# Implementing the Counsel at Arraignment Obligations in the *Hurrell-Harring v. The State Of New York* Settlement 2021 Update



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#### Introduction

In the six years since the Office of Indigent Legal Services (ILS) issued the 2015 Plan: *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement*, the five settlement counties (Onondaga, Ontario, Schuyler, Suffolk, and Washington) have worked to ensure systems are in place that provide access to counsel at arraignment for every individual in their respective jurisdictions. We have chronicled these efforts, described their progress, and analyzed the effectiveness of these systems for arraignment representation in annual update reports submitted pursuant to section III(D) of the settlement. This is the sixth update to the 2015 Plan, and we are pleased to report that the now entrenched systems for providing counsel at arraignment in the *Hurrell-Harring* counties remain effective in ensuring access to counsel at this critical stage.

The continued success of the *Hurrell-Harring* counties' counsel at arraignment programs is particularly notable against the backdrop of the ever-changing legal landscape resulting from the Covid-19 pandemic and the implementation of sweeping changes to New York's bail laws that took effect in January 2020. In last year's report, we described the steps taken by each *Hurrell-Harring* provider to adapt to pandemic-related changes to arraignment practice, including the temporary shift to virtual arraignment representation using videoconferencing technology. We also described their efforts to prepare for changes to arraignment practice necessitated by bail reform. We concluded that, together with strong, mission-driven leadership, existing arraignment representation structures implemented pursuant to the settlement allowed the *Hurrell-Harring* providers to respond to these changes and, despite these unprecedented times, arraignment representation did not waiver. We also cautioned against overreliance on virtual arraignments which though necessary for safety during the height of the pandemic, diminish the quality of arraignment representation.

In the year since issuing the 2020 Report, the *Hurrell-Harring* providers have again adapted their arraignment representation programs as courts resumed some in-person arraignments. Throughout the remainder of 2020 and the early months of 2021, the status of arraignments (in-person or virtual) and other court proceedings was dependent on local conditions. From our discussions with providers, it appears that jurisdictions with higher rates of Covid-19 infections tended to remain virtual for longer than those with lower rates, though infection rate was not the sole determining factor as the return to in-person arraignments has also depended on logistical considerations.

Though Criminal Procedure Law § 182.20 permits some electronic proceedings in a limited number of counties,<sup>3</sup> the authority for all New York counties to conduct arraignments virtually

<sup>&</sup>lt;sup>1</sup> The annual counsel at arraignment reports from 2016-2020 are available here: <a href="https://www.ils.ny.gov/node/57/hurrell-harring-settlement-plans-and-reports">https://www.ils.ny.gov/node/57/hurrell-harring-settlement-plans-and-reports</a>.

<sup>&</sup>lt;sup>2</sup> See, generally, 2020 *Hurrell-Harring* Counsel at Arraignment Update Report (2020 Report) at 2. For county-specific information, see sections II(A)-II(E).

<sup>&</sup>lt;sup>3</sup> CPL § 182.20(1) provides: "Notwithstanding any other provision of law and except as provided in section 182.30 of this article, the court, in its discretion, may dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action pending in Albany, Bronx, Broome, Erie, Kings, New York, Niagara, Oneida, Onondaga, Ontario, Orange, Putnam, Queens, Richmond, St. Lawrence, Tompkins, Chautauqua, Cattaraugus, Clinton, Essex,

during the public health emergency derived from Executive Order 202.1 which included an emergency provision authorizing electronic criminal court proceedings "in any county in New York State, provided...the defendant, after consultation with counsel, consents on the record." Shortly after the Governor issued Executive Order 202.1, ILS issued a statement to public defense providers indicating that while section III(A) of the *Hurrell-Harring* settlement and Executive Law § 832(4)(a) require in-person arraignments, the public safety concerns associated with the pandemic necessitated this temporary shift to virtual arraignments if a client consents after consultation with the arraigning defense attorney.<sup>5</sup>

In June 2021, the decline in infection rate and increase in statewide vaccination rate led to lifting most pandemic-related restrictions,<sup>6</sup> and on June 24, 2021, then-Governor Cuomo issued Executive Order (EO) 210 rescinding Executive Orders 202-202.11 and effectively returning the courts to in-person proceedings as of the next day.<sup>7</sup> Though most courts and stakeholders were already developing plans to fully return to in-person proceedings, EO 210 accelerated the process without notice. Shortly after EO 210, on June 29, 2021, ILS issued another notice to public defense providers indicating that with the rescission of EO 202.1, state funded public defense provider arraignment representation must return to in-person pursuant to the settlement and Executive Law 832(4).<sup>8</sup> However, recognizing the abrupt nature of the new Executive Order, we informed counties that they should work with us if they needed a reasonable period to make this transition.

In Section I of this report, we briefly summarize the systems in place for providing arraignment representation in each county, the data on arraignments in the last year, and providers' status and any challenges impeding the return to in-person arraignments. As we have done in previous reports, we also include any relevant arraignment practice updates in this section.

Additionally, this year we conducted research which, among other things, offered insight into virtual arraignment attorney practice. In April 2021, we conducted a "Covid-19 survey" which asked line attorneys in the five counties a series of questions about practice during the pandemic. In May through August 2021, we followed up in a series of attorney interviews and focus groups. Through this qualitative research, we gained a deeper understanding of virtual arraignment representation and, in Section II of this report, we discuss those findings.

Montgomery, Rensselaer, Warren, Westchester, Suffolk, Herkimer or Franklin county, provided that the chief administrator of the courts has authorized the use of electronic appearance and the defendant, after consultation with counsel, consents on the record. Such consent shall be required at the commencement of each electronic appearance to such electronic appearance."

<sup>&</sup>lt;sup>4</sup> Executive Order (A. Cuomo), No. 202.1.

<sup>&</sup>lt;sup>5</sup> See ILS Memorandum on Video Arraignments (March 19, 2020), available upon request. ILS issued a second notice on December 2, 2020 emphasizing "that conducting arraignments virtually is a temporary, emergency exception to the legal requirements of personal appearance by the defendant, and in person representation by counsel." ILS further stated that in-person arraignments must resume when virtual arraignments are no longer a public health necessity, justified by a valid Executive Order.

<sup>&</sup>lt;sup>6</sup> See Governor Cuomo Announces COVID-19 Restrictions Lifted as 70% of Adult New Yorkers Have Received First Dose of COVID-19 Vaccine, NY.GOV, (June 15, 2021), <a href="https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first">https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first</a>.

<sup>&</sup>lt;sup>7</sup> Executive Order (A. Cuomo), No. 210.

<sup>&</sup>lt;sup>8</sup> See Notification Regarding Representation at Arraignments, ILS (June 29, 2021), available upon request.

Finally, as we noted in last year's report, the disruptive effect of Covid-19 on the court system complicated any understanding of bail reform's impact on arraignment practice. Still, this year we preliminarily reviewed information received from the providers as part of regular *Hurrell-Harring* data reporting and compared it to a period prior to bail reform implementation. This information is presented in Section III of the report. While we caution against drawing final conclusions, we can preliminarily determine that the imposition of bail in low level cases has significantly decreased in all five counties.

# I. County Updates

# A. Onondaga County

Arraignments in Onondaga County are conducted in one of four contexts: Syracuse City Court, Syracuse Traffic Court, the twenty-eight town and village courts, and the Centralized Arraignment Part (CAP). The Onondaga County Bar Association Assigned Counsel Program (ACP) provides arraignment representation and has developed four programs to ensure full arraignment coverage.

## Syracuse City Court

Arraignments from the city of Syracuse accounted for over 40% of Onondaga County's arraignment volume during this reporting period. In addition to hearing custodial and appearance ticket arraignments from within the City of Syracuse, Syracuse City Court hosts the morning CAP session during which custodial arraignments from every jurisdiction in the county are heard. The ACP monitors the number and type of arraignments scheduled for City Court and uses this information to ensure that the court is staffed appropriately. This is crucial to providing quality representation and to giving attorneys the opportunity to meet confidentially with clients before their cases are heard.

# Syracuse Traffic Court

Syracuse City Court's Traffic Part presides over arraignments arising primarily from alleged violations of the Vehicle and Traffic Law. Each session is staffed by an ACP panel attorney who provides representation for clients charged with eligible offenses.

# Town and Village Courts

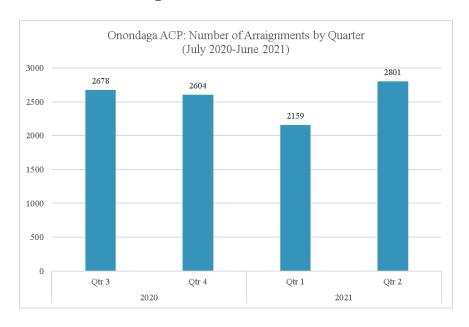
Onondaga County's twenty-eight town and village courts each have regular sessions at which arraignments might be heard. The ACP assigns at least one attorney to cover arraignments for every such regular session. In busier courts, two attorneys are assigned to ensure comprehensive arraignment coverage.

# Centralized Arraignment Part

Off-hour arraignments (i.e., arraignments occurring outside of a regularly scheduled criminal calendar) are all heard in the CAP. There are two CAP sessions every day, the first of which is part of the morning Syracuse City Court calendar. The second session begins at 5:00 p.m. and runs until 10:00 p.m. When in-person, evening CAP sessions are held in the Public Safety Building, which is adjacent to the county's jail and Syracuse City Court. Each CAP session is staffed by ACP attorneys who are responsible for conferencing with detained clients prior to their arraignments, providing arraignment representation on the record, and inputting case information into the ACP's IntelLinx data management software once the case has been heard. The ACP also employs a clerk who assists CAP judges in assigning a suitable panel attorney to continue representation of each eligible client going forward.

The systems described above provide comprehensive arraignment coverage in Onondaga County. The data ILS has received from the Onondaga County Bar Association ACP show that between July 1, 2020 and June 30, 2021:

- Onondaga ACP attorneys provided representation at a total of 10,242 arraignments.
- > There were no cases in which individuals waived or refused representation at arraignment.
- > There were **no missed arraignments.**



# Arraignment Status and Program Updates

On July 15, 2021, appearance ticket arraignments in Onondaga County's justice courts and Traffic Court returned to in-person proceedings. As of the date of this report, custodial arraignments continue to be virtual. Thus, in practice, the City Court/CAP court is being run as a hybrid in-person/virtual courtroom. The ACP panel attorneys assigned to appearance ticket arraignments are physically present in the City Court/CAP courtroom with their clients, while the

attorneys who are assigned to custodial arraignments appear virtually and their clients also appear virtually from a terminal in the jail. The District Attorney's Office also uses a similar hybrid arrangement. The CAP judge hears both in-person and virtual cases as they become ready.

Per ILS's *Notification Regarding Representation at Arraignments*, ACP Executive Director Kathleen Dougherty has worked with ILS to create a plan to resume in-person custodial arraignments, and ACP arraignment attorneys are at the ready to return to full in-person representation. However, this plan has been stymied by logistical hurdles outside of the ACP's control. The most significant obstacle is that the Onondaga County Sheriff's Department has been unable to maintain enough staff to transport detained persons to the CAP for arraignment. This staffing shortage has also precluded the possibility of moving the CAP to the jail, as deputies would still be needed to escort each detained person from housing or booking to wherever the proposed courtroom would be within the jail itself. Moving the CAP to the jail would also create access problems for members of the public, as any available space for a courtroom would be within the secure area of the facility. Notwithstanding the temporary setback, the ACP continues to work with law enforcement, other county stakeholders, and ILS toward the full resumption of in-person arraignments as soon as possible.

In previous reports, we noted that ACP panel attorneys were often denied access to their clients' criminal history records ("RAP" sheets), especially in Syracuse City Court (and morning CAP sessions). In our 2020 Report, we noted that Fifth Judicial District Administrative Judge Hon. James P. Murphy issued two administrative orders clarifying the defense's right to access RAP sheets at arraignment. Ms. Dougherty has informed ILS that these orders have largely been effective at ensuring electronic access throughout the pandemic. She reports that the Syracuse City Police Department and the Sheriff Department's patrol division subcontract fingerprinting and RAP sheet access to the Sheriff Department's corrections division. Thus, as the county works toward the return to in-person arraignments, ACP leadership is working with the corrections department, the courts, the District Attorney's Office, and the arresting agencies to ensure that RAP sheets and other relevant paperwork continue to be sent out to the ACP in advance of any arraignments.

The ACP's IntelLinx e-vouchering system, adopted on January 1, 2020, continues to facilitate the efficient management of assignments, vouchering, and information sharing. The ACP is currently working with IntelLinx to expand the program's functionality. One planned change would introduce a feature to allow attorneys to search for whether another attorney has already opened a file for a case to which they have been assigned. This will avoid duplicate entries and facilitate the transfer of important case information from the arraignment attorney to any subsequently assigned attorney.

#### B. Ontario County

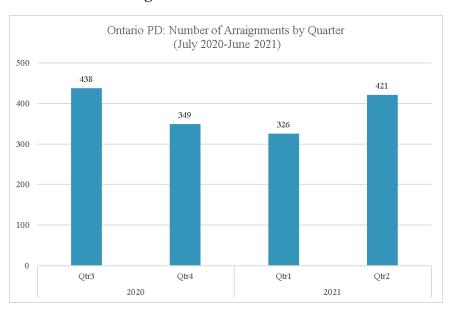
Approximately 62% of Ontario County arraignments during the present reporting period occurred in the county's CAP court, which hears off-hour arraignments in the county during either its morning session from 7:00 a.m. to 9:00 a.m. or its evening session from 5:00 p.m. to 7:30 p.m. The Public Defender's Office (PD Office) is the primary provider of arraignment

representation. Ontario County Public Defender Leanne Lapp assigns two attorneys to CAP sessions on a rotating basis. Additionally, the Conflict Defender's Office (CD Office) staffs the CAP two to three days per month and also occasionally provides arraignment representation when the PD Office learns of a conflict in advance of the arraignment.

The PD Office also staffs each regular session of the county's 19 local courts, where appearance ticket arraignments are heard during regularly scheduled criminal calendar sessions. One promising development we described in the 2020 Report was Ms. Lapp's effort to ensure that information is shared with the PD Office promptly after an appearance ticket is issued and charges are filed with one of the local courts, prior to arraignment. This practice, which has continued smoothly through the present reporting period, has allowed the PD Office to be proactive in screening clients for eligibility, assigning attorneys, and following up with prearraignment interviews and investigations. This also allows the PD Office to identify conflicts pre-arraignment, resulting in earlier assignment of conflict counsel. Where the CD Office is notified of a conflict case pre-arraignment, they will appear for arraignment representation. The CD Office also regularly staffs and provides arraignment coverage in some of the county's busiest local courts, including Geneva City Court, Victor Town Court and Farmington Town Court.

The arraignment data ILS received from the Ontario County Public Defender's Office shows these systems continue to be effective. From July 1, 2020 to June 30, 2021:

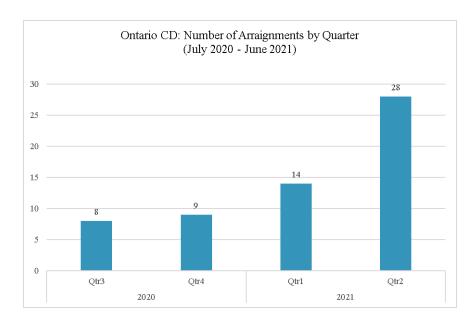
- Ontario PD Office attorneys provided representation at a total of 1,534 arraignments.
- > There were 3 cases in which individuals waived or refused representation at arraignment.
- > There were no missed arraignments.



As discussed above, the CD Office now appears at more arraignments thanks in large part to the early identification of conflicts and pre-arraignment information sharing between the PD and CD

Offices. In the 2020 Report, where we presented CD Office arraignment data for the first time, we noted that the program represented clients at a total of 12 arraignments. The data for the present reporting period demonstrates the continued integration of the program into the county's comprehensive arraignment coverage network. The arraignment data ILS received from the Ontario County Conflict Defender's Office shows that from July 1, 2020 to June 30, 2021:

Ontario CD Office attorneys provided representation at a total of 59 arraignments.



#### Arraignment Status and Program Updates

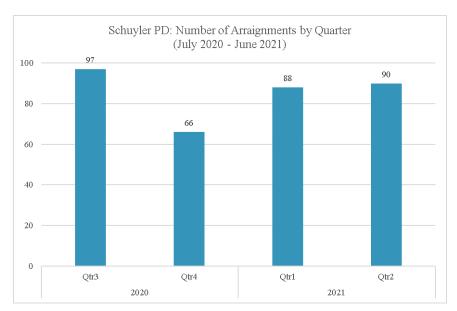
Ontario County returned to full in-person arraignments on June 17, 2021, approximately one week before the Governor rescinded most of the Covid-related executive orders. Ms. Lapp reports that, because her program had a well-developed system in place for arraignment coverage before the pandemic, it was an easy transition back to in-person operations.

# C. Schuyler County

The Schuyler County Public Defender's Office (PD Office) provides arraignment representation in Schuyler County, staffing every regular session of the county's eleven town and village courts. As in years past, the busiest courts in this reporting period continue to be Watkins Glen and Montour Falls Village Courts, accounting for approximately 48% and 13% of the county's arraignments, respectively. Off-hour arraignments during the present reporting period have largely been conducted in the county's virtual arraignment part (VAP). The VAP was implemented in lieu of the county's CAP court, which was scheduled to begin operating in March 2020 but was delayed due to Covid-19. As a temporary pandemic-related stopgap, the VAP conducted all custodial arraignments until June 1, 2021. On that date, the CAP court began operating from a central location located in the county jail for two sessions at day (8:00 a.m. and 8:00 p.m.).

We previously reported that unavoidable overnight gaps in on-call arraignment coverage led to a small number of missed arraignments. As anticipated, the implementation of the VAP and CAP seem to have resolved this issue. The arraignment data ILS received from the Schuyler County Public Defender's Office shows that between July 1, 2020 and June 30, 2021:

- > Schuyler PD Office attorneys provided representation at a total of 341 arraignments.
- > There were 7 cases in which individuals waived or refused representation at arraignment.
- > There were **no missed arraignments.**



#### Arraignment Status and Program Updates

Prior to the June 24, 2021 issuance of Executive Order 210, some courts in Schuyler County were conducting appearance ticket arraignments in-person however, most were still virtual, as were all custodial arraignments. The county began preparations for a return to in-person by first centralizing the VAP. Before the transition, the VAP operated as an "as-needed" forum for arraignments originating in the town and village courts. Thus, local court judges would hear their jurisdiction's arraignments from their respective courtrooms. Attorneys appeared virtually and custodial defendants appeared from the county jail.

On June 1, 2021, the CAP officially came into virtual operation. A rotation schedule for the participating local court judges was established, and virtual arraignments started occurring during one of two CAP sessions, held at 8:00 a.m. and 8:00 p.m. During this time, the judges appeared from the CAP courtroom, with attorneys and clients appearing remotely, though Schuyler County Public Defender Valerie Gardner reports that for many daytime arraignments, attorneys went in-person to the jail to speak to their clients prior to arraignment. On June 24, 2021, pursuant to EO 210, the CAP transitioned to full in-person operations, and now all parties are present in the courtroom.

Ms. Gardner states that though the shift to in-person was sudden, PD Office attorneys were ready and able to make the transition seamlessly. She reports there are still some cases for which they are called to provide representation outside of the CAP. This typically occurs in instances where the jail is unable to hold the person charged, e.g., if the person is female and cannot be held with male detainees or if there are multiple people awaiting arraignment and there is not enough room in the jail holding facility. However, most custodial arraignments are now heard in a central location, close to the PD Office, so they can better anticipate arraignment coverage needs. Additionally, with so many courts to cover and a small number of staff attorneys, prior to the CAP attorneys were often called to arraignments all over the county which was time consuming. Now, they can generally depend on a predictable schedule and location allowing PD Office attorneys to devote time to other representation needs.

# D. Suffolk County

Unique among the five counties for its geographic diversity and population density patterns, Suffolk County has required a multifaceted approach for full arraignment coverage. The West End is characterized by dense suburban development, and most arraignments are heard in a District Court. The East End is markedly less densely populated, and arraignments in the East End are heard in its town and village courts. The Suffolk County Legal Aid Society (SCLAS) and the Suffolk County Assigned Counsel Defender Program (SCACP) continue to share arraignment coverage responsibility. Working in tandem, they provide comprehensive arraignment coverage as described below.

## The West End: District Court Arraignments

The West End's custodial arraignments are heard in District Court's Part D-11, which operates seven days a week from 9:30 a.m. to 5:00 p.m. SCLAS provides primary arraignment representation and assigns three attorneys to Part D-11 each day. An SCLAS supervisor is also on site and a social worker is available on an as-needed basis for client support. SCACP attorneys also staff D-11 to provide arraignment representation when SCLAS attorneys are disqualified due to, for instance, a conflict of interest.

Appearance ticket arraignments in the West End are mainly heard in District Court's Street Appearance Part (SAP), which operates weekdays from 9:30 a.m. to 5:00 p.m. The SCACP provides primary arraignment coverage in SAP, assigning rotating teams of two attorneys to cover the part on a weekly basis.

#### The West End: Village Court Arraignments

A minority of West End jurisdictions have elected not to participate in the District Court system. While these courts tend to be less busy, SCLAS maintains full coverage by assigning attorneys to each court. These attorneys are available to cover any arraignments occurring at regularly scheduled sessions in these courts, as well as any off-hour arraignments that occur during normal business hours.

<sup>&</sup>lt;sup>9</sup> For instance, the busiest such court during the present reporting period, Northport Village Court, heard a total of thirteen arraignments.

#### The East End: Weekday Arraignments

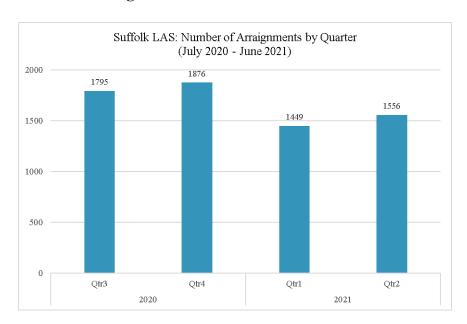
All arraignments in the East End are heard in its ten town and village courts. Settlement implementation allowed SCLAS to staff every regular session of each of the East End's ten local courts. SCLAS also implemented an on-call system whereby attorneys are available to appear for off-hour arraignments during normal business hours in East End courts.

# The East End: Weekend and Holiday Arraignments

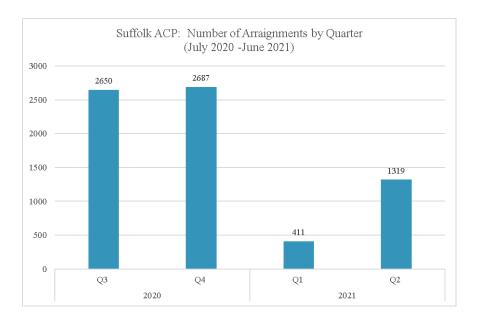
Weekend and holiday arraignments in the East End are covered by SCACP panel attorneys via an on-call system. Administrator Dan Russo assigns qualified panel attorneys to on-call shifts in specific courts. Those attorneys are responsible for covering any arraignments that might occur during their shifts.

In this sixth year of settlement implementation, Suffolk County's two providers continue to demonstrate the efficacy of their approach to arraignment coverage in a diverse and complicated jurisdiction. This is borne out by data ILS has received from SCLAS and SCACP, which shows that from July 1, 2020 to June 30, 2021:

- > SCLAS attorneys represented defendants at a total of 6,676 arraignments.
- > SCLAS reported 7 cases in which individuals waived or refused representation at arraignment.



- > SCACP attorneys represented defendants at a total of 7,067 arraignments.
- ➤ There were 3 cases in which individuals waived or refused representation at arraignment.



➤ There were no missed arraignments reported in District Court. 10

# Arraignment Status and Program Updates

For much of the reporting period, arraignments in Suffolk County's District Court remained mostly virtual. In June 2021, Suffolk County began to shift from mostly virtual arraignments in D-11 to fully in-person. Though for a period SAP was employing a hybrid approach (with the client appearing in person but the attorneys appearing remotely), SAP has also resumed inperson arraignments.

The East End town and village courts were conducting virtual arraignments as of June 2020 though many resumed in-person arraignment proceedings later that summer and in fall 2020. To date, some courts remain virtual, and some are conducting in-person arraignments. We are told that the delay in fully resuming in-person proceedings may be logistical as some of the courts are not set up to safely conduct in-person proceedings. Both SCLAS and SCACP already appear in-person in the courts that have returned to normal, and they are prepared to appear at all in-person proceedings.

In previous reports, we discussed issues with tracking missed arraignments in the East End courts. Both SCLAS and the SCACP continue to appear at all arraignments for which they are notified, and SCLAS attempts to track any missed arraignments by asking people when they apply to SCLAS for assigned counsel if they were represented at their first court appearance. As we have noted in the past, this system of tracking missed arraignments relies on self-reporting by individuals who are often unfamiliar with the court system, and as a result it is not 100% accurate. Still, it has helped us identify trends, such as in 2018 and 2019 when we noted many applicants from Riverhead Town Court who reported that they had not been represented by

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<sup>&</sup>lt;sup>10</sup> There were a limited number of arraignments reported in the East End Courts in which people reported they were not represented by an attorney. We discuss this further below.

counsel. At that time, we worked with the Administrative Judge to remind judges that counsel should be notified prior to arraignment so that all people are represented at arraignment.

We have continued to monitor this issue and during this reporting period, learned that there were a small number of cases where individuals reported that they were not represented by an attorney at their first court appearance. From our review of the data and subsequent consultation with SCLAS and SCACP, it appears that most of these involve Vehicle and Traffic Law cases where judges may have failed to notify SCLAS attorneys that a person appeared for an arraignment. In these cases, it is not clear if the judge conducted the arraignment at the first court appearance or declined to do so, and instead advised the individual to retain an attorney or contact SCLAS to apply for assigned counsel. Thus, it is not entirely clear if these are missed arraignments. We are told that most East End judges are careful to ensure counsel is present at all arraignments, but given the data, we are investigating to determine if further action is necessary. In the interim, SCLAS is also looking into additional methods to increase the accuracy of the data.

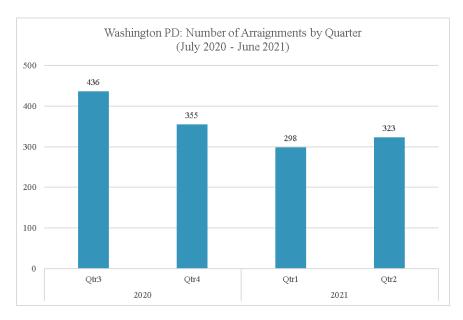
# E. Washington County

In Washington County, the Public Defender's Office (PD Office) continues to serve as the primary provider of arraignment representation with the exceptions discussed below. The PD Office staffs each regular session of the county's twenty-two town and village courts as well as the county's CAP, which hears all off-hour arraignments in one of two daily sessions (8:00 a.m. – 9:30 a.m. and 7:00 a.m. – 9:30 p.m.) and accounted for some 29% of all PD Office arraignments in the present reporting period.

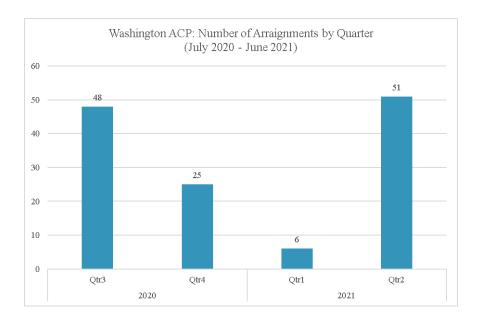
A central element of settlement implementation in Washington County was the development of a caseload overflow plan. To ensure continued compliance with caseload standards, the Washington County Assigned Counsel Program (ACP) has primary responsibility – including arraignment representation – for a subset of Vehicle and Traffic Law offenses in six of the county's busiest courts.

Arraignment data ILS has received from the Washington County PD Office and ACP shows that between July 1, 2020 and June 30, 2021:

- ➤ Washington PD Office attorneys provided representation at a total of 1,412 arraignments.
- ➤ There were 2 cases in which individuals waived or refused representation at arraignment.
- > There were **no missed arraignments.**



- Washington ACP attorneys provided representation at a total of 130 arraignments.
- ➤ There were 4 cases in which individuals waived or refused representation at arraignment.



# Arraignment Status and Program Updates

Washington County's CAP returned to in-person custodial arraignments in June 2020 and has continued to hear in-person arraignments ever since. Public Defender Michael Mercure reports that the town and village courts were less consistent in their transitions from virtual arraignments back to in-person proceedings, with each court – and sometimes each individual judge – deciding how arraignments would proceed. Thus, there were times in the last year when some local courts were conducting only in-person arraignments while others were conducting only virtual

arraignments. A third subset of courts conducted in-person arraignments on certain days and virtual arraignments on others. Mr. Mercure also reports that most of the town and village courts resumed in-person arraignments from June 2020 through just after the 2020 Thanksgiving holiday but, returned to virtual arraignments from December 2020 through April 2021 due to concerns over increasing transmission rates of Covid-19. By April 2021, all Washington County's courts had returned to full in-person arraignment proceedings.

As reflected in the data described above, The PD Office and the ACP ensured continued comprehensive arraignment coverage regardless of the format throughout this unpredictable and ever-shifting period. With the early return of the CAP to in-person arraignments and the countywide return to in-person arraignments in April 2021, Washington County arraignment practice appears to have stabilized.

# II. Virtual Arraignments Update

In our 2020 Report, we described some of the measures program leaders took to ensure continuity of full arraignment coverage when courts shifted to virtual arraignment proceedings. We also described some of the barriers to quality representation posed by the transition to virtual arraignments. A year later, our understanding of how virtual arraignment practice has affected public defense providers and their clients continues to improve. As providers and courts work to fully return to in-person arraignment proceedings, the information we learned underscores the importance of doing so.

During the present reporting period, ILS created a survey containing questions relating to practice during the Covid-19 pandemic for distribution to attorneys in the five counties. <sup>11</sup> In addition to a survey, ILS also conducted 18 video interviews and focus groups. <sup>12</sup> Attorneys who participated ranged in experience and came from both institutional defense providers and ACP panels. Despite this diversity of geography, experience, and practice environment, we identified consistent themes regarding virtual arraignment practice.

Chief among these themes was a general sense that virtual arraignment practice presented a significant challenge to attorneys' ability to provide quality representation. Much of the feedback we received from attorneys regarding obstacles to quality arraignment representation focused on diminished access to clients, the pervasive sentiment that confidentiality of communications with clients during virtual arraignments is not guaranteed, and a concern that the communication barriers undermine attorneys' ability to establish the trust and rapport with their clients necessary for an effective attorney-client relationship.

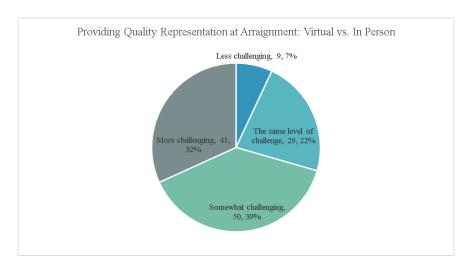
<sup>12</sup> In total we spoke to 37 attorneys during the interview and focus group sessions. The Covid-19 survey, focus groups, and interviews are also discussed in considerable detail in ILS's *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Settlement Counties, 2021 Update* (October 30, 2021), available upon request.

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<sup>&</sup>lt;sup>11</sup> We received a total of 181 responses to the Covid-19 survey. After eliminating incomplete and irrelevant responses, we analyzed 167. Of those 167 responses, 129 attorneys indicated that they provided representation at virtual arraignments.

# A. Quality

Almost three quarters of attorneys (71%) who indicated in survey responses that they provide virtual arraignment representation agreed that providing quality representation at virtual arraignments is either "more challenging" or "somewhat challenging" as compared to in-person arraignments.<sup>13</sup> Only 7% of attorneys believed that virtual arraignments were less challenging than in-person arraignments.



# One attorney explained:

When you're live, in person you can turn to your client and explain what is happening or why it's happening. When it's virtual you try to fill them in on everything beforehand but it's not always possible or something happens that you didn't predict. Also, when you're live [] and in person and the client tries to say something or ask a question you can speak to them confidentially right then and either advise them not to speak or that you'll answer their question, and it doesn't need to be directed to the court. On virtual appearances there's no way to do that so clients may be speaking when you don't want them to. Also, every once in a while, a client's family member would come to a live arraignment and it's one more thing you can point to that they have contacts to the community and that they'll return to court. I never had a family member come to a virtual arraignment.

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<sup>&</sup>lt;sup>13</sup> N=129. 33% of attorneys at institutional providers and 31% of ACP attorneys responded that providing quality representation at virtual arraignments is "more challenging" than at in-person arraignments. 31% of attorneys at institutional providers and 43% of ACP attorneys responded that providing quality representation at virtual arraignments is "somewhat challenging" when compared to in-person arraignments.

Several other attorneys noted that there is no virtual substitute for the effectiveness of in-person communication, with the following survey responses:

- In person easier to address any fluid situation and speak comfortably with client pre/during arraignment.
- The comfort of an in-person meeting with a client you are assigned to represent can never be replaced. The human condition is necessary when you are representing people.
- Not being able to have a sidebar, low volume conversation during the arraignment if they wish to tell me something is a bit of a challenge.
- The only challenge I feel is the inability to speak to the person IN PERSON.
- I found the most challenging aspect with virtual arraignments was having sufficient time and ability to gather defendant's personal information to make thorough bail arguments when applicable.

One attorney described how virtual arraignments have made holistic representation more difficult:

The process for contacting clients in virtual arraignments involves calling the Sheriff's Dept. and getting a call back when the client is waiting at the phone. Phone calls are not time-limited, but it is generally only feasible to make one call to the client. There is no way to provide the clients with documentation and contact information, or to have them sign documents like HIPAA releases for follow-up with treatment providers. Virtual arraignments is particularly difficult with our homeless clients who we would normally try to connect with supportive services. We often have no follow up contact information for them and cannot check in with them after they are released to make sure they understand what is happening and have access to resources like bus tokens, emergency shelter referrals, and food.

Some attorneys questioned whether legal arguments made virtually have the same impact on judges. During a focus group session, one attorney told ILS that he wonders whether an oral argument is more effective in person. His impression is that judges are less receptive during virtual arraignments, and in-person was "just a better way to do it." This sentiment was shared by another attorney who noted in their survey response that, "it is different not being physically present with the Judge and your client. I think it is easier for a Judge to say 'No' when you are on a computer and not physically there."

#### B. Confidentiality

In the Covid-19 survey, we asked attorneys about their ability to communicate confidentially with their clients before and during virtual arraignments. We specifically asked how frequently

they were able to do so via telephone, videoconference, and in person. In each case, they were able to select "always," "sometimes," or "never" so the categories were not mutually exclusive.

Most attorneys who responded to these questions indicated they communicated with clients before and during virtual arraignments via telephone. Several attorneys also relied on videoconference and, some were able to meet with clients at the jail in person before the proceeding. Of these responses, 91% of the attorneys who communicated via telephone said that they could "always" or "sometimes" have a confidential phone call with their clients *before* an arraignment (n=124). For videoconferences, a combined 64% of attorneys answered that they could "always" or "sometimes" have a confidential videoconference with their clients *before* arraignment (n=64) and about 86% of attorneys who met in person with clients told us they could "always" or "sometimes" meet confidentially *before* arraignments (n=43).

When asked about confidential communication *during* virtual arraignment proceedings, the results were quite different. Only a combined 52% answered that they could "always" or "sometimes" speak with their clients confidentially via telephone during an arraignment (n=103) and those communicating via videoconference were able to do so even less frequently, with only a combined 38% answering "always" or "sometimes" and 62% indicating "never" (n=80). Only those present in-person with their clients at the jail during the arraignment felt confident in confidential communications during the proceedings (73% "always" or "sometimes," n=40).

The most obvious trend suggested by this data is that, regardless of whether it is by phone, videoconference, or an in-person conversation, access to essential confidential communication between attorneys and their clients is diminished *during* virtual arraignment proceedings as compared to access *before* virtual arraignments.

These results are consistent with what we heard during focus groups and interviews. Participating attorneys frequently noted that having confidential communications with their clients during arraignments was particularly difficult. One attorney said that even when she asked the court to pause the proceedings so she could consult with her client, the procedure to do so required that the videoconference be left active, and all other participants mute their microphones and turn off the sound on their devices, so they were not listening in on the attorney-client conversation. While she had no specific reason to believe that this was not being done, it simply did not feel as secure as being able to speak to her client privately. Other attorneys noted that often, during phone calls or videoconferences with their clients, jail guards, court officers, or other court staff would be in a position where they could hear the conversation. In addition to undermining confidentiality, this had a chilling effect on the breadth of the conversations attorneys were willing to have with their clients. As one interviewed attorney put it, she had to be "especially careful" in her communications with her client. Another attorney explained:

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<sup>&</sup>lt;sup>14</sup> 71% of attorneys in institutional providers answered "always" when asked about pre-arraignment confidential phone calls, while only 55% of ACP attorneys answered "always." This disparity could relate to the fact that institutional providers tend to have more long-standing and formal relationships with other county agencies, including the courts and jails.

It is generally hard when the attorney is standing right next to the client during an arraignment, as the general tendency is to want to talk to the client and explain things. It is that much harder when the attorney is not there to stop the client from saying things he should not be saying during the proceeding. Additionally, there is a lot of information, such as their phone numbers and contact information, which the attorneys want to give to the clients for their pre-trial release, so they know whom to call. For this, the attorneys have had to rely on the deputies to write the information down and provide it to the clients.

# C. Attorney-Client Relationship

While attorneys may have had the ability to communicate with clients in a virtual setting, the circumstances were not always conducive to establishing a good working relationship with their clients. This is the first step every attorney must take toward an effective defense and, in most cases, this relationship begins just before a client is scheduled to be arraigned. Attorneys are often meeting their clients at a crisis point and establishing trust is a demanding and subtle task. This is important whether or not the attorney appearing at arraignment is assigned for the pendency of the case. Important information must be gathered at this first meeting including information that can affect a person's release. If attorneys are prevented from effective communication initially, that can affect the entire case trajectory as well as the client's trust in the public defense system.

Several attorneys told us in focus groups and interviews that virtual arraignments made establishing an effective attorney-client relationship much more difficult. These are some of their remarks:

- Virtual undermines the ability to develop an attorney client relationship, in my
  experience. Going into jails and meeting face to face results in a better
  relationship and better results. Clients often believe that phone calls are recorded.
  They feel more secure in person. I hope they don't rewrite history to make it seem
  like virtual court is good. I think it's not good, especially with custody clients.
- The client would have to call you before an arraignment and not even on video. It's harder to identify a potential mental health or substance abuse issue and to build an attorney client relationship. ... Creating relationships in a brief time on the phone doesn't work.
- [Virtual arraignments are] not very effective. Sometimes you couldn't even talk to the client before. Same for arraignments on an indictment. You could only talk on the phone which is very limiting. You had to call through the system and wait days sometimes. The client might forget an important detail in that time, that would have helped with the investigation. I had a felony VOP for a woman with breast cancer; I had to meet with people in the medical unit at the jail. I wonder if it took longer to get her out because it was all virtual. Many times, I saw notes that the arraigning attorney couldn't speak to the client before the arraignment.

Then I'd talk to the client and learn information that might have affected bail or would have triggered the need for a quick investigation. I don't know why we are still doing anything virtual.

- I'd had four clients in Covid quarantine or on the mental health floor and I couldn't talk to them at all. They'd wheel a video monitor over and you're yelling through the computer and through a hole in the door. Those are the clients who need in person discussion the most.
- We would talk to the client prior to the arraignment, they would be in the police precinct [and] I would definitely avoid talking about the facts of the case because of the issues with privacy.
- I didn't like how difficult it was to talk to client before the arraignment, I could call them sometimes but since I had to go through the jail, the jail would get mad. The jail would wait until they were booked, which was sometimes only 15 minutes before the arraignment. The jail would act annoyed, like it was burdensome, and I had limited the amount of time I could talk with them.

These comments demonstrate that many attorneys feel unable to connect with their arraignment clients by phone or videoconference in the same way that they could if they were in person. Remote communication can curtail attorneys' ability to fully answer clients' questions and explain their legal circumstances. Attorneys feel less able to appropriately advise their clients as issues come up during the virtual arraignment itself. And attorneys may be unable to thoroughly follow up with their clients immediately after the virtual arraignment proceeding concludes.

# D. Access to Paperwork

Attorney access to arraignment paperwork is critical for quality arraignment representation. Without timely access to accusatory instruments, statutory notices, and client criminal histories ("RAP sheets"), defense attorneys and their clients are left at a significant disadvantage. Attorneys must have time to review these documents before their client is arraigned to make effective arguments regarding potential defects in the charging documents, initiate timely investigations, and prepare robust applications for release. While difficulty obtaining these documents (particularly RAP sheets) is a problem that in some counties predates the start of virtual arraignment practice, we heard from several attorneys who participated in our interviews and focus groups that this problem also arose during the transition to virtual arraignments.

In the Covid-19 survey, we asked attorneys whether they could access these documents before, during, or after a virtual arraignment. While a large majority said they "always" received the charging document(s) pre-arraignment (78%), only slightly more than half of the attorneys we polled told us that they "always" received RAP sheets and statutory notices pre-arraignment (56% and 47%, respectively). Moreover, over a quarter of responding attorneys (27%) told us that they do not receive RAP sheets until *after* their client has been arraigned and the judge decided their custody status.

One possible explanation for the pandemic-related decrease in access to arraignment paperwork is the increased organization and action required of courts, law enforcement, or both to scan these documents and distribute them electronically. However, this issue should diminish as stakeholders adjust to new procedures. Indeed, some attorneys told us that the issue of access has been improving over the course of the pandemic. One attorney noted that, while there was a time when he was not regularly receiving RAP sheets at all, at some point the Sheriff's Office "just caught on" and was regularly sending arraignment documents (including RAP sheets) to him electronically pre-arraignment. Another attorney in a different county shared a more mixed experience. She noted that the problem had only started with the pandemic, and for a time she was not receiving any RAP sheets at all in certain courts. By the time of her interview, those courts would get her RAP sheets if she specifically asked for them, and she told us that she would continue to work with the courts to help the judges and court personnel understand that defense counsel is entitled to this documentation.

In light of the comments above, it is possible that this issue was particularly acute at the start of the pandemic and diminished as court actors and law enforcement grew accustomed to the new system of delivery. Still, as access to arraignment paperwork, and access to RAP sheets in particular, is both legally required and necessary for arraignment representation, ILS will continue to monitor its status as the transition to in-person arraignments continues.

As articulated by the attorneys we surveyed and interviewed, virtual arraignment proceedings create obstacles to effective representation. Diminished access to confidential, in-person communication and paperwork have led to a prevailing impression that providing quality representation becomes more challenging when arraignments are virtual. The transition to virtual arraignments was a necessary emergency response to an unprecedented public health crisis. As we emerge from that crisis, and as the legal authority and practical necessity for virtual arraignments has receded, the above information makes clear the importance of returning to inperson arraignment representation. Not only is this a legal imperative, <sup>15</sup> it is essential for quality representation.

# III. Bail Reform Update

Bail reform was a major component of the criminal justice reform legislation passed on April 1, 2019 and effective January 1, 2020. 16 Certain portions of the bail reform legislation were modified by a statute passed on April 3, 2020 and effective July 1, 2020. 17 Thus, changes to the laws governing bail and custody have impacted arraignment practice within the five counties since the outset of 2020, just a few months before the tectonic shift in court procedures created by the Covid-19 emergency. We described in the 2020 Report how the near simultaneous occurrence of these two significant developments in arraignment practice made their individual effects difficult to assess. However, after collecting data for over a year and a half, we are now able to present some preliminary information about bail reform's effect on arraignment outcomes in the five counties. We note that any conclusions must take into account the fact that some information was collected during the public health emergency.

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<sup>&</sup>lt;sup>15</sup> See Hurrell-Harring settlement § III(A); Executive Law § 832(4)(a).

<sup>&</sup>lt;sup>16</sup> L. 2019, c. 59, pt. JJJ.

<sup>&</sup>lt;sup>17</sup> L..2020, c. 56, pt. UU.

Since 2016, the *Hurrell-Harring* counties have collected information on arraignment representation and reported it to ILS as part of settlement implementation. Initially, this information was collected as the programs built arraignment representation capacity and implemented systems for full arraignment coverage. In four counties, this has also included developing and implementing a CAP. Thus, much of the early arraignment data, including information on arraignment type (i.e., custodial versus appearance ticket) and outcome (i.e., bail, remand, or release), was collected during periods of transition. As a result, for our analysis, we looked at data points from the reporting period of July 1, 2018 to June 30, 2019, as this prepandemic time period reflects the least amount of transition. We compared it to the present reporting period where substantially all arraignments were done in the context of the postamendment bail reform. The results of the comparison are striking and are presented below.

# A. Review of Appearance Ticket and Custodial Arraignments

The bail reform legislative amendments included, among other things, amendments to Criminal Procedure Law (CPL) § 150.20 to require issuance of appearance tickets upon arrest in certain cases. <sup>18</sup> This change in the law was intended to reduce the number of people taken into custody upon arrest. As a result, we anticipated that after the January 1, 2020 implementation date, the number of appearance ticket arraignments would increase, and the number of custodial arraignments would decrease. To assist *Hurrell-Harring* providers with preparing for this change to arraignment practice which likely would impact counsel at arraignment staffing patterns, in 2019, ILS reviewed their 2018 arraignment data to project how bail reform may affect the number of arraignments at different court sessions. Now, more than a year and a half after the bail reform legislation took effect, we are able to review what actually happened.

Notably, this is an area where the impact of the pandemic-related adjournments and reduction in overall arraignments likely affected the data. Under Chief Administrative Judge Marks's Administrative Order 68/20 (March 16, 2020) only custodial arraignments were deemed "essential proceedings;" appearance ticket arraignments were "administratively adjourned until further notice." Though eventually appearance ticket arraignments resumed, for some of this period, only custodial arraignments were conducted. Moreover, we have heard from providers anecdotally that many arresting agencies were making fewer arrests for less serious offenses during the peak of the pandemic, thus creating a disproportionately high number of felony (and specifically violent felony) arrests, which were more likely to result in custodial arraignments. <sup>20</sup>

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<sup>&</sup>lt;sup>18</sup> Under the 2019 legislation, permissive appearance ticket arrests became mandatory, with certain exceptions. Specifically, police are required to issue appearance tickets unless the person arrested is charged with any of the following offenses: Class A, B, C, or D felonies; Penal Law article 130 offenses (felony and misdemeanor sex offenses); certain escape offenses (PL § 205.10, § 205.17, § 205.19) and bail jumping 2nd degree PL (§ 215.56); offenses for which an Order of Protection (OOP) may be requested; and offenses for which the court may suspend or revoke the person's driver's license. Law enforcement may also take a person into custody at arrest if certain other exceptions exist, such as the person has an outstanding criminal warrant, has failed to appear in criminal court in the last two years, refuses to provide information about his or her identity, or the person is in distress and in need of immediate mental health or medical attention.

<sup>&</sup>lt;sup>19</sup> Administrative Order of the Chief Admin. Judge of Cts AO/68/20.

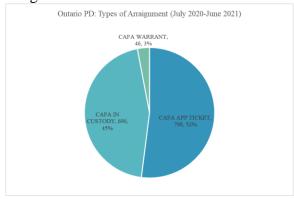
<sup>&</sup>lt;sup>20</sup> This is consistent with the most recent data available from the NYS Department of Criminal Justice Services (DCJS). DCJS reports fingerprintable misdemeanor arrests dropping from 230,897 in 2019 to 154,223 in 2020. The change in felony arrests is much less pronounced, with 125,812 in 2019 and 101,369 in 2020. Statistics available at <a href="https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nys.pdf">https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nys.pdf</a>.

Given this disproportionate number of felony arrests, it would be anticipated that there would also be a disproportionate number of custodial arraignments, and for that reason, any comparison of pre-bail reform and post-bail reform arraignment types must be evaluated with this Covid effect in mind. Nevertheless, the data from the five counties indicates that appearance ticket arraignments increased or remained the same as compared to the 2018-2019 period.

In three of the *Hurrell-Harring* counties – Ontario, Schuyler, and Washington – there was a noticeable increase in appearance ticket arraignments even in the context of the pandemic-related adjournments. In the remaining two – Suffolk and Onondaga – the numbers remained about the same. However, given the delays in appearance ticket arraignments and other issues discussed above, this is a positive indicator that bail reform is achieving its intended effect of decreasing pretrial detention.

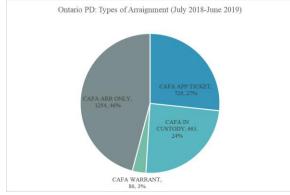
In Ontario County, data from the Ontario PD Office shows that from July 2020 to June 2021, attorneys provided representation at a total of 1,534 arraignments:

- 52% of these arraignments were appearance tickets arraignments, and
- 45% were custodial arraignments.<sup>21</sup>



In comparison, from July 2018 to June 2019, attorneys provided representation at a total of 2,732 arraignments:

- 27% of these arraignments were appearance tickets arraignments, and
- 24% were custodial arraignments.

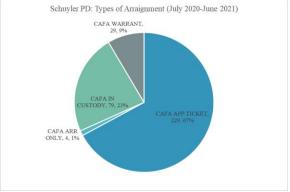


Thus, there was a nearly twofold increase in appearance ticket arraignments in Ontario County between the two periods.

<sup>&</sup>lt;sup>21</sup> For all counties, the data included additional categories such as "CAFA Warrant" and "CAFA Arr Only." While represented in the accompanying charts, they have been omitted for the purposes of this discussion.

In Schuyler County, data from the Schuyler PD Office shows that from July 2020 to June 2021, the Schuyler PD attorneys provided representation at a total of 341 arraignments:

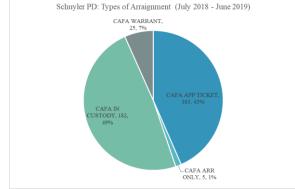
- 67% of these arraignments were appearance tickets arraignments, and
- 23% were custodial arraignments.



In comparison, from July 2018 to June 2019, the Schuyler PD attorneys provided representation at a total of 375 arraignments:

Schuyler PD: Types of Attraignment (July 2018 - June 2019)

- 43% of these arraignments were appearance tickets arraignments, and
- 49% were custodial arraignments.

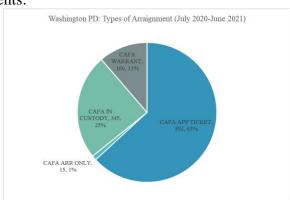


Thus, appearance ticket arraignments increased over one and a half times in Schuyler County.

In Washington County, we reviewed both the Washington PD Office and the Washington ACP data as both programs were providing some primary representation during the relevant periods.

Data from the Washington PD Office shows that from July 2020 to June 2021, attorneys provided representation at a total of 1,412 arraignments:

- 63% of these arraignments were appearance tickets arraignments, and
- 25% were custodial arraignments.

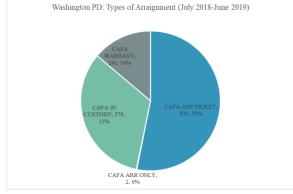


In comparison, from July 2018 to June 2019, attorneys provided representation at a total of 1,757

arraignments:

• 53% of these arraignments were appearance tickets arraignments, and

• 33% were custodial arraignments.

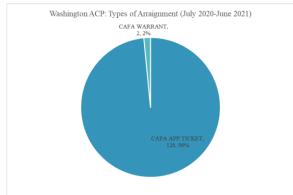


Thus, the Washington PD Office reported an increase in the use of appearance tickets from just over half to nearly two thirds of arraignments.

The Washington ACP reported from July 2020 to June 2021, panel attorneys provided

representation at a total of 130 arraignments:

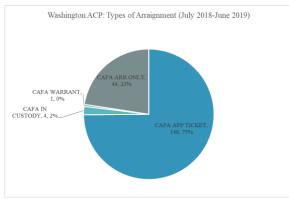
• 98% of these arraignments were appearance tickets arraignments.



In comparison, from July 2018 to June 2019, Washington ACP attorneys provided representation at a total of 195 arraignments:

• 75% of these arraignments were appearance tickets arraignments, and

• 2% were custodial arraignments

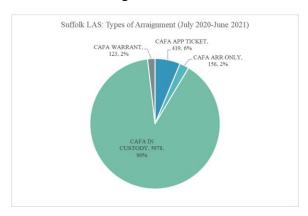


Thus, the Washington ACP reported in increase in appearance tickets from about three quarters of all arraignments to nearly all arraignments. This is particularly interesting given that the ACP's primary arraignment responsibility is for Vehicle and Traffic Law cases for which appearance tickets should typically be issued. Our analysis shows that prior to bail reform, that may not have always been the case for these lower-level cases in Washington County.

Because of the complex arraignment structure in Suffolk County, it is challenging to look across all arraignments to compare custodial and appearance ticket arraignments. Examining arraignments by provider, however, is revealing and shows that both providers experienced an increase in custodial arraignments in the current reporting period as compared to July 2018 – June 2019. However, SCACP's data also shows an overall increase in appearance ticket arraignments in this period as compared to July 2018-June 2019.

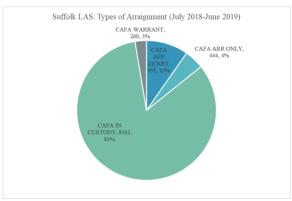
As discussed in Section I(D), the Suffolk County Legal Aid Society (SCLAS) provides arraignment representation for most custodial arraignments in D-11 and most appearance ticket arraignments in the East End courts, with the D-11 arraignments constituting the largest percentage of their arraignment practice. SCLAS reported that from July 2020 to June 2021, attorneys provided arraignment representation at a total of 6,676 arraignments:

- 6% of these were appearance ticket arraignments, and
- 90% were custodial arraignments.



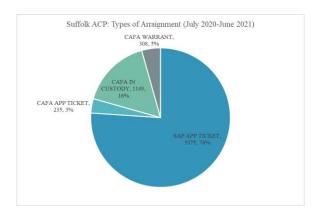
In comparison, from July 2018 to June 2019, the Suffolk LAS attorneys represented defendants at a total of 9,821 arraignments:

- 10% of these arraignments were appearance tickets, and
- 83% were custodial arraignments.



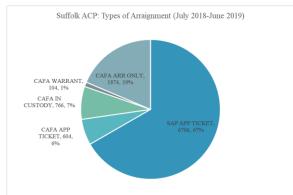
SCACP is the primary provider of arraignment representation in SAP, where most the county's appearance ticket arraignments occur. SCACP data shows from July 2020 to June 2021, attorneys provided representation at a total of 7,067 arraignments:

- 76% of these were SAP appearance tickets arraignments,
- 16% were custodial arraignments, and
- 3% were non-SAP appearance tickets arraignments.



In comparison, from July 2018 to June 2019, SCACP attorneys provided representation at a total of 10,054 arraignments:

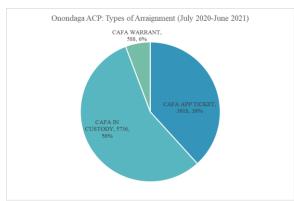
- 67% of these arraignments were SAP appearance tickets,
- 7% of these were custodial arraignments, and
- 6% were non-SAP appearance tickets arraignments.



Thus, the SCACP realized a slight increase in the percentage of appearance ticket arraignments. As discussed above, it is likely the Suffolk arraignment data is impacted by Covid-19 thus any conclusions should include this consideration. Still, the fact that the SCACP appearance ticket arraignment rate showed a slight increase in this context is a positive sign in terms of bail reform having its intended impact.

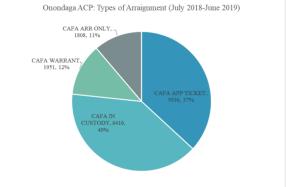
Finally, the Onondaga ACP reported from July 2020 to June 2021, panel attorneys provided representation at a total of 10,242 arraignments:

- 38% of these were appearance tickets arraignments, and
- 56% of these arraignments were custodial.



In comparison, from July 2018 to June 2019, attorneys provided representation at a total of 16,111 arraignments:

- 37% of these were appearance tickets arraignments, and
- 40% of these arraignments were custodial.



Thus, like Suffolk County, the percentage of custodial arraignments increased while the percentage of appearance ticket arraignments remained relatively unchanged. The effects of Covid-19 likely account for the somewhat paradoxical result observed in Onondaga County.

# B. Post Bail Reform Imposition of Bail

The reforms to New York's bail laws were also intended to reduce reliance on monetary bail to detain people prior to trial. Changes to Articles 500, 510, 520, and 530 of the Criminal Procedure Law are designed to ensure that most people charged with misdemeanors and non-violent felonies are released at their arraignment. Judges are permitted to impose non-monetary conditions in these cases only if they make "an individualized determination that the principal poses a risk of flight to avoid prosecution" and then the law instructs them to use the "least restrictive alternative." For those bail eligible cases, or "qualifying offenses," the judge may set monetary bail if they determine release or a non-monetary condition is insufficient to ensure a person's return to court. For qualifying felonies, the judge also has the option to remand a person to the custody of the sheriff. The net result of these changes should be fewer people held in custody pretrial, particularly those charged with lower-level offenses. With this in mind, we reviewed the *Hurrell-Harring* provider data to understand changes in the use of bail after these laws took effect.

The results are striking across all five counties and highlight the fact that prior to bail reform, judges were frequently setting bail on low level cases. Using the same pre-bail reform period, June 2018-July 2019, as compared to the current reporting period, June 2020-July 2021, we looked at the number of cases in which the judge either set bail or remanded the person to custody. We found that all five counties saw a marked decrease in the overall use of pretrial incarceration.

<sup>&</sup>lt;sup>22</sup> See CPL § 510.10(1) (presumption of release in non-qualifying offenses; court must select the "least restrictive alternative" if no release on recognizance); CPL § 500.10(3-a) authorizing release under non-monetary conditions; and CPL § 520.10(2)(b) (requiring three forms of bail when set, one of which must be "either unsecured or partially secured surety bond.").

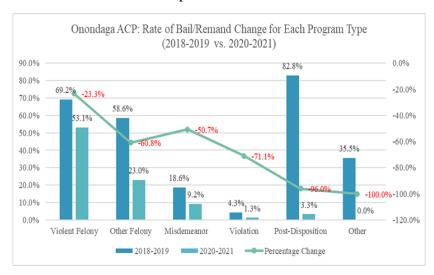
 $<sup>^{23}</sup>$  Id

<sup>&</sup>lt;sup>24</sup> CPL § 510.10(4) (detailing "qualifying offenses" for which bail may be set).

<sup>&</sup>lt;sup>25</sup> *Id*.

As expected, the reduction in the use of pretrial custody was most apparent in misdemeanor and violation level cases, though we saw a significant reduction in non-violent felony cases as well. Unsurprisingly, violent felony cases in every county – most of which continue to be eligible for cash bail as so-called "qualifying offenses" – were the least impacted by bail reform. This reflects the reality that despite the mandate included in the bail reform legislation that courts select the "least restrictive alternative" required to ensure someone's attendance at future court proceedings, cash bail remains a judicial preference for people accused of the most serious category of offense.

In Onondaga County, for example, the ACP reported from July 2018-June 2019, judges set bail/remand in 69.2% of violent felony cases. From July 2020-June 2021, the number slightly decreased to 53.1% of violent felony cases. In contrast, from July 2018-June 2019, bail/remand was set in 18.6% of misdemeanor cases, whereas from July 2020-June 2021, judges set bail/remanded in only 9.2% of misdemeanor cases. The chart below demonstrates the change in the use of bail or remand between the two periods.



The Ontario, Schuyler, and Suffolk County comparisons are even more remarkable. Data from the Ontario PD Office shows a 78.8% reduction in the use of bail on misdemeanors cases.<sup>30</sup> In Schuyler County, the PD Office reported a 92.0% reduction in the use of bail in these cases.<sup>31</sup> In Suffolk County, SCLAS's data showed a 72.5% reduction in the use of bail in misdemeanor cases.<sup>32</sup>

<sup>&</sup>lt;sup>26</sup> 472 out of 682 violent felonies.

<sup>&</sup>lt;sup>27</sup> 550 out of 1,036 violent felonies.

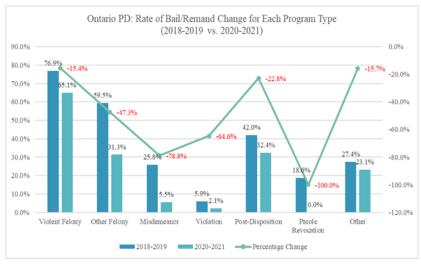
<sup>&</sup>lt;sup>28</sup> 1,838 out of 9,876 misdemeanors.

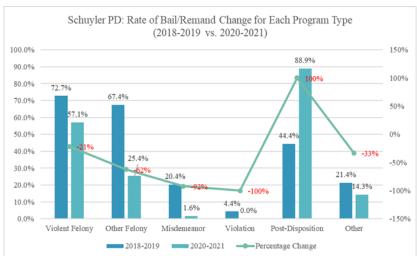
<sup>&</sup>lt;sup>29</sup> 558 out of 6,082 misdemeanors.

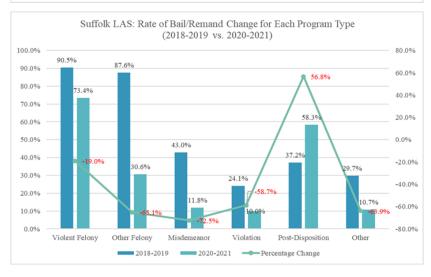
<sup>&</sup>lt;sup>30</sup> From July 2020-June 2021, the Ontario PD reported that in 5.5% misdemeanor cases (48 out of 880) judges set bail or remanded the person, whereas from July 2018-June 2019, judges set bail or remanded the person in 25.8% of misdemeanor cases (432 out of 1,677).

<sup>&</sup>lt;sup>31</sup> From July 2020-June 2021, the Schuyler PD reported that in 1.6% misdemeanor cases (4 out of 250) judges set bail/remanded, whereas from July 2018-June 2019, judges set bail/remanded in 20.4% of misdemeanor cases (56 out of 275).

<sup>&</sup>lt;sup>32</sup> From July 2020-June 2021, SCLAS reported that in 11.8% of misdemeanor cases (525 out of 4,443) bail/remand was set, whereas from July 2018-June 2019, bail/remand was set for 43.0% of misdemeanor cases (2,852 out of







<sup>6,637).</sup> Note: we did not include the Suffolk ACP in this review as SCLAS provides the majority of custodial arraignment coverage in Suffolk County.

Like Onondaga County and as shown in the charts above, Ontario, Schuyler, and Suffolk Counties also reported modest reductions in the use of pretrial custody in violent felony cases. The Ontario PD Office reported from July 2018-June 2019, bail/remand was set for 76.9% of violent felony cases, whereas from July 2020-June 2021, judges set bail or remanded the person in 65.1% of the violent felony cases. In Schuyler County, from July 2018-June 2019, bail/remand was set for 72.7% of violent felony cases and from July 2020-June 2021, in 57.1% of the violent felony cases. Finally, SCLAS reported from July 2018-June 2019, judges set bail or remanded the person in 90.5% of violent felony cases, whereas from July 2020-June 2021, judges set bail or remanded the person in 73.4% of the violent felony cases. Interestingly, both Schuyler and Suffolk reported an increase in the number of times judges set bail/remand in "post-disposition" cases which, among other things, includes cases charging a violation of probation, a violation of conditional discharge, and failure to pay a fine.

As Washington County was one of the first counties to implement a Centralized Arraignment Part (CAP), we monitored the impact of the CAP's implementation on arraignment practice. As part of that review, we analyzed the number of custodial arraignments both prior to the CAP (calendar year 2017) and post CAP implementation (calendar year 2018) and found for both calendar years, nearly three-quarters of custodial arraignments were misdemeanors and violations (about 73%).<sup>39</sup> We also reviewed the release rate for both periods and found that while there was a slight decrease in the number of people held in custody after the CAP was implemented, the number hovered around 45%. The data also showed that for many people, even low bail was a barrier to release. For example, 167 (or about 54%) of the 311 defendants who had bail set in CAP could not post bail that was set at or under \$1,000 cash or \$3,000 bond. Fifty-one of these individuals could not make bail set at or less than \$250 cash or \$1,500 bond. This information suggests that prior to bail reform, a considerable number of people were incarcerated pretrial on low level cases. It is in this context that the chart below, showing a 72.0% reduction in the use of bail in misdemeanor cases from June 2018-July 2019 to June 2020-July 2021, demonstrates just how significant bail reform's impact has been in Washington County.

<sup>&</sup>lt;sup>33</sup> 70 out of 91 violent felonies.

<sup>&</sup>lt;sup>34</sup> 54 out of 83 violent felonies.

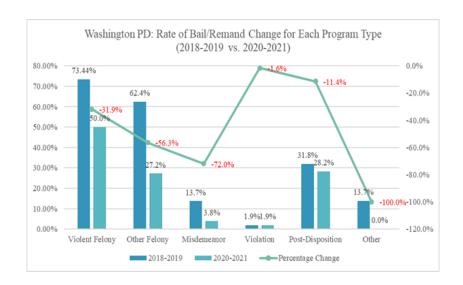
<sup>&</sup>lt;sup>35</sup> 8 out of 11 violent felonies.

<sup>&</sup>lt;sup>36</sup> 4 out of 7 violent felonies.

<sup>&</sup>lt;sup>37</sup> 268 out of 296 violent felonies.

<sup>&</sup>lt;sup>38</sup> 204 out of 278 violent felonies.

<sup>&</sup>lt;sup>39</sup> Data available upon request.



Notably, in Washington County bail reform has not significantly changed the rate of bail/remand in post-disposition cases.

The primary goal of bail reform was to reduce the number of people held in custody pretrial, prior to a determination of guilt or innocence. We have been careful to note that the data and analysis presented in this report must be interpreted with the understanding that the full measure of the Covid-19 pandemic's influence on criminal practice across the state is still unknown. But even with that caveat in mind, the trends described above suggest that bail reform is having its intended impact. In three of the five counties, we have seen a marked increase in the use of appearance ticket arraignments, and in all five counties a dramatic decrease in the use of pretrial detention. The change has been most pronounced for arraignments involving misdemeanors and other low-level offenses. These data also demonstrate that the public defense providers in the five counties have been able to translate the change in law into better outcomes for their clients. This could not happen without the training and programmatic support that the *Hurrell-Harring* providers have been able to offer their attorneys.<sup>40</sup>

The 2019 criminal justice reform legislation marked the first major change to arraignment practice in New York in decades. As we continue to monitor and analyze the information we receive from the *Hurrell-Harring* providers, we look forward to building on these preliminary results to a more comprehensive understanding of how this change in law affects arraignment practice.

#### Conclusion

In some ways, this report mirrors those from the last several years. The *Hurrell-Harring* defenders continue to provide comprehensive arraignment coverage in the five counties. This result is a testament to the success and durability of the settlement, as well as the creativity and

<sup>&</sup>lt;sup>40</sup> To this point, From July 2019 through June 2020, criminal justice reform-centered trainings were the most commonly attended CLEs among surveyed line attorneys in the five counties by a significant margin. *See* Office of Indigent Legal Services, *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Counites* at 26 (October 30, 2020), available upon request.

dedication of the public defense providers. This success is especially encouraging in the context of this unprecedented pandemic.

This report marked an opportunity to present some of the information we have gleaned about virtual arraignments from our outreach efforts over the last year. In light of recent calls to make virtual arraignments a permanent fixture of criminal practice in New York, the data we obtained through our Covid-19 survey, interviews and focus groups, and summarized in the body of this report is a timely reminder that there is simply no substitute for in-person court proceedings and representation. During virtual arraignments, attorneys feel that they have less access to their clients, and that access is less confidential and less lengthy. Access to client paperwork was challenging in a virtual setting and attorneys also find it more difficult to build the trust and rapport that is so crucial to a productive attorney-client relationship. All of this adds up to a feeling among attorneys that their ability to provide quality arraignment representation is diminished when arraignments are virtual. For these reasons, we have been pleased to support the *Hurrell-Harring* providers in their commitment to high-quality, in-person representation during this time of transition.

The period discussed in this report is unique. It is framed almost exactly by the amended bail reform legislation at its start, and the recission of the Executive and Administrative Orders authorizing virtual arraignments just days before its end. As discussed above, this has created challenges to measuring the effect of either bail reform or the Covid-19 pandemic in isolation. However, it has presented a preliminary opportunity to assess the combined impact that these changes have made. In addition to providing a useful baseline for future research efforts, the data suggests that bail reform is achieving its intended goal of reducing pretrial detention, particularly in lower-level non-violent cases. This also suggests that public defenders in the five counties are making good use of the new tools provided by the bail reform legislation.