

The Impact of Defense Counsel at Bail Hearings

Roughly half of U.S. counties do not provide defense counsel at bail hearings. A field experiment in Pittsburgh, Pennsylvania, shows that providing counsel can decrease the use of monetary bail and pretrial detention.

Although the Sixth Amendment guarantees legal representation to criminal defendants at critical stages of a prosecution, the U.S. Supreme Court has not yet recognized the bail hearing as a critical stage. As a result, states and counties have been left to themselves to decide whether defense counsel will be provided at bail hearings.

It is estimated that up to half of the counties in the United States do not provide defense counsel at the bail hearing stage.¹ Bail hearings, where judges decide such issues as bail and pretrial detention,² can carry high stakes: Recent research shows that pretrial detention leads to worse outcomes for defendants—and society—including longer jail stays and higher chances of conviction in the short term, as well as lower employment and higher rates of rearrest over the long term.³

RAND researchers conducted a field experiment in Pittsburgh, Pennsylvania, that should help state and local policymakers assess their policies regarding the provision of defense counsel at bail hearings. The research findings may also inform the legal debate on whether those hearings should be considered a critical stage of a prosecution that should be covered under the Sixth Amendment right to counsel.

RAND researchers found that providing counsel (a public defender) at the bail hearing decreased the use of monetary bail and pretrial detention without increasing the rate at which defendants failed to appear at preliminary court hearings. However, having a public defender at the initial bail hearing did result in a short-term increase in rearrests on theft charges.

How the Experiment Worked

Despite the impact of pretrial detention decisions on defendants' lives and society at large, prior research has not documented the causal effects of providing counsel at bail hearings.

The RAND study, conducted in the Pittsburgh Municipal Court in Allegheny County, was designed around the fact that the jurisdiction only had sufficient resources to provide public defenders for half of the bail hearing shifts that did not already have public defenders. This allowed RAND researchers to work with the public defender's office to develop a work schedule such that the shifts in which a public defender was working had defendants and judges who were, on average, virtually identical to those in which a public defender was not working. This research design resembles a randomized controlled trial and allowed for causal analysis of the impact of providing counsel. The study was in the field from April 1, 2019, through March 13, 2020, and included 2,002 cases in which a public defender was scheduled (which are shown as "Public defender" in Figures 1–6) and 2,089 cases in which no public defender was scheduled (which are shown as "No public defender" in Figures 1–6). Note that, for all results, even though a public defender was scheduled to appear, this does not necessarily indicate that a public defender was present. However, compliance with the schedule was very good.

Impacts on Bail Hearing Decisions

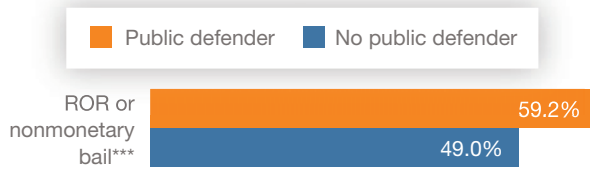
The study results showed that having public defenders at bail hearings clearly and substantially improves outcomes for defendants. While defendants who did not have a public

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defender present received either release on their own recognizance (ROR) or a release subject to nonmonetary conditions 49 percent of the time, those with a public defender received this favorable outcome 59 percent of the time—a 21 percent increase (Figure 1).⁴

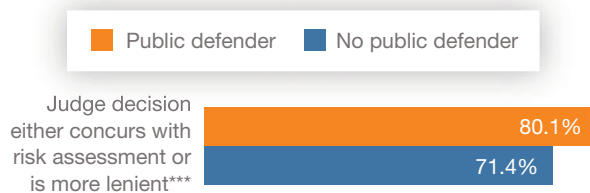
FIGURE 1
Public Defenders Improve Bail Hearing Outcomes for Defendants



*** The difference between the two groups is statistically significant at the 1-percent level.

The results indicate that one potential reason why public defenders were able to improve defendants’ outcomes at the bail hearing is that they were able to increase the judge’s concurrence with the county’s assessment of the risk posed by the defendant (Figure 2). Having public defenders at bail hearings may increase concurrence because public defenders can ask a judge why they are imposing less favorable conditions than the risk assessment recommends.

FIGURE 2
Impact of Public Defenders on Judge Concurrence with County Risk Assessment

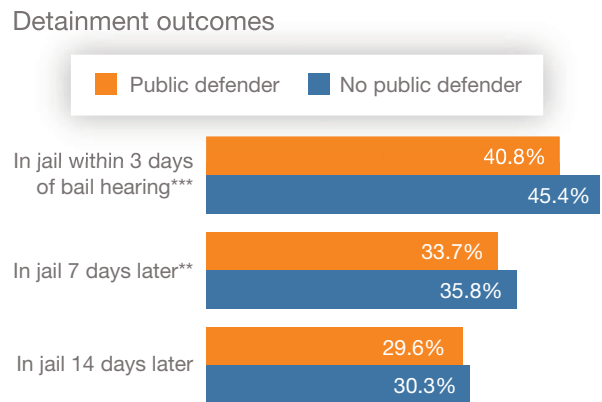


*** The difference between the two groups is statistically significant at the 1-percent level.

Impact on Pretrial Detention

Having a public defender present resulted in a decline of pretrial detention within three days of the initial bail hearing of 4.6 percentage points, a 10 percent decrease. However, 14 days after the pretrial bail hearing, both defendants who had a public defender and those who lacked them were equally likely to be out of jail (Figure 3). The RAND researchers believe that this happens because many defendants who are still in jail a few days following their first bail hearing get a second bail hearing at which a public defender is always present.

FIGURE 3
Impact of Public Defenders on Detention over Time



*** The difference between the two groups is statistically significant at the 1-percent level.

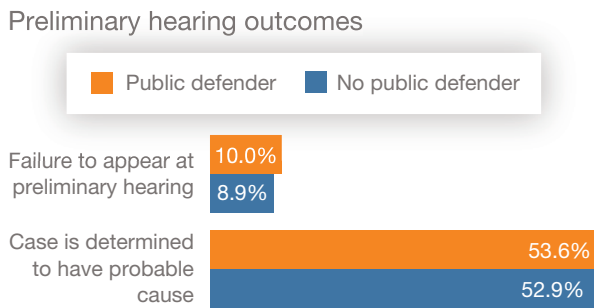
** The difference between the two groups is statistically significant at the 5-percent level.

Impact on Preliminary Hearings

The analysis showed that having a public defender at the initial bail hearing had no statistically significant impact on whether a defendant failed to appear at a preliminary

hearing in their criminal case or on the outcome of that hearing (which determines whether a case has probable cause and can proceed) (Figure 4). That is unsurprising because those preliminary hearings typically do not take place until two weeks after the initial bail hearing, by which time all defendants were equally likely to be out of jail. The preliminary hearing itself is a critical stage, and therefore all defendants receive representation.

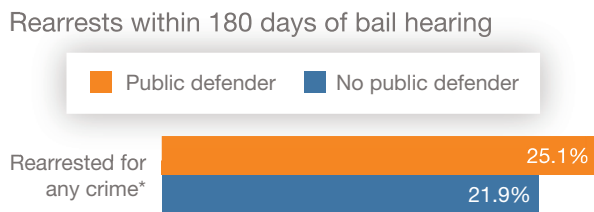
FIGURE 4
No Statistically Significant Impact on Failure to Appear



Impact on Rearrests

With respect to rearrests within 180 days of the bail hearing, the research found that those who had a public defender were 3.2 percentage points more likely to be rearrested for a crime (Figure 5).

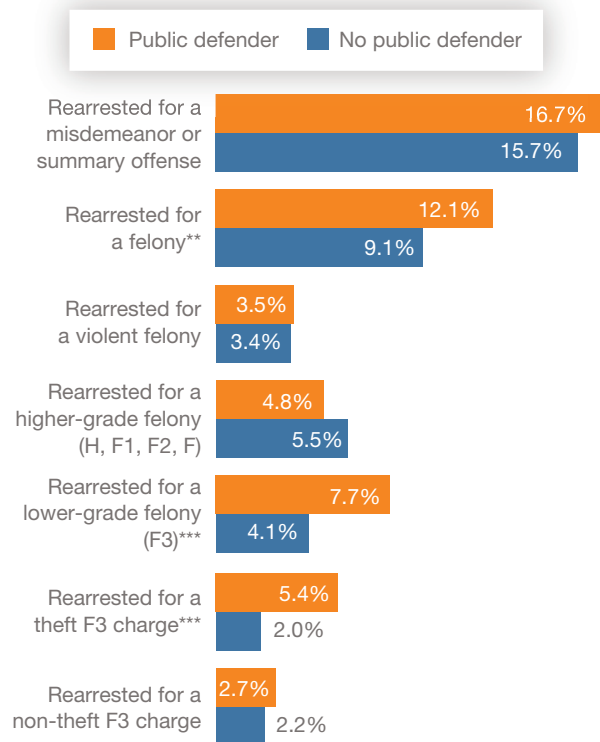
FIGURE 5
Rearrests Within 180 Days



* The difference between the two groups is statistically significant at the 10-percent level.

The increase in rearrests was driven by rearrests for third-degree felony thefts, the majority of which are retail thefts. While 5.4 percent of those who had a public defender at the initial bail hearing were rearrested for a third-degree felony theft charge, only 2 percent of those who did not have a public defender were rearrested on that charge (Figure 6).

FIGURE 6
Breakdown of Rearrests



*** The difference between the two groups is statistically significant at the 1-percent level.

** The difference between the two groups is statistically significant at the 5-percent level.

NOTE: F = ungraded felony drug charge; F1 = first-degree felony; F2 = second-degree felony; F3 = third-degree felony; H = homicide.



Policy Trade-Offs

The results indicate that, in this setting, having a public defender at the bail hearing involves a trade-off between lowering pretrial detention rates and increasing rearrests for third-degree felony thefts. Because of the coronavirus disease 2019 (COVID-19) pandemic, the research team was not able to evaluate the impact on long-term rearrest rates. Prior research suggests that long-term rearrest rates for those not detained pretrial may eventually equal those who were detained, and thus the long-term effects can be different than the short-term effects on rearrests that are estimated here.⁵

What any particular jurisdiction or policy-maker will think about the trade-offs observed here will vary. Some jurisdictions will always elect to provide defense representation based on norms around notions of justice. Some jurisdictions may want to provide defense representation as long as it has a beneficial impact on defendants; these results clearly indicate this to be the case.

For jurisdictions that are concerned about the trade-off between pretrial detention and rearrests, the results indicate that this intervention would have a negative value to society only if the cost of a third-degree felony theft charge to society is at least 8.5 times more than the cost to society of a day in detention. Previous literature indicates that the trade-offs between detention and rearrests found here would be acceptable to the median individual.⁶

Context on the Findings

The Pittsburgh public defender initiative presented a unique opportunity to compare the effects of providing or withholding public defender representation at preliminary bail hearings held in Pittsburgh. Bail hearing procedures differ across jurisdictions, which suggests that care is required to determine whether these findings apply to other jurisdictions. Also, because of the COVID-19 pandemic, the research team could not evaluate the impact on long-term rearrest rates.



Notes

¹ D. Colbert, “Prosecution Without Representation,” *Buffalo Law Review*, Vol. 59, 2011.

² At the bail hearing, the judge can release the defendant without making them pay anything, set a monetary bail, or require them to be detained. Defendants who are required to be detained or who are assigned a monetary bail that they cannot pay will go to jail directly after the hearing.

³ S. H. Didwania, “The Immediate Consequences of Federal Pretrial Detention,” *American Law and Economics Review*, Vol. 22, 2020; W. Dobbie, J. Goldin, and C. S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review*, Vol. 108, 2018; A. Gupta, C. Hansman, and E. Frenchman, “The Heavy Costs of High Bail: Evidence from Judge Randomization,” *Journal of Legal Studies*, Vol. 45, 2016; P. Heaton, S. G. Mayson, and M. Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review*, Vol. 69, 2017; E. Leslie and N. G. Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,” *Journal of Law and Economics*, Vol. 60, 2017; M. T. Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,” *Journal of Law, Economics, and Organization*, Vol. 34, 2018.

⁴ For all figures, the comparisons between the “Public defender” and “No public defender” groups are ordinary least squares regression—adjusted using controls for gender, race, age, and education level of the defendant; whether the offense occurred within Pittsburgh (versus the greater county); grade and type of dominant charge; prior record and failures to appear; whether the defendant had other pending charges or was on probation at the time of their bail hearing; whether the defendant had any holds; judge; and month controls, as well as indicators for the 16 different four-hour shifts that composed the two groups.

⁵ W. Dobbie, J. Goldin, and C. S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review*, Vol. 108, 2018; P. Heaton, S. G. Mayson, and M. Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review*, Vol. 69, 2017.

⁶ Megan T. Stevenson and Sandra G. Mayson, “Pretrial Detention and the Value of Liberty,” *Virginia Law Review*, Vol. 108, No. 3, May 2022.



This brief describes work done in RAND Social and Economic Well-Being and documented in "The Impact of Defense Counsel at Bail Hearings," by Shamena Anwar, Shawn Bushway, and John Engberg, *Science Advances*, Vol. 9, No. 18, May 5, 2023, EP-70066 (available at www.rand.org/t/EP70066). To view this brief online, visit www.rand.org/t/RBA1960-1. The RAND Corporation is a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier and more prosperous. RAND is nonprofit, nonpartisan, and committed to the public interest. RAND's publications do not necessarily. **RAND**[®] is a registered trademark.

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