



# Utah Indigent Defense Commission

## INDIGENT DEFENSE & COUNSEL AT FIRST APPEARANCE (CAFA)

### Initial Bail / Release Decision

When a criminal defendant is first arrested or cited for an offense, a judge must make an immediate decision about whether a defendant should be in custody (with a bail determination) or release her on “O.R.” (own recognizance), to appear at a later first court appearance—an “arraignment (in justice court) or “first appearance” (in district court).

This initial determination is made quickly and based on limited information: a judge may have a probable cause statement written by the arresting officer and in some jurisdictions, a [PSA](#) (the pretrial risk assessment tool in place in many Utah Courts). The judge rarely has any additional information—they don’t know whether the defendant has a full-time job, or whether he is the primary caretaker for children, has rent due that day, a dog stuck inside, etc. Importantly, this initial determination is not made as part of a court proceeding—judges make this determination electronically from chambers or even home, and counsel is not present.

### A Defendant’s First Court Appearance

A defendant’s first opportunity to challenge that initial determination and seek release or a bail adjustment is the “arraignment” (in justice court) or “first appearance” (in district court).

Constitutionally, the right to counsel applies to all critical stages<sup>1</sup> of criminal proceedings. Often clients with private counsel will be represented at first appearances. Early representation is critical as rights may be lost when counsel is not available or able to be secured in the early stages of a case. Particularly when you consider the potential for counsel to develop arguments for release of non-violent offenders, to prevent their job loss, family and housing disruptions, etc. because no one is there to develop the argument for O.R., resulting in the unnecessary use of jail beds while awaiting court proceedings.

Without defense representation, accused persons experience extended time in custody because there is no attorney to advocate for their release, resulting in the disappearance of critical evidence as bruises heal, video footage is erased, and essential witnesses disappear. Early appointment of counsel provides the necessary safeguards to protect against many forms of injustice and result in a savings across the criminal justice system.

### Current Data Landscape re: CAFA

From qualitative data (stakeholder interviews, etc.) and data from IDC grant applications and reporting, we know defense counsel is commonly not present at initial court appearances.

In Utah justice courts, usually neither the prosecution or defense is at arraignments, or only the prosecutor is present. Some Examples: South Jordan justice court has only the judge and bailiff present; SLC justice court has had only prosecutors present in court for decades; 3<sup>rd</sup> District Court has only the prosecution on Class A misdemeanors and felony first appearances.<sup>2</sup>

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<sup>1</sup> Rothgery v. Gillespie County, 554 U.S. 191 (2008)

<sup>2</sup> The majority of the 70% of un-adjudicated people in SLC jail are there on Class A misdemeanors. West Valley City does have its public defenders present at most first appearances in District Court.



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Qualitative data (stakeholder interviews, etc.) and data gathered from IDC grant applications and grant reporting reveal that defense counsel is commonly not contractually required to be present at the initial court appearance. Some examples include:

- 5 counties reported having contractual requirements for defense counsel to appear at the first appearance;
- 4 counties and 2 cities have mixed requirements for defense counsel to appear at first appearances. For example, one county does not have CAFA in District Court (criminal cases and termination/adoption cases) or County Justice Court, but does have CAFA in Juvenile Court for delinquency and child welfare proceedings. (Required under SB32).
- 2 counties and 1 city do not have any requirements for defense counsel to appear at the first hearing in front of a judge.
- 1 city did not know if there was any contractual requirement for defense counsel to appear at the first hearing in front of a judge.

Several mornings spent observing high-volume district and justice courts in August of 2019 yielded several examples of the need for CAFA:

- A defendant was held in jail on \$100 bail, which he was unable to afford, did not have access to an attorney to advocate for a bail reduction or an O.R. release.
- A college student facing a charge of retail theft, had questions about whether a plea in abeyance would affect her plans to apply to medical school. She accepted the plea that was offered without the ability to consult with a defense attorney.
- An 18-year-old heading to school at UVU on a scholarship with a work-study job lined up, insisted on pleading guilty to a possession charge—over the judge's careful admonitions about collateral consequences and the advisability of consulting with a public defender.
- In a case alleging domestic violence, a defendant and his spouse/the alleged victim, collectively desired to have a protective order lifted to allow the defendant to care for his children, but without defense counsel the judge would not entertain the request.

## **Closing the Data Gaps**

One purpose of the IDC grant program is to yield data on indigent defense quality indicators. Another purpose is to spur improvement relative to those indicators—for example, one performance metric measured by the grant program is % of representation at first appearance. (Indigent defense systems not receiving IDC grant funds do not track this information.) Quarterly reporting due at the end of September, will yield CAFA information from our grantees.

A comprehensive data picture re: CAFA including all defense systems (not just grantees) is in development involving these additional action steps:

- Collect and analyze available court data;
- Survey court staff re: current CAFA practices