



REPRESENTATION AT ARRAIGNMENT:

THE IMPACT OF “SMART DEFENSE” ON DUE PROCESS AND JUSTICE IN ALAMEDA COUNTY

Alameda County found increases in releases, and more efficient due process – both resulting in significant savings for the County due to less time spent by defendants in custody. This also has large positive impacts for the defendants themselves.

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About Us

IMPACT JUSTICE

Impact Justice is a national innovation and resource center committed to reducing the number of people involved in US criminal justice systems, improving conditions for those who remain incarcerated, providing meaningful opportunities for successful re-entry, and attending to crime victims' needs. Home to some of the foremost leaders in juvenile justice, violence prevention, research and evaluation, restorative justice, and youth development, Impact Justice provides an array of technical assistance to criminal justice and community stakeholders. For more information, please visit www.ImpactJustice.org

THE RESEARCH AND ACTION CENTER

This report falls under the purview of the Research and Action Center. As a Center of Impact Justice, our research catalyzes community efforts to eliminate disparities and propel system change. We focus especially on the populations most impacted by disparities, including youth and adults of color, as well as members of the LGBTQ/GNCT communities. That's why we partner with community service providers, government agencies, and key stakeholders across the country to research, evaluate, and support implementation of the most effective and innovative practices.

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The Alameda County Public Defender's Office, established in 1927, is one of the outstanding public defense offices in the United States. The Office's reputation for providing high level legal services to indigent clients is due to its historically rigorous professional and ethical standards. In addition to providing regular trainings on trial skills, best practices, and the latest in criminal law to attorneys within the office and across the state, the Alameda County Public Defender's Office takes pride in leading the practice of indigent defense in holistic representation. With the addition of the first immigration unit within a public defender office in California, a team of social workers, reentry programs which include a clean slate practice and voter registration, and know-your-rights presentation to youth, ACPDO has expanded what it means to advocate for clients.

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Executive Summary

This report, written by Impact Justice's Research & Action Center, explores the Alameda County Public Defender's Office (ACPDO) implementation of the Smart Defense Initiative, which seeks to ensure representation at arraignment hearings. Previously, Alameda was the only county of its size in California that did not guarantee representation at this stage of the justice process. With funding from the Bureau of Justice Assistance, the ACPDO provided representation to more than 3,602 defendants facing felony charges during a one-year period. This initiative enabled the ACPDO to implement services in alignment with their mission, "to zealously protect and defend the rights of our clients through compassionate and inspired legal representation of the highest quality, in pursuit of a fair and unbiased system of justice for all."¹

The results of their efforts are clear: Many defendants spend less time in custody and due process is ensured starting from the arraignment process. The County benefits both financially, from fewer and shorter jail terms, and advances its interests to pursue justice. The initiative also holds potential for a tremendous positive impact in the lives of defendants.

This evaluation resulted in several important findings:

- Motions to release defendants greatly increased (from virtually 0 to 27% of cases), and were largely granted
- Motions to reduce bail were largely granted (83% granted)
- Rights to a speedy trial were asserted and increased as well (from 1% to 40%).

All these findings positively impact justice and due process outcomes. The County released defendants who would have otherwise remained incarcerated, averting a cumulative 2,974 days of incarceration during the course of a year. The ACPDO's progress in providing counsel at arraignment translates into over \$420,000 in savings per year. The financial and human costs of incarceration are significant and should not be accepted without careful examination of all alternatives.

Numerous studies detail the importance of pre-trial representation and release, finding benefits to defendants' outcomes at trial and in their personal lives (ability to maintain employment, and social and familial ties), all without compromising public safety. The Smart Defense initiative ensures those who could avoid additional days in custody are able to do so. This work provides evidence that representation at arraignment substantively benefits stakeholders within the criminal justice system, as well as the general public.

¹ www.acgov.org/defender/about/mission.htm

Description of the Project

CONTEXT, GOALS, & OBJECTIVES

The Supreme Court of the United States in *Rothgery vs. Gillespie County* held, “the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him [or her] and restrictions are imposed on his [or her] liberty.”² Historically, those charged with a criminal offense in Alameda County, for both misdemeanors and felonies, did not have counsel present at arraignment. Defendants both in and out of custody appeared in court without an attorney and had their charges read to them by a judge. Bail was often set according to the bail schedule, with the input of a district attorney. The defendant was then given the option to request a public defender or seek private counsel. Before the awarding of this grant, Alameda County was the only large county in California in which arraignment hearings were conducted with both a judicial officer and district attorney, but without defense counsel present. The ACPDO contracted the Research & Action Center of Impact Justice to conduct an evaluation of their Smart Defense Initiative. This report presents the findings of this evaluation, with key context and background information provided by the ACPDO.

The ACPDO sought to address the revolving door of the criminal justice system by changing the entry point to the system. The Supreme Court has repeatedly recognized that pretrial detention is detrimental to both a defendant’s criminal case³ and livelihood generally.⁴ Legal commentators have also observed the broad, deleterious effects that keeping defendants in pretrial custody can have.⁵ These effects are not limited to the defendants themselves; families

² *Rothgery vs. Gillespie County* (2008) 554 U.S. 191, 194 (citing *Brewer v. Williams* (1977) [430 U.S. 387](#), 398–399; *Michigan v. Jackson* (1986) [475 U.S. 625](#), 629, n.3). Although the case did not turn on counsel’s physical presence at the hearing, but rather being appointed shortly thereafter, the Court made it clear that the best practice is to have counsel present at the arraignment. See *Rothgery, supra*, 554 U.S. at 198, 211–12.

³ See *Stack v. Boyle* (1951) 342 U.S. 1, 8 (“Without this conditional privilege [of pretrial release], even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.”) (opinion of Jackson, J.).

⁴ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (recognizing that “[p]retrial confinement may imperil the suspect’s job, interrupt his source of income, ... impair his family relationships” and undermine his “ability to assist in preparation of his defense”).

⁵ As has been noted, “[t]he stress of incarceration—or even just the threat of jail time—frequently prompts defendants to plead guilty and give up their right to trial [I]t is a self-fulfilling system; defendants have to plea, and end up with a record, which permanently labels them as criminal, which in turn further influences judges when setting bail in future cases. Virtually all individuals charged with low-level offenses who face an unaffordable bail amount end up accepting a plea, thereby absolving the state of its burden to prove the case beyond a reasonable doubt Individuals who insist on their innocence and refuse to plead guilty get held And while the plea might prevent detention altogether or at least allow a return to productivity outside the

and communities suffer from the lost income from their incarcerated family members, expenses associated with jail time,⁶ including but not limited to loss of employment or pay, issues with child care, and disruption of the family unit when a parent is in custody.

Empirical research supports these general assertions. For example, increased time in pretrial custody increases the likelihood of pretrial concession of crime, failure to appear at subsequent court dates, and post-conviction recidivism.⁷ Just two or three extra days in pretrial custody can make a substantial difference in a defendant's likelihood to reoffend or fail to appear.⁸ While this research was correlative, it found longer pretrial custody times had a significantly higher effect on the outcomes of low- and moderate-risk defendants.⁹ Thus, it is unlikely that poorer outcomes for those held longer pretrial are related to any objective assessment by the courts regarding a defendant's likelihood to flee or reoffend.

Not only does pretrial custody negatively affect individual defendants, it has a disparate impact on vulnerable and marginalized communities. African Americans, Latinos and low-income whites are the groups most likely to be found among detainees unable to afford money bail or a bail bondsman's fee.¹⁰ Income and wealth disparities mean these groups bear the brunt of states' failure to provide counsel at initial appearances and at the early stages of a criminal prosecution.¹¹

Moreover, a person represented by counsel at arraignment is more likely to be released from pretrial detention, which in turn impacts the likelihood of a harsh prison sentence upon disposition.¹² A study in Baltimore, Maryland in 2001 found when nonviolent offenders had legal counsel at bail hearings, judges were two and a half times more likely to release the

jail cell, it may also come with a criminal record." Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System* (2017) 82 Bklyn. L.Rev. 881, 897 (quotations and footnotes omitted).

⁶ *Id.* at 899.

⁷ See *Pretrial Criminal Justice Research* (November 2013) Laura and John Arnold Foundation <https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf> [hereinafter *Pretrial Criminal Justice Research*.]

⁸ *Id.*

⁹ *Id.*

¹⁰ *Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing* (March 2015) Constitution Project National Right to Counsel Committee <https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf> [hereinafter *Don't I need a Lawyer?*]

¹¹ *Id.*

¹² See *Id.* at 29.

accused on personal recognizance or reduce bail to an affordable amount, compared to cases of arrestees without counsel.¹³

Representation for defendants at arraignments can lead to better outcomes for both defendants and for society more broadly. Nevertheless, in courtrooms across the country, unrepresented people appear at arraignments on a daily basis without the benefit of an attorney simply because they cannot afford to hire counsel. Compounding this issue, at least 60 percent of all people incarcerated in American jails are pretrial defendants who have neither been convicted nor sentenced, but are awaiting to either litigate or resolve their cases.¹⁴ In particular, California's large urban counties incarcerate defendants pretrial at almost twice the rate of the rest of the country, without any bearing on failures-to-appear or the pretrial crime rate.¹⁵ While the right to pretrial release is a fundamental liberty interest, rooted in the notion that one is presumed innocent until proven guilty beyond a reasonable doubt,¹⁶ the practice of depriving defendants of the right to counsel at arraignment threatens to turn this principle on its head.

THE PROBLEM ADDRESSED

Matters Addressed at Arraignment: Custody Status and Bail¹⁷

An arraignment hearing is, generally, the stage in criminal proceedings where the court informs the defendant of any criminal charges filed and is the first appearance a defendant makes before a judicial officer. It is also the first opportunity for a defendant to request release from custody, either without bail or with a reduction in the bail amount. A judge may release a defendant in various ways¹⁸: 1) solely on a promise to appear (commonly referred to as a "release on their own recognizance"), 2) under specific conditions of release, or 3) with a

¹³ *The Pretrial Release Project: A Study of Maryland's Pretrial Release and Bail System* (September 2001) The Abell Foundation at ii <[https://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01\(1\).pdf](https://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01(1).pdf)>; see also *Don't I Need A Lawyer?*, *supra* note 12, at 11.

¹⁴ Minto, Todd, *Jail Inmates at Midyear 2011- Statistical Tables* (April 2012) <<https://www.bjs.gov/content/pub/pdf/jim11st.pdf>>; Goff, *supra* note 7, at 881>.

¹⁵ Tafoya, Sonia et al., *Pretrial Release in California* (2017) Public Policy Institute of California <https://www.ppic.org/content/pubs/report/R_0517STR.pdf>.

¹⁶ *Stack v. Boyle* (1951) 342 U.S. 1, 4 (1951); see also *United States v. Salerno* (1987) 481 U.S. 739, 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.")

¹⁷ For more information on how arraignment generally proceeds in Alameda County, please refer to Appendix 1

¹⁸ For more detail on each of these types of release, please see Appendix 2

requirement that the person post bail, a set amount of money deposited with the court, intended to guarantee the defendant returns for future court dates.¹⁹

Critical issues are decided at arraignment, creating the pressing need for every defendant to have an attorney at this stage of the justice process. The release of an individual from jail, either through a court's order to release or bail set at a reasonable amount, can have a profound effect on the future of a defendant's case. An individual who is free from custody can assess the merits of their case and make a more voluntary decision about whether to resolve or fight their case, since the duress imposed by incarceration is ameliorated.

The lack of attorney representation at arraignment, for those who could not afford counsel, represented a critical gap in the capacity of Alameda County to protect the constitutional right to counsel for all defendants. Those formally accused of a crime should have counsel present to advise and advocate for their best interests at each stage of criminal proceedings. Without counsel, the ability of a defendant to make an informed decision of whether to go to trial or plead guilty is severely impaired.²⁰ The Alameda County Public Defender's Office (ACPDO) recognized that a pre-arraignment services program was critical to not only protect each client's Sixth Amendment rights, but also to improve the criminal justice system as a whole.

The absence of counsel during this important first stage in court proceedings made the need for a smart and innovative solution clear. In 2014, there were close to 25,000²¹ new filings in Alameda County,²² with most defendants making an initial appearance before the judge and district attorney (DA) without representation, despite the lasting consequences of such proceedings.

Prior to the awarding of this grant, the Alameda County court arraigned defendants without public defenders present. Without counsel present, the court could call cases as soon as they were charged by the DA. These cases were then processed by the court and continued for a period of one to three calendar days, upon which defense counsel entered the case. In theory, this process permitted the court to arraign defendants quickly and clear the calendar, while allowing defendants to avoid waiting in the cramped courthouse and return to the jail on the

¹⁹ Hawk, Jamie, *No Money, No Freedom: The Need for Bail Reform* (September 2016) ACLU of Washington <<https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Bail%20Position%20Paper%2C%20Final%20II.pdf>> [as of November 27, 2018.]

²⁰ *Powell v. Alabama* (1932) 287 U.S. 45, 59.

²¹ For more information on the background research the ACPDO conducted before beginning the Smart Defense Initiative, please see Appendix 3

²² See attached statistics from Alameda County Superior Court.



midday bus. However in practice, defendants often waited in court all day, most often without meeting with a public defender.

The experience of those waiting to be charged was one fraught with anxiety and a lack of information. Defendants brought to the court from jail were roused at 3:00 a.m. and transported to the courthouse, where they waited in cramped holding cells for a charging decision, without access to information about their case, an attorney, or an opportunity to address the court about their custody status. Those who were not in custody for their arraignment hearing would also often wait for hours, often the whole day, without knowing whether they would be charged. Defendants and their families would often wait all day for a brief, two- or three-minute appearance, during which they were not allowed to address the court. They were then required to return to the court on another day, under the same difficult conditions. During this second appearance, the court would appoint an attorney to the case and the defendant would, only then, hear their options regarding litigating or adjudicating their case.

Motions for bail reduction or pretrial release were usually not heard until an attorney entered the case. Therefore, those in custody who did not have an attorney at their initial hearing were told to return the following court day and interview with a representative of the ACPDO. It was at this time, usually after one to three days in custody, that the ACPDO first met clients to discuss their case. It was also at this time that the ACPDO could seek out family members and gather information relevant to release, including corroboration of ties to the community, employment, and any other valuable information. This appearance in court is called “attorney and plea,” the stage where an attorney enters the case, the defense receives the police report, a plea (usually of not guilty) is entered, and decisions are made regarding litigation of the case and the client’s plans to assert constitutional rights to a speedy process.

Summary of Outcomes

IMPLEMENTATION SUCCESSES & CHALLENGES

ACPDO: Internal Challenges

The biggest internal challenges for the ACPDO in appearing at arraignment were 1) staffing, 2) data collection, and 3) changes in the court's structure.

Staffing

During prior years, no attorneys from the ACPDO were assigned to courtrooms solely for the purposes of interviewing clients and appearing at arraignment. There was an effort to enter in arraignment proceedings if timing and staffing permitted, or if there was an urgent need or a unique case, but no formal process was established to ensure representation at arraignment for all clients. Reallocation of attorneys and support staff was needed to fully support this effort. This type of reallocation takes time, resources, and collaboration. Not only did the ACPDO have to redistribute staff and attorneys to accomplish this task, but cooperation of the court, the DA, the sheriff, and the court staff was needed for this program to succeed.

Data Systems and Data Collection

There were two data collection processes for this project: through the ACPDO's internal case management system (JCATS²³) and manual data collection. Initially, we hoped to use both internal and county databases to track cases and the impacts of representation at arraignment. However, reliance on the existing databases proved to be problematic due to a lack of uniformity in data entry.

JCATS imported client and court case file information from CRIMS (the database utilized by the court, with data entered by court clerks). Therefore, instead of requiring attorneys or ACPDO support staff to manually enter court dates and hearing outcomes, CRIMS populated these portions into the JCATS case file automatically. In theory, the auto-populated portions from CRIMS gave the ACPDO the capability to pull relevant data through JCATS. However, the data entered into the system, reflecting charges and outcomes, was not standardized, making it extremely challenging to code queries to pull usable data.

In addition to these changes, the county also introduced plans to convert its own case management system to a paperless, digitized system (Odyssey). We were hopeful this change

²³ For more information on JCATS and other databases the ACPDO interacts with, please refer to Appendix 4

would ameliorate some of the inconsistencies in data entry. This system utilized drop-down menus for many of the court action entries to ensure uniform record keeping, which would translate into streamlined data extraction. However, the transition to Odyssey in August 2016 was fraught with problems that were not resolved in time for us to benefit from this improved data capability.

While the ACPDO was able to pull data from JCATS, the dataset needed to be limited in time and scope so that it could be manually examined for accuracy. The ACPDO therefore elected to also perform manual collection of data to have greater control over the data quality and accuracy.

East County Hall of Justice

As the work to fix Odyssey continued, a reorganization of the courts began to fully take shape. The progress made between March 2016 and June 2017 on this project came to a halt when the presiding judge of Alameda County determined, for budgetary reasons, some courthouses were to shut down. All arraignment cases in the county were moved to the newly constructed courthouse in Dublin, the East County Hall of Justice (ECHOJ).

The presiding judge, Morris Jacobson, announced all in-custody arraignments in Alameda County would move to the ECHOJ for the first appearance. Judge Jacobson argued that not only would the move save resources for county agencies, but would also benefit defendants by simplifying transportation between the various courthouses.²⁴ Judge Jacobson described the transportation of defendants to arraignment in Oakland as an ordeal starting with a 3:00 a.m. wakeup, followed by a waiting period of around three to four hours, then spending the day in court, all while deprived of a hot meal, and finally enduring a similar process upon returning from court late in the evening.²⁵

However, the detrimental impacts of moving the county's arraignments almost 30 miles away from many clients' homes and families was clear. More than half of the county's defendants lived in Oakland. It is costly to get to ECHOJ from cities like Oakland, both by car and public transportation; while promised, there were no shuttles or bus lines going to or from the Dublin BART station, the closest stop on the local transit system, to the courthouse. Therefore, clients who appeared with attorneys at arraignment, and were fortunate enough to have family

²⁴ Superior Court of California, County of Alameda Press Release Issued June 27, 2017 <[http://www.alameda.courts.ca.gov/Resources/Documents/PRESS%20RELEASE%20July%2027%202017%20re%20ECHOJ%20in-custody%20arraignments\(1\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/PRESS%20RELEASE%20July%2027%202017%20re%20ECHOJ%20in-custody%20arraignments(1).pdf)> [as of December 14, 22018.]

²⁵ Id.

members who could have provided the court with proof of the client's ties to the community, often could not benefit from their family's support.

In addition, design flaws in the newly constructed courthouse restricted attorneys' access to meaningful contact with clients. There was insufficient space in the new courthouse to interview clients (there are only four interview rooms, used by all departments, in the entire courthouse, and one interview room in the two arraignment courtrooms). The interview rooms themselves were poorly designed, making it difficult for clients and attorneys to hear one another, much less communicate sensitive and privileged information.²⁶ Confusion about where and when defendants were scheduled for court caused delays in the calendar. Defendants were left behind in the jail or brought to the wrong courtroom. The District Attorneys often did not have charging information for cases originating from other courthouses; although arraignment hearings could not be held in these cases, defendants were not released. The DAs frequently did not have access to police reports, so discovery materials were often not provided to the defense counsel. The Public Defender's ability to appear with clients at arraignment was, therefore, significantly curtailed.

Recognizing the severe hardship this move would present to clients' family members, the ACPDO, under the leadership of Brendon Woods, strictly and publicly opposed the move.²⁷ Many other government officials and community organizations joined the opposition as well. By creating additional barriers for family members, particularly low-income family members, and other community support members who could appear at arraignment hearings in support of defendants, many cases were jeopardized by the inability to demonstrate sufficient community ties that could lead to a defendant's release on their own recognizance.²⁸ Judge Jacobson argued arraignment hearings are brief proceedings during which defendants are unable to see or communicate with family members.²⁹ However, this misstatement failed to recognize defendants can often see their family members or friends sitting in support in courtroom audiences and, more significantly, overlooked the value of having family members present in court to speak with defense counsel and provide information about the client and

²⁶ Lyons, Jenna, "Reversal in decision to hold inmate arraignments in Dublin" (September 20, 2017) SFGATE < <https://www.sfgate.com/bayarea/article/Reversal-in-decision-to-hold-inmate-arraignments-12211579.php> > [as of December 14, 2018.]

²⁷ Id.

²⁸ Id.

²⁹ Superior Court of California, County of Alameda Press Release Issued June 27, 2017 < [http://www.alameda.courts.ca.gov/Resources/Documents/PRESS%20RELEASE%20July%2027%202017%20re%20ECHO%20in-custody%20arraignments\(1\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/PRESS%20RELEASE%20July%2027%202017%20re%20ECHO%20in-custody%20arraignments(1).pdf) > [as of December 14, 2018.]

the case, offering an extremely valuable opportunity for the attorney to gather information for matters ranging from motions to release to investigation of the case.³⁰

Local government officials, including California State Assembly Members Rob Bonta and Tony Thurmond, Oakland's Mayor and City Council Members, and Alameda County Supervisor Wilma Chan; community organizations such as the American Civil Liberties Union (ACLU) and the Ella Baker Center; and community members and activists joined the ACPDO in objecting to these changes to the court.³¹ Following two months of protest, including petitions, press releases, and a letter to the California State Bar, ACPDO's efforts to fight against this plan were successful, and the court relented, sending north county felony arraignments back to their courts of origin at the end of September 2017.

ACPDO: Internal Successes

The greatest internal successes for the ACPDO during the program were 1) changing representation structure and 2) fostering relationships and developing coalitions.

Vertical Representation

Despite the disruption and hardship caused by the court's reorganization in 2017, it compelled the ACPDO to make a significant positive shift in their approach to representation. For decades, the ACPDO relied on a model of horizontal representation, through which different lawyers would represent a defendant at each stage of the criminal justice process. This model was, in part, a response to where felony cases were scheduled in Alameda County — hearings for a single case would take place in different courthouses across the county. With the reorganization of the courts, felony cases would occur, for the most part, in one courthouse. A single attorney could, therefore, stay with a case from start to finish (i.e. vertical representation) and ensure continuity for their clients. Defendants developed trust in their attorneys and were empowered to assist attorneys and make informed decisions about the direction of their case. The vertical representation model facilitates the development of deeper relationships between clients and their attorneys. In addition, vertical representation is reported to foster accountability between attorneys and clients, prevent the loss or omission of key materials, and

³⁰ See attached Alameda County Public Defender Letter to Commission on Judicial Performance (July 25, 2017.)

³¹ See attached Alameda County Public Defender Letter to Commission on Judicial Performance (July 25, 2017.)

generally improve defendants' experience in the justice system.³² To this day, the ACPDO continues to successfully employ a vertical representation model.


Partner Relationships: Convincing Stakeholders

When the ACPDO first received this federal grant, substantial changes were needed to create an infrastructure that would allow public defenders to begin appearing at arraignment. Initially, such changes were met with some resistance, as they required multiple agencies to move away from practices that had existed for decades. However, through negotiations over a six-month period from October 2015 to March 2016, it became apparent the interests of the DA, the court, the court staff, and the sheriff could align in this endeavor.

The ACPDO first approached the sheriff to discuss granting attorneys access to defendants who were in custody, when they were brought to court. This required defendants to be brought to the courtroom or to interview rooms, prior to arraignment, so the public defender could assess financial eligibility, check for conflicts of interest, and conduct an interview about the facts of the case and issues related to their release from custody. The sheriff's position was for court deputies to make defendants available for interviews, if the arraignment judge was willing to delay calling the case, as long as this interruption did not cause delay in transporting the defendants back to the jail. The ACPDO was ultimately able to demonstrate it was of benefit to the sheriff's department to support this project, as this project would result in financial savings. Appearance of counsel at arraignment would result in a reduction in the number of court dates where a defendant needed to be present, thereby reducing the need for transportation, staff, and security associated with moving defendants between the jail and the court.

The ACPDO next approached the court to request time for the public defender to interview clients prior to the arraignment hearing. Multiple meetings of the local branch heads from the ACPDO, the presiding judge, and arraignment court judges were held to describe this project and the vision for its implementation. The ACPDO assured the court that additional staff would ensure efficient execution of the plan. The court acknowledged defendants often sought to address the court on a variety of questions and requests related to their case, bail, and release during arraignment hearings. The court recognized providing representation at the initial hearing would be a beneficial change. The court also had a vested interest in supporting the

³² Wallace, Scott, and David Carroll. "Implementation and Impact of Indigent Defense Standards." *National Legal Aid and Defender Association*, Dec. 2003.



ACPDO's move towards appearance at arraignment, as the initiative would reduce court spending by saving the expense of an additional court date.

The ACPDO finally approached the District Attorney. Appearance by the public defender at arraignment presented challenges to the DA's office. It required mobilizing resources and staff within the DA's office to make charging decisions and prepare discovery materials earlier in the trial process. For an attorney to effectively represent their client, the charges and police report are necessary, at a minimum. Therefore, the ACPDO needed the DA's office to review cases, make charging decisions, and have discovery available to the defense counsel earlier than was previously expected. The DA, in turn, needed to receive these reports from law enforcement on an expedited timeline. There were various meetings between supervisors within ACPDO and the DA to gauge whether adjustments could be made. Ultimately, the DA had limited capacity during the grant period, but the ACPDO chose to proceed with representation of clients at arraignment. The ACPDO continues in its efforts to improve the ways in which information is shared between departments in Alameda County.

The collaboration with various criminal justice system partners, prior to the implementation of this grant, was a critically important part of the process. The decision to do so helped ACPDO start this program on sure footing. Challenges, as discussed above, nevertheless arose, but ACPDO has been able to successfully provide representation at arraignment to the majority of clients since the launch of this program. Both new and seasoned attorneys were extremely proud of this endeavor. Attorneys clearly recognized how important appearance at arraignment is for clients and their families, and for the just representation of their cases.

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Key Findings

Methods

Impact Justice’s Research & Action Center examined the impacts of the ACPDO’s implementation of the Smart Defense grant. To assess the impact of the program, the RAC completed a repeated cross-sectional analysis of felony cases arraigned in Oakland and Hayward courtrooms from September 1, 2016 to February 28, 2017. There were 1,801 felony arraignment cases included in the sample and analysis that follows.³³ Our analysis relies on statistical testing of differences between the program group and comparison group. Our comparison group consisted of felony arraignment cases held in the same courtrooms, over the same timespan during the previous year (i.e. September 1st, 2015 to February 29th, 2016). We employed t-tests and ANOVAs (analysis of variance) to examine differences across time within the following variables: Motions to Release, Releases, Time Waive, No Time Waived, Cases Continued, Motions to Reduce Bail, Bail Reduced, Cases Dismissed, and Cases Resolved. These variables and results are discussed below. For the purpose of this analysis, the program group refers to individuals served during the program period (2016-2017). The comparison group refers to the group arraigned during the year prior to the implementation of the Smart Defense Initiative (2015-2016).

Client Demographic Information

Most clients represented during the program were male (Table 1.A: 83%) and of color (as shown in Table 1.B: 43% Black, 29% Hispanic, 4% Asian/Pacific Islander, 22% White, and 2% Other/Unknown). The comparison group had a similar demographic background. No further demographic information was available, such as for sexual orientation, gender identity and gender expression, primary language, or income.

The above demographic makeup corresponds closely, in terms of race and sex³⁴, to the population we observe during the comparison period. The program and comparison period demographics are presented in the Appendix 6, Tables 2.A and 2.D. Demographic breakdowns do not sum to 100% due to cases for which this data was missing.

³³ Please see Appendix 5 for more information on sample size and how the analytical sample was selected

³⁴ The data collected by ACPDO includes the categories “Male” and “Female” under the variable labeled “Sex,” and is reported here using those same categorizations.

Table 1.A.: Sex by Time Period

	Program Period	Comparison Period
	Frequency %	Frequency %
Female	270 16.7%	255 17.4%
Male	1,343 83.3%	1,210 82.6%
Total	1,613 100%	1,465 100%

*Sex was unreported/missing for 188 cases (10.4% of sample) during the program and 447 cases (23.4% of sample) during the comparison period

Table 1.B.: Race/Ethnicity by Time Period


	Program Period	Comparison Period
	Frequency %	Frequency %
Asian/ Pacific Islander	67 4.2%	69 4.4%
Black	695 43.1%	857 54.5%
Hispanic	465 28.8%	369 23.5%
White	346 21.5%	247 15.5%
Native American	3 0.2%	5 0.3%
Other/ Unclassified	36 2.2%	26 1.7%
Total	1,612 100%	1,573 100%

*Race/Ethnicity was unreported/missing for 189 cases (10.5% of sample) during the program and 339 cases (17.7% of sample) during comparison

Summary of outcomes

Nine key outcomes were examined, based on the services provided by ACPDO through this program and available data:

1. Motion to Release
2. Released
3. No Time Waived
4. Time Waived
5. Case Continued
6. Motion to Reduce Bail
7. Bail Reduced
8. Case Dismissed
9. Case Resolved



The analysis found positive outcomes in many of the variables listed above. Table 1.C below reflects differences between the program to comparison groups. Variables marked with asterisks in the tables below show statistically significant differences between the program and comparison groups. Further discussion of these variables is included below the table.

Table 1.C.: Key Outcomes by Time Period

<i>N (Comparison): 1,801 — N (Program): 1,912</i>		
	Time Period	Mean
Motion to Release	Program	.2704†
	Comparison	.0000
Released	Program	.2038***
	Comparison	.0073
No Time Waived	Program	.4003***
	Comparison	.0141
Time Waived	Program	.0505***
	Comparison	.0110
Continued	Program	.8073***
	Comparison	.9650***
Motion to Reduce Bail ^b	Program	.0300
	Comparison	.
Bail Reduced ^b	Program	.0250
	Comparison	.
Dismissed	Program	.0378
	Comparison	.
Resolved	Program	.1277
	Comparison	.

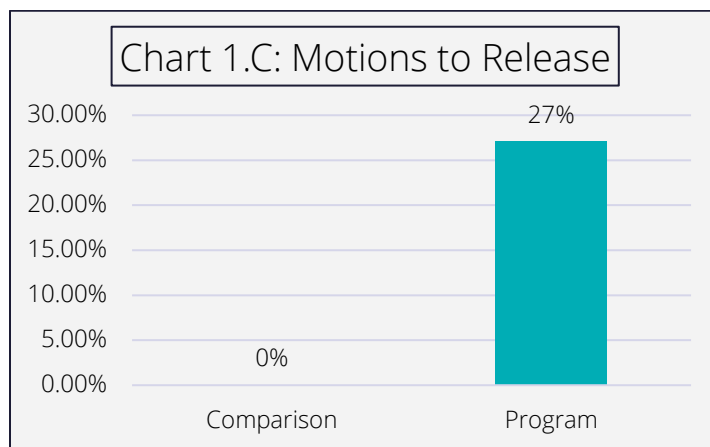
^a This data is unavailable — not collected in JCATS

^b Comparison cannot be made (pre-program data also captures incidence of other bail-related outcomes)

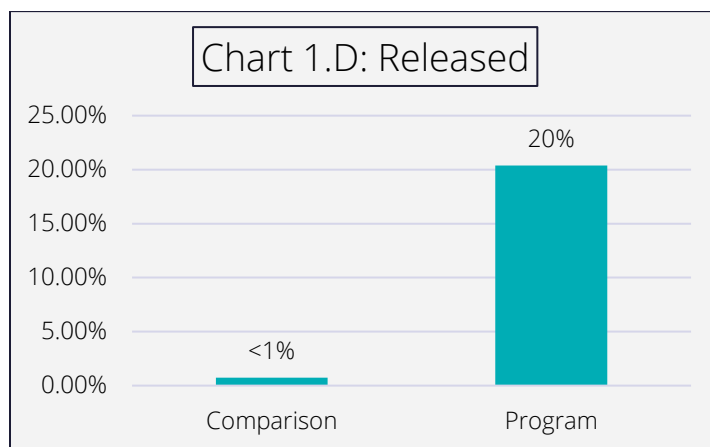
*** Statistically significant at the 0.001 level

† Statistically significant at the 0.01 level


More motions to release were filed for program participants. The number of motions to release increased significantly from 0% during the comparison period to 27% (487 cases) during the program period. (See Chart 1.C.)



More defendants were released at arraignment. Cases in which a defendant was released at arraignment increased during the program period. As shown in Chart 1.D, 20% (367 cases) were released during the program period contrasted with less than 1% of (14 cases) during the comparison period.



This steep increase in releases at arraignment is promising and perhaps the most significant finding. To understand the direct impact of these releases, both on the individuals released and on Alameda's justice system, it is important to understand how long those awaiting trial



would otherwise remain in custody pre-release. This elapsed time³⁵, on average, is 2.45 days (2.41 days for defendants without felony probation violations (FPVs) or 14 days for those with FPVs).³⁶

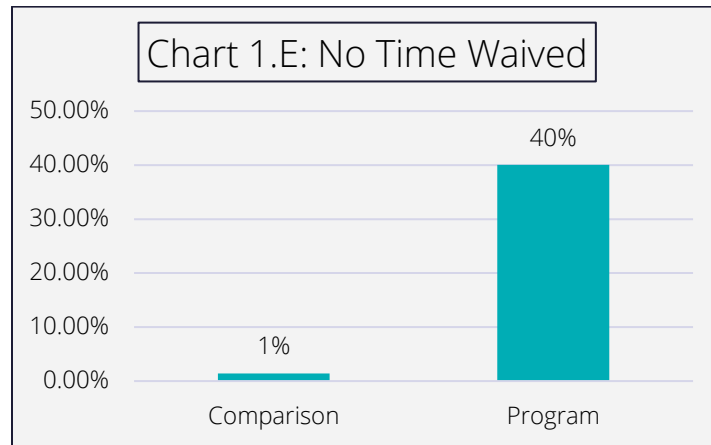
This data points to substantial and critical successes of the Smart Defense Initiative. Before the program, even those eligible for release pre-trial would have, generally, waited for a public defender's representation after their arraignment hearing; the current program is essentially ensuring this waiting period is nonexistent. Therefore, we can extrapolate that the 367 defendants who were released at arraignment would have otherwise remained incarcerated until their attorney and plea hearing, where they would have met with a public defender. This equates to 315 defendants for an average of 2.41 days and another 52 defendants for an average of 14 days after their arraignment hearings. This sums to 1,487 days during the 6-month observed period and extrapolates to **2,974 in-custody days “saved” for a 12-month period.**

Whether two weeks or several days, the cumulative effects on an individual of time spent in custody are consequential.

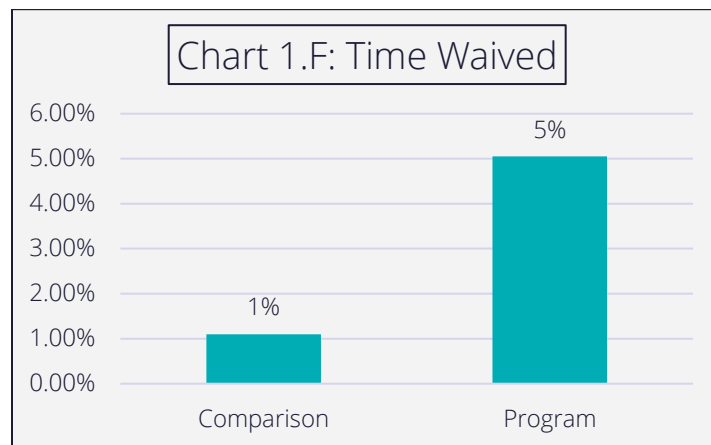
No Time Waived — More Clients Have Access to a Speedy Process. A greater number of clients had access to a speedy process (includes cases in which one's right to a speedy preliminary hearing was not waived); the number increased from 1% for the comparison group (27 cases) to 40% (721 cases) during the program period. This steep increase may indicate those whose cases proceed to a preliminary hearing spend less time in custody than they would if an attorney had not been present at arraignment. This is discussed in further detail below. (Chart 1.E)

³⁵ To gauge the length of time defendants released at arraignment would have otherwise waited for representation, had the Smart Defense program not provided an attorney at arraignment, we can refer to the time elapsed pre-program between arraignment and the attorney and plea hearing. Pre-program, the attorney and plea hearing served as the first point of contact between defendant and attorney and was the point in time during which defendants could obtain release through representation. Therefore, the time elapsed, pre-program, between arraignment and attorney and plea is the time that defendants released during the program period avoided spending in custody.

³⁶ ACPDO reported that defendants with felony probation violations are incarcerated for much longer periods of time, while awaiting representation from an attorney, than those without FPVs. Without a statutorily designated time period for a right to a speedy hearing on a probation violation, cases with FPVs are not given priority by the court.

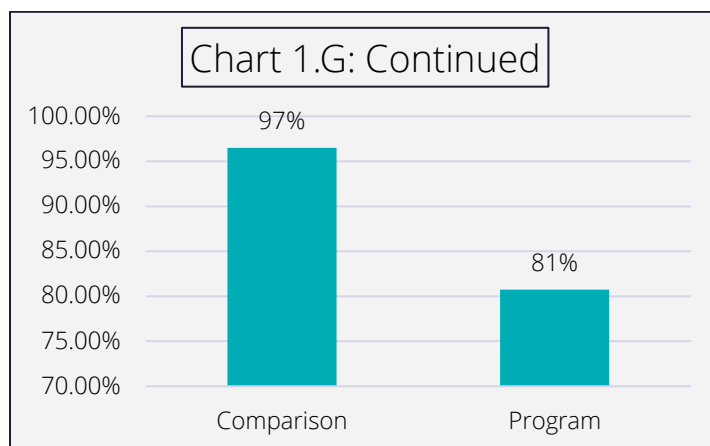


Time Waived Increased by 4%: Cases in which time was waived (i.e. waiving one’s right to a speedy preliminary hearing) increased from 1% (21 cases) during the comparison period to 5% (91 cases) during the program. “Time waived” almost invariably occurs under the advisement of the defendant’s attorney, who may need additional time to prepare an adequate defense (including conducting their own investigation, etc.). (See Chart 1.F)



Cases Continued decreased by 16.3%: The number of continued cases dropped from 97% pre-program (1,845 case) to 81% during the program period (1,454 cases). Of the 67 cases not continued during the comparison period, 3 (4%) were marked as released. Of the 347 cases marked as not continued during the program, 90 (26%) were marked as released. The 16% decrease in continued cases indicates that, due to the presence of a public defender, a greater number of cases come to resolution at arraignment. Although cases which are not continued are not entirely composed of releases or dismissals, this finding is nevertheless

positive, indicating many defendants receive closure at an earlier stage of the criminal justice process. (Chart 1.G)



Comparison not feasible for Motions to Reduce Bail: Motions to Reduce Bail were observed for 3% of cases, 54 cases in all, during the program period. However, during the comparison period, any case in which bail was set, reduced, increased, or where there were any motions relating to bail was marked as having a motion to reduce bail (this is one of the “quirks” of the JCATS data alluded to above). Thus, a comparison of motions to reduce bail during the program and pre-program time periods could not be made.

Comparison not feasible for Bail Reduced: Bail reduced indicated the reduction of bail during an arraignment hearing and was observed for 2.5% of cases during the program period, a total of 45 cases. Unfortunately, there is a similar issue with JCATS data as discussed above, and the data for this variable reflects cases within which bail was set, bail was modified, or there was a motion to reduce bail. Therefore, the *bail reduced* variable cannot accurately be tracked across time. Nonetheless, we do observe that 45 out of the 54 cases for which a motion to reduce bail was filed during the program period receive reductions in bail. Although these make up small percentages of ACPDO’s overall caseload, it does indicate that **the majority of bail reduction motions (83%) are successful.**

Dismissed cases were not captured in the comparison data; however, 4% (68 cases) were dismissed at arraignment during the program period, granted to the ACPDO’s representation at arraignment hearings.



Resolved cases were not captured in the comparison data; however, 13% (230 cases) were resolved at arraignment during the program period, due to a public defender's representation.


Differences by Sex

During the comparison period, statistically significant differences were observed in motions to reduce bail, bail reduction, and instances of time waived between cases where defendants were male and female (Appendix 6, Table 2.C). As mentioned in the overview of data above, the comparison data contains anomalies in the motions to reduce bail and bail reduction variables, which capture more data than simply bail reductions. Although this does not allow us to compare outcomes relating to these variables between the comparison and program periods, comparing within a time period does yield practical insight. The statistically significant differences in the “motion to reduce bail” and “bail reduced” variables between male and female defendants indicate the outcomes these populations face at arraignment are disparate.

Problems with the data preclude analysis into the specifics of the bail proceedings; however, the statistically significant differences ($p=0.001$) during the comparison period indicate that sex played a significant role in arraignment outcomes. In contrast, the only outcome showing significant differences by sex during the program period is in incidence of cases dismissed (as mentioned above, JCATS data was unavailable for cases that were dismissed, so a comparison is not possible). Female defendants are more than twice as likely as male defendants to have their cases dismissed at arraignment (7% compared to 3%, respectively) during the program period.

As a whole, these findings are promising and indicate that pre-trial representation is likely to reduce disparities that male and female defendants face due to sex/gender.

Although the lack of clarity into the *motion to reduce bail* and *bail reduced* variables during the comparison period does not allow for specific analysis into how bail plays a role in arraignment proceedings when a lawyer is not present, we do observe male and female defendants face different outcomes at arraignment. Similar differences are not observed during the program period, indicating representation by a public defender can reduce such disparities. Further exploration is needed here. Specifically, further research is needed to



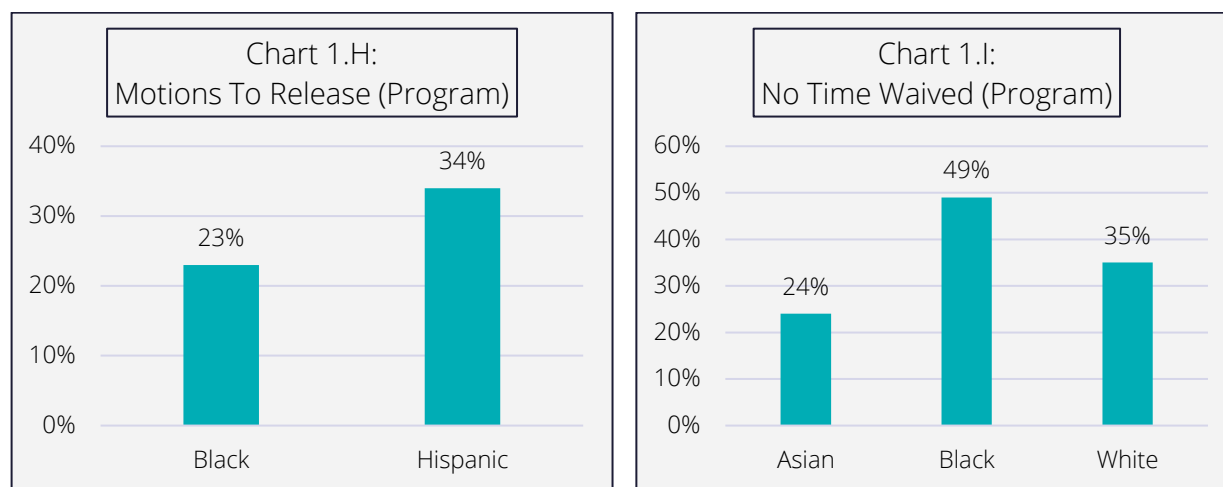
disaggregate outcomes by sex/gender when taking charge(s) or offense type into account. Due to limitations with available data, such analysis is not feasible at this point. In addition, interviews with judges, attorneys (both prosecution and defense), and defendants would provide valuable insight into the underlying mechanisms which result in disparities along lines of sex or gender.

Differences by Race

Differences in arraignment outcomes were also observed by race, both during the program and comparison periods (Appendix 6, Table 2.F). During the comparison period (before defendants had representation), significant differences by race were observed in indicators related to motions to reduce bail and bail reductions. As mentioned previously, these variables contained information beyond reductions in bail, also indicating when bail may have been increased, set, or reset. Significant differences by race therefore allow us to understand that a defendant's race impacts bail proceedings during an arraignment process; however, further inferences regarding the nature of such differences cannot be made using currently available data. The differences observed show cases in which defendants are Asian were less likely to receive a motion related to bail and a reduction/modification in bail (45%) than cases in which defendants were Black (80%), Hispanic (78%), or White (~75%). No significant differences by race were observed among the other outcome variables.

During the program period, several significant differences were also observed. Cases in which defendants were Black were less likely to have a motion to release presented than cases in which defendants were Hispanic (23% and 34%, respectively). In addition, significant differences by race were observed for the incidence of not waiving time. 49% of cases involving Black defendants did not waive time, compared to 24% of cases involving Asian defendants and 35% of White defendants. Further research is needed here. Specifically, gathering richer data on the types of charges filed against defendants and the mechanisms driving observed disparities would allow for a deeper understanding of how racial biases at different touch-points (e.g. at arrest) impact individuals throughout the criminal justice process. Any racial disparities observed at arraignment, or lack thereof, are informed by all stakeholders who held power in deciding any aspect of a defendant's case — police officers, the prosecutor, the judge, and the public defender. **Notably, we do not observe differences by race in outcomes related to motions to reduce bail, bail reductions, or**

releases, indicating that ACPDO's representation improves outcomes for defendants, regardless of race or ethnicity. However, disparities are observed in the other outcomes discussed above. **Great care should be taken to ensure justice is applied equally at all stages of the justice process, from initial contact with police to release from custody.**



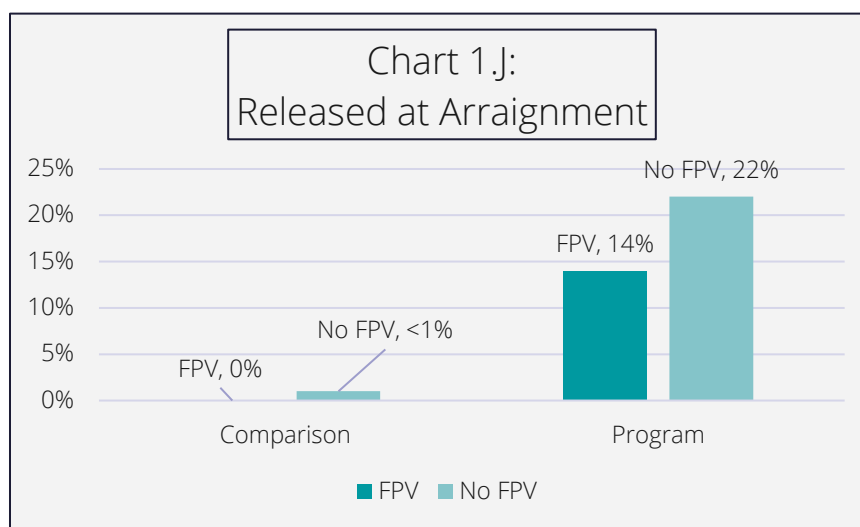
Note that only statistically significant results are presented in the charts above. For full results, please see Appendix 6, Table 2.G

Felony Probation Violations

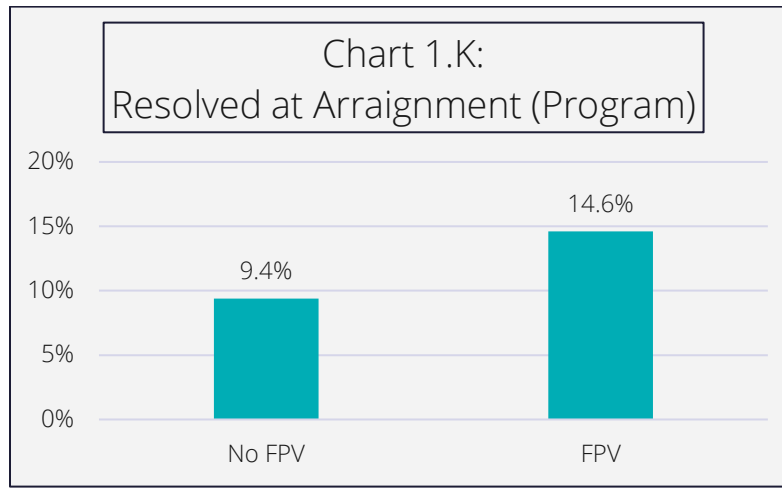
The effects of this program on defendants arraigned with felony probation violations (FPV) are also noteworthy. The program and comparison datasets differed in how FPVs were recorded, and, therefore, the two are not directly comparable. However, by focusing exclusively on the program period and comparing those arraigned with and without FPVs, we can discern whether outcomes differed for this sub-population of defendants.

During the program period, 377 arraignments involved defendants with felony probation violations. Of these, 19% received motions to release and nearly 14% were released (See Appendix 6, Table 2.G). Although the occurrence of motions and subsequent releases is lower among this population than those arraigned without an FPV (and therefore lower than the overall averages), these results are substantial and promising. ACPDO reported the incidence of judges releasing defendants with felony probation violations was practically zero prior to the implementation of this program. From a judge's perspective, probation violations could

serve as a proxy indicator of risk to re-offend or increased public safety risk, thereby making judges averse to releasing defendants with FPVs. Nonetheless, we see 14% of those arraigned with an FPV are released when represented by a public defender. This is compared to 0% of defendants without a public defender or 22% of defendants without FPVs when represented by an attorney (Chart 1.J).



In addition, statistically significant differences are observed in the number of cases resolved between those arraigned with and without felony probation violations (FPVs). Whereas 9.4% of cases in which defendants were arraigned without FPVs were resolved, 14.6% of cases where defendants did have FPVs were resolved (Chart 1.K). This may indicate those arraigned due to low-level or technical violations of their probation, such as not appearing for a required narcotics anonymous meeting, are more likely to face a speedier resolution to their case. **Defendants whose cases are resolved at arraignment then avoid a host of possible adverse outcomes** (e.g. returning to court, incarceration, or incurring costs related to court fees or missed work). The impact of these releases, both on defendants and more broadly, are discussed below.



Cost Savings

As discussed above, due to the presence of public defenders at arraignment hearings, 20% of cases (n=367) result in defendants released pre-trial, compared to less than 1% of defendants (n=14) when a public defender is not present. With this in mind, we can gauge the cost savings of this program by employing the following assumptions:

- (1) Those arraigned during the program period would have been released at similar rates to those arraigned during the comparison period, had they not received representation at arraignment;
- (2) A defendant without an FPV would have had to wait for representation for an average of approximately 2.41 days after their arraignment hearing (i.e. the observed time-span during the comparison period) or an average of 14 days if the defendant had an FPV.

We can extrapolate the 367 defendants who were released at arraignment during the program would have otherwise remained incarcerated until their attorney & plea hearing – 315 defendants for an average of 2.41 days and another 52 defendants for an average of 14 days after their arraignment hearings. The cumulative number of days not spent in detention by those who would have otherwise remained incarcerated sums to 1,487 days during a half-year period. Extrapolated to a year, this number doubles to 2,974 days.

As illustrated in the graphic below, Alameda county spends, on average \$142 per person for a night spent in jail. It then follows that **the Smart Defense Initiative resulted in a savings of \$422,308 over a 12-month period**. This figure does not factor in the costs to the county of providing public defenders. In addition to direct financial savings to the county, the social cost of unnecessarily keeping individuals in jail, is averted. The social cost associated with incarceration, even for a matter of days, and especially when an individual can safely be released into the community, is significant.

$$\left(\frac{315 \text{ defendants}}{(No \text{ FPV})} \times 2.41 \text{ days saved} \right) + \left(\frac{52 \text{ defendants}}{(FPV)} \times 14 \text{ days saved} \right) \\ = 1,487 \text{ days saved per 6 months} \rightarrow 2,974 \text{ days per year}$$

↓

$$2,974 \text{ days saved} \times \$142 \text{ per day} = \$422,308 \text{ saved per year}$$

Lessons Learned & Implications

REPLICATION & SUSTAINABILITY

In 2018, California Governor Jerry Brown signed into law Senate Bill 10, which will take effect on October 1, 2019.³⁷ Initially lauded as an important step in the right direction for criminal justice reform by public defender offices and community organizations, amendments to the bill have dramatically changed it, drawing the ire of the same groups that once supported it.

SB 10 “create[d] a risk-based non-monetary pre-arraignment and pretrial release system for people arrested for criminal offenses, including preventative detention procedures for persons determined to be too high a risk to assure public safety if released.”³⁸ While SB 10 does away with cash bail and the legislative summary states that it “creates a presumption that the court will release the defendant on his or her own recognizance at arraignment with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant’s return to court,”³⁹ the statutory scheme has enough caveats and conditions to permit a court to keep almost anyone in custody for the duration of their case.

In practice, there is much concern regarding the implementation of this legislation in the defense community. For example, Penal Code section 1320.8 broadly states misdemeanants shall be released by the Pretrial Assessment Service (PAS) within 12 hours and without a risk assessment. However, PAS does not hold the authority to release an arrestee in many instances. These include, but are not limited to, a person assessed as “high risk”, a person charged with a third DUI or a DUI where the blood alcohol level is alleged to be greater than 0.20, a person charged with a felony involving violence or weapons, a person who has violated any type of restraining order in the last five years, or any person who has three or more prior warrants for failure to appear within the previous 12 months. Those arrestees unable to obtain release under PAS authority will remain in custody until the court conducts a “pre-arraignment review” or arraignment.⁴⁰ These circumstances alone make up many

³⁷ For more details regarding relevant legislation & further discussion of SB10, please see Appendix 7

³⁸ Sen. Rules Com., Off. of Sen. Floor Analyses, 2nd reading analysis of Sen. Bill No. 10 (2017-2018 Reg. Sess.) as amended August 20, 2018, Digest.

³⁹ Sen. No. 10 (2017-2018 Reg. Sess.).

⁴⁰ Pen. Code § 1320.13.



instances in which a defendant would not be released prior to arraignment and would wait until arraignment to address their custody status.


Under this new law, the role of an attorney at arraignment is likely to significantly change. Critics of the law argue it “creates a byzantine maze of court hearings that will ultimately result in greater pretrial incarceration, and, at a minimum, new opportunities to incarcerate someone before he/she is determined to have actually committed a crime.”⁴¹ For this reason, it will be critical for defense attorneys to appear alongside clients at each hearing in order to advocate for clients’ release, provide context to key data points, and challenge misleading or misrepresentative information. As the need for attorneys at arraignment grows with recent changes to California’s law, ACPDO is proud to run an established arraignment services program with DOJ/BJA support.

The successes and challenges encountered by the ACPDO can serve as potential lessons for those seeking to expand representation in their jurisdictions. One factor in particular contributing to their success was an emphasis on relationships and stakeholder buy-in, as well as the centering of defendants’ needs in the justice system. The ACPDO encountered numerous, unforeseen, and unique challenges throughout the implementation of the Smart Defense Initiative. Nevertheless, the department improved outcomes for clients by ensuring counsel at arraignment. In implementing similar initiatives, other public defender’s offices are likely to experience their own, unique set of challenges, yet can aim to adapt and advocate, as demonstrated by the ACPDO, when encountering such circumstances. In an effort to improve outcomes for defendants, the courts, and the justice system as a whole, other jurisdictions can employ this model to provide counsel at every stage of the justice process.

FUTURE RESEARCH

To fully understand the impacts representation at arraignment has on defendants, as well as other stakeholders in Alameda County, further research is needed. As discussed above, this analysis was hindered by a lack of consistency between data systems (i.e. JCATS and attorney-collected data) and missing or otherwise unusable data. Specifically, systematization of data associated with charge/offense types would allow for deeper analysis into observed

⁴¹ Sen. Rules Com., Off. of Sen. Floor Analyses, 2nd reading analysis of Sen. Bill No. 10 (2017-2018 Reg. Sess.) as amended August 20, 2018, Page 8 Argument in Opposition.



differences in outcomes at arraignment. In addition, we recommend collecting further demographic data, such as sexual orientation, gender identity, primary language, and national origin. This context would allow key stakeholders (i.e. the police department, public defender's office, or court system) to have further insight into where and how biases play a role in creating disparities observed at different touchpoints of the criminal justice system.

Further research is also needed to understand both how this program impacts individual defendants' experiences throughout the criminal justice process, as well as to understand the broader impacts on the Alameda County justice system. Programs such as this one hold great potential in building defendants' trust and understanding of the trial process – key to creating a truly *just* criminal justice system. Interviews with defendants, defendants' families, judges, public defenders, and other stakeholders would allow for insight into such effects. In addition, there is space for further research to evaluate how representation at arraignment impacts an individual's outcomes at trial and long-term outcomes post-release. To understand the broader impact on Alameda's justice system, future research could take misdemeanor arraignments into account, consider cases where representation is provided by private counsel, and analyze outcomes at all stages of the sentencing process.

Appendix 1: The Arraignment Procedure


Under California law, a person arrested and charged with a crime must be arraigned on the charges within 48 hours of their arrest (excluding Sundays or Holidays), or the first judicial day immediately following if the 48-hour period ends on a date when the court is not in session.⁴² In Alameda County, arraignments are held Monday through Friday, except for court holidays. Therefore, defendants arrested and held in custody on a Monday are typically arraigned by Wednesday. However, those who are arrested on a Friday do not have to be arraigned until the following Tuesday.

Prior to the court reorganization in 2017, misdemeanor and felony arraignments occurred at courthouses in Oakland, Hayward, Fremont, and Pleasanton. During the grant period, there were substantial changes made by the presiding judge to the location, organization, and structure of the Alameda County courts. These changes had a significant impact on where and how arraignments were conducted in the county. Additionally, the court converted the physical court files into a digitized case management system, which also had a dramatic impact on the administration of the courts, and therefore on how arraignments were processed. Each of the stakeholders in Alameda County's criminal justice system, including judges, DAs, the sheriff, and the court staff, were affected by the changes. These changes also affected ACPDO's ability to smoothly and effectively launch a new program to represent clients at arraignment.

In 2015, the courthouses holding arraignments were: Wiley W. Manuel (Oakland) Courthouse, Hayward Hall of Justice, Fremont Hall of Justice, and Pleasanton Hall of Justice. Arraignments in each of these courthouses were for both felonies and misdemeanors. Those brought to arraignment court were typically held in city jails or Santa Rita Jail. If the defendant was cited out or bailed prior to arraignment, they were given a court date to appear out of custody. For those who remained in custody prior to arraignment, the arresting law enforcement agency would submit a police report to the Alameda County District Attorney's Office (DA), where a charging deputy district attorney would make a decision about whether or not to charge the case within the statutory 48-hour period between arrest and arraignment. If the DA's Office failed to file charges in time, the person would be released, sometimes with a future arraignment date.

In cases where a crime was charged, the DA filed a "complaint," or formal charging document, with the court. The court then created a court file and processed the case to ensure that it was properly calendared for the correct date, time, and location for arraignment. Prior to March 2016, the assigned courtroom would receive the proper paperwork and the judge would simply call the case, on the

⁴² Pen. Code § 825.



record, with the district attorney present. The charges were read to the defendant and the defendant was asked whether they would prefer to be represented by a public defender hire private counsel. The judge also conferred with the district attorney regarding the “scheduled” bail amount. Relying upon limited information from the probable cause declaration, the district attorney’s representation of the defendant’s criminal history, the police report, and the local bail schedule, the judge set bail in the case. If a defendant posted bail prior to arraignment, and the bail amount was then reset in excess of what was originally paid, the defendant would need to post additional bail or return to custody. When defendants appeared at arraignment in custody and wished to be released on their own recognizance or have the bail amount lowered, the judge often denied the request, informing the individual that an attorney could address the issue once an attorney enters the case. The practical effect of such denials was an additional one to three days of incarceration.

Appendix 2: Types of Release

RELEASE ON RECOGNIZANCE

Article 1 § 12 of the California Constitution dictates that a person may be released on bail or on their own recognizance. The California Penal Code further states that a misdemeanor defendant is entitled to be released on their own recognizance unless release will compromise public safety or will not reasonably assure the appearance of the defendant as required.⁴³ The court has broad discretion in determining whether a defendant is a danger to public safety or a flight risk. In determining the probability that the defendant will return to court if released on own recognizance, the court must consider the defendant's ties to the community, the defendant's record of appearance at past hearings or of flight to avoid prosecution, and the severity of the possible sentence the defendant faces.⁴⁴ When evaluating whether someone is a danger to public safety, the court considers the nature of the charges, any allegations of violence or threats of violence, and the facts alleged; the court also often examines the defendant's past contacts with the criminal justice system, both in and out of county. The prosecution bears the burden of producing evidence of the defendant's record of appearance at prior court hearings and the severity of the possible sentence. The defendant bears the burden of producing evidence of community ties, including employment or other sources of income, the duration and location of the defendant's residence, property holdings, family attachments, school commitments, and community involvement.


RELEASE ON BAIL

Bail is usually collected in the form of cash or surety bond. A defendant can pay cash bail directly to the court — this money is then returned once the accused has attended all court appearances and the case has concluded. However, bail is almost always set at an amount proscribed by the local “bail schedule.” This amount is far greater than most defendants can afford. For this reason, courts accept payment of bail in the form of a surety bond, which is a promissory note from a bail bondsman to the court for the entire bond amount.⁴⁵ In exchange for posting this surety bond, bail bondsmen typically require a defendant to pledge an asset as collateral (i.e. a house or car) and pay a non-refundable fee. Either the accused or a family member can pledge collateral to the bail bondsman, which the bondsman may collect if the defendant fails to appear in court. The non-refundable fee is typically ten percent of the total bail amount and can be paid to the bail bondsman in installments over time.

⁴³ Pen. Code § 1270(a).

⁴⁴ *Van Atta v Scott* (1980) 27 C3d 424, 438.

⁴⁵ *Id.*



In California, every person is entitled to bail as a matter of right. Article 1 § 12 mandates that “[a] person shall be released on bail by sufficient sureties.” There are only three “narrow” exceptions to this rule: 1) capital or death penalty cases, 2) felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, and 3) felony offenses where there is a substantial likelihood that the person would carry out a threat if released.⁴⁶ An individualized assessment of both a defendant’s pretrial flight risk and any potential danger to the community must be conducted when the court sets a bail amount.⁴⁷ In setting, reducing, or denying bail, the judge must consider public safety, victim safety, seriousness of the offense charged, criminal record, and likelihood of future court appearances.⁴⁸

When setting bail, courts typically turn to the county bail schedule for guidance. Superior court judges in each county are statutorily mandated to prepare and adopt a uniform countywide schedule for bail for all applicable felonies and misdemeanor infractions, with the exception of Vehicle Code infractions.⁴⁹ Penal Code section 1269c permits deviation from the bail schedule, either to increase or decrease bail, if a party successfully argues that the facts of the case support such deviation.

⁴⁶ Cal. Const., art. I, §12, subs (c).

⁴⁷ See *Stack v. Boyle* (1951) 342 U.S. 1, 5; *United States v. Salerno* (1987) 481 U.S. 739, 755

⁴⁸ Cal. Const., art. I, §28(f)(3); Pen. Code § 1275.

⁴⁹ Pen. Code § 1269b.

Appendix 3: Background & Preparatory Research Conducted by ACPDO

In preparation for the Smart Defense grant application, the ACPDO conducted a focused review of the Oakland misdemeanor arraignment court ⁵⁰ from January 1, 2014 to April 15, 2015. This snapshot indicated 1,138 people (approximately 75 per month) were arraigned without a public defender, and therefore remained in custody. All these defendants were then released after a day or two, when a public defender entered the case. Every month, approximately 75 people lost a day or two of their lives, interrupting their work, family, and community obligations without any benefit to either the court system or society as a whole.

An even closer examination of these numbers was conducted for the month of March 2015 to capture more detailed information. Analysis of these cases showed 63 people were arraigned without an attorney, therefore remaining in custody for at least one extra day. Of those 63 defendants, Alameda County had the capacity to improve representation for 50 people: 25 of these defendants resolved their case and were released the next day, once a public defender was present; 12 were released on their Own Recognizance (OR) when a public defender was present; 6 were conflicts for the ACPDO and remained in custody for a third day before hiring a private attorney; and 7 clients had their cases dismissed or were released on a deferred prosecution with the assistance of a public defender one day after their arraignment hearings. ⁵¹

The ACPDO determined that the Hayward Courthouse was the best place to launch the Smart Defense Initiative, where arraignments for both misdemeanors and felonies were held. Attorneys were assigned to that courtroom and the program was rolled out in the month of March 2016. The program was then expanded to include the Oakland courthouse, where only felony arraignment hearings occurred. Cases in Oakland and Hayward (i.e. East County) courthouses were the focus of this grant because they held the largest number of cases, in comparison to smaller, outlying courthouses in Fremont and Pleasanton.

⁵⁰ Oakland represents the largest area with the highest population of ACPDO clients.

⁵¹ ACPDO was able to run these statistics by using an internal database, JcatsDefender.

Appendix 4: JCATS & Other Databases

JCATS


JCATS is a case management system adopted by the ACPDO in December of 2010. It is a database that houses case information from two sources: 1) manual input by ACPDO staff and 2) automatic import from the county and court systems. The ACPDO office switched to JCATS to augment prior case management capabilities. In addition to the paper files that were generated in every case, a parallel digital file was kept within JCATS. All client information and internal attorney work required manual entry into the JCATS system by attorneys and staff. Case information, such as court dates and shorthand court action notes created by court clerical staff, was imported from the county system into JCATS. Attorney's personal notes about the case, a log of court action notes, and copies of discovery and filed motions were uploaded to JCATS as a PDF before an attorney closed a case.

CORPUS & CRIMS

CORPUS was the prior county database system, containing records dating back to 1973.⁵² Courtroom clerks created court minutes on a triplicate copy form by hand; the form was then sent to clerical staff in the courthouse and entered into CORPUS. The information available in CORPUS was limited but clear and the entries were fairly uniform in composition. Law enforcement was also able to input summary arrest and custody information so that information could be accessed through a single system. ACPDO was granted access to this information based upon security clearance throughout the county.

In 2014, Alameda County introduced CRIMS to replace the CORPUS mainframe green-screen functionality. CRIMS was a web-based platform designed by Alameda County's Information Technology Department (ITD) to replace CORPUS. CRIMS was designed to communicate with the Jail Management System, CLETS (Criminal Law Enforcement Telecommunications System), the DA's web-based case management system with electronic filing and data outcomes, the system built for Probation, the court's data and case events and outcomes system, and other systems capturing and recording data of individuals and events within the criminal justice system of Alameda County. The ACPDO was granted access to court events, case outcomes, rap sheets, arrest event summary details, and custody information. It should be noted that this type of access to shared court and law enforcement information is unusual for most public defender's offices.

⁵² *Alameda County Sheriff's Office Historical Facts*, Alameda County Sheriff's Office <<https://www.alamedacountysheriff.org/history.php>> [as of December 14, 2018.]



The conversion from CORPUS to CRIMS caused discrepancies between the two systems in the reported information. Agencies in Alameda County (DA, ACPDO, Sheriff, Probation, Court) used both systems in tandem to work around these problems until the use of CORPUS was discontinued by the court and sheriff in July of 2016.

ODYSSEY

Odyssey, the court's paperless case management system, launched in August 2016. The transition was rife with problems. Court schedules were inaccurately logged, entire court files were lost, people were arrested on old warrants and erroneous court orders, and clients were brought back for multiple court dates because the court could not access information on their case. Court staff were not fully trained on how to use Odyssey, which caused an additional backlog of court entries. Recalled warrants remained in the system, and errors corrected in court were not properly recorded and reported to law enforcement. The ACPDO moved to enjoin the Alameda County Superior Court to stop proceedings after each case and fully update the court file through Odyssey or discontinue use of the Odyssey system.


The ACPDO also filed a motion to compel an accurate and contemporaneous record of court proceedings. Upon review, it was found that twenty-six cases were impacted by system glitches: defendants were wrongly held in custody, erroneous warrants were issued resulting in false arrests for matters already settled in court, and some defendants were incorrectly identified as required to register as sex offenders.⁵³ These twenty-six cases constituted only a small snapshot of the negative impact those coming into contact with the criminal justice system in Alameda County experienced during that time.⁵⁴ The Alameda County Superior Court Executive Officer questioned whether the system was designed for use within the criminal context, as the volume of cases processed by the system was cumbersome for court staff to manage in Odyssey, creating the considerable backlog.⁵⁵ However, internal communications between multiple criminal justice stakeholders suggested that the initial data entry and storage issues were not inherent to the Odyssey system itself, but due to user error and lack of training, and that the problems would be rectified over time.

The ubiquitous presence of a public defender, throughout all proceedings, was crucial during this time. Given the system-wide errors and their palpable impacts on defendants, efforts by defense counsel to

⁵³ Esmile, Alex, *Alameda County Public Defender: Court's New E-Filing System Causing False Arrests, Extending Custody* (November 17, 2016) KQED News < <https://www.kqed.org/news/11175546/alameda-county-public-defender-courts-new-e-filing-system-causing-false-arrests-extending-custody> > [as of December 14, 2018.]

⁵⁴ *Id.*

⁵⁵ *Id.*

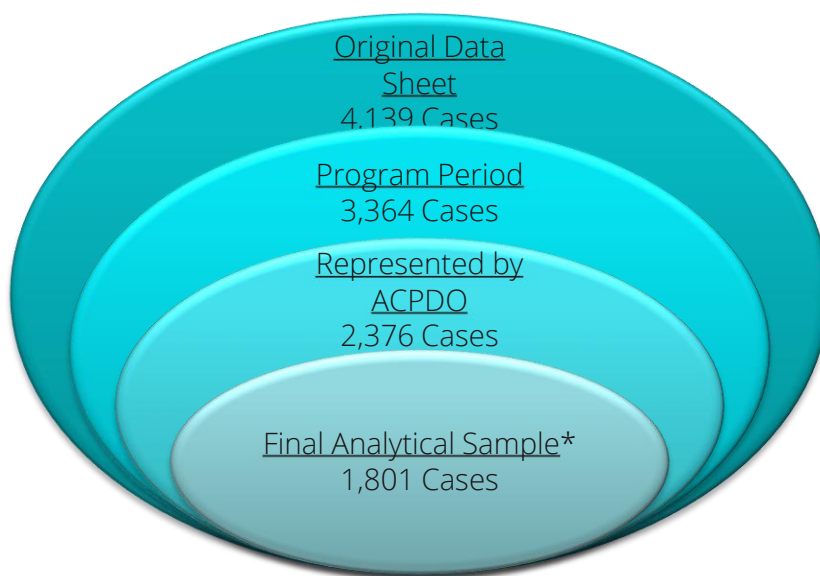


correct inaccurate system records in court, particularly at arraignment, could mean the difference between a defendant's release or continued incarceration. For example, there were many instances of defendants arraigned for felony probation violations although the probation period had expired. Defendants were erroneously arrested for violating the terms of a probation which had already expired. Those charged with felony probation violations, as discussed previously, were often incarcerated for a period of at least two weeks before having the opportunity to appear before a judge with an attorney. These individuals were illegally and erroneously held before the error was noticed or brought to the court's attention. In such situations, public defenders present in court were able to address system errors to argue for clients' immediate release.

Appendix 5: Sample Size

The program period observed for this analysis lasted 6 months, from September 1, 2016 to February 28, 2017, and only felony cases were considered, since that was the focus of the Smart Defense initiative. The program data was documented by attorneys from both Oakland and Hayward courtrooms, using a templated Excel sheet, and included 4,139 cases. Redacting the sheet to include only cases which fell during the program period brought the sample down to 3,364 cases. By removing cases which did not receive representation from a public defender, (i.e. cases not filed by the court, cases with a private attorney, cases in which the defendant wasn't brought to the court, etc.) left a sample of 2,375 cases. A final review of the data, in collaboration with ACPDO, allowed us to remove additional cases which either did not receive representation or had too much missing data to use for this analysis. Our final sample for this analysis includes 1,801 felony arraignment cases, over a 6-month period in two Alameda County courtrooms.⁵⁶

Program Period: Analytical Sample



⁵⁶There were 3,364 felony arraignment cases, over a 6-month period in two Alameda County courtrooms cases that fell within the designated time span and were included in the analysis. Among these cases 989 did not receive representation from a public defender, (i.e. cases not filed by the court, cases with a private attorney, cases in which the defendant wasn't brought to the court, etc.) left a sample of 2,375 cases. A final review of the data, in collaboration with ACPDO, required that we remove additional 574 cases which either did not receive representation or whose data were incomplete and usable. This left a sample of 1,801 to include in the analysis.

*Additional cases were omitted based on determinations by the ACPDO that they did not fit inclusion criteria

It is worth noting that the data from the program and comparison periods are from two different sources. As stated above, the program data was collected and entered by attorneys at Alameda County Public Defender's Office. This decision was made in an effort to collect richer, more comprehensive and accurate data than the automatically-collected data available through the county's JCATS system. Additionally, coinciding with the timespan of the Smart Defense Initiative, JCATS system data were compromised due to malfunctions in the inter-connected database system the Court and the Public Defender's offices use. Hand-collected data was, therefore, the best data source for this time period. Prior to the program, however, there was of course no such hand-collected data. Although JCATS was not experiencing the malfunctions mentioned above during the comparison period, there are nevertheless some anomalies and limitations with the data – artifacts of the JCATS database system itself. These are explained in more detail below.

The original data collection plan included multiple sources of data, both quantitative and qualitative. For example, we hoped to administer a post-arraignment survey to clients, as well as conduct interviews or focus groups. Unfortunately, these plans did not come to fruition, mainly due to concerns around maintaining client confidentiality (for clients with active cases), and difficulties in following up with clients whose cases were resolved.

However, despite these difficulties, we were able to conduct a thorough analysis of available data and are pleased to present the positive results discussed here. It is clear that the efforts of the ACPDO paid off – both for the County and for the clients they represented.

Our final sample for this analysis includes 1,801 felony arraignment cases, over a 6-month period in two Alameda County courtrooms.

Appendix 6: Key Tables

2.A – Days in Custody by Time Period

		N	Mean	Std. Deviation
Days in Custody	Post (Arrest - Arraignment)	1576	3.75	1.458
	Pre (Arraignment - PDE)	907	2.45	2.850

2.B – Sex (Full Sample)

		Frequency	Percent	Valid Percent
Valid	Female	525	14.1	17.1
	Male	2553	68.8	82.9
	Total	3078	82.9	100.0
Missing	System	635	17.1	
Total		3713	100.0	

2.C – Sex by Time Period

Data		Frequency	Percent	Valid Percent
Program Period	Female	270	15.0	16.7
	Male	1343	74.6	83.3
	Total	1613	89.6	100.0
	Missing	188	10.4	
	Total	1801	100.0	
Comparison Period	Female	255	13.3	17.4
	Male	1210	63.3	82.6
	Total	1465	76.6	100.0
	Missing	447	23.4	
	Total	1912	100.0	

2.D – Key Outcomes by Sex and Time Period

Data		Sex	N	Mean	Std. Deviation
Post	Motion to Reduce Bail	Female	270	.0333	.17984
		Male	1343	.0328	.17808
	Bail Reduced	Female	270	.0296	.16988
		Male	1343	.0268	.16158
	Motion to Release	Female	270	.3185	.46677
		Male	1343	.2785	.44842
	Released	Female	270	.2259	.41897
		Male	1343	.2025	.40204
	Time Waived	Female	270	.0741	.26238
		Male	1343	.0514	.22085
	No Time Waived	Female	270	.4000	.49081
		Male	1343	.4326	.49562
	Continued	Female	270	.8037	.39793
		Male	1343	.8429	.36404
	Dismissed***	Female	270	.0704	.25625
		Male	1343	.0305	.17210
	Resolved	Female	270	.1111	.31485
		Male	1343	.1117	.31510
Pre	Motion to Reduce Bail****a	Female	255	.6000	.49086
		Male	1210	.8099	.39253
	Bail Reduced****a	Female	255	.5922	.49240

	Male	1210	.8058	.39576
Motion to Release	Female	255	.0000	.00000 ^a
	Male	1210	.0000	.00000 ^a
Released	Female	255	.0078	.08839
	Male	1210	.0058	.07587
Time Waived***	Female	255	.0471	.21218
	Male	1210	.0041	.06418
No Time Waived	Female	255	.0078	.08839
	Male	1210	.0174	.13065
Continued	Female	255	.9412	.23576
	Male	1210	.9694	.17224
Dismissed	Female	0 ^b	.	.
	Male	0 ^b	.	.
Resolved	Female	0 ^b	.	.
	Male	0 ^b	.	.

*** Statistically significant at the 0.001 level

a. These variables also capture incidence of other bail-related actions (i.e. bail increased, reinstated, etc.)

2.E – Race (Full Sample)

		Frequency	Percent	Valid Percent
Valid	Asian/Pacific Islander	136	3.7	4.3
	Black	1552	41.8	48.7
	Hispanic	834	22.5	26.2
	White	593	16.0	18.6
	Native American	8	.2	.3
	Other/Unclassified	62	1.7	1.9
	Total	3185	85.8	100.0
Missing		528	14.2	
Total		3713	100.0	

2.F – Race by Time Period

Data		Frequency	Percent	Valid Percent
Program Period	Asian/Pacific Islander	67	3.7	4.2
	Black	695	38.6	43.1
	Hispanic	465	25.8	28.8
	White	346	19.2	21.5
	Native American	3	.2	.2
	Other/Unclassified	36	2.0	2.2
	Total	1612	89.5	100.0
	Missing	189	10.5	
Total		1801	100.0	
Comparison Period	Asian/Pacific Islander	69	3.6	4.4
	Black	857	44.8	54.5
	Hispanic	369	19.3	23.5
	White	247	12.9	15.7
	Native American	5	.3	.3
	Other/Unclassified	26	1.4	1.7
	Total	1573	82.3	100.0
	Missing	339	17.7	
Total		1912	100.0	

2.G – Key Outcomes by Race and Time Period

Data			N	Mean	Std. Deviation
Program Period	Motion to Reduce Bail	Asian/Pacific Islander	67	.0299	.17146
		Black	695	.0302	.17130
		Hispanic	465	.0323	.17687
		White	346	.0376	.19043
		Native American	3	.0000	.00000
		Other/Unclassified	36	.0556	.23231
		Total	1612	.0329	.17837
	Bail Reduced	Asian/Pacific Islander	67	.0299	.17146
		Black	695	.0230	.15008
		Hispanic	465	.0280	.16503
		White	346	.0318	.17570
		Native American	3	.0000	.00000
		Other/Unclassified	36	.0556	.23231
		Total	1612	.0273	.16299
	Motion to Release	Asian/Pacific Islander	67	.2985	.46106
		Black	695	.2317	.42219
		Hispanic	465	.3419	.47487
		White	346	.3006	.45917
		Native American	3	.0000	.00000
		Other/Unclassified	36	.3889	.49441



	Total	1612	.2841	.45113
Released	Asian/Pacific Islander	67	.1791	.38633
	Black	695	.1971	.39811
	Hispanic	465	.2151	.41130
	White	346	.2081	.40653
	Native American	3	.0000	.00000
	Other/Unclassified	36	.3333	.47809
	Total	1612	.2066	.40497
Time Waived	Asian/Pacific Islander	67	.0597	.23872
	Black	695	.0446	.20658
	Hispanic	465	.0559	.23000
	White	346	.0636	.24436
	Native American	3	.0000	.00000
	Other/Unclassified	36	.1389	.35074
	Total	1612	.0546	.22725
No Time Waived	Asian/Pacific Islander	67	.2388	.42957
	Black	695	.4878	.50021
	Hispanic	465	.4237	.49467
	White	346	.3497	.47757
	Native American	3	.0000	.00000
	Other/Unclassified	36	.4444	.50395
	Total	1612	.4274	.49486
Continued	Asian/Pacific Islander	67	.7015	.46106



		Black	695	.8576	.34976
		Hispanic	465	.8430	.36418
		White	346	.8035	.39795
		Native American	3	.6667	.57735
		Other/Unclassified	36	.8889	.31873
		Total	1612	.8356	.37075
Comparison Period	Motion to Reduce Bail ^a	Asian/Pacific Islander	69	.4493	.50106
		Black	857	.8040	.39723
		Hispanic	369	.7832	.41263
		White	247	.7611	.42726
		Native American	5	.8000	.44721
		Other/Unclassified	26	.5385	.50839
		Total	1573	.7724	.41941
		Bail Reduced ^a	Asian/Pacific Islander	69	.4493
Black	857		.8005	.39988	
Hispanic	369		.7778	.41630	
White	247		.7490	.43448	
Native American	5		.6000	.54772	
Other/Unclassified	26		.5385	.50839	
Total	1573		.7667	.42307	
Motion to Release	Asian/Pacific Islander		69	.0000	.00000
	Black	857	.0000	.00000	
	Hispanic	369	.0000	.00000	



	White	247	.0000	.00000
	Native American	5	.0000	.00000
	Other/Unclassified	26	.0000	.00000
	Total	1573	.0000	.00000
<hr/>				
Released	Asian/Pacific Islander	69	.0000	.00000
	Black	857	.0093	.09622
	Hispanic	369	.0027	.05206
	White	247	.0040	.06363
	Native American	5	.0000	.00000
	Other/Unclassified	26	.0000	.00000
	Total	1573	.0064	.07950
<hr/>				
Time Waived	Asian/Pacific Islander	69	.0145	.12039
	Black	857	.0105	.10200
	Hispanic	369	.0081	.08992
	White	247	.0121	.10976
	Native American	5	.0000	.00000
	Other/Unclassified	26	.0385	.19612
	Total	1573	.0108	.10343
<hr/>				
No Time Waived	Asian/Pacific Islander	69	.0435	.20543
	Black	857	.0128	.11263
	Hispanic	369	.0190	.13660
	White	247	.0121	.10976
	Native American	5	.0000	.00000



	Other/Unclassified	26	.0000	.00000
	Total	1573	.0153	.12261
Continued	Asian/Pacific Islander	69	.9710	.16899
	Black	857	.9720	.16508
	Hispanic	369	.9431	.23199
	White	247	.9636	.18776
	Native American	5	.8000	.44721
	Other/Unclassified	26	.9231	.27175
	Total	1573	.9625	.19006

b. These variables also capture incidence of other bail-related actions (i.e. bail increased, reinstated, etc.)

2.H – Key Outcomes by Felony Probation Violation (Program Time Period)

	FPV Status	N	Mean	Std. Deviation
Motion to Reduce Bail	FPV	377	.0106	.10259
	No FPV	1301	.0354	.18475
	Overall	1801	.0300	.17059
Bail Reduced	FPV	377	.0106	.10259
	No FPV	1301	.0277	.16409
	Overall	1801	.0250	.15613
Motion to Release***	FPV	377	.1910	.39360
	No FPV	1301	.2929	.45525
	Overall	4801	.2704	.44429

MOR***	FPV	377	.1459	.35346
	No FPV	1301	.2606	.43911
	Overall	1801	.2310	.42158
Released***	FPV	377	.1379	.34529
	No FPV	1301	.2160	.41166
	Overall	1801	.2038	.40292
Time Waived***	FPV	377	.0000	.00000
	No FPV	1301	.0646	.24585
	Overall	1801	.0505	.21909
No Time Waived	FPV	377	.4562	.49874
	No FPV	1301	.4120	.49238
	Overall	1801	.4003	.49010
Continued	FPV	377	.8647	.34248
	No FPV	1301	.8063	.39535
	Overall	1801	.8073	.39451
Dismissed***	FPV	377	.0080	.08897
	No FPV	1301	.0477	.21312
	Overall	1801	.0378	.19066
Resolved**	FPV	377	.1459	.35346
	No FPV	1301	.0938	.29163
	Overall	1801	.1277	.33386

*** Statistically significant at the 0.001 level (comparisons between FPV and No FPV)

** Statistically significant at the 0.005 level (comparisons between FPV and No FPV)

Appendix 7: SB10 & Related Legislation

In 2018, the courts, legislature, and the Alameda County community grappled with the detrimental effect of pretrial detention and the inherent inequities of the money bail system. The resulting changes to the law have been limited in scope, potentially exacerbating the need for counsel at arraignment.

The California First District Court of Appeal addressed the issue of money bail in January 2018 in *In Re Humphrey* (2018) 19 Cal. App. 5th 1006. The court held that setting bail in an amount which a defendant cannot pay effectively constitutes a pretrial detention order⁵⁷ and a failure to inquire about a defendant's ability to post bail violates due process and equal protection⁵⁸. The court further held that the decision to set the bail amount based solely on bail schedule, rather than individualized inquiry, violated defendant's due process rights.⁵⁹

In its reasoning, *Humphrey* observed that when a court sets bail, it reflects a judicial determination that public safety does not require pretrial detention of the defendant. Given that "the amount of money bail . . . is relevant only to protect against flight risk," bail should be set at an amount a defendant is able to pay.⁶⁰ "Once the trial court determines public and victim safety do not require pretrial detention and a defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or court-ordered hearing."⁶¹ *Humphrey* demanded that "[b]ail determinations must be based on consideration of individualized criteria."⁶² Therefore, while judges may consult the bail schedule as a useful "starting point," the court cautioned that bail schedules "represent the antithesis of the individualized inquiry required before a court can order pretrial detention."⁶³ Bail schedules provide standardized, yet arbitrary, bail amounts based on charged crimes and prior convictions, without regard for the facts underlying a particular offense or characteristics of an individual defendant, including the risk he or she currently presents. For many, "reliance on bail schedules amounts to a virtual presumption of incarceration."⁶⁴

⁵⁷ *In re Humphrey* (2018) 19 Cal. App. 5th 1006, 1014.

⁵⁸ *Humphrey, supra*, 19 Cal. App. 5th at 1025-6.

⁵⁹ *Ibid.*

⁶⁰ *Humphrey, supra*, 19 Cal. App. 5th at 1047.

⁶¹ *Id.* at 1044.

⁶² *Id.* at 1042.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

Courts in Alameda County did not immediately establish new practices that meaningfully considered a defendant's ability to pay when setting bail at arraignment in recognition of the *Humphrey* decision. In accordance with *Humphrey*, the ACPDO argued for clients' release or reduction of bail to an amount the defendant could afford to pay. These efforts were met with some resistance, but an effort was made to comply with the Court of Appeal's decision. However, once the California Supreme Court granted review of *Humphrey*, many courts reverted to the previous practice of setting bail according to the bail schedule.

SB10 requires the use of risk assessments to determine whether a defendant is eligible for pre-trial release. Previously, Alameda County used a risk assessment tool called the Ohio Risk Assessment System (ORAS) for pre-trial assessment of a defendant's suitability for pre-trial release.⁶⁵ However, use of this assessment tool was short-lived as the court eliminated the Pretrial Services Department for budgetary reasons. With the recent passage of Senate Bill 10, which abolished money bail, and the introduction of Senate Bill 36, which mandates pretrial release services utilizing risk assessment tools, the Alameda County Probation Department has assumed the responsibility of providing pretrial release services. The Alameda County Probation Department recently presented on the research and planning the department completed for its pretrial release program to the Alameda County Board of Supervisor's Public Protection Committee.

While it is unclear which risk assessment tool will be used in Alameda County once the new law is implemented, the implementation of risk assessment tools is often problematic. These tools consider factors such as criminal history and failures to appear to predict the likelihood of a defendant's future appearance in court or likelihood of reoffending. These predictive factors are compiled from arrest data, which is often biased against minorities.⁶⁶ Critics of risk assessment tools fear that "sometimes the tests consider people's neighborhoods, employment or other personal factors, such as family and home-life structure, potentially penalizing those coming from low-income situations."⁶⁷ Similarly, data points associated with race, such as poverty, joblessness and social marginalization, cannot easily be

⁶⁵ *Proposed FY 15-16 Pretrial Services and Early Intervention Court Investment (2015)* Alameda County Superior Court <<http://www.acgov.org/probation/documents/CourtsFY15-16EarlyInterventionCourtInvestment.pdf>> [as of December 10, 2018.]

⁶⁶ Bay City News Service, *Changes To State's Bail Reform Bill Turn Supporters Into Opponents* (August 16, 2018) SFGATE < <https://www.sfgate.com/news/bayarea/article/Changes-To-State-s-Bail-Reform-Bill-Turn-13162233.php>> [as of December 10, 2018.]

⁶⁷ Flynn, Meagan, *California abolishes money bail with a landmark law. But some reformers think it creates new problems* (August 29, 2018) The Washington Post < https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/california-abolishes-money-bail-with-a-landmark-law-but-some-reformers-think-it-creates-new-problems/?utm_term=.9807a82e1f7c> [as of December 10, 2018.]



isolated from assessment tool evaluations without compromising accuracy⁶⁸. An individual's race or economic status may, therefore, deem them as “high risk” — keeping the defendant in custody without the option to post bail or any other recourse.

In a study by ProPublica on the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) instrument in Broward County, FL, researchers found that among defendants who did not reoffend, black defendants were assessed as medium- or high-risk for recidivism at twice the rate of white defendants.⁶⁹ These tools ignore the inequities many clients face (i.e. past drug use, homelessness, unemployment, lack of education, etc.), which may contribute to a person's criminal history and increase their present risk-score.

If authorized by local court rules, Pretrial Assessment Services (PAS) can release a misdemeanor or felony arrestee prior to arraignment, subject to the “least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the person's return to court” if they are assessed as “low” or “medium” risk.⁷⁰ Yet, the court may decline to release a person pending arraignment if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person as required.⁷¹

While release before arraignment may be discretionary, a detainee “shall” be released at arraignment with the least restrictive nonmonetary conditions necessary to reasonably assure his appearance and public safety, unless the prosecution files a motion for preventive detention. At arraignment, the court must have the results of a risk assessment, the criminal history of the person, supplemental information reasonably available that directly addresses the defendant's risk to public safety or risk of failure to appear in court as required, recommendations by the Judicial Council for conditions of release to impose upon a released defendant, and input from the victim.⁷² Additionally, under certain specified conditions, the prosecution may file a motion seeking preventive detention of the defendant pending trial at arraignment or anytime thereafter.⁷³ This can keep an arrestee for several additional days pending the motion.⁷⁴

⁶⁸ Angwin, Julia, et al., *Machine Bias* (May 23, 2016) ProPublica <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> [as of November 28, 2018.]

⁶⁹ Id.


⁷⁰ Pen. Code § 1320.10(b).

⁷¹ Pen. Code § 1320.13(h).

⁷² Pen. Code § 1320.17.

⁷³ Pen. Code § 1320.18.

⁷⁴ Pen. Code § 1320.18(d).



While the new law does spell out specific opportunities for advocacy, the risks of SB 10 make defense counsel at arraignment vital. The great uncertainty about the new procedures at arraignment make it crucial for defense counsel to be present at arraignment and prevent unjust practices which may violate clients' Constitutional rights. Specifically, defense counsel's presence at arraignment and all initial custody-status hearings is vital to protect defendants from entering into guilty pleas solely for the purpose of release from custody. According to Rebecca Brown, director of policy at the Innocence Project, SB 10 "creates larger problems for people who would have otherwise been released and risks compelling pleas from innocent people. Since there is a built-in presumption to detain people charged with certain crimes who would have otherwise made bail, the risk of an innocent person pleading guilty to a crime he or she did not commit remains."⁷⁵ The new law improves pre-release circumstances for those charged with certain misdemeanors, but may jeopardize innocent people with criminal histories or facing certain criminal charges.⁷⁶

⁷⁵ Innocence Staff, *Criminal Justice Advocates Raise Concerns about New California Law that Abolishes Cash Bail* (August 30, 2018) Innocence Project <<https://www.innocenceproject.org/advocates-raise-concerns-about-california-law-cash-bail/>> [as of December 10, 2018.]

⁷⁶ Id.