Constitutional Law - Eighth Amendment - Fourteenth Amendment - Excessive Bail

Matt Curiale

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Matt Curiale, Constitutional Law - Eighth Amendment - Fourteenth Amendment - Excessive Bail, 20 Duq. L. Rev. 689 (1982).
Available at: https://dsc.duq.edu/dlr/vol20/iss4/8

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
CONSTITUTIONAL LAW—EIGHTH AMENDMENT—FOURTEENTH AMENDMENT—EXCESSIVE BAIL—The United States Court of Appeals for the Third Circuit has held that the excessive bail clause of the eighth amendment is applicable to the states.


In October 1971, Edward Sistrunk was convicted in a Pennsylvania state court of murder and other related offenses stemming from a store robbery. He received a sentence of life imprisonment for murder and consecutive and concurrent twenty-to-forty year sentences for other crimes. On appeal, the Supreme Court of Pennsylvania affirmed the conviction and sentence.

Sistrunk then filed a petition pursuant to the Pennsylvania Post Conviction Hearing Act, arguing that he had been ineffectively represented by counsel at trial and that his constitutional rights had been abridged by prejudicial error in the prosecutor's closing argument. In May 1979, the Philadelphia Court of Common Pleas granted Sistrunk a new trial. He then requested that bail be set pending retrial. In June 1979, a bail hearing was held and the same court set bail at two million dollars.

---

1. Sistrunk v. Lyons, 646 F.2d 64 (3d Cir. 1981). On January 4, 1971, Sistrunk and seven accomplices staged a robbery at a furniture store during which a man was killed, 5 fires were ignited, and several persons were assaulted. Id. at 65.

2. Id. at 65. Sistrunk was convicted on twelve charges including first degree murder, four counts of aggravated robbery, burglary, conspiracy, and four counts of assault and battery with intent to murder. Id. See 18 PA. CONS. STAT. §§ 1102, 3701 n.4, 3502, 903-911, 2702 (Purdon 1973), respectively.


5. 646 F.2d at 65. Trial counsel had failed to file a pre-trial motion to suppress and prevent an in-court identification of Sistrunk where the in-court identification of 2 Commonwealth Witnesses was tainted and a third witness had identified someone else at a pre-trial line-up. This eyewitness testimony was the only evidence linking Sistrunk to the crime.

6. 646 F.2d at 65. The court ruled that there was substantial prejudicial error in the prosecutor's closing argument and that it violated the appellant's sixth amendment rights. Id.

7. Id. Pennsylvania's 10% bail system required Sistrunk to deposit $200,000 cash, or the equivalent in realty or a combination thereof, with the
appeal, the Pennsylvania Supreme Court denied Sistrunk's application for a bail reduction. Sistrunk then filed for habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania, alleging that the two million dollar bail violated his eighth and fourteenth amendment rights to reasonable bail and abridged the presumption of innocence afforded all persons not yet convicted. The court denied relief without a hearing on the merits.

On appeal, the United States Court of Appeals for the Third Circuit affirmed, holding that the excessive bail provision of the eighth amendment does apply to the states pursuant to the due process clause of the fourteenth amendment. The court, however, denied Sistrunk habeas corpus relief because it found that the Pennsylvania Supreme Court may have intended to deny bail, and not set it at two million dollars.

Judge Adams, writing for a unanimous three-judge panel, examined whether the court had jurisdiction to hear the dispute.

8. Clerk of court in order to secure release. Pa. R. Crim. P. 4006(c), (e).
9. Brief for appellee at 6 & 7. Subsequent to the original bail hearing, Sistrunk moved to have the charges against him dismissed on double jeopardy grounds. Relief was denied in the Philadelphia Court of Common Pleas and there is an appeal pending to the Pennsylvania Supreme Court, docketed at No. 398, January term, 1979. Id.
10. Id. at 66. A defendant appealing the imposition of bail by a state court must exhaust available state remedies before commencing a habeas proceeding in the federal district court. 28 U.S.C. § 2254(b) (1977).
11. 646 F.2d at 66. The eighth amendment provides that “excessive bail shall not be required. . . .”, U.S. Const. amend. VIII, and the fourteenth amendment that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV, § 1.
12. 646 F.2d at 66. Sistrunk also contended that his bail violated a policy of equal treatment because one of his codefendants had been released on a lesser bail.
13. The district court adopted the report and recommendation of a United State Magistrate. The court concluded that the state trial judge had not abused his discretion in setting bail nor set an arbitrary or discriminatory bail in violation of the fourteenth amendment. The district court also reasoned that because Sistrunk could be subject to the death penalty on retrial, bail could have been denied anyway. Id.
14. Id. The order of the district court was affirmed without prejudice to Sistrunk to seek clarification from the state courts. Id.
15. Id. Circuit Judge Sloviter and District Judge Brotman, sitting by designation, joined in the opinion.
The court noted that its jurisdiction hinged upon whether the eighth amendment's guarantee against excessive bail is applicable to the states through the due process clause of the fourteenth amendment.  

Judge Adams observed that since 1945, through use of the doctrine of selective incorporation, specific guarantees of the Bill of Rights have been applied to the states through the due process clause of the fourteenth amendment. The court observed that although the eighth amendment's prohibition against cruel and unusual punishment has been applied to the states, the Supreme Court of the United States has never addressed the same issue in relation to the excessive bail clause of the eighth amendment. Despite this, Judge Adams observed that, based on historical reasons and certain Supreme Court decisions, it has been assumed that the excessive bail clause does apply to the states through the fourteenth amendment. He also stated that

16. Id. The federal courts have authority to consider habeas petitions of persons in state custody in violation of the Constitution, laws or treaties of the United States under 28 U.S.C. § 2254 (1977). In order for Sistrunk to make out a claim under section 2254, the eighth amendment excessive bail provision must be applicable to the states.

17. In deciding which Bill of Rights provisions to incorporate, the Supreme Court has continually rejected the theory of total incorporation and instead searched for principles of justice so rooted in the tradition and conscience of our people as to be ranked as "fundamental". Only the provisions of the Bill of Rights which were basic in our system of jurisprudence were incorporated. In the early 1960's, the courts proceeded upon the assumption that state criminal processes bear specific characteristics and the courts asked whether given this kind of system a particular procedure is fundamental or necessary to an Anglo-American idea of ordered liberty. This scheme developed in an era where only 2 decades before, the Supreme Court in Adamson v. California, 332 U.S. 46 (1947), came within one vote of holding that the Bill of Rights applies completely to the states. See J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 376-378 (1977) and L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-569 (1977).

18. 646 F.2d at 66. In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held that states were bound by the eighth amendment's clause against cruel and unusual punishment.

19. 646 F.2d at 66.

20. Id. Enforcement of the eighth amendment's cruel and unusual punishment clause against states is based on the presence of that prohibition in the English Bill of Rights of 1689. See Furman v. Georgia, 408 U.S. 238 (1972) and Louisiana v. Resweber, 32 U.S. 459 (1947). The excessive bail prohibition is also enumerated in the ancient Bill of Rights. Bill of Rights, 1689, 1 Wm. & Mary Sess. 2, c. III, I(10) [hereinafter cited as 1 Wm. & Mary].


22. 646 F.2d at 67.
because other constitutional rights aimed at keeping the innocent from unwarranted confinement have been applied to the states, freedom from excessive bail should also be applied because it serves a similar function.23

The court then noted that the Supreme Court in *Duncan v. Louisiana*24 developed a set of inquiries for determining whether a right provided by the Bill of Rights with respect to federal criminal proceedings is also applicable through the fourteenth amendment to similar state proceedings. Judge Adams stated that the relevant inquiries are: (1) whether a right is among those fundamental principles of liberty and justice upon which all our civil and political institutions are based; (2) whether the right is a basic one in our system of jurisprudence; and (3) whether it is essential to a fair trial.25

Judge Adams found that the right to be free from excessive bail met the first prong of the *Duncan* test.26 He noted that bail was a carefully guarded right in the American colonies27 and that the eighth amendment clause against excessive bail was immediately augmented after its adoption by a positive federal statutory

---

23. *Id.* Other rights aimed at preventing unwarranted confinement of those not guilty are the sixth amendment right to a speedy trial, which was upheld in *Klopfer v. North Carolina*, 386 U.S. 213 (1967), and proof of a criminal charge beyond a reasonable doubt, upheld in *In re Winship*, 397 U.S. 358, 364 (1970).

24. 391 U.S. 145 (1968). The Duncan Court held that a trial by jury in criminal cases is fundamental to the American scheme of justice and therefore the sixth amendment right applies to the states through the fourteenth amendment. Without defining which criminal offenses are petty and which serious, the Court held that any crime punishable by 2 years in prison is serious and therefore any accused of such a crime is entitled to a jury trial. *Id.* at 161-62.

25. 646 F.2d at 67. See *Duncan*, 391 U.S. at 148-49.

26. 646 F.2d at 68. This test was originally propounded in *Powell v. Alabama*, 287 U.S. 45 (1932). The Powell Court was addressing the issue of the right to counsel in a criminal prosecution and deemed this right to be fundamental and therefore guaranteed by the due process clause of the fourteenth amendment. The Court also stated that one test which has been used in certain instances is to ascertain what were the settled usages and modes of proceeding under the command statutory law of England before the Declaration of Independence; subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by demonstrating that they were followed in this country after it became a nation. 646 F.2d at 65.

27. 646 F.2d at 68. Early legislation replaced the English bail law of magistral discretion with a positive right to bail, except in capital cases. Pennsylvania created such a protection in 1682. Foote, *The Coming Constitutional Crises of Bail*; I, 113 U. PA. L. REV. 975 (1965).
right to bail in all noncapital cases. Judge Adams observed that although the eighth amendment does not create an absolute right to bail, it is the foundation of the bail system and must be carefully guarded against the diminuation of its protections.

The court also reasoned that the excessive bail clause of the eighth amendment also meets the second test set forth in *Duncan* because it is a basic right of our jurisprudential system. In support of this conclusion, the court noted that the right to be free from excessive bail has been a central theme throughout English and American history.

In applying the third test from *Duncan*, Judge Adams observed it was necessary to balance the values represented and protected by bail against the social costs and difficulties of administering the bail system. The court then noted that these conflicting in-

---

28. 646 F.2d at 68. See First Judiciary Act of 1789, I Stat. 73, 91 containing this statutory right. Also, throughout American history, there seemed to be a deep-rooted commitment to freedom before conviction which goes hand-in-hand with preserving the presumption of innocence until proven guilty. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951), which discusses this commitment as inherent in American law.

29. 646 F.2d at 68. Judge Adams also noted that the right to bail balances equally the defendant's right to pre-trial freedom and society's interest in assuring the defendant's presence at trial. *Id.*

30. *Id.* This criterion of a right being basic to our system of jurisprudence is derived from *In re Oliver*, 333 U.S. 257 (1948). There the Court focused on the traditional Anglo-American distrust for secret trials which it viewed mostly as a reaction to their abuses in other cultures, such as the Spanish Inquisition. *Id.* at 168-69.

31. 646 F.2d at 68-69. The Magna Carta's 39th chapter, which promised due process safeguards for all arrests and detentions, was implemented by the Petitions of Rights of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689. These statutes grew out of cases which alleged abusive denial of freedom or bail pending trial. The excessive bail provision was included in many state constitutions adopted during the revolutionary period and was eventually included in the eighth amendment. For details of American and English bail law history, see *Foote, supra* note 27, at 963-69. Judge Adams compared this Anglo-American right to be free from excessive bail with some European systems which either do not have a bail system or rely on discretion in granting bail. 646 F.2d at 69.

32. 646 F.2d at 69. The court opined that without the bail privilege, the innocent are punished by imprisonment while awaiting trial and are put at a disadvantage is preparing for trial. See *Stack v. Boyle*, 342 U.S. at 7-8. On the other hand, if granted bail, the defendant may flea or intimidate witnesses. Finally, excessive bail may penalize indigent defendants more harshly, even though there have been steps taken to reduce the inequality faced by indigent offenders, such as the Bail Reform Act of 1966, 18 U.S.C. § 3146 (1976), and Pa. R. Crim. P. 4004. See 646 F.2d at 69.
The court observed that because the function of bail is to assure the defendant's presence at trial, any amount higher than that reasonably calculated to fulfill this purpose is excessive under the eighth amendment.

Thus, the court concluded that bail is a fundamental liberty, elemental to the American system of jurisprudence. The court therefore asserted that states should respect this practice. Because our system of deterrents is based on the threat of subsequent punishment and not prior confinement, states should not be permitted to use bail as a form of pre-trial punishment.

The court stressed that the eighth amendment deals only with the right to be free from excessive bail and not the right to bail itself. The court found that while federal law defines "excessiveness", the states would still have the right to define the range of offenses for which bail is discretionary. Recognizing the Supreme Court's admitted reluctance to involve itself with the details of a state's bail system, Judge Adams observed that the Constitution only sets a limit on the employment of bail and does not provide a right to bail per se. Therefore, the states will not be unduly restricted by a uniform Federal code.

The court also rejected the argument that the excessive bail provision should not be incorporated because the term "excessive" is too vague. Judge Adams noted that other terms which are also vague have been applied against the state and reasoned that the employment of a subjective rather than an objective standard is not a determinative factor in the incorporation

33. 646 F.2d at 69. See Stack v. Boyle, 342 U.S. 1 (1951) (possibility of flight is a calculated risk which is the price of our system of justice).
34. 646 F.2d at 70. See Stack v. Boyle, 342 U.S. at 5.
35. 646 F.2d at 70. See also, Note, Preventive Detention Before Trial, 79 Harvard L. Rev., 1489, 1503 (1966) which observes that bail may be refused in order to protect the integrity of the legal system, e.g., when a defendant might flee or intimidate witnesses. However, bail should not be refused in order to prevent dangerous acts, for the would displace the established legal method of prohibiting the commission of crimes.
36. 646 F.2d at 70. The court states that federal bail statutes only provide a guideline on the right to bail.
37. See Schlub v. Kuebel, 404 U.S. at 365, in which the Court assumed the applicability of the eighth amendment to the states but stated that the administrative detail and procedure of the bail system is hardly to be classified as a fundamental right.
38. 646 F.2d at 71.
analysis. Thus, the court held that the excessive bail provision is binding upon the states and that therefore it did have jurisdiction to hear Sistrunk’s complaint.

The court then considered Sistrunk’s first argument, that his bail abridged his presumption of innocence. The court, following the Supreme Court’s holding in Bell v. Wolfish, noted that despite its important role in the criminal justice system, the presumption of innocence is not a source of substantive rights and does not provide adequate footing for a habeas petition.

Judge Adams rejected Sistrunk’s second contention that he suffered discrimination because co-defendants received lesser bail. He noted that bail is an individualized determination and the fact that co-defendants had bail set in a lower amount, without more, is insufficient evidence to established discrimination.43

Finally, the court examined Sistrunk’s argument that his two million dollar bail is excessive and violative of the eighth amendment. The court noted that the Supreme Court has defined excessive bail as one set at a figure higher than that reasonably calculated to assure defendant’s presence at trial. However, the court cautioned that in a habeas corpus proceeding, federal-state comity mandates some degree of certainty that a federal constitutional right has been violated before granting relief.

Judge Adams concluded that the Pennsylvania Supreme Court either intended to deny bail altogether, considered two million dollars not to be excessive because bail could have been denied, or determined that two million dollars was not excessive under the circumstances of the case. The court decided that because a

39. Id. Other terms which are also vague but which, the court notes, apply to the states are “unreasonable” searches and seizures and “cruel and unusual” punishment.
40. Id.
41. 441 U.S. 520 (1979). The Bell Court stated that despite the importance of the presumption of innocence in our system, “it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has ever begun.” Id. at 533.
42. 646 F.2d at 71.
43. Id. at 72. The court based this conclusion on Stack v. Boyle, 342 U.S. 1 (1951).
44. 646 F.2d at 72. See Stack v. Boyle, 342 U.S. 1 (1951).
45. 646 F.2d at 73. The court observed that the trial court had found that the defendant did have a right to bail, while the Pennsylvania Supreme Court said that bail should be denied in this case but allowed the two million dollar bail to stand anyway.
plausible reading could be placed on the state proceedings, it
would not disturb the state criminal system through its review
role in a habeas corpus proceeding. The court recognized that
such an interpretation allowed it to avoid resolving Sistrunk's
contention of excessiveness.

In a concurring opinion, Judge Sloviter agreed that the eighth
amendment's prohibition of excessive bail does apply to the
states and the habeas corpus could constitutionally decide that
Sistrunk had no right to bail.

Bail is the releasing of a person charged with an offense, sub-
ject to the insurance that he will appear in court. The excessive
bail clause of the eighth amendment was adopted almost verba-
tim from section nine of the Virginia Declaration of Rights of
1776 which in turn was derived from the English Bill of Rights of
1689.

The first statutory regulation of bail was a 13th century
English act, which sought to curb abuses by the Sheriff, who
had broad and discretionary powers to bail the King's prisoners,
by enumerating which offenses were bailable and which were

46. The court held that the first interpretation that the state intended to
deny bail has a basis in Pennsylvania constitutional law. According to PA. CONST.
art. 1 § 14, because Sistrunk could have received the death penalty, he has no
right to bail, although he could be admitted to bail at the discretion of the
court. The court noted, however, that even though this interpretation would
change the extent of the sentence and the defendant's state constitutional
rights on retrial, the question is one of state law and not the province of a
federal court to re-examine on a habeas petition. Judge Adams observed that in
Pennsylvania a defendant is sentenced to a non-capital penalty, he may not
receive a capital sentence on re-trial. 646 F.2d at 73.

47. Id. at 73. Judge Adams observed that because Sistrunk failed to
file a motion for clarification in the state court, he could not now expect the
court to speculate that the Pennsylvania Supreme Court's order was other than
a denial of bail. Id.

48. Id. (Sloviter, J., concurring).

49. BLACK'S LAW DICTIONARY 127 (rev. 5th ed. 1979). Whether bail is a
"basic human right" and the eighth amendment excessive bail provision en-
forces this right or whether bail is only an important statutory right will not be
discussed in this note. Two opposing views on this subject can be found in U.S. v.

50. See 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49
(W. Swindler ed. 1979) for the Virginia Declaration of Rights of 1776, and 1 Wm.
& Mary, supra note 20, for the English Bill of Rights.

51. The Statute of Westminster I, 3 Edw. 1, c. 15 Q (1275).
not.\textsuperscript{52} The statute, however, did not bind the higher justices nor the King, and Parliament was free to redefine which crimes were bailable.\textsuperscript{53} When the Stewarts exploited defects in the law to deny release to particular prisoners, further limitations on discretion to grant bail were enacted.\textsuperscript{54} One of these was the Habeas Corpus Act of 1679.\textsuperscript{55} When the protections of the Habeas Corpus Act were circumvented by the practice of setting prohibitively high bail, an excessive bail clause was drafted into the Bill of Rights of 1689. The excessive bail clause was developed as a specific remedy for judicial abuse of the bail procedure as otherwise established by law and did not imply any right to bail.\textsuperscript{56}

Many courts have assumed that the excessive bail clause of the eighth amendment applies to the states through the fourteenth amendment without utilizing any type of constitutional incorporation analysis. In \textit{Schilb v. Kuebel},\textsuperscript{57} the United States Supreme Court assumed that the excessive bail clause applied to the states through the fourteenth amendment, noting that bail is basic to our system of law.\textsuperscript{58} The \textit{Schilb} Court cited two other cases as precedent, although neither case actually decided the excessive bail issue.\textsuperscript{59} The Court also noted that it was not concerned with any fundamental right to bail or the question of excessive bail.\textsuperscript{60}

As a result of the Supreme Court’s pronouncement, many federal courts, in answering bail questions from the states, also

\begin{footnotes}
\item[52] \textit{See U.S. v. Edwards}, 430 A.2d at 1326.
\item[53] \textit{Id.} at 1327. \textit{See also} Duker, \textit{The Right to Bail: A Historical Inquiry}, 42 \textit{Alb. L. Rev.} 33 (1977), for an overall history of the English bail system.
\item[54] \textit{See U.S. v. Edwards}, 430 A.2d at 1327.
\item[55] \textit{Id. See also} Duker, \textit{supra} note 53, at 65 & 66.
\item[56] \textit{U.S. v. Edwards}, 430 A.2d at 1327.
\item[57] 404 U.S. 357 (1971). The \textit{Schilb} Court ruled that the Illinois bail system procedure of retaining 1\% of the 10\% bail deposit did not violate equal protection or due process.
\item[58] \textit{Id.} at 365.
\item[59] \textit{Id.} One case cited was Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963), in which the court stated that they took for granted that earlier cases such as \textit{Ex Parte Watkins}, 32 U.S. (7 Pet.) 568 (1833) and Collins v. Johnston, 237 U.S. 502 (1915), were now to be overruled, but never supported this conclusion. Another case cited was Robinson v. California, 370 U.S. 660 (1962), which dealt with the cruel and unusual punishment clause of the eighth amendment and not excessive bail.
\item[60] 404 U.S. at 365.
\end{footnotes}
have been applying the eighth amendment excessive bail provision without actually reaching the incorporation issue.\textsuperscript{61}

The Fifth Circuit in \textit{Simon v. Woodson}\textsuperscript{62} noted that that circuit\textsuperscript{63} and the Eighth Circuit\textsuperscript{64} are committed to the proposition that the eighth amendment prohibition of excessive bail is binding on the states.\textsuperscript{65} The court, however, held that because the appellant would have no constitutional relief even if the state of Texas were bound by the eighth amendment, it was inappropriate and unnecessary to expound on the excessive bail clause's applicability to the states.\textsuperscript{66}

In \textit{United States v. Kehl},\textsuperscript{67} the Second Circuit began its analysis by noting that the excessive bail provision of the eighth amendment has not yet been held by the Supreme Court to be applicable to the states through the fourteenth amendment, but stated that it had little doubt that it will be.\textsuperscript{68}

The \textit{Sistrunk} court followed the accepted constitutional theory that those provisions of the Bill of Rights that are fundamental to the American system of law should be applied to the states through the due process clause of the fourteenth amendment.\textsuperscript{69}


\textsuperscript{62} See 454 F.2d 161 (5th Cir. 1972). The \textit{Simon} court reversed an order from a Texas federal district court which granted habeas corpus relief on a finding that bail set by the state was excessive. The court ruled that the only issue to be decided was whether the state judge had acted arbitrarily in setting bail. \textit{Id}.

\textsuperscript{63} The Fifth Circuit precedent was a six-word footnote in Henderson v. Dutton, 397 F.2d 375 (5th Cir. 1968); the text read, "The Constitution prohibits the state from inflicting cruel and unusual punishment," a footnote added: "and undoubtedly excessive bail as well." \textit{Id}., n.3.

\textsuperscript{64} The precedent cited from the Eighth Circuit was Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963). \textit{See supra} note 59.

\textsuperscript{65} 454 F.2d at 165.

\textsuperscript{66} \textit{Id}.

\textsuperscript{67} 456 F.2d 863 (2d Cir. 1972). The \textit{Kehl} court ruled that a federal district court erred in granting relief upon a habeas corpus petition where a radio station manager was sentenced to 30 days for contempt for not releasing tape recordings and the court noted he would be released sooner if he complied.

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{See J. Nowak, R. Rotunda, J. Young, Handbook on Constitutional Law} at 376, 377 (1977) [hereinafter cited as \textit{Nowak}]. The most recent standard
The *Sistrunk* court applied the most recent constitutional rationale on incorporation, the accepted standard for selective incorporation set forth in *Duncan*. In holding that the eighth amendment excessive bail clause, which for all practical purposes had been treated as if incorporated already,\(^7\) shall be incorporated into the fourteenth amendment, *Sistrunk v. Lyons* was a logical step into setting sounder precedent for future application of the excessive bail provision.\(^7\)

The *Sistrunk* decision incorporating the excessive bail clause of the eighth amendment to the states through the fourteenth amendment was a predictable step premised on accepted constitutional principles and left the court with jurisdiction to hear this particular appeal, if the Pennsylvania courts decided bail was not being denied, and future habeas appeals on excessive bail issues from state courts.

*Matt Curiale*

---

70. See *Nowak*, supra note 69, at 376 n.7.

71. Whether the excessive bail provision of the eighth amendment grants a constitutional right to bail in a criminal case has never been decided in the federal courts. The *Sistrunk* court takes the position that the Constitution does not provide a right to bail per se to which the states must conform, it only sets a ceiling on its employment. 646 F.2d at 71.