

Ending Arkansas' First Appearance Crisis



! THE PROBLEM

Arkansas law is clear: every arrested person has the right to an attorney's help the first time they see a judge. But across the state, people often face a judge at first appearance without a lawyer by their side. Even worse, a shortage of attorneys means people sometimes wait months for a lawyer's help.



Arrested people have a constitutional right to prompt access to the courts, the assistance of counsel, and a fair and speedy trial.¹ These due process milestones begin at first appearance: the first time an arrested person sees a judge about their case.

Like 25 other states,² Arkansas promises that an arrested person will be represented at first appearance:

ARKANSAS RULE OF CRIMINAL PROCEDURE 8.2

"A judicial officer shall determine whether the defendant is indigent and, if so, appoint counsel to represent him or her at the first appearance ..."

But Arkansas is failing. **Despite Rule 8.2, Arkansans are commonly forced to stand alone before a judge at first appearance.**³ Often, they do not see a lawyer until arraignment, which can occur months after their first appearance.⁴ During these months, arrested people—who are presumed innocent—can sit in jail without knowing when they will next be brought to court or how to effectively advocate for their release.

✓ THE SOLUTIONS

Counsel at First Appearance 4

Defense Counsel within 72 Hours 7

Fund Public Defense 9

FIGURE 1

Local Practice Violates State Rule



Counsel at first appearance?

Arkansas Rule 8.2

Yes.

Arkansas Practice

No.

! THE CONSEQUENCES

POLICY BRIEF

Uncounseled first appearances and delays in the appointment of counsel have devastating consequences, including:



Longer pretrial detention



Trauma, violence, and even death



Waste of taxpayer resources

LARRY EUGENE PRICE, JR.'S STORY

Larry Eugene Price, Jr., was well known to Fort Smith police officers when he burst into the police station on August 19, 2020. Mr. Price was homeless and had a long history of mental illness. He often visited the police station, agitated, multiple times a day. On this day, he was shouting incoherently. At some point, Mr. Price “held out his plainly empty hand as if he was holding a gun and used his index finger to pull an imaginary trigger.” The police arrested Mr. Price and booked him on a felony charge of making terroristic threats.

Five days later, Mr. Price appeared before a judge for his first appearance.⁵ He did not have an attorney. The judge set his bail at \$1,000. With a cash payment of 10%—just \$100—Mr. Price could buy his pretrial release. But he could not pay \$100. As a result, he sat in jail for more than a year.

Mr. Price’s mental health deteriorated, and he stopped eating. He died of starvation in his cell on August 29, 2021. At the time of his arrest, Mr. Price weighed 185 pounds. At death, he only weighed about 90 pounds.

The County is now facing a wrongful death lawsuit and taxpayers may be liable for millions of dollars in damages.⁶

Mr. Price’s story is not unique. Arkansas jails are dangerous places for people detained before trial. In 2023:

! Two people died the day after being booked.⁷

! Three people died by suicide.⁸

! Several jail officials were arrested and charged with assaulting detained people.⁹

The alarming lack of counsel at first appearance in Arkansas has been challenged in state and federal courts.

■ ***Burnett v. Arkansas***
Ark. Sup. Ct. CR-22-253 (2022)

Ricky Lee Burnett's first appearance was on January 4, 2022. Although the public defender was present, he declined to represent Mr. Burnett. At the prosecutor's request, the judge set a \$350,000 cash-only bond. Mr. Burnett claimed that his first appearance violated Arkansas law because he did not have counsel. Had Mr. Burnett been represented, his lawyer could have informed him of his rights and made arguments regarding indigency, probable cause, and pretrial release. After ordering full briefing, the Arkansas Supreme Court declined to address the right to counsel question and dismissed Mr. Burnett's case as moot in November 2023.

■ ***Farella v. Benton County***
5:22-CV-05121-TLB (W.D. Ark. June 24, 2022)

At first appearance, a judge found Abigail Farella and Logan Murphy to be indigent, but failed to appoint counsel to assist them. The judge then set their bail at more than \$10,000. Ms. Farella and Mr. Murphy filed a class action in the United States District Court for the Western District of Arkansas arguing that, under the U.S. Constitution, people must have counsel at first appearance. The judge recently denied a motion to dismiss. This case remains active and the parties were recently deposed.

Learn about solutions from other jurisdictions in the Deason Center's policy brief:

How to Solve the Initial Appearance Crisis

POLICY BRIEF

How to Solve the Initial Appearance Crisis

THE PROBLEM

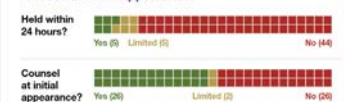
Across the United States, people are arrested and held behind bars for days, weeks, and sometimes even months, without ever seeing a judge or attorney. These delays violate the United States Constitution's promise that an arrested person—who is innocent unless proven guilty—will have prompt access to the courts, the assistance of counsel, and a fair and speedy trial.

These due process milestones begin at initial appearance: the first time an arrested person sees a judge about their case. At an initial appearance, the judge should inform an arrested person of the charges against them. The judge should also make an informed decision about whether, and under what conditions, to release a person from jail pending trial. The judge should hold this initial appearance promptly after arrest, and an attorney should advocate for the arrested person. Too often, none of these things happens.

THE SOLUTIONS

- Initial Appearance within 24 Hours
- Delay Requires Rationale
- Counsel at Initial Appearance
- Defense Counsel within 72 Hours
- Prompt Review if Detained

FIGURE 1
Most U.S. Jurisdictions Fail to Provide Basic Due Process at Initial Appearance¹



✓ SOLUTION 1

Guarantee Counsel at First Appearance

No one should be forced to represent themselves at first appearance. Every arrested person must be represented by counsel. Arkansas rules already guarantee this right to counsel—now Arkansas must deliver on this promise.

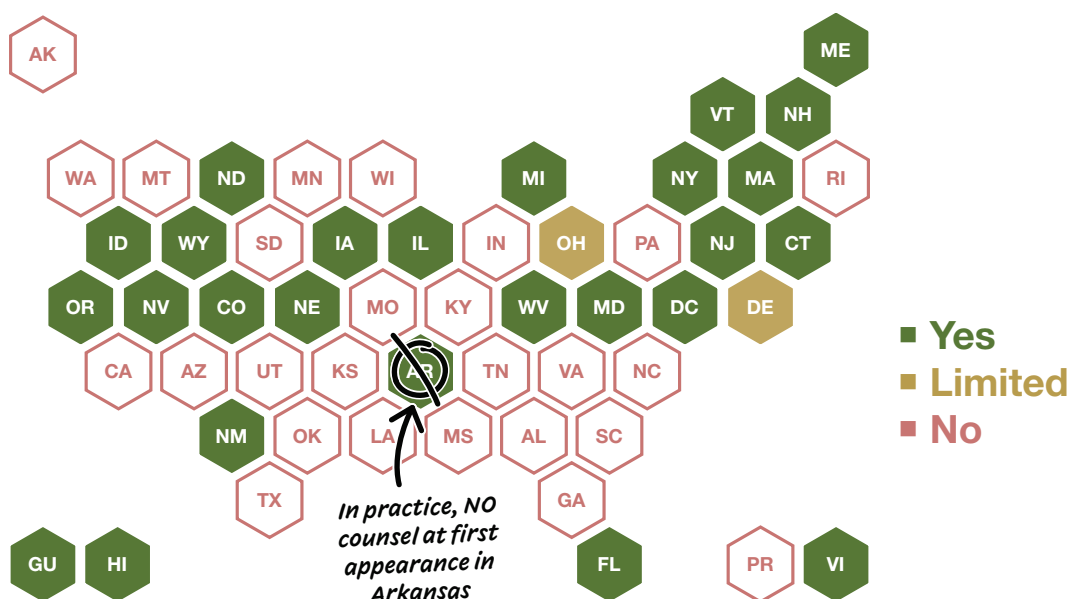
Why Counsel at First Appearance Matters

Counsel has several important roles at first appearance:

- **Challenging wrongful arrests.** Police make mistakes. An attorney can identify errors and challenge illegal arrests, potentially resulting in the dismissal of charges.¹⁰
- **Ensuring judges make informed decisions about pretrial release.** Arkansas judges must consider nine factors when addressing pretrial release.¹¹ Someone who is not a lawyer is unlikely to know these wide-ranging factors, much less use them effectively to argue for release.
- **Helping arrested people understand the criminal process.** Counsel can explain the arrest, charging, and arraignment processes. They can also invoke a person's speedy trial rights and request the preservation of evidence.



FIGURE 2
Many Other States Guarantee Counsel at First Appearance



The Impact of Counsel at First Appearance

Counsel at first appearance should be a priority. Counsel can ensure that presumptively innocent people are not in jail unless they pose a serious risk of harm to the public. Promptly releasing people who pose little risk to the public reduces harm for everyone:

- Released people retain their jobs and can continue to support their families.¹² They can also maintain their relationships, helping their spouses and raising their children. In contrast, detained people often face financial ruin and broken family relationships, particularly with their children.¹³
- Communities experience less recidivism. According to one study, when low-risk people are released from jail within 24 hours, they are 36% less likely to be rearrested, compared to those jailed for 8–14 days before release.¹⁴
- Arkansas would save the unnecessary costs of jailing people who can be safely released.¹⁵ Jailing a person in Arkansas costs around \$65 per person, per day.¹⁶ Litigation over jail conditions and abuses, like the lawsuit over the death of Larry Eugene Price, Jr., is even more costly.¹⁷

SOLUTION 1

Guarantee Counsel at First Appearance



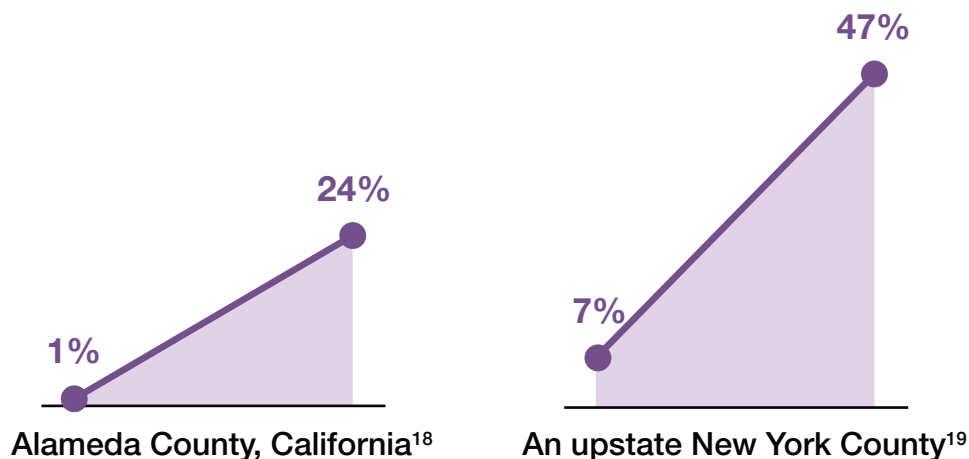
A study of Cook County, Illinois predicted that providing an attorney within 24 hours of arrest would save the county up to

\$43.9 million
in annual jail costs.

FIGURE 3

Counsel at First Appearance Increases Pretrial Release

Pretrial Release Before and After Counsel at First Appearance



Formalize First Appearance

In many Arkansas courts, first appearances are not formal proceedings. There is:

- **No notice:** First appearances are often held in front of district court judges, who rarely publish a court calendar. Particularly in rural Arkansas, first appearances frequently occur at the whim of the judge, whenever the judge asks to see anyone who has been arrested since the last first appearance. Some judges hold first appearances at 6:00 a.m., or even earlier.²⁰
- **No public access:** First appearances are often held in jail. This prevents families, the public, and the press from attending. Barring access is particularly harmful to arrested people seeking release, as they cannot demonstrate their ties to the community or draw attention to the family and friends who might help ensure their return to court.
- **No recordings or transcripts:** First appearances are often held in district courts, which, until very recently, were courts of “no record.”²¹ A recent amendment to the Supreme Court’s Administrative Order now requires that all courts record first appearances, but many courts are not yet complying. Without a recording of the proceedings, the defendant cannot effectively challenge the decision or argue for a modification.

To ensure the assistance of an attorney at first appearance, Arkansas must require judges to schedule first appearances at regular times. First appearance proceedings should also be held on the record. This would allow a reviewing court to evaluate the district court judge’s reasoning and ensure that they considered all the factors required under the Arkansas rules.

SOLUTION 1 Guarantee Counsel at First Appearance



Learn more about the harms of inadequate first appearances. Read the Report.

Ending Injustice: Solving the Initial Appearance Crisis



Appoint Defense Counsel within 72 Hours of Arrest

Even where counsel is provided at first appearance, that lawyer often only represents that person for that hearing. Trial counsel is assigned later. This change of counsel can create a gap—leaving the person to sit in jail unrepresented for months.

To avoid gaps in representation, Arkansas should require that courts appoint trial counsel within 72 hours of arrest. Between first appearance and arraignment, that counsel should:

- **Provide a point of contact for people who remain in jail.** The Supreme Court of Arkansas has noted that first appearance helps protect people “from being held incommunicado for protracted periods of time.”²² Prompt assignment of defense counsel ensures that people are not lost in the system. Counsel can assist detained people in invoking their procedural rights and seeking a review or modification of conditions of release.
- **Collect time-sensitive, exonerating evidence.** As time passes, physical evidence can erode or disappear. Digital evidence, such as surveillance tapes, can be erased if not gathered quickly. Witnesses can become harder to track down over time.²³ To provide effective representation and prevent miscarriages of justice, lawyers must promptly identify and gather exculpatory evidence.²⁴
- **Keep cases on schedule.** Failure to appoint counsel during this critical period is likely to cause future delays. If counsel cannot promptly begin their investigation, they may not be prepared to promptly exchange discovery, negotiate a potential plea, or timely move cases toward trial.



DEFINITIONS

Counsel at First Appearance — The attorney who represents an arrested person at their first appearance. This might be a “duty attorney” or an “attorney for the day,” whose limited scope of representation ends when defense counsel enters the case.

Defense Counsel — The attorney who represents an arrested person through the disposition of their case. In some instances, defense counsel might also be the first appearance attorney. In other situations, defense counsel may replace the first appearance attorney.

Continuous Representation — Representation of an arrested person from first appearance through disposition by two or more lawyers who sequentially assume responsibility for the case without any gaps in representation.

ACCOUNTABILITY

Identify Defense Counsel

Courts often appoint a public defender office or law firm to represent a person, but a general appointment does not ensure that an individual lawyer is responsible for the case. Courts should require a specific attorney to file an entry of appearance within 48 hours of appointment. If a specific, named defense counsel does not promptly enter an appearance, the judge should address this failure with the firm or public defense agency.

ACCOUNTABILITY

Ensure Continuous Representation

The attorney who represents an arrested person at first appearance must represent that person until defense counsel enters an appearance. Continuous representation ensures that the judge can always identify the individual lawyer responsible for each case.

SOLUTION 2 Defense Counsel within 72 Hours



MODEL LANGUAGE

a. **Procedure for Appointment of Counsel for Indigent Defendants** . . .

b. **Entry of Appearance.** At or before a first appearance in any court on behalf of any defendant, an attorney, whether privately retained or court-appointed, shall file an entry of appearance or, in lieu thereof, the court shall note the attorney's appearance on the record.

c. **Duty of Continuing Representation.** Counsel representing at any stage shall continue to represent that defendant in all further proceedings . . . unless counsel is allowed to withdraw for good cause as approved by the court and new counsel is retained or appointed (unless the right to counsel has been properly waived pursuant to Rule 7.1(c)).

Mississippi Rule of Criminal Procedure 7.2 (2023)

✓ SOLUTION 3

Fund Public Defense

Arkansas faces a massive shortage of public defense attorneys, particularly experienced defense attorneys.²⁵ Many offices have open positions they cannot fill.²⁶ As a result, some rural Arkansas counties have reportedly created waitlists for counsel—a practice a Missouri court recently held unconstitutional.²⁷ After losing more than a dozen attorneys in 2022, one Arkansas public defender office had to refuse to take death penalty cases.²⁸

Providing counsel at first appearance could reduce defenders' overall workload by screening out weak cases early.²⁹ However, the understaffed Arkansas public defense system cannot prioritize first appearances. Instead, overburdened public defenders are forced to prioritize cases set for trial.

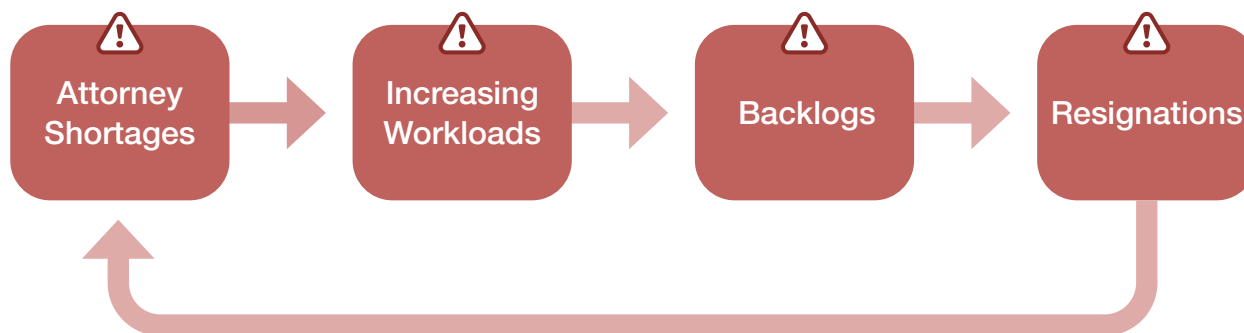


“You’re always playing catch up.”

Gregg Parrish
Director, Arkansas Public
Defender Commission

FIGURE 4

Arkansas Is Stuck in an Attorney Shortage Cycle



🔍 ACCOUNTABILITY

Courts Must Release People Jailed without Lawyers

A person detained pretrial is presumed innocent. Jailing a person pretrial without promptly providing counsel violates due process.³⁰ Accordingly, if the court does not promptly appoint a lawyer, the person must be released.³¹

Arkansas must ensure that there are enough public defenders to guarantee due process to all Arkansans. Policymakers should:

SOLUTION 3 Guarantee Sufficient Public Defenders



Improve public defender pay

In Arkansas, public defenders generally are paid less than prosecutors. Arkansas should immediately create pay parity between public defenders and prosecutors of similar experience.

ABA Standards Require Pay Parity:

“The compensation for lawyers working for Public Defense Providers should be appropriate for and comparable to other publicly funded lawyers. Full-time public defender salaries and benefits should be not less than the salaries and benefits for full-time prosecutors.”

Principle 2, ABA Ten Principles of a Public Defense Delivery System (2023)



Create retention incentives

To end the devastating cycle of resignations that increase lawyer workloads, Arkansas should incentivize experienced defense attorneys to remain in public defense. Strategies include retention bonuses, training, and career development opportunities.³²



Fund innovative recruitment programs

Arkansas should incentivize new lawyers to choose public defense as a career. Other jurisdictions have recently considered:

- **Educational pipeline programs**, including externships that place law students in public defender offices.³³
- **Loan forgiveness programs**, modeled on medical recruitment programs, which pay off educational debt over several years of service. These programs could be tailored to incentivize rural practice or other areas of identified need.³⁴

CONCLUSION

Arkansas Can Solve Its First Appearance Crisis

The Constitution promises that every person in jail will have access to the courts and to counsel. Yet far too often, Arkansas allows people to languish in jail alone, afraid, and undefended.

To honor the Constitution's promises, Arkansas must guarantee counsel at first appearance, ensure appointment of defense counsel within 72 hours of arrest, and adequately fund public defense. These reforms can end the first appearance crisis, reduce court backlogs, and ease jail overcrowding. For the sake of all Arkansans, policymakers must act now.

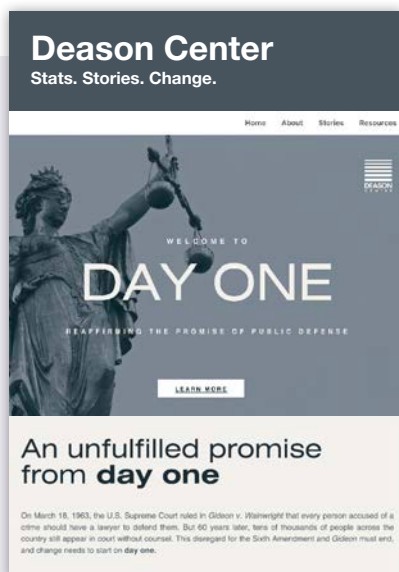
✓ THE SOLUTIONS

Counsel at First Appearance

Defense Counsel within 72 Hours

Fund Public Defense

Endnotes and references available at bit.ly/deasonendnotes



The Deason Center researches best practices in early-stage criminal procedure.

Deason Center faculty and staff are available to provide testimony, draft model legislation, and offer other assistance to policymakers interested in improving initial appearances.

Contact us at DeasonJusticeCenter@smu.edu

ACKNOWLEDGMENTS

Authors: Malia N. Brink, Pamela R. Metzger, Claire Buetow, Terrence Cain

Research Support: Andrew L.B. Davies

Data Visualization and Layout Design: Randy Krum and Jeremy Yingling, InfoNewt.com

Suggested Citation:

Brink, M.N., Metzger, P.R., Buetow, C., Cain, T., *Ending Arkansas' First Appearance Crisis*, Deason Criminal Justice Reform Center (May 2024).

<https://doi.org/10.25172/dc.12>

© Copyright 2024 Southern Methodist University,
Deason Criminal Justice Reform Center.
This work is licensed under a [CC BY-ND 4.0 license](#).



Learn more about the Deason Center's Initial Appearance Campaign

Contact us:



DeasonCenter.org



(214) 768-2837



deasonjusticecenter@smu.edu

Follow us:



facebook.com/SMULawDeason



[@SMULawDeason](https://www.instagram.com/SMULawDeason)



[@SMULawDeason](https://twitter.com/SMULawDeason)

About the Deason Center

The Deason Criminal Justice Reform Center takes a Stats and Stories approach to criminal justice reform. The Stats: we collect, analyze, and assess qualitative and quantitative data about our criminal justice system. The Stories: we uncover, recount, and amplify the experiences of people who live and work in that system. Together, these Stats and Stories make a compelling case for compassionate criminal justice reform.

The Deason Center supports criminal justice reform in America's small, tribal, and rural (STAR) communities. The Center's STAR Justice Network provides STAR practitioners with a virtual practice community and with online STAR criminal justice resources. To connect STAR justice practitioners with policymakers, researchers, and non-profit organizations, the Deason Center convenes webinars, panel discussions, and conferences.