

Research on the Impact of Early Involvement of Counsel in Criminal Cases

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When defendants are detained pretrial, they are more likely to be convicted, enter a guilty plea, receive a jail sentence, and have longer jail sentences (Heaton & Stevenson, 2016). Studies have found that even brief pretrial detention of 2-3 days can increase the risk of new criminal activity (Lowenkamp, VanNostrand, & Holsinger, 2013), while longer stays may substantially increase the risk of a failure to appear (FTA) after release (Holsinger, 2016).

National standards from the American Bar Association recommend the early involvement of defense counsel (ABA, 2015), and the North Carolina Commission on the Administration of Law and Justice recommends involvement of counsel during bail proceedings in North Carolina criminal cases (NCCALJ, 2017, pp. 25-46). Studies of the effects of early involvement of counsel consist of two randomized controlled trials (RCTs) and three program evaluations. These five studies collectively suggest that providing counsel at first appearances and during bail hearings can reduce the length of pretrial detention, decrease average bail amounts, and increase the likelihood of pretrial release. Each study is discussed below, and a chart presenting their findings is available at the end of this paper.

Baltimore, Maryland

A 1998 Baltimore RCT examined the effects of representation during district court bail hearings¹. The study included 300 nonviolent defendants (175 in the test group; 125 in the control group). Defendants in the test group were represented by counsel during their bail review hearings. Comparing the test and control groups across age, employment, prior arrests, prior FTAs, race, and offense type revealed three significant differences. The control group was more likely to already have pending charges at their bail hearings (56% vs. 44%), the test group was more likely to have an arrest in the past five years (87% vs. 74%), and the test group was more likely to have a conviction in the past year (44% vs. 31%). It is not clear what impact these differences may have had on the final results, as the pending charges suggest the control group would be more likely to be detained or receive higher bail, whereas the latter two differences suggest the opposite. It is not possible to determine to what extent these differences in the control and test groups are responsible for the differences found in the final results.

The study identified a range of positive outcomes for defendants who had representation at their bail hearings. First, the test group was more likely to be released on recognizance (34% vs. 13%) compared to the control group. The average bail amount for the test group was \$2,441; for the control group it was \$3,012. The bail amount for the test group also was reduced by approximately \$1,000 on average following hearings, whereas it was reduced by an average of \$166 for the control group. Finally, the study examined the portion of defendants with low bail amounts (<\$500) following the hearing. It found that 22% of the test group had bail of \$500 or less, as opposed to 13% of the control group (Colbert, Paternoster, & Bushway, 2001, pp. 1752-

¹ In Maryland District Court, defendants are provided an initial appearance before a commissioner within 24 hours of arrest. If detained, defendants then are brought before a District Court judge for a bail review hearing.

1756). The researchers did not test whether each of their findings were statistically significant, but the consistency and depth of the differences between the test and control groups suggests early representation had a meaningful impact on pretrial outcomes.

Haywood and Jackson, North Carolina

As part of a larger reform project, beginning in January 2019 two counties in Judicial District 30B—Haywood and Jackson—began offering new first appearance proceedings for defendants charged with misdemeanors and low-level felonies. In North Carolina, a first appearance is the proceeding during which a judge reviews the bail determination made by a magistrate immediately after arrest. Because state law only requires first appearance proceedings for in-custody felony defendants, these were new proceedings for in-custody misdemeanor defendants. Additionally, in Haywood County, defendants were provided with representation at the proceedings. Specifically, NC Indigent Defense Services contract counsel met with defendants in jail prior to the new proceedings, obtained and reviewed their criminal history records, and represented defendants at the new proceedings.

An empirical evaluation of the project examined outcomes in the two counties. In Jackson County, 5.3% of defendants had counsel at first appearance compared to 93.2% who had counsel at first appearance in Haywood County. The percentage of defendants who still had a secured bond following first appearance was 62.3% in Jackson and 58.47% in Haywood. In Jackson County, 38.92% of defendants had their bail modified, as compared to 55.33% in Haywood.² Of those who had their bond modified in Jackson, 20.58% had bond amounts modified and 11.02% had bond amounts modified and unsecured; in Haywood those numbers were 18.92% and 7.09% respectively. Average bond amount reduction in Jackson was \$5,730.64 compared to \$10,456.15 in Haywood. In Jackson, average bond amount after the new proceeding was \$20,688.85 and 7.8% had a final bond of \$500 or less; in Haywood those numbers were \$32,802.33 and 8.4% respectively (Vaske, 2020, pp. 16-17). The differences between Jackson and Haywood County were not tested for statistical significance, nor were confounding factors discussed, so we cannot conclusively state that these differences are the result of the early involvement of counsel.

The evaluation also looked at outcomes within Haywood County for defendants with and without counsel at first appearance. Haywood County defendants who were represented by counsel at first appearance were 1.37 times more likely to have their bond modified and 1.52 times more likely to have their bond amount reduced compared to defendants without representation at the first appearance hearing. 57.9% of defendants were detained after the first appearance hearing, but defendants with counsel at first appearance were 2.22 times as likely to have their secured bond amount reduced than defendants who did not have counsel at first appearance (Vaske, 2020, p. 18). Each of these findings was statistically significant. However, because potentially confounding factors were not discussed, we cannot conclusively state that these differences are the result of representation at first appearance hearings.

² Excluded from this analysis were “48-hour defendants.” Under state law, only a judge may set bail for these domestic violence defendants during the first 48 hours; thus, they are held without bail by a magistrate and the judge's determination at the first appearance typically is a first bail setting.

New York

In 2014, the New York State Office of Indigent Legal Services (ILS) funded the creation and implementation of counsel at first appearance (CAFA) programs³ for misdemeanor and felony defendants in 25 counties. A 2020 report, using data from pre and post-CAFA, examined six counties for the effects of CAFA on pretrial decisions, case outcomes, and the criminal process. The identities of the counties were kept confidential. Four—chosen because they primarily relied on public defender offices for indigent defense services—were given alias names Hudson, Polar, Lake, and Moose. The remaining two, which primarily relied on attorneys from private practices for indigent defense, are referred to as Bleek and Williams⁴. Sample sizes were as follows:

- Bleek: 182 pre-CAFA, 148 post-CAFA
- Hudson: 695 pre-CAFA, 283 post-CAFA
- Williams: 217 pre-CAFA, 332 post-CAFA
- Polar: 307 pre-CAFA, 559 post-CAFA
- Lake: 250 pre-CAFA, 226 post-CAFA
- Moose: 68 pre-CAFA, 138 post-CAFA

In evaluating the effects of CAFA, the study attempted to control for highest charge, previous arrests, race, ethnicity, and gender; however, some missing data led to a significant portion of unknowns for race, ethnicity, and gender. Compared to pre-CAFA misdemeanor defendants, post-CAFA misdemeanor defendants were 19.1% more likely to be released pretrial, had bail amounts that were 14.9% lower, and were held 20.3% fewer days pretrial. Compared to pre-CAFA felony defendants, post-CAFA felony defendants were 31.5% more likely to be released pretrial, had bail amounts that were 25.9% lower, and were held 30.7% fewer days pretrial (Worden, Davies, Shteynberg, & Morgan, 2020, p. 21). All of these findings were statistically significant, indicating that CAFA had a direct effect in increasing the frequency of pretrial release, reducing bail amounts, and reducing the length of pretrial detention for both misdemeanor and felony defendants.

Passaic County, New Jersey and Shelby County, Tennessee

The first RCT to study early involvement of counsel was conducted in 1984 by the National Institute of Justice (NIJ) to “test the impact of early, continuous, and enhanced representation by the Public Defender” (Fazio Jr., Wexler, Foster, Sheppard, & Musso, 1984). The team identified three sites to test the early involvement of counsel for non-capital felony defendants: Passaic County, NJ; Shelby County, TN; and Palm Beach County, FL. Due to data collection problems with the control group at the Palm Beach County site, those results are excluded from this discussion. Test sites randomly sorted defendants charged with violent and non-violent offenses into test and control groups that were identical across race, gender, age, and arrest charge. However, there were two notable differences. In Passaic, a higher percentage of the test group was charged with serious crimes (burglary, arson, etc.), and, in Shelby, a higher

³ The report did not specify exactly when counsel first met with defendants.

⁴ Williams county used a combination of both, with 70% being assigned private counsel.

percentage of the test group had no prior arrest record compared to the control. The counties also had varying levels of staff, training, and technical assistance.

The Shelby and Passaic programs also had differences in their implementation. Attorneys in Passaic were able to meet with clients within 24 hours of arrest. Following initial interviews of twenty to forty minutes, defense attorneys represented their clients at first appearance hearings. In Shelby, attorneys were able to meet with clients an average of 2.5 days after arrest. In addition, Shelby defense attorneys were only able to meet with their clients in the minutes just prior to their first appearances (Fazio Jr. et al., 1984, pp. 147-154).

In Shelby (753 in the test group and 1077 in the control group), early representation was associated with an increase in pretrial release (51.6% vs. 36.9%) and shorter detention times before release (3.4 days vs. 5.9 days). In Passaic (520 in the test group and 283 in the control group), there was an unexpected decrease in pretrial release (51.6% vs. 57.9%); however, the authors note that, because of significant jail overcrowding at the time of the study, pretrial release rates were likely inflated for all defendants, which would make it difficult to assess the impact of early representation. Passaic defendants with early involvement of counsel showed the greatest decrease in detention time before release (5.3 days vs. 12.8 days) and were more likely (56.7% vs. 44.2%) to be released on recognizance (ROR) compared to those without early involvement of counsel (Fazio Jr. et al., 1984, pp. 205-210).

These results suggest that early access to counsel can reduce pretrial detention times and may have other benefits for defendants; however, these findings should be interpreted with caution. Each site's control and test groups were not identical across the chosen metrics, which may have affected the final results. In addition, the different resources and systems in place at each site means that these findings should not be generalized to other locations, and the study did not discuss whether its findings were statistically significant. Altogether, these limitations, as well as the contradictory findings for pretrial release, mean we cannot conclusively state that providing counsel during first appearances increases pretrial release. The consistency and magnitude of the decrease in pretrial detention, however, is a promising sign that early access to counsel reduces detention length.

San Francisco, California

Beginning in October 2017, the San Francisco Pre-Trial Release Unit (PRU) began giving pre-arraignment representation to some indigent defendants. The goal of the program was to provide pre-arraignment representation to indigent defendants by providing “‘arrest-responsive’ interventions ... to provide client interviews, case investigation, notification of prior attorney of record, family/friend contacts, and recruitment of community members to attend arraignment.” (Yamosky, 2018, p. 2). Public defenders continued to be assigned on the day of arraignment.

Between October 2017 and February 2018, 1,024 cases were assessed for the impact of PRU on pre-trial detention. The control and test groups were matched along age, race, gender, charge severity, warrants, parole or probation holds, and criminal history in order to control for potentially confounding factors. Individuals who received services were twice as likely to be

released at arraignment (14% vs. 28%). The author also estimated that the arrest-responsive program saved approximately 4,689 jail bed-days during the 5-month evaluation.

Conclusion

Throughout the studies discussed here, there is some evidence of the effects of early involvement of counsel on pretrial outcomes. Although only the New York study discussed the statistical significance of its findings, the studies generally showed an increase in pretrial release following the provision of early access to counsel. In addition, there was some evidence to suggest that average bail amounts and pretrial detention lengths were reduced by having representation during first appearances and bail hearings. Further analysis and greater statistical rigor are needed to understand these outcomes and how the effects of individual elements in early involvement programs influence the efficacy of such programs.

Findings Table

Study Site	Sample Size	Study Date	Findings
Baltimore	300	1998	<p>Defendants with early involvement of counsel: 21 percentage point increase in portion of defendants receiving ROR \$571 decrease in average bail amount 9 point increase in the portion of defendants receiving bail under \$500</p>
Haywood and Jackson	1,455	2019	<p>93.2% of Haywood defendants had counsel at first appearance 58.47% of Haywood defendants had secured bonds after first appearance \$10,456.15 average reduction in bail amount for Haywood defendants</p> <p>5.3% of Jackson defendants had counsel at first appearance 62.3% of Jackson defendants had secured bonds after first appearance \$5,730.64 average reduction in bail amount for Jackson defendants</p> <p>Haywood defendants with counsel at first appearance, compared to Haywood defendants without counsel at first appearance, were: 1.37 times as likely to have their bond modified* 1.52 times as likely to have their bond amount reduced** 2.22 times as likely to have their secured bond amount reduced when detained after their first appearance*</p>
New York	3,405	2020	<p>Misdemeanor defendants with early involvement of counsel: 19.1% more likely to be released pretrial*** 14.9% lower bail amounts*** 20.3% shorter pretrial detention lengths***</p> <p>Felony defendants with early involvement of counsel: 31.5% more likely to be released pretrial*** 25.9% lower bail amounts*** 30.7% shorter pretrial detention lengths***</p>
Passaic	1,830	1984	<p>Defendants with early involvement of counsel: 15.3 percentage point increase in pretrial release 2.5-day reduction in average detention length</p>
Shelby	803	1984	<p>Defendants with early involvement of counsel: 6.3 percentage point decrease in pretrial release 7.5-day reduction in average detention length</p>
San Francisco	1,024	Oct. 2017 - Feb. 2018	<p>Defendants with pre-arraignment involvement of counsel: 14 percentage point increase in release at arraignment</p>

*Statistically significant at the .05 level (95% chance findings are not due to random chance)

**Statistically significant at the .01 level (99% chance findings are not due to random chance)

***Statistically significant at the .001 level (99.9% chance findings are not due to random chance)

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