New York State Defenders Association, Inc.

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VIA E-MAIL (arossi@nycourts.gov)

The Honorable Michael V. Coccoma
Deputy Chief Administrative Judge
for Courts Outside New York City
NYS Unified Court System
Office of Court Administration
Empire State Plaza, Suite 2001, 4 E.S.P.
Albany, NY 12223-1450

Re: Off-Hours Arraignment Parts

Dear Judge Coccoma:

Thank you for the opportunity to submit written comments regarding off-hours arraignment parts, which have been authorized by Chapter 492 of the Laws of 2016. The New York State Defenders Association (NYSDA) provides legal support services to the over 130 public defense programs in the state's 62 counties. As part of its support services to public defense providers and state and local governmental entities, NYSDA provides consultation and technical assistance about legal and policy issues relevant to the criminal justice system, delivery of defense services, and barriers thereto.

Throughout the development and review of plans for off-hours arraignment parts, the primary goal must be to "facilitate the availability of public defenders or assigned counsel" at arraignment for defendants in need of legal representation. The legislation was intended to help ensure that defendants outside New York City are afforded the right to counsel at arraignment, a critical stage of the criminal proceeding. *See Hurrell-Harring v State of New York,* 15 NY3d 8 (2010).

While plans may have the effect of making the arraignment process more efficient and convenient for judges, law enforcement, and others, this is secondary to the goal of holding arraignments in a specific location so that defendants can appear with counsel. And efficiency and convenience must not be used to justify arraignment delays or the increased reliance on pre-arraignment detention. We urge Chief Administrative Judge Lawrence Marks to be cognizant of the legislation's primary purpose when reviewing proposed plans for off-hours arraignment parts.

Below is a list of other issues and recommendations regarding plans for off-hours arraignment parts. There are no doubt many other issues, some of which will arise during planning and implementation. We are encouraged by your interest in having a continuing dialogue about this important legislation.

Review and Amendment of Plans

Plans should be reviewed on a periodic basis to ensure that they fulfill the goal of the legislation. During the periodic review, the Chief Administrative Judge or those responsible for implementation of approved plans should solicit comments from the defense providers identified in Judiciary Law § 212(1)(w).

Also, when a plan is approved, there should be clear instructions on making future amendments to the plan. Even the most thoughtful plans can have unexpected consequences and it is important to ensure that these problems can be remedied quickly.

Defense Counsel Access to Client Rap Sheets at Arraignment

Despite clear statutory provisions directing that client criminal history reports (rap sheets) be given to defense counsel at arraignment (*see* Criminal Procedure Law 160.40[2] and 530.20[2][b][ii]), as well as the Office of Court Administration's ongoing efforts to educate and remind arraigning judges of this requirement, NYSDA continues to receive calls from defenders about not receiving rap sheets at arraignment. Rap sheets are essential to provide proper representation at arraignment and any plan for off-hours arraignment parts must include details regarding how rap sheet dissemination at arraignment will be accomplished.

Facilities for Off-Hours Arraignment Parts- Need for Private Space for Attorney-Client Consultation

Off-hours arraignments should be held in court facilities that allow attorneys and clients to have private, confidential conversations. These conversations are often the first opportunity for a defendant to speak to an attorney and confidential information will be exchanged during that meeting. We recognize that law enforcement agencies may have a policy that requires constant visual monitoring of persons who have been arrested. However, such monitoring must not facilitate law enforcement overhearing or otherwise understanding privileged attorney-client communications or impede meaningful attorney-client exchanges. Off-hours arraignments should not be held in court facilities that do not have this capacity.

Arraignment Delays and Pre-Arraignment Detention

The December 19, 2016 initial stakeholders meeting reaffirmed that swift arraignment of individuals and providing counsel at arraignment are considered the primary goals of the off-hours arraignment parts. Although scheduling arraignments at specified times of the day may be convenient, this should not cause individuals who have been arrested to wait longer than they currently do for arraignment. Plans should be required to satisfy the dual goals of swift arraignment and provision of counsel at arraignment. There are programs operating today in which on-call counsel is assigned and dispatched telephonically, allowing for full compliance with the requirements of *Hurrell-Harring*.

We have a number of concerns about the reliance on pre-arraignment detention; proposals that rely on such detention should be examined carefully and modified to avoid increased detention. Plans should be required to describe why alternatives to pre-arraignment detention, such as the use of appearance tickets, would not work in that county.

The availability of pre-arraignment detention facilities makes it easier to postpone arraignments. This can cause significant harm to an individual, such as missed work and possible loss of employment and temporary removal of a child because no one else is available to provide child care. Also, when defendants are already sitting in the county jail, some judges may be more reluctant to consider releasing a defendant, whether ROR or on bail. And it can give law enforcement and prosecution additional time to interrogate, without counsel, people who have been arrested. If individuals must be detained before arraignment, it is essential that plans do not provide an additional opportunity for unilateral law enforcement access for soliciting uncounseled statements. Plans should require that defense counsel be notified of the arrest and be given the opportunity to promptly meet with the client at the detention facility. This will give counsel time to discuss the case with the client and gather information to support a bail release argument, and will also reduce the amount of time needed for the arraignment. In the alternative, plans should affirmatively and consensually prevent law enforcement access during the pre-arraignment period exclusively caused by adjournment of what would otherwise have been a nighttime arraignment.

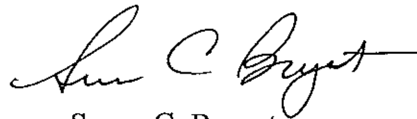
Video Arraignments

At the December 19, 2016 meeting, it was suggested that OCA consider the use of video arraignments and the elimination of the defendant consent requirement. NYSDA has opposed the use of video arraignments for years, as described in the attached memorandum (also available here). Video arraignment is not a substitute for the presence of counsel at arraignment. As noted by William Leahy, Director of the NYS Office of Indigent Legal Services, state funding for counsel at first appearance explicitly requires the physical presence of counsel with the client in court; this requirement ensures that representation comports with ethical standards. Any off-hours arraignment plan must not force defense attorneys to compromise their ethical and professional obligations to clients.

Conclusion

This common sense legislation presents a wonderful opportunity to build on the work that is already being done, in the five counties that are parties in the *Hurrell-Harring* litigation, in other counties where defense providers have received grant funding for counsel at first appearance, and elsewhere in the state, to provide counsel at arraignment. NYSDA will provide whatever assistance is needed to help ensure the right to counsel at arraignment is met throughout New York.

Sincerely,



Susan C. Bryant
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Enclosure

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STATEMENT IN OPPOSITION TO AUDIO-VISUAL ARRAIGNMENTS

In 1990, the Legislature authorized the experimental use of audio-visual court appearances via two-way closed-circuit television in the Bronx, Brooklyn and Manhattan. The purpose of the legislation was to "eliminate transportation costs, court detention facility resources, and the waiting time and inconvenience that precede court appearances in situations where *nothing of substance* will be determined (e.g., where both sides anticipate an adjournment.") (Preiser, Practice Commentary McKinney's Cons. Laws of N.Y. CPL Art. 182) (emphasis added). When the experiment was not undertaken in any of the three boroughs during the original eighteen-month study period, the legislation was renewed in 1993, at which time additional counties were added to the list of authorized jurisdictions, a trend that has continued to the present day. There are currently twenty-seven jurisdictions authorized to participate in the experimental use of audio-visual court technology. In most places, the statute is being appropriately employed to avoid needless court appearances when nothing of substance will occur in court. Lawyers with established attorney-client relationships also use the technology to stay in close touch with incarcerated defendants. However, every now and again, a jurisdiction floats the idea of using audio-visual technology to dispense with the personal appearance of defendants at the initial arraignment, a critical phase of a criminal prosecution. The New York State Defenders Association continues to strongly oppose such initiatives as an improper use of the technology.

In over 22 years, no jurisdiction in New York has implemented a system of audio-visual arraignments under the statute. The reasons are twofold. First, the statute requires each defendant to give informed consent to the procedure and the choice must be voluntary. Consent may not be coerced by penalizing defendants who opt to personally appear in court by delaying the arraignment. Thus, counties must maintain an expensive dual system of audio-visual and conventional arraignments. Secondly, as explained below, no competent criminal defense lawyer would routinely recommend to clients that they waive personal appearance in court at the arraignment.

As counsel to the Office of Court Administration commented in response to the original legislation in 1990, "[N]ew technology in the judicial forum must be embraced carefully and only after thorough study of its impact upon court procedures and the administration of justice."[1] The use of audio-visual technology to avoid transporting pre-trial detainees to courthouses for routine case status conferences is fundamentally different from use of the technology to eliminate a defendant's personal appearance at the initial arraignment proceeding.

Important matters are reviewed and critical decisions are made at a criminal court arraignment. Central among these is the court's duty to apprise a defendant of the cause and nature of the allegations, and decide whether to release or hold the defendant in lieu of bail

[1] Letter from Michael Colodner to Evan Davis, Counsel to Governor Cuomo, dated July 20, 1990 at p. 2.

during the pendency of the criminal action. For the accused person, few decisions are as critical as the court's bail decision. Detention in jail for even a few days can result in the loss of employment, financial hardship, loss of custody of children, and devastation to one's family. Pre-trial detention can also adversely affect a defendant's ability to mount a successful defense to a criminal charge. Given the important liberty interests at stake at a criminal court arraignment, any plan that restricts the flow of information to the court and interferes with its ability to render a fair and impartial bail decision demands a compelling justification. Clearly, the administrative urge to save a few dollars on personnel expenses does not meet this high threshold. Indeed, a recent study in Cook County, Illinois, noted a statistically significant increase in bail amounts resulting from videoconferenced arraignment proceedings. The study concluded that "defendants were significantly disadvantaged by . . . videoconferenced bail proceedings." Shari Seidman Diamond, et. al. "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions." 100 Crim. L. and Criminology 869, 898 (2010). Moreover, higher bail amounts "can impose additional financial costs on the justice system by leading to increased pre-trial incarceration of defendants who would otherwise be released." Id. at p. 901.

In addition to bail decisions, judges must make other important determinations during the arraignment that can have wide-ranging consequences for criminal defendants. Judges must decide at the arraignment whether to refer an apparently mentally unstable defendant for psychological testing to determine competence to stand trial,[2] or whether to issue a temporary order of protection to protect a crime victim,[3] or whether to suspend a defendant's license to possess a firearm,[4] or to drive a motor vehicle.[5] In order to make any of these discretionary judgment calls, judges must have the ability and means to "size up" the defendant, a difficult and largely intuitive process that would be seriously impaired if judges were relegated to making decisions based on whatever information they could glean from the defendant's image and voice on a video monitor. When the accused is not physically present in the courtroom, the court cannot get a full spectrum of nonverbal cues about the defendant's character and trustworthiness. The court literally cannot "look the defendant in the eye" to make a personal assessment of credibility. The defendant is likewise deprived of an opportunity to personally engage the judge when endeavoring to convey sincerity and respect for the legal process. *See* Ann Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004).

A defendant's personal appearance in court in response to a criminal charge also serves an important symbolic function in our criminal justice system. Unlike a police detention facility, a courtroom is an independent place. While police and prosecutors may be physically present in the courtroom, it is not *their* domain. The courtroom is the province of an independent judiciary, and the defendant is the central participant and focus of the arraignment proceeding. The defendant's presence is not a mere formality that can or should be routinely dispensed with. Physical presence in the courtroom has its own significance and meaning. Under our justice system, the accused must be turned over by his captors and allowed to stand, as a person presumed innocent, before a court of law. While accused persons may be in custody, they are in

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[2] CPL § 730.30
[3] *See* CPL §§ 530.12, 530.13
[4] *See* CPL § 530.14
[5] *See* VTL § 510 (3)

the hands of the court and its officers. Family and loved ones can see the accused and be reassured that he or she has not been harmed, and will be treated with respect by the court. From this small event, public respect for the law and for our system of justice flows.

The right of personal appearance is not only important to the accused; it is also important to the independence of the judiciary. Even when physically producing a defendant in court may cause inconvenience and expense, judges have an obligation to perform their duties with dignity and decorum. This obligation should not be lightly surrendered to administrative and fiscal concerns about convenience and cost-cutting. The right to personally appear in court at a critical stage of a criminal proceeding is indispensable. It should be relinquished only in the most extraordinary circumstances when no practical alternatives exist.

Arraignments conducted via two-way closed-circuit television can interfere with the development of trust between attorney and client, and can seriously interfere with a lawyer's ability to effectively advocate for a client. The closed-circuit process offers defense lawyers two equally objectionable choices: to be physically present in the police detention facility with a client, or in the courtroom with the judge and prosecutor. In the former situation, a defense lawyer's ability to advocate for a client is diminished by his or her absence from the courtroom, the locus of authority and decision-making. In the latter situation, counsel cannot stand by the client's side during the arraignment process, the critical first stage in most attorney-client relationships. The physical separation of attorney and client inevitably results in poor communication between the two parties, a situation that is only made worse when the client has special needs, such as language difficulties, mental health problems, or limited intelligence. In one study in New Jersey, 68% of the clients arraigned by closed-circuit television did not get to speak to an attorney during the bail hearing, and an overwhelming 96% did not get to speak to their attorney following the hearing.[6] This lack of communication can only serve to alienate attorney and client during this important early phase of their relationship.

For all of these reasons, audio-visual arraignments via two-way closed-circuit television are destructive of the rights of criminal defendants and are inconsistent with the deliberative process of the courts. The New York State Defenders Association strongly opposes it.

December 5, 2012

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[6] *See* Hudson County Video Link System, a report prepared for the Public Defender of New Jersey, on file with NYSDA.