

PRETRIAL MOTIONS

A PRIMER
FOR LEGAL AID
LAWYERS

CONTENTS

- 1 INTRODUCTION**
- 2 EXECUTIVE SUMMARY**
- 5 PART 1: WHY PRETRIAL MOTIONS ARE IMPORTANT**
- 8 PART 2: WHAT ARE PRETRIAL MOTIONS?**
- 10 PART 3: INTRODUCING PRETRIAL MOTION PRACTICE INTO DEVELOPING LEGAL CONTEXTS**
 - A. PROCEDURAL ASPECTS**
 - 1. TIMING
 - 2. STRATEGY
 - B. CATEGORIES OF PRETRIAL MOTIONS AND POSSIBLE GROUNDS**
 - 1. MOTIONS TO RELEASE - ILLEGAL DETENTION VS. CONDITIONAL RELEASE
 - 2. MOTIONS TO DISMISS
 - 3. MOTIONS CONCERNING EVIDENCE - PRODUCTION AND DISCLOSURE VS. EXCLUSION AND NULLIFICATION
 - 4. MOTIONS AFFECTING PROCEDURE
- 20 CONCLUSION**

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Pretrial Motions: A Primer for Legal Aid Lawyers is intended to introduce legal aid lawyers across the world to the practice of filing and litigating pretrial motions. Pretrial motions are applications to the court requesting a decision on issues before the trial begins. They are a practical mechanism through which legal aid lawyers can demand a legal remedy from the court for violations of the rights of their clients, or seek a decision on a key issue in advance of a trial on the merits of the case.

Evidence obtained through torture or illegal seizure does not get suppressed or nullified on its own; legal aid lawyers need to submit pretrial motions demanding this remedy. Pretrial motion practice can also ward off prosecutorial misconduct and corruption and increase efficiency of the justice system by providing a means to dismiss cases before the trial starts. Additionally, pretrial motions serve an important role in guaranteeing the fairness of the trial, as courts can prevent the admission of prejudicial evidence, or take other actions to protect the right of the accused to a fair trial.

Pretrial motions are critical to remedying, and ultimately curbing, abuse by authorities. If the court issues an order prior to trial that suspects must be released because they were illegally arrested or detained, evidence must be excluded because it was obtained in violation of the law, or that the case must be dismissed based on prosecutorial misconduct, the court sends a clear message that such actions will not be tolerated.

This primer builds on the ILF's two decades of experience training legal aid lawyers in diverse country contexts around the world to engage in pretrial motion practice. It is meant as a basic introduction to pretrial motion practice, and is intended to raise legal aid lawyers' awareness of their obligation to timely file and argue pretrial motions that may be advantageous to their clients. To help legal aid lawyers advance pretrial motion practice in their specific jurisdictions, the ILF is developing a series of practical country guides that are tailored to local laws, conditions and practice.

For more information about pretrial motion practice or assistance on how to advance this work in a specific jurisdiction, please contact us at info@theilf.org.

Ensuring the right to a fair trial means more than just having a defense lawyer defend the accused at trial. It requires that defense lawyers be qualified, capable, and highly trained, and that they engage in zealous, creative, and comprehensive representation of their clients throughout the entire legal process. As legal systems around the world move increasingly towards adversarial (as opposed to inquisitorial) frameworks, the notion of pretrial litigation, through a robust motion practice, will be an increasingly important tool for defense lawyers to provide quality representation. The purpose of this primer is to urge and enable defense lawyers worldwide to incorporate the critical element of pretrial motion practice into their day-to-day representation of their clients.

Pretrial motion practice occurs when the legal aid lawyer approaches the court prior to the final adjudication phase of the legal process to decide a legal issue or grant an appropriate remedy for a violation of their client's rights. Many times, such motions claim that one or more of the client's legal rights have been violated, for example via unlawful arrest, illegal search and seizure of evidence, or in-custody abuse. Appropriate remedies can span from release of the client from pretrial detention, to exclusion of evidence, to full outright dismissal of the case. Pretrial motions to dismiss can also be brought where there is a lack of evidence, lack of jurisdiction, or where the law provides for settlement before trial. Additionally, pretrial motions ensure the fairness of trials. For example, through requests for a change in venue or severance of the case from other co-accused, legal aid lawyers can prevent undue prejudice against the accused.

Although there are numerous legal systems around the world, varying contexts, and a plethora of current pretrial litigation practices and developments, this primer will introduce lawyers to the core practical and strategic elements of an effective pretrial motion practice that can be incorporated into any criminal justice system. The ILF plans to develop country specific supplements to this primer to instruct on the actual legal provisions under which these motions can be introduced in any given legal context. The first supplement was developed in Afghanistan, and it is the ILF's work introducing pretrial motion practice in that country that was the impetus for this primer.

The primer begins by explaining why pretrial motions are essential to an effective defense (**Part 1**). Not only are the legal remedies of obvious benefit to an individual defendant, they also confer an important benefit on the criminal justice system itself, and, indeed, upon the society as a whole. A culture of pretrial motion practice holds courts to their duty to regulate the behavior of justice system actors, such as police and prosecutors. More broadly, by upholding the constitutional rights of even the most unpopular community

members, courts affirm the fundamental nature of the rights themselves, and make clear their applicability to each and every member of society. Through the provision of legal remedies when rights are violated, the rule of law is strengthened and faith in the justice system restored.

The primer next describes the fundamental components of a solid pretrial motion (**Part 2**), including their history, their conceptual underpinnings, and the international consensus regarding their effectiveness and importance, before turning to the heart of the instruction (**Part 3**), which provides strategic and tactical guidance on engaging in pretrial motion practice. The first section (**Section A**) discusses the practical and strategic considerations that should guide the lawyer's deployment of pretrial motions: when such motions should be brought (e.g. at the first court hearing or just before trial), to whom (the trial judge or another judge), and for what purposes (i.e. remedying a rights violation, influencing the trial itself and/or developing the record for appeal).

The next section (**Section B**) surveys the four main categories of pretrial motions, providing information and guidance on when and how to use each type:

1. **MOTIONS TO RELEASE:** Release motions contend that the detention is either unlawful or contrary to the interests of justice or the needs of the court:
 - a. **Illegal Arrest or Detention:** These motions demand release on the grounds that the state has no legitimate right to arrest or detain the accused. Their bases may include a lack of evidence for arrest, or violations of statutory time limits for detention. Release may also be an appropriate remedy where the police failed to honor the accused's right to counsel or to be notified of charges. The only complete remedy for an illegal detention is release, but lawyers may need to consider alternative remedies in certain situations.
 - b. **Conditional Release:** Even if there is a legitimate basis for detention, a court may have discretion to decide whether detention is necessary, such as to ensure that the accused appears for trial, does not interfere with witnesses or evidence, or commit further crimes. Pretrial motions of this type seek to persuade the court that fundamental rights at stake outweigh the possibility of harm, and that pretrial detention should not be the norm.
2. **MOTIONS TO DISMISS:** A motion to dismiss is a formal request to the judge to discharge the case entirely. This may be granted "with prejudice," meaning that the prosecution cannot ever refile this case, or "without prejudice," in which case the prosecution can refile, usually after correcting some formal or procedural error. Such motions may be brought on procedural grounds (e.g. lack of jurisdiction or lapsed statute of limitation), as a result of insufficient evidence, or because of misconduct so reprehensible as to render the trial irreparably unfair (e.g. torture).

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Pretrial motions concerning evidence function not only to protect a client's rights, but to safeguard the integrity of the immediate trial itself and the system as a whole.

- 3. MOTIONS CONCERNING EVIDENCE:** Procedural rules exist to safeguard the fairness of the trial procedure itself; when such rules are violated, the legitimacy of the court process itself is compromised, irrespective of the accused's actual culpability. Therefore, pretrial motions concerning evidence function not only to protect a client's rights, but to safeguard the integrity of the immediate trial itself and the system as a whole. Generally speaking, such motions come in two types:

 - a. Disclosure and Production:** For a person accused of a crime to meaningfully defend himself, he must have access to relevant information and evidence, including any potentially exculpatory evidence, which is often held initially by the police or prosecution. Disclosure and production motions ask the court to determine whether the police or prosecution have fulfilled their obligations under the law, and to direct them to do so if they have not.
 - b. Exclusion and Nullification:** Investigation may lead to the conclusion that a piece of evidence has been unlawfully obtained, e.g., through torture or illegal seizure; it would be profoundly unfair to the accused for that evidence to be used against him at trial. In such cases, motions can seek to exclude this evidence, or even to nullify certain procedures entirely. For this remedy to be effective, it means that even if the evidence is heavily inculpatory, if it is excluded or nullified, it cannot be used or considered in the trial.
- 4. MOTIONS AFFECTING PROCEDURE.** Another category of motions are those that influence the court's procedural decisions in ways that may benefit a client. For example, a lawyer may wish that a case be severed into two separate cases, or alternatively, it may be advantageous to a client to join a co-defendant into their case. A lawyer may seek a change of court, judge or prosecutor, because of prejudice or towards a specialized court more appropriate for the type of case (e.g. domestic violence, or juvenile crimes). While these motions may not immediately end a case, they may significantly impact the fairness and ultimate outcome.

WHY PRETRIAL MOTIONS ARE IMPORTANT

Ensuring that all accused persons are provided with the right to defense means more than just having a defense lawyer present at trial. Legal aid lawyers are obligated to provide quality representation from the earliest stage of the criminal process, including the protection of individual rights and due process of law. Pretrial motions are one tool to be used in fulfilling this duty and work to uphold broadly the fundamental right to present a complete defense in a full and fair trial by a neutral tribunal. As explained in the ILF's publication *Measuring Justice: Defining and Evaluating Quality for Legal Aid Providers*, engaging in pretrial motion practice is a requisite action to providing quality representation and a performance standard against which lawyers' performance can be monitored, evaluated and improved.

Pretrial motions are a practical measure through which legal aid lawyers can meet their commitment of protecting the rights of their client, by demanding a legal remedy from the court for rights violations, in advance of the substantive trial on the merits of the case. The concept that for every right there must be a remedy is a basic concept underlying the rule of law, and is in and of itself a fundamental right. The Universal Declaration of Human Rights, Article 8 provides that, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Pretrial motions can be engaged to demand a specific remedy for an individual client, but also, used consistently, pretrial motion practice can be used strategically to address systematic and widespread violations, like unlawful arrests or use of torture to coerce confessions.

Courts must therefore understand that they not only have the authority to provide relief, but that they have the responsibility to do so. If suspects are released based on illegal arrest or detention, if evidence is excluded when obtained in violation of the law, if cases are dismissed based on gross misconduct or insufficient evidence, the court sends a clear message that such actions will not be tolerated. By introducing these violations early and in front of a neutral arbitrator, legal aid lawyers ensure that the issues are fully

PART 1

The concept that for every right there must be a remedy is a basic concept underlying the rule of law, and is in and of itself a fundamental right.

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and fairly heard, as part and parcel of a complete defense. Moreover, lawyers ensure that due process, fair trial principles and individual rights prevail.

Additionally, pretrial motions hold the justice system accountable and ensure the fulfillment of each actor's responsibility in the administration of justice. In different legal systems (primarily Civil Law/Inquisitorial systems vs. Common Law/Adversarial systems), the roles and legal authority of the police, prosecutor and court vary during the investigation and pretrial stages of the case. However, the role of the defense lawyer to litigate rights violations early and thoroughly is a constant across systems. Laws and procedure codes generally provide the accused the opportunity to appear before a judge early in the process, even where the police or the prosecutor controls investigation and/or there are long periods of investigation and presentation of evidence before indictment or confirmation of charges. As the prosecutor is, by definition, the adversary of the accused, and the prosecutor and the police are unlikely to agree to the defense lawyer's requests for release or other legal remedy, defense lawyers need to get these issues in front of judges, who are (in theory) neutral and are required to apply and uphold the law as written.

Subject to strategic decisions and individual client interests which will vary from case to case, the defense lawyer's guiding principle should generally be to bring the rights violation to the attention of the court as early as possible, and secure a timely remedy for the client. There are few reasons to wait until trial to argue, for example, that the client's right against arbitrary detention has been violated, or that illegally obtained evidence should not be admitted as proof of guilt. These issues can be litigated well before trial on the merits of the case. By the time a case reaches trial, it is often too late for the court to grant a remedy for any rights that may have been violated.

In addition to ensuring protection for fundamental rights and adherence to the rule of law, pretrial motions contribute to more effective administration of justice by:

a. Reducing pretrial detention:

Pretrial motions are key to advocating for the right to liberty and the presumption of innocence, which are undermined by pretrial detention. If there is no process whereby release serves as a remedy to violations of rights and laws, and if motions for pretrial release are not a routine part of the criminal procedure practice, prisons will remain overcrowded and injustices will continue. Accused persons will be subjected to the detrimental impact of incarceration and be unfairly punished before any conviction, and many will be pressured to plead guilty to get "time served" and get out of jail instead of pursuing their right to trial.

b. Avoiding unnecessary prosecution:

Each time an individual faces prosecution, it not only places a burden on the resources of the criminal justice system, but it also places a burden on the resources of the individual, his family, the complainant, and other witnesses in the case. Further, flaws in the justice system mean that all prosecutions run the risk of placing the accused – who is

presumed innocent – in danger of a wrongful conviction. An unnecessary prosecution heightens the risk of an unfair and tainted trial, an unfounded conviction, and wrongful imprisonment. Moreover, particularly low-risk accused, like juveniles or first-time offenders, will be better served by diverting them from the criminal justice system, and focusing on rehabilitation as a means to decrease recidivism rather than prosecution. The criminal justice system relies on strong defense lawyers to advocate for their clients. This starts with filing motions to dismiss or reduce charges before trial, to prevent unfair prosecutions from proceeding to trial.

c. Saving resources:

Trials and imprisonment are costly. If there is insufficient evidence to ultimately sustain a conviction or there exists a violation of rights or law that impairs the fairness of the proceedings, it is better to dispose of the case earlier rather than to allow the courts, prisons, prosecution office, and accused to spend unnecessary money and time on a trial.

d. Enhancing public confidence in the legal system:

Through pretrial motions, the constitution and the law come to life. Even in established democracies, the public's trust and confidence in government institutions and the rule of law can be low. Although the law may provide for fundamental rights and protections for all citizens, the public will not have confidence in the government's commitment or ability to protect these rights unless there is a mechanism to protect them. Pretrial motions are one such mechanism that can help to increase public confidence in the justice system.

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PART 2

WHAT ARE PRETRIAL MOTIONS?

A motion is an application to the court made by a defense lawyer or prosecutor, requesting that the court make a decision on a certain issue before the trial begins. This is a form of litigation. Critically, the motion must present a demand for a remedy in the event that the court agrees there has been a violation of law. Without a remedy for the violation, the right itself has little meaning. Therefore, the defense lawyer must be clear in what the motion is demanding the court to do. The opposing party is usually allowed a chance to respond to the motion and then the court makes its determination through a judgment, decision or order. Sometimes a pretrial application is submitted to the prosecution or police, and this may be supported in law, rooted in practice, and in some cases, strategically appropriate. However, for purposes of this primer, applications to prosecutors or police are not considered pretrial motions, nor are they considered litigation in that a court is not deciding on the issue. Pretrial motions must be submitted and argued to the court which has authority to decide and act on an issue of law.

For purposes of this primer, any motion submitted, argued and decided by a judge before the substantive consideration of the merits of the case by the trial chamber can be considered a pretrial motion.

The concept of “pretrial” can mean different things in various legal systems and when dealing with different types of criminal cases. In some jurisdictions, there may be a lengthy investigation period before the case is submitted to the court and a relatively short period in front of the court. In other jurisdictions, there may be an extended pretrial period of presentation of evidence in court by the prosecution before a formal framing of the charges and plea is entered. Relatedly, who is the authority over the pretrial period will vary as well. In some jurisdictions and in certain types of cases, usually less serious charges, the responsibilities of an investigative or pretrial judge may be carried out by the prosecutor. For purposes of this primer, any motion submitted, argued and decided by a judge before the substantive consideration of the merits of the case by the trial chamber can

be considered a pretrial motion. Motions in *limine litus*, or at the start of trial, whether decided by the judge at the time of submission or as part of the final judgment, are not considered pretrial motions.

It bears repeating, where the rights at play are those that arise during the early stages of the case (i.e. during investigation), the defense lawyer should fight to get in front of a judge and represent the client as early as possible. Any statement by the court that it does not have jurisdiction over a case or an issue during the pretrial investigation stage is usually flawed, since mechanisms in the law (explained in detail below) generally provide for pretrial appearances, hearings and the submission of motions. Thus, introducing and developing a pretrial motion practice will generally be a question of changing practice and implementing the law, rather than changing the law itself.

Pretrial motions are usually written submissions on important points of law in the case that will be added to the court file and become a part of the record for review. A legal issue raised in a pretrial motion may need to be fully litigated at a hearing in front of the trial judge, and subsequently through revisions or interlocutory appeals, before proceeding with the trial. The appeal court can look at the record from the lower court in order to understand the issue and the argument. Additionally, in systems where direct appeals are not *de novo*, pretrial motions “preserve the issues for appeal.”

There is a well-established history of pretrial motions in many legal systems. Perhaps the most hallowed of these is the request for relief through a writ of habeas corpus. References to habeas corpus can be found in England as far back as the 12th century, when the king was entitled to have an account of why the liberty of any of his subjects was restrained. It became a more established form of relief in England in the 1600s, although there have been periods of time when habeas corpus was restricted or suspended. The plenary right to challenge one’s detention is also well-settled in international human rights law, including the Arab Charter on Human Rights and the International Covenant on Civil and Political Rights. Some countries, such as Pakistan, the United States, and India, have enshrined the right to challenge detention in their constitutions. Other countries, including Yemen, Iraq, and France have a combination of constitutional and statutory mechanisms to challenge illegal detentions. Habeas corpus relief is of paramount importance because it allows unlimited access to the courts to challenge the legality of detention.

There are other well-established grounds for pretrial motions, including preliminary hearings in the United States, that require a judicial finding on whether there is enough evidence to proceed with the case against a particular suspect. Criminal procedure codes and case law across many legal systems support litigation of issues pretrial, and some jurisdictions, more commonly in adversarial systems, already have a particularly strong practice of pretrial motions to challenge police or prosecutorial misconduct. There are hearings to determine whether evidence was seized in accordance with the law, whether one’s property was searched in a constitutionally sound manner, and whether an accused’s statement was given voluntarily. Strong and oft recurring issues and grounds for pretrial motions will be discussed below.

Introducing and developing a pretrial motion practice will generally be a question of changing practice and implementing the law, rather than changing the law itself.

PART 3

INTRODUCING PRETRIAL MOTION PRACTICE INTO DEVELOPING LEGAL CONTEXTS

PROCEDURAL ASPECTS

1. TIMING

In general, when the legal aid provider files pretrial motions is crucial. In jurisdictions where pretrial motion practice is well-established, the criminal procedure code or other statute may dictate when a particular motion can be brought and/or the time requirements for submission of opposition (if any) and the issuance of a decision. This is sometimes called a “motions schedule.” For example, the statute may state explicitly that the prosecution must file for an extension of detention within 7 days of the initial detention order. This means at the end of those 7 days, the defense lawyer must be ready to file a motion objecting to the extension of detention.

In jurisdictions where pretrial motion practice has not yet been well-established, legal aid lawyers may question when they can submit motions to the court. All other things being equal, defense lawyers should seek to file a motion as early as possible. Where statutes do not explicitly state when the motion should be filed, lawyers should attempt to file pretrial motions at other statutorily mandated pretrial hearings, including at remand hearings which often take place within 24-48 hours of the arrest. In all cases, the defense lawyer should determine when to submit in a timely manner, based on what the motion is for and the remedy being sought. For example, if the defense lawyer wants to argue a motion alleging that the charging instrument is legally insufficient, the time to litigate this motion would be when the case is initially transferred to the court or the charge is framed. General pretrial motions for release, on the other hand, should be filed as soon after the arrest and original detention as possible, while an illegal detention hearing is usually permitted at any stage of the proceedings.

The timing for each motion will depend on both the law and the defense lawyer’s legal strategy. If there is nothing in the law expressly prohibiting filing of applications to the court, then a motion to exclude certain evidence or nullify a case, for example, could be filed any time before delivering the final argument at trial. While many times it will be best to file these motions early, there may be strategic reasons to wait until later. The important thing is to

All other things being equal, defense lawyers should seek to file a motion as early as possible.

litigate these motions before the commencement of the trial or the substantive decision on the merits of the case, as determination on these issues will affect the progression of the case and development of the defense theory.

2. STRATEGY

The timing of when to file a particular pretrial motion also depends on strategy. For example, although normally a motion to dismiss based on the legal insufficiency of the charges is best to litigate when the case is first referred to the court, there are times when this motion may be best to litigate just before the trial. In this way, the defense lawyer can limit the time the prosecution has to change the charging document to account for or explain away missing information, gaps in the case, or inaccuracies. Part of the strategy may also include considering the judge. If the case comes before different judges for different stages of the case, the defense lawyer may decide whether or not to file the pretrial motion depending on the judge.

Moreover, the defense lawyer may not have the grounds for a pretrial motion until hearing from a certain witness or discovering certain evidence. This can affect both the timing of the motion and the specific request in the motion. For example, there may be a hearing with a supposed eyewitness to learn how the post-incident identification came about. After hearing from this witness, it may become clear that the “positive” identification of the suspect was actually a result of illegal, suggestive police misconduct, requiring a pretrial motion to preclude the identification from being admitted at trial. Therefore, the defense lawyer might submit a motion asking for a hearing of a particular witness in order to get the facts to determine the pretrial issue. Additionally, the ability of the prosecution to fix any mistakes in the case and the ability of the prosecution to take an interlocutory appeal after a pretrial motion are other factors worthy of consideration. Delays in the case as a result of the pretrial litigation are an important concern, particularly if the client is detained.

There are often several possible remedies for the violations raised by the defense lawyer. These remedies could range from something as terminal as a complete dismissal of the case to something more symbolic, such as a reprimand of the authorities. There is no need to choose only one remedy, or to only ask for the remedy that is most commonly granted. Rather, the defense lawyer should aim high – i.e., the defense lawyer should begin by asking for the most significant remedy permitted under the law. In the context of rights violations, this remedy will typically be a dismissal of the entire case with prejudice (banning the prosecution from bringing the charges again). If this request is not granted, the defense lawyer can then move for the next level of sanction – whether that is a dismissal without prejudice, exclusion of particular evidence, or a warning to the prosecutor or police to deter future misconduct. If each request is denied, the next level of remedy may be requested. In this way, there is a greater likelihood of obtaining a more significant remedy. This approach also ensures that the record is stronger for appeal, as the higher courts will have all of the previous remedies that were requested before them, and may consider each one in turn.

There are often several possible remedies for the violations raised by the defense lawyer. These remedies could range from something as terminal as a complete dismissal of the case to something more symbolic, such as a reprimand of the authorities.

The defense lawyer may want to entreat the authority of the court. Litigating issues pretrial gives the court – and the judge – an opportunity to affirm its authority. In the written motion and/or in oral argument, the defense lawyer can remind the judge that it is the court’s interpretation of the law, not the prosecutors’, that determines the validity and outcome of a pretrial motion.

CATEGORIES OF PRETRIAL MOTIONS AND POSSIBLE GROUNDS

Common legal grounds or issues for pretrial motions are presented here under four general categories of pretrial motions: motions to release, motions to dismiss, motions concerning evidence, and motions affecting procedure. Please note that this list of categories is not meant to be exclusive and should not limit a defense lawyer’s creativity in filing pretrial motions. Similarly, the legal grounds may appropriately be raised under more than one category, or in other words, multiple remedies may be (and often times should be) sought for one legal issue. For example, the defense lawyer might seek dismissal in addition to release, for a particularly egregious instance of illegal detention. Or the defense lawyer might argue for exclusion of a confession based on torture in the event that the court decides not to grant the initial request of dismissal. Certain terminology, e.g. nullification, may also cross categories, like motions to dismiss and motions to exclude. For the sake of clarity and brevity, the grounds are presented below only under one category.

1. MOTIONS TO RELEASE – ILLEGAL DETENTION VS. CONDITIONAL RELEASE

Introduction: This section will consider the difference between litigating a pretrial motion on illegal detention and on conditional release. Although there is an interplay between the two issues, the legal argument and the litigation process are different. Illegal detention violates the client’s fundamental right to be free and not to be detained arbitrarily or unlawfully. The main remedy for this illegal action is to release the client immediately. Since the issue is not one of discretion, the defense lawyer may try to fully litigate this issue through interlocutory appeals and revisions. In a conditional release motion, the defense lawyer is not necessarily arguing that detention is a violation of the law. Instead, the argument rests more on the principle that there is not sufficient justification to detain the accused and the court should, in its discretion, release the accused pretrial. There must be concrete reasons to detain someone despite the presumption of innocence and fair trial rights, and issues of equal protection of the law (particularly for the poor and marginalized) must be addressed in determining the fairness of bail decisions. Moreover, there are policy considerations here, as well, in that alternatives to pretrial detention, like work programs, school, drug treatment or other monitored services, will better rehabilitate the individual, protect and improve society, and address problems with the system, like prison overcrowding and exorbitant costs. There are several alternatives in addition to release without conditions that the judge can consider. Denial of a conditional release request may warrant an appeal or revision, but in most cases, because it is based on judicial discretion, it will not.

Illegal detention violates the client’s fundamental right to be free and not to be detained arbitrarily or unlawfully. The main remedy for this illegal action is to release the client immediately.

A. Illegal Detention:

There are several grounds on which a detention may be illegal. The most clear-cut ground is usually based on statutory time limits, like the length of time someone can be held by the police before being brought to court, or the number of days someone can be detained during investigation before a formal charge is brought. Additionally, there are sometimes statutory time limits regarding “speedy trial” and how long someone can be detained before the start of trial. In other jurisdictions, there are not explicit time limits for detention, but defense counsel can still make an argument that the detention is illegal based on an unreasonable delay and violation of speedy trial rights. Arguments can be made that detention is illegal when other rights are violated, as well, like the right to counsel or the right to be notified of the charges. Someone may also be detained without due process of law, as when detained without a hearing or after an improperly conducted hearing. There may be additional protections for vulnerable groups, like children and the infirm, so more specific arguments should be considered.

The impact of illegal detention is great, and there may be several resulting violations and remedies to consider, but the principle remedy to illegal detention is release. Each day that the client is illegally detained is a day that the client’s fundamental rights and human dignity are being violated. When someone is released to remediate the violation of being illegally detained, the case is not over. It continues while the defendant is at liberty, meaning that he must appear for subsequent court dates.

A motion to release based on illegal detention must, at a bare minimum, contain a law and a statement of fact showing that law has been violated with the result that the detention is no longer permissible. As introduced above, a writ of habeas corpus is a centuries-old legal action brought to secure the release of a person from illegal detention. This mode of recourse is a safeguard against arbitrary and unlawful state action. Habeas corpus ensures the separation of powers, in that the judicial branch checks the power of the executive branch. It can be brought at any time and requires that the person being detained be immediately brought before a judge (habeas corpus is Latin for “produce the body”). Because a request for habeas corpus relief can be brought at any time, it is one of the most effective tools for challenging illegal pretrial detentions in a timely fashion. Where there is no explicit reference to “habeas corpus” in a particular country’s statutory codes, there should be one or more provisions which can be interpreted to allow for a petition in the nature of a writ of habeas corpus, or at the very least hearings or court dates where the defense lawyer can raise the issue.

While release is the only complete remedy for illegal detention, when judges are pervasively unwilling to release defendants pretrial, even those being detained illegally, additional options may be available. Statutory schemes may provide for an action for money damages for illegal detention. (It should be noted, that depending on the procedural law for such an action, the individual will likely need an order from a judge finding the detention illegal, so the threat that the detention facility or detainer will need to pay monetary compensation may actually act as a disincentive to the court to rule that the detention is illegal.) Alternatively, a hearing on the issue of detention, in and

A motion to release based on illegal detention must, at a bare minimum, contain a law and a statement of fact showing that law has been violated with the result that the detention is no longer permissible.

of itself, can be considered a limited remedy to the violation, as the injured party is at least afforded due process, may be able to call and confront witnesses, discover the basis or strength of the accusation, and argue and advocate for further relief.

B. Conditional Release:

Statutory schemes usually provide for legal bases upon which accused individuals can be detained pretrial. Generally, they will include whether there is a risk that the accused will fail to appear for trial, interfere with evidence, commit other crimes, or disrupt public order. They may also include the nature or severity of the alleged crime. Although in a few jurisdictions the default is for pretrial release and the prosecution may show any of these risks in order to trigger detention, in most systems, the determination of the court whether detention is justified will come down to discretion.

Pretrial conditional release can be requested from the court on any case. There are at least four essential aspects of any successful conditional release motion: an argument that pretrial detention is in conflict with fundamental rights and principles of justice, including the presumption of innocence; indication and explanation of statutory requirements of detention, and whether they were either not met or violated; the basic facts of the client's life, including their ties to the community, family obligations, and the likelihood that they can be trusted to return to court; and the legal factors of the case itself, including weaknesses in the case, potential for non-jail sentences, and any other relevant factors that would warrant release of the client.

Legal aid lawyers can advocate that there are less restrictive methods than incarceration which will ensure that the client will be present in court and that the administration of justice will be served. Conditional release allows the suspect/defendant to be released while awaiting or during the trial with certain conditions or restrictions. The rules for conditional release vary depending on the jurisdiction. Someone can be released on their own promise to come back to court with the understanding that they are subject to arrest and detention if they fail to appear. Conditional release may also involve some type of monetary assurance (bail/bond), the sworn promise of another person, some type of pretrial reporting (to the police, court or drug treatment facility, for example), or restrictive measures like house-arrest or surrendering of a passport. It may involve a combination of options. The important thing to note is that with conditional release, *the accused person is not completely free* – they must follow various rules that are specified under the law and by the judge.

2) MOTIONS TO DISMISS:

Introduction: A motion to dismiss is a formal request to the judge to discharge the criminal case completely. That dismissal may be granted “with prejudice” or “without prejudice.” In general, a dismissal with prejudice is final, and the prosecution is forbidden from filing the case again. This remedy is generally reserved for gross, intentional police or prosecutorial misconduct, or a particularly egregious infringement of the accused's rights.

Legal aid lawyers can advocate that there are less restrictive methods than incarceration which will ensure that the client will be present in court and that the administration of justice will be served.

A dismissal without prejudice allows the prosecution to refile charges. This is often the remedy granted for a violation which the judge views as more procedural. The goal is a dismissal with prejudice, and so it is incumbent on the defense lawyer to point out the fundamental rights which have been violated, in addition to procedural rules.

There are various times when a motion to dismiss would be an appropriate remedy. Generally, dismissal is granted because of one or more foundational procedural defects in the case (such as lack of jurisdiction), or because the indictment or charging document is legally insufficient, or because violations of law or procedure were reprehensible or render the trial irreparably unfair (e.g., torture), or because the alleged victim in the case has dropped his/her claim. It is worth noting that even in jurisdictions where an acquittal (a finding of not guilty at trial) cannot be appealed by the prosecution, the dismissal of a case can usually be appealed to the higher court.

Foundational or threshold procedural defects include violations of the statute of limitations or lack of jurisdiction. Jurisdiction refers to whether a particular court has the authority or ability to hear a particular proceeding. The court may lack jurisdiction because of the location where an alleged crime took place, based on the nature of the crime, or something else. Defense lawyers must look at subject-matter jurisdiction, territorial jurisdiction, the authority of the prosecutor and time limitations on prosecution.

Legal sufficiency motions, sometimes called "facial sufficiency" motions, are an important aspect to pretrial motions to dismiss. At the time of the filing of the charges, even if all of the prosecution's evidence is accepted as true, it may still not make out the elements of a crime or the fact that the client committed it. For the purposes of a facial sufficiency motion, the strength or reliability of the evidence the prosecution might have at trial is not paramount. In order to subject the accused to the arduous and stressful experience of a criminal trial, the prosecution must at least make a complete accusation which establishes each material element of the accusation against them. If the prosecution fails to properly and sufficiently accuse the client, the defective charging document should be dismissed immediately and the trial should not be allowed to begin. Facial sufficiency motions are normally granted "without prejudice," meaning that the prosecution can seek to bring the case again if they purport to fix the deficiency. Note, the argument that the prosecution has failed to prove one or more elements of the crime may be argued again in the final defense argument, although usually at that stage the argument will be that the element(s) was not proven to the requisite standard (e.g. beyond a reasonable doubt). At the motion to dismiss stage, the argument is that even if the evidence so far presented is un rebutted (taken to be true), the accusation is still incomplete to make out a crime, and thus the accused could never be convicted at trial.

A motion to dismiss may also be based on an argument that the violation of law or procedure is of such gravity or so irreparable that the only remedy acceptable is dismissal of the case. A redo of the proceedings (e.g. in the presence of a defense lawyer) or a simple statement from the court that the action was a violation of the law is not enough. A motion to dismiss based on

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the fact that the accused was tortured by authorities, during the investigation or otherwise, is a clear example where the violation was of a fundamental right and the misconduct so egregious that the best remedy is full discharge from the case. The strength of the prosecution's case or the culpability of the accused is irrelevant, and redoing the procedure would not cure the wrong. The defense lawyer should make every effort to push for dismissal of the case, but can also argue for alternative remedies in the event the judge is not willing to dismiss the case, like exclusion of evidence. If the judge will not dismiss a case based on torture of the suspect during interrogation, any confession obtained as a result of the torture is wholly unreliable and should not be considered as evidence of guilt.

3) MOTIONS CONCERNING EVIDENCE - PRODUCTION AND DISCLOSURE VS. EXCLUSION AND NULLIFICATION

Introduction: Pretrial motions also work to fulfill basic expectations of fairness. At a very fundamental level, every person accused of a crime has a right to defend himself at a fair trial. Judges have a gatekeeping role in this regard, as they have the authority and responsibility to protect individual rights and uphold the law. Concerning evidence, the determination needs to be made as to what evidence must be produced and disclosed to the accused in order to fairly prepare a defense and what evidence "comes in to the trial," or can be considered in the substantive determination of guilt, in order for the trial to be fair. Different jurisdictions have different doctrines which empower judges to guarantee the fairness of the trial and deal with instances of unfairness. This section presents possible motions to compel the production and disclosure of evidence and motions to seek legal remedies when there is a problem or issue relating to evidence (e.g. who it was obtained by and/or under what circumstances).

A. Motions to Compel Evidence - Disclosure and Production:

There are several critical pieces included in the right to defense and the right to a fair trial, like the right to counsel and the right to be notified of the charges. Certainly, knowing the evidence that the prosecution has to prove their case (sometimes called "discovery") and being allowed to present defense evidence are two important pieces to being able to prepare a defense. Exactly what evidence must be disclosed to the accused and when, in order for the trial to be fair, has a wide range of answers depending on the jurisdiction, and is a question that has not been fully addressed in many places either in law and procedure or litigation. Particularly in places where the issue is still developing, defense lawyers should be filing discovery motions early and often, in order to uphold the client's right to defense. The discovery motion is asking the court to compel the prosecution to disclose all the evidence that they have—both inculpatory and exculpatory. In jurisdictions that have plea bargaining, having prompt knowledge of the evidence that the prosecution has is paramount to being able to make an informed decision on whether to accept the plea bargain or proceed to trial.

The right of the accused to present evidence in his defense is well accepted. However, there may be certain types of evidence that are under the

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prosecutor's control or which would be stronger if ordered by the court. In such cases, the defense lawyer can file a motion to compel production of evidence. For example, certain medical examinations or forensic tests may be conducted only at the behest of the prosecutor. Where the client claims that he was tortured, demanding a medical examination immediately is advisable. In most cases, the client will be detained, and consequently an independent medical examination by a defense doctor may be impossible or, at least very difficult (although trying to obtain one is likely in the client's interests). The defense lawyer might also file a motion to compel production of a witness for pretrial testimony regarding the violation. Ultimately, a pretrial hearing with witnesses and evidence may be necessary in order to fully litigate the issue.

B. Motions to Exclude or Nullify Evidence:

On the other hand, when evidence is illegally gathered (typically in a way that violates the accused's rights), the proper remedy is for the court to exclude the evidence. There are two ways to determine whether authorities recovered evidence in accordance with the law. One way is to make this determination by simply looking at the discovery provided, including the police paperwork, search/arrest warrants, etc. However, the paperwork is often insufficient to understand the circumstances or may inaccurately reflect what actually occurred (according to the client), so it may be necessary to make further inquiry. In such instances, the defense lawyer should make a motion to compel production of evidence, as explained above, like the police officer who made the arrest or seized the evidence or interrogated the suspect, to probe the circumstances surrounding the seizure of the evidence before the judge decides whether to exclude the evidence. Some jurisdictions have incorporated pretrial hearings on these important issues into the criminal justice process, so that the court can ensure in every case that the search was conducted lawfully, that the physical evidence was legally obtained, that the suspect was not tortured or forced to make a confession, that the identification of the accused was conducted properly, etc.

With exclusion of evidence, the court is making a determination that the evidence cannot be considered in the trial. The evidence may have been obtained unlawfully (without a warrant or as a result of torture or coercion) or it may have been gathered properly but subsequently handled in a way that violates rules of evidence, rules of procedure or other rules. The consequence of the unlawful action - the exclusion of the evidence - is meant to remediate the violation.

Nullification is another possible remedy presented in some jurisdictions, but in many cases it is a synonymous term and has the same effect as exclusion. Generally, the law will state what the defense lawyer can move to nullify, whether for example it is evidence, like documents, or whether it is procedures or proceedings. The scope or effect of the nullity, particularly when procedures or proceedings are nullified, may be delineated in the statute or may be open for interpretation. Oftentimes when a procedure or proceeding has been nullified, the effect of this nullification is that the proceeds of this procedure are treated as if they do not exist.

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The proceeds of the nullified procedure can be understood under the “Fruit of the Poisonous Tree” doctrine, which provides the logical connection between the unlawful action and the exclusion of evidence. When police perform an action, like a search or seizure, illegally and against the individual’s rights, that police behavior is considered “poisonous.” Any evidence that is obtained as a result of, or growing out of, this poisonous, illegal police behavior is like the fruit of a poisonous tree – that evidence itself is poisoned by the police misconduct and therefore cannot be used against the individual. The “fruit of the poisonous tree” doctrine is applied as a punitive measure intended to serve as a deterrent against future police or prosecutorial misconduct.

There are some exceptions to this doctrine, however, that have developed to varying extents in different jurisdictions. If the evidence was also independently obtained through legal means, if it is inevitable that the evidence would have been discovered in the course of the investigation, or if the court determines that the illegal action did not affect the overall fairness of the investigation, such evidence may still be admitted.

In certain cases, success on a pretrial motion concerning evidence will be determinative of the outcome of the case. For example, if the charge is possession of illegal narcotics, but the drugs were seized in violation of the law and the defense lawyer successfully argues that the drugs should be excluded from evidence, then there is no evidence of the illegal narcotics in the record, and the client cannot be convicted for possession thereof. Moreover, if the only evidence of guilt against the client is a statement of admission made to the police, but the statement was obtained using torture, if the court excludes that statement as a remedy to the illegal way in which it was obtained, then there is no longer any evidence of guilt. The defense lawyer should pursue a pretrial motion to dismiss (or nullify the case).

One thing to keep in mind is that litigation of these pretrial motions may happen in front of the same judge that will preside over the trial. This means that the same judge will hear all of the evidence that the defense lawyer ultimately does not want the “fact-finder” to be able to consider. The idea is like ringing a bell. Once the bell is rung, there is no way to “un-ring” the bell. The judge ruling on the pretrial motion has already heard the evidence, and it will be difficult to un-ring that bell when they become the finder of fact. The defense lawyer may try to have the pretrial issues heard by a different judge. Where this is not possible, the defense lawyer must make absolutely clear that the judge (or the fact-finder if different from the judge) must determine guilt or innocence based only on the evidence that was admitted in court into the record legally.

4) MOTIONS AFFECTING PROCEDURE:

Defense lawyers should also consider whether to file pretrial motions that will affect the procedure of the case in the accused’s interests, or limit undue prejudice or bias against the accused. Criminal procedure codes generally provide for mechanisms to sever or join cases, or change the venue of the proceedings.

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Sometimes one defendant is charged with multiple different offenses. For example, the defendant may be charged with trafficking in heroin on one date and also for a murder that happened several months later. The two offenses have nothing to do with each other. Even though judges are supposed to be neutral and impartial, if the judge hears about the murder case, it may have an impact on his opinion on the drug trafficking case. If the judge is influenced by knowledge of the unrelated case, even without knowing it, the defendant will be denied the right to a fair trial. In such a situation, the legal aid provider should move to “sever” (separate) the charges (drug trafficking and murder) in order to have two separate and independent trials, with different judges, possibly different prosecutors, and different juries (if applicable).

Other times, the client may be charged with the appropriate charges, but he may be charged with another person, and the circumstances of the case may be such that the trial of the two together is unfair. The defense lawyer may seek to have the client’s case severed from the co-defendants. This is a matter of law and strategy. For example, if the co-defendant made a confession that implicates the client and this confession is not legally admissible against the client, then the defense lawyer may want to sever the client from the co-defendant because the client cannot get a fair trial in front of the same judge who is hearing the co-defendant’s confession.

On the other hand, the defense lawyer may want to file a motion to have cases joined together, whether it is separate charges against the same defendant (the client) or separate cases involving the same incident (the client and what should be a co-defendant). For example, if the client and another person are charged with drug trafficking of the same drugs and in the same location at the same time, the defense lawyer may want to keep the two defendants joined for trial, because the strategy may be to tell the judge that the client did not know anything, and that it was the other defendant who was the real trafficker.

In addition to severance and joinder, change of venue motions are important pretrial motions. In some situations, the defense lawyer may argue that the current venue will not afford the accused a fair trial, perhaps because of the notoriety of the case or the client and the prejudice against the accused that entails. Similar situations may also affect the safety of the accused and moving the location of the trial may be necessary for the client’s security. Finally, where specialized courts exist, whose purpose is to provide more comprehensive, population specific justice, the defense lawyer should consider seeking to move the case to the specialized court. Juvenile courts, domestic violence, and drug courts are increasingly available in court systems.

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CONCLUSION

The role of an effective legal aid lawyer includes **filing and arguing pretrial motions to the court that may be advantageous to the accused.** Lawyers can only protect the fundamental rights guaranteed to the accused if they promptly, proactively and consistently raise violations of these rights in court, to a judge. It is judges who have the final authority to correct the injustices and violations that are routinely perpetrated against the criminally accused. The first – and most important – step is for the defense lawyer to consider, strategize, file, and litigate these pretrial issues through motions to the court. In fact, there may be several motions that are necessary to address all of the issues on a case, and they may need to be appealed and litigated up to higher courts. Of course, instruction from the client will be guiding, but the lawyer must anticipate arguments and decisions and be ready at every turn to file the next motion or appeal. Through the systematic practice of filing pretrial motions, defense lawyers can ensure the protection of fundamental fair trial rights as a matter of course.

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