November 15, 2021

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

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

Dear Leader Herring and Senator Edwards:

We, the undersigned members of the Virginia Pretrial Justice Coalition ("Coalition"), write to you in your capacity as Chair and Vice-Chair of the Virginia State Crime Commission (VSCC) to share our concerns regarding the report recently released by a work group convened to study the appointment of counsel at first appearance (CAFA) and currently under consideration by the VSCC.

Established in 2018, the Coalition works to advance meaningful pretrial reform in Virginia. In this effort, we are guided by two primary principles: (1) a reduction in the number of people held in our jails pretrial; and (2) the elimination of racial disparities in pretrial detention and pretrial surveillance. Our Coalition has been a leading voice for pretrial reform in the General Assembly for the past two years, advocating for substantive improvements including the successful passage of pretrial data collection and transparency legislation (HB 2110/SB 1391).

As you may recall, language included in the 2021 Appropriation Act tasked the Office of the Executive Secretary (OES) of the Supreme Court of Virginia to bring together various stakeholders to review the requirements in House Bill 2286 of the 2021 session of the Virginia General Assembly ("HB 2286") and produce a plan for the implementation of the provisions of the bill, a cost estimate, and an estimate of cost savings. Additionally, the VSCC sent a letter to Chief Justice Lemons in January requesting that "the Committee on District Courts study and make recommendations on procedures and practices for appointing an attorney and conducting a bond hearing when any detailed [individual] first appears before the court." In response to this charge, earlier this month OES submitted its report ("OES Report").

The OES Report is built around flawed data, flawed methodology, and flawed reasoning. It considers barriers to implementation that may not actually exist and fails to consider the ways in which jurisdictions currently providing CAFA are able to do so without any additional costs. The OES Report minimizes savings in both the range of factors it chooses to consider and in the included calculations. The core flaws in the report leave it largely unreliable as a source for determining costs, addressing implementation, or measuring savings.

Our Coalition respectfully requests the VSCC to include CAFA legislation, substantially similar to HB 2286, in its 2022 legislative package. Counsel at first appearance provides extensive individual and systemic benefits; the fiscal impact is likely to be significantly lower than described

in the OES Report; and purported barriers to statewide implementation can be addressed by locally-responsive, jurisdiction specific plans.

Counsel at First Appearance Is Necessary and Achievable in the Commonwealth.

The OES Report portrays counsel at first appearance, as envisioned by HB 2286, as fraught with insurmountable implementation obstacles and a significant price tag. However, examination of the report, current practices in Virginia, the terms of HB 2286, the national research regarding CAFA, and the impact of pretrial detention, demonstrates that providing CAFA in the Commonwealth is feasible, fiscally sound, and necessary to improve the delivery of justice.

Providing CAFA Improves the Quality of Justice in the Commonwealth.

For individuals accused of a crime, their first appearance before a judge can be one of the most crucial moments in their case. At this initial appearance, they receive formal notice of the charges being brought against them and the penalties they face, and are advised of their rights, including their right to counsel. For those detained, this first appearance is also typically the time a judicial officer will examine bail and the terms of release. Many accused individuals risk remaining in pretrial detention if they are unable to afford bail or, if released, may be saddled with onerous pretrial conditions.

Time is a critical element of the pretrial process. The earlier someone is released, the better their outcomes. Research had demonstrated that those released within the first 24 hours are:

- Are more likely to have their case dismissed.
- Are more likely to be given an opportunity for a deferred adjudication.
- Are less likely to be sentenced to incarceration if convicted.
- Receive shorter jail and prison sentences than their peers with similar charges and criminal history.
- Are less likely to miss a court appearance.
- Are less likely to be arrested for a new offense while pending trial.
- Are less likely to be arrested again in the two years after their case concludes.[1]

Data-driven studies and first-hand experiences from across the country repeatedly demonstrate the benefits of providing counsel at first appearance. The presence of counsel at this initial court proceeding improves outcomes for accused individuals, the legal system, and the community. Providing a meaningful defense voice at these early moments when a person's liberty is at stake helps redress the disproportionate impact of the criminal legal system on communities of color,

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

who are overrepresented in pretrial detention.[2] According to a 2015 report, on any given day there are more than 730,000 people in local jails across the country resulting in $22.2 billion in spending.[3] A significant portion of these individuals are being held pretrial [4], a practice that places a costly burden on local governments, who spend a collective $13.6 billion nationwide on pretrial detention every year.[5]

In Virginia, 45% of the local and regional jail population is comprised of people who the law presumes to be innocent. Black individuals are disproportionately impacted by both the legal system and the Commonwealth's pretrial detention practices. Despite constituting only 20% of the state's residents, Black individuals make up 43% of the people in the state's jails and are overrepresented in its pretrial detention population. As detailed in the Virginia State Crime Commission's final report on the Virginia Pre-Trial Data Project[6] (Pre-Trial Data Report), Black individuals were significantly overrepresented in their pretrial cohort, constituting 40% of the cohort population.[7]

Notably, while the Pre-Trial Data Report indicates that secure bail amounts did not vary greatly across race and ethnicity, the impact of those bail amounts does. According to the Virginia Department of Health, Black/African-American individuals residing in the Commonwealth earn less each year than white individuals. While the state's average annual income is $39,278, white adults earned an average of $45,000 per year, or about $6,000 ***above*** the state average, whereas Black/African-American adults earned $28,000 per year, or about $11,000 ***below*** the state average.[8] As a result, while both white and Black defendants may have the same bond amount set, their ability to post the bond, and the proportion of their wealth that is required to post that bond is substantially different.

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[2] David Arnold, Will Dobbie, Crystal S Yang, "Racial Bias in Bail Decisions" (May 2018): ady_racialbias.pdf (harvard.edu).

[3] Christian Henrichson, Joshua Rinaldi, and Ruth Delaney. *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*. New York: Vera Institute, 2015.

[4] Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2020," Prison Policy Initiative (March 2020), https://www.prisonpolicy.org/reports/pie2020.html#slideshows/slideshow1/2.

[5] National Legal Aid & Defender Association, "Access to Counsel at First Appearance: A Key Component of Pretrial Justice" (September 2020): 7, http://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf.

[6] The Virginia Pre-Trial Data Project ("Project") was developed due to the significant lack of data readily available to answer many important questions related to the pretrial process in Virginia. The Project represents an unprecedented, collaborative effort across all three branches of government to examine matters related to the pretrial process. The Project focused on the pretrial period, which includes the various stages of a criminal case from the time a defendant is charged with an offense until the final disposition (trial and/or sentencing) of the matter. The Project involved collecting and merging data from numerous state and local government agencies into a singular dataset that resulted in a cohort of 22,986 adult defendants charged with a criminal offense during October 2017 (referred to as the "contact event"). These defendants were tracked during the pretrial period until the final disposition of their contact event or December 31, 2018, whichever date occurred first. Up to 850 variables were captured for each of the defendants in the Project dataset, such as demographics, offense details, criminal history records, bond amounts, court appearance and public safety rates, assigned risk levels, and final dispositions. A statewide and locality descriptive analysis was conducted for the 11,487 defendants in the cohort who were charged with a criminal offense punishable by incarceration where the bail determination was made by a judicial officer.

[7] Virginia State Crime Commission, "Virginia Pretrial Data Project: Final Report" (October 2021): Microsoft Word - PreTrial Report Cover.docx (virginia.gov).

[8] Virginia Department of Health Equity at a Glance, Virginia Income and Poverty, https://www.vdh.virginia.gov/equity-at-a-glance/virginia/income-and-poverty/, last viewed November 13, 2021.

House Bill 2286 can help address this gap by promoting early, meaningful bond hearings that can help remediate the disparate impact of secured bail amounts by introducing relevant information that can better inform bail setting decisions that take into account a person's financial resources and facilitate more prompt releases from pretrial detention.

Providing CAFA is Feasible and Achievable in the Commonwealth.

To understand the feasibility of providing CAFA in the Commonwealth, one need look no further than the language of HB 2286 itself. The bill calls for each jurisdiction to form a committee with a broad array of stakeholders to design a plan for implementation that reflects the needs, resources, staffing and practices of that locality. The importance of this flexibility cannot be understated. Rather than suggesting that OES, the legislature, the Virginia Indigent Defense Commission, the Supreme Court, or any other group dictate the method of implementation, HB 2286 empowers each locality to develop a plan responsive to their community's unique needs. As introduced in 2021, the bill:

- Guarantees every person who is not free on bail be brought before a judge on the first day on which such court sits after the person is detained.
- Guarantees every person in custody have a lawyer to assist them during their first court appearance.
- Provides the lawyer have access to the information needed for effective pretrial advocacy.
- Ensures an individual and their lawyer have adequate time to communicate in confidence before appearing in court.
- Requires courts to allow a meaningful bond hearing take place on the same day as the initial appearance.

Although the OES Report presents a list of barriers and challenges to implementation, several jurisdictions in the Commonwealth are already providing CAFA, and doing so without any additional funding. The Work Group itself spoke with judges from two jurisdictions currently conducting bond hearings on the same day as the initial appearance. Although this is referenced in the OES Report, there is no mention of these judges being asked about how they have addressed the concerns OES expresses regarding implementation.

In its information gathering process, the OES Work Group conducted a survey, administered exclusively to the chief judge of every district, the survey asked a limited range of questions, few of which addressed any of the concerns OES raised in its report.[9]

An examination of the survey itself demonstrates its shortcomings and missed opportunities for OES to examine the nature, scope, and potential solutions to the barriers they identified, including:

- What are the potential benefits to CAFA and same day bond hearings? Instead, the survey

[9] The survey had thirteen questions, four of those questions related to demographic information about the court, one was whether their jurisdiction was served by a public defender office and one was an acknowledgement of the definition being used for "first appearance," leaving only seven substantive questions relating to the first appearance and bail hearing process.

only asked about potential barriers to implementation.

- How many jurisdictions currently have a prosecutor present during the arraignment docket?
- How many non-public defender jurisdictions are currently providing CAFA?
- Although nearly half of the responding courts (45 of 100) indicated they are "currently offering opportunities to be heard on bond and conditions of release at arraignment" (Q8) and 35% of those responding to Q9 indicated they "are currently conducting same day bond hearings" upon the request of the defendant or their counsel as a standard practice[10] the survey failed to ask any of these jurisdictions:
    - How do you address victim notification requirements?
    - How do you address potential conflicts?
    - How much additional time, if any, is added to the arraignment process when bond is considered?
    - What are some of the challenges to reviewing bond at this stage?
    - What are some of the benefits to reviewing bond at this stage?
    - How frequently are there subsequent bond hearings for those who had their bond addressed on their initial appearance date?
    - Do you find there is any diminution in the quality of the bond hearing or the information you receive when bond is heard the same day?
    - Do you have any indication of changes in:
        - Failure to appear rates.
        - Non-compliance with bond or release conditions.
        - How long it takes for cases to be resolved.
        - Conviction, dismissal, or deferral rates.
        - Jail population.

Addressing Barriers

In its report, OES described several concerns and potential barriers to implementing HB 2286. All of these concerns can be addressed or do not actually exist under the terms of the bill.

Crime Victim and Witness Rights Act

Despite expressing concerns about whether holding bond hearings on the same day as arraignment might prevent prosecutors from notifying victims, OES did not attempt to determine current practices and how, if at all, they may be impacted. Notably, despite surveying judges regarding barriers to implementation, there were no questions directed toward this issue, including:

- How frequently do prosecutors indicate they have attempted to notify victims before a bond hearing?
- How frequently do prosecutors request additional time for victim notification?
- How frequently do victims appear for bond hearings?
- If your jurisdiction provides same day bond hearings currently, how do you address victim notification?

[10] It is unclear if this number may be larger, as this question allowed respondents to choose more than one answer and as the report only provides the aggregate data, it is unclear how many of the thirteen courts that indicated they provide same day bond hearings upon written motion also provide same day hearings on oral motions.

Additionally, despite having two judges who currently provide same day bond hearings appear before the Work Group, the OES Report makes no mention of this being a barrier they face or a concern they have.

Most tellingly, although the Virginia Association of Commonwealth's Attorneys provided a written statement describing their potential challenges in implementing the provisions of HB 2286, they make no mention of this as a concern.

Waiver of the Bond Hearing

Another concern raised by the OES Report is that the current bill mandates everyone have a bond hearing and does not provide defendants the opportunity to waive the hearing. This concern is misplaced and does not consider the express language of HB 2286. The bill's language states *"[t]he court shall also* ***hear and consider motions*** *by the person [being arraigned] or Commonwealth relating to bail or conditions of release pursuant to Article 1 (§19.2-119 et seq.)*" (Emphasis added).

The very terms of the HB 2286 indicate bail (which is what is covered by §19.2-119 et seq.) is only to be considered upon a motion by the accused or the Commonwealth. As a result, a defendant does not need a waiver mechanism, their silence on the matter is sufficient. In addition, courts frequently address areas where an accused has a right to some protection and is allowed to waive it without any affirmative language in the law or constitution granting them "permission" to do so. This includes their right to counsel, right to remain silent, and right to trial as well as many others.

Securing Counsel

The OES Report makes a number of assertions and assumptions regarding the ability of jurisdictions not served by a public defender office to effectively implement the provisions of HB 2286, including challenges in recruiting counsel. Despite these concerns the charge to "study and make recommendations on procedures and practices for appointing an attorney and conducting a bond hearing," the Work Group undertook few efforts to examine *how it could be done*, focusing instead on *why it could not be done*. This is most evident in the areas addressing securing counsel.

<u>Failure to ask</u>

As noted earlier, the Work Group undertook a statewide survey of judges, but chose not to pursue similar surveying of other stakeholder groups, including the defense community. When confronted with questions about whether there were enough lawyers, whether they would be available on short notice, whether they would retain cases once assigned, whether they could quickly check for conflicts, the Work Group opted not to ask defenders about these issues.

Additionally, the Work Group had at its disposal the various jurisdictions in Virginia with experience providing CAFA, including non-public defender jurisdictions such as James City County (which is currently providing such representation) and Prince William County (which implemented its program using assigned counsel before the county secured a public defender's office). Its survey results could have been utilized to identify additional jurisdictions to examine.

Failure to research

In addition to looking to other jurisdictions in the Commonwealth, research would have revealed several states and localities of varying sizes, geography, and defense delivery systems across the country that provide CAFA. Such an effort would have easily uncovered places such as Michigan, who's CAFA pilot projects include a mix of public defender and non-public defender jurisdictions and who's report details information and ideas on how to address many of the concerns voiced in the OES Report.[11]

Courthouse and Jail Infrastructure

HB 2286 requires counsel "*be provided with adequate time and space in which counsel can confidentially consult with the accused."*

Providing for private confidential space, whether in-person or virtual, is a principle that is not unique to implementation of CAFA. The principles of justice, fairness, and due process upon which our legal system is built necessitate confidentiality between the accused and their defense counsel. Attorney client privilege is one of the "oldest . . . privileges for confidential communications" and has been an important part of the American legal system for hundreds of years.[12]

The American Bar Association (ABA) recognize this as a foundational principle as well, denoting it as one of the ABA's Ten Principles of a Public Defense Delivery System:

> **Principle 4:** Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
>
> **Commentary**: "Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel."[13]

It is difficult to imagine that courthouses lack secure spaces for attorneys to confer with clients to discuss last minute plea offers or case developments and that jails lack private locations where attorneys and clients can meet to review discovery, discuss a client's life history, or plan case strategy. However, to the extent that such places exist in the Commonwealth, rather than perceive

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[11] Michigan Indigent Defense Commission, "Counsel at First Appearance and Other Critical Stages" (Spring 2017), , https://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-4-Counsel-at-first-appearance-and-other-critical-stages.pdf. Michigan Indigent Defense Commission, "The Huron County District Court's Counsel at First Appearance Pilot Program" (Summer 2017), Huron-County-Counsel-at-First-Appearance-Report.pdf (michiganidc.gov). See Also, NLADA Policy Brief on Access to Counsel at First Appearance, https://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf.

[12] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also, e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (discussing foundational importance of attorney-client privilege); In re Search Warrant Issued June 13, 2019, 942 F. 3d 159, 167, 172–73 (4th Cir. 2019) (discussing attorney-client privilege as "the oldest of the privileges" for confidential communications).

[13] ABA Ten Principles of a Public Defense Delivery System (2002).

their lack of spaces as a barrier to implementation of CAFA, we should be embracing this as an impetus to ensure that these fundamental deficits are corrected.

Additionally, an outgrowth of the pandemic, has been the development of competence and confidence in the use of video and other virtual technologies to allow court proceedings and attorney-client communications to occur.

Potential Changes to the Quality of the Bond Hearing

Another concern expressed by the OES Report is that shortening the time frame between the first appearance and a bond hearing may hamper judges' ability to make informed decisions and for the Commonwealth to make appropriate recommendations on bond and release conditions. Although expressing this concern, the Work Group undertook no apparent efforts to address this question with jurisdictions which currently are providing same day bond hearings.[14] According to the OES survey at least nineteen jurisdictions currently provide bond hearings the same day as the first appearance. OES's survey also indicates 45 jurisdictions currently offer the opportunity to have bond and bond conditions considered at the first appearance.

It is important to note that the legislative language does not prevent additional bond hearings, if necessary for additional information needs to be considered. If, in a particular case, a Judge feels they lack the information needed to make an informed decision, they can elect not to adjust the existing bond at the time of the initial appearance.

This concern was examined in the recent analysis of Huron County, Michigan's CAFA pilot program. Launching its CAFA program in 2016, the Huron District Court provides counsel to every accused individual being arraigned. Every stakeholder group, including the judges, have extolled the benefits of the program. For example, the Judge expressed satisfaction that the bond conversation "feels more complete" and left him more confident in the bonds he issued. Even instances in which the bond conversation took longer since the defense attorney had more information to present, all parties agreed that the decision was now better informed.

Providing CAFA is Financially Feasible and Fiscally Sound for the Commonwealth.

The OES Report assess the costs for attorneys providing CAFA in the state's non-public defender jurisdictions as $15,391,800 while valuing the cost savings at $273,620. Both calculations are premised on fundamental errors that render the Report's results virtually meaningless. Utilizing the publicly accessible data from the VSCC Pre-Trial Data Project as well as the figures presented to OES (at their request) by the Compensation Board, a more accurate picture of both costs for providing counsel, and core savings as represented by decreased days in pretrial detention can be drawn. These data points reflect providing CAFA will result in a multi-million-dollar net savings to the Commonwealth overall.

Costs: The OES Report premises costs on the amount of money that will be paid to court-appointed counsel to provide CAFA services. As the Virginia Indigent Defense Commission indicated all

[14] The OES Report does indicate that such jurisdictions receive pretrial reports but does not explore whether judges feel they have sufficient information to make a decision with those reports, how counsel further informs those decisions, or whether the Commonwealth has sufficient time to prepare.

jurisdictions served by a public defender office can provide CAFA services without any additional cost, the only jurisdictions in which representation for bail hearings at arraignment will result in attorney's fees are those jurisdictions not served by a public defender's office.[15]

To calculate the costs of providing counsel, one needs to know the number of units of representation to be provided and the cost for each unit. To do so accurately, requires first an understanding of what the unit of representation is. It is at this initial juncture that the OES Report commits a fundamental error.

OES's cost analysis is built upon a calculation of the number of "cases" each impacted court (circuit, general district, and juvenile and domestic relations) in a non-public defender jurisdiction handles each year. OES reports this figure to be 128,265.[16] This number significantly overstates the number of representation events that would occur under the provisions of HB 2286.

What is a "case"?

As a threshold issue, the OES Report, despite building its entire financial model on this unit, fails to define what a "case" represents. This is critical as the number of "cases" may not be representative of the number of initial appearances for incarcerated individuals that may occur. Without knowing what the term "case" refers to, it is difficult for anyone to assess the validity of the OES Report's analysis.

Potential definitions of "case" can include:

- An individual charge.
- All charges of the same type involving a single person in a single arrest.
- All charges for a single person alleged to have occurred on a single day.
- All charges that are heard at a single court appearance.

By way of example: If John Doe was arrested January 30th for passing fraudulent checks on January 5th and January 10th in County A and charged with forgery, uttering and obtaining money by false pretenses for each check, he could alternately be described as having:

- 6 cases (2 each for forgery, uttering and obtaining money by false pretenses).
- 3 cases (1 for his forgery charges, 1 for his uttering charges, and 1 for his false pretenses charges).
- 2 cases (1 for the charges associated with passing the check January 5 and 1 for the charges associated with passing the check January 10).
- 1 case (because he was arrested on one date for all 6 charges and has 1 court appearance).

OES's "case" is not the proper unit of measurement to determine the costs of representation.

The provisions of HB 2286 apply only to persons who are "not free on bail" at the time of their

[15] Utilizing the VSCC Pre-Trial Data Project's public data, although public defender offices exist in only about half of the counties in Virginia, those counties represent about 70% of the total cases statewide. This is because virtually every large county in Virginia is served by a public defender office.

[16] OES limits its consideration to jailable offenses, and all discussions in this section retain this consideration.

initial appearance. Not every person with a "case" in a particular jurisdiction will be detained at the time of their initial appearance. This is supported by an examination of both the VSCC pre-trial data and the report from the Compensation Board, requested by OES for its cost savings analysis.

The VSCC Pre-Trial Data Report reflects that roughly 18% of persons charged with a jailable criminal offense were released on a summons. These individuals, despite having "cases" before the court, are not detained and thus would not trigger the provisions of HB 2286.

For the persons who are arrested, the Compensation Board reported that 64% of those people are released the same day or the next day. [17] They assume these are largely attributable to individuals about to be released under bonds set by the magistrate (such as releases on personal recognizance, unsecured bonds, or following payment of a secure bond). [18] Similar to the group released on a summons, this group, despite having "cases" before the courts, does not trigger the provisions of HB 2286.

Applying these two factors to OES's report of 128,265 "cases" results in a net number of "cases" requiring compensated CAFA representation of 37,864.

128,265 *.82 (% of people not released on a summons) = 105,178 people arrested
105,178 *.36 (% incarcerated 2 days or more) = **37,864 cases requiring CAFA in non-PD jurisdictions**

Even this figure is likely an overstatement as to the number of initial hearings with CAFA triggered by HB 2286. This is because the OES "case" is most likely a unit of individual charge, not a unit of appearance. Persons with multiple charges at the time of their arrest, if those charges are for a single jurisdiction and court, will have a single initial appearance and bond determination.

The VSCC Pre-Trial Data Report utilized this very unit of measurement in its process, referring to it as a "court occurrence." The VSCC report identified that many individuals appeared before a court with more than one case or charge and undertook its examination by grouping together all of the charges that a single defendant had before a single type of court (JDR, GDC or Circuit) in a single jurisdiction. Under this rubric a single person could have multiple "court occurrences" if they had charges in more than one jurisdiction or more than one type of court. The "court occurrence" is the proper unit of measurement for determining how many instances of CAFA for bail hearings would occur.

This is corroborated by an examination of the Compensation Board's data. In its letter to OES, the Board indicated an annual arrest population of 92,892 people.[19] If 64% of them are released the same day or the day after their initial detention, then roughly 33,442 people, state-wide, are not free on bail at the time of their initial appearance. Only a fraction of these are people in non-public

[17] OES Report, Appendix F, Fiscal Analysis Provided by the Compensation Board.
[18] OES Report, Appendix F, Fiscal Analysis Provided by the Compensation Board.
[19] The Compensation Board indicated 61,923 people were committed to jail between January 1 and September 10, 2021, an 8-month period. Extending this population out to a full year, represents 92,892 defendants committed to jail annually. OES Report, Appendix F.

defender jurisdictions.[20]

While the Compensation Board unit of measurement is not a perfect substitute for the initial appearance unit[21], it does reflect a dramatically lower number than the "case" based number from OES, and most importantly, reflects that nearly two-thirds of those arrested will be released before their initial appearance occurs.

The Cost of Representation.

The flawed assumptions of the OES Report are further magnified by their assessment that each "case" will cost $120 in attorney fees. This amount is based on HB 2286's provision authorizing "payments to an appointed attorney at the same rate . . . as for court-appointed misdemeanor representation" under the Virginia Code. The current repayment structure, however, is not a flat fee of $120 per case, but rather an hourly rate of $90/hour, with a *cap* of $120 per case. To receive compensation, an attorney submits a voucher detailing the actual time spent providing representation. An attorney may only collect for their actual time spent providing services to the client.

Under the existing fee structure, OES's estimates an attorney will spend 1 hour and 20 minutes on each "case." This would mean that if a court had 6 "cases" on its docket all requiring CAFA bail representation, OES is anticipating an attorney taking a full day to provide representation to these 6 individuals. It is difficult to conceive of any court or lawyer devoting a full day to handle 6 arraignments and bond hearings.

Considering an expenditure of even a half-day to provide CAFA representation in 6 cases results in a markedly reduced cost. If each attorney spent, on average, 30 minutes meeting with the client and reviewing the pretrial information, and 10 minutes per case to conduct the court proceeding, the compensation for attorneys providing CAFA would be $60 per case.

Based on these corrections alone, the cost of providing CAFA representation in the Commonwealth's non-public defender jurisdictions is under $2.3M dollars.

Costs: 37,864 cases involving individuals not free on bail *** $60/case = $2,271,840**

Cost Savings

In addition to the problems with the cost side of the ledger, the OES Report has several flaws in its costs savings analysis. Putting aside the failure to consider any other savings, the calculation of the reduction in costs for additional days in detention avoided by prompt bond determinations, is erroneous in several ways. First, although OES calculated costs over twelve months, it appears the Compensation Board based its calculations on the number of persons detained between January 1 and September 10, a roughly eight-month period.

[20] Utilizing the VSCC data, roughly 70% of the appearances occur in jurisdictions served by a public defender office. This stands to reason given virtually every large city and county in the Commonwealth is served by a public defender office.

[21] The Compensation Board unit of measurement is individual defendants, without regard to whether they have charges in one jurisdiction or before one court, or have multiple cases before multiple courts.

As well, the Compensation Board's calculation was only for the $4/day the state pays jails in "Locally Responsible" per diem expenses. This figure ignores the vast majority of the costs of jail. As reported in the Compensation Board's FY19 Report to GA,[22] much of these costs are borne by the Commonwealth in the form of jail staff salaries paid from the Compensation Board. [23]

In FY2019, the Commonwealth funded salaries equivalent to $28.15 per inmate day, and total costs of $34.34 per inmate day (including the per diem costs). Moreover, local and regional jails bear even further additional costs for each inmate day, and the total operating costs per inmate day across all funding sources in FY 2019 was $91.97.[24] In other words, the true cost savings associated with each avoided jail day is actually more than 20 times larger than those used in the OES Report.

Utilizing the Compensation Board's daily inmate cost with the total number of days of detention projected to be saved in the Compensation Board's letter to OES, results in a **cost savings is over $6.2M dollars**. (68,405 days * $91.97/day = $6,291,207.85)

When a more accurate cost rate is applied to a more complete savings rate, the Commonwealth stands to **save over $4M dollars by implementing HB 2286**.

$2,271,840 (costs) - $6,291,207.85 (cost savings) = (-$4,019,367.85)

Finally, the OES Report clearly ignores many other important costs that are saved through each avoided pretrial jail day. Chief among these are the costs borne by the individual defendants and their families, including lost income, destabilization of housing, disruptions to medical and mental health services and medications, as well as the trauma inflicted by the experience. Moreover, the calculation must account for other longer-term cost savings, such as the reduction in convictions and shorter terms of incarceration for those convicted and decreases in missed court dates and arrests for new criminal charges. Although difficult to estimate, these costs and savings are real and likely to be large. In many cases, they likely exceed the direct costs of jail that are avoided. Estimating and adding these cost savings would tilt the balance even further.

Conclusion

We understand that change can sometimes be difficult or feel less than desirable. But an accused individual's first appearance is critical – their liberty is at stake. If uncounseled at this stage, they are forced to face Virginia's criminal legal system alone, and the consequences can have adverse impacts that reverberate throughout the individual's life, family and community, long after any case resolution. Therefore, we urge the Commission and members of the General Assembly to continue to strengthen Virginia's criminal legal system and advance meaningful pretrial reforms by supporting policies to implement counsel at first appearance statewide.

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[22] Compensation Board's FY19 Report to GA.

[23] The Commonwealth funded approximately 35% of these costs (in the form of salaries and per diem costs, equivalent to $34.34 per inmate day).

[24] The Commonwealth funded approximately 35% of these costs (in the form of salaries and per diem costs, equivalent to $34.34 per inmate day).

Sincerely,

Justice Forward Virginia
Legal Aid Justice Center
National Association of Criminal Defense Lawyers
New Virginia Majority
WJCC Coalition for Community Justice

Enclosures: House Bill 2286 (2021 session of the Virginia General Assembly)
Ariel BenYishay Cost and Savings Estimate, HB2286 (CAFA)
Legal Aid Justice Center CAFA one-pager
National Association of Criminal Defense Lawyers CAFA support letter

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