

A blue-tinted background image of a statue of Lady Justice, blindfolded and holding a sword and scales of justice.

Day One Representation

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Pamela R. Metzger, Deason Criminal Justice Reform Center



SMU Dedman School of Law



CARTER LAW OFFICE

KOSCIUSKO, MS



Right to Counsel



STAR Justice



Prosecutorial Discretion





WELCOME TO

DAY ONE

JUSTICE STARTS HERE

Values – Serving People in Crisis

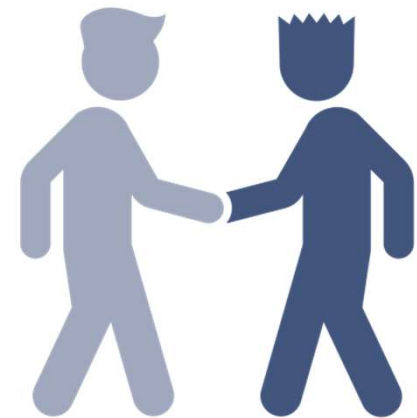
- Individual rights (Constitution)
- Case outcomes
- Public policy



Philosophy



Centered on:
• **Client**



Philosophy



Centered on:

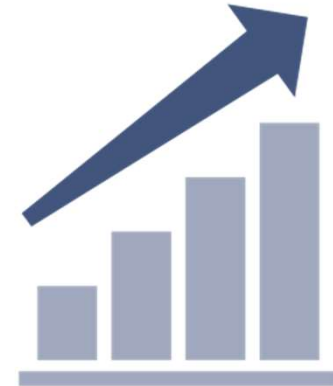
- **Client**
- **Constitution**



Philosophy

Centered on:

- **Client**
- **Constitution**
- **Evidence**



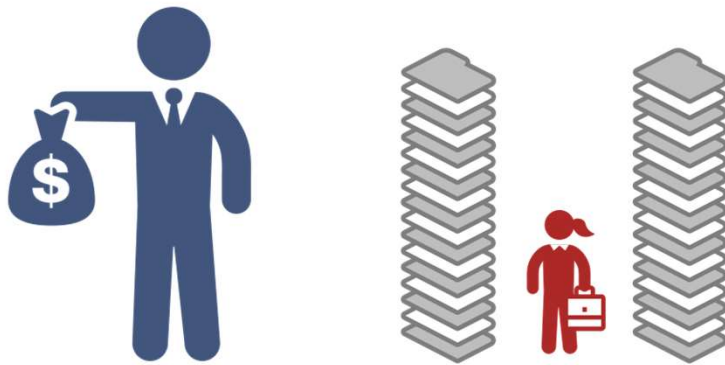
Key Questions

If public defense attorneys were **fully resourced**



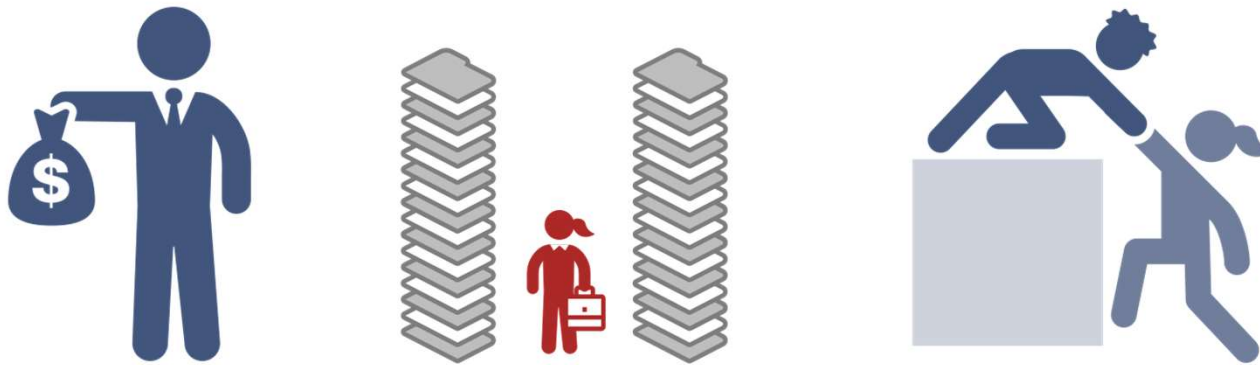
Key Questions

If public defense attorneys were fully resourced and had **reasonable caseloads**,



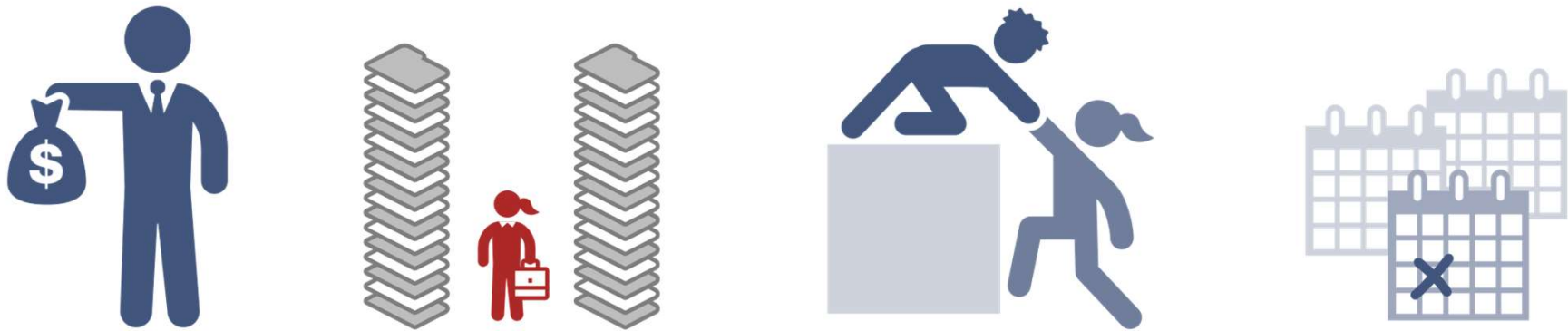
Key Questions

If public defense attorneys were fully resourced and had reasonable caseloads, what would they **want to do for their clients**



Key Questions

If public defense attorneys were fully resourced and had reasonable caseloads, what would they want to do for their clients . . . and **when**?



Day One Facts



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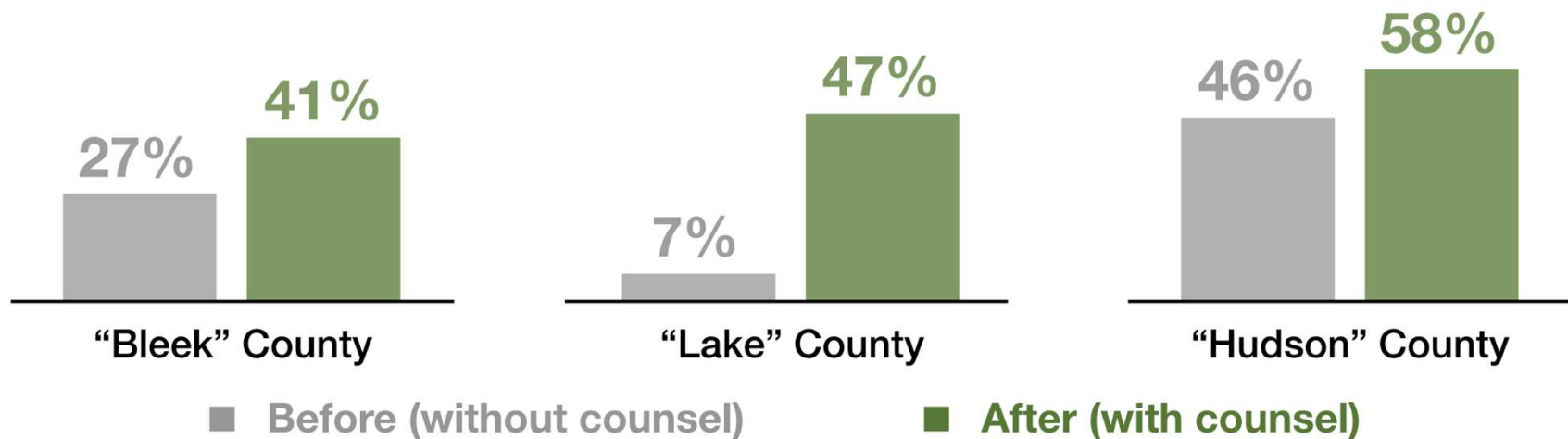
Day One Practice Protects the Constitution



Maryland's first year providing counsel at first appearance... judges **dismissed 3,500 cases** for no probable cause.

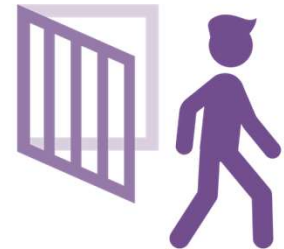
Day One Practice Increases Likelihood of Release

In Three Rural New York Counties, Providing Counsel at First Appearance Increased Pretrial Release



Day One Practice Improves Release Conditions

- Increased likelihood of ROR
- Reduced amounts of bail
- Fewer and less stringent conditions



Day One Practice Increases Likelihood of Release



Santa Clara Public Defender Study

- **Compared outcomes counsel**
 - **Counsel before arrest and first appearance**
 - **Counsel at first appearance**
- **Defendants who had earlier access to counsel**
 - **Were more likely to be released pretrial**
 - **Spent less time in detention**

Day One Practice Increases Likelihood of Release



Santa Clara Public Defender Study

- Compared outcomes counsel
 - Counsel before arrest and first appearance
 - Counsel at first appearance
- Defendants who had earlier access to counsel
 - Were **75%** more likely to be released pretrial
 - Spent **79%** less time in detention

Day One Practice Mitigates Racial Bias

Most people associate traffic stops with tickets, but traffic stops also lead to arrests. A 2019 study of four million police stops in California showed that **police officers jailed Black people after traffic stops almost twice as often as they jailed White people.**²²

Arrested after traffic stop²³



The sooner counsel enters the case, the sooner they can help Black arrestees and their families reclaim their lives.

Day One Practice Mitigates Racial Bias



The Philadelphia Experiment: Bail advocates

Non-lawyer bail advocates randomized

- Collected information about arrested people and their cases
- Familiarized them with pretrial process
- Connected with family members, friends, and services

Lawyers at initial appearance

- Individualized bail arguments
- Tailored to clients' circumstances and needs

Day One Practice Mitigates Racial Bias



The Philadelphia Experiment: Bail advocates

Making bail advocates available to all people facing criminal charges would eliminate the increases in racial disparity observed due to pretrial detention.

Day One Practice Saves Lives



Between 2000-2019,

20,413 people died in local jails.

Day One Practice Saves Lives



About **40% of jail deaths**

Day One Practice Saves Lives



About **40% of jail deaths** occur within
a person's **first 7 days** in custody.

Day One Practice Saves Lives



People who died in jail of drug or alcohol intoxication were incarcerated a median of **just 1 day.**

Day One Practice Saves Lives



Suicide accounts for 30% of jail deaths.
12% of jail suicides occur within 24 hours.
44% occur within the first week.

Day One Practice Saves Lives



**People held for drug offenses
account for 10% of jail suicides.**

Day One Practice Saves Lives



People held for drug offenses account for 10% of jail suicides.

People held for property and public order offenses account for 19% of jail suicides.

Day One Practice Saves Taxpayers Money



Hypothetical

20 arrests each week

12 days between arrest and preliminary hearing

50% released at a preliminary hearing

Day One Practice Saves Taxpayers Money



Hypothetical

20 arrests each week

12 days between arrest and preliminary hearing

50% released at preliminary hearing

At an average cost of **\$65.35** per jail bed, per night, the jurisdiction would spend **\$407,784** to detain people between initial appearance and preliminary hearing.

Day One Practice Saves Taxpayers Money



**Release at initial appearance...would
save the jurisdiction **\$339,820****



Day One Practice Saves Taxpayers Money



Release at initial appearance

Day One Practice Improves Public Safety



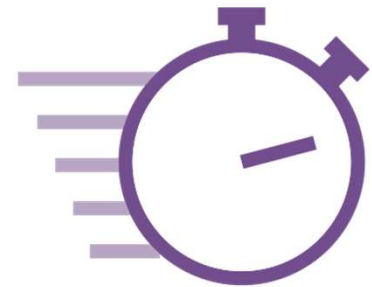
The Philadelphia Experiment: Bail Advocates

- Reduced incidence of bail violation by **64%**
- Reduced pretrial reoffending by **41%**
- Reduced and overall future offending **26%**

Day One Practice Reduces Recidivism

Kentucky Study

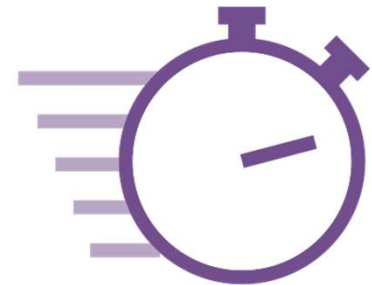
- Low-risk defendants
- 24 hours vs. 2-3 hours



Day One Practice Reduces Recidivism

Kentucky Study

People detained 2-3 days were **40%** more likely to reoffend than people released within 24 hours.

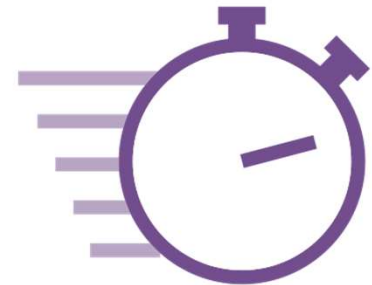


Day One Practice Reduces Recidivism

Kentucky Study

People detained 2-3 days were **40%** more likely to reoffend than people released within 24 hours.

People detained more than 30 days were **74%** more likely to reoffend.



Resources



Quattrone Center Amicus Brief summarizing
this research

<https://penn.link/farella>



Day One Strategies



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Arrest, Booking, and Prompt Appointment

- Self-surrender is always better
- Appointment before appearance
- Meeting before initial appearance



Public Defender – Appointment of Counsel



- Arresting authority provides affidavit.
- Appointment is automatic.
- Judicial role is limited.

Public Defender – Appointment of Counsel



1. Arresting authority provides affidavit

“When any person shall be arrested and charged . . . the arresting authority **shall afford such person an opportunity to sign an affidavit stating that such person is an indigent and unable to employ counsel.”**

Miss. Code § 25-32-9(1)

Public Defender – Appointment of Counsel



2. Appointment is automatic

“Upon the signing of such affidavit by such person, the public defender shall represent said person.”

Miss. Code § 25-32-9(1)

Public Defender – Appointment of Counsel



3. Judicial role is limited

- a. **Review: Affidavit “shall be a part of the record [and] subject to review by the appropriate court.” § 25-32-9(1)**

Public Defender – Appointment of Counsel



3. Judicial role is limited

- a. Review: Affidavit “shall be a part of the record [and] subject to review by the appropriate court.” § 25-32-9(1)
- b. Rejection: “if the appropriate court finds that the defendant is not indigent, said court shall terminate the representation....” § 25-32-9(1))

Public Defender – Appointment of Counsel



3. Judicial role is limited

- a. Review: Affidavit “shall be a part of the record [and] subject to review by the appropriate court.” § 25-32-9(1)
- b. Rejection: “if the appropriate court finds that the defendant is not indigent, said court shall terminate the representation....” § 25-32-9(1)
- c. **Waiver Allocution**: If defendant desires to act as his/her own attorney, the court shall conduct **an on-the-record examination** of the defendant.” Rule 7.1(c).

Other Appointments of Counsel

Rule 7.1(b) “appointment ... shall be made **no later than ..first appearance**”

Rule 7.1(a) “the right to be represented shall include the right to consult in private with an attorney...**sufficiently in advance ... to allow adequate preparation therefor.**”

Consultation Before Appearance

Now that I'm appointed, I'd like a few minutes to speak with my client.



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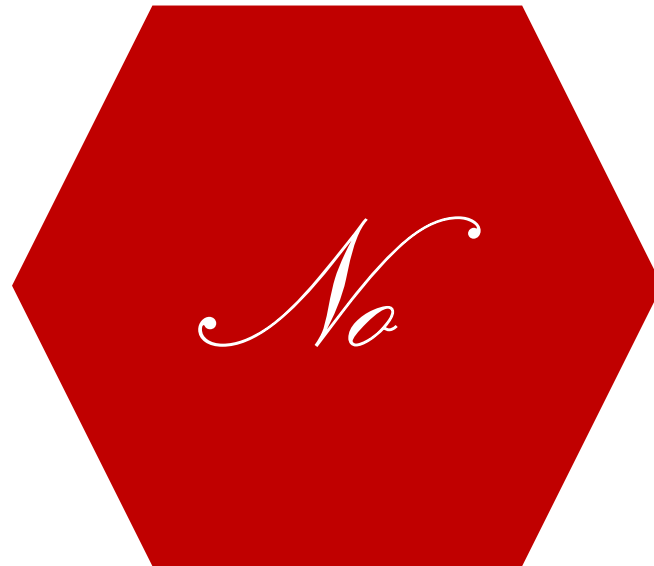
Judge, I know you want to get this right. Once I've spoken with my client, I'll be able to give you the information you need.



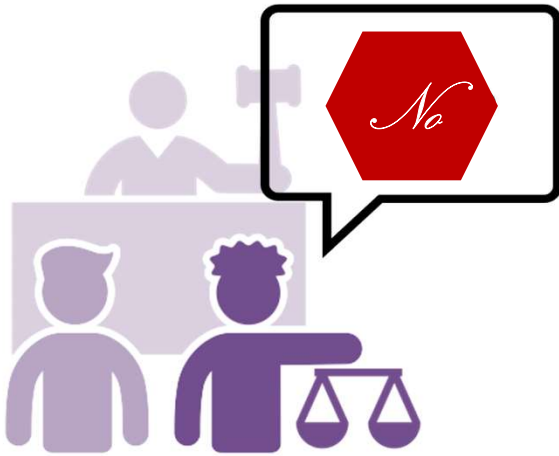
The Power of “No”



The Power of the Polite “No”



Saying “No” is Power



I’m sorry Judge, but if I proceed without speaking to my client, I would be providing ineffective assistance of counsel and violating the Constitutions of Mississippi and the United States, as well as my ethical obligations.

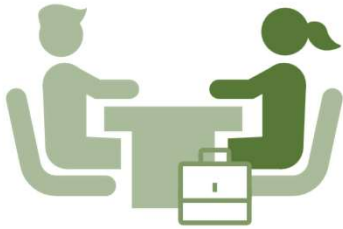
Saying “No” is Power

- “No” is a complete sentence.
- “I’m sorry Judge, but I can’t do that.”
- “Judge, if it was my family member....”



No

First Meeting



- **Help them complete application for counsel**
- **Establish trust before asking about offense**
- **Focus interview on initial appearance**
- **“you can't write a good bail motion unless you know something about your client.”**

Preparing for initial appearance

- Prepare a bail package
- Organize friends and family to attend
- Gather paystubs and other documents
- Consider affidavit of bail reliability



In the Initial Appearance Courtroom

General Principles

- Make your record
- Appointment before appearance
- Insist on time to speak with your client



- If possible, submit a written proposal
- 8.2 “right to release” provision “was written to ensure that a judge not give inordinate weight to the nature of the present charge.”
- This means that the bail guidelines are NOT binding

Bail Advocacy

- Bring family members to court
- Proof of employment and likelihood of job loss
- Scrutinize criminal history – there's a high % of error
- You are entitled to explore the facts - “Apparent probability of conviction...insofar **as relevant to risk of non-appearance.**”

Bail Advocacy



- **Bring “responsible members of the community” to court**
- **Use character witnesses.**
- **In the alternative, have an affidavit or a letter.**

Affidavit supporting bail reliability



I _____, hereby state upon my oath I have known [defendant] for [X] years.

I have [add relevant information about witness's relationship with defendant.]

I am [add relevant information about witness.]

I vouch for _____'s reliability and my belief that he poses no flight risk or danger to the public.

So sworn, this _____ day of 20__.

At Initial Appearance

- **If detained**
 - make the judge say whether they are detaining on flight or danger
 - have judge issue order for medical, MH, or SA treatment
- **If bond set, insist on “least onerous conditions”**
 - Burden is on the court here?
 - Ankle monitor fees?
 - Insist that ankle monitor reduce other reporting

At Initial Appearance



If bond set and defendant cannot afford it

- **Ask the judge to explain that amount**
- **Tell the client that you'll be filing modification motion**
- **Ask them to think about any other contacts who can help advocate**

Before Defendant Walks Out the Door



If defendant is released

- **Rule 8.7: bond immediately transferrable**

Before Defendant Walks Out the Door



If defendant is out of custody

- Establish next meeting time and place
- Reinforce conditions (including monthly address check ins)
- Remind them not to make statements

Before Defendant Walks Out the Door



- **If defendant is still in custody**
 - **Remind them that you will make a written for reconsideration**
 - **Emphasize importance of silence**
 - **Phones may be monitored**
 - **They understand your “code”**

After Initial Appearance

- **At least one immediate follow up meeting with client**
 - **review what happened**
 - **discuss next steps in case**
- **Ask prosecutor for evidence (worst they can do is say no)**
- **Investigate facts**
- **Prepare written bond modification motions**
- **Prepare for prelim, including issuing subpoenas if necessary**

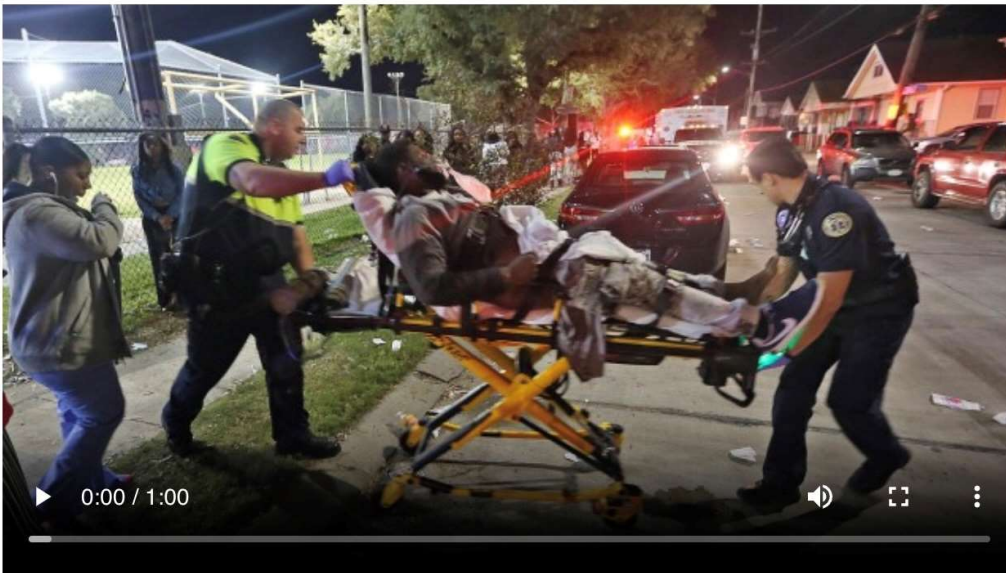
Day One...Bunny Friend



Day One ... Bunny Friend

Shooting in New Orleans park leaves at least 16 people wounded

Police were on their way to break up a large crowd at Bunny Friend park in the city's 9th ward when shooting broke out between two groups



of Law

Day One ...Bunny Friend



Day One...Bunny Friend

Joseph Allen, once Bunny Friend Park shooting suspect, released from jail

“On Tuesday, Joseph Allen's attorneys provided 14 pieces of evidence to investigators and prosecutors, including surveillance video placing Allen and his wife inside at least three stores in Texas on the night of the shooting.”



Preliminary Hearing Preparation

- **Before the preliminary hearing:**
 - **Meet with client**
 - **Meet with witnesses before the hearing**
 - **Ask to review video before you try to contradict it**



Before the Preliminary Hearing



Investigate

- **Locate witnesses**
- **Serve subpoenas**
- **Request preservation orders**

Preliminary Hearing

Standard practices:

- File a written motion ahead of time
- Record the proceedings
- Reject the trading of client rights
- Demand preliminary hearing and bail argument
- Tell the judge what they offered



Alert the judge and DA that these will be your new practices

Preliminary Hearing



The Rules

- Upon request, must be held with 14 days
- Cannot be waived or postponed without
 - Client consent
 - In writing
- Unless commenced with 14 days, the defendant “shall be released on recognizance.”

Revisiting Bail

- Review conditions of release pursuant to MS Rules of Criminal Procedure 8.5 (b) and (c)
- Written motion



After a Bindover Decision

- Bail review?
- Probable cause review?
- Both?



Habeas Writs

Miss. Code Ann. Section 11-43-9:

- **Application for a writ of habeas corpus**
 - **petition**
 - **in writing**
 - **sworn to by the person for whose relief it is intended, or by someone in his behalf**
 - **describing where and by whom he is deprived of liberty**
 - **facts and circumstances of the restraint**
 - **ground relied on for relief**
 - **made to the judge or chancellor of the district in which the relator is imprisoned**
 - **unless good cause be shown in the petition to the contrary.**

The Right Cross-Examination at Prelim



Circuit court habeas hearing

- **Defense attorney examines witnesses**
- **State objects**
 - **“Answers might reveal identity of the witness, who allegedly feared retaliation”**
 - **Defendant “was not entitled to pre-indictment ‘discovery’.”**

Harris v. Patten



Circuit judge:

“[The justice court] found that probable cause existed and bound the matter over. The burden had been met.... [T]his is how our system is set up.”

Harris v. Patten, 396 So. 3d 1217, 1219 (Miss. Ct. App. 2024)

Harris v. Patten



Circuit judge:

“[Y]ou can't just ... file a habeas and make an end run around the rules.”

Harris v. Patten, 396 So. 3d 1217, 1219 (Miss. Ct. App. 2024)

Harris v. Patten



Circuit judge:

“It was enough for the Justice Court.... [T]he next check is the grand jury. That's the next check. It's not me in habeas.”

Harris v. Patten, 396 So. 3d 1217, 1219 (Miss. Ct. App. 2024)

Right to Challenge Inferior Court Ruling



Court of Appeals:

“Prisoner, who was held in jail...without indictment, was permitted to file habeas corpus petition challenging the existence of probable cause, and habeas corpus court had a duty to hear and consider evidence on that issue, regardless of fact that the justice court previously found probable cause existed and bound matter over.”

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Right to Challenge Inferior Court Ruling



Court of Appeals:

“a habeas corpus court clearly has the duty to determine if there is probable cause to believe the prisoner committed a crime, and the habeas corpus court is not bound by the prior judgment of a lower court.”

Harris v. Patten, 396 So. 3d 1217, 1219 (Miss. Ct. App. 2024)

The Right to Cross-Examination at Prelim



Harris v. Patten:

- “Circuit judge limited defendant’s cross-examination.”
- Because the circuit judge did not afford Harris a full habeas corpus hearing on the issue of probable cause, we reverse and remand the case for a new hearing.

Day One Recent Victories



2023 – Mississippi’s continuous representation rule

2024 – Day One public defender offices in Kansas

2025 – North Dakota....

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 54-61-01 of the North Dakota Century Code is amended and reenacted as follows:

1. The commission on legal counsel for indigents is established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to the standards and policies of the commission governing eligibility for such services. For purposes of establishing release conditions at an initial appearance, an incarcerated individual is presumed indigent.

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For purposes of establishing release conditions at an initial appearance, an incarcerated individual is presumed indigent

There is appropriated the sum of \$463,644 for legal counsel services to incarcerated individuals at initial appearances.



Questions??



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