



November 15, 2021

Majority Leader Charniele Herring  
Pocahontas Building  
900 E. Main St,  
Richmond, Virginia 23219

Senator John Edwards, Vice-Chair  
Pocahontas Building  
P. O. Box 396  
Richmond, VA 23218

Dear Leader Herring and Senator Edwards:

The National Association of Criminal Defense Lawyers (NACDL) writes to you in your capacity as Chair and Vice-Chair of the Virginia State Crime Commission (VSCC) to express support for efforts to implement counsel at first appearance in Virginia statewide. NACDL has long been committed to supporting the development of effective public defense systems that assure all those who stand accused have access to the effective assistance of counsel guaranteed in our Constitution. This includes the early appointment of counsel for individuals accused of crime. We, therefore, urge you, as the leaders of the VSCC and the members of the Virginia General Assembly to strengthen the Commonwealth's public defense delivery system by implementing meaningful counsel at first appearance.

### **The Mission and Expertise of NACDL**

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers, ensuring justice and due process for persons accused of crimes or other misconduct, and promoting the proper and fair administration of justice. A professional bar association founded in 1958, NACDL's many thousands of direct members – and our 90 state, provincial and local affiliate organizations' tens of thousands of members – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Representing the thousands of criminal defense attorneys who know firsthand the inadequacies of the current criminal legal system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and model practices.

NACDL's representation of the defense perspective in the courts is unparalleled. Every year NACDL files 60-70 amicus briefs on a wide range of legal issues in state and federal appellate cases across the country. In the United States Supreme Court, NACDL is recognized as the most

cited and, according to the leading Supreme Court blog,<sup>1</sup> most effective amicus party before the Court. Also, a respected voice in the U.S. Judiciary Conference’s rulemaking process, NACDL regularly files comments on proposed rule changes relevant to criminal proceedings.

NACDL has long been active in the area of systemic public defense reform. As an organization, NACDL has authored reports related to public defense, including state-focused reports in Louisiana ([State of Crisis](#)), South Carolina ([Summary Injustice](#) and [Rush to Judgment](#)), and Florida ([3 Minute Justice](#)), a three-part examination of public defense in America ([Gideon at 50](#) Parts 1, 2 and 3), and an examination of the federal indigent defense system ([Federal Indigent Defense 2015: The Independence Imperative](#)); served as amicus on numerous filings related to the provision of public defense services in state and local courts including [Hurrell-Harring v. State of New York](#), [Tucker v. Idaho](#) and [Kuren v. Luzerne County \(PA\)](#); and filed public comments in support of rule changes to increase court-appointed counsel compensation (most recently in [Wisconsin](#) and [Tennessee](#)). NACDL hopes that its national perspective drawn from sixty years of advocacy, investigation, training, and public defense reform efforts will be helpful.

In 2012, NACDL’s Board of Directors adopted a [board resolution](#) urging all states and U.S. territories to adopt such constitutional provisions, laws or regulations necessary to guarantee that every accused person, irrespective of financial capacity to engage counsel, be guaranteed counsel at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered.

In recent years, NACDL has provided amicus support in litigation advocating for a right to counsel at first appearance and has championed the critical importance of counsel at initial appearances, particularly those at which liberty is at stake. Most notably, in 2008 in *Rothgery v. Gillespie County, Texas*,<sup>2</sup> NACDL assumed a leading role as amicus in support of Rothgery’s claim that he had been denied the assistance and assignment of counsel when bail was initially determined. The Supreme Court’s 8-1 ruling cited NACDL’s assertion that Rothgery’s right to counsel attached at his first appearance before a magistrate.<sup>3</sup>

NACDL has a long history of support for pre-trial release advocacy, including authoring New Jersey, Colorado, Wisconsin and Harris County, TX bail manuals and executing trainings for defense lawyers providing counsel at first appearance throughout the country.

In addition, NACDL has a long-term and on-going commitment to improving criminal defense in the Commonwealth of Virginia, including public defense services. After several delays, changes to Virginia’s discovery rules took effect July 1, 2020, marking the first such overhaul in decades and the culmination of a NACDL-led reform campaign. The amended rules provide far greater pretrial disclosure by prosecutors, including the inspection and review of police reports. Additionally, NACDL has been working alongside the Virginia Pretrial Justice Coalition since its inception in 2018 in successfully advancing pretrial data collection and transparency legislation ([HB 2110/SB 1391](#)) and the successful elimination of presumptions against bail ([SB 1266](#)).

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<sup>1</sup> Empirical SCOTUS, [The Most Effective Friends of the Court - Empirical SCOTUS](#) (May 2016).

<sup>2</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (“What makes a stage critical is what shows the need for counsel’s presence.”).

<sup>3</sup> *Id.*

NACDL has also been working with the coalition and other stakeholders on the legislation introduced to provide for the early appointment of counsel ([HB 2286](#)).

### **The Importance of Counsel at First Appearance (CAFA)**

Few rights are as fundamentally American as the accused's right to counsel when facing the awesome power of the government. Enshrined in the Sixth Amendment, this right is a critical bulwark against government overreach and abuse of power and ensures the protection of other constitutional rights. An effective defender can examine the criminal charge, conduct a critical review of the government's conduct, investigate the allegations, and identify and pursue defenses and mitigating evidence. These actions all help preserve the robust Fourth, Fifth, and Sixth Amendment rights of the greater community. For these reasons, it is imperative that all accused individuals have effective assistance of counsel at every stage of a criminal prosecution, including the first appearance before a judicial officer where their liberty is at stake.

In 1987, the Supreme Court asserted that, "[I]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."<sup>4</sup> However, today the promise that pretrial detention be a limited exception occurring only after a meaningful adversarial hearing lays broken in state and federal courts across the nation as pretrial populations frequently outstrip the number of persons held in those same jails serving sentences.<sup>5</sup> And the consequences of excessive pretrial detention reverberate throughout the legal proceedings and the community. Nationally, nearly 3 out of every 4 people in jail are individuals who are legally presumed to be innocent and awaiting trial. Some will spend days in jail, awaiting a determination of their bail; while others face weeks, months, or even years in pre-trial detention unable to purchase their freedom because they cannot afford to pay the bail that is set.

Pre-trial detention for even a few days can have life altering effects. Research shows that those released within the first 24 hours following their detention:

- Are more likely to have their case dismissed.
- Are more likely to be given an opportunity for a deferred adjudication.
- Are less likely to be sentenced to incarceration if convicted.
- Receive shorter jail and prison sentences than their peers with similar charges and criminal history.<sup>6</sup>

Being detained more than 24 hours can often mean losing employment and housing; disruption of medical care, mental health services, and medication; and serious damage to family and community relationships.

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<sup>4</sup> *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>5</sup> Incarceration Trend, Vera Institute for Justice: [Incarceration Rates - Incarceration Trends - Vera Institute of Justice](#).

<sup>6</sup> Public Policy Research Institute, Texas A&M University, [Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs](#) (October 2012), at 54-59. See also, Dobbie, W., Golden, J., and Yang, C., [The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges](#) (July 2016). See also, Alexander Holsinger, Christopher T. Lowenkamp, and Marie Van Nostrand, "Investigating the Impact of Pretrial detention on Sentencing Outcomes" (November 2013): [Investigating the Impact of Pretrial Detention on Sentencing Outcomes - IssueLab](#).

In addition to the impact on the person being detained and their family, even brief periods of pretrial detention have significant adverse impacts on critical factors that impact the legal system and the community. Data establishes that those released within the first 24 hours are:

- Less likely to miss a court appearance.
- Less likely to be arrested for a new offense while awaiting disposition of their case.
- Less likely to be arrested within the 2 years after their case concludes.<sup>7</sup>

## CAFA's Impact on the Criminal Justice System

### *Ensuring Meaningful Initial Appearances*

For many persons accused of a crime, their first appearance is one of the most crucial moments in their case. For those in custody, their arraignment represents a time at which they are formally advised of the charges against them and the penalties they may face if convicted. This is also a time when they are advised of their current bond terms and their right to counsel.<sup>8</sup>

With counsel present at this critical stage in the proceedings,<sup>9</sup> an accused individual may ask the court to consider changes to bond conditions and terms. The attorney can help ensure that they understand the nature of the charges, the penalties they face, and their legal rights and obligations.

The initial appearance is also critical because it is typically the first time an arrestee is seen by someone other than a law enforcement officer or detention center staff. The value of having someone else be aware of your status, of being able to communicate with someone outside the law enforcement structure, and, more fundamentally, of being seen in a more public way, cannot be understated. At the time of their initial appearance, many individuals may not yet have had an opportunity to communicate with their loved ones about their whereabouts or their well-being and may not know if anyone is aware of where they are or what is occurring. The arraignment can represent a critical opportunity for those arrested to be seen and heard from.

The importance of the arraignment is underscored by the fact that Virginia law requires those in custody who are charged with a crime to be brought before the court on the first day it sits following arrest.<sup>10</sup> While in many places this ensures most arrestees are seen within 24 hours of their arrest, for those arrested in more rural communities, this can mean a person in custody may wait a week or more before being seen by a judge for the first time. With the current provisions of the Virginia Code permitting bail hearings to be delayed as much as an additional 3 calendar days (excluding weekends and holidays)<sup>11</sup>, a person detained in some communities may not have an opportunity for a meaningful examination of their bail conditions until 2 weeks or more has passed.<sup>12</sup>

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<sup>7</sup> Alexander Holsinger, Christopher T. Lowenkamp, and Marie Van Nostrand, "The Hidden Costs of Pretrial Detention" (November 2013): [LJAF Report hidden-costs FNL.pdf \(craftmediabucket.s3.amazonaws.com\)](#).

<sup>8</sup> Virginia Code section 19.2-158.

<sup>9</sup> *Rothgery v Gillespie County*, 554 U.S. 191 (2008).

<sup>10</sup> Va. Code section 19.2-158.

<sup>11</sup> *Id.*

<sup>12</sup> For example, Daniel Reid was arrested in Mathews County on a series of felony property offenses occurring between October 2020 and May 2021. A warrant was issued the morning of October 25, 2021, and Mr. Reid was

## *Improving Bail Proceedings and Case Outcomes*

Having counsel present and engaging in a meaningful bail consideration at the initial appearance allows courts to make timely, informed decisions regarding pretrial release. Counsel can ensure relevant information is brought to the court's attention while ensuring an accused's fundamental rights, including their right to remain silent, are protected. Counsel can facilitate communications with accused individuals and their supporters to increase understanding of and adherence to release conditions. Moreover, meaningful initial appearances can reduce the need for subsequent bail hearings, which not only save days of incarceration, but reduce time and resources expended by court security, clerks, judicial staff, prosecutors, and defense lawyers in the filing, processing, and conducting of such hearings.

For those who are considered “low” and “moderate” risk defendants<sup>13</sup> the impact of counsel at first appearance and meaningful early bail determinations is most acute. Empirical research has shown that those who are considered low and moderate risk face dramatically different re-arrest rates based on the length of their pretrial detention.<sup>14</sup> Specifically, defendants classified as “low risk” who are held 2 to 3 days are nearly 40 percent more likely to be arrested for a new criminal offense during the pre-trial period than similar peers released within the first 24 hours of their arrest. This group is also at an elevated risk for missing a court date the longer they are detained pre-trial.<sup>15</sup>

According to an economic study of more than 400,000 defendants, when factoring in the costs of incarceration, the likelihood of a conviction (especially through the increased likelihood of a guilty plea), the risk of pretrial flight, as well as the impact on employment as well as utilization of resources, the long term “cost” of an initial decision to detain an individual pretrial can be between \$55,000 and \$99,000 *per pre-trial detainee*.<sup>16</sup> (“We conclude by using our new estimates to conduct a partial cost-benefit analysis that accounts for administrative jail expenses, costs of apprehending defendants, costs of future crime, and economic impacts on defendants. We estimate that the **net benefit of pretrial release at the margin is between \$55,143 and \$99,124 per defendant**. The large net benefit of pretrial release is driven by both the significant collateral consequences of having a criminal conviction on labor market outcomes and the relatively low costs of apprehending defendants who fail to appear in court.”)<sup>17</sup>

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served with the warrants at 1:30pm that same day and held without bond. His arraignment was scheduled for November 3<sup>rd</sup>, 9 days after his arrest. Under the provisions of 19.2-158, his bail hearing could be as late as Monday, November 8 (3 calendar days later, excluding weekends), leaving Mr. Reid to remain in custody without an avenue to address his bail for 2 weeks. *Daniel J. Reid v. Commonwealth*, [GC21-1281-00](#), et seq.

<sup>13</sup> Such classifications are derived from the use of pre-trial risk assessments such as the Virginia Pretrial Risk Assessment Instrument (VPRAI) and the Public Safety Assessment (PSA).

<sup>14</sup> Alexander Holsinger, Christopher T. Lowenkamp, and Marie Van Nostrand, “The Hidden Costs of Pretrial Detention” (November 2013): [LJAF Report hidden-costs FNL.pdf \(craftmediabucket.s3.amazonaws.com\)](#).

<sup>15</sup> *Id.*

<sup>16</sup> [The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges](#), Will Dobbie, Jacob Goldin and Crystal S. Yang, *American Economic Review* 2018, 108(2): 201–240. Data from the study included findings that “initial pretrial release decreases the probability of being found guilty by 14.0 percentage points, a 24.2 percent change from the mean for detained defendants, with larger effects for defendants with no prior offenses in the past year. The decrease in conviction is largely driven by a reduction in the probability of pleading guilty, which decreases by 10.8 percentage points, a 24.5 percent change.” (At p. 203)

<sup>17</sup> *Id.* at p. 204. (Emphasis added.)

## *Improving Access to Evidence, Facilitating Just and Accurate Outcomes*

With a person's liberty at stake, access to counsel is *critical*; the earlier access to counsel occurs, the more meaningful and impactful the effect. This is true not only as it relates to securing pretrial release, but in engaging in all the activities of meaningful representation.

The ABA's Criminal Justice Standards includes a laundry list of actions defense counsel should undertake. Among the list of "Prompt and Thorough Actions to Protect the Client" are informing a defendant of their rights, taking steps to preserve evidence, developing an investigative strategy, and considering opportunities for cooperation which "will be lost if not pursued quickly."<sup>18</sup>

One critical role the early intervention of counsel plays is to quickly identify erroneous charges that can save the accused, the prosecution, and the court time and resources. An example of this is *Rothgery v. Gillespie County*.<sup>19</sup> In that case Walter Rothgery was arrested on a charge of possession of a firearm by a person convicted of a felony. Rothgery initially posted bond and requested counsel. The court, following local practice, deferred appointing counsel until he was indicted. After his indictment and an associated increase in his bond which resulted in his being re-incarcerated, Rothgery was given a lawyer who not only secured his release but obtained the documents that demonstrated Rothgery was not in fact previously convicted of a felony.<sup>20</sup> Had counsel been inserted into the case sooner countless time and resources, including that of the court, prosecution, and Rothgery himself, could have been saved.

Early appointment of counsel can also help an accused individual gather the information needed to corroborate a legal or factual defense, undermine the credibility of a government witness or theory, lessen the degree of the offense or minimize his role, or mitigate his sentence. When a lawyer is promptly identified, assigned, and engaged with their client they can:

- Document bruises, abrasions, and other injuries before they heal to corroborate self-defense claims.
- Capture critical, but transient features of relevant locations, such as foliage on the trees, construction on a roadway, a dimmed streetlamp, or obscured signage on a fence.
- Locate and interview witnesses before their memories fade or they change jobs or addresses.
- Capture social media posts, preserve text messages, and document other digital content before it is deleted.<sup>21</sup>
- Identify a lack of organized thinking, paranoid statements, delusional beliefs, and racing thoughts that can be the indicia of serious mental illness. Prompt identification and recognition of mental illness can both provide corroboration for a mental health-based

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<sup>18</sup> ABA Criminal Justice Standards for the Defense Counsel (4<sup>th</sup> ed. 2017)<sup>18</sup> ("ABA Defense Standards"), Std. 4-3.7.

<sup>19</sup> *Rothgery*, 554 U.S. 191 (2008).

<sup>20</sup> *Id.*

<sup>21</sup> Whether intentionally deleted to prevent discovery or removed because of ignorance as to its evidentiary value, social media posts, text messages, and other digital content can quickly become beyond the reach of the defense, making it critical to photograph, download, or otherwise preserve this information. Major cell phone providers, for example, may retain call detail records (date, time, and number contacted) for several months, but retain the *content* of the communication for days. Joseph B. Evans, *Cell Phone Forensics: Powerful Tool Wielded By Federal Investigators*, Fordham J. Corp. and Fin. Law, blog post June 2, 2016.



defense and minimize risks of significant deterioration that cause lengthy restoration of competency efforts.

- Counsel can be a mechanism for an arrestee's family to provide important, personal information regarding a mental health history, traumatic brain injury, or developmental disability that may impact their ability to meaningfully participate in the proceedings or compromise their safety and well-being while incarcerated.

Another, and increasingly crucial reason for early intervention of counsel, is to ensure the recovery of video surveillance footage from stores and home security systems before retention policies call for their erasure.<sup>22</sup> An example of this occurred a few years ago in New Orleans, when a shooting between two rival gangs left 17 people, including a 10-year-old boy, injured. An eyewitness identified Joseph Allen as one of the shooters, picking him out of a lineup. Allen had a significant criminal record, including a prior arrest for a firearm charge, and was a known member of one of the gangs involved. Although his family insisted Allen was in Houston on a shopping trip with his girlfriend at the time of the shooting, within days the police had a warrant charging Allen with 17 counts of attempted murder. Allen turned himself in and appeared before a hearing officer the following day where bail was set at \$1.7 million.<sup>23</sup>

Allen's family was able to hire a lawyer, who immediately spoke with Allen and his girlfriend, getting important details of the events, and hiring an investigator. Within days the investigator secured surveillance footage from three different Houston stores that showed Allen and his girlfriend shopping at the time the shooting occurred. Shortly thereafter the charges against Allen were dropped.<sup>24</sup> Had there been a delay in securing counsel and interviewing Allen and his family, this critical exonerating evidence could very well have been lost.

Fundamentally, evidence once lost cannot be recreated, witness memories once faded cannot be recaptured, unchecked mental illness can lead to long efforts to restore competency, and lost opportunities for cooperation cannot be regained.

### *Protections Against Coerced Confessions and Uninformed Guilty Pleas*

One of the major impacts of pretrial detention, even for brief periods of time, is on guilty plea rates. Individuals detained pretrial who are unable to readily secure their release face increased pressure to plead guilty as a way of "purchasing" their release. Rather than paying money to the court or a bail bondsman to pay a secured bond, individuals plead guilty in exchange for a sentence that secures their release. Multiple studies demonstrate that those detained pretrial have a higher

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<sup>22</sup> Because of volume businesses regularly purge surveillance video content. This is especially true for cameras which record 24/7. See e.g. *How Much Video Surveillance Storage Does My Business Need?* Business News Daily, March. 10, 2021, (recommending most small and mid-size businesses retain video footage for 30 days) <https://www.businessnewsdaily.com/16024-video-surveillance-storage.html#:~:text=It%20depends%20on%20the%20amount,for%20three%20months%20or%20more>.

<sup>23</sup> Ken Daley, *Bunny Friend Park shooting suspect arrested on word of single witness, documents show*, Nola.com, November 30, 2015 [https://www.nola.com/news/crime\\_police/article\\_7bcaa5b4-fcec-56d4-b1dd-c6ff4bc8909b.html](https://www.nola.com/news/crime_police/article_7bcaa5b4-fcec-56d4-b1dd-c6ff4bc8909b.html).

<sup>24</sup> Jonathan Bullington, *Joseph Allen, once Bunny Friend Park shooting suspect, released from jail*, Nola.com, December 10, 2015. [https://www.nola.com/news/crime\\_police/article\\_9b1e211c-1d31-550f-9e94-8a1dc5ab0a6d.html](https://www.nola.com/news/crime_police/article_9b1e211c-1d31-550f-9e94-8a1dc5ab0a6d.html).

rate of conviction. A 2016 study of data from Harris County, Texas, indicates that persons charged with misdemeanors who were detained more than 7 days were 25% more likely to be convicted than similarly situated individuals who were released.<sup>25</sup>

Having counsel at first appearance may not only serve to decrease pretrial detention but can help those who are detained and wish to plead guilty to better understand the terms and consequences of their plea, identify any legal defenses they may have, engage in more equitable plea negotiations with prosecutors, mitigate collateral consequences of convictions, and present relevant mitigating information.

### *Limiting the Collateral Consequences of Detention and Incarceration.*

In 2014 NACDL released a groundbreaking report on the impacts of collateral consequences on people with a criminal history, “*Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime – A Roadmap to Restore Rights and Status After Arrest or Conviction*,” which offers a set of recommendations for reform. The report was based, in part, on testimony from over 150 witnesses at hearings in Chicago, Miami, Cleveland, San Francisco, New York and Washington, DC. Collateral consequences are defined as the specific legal restrictions, generalized discrimination and social stigma<sup>26</sup> that accompany an individual who has a criminal conviction or arrest record. As discussed in the report, research has shown that the ability to earn a living is the best way to keep someone from being re-arrested.<sup>27</sup> The cost of detention and incarceration are not only felt in the dollars spent, but also in the economic and social costs to the community. When detained pretrial, individuals risk losing their job, housing, or custody of their children, and falling into financial instability.<sup>28</sup> For those with disabilities, mental health illnesses, or significant medical needs, pretrial detention can interrupt access to critical medications and counseling services. Children experiencing the incarceration of a parent face long-term emotional, educational, and health impacts.<sup>29</sup> Additionally, the state loses tax revenues, as those who are incarcerated are not working and, as research demonstrates, upon their release, such individuals will earn less over their lifetimes.<sup>30</sup>

Individuals held in detention are four times more likely to receive jail time, and three times more likely to receive a prison sentence than their similarly situated peers who are released pretrial.<sup>31</sup> In

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<sup>25</sup> [The Downstream Consequences of Misdemeanor Pretrial Detention](#), Paul Heaton, Sandra Mayson, and Megan Stevenson, 69:3 Stanford L. Rev. 711 (2017).

<sup>26</sup> *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime – A Roadmap to Restore Rights and Status After Arrest or Conviction*. [www.nacdl.org/restoration/roadmapreport](http://www.nacdl.org/restoration/roadmapreport).

<sup>27</sup> *Id.*

<sup>28</sup> Michigan Indigent Defense Commission, *supra* note 5

<sup>29</sup> University of Minnesota Medical School, “Incarceration of parents impacts health of their children into adulthood,” Science Daily, July 17<sup>th</sup>, 2018, <https://www.sciencedaily.com/releases/2018/07/180717102807.htm>; Prison Fellowship, “Impact of Incarceration on Children,” <https://www.prisonfellowship.org/resources/training-resources/family/ministry-basics/impact-of-incarceration-on-children/>.

<sup>30</sup> Lottie Joiner and the National Journal, “How Families Pay the Never-Ending Price of a Criminal Record,” The Atlantic, December 15<sup>th</sup>, 2015, <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>

<sup>31</sup> Laura and John Arnold Foundation, “Investigating the Impact of Pretrial Detention on Sentencing Outcomes” (November 2013): 3, [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf).



addition, the incarceration of one person in a household impacts the entire family. This is especially true when it comes to childcare. Childcare expenses in Virginia are the 10<sup>th</sup> highest of any state in the country.<sup>32</sup> With the average childcare expense exceeding the average cost of rent, many families rely on two incomes to meet basic expenses. Incarceration of one household member may mean another has to withdraw from the workforce and stay home because they can no longer afford childcare.<sup>33</sup> In other instances, decreased income means curtailed spending or reliance on community or government programs to aid with rent, food, or utilities.

A public defense system that provides for the early appointment of counsel helps to mitigate these harms, facilitating pretrial release of those who do not pose a public safety risk, connecting individuals with needed mental health and substance abuse services, and facilitating considerations of the long-term impact of case decisions.

### *Reducing Racial Disparities in Pretrial Practices*

Issues of racial bias and racial disparity are pervasive in the criminal legal system. Racial disparities in Virginia have been well documented, including in sentencing, policing and traffic enforcement, just to name a few. For example, a RAND corporation study on racial disparities in misdemeanor speeding convictions found that compared with white motorists, Black motorists were more likely to be charged with a misdemeanor by law enforcement, and 36 percent of Black motorists were convicted of a misdemeanor, compared with 19 percent of White motorists.<sup>34</sup> Additionally, data collected under Virginia’s Community Policing Act shows that Black motorists are almost two times more likely than White drivers to be pulled over by police and three times more likely to have their vehicles searched.<sup>35</sup> A recent publication by The Sentencing Project reveals Black individuals comprise 55 percent of Virginia’s prison population, though they only represent 19 percent of Virginia’s population.<sup>36</sup>

The racial disparities in the criminal legal system are magnified at the pretrial stage as persons of color are overrepresented in America’s jail population and regularly receive higher bails and more onerous release conditions than their similarly situated white peers.<sup>37</sup> And Virginia is no exception.

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<sup>32</sup> Economic Policy Institute (EPI), <https://www.epi.org/child-care-costs-in-the-united-states/#/VA>.

<sup>33</sup> According to EPI data, a minimum wage worker in Virginia needs to work full-time for 48 weeks just to pay for childcare for one infant. *Id.*

<sup>34</sup> Anwar, Shamena, Patrick Bayer, Randi Hjalmarsson, and Matthew L. Mizel, Racial Disparities in Misdemeanor Speeding Convictions. Santa Monica, CA: RAND Corporation, 2021. [https://www.rand.org/pubs/research\\_reports/RRA1317-1.html](https://www.rand.org/pubs/research_reports/RRA1317-1.html).

<sup>35</sup> Ned Oliver, “New data shows Virginia police are more likely to stop and search black drivers,” May 19, 2021: [New data shows Virginia police are more likely to stop and search Black drivers - Virginia Mercury](#).

<sup>36</sup> The Sentencing Project, “The Color of Justice: Racial and Ethnic Disparity in State Prisons” (October 2021): [The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf \(sentencingproject.org\)](#).

<sup>37</sup> David Arnold, Will Dobbie, Crystal S Yang, “Racial Bias in Bail Decisions” (May 2018): [ady\\_racialbias.pdf \(harvard.edu\)](#).

As detailed in the Virginia State Crime Commission’s final report on the Virginia Pretrial Data Project<sup>38</sup>, Black individuals were significantly overrepresented in pretrial detention.<sup>39</sup>

Effectively tackling these disparities in Virginia’s criminal legal system will require decision makers to carefully examine every aspect of the system through a racial equity lens. As stated in the Vera Institute’s 2018 report, *An Unjust Burden*, “racial disparities in the criminal justice system are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality.”<sup>40</sup>

Providing counsel at first appearance is an effective strategy in addressing these disparities. With the assistance of counsel at the initial hearing, detained individuals will be more likely to be released after their first appearance, receive lower bail amounts, and have better overall case outcomes.

### **Nationwide CAFA Programs Demonstrating Improved System-wide Outcomes**

Jurisdictions across the country have launched successful programs to bring counsel at first appearance (CAFA) to their communities. The following studies provide a sampling of the results, demonstrating the effectiveness of CAFA in cities, as well as rural and suburban areas.

#### **Alameda County, California (2018)<sup>41</sup>**

Utilizing a MacArthur Safety & Justice Challenge Grant, the Alameda County Public Defender’s Office (ACPDO) implemented a pilot project to represent incarcerated individuals at their initial court appearance. Prior to the pilot, the process in Alameda operated similar to that in Virginia: following arrest, persons appeared before a judge, who advised them of their charges and, if they were eligible, appointed counsel to represent them. Appointed attorneys would then file motions for bond, appearing before the court 1 to 3 days later to have those motions heard.

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<sup>38</sup> The Virginia Pre-Trial Data Project (“Project”) was developed due to the significant lack of data readily available to answer many important questions related to the pre-trial process in Virginia. The Project involved collecting and merging data from numerous state and local government agencies into a singular dataset that resulted in a cohort of 22,986 adult defendants charged with a criminal offense during October 2017 (referred to as the “contact event”). These defendants were tracked during the pre-trial period until the final disposition of their contact event or December 31, 2018, whichever date occurred first. Up to 850 variables were captured for each of the defendants in the Project dataset, such as demographics, offense details, criminal history records, bond amounts, court appearance and public safety rates, assigned risk levels, and final dispositions. A statewide and locality descriptive analysis was conducted for the 11,487 defendants in the cohort who were charged with a criminal offense punishable by incarceration where the bail determination was made by a judicial officer.

<sup>39</sup> Virginia State Crime Commission, “Virginia Pretrial Data Project: Final Report” (October 2021): [Microsoft Word - PreTrial Report Cover.docx \(virginia.gov\)](#).

<sup>40</sup> Elizabeth Hinton, LeShae Henderson, and Cindy Reed. *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*. New York: Vera Institute of Justice, 2018. [for-the-record-unjust-burden-racial-disparities.pdf \(vera.org\)](#).

<sup>41</sup> Impact Justice’s Research & Action Center, “Representation at Arraignment: The Impact of “Smart Defense” on Due Process and Justice in Alameda County” (December 2018), <https://impactjustice.org/wp-content/uploads/Smart-Defense-Report-2019.pdf>.

Under the pilot, public defense lawyers met with incarcerated individuals prior to the start of the court’s docket and were given the opportunity to advocate for amendments to bail amounts and terms if they were believed to be appropriate. Data was tracked regarding the impact of having counsel present at the initial court hearing and then compared to the period immediately preceding the implementation of the pilot. The results demonstrated significant changes in case outcomes by having counsel present to provide information to the court and advocate on behalf of the accused.

	<b>Without CAFA</b>	<b>With CAFA</b>
<b>Percentage of Persons Released at Initial Appearance</b>	.07%	20%
<b>Percentage of Cases resolved at Initial Appearance</b>	3%	19%

The study also examined the fiscal impact of these changes. Considering just the number of days of incarceration saved, the researchers found the addition of defense counsel at initial appearance resulted in an annual savings of \$422,308 (2,974 bed-days per year at a rate of \$142.00 per day)

**Upstate New York (2018)<sup>42</sup>**

Beginning in 2015, 6 small counties in upstate New York participated in a study of the impact of CAFA. Similar to what is called for under Virginia HB 2286, in the New York project, each county was permitted to design their own plan for implementation, adapting to the unique practical, administrative, political and geographic needs and challenges of that jurisdiction.

The research evaluated two key considerations: what impact did CAFA have on pretrial detention outcomes and what impact did it have on the court’s process. Although there were variations among the six counties, the research showed that with CAFA:

- All jurisdictions experienced an increase in the likelihood a person would be released on recognizance and a correlating decrease in the likelihood of a person being required to post a secured bond. Among the changes were
  - A 20% increase in individuals released after first appearance in one county.
  - A 22% increase in persons having bail set under \$500, and 15% increase in bail set under \$1,000 in another county.
- Overall, people spent fewer days in pretrial detention.
- Most sites saw an increase in the probability that a charge would be reduced in severity.

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<sup>42</sup> [Early Intervention by Counsel: A Multi-Site Evaluation of the Presence of Counsel at Defendants’ First Appearances in Court](https://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/) , Alissa Pollitz Worden, Ph.D., Andrew L.B. Davies, Ph.D., Reveka V. Shteynberg, M.A., Kirstin A. Morgan, Ph.D., a report to the National Institute of Justice, U.S. Dept. of Justice (submitted Jan. 2020);” Guaranteeing representation at first Court appearances may be better for defendants, and cheaper for local governments,” London School of Economics and Political Science (2018), <https://blogs.lse.ac.uk/usappblog/2018/08/28/guaranteeing-representation-at-first-court-appearances-may-be-better-for-defendants-and-cheaper-for-local-governments/>.

- In the 2 counties utilizing assigned counsel to provide CAFA, even when accounting for the CAFA appearance, the average overall case voucher for misdemeanor representation was slightly *lower*.

### **San Francisco, California (2017)<sup>43</sup>**

In October 2017, the San Francisco Public Defender’s Office piloted the Pre-Trial Release Unit (PRU) to enhance access to pre-arraignment legal representation for indigent arrestees. Study findings concluded that the Public Defender’s Pre-Trial Release Unit demonstrated promising initial success in meeting its goals of 1) reducing wealth disparities in access to pre-arraignment representation, and 2) reducing the jail population through increased access to pre-trial release. Specifically, the PRU reduced the length of pretrial incarceration. The impact of the PRU included:

- The likelihood of release at arraignment grew from 14% to 28%.
- Savings:
  - Approximately 11,253 jail bed days per year.
  - At a rate of approximately \$30/day, the annual fiscal savings was \$335,000.

### **Ingham, Kent, and Huron Counties, Michigan (2014-2017)<sup>44</sup>**

Beginning 2014, the 55th District Court in Ingham County and the 63rd District Court in Kent County instituted programs designed to provide defendants counsel at all arraignments. Huron County joined later with a similar pilot project in the 73B District Court. The Ingham and Kent County program operated through the use of their appointed counsel system, while the Huron program utilized public defenders to provide representation.

- Impact of Providing CAFA:
  - Ingham County:
    - Cases concluded 20% sooner, with 13% of cases resolved by arraignment.
    - 28% reduction in time spent in jail between arraignment and release.
    - Judges reported fewer failures to appear and overall improved court operations.
  - Kent County:
    - 11% reduction in the total number of hearings in the program’s first year and a 20% reduction in the second.
    - Increased courtroom efficiency, as judges needed to spend less time explaining procedures because counsel had already done so.

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<sup>43</sup> Alena Yarmosky, “The Impact of Early Representation: An Analysis of the San Francisco Public Defender’s Pretrial Release Unit,” University of California, Berkeley, Goldman School of Public Policy (2018), [Green and Blue Annual Report \(sfpdr.com\)](#) and [Early Representation -- CPL Policy Brief -- June 2018 -- 61918 10p \(capolicylab.org\)](#).

<sup>44</sup> Michigan Indigent Defense Commission, “Counsel at First Appearance and Other Critical Stages” (Spring 2017), <https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf>.

- Huron County:
  - 18% of defendants had their case resolved at arraignment, an 8% increase.
  - Many cases resolved at arraignment involved charges being dropped or reduced, providing better outcomes for defendants.
  - 59% of defendants had their bond amount reduced.
  - Court staff, including clerks and bailiffs, reported less time spent answering questions about process and procedure because counsel was able to provide that information.
  - Court administration also reported defense lawyers improved their skills, an unexpected benefit of their spending more time in court doing advocacy and representational activities.
  
- Note on Attorneys’ Fees: In Huron County, an examination of vouchers indicated lawyers spent an average of 50 minutes *per client* providing CAFA services. This is roughly 60% of the time estimate OES utilized in its assessment of the CAFA costs *per case*.<sup>45</sup>

In Huron County, the Michigan Indigent Defense Commission spoke with court administrators, judges, prosecutors and defense attorneys to better understand the impact of their CAFA program. Defense attorneys noted that early representation impacted not only the bond amount, but release conditions as well. Judicial officers also expressed satisfaction with having defense counsel present. One judge explained bond hearings “feel more complete,” and the process leaves him much more confident in the bonds he issues because he is better informed.<sup>46</sup>

“[Additionally]– and perhaps most importantly – the defense attorneys and the court administration are adamant that clients have better experiences with the CAFA program in place. They are more comfortable, less nervous, and better prepared for not only the arraignment but also when and if they move ahead in the court process. Anecdotally, stakeholders report that clients are more likely to show up for future attorney meetings and hearings, likely because they are less anxious. Having a lawyer present at arraignment and knowing all of the options allows them to assess plea bargain proposals with a better sense of all of their options.”

-- Michigan Indigent Defense Commission, “The Huron County District Court’s Counsel at First Appearance Pilot Program” (Summer 2017), pp. 5-6

<sup>45</sup> OES calculated the costs of providing counsel at \$120/case. The provisions of HB2286 provides counsel is to be compensated “at the same rate as for court appointed misdemeanor representation in accordance with § 19.2-163.” The current rate of compensation for misdemeanor representation is \$90/hour, with a waivable fee cap of \$120/case. At a rate of \$90/hour, an attorney providing 50 minutes of representation to a client would be entitled to \$75 per client.

<sup>46</sup> Michigan Indigent Defense Commission, “The Huron County District Court’s Counsel at First Appearance Pilot Program” (Summer 2017), [Huron-County-Counsel-at-First-Appearance-Report.pdf \(michiganidc.gov\)](https://michiganidc.gov/Huron-County-Counsel-at-First-Appearance-Report.pdf).

## Conclusion

In recent years the Commonwealth of Virginia has enacted significant criminal justice reforms. We applaud Virginia for these efforts in continuing to make its criminal legal system more fair, humane and just. We urge you to further advance meaningful criminal justice reform by strengthening the Commonwealth's public defense delivery system by implementing meaningful counsel at first appearance.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyle O'Dowd". The signature is fluid and cursive, with the first name "Kyle" and last name "O'Dowd" clearly distinguishable.

Kyle O'Dowd  
Associate Executive Director of Policy  
National Association of Criminal Defense Lawyers

cc: Members, Virginia State Crime Commission  
Kristen Howard, Executive Director, Virginia State Crime Commission