



LEGAL SERVICES

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Memo

To: Director Joseph Del Ciampo
From: Shanna O'Donnell
Date: February 7, 2019
Re: Proposed revision to Practice Book §37-1, item 5-9 on the 1/22/19 Rules Committee agenda.

You asked to me to review the proposed amendment to Practice Book § 37-1. This amendment was proposed by Judge Alexander and allows for a judge to waive the presence of a defendant at arraignment for good cause shown.

This revision may conflict with a defendant's right to be present at critical phases of a criminal proceeding. If this section of the Practice Book is amended as suggested, there are other Practice Book provisions and statutes that would also need to be amended to address conflicting language.

Federal Law Regarding the Right to Be Present

The Fifth Amendment of the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ..." and the Fourteenth Amendment specifies that "[n]o State ... shall deprive any person of life, liberty, or property, without due process of law..."

The courts have held that one element of this right to due process is the right to be present during certain proceedings, and is not limited to the defendant's rights under Sixth Amendment to confront witnesses. In *United States v. Gagnon*, the United States Supreme Court explained that "[t]he constitutional right to presence [...] is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." 470 U.S. 522, 526 (1985).

Other cases have made clear some of the situations in which this right to presence would apply, and they have further specified that this right is to a "personal presence." In *Rushen v. Spain*, the United States Supreme Court stated "the right to

personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.” 464 U.S. 114 (1983).

The types of proceedings that meet the definition of “critical stages” are enumerated by several different cases. Arraignment, which is at issue here, is generally one of those “critical stages.” While the United States Supreme Court at one time considered each state’s rules and procedures for arraignments separately to determine whether they would be “critical stages”, *see e.g. Hamilton v. Alabama*, 368 U.S. 52 (1961), more recent cases do not. For example, *Missouri v. Frye* includes arraignments in the list of “critical stages” with no further distinctions made. *Missouri v. Frye* states that “[c]ritical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” 566 U.S. 134 (2012).

State Law Regarding the Right to be Present

Connecticut’s Supreme Court has also held that arraignments are critical stages, given that arraignments provide the defendant with the opportunity to raise certain defenses, to enter a plea, and to be informed of their rights. “[T]he arraignment in this matter was a critical stage of the proceedings. Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail” *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 482–83 (2013).

As with the United States Supreme Court, the Connecticut Supreme Court has also held that the defendant has the right to be present at critical stages of criminal proceedings. *State v. Strich*, 99 Conn. App. 611, 622 (2007). This right is derived from the due process clause as well as the confrontation clause. “Although the constitutional right to be present is rooted to a large extent in the confrontation clause of the sixth amendment, courts have recognized that this right is protected by the due process clause in situations when the defendant is not actually confronting witnesses or against him.” *State v. Lopez*, 271 Conn. 724 (2004), citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 108 (1934).

Right to Counsel

It is unclear from the proposed amendment how the court would address the appointment of counsel without the defendant’s presence and input, but this change to procedure could also create issues under the Sixth Amendment of the United States Constitution, which provides for the right to the assistance of counsel in criminal prosecutions. In Judge Alexander’s proposal, she indicates that the court would be able to appoint counsel, but it is unclear how this would occur in the defendant’s absence. Generally, the defendant can ask for a public defender at their court date and they are

then provided the opportunity to fill out an application form so that the court can decide whether or not to appoint an attorney. This would also be the defendant's opportunity to let the court know if they are intending to retain private counsel, or if they want to proceed without representation.

Protective Orders

In Judge Alexander's proposal, she indicates that the court would be able to issue orders of protection if the defendant's presence were waived by the court under the proposed Section 37-1. It is my understanding that Family Services make inquiries regarding the factors for family violence when they meet with defendants waiting for arraignment, which are then used to help the court make a determination of whether or not to enter protective orders. If the defendant is not present for the arraignment, it is unclear if the defendant would be able to provide relevant information to Family Services before the court makes its decision. There would also need to be procedures to notify an absent defendant of the issuance of a protective order.

Related Rules

Practice Book § 44-7¹ provides that defendant has the right to be present at the arraignment. If the proposed amendment to Practice Book § 37-1 is adopted, § 44-7 would need to be amended as well.

Practice Book §§ 37-3 and 37-4 provide that the defendants shall be advised of their rights.

General Statutes § 54-1b² provides that at arraignment the defendant must be advised of certain rights. If the proposed amendment to Practice Book § 37-1 is adopted, the defendant would not necessarily be present to be advised of those rights. General Statutes § 54-1b also provides that the defendant should have the chance to consult with counsel, which would also not be possible if the defendant is not present.

¹ "The defendant has the right to be present at the arraignment, at the time of the plea, at evidentiary hearings, at the trial, and at the sentencing hearing, except as provided in Sections 44-7 through 44-10. Whenever present, the defendant shall be seated where he or she can effectively consult with counsel and can see and hear the proceedings. An incarcerated defendant or an incarcerated witness shall not be required during the course of a trial to appear in court in the distinctive attire of a prisoner or convict." Practice Book § 44-7.

² "Any accused, when he is arraigned before the Superior Court, shall be advised by a judge that he has a right to counsel, that he has a right to refuse to make any statement and that any statement he makes may be introduced in evidence against him. Each such person shall be allowed a reasonable opportunity to consult counsel." General Statutes § 54-1b.

Several statutes are predicated upon the defendant being "presented" before the court. There would need to be modifications to allow the defendant to be "presented in absentia" in order to address the conflicts created by the proposed amendment to § 37-1.

A few examples:

General Statutes § 54-1d provides that the defendant shall be presented for arraignment and specifies the court to which this presentment shall be made. If the proposed amendment to Practice Book § 37-1 is adopted, this statute would need to be amended to allow for situations where the defendant is not presented.

General Statutes § 54-1g provides that arrested persons should be presented before the court within certain time periods. If the proposed amendment to Practice Book § 37-1 is adopted, this statute would need to be amended to allow for situations where the defendant is not presented.