

Policy Brief

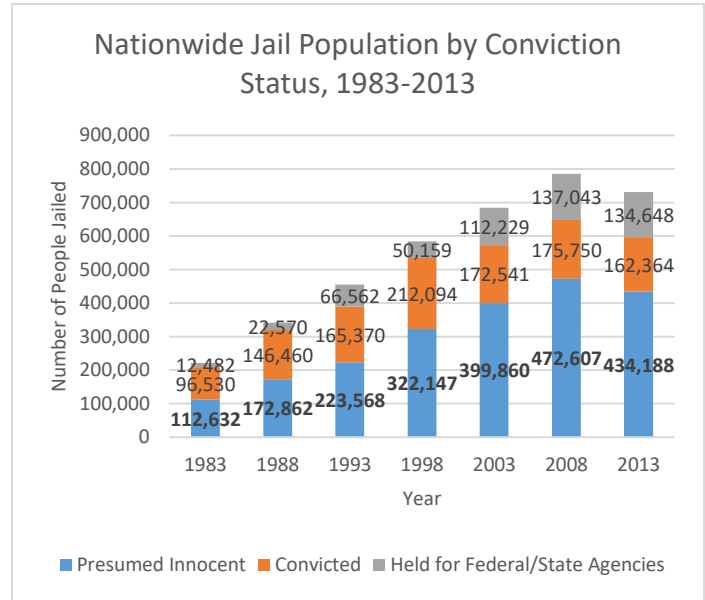
Access to Counsel at First Appearance

A Key Component of Pretrial Justice

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.

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.



Counsel at First Appearance Can Address Racial Equity Concerns in the Criminal Legal System

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 other 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. 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 and therefore humanizing people who are accused of crimes.

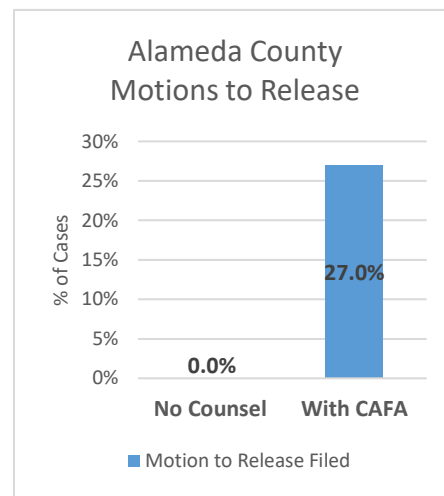
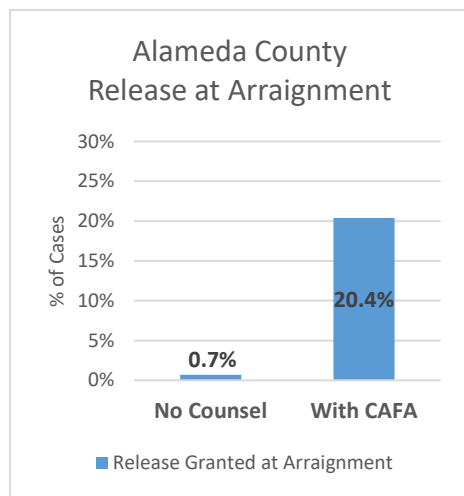
The case for jurisdictions across the country to provide counsel at first appearance is compelling on multiple levels. **This practice is supported by legal and constitutional standards and best practices along with successful track records in a variety of jurisdictions**, as reflected in the snapshots 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.



COVID-19 Highlights the Need for Proper Measures in Pretrial Access to Counsel

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