



**Implementing the Counsel at Arraignment Obligations in  
the *Hurrell-Harring v. The State Of New York* Settlement  
2022 Update**

November 10, 2022



**Indigent  
Legal Services**

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## Introduction

In accordance with Section III(A)(2) of the *Hurrell-Harring v. The State of New York* settlement agreement, in 2015 the New York State Office of Indigent Legal Services (ILS) issued a plan for implementing counsel at arraignment in Onondaga, Ontario, Schuyler, Suffolk, and Washington counties (five counties or *Hurrell-Harring* counties).<sup>1</sup> In each subsequent year, we have published an update report pursuant to section III(D) of the settlement.<sup>2</sup> These update reports have described changes the five counties have made to ensure every individual charged with a crime receives effective assistance of counsel at arraignment; the reports have also identified any challenges the five counties have faced in meeting this obligation. While each county has taken a different approach to achieve compliance with this settlement imperative, the results are uniform: counsel at arraignment is now standard practice in the five counties.

This continued compliance is impressive given the changes to criminal defense practice in New York necessitated by the onset of the Covid-19 pandemic in March 2020 and criminal justice reform legislation passed in 2019, and amended in 2020 and 2022.<sup>3</sup> During the last two-and-a-half years, providers in the five counties have had to adapt to ever-changing Covid-19 prevention policies and significant changes to the Criminal Procedure Law, many of which pertain to the issuance of appearance tickets and bail and affect how arraignments are conducted.

Over the past year institutional providers and Assigned Counsel Programs (ACPs) in the *Hurrell-Harring* counties have also been contending with historic challenges to recruitment and retention of attorneys amid rising inflation and a nationwide labor crunch. With fewer attorneys available to provide public defense representation, providers are faced with the challenge of ensuring attorneys are available for all aspects of criminal case representation, including arraignment coverage. For ACPs, the situation is unique from their institutional counterparts in that they depend on having a sufficient number of independent attorneys who “opt in” to providing arraignment coverage by staffing a specific court or agreeing to be on call for arraignments that arise. This year, ACPs in the five counties have faced diminishing numbers of private attorneys who are willing to accept assigned counsel cases due to the stagnant statutory rates of pay.<sup>4</sup> In

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<sup>1</sup> See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement, Final Plan* (November 12, 2015), available at: <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Counsel%20At%20Arraignment%20Plan%20111215.pdf>.

<sup>2</sup> Section III(D) states, “ILS, in consultation with the Executive, OCA, the Five Counties, and any other individual or entity it deems appropriate, shall, on an ongoing basis, monitor the progress toward achieving the purposes set forth in paragraph 111(A)(1) above. Such monitoring shall include regular, periodic reports regarding: (1) the sufficiency of any funding committed to those purposes; (2) the effectiveness of any system implemented in accordance with paragraph 111(A)(3) in ensuring that all Indigent Defendants are represented by counsel at Arraignment; and (3) any remaining barriers to ensuring the representation of all Indigent Defendants at Arraignment, Such reports shall be made available to counsel for the Plaintiff Class and the public.”

<sup>3</sup> These issues impacting criminal defense practice have been discussed in previous ILS reports. See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State Of New York Settlement, 2020 Update* (“2020 report”); *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State Of New York Settlement 2021 Update* (“2021 report”), both available at: <https://www.ils.ny.gov/node/57/hurrell-harring-settlement-plans-and-reports>.

<sup>4</sup> Current rates of pay for assigned counsel plan attorneys are fixed at sixty dollars per hour for work on misdemeanor assignments and seventy-five dollars per hour for work on felonies. (County Law 722-b). These rates have been effective since January 1, 2004.

developing systems for representation at arraignment, the *Hurrell-Harring* providers have relied on settlement funding to provide stipends to attorneys who are willing to provide arraignment representation. In the *Hurrell-Harring* counties where ACP attorneys cover a significant share of total arraignments, these stipends have been critical to maintaining full coverage even as programs struggle to keep attorneys on their panels for case assignments.

In the present reporting period, which spans from July 1, 2021 through June 30, 2022, we continued to track the effectiveness of *Hurrell-Harring* providers' arraignment systems as well as their responses to the instability created in the wake of the pandemic. In Section I of this report, we detail the structures and systems in place for providing arraignment coverage as well as any program updates or challenges faced by *Hurrell-Harring* providers this year.

Perhaps the biggest change to arraignment practice resulting from the Covid-19 pandemic was the authorization by Executive Order (EO) 202.1 of so-called "virtual" arraignments (i.e., arraignments conducted via videoconferencing technology).<sup>5</sup> In both our 2020 and 2021 reports we discussed the barriers to providing quality arraignment representation when arraignments are conducted virtually. We learned from attorneys that issues with client communication, concerns about confidentiality, technology glitches, and interference with the attorney-client relationship were chief among the concerns with virtual arraignments. In our 2021 report, we noted that on June 24, 2021, EO 202.1 was rescinded with little advance notice to providers.<sup>6</sup> This year we learned that with some exceptions detailed below, nearly all arraignments in the five counties are conducted in person, which we have previously recognized as "essential for quality representation."<sup>7</sup>

In Section II of this report, we examine each *Hurrell-Harring* provider's approach to representation coverage in the critical period immediately following the arraignment. With systems of arraignment representation firmly established in the five counties, it has been incumbent on the *Hurrell-Harring* providers to also ensure systems for continuity of representation during the period immediately after the arraignment. It is during this time that clients might be awaiting final eligibility determination or assignment of permanent counsel. Yet, during this time client communication must be ongoing and investigation must begin. Further, with the 2019 changes to New York's laws governing discovery, which included strict timelines for service of discovery on defense counsel, the potential for serious prejudice is heightened if systems are not in place to ensure continuity of representation post-arraignment. Thus, we examine the *Hurrell-Harring* providers' systems for addressing these potential gaps in representation and conclude that the foundational elements provided as a result of the settlement, together with dedicated leadership, have meant clients in the five counties are generally represented during this critical period.

Section III of the report extends the bail and appearance ticket analysis we undertook in the 2021 report to include data from the present reporting period. Based on data collected from the *Hurrell-Harring* providers, last year's analysis provided a preliminary look at the impact of the changes to New York's bail laws passed as part of the 2019 criminal justice reform legislation

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<sup>5</sup> Executive Order (A. Cuomo), No. 202.1.

<sup>6</sup> Executive Order (A. Cuomo), No. 210.

<sup>7</sup> 2021 report at 20.

(commonly referred to as “bail reform”) on two key points: 1) the issuance of appearance tickets as compared to taking people into custody for arraignment; and 2) the imposition of bail or remand as compared to those released from custody after arraignment. We concluded that bail reform was having its intended impact; the post-bail reform data indicated fewer people were taken into custody for arraignment and fewer people were held in custody after their arraignment than were pre-bail reform. With this year’s data, we expand on this analysis to present an overview of custodial arraignments and post-arraignment custodial outcomes in the five counties. By comparing this year’s data with data from last year and a pre-bail reform year, we identify trends that show there has been some regression from the progress made in the initial months of bail reform implementation.

## **I. County Updates**

### **A. Onondaga County**

The Onondaga County Bar Association Assigned Counsel Program (ACP) continues to provide all the county’s public defense arraignment coverage. To fulfill this obligation, the ACP has developed four distinct arraignment coverage programs. They correspond to each of the four contexts in which arraignments are conducted in Onondaga County: (1) Syracuse City Court; (2) Syracuse Traffic Court; (3) the 28 town and village justice courts; and (4) the Centralized Arraignment Part (CAP).

#### ***Syracuse City Court***

Syracuse City Court is the county’s busiest court. During the present reporting period it accounted for approximately 32% of the total number of arraignments conducted within Onondaga County. In addition to conducting all custodial and noncustodial arraignments for cases originating within the city of Syracuse, Syracuse City Court also hosts the morning session of the county’s Centralized Arraignment Part (CAP). To ensure there is an ACP panel attorney available for every arraignment in City Court, the ACP continuously monitors the number and types of arraignments scheduled, enabling program administration to assign appropriate panelists for each session of City Court.

#### ***Syracuse Traffic Court***

The Traffic Part of Syracuse City Court – commonly referred to as Syracuse Traffic Court – conducts arraignments involving alleged violations of the Vehicle and Traffic Law. The ACP staffs each session of Traffic Court with an attorney who provides representation for clients charged with eligible offenses.

#### ***Town and Village Courts (Justice Courts)***

The ACP staffs each regular session of the county’s 28 town and village courts with one or more attorneys, depending on case volume. We noted in the 2015 *Hurrell-Harring* Final Counsel at Arraignment Plan that 14 town and village courts accounted for 92% of all justice court

arraignments.<sup>8</sup> In 2014, using the ILS Counsel at Arraignment grant, the ACP provided arraignment coverage at the regular court sessions of 15 of the county's justice courts, including the 14 high-volume courts, but there was not enough grant funding to cover off-hour arraignments in these courts, or arraignments in any of the remaining 13 justice courts. It is a measure of the progress made over the course of settlement implementation to observe that now, an ACP attorney staffs every regular session of each low-volume court, while two ACP attorneys staff each session of the high-volume courts. All off-hour town and village court arraignments are covered by ACP attorneys at the CAP.

### ***Centralized Arraignment Part***

The CAP conducts every off-hour arraignment – that is, any arraignment not occurring during a court's regularly scheduled criminal calendar – for every jurisdiction within the county. To do so, the CAP holds two sessions per day, one in the morning and one in the evening. As noted above, the CAP's morning session is coterminous with the morning session of Syracuse City Court's daily criminal arraignment calendar. The CAP's evening session runs from 5:00 p.m. to 10:00 p.m. every day. Evening sessions take place in the Public Safety Building, which is situated directly between Syracuse City Court and the county's jail. Each CAP session is staffed by ACP attorneys and a clerk who aids the court in assigning an appropriate ACP attorney to continue each client's post-arraignment representation.

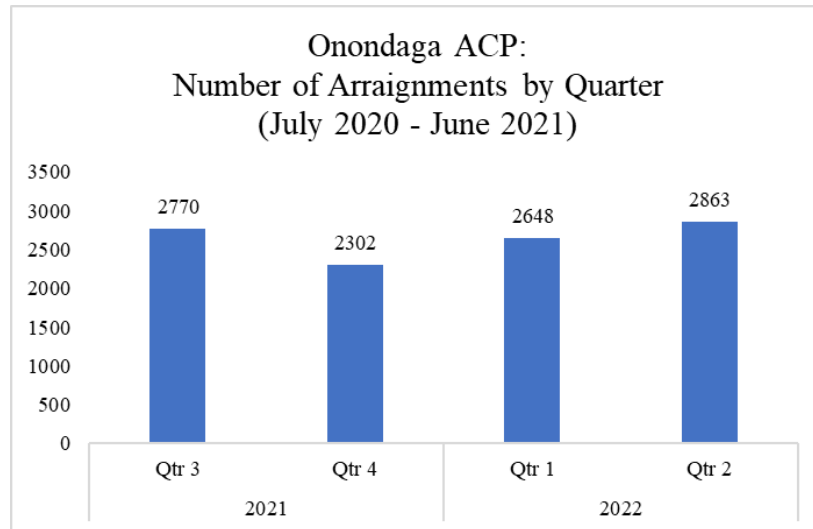
This four-pronged approach to arraignment coverage allows the ACP to continue providing comprehensive arraignment coverage for all people facing criminal charges in Onondaga County. Data received from the ACP shows that between July 1, 2021 and June 30, 2022:

- Onondaga ACP attorneys provided representation **at a total of 10,583 arraignments**
- There were **no cases in which individuals waived or refused representation at arraignment.**
- There was **one (1) missed arraignment.**<sup>9</sup>

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<sup>8</sup> *Hurrell-Harring Final Counsel at Arraignment Plan* (2015) at 7. Available at <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Counsel%20At%20Arraignment%20Plan%20111215.pdf>.

<sup>9</sup> Data received from the ACP initially indicated 96 potential missed arraignments but upon further examination, the ACP determined that 95 of the 96 cases were likely the result of incomplete reporting from arraignment attorneys, and there were in fact attorneys at these arraignments. The one confirmed missed arraignment resulted from a Syracuse City Court judge who would not wait for an ACP attorney to arrive. The ACP was made aware of this incident and has addressed this issue with the judge to ensure this will not happen again in the future.



### *Program Updates*

In the 2021 report, we noted that custodial arraignments in Onondaga County were still being conducted virtually. Some progress has been made since the last report, and all arraignments except custodial arraignments in the morning session of Syracuse City Court are now occurring in person. As of the date of this report, however, custodial arraignments in the morning session of Syracuse City Court continue to be held virtually. The county reports that the primary obstacle to resumption of in-person arraignments continues to relate to staffing issues within the Onondaga County Sheriff’s Department, whose deputies are normally responsible for the transport of people in custody at the jail to and from court. The ACP’s Executive Director Kathleen Dougherty has continued to work with ILS and Onondaga County officials to arrive at a solution to this enduring side effect of the largescale disruptions to normal operations caused by the Covid-19 pandemic. The ACP is prepared to resume full in-person representation. ACP attorneys continue to staff these morning sessions in Syracuse City Court and meet with clients in-person at the jail prior to any virtual arraignment proceeding. ILS has taken steps to meet with the county to address this ongoing issue and will continue to monitor this situation and work with the county to resume full in-person arraignment representation.

Another issue we have identified in previous reports is the difficulty ACP attorneys have historically had obtaining their clients’ criminal history records (RAP sheets) in Syracuse City Court (and morning CAP sessions). This has been an ongoing issue since early settlement implementation, but meaningful progress has been made. As reported last year, Fifth Judicial District Administrative Judge James P. Murphy issued two administrative orders that affirmed the defense’s right to access RAP sheets at arraignment, and ACP leadership made considerable efforts working with stakeholders to resolve this issue. Ms. Dougherty reports that, although the issue persists in a minority of cases in Syracuse City Court, they are getting RAP sheets in a significant majority of cases. When they do not, it seems to be the result of a communication breakdown between the jail (where fingerprints are taken and RAP sheets are generated) and the court. To this point, if the defense does not have a fingerprint RAP sheet, neither do the court or prosecution. In these cases, prosecutors and the court rely on a name-based “repository” RAP sheet. Defense counsel is always permitted to review the name-based RAP sheet during an

arraignment but depending on which Assistant District Attorney is present at the arraignment, they may or may not be given a copy for their file. Ms. Dougherty reports that the issue has improved steadily, and they will continue to monitor this issue and advocate as necessary.

The ACP uses IntelLinx as its case management and e-vouchering system. IntelLinx enables attorneys and ACP clerks to enter client and case information into the system at arraignment and streamlines the assignment process. As this is a relatively new system, the ACP continues to refine its functionality to better suit their needs. We reported last year that the program was contemplating some updates to improve IntelLinx's functionality to allow limited access to assigned attorney information for clients who already have pending cases in other courts. To ensure continuity of representation, the ACP's handbook states that it is their policy that each assigned client is represented by the same attorney in all pending matters in Onondaga County. Thus, this functionality would further assist the ACP in meeting this goal. Those upgrades have been made and it is now possible for court clerks to access very limited information regarding a client's name, date of birth, and whether there is an ACP attorney already assigned on another case. This has been very successful in ensuring continuity of representation and facilitating timely transfer of case information to already-assigned attorneys, all of which enhances the quality of representation clients receive.

Onondaga County is the only *Hurrell-Harring* county that relies exclusively on an ACP for arraignment coverage. However, the Onondaga ACP has seen a significant reduction in panel attorneys willing to accept assigned cases in the last year. The ACP reports that their arraignment attorney cores (i.e., attorneys who elect to participate in staffing certain arraignment shifts) are the only panels where they have been able to maintain enough attorneys to cover the necessary courts. They attribute this to the ability to offer a reasonable stipend for time spent providing this service. The arraignment stipends made possible by the settlement funding have been vital to allowing for continued arraignment representation in Onondaga County despite the crisis currently faced by the ACP.

## **B. Ontario County**

The busiest arraignment court in Ontario County is the CAP court which conducts all custodial arraignments within the county. In the present reporting period, CAP arraignments accounted for 53% of the total number of arraignments conducted in Ontario County. The CAP court holds two sessions every day. The morning session runs from 7:00 a.m. to 9:00 a.m., while the evening session occurs from 5:00 p.m. to 7:30 p.m. The Ontario County Public Defender's Office (PD Office) remains the primary provider of arraignment coverage and assigns attorneys on a rotating basis to each CAP session. Attorneys are responsible for calling the jail to ascertain whether an arraignment is scheduled and ensuring that the individual is interviewed before their court appearance. The Ontario County Conflict Defender's Office (CD Office) also staffs the CAP court with an attorney twice per month, with additional CD Office attorney appearances occurring when the PD Office is aware in advance of a conflict of interest that would prevent them from appearing for arraignment.

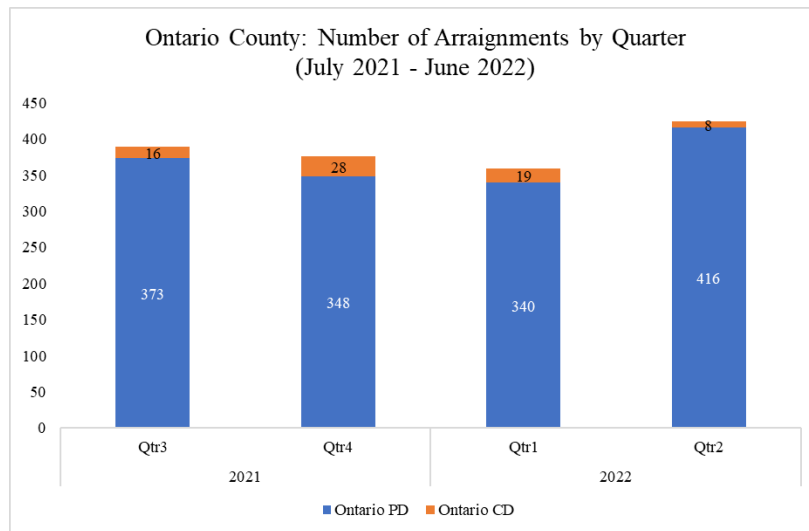
Arraignments not conducted at the CAP court are conducted during regularly scheduled criminal calendar sessions in Ontario County's 19 local justice courts. To ensure full arraignment



coverage, the PD Office staffs each regular calendar session with at least one attorney. We reported in previous years that the CD Office also staffed busier town and village courts. This practice was initiated as part of the county’s caseload overflow plan which requires both providers to monitor attorney caseloads and periodically send cases to the conflict provider if they are in danger of being out of caseload standards compliance. Ms. Lapp and Conflict Defender Carrie Bleakley coordinate on these monitoring efforts to ensure the most efficient and effective approach to both arraignment coverage and attorney caseloads. Initially, CD Office attorneys were travelling to several of the county’s town and village courts to absorb cases in excess of the PD Office’s caseload capacity. This proved very difficult for the CD Office attorneys, who were frequently traveling long distances on an irregular schedule. Ms. Lapp and Ms. Bleakley developed a new plan for the CD Office to staff regular calendar sessions of specific town courts, thereby providing overflow arraignment coverage and case representation in a manner that is more predictable and less burdensome for CD Office attorneys. Because for the past two years the PD Office has been below its caseload capacity, this additional coverage by the CD Office has not been necessary. CD Office attorneys remain available for conflict coverage should the need arise, and Ms. Lapp and Ms. Bleakley communicate regularly regarding any such need.

Data received from the PD Office and CD Office confirms that this approach continues to provide for comprehensive arraignment coverage. From July 1, 2021 to June 30, 2022:

- The PD Office provided representation **at a total of 1,477 arraignments.**
- The CD Office provided representation **at a total of 71 arraignments.**
- There was **one (1) reported case in which an individual waived or refused representation at arraignment.**
- There were **no missed arraignments.**



***Program Updates***

In our last report, we noted that Public Defender Leanne Lapp worked with county stakeholders to arrange for information to be shared with her office as soon as an appearance ticket is issued and charges are filed with a local justice court. This practice has continued to develop in the

present reporting period and Ms. Lapp continues to refine the mechanisms for receiving this notification. During this reporting period, notification of appearance tickets was facilitated by two Office of Court Administration (OCA) attorneys who work at the CAP. These OCA attorneys received and distributed appearance ticket information for the entire county, then forwarded Ms. Lapp all appearance tickets (and occasionally other arraignment documents) issued each day.<sup>10</sup> After receiving notice, the PD Office contacted individuals directly using a standard form letter. This letter includes an explanation of the right to counsel, and an invitation for those who cannot afford to hire counsel to contact the PD Office to be screened for eligibility and potentially assigned an attorney. Ms. Lapp informed us that people appreciate being contacted directly by an attorney under these circumstances as it alleviates the anxiety of having to appear in court unrepresented and without having spoken to an attorney about what might happen.

### C. Schuyler County

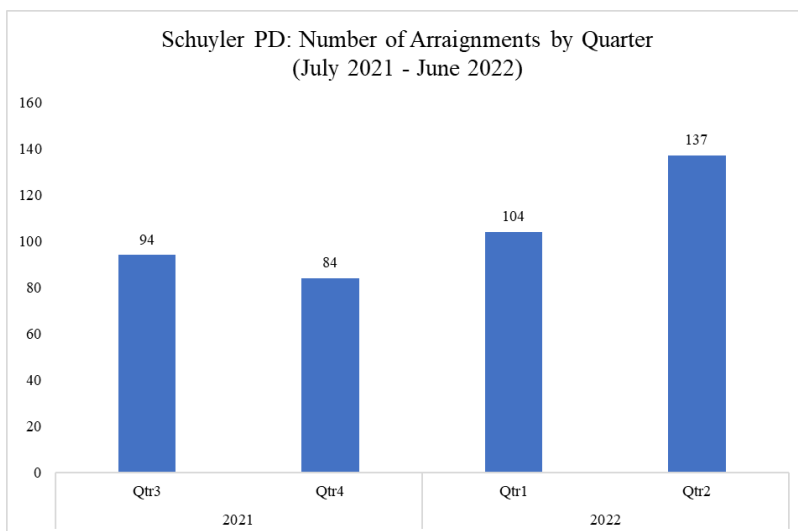
The Schuyler County Public Defender’s Office (PD Office) is the county’s sole provider of arraignment coverage. They continue to staff every regular session of the county’s 11 local justice courts, where appearance ticket arraignments are heard, as well as the county’s CAP where all off-hour arraignments are conducted. We reported last year that inauguration of the CAP court, scheduled for March 2020, was delayed due to the Covid-19 pandemic. The county operated a “virtual” arraignment part until June 1, 2021, at which time the CAP court became operational. By June 24, 2021, all arraignments conducted in the CAP were fully in-person. This reporting period reflects the first full year of CAP implementation and by all accounts, it has been a success. The CAP holds two sessions per day, every day of the year. The morning session runs from 8:00 a.m. to 10:30 a.m., while the evening session runs from 8:00 a.m. to 10:30 p.m. The PD Office staffs each CAP session with at least one attorney. They also have an on-call attorney who can be reached by phone in case there is an emergency arraignment that cannot be conducted at one of the scheduled CAP sessions. With the CAP firmly in place, the Schuyler PD reports that there were no missed arraignments for a second year in a row, indicating that, as anticipated, the CAP resolved the overnight gap in arraignment coverage.

Full implementation of the CAP court combined with continued staffing of every criminal calendar in the local justice courts has proven effective in Schuyler County. Data received from the PD Office shows that between July 1, 2021 and June 30, 2022:

- The Schuyler PD Office provided representation **at a total of 419 arraignments.**
- There were **six (6) cases in which individuals waived or refused representation at arraignment.**
- There were **no missed arraignments.**

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<sup>10</sup> This practice continued through the entire July 1, 2021 – June 30, 2022 reporting period, although Ms. Lapp reports that as of September 2022, the CAP court attorneys have ceased forwarding appearance ticket information due to a change in court procedure. Ms. Lapp is actively working with the Sheriff to create an alternate means by which her office can obtain countywide appearance tickets as they are issued. In the meantime, she has separately worked out an arrangement with Canandaigua and Geneva City Courts whereby she is forwarded all of their respective appearance tickets.



### ***Program Updates***

In the 2021 report, we noted that due to restrictions on the number of people who can be held and a lack of female deputies, the jail is frequently unable to hold women awaiting arraignment. Thus, detained women cannot be arraigned in the CAP, which relies on the jail for limited pre-arraignment detention. As of the date of this report, this issue persists. However, this has not created a gap in arraignment coverage, as the PD Office maintains a back-up phone number for those arraignments that cannot be conducted in the CAP. In such cases, the jurisdiction in question will call the designated number, and a PD Office attorney will be available on an on-call basis to cover such arraignments. Notably, this on-call system is available for other rare occurrences when, due to other jail capacity issues or a need for an immediate arraignment for medical or other health reasons, custodial arraignments must be held outside of the CAP structure.

In February 2021, long-time Schuyler County Public Defender Wes Roe resigned. In March 2021, Valerie Gardner was appointed Public Defender. She served in that capacity for 14 months, resigning in May 2022. As of June 30, 2022 (the last day of the present reporting period), the program was still without a Chief Public Defender (although Jill Paperno, former Monroe County First Assistant Public Defender, was serving as a mentor for Schuyler PD Office attorneys). More recently, the county appointed Nancy Farrell to the position.<sup>11</sup> Through this challenging time, the program has remained committed to quality representation and full arraignment coverage. As we have noted in previous reports, *Hurrell-Harring* settlement implementation has allowed programs to develop resilient and flexible institutional structures. This was critical to ensuring continued arraignment coverage during the most uncertain and difficult periods of the Covid-19 pandemic. In the same way, it has been instrumental in ensuring continuity of coverage during the PD Office’s time without a permanent Chief Public Defender. Despite the change in leadership, PD Office attorneys and staff have remained dedicated to ensuring uninterrupted arraignment representation for their clients.

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<sup>11</sup> Nancy Farrell was appointed Schuyler County Public Defender in September 2022 and began work on October 17, 2022.

## **D. Suffolk County**

The largest, most populous, and most geographically diverse of the five *Hurrell-Harring* counties, Suffolk County has always required a multifaceted approach to achieve full arraignment coverage. Such coverage can be understood as falling into one of two categories: the West End model and the East End model. The West End model relies on a centrally located District Court that conducts most arraignments in the densely populated western portion of Suffolk County. In the less-densely populated East End, the town and village justice courts conduct all arraignments. This bifurcated approach, described in more detail below, allows Suffolk County providers to fulfill their mandate to cover arraignments in the county.

### ***The West End: District Court Arraignments***

In the West End, most arraignments are conducted in the county's District Court. The court has sessions every day of the year from 9:30 a.m. to 5:00 p.m. Custodial arraignments occur in Part D-11, which is staffed by two to three Suffolk County Legal Aid Society (SCLAS) line attorneys and one supervising attorney every day. SCLAS also assigns a staff social worker to D-11 who is available for clients should the need arise. The Suffolk County Assigned Counsel Defender Plan (SCACP) also staffs Part D-11 with three attorneys (one who handles new conflict felonies, one who handles new conflict misdemeanors, and one who handles arraignments where a SCACP attorney is already assigned to the client or the person being arraigned is deemed presumptively ineligible for assigned counsel), ensuring the availability of counsel if SCLAS cannot provide representation. Appearance ticket arraignments are conducted in District Court's Street Appearance Part (SAP). SCACP continues to provide primary arraignment representation coverage in SAP by assigning rotating teams of two attorneys for weeklong shifts.

### ***The West End: Justice Court Arraignments***

While most municipalities in the West End participate in the District Court program, there are a few local jurisdictions that have elected to rely on their justice courts for arraignments.<sup>12</sup> SCLAS staffs each regular criminal calendar in these courts. SCLAS also provides on-call coverage for arraignments occurring in these courts during normal business hours but outside of a regularly scheduled criminal calendar.

### ***The East End: Weekday Arraignments***

In the East End, all arraignments are conducted in the local justice courts. SCLAS staffs each regular criminal calendar of the East End's 10 town and village courts. SCLAS also has an on-call rotation that ensures attorneys are available to appear for any off-hour arraignments that occur during regular business hours.

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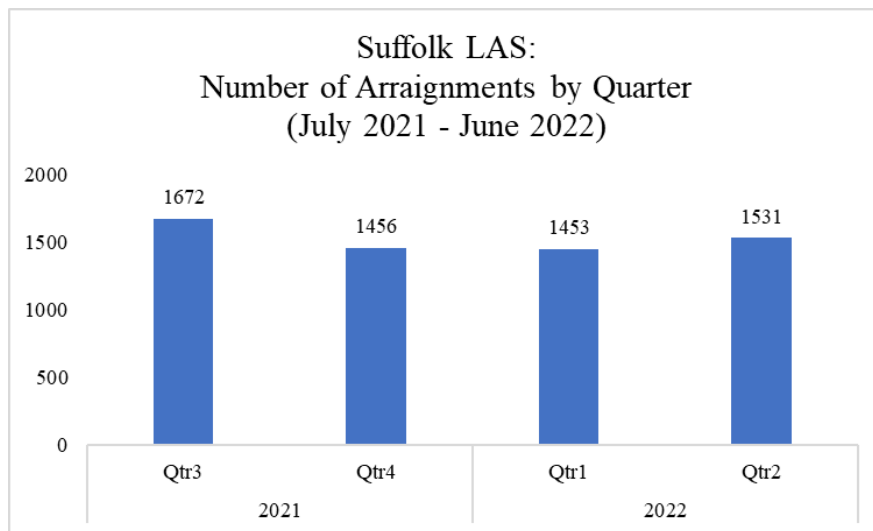
<sup>12</sup> These include the village courts of: Amityville, Babylon, Huntington Bay, Islandia, Lake Grove, Lindenhurst, Patchogue, Port Jefferson, Northport and Ocean Beach (seasonal). There are also other smaller West End courts which SCLAS staffs as needed for arraignments and other matters.

### ***The East End: Weekend and Holiday Arraignments***

During weekends and holidays, arraignment coverage is provided by SCACP on an on-call basis. Administrator Dan Russo has optimized this on-call system by assigning qualified attorneys to courts based on their geographic proximity to those courts. Like in Onondaga County, Mr. Russo has been able to attract and maintain on-call attorneys by relying on settlement funds to provide arraignment representation stipends. By doing so, the SCACP has efficiently managed on-call arraignments in a relatively large catchment area.

During the present reporting period, Suffolk County’s two providers of mandated defense have continued to work together to provide full arraignment coverage in the most complicated of the five *Hurrell-Harring* counties. Data received from SCLAS shows that from July 1, 2021 to June 30, 2022:

- SCLAS attorneys provided representation **at a total of 6,112 arraignments.**
- SCLAS reported **19 cases in which individuals waived or refused representation at arraignment.**
- There were **no missed arraignments in District Court; there were two (2) missed arraignments in the East End courts.**<sup>13</sup>

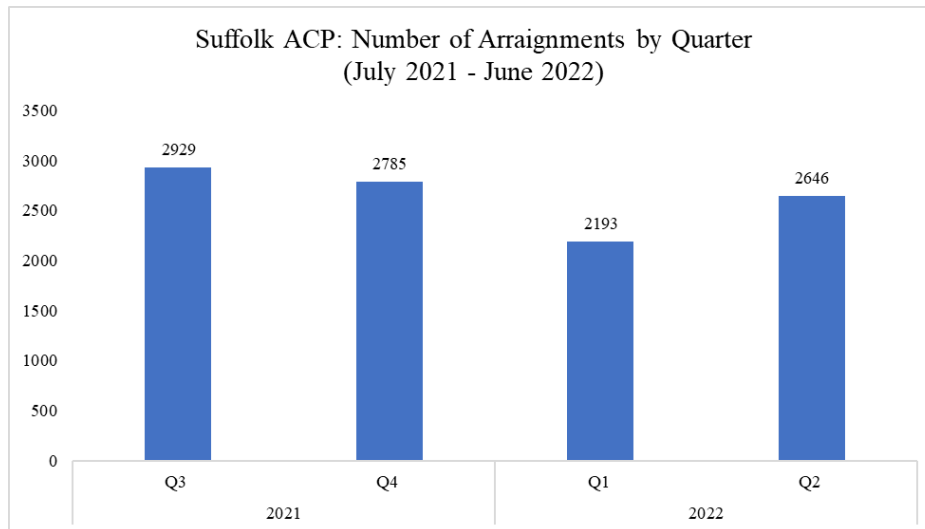


Data received from SCACP show that from July 1, 2021 to June 30, 2022:

- SCACP attorneys provided representation **at a total of 10,553 arraignments.**
- SCACP reported **two (2) cases in which individuals waived or refused representation at arraignment.**

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<sup>13</sup> The two confirmed missed arraignments were both cases charging violations of the Vehicle and Traffic Law (VTL) where the court did not notify SCLAS that an arraignment was occurring. SCLAS is monitoring this issue and reports that this lack of notification was more common during the height of the Covid-19 pandemic and typically only occurred on VTL cases. It has not occurred in recent months as courts resume normal operations.



### ***Program Updates***

In the 2021 report, we noted that while District Court had resumed in-person arraignments, there was continued reliance on virtual arraignments in some courts in Suffolk County’s East End. Since then, ILS has worked with OCA and the defense providers to address the problem of ongoing virtual arraignments. ILS has also worked with SCLAS to track and monitor instances where SCLAS attorneys were asked to appear at virtual arraignments. By April, all but two East End courts – Riverhead Town Court and East Hampton Justice Court – had resumed in-person arraignments. OCA reminded the judges in those courts that in-person arraignments should be the default and, we are told, shortly after this reminder the Riverhead Town Court resumed fully in-person arraignment proceedings. However, East Hampton Justice Court continues to conduct some virtual arraignments, though we are told they are infrequent. Notably, we are told that a primary reason for ongoing virtual arraignments on the East End is judicial expediency—the long distances attorneys must travel to the arraignment requires judges to wait for their arrival and delays the proceedings. This proffered reason underlines the unpredictability of custodial arraignments and the challenge inherent in relying on an on-call program to cover unscheduled sessions. A possible solution is to implement a CAP on the county’s East End. As it has elsewhere, a CAP court in the East End would allow for predictable arraignment times at a set location, facilitating regularly scheduled in-person arraignment coverage. ILS will continue to monitor this issue and work with stakeholders as necessary to ensure this issue is resolved.

Last year, we also reported an ongoing issue with reporting missed arraignments in the East End. While we recognized that both SCLAS and SCACP appear at all arraignments for which they receive notice, there was a significant gap between what was occurring in court and the data reported to ILS. We noted that we would continue to work with the providers to ensure full arraignment coverage in the East End, and also to ensure accurate reporting of coverage. For this year, we are pleased to report that significant progress has been made.

In the course of working through this problem with the Suffolk County providers, we learned that there was significant room for error due to the manner in which representation at arraignment was being recorded. Upon completion of an arraignment in the East End courts,

clients in need of screening to determine financial eligibility for assigned counsel are referred to SCLAS. The eligibility screening process includes a question asking clients whether they were represented at arraignment, to track missed arraignments on the East End. Because this process relies on self-reporting by individuals who may not have experience with the criminal legal system, it has led to many instances where a client mistakenly reported that they did not have an attorney at arraignment. In past years, when ILS received this data from SCLAS, there were frequently high numbers of “missed arraignments” initially reported, though the number decreased after SCLAS cross-checked these cases against their files. It was not always clear whether arraignments reported as “missed” were in fact missed or just a reporting error, though notably this method has assisted ILS and SCLAS in identifying and addressing systemic issues in the East End courts.

Since the last reporting period, SCLAS has begun flagging and investigating any reported missed arraignments by reviewing their case files and using that information to correct erroneous “missed arraignment” entries in their records prior to transmitting the information to ILS. The result of this change in procedure is a more accurate picture of arraignment coverage in the East End, and a much lower rate of missed arraignments than previously reported.

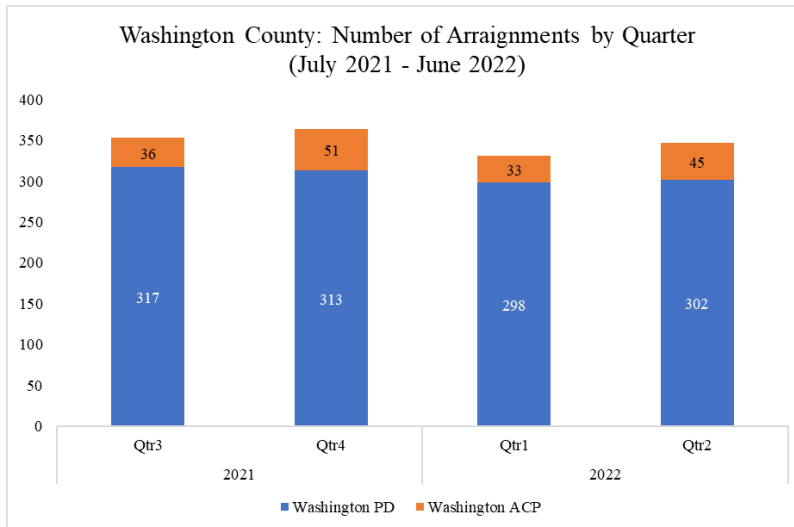
### **E. Washington County**

Arraignments in Washington County are covered primarily by the Washington County Public Defender’s Office (PD Office). Appearance ticket arraignments occur in the county’s 22 local town and village justice courts during regularly scheduled criminal calendars, each of which is staffed by a PD Office attorney. All off-hour arraignments are heard in the county’s CAP court, which holds a morning session from 8:00 a.m. to 9:30 a.m. and an evening session from 7:00 p.m. to 9:30 p.m. every day. The PD Office staffs each CAP session with at an attorney to ensure full arraignment coverage.

While the PD Office provides primary criminal case representation, a critical part of settlement implementation in Washington County was the development of a caseload overflow plan. As part of the plan, the Washington County Assigned Counsel Program (ACP) took over primary responsibility for most Vehicle and Traffic Law arraignments in the county’s six busiest courts. This practice continues, although as discussed below, recent changes in the Vehicle and Traffic Law have significantly reduced the volume of traffic misdemeanors. Despite the reduction in traffic arraignments requiring ACP coverage, the overflow plan remains in place as a bulwark against the possibility of an unanticipated increase in arraignments and caseloads countywide.

Arraignment data ILS received from the Washington County PD Office and ACP shows that between July 1, 2021 and June 30, 2022:

- The PD Office provided representation **at a total of 1,230 arraignments.**
- The ACP provided representation **at a total of 165 arraignments.**
- There were **three (3) cases in which individuals waived or refused representation at arraignment.**
- There were **no missed arraignments.**



### ***Program Updates***

As noted above, settlement implementation in Washington County included the creation of a caseload overflow plan. The purpose of the overflow plan is to ensure the PD Office remains in compliance with ILS caseload standards should the number of new cases threaten to exceed PD Office capacity. In addition to regular monitoring of PD Office caseloads and periodically sending cases to the ACP after arraignment, an important element of the caseload overflow plan was the reassignment of primary arraignment responsibility for Vehicle and Traffic Law offenses from the PD Office to the ACP in six of the county’s busiest justice courts to the ACP. In these courts, the relatively high volume of traffic misdemeanor arraignments was historically driven by offenses related to license suspensions for failure to pay traffic offense-related fines. The typical trajectory of such cases usually begins with a motorist being cited for a traffic offense. Prior to 2021, in the event the motorist was unable to pay the fines and fees incurred as a result of the initial traffic citation, their license would eventually be suspended by the court, exposing them to criminal prosecution for Aggravated Unlicensed Operation of a Motor Vehicle and related offenses.

In 2021, the Vehicle and Traffic Law was amended via the Driver’s License Suspension Reform Act to eliminate the possibility of license suspension for failure to pay fines in many circumstances.<sup>14</sup> ACP Supervising Attorney Tom Cioffi reports that, as expected, this has significantly reduced the number of traffic misdemeanor cases assigned to ACP attorneys. While the ACP continues to staff the designated courts, Mr. Cioffi reports that the reduced volume of suspension-related offenses has been a welcome change in these busy jurisdictions.

Since the CAP was implemented in Washington County in 2017, the PD Office has continued to refine their arraignment staffing, practice, and protocols. To that end, the PD Office recently implemented a new staffing pattern for their CAP coverage. Washington County Public Defender Michael Mercure informed ILS that each CAP attorney now has a regular shift assignment for weekday CAP sessions that remains consistent from week to week. This reflects a

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<sup>14</sup> L. 2021, c. 76.



change from earlier CAP staffing patterns, which was based on a less-predictable rotation. According to Mr. Mercure, attorneys appreciate the ability to plan around a stable schedule. Mr. Mercure also reports that, for weekend CAP shifts, they still rely on a rotation to spread the more burdensome weekend CAP responsibility among attorneys in an equitable fashion.

## II. Continuity of Representation

As detailed in Section I of this report, *Hurrell-Harring* settlement implementation enabled public defense providers to develop and implement systems for ensuring representation at arraignments in the five counties. Since the initial implementation, *Hurrell-Harring* providers have adjusted their systems for arraignment representation, including adapting to changes in arraignment practice for implementation of CAP, as was the case in four of the five counties, or recent changes in the law. One such area of refinement has been the period immediately following an arraignment. This period is of critical importance in the defense of a criminal case. Any delay in the assignment of counsel after arraignment could result in an untimely investigation, missed opportunities for grand jury practice, delayed bail applications, and a host of other problems. Further, with the changes to New York’s discovery laws in 2019, there are now shorter timelines for service of discovery on defense counsel which may impact motions for case dismissal or other sanctions. Thus, in cases where the arraigning attorney is not assigned to a client’s case at arraignment, or where formal assignment is delayed during the eligibility determination process or transfer to another attorney, relevant standards require continuity of representation until a final assignment is made.<sup>15</sup> ILS’ *2022 Statewide Plan for Implementing Counsel at Arraignment: Year Four Report*<sup>16</sup> noted that 30 non-settlement counties across the state did not yet have a transfer protocol that ensured continuity of representation during the period between arraignment and final assignment of counsel. This is due in large part to the later start of reform implementation in the non-settlement counties under Executive Law § 832(4). In the *Hurrell-Harring* counties, this problem has largely been solved as part of settlement implementation. Thus, they can serve as a model for other counties that are still developing these systems.

In Onondaga County, all arraignments result in the provisional assignment of counsel pending the final eligibility determination. It is ACP policy that attorneys perform all necessary case-related tasks regardless of the status of an eligibility determination. In nearly every case, assignment occurs at the conclusion of the arraignment, so clients generally know who is assigned to their case before they leave court. The final assignment may be made to the arraigning attorney (which is typically the case in the town and village courts), or to another ACP attorney (this is the common practice in CAP, as well as Syracuse City and Traffic Courts). If an ACP attorney in a town or village court declines an assignment, the court clerks consult with the ACP administration to identify an attorney for assignment.

In Ontario County, the PD Office handles the overwhelming majority of arraignments. In these cases, PD Office attorneys interview clients at arraignment and make an initial eligibility determination. Once the arraignment is completed, the arraignment paperwork is returned to the

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<sup>15</sup> See ILS *Standards for Determining Financial Eligibility for Assigned Counsel*, February 16, 2021, Standard III, Commentary (stating, “When delay [in determining financial eligibility for counsel] is unavoidable, counsel must be provisionally appointed until eligibility for assignment of counsel is determined.”).

<sup>16</sup> Available at: <https://www.ils.ny.gov/files/Statewide%20CAFA%20Report%202022.pdf>.

PD Office where cases are reviewed by Public Defender Leanne Lapp. Ms. Lapp and her staff make a final eligibility determination and run a conflict check. For cases where a conflict is discovered, the paperwork is transferred electronically to the CD Office and Conflict Defender Carrie Bleakley assigns a conflict attorney immediately. Thus, there is never a point at which a client is unrepresented, and casework begins almost immediately in all matters.

Similarly, the Schuyler PD Office is the county's sole arraignment provider. If they are not appointed at arraignment, PD Office attorneys remain provisionally assigned pending any eligibility application. Since the PD Office screens most cases for eligibility, cases where there is no conflict remain within the office and attorneys begin work immediately. When a conflict is discovered, cases are transferred to the ACP for assignment. The recent change in leadership, which left the PD Office short an attorney position for several months, required the PD Office to send more cases to the ACP as caseload conflict cases to ensure compliance with caseload standards. As predicted,<sup>17</sup> because the statutory assigned counsel compensation rates have not increased since 2004, the ACP is struggling to retain enough panel attorneys to take all case assignments, and ILS has been told that there have been some delays between the time a conflict is discovered (including caseload conflicts) and assignment of a conflict attorney. When there are a sufficient number of panel attorneys to handle all case assignments, however, this system works well to ensure that there is no gap in representation post-arraignment.

In Suffolk County, the approach in the West End District Court and the approach in the county's town and village courts are somewhat different. For custodial arraignments on the West End, most clients are assigned counsel immediately at arraignment. In D-11, all potential clients are screened for presumptive eligibility and conflict before their arraignment. For cases where the person is eligible and SCLAS does not have a conflict, this results in immediate assignment, so these individuals do not leave without having been assigned an attorney. Conflict cases are assigned shortly after D-11 arraignment by SCACP. Individuals out of custody appearing in the District Court's Street Appearance Part (SAP) are sent directly to the SCACP eligibility screening office (which is in the same building as the SAP courtroom). If they are eligible, their information is sent to SCLAS immediately for internal assignment though they must wait until the next court date for the formal court assignment to receive the case paperwork. In the event SCLAS identifies a conflict of interest, the case is referred to SCACP.

In the East End justice courts, most custodial arraignments result in immediate assignment of counsel. If a conflict is discovered during an East End regular calendar session, SCLAS informs SCACP, which usually sends an attorney to represent the person at that same calendar session. For weekend and holiday East End arraignments, SCACP transfers the arraignment paperwork to SCLAS the following day. Despite the complex system of arraignments and arraignment representation in Suffolk County, the two public defense providers continue to work together to streamline the assignment process, improve communication protocols for case transfers, and minimize gaps in continuity of representation as they refine their approach.

In Washington County, PD Office attorneys handle the majority of arraignments while the ACP is responsible for all eligibility screening. Consequently, the ACP receives information about

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<sup>17</sup> On May 16, 2022, ILS notified the *Hurrell-Harring* parties of this issue and identified the concern that there may not be enough ACP panel attorneys to handle all the Schuyler PD Office conflicts, particularly caseload conflicts.

each case from the PD Office once an arraignment occurs. During the eligibility screening process, the PD Office remains provisionally assigned until a final determination is made. The ACP also conducts a conflict check for each new case. In the event of a conflict, the ACP assigns an attorney after arraignment. Until a formal substitution of counsel is accepted by the court, the PD Office remains provisionally assigned, ensuring a gapless transition. In those situations where a conflict is known before the arraignment, the ACP assigns an attorney from the outset.

With the benefit of seven years of settlement implementation and strong public defense provider leadership, the *Hurrell-Harring* counties have adopted systems to ensure there are few to no gaps in representation during this critical post-arraignment period.

### III. Bail Reform Update

Last year, for the first time since the January 2020 implementation of the bail reform legislation, we analyzed counsel at arraignment data collected from the *Hurrell-Harring* providers to preliminarily gauge in the five counties the impact of bail reform on reducing reliance on pre- and post-arraignment detention.<sup>18</sup> To do so, we reviewed information on decision-making both prior to and at the arraignment. We asked two questions: (1) what is the rate at which individuals were issued appearance tickets before their arraignments (what we refer to as “non-custodial” or “appearance ticket” arraignments) as compared to those taken to their arraignment while in police custody after arrest (referred to here as “custodial arraignments”); and (2) what is the rate at which those being arraigned remained in detention after the proceeding because bail was set or they were remanded without bail (a “custodial outcome”)?<sup>19</sup> We then compared the answers to those questions for a period pre-bail reform (June 30, 2018-July 1, 2019) and post-bail reform implementation (June 30, 2020-July 1, 2021). We chose those years to compare because 2018-2019 was the last full reporting year which did not reflect any disruption from either Covid-19 or bail reform legislation. Here, we build on the 2021 analysis, comparing data from the previous reporting periods to data collected during the present reporting period (June 30, 2021-July 1, 2022).

In our last report, we noted that the effects of the Covid-19 public health crisis on bail practices could not be clearly disentangled from the effects of bail reform legislation. Subsequent modifications to the bail laws have further complicated this analysis; between April 1, 2019 and April 11, 2022, the portions of the Criminal Procedure Law (CPL) governing bail (and other forms of securing orders) have been modified three times,<sup>20</sup> most recently in April 2022.

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<sup>18</sup> Since 2016, the *Hurrell-Harring* providers who provide counsel at arraignment have collected information on arraignment representation and reported it to ILS as part of settlement implementation. In addition to information on the number of arraignments where representation is provided, the number of individuals who refuse arraignment representation, and any missed arraignments, providers also collect data on type of arraignment and arraignment outcomes. This information serves as the basis for this analysis.

<sup>19</sup> For our analysis, an arraignment has a custodial outcome if bail is set or the individual being arraigned is remanded without bail. We do not consider whether those subject to custodial outcomes post-arraignment remain incarcerated during the pretrial period or whether they regain their liberty by, for instance, posting bail or successfully litigating a motion for release at a time subsequent to the arraignment.

<sup>20</sup> Amendments were made specifically by L. 2019, c. 59, pt. JJJ; L. 2020, c. 56, pt. UU; and most recently as part of the Fiscal Year 2022-2023 state budget, see L. 2022, c. 56, Part UU.

Notwithstanding these challenges, the data collected from the *Hurrell-Harring* providers continues to describe custodial arraignment and bail practices in the five counties.

### A. Review of Appearance Ticket and Custodial Arraignments

As part of the criminal justice reform legislation, CPL § 150.20 was amended to, in many instances, require police to issue appearance tickets instead of relying on custody prior to an arraignment. We expected this to decrease the relative frequency of custodial arraignments. This expected result was largely borne out in the data we collected and analyzed in the 2021 report, although Covid-19-related disruptions to normal operations made these results challenging to parse.<sup>21</sup>

For this report, with another year of post-bail reform data, we compared data on the use of appearance tickets during the present reporting period to that during the two periods described in the 2021 report. We expected that the past year's return to more normal court operations would provide a more complete picture of arraignment practice post-bail reform. However, this comparison was complicated by another change to CPL § 150.20, passed as part of the Fiscal Year 2022-23 enacted state budget and effective as of May 9, 2022. These most recent changes added several exceptions to the requirement that police issue an appearance ticket rather than take a person into custody for arraignment. The most significant of these exceptions includes any felony or class A misdemeanor involving harm to an identifiable person or property.<sup>22</sup> Although this change was made late in the reporting period, it opened the door to custodial arraignments for many offenses that were previously excluded by the original 2019 amendment to CPL § 150.20. We therefore expect that it had an impact on the data, albeit a modest one.

In Onondaga County, the ACP reported that 40% of the arraignments the program covered from June 30, 2021 to July 1, 2022 were appearance ticket arraignments. This is a small increase from the 38% reported during the 2021 reporting period.

The Suffolk County providers also observed increased use of appearance tickets during the present reporting period as compared to the 2021 reporting period. Data collected from SCLAS show that 11% of the arraignments they covered involved appearance tickets, an increase from the 6% reported in the 2021 report. SCACP also reported an increase in appearance ticket arraignments, going from a total of 79% appearance ticket arraignments in the 2021 reporting period to 85% in the present reporting period.<sup>23</sup>

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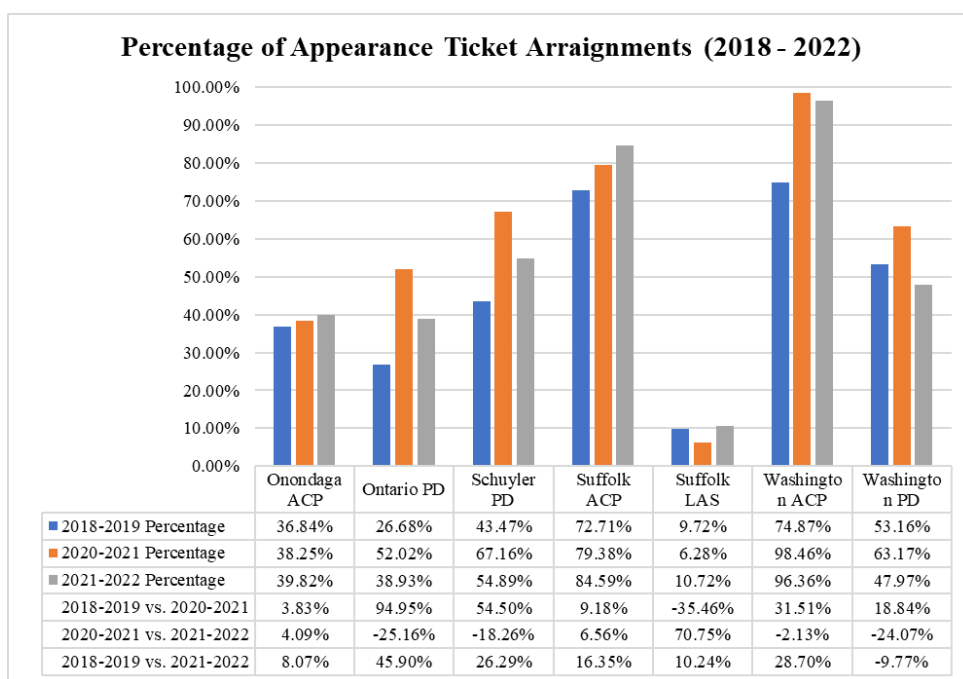
<sup>21</sup> We noted in the 2021 report that, for a significant portion of the 2020-2021 reporting period, only custodial arraignments were being heard. We also noted there was evidence that during the height of the pandemic, police seemed to be making fewer arrests for less serious offenses. Both of these factors effectively depressed the overall number of arraignments that occurred during that period, and also increased the relative proportion of those arraignments that were custodial. In two of the *Hurrell-Harring* counties – Onondaga and Suffolk – the proportionate share of appearance ticket arraignments versus custodial arraignments remained steady despite these countervailing pressures. In the other counties, we noted a marked increase in the use of appearance tickets.

<sup>22</sup> See CPL §§ 150.20(1)(b)(xi); 510.10(4)(t); 530.40(4)(t).

<sup>23</sup> Because SCLAS covers D-11 (the custodial arraignment part of the West End's District Court), they typically provide arraignment representation on a higher proportion of custodial arraignments than SCACP (which covers SAP, the non-custodial arraignment part of District Court). SCACP provides most of the appearance ticket arraignment representation.

Conversely, Ontario, Schuyler, and Washington Counties each reported a decrease in the use of appearance tickets from last year. For the 2021 reporting period, the Ontario County PD Office reported that appearance tickets were issued for 52% of all arraignments they covered. This year, that number decreased to 39%. In Schuyler County, the PD Office reported a decrease from 67% last year to 55% this year. The Washington County PD Office saw appearance ticket arraignments decrease from 63% to 48%, and the Washington ACP reported a decrease from 98% to 96%.

A comparison of the last two years of data to the pre-bail reform period provides some additional insight. As the chart below shows, the overall rate of appearance ticket arraignments has increased in every county but Washington County since the pre-bail reform period analyzed (2018-2019).<sup>24</sup>



Last year, we reported that the rural *Hurrell-Harring* counties (Ontario, Schuyler, and Washington) dramatically increased their use of appearance tickets while in the more urban counties with higher case volume (Suffolk and Onondaga), the use of appearance tickets remained essentially flat. In the current reporting period, that trend is reversed; the rural counties have all decreased their use of appearance tickets while the more urban counties have had a modest increase in appearance ticket arraignments.

As of the last day of this reporting period, only two and a half years have elapsed since the initial modification of CPL § 150.20 took effect on January 1, 2020. In addition to disruptions cause by

<sup>24</sup> Though the Washington ACP reported an overall increase in the use of appearance tickets since 2018-2019, it is not necessarily indicative of overall county practice because of the minimal number of arraignments on only certain Vehicle and Traffic Law cases covered by the ACP. Since the Washington County PD Office covers the majority of the county’s arraignments, the data reported by the PD Office better represents the overall picture of the use of pre-arraignment custody in the county.

the Covid-19 pandemic and further amendments to the Criminal Procedure Law, provider caseloads were impacted during this period. Since appearance ticket eligibility is heavily dependent on case type, this could be an additional factor at play.<sup>25</sup> As noted above in Washington County’s section, the Driver’s License Suspension Reform Act may have reduced the number of arrests for Aggravated Unlicensed Operation in some counties. Similarly, the Marijuana Regulation and Taxation Act was signed into law in March 2021 and repealed many marijuana-related offenses.<sup>26</sup> Both of these case types previously included lower-level charges that would typically qualify for appearance tickets. We must therefore acknowledge the evolving nature of the question of appearance ticket use, and pre-trial custody more broadly. Still, this year’s decline in the use of appearance tickets in the three most rural *Hurrell-Harring* counties (Ontario, Schuyler, and Washington) is worth noting.

## **B. Custodial Outcomes at Arraignment**

Since the 2019 bail reform legislation, there have also been two subsequent modifications to the relevant portions of the Criminal Procedure Law governing imposition of bail at arraignment. In each case, the later amendments have represented a retrenchment of the 2019 changes by defining more qualifying (i.e., bail-eligible) offenses and by creating more exceptions that permit judges to set bail on otherwise non-qualifying offenses. It is in this context that we view the additional data on post-arraignment detention (as measured by custodial outcomes at arraignment) received during the present reporting period.

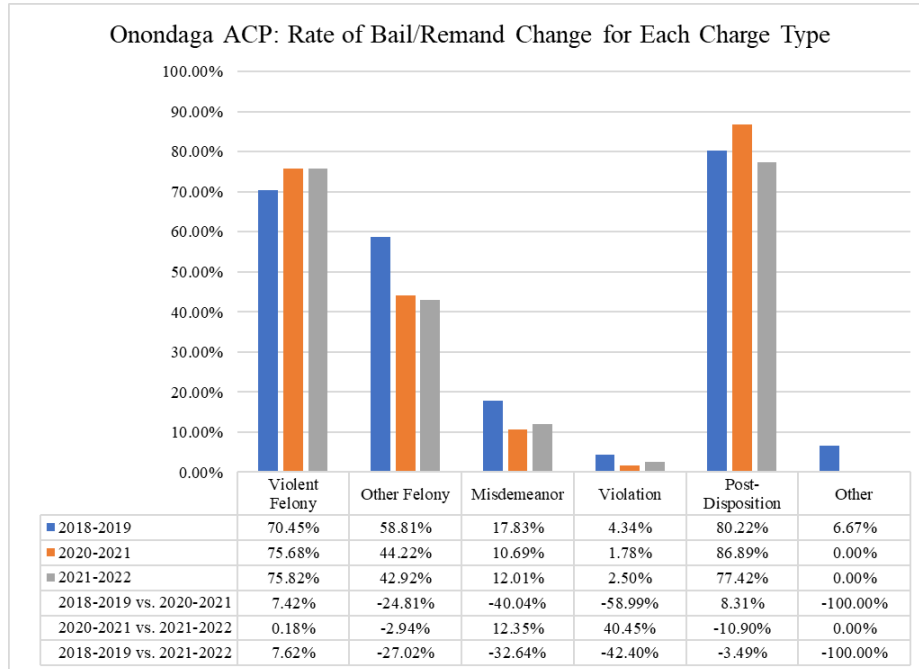
In Onondaga County, since the 2018 pre-bail reform reporting period, there has been an overall decrease in custodial outcomes in all charge types except violent felony offenses (see graph below). However, when compared solely to the 2021 data, there was an increase in custodial outcomes in lower-level charge types in the last year. The ACP reported a 12% increase in bail or remand in misdemeanor cases and a 40% increase in the use of bail or remand in violation level cases. There was a continued decrease in custodial outcomes for other felony cases and an 11% decrease in custodial outcomes for post-disposition arraignments (e.g., violation of probation petitions).<sup>27</sup> For violent felonies, the rate at which bail was set was essentially the same across the 2021 and 2022 reporting periods and actually represents an increase as compared to the period pre-bail reform. Though this data presents a mixed picture, it also indicates that judges in Onondaga County continue to set bail on most cases when they have the discretion to do so.

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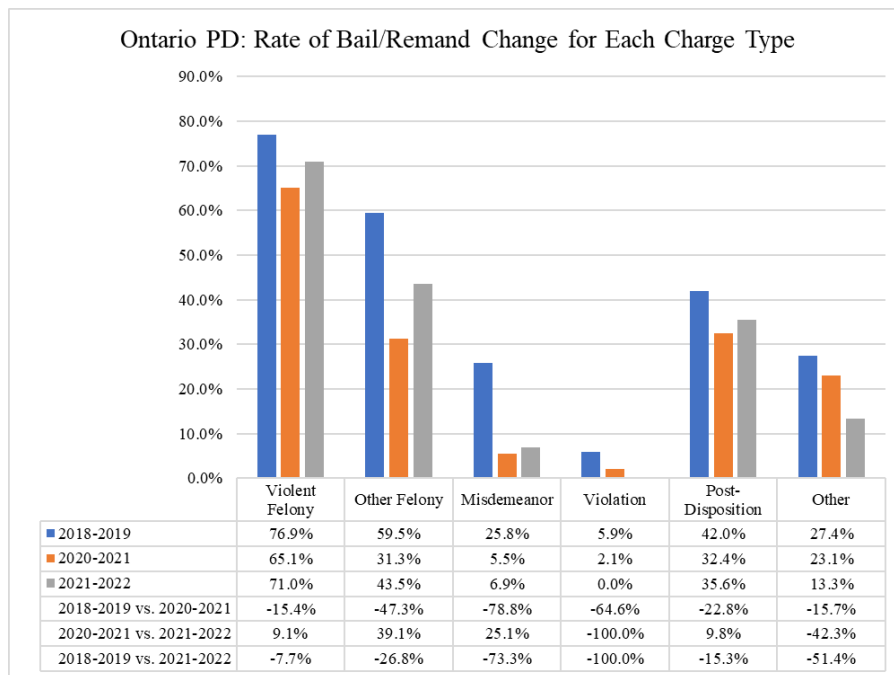
<sup>25</sup> Only individuals charged with certain misdemeanor or “E” felony offenses are eligible for an appearance ticket. See CPL §§ 140.10; 150.20.

<sup>26</sup> L. 2021, c. 92.

<sup>27</sup> Because arraignments on post-disposition cases are much less common than felony, misdemeanor, and violation arraignments, we caution that the trends observed among post-disposition arraignments are of less statistical importance than the more numerous arraignments in the core criminal offense charge types (that is, violent felony, other felony, misdemeanor, and violation).

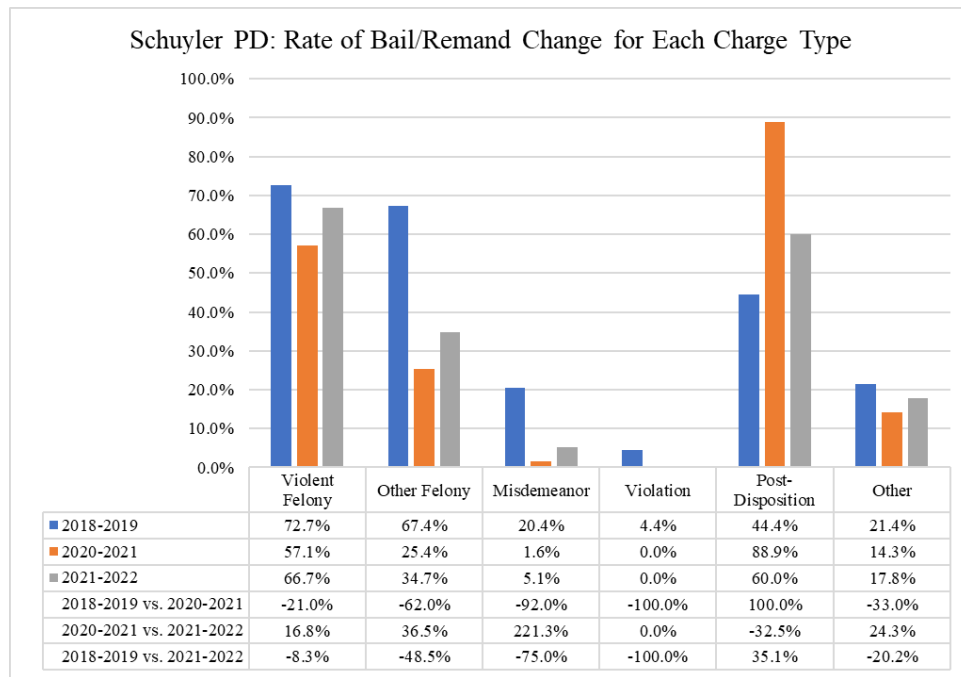


In Ontario County, the trend is clear. While the overall rate of post-arraignment detention remains lower than that reported in the pre-bail reform period, custodial outcomes for this period increased from the 2021 reporting period across every charge type except for violations.<sup>28</sup> The most significant changes were in the other felony and misdemeanor charge types, with year over year increases in custodial outcomes of 39% and 25% respectively.



<sup>28</sup> We omit the catchall “other” category from this analysis.

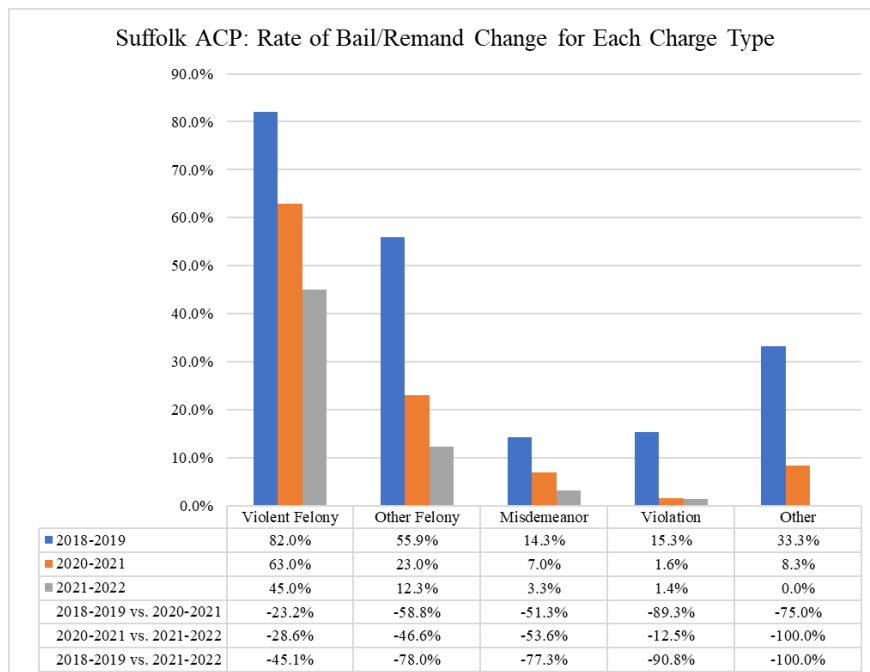
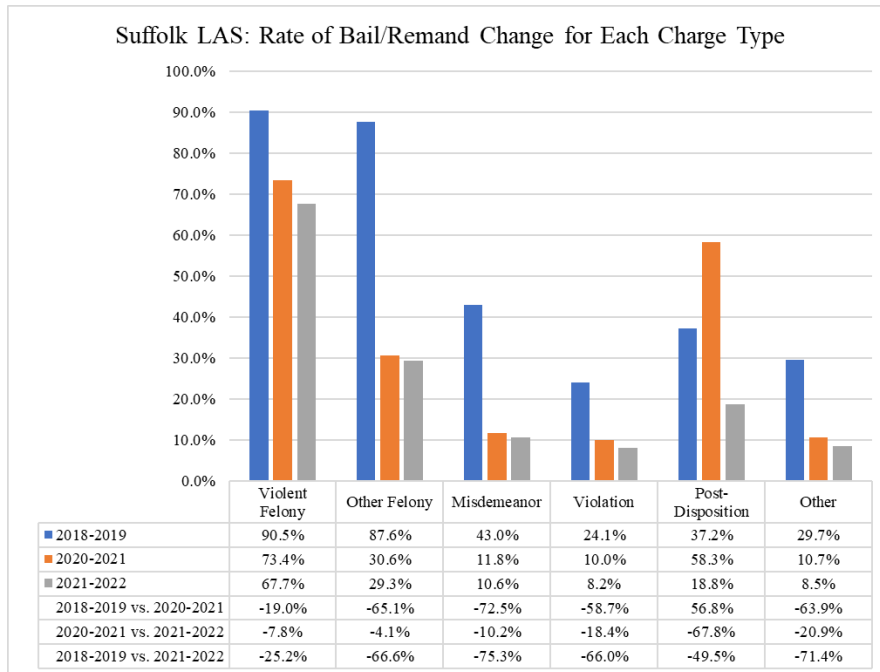
Data from Schuyler County shows a similar trend. After a fairly dramatic dip in custodial outcomes reported in 2021 as compared to the pre-bail reform period, last year custodial outcomes increased across most charge types (though custodial outcomes are still generally lower than the period prior to bail reform).<sup>29</sup> In the present period, the rate of custodial outcomes for violent felony arraignments is approaching the rate reported pre-bail reform. And while custodial outcomes in other felony and misdemeanor arraignments remain lower than the pre-bail reform baseline, there are notable increases in both other felony and misdemeanor charge types between the 2021 and 2022 reporting periods. In 2020-2021, the rate that bail was being set on misdemeanors was reduced from more than a quarter of cases in the 2018-2019 period (25.8%) to under 2%. In 2021-2022, that rate increased to over 5% of cases.



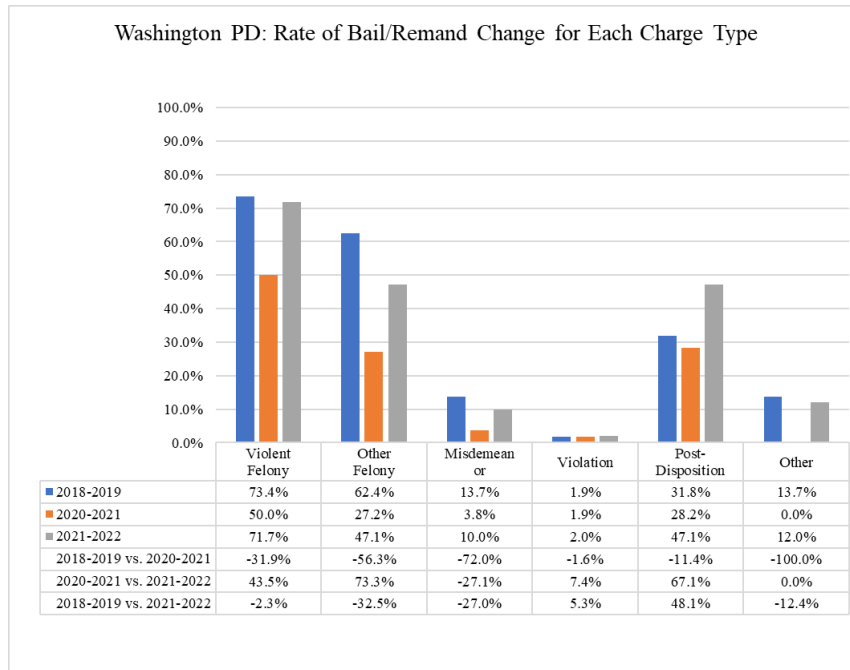
In Suffolk County, the data from both SCLAS and SCACP shows a continued decrease in custodial outcomes across all charge types. For violent felonies, other felonies, misdemeanors, and violations, there seems to be a more-or-less regular curve describing a dramatic decrease in the use of bail from 2018-2019 to 2020-2021, and a more modest decrease from 2020-2021 to 2021-2022. This plateauing suggests that bail practices may be stabilizing in Suffolk.

<sup>29</sup> Notably, for both years post-bail reform, no violation level cases had bail or remand imposed.





In Washington County we observe a drift toward pre-bail reform practices, with bail or remand imposed on violent felonies at an almost identical rate in the present reporting period as that reported in 2018-2019. Custodial outcomes for misdemeanors increased by more than two and a half times over last year's reporting period. Overall, while the rate of custodial outcomes in Washington County arraignments remains lower than before the 2019 bail reform legislation came into effect, that rate is trending upwards and approaching pre-bail reform levels.



Last year, we highlighted the reduction in the use of pre-trial detention in Washington County as compared to information collected during the initial implementation of CAP.<sup>30</sup> However, this data together with the above data on appearance tickets indicates a rise the use of pre-arraignment and pre-trial detention in Washington County. Over the last year, appearance tickets were issued less frequently than in the previous reporting period and there were more instances where bail or remand was imposed at the arraignment. This is also true in Ontario and Schuyler counties. Although custodial outcomes in Ontario and Schuyler counties were still generally lower compared to the historical baseline (represented by the data from the 2018-2019 period), judges uniformly set bail more frequently during the present reporting period than they did during the previous year.

We note that there may be a relationship between the increase in custodial arraignments discussed in section III(A) above and the increase in post-arraignment custodial outcomes. Put simply, it is much easier for a judge to set bail on someone who is arraigned while in custody than it is for someone who appears in court for arraignment on an appearance ticket. Because the changes to CPL § 150.20 permitting more custodial arrests were only in effect for about 50 days in this reporting period, this change may only partially underly these increases.

There are other factors that may contribute to the increased use of detention over this past year, as revealed in this year’s data. Bail reform has received much media attention in recent years and there has been a concerted push by some to “roll back” the reforms. Some of this attention has focused on a perceived increase in crime which may influence detention decisions.<sup>31</sup> As noted

<sup>30</sup> See 2021 report at 30.

<sup>31</sup> Data from the NYS Division of Criminal Justice Services (DCJS) indicates that crime rates have generally remained steady in recent years though there has been an increase in violent crime and motor vehicle theft. See <https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm>. Additionally, recently released DCJS data on recidivism

previously, there have been subsequent amendments to the bail laws which rolled back portions of the 2019 legislation. Further, it is also possible that, as the 2019 reforms took effect amid the first wave of Covid-19, judges were erring on the side of caution in their interpretations of the statute to prevent as many people as possible from being jailed to minimize the risk of contagion for those incarcerated in and working at jails. Over time, as the exigencies of the pandemic have receded, this public health concern may weigh less heavily in judicial decision-making. Nevertheless, the increased reliance on detention in the three most rural *Hurrell-Harring* counties merits continued examination, especially after the marked decreases reported in 2021.

## Conclusion

As in the 2021 Update Report, we have again used this report to share the data ILS has received and compiled on the status of custodial arraignments and the use of pre-trial detention in the *Hurrell-Harring* counties. This information, we believe, serves a dual purpose. First, it provides critical context that should aid in understanding how changes in criminal practice have continued to impact the *Hurrell-Harring* providers in their mission to provide counsel at arraignment representation. Second, it is our hope that this data offers an objective touchstone in what has become an area of considerable interest to stakeholders in the criminal legal system and the public more broadly.

This report also demonstrates that the systems the *Hurrell-Harring* providers developed for arraignment representation ensure not only counsel at the arraignment, but also during the period between the conclusion of an arraignment, through conflict checks and eligibility determinations, to the formal assignment of counsel. This fact is a sign that the *Hurrell-Harring* counties have been, and continue to be, at the forefront of the significant progress being made statewide in public defense.

This reporting period is the third consecutive year during which providers have had to grapple with changes to the Criminal Procedure Law and the continued fallout from the Covid-19 pandemic. The challenges facing the *Hurrell-Harring* providers are significant. Issues with recruitment and retention of attorneys, rollbacks to criminal justice reform legislation, and – in limited circumstances – continued virtual criminal practice have posed obstacles. As such, it is especially heartening to report that the core settlement goal and mandate of complete arraignment representation coverage continues to be a reality in each of the *Hurrell-Harring* counties. And as we are now approaching the final year of the *Hurrell-Harring* settlement, it is appropriate to retrospect on the radical improvements to arraignment practices in the five counties since implementation began.

When ILS issued the Final Plan to implement the settlement’s counsel at arraignment obligations in 2015, none of the counties had complete arraignment coverage. In Onondaga County, there was no arraignment coverage in Syracuse Traffic Court, no arraignment coverage for regular calendar sessions of 13 of the county’s 28 town and village courts, and no coverage for off-hour

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rates pre- and post-bail reform do not clearly show an increase in recidivism after bail reform despite many reports to the contrary in the media, though the overall picture is complex. See S. Arbetter, *Times Union's Josh Solomon on the new DCJS Crime Stats*, September 29, 2022, available at: <https://spectrumlocalnews.com/nys/central-ny/politics/2022/09/29/times-union-s-josh-solomon-on-new-dcjs-crime-stats>.

arraignments at *any* of the justice courts.<sup>32</sup> In Ontario County, the gap in arraignment coverage existed for all regularly scheduled “non-DA day” calendars in the county’s justice courts, as well as arraignments occurring after 10:00 p.m. in Geneva City Court and Bloomfield Town Court.<sup>33</sup> Schuyler County had no weekend arraignment coverage or “non-DA day” coverage for regular justice court calendars.<sup>34</sup> Suffolk County’s pre-settlement plan did not provide for coverage of weekday arraignments in five of the East End justice courts, nor for weekend and holiday arraignments for any of the East End courts.<sup>35</sup> And in Washington County, arraignment coverage was generally non-existent and at best sporadic in the county’s 24 justice courts.<sup>36</sup>

As we have reported above, these gaps in arraignment representation coverage simply no longer exist. This is not to say that there are no challenges. As we have reported above and in each of the previous years since the Final Plan was issued, some obstacles persist over time, and many new ones present themselves each year for the *Hurrell-Harring* providers. But by approaching these problems systematically, by effectively using state settlement and non-settlement funding, and through good-faith collaboration between dedicated program leaders, the *Hurrell-Harring* counties have built the infrastructure and programmatic support necessary to provide all individuals charged with crimes with counsel at arraignment.

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<sup>32</sup> See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement, Final Plan* (November 12, 2015) at 8.

<sup>33</sup> *Id.* at 17-18.

<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.* at 30.

<sup>36</sup> *Id.* at 38.