

August 2022

Counsel at First Appearance Can Protect Liberty and Reduce Jail Costs

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Introduction

To anyone raised on American television, it may come as a surprise that a person could appear at a court hearing without a lawyer. But every day in West Virginia, people who are arrested face their first hearings alone. This has significant consequences. At the first appearance hearing the magistrate provides critical case information and makes what can be the most important decision about a person's case: whether they can remain free in their community or must go to jail while they await their next hearing. Those without a lawyer are more likely to face financial bonds they cannot afford than people who do have representation, which results in higher rates of, often unnecessary, incarceration among lower-income West Virginians.

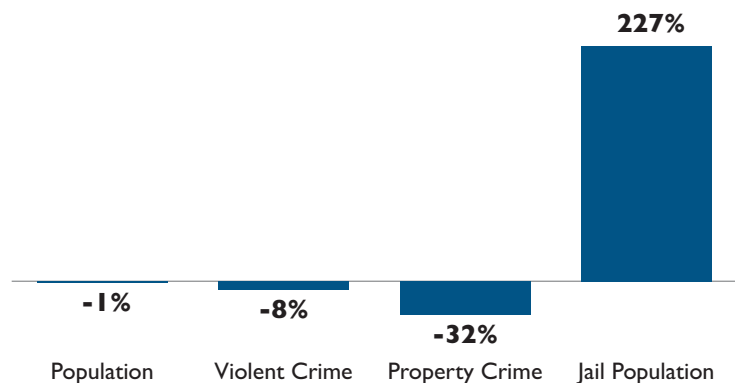
Pretrial incarceration can have a devastating impact on a person, including the loss of their job, home, and child custody. Moreover, the United States Supreme Court has recognized the pretrial period as “the most critical” in a criminal case.¹ When a person is jailed prior to trial, they not only lose their liberty, but also their “ability to gather evidence, contact witnesses, or otherwise prepare [a] defense.”² As a result, they are more likely to be convicted, more likely to receive a longer jail or prison sentence, and more likely to accrue court fines and fees than if they had not been detained.³

The lack of legal representation at first appearance hurts not only the arrested person and their case; it also has ramifications for West Virginia's regional jails. During the last 30 years, the average bail amount across the country more than doubled, leading to more people awaiting trial in jail because they could not afford a money bond.⁴ In

FIGURE I

Jail Population Rising as State Population and Crime Rates Fall

Positive/negative growth rates of total state population, violent crime, property crime, and jail population, West Virginia, 1999-2019



Sources: Federal Bureau of Investigation, Crime Data Explorer, National Incident-Based Reporting System (NIBRS) details reported in West Virginia, <https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime> (accessed June 30, 2022); USAFacts, “Our Changing Population: West Virginia,” Selected Years 2009 to 2019, <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/westvirginia?endDate=2019-01-01&startDate=1999-01-01> (accessed on August 1, 2022); “Annual Report Fiscal Year 2014” (Charleston, WV: West Virginia Regional Jail Authority, January 2015), 28; “FY 2019 Annual Report WV Division of Corrections & Rehabilitation” (Charleston, WV: Division of Corrections and Rehabilitation, December 2021), 45.

1 Powell v. Alabama, 287 U.S. 45, 57 (1932).

2 Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

3 “Access to Counsel at First Appearance,”: A Key Component of Pretrial Justice” (Washington, DC: National Legal Aid & Defender Association, September 2020), 5; Mary T. Phillips, “Bail, Detention, & Felony Case Outcomes” (New York, NY: New York City Criminal Justice Agency, Inc., September 2008), 7, <https://www.nycja.org/assets/ResearchBrief18.pdf> (accessed June 8, 2022).

4 “Access to Counsel at First Appearance,” 5 (emphasis original); Ram Subramanian et al., “Incarceration’s Front Door: The Misuse of Jail in America” (New York, NY: Vera Institute of Justice, 2015), 23 (“In 1983 there were only half as many bookings as arrests while in 2012 bookings nearly matched arrests, suggesting a greater propensity to hold many who in earlier times would have been released.”).

1999, West Virginia’s regional jails had an average daily population of 1,581 people.⁵ Over the next 20 years, violent offenses in the state dropped by eight percent and property offenses dropped by 32 percent, while overall state population decreased by more than 16,000 people.⁶ Yet by 2019, the average daily jail population had grown 227 percent to 5,172 people.⁷ How can jail populations rise while both crime rates and population fall? One answer: nearly half of people in West Virginia jails are legally innocent and awaiting trial — incarcerated for a crime for which they have not been convicted.⁸ At the end of Fiscal Year 2022, West Virginia’s jails were nearly 1,000 people above capacity.⁹ Research shows that providing legal representation makes hearings fairer and more efficient, increases compliance with the rules, protects citizens from unnecessary detention, and reduces pretrial detention costs. By ensuring that those arrested have counsel at first appearance (CAFA), fewer West Virginians would be subject to onerous or higher-than-necessary bonds. This would significantly reduce jail incarceration, thereby relieving overcrowding, keeping families together, and saving money for cash-strapped county governments.

Key Findings

- Between 1999 and 2019, West Virginia’s average daily jail population grew by 227 percent, despite a decrease in crime and declining population.
- Half of those incarcerated in our state’s jails are legally innocent and awaiting trial.
- Despite the state holding per diem costs flat, in Fiscal Year 2022, West Virginia counties incurred \$45.8 million in regional jail bills — a \$2 million increase over 2021.
- People without a lawyer at the first appearance hearing are more likely to face financial bonds they cannot afford and remain in jail than those with legal representation at first appearance.
- At least 66 percent of people who died in West Virginia jails between 2009 and 2019 were legally innocent and awaiting trial.
- As little as four days in jail prior to trial can increase the likelihood of conviction by 13 percent.¹⁰
- When Philadelphia provided accused individuals bail advocates, a study of 100,000 cases revealed that the presence of an advocate reduced bond violations by 64 percent and future arrests by 26 percent.
- An analysis of a single month of felony charges in Kanawha County showed that when a lawyer entered the case days after the first appearance hearing, 43 percent of people who had received a financial bond had that bond reduced or their case dismissed — but only after the county incurred \$13,847 in jail bills.

5 “Annual Report FY 2014” (Charleston, WV: West Virginia Regional Jail Authority, January 2015), 28.

6 Federal Bureau of Investigation, Crime Data Explorer, National Incident-Based Reporting System (NIBRS) details reported in West Virginia, <https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime> (accessed June 30, 2022); USAFacts, “Our Changing Population: West Virginia, Selected Years 2009 to 2019,” <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/west-virginia?endDate=2019-01-01&startDate=1999-01-01> (accessed on August 1, 2022).

7 “FY 2019 Annual Report WV Division of Corrections & Rehabilitation” (Charleston, WV: Division of Corrections and Rehabilitation, December 2021), 45.

8 “Overcrowded and Deadly: West Virginia’s Jails are in Crisis” (Charleston, WV: ACLU-WV, February 2021), 7, https://www.acluww.org/sites/default/files/field_documents/overcrowded_and_deadly_final.pdf (accessed February 8, 2021).

9 “West Virginia Division of Corrections and Rehabilitation Adult Inmate Count, Run Date 7/7/2022” (Charleston, WV: Division of Corrections and Rehabilitation).

10 Emily Leslie and Nolan G. Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments,” *The Journal of Law and Economics* 60, no. 3 (August 2017): 530-31; Paul Heaton, Sandra Mayson, and Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review* 69, no. 3 (March 2017): 711, 728, <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf> (accessed May 20, 2022) (An analysis of 380,689 misdemeanor cases resolved in Harris County, Texas found “that detained defendants are 25% more likely than similarly situated releases to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that more than twice as long on average.”).

What is the First Appearance?

A person brought before a magistrate after an arrest is often disoriented, anxious about their fate, and unprepared to speak up for themselves in a fast-paced court proceeding. They are unlikely to have the necessary understanding of their rights and the law to know that West Virginia requires a magistrate to set the least restrictive bond necessary to ensure that they will appear in court and not pose a threat to public safety. Nor would they know that the law requires the magistrate to consider a dozen factors when setting bond, including their ability to pay, their character, their health, their home and ties to the community, as well as the state's "policy against unnecessary incarceration of arrested persons pending trial." And because most people associate bond with cash or property, they may not know that West Virginia law provides magistrates with non-financial options such as a requirement to maintain or seek employment, refrain from use of alcohol or controlled substances, or even remain in the custody of another adult in the community, such as a spouse or a parent.

Without a lawyer marshaling these facts and arguments, magistrates at first appearance hearings typically lack the information needed to make an informed bond decision. Consequently, people without a lawyer are more likely to face financial bonds they cannot afford and to lose their freedom, compared to people who do.

Still, in most cases West Virginians do not have the opportunity to speak to a lawyer until days after the first appearance hearing. By then, the magistrate has already decided whether to give a bond that allows them to go home or to wait for their next hearing in a regional jail.

Sources: W. Va. Code § 61-1C-1a(2)-(3); State ex rel. Ghiz v. Johnson, 155 W.Va. 186, 190 (1971); John P. Gross, "The Right to Counsel But Not The Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release," *Florida Law Review* 69, no. 3 (2018): 834.; Douglas L. Colbert, "Prosecution without Representation," *Buffalo Law Review* 59, no. 2 (April 2011): 347, <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol59/iss2/2> (accessed May 17, 2022).

What is a Bond?

A bond — also referred to as bail — is meant to ensure that an accused person will appear for all their court hearings. Unless charged with an offense that carries a life sentence, every person is entitled to bail. At a first appearance hearing, the magistrate will set a bond amount and decide the form of the bail. A person may be required to pay the full amount in cash or post a recognizance bond, which could be a signed promise to return to court, 10 percent of the bond amount, posting property in the amount of the bond, or using a bail bondsman to post the bond. But, as the United States Supreme Court reminded courts setting bond, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

Bond Amount	Type of Bond	What the Court Must Receive for Release
\$5,000	Cash Bond	\$5,000 cash
	Personal Recognizance	No payment required
	10 Percent Recognizance	\$500 cash
	Property Recognizance	A pledge to forfeit a West Virginia property with a value of at least half of the bond amount
	Surety Recognizance	A bail bondsman signs a pledge for the bond amount

Sources: W. Va. Code §§ 62-1C-1; 62-1C-2, 62-1C-4; United States v. Salerno, 481 U.S. 739, 755 (1987).

Pretrial Detention Can Unravel Lives and Families

Nearly every person charged with a crime in West Virginia is deemed eligible for a court-provided attorney due to their financial status.¹¹ Although this determination can happen immediately or within a few days of arrest, it will be up to five to ten business days before a person has their first hearing with a lawyer present.¹² Over that period, someone who has not been convicted of anything can lose their job, be evicted, lose custody of their children, miss medical appointments, and more.¹³

The consequences of job loss continue long after the period of pretrial detention. People who manage to find work after their release from jail “earn less on average than their counterparts who have never been incarcerated.”¹⁴ One study found that a full *three to four years after* the initial bond decision, people who were detained pretrial were less likely to have a job in the formal labor sector and earned nearly \$1,000 less annually than those who were released prior to trial.¹⁵

Similarly when a person loses their home due to incarceration, it can lead them through a “revolving door of homelessness and punishment.”¹⁶ After release from jail or prison, a person is 10 times more likely to be unhoused than the general population.¹⁷ Unsheltered people have 10 times as many contacts with police than people living in shelters.¹⁸ Research suggests that one in six people behind bars had experienced homelessness in the year prior to their incarceration.¹⁹

The loss of liberty takes a financial and emotional toll on families and children. Research has shown that incarceration strains marriages and “frequently contributes to divorce.”²⁰ Children are especially harmed when a parent is jailed. Approximately one in 10 West Virginia kids have had a parent incarcerated at some point in their childhood.²¹ Considered to be a traumatic experience by the Centers for Disease Control, parental incarceration can have a devastating impact on a child’s well-being.²² A parent behind bars is linked to illnesses like asthma, depression, and anxiety; acting out; economic hardship; and poorer physical and mental health in adulthood.²³

11 Data regarding percentage of people charged in West Virginia who qualify for court-appointed counsel, provided in an email from Dana Eddy, Executive Director of Public Defender Services, July 18, 2022. To qualify for court-appointed, a person must earn less than 125 percent of the federal Poverty Income Guidelines. For instance, one with a family of three must earn a gross income below \$27,150 to qualify for court-appointed counsel. “Financial Guidelines for Determining Eligibility for Legal Representation by Appointed Counsel or Public Defender (effective April 1, 2021),” (Charleston, WV: Department of Administration, Public Defender Services), <https://pds.wv.gov/Documents/FINANCIAL%20GUIDELINES.02-09-21.MEM.pdf>.

12 W. Va. R. Crim. P. 5(c); W. Va. Code § 62-1C-1a(c).

13 Pamela Metzger et al., “Ending Injustice: Solving the Initial Appearance Crisis” (Dallas, TX: Deason Criminal Justice Reform Center, September 2021), 18.

14 Bruce Western and Becky Pettit, “Collateral Costs: Incarceration’s Effect on Economic Mobility” (Washington, DC: The Pew Charitable Trusts, 2010), 11.

15 Will Dobbie, Jacob Goldin, and Crystal S. Yang, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,” *American Economic Review* 108, no. 2 (February 2018): 227, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503> (accessed June 28, 2022).

16 Lucius Couloute, “Nowhere to Go: Homelessness Among Formerly Incarcerated People” (Northampton, MA: Prison Policy Initiative, August 2018), <https://www.prisonpolicy.org/reports/housing.html> (accessed June 16, 2022).

17 Ibid.

18 Janey Rountree, Nathan Hess, and Austin Lyke, “Health Conditions Among Unsheltered Adults in the U.S.” (Los Angeles, CA: California Policy Lab, October 2019), 6.

19 Couloute, “Nowhere to Go.”

20 David Murphey and P. Mae Cooper, “Parents Behind Bars: What Happens to Their Children?” (Bethesda, MD: Child Trends, October 2015), 2, <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> (accessed June 7, 2022).

21 “A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families, and Communities (Baltimore, MD: The Annie E. Casey Foundation, April 2016), 5, <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> (accessed June 7, 2022).

22 Vincent J. Felitti et al., “Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults,” *American Journal of Preventive Medicine* 14, no. 4 (May 1998): 245, [https://doi.org/10.1016/S0749-3797\(98\)00017-8](https://doi.org/10.1016/S0749-3797(98)00017-8); “A Shared Sentence,” 3.

23 Rebecca Vallas et al., “Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two-Generation Approach” (Washington, DC: Center for American Progress, December 2015), 3, <https://americanprogress.org/wp-content/uploads/2015/12/CriminalRecords-report2.pdf> (accessed June 8, 2022); Nazgol Ghandnoosh, Emma Stammen, and Kevin Muhitch, “Parents in Prison” (Washington, DC: The Sentencing Project, February 2021), 1, <https://www.sentencingproject.org/wp-content/uploads/2021/11/Parents-in-Prison.pdf> (accessed June 7, 2022); Murphey and Cooper, “Parents Behind Bars,” 2-3.

Jails are often traumatic and dangerous. In the spring of 2022, West Virginia jails housed 1,000 people over capacity on average, had hundreds of staff vacancies, and required \$95 million of maintenance.²⁴ In June, members of the legislature heard testimony from two women jailed because of their inability to afford a money bond. One testified that she was placed in a cell for 12 days without hygiene products, including three days without toilet paper.²⁵ The other described sleeping in two inches of standing water after the sprinklers went off in her section of the jail.²⁶ Over the last decade, West Virginia's regional jails had the highest death rate in the country — 53 percent higher than the national average.²⁷ At least 66 percent of the people who died here were legally innocent and awaiting trial.²⁸ Even relatively short periods of incarceration could be life threatening. More than half of people who died in West Virginia jails had been locked up for less than 30 days.²⁹

At least 66 percent of people who died in West Virginia jails between 2009 and 2019 were legally innocent and awaiting trial.

A person awaiting trial in jail is less likely to have the charge reduced and more likely to be convicted.³⁰ Those convicted are more likely to receive a jail or prison sentence, as opposed to an alternative sentence like probation.³¹ Further, detention of legally innocent people contributes to mass incarceration through longer sentences.³² Studies have found that pretrial detention led to an additional 157 days in felony sentences and an additional nine days in misdemeanor sentences.³³ Finally, people detained pretrial faced a 41 percent increase in court-imposed fines and fees, meaning that those least able to afford a money bond were more likely to accrue court debt.³⁴

There are several reasons why pretrial detention could lead to convictions and longer sentences: being in jail interferes with case preparation and communication with one's lawyer; jailed people cannot engage in behavior that often leads to acquittal, reduced charges, or alternative sentences (for instance, school, employment, treatment for substance use disorder, or making restitution payments); since detention has already caused a loss of freedom and disruption, a person may have less to lose by pleading guilty; and appearing in court in jail clothes and handcuffs can create "superficial impressions of criminality" for decision makers like prosecutors and judges.³⁵ Regardless of the reason, the result is the same: people detained prior to trial are at a significant disadvantage when facing government prosecution. And people without an attorney at the first appearance hearing are more likely to be detained.

24 Lacie Pierson, "Former Inmates Recount Sleeping in Water, Lack of Medical Care in Overcrowded Jails," *Charleston Gazette-Mail*, June 13, 2022, https://www.wvgazette.com/news/former-inmates-recount-sleeping-in-water-lack-of-medical-care-in-overcrowded-jails/article_091eb3fe-0bb4-5456-ac4a-f6abe7130303.html.

25 Ibid.

26 Ibid.

27 ACLU, "Overcrowded and Deadly," 1, 3.

28 Ibid, 7.

29 Ibid, 8.

30 Phillips, "A Decade of Bail Research," 116; Phillips, "Bail, Detention, & Felony Case Outcomes," 5.

31 Ibid.

32 Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes" (Houston, TX: Laura and John Arnold Foundation, November 2013), 3, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf (accessed June 9, 2022).

33 Leslie and Pope, "Unintended Impact of Pretrial Detention," 546; Heaton, Mayson, and Stevenson, "Downstream Consequences," 747.

34 Stevenson, "Distortion of Justice," 513.

35 Stevenson, "Distortion of Justice," 515; Alissa Pollitz Worden et al., "The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions," *Criminal Justice Policy Review* 31, no. 6 (July 2020): 836 (internal citations omitted); Heaton, Mayson, and Stevenson, "Downstream Consequences," 722.

“Bursting at the Seams”: Consequences for West Virginia

In the words of Betsy Jividen, most recent Commissioner of the Division of Corrections and Rehabilitation (DCR), West Virginia’s jails are “bursting at the seams.”³⁶ This is a crisis of liberty and a budget crisis, too. In addition to increased recidivism, overreliance on pretrial detention has driven jail overcrowding and forced local governments to dedicate a growing share of their revenue to regional jail bills. When a city or county detains a person pretrial, state law requires that local government to pay for each day of incarceration — a cost referred to as the per diem rate.³⁷ Although the actual cost of jailing a person is \$54.13 per day,³⁸ the state has offset part of that cost, capping the per diem rate for local governments at \$48.25 since 2013.³⁹

In Fiscal Year 2022, West Virginia counties incurred \$45.8 million in regional jail bills — a \$2 million increase over 2021.

Despite the state’s intervention to hold per-diem costs down, growing incarceration is driving up costs for counties. In FY 2022, West Virginia counties incurred \$45.8 million in regional jail costs — a \$2 million increase over 2021 — and some counties are unable to pay their jail bills at all.⁴⁰

This has prompted lawmakers to create a working group to address overcrowding in the jails and the subsequent financial burden on local governments.⁴¹ One key driver they should prioritize is that much of the overcrowding crisis can be traced to a person’s first appearance hearing, where bond is decided.

West Virginia is at an impasse. Regional jail overcrowding is a problem that will not go away. Counties routinely fail to pay their jail bills — even with the state artificially depressing the cost of those bills. Changing who is responsible for paying these costs will not change the fact that jail bills increasingly divert taxpayer dollars away from education, mental health, drug treatment, and other community services that keep communities safe. Nor will it restore the liberty of thousands of West Virginians. The best solution is to reduce the number of people in jail.

A Simple Solution: Counsel at First Appearance

Counsel at first appearance (CAFA) would reduce uninformed bond decisions that lead to unnecessary, costly pre-trial detention. CAFA is a proven policy that has been in place for decades in federal criminal court.⁴² The American Bar Association has endorsed the use of CAFA in state courts to protect the liberty of accused individuals and to “advance the efficient administration of justice by reducing the risk of wasteful prosecutions.”⁴³ Further, the West Virginia Rules of Criminal Procedure create a clear right to a lawyer at the first appearance.⁴⁴ And yet, there is not a single jurisdiction in West Virginia that honors this correctly.

36 Lacie Pierson, “WV Jails ‘Bursting at the Seams’ as Lawmakers Weigh Options,” *Charleston Gazette-Mail*, November 18, 2019, https://www.wvgazette.com/news/politics/wv-jails-bursting-at-the-seams-as-lawmakers-weigh-options/article_12c129c3-89e0-549e-907a-f3bd33bd18a6.html.

37 W. Va. Code § 15A-3-16(g).

38 “FY 2021 Annual Report WV Division of Corrections and Rehabilitation” (Charleston, WV: Division of Corrections and Rehabilitation, December 2021), 28, https://dcr.wv.gov/resources/Documents/annual_reports/FY21ANNUAL%20REPORT%20WVDCR.pdf (accessed June 11, 2022).

39 Lori Kersey, “County Jail Per Diem Rates to Stay the Same in 2018,” *Charleston Gazette-Mail*, October 26, 2017, https://www.wvgazette.com/news/county-jail-per-diem-rates-to-stay-the-same-in-2018/article_dadb2480-103b-598e-b815-1fa617591b63.html.

40 “WV Regional Jail and Correctional Facility Customer Balance Detail” (Department of Homeland Security, July 2022).

41 Lacie Pierson, “Lawmakers Pursue Workgroup to Address W.Va. Jail Population, Costs,” *The Herald-Dispatch*, May 25, 2022, https://www.herald-dispatch.com/news/lawmakers-pursue-workgroup-to-address-w-va-jail-population-costs/article_206010ce-bf0d-5b99-bdbb-92d853c2505c.html.

42 Fed. R. Crim. P. 44(a).

43 Brief for The American Bar Association as Amici Curiae Supporting Petitioner, *Rothgery v. Gillespie County*, 128 S.Ct. 2578 (2008) (No. 07-440).

44 W.Va. R. Crim. P. 44 (“Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him or her at every stage of the proceedings from initial appearance before the magistrate or the court through appeal, unless the defendant waives such appointment.”); W. Va. R. Crim. P. 5(c).

At a first appearance hearing, a lawyer can efficiently verify and present information critical to the magistrate's bond decision.⁴⁵ They can advise a magistrate "where the person will live if released, existing family support for returning to court, and whether the defendant is employed, attends school, cares for family or is engaged in other productive activities that demonstrate responsibility and dependability."⁴⁶ A lawyer can also speak the language of the court, identifying, for instance, non-financial bond conditions that may increase the likelihood of release, such as a requirement that a person enroll in substance use disorder treatment.⁴⁷ After CAFA was implemented in his jurisdiction, one Michigan judge "expressed satisfaction that the bond conversation now 'feels more complete' and, as a result, he feels much more confident in the bonds that he issues."⁴⁸

CAFA makes court hearings more efficient. After lawyers in Alameda County, California began to represent people at first appearances, 17 percent of cases were either dismissed or resolved at that first hearing.⁴⁹ In Huron County, Michigan, 18 percent of cases were resolved at the first appearance hearing after lawyers were appointed.⁵⁰ With lawyers present, judges spent less time explaining the case process and answering questions.⁵¹ Courts implementing CAFA discovered that advocates could present "rich, concise snapshots of a client's family, employment, and personal reliability within the same time it had taken judges to explain the proceedings to unrepresented defendants."⁵² In one California county, CAFA led to fewer court dates, which in turn reduced the amount of time and money spent transporting detained people between the courthouse and jail.⁵³

A Lawyer's Impact on Liberty: A Snapshot of One West Virginia County

Since four out of five people detained pretrial are charged with a felony offense, it is useful to examine felony first appearance hearings. In April 2022, there were 115 felony charges filed in Kanawha County and first appearance hearings took place in 103 of those cases.

Without a lawyer to present critical bond information, magistrates required a **money bond in 76 percent of cases**, and made **zero use of non-financial conditions** such as drug treatment, employment, and home confinement.

When people who received a money bond were finally able to appear in court with a lawyer, the results were significant:

19% had their cases **dismissed**,
after having spent a total of 120 days in jail,
at a cost of \$5,790

24% had their bond **reduced**,
after having spent a total of 167 days in jail,
at a cost of \$8,057

Sources: "West Virginia Division of Corrections and Rehabilitation - Adult Inmate Count," July 7, 2022; WVCBP analysis of data accessed through "UJA/LEO", an online case portal administered by the Supreme Court of Appeals of West Virginia

45 Alissa Pollitz Worden, Ph.D. et al., "Early Intervention by Counsel: A Multi-State Evaluation of the Presence of Counsel at Defendant's First Appearances in Court" (April 2020) ii, <https://www.ojp.gov/pdffiles1/nij/grants/254620.pdf> (accessed April 26, 2022).

46 "Don't I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing" (Washington, DC: The Constitution Project, March 2015), 31.

47 Worden et al., "Impact of Counsel," 835-36 (internal citations omitted).

48 "The Huron County District Court's Counsel at First Appearance Pilot Program" (Lansing, MI: Michigan Indigent Defense Commission, Summer 2017), 5, <https://michiganidc.gov/wp-content/uploads/2015/04/Huron-County-Counsel-at-First-Appearance-Report.pdf> (accessed May 13, 2022).

49 Danielle Soto and Mark Lipkin, "Representation at Arraignment: The Impact of 'Smart Defense' on Due Process and Justice in Alameda County" (Oakland, CA: Impact Justice, December 2018), 23-24, <https://impactjustice.org/wp-content/uploads/Smart-Defense-Report-2019.pdf> (accessed June 9, 2022).

50 "Access to Counsel at First Appearance," 3.

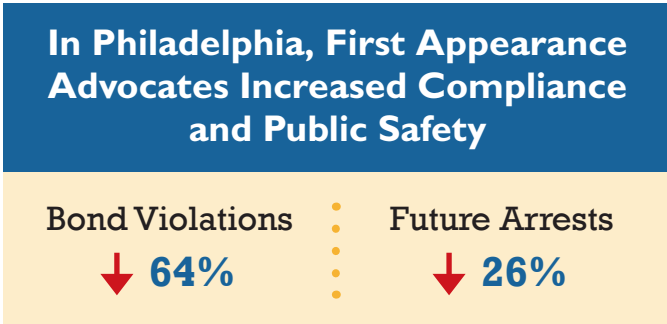
51 "Counsel at First Appearance and Other Critical Stages: A Guide to Implementation of the Minimum Standards for Delivery Systems" (Lansing, MI: Michigan Indigent Defense Commission, Spring 2017), 10, <https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf> (accessed May 13, 2022).

52 Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, "Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," *Cardozo Law Review* 23 (January 2002): 1735, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1290&context=fac_pubs (accessed May 20, 2022).

53 Soto and Lipkin, "Representation at Arraignment," 13; "Access to Counsel at First Appearance," 3.

Finally, CAFA could make the bond decision fairer for people already struggling financially. Without a lawyer at the first appearance hearing, “judges are more likely to order a financial condition on release before trial, which results in low income and poor defendants — who are disproportionately people of color — remaining incarcerated” before a trial.⁵⁴ While Black people are 3.7 percent of the state’s population, they made up 11.1 percent of the people who entered West Virginia jails in Fiscal Year 2021.⁵⁵ By providing more thorough information, a lawyer can help magistrates overcome implicit bias that leads to racial disparities in who is sent to jail.⁵⁶

Fairer hearings lead to greater compliance with conditions of bond.⁵⁷ A randomized controlled CAFA trial in Baltimore found that people who were provided an advocate at their bond hearing, “reported greater confidence in the fairness of their bail proceeding.”⁵⁸ When Philadelphia provided bail advocates to accused individuals, an analysis of 100,000 cases revealed that the presence of an advocate reduced bond violations by 64 percent and future arrests by 26 percent.⁵⁹ Court staff involved in a Michigan CAFA program reported that people who had a first appearance lawyer were more likely to show up for future court appearances and meetings with their attorneys.⁶⁰ A Michigan magistrate concluded that having a lawyer at first appearance made people less intimidated by the process and more likely to return to court.⁶¹



When a lawyer is present at the first appearance hearing, courts set less restrictive, lower bonds, fewer people are unnecessarily detained, and jail costs decrease.⁶² The Baltimore program paired people with advocates at bail review hearings. In that system, a person receives a bond at arrest, then is brought before a judge within 24 hours for a bail review hearing. In this experiment, the people provided with advocates at the review hearing were more than two and a half times more likely to be released without any bond conditions and over four times as likely to have the bond reduced.⁶³ When a person was represented, their bond was reduced by nearly \$1,000, compared to unrepresented people who saw an average reduction of \$166.⁶⁴

When courts set less restrictive bonds, more people can await trial in the community. In Alameda County, the number of people released at the first appearance hearing went from one percent pre-CAFA to 20 percent post-CAFA.⁶⁵ Similarly, in upstate New York, CAFA increased the number of people who remained free across all pilot programs, and in one county, nearly tripled the number of people released.⁶⁶ When bonds are set at a reasonable amount, people are more likely to post the bond. In Baltimore, the median time spent in jail was two days for people with advocates, versus nine days for people who appeared in court without a lawyer.⁶⁷

54 “Don’t I Need a Lawyer?” 1.

55 DCR, “FY 2021 Annual Report,” 39.

56 Paul Heaton, “Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities,” *Indiana Law Journal* 96, no. 3 (Spring 2021): 734, <https://www.repository.law.indiana.edu/ilj/vol96/iss3/2> (accessed May 19, 2022).

57 Colbert, Paternoster, and Bushway, “Do Attorneys Really Matter?” 1744-45.

58 “Access to Counsel at First Appearance,” 3.

59 Heaton, “Enhanced Public Defense,” 703-4; Shamena Anwar, Shawn D. Bushway, and John Engberg, “The Impact of Defense Counsel at Bail Hearings” (working paper, RAND Corporation, March 2022), 3, https://www.rand.org/content/dam/rand/pubs/working_papers/WRA1900/WRA1960-1/RAND_WRA1960-1.pdf (accessed May 20, 2022) (After Pittsburgh Municipal Court provided lawyers at bail hearings, there was “a significant decrease in the use of monetary bail and short-term detention, with no impact on failure to appear rates.”).

60 MIDC, “Huron County,” 5-6.

61 MIDC, “Counsel at First Appearance,” 9.

62 Worden et al., “Early Intervention by Counsel,” 28.

63 Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, “Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail,” *Cardozo Law Review* 23 (January 2002): 1753, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1290&context=fac_pubs (accessed May 20, 2022).

64 Ibid, 1754.

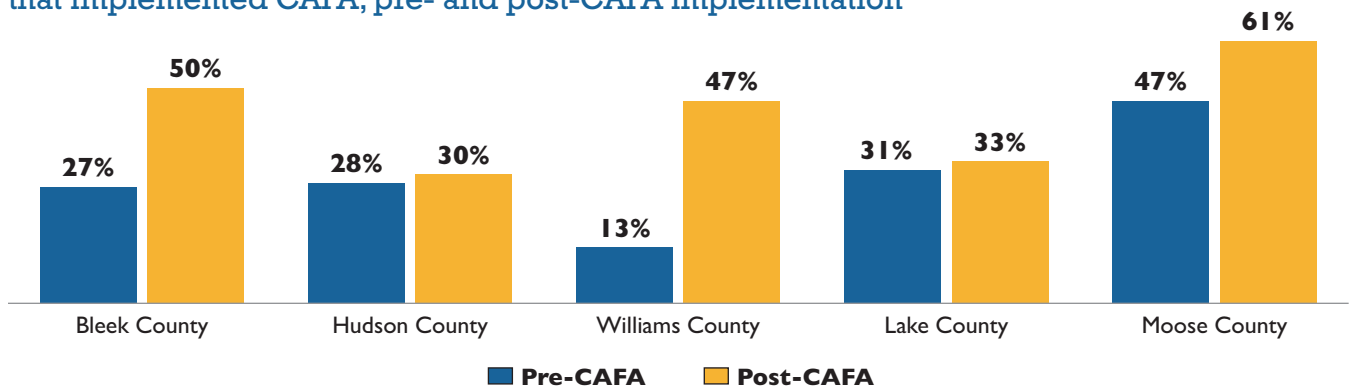
65 “Access to Counsel at First Appearance,” 21; Soto and Lipkin, “Representation at Arraignment,” 20.

66 Worden et al., “Early Intervention by Counsel,” 28.

67 Colbert, Paternoster, and Bushway, “Do Attorneys Really Matter?” 1755.

FIGURE 2

Implementing CAFA Can Increase Bond Releases without Conditions
Percentage of bond releases without conditions in upstate New York counties that implemented CAFA, pre- and post-CAFA implementation



Source: Worden et al., “Early Intervention by Counsel,” 28.

Finally, CAFA has been shown to reduce jail overcrowding. When the Baltimore CAFA experiment began, the local jail was 50 percent over capacity.⁶⁸ But nine months into the program, the jail population had shrunk to half its usual size.⁶⁹ A study of arrests in Cook County, Illinois found that providing a lawyer to an individual within 24 hours of their arrest would save the county up to \$43.9 million every year in jail costs.⁷⁰ In upstate New York, researchers found that in addition to a decline in jail costs, CAFA led to slightly lower case costs since court-appointed lawyers were able to dedicate less time to cases when the client was not in jail prior to trial.⁷¹

Conclusion

Despite falling crime rates, West Virginia faces an incarceration crisis. Jail overcrowding needlessly strains government budgets and harms our state’s families. Jurisdictions around the country offer a path forward — a policy that reduces jail overcrowding and saves local funds, without risking public safety or burdening courtrooms. A CAFA program in West Virginia would help our courts to live up to their own standards of justice: no one should be put behind bars without legal representation.

68 Ibid, 1739.

69 Ibid.

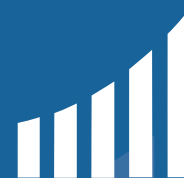
70 Bryan L. Sykes, Eliza Solowiej, and Evelyn J. Patterson, “The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County, 2013” *UC Irvine Law Review* 5, no. 4 (2015): 832.

71 Worden et al., “Early Intervention by Counsel,” ii.

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