

# CHITTENDEN COUNTY OFFICE OF THE PUBLIC DEFENDER

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July 18, 2017

To the Members of the Justice Oversight Committee:

As the staff attorneys of the Chittenden County Public Defender office, we are tasked daily with representing clients from Chittenden County and neighboring counties who are arrested, lodged, and are to be arraigned via video. It is our unequivocal position that video arraignments are unconstitutional, unfair, and systematically disadvantage countless indigent Vermonters each day.

With a normal, in-person arraignment and first appearance before a judge, our lodged clients are given a brief opportunity to speak with a lawyer in a private room at the courthouse. This initial appearance can be crucial as it can result in the individual's pretrial incarceration for lack of cash bail or due to conditions of release. It can also, less frequently, result in the dismissal of a case for lack of probable cause. As a result, this initial, confidential consultation is critical in discussing and explaining the nature of the charges, immigration issues, mental health and substance abuse issues, issues related to probable cause determinations, conditions of release requested by the State, and facts related to bail if the State has requested cash bail. With video arraignments, this does not occur in any meaningful way.

With a video arraignment, this critical and limited opportunity to consult with an attorney occurs with our clients on a video-phone in the open booking area of the jail standing a few feet away from correctional officers, medical staff, and other inmates and detainees who can hear the entirety of the clients' end of the phone conversation. To the right of the client are desks where the correctional officers sit. To the client's left are the other detainees in a cell that has a clear partition through which all of the detainees in the cell can hear the client who is speaking on the video-phone. Often behind the client, in view of defense counsel over the video screen, are other jail staff and inmates passing through, medical staff dispensing medication, inmates cleaning, and other activity that violates any semblance of confidentiality or privacy for the client on the video-phone.

With the advent of video arraignments our clients are no longer able to speak to an attorney in confidence prior to their arraignment. There is no doubt in our minds that information that would be pertinent and very important for us to obtain to effectively represent clients during their arraignments is regularly being omitted from these "confidential" conversations. The public placement of the video-phone chills the ability of our clients to have an open conversation with an attorney before their arraignment, and

in fact, in certain situations we may even advise clients *not* to discuss certain things. Due to video arraignments, our clients are no longer afforded confidential or effective assistance of counsel to which they are constitutionally entitled at their arraignment and first appearance before a judge

In addition to the utter lack of confidentiality, clients are not getting effective assistance of counsel simply because there is constant noise and interruption due to the activity going on around them at the jail. It is always extremely difficult, and sometimes literally impossible, for defense counsel to hear the client and/or the client to hear defense counsel over the video-phone due to the noise surrounding the client at the jail. This noise can be anything from correctional officers yelling back and forth to each other, to a detainee who is suffering from a mental health crisis and who is, literally, screaming in the background. Sometimes, the phone connection is also bad and we cannot hear each other.

As public defenders, we regularly represent clients with mental health issues, substance abuse issues, language barriers, diminished capacity, and other issues that are important for us to recognize as early in the case as possible, including at arraignment. Due to the video arraignment process, we are now hindered from exploring these issues either because we cannot ask the client about these issues over the video-phone due to the public nature of the client's location or because we cannot as easily identify the issues because we are speaking to the client over the video-phone rather than in-person.

Once we are before the judge, clients appear like disembodied heads over the video screen in the courtroom during their arraignments and frequently try to interject and say things in the courtroom that could potentially be to their detriment. Defense counsel has no easy ability to stop them or to quickly consult with them, which we would if we were standing right next to them.

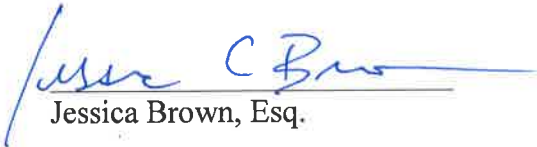
Under the new Rule 43, our clients cannot be arraigned via video without their consent. Under the judiciary's interpretation of the rule, rather than end video arraignments all together, detainees can now either "consent" to arraignment via video, or will be released and cited to return to court for arraignment on another day or, if held, will be brought to court for arraignment on another day. It is our position that Rule 5 and Rule 43 make clear that physical presence is now required at this stage of the proceeding. The Judiciary's implementation of this "choice" or "consent" policy via video not only violates the Criminal Rules and the Sixth Amendment, but is also not true consent in a constitutional sense as any "consent" under these conditions is clearly involuntary. If a detainee wants to exercise his right to appear in court, in person, for his arraignment but is told that he will have to come back another day – perhaps missing another day of work, having to arrange for childcare, having to pay for transportation, etc. – his "consent" to be arraigned by video cannot possibly be considered voluntary.

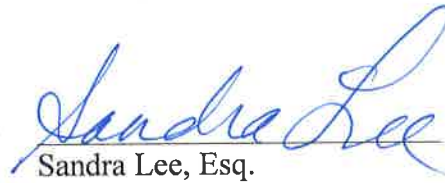
Of note, the vast majority of our clients *do* get released at arraignment which raises a related issue: most arrestees who are lodged and held for lack of bail, thus requiring a video arraignment in the first place, should never be lodged or held at all. This

occurs out of the practice of allowing court clerks to indiscriminately set temporary bail and conditions of release when defendants are arrested during non-business hours. Essentially, the vast majority of video lodgings should never have been lodged or held in the first place, and indeed, are released once an actual judge reviews their conditions and arraigns them.

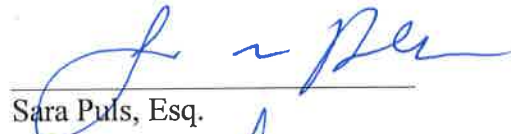
Regardless of whether most detainees do end up being released at the first appearance, the video arraignment process systematically denies our clients the consultation and effective assistance of counsel to which they are constitutionally entitled and this practice is in direct contradiction to Vermont Rules, Statutes, and the Vermont Constitution.

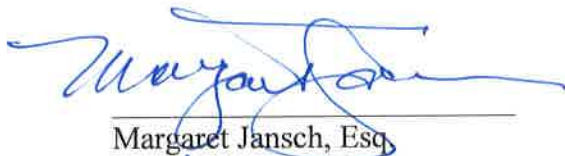
Sincerely,

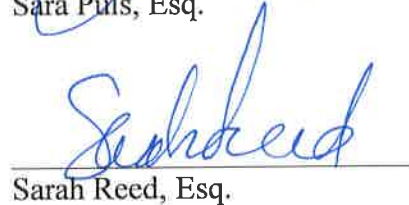
  
Jessica Brown, Esq.

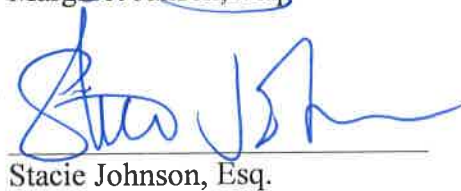
  
Sandra Lee, Esq.

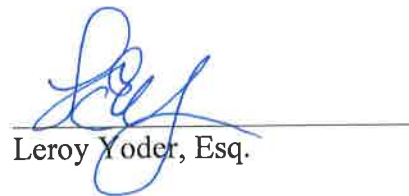
  
Bryan Dodge, Esq.

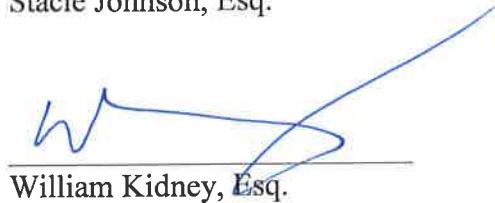
  
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