

THE RIGHT TO COUNSEL AT ARRAIGNMENT IN NEW YORK

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I. The Court of Appeals Decision in *Hurrell-Harring v. New York*

In May of last year, a divided Court of Appeals reinstated a complaint brought by The New York Civil Liberties Union on behalf of indigent criminal defendants in *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010) that alleged New York's public defense system was inadequate to ensure the constitutional right to counsel. That decision was remarkable for two reasons, the first well publicized and the second less so but perhaps of greater significance.

First, the Court recognized a cognizable claim for relief based on allegations that the plaintiffs had been denied the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963)¹. Rather than view the allegations made in the complaint as claims based on ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), they found the allegations supported a claim that the plaintiffs had no counsel or had counsel in name only. This distinction is a significant one since a claim for ineffective assistance of counsel must allege that an individual attorney's performance, under the specific circumstances of the case, has fallen below an objective standard of reasonableness and has prejudiced the outcome of the proceedings or the defendant's right to a fair trial. This type of outcome oriented approach permits courts to view substandard performance by defense attorneys as harmless error. The Court of Appeals decision in *Hurrell-Harring* recognizes that the ruling in *Strickland* is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will ordinarily be satisfied².

¹ “[T]he complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.” *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 23 (2010).

² *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 18 (2010)

As significant as the creation of a right to a pre-trial determination of the adequacy of assigned counsel under *Gideon* may be, what is perhaps of greater significance for the criminal defense bar in New York State is the Court's recognition that an arraignment is a critical stage of the proceeding which requires the presence of counsel. The Court's ruling that a defendant's arraignment is a critical stage in the proceedings that requires the assistance of counsel is premised on the fact that a defendant's "pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents."³ While the Court states that arraignments are "undoubtedly" a critical stage of the proceedings which require the presence of counsel, prior to the decision in *Hurrell-Harring*, the notion that arraignments in New York State were a critical stage of the proceedings was very much in doubt.

Whether the plaintiffs will be successful in ultimately proving that New York's current system for providing indigent defense suffers from systemic flaws that effectively deprive indigent defendants the right to counsel under *Gideon* remains to be seen as the case is now back in Albany County Supreme Court. But whatever the ultimate outcome, the decision by the Court of Appeals reinstating the complaint includes an unequivocal recognition that arraignment is a critical stage of criminal proceedings for the purposes of an indigent defendant's Sixth Amendment right to counsel⁴.

II. The History of the Right to Counsel at Arraignments in New York

It would seem obvious that a proceeding where "pretrial liberty interests" were adjudicated would be considered a "critical stage" of the proceedings, at least from the perspective of the defendant. Yet New York Courts have repeatedly failed to recognize that the arraignment on a criminal complaint is a "critical stage" of the proceedings that would trigger the Sixth Amendment right to counsel. Their failure to do so is in large part based on an analysis that views a critical stage of the proceedings as one where a defendant's rights at trial might be affected.

³ *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 20 (2010)

⁴ "There is no question that 'a bail hearing is a critical stage of the State's criminal process'" *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 20 (2010) citing *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007)

Following the Supreme Court's decision in *Hamilton v. State of Alabama*, 368 U.S. 52 (1961) wherein they found that the defendant's arraignment was a "critical stage" of the proceeding the Appellate Division, Second Department in *People v. Combs*, 241 N.Y.S.2d 104 (2nd Dept. 1963) rejected the argument that an arraignment under New York law was a critical stage in the proceedings:

"There is a radical difference, however, between the law of Alabama and the law of this State. Under the law of this State, we hold as a matter of law and find as a fact that in this case the defendant lost no rights and suffered no prejudice whatever because of his counsel's absence at the time of his (defendant's) initial arraignment; whatever counsel could have done then on defendant's behalf, counsel was free to do thereafter."⁵

The United States District Court for the Southern District of New York in *United States ex rel. Hussey v. Fay*, 220 F. Supp. 562 (S.D.N.Y. 1963) cited *Combs* to support the proposition that arraignments are not a critical stage of the proceedings in New York. Unlike the situation in *Hamilton* where certain defenses had to be asserted at the time of arraignment or else were deemed to have been waived, "[u]nder New York law, a defendant suffers no such prejudice, for whatever counsel could have done upon arraignment on defendant's behalf, counsel were free to do thereafter. There is nothing in New York law which in any way prevents counsel's later taking advantage of every opportunity or defense which was originally available to a defendant upon his initial arraignment."⁶

In 2005 the United States District Court for the Eastern District of New York cited *United States ex rel. Hussey v. Fay* with approval in deciding that the initial arraignment was not a critical stage in the proceedings that would have warranted the appointment of counsel absent some showing that the defendant was prejudiced.⁷ As recently as 2008, in *People v. Green*, 849 N.Y.S.2d 826 (N.Y.A.D. 4th Dept.) the Appellate Division, Fourth Department cited *Combs* with approval when ruling that the absence of counsel at a defendant's arraignment did not result in prejudice since "whatever counsel could have done then on defendant's behalf, counsel was free

⁵ *People v. Combs*, 241 N.Y.S.2d 104 (2nd Dept. 1963)

⁶ *United States ex rel. Hussey v. Fay*, 220 F. Supp. 562, 563 (S.D.N.Y. 1963)

⁷ *Holland v. Allard*, 2005 WL 2786909 (E.D.N.Y.)

to do thereafter.” These decisions stand for the proposition that arraignments are not a “critical stage” in the proceedings under New York Law.

The dissenting opinion in *Hurrell-Harring* cites both *Hussey* and *Combs* in coming to the conclusion that “[w]here a criminal defendant is arraigned without the presence of counsel and pleads not guilty – or the court enters a not guilty plea on his behalf – there is no Sixth Amendment violation.”⁸ In addition, the dissent points out that Criminal Procedure Law Article 180 “presupposes that a criminal defendant, upon arraignment, may not have yet retained counsel or, due to indigency, requires the appointment of one.”⁹ While C.P.L. Article 180.10(3) requires that a defendant be advised of certain rights at the time of arraignment, such as the right to be represented by counsel, to communicate free of charge to obtain counsel, to have counsel assigned if the defendant is indigent and to have the case adjourned in order to obtain counsel, it does not require the Court to furnish the defendant with counsel at the time of arraignment. In fact, one of the rights explicitly granted to a defendant under CPL 180.10(5) is the right “to proceed without the aid of counsel” and the court “must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof.”

In addition, the Uniform Rules for the New York State Trial Courts presume that counsel will not be present at arraignment when bail is actually set. Section 220.26(c) does state that, if the defendant is without counsel and appears financially unable to obtain counsel, “the court shall, prior to issuing a securing order fixing bail or committing the defendant to the custody of the sheriff, assign counsel.” However, this “assignment of counsel” is in name only since section 220.26(c) explicitly states: “[w]here assigned counsel is not present in court at the time of the assignment, the court may issue such securing order in the absence of counsel”. Assigned counsel is then to be notified upon the issuance of the securing order “or, if not practicable, within 24 hours thereafter, but no later than 48 hours thereafter if extraordinary circumstance so require”. Not only do the Uniform Rules authorize a judge to proceed with an arraignment in the absence of counsel, but they authorize the setting of bail in counsel’s absence and permit a two day delay in notifying assigned counsel if there are “extraordinary circumstances”.

⁸ *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 32 (2010)

⁹ *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 31 (2010)

III. The Changing Definition of What Constitutes a Critical Stage of the Proceedings

The argument for not categorizing the arraignment as a critical stage of the proceedings under New York law is that what happens at the arraignment has no bearing on the defendant's rights at trial. While that analysis was once adopted by the Supreme Court, such a narrow application of the right to counsel was long abandoned in favor of an analysis that recognizes that the Sixth Amendment safeguards a defendant's right to counsel during the "criminal prosecution" and not simply during trial. In fact, in *Powell v. Alabama*, 287 U.S. 45 (1932) one of the Supreme Court's first cases that held a defendant has a fundamental right to the appointment of counsel for his defense, the Court emphasized that "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."¹⁰

While the Supreme Court's landmark decision in *Gideon* did focus on a defendant's right to the effective assistance of counsel at trial, the Court has repeatedly made it clear that the presence of counsel is required during "critical stages" of the proceedings. In extending the right to counsel under the Sixth Amendment to pre-trial identification proceedings in *United States v. Wade*, 388 U.S. 218 (1967), the Court recognized that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial to a mere formality." For that reason the Court construed the Sixth Amendment guarantee to apply to "critical stages of the proceeding". A summary of the Court's rationale for expanding the Sixth Amendment right to counsel was offered by the Court in *United States v. Ash*, 413 U.S. 300 (1973):

"This extension of the right to counsel to events before trial has resulted from the changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be part of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."

¹⁰ *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932)

Over time the Supreme Court has come to recognize that “critical stages” of the proceedings can occur well before trial. The text of the Sixth Amendment refers to the “assistance of counsel” in “all criminal prosecutions” and not simply at trial. As the Court noted in *Mempa v. Rhay*, 389 U.S. 128 (1967) “[t]here was no occasion in Gideon to enumerate the various stages in a criminal proceeding at which counsel was required” but based on some of its earlier decisions the Court concluded that the “appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”¹¹ The Court of Appeals in *Hurrell-Harring* recognized that a judge’s bail determination at arraignments carries with it “serious consequences” for a defendant which leaves “no question” that the arraignment is a critical stage of the proceeding¹².

Another factor used by the Supreme Court when considering whether something is a “critical stage” of the proceeding is if the presence of counsel would assist the defendant in coping with the “intricacies of the law”.¹³ It is worth noting that the factors judges are required to take into consideration under Criminal Procedure Law 510.30 when making a determination regarding bail can be complex. While there are some facts which you might expect the average person to be able to articulate to the court such as their family ties and length of residence in the community¹⁴ as well as their employment and financial resources,¹⁵ the judge is also required to consider “the weight of the evidence” against the defendant as well as “any other factor indicating probability or improbability of conviction”.¹⁶ Clearly, formal legal training is necessary in order to address the issues the court should consider when making a bail determination. The Supreme Court’s expansion of the right to counsel to “trial-like confrontations”¹⁷ has been based on the recognition that a defendant needs the assistance of counsel in coping with the complexities of our criminal justice system. The test the Supreme Court has adopted when evaluating whether or not an event is a “critical stage” of the proceedings calls for the “examination of the event in order to determine whether the accused

¹¹ *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)

¹² *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 20 (2010)

¹³ *United States v. Ash*, 413 U.S. 300, 310 (1973)

¹⁴ CPL 510(2)(a)(iii)

¹⁵ CPL 510(2)(a)(ii)

¹⁶ CPL 510.30(2)(a)(vii)

¹⁷ *United States v. Ash*, 413 U.S. 300, 312 (1973)

required aid in coping with legal problems or assistance in meeting his adversary.”¹⁸ Under this definition of “critical stage” of the proceedings a defendant’s arraignment in New York requires the presence of counsel.

If there was any doubt regarding the classification of an arraignment as a “critical stage” of the proceedings those doubts should have been put to rest with the Supreme Court’s decision in *Rothgery v. Texas*, 554 U.S. 191 (2008). Citing earlier decisions in *Brewer v. Williams*, 430 U.S. 387 (1977) and *Michigan v. Jackson*, 475 U.S. 625 (1986) the Court clearly stated “that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusations against him and restrictions are imposed on his liberty.”¹⁹ It is also worth noting that the argument made in *Rothgery* that the defendant’s arraignment was not a “critical stage” of the proceedings was based on the fact that there was no prosecutor present during the arraignment, a common occurrence in many Town and Village Courts in New York State. In fact, in *Rothgery*, the prosecutor was totally unaware that the arraignment was taking place since the defendant was arrested by police without a warrant and immediately brought before a magistrate who made a probable cause determination and fixed bail. The fact that the prosecutor was unaware that formal charges had been filed made no difference to the Supreme Court: “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”²⁰

IV. The Waiver of the Right to Counsel at Arraignment

The Court of Appeals decision in *Hurrell-Harring* recognizes that an arraignment in New York is a critical stage of the proceedings thus giving rise to a right to counsel under the Sixth Amendment. That being said, Criminal Procedure Law 180.10(5) leaves open the possibility that a defendant can waive their right to counsel at arraignment if the waiver is done with “the knowledge of the significance thereof.” In *Faretta v. California*, 422 U.S. 806 (1975) the Supreme Court established that a criminal defendant has a right to forego the assistance of an

¹⁸ *United States v. Ash*, 413 U.S. 300, 313 (1973)

¹⁹ *Rothgery v. Texas*, 554 U.S. 191, 194 (2008)

²⁰ *Rothgery v. Texas*, 554 U.S. 191, 213 (2008)

attorney and represent themselves. However, since a defendant who elects to proceed without counsel will lose the benefits afforded to them by the Sixth Amendment the Court required that “the accused must ‘knowingly and intelligently’ forgo those benefits.”²¹

The Court went on to say that while a defendant need not have the skill and experience of a lawyer to choose self-representation a defendant “should be made aware of the dangers and disadvantages of self-representation so that the record will establish that ‘he knows what he is doing and his choice is made with open eyes.’”²² While *Faretta* dealt with the waiver of counsel at trial, the Supreme Court has also addressed the issue of the waiver of counsel during earlier stages of criminal proceedings and has come to the conclusion that “a less searching or formal colloquy may suffice.”²³ The Supreme Court has endorsed a “pragmatic approach to the waiver question,” one that asks “what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage,” in order “to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.”²⁴

With that standard in mind, a valid waiver of counsel could be obtained from a defendant at their arraignment if the arraignment judge apprised the defendant of the risk associated with self-representation and the defendant voluntarily waived those rights. However, the New York Court of Appeals has found what is sometimes described as an “indelible” right to counsel under the State Constitution. While the Supreme Court has never ruled that the decision to waive counsel must itself be counseled²⁵, the Court of Appeals has ruled that “where the investigatory stage of a prosecution has concluded and formal judicial proceedings have commenced, whether by indictment or arraignment, the right to counsel may be waived only in the presence of counsel.”²⁶ Add to this the admonition in C.P.L. 180.10(4) that it is the court that must take “affirmative action” to effectuate the right to counsel at arraignment and it is doubtful that any

²¹ *Faretta v. California*, 422 U.S. 806, 835 (1975) citing *Johnson v. Zerbst*, 304 U.S., at 464-465

²² *Faretta v. California*, 422 U.S. 806, 835 (1975) citing *Adams v. United States ex rel. McCann*, 317 U.S. at 279

²³ *Patterson v. Illinois*, 487 U.S. 285, 299 (1988)

²⁴ *Patterson v. Illinois*, 487 U.S. 285, 298 (1988); see also *Iowa v. Tovar*, 541 U.S. 77 (2004)

²⁵ See *Montejo v. Louisiana*, 129 S.Ct 2079 (2009) and *Michigan v. Harvey*, 494 U.S. 344 (1990)

²⁶ *People v. Settles*, 46 N.Y.2d 154, 166 (1978) citing *People v. Blake*, 35 N.Y.2d 331, 340 and *People v. Lopez*, 28 N.Y.2d 23, 26-29

such waiver would be valid under New York law²⁷. The line of cases in New York that establish that the right to counsel “indelibly” attaches at arraignment suggests that the Court of Appeals would view a waiver of counsel during the arraignment to only be knowing and voluntary once the defendant has had the opportunity to consult with counsel regarding the wisdom of proceeding with the arraignment without counsel. This would therefore make it impossible to arraign a defendant in the absence of counsel.

V. The State of the Right to Counsel at Arraignments in New York after *Hurrell-Harring*

Arraignments are now unquestionably a critical stage of the proceedings in New York. The Supreme Court has held that the complete absence of counsel during a critical stage of the proceedings is a violation of the Sixth Amendment right to counsel which requires reversal even without a showing of prejudice. In cases where there has been a “complete denial of counsel” during a critical phase of the proceedings the Supreme Court simply assumes prejudice to the defendant²⁸. But does the Court of Appeals ruling in *Hurrell-Harring* mean that every conviction in New York where the defendant was not represented by counsel at arraignment is subject to reversal? Does it guarantee that no arraignment will take place absent the presence of counsel for the defendant? Regrettably, I believe that the answer to both of these questions is “no”.

The right to counsel does not exist in a vacuum. The Supreme Court has consistently said that the right to the effective assistance of counsel “is recognized not for its own sake, but because of the effect it has on the accused to receive a fair trial.”²⁹ In a situation where a defendant was arraigned without counsel but was released and the defendant cannot claim the delay in the appearance of counsel prejudiced their case, I do not believe that the Court of Appeals would reverse a subsequent conviction. The decision to define arraignments as a “critical stage” of the proceedings in *Hurrell-Harring* was based in no small part on the fact that bail determinations were being made which led to “serious consequences” for the defendants. If

²⁷ When it comes to the appointment of counsel for an indigent criminal defendant it is exactly this type of “affirmative action” that the Supreme Court contemplated in *VonMoltke v. Gillies*, 332 U.S. 708, 722 (1948) when they described it as the judges “solemn duty” to make a “thorough inquiry” of a defendant who appears without counsel and “to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings.”

²⁸ *U.S. v. Chronic*, 466 U.S. 648, 659 (1984); See also *Mickens v. Taylor*, 535 U.S. 162, 166 (2001): “We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding.”

²⁹ *U.S. v. Chronic*, 466 U.S. 648, 658 (1984)

there were not any “serious consequences” in a particular arraignment, then it seems unlikely the Court of Appeals would deem that arraignment a “critical stage” where the complete absence of counsel required reversal.

It is also worth noting that while the Supreme Court has made it clear that the right to counsel attaches at the first appearance before a magistrate, the decision in *Rothgery* left open the question of what amount of delay in appointing counsel would be prejudicial to the defendant:

“Our holding is narrow. We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery’s Sixth Amendment right, and have no occasion to consider what standards should apply in deciding this.”³⁰

This creates the anomalous situation where the Sixth Amendment right to counsel attaches at arraignment but where a delay in the appointment of counsel might not be held to be prejudicial to a defendant. Thus, even though there would be a total absence of counsel during a “critical stage” of the proceedings, the Court would not presume that the defendant was prejudiced.

The way to reconcile both the Supreme Court’s holding in *Rothgery* and the Court of Appeals holding in *Hurrell-Harring* is to recognize that in both cases defendants’ pre-trial liberty interests were being adjudicated in the absence of counsel. The Supreme Court acknowledged that during an arraignment a defendant is typically read the charges against him, is informed of various rights, including the right to counsel, and that a determination regarding conditions for pretrial release are made. The Court of Appeals referenced the fact that defendants’ “pretrial liberty interests were... regularly adjudicated.” In neither *Rothgery* nor *Hurrell-Harring* is there any mention of prejudice to the defendant at trial, such as was present when the Supreme Court first declared arraignments a critical stage of the proceedings in *Hamilton v. State of Alabama*, 368 U.S. 52 (1961). The focus is not on some disadvantage a defendant might suffer at trial due to the absence of counsel at arraignment but rather the fact that a defendant may have limits placed on their liberty at their arraignment well in advance of trial. If a defendant’s liberty was in no way restricted at their arraignment and if no rights at trial were waived during the arraignment

³⁰ *Rothgery v. Texas*, 554 U.S. 191, 223 (2008)

then it is difficult to see how a defendant was prejudiced in any meaningful way by the absence of counsel.³¹

From the defendant's perspective, there is certainly a benefit to having counsel present at arraignments even if the court does not intend on setting bail and they are in no danger of losing a defense at trial. Counsel can fully explain the charges to the defendant and assist the defendant with their understanding of the arraignment process. New York Criminal Procedure Law 170.10(4)(d) directs the Court to inform the defendant that he has a right to be prosecuted by an Information. Clearly, most defendants will have little or no idea what it is the court is referring to when they inform them of this right. Counsel's presence would certainly assist the defendant in simply understanding the proceedings. This type of assistance is more than simply hand-holding as a defendant who is confused about the purpose of the arraignment and who hears charges read aloud against them might very well attempt to respond to those allegations and unknowingly say something which could be prejudicial to their case. While the assistance of counsel at a defendant's arraignment would always be beneficial, it does not automatically follow that defense counsel's absence is, in every case, prejudicial.

What is automatic following the decision in *Hurrell-Harring* is that the setting of bail in the absence of counsel is prejudicial. The bright line rule that should be imposed is that the court should not be permitted to set bail at a defendant's arraignment in the absence of counsel. An analogy can be drawn to the Supreme Court's holding in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) where they ruled, absent a knowing and intelligent waiver of counsel, that no one could be imprisoned for any offense unless they were represented by counsel at trial. This "one day in jail" rule was created to clarify the Court's holding in *Gideon* regarding the right to counsel.

"Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the

³¹ Undoubtedly, counsel should be appointed as soon as possible so that they can begin the process of preparing a defense. Defense counsel's ability to conduct a defense could be compromised by a delay in appointment since such a delay could result in the loss of evidence, something which would prejudice a defendant.

seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.”³²

A rule that made the setting of bail in the absence of counsel a violation of a defendant’s Sixth Amendment right to counsel would be an easily enforceable, bright line rule for judges in New York State. It would allow arraignments to proceed in the absence of counsel, but in doing so, the judge would be relinquishing the authority to set bail on the defendant. The Court of Appeals interpretation of CPL 180.10 in *Hurrell-Harring* would seem to make counsel obligatory if the judge was considering setting bail since “nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant’s informed option, when matters affecting pretrial liberty or ability subsequently to defend against the charges are to be decided.”³³

In May of this year, almost a year after the decision in *Hurrell-Harring* Chief Judge Jonathan Lippman publicly stated that the failure to provide indigent defendants with an attorney at arraignment is a problem that “can no longer be tolerated,”³⁴ it was reported that defendants in New York State are still routinely unrepresented not only at their initial appearance in town and village courts, but in the vast majority of city courts in the 61 cities outside of New York City.³⁵ If counsel’s absence from a critical stage of the proceedings, such as a defendant’s arraignment, is tolerated it would “convert the appointment of counsel into a sham and nothing more than formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel.”³⁶ In effect, New York Courts are continuing to engage in just such a “sham” by appointing counsel in name only at a defendant’s arraignment and then setting bail in the absence of counsel.

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³² *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)

³³ *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 21 (2010)

³⁴ Thomas Kaplan, *State’s Chief Judge Pledges More Aid for Poor in Courts*, N.Y. Times, May 2, 2011

³⁵ John Caher, *Distance and Finances Hamper Goal of Lawyers at Arraignments*, N.Y.L.J., September 1, 2011

³⁶ *Avery v. Alabama*, 308 U.S. 444, 446 (1940)

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