



Policy Brief

# Access to Counsel at First Appearance

## A Key Component of Pretrial Justice

Prepared by the National Legal Aid & Defender Association  
September 2020

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National Legal Aid & Defender Association

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The **National Legal Aid & Defender Association** (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. Among its key strategies, NLADA works to expand the defender community's capacity to utilize research and data through information, training, and technical assistance.

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## Report Update: How Access to Counsel at First Appearance Can Address COVID-19 Pandemic and Racial Equity Concerns

Although this guide was developed long before the most pressing events of 2020 drastically altered everyday routines and systems, we are confident that it offers both short- and long-term solutions to some of the most pressing issues facing the criminal legal system in the United States.

The COVID-19 pandemic and the racial uprising from the killings of George Floyd, Breonna Taylor, and others have brought sweeping changes to many aspects of our society. Communities and system stakeholders are looking for solutions for long-standing problems with the criminal legal system. This report offers valuable solutions on ways to create fairness and equity through ensuring all persons have access to quality representation at the early stages in the criminal legal process. Indeed, the events of 2020 have brought into focus the already-existing inequities and structural problems of the criminal legal system, which can be addressed in substantial part through the implementation of counsel at first appearance practices and policies.

In light of the public outcry following the killings of Breonna Taylor, George Floyd, and too many other Black Americans in 2020, policymakers and stakeholders should take a critical look at all parts of the system through a racial equity lens. Providing access to counsel at first appearance can be used as an effective strategy in promoting racial equity in the criminal legal system. Black people and people of color are overrepresented in America's jail population, and advocacy by counsel at a first appearance proceeding has been shown to reduce jail admissions, the length of jail stays, and bail amounts, as discussed later in this guide. It can also fight back against the culture of treating people in the system as case numbers rather than full human beings with lives that matter. Quality representation at first appearance is critical for telling the stories of people impacted by the criminal legal system and humanizing people accused of crimes. This aspect of pretrial representation by counsel is particularly notable in the context of the systematic devaluation of Black lives that has been perpetuated by the criminal legal system for centuries.

The closing and gradual reopening of courts during the pandemic has altered the appearance and procedure of pretrial justice, as arraignments and other first-appearance proceedings have largely shifted to remote, videoconference settings. The concerns detailed in this guide about problems maintaining quality representation during videoconferenced first appearances are perhaps more relevant than ever. Circumstances have forced indigent defense providers in many jurisdictions to represent a client who is not in the same room, which has created difficulty in communication, including conducting confidential discussions during proceedings and reading a client's body language.<sup>i</sup>

The problems that have come to light echo long-standing concerns with conducting arraignments over video, which are discussed in this guide. These concerns, which vary from logistical to technological to constitutional, should give jurisdictions and systems stakeholders pause about the notion of making video arraignments the "new normal" for pretrial justice after pandemic measures are no longer necessary.

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<sup>i</sup> See, e.g., Alan Feuer, Nicole Hong, Benjamin Weiser & Jan Ransom, *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> (describing problems faced by public defenders, their clients, and others in conducting arraignments over videoconferencing services).

## Executive Summary

America's jail populations have shown alarming growth over the past three decades. This has been driven primarily by the rise in the number of people who are incarcerated in the pretrial phase of criminal case adjudication, i.e., those who are accused of crimes but are presumed innocent and have not faced trial yet. Today, almost two-thirds of the country's total jail population is presumed innocent. Providing quality representation by counsel at an accused individual's first appearance before a judicial officer (counsel at first appearance, or "CAFA") is a key component of effective pretrial justice that local and state governments should implement. CAFA has been shown to reduce jail populations and legal system costs, and strengthens procedural justice, among other benefits.

This paper aims to provide indigent defense service providers and other criminal legal system stakeholders with legal arguments, standards, examples from the field, and empirical data to help them promote CAFA in their own jurisdictions. The discussion undertaken in this guide is divided into six parts:

1. A brief overview of existing problems in the criminal legal system—particularly overuse of pretrial incarceration—that can be partially solved by providing CAFA;
2. Legal arguments stemming from *Rothgery v. Gillespie County* and its progeny that advocates can use to support introduction or maintenance of CAFA in a given jurisdiction;
3. The advantages that provision of CAFA brings for quality representation, in alignment with practice standards;
4. Case studies and empirical examples of jurisdictions that have implemented CAFA programs, showing that these programs are both feasible and successful;
5. More recent efforts to implement CAFA in various jurisdictions; and
6. Key policy components for successful implementation of a CAFA program.

One of the most compelling legal arguments in favor of CAFA, already affirmed by the highest courts of Massachusetts and New York, is that because liberty interests of the accused are at stake in a first appearance proceeding—i.e., the accused may be jailed at the proceeding—it qualifies as a "critical stage" that requires the presence of counsel. This approach is rooted in the U.S. Supreme Court's landmark *Rothgery v. Gillespie County* decision, which decreed that counsel must be provided at "any critical stage before trial." Advocates may also look to arguments based on the relevant state constitution, as the highest court in Maryland has done.

Generally, CAFA pilot programs also demonstrate how increased indigent defense resources in this key area improve system-wide outcomes. These programs have shown reductions in the number of people being sent to jail while presumed innocent, reductions in average bail amounts, increases in client satisfaction and perception that the proceedings were fair. These results have been found in both urban and rural jurisdictions. More recent efforts in a number of jurisdictions provide additional models of CAFA implementation.

In order to achieve effective implementation of CAFA, some key criminal legal system elements must be in place, all aligning with recommended best practices for access to counsel. These elements include reasonable time and a private space to confer with clients prior to the pretrial hearing, time to prepare the case, fair discovery practices, and privacy in attorney-client communications.

The case for jurisdictions across the country to provide counsel at first appearance is compelling on multiple levels. This practice is supported by legal and constitutional standards and best practices along with successful track records in a variety of jurisdictions, as reflected in the snapshots from field studies below. Indigent defense providers, other criminal legal system stakeholders, and criminal legal reform advocates outside the system can look to CAFA as a way to achieve common goals for improving the administration of justice across the country.



### *Snapshots from Field Studies*

In Baltimore, Maryland, an experiment where half of a sample group of persons accused of crimes were provided counsel at bail hearings found that those who were represented were **2.5 times more likely** to be released on their own recognizance without paying bail, **4 times more likely** to have their bail amount reduced, and **2 times more likely** to be released on the day of arrest. That same study found that clients reported greater confidence in the fairness of their bail proceeding and greater willingness to comply with the court's decision.

In Upstate New York, new CAFA programs increased the percentage of people who were released after their initial appearance by almost **21%** in one county and by over **15%** in another.

In Michigan, three counties' pilot programs demonstrated the effectiveness of CAFA in improving justice systems. Ingham County saw a **28%** reduction in the amount of time that the accused spent in jail between arraignment and release. Kent County had an **11%** reduction in the number of hearings due to increased pre-hearing dispositions. In Huron County, the court set bond at the level recommended by defense counsel in **30%** of cases and at a lower level than the interim bond in **59%** of cases. Additionally, **18%** of the accused in Huron County had their cases resolved at the first appearance proceeding, representing an **8%** increase from the previous year.

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## Introduction

America's jails are overcrowded with people who have not been adjudicated guilty of crimes and those who may be in dire need of social services to address the underlying issues that contribute to their contact with the legal system. One of the most effective and crucial practices to reduce pretrial jail populations, while also producing other benefits, is the appointment of counsel to represent people accused of crimes at their first appearance before a judicial officer.<sup>1</sup> Provision of counsel at first appearance ("CAFA") is recognized in law and standards as an effective way to defend the presumption of innocence in the pretrial phase and fulfill defense attorneys' duties to their clients throughout the course of their representation. The American Bar Association,<sup>2</sup> the National Legal Aid & Defender Association,<sup>3</sup> the Sixth Amendment Center,<sup>4</sup> the Pretrial Justice Institute,<sup>5</sup> and the Constitution Project National Right to Counsel Committee<sup>6</sup> are among the national justice organizations that have called for implementation of CAFA throughout the country. A growing body of research is now demonstrating that counsel at a person's first appearance in court is an essential practice for preventing unnecessary incarceration and its harmful short- and long-term effects.

Unfortunately, far too many people who cannot afford attorneys appear alone without representation at this critical first stage of the criminal proceeding. A majority of states do not statutorily require counsel's presence at first appearance proceedings, and even when state rules mandate CAFA, local practice often ignores the requirement.<sup>7</sup> A 2017 national survey of state procedural rules found that in thirty-two states, although counsel may be appointed at first appearance proceedings, counsel is not physically present for that hearing, which typically includes the initial pretrial release determination.<sup>8</sup> In addition to statutory restrictions, a number of obstacles hamper the provision of CAFA, including lack of funding to pay for additional attorneys/hours, excessive caseloads that overburden defenders, and other logistical problems.<sup>9</sup>

**This paper is meant to provide indigent defense service providers,<sup>10</sup> other criminal legal system stakeholders, and interested members of the general population with details about the need for and benefits of CAFA, as well as recommendations on implementing CAFA programs.** The positive effects of CAFA implementation—including fulfillment of constitutional mandates, promotion of procedural justice without detriment to public safety, and reduction of legal system costs—more than justify the investment of resources needed to undertake such a program. Defenders and other advocates should use the information in this paper to push for the funding and resources needed to implement CAFA, whether that support comes from governmental or private-sector funders.

Our discussion will be undertaken in six parts. First, we will provide a brief overview of existing problems in the criminal legal system—particularly overuse of pretrial incarceration—that can be partially solved by providing CAFA. Second, we will look to legal arguments stemming from *Rothgery v. Gillespie County*<sup>11</sup> and its progeny that advocates can use to support introduction or maintenance of CAFA in a given jurisdiction. Third, we will discuss the advantages that provision of CAFA brings for quality representation, in alignment with practice standards. Fourth, the discussion will turn to case studies and empirical examples of jurisdictions that have implemented CAFA programs, showing that these programs are both feasible and successful. Fifth, we will look at more recent efforts to implement CAFA in various jurisdictions. Finally, we will review key policy components for successful implementation of a CAFA program.

## Jailing the Accused

Our country's interwoven network of criminal legal systems over-rely on jailing people who have been accused but not convicted of crimes, and who have not yet had their day in court. About one-third of the 2.3 million people incarcerated in this country are held in local jails.<sup>12</sup> **Approximately 74% of the total jail population held for local authorities—about 465,000 people—have not been convicted and have been deprived of their liberty despite the legal presumption of innocence.**<sup>13</sup> Including those who are held pretrial in local jails, in juvenile detention, for psychiatric evaluation or treatment, in Indian Country, or in federal facilities, **overall about 556,100 people are currently being held without having been convicted or sentenced.**<sup>14</sup> Figure 1 breaks down America's incarcerated population.<sup>15</sup>

The explosive growth in jail populations since the 1980s is predominantly the result of incarcerating people who are accused of crimes and awaiting trial.<sup>16</sup> This is especially true over the past fifteen years, in which time **99% of jail growth has been attributable to pretrial detention of people who are legally presumed innocent.**<sup>17</sup> There are almost four times as many people detained pretrial today as there were thirty years ago.<sup>18</sup> Figure 2 illustrates the components of jail growth over the past three-plus decades.<sup>19</sup> This is the case despite a slight downward trend in jail populations since that figure peaked in 2007.<sup>20</sup> Money bail is part of the cause; during this same period, the average bail amount more than doubled,<sup>21</sup> meaning that fewer people can now afford the cost of their release from jail. As a result, America's system of mass incarceration locks up many people who are not convicted of a crime: **of the over two million incarcerated Americans, about one in five are presumed innocent.**<sup>22</sup>

Jails have become warehouses for marginalized individuals: people of color, the homeless, and people with substance abuse and mental health disorders.<sup>23</sup> Racial disparities are stark: **people of color comprise 52% of America's jail population but just 28% of the general population, and Black people are jailed at a rate four times higher than white people.**<sup>24</sup> Moreover, research shows that people who are in jail before trial have worse outcomes in their criminal cases and in their lives.<sup>25</sup> As a result of pretrial detention, they are:

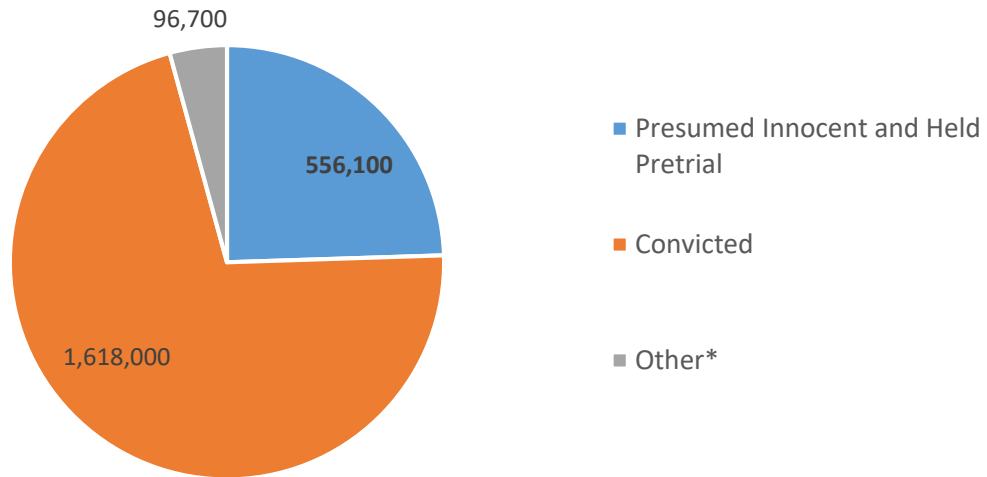
- more likely to lose connections to employment, housing, and family;
- more likely to be convicted;
- more likely to have a longer prison sentence; and
- more likely to be rearrested for new crimes.<sup>26</sup>

These longer-term consequences destabilize the accused, their families, and the communities where they live.<sup>27</sup> Pretrial release has been found to have substantial benefits beyond protection of liberty, including better outcomes for accused individuals, their communities, and the functioning of the legal system.<sup>28</sup>

The increased likelihood of conviction stemming from pretrial incarceration warrants further discussion. In too many instances, an accused individual faces the prospect of being jailed pretrial for a period of time that approaches or equals the amount of time the person would have been sentenced to had he or she been convicted.<sup>29</sup> This scenario can have a detrimental effect on the person's pretrial decision-making calculus, particularly by making a guilty/no-contest plea much more appealing when considering the likelihood of incarceration, whether that incarceration takes place before or after a trial.<sup>30</sup> Furthermore, a conviction brings costs lasting long after the sentence is completed, as there are over 44,000 statutory collateral consequences to a criminal conviction that restrict access to, *inter alia*, employment, housing, government benefits, and education.<sup>31</sup> By limiting access to personal and family support, collateral consequences perpetuate a cycle of involvement with the criminal legal system.<sup>32</sup>

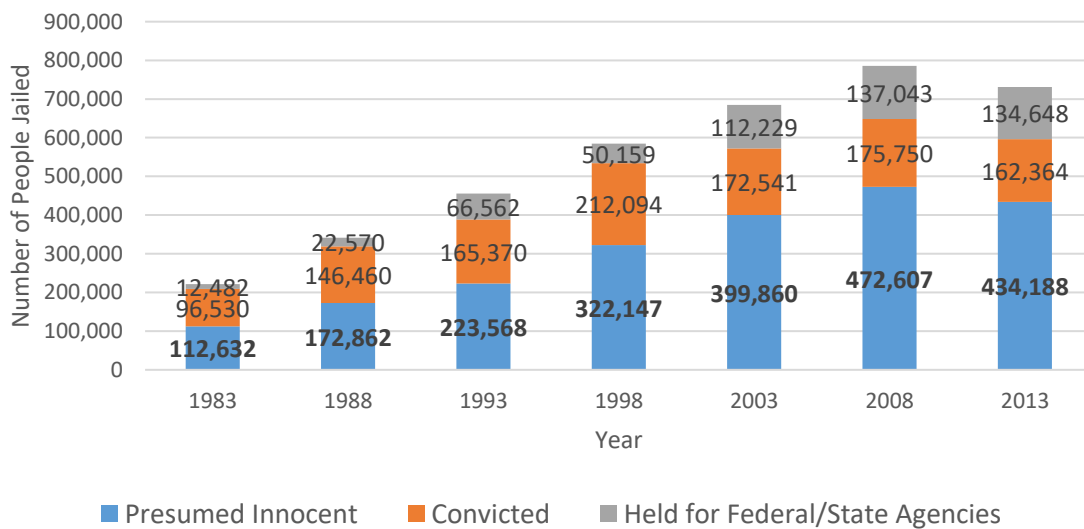


Figure 1:  
Incarcerated Americans, 2020



\* "Other" includes non-pretrial populations for those held in: juvenile detention, territorial prisons, immigration detention, involuntary commitment, Indian country, and military detention.

Figure 2:  
Nationwide Jail Population by Conviction Status, 1983-2013



The body of research about the impact of even small amounts of jail time on prospects for a criminal case (as well as every other aspect of the accused individual’s life), in addition to reports of how increasingly common pretrial detention has become, indicate that bail-setting has taken on outsized importance in criminal legal systems. For example, a 2016 study found that people detained pretrial in Philadelphia, Pennsylvania and in Harris County (Houston), Texas were more likely to be convicted and to serve longer sentences of incarceration, simply because they were detained.<sup>33</sup> In such a system, the authors wrote, “the bail hearing [is] *the* critical stage of criminal proceedings.”<sup>34</sup> There is growing evidence from around the country that representation by defense counsel makes a significant difference at these hearings.<sup>35</sup>

Furthermore, incarcerating such a large number of people is expensive. As a nationwide aggregate estimate, **pretrial detention costs local governments \$13.6 billion per year.**<sup>36</sup> The average cost to taxpayers of holding someone in a local jail can vary widely—from about \$48 to over \$500 per incarcerated person per day—depending on a variety of factors, but **the primary driver of costs is the size of the jail population.**<sup>37</sup>

Guaranteeing CAFA is a promising solution for reducing criminal legal system costs.<sup>38</sup> A 2018 study in Upstate New York found that programs that guarantee CAFA can reduce overall criminal legal system costs.<sup>39</sup> Another study estimated that **providing access to counsel within twenty-four hours of arrest in Cook County (Chicago), Illinois could save the county between \$12.7 and \$43.9 million and eventually allow the county to close twenty-two jail units.**<sup>40</sup>

In short, the status quo of pretrial justice means more harm, less effectiveness, and higher costs; but efforts to reduce jail populations, such as CAFA programs, can reverse those negative trends.

We also cannot overlook the role that the administration of pretrial justice has played in perpetuating racial and ethnic disparities in the criminal legal system. A 2017 study of courts in Harris County, Texas found that an accused individual’s bail amount and the likelihood of pretrial detention correlate with key legal and extralegal factors, particularly the gender, race, and ethnicity of the accused, and whether that person is represented by counsel.<sup>41</sup> The study found that “[c]ontrolling for legal factors, women are more likely to make bail relative to their male counterparts, and Hispanic and Black males are more likely to be detained relative to their White counterparts.”<sup>42</sup> These findings confirmed the conclusions of earlier studies.<sup>43</sup>

Furthermore, the authors of this study stressed the importance of representation at this stage in criminal proceedings: “Having the resources to retain private representation is the most important factor in attaining pretrial release. . . . [T]he odds of a defendant making bail who hires private representation is 45 times greater than the odds of making bail of a defendant who does not have private representation.”<sup>44</sup> The authors recommended that because it is impractical to expect most accused persons at bail hearings to be able to afford private counsel, jurisdictions should ensure the quality of public defenders and court-

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appointed counsel by increasing the number of attorneys in the county's public defender office so that they can represent the accused at first appearance proceedings.<sup>45</sup> Such a measure would allow public defenders more time to confer with clients before the client's first court appearance, a critical component of quality representation.<sup>46</sup>

**We recommend that indigent defense providers, policymakers, and other criminal legal system stakeholders look to adopt and implement CAFA in their jurisdictions to address the harmful effects of America's over-reliance on jails.** To assist advocates in the courtroom, the legislative chamber, or elsewhere in making the case for CAFA, this paper now turns to the various types of arguments and evidence that support provision of CAFA. We start with legal and constitutional arguments, then look to the ways CAFA supports effective trial practice. Our focus then shifts to specific sites where CAFA has been studied, followed by descriptions of more recent implementation efforts. We take note of keys to implementation of CAFA before concluding the discussion.

## How to Make the Case for Counsel at First Appearance

The provision of counsel at first appearance is supported by a long line of legal arguments that span from the U.S. Constitution to recent case law. This section begins with a discussion of the Sixth Amendment right to counsel and its interpretation over the past century. We then delve into the landmark case of *Rothgery v. Gillespie County*, followed by an examination of *Rothgery's* progeny and the “critical stage” standard.

### The Accused’s Right to Counsel

The Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”<sup>47</sup> It took nearly two centuries for the Supreme Court to outline the contours of the right to counsel as a right to state-funded counsel for individuals who cannot afford an attorney.

A few twentieth-century cases warrant mention in sketching out right to counsel jurisprudence. In 1938, the Court declared in *Johnson v. Zerbst* that the right to counsel must be satisfied, unless competently and intelligently waived, before a federal court can deprive an accused individual of life or liberty.<sup>48</sup> The *Hamilton v. Alabama* decision in 1961 held that absence of counsel at arraignment violated the Fourteenth Amendment due process rights of a man who received a death sentence.<sup>49</sup> The Supreme Court’s landmark 1963 decision in *Gideon v. Wainwright* expanded the right to counsel to persons in state court who were facing imprisonment and could not afford an attorney.<sup>50</sup> In 1972, the Court held in *Argersinger v. Hamlin* that the provision (or waiver) of counsel was a prerequisite for actual imprisonment.<sup>51</sup> Apart from *Hamilton’s* requirement of counsel at arraignment in capital cases, the Supreme Court did not substantially address the issue of CAFA until 2008.

### *Rothgery v. Gillespie County*

Walter Rothgery’s story illustrates the injustice of jailing the accused and demonstrates how counsel can correct against this injustice. In 2002, Rothgery was arrested in Gillespie County, Texas, for the crime of being a felon in possession of a firearm.<sup>52</sup> A magistrate judge set his initial bail at \$5,000, and let him out of jail when his wife posted a surety bond. Six months later, he was indicted by a grand jury, rearrested, and had his bail increased to \$15,000. This time, Rothgery could not afford bail, and had to remain in jail awaiting trial.<sup>53</sup>

The truth was that Rothgery was not a felon (nor had been convicted of any previous crime) and therefore was innocent of the crime of which he was accused; he was originally arrested because of an error in a computer background check.<sup>54</sup> Unfortunately, he could not afford a lawyer to clear up his case, so he asked for one to be appointed at his first bail hearing,<sup>55</sup> and repeatedly thereafter. He was not assigned a lawyer until three weeks after he was indicted and jailed. Right away, Rothgery’s public defender had his bail amount reduced so that he could go free. His attorney also prepared the paperwork establishing that Rothgery had never been convicted of a felony. Three months later, the prosecutor dismissed the indictment.

Rothgery went to the U.S. Supreme Court with a relatively modest claim: that his right to counsel formally “attached” at his initial hearing, and that he should have been assigned a lawyer in a reasonable time thereafter. The Supreme Court agreed, holding in 2008 that “counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as

well as at trial itself.”<sup>56</sup> This mandate and interpretations thereof have propelled case law on CAFA for over a decade.

### Defining “Critical Stage”: Arguments on Counsel at First Appearance after *Rothgery*

The Supreme Court noted in *Rothgery* that although the Sixth Amendment right to counsel<sup>57</sup> attaches at first appearance, whether the first appearance is a “critical stage” that *requires* the presence of counsel is a separate question.<sup>58</sup> The Court stated that “**what makes a stage critical is what shows the need for counsel’s presence,**”<sup>59</sup> and further elaborated that “[t]he cases have defined critical stages as proceedings between an individual and agents of the State . . . that amount to **trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary.**”<sup>60</sup>

Because the Supreme Court only provided this imprecise standard and did not require states to guarantee counsel at first appearance, states have taken varying approaches to interpreting *Rothgery*. In particular, post-*Rothgery* legal analysis has focused on defining the contours of what constitutes a “critical stage.” The Supreme Court has not since determined whether a first appearance is a critical stage that requires the presence of counsel. In the absence of such a decision, lower federal and state courts and state legislatures have tackled the question with various approaches, leaving an inconsistent patchwork of laws from state to state regarding both whether there is a right to counsel at first appearance and whether the presence of counsel is mandated at first appearance.<sup>61</sup>

The variance in approaches to the critical stage question is highlighted by the fact that many of the relevant court decisions in this area are based on peculiarities of state law. For example, the Indiana Supreme Court has affirmed that the right to counsel attaches *upon arrest* under Indiana law, as opposed to the federal standard of attachment upon the initiation of formal proceedings.<sup>62</sup> Similarly, the Maryland Court of Appeals (the highest court in the state) has held that a person who is indigent and accused of a crime has the right to appointment of counsel at a bail determination hearing pursuant to Maryland’s Public Defender Act, which is broader in scope than the right granted under the Sixth Amendment to the U.S. Constitution.<sup>63</sup> Despite the lack of uniformity nationwide, defenders can look to decisions from other jurisdictions for creative approaches and model arguments to support the goal of quality representation at first appearance.<sup>64</sup>

The specific proceeding that constitutes a first appearance for purposes of appointing counsel varies from jurisdiction to jurisdiction and sometimes from case to case. Instead of arguing for a more general right to counsel at first appearance, defenders may find more success arguing for a right to counsel at a particular form of hearing, regardless of whether it is the *first* appearance, whether it be arraignment,<sup>65</sup> bail review hearing,<sup>66</sup> pretrial hearing,<sup>67</sup> an attempt to elicit information from the accused,<sup>68</sup> plea bargaining,<sup>69</sup> or another proceeding.<sup>70</sup> Focus on what makes the presence of counsel necessary.

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*“[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.”*

*Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008)*

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Another potentially successful strategy is to engage in a jurisdiction-specific examination of the initial appearance to articulate the necessity of defense counsel in those proceedings. In *Coleman v. Alabama*, for example, the U.S. Supreme Court found that a preliminary hearing in an Alabama court is a critical stage that required the assistance of defense counsel.<sup>71</sup> The Court examined the nature and steps of the proceeding, and outlined the advantages that counsel provides, namely in examination and cross-examination of witnesses, impeachment of witnesses, discovery, and pretrial advocacy for early psychiatric evaluation or bail.<sup>72</sup> Similarly, some state courts have delved into the characteristics of the proceeding to determine whether counsel is necessary. For example, the highest courts of appeal in Massachusetts<sup>73</sup> and New York<sup>74</sup> have held that the first appearance of the accused is a critical stage because liberty interests are at stake during that proceeding.

Note also that the Sixth Amendment is not the only path to arguing for a constitutional basis for counsel at first appearance. For example, the federal district court in New Orleans found in 2018 that a bail hearing is a critical stage for purposes of appointing counsel, and that the right to counsel at bail hearings is required under the Due Process Clause of the Fourteenth Amendment.<sup>75</sup>

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*The highest courts of appeal in Massachusetts and New York have held that the first appearance of the accused is a critical stage because liberty interests are at stake during that proceeding.*

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When examining the legal landscape and crafting arguments to support an accused’s right to counsel at their first appearance, defenders must not ignore unfavorable court decisions. In 2016, for instance, the U.S. Court of Appeals for the Ninth Circuit dealt a blow to pretrial reform efforts by holding in *Farrow v. Lipetzky* that an initial appearance in California did not qualify as a critical stage that would trigger the Sixth Amendment right to counsel.<sup>76</sup> Furthermore, the Court held that the Equal Protection Clause of the Fifth and Fourteenth Amendments does not require that an indigent and accused individual be provided counsel at first appearance.<sup>77</sup> Despite this setback, there is a silver lining to the decision, as the

bases of the ruling<sup>78</sup> provides a rhetorical framework for defenders in Ninth Circuit federal district courts to distinguish the case. Specifically, defenders should argue that a first appearance has some relationship to the merits of the case; that the assistance of skilled counsel is necessary to ensure that people accused of crimes understand the proceedings; and that without counsel, it would be plausible for an accused individual to permanently forfeit significant rights or that some permanent harm could befall the accused.

Another obstacle is the U.S. Supreme Court’s decision in *Gerstein v. Pugh* (1975), where the Court held that a post-arrest probable cause determination was not a critical stage.<sup>79</sup> The Court argued that a post-arrest probable cause determination “is addressed only to pretrial custody,”<sup>80</sup> and that although “pretrial custody may affect to some extent the defendant’s ability to assist in preparation of his defense . . . this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*.”<sup>81</sup> Advocates can counter arguments that rely on *Pugh* by pointing to evidence showing the more harmful consequences of pretrial detention.<sup>82</sup>

Similarly, advocates should take note of *United States v. Mendoza-Cecelia*, a 1992 case in which the U.S. Court of Appeals for the Eleventh Circuit refused to suppress an uncounseled confession at a first appearance in federal court.<sup>83</sup> The Court noted:

The initial appearance is largely administrative. In [the accused's] case, the court read the charges, ascertained his name, recited his *Miranda* rights, appointed counsel and set bail. Although the court in the initial appearance must consider the weight of the evidence against the defendant as one of many factors in setting bail, the bail hearing is not a trial on the merits in which the guilt of the accused is adjudicated.<sup>84</sup>

The *Mendoza-Cecelia* decision signals the need for CAFA advocates to make clear the ways in which the first appearance constitutes a trial-like confrontation and/or is likely to prejudice proceedings at trial.

Additionally, advocates looking to argue at an appellate level that deprivation of counsel at first appearance was a constitutional violation should take note of procedural hurdles in this endeavor.<sup>85</sup> An alleged violation of the right to counsel may require a showing of prejudice.<sup>86</sup> An alleged pretrial deprivation of counsel requires showing that the deprivation prejudiced the opportunity for a fair trial.<sup>87</sup> The added degree of difficulty from these requirements may make appeal to legal standards a simpler undertaking for arguments to policymakers and others outside of a courtroom setting. The unsettled nature of jurisprudence on the right to counsel at first appearance, however, presents an opportunity for advocates to work toward a case law precedent in favor of CAFA.

## Providing Counsel at First Appearance Supports Effective Trial Practice

Although this paper is aimed at advocacy for CAFA on a policy level, our discussion warrants at least a brief description of the direct benefits that pretrial representation has for clients on a trial practice level. Representation at an accused individual's first appearance before a judicial officer brings substantially improved results for clients at a crucial stage of their involvement with the criminal legal system.<sup>88</sup> Defense counsel is critical to fair and effective pretrial justice practices, because defense attorneys are the only stakeholders with the professional responsibility to guide the accused through the criminal legal process, protect their rights, and ensure a fair trial. Indigent defense attorneys, in particular, represent clients most adversely affected by the system of money bail, and the provision of counsel for these clients is essential to reducing the burden of money bail on clients. This representation promotes critical interventions to reduce jail populations, including: securing pretrial release, investigating the facts of the case, protecting the rights of the accused, and advising the accused and the court.

### Securing Pretrial Release

Defense counsel has a duty to pursue pretrial release whenever appropriate.<sup>89</sup> If counsel is not successful at securing pretrial release under the court's conditions, then he or she should consider pursuing a modification of those conditions.<sup>90</sup> Walter Rothgery's attorney, for example, was able to have Rothgery's bail amount reduced so that he could be released.

### Investigating the Facts of the Case

Counsel has a duty to independently investigate the accused's case and to begin the investigation as soon as possible.<sup>91</sup> Rothgery's case was ongoing for six months until counsel was appointed and was able to get to work. Defense counsel's independent investigation found that Rothgery had been arrested, indicted, and jailed due to an error in criminal records. This investigation could have been completed, and the case resolved, six months sooner if counsel had been assigned from the beginning. In a sense, however, Rothgery was lucky: the critical evidence in his case did not disappear, the way that exculpatory crime scene recordings, witnesses' recollections, and physical evidence can become increasingly difficult to obtain over time. This evidence can be critical to having a case dismissed or a fair plea negotiated.

### Protecting the Rights of the Accused

Counsel should be present at the initial appearance to protect the rights of the accused, especially by preventing coerced or uninformed guilty pleas, informing the accused of the adverse outcomes and collateral consequences of a guilty plea or conviction, preserving the right to a jury trial, challenging probable cause determinations, and requesting preliminary hearings.<sup>92</sup> Once counsel is appointed and has thoroughly investigated the case, he or she should file pretrial motions to ensure that the accused is being detained and charged legally, and that the case is moving forward appropriately.<sup>93</sup> Without counsel, people risk spending months wrongfully held in jail, with their clearest recourse being a guilty plea to get out of jail.

### Advising the Accused and the Court

Communication between counsel and the accused is critical to the effectiveness of the defense, and delaying attorney-client communications can prejudice the client's case. Interviews with clients prior to first appearance can elicit critical information that may inform defense counsel's arguments, influence



release decisions, preserve evidence that might be lost if there is a delay in securing it (e.g., video surveillance footage), and identify witnesses that are critical to locate early in the proceedings while their recollection of relevant events is still fresh. These early communications can include information that the client might not realize is essential to achieving pretrial release and optimal outcomes in his or her case, and meeting needs in his or her everyday life. Speaking with the client early in the process also builds trust that is essential to effective communications, including disclosures by the client of information they may not understand the value or relevance of without hearing from counsel who can listen, explain the process and ask critical questions that could result in pretrial release. A client's needs may relate to a medical condition that requires outside care, dependent children,<sup>94</sup> employment, housing, and other factors that will often concern the ability to pay bail.<sup>95</sup> Armed with this information—which would otherwise be unavailable to the court—defense counsel can pursue alternatives to jail, like pretrial diversion, that will be better for their clients, the criminal legal system, and the community.

This attorney-client communication goes both ways: “the purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case.”<sup>96</sup> One key obligation of defense counsel is to keep the client informed.<sup>97</sup> The client's need to know is heightened when they are incarcerated and cut off from information about their case. Speaking with the client early in the process also builds trust that is essential to effective communications throughout the case. Additionally, helping people navigate the criminal legal system makes it more likely that they are able and willing to follow court orders and not be re-arrested.<sup>98</sup>

In considering CAFA, we should note that representation at first appearance facilitates the practices described above that are recommended to reduce jail time and bail amounts. We should also consider what happens—or what does not happen—in the absence of CAFA. Without counsel at the first appearance proceeding, an accused individual does not have guidance to secure pretrial release, investigate the facts of the case, protect their rights, or make their case to the court. In this framing, an accused individual is at a distinct disadvantage in their criminal case without CAFA.

Having examined more general, principle-based arguments in favor of CAFA, in both case law and practice principles, our discussion now turns to specific examples of CAFA adoption and implementation. We first survey empirical studies of CAFA implementation and take note of the system-wide benefits demonstrated therein. Afterward, we will continue our jurisdiction-level focus by looking at more recent efforts to implement CAFA.

## System-Wide Benefits of Counsel at First Appearance

The provision of defense counsel at first appearance is supported not only by legal analysis and standards, but also by success stories from implementation of CAFA programs in jurisdictions throughout the country. In this section, we will look to studies conducted in a number of jurisdictions that have made strides with CAFA programs: Baltimore, Maryland; Upstate New York; and Michigan.

These examples from the field demonstrate the challenges overcome and successes earned through implementation of CAFA in both urban and rural settings. Generally, these programs achieved reductions in the number of accused people incarcerated pretrial, and many also yielded lower bail amounts for the accused. Between increased efficiency, better defense representation, and reports of improved client satisfaction, these programs earned buy-in and support from a diverse set of stakeholders in each jurisdiction.

### Baltimore

When Professor Douglas Colbert arrived in Baltimore, Maryland<sup>99</sup> after having practiced criminal law for many years in New York City, where courts had long required the presence of counsel at first appearance, he was shocked to find that decisions about pretrial detention were made without defense counsel present, and that people sat in jail unrepresented for months at a time.

In 1998, he and his criminology colleagues designed the Baltimore Lawyers at Bail (LAB) Project to study the effect of counsel at bail.<sup>100</sup> About half of a pool of 300 people accused of nonviolent crimes were randomly assigned LAB lawyers, and the rest were not; in all other respects, they were largely the same.<sup>101</sup> They discovered that **people represented by counsel were:**

- 2.5 times more likely to be released on their own recognizance (without paying bail)<sup>102</sup>;
- 4 times more likely to have their bail amount reduced<sup>103</sup>; and
- 2 times more likely to be released on the day of arrest.<sup>104</sup>

Figure 3 illustrates the differences in outcomes between accused individuals in the sample group who were assigned an attorney and those who were not.<sup>105</sup> In addition, people represented by counsel spent less time in jail: their median time in jail was two days, while unrepresented people spent a median time of nine days in jail.<sup>106</sup>

People represented by counsel also reported having greater confidence in the fairness of their bail proceeding<sup>107</sup> and greater willingness to comply with the court's decision.<sup>108</sup> Figure 4 illustrates the impact that counsel had on accused individuals' perspectives about the hearing.<sup>109</sup> Their experience is consistent with research on procedural justice, which shows that people follow the law when they believe they were treated fairly.<sup>110</sup>

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*These examples from the field demonstrate the challenges overcome and successes earned through implementation of CAFA in both urban and rural settings.*

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Figure 3:  
Baltimore LAB Case Outcomes

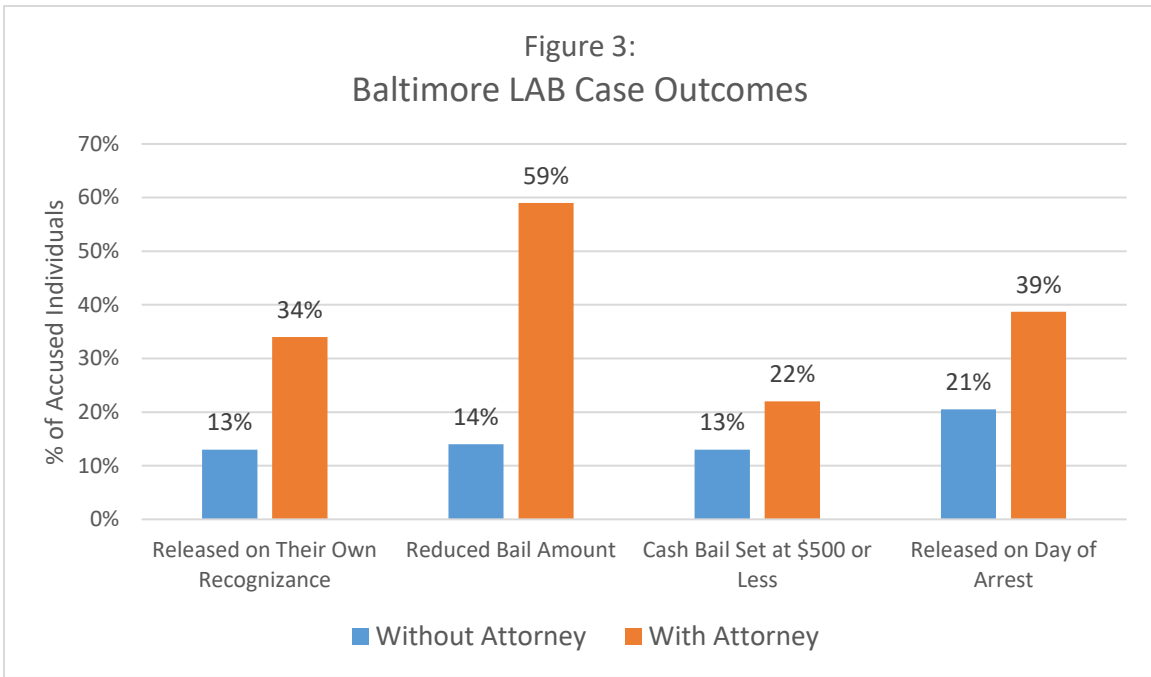
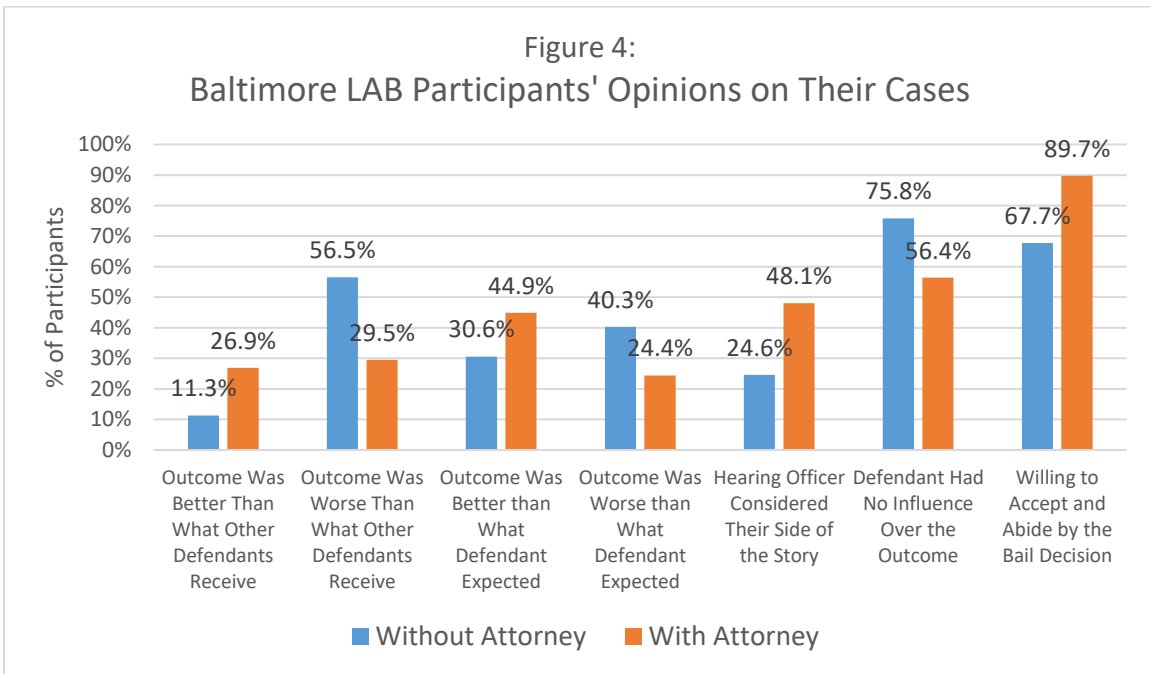


Figure 4:  
Baltimore LAB Participants' Opinions on Their Cases



## Upstate New York

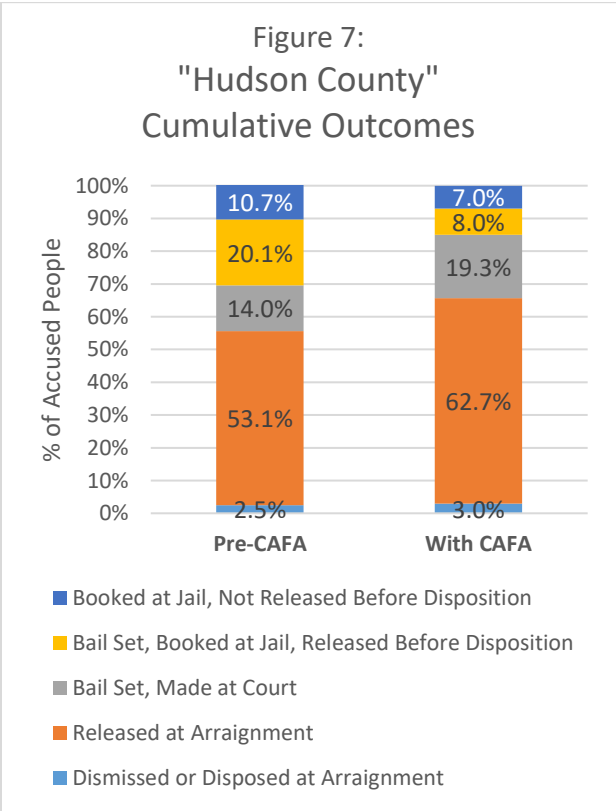
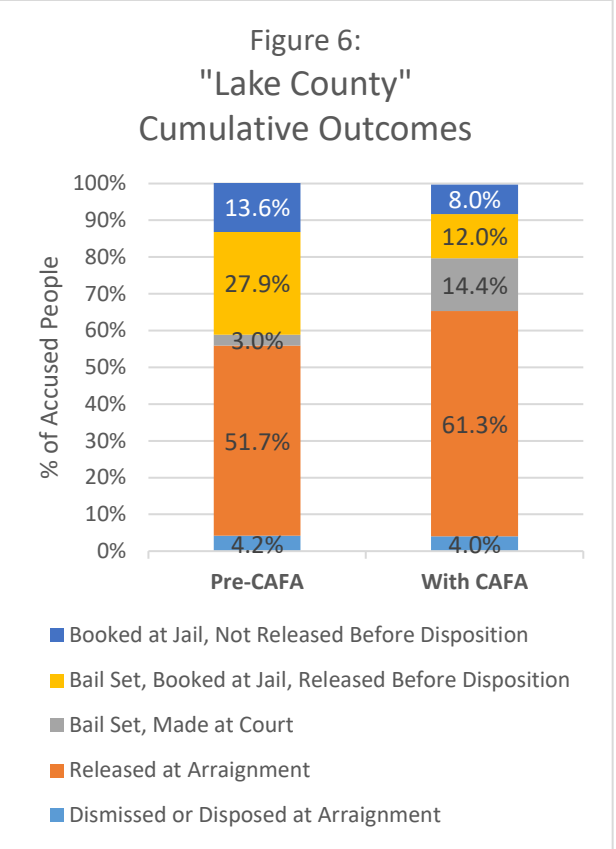
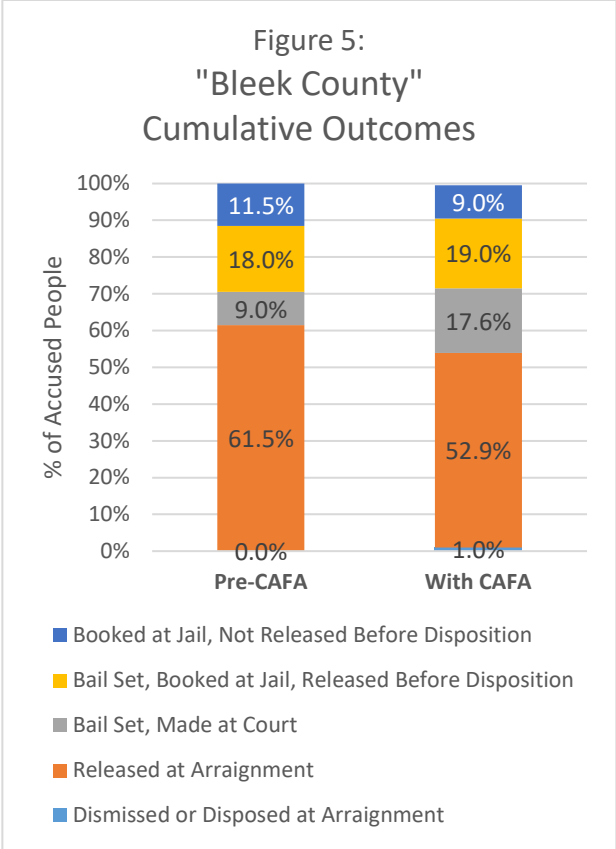
The State of New York<sup>111</sup> has undertaken historic reform of its indigent defense system by studying and implementing statewide improvements. This reform has been propelled by the landmark settlement in *Hurrell-Harring v. State*, a class action case in which the five plaintiff counties in Upstate New York sued the state for constitutional violations in denying counsel at first appearance, among other systemic failures.<sup>112</sup> Under the *Hurrell-Harring* settlement agreement reached in 2014, the state was required to allocate funding so that the five Upstate counties—Onondaga, Ontario, Schuyler, Suffolk, and Washington Counties—could implement counsel at first appearance programs there by November 2016.<sup>113</sup>

A 2017 report by the New York State Office of Indigent Legal Services on implementation of the *Hurrell-Harring* settlement found that “there is growing recognition across the State that defense counsel can elevate the level of advocacy at arraignments to ensure that fewer people are detained pretrial and to guard against unjust prosecutions.”<sup>114</sup> Additionally, defenders reported that their representation at arraignment counteracted overreaching by prosecutors and judges, and resulted in more clients being released and more reasonable bail amounts being set.<sup>115</sup> Furthermore, officials in the five counties have worked hard to make sure that the eleven indigent defense service providers can access the settlement funds to provide CAFA, even in the face of political opposition to use of funds for indigent people who have been accused of crimes; and that indigent defense providers have been diligent in their efforts to implement the settlement.<sup>116</sup>

In 2013, even before the *Hurrell-Harring* settlement, the New York Office for Indigent Legal Services (ILS) awarded grants to twenty-five counties to fund counsel at first appearance demonstration projects.<sup>117</sup> Researchers at ILS and the School of Criminal Justice at the University at Albany, State University of New York selected six of these counties to study how they implemented new or expanded counsel at first appearance programs, and what outcomes this representation produced.<sup>118</sup> These counties were selected for diversity of geography and demographics, and each implemented a different counsel at first appearance program, responsive to local needs.

The researchers studied three of the counties to which it had awarded grants to determine the effect of providing CAFA.<sup>119</sup> (The three counties were anonymized in the published report and assigned fictional names: “Bleek,” “Hudson,” and “Lake” Counties.) The study’s findings are summarized in Figures 5, 6, and 7.<sup>120</sup> In particular, the findings show that CAFA had measurable and substantial benefits in reducing bail amounts, reducing the overall time that the accused spent in jail, and reducing the number of accused individuals who spent any time in jail.<sup>121</sup> **In all three counties, the percentage of accused individuals who were free<sup>122</sup> after the initial appearance increased:** 1.0% in Bleek County (from 70.5% to 71.5%), 20.8% in Lake County (from 58.9% to 79.7%), and 15.4% in Hudson County (from 69.6% to 85.0%).<sup>123</sup> Although Bleek County courts released fewer people at arraignment and set bail for more people as compared with pre-CAFA data, CAFA also increased threefold the likelihood that courts would set bail for a given accused person at under \$500.<sup>124</sup>

In 2017, spurred on by the success of the *Hurrell-Harring* and ILS-funded programs, the New York State Legislature passed a budget to fund counsel at first appearance statewide.



## Michigan

In Michigan,<sup>125</sup> which has had a statewide indigent defense system only since 2011, just 6% of courts required the presence of counsel at the bail hearing and arraignment as recently as 2016.<sup>126</sup> Between 2014 and 2016, the state launched three CAFA pilot programs in Ingham, Kent, and Huron Counties.<sup>127</sup> Local criminal legal system stakeholders collaborated in each county to overcome logistical difficulties and produce successful results from these programs.<sup>128</sup>

### Ingham County

The 55th District Court in Ingham County (Lansing) began a CAFA pilot program in 2014. The four-attorney rotation used in the program's initial phase, combined with the attorneys continuing representation until disposition, resulted in some clients having to wait as long as four hours for an arraignment because their assigned counsel was occupied with other cases.<sup>129</sup> The assignment system was adjusted in the program's second phase to avoid this problem.<sup>130</sup>

The implementation of CAFA produced a 20% reduction, on average, in the amount of time to bring a case to its resolution, compared with the previous year.<sup>131</sup> The county also saw a **28% decline in the amount of time that the accused spent in jail between arraignment and release** as compared with 2013.<sup>132</sup> Additionally, over thirteen percent of cases were resolved before arraignment, which often resulted in the charge being reduced to a civil infraction or a non-reportable misdemeanor.<sup>133</sup>

### Kent County

Like Ingham County, the 63rd District County in Kent County (Grand Rapids) also started a CAFA program in 2014. The program had three goals: 1) improve the public defense system by providing attorneys as early as possible after arrest; 2) streamline docket time by eliminating court appearances for cases that could be easily resolved; and 3) protect accused individuals' rights against incrimination through support from public defenders.<sup>134</sup>

The county attempted to provide counsel as early as feasible after arrest to guarantee vertical representation throughout a given case, but logistical problems with collecting counsel request forms and determining eligibility necessitated altering the procedure.<sup>135</sup> For the second year of the project, the program provided "limited legal representation for arraignment purposes for everyone," which moved the eligibility determination to after the arraignment and meant that a client would likely have a different public defender represent them for subsequent proceedings.<sup>136</sup>

The CAFA program's efficiency in resolving cases reduced the number of hearings in the county substantially, including arraignments, pretrial hearings, and pleas: as compared with the March-September 2013 period (the year before the program started), the March-September 2014 period saw **11% fewer hearings**, and the March-September 2015 period saw **20% fewer hearings**.<sup>137</sup> The percentage of cases resolved within 126 days increased slightly, from 95.22% to 96.34%.<sup>138</sup> The county found that providing counsel earlier did not always mean quicker dispositions, but also found that the program was effective in protecting the rights of the accused.<sup>139</sup> In total, the county made "sufficient progress" in each of its goals for the project.<sup>140</sup>

Note that speed and efficiency in resolution of cases must not be prioritized over ensuring the fairness of proceedings. Court rules and statutes governing indigent defense can and should be framed to safeguard the fairness of the process.<sup>141</sup>

## Huron County

The 73B District Court in Huron County (Bad Axe) launched a counsel at first appearance pilot program in August 2016, with encouraging results.<sup>142</sup> Under this program, eligibility for court-appointed counsel was determined at arraignment, and every person accused of a crime was provided with an attorney for arraignment regardless of wealth.<sup>143</sup> Focus group discussions with court administration, court staff, defense attorneys, and prosecutors found five major areas in which the Huron County CAFA program had a positive impact: “(1) bond, (2) client knowledge and satisfaction, (3) case resolution, (4) court efficiency, and (5) attorney competency.”<sup>144</sup>

The presence of counsel at arraignment had significant, positive impact for clients who were in custody and had an interim bond issued at the time of arraignment: **the court set bond at the level recommended by defense counsel in 30% of cases and at a level lower than the interim bond in 59% of cases.**<sup>145</sup> Anecdotally, public defenders and other stakeholders agree that clients have better court experiences with the CAFA program in place: they are more comfortable, less anxious, more likely to attend future meetings with their attorney, more likely to be present for court appearances, and be better prepared for their arraignment and subsequent court proceedings.<sup>146</sup> Over the six-month project, **18% of the accused had their cases resolved at the first appearance proceeding, representing an 8% increase as compared to the previous year.**<sup>147</sup> Defense attorneys also claim that “poor plea deals are less common” under the CAFA program.<sup>148</sup> Public defenders spent an average of 50 minutes with each client in preparation for arraignment hearings and in the hearings themselves.<sup>149</sup> On average over the first ten months of the program, the court spent \$52.79 per client to provide counsel at first appearance.<sup>150</sup>

Anecdotally, stakeholders found the Huron County project successful: court staff reported that administrative challenges early in the project were easy to solve; court administrators and prosecutors reported increased efficiency in their work; arraignment attorneys reported less anxiety in clients; and attorneys representing clients for subsequent proceedings reported that client meetings ran more smoothly because clients received clear information from their arraignment attorney at the outset of the case.<sup>151</sup>

The academic studies of CAFA implementation in Baltimore, Upstate New York, and Michigan yield compelling evidence to support the provision of CAFA elsewhere. With benefits for both clients and legal systems, CAFA offers a rare “win-win” situation for criminal legal systems. Jurisdictions seeking to realize these successes can look not only to these studies, but also to more recent efforts to adopt and implement CAFA, which is where our attention turns next.

## Recent Implementation Efforts

In addition to the studies described above, jurisdictions around the country have undertaken initiatives to implement CAFA locally. Here we will discuss CAFA projects in Alameda County, Cook County, New Orleans, and Philadelphia.

Although these efforts have not yet yielded detailed quantitative analyses, preliminary outcomes and anecdotal results have been encouraging and consistent with the positive outcomes demonstrated in the case studies described above. These examples also demonstrate both challenges faced and solutions found by localities when launching a CAFA initiative.

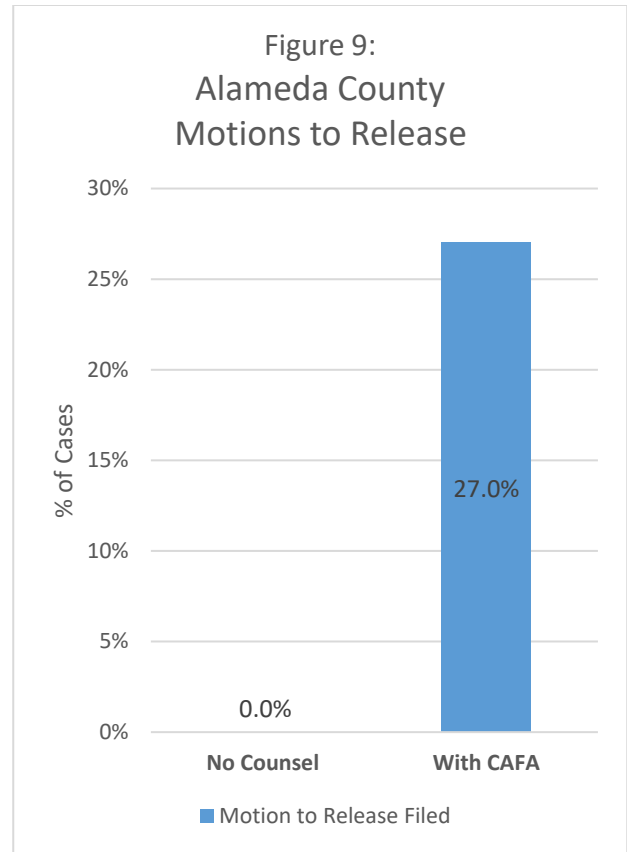
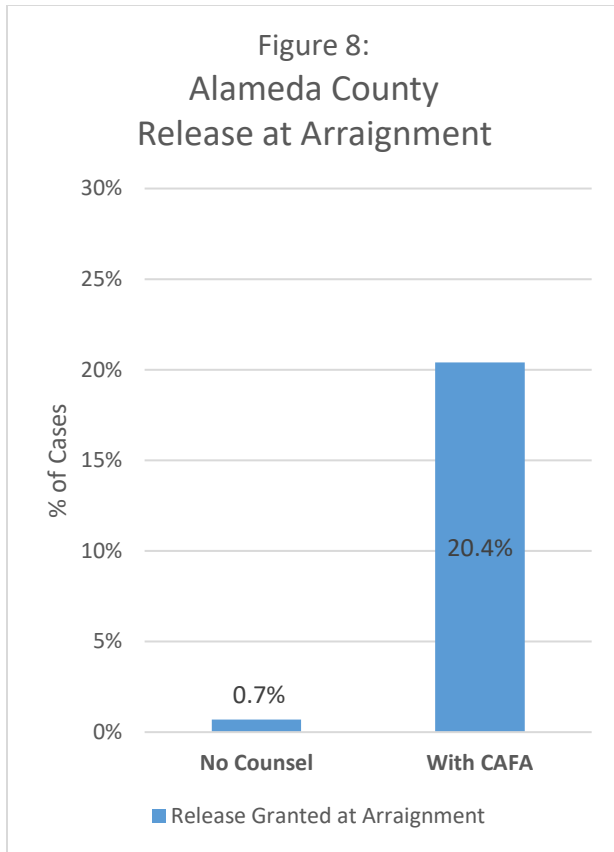
### Alameda County

As of 2015, Alameda County, California<sup>152</sup> (which includes Oakland) was the only large county in the state (i.e., the only county with a population over 500,000) in which people appeared in court for the first time, with a judge and district attorney present but without defense counsel.<sup>153</sup> To take a snapshot of the impact of this gap in representation, the Alameda County Public Defender's Office (ACPDO) reviewed a year and a half of misdemeanor arraignments. They found that 1,138 people (or about 75 per month) were arraigned without a public defender, held in jail, and then released the next day, when a public defender entered the case.<sup>154</sup>

With funding from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance's Smart Defense Initiative and technical support from the National Legal Aid & Defender Association, the ACPDO embarked on a year-long pilot project to provide representation at arraignment for clients facing felony charges and track the effects of CAFA.<sup>155</sup> Comparing 1,801 felony cases from two Alameda County courtrooms over a six-month period where ACPDO provided representation at arraignment<sup>156</sup> with a control set of sample cases where the office did not provide CAFA, the representation provided during this project yielded substantial benefits for clients and for the criminal legal system:

- **The percentage of cases where accused individuals were released at arraignment increased from less than 1% to 20%.**<sup>157</sup> (See Figure 8.<sup>158</sup>)
- The percentage of cases where motions to release were filed **increased from 0% to 27%.**<sup>159</sup> (See Figure 9.<sup>160</sup>)
- Motions to reduce bail had an **83% success rate.**<sup>161</sup>
- The percentage of cases where accused individuals did not “waive time” (i.e., did not waive their right to a speedy trial<sup>162</sup>) **increased from 1% to 40%.**<sup>163</sup>
- CAFA provided more closure at arraignment, as the percentage of cases continued **decreased by 16%**, from 97% to 81%.<sup>164</sup>
- **The provision of CAFA avoided 2,974 days of incarceration.** At a cost of \$142 per day to incarcerate an individual in Alameda County, that translates to a **savings of \$422,308 in a single year.**<sup>165</sup>





## Cook County

In 2018, the Law Office of the Cook County Public Defender, located in Chicago and the surrounding suburbs of Cook County, Illinois, undertook an initiative to provide legal representation to clients not just at first appearance, but immediately after arrest at police stations. With an assist from the courts and despite resistance from police, the public defenders’ Police Station Representation Division (PSRD) has grown to serve over 110 clients per month as of June 2019.<sup>166</sup>

Before the PSRD was established, police station representation had been provided in Chicago since 1995 by First Defense Legal Aid (FDLA), a non-profit organization that operated a twenty-four-hour hotline for people in custody and provided representation at police stations, all free of cost.<sup>167</sup>

An invaluable asset in this effort was a general administrative order by the Chief Judge of the Cook County Circuit Court, which declared that when anyone in police custody requests counsel, and when the Public Defender or its designee is available to represent that person, the Public Defender is deemed appointed immediately.<sup>168</sup> This order came after more than a year of efforts by private attorneys urging the Chief Judge to address the county’s long history of police mistreatment of persons in custody.<sup>169</sup>

Equipped with the Chief Judge’s order, the Law Office of the Cook County Public Defender established the PSRD In April 2018.<sup>170</sup> When the public defenders first started their police station representation, their work overlapped with First Defense Legal Aid’s efforts; now, FDLA has shifted out of that role and into referring clients to the PSRD and providing legal educational outreach to Chicago communities.<sup>171</sup> The PSRD is now

staffed twenty-four hours a day, seven days a week by a core of nine attorneys who work in shifts, with two attorneys per shift.<sup>172</sup> From the foundation of the PSRD in April 2018 through the end of May 2019, the PSRD completed 890 visits to police stations, with visits increasing in frequency in the last three months of that period: the PSRD started with about 50 to 70 site visits per month, and by June 2019 had expanded their efforts to about 110 per month.<sup>173</sup>

The PSRD has provided representation at police stations primarily on the authority of the Chief Judge's order, without buy-in—and despite resistance—from the Chicago Police Department (CPD). When presented with the Chief Judge's order, CPD officers have questioned the validity of the order, have required public defense attorneys to produce their drivers' licenses before having access to their client, and have produced questionable affidavits "signed" by the client saying that the client does not want an attorney.<sup>174</sup> Notably, however, police in the Chicago suburbs within Cook County have been much more cooperative.

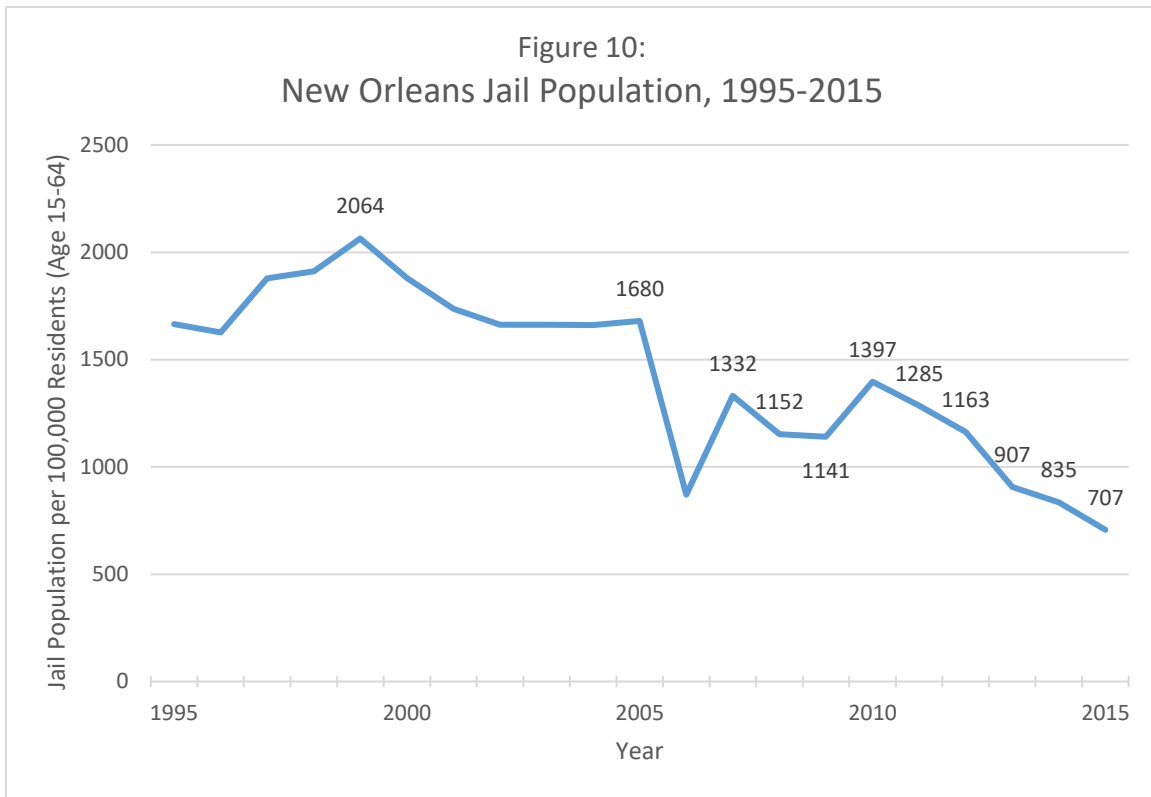
## New Orleans

The Orleans Public Defenders (OPD) in New Orleans, Louisiana<sup>175</sup> was established in 2007 as the city recovered from the devastation of Hurricane Katrina. From the beginning, OPD attorneys provided CAFA for all clients.<sup>176</sup> Although the fact that the introduction of CAFA coincided with the establishment of a public defender office for New Orleans makes it especially difficult to distinguish the effects of one development from the other, we can see that OPD's work has substantially reduced jail populations. Additional efforts by the OPD through support from the MacArthur Foundation have bolstered the office's capacity for holistic defense and additional improvements in client outcomes.

Jail populations declined dramatically upon the arrival of OPD into the New Orleans criminal legal system in 2007. Figure 10 shows New Orleans's jail population per 100,000 residents (age 15-64) for ten years before and after Hurricane Katrina devastated New Orleans and the Gulf Coast in August 2005.<sup>177</sup> From 2003 to 2005, the city's jail population stayed nearly constant at just above 1,660 per 100,000 residents.<sup>178</sup> After a sharp decline in the immediate aftermath of Katrina in 2006, that figure was down from 1,663 in 2005 to 1,332 in 2007.<sup>179</sup> **In the first two full years of OPD's services in 2008 and 2009, the jail population per 100,000 residents dropped to 1,152 then 1,141, respectively.**<sup>180</sup> The 2009 level represents a **14% drop** from when the OPD was established two years prior. Note that because the measure is jail population *per 100,000 residents* of New Orleans, the changes described here cannot be attributed primarily to the decline in the city's overall population resulting from Hurricane Katrina evacuations.

In 2010, the jail population spiked to 1,397 per 100,000 residents<sup>181</sup> because of an unusual practice adopted by the local sheriff and the state Department of Corrections. Between 2008 and 2010, the population of the city's jail, Orleans Parish Prison (OPP), ballooned as the Department of Corrections began using nearly half the facility's beds for people serving state prison terms.<sup>182</sup> That group's population at OPP grew from near zero in 2008 to over 1,000 by 2010.<sup>183</sup>

By 2015, the jail incarceration rate fell to 707 per 100,000 residents,<sup>184</sup> representing a 47% drop from when the OPD was established in 2007. In that same period, the pretrial jail population fell from 1,010 per 100,000 to 459 per 100,000,<sup>185</sup> a **55% drop**. Although we cannot separate the establishment of OPD from the implementation of CAFA for purposes of assigning a cause of these reductions, evidence from other jurisdictions discussed throughout this paper suggests that CAFA played a significant role in these positive outcomes. Indeed, local practitioners report that the increased provision of counsel at first appearance for



the accused in New Orleans has increased the rate at which people are released on their own recognizance at first appearance proceedings.<sup>186</sup>

Through the support of the MacArthur Foundation Safety and Justice Challenge, OPD has taken steps to expand their services in the model of holistic defense. In a holistic defense practice, public defenders address their clients’ needs both directly pertaining to the criminal case at hand as well as civil legal needs that are indirectly related to the case, including physical and mental health, family matters, housing, employment, and immigration. Starting in 2015, OPD has been a recipient of funding through the Safety and Justice Challenge, which engages with criminal legal system stakeholders in selected sites to lower jail populations and reduce racial and ethnic disparities in the criminal legal system. OPD used \$180,000 of funding from their MacArthur Foundation grant to fund two additional attorneys to focus on persuading magistrates to reconsider initial bail settings.<sup>187</sup> As of 2018, **the percentage of accused individuals who receive reconsideration for lower bail has increased from 24% to 34%.**<sup>188</sup>

### Philadelphia

In Philadelphia, Pennsylvania,<sup>189</sup> public defenders have been active for years in providing counsel at first appearance proceedings, which in Pennsylvania are called “preliminary arraignments.” The Defender Association of Philadelphia has staffed preliminary arraignments with a combination of attorneys and “legal interns,” i.e., newly barred attorneys and law school graduates waiting on bar exam results. The Defender Association’s community intake practice aims to provide representation at all preliminary arraignment hearings to secure pretrial release. Ideally, the public defender walks in with the client and walks out with the client.

Defense counsel is provided at 100% of preliminary arraignments in Philadelphia, although a defender has an opportunity to confer with their client and gather information before the hearing in just 2% to 3% of cases.<sup>190</sup> This disparity is due to the courts' use of closed-circuit television for preliminary arraignments. In this videoconferencing arrangement, the judge, prosecutor, and defender are together at the downtown Criminal Justice Center, and the accused person is located remotely at one of seven or eight police stations or detective divisions around the city. A phone line is provided for communications between defenders and their clients, although the privacy of this consultation phone has been questioned. Through funding from the MacArthur Safety and Justice Challenge, the Defender Association of Philadelphia launched a pilot program in 2017 to place an attorney at police headquarters to meet with accused individuals prior to their first appearance hearings. With significant work required to launch the pilot program, this advocacy at police headquarters reached just 2% to 3% of clients as of early 2018.<sup>191</sup>

In the broader context of indigent defense in Pennsylvania, Philadelphia is a rare jurisdiction by virtue of providing counsel at first appearance. Most other county-funded public defender offices, including those with full- and part-time staffing, do not provide counsel at preliminary arraignments. Pennsylvania has no statewide indigent defense system.

The snapshots of CAFA implementation in Alameda County, Cook County, New Orleans, and Philadelphia provides additional examples of how CAFA can work in a broad variety of jurisdictions. The successes and challenges that these different sites have experienced can inform other parts of the country interested in adopting CAFA, and our focus now shifts to what measures need to be taken to ensure best outcomes in a CAFA program.

## Keys to Successful CAFA Implementation

For defense counsel to do their job ethically and effectively, certain structural and procedural features are necessary for success. Among these essential components are: access to clients before the hearing, time to prepare for the hearing, fair discovery, and privacy in attorney-client communications, particularly when first appearance proceedings are conducted via videoconference and the defender and their client are in separate locations.

Note that these keys to implementation of counsel at first appearance are in line with recommended practices for quality indigent defense representation more generally.<sup>192</sup> Every indigent defense system should already provide and protect these core components of representation. Therefore these elements should not be misconstrued as obstacles to implementation or excuses for why a given jurisdiction cannot ensure counsel at first appearance.

### Access to Clients

Prior to the first appearance proceeding, defenders need to be able to speak privately with their clients. This access is essential wherever the client is located; however, the issue of access to clients demands more attention when the client is in jail or otherwise detained, given the additional barriers to private communication that this scenario brings.

Talking with the client before the hearing is essential to effective representation, as this exchange of information is necessary to learn and confirm the facts of the case, discuss the client's goals and expectations, review first appearance and pretrial release strategy, and help the client understand the court proceedings.<sup>193</sup> Without adequate time to confer with their clients before the initial hearing, defense counsel is less informed and prepared than they need to be, and their clients may have little idea what to expect in the hearing. Because attorney-client communications are essential to quality representation, unnecessary restrictions on access to clients in jail can be detrimental to effective implementation of a CAFA program.

Videoconferencing<sup>194</sup> as a medium for attorney-client communications in a courtroom setting gives rise to several additional problems, as it can diminish the client's ability to effectively participate in their own defense, jeopardize the ability to communicate with counsel clearly,<sup>195</sup> and threaten the confidentiality of attorney-client communications.<sup>196</sup>

### Time to Prepare

Like any attorneys, indigent defense counsel need adequate time to prepare their case before a hearing. This includes time to confer with the client, interview witnesses, and gather and analyze evidence.<sup>197</sup>

Unfortunately, many defenders who are representing a client in a pretrial proceeding do not have sufficient time to prepare their case. The situation of defenders stands in stark contrast to that of prosecutors, who typically have much more time and resources to build their case. The disparity between prosecutors' time and defenders' time to prepare is an obstacle to effective implementation of pretrial representation.<sup>198</sup>

## Access to Case Information

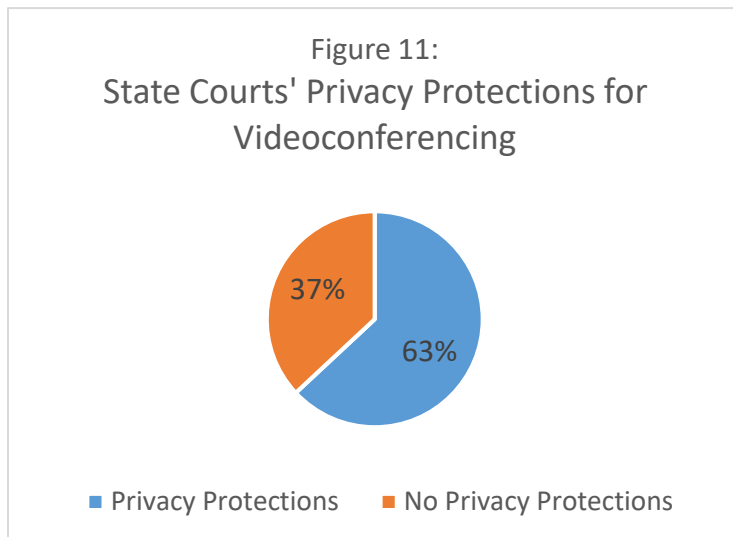
In order to effectively develop a case strategy and represent their clients, indigent defense attorneys need to ascertain the facts of the case and understand the evidence that supports or harms their client's position. Thus defense counsel's access to charging documents and any other information that the prosecution or court will use in determining release is critical to implementation of any CAFA program.

In particular, police reports are a critical element, as these reports can help defense counsel identify prosecution witnesses, theories of the case, deficiencies in probable cause, and other factors that can influence release decisions. Defense counsel's expertise is essential to making the most effective use of the information in a police report: a defense attorney can identify problems with a police report, such as a procedural default that will allow for a successful suppression motion, or be able to tell that a prosecutor will likely dismiss the case upon closer examination of the police report.<sup>199</sup> Without the trained eye of a defense attorney, the accused on their own may miss crucial information or strategic opportunities to secure release or position the case for optimal outcomes.

## In-Person Representation

Since the advent of digital technology, many jurisdictions have experimented with using videoconferencing, especially for arraignment and bail hearings.<sup>200</sup> Typically, the judge and attorneys will videoconference with the accused, who remains in the jail. The technology is meant to cut down on the time and cost of transporting people to and from the court and enhance the safety of people in the courtroom. Some studies have questioned the cost-savings justification on the basis that videoconferencing may increase bail amounts and the number of people detained pretrial, at overall greater fiscal cost.<sup>201</sup> In general, video and audio communication have been shown to make decisionmakers less sympathetic, as compared to in-person interactions.<sup>202</sup> Furthermore, videoconferencing can alienate the accused from the criminal legal system.<sup>203</sup>

Videoconferencing also raises constitutional concerns, including the accused's right to effective assistance of counsel.<sup>204</sup> In order to fulfill the defense attorney's duties to their client, described above, the attorney and client must be able to communicate with each other, clearly and privately.<sup>205</sup> A video feed in open court provides no mechanism for attorneys and clients to speak to each other alone.<sup>206</sup> A 2013 analysis of survey data from the National Center for State Courts found that **over a third of courts that used videoconferencing (37%) did not protect the privacy of the communications between attorneys and clients.**<sup>207</sup> Figure 11 illustrates this finding. Over a third of courts also reported technical failures of the videoconferencing systems that may have made their video or audio less clear.<sup>208</sup>



## A Way Forward for Pretrial Reform

As the pretrial stage of criminal proceedings gains more attention in reform efforts, indigent defense providers can and should take a leadership role in advocating for the accused to have access to counsel at their first appearance. Not only does the focus on pretrial justice present an opportunity for meaningful change, but implementation of counsel at first appearance is warranted to fulfill constitutional mandates. Furthermore, representation at first appearance has several positive effects for clients and the legal system more broadly: lower jail populations, reduced recidivism, reduced bail amounts, reduced instability in the lives of those who have been accused of crimes and are presumed innocent, increased client satisfaction, and strengthened procedural justice, among others.

In jurisdictions that do not yet provide accused individuals with pretrial access to an attorney, state and local advocates and policymakers should push for the creation, funding, and implementation of counsel at first appearance programs. Funding is critical, as these programs require up-front investment to get started, primarily to pay for additional attorney hours and any necessary additional administrative support for the attorneys providing pretrial representation. As discussed herein, the financial and procedural benefits to the criminal legal system validate these initial costs.

In addition to facilitating implementation through budgets, policymakers should consider enacting statutes and court rules requiring the provision of counsel at first appearance, and providing defense counsel time and space to consult with clients prior to first appearance, to increase the likelihood of successful implementation.<sup>209</sup> Waiting for the courts to impose such a mandate through litigation is an uncertain strategy that deprives state and local policymakers of agency in shaping the future of criminal legal systems. Short of changing the law, jurisdictions can also take less cumbersome steps to facilitate counsel at first appearance: e.g., pushing the first appearance docket to begin later in the day can allow defense attorneys more time to meet with their clients before those proceedings start.

The Supreme Court has yet to renew its participation in this battle. Lower courts around the country are recognizing that the Sixth Amendment right to counsel and due process under the Fourteenth Amendment require that counsel be made available at bail hearings, arraignments, and any other form of a first appearance proceeding where the liberty of the accused is at stake, but it is unclear if or when litigation will produce a broad court-produced mandate. State and local policymakers should take a cue from these decisions and, in consultation with the local indigent defense community, pass laws and budgets that actively support counsel at first appearance.

As more states and localities adopt counsel at first appearance programs, we expect that jails will become less burdened with enormous pretrial populations and legal systems will see long-term benefits. Importantly, we also expect that accused individuals and the communities they come from will perceive legal systems as fairer and more trustworthy.

## Notes

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<sup>1</sup> A first appearance can have many formal and informal names depending on the jurisdiction, including “bail hearing,” “arraignment,” and “magistration.” The judicial officer involved may hold various titles, including Judge or Magistrate. Some jurisdictions have pretrial release determinations and/or setting of bail performed not by a judicial officer but by a jail official or a similar authority; the discussions in this paper also applies to those jurisdictions. Although first appearances can have differing procedural postures, this paper will consider all types of first appearance proceedings together for the purpose of representation by counsel. Furthermore, we consider remote, virtual representation by videoconference (e.g., with the defense attorney in the courtroom and the client appearing by videoconference from an off-site jail) as a provision of counsel at first appearance, although that scenario raises obstacles to quality of representation, particularly with privacy of attorney-client communications.

<sup>2</sup> See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (Principle 3: “Clients are screened for eligibility, and defense counsel is assigned and notified of the appointment, as soon as feasible after clients’ arrest, detention, or request for counsel”); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-6.1 (3d ed. 1992) (stating that counsel should be “provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first”).

<sup>3</sup> See NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 3.1 (2006), <http://www.nlada.org/defender-standards/performance-guidelines> (noting that “[t]he attorney should preserve the client’s rights at the initial appearance on the charges”).

<sup>4</sup> SIXTH AMENDMENT CENTER & PRETRIAL JUSTICE INST., EARLY APPOINTMENT OF COUNSEL: THE LAW, IMPLEMENTATION, AND BENEFITS (2014), [http://sixthamendment.org/6ac/6ACPJI\\_earlyappointmentofcounsel\\_032014.pdf](http://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> See THE CONSTITUTION PROJECT NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 197 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> (stating that counsel should be provided “as soon as feasible after accused persons are arrested, detained, or request counsel”). See also THE CONSTITUTION PROJECT NAT’L RIGHT TO COUNSEL COMM., DON’T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 3 (2015), [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf) [hereinafter DON’T I NEED A LAWYER?] (recommending that “[j]urisdictions should appoint counsel in a timely manner prior to initial bail and release hearings”).

<sup>7</sup> John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 840-41 (2017), <http://www.floridalawreview.com/wp-content/uploads/5-Gross-1.pdf>.

<sup>8</sup> *Id.* at 841. The thirty-two states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See *id.* at 841-48.

<sup>9</sup> See, e.g., N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., STATEWIDE PLAN FOR IMPLEMENTING COUNSEL AT ARRAIGNMENT 8 (2017), <https://ils.ny.gov/files/Statewide%20Expansion/Statewide%20Expansion%20Counsel%20at%20Arraignment%20Plan%20120117.pdf> (describing challenges with provision of CAFA).

<sup>10</sup> There are many systems for provision of state-funded defense representation to indigent clients, including institutional public defender offices, contract counsel systems, and assigned counsel programs. For brevity, this paper will use the general terms “indigent defense” and “indigent defense providers/attorneys” to refer to these services and service providers respectively, with the intent of being as inclusive as possible of those who represent indigent clients.

<sup>11</sup> 554 U.S. 191 (2008).

<sup>12</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.



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- <sup>13</sup> *Id.* That figure is 65% if the count excludes the 115,000 people held by non-local authorities in rented space at local jails. *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> JOSHUA AIKEN, PRISON POLICY INITIATIVE, ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH (2017), <https://www.prisonpolicy.org/reports/jailovertime.html>.
- <sup>17</sup> Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POLICY INITIATIVE (Aug. 14, 2015), <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter>.
- <sup>18</sup> AIKEN, *supra* note 16.
- <sup>19</sup> *Id.*
- <sup>20</sup> See ZHEN ZENG, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 251210, JAIL INMATES IN 2016 at 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.
- <sup>21</sup> AIKEN, *supra* note 16.
- <sup>22</sup> Wagner, *supra* note 17.
- <sup>23</sup> AIKEN, *supra* note 16.
- <sup>24</sup> *Id.*
- <sup>25</sup> See CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013), [https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf) (finding that pretrial detention is correlated with higher likelihood of failure to appear, new criminal activity, and post-disposition recidivism).
- <sup>26</sup> AIKEN, *supra* note 16; LAURA & JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH (2013), [https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief_FNL.pdf); MEGAN STEVENSON, DISTORTION OF JUSTICE: HOW THE INABILITY TO PAY BAIL AFFECTS CASE OUTCOMES (2017), <https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Stevenson%20Job%20Market%20Paper%20Jan%202016.pdf>.
- <sup>27</sup> See, e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417 (2017) (analyzing private and social costs of pretrial detention); *id.* at 1425 (discussing externalities of pretrial detention); ELIZABETH SWAVOLA, KRISTI RILEY & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf> (discussing the impact that incarceration of women has on families and communities).
- <sup>28</sup> See AMERICAN COUNCIL OF CHIEF DEFENDERS, POLICY STATEMENT ON FAIR AND EFFECTIVE PRETRIAL JUSTICE PRACTICES 5-6 (2011), [http://nlada.net/sites/default/files/na\\_accdpretrialstmt\\_06042011.pdf](http://nlada.net/sites/default/files/na_accdpretrialstmt_06042011.pdf).
- <sup>29</sup> See, e.g., Rebecca Rosenberg, *Inmate Takes Plea Deal After Nearly 7 Years in Rikers Without Trial*, N.Y. POST, Sept. 10, 2015, <https://nypost.com/2015/09/10/inmate-takes-plea-deal-after-nearly-7-years-in-rikers-without-trial> (describing the case of an accused individual who pled guilty to a manslaughter charge and was sentenced to thirteen years in prison after he had been jailed pretrial for seven years).
- <sup>30</sup> See, e.g., Mary E. Buser, *How Rikers Drove My Innocent Patient to Plead Guilty*, POLITICO MAGAZINE, Oct. 6, 2015, <https://www.politico.com/magazine/story/2015/10/rikers-island-plea-bargains-213223> (reporting on an accused individual's decision-making process in deciding to plead guilty in the face of lengthy pretrial detention despite maintaining his innocence).
- <sup>31</sup> *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org/database/results>.
- <sup>32</sup> See U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 133 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.
- <sup>33</sup> Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).
- <sup>34</sup> *Id.* at 776.
- <sup>35</sup> *Id.* (finding in this study that "representation at bail hearings can reduce the likelihood of detention, and thus of conviction").
- <sup>36</sup> PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION (2017), <https://www.prisonpolicy.org/reports/money.html>.

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- <sup>37</sup> CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION* 21 (2015), <https://www.vera.org/downloads/publications/price-of-jails.pdf>.
- <sup>38</sup> *See id.* at 24 (finding that the only way to safely reduce the total and marginal costs of local jails (i.e., both the total cost and the cost savings of increasing/decreasing jail populations) is to limit jail populations).
- <sup>39</sup> Andrew L.B. Davies, Reveka V. Shteynberg, Kirstin A. Morgan & Alissa Pollitz Worden, *Guaranteeing Representation at First Court Appearances May Be Better for Defendants, and Cheaper for Local Governments*, LONDON SCH. OF ECON. U.S. CENTRE: U.S. POLITICS & POLICY (Aug. 28, 2018), <http://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments> [hereinafter *NY ILS Summary*]; *see also* Alissa Pollitz Worden, Kirstin A. Morgan, Reveka V. Shteynberg & Andrew L.B. Davies, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUST. POL'Y REV. 710 (2018), <http://journals.sagepub.com/doi/abs/10.1177/0887403417726133?journalCode=cjpa&> [hereinafter *NY ILS Report*].
- <sup>40</sup> Bryan L. Sykes, Eliza Solowiej & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013*, 5 U.C. IRVINE L. REV. 813, 815 (2015), <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1219&context=ucilr>. “Units” are defined as “wings, blocks, stories, or PODS” of a detention facility. *Id.* at 831.
- <sup>41</sup> ROD V. HISSONG & GERALD WHEELER, *THE ROLE OF PRIVATE LEGAL REPRESENTATION AND THE IMPLICIT EFFECT OF DEFENDANTS’ DEMOGRAPHIC CHARACTERISTICS IN SETTING BAIL AND OBTAINING PRETRIAL RELEASE* 15 (2017), <https://doi.org/10.1177/0887403417714560>.
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.* at 4 (“It is well established that pretrial release is a function of race, ethnicity, and gender. Multiple studies have found that numerous extralegal factors are considered in determining the bail amount . . . and who ultimately makes bail.”).
- <sup>44</sup> *Id.* at 16-17.
- <sup>45</sup> *Id.* at 20.
- <sup>46</sup> *See id.* (noting that “[m]any defendants who do not retain private counsel meet their attorney immediately before their first appearance, in some instances more than 3 days after . . . the probably cause hearing”); *see also* MAREA BEEMAN, NAT’L LEGAL AID & DEFENDER ASS’N, *NATIONAL INDICATORS OF QUALITY INDIGENT DEFENSE: A PROJECT OF THE NLADA DEFENDER RESEARCH CONSORTIUM* 15 (2018), <http://www.nlada.org/tools-and-technical-assistance/defender-resources/research> (detailing indicators of quality representation by public defenders at, *inter alia*, the pretrial phase of the case).
- <sup>47</sup> U.S. CONST. amend. VI.
- <sup>48</sup> *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).
- <sup>49</sup> *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).
- <sup>50</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
- <sup>51</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).
- <sup>52</sup> *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 195 (2008); *see also* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 346 (2011) [hereinafter Colbert, *Prosecution Without Representation*] (providing an overview of Rothgery’s prosecution).
- <sup>53</sup> Colbert, *supra* note 52, at 346.
- <sup>54</sup> *Id.* at 338.
- <sup>55</sup> The magistrate judge gave Rothgery the option of waiting to have his bail set until an attorney could be assigned, but required that Rothgery remain in jail until the assignment. Rothgery decided to proceed without counsel rather than stay in jail. *Id.* at 338-39.
- <sup>56</sup> *Rothgery*, 554 U.S. at 212.
- <sup>57</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).
- <sup>58</sup> *Rothgery*, 554 U.S. at 211.
- <sup>59</sup> *Id.* at 212 (emphasis added).
- <sup>60</sup> *Id.* at 212 n.16 (citations omitted) (emphasis added). For further discussion of the Supreme Court’s “critical stage” analysis before *Rothgery*, *see* DON’T I NEED A LAWYER?, *supra* note 6, at 13.

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<sup>61</sup> See generally Gross, *supra* note 7, at 841-50 (summarizing various states' standards for provision of counsel at first appearance).

<sup>62</sup> State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016).

<sup>63</sup> DeWolfe v. Richmond, 76 A.3d 962, 973 (Md. 2012). See also DeWolfe v. Richmond, 76 A.3d 1019, 1026 (Md. 2013) (holding that an indigent accused has a right to counsel at first appearance under the Due Process provision of Article 24 of the Maryland Declaration of Rights, and explicitly not deciding whether such a right is mandated by the Sixth or Fourteenth Amendments to the U.S. Constitution or under Article 21 of the Maryland Declaration of Rights (which is comparable to the Sixth Amendment to the U.S. Constitution)).

<sup>64</sup> An extended state-by-state analysis of statutes, case law, and court rules on CAFA is outside the scope of this paper. For a summary of state laws providing for appointment of counsel "before, at, or just after initial appearance," see Rothgery, 554 U.S. at 204. For a categorical summary of state laws on CAFA, see Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1724 (2002), [https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1290&context=fac\\_pubs](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1290&context=fac_pubs) [hereinafter Colbert, Paternoster & Bushway, *Do Attorneys Really Matter?*]. For a discussion of what states require the presence of counsel at first appearance proceedings, see Gross, *supra* note 7, at 841. For discussion of adherence to state laws on CAFA and survey results on actual compliance practices, see Colbert, *Prosecution Without Representation*, *supra* note 52, at 385-86.

<sup>65</sup> See White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Gonzalez v. Comm'r of Corr., 68 A.3d 624, 635-36 (Conn. 2013); People v. Slaten, 300 N.E.2d 46, 49 (Ill. App. Ct. 1973); Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010).

<sup>66</sup> See Tucker v. State, 394 P.3d 54, 63 (Idaho 2017); Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 902 (Mass. 2004).

<sup>67</sup> See Coleman v. Alabama, 399 U.S. 1, 7 (1970); Ditch v. Grace, 479 F.3d 249, 253 (3d Cir.), *cert. denied*, 552 U.S. 949 (2007); Tucker, 394 P.3d at 63. *But see* Farrow v. Lipetzky, 637 F. App'x 986, 988 (9th Cir.), *cert. denied*, 137 S. Ct. 82, 196 L. Ed. 2d 36 (2016) (holding that a pretrial hearing that constituted the initial appearance of the accused was not a critical stage that required the presence of counsel); Hopper v. State, 957 N.E.2d 613, 616-17 (Ind. 2011) (holding that an initial hearing is not a critical stage under Indiana law that requires the presence of counsel).

<sup>68</sup> See Massiah v. United States, 377 U.S. 201 (1964).

<sup>69</sup> See Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

<sup>70</sup> See generally Heaton, Mayson & Stevenson, *supra* note 33, at 774-75 (providing a brief overview of Supreme Court jurisprudence on "critical stage" determinations).

<sup>71</sup> 399 U.S. 1, 9-10 (1970).

<sup>72</sup> *Id.* (internal quotations and citations omitted).

<sup>73</sup> Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 902 (Mass. 2004) (noting that "[b]ecause a defendant's liberty, a fundamental right, is at stake at a bail hearing, the principles of procedural due process in art. 12 of the Massachusetts Declaration of Rights are implicated. They include the right to be heard, which necessarily includes the right to be heard by counsel.>").

<sup>74</sup> Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010). The Court noted that arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the "critical stage" label . . . it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents.

*Id.* (citations omitted).

<sup>75</sup> Caliste v. Cantrell, No. 17-6197, slip op. at 20 (E.D. La. Aug. 6, 2018), [https://www.macarthurjustice.org/wp-content/uploads/2018/08/Caliste-v-Cantrell\\_Decision.pdf](https://www.macarthurjustice.org/wp-content/uploads/2018/08/Caliste-v-Cantrell_Decision.pdf), *aff'd on other grounds*, No. 18-30954, slip op. (5th Cir. Aug. 29, 2019), <http://www.ca5.uscourts.gov/opinions/pub/18/18-30954-CV0.pdf>.

<sup>76</sup> 637 F. App'x 986, 988 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 82, 196 L. Ed. 2d 36 (2016). Although Farrow bodes poorly for the right to counsel at first appearance, the weight and precedential effect of the decision is limited. The

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Ninth Circuit only has precedential authority over federal law arguments in federal district courts in Alaska, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

<sup>77</sup> *Id.* at 987.

<sup>78</sup> The Court based its ruling on a finding that: the first appearance proceeding in Contra Costa County, California at issue “did not test the merits of the accused’s case”; “skilled counsel was not necessary to help the accused understand the proceedings”; and “there was no risk that an uncounseled defendant would permanently forfeit significant rights.” *Id.* at 988 (internal quotation marks and brackets omitted).

<sup>79</sup> 420 U.S. 103, 122 (1975).

<sup>80</sup> *Id.* at 123.

<sup>81</sup> *Id.*

<sup>82</sup> *E.g.*, Heaton, Mayson & Stevenson, *supra* note 33, at 776 (discussing research that undermines the Court’s reasoning in *Pugh*).

<sup>83</sup> 963 F.2d 1467, 1473 (11th Cir. 1992).

<sup>84</sup> *Id.* (footnotes and citations omitted).

<sup>85</sup> See Alex Bunin, *The Constitutional Right to Counsel at Bail Hearings*, CRIM. JUST., Spring 2016, at 23, 26, (describing difficulties with litigation on counsel at first appearance).

<sup>86</sup> See *Mickens v. Taylor*, 535 U.S. 162 (2002); *but see United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

<sup>87</sup> See *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012).

<sup>88</sup> See N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., IMPLEMENTING THE *HURRELL-HARRING V. THE STATE OF NEW YORK SETTLEMENT*: 2017 UPDATE 61 (2017), <https://www.ils.ny.gov/files/Hurrell-Harring/2017%20Update%20Quality%20and%20Counsel%20at%20Arrestment%20Plans%20FINAL%20103017.pdf> (describing the benefits of recently implemented counsel at first appearance programs in five counties in Upstate New York).

<sup>89</sup> See, *e.g.*, NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 3, at Guideline 2.1 (stating that defense counsel “has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client”); *id.* Guideline 2.3 (stating that “[c]ounsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release”).

<sup>90</sup> See *id.* Guideline 2.3(b).

<sup>91</sup> See *id.* Guideline 4.1(a).

<sup>92</sup> See *id.* Guideline 3.1.

<sup>93</sup> See *id.* Guideline 5.1.

<sup>94</sup> See SWAVOLA, RILEY & SUBRAMANIAN, *supra* note 27, at 7.

<sup>95</sup> See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 89, Guideline 2.2(b)(2).

<sup>96</sup> See *id.* Guideline 2.2(b).

<sup>97</sup> See *id.* Guideline 1.3(c).

<sup>98</sup> AIKEN, *supra* note 16.

<sup>99</sup> Maryland has required the Office of the State Public Defender to provide CAFA to indigent accused individuals only since 2013. See *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013).

<sup>100</sup> Colbert, Paternoster & Bushway, *Do Attorneys Really Matter?*, *supra* note 64.

<sup>101</sup> *Id.* at 1749.

<sup>102</sup> *Id.* at 1753.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1755.

<sup>105</sup> See *id.* at 1753-55.

<sup>106</sup> *Id.* at 1755.

<sup>107</sup> See *id.* at 1758-62.

<sup>108</sup> *Id.* at 1762.

<sup>109</sup> *Id.* at 1758-62.

<sup>110</sup> See, *e.g.*, *id.* at 1744-45; Yang, *supra* note 27, at 1421; Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009).

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<sup>111</sup> New York state law gives accused persons the right to representation by counsel at arraignment. N.Y. CRIM. PROC. LAW. ANN. § 180.10(3) (West 2007); *see also* Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010). In practice, however, surveys of city, town, and village court judges show that few people are actually represented by counsel. *See NY ILS Report, supra* note 39.

<sup>112</sup> 930 N.E.2d 217, 223 (N.Y. 2010) (overturning the intermediate appellate court’s granting of a motion to dismiss for failure to state a claim, and holding that the plaintiff counties could proceed in a class action to address their complaints systematically).

<sup>113</sup> Stipulation and Order of Settlement at 5, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014), <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf>.

<sup>114</sup> N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., *supra* note 88, at 61.

<sup>115</sup> *Id.* at 62.

<sup>116</sup> *Id.* at 76-77.

<sup>117</sup> *HH Counsel at First Appearance*, NYS OFFICE OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/hh-counsel-first-appearance-0>.

<sup>118</sup> *NY ILS Report, supra* note 39; *see also NY ILS Summary, supra* note 39.

<sup>119</sup> *See NY ILS Report, supra* note 39.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> The sum of cases with dismissal or disposition at arraignment, release at arraignment, and bail set and made immediately at the court. *See NY ILS Summary, supra* note 39.

<sup>123</sup> *NY ILS Report, supra* note 39.

<sup>124</sup> *NY ILS Summary, supra* note 39.

<sup>125</sup> Michigan law provides that a person who has been accused of a crime is to be informed at arraignment about the right to counsel “at all subsequent court proceedings.” MICH. CT. R. CRIM. P. 6.104(E)(3).

<sup>126</sup> JONAH A. SIEGEL, SNAPSHOT OF INDIGENT DEFENSE REPRESENTATION IN MICHIGAN’S ADULT CRIMINAL COURTS: THE MIDC’S FIRST SURVEY OF LOCAL COURT SYSTEMS 1 (2016), <https://michiganidc.gov/wp-content/uploads/2015/04/MIDC-Court-Survey-Report-Feb-16.pdf>.

<sup>127</sup> *See* MICH. INDIGENT DEFENSE COMM’N, COUNSEL AT FIRST APPEARANCE AND OTHER CRITICAL STAGES: A GUIDE TO IMPLEMENTATION OF THE MINIMUM STANDARDS FOR DELIVERY SYSTEMS 7 (2017), <https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf> [hereinafter MIDC IMPLEMENTATION GUIDE].

<sup>128</sup> *Id.* at 7-8.

<sup>129</sup> *Id.* at 8.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 9.

<sup>135</sup> *Id.* at 9-10.

<sup>136</sup> *Id.* at 10.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Washington State, for example, has shaped its court rules to require CAFA and safeguard the rights of the accused. *See, e.g.*, WASH. SUPER. CT. CRIM. R. 3.1(b)(1) (“The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.”); WASH. S. CT. STANDARDS FOR INDIGENT DEFENSE 3.4, <https://opd.wa.gov/12-pd/128-officialstandards> (“Resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case.”).

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- <sup>142</sup> See MICH. INDIGENT DEFENSE COMM'N, THE HURON COUNTY DISTRICT COURT'S COUNSEL AT FIRST APPEARANCE PILOT PROGRAM (2017), <https://michiganidc.gov/wp-content/uploads/2015/04/Huron-County-Counsel-at-First-Appearance-Report.pdf> [hereinafter MIDC HURON COUNTY REPORT] (describing the functioning of and early results from Huron County's program); see also MIDC IMPLEMENTATION GUIDE, *supra* note 127, at 11.
- <sup>143</sup> MIDC HURON COUNTY REPORT, *supra* note 142, at 3.
- <sup>144</sup> *Id.* at 5.
- <sup>145</sup> *Id.* Under Michigan law, an interim bond is set by "the arresting officer or the direct supervisor of the arresting officer or department, or . . . the sheriff or a deputy in charge of the county jail" for misdemeanor cases "if a magistrate is not available or immediate trial cannot be had" after arrest. MICH. COMP. LAWS § 780.581(2) (2018).
- <sup>146</sup> MIDC HURON COUNTY REPORT, *supra* note 142, at 5-6. Note that the researchers conducting this study were not able to gather feedback from clients themselves. *Id.* at 6.
- <sup>147</sup> MIDC IMPLEMENTATION GUIDE, *supra* note 127, at 10.
- <sup>148</sup> MIDC HURON COUNTY REPORT, *supra* note 142, at 6.
- <sup>149</sup> *Id.* at 9.
- <sup>150</sup> *Id.*
- <sup>151</sup> MIDC IMPLEMENTATION GUIDE, *supra* note 127, at 10.
- <sup>152</sup> Under California law, a person who appears for arraignment without counsel will be informed of their right to counsel and will have counsel appointed if they cannot afford an attorney. CAL. PENAL CODE § 987 (West).
- <sup>153</sup> See DANIELLE SOTO & MARK LIPKIN, IMPACT JUSTICE, REPRESENTATION AT ARRAIGNMENT: THE IMPACT OF "SMART DEFENSE" ON DUE PROCESS AND JUSTICE IN ALAMEDA COUNTY 4 (2018), <https://impactjustice.org/wp-content/uploads/Smart-Defense-Report-2019.pdf>.
- <sup>154</sup> *Id.* at 37.
- <sup>155</sup> See NAT'L LEGAL AID & DEFENDER ASS'N, INNOVATIVE SOLUTIONS IN PUBLIC DEFENSE: ALAMEDA COUNTY, <http://www.nlada.org/sites/default/files/pictures/2019-09-17%20nlada-alameda.pdf>.
- <sup>156</sup> SOTO & LIPKIN, *supra* note 153, at 41.
- <sup>157</sup> *Id.* at 20.
- <sup>158</sup> *Id.* at 19-20.
- <sup>159</sup> *Id.* at 20.
- <sup>160</sup> *Id.* at 19-20.
- <sup>161</sup> *Id.* at 23. The data analyzed in this study did not allow for comparisons with bail motions before the CAFA pilot. *Id.*
- <sup>162</sup> In California, accused individuals in felony cases have a right to be brought to trial within 60 days of arraignment. CAL. PENAL CODE § 1382(a)(2) (West).
- <sup>163</sup> SOTO & LIPKIN, *supra* note 153, at 21.
- <sup>164</sup> *Id.* at 22-23.
- <sup>165</sup> *Id.* at 28-29.
- <sup>166</sup> Telephone Interview with Peter Parry, Deputy, Law Office of the Cook Cnty. Pub. Defender (June 14, 2019).
- <sup>167</sup> *About FDLA*, FIRST DEFENSE LEGAL AID, <https://www.first-defense.org/about>.
- <sup>168</sup> General Administrative Order No. 2017-01 (Cook Cnty. Ill. Cir. Ct. Mar. 14, 2017), <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2541/GENERAL-ADMINISTRATIVE-ORDER-NO-2017-01-APPOINTMENT-OF-THE-PUBLIC-DEFENDER-OR-DESIGNEE-FOR-PERSONS-l.aspx>.
- <sup>169</sup> Telephone Interview with Peter Parry, *supra* note 166; see generally Spencer Ackerman, *Inside Chicago's Legacy of Police Abuse: Violence 'As Routine as Traffic Lights,'* GUARDIAN (London), Mar. 3, 2015, <https://www.theguardian.com/us-news/2015/mar/03/chicago-police-violence-homan-square> (summarizing the recent history of violent misconduct by Chicago police).
- <sup>170</sup> Telephone Interview with Peter Parry, *supra* note 166.
- <sup>171</sup> *Id.*
- <sup>172</sup> *Id.*
- <sup>173</sup> *Id.*
- <sup>174</sup> *Id.*

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<sup>175</sup> Louisiana law does not require the presence of counsel at first appearance. The accused must be brought before a court within 72 hours of arrest “for the purpose of appointment of counsel,” and at that hearing the court can “determine or review a prior determination of the amount of bail.” LA. CODE CRIM. PROC. ANN. art. 230.1(A).

<sup>176</sup> Interview with Danny Engelberg, Chief of Trials, Orleans Pub. Defenders (June 3, 2019).

<sup>177</sup> Data retrieved from the Vera Institute of Justice’s Incarceration Trends database. *See Orleans Parish, LA*, VERA INSTITUTE OF JUSTICE, <http://trends.vera.org/rates/orleans-parish-la>. Note that the City of New Orleans is coterminous with Orleans Parish.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Katy Reckdahl, *Orleans Parish Prison Holds Almost as Many State Inmates as Local Prisoners*, NEW ORLEANS TIMES-PICAYUNE (Dec. 19, 2010, 5:03 PM), [https://www.nola.com/news/politics/article\\_4ece7450-26db-56ca-a303-ce09317fa567.html](https://www.nola.com/news/politics/article_4ece7450-26db-56ca-a303-ce09317fa567.html).

<sup>183</sup> *Id.*

<sup>184</sup> *Orleans Parish, LA*, *supra* note 177.

<sup>185</sup> *Id.*

<sup>186</sup> Interview with Danny Engelberg, *supra* note 176.

<sup>187</sup> Matt Sledge, *New Orleans Jail Population Cut in Half: Here’s How Trend Can Continue, Landrieu’s Office Says*, NEW ORLEANS ADVOCATE, Apr. 24, 2018, [https://web.archive.org/web/20180424181143/https://www.theadvocate.com/new\\_orleans/news/courts/article\\_0f3d3c3c-4755-11e8-b58d-5f5a2ece5825.html](https://web.archive.org/web/20180424181143/https://www.theadvocate.com/new_orleans/news/courts/article_0f3d3c3c-4755-11e8-b58d-5f5a2ece5825.html).

<sup>188</sup> *Id.*

<sup>189</sup> Pennsylvania law does not require counsel’s presence at all first appearances. Counsel is appointed “immediately after [the accused] are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases.” PA. R. CRIM. P. 122(C).

<sup>190</sup> Email from Mark Houldin, Policy Director, Defender Ass’n of Phila., to author (Aug. 22, 2018, 19:21 EDT) (on file with author).

<sup>191</sup> *Id.*

<sup>192</sup> For further discussion of elements and indicators of quality in indigent defense representation, *see* BEEMAN, *supra* note 46.

<sup>193</sup> *See* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 17 (1998) [hereinafter Colbert, *Thirty-Five Years After Gideon*] (noting that “[f]or the accused represented by counsel, the initial interview provides the first opportunity to inform the lawyer about essential facts for evaluating the state’s case. When this interview is conducted soon after arrest, the lawyer is most able to be a diligent defender and provide effective assistance.”). *See also* AMERICAN BAR ASS’N, *supra* note 2, at 2 (noting in commentary to Principle 4: “Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.”).

<sup>194</sup> Videoconferencing can be defined as a mode of interactive communication that transmits voice, video, and data between two or more parties such that the parties can see and communicate with one another through video monitors. *See, e.g.*, WIS. STAT. § 885.52(3). The process can involve a closed-circuit television feed, internet video chat applications, telephone service, or some combination thereof.

<sup>195</sup> *See* LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL PROCEEDINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 36 (2005), [http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport\\_080205.pdf](http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf).

<sup>196</sup> *See* Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT’L COM. L. & TECH. 24, 44-45 (2013), <https://media.neliti.com/media/publications/28827-EN-private-attorney-client-communications-and-the-effect-of-videoconferencing-in-th.pdf>; NCSC *Video Conferencing Survey*, NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-video-conferencing-survey>. For further discussion of privacy concerns in videoconferencing, *see* “Privacy in Communications,” *infra*.

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<sup>197</sup> See Colbert, *Thirty-Five Years After Gideon*, *supra* note 193, at 14-15. In describing the importance of counsel at the initial appearance, the author describes the role that a “well-prepared lawyer” can play in court:

The lawyer can corroborate important factors in the accused’s background, such as residence, community ties, and employment, which demonstrate that he is a good risk to return to court when required. . . . The attorney may arrange for family members or community leaders to be present in court to attest to the defendant’s reliability.

*Id.*

<sup>198</sup> See AMERICAN BAR ASS’N, *supra* note 2, at 3. In commentary to Principle 8, the ABA notes:

There should be parity of workload, salaries and other resources . . . between prosecution and public defense. . . . This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

*Id.*

<sup>199</sup> See John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1269 (1994).

<sup>200</sup> NCSC *Video Conferencing Survey*, *supra* note 196 .

<sup>201</sup> Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>.

<sup>202</sup> LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, *supra* note 195, at 18; *see also* John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 HUM. COMM. RES. 197, 201 (1995); Gene D. Fowler & Marilyn E. Wackerbarth, *Audio Teleconferencing Versus Face-to-Face Conferencing: A Synthesis of the Literature*, 44 W. J. SPEECH COMM. 236, 245 (1980).

<sup>203</sup> See Bellone, *supra* note 196, at 27; Michael A. Stodgill, *Permitting the Use of Videoconferencing in Civil Commitment Hearings*, 55 MD. L. REV. 1001, 1016 (1996).

<sup>204</sup> See LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, *supra* note 195, at 56 (“With its capacity to impede detained immigrants from effectively presenting their case, videoconferencing makes the need for counsel acute. Detained immigrants who are held in remote facilities are severely restricted from communicating with their attorneys.”); Bellone, *supra* note 196, at 27.

<sup>205</sup> See WIS. STATE PUB. DEFENDER’S QUALITY INDICATORS WORKING GRP., PROTECTING QUALITY REPRESENTATION IN VIDEO COURT: A PRACTICAL HANDBOOK FOR WISCONSIN DEFENSE ATTORNEYS 9 (2d ed. 2010). This videoconferencing handbook notes:

Quality representation includes those critical activities that an attorney does which are client-centered and optimizes the chances for the best possible result for the client. They include meeting and conferring with the client in-person, face-to-face, ensuring that the client’s rights to be physically present in court, to hear the proceedings, and to see everything in the court are preserved. The defense attorney must ensure effective and confidential communication with the client.

*Id.*

<sup>206</sup> See Bellone, *supra* note 196, at 27 (“Videoconferencing invariably detracts from the attorney/client relationship and the private communication between them.”).

<sup>207</sup> *Id.* at 44-45; NCSC *Video Conferencing Survey*, *supra* note 196 .

<sup>208</sup> Bellone, *supra* note 196, at 44-45.

<sup>209</sup> For examples of statutory language and court rules governing the provision of CAFA, *see* Gross, *supra* note 7, at 848-50 .



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