emphasis added).

Strickland does not apply when analyzing the defendant's denial of his Sixth Amendment right to counsel in the context of videoconference bail review.[161] The central issue becomes whether the State shall be permitted to interfere with and restrain the accused's right to assistance of counsel.

In *Geders v. United States*, the Supreme Court distinguised governmental interference with the right to counsel from counsel's failure to provide effective assistance.[162] The Court held that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[163] Analogous to *Geders*, CCTV displaces the attorney and his client from the traditional seating arrangement[164] where the two have the opportunity to converse privately, prior to, during, and after the hearing. Counsel's inability to represent his client effectively is due to the inherent flaws of a system that was created for the convenience of the government. The promise of *Gideon* is empty when the defendant is removed from his own bail review hearing.[165]

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[161] The *Strickland* Court held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 669 (1984).

[162] Geders v. United States, 425 U.S. 80 (1976) (holding that a trial judge's order preventing defendant from consulting his counsel during a seventeen hour overnight recess between his direct and crossexamination deprived defendant of his right to assistance of counsel and was invalid).

[163] Perry v. Leeke, 488 U.S. 272, 280 (1989), (citing Geders v. United States, 425 U.S. 80 (1976)).

[164] CCTV allows the defendant to remain in Central Booking where he will be seated amongst other detainees. Collectively, their image is transmitted through a video camera to the judge's courtroom. The judge's image is simultaneously transmitted to a TV screen where the accused can see him seated. The attorney has the choice to either remain in Central Booking, where the client is located, or to travel to the courthouse and physically represent her clients' cases before the judge. The latter clearly disconnects the two parties by miles. It may seem as if the attorney will be able to communicate with her client if she remains in Central Booking, but her client remains seated amongst others awaiting bail review and she is kept several feet away. The traditional seating arrangement is one in which the attorney and client are seated next to each other, at the same table, and the two are capable of having a private exchange as the hearing progresses. Simply by preventing the attorney and his client from having any communication, CCTV does not sustain the traditional role attorneys are intended to carry out when representing a client.

[165] *See Gideon*, 372 U.S. 335. *See also* Juliana B. Humphrey, *The Folly of Video Courts*, INDIGENT DEF. (NLADA, Washington D.C., Md.) Sept–Oct. 1998, V.2 No. 4. ("The NLADA Board of Directors in March 1990 resolved that the Association 'strongly' opposed the employment of [CCTV] for criminal arraignments because of the adverse impact on the accused's Sixth Amendment right to the effective assistance of counsel.").

Data demonstrates that representation by counsel positively impacts the outcome of the accused's bail review hearing, so the denial of counsel is a significant factor.[166] With CCTV bail reviews, attorneys have to choose whether to remain in the jail with their client during the hearing or to travel to the courthouse to be in the same room as the judge. Judge Cooper's experience is that representation is hindered if the attorney is not present in the courtroom, but he acknowledges the time constraints attorneys face, stating, "I would rather have the attorney remain with the client so he does not sacrifice important information-gathering time."[167]

Proponents of CCTV bail review hearings would suggest that the system operates fairly when the attorney remains at Central Booking with her client. However, there is a lack of consistent training and oversight of correctional officers who organize detainees for the CCTV hearings within Central Booking's videoconference room.[168] By contrast, bailiffs of the court are accustomed to the decorum of courtroom proceedings, and the presiding judge is able to instruct them at any time. When the courtroom is extended to the secured facility through videoconference technology, the judge is not privy to the hostile, demeaning, and potentially unconstitutional conduct of the correctional officers.[169]

During one observed instance of CCTV bail review, a correctional officer denied a public defender's request to speak with one of her clients in Central Booking before the videoconference system was activated and before the judge was seated at the bench. The judge was unaware of the controversy. The public defender, Megan Lewis, did not relent, and called for another correctional officer to intervene. Ms. Lewis and her client were eventually

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[166] Colbert, *supra* note 9; THE ABELL FOUND., *supra* note 9 (Defendants represented by counsel were "two and one-half times more likely to be released on their own recognizance . . . [t]he bail review judge reduced the bail amount for one out of every two [represented defendants], but only one out of every seven" who were unrepresented).

[167] Interview with the Honorable Judge Robert Cooper, District Court of Maryland for Baltimore City, June 12, 2013.

[168] *See, e.g.*, Ian Duncan et al., *Inside Jail Run From Within*, THE BALT. SUN (Apr. 28, 2013), http://www.baltimoresun.com/news/maryland/bal-black-guerrilla-family-tavon-white-prison-corruption-20130425,0,7483161.html; Roger Baysden, *Fix City Jail by Tearing Up Officers' 'Bill of Rights'*, THE BALT. SUN (May 21, 2013), http://articles.baltimoresun.com/2013-05-21/news/bs-ed-city-jail-letter-20130521_1_maryland-voters-correctional-officers-bill-appeals-board; *Mismanagement and Failed Leadership Led to the Debacle at Baltimore's Jail*, THE BALT. SUN (May 9, 2013), http://articles.baltimoresun.com/2013-05-09/news/bs-ed-prison-scandal-20130509_1_prison-guards-prison-system-failed-leadership.

[169] *See* NAT'L ASS'N PRETRIAL SERV. AGENCIES, *supra* note 10 ("The first appearance before a judicial officer should take place in such physical surroundings as are appropriate to the administration of justice" with commentary adding that the first appearance should be "conducted with the dignity and decorum that a court should convey.").

allowed to speak, but the two correctional officers hovered over their conversation, failing to recognize attorney-client privilege. Correctional officers maintain order within Central Booking—they are not charged with the duty of protecting the defendants' rights.

Blockades to communication are commonplace. These disputes are not always resolved in such a way that allows for the attorney to consult with her client. Valuable preparation time is lost, and arguing with correctional officers over basic client communication standards creates an unnecessary distraction from the administration of justice.[170]

Extending the courtroom to untrained personnel, outside of the judge's reach and view, has grave implications for the accused's constitutional right to access counsel. Whether intentional or unintentional, correctional officers often deny attorneys the opportunity to meet privately and to communicate with their client prior to, or during, a video bail docket.[171]

ii. Attorneys Cannot Fulfill the Ethical Duties of Advising and Advocating through a CCTV Proceeding

A lawyer has a duty to *advise*,[172] to *communicate* with,[173] and to *advocate* for her client at all times during the course of the representation.[174] A lawyer

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[170] "The right to a fair trial and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments extends to pre-trial detainees." Collins v. Schoonfield, 344 F. Supp. 257, 280 (D. Md. 1972) (citations omitted) (holding that inadequate facilities in attorney-client visiting rooms constituted denial of effective assistance of counsel when a pretrial detainee in city jail was prevented from communicating with his attorney as a form of discipline). *Collins* can be analogized to the method in which bail review hearings are currently conducted. The separation of the attorney from his client during the hearing hampers the attorney's ability to confer with his client and to riposte statements made by Pretrial Services. If the attorney is in the courthouse and the accused remains in Central Booking, CCTV disconnects the attorney from his client. In the case of Baltimore City, there is no alternative for the attorney and his client to confer during the bail review hearing, in private, without breaking privilege. Attorneys are not provided with a secured phone or fax line in which they can privately confer or share documents with their clients during the hearing. *See also* Jack Rubin, *Central Booking and Jails are Failing*, THE BALT. SUN, Aug. 7, 2012, http://articles.baltimoresun.com/2012-08-07/news/bs-ed-jail-letter-20120807_1_deplorable-conditions-baltimore-city-detention-center-interviews.

[171] This has been the experience of the Authors.

[172] Md. R. 16-812 (2005) (also codified and set forth in Appendix as MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.4 (2005)) (hereinafter "MLRPC"). *See also Ideals of Professionalism*, MARYLAND PROFESSIONAL CENTER, INC., http://www.marylandprofessionalism.org/images/pdf/2216633.pdf (last visited Sept. 16, 2014) ("[Lawyers should] keep a client apprised of the status of important matters affecting the client and inform the client of the frequency with which

cannot effectively communicate with her client over a closed circuit television system, as the defendant will not be able to confer in confidence.[175] All exchanges will be audible to the judge, the prosecution, the members of the public in the courtroom, and other inmates and jail personnel located in the room from where the defendant's images are being projected. Communications that would be privileged if the defendant were present become very public. All the defendant's statements will be recorded, and could be used against him.[176]

Specifically, the defendant, over CCTV, will not be able to benefit from counsel's advice about decorum.[177] The defendant may want to interject facts or arguments, and counsel will not, over video, be able to discretely

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information will be provided, understanding that some matters will require regular contact . . . .").

[173] See the MLRPC, *supra* note 172, R. 2.1. *See also* Preamble to MLRPC, *supra* note 172 ("[A]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.").

[174] *See* Preamble to MLRPC, *supra* note 172 ("[A]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

[175] Hillman, *supra* note 136, at 63 ("Furthermore, even if the defendant and counsel can speak over a private line, counsel will suffer from the same problems that a judge may encounter when video teleconference is used, i.e., the inability to detect non[]verbal [sic] cues and the problems caused by the camera-video setup. . . . [E]ven if privileged communications can be provided, the relationship and conversation between attorney and defendant may be chilled. This will contribute to a lower threshold of advice and communication which weighs unfairly against the defendant.") (footnotes omitted).

[176] Fenner v. State, 381 Md. 1, 27, 846 A.2d 1020, 1034 (2004) (holding that the trial court's admission of defendant's statements, made in response to the judge's question, "Is there anything you'd like to tell me about yourself, sir[,]" while defendant was not represented by counsel at an initial appearance, did not violate the Fifth or Sixth Amendments); Schmidt v. State, 60 Md. App. 86, 101, 481 A.2d 241, 248-49 (1984) (upholding trial court's admission of a defendant's statement made at a bail review); Cowards v. Georgia, 465 S.E.2d 677, 679, (Ga. 1996) (holding that defendant's statements made at bail review were properly admitted in trial); United States v. Ingraham, 832 F.2d 229, 237-39 (1st Cir. 1987) (affirming a trial court's admission of statements a defendant made during a "harangue" at his bail review); United States v. Melanson, 691 F.2d 579, 584 (1st Cir. 1981) (affirming a trial court's admission of exculpatory statements a defendant made while unrepresented at a bail hearing, and remarking that "factors pertinent to the granting of bail, such as 'the nature and circumstances of the offense charged' and 'the weight of the evidence against the accused,' *see* 18 U.S.C. § 3146, may inspire an accused to try to show, unadvisedly, that matters were different from what the government portrays, getting him into hot water as a result"). *See* United States v. Lentz, 524 F.3d 501, 523–24 (4th Cir. 2008) (discussing attorney-client privilege and the waiver of that privilege when the defendant knows his telephone discussion with his lawyer is being recorded).

[177] *See* Poulin, *supra* note 155 at 1129–30.

advise him about the propriety or benefit of doing so.[178] The defendant may feel emotional over the arguments or outcome of the hearing, and may express his disappointment in a way that reflects negatively on him.[179] One of counsel's tasks is to assist the defendant in presenting himself favorably; however, over a video connection, counsel can be of no help to her client in this task.

There is a clear deficiency within the system when an attorney cannot communicate with her client in confidence, and present the information he shares to the trier of fact. If the Public Defender Act mandates representation at bail review hearings, that representation must comport with the rules of ethics.[180]

B. Right of Defendant to be Physically Present

The right to presence has deep roots in English common law, where accused felons were traditionally denied the assistance of counsel.[181] Denial of counsel gave a defendant's right to presence "a position of even greater importance."[182] American courts did not adopt the English common law provision, as the concept of denying the accused representation was thought to be an "inherent irrationality of the English limitation."[183] The Fourth Circuit identified two prevalent rationales behind the defendant's right to be present:

> (1) [A]ssuring nondisruptive defendants the opportunity to observe—and . . . to understand—all stages of the trial not involving purely legal matters generally incomprehensible to the layman in order to prevent the loss of confidence in

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[178] *Id.* at 1130.

[179] "The risk, of course, is that if the defendant displays inappropriate behavior—any conduct not within the norm for the court—the court will evaluate the defendant negatively. That negative evaluation can precipitate specific negative findings (that the defendant poses a risk to herself or others) or simply prompt the court to exercise discretion against the defendant." *Id*. "[I]f the defendant feels compelled to respond to the prosecution's allegations, but counsel believes it would be imprudent for the defendant to address the court, the physical separation between defendant and counsel will make it more difficult for counsel to calm and silence the defendant." *Id*. at 1148 (footnotes omitted).

[180] *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 16-209 (West 2008) ("Communications between an indigent individual and an individual in the Office or engaged by the Public Defender are protected by the attorney-client privilege to the same extent as though an attorney had been privately engaged.").

[181] United States v. Gregorio, 497 F.2d 1253, 1257 (4th Cir. 1974), *overruled on other grounds by* United States v. Rolle, 204 F.3d 133 (4th Cir. 2000).

[182] *Id.* at 1258–59.

[183] *Id.* (*citing* United States v. Ash, 413 U.S. 300, 306 (1973)).

> courts as instruments of justice . . . [and] (2) protecting the integrity and reliability of the trial mechanism by guaranteeing the defendant the opportunity to aid in his defense.[184]

These rationales establish a framework for a fair and just trial, and the reasoning equally applies to physical presence in bail review hearings.[185]

Rule 43 of the Federal Rules of Criminal Procedure ("Rule 43") governs when a defendant is required to be present in federal proceedings.[186] The Fifth Circuit analyzed the plain meaning and context of Rule 43, concluding that "Rule 43(a) requires a defendant's 'presence' . . . at all stages of trial. The rights protected by Rule 43 include the defendant's constitutional Confrontation Clause and Due Process rights, and the common law right to be present."[187]

The law has developed such that the right for the accused to be physically present at a pretrial proceeding is intertwined with his right to counsel. The Maryland Rules also explicitly require that the "[p]ublic [d]efender shall provide representation to an eligible defendant at the initial appearance[,]"[188]

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[184] *Gregorio*, 497 F.2d at 1258–59.

[185] "Because many of the defendants at first appearance proceedings are likely to be in an anxious, confused, or physically or mentally unwell state (especially if they have been abusing drugs or alcohol, or have been involved in a physical altercation), it is especially important for the judicial officers and others who interact with them to make sure that they understand what is happening." *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, (commentary to Standard 2.2(c)): "At any pretrial detention hearing, defendants should have the right to: (i) be present . . . .").

[186] *See* United States v. Lawrence, 248 F.3d 300 (4th Cir. 2001) (defendant had right to be present during sentencing, physically, not by CCTV, despite the fact that he had acted aggressively during court proceedings in the past). *See also* United States v. Navarro, 169 F.3d 228 (5th Cir. 1999) (sentencing ought not take place unless the defendant is physically present, and the meaning of the word presence as used in Rule 43 is not satisfied by videoconference); United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983) (where the trial judge conducted a portion of voir dire at the bench, out of the defendant's hearing, defendant's exclusion from a portion of voir dire was harmless error; however, the court noted that a defendant's right to be present in order to assist counsel applied during voir dire).

[187] *Navarro*, 169 F.3d at 236.

[188] Md. R. 4-216(e)(2) ("Duty of Public Defender. Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of an initial appearance before a judge in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the initial appearance.").

and that the judge shall advise the defendant of that right.[189] In *Rothgery v. Gillespie County*, the appellant, originally unrepresented, was arrested and charged with being a felon in possession of a gun, despite the fact that he had no prior criminal history.[190] The court held the accused's right to counsel attached at his initial appearance, and that states cannot unreasonably delay assigning representation to indigent defendants.[191]

In *United States v. Wade*, the Supreme Court of the Untied States construed the Sixth Amendment right to counsel to apply to critical stages[192] of the proceeding.[193] While the Court has not explicitly held that a bail review hearing is a critical stage, counsel's representation is eviscerated without his client.[194] The accused is the center of the defense; for it is his experiences, his memories, and his life that are being discussed. The hearing is a fluid process where information is conveyed quickly, and an attorney needs continuous input from his client.[195] When counsel's representation is required, together both he and the defendant must stand together before the court. When counsel is not present, a defendant's belief that he has no input in his own trial amplifies:

> Criminal defendants, especially minorities, often feel they are "outsiders" rather than participants in the adjudication of justice. [They] may already distrust and feel intimidated by the criminal justice system, [and] CC[TV]provide[s] another bar to their full understanding of the proceedings and reinforce[s] their distrust of the system. CC[TV] only further magnif[ies] this distrust and alienation.[196]

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[189] Md. R.4-216(e)(3)(A)(i) (stating that the judge at a bail review hearing shall advise the defendant that he has a right to an attorney at that proceeding).
[190] Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008).
[191] *Id.* at 213.
[192] United States v. Wade, 388 U.S. 218 (1967) (holding a post indictment lineup in the absence of counsel was a violation of the Sixth Amendment, in which counsel would remove any taint of unfairness), *abrogated by* Wood v. State, 196 Md. App. 146, 7 A.3d 1115 (2010).
[193] "As early as *Powell v. State of Alabama*, supra we recognized that the period from arraignment to trial was 'perhaps the most critical period of the proceedings,' during which the accused 'requires the guiding hand of counsel' if the guarantee is not to prove an empty right." *Wade*, 388 U.S. at 225 (citing Powell v. Alabama, 287 U.S. 45, 54 (1932) (citations omitted)).
[194] *See infra* Part V.C.ii.
[195] Colbert, *supra* note 9 ("The [bail review] hearing took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel.").
[196] *See* Thaxton, *supra* note 20, at 197–98 (footnotes omitted).

While the Constitution does not guarantee the defendant a right to be confident in his proceedings,[197] the defendant's inability to comprehend the bail review process is further strained by videoconference hearings. The removal of safeguards, such as the right to counsel, furthers a defendant's distrust in the process.[198] A familiar admonishment to the defendant is, "[d]on't speak because what you say is being recorded and will be used against you." This is good advice under the circumstances; the defendant is miles away from his counsel, and his words, if audible at all, will be heard by the judge and made part of the court record.[199] The public defender collects extensive information from her client. Pretrial Service's proffer is not disclosed in advance of the CCTV hearing, however, so counsel is unable to communicate its contents to her client or to prepare a response to that proffer ahead of time. For this reason, the attorney should be within a whisper's distance during the hearing.[200]

A fair and just trial is kindled by an initial confidence vested in the pretrial stage.[201] The use of technology must be restrained to ensure fairness

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[197] United States v. Baker, 45 F.3d 837, 846 (4th Cir. 1995).

[198] *See* Thaxton, *supra* note 20, at 198 ("Keeping a defendant in her jail cell while her attorney is in the courtroom perpetuates a defendant's distrust of her attorney.").

[199] *See* Fenner v. State, 381 Md. 1, 27, 846 A.2d 1020, 1034 (2004) (holding that the trial court's admission of defendant's statements, made in response to the judge's question, "Is there anything you'd like to tell me about yourself, sir[,]" while defendant was not represented by counsel at an initial appearance, did not violate the Fifth or Sixth Amendments); Schmidt v. State, 60 Md. App. 86, 101, 481 A.2d 241, 248-49 (1984) (upholding trial court's admission of a defendant's statement made at a bail review); Cowards v. Georgia, 465 S.E.2d 677, 679, (Ga. 1996) (holding that defendant's statements made at bail review were properly admitted in trial); United States v. Ingraham, 832 F.2d 229, 237-39 (1st Cir. 1987) (affirming a trial court's admission of statements a defendant made during a "harangue" at his bail review); United States v. Melanson, 691 F.2d 579, 584 (1st Cir. 1981) (affirming a trial court's admission of exculpatory statements a defendant made while unrepresented at a bail hearing, and remarking that "factors pertinent to the granting of bail, such as 'the nature and circumstances of the offense charged' and 'the weight of the evidence against the accused,' *see* 18 U.S.C. § 3146, may inspire an accused to try to show, unadvisedly, that matters were different from what the government portrays, getting him into hot water as a result"). *See* United States v. Lentz, 524 F.3d 501, 523–24 (4th Cir. 2008) (discussing attorney-client privilege and the waiver of that privilege when the defendant knows his telephone discussion with his lawyer is being recorded).

[200] The language of Rule 43 of the Federal Rule of Criminal Procedure demonstrates, implicitly, that initial physical presence must be required where the rules affirmatively indicate that a waiver of presence can be made. United States v. Navarro, 169 F.3d 228 (5th Cir. 1999). *See also* Illinois v. Allen, 397 U.S. 337, 351 (1970) (trial judges should allow attorney-client communication when defendant is excluded).

[201] *See* Ake v. Oklahoma, 470 U.S. 68, 76 (1985).

for the accused.[202] The right of the accused to be physically present before a judicial officer is deeply rooted in our system of fostering fair and just trials for all who face the possibility of incarceration.[203]

Character evidence is a form of propensity evidence that is not permitted during trial in order to prevent the jury from forming inferences of guilt against the accused.[204] Bail review is the only time during the accused's proceeding that his character and prior bad acts are discussed substantively. At bail review, the accused's character is directly at issue, and his absence from the hearing prevents any opportunity to rebut representations made to the court.[205] A defendant suffers a severe indignity by being subjected to a discussion about his past acts while he bears the scrutiny silently.

Maryland's bail review hearings have adversarial components that cannot be avoided simply by labeling Pretrial Services a "neutral party." The charges presented against the accused contain evidence from the arresting police officer. A police officer is not a neutral party, as his duty is to ferret out crime. All too often, arresting officers have a motive to embellish on factual information to support an arrest.[206] Law enforcement agents'

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[202] Adding an insightful analogy to our understanding of presence and the intention of the legislature, Justice Widener observes: "The problem presented here is at least as old as the trial of Walter Raleigh, who begged the court in vain to bring Lord Cobham from the Tower. Sending the televised image of a witness from Butner to the City of Raleigh is no different than sending Cobham's writings from the Tower to Winchester." *Baker*, 45 F.3d at 850-51 (Widener, J., dissenting). The case of Sir Walter Raleigh is more prevalent than ever as it reminds parties within the criminal justice system why formalities such as physical appearance were deliberately created and protected. Any substitute for physical presence cannot be as meaningful.

[203] The Honorable Spottswood William Robinson III advocated for the defendant's right to physical presence during the bail review stage, stating: "The trial court is not only the traditional but also the superior tribunal for the kind of information gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial." United States v. Stanley, 469 F.2d 576, 581-82 (D.C. Cir. 1972).

[204] Lester, *supra* note 154, at 35–36 (citations omitted) ("The rules of evidence themselves prohibit the practice of using past actions to prove future actions. This certainly should not be a guiding principle when the future action has not and may never even occur. A presumption of guilt accompanies a defendant instead of a presumption of innocence. The presumption of guilt is not only for the charged crime but also for future crimes.").

[205] *Id.* at 35 ("Basing future actions on mere allegations of prior indiscretions necessarily requires a substantive discussion regarding the validity of the alleged crime. To have such a discussion at a point when discovery is minimal, and the availability of important witnesses is not required, places the defendant at a severe information disadvantage.").

[206] *See generally supra* note 40.

representations are given great weight at bail review hearings, and go largely unchallenged because the defense has not been provided with discovery.[207] The accused's presence is not only intertwined with his access to effective counsel, but also with his ability to challenge the probable cause determination by means of the Confrontation Clause.[208]

C. Violation of Confrontation Clause

The Supreme Court of the United States has interpreted the Confrontation Clause, with certain exceptions, to guarantee defendants a face-to-face meeting with witnesses appearing before the trier of fact.[209] CCTV violates a defendant's right to confrontation during a sentencing.[210] The term "present" under Rule 43 of the Federal Rules of Criminal Procedure means that, for the purposes of sentencing, a defendant must be at the same location as the judge.[211]

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[207] "Basing future actions on mere allegations of prior indiscretions necessarily requires a substantive discussion regarding the validity of the alleged crime. To have such a discussion at a point when discovery is minimal, and the availability of important witnesses is not required, places the defendant at a severe information disadvantage." Lester, *supra* note 154, at 35.

[208] A discussion of how CCTV violates the Confrontation Clause is included in a later section. *See infra* Part V.C.

[209] *Maryland v. Craig* and *Coy v. Iowa* are relevant to the interpretation of the right of confrontation in the context of videoconferences in which a witness was given dispensation from personal appearance in court. Maryland v. Craig, 497 U.S. 836, 862 (1990); Coy v. Iowa, 487 U.S. 1012, 1012 (1988) (holding that under the Confrontation Clause, witnesses can not appear in trial by video unless case-specific findings are made as to why the witness can not be physically present). In both, the child witness was given a pass on coming face-to-face with a defendant. The interest in protecting the complaining witness, due to precise findings of vulnerability, outweighed, in the Court's reasoning, the defendant's right to confront his accusers. In response to the Court's decision in *Maryland v. Craig*, Justice Scalia wrote a strong-worded dissent, in which Justices Brennan, Marshall, and Stevens joined. The four-justice opinion criticized the majority opinion that sanctioned Maryland's procedure of allowing an alleged child victim of sexual abuse to testify in trial via CCTV. Justice Scalia wrote, "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (emphasis in original).

[210] United States v. Navarro, 169 F.3d 228, 236–37 (5th Cir. 1999) (citing *Craig*, 497 U.S. at 849). In *Navarro*, the court held that sentencing by videoconference between judge and defendant violated rule requiring defendant's presence at sentencing. *Id.* Presence was interpreted to describe the defendant's physical presence in court. *Id.*

[211] *Navarro*, 169 F.3d at 236-37 (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)). *See supra* Part IV.A (detailing the argument regarding the interpretation of "presence.").

The Confrontation Clause does not guarantee the defendant absolute protection in a criminal trial, but it has some application to pretrial hearings, however limited, on a case-by-case basis.[212] In order to determine whether the Confrontation Clause is germane to claims arising from pretrial hearings, lower courts have considered: whether the pretrial hearing is adversarial, whether excluding the defendant from the hearing interferes with his opportunity to challenge evidence presented against him, and whether the pre-trial proceeding is considered a critical stage.[213] To establish the necessity for the Confrontation Clause's safeguard in bail review hearings conducted through CCTV, this section will apply the various factors identified by lower courts.

i. Pretrial Services Present Adverse Evidence Against the Accused

The Pretrial Services' representatives should present unbiased background information and provide an objective bail recommendation.[214]

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[212] As Scalia explained, the right of confrontation explicitly provides for "face-to-face" confrontation, but also guaranteed are "implied and collateral rights such as cross-examination, oath, and observation of demeanor. These are the specific trial procedures and 'the purpose of this entire cluster of rights is to ensure the reliability of evidence.'" *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

[213] The right of a defendant to be present as guaranteed by the Fourteenth Amendment is triggered "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964). "Rather than analyzing how the right to confrontation applies to pretrial proceedings, the Court instead decided 'it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination,' and they found that it did not." Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1608 (2010) (the author analyzes various interpretations of precedent by lower courts to determine whether the Confrontation Clause applies to pretrial hearings) (citations omitted).

[214] *See* Barry Mahoney Et Al., *Pretrial Services Programs: Responsibilities and Potential*, NATIONAL INSTITUTE OF JUSTICE ISSUES AND PRACTICES, 31-32 (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/181939.pdf.

> Subjective risk assessments are based on program staff members' consideration of the relative weight to be given to different factors. Objective risk assessments use instruments such as point scales or pretrial release guidelines that assign weights to variables such as nature and seriousness of the current charge, seriousness of prior record, employment status, housing situation, family ties, and the existence and nature of mental health or substance abuse problems. . . . All three principal sets of national standards in the pretrial release field favor the use of objective criteria, principally on the grounds that they are fairer and more consistent.

The Pretrial Services representative provides information to the court about the alleged crime and the defendant's life circumstances including employment, education, and residential details. The representative lists any prior occasions during which a presiding judge issued a "failure to appear" warrant for a defendant. The record of a failure to appear will be provided to the court regardless of the defendant's reason for not being present in court. To a first time bystander, Pretrial Services' role may seem indistinguishable from that of the State's Attorney, an adversarial party.[215] The judge gives great weight to Pretrial Services assessment of the accused's likelihood to appear for trial and the risk he poses to public safety.

The Confrontation Clause is sometimes thought to apply only during hearings under oath. Putting adverse witnesses under oath is a protection afforded to the defendant. The oath is a safeguard against unfettered, dishonest testimony without repercussions. Historically, it is made to God, and designed to evoke the scruples in a witness, as his lie would provoke an eternal consequence.[216]

Allowing extensive proffers while maintaining that the Confrontation Clause does not apply in the absence of an oath is an unfortunate misinterpretation of the purpose and meaning of the oath. In his dissent in *Maryland v. Craig*, Justice Scalia made clear that the oath was not a prerequisite to the right of confrontation, but an additional safeguard against false accusation, along with the right of cross-examination: "If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc."[217]

Crawford v. Washington established that the Confrontation Clause applies to all statements that are testimonial or made with an expectation that they are to be used in court.[218] Certainly, the statements Pretrial Services delivers during bail review hearings are testimonial, and absence of the oath does not change that fact. Therefore, the defendant should be afforded the right to be present in court to confront the Pretrial Services representative.

Shortly after the time of arrest, a commissioner determines probable cause by reviewing the arresting officer's statement of charges. Pretrial Services then furnishes the commissioner with a report, which will be considered at the defendant's initial appearance. Additionally, the report contains

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Id.

[215] This has been the experience of the Authors.

[216] *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

[217] *Id.* at 866.

[218] Crawford v. Washington, 541 U.S. 36, 50-53 (2004) (holding unanimously that the Sixth Amendment's Confrontation Clause applies equally to both in-court testimony and out-of-court statements).

information gathered during an interview of the accused by a Pretrial Services representative. If a subsequent request for a bail review is filed in circuit court, the information that was initially gathered pursuant to the interview is used again by Pretrial Services, and the accused will not be interviewed again. Counsel may provide updated information prior to the hearing; ultimately, however, the Pretrial Services representative will make extensive representations to the court regarding what family members said or left out.[219] The Pretrial Services representative is not under oath and will not be subject to cross-examination by counsel.[220]

At a bail review hearing, the Pretrial Services representative will provide information, as an officer of the court, about the defendant. Pretrial Services will use the charging document to make recommendations of bail, or denial of bail. The defendant has a right under the Confrontation Clause to confront the witnesses against him, and virtual confrontation is not sufficient. Allowing unsworn, un-cross-examined testimony during a bail review hearing, when the defendant's liberty interest is at stake, withers the rights of a defendant facing criminal charges.

ii. Excluding the Defendant from a Bail Review Hearing Interferes with his Opportunity for Effective Confrontation

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him...." The Supreme Court of the United States has made clear that it "is the accused, not counsel, who must be 'confronted with the witnesses against him . . . .'"[221] During a CCTV bail review hearing in circuit court, the accused may hear the statements made by Pretrial Services over the video feed. The Sixth Amendment guarantees the defendant a right to confront, not to listen. Though the accused may be in the same room as the Pretrial Services representative during a CCTV bail review hearing in district court, he is unable to directly provide information to his attorney in confidence as Pretrial Services states its findings. In both scenarios, the defendant is stifled by the inability to contest inaccurate statements.

By making representations to the court about the defendant's criminal history, perceived risk of flight, and dangerousness to society,[222] the

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[219] *See generally,* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 59-60.

[220] *Id.* at 13.

[221] Faretta v. California, 422 U.S. 806, 816 (1975) (holding that the Sixth Amendment grants the defendant the right to make his own defense).

[222] Md. R. 4-216(f)(1) (Maryland Rules provide a detailed list of "factors" to be considered at a bail review. In Baltimore City, an Assistant State's Attorney and an agent from the Pretrial Services Division of the Department of Public Safety provides extensive information.). *See also* 18 U.S.C. § 3142 (2008).

prosecutor and Pretrial Services' representative essentially become witnesses against the defendant.[223] The defendant is neither able to confront the prosecutor, nor the representative during a video conference bail hearing.

D. Violation of Right to Due Process of Law

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[224]

In *Mathews v. Eldridge*, the Court established a three prong balancing test to determine those "procedural safeguards due a person whose interests are to be adversely affected by government actions."[225] Courts should consider the following factors:

> (1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[226]

The Due Process Clause is used as a prism to reveal the rights guaranteed to a criminal defendant in protection of his liberty. Thus, the issue that CCTV generates is one of constitutional dimension: Whether the defendant's

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[223] *See* Poulin, *supra* note 1555, at 1148 (noting that "the prosecution and defense may present conflicting information" at a bail review hearing, and "[i]f the defendant is not in court, the defendant will be hampered . . . in assisting counsel to change the facts presented"). *See also* Thaxton, *supra* note 20, at 188 ("[B]y making representations to the court as to the defendant's criminal history, perceived risk of flight, and dangerousness to society, the prosecutor becomes a witness that the defendant is unable to confront due to the use of [CCTV].").

[224] MAGNA CARTA, Cl. 39 (1215), *referenced in*, A.E. DICK HOWARD, TEXT AND COMMENTARY, MAGNA CARTA (1964).

[225] Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (holding that the plaintiff satisfied the first prong of its test, acknowledging that the receipt of benefits was an important private interest—plaintiff accused the federal government of terminating his Social Security disability benefits without an evidentiary hearing prior to termination).

[226] *Id.*

presence at the bail review hearing would reduce the risk of an erroneous deprivation of liberty?

i. Private Interests Affected by CCTV

The accused has an interest in liberty pending trial. It follows that he also has an interest in a bail determination that is based upon a full and fair portrayal of his character and ties to the community. [227] Meaningful assistance of counsel is crucial to a fair hearing. The defendant's ability to obtain a fair bail determination is also dependent on the opportunity to effectively confront the adverse evidence presented against him.[228]

Presence allows for the procedural safeguards that are absent in CCTV hearings. Because counsel cannot effectively advocate for his client if the accused is not by his side, the Sixth Amendment right to counsel cannot be fulfilled without the accused's physical presence. Counsel cannot effectively advocate for his client if the accused is not by his side. As discussed above, the right to counsel and defendant's physical presence at the hearing are interdependent. Baltimore City affords indigent defendants the right to counsel during the bail review stage, but with CCTV, this right is hollow. The Maryland Legislature recognized the importance of representation during this stage, which is why the right to counsel during the bail review stage survived after *DeWolfe* I.[229] Moreover, the adversarial components of bail review necessitate the guidance of counsel, and the counselor's need to obtain input from her client at any time during the bail review hearing.

Individualized justice is lost at the bail review hearing when the accused is physically removed from the courtroom. The presumption of innocence is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[230] Where is the presumption of innocence when the accused is banished from the courthouse

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[227] United States v. Salerno, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting) ("If excessive bail is imposed the defendant stays in jail.").

[228] In Maryland, the preliminary hearing, which is controlled by Maryland Rule 4-221, generally occurs before a district court judge. This hearing is a "critical stage" of the criminal process, within the meaning of *Coleman v. Alabama*, to determine whether there is probable cause to require the defendant to stand trial on the charges. 399 U.S. 1, 9-10 (1970). *See also* Green v. State, 286 Md. 692, 695, 410 A.2d 234, 235 (1980); Hebron v. State, 13 Md. App. 134, 151 n.2, 281 A.2d 547, 556 n.2 (1971).

[229] Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i).

[230] *Salerno*, 481 U.S. at 763 (citing Coffin v. United States, 156 U.S. 432, 453 (1895)).

and is depicted in a jail surrounding?[231] Video bail dehumanizes an individual who is presumed innocent.[232]

The defendant's interest in liberty triggers a due process analysis. Unfavorable bail determinations lead to the deprivation of liberty. When a video bail hearing's removal of necessary procedural safeguards, revolving around physical presence, is the cause of an individual's deprivation of liberty, that deprivation is erroneous. The accused is not afforded his right to counsel when he is removed from counsel's side. He is denied his right to confront adverse evidence and witnesses when he is absent from the courtroom, where the information is being conveyed to the judge. He loses his presumption of innocence when he is depicted, not only in prison garb, but *inside the jail*.[233] Without presence, the accused is not afforded his full spectrum of rights.

ii. Risk of Erroneous Deprivation of Liberty

The second prong of the *Eldridge* test assesses the risk of the possibility that a person will be mistakenly deprived of their private interests because of the lack of additional or different procedural safeguards.[234] Generally, if the

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[231] "It is clear that the presumption of innocence must be maintained in the eyes of a jury. But a judicial officer is just as susceptible to bias as a juror. A judicial officer may be more vulnerable to the risk of implied bias based on the mere status of the defendant. A juror may only hear a handful of cases, but a judicial officer will hear thousands." Lester, *supra* note 154, at 9–10 (citations omitted). *See also* John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. TIMES: MAGAZINE (Aug. 17, 2011), http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?_r=3&scp=1&sq=willpower&st=cse&.

[232] Lester, *supra* note 154, at 6 ("For the presumption to have its full meaning, it must apply at all stages of the judicial process."). *See generally* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (holding that the right to counsel under the Sixth Amendment to the Constitution, made applicable to the States under the Fourteenth Amendment to the Constitution, requires counsel to be present when requested by the defendant during all critical stages of the proceedings, including, but not limited to, pretrial interrogations).

[233] *See generally* Lester, *supra* note 154, at 54 (explaining how the courts must consider the defendant's due process rights in all stages of the criminal proceedings, including bail review hearings).

[234] In *Mathews v. Eldridge*, the Court ruled that the administrative procedures in place did not violate the plaintiff's due process rights. The plaintiff was offered several methods to address the termination of benefits, but did not choose to employ them. 424 U.S. 319, 346 (1976). However, in *Goldberg v. Kelly*, the Court held that the governmental interest in conserving administrative costs were not sufficient to override public aid recipients' interest in procedural due process, even though the procedures did not permit recipients to present evidence, be heard in person or through counsel, or to confront adverse witnesses. 397 U.S. 254, 268 (1970). The *Eldridge* Court distinguished *Goldberg*, saying the crucial factor in *Goldberg* was

risk of error is minimal, the need for additional procedures diminish. In the alternative, if the risk is high, then additional procedures would be merited.

Videoconference systems disproportionately affect indigent defendants, and there has been no significant effort made by the state to address or remedy the disparate impact. As discussed above, jails are filled with individuals deep in poverty.[235] Indigent individuals accused of a crime should be situated in a manner similar to that of wealthy individuals accused of the same crime; however, their outcomes differ substantially. Rarely does an affluent individual remain in Central Booking long enough to have a bail review hearing; thus, CCTV disproportionately affects indigent defendants. The CCTV images of detainees in a jail setting place a stigma against indigent defendants, that their only identity is that of a criminal. Indigent defendants often cannot afford the bail amounts set by commissioners, but indigency alone does not make them deserving of a sub-par form of justice.

Each defendant's demeanor is different, each judge's perception varies, and never has a video system's transmission been ideal. The risk of error in a video bail review hearing is not minimal. Where the defendant is physically absent, there is a significant risk that the defendant's liberty will be erroneously deprived during a bail review hearing. To avoid the risk of wrongfully depriving the accused of his liberty before being found guilty, pretrial incarceration should be the last resort.

iii. Governmental Interests

The third prong of the *Eldridge* test scrutinizes the government's interests.[236] The *Eldridge* Court made clear that when the procedure at issue was created to alleviate administrative burdens, then a court considers whether the need for "enhanced due process" is merited by the need to assure individuals that administrative actions are procedurally just.[237] Administrative costs should not be considered if enhanced due process is merited. However, if the costs of the additional procedures outweigh the benefits, then the government should not be required to use additional resources.

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that welfare recipients are in dire need and assistance is only given to persons on the very margin of subsistence, whereas eligibility for social security disability is not based on financial need. The *Eldridge* Court also recognized an additional factor that adds dimension to its analysis:the fairness and reliability of existing procedures, and the probable value of additional procedural safeguards. *Eldridge,* 424 U.S. at 340. *Goldberg* held that access to financial aid that sustains ones ability to obtain food and shelter are quintessential elements of human survival. *Goldberg*, 397 U.S. at 364.

[235] *See generally* Walsh *supra* note 9 and accompanying text.

[236] *Eldridge*, 424 U.S. at 335.

[237] *Id.* at 348.

The administrative costs associated with conducting video bail review hearings should not be given any weight. CCTV deprives the accused of essential safeguards, which assist him in obtaining a favorable bail determination. Enhanced due process (i.e., allowing a non-disruptive defendant to be physically present) is required to eliminate the risk of generating a disparate impact on the impoverished.

In *United States v. Salerno*, the Court evaluated the constitutionality of the Bail Reform Act of 1984.[238] The Bail Reform Act requires "courts to detain[,] prior to trial[,] arrestees charged with certain serious felonies if the Government demonstrates by *clear and convincing evidence* after an *adversary hearing* that no release conditions 'will reasonably assure… the safety of any other person and the community.'"[239]

Regarding the respondent's Eighth Amendment claim, the *Salerno* Court concluded, "Where Congress has mandated detention on the basis of some other *compelling interest*—here, the *public safety*—the Eighth Amendment does not require release on bail."[240] Justice Rehnquist's opinion reasons that the Eighth Amendment "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail."[241]

The respondent in *Salerno* argued that pretrial detention of the sort contemplated in the Bail Reform Act required substantive due process; however, the Court disagreed, holding that procedural due process was all that was required.[242] The Court reasoned that the Bail Reform Act's aim was regulatory in nature, as it was designed to prevent crimes committed by those released on bail, and not to punish those held in pretrial detention.[243]

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[238] United States v. Salerno, 481 U.S. 739, 741 (1987).
[239] *Id.* at 739 (emphasis added).
[240] *Id.* at 740 (emphasis added).
[241] *Id.* at 754 (quoting Carlson v. Landon, 342 U.S. 524, 545 (1952)).
[242] *Salerno*, 481 U.S. at 752. The respondent also unsuccessfully argued that The Bail Reform Act violated the Eighth Amendment. The *Salerno* Court stated, "Where Congress has mandated detention on the basis of some other *compelling interest*—here, the *public safety*—the Eighth Amendment does not require release on bail." *Id.* at 740. Justice Rehnquist's opinion reasoned that the Eighth Amendment "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." *Id.* at 754 (quoting Carlson v. Landon, 342 U.S. 524, 545 (1952)).
[243] Justice Rehnquist's argument has been called into question, as Justice Marshall points out: "The absurdity of this conclusion arises, of course, from the majority's cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition." *Salerno*, 481 U.S. at 760 (Marshall, J., dissenting). Justice Marshall also comments on the majority's logic in denying the claim to substantive due process on the

The Court explained that a compelling governmental interest may outweigh an individual's liberty interest, stating, "[f]or example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."[244] *Salerno* set the benchmark for compelling governmental interests in the context of bail review.[245] A reasonable inference can be made that the state's purported interests in replacing live bail review hearings with video broadcasts include promoting administrative convenience, save transportation costs and security fees, and reduce the danger of harms associated with the transportation process. On the other hand, the defendant's liberty interest is fundamental, and not easily outweighed.[246]

Maryland Rule 4-231(b) mandates that a "defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial."[247] In applying the *Salerno* standard, the exception carved out for video bail in Rule 4-231(d) deprives defendants of procedural safeguards.[248] The government's interest in conducting CCTV bail hearings is neither compelling nor narrowly tailored. The risk of erroneous deprivation of liberty runs high when the accused is not present at his own hearing.

Presumably the state is interested in fostering efficiency. Efficiency is generally met by harmonizing quantity and quality. However, the state is employing procedures that focus on the quantity, not the quality of hearings. Proponents of CCTV allege that videoconference systems are a step in the right direction to meeting the *Riverside* standard.[249] However, the state's rationale for utilizing CCTV is not prompt presentment, but convenience and brevity. CCTV bail hearings have not brought Baltimore City any closer to

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grounds of an Eight Amendment violation for excessive bail, stating: "The Eighth Amendment, as the majority notes, states that '[e]xcessive bail shall not be required.' The majority then declares, as if it were undeniable, that: 'This Clause, of course, says nothing about whether bail shall be available at all.' *If excessive bail is imposed the defendant stays in jail.* The same result is achieved if bail is denied altogether. Whether the magistrate sets bail at $1 billion or refuses to set bail at all, the consequences are indistinguishable." *Id*. at 760–61 (Marshall, J., dissenting) (emphasis added) (citations omitted). *See also* Lester, supra note 154, at 32–33 (citations omitted) ("The *Salerno* majority did not dispute the premise that punishment with less than proof beyond a reasonable doubt is unconstitutional; it merely found that the detainment set forth pursuant to 18 U.S.C. § 3142 was not punishment, but a regulation. The *Salerno* court thus indirectly recognized this idea when it characterized pretrial detention as regulatory rather than punitive since it would be unconstitutional to punish with the limited proof offered at a pretrial detention hearing.").

[244] *Salerno*, 481 U.S. at 748.

[245] *Id.* at 739.

[246] *Id.* at 750.

[247] Md. R. 4-231(b).

[248] Md. R. 4-231(d).

[249] *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

satisfying the *Riverside* benchmark, requiring the initial appearance be held within 48 hours of detention.[250]

In *United States v. Baker*, the Fourth Circuit noted that "the goal of a criminal proceeding is to uncover the truth by examining rigorously the reliability of conflicting evidence presented and then engaging in extensive fact-finding. The rights of cross-examination and confrontation, as well as the right to effective assistance of counsel, are all directed toward this goal."[251] Quality is not produced by enhanced television resolution, but by effective counsel and the right to confrontation. Quality is promoted by the safeguards that prevent the government from turning an individualized hearing into a dehumanizing, hurried cattle call. Due Process demands that indigent defendants are present, in the flesh, at bail review hearings, as their liberty interests outweigh the government's interest in alleviating administrative burdens.

CONCLUSION

Studies from the Cook County and Asylum hearings demonstrate the consequences of videoconference bail review hearings for the accused.[252] As discussed above, the defendant's presence is critical. Physical presence adds integrity to the pretrial proceeding, and is the foundation upon which a defendant's constitutional rights, ensuring a fair and just trial, are based. If the accused is not present, assistance of counsel cannot be effective and confrontation is not possible. Judges making bail determinations should consider that there are months, and potentially years, of pretrial incarceration at stake for each defendant. [253] When making these important decisions that so profoundly affect people's lives, the accused's humanity is a critical factor. Their families, jobs, rental payments, health considerations, and human need for freedom, comfort, and privacy are all relevant to a judge's

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[250] *See id.*; Ian Duncan, *Lost in Jail, Defendants Wait Weeks for Chance at Freedom*, THE BALT. SUN (Mar 16, 2014), http://articles.baltimoresun.com/2014-03-15/news/bs-md-forgotten-in-jail-20140315_1_brewer-defendants-prosecutors.

[251] United States v. Baker, 45 F.3d 837, 844 (4th Cir. 1995) (citing Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.")).

[252] *See* Seidman Diamond, *supra* note 91 at 898. *See also* Walsh & Walsh, *supra* note 81, at 271.

[253] Mason v. Cnty. of Cook, 488 F.Supp. 2d 761, 765 (2007) (denying the motion to dismiss Plaintiff's Sixth Amendment and Due Process claims, remarking that bail "is important to anyone charged with an offense—there are days, weeks, or even months of incarceration at stake[—and i]f Plaintiff or others are denied bail because of unconstitutional procedures, they may be entitled to the equitable relief they seek here").

decision. By excluding an accused from his own bail hearing, his humanity and dignity are forgotten, as he is out of sight and out of mind. Bail amounts reflect the imbalance. The accusation and the defendant's criminal history should not be the only factors a judge considers in reaching a bail determination. There is a person on the other side of the camera who deserves to breathe the same air as the judge deciding his fate.

Videoconferencing affected Mr. Johnson's outcome. Constitutional safeguards, inherent in live bail review hearings, arguably made the difference between Mr. Gibson receiving a favorable bail determination and Mr. Johnson remaining incarcerated pending trial. The Sixth Amendment rights to counsel and confrontation are intended to protect liberty, and are not designed for the convenience of the state.

Pretrial incarceration has reached astronomical levels nationally. Baltimore City, out of the twenty cities with the largest jails, locks up the largest percentage of its population in the country.[254] Ninety percent of those in the Baltimore jail complex are awaiting trial, and therefore are presumed innocent until proven guilty.[255] Bail review hearings test the presumption of innocence after *Salerno* and that presumption needs championing.[256]

Videoconference bail review hearings are one brick in the wall around the jail, which, according to recent data collection and scholarship by professors from Northwestern University, result in 51% higher bail amounts than their live counterparts.[257] Many jurisdictions face some form of automated justice, which tends to dehumanize the accused. The trend towards the integration of CCTV in criminal proceedings raises an important issue concerning the proper balancing of judicial efficiency and a criminal defendant's constitutional rights. This article seeks to give a voice to indigent defendants who have become disproportionately subject to a subpar process.

In *DeWolfe v. Richmond*, Maryland's highest court affirmed the guarantee of counsel for indigent defendants during bail review hearings.[258] However, the Maryland Rules authorize the use of CCTV during such proceedings when held in district court, but not in circuit court.[259] Therefore, in the district court context, the holding in *DeWolfe* I and the Maryland Rules act in opposition to each other. This opposition exists because the use of video in an adversarial hearing deprives the defendant of his right to counsel and confrontation.

It is expected that criminal procedure will make technological advances, but these advances must operate to increase efficiency without sacrificing

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[254] *See* Walsh, *supra* note 9, at 1.
[255] *Id*. at 9.
[256] United States v. Salerno, 481 U.S. 739, 766 (1987).
[257] *See* Seidman Diamond, *supra* note 91, at 892.
[258] DeWolfe v. Richmond, 434 Md. 403, 439, 76 A.3d 962, 983 (2012).
[259] *See* Md. R. 4-231.

fairness. The core concerns that go to the heart of fair and just criminal proceedings and human dignity are being increasingly overlooked as technology advances. CCTV leaves accused individuals without constitutional safeguards and makes them vulnerable to an erroneous deprivation of liberty, which uproots the organization of their lives and negatively affects trial outcomes. As Bryan Stevenson correctly stated:

> We will ultimately not be judged by our technology, we won't be judged by our design, we won't be judged by our intellect and reason. Ultimately, you judge the character of a society, not by how they treat their rich and the powerful and the privileged, but how they treat the poor, the condemned, the incarcerated.[260]

CCTV bail reviews strip away the rights and liberty interests of accused individuals only to further administrative convenience. Sustaining all constitutional safeguards in a meaningful way will ensure fairness and integrity, recognizing the humanity of the accused and their inalienable right to liberty.

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[260] Bryan Stevenson, *We Need to Talk About an Injustice*, TED TALKS (March 2012), http://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice.html. Addressing the Supreme Court of the United States, Abe Fortas summed it up best during oral argument in Gideon v. Wainwright:

> I do believe that in some of this Court's decisions there has been a tendency from time to time, because of the pull of federalism, to forget, to forget the realities of what happens downstairs, of what happens to these poor, miserable, indigent people when they are arrested and they are brought into the jail and they are questioned and later on they are brought in these strange and awesome circumstances before a magistrate, and then later on they are brought before a court; and there, Clarence Earl Gideon, defend yourself.

Oral Arg. Tr. at 4, *Gideon*, 372 U.S. 335 (1963).