The Price of Presumed Innocence: Pretrial Detention, Delayed Justice, and the Poor Defendant in America

By Michael Andrews July 2026

There is something fundamentally inconsistent about the way we talk about criminal justice in America. We tell people that every person accused of a crime is presumed innocent until proven guilty. We teach that principle in school. Judges discuss it with juries. Lawyers repeat it in courtrooms. It is supposed to be one of the lines separating our system from one where an accusation itself becomes punishment. Yet for hundreds of thousands of Americans, the practical reality begins very differently. They are arrested based upon an allegation, brought before a judicial official, given a bond they cannot afford, and taken back to jail. They may remain there for months or even years without ever having been convicted of anything.

This is not a small part of the American jail system. At midyear 2024, the Bureau of Justice Statistics reported that 69 percent of the people held in local jails—approximately 450,600 people—were unconvicted. That category includes people awaiting court action on pending charges as well as some people held for other reasons, so it should not simply be described as 450,600 people unable to make bond. But the larger point is unavoidable: the majority of people in American jails had not been convicted of the charges for which court action was still pending. (Bureau of Justice Statistics)

The law, of course, is more complicated than the phrase "presumed innocent." The Supreme Court has explained that the presumption of innocence is primarily a rule governing the burden of proof at trial and does not itself prohibit pretrial detention. At the same time, the Court has also recognized the importance of liberty before conviction. In *Stack v. Boyle*, the Supreme Court held that bail set higher than reasonably necessary to assure a defendant's presence is excessive, and the Court connected pretrial liberty to a defendant's ability to prepare a defense and to the meaningful preservation of the presumption of innocence. (Justia Law) The distinction may make sense as constitutional doctrine. It becomes considerably harder to explain to the man sitting in a county jail for two years waiting for the State to decide what it is going to do with him.

North Carolina's Constitution says that excessive bail shall not be required. (North Carolina General Assembly) North Carolina law also recognizes that money is not the only mechanism available to secure a person's appearance in court. Under the current version of N.C. Gen. Stat. § 15A-534, release conditions can include an unsecured appearance bond, release to a designated person or organization willing to supervise the defendant, a secured appearance bond, house arrest with electronic monitoring, and restrictions on travel, associations, conduct, or residence. The statute expressly tells judicial officials to consider matters including the weight of the evidence, family ties, employment, financial resources, housing, length of residence in the community, criminal history, and history of failing to appear. (North Carolina General Assembly)

That is important because the purpose of bond should not be to determine who has money. If two defendants present the same risk of failing to appear, and one walks out of jail because his family has $25,000 available while the other stays incarcerated because his family does not have $2,500 to pay a bondsman, what exactly have we measured? We have not necessarily measured dangerousness. We have not necessarily measured guilt. We may not even have measured the likelihood of appearing in court. We have, at least in substantial part, measured access to money.

I understand the argument on the other side. Courts have a legitimate responsibility to protect alleged victims and the public. Some defendants do flee. Some defendants intimidate witnesses. Some people arrested for serious crimes commit additional crimes after release. No serious discussion of bail reform should pretend those concerns do not exist. North Carolina's present statute reflects those concerns strongly, particularly for defendants charged with offenses the statute classifies as violent offenses. (North Carolina General Assembly) The answer, however, cannot simply be that the seriousness of an allegation makes the allegation self-proving. A charge is not evidence simply because the charge sounds terrible.

In fact, North Carolina law itself recognizes that distinction. Section 15A-534 directs the judicial official to consider not only the nature of the accusation but also “the weight of the evidence against the defendant.” (North Carolina General Assembly) Those are two different things. A person can face an extraordinarily serious allegation supported by extraordinarily weak evidence. If there is little or no independent evidence corroborating an accusation, that does not automatically mean the accusation is false, and it does not prevent prosecution. But neither should the seriousness of the accusation make the actual strength of the evidence irrelevant when the court decides whether a human being will remain incarcerated before trial.

Money creates another strange contradiction. A defendant may be poor enough to qualify for appointed counsel, yet people sometimes operate under the assumption that if he can somehow post a substantial bond, then he should be able to hire his own lawyer. But those are not equivalent financial questions. North Carolina law defines an indigent person as someone financially unable to obtain legal representation and pay the other necessary expenses of representation. (North Carolina General Assembly) A bond may be posted by a family member, friend, surety, property owner, or professional bondsman. The North Carolina Judicial Branch itself explains that a third party may provide the security for a defendant's bond. (North Carolina Judicial Branch) A mother mortgaging property or a family gathering enough money to pay a bondsman's nonrefundable premium does not somehow create another $25,000 or $50,000 with which the defendant can retain and finance a serious felony defense.

My own experience changed the way I looked at all of this. I was facing a serious felony accusation and spent nearly two years in jail waiting for the prosecution to meaningfully move my case forward. I was not serving a sentence. I had not been convicted. I was waiting. There is a profound difference between reading the words “pretrial detention” in a judicial opinion and living inside those words. Days become months. Months become a year. Your life outside the jail continues without you. Evidence does not become fresher. Witnesses do not remember more. Financial problems do not improve. Your ability to assist in your own defense does not become easier.

North Carolina is particularly troubling in this respect because it does not have a statutory speedy-trial deadline comparable to the federal Speedy Trial Act or statutes in some other jurisdictions. North Carolina once had a Speedy Trial Act. The General Assembly repealed it in 1989. (North Carolina General Assembly) What remains is primarily the constitutional right to a speedy trial, evaluated under the balancing test established by the United States Supreme Court in *Barker v. Wingo*. Courts look at the length of the delay, the reason for the delay, whether the defendant asserted the speedy-trial right, and prejudice to the defendant. North Carolina's appellate courts continue to apply that analysis. In *State v. Farook*, the North Carolina Supreme Court reaffirmed that a defendant can establish prejudice through actual or presumptive prejudice. (North Carolina Judicial Branch)

The problem is that a constitutional balancing test and an actual deadline are very different things. A deadline tells the government that something must happen. A balancing test tells everyone that, after enough time passes, lawyers can argue about whether what happened was unconstitutional.

The distinction is not theoretical. North Carolina appellate cases demonstrate how substantial delays can occur without ultimately producing a speedy-trial violation. The University of North Carolina School of Government's review of North Carolina speedy-trial decisions identifies cases involving delays of approximately twenty-two months, twenty-seven months, two years, three years and seven months, four and one-half years, and more than five years in which courts rejected speedy-trial claims under the circumstances presented. (NC PRO) In *State v. Farmer*, for example, the defendant was indicted in May 2012 and trial did not begin until July 2017; the North Carolina Supreme Court ultimately concluded that the circumstances did not violate his constitutional speedy-trial right. (NC PRO)

That does not mean those decisions were wrongly decided under existing precedent. Different cases involve different reasons for delay. Defense attorneys request continuances. Defendants change lawyers. Competency issues arise. Forensic testing takes time. Witnesses become unavailable. Complex cases legitimately require substantial preparation. The pandemic created extraordinary delays. A court applying *Barker* is supposed to consider those realities rather than treating every month on a calendar as prosecutorial misconduct.

But that is not the end of the fairness question.

The Supreme Court itself recognized the problem more than fifty years ago in *Barker*. When discussing prejudice caused by delay, the Court identified oppressive pretrial incarceration as one of the harms the speedy-trial right is designed to prevent. More importantly, the Court recognized something that anybody who has ever tried to reconstruct an old event understands instinctively: memory disappears. Witnesses die or disappear. People lose the ability to accurately recall events from years earlier. And the Court made an especially important observation—loss of memory is difficult to demonstrate because a person usually cannot identify what he has forgotten.

That problem becomes especially serious when a criminal case depends heavily upon human recollection rather than objective evidence. Suppose an allegation is made and there is little independent evidence establishing exactly what happened. Two, three, or four years later, everyone is asked to reconstruct conversations, locations, sequences, statements, times, emotional reactions and small details. The prosecution may argue that inconsistencies in a defendant's account demonstrate deception. The defense may argue that inconsistencies in an accuser's account undermine reliability. Yet ordinary memory has been deteriorating for everyone during the delay. The criminal justice system then asks twelve strangers to determine what happened years earlier, sometimes from memories that have been repeated, discussed, reconstructed and unintentionally changed over time.

Meanwhile, the detained defendant experiences a different kind of pressure: the plea offer.

This is where the empirical research becomes difficult to ignore. A major study published in the *American Economic Review* used the differing detention tendencies of quasi-randomly assigned bail judges to estimate the effects of pretrial detention. The researchers concluded that pretrial detention significantly increased the probability of conviction, primarily because it increased guilty pleas. They also found negative effects on later formal employment. (American Economic Association) Another large study of misdemeanor defendants found that detained defendants were substantially more likely than similarly situated released defendants to plead guilty and to receive incarceration. (Stanford Law Review)

That should trouble anyone who believes guilt should be determined by evidence.

If detention changes the likelihood that a person will plead guilty, then detention is not simply preserving the defendant until his case is decided. Detention is affecting how the case gets decided.

Consider the practical choice facing somebody who has already been in jail for eighteen months. The prosecutor offers a plea under which he may be released shortly, perhaps even immediately because of credit for time served. The alternative is to reject the offer and remain incarcerated another six months, another year, perhaps longer, waiting for a trial where the potential punishment is substantially greater. We can call the resulting guilty plea voluntary because the defendant stood before a judge and said the required words. Legally, it may satisfy every requirement for a valid plea. But if we are studying the system rather than simply describing doctrine, we should ask a harder question: how voluntary is a decision when one choice gives a man his freedom and the other requires him to remain incarcerated indefinitely before the government has proven him guilty?

Plea bargaining now dominates American criminal adjudication. In federal cases during fiscal year 2025, the United States Sentencing Commission reported that 98 percent of cases resulted in guilty pleas rather than trials. (U.S. Sentencing Commission) State systems differ and that federal figure should not simply be transferred to North Carolina, but it illustrates how unusual a trial has become. The constitutional system is built around the right to trial, confrontation, compulsory process, proof beyond a reasonable doubt and the testing of evidence before a jury. Yet the overwhelming majority of criminal cases never reach that stage.

And innocent people do plead guilty. That statement is not speculation. The National Registry of Exonerations documents people who were convicted through guilty pleas and later exonerated. Its research has specifically examined innocent defendants who pled guilty, and its annual reports continue to document convictions later shown to be wrongful. (National Registry of Exonerations) The existence of those cases does not establish that most defendants who plead guilty are innocent. It establishes something narrower but enormously important: a guilty plea cannot logically be treated as proof that the system's pressures never cause an innocent person to surrender.

This brings me back to something the Supreme Court said in *Griffin v. Illinois* in 1956: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” (Justia Law) *Griffin* concerned access to appellate review and transcripts, not bail, so it would be legally inaccurate to pretend that the case itself invalidates modern money-bail systems. But the principle announced by the Court raises a question that goes far beyond the precise procedural issue in *Griffin*.

What does equal justice mean today?

If a defendant with money can remain at home while his attorney investigates the allegation, locates witnesses, hires experts, reviews discovery and prepares for trial, while an indigent defendant accused of the same offense remains in a jail cell for two years, are those defendants truly preparing for the same trial? If one can continue working and financing his defense while the other loses his job, his housing and perhaps the relationships necessary to help him investigate the case, can we realistically pretend that money has not affected the kind of defense each receives?

The empirical evidence on lawyers at the bail stage adds another piece to this problem. A 2023 field experiment published in *Science Advances* examined the effect of providing public defenders at initial bail hearings in Pittsburgh. Providing counsel significantly reduced the use of monetary bail and short-term detention without increasing failures to appear at the preliminary hearing. (Science) That does not prove that every public defender will obtain a bond reduction, and it certainly does not prove my own observation that indigent defendants frequently feel they have virtually no realistic chance at meaningful bond relief. What it does demonstrate is that advocacy at the bail stage matters. Liberty can turn on whether somebody capable of investigating and presenting the defendant's circumstances is standing beside him when the decision is made.

That may be one of the most overlooked aspects of the entire process. Bond is treated as preliminary, almost administrative, while trial is treated as the main event. Empirically, however, the preliminary decision may influence everything that comes afterward. Detention affects employment. It affects family relationships. It affects the ability to investigate. It alters bargaining power. And research indicates that it affects the probability of a guilty plea and conviction. (American Economic Association) In that sense, the bond hearing is not merely about where a defendant sleeps while waiting for justice. It may help determine what justice ultimately looks like.

The answer is not that everyone arrested should automatically be released. There are defendants for whom detention is justified because no reasonable condition can adequately protect the public, protect witnesses, or assure appearance. The answer is that detention should actually be based on those reasons rather than quietly becoming a substitute for punishment or a consequence of poverty.

North Carolina could begin by creating meaningful statutory time protections for defendants who remain incarcerated before trial. A defendant held continuously should receive priority over defendants who are living at home while their cases remain pending. Long periods of prosecutorial inactivity should trigger meaningful judicial review. Bond should be reviewed automatically at defined intervals rather than requiring an incarcerated defendant to repeatedly convince an overworked attorney to place the matter back before the court. At those reviews, judges should examine what has actually happened in the case: whether discovery has been produced, whether forensic testing is outstanding, whether the State is actively preparing for trial, whether delays are attributable to the defense or prosecution, and whether the evidence supporting the charge has materially changed.

Courts should also take seriously the statutory instruction to consider the weight of the evidence when deciding pretrial release. A serious accusation supported by substantial physical evidence, independent witnesses, digital evidence or admissions presents a different pretrial question from an equally serious accusation resting almost entirely upon an uncorroborated allegation. That does not require a judge to conduct the trial at the bond hearing. It requires the justice system to recognize the difference between the seriousness of an accusation and the strength of the proof supporting it.

Most importantly, we should stop pretending that time spent in jail before trial is neutral.

It is not neutral to lose two years of your life while legally innocent. It is not neutral when witnesses' memories fade. It is not neutral when a defendant loses employment and housing. It is not neutral when incarceration weakens a person's bargaining position until an offer that once seemed unacceptable begins to look like the only path home. And it is certainly not neutral when empirical research shows that detained defendants are more likely to plead guilty.

The criminal justice system will never eliminate difficult choices. Prosecutors have an obligation to prosecute cases they believe can be proven. Courts have an obligation to protect the public. Defense attorneys have an obligation to advise clients realistically about risk. Plea bargaining is not inherently unjust merely because it resolves most criminal cases. Nor does every lengthy case establish government misconduct.

But fairness requires more than saying the correct constitutional words.

Presumption of innocence means very little to a defendant if the practical consequence of an accusation is years of incarceration before the evidence is tested. The right to trial means less if exercising it requires a person to remain jailed while accepting a plea can send him home. Equal justice means less if one defendant can purchase the freedom necessary to prepare his defense and another cannot.

We should be willing to ask the question without assuming that criticism of the system is criticism of every prosecutor, judge or defense lawyer who works inside it. The question is structural: have we created a process where the accusation itself can impose so much punishment, delay and financial pressure that the eventual determination of guilt becomes secondary?

If the answer is even sometimes yes, then we have a problem worth fixing.

The government unquestionably has the authority to arrest, charge and prosecute people when supported by law and evidence. That power is necessary. But the greater the government's power, the greater its obligation to use that power carefully. A system worthy of the phrase “presumption of innocence” should not require a poor defendant to prove his innocence merely to avoid spending years incarcerated while waiting for the government to prove his guilt.

And a system committed to equal justice should never be comfortable with the possibility that the most important difference between the defendant who goes home to prepare for trial and the defendant who sits in jail until he accepts a plea is not the evidence against him.

It is the amount of money he has.