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The Right to Counsel: Woman Becomes a Test Case

By [WILLIAM GLABERSON](#)

FORT EDWARD, N.Y.

SHE was poor and in trouble. He was the public defender appointed to represent her.

She was Kimberly Hurell-Harring, a nobody in the courts, a nursing home worker and a mother of two who had done something stupid. He was Patrick E. Barber, a lawyer with a silver stubble of a beard, paid by the county and state to help make the criminal justice system as fair to the poor as it is to the rich.

At his urging, she pleaded guilty and went to jail for a felony that turned out not to be a felony at all. “It seemed like he was on the D.A.’s side,” she said later.

He said recently that he had done what he could: “They had her dead to rights.”

Usually, such a minor case would go unnoticed; a little test of the constitutional right to a lawyer, results unknown. Instead it has made Mr. Barber an emblem of the problems of the state’s ramshackle system of providing lawyers for indigent defendants. On Tuesday, New York’s highest court is to consider [a class-action suit](#), filed by civil liberties lawyers in Ms. Hurell-Harring’s name, that seeks broad changes in the state’s frayed network of public defenders, who are routinely unmonitored and often overwhelmed. Her case, now being pored over by some of the state’s leading lawyers and judges, offers a window into the everyday corners of the legal system, where no one is usually watching.

It began two and a half years ago, in October 2007, in the Washington County Court here, not far from the Vermont border. In an area of the state where prisons are an industry, Ms. Hurell-Harring pleaded guilty to trying to sneak her inmate husband three-quarters of an ounce of [marijuana](#) in a condom she had hidden in her vagina.

From the courtroom benches, the few spectators saw a frightened woman who had never been in trouble before and a public defender who was not fighting for her. “She was sitting there looking stunned and confused,” said Daniel J. Freeman, a recent Yale Law School graduate who had been sent to observe by the [New York Civil Liberties Union](#). “I didn’t see him interacting much with her.”

The story of this one defendant and her public defender, assembled through interviews and court records, is about a woman who was barely making it before the legal system helped shove her off track.

And it is also about a small-town lawyer and part-time public servant sinking in personal and professional quicksand that few people knew about when he showed up to represent Kimberly Hurell-Harring. Least of all her.

The Client

She was 31 in the fall of 2007, a spirited woman with a big smile and 13 gold hoops in one ear. Pregnant at 14, she could have become lost. But she had earned her high school diploma and done something with the nursing assistant's certificate she carried proudly in her wallet.

She worked nights, sometimes two jobs, changing bedpans and offering solace. When Amos D. Harring was arrested for assault, she stuck by him. The police said he had shot someone.

She arrived in Washington County on Sept. 29 on the journey thousands of women make every year to the state's far reaches, where their men are locked away. She came twice a month or even more often, sometimes alone, sometimes with her two girls, ages 16 and 4.

This time, the three of them had driven together, 240 miles across the state from Rochester, where they had always lived. There was to be a family visit the next day at the hulking maximum-security prison, Great Meadow Correctional Facility, where Mr. Harring, who was 30, was doing eight years.

But that morning, she left the girls at the Budget Inn and went by herself to see him. When she got to the turreted wall that makes Great Meadow look like some 1940s-movie prison, two investigators hustled her off. They had recordings of the couple's phone conversations. They knew about the marijuana in the condom, a tactic that was more of a prison cliché than an investigative challenge.

Three-quarters of an ounce was not much. But any marijuana is contraband.

She was terrified as the investigators laid out their case, and confessed. "I am very, very, very sorry that I did this," she wrote, acknowledging, too, that it was not the first time. Her husband said later that it had all been his idea. "I have threatened and forced her to bring drugs into the facility," he wrote in a notarized statement a few days after her arrest.

There was a frantic call to an aunt in Rochester to pick up the girls. A local judge set bail at \$10,000, an impossible sum. Then she landed in Alpha Pod, the spartan women's dormitory at the county jail, where 22 women slept on metal bunks in a concrete-block room.

She worried. About her girls. About her mother, a stroke victim. About her future. She knew a felony conviction meant any nursing home job would be gone, along with her rent-subsidized apartment and a lot of other things.

She kept saying, to anyone who would listen, that she wanted a misdemeanor deal. She knew she had made a mistake, but, though she had not a day of legal training, it did not seem like a felony to her.

Some of the other women in Alpha Pod were hard cases, drug abusers and repeat petty criminals who warned her about public defenders. It is an article of jailhouse faith that poor people get what they pay for in lawyers: Nothing.

She said one of the women, named Becky, gave her a specific caution about Mr. Barber: "You got to be careful."

The Lawyer

Everybody around Fort Edward knew Pat Barber, a fixture at the courthouse and a stepfather of two whose family owned a local tavern. He had been here all his life except for college in western New York and law school at Syracuse.

So there was not much in the way of vetting when he put in a cost-conscious bid to become Washington County's chief public defender, a part-time position he added to his private practice of trial work, debt collections, wills and divorces. It was quickly settled. Beginning in 2006, he would get \$50,000 a year and some rent for the office he had shared with a law partner who had recently died. "We have to have a good reason not to take the low bid," said John A. Rymph, the chairman of the County Board of Supervisors.

There were plenty of good reasons, according to court records released last month. Mr. Barber, 49 at the time, had been reprimanded twice — in 2002 and 2005 — by the Committee on Professional Standards, the state group that disciplines lawyers, for neglecting cases. He had been struggling with depression for years. "On some occasions he had to leave the courtroom because of panic attacks," a report from his psychiatrist said. "He had daily drinks to cope."

But the people reviewing the bids in Washington County knew none of that. The reprimands were confidential, though officials at the professional standards committee say they could have been released to a potential employer if Mr. Barber had signed a waiver. If, that is, anyone in Washington County had known to ask him to sign one.

Told recently about Mr. Barber's history, Roger Wickes, the county attorney, said, "I would have assumed the board would have been concerned had they known about it."

By the time Ms. Hurell-Harring made her trip across the state, Mr. Barber's troubles were piling up.

He had put \$304,895.46 in checks for an auto-accident settlement into the file and never mailed them to his client, court records say. He kept telling another client he was finishing up some work related to her divorce. "I misled her as far as the progress of what was going on," he testified later.

In a third private-practice case, a man appealed his rape conviction, claiming that Mr. Barber had failed to do basic things at the trial like question some important witnesses. In time, a divided appeals court ruled that "no legitimate trial strategy existed."

The week in October that he went to court for Ms. Hurell-Harring, Mr. Barber was being pursued on yet another file full of trouble. At the request of county officials, John R. Winn, a local lawyer, had been asking questions about two estates Mr. Barber was supposed to be handling that had been so neglected that two properties had been sold for unpaid taxes.

Mr. Winn started calling Mr. Barber, and eventually he turned over a carton with all his records on the two estates — dividend checks, tax bills and bank statements, all in their original envelopes. "I looked, and I said, 'He's never opened anything,' " Mr. Winn said. One of the women had died six years earlier.

In a long interview this month, Mr. Barber blamed his depression. "You just develop this nausea fear of a file and you would do anything to stay away from it," he said.

He argued that his problems had not affected his public work. But his psychiatrist, Dr. Koock E. Jung, said in another disciplinary case against him, in 2009, that his symptoms included "breaking out sweating, dizziness and shortness of breath, which affected his law practice seriously, especially his public defender's job."

The Case

At the county jail, Ms. Hurell-Harring was growing frantic as she waited nearly a month for her sentencing. She called Mr. Barber's office every few days. Usually the secretary said he was busy. When they did talk, she said, Mr. Barber told her she had no options.

On Nov. 8, 2007, the [civil liberties union filed its class-action suit](#) in Albany, mentioning Ms. Hurell-Harring's contraband charge. A lawyer read it at the [New York State Defenders Association](#), an organization that provides training and expertise to defense lawyers.

The lawyer, Alfred A. O'Connor, had been working for years on the very issue in her case: whether that small amount of marijuana should be defined as dangerous prison contraband, which could make her smuggling effort a felony, or whether it was ordinary contraband, a misdemeanor that might mean no jail time at all and none of the consequences that come with felony convictions.

Mr. O'Connor started calling Mr. Barber, too. "Good news," he recalls saying when they spoke on Nov. 15, the day before Ms. Hurell-Harring's sentencing. He told Mr. Barber that the state's highest court was considering the contraband question. Defense lawyers had already laid out the very argument that could mean freedom for his client.

But Mr. Barber did not ask for a copy of the briefs. "There wasn't any enthusiasm," Mr. O'Connor said. Asked about this in the recent interview, Mr. Barber said had not wanted to bring up anything that could make prosecutors ask for a longer sentence.

The next day in court, Judge Kelly S. McKeighan noted that Ms. Hurell-Harring had admitted to the felony charge: promoting prison contraband in the first degree. Mr. Barber agreed, never mentioning that it might not be a felony at all.

"I just want to go home to my kids and my mother," Ms. Hurell-Harring told the judge. Instead, she went back to jail, serving four months before she was released for good behavior. She left Washington County on Jan. 28, 2008, a convicted felon facing five years of probation.

The Aftermath

At home on Rochester's northwest side, things were rough. Her \$12-an-hour job was gone. She and the girls moved into her mother's run-down house and survived on food stamps. The older one, Shaniqua, took a while to pick up where they left off.

"I promised her I would never leave her again," Ms. Hurell-Harring said.

In New York City, the civil liberties lawyers had asked Roberta A. Kaplan, a partner at one of the country's leading corporate firms, Paul, Weiss, Rifkind, Wharton & Garrison, to see what could be done for Ms. Hurell-Harring.

Working without a fee, Ms. Kaplan and her team of lawyers did the kind of work lawyers there do for big companies like Citigroup and Time Warner and well-known people like Gov. [David A. Paterson](#). They studied Mr. Barber's work. They started filing appeals on Ms. Hurell-Harring's behalf. One of them, Andrew J. Ehrlich, wondered: "How many other Kimberlys are there out there?" How many other Pat Barbers?

In June 2008, the State [Court of Appeals ruled in the case](#) Mr. O'Connor had worked on: that, indeed, a small amount of marijuana does not usually amount to dangerous prison contraband like a gun or a razor blade.

Pointing to that ruling, the Paul, Weiss lawyers persuaded a state appeals court in October 2009 to [overturn Ms. Hurell-Harring's conviction](#). "The act of which defendant is accused," the court said, "does not constitute a crime."

In Rochester, Ms. Hurell-Harring talked to her husband on the phone for the first time in two years. This month, she went back to work at a nursing home, for \$9.70 an hour. “I finally can try to get my life back,” she said a few weeks ago.

In Washington County, court officials last spring noticed something odd in a judge’s order in a paternity case Mr. Barber had handled in 2007. It seemed to be signed by a Family Court judge, but the court had no such document in its files.

In June, a suicidal Mr. Barber was briefly hospitalized. In September, he resigned as public defender. Five months later, he was arrested and charged with a felony: forging the court order. He was released without bail.

In February, he was disbarred. An appeals court said he had created fake documents to “deceive his clients into believing that he had undertaken the tasks for which he had been retained.”

This month, still awaiting his own day in court on a felony charge, Mr. Barber sat at his law office desk sorting through a bunch of files. Inside, there was no heat. Outside, there was a “for sale” sign.

“Obviously, I did some stupid things,” he said. “I even hurt a couple of people, which I am very regretful for.”

But he defended some of his work, including the case of Kimberly Hurell-Harring.

He was asked what he remembered of her in those weeks in 2007 when their paths crossed. “Honestly,” he said, “a lot of crying.”

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