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6. Ensure Public Defense Counsel Before Arraignment

Ensure Public Defense Counsel Before Arraignment

RECOMMENDATION

Data show that effective legal representation at an arrested person's first court appearance reduces recidivism and saves money. Under current California law, only people who can pay for their own attorney are guaranteed legal representation prior to a court appearance. California does not currently provide appointment of public defenders for indigent people facing criminal charges until after someone's first appearance in court.

The Committee therefore recommends the following:

Require that people unable to afford their own attorney have counsel appointed within 24 hours of booking, or sufficiently before arraignment to provide meaningful representation, whichever is earlier.

To facilitate this prompt assignment of counsel, the following should be added to the Penal Code:

- A presumption that a detained person is eligible for public defender services.
- Notification to the public defender of individuals who are being held in custody after an arrest.
- Defense counsel access from local jails and courts to detained individuals prior to formal appointment of counsel, without delaying the initial hearing.
- Allow individuals to waive the right to counsel only after they have spoken to defense counsel.

RELEVANT STATUTES

Penal Code §§ 810(b), 825, 849, 987, 988, 987.2(a), 987.5, 1269c
Government Code §§ 27700–27712

BACKGROUND AND ANALYSIS

Prompt assignment of counsel not only increases fairness and helps protect constitutional rights, but data show that it also has significant public safety and cost-saving benefits.

Professor Paul Heaton, Academic Director of the Quattrone Center for the Administration of Justice at the University of Pennsylvania Law School, presented the Committee with empirical evidence that “improving the quality of counsel at first appearance can realize broadly shared goals of reducing bail violations, enhancing public safety, diminishing racial disparity, and reducing the system’s imprint on people’s lives.”¹⁸⁶

In California, unlike many other states, recently arrested people who cannot afford to hire their own attorney are not guaranteed access to a lawyer until after their first court appearance, during which a judge inquires if the person can afford counsel, and appoints counsel when necessary.¹⁸⁷ This system recently earned California a failing grade on its first appearance procedures by researchers at the Dedman School of Law.¹⁸⁸ Judge Juliet McKenna of the Superior Court of the District of Columbia, told the Committee that she could not imagine a fair and efficient criminal justice system without the prompt appointment of defense counsel, as routinely occurs in her court.¹⁸⁹

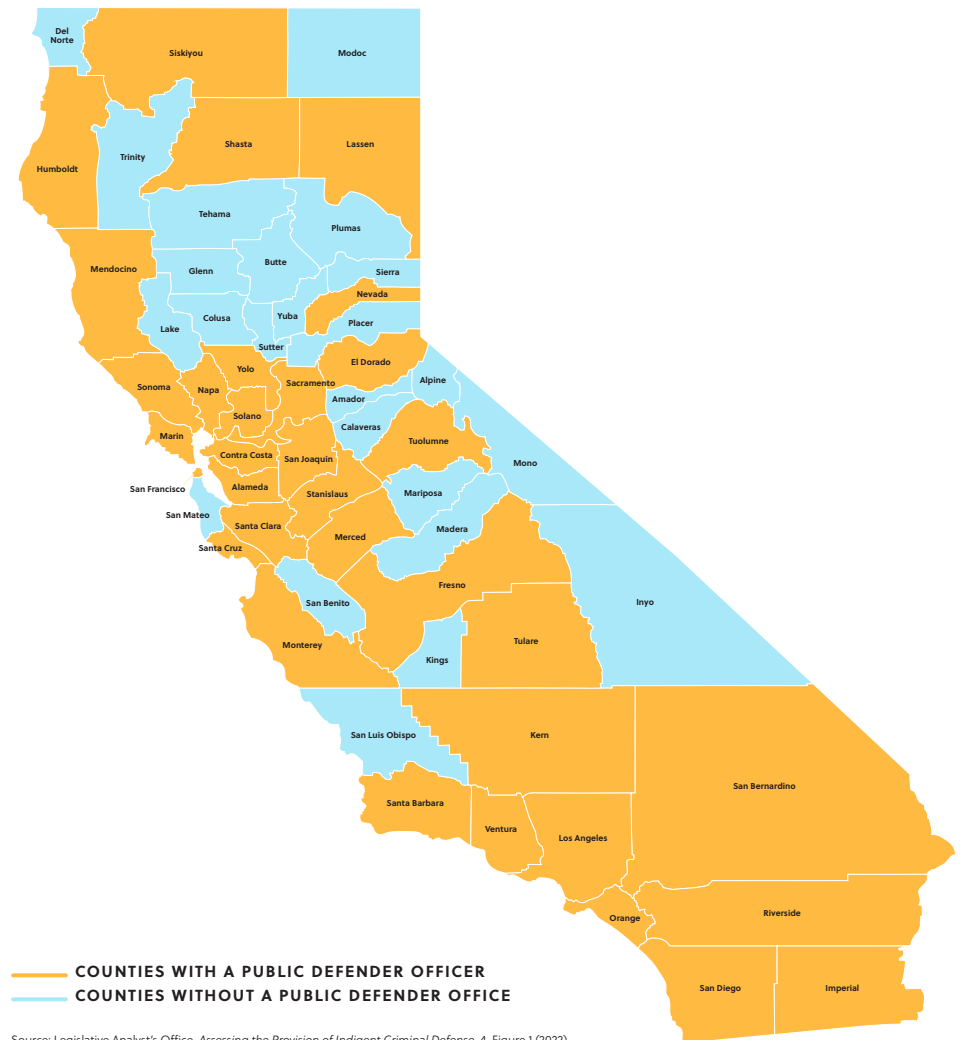
¹⁸⁷ See Penal Code § 987.

¹⁸⁸ Malia N. Brink, Jiacheng Yu, & Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, 15 (September 2022).

¹⁸⁹ Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:36:00–0:39:06

As explained to the Committee by Aditi Goel, Senior Program Manager at the Sixth Amendment Center, California is one of only 8 states that does not have a state government entity overseeing any part of trial-level indigent defense services.¹⁹⁰ California is also one of only 5 states in the nation that does not provide regular funding for trial level public defender systems.¹⁹¹ Galit Lipa, Executive Director of the Indigent Defense Improvement Division of the Office of the State Public Defender, told the Committee that access to counsel during the early stages of a case is inconsistent across the state and nonexistent in many counties. For example, in Butte County – which does not have an institutional public defender office – people can be arrested and spend up to 10 nights in jail before seeing a lawyer because the Penal Code does not specify when counsel must be appointed.¹⁹²

CALIFORNIA PUBLIC DEFENDER OFFICES BY COUNTY



190 Written Submission of Aditi Goel to Committee on Revision of the Penal Code for the Meeting on September 2, 2022. The other states are Arizona, Illinois, Mississippi, Nebraska, Pennsylvania, South Dakota, and Washington.

191 Written Submission of Galit Lipa to Committee on Revision of the Penal Code for the Meeting on September 2, 2022.

192 The Penal Code contains some provisions allowing a lawyer to take action on a case before arraignment. See Penal Code §§ 825(b) (specifying that an attorney may visit a person after their arrest), and 1269c (allowing attorneys to request the magistrate reduce cash bail before arraignment).

While there is no statewide data on the number of guilty pleas entered into without the assistance of counsel, according to experts and practitioners consulted by Committee staff, the practice is common throughout the state.¹⁹³ For example, a review of Kern County data conducted by the ACLU found that more than 75% of people went before a judge without counsel at misdemeanor arraignment over a 7-year period.¹⁹⁴ At least 30% of these people (more than 67,000 cases) pled guilty or no contest without counsel.¹⁹⁵ According to information submitted to the Committee by the Immigrant Legal Resource Center, pleading guilty without counsel is especially treacherous for noncitizens – who account for approximately 12% of all defendants in the state – because they may face immigration consequences as a result of their conviction, but not be given sufficient information about them before entering a guilty plea.¹⁹⁶

A few California public defender offices have developed early representation programs that allow attorneys to begin assisting people much earlier in the process and before they even appear before a judge.¹⁹⁷ At the September 2022 meeting, Carlie Ware, who supervises an early representation unit in Santa Clara County, outlined the building blocks of such a program, including information sharing between county agencies and access to the people held in custody.¹⁹⁸ Santa Clara County Assistant District Attorney David Angel endorsed the practice of early appointment of counsel in Santa Clara and emphasized that public defenders and prosecutors are often aligned on assigning counsel as early as possible because arrested people are released from custody sooner with access to more services, improving public safety.¹⁹⁹ Whether counties rely on a public defender office or a panel of private attorneys to provide indigent defense, the building blocks outlined by Ms. Ware can be used to ensure effective representation at the earliest stages of a case.

Some public defender offices have incorporated social workers to facilitate meaningful access to counsel.²⁰⁰ These and other professionals may be better suited to the information-gathering and needs-assessments that occur during a first meeting with a client and similar models should continue to be explored in California. Development of these models can facilitate further expansion of holistic defense – a model in which public defenders work with interdisciplinary teams to address the underlying causes and collateral impacts of criminal legal involvement – which research has shown reduces incarceration rates, sentence lengths, and pretrial detention without harming public safety.²⁰¹

California recently passed legislation improving the appointment of counsel process in juvenile cases. Assembly Bill 2644 (Holden) requires public defenders to be notified of all juvenile bookings within 2 hours. Extending similar reforms to the adult system can improve public safety and generate cost-savings, while recognizing that people should be treated equally regardless of how much money they have.

EMPIRICAL RESEARCH

Providing legal assistance earlier in the criminal legal process can have important public safety benefits. Recent research by Professor Paul Heaton using data from nearly 100,000 cases in Philadelphia found that people who were provided assistance from the public defender's office before their bail hearings were 64% less likely to have

¹⁹³ See Letter from ACLU of Northern California and Southern California to the Committee on Revision of the Penal Code for the Meeting on September 2, 2022.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Letter from the Immigrant Legal Resource Center to the Committee on Revision of the Penal Code for the Meeting on September 2, 2022. Defense attorneys are required to provide accurate advice about the immigration consequences of a plea to their clients. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); Penal Code § 1016.3. When a person pleads guilty to an offense without counsel, courts are only required to give them a general advisement that the plea can carry negative immigration consequences. Penal Code § 1016.5.

¹⁹⁷ Public defender offices in Contra Costa, Sacramento, Santa Clara, and Santa Cruz have all developed early representation programs. See *Early Representation, Contra Costa Public Defenders; New Public Defender Program Wins Merit Award, Sac County News*, November 12, 2020; Robert Salonga, *'It Results in More Justice': New Santa Clara County Public Defender Program Looks to Even the Field at Arraignments*, *The Mercury News*, February 29, 2020; Santa Cruz County Officer of the Public Defender, *Early Representation*.

¹⁹⁸ Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:39:14–0:45:35.

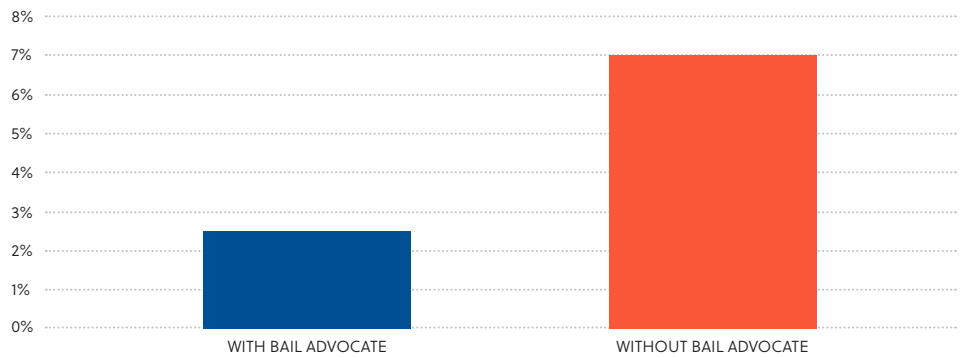
¹⁹⁹ *Id.* at 0:45:48–0:51:10.

²⁰⁰ See, e.g., *New Public Defender Program Wins Merit Award, Sac County News* (November 12, 2020) (describing the Sacramento County Public Defender Office's Pretrial Support Project, which uses law students and social workers to conduct needs assessments of arrested individuals within 24 hours of booking, and provide linkage to services and case management.)

²⁰¹ See James M. Anderson, Maya Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, *Harvard Law Review*, Vol. 132, No. 3 (January 2019).

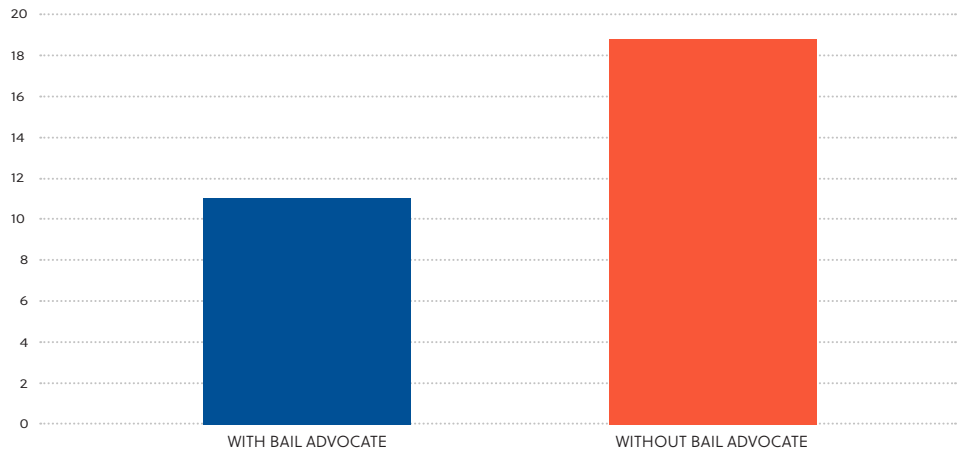
a bail violation and 26% less likely to be arrested in the future.²⁰² Representation by a bail advocate was also associated with a decrease in the likelihood of a guilt determination, less harsh sentences, and a reduction in racial disparities in pretrial release rates.²⁰³

PHILADELPHIA ENHANCED PUBLIC DEFENSE STUDY: PERCENTAGE OF PEOPLE WITH BAIL REVOKED OR FORFEITED



Source: Presentation by Professor Paul Heaton to Committee on Revision of the Penal Code, September 2, 2022.

PHILADELPHIA ENHANCED PUBLIC DEFENSE STUDY: NEW PRETRIAL ARRESTS PER 100 PEOPLE



Source: Presentation by Professor Paul Heaton to Committee on Revision of the Penal Code, September 2, 2022.

202 Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, Indiana Law Journal, Vol. 96, Iss. 3, Article 2, 724–25 (2021).

203 *Id.* at 725–28.

204 See National Legal Aid and Defender Association, *Access to Counsel at First Appearance: A Key Component of Pretrial Justice*, 15–25 (2020).

205 Danielle Soto & Mark Lipkin, *Representation at Arraignment: The Impact of “Smart Defense” on Due Process and Justice in Alameda County*, Impact Justice, 20 (2018).

206 Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender’s Pre-Trial Release Unit*, California Policy Lab (June 2018).

207 Bryan L. Sykes, Eliza Solowiej, & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County*, 2013, 5 UC Irvine Law Review 813, 829 (2015).

People represented by counsel at their first court appearance are more likely to be released pretrial²⁰⁴ and this can result in significant cost savings. After the Alameda County Public Defender’s Office began to represent people at their first court hearing, the pretrial release rate increased from 1% to 20%.²⁰⁵ A study of a similar program in San Francisco showed an increase of releases at arraignment from 14% to 28%, and an estimated savings of more than 11,000 jail bed-days per year.²⁰⁶ A study of early representation in Cook County, Illinois, found that providing counsel within 24 hours of arrest would save between \$12 and \$44 million per year.²⁰⁷

INSIGHT FROM OTHER JURISDICTIONS

Twenty-four states, including Illinois, Florida, and New York, require that the state provide counsel at a person's initial appearance.²⁰⁸

- *Massachusetts*: At the September 2022 Committee meeting, Aditi Goel described the appointment of counsel process in Massachusetts, which requires courts to determine whether people are eligible for appointed counsel prior to the first appearance and to appoint attorneys for those who are eligible.²⁰⁹ An attorney must enter a notice of appearance on or before the arraignment so that a person has a meaningful opportunity to consult with their attorney.²¹⁰
- *Washington D.C.*: Judge Juliet J. McKenna of Washington D.C. also explained her jurisdiction's rules, which require appointment of and an opportunity to consult with counsel prior to an accused person's initial appearance.²¹¹
- *Florida*: In addition to mandating that an arraignment take place within 24 hours after arrest,²¹² Florida law also requires that counsel be provided as soon as possible after arrest.²¹³ The booking officer must immediately notify the public defender if a person is indigent and desires counsel and then the public defender may interview that person, offer advice, and represent the person until a formal finding of indigency and appointment by the court at arraignment.²¹⁴

208 Malia N. Brink, Jiacheng Yu, & Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, 65 (September 2022). Two United States territories, Guam and the Virgin Islands also require counsel at an initial appearance. *Id.* at 22, 57. Ohio requires it for any offense punishable by more than six months in jail. *Id.* at 47. Like many other states, California received an "F" grade on its policies around initial court appearances for arrested people. *Id.* at 15.

209 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:32:22–0:33:19; Mass. Gen. Law c. 211D, § 5 (2022).

210 Mass. R. Crim. Pro. Rule 7(c)(1).

211 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:33:38–0:39:06. See also D.C. Superior Court Criminal Rule 44(a); D.C. Superior Court Criminal Rule 5(c) ("The court must allow the defendant reasonable time and opportunity to consult counsel.")

212 Fla. R. Crim. P. 3.130(a).

213 Fla. R. Crim. P. 3.111(a); 3.130(c)(1). See also John P. Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-trial Release*, 69 Florida Law Review 831 (2018).

214 Fla. R. Crim. P. 3.111(c)(2)-(4).