



REPORT

# Ending Injustice

Solving The Initial  
Appearance Crisis

## ACKNOWLEDGMENTS

The Deason Center gratefully acknowledges Arnold Ventures and the Charles Koch Foundation for their generous support of this project.



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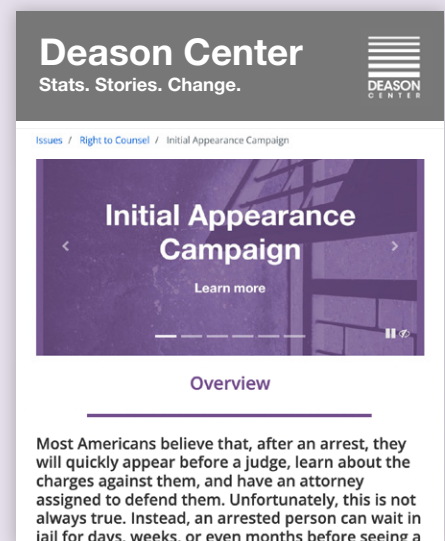
**Suggested Citation:** Metzger, P., Hoeffel, J., Meeks, K., & Sidi, S., *Ending Injustice: Solving the Initial Appearance Crisis*, Deason Criminal Justice Reform Center (September 2021).

### The Deason Center's *Initial Appearance Campaign* supports state and local reform.

Our experts are available to:

- Testify about the initial appearance crisis and its solutions.
- Consult with advocacy groups about strategies to improve initial appearance practices.
- Review draft legislation and proposed changes to the rules of criminal practice.

Contact us at [DeasonJusticeCenter@smu.edu](mailto:DeasonJusticeCenter@smu.edu).



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## FROM THE DIRECTOR

*Ending Injustice: Solving the Initial Appearance Crisis* describes a crisis in post-arrest criminal procedure and offers strategies to end it.

Most Americans believe that, after an arrest, they will quickly appear before a judge, learn about the charges against them, and have an attorney assigned to defend them. Unfortunately, this is not always true. Instead, an arrested person can wait in jail for days, weeks, or even months before seeing a judge or meeting an attorney.

Detention without access to courts or counsel strikes at the very core of our expectations about American criminal justice. But the Supreme Court neither guarantees a prompt initial appearance nor requires a lawyer's help at that procedure.

This report chronicles the resulting initial appearance crisis and highlights its devastating consequences. More importantly, it provides policymakers and advocates with actionable recommendations.

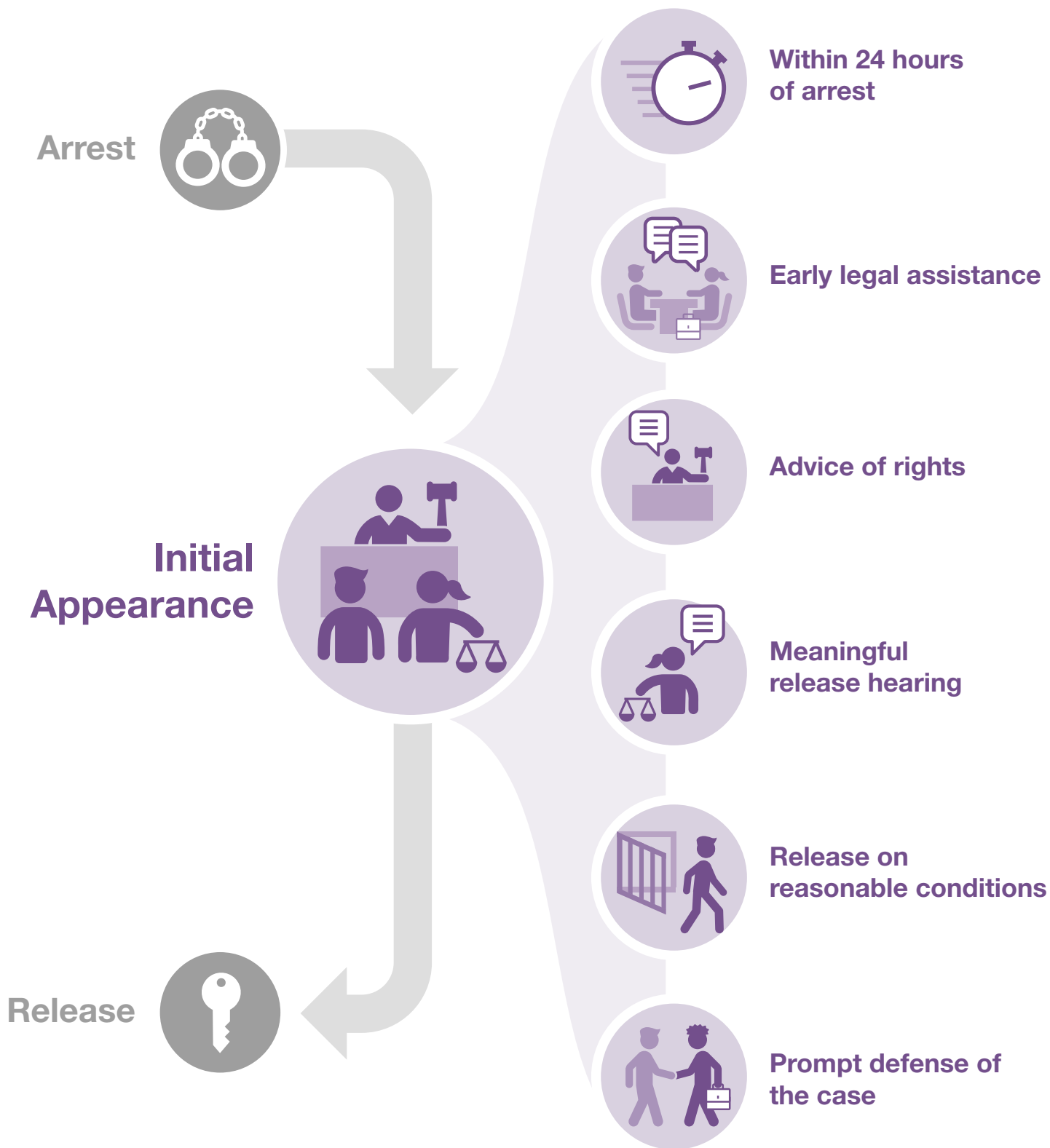
We hope that *Solving the Initial Appearance Crisis* helps transform this critical stage of our criminal legal process.

Sincerely,

**Pamela R. Metzger**

Director, Deason Criminal Justice Reform Center  
SMU Dedman School of Law

# What Should Happen at an Initial Appearance?



# Consequences of the Initial Appearance Crisis



**Longer pretrial detention**



**Loss of housing and income**



**Coerced confessions and uninformed waiver of rights**



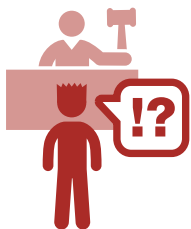
**Harm to families and children**



**Trauma, violence, injury, and illness**



**Worse case outcomes**

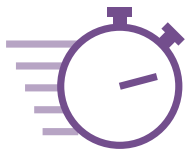


**Pleading guilty without a lawyer**



**Waste of taxpayer resources**

# Recommendations for Ending the Initial Appearance Crisis



**Require initial appearance as soon as possible, and never more than 24 hours after arrest**



**Make system stakeholders accountable for preventing delay**



**Provide legal assistance before and during initial appearance**



**Deliver clear advice of rights**



**Make an informed decision about pretrial release**



**Within 72 hours, appoint a lawyer to begin the defense**



**Study technological adaptations**

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# Introduction

*Because the local court only met four times each year, Jessica Jauch spent 90 days in jail without seeing a judge or a lawyer.*

*A false arrest, followed by 48 days in jail without an initial appearance, left Carl Murdock homeless and destitute.*

*After begging in vain for a lawyer's help, 18-year-old Trequelle Vann-Marcoux hanged himself in jail.*

Across the United States, people are arrested and held behind bars for days and weeks—sometimes even for months—without ever seeing a judge or an attorney. The Constitution promises to protect an arrested person by giving them access to the courts, notice of the charges, the assistance of a lawyer, and a fair and speedy trial. But the Constitution is silent about when or how those rights will be delivered.<sup>1</sup>

How long can a person be held in jail before they see a judge? When will they learn what crime they are accused of committing? How long must they wait for a lawyer to defend them?

The Supreme Court has never answered any of these questions. As a result, an arrest thrusts a person into a terrifying procedural limbo that only a judge or a lawyer can end.<sup>2</sup>

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## IN FOCUS

### High stakes but little proof

In the United States, people are presumed innocent—even after an arrest. It takes proof beyond a reasonable doubt to undo that presumption and convict a person of a crime.<sup>3</sup>

But it only takes probable cause for police to arrest and detain a person. Probable cause is far less than reasonable doubt—it is less than 51% likelihood of guilt.<sup>4</sup>

This means that it is harder to repossess rent-to-own furniture or suspend a child from school than to arrest a person and keep them in jail before they've seen a judge or a lawyer.<sup>5</sup>

# What Is an Initial Appearance and Why Does It Matter?

An initial appearance procedure occurs the first time an arrested person goes to court and sees a judge about their case. Procedures differ from state to state, but all initial appearances share a common purpose: educating a person about their constitutional protections and allowing them to exercise their constitutional rights.<sup>6</sup>

At an initial appearance, the judge should advise a defendant of their rights and tell them about the charges that they face.<sup>7</sup> The initial appearance triggers the constitutional right to counsel and is a defendant's first chance to contest the charges.<sup>8</sup> Often, it is also a defendant's first opportunity for pretrial release.<sup>9</sup>

While waiting for their initial appearance to happen, a person can spend weeks—or even months—in jail, without seeing a judge, learning about their rights, or meeting a lawyer.<sup>10</sup> Without an initial appearance, they have no opportunity to argue for pretrial release or to investigate their case. Witnesses' memories may fade, and essential evidence may disappear. Meanwhile, a defendant may lose their job, home, or family.<sup>11</sup>

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## IN FOCUS

### Different states, different terms

States use different terms for the first post-arrest court appearance. Common terms include:



- initial appearance
- first advisement
- magistration
- arraignment
- presentment
- first appearance

# The Importance of a Prompt Initial Appearance

A prompt initial court appearance, with the assistance of counsel, is essential to fulfilling the Constitution's promises because it:



## Prevents secret detentions and interrogations

Before the initial appearance, police exercise absolute power and control over an accused person. Arrest and detention isolate a defendant, making them more susceptible to police interrogation. An initial appearance protects against this coercion. It alerts a judge about a person's arrest, keeps the public informed about police practices, and prevents the police from using a delay to extract a confession.



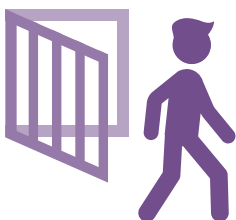
## Gives an arrested person important information and advice

Until the initial appearance, police and jailers are an arrested person's only sources of "advice." An initial appearance connects a defendant with a judge who can provide neutral oversight of the process. The judge tells a defendant about the reason for their arrest and advises them about their constitutional rights, including the right to remain silent and the right to counsel.



## Triggers the Sixth Amendment right to counsel

The Sixth Amendment right to an attorney arises at the initial appearance. So, a prompt initial appearance promotes prompt access to an attorney. Importantly, a defendant who is represented by a lawyer is far more likely to be released before trial than a defendant who appears in court alone. Early representation by an attorney also promotes prompt investigation and more effective advocacy, leading to better case outcomes.



## Facilitates a person's prompt release from jail

The initial court appearance is, in most cases, a person's first opportunity for pretrial release. A person who is released from jail can maintain their employment and their family and community ties. They can also meet freely with their lawyer and help prepare a defense. The sooner a person is released, the faster they can begin to repair their life.

# A Shocking Reality: What Really Happens After Arrest



# Fact v. Fiction

Most people believe that, after an arrest, a person will quickly go to court and get a lawyer to defend them. But in our overcrowded and under-resourced criminal legal system, this is simply not true.

The Supreme Court has not clearly explained what kind of initial appearance the Constitution requires, and state laws vary.<sup>12</sup> Some states have laws that defy our expectations about fairness. Other states require fair process but do not monitor compliance, allowing local courts to disregard the rules.<sup>13</sup>

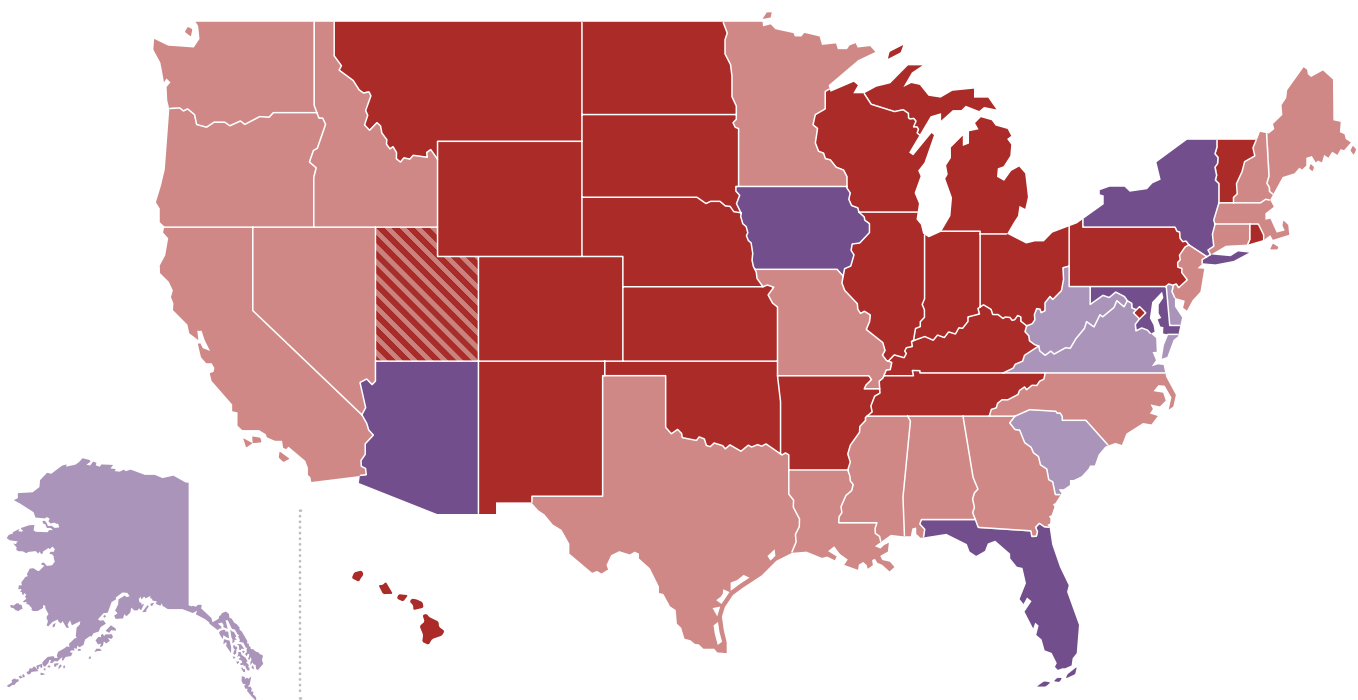
The result is a dismal patchwork of procedural rules, with too few constitutional guidelines and a wide range of inconsistent state laws. People in one state may receive far less initial appearance process than people in another state.

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## DATA SNAPSHOT

States have very different initial appearance rules.<sup>14</sup>

■ 24 hours or less   ■ 24 hour with limitations   ■ 2 – 7 days   ■ No firm deadline



# The law allows detention for days, weeks, or even months, without a court appearance

In many places, a newly arrested person can spend days, weeks—or even months—in jail without ever seeing a judge or learning about their rights. Yet, state laws allow this unfairness.

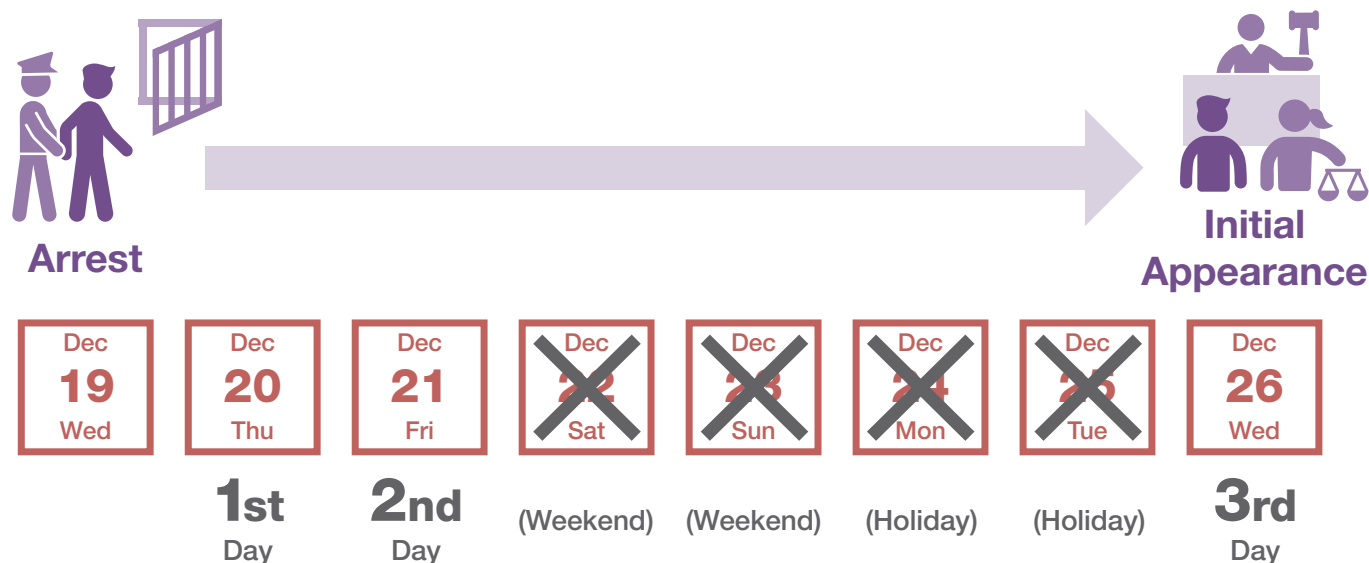
For example, Alabama, Georgia, and Louisiana allow three days between a person’s arrest and their first appearance, but weekends and holidays do not count.<sup>15</sup> Connecticut and Massachusetts only require that a defendant’s first court appearance occur at the next available court session, regardless of how long that may take.<sup>16</sup>

Thirty-three states have no clear timeline for providing an incarcerated person with an initial appearance.<sup>17</sup> They only require that an initial appearance occur “without unnecessary delay,” “as soon as practicable,” or “within a reasonable time.”<sup>18</sup>

## IN FOCUS

### When three days becomes a week<sup>19</sup>

While Louisiana law says the initial appearance must occur within three days of arrest, but holidays and weekends do not count toward that time limit.



## JESSICA JAUCH'S STORY

# 90 days in jail without a judge or a lawyer<sup>20</sup>

Relying on a secret informant, a grand jury in Choctaw County, Mississippi, indicted Jessica Jauch on felony drug charges and issued a warrant for her arrest. No one notified Ms. Jauch about the charges.

One day, the police stopped Ms. Jauch for a traffic violation and discovered the outstanding warrant. The police arrested Ms. Jauch and took her to jail.

Insisting that she knew nothing about the charges, Ms. Jauch begged jail officials to let her go to court or post bail. But before she could post bail, she needed to appear before a judge who could set bail.

At that time, Mississippi law said that Ms. Jauch's initial appearance could wait until "the next term of court." But the Choctaw County court only met four times per year, and the timing of Ms. Jauch's arrest meant that the next term of court was three months away.

After 90 days in jail, Ms. Jauch finally had her first court appearance. The judge explained the charges, set bail, and appointed an attorney. Six days later, Ms. Jauch posted bail and went home.

In short order, Ms. Jauch's attorney reviewed the surveillance video. But it only showed Ms. Jauch borrowing \$40 from her "friend" who was acting as a police informant. The attorney contacted the prosecutor, who dismissed all charges.

Ms. Jauch had been innocent all along.



## 90 days



# Police, jailers, judges, and lawyers violate initial appearance deadlines

Many defendants wait in jail without a court appearance long past the legal deadline, no matter what the law requires.<sup>21</sup> Some of these over-detentions are isolated instances of malpractice or oversight. Others are simply accepted—albeit illegal—patterns of local practice. There are even fill-in-the-blank legal forms that defendants can use to complain about being jailed without an initial appearance.<sup>22</sup>

## Presumptively innocent people languish in dangerous jails

For most defendants, the initial appearance is their first opportunity for pretrial release. Every day of delay in the initial appearance means another day of detention.

The law says that accused people are presumed to be innocent.<sup>23</sup> But their experiences in jail suggest that these pretrial detainees are already being punished—even before they have seen a judge or a lawyer.

People who are in jail cannot work or meet their family obligations. They are frightened about what may happen, and—because they have not had an initial appearance—they have little information about the legal process.<sup>24</sup>

Additionally, jails are violent, cramped, and frightening places. A person who is in jail before trial may suffer long-term trauma or physical injury.<sup>25</sup>

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“ In the largely underground Hamblen County Jail, detainees, **shackled at the ankles, overflow from mold- and mildew-infested cells, and some sleep nearly naked on the concrete jail floor. Many human beings are chained to benches, door handles, poles, and their own wheelchairs.** ”<sup>26</sup>



Hamblen County,  
Tennessee



# Defendants receive incomplete or confusing information about their rights

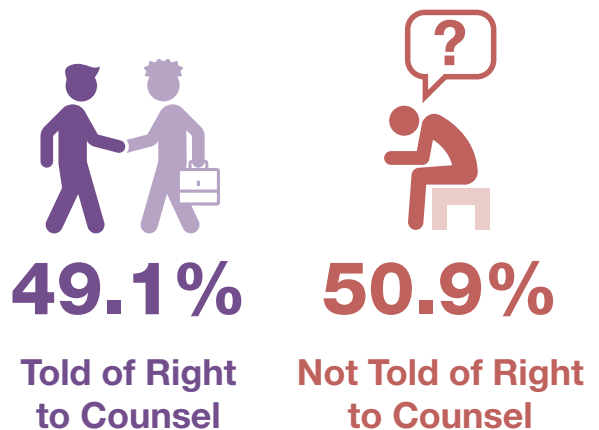
Without an attorney to help them, defendants may receive incomplete or confusing information at their initial appearance. For example, a judge may only give a partial explanation of a defendant's rights, skipping over those that are "inconvenient" or expensive, such as the right to a court-appointed defense lawyer.<sup>27</sup>

Sometimes, a judge reads a list of constitutional rights to a room full of defendants rather than advising each person individually.<sup>28</sup> Elsewhere, the advice of rights is prerecorded and played in the jail or courthouse. No one asks if each defendant heard—much less understood—those rights.<sup>29</sup>

## DATA SNAPSHOT

### Advice of Rights

In a five-county study, less than half of the defendants were told about their right to counsel when a judge delivered the advice of rights.<sup>30</sup>



# Defendants appear in court without a lawyer to help them

Although the initial appearance triggers a person's right to counsel, the Supreme Court has said that there is no right to have an attorney's help at the initial appearance itself.<sup>31</sup> The Court has never explained when a lawyer must be assigned or how quickly they must begin to work on the defendant's case. The Court has only said that a lawyer must be appointed within a "reasonable" time after the initial appearance and must assist in "any critical stage" of the proceedings.<sup>32</sup>

Many states do not provide indigent defendants with an attorney at initial appearance.<sup>33</sup> Instead, defendants stand in court alone, with no one to speak for them. They do not know whether their arrest was legal, much less how to argue for their release. Weary and frightened, they are left to fend for themselves.<sup>34</sup>

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## RACIEL ZALVA ZALDIVAR-PROENZA'S STORY

### Facing the prosecution alone<sup>35</sup>

Raciel Zalva Zaldivar-Proenza was arrested for sexual assault. A prosecutor was in court for the initial appearance, but Mr. Zaldivar-Proenza—who did not speak English—was unrepresented. The judge agreed to appoint an attorney to defend him, but not until the next court appearance.

Mr. Proenza had scratches on his arms. The prosecution claimed that those scratches came from grappling with the complaining witness. Mr. Proenza tried to explain that he had been injured at work handling barbed wire, but the judge told him to wait and speak to his attorney.

Invoking complex procedural rules that Mr. Proenza could not understand, the prosecutor made a motion to take pictures of his arms. With no lawyer there to object on his behalf, the judge granted the motion.

The prosecution only took pictures that supported their theory of the case.

No one took pictures that might have shown other barbed wire injuries. And because there was no defense lawyer watching, no one could object if the lighting and camera angles skewed the pictures to fit the prosecution's case.

At trial, those photos were the only evidence that corroborated the state's witness. A jury convicted Mr. Zaldivar-Proenza, and a judge sentenced him to six-and-a-half years in jail.

As one Minnesota Supreme Court Justice explained, the prosecution's request "presented a legal problem, one that Zaldivar-Proenza, a non-

English-speaking layperson, was ill-equipped to understand without the aid of counsel. The absence of counsel during the hearing meant that Zaldivar-Proenza lost the benefit of having his attorney inspect and preserve the evidence for trial."

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“The verdict might have been different had Zaldivar-Proenza's counsel been present.”<sup>36</sup>

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# Poor defendants struggle to get a court-appointed lawyer

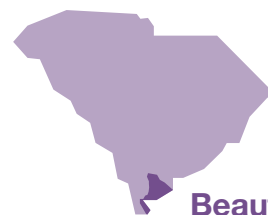
Although the Constitution promises the assistance of counsel, indigent defendants struggle to get the court-appointed lawyer they deserve. It is not simply that some judges discourage them from asserting their right to counsel. Local rules may also play a part in this injustice.

Many places require an arrested indigent person to submit a written application for legal assistance.<sup>37</sup> This delays the appointment of counsel.<sup>38</sup> Even getting the application can be challenging.<sup>39</sup> In some courthouses, the judge only provides the application after the initial appearance is over.<sup>40</sup> Elsewhere, defendants must request the application from their jailers. For illiterate defendants or non-English speakers, these forms may present an insurmountable hurdle.

In some places, indigent defendants must also pay public defender application fees, ranging from \$10 to \$400.<sup>41</sup>

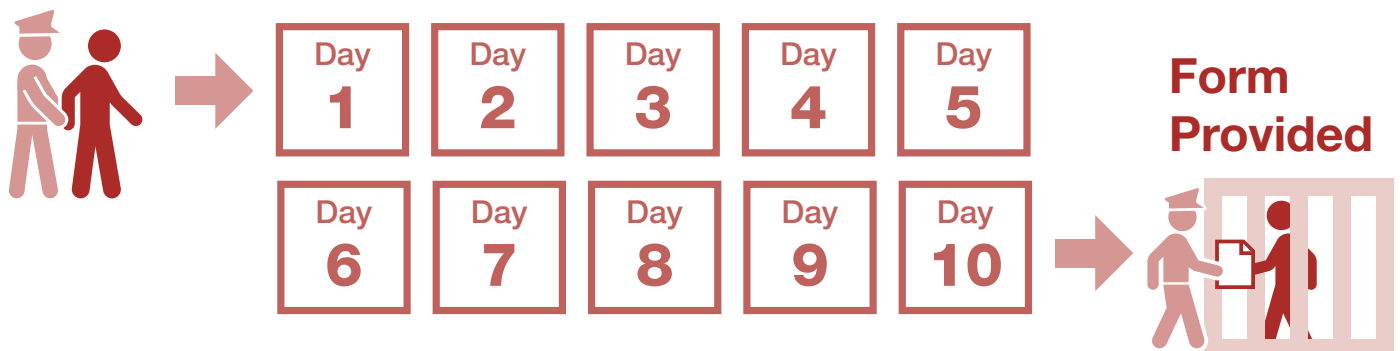
## DATA SNAPSHOT

In Beaufort County, South Carolina, the court makes defendants wait in jail for ten days before giving them a form to apply for appointed counsel.<sup>42</sup>



Beaufort County, SC

### Arrest



# It may be weeks before an attorney begins to work on the case

The lawyer who assists a defendant at the initial appearance may not be the attorney who will handle the case through plea or trial. Instead, a “duty lawyer” or “lawyer for the day” may handle the initial appearance, and another lawyer will be appointed to defend against the charges.<sup>43</sup>

Often, a duty lawyer has no further interaction with a defendant.<sup>44</sup> If so, after the initial appearance, a defendant will be effectively unrepresented until another lawyer is assigned.<sup>45</sup> Particularly in rural areas, where there is a severe shortage of criminal lawyers, it may be a long time before that happens.<sup>46</sup>

Even when an attorney is finally assigned, that does not mean that they are actively working on the case or communicating with the defendant.<sup>47</sup> They may have too many cases, or work too far away, to turn their attention to a new client. So a defendant must wait for help.

What is a “reasonable” amount of time for a defendant to wait in jail for someone to actually start to defend them? The Supreme Court has never said.<sup>48</sup> Perhaps, as a result, courts have denied relief to defendants who were held in jail for several weeks before the appointment of a lawyer.<sup>49</sup>

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## DATA SNAPSHOT

Courts have denied appellate, civil, and post-conviction relief to defendants who waited weeks for a lawyer’s help.<sup>50</sup>

### Clark v. State

**35** days  
### ### ### ### ###  
### ###

### Grogen v. Gautreaux

**40** days  
### ### ### ### ###  
### ### ###

### Commonwealth v. Padilla

**47** days  
### ### ### ### ###  
### ### ### ### ||

### Hawkins v. Montague Cty

**60** days  
### ### ### ### ###  
### ### ### ### ###  
### ###

# Bias and inequity impose unequal burdens on defendants of different races and ethnicities

The initial appearance crisis does not impact all races and ethnicities equally. Data on arrests, jail populations, and pretrial detention demonstrate a disproportionate impact on Black and African-American populations.<sup>51</sup>

In 2019, Black people made up 26.6% of arrests nationwide,<sup>52</sup> but represented only 13.4% of the total United States population.<sup>53</sup> Statistics on jail inmates in 2019 showed that Black people were incarcerated in jail at a rate (600 per 100,000) of more than three times the rate of White people (184 per 100,000).<sup>54</sup> Not only is a larger proportion of the Black population in jail, but available research shows that Black people are far more likely to be detained before trial than White people.<sup>55</sup>

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## DATA SNAPSHOT

The Prison Policy Initiative reports that:<sup>56</sup>

In large urban areas, Black felony defendants are over

**25%**

more likely than white defendants **to be held pretrial.**

Young Black men are about

**50%**

more likely **to be detained pretrial** than white defendants.

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Across the country, Black and brown defendants are at least

**10–25%**

more likely than white defendants **to be detained pretrial or to have to pay money bail.**

Black and brown defendants receive bail amounts that are

**2x as high**

**as bail set** for white defendants—and they are less likely to be able to afford it.

# **Dire Consequences for Delayed, Defective, and Uncounseled Initial Appearances**



## CONSEQUENCE

# Longer pretrial detention



In most places, the initial appearance is a defendant's first opportunity for pretrial release.<sup>57</sup> So, when the initial appearance is delayed, a defendant spends more time in jail.

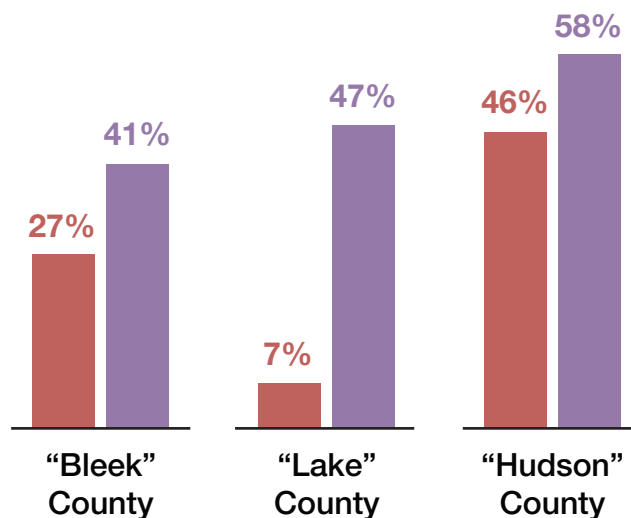
Whether a defendant will remain in jail depends heavily on a lawyer making a meaningful pretrial release argument. A defendant who does not have a lawyer at this vital hearing is far more likely to be detained before trial.<sup>58</sup> A defendant who only meets their lawyer at initial appearance may fare no better.

If the first attorney-client meeting happens during the initial appearance, the lawyer knows nothing about the defendant or their circumstances.<sup>59</sup> As a result, they cannot present the judge with solid evidence favoring the defendant's release.<sup>60</sup>

A meaningful argument about release will have to wait until a lawyer meets with the defendant, learns about their life, and presents evidence to the judge. But by that point, the lawyer is fighting an uphill battle. They are asking a judge to reverse an existing order, which often requires a higher standard of legal proof.<sup>61</sup> In other words, it is harder to modify a pretrial release decision than to get the ruling right at the initial appearance.

## DATA SNAPSHOT

After three New York Counties provided counsel at first appearance, there were dramatic increases in release at initial appearance.<sup>62</sup>



Percentage of people released at initial appearance

- Before (without counsel)
- After (with counsel)

## CONSEQUENCE

# Coerced confessions and uninformed waiver of rights



When a person is jailed without seeing a judge or a lawyer, they may quickly become demoralized. They are scared about their legal case and at risk of violence from other inmates. There is no help in sight.

If they receive confusing, incomplete, or misleading information about their rights, defendants may make unforced legal errors.<sup>63</sup> Some people confess—even to crimes that they never committed.<sup>64</sup> Other defendants accidentally give up their legal rights simply because they did not know enough to assert them.<sup>65</sup> The longer the delay in seeing a judge and a lawyer, the greater the risk that a desperate defendant will make mistakes that cannot be fixed.

## CONSEQUENCE

# Trauma, violence, injury, and illness



Delay in initial appearance means a delay in pretrial release. Even short periods of pretrial detention can cause significant physical, emotional, and financial harm. Jails can be overcrowded and dangerous. A defendant who is detained before trial can be assaulted, injured, raped, or killed.<sup>66</sup>

Even the healthiest people can become sick in jail. Respiratory illnesses, like Covid-19, spread quickly in confined spaces.<sup>67</sup> And because jails are not intended to address severe mental and physical illness, any pre-existing conditions may worsen.<sup>68</sup> Mental health conditions may become acute, and people who are detained face an increased risk of suicide.<sup>69</sup>

Detention without an attorney can exacerbate these problems. Yet, there is no one who can bring these issues to a judge's attention or argue for relief.



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## TREQUELLE VANN-MARCOUEX'S STORY

### Life and death consequences<sup>70</sup>

Trequelle “Tre” Vann-Marcouex was only 18 years old when he died in jail in rural Wood County, Wisconsin.

At Mr. Vann-Marcouex’s initial appearance, he qualified for a court-appointed attorney. But the local public defender had a conflict of interest. In Mr. Vann-Marcouex’s rural community, it was difficult to find another lawyer who could represent him.

Twelve days after his arrest, Mr. Vann-Marcouex was brought back to court for a high-stakes preliminary hearing. If the prosecution’s evidence was insufficient, the judge would dismiss the case and release Mr. Vann-Marcouex. But Mr. Vann-Marcouex did not have a lawyer to represent him at that hearing.

The judge did not postpone the hearing or try to find a lawyer to help the teenager. Instead, he allowed the prosecution to call witnesses to testify against Mr. Vann-Marcouex and forced him to represent himself.

Mr. Vann-Marcouex was at a loss. He was just a teenager. He knew how to play video games—not how to cross-examine witnesses.

Addressing the bewildered youth, the judge said, “you do have the right to ask questions . . . although if you had an attorney here, they would tell you not to do so because anything you say is being recorded here today on the record and could be used against you.”

Mr. Marcouex asked no questions, the prosecution won the hearing, and the judge sent Mr. Vann-Marcouex back to jail. Less than 12 hours later, Mr. Vann-Marcouex attempted suicide. He died in a hospital five days later.

Although Mr. Vann-Marcouex never knew it, help had been on the way. After 12 days and more than 300 phone calls, a lawyer had finally agreed to take Mr. Vann-Marcouex’s case. It was simply too little, too late.

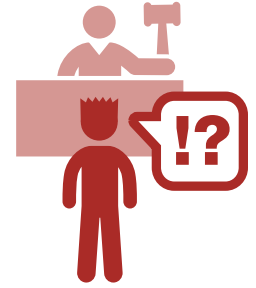
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**In 2018, suicide was the leading cause of death in local jails.**<sup>71</sup>

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## CONSEQUENCE

# Pleading guilty without a lawyer



Unsure when they will see an attorney or for how long they will be in jail, thousands of defendants simply give up. They plead guilty at initial appearance—before they have ever spoken to a lawyer.<sup>72</sup> In some places, judges pressure defendants to proceed without a lawyer. A judge may tell the defendant that hiring a lawyer or requesting a court-appointed lawyer will delay their release from jail.<sup>73</sup> Or a judge may promise probation and immediate release from jail—but only if the defendant gives up their right to have a lawyer’s advice.<sup>74</sup>

The hearings often last seconds and rarely more than a few minutes. Arrestees are instructed not to speak and are not offered any opportunity to submit evidence of their relative ability to post bond. Prosecutors routinely offer time-served plea bargains at the hearing, and arrestees are under immense pressure to accept the plea deals or else remain incarcerated for days or weeks until they are appointed a lawyer.<sup>75</sup>

At this early stage, no lawyer has investigated the case or explored any defense to the charges. No lawyer has advised the defendant about the wisdom of taking a plea deal. Yet, a defendant’s guilty plea—even to a misdemeanor—can have lifelong consequences.<sup>76</sup>

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## IN FOCUS

### Long term consequences for hasty guilty pleas

A defendant may plead guilty, thinking that they are putting the court case behind them, only to discover later that they face lifelong collateral consequences. Those consequences can include deportation, forfeiture of a professional license, disqualification for some types of employment, or the loss of government benefits. Unfortunately, it is almost impossible to undo these uncounseled convictions.<sup>77</sup>

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## CONSEQUENCE

# Loss of income and housing



A person who is detained before trial can lose their job. As a result, they can fall behind on rent, car payments, and other bills. They may damage their credit rating, lose rent-to-own furniture, default on loan payments, or face eviction from their home.<sup>78</sup>

## CARL MURDOCK'S STORY

# Wrongful arrest, delayed initial appearance, and financial ruin<sup>79</sup>

On June 19, 2014, Alabama police arrested Carl Murdock, Jr. and booked him into the Montgomery County jail.

After several days without an initial appearance, Mr. Murdock began to ask the jail staff for help. They told him that the judge assigned to his case would be on vacation in July. Unless Mr. Murdock was brought to court soon, he would have to wait until August.

Forty-eight days later, on August 6, 2014, Mr. Murdock finally had his initial appearance. The judge was shocked by his prolonged detention and horrified to discover that his arrest was a mistake. The warrant for Mr. Murdock's arrest was due to a clerical error.

The judge ordered Mr. Murdock's immediate release. But Mr. Murdock's prolonged detention had caused him great harm. Among other things, he had been fired from his job at the Veteran's Administration hospital.

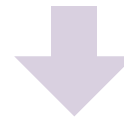
With the judge's help, Mr. Murdock persuaded his boss to rehire him. But Mr. Murdock suffered other financial harms that were not so easy to fix.

During 48 days of wrongful detention, Mr. Murdock lost several

weeks of income. Mr. Murdock defaulted on a loan and was forced into bankruptcy. His roommate sold Mr. Murdock's personal belongings and kicked him out of their apartment. Even his car was repossessed.

If Mr. Murdock had gone to court or seen a lawyer immediately after his arrest, none of that would have happened.

Instead, after seven weeks of detention without an initial appearance, Mr. Murdock was financially ruined.

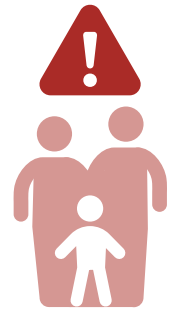


**48 days**



## CONSEQUENCE

# Harm to families and children



Family members, especially children, suffer emotional strain and uncertainty when a loved one is in jail. Maintaining contact is difficult. In-person visits can be costly and may conflict with a child’s school hours or a spouse’s work schedule. Video and telephone visits may be equally challenging.

Private contractors charge exorbitant rates for family phone calls and video visits. In some places, the first-minute phone call rates can be as high as \$6.50, and a 15-minute call can cost much as \$24.80.<sup>80</sup>

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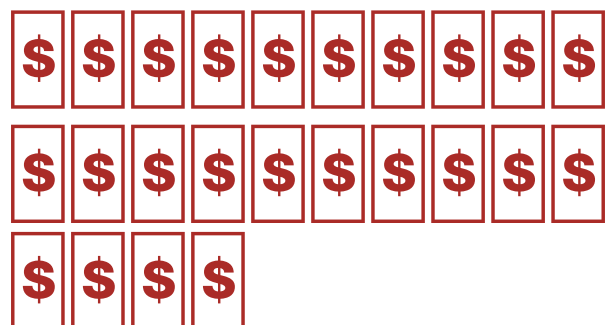
## IN FOCUS

### The high cost of maintaining family ties

“High rates and charges for inmate calling services can impede the ability of families to stay connected by making it prohibitively expensive for inmates and their families to stay in touch. This can have devastating impacts. Regular contact with family has been shown to reduce inmate recidivism, and children who stay in touch with an incarcerated parent exhibit fewer disruptive and anxious behaviors. These and other benefits cannot be realized if the rates and charges for inmate calling services are excessive, especially given that inmates’ families typically bear the burden of paying for these important calls.”<sup>81</sup>

**Cost of one 15-minute call from jail**

**\$24.82**



## CONSEQUENCE

# Worse case outcomes



A delay in holding an initial appearance or appointing a lawyer can contribute to worse case outcomes.<sup>83</sup> Investigative delays can permanently damage a defendant’s chance to defeat the charges. As time passes, evidence can disappear, and witnesses’ memories may fade. When an attorney finally begins to work on the defendant’s behalf, it may be too late for them to prove their client’s innocence.<sup>84</sup>

Problems that begin with delayed and uncounseled initial appearances—such as extended pretrial incarceration or the waiver of rights—can have other long-term consequences for a defendant’s case. People who experience lengthy pretrial detentions are more likely to be convicted and to receive longer sentences.<sup>85</sup>

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### IN FOCUS

## Short delays, long term consequences

Even short delays can make things worse. Studies have found that more than three days of pretrial detention can increase a person’s likelihood of conviction by 13%.<sup>85</sup>

Pretrial detention also has a significant impact on sentencing. Pretrial detention can increase minimum felony sentences by 157 days and misdemeanor sentences by 19 days.<sup>86</sup>

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### DATA SNAPSHOT

According to a study in Wichita County, TX, defendants who made bond experienced:<sup>87</sup>

**30%**

better chance of having all charges dismissed

**333%**

better chance of having a deferred adjudication

**54%**

fewer jail days sentenced to incarceration

## CONSEQUENCE

# Waste of taxpayer resources



Delayed initial appearances increase pretrial detention, wasting scarce government resources. This unnecessary pretrial incarceration comes with a high price tag for criminal legal systems and the communities they serve. Jails are expensive to run and challenging to operate. Jails must have enough money to staff their facilities and provide accused people with food, medication, safe housing, and recreational opportunities.<sup>88</sup>

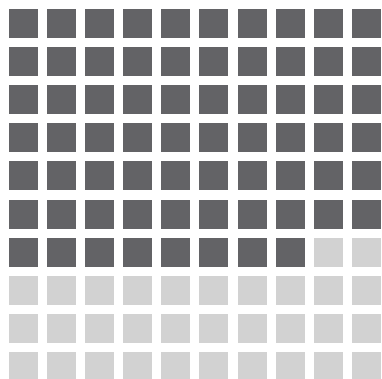
In addition, incarceration reduces tax revenues that a person would otherwise have paid in income, property, and sales tax. While they are detained, a person can lose their job and be unable to support their family, forcing taxpayers to spend more on social and public services.<sup>89</sup> Every additional day that a person spends in jail imposes more costs.

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## DATA SNAPSHOT

According to a 2017 report by the Pretrial Justice Institute:<sup>90</sup>

**63%** of the total U.S. jail population is awaiting trial



Costing U.S. taxpayers  
**\$38 million** per day

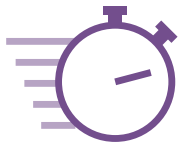


# Steps to End the Initial Appearance Crisis



# What Should Happen at an Initial Appearance?

To resolve the initial appearance crisis, we need a prescription for success. Fortunately, we know what should happen at an initial appearance:



## Within 24 hours of arrest

A person should have their initial appearance as soon as possible after an arrest, but never more than 24 hours later. A prompt initial appearance informs a defendant about their rights, triggers the right to counsel, and minimizes unfair and unnecessary pretrial detention.



## Early legal assistance

A defendant should have a lawyer's help before and during their initial appearance. The lawyer should meet with the defendant, learn about their circumstances, and use that information to argue for release. The lawyer should also warn the defendant against making any statements.



## Advice of rights

A judge should provide the defendant with an advice of rights and tell them about the charges they face. The rights should be communicated individually, and in the language spoken by the defendant. The judge should confirm that the defendant understands those rights.



## Informed release hearing

At the release hearing, the judge should hear arguments from both sides. The judge should scrutinize the prosecution's case to be sure that their evidence is sufficient. The defense attorney should educate the judge about the defendant's personal circumstances and argue for their release.



## Release on reasonable conditions

The judge should release the defendant on their own recognizance or set bail conditions. Any bail amount should be affordable, and any conditions of release should be reasonable. The defense attorney should notify the defendant's friends and family in order to expedite the release.



## Prompt defense of the case

If the initial appearance lawyer is assigned for that day only, an attorney should also be assigned to handle the defense. Within 72 hours, that attorney should meet with the defendant and begin to investigate the facts, file motions, negotiate a plea bargain, or prepare for trial.



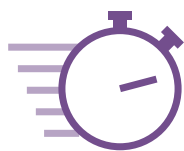
# Steps to End the Initial Appearance Crisis

The United States Supreme Court should acknowledge the right to a prompt and meaningful initial appearance, with the assistance of an attorney before, during, and after that court hearing. But state and local governments cannot wait for the Supreme Court to act. They must pass new laws that guarantee post-arrest due process. They must also draft rules that make criminal justice stakeholders accountable for complying with the law.

Stakeholders in local criminal legal systems also have the power to implement real change. Jailers, judges, courts, and prosecutors must work together to design systems to ensure that a person has a prompt initial appearance or is released from jail. Lawyers and judges must implement strategies that provide defendants with a lawyer, an informed bail hearing, and a prompt defense.

Using common sense, cooperation, and commitment, we can end the initial appearance crisis with six significant reforms.

## Require initial appearance as soon as possible, and never more than 24 hours after arrest<sup>91</sup>



An initial appearance should be held as soon as possible, but never longer than 24 hours after arrest. A speedy initial appearance gives defendants a fair shot at prompt release, which can help to reduce the harms associated with pretrial incarceration.

Holding an initial appearance within 24 hours minimizes the likelihood of coerced confessions. It also expedites a person's pretrial release and improves their chances of success at trial.

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“ Long-term outcomes are considerably worse for defendants held in jail longer than 24 hours, even if they are later released.”<sup>93</sup>

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Replacing vague standards such as “without excessive delay” with a strict 24-hour time limit would also have systemic benefits. Police, jailers, judges, and prosecutors would have clear rules to follow. And providing counsel within 24 hours of arrest can reduce system costs and mitigate jail crowding.<sup>92</sup>

# Make system stakeholders accountable for preventing delay



Rules establishing fair initial appearance procedures can only help if they are followed. Criminal justice actors should have both the power and the responsibility to enforce a 24-hour initial appearance rule. State law should require sheriffs, police chiefs, and jailers to notify the responsible court or prosecutor if a person is detained more than 24 hours without an initial appearance.

State law should also provide immediate solutions for any detention without appearance or the appointment of counsel. If a judge knows about an unlawful initial appearance delay but refuses to do anything about it, a jailer should be required to release the defendant.

When mistakes occur, stakeholders should gather to brainstorm solutions that will prevent errors. Discovering the cause of initial appearance injustice should be treated as an opportunity for growth and change.<sup>94</sup>

However, stakeholders who routinely ignore a 24-hour rule, refuse to appoint defense counsel, or neglect their other legal obligations should be held accountable. There should be no immunity from paying civil damages if police, sheriffs, jailers, or judges are complicit in initial appearance delays.

Additionally, lawyers who provide public defense services must boldly insist on providing effective assistance of counsel. Chief public defenders

must demand time and space for lawyers to meet privately with defendants before the initial appearance. They must also provide defendants with a lawyer who can start to work on their defense right away.<sup>95</sup> If no lawyers are available, or if the available lawyers have too many cases to provide real assistance, a judge must immediately be notified.<sup>96</sup> Litigation should also be filed seeking the release of people who are detained without representation.<sup>97</sup>

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## IN FOCUS

### Maine requires jailers to act

In Maine, an initial appearance must occur within 48 hours of arrest. If 36 hours pass without an initial appearance, the defendant's jailer must notify the prosecution about the impending deadline. If 48 hours expire without an initial appearance, a jailer "shall release the defendant from custody or bring the defendant forthwith before the court for appearance."<sup>98</sup>



## RUDY RIVERA'S STORY

# Why accountability matters<sup>99</sup>

The criminal legal system failed Rudy Rivera.

Mr. Rivera was arrested in California and sent to Nevada, where he faced marijuana-related charges. At his initial appearance in California, Mr. Rivera had a lawyer who handled the transfer hearing. But that lawyer had no responsibility for the case in Nevada and never checked to be sure that a lawyer was waiting there.

The U.S. Marshals took Mr. Rivera to Nevada, but there were no available beds in a federal facility. So the Marshals paid for Mr. Rivera to go to a private prison.

Weeks—and then months—went by, but Mr. Rivera never went to court. Mr. Rivera asked prison staff for help. But Mr. Rivera's jailers told him he had to wait for the federal officers to come get him.

After 355 days, Mr. Rivera finally had his first appearance in Nevada—but only because he had been able to reach a public defender to explain his plight.

After the prosecution dropped the charges, Mr. Rivera sued the federal government and the private prison corporation. The private prison denied all wrongdoing.

If the law required jail staff to report detentions without initial appearance, things might have been different. Instead, Mr. Rivera lost a year of his life to a private prison's indifference. Each day of that detention, the prison earned more money.



**355  
days**



# Provide legal assistance before and during the initial appearance



An attorney's assistance is critical to protect a defendant's rights and set fair release terms. As a practical matter, meaningful representation at an initial appearance requires the time and space for a private attorney-client conversation *before* the defendant sees the judge.<sup>100</sup>

Meeting with an attorney before the initial appearance minimizes a defendant's anxiety and educates them about the criminal process. It also allows the defense lawyer to learn about the defendant's circumstances and contact friends, family members, and employers who can support the defendant's motion for release.

In contrast, if a lawyer's first meeting with a defendant occurs at the actual court appearance, the lawyer will know nothing about the defendant or their circumstances. As a result, the lawyer will not be able to make a compelling argument for the defendant's release.

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## DATA SNAPSHOT

A study of Chicago and Cook County, Illinois, predicted that providing an attorney within 24 hours of arrest would save public funds.<sup>101</sup>

Close **22** jail units



Save between

**\$12,700,000** and  
**\$43,900,000** per year



# Make an informed decision about pretrial release



The Constitution requires that pretrial release considerations be individually tailored to each defendant's situation. The charges are only one of many factors that a judge must consider. The judge must also evaluate the defendant's background, employment, ties to the community, and financial circumstances.<sup>102</sup>

But a judge can only consider the information that is before them. Police tell the judge about the charges and provide a criminal history "rap sheet." Without a defense attorney, there is no one to contest the charges or identify errors in the rap sheet.

Perhaps more importantly, only a well-informed defense lawyer can provide vital information that will result in a fair release decision.<sup>103</sup> Background information supplied by a pretrial services officer will not suffice. Only the de-

fense lawyer has a constitutional obligation to take the defendant's side.

At the pretrial release hearing, the judge should listen to the lawyer's arguments and, whenever possible, release the defendant without requiring cash bail. If cash bail is required, the lawyer must ensure that the judge selects a truly affordable amount. No one should remain in jail simply because they are poor.

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**In New York State, at least 2.1 million people have rap sheets that are inaccurate, incomplete, or misleading.<sup>104</sup>**

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## DATA SNAPSHOT

When Alameda County, California, provided counsel before and during initial appearance, the number of people released increased dramatically.<sup>105</sup>



**Before: 1%** of defendants released at initial appearance



**After: 24%** of defendants released at initial appearance

## Deliver clear advice of rights



The judicial advice of rights should be standardized to cover a list of mandatory topics. A judge should deliver those rights individually. If English is not a defendant's first language, an interpreter should be provided.

As a judge reads the rights, they should stop to ensure that the defendant understands. Video recordings or speeches made to a packed courtroom cannot do this important work.

The entry of a guilty plea at initial appearance should be handled with particular caution. A judge should be sure that the defendant has met with an attorney and received meaningful advice about the wisdom of a plea. A defendant should understand that a guilty plea can have lifelong collateral consequences, even if the plea is to a misdemeanor or does not include a jail sentence.

## Within 72 hours, appoint a lawyer to begin the defense



Early investigation is imperative to success in a criminal case, so an attorney should be appointed as soon as possible to handle the defense, and never later than 72 hours.<sup>106</sup> If a duty lawyer handles the initial appearance, that lawyer should continue to represent the defendant, and conduct investigation, until the new lawyer takes over.

Once appointed, a lawyer should immediately meet with the defendant and begin to work on their case. If the defendant is still in jail, the attorney should make a compelling motion to modify their bail.

The attorney should work quickly to recover photographic and video materials, such as surveillance videos, traffic cameras, and license plate readers.<sup>107</sup> Otherwise, these crucial materials—which can make or break a case—may be erased or deleted. The attorney should locate and interviewing witnesses while their recollections are fresh.

If the appointed lawyer has too many cases to provide real assistance, a judge must immediately be notified.<sup>108</sup> Litigation should be filed seeking the release of a defendant who is detained without representation.<sup>109</sup>

A defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives."<sup>110</sup>

# Study technological adaptations



Remote initial appearances—usually by video—may appear to be an attractive solution for providing rapid access to courts and counsel. Remote rural criminal court systems have long relied on telephone and video communications to conduct initial appearances.<sup>111</sup> In the era of COVID-19, many other courts have launched similar initiatives.<sup>112</sup>

While remote initial appearances can reduce the time between arrest and appearance, there is little research about whether these proceedings are fair and effective. Important questions remain unanswered.<sup>113</sup>

How can a remote judge know whether a defendant understands their rights? Can defendants and attorneys have truly private conversations? Will defendants even be willing to share personal information across a video screen? How does remote communication impact the likelihood of release or the conditions set for bail?<sup>114</sup>

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## DATA SNAPSHOT

### Remote proceedings can harm defendants

After Cook County, Illinois, shifted to remote initial appearances, bond amounts increased by 51%.<sup>118</sup>



Existing studies suggest cause for concern. Remote video proceedings can impair attorney-client trust and impede private communication.<sup>115</sup> Poor camera angles, bad lighting, or brief internet lags may cause a viewer to miss—or misinterpret—changes in someone’s demeanor or body language.<sup>116</sup> And without a living, breathing person standing in front of them, it may be easier for a judge to set high bail amounts or order pretrial detention.<sup>117</sup>

Because of these important concerns about fairness and due process, remote initial appearances must be carefully studied and modified—or even abandoned—if they cause more harm than good.

# Conclusion

Lengthy detentions between arrest and a first court appearance mimic the police “disappearances” so common under authoritarian regimes.

The Constitution guarantees that no one will be jailed without access to the courts or an attorney. Yet, the initial appearance crisis allows people to languish in jail alone, afraid, and undefended.

But change is possible. At the state and local level, lawyers, lawmakers, judges, and jailers must honor the Constitution’s promises and end the initial appearance crisis.



## ENDNOTES

1. See generally Metzger, P. & Hoeffel, J., *Criminal (Dis)appearance*, 88 *Geo. Wash. L. Rev.* 392 (2020).
2. Oppel, R. & Patel, J., *One Lawyer, 194 Felony Cases, and No Time*, *The New York Times* (Jan. 31, 2019); Harlow, C., *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases*, *Bureau of Justice Statistics* (Nov. 2000).
3. *In re Winship*, 397 U.S. 358, 363 (1970).
4. *Gerstein v. Pugh*, 420 U.S. 103, 120–21 (1975).
5. *Id.* at 127 (Stewart, J., concurring).
6. Metzger, P. & Hoeffel, J., *supra* at 398; *Coleman v. Frantz*, 754 F.2d 719, 724 (7th Cir. 1985), abrogated in part on other grounds by *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986); *Hayes v. Faulkner Cty.*, 388 F.3d 669, 673 (8th Cir. 2004).
7. Metzger, P. & Hoeffel, J., *supra* at 398, citing *Armstrong v. Squadrito*, 152 F.3d 564, (7th Cir. 1998).
8. *Rothgery v. Gillespie County*, 554 U.S. 191, 211, 212 n. 15–17 (2008) (holding right to counsel attaches at initial appearance but initial appearance is not, per se, a critical stage requiring counsel’s assistance).
9. *ABA Standards for Criminal Justice: Pretrial Release*, 3rd ed., *American Bar Association* 78 (2007); Metzger, P. & Hoeffel, J., *supra* at 406; see also James A. Allen, “Making Bail”: Limiting the Use of Bail Schedules and Defining the Elusive Meaning of “Excessive” Bail, 25 *J.L. & POL’Y* 637 (2017).
10. Metzger, P. & Hoeffel, J., *supra* at 401.
11. Metzger, P. & Hoeffel, J., *supra* at 446, quoting *Gerstein*, 420 U.S. at 114.
12. See Metzger, P. & Hoeffel, J., *supra* at 433.
13. See Metzger, P. & Hoeffel, J., *supra* at 407.
14. Brink, M. N., Yu, J., & Metzger, P. R., *Grading Injustice: Initial Appearance Report Cards*, *Deason Criminal Justice Reform Center* (September 2022). In Utah: If arrested on a warrant, initial appearance must occur within 48 hours of arrest, excluding weekends and holidays. Utah R. Crim. P. 9A (West 2020). For warrantless arrests, initial appearance must occur “without unnecessary delay.” Utah Code Ann. § 77-7-23 (West 2018).
15. Al. R. Cr. P. Rule 4.4 (2021); Ga. Code Ann. § 17-4-26 (West 1995); LA. CODE CRIM. PROC. ANN. art. 230.1 (2018).
16. Conn. Gen. Stat. § 54-1g (2012); MASS. R. CRIM. P. 7. This can be a particular hardship in rural areas, where the next term of court may not occur for weeks, or even months. See Jacob Kang-Brown & Ram Subramanian, *Vera Inst. of Justice*, *OUT OF SIGHT* 19 (2017); Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End Indefinite Detention Without Counsel*, 61 *ST. LOUIS U. L.J.* 665, 666–69, 676–77 (2017).
17. See citations as note 14, *supra*.
18. COLO. R. CRIM. P. 5; IOWA R. CRIM. P. 2.2; KAN. STAT. ANN. § 22-2901 (2007); KY. R. CRIM. P. 3.02; MICH. COMP. LAWS ANN. § 764.13 (West 2010); MISS. CODE ANN. § 99-3-17 (2015); MO. R. CRIM. P. 22.07; MONT. CODE ANN. § 46-7-101 (2017); NEV. REV. STAT. § 171.178 (2017); N.M. STAT. ANN. § 31-1-5 (West 2019); N.Y. CRIM. PROC. LAW §§ 120.90, 140.20 (McKinney 2004); N.C. GEN. STAT. § 15A-501 (2017); N.D. R. CRIM. P. 5; OKLA. STAT. ANN. tit. 22, § 181 (West 2019); PA. R. CRIM. P. 516, 519; P.R. LAWS ANN. tit. 34, § 22 (2019); S.D. CODIFIED LAWS § 23A-4-1 (2016); UTAH CODE ANN. § 77-7-23 (LexisNexis 2017); VT. R. CRIM. P. 3; VA. CODE ANN. § 19.2-80 (2015); W. VA. CODE ANN. § 62-1-5 (LexisNexis 2014); WIS. STAT. ANN. § 970.01 (West 2007).
19. LA. CODE CRIM. PROC. ANN. art. 230.1.
20. This account of Ms. Jauch’s case is taken from *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017)

and from Brief for Appellant, *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017) (No. 16-60690), 2016 WL 7386084.

21. Metzger, P. & Hoeffel, J., *supra* at 396.
22. See, e.g., John W. Witt et al., *Unreasonable Delay in Bringing Pretrial Detainee Before Judge*, in SECTION 1983 LITIGATION: FORMS § 1.187 (2d ed. Supp. 2019); see also *Moya v. Garcia*, 895 F.3d 1229, 1240 (10th Cir. 2018) (McHugh, J., concurring and dissenting) (plaintiff's claim of "overdetention," falls "into a category of claims which unfortunately have become so common that they have acquired their own term of art" (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010))).
23. *Winship*, 397 U.S. at 363.
24. Metzger, P. & Hoeffel, J., *supra* at 398.
25. *Id.* at 407.
26. Class Action Complaint, *Torres v. Collins*, No. 2:20-CV-00026-DCLC, 2020 WL 7706883 (E.D. Tenn. Nov. 30, 2020), Declaration of Ethel Rhodes, Assistant Public Defender for Tennessee's Third Judicial District (Rhodes Decl.), Ex. A ¶ 13.
27. Robert C. Boruchowitz, *Judges Need to Exercise Their Responsibility to Require that Eligible Defendants Have Lawyers*, 46 HOFSTRA L. REV. 35, 46–48 (2017), citing to Smith, A., et al., *Rush to Judgment: How South Carolina's Summary Courts Fail to Protect Constitutional Rights*, *National Association of Criminal Defense Lawyers* 27 (2017); see also, *County of Price v. Kraus*, Nos. 00-3213-FT, 00-3214-FT, 2001 WL 243546, at \*2 (Wis. Ct. App. Mar. 13, 2001).
28. Standing Comm. on Legal Aid & Indigent Defendants, Am. Bar Ass'n, *GIDEON'S BROKEN PROMISE* 24–25 (2004).
29. Sixth Amendment Center, *The Right to Counsel in Maine: Evaluation of Services Provided by the Maine Commission on Indigent Legal Services* 43 (April 2019); Boruchowitz, R., *supra*, at 57. Smith, A. et al., *supra* at 27. Boruchowitz, R., *supra*, at 46–48.
30. *Id.*
31. *Rothgery*, 554 U.S. at 191, 211, 212 n. 15–17.
32. *Id.* at 212.
33. Right to Appointed Counsel: 50 State Statutory Survey, 0030 Surveys 22, Thomson Reuters (2020).
34. Boruchowitz, R., *supra* at 52; Smith, A. et al., *supra* at 6, 31–32.)
35. *State v. Zaldivar-Proenza*, 957 N.W.2d 93 (Minn. 2021).
36. *Id.* at 105.
37. See generally Washington University School of Law Criminal Justice Clinic, *Collection of State Indigency Guidelines and Statutes* (Nov. 2012).
38. Metzger, P. & Hoeffel, J., *supra* at 453; Jack King, *NACDL News: Board Members Elevate Cynthia Hujar Orr to President-Elect*, *CHAMPION*, Nov.–Dec. 2008, at 12, 13; see, e.g., Schulhofer, S., *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 *Ohio St. J. Crim. L.* 505, 549–55 (2015); Baxter, H., *Too Many Clients, Too Little Time: How States are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 *Fed. Sent. R.* 91, 96 (Dec. 12, 2012).
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## ACKNOWLEDGMENTS

The Deason Center gratefully acknowledges Arnold Ventures and the Charles Koch Foundation for their generous support of this project.



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**Suggested Citation:** Metzger, P., Hoeffel, J., Meeks, K., & Sidi, S., *Ending Injustice: Solving the Initial Appearance Crisis*, Deason Criminal Justice Reform Center (September 2021).

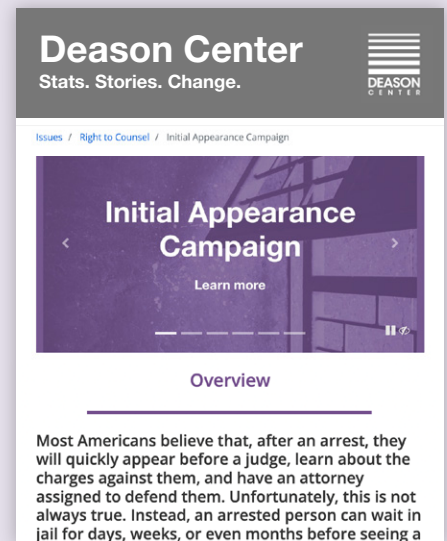
Originally published October 2021, Updated September 2022

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