

PUBLIC HEARINGS ON ELIGIBILITY FOR ASSIGNMENT OF COUNSEL

I am the Honorable Dr. Carrie A. O'Hare. I am a Town Justice in the Town of Stuyvesant, Columbia County and I have been a Stuyvesant Town Justice since March, 2001. I am the past President of the Columbia County Magistrates Association and a current Director of the New York State Magistrates Association that represents 1872 Town and Village Judges presiding over 1277 Town and Village Courts across the State of New York. I want to thank the New York State Office of Indigent Legal Services for the opportunity to speak today, before you develop the criteria and procedures to guide the Courts when determining eligibility for mandated legal representation in Criminal Court proceedings.

As a local Criminal Court Justice serving a *rural community in upstate New York*, my objective today is to lend some insight with respect to the current procedures followed, as well as respectfully presenting suggestions as to how the system might be improved. Upon review of the Hurrell-Harring Stipulation and Order of Settlement, it appears that there are four main objectives that the parties to the lawsuit sought to achieve:

- (1) Counsel at arraignment regardless of eligibility
- (2) Caseload relief for attorneys providing mandated representation
- (3) Quality of mandated representation, and
- (4) Eligibility standards for representation

I will specifically address items (1) and (4) – Counsel at Arraignment and Eligibility Standards. Criminal Procedure Law 170.10 sets forth the current requirements for the

arraignment of a defendant on an Information, Simplified Traffic Information, Prosecutor's Information or a Misdemeanor Complaint. Criminal Procedure Law 180.10 has comparable language for arraignments on Felony Complaints. These statutes (CPL 170.10[3], 180.10[3]) contemplate that the defendant may be appearing without the assistance of counsel, and in that instance, is entitled to (a) an adjournment to obtain counsel, (b) an opportunity to communicate free of charge for the purpose of obtaining counsel and informing a relative or friend that he or she has been charged with an offense and, (c) have counsel appointed free of charge by the Court if he or she is unable to afford the same. These statutes direct that the Court must take such affirmative action as is necessary to effectuate a defendant's right to counsel. (See, CPL 710.10[4][a], 180.10[4].) Moreover, the statutes (CPL 170.10[6], 180.10[5]) provide that the Court must be certain that the defendant understands the significance of proceeding without counsel (the Court must engage in a pro se colloquy) and that to do so, is not deemed a waiver of his or her right to counsel at a later time.

Prior to Hurrell-Harring there were additional safeguards in place to protect the defendant's constitutional right to counsel at every stage of the proceedings. In addition to following the statutorily proscribed process for an arraignment (CPL 170.10 or 180.10), Town and Village Justices were taught to provide the defendant with a Public Defender application and to make an assessment as to eligibility at the time of arraignment. If counsel is assigned at arraignment, the Court is instructed to issue a form referred to as TV-1, Order Assigning Counsel; if counsel is not assigned at arraignment, the Court is instructed to issue a form referred to as TV-2, a Notice that there was No Assignment of Counsel. Pursuant to Title 22 New York Code of Rules and Regulations §200.26(c) the Court is required *within 24 hours of arraignment*

to notify the Public Defender, Conflict Defender, Legal Aid, etc. **and** pre-trial services agency/unit **by telephone, and fax**, of the issuance of the Order of Assignment (TV-1) or of the Notice that there was NO Assignment of Counsel (TV-2). **Consequently, if this Judge gets an arraignment in the middle of the night, I fax either the TV-1 or TV-2 before I leave the Court and I follow up with a phone call the next day to ensure all parties have received the fax.** Thus, the sole purpose of the TV-1 or TV-2 is to inform the aforesaid agencies that the defendant has been incarcerated, with or without bail, so that they can promptly take whatever steps they deem necessary to protect the defendant's rights.

As part of the arraignment process, the Court is directed to consider the bail factors set forth in CPL 510.30 to determine whether the defendant is a flight risk. The question of bail is what degree of control or restriction is necessary to secure the defendant's future Court attendance. The factors to be considered are (1) defendant's character, reputation, habits and mental condition, (2) defendant's employment and financial condition, (3) defendant's family ties and length of residence in the community, (4) defendant's criminal record, (5) defendant's record as a juvenile delinquent, (6) defendant's record of responding to Court appearances when required, (7) the weight of evidence against the defendant in the pending criminal action, and (8) the possible sentence that might be imposed. (See, CPL 510.30.)

After Hurrell-Harring, as a result of increased funding, steps have been instituted by Public Defender's Offices and Legal Aid Offices to protect the right to counsel at the time of arraignment, regardless of eligibility. The Columbia County Public Defender's Office has notified the Town and Village Courts that their office is available to appear for the arraignment of all defendants, at any time, day or night. The procedure is that upon receiving a call out by a

Police agency, the Court is to contact the Public Defender's arraignment phone number (cell) and a pre-arranged designated Assistant Public Defender will be dispatched to cover said arraignment. If the Court calls promptly upon receiving notice from the Police agency, any potential wait time will be **minimized**. The Public Defender's Office will also represent those defendants arraigned on regularly scheduled Court nights, regardless of eligibility, for arraignment purposes only.

In our County, there is presently only one Assistant Public Defender assigned at a time to cover night time arraignments. The current system does, however, seem to be working presently in achieving the goal of ensuring that all defendants are represented by counsel at the time of arraignment in Columbia County. I cannot speak as to whether the same success has been achieved in other Counties, but contend that the number of on-call attorneys must be proportionate to the average number of call outs per day/night, and must also correlate with the geographical region to be covered.

With respect to the issue of eligibility, the Columbia County Public Defender's Office has a designated application form for determining eligibility. It is my opinion that the Court needs to examine the question of eligibility on a case by case basis and make a determination whether the defendant can afford to hire counsel or not, taking into account not only the defendant's income, but also cash on hand, expenses, liabilities, liquidity, anticipated cost of counsel, etc. Perhaps it would be instructive for the New York State Office of Indigent Legal Services to develop a *statewide application form* that incorporates the factors set forth in the Hurrell-Harring Stipulation and Order of Settlement.

Specifically the form should include language indicating whether the defendant can afford the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged. Also the form should provide a means whereby the defendant can segregate the amount of income needed to meet the reasonable living expenses of the applicant and any dependent minors within his or her immediate family, or a dependent parent or spouse, as well as identify assets that are necessary to maintain their employment. Non-liquid assets and assets of family members should be categorized separately. Furthermore, the application should allow a defendant to set forth whether their income is below federal poverty guidelines, whether they reside in a mental health or correctional facility, or receive public assistance. The defendant's debts and obligations should be identified, as well as income and assets, so that the Court may make an informed decision as to whether the defendant possesses disposable income sufficient to afford to retain private counsel. The Court should err on the side of assigning counsel since the Public Defender has a remedy if they disagree with the Court's assessment, in that, they can bring a proceeding pursuant to County Law §722-d to force the defendant to pay all or part of the cost of representation. The defendant does not have a similar remedy under the statute.

Lastly, I want to dispel any misconception that the current system of justice in the Town and Village Courts is the genesis of the problem addressed in Hurrell-Harring. **Our current system is not broken, it simply needs to be tweaked. Town and Village Courts are the Courts closest to the People and charged with the responsibility of protecting a defendant's fundamental right to an immediate arraignment. (See, CPL 140.20 et. al.) The right to an immediate arraignment is the hallmark of the right to liberty as guaranteed to each person under the United States and New York State Constitutions.**

In upstate New York, Town and Village Justices are the **only** Judges in the Unified Court System that are on call 24 hours a day, 7 days a week, and 365 days a year. The significance of that fact is not lost on the average defendant, faced with spending a night or two in jail while waiting to be arraigned. Certainly a defendant, if given a choice, would choose appearing before a Town or Village Justice, with or without counsel, to discuss the issue of bail, rather than sitting in a holding cell until counsel can be present for an arraignment. **While the right to counsel is a fundamental right we swear to preserve, so is the right to one's liberty.** My hope is that the State Office of Indigent Legal Services will consider both when proposing a solution to this vexing problem. I thank you for your time and consideration.

STATE OF NEW YORK
COUNTY OF _____
Justice Court, Town/Village of _____

ORDER

THE PEOPLE OF THE STATE OF NEW YORK)
)
-against-)
)
)
)

Defendant)

X

Assignment of Counsel
(Upon Issuing a Securing Order Fixing Bail
Or Ordering Defendant Held Without Bail)

[22 NYCRR Section 200.26(c)]

Docket/Case No. _____

The defendant having been brought before the Court on _____ [Date] at _____ [Time] for arraignment on an accusatory instrument filed with the Court, and it appearing that the defendant is financially unable to obtain counsel, the Court makes the following assignment of counsel, pursuant to County Law section 722:

- _____ [indicate Public Defender Office, Conflict or Alternate Defender Office, Legal Aid Society or named attorney, as appropriate] is assigned to represent the defendant; or
- _____ [enter name of Administrator of Assigned Counsel Program] is directed to, without delay, select and assign an appropriate attorney to represent the defendant from the Administrator's list of eligible attorneys.

CHARGE(S) AGAINST DEFENDANT: _____

NAME(S) OF CO-DEFENDANT(S): _____

BAIL AMOUNT: _____

TERM(S) OF SECURING ORDER [e.g., cash bail, insurance co. bond]: _____

DATE AND TIME OF NEXT COURT APPEARANCE: _____

OTHER: _____

- A copy of the accusatory instrument(s) is/are attached.
- The defendant has been provided, in writing, with the name, business address and telephone number of assigned counsel.
- The appropriate pre-trial services agency or pre-trial services unit of the County Probation Department (if any) has been notified of this assignment by telephone, and by faxed (or other) delivery of a copy of this order of assignment, in accordance with 22 NYCRR 200.26(c). [Do NOT send copy of accusatory instrument to pre-trial services agency or pre-trial services unit of Probation Department.]

DATED: _____

Town/Village Justice

Pursuant to 22 NYCRR § 200.26(c): Assigned counsel and pre-trial services agency/unit (if any) to be notified of this assignment by telephone, and by faxed (or other) delivery of a copy of this order of assignment, upon issuance of securing order or, if not practicable, within 24 hours thereafter, but not later than 48 hours thereafter if extraordinary circumstances so require.

STATE OF NEW YORK
COUNTY OF _____
Justice Court, Town/Village of _____

NOTICE

THE PEOPLE OF THE STATE OF NEW YORK)
)
-against-)
)
)
)
)
Defendant)
_____ x

Notice of Defendant's Appearance and
Issuance of Securing Order Fixing Bail
Or Ordering Defendant Held Without Bail

(No Assignment of Counsel)

[22 NYCRR Section 200.26(d)]

Docket/Case No. _____

TO _____
[indicate Director of Public Defender/Conflict or Alternate Defender/Legal Aid Society Office or Administrator of Assigned Counsel Program, as appropriate]:

PLEASE TAKE NOTICE that the defendant was brought before the Court on _____ [Date] at _____ [Time] for arraignment on an accusatory instrument filed with the Court. At such time, the Court issued a securing order as indicated below and made a preliminary determination that the defendant appears to be financially able to retain counsel.

CHARGE(S) AGAINST DEFENDANT: _____

NAME(S) OF CO-DEFENDANT(S): _____

BAIL AMOUNT: _____

TERM(S) OF SECURING ORDER [e.g., cash bail, insurance co. bond]: _____

DATE AND TIME OF NEXT COURT APPEARANCE: _____

OTHER: _____

- A copy of the accusatory instrument(s) is/are attached.
- The defendant has identified the following attorney he/she intends to retain: _____
- The appropriate pre-trial services agency or pre-trial services unit of the County Probation Department (if any) has been notified by telephone, and by faxed (or other) delivery of a copy of this notice, of the defendant's appearance and the court's issuance of a securing order, in accordance with 22 NYCRR 200.26(d). [Do NOT send copy of accusatory instrument to pre-trial services agency or pre-trial services unit of Probation Department.]

DATED: _____

Town/Village Justice

Pursuant to 22 NYCRR § 200.26(d): Director of Public Defender/Conflict or Alternate Defender/Legal Aid Society Office or Administrator of Assigned Counsel Program, as appropriate, and pre-trial services agency/unit (if any) to be notified by telephone, and by faxed (or other) delivery of a copy of this notice, of defendant's appearance and Court's issuance of securing order upon issuance of securing order or, if not practicable, within 24 hours thereafter, but not later than 48 hours thereafter if extraordinary circumstances so require.

Bail Factors under CPL §510.30

The question of bail is what degree of control or restriction is necessary to secure the defendant's future Court attendance.

The factors to be considered are as follows:

1. Defendant's character, reputation, habits and mental condition,
2. Defendant's employment and financial condition,
3. Defendant's family ties and length of residence in the community,
4. Defendant's criminal record,
5. Defendant's record as a juvenile delinquent,
6. Defendant's record of responding to Court appearances when required,
7. The weight of evidence against the defendant in the pending criminal action, and
8. Possible sentence that might be imposed.