IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Adverse Party,

v.

JAYME SIERRA CASUGA,

Defendant-Relator.

No. S071501

Washington County Circuit Court No. 23CR60008
Proceeding in Mandamus from the Order of the Washington County Circuit Court, Hon. Elizabeth Lemoine, Circuit Judge.

STATE OF OREGON,

Plaintiff-Adverse Party,

v.

ALLEN REX ROBERTS,

Defendant-Relator.

No. S071661

Multnomah County Circuit Court No. 21CR38424
Proceeding in Mandamus from the Order of the Multnomah County Circuit Court, Honorable Benjamin Souede, Circuit Judge.

BRIEF OF AMICI CURIAE CRIMINAL LAW & JUSTICE CENTER AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF DEFENDANTS-RELATORS

Lindsey Burrows
OSB 113431
O'CONNOR WEBER LLC
1500 SW First Ave
Suite 1090
Portland, OR 97201
Telephone: 503.226.0923

Attorney for
CRIMINAL LAW & JUSTICE
CENTER

Todd Gregorian**
Garner Kropp**
FENWICK & WEST LLP
555 California Street, 12th Floor
San Francisco, CA 94014
Telephone: 415.875.2300

Kathryn Hauh**
FENWICK & WEST LLP
801 California St
Mountain View, CA 94014
Telephone: 650.988.8500
***pro hac vice pending*

Attorneys for
CRIMINAL LAW & JUSTICE
CENTER

Kelly Simon, OSB No. 154213
ACLU FOUNDATION OF
OREGON, INC.
P.O. Box 40585
Portland, OR 97240
Telephone: 503.227.6928

Attorney for
AMERICAN CIVIL LIBERTIES
UNION OF OREGON

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INTEREST OF THE AMICI CURIAE[1]

The Criminal Law & Justice Center (the Center) at UC Berkeley School of Law researches policy outcomes and advocates for a more effective, equitable criminal justice system. Within a leading academic institution, the Center bridges scholarly research with practical reform initiatives. In coordination with other research groups at the university, the Center conducts data-driven analyses on crime and incarceration. Its research has appeared in peer-reviewed publications, like JAMA and the Berkeley Journal of Criminal Law.

In addition to publishing scholarship, the Center advocates in criminal cases. The Center supports resentencing for criminal defendants, including cases where courts converted life-without-parole sentences to parole-eligible sentences and awarded releases with credit for time served. The Center's post-conviction resentencing project has prevented over 170 years of unnecessary incarceration. The Center also regularly submits amicus briefs on critical criminal justice issues,

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[1] Counsel for the parties have not authored this brief in whole or in part. No one other than the Center, ACLU of Oregon, and the Center's counsel has contributed money that was intended to fund preparing or submitting this brief.

particularly concerning wealth-based detention and access to counsel for indigent defendants.

Chesa Boudin founded and leads the Center. Mr. Boudin served as a career public defender in San Francisco and was later elected as the county's District Attorney. Mr. Boudin has first-hand experience with seeking to reduce harms like those the defendants alleged they have suffered.

The American Civil Liberties Union of Oregon (ACLU of Oregon) is a statewide non-profit and non-partisan organization with over 41,000 members and supporters statewide. As a state affiliate of the national ACLU organization, ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental rights protected in the Oregon Constitution and the United States Constitution. That includes defending the suite of rights in Article I, section 11, of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution that ensure that the State of Oregon treats people fairly in its criminal legal system. ACLU of Oregon and the Center file this brief in support of Defendants-Relators (collectively referred to as "Roberts").

SUMMARY OF THE ARGUMENT

Jayme Sierra Casuga and Allen Rex Roberts are two of the more than three thousand defendants in Oregon who have waited, sometimes for over a year, for the Government to appoint them lawyers. Oregon guarantees these defendants counsel at "critical stages" in their cases, *State v. ex rel. Russell v. Jones*, 293 Or 312, 315, 647 P2d 904 (1982), but the state actors charged with the responsibility for making that guarantee a reality have refused to do so in any reasonable time after defendants invoke their rights.

Courts have already condemned the Government's inaction. In November 2023, a federal court entered a preliminary injunction requiring the Government to release from custody any indigent defendant who did not receive appointment of counsel within seven days of arraignment or withdrawal of their previously-appointed counsel, and the Ninth Circuit affirmed that order. *See Betschart v. Oregon*, 103 F4th 607, 614 (9th Cir. 2024) ("*Betschart III*"). That interim relief, however, does not cure the damage that unconstitutional deprivations of counsel continue to inflict upon individuals across Oregon.

Indeed, the Government's denial of counsel continues to cause serious, irreparable harm to criminal defendants. As the Center and ACLU of Oregon present through the stories of indigent Oregonians, defendants languish without counsel while facing life-altering criminal charges. They suffer both direct consequences in their legal defenses and collateral consequences in their personal lives. And those harms persist even when those defendants are released from custody pending trial.

Moreover, such harms are not limited to the stories recounted here. Social science research shows a wide gulf in the litigation outcomes between defendants who received timely appointment of counsel and those who did not. Courts too have underscored that criminal defendants need representation early in prosecutions because that is when—through fact investigation, negotiating pleas, and motion practice—cases are crystallized in ways that determine their outcome. Laypeople have no hope of completing these tasks effectively on their own. The Government denies counsel at stages that shape defendants' cases and their lives.

When the Government has denied counsel to a defendant at a critical stage of the case, the courts must provide a remedy tailored to that wrong. The remedial principle that should govern here is that such

a remedy must restore the defendant to their position had the Government not violated their Constitutional rights. *See, e.g.*, *State v. Craigen*, 370 Or 696, 711, 524 P3d 85 (2023). But when the Government denies counsel for months, courts have no remedy that can restore what defendants lose in their defenses and their personal lives. Moreover, requiring unrepresented defendants to investigate and articulate to the court their individualized harms to obtain relief would impose an unfair burden, one that merely compounds the underlying Constitutional violation. Since the Government cannot repair the damage it inflicts by denying counsel, dismissal is an appropriate remedy.

The Government has not offered a viable alternative to dismissal. The Government has argued that remedies for violations of the right to speedy trials displace remedies for the denial of counsel. And other states' governments have argued that postconviction relief should be the exclusive relief for claims of systemic denial of counsel. Neither of these are viable. Courts cannot rely on unrepresented defendants to file motions for relief while the Government uses its own counsel. Further, motions for speedy trials and postconviction motions arise only late in criminal cases and cannot address the damage of the Government's

failure to appoint counsel at early stages. And limiting the available remedies to these inadequate ones would only encourage the Government to persist in the systemic denial of counsel at issue here. The Government should not be permitted to prosecute cases while it denies defendants the ability to build their defenses.

This Court should pick up where the federal courts in *Betschart* left off. Defendants out of custody still suffer when the Government fails to appoint them counsel, and Oregon's courts should now decide the appropriate remedy. That remedy is dismissal.

ARGUMENT

I. Criminal defendants suffer when the Government fails to provide counsel.

Unrepresented defendants in Oregon suffer irreparable harms every day under the current system of non-appointment of counsel. Even if their charges lack merit, unrepresented defendants often suffer the same consequences as if they had been convicted: unfavorable release conditions, loss of employment, and travel restrictions. These consequences cannot be undone through a motion for violation of the right to a speedy trial or a motion for postconviction relief. Indigent defendants in Oregon bear significant direct costs in their cases and

collateral costs in their personal lives because the Government fails to appoint counsel.

A. C.D.'s case remained on an indefinite hold because the Government failed to appoint counsel.

C.D. is an indigent Oregonian who had little experience navigating the criminal justice system. After C.D.'s arrest, the Government failed to assign her counsel and left her to face her charges alone. Following her initial arraignment in December 2022, C.D. appeared in court thirteen times without an attorney. Each time, the judge told C.D. that there was still no attorney available to represent her. Each time, the burden of defending her case without the guidance of counsel grew heavier for C.D., and the prospect of resolving her case grew increasingly bleak.

C.D. experienced significant collateral consequences in her life from the Government's denial of counsel. C.D. worked a part-time job and cared for her ill mother. C.D. had hoped to relocate to secure full-time employment, but the court dashed those prospects at the preliminary hearing. C.D. attended that hearing unrepresented and, without the benefit of counsel's advocacy, the court set harmful terms of her release. Among other conditions, the court prohibited C.D. from

leaving Oregon and forced her to live at her father's home in Sutherlin. Accordingly, C.D. could not relocate to seek full-time employment. As her case stalled, so too did her prospects for employment.

The court also required C.D. to appear for monthly status check hearings. These hearings cost C.D. time and money, causing her a great deal of stress because she did not have a car and had to pay drivers to transport her to the court. In addition, C.D. had to take time off from her part-time job to attend the hearings.

C.D.'s defense suffered too. As an unrepresented layperson, C.D. struggled to understand criminal procedure and meaningfully discuss her case at hearings. She had more questions than answers when the judge discussed legal concepts. The judge assured C.D. that a lawyer would answer her questions once the Government provided her one, but the judge provided no guarantee of when that would be. In the meantime, C.D. could neither participate in discovery nor engage in plea negotiations with the Government. As C.D.'s case languished, one of her alleged co-conspirators, who had the benefit of counsel, swiftly resolved their case.

The Government's failure to appoint counsel freezes unrepresented defendants' lives, even when the Government does not hold those defendants in custody. Those costs spill over into the administration of the case, draining the court's time, blocking the parties' discovery, and delaying progress toward a resolution.

B. The Government forced D.Z. out of his home and support network because he had no counsel to represent him.

The story of another Oregonian, D.Z., demonstrates the consequences that result when the Government's failure to timely appoint counsel leaves defendants with no choice but to represent themselves. D.Z. is a disabled, indigent Oregonian who lacks legal training. D.Z. suffered from substance use dependencies for which he was diligently pursuing recovery. For support, he relied heavily on his recovery community. Unrepresented, D.Z. received harmful release conditions at his bail hearing.

After D.Z. was arrested and charged, the Government failed to appoint counsel for seven months after he invoked that right, during which he had nine court appearances without an attorney. He had to miss work to show up for hearings and eventually lost his job due to the

reputational damage from looming criminal charges. At one of the initial hearings, which determined D.Z.'s bail, D.Z. had to argue on his own behalf, with disastrous results. Because D.Z. lacked an attorney to advocate for him and bring forth his relevant circumstances, the court denied D.Z. release on his own recognizance and imposed a no-contact order with three punitive release conditions: D.Z. could not contact two individuals involved in the incident that led to his arrest, leave Oregon, or return to the site where the incident occurred. Because that site was located next to his home, D.Z. had to move out within 72 hours of posting bail. And because the two individuals in the no-contact order were members of his recovery community, D.Z. had to abandon his social network. Without this community, he struggled to maintain his sobriety. The court's conditions eviscerated D.Z.'s safety net.

While D.Z. waited for the court to appoint an attorney, his defense stagnated. Even when the court finally appointed counsel after seven months, D.Z. had to wait another month to meet with his attorney. All the while, he had no lawyer to investigate the facts of his case and interview witnesses while their accounts were still fresh. The same was not true for the Government, which had lawyers assigned to his case and

sole possession of the relevant evidence. The Government withheld that evidence and produced it only through D.Z.'s lawyer after appointment. By that time, defense investigations were severely limited. The state built a case strategy while D.Z. could not.

The delay also burdened the justice system beyond D.Z. The court's administration of the case suffered, as the court rescheduled hearings over and over, waiting for the Government to appoint counsel. The court's risk of error and reversal also increased while dealing with a pro se defendant. And the victim involved with D.Z.'s case also sat in limbo, waiting to be called into hearings and lacking any closure as long as the case remained unresolved.

C. An attorney buoyed B.F.'s life with advocacy at a bail hearing.

C.D.'s and D.Z.'s journey contrast with that of another Oregonian defendant, B.F., who, thanks to the assistance of counsel, avoided unnecessarily harsh conditions of release. B.F. is an indigent, disabled Oregonian who, like D.Z., relies on others for support. B.F. is a blind Army veteran who suffers from PTSD and needs a live-in caretaker. B.F. had temporary counsel at his bail hearing, and, as a result, secured favorable terms of release. With his attorney's advocacy, the court

removed B.F.'s $2,000 bail and released him on his own recognizance. At the bail hearing, the court proposed a no-contact order that would have prevented B.F. from interacting with his caretaker, due to her involvement in the incident leading to his arrest. But B.F.'s attorney persuaded the court to reduce this no-contact order to a no-offensive-contact order, allowing the caretaker to continue to support B.F as long as B.F. did not harass her. This made all the difference in the world for B.F. Unlike C.D. and D.Z., B.F. received manageable conditions of release because a lawyer advocated for him and explained his circumstances.

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Arrests and detention harm defendants, regardless of the merits of their charges. C.D. lost time to care for her ill mother and could not get a full-time job. Her endless cycle of hearings without counsel wasted the court's time and stalled the resolution of her case. D.Z. lost his job, his home, and his recovery network before he ever had access to representation. By observing its Constitutional obligation to appoint counsel to guide defendants as they enter the justice system, the Government would reduce these harms. Indeed, even the limited

assistance provided by temporary defense counsel can reap life-altering rewards. B.F.'s temporary attorney made the difference between maintaining care at home and setting an indigent, blind man off on his own.

But the Government is not meeting its obligation. Defendants suffer when the Government fails to provide counsel at the onset of criminal cases, and those costs persist even under the injunction requiring mandatory release from custody of defendants who go without counsel for seven days. If the Government fails to provide counsel and stop the direct harm to defendants' cases and the collateral harm to—and in some cases, destruction of—their personal lives, it should stop prosecuting those cases. This Court should require dismissal of each case where the Government does not meet its Constitutional obligation to ensure that each side benefits from an attorney's advocacy.

II. Representation makes a stark difference at key moments in criminal defendants' cases.

Appointed counsel would have mitigated the harms that C.D. and D.Z. suffered during their prosecutions. Stories like C.D.'s and D.Z.'s are all too common because a complex, adversarial legal system relies on lawyers. Studies show that having a lawyer makes a significant

difference at key pretrial steps in criminal prosecutions. In research from three jurisdictions, effective public defense from the onset of prosecutions reduced pretrial detention, improved the quality of advocacy, and improved the ultimate outcomes of defendants' cases. Reflecting prosecutors' shift in focus to pretrial procedure, courts too have recognized that more and more initial steps in a defendant's case require counsel. With prompt appointment of counsel, Oregon will protect defendants' ability to defend themselves. Where Oregon does not appoint counsel, the Court should require dismissal so that defendants do not bear the costs of the Government's inaction.

A. Studies confirm that criminal defendants need attorneys at the initial stages of their cases.

Research confirms that unrepresented defendants suffer the costs of not having a lawyer throughout their cases. In particular, the early stages of a case are critical for preparing defenses and reducing the disruption of custody. Data from three jurisdictions that provided counsel before arraignment show that public defense from the onset of a prosecution improves defendants' cases and lives.

Prompt representation in California. Two counties in California provided attorneys within 48 hours of arrests to support

defendants' cases. In San Francisco, the Public Defender Office designed a "Pre-Trial Release Unit" (led by Mr. Boudin) with two attorneys and one investigator to contact indigent defendants almost immediately after arrest. *See* Alena Yarmosky, *The Impact of Early Representation, An Analysis of San Francisco Public Defendant Pre-Trial Release Unit*, at 2, California Policy Lab (2018) (available at https://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf) (also attached at APP-1). The Pre-Trial Release Unit coordinated defendants' initial responses to arrests with one-on-one interviews, early fact investigation, notification of other attorneys that defendants may have, contacts to family and friends, recruitment for others to support defendants at arraignment, and bail advocacy. *See id.* Santa Clara County built a similar program, called Pre-Arraignment Representation and Review. *See* Johanna Lacoe, et al., *The Effect of Pre-Arraignment Legal Representation on Criminal Case Outcomes*, at 5, National Bureau of Economic Research, Working Paper 31289 (May 2023) (available at https://www.nber.org/papers/w31289) (also attached at APP-131). There, public defenders met with indigent defendants between booking and arraignment to learn about

employment, community ties, and housing, as well as collect time-sensitive evidence and communicate with the District Attorney's office. *Id.* at 6-7. The program attorneys then advocated for the defendants at arraignment. *See id.* at 7. Both counties designed these early contacts to bolster defense and blunt the harm of the initial days of detention.

These interventions improved the quality of evidence and advocacy in defendants' cases. Research teams measuring those improvements made three significant findings. First, the teams found that representation soon after arrest dramatically increased the likelihood that a defendant would be released at arraignment. In San Francisco County, 28 percent of defendants with representation soon after arrest were released at arraignment—a rate twice as high as similar defendants who did not have timely representation. Yarmosky, *supra*, at 25. Similarly, defendants with timely representation in Santa Clara County were 75 percent more likely to be released at arraignment versus those that did not have timely representation. Lacoe, et al., *supra*, at 3.

Second, in Santa Clara, representation also reduced pretrial detention. Defendants who received counsel at those initial stages spent 79 percent less time in pretrial detention, amounting to 23 days in jail on

average. *Id*. And third, the research from Santa Clara also found that representation improves defendants' ultimate case outcomes. Defendants with timely representation were 75 percent less likely to be convicted and 27 percent more likely to have their case dismissed. *Id.* at 3.[2]

Representation at bond hearings in Pittsburgh. Like these California counties, the City of Pittsburgh also provided counsel at a key pretrial stage. Its municipal court appointed attorneys to represent some defendants at preliminary bail hearings. A research team measured how much these appointments improved defendants' outcomes at the hearings. That team found that a defendant with an appointed lawyer was 21 percent more likely to be released on own recognizance or with nonmonetary bail. Shamena Anwar, et al., *The Impact of Defense Counsel at Bail Hearings*, at 5, Science Advances (May 5, 2023) (available at https://www.science.org/doi/10.1126/sciadv.ade3909) (also attached at APP-174).

[2] Unlike the study in Santa Clara, the San Francisco research did not gauge effects on pretrial detention or case outcomes.

Utility of timely representation. Coupling anecdotal evidence with the statistical results, these studies suggested several reasons why timely representation at those initial stages was so crucial to defendants' outcomes.

Lawyers offered technical skill. Defendants reported that, without representation, they were overwhelmed by criminal procedure, having "no idea how the system worked." Yarmosky, *supra*, at 30. Laypeople flounder without a trained professional. Assistance of counsel early on allows defendants to navigate and participate in complex criminal procedure.

Lawyers improved the fact gathering in defendants' cases. Five of six attorneys in San Francisco's program reported that their advocacy at arraignment would have been less successful without evidence collected by early intervention. Yarmosky, *supra,* at 26. In the days after a defendant is arrested, witnesses' memories fade. Digital files can be deleted. Even for evidence that does not disappear, lawyers know what facts about employment, housing, and community ties assist a judge's determination of a defendant's pretrial conditions. Appointment of

counsel early in a case allows a defendant to collect and present that evidence.

Defense lawyers improved advocacy. Not only do lawyers argue for clients in hearings, but they also "open the door" to negotiate release with prosecutors and judges. Lacoe, *supra*, at 1. Simply having an advocate frame the defendant's positions and communicate with opposing counsel can lead to early plea agreements and other relief. Those chances for early resolution can be abused against unrepresented defendants who do not know typical plea standards. *See United States v. Gonzalez-Lopez*, 548 US 140, 150 (2006). Resolutions between represented parties reduce the stress on often overburdened judiciaries. Representation also builds defendants' faith in the legal process. After feeling like no one in the judicial system was listening to the defense, one defendant reported, "I believed [my attorney] believed me." Yarmosky, *supra*, at 30.

These studies reflect a criminal justice system built for professionals, not laypersons. Representation at the beginning of a case improves a defendant's journey through the justice system. These studies confirm with evidence the benefits of counsel that seem obvious; an attorney helps prepare evidence and advocate for a defendant at bail

hearings and arraignment. By denying counsel and forcing defendants to wait months before they get an attorney, the Government eliminates the many benefits of prompt representation and undermines core constitutional rights. Even when the Government releases defendants from custody, many of the consequences of the lack of representation persist. The beginning of a prosecution is a crucial period that shapes the rest of defendants' cases, and the Government cannot simply release unrepresented defendants and appoint counsel at a time of its choosing.

B. Courts recognize that the initial stages of a case are critical points that require counsel, particularly because prosecutors have shifted focus to pretrial procedure.

The foregoing studies are evidence of a principle that the courts have long recognized: ensuring a fair criminal process consistent with constitutional guarantees requires defense counsel early in the case's prosecution.

Federal courts. Federal courts recognize that pretrial steps are "critical stages" where a defendant needs the advice of counsel. *See Hamilton v. Alabama*, 368 US 52, 54 (1961). The U.S. Supreme Court has recognized for nearly 100 years that laypeople struggle with gathering evidence and leveraging criminal procedure in "the science of

law." *Powell v. Alabama*, 287 US 45, 68-69, 53 S Ct 55, 77 L Ed 158 (1932). One particular passage that the Court has repeated in its entirety over and over again describes the serious challenges that individuals face trying to defend themselves:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.

Id. at 69; *see United Sates v. Ash*, 413 US 300, 307, 99 S Ct 2568, 37 L Ed 2d 619 (1973) (quoting the entire paragraph and acknowledging it as "well-known observations"); *see, e.g., Williams v. Kaiser*, 323 US 471, 473, 65 S. CT 363, 89 L Ed 298 (1948) (quoting the entire paragraph); *Chandler v. Fretag*, 348 US 3, 9-10, 75 S Ct 1, 99 L Ed 4 (1954) (same); *Gideon v. Wainwright*, 372 US 355, 344-45, 83 S Ct 814, 9 L Ed 2d 811 (1962) (same); *Fuller v. Oregon*, 417 US 40, 52, 83 S Ct 814, 9 L ED 2d 811(1974) (same); *United States v. Cronic*, 466 US 648, 653 n 8, 104 S Ct 2039, 80 L Ed 2d 657 (1984) (same); *Maine v. Moulton*, 474 US 159, 169,

106 S Ct 477, 88 L Ed 2d 481 (1985) (same); *Luis v. United States*, 578 US 5, 10-11, 136 S Ct 1083, 194 L Ed 2d 256 (2016) (same).

Powell was the "watershed" moment in defendants' right to counsel. *State v. Davis*, 350 Or 440, 470, 256 P3d 1075 (2011) (characterizing *Powell*). Surveying the history of America's criminal justice system from colonial law, the Court in *Powell* concluded that the Sixth and Fourteenth Amendments of the U.S. Constitution provide defendants with the right to counsel at *and before* trial. *See* 287 US at 71. The Court endorsed "the guiding hand of counsel at every step in the proceedings," because without it, a defendant "faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 69. In *Powell*, the federal judiciary turned its attention to specific pretrial processes to ensure that defendants could protect their defense.

Counsel at the initial stages of a case has become more valuable over time. In contrast to early English common law, pretrial representation has become even more important as "changing patterns of criminal procedure and investigation [] tended to generate pretrial events that might be appropriately considered to be parts of the trial itself." *Ash*, 413 US at 310. In many instances, pretrial representation

is more important than trial itself because at trial, positions are already solidified by investigations and motion practice. *Moulton*, 474 US at 170. And as fewer cases actually proceed to trial, defendants must make key choices about the outcome of their cases, like plea bargains or cooperation with the state, that don't concern conduct at trial at all. *See Gonzalez-Lopez*, 548 US at 150. The right to trial counsel means nothing if the defendant has already forfeited his or her rights long before, or is unable to take steps to marshal witnesses and evidence needed for the defense.

The Court has reaffirmed the importance of representation repeatedly since *Powell*, holding that a criminal defendant must have counsel for any "critical" stage of the pretrial process, including post-indictment interrogations, *Massiah v. United States*, 377 US 201, 205-07, 84 S Ct 1199, 12 L Ed 2d 246 (1964), preliminary hearings before convening a grand jury, *Coleman v. Alabama*, 399 US 1, 9-10, 90 S Ct 1999, 26 L Ed 387 (1970), post-indictment line-ups, *United States v. Wade*, 388 US 218, 236-38, 87 S Ct 1926, 18 L Ed 2d 1149 (1967), arraignments, *Hamilton v. Alabama*, 368 US 52, 53, 82 S Ct 157, 7 L Ed 2d 114 (1961), and plea negotiations, *Lafler v. Cooper*, 556 US 156, 162, 129 S Ct 1446, 173 L Ed 2d 320 (2011). Denial of representation at these

steps is so grave that courts must overturn any subsequent conviction without considering if the error caused any harm. *See Gonzalez-Lopez*, 548 US at 148. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 US 60, 76, 62 S Ct 457, 86 L Ed 680 (1942), superseded by statute on other grounds as stated in *Bourjaily v. United States*, 483 US 171, 177, 107 S Ct 2775, 97 L Ed 2d 144 (1987)).

Oregon courts. The Government's non-appointment policy also contravenes the Oregon Supreme Court's emphasis that defendants need lawyers at the initial stages of their cases. This Court held that the right to counsel granted in Article I, Section 11 of Oregon's Constitution is *at least* as protective of defendants as the right to counsel in the U.S. Constitution. *State v. Prieto-Rubio*, 359 Or 16, 28, 376 P3d 255 (2016); *see Davis*, 350 Or at 475. Criminal defendants need counsel throughout pretrial steps to "counteract the handicaps of a suspect enmeshed in the machinery of the criminal process." *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182 (1983) (quoting Note, Interrogation and the Sixth Amendment:

The Case for Restriction of Capacity to Waive the Right to Counsel, 53 Ind L J 313, 315 (1977–1978)).

Oregon courts thus recognize that prosecutions rely increasingly on pretrial procedure, and defendants require earlier appointment of counsel to protect their rights. *See* Chesa Boudin et al., *Towards Pretrial Criminal Adjudication*, Bos. Coll. L. Rev. (forthcoming 2025) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5026754) (also attached at APP-43). Like the federal right, Oregon's right to counsel tracks "changes in [the] nature of criminal prosecutions and law enforcement." *State v. Gray*, 370 Or 116, 129, 515 P3d 348 (2022). Now, "the point at which the individual first confronts the amassed power of the state has moved back in the process from trial to the police stage." *Sparklin*, 296 Or at 92 n 9. The prosecution and the defense interact frequently before trial through motion practice and discovery, and unrepresented defendants face professional prosecution without resources of their own. Long before trial, the "state builds its case against the accused" with procedural and investigative tools, like line-ups, polygraphic sessions, and psychiatric examinations. *Id.* at 94.

Defendants must have counsel to ensure that prosecutors use these tools legally and to protect potentially exculpatory evidence.

Early in their cases, indigent defendants in Oregon ask for the aid of counsel. They are arrested, arraigned, and cast into the labyrinth of the criminal justice system. Courts recognize that laypeople will struggle to navigate this process alone, especially in the first steps of a case. In response, these courts have guaranteed counsel to assist defendants. Indigent defendants like Roberts have exercised that right, and the Government has refused it. The Government fails to provide attorneys in a timely manner, ignoring the nature of modern prosecution and the judiciary's command to adapt the right to counsel in response.

III. Dismissal is an appropriate remedy when the Government fails to appoint counsel because no effective alternative remedies exist.

A. The Government cannot restore indigent defendants' defenses and lives that they would have had but for the Government's denial of counsel.

Roberts asks this Court to dismiss his individual case and provide guidance to Oregon's trial courts in the thousands of other cases where the Government has denied counsel. *See* Defs.-Relators' Opening Br. ("OB"), at 2. This Court should do so, because the Government has no

workable remedy to undo the harm it has caused by systemically denying counsel. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 US 678, 66 S Ct 773, 90 L Ed 939 (1941) (citing *Marbury v. Madison*, 5 US 137, 2 L Ed 60 (1803)). When the Government deprives defendants of their right to counsel, courts must restore the unrepresented defendants "to their positions as if the state's officers had remained within the limits of their authority." *Craigen*, 370 Or at 711.

If the Government denies counsel to a defendant at a critical stage of a case, courts already must suppress any evidence the Government acquired but for the constitutional violation or vacate any jury verdict based on that evidence. *See id.* at 698-99, *Prieto-Rubio*, 359 Or at 19. But, as shown above, suppressing evidence or vacating a verdict does not make whole a defendant who lacked counsel throughout his case. This case calls for a broader remedy because the Government's systemic denial of counsel infects the entire defense. An unrepresented defendant may have received punitive bail terms because he did not know what terms to propose at the bail hearing. He may have lost relevant testimony because

he had no agent to interview witnesses. He may have forgone filing meritorious motions because he had no experience with criminal procedure. He may have even forgone a negotiated resolution to the case because he had no counsel to negotiate with the Government's attorneys.

The Government's denial of counsel also causes collateral harms in a defendant's personal life outside of his case. An unrepresented defendant may lose his job because his employer infers guilt from the charges. He may spend time in court that he needs to care for dependent children or ailing parents. He may waste money traveling back and forth to the courthouse for mandatory hearings that get canceled because the Government provided no attorney.

Courts cannot repair these harms after the fact. Courts should dismiss cases when the Government systemically denies counsel because defendants cannot return to the positions they would be in with counsel. Courts cannot revive a witness's memories that faded or find witnesses who moved away. Courts cannot give a defendant back the liberty he lost while subject to punitive bail conditions. And courts cannot order any remedy that restores a defendant's employment, family relationships, or any other collateral harm that the defendant suffered outside of the

litigation. Even if courts had the power to provide these remedies, they would rely on a deluge of motion practice and individual factual determinations, overwhelming the judiciary and prolonging cases that have already stalled for too long.

The Government has refused to appoint defendants counsel throughout their criminal cases, and it cannot reverse the damage it caused. If the Government cannot make unrepresented defendants whole, the only fair result is dismissal of their cases.

B. Postconviction relief and remedies for violation of the right to a speedy trial cannot cure all violations of the right to counsel.

When governments in other states have defended lawsuits for systemic denial of counsel, those governments argued that courts can only award relief in a postconviction appeal. And here, the Government has suggested only one other solution: have unrepresented people seek relief through a speedy trial motion, if one becomes ripe. TCF 1/2/2025. But neither postconviction relief nor a motion for violating the right to a speedy trial is a viable alternative when the Government systemically denies counsel. The right to counsel is a standalone right that warrants

its own remedy, and the Government cannot wait until it violates other Constitutional rights for defendants to find relief.

Postconviction motions. To defend claims of systemic denial of counsel, other states' governments have argued that criminal defendants' only remedy should be individual postconviction relief. At least seven other courts, including the Ninth Circuit in *Betschart III*, have rejected versions of this argument. These arguments failed because remedies for systemic denial of counsel do not turn on the outcome of trial or any other showing of prejudice.

In *Kuren v. Luzerne County*, 637 Pa 33, 146 A3d 715, 718 (2016), the Pennsylvania Supreme Court allowed a class action for ongoing and prospective Sixth Amendment violations. The lower court dismissed the case, under the government's theory that individual criminal defendants both lacked standing and could not state a claim for prospective, class-wide relief because violations of the right to counsel can only be remedied through individual postconviction motions. *Id.* at 727-29. The Supreme Court disagreed. It wrote that forcing defendants to seek individual postconviction relief "would be untenable"—"[i]t would render irrelevant" all violations of the right to counsel "so long as they do not clearly affect

the substantive outcome of a trial." *Id.* at 743, 747. The highest courts of New York, Idaho, and Massachusetts rejected similar contentions that postconviction appeals provided adequate relief when the state systemically denies counsel to indigent defendants. *See Tucker v. State*, 162 Idaho 11, 394 P3d 54, 73 (2017); *Hurrell-Harring v. State*, 15 NY3d 8, 930 NE2d 217, 222 (2010); *Lavallee v. Justs. in Hampden Superior Ct.*, 442 Mass 228, 812 NE2d 895, 907 (2004).

The governments of Michigan and Georgia made similar arguments, asserting that class claims against denial of counsel could not succeed without each individual defendant showing that the government prejudiced his case by failing to appoint counsel. *See Luckey v. Harris*, 860 F2d 1012, 1016 (11th Cir 1988); *Duncan v. State*, 284 Mich App 246, 774 NW2d 89, 117 (2009). Both courts rejected this argument. They permitted class-wide injunctions to remedy "pervasive and persistent" denial of counsel without sending each defendant to move for postconviction relief after the fact. *See Luckey*, 860 F2d at 1017; *Duncan*, 774 NW2d at 124-25. These courts agreed that forcing defendants to show prejudice through individual postconviction motions was inappropriate because defendants have rights to counsel even in

situations that do not affect the outcome of trials. *Luckey*, 860 F2d at 1017; *Duncan*, 774 NW2d at 127-28.

These arguments by state governments boil down to the notion that postconviction relief should be the exclusive remedy when a government refuses to give a defendant an attorney. Such arguments fail because postconviction relief does not remedy the harm caused by denial of counsel. Indeed, it is useless to at least three types of defendants who are denied counsel: defendants who are not ultimately convicted, convicted defendants whose denial of counsel did not cause a conviction, and defendants whose denial of counsel harmed them in ways unrelated to the outcome of a trial.

Initially, postconviction relief does not apply to a portion of defendants who are denied counsel—those who were not convicted but, as illustrated *supra,* were nevertheless prejudiced. The right to appointed counsel does not rely on guilt or innocence and "neither can the availability of a remedy for its denial." *Hurrell-Harring*, 930 NE2d at 227. The Ninth Circuit used the same logic to reject the notion that "Sixth Amendment protection only kicks in *after* [defendants] have been proven guilty beyond a reasonable doubt." *Betschart III*, 104 F4th at 618.

Even for defendants who are convicted, postconviction relief can impose an incorrect standard of review that eliminates claims where denial of counsel did not cause the conviction. Postconviction relief is more typically sought by a defendant claiming ineffective counsel rather than one denied counsel entirely. As announced in *Strickland v. Washington*, defendants who received ineffective counsel can overturn a conviction only by showing that the adversarial process was undermined and the verdict cannot be trusted. 466 US 668, 686, 104 S Ct 2052, 80 L Ed 2d 674 (1984). This test tips the scales in favor of the prosecution because it reflects "concerns for finality [and] concern that extensive post-trial burdens would discourage counsel from accepting cases." *Duncan*, 774 NW2d at 128. In other words, there must be a reasonable probability that the defendant would not have been convicted, but for the constitutional violation. *Strickland*, 466 US at 694.

But the right to *appointment of* counsel is distinct from the right to *effective* counsel. The Sixth Amendment "protects rights that do not affect the outcome of trial," like the right to appointment of counsel. *Luckey*, 860 F2d at 1017. Denial of counsel that prejudices a defendant, but not in a way that meets the *Strickland* standard and supports a

motion for a new trial, "may nonetheless violate a defendant's rights" under the Sixth Amendment. *See id.*; *Lavallee*, 812 NE2d at 905. Postconviction relief does nothing for defendants whose denial of counsel was harmful, but not outcome-determinative. The Sixth Amendment and state analogs must provide those defendants with a remedy. The right to counsel "must mean more than just the right to an outcome." *Duncan*, 774 NW2d at 126.

For all defendants, postconviction relief and motions based on the right to a speedy trial cannot cure harms that unrepresented defendants suffer. In the early stages of a case, it is crucial for the defense to interview witnesses and preserve physical evidence. *Lavallee*, 812 NE2d at 904. Without a lawyer to investigate, this evidence fades over time. "The effects of the passage of time on memory or the preservation of physical evidence are so familiar that the importance of prompt pretrial preparation cannot be overstated." *Id*. Without counsel, a defendant may also suffer prolonged pretrial detention or forgo potentially meritorious motions. *See Kuren*, 146 A3d at 743-44. Denial of counsel upends defendants' cases and lives, "even without neatly wrapping the justiciable harm around a verdict and trial." *Duncan*, 774 NW2d at 127.

And because those harms are not tethered to any conviction, they "cannot be adequately addressed on appeal." *Lavallee*, 812 NE2d at 907; *see also Hurrell-Harring*, 930 NE2d at 227 (describing "grave and irreparable injury" caused by denial of counsel, regardless of conviction). Motions for postconviction relief and violations of the right to a speedy trial will only address a fraction of the problems that the Government's inaction causes.

Speedy trial motions. Likewise, a motion based on a violation of the right to a speedy trial is not a viable alternative because those motions must show that the delay prejudiced the defendant, a standard that courts refuse to impose when the government denies a defendant counsel.

Courts use a multi-factor test to evaluate whether a delay between accusation and case resolution violates the Sixth Amendment's right to a speedy trial. *See Doggett v. United States*, 505 US 647, 651-52, 112 S Ct 2686, 120 L Ed 2d 520 (1992). One factor is whether the delay in trial prejudiced the defense. *Id.* at 652. This requires the court to wade into a "necessarily relative," fact-specific inquiry that does not lend itself to bright-line rules. *Beavers v. Haubert*, 198 US 77, 87, 25 S Ct 573, 49 L Ed 950 (1905). The U.S. Supreme Court admitted that "the right to a

speedy trial is more a vague concept than other procedural rights." *Barker v. Wingo*, 407 US 517, 521, 92 S Ct 2182, 33 L Ed 2d 101 (1972).

But the right to counsel does not exist in a gray area. That right is so fundamental to the adversarial system that courts must award relief without considering whether the deprivation caused any harm. *See Gonzalez-Lopez*, 548 US at 148; *Glasser*, 315 US at 76. The consequences of denying counsel are so pervasive that the violation occurs *"whenever"* the government denies counsel. *Id.* at 150 (emphasis original). If speedy trial motions are permitted to swallow cases where defendants have been denied counsel, each defendant who cannot show that the state harmed his defense will lose a remedy even though the state violated his right to counsel.

C. Relief for denial of counsel cannot rely on counsel to carry out.

The Government's argument has a critical flaw: at least in the vast run of cases, defendants who have no lawyer cannot solve their problems with motion practice.

Unrepresented defendants generally lack the knowledge to identify when they are owed an attorney and the harm to their defense caused by not having one. *See Lavallee*, 812 NE2d at 905. They also typically lack

the skill to draft the writs that would force a court to appoint them counsel or posttrial motions. *See id.* (citing *Powell*, 287 US at 69). In an adversarial legal system, denial of counsel weakens a defendant's "ability to assert any other rights he has." *Hurrell-Harring*, 930 NE2d at 226.

Even if a defendant has the skill to write and file a motion for a speedy trial or a postconviction motion, those motions would strain Oregon's judicial system. A pro se defendant is less likely to present issues as clearly as an experienced attorney would, and responding to those motions can take more work than responding to motions drafted by counsel. A flood of pro se motions, each requiring fact-specific inquiries, will overwhelm the already burdened courts. Here, Jayme Casuga filed one such motion, and it was futile. *See* TCF 9/16/2024. Neither the Government nor the trial court responded to her motion.

Countless defendants would drown in criminal procedure if forced to file a motion to get an attorney. Bluntly, "[t]he harm involved here, the absence of counsel, cannot be remedied in the normal course of trial and appeal because an essential component of the 'normal course,' the assistance of counsel, is precisely what is missing here. The course of the

proceedings in these cases is per se not normal." *Lavallee*, 812 NE2d at 907.

Courts and pro se defendants would benefit from a bright-line standard that requires dismissal at least when the defendant has gone thirty days without receiving an appointment of counsel. Denial of counsel is "easy to identify" and "easy for the government to prevent." *Strickland*, 466 US at 692. On the other hand, when the state denies a defendant a lawyer, the resulting prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Id.* Litigating denial of counsel claims individually may work for the prosecution—who has its own lawyers to address these motions and potentially benefit from the accompanying procedural hurdles and delay—but not for unrepresented defendants.

CONCLUSION

The Court should review Jayme Sierra Casuga's and Allen Rex Roberts's petitions for writs of mandamus on the merits and order that their cases be dismissed for the Government's failure to appoint counsel for thirty days after commencement of their criminal proceedings.

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Respectfully submitted,

DATED: February 24, 2025

O'CONNOR WEBER LLC

By: */s/ Lindsey Burrows*

Lindsey Burrows

Attorney for CRIMINAL LAW & JUSTICE CENTER

FENWICK & WEST LLP

By: */s/ Garner Kropp*

Todd Gregorian**
Garner Kropp**
Kathryn Hauh**
***pro hac vice forthcoming*

Attorneys for CRIMINAL LAW & JUSTICE CENTER

AMERICAN CIVIL LIBERTIES UNION OF OREGON

By: */s/ Kelly Simon*

Kelly Simon

Attorney for AMERICAN CIVIL LIBERTIES UNION OF OREGON

Appendix

NBER WORKING PAPER SERIES

THE EFFECT OF PRE-ARRAIGNMENT LEGAL REPRESENTATION ON CRIMINAL CASE OUTCOMES

Johanna Lacoe
Brett Fischer
Steven Raphael

Working Paper 31289
http://www.nber.org/papers/w31289

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The Effect of Pre-Arraignment Legal Representation on Criminal Case Outcomes
Johanna Lacoe, Brett Fischer, and Steven Raphael
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ABSTRACT

Low-income individuals arrested on criminal charges face disproportionately high rates of pretrial detention and conviction. We study a novel approach to addressing this inequity: providing low-income individuals with access to legal counsel immediately following their arrest. Focusing on a pilot program in a large urban county, we estimate the causal impact of early representation by a public defender on release and case outcomes, leveraging quasi-random variation in access to counsel pre-arraignment. Low-income individuals who met with a public defender shortly after arrest were 28 percentage points more likely to be released pretrial, and 36 percent more likely to see their cases dismissed, relative to otherwise similar individuals who would first meet with a public defender at their arraignment. These results suggest that providing timely access to legal representation could improve release and case outcomes for public defender clients.

Johanna Lacoe
University of California, Berkeley
johanna.lacoe@berkeley.edu

Brett Fischer
California Policy Lab,
University of California, Berkeley
brett.fischer@berkeley.edu

Steven Raphael
Goldman School of Public Policy
University of California at Berkeley
2607 Hearst Avenue
Berkeley, CA 94720
and NBER
stevenraphael@berkeley.edu

A randomized controlled trials registry entry is available at https://osf.io/r2je8/

1. Introduction

Pretrial detention imposes serious legal and economic costs on individuals arrested on criminal charges, limiting access to their families, employers, and legal counsel. Under these circumstances, defendants often accept plea deals to secure quicker release (Digard and Swavola, 2019; Dobbie et al., 2018; Heaton et al., 2017; Lerman et al., 2021), resulting in higher rates of conviction (Davidson et al., 2019; Stevenson, 2018; Leslie and Pope, 2017) and post-sentencing incarceration (Phillips, 2012; Campbell et al., 2020; Koppel et al., 2022). Beyond the legal ramifications, pretrial detention disrupts families (Wakefield and Anderson, 2020) while reducing arrested individuals' earnings and likelihood of employment (Dobbie et al. 2018). Low-income individuals disproportionately bear the consequences of post-arrest incarceration: many are unable to post bail, nor can they afford to retain a defense attorney, who could help them negotiate more favorable release terms.

Providing legal representation for low-income individuals shortly after arrest may enable them to secure earlier release and improve their case outcomes. Public defenders who represent indigent defendants typically meet with clients for the first time at their arraignment, which occurs between 2 and 5 days after arrest, during which time many defendants remain in detention. By contrast, providing access to public defenders shortly after arrest opens the door for negotiations with prosecutors and robust advocacy at arraignment to remove bail requirements or other barriers to release. It also allows more time for attorneys to investigate and strengthen their case. Both effects might improve eventual case outcomes.

We evaluate the impact of a pilot effort to provide pre-arraignment legal services to arrested individuals developed by the Public Defender's Office in Santa Clara County, California. The County of Santa Clara's Pre-Arraignment Representation and Review (PARR)

model provides early legal assistance to detained individuals arrested for felony offenses and misdemeanor domestic violence offenses who qualify for public defender representation. The PARR model aims to increase pretrial release rates among low-income defendants, both by providing timely legal advice (within 48 hours of arrest), and by collecting information about the incident, the individual's family, and connections to the community (for example, their employment status) with which to advocate on their behalf prior to and during the arraignment.

During the PARR pilot phase in early 2020, the Public Defender's Office did not have the staff capacity to serve all individuals in custody on felony charges in Santa Clara County. To facilitate our evaluation of the intervention, and to fairly distribute access to the early representation legal services, the County of Santa Clara Public Defender agreed to provide the additional legal services one day per week, rotating the intervention day across weeks. Individuals booked on an intervention day were eligible for services and, absent bailing out on their own and procuring private counsel, consulted with their public defender prior to arraignment. By contrast, otherwise eligible individuals booked on non-treatment days who used public defender services met with their attorney for the first time at arraignment.

This study leverages the rotating PARR treatment window to compare pretrial release and case outcomes between eligible individuals booked on PARR service days (treatment group) and eligible individuals booked on non-PARR days (control group). We confirm balance on observable case characteristics between individuals booked on intervention days and those booked on non-intervention days. Using the PARR booking day as an instrument for receiving PARR services, we estimate the causal impact of PARR on defendant release and conviction rates in a two-stage least squares (2SLS) framework.

We find sizable intent-to-treat differences in outcomes between those individuals admitted on a PARR treatment day and those admitted on other days. Given that roughly one-third actually received treatment, treatment-on-the-treated effects estimated using 2SLS are roughly three time the size. Specifically, PARR clients were 75 percent (36 percentage points) more likely to secure pretrial release and spent 79 percent less time in detention before and after arraignment. Early access to a public defender also resulted in a significant, 75 percent (27 percentage points) decrease in the likelihood of conviction as well as a 27 percentage-point increase in the probability of case dismissal. Though noisy, point estimates suggest these effects stem from a reduction in plea deals among PARR clients. Although the PARR pilot treated a relatively small number of individuals, the magnitude of our estimates, combined with permutation tests that confirm their statistical significance, underscore the positive impact of pre-arraignment representation for low-income individuals.

The PARR program's benefits echo a range of similar studies that find a close link between post-arrest events, including detention and attorney assignment, and case dispositions. While prior work focuses on the quality of public defense (Agan, Freedman, and Owens 2021; Shem-Tov 2022) and the benefits of access to counsel at bail hearings (Anwar, Bushway, and Engberg 2022), we provide new evidence that shifting the timing and content of a public defender's intervention can substantially improve the effectiveness of public defense services. Our approach builds on a longstanding notion that ultimate case outcomes depend on factors other than the specifics of the case, from judge harshness (Augustine, Lacoe, Raphael, and Skog 2022; Dobbie, Goldin, and Yang 2018) to district attorney leniency (Agan, Doleac, and Harvey 2023) to idiosyncratic features of jurisdictions (Bird et. al. 2023; Feigenberg and Miller 2021). Our findings suggest that the inability to pay for access to legal counsel immediately after arrest

penalizes low-income individuals' ability to secure timely release from detention and eventual case outcomes. Changing the timing of initial contact between public defenders and clients, while jumpstarting a robust defense and providing support services, could go a long way towards improving the efficacy of public defense and the equity of the criminal justice system.

2. Policy Background

In Santa Clara County, as in most jurisdictions across the country, public defense services provide legal representation to arrested individuals who cannot afford their own attorney. Typically, public defenders meet with clients for the first time at their arraignment hearing which must occur within 48 hours from booking (excluding Sundays and holidays). In practice, the first arraignment generally occurs between two and five days after arrest. In the interim, many individuals who are eligible for public defenders' services are held in pretrial detention, frequently the default outcome for arrested individuals around the country.[1] At the arraignment, public defense attorneys only have a few minutes to meet their clients prior to appearing before a judge, and the attorneys provide representation for ten to twenty people at a single arraignment session. By contrast, individuals who can afford to retain their own counsel can meet with their

[1] The motivation for detaining people pretrial is two-fold: (1) to ensure their presence at future court hearings, and (2) to prevent further criminal offending while the case is processing. Certainly, pretrial detention prevents these events from happening, but at a cost. While it is impossible to compare pretrial misconduct rates between detained and released individuals, several studies compare outcomes between groups experiencing different types of release or lengths of pretrial detention. One descriptive study in Kentucky finds that individuals detained for 2 or 3 days and then released are more likely to fail to appear for court than individuals detained for shorter periods (e.g. up to one day). Moreover, the likelihood of failing to appear for court continues to grow with detention length (Lowenkamp et al. 2013). The HOPE randomized control trial in Hawaii found no difference in pretrial arrests between the program group and the control group receiving standard pretrial services. However, the program group was less likely to be arrested on a new criminal charge and less likely to be arrested on a felony during the pretrial period (Davidson et al., 2019). Still, questions regarding the potential public safety or court processing benefits of pretrial detention are largely unresolved.

lawyer immediately following arrest, at which point the attorney begins advocating for their release from detention and preparing a defense.

The divergent pretrial experiences of individuals who can and cannot afford private counsel have meaningful legal and economic consequences. Even a few days in jail can disrupt a person's life, including the loss of employment (Dobbie et al. 2018), and increases the likelihood of conviction and incarceration (Campbell et al., 2020; Koppel et al., 2022; Leslie and Pope, 2017 Phillips, 2012). Access to public defenders soon after arrest could improve indigent defendants' legal prospects by helping them secure timely release: Anwar, Bushway, and Engberg (2022) find that public defender representation at bail hearings markedly reduces the likelihood of pretrial detention. Furthermore, beyond raising the potential for a speedy release, quick access to an attorney provides additional time to prepare a defense and advocate for the defendant, which could improve their outcomes, as Yarmosky (2018) finds suggestive evidence for cases served by San Francisco's Pretrial Release Unit. Thus, there is ample reason to believe that earlier public defender intervention in the criminal process might substantially improve low-income individuals' case outcomes and limit the economic repercussions of an arrest.

Our study examines a novel policy intervention meant to reduce disparities in access to counsel between indigent and more affluent individuals: the Pre-arraignment Representation and Review (PARR) program. Launched in Santa Clara County, California (which contains the city of San Jose) in 2020, PARR provides eligible low-income individuals with legal representation between their booking into jail and their arraignment.[2] The program only serves individuals

[2] Only "indigent" individuals qualify for public defense in the County of Santa Clara; we use the terms "indigent" and "low-income" interchangeably in this paper. Per California's business and professions code (section 6210-6228) "indigent" refers to a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project

booked into custody on felony charges or misdemeanor domestic violence charges. Individuals booked on these charges face a much greater risk of pretrial detention (and post-sentencing incarceration) than those booked on misdemeanor charges and stand to gain the most from timely access to legal counsel.[3]

Though PARR remains active today, we focus on a period when PARR operated as a pilot, between January 2020 and March 2020.[4] During this time, the PARR unit only provided services to individuals booked on a particular day of the week, which rotated across weeks. This rotating calendar provides the basis for our identification strategy, which we discuss in the next section.

Eligible individuals—those who were booked into jail on that week's designated day, faced an eligible felony or misdemeanor domestic violent charge, and who were in custody awaiting arraignment—were compiled into a list of prospective clients. PARR attorneys then attempted to interview as many of the eligible clients on the list as possible, conducting in-person interviews with individuals on the list held at two jails in Santa Clara County, and representing their interests in the lead-up to the arraignment. The PARR attorney would then appear at

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which provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code.

[3] PARR excluded individuals booked on very serious felonies, such as homicide and sexual assault, since those cases are often much more complex and rarely result in pretrial release. The program also excluded those facing an outstanding hold for an ongoing criminal case, who are also much less likely to be released. Criminal history was not a factor in the selection of PARR cases.

[4] Unexpected changes in crime patterns and criminal processing due to COVID-19 and the shelter-in-place order affected the implementation of PARR during the pilot period and as a result, this study. Relative to February 2020, reported crimes dropped by approximately 40 percent in the four large California cities in March 2020, with the largest percentage drops in Bay Area cities (Lofstrom and Martin, 2020). Most of the declines were driven by decreases in property crimes, as well as declines in reported assaults and robberies. The County of Santa Clara instituted a shelter-in-place order on March 17th. In the following week, San Jose, the largest city in Santa Clara County, reported a 46 percent decline in violent crime relative to the same week in 2019, with declines in property crime as well (Salonga, 2020). The Santa Clara County Superior Court closed on March 13th, 2020, and all PARR services were suspended. Therefore, this study focuses on individuals booked through March 11, 2020.

arraignment with their client. Figure 1 illustrates the relative timing of these milestones in the criminal process and the PARR intervention.

During their meetings with individuals held in detention, PARR attorneys would learn the specifics of the case as well as collect information about the person's community ties, employment, and family and housing situation. With this information, PARR attorneys aimed to more effectively advocate for release prior to or at arraignment, begin investigations and collect time-sensitive evidence, communicate with the District Attorney's Office, reach out to families, and connect clients with social workers and other community resources.[5] The PARR attorney continued to work on the case following arraignment, advocating for subsequent pretrial release or bail review, as needed. These PARR services were intended to bolster the defense's case and blunt the potential harms of pretrial detention.

3. Data and Sample

Our data come from the County of Santa Clara's Criminal Justice Information Control ("CJIC") system, which contains all bookings and arraignments in Santa Clara County, from the case management systems of the Public Defender's Office, the District Attorney's Office, and the Pretrial Services Office. For each individual arrested and booked in Santa Clara County, CJIC identifies the booking dates and charges associated with their case, their final release date from jail, and their case disposition. From the charge records, we determine whether a given offense is a felony or misdemeanor and assess the overall case severity using the California

[5] The exact services provided by the PARR attorneys vary depending on the needs of the individual and the nature of their case. Some of the services simply provide a moment of human compassion, such as asking if the client has a car that needs to be moved or a child that needs to be picked up from school. Others aim to address needs that may be of particular concern to a judge, such as mental health services or connection to a social worker. PARR tracks the selection of its services in a case management system; in the appendix, we present the share of PARR clients receiving each type of service during the pilot period.

Department of Justice's categorical scoring system, which assigns lower values to more serious offenses (e.g., homicide has a score of 1, while burglary has a score of 8). The CJIC records also include demographic information, such as sex, race/ethnicity, and age. We combine these case-level records with reports from the Public Defender's Office indicating which, if any, pretrial services a person received as part of the PARR program.

From the CJIC records, we construct several outcome variables. Specifically, we construct a binary indicator for whether an individual secured release from jail—capturing the extensive margin of PARR's impact—as well as continuous measure of time to final release, which captures any intensive-margin effects.[6] We also consider how pre-arraignment representation shapes case dispositions, including whether the District Attorney's Office dropped all charges, whether the defendant was convicted, and whether they pled guilty.

In Santa Clara County, most individuals held in pretrial detention are male (88 percent) and more than half are Hispanic (52 percent). More than 80 percent of individuals in pretrial detention are booked on a felony, and of those, 42 percent are charged with a felony violent crime or assault (County of Santa Clara Office of Pretrial Services, 2019a). Currently, most individuals arrested on felony offenses are not eligible for release on their own recognizance or supervised release by the duty or night judge prior to their first arraignment (County of Santa Clara Office of Pretrial Services, 2019b).

Our data contain all cases booked in Santa Clara County between January 2 and March 11, 2020. However, the PARR program focused on a narrow subset of cases booked on relatively serious charges; logistical and legal barriers (see Section 2) further limited the types of cases and

[6] Our indicator for release captures only pretrial release outcomes, including the CJIC codes for "release" and "released on bail"; this indicator does *not* include releases following a completed jail sentence. By contrast, the time to final release will also capture any sentenced (post-trial) jail time, since the CJIC data only report an individual's final release date, and not intermediate release or (re-) booking spells.

defendants eligible for pre-arraignment representation. For our final research sample, we include only PARR-eligible cases, replicating the PARR eligibility criteria to the best of our ability, based on extensive discussions with the County of Santa Clara Public Defender's Office.[7] Specifically, we remove cases that contain only misdemeanor charges (charges with a severity score of more than 20); cases involving manslaughter or rape, which are not eligible for PARR; arrested individuals who have outstanding warrants, open cases, or who are immediately cited and released from custody; and individuals released within one day of booking (with whom PARR attorneys would not have had time to meet prior to their release).[8] These restrictions leave us with 600 PARR-eligible cases, of which 40 actually received PARR services.

Table 1 compares the full sample of cases booked during the PARR pilot period (N=4,223) to this analytical sample, as well as the subsamples of cases booked on PARR-designated days (N=101), and those "treated" by PARR (N=40). By design, PARR-eligible cases have lower severity scores (indicating more serious offenses) than the full sample, with an average score of 8.7, versus 19.5 among all cases booked in Santa Clara County. More than half (55 percent) of PARR-eligible cases have a Hispanic defendant, and 58 percent involve a person offense (e.g., assault). Participants in PARR are further selected along these margins: 63 percent of cases receiving pre-arraignment representation have a Hispanic defendant, while 65 percent involve a person offense.[9] Interestingly, we find that PARR-treated cases have noticeably more

[7] The public defender's office and the PARR program only serve individuals who cannot afford their own attorney. We do not observe defendant earnings or wealth, so we cannot explicitly exclude defendants based on financial need. However, the PARR case lists also do not factor in (unobservable) earnings, and ultimately our goal is to approximate the PARR eligibility list on non-PARR days.

[8] Note that we apply these restrictions to all cases, including the 29 cases that did receive PARR services despite being technically ineligible. Conversations with the public defender's office suggest idiosyncratic attorney decisions likely explain these anomalous PARR cases; we omit them to maintain a consistent definition of PARR eligibility across our treated and untreated groups.

[9] As we discuss below, the PARR program randomly designated booking days for which PARR attorneys would provide services to eligible defendants. The program did not randomly select cases within PARR booking days to receive PARR, but rather worked through a case list subject to a time constraint. PARR attorneys further exercised

favorable outcomes than the PARR-eligible cases as a whole: the average defendant served by PARR attorneys spent 18 fewer days in jail, was 15 percentage points more likely to secure release, and was roughly half as likely to be convicted as the average PARR-eligible defendant. Of course, given selection into PARR, it remains to be seen whether these patterns represent the causal impact of pre-arraignment representation via PARR, or of underlying case characteristics.

4. Research Design

By design, PARR services are nonrandomly assigned, which complicates our effort to determine the causal impact of the program. The County of Santa Clara public defenders only met with individuals who qualified for a public defender—that is, those who could not afford to retain private counsel—and those charged with felony offenses (excluding homicide and sexual offenses, as noted above). Ex ante, individuals who are eligible for PARR would be expected to experience less favorable case outcomes than the average arrested individual. Indeed, Table 1 shows that people eligible for PARR were less likely to have their cases dropped and spent almost a week more in jail than the average person booked in Santa Clara County. Consequently, a simple OLS regression of case release on PARR receipt might understate the effectiveness of PARR services, particularly on case dispositions.

4a. Identifying the PARR Effect from Rotating PARR Calendar

To address this selection problem, we leverage quasi-random variation in the provision of pre-arraignment representation during PARR's pilot window between January and mid-March 2020. As we discussed in Section 2, during this period, the County of Santa Clara Public

their discretion to deviate from the list in ways that we cannot replicate in our eligibility criteria. For example, if the PARR attorney inferred that a potential client had a co-defendant already being represented by the public defender's office, they would skip over that case, as serving both clients would pose a conflict of interest. As we discuss below, empirically, we find our results differ little when we control for a variety of case and defendant characteristics that PARR attorneys might select on.

Defender's Office only provided PARR services to people booked into jail on specific days of a given week. PARR-eligible individuals booked on those predefined dates were compiled into lists for PARR attorneys to work though; comparable individuals booked on the remaining days of the week would not appear on these lists and thus would not receive PARR services.

The designated PARR booking days rotated across weeks according to a preset calendar (Appendix Figure A1). For example, during the week of January 26, 2020, PARR attorneys only provided services to individuals booked on Tuesday and Wednesday; the following week (February 2nd), they only served clients booked on Friday and Saturday. Moreover, the PARR calendar, set up in advance to facilitate evaluation of the pilot program and unobserved by potential clients, is plausibly exogenous with respect to individual characteristics and expected case outcomes.[10] Indeed, in the appendix, we show that cases booked on designated days are observationally similar to those booked on non-PARR days, confirming that PARR days themselves are randomly assigned.

Note that eligible individuals booked on PARR days did not necessarily receive PARR services – on most PARR days, staff were unable to interview all those who were eligible. Conversations with the County of Santa Clara Public Defender's Office and our own analysis of the data suggest that PARR attorneys did not systematically order defendants on each day's list. While there is no guarantee of randomization of PARR services within PARR booking days, in the appendix, we show that PARR receipt within PARR days is not significantly related to case or individual characteristics, save for a marginally significant correlation with age. Though not essential for our research design, the absence of systematic selection into PARR on PARR-

[10] The only deviation from the pre-set calendar happened the week of January 20th, when PARR intended to serve individuals booked on Monday (January 20th), which was a public holiday (Martin Luther King Day). PARR services were instead provided to individuals booked on January 21st.

designated days provides some reassurance that our findings capture the effect of PARR and not an underlying correlation between placement order on the PARR list and ultimate case outcomes.

4b. Instrumental Variables Design

Our research design leverages variation in PARR service provision across booking days to estimate the causal effect of PARR pre-arraignment representation. Fundamentally, we use the fact that an individual was quasi-randomly booked on a PARR day as an instrument for their receipt of PARR services. Our preferred empirical specification isolates variation driven exclusively by the week-to-week rotation of PARR-designated booking days, using controls for the week, day of week, time (night versus day), and day-by-time of booking.[11] Though not essential for identification, these fixed effects help improve statistical inference by accounting for unobservable differences between, for example, cases booked at night or on weekends (which frequently involve DWI charges) from those booked during the daytime or on weekdays.

To estimate the causal impact of pre-arraignment representation on case outcomes, we use a 2SLS regression system. The first stage specification estimates the extent to which being booked on a designated PARR day (*PARRday*) affects the probability an individual receives PARR services (*PARR*). The second stage estimates the relationship between PARR representation (driven by PARR-day bookings) and case outcomes *Y*. For individual *i* booked at time *t* (daytime or nighttime) on day *d* of week *w* during the PARR pilot period, we estimate the following model:

$$PARR_{itdw} = \pi_0 + \pi_1 PARRday_{tdw} + \gamma_{tdw} + \eta_{itdw}$$

[11] We refer to any booking between 5:00 pm and 5:00 am as a nighttime booking. We distinguish between daytime and nighttime bookings in part because PARR-designated booking days frequently only covered particular times during the day–either 5:00 pm to midnight or midnight to 5:00pm. Cases booked on the same calendar date but outside these windows were ineligible for PARR, and we do not count them as being booked on PARR days.

$$Y_{itdw} = \beta_0 + \beta_1 PARR_{itdw} + \gamma_{tdw} + \epsilon_{itdw}, \qquad (1)$$

where the vector γ_{tdw} represents the day of week, week, nighttime booking, and day-by-night booking fixed effects we include in all specifications in order to control for unrelated variation in outcomes correlated with booking days (e.g., bookings on the weekends are more likely to be for DWI charges).[12] In some specifications, we include additional person and case covariates (X_i) to demonstrate the robustness of our results to different sets of controls. We cluster our standard errors by booking date.

To assess whether our results are being driven by a particularly large local average treatment effect among those who receive treatment, we also report estimates of the "intent-to-treat" effect of being booked on a quasi-randomly-assigned PARR day on release and case outcomes. We estimate the following reduced-form model, which regresses defendant *i*'s outcome *Y* on an indicator for whether their booking time *t* on day *d* of week *w* made them eligible to receive PARR services, along with the same time fixed effects we include in our 2SLS specification:

$$Y_{itdw} = \alpha_0 + \alpha_1 PARRday_{tdw} + \gamma_{tdw} + \alpha_2 X_i + \varepsilon_{itdw}. \quad (2)$$

The coefficient of interest, α_1, captures the reduced-form effect of being booked on a designated PARR day on PARR-eligible clients' outcomes.

[12] In the appendix, we show that our main results remain largely similar when we use different choices of fixed effects or omit fixed effects altogether. We discuss these results in Section 5 below.

5. Results

In this section, we present our empirical results. We first provide support for our identification assumption, that cases quasi-randomly booked on designated PARR days do not systematically differ from those booked on remaining days of the week. Then, we present the results of our primary models of the effect of PARR on release from detention and case outcomes. Finally, we discuss robustness tests that we use to evaluate our estimates.

5a. Validity of PARR Booking Day Instrument

Our research design is predicated on the assumption that cases booked on PARR-designated days do not differ from those booked on non-PARR days (our "control" group). That is, the coefficient of interest in Equation 1, β_1, delivers the causal effect of PARR services only if our instrument, *PARRday*, is uncorrelated unobserved determinants of case outcomes, represented by ϵ. We cannot test this identification criterion directly. However, we can evaluate whether PARR-eligible cases booked on PARR days differ from those booked on non-PARR days along observable dimensions. To do so, we estimate a single model in which we regress an indicator for whether a defendant was booked on a PARR day on the set of individual and case characteristics (Table 2); we also include our set of time, day, week, and time-by-day fixed effects, to mirror Equations 1 and 2. Overall, we do not find evidence of systematic differences that distinguish cases booked on PARR days from those booked on non-PARR days. The test of the overall significance of this regression model yields an F-statistic 1.12, an indication that PARR days are uncorrelated with demographic and case characteristics that might bias our findings.

5b. Effect of PARR on Pretrial Release

We first investigate the effect of pre-arraignment representation provided by the PARR program on the likelihood and timing of an individual's release from custody. A key aim of the public defender in fielding the pilot was to secure quicker pretrial release for indigent clients; using the PARR booking day instrument and Equations 1 and 2, we examine whether they succeeded. Our results appear in Table 3.

Point estimates in the first panel of Table 3 show that PARR resulted in more and earlier releases from custody. Reduced-form estimates in columns 2 and 3 indicate that individuals booked on PARR-designated days were 7.9 to 8.9 percentage points more likely to be released than those booked on non-PARR days. Likewise, PARR-eligible individuals booked on PARR days were released from 12.4 to 12.6 days earlier than similar people booked on non-PARR days, resulting in roughly 23 percent less time in jail. Recall that time to release includes any eventual, post-conviction jail sentence, so this effect captures both the reduced time spent in pretrial detention, as well as potential reductions in the probability and length of incarceration imposed at sentencing. Though point estimates from specifications with and without additional individual and case covariates vary slightly, these differences do not point to systematic nonrandom selection that would bias our findings.

The remaining columns of Table 3 present our treatment-on-the-treated, 2SLS estimate based on equation (1) above. The results indicate that PARR had a substantial impact on stays in custody. PARR recipients were up to 28 percentage points more likely to secure release than non-recipients and had 78.6 percent shorter stays in custody. Our strong first stage estimates (F-statistics are around 40) support our claim that these estimates reflect the impact of pre-

arraignment services per se.[13] Taken together, our findings support the conclusion that PARR's intervention dramatically reduced the rate of pretrial confinement.

5c. Effect of PARR on Case Outcomes

We turn to examining how pre-arraignment representation through PARR affects final case dispositions. Receiving PARR could improve case outcomes directly, since, for example, PARR attorneys initiate the discovery and investigation process pre-arraignment, which might give them time to mount a stronger defense. PARR could also generate more favorable dispositions indirectly via its effect on release, if, as prior work as found, quicker release from jail reduces the necessity of plea deals.

Our findings appear in the second panel of Table 3. The 2SLS estimates in the fourth and fifth columns indicate that PARR recipients were up to 36 percentage points more likely to see their cases dismissed by the County of Santa Clara District Attorney's Office, and were likewise up to 26.8 percentage points less likely to be convicted. Though noisy, point estimates indicate that these effects might stem from fewer plea deals: PARR recipients were 23 percentage points less likely to plead guilty.

5d. Robustness

In the appendix, we provide two additional sets of results that speak to the robustness of our findings to alternative specifications and approaches to statistical inference. First, we examine how our reduced-form results change depending on the specific fixed effects we employ. Using a stepwise approach, adding in additional levels of fixed effects, we test the

[13] We must assume that the PARR assignment mechanism is monotonic—that is, no defendant booked on a designated PARR day is less likely to receive PARR services than they would have been if they had been booked on a non-PARR day. By definition, we cannot test this assumption, although it follows from our policy context. In the appendix, we provide evidence that our first stage estimates remain uniformly positive and quantitatively similar across a range of subsamples, which is consistent with monotonicity.

sensitivity of our estimates to different controls. Encouragingly, we obtain quantitatively similar estimates to those from our preferred specification when we exclude our time-based fixed effects, although, not surprisingly, these estimates are generally less precise than those from our preferred model. This comparison bolsters our claim that our design recovers the treatment effect of PARR.

Second, given our relatively small sample size, a key concern is whether our traditional standard errors can be trusted to gauge the significance of our estimates. We therefore conduct permutation tests for all our primary outcomes, re-estimating our reduced-form specification (Equation 1) 1,000 times while randomly assigning observations to the "treated" and "untreated" groups. In the appendix, we present the resulting distributions of estimates, along with our "true" reduced-form estimates given in Table 3 (Appendix Figure A2). Reassuringly, we find that our true release estimates are outliers: Fisher's exact p-values for release outcomes and guilty plea rates are less than 0.05, while p-values for dismissal and conviction rates are less than 0.10 (0.054 and 0.068, respectively). These tests provide us with additional confidence that, despite our small sample, our estimates capture statistically meaningful effects.

6. Discussion and Policy Implications

An extensive literature documents how an inability to pay for cash bail leads to future hardship for people arrested on criminal offenses. But that same inability to pay has a second, less-recognized consequence: limiting access to prompt legal representation after arrest. We provide new evidence that, for low-income individuals, early access to legal representation carries substantial benefits, reducing their time spent in jail and increasing the probability of case dismissal. Given the social and economic consequences associated with even a few days in

detention, these effects are meaningful, and stretch beyond the criminal justice system. Our findings suggest that the criminal justice system could achieve greater equity by balancing access to timely legal counsel across arrested individuals, regardless of their ability to pay.

It is important to recognize that the PARR pilot achieved this sizeable impact with a staff of just two full time public defender attorneys and at relatively low cost. The program shifted the point of contact between public defenders and their clients up by a few days, and in those days, they connected clients with support services, conducted investigations to strengthen the defense, and advocated for release. These initiatives had sizeable impacts on release and case outcomes for low-income individuals who typically are not afforded the same type of speedy defense. This change to the timing and format of public defender's services could help alleviate persistent gaps in the criminal justice system experiences and outcomes between individuals who can afford private representation and those who cannot.

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Figures and Tables

Figure 1. PARR Case Progression Diagram

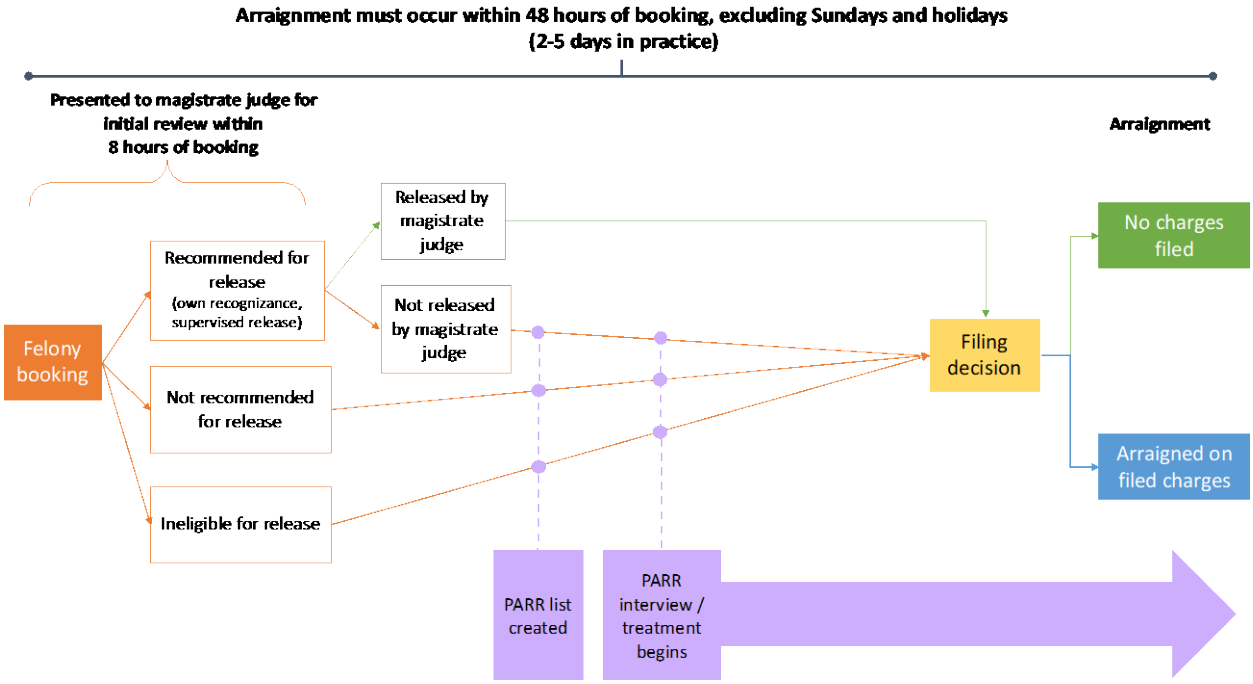

Table 1: Descriptive Statistics of Full Sample, PARR-eligible Cases, and PARR-treated Cases

	All Cases	Eligible for PARR	Booked on PARR Days	Treated by PARR
	(1)	(2)	(3)	(4)
I. Demographic Characteristics				
White	0.24	0.21	0.19	0.18
	(0.43)	(0.41)	(0.39)	(0.39)
Black	0.13	0.14	0.13	0.08
	(0.33)	(0.35)	(0.34)	(0.27)
Hispanic	0.51	0.55	0.60	0.63
	(0.50)	(0.50)	(0.49)	(0.49)
Female	0.21	0.18	0.17	0.10
	(0.41)	(0.38)	(0.38)	(0.30)
Age	36.6	36.2	34.3	34.6
	(11.8)	(12.4)	(12.5)	(12.5)
II. Case Characteristics				
Severity (cat 1-76)	19.5	8.7	8.3	9.0
	(14.4)	(3.9)	(3.3)	(4.4)
Felony Offense	0.51	1.0	1.0	1.0
	(0.50)	(0)	(0)	(0)
Person Offense	0.36	0.58	0.59	0.65
	(0.48)	(0.50)	(0.49)	(0.48)
Property Offense	0.22	0.32	0.36	0.28
	(0.42)	(0.36)	(0.48)	(0.45)
Drug Offense	0.41	0.36	0.39	0.38
	(0.49)	(0.48)	(0.49)	(0.49)
Num Charges	3.5	3.7	3.7	3.5
	(3.6)	(3.2)	(3.3)	(2.8)
III. Case Outcomes				
Released	0.51	0.80	0.86	0.95
	(0.50)	(0.40)	(0.35)	(0.22)
Time to Release (days)	23.5	25.6	19.8	7.6
	(73.2)	(63.4)	(42.8)	(12.3)
Case Dropped	0.60	0.44	0.51	0.50
	(0.49)	(0.50)	(0.50)	(0.51)
Conviction	0.26	0.28	0.22	0.15
	(0.44)	(0.45)	(0.42)	(0.36)
N	4,223	600	101	40

Each column describes a different subsample of cases booked into Santa Clara County jail during the PARR pilot period (January 2 to March 11, 2020). Column 1 summarizes the mean characteristics of all cases booked during this period (N=4,223 for all outcomes except case severity, which is missing for 47 PARR-ineligible cases). Column 2 describes cases in our primary research sample, which includes cases we expect to be eligible for PARR (N=600). Column 3 describes PARR-eligible cases booked on designated PARR days (N=101). Column 4 includes cases that actually received PARR services (N=40). Standard deviations appear in parentheses.

Table 2: Baseline Balance: Comparing Eligible Cases Booked on PARR and Non-PARR Days

	Sample Mean	Balance Estimate
	(1)	(2)
White	0.220	0.023
	(0.408)	(0.052)
Black	0.138	0.023
	(0.346)	(0.052)
Hispanic	0.547	0.056
	(0.498)	(0.052)
Female	0.175	-0.033
	(0.380)	(0.027)
Age	36.2	-0.002
	(12.4)	(0.001)
Severity	8.7	-0.002
	(3.9)	(0.001)
Person Offense	0.363	0.020
	(0.495)	(0.054)
Property Offense	0.317	0.015
	(0.356)	(0.040)
Drug Offense	0.363	0.015
	(0.481)	(0.029)
Num Charges	3.7	-0.000
	(3.2)	(0.003)
	Joint F-statistic:	1.12
	p-value:	0.357

The sample includes all PARR-eligible cases (N=600). Column 1 provides the sample mean of each covariate in the left-hand column. Column 2 reports OLS coefficients from a single specification in which we regress an indicator for whether a case was booked on a PARR day on all of the listed covariates. The specification includes day of week and nighttime booking fixed effects, along with their interaction, and week fixed effects. Robust standard errors clustered by booking date appear in parentheses.

Table 3: Regression Estimates of PARR's Impact on Release and Case Outcomes

	Control-complier Mean	Reduced-form Estimates		Treatment-on-treated Estimates	
	(1)	(2)	(3)	(4)	(5)
I. Release Outcomes					
Released	0.742	0.078**	0.088**	0.250*	0.283**
		(0.038)	(0.036)	(0.130)	(0.131)
Time to Release (days)	28.6	-12.6**	-12.4**	-40.2**	-39.8**
		(6.1)	(5.9)	(18.9)	(18.4)
Time to Release (log)	2.133	-0.223*	-0.246**	-0.711*	-0.786**
		(0.123)	(0.119)	(0.381)	(0.385)
II. Case Disposition					
Case Dismissed	0.273	0.096**	0.111**	0.307**	0.359**
		(0.043)	(0.046)	(0.142)	(0.156)
Conviction	0.360	-0.075*	-0.084*	-0.240*	-0.268**
		(0.043)	(0.043)	(0.134)	(0.132)
Guilty Plea	0.323	-0.064	-0.072*	-0.204	-0.230*
		(0.040)	(0.042)	(0.132)	(0.139)
Booking Week, Day, Time FEs		Y	Y	Y	Y
Defendant, Case Covariates		N	Y	N	Y
First Stage Coefficient		–	–	0.314***	0.313***
				(0.050)	(0.050)
First Stage F-statistic		–	–	39.7	41.0

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The sample includes all PARR-eligible cases (N=600). Column 1 provides the control-complier mean for the outcome in the left-hand column, following Imbens and Ruben (1997). Columns 2 and 3 present reduced-form regression estimates showing the difference in outcomes between cases booked on PARR and non-PARR days, following Equation 1. Columns 4 and 5 present 2SLS regression estimates of the PARR treatment effect, following Equation 2. Specifications reported in columns 3 and 5 include defendant- and case-level covariates: individual race/ethnicity, age, and sex, plus case severity, number of charges, and types charge(s) (drug, property, person, or other). All specifications include day of week and nighttime booking fixed effects, along with their interaction, and week fixed effects. Robust standard errors clustered by booking date appear in parentheses.

APPENDIX

Table A1: PARR Services and the Share of Clients Receiving Them

Visited Client in Custody	88.3%
PARR Arraignment Representation	65.1%
Contacted Family/Community Support	61.6%
Appeared at Arraignment	43.0%
Investigation Request	37.2%
Contacted Client's Employer	16.3%
Social Worker Referral	9.3%
Contacted DA	9.3%
PARR Motion Filed	8.1%
Defense Motion for Pretrial Release	7.0%
Advocacy re: Hold	3.5%

The table lists the PARR services provided by the Santa Clara County Public Defender's Office during the pilot window (January 2 - March 11, 2020). The second column provides the share of unique PARR clients who received the given service.

Table A2: Verifying Randomization of the PARR Calendar

	Sample Mean	Balance Estimate
	(1)	(2)
White	0.239	-0.024
	(0.426)	(0.023)
Black	0.125	-0.038
	(0.330)	(0.028)
Hispanic	0.514	-0.036
	(0.500)	(0.023)
Female	0.213	-0.005
	(0.409)	(0.016)
Age	36.6	-0.0003
	(11.8)	(0.0005)
Severity	19.5	-0.0001
	(14.4)	(0.001)
Person Offense	0.363	0.023
	(0.222)	(0.019)
Property Offense	0.223	0.029
	(0.416)	(0.023)
Drug Offense	0.408	-0.015
	(0.492)	(0.015)
Num Charges	3.49	0.002
	(3.63)	(0.002)
Felony Case	0.51	0.01
	(0.50)	(0.02)
Felony Case	0.51	0.01
	(0.50)	(0.02)
	Joint F-stat:	1.04
	p-value:	0.42

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The sample includes all cases—PARR-eligible and otherwise—booked during the PARR pilot window (January 2 - March 11, 2020; N=4,186 because of 47 cases that are missing a severity score). Column 1 provides the sample mean of the covariate in the left-hand column. Standard deviations are in parentheses. Column 2 reports regression coefficients from a single model that regresses an indicator for whether a case was booked on a PARR day on all of the listed coviarates. Robust standard errors clustered by the booking day appear in parentheses.

Table A3: Selection into PARR within PARR Booking Days

	Sample Mean	Balance Estimates	
		All Covariates	Omitting Age
	(1)	(2)	(3)
White	0.188	-0.127	-0.179
	(0.393)	(0.312)	(0.327)
Black	0.129	-0.134	-0.244
	(0.337)	(0.224)	(0.220)
Hispanic	0.604	0.001	-0.118
	(0.492)	(0.289)	(0.286)
Female	0.168	-0.048	-0.036
	(0.376)	(0.157)	(0.156)
Age	34.3	0.009*	—
	(10.7)	(0.005)	—
Severity	8.3	0.026	0.039
	(3.3)	(0.022)	(0.026)
Person Offense	0.594	0.217	0.275
	(0.494)	(0.200)	(0.217)
Property Offense	0.356	0.097	0.101
	(0.481)	(0.123)	0.129
Drug Offense	0.386	-0.141	-0.125
	(0.489)	(0.118)	(0.125)
Num Charges	3.72	-0.009	-0.008
	(3.34)	(0.012)	(0.012
	Joint F-stat:	2.71	1.19
	p-value:	0.04	0.36

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The sample includes all PARR-eligible cases booked on designated PARR days (N=101). Column 1 provides the sample mean of the covariate in the left-hand column. Standard deviations are in parentheses. Column 2 reports regression coefficients from a single model that regresses an indicator for whether the arrested individual received PARR services on all of the listed coviarates, as well as booking day fixed effects. Column 3 reports estimates from a similar model that omits age. Robust standard errors clustered by the booking day appear in parentheses.

Table A4: Monotonicity: First Stage Estimates by Defendant/Case Characteristics

		Case Severity		Case Type		
	Full Sample	More Severe	Less Severe	Person	Property	Drug
	(1)	(2)	(3)	(4)	(5)	(6)
PARR Intake	0.314***	0.345***	0.290***	0.344***	0.220***	0.236***
	(0.050)	(0.056)	(0.065)	(0.058)	(0.078)	(0.072)
N	600	355	245	345	190	218

	Ethnicity		Sex		Age	
	Hispanic	Non-Hispanic	Male	Female	< 36	> 36
	(7)	(8)	(9)	(10)	(11)	(12)
PARR Intake	0.328***	0.262***	0.229***	0.341***	0.323***	0.312***
	(0.078)	(0.067)	(0.081)	(0.055)	(0.066)	(0.060)
N	328	272	105	495	332	254

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Each cell reports an OLS first stage coefficient for a given subsample of cases or defendants, as indicated. The specification is Equation 1, where the outcome is an indicator for whether the defendant receives any PARR services. The model includes day of week and nighttime booking fixed effects, along with their interaction, and week fixed effects. Robust standard errors clustered by case booking data appear in parentheses. The full sample in column 1 includes all PARR-eligible cases (N=600). The remaining cells include only the subsample described in the column header. "More severe" cases have a severity score of less than 8, while "less severe" cases have a severity score of greater than or equal to 8. Sample sizes do not add up across case types (columns 4-6) because case types are not mutually exclusive.

Table A5: Interpreting the LATE: Complier Characteristics

	Sample Mean	Complier Mean
	(1)	(2)
White	0.220	0.151
	(0.408)	
Black	0.138	0.099
	(0.346)	
Hispanic	0.547	0.625
	(0.498)	
Female	0.175	0.132
	(0.380)	
Age	36.2	35.9
	(12.4)	
Severity	8.7	8.4
	(3.9)	
Person Offense	0.363	0.658
	(0.495)	
Property Offense	0.317	0.243
	(0.356)	
Drug Offense	0.363	0.296
	(0.481)	
Num Charges	3.7	3.1
	(3.2)	

The sample includes all PARR-eligible cases (N=600). Column 1 provides the mean characteristics of these cases. Standard deviations appear in parentheses. Column 2 reports the mean among "complier" cases. About 180 cases (or 30 percent of the sample) are compliers.

Table A6: Reduced-form Estimates of PARR's Impact on Bail and Arraignment

		Reduced-form Estimates	
	Sample Mean	Baseline Model	+Covariates
	(1)	(2)	(3)
Defendant Bailed	0.171	0.010	0.011
	(0.377)	(0.043)	(0.038)
Defendant Arraigned	0.183	0.014	0.013
	(0.387)	(0.038)	(0.037)
Time to Arraignment (days)	60.9	-18.1	-28.1
	(149.8)	(64.5)	(71.9)

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The sample includes all PARR-eligible cases (N=600), with the exception of time to arraignment, which is conditional on the defendant being arraigned (N=110). Column 1 provides the sample mean for the variable in the left-hand column. Standard deviations are in parentheses. Columns 2 and 3 present regression estimates of the effect of PARR booking days on case outcomes, following Equation 1. Column 3 adds defendant- and case-level coavariates, which are listed below Table A8. All specifications include day of week and nighttime booking fixed effects, along with their interaction, and week fixed effects. Robust standard errors clustered by booking date appear in parentheses.

Table A7: Robustness of Reduced-form Results to Alternative Specifications

					Preferred Model
	No FEs	+Week FEs	+DoW FEs	+Night FE	+Interact Night/DoW
	(1)	(2)	(3)	(4)	(5)
Released	0.070**	0.080**	0.069**	0.080**	0.078**
	(0.032)	(0.035)	(0.036)	(0.035)	(0.038)
Time to Release (days)	-7.0	-8.4	-10.6*	-9.2*	-12.6**
	(6.0)	(5.5)	(5.7)	(5.3)	(6.1)
Case Dropped	0.080*	0.075*	0.085**	0.072*	0.096**
	(0.041)	(0.041)	(0.043)	(0.042)	(0.043)
Conviction	-0.073*	-0.073*	-0.082**	-0.067*	-0.075*
	(0.040)	(0.038)	(0.039)	(0.039)	(0.043)
Guilty Plea	-0.032	-0.029	-0.032	-0.030	-0.064
	(0.030)	(0.033)	(0.036)	(0.032)	(0.040)

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The sample includes all PARR-eligible cases booked (N=600). Each cell reports a regression coefficient from a reduced form model estimating the relationship between PARR day booking and case outcomes. The baseline specification in column 1 includes only an indicator for a PARR booking day as an independent variable. Columns 2-5 add week, day of week, nighttime booking, and interacted day/nighttime booking fixed effects, as indicated. Column 5 presents our preferred specification, without covariates, exactly replicating column 2 of Table 3 in the text. Robust standard errors clustered by booking date appear in parentheses.

Figure A1: PARR Service Schedule

TX week	Arraignment day	Booking day	Booking time of day
1	Wednesday	Friday	5:00 pm-11:59 pm
		Saturday	12:01 am-11:59 pm
2	Wednesday	Sunday	12:01 am-11:59 pm
		Monday	12:01 am-5:00 pm
3	Monday	Thursday	12:01 am-5:00 pm
4	Tuesday	Thursday	5:01 pm-11:59 pm
		Friday	12:01 am-5:00 pm
5	Thursday	Monday	5:01 pm-11:59 pm
		Tuesday	12:01 am-5:00 pm
6	Friday	Tuesday	5:01 pm-11:59 pm
		Wednesday	12:01 am-11:59 pm

Figure A2. Permutation Tests

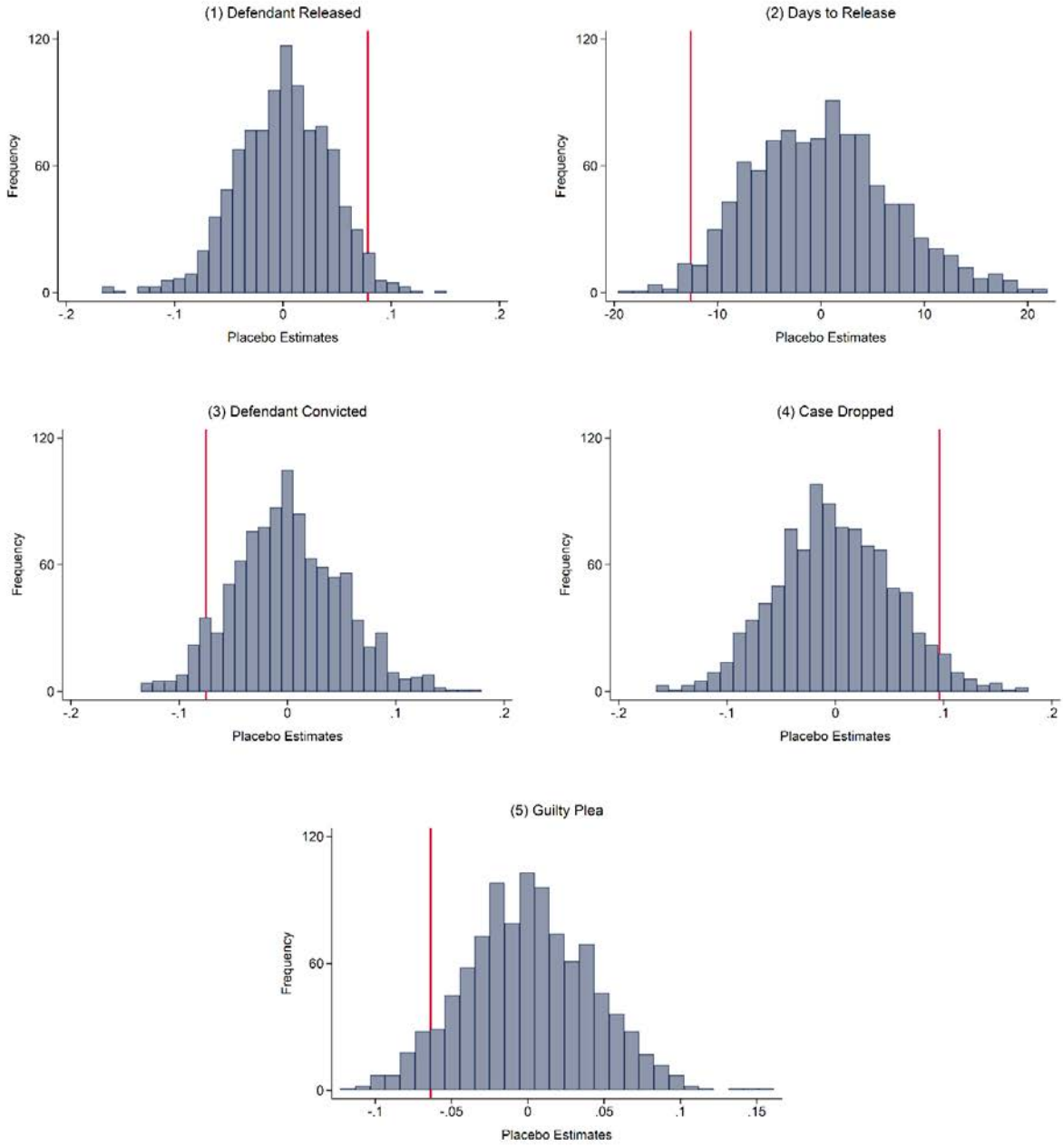

Figure A1: Each figure reports the distribution of placebo reduced-form estimates, following Equation 1, but using randomly-assigned outcome data. The Monte Carlo process creates 1,000 datasets with observations randomly assigned to outcomes. The height of each bar represents the number of generated datasets that yield a given point estimate. Solid red lines denote the "true" estimate from our actual data. The one-sided p-values for each figure are, respectively, 0.033, 0.021, 0.068, 0.054, and 0.045.

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TOWARDS PRETRIAL CRIMINAL ADJUDICATION

Chesa Boudin & Eric S. Fish[*]

The American criminal justice system faces a crisis of adjudication. Courts rarely decide facts, hear arguments, or hold adversary hearings. Trials are an endangered species. Convictions nearly always happen when defendants declare themselves guilty pursuant to plea bargain agreements. This crisis of adjudication undermines the system's legitimacy. The rule of law has little purchase in a regime governed by guilty pleas. Legal rights are not asserted. The government's evidence is not tested. The values of neutrality, transparency, and legality are sacrificed as power moves from the courtroom to the prosecutor's office. And case outcomes are dictated by punishment leverage, not by in-court presentation of evidence. This has created a persistently high risk of wrongful convictions. It has also eroded the rule of law and facilitated the growth of incarceration.

To address this crisis, academics and reformers have mostly focused on reviving the criminal jury trial. This Article proposes instead to reframe criminal procedure in a way that emphasizes robust pretrial adjudication. There are a variety of hearings and other legal proceedings that can happen before a jury trial. These include grand juries, preliminary hearings, witness depositions, suppression hearings, and bench trials. In most American jurisdictions, these procedures are weak or nonexistent. But in some places, they are powerful. California has an unusually demanding grand jury process. Florida gives defendants broad rights to depose witnesses before trial. North Carolina provides misdemeanor defendants both an initial bench trial and a subsequent jury trial. This Article examines these and other unique practices to propose a fresh way of thinking about criminal adjudication. It should not be an all-or-nothing proposition that begins and ends with the jury trial. Adjudication is, at its core, the testing of evidence and law, before a neutral tribunal, carried out in public by trained legal experts. And adjudication, thus understood, can be incorporated into the pretrial criminal process much as it is in civil cases. Robust pretrial adjudication serves many of the criminal trial's essential functions—producing evidence, creating transparency, imposing burdens, dignifying the parties, and preserving the rule of law. Such procedures can supplement the rarely exercised right to a jury trial. And, if made effective, they can help restore the power of courts in a system that has mostly abandoned adjudication.

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[*] Chesa Boudin is the executive director of the University of California, Berkeley's Criminal Law & Justice Center. Eric Fish is a law professor at the University of California, Davis.

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INTRODUCTION

Ours is no longer a system of criminal trials. It has not been for at least a century.[1] And with the death of the trial, criminal adjudication has nearly disappeared in the United States. Criminal courts have become guilty-plea-processing machines.[2] Only rarely do lawyers make legal arguments or present evidence in criminal cases.[3] But the legitimacy of the American criminal process, on our current understanding, depends almost entirely on the jury trial. Hence the death of the trial, and the criminal procedural edifice built around it, has also mean the death of foundational adversary values. In a system of guilty pleas, neutral decision-makers do not screen cases. There is no adversarial in-court conflict where the defendant's rights are asserted and the state's evidence questioned. There is no publicly visible accounting of the crime or of the prosecutor's proof. The center of power in criminal cases moves from the judge's courtroom to the prosecutor's conference room

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[1] Scholars point to the beginning of the 20th century as the period when guilty pleas became the dominant method of conviction in the United States. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 (1979); William Ortman, *When Plea Bargaining Became Normal*, 97 B.U. L. REV. 1435, 1455-59 (2020).

[2] *See* Jon Gramlich, *Only 2% of federal criminal defendants went to trial in 2018, and most who did were found guilty*, PEW RESEARCH CENTER, June 11, 2019 (showing that in 2018, 90% of federal cases resolved with guilty pleas and 2% went to trial); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in the Federal and State Courts. Does It Matter?*, 101 JUDICATURE 4, 32 (2017) (showing trial rates in 2015 for four states: California (0.78%); Florida (1.83%); Texas (0.97%); Pennsylvania (1.17%)); Court Statistics Project, Trial Court Caseload Overview, *available at* https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (last accessed Jan. 17, 2024) (providing jury trial rates in 2022 for 20 states, which vary from a low of 0.06% (New Jersey) to a high of 1.33% (Wisconsin), with 19 of the 20 states below 1%).

[3] Aside from trials, the only opportunities for substantive adversary advocacy in the criminal justice system are pretrial proceedings of the kind discussed in this article (i.e. preliminary hearings, bench trials, and motion hearings like suppression hearings). These are rare occurrences in most jurisdictions. *See, e.g.*, Jon Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 n.13 (2004) (citing several studies of suppression motions from the 1970s through the 1990s, concluding that the average estimate suggests they are filed in around 15% of cases (note that not all such cases would result in an actual hearing)); Court Statistics Project, *supra* note 2 (providing bench trial rates in 2022 for 22 states, with 19 states conducting bench trials in less than 3% of cases); Andrew Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1338-52, 1403-09 (2018) (cataloguing how prosecutors in most jurisdictions bypass preliminary hearings with grand juries or other procedural tools). Bail hearings are more common, but they are normally quite brief and concern custody status rather than guilt or innocence. *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* REFORMING CRIMINAL JUSTICE VOLUME 3: PRETRIAL AND TRIAL PROCESS 25-26 (Erik Luna ed., 2017).

(or e-mail account).[4] A guilty-plea-based system sacrifices the dignity of adversary procedure, the law-preserving function of neutral courts, and the impartial sorting of guilt from innocence. In exchange, it provides efficiency. The monumental increase in America's incarcerated population since the 1970s would have been impossible without plea bargains.[5]

Scholars and reform advocates have adopted two basic responses to this long-running legitimacy crisis. One is to rage against the death of the trial and demand its return. Academics have been arguing for decades that we should go back to a system of trials.[6] Criminal justice reformers have periodically pushed for more trials as well.[7] But trials have not returned. And the heavy burden of conducting trials, combined with the sheer number of criminal cases courts process each day, makes a restoration of the trial system unlikely.[8] The other response has been to concede the death of the trial and try to build process values into a guilty-plea-based system. Some scholars focus on reforming the plea-bargain process, seeking to make it more transparent or less coercive.[9] The Supreme Court's recent decisions requiring disclosure of immigration consequences and providing a right to effective counsel at plea bargaining are a step in this direction.[10] Some scholars direct their focus toward prosecutors' offices, arguing that they should be the locus of reform efforts.[11] That approach treats criminal law as basically a branch of

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[4] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559-63 (2004) (explaining how sentencing law, prosecutorial charging authority, and judges' desire to clear their dockets all empower prosecutors to dictate case outcomes in a plea-bargain-based system).

[5] *See* Albert Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. SURVEY AM. L. 205 (2021); CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 32-34 (2021).

[6] *See, e.g.*, HESSICK, *supra* note 5; William Ortman, *Plea Bargaining Abolitionism: A History*, 20 OHIO ST. J. CRIM. L. 1, 29-36 (2023) (surveying plea bargain abolitionist thought from the 1970s).

[7] *See, e.g.*, AMERICAN BAR ASSOCIATION, PLEA BARGAIN TASK FORCE REPORT AT 14 (2023); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 11, 2012) (calling on criminal defendants to collectively exercise their right to trials); Clark Neilly et al., *Restoring the Jury Trial*, CATO HANDBOOK FOR POLICYMAKERS (2022), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/restoring-jury-trial.

[8] *See* Ortman, *supra* note 6, at 22-29 (describing the failure of concerted efforts to end plea bargaining in Texas, Oregon, Alaska, and Michigan).

[9] *See, e.g.*, Jenia Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973 (2021); Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargain*s, 6 TEX. A&M L. REV. 653, 664 (2019); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011).

[10] Padilla v. Kentucky, 559 U.S. 356 (2010); Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012).

[11] *See, e.g.*, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM

administrative law, with bureaucratic checks rather than adversarial ones.[12] In a non-adjudicative conviction processing system, after all, the most important decisions are made in the prosecution bureaucracy.

In this Article we propose a different approach. Criminal adjudication does not start and end with jury trials. Adjudication is a trans-procedural phenomenon that can be realized in many ways. At core, it is the testing of evidence and law, before a neutral tribunal, carried out in public by trained legal experts. These features of adjudication protect core values of accuracy, due process, accountability, and the rule of law. And they can be realized outside of trial in ways that are unappreciated. Thus we propose a vision of criminal procedure aimed not at the trial but at the underlying commitment to adjudication. Every step of the criminal process, from initial appearance to disposition, should be understood as an opportunity for adjudication, even (perhaps especially) if a trial never occurs. There are many pre-trial procedures that can perform this function. These include preliminary hearings, grand jury proceedings, witness depositions, suppression hearings, and even bench trials. Such procedures involve (to varying degrees) lawyers for each side presenting and challenging evidence, judges considering legal arguments, and criminal charges getting modified or even dismissed. If such procedures are taken seriously, they can perform many of the same functions as criminal trials. They can screen out bad charges, give defendants and lawyers a clear view of the evidence, provide a neutral forum for legal arguments, create a public record of the case, and satisfy defendants' dignitary interest in challenging the charges against them.

Civil litigation provides a powerful analogy for this approach. Civil trials are just about as rare as criminal trials in the United States.[13] But civil procedure establishes pretrial rules that make civil litigation more robust.[14]

AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013); Eric Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018); Eric Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 260 (2017); Brandon Hasbrouk, *The Just Prosecutor*, 99 WASH. U. L. REV. 627 (2021); Marc Miller & Ron Wright, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

[12] Some scholars have explicitly adopted this framing. *See, e.g.*, Gerard Lynch, *Our Administrative System of Criminal Justic*e, 66 FORDHAM L. REV. 2117 (1998); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

[13] *See* SUJA THOMAS, THE MISSING AMERICAN JURY 2 (2016) (noting that the jury trial rate in federal civil cases fell from 5.5% in 1962 to 0.8% in 2013, and that the jury trial rate in civil cases in the 22 most populous states fell from 1.8% in 1976 to 0.6% in 2002); Court Statistics Project, *supra* note 2 (providing jury trial rates in civil cases for 17 states in 2022, which range from 0.03% to 0.54%, with a median of 0.09%).

[14] *See* Russell Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 65-105 (2022) (detailing civil procedure's more robust pre-trial procedures for interim relief, claim

Civil parties engage in multiple litigation phases prior to trial, including motions to dismiss for failure to state a claim and motions for summary judgment.[15] They also conduct extensive adversarial discovery, including the use of witness depositions that mimic in-trial testimony.[16] This expansive pretrial process makes civil litigation meaningfully adversarial, even though the great majority of cases end prior to trial. It allows the parties to gather information about the case, screen their claims for quality, test the other side's evidence, engage in confrontation, present arguments to the judge, and receive decisions on pretrial legal issues. Criminal procedure can and should follow this example.

In our current criminal justice system, pretrial hearings are commonly nonexistent or pro forma. Often the hearings do not happen at all.[17] When they do happen, the liberal use of hearsay evidence can render them basically meaningless.[18] But this is not universally true. There are some states where pretrial adjudication is a major feature of the criminal justice system, taking up significant court and attorney resources and directing case outcomes. In this Article we describe several such states. We look at their laws, judicial decisions, and procedural rules. We also examine case data from their criminal courts and conduct interviews with defense lawyers and prosecutors on the ground. And we show that they are exceptional by conducting two 50-state surveys, which demonstrate that most other states have weak pretrial adjudication processes. By highlighting states with unusually robust pretrial procedures, we show that the criminal justice system can adopt meaningful adversary adjudication despite the decline of the jury trial. We focus on five types of hearings.

First, we explore grand jury proceedings. Grand juries are bodies of ordinary citizens who decide whether to approve formal charges ("indictments") in felony cases. The proof threshold before a grand jury is "probable cause," significantly lower than the "beyond a reasonable doubt" standard in jury trials.[19] Grand jurors hear only from a prosecutor—there is

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screening, discovery, appeals, and more, vis-à-vis criminal procedure).

[15] *See, e.g.*, FED. R. CIV. P. Rule 56 (motion for summary judgment where there is no genuine dispute of material fact); *id*. Rule 12(b)(6) (motion to dismiss for failure to state a claim on which relief can be granted).

[16] FED. R. CIV. P. Rule 30 (procedures for oral deposition); John Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 545-51 (2012) (observing that depositions and other party-conducted discovery have replaced the civil trial's factfinding function).

[17] *See supra* note 3.

[18] *See infra* Parts II & III (discussing how lax hearsay rules at grand jury proceedings and preliminary hearings let them become *pro forma* exercises in which no arresting officers or eyewitnesses are heard from).

[19] *See* Kaley v. United States, 571 U.S. 320, 328 (2014); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 540-51 (2016) (historical account of how "probable

no judge or defense lawyer present.[20] The proceedings are normally kept secret, which prevents defense lawyers from contesting indictments after the fact.[21] And most states allow hearsay testimony before a grand jury, meaning that the prosecutor can have a police officer simply read the grand jurors the arrest report, even if the evidence within was gathered by a different person.[22] Due to the low evidentiary threshold and the one-sided nature of the proceedings, grand juries are generally weak checks on prosecutors.[23] As the saying goes, a grand jury would indict a ham sandwich. But a few states are different. In California, for example, the rule against hearsay applies to grand jury proceedings.[24] This means that to secure an indictment, prosecutors must actually bring in the eyewitnesses to the alleged crime.[25] And in California, defense lawyers can challenge the grand jury's findings after the fact.[26] Unlike in most states, defense lawyers receive the transcripts of California grand jury proceedings and can relitigate them before judges.[27] California's grand jury system thus provides more rigorous case screening than most other states.

Second, we discuss preliminary hearings. These serve a similar function to grand juries—they are initial proceedings that screen criminal charges, and their standard of proof is also "probable cause."[28] But unlike grand juries, preliminary hearings occur in open court with a judge presiding and defense counsel participating.[29] This makes them an ideal form of pretrial adjudication: they involve in-court presentation and challenging of evidence in an adversary proceeding. Most states and the federal system have laws creating a right to a preliminary hearing.[30] However, in practice they occur only rarely because prosecutors have a variety of workarounds to avoid

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cause" became the prevailing standard before grand juries).

[20] *See, e.g.*, FED. R. CRIM. P. Rule 6(d).

[21] *See, e.g.*, *id.* at Rule 6(e)(2). Some states, however, do have mechanisms for challenging the grand jury's finding after the fact. *See infra* Part III.

[22] *See* discussion *infra* Part III.

[23] *See* Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 539-75 (1980) (cataloguing the procedural deficiencies with federal grand juries, and proposing that they be reformed to provide more meaningful screening of weak cases).

[24] Cal. Penal Code §939.6(b).

[25] There is a limited exception, wherein sworn law enforcement officers can testify to one level of hearsay (e.g. statements that the officer directly heard). Cal. Penal Code §939.6(c).

[26] Cal. Pen. Code §995.

[27] For different states' rules, see discussion *infra* Part III.

[28] *See* FED. R. CRIM. P. Rule 5.1(e); Ortman, *supra* note 19, at 543-44.

[29] *See* FED. R. CRIM. P. Rule 5.1(e).

[30] *See* discussion *infra* Part IV.

preliminary hearings.[31] In the few states where preliminary hearings do happen regularly, they often allow multiple levels of hearsay.[32] This means that prosecutors can simply call a case agent to read the police report, minimizing the case-screening value of the hearing. But California, again, is a notable exception. Preliminary hearings in California happen quite regularly in felony cases.[33] They also provide a meaningful opportunity for adversarial factfinding, because the use of hearsay testimony is limited.[34] Preliminary hearings in California thus give the defendant a chance to hear evidence, challenge witnesses, and have an impartial magistrate decide whether the case goes forward.

Third, we consider witness depositions. A deposition is an out-of-court proceeding where the lawyers for each side ask questions of a witness who is under oath. Depositions are a major feature of civil litigation in the United States, but they are not widely used in criminal cases.[35] In the states that allow criminal depositions, they are normally permitted only under specific circumstances.[36] But Florida is an exception. In Florida, defense lawyers have a statutory right to depose all significant witnesses in felony cases.[37] Consequently, criminal depositions happen as a matter of course.[38] Defendants and their counsel question arresting officers, eyewitnesses, and alleged victims prior to trial, and record the witnesses' answers. This gives both sides a clearer understanding of the evidence. Depositions thus help defendants develop trial defenses, and often convince prosecutors to dismiss cases or offer more lenient plea bargains.

Fourth, we explore bench trials. In our criminal justice system, bench trials are normally seen as an alternative to jury trials.[39] Criminal defendants sometimes waive their right to a jury and instead have a judge act as the factfinder. A defendant might do this for a variety of reasons.[40] But in North

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[31] *See* Crespo, *supra* note 3 at 1338-52.

[32] *See* discussion *infra* Part IV.

[33] *See* discussion *infra* Part IV.

[34] Cal. Penal Code §939.6(b).

[35] *See* Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOKLYN L. REV. 1091, 1108-11 (2014) (noting that all 50 states give civil litigants broad power to depose witnesses, but only a handful of states give criminal defendants similarly broad power to depose witnesses); discussion *infra* Part V.

[36] *See* discussion *infra* Part V.

[37] Fla. R. Crim. P. 3.220 (2023).

[38] *See* discussion *infra* Part V (estimating the prevalence of depositions in one Florida county).

[39] *See* Guha Krishnamurthi, *The Constitutional Right to a Bench Trial*, 100 N.C. L. REV. 1621, 1637-39 (2022) (explaining the practice in different states—some let defendants unilaterally choose a bench trial rather than a jury trial, while some require the prosecutor's and/or judge's consent).

[40] *See* Lauren Ouziel, *Fact-Finder Choice in Felony Courts*, 57 UC DAVIS L. REV. 1191,

Carolina misdemeanor cases, defendants get both a bench trial and a full jury trial. That is, they are initially tried in district court before a judge, and then (if convicted) they can demand a full jury trial in superior court on appeal.[41] In the bench trial, all the rules of evidence and constitutional confrontation rights apply, and the standard of proof is "beyond a reasonable doubt."[42] And if the defendant exercises their right to a subsequent jury trial it proceeds *de novo*: the outcome of the prior bench trial is set aside.[43] In North Carolina's misdemeanor system, then, these initial bench trials function as a kind of super-preliminary hearing. The defendant gets an initial chance to see the evidence against them and argue their case, and judges can screen out unproven charges (by acquitting on them) before they reach a jury.

Fifth, we analyze suppression hearings. These are pretrial proceedings where the defendant argues that evidence should be excluded because it was illegally obtained. For example, if a search happened without a valid warrant or a statement was taken in violation of *Miranda* rights, the court will hold a hearing and decide whether that evidence can come into trial.[44] These hearings typically involve live witness testimony and cross-examination. In most American jurisdictions, they are pretrial hearings where the defense attorney gets an initial chance to ask questions of government witnesses (usually police officers) and receive a ruling from the judge. In some jurisdictions, like Washington state, the prosecutor even has an affirmative burden to prove their evidence is admissible in a pretrial hearing.[45] This gives the defense and the court an opportunity for robust pretrial adjudication. In some jurisdictions however, such as San Francisco misdemeanor court, judges do not permit pretrial suppression hearings.[46] If a defendant wants evidence suppressed, they must wait for the trial itself to make their argument. This gives the defendants significantly less pretrial process, limiting their ability to know the state of the evidence or question the government's witnesses before a jury is called.

In highlighting these jurisdictions with unusually robust pretrial hearings,

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1250-55 (2023) (describing inducements that encourage bench trials in several jurisdictions, including lower punishment vis-à-vis jury trials, a sooner trial date, judicial signaling of case outcomes, and local practice norms).

[41] N.C. Gen. Stat. Ann. §7A-272; N.C. Gen. Stat. Ann. §15A-1201.

[42] *See, e.g.*, State v. Jones, 816 S.E.2d 921, 925 (NC Ct. App. 2018).

[43] N.C. Gen. Stat. Ann. §15A-1431.

[44] *See, e.g.*, CA P.C. sec. 1538.5 (setting out procedure for suppression hearings in California).

[45] Washington State Rule of Criminal Court 3.5. https://www.courts.wa.gov/court_rules/pdf/CrR/SUP_CrR_03_05_00.pdf.

[46] *See* discussion *infra* Part VII; Jeff Adachi and Elizabeth Hilton, SAN FRANCISCO PUBLIC DEFENDER'S OFFICE MISDEMEANOR TRAINING MANUAL, The San Francisco Public Defender's Survival Guide for New Attorneys, updated 2017 by Brian Pearlman, at 18, on file with authors.

we seek to reframe American criminal procedure. We suggest that criminal litigation should not be collapsed into a single event: the guilty plea or the trial. Rather, it should be spread over multiple proceedings, as it is in civil litigation. Robust pretrial adjudication can significantly improve criminal law. It allows for meaningful adversary advocacy, which, absent a trial, is lacking. It makes the criminal process more transparent to the public by moving parts of it into open court. And its downstream effects on a case are also significant. all sides get a better picture of the evidence. Getting to see actual witness testimony helps with trial preparation and with plea negotiations. If the hearing goes poorly for the prosecutor, they can dismiss charges or offer a lighter plea bargain. If the hearing goes poorly for the defense, they have fair warning of the likely trial outcome. Judges also use pretrial proceedings to screen cases, dismissing them or otherwise resolving them in light of the testimony. Because these pretrial proceedings take time, they can give defendants additional negotiating leverage in the plea bargain market. And, because most of these proceedings involve neutral judges evaluating evidence, hearing legal arguments, and deciding whether cases will proceed, they can help restore rule-of-law values to the system.

To improve the criminal process in these ways, however, pretrial adjudication must first be made effective. And the utility of these hearings depends not just on the written law, but also on norms and procedures on the ground. In many states, these procedures exist on paper but are rendered meaningless in practice. This happens in three main ways: plea-bargaining norms that cause defendants to systematically waive hearings, procedural workarounds that let prosecutors avoid hearings, and lax evidentiary and review rules that render hearings pointless. Allowing pretrial hearings on paper is one thing, making such hearings meaningful in practice is another. Defendants might have a right to conduct depositions, for example, but this right means little if the right is systematically waived in plea negotiations. And a right to a preliminary hearing is rendered useless if prosecutors can regularly circumvent it through simpler procedures. Reformers who seek to create robust pretrial adjudication should thus focus on preventing prosecutorial circumvention, preserving meaningful procedure, and cultivating plea negotiation norms that allow robust hearings to occur. As we will show, there are several states where significant pretrial adjudication is commonplace. By examining these successes, and comparing them to other states, we will map out the obstacle course reformers must navigate to make pretrial adjudication meaningful.

This Article is organized into eight parts. The first two parts lay out the basic case for emphasizing pretrial adjudication, describing the legitimacy crisis in American criminal procedure and explaining how strengthened pretrial adjudication might address it. Parts three through seven explore each

of the pretrial proceedings in turn, describing their normal form and highlighting jurisdictions where they are unusually robust. Part eight draws on our case studies to tease out the conditions in which serious pretrial adjudication can take root.

I. THE COLLAPSE OF CRIMINAL PROCEDURE

The Constitution guarantees a right to trial by jury in all criminal cases.[47] But starting in the 1800s, the plea bargain began to supplant the jury trial as the workhorse of American criminal law.[48] By the turn of the 20th century, most convictions resulted from guilty pleas.[49] Today even the Supreme Court acknowledges that we have a system of pleas rather than a system of trials.[50] In the prototypical modern criminal case, the prosecutor files charges and then presents the defense lawyer with a plea bargain offer. This offer generally trades somewhat lower punishment (either less punitive charges than the prosecutor could otherwise pursue, a lower punishment than might be imposed after trial, or both) for the convenience and certainty of an uncontested conviction. And the defendant nearly always agrees to plead guilty, sometimes right away and sometimes after negotiating.[51]

Plea bargains are much more efficient than trials. A plea-bargaining regime thus allows criminal courts to process many more convictions than they could if every case required a jury.[52] But in exchange for this efficiency, a plea-based system sacrifices the values that are supposed to animate American criminal justice. Legal scholars have been critiquing the death of the trial on that basis since the 1970s.[53] Indeed, the conflict between our system's official narrative (adversary legalism) and its practical reality (guilty pleas without litigation) has been a major preoccupation of criminal

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[47] U.S. CONST. Amd. VI.

[48] Several historians trace the initial rise of plea bargaining to the latter part of the nineteenth century. *See, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 112-13 (2003); MIKE MCCONVILLE & CHESTER MIRSKY, JURY TRIALS AND PLEA BARGAINING 13 (2005); Ortman, *supra* note 1 at 1441.

[49] *See* Alschuler, *supra* note 1, at 6.

[50] Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

[51] *See* sources cited *supra* note 2 (showing vanishingly low trial rates in states and the federal system).

[52] *See* FISHER, *supra* note 48, at 40-44 (arguing that caseload pressure led to the rise of plea bargaining in 19th Century Massachusetts); HESSICK, *supra* note 5 at 32-34; Alschuler, *supra* note 5.

[53] *See, e.g.*, Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1976); Ortman, *supra* note 6, at 29-36 (surveying anti-plea bargaining scholarship in the 1970s).

law scholarship.[54] The collapse of adjudication erodes system values that are necessary to legitimize American criminal justice. Here we identify five such values: neutral evidentiary screening, the rule of law, public transparency, dignity in the legal process, and procedural limits on punishment.

First, the lack of adjudication increases the risk of false convictions by removing neutral factfinders' role in sorting innocent defendants from guilty ones.[55] In a plea-based system, convictions are generated by plea agreements made under the threat of greater punishment. This process leaves no room for neutral factfinders to evaluate evidence and decide whether the charges are true. Rather, in a plea-based system the main evidence screeners are the prosecutors. Prosecutors, however, are adversary lawyers vulnerable to confirmation bias.[56] Their main goal is to secure convictions. They have little incentive to investigate a defendant's claims of innocence after a case has been charged.[57] Indeed, prosecutors sometimes even fail to review the evidence in a case until the defendant has rejected a plea offer and demanded trial.[58] And innocent defendants can rationally decide to plead guilty for any number of reasons. Some plead guilty because they are stuck in custody and a guilty plea is the only way to get out quickly.[59] Some plead guilty to avoid

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[54] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2015); DARRYL BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016); HESSICK, *supra* note 5; WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Alschuler, *supra* note 53; Langbein, *supra* note 53; Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Thea Johnson, *Lying at Plea Bargaining*, 38 GA ST. L. REV. 673 (2022).

[55] *See* Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493-96 (2004); Lucian Dervan, Vanessa Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919 (2023).

[56] *See* Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 404-08 (2015) (observing that confirmation bias likely explains why prosecutors continued to seek retrial of several defendants exonerated by DNA evidence); D. Kim Rossmo & Joycelyn Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NORTHEASTERN U. L. REV. 790, 819 (2019) ("[P]rosecutors are trained to prepare a case in such a way as to ensure conviction. Once a decision to prosecute has been made, their training prepares them to consider contrary evidence only for the purpose of responding to and attacking such evidence").

[57] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117, 1127-30 (2008).

[58] *See* Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 282-90 (2011) (explaining why prosecutors with high caseloads often speak to witnesses and dig into the evidence at the last minute before trial, causing *Brady* violations and preventing dismissals against innocent defendants).

[59] *See id.* at 290-91; Hessick, *supra* note 5, at 61-62.

the hassle of repeatedly returning to court.[60] And some plead guilty because they fear worse punishment after trial.[61] A criminal justice system that thus procures guilty pleas cannot claim to convict based on neutral evaluation of the evidence.

Second, a system of only guilty pleas sacrifices the rule of law.[62] When there is no adjudication, courts do not hear legal arguments. And when there is no forum for legal arguments the law does not constrain prosecutors, protect defendants, or preserve the system's integrity. Prosecutors are free to break the rules by lying or concealing evidence. Defendants are unable to contest unlawful searches or unconstitutional charges. And sometimes defendants plead guilty to crimes the prosecutor knows they did not commit, or crimes that do not even exist.[63] The law does not develop unless parties litigate, so basic legal questions remain unresolved by judges. Prosecutorial discretion governs case outcomes, and judicially authored legal doctrine falls by the wayside.[64] In short, lack of adjudication renders American criminal justice lawless.

Third, a system without adjudication lacks transparency. Courtrooms are open to the public in the United States, so anyone can watch a criminal trial.[65] The records of court cases are also generally public.[66] However, in a system without adjudication little of note happens on the record in court. The real decisions are made in private discussions between prosecutors and defense lawyers. These discussions are not transparent.[67] The public normally has no way of learning why prosecutors make the offers they do, or why certain cases reach certain outcomes. This opacity prevents the public from understanding how criminal courts function. It frustrates journalists and

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[60] *See* HESSICK, *supra* note 5, at 120-24 (story of a defendant who pled guilty to trespassing in his own apartment building because he did not want to come back to court); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979) (observing that defendants plead guilty to avoid the burden of repeated court appearances).

[61] *See* John Blume & Rebecca Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 180 (2014).

[62] *See* BROWN, *supra* note 54, at 4 ("Quite literally, proclivities for democratic authority and market processes in criminal procedure make American criminal justice more lawless. Instead of legal rules against illegitimate practices, the justice system trusts democratic or market-like mechanisms to prevent them.").

[63] *See* Thea Johnson, *Fictional Pleas*, 94 INDIANA L.J. 855 (2019).

[64] *See* WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2 (2011) ("First, the rule of law has collapsed. To a degree that had not been true in America's past, official discretion rather than legal doctrine or juries' judgments came to define criminal justice outcomes.").

[65] Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980).

[66] *See* Eric Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1374, 1397-98 (2021).

[67] *See* Turner, *supra* note 9, at 987-92; Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003).

scholars who wish to study criminal courts. And it distorts democratic feedback, as voters are left with little idea of how these institutions work.

Fourth, a system without adjudication sacrifices the dignitary value of due process.[68] The adversary system is designed to give parties their day in court. Adjudication is supposed to be something the parties participate in, not something that happens to them. Criminal defendants have a right to testify and tell their story.[69] Or, if they choose, to not testify and remain silent.[70] They have a right to attack the government's evidence, and to hear from and cross-examine witnesses against them.[71] And they have a right to the assistance of a competent lawyer in contesting the charges.[72] These due process rights affirm the defendant's inherent dignity before the state. By protecting these rights, criminal courts show that they respect defendants as free and equal members of a liberal society. But if there is no adjudication, there is no dignitary value to criminal procedure. The entire process consists of the defendant acquiescing to a guilty plea.[73] This renders the defendant an object to be processed, not a free subject with equal dignity before the law.

Fifth, a system without adjudication lacks procedural checks on the imposition of punishment. In theory, the criminal justice system is designed to make it burdensome for prosecutors and courts to process convictions. Prosecutors need to gather evidence, identify witnesses, ensure those witnesses come to court, and prove the charges beyond a reasonable doubt. Courts need to impanel and manage juries and dedicate the time and staff necessary to conduct trials. But the current system circumvents these burdens and replaces them with a single, quick, non-adversarial guilty plea. This streamlines prosecution. It allows our system to incarcerate many more people than it could if criminal courts regularly heard evidence or decided legal questions.[74]

Scholars critical of our nonadjudicative criminal justice system have developed two main perspectives on how to reform it. One approach is to figure out how to bring back trials. Some scholars call for plea bargaining to

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[68] *See generally* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (articulating a dignitary theory of procedural due process).

[69] *See* Rock v. Arkansas, 483 U.S. 44 (1987).

[70] U.S. CONST. amd. V.

[71] U.S. CONST. amd. VI.

[72] *Id.*; Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963).

[73] *Cf.* Bennett Capers, *Bringing Up the Bodies*, 83 U. CHI. L.F. 83, 86-97 (2022) (Observing the many ways that the criminal justice system silences defendants, reducing them to inanimate bodies in their own criminal proceedings).

[74] *See* sources cited *supra* note 5.

be banned, either partly or fully.[75] A few jurisdictions have actually tried to end plea bargaining, though with limited to no long-term success.[76] Other scholars call for defendants to collectively demand trials,[77] for trials to happen by lottery,[78] for post-trial punishment to be limited so that more cases go to trial,[79] or for trials to become less burdensome so they are more likely to happen.[80] A second approach acknowledges that the trial is dead and tries to improve the plea system by adding in adversarial or bureaucratic checks.[81] Some scholars call for the plea bargain process to be made more transparent to defendants and to the public.[82] Some call for more evidence to be provided before guilty pleas, for example through earlier discovery or the use of witness testimony at plea proceedings.[83] Other scholars seek more administrative checks—for example reforming prosecutors' offices to ensure that they process cases more justly,[84] providing greater ethical regulation of

[75] *See, e.g.*, HESSICK, *supra* note 5; Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978); Schulhofer, *supra* note 54; Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006).

[76] *See* Ortman, *supra* note 6, at 22-29.

[77] *See* Alexander, *supra* note 7.

[78] *See* Kiel Brennan-Marquez, Stephen Henderson & Darryl Brown, *The Trial Lottery*, 57 WM. & MARY L. REV. 1083 (2016).

[79] *See, e.g.*, Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083 (2016).

[80] *See, e.g.*, Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969 (1983); Stephen Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

[81] Albert Alschuler noted the transition between these approaches thusly: "The time for a crusade to prohibit plea bargaining has passed. Instead, the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful. Improving the plea bargaining process should be one of their goals." Albert Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQUESNE L. REV. 673, 706-07 (2013).

[82] *See, e.g.*, Bibas, *supra* note 9; Levine et al., *supra* note 9; Turner, *supra* note 9; Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019); Russell Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257 (2023); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

[83] *See, e.g.*, Colin Miller, *The Right to Evidence of Innocence Before Pleading Guilty*, 53 U.C. DAVIS L. REV. 271 (2019); William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451 (2021); Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539 (2023); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541 (2006).

[84] *See, e.g.*, Miller & Wright, *supra* note 11; Hasbrouk, *supra* note 11; Davis, *supra* note 11; Barkow, *supra* note 12; BAZELON, *supra* note 11; Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006).

prosecutors,[85] or even explicitly adopting an inquisitorial criminal justice system.[86]

These approaches to reform share an assumption that we must either (a) return to a trial-based system or (b) work to improve a system that lacks adversary adjudication. As we argue in the next Part, there is a third option.[87]

II. THE MODEL OF PRETRIAL ADJUDICATION

In American criminal law, there are various pretrial procedures that involve adjudicative work like taking testimony, arguing in court, and deciding whether a case can proceed. These procedures are not nearly as burdensome as trials. One could envision a system where they happened regularly. Unfortunately, in the current state of American criminal justice these pretrial procedures are mostly meaningless. They are either waived in the plea bargain market, avoided through procedural shortcuts, or made impotent by lax evidentiary rules. Strengthening these procedures could help restore adversarial values to the system. And that would provide a middle path between a system of trials and a system of pleas.

In calling for more robust pretrial adjudication in the criminal justice system, it is helpful to compare criminal and civil procedure. As scholars have documented, civil procedure gives parties far more pretrial process.[88] Civil parties litigate motions to dismiss and motions for summary judgment.[89] Indeed, the Supreme Court has heightened federal civil pleading standards to screen out claims with insufficient support.[90] Civil parties also conduct witness depositions, which allows them to see the witnesses'

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[85] *See, e.g.*, Eric Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018); William Ortman, *The Prosecution Bar*, 101 WASH. U. L. REV. 123 (2023).

[86] *See, e.g.*, John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Lynch, *supra* note 12.

[87] *Cf.* John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015) (observing that criminal trial rights can be unbundled and negotiated over piecemeal, creating a middle path between guilty pleas and full jury trials).

[88] *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y Rev. 1, 22 (2006) ("[D]efendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods."); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39 (2014); Darryl Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155 (2018); Gold, *supra* note 14; Russell Gold, Carissa Byrne Hessick & Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607 (2017).

[89] FED. R. CIV. P. Rule 56; *id*. Rule 12(b)(6).

[90] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

testimony in advance of trial.[91] And adversary discovery in the civil legal system is robust, requiring parties to provide each other with witnesses, documents, responses to interrogatories, and other evidence.[92] This extensive pretrial process helps civil parties learn about their cases, screen claims, and negotiate settlements. Indeed, trials are about as rare in civil cases as they are in criminal cases.[93] The key difference is that civil settlements typically benefit from pretrial adjudication while criminal plea bargains largely do not.

Numerous scholars have called for the criminal justice system to adopt civil procedure rules that would provide greater due process.[94] Here, we focus instead on strengthening pretrial procedures that already exist in the criminal justice system but have atrophied in most places.[95] Doing so would restore some of the adversary values we have lost.[96] Pretrial adjudication can improve case screening by providing an inflection point for discovery and a preview of the trial evidence. It can restore rule-of-law values by empowering judges to make pre-trial rulings on legal issues. It can preserve public transparency and defendants' dignity by moving the proceedings into open court and allowing adversary confrontation. And it can limit punishment by slowing down the conviction process and giving defendants more negotiating leverage. Admittedly, a preliminary hearing (or any other pretrial proceeding) does provide less adversary process than a full jury trial. But it provides far more than a guilty plea.

In Parts III through VII, we analyze five different pretrial criminal procedures: grand juries, preliminary hearings, witness depositions, bench trials, and suppression hearings. As we show, in most jurisdictions these

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[91] FED. R. CIV. P. Rule 30.

[92] *See* Gold et al., *supra* note 88, at 1633-35.

[93] *See supra* note 13.

[94] *See, e.g.*, Gold et al., *supra* note 88; Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661 (2011); Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667 (2021); Russell Gold, *Jail as Injunction*, 103 GEO. L.J. 501 (2019); Ortman, *supra* note 85.

[95] In making this argument, we build on Peter Arenella's seminal 1980 article "Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication." Arenella, *supra* note 23. Arenella argued that federal grand juries and state preliminary hearings should use heightened standards of proof, to play a more significant role in substantive case screening. We build on his insight by conducting a detailed analysis of states with robust grand juries and preliminary hearings, as well as depositions, bench trials, and suppression hearings, and documenting what makes those states unique.

[96] Which values are served does depend, in part, on the specific procedures adopted. Grand juries, for example, can screen cases for weak evidence but do not provide a forum for in-court advocacy. Similarly, depositions provide access to evidence but involve no case dispositive judicial rulings.

procedures provide little meaningful adversary process.[97] But there are outlier states where these procedures are vibrant parts of the criminal justice system. We focus on grand juries and preliminary hearings in California, witness depositions in Florida, bench trials in North Carolina, and suppression hearings in Washington. In these states, pretrial hearings happen regularly and provide meaningful process. These states thus illustrate how pretrial adjudication can help restore the adversarial values that the plea system has abandoned.

III. GRAND JURIES

Grand juries are groups of ordinary citizens who decide whether a prosecutor has enough evidence to bring formal criminal charges, called "indictments." It is often said that a prosecutor could indict a ham sandwich.[98] This savory idiom captures the conventional wisdom that a prosecutor could induce a grand jury to approve charges against anyone or anything. It need not be so. This Part explores why grand juries give criminal defendants such minimal procedural protections. It also highlights one jurisdiction, California, where grand juries provide meaningful pretrial adjudication. First, we offer a brief history of grand juries to show that their case-screening function has diminished over time. Next, we provide the results of an original 50-state survey of modern grand jury laws.[99] This survey focuses on the evidentiary and procedural rules that turn most states' grand juries into rubber stamps: the free admissibility of hearsay and illegally obtained evidence, and the absence of any post-indictment review by defense lawyers or judges. Finally, we explore California's grand jury process. California, in contrast with most other states, subjects its grand juries to both robust evidentiary rules and extensive post-indictment review. California grand juries thus actually do provide substantial pretrial review of criminal charges. If a typical state's grand juries would indict a ham sandwich, California's require a footlong sub with all the trimmings, chips, and a soda.

A. The Twilight of the Grand Jury

Grand juries used to be much more important than they are today.[100] The

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[97] The major exception is suppression hearings, which are generally available as stand-alone hearings in most jurisdictions. *See infra* Part VII.

[98] The turn of phrase originated in a 1985 statement by the Chief Judge of New York. Matter of Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 (Sup. Ct.), fn. 1, aff'd as modified sub nom. In re Stewart, 548 N.Y.S.2d 679 (1989).

[99] Full survey on file with authors.

[100] *See generally* Nino C. Monea, *The Fall of Grand Juries*, 12 NORTHEASTERN UNIV. L. REV. 411 (2020).

institution traces its origins to the beginnings of the English common law nearly a millennium ago.[101] Grand juries made their way to the American colonies in the 1600s, becomoming an integral part of local legal systems.[102] They were unique institutions, belonging to no particular branch of government and providing direct citizen participation in the administration of justice.[103] Early American grand juries served a number of different public functions, including levying taxes, recommending new laws, and monitoring the performance of government officials.[104] They were also a key community check against prosecutorial overreach, deciding whether criminal cases could proceed to trial.[105] Indeed, grand juries' refusal to enforce British revenue and sedition laws was a factor leading to the Revolutionary War.[106]

After independence, the grand jury was enshrined in the Constitution's Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[107] The Supreme Court has observed that the grand jury was historically "a primary security to the innocent against hasty, malicious and oppressive persecution," one that "serves the invaluable function in our society of standing between the accuser and the accused."[108] Grand juries initially screened all types of cases, including misdemeanors and felonies.[109] At the time of the Constitution's framing, grand juries usually applied a high standard of review requiring them to be convinced of the defendant's guilt.[110] Later, in the Nineteenth Century, many jurisdictions also created robust systems of judicial review for grand juries' findings.[111] These allowed

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[101] *See* R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983).

[102] See Mark Kadish, Behind the Locked Door of a Grand Jury: Its Secrecy, its History, and its Process, 24 FLA. ST. L. REV. 1, 9-10 (1996).

[103] *See* United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005).

[104] *See id.* at 10-12; Richard Younger, The People's Panel: The Grand Jury in the United States, 1634–1941, at 36-38 (1963).

[105] *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1170 (1960) (calling the grand jury "the most celebrated of the pre-trial screening devices").

[106] *See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2342-45 (2008)

[107] U.S. CONST. amd. V.

[108] Wood v. Georgia, 370 U.S. 375, 390 (1962).

[109] *See* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599, 608-10 (2022) (noting that federal misdemeanors required grand jury indictment until 1930); Monea, *supra* note 100, at 432 (noting that exceptions for minor crimes did not become widespread until after the 1840s).

[110] *See* Ortman, *supra* note 19, at 530-33 (noting a number of different formulations of the standard, including "thoroughly persuaded," "well satisfied," "well convinced," "sufficient to convict," etc.).

[111] *See* Goldstein, *supra* note 105, at 1170-71 ("[T]hose requirements were frequently

defendants to challenge an indictment after the fact, arguing that it was supported by insufficient evidence. Historically, then, grand juries were an important chokepoint in the criminal process.

In the modern criminal justice system, by contrast, grand juries have become a mere formality. Today grand juries virtually always agree with the government and issue an indictment.[112] As the Ninth Circuit Court of Appeals has observed, grand juries "tend to indict in the overwhelming number of cases brought by prosecutors," and because of this fact "many criticize the modern grand jury as no more than a 'rubber stamp' for the prosecutor."[113] This criticism is valid, because grand juries are no longer set up to meaningfully review cases. The standard of review is now universally set at "probable cause," a low threshold.[114] Judicial review of grand jury decisions has disappeared in most jurisdictions.[115] Because grand jury proceedings are kept secret, defendants cannot use them to preview evidence.[116] Such secrecy also inhibits transparency, shielding prosecutors' presentation of evidence from public scrutiny.[117] Grand juries hear only from the prosecutor and the

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enforced through the granting of motions to quash indictments based on no evidence at all, or no evidence as to an element of the crime, or 'utterly insufficient' evidence.").

[112] *See* Zachary Goldfarb, *The single chart that shows that federal grand juries indict 99.99 percent of the time*, WASH. POST, Nov. 24, 2014 ("From October 2009 to September 2010, U.S. Prosecutors pursued 193,000 cases and prosecuted 162,350. Of the more than 30,000 they didn't prosecute, 11 cases were because a grand jury did not return an indictment."); MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2012 - STATISTICAL TABLES, at 11-12 (Noting that from October 1, 2011 to September 11, 2012, only 14 cases were declined by federal prosecutors because a grand jury refused to indict. In that same period, 166,339 federal prosecutions were initiated.). Of course, in rare instances prosecutors presenting a case to a grand jury do not ask for an indictment. This may be most common in cases where police officers are the target of the investigation. *See, e.g.*, *infra* note 117.

[113] United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005).

[114] *See* Ortman, *supra* note 19, at 540-51.

[115] *See* Goldstein, *supra* note 105, at 1170-72; discussion *infra* Section III.B (showing that today only 10 states have procedures to review a grand jury's findings).

[116] *See* FED. R. CRIM. P. Rule 6(e)(2); Kadish, *supra* note 101, at 12-22. Traditional justifications for grand jury secrecy include: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md., 1931).

[117] This can cut both ways; in cases involving police violence, it is common for prosecutors to be accused of pulling punches behind closed doors to avoid indictment. For

witnesses the prosecutor calls—no judge or defense lawyer is present.[118] Thus, while grand juries' investigative powers are broad, in practice they are controlled by prosecutors.[119] And evidentiary standards are relaxed in front of a grand jury—hearsay evidence is admissible in most states, as is evidence obtained in violation of the law.[120] This makes the prosecutor's job easier: they can rely on police officers' written accounts of the investigation to indict.

Taken together, these features of the grand jury basically eliminate its adjudicative value. Grand jurors hear evidence only from the prosecutor, do not necessarily hear from any witnesses to the crime, are tasked only with deciding whether probable cause exists, and neither their decision nor the evidence are subject to later judicial review. Scholars have proposed reforming the grand jury to enhance its case screening function, for example by heightening the standard of proof, applying rules of evidence, or incorporating adversarial process.[121] Barring such reforms, grand juries in most jurisdictions are little more than speed bumps on the road to conviction.

B. Survey of State and Federal Grand Jury Procedures

To get a more comprehensive view of grand juries' adjudicative value, we surveyed the laws of all fifty states and the federal system. The results of this survey paint a clearer picture of how grand juries operate in the United States, and of which jurisdictions are outliers. We specifically explored three

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example, in the high profile killing by police of Breonna Taylor in 2020, a grand jury declined to directly charge anyone for Taylor's killing, leading to public protests. Ultimately a public dispute between a member of the grand jury and the Kentucky Attorney General led a court to take the "extraordinary action" of releasing some 15 hours of recorded proceedings. Bill Chappell, *Court Releases Grand Jury Recording In Breonna Taylor Case*, NATIONAL PUBLIC RADIO, Oct. 2, 2020, *available at* https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/02/919245689/court-releases-grand-jury-recording-in-breonna-taylor-case

[118] *See* Monea, *supra* note 100, at 441.

[119] Louis M. Aragon, *The Federal and California Grand Jury Systems: Historical Function, Procedural Differences and Move to Reform*, 5 CRIM. JUST. J. 95, 97 (1981).

[120] In most states as well as before federal grand juries, formal rules of evidence do not apply and there are virtually no limits on the evidence a prosecutor can offer the grand jury. *See, e.g.*, Fed. R. Evid. 1101(d)(2) (rules of evidence do not apply to grand jury proceedings aside from privileges).

[121] *See, e.g.*, Benajmin E. Rosenberg, *Indictments, Grand Juries, and Criminal Justice Reform*, 48 AM. J. CRIM. L. 81 (2020) (arguing for reviving evidentiary and procedural protections in grand jury indictment process, along with judicial review); Arenella, *supra* note 23, at 558-75 (proposing a number of reforms including banning hearsay, requiring exculpatory evidence be presented, and giving defendants transcripts of grand jury proceedings); Ortman, *supra* note 19 (arguing that the standard of proof should be higher than "probable cause").

questions. First, to what extent is hearsay evidence that would be inadmissible at trial admissible before a grand jury? Second, to what extent is illegally obtained evidence that would be inadmissible at trial allowed to be presented to a grand jury? Third, is there a procedure for defendants to challenge the grand jury's finding of probable cause?

1. Hearsay

The rules limiting hearsay prevent certain out-of-court statements from being admitted as evidence.[122] These rules are designed to ensure that factfinders only hear firsthand accounts of the events in question, letting them evaluate witnesses' demeanor and credibility.[123] Yet most jurisdictions do not apply hearsay rules to grand jury proceedings. In such jurisdictions, the prosecutor just needs a police report to secure an indictment. When grand juries do not hear from the witnesses who would be brought to a trial it diminishes the proceedings' adjudicative value. This limitation is compounded by the non-adversarial nature of grand jury proceedings—no one is in the room to object or cross examine witnesses.

Broadly defined, the 50-state survey results can be organized into three categories. First, the federal government and most states do not apply any hearsay limitations on evidence admissible before grand juries. These jurisdictions include: the federal system, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii,[124] Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgina, Washington, West Virginia, Wisconsin, and Wyoming. In these 42 jurisdictions, the standard is typically stated as follows: "The rules of evidence do not apply in proceedings before grand juries."[125] The U.S. Supreme Court has even upheld the validity of an indictment based entirely on hearsay.[126] A federal prosecutor can thus rely solely on out-of-court

[122] *See, e.g.*, FED. R. EVID. Rule 801.

[123] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004) (discussing the confrontation clause, testimonial statements, hearsay, and reliability).

[124] *But see* State v. Miyazaki, 645 P.2d 1340, 1344 (1982) (disfavoring use of hearsay before grand jury but holding that no dismissal of an indictment is appropriate unless defendant shows that prosecutor deliberately used hearsay in lieu of better evidence to improve chances of indictment).

[125] *See, e.g.*, Md. Rules 5-101(b) (rules, other than those relating to the competency of witnesses, are inapplicable to grand jury proceedings). *See also* Bartram v. State, 280 Md. 616, 374 A.2d 1144, 1148 (1977) (Maryland does not require indictments be returned on legal or competent evidence).

[126] Costello v. United States, 350 U.S. 359, 362-63 (1956).

statements to secure an indictment.

Second, two states allow otherwise inadmissible hearsay to be presented to grand juries in limited categories of cases or special circumstances. In Alaska, hearsay is generally inadmissible in front of a grand jury unless the out-of-court statement is made by a child victim of a sexual offense and certain other conditions are satisfied.[127] Similarly, Nevada has a general prohibition on hearsay but carves out exceptions for child victims of felony sex crimes or physical abuse, and for felony domestic violence victims.[128]

Third, eight states strictly apply the normal hearsay rules to grand jury proceedings with only technical exceptions, if any. These states include California, Kansas, Minnesota, New York, North Dakota, Oklahoma, Oregon, and South Dakota. For example, Minnesota law provides that any grand jury "indictment shall be based on evidence admissible at trial," except for foundational hearsay, expert reports, certain written sworn statements, and a few other narrow exceptions.[129] North Dakota's statute simply makes the rules of evidence at trial govern admissibility of evidence before a grand jury: "[t]he grand jury shall receive only evidence that be admissible over objection at the trial of a criminal action."[130] Similarly, South Dakota mandates that "[t]he rules of evidence shall apply to proceedings before the grand jury."[131] In these states, grand jurors are much more likely to hear from real witnesses.

2. Illegally obtained evidence

Some evidence is obtained illegally and is subject to exclusion before trial. For example, Fourth and Fifth amendment violations, if established, are typically remedied by excluding the physical evidence seized, the observations, or the statements at issue.[132] Most jurisdictions, however, do not have any rule preventing illegally obtained evidence from being admitted before a grand jury.[133] Indeed, the Supreme Court has held that "[A]n

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[127] Alas. Stat. §12.40.110; *see also* Alas. R. Crim. P. 6(s)(2) (allowing hearsay statement made by a child victim of sexual offense to be admitted with safeguards and limits).

[128] Nev. Rev. Stat. §172.135(2).

[129] Minn. R. Crim. P. 18.05.

[130] N.D. Cent. Code Ann. §29-10.1-26.

[131] S.D. Codified Laws §23A-5-15.

[132] *See* Part VII, *infra*.

[133] A separate but related inquiry not fully explored here is whether prosecutors are required to—and remedies available for failure to—present grand juries with exculpatory evidence. For example, the U.S. Department of Justice policy is that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person," even though "failure to follow the Department's policy should not result in dismissal of an

indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination."[134] Similarly, for a representative example of the majority approach to this issue, Tennessee courts have held: "The exclusionary rule does not apply to grand jury proceedings."[135] This means prosecutors can use coerced statements, physical evidence obtained without probable cause, and other illegal evidence. The inclusion of such evidence undermines the rule-of-law principles that a strong exclusionary rule furthers. In contrast, only eight states have rules that limit what may be presented to "legal" evidence. These include Alabama, California, Idaho, Indiana, Iowa, Kansas, Nevada, and New Jersey. Statutory language requiring only "legal" evidence stemmed from concerns about the diminishing independence of grand juries vis-à-vis prosecutors.[136] Yet even these rules have no teeth absent some mechanism for the defense to challenge, and for the court to review, the validity of an indictment.

3. Challenging the indictment

A quintessential feature of grand juries is secrecy. But if grand jury proceedings are secret, it is impossible for a court to later review the evidence and process that resulted in the indictment. Unsurprisingly, nearly all jurisdictions do not allow defendants to challenge the validity of an indictment after the fact.[137] By our count, forty states and the federal system have no mechanism to challenge an indictment. Even those states that impose some limits on the kinds of evidence that may be presented to a grand jury generally fail to allow any remedy when the evidentiary rules are violated, illegally obtained evidence is admitted, or an indictment issues with insufficient evidence. For example, South Dakota mandates that the rules of evidence "shall" apply at grand jury proceedings.[138] Yet the South Dakota Supreme Court eliminates any possible remedy for violations of these rules or others: "Even though the rules of evidence apply to grand jury proceedings, we. . . will not inquire into the legality or sufficiency of the

indictment." DOJ Policy 9-11.233 – *Presentation of Exculpatory Evidence*, *available at* https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.233.

[134] United States v. Calandra, 414 U.S. 338, 345 (1974) (internal citations omitted).

[135] State v. Dixon, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992).

[136] *See* Goldstein, *supra* note 105, at 1171.

[137] *See, e.g.*, Com. v. Webster, 462 Pa. 125, 131–32 (1975) ("[T]he inadequacy, incompetency, or even illegality of the evidence presented to the grand jury do not constitute grounds for the quashing of an indictment returned on the basis of such evidence").

[138] S.D. Codified Laws §23A-5-15.

evidence upon which an indictment is based."[139]

Combined with the grand jury's other limitations, this absence of post-indictment review renders them basically useless as a pretrial screening mechanism. Where there is no transparency, no restriction on evidence, and no vehicle for judicial challenge (either during the taking of evidence or after the fact), there is virtually no adjudicative value. The only exceptional jurisdictions that provide some meaningful vehicle[140] for courts to review the propriety of an indictment are Alaska, California, Colorado, Hawaii, Idaho, Minnesota, Nebraska, Nevada, New York, and North Dakota. In these states, criminal defendants can raise substantive challenges to a grand jury's findings after the fact. In Minnesota, for example, the defense can move to dismiss an indictment if the evidence was not sufficient to establish the charged offense.[141] And in Nebraska, the trial judge is required to dismiss an indictment if it was not supported by the record.[142] In such jurisdictions the grand jury has at least some adjudicative value, insofar as the defense is provided with transcripts and a judge can review the grand jury's findings. Subsequent review also creates an incentive for the prosecutor to be careful and thorough in the presentation of evidence, and to abide by whatever rules or limits the jurisdiction may have.

C. Grand Juries in California

California's uniquely robust grand jury system is the product of legislation, ballot initiatives, and several decisions of the California Supreme Court. To understand how California's system emerged, it is helpful to recount that history. The California Constitution provides that felony cases can be tried only after a grand jury indictment or a preliminary hearing in front of a magistrate.[143] The prosecutor has complete discretion over which one is used.[144] And the difference between these two paths has major implications for the pretrial adjudication process. As Justice Stanley Mosk of

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[139] State v. Carothers, 724 N.W.2d 610, 616 (2006) (internal citations, quotations, and alterations omitted).

[140] Several states do allow courts to cure purely technical defects in an indictment. *See, e.g.*, Ore. Rev. Stat. §135.510 (allowing the court to set aside an indictment if the document is not found, endorsed and presented as prescribed by law or if the names of witnesses examined are not properly documented). But such technical challenges do not go to the substance of the grand jury's findings.

[141] 49 Minn. R. Crim. P. 17.06.

[142] Neb. Rev. Stat. Ann. §29-1418.

[143] Cal. Const. art I, §14 ("Felonies shall be prosecuted as provided by law either by indictment or, after examination and commitment by a magistrate, by information.").

[144] This prosecutorial discretion has raised concerns, including from the state Supreme Court. *See, e.g.*, Johnson v. Superior Court, 15 Cal. 3d 248, 255 (1975)

the California Supreme Court explained in *Johnson v. Superior Court*:

> If prosecution is begun by information the accused immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence. By contrast, the indictment procedure is distinctive because of its deliberate omission of even minimal safeguards.[145]

In *Johnson*, the Court held that because of this discrepancy the district attorney has a duty to inform the grand jury of any exculpatory evidence of which he or she is aware.[146] Yet that requirement was not enough to level the pretrial playing field.

A few years after *Johnson*, Justice Mosk addressed his broader concerns. In *Hawkins v. Superior Court*, writing for the majority, Justice Mosk held that prosecution via indictment denies an accused equal protection of the law and other substantial rights which are available in a preliminary hearing.[147] The fact that California already allowed judicial review of an indictment, unlike most states, was not enough to persuade the court. Judicial review of a secret, *ex parte* hearing was no replacement for an adversarial hearing.[148] Finding an equal protection violation, the Court fashioned a remedy: defendants whose cases commenced by way of grand jury indictment would have a right to a subsequent preliminary hearing.[149]

This created a problem for the grand jury system. If a defendant is entitled to a preliminary hearing even after an indictment, then a prosecutor has no incentive to go to a grand jury. Observers described the ruling in *Hawkins* as a "tremendous blow" to the grand jury in California from which "it may not recover,"[150] at least not without major reforms. In 1990, California voters adopted the ballot initiative Proposition 115 ("Prop. 115"), identified as the "Crime Victims Justice Reform Act." Among other things, Prop. 115 added

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[145] *Id.* at 256-7 (J. Mosk, concurring) (internal citations omitted).

[146] *Id.* at 255.

[147] Hawkins v. Superior Court, 22 Cal. 3d 584, 586 (1978) (Superseded by Constitutional Amendment as Stated in Strauss v. Horton, 46 Cal. 4th 364, 407 (2009)).

[148] Id. at 588-89.

[149] *Id.* at 593.

[150] Louis M. Aragon, The *Federal and California Grand Jury Systems: Historical Function, Procedural Differences and Move to Reform*, 5 CRIM. JUST. J. 95, 107 (1981).

section 14.1 to article I of the state constitution.[151] That section mandates that "[i]f a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing." Thus, Prop. 115 abrogated the holding in *Hawkins* and established that if a grand jury issues an indictment the defendant does not then get a preliminary hearing.[152] Prop. 115 thus revived the California grand jury. But it left in place the robust procedures missing from other jurisdictions.

Specifically, there are three key procedural protections still operative in California for cases that proceed by way of grand jury indictment. First, the holding in *Johnson* that prosecutors are required to present any exculpatory information in their possession to a grand jury remains good law,[153] and is now codified by statue.[154] Second, state law explicitly requires that any evidence a grand jury receives must be "admissible over objection at the trial," except for foundational hearsay via a sworn peace officer which may only be used to admit documentary evidence.[155] Finally, and critically, state law also provides for multiple layers of judicial review of an indictment.[156] If the defense is to raise arguments about the sufficiency or legality of evidence, instructional error, or any other of the myriad potential challenges to a grand jury indictment, it must have a full transcript of the proceedings. The California penal code thus mandates that the defense receive a transcript, at no cost, within 10 days of the indictment.[157]

These robust procedures create burdens and risks for prosecutors that do not exist in other jurisdictions. They also dramatically enhance the adjudicative value of grand jury proceedings. A California prosecutor could try to indict a ham sandwich, but they would be prohibited from relying on hearsay, would have to offer available exculpatory evidence, and a judge would consider the ham sandwich's arguments on review. California's grand jury system thus advances several of the adversary-adjudication values that we identified in Part I. It provides more substantial screening of cases because it requires prosecutors to present more evidence to the grand jury

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[151] Bowens v. Superior Court, 1 Cal. 4th 36, 39 (1991).

[152] *Id.*

[153] When a target of a grand jury investigation is already represented by counsel, it is common practice for prosecutors to send a "*Johnson* letter" requesting any exculpatory evidence from the defense. This serves the dual purpose of providing the prosecution with a window into the defense at trial and insulating the grand jury proceeding against attack on the basis of withholding of exculpatory evidence.

[154] Cal. Pen. Code §939.71.

[155] Cal. Pen. Code §939.6.

[156] Cal. Pen. Code §995. A motion to dismiss an indictment under this section is reviewed by a judge of the Superior Court, appealable to the Court of Appeal and state Supreme Court.

[157] Cal. Pen. Code §938.1.

(exculpatory and eyewitness evidence) and subjects that evidence to multiple rounds of review (the grand jury itself and later defense challenges). It better enforces rule-of-law norms by excluding illegally obtained evidence and providing for judicial review. It provides more transparency by offering the defense and the public a transcript of the proceeding. It slows down the processing of cases by imposing higher logistical burdens on the prosecutor (e.g. the need to call eyewitnesses, present exculpatory evidence, and defend the indictment in court). And while it does not allow in-court confrontation in the form of witness cross-examination, its post-indictment challenges at least somewhat preserve the dignitary value of confrontation.

Bringing a case before a grand jury is a lot of work in California, and less appealing for prosecutors in most cases than the alternative.[158] Thus, district attorneys in California "generally prefe[r] to use the speedier preliminary hearing process."[159] This is notable because, as we will explore in the next Part, the opposite dynamic exists in other states. Prosecutors in most states and the federal system regularly use the grand jury process to avoid having to conduct a preliminary hearing.[160]

IV. PRELIMINARY HEARINGS

In the mid-1800s, U.S. courts began allowing prosecutors to charge defendants using an "information" rather than an indictment.[161] The key difference is that an information triggers review by a preliminary hearing rather than by a grand jury.[162] Preliminary hearings are in-court proceedings typically presided over by magistrates.[163] In a preliminary hearing, the prosecutor must present evidence establishing probable cause that the

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[158] For example, a prosecutor may choose to send a case to a grand jury, or threaten to do so, when a felony case that was initiated by way of arrest and complaint is mired in pre-preliminary hearing delays. In other instances, grand juries are a valuable tool for investigations that may or may not result in a criminal case.

[159] Superior Court of California, Glenn County, *History of the Grand Jury*, *available at* https://www.glenn.courts.ca.gov/divisions/grand-jury/history-grand-jury

[160] *See* discussion *infra* Part IV; Crespo, *supra* note 3, at 1403-09 (cataloguing how prosecutors in most jurisdictions bypass preliminary hearings with grand juries or other procedural tools).

[161] *See* Ortman, *supra* note 19, at 543.

[162] The Supreme Court has held that in the states no preliminary hearing is required prior to trial. Lem Woon v. Oregon, 229 U.S. 586 (1913). However, where preliminary hearings are guaranteed under state law, they are a critical stage triggering the right to counsel. Coleman v. Alabama, 399 U.S. 1, 10 (1970).

[163] Commonly states have magistrates rather than trial judges preside over preliminary hearings. Among other things, this allows those jurisdictions that have a procedure for review of the preliminary hearing to have a trial judge play that initial review function.

defendant committed the charged crimes.[164] The defense has an opportunity to present its own evidence and arguments, and to cross-examine the government's witnesses.[165] Courts often describe preliminary hearings as serving a screening function that protects defendants from meritless charges.[166] They were originally intended as a less burdensome and more transparent alternative to grand juries.[167]

In many ways, preliminary hearings seem like ideal vehicles for pretrial adjudication. For starters, they involve truly adversary procedure. The defendant is present in court, represented by counsel, and able to hear and confront the state's witnesses.[168] A neutral judicial officer decides whether the charges go forward. Preliminary hearings let both parties evaluate witnesses' testimony.[169] This provides crucial information in deciding whether to settle or dismiss charges. It also helps prepare them for trial. These are all advantages over the opaque and non-adversarial grand jury process.

In practice, however, the value of preliminary hearings depends on highly variable jurisdiction-specific rules.[170] In most states prosecutors regularly bypass preliminary hearings entirely, opting instead for documents-only review or grand jury indictments.[171] This allows prosecutors to avoid subjecting their witnesses to cross-examination or giving the defense a preview of evidence. Further, many states have lax procedural rules that permit unlimited hearsay or prevent review of probable cause determinations. Such rules limit the procedural benefits of these hearings. But California's system provides an example of robust preliminary hearing practice. Prosecutors in California normally opt for preliminary hearings over grand

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[164] Preliminary hearings usually only occur in felony cases. Utah is a notable exception, however, as it requires preliminary hearings even for certain classes of misdemeanors. *See State v. Hernandez*, 268 P.3d 822 (2011); Paul Cassell & Thomas Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 2011 UTAH LAW REV. 1377 (2011).

[165] *See, e.g.*, FED. R. CRIM. P. Rule 5.1(e); WAYNE LAFAVE, ET AL., CRIMINAL PROCEDURE §14.1(a) (4th ed. 2015).

[166] *See e.g.*, State v. von Brincken, 86 Nev. 769 (Nev. 1970); Holmes v. District Court of Summit County, 668 P.2d 12 (Colo. 1983); Jones v. Superior Court, 4 Cal.3d 660, 84 Cal. Rptr. 209 (Cal. 1971).

[167] *See* Ortman, *supra* note 19, at 543.

[168] *See, e.g.*, Cal. Pen. Code §866; Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 475-84 (2020).

[169] Prosecutors should benefit from a more detailed preview of the strengths and weaknesses of their case outside the presence of a jury than the initial charging process allows. Other benefits to prosecutors can include a preview of defense arguments, adding new charges based on evidence admitted at the hearing, and preservation of testimony of witnesses who may not be available at trial.

[170] *See* Crespo, *supra* note 3, at 1348 ("[T]he structures of [preliminary hearing] review are exceptionally diverse").

[171] *See id.* at 1403-09 (cataloguing the states' bypass procedures).

juries. Preliminary hearings thus happen in a substantial percentage of California felony cases. And California's procedural rules are strong enough that preliminary hearings provide meaningful adjudication before trial.

A. Survey of State and Federal Preliminary Hearing Procedures

We conducted a survey of all fifty states and the federal system, looking at their preliminary hearing procedures.[172] We focused on two issues: whether and to what extent hearsay is permitted, and the manner of post-hearing review. In addition, we relied on prior surveys to analyze the different mechanisms prosecutors use to bypass preliminary hearings.[173]

1. Bypass

U.S. jurisdictions can be grouped into three categories based on whether they require indictments or informations. First, in the federal system and eighteen states the accused has a right to require that felony charges be indicted by a grand jury.[174] Most of these jurisdictions also provide for preliminary hearings, but let prosecutors avoid them by securing an indictment first.[175] Second, in twenty-eight states the prosecutor can choose whether to proceed by information or indictment.[176] Third, four states require grand jury indictments for the most serious crimes and permit informations for other crimes.[177] Looking at these three types of systems, which collectively seem to treat indictments as the default and informations as a less formal alternative, one might assume that prosecutors prefer preliminary hearings to grand juries. But the opposite dynamic exists in practice—prosecutors generally try to avoid preliminary hearings by opting for less burdensome paths, such as defense waivers, direct filing of charges, and grand juries.[178]

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[172] Full survey on file with the authors.

[173] LAFAVE, ET AL., *supra* note 165; Crespo, *supra* note 3.

[174] LAFAVE, ET AL., *supra* note 165, at §15.1(d).

[175] *See* Crespo, *supra* note 3, at 1342-44. In North Carolina, for example, if an indictment has not been issued a defendant has a statutory right to a probable cause hearing. N.C. Gen. Stat. Ann. §15A-601(a). Notwithstanding this right, probable cause hearings rarely happen in practice. *See* North Carolina Defender Manual, Vol. 1 Pretrial Ch. 3: Probable Cause Hearings (Mar. 2018) 3-8, *available at* https://defendermanuals.sog.unc.edu/pretrial/3-probable-cause-hearings. *See also* FED. R. CRIM. P. Rule 5.1(a) (providing a right to a preliminary hearing in felony cases unless the case is indicted or the defendant waives the right).

[176] LAFAVE, ET AL., *supra* note 165, at §15.1(g), note 54.

[177] LAFAVE, ET AL., *supra* note 165, at §15.1(d).

[178] *See* Crespo, *supra* note 3, at 1342-44; Janine Robben, *Secrecy: A Help or A*

In most jurisdictions, prosecutors can avoid preliminary hearings by choosing an indictment or other charging option. Professor Andrew Crespo has created a helpful typology of these bypass regimes.[179] Only six states give defendants an unqualified right to a preliminary hearing in felony cases, meaning that the hearing must happen unless the defendant chooses to waive it.[180] At the opposite extreme, five states have no provision for preliminary hearings or permit them only in very narrow circumstances.[181] In the remaining thirty-nine states and the federal system, preliminary hearings exist by law but prosecutors can circumvent them. The federal system and thirty-three states have "indictment bypass" systems, meaning that if a prosecutor gets an indictment from a grand jury the defendant no longer has a right to a preliminary hearing.[182] And the remaining six states have "information bypass" systems, in which the prosecutor can avoid a preliminary hearing by simply filing charging documents directly with the court.[183] Thus, in the great majority of American jurisdictions, prosecutors can choose between preliminary hearings and other (less adversarial) charging mechanisms.[184]

The federal system provides a useful illustration of how prosecutors use bypass rules to avoid preliminary hearings.[185] When one of the authors (Fish) was a federal defense lawyer in California, the court he practiced in basically

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Hindrance?, OR. ST. B. BULL., July 2004, at 13 (citing the president of the Oregon District Attorney's Association for the proposition that all district attorneys in Oregon prefer using grand juries over preliminary hearings).

[179] *Id.* at 1403-09 (50-state survey of preliminary hearing bypass rules).

[180] *Id.* (Nebraska, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Wisconsin).

[181] *Id.* (Arkansas, Connecticut, Indiana, Maine, and Minnesota). Connecticut and Minnesota do provide for document-based "papers review" of probable cause, but not for preliminary hearings. *Id.* at 1346, 1404-05. Connecticut only allows preliminary hearings in cases punishable by life imprisonment or the death penalty. Conn. Gen. Stat. Ann. §54-46a.

[182] *Id.* at 1403-09 (the federal system, Alabama, Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Viriginia, and Wyoming).

[183] *Id.* (Delaware, Florida, Iowa, Montana, Rhode Island, Washington). *See also* LAFAVE, ET AL., *supra* note 165, at §14.1(a).

[184] There are also jurisdictions where prosecutors can get multiple bites at the apple, for example seeking an information after failing to secure an indictment or vice versa. *See e.g.*, *People v. Noline*, 917 P.2d 1256 (Colo. 1996) (gathering cases); Ill. Comp. Stat. Ann. ch. 725, §5/111-2(f); Janet Gilboy, *Prosecutors' Discretionary Use of the Grand Jury to Initiate or Reinitiate Prosecution*, 9 AM. BAR FOUNDATION R.J. 1 (1984).

[185] *See* LAFAVE, ET AL., *supra* note 165, at §14.2(b) ("In general, the impact of the proviso [allowing indictment bypass] was largely to eliminate preliminary hearings in the federal courts. . . . Various U.S. Attorneys have been able to perfect this practice to the point where preliminary hearings have been virtually eliminated in their districts. In other districts, it is not as easy to always obtain indictments within the prescribed time limits, and mooting the preliminary hearing is common, but not inevitable.").

never conducted preliminary hearings in felony cases.[186] The prosecutors would require defendants to waive the preliminary hearing as a condition of keeping the first plea bargain offer open. And if a defendant chose to reject that plea bargain offer, the prosecutors would immediately go to a grand jury to secure an indictment. Because the federal system has an indictment bypass regime, doing so would eliminate the defendant's right to a preliminary hearing.[187] Preliminary hearings were thus cut out of the system entirely.

Prosecutors seek to avoid preliminary hearings for two main reasons. First, they are burdensome. Prosecutors must arrange for their witnesses to come to court, and must also dedicate several hours of their own time to the hearing. Second, they are strategically risky. A witness may fail to show up, or may say something under oath that the prosecutor does not anticipate. And defense lawyers get a free look at evidence, a chance to cross-examine the prosecutor's witnesses, and potentially ammunition to impeach those witnesses at trial. It is safer, from the prosecutor's perspective, to go before a closed and non-adversarial grand jury.[188] Or, even better, to obtain a defense waiver or file charging documents without a hearing. However, this calculus is sometimes reversed. There are circumstances where a prosecutor might prefer to conduct a preliminary hearing. These include situations where the preliminary hearing gives the prosecutor a strategic benefit (like preserving testimony of a witness who might be unavailable at trial, or previewing the defense's trial strategy), or where the alternative process is more burdensome.[189] For example, as explained below, California prosecutors usually choose preliminary hearings over the state's unusually burdensome grand jury process.

2. Hearsay

Preliminary hearings can also be rendered toothless by liberal use of hearsay testimony. If the prosecutor is allowed to bring in unlimited hearsay, then one police officer can simply read from an investigation report describing the incriminating evidence.[190] And that police officer need not

[186] This was the United States District Court for the Southern District of California from 2017 to 2021. In nearly 300 federal felony cases over three and a half years of practice, Fish did not participate in any preliminary hearings. He is also not aware of any of his former defense lawyer colleagues having held a preliminary hearing.

[187] FED. R. CRIM. P. Rule 5.1(a).

[188] *See infra* notes 17-23 & accompanying text.

[189] LAFAVE, ET AL., *supra* note 165, at §14.2(c) (listing "special circumstances" where a prosecutor might benefit from a preliminary hearing). *See, e.g.*, Crespo, *supra* note 3, at 1348 (noting that Nebraska's grand jury process is so cumbersome—requiring a petition signed by 10% of a county's registered voters—that "preliminary hearings are effectively guaranteed").

[190] *See* Crespo, *supra* note 3, at 1349-50 ("In such a regime, a single police officer can

even have been involved in the investigation. For example, one author (Fish) once participated in a preliminary hearing for a violation of supervised release involving allegations of drunk driving on a military base.[191] At this hearing, the only testifying witness was a probation officer who had not been involved in the defendant's arrest. This probation officer's only evidence was a probable cause statement written by a different probation officer that had been filed with the court at the start of the case. The probable cause statement summarized the military police officers' observations of the defendant when he was arrested. The preliminary hearing was thus basically useless. The only witness had no personal knowledge of the facts at issue, and was just reciting information from a document the parties had already read.

Our fifty-state survey reveals a good deal of variation in states' evidence rules at preliminary hearings.

At the outset, three states are excluded because they do not hold preliminary hearings.[192] All three of those states also impose no limits on the use of hearsay in grand jury proceedings.

Eleven states and the federal system have no (or virtually no) limits on the use of hearsay at preliminary hearings.[193] For example, in Wyoming, the rules of evidence do not apply at preliminary hearings,[194] hearsay is allowed,[195] and judges are not even required to determine the reliability of hearsay outside of trial.[196]

Thirty-one states allow hearsay with some meaningful limitations.[197] Those limitations vary considerably. In Alabama, for example, expert reports, documentary evidence, and other out-of-court statements are generally admissible if there are assurances that the witnesses will be available at

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simply take the stand and summarize the most inculpatory portions of the case file, thus shielding potentially weak witnesses from cross-examination and perhaps sanitizing their accounts in the process."); Cicchini, *supra* note 168, at 493-99 (describing preliminary hearings where the only witness is a police officer who had nothing to do with the investigation and who read the criminal complaint right before the hearing).

[191] This was a preliminary hearing for an out-of-district violation of supervised release, which can take place in the district of arrest. FED. R. CRIM. P. Rule 32.1(a)(5). It was not a new felony case—as noted above, preliminary hearings for felony cases are universally bypassed in the Southern District of California.

[192] These are Arkansas, Indiana, and Maine.

[193] Delaware, Georgia, Illinois, Kentucky, Maryland, Montana, New Jersey, North Dakota, South Carolina, Washington, and Wyoming.

[194] Wyo. R. Evid. 1101(b)(3).

[195] Wyo. R. Crim. P. 5.1(b).

[196] *Hennigan v. State*, 746 P.2d 360, 369 (Wyo. 1987).

[197] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

trial.[198] Hawaii focuses on convenience: a probable cause determination at a preliminary hearing "may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."[199] Colorado does not apply the rules of evidence to preliminary hearings,[200] but its courts "have consistently ruled that at a preliminary hearing the prosecution may not rely solely upon hearsay evidence to establish probable cause when a perceiving witness is available to testify."[201] Colorado courts also have created guardrails to limit the abuse of hearsay at preliminary hearings. Specifically, "[t]he prosecution satisfies the minimum requirement for nonhearsay if it (1) presents some competent nonhearsay addressing essential elements of the offense, and (2) presents hearsay testimony through a witness who is connected to the offense or its investigation and is not merely reading from a report."[202] These guardrails help preserve the adjudicative value of preliminary hearings, but they are not as rigorous as simply applying the rules of evidence.

Finally, in five states the normal rules of evidence apply during preliminary hearings.[203] For example, in Massachusetts, courts do not allow otherwise inadmissible hearsay at preliminary hearings.[204] As the Massachusetts Supreme Court explained, the rules of evidence apply because "the primary objective of the probable cause hearing is to screen out those cases where the legally admissible evidence of guilt would be insufficient to warrant submission of the case to a jury if it had gone to trial."[205] These sorts of evidentiary standards increase the burden on prosecutors along with the adjudicative value of the proceeding. However, it is notable that Massachusetts is one of many states that *does* allow otherwise inadmissible hearsay in grand jury proceedings.[206] Indeed, of the five states that apply the rules of evidence at preliminary hearings, all except South Dakota have no limits on hearsay in front of grand juries.[207] In those four states, then, the evidentiary rules create a structural incentive for prosecutors to favor grand juries over preliminary hearings. If the prosecutor wants to avoid bringing

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[198] Ala. R. Crim. P. 5.3(c).
[199] Haw. R. Penal P. 5(c)(6).
[200] Colo. R. Evid. 1101(d).
[201] People v. Horn, 772 P.2d 108, 109 (Colo.1989) (citations omitted).
[202] People v. Huggins, 220 P.3d 977, 980 (Colo. App. 2009).
[203] Massachusetts, Ohio, Rhode Island, South Dakota, and Texas.
[204] Mass. R. Crim. P. 3.
[205] Myers v. Com., 363 Mass. 843, 849 n. 6 (1973).
[206] Mass. R. Evid. 1101.
[207] S.D. Codified Laws § 23A-5-15. South Dakota is a rare state with heightened application of the rules of evidence in both grand juries and preliminary hearings. But, as described below, South Dakota does not allow judicial review of a preliminary hearing.

their witnesses to court before trial, they can charge via indictment.

3. Review

A third procedural variable is whether a defendant can seek review of a preliminary hearing prior to trial. In states that do permit review, preliminary hearings offer more robust pretrial adjudication because the defendant can contest probable cause before two judicial officers—the magistrate who presides over the hearing, and the judge who reviews the hearing. Our fifty-state survey of review procedures for preliminary hearings reveals three basic models: no mechanism for review, a general mechanism for review that may apply to preliminary hearings, and explicit review of preliminary hearings.[208]

Six states have no vehicle to appeal or seek substantive review of a preliminary hearing prior to trial.[209] This means that if a magistrate finds probable cause, no matter how implausibly, the defense cannot challenge that finding. In South Dakota, for example, judges cannot inquire into the sufficiency of a probable cause determination.[210] The state supreme court has held that "[a] circuit court's conclusion that there is no probable cause is not one of the statutory grounds for dismissal."[211] Thus, once a South Dakota magistrate has found probable cause, the defense cannot seek review of that determination from a judge.[212] So while South Dakota does stand out for its heightened evidentiary standards at preliminary hearings, it limits review of those hearings.[213]

Another twenty-five states have general pretrial motion procedures that may allow review of a preliminary hearing.[214] For example, North Carolina is one of several states that has a specific statute establishing grounds to dismiss an information.[215] And Alaska is one of many states that has a statutory framework governing pretrial motions to dismiss, but no specific provision for challenging an information.[216] Pretrial review of preliminary hearings in these states may be available.

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[208] Arkansas, Indiana, and Maine do not have preliminary hearings and thus have no vehicle for review.

[209] Georgia, Illinois, New Hampshire, North Dakota, South Carolina, and South Dakota.

[210] *State v. Vatne*, 659 N.W.2d 381, 384 (S.D. 2003).

[211] *State v. Springer-Ertl*, 570 N.W.2d 39, 40 (S.D. 1997).

[212] *State v. Hoekstra*, 286 N.W.2d 127, 128 (S.D. 1979).

[213] *See supra* notes 207 & 211.

[214] Alaska, Colorado, Connecticut, Delaware, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

[215] N.C. Gen. Stat. Ann. §15A-955.

[216] Alaska R. Crim. P. 12.

The remaining sixteen states have specific procedural vehicles to seek pretrial review of a preliminary hearing or to challenge an information.[217] For example, Florida's rule provides a unified procedure for a pretrial motion to dismiss either an indictment or an information.[218] Defense lawyers in Florida can thus argue in a pretrial motion that the magistrate's finding of probable cause was legally or substantively wrong. In Hawaii, similarly, a defendant can move to dismiss an information after the preliminary hearing on the grounds that it does not establish probable cause.[219] In states like these, the defendant enjoys two levels of pretrial review—the initial preliminary hearing, and subsequent review of that hearing for legal and factual errors.

B. Preliminary Hearings in California

California regularly provides robust pretrial adjudication in its felony cases through preliminary hearings. Its approach to preliminary hearings thus provides a useful case study. This is not because California is a procedural outlier. Its preliminary hearing rules, taken on their own, are well within the heartland of "information state" procedures. Rather, California is unique because its preliminary hearings (1) have real adversarial value,[220] and (2) are actually held quite frequently.[221]

In California the rules of evidence generally apply at preliminary hearings with a couple of significant, though limited exceptions.[222] Since the passage of Proposition 115 in 1990,[223] one layer of hearsay evidence via a sworn peace officer is admissible at a preliminary hearing.[224] This ability to

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[217] Alabama, Arizona, California, Florida, Hawaii, Idaho, Kansas, Maryland, Nevada, New Jersey, Ohio, Oklahoma, Rhode Island, Tennessee, Vermont, and Wisconsin.

[218] Fla. R. Crim. P. 3.190(b) (2023).

[219] Haw. Rev. Stat. Ann. §806-85, 86.

[220] *See* LAFAVE, ET AL., *supra* note 165, §14.3(a), fn. 35, *quoted by Walker v. Superior Ct.*, 12 Cal. 5th 177, 204 (2021) ("California's criminal preliminary hearing is relatively akin to a 'mini-trial hearing,' even in the wake of Prop. 115, in that its rules potentially increase the rigor of its screening function by generally limiting the prosecution to the use of evidence that would be admissible at trial.").

[221] *See* Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 503 (1998) ("In order to screen cases, California courts, unlike the federal system, have traditionally placed a heavy emphasis on preliminary hearings in addition to plea bargaining").

[222] People v. Chapple, 138 Cal. App. 4th 540, 546 (2006).

[223] *See supra* note 151 & accompanying text. Recall that Prop. 115 also eliminated the right to a post-indictment preliminary hearing. Thus, it revived, to a limited extent, the value to prosecutors of grand jury proceedings. But its more significant contribution to helping prosecutors secure criminal charges was allowing hearsay at preliminary hearings.

[224] Cal. Const. art. I, §30(b); Cal. Pen. Code §872(b); Cal. Evid. Code §1303.1. Technically multiple levels are hearsay are allowed at preliminary hearings when each layer

introduce one layer of hearsay is equally available to the defense and the prosecution.[225] The defense may also, in some circumstances, call the declarant as a witness even if the prosecutor did not.[226] A second way California relaxes the rules of evidence for preliminary hearings is that the best evidence rule does not apply, meaning copies of documents can be used rather than the originals.[227] While these evidentiary exceptions somewhat diminish the adjudicative value of a preliminary hearing, they still permit robust hearings compared to other jurisdictions. For example, a prosecutor in California could not establish probable cause by simply having a case agent summarize a police report.[228]

Moreover, in California, a defendant may choose to combine a motion to suppress evidence with a preliminary hearing.[229] While some defense lawyers may strategically wait to file a motion to suppress until after a preliminary hearing has locked officers into testimony and aided with discovery, there are also advantages to combining the suppression and probable cause hearings. For example, while Proposition 115 allows hearsay through an officer for purposes of establishing probable cause, it does not affect the rules of evidence for a suppression hearing.[230] Combining a suppression hearing with a preliminary hearing could thus broaden the scope of questioning, provide more useful impeachment material for trial, require the prosecutor to call additional witnesses, and let the defendant challenge the admission of their own inculpatory statements to establish probable cause.[231]

Other statutory rules, rights, and remedies combine to make California's preliminary hearings both frequent and meaningful. For example, both parties

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can be justified by some exception, just as at trial. However, the only way in which the rules of evidence are relaxed for preliminary purposes are to allow *one layer* of hearsay through a peace officer. *See* Tu v. Superior Court, 5 Cal. App. 4th 1617, 1621 (1992); *but see Correa v. Superior Court*, 27 Cal. 4th 444, 448 (2002) (allowing peace officers to testify at preliminary hearings to hearsay witness statements even when those statements were obtained through a language interpreter).

[225] Nienhouse v. Superior Court, 42 Cal. App. 4th 83, 90–93 (1996).

[226] *People v. Erwin*, 20 Cal. App. 4th 1542 (1993).

[227] *See* Cal. Pen. Code §872.5 ("[I]n a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence").

[228] *See* Tu v. Superior Court, 5 Cal. App. 4th 1617, 1621 (1992) ("Proposition 115 does not permit a designated 'reader' who has no personal knowledge about the case to testify at a preliminary hearing.").

[229] Cal. Pen. Code § 1538.5(f)(2). The suppression motion must be noticed at least five court days prior to the hearing.

[230] *See People v. Best*, 56 Cal. App. 4th 41, 46 (1997) (holding that while Penal Code § 872(b) "provides that the finding of probable cause following a preliminary hearing may be based upon certain hearsay statements, it does not create a general exception to the prohibition against the use of hearsay in other proceedings.").

[231] *People v. Smithson*, 79 Cal. App. 4th 480, 494 (2000).

have a right to a speedy preliminary hearing, and, absent a waiver or good cause, the magistrate "shall" hold a hearing within ten court days of arraignment.[232] When the defendant's right to a speedy hearing is violated they must be released from custody or the case must be dismissed.[233] Even if a defendant has waived the 10 court day hearing or is out of custody, the court must, absent a personal waiver, provide a preliminary hearing within 60 calendar days of arraignment or dismiss the case.[234] Similarly, a defendant is entitled to a continuous, uninterrupted (by other court business) hearing and, absent personal waiver or good cause, the violation of this right is remedied by dismissal.[235]

California also provides for robust review of preliminary hearings. Both parties have a statutory right to appeal magistrate decisions at a preliminary hearing on a wide array of technical and substantive grounds.[236] A defendant can use this procedure to challenge the magistrate's finding of probable cause by moving to dismiss before a superior court judge. On the other hand, a prosecutor dissatisfied with a magistrate's dismissal of charges can refile those charges.[237] If that happens the defendant's remedy is, again, moving for dismissal before a judge.[238] After receiving such a motion, the judge conducts a review of the preliminary hearing based on the transcript and evidence presented, and decides whether the rules were followed and probable cause was established.[239] That judge's decision, in turn, can be appealed to the Court of Appeal.[240]

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[232] Cal. Pen. Code § 859b. In one author's (Boudin's) experience as a public defender and the elected prosecutor in San Francisco, it is common for even complex and serious cases to proceed to preliminary hearing within the ten-day statutory period.

[233] *Id.*

[234] *Id.* Even "good cause" cannot avoid a dismissal if the 60 day right to a hearing is violated. *People v. Superior Court (Arnold)*, 59 Cal. App. 5th 923, 940-1 (2021).

[235] Cal. Pen. Code § 861.

[236] Cal. Pen. Code §§ 871.5, 995.

[237] Cal. Pen. Code §739.

[238] In practice this shifts power from the court to the prosecutor because a prosecutor can disregard a magistrate's order and force a defendant to file a motion to dismiss upon which a different, superior, judicial officer will rule based on the evidence presented at the hearing. In any of these scenarios, it will be the factual record at the preliminary hearing that determines which charges are allowed to advance to trial.

[239] The judicial officer who presides over a preliminary hearing is deemed a "magistrate" even if the officer is a full-fledged superior court judge. 1 Simons, California Preliminary Examinations and 995 Benchbook—(2023 Edition) Introduction (Matthew Bender, Rev. Ed.).

[240] *See People v. Laiwa*, 34 Cal. 3d 711, 718 (1983) (internal citations omitted) ("[I]t is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. On review by appeal or writ, moreover, the appellate court in effect

Despite the procedural robustness of California's preliminary hearings, prosecutors still prefer them over grand juries.[241] This is because, as explored earlier, the grand jury process in California is unusually burdensome—it prohibits nearly all hearsay evidence, and allows defendants to challenge an indictment after the fact.[242] When one of the authors (Boudin) was the district attorney of San Francisco, his prosecutors opted for preliminary hearings over grand juries in the vast majority of cases. His prosecutors mainly used grand juries in cases that had lasted two years or more without a preliminary hearing.[243] For example, in one murder case that the author personally presented to a grand jury, the case had been awaiting a preliminary hearing for over three years.[244] In most cases, notifying the defense that the case would be presented to a grand jury was an effective way to advance towards settlement or towards a long-delayed preliminary hearing.[245] However, assistant district attorneys in that office almost never wanted to present domestic violence, child or sexual assault cases to grand juries. This was because California prohibits hearsay in grand jury proceedings, and the attorneys sought to avoid calling vulnerable victims to testify about traumatic events multiple times.[246] It is often impossible to secure an indictment without calling such witnesses to testify before the grand jury.[247] But the same case could be advanced at a preliminary hearing using hearsay from a police officer who spoke with the victim, thus protecting the victim from having to testify until trial.[248] As this dynamic illustrates, the evidentiary rules

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disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer.").

[241] *See* Superior Court, County of Glen, *supra* note 159.

[242] *See supra* notes 154-56.

[243] Grand juries were also used for complex investigations or in some instances to initiate white collar, political corruption, or police violence cases.

[244] Megan Cassidy, *Chesa Boudin, in policy shift, seeks to clear case backlog by leaning more on grand juries for charges*, S.F. CHRONICLE, Jan. 1, 2021, *available at* https://www.sfchronicle.com/crime/article/In-policy-shift-Boudin-seeks-to-clear-case-15839376.php.

[245] Overwhelmingly defense attorneys did not want to forfeit the opportunity to ask questions, confront witnesses, and make arguments at a preliminary hearing.

[246] By contrast, sex cases involving allegations of violating Penal Code §288.4 ("to catch a predator" cases) were ideal for a grand jury indictment because they could be put in with a single police officer witness. These cases typically involved a police officer posing in online chatrooms as a minor and then meeting an adult for a sexual encounter at which point the adult would be arrested and charged.

[247] In the jurisdictions with relaxed evidentiary rules, by contrast, their testimony could be admitted before the grand jury through various layers of hearsay.

[248] In cases, where the assigned prosecutors were concerned that a victim or witness might not show up for trial for whatever reason, they would sometimes call them to testify in person at a preliminary hearing, rather than using hearsay, and subject them to confrontation through cross examination to preserve their testimony.

are a key variable when prosecutors decide which procedure to use.

While court data is notoriously difficult to obtain,[249] all indications (and the authors' experience) confirm that preliminary hearings are a widespread and common part of criminal practice in California state courts. As early as the mid-1990s California trial courts handled a large volume of preliminary hearings, and the more serious the charge, the more likely the case would require one. According to a 1998 survey of California judges, the median rate of preliminary hearings was "37 percent for non-strike cases, 67 percent for second-strike cases, and 79 percent for third-strike cases."[250] More recently, in fiscal year 2021-2022, California courts reported that of 25,349 cases, approximately 8,694 had received a preliminary hearing, or more than a third.[251] In San Francisco Superior Court in 2017, there were 3,469 new felony arraignments and 773 felony cases arraigned on a post-preliminary hearing information.[252] This means roughly 22 percent of commenced cases received a preliminary hearing (this includes cases that were dismissed or where the defendants accepted misdemeanor plea deals). In one author's experience (Boudin), it is common for a single trial court room in California to conduct multiple preliminary hearings in a single day, though hearings in more complex cases can last multiple days.[253] There are numerous judges in larger counties whose primary job is to preside over preliminary hearings. There is likely a high degree of variation in local practice across California's 58 counties.[254] But it is clear that California conducts preliminary hearings in

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[249] *See, e.g.*, Jonathan Abel, *Going Federal, Staying Stateside: Felons, Firearms, and the "Federalization" of Crime*, 73 AM. U. L. REV. 585, 621 (2024) (describing 75 separate in person trips to the Alameda County, California courthouse to obtain data).

[250] JUDICIAL COUNCIL OF CALIFORNIA ANNUAL REPORT VOL. II at 25 (1998), *available at* https://www.courts.ca.gov/documents/98sco-2.pdf.

[251] JUDICIAL COUNCIL OF CALIFORNIA, 2023 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS at 139, *available at* https://www.courts.ca.gov/documents/2023-Court-Statistics-Report.pdf.

[252] San Francisco Superior Court 2018 Monthly Criminal Arraignment Stats spreadsheet, on file with the authors. Note that this metric under counts the number of hearings as it would not capture any case where, after a preliminary hearing, the magistrate discharged the case or reduced it to a misdemeanor, the prosecutor chose not to file an information, or where the defendant failed to appear at arraignment on the information.

[253] During his first two years in the felony trial assignment as a public defender the author (Boudin) conducted 53 preliminary hearings while he resolved (including trials and all other dispositions) 147 cases both pre-and post-hearing.

[254] *See, e.g.*, Abel, *supra* note 249, at 667 n.345 (finding about an 11% rate of felony cases filed in Oakland going to a preliminary hearing, and thus having an information filed, from 2017 to 2022: "June 2017 through December 2017: 3,575 felony cases, 424 cases with an information filed; 2018: 5,425 felony cases, 684 cases with an information filed; 2019: 5,435 felony cases, 702 cases with an information filed; 2020: 5,231 felony cases, 546 cases with an information filed; 2021: 5,106 felony cases, 430 cases with an information filed; January through May 2022: 2,059 felony cases filed, 189 cases with an information filed.").

a notably large percentage of its felony cases, particularly in light of the relatively robust procedure those hearings provide.

V. WITNESS DEPOSITIONS

A deposition is a proceeding where the lawyers for each side ask questions of a witness under oath. Depositions generally happen outside of the courtroom and without a judge.[255] The lawyers and the witness convene with a court reporter who documents the examination and cross-examination.[256] The idea is to generate an official record of that witness's testimony. This process informs the parties about what the witness will say at trial. It also (in some cases) preserves the witness's testimony in case they do not ultimately come to trial.[257] Depositions serve a variety of different purposes from the parties' perspective. They help lawyers get a preview of the opponent's evidence, prepare their own witnesses for trial, evaluate the strength of the case, and potentially push the other side towards a settlement.[258]

Depositions are a common feature of civil litigation in the United States.[259] Yet they are exceedingly rare in criminal cases.[260] This is unfortunate, because they could be powerful tools of pretrial adjudication. Depositions are unlike our prior two examples (grand juries and preliminary hearings), in that they do not involve a neutral adjudicative body reviewing evidence and screening charges. Nonetheless, they share many other features with those pretrial proceedings. They involve live testimony from key witnesses, as well as cross-examination and the creation of an official record. They reveal evidence that would otherwise not come out before trial, which helps both sides evaluate the likelihood of conviction.[261] Criminal

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[255] 8A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2112.

[256] *See* DEPOSITION CONSIDERATIONS—PERSONS PRESENT AT THE DEPOSITION, FUNDAMENTALS OF LITIGATION PRACTICE § 14:10 (2023 ed.) (describing who may be present at a deposition).

[257] *See* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 856 (1995) (distinguishing preservation and discovery depositions).

[258] *See* James W. McElhaney, *Objecting at Depositions*, LITIGATION, Summer 1988, at 51, 51–52 ("We use depositions for lots of purposes—to investigate the case, learn what the witnesses will say, prepare them for trial, evaluate our opponent's witnesses, give our own cases a trial run, keep witnesses from changing their stories, and push our opponents toward settlement.").

[259] *See, e.g.*, Dennis R. Suplee, *Depositions: Objectives, Strategies, Tactics, Mechanics and Problems*, REV. OF LIT. 255, 257 (1982) ("Depositions are the most important of the pretrial discovery tools.").

[260] *See* Meyn, *supra* note 35, at 1094.

[261] Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1625 (2017) ("The lack of access to evidence often

depositions could thus help correct the information asymmetry that exists between prosecutors and defense lawyers.[262] And they could also affect case outcomes. If a deposition goes badly for a prosecutor they may choose to dismiss charges, or perhaps offer a more lenient plea deal. If a deposition goes badly for the defense, then they know more about the downside of going to trial and may plead guilty. For these reasons, academics and legal reformers have called for the widespread use of depositions in criminal cases.[263] Yet few jurisdictions have allowed depositions to serve a meaningful role in criminal litigation.

This Part considers how depositions in criminal cases can improve pretrial adjudication. It first presents our review of how the federal system and the states approach criminal depositions. We found that criminal depositions are not commonly used in the United States. Only six states give defendants a broad right to depose witnesses. The remaining 44 states and the federal system either require a showing of good cause or restrict depositions to narrow circumstances. This Part also explores Florida's unique deposition practices. Florida law allows the parties to depose important witnesses in basically every felony case.[264] Drawing on interviews with several Florida criminal defense lawyers and elected prosecutors, we show that depositions happen quite frequently there. Florida defense lawyers often use depositions to lock down witnesses' stories, get a preview of the government's evidence, and convince prosecutors to drop charges or offer better deals. And prosecutors benefit from depositions as well, using them to get a clearer view of the evidence and the likelihood of conviction.

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inhibits defendants from forming an accurate, independent assessment of their likelihood of conviction to inform their bargaining positions.").

[262] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004).

[263] *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1638–40 (2005) (arguing for judicial deposition of key witnesses to establish a factual basis for pleas); Ortman, *supra* note 83 (proposing a right to depositions in criminal cases under the Sixth Amendment); Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765 (2019) (comparing criminal and civil discovery procedures); Prosser, *supra* note 83, at 607-613 (discussing how criminal depositions can remedy discovery violations and information asymmetries); John Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2188–92 (2000) (emphasizing benefits from discovery depositions in criminal cases); George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 592–601 (2010) (reviewing the frequency of and costs associated with discovery depositions in various jurisdictions). Note also that five decades ago the drafters of the model penal code recommended criminal depositions in criminal cases as a matter of right mainly as a cheaper alternative to preliminary hearings rather than a supplement to other pretrial adjudication. Unif. R. Crim. P. Model Penal Code R. 431 (1974).

[264] Fla. R. Crim. P. 3.220(h)(1).

A. Survey of State and Federal Deposition Procedures

To explore how depositions are used in American criminal cases, we surveyed the laws of the fifty states and the federal government.[265] Most states do not, as a matter of course, allow defendants to take depositions of witnesses in criminal cases. For example, Hawaii's courts have gone so far as to assert that the "primary object of the [Sixth Amendment's] confrontation guarantee is to prevent the use of depositions . . . in a criminal proceeding."[266] California courts have held that "[a] defendant in a criminal action does not, however, have a right to take the deposition of a potential prosecution witness for discovery purposes."[267] Many states do provide for preservation depositions or "conditional examinations" in certain categories of cases with vulnerable material witnesses.[268] But conditional examinations are a narrow tool for preserving evidence in exceptional circumstances, and not used for discovery or normal litigation.

Many jurisdictions provide for criminal depositions on paper, but only after a showing of good cause (or a similarly high burden) and with court authorization.[269] This makes depositions rare in practice. For example, New Hampshire only allows depositions after a showing of necessity to preserve testimony or ensure a fair trial.[270] Texas requires an affidavit stating "good reason" for a deposition before a court will authorize one.[271] And the federal system has a statute providing for material witnesses to be arrested, detained, and held in jail (or made to post bond) "if it is shown that it may become impracticable to secure the presence of the person by subpoena."[272] This law is almost exclusively used in immigrant smuggling cases where the immigrants are held as witnesses against the accused smugglers.[273] While

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[265] Full survey on file with the authors.

[266] State v. Tucker, 861 P.2d 24, 32 (1993). *But see* Haw. R. Pen. P. 15 (establishing procedures for depositions under "special circumstances").

[267] Everett v. Gordon, 266 Cal. App. 2d 667, 671 (1968).

[268] *See, e.g.*, Cal. Pen. § Code 1335 et seq.; Okla. Stat. tit. § 22-762 ("When a material witness in any criminal case is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant or the State of Oklahoma may apply for an order that the witness be examined conditionally.").

[269] Ariz. R. Crim. P. 15.3; Neb. Rev. Stat. Ann. 29-1917(1); N.H. Rev. Stat. Ann. §§ 39, 517:13; Ohio Rev. Code Ann. 2945.50; Tex. Code Crim. P. Ann. Art. 39.02.

[270] N.H. Rev. Stat. Ann. § 517:13.

[271] Tex. Code Crim. P. Ann. Art. 39.02.

[272] 18 U.S.C. §3144

[273] *See* Sarah Cutler et al., *Jailed by the Thousands, Without Charges, to Act as Witnesses*, NY TIMES, Oct. 3, 2023 (noting that 104,000 people had been held as federal material witnesses since 2003, and that "[i]n the past 10 years, the law has been used almost exclusively to help prosecute human-smuggling cases along the Mexican border").

thousands of immigrant witnesses are kept in jail under this law, actual depositions are rare. Prosecutors require defendants to waive depositions as part of the plea deal, and prosecutors' leverage is quite strong in these cases because they can charge mandatory minimums.[274]

Only six states afford criminal defendants a broad right to depose witnesses in the case against them: Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont.[275] In North Dakota, for example, state rules authorize either party to depose any person except the defendant and shifts the burden to potential deponents to seek court intervention if they wish to avoid being deposed.[276] North Dakota even provides for a party to force compliance with a deposition request on pain of incarceration for up to six hours.[277] Missouri has similarly liberal criminal deposition laws, letting defendants use them in "any criminal case" and applying the same rules as used in civil depositions.[278] And Vermont lets the prosecutor or the defense conduct witness depositions at any time after the information or indictment is filed, subject to any protective orders the court imposes.[279] We will now examine Florida's deposition practice in more depth.

B. Witness Depositions in Florida

Florida provides a useful case study because it creates a general right to criminal depositions, those depositions happen frequently,[280] and it is a

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[274] Immigrant smuggling defendants rarely go to trial. *See id.* ("About 1 percent of the more than 30,000 human-smuggling cases over the past decade went to trial[.]"). In one author's experience (Fish), prosecutors in these cases commonly offer a non-mandatory minimum plea deal in exchange for a rapid guilty plea that waives the right to witness depositions. *See* 8 § 1324(a)(2)(B)(i)-(ii) (three- and five-year mandatory minimums).

[275] Fla. R. Crim. P. 3.220(h); Ind. Code § 35-37-4-3 (2020); Iowa R. Crim. P. 2.4, 2.5(3), 2.13; Mo. R. Crim. P. 25.12; N.D. R. Crim. P. 15; Vt. R. Crim. P. 15.

[276] N.D. R. Crim. P. 15(a).

[277] *Id.* at 15(b).

[278] Mo. R. Crim. P. 25.12. *See* H. Morley Wingle, *Depositions in Criminal Cases in Missouri*, 60 J. MO. B. 128 (2004) (providing a detailed exploration of depositions in Missouri).

[279] Vt. R. Crim. P. 15.

[280] Interview with Elizabeth Rose London, Assistant Public Defender, 6th Judicial Circuit, Florida (Dec. 13, 2023) (notes on file with the authors); Interview with James Rubin, manager, Broward County Public Defender, and Katerine Lopez, Chief Assistant, Broward County Public Defender (Jan. 4, 2024) (notes on file with the authors); E-mail from Monique Worrell, former elected State's Attorney for the Ninth Judicial Circuit, Florida (Feb. 16, 2024) (on file with the authors); Interview with Aramis Ayala, former elected State's Attorney for the Ninth Judicial Circuit, Florida (Feb. 9, 2024) (notes on file with the author). *See also* John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive*?, 16 FLA. ST. U. L. REV. 675 (1988) (gathering criticisms).

populous state.[281] When the Florida Supreme Court first issued comprehensive criminal procedure rules in 1968 it created a process for discovery depositions.[282] At that time, however, depositions required a showing of good cause.[283] In 1972 the rules were updated to provide essentially unlimited depositions without leave of the court.[284] In 1988 a coalition of law enforcement and crime victim advocates tried unsuccessfully to abolish the practice.[285] They tried and failed again a few years later.[286] Pushing back on these repeal efforts, the Florida Supreme Court's Commission on Criminal Discovery wrote that depositions "make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process."[287] The court appreciated the benefits of pretrial discovery that occurs outside of the courtroom and does not take up judges' time.[288]

Florida's criminal deposition rules mirror its civil deposition rules. Absent an explicit difference, criminal deposition procedure "shall be the same as that provided in the Florida Rules of Civil Procedure."[289] These rules ensure that depositions are easy to arrange and useful after the fact. For example, they provide that "[a]ny deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness."[290] A defendant seeking to depose a

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[281] In contrast to the other states with depositions as of right. *See* Thomas, *supra* note 263, at 592–93 ("A discovery process that might work just fine in Vermont could pose an administrative nightmare in a more populous state. Indeed, of the six states that permit defendants to depose all prosecution witnesses, four of them are primarily rural—Iowa, Missouri, North Dakota, and Vermont.").

[282] Yetter, *supra* note 280, at 680.

[283] Fla. R. Crim. P. 1.220(f) (1968).

[284] Yetter, *supra* note 280, at 681; Fla. R. Crim. P. 3.220(d) (1972).

[285] On these groups' opposition to depositions generally, *see* Meyn, *supra* note 263.

[286] Ortman, *supra* note 85, at 497-98 (2021). *See also* Howard Dimmig, *Deposition Reform: Is the Cure Worse than the Problem?*, Fla. Bar J., July–Aug. 1997, available at https://www.floridabar.org/the-florida-bar-journal/deposition-reform-is-the-cure-worse-than-the-problem/ (criticizing the 1996 amendments); Yetter, *supra* note 280 (reviewing the 1988 repeal efforts and arguments).

[287] Criminal Discovery Commission, Report of The Florida Supreme Court's Commission on Criminal Discovery (Feb. 1, 1989) (as quoted in Yetter, *supra* note 280, at 695).

[288] A later effort to abolish criminal depositions succeeded only in restricting depositions without leave of the court to felonies, and in making it more difficult to depose certain kinds of (usually non-essential) witnesses. Dimmig, *supra* note 286.

[289] Fla. R. Crim. P. 3.220(h)(1). There are some significant differences. For example, given the vulnerable nature of some victim-witness, victim-witnesses are entitled to have an advocate at their depositions. Fla. Stat. § 960.001(1)(q) (2020). Also, in a departure from civil discovery, Florida generally prohibits the defendant from being physically present at the deposition. Fla. R. Crim. P. 3.220(h)(7).

[290] Fla. R. Crim. P. 3.220(h)(1).

law enforcement officer, the most common type of witness for the prosecution,[291] need not issue a subpoena but can simply send an e-mail with five days' notice.[292] If a subpoenaed witness fails to show up, the court may hold them in contempt.[293] And their refusal to be deposed, often a good indication of their likelihood of showing up at trial, is a valuable piece of information for the parties.[294]

As with other pretrial procedures, criminal depositions can be waived during the plea negotiation process.[295] In federal immigrant smuggling cases, for instance, defendants almost always waive their right to depose detained witnesses.[296] This is because prosecutors make them waive the depositions as a condition of the plea offer. But that dynamic does not seem to prevail in Florida, where depositions happen frequently.[297] Florida prosecutors do not usually penalize defendants for conducting pretrial depositions, for example by revoking a plea bargain offer. This is because depositions have become a normal part of the courtroom culture, and prosecutors see them as providing benefits for both sides.[298] The major exception is that prosecutors will often

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[291] London Interview, *supra* note 280; Rubin and Lopez Interview, *supra* note 280.

[292] Fla. R. Crim. P. 3.220(h)(5).

[293] Fla. R. Crim. P. 3.220(h)(1).

[294] Ayala Interview, *supra* note 280. Similarly, in Vermont, another state with robust pretrial deposition rights and practice prosecutors value depositions, in part, because they give a preview of which witnesses will actually come to testify at trial. E-mail from Sarah F. George, Chittenden County State's Attorney (Feb. 4, 2024) (on file with the authors).

[295] *See* Ortman, *supra* note 83, at 495, n. 270 (2021).

[296] *See supra* notes 272-74 & accompanying text.

[297] London Interview, *supra* note 280; Rubin and Lopez Interview, *supra* note 280; Interview with Prya Murad, principal at Prya Murad Law and faculty member at the National Institute of Trial Advocacy (Feb. 4, 2024) (notes on file with the author). Similarly, in Vermont, depositions are a regular part of the practice: approximately "one or two depositions are done in 60-75% of violent felonies." George E-mail, *supra* note 294.

[298] London Interview, *supra* note 280. *But see* Rubin and Lopez Interview, *supra* note 280 (explaining that in cases with particularly vulnerable victims, such as sexual assault, prosecutors will sometimes take plea offers off the table if the defense deposes the victim, assuming the victim shows up and testifies well at the deposition). *See also* Murad Interview, *supra* note 297 (confirming that prosecutors almost never punish her clients for taking a deposition except if she seeks to depose a child victim or similarly vulnerable victim); Ayala Interview, *supra* note 280 (explaining that prosecutors sometimes offer a discount for early resolution but that depositions are a normal, accepted, and valued part of pretrial litigation with reciprocal benefits and with the possibility to make the case much stronger or weaker for either side); Worrell E-mail, *supra* note 280 (explaining that it is wrong to punish people for asserting their rights and that depositions are often needed to reveal the truth for both sides). These reciprocal benefits are not limited to Florida. Vermont is another state with a broad right to criminal depositions. According to Sarah F. George, elected State's Attorney for Chittenden County (Burlington) Vermont, depositions are "absolutely" helpful for the prosecution "in that you get a preview of what issues or weaknesses defense counsel sees in your case . . . . They are helpful in that you are able to hear your witnesses' testimony

take a plea bargain off the table if the defense lawyer deposes an especially vulnerable victim, such as a child victim in a sexual abuse case.[299]

There is also substantial variation in practice norms from one Florida county to another. For example, some counties' judges regularly allow depositions in misdemeanor cases while other counties' judge do not.[300] In addition, while some counties prefer the efficiency of remote depositions over a video link, Broward County's public defenders only take depositions in person.[301] Nevertheless, Broward County's public defenders conduct a significant number of depositions: from November 1, 2023 through January 31, 2024 that office scheduled 3,444 depositions in 1,339 cases, or an average of more than 2.5 depositions per case.[302]

Practitioners in Florida—prosecution and defense—see a lot of benefits to depositions. They help with trial preparation by previewing testimony and potential impeachment evidence.[303] They provide mitigating information for sentencing.[304] They also inform attorneys which witnesses are likely to show up at trial.[305] And all this information is useful for plea negotiations. As one public defender explained it, every trial case will definitely have depositions—sometimes one, sometimes fifteen—but not all cases with depositions end up going to trial.[306] The Broward County public defenders estimate that when depositions happen they affect a case's outcome about

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firsthand and gauge their credibility, especially as to how they respond to questioning by defense counsel. . . . All these benefits help to know whether you should resolve the case, dismiss the case, or go to trial on the case. You wouldn't necessarily know any of these things if you didn't have the depositions." George E-mail, *supra* note 294. State's Attorney George also does not have a "deposition penalty" except sometimes in cases where defendants depose a child victim in a sex case. She notes, however, that if defense counsel treat any victim badly during a deposition, the victim "may no longer support a particular resolution. We sometimes have to weigh that input differently and it may ultimately impact the outcome. It's somewhat of an indirect punishment for the defendant." *Id.*

[299] Rubin and Lopez Interview, *supra* note 280; Murad Interview, *supra* note 297.

[300] In misdemeanor cases, depositions can only be taken after a showing of good cause and a court order. Fla. R. Crim. P. 3.220(h)(1)(D). Whether or not judges grant deposition requests in misdemeanor cases seems to vary by county. *Compare* London Interview, *supra* note 280 (reporting that judges in Pinellas County rarely grant depositions in misdemeanors) *with* Rubin and Lopez Interview, *supra* note 280 (reporting that judges in Broward County regularly grant depositions in misdemeanors, while judges in Miami-Dade County do not).

[301] Rubin and Lopez Interview, *supra* note 280.

[302] E-mail from Katerine S. Lopez, Chief Assistant, Broward County Public Defender (Feb. 19, 2024) (on file with the authors).

[303] Ayala Interview, *supra* note 280 (explaining that it is hard for either side to be fully prepared for or committed to trial without depositions).

[304] Rubin and Lopez Interview, *supra* note 280.

[305] Ayala Interview, *supra* note 280; London Interview, *supra* note 280; Rubin and Lopez Interview, *supra* note 280.

[306] London Interview, *supra* note 280.

half the time.[307] A case that was going to trial might end up dismissed if a key deposition goes poorly for the prosecution, or pleading out if it goes poorly for the defense. And a former public defender in South Florida observed that a lot of strategizing goes into deciding who—and who not—to depose.[308] Depositions inform not just trial strategy and settlement negotiations, but also other litigation stages like motions to suppress evidence.[309] And depositions are such a common and important feature of litigation that some criminal defense offices use them to evaluate lawyers for promotion.[310]

Florida provides a real-world example of how pretrial litigation can provide robust adversary process. Depositions, when they actually happen, make the criminal process meaningfully adversarial, allow for confrontation of witnesses, test the strength of charges and cases, and foster more informed negotiations. In Florida, law enforcement's efforts to curtail depositions failed thanks to the value that lawyers and judges place on them. While there are expenses associated with expanding pretrial adjudication, there are also clear benefits to the administration of justice.

VI. PRELIMINARY BENCH TRIALS

A bench trial is normally an alternative to a jury trial. In most states and the federal system, a defendant can waive their right to a jury and elect instead to have a judge be the factfinder.[311] Some states let the defendant make this choice unilaterally, while others require the prosecutor's consent.[312] A defendant might choose a bench trial for a few reasons—sometimes a judge signals that they will give a lighter sentence after a bench trial, and sometimes a defense is more likely to succeed before a judge than a jury.[313] Indeed, bench trials outnumber jury trials in some jurisdictions.[314] They have all the procedural trappings and evidence rules of a normal trial, but with the judge acting as jury.

Bench trials are thus not normally thought of as pretrial adjudication—they are the trial itself. But not always. In some states, misdemeanor defendants can get both a bench trial and a jury trial in the same prosecution. This means a case is initially sent to a judge for a bench trial. Then, if the

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[307] Rubin and Lopez Interview, *supra* note 280.
[308] Murad Interview, *supra* note 297.
[309] *Id*.
[310] *Id.*
[311] Krishnamurthi, *supra* note 39, at 1637-39.
[312] *Id.*
[313] Ouziel, *supra* note 40, at 1250-55.
[314] *Id.* at 1221-36 (describing bench trials in Chicago and Philadelphia, where they make up the overwhelming majority of trials).

defendant is convicted at the bench trial, they have a right to a *de novo* jury trial.[315] If they assert this right, the jury decides the case afresh as if the bench trial never happened.[316] In such systems, bench trials function like preliminary hearings. They are in-court proceedings where the parties present testimony and arguments to a judge, and the judge decides on the charges' validity. An acquittal ends the case, while a conviction lets the defendant try again in front of a jury. Here we refer to these bench trials as "preliminary bench trials," reflecting the fact that they occur before a hypothetical jury trial.

In theory, preliminary bench trials should have much to offer our project of enhancing pretrial adjudication.[317] Bench trials, since they are full trials, should be more procedurally robust than grand juries or preliminary hearings. Trials involve a higher burden of proof: "beyond a reasonable doubt" rather than "probable cause." They also apply the rules of evidence, including the rule against hearsay testimony. But, as we shall see, in practice preliminary bench trials are not always models of due process.

In this Part, we will contrast two different real-world examples of preliminary bench trials. First, we will discuss their use in municipal courts. These are court systems operated by city governments that use preliminary bench trials to decide misdemeanor cases. Municipal courts have exceptionally summary procedural rules. They commonly lack lawyers, operate in a highly informal fashion, and function mostly as a barrier between misdemeanor defendants and real jury trials.[318] Second, we will discuss North Carolina's more robust system of preliminary bench trials. In North Carolina, preliminary bench trials are treated as normal bench trials. There are prosecutors, defense lawyers, and professional judges, the rules of evidence apply, and the burden of proof is beyond a reasonable doubt.[319]

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[315] *See* v David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Nova Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 383 (1992).

[316] *See* Colten v. Kentucky, 407 U.S. 104, 113 (1972) ("[N]either the judge nor jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance.").

[317] *Cf.* Schulhofer, *supra* note 80 (proposing a system where cases are processed through bench trials rather than guilty pleas).

[318] *See* Harris, *supra* note 320 at 383-90; Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 985-90, 1012-14 (2021); Samuel P. Newton et al., No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts, 2012 UTAH ONLAW 27, 60-63 (2012); Bairefoot et al v. City of Beaufort et al., 9 17-cv-2759-RMG (D. South Carolina) (complaint Oct. 21, 2017) (class action lawsuit brought by ACLU against a South Carolina city that denies defendants attorneys in its municipal court system).

[319] *See, e.g.*, State v. Jones, 816 S.E.2d 921, 925 (NC Ct. App. 2018).

A. Summary Bench Trials in Municipal Courts

Municipal courts are low-level judicial systems run by cities and towns. They normally function as stand-alone courts, and not as part of the larger state judiciary.[320] Municipal courts have criminal jurisdiction over misdemeanors and local ordinance violations, and collectively they process over three and a half million criminal cases per year.[321] In her seminal article describing municipal court systems in the United States, Professor Alexandra Natapoff identified over 7,500 of them operating in 30 different states.[322]

Misdemeanor prosecutions in municipal courts are quite informal when compared to normal criminal courts. Municipal courts do not conduct jury trials, but instead process their criminal cases through bench trials.[323] The judges who preside at these bench trials are not necessarily lawyers—most states with municipal court systems allow layperson judges.[324] Nor are the prosecutors necessarily lawyers: several states allow the arresting police officers to act as prosecutors.[325] It is also common to have cases prosecuted by part-time prosecutors who have other municipal jobs like judge or city counselor.[326] And there are usually no court-appointed defense lawyers.[327] Indeed, in many municipal courts people are convicted of misdemeanors without a single lawyer present in the courtroom.[328] The proceedings themselves are also quite summary. There is ordinarily no official transcript or other record of a municipal court bench trial.[329] Judges ignore the rules of evidence and operate through fast-paced, informal court procedures.[330] Indeed, given the frequent absence of attorneys, it is difficult to pursue legal arguments at all in these courts.[331] There is no appellate review of municipal courts' legal rulings, because the appeals become de novo jury trials.[332] And the bureaucrats who operate these court systems are preoccupied with using them to bring money into the municipal coffers, generally through fines levied on the defendants.[333] These court systems thus, for the most part, lack

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[320] Natapoff, *supra* note 323, at 974, 1056-60.
[321] *Id.* at 966.
[322] *Id.*
[323] *Id.* at 997-99.
[324] *Id.* at 1056-60.
[325] *Id.* at 1002.
[326] *Id.* at 968.
[327] *Id.*
[328] *Id.* at 985, 1002-03.
[329] *Id.* at 1012.
[330] *Id.* at 1012-14; Harris, *supra* note 320 at 418-19.
[331] Newton et al., *supra* note 323, at 60-63.
[332] Natapoff, *supra* note 323, at 1003-05.
[333] *Id.* at 982-91.

even the basic procedural safeguards of ordinary criminal courts.[334] Several scholars have criticized municipal courts as lawless and corrupt, and have called for their abolition.[335]

Appellate review for municipal courts happens through de novo jury trials. This means that if a defendant loses their bench trial in a municipal court, they can file an appeal and receive a full jury trial in the ordinary state court system. In a sense, then, a municipal court bench trial could be seen as a pretrial hearing before the ultimate jury trial in a higher court. But this is not how it works in practice. Very few misdemeanor convictions in these courts are ever appealed.[336] A variety of factors including high guilty plea rates, lack of counsel, short sentence duration, and the hassle of the misdemeanor process prevent such appeals from happening.[337] And even though bench trials are highly informal, they do not necessarily occur at high rates. For example, in Salt Lake City, Utah's municipal court system, called "Justice Court," the bench trial rate is only 2.3 percent.[338] The de novo appeal procedure is thus used rarely in practice. But it does provide cover for municipal court systems' lawlessness. In the 1976 case *North v. Russell*, the Supreme Court upheld this kind of system by ruling that a trial before a non-lawyer judge (in that case a coal miner with a high school education and no legal training) did not violate the Due Process Clause since the defendant had the right to a trial de novo before a lawyer judge.[339] The de novo appeal process thus formally legitimizes a system that functionally lacks basic due process.

Municipal courts represent, in a sense, the inverse of our thesis. We argue that an expansion of pretrial procedure can bring meaningful adversary process back to the criminal justice system. But in municipal courts, informal pretrial procedures end up removing even basic safeguards like defense

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[334] Professor Natapoff's description of Seattle's municipal courts suggests that it may be an exception. It seems embrace more formality and robust process, akin to North Carolina's preliminary bench trial system. *Id.* at 986.

[335] *See, e.g.*, Harris, *supra* note 320, at 418-19, 422-24; Newton et al., *supra* note 323, at 66-67; Brendan Roediger, *Abolish Municipal Courts: A Response To Professor Natapoff*, 134 HARV. L. REV. F. 213 (2021); Shaun Ossei-Owusu, *Kangaroo Courts*, 134 HARV. L. REV. F. 200 (2021).

[336] *See* Natapoff, *supra* note 323, at 1005; Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1939-41 (2019) (observing that the rate of appeals in misdemeanor cases is very low, and estimating it at about one appeal for every 1,250 convictions).

[337] *See* King & Heise, *supra* note 343, at 1944-48; Harris, *supra* note 320 at 403-08.

[338] HESSICK, *supra* note 5, at 185. Hessick also notes that the dismissal rate in Justice Court is 45.6 percent, which is higher than the baseline misdemeanor dismissal rate in Utah's district courts of 35 percent. *Id.* Hessick interviewed local public defenders who attributed this higher dismissal rate to an increased risk of cases going to bench trial. *Id.*

[339] North v. Russell, 427 U.S. 328 (1976).

lawyers and legally trained judges. We turn now to a more helpful case study: a state where preliminary bench trials are treated as real trials.

B. Preliminary Bench Trials in North Carolina

In North Carolina, all misdemeanor cases are initially set for a preliminary bench trial before a district court judge.[340] If the defendant loses this bench trial, they have the right to take the case to superior court for a full jury trial. Unlike in municipal court systems, North Carolina's misdemeanor bench trials are real trials.[341] The judges are lawyers. Prosecutors and defense counsel are present. The rules of evidence apply, including the rule against hearsay testimony. Legal arguments such as suppression motions are given a hearing.[342] However, since the only form of appeal is a de novo trial, district judges' rulings are not subject to traditional appellate review.[343] And no official transcript of the bench trial is provided by the court (although the lawyers can create their own).[344] Beyond those two limitations, North Carolina's preliminary bench trials are the same as ordinary bench trials. North Carolina is not the only jurisdiction to use preliminary bench trials with de novo appeals. Maryland has a similar system, as did Massachusetts prior to 1994, and as have several other states either currently or previously.[345] But North Carolina is our focus.

To get a better understanding of how North Carolina's preliminary bench trials work, we interviewed attorney Daniel Spiegel.[346] Mr. Spiegel practiced as both a prosecutor and a defense attorney in North Carolina. Most relevant for our inquiry, he worked as a misdemeanor public defender in Charlotte from 2010 to 2013. He confirmed that bench trials were very common in Charlotte's misdemeanor courts. Cases he took to bench trials included drunk

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[340] N.C. Gen. Stat. Ann. §7A-272 ("[T]he district court has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony"); N.C. Gen. Stat. Ann. §15A-1201 ("In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court").

[341] Interview with Daniel Spiegel, Assistant Professor of Government, University of North Carolina (Jan. 22, 2024) (noting that in North Carolina misdemeanor bench trials all normal evidence rules apply, the standard of proof is beyond a reasonable doubt, and the proceedings are treated as a normal trial).

[342] *Id.* (suppression hearings are held concurrent with bench trials).

[343] *Id.*; *see also* Binny Miller, *Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems Misdemeanor Two-Tier Court System*, 63 ST. LOUIS U. L.J. (2019) (describing and criticizing the lack of meaningful review in de novo appeal systems).

[344] Spiegel Interview, *supra* note 348.

[345] Miller, *supra* note 350 (describing systems in Maryland, Massachusetts, and Missouri).

[346] Spiegel Interview, *supra* note 348.

driving charges, marijuana charges, larceny charges, assault charges, and others. These bench trials also happen relatively quickly. For most misdemeanor cases, they involve only one or two government witnesses (usually police officers) and take less than half of a court day. Most bench trials are over in a single day, although a small number of more complicated cases take more time. If the defense lawyer has a motion to argue (such as a Fourth Amendment issue) this is heard at the same time as the bench trial.[347] And the district court judges are incentivized to give relatively light sentences compared to what the defendant is likely to get on appeal. This encourages defendants to accept the outcome of the bench trial and not seek a *de novo* jury trial.[348] The relatively quick nature of these bench trials has allowed a culture where they are accepted as a regular occurrence. Prosecutors can technically circumvent the preliminary bench trial by presenting a case to a grand jury and sending it straight to superior court.[349] But this grand jury process is (perhaps counterintuitively) more burdensome than a quick bench trial, so prosecutors rarely exercise this workaround.[350]

North Carolina provides an excellent illustration of pretrial adjudication's benefits. The state has created a pretrial process in which defendants (in misdemeanor cases) can access meaningful adversary adjudication. Bench trials happen there with some frequency.[351] And the credible threat of a bench trial provides other system benefits, like more opportunities to present legal arguments to a judge and more rigorous case screening by prosecutors. Several prominent criminal justice scholars have called for the simplification and streamlining of trials, arguing that if trials are quicker they are more likely to actually happen.[352] It seems that North Carolina has pursued this vision in a unique way. Rather than streamlining jury trials, North Carolina

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[347] The same practice exists in San Francisco misdemeanor cases, *see* Section VII.B, *infra*.

[348] The flip side of this dynamic is that the judges on appeal have an incentive to impose a harsher sentence to discourage appeals. *See* Binny, *supra* note 350, at 198 (describing a Maryland case where the judge increased a sentence from 60 days to eight months to punish a defendant for bringing a de novo appeal). This is quite similar to the operational logic of the plea bargain system, just with an appeal tax instead of a trial tax. The major difference is that a defendant deterred by the appeal tax has received a bench trial, whereas a defendant who pleads guilty to avoid the trial tax has not.

[349] G.S. 7A-271(a).

[350] Spiegel Interview, *supra* note 348; JOHN RUBIN ET AL., 1 NORTH CAROLINA DEFENDER MANUAL: PRETRIAL AT 8.3(C) (2013) ("If the prosecution wants to charge a new misdemeanor, it must start again in district court except in the rare circumstance in which the grand jury initiates a misdemeanor prosecution by presentment in superior court.").

[351] *See* North Carolina Judicial Branch, Caseload Dispositions, available at https://data.nccourts.gov/explore/dataset/caseload-disposition (showing 23,546 misdemeanor bench trials in North Carolina for 2023-2024).

[352] *See, e.g.*, Alschuler, *supra* note 80; Schulhofer, *supra* note 80.

has created a pretrial system of bench trials.

VII. SUPPRESSION HEARINGS

Motions to suppress evidence are one of the most-commonly-filed pre-trial motions in criminal cases.[353] They often lead to adversarial hearings before a judge featuring live confrontation of witnesses, usually police officers. The official purpose of these hearings is to decide whether evidence will be excluded from the trial. But more broadly, hearings on suppression motions are also an important form of pre-trial adjudication. They serve not only the immediate goal of seeking to suppress the evidence, but also the broader goals of previewing the government's case, permitting in-court advocacy, and empowering judges in the criminal process. This Part discusses the use of suppression hearings as pretrial adjudication. It also explores two illustrations, one from San Francisco's misdemeanor docket and the other from Washington State, of how procedural rules and local practice culture can strengthen or diminish the value of these hearings.

A. The Adjudicative Value of Suppression Hearings

Motions to suppress argue that a government actor obtained evidence in violation of the defendant's constitutional rights. As a remedy, these motions seek exclusion of evidence derived from the challenged search or interview. Suppression motions can seek to exclude physical evidence, a defendant's inculpatory statements, and even observations of law enforcement officers.[354] Let's consider, for example, a common misdemeanor charge in many jurisdictions: driving under the influence of alcohol (DUI). Most such cases commence with a traffic stop, followed by questioning, then field sobriety tests, then some kind of chemical test (breath, blood, or both), followed by arrest. If a defendant in such a case files a motion to suppress, they might argue the initial traffic stop was illegal, in which case a successful motion could result in all subsequent parts of the investigation being inadmissible. Or the defendant might argue that some subsequent search, for example the blood draw, was illegal, in which case a win would simply mean the prosecution could not introduce the blood evidence.

Depending on the particulars of the motion, the prosecution may need to call one or numerous live witnesses for a hearing. For instance, it may need

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[353] *See, e.g.*, *Steps in the Federal Criminal Process: Pre-Trial Motions*, US Dept. of Justice, Office of the US Attorneys, available at https://www.justice.gov/usao/justice-101/pretrial-motions (listing suppression motions as one of just three examples of "common pre-trial motions").

[354] Miranda v. Arizona, 384 U.S. 436 (1966).

to call multiple witnesses in cases involving complex investigations where several officers relied on each other's work to justify a detention, arrest, and search.[355] In our DUI hypothetical, a suppression motion challenging the traffic stop would require calling the arresting officer, while a motion based on the blood draw might require the phlebotomist. These witnesses are questioned under oath by both parties about how the evidence was obtained.

Hearings on suppression motions can be a significant step in pre-trial adjudication. They create a forum for adversary advocacy in open court, with both sets of lawyers present, questioning witnesses, and arguing before a judge. They give the defense an opportunity to hear police officers' testimony about how evidence was gathered in the case. They also let the defense cross-examine those officers to challenge the legality of their actions. This provides a clearer picture of how the police decided that the defendant had committed a crime. It also locks the witnesses into specific details, and lets the lawyers evaluate their credibility face to face. In the DUI hypothetical, for example, a defense attorney at a suppression hearing might cross-examine the officer about how the defendant was driving or how she performed on field sobriety tests. If the motion fails and the case proceeds to trial, the officer would be locked into their prior sworn testimony.

The information revealed in a suppression hearing helps both sides evaluate the strengths and weaknesses of their case ahead of trial. If the government's case looks worse after a hearing, this might lead to a dismissal or more favorable plea terms. Similarly, judges can use their power over suppression hearings to encourage prosecutors to settle cases.[356] Suppression hearings can also preserve rule-of-law values by providing a forum for the judge to ensure the government's investigation was lawful. And they impose significant procedural burdens on both prosecutors and the court. The prosecutor needs to arrange for all the relevant witnesses to be available to testify. Courts need to assign judges, court staff, and courtrooms to conduct these hearings. Suppression hearings thus slow down the processing of cases and provide defendants with further negotiating leverage.

The timing of a suppression hearing matters a great deal. Depending on local rules and the case management practices of the court, a motion to suppress could potentially be held at any point between arraignment and trial. For example, in California a court can hear suppression motions concurrent with trial, at a standalone "special" suppression hearing, or concurrent with a

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[355] Multiple witnesses might even be called in simpler cases. *See, e.g.*, U.S. v. Russell, 664 F.3d 1279 (9th Cir. 2012).

[356] *See* Nancy King & Ronald Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016) (observing that judges often participate directly in plea negotiations, using their power to encourage the parties to settle).

preliminary hearing.[357] Holding a suppression hearing concurrent with a preliminary hearing may be more efficient for prosecutors and the court, since it avoids duplication.[358] Holding a suppression hearing concurrent with trial essentially requires the defense to reject all plea offers if they want to challenge the legality of the evidence. This also prevents a suppression hearing from being used to preview the evidence or influence the plea-bargaining process.[359] Standalone suppression hearings impose a greater burden on the prosecutor and the court, and ensure the defense will benefit from the hearing prior to trial. The more suppression hearings are practically available to the defense, the more value they hold for pretrial adjudication.

B. Suppression Hearings in San Francisco and Washington

As is often the case in criminal law, local courthouse culture can matter as much or more than case law or statutes.[360] This section presents two examples of local practices at opposite ends of the pretrial adjudication spectrum. San Francisco County's Superior Court makes it all but impossible for motions to suppress to get a hearing ahead of trial in misdemeanor cases. Washington State courts, on the other hand, force prosecutors to affirmatively prove ahead of trial that certain categories of evidence are admissible.

1. San Francisco: Misdemeanor suppression hearings concurrent with trials

In San Francisco Superior Court, the judges' long-standing practice is to deny suppression hearings until the case is sent to a courtroom for trial.[361] This means that to argue that evidence should be excluded from trial, a defendant must reject all plea bargain offers and actually go to trial. This arrangement nearly eliminates the adjudicative value of a suppression

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[357] Cal. Pen. Code § 1538.5(f).

[358] Holding both hearings at once can be advantageous to the defense as well. It could, for example, avoid punitive outcomes if the prosecution or the court seeks to punish defendants for increasing the work burden, or it could broaden the scope of permissible questioning at a preliminary hearing to include issues not related to probable cause but rather to the detention, arrest, search, and seizure.

[359] In the DUI hypothetical, if the defense is forced to wait until trial to do the motion to suppress hearing, their trial strategy cannot be informed by the arresting officer's testimony about field sobriety tests, for example, nor would they have time to obtain a transcript of the suppression hearing for impeachment purposes.

[360] *See, e.g.*, *Sidestepping Justice? Adjournments in Contemplation of Dismissal in Misdemeanor Court*, Alissa Pollitz Worden et al., 76 ALB. L. REV. 1713, n.116 (2013) (gathering sources on the impact of local courthouse culture on sentencing).

[361] As discussed in Part IV.B, this is also the practice in North Carolina's misdemeanor bench trial system.

hearing. Because the vast majority of cases do not ever make it to trial, almost no defendants will get the benefit of a suppression hearing.

When one of the authors (Boudin) was defending misdemeanor cases in San Francisco he represented a young man accused of DUI.[362] Because police found the defendant asleep behind the wheel of his parked car, and because the phlebotomist who poked him at least four times with the needle while he was strapped to a gurney and refusing consent was fired shortly thereafter, there was a strong motion to suppress evidence on the grounds that his arrest and blood draw were unlawful.[363] However, it was not a good trial case for other reasons. We filed a motion to suppress shortly after arraignment but the court, consistent with local practice, refused to offer a hearing prior to trial.[364] We set the case for trial, simply in the hopes of obtaining a suppression hearing.[365] During the 30 day statutory period allowed for speedy trial,[366] the defendant violated one of the terms of his pretrial release and the judge threatened to remand him into custody if he did not accept the prosecutor's no jail time plea deal on the spot.[367] The defendant pled and waived not only his right to trial but also his right to a suppression hearing.[368] This case illustrates how denying a pretrial suppression hearing effectively prevents a defendant from asserting their constitutional rights.

When a suppression hearing is held in advance of trial, it can provide robust pretrial adjudication. But such a hearing cannot provide a meaningful preview of the evidence if it is held at the same time as the trial itself. The defense lawyer is also deprived of the ability to get an official transcript of the testimony, which can be invaluable for cross-examination or impeachment at trial. And a suppression hearing held during the trial cannot realistically influence the plea negotiation process, since by the time trial has arrived that process will be over.

2. Washington State: Automatic *Miranda* hearings initiated by the prosecutor

Washington State offers a stark contrast to San Francisco. In Washington State there is a rule of court that shifts the burden to the prosecution to prove the admissibility of any statement made by the defendant that the prosecution seeks to admit at trial.[369] Rule of Court 3.5, first adopted in 1973, creates a

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[362] Contemporaneous notes and other case details on file with the author.
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] Ca. Pen. Code § 1382(a)(3).
[367] Contemporaneous notes and other case details on file with the author.
[368] *Id.*
[369] Washington State Rule of Criminal Court 3.5.

procedure for determining the admissibility of any inculpatory statement by a defendant.[370] The court "shall hold" such a hearing and a defendant "may, but need not, testify at the hearing."[371] If the defendant does choose to testify at the hearing, they do not waive their right to remain silent during the trial and no mention of the admissibility hearing or their testimony can be made to the jury.[372] The rule further requires that the court provide a recording or transcription of the hearing, and make a detailed written ruling on the issues.[373]

This rule, and the fact that is actually enforced and litigated as a matter of practice,[374] makes pretrial adjudication in Washington considerably stronger. Because the rule automatically requires such a hearing, even defendants with incompetent or overwhelmed defense attorneys will still receive a hearing if no motion is filed. The defense cannot unintentionally forfeit the right to such a hearing, because it is the prosecution's burden to prove admissibility of any statements it seeks to introduce. Indeed, the defense gets the benefit of these hearings even regarding statements whose admissibility is not being contested.[375] And in contrast to San Francisco's practice, which makes it virtually impossible for the parties to obtain transcripts of suppression hearings ahead of trial, Washington's rule requires that recordings or transcripts be made available.

These two jurisdictions illustrate how local practices can either enhance or undermine pretrial adjudication. Pretrial adjudication is only valuable if it actually happens before trial. If it is rolled into the trial process, as in San Francisco, then we are back in a nonadjudicative guilty plea system. On the other hand, if pretrial adjudication is made automatic as in Washington, then

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https://www.courts.wa.gov/court_rules/pdf/CrR/SUP_CrR_03_05_00.pdf

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] *Id.*

[374] As one, admittedly imperfect, heuristic to measure the extent to which the hearings that Rule 3.5 provides for are actually being litigated, compare the number of citing cases to each of several rules of criminal procedure: 3.5 (the rule at issue here) has 1,627 citing cases. By contrast Rule 3.6 (Suppression hearings, duty of court) has 1,457, Rule 4.1 (arraignment) has 131, Rule 4.2 (pleas) has 940, Rule 4.4 (severance of offenses and defendants) has 388, and Rule 4.7 (discovery) has 729.

[375] *See, e.g.*, Eaglespeaker v. Connell, No. C22-5151-MJP-SKV, 2022 WL 17569728, at *2 (W.D. Wash. Nov. 2, 2022), report and recommendation adopted, No. C22-5151-MJP-SKV, 2022 WL 17551141 (W.D. Wash. Dec. 9, 2022) ("At [the close of the CrR 3.5 hearing] the defense did not object to the admission of the statements that Eaglespeaker made at the time of his arrest").

it provides a more meaningful check. It gives defense lawyers an automatic opportunity to see and challenge the government's evidence prior to the trial, and gives judges an automatic opportunity to rule on legal arguments and screen out bad charges.

VIII. PRETRIAL ADJUDICATION IN PRACTICE

Our case studies illustrate that meaningful pretrial adjudication is not only possible, but also that it exists in at least a few states. And where these more robust procedures exist, not just on paper but also in practice, they make the criminal justice system more fair, more lawful, and more accurate. To be clear, we are not arguing that any of these proceedings can or should replace jury trials. But given the long-standing and apparently immutable reality that jury trials are going the way of the dodo, more robust pretrial process is preferable to a system of "meet 'em and plead 'em."[376] Pretrial adjudication can slow down case processing. It can give defendants the chance to appear in court and confront the evidence against them. It can increase the quality of evidence (or at least root out false, erroneous, or illegally obtained evidence), bring the law to bear on case outcomes, and facilitate intensive case screening by judges and lawyers.

But an important question remains: how do we ensure that the robust versions of these proceedings actually happen? For every state we highlighted as a model of pretrial criminal procedure, there are many more states where such procedure is nonexistent, is typically waived, or is rendered meaningless through lax evidentiary or procedural rules. The specific hearings we have emphasized are like islands of pretrial adjudication in a roaring river of case-processing efficiency. We should study these islands to figure out why they are not swept away.

The goal is to create a norm where these kinds of hearings happen regularly, if not in every case. But for pretrial adjudication to succeed, it must survive pressure from powerful system insiders who want to sacrifice process for efficiency.[377] Even when a strong rule exists on paper by statute, rule, or court order, there are myriad ways it can be rendered meaningless or as rare

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[376] CeCelia Valentine, *Meet 'Em and Plead 'Em: Is This The Best Practice?* 37 CHAMPION 18 (2013).

[377] Justice system stakeholders including courts, prosecutors, and defense attorneys often prefer the process to move quickly and efficiently. *See, e.g.,* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 78 n.75 (1993) (listing 11 studies that describe cooperative relationships between adversarial stakeholders that occur at the expense of the defendant and the public interest in process).

as a jury trial.[378] The procedures we highlighted are common in specific jurisdictions because those jurisdictions have successfully navigated three obstacles: (1) Lax procedural and evidentiary rules that render pretrial adjudication ineffectual. (2) Summary workarounds that let prosecutors avoid robust pretrial adjudication. (3) Plea bargain practice that threatens to swallow the pretrial process just as it does the trial.

In many jurisdictions and for many pretrial hearings, lax procedural and evidentiary rules prevent meaningful adversary process. For example, grand juries cannot check the power of the state or the veracity of accusations where, as in most states, there are no limits on the use of hearsay or illegal evidence, no one other than the prosecutor appears, and there is no mechanism for review.[379] Similarly, preliminary hearings do not really help with case screening if prosecutors can use multiple levels of hearsay to shield all the potential trial witnesses from testifying.[380] And preliminary bench trials actually undermine due process where, as in many municipal courts, they lack even the trappings of legality like professional judges, defense lawyers, or rules of evidence.[381] Just creating pretrial proceedings like these is insufficient. They must be implemented in a way that gives them actual power.

Procedural hydraulics create a second obstacle to robust pretrial adjudication. When procedural rules allow for multiple pathways and one option is more burdensome, prosecutors will generally opt for the less exacting alternative. Though the pathways are often complex, the basic incentives are straightforward. In most jurisdictions grand juries are a less burdensome path to establish probable cause than preliminary hearings. Thus, to the extent prosecutors are given a choice, they opt for grand juries. California exhibits a unique reversal of this dynamic, because it has unusually burdensome grand jury procedures.[382] California is thus an outlier jurisdiction where preliminary hearings occur in high volume and actually have adjudicative value.[383] Similarly, in North Carolina prosecutors could send misdemeanor cases straight to superior court with a grand jury procedure, but generally opt instead for misdemeanor bench trials in district court.[384] While the particular legal history and practice culture varies significantly between jurisdictions, the key is to design pretrial adjudication in ways that avoid prosecutors substituting less robust alternatives as a

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[378] *See, e.g.*, *supra*, Part VII(B)(1) discussing the limitations on obtaining a hearing on a motion to suppress evidence in San Francisco's misdemeanor docket.

[379] *See supra* Section III.B.

[380] *See supra* Section IV.A.

[381] *Supra* Section VI.A.

[382] *Supra* Section II.C.

[383] *Supra* Part III(B).

[384] *Supra* Part VI(B).

bypass. Having multiple pathways that prosecutors can choose from, as in California and North Carolina, is not fatal as long as there are robust rules in both alternatives.

Finally, perhaps the most intense and constant pressure on islands of pretrial adjudication is the plea bargain market. In every jurisdiction there is a risk that any procedural right, no matter how robust if exercised, will be systematically waived in plea deals. Theoretically any of the procedures outlined in this article could be swallowed up by the plea bargain system. Pressure from judges, prosecutors, or even defense attorneys can leave defendants, especially those in pretrial detention, unable to avail themselves of pretrial procedure. In Florida, for example, prosecutors and defense attorneys from across the state agreed that asserting the right to depose certain vulnerable victims, such as in child sex cases, would generally result in withdrawal of any plea offer.[385] Thus, there is an understanding and a culture of not deposing these victims except in cases that are all but certain to go to trial.[386] Similarly, in San Francisco misdemeanor court, obtaining a hearing on a motion to suppress evidence generally requires actually going to trial.[387] This effectively removes suppression hearings from most defendants' reach.

While there is always a risk of pressure to plea swallowing pretrial adjudication, there are various factors that can safeguard against this outcome on a system-wide basis. First, all the procedures discussed in this article are substantially less burdensome than jury trials. Even California's preliminary hearings and North Carolina's bench trials regularly happen in a single court session. The system should thus be much more able to accommodate these procedures than full jury trials. Second, even after these procedures occur, the prosecutor and the court still have an incentive to offer a deal to avoid trial. Threatening to pull or worsen a plea offer is thus not always credible, particularly where there is a widespread practice of asserting procedural rights. A prosecutor may threaten to pull the offer if the defendant does a deposition, but after the deposition the prosecutor still wants to incentivize a guilty plea. Third, and related, often meaningful pretrial adjudication weakens the government's case resulting in dismissal or less punitive plea deals. For example, a prosecutor can threaten to pull a plea deal if a defendant insists on deposing a victim, but if the victim does not show up there is a good chance the case will get dismissed entirely.[388] Fourth, prosecutors and judges

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[385] London Interview, *supra* note 280; Rubin and Lopez Interview, *supra* note 280; Murad Interview, *supra* note 297; Ayala Interview, *supra* note 280.

[386] *Id.*

[387] *Supra* Part VII.B.

[388] This is not just hypothetical, but an actual example used by a former elected prosecutor describing the benefits of depositions for the prosecution. Ayala Interview, *supra* note 280.

actually do find some of these procedures useful. Prosecutors would much rather learn via a deposition,[389] grand jury, preliminary hearing, or suppression hearing that an investigating officer is "testilying,"[390] than end up embarrassed in front of a jury. Trial judges, for their part, would also prefer that the parties are well prepared to present evidence at a trial, which is impossible if there has been no pretrial discovery or adjudication of legal issues. And judges and prosecutors, to the extent their job is to sort innocent defendants from guilty ones, have an interest in the case screening function that these procedures serve.

Robust pretrial adjudication can significantly improve a system of pleas. If every case ended up in front of a jury, pretrial adjudication would mostly just help the parties in preparing for trial. In a system where almost no cases end up in front of a jury, however, pretrial adjudication is imperative to preserve the rule of law and the adversarial system.[391] But this does not mean these hearings need to happen in every case. Even in an ideal system with lots of pretrial adjudication, hearings will sometimes get waived in the defendant's best interest. For example, if a defendant is in custody they may want to waive a preliminary proceeding to reduce their time jail. Indeed, the more pretrial adjudication that is readily available, the more easily a defendant can choose which procedures are mostly likely to be productive and which can be waived for a benefit.[392] Frequent pretrial hearings can improve the system even if they don't happen in every case.

Where pretrial adjudication happens regularly, it not only informs decision-making by the parties, it also empowers judges to impact case outcomes. Judges can use their leverage over the hearings to push the parties towards reasonable plea agreements.[393] Judges can also screen out unsupported charges or narrow the scope of evidence. The very fact that these procedures are available, and the credible threat that they might happen, helps

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[389] Worrell E-mail, *supra* note 280.

[390] Joseph Goldstein, *Police "Testilying" Remains a Problem. Here Is How the Criminal Justice System Could Reduce It,* N.Y. TIMES (Mar. 22, 2018), *available at* https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html.

[391] It is unlikely that expanding pretrial adjudication would meaningfully decrease the paltry number of cases that go to trial now. However, to the extent pretrial adjudication provides prosecutors with reason to dismiss or substantially improve a plea deal, that is likely a net positive for the system. To the extent pretrial adjudication provides the defense with a reason to avoid the risk of trial, that is also likely a net positive. Civil litigation operates by the same logic: more information, earlier, is better.

[392] *Cf.* Rappaport, *supra* note 87.

[393] For example, in San Francisco Superior Court, the judge assigned to handle felony settlement conferences is often the same judge assigned to rule on motions to set aside informations after a preliminary hearing. Some judges will intentionally withhold ruling on a dispositive motion for extended periods of time so that there is risk and leverage to facilitate settlement.

rejudicialize a process that is currently dominated by prosecutors. It also empowers defense lawyers because it allows them to make arguments before a neutral tribunal, not just directly to the prosecutor. If pretrial adjudication becomes widespread, defendants can have their day in court again.

CONCLUSION

The United States has an adversary criminal justice system with no adversary criminal justice. It is a strange paradox. Our system's theory of legitimacy is that defendants are given rights and process to contest the government's charges in open court. But that doesn't actually happen. Almost everyone pleads guilty without meaningful adversary proceedings, because the system is designed to make them. So what do you do when a system's legitimizing idea has been abandoned by reality? It does not seem like jury trials are coming back any time soon. And the main reform proposals—trying to make guilty pleas transparent, treating prosecutors as adjudicators, etc.—adopt a more inquisitorial vision of legitimacy. Give up on fighting your case in open court. Your lot is to be processed into jail by a well-meaning prosecution bureaucracy. But don't worry, your lawyer will explain very clearly why pleading guilty is your best option.

We are not ready to give up on the adversary system. If the United States is going to have criminal courts, they should do more than just process guilty pleas. They should hold the occasional hearing where evidence is presented, arguments are made, and legal questions are decided. This does happen in the civil justice system. Civil procedure has largely abandoned trials too. But it has replaced them with extensive pretrial litigation that serves most of the same functions as trials. Can criminal procedure replicate this move? Civil defendants do, admittedly, have better lobbyists than criminal defendants. But there is some hope. Thanks to the laboratories of experimentation amongst the fifty states, there are real-world models of pretrial adjudication at hand. These models have demonstrated that grand juries don't have to be rubber stamps, that criminal discovery can involve depositions, that preliminary hearings can be like mini-trials, and that bench trials can be like preliminary hearings. These procedures, and others like them, could provide the blueprint for a program of reform. It is possible for the criminal justice system to value more than just efficiency.

APPENDIX A: GRAND JURY PROCEEDINGS					
State	SOURCE OF AUTHORITY		PROCEDURE		
	Statute or Court Rule	Case Law	Hearsay Admissibility	Illegally Obtained Evidence (IOE) Admissibility	Challenging the Indictment for Sufficiency & Competency of Evidence
Federal	Fed. R. Evid. 1101 (hearsay)	U.S. v. Calandra, 414 U.S. 338, 345 (1974) (IOE); Costello v. U.S., 350 U.S. 359, 363 (1956) (hearsay); United States v. Blue, 384 U.S. 251, 255 (1966) (IOE); Midland Asphalt Corp. v. U.S., 489 U.S. 794, 802 (1989) (challenge)	Admissible.	Admissible.	Not challengeable.[394]
AL	Ala. Code 1975 § 12-16-200 (hearsay); Ala. R. Crim. P. 12.8 (hearsay and IOE)	Coral v. State, 628 So.2d 954 (Ala. Crim. App.1992) (hearsay); Wabbington v. State, 446 So.2d 665, 667 (1983) (challenge)	Admissible.	Admissible.	"Ordinarily" not challengeable.
AK	Alaska R. Crim. Proc. 6 (hearsay)	Mohn v. State, 584 P.2d 40, 42 (Alaska 1978) (Court left IOE unaddressed); Nelson v. State, 628 P.2d 884, 890 (Alaska 1981) (challenge)	Admissible w/ compelling justification or from child victim.	Unclear.	Challengeable.
AZ		Franzi v. Superior Court of Arizona In and For Pima County, 139 Ariz. 556, 679 (1984) (hearsay); State v. Cousino, 18 Ariz.App. 158, 160 (1972) (hearsay); State ex rel. Berger v. Myers, 495 P.2d 844, 846 (1972) (IOE); State v. Jacobson, 22 Ariz. App. 128, 130 (1974) (challenge)	Admissible.	Admissible.	Not challengeable.[395]

[394] See U.S. v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (Conviction by petit jury renders errors at the grand jury stage harmless and therefore not amenable to post-conviction review).

[395] A defendant may challenge an indictment for denial of a substantial procedural right or insufficient number of qualified grand jurors, Ariz. R. Crim. P. 12.9, or if the allegations charged in the indictment do not constitute a crime. Mejak v. Granville, 136 P.3d 874, 875 (2006).

AR	Ark. R. Evid. 1101 (hearsay); Ark. Code Ann. § 16-85-706 (challenge)	McDonald v. State, 155 Ark. 142, 244 S.W. 20, 22 (1922) (IOE)	Admissible.	Admissible.[396]	Not challengeable.
CA	Cal. Pen. Code § 939.6 (hearsay & IOE); Cal. Pen. Code § 938.1. (challenge)		Inadmissible except for establishing foundation through a peace officer.	Inadmissible	Challengeable.
CO	CRE 1101 (hearsay)	People ex rel. Dunbar v. Dist. Ct. In and For Second Jud. Dist., 179 Colo. 321, 323 (1972) (IOE)	Admissible.	Admissible.[397]	Challengeable.[398]
CT		State v. Fasset, 16 Conn. 457, 471-72 (1844) (hearsay); State v. Avcollie, 188 Conn. 626, 631, 453 A.2d 418, 421 (1982) (IOE); State v. McGann, 199 Conn. 163, 168, 506 A.2d 109, 112 (1986). (challenge)	Admissible.	Admissible.	Not challengeable.
DE	Del. R. Evid. 1101 (hearsay)	State v. Jenkins, 277 A.2d 703 (Del. Super. Ct. 1971) (IOE); Steigler v. Super. Ct. In and For New Castle Cnty., 252 A.2d 300, 304 (1969) (challenge)	Admissible.	Likely Admissible.[399]	Not challengeable.
FL	Fla. Stat. Ann. § 90.103 (hearsay & IOE)	State v. Schroeder, 112 So. 2d 257, 259 (1959) (challenge); In re Grand Jury	Admissible.	Admissible absent statutory requirement.[400]	Not challengeable.

[396] "When the grand jury has returned an indictment accusing a person of crime without hearing any legal evidence, such a proceeding upon the part of the grand jury does not deprive the accused of any right guaranteed to him under the Constitution." McDonald v. State, 155 Ark. 142, 244 S.W. 20, 22 (1922).

[397] See People ex rel. Dunbar v. Dist. Ct. In and For Second Jud. Dist., 179 Colo. 321, 323 (1972) (holding that grand jury proceedings were free of technical rules and illegally obtained evidence is not required to be suppressed or excluded from grand juries).

[398] "The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record." Colo. Rev. Stat. Ann. § 16-5-204 (West)

[399] See State v. Jenkins, 277 A.2d 703 (Del. Super. Ct. 1971) (citing Costello and suggesting indictment based on illegally obtained evidence may be admissible in grand jury hearings).

[400] The only situation where evidence alleged to have been seized illegally has been ruled an improper subject of grand jury inquiry has been where legislation expressly provides that such evidence may not be considered by the grand jury. In re Spring Term (1977),

		Investigation, 287 So. 2d 43, 48 (Fla. 1973) (IOE); In re Spring Term (1977), Pinellas Cnty. Grand Jury, 357 So. 2d 770, 771 (Fla. Dist. Ct. App. 1978) (IOE)			
GA		Anderson v. State, 365 S.E.2d 421, 426 (Ga. 1988) (hearsay); Powell v. State, 237 Ga. 490, 228 S.E.2d 875 (1976) (IOE); First Nat. Bank & Tr. Co. in Macon v. State, 237 Ga. 112, 112, 227 S.E.2d 20, 20 (1976) (challenge)	Admissible.	Admissible.	Not challengeable.
HI	Haw. R. Evid. 1101(d) (hearsay)	State v. Wilson, 519 P.2d 228 (Haw. 1974) (Ogata, J., dissenting) (IOE)[401]; State v. Ontai, 929 P.2d 69, 77 (Haw. 1996) (challenge)	Admissible.	Admissible.	Challengeable for insufficient evidence.[402]
ID	I.R.E. 101 (hearsay & IOE); Idaho Code Ann. § 19-1105 (hearsay & IOE)	State v. Edmonson, 113 Idaho 230, 236 (1987) (hearsay, IOE & challenge); State v. Jones, 125 Idaho 477, 483, 873 P.2d 122, 128 (1994) (challenge)	Inadmissible.[403]	Inadmissible.[404]	Challengeable.[405]

Pinellas Cnty. Grand Jury, 357 So. 2d 770, 771 (Fla. Dist. Ct. App. 1978). Section 934.06 specifically states that evidence obtained as a result of violation of Chapter 934, Florida Statutes, may not be presented for a grand jury's consideration. In re Grand Jury Investigation, 287 So. 2d 43, 48 (Fla. 1973).

[401] "Even had the evidence sought to be suppressed been seized unconstitutionally, it was nonetheless admissible in the deliberations of the grand jury. The exclusionary rule did not apply." State v. Wilson, 519 P.2d 228 (Haw. 1974) (Ogata, J., dissenting).

[402] See State v. Ganal, 81 Haw. 358, 367, 917 P.2d 370, 379 (1996) (writing that while reviewing an indictment's sufficiency of evidence to establish probable cause, every legitimate inference must be drawn in favor of the indictment).

[403] "In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive any evidence that is given by witnesses produced and sworn before them except as hereinafter provided, furnished by legal documentary evidence, the deposition of a witness in the cases provided by this code or legally admissible hearsay." Idaho Code Ann. § 19-1105.

[404] Id.

[405] "Inquiry into the propriety of the grand jury proceeding is two-fold. First, we must determine whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause… Second, we must dismiss the indictment if, despite an adequate finding of probable cause, the prosecutorial misconduct in submitting the illegal evidence was so egregious as to be prejudicial." State v. Jones, 125 Idaho 477, 483, 873 P.2d 122, 128 (1994), overruled the other grounds by State v. Montgomery, 163 Idaho 40, 408 P.3d 38 (2017).

IL		People v. Jones, 19 Ill.2d 37 (1960) (hearsay); People v. J.H., 136 Ill. 2d 1, 11, 554 N.E.2d 961, 965 (1990) (IOE); People v. Nolan, 2019 IL App (2d) 180354, 140 N.E.3d 824, 827 (challenge); People v. Basile, 203 N.E.3d 410, 414 (2022) (challenge).	Admissible.	Admissible.	Challengeable for prosecutorial misconduct.[406]
IN	Rule 101(d) (hearsay)	King v. State, 236 Ind. 268 (1957) (IOE); State ex rel. Pollard v. Criminal Court of Marion County, Division One, 263 Ind. 236 N.E.2d 573, 585 (1975) (IOE); Hubbard v. State, 262 Ind. 176, 179 (1974) (challenge)	Admissible.	Admissible.	Not challengeable.
IA	Iowa R. Civ. P. 5.1101 (hearsay); Iowa R. Civ. P. 2.4 (challenge).	State v. Hall, 235 N.W.2d 702 (Iowa 1975) (IOE); State v. Doss, 355 N.W.2d 874, 880 (Iowa 1984) (challenge)	Admissible.	Admissible unless privileged.	Not challengeable except for prejudice.[407]
KS	Kan. Stat. Ann. § 60-402 (hearsay); Kan Stat § 22-3003 (hearsay & IOE); Kan. Stat. Ann. § 22-3208 (West) (challenge)	State v. Turner, 300 Kan. 662, 333 P.3d 155 (2014) (IOE & challenge)	Inadmissible.	Inadmissible.	Challengeable.
KY	KRE Rule 1101 (hearsay & IOE); Ky. R. Crim. 5.10 (challenge)	Tinsley v. Million (C.A.6 (Ky.) 2005) 399 F.3d 796 (hearsay); Jackson v. Com. 20 S.W.3d 906, 908 (2000) (challenge)	Admissible.	Admissible unless privileged.	Not challengeable.
LA	La. Code Evid. Ann. art. 1101 (hearsay); La. Code Crim. Proc. Ann. art. 442 (IOE)	State v. Antoine, 344 So.2d 666 (La.1977) (hearsay); La. Code Crim. Proc. Ann. art. 533 (challenge)	Admissible.	Admissible.	Not challengeable.
ME	Me R Evid 101(b)(2) (hearsay & IOE)	Halacy v. Steen, 670 A.2d 1371, 1375 (Me. 1996) (hearsay); State v. St. Clair, 418 A.2d 184, 186 n.2 (Me.	Admissible.	Admissible unless privileged.	Not challengeable.

[406] See People v. Nolan, 2019 IL App (2d) 180354, 140 N.E.3d 824, 827 (ruling that while a defendant may not challenge the sufficiency of the evidence considered by a grand jury as long as some evidence was presented, a defendant may challenge an indictment that was procured through prosecutorial misconduct.)

[407] See Iowa R. Civ. P. 2.4. (provides that proceedings will not be affected by any defect in the indictment that does not prejudice a substantial right of the defendant).

		1980) (IOE); State v. Marshall, 491 A.2d 554, 557 (1985) (challenge); State v. Douglas, 114 A.2d 253 (1955) (challenge)			
MD	Md. R. Evid. 5-101 (hearsay); Md. Code Ann., Cts. & Jud. Proc. § 10-412 (West) (IOE)	Casey v. State, 124 Md.App. 331, 348 (1999) (IOE & challenge); Steffey v. State, 573 82 Md.App. 647, 656 (1990) (IOE & challenge); Bartram v. State, 33 Md.App. 115, 179 (1976) (challenge)	Admissible.	Admissible absent statutory requirement.[408]	Not challengeable.
MA	Mass. R. Evid. 1101 (hearsay);	Com. v. Gibson, 368 Mass. 518, 333 N.E.2d 400 (1975) (IOE); Com. v. Thompson, 427 Mass. 729, 738, 696 N.E.2d 105, 111 (1998) (challenge); Com. v. McCarthy, 385 Mass. 160, 163, 430 N.E.2d 1195, 1197 (1982) (challenge).	Admissible.	Admissible.	Not challengeable except in extraordinary circumstances.[409]
MI	Mich. R. Evid. 1101 (hearsay & IOE); Mich. Comp. Laws Ann. § 767.74 (challenge)	People v. Hoffman, 205 Mich. App. 1, 23, 518 N.W.2d 817, 828 (1994) (IOE)	Admissible.	Likely Admissible.[410]	Not challengeable.
MN	Minn. R. Evid.	State v. Plevell, 889 N.W.2d	Admissible if:	Inadmissible.	Challengeable.[412]

[408] Evidence seized in violation of Maryland's wiretap and electronic surveillance statute is inadmissible in a grand jury hearing. Md. Code Ann., Cts. & Jud. Proc. § 10-412 (West). But, an defendant is not entitled to a dismissal of an indictment, even though it was returned by a grand jury that received evidence from a wiretap conceded to have been unlawful. Casey v. State, 124 Md.App. 331, 348 (1999).

[409] See Com. v. Thompson, 427 Mass. 729, 738, 696 N.E.2d 105, 111 (1998) (courts should not enquire into "quality" of evidence before grand jury without "extraordinary circumstances"); Commonwealth v. Buono, 484 Mass. 351, 142 N.E.3d 14, 375 Ed. Law Rep. 964 (2020) (special statute of limitations for sex crimes against a child that requires corroborating evidence for charge brought more than 27 years after the commission of the offense is an exception to the rule that courts will not review the competency or sufficiency of the evidence before the grand jury and required the prosecution to present corroborating evidence to the grand jury).

[410] While there is no direct case law, IOE is presumed admissible as other incompetent evidence is admissible. See People v. Hoffman, 205 Mich. App. 1, 23, 518 N.W.2d 817, 828 (1994) (holding that because a grand is not constrained by the rules of evidence, it can consider incompetent evidence in the form of polygraph results).

[412] A motion to dismiss an indictment may be made if the evidence admissible before the grand jury was not sufficient to establish an offense charged or any lesser or other included offense. Minn. R. Crim. P. 17.06. But see State v. Greenleaf, 591 N.W.2d 488, 498 (1999) (holding that presumption of regularity attaches to the indictment and it is a rare case

	1101(b)(2) (hearsay); Minn. R. Crim. P. 18.05 (hearsay & IOE); Minn. R. Crim. P. 17.06 (challenge)	584, 588 (2017) (hearsay); . State v. Greenleaf, 591 N.W.2d 488, 498 (1999) (IOE & challenge)	foundational; presentable at trial; expert report; regarding property crimes; signed statements from unavailable witnesses; or oral summaries of documents.[411]		
MS	Miss. R. Evid. 1101 (hearsay)	Welch v. State, 8 So. 673, 673 (Miss. 1891) (IOE & challenge); State v. Matthews, 218 So.2d 743, 744 (1969) (challenge)	Admissible.	Admissible.	Not challengeable.
MO		State v. Tressler, 503 S.W.2d 13, 15–17 (Mo. 1973) (hearsay); State v. Stapleton, 539 S.W.2d 655 (Mo. Ct. App. 1976) (IOE); . State v. Burkhart, 615 S.W.2d 565, 568 (Mo. App. W. Dist. 1981) (challenge)	Admissible.	Admissible.	Not challengeable.
MT	Mont. R. Evid. 101 (hearsay)	State v. Thorsness, 165 Mont. 321, 528 P.2d 692 (1974) (IOE); Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 992 (Mont. 1976) (IOE & challenge)	Admissible.	Questionable.[413]	Grounds for review not established.[414]
NE	Neb. Rev. Stat. Ann. § 27-1101 (hearsay & IOE); Neb. Rev. Stat.	State v. Schrader, 196 Neb. 632, 244 N.W.2d 498 (1976) (IOE)	Admissible.	Admissible.	Challengeable for insufficient evidence.[415]

where an indictment will be invalidated).

[411] Minn. R. Crim. P. 18.05.

[413] See State v. Thorsness, 165 Mont. 321, 528 P.2d 692 (1974) (holding that illegally seized evidence may be used in grand jury proceedings). But see Mont. Code Ann. § 46-11-314 ("In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it or that furnished by legal evidence or the deposition of a witness").

[414] See Matter of Secret Grand Jury Inquiry, John and Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 992 (Mont. 1976) (adopting Calandra's perspective on independence of grand jury from judiciary). But see Mont. Code Ann. § 46-11-314 (statute establishing higher bar for grand jury evidence than Calandra).

[415] "The district court before which the indicted defendant is to be tried shall dismiss any indictment of the grand jury if such district court finds, upon the filing of a motion by the

	Ann. § 29-1418 (challenge)				
NV	Nev. Rev. Stat. Ann. § 172.135 (hearsay & IOE); Nev. Rev. Stat. Ann. § 172.155 (challenge)	Gathrite v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark, 135 Nev. 405, 451 P.3d 891 (2019) (IOE); Sheriff, Washoe Cnty. v. Miley, 663 P.2d 343, 344 (Nev. 1983) (challenge)	Inadmissible except for certain exceptions.[416]	Inadmissible.[417]	Challengeable for insufficient evidence.[418]
NH	N.H. R. Evid. 1101 (hearsay)	State v. St. Arnault, 114 N.H. 216, 218, 317 A.2d 789, 791 (1974) (hearsay); . State v. Blake, 113 N.H. 115, 119, 305 A.2d 300, 303 (1973) (IOE); State v. Williams, 708 A.2d 55, 57 (N.H. 1998) (challenge)	Admissible.	Admissible.	Not challengeable.
NJ	NJ R EVID N.J.R.E. 101 (hearsay)	State v. Sugar, 417 A.2d 474, 486 (N.J. 1980) (IOE); State v. Price, 260 A.2d 877, 879 (N.J. Super. L. Div.	Admissible.	Inadmissible.	Challengeable.[419]

indicted defendant based upon the grand jury record without argument or further evidence, that the grand jury finding of probable cause is not supported by the record." Neb. Rev. Stat. Ann. § 29-1418.

[416] Nev. Rev. Stat. Ann. § 172.135 provides that hearsay evidence is inadmissible at a grand jury hearing unless: (1) it a an expert's report or an affidavit of a property crime victim; (2) it is a statement made by the alleged victim of the following offenses: (a) a sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony; (b) abuse of a child under the age of 16 years and the offense is punishable as a felony; and (c) domestic violence that is punishable as a felony which resulted in substantial bodily harm to the alleged victim; or (3) a prior inconsistent statement by a grand jury witness. Nev. Rev. Stat. Ann. § 172.135 (West).

[417] "The grand jury can receive none but legal evidence." Nev. Rev. Stat. Ann. § 172.135. Gathrite v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark, 135 Nev. 405, 451 P.3d 891 (2019) (holding that evidence that has been suppressed because it was obtained in violation of a defendant's constitutional rights is not "legal evidence" that may be presented to the grand jury, because such evidence is not admissible).

[418] The defendant may object to the sufficiency of the evidence to sustain the indictment only by application for a writ of habeas corpus. Nev. Rev. Stat. Ann. § 172.155. But see Sheriff, Washoe Cnty. v. Miley, 663 P.2d 343, 344 (Nev. 1983) ("In grand jury proceedings, the state need only show that a crime has been committed and that the accused probably committed it. The finding of probable cause to support a criminal charge may be based on "slight, even 'marginal' evidence").

[419] An indictment should be quashed only when palpably deficient . . . If the evidence is either tainted or incompetent in some fashion, defendant has adequate legal remedies at a later stage in the proceedings against him. While a grand jury cannot be permitted to indict upon mere whim or caprice, it is only required to find that a crime was committed and that the accused person should be required to stand trial on the charge." State v. Price, 260 A.2d 877, 879 (N.J. Super. L. Div. 1970).

		1970) (challenge)			
NM	N.M. Stat. Ann. § 31-6-11 (hearsay & challenge)	Buzbee v. Donnelly, 634 P.2d 1244, 1254 (N.M. 1981) (IOE)	Admissible.	Admissible.	Not challengeable.
NY	N.Y. Crim. Proc. Law § 190.30 (hearsay); N.Y. Crim. Proc. Law § 210.20 (challenge)	People v. McGrath, 385 N.E.2d 541 (N.Y. 1978) (IOE); People v. Estenson, 101 A.D.2d 687, 687, 476 N.Y.S.2d 39, 40 (1984) (IOE); People v. Sanoguet, 597 N.Y.S.2d 854, 857 (N.Y. Sup. Ct. 1993) (challenge)	Inadmissible except expert reports, property crime authentication, sex offender registry, videotaped child witness, and certain business records.	Admissible.	Challengeable for insufficient evidence.[420]
NC	N.C. Gen. Stat. Ann. 8C-1, 1101 (hearsay & IOE);	State v. Turner, 268 N.C. 225, 150 S.E.2d 406, 409–10 (1966) (IOE & challenge)	Admissible.	Admissible.	Challengeable for wholly incompetent evidence.[421]
ND	N.D. Cent. Code Ann. § 29-10.1-26 (hearsay, IOE & challenge)	State v. Nordquist, 309 N.W.2d 109, 116 (1981) (challenge)	Inadmissible.	Inadmissible but not grounds for dismissing indictment.[422]	Challengeable.
OH	Ohio R. Evid. 101 (hearsay)	Villasino v. Maxwell, 190 N.E.2d 265, 266 (Ohio 1963) (IOE); . State v. Selby, 126 N.E.2d 606, 607 (Ohio Com. Pl. 1955) (challenge)	Admissible.	Admissible.	Not challengeable.
OK	Okla. Stat. Ann. tit. 12, § 2103 (hearsay); Okla. Stat. Ann. tit. 22, § 333 (hearsay & IOE)	Shivers v. Territory, 1903 OK 98, 13 Okla. 466, 74 P. 899 (challenge)	Likely inadmissible except for written testimony of preliminary hearing witnesses or sworn testimony	Likely Inadmissible.[424]	Challengeable.

[420] An indictment may be dismissed if "the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense." N.Y. Crim. Proc. Law § 210.20. Evidence is legally sufficient if, unexplained and uncontradicted, it would support a conviction. People v. Sanoguet, 597 N.Y.S.2d 854, 857 (N.Y. Sup. Ct. 1993).

[421] See State v. Turner, 268 N.C. 225, 150 S.E.2d 406, 410 (1966) (ruling that indictment may be challenged if there is no competent evidence).

[422] "[T]he fact the evidence inadmissible at the trial was received by the grand jury does not render the indictment void if sufficient competent evidence to support the indictment was received by the grand jury." N.D. Cent. Code Ann. § 29-10.1-26.

[424] Id.

			from DA.[423]		
OR	Or. Rev. Stat. Ann. § 132.320 (hearsay & IOE)	State v. Stout, 305 Or. 34, 749 P.2d 1174 (1988) (hearsay); b. State v. Broadhurst, 184 Or. 178, 196 P.2d 407 (1948) (challenge); State v. O'Brien, 96 Or. App. 498, 774 P.2d 1109 (1989) (challenge)	Inadmissible with specific exceptions.[425]	Inadmissible but not grounds for dismissing indictment.[426]	Not challengeable.
PA		Com. v. Dessus, 224 A.2d 188, 191 (Pa. 1966) (hearsay); Com. v. Padden, 50 A.2d 722, 724 (Pa. Super. 1947) (IOE); Com. v. Webster, 337 A.2d 914, 917 (Pa. 1975) (challenge).	Admissible.	Inadmissible but not grounds for dismissing indictment.	Not challengeable.
RI	R.I. R. Evid. 101 (hearsay)	State v. Stone, 924 A.2d 773, 782 (R.I. 2007) (IOE); State v. Acquisto, 463 A.2d 122, 127 (R.I. 1983) (challenge)	Admissible.	Admissible.	Not challengeable.
SC	S.C. R. Evid. 1101 (hearsay)	State v. Williams, 210 S.E.2d 298, 301 (S.C. 1974)	Admissible.	Admissible.	Not challengeable.

[423] There is no direct case law regarding whether rules of evidence apply, grand jury hearings are not called out in the list of proceeding exempted from the code (Okla. Stat. Ann. tit. 12, § 2103), and the statute explicitly allowing for hearsay in grand jury proceedings was repealed (Okla. Stat. Ann. tit. 12 § 3102, Repealed by Laws 2002, c. 468, § 80, eff. Nov. 1, 2002). Okla. Stat. Ann. tit. 22, § 333 provides that "the grand jury may receive the written testimony of the witnesses taken in a preliminary examination of the same charge, and also the sworn testimony prepared by the district attorney without bringing those witnesses before them, and may hear evidence given by witnesses produced and sworn before them, and may also receive legal documentary evidence."

[425] Or. Rev. Stat. Ann. § 132.320 provides that the grand jury cannot receive any evidence that would be inadmissible in a trial except: expert reports, affidavit from witness with good cause to be unable to appear, peace officer's affidavit regarding defendant's driving with suspended record, live-telecommunication testimony, affidavit from court officer regarding defendant's failure to appear, peace officer testifying regarding information from another officer's investigatory report, sex offender registration information regarding defendant's failure to register, affidavit from peace officer regrading defendant operating under the influence, an affidavit of a representative of a financial institution for authenticating records, statements of underage victim or person with disabilities such that they cannot understand or participate in hearings. But see State v. Stout, 305 Or. 34, 749 P.2d 1174 (1988) (holding that presentation of hearsay evidence to grand jury, in violation of grand jury evidentiary statute, did not warrant setting aside the indictment, as grand jury evidentiary statute did not demonstrate legislature's intent to override interpretation that another statute provided exclusive grounds for setting aside an indictment).

[426] See Or. Rev. Stat. Ann. § 132.320. But see State v. O'Brien, 96 Or. App. 498, 774 P.2d 1109 (1989) (Grounds for setting aside an indictment are listed in statute and are the exclusive grounds).

		(hearsay, IOE & challenge)			
SD	S.D. Codified Laws § 23A-5-15 (hearsay & IOE)	State v. Carothers, 2006 S.D. 100, ¶ 9, 724 N.W.2d 610, 616 (hearsay, IOE & challenge)	Inadmissible but not grounds for dismissing indictment.[427]	Inadmissible but not grounds for dismissing indictment.[428]	Not challengeable.
TN		State v. Marks, 464 S.W.2d 326, 328 (Tenn. Crim. App. 1970) (hearsay); State v. Dixon, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992) (IOE); State v. Gonzales, 638 S.W.2d 841, 845 (Tenn. Crim. App. 1982) (challenge)	Admissible.	Admissible.	Not challengeable.
TX	Tex. R. Evid. 101 (hearsay)	Albarqawi v. State, 626 S.W.2d 136 (Tex. App. Eastland 1981) (IOE); Alejandro v. State, 725 S.W.2d 510, 513 (Tex. App. Houston 1st Dist. 1987) (IOE); Dean v. State, 749 S.W.2d 80, 82 (Tex. Crim. App. 1988) (challenge); Carpenter v. State, 477 S.W.2d 22, 23 (Tex. Crim. App. 1972) (challenge)	Admissible.	Admissible.	Not challengeable.
UT	Utah Code Ann. § 77-10a-13 (hearsay & IOE); Utah Code Ann. § 77-10a-14 (hearsay and challenge); Utah Code Ann. § 77-10a-10 (IOE); Utah R. Crim. P. 12 (challenge)		Admissible if reliable hearsay.[429]	Likely admissible.[430]	Challengeable.
VT	Vt. R. Evid. 1101 (hearsay & IOE); Vt.	State v. Bullock, 2017 VT 7, ¶ 8, 204 Vt. 623, 624, 165	Admissible.	Admissible.	Challengeable.

[427] See State v. Carothers, 2006 S.D. 100, ¶ 9, 724 N.W.2d 610, 616 (holding that though the rules of evidence apply to grand jury proceedings, courts will not inquire into the legality or sufficiency of the evidence upon which an indictment is based).

[428] Id.

[429] See Utah Code Ann. § 77-10a-13 (a grand jury may receive hearsay evidence only under the same provisions and limitations that apply to preliminary hearings, which require reliable indicators for hearsay to be presented). See also Utah Code Ann. § 77-10a-14 (an indictment may not be returned solely on the basis of incompetent hearsay).

[430] No caselaw addresses this issue, but code requires that the grand jury "shall receive evidence without regard for the formal rules of evidence." Code Ann. § 77-10a-13, and necessitates that the grand jury finds "credible evidence of each material element of any crime charged before returning an indictment." Utah Code Ann. § 77-10a-10.

	R. Crim. P. 12. (challenge)	A.3d 143, 145 (2017) (challenge).			
VA	Va. R. Sup. Ct. 2:1101 (hearsay & IOE)	Wadley v. Cmmw., 35 S.E. 452, 453 (Va. 1900) (challenge)	Likely Admissible.[431]	Unclear.[432]	Not challengeable.[433]
WA	ER 1101 (hearsay); Wash. Rev. Code Ann. § 10.40.110 (challenge)	State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982) (IOE); State v. Bogardus (1904) 36 Wash. 297, 78 P. 942 (challenge).	Admissible	Likely inadmissible.[434]	Limited challenge.
WV	W. Va. R. Evid. 1101 (hearsay)	State v. Slie, 158 W.Va. 672, 678-679 (1975) (IOE & challenge)	Admissible.	Admissible.	Not challengeable.
WI	Wis R Evid 911.01(4)(b) (hearsay)	State v. Moats, 156 Wis. 2d 74, 88, 457 N.W.2d 299, 305 (1990) (IOE); State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 711 (Wis. 1977) (challenge)	Admissible.	Likely inadmissible.[435]	Not challengeable.
WY	Wyo R Evid 1101(b)(2) (hearsay & IOE)	Hennigan v. State, 746 P.2d 360, 371 (Wyo. 1987) (challenge)	Unclear.[436]	Unclear.	Not challengeable.

[431] A grand jury may consider the testimony of a witness who was not an eyewitness to the alleged criminal activity; moreover, a grand jury may consider the testimony of an officer, not involved in the case, who testifies from the report of an investigating police officer. In both cases, the grand jury may return a sufficient indictment based solely upon such testimony. 1990 Op.Atty.Gen. No. 137, April 4, 1990.

[432] Virginia statute states that adherence to the Rules of Evidence is permissive, not mandatory, in criminal proceedings other than trial, preliminary hearings, and sentencing proceedings before a jury; grand jury hearings are presumably included in "criminal proceedings other than trial." Va. R. Sup. Ct. 2:1101.

[433] See Wadley v. Cmmw., 35 S.E. 452, 453 (Va. 1900) (holding that the sufficiency of the proof upon which a grand jury finds an indictment cannot be inquired into on a motion to quash the indictment).

[434] See State v. White, 97 Wash. 2d 92, 640 P.2d 1061 (1982) (indicating that exclusionary rule has broader reach under Washington Constitution than under United States Constitution due to state privacy protections; note, case overruled on grounds).

[435] "A prosecution is not abated or barred even when tainted evidence has been submitted to a grand jury… The Wisconsin Constitution, like the fifth amendment, does not dictate the kind of evidence that must necessarily be presented at a pretrial procedure. Likewise, Wisconsin case law stands in accord." State v. Moats, 156 Wis. 2d 74, 88, 457 N.W.2d 299, 305 (1990).

[436] While Wyoming code states that the rules of evidence, except for those relating to privileges, do not apply in grand jury hearings, Wyo R Evid 1101(b)(2), the specific statute allowing for an indictment to be based on "hearsay evidence in whole or in part," Rule 7(b), W.R.Cr.P., was deleted by order of the court in 2001.

APPENDIX B: PRELIMINARY HEARING PROCEEDINGS				
State	**SOURCE OF AUTHORITY**		**HEARSAY ADMISSIBILITY**	**CHALLENGE PROCEDURE**
	Statute or Court Rule	**Case Law**		
Federal	Fed. R. Crim. P. 5.1 (hearsay) [437]; 28 U.S.C.A. 1651 (challenge)[438]	U.S. v. King, 482 F.2d 768, 771 (D.C. Cir. 1973) (challenge); In re Grand Jury Subpoenas, 573 F.2d 936 (6th Cir. 1978) (challenge) [439]	**Hearsay Generally Admissible**	**May Allow for Pretrial Challenge:** Defendant may file interlocutory appeal for a writ of mandamus to review the district court's probable cause finding and grant such extraordinary relief as necessary to correct the error.
AL	Ala. R. Crim. P. 5.3(c) (hearsay); Ala. R. Crim. P. 15.2 (motion to dismiss)		**Certain Hearsay Admissible:** Expert reports, documentary evidence if predicate available at trial & hearsay w/ factual support or from a credible witness who will be available at trial.	**Allows for Pretrial Challenge:** Motion to dismiss for insufficient preliminary hearing.
AK	Alaska R. Crim. P. 5.1 (hearsay); Alaska R. Crim. P. 12 (motion to dismiss)		**Certain Hearsay Admissible:** Expert reports.	**May Allow for Pretrial Challenge:** Motion to dismiss for defects in the information.
AZ	Ariz. R. Crim. P. 5.4 (hearsay); Ariz. R. Crim. P. 5.5 (pre-trial review)		**Certain Hearsay Admissible:** Expert report, documentary evidence if foundation available at trial & w/ factual support or from a declarant who will be available at trial.	**Allows for Pretrial Challenge:** Provides pre-trial review of probable cause finding.
AR	No Adversarial Preliminary Probable Cause Hearing Offered.[440]			

[437] 2002 rule amendment removed clause explicitly providing for the use of hearsay in preliminary hearings because the committee believed it was no longer necessary because Federal is clear that hearsay is permitted in preliminary hearings. The committee "does not intend to make any substantive changes in practice by deleting the reference to hearsay evidence" Fed. R. Crim. P. 5.1 (Advisory Notes on 2002 Amendments).

[438] The All Writs Act, 28 U.S.C.A. 1651, confers jurisdiction upon the court of appeals to review the district court's probable cause finding and grant such extraordinary relief as necessary to correct the error. In re Grand Jury Subpoenas, 573 F.2d 936 (6th Cir. 1978)

[439] *Id.*

[440] Adversarial preliminary hearings are not required. Arkansas uses the same standard as a warrant when preliminary hearings are used; that is, if from the affidavit, recorded

CA	Cal. Evid. Code §§ 300, 1370 (hearsay); Cal. Penal Code §§ 872(b), 872.5 (hearsay); Cal. Penal Code § 995 (motion to set aside)	Ex parte Plummer, 79 Cal. App. 2d 651, 180 P.2d 771 (1947) (challenge)	**Certain Hearsay Admissible:** Proposition 115 testimony by officers[441], writing supported by other evidence & statements of victim of physical violence	**Allows for Pretrial Challenge:** Motion to set aside for lack of probable cause.
CO	Colo. R. Evid 1101(d) (hearsay); Colo. R Crim. P. 5(a)(4) (hearsay); Colo. R. Crim. P. 12 (motion to dismiss)	People v. Horn, 772 P.2d 108, 109 (Colo.1989) (hearsay); People v. Huggins, 220 P.3d 977, 980 (Colo. App. 2009) (hearsay)	**Certain Hearsay Admissible:** In conjunction w/ some non-hearsay evidence.	**May Allow for Pretrial Challenge:** Motion to dismiss for defects in the information.
CT	Conn. Gen. Stat. Ann. § 54-46a (hearsay)[442]		**Certain Hearsay Admissible:** Expert reports & authenticating chain of custody.	**May Allow for Pretrial Challenge:** Motion to dismiss for insufficient evidence.[443]
DE	(Del. Super. Ct. Crim. R. 5.1) (hearsay); Del. Super. Ct. Crim. R. 12 (motion to dismiss)	Schramm v. State, 366 A.2d 1185, 1192 (Del. 1976) (hearsay)	**Hearsay Generally Admissible:** Dependent on judge's reliability discretion	**May Allow for Pretrial Challenge:** Motion to dismiss for defects in the information.
FL	Fla. R. Crim. P. 3.133 (2023) (hearsay); Fla. R.	Perry v. Bradshaw, 43 So. 3d 180, 181 (Fla.	**Certain Hearsay Admissible:** Must be supported by non-	**Allows for Pretrial Challenge:** Motion to dismiss may challenge

testimony, or other documents information, it appears there is reasonable cause to believe an offense has been committed and a person has committed it. Ark. R. Crim. P. 8.3. Determination of probable cause to detain is done by magistrate at defendants' first appearance in an "informal, non-adversary hearing" (Gerstein review). Ark. R. Crim. P. 8.3. In 2005, the traditional adversarial preliminary hearing process was repealed. See Act 1994 of the Acts of 2005. Even before 2005, Arkansas did not require a preliminary hearing as a prerequisite to prosecuting a felony by information. See Penton v. State, 109 S.W.2d 131 (Ark. 1937).

[441] Under Proposition 115, an Officer can testify in court regarding their investigation and the information shared with them. Officers are restricted to testifying only to one level of hearsay, meaning they cannot testify to information that a person heard from another person unless certain exceptions apply. See Cal. Penal Code § 872(b).

[442] Preliminary hearings are only provided for felonies punishable by death or life imprisonment. Conn. Gen. Stat. Ann. § 54-46a.

[443] No specific procedure to challenge preliminary hearing, but Connecticut Superior Court section 41-8 provides for filing a pre-trial motion to dismiss for insufficiency of evidence or cause. Conn. Practice Book Sec. 41-8.

	Crim. P. 3.190 (challenge)	Dist. Ct. App. 2010) (hearsay); Davis v. Junior, 300 So. 3d 307, 309 (Fla. Dist. Ct. App. 2020) (hearsay)	hearsay evidence. [444]	substance of the information.
GA	Ga. Code Ann. § 17-7-28 (hearsay); Ga. Unif. Super. Ct. R. 26.2 (B) (hearsay)	Bethel v. Fleming, 310 Ga. App. 717, 724, 713 S.E.2d 900, 906 (2011) (hearsay)	**Hearsay Generally Admissible:** At commitment hearing to determine probable cause before pre-trial detention.	**No Pretrial Challenge.**
HI	Haw. R. Penal P. 5(c)(6) (hearsay); Haw. Rev. Stat. Ann. § 806-86 (challenge)		**Certain Hearsay Admissible:** If direct testimony is unavailable or "demonstrably inconvenient" to have direct witnesses.	**Allows for Pretrial Challenge:** Motion to dismiss for lack of probable cause.
ID	Idaho Crim. R. 5.1 (hearsay); Idaho Crim. R. 12 (challenge)		**Certain Hearsay Admissible:** Admissible to show property ownership, medical facts, court judgments, and reports of scientific examinations.	**Allows for Pretrial Challenge:** Motion to dismiss the information for lack of probable cause.
IL	IL R EVID Rule 1101 (hearsay); 725 Ill. Comp. Stat. Ann. 5/114-1 (challenge)	People v. Blackman, 91 Ill. App. 3d 130, 132, 414 N.E.2d 246, 248 (1980) (hearsay)	**Hearsay Generally Admissible:** Rule of evidence do not apply and hearsay admissible.	**May Allow for Pretrial Challenge:** Motion to dismiss if the information is based solely upon the testimony of an incompetent witness.
IN	No Preliminary Probable Cause Hearing Offered.[445]			
IA	I.C.A. Rule 2.2(4)(c)		**Certain Hearsay Admissible:** Rules of	**May Allow for Pretrial Challenge:** Motion to

[444] The Florida Supreme Court has not addressed hearsay in preliminary hearings, but the lower courts which have ruled on the issue are in consensus.

[445] Indiana has several provisions directing a magistrate to determine probable cause, but all involve an ex parte determination. Code Ann. §§ 35-33-2-1, 35-33-7-2, and 35-33-7-3.5. While previously, Indiana required a "preliminary hearing for the purpose of binding over," See State ex rel Hale v. Marion County, 234 Ind. 467, 127 N.E.2d 897 (1955); Davis v. Bible, 33 N.E. 910, 134 Ind. 108 (1893); State v. Morgan, 67 Ind. 35 (1878), currently, Indiana does not mandate the submission of a probable cause affidavit as a prerequisite for filing an information, unless it serves as the basis for an arrest. State v. Palmer, 496 N.E. 2d 1337 (Ind.App. 1986). Furthermore, case law provides that the sufficiency of evidence is a trial matter and cannot be used to question an indictment or information. Shultz v. State, 413 N.E.2d 913, 916 (Ind. 1981).

	(hearsay); Iowa R. Civ. P. 5.1101 (hearsay); Iowa R. Civ. P. 2.11 (challenge)		evidence do not apply to criminal preliminary hearing and hearsay with a factual basis. allowed if credible.	dismiss the information.
KS	Kan. Stat. Ann. § 60-402 (hearsay); Kan. Stat. Ann. § 22-2902 (hearsay); Kan. Stat. Ann. § 22-3208 (challenge)	State v. Cremer, 234 Kan. 594, 600, 676 P.2d 59, 64 (1984) (hearsay); State v. Lashley, 233 Kan. 620, 624, 664 P.2d 1358, 1364 (1983) (challenge)	**Certain Hearsay Admissible:** Rules of evidence apply but hearsay admissible if victim is under 13.	**Allows for Pretrial Challenge:** Motion to dismiss to challenge the sufficiency of a preliminary examination.
KY	Ky. R. Cr 3.14 (hearsay); KRE 1101 (hearsay); Ky. R. Cr 8.16 (challenge); Ky. R. Cr. 8.18 (challenge)		**Hearsay Generally Admissible:** Rules of evidence do not apply and hearsay is permitted.	**May Allow for Pretrial Challenge:** Motion to dismiss the information.
LA	La. Code Evid. Ann. art. 1101 (hearsay); La. Code Crim. Proc. Ann. art. 521 (challenge); La. Code Crim. Proc. Ann. art. 532 (challenge)	State v. Antoine, 344 So. 2d 666, 666 (La. 1977) (hearsay); State v. Sims, 2019-1602 (La. App. 1 Cir. 9/2/20), 312 So. 3d 616, 620 (challenge)	**Certain Hearsay Admissible:** Witnesses must be available for full cross examination.	**May Allow for Pretrial Challenge.**[446]
ME	No Preliminary Probable Cause Hearing Offered.[447]			
MD	Md. Rule 4-221(d) (hearsay); Md. Rule 4-251 (challenge); Md. Rule 4-252 (challenge)		**Hearsay Generally Admissible:** Rules of evidence do not apply to preliminary hearings.[448]	**Allows for Pretrial Challenge:** Motion to dismiss for lack of probable cause.
MA	Mass. R. Crim. P. 3 (hearsay);	Myers v. Com., 363 Mass. 843,	**Rules of Evidence Apply w/out**	**May Allow for Pretrial Challenge:** Motion to

[446] La. Code Crim. Proc. Ann Art. 521 - 523 provides procedure and pretrial motions after discovery begins, and Art. 531 - 538 provides procedure and grounds for a motion to quash. Caselaw allows for, but does not specify a motion to challenge a pretrial hearing or lack of probable cause. See *State v. Sims*, 2019-1602 (La. App. 1 Cir. 9/2/20), 312 So. 3d 616, 620.

[447] Maine repealed its statutory provisions providing for preliminary hearings in 1965. See Act Effective Dec. 1, 1965, 1965 Me. Laws 455.

[448] See 59 Md. Op. Att'y Gen. 182-83 (1974) (Hearsay permitted in preliminary hearings)

	Mass. R. Crim. P. 13 (challenge)	298 N.E.2d 819 (1973) (hearsay); Paquette v. Com., 440 Mass. 121, 134, 795 N.E.2d 521, 533 (2003) (hearsay)	**Exception:** Bind-over hearings do not allow hearsay.	dismiss.
MI	Mich. Comp. Laws Ann. § 766.11b (hearsay); Mich. Comp. Laws Ann. §§ 767.2, 767.74 (challenge)	People v. Usher, 121 Mich. App. 345, 328 N.W.2d 628 (1982) (hearsay)	**Certain Hearsay Admissible:** Rules of evidence apply to preliminary hearings, but hearsay allowed for lab reports, certified copies of government or court orders, and non-investigative law enforcement reports.	**May Allow for Pretrial Challenge:** Motion to quash the information.[449]
MN	Minn. R. Crim. P. 11.04 (hearsay); Minn. R. Crim. P. 10.01-10.03 (challenge)	State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976) (hearsay); State v. Suspitsyn, 941 N.W.2d 423, 427 (Minn. Ct. App. 2020) (hearsay)	**Certain Hearsay Admissible:** No preliminary hearing, but "Reliable Hearsay" is permitted in probable cause motion hearings.[450]	**May Allow for Pretrial Challenge:** Motion to dismiss may be filed after omnibus hearing.
MS	MS R RCRP Rule 6.2(c) (hearsay); M.R.E. 1101 (hearsay); MS R RCRP Rule 16.1 (challenge)		**Certain Hearsay Admissible:** Rules of evidence do not apply to probable cause hearings and hearsay is admissible if source is credible and the information has a factual basis.	**May Allow for Pretrial Challenge:** Motion to dismiss.
MO	Mo. Ann. Stat. § 544.280 (hearsay); Mo. Ann. Stat. §		**Certain Hearsay Admissible:** Rules of evidence apply, but certified copies of	**May Allow for Pretrial Challenge:** Motion to quash.[452]

[449] The term "indictment" is to be treated as also referring to charges made by the filing of an information. M.C.L. § 767.2.

[450] In 1975, Minnesota replaced preliminary hearing screening with an omnibus hearing, at which the defendant could challenge in the trial court whether the charging instrument was supported by probable cause. See Minn. R. Crim. P. 11.01–11.10.

[452] [452] Missouri does not offer a specific rule outlining provisions for amotion to dismiss an information, but section 545.300 specifies that any time prior to trial, the court may grant the State leave to amend an information that is insufficient or incorrect. Mo. Ann. Stat. §§ 545.300.

	544.376 (hearsay); Mo. Ann. Stat. §§ 545.300, 545.830 (challenge)		laboratory analysis reports are admissible.[451]	
MT	Mont. R. Evid. 101 (hearsay); Mont. Code Ann. § 46-13-101 (challenge); Mont. Code Ann. § 46-13-401 (challenge)		**Hearsay Generally Admissible:** Rules of evidence do not apply to preliminary hearing.	**May Allow for Pretrial Challenge:** Procedure for pretrial motions, but motions to dismiss may only be initiated by the state or the court.
NE	Neb. Rev. Stat. Ann. § 27-1101 (hearsay); Neb. Rev. Stat. Ann. § 29-1808 (challenge)	State v. Betancourt-Garcia, 310 Neb. 440, 967 N.W.2d 111 (2021) (hearsay); State v. Johnson, 287 Neb. 190, 191, 842 N.W.2d 63, 66 (2014) (hearsay)	**Certain Hearsay Admissible:** Rules of evidence do not apply to preliminary hearing, but hearsay must be reliable.	**May Allow for Pretrial Challenge:** Motion to quash for defects in charging institution.
NV	Nev. Rev. Stat. Ann. §§ 171.196, 171.197 (hearsay); Nev. Rev. Stat. Ann. §§ 174.105, 174.075 (challenge)	Grace v. Eighth Jud. Dist. Ct., 132 Nev. 511, 515, 375 P.3d 1017, 1019 (2016) (hearsay)	**Certain Hearsay Admissible:** Rules of evidence apply to preliminary hearing, but hearsay evidence from a child abuse victim is permitted and the State may provide affidavits from victims of a property or financial crime if they are located >100 miles away.[453]	**Allows for Pretrial Challenge:** Motion to dismiss for insufficient evidence.
NH	N.H. R. Evid. 1101(d)(3)	State v. St. Arnault, 114	**Certain Hearsay Admissible:** Rules of	**No Pretrial Challenge.[454]**

[451] Mo. Ann. Stat. § 544.376 provides that certified copies of laboratory analysis reports are admissible if served upon the defendant 10 days before the hearing. Additionally, the analyst preparing the report may be interviewed by defense counsel upon notice to the prosecutor.

[453] If defendant can show a dispute of fact in the State's affidavit, the State must provide the witness for cross-examination. Nev. Rev. Stat. Ann. § 171.197.

[454] No provision for challenging a preliminary hearing, but N.H. Rev. Stat. Ann. 599:1 provides for a de novo trial in the superior court if convicted of a class A misdemeanor in the circuit court; State v. St. Arnault suggests that this provision can also be used to appeal felony preliminary hearings binding-over defendants to the superior court. See State v.

	(hearsay); N.H. Rev. Stat. Ann. § 599:1 (challenge)	N.H. 216, 219, 317 A.2d 789, 791 (1974) (hearsay & challenge)	evidence do not apply to preliminary hearings and credible hearsay is admissible.	
NJ	N.J. Ct. R. 3:4-3 (hearsay); NJ R EVID N.J.R.E. 101 (hearsay); N.J. Stat. Ann. § 2A:162-19€ (hearsay); N.J. Ct. R. 3:10-2 (challenge)	State v. Ingram, 230 N.J. 190, 206, 165 A.3d 797, 805–06 (2017) (hearsay)	**Hearsay Generally Admissible:** Rules of evidence relaxed in probable cause hearings.[455]	**May Allow for Pretrial Challenge:** Motion to dismiss for defects in institution of the prosecution.
NM	NMRA, Rule 5-302 (hearsay); NM R MAG CT RCRP Rule 6-202.1 (hearsay); NM R MAG CT RCRP Rule 6-304 (challenge)		**Certain Hearsay Admissible:** Rules of evidence apply in preliminary examinations; hearsay exemptions for forensic interviews of a minor or incompetent witness at a safe house, and lab reports.	**May Allow for Pretrial Challenge:** Motion to dismiss.
NY	N.Y. Crim. Proc. Law §§ 180.60, 190.30 (hearsay); N.Y. Crim. Proc. Law § 170.35 (challenge)		**Certain Hearsay Admissible:** Exceptions include reports of experts and technicians in professional and scientific fields, property crime testimony, and records of a sex offender.	**May Allow for Pretrial Challenge:** Motion to dismiss the information if insufficient or defective.
NC	N.C. R. Evid. 1101(b)(3) (hearsay); N.C. Gen. Stat. Ann. § 15A-611 (hearsay); N.C. Gen. Stat. Ann. § 15A-954 (challenge)		**Certain Hearsay Admissible:** Rules of evidence do not apply, but proving probable cause requires non-hearsay evidence; exceptions: to show ownership or value of property, to authenticate, and for experts' reports.	**May Allow for Pretrial Challenge:** Motion to dismiss.
ND	N.D.R. Evid.	State v. Brown,	**Hearsay Generally**	**No Pretrial Challenge:**

Ingram, 230 N.J. at 206.

[455] N.J. Stat. Ann. § 2A:162-19(e) and State v. Ingram, 230 N.J. at 805–06 suggest that hearsay is admissible in all probable cause hearings.

	1101(d)(3) (hearsay); N.D. R. Crim. P. 5.1 (hearsay); N.D. R. Crim. P. 12 (challenge)	2021 ND 226, ¶ 7, 967 N.W.2d 797, 800 (hearsay); State v. Morrissey, 295 N.W.2d 307 (N.D. 1980) (challenge)	**Admissible:** Rules of evidence do not apply to probable cause hearings.	Review limited to jurisdictional defects.
OH	Ohio Crim. R. 5 (hearsay); Ohio Crim. R. 12 (challenge)		**Rules of Evidence Apply w/out Exception.**	**Allows for Pretrial Challenge:** Motion to dismiss for defects in prosecution.
OK	Okla. Stat. Ann. tit. 12, §§ 2103, 2803.1 (hearsay); Okla. Stat. Ann. tit. 63, § 949 (hearsay); Okla. Stat. Ann. tit. 22, §§ 504.1, 524 (challenge)	State v. Juarez, 2013 OK CR 6, ¶ 9, 299 P.3d 870, 873 (hearsay)	**Certain Hearsay Admissible:** Rules of evidence apply; exceptions: stipulated lab reports.[456]	**Allows for Pretrial Challenge:** Motion to quash for insufficient evidence.[457]
OR	Or. Rev. Stat. § 135.173 (hearsay); Or. Rev. Stat. Ann. § 135.520 (challenge)		**Certain Hearsay Admissible:** Rules of evidence apply, but hearsay is admissible if reliable and testifying would impose an unreasonable burden.	**May Allow for Pretrial Challenge:** Motion to set aside or dismiss.
PA	Pa. R. Crim. P. 542 (hearsay); Pa. R. Crim. P. 578 (challenge)	Commonwealth v. McClelland, 660 Pa. 81, 109, 233 A.3d 717, 734 (2020) (hearsay); Commonwealth v. Munson, 2021 PA Super 161, 261 A.3d 530 (2021) (hearsay); Commonwealth v. Harris, 2022 PA Super 1, 269 A.3d 534, 547, reargument	**Certain Hearsay Admissible:** Hearsay is admissible in preliminary hearings, but cannot be the sole basis of the case.	**May Allow for Pretrial Challenge:** Omnibus motion.

[456] Oklahoma has a general hearsay exception for children testifying about abuse. Okla. Stat. Ann. tit. 12, § 2803.1.

[457] Section 524 provides an opportunity for a preliminary hearing after a felony indictment, which appears to be a separate procedure form the initial preliminary examination. Okla. Stat. tit. 22, § 258.

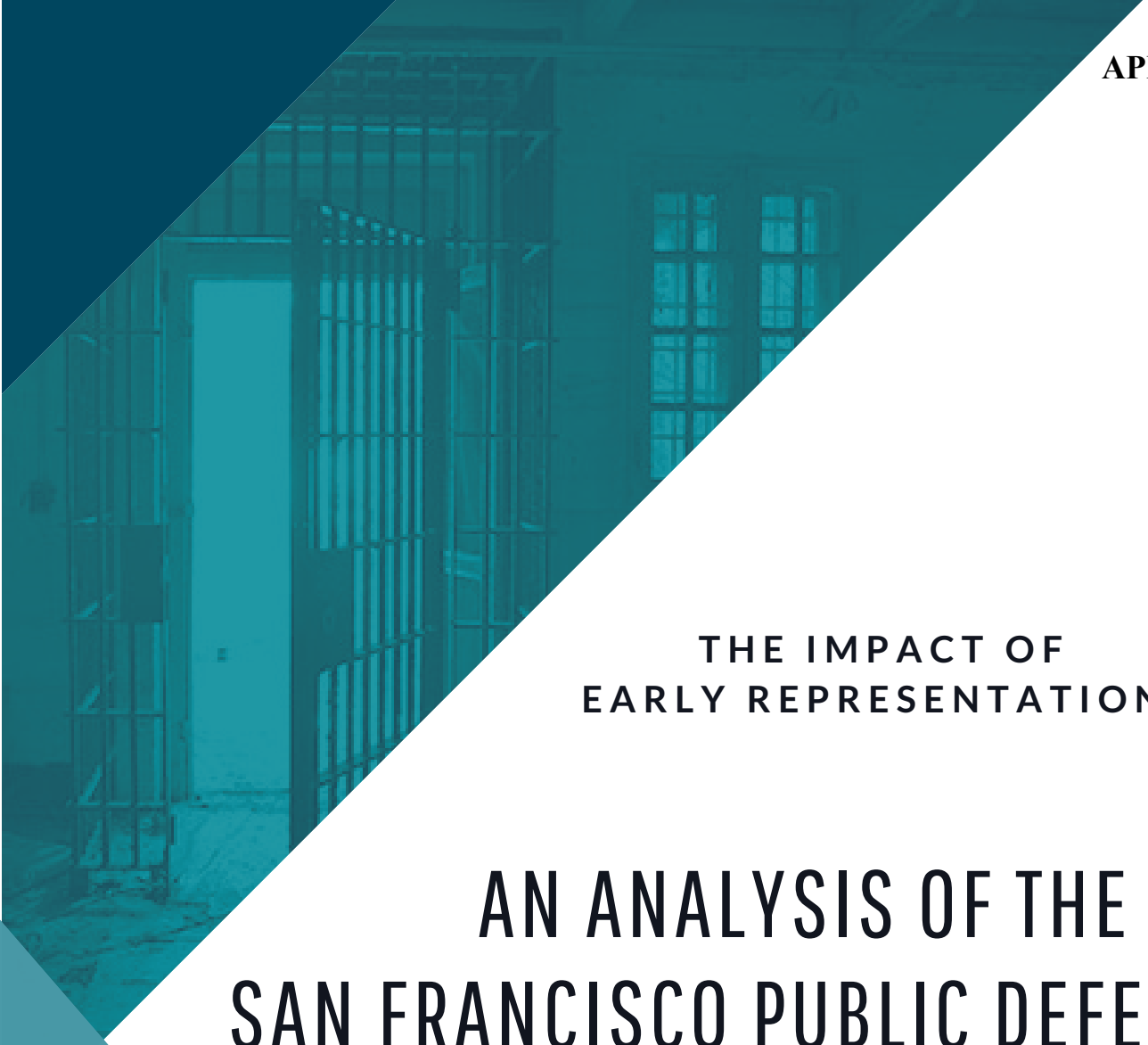
		denied (Mar. 14, 2022), appeal granted, 285 A.3d 883 (Pa. 2022) (hearsay)		
RI	RI R Super. R. Crim.P. 5 (hearsay); R.I. R. Evid. 101 (hearsay); 12 R.I. Gen. Laws Ann. §§ 12-12-1.7, 12-12-1.9 (challenge)		**Rules of Evidence Apply w/out Exception.**	**Allows for Pretrial Challenge:** Motion to dismiss on failure to show probable cause.
SC	S.C. R. Evid. 1101(d)(3) (hearsay); S.C. Code Ann. § 17-19-90 (challenge)	State v. Jones, 273 S.C. 723, 726, 259 S.E.2d 120, 122 (1979) (hearsay); State v. Massey, 430 S.C. 349, 358, 844 S.E.2d 667, 671 (2020) (challenge)	**Hearsay Generally Admissible:** Rules of evidence and hearsay is admissible.	**No Pretrial Challenge:** Sufficiency of the evidence cannot be challenged by a pretrial motion.
SD	S.D. Codified Laws § 23A-4-6 (hearsay); S.D. Codified Laws § 23A-8-2 (challenge)	State v. Vatne, 2003 S.D. 31, 659 N.W.2d 380, 384 (challenge)	**Rules of Evidence Apply w/out Exception.**	**No Pretrial Challenge:** Exclusive grounds for pretrial dismissal do not include defects in the preliminary hearing.
TN	Tenn. R. Crim. P. 5.1 (hearsay); Tenn. R. Crim. P. 12 (challenge)	Waugh v. State, 564 S.W.2d 654, 659 (Tenn. 1978) (hearsay)	**Certain Hearsay Admissible:** To prove property ownership and written expert report admissible.	**Allows for Pretrial Challenge:** Motion to dismiss for defects in prosecution.
TX	Tex. Code Crim. Proc. Ann. art. 16.01 (hearsay); Tex. Code Crim. Proc. Ann. art. 16.07 (hearsay); TX R EVID Rule 101 (hearsay); Tex. Code Crim. Proc. Ann. art. 28.01 (challenge)	Garcia v. State, 775 S.W.2d 879, 881 (Tex. App. 1989) (hearsay); Bell v. State (Cr.App. 1969) 442 S.W.2d 716 (challenge)	**Rules of Evidence Apply w/out Exception:** Rules of evidence do not apply in preliminary hold-over hearings, but the rules apply, and hearsay is not permitted, in preliminary examining hearings.	**May Allow for Pretrial Challenge:** Court has discretion hear challenges to the form or substance of the information pre-trial.
UT	Utah R. Evid. 1102 (hearsay); Utah R. Crim. P.	State v. Timmerman, 2009 UT 58, 218	**Certain Hearsay Admissible:** Reliable hearsay is admissible in	**May Allow for Pretrial Challenge:** Motions to quash and dismiss.

	7B (hearsay); Utah R. Crim. P. 12 (challenge)	P.3d 590, 595–96 (hearsay)	preliminary hearings; includes: foundations for authenticity, lab reports, police statements, child victim statements, and statements under oath. Probable cause cannot be based solely on hearsay under oath.	
VT	Vt. R. Crim. P. 5 (hearsay); Vt. R. Crim. P. 4 (hearsay); Vt. R. Crim. P. 12 (challenge)	State v. Rooney, 173 Vt. 506, 507–08, 788 A.2d 490, 491–92 (2001) (challenge)	**Certain Hearsay Admissible:** Preliminary hearings are only provided for warrantless arrests, and hearsay is admissible if reliable and factually based.	**Allows for Pretrial Challenge:** Defendant may file a motion for challenging the prosecution's ability to prove elements of the case.
VA	Va. Code Ann. §§ 19.2-183, 19.2-187, 19.2-188 (hearsay); Va. Code Ann. § 19.2-266.2 (challenge)		**Certain Hearsay Admissible:** Rules of evidence apply; exceptions for lab reports and medical examiner testimony.	**May Allow for Pretrial Challenge:** Allows for challenges to an information on procedural or constitutional grounds.
WA	WA ST ER 1101 (hearsay); WA ST SUPER CT CR CrR 3.2.1 (hearsay)[458]; WA ST SUPER CT CR CrR 8.3 (challenge)		**Certain Hearsay Admissible:** Rules of evidence do not apply to preliminary hearings.	**May Allow for Pretrial Challenge:** Motion to dismiss based on insufficient evidence to establish a prima facie case.
WV	West Virginia Code § 62-1-8 (hearsay); W. Va. R. Crim. P. 5.1 (hearsay); W. Va. R. Crim. P. 12 (challenge)	State v. Haught, 371 S.E.2d 54, 60-62 (W. Va. 1988) (hearsay); Peyatt v. Kopp, 189 W. Va. 114, 428 S.E.2d 535 (1993) (hearsay)	**Certain Hearsay Admissible:** Hearsay from a credible source is admissible in a preliminary hearing if it has factual basis and direct testimony would be unreasonably burdensome.	**May Allow for Pretrial Challenge:** Motion to dismiss.
WI	Wis. Stat. Ann. §§ 970.03, 970.038 (hearsay); Wis.	State v. O'Brien (2014) 850 N.W.2d 8, 354 Wis.2d 753	**Certain Hearsay Admissible:** Hearsay is admissible but courts must consider	**Allows for Pretrial Challenge:** Notion to dismiss challenging sufficiency of the

[458] See WA ST CR LTD JURIS CrRLJ 3.2.1 ("The written or recorded evidence considered by the court may be hearsay in whole or part. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations.")

	Stat. Ann. § 971.31 (challenge)	(hearsay); Wold v. State (1973) 204 N.W.2d 482, 57 Wis.2d 344 (challenge)	reliability. Specific hearsay exceptions include: lab reports, fingerprint reports, and the recorded testimony of a child under 16.	preliminary examination.
WY	Wyo. R. Crim. P. 5.1 (b) (hearsay); Wyo. R. Evid. 1101(b)(3) (hearsay); Wyo. R. Crim. P. 12 (challenge)	Hennigan v. State, 746 P.2d 360, 369 (Wyo.1987) (hearsay)	**Hearsay Generally Admissible:** Rules of evidence do not apply.	**May Allow for Pretrial Challenge:** Motion to dismiss.

State	APPENDIX C: DEPOSITIONS	
	Statute or Court Rule	**Key language**
FL	Fla. R. Crim. P. 3.220(h)	"At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule"
IN	Ind. Code § 35-37-4-3	"The state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure"
IA	Iowa R. Crim. P. 2.13	"A defendant in a criminal case may depose all witnesses listed by the state in the minutes of testimony in the same manner, with the same effect, and with the same limitations, as in civil actions"
MO	Mo. R. Crim. P. 25.12	" A defendant in any criminal case after an indictment or the filing of an information may obtain the deposition of any person on oral examination or written questions. The manner of taking the deposition shall be governed by the rules relating to the taking of depositions in civil actions"
ND	N.D. R. Crim. P. 15	"At any time after the defendant has appeared, any party may take testimony of any person by deposition including audio-visual depositions taken as provided in N.D.R.Civ.P. 30.1"
VT	Vt. R. Crim. P. 15	"A defendant or the state, at any time after the filing of an indictment or information charging a felony, or charging a misdemeanor if authorized under subdivision (e)(4), may take the deposition of a witness subject to such protective orders and deposition schedule as the court may impose"



THE IMPACT OF
EARLY REPRESENTATION:

AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT

Alena Yarmosky, MPP 2018

University of California, Berkeley

Goldman School of Public Policy

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Executive Summary

Overview of Pre-Trial Release Unit

The San Francisco Public Defender's Office launched its "Pre-Trial Release Unit" (PRU) on October 2, 2017. The PRU, which is staffed by two full-time attorneys and one full-time investigator, provides legal advice and advocacy to indigent arrestees during the critical period between booking and arraignment. PRU interventions include direct representation (through one-on-one interviews), early case investigation, attorney notification, parole advocacy, contacts to family and friends, in-person arraignment recruitment, in-jail referrals, and bail advocacy. In its first five months of operation, the PRU provided pre-arraignment representation in 1,024 unique cases.

Goals of the PRU

After years of providing counsel to indigent arrestees in San Francisco, the Public Defender's Office is acutely aware of wealth disparities in access to pre-arraignment representation. The pre-arraignment period is critical for a number of reasons: bail is set, formal charges are filed, case investigation begins, and the first round of police interviews occur. Individuals wealthy enough to afford a private attorney immediately after booking have access to a number of services (including bail advocacy, early defense investigation, rebooking advocacy, and in-person invocation of rights) that indigent arrestees – who are not provided a public defender until arraignment – do not receive. These services can significantly impact later criminal case proceedings, increase the likelihood of pre-trial release, and help to ensure clients' stability during and post incarceration.

In addition to reducing wealth disparities in pre-arraignment representation**,** the Public Defender's Office also aims to reduce the county jail population – a key priority shared by the Mayor, District Attorney, and Sherriff's Department. In order to ensure the permanent closure of County Jails #3 and #4, the City and County of San Francisco (the City) must reduce its jail population by 83,000 jail bed days per year. The PRU hopes to contribute to this reduction goal by increasing arrestees' likelihood of pre-trial release.

Study Evaluation Methods

To quantitatively assess the impact of the PRU on length of pre-trial incarceration, we generated a dataset of booking, demographic, and charge information for all arrestees booked into county jail during our study period (October 2, 2017 - February 28, 2018). This dataset was generated primarily from the Public Defender's GIDEON case management system, which draws from data maintained by the San Francisco County Superior Court's larger case management database, and included PRU treatment coded by intervention type.

Because selection into arrest-responsive PRU treatment is non-random, we used a propensity score method to control for differences among treated and non-treated individuals. The propensity score indicates the likelihood that a client receives arrest-responsive PRU treatment given: age, race, gender, out-of-county warrants, parole or probation holds and criminal history. We then used a "nearest neighbor" matching technique to match clients treated by the PRU with similarly-scored defendants who did not receive treatment. Because there was little

selection bias associated with parole advocacy, we used a regression model to measure impact of parole advocacy on eligible parolees' length of incarceration.

To further evaluate the impact of the PRU on pre-trial detention, clients' stability, and likelihood of repeat involvement with the criminal justice system, we conducted interviews with a total of 14 stakeholders. Interviewees included PRU program staff (4), Deputy Public Defenders (6), and former PRU clients (4).

Summary of Findings

Based on the findings from our quantitative analysis and qualitative interviews, we conclude that the Public Defender's Pre-Trial Release Unit has demonstrated promising initial success in meeting its goals of 1) reducing wealth disparities in access to pre-arraignment representation, and 2) reducing the jail population through increased access to pre-trial release.

Specifically, our analysis reveals that PRU intervention reduces the length of pre-trial incarceration**:**

- **Individuals who receive arrest-responsive intervention are twice as likely to be released at arraignment when compared with similarly situated, non-treated arrestees**. Similar, not-treated arrestees are released at arraignment 14 percent of the time, compared to a 28 percent rate for treated arrestees. This appears to be due primarily to attorneys' increased ability to argue for release at arraignment, including increased access to client information, early investigation, and in-person presence at arraignment.
- Among all eligible parolees, **parole advocacy provided by the PRU reduced the length of incarceration by 230 hours (approx. 9.5 days).** This is consistent with qualitative evidence that suggests parole advocacy increases the speed at which parole holds are lifted and reduces the number of parole petitions filed.

We also conducted interviews with PRU program staff, public defender attorneys, and former PRU clients to attempt to evaluate the qualitative, more intangible impact of the PRU. Although difficult to measure, it appears that PRU intervention is reducing wealth disparities in access to critical pre-arraignment benefits. Our analysis suggests:

- **PRU intervention may uncover evidence that may positively impact later case outcomes**. This evidence, including surveillance footage and/or witness testimony, may be impossible to access post-arraignment.
- By simultaneously advocating for arrestees and helping them navigate the legal process, **PRU intervention likely increases procedural justice**.
- By contacting the employers, family members, and friends of arrestees, the **PRU may help clients' keep their jobs, maintain stable housing, and protect their families while incarcerated**. This increased stability during incarceration may lead to increased stability in the longer-term.

Using the above analyses, we calculated that **PRU's arrest-responsive treatment has saved approximately 4,689 jail bed days** during its initial 5 months of operation. This is an average savings of 940 jail bed days a month, or approximately 11,253 jail bed days saved per year.

Introduction

The San Francisco Public Defender's Office is committed to ensuring equal access to justice for all, regardless of race, gender, national origin or class. As part of this mission, the Public Defender's Office provides attorney representation, including direct defense, re-entry services, and legal support, to approximately 23,000 indigent individuals charged with crimes each year.[1] While racial disparities in the criminal justice system are undeniable both nationally and in San Francisco, the Public Defender's Office has helped to significantly reduce disparities on the basis of wealth. In addition to high quality representation, the PD's Office is currently leading the nation in efforts to reduce the burden of money bail and criminal justice debt on low-income city residents.[2]

Despite significant progress however, there remains a critical area in which wealthy arrestees in San Francisco have a significant advantage over the indigent: pre-arraignment representation. Arrestees who are wealthy enough to hire private counsel have access to legal representation and advocacy immediately upon being booked into jail. In contrast, indigent arrestees are traditionally not assigned a public defender until arraignment (the first hearing before a judge). Depending on the time and day of arrest, arraignment may occur three to four days after an individual is booked into jail.[3]

The pre-arraignment period is critical for a number of reasons: The District Attorney's Office decides whether and what charges to file, bail is set, and preliminary investigations may begin to uncover evidence. Wealth also plays a significant role in the likelihood of release pre-arraignment; wealthy arrestees who can afford to post bail and/or receive rebooking advocacy may remain in their homes and communities while awaiting the DA's charging decision. In contrast, the majority of San Francisco's indigent arrestees cannot afford to post bail.[4] These individuals must remain incarcerated at least until their case is either arraigned or dismissed, with potentially significant costs to employment, child custody, and financial stability. Pre-arraignment representation may also increase the likelihood of release *at* arraignment by providing attorneys the time needed to compile a robust case for release.[5]

The impact of pre-trial release cannot be overestimated. Defendants who are incarcerated pre-trial plead guilty at higher rates, are more likely to be convicted, and face longer sentences than similarly-situated releasees.[6] Pre-trial incarceration is also correlated with increased recidivism, as longer jail time can cause a defendant to lose his/her job, housing, eligibility for certain treatment programs, or community supports.[7]

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[1] San Francisco Public Defender. Retrieved from http://sfpublicdefender.org/about/

[2] Fuller, T., & Stevens, M. (2018, February 28). New York Times, California Today: Should Bail Be Set Above What Defendants Can Pay? Retrieved from https://www.nytimes.com/2018/02/28/us/california-today-bail-hearings-san-francisco.html

[3] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March - April)

[4] Do the Math: Money Bail Doesn't Add Up for San Francisco. (2017). San Francisco Financial Justice Project, Office of the Treasurer & Tax Collector.

[5] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)

[6] Dobbie, W., Goldin, J., & Yang, C. S. (2018). The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. American Economic Review, 108(2), 201-240. doi:10.1257/aer.20161503

[7] Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). The Hidden Costs of Pretrial Detention. Laura and John Arnold Foundation. Retrieved from http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf

In keeping with its mission to ensure access to justice for all, the San Francisco Public Defender's Office launched its pilot "Pre-Trial Release Unit" (PRU) in October of 2017. The PRU aims to reduce wealth disparities in access to pre-arraignment representation by providing legal advice and advocacy to indigent defendants in the critical period between booking and arraignment. The PRU also seeks to reduce the county jail population – a key priority shared by the Mayor, District Attorney, and Sherriff's Department – by increasing the likelihood of release pre- and at arraignment.

This report will examine whether pre-arraignment representation, as provided by the PRU, has a significant impact on pre-trial incarceration of indigent defendants. Specifically, this report will assess the PRU's progress in its goals of 1) rectifying wealth disparities in pre-arraignment representation and 2) reducing the jail population. We hope that this analysis aides the Public Defender's Office, as well as the City and County of San Francisco, in its decision whether to continue this pilot program past the nine-month trial period.

Policy Background

Early Representation a Long-Held Priority for the Public Defender's Office

The San Francisco Public Defender's Office provides high-quality legal representation to indigent defendants within the City and County of San Francisco (the City). Due in large part to this robust counsel, the City has made progress in ensuring equitable access to justice regardless of wealth. However, wealthy arrestees continue to hold a significant advantage over the indigent in one critical area: access to pre-arraignment representation.

Arrestees who are able to hire private counsel have access to legal representation and advocacy immediately upon being arrested and booked into jail. In contrast, indigent arrestees are historically not assigned a public defender until arraignment, which can occur three to four days after arrest. The San Francisco Public Defender's Office has been acutely aware of these wealth disparities – and the resulting differences in pre-arraignment legal advice and advocacy – for several years. However, prior to the funding of the Pre-Trial Release Unit in Fall 2017, the office had been unable to expand their indigent representation to the pre-arraignment period. [8]

San Francisco Faces a Mandatory Reduction in Jail Population

The City and County of San Francisco spends approximately $119.5 million each year on programs targeting the City's justice-involved population.[9] A significant portion of this funding is used to house individuals within the City's jail system: County Jail #2 (located at 425 7th St.), County Jails #3 and #4 (located at 850 Bryant St.), and County Jail #5 (located at #1 Moreland Dr. San Bruno).[10] The San Francisco Sheriff's Department also maintains a locked ward at San Francisco General Hospital, which houses incarcerated individuals in need of intensive medical treatment. [11]

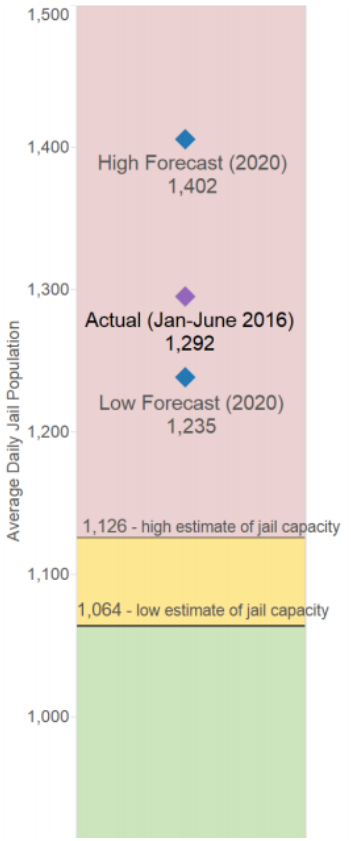
Out of the four primary jails responsible for housing prisoners, two (County Jails #3 and #4) have been deemed unsafe for permanent habitation. County Jails #3 and #4, both located in the Hall of Justice, have been classified as "seismically unfit" by inspectors and pose a serious threat to incarcerated individuals in the event of a major earthquake or similar emergency. [12] In 2015, the City proposed construction of a new facility to replace County Jails #3 and #4. However, after months of advocacy from local activists and criminal justice stakeholders, the Board of Supervisors voted unanimously in January 2016 to reject the City's proposal. Instead, the Board called for the formation of a working group to propose alternative measures, with the ultimate goal of reducing the jail population enough to allow for the permanent closure of Jails #3 and #4.[13]

[8] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March - April)
[9] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).
[10] County Jail #1, located at 425 7th Street, is used for processing of booking and release only. No individuals are housed here.
[11] San Francisco County Jail System Facility Descriptions. Retrieved from http://www.sfsheriff.com/jail_info.html
[12] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).
[13] Ibid.

The "Work Group to Re-envision the Jail Replacement Project" (Work Group) was formed in March 2016. Chaired by San Francisco Sherriff Vicki Hennessy, Barbara Garcia (Director of Department of Public Health), and Roma Guy (community member and representative of Taxpayers for Public Safety), its membership consisted of 39 local criminal justice and mental health experts, including the San Francisco Public Defender's Office. Given its mandate to facilitate the permanent closure of unsafe county jails, the Work Group prioritized methods for a significant, sustainable reduction in the city's jail population.[14]

To assess the reduction required, the Work Group compared the total number of usable beds in San Francisco's jail system to the average daily jail population in the first six months of 2016. They concluded that in order to allow for the permeant closure of County Jails #3 and #4, the jail population must be reduced by an average of 166-228 individuals per day (see Figure 1). This is a necessary jail bed reduction of 83,220 bed days per year. [15] [16]

Figure 1: Jail Population vs. Capacity



Source: Work Group to Re-envision the Jail Replacement Project, Board of Supervisors Presentation (June 13, 2017)

Pre-Trial Intervention a Promising Approach

San Francisco's jail population largely consists of individuals who have not been convicted of a crime. 85 percent of individuals in San Francisco county jail are in the pre-trial phase, meaning they have not been sentenced and are still awaiting resolution of their case.[17] Although a portion of these individuals may be ineligible for release due to out-of-county warrants, federal holds, or parole/probation violations, a significant portion of the total jail population (45 percent) is eligible for release pre-trial.[18] This indicates that pre-trial intervention is a promising means of reducing the jail population overall.

Of course, jail population is not equivalent to jail bed day use. The majority of San Francisco's jail population (65 percent) is made up of individuals who stay in jail for 15 days or less. Despite their numbers, these individuals account for only 3 percent of total jail bed days used. In contrast, a small minority of individuals (12 percent)

[14] San Francisco Department of Public Health. Work Group to Re-envision the Jail Replacement Project. Retrieved from https://www.sfdph.org/dph/comupg/knowlcol/jrp/default.asp

[15] It is important to note that jail population reduction is measured in terms of jail bed days, not the total number of people in jail. This is due to the fact that individuals are incarcerated for different lengths of time; reducing the short-term stays of several people in jail would have the same impact on average daily jail population as reducing the long-term stay of one individual. Further, a jail bed calculation allows us to consider the resources saved by reducing an individual's length of detention, even if he/she is not entirely released from jail.

[16] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).

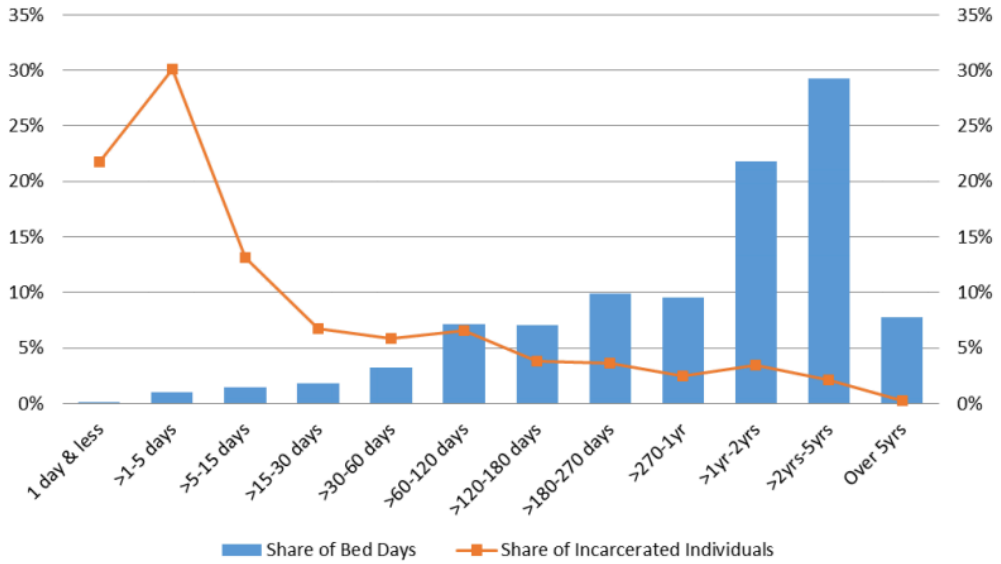
[17] Update to the Jail Population Forecast (Rep.). (2015). City Services Auditor, Office of the Controller, City and County of San Francisco.

[18] Percentage derived from daily jail population snapshot on August 23, 2016. Work Group to Re-envision the Jail Replacement Project Report Release & Next Steps. Presentation to Board of Supervisors, June 13, 2017, San Francisco. Retrieved from https://www.sfdph.org/dph/files/jrp/BOS-Presentation-6-13-2017.pdf

have long-term jail stays of over 180 days. Although a much smaller portion of the population, these individuals account for 78 percent of 2015 jail bed days used (see Figure 2).[19]

Practically, this indicates that a similar reduction in jail bed days could be achieved by either 1) targeting many individuals with short-term stays, or 2) targeting fewer individuals with significantly longer stays.

Figure 2: 2015 Incarcerated Individuals, Share of Bed Days vs. Share of Population



Source: Work Group to Re-envision the Jail Replacement Project, Board of Supervisors Presentation (June 13, 2017)

This analysis can be helpful in measuring the impact of various interventions on jail bed day reduction. However, this approach is limited in predicting the impact of *pre-trial* intervention. That's because pre-trial intervention may itself impact the length of time that an individual is in jail. Consider an individual who receives pre-trial intervention and who stays in jail less than 15 days. If this pre-trial intervention was effective in securing her release, it is likely that she would have been incarcerated for much longer – accounting for a significantly larger share of jail bed days – had she not received treatment. The causal effects of pre-trial intervention make it difficult to determine a critical threshold for impact using program size alone.

Launch of the Pre-Trial Release Unit

In their final report, the Work Group recommended pre-trial intervention as a promising approach to reducing San Francisco's jail population. Their recommendation aligned ideally with the Public Defenders' long-held priority of reducing wealth disparities in access to pre-arraignment representation.

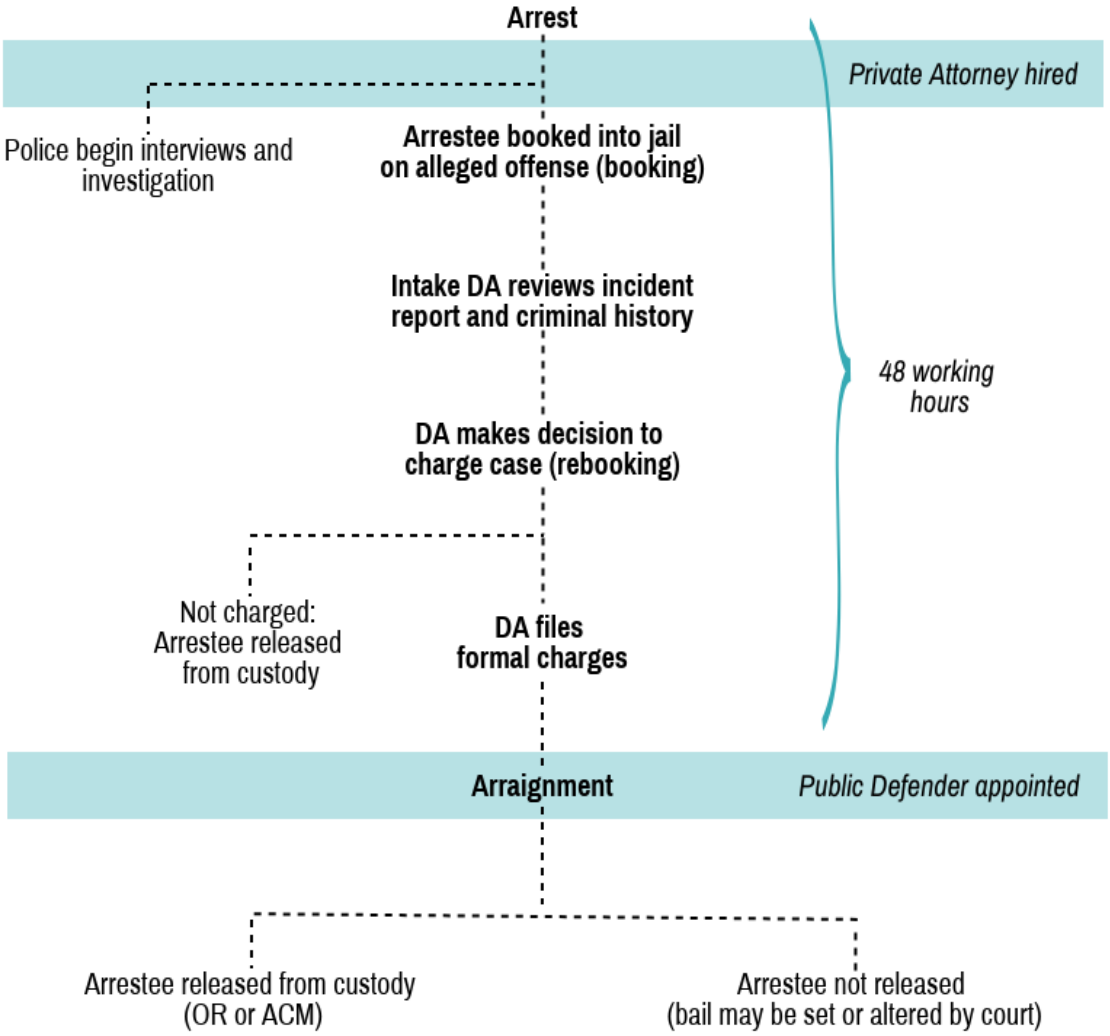
The Pre-Trial Release Unit was launched on October 2, 2017, supported by $355,000 in funding from the Mayor's FY 2017 – 2018 budget. The goals of the unit reflect the twin priorities of its founding: 1) rectify wealth disparities in pre-trial outcomes, and 2) reduce San Francisco's jail population.

[19] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).

Wealth Disparities in Pre-Arraignment Representation

Significant wealth disparities exist in access to pre-arraignment representation. Individuals who are able to hire a private attorney have access to legal representation and advocacy immediately upon being booked into jail. In contrast, prior to the launch of the Pre-Trial-Release Unit, low-income arrestees were not assigned a public defender until arraignment. Figure 3 provides a basic overview of the pre-arraignment process prior to the PRU.

Figure 3: Overview of Process from Arrest to Arraignment, Prior to PRU Implementation



Source: Arrest to Arraignment Process Maps, Office of the Controller, City and County of San Francisco

As noted in Figure 3, California law requires that individuals are arraigned no more than 48 *working* hours after arrest.[20] Practically, this means that individuals arrested during non-working hours (on the weekends or holidays) may have to wait several additional days before their case is either discharged or arraigned.[21]

The San Francisco District Attorney's Office is currently working to reduce these delays by extending charging decisions to non-working days (weekend rebooking).[22] However, it is important to note that arraignment hearings continue to occur exclusively during working hours.[23] Therefore, individuals arrested at the end of the week and formally charged by the DA may still have to wait up to 96 hours before arraignment.[24]

Criminal Case Impacts of Pre-Arraignment Representation

This disparate access to pre-arraignment representation can severely impact individuals' later criminal case proceedings. Wealthy individuals who retain private counsel prior to arraignment are more quickly informed of their constitutional rights, receive critical early investigation, and have access to direct re-booking advocacy. All of these services – traditionally unavailable to indigent defendants – can help to ensure individuals are not overly charged, wrongfully convicted, and/or unnecessarily incarcerated.

Invocation of Rights: Arrestees who can afford to pay for pre-arraignment representation are able to invoke their constitutional rights under the 5th and 6th amendments. Specifically, arrestees are informed by their attorney that they have a right to legal counsel in critically-important police interviews, and they are likely instructed by their attorney to invoke this right in any and all communication with police.

Despite media popularization of Miranda rights, the majority of arrestees do not fully understand the extent of their rights as criminal case defendants.[25] As a result, arrestees may unintentionally self-incriminate (or appear to self-incriminate) in conversations with police. Young adults, non-native English speakers, and people with cognitive disabilities and mental illness face particularly steep barriers to understanding, and are therefore particularly vulnerable to self-incrimination. However, because police interviews typically happen within 24 hours of arrest – the period before a public defender is traditionally assigned -- the most vulnerable arrestees are often those most likely to waive their constitutional rights. Future charging decisions, plea offers, and trial decisions may be significantly impacted as a result.

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[20] California Penal Code §825

[21] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).

[22] Ibid.

[23] The Superior Court, County of San Francisco maintains normal working hours and does not operate on weekends or holidays.

[24] To account for this, our propensity score analysis does not incorporate individuals who are booked on Fridays. Nonetheless, PRU program staff report that individuals booked on Thursdays may also remain incarcerated over the weekend prior to arraignment. In order to maintain a conservative estimate, we assume 96 hours as the maximum time from booking to arraignment. See "Study Assumptions and Limitations" for further information.

[25] Rogers, R. (2011, November). Getting it wrong about Miranda rights: False beliefs, impaired reasoning, and professional neglect. Retrieved from https://www.ncbi.nlm.nih.gov/pubmed/22082397

Early Investigation: Pre-arraignment representation is also critically important to the successful assembly of evidence. Surveillance footage, an increasingly weighty component of criminal case evidence, often automatically updates every 48–72 hours and may be inaccessible even three days post-arrest. Early investigation is also important in securing witness testimony; the more time passes between an alleged incident and investigation, the more difficult it becomes to identify and locate witnesses. This can be a particular challenge in San Francisco due to the high proportion of transient and homeless individuals.[26] Without concrete home addresses or reliable contact information, it can be virtually impossible to access and interview these individuals even days post-arrest.

In interviews with deputy public defenders, numerous attorneys reinforced the importance of early investigation. When asked about challenges to legal defense, 5 out of 6 attorneys interviewed voluntarily reported difficulties in accessing some forms of evidence once they had been formally assigned to the case.[27] In contrast, wealthy arrestees who can afford pre-arraignment counsel have significantly increased likelihood of obtaining what may become critically important evidence in later case proceedings.

Rebooking Advocacy: As outlined in Figure 3, an arrestee is both booked and rebooked during the pre-arraignment period. Initial booking occurs at jail intake, when an SFPD officer files informal booking charges based on his/her interpretation of alleged offense. Rebooking occurs approximately 24 to 48 hours after initial booking, when the District Attorney makes a decision to file formal charges in an arrestees' case.

Unlike initial booking, the DA's rebooking decision is based on further case investigation. This makes rebooking a critical opportunity for legal advocacy: if attorneys are retained prior to rebooking, they can directly petition the DA to reduce or dismiss their clients' charges. Rebooking advocacy is also closely related to early investigation. If attorneys uncover critical or even exculpatory evidence during early investigation, they can present this evidence during rebooking to help secure their clients' immediate release.

From a systems perspective, rebooking is also an important check on police discretion exercised during the initial booking stage. A 2017 report by University of Pennsylvania's Quattrone Center found that racial bias in police booking charges is a primary driver of overall racial disparities in San Francisco's criminal case outcomes.[28] When an individual is incorrectly or overly-charged by police, rebooking is the earliest opportunity to correct this injustice.

Despite its importance, however, rebooking advocacy is primarily accessible only to wealthy arrestees. Because rebooking occurs prior to arraignment – and the start of traditional public defender representation – indigent individuals have been largely left out.

[26] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)
[27] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March - April)
[28] Owens, E., Kerrison, E. M., & Da Silveira, B. S. (2017). Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco. Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School.

Wealth Disparities in Pre-Arraignment Release

Due in part to differences in access to pre-arraignment representation, significant wealth disparities continue to exist in pre-arraignment release. When compared to wealthy arrestees, low-income arrestees are more likely to remain in custody pre-arraignment.[29]

The Role of Money Bail

A primary driver of this disparity is the United States' reliance on money bail. When an individual is booked into jail, his/her bail is set according to alleged offense.[30] At arraignment, a judge may decide to alter a defendant's bail amount based on community ties, criminal history, and public safety risk.[31]

Wealthy arrestees who can afford to post the full bail amount (as indicated by the Superior Court's fixed fee schedule) are able to remain in their homes and communities while awaiting formal charges and/or arraignment. If the District Attorney decides not to file charges in their case or they are exonerated at trial, these individuals get a full bail refund. In contrast, indigent arrestees who wish to be released pre-arraignment must pay a nonrefundable bail fee (generally 10 percent of set bail) to a bail bondsman.[32] Because this fee is non-refundable, indigent individuals and their families may find themselves thousands of dollars in debt, even if charges are never filed against them.[33]

Some low-income arrestees are able to pay the non-refundable fee needed to secure release on bail. However, given San Francisco's particularly high bail schedule, the majority of the city's indigent arrestees are unable to afford even this 10 percent fee.[34] A recent report from the San Francisco Treasurer's office found that 40 – 50 percent of San Francisco's pre-trial jail population would be released if they could afford to pay bail.[35]

Unequal Access to Bail Advocacy: Unequal access to early representation reinforces this disparity in pre-arraignment release. Although bail is set at booking using a fixed fee schedule, the California Penal Code empowers most arrestees to make an application for reduced bail prior to arraignment -- within 8 hours of being booked into county jail.[36] Without legal counsel, there is no mechanism for an incarcerated individual to file this

[29] "Not in it for Justice" | How California's Pretrial Detention and Bail System Unfairly Punishes Poor People. Human Rights Watch. (2017, June 06).

[30] Superior Court of California, County of San Francisco, Felony-Misdemeanor Bail Schedule. (2017, July 1).

[31] California Penal Code §1275

[32] Do the Math: Money Bail Doesn't Add Up for San Francisco. (2017). San Francisco Financial Justice Project, Office of the Treasurer & Tax Collector.

[33] Ibid.

[34] Median felony bail in California is estimated to be $50,000, more than five times the national average. San Francisco's bail schedule is estimated to be in the top highest quartile in the state.

[35] Do the Math: Money Bail Doesn't Add Up for San Francisco. (2017). San Francisco Financial Justice Project, Office of the Treasurer & Tax Collector.

[36] California Penal Code §§1268–1276.

petition. But if an arrestee is wealthy enough to hire private counsel pre-arraignment, his/her attorney can use this approach to advocate for reduced bail almost immediately.

Wealth Disparities in Release at Arraignment

Indigent arrestees are similarly disadvantaged in their access to release *at* arraignment. This is primarily due to differences in attorneys' capacity to present a robust, individualized case for release.

Private attorneys hired immediately upon arrest or booking have approximately 48 hours to conduct early investigation, gather evidence of clients' community ties, and otherwise prepare a strong case for their client's release at arraignment. In contrast, public defenders must attempt to gather any/all relevant information on the day of arraignment itself.

Aside from obvious preparation limitations, public defenders face barriers in communicating with clients and receiving critical case information. First, attorney-client interaction is extremely limited prior to arraignment. In interviews, attorneys reported having an average of 5-10 minutes to meet and speak with each client prior to the start of proceedings.[37] The scope of their conversation is also limited. Because all pre-arraignment interviews take place in large communal holding cell, attorneys are unable to discuss case specifics with their client out of concern for confidentially. And while attorneys do ask their clients questions about community ties, they have no opportunity to verify or illustrate this information before presenting it to the judge. Finally, public defenders are only provided access to critical case information (including client's arrest report and RAP sheet) immediately prior to the start of arraignment. With limited time to read and process this information – which may be extensive – public defender attorneys have little ability to prepare robust, case-specific arguments for their clients.[38]

Private attorneys hold a final advantage in their ability to argue for release at arraignment: clients' community contacts. Private attorneys who are hired 24-48 hours prior to arraignment can recruit clients' friends, family members, and even employer(s) to attend the arraignment hearing in-person. Attorneys report that an in-person presence at arraignment can be incredibly helpful in securing a clients' release, mainly by demonstrating the strength of an individual's local and community ties.[39] However, prior to the PRU, in-person recruitment was a virtual impossibility for indigent arrestees. If the first time a public defender meets his/her client is at arraignment, it is too late to bring anyone else to the courtroom.

[37] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March - April)
[38] Ibid.
[39] Ibid.

The Impact of Pre-Trial Incarceration

Wealth disparities in pre-trial release are particularly problematic when considering the severe consequences of pre-trial detention on conviction, sentencing, and stability post-release. Research demonstrates that defendants who are detained pre-trial are more likely to be convicted, sentenced to jail, and remain in jail for longer periods of time.

Recent studies have found significant correlation between pre-trial detention and increased likelihood of conviction. A 2016 study conducted by the National Bureau of Economic Research found that defendants detained pre-trial were significantly more likely to be convicted than similarly situated defendants who had been released pre-trial.[40] It is important to note that this disparity is driven both by an increase in guilty pleas and guilty findings: pre-trial detention was found to be associated with a 27.5 percent increase in the likelihood of a defendant pleading guilty and a 27.3 percent increase in the likelihood of being found guilty by judge or jury.[41]

Considering that criminal cases can take several months and even years to resolve, it is unsurprising that defendants detained pre-trial tend to plead guilty more quickly and at higher rates. Even individuals who are innocent of alleged crimes may decide that pleading guilty is the best way to secure release; this is particularly true for defendants who, due to credit for time served, become eligible for release immediately upon entering a guilty plea. [42] [43]

On the other hand, a defendant's appearance during trial has been shown to have a significant effect on his/her likelihood of being found guilty.[44] The positive relationship between pre-trial detention and guilty findings may be due in part to this appearance bias; jail jumpsuits and shackles may make a defendant appear "more guiltily" when compared with a professionally dressed defendant. Jurors may also assume that defendants who do not qualify for pre-trial release are in fact a threat to public safety, further biasing their perceptions of the defendant.[45]

In addition to increased likelihood of conviction, defendants detained pre-trial face increase likelihood of being sentenced to jail. A 2016 study of 380,000 misdemeanor defendants in Harris County Texas found stark differences in sentencing among detained and non-detained defendants: defendants detained pre-trial were 43

[40] Dobbie, W., Goldin, J., & Yang, C. S. (2018). The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. American Economic Review, 108(2), 201-240. doi:10.1257/aer.20161503
[41] Ibid.
[42] Meghan Sacks & Alissa R. Ackerman (2012) Pretrial detention and guilty pleas: if they cannot afford bail they must be guilty, Criminal Justice Studies, 25:3, 265-278, DOI: 10.1080/1478601X.2012.705536
[43] Pinto, N. (2015, August 13). The Bail Trap. The New York Times Magazine. Retrieved from https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html
[44] Gunnell, J. J., & Ceci, S. J. (2010). When emotionality trumps reason: A study of individual processing style and juror bias. Behavioral Sciences & the Law, 28(6), 850-877. doi:10.1002/bsl.939
[45] Dobbie, W., Goldin, J., & Yang, C. S. (2018). The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. American Economic Review, 108(2), 201-240. doi:10.1257/aer.20161503

percent more likely to be sentenced to jail time.[46] A 2013 study of over 150,000 bookings into a Kentucky county jail found similar results for both felony and misdemeanors offenses: detained defendants were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released pre-trial.[47] Pre-trial detention is associated with longer sentencing. In Harris County Texas, detained defendants received sentences that were more than twice as long, on average, when compared to similarly situated defendants who had been released pre-trial.[48] Kentucky arrestees detained pre-trial were found to have jail sentences nearly three times as long.[49]

Finally, pre-trial detention is correlated with increased likelihood of recidivism. Another study analyzed the same sample of 150,000 bookings into a Kentucky jail from July 2009 to July 2010. The authors found that defendants detained pre-trial were 1.3 times more likely to be rearrested within the next 24 months, compared with similarly-situated releasees.[50] This relationship was shown to strengthen over time; the longer a defendant was detained pre-trial, the greater the likelihood of later arrest. This effect is particularly great for low-risk defendants – even 48 hours in jail was shown to increase recidivism of low-risk or first-time offenders by almost 40 percent.[51]

The long-term consequences of pre-trial detention are important to understand, not only as they impact the integrity of our justice system, but also as they drive overall trends in jail population. Practically, an increase in the number of defendants detained pre-trial not only results in more jail bed days used during the pre-trial period, but also leads to a proven increase in jail bed days required post-conviction and in future arrests. Pre-trial release is therefore an investment that continues to yield returns.

[46] Heaton, P., Mayson, S., & Stevenson, M. (2016). The Downstream Consequences of Misdemeanor Pre-Trial Detention. Quattrone Center for the Fair Administration of Justice, University of Pennsylvania School of Law.
[47] Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). Investigating the Impact of Pretrial Detention on Sentencing Outcomes. Laura and John Arnold Foundation.
[48] Heaton, P., Mayson, S., & Stevenson, M. (2016). The Downstream Consequences of Misdemeanor Pre-Trial Detention. Quattrone Center for the Fair Administration of Justice, University of Pennsylvania School of Law.
[49] Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). Investigating the Impact of Pretrial Detention on Sentencing Outcomes. Laura and John Arnold Foundation.
[50] Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). The Hidden Costs of Pretrial Detention. Laura and John Arnold Foundation.
[51] Ibid.

Program Overview

The San Francisco Public Defender's Pre-Trial Release Unit is staffed by two full-time attorneys and one full-time investigator. From October 2, 2017 through February 28, 2018, the PRU provided 1,024 defendants with pre-trial representation.

Types of PRU Intervention

PRU staff provide clients with a variety of pre-arraignment representations. In order to be considered a PRU client, defendants must receive at least one of 8 distinct services (detailed below and in Figure 4).

Direct Representation: Attorneys provide direct representation in the form of interviews with recently-booked indigent defendants. The purpose of these interviews is to 1) Generate leads on potential helpful or exculpatory evidence, (including witness names and details of arrest) as possible, 2) Compile information on clients' life circumstances, including family, job history, health, and community ties, for use in future court proceedings, and 3) Allow for invocation of rights in any future interaction with police.[52]

Attorney of Record Notification: Staff notifies fellow PD attorneys when their client has been re-arrested. Prior to the PRU, PD attorneys often did not know their client had been re-arrested until after they had been arraigned.[53]

Early Investigation: PRU staff conducts investigations into circumstance of arrest, identifies weaknesses in the charges levied against the defendant, if possible, and compiles exculpatory and/or helpful evidence for use in future case proceedings. PRU investigations may include identification of key witnesses, interviews with witnesses, review of surveillance footage, and/or contemporaneous documentation of mental or physical ailments.

Parole Advocacy: The PRU also provides parole advocacy for defendants arrested while on parole. Parolees can be arrested for failing to adhere to strict parole guidelines, or for an alleged offense unrelated to their parole status. When these individuals are arrested, they face an automatic "Parole Hold" for up to 10 days. Parole holds can only be lifted by a defendant's Parole Agent. PRU staff contacts defendants' Parole Agents and requests that their holds be lifted. At the Agent's request, and often as a condition of release, PRU staff meets with the defendant, relays communication from their Agent, and urges adherence to parole conditions.

[52] Prior to every visit, PRU staff use CMS and Gideon to identify conflicts of interest. If there is an actual or possible conflict of interest, the booked individual will not be interviewed by the PRU.

[53] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)

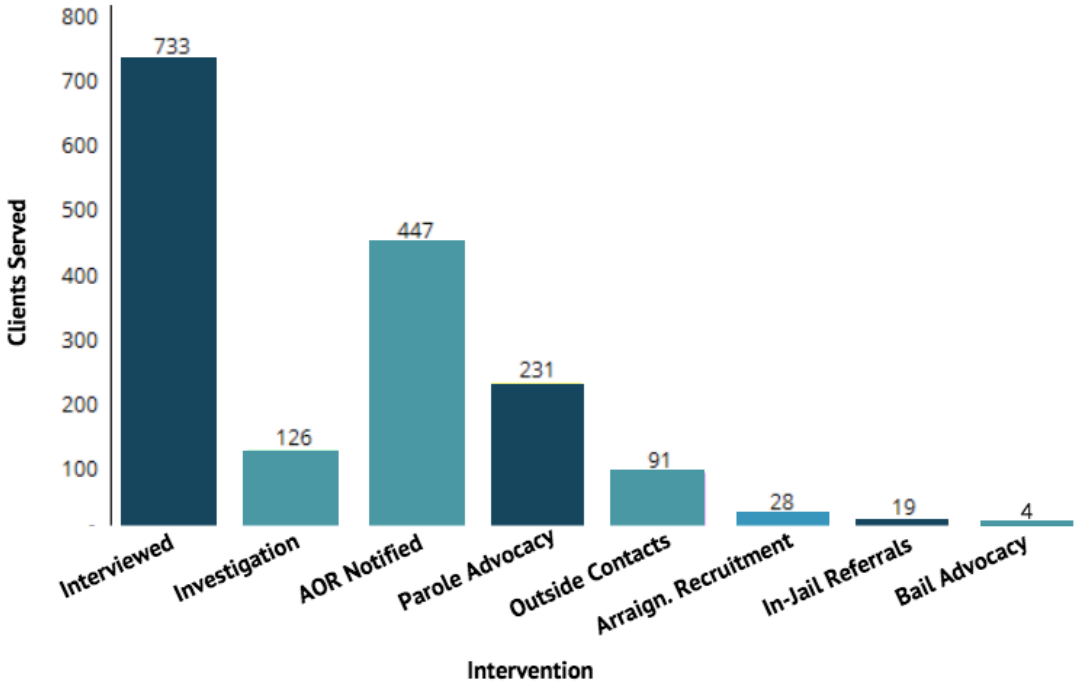
Family/Friend Contacts: Arrestees are often unable to alert their friends or family members upon being booked into jail. Outside assistance can be critical, however; If contacted, a clients' friends/families can help to coordinate childcare, ensure housing is maintained, communicate work absences to employers, and otherwise help to fulfill client's obligations while incarcerated.

In-Person Arraignment Recruitment: For defendants who have strong family and community ties, PRU staff recruits supportive individuals to attend the defendant's arraignment. In-person attendance can demonstrate a defendant's investment in the local community, an important indicator of "flight risk".

In-Jail Referrals: For defendants who are injured, ill, or suffering from mental illness, PRU staff provides immediate referrals to in-jail medical and psychiatric assistance.

Bail Advocacy: To facilitate pre-arraignment release for indigent defendants, attorneys submit 1269c petitions to the Court for release or reduction of bail.

Figure 4: Total PRU Client Per Intervention Type



Client Selection Process

While PRU attorneys aim to provide assistance to all individuals booked into San Francisco county jail, the unit's limited capacity makes this unrealistic. Instead, attorneys prioritize clients for intervention based on the following factors:

Charge severity: PRU attorneys provide representation almost exclusively to individuals charged with felonies. Of those charged with felonies, attorneys prioritize individuals charged with serious and/or violent offenses.

Previous criminal history: When possible, PRU attorneys prioritize individuals who, due to previous convictions or current charges, may qualify for sentencing enhancements under California's "Three Strikes" law.

Parole violations: PRU attorneys provide parole advocacy to individuals at risk of flash incarceration or parole revocation. This intervention is provided regardless of presence or severity of criminal charge.

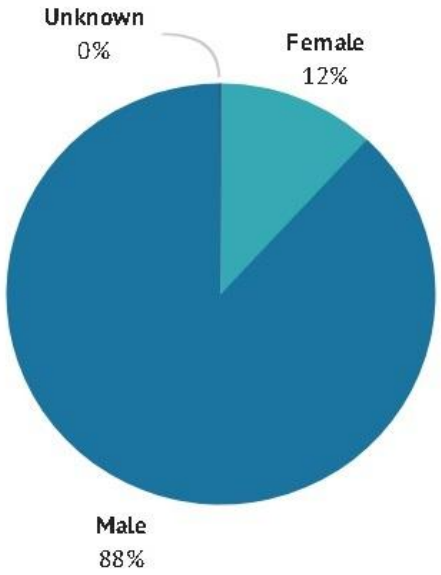
It is important to note that PRU intervention falls into two primary categories: arrest-responsive intervention, which includes pre-arraignment interviews, case investigation, attorney notification, contacts to family or friends, and pre-arraignment recruitment; and parole advocacy, which is provided to clients regardless of presence or severity of criminal charge. This distinction is important in determining the impact of PRU intervention and is discussed further in our "Evaluation Results" section (see page 27).

Client Characteristics

Defendants receiving PRU services are predominately male. More than 88 percent of PRU clients (901) are male, compared with 12 percent (122) female clients. This is consistent with the over-representation of men in the criminal justice system overall.

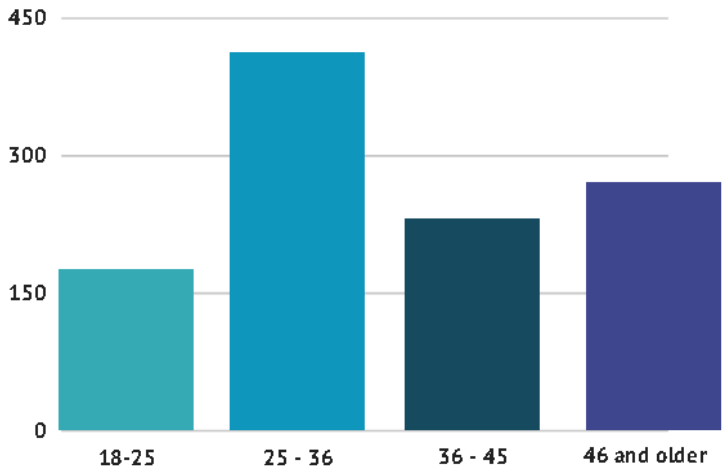
It is important to note that while the PRU represented at least 2 clients who identify as transgender, this information is not provided in gender data obtained from the Court Management System (CMS). Until February 20th of this year, the San Francisco Sherriff's Department classified jailed individuals by the gender assigned to them at birth. While the Sherriff's Department now allows transgender individuals to be classified according to their gender identity (a necessary step to ensure transgender women are not housed with cis-gendered men), this policy took effect only 8 days prior to the end of our 5-month data sample. As such, gender information provided here largely does not account for transgender individuals.

Figure 5: PRU Clients, by Gender



The average age of PRU clients is 37. Approximately 38 percent of PRU clients are between the ages of 25 and 36; 16 percent are between the ages of 18 and 25; 22 percent are between the ages of 36-45; and 25percent are 46 or older. Clients who received PRU treatment are an average of one year older than non-treated clients, and this difference was found to be statistically significant. Because age of client is not a factor in client selection (see "Client Selection Process" above), this is likely due to the fact that age is significantly correlated with likelihood of prior arrest. Clients' criminal history is considered in prioritization of PRU clients, likely explaining the difference in average age among treated and non-treated groups.

Figure 6: PRU Clients, by Age

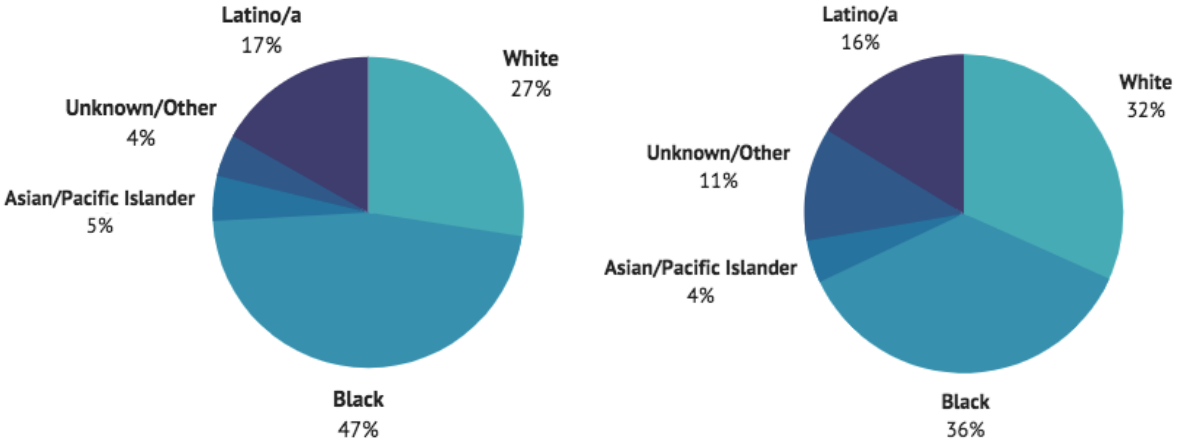


Using data accessed through the CMS/Gideon systems, we determined that the racial demographics of PRU clients largely reflect the racial makeup of the total jail population (see Figure 7). Approximately 27 percent of PRU clients are white, 47 percent are black, 17 percent are Latino/a, 5 percent are Asian or Pacific Islander, and 4 percent are identified as either "Unknown" or "Other".

As was the case with gender data, it is important to note the limitations of the race data available within San Francisco's Court Management System. Although PRU attorneys keep detailed race data within client files and case notes, this information has not yet been uploaded to shared tracking spreadsheets. CMS/Gideon data only classifies individuals as "White," "Black," "Asian/Pacific Islander," and "Other" -- noticeably missing is a classification for Latino/a individuals. This is problematic for the purposes of this research, because evidence shows that Latino/a arrestees in San Francisco face more severe pre-trial case outcomes than similarly situated White defendants.[54]

To more accurately categorize Latino/a individuals, we used 2010 census data to identify surnames for which at least 85 percent of census respondents identified as Latino/a. By matching the surnames of arrestees' in our sample with these assumed-Latino surnames, we were able to appropriately classify Latinos as 17 percent of PRU clients and 16 percent of the jail population overall.

Figure 7: PRU Clients and All Booked Individuals, by Race



Finally, PRU clients face significantly more severe booking charges than non-treated arrestees. Clients' top booking charges were grouped into 11 distinct categories based on charge summary code (see Figure 8).[55] Summary codes range from 1- 74, with 1 constituting the most severe charge ("Willful Homicide"), and 74 constituting the least severe ("Misc. Traffic Violations").

[54] Indigent Latino defendants in San Francisco are convicted of 10 percent more misdemeanors and receive probation sentences that are 55 percent longer than white defendants. Source: Owens, E., Kerrison, E. M., & Da Silveira, B. S. (2017). Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco. Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School.

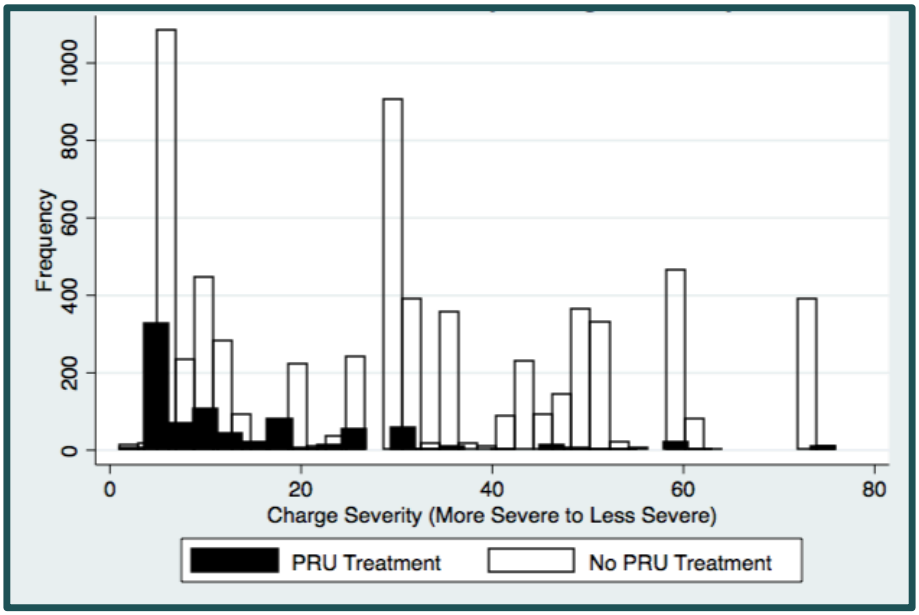
[55] Clients' top charge is determined by a Public Defender clerk, who reviews all charges and chooses the most severe ("top") offense to enter into the Gideon database. While there is potential for human error here, we were unable to access additional client charges in an operational form.

The average summary code of PRU clients' charges is 15.29. The median summary code associated with PRU charges is 9. In contrast, non-PRU defendants have an average charge summary code of 33.28 and a median of 31. Given the fact that PRU staff prioritizes more severe booking charges for representation, it is unsurprising that these differences are statistically significant.

Figure 8: Booking Charge by Summary Code Category

	SUMMARY CODE	CHARGES INCLUDED (SAMPLE)
FELONY	1 - 6	Willful homicide, manslaughter (non-vehicular and vehicular), forcible rape, robbery, assault
	7 - 11	Kidnapping, burglary, theft, motor vehicle theft, forgery, checks, access cards
	12 - 15	narcotics, dangerous drugs, other drug violations
	16 - 18	Lewd or lascivious, unlawful sexual intercourse, other sex law violations
	19 - 24	Weapons, DUI, hit-and-run, escape, bookmaking, arson
	25	Felony traffic, accessory, treason, bigamy, bribery, extort, neglect, perjury, malicious mischief, and gambling
	26 - 28	Federal offenses
MISD.	29 - 40	Dangerous drugs, petty theft, indecent exposure
	40 - 64	Prostitution, disorderly conduct, trespassing, DUI
	60	Public nuisance, contempt of court, perjury, highway
	65 - 67	Misc. traffic offenses

Figure 9: PRU Treated and Non-Treated Individuals, by Charge Severity



Evaluation Methods

Research Questions

The following research questions guided our evaluation:

1. Does early representation provided by the PRU have an impact on defendants' length of pretrial incarceration? Specifically, does PRU intervention increase clients' likelihood of release at arraignment?
2. Does early representation help reduce wealth disparities in pre-arraignment outcomes? Specifically, does PRU intervention provide additional benefits to clients in the form of procedural justice, later case outcomes, and economic or family stability?
3. How many jail bed days, if any, are saved as a result of PRU treatment?

A mixed-methods approach was used to answer the research questions above.

Quantitative Analysis

To quantitatively measure the impact of PRU treatment, we conducted an analysis of pre-trial criminal case outcomes for indigent arrestees booked during the first 5 months of the PRU program: October 2, 2017 - February 28, 2018.

This dataset was generated primarily from the Public Defender's GIDEON case management system, which draws from data maintained by the San Francisco County Superior Court's larger case management database. Included in this dataset was client demographic information, information on booking charge, length of pre-trial incarceration, and out-of-county, parole, and probation holds, if applicable.

We also analyzed internal PRU data, which is currently tracked by staff in a shared spreadsheet. While data is occasionally coded by activity, it is stored primarily in the form of qualitative case notes. A review of this data indicated that PRU representation can be separated into 8 primary categories:[56]

- Client interviews;
- Early case investigation;
- Attorney notification/referral;
- Parole advocacy;
- Contacts to outside family, friends, employers, and housing;
- In-person arraignment recruitment; and
- In jail assistance
- Bail advocacy

[56] The details of specific PRU interventions are explained in the "Program Overview" section.

Using PRU case notes, we coded these 8 distinct PRU interventions for each client served. We then merged PRU treatment data with our primary GIDEON booking dataset to generate a universe of 8,179 unique booking spells from October 2 2017 – February 28, 2018. Of all unique bookings into San Francisco jail during this time period, 1,024 received some form of PRU representation.

It is important to note that this dataset does not consist of 8,179 unique individuals, as individuals may be booked into jail multiple times over the five months studied. Unlike GIDEON and PRU data, this dataset is also not stored according to unique court number. This is due to the fact that an individual booked into jail at a specific time may be assigned multiple court numbers for the same booking spell, depending on his/her probation/parole holds and existing warrants. To isolate clients' unique booking spells, we merged arrest charge, hold, and warrant information for each client booked into jail at a unique time.

In evaluating arraignment outcomes, it is also important to incorporate an analysis of defendants' criminal history. Criminal history is a significant factor in the decision to release a client at arraignment,[57] yet due to information barriers, it can be difficult to evaluate statistically.[58] To approximate a defendant's criminal history as closely as possible, we evaluated case information for all individuals arrested and booked into San Francisco County jail between January 1, 2013 and October 1, 2017 (immediately prior to the start of the PRU). Using arrestees' SF number, a unique identifier within the Superior Court's case management system, we matched defendants in our sample database with their local misdemeanor and felony arrest history over the previous 58 months.

While the PRU spreadsheet provided information on clients' arraignment outcomes, this information was not available for non-PRU defendants. However, we were able to approximate custody status at arraignment using length of incarceration as a proxy. Given the typical arraignment timeline (in which defendants are arraigned anywhere from 24 to 96 hours after booking), we assumed that any individual incarcerated for 24 hours or less had been released prior to arraignment. We then assumed that individuals incarcerated for 96 hours or more had: 1) been arraigned while in custody, and 2) had not been released at arraignment.

That analysis left us with 988 non-treated defendants who had spent anywhere from 24 to 96 hours in jail. We pulled individual CMS records for 10 percent (98) of these cases and found that only 20 percent of these marginal defendants had been in custody at arraignment. Of these individuals, 80 percent were released at arraignment. 20 percent were denied release. [59] We then projected these ratios onto the remaining 890 non-treated defendants.

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[57] California Penal Code §§1318-1319.5, 1270 govern release on one's own recognizance.

[58] The Public Defender does not have access to clients' RAP sheets in aggregate form, making it difficult to operationalize clients' conviction information. See "Assumptions and Limitations" for additional information on data challenges.

[59] For the purposes of this analysis, "in custody at arraignment" indicates that a client was arraigned on a criminal charge while in custody. "Not in custody at arraignment" indicates that a client was not arraigned on a criminal charge while in custody. Note that individuals classified as "not in custody" may have either: 1) been released prior to criminal charge arraignment, 2) had his/her charge dropped or dismissed prior to arraignment, or 3) did not face criminal arraignment due to parole/probation violation or out-of-county warrant.

The non-random nature of PRU selection prevented us from directly comparing pre-trial outcomes across treated and non-treated groups. Instead, we used a propensity score method to generate a control group of defendants similarly-situated to PRU clients. The propensity score (measured from 0 to 1) indicates the likelihood that a client would receive arrest-responsive PRU treatment given the following characteristics:

- Age
- Race
- Gender
- Out-of-county warrants (misdemeanor and felony)
- Parole or probation holds
- Criminal history (previous felony arrests and previous misdemeanor arrests)
- In custody for at least 6 hours (to eliminate those ineligible for treatment due to immediate dismissal)

We then used a "nearest neighbor" matching technique to match clients treated by the PRU with similarly-scored defendants who did not receive treatment. With comparable control and treatment groups, we could then isolate the average effect of PRU treatment.

Because there was little selection bias associated with parole advocacy, a less extensive process was required to isolate treatment effect. After checking for randomness, we used a regression model to measure impact of parole advocacy on eligible parolees' length of incarceration.

Qualitative Interviews

To further evaluate the impact of the PRU on pre-trial detention, clients' stability, and likelihood of repeat involvement with the criminal justice system, the research team conducted interviews with a total of 14 stakeholders.

- Program Staff Interviews (4)
    - Director, Specialty Courts & Reentry Programs
    - 2 Deputy Public Defenders, Pre-Trial Release Unit
    - Investigator, Pre-Trial Release Unit

- Attorney Interviews (6)
    - Deputy Public Defenders (Felony team) who have used information collected by the PRU in their arraignment proceedings. These interviews sought to determine whether information gathered by the PRU increased attorneys' ability to argue effectively for their clients' pre-trial release.

- Former Client Interviews (4)
    - Individuals who received pre-trial representation through the PRU. Interviews with former clients sought to isolate the impact of pre-trial incarceration on defendants' health, family, and economic stability.

Evaluation Results

PRU Intervention Reduces Length of Pre-Trial Incarceration

i. Individuals who Receive Arrest-Responsive Intervention are Twice as Likely to be Released at Arraignment:

Using a propensity score model to control for differences in characteristics across treatment and non-treatment groups (including age, race, gender, prior felony and misdemeanor arrests, out-of-county warrants, and severity of booking charge), we found that individuals who receive PRU intervention are more likely to be released at arraignment than similarly situated, non-treated arrestees.

Figure 10 below illustrates the propensity scores of treated and control individuals before and after matching. While propensity scores differ significantly between the control and treatment groups prior to matching, the nearest-neighbor matching technique creates a new, parallel control group that consists only of individuals with like propensity scores.

Figure 10: Propensity Scores of Treated and Non-Treated Individuals, Before and After Matching

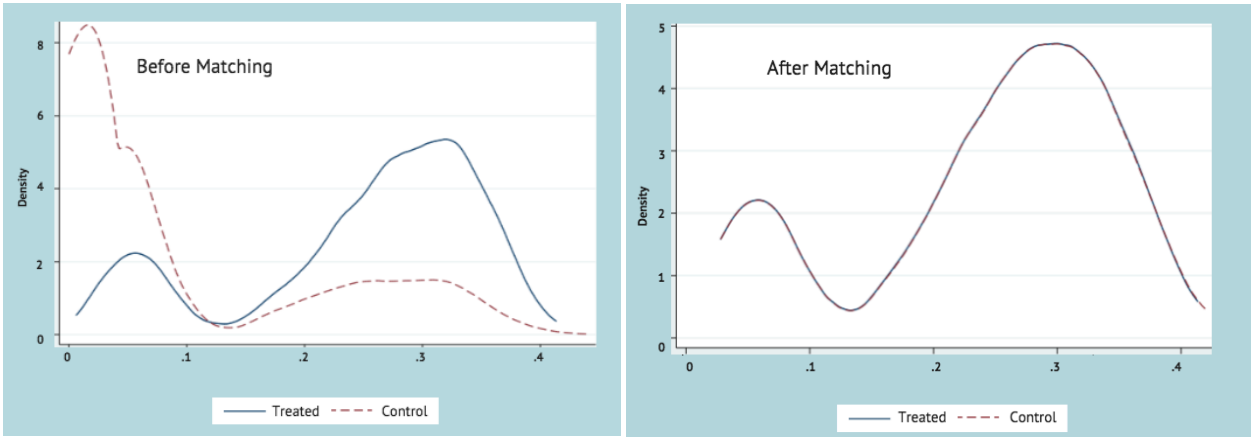

Figure 11: Effect of Treatment on Likelihood of Release at Arraignment:

Not Treated	Received Treatment	Average Treatment on the Treated
14% released at arraignment	**28%** released at arraignment	**100 percent increase** *(standard error .0282, T-stat 4.95)*

Because the likelihood of treatment (propensity score) is based on individuals' underlying characteristics, our treatment and control groups consist of individuals who share similar booking charges, criminal history, and demographic makeup (age, race, and gender). Matching on these characteristics allows us to isolate the average

impact of treatment on individuals receiving arrest-responsive intervention: a 100 percent increase in likelihood of release at arraignment (Figure 11).[60]

The PRU's significant influence on release at arraignment is consistent with the assessment of attorneys interviewed. As discussed at length on page 15, public defenders universally reported that – prior to the formation of the PRU – they had limited opportunities to prepare a robust case for release. Attorneys were not able to meet with their clients until the afternoon of arraignment, and once there, could only spend an average of 5-10 minutes with them in a crowded, non-confidential holding cell. In addition, because public defenders have extremely limited time to read case information and police reports at arraignment (the first time they have access to these documents) they have little information about their clients' circumstance of arrest, criminal history, or ties to the community.

In contrast, **attorneys who relied on PRU-gathered information in their arraignment proceedings reported significant increases in their ability to argue for release.** Six out of six attorneys interviewed reported that information provided by the PRU had "enabled them to successfully negotiate an improved outcome for their client at arraignment." Five out of six attorneys stated that they would not have been as successful without this information; all attorneys interviewed reported that the PRU had helped them argue successfully for at least one client's release on his/her own recognizance at arraignment.[61]

When asked to explain why they believed the PRU had been so impactful, attorneys reported it was primarily due to increased access to client information. After the PRU interviews a client, staff compiles relevant case and client information into a detailed memo, which is uploaded onto the public defenders' shared Gideon database.[62] According to attorney interviews, PRU memos provide critical information about clients' circumstance of arrest that would be otherwise unavailable before arraignment. In addition, the PRU gathers information about clients' family and community ties – a critical factor in the decision to release at arraignment. As one attorney stated: "We can now offer documentation of the program [our client] is in, their living situation…it's very important."[63]

Attorneys also attribute increased efficacy at arraignment to early investigation provided by the PRU. As discussed on page 10, early investigation involves interviews with key witnesses and family members, recovery of surveillance footage, and in some cases, conversations with complaining witnesses/victims. At its most basic, early investigation has been used to corroborate or enhance evidence of a clients' community ties through documented conversations with family members, neighbors, and local organizations.[64] At its most effective, early investigation has provided attorneys with compelling exculpatory evidence that they have used to argue for their clients' immediate release.[65]

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[60] See Appendix B for summary statistics

[61] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)

[62] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March - April)

[63] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)

[64] Ibid.

[65] Ibid.

Early investigation, as provided by the PRU, may also assist attorneys in crafting a sound legal defense. For example, even if a client discloses the details of his/her case to a public defender in their short pre-arraignment interview (discouraged by attorneys due to confidentiality concerns) *and* is able to provide a compelling alibi, attorneys are often hesitant to present this information to the court out of fear that it cannot be externally validated.[66] In contrast, early investigation provides attorneys the verified information they need to begin building a robust case for release and/or exoneration from the first court appearance.[67]

In fact, attorneys reported that early investigation may be helpful in securing release at arraignment even if no evidence is produced. As one attorney explained in discussing the procurement of surveillance footage, the absence of information can be information itself. "Even if a store refuses to provide video, we can sometimes use this refusal as evidence of bias...if we can start to plant the seed that this client might be innocent, the judge may decide to release."[68]

Finally, attorneys repeatedly stressed the importance of having clients' friends and/or family members attend arraignment. As one attorney stated, "[In-person attendance] makes a huge difference. There are some judges where as long as someone comes for you, they'll release you…that's all they need, really." The PRU contacted clients' friends or family members in 91 cases over the study period, and formally recruited for an in-person presence at arraignment in 19 cases.

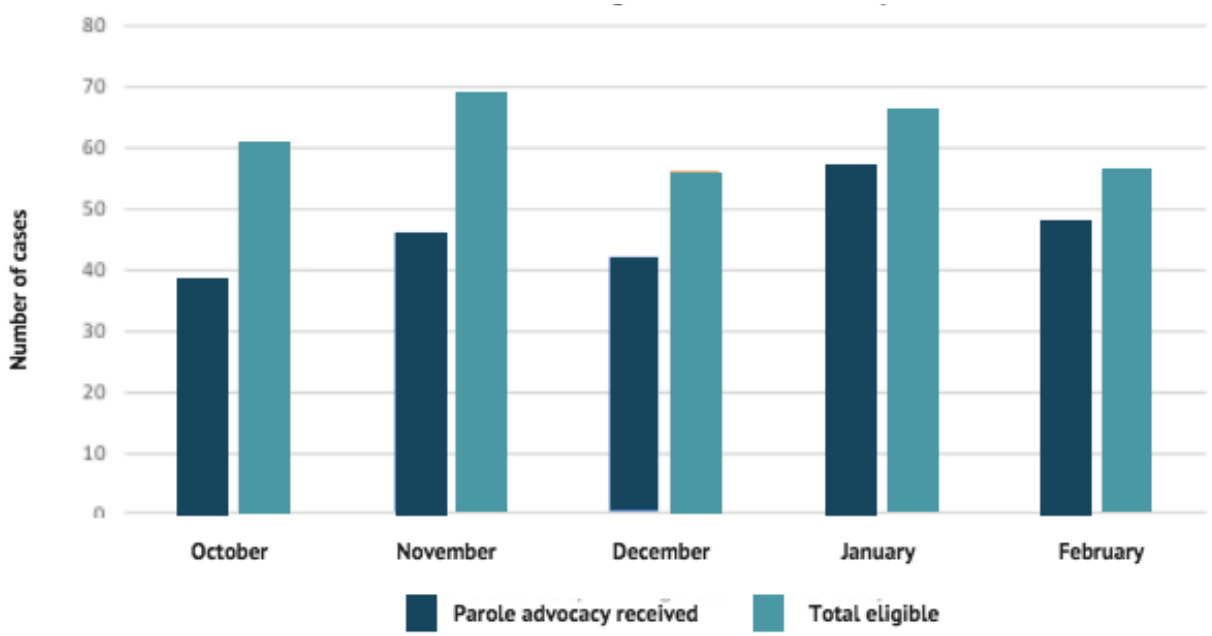
According to attorney interviews, this recruitment has made a significant difference in arraignment outcomes. "If [arraignment is] the first chance for [my client] to talk to an attorney, he could give me information about his family… and I could tell the judge 'okay he's got a mother and a father and a fiancé here,'" this attorney continued. "But if they're not in court, it doesn't matter. When the PRU talks to my clients ahead of time, the courtroom is filled with their family members…that makes a huge difference."[69]

ii. Parole Advocacy Reduces the Length of Parolee Incarceration by Avg. of 9 days:

Over the course of the 5-month study period, 308 cases were charged with parole holds or violations. Of these 308 cases, PRU attorneys provided parole advocacy in 231 (75 percent).

[66] Deputy Public Defenders, Felony Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April)
[67] Ibid.
[68] Ibid.
[69] Ibid.

Figure 13: Cases Receiving PRU Parole Advocacy, by Month



We observed no statistically significant difference in the booking charges, age, or gender of those who received parole advocacy (75 percent of all eligible) and those did not receive parole advocacy (25 percent of all eligible).[70] This is consistent with the reports of PRU staff, who indicated that they have no mechanism for prioritizing treatment among clients eligible for parole.

To confirm that selection into parole advocacy was in fact random, we regressed a dummy variable indicating whether or not an individual had received parole advocacy on hours of pre-trial incarceration for eligible parolees, controlling for various covariates (including age, race, gender, prior felony and misdemeanor arrests, out-of-county warrants, and severity of booking charge). We then ran an identical regression without controlling for these covariates.

Because controlling for covariates appears to have negligible effect on parole advocacy's impact, we concluded that selection into parole advocacy was sufficiently random to validate the results of regression analysis. **Among all eligible parolees, parole advocacy provided by the PRU reduced the length of incarceration by 230 hours (approx. 9.5 days).** [71]

Qualitative evidence reinforces these findings. Internal tracking data counts 95 unique cases in which parole agents decided to lift a hold after being contacted by PRU staff. Although it is likely that a portion of these holds would have been lifted regardless of contact, data from case notes and program staff interviews suggest that agents may lift holds sooner than they otherwise would. For example, agents may have trouble accessing

[70] Interestingly, we found that individuals who received parole advocacy were more likely to be Black or Asian/Pacific Islander than those who did not receive treatment. While these differences were statistically significant, race did not have a statistically significant impact on hours of incarceration for parolees in our regression models, nor did inclusion of race controls significantly change the impact of parole advocacy on hours of incarceration (see Appendix B for full summary statistics).

[71] See Appendix B for full summary statistics

information on their client's arrest, charge, and/or case progress; PRU provides this information and prompts a hold decision. In some cases, a parole agent may not yet even be aware of their client's arrest; PRU contact provides these agents the opportunity to make a decision much earlier than otherwise possible.

PRU staff may further reduce the length of parolee incarceration by offering to serve as a line of communication between agent and client. In several cases within the 5-month study period, PRU staff delivered messages or reprimands from agent to client as a condition of release. Prior to the PRU, agents' main mechanism for reprimanding an incarcerated parolee was keeping him or her incarcerated (via either a flash incarceration or a parole petition). With PRU intervention, agents who may have otherwise filed a petition against a client – or kept them waiting in jail for additional days – can now stress the importance of parole adherence without increased incarceration.

Finally, there is evidence that PRU intervention may keep parolees from having their parole violated. In one case, an individual had been unknowingly absconding from parole for several years. This is a very serious offense, particularly for a parolee of his status, and virtually always results in parole revocation. However, PRU staff was able to provide evidence of this individuals' stable life (including documentation of steady employment, community ties, and improved health) to his parole agent. What would have almost certainly been a revocation of parole – with a maximum of 90 days in county jail and a likely prison sentence – became a brief jail stay instead.[72] In another case, a parole agent was getting pressure to violate her client after a misdemeanor offense. Because PRU staff was able to get this client on alcohol treatment instead, the agent chose not to violate.[73]

PRU Intervention Helps Close the Pre-Arraignment Wealth Gap

As explained at length on pages 11-12, pre-trial representation is likely to benefit defendants' in later criminal case proceedings. While these benefits were previously only available to wealthy arrestees with access to private attorneys, evidence suggests that PRU intervention may provide similar positive benefits for indigent arrestees.

1. PRU Intervention May Positively Impact Later Case Outcomes:

As described on page 12, early investigation may uncover evidence that would be otherwise inaccessible. Surveillance footage often automatically updates every 48 to 72 hours, and witnesses may be difficult to locate and interview even a few days after an arrest. Early investigation allows for the discovery of evidence that – while critical to ensuring a just case outcome – may have otherwise been lost. PRU-provided witness accounts, contemporaneous documentation and available surveillance videos are all used by attorneys to build a robust defense for their clients.

PRU intervention may also allow for the preservation of certain evidence. Throughout the course of the 5-month study period, PRU attorneys referred 28 clients to in-jail medical or psychological treatment. These referrals serve a dual purpose that is often overlooked: while they help to ensure that jailed individuals receive the treatment they need, in-jail referrals also provide an opportunity for contemporaneous documentation of medical

[72] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April); Former PRU Clients. [Personal interviews]. (2018, April).

[73] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April);

or psychological aliments. An individual who was struggling with mental health challenges during an alleged offense, for example, may later use this as part of his/her legal defense. However, because trial proceedings often occur months after arrest, this same individual may appear completely stable by the time his/her trial begins. Contemporaneous documentation of mental or physical issues, provided by the PRU, can be critical in ensuring that jurors or trial judges understand the reality of an incident regardless of time elapsed.[74]

Finally, PRU staff instructs clients to avoid self-incrimination by: 1) avoiding case discussions on jail phones, and 2) invoking their right to a lawyer in critically important police interviews. By increasing arrestees' knowledge of their constitutional rights, PRU intervention may reduce the likelihood of self-incrimination – particularly among vulnerable populations most typically served by the Public Defender's Office. Future charging decisions, plea offers, and trial decisions may be positively impacted as a result.

2. PRU Intervention Likely Increases Procedural Justice:

A 2017 Gallup poll found that only 27 percent of Americans have a "great deal" or "quite a bit" of trust in our criminal justice system.[75] This lack of confidence – while perhaps unsurprising – is concerning given its impact on what is referred to as "procedural justice". As it relates to the criminal justice system, procedural justice is most often defined as they way in which justice-involved individuals feel about the laws, processes, and procedures that govern them. Research indicates that if individuals trust the fairness of the laws and the actors that enforce them, they are more likely to follow the law.[76]

Unfortunately, many arrestees find it difficult to navigate the complicated legal system in which they find themselves.[77] This can further erode arrestees' trust in the system, increasing their likelihood to reoffend.[78] This challenge is central to current criminal justice reform efforts, and although important, is largely outside the scope of this research. However, evidence gathered during interviews with former PRU clients suggests that PRU intervention may improve procedural justice – with the potential for significant long-term benefit.

In interviews, the majority of former clients reported that the PRU had helped them better understand the charges against them, their case, and the legal system overall. Three out of four clients interviewed reported that, prior to PRU intervention, they had little understanding of the process in which they found themselves. They described their experiences using the following phrases: "I had no idea how the system worked," "I wasn't sure how the process was going to work," "no one told me anything." After meeting with PRU attorneys however, they reported feeling respected, heard, and more knowledgeable about the process to come. One former client explained that after feeling previously like his word meant nothing, PRU attorneys were finally listening: "I believed [my attorney] believed me."[79]

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[74] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April).

[75] Gallup, Inc. (2017). Confidence in Institutions. Retrieved from http://news.gallup.com/poll/1597/confidence-institutions.aspx

[76] LaGratta, E. (2017). To Be Fair: Conversations About Procedural Justice. New York, NY: Center for Court Innovation.

[77] Rogers, R. (2011, November). Getting it wrong about Miranda rights: False beliefs, impaired reasoning, and professional neglect. Retrieved from https://www.ncbi.nlm.nih.gov/pubmed/22082397

[78] Beijersbergen, K. A., Dirkzwager, A. J., & Nieuwbeerta, P. (2015). Reoffending After Release. Criminal Justice and Behavior, 43(1), 63-82. doi:10.1177/0093854815609643

[79] Former PRU Clients. [Personal interviews]. (2018, April).

Former clients' feelings of comfort and acknowledgement suggest that the PRU is providing high-quality counsel on par with that previously only accessible to the wealthy. In addition, it is possible that by increasing clients' sense of procedural justice, the PRU may help to reduce likelihood of re-arrest and recidivism.[80]

3. PRU Intervention May Help Clients' Maintain Stability During and Post-Incarceration

Finally, evidence suggests that PRU intervention may help clients maintain their economic, family, and personal stability during and post-arrest. This is achieved primarily by PRU staff contacting arrestees' friends, family members or employers during the time of incarceration. Over the 5-month study period, PRU staff contacted family members, friends, or employers of arrestees in 91 unique cases.

Although contact with the outside world is technically feasible via jail telephone, it is often difficult for arrestees to get in touch with friends or family members outside. Cell phones are taken during jail booking, forcing arrestees to rely only on memorized contact information.[81] If an individual cannot remember any specific phone number (increasingly common given modern technology), they may not be able to contact anyone at all.

Even if arrestees' have access to their loved ones' contact numbers, they might choose to avoid jail phones due to privacy concerns. As mentioned previously, PRU attorneys instruct clients to avoid talking about their case on jail phones, which are recorded by the Sherriff and may be used as incriminating evidence. Arrestees may also have more immediate concerns: one former client reported that, despite his need to call in sick to work, he would not contact his employer on the jail phone for fear of being identified as calling from jail.[82] Other former clients reported that they found the jail phones complicated and virtually impossible to use.[83]

In these cases, PRU staff may be arrestees' only means of interacting with outside family, loved ones, or employers. If an individual knows the number of the person he/she would like to reach, PRU staff will contact them to relay messages and case information, as relevant. If an individual does not know the number of the person he/she needs to reach, PRU staff will often search for individuals' contact information. If necessary, PRU staff may even contact an individual via social media platforms such as Facebook.[84]

These outside contacts can make a significant difference in arrestees economic, family, and personal stability. Because individuals are often arrested unexpectedly, they likely do not have time to alert their family members or employers of their arrest. PRU contacts may therefore be a clients' only means of arranging childcare, alerting their employers of time missed, or holding their housing. In addition to improving economic, personal and family stability during incarceration, PRU contacts may have long-term benefits; an arrestee that loses employment due to pre-trial incarceration may face up to a 40 percent reduction in annual earnings.[85]

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[80] Beijersbergen, K. A., Dirkzwager, A. J., & Nieuwbeerta, P. (2015). Reoffending After Release. Criminal Justice and Behavior, 43(1), 63-82. doi:10.1177/0093854815609643

[81] Former PRU Clients. [Personal interviews]. (2018, April).

[82] Ibid.

[83] Ibid.

[84] Program Staff, Pre-Trial Release Unit, San Francisco Public Defenders Office. [Personal interviews]. (2018, March – April).

[85] Baughman, S. B. The Costs of Pre-Trial Detention (Rep.). Boston University Law Review.

Total Jail Bed Days Saved

Given the limitations of the data available and the early nature of this evaluation, it is difficult to quantify the PRU's impact on jail bed day reduction. Many of the PRU's outcomes are either difficult to measure quantitatively (such as increased access to procedural justice or stability post-arrest) or require a much longer timeframe before impact can be observed (such as PRU's impact on conviction, sentencing, and recidivism). However, because reduction of the San Francisco jail population remains a priority for the PRU, we provide a high-level estimate of jail bed days saved, below.

Using our 5-month study period as a guide, we found that jailed individuals who received treatment and were released at arraignment were incarcerated for an average of 369.08 hours, as opposed to an average of 1320.36 hours for those treated and not released (see Figure 13).[86]

Figure 14: Average Hours of Incarceration Among Treated Individuals, Released and Non-Released

Not Released at Arraignment	Released at Arraignment
1320.36 hours avg. hours of incarceration	**369.08 hours** avg. hours of incarceration
55 days avg. days of incarceration	**15 days** avg. days of incarceration

Because we know that 28 percent of treated individuals are released at arraignment and 14 percent of non-treated individuals are released, we can calculate the expected value of hours incarcerated for the average treated and non-treated individuals:

(.28 * 369.08) + (.72 * 1320.36) = 1,054 avg. hours if treated

(.14 * 369.08) + (.86 * 1320.36) = 1,187.18 avg. hours if non-treated

Subtracting the expected value hours incarcerated (treated) from the expected value of hours incarcerated (non-treated) we find that **PRU treatment saves 133.18 hours (5.5 days) per treated individual**. Summing this across the 845 individuals who received arrest-responsive treatment during the first 5 months of PRU operation, we can conclude that **arrest-responsive PRU intervention saved approximately 112,537 hours of incarceration (4,689 jail bed days) from October 2, 2017 – Feb. 28, 2017.** This is an average savings of 940 jail bed days a month, or approximately 11,253 jail bed days saved per year. [87]

[86] This number is higher than we would expect if individuals are indeed being arraigned and released within 48 to 96 hours of booking. This could be due to individuals being technically released at arraignment but remaining incarcerated until they can be picked up by another county for an outstanding warrant. Alternatively, this average could be skewed by individuals who are serving flash parole incarcerations or awaiting parole petitions. We recommend investigating this further in future studies.

[87] The cost of incarcerating an individual in San Francisco county jail is approximately $172/day. In reducing jail bed days by 4,689 over the first 5 months of operation, the PRU has saved the City approximately $806,508 in incarceration costs.

Final Recommendations

Based on the findings from our quantitative analysis and qualitative interviews, we conclude that the Public Defender's Pre-Trial Release Unit has demonstrated promising initial success in meeting its goals of 1) reducing wealth disparities in access to pre-arraignment representation, and 2) reducing the jail population through increased access to pre-trial release.

We recommend the Public Defender's Office implement the following recommendations to continue building on the PRU's initial successes:

1. Continue robust data collection practices by maintaining qualitative case notes and instituting protocols for increased quantitative data collection.

PRU staff maintain detailed case notes on each client with include extensive qualitative information. While these notes are occasionally coded by intervention type, quantitative coding is inconsistent. In order to ensure that the PRU can undergo future evaluation, we recommend all PRU staff code their client notes by activity type and outcome. While qualitative notes are certainly valuable, this change will allow future researchers to more easily measure program impact – particularly important if relying on months or years of data.

2. Investigate the Pre-Trial Release Unit's impact on recidivism, when feasible given data constraints.

Defendants who are detained pre-trial are more likely to be convicted, sentenced to jail, and remain in jail for longer periods of time. This indicates that the impact of the Pre-Trial Release Unit is likely to compound over time, as otherwise convicted or re-arrested individuals remain out of custody. In order to understand the true impact of the PRU, we recommend a future study examines the unit's impact on recidivism. Of course, because such a study would require at least 2-3 years of data, such an analysis is not currently possible.

3. Continue to investigate racial disparities within booking of indigent defendants, with a particular emphasis on mechanisms to correct for police over-booking of arrestees of color.

As mentioned within this report, significant racial disparities exist in pre-trial outcomes among San Francisco's indigent defendants. These disparities are largely driven by police over-charging defendants of color at the booking stage; when over-charging occurs, it is not corrected for in the DA's rebooking decision or beyond.

Due to limited data, we were unable to quantitatively evaluate the PRU's impact on rebooking within the context of report. Nonetheless, a cursory review of qualitative evidence suggests that the PRU may be helping to overcorrect police bias at booking by increasing the likelihood of DA discharge prior to arraignment.

We recommend that the Public Defender's Office advocate for additional research to: 1) further investigate police over-charging at the booking phase, and 2) evaluate mechanisms – including through the Pre-Trial Release Unit – to specifically reduce racial disparities in pre-trial outcomes.

4. Secure funding for the Pre-Trial Release Unit to continue operations past the 9-month pilot period.

Despite limited data and the challenges of early program evaluation, we found strong evidence to indicate that the PRU is meeting its goals. Early representation, as provided by the PRU, is associated with decreased time in pre-trial incarceration, including increased likelihood of release at arraignment and decreased length of detention for parolees. While more difficult to measure, it appears that the PRU may also increase arrestees' economic stability during incarceration, increase arrestees' sense of procedural justice, and result in positive benefits for arrestees in later case outcomes.

Based on these early successes, we recommend the Public Defender's Office secure funding to continue the Pre-Trial Release Unit past the 9-month pilot period.

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Appendix A: Study Assumptions and Limitations

Criminal History

In evaluating arraignment outcomes, it is important to incorporate an analysis of defendants' criminal history. To approximate a defendant's criminal history as closely as possible, we evaluated case information for all individuals arrested and booked into San Francisco County jail between January 1, 2013 and October 1, 2017 (immediately prior to the start of the PRU). Using arrestees' SF number, a unique identifier within the Superior Court's case management system, we matched defendants in our sample database with their local misdemeanor and felony arrest history over the previous 58 months.

Although this approximation of criminal history allows for a more nuanced quantitative evaluation, it is an imperfect measure. First, arrest does not indicate conviction; it is very likely that some clients either had their cases discharged or dismissed post-arrest or were ultimately exonerated at the trial phase. Nonetheless, because arrests are included on clients' RAP sheets, arrest history may very well factor into a judges' decision to release at arraignment.

We were also limited in our ability to access information on any arrests or convictions outside of San Francisco. It is certainly feasible that a client who is arrested and booked in the city of San Francisco may also have been arrested and booked into jail in other counties or states, thereby impacting the validity of our analysis. Recent research is helpful here, however: In their study on racial disparities in San Francisco criminal case outcomes, University of California Professor Steve Raphael and co-author John MacDonald found that local criminal history reliably approximates non-local criminal history.[88]

Friday Bookings

California law requires that an arrestee is arraigned within 48 working hours of being arrested. The DA currently declines to file in approximately 50 percent of cases, meaning that an average of 50 percent of booked individuals are technically eligible for release within two working days.[89] Prior to October 2017, the DA did not file rebooking decisions on holidays or weekends. Practically, that meant that individuals booked on Thursdays and Fridays often faced up to 4 -5 days of incarceration prior to the charge decision.[90]

To rectify this disparity and reduce use of the jail beds, the District Attorney's Office received funding during the FY17-18 fiscal year to implement weekend rebooking. Staff began evaluating and filing charge decision in cases in late 2017. However, because weekend rebooking did not start at the same time as the Pre-Trial Release Unit,

[88] Table 3.5 of this report summarizes prior convictions, arrest cycles, and sentences at the time of arrest using the state ACHS data for criminal suspects in our data set by race/ethnicity. The patterns in table 3.5 largely parallel the patterns observed for local criminal history. Source: Raphael, S., & MacDonald, J. (2017). An Analysis of Racial and Ethnic Disparities in Case Dispositions and Sentencing Outcomes for Criminal Cases. Presented to and Processed by the Office of the San Francisco District Attorney.

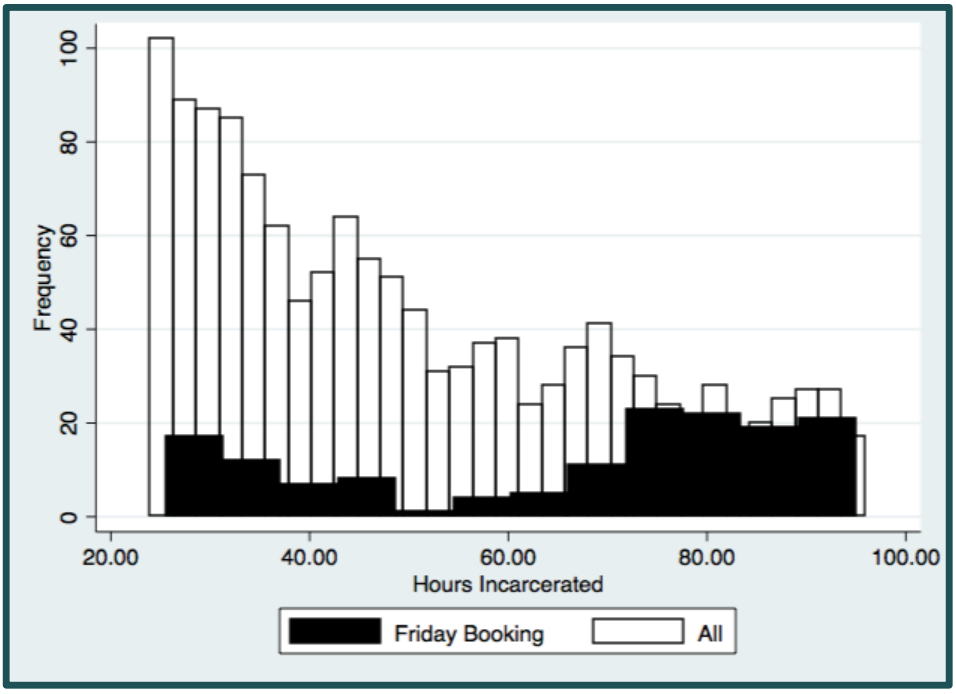
[89] Final Report, Work Group to Re-envision the Jail Replacement Project. (2017).

[90] Ibid.

individuals in our sample may have been charged at inconsistent intervals depending on day of the week booked.

Our dataset bears this out: in comparing hours incarcerated for individuals booked on Fridays within our 5-month research period, we found that individuals booked on Fridays have hours of incarceration that trends up, as opposed to the downward trend overall (see figure 13, below). To rectify these inconsistencies, we dropped individuals booked on Fridays prior to matching on propensity score.

Figure 13: Hours Incarcerated (24 – 96 hours), All Booked Individuals vs. Individuals Booked on Fridays



It is important to note that we do not drop Thursday bookings from our sample, despite the fact that an individual booked into jail on a Thursday may also remain incarcerated over the weekend prior to arraignment. To account for this extra time, we maintained a conservative estimate of length of pre-arraignment detention (96 hours) when formulating proxy custody and arraignment variables for non-treated individuals (see below). This may have underestimated our treatment effect; if we assumed instead that all non-treated individuals with over 72 hours of incarceration had not been released at arraignment, we would likely see an increase in the effect of PRU treatment.[91]

[91] Alternatively, because this 96-hour maximum may be too low for individuals booked on Thursdays prior to holiday weekends, we may be overestimating PRU impact. However, because we assume that the number of these Thursday bookings are relatively small, within our 5-month sample, any overestimation should be limited.

Hours of Incarceration

Using case booking time/date and case release time/date, we were able to calculate hours incarcerated for each unique observation in our sample.[92] However, Gideon booking data did not provide release dates for individuals in the following two categories: 1) Arrestees still incarcerated at time of initial data pull, and 2) Arrestees who had been booked and released at the same time, and therefore never spent time in county jail.

Because individuals in these categories have dramatically different underlying characteristics and case circumstances, it was critical to access more precise data on release date and hours incarcerated. To accomplish this, we pulled individual CMS case records for approximately 2,500 out of 3,000 observations with missing release dates.

It is important to note that individuals marked as incarcerated in CMS may have, in fact, remained in custody since booking. However, it is also possible that these individuals were released pre-trial, failed to appear for a future court date, and were re-incarcerated. In pulling individual case records, we attempted to account for these discrepancies as accurately as possible. Re-arrested individuals who failed to appear for arraignment (or were cited out/ bailed out prior to arraignment) were assigned 15.82 hours, the average hours of incarceration for an individual *not* in custody at arraignment. Individuals released at arraignment or later court hearings were assumed to have been released at approximately 10:00pm the day of court proceedings.[93]

After evaluating CMS case records, we were left with 501 cases that did not have a release date. It is important to note that these 501 cases were *not* treated by the PRU. In our propensity score analysis, we assumed all cases with missing release dates had spent 0 hours in jail, likely causing an underestimation of the treatment effect (see "Propensity Score Matching" below).

Projecting Custody and Arraignment Variables

To isolate the impact of treatment on likelihood of release at arraignment, we needed information on arraignment outcomes for all treated and non-treated individuals within our 5-month sample. However, while internal PRU tracking data provided information on clients' arraignment outcomes, this information was not available for non-PRU arrestees.

To account for this, we approximated custody status at arraignment using length of incarceration as a proxy. Given the DA's arraignment timeline (in which defendants are typically arraigned 48-72 hours after booking) we assumed that any individual incarcerated for 24 hours or less had been released prior to arraignment. In order to account for individuals booked later in the week and not arraigned until Monday (see above), we set a conservative estimate of 96 hours as maximum length of incarceration pre-arraignment.[94] We then assumed that

[92] Hours incarcerated is calculated using booking time, and not time of arrest.

[93] This estimation was based on interviews with PRU program staff. It is conservative; individuals ordered released at arraignment are often held in jail until after midnight that same day.

[94] The conservative estimate of 96 hours pre-arraignment may underestimate the impact of the PRU on release at arraignment. If we assumed instead that all non-treated individuals with over 72 hours of incarceration had not been released at arraignment, we would likely see an increase in the effect of PRU treatment. Alternatively, because this 96-hour maximum may be too low for individuals

individuals incarcerated for 96 hours or more had: 1) been arraigned while in custody, and 2) had not been released at arraignment.

That analysis left us with 988 non-treated defendants who had spent anywhere from 24 to 96 hours in jail. We pulled individual CMS records for 10 percent (98) of these cases and found that only 20 percent (20) of these marginal defendants had been in custody at arraignment. Of these individuals, 80 percent (16) were released at arraignment. 20 percent (4) were denied release. [95] We then projected these ratios onto the remaining 890 non-treated defendants.

Propensity Score Matching

Our propensity score was modeled using the following covariates:

- Age
- Race (dummy variables for each race category)
- Gender (dummy)
- Out-of-county warrants (number of misdemeanor and felony warrants, as listed in booking data)
- Parole or probation holds (dummy variables for each category, as listed in booking data)
- Criminal history (number of previous felony arrests and previous misdemeanor arrests)
- In custody for at least 6 hours (to eliminate those ineligible for treatment due to immediate dismissal)

After generating a propensity score for individuals within our sample, we prepared to run a "nearest-neighbor" match to generate a control group of similarly situated, non-treated defendants. Prior to matching, we made the following adjustments to our sample:

- Dropped individuals booked on Friday. See "Friday Bookings" above.
- Dropped individuals with Motions to Revoke Probation or Parole. Individuals with MTRs may have had their criminal charges dismissed in order to proceed with a motion to revoke, meaning they might have been arraigned on this motion and not on criminal charges. To eliminate this complication and ensure we were isolating impact of the PRU on criminal arraignments, we dropped anyone identified to have a MTR. [96]

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booked on Thursdays prior to holiday weekends (see "Friday Bookings"), we may be overestimating PRU impact. However, because we assume that the number of these Thursday bookings are relatively small, any overestimation should be limited.

[95] For the purposes of this analysis, "in custody at arraignment" indicates that a client was arraigned on a criminal charge while in custody. "Not in custody at arraignment" indicates that a client was not arraigned on a criminal charge while in custody. Note that individuals classified as "not in custody" may have either: 1) been released prior to criminal charge arraignment, 2) had his/her charge dropped or dismissed prior to arraignment, or 3) did not face criminal arraignment due to parole/probation violation or out-of-county warrant.

[96] Individuals with MTRs were identified via PRU case notes and individual data pulls from CMS on approx. 2000 observations. Because we were unable to pull individual CMS records for each observation within our sample, it is likely that some individuals with MTRs remain. However, this effect should be largely controlled for by including parole/probation holds and violations in our propensity score estimator.

- Dropped individuals identified as having a conflict of interest with the Public Defender's Office. Conflict individuals were represented by conflict counsel and not public defenders; eliminating conflicts did not impact our final result.
- Assumed hours of incarceration for individuals without a known release date was zero (ie: no time spent in jail). As mentioned above, approximately 500 non-treated individuals had unknown release dates. Zeroing out hours of incarceration for these individuals is likely to have caused us to underestimate the treatment effect (as only non-treated had length of time reduced).

Appendix B: Summary Statistics

A. Propensity Score Match: Average Treatment on the Treated, Outcome at Arraignment

Variable	Sample	Treated	Controls	Difference	S.E.	T-stat
Outcome at arraignment	Unmatched	.28186	.12250	.15936	.0196	8.11
	Avg. Treatment on Treated	.28186	.14215	**.13970**	.0282	4.95

B. Regression models: Parole advocacy on hours of incarceration with/without controls:

	(1) hours incarcerated (with controls)	(2) hours incarcerated (without controls)
parole advocacy	**-245.2 (105.4)**	**-229.4 (101.8)**
age	7.061 (3.693)	
gender	-33.23 (279.8)	
race (White)	58.16 (296.9)	
race (API)	omitted (.)	
race (Black)	73.18 (289.1)	
race (Latino)	-15.16 (308.6)	
race (unknown)	-211.6 (383.5)	
enroute warrant (fel)	73.89 (166.5)	
enroute warrant (misd)	508.3 (349.7)	
previous arrest (fel)	-105.5 (120.6)	
previous arrest (misd)	212.9 (132.1)	
sc1_6	618.7 (171.7)	
sc7_11	882.0 (153.3)	
sc12_15	omitted (.)	
sc16_18	-261.9 (284.2)	
sc19_24	702.6 (232.9)	
sc25	-181.7 (359.3)	
sc26_28	-252.2 (109.5)	
sc29_40	-78.32 (168.8)	
sc40_64	189.4 (303.2)	
sc60	172.1 (207.9)	
sc65_67	-196.5 (284.5)	
sc68_72	0 (.)	
_cons	321.8 (444.8)	697.0 (87.80)

SOCIAL SCIENCES

The impact of defense counsel at bail hearings

Shamena Anwar[1]*†, Shawn Bushway[1,2]†, John Engberg[1]†

Roughly half of U.S. counties do not provide defense counsel at bail hearings, and few studies have documented the potential impacts of legal representation at this stage. This paper presents the results from a field experiment in Allegheny County, Pennsylvania, that provided a public defender at a defendant's initial bail hearing. The presence of a public defender decreased the use of monetary bail and pretrial detention without increasing failure to appear rates at the preliminary hearing. The intervention did, however, result in a short-term increase in rearrests on theft charges, although a theft incident would have to be at least 8.5 times as costly as a day in detention for jurisdictions to find this tradeoff undesirable.

INTRODUCTION

At the first court appearance after an arrest in the United States, a judge makes critical decisions about the conditions necessary for defendants to be released from jail until the case is resolved. Most jurisdictions operate a cash bail system in which the judge determines an amount that a person must pay to be released from detention (*1*). Recent studies have provided substantial causal evidence that pretrial detention leads to worse outcomes for the defendant and society at large, with longer jail stays and higher chances of conviction in the short term, and worse recidivism and employment outcomes over the long term (*2*–*7*).

Despite the importance of the bail hearing, the U.S. Constitution does not guarantee the provision of legal representation for defendants at this stage. While the Sixth Amendment guarantees the provision of defense counsel at all critical stages of a criminal prosecution, the U.S. Supreme Court has not recognized the bail hearing as a critical stage, which would require that the presence of defense counsel at this hearing have a direct impact on the case outcome. As a result, whether defense counsel is provided at bail hearings has been left up to states and local jurisdictions to decide. Although the exact number is not known, up to half of the counties in the United States do not provide defense counsel at this stage (*8*).

In this current landscape, research on the impact of defense counsel at bail hearings is crucial because it can simultaneously shed light on whether the bail hearing should be considered a critical stage at which defense counsel must be provided, as well as help state and local jurisdictions assess the efficacy of their policies regarding the provision of defense counsel. The latter is especially important if states and localities argue that providing defense counsel is too costly and/or that defense counsel does not have any real impact on defendant outcomes at these hearings (*8*). In particular, the reality of these hearings, which, in many large jurisdictions, are assembly line style hearings usually lasting less than 3 min and conducted via video feed, has bred some skepticism about the potential of attorneys to affect the outcome (*9*). Understanding the extent to which providing defense counsel at the bail hearing can affect the use of monetary bail and pretrial detention will thus provide policymakers with the necessary information on the effectiveness of this intervention.

Despite the importance of this issue, there is unexpectedly little known regarding the benefits of providing defense counsel at the bail hearing. The empirical evidence in this area is limited to three studies, two of which are now-dated experiments that suffered some deviation from the research design during implementation (*10*, *11*). The third is a study examining a policy change, comparing outcomes after the change to those before, without a comparison group (*12*, *13*). A recent related study examined the impact of providing bail advocates to support public defenders (*14*), although the study did not directly evaluate whether the public defenders themselves have an impact on bail hearing outcomes. While, collectively, these studies mostly support the claim that better defense representation at the bail hearing reduces pretrial detention with no increase in the rate at which defendants fail to appear at the next hearing, none of these studies are able to identify the causal impact of providing defense counsel at bail hearings.

To address this gap, this paper presents the results of an evaluation of the impact of a year-long initiative to provide public defenders at some bail hearings within the Pittsburgh Municipal Court (PMC), which holds the majority of the bail hearings that occur within Allegheny County. The jurisdiction only had sufficient resources to provide public defenders for half of the shifts that did not already have public defenders. Our experimental design generated a public defender 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, akin to a randomized control trial, allows us to rigorously evaluate the impact of providing a public defender at the defendant's initial bail hearing on a variety of defendant outcomes.

The results indicate that providing a public defender at the bail hearing led to a significant decrease in the use of monetary bail and short-term pretrial detention, with no impact on failure to appear rates or the probable cause determination at the preliminary hearing. However, the intervention did result in an increase in rearrests for third-degree felony theft charges within the first 6 months of the bail hearing. For jurisdictions facing similar tradeoffs, whether this tradeoff is acceptable will depend on the factors that they consider. For jurisdictions whose primary concern about providing defense representation at this stage is ensuring defense counsel actually affect the proceedings, these results provide clear

[1]RAND Corporation, Santa Monica, CA, USA. [2]University at Albany, State University of New York, Albany, NY 12222, USA.
*Corresponding author. Email: sanwar@rand.org
†These authors contributed equally to this work.

evidence of the benefit of this intervention. For jurisdictions concerned about the additional criminal activity arising from this intervention, our analysis indicates that for the tradeoff between reduced pretrial detention and increased criminal activity to be problematic, the cost of a theft charge to society would have to be at least 8.5 times more than the cost to society of a day in detention. Current survey estimates indicate that individuals perceive the societal cost of a theft charge and a day in detention to be roughly equivalent, implying that this tradeoff should be acceptable for many individuals (*15*). However, the distribution of individuals with outlying views and the workings of political and bureaucratic processes will determine whether this tradeoff is accepted in any given jurisdiction.

BACKGROUND

If an individual is arrested for alleged criminal activity within the Pittsburgh city limits at any time or in an outlying area within Allegheny County outside normal court business hours, then their initial bail hearing takes place in the PMC. Arrested individuals are brought to the jail, which is physically adjacent to PMC, where pretrial staff administer a risk assessment using a locally validated tool (which is similar to the Public Safety Assessment tool that is commonly used in many jurisdictions) and provide the results to the judge overseeing the bail hearing. The risk assessment predicts both the risk that the defendant will fail to appear at future criminal hearings, as well as the risk that they will commit new criminal activity during the pretrial period. The risk assessment algorithm recommends either unconditional pretrial release, release with nonmonetary conditions, or no release. Although monetary bail is never recommended, judges set a monetary bail roughly half the time. Judges examine the risk assessment paperwork and make their bail hearing decision before the bail hearing, without talking to the defendant. During the hearing, the judge typically will just read their final decision to the defendant, who is in the jail and appears via video in the courtroom. While it is technically possible for the judge to change their decision at the bail hearing (and redo the paperwork), our court observation indicates that, in practice, this rarely happens. Judges can elect to either release the defendant with no conditions (ROR), release them with nonmonetary conditions, assign a monetary bail, or detain the defendant without bail. Judges rarely use the detainment without bail option. Prosecutors have no role in these hearings.

In the absence of a lawyer for the defendant, the judge makes their decision solely on the basis of the risk assessment and the charge for which the individual was arrested. When a public defender is present, they will speak to the judge in the courtroom while the judge is reviewing the risk assessment paperwork and making their decision (before the hearing). The public defender will have already spoken to the defendant and can make the judge aware of relevant information about the defendant, such as informing the judge that the defendant has a regular job for which they need to show up or that the defendant has a place to live that is separate from where an alleged victim is living. Public defenders thus act as a conduit through which defendants can convey important mitigating information to the judge. Furthermore, public defenders can try to increase judge concurrence with the pretrial risk assessment; in particular, they can try to get judges to avoid setting a monetary bail in situations where the risk assessment recommends the defendant be released with nonmonetary conditions. Note that while these are some potential mechanisms through which the public defender can affect the outcomes of bail hearings, our study will not be able to definitively determine the exact mechanism responsible.

MATERIALS AND METHODS

In April 2017, Allegheny County began providing public defenders for all bail hearings at PMC during regular business hours (Monday through Friday from 8 a.m. to 4 p.m.). Allegheny County conducted an internal evaluation using a pre-post research design, which showed that providing a public defender appeared to reduce the use of monetary bail and pretrial detention (*16*). As a result, in early 2019, the county decided to expand their provision of public defense services to the bail hearings that take place during nonbusiness hours (bail hearings take place 24 hours a day, 7 days a week). To implement this expansion of services, the public defender′s office hired two new public defenders to cover the bail hearings occurring in these off-hours. Because these two attorneys could only staff about half of the shifts during the evening, overnight, and weekend hours, we worked with the public defender′s office to assign the attorneys in a way that would allow for a more rigorous evaluation of the impact of public defenders.

Our goal was to ensure that the cases in the shifts with a public defender (the treatment shifts) would look very similar to the cases in the shifts with no public defender (the control shifts). We also had to ensure that the resulting work schedule was relatively regular to make it amenable for the two attorneys staffing these shifts and could not reduce the staffing of business hour shifts. Figure 1 presents the schedule that was developed: Bail hearings that occur in cells with a "PD" were staffed with a public defender, and empty cells indicated shifts where no public defender was present. The public defender′s office followed the Pay Period 1 schedule for 2 weeks, then alternated to the Pay Period 2 schedule for 2 weeks, then back to the Pay Period 1 schedule for 2 weeks, and so forth for the duration of the study. The study was in the field between 1 April 2019 and 13 March 2020. A public defender working a given shift represented all defendants who had their bail hearing during that time period, regardless of their eligibility for a public defender at subsequent hearings. The study received approval from RAND′s Human Subjects Protection Committee, and all the guidelines were adhered to. We were not required to obtain informed consent because our study had minimal impact on defendants, as the intervention was going to happen anyways and our study did not alter the average probability of a defendant having a public defender at their bail hearing.

To have balanced treatment and control groups, our analyses only included defendants that had bail hearings in shifts where the public defender status varied across pay periods. For example, over the year with which our study was in the field, we expected that the set of defendants who had their bail hearing on Sunday between 4 a.m. and 8 a.m. to be relatively similar from week to week; those who happened to have their bail hearing during Pay Period 1 were provided a public defender, while those who happened to have their bail hearing during Pay Period 2 were not. In this way, we can only study the bail hearings that occur in the blue and orange cells in Fig. 1. The bail hearings that occur in the orange cells correspond to the treatment group, and the bail hearings that occur in the blue cells correspond to the control group. While our research design

Pay Period 1 schedule

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
12 midnight–4 a.m.		PD	PD	PD			
4 a.m.–8 a.m.	PD	PD	PD	PD	PD		
8 a.m.–12 noon	PD	PD	PD	PD	PD	PD	
12 noon–4 p.m.		PD	PD	PD	PD	PD	
4 p.m.–8 p.m.		PD	PD	PD	PD	PD	
8 p.m.–12 midnight		PD	PD				

Pay Period 2 schedule

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
12 midnight–4 a.m.					PD	PD	
4 a.m.–8 a.m.		PD	PD	PD	PD	PD	
8 a.m.–12 noon		PD	PD	PD	PD	PD	
12 noon–4 p.m.		PD	PD	PD	PD	PD	PD
4 p.m.–8 p.m.			PD	PD	PD	PD	PD
8 p.m.–12 midnight				PD	PD	PD	

Fig. 1. Public defender shift schedule. The schedule alternates back and forth between these two shift schedules every 2 weeks. The orange shifts represent the treatment shifts, and the blue shifts represent the control shifts.

will only allow us to estimate the impact of public defenders for bail hearings that occur outside business hours, these off-hour hearings compose about 63% of all bail hearings in Allegheny County.

Allegheny County provided data on all bail hearings that occurred between 1 April 2019 and 13 March 2020. For each hearing, we observe information on the date and time that the bail hearing took place, the outcome, the demographics of the defendant and their criminal history, who the judge was, the complete set of charges associated with the arrest, and the defendant's pretrial risk assessment. The county also provided information on preliminary hearing outcomes (failure-to-appear rates and probable cause findings), rearrests, and jail booking data, which detail the jail stints for all individuals in our sample, as well as notes whether they had any holds that would require them to be detained in jail regardless of what happened at their bail hearing. The public defender's office provided data on all of the bail hearings that they staffed, which allowed us to identify which of the bail hearings actually had a public defender. More details on the construction of the data are provided in the Supplementary Materials. In total, we have 2002 cases in the treatment group and 2089 cases in the control group.

Table 1 examines whether our experiment design resulted in balanced treatment and control groups with respect to the key defendant and case covariates. For completeness, tables S1 and S2 examine balance for the full set of relevant covariates, which include judge indicators, month indicators, shift indicators, and a more detailed version of the key defendant and case covariates presented in Table 1. In particular, table S2 breaks out many of the core variables presented in Table 1 into multiple categories, which reflects how these variables factor into the pretrial risk assessment. To test for balance, we used two complementary approaches. First, we examined whether the treatment means were statistically different from the control means after accounting for shift and month controls. We account for shift (which reflects both the day of the week and the specific 4-hour time block) and month controls because we assume that after conditioning on these timing factors, defendants arrive randomly to shifts with and without an assigned public defender. Column 5 of Table 1 presents P values from t tests that compare the treatment and control means for each of the key covariates. In addition, we regressed a treatment indicator on the full set of 128 covariates presented in tables S1 and S2 and conducted an F test to determine the level at which the covariates were jointly significant. While only four of the differences in covariate means shown in Table 1 are statistically significant at the 0.05 level, the P value for the F test of joint significance was 0.000.

Because the results above indicate that at least some covariate means vary by treatment status, our second approach to checking for balance follows Imbens and Rubin (*17*), who note that good balance does not necessarily require that there be no statistically

Table 1. Covariate balance between treatment and control groups.

	Overall mean	Overall SD	Treatment mean*	Control mean*	*P* value from *t* test comparing T and C means*	T/C difference as a percent of SD*
Defendant demographics						
Age (years)	35.0	12.0	35.0	35.1	0.761	1.0
Black	0.561	0.496	0.561	0.562	0.931	0.3
White	0.422	0.494	0.421	0.421	0.980	0.1
Female	0.274	0.446	0.257	0.294	0.008	8.4
Criminal history						
Age at first arrest (years)	21.3	8.2	21.2	21.3	0.802	0.8
Number of prior arrests	10.4	11.4	10.3	10.5	0.510	2.1
Number of prior felony convictions	1.50	2.83	1.52	1.49	0.741	1.0
Number of prior misd. convictions	2.70	3.48	2.60	2.80	0.062	5.9
Number of FTAs	1.20	2.14	1.17	1.23	0.391	2.7
Case and defendant characteristics						
Lead charge is felony	0.438	0.496	0.449	0.430	0.233	3.7
Number of charges	3.58	2.89	3.55	3.60	0.605	1.6
Multiple incidents being handled	0.064	0.244	0.068	0.061	0.375	2.8
Person charge	0.370	0.483	0.367	0.370	0.829	0.7
Property charge	0.228	0.420	0.227	0.233	0.677	1.3
Drug charge	0.137	0.344	0.153	0.122	0.004	9.1
Weapon charge	0.036	0.186	0.040	0.034	0.320	3.1
Public order charge	0.130	0.336	0.118	0.139	0.043	6.4
Other pending charges	0.350	0.477	0.350	0.348	0.905	0.4
Currently on probation	0.297	0.457	0.281	0.312	0.034	6.7
Hold/detainer issued	0.221	0.415	0.214	0.225	0.407	2.6
Arrest within Pittsburgh	0.553	0.497	0.564	0.543	0.179	4.2
Risk assessment recommendation						
Pretrial recommendation of ROR	0.084	0.278	0.085	0.083	0.817	0.7
Pretrial recommendation of nonmonetary release	0.672	0.470	0.671	0.672	0.934	0.3
Pretrial recommendation of detention	0.243	0.429	0.244	0.244	0.980	0.1
Observations	4091		2002	2089		

*The treatment and control means, as well as the last two columns, are OLS regression–adjusted for shift and month controls. Each characteristic was regressed on a treatment indicator, as well as shift and month controls. The control mean represents the average value in the control group, and the treatment mean reflects the sum of the control mean and the coefficient on the treatment indicator in the regression. Each month of the intervention includes approximately two treatment instances and two control instances of each shift. Treatment assignment is effectively randomized if there is no systematic difference between being arrested during a treatment instance and a control instance of each shift during each month.

significant differences between the treatment and control means across all covariates. Rather, what is required is that the differences between the treatment and control covariate means are small enough that simple regression methods will be reliable for removing biases associated with the differences in covariates. Imbens and Rubin (*17*) note that for a simple regression methodology to estimate unbiased treatment effects, the difference between the treatment and control means for a given covariate should be smaller than 25% of the SD of the covariate. We thus use this criterion based on the standardized difference in covariate means, after accounting for shift and month controls, to examine balance. The last column of Table 1 shows that all of these covariate differences are well within the required bounds; tables S1 and S2 further show that each of the 128 covariates included in these tables are also within the required bounds. When checking for balance simultaneously across many covariates, Imbens and Rubin (*17*) recommend

calculating the Mahalanobis distance between the means of the treatment and control groups (which results in one number that summarizes how the treatment and control group compare with respect to the means of all of the covariates simultaneously). Using the full set of covariates listed in tables S1 and S2, we find an average scaled deviation of 0.0067, which is well below the 0.25 threshold. These results indicate that our experiment resulted in well-balanced treatment and control groups and that we should be able to identify unbiased treatment effects as long as we include covariate controls.

The Supplementary Materials provides further evidence of the validity of our experiment design. Table S4 provides evidence that the courts were not manipulating who was in the treatment and control groups. Table S3 indicates that there was extremely good compliance with the research design, such that public defenders worked the shifts that they were supposed to and were not present when they were not on the schedule. This compliance, along with the fact that, at the initial bail hearing, private attorneys were rarely involved and everyone qualified for the public defender, results in a situation in which the treatment-control comparison will reveal the impact of going from a situation where essentially no one has a lawyer to one in which everyone has the services of a public defender.

The analysis plan for this project was preregistered on Open Science Framework. The specifications used in this paper mirror the initial analysis plan closely, although we note in the Supplementary Materials exactly how the final specifications used differ from the preregistered specifications.

RESULTS

The impact of public defenders on bail hearings and pretrial detention outcomes

Figure 2 presents our main results regarding the impact that providing public defenders at bail hearings has on bail hearing and pretrial detention outcomes. These are estimates of intent-to-treat effects in that we are directly comparing the outcomes of defendants assigned to the treatment group with the outcomes of those assigned to the control group. Because our discussion in the previous section indicated that the covariate imbalances were not zero, all the treatment-control comparisons presented in Fig. 2 control for an extensive set of defendant and case characteristics. Specifically, we identify the treatment effect by regressing a given outcome on a treatment indicator and the full set of 128 covariates included in tables S1 and S2. The outcomes shown for the control group in Fig. 2 correspond to the average value of the outcome variable among the control group (i.e., the baseline value), while the outcomes for the treatment group are determined by adding the regression-adjusted coefficient on the treatment indicator to the baseline value for the control group. Figure S1 in the Supplementary Materials presents our main outcome results with no covariate controls included and shows that none of our main findings are appreciably changed by not including covariate controls.

The standard errors for our regression specification were clustered following the guidelines provided by Abadie *et al.* (*18*), which note that a cluster should be defined as a set of cases where the regression errors will be correlated with each other and where all cases received the same treatment status. As we are controlling for month, as well as the specific 4-hour shift block (which picks up both day of the week and time of day effects), we expect the main reason the remaining regression errors should be correlated is that the cases that happen in time periods that are close together are likely handled by either the same judge, the same public defender, or both. For example, within a 4-hour shift block, all bail hearing decisions are made by the same judge/public defender combination and all have the same treatment status; we thus must cluster by at least the shift time and date level. However, if there are adjacent shifts included in our sample where treatment status remains the same and either the same public defender or judge (or both) carry over, then those SEs could be correlated as well, and we thus group them into the same cluster. For example, on a given Monday, the 4 p.m. shift and the 8 p.m. shift are combined into one cluster (as the same judge and public defender staff both); the Tuesday 12 a.m. shift however falls into a separate cluster as both the judge and public defender change at 12 a.m. In this way, the 16 4-hour shifts included in our analysis each week are grouped into 12 clusters. As a sensitivity check, we also calculated *P* values using randomization inference and found similar results.

The results for the bail hearing outcomes show clearly that public defenders have a substantial impact on defendants receiving a favorable outcome at the initial bail hearing. While those in the control group received either an ROR or nonmonetary release only 49% of the time, those in the treatment group received this favorable outcome 59.2% of the time, which is a 21% increase. We also examine the proportion in the treatment and control groups that are assigned a monetary bail falling below a given threshold, where those who received either ROR or nonmonetary conditions are coded as being below the threshold. The results indicate that public defenders mainly influence outcomes for defendants that would have received a monetary bail of $10,000 or less. We also find that public defenders increased judges′ concurrence with the risk assessment tool, which is defined as occurring when the judge′s decision either follows the recommendation from the risk assessment or is more lenient. This increased concurrence thus seems to be one mechanism through which public defenders reduce the likelihood that a monetary bail will be set. One potential reason public defenders may increase judge concurrence with the risk assessment tool is that their presence will likely require a judge that is deviating from the risk assessment to explain why. While sometimes judges might deviate from the risk assessment because of well-defined reasons, in situations where they do not have well-defined, legitimate reasons, they may decide to go along with the risk assessment when questioned about it by the public defender.

The results for detainment outcomes indicate that having a public defender at the initial bail hearing resulted in a decline in immediate pretrial detention after the bail hearing of 4.6 percentage points, which is a 10% decrease. Note that there is not a one-to-one relationship between being assigned a monetary bail and being detained pretrial. Some of the defendants in the control group who were assigned a monetary bail paid the bail amount and were released, while some members of the treatment group who were released with either an ROR or with nonmonetary conditions were subsequently detained in jail because they had another hold (such as a probation detainer). For this reason, the impact of the public defender intervention was naturally somewhat smaller for pretrial detention than it was for the bail hearing decision.

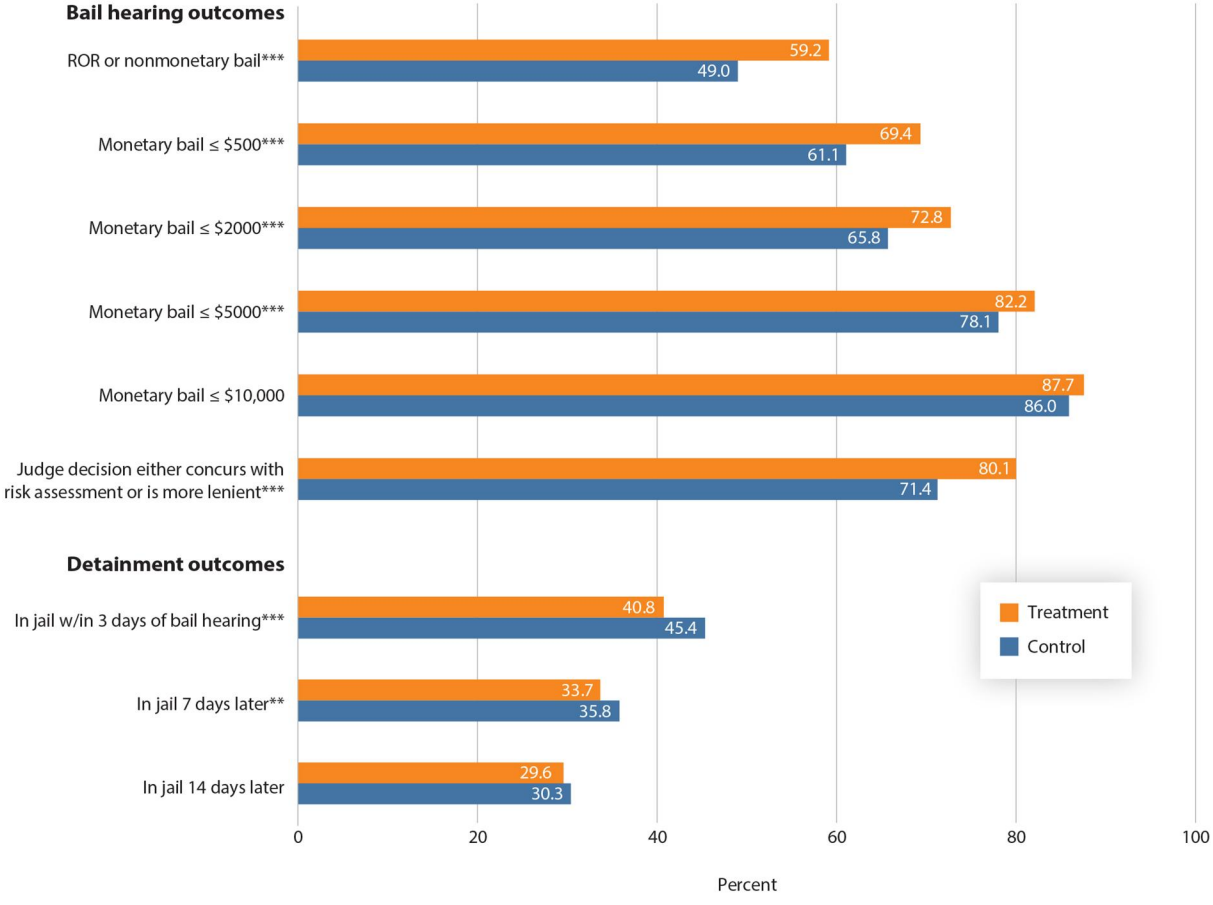

Fig. 2. Impact of public defender provision on bail hearing and pretrial detention outcomes. Asterisks ***, **, and * indicate that the difference between the treatment and control group is statistically significant at the 1, 5, and 10% level, respectively. The treatment-control comparisons are ordinary least squares (OLS) 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 4-hour shifts that composed the treatment and control groups. SEs were clustered by shift time and date; shifts that were adjacent, which shared the same treatment status and either the same public defender or judge, were grouped into the same cluster (see Results for more details). With the exception of the 7- and 14-day later detainment outcomes, all comparisons use the sample of 4091 bail hearings that occurred between 1 April 2019 and 13 March 2020. The 7- and 14-day later detainment outcomes truncate 1 and 2 weeks from the sample, respectively, so that the detainment outcome can be measured before the onset of the pandemic.

While the public defender had a significant impact on immediate pretrial detention, the results indicate that 14 days after the bail hearing, those in the treatment and control groups were equally likely to be in jail. The dissipation of this pretrial detention effect likely occurred because bail review hearings were conducted on all individuals who remain in jail solely because they were assigned a monetary bail that they cannot pay and for whom the pretrial risk assessment recommended release. At these review hearings, which typically happen within 3 days of the initial bail hearing, public defenders are present for all defendants. Thus, eventually, the treatment and control groups ended up in the same situation with respect to pretrial detention, but it took those in the control group longer to get there because it took them longer to get access to a public defender.

Results from a heterogeneity analysis, which examines whether certain groups benefited more than others from the provision of a public defender, are presented in the Supplementary Materials. Table S5 indicates that the observed reduction in pretrial detention only occurred among individuals charged with a nonviolent offense. We also estimate a significantly larger impact on receiving ROR or nonmonetary release for individuals charged with a nonviolent offense versus those charged with a violent offense. Both of these findings imply that judges might have been more open to listening to the public defender's recommendation for individuals charged with nonviolent offenses. The treatment effects do not appear to vary by the defendant's gender or race at a statistically significant level, but the treatment did have a larger negative impact on pretrial detention for defendants older than 30 than for younger defendants.

The impact of public defenders on downstream defendant outcomes

As noted in the Introduction, prior research has demonstrated that interventions that affect pretrial detention rates can also affect failure-to-appear rates at court hearings, case outcomes, and rearrest rates. To better understand the broader impacts of providing

public defenders at bail hearings, the results in this section evaluate the impact that the intervention had on these downstream outcomes.

Our results in this section have two key caveats. First, public defenders were already being provided at bail review hearings that occurred within 3 days of the first hearing. Therefore, our estimates reflect only the impact relative to the status quo of a public defender at the bail review hearing. Second, at the onset of the coronavirus disease 2019 (COVID-19) pandemic in Allegheny County, we decided that we were not going to use data on any outcomes that occurred after 13 March 2020; we thus stopped requesting data from our partners at this time. After this date, several changes were made to various criminal justice processes within Allegheny County that had the potential to significantly affect the outcomes examined here. In particular, court cases were substantially delayed, and eventual outcomes were potentially affected, as there was likely a higher propensity to dismiss cases to reduce the backlog in the courts. Arrest activity around the county also declined once the pandemic began, and the county also made it a priority to release all individuals charged with a nonviolent offense who were in jail solely because they could not pay their monetary bail. Using data after the pandemic began would thus identify the impact that this intervention had on outcomes under the policies and trends present during the pandemic, which, while interesting, would not provide generalizable insights about the impact of a public defender at this stage. Because the intent of this study is to provide an estimate of the impact of this intervention in prepandemic times, our analysis necessarily focuses on short-term outcomes, as these are unaffected by the pandemic. We thus examine the impacts that the intervention had on preliminary hearing outcomes (as opposed to the final case disposition), as well as rearrest activity within 180 days from the bail hearing (versus a longer 2- or 3-year follow-up period). Each of the outcomes examined in this section requires a different level of sample truncation to ensure that the outcome for everyone in the sample can be measured by 13 March 2020. For example, to measure whether individuals were rearrested within 180 days of their bail hearing, we can only use individuals that had their bail hearings on or before 15 September 2019 so that the entire 180-day follow-up period occurs before 13 March 2020.

Figure 3 shows the impact that public defender provision at the bail hearing had on downstream outcomes; the methodology used to obtain these results mirrors that used to obtain Fig. 2. The estimates indicate that the public defender intervention had no statistically significant impact on whether the defendant failed to appear at their preliminary hearing or on the outcome of the preliminary hearing. These results are expected given the impact of the intervention. With respect to failure to appear rates, these preliminary hearings typically do not take place until at least 2 weeks after the bail hearing. By that point, the intervention no longer had any impact on whether a defendant was in jail, and thus, there should be no impact on failure to appear rates. With respect to the outcome of the preliminary hearing, the public defender intervention only provided assistance to the defendant regarding the outcome of their bail hearing. A different public defender was then assigned to represent the individual at their preliminary hearing if they were eligible for a public defender. Those in the treatment group were not receiving any extra access to services from the public defender′s office between the time of their bail hearing and their preliminary hearing that would decrease the likelihood that the judge would determine probable cause to exist (thus allowing the case to move to the next level of prosecution).

The final outcome that we consider in Fig. 3 is whether individuals were charged with a new crime by law enforcement within 180 days of their initial bail hearing, which we term a rearrest. Note that this measure of rearrest does not include arrests for failures to appear in court on the initial charge, as those incidents were already examined in the failure to appear outcome. The results indicate that those in the treatment group were 3.2 percentage points more likely than those in the control group to be rearrested for any crime within the first 180 days of their bail hearing. The remaining rearrest specifications examine which specific crime types increased after this intervention. Once we identify that the treatment only had a statistically significant impact on rearrests for felony crimes (as opposed to misdemeanor or summary offenses), we then further parse which sets of felony crimes drive this result. (While the significance levels for the rearrest outcomes in Fig. 3 are not corrected for multiple hypothesis testing, we obtain similar results when we apply the conservative Bonferroni test.) Notably, the results indicate that the intervention has no impact on rearrests for violent felonies. Instead, we find that the overall increase in rearrests was being driven by an increase in rearrests for third-degree felony theft charges (which make up 55% of third-degree felony rearrests). In particular, while 2% of those in the control group were rearrested within the first 180 days of their bail hearing for a third-degree felony theft charge, 5.4% of those in the treatment group were. Although third-degree felony theft charges can potentially involve theft of items worth a significant monetary amount, almost three-quarters of these rearrests were for retail theft. Under Pennsylvania law, if the individual has two prior theft convictions, an incident of retail theft will be charged as a third-degree felony regardless of the value of the item stolen. While we do not observe the value of items stolen in our data, it is possible that many of these rearrests involved minor retail thefts.

The rearrest results suggest that reductions in monetary bail and pretrial detention (which are the main ways that the intervention affected individuals) led to an increase in rearrests for lower-grade theft charges. There are several potential reasons why this might have happened. While incapacitation (whereby those in jail are physically prevented from reoffending) is often put forth as an explanation for why reductions in pretrial detention can lead to increases in rearrest rates, our results are not consistent with an incapacitation effect. The decrease in pretrial detention caused by the intervention was not large enough to incapacitate individuals from reoffending over a 180-day time frame. In the Supplementary Materials, we show that our findings imply that the treatment causes an average decrease in detention of 0.29 days, which is a very small change in incapacitation relative to the 180-day time frame. This average reduction in detention ignores the possibility that some people see no impact on their detention and others have a larger impact. Using the findings at the bottom of Fig. 2, we see that 55% of the control group did not go to jail (i.e., were not in jail within 3 days of their bail hearing) and 30% were still in jail after 14 days. If we assume that all the impact on detention was on the remaining 15% who were in jail between 1 and 14 days, then this subset would have experienced a 1.9-day decrease in detention days (as 0.29/0.15 = 1.9). We think that it remains unlikely that having the opportunity to offend for roughly two extra days over

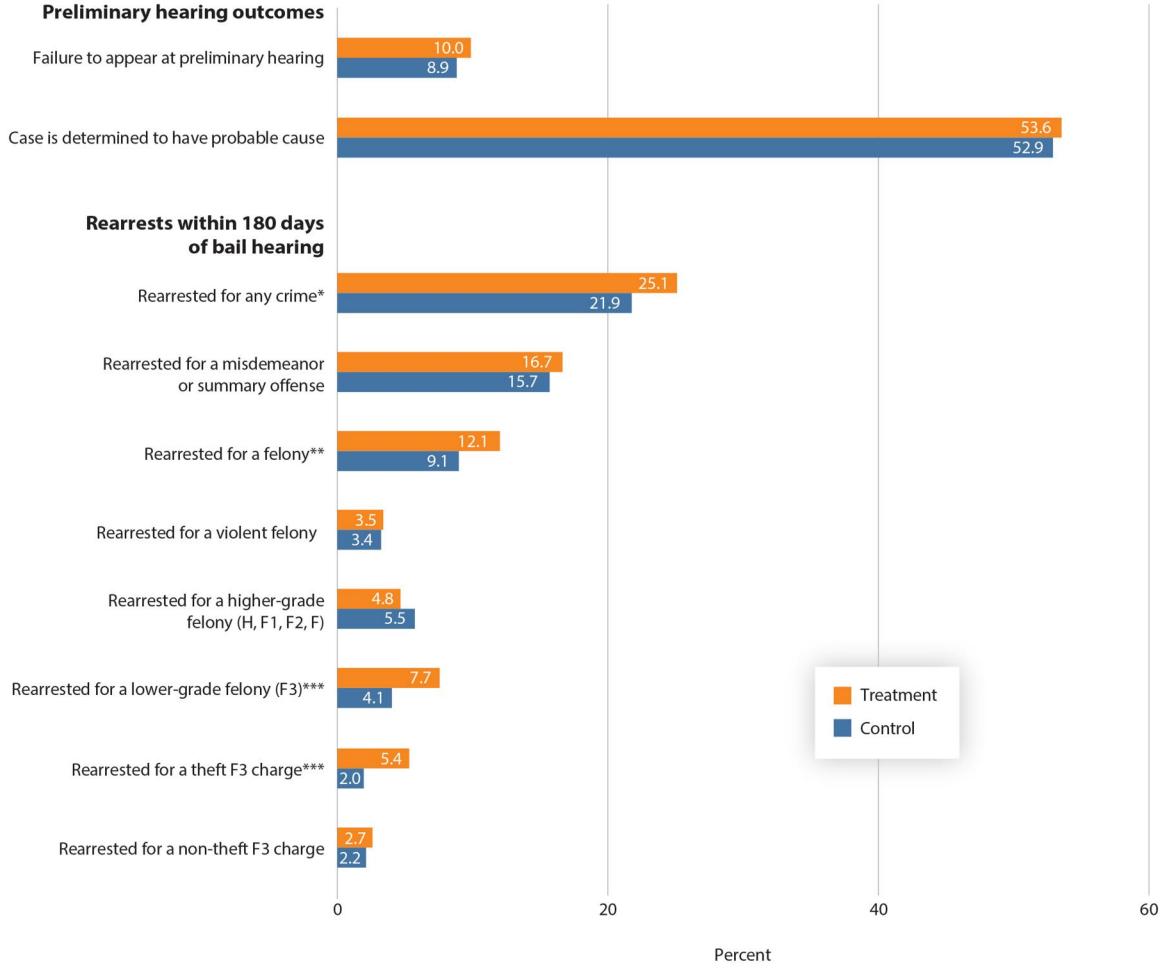

Fig. 3. Impact of public defender provision on downstream outcomes. Asterisks ***, **, and * indicate that the difference between the treatment and control group is statistically significant at the 1, 5, and 10% level, respectively. The treatment-control comparisons are OLS regression–adjusted using the same specification as described in Fig. 2. To only use data collected before the pandemic, sample sizes vary across the outcomes used. For failures to appear, we used all bail hearings that occurred between 1 April 2019 and 30 November 2019 (n = 2993); the probable cause determination dropped 261 additional observations that had not had their preliminary hearing as of 13 March 2020. For the rearrest within 180-day outcome, we use the 2167 bail hearings that occurred between 1 April 2019 and 15 September 2019. A crime of grade "F" corresponds to an ungraded felony drug charge. For this charge, the maximum punishment is driven by prior convictions, and thus, it does not have a specific grade attached to it like the other charges do.

the course of 6 months was enough to explain why those in the treatment group were almost three times as likely to be rearrested for a third-degree felony theft charge. As further evidence that our results are not the result of incapacitation, we find that the estimated treatment effect on rearrest presented in Fig. 3 remains virtually unchanged when we add an explicit control for the number of days (over the 180-day period) that the individual was out of jail. Thus, the additional time outside of jail does not seem to be driving the impact on rearrests.

Although the relatively small average reduction in jail time suggests that an increase in overall incapacitation is not driving the increase in minor felony rearrests, it is possible that the public defender's presence leads to "selective incapacitation," whereby more defendants at risk for these minor felonies are being released while awaiting trial but fewer other defendants are being released. Such reallocation of pretrial confinement could account for increased minor felony rearrests without changing the average number of days of pretrial confinement in the population much. We do not have any reason to think that the public defender's presence would increase confinement of some other group of defendants who are not at risk of reoffending nor do we find evidence of reductions in other types of rearrests, but we raise this as a possibility for consideration.

Beyond an incapacitation effect, there are a couple deterrence-based reasons why the intervention might have led to an increase in rearrests. Specifically, because those in the control group were more likely to have to pay a monetary bail and more likely to be detained pretrial, the negative experience of those events might deter them from offending in the future. Alternatively, those in the treatment group who received public defender services might have been emboldened by their experience of getting out of pretrial detention and thus perceived the consequences of being arrested again to not be as serious. Note that Allegheny County does not require individuals to forfeit their bail if they reoffend during the

pretrial period, and thus, the monetary bail itself should not directly incentivize individuals to avoid offending during the pretrial period (although the experience of having to pay the monetary bail might).

In terms of why the increase in rearrest rates only occurred for third-degree felony theft charges, one reason this might have occurred is that the people who were most affected by the intervention were more likely to commit these types of offenses. Specifically, the heterogeneity analyses presented in table S5 indicate that the public defender intervention only reduced the likelihood of detention for those who had a nonviolent arrest charge. This group was much more likely to have their focal arrest charge classified as a theft charge, implying that their future rearrests might fall in this category as well. An alternative possibility is that the experience of paying a monetary bail deters individuals specifically from committing financial crimes. For example, the benefit to an individual of committing a financial crime should decrease if they feel that they may have to pay a monetary bail.

Last, several previous studies evaluating the impact of pretrial detention on rearrest rates have found that pretrial detention caused rearrest rates to increase, while our results imply the opposite. One potential reason for these different findings is that we are only able to examine short-term rearrest outcomes, while previous literature has followed the impact on arrest over a 2- or 3-year follow-up period. This longer follow-up period allows the impact of pretrial detention to change over time. For example, early on, those who are detained pretrial might be deterred from reoffending. In the long-term, however, even two extra days of pretrial detention can be extremely disruptive to individuals if it causes them to lose their job and custody of their children, as well as increases their exposure to criminogenic influences, which can then lead to disruptions in the individual's living situation and health (*19*). This pattern, whereby the causal relationship between pretrial detention and rearrest rates is first negative but then becomes positive as the follow-up window increases, has been observed in several studies (*3*, *5*). Future work should thus evaluate the impact of this intervention on rearrest rates over a longer time window.

The tradeoff between pretrial detention and rearrests

Our results indicate that, in this setting, providing a public defender at bail hearings appears to involve a tradeoff between lowering pretrial detention rates and increasing rearrests for third-degree felony theft charges. In this section, we discuss how to think about this tradeoff, albeit recognizing that this tradeoff will not be relevant to all jurisdictions. First, for some jurisdictions, the question of whether to provide a public defender at this stage will be normative. Within this perspective, because the bail hearing can have important consequences for a defendant, representation should be provided to defendants at this stage regardless of what any analysis shows. Second, some jurisdictions might be willing to staff public defenders at bail hearings so long as these attorneys are shown to have a positive effect on defendant outcomes at these hearings. The results presented here provide clear evidence of this, and thus, a discussion of the tradeoffs between pretrial detention and rearrest rates would be irrelevant for these jurisdictions as well. However, given the intense public focus that often occurs whenever changes in pretrial policy are thought to increase crime rates (*20*), it is likely that some jurisdictions will consider both the immediate and downstream consequences of potential interventions and may only support the provision of representation at the initial bail hearing if the tradeoffs between pretrial detention and rearrests are favorable. We thus directly consider these tradeoffs in this section to help inform these discussions.

While monetary cost-benefit analyses can often be helpful in situations where an intervention involves clear tradeoffs, in this setting, with wide variation in estimates of the benefit of staying out of jail, the results can be more difficult to interpret. A monetary cost-benefit analysis will essentially identify a threshold in dollar terms such that the policy should be implemented if a day of someone's freedom is worth more than the threshold. However, because there will inevitably be a large amount of variation in terms of the amount individuals are willing to pay to stay out of jail (i.e., the value of freedom) and this amount is likely to be related to income level, this monetary threshold is unlikely to help policymakers come to a consensus conclusion about whether the tradeoff that the intervention presents is worth it. Instead, we follow a cost-benefit approach developed by Stevenson and Mayson (*15*), which involves directly comparing the number of pretrial detention days avoided with the number of additional crimes committed. Results from a traditional monetary cost-benefit analysis are presented in the Supplementary Materials and indicate that if society values the damage from incarcerating an individual for 1 day to be greater than $488 (which is only 3% of the higher estimate of the societal cost of a day in jail), then this intervention should be considered cost-effective.

The results from Figs. 2 and 3 indicate that the average treatment group member served 0.29 less days of detention and committed 0.034 more third-degree felony theft crimes than the average control group member. This means that, for the tradeoff presented by this intervention to be undesirable, the cost of a third-degree felony theft charge to society must be at least 8.5 times more than the cost to society of a day in detention (0.29/0.034 = 8.5). Put another way, for this tradeoff to be bad, individuals would have to be willing to spend at least 8.5 days in jail to avoid being the victim of a third-degree felony theft crime. Stevenson and Mayson (*15*) surveyed individuals in the general population and found that the median respondent would only be willing to spend 1 day in jail to avoid being the victim of a burglary. A third-degree felony theft offense is less harmful than a burglary, and thus, these survey results indicate the median individual would be willing to accept the tradeoff the public defender intervention induces. We provide Stevenson and Mayson's (*15*) valuation of the tradeoff between incarceration and burglary merely as a point of reference as individuals, policy-makers, and jurisdictions will have their own valuations of this tradeoff. For simplicity, our analyses of these tradeoffs only use the point estimates from our empirical analysis and are not accounting for the uncertainty in these estimates.

The analysis conducted in this section is constrained to considering the short-term tradeoffs. As noted earlier, the relationship between pretrial detention and rearrest rates might have been neutral or even positive if we had been able to use a longer follow-up window, which would eliminate the need to consider the tradeoff between these two factors.

DISCUSSION

This paper presents experimental evidence that providing public defenders at bail hearings increased the probability of receiving an ROR or nonmonetary release at bail hearings by 21%, reduced

the probability an individual was in jail 3 days after their bail hearing by 10%, and had no impact on failure to appear rates or the probable cause determination at the preliminary hearing. This evidence is important for constitutional arguments about whether bail hearings should be considered a critical stage requiring a lawyer (*14*). Furthermore, in the absence of this designation, these results should help inform local jurisdictions, who are currently responsible for deciding whether defense counsel will be provided at bail hearings. These results are especially relevant given that recent widespread efforts at the local level to reform the monetary bail system have focused almost exclusively on implementing risk assessment instruments that recommend to judges that they replace monetary bail with supervisory conditions. However, research has found that judges often do not follow these recommendations and continue to set monetary bail (*21*). The results that we find in Allegheny County indicate that, in these situations, providing a public defender at the bail hearing appears to increase concurrence with the risk assessment, which will subsequently help jurisdictions reduce their use of monetary bail and pretrial detention.

For jurisdictions that are concerned with the increase in rearrests for third-degree felony theft charges that arose as a downstream impact of this intervention, our analysis indicates that for the tradeoff between reduced pretrial detention and increased rearrests to be problematic, the cost of a theft charge to society must be at least 8.5 times more than the cost to society of a day in detention. Current survey estimates of how individuals value these costs indicate that this tradeoff should be acceptable for most individuals. Note that, because of the COVID-19 pandemic, we were prevented from evaluating the long-term impact of the intervention on rearrest rates. This is important for future research to consider, as the impact on rearrest rates might have changed if we were able to examine a longer time window for rearrests, potentially nullifying the concern about these tradeoffs.

Last, note that there are many aspects regarding how bail hearings are conducted that vary by jurisdiction. The bail hearing process in Allegheny County does not include prosecutors, does provide judges the use of a risk assessment score, typically does not involve the judge basing their decision on information that they learn from the defendant during the bail hearing, and allows for bail review hearings within a few days of the initial hearing. While none of these components are unique to Allegheny County, there are likely to be many other jurisdictions that have a bail hearing process that differs in important ways than the one we study here. More research in this area is needed to understand the extent to which the results that we find here are generalizable to other jurisdictions with different process components. For example, the fact that bail review hearings (during which a public defender is always present) occur within 3 days of the initial bail hearing in this jurisdiction means that, a priori, the public defender who appears at the initial bail hearing could only have a limited impact on the length of time spent in detention. In jurisdictions where bail review hearings are either not conducted or conducted without a public defender, the provision of public defenders at bail hearings might have a bigger impact on the number of days a defendant was detained pretrial, which, in turn, might affect case outcomes and rearrest outcomes in different and more substantial ways.

Supplementary Materials

This PDF file includes:

Supplementary Materials and Methods
Figs. S1 to S3
Tables S1 to S5
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cost-benefit analysis. All three authors discussed the results and jointly wrote the final manuscript. **Competing interests:** The authors declare that they have no competing interests. **Data and materials availability:** All data needed to evaluate the conclusions in the paper are present in the paper and/or Supplementary Materials. The Data Use Agreement (DUA), which was executed between RAND and the Allegheny County Department of Human Services, precludes us from making the individual-level data publicly available. Other researchers wishing to gain access to these data will need to execute a DUA with the Allegheny County Department of Human Services.

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By: */s/ Lindsey Burrows*
Lindsey Burrows

Attorney for CRIMINAL LAW & JUSTICE CENTER

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I certify that I directed the original Brief of Amici Curiae to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

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Respectfully Submitted,

/s/ Lindsey Burrows

Lindsey Burrows
OSB No. 113431
O'Connor Weber LLC
1500 SW First Avenue, Suite 1090
Portland, OR 97201
(503) 226-0923
lindsey@oconnorweber.com