



EARLY REPRESENTATION BY DEFENSE COUNSEL  
FIELD TEST EVALUATION

THE SHELBY COUNTY EXPERIENCE: A CASE STUDY

FEBRUARY 1984

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## I. COMMUNITY DESCRIPTION

### A. OVERVIEW OF SHELBY COUNTY

Shelby County is located in the extreme southwest corner of the state of Tennessee. It is the most populous county in the state and Memphis, its county seat, is the state's largest city. Shelby County forms a Standard Metropolitan Statistical Area with nearby counties in Arkansas and Mississippi. The 1980 Census lists the population of Shelby County at 777,113, of whom 57.3% are caucasian, 41.7% are Black, and 1% are Hispanic. The median age of the population is 28 years.

Shelby County is the largest of the three ERDC field test sites and is the only one dominated by a large center city. Shelby County residents as a group have a lower standard of living than do their counterparts in Passaic, New Jersey and Palm Beach, Florida. Approximately 20% of Shelby County residents live below the nationally established poverty level.

The economy of Shelby County is stable but uneasy. Located on the Mississippi River, Memphis long has been known as the hub of the Mid-South, a major port of trade. Today's Memphis is the home of Holiday Inns, Federal Express and a number of other growth companies. At the same time, Memphis suffers from high unemployment and underemployment rates. Efforts to upgrade the aging center city abound, but the more successful commercial developments are located in the growing suburban districts of the county.

To the outsider, Memphis and Shelby County appear to be in a period of political transition. Social and political changes during the past two decades have been dramatic. The old political alliances and power bases that once controlled Memphis and Shelby County no longer dominate the electoral scene. The Congressman from the area, Harold Ford, is Black, and recent municipal elections saw Blacks elected to county-wide offices and seriously challenged

contenders for District Attorney General and Mayor. Local residents expect such power shifts to continue.

## B. OVERVIEW OF THE CRIMINAL JUSTICE COMMUNITY

### 1. General Crime and Criminal Process Issues

The spiralling crime rate is a matter of grave concern in Shelby County. The local print and electronic media are aggressive and thorough in their reporting of community crime. Chapters of citizen organizations, such as Crime Watch and Mother's Against Drunk Driving (MADD), are quite active. The statistics on crime bear out these expressed concerns. Shelby County has the highest crime rate in the State of Tennessee and one of the higher crime rates in the country.

The processing of growing numbers of defendants has placed an increasing burden on the criminal justice system of the county. Between 1978 and 1982, the Memphis City Court, the principal court of original jurisdiction in the county, experienced a 72% increase in the number of felony defendants it handled. During the first six months of 1983, this trend continued with upwards of 15% more felony defendants processed through the lower courts per month than in 1982.

In contrast to the rise in the number of felony defendants processed has been a decline in the proportion of felony cases disposed of in municipal court. During the four year period discussed above, the proportion of felony cases disposed of in municipal court dropped from 28% (1,113 of 3,855 cases) to 24% (1,615 of 6,608 cases). Unlike his counterparts in Palm Beach and Passaic Counties, the Shelby County District Attorney General has not pursued a policy of aggressively screening cases in municipal court. This, in turn, has meant that the caseloads of the Grand Jury and the Criminal Courts (general jurisdiction) have grown at even greater rates than that of the municipal court.

The growth of the county's criminal caseload has not been matched by an expansion of those criminal justice agencies that manage that caseload. As a result of this, the Shelby County criminal justice process has been uncommonly slow. Prior to the implementation of the field test, the Shelby County Public Defender's Office conducted a random review of fifty indicted cases to see how long it took to process a case from arrest to indictment. The case processing times ranged from a low of two months to a high of six months and averaged over 100 days. Once indicted trial cases can take upwards of a year or more to be resolved. Since no Speedy Trial rules control Tennessee courts, the concept of the Early Representation by Defense Counsel Field Test with its emphasis upon marshalling defense services early in the criminal justice process and early settlement was uniquely suited to the Shelby County system.

## 2. The Shelby County Criminal Justice System

### • Office of the Public Defender

The Office of the Public Defender of Shelby County is funded by the Shelby County government and in part by the Supreme Court of the State of Tennessee. Administratively, the office is a department of the County Division of Health and Public Services, which also includes the welfare department, the medical examiner, the pre-trial services operation, the divorce referee, and a number of health care centers. As a department of a county agency, the Public Defender Office is subject to all of the budgetary and administrative vagaries that other bureaucratic units face. All hiring and personnel policies are dictated by county government and civil service. The county mayor ultimately selects all assistant public defenders and reserves the authority to terminate them.

The office is headed by the Chief Public Defender who is appointed by the mayor and confirmed by the County Commission yearly. The Chief Public Defender serves in this capacity on a part-time basis and maintains a private law practice. He answers to the Director of the Division of Health and Public Services and ultimately to the mayor on all administrative and personnel issues. The Chief Public Defender, however, has relative autonomy over the operations of his office.

History--To understand the unique organization and staffing of the office, it would be helpful first to examine the evolution of the office over time. It is one of the oldest public defender operations in the U.S., was authorized by the Tennessee State Legislature and established by Shelby County in 1917. From the beginning the Public Defender served only on a part-time basis and, until the 1950s, was supported only by a part-time assistant and an investigator. By 1969, the Chief Pubic Defender had a staff of 14 part-time attorneys each of whom maintained a private law practice. There was resistance to hiring full-time assistant public defenders because, in the words of a former Chief Public Defender (1941-1974), "full-time lawyers would inevitably lower the standards of the staff." However, in 1969 three full-time attorneys were appointed and by 1975 this number had increased to seven.

Only indicted felony defendants were provided public defense services in Shelby County prior to 1972. In that year, in response to Argentsinger v. Hamlin, the state legislature authorized the establishment of a public defense service in the Memphis City Court to serve misdemeanor clients. In 1974 the Memphis City Attorney established and staffed a City Public Defender Office which handled all misdemeanor cases and represented felony defendants until they were "held to the State" or bound over for Grand Jury indictment. In 1980 the City Public Defender Office was consolidated with the county office.

Staffing--The current Chief Public Defender is only the seventh individual to hold the position since 1917, but the third since 1974. He is given high marks as a manager and administrator both in organizing the office and in maintaining liaison with county government. He is assisted by a Deputy Administrator, who is also appointed by the mayor. The deputy supervises the investigators, handles appeals and serves as liaison to the legislature and the private bar. The office employs 31 attorneys (17 full-time and 14 part-time). Six attorneys are assigned to the City Court Division (changed to the General Sessions Court Division after the September 1982, reorganization); 16 are assigned to the Criminal (Felony) Court Division (one full-time and one part-time attorney in each of eight divisions); and three (one full-time and two part-time) attorneys

are assigned to the Capital Division. Three to five attorneys are assigned to an Appeals Division.

The office has an investigative staff of ten. One investigator is assigned to the City Court Division; eight are assigned to the Criminal Court, with each serving two divisions in a two-person team; and one investigator is assigned to the capital division.

The office has only five full-time clerical workers on staff: the secretary of the Chief Public Defender, an Appellate Division secretary, a secretary for the municipal court, an administrative assistant and a custodian of records. Each of these staff performs work for the felony attorneys as time permits, but the office traditionally has depended heavily upon CETA funded secretaries and summer youth work placements to fulfill those tasks.

Little or no funds are available to the office to pay for special experts or technical support. In addition, recent budget cutbacks limited the staff of the once active Social Services Division to one person. In the past the services of the division were available to all felony defendants. At present, because of the budget reduction, the remaining staff person works exclusively on capital cases. Moreover, only capital cases receive any expert assistance, which is limited to psychological and/or psychiatric testimony bearing on the sanity of the defendant.

The office staffing pattern represents an interesting mixture of young inexperienced attorneys and older more established ones. The City Court attorneys are usually younger; the felony attorneys, both full-time and part-time, are older and more experienced. In viewing the office in operation one gets a distinct impression of a medium sized private law firm (except for the lack of adequate secretarial support). The fact that there are a considerable number of part-time attorneys, each of whom has a private criminal defense practice, adds to this impression. It is further supported when observing the group of younger "associates" who appear eager to move up to the responsible

felony positions now held by the "partners." The overall laissez-faire management style of the office further promotes the image. In a sense the office is a hybrid between public service and private practice and of the three test sites is best characterized as The Hybrid Office.

Operations/Appointment--Operationally, the Shelby County Public Defender Office enters cases only upon judicial appointment. While similar to the Palm Beach County Office in this regard, the situation surrounding appointment in Shelby County is rather unique. Owing to the long-standing separation of the city and county courts, private attorneys routinely represent defendants at the municipal court level. Judges, knowing that an otherwise indigent defendant can receive private representation for \$500 or less, are often reluctant to appoint a public defender at first appearance. Rather, cases typically are continued for from two days to two weeks, to "enable" the defendant to retain private counsel. Thus, some judges would appoint a public defender only after the defendant had been unsuccessful in his or her search for private counsel. An outcome of this practice was that, prior to the ERDC Field Test, the Shelby County Public Defender invariably represented more defendants in Criminal (Felony) Court than it did in municipal court, since many of its felony clients were represented by private counsel in municipal court. The local private criminal bar expressed concern about the implementation of ERDC in Shelby County and the implications which early public defender representation might have for private criminal practice. The local bar played an active role in the early development of the ERDC Test process in Shelby County.

The normal process for municipal court appointment prior to ERDC implementation was as follows:

- upon appointment (from three days to two weeks after first appearance) the City Court Division investigator would secure whatever case specific information was available from the clerk and the prosecutor, and interview the defendant in jail;
- on the "report date" (from two days to one week after appointment) the attorney would review the interview form and interview the defendant to

determine whether a preliminary hearing should be held or waived (waiver brings about an almost automatic motion for bail reduction by the municipal court prosecutor which is rarely denied), or whether the prosecutor is to be approached for an early resolution (ordinarily only reductions to misdemeanors, approximately 25% of the felony arrests, resolve cases in municipal court). He or she will then report to the court regarding the intentions of the defendant;

- preliminary hearings may result in a finding of probable cause, a finding of no probable cause and a dismissal (with or without costs), or a nolle prosequi by the prosecutor (if witnesses fail to appear). Only in the case of a finding of no probable cause where costs are assessed to the defendant does a dismissal actually dispose of the case. In all other situations, the prosecutor sends the case file to the Grand Jury Unit which will prepare for indictment. All dismissals or nolles do result in the defendant being released if he or she has been in jail, but upon indictment a capias is issued, the defendant is rearrested and a new bond is set by the Criminal Court judge.

Municipal court public defenders cease all work on a case once it bound over or "held to the state." From that point until the arraignment in criminal court, a period of about 45 days but which may be as long as five months, no one from the office has any involvement with the defendant or with his or her case. In Criminal Court the public defender is appointed to the case at or soon after arraignment. Case assignments for such felony appointments are made by the office's custodian of records who assigns three out of every four cases to the full-time attorney in the division and one to the part-time attorney.

Caseload--In 1981, 5,500 felony defendants were processed in the Memphis City Court and 4,300 were transferred to the Grand Jury for indictment.

Approximately 1,400 of the defendants were served by the municipal court unit of the Shelby County Public Defender. The office served 2,400 defendants in criminal court.

Prior to the ERDC Field Test, caseloads for the two city court attorneys who handled felony processing averaged between 600 and 700 cases per year. Full-time felony attorney caseloads averaged 200 cases per year, while those of part-time attorneys were around 75. The extreme pressures on municipal court attorneys, and their inability to provide felony attorneys with information regarding cases, in part, prompted the Shelby County Public Defender to participate in the ERDC Field Test.

• The Courts

Prior to the implementation of the ERDC Field Test, original jurisdiction in Shelby County was vested in the General Sessions or County Court and five municipal courts of which the Memphis City Court was by far the largest. On September 1, 1982 the criminal court activities of the Memphis City Court were transferred to the General Sessions Court. While the change had dramatic impacts on the system and on the ERDC Field Test (see below, Implementation Issues), the General Sessions court operates much like the City Court had.

All municipal court judges in Tennessee are elected. General Sessions Court judgeships are contested every six years. Each of the judges who served on the criminal bench during the field test period was a candidate in the municipal election of August of 1982. Five of the six judges had served as Memphis City Court judges and one was new to the bench.

The General Sessions Court is administered by an elected clerk of court. The clerk is responsible for general administration, record keeping and court assignment. Individual judges have a wide degree of latitude in managing their own courtrooms. There is no administrator or administrative judge who has authority to promulgate courtroom rules or procedures. General Sessions records are computerized, but the system of record keeping was incompatible with that of the Criminal (Superior) Court during the ERDC Field Test.

The responsibility for processing felony cases through the General Sessions Court in Shelby County rotates monthly. Each month, one of the divisions is

assigned to felony cases while the remaining five divisions handle misdemeanors. Each of the General Sessions Judges exercises a great deal of autonomy, especially in determining indigency and in making public defender assignments for felony defendants.

Felony case processing in the General Sessions Court includes the initial arraignment and bail setting, the finding of probable cause through a preliminary hearing and the bind over of cases that are "held to the state" for Grand Jury indictment and criminal court processing. Approximately 550 cases were processed through the felony arraignment court per month during the ERDC test period. This was up from an average of 500 cases per month in the preceding year.

The Criminal Court is the court of general criminal jurisdiction in Shelby County. There are eight divisions of the Criminal Court each of which is staffed by three Assistant State Attorney General and one full-time and two part-time Assistant Public Defenders. One of the eight divisions is assigned defendants who may be found to be habitual offenders, while the remaining seven divisions are assigned cases on a rotational basis. Divisional case assignments are made by the elected clerk of the court.

All Criminal Court cases are initiated by a Grand Jury indictment. The Shelby County Grand Jury is made up of thirteen individuals who sit twice a week for four months. The Grand Jury rarely "enters a no bill," or dismisses a case submitted to it by the prosecutor--one observer suggested that less than 100 "no bills" are entered in a year. During the period of the field test, none of the cases tracked for the evaluation were "no billed" by the Grand Jury.

In applying for the field test, the Shelby County Public Defender hoped that ERDC would enable him to negotiate with the prosecutor's Grand Jury Unit on selected cases prior to their submission to the Grand Jury for indictment.

• The Office of the District Attorney General

The Shelby County District Attorney General is an elected official. The current Attorney General is in his third four year term having been most recently reelected in August, 1982 after a hotly contested race. Prior to becoming Attorney General, he was at one time an assistant public defender. His office, organized to serve the standing courts of the county, can be characterized as traditional and conservative.

Municipal Court Unit--The municipal court unit was first organized in 1974, when the District Attorney General was given responsibility for felony processing in the Memphis City Court. The office later assumed responsibility for misdemeanor prosecutions as well. With the transfer of municipal criminal matters from the Memphis City Court to the County General Sessions Court in September, 1982, the felony unit of municipal court expanded from three to five prosecutors. A victim witness coordinator, a records clerk, and a secretary are also assigned to the unit. The felony unit is the only division of the Office of the District Attorney General which compiles accurate monthly and annual records of its activities.

The felony unit is headed by the chief assistant district attorney general of the General Sessions Criminal Division who also has responsibility for the five misdemeanor courts. He supervises four felony prosecutors and often assumes direct line responsibility. The division of labor in the unit is somewhat unique. One prosecutor handles the general business of the court, including bail recommendations, reports of negotiations with defense counsel, etc. The chief of the unit often assumes this role. Depending on the caseload, one or two prosecutors argue all preliminary hearings on individual cases and work closely with the victim/witnesses coordinator in preparing witnesses for testimony. Two prosecutors handle all negotiations with defense counsel regarding the possibility of reducing felony charges to misdemeanors and disposing of cases in municipal court. Also, following a general practice that the prosecutor will call for a reduction in bail in turn for a waiver of a preliminary hearing, they will negotiate bail issues with defense counsel.

Traditionally, there has been very little latitude in negotiating charge reductions in Shelby County. Prior to the ERDC Field Test charges were rarely reduced on any case more serious than a third degree burglary. The Chief Public Defender hoped that the early involvement of a full-time field investigator would provide information to the defender so as to open up the negotiation process.

Grand Jury Unit--The Grand Jury Unit consists of three prosecutors, one of whom serves as supervisor. The unit receives municipal court files, reviews police reports for completeness and legal propriety and prepares cases for presentation to the Grand Jury. The Unit has some latitude to reduce charges or dismiss cases, but rarely if ever has any contact with defense attorneys regarding individual cases.

Criminal Courts--Three Assistant Attorney Generals (AAG) staff each of the eight Criminal Court Divisions. They are assigned cases on the basis of seniority and expertise. The titular supervisor of each division is known as the "Monday man," so named because he handles those cases assigned on Mondays which include the most serious felonies. The second AAG is known as the "Tuesday-Thursday man" and is responsible for lesser felonies. The least senior AAG is the "Wednesday-Friday man who," handles the least serious offenses and the general procedural hearings.

The eight divisions operate autonomously within certain parameters. Plea bargaining in Shelby County is unique in that AAGs can negotiate on charge, sentence, and location of detention. It should be noted that the Shelby County Correctional Center (SCCC), a rural self-sustaining work farm, is licensed to detain for sentences of up to five years and there is the possibility of extending its authorization to include detention for up to seven years. The prosecutors believe that SCCC gives them bargaining latitude that is otherwise unavailable to other counties.

• Law Enforcement

The two largest law enforcement bodies in Shelby County are the Shelby County Sheriff's Department and the Memphis Police Department. The Sheriff's Department is responsible for policing the unincorporated areas of the county and for administering and maintaining the new pre-trial detention facility and the Shelby County Correction Center. After the September 1982 reorganization, the Sheriff's Department detention responsibility was expanded to include all felony defendants during municipal court processing. Prior to that date, the Memphis City Jail of the Memphis Police Department handled all Memphis municipal court detention. The Shelby County Jail is one of the most modern pretrial detention facilities in the country. Fully computerized and able to house over 1000 men and women, the jail has been a subject of some controversy in Shelby County. Statistics are unavailable on the number or status of defendants housed in the facility prior to or during the ERDC Field Test.

With approximately 1200 uniformed patrol officers and 250 detective/investigators, the Memphis Police Department is the largest law enforcement arm in the county. Uniformed operations are conducted out of four precincts organized according to relative crime rate. Most investigators operate out of the precincts, but there are specialized investigatory units (e.g., homicide) which operate out of the central office of the police department.

Police investigators are key to the criminal justice process in Shelby County since they have ultimate responsibility for preparing the "state's case." When an officer brings in an arrestee, he fills out the "ticket" and presents it to a watch commander who screens it for completeness and accuracy and assigns the case to an investigator. The investigator conducts the case from this point on--interrogating the accused, interviewing witnesses, working with the arresting officer, gathering all physical evidence and supervising crime scene activities, preparing and swearing to the affidavit of complaint, testifying at the preliminary hearing if necessary, and preparing the state's case for submission to the Grand Jury. Investigators often conduct these activities on a priority basis and thus certain cases may get earlier consideration while

others may be deferred. This process is said to account for much of the delay between the end of municipal court processing and eventual Grand Jury indictment.

- Pre-Trial Services

Pre-trial services in Shelby County are administered by the Pre-Trial Services Agency (PTS), a unit of the Shelby County Division of Community Service (which also includes the Office of the Public Defender). The agency is responsible for a fully integrated pre-trial release program, patterned after the pre-trial program of the Vera Institute in New York City, and for a pre-trial diversion program. After the September, 1982, court consolidation, the agency also assumed responsibility for all misdemeanor probation functions formerly performed by the City of Memphis.

The agency's Pre-Trial Release (PTR) Program has an active and important role in the bail-setting and pre-trial release decision making process. Approximately sixty percent of all felony defendants--those without extensive prior records, holds, or pending complaints--are interviewed by PTR staff. PTR recommendations for bail or release on own recognizance (ROR) are made in open court and generally are followed by the judge. Clients released ROR are supervised by the program. PTR can revoke released clients for cause by making recommendations to the court.

The Pre-Trial Diversion Program (PTD) is responsible for screening, interviewing, validating and preparing reports for those defendants deemed by the municipal court prosecutor to be potential divertees. As a practical matter, only a first offender charged with an offense less than a third degree burglary is eligible for diversion and deferred prosecution. Approximately 80% of all potential divertees are recommended for diversion. Once diverted, individuals are supervised by PTD staff for a period of nine to twelve months.

The Pretrial Services Agency assumed a central role in the implementation of the Early Representation by Defense Counsel Field Test in Shelby County. It was provided grant funds to conduct the initial indigency screening and

eligibility determination functions of the test. Each felony defendant, regardless of charge or prior record, was to be screened by the agency to determine the pool of eligible defendants who would be served during the test.

## II. DEVELOPMENTAL PROCESS

### A. SELECTION AND APPLICATION

During the initial screening phase, the NIJ selection team rejected Shelby County for the Early Representation by Defense Counsel Field Test. It did so for two basic reasons. First, since the Public Defender provided some services in municipal court, it was felt that ERDC would not have a large enough impact if successfully implemented there. Second, since the appointment of the public defender in Shelby County was controlled by judicial discretion, it was felt that there was no way to guarantee that test representation would begin within 24 hours of arrest, a requirement of the field test.

However, the selection team was interested in having a geographically representative mix of sites for the field test. Inclusion of a site from the South was a top priority. After two other southern jurisdictions, which had originally seemed more suitable were rejected, the selection team turned once again to Shelby County. An on-site search visit was conducted, and the selection team came away very impressed with the Chief Public Defender, and even more impressed with the strong support given the test by the other leaders of the local criminal justice community. On the strong recommendation of the site study team, Shelby County was accepted as a finalist and asked to submit an application.

The Shelby County Chief Public Defender felt that the Early Representation by Defense Counsel Field Test would be of great benefit to his office. His overriding interest in the test was that it would help to improve the representation provided by the office to the felony defendants in municipal court. Since judicial appointment of the public defender was routinely deferred until it was firmly established that a defendant could not retain private counsel, a public defender was rarely involved in a case until weeks after the arrest. There was little or no involvement by public defenders in the bail setting

process and no contact with a defendant until he or she had already been detained for up to three weeks.

After appointment, public defender representation was limited. No investigative services were available for municipal court cases.

The two municipal court public defenders, with yearly caseloads of 600 to 700 clients, were able to do little more than meet once with a client before a preliminary hearing or initiate limited negotiation with the prosecutor. And, with no case assignment system for municipal court felony cases, there was no assurance to a defendant that the attorney who first interviewed him or her would be the attorney who would later argue the case at the preliminary hearing.

Public defender representation in municipal court ended when the case was "held to the state." From that time until the defendant was indicted, arraigned on the indictment, and appointed a public defender in the Criminal Court, there were no services provided him or her by the Shelby County Public Defender Office. As mentioned earlier, the period from bind over to arraignment on an indictment averages six weeks to two months for all defendants, whether in custody or out. The Shelby County Chief Public Defender hoped that the services available to clients would be improved by the ERDC Field Test.

A lesser but still important incentive for the Chief Public Defender was the potential to enhance the office's stature and improve its image within both the criminal justice and the broader communities. He saw the selection and participation of the office in the ERDC Field Test--an unprecedented, national effort in the area of public defense--as a benefit to the office. Furthermore, he felt that the grant would provide information that could assist him in his efforts to educate the county government regarding the impact that an adequately staffed public defender office can have and to strengthen his position in the budget process. In the final analysis, he felt that the grant would be good for the county--that participation in a national initiative would enhance the image of the community.

The application prepared by the Shelby County Public Defender Office reflected the above concerns. Submitted to NIJ on July 10, 1981, it proposed a project which greatly enhanced the representation provided to a felony defendant in municipal court. After initial screening and random assignment, each test client would be seen by a special intern within twelve hours of arrest and later interviewed by one of three test public defenders prior to his or her first appearance. The same public defender would represent the client at first appearance (arguing for lower bail or ROR release where possible), discuss the case with the prosecutor, represent the client at the preliminary hearing, and, where possible and appropriate, attempt to negotiate with the Grand Jury prosecutor prior to the case's presentation to the Grand Jury. A full-time field investigator and a full-time social worker also were to be available to support the test public defenders. The application asserted that having those two individuals involved early in a case would promote the early resolution of many cases. Early investigation also was expected to be an invaluable resource for the felony court public defenders, who too often had to rely upon investigations begun months after the incident when whatever evidentiary leads or potential witnesses that may have once existed were long gone.

The application readily admitted that there were a number of issues which had to be resolved before the field test could begin. Among these was the resistance of the private criminal bar to early representation. The office knew that local attorneys would object to any perceived threat to their livelihood. How great would be their objections, how much support they would be given by the judiciary and the prosecutor, and how many concessions would need to be made to gain their acceptance of early representation were not known to the office when the applicaiton was prepared.

A second operational issue which had to be resolved prior to start-up centered around who would conduct the initial eligibility and indigency screening of defendants. An adequate eligibility screening system was vital to ensuring the success of the experimental design. The application suggested that the function might be performed by the clerk of court's office, by the Pre-Trial Services Agency, or by the office itself.

A third issue was attitudinal. It concerned the municipal court judges and whether they would cooperate with the test and appoint the public defender at first appearance. While the application included the signature of the Chief Judge of the Municipal Court, his support by no means guaranteed the cooperation of the other five municipal court judges who would preside over the felony division during the course of the year.

The office was advised by the site selection team that the project budget submitted with the grant application should use \$180,000 as a target figure for operating the test. The budget submitted on July 10 was for \$199,867. It included salaries and fringe benefits for eight staff: a full time Project Director/Test Attorney, two additional test attorneys, an investigator, a social worker, a law clerk, a research assistant/data collector and a secretary. NIJ requested a second budget more closely in line with the target amount. The office submitted a second budget of \$175,825 on September 19, 1981. This budget reflected more accurately the salary levels and work schedules of test staff, especially those of the proposed Project Director.

The Shelby County grant application process differed from that of the other two sites in that the Chief Public Defender and the proposed Project Director were the individuals primarily responsible for its preparation. The proposed Project Director was the only assistant public defender who both participated in the application process and also later had a key role to play in the implementation of the project. It is not just a coincidence, therefore, that the Shelby County grantee was, at the outset, the most knowledgeable of the three offices regarding the data collection and recording requirements, and specific implementation design criteria.

The application submitted by the Shelby County Public Defender Office was thorough and straightforward; it accurately presented the strengths and weaknesses of the county as a site for ERDC testing. For example, the narrative presumed that the test would be fully implemented prior to September 1, 1982, the date of the court reorganization. Thus, all descriptions of court

processing and court and jail facilities in the application were of the Memphis City Court and the Memphis City Jail and not the General Sessions Court or the Shelby County Jail. The preparers also assumed that the local election of August, 1982, which included races for all municipal court judgeships and the District Attorney General, would happen after the test period. In fact the system reorganization and, to a lesser extent, the election, had dramatic impacts upon the test in Shelby County. This was true because, due to a number of factors which could not have been anticipated in July 1981, the Early Representation by Defense Counsel Field Test did not begin until September, 1982--and then it began in tandem with the most significant criminal justice reorganization in Shelby County in recent memory.

#### B. EARLY DEVELOPMENT

ERDC Field Test grants were awarded for a term of eighteen months. This grant period was to be divided into three phases: (1) a three month developmental phase when the grantee would finalize its plan of operations; hire, orient and train the staff; orient and obtain the support of the local criminal justice community; and establish all of the data collection and transfer procedures which would support the evaluation (2) a twelve-month implementation phase when the grantee would implement the ERDC controlled experiment; and, (3) a three-month winding-down phase when the grantee would conclude the data collection effort and plan for institutionalization (if warranted).

The original plan of NIJ was for ERDC grants to commence on January 1, 1982 and terminate on June 30, 1983. Delays in the NIJ approval process pushed the start-up date to February 15, 1982, a full five months after the submission of the revised budget. For Shelby County such delays would become the rule rather than the exception.

The original evaluation field visit to Shelby County in February and the initial ERDC cluster conference in March suggested to NIJ and its contractors

that the Shelby County field test was in jeopardy for a number of reasons. First, since the grant delays would defer implementation until the early summer of 1982, the project would have just become fully operational when the entire Shelby County criminal justice system reorganization was to occur. There was no way to calculate the impact that reorganization would have on the ERDC Field Test in Shelby County. Second, there was no clear understanding of the process which would be used to control the eligibility screening and indigency determination function and which agency--the Public Defender, the Clerk of Court, or the Pre-Trial Services Agency--would be responsible for it. Third, there was no assurance that the judges in the Memphis City Court and later in the General Sessions Court would cooperate with the ERDC project by appointing the public defender to cases at first appearance. Fourth, the conflict with the private criminal bar remained unresolved and in fact appeared to be escalating. Thus, the development of the Shelby County ERDC Field Test appeared to be shaky. There was palpable resistance to the ERDC concept, there was concern that the quota of 1200 cases might not be reachable, and there were fears that the operation of the test was going to be affected by the system reorganization.

By the first cluster conference, it became apparent that the data collection and case management systems used by the three test sites were sadly deficient for test purposes. None of the sites systematically gathered information on cases prior to superior (upper) court arraignment. No hard copy case files were opened until arraignment on an indictment or information, and work performed on a case prior to that time was not necessarily available to the felony attorney. As it turned out, Shelby County did have the most complete data recording system for municipal court processing, and was the best prepared of the three sites to handle the management information system (MIS) needed to comply with the evaluation.

Early in May, an unforeseen event occurred which threatened the very existence of the field test. The Chief Public Defender, who had been the driving force behind the effort and who was believed to be the only person who could pull the test together, announced that he was a candidate for the office of Shelby

County District Attorney General. On May 11, he and the four assistant public defenders who had also announced for judicial races left the County payroll. The Chief Deputy Public Defender, who had not been involved in the ERDC effort, became the Acting Chief Public Defender for Shelby County.

This event presented NIJ with a difficult situation. The test was scheduled to begin in Shelby County on July 1. The proposed Project Director/Coordinator was not scheduled to leave his post as a full time felony attorney to direct the field test until June 7. The election was in August and the system reorganization was scheduled for September and there had been no progress in resolving the problems which had surfaced at the cluster conference. There were a number of options available to NIJ, but the one chosen--to defer the start-up of the test until September after the election and during the reorganization--proved to be the best. By delaying the start-up, NIJ provided the office with the time to resolve many of its problems and to prepare for the more technical data collection aspects of the test. It also gave the evaluator's on-site field researcher the opportunity to become fully conversant with the office and the system operations prior to test start-up. This was an asset to the evaluation.

To local observers, the Shelby County municipal elections of August, 1982 were predictable. The Chief Public Defender lost his bid for prosecutor and returned to manage the Office and the field test. One of the four public defenders running for office was elected to a judgeship--coincidentally, to one of the new General Sessions Criminal Judgeships.

The Chief Public Defender returned just in time to preside over a special meeting convened by the office to orient the criminal justice community to the field test and to finalize negotiations with the Shelby County Pre-Trial Services Agency regarding its commitment to conduct the critical eligibility screening and indigency determination functions of the project. By the time that ERDC began on September 15, 1982, the office routine was back to normal--a normalcy which would soon be broken by the implementation of the project.

Several critical activities were performed during the developmental period which deserve fuller description. These include the preparation of the operations manual, the staffing of the field test, the training of the staff, the orientation of the criminal justice community, and the establishment of the data collection and transfer process.

### C. PREPARATION OF THE OPERATIONS MANUAL

NIJ required each of the ERDC Field Test Office to prepare an operations manual detailing the step-by-step process which would be followed in implementing the test. In the case of Shelby County, the process of preparing the manual was lengthy and involved the full participation of the office, the evaluator and Professor Norman Lefstein of the University of North Carolina, a consultant to NIJ and the technical assistance contractor. Professor Lefstein provided assistance to the office from the initial cluster conference in March, 1982, until August of the same year. During that time he and the evaluator worked with the Acting Public Defender and the Project Director to revise the test procedures described in the original grant application. In all, a total of five separate revisions were required. The necessity for the five revisions was, in part, due to: the range and complexity of developmental obstacles which the test would have to overcome; the inexperience of the Shelby participants in preparing such a process oriented document; and the fact that the Project Director could not devote as much time to the effort as had been planned. In fact, he retained his full felony caseload well into July and did not become a full-time coordinator/director until August, two months after the original schedule. The final revision, prepared for the August 19 presentation to the criminal justice community, became the operations manual of record.

In all documents proposing to satisfy the requirements of an operations manual were submitted on March 2, April 30, June 8, July 3, and August 19. Each one represented an improvement over the preceding ones which in turn represented the increased understanding by the Shelby County Public Defender of the

intricacies of the ERDC process. The critical elements of that process for Shelby County included the recognition of the importance of the control mode to the experiment, the development of an eligibility screening process which could satisfy the judiciary and the private bar, and the preparation of a realistic case management process which would reflect the realities of the Shelby County system after the reorganization.

### 1. Importance of the Control Mode

While each test site had difficulty in appreciating the importance of the control mode, especially the need to document and gather data on the control process, Shelby County faced the greatest challenge. It, among the three sites, provided the most extensive pre-indictment representation. Unlike the other sites, control attorneys in Shelby would observe all test activities and would essentially perform the same functions, albeit later in the process. Shelby control attorneys would be most susceptible to "Hawthorne Effect" because of their close proximity to test attorneys. By August, the office had recognized the importance of the control attorneys to the field test and established parallel procedures for data recording, collection and transfer for control cases. However, for the control attorneys, problems associated with the reorganization were to be an issue for the field test throughout its life.

### 2. Eligibility Screening

The office faced some real problems in developing an adequate eligibility screening process. It was clear that screening would have to be conducted by an agency other than the Shelby County Public Defender Office to satisfy the objections of the private bar to "anything which smacked of solicitation." According to the April 30 version of the operations manual, the Pretrial Services Agency would interview each felony defendant to determine if he or she wished to have the services of the Public Defender and, if so, whether he or she was financially eligible for those services. By the June 8 version it was apparent that if the PTS counselor was to conduct a two part interview with each defendant the agency would have to be compensated. Also, became

obvious apparent that some accomodation would have to be made for time spent in contracting and interviewing the 40% of felony defendants who were not routinely interviewed by the agency (i.e., those with more serious charges, prior records or existing holds).

The August version made it clear that a full-time indigency screener would have to be hired by PTS to fulfill the function. To support this position, the office was forced to eliminate the test social worker from the grant staff. This was unfortunate because NIJ had found the original idea of a social worker who would seek out alternative placements to mental health and chemical dependency programs, an attractive aspect of the original Shelby County application.

Even though the funding of the position was resolved in August, the fact still remained that the Shelby County grantee was the only one which would have to rely upon an outside agency to perform a vital task in its test process. This proved to be a problem for the test as implemented.

### 3. Test Process

Achieving a realistic test process proved to be a difficult proposition for the office. First, there was no way of knowing what problems the reorganization would present to the Test and what adjustments would have to be made. these would surface only after the field test began. A more immediate problem was arriving at a realistic Test process which would be acceptable to the criminal justice community.

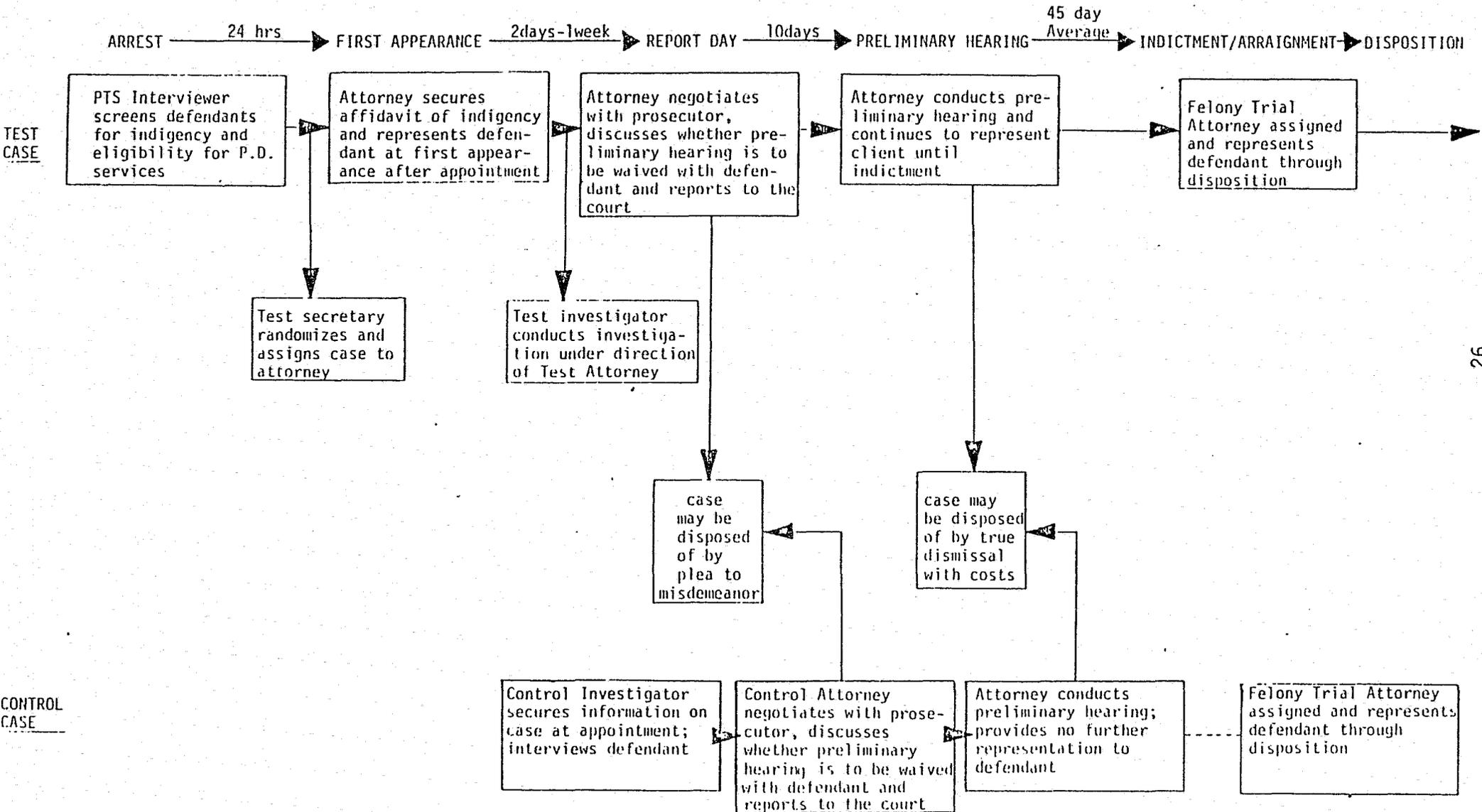
For example, the original application and the early versions of the operations manual alleged that indigency screening would occur within 12 hours of arrest, a test staff member would interview the client soon afterwards, and the test attorney would initiate discussions with the prosecution at or soon after the formal filing of the affidavit of complaint. This presumed that significant work would be done on a case prior to first appearance and the formal appointment of the public defender. It soon became apparent that such a process

would meet strong resistance from the judges, the prosecutor and the private bar, who all objected to any pre-appointment casework. The final manual described a process which was aimed at placating the objections of the criminal justice community. It also more closely reflected the time and space constraints that test activities would face. These included the fact that it would be difficult to interview a client prior to first appearance because the hearing occurred at 9:00 A.M. each morning and there was no way of conducting in-jail interviews prior to that time. In short, the original plan probably could not have been implemented even if there had been no resistance.

There was one other important concession that the office was forced to make to satisfy the complaints of the private bar. Test attorneys were to be required to have each test client execute a waiver of confidentiality which would enable the attorney to "breach" the attorney-client privilege if a prosecution was brought against the defendant for perjury as to his or her indigency. This rather extreme method of assuring that no client who could afford private counsel would be served by a public defender proved in practice to be a benefit to the defense. While no defendant was ever prosecuted for any fiscal perjury, the fact that the test attorney had to have the waiver executed by the defendant prior to appointment provided the attorney the opportunity to conduct an interview, albeit short, and gather information which he or she could then use to argue for reduced bail or ROR during the first appearance. Without the waiver process the attorney would have been prohibited from consulting with his or her prospective client until after appointment at the first appearance.

Developing the operations manual was viewed by the Project Director as a difficult but positive experience. It helped him and the office to understand the test process earlier and better than the other two sites, and it eased the transition to the more rigorous data collection regime that the office would have to follow during implementation. At the same time, the process laid out in the manual still had to be adjusted and refined during implementation. The following graphic depicts the test process as it was designed by the Shelby County Public Defender Office.

# TEST PROCESS: SHELBY COUNTY



#### D. STAFFING OF THE FIELD TEST

The staff which implemented the ERDC Field Test differed somewhat from the plans of the grant application. The test staff did not include a social worker nor did it include a control secretary. Two control attorneys were assigned to felony cases where only one had been planned. This latter change was justified by the increased felony caseload of the General Sessions Court.

Except for the Project Director/Coordinator, all of the test staff were new hires who were supported by the grant. In contrast, all of the control staff were experienced employees of the office. This difference in staff experience was not to become an issue for the non-attorney test staff, because there were no control staff who performed comparable functions. (The control investigator/interviewer never "investigated" a case. Her sole role was to interview control defendants in jail after appointment. The test investigator was responsible for conducting field investigations of all cases assigned to him.)

For attorneys, the experiential difference represented a departure from the Test Design which mandated that test and control attorneys be comparable so as to ensure that variability in case outcomes could be attributable to the test condition and not to the relative competence of the attorneys who implemented the test. The mandate was to guard against "stacking" the test mode with superior attorneys to ensure success. In the case of the Shelby project, the opposite became possible. The success of the test could have been jeopardized by the inexperience of two of the three test attorneys.

All individuals hired for the test went through the Shelby County hiring process. The positions were formally announced and advertised, applicants were screened and numerous interviews were conducted. The top three applicants for attorney were submitted to the county mayor who made the final determination. The hiring of the other staff followed county civil service regulations.

While the hiring process was lengthy and involved numerous steps, all grant positions except the PTS eligibility screener were filled by the August 19 ERDC presentation. Filling the eligibility screener position would be a problem confronting the project during its first few months.

#### E. TRAINING

No formal training was provided by NIJ or its contractors to the Shelby County grantee to prepare the office for the Field Test. Technical assistance was provided by the TA contractor and the evaluator in certain aspects of the test, but no substantive training was made available.

No formal sessions were conducted to orient the non-test staff of the office to the operations of the test. Everyone was aware that a test was being conducted with federal grant funds, but unless a person learned about the test from one of the test staff or the on-site evaluator, he or she was likely to remain ignorant about the operation of the test at least for the first few months.

The lack of staff training and orientation eventually created some problems with the control attorneys. Control attorneys were briefed about the test process, and their role in that process, but they were not fully oriented or trained regarding the increased caseload and data reporting demands which they would face during the test. The control attorneys would become somewhat resentful of the demands placed on them, but their problems and concerns did not appear to inhibit or constrain their work. However, had they been included in the training process, the test would have run more smoothly and with less internal dissention.

The test staff was provided with training, but the level and detail of that training varied. For the test investigator and test secretary, who were both experienced in their jobs, the training stressed the elements of the test which

would be a departure from normal (control) routine. Both knew their jobs and merely had to accommodate themselves to the test experience. For the test attorneys, things were different. Neither of the new test attorneys had ever conducted a preliminary hearing, negotiated with a prosecutor, or argued for reduced bail. Although not recent law school graduates, neither attorney had ever practiced in municipal court--criminal or civil.

The training that the Project Director gave his two attorneys focused on familiarizing them to the municipal court process and the numerous activities which they would be expected to perform there. For two weeks they observed the normal daily routine of arraignment, report date, preliminary hearing, plea negotiation and settlement. They also were introduced to the office's clients. They accompanied the control investigator to the jail and sat in on a few initial interviews.

In short, the two junior test attorneys were given a crash course in municipal court public defense. The emphasis of the course was on the special test process for which they were to be responsible. Their lack of general experience in criminal defense may have limited the training they received. It surely limited the time available to discuss the critical test issues of data and activity recording, test process paper flow, and general orientation to office procedures. Issues would arise in these areas during the test.

#### F. ORIENTATION OF THE CRIMINAL JUSTICE COMMUNITY

One reason why so little effort was given to orienting the staff to the test was that so much emphasis was placed on mitigating the resistance of other system actors to the test. NIJ and its contractors placed pressure on the Shelby grantee to satisfy the concerns of the private bar and to secure the support of the judges. In turn the Chief Public Defender, his Chief Deputy and the Project Director spent long hours in briefing other critical justice system actors about the test and the benefits it would produce. While they

faced some skepticism and outright hostility, they did succeed in convincing the judges and the prosecutor to allow the test to proceed as planned. Once underway, they faced little or no resistance from those two fronts. Also, while the private bar was never fully comfortable nor satisfied with the test, early threats to seek restraining orders and injunctions against early representation never materialized.

The forums for orienting the outside community varied. Often they involved one-to-one sessions with key individuals such as judges. A number of meetings were held with Pre-Trial Services to air fully issues of process and funding. Both the Chief Public Defender and his deputy made presentations to committees of the local defense bar in order to respond to objections directly. Each of these approaches was effective in its own way. But the most critical forum from the standpoint of informing individuals about the test proved to be the special meeting convened by the office and held at the Pink Palace on August 19, 1982. In attendance at that meeting were five of the six participating General Sessions judges, three Assistant District Attorneys Generals, the director and three supervisors of the Pretrial Services Agency, one representative each from the court clerk's office and the Sheriff's Department. NIJ and its two contractors also were represented. In all, thirty persons heard the presentations of the office and NIJ regarding the test and how it would operate. Conspicuous by their absence were representatives of the local private bar, especially those who had raised the loudest objections.

The meeting served to impress those in attendance with the serious nature of the ERDC Field Test and its national scope. When later interviewed, many admitted that they learned the most about the test at that session. To others, the session was helpful in highlighting the fact that the active cooperation of several agencies would be required if the project was to succeed and that active resistance should be kept to a minimum because all of Shelby County had a stake in the project.

## G. DATA COLLECTION AND TRANSFER PROCESS

The data collection and data transfer scheme developed for Shelby County was the most straightforward and proved to be the most successful of the three sites. The design of the process involved the evaluator and various members on-site. It was refined by the on-site evaluator and the project secretary as problems arose throughout the test period.

The Shelby County Public Defender Office kept the most accurate and up to date case management information of the three sites. Prior to the test, the system originated with the formal appointment of a public defender in Criminal Court. Hard copy files were not opened prior to that. For the test it was necessary to establish a process which would ensure that all prearrest events and activities were recorded and preserved. To do this a separate series of forms were designed by the evaluator for use by both test and control staff. The paper flow aspects of the process were described in a memorandum from the evaluator in July. The process was included in the operations manual and set in place early in the implementation phase. Problems which arose, and there were many, were handled by the on-site evaluator.

The data collection problems which surfaced in Shelby County, while important to those on-site, were marginal when compared to those encountered by the other two sites. This was due in part to the commitment of the site to support the evaluation although the Shelby County grantee was not alone in its commitment to reporting. Most importantly perhaps was the fact that the Shelby site was the only one where felony attorneys routinely recorded their activities and the critical events which occurred during the case. Also, there was a high degree of data recording expected from attorneys working on felonies in municipal court. Lastly, Shelby's centralized case management system, while not perfect, served to ensure that case files were readily available from one central source.

## H. SUMMARY

The development phase in Shelby County was perhaps the most traumatic and eventful of the three test sites. It was surely the longest. But, by the time the test started there was an enthusiasm and a commitment to see it through. Whatever the cause, be it the longer preparation time or the more thorough briefing of the system, the Shelby County experience in actually implementing the ERDC Field Test was much less dramatic than the preparation period.

### III. IMPLEMENTATION PROCESS

#### A. OVERVIEW

The Shelby County Early Representation by Defense Counsel Field Test began formal operation on September 15, 1982 approximately six weeks after Palm Beach County and ten weeks after Passaic County. The random assignment of cases to test and control conditions continued unabated through May 15, 1983. During that time, a total of 1952 defendants--800 test and 1152 control--were served in General Sessions Court by the Public Defender's Office. Thus, in only eight months of operation, the Field Test accounted for 33% more cases than the office served during all of 1982. The office, in its final report on the test, suggested that this dramatic increase was due to a number of factors including the court consolidation, the increased crime rate, the availability of five public defenders in municipal court instead of the normal two, and the depressed economic conditions which existed then in the county. The latter point, that the higher unemployment rate in Memphis had produced higher crime and prosecution rates, was echoed by judges, prosecutors, and police. Whatever the reason, the fact remains that the early concerns regarding the Shelby County grantee's ability to generate the required 1200 cases for analysis were unfounded.

By and large the same can be said for the other issues which surfaced during the developmental phase--that eligibility screening would not occur, that the judges would not cooperate, that the private bar would sue to enjoin the office from operating the test. As with the fears concerning the site's ability to generate sufficient cases, these issues never materialized either. This is not to say that there were no problems, but rather that the problems which did occur were not serious enough to fatally flaw the field test.

Many of the findings included in this case study and the overall final report are based upon the analysis of 1,301 cases--569 test and 732 control--which were closed and documented during the data collection period. This represents

67% of all original intakes recorded for the test during its year of operation. The findings reported also are based upon the analysis of two rounds of interviews with key system actors who were involved with the test during its operation, three rounds of interviews with assistant public defenders and investigators, interviews with one hundred clients of the public defenders office who were served during the test and the bimonthly field notes and observations prepared for the evaluation team by the on-site field researcher.

#### B. TEST START-UP

The Shelby County ERDC Field Test was initially scheduled to begin on September 1 to coincide with the court reorganization. When September 1 came, the Public Defender staff were ready to begin operations, but Pre-trial Services had not yet hired an eligibility screener. Random assignment could not begin without screening. Thus the official beginning of the test was stalled once again (already having been delayed by the court reorganization).

After more than a week of waiting and with the prospect of waiting even longer for the formal selection process to be completed, the Chief Public Defender arranged with county government and the Pre-trial Services Agency to have an intern temporarily appointed to the position of eligibility screener. The interim position was approved on Friday, September 9, and formal screening began on September 12, 1982.

The initial two week delay was both a burden and a benefit to the test. It was a burden because it meant yet another postponement. On the other hand, it was a benefit because it allowed the Public Defender's Office to partially acclimate itself to the effects of the court reorganization.

The Shelby County court reorganization was planned for several years. Unfortunately, the plans for the new facility did not take into account fully the space demands of the General Sessions Court. The architect of the massive county jail-court-office complex had known that space was required for a felony

magistrate court, which would eventually have to hear all county felony cases. However, the courtroom that was designed significantly underestimated the area needed to accommodate court personnel, attorneys, bailed defendants, families, and interested spectators. After the reorganization, the area outside the felony courtroom was constantly filled with a milling overflow of people waiting for their cases to be called. Such a situation could have been predicted since the new General Sessions courtroom was one-third the size of the City courtroom it replaced.

The designers also neglected or overlooked the fact that defense attorneys need to talk to their jailed clients prior to first appearance. In the old City courtroom a secure holding area for attorney client conferences adjoined the courtroom. In the newly designed General Sessions courtroom no such area existed. Therefore, there was no easy way for attorneys to prepare their incarcerated clients for first appearances, preliminary hearings or other matters. This oversight directly affected the field test implementation.

The space problems of the felony magistrate court were exacerbated by the last judge to sit in the felony division of the Memphis City Court. During his rotation in August 1982, hundreds of cases were continued to September 1, when they became the responsibility of the first General Sessions judge to preside in the new courtroom. As a consequence of this action, the first few weeks of September saw upwards of eighty defendants (some of whom were arrested as early as July) arraigned each day in a courtroom designed to handle twenty. Mondays were extremely chaotic, as new weekend arrestees were fit in between the August continuances.

As mentioned above, the volume of cases which passed through the court never really diminished during the entire year. The situation in the courtroom never improved either.

This had both an immediate and long term impact on the test in Shelby County. The test design had expected a public defender caseload comparable to that

experienced in City Court. One control attorney was expected to handle the control caseload. The unanticipated increase in volume in the General Sessions Court made this impossible. Except for the month of November, two control attorneys practiced in General Sessions Court during the test period.

While later discussions will expand on the issue of attorney caseloads, one early problem which control attorneys faced should be described here. Since the ERDC Field Test was to examine the impact of early (within 24 hours of arrest) representation by public defenders, test cases--those cases handled by test attorneys--were to be sampled from the pool of defendants who were arrested after the test began. It fell immediately on the control attorneys to represent all of the public defender eligible defendants whose cases had been continued from City Court as well as those who were arrested between September 1 and September 12. The records indicate that 132 defendants arrested prior to September 12 were represented by the control attorneys in General Sessions Court during the early implementation period.

However, it should be remembered that control attorneys operated under the "old system" in which a case was continued for from two to ten days to "enable the defendant to secure private counsel" before the public defender would be appointed. As such, control clients would not normally be appointed a public defender on the same day as test clients. Hence, some backlog of cases was needed to ensure that control attorneys had something to work on during the early days of the test. The postponement of the test enabled such a backlog to surface. Unfortunately the volume of that backlog was so large that it created tensions between test and control attorneys which continued throughout the life of the test.

### C. EARLY REPRESENTATION

Early representation in the ERDC Field Test had three basic components: eligibility screening, random assignment, and early attorney contact. On the surface, Shelby County approached these components in a straightforward manner.

Defendants were to be screened soon after arrest for eligibility. Those deemed eligible for indigent defense services were to be randomly assigned into test and control groups and test attorneys were to begin representing test defendants as soon after randomization as possible. During implementation each of the components presented its own problems.

### 1. Eligibility Screening

Many of the problems confronting the eligibility screening component have been discussed in earlier sections of this report. Indigency is a relative term, and in Shelby County indigency was defined much more strictly and precisely than in the other two sites. To assure the private bar, the judiciary, and the prosecution that only truly indigent clients would be represented, the Shelby County Office of the Public Defender turned over responsibility for eligibility screening to another agency, Pre-Trial Services (PTS); designed an elaborate, two-part indigency interview; and agreed to have potential test clients execute a waiver of attorney-client privilege prior to appointment.

Having an outside agency screen for eligibility was a continuous burden for the project. It also was a considerable burden to that agency. The first hurdle for PTS was to select and train a full-time interviewer/screener. The hiring process took over one month--the interviewer's first day on the job was not until October 20, five and one-half weeks after the test began.

The second hurdle concerned weekend coverage. From the outset of the test weekend screening posed a problem. Since the full time screener only worked Mondays through Fridays, regular PTS interviewers were expected to screen defendants for eligibility on weekends. Early in the test it became apparent that not all weekend arrestees were being interviewed by PTS. The weekend process remained a chronic problem until December, when the situation was improved somewhat.

The third and most critical hurdle for the eligibility screening effort was the establishment of an effective and efficient process that would satisfy the

requirements of both the field test and the criminal justice community in Shelby County. For example, during the year the screener often was required to perform functions for PTS which were unrelated to the test. This forced him to compromise his screening function somewhat. Even on weekdays he was not the only person performing the indigency screening function. Prior to December, he only interviewed the 40% of the defendants who were deemed ineligible for PTS consideration. When this fact was learned by the grantee, objections were raised and PTS agreed that the screener would be the sole interviewer for indigency.

The fact that not all arrested defendants were screened for eligibility during the test period posed the most serious difficulty. While this was more of a problem during early implementation and on weekends, it was an issue throughout the test. The records show that of 1152 control cases initiated during the test, 185 or 16% did not receive a screening interview prior to appointment. This was first identified by the on-site field evaluator during a routine records check in November. She found that 68 control defendants--24 whom had been arrested on weekends--were never given a screening interview. Thirty-five of these 68 defendants would have been assigned to the test group had they been interviewed. The Public Defender's Office brought the issue to the attention of PTS and a series of meetings were held in December to resolve the situation.

Everyone was concerned but they soon concluded that the problem was created by the system in Shelby County. PTS explained that there were times when individuals were left off the list of defendants which PTS received from the clerks office. Also, it was common knowledge that the Sheriff's Department was overburdened by the increase in pre-indictment detainees who previously were held in the Memphis City Jail. Stories about defendants who were "lost" for weeks in jail abounded in the press and in conversation.

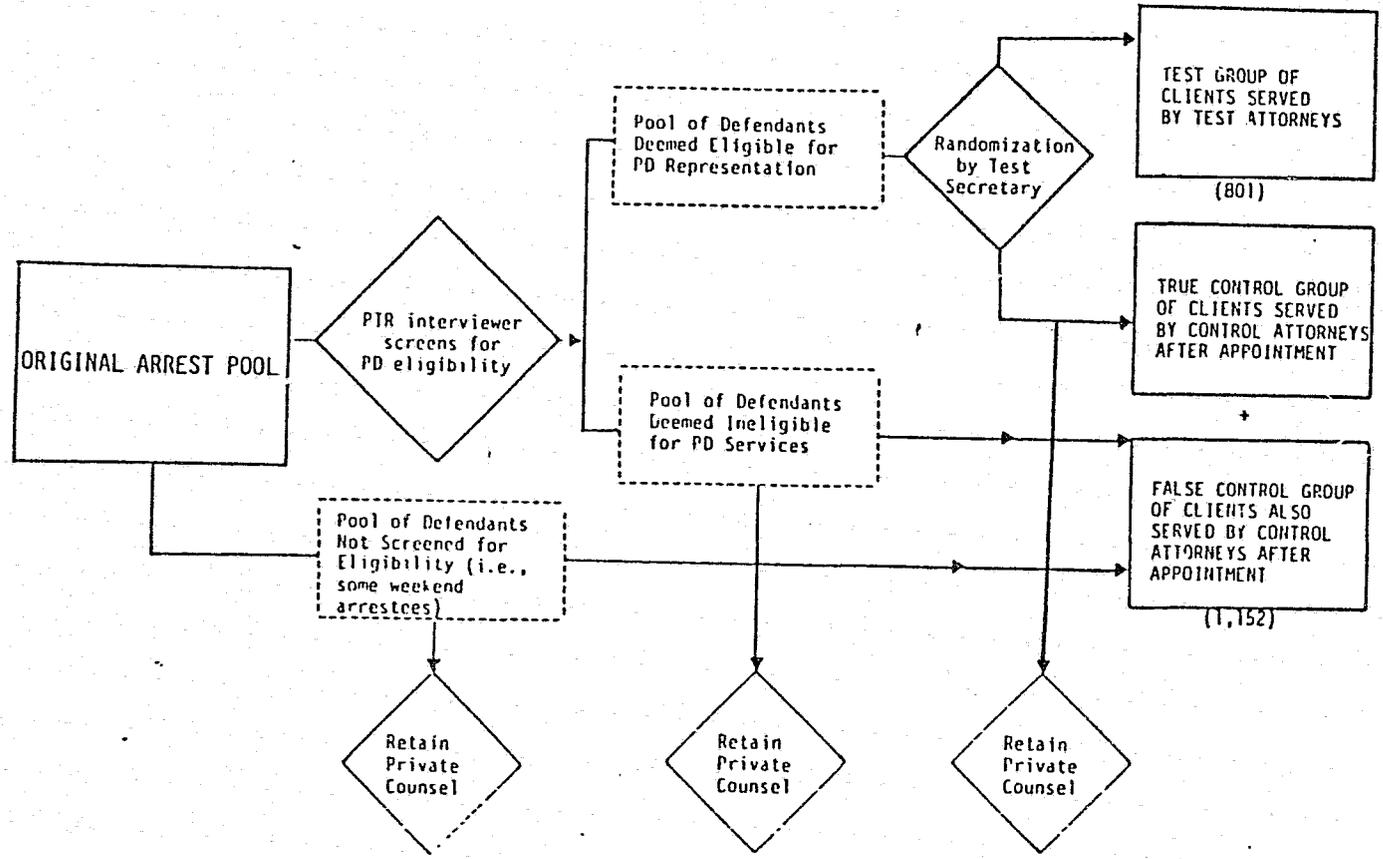
The situation improved over time, but the fact remains that between January and May, 1983 more than eighty clients of the control attorneys were not inter-

viewed for indigency. Approximately 40 of them would have been randomly assigned as test clients. The missed interview issue swelled the control caseload beyond what it should have been and added to the tensions which existed between the test and control staffs.

One final problem in implementing the eligibility screening process in Shelby County was created by the criminal defense tradition of the county and the unspoken but widely held expectation that all felony defendants should be represented by private counsel in municipal court if at all possible. The force of the tradition mandated the rather extreme screening process used. Whatever the reason, the fact remains that 479 or 42% of the control attorney caseload during the test period was made up of defendants who were eliminated from the randomization process as not being indigent. The following graphic depicts the departure from the original test design and should be compared with the illustration of pp. 40.

Thus, the eligibility screening process in Shelby County presented a number of problems to the grantee and the site. It represented an intrusion into a traditional defense system which was controlled by the judge and protected by the private bar and others. The implementation of the process, at best, was uneven and created tensions among the involved agencies. However, the process was not a total failure. One judge expressed an interest in having an ongoing screening system. A few prosecutors admitted that lengthy continuances to enable defendants to raise enough money to retain private counsel often slowed down the system unnecessarily. Even a representative of the private bar admitted that the screening process may have helped improve what had been a cumbersome and often arbitrary system. The eligibility screening process was continued after the random assignment system ended in May. Once the grant funds were exhausted in August, the process was discontinued.

DEPARTURES FROM ORIGINAL TEST PROCESS  
Shelby County: Eligibility Screening Process



## Random Assignment

The Shelby County random assignment scheme was the least controversial of the three chosen by the ERDC grantees. It also posed the least problems for the site.

Each morning between 7:45 and 9:00 A.M. completed interviews were to be delivered to the Public Defender Office either in person or through the pneumatic tube system. The test secretary would divide the interviews into two groups according to their results--indigent and non-indigent.

The group of eligible (i.e., indigent) defendants would be randomly assigned to the test or control condition depending upon whether the individualized booking number assigned to each defendant was odd or even. The odd or even number designation changed daily depending upon a random numbering system generated by the evaluator and controlled by the evaluator's on-site field researcher.

After randomization, the secretary would open a hard copy file and assign test cases to individual test attorneys. Control interviews would be filed in alphabetical order awaiting the later appointment of the public defender.

The Shelby County random assignment system produced the following results:

- 783 test defendants were found to be eligible for public defender services, randomly assigned to the test mode and processed as test cases;
- 10 test defendants were not interviewed and three test defendants were interviewed and found not indigent. (The test attorneys and the field researcher suggested that these 13 cases were either co-defendants of test clients, rearrests or somehow missed in the randomization process but recognized and picked up by test attorneys at first appearance.)
- 485 control defendants were found to be eligible for public defender services, randomly assigned to the control mode, and processed as control cases. (The test secretary and the field researcher suggested that the

disparity between the numbers of test cases and "true" control cases was due to the fact that a significant number of potential "true" control defendants either retained private counsel or otherwise moved through the system without being appointed the public defender; thus, reducing the number of randomized control cases.)

- 479 control defendants were found to be ineligible for public defense services, were unable to retain private counsel, and later were appointed the public defender and processed as control cases. (See, Eligibility Screening above.)
- 185 control defendants were never interviewed and screened for eligibility and were later appointed the public defender. (See, Eligibility Screening above.)

The above suggests that the eligibility screening and random assignment processes did not work perfectly. Such is the case when working within a dynamic social system, especially one similar to Shelby County's which was experiencing a radical organizational change. However, the purpose of any random assignment scheme is to produce two comparable groups of subjects. The Shelby County random assignment process did result in the creation of two such groups. It also produced two additional control populations which serve some analytical and operational purposes. In comparing the test and control groupings on a number of dimensions the following is revealed.

	Test	Control I "True" Controls	Control II "Ineligible" Controls	Control III "Missed" Controls
<u># Defendants</u>				
% Male	89%	90%	91%	85%
% Female	11%	10%	9%	15%
% White	15%	15%	15%	24%
% Black	84%	84%	85%	76%
Mean Age	27.29	26.30	25.72	27.88
No Prior Record	55%	35%	32%	34%

A full test of the efficacy of the random assignment process is not possible. Comparison of "true" test and control cases indicates that they are comparable across major variables. Although we can speculate as to why there is such a difference in the number of cases within each condition, we do not know precisely why this occurred or if the cases absent from the "true" control condition are different from those for which we have information. However, according to the information available, a substantial number of control defendants may have retained private counsel prior to the first data collection point, thus eliminating them from the control caseload base.

### 3. Early Client Contact

Early attorney contact with the client was the very essence of the field test concept. The ERDC Test Design document stipulated that for the test such contact had to be within 24 hours of arrest and prior to the first appearance of the defendant before a magistrate. We have chosen to discuss the implementation of the early contact component in terms of the timing and nature of the component as implemented in terms of the results of that implementation as observed and reported.

Timing of Early Contact--It was difficult for Shelby County to satisfy the early attorney contact target of twenty-four hours after arrest. Before a test attorney could meet with his or her clients, the eligibility screener had to interview the client and deliver the results to the office. The test secretary then had to randomly assign the client to the test mode, open a case file and deliver the file to the test attorney. The test attorney then had to contact his client prior to his or her first appearance.

Early in the test a problem arose regarding eligibility screening. Interviews were not being received by the test secretary early enough to ensure first appearance coverage. The problem on weekdays was apparently caused by the PTS practice of having more than one person screen for indigency. Once the eligibility screener was given full responsibility for interviewing, the problem was resolved.

Weekends presented a similar problem--indigency interviews were not being received at a time which allowed the weekend test attorney to set his or her schedule. Interviews were received too late in the day for the interview to be randomized and for the attorney to meet with the test defendants without some difficulty. By December agreements had been worked out between the Public Defender and PTS which established clear schedules for the delivery of interviews.

The problems faced by Shelby County in implementing the early contact component of the ERDC field test while troublesome, were fairly minor. In all, 800 clients were served under the test mode. For test clients the following frequencies were observed:

- the average time from arrest to PTR interview--1.2 days (n=773);
- the average time from arrest to first contact with test public defender--2.7 days (n=755).

When these figures are compared to those for the control group of clients there is a dramatic difference. For control cases:

- average time from arrest to PTR interview--1.6 days (n=464);
- average time from arrest to first contact with Public Defender's Office--14.8 days;
- average time from arrest to first contact with control public defender--19 days.

Thus, even with the problems faced by the test staff early during implementation, the test mode did succeed in radically reducing by over two weeks the time between arrest and first attorney client contact in Shelby County. By December 1982, the project staff had succeeded in meeting the timing targets for first contact on the majority of weekday cases.

Nature of Early Contact--The nature of the initial attorney client contact varied during the test. During the first week of the test, jail staff allowed

test attorneys to meet with their clients in the "holding tank" adjacent to the courtroom prior to first appearance. Test public defenders were the only attorneys allowed in this area. Since the area was not designed for attorney contacts with defendants, jail staff soon became concerned with issues of security and order, while private attorneys became concerned with issues of client access.

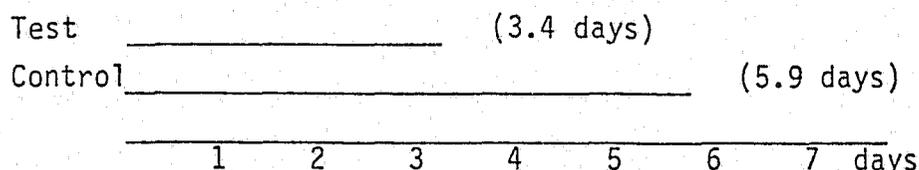
Members of the private bar began registered complaints about the special treatment given the test attorneys. A meeting was held--attended by prosecutors, jail staff, the Public Defender and private attorneys--where it was decided that no one would be allowed to meet with clients in the holding facility prior to first appearance. Afterwards, only one of the six General Judges was to allow the test attorneys access to the holding area during the year. Except when that judge presided, first contact with prospective clients was, in the words of the office in its final report of October 1983:

limited to a brief and whispered conversation in the courtroom, often moments before arraignment. It was not unusual for the defendant's case to be called while the test attorney was engaged in his first contact with the prospective client. The judges were generally cooperative in allowing the test attorneys sufficient time to complete their initial interview.

Thus, the initial client contact in Shelby County was limited to what bits and pieces of information the test attorney could learn about the case from the defendant after explaining and executing the waiver of attorney-client privilege. While the quality of the contact, even this brief contact as it did so early in a case did have some effect.

Results of Early Contact--The initial attorney-client contact had both immediate and long term effects. First, since the contact served to establish the attorney-client relationship both in the eyes of the attorney and client and in the eyes of the court, it aided in implementation of the waiver. The little problem in obtaining judicial appointment of the public defender for first appearance. Only one judge, the first judge who presided over the felony magistrate court at the outset of the test, had any problem with appointing test

TIME BETWEEN ARREST AND PRETRIAL RELEASE



Fourth, early contact had a positive effect on the attorney-client relationship. As explained in the final report of the grantee:

Another benefit of early contact with defendants was an increased level of confidence and communication between the test attorney and his client. The test attorney informed the client what to expect at first appearance in terms of a bond setting. The test attorney would usually visit the new client in the jail the same day of first appearance, or shortly thereafter. This continuity of contact fostered improved communication and trust between the attorney and client.

Follow-up interviews with test and control clients echoed this sentiment. Test clients felt better about their experiences than did control clients and this is attributable in part to the early contact and service they received from their attorneys.

Fifth, while early contact had positive effects on the bail setting process and the attorney client relationship, there is no evidence to suggest that early contact achieved any reduction in the percentage of defendants who made confessions without advice of counsel or any increase in the percentage of defendants represented by the public defender at line-ups or police interrogations. All participating attorneys, regardless of site, agreed that the design of the test would have had to mandate much earlier client contact (i.e., within three hours of arrest) for any real effects to occur in these areas. Shelby County would not have been a viable site for such a test. Individual test attorneys in Shelby County did admit that in isolated instances their presence early in a case may have meant that a client did not make a remark damaging to his or her interest, but again agreed that such cases were isolated and the exception rather than the rule.

Thus, the Shelby County ERDC Field Test had mixed success on its implementation of early client contact. Early problems with the eligibility screening system and the limitations of the available facilities compromised the timing and nature of implementation. However, implementation was successful in producing a clear difference between test and control procedures and that difference had a measurable effect on the bail setting process and on the attorney client relationship.

#### D. ENHANCED REPRESENTATION

The enhanced representation components of the Shelby County ERDC Field Test included continuous, individualized representation, early investigation and negotiation with the Grand Jury Unit of the Attorney General's Office. They were all considered important to the Office of the Public Defender because they represented improvements over what the office felt was the less than adequate representation traditionally available to municipal court clients of the Public Defender.

##### Continuous/Individualized Representation

The office sought to resolve two fundamental problems in its municipal court operations through the field test. These problems they went to the core of the defense function and related to continuity and consistency in criminal defense.

Under the test the criminal defense services provided to test clients were to be continuous and individualized. For Shelby County this meant that test attorneys would be responsible to their individual clients from appointment through arraignment on an indictment. While all activities on a control case ceased when a defendant was bound over or "held to the state," test cases were to be continued for purposes of investigation, client contact, and/or ongoing negotiation. Additionally, while no control defendant was ever sure just who his or her attorney was (cases were shared with one attorney conducting the initial interview while the other appeared at the preliminary hearing), test

defendants were to be served by one attorney who would be responsible for all client contacts, court appearances, and plea negotiations.

The project experienced some difficulty in implementing individualized representation. The problems which surfaced involved both the attorney assignment process and the confusing nature of the experimental design. Initially, each case was assigned to test attorneys in rotation, a procedure which was called for in the Test Design to protect the integrity of the test. Practically speaking, this requirement forced all test attorneys to be at first appearance from 9:00 A.M. until noon each day and often created problems for the judges who would observe three attorneys handling only half of the potential caseload. One judge in particular tried to appoint test attorneys to non-test cases.\* Shelby County obtained permission from NIJ to adjust the assignment process by assigning to the test attorney of the day responsibility for all test appointments in that day. The daily assignment system proved to be an important component of the test process.

An immediate and long-term impact of the system was that, at first appearance and throughout General Sessions processing, every court officer was aware of the attorney assigned to test cases. The clerk would note the name of the attorney on the court file which controlled all activities in municipal court. Since no one represented control defendants at first appearance, the only notation on those cases was "Public Defender."

Individualized case processing was cited by clerks, prosecutors, judges and public defenders--test and control--as one of the most important system effects of the field test. Once it was in place everyone knew which public defender was responsible for a case at first appearance and thereafter. When something

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\*This was also a problem in Palm Beach County where eight test attorneys would have had to attend first appearance each day had not the Test Design mandate been relaxed.

came up, everyone knew who was to be responsible. Overtime, test cases came to be treated like the cases of private attorneys. All court officers indicated that this "treatment" represented an elevation in status for the defendant, his attorney and public defense in general. The individualized case assignment system was cited by control attorneys as second only to early investigation as the elements of the field test which they would have most liked to have used.

Implementing continuous representation was relatively simple for the office. Test attorneys were made aware of their extended responsibilities, and they acted accordingly by pursuing cases after General Sessions processing was completed. Unfortunately, the ease of implementation belied the problems which implementation was to create. In fact what occurred in Shelby County was that test attorneys often represented their clients too long and neglected to follow office procedures which were critical to the smooth running of the office.

Office procedures dictated that all public defender cases closed in municipal court, which might be later indicted, were to be written up by the attorney and delivered to the Custodian of Records. The Custodian would file the records and retrieve them when a defendant was appointed the public defender in felony court and include them in the formal case file. After the first few months of implementation, it became apparent that test attorneys were holding on to cases which had been indicted. On some cases felony attorneys were not receiving the benefits of the test, in fact they were getting something much worse than normal since they were being told by their clients that all of their questions had already been answered "to the public defender in General Sessions." Without the transfer of records, there was no way of knowing that the public defender had represented the client in General Sessions. The most blatant and regrettable examples of the problem were when cases, which were given early investigation, would be investigated a second time because the records had not been passed on.

Meetings were held to eliminate this rather embarrassing procedural snafu. Test attorneys were told that their first responsibilities were to their clients and the office. They were reminded that continuous representation carried with it the responsibility to monitor the processing of cases through the system. They were to make sure that all case information be turned in prior to or immediately after criminal court indictment.

Unfortunately, one of the test attorneys never fully complied with this all important mandate. During the year there were additional times when a case was not closed and the information not transferred in time for the felony attorney to pursue his case. Such reoccurrences were viewed as unforgivable by the felony attorneys. The situation created a level of tension and animosity in the office toward the test which was unfortunate since it could have so easily been avoided. Today, the problem no longer exists and felony attorneys are able to have the full benefits of early and enhanced representation when it occurs.

#### Early Investigation

While Shelby County Office of Public Defender achieved a level of success and impact from almost all of its ERDC components, it was and remains the consensus of everyone who was involved with the field test that early investigation achieved the most notable, consistent and sustained success of all.

Early investigation was an important but undefined element in the NIJ Test Design. There was an expectation that early attorney contact would result in early investigation, but there was no real suggestion of how such early investigation was to be implemented. The staffing plans of each of the three ERDC grantees did include test investigators--two test investigators for the Palm Beach project and one each in the Shelby and Passaic projects. Each of the offices had prior experience with municipal court investigation, but in each office early investigation had been limited to conducting client interviews. The Shelby County Public Defender was the only ERDC grantee to stress the importance of early investigation in its grant application. It was

the only grantee to emphasize early field investigation including interviewing of witnesses and visiting crime scenes. The Chief Public Defender had long believed that early investigation would be beneficial to his office and he had seen the ERDC Field Test as the vehicle to demonstrate its value.

Implementing early investigation proved to be quite simple for Shelby County. The test investigator came from a varied background which included insurance claims investigation. He was excited by the prospect of criminal investigation and eagerly awaited the challenge. However, certain critical issues needed to be resolved before he could begin. First, a general assignment process had to be developed which would control his activities. The normal request for investigation process used by the office was adjusted somewhat to reflect the limited time available for such an investigation and the limited investigatory resources. Not all cases could be investigated, but over time the test attorneys and the investigator worked out a system that was mutually acceptable.

Second, there was a need to be sensitive about the work product of the investigator, and the fact that it might become available to the prosecution due to the reciprocal discovery rules of Tennessee law. Hence, while the most productive means of preserving the results of a witness interview might be a voice recording, it was determined that tape recordings and transcriptions of interviews could be ultimately harmful to the interests of the client should they be subpoenaed by the prosecution. Since such issues had never surfaced prior to ERDC, the field test became the forum to resolve them.

Over two hundred early investigations were conducted during the ERDC field test. In the opinions of all public defender staff, these investigations were an invaluable tool in the ultimate resolution of cases. For the first time in General Sessions Court, public defenders were armed with information gained from eye witness or victim interviews. For the first time, crime scenes were visited. This information, in turn, could be relayed to the prosecutor during

plea negotiations. In the words of one prosecutor:

The information we are getting from P.D.'s is often sufficient to allow us to downfile a felony to a misdemeanor on cases with charges which we could never touch before. Information is what makes the system work, and now the P.D.'s have some and we all benefit by it. (Assistant Attorney General, General Sessions Court)

One unique example of this new information breakthrough was the "refusal to prosecute". After a number of months into the test, it became apparent to the investigator and his supervisor that many victims of crime simply did not wish to proceed with prosecution. As noted in the grantee's final report:

This was particularly evident when the victim was a relative or boyfriend/girlfriend. Often victims only wanted restitution.

After a while, the test staff developed a pre-printed refusal to prosecute form. The prosecutor agreed to accept this form as a formal victim statement, and favorable plea arrangements or dismissals were entered on such cases during the test. Since the test the form has been used even more extensively as the prosecutor has become more comfortable with the process. No objections to this process from the prosecutors or victims were reported to the evaluators during the test period. Issues of tampering or influencing of victims never surfaced. Rather, the prosecution in Shelby County's General Sessions Court apparently accepts the "refusal to prosecute" as a viable tool for expediting cases when possible at the General Sessions Court level.

The role of early investigation in the Shelby County Field Test did not end in municipal court. As the final grantee's report notes:

In cases that could not be settled, early investigation aided the test attorneys in conducting a meaningful preliminary hearing. Often, the early investigation provided as much, or more information than a preliminary hearing could provide; this enabled the test attorney to negotiate a waiver of preliminary hearing in exchange for an agreed bond reduction. It has been our finding that victims and witnesses are willing to talk and recall events surrounding the crime more readily at the General Sessions level, as compared to an investigation three or four months after the fact.

It was the general consensus of our trial attorneys that an indicated case with an early investigation from General Sessions Court was

disposed of (more) quickly in Criminal Court. When a test case was arraigned on the indictment and an investigation was already completed in General Sessions Court, the trial assistant was in an effective position to begin plea negotiations. Prior to implementation, plea negotiations were frequently made without the defense attorney having the benefit of a completed investigation. It has been our observation that test cases frequently were disposed of by guilty plea or announced for trial at the first report date after arraignment on the indictment.

The observations conducted by the on-site evaluation field researcher underscored the sentiments of the office. On two occasions she accompanied the test investigator and a felony investigator into the field. (Since there was no car expense included in the budget and no county car available to the test, the test investigator often had to accompany a felony investigator into the field. Such was the case during the observations.) In her words:

The contrast between test and felony investigations was startling. In almost each test case, the witness to be interviewed was available and willing. In almost every felony case the witness either had moved, or the address was wrong. The test and felony investigators both agreed that early investigation was the more effective way of doing their work.

Early investigation was to many the most successful element of the Shelby County ERDC Field Test. While opinions regarding the efficacy of the test varied widely both within the grantee office and without, there was a general consensus that early investigation was the one element of the test which should be retained. This point was stressed by the Chief Public Defender and his Test Coordinator at each of the three Cluster Conferences held during the term of the field test. It was also echoed by the test, control and felony attorneys in the two evaluation interviews conducted after the test began operating, and it was expressed by prosecutors and judges who observed the results of early investigation in action.

#### Plea Negotiations with the Grand Jury Unit

Each of the three ERDC grantees was to implement a new approach to plea negotiations. In Shelby County the Grand Jury Unit of the District Attorney General's Office was to be the focus of this special negotiation approach.

Since the public defender normally had little or no contact with the Grand Jury Unit, no public defender was involved in a case between bindover and arraignment in Criminal Court. This experience differed from that of private attorneys, who would routinely approach the Grand Jury Unit to discuss cases which might warrant a downfile, a reduction, or a dismissal.

The Chief Public Defender had long been interested in setting up a forum to test negotiations with the Grand Jury Unit, and ERDC provided him with that forum. Continuous representation (discussed above) mandated that representation continue, where practical, through the grand jury process. Test attorneys were advised that they could and should approach the Grand Jury Unit where it was warranted.

In practice, the promise of Grand Jury Unit negotiations never was realized. Each test P.D. attempted to use it, but only the Test Coordinator was successful and then in only a small percentage of cases. The two junior test attorneys were largely unsuccessful. For them the exercise may have been counterproductive because it contributed to the problem of not closing cases on time.

Discussions with the Grand Jury Unit staff revealed that they were largely unaware of the Public Defender Office's interest in negotiating. No formal meetings were convened to establish protocols, and no criteria was agreed upon to control the boundaries of negotiation.

The limited success of negotiating with the Grand Jury Unit has not meant a rejection of the concept, but rather has prompted the Chief Public Defender to approach it differently. Instead of stressing contact with the prosecutor, the Public Defender's Office is now more interested in maintaining client contact. The office hopes to assign one experienced public defender to support clients after they have been bound over to the Grand Jury. Contact and negotiations with the Grand Jury Unit on individual cases will become a secondary priority to maintaining such continuity in representation.

#### 4. Summary

The elements of enhanced representation were critical to the success of the Shelby County ERDC Field Test. Individualized case handling and early investigation were unqualified successes which added to the prestige of the office in the eyes of other system actors and enhanced the level and quality of service which the office could provide to its clients. Continuous representation and grand jury bargaining were not as successful, and together created some internal case management problems for the office. However, they too were viewed positively in that they have prompted an institutionalized response from the grantee for the future.

#### E. CHANGES IN OPERATING ENVIRONMENT DURING THE TEST PERIOD

One task of the on-site field evaluators was to document any critical events in the test communities which might effect the field test effort. They were to monitor those exogenous influences in the criminal justice community--procedural, administrative or functional--or in the criminal justice process which were not attributable to the field test and which therefore would "compete with" ERDC as the cause of system impact.

The development of the ERDC Field Test in Shelby County had been so idiosyncratic and dramatic that any attempt to develop baseline data for pre/post analysis had been rejected prior to implementation. The events which occurred prior to implementation included the transfer of all municipal criminal prosecutions from the Memphis city court to the General Sessions Court and the transfer of all pre-arraignment detention responsibility from the Memphis City Jail to the Shelby County Jail. Both of these moves required sweeping procedural changes as the criminal justice process adjusted to new facilities and administrators. The municipal election also produced changes in one General Sessions judgeship and a number of Criminal Court judgeships and a new Memphis mayor, whose criminal justice priorities were quite different from those of his predecessor.

With such dramatic change just prior to and at the point of ERDC implementation, everyone involved with the ERDC effort assumed that additional changes would occur during implementation. In fact, those assumptions proved false, and from September 1982 through the summer of 1983 the Shelby County criminal justice system was the most stable of the three sites. For example, there were no major personnel shifts in those agencies directly involved in the Field Test. The same assistant district attorney generals, judges, clerks, and pre-trial release counselors were assigned to the felony division of General Sessions Court. The same overall court procedures were in effect during the test. The crime, arrest, and prosecution rates--while increasing somewhat during the test--reflected broad trends which had been operating in Shelby County for some time.

The changes that did occur during the test period were limited largely to internal personnel shifts within the Public Defender's Office itself. These included:

- the initial data collector hired for the test died in October, 1982. His replacement missed approximately six weeks of work during the Spring of 1983 due to childbirth;
- the test staff remained stable throughout the test. However, one test attorney did miss considerable time due to pregnancy and childbirth;
- there was a complete turnover of control attorneys during the test. The first two-person team of control attorneys worked through November 1. They were replaced by a single attorney who had some part time support for the month of November. A second full-time control attorney was hired on December 1. He continued in the position through May, when he was replaced by an experienced misdemeanor attorney;
- there was some turnover of full- and part-time Criminal Court attorneys during the test period;
- the on-site evaluator was absent for a six week period during the middle of the test due to childbirth.

## F. SUMMARY OF IMPLEMENTATION

The Shelby County Office of the public Defender implemented the Early Representation by Defense Counsel Field Test successfully. Every critical element of the test design was carried out as planned in the Operations Manual. There were no significant deviations from the original design. The following statements can be made about the relative success of implementation.

- Eligibility screening proved to be a difficult element to implement due to a number of factors: (1) the logistics involved in completing the screening process prior to first appearance; (2) the level of inquiry which was required to document indigency was perhaps too involved to be objectively implemented; and (3) the test period was too short to overcome the traditional expectations of each defendant and the criminal justice community of Shelby County that the Public Defender should be appointed to cases only as a last resort after all attempts to secure private counsel have been exhausted.
- Randomization which was tied to the eligibility screening process did not result in the creation of two identical groups of defendants. Numerous defendants deemed ineligible or not indigent during screening were unable to retain private counsel and became "false" control defendants. Numerous defendants who were screened as eligible for public defender services did retain private counsel and were lost to the test. Numerous defendants were not screened for eligibility and thus became control clients. These three control groups were not exactly comparable to the test group.
- First attorney client contact for test cases occurred after 24 hours on the average. The quality of initial contact was limited by the physical facilities in the municipal court.

- All Municipal Court judges cooperated with the test by appointing the Public Defender at First Appearance in the vast majority of test cases;
- Test defendants were represented by test attorneys at first appearance where a higher proportion of them received favorable bail determinations than control clients.
- Individualized and continuous representation were implemented. Individualized representation was an unqualified success. The very limited success of both continuous representation and the negotiations with the Grand Jury Unit prosecutors did not justify the internal problems within the Public Defender's Office which were created by test attorney negligence in implementing them.
- Early investigation was an unqualified success. It was relatively easy to implement, it became a factor in approximately 25% of all test cases, has become an integral part of the Shelby County system and is relied upon heavily by the assistant public defenders assigned to the felony division of General Sessions Court.
- A significant majority of the individuals interviewed during the test--most notably judges and prosecutors in lower court--considered it to be a success and felt that its operations, especially early investigation, should be institutionalized.

#### IV. RESULTS OF THE ERDC FIELD TEST IN SHELBY COUNTY

In this section of the Shelby County Case Study, we will present results of the Early Representation by Defense Counsel Field Test as observed and reported. The discussion will focus on three areas:

- experimental findings expressed in terms of variation between test and control case data;
- post-implementation changes in Shelby County criminal justice process due to ERDC.

##### A. EXPERIMENTAL FINDINGS

In analyzing the case data and interview data collected during the field test, we have observed that significant variation exists between test and control cases in terms of the time from arrest to most key case processing events, and in terms of the outcomes of the cases at those key events.

##### 1. Variation in Timing

One of the key hypotheses of the field test was that early representation by defense counsel would speed up the criminal justice process. It was hypothesized that if the public defenders were appointed to cases and provided with investigatory resources earlier than the established norm that those cases would be processed quicker through the system than the established norm.

In Shelby County, the established norm for the appointment of the public defender to felony cases in municipal court was between two and three weeks of arrest. No investigatory resources other than a client interviewer were available to the municipal court public defender. During the test the control mode closely approximated that established norm. For the three control

groups--true, screened as ineligible, and never screened--the mean time from arrest to appointment was as follows:

- True (N=485)--13.66 days;
- Not Eligible (N=479)--16.20 days;
- Never Screened (N=188)--14.39 days.

Under the test design, initial attorney contact on the test cases was to occur within 24 hours of arrest. The Shelby County Field Test could not meet the standard for a variety of reasons, including: police practices, jail practices, independent eligibility screening, and the space and time limitations of the criminal justice process. However, attorneys were appointed to test cases at first appearance which occurred approximately two weeks on the average before control case appointments.

The variation in the processing of test and control cases first observed in the timing of the appointment of the public defender was maintained for every significant event in municipal court during the test. These include the times from arrest to pre-trial release, to the completion of lower court processing and to action on the case by the Grand Jury. A comparison of the timing for these events follows.

• (Arrest to Pre-Trial Release)

Test Cases (N=290)--3.40 days

Control Cases (N=270)--5.87 days

This variation can be attributed entirely to the test process since only test defendants had representation during bail setting while control defendants on the average obtained their release if at all long before they ever saw their public defender. These figures, taken from the 1031 closed cases for which data is available, indicate that 2.47 days per case or a total of 716.3 jail days were saved during the test. This represents a considerable savings to Shelby County which must pay upwards of \$12 per day over the state subsidy of \$8 to house each pretrial state (felony) detainee. This \$8,500 savings represents a crude estimate of only a portion of the money which could be

saved in Shelby County each year if defendants were represented by the public defender at first appearance. Moreover, impressionistic data suggest that there was no significant difference in re-arrest rates while on pretrial release between test and control defendants, thus suggesting that the savings in money were not compromised by increased danger to the community.

• Arrest to Completion of Lower Court Processing

Test (N=569)--25.71 days

Control (N=732)--30.58 days

This variation represents a composite of a number of possible actions yo a case which serve to complete General Sessions Court processing. These actions include: a true dismissal on a finding of no probable cause, a dismissal of a waived preliminary hearing, a plea to a misdemeanor, a diversion, a bindover to the Grand Jury, a finding of no probable cause which is later indicted and a waiver of preliminary hearing which is later indicted. The variation is maintained for the mean time from arrest to each type of action cited.

It is important to note that similar variation in timing exists between arrest and other points in municipal court processing. For example, the report date--the date when the defense reported to the court on the status of the case--occurred considerably earlier for test cases than control cases. Reported control case data are insufficient to provide the actual variation that did exist, but test and control attorneys agree that report dates occurred significantly earlier in test cases.

While test cases were processed through municipal court sooner than control cases, test attorneys did represent their clients for a longer period of time on the average (27.95 days) than did control attorneys (15.75). The additional twelve days time allowed for early investigation, additional attorney-client contact, or extended plea negotiating on those cases which warranted it.

A net savings of five days per case cannot be easily translated into dollar savings, since municipal court is in session regardless of the court caseload or backlog. However, discussions with municipal court prosecutors revealed that a reduction in the court backlog was desirable for the system and that there was a reduction in the backlog during the term of the test. However, it should be recognized that the individual judge's approach to case processing was considered to be an important intervening variable in the reduction or expansion of the court caseload.

- Arrest to Indictment and Arraignment in Criminal Court

- Grand Jury Action

- Experimental (N=175)--66.1 days

- Control (N=358)--69.5 days

The variation in timing between test and control cases is maintained for cases submitted to the Grand Jury. It is interesting to note that approximately 40 days elapsed on the average between bind over or submission to the Grand Jury Unit prosecutor and the entering of an indictment. It should be understood that this average is based upon the 67% of the cases on which data has been received and which were resolved during the data collection period (September, 1982 to November, 1983). We have assumed that a significant portion of the 33% of cases for which disposition data have not been received were still being processed through the system. If all of the cases were analyzed at a later date, the period between bind over and indictment might increase.

- Arrest to Arraignment in Criminal Court

- Test--87.82 days

- Control--88.06 days

The variation in timing between test and control data is all but obliterated by arraignment in Criminal Court. It is interesting to note that almost three weeks elapses between indictment and arraignment.

o Arrest to Disposition in Criminal Court

Test (N=165)--134.42 days

Control (N=350)--132.46 days

For the cases disposed of in Criminal Court, the variation in timing shifts slightly to favor control cases. However, the difference in timing is so insignificant that, on the basis of data recorded during the evaluation, it would appear that early intervention had little impact on the length of Criminal Court processing in Shelby County.

In summary, the variation between the timing of test and control cases holds throughout municipal court processing. The variation represented real savings to the county in terms of reduced jail expenses and reduced municipal court backlog. Once cases were transferred from municipal court to the Grand Jury and the Criminal Court, little or no significant variation in timing was observed.

As others have suggested, the criminal justice process is not easily modified, and when modifications such as ERDC are introduced, the changes then produced are incremental. The findings regarding variation in the timing of case processing tend to support this notion and, moreover, suggest that the locus of effect of any intervention may be determined by the point at which that intervention is introduced into the system.

2. Variation in Outcome

A corollary to the hypothesis that ERDC will have an impact on the timing of criminal case processing is the notion that ERDC will also have an impact on case outcome. And, in fact, the Shelby County Case data does suggest that the test services provided during the Field Test did have some limited impact on the outcome of cases. This analysis includes considerations of pretrial release, municipal court disposition, municipal court sentencing, felony court disposition and felony court sentencing.

- Pre-Trial Release

The data on reported closed cases indicate a significant variation between the percentage of test and control defendants who obtained pretrial release during the test period:

Test (N=290)--52%

Control (N=270)--37%

Thus, not only did release occur earlier for released test defendants (see, Variation in Timing, above), but a significantly higher percentage of test defendants obtained pretrial release than did control defendants. This variation holds after controlling for the instant arrest charge and the prior record of the defendant. For example, for defendants with significant prior arrest records, 17.2% of test defendants obtained pretrial release compared to 11.3% of controls; for defendants with limited prior arrest records, 26.1% for defendants with limited arrest records, 26.11% of test defendants obtained pre-trial release compared to 20.9% of controls; and for defendants with no prior arrest levels 59.4% of test defendants obtained pretrial release compared to 44.9% of controls.

The analysis conducted to date does not suggest that obtaining pretrial release has any impact on ultimate case outcome. However, discussions with Shelby County public defenders and other criminal defense attorneys suggest that a defendant who is released prior to trial can participate more in the preparation of his or her defense by helping to locate witnesses, and meeting with his or her attorney more often. It is believed that the defendant, hence, ultimately obtains a more favorable case outcome. If the beliefs are true then ERDC in Shelby County increased the opportunity for test defendants to participate more in their defense.

- Municipal Court Disposition and Sentencing

The data on reported closed cases indicate that a higher percentage of test cases were disposed of in lower court than control cases. The following chart demonstrates this fact.

General Sessions Court Dispositions

<u>Method of Disposition</u>	<u>Test</u>	<u>Control</u>
Plea to Misdemeanor	177 (31%)	194 (27%)
Diversion	26 ( 5%)	24 ( 3%)
Dismissal with Prejudice	41 ( 8%)	48 ( 7%)
Attorney Relieved/Withdrew*	145 (26%)	108 (15%)
<u>TOTAL DISPOSITIONS*</u>	<u>244 (58%)</u>	<u>266 (42%)</u>
Bound over to Grand Jury	135 (24%)	255 (35%)
Dismissed and Later Indicted	40 ( 8%)	103 (14%)
	175 (32%)	358 (49%)
<u>TOTAL CASES*</u>	<u>419</u>	<u>714</u>

The chart shows that 58% of all closed test cases were disposed of in General Sessions Court as compared to 42.6% of control cases. This variation holds when the nature of the charge and the prior record of the defendant are controlled. The figures tend to support the statements of General Sessions Court public defenders and prosecutors which suggested that both the investigative resources and additional time to represent clients, which were available only to test attorneys, made it possible for a higher percentage of test cases to be resolved at the lower court.

There also appears to be a variation between the sentences received by defendants who entered guilty pleas. Twenty percent of all test defendants who pled guilty to misdemeanor charges in General Sessions Court during the test were sentenced to probation only as compared to only 4% of similarly

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\*Attorney withdrawals are not included in the totals. Early in the test one judge relieved the test attorneys on all cases where a defendant made bail. This situation was resolved by December. Attorney withdrawals occurred earlier on test cases than control cases.

*attach*

situated control defendants. Eighty percent of all test misdemeanants and 96% of all control misdemeanants were given jail sentences.

The above figures tend to support the contention that early representation can be an effective tool for screening out those cases which have no business being prosecuted as felonies. Referred to as "garbage" or "junk" cases by individuals at each of the three test sites, these cases are a major source of felony court backlog and require major expenditure of time and resources by all members of the criminal justice community when they are not resolved. Thus, ERDC was an important resource of the Shelby County criminal justice community while it was in operation since it aided and promoted the early resolution of those cases which were not appropriate for indictment and Criminal Court prosecution.

• Criminal Court Disposition and Sentencing

There was no observable difference between the outcome of test and control cases or the sentences received by test and control defendants for those cases prosecuted in Criminal Court. Ninety-five percent of all test case and 94% of all control cases were resolved between test and control cases in this regard is that a lower proportion of test defendants (45%) than control defendants (51%) plead guilty to non-serious property crimes. (This distinction may be accounted for by the fact that a higher proportion of test cases (39%) were resolved by guilty plea or dismissal in municipal court than control cases (34%).

The mean sentence received in felony court by test defendants is somewhat longer than that received by control defendants--36.56 months as compared to 31.72 months. This variation is attributable to the fact that a higher proportion of test cases (12%) than control cases (9%) received sentences in excess of 60 months.

## B. INSTITUTIONALIZATION OF ERDC

The ERDC demanded a high degree of cooperation and support from the criminal justice communities at each of the three test sites. In Shelby County, significant demands were made upon the judges, the Attorney General's Office, the Clerk of Court, the Sheriff's Department and the Pretrial Services agency. The range and nature of these demands have already been discussed in this case study. In this section we will attempt to highlight the short- and long-term changes in the Shelby County criminal justice process resulting from the test and to highlight those areas where the test mode proved to be significantly different from the control mode. Each point in the process will be described.

### 1. Pre-First Appearance

The ERDC had a dramatic but short-lived impact on the pre-first appearance process during the test. The eligibility screening function required the coordination of the regular PTS and the ERDC interviewing activities, thus making demands on the jail staff of the Sheriff's Department, the PTS release staff, and the PTS eligibility screener. Establishing a suitable working system required time and energy and the participation of the director of PTS and Chief Public Defender and ERDC Project Coordinator as well as the line staff responsible.

The eligibility screening function was an artifact designed solely for the Field Test. As implemented the eligibility screening process represented a series of compromises, each of which added to its artificial nature.

Today all vestiges of eligibility screening and early attorney appointment have disappeared in the felony division of General Sessions Court. The judge appoints the public defender to cases only after the defendant has proven he

or she is unable to retain private counsel. The inability of the defendant to hire an attorney is the proof of his or her indigency. Some informed observers do contend, however, that the ERDC field test did have an impact on the judicial appointment process. They insist that the public defender is appointed earlier today than before the test--as much as one week earlier than before, often within five days of arrest.

## 2. First Appearance and Early Representation

The ERDC had a considerable impact upon the First Appearance process in General Sessions Court. Test attorneys were appointed and represented their clients during the bail setting process while control attorneys were rarely if ever appointed at first appearance and never were involved in arguing bail at the first appearance. One change noted by some observers was that first appearance was longer for test defendants, but they also agreed that the longer period was worth the effect since it improved the bail setting process.

Today, public defenders in the General Sessions Court are not present at first appearance. The bail setting process is concluded without their input. Thus, one of the most significant benefits of the field test in Shelby County which was due to the role of the public defender at first appearance-- that a significantly higher percentage of test defendants obtained pre-trial release than control defendants and obtained their release approximately three days sooner--will not be institutionalized. To do so would entail a major revision of the traditional judicial appointment system in Shelby County, and such a revision would not be done without further discussion and debate. ERDC had a further effect on early case processing for test cases by establishing an individualized case handling system and introducing early investigation.

Today, the individualized case assignment system has been institutionalized in the felony division of General Sessions Court. The institutionalization of the case handling system is an important test impact. Moreover three experienced public defenders are assigned to the division. The addition of a third public defender reflects the added importance given to municipal court representation by the field test.

Perhaps the most worthy element of ERDC in Shelby County was early investigation. The value of insitutionalizing the service was apparent within one month of implementation. However, the Chief Public Defender has faced an uphill battle with the county regarding the funding of the position. It is unfortunate that in an era of tight municipal budgets and cutback management, that an activity such as early investigation which has the almost unanimous endorsement of the criminal justice community is not recognized as a cost savings rather than an additional expense.

Since the field investigator remains in his position as of this writing, it can be said that early investigation has been institutionalized in spirit as an element of the Public Defender activity in General Sessions Court. Approximately 40 cases per month have been investigated at the General Sessions level since the test ended in August. The refusal to prosecute affidavit has been institutionalized as has early and more substantive negotiations. The prosecutors continue to agree that, with information, charges are reduced on cases today which would not have happened without early investigation.

Today, with the General Sessions felony court served by a staff of three attorneys, a "street" investigator, and a client interviewer, the General Sessions process proceeds faster than it did prior to ERDC even with the expanded caseload. The survival of early investigation beyond 1984 remains in question.

### 3. Preliminary Hearing/Bind Over

There was little or no noticeable variation between the test and control modes in the preliminary hearing/bindover process. However, since test attorneys were often more knowledgeable about their cases due to early investigation than control attorneys, their need to use preliminary hearings as a discovery tool was not as great. Also, as with all other stages in the General Sessions process, the time from arrest to bind over (or dismissal) was appreciably shorter for test cases than for control cases.

#### 4. Criminal (Upper) Court Processing

The field test had little or no impact on overall Criminal Court case processing. However, felony attorneys did agree that cases investigated in General Sessions Court were processed quicker through Criminal Court. Also, a number of felony attorneys observed that test clients appeared to be better informed and better prepared for their cases in felony court than control clients. However, one felony attorney observed that some test clients had unreal expectations about the potential for favorable outcomes on their cases and that such expectations lengthened the court process.

Today, with the availability of early investigation, felony attorneys enjoy a degree of latitude on those cases which are investigated, which they did not have prior to ERDC.