

STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS
MAY 16 2006

C1-84-2137

FILED

IMPLEMENTATION OF ITV PROTOCOL
AND THE MINNESOTA RULES OF CRIMINAL PROCEDURE

ORDER

In October 1999, the Court approved the statewide use of interactive television (“ITV”) in limited criminal matters on a pilot basis under the protocol previously approved by the Court for the Ninth Judicial District pilot project. The pilot protocol is set forth in Attachment A to this Order. In April 2006, the Judicial Council recommended the revised protocol set forth in Attachment B to this order (“proposed criminal ITV protocol”). Implementation of the proposed criminal ITV protocol potentially conflicts with provisions of the Minnesota Rules of Criminal Procedure, and avoidance of such conflicts is desirable. The Court is fully advised in the premises.

IT IS ORDERED:

1. The Supreme Court Advisory Committee on the Rules of Criminal Procedure shall review the proposed criminal ITV protocol set forth in Attachment B to this Order and shall recommend and comment upon draft rules implementing the protocol, if it is adopted by the Court, and shall report the recommended rule changes to the Court, along with any comments the committee may wish to make in regard to the protocol, on or before October 20, 2006.

2. All persons, including members of the Bench and Bar, desiring to submit written statements on the implementation of the criminal ITV protocol for consideration by the advisory committee on the rules of criminal procedure shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota 55155, on or before September 8, 2006.

DATED: May 16, 2006

BY THE COURT:



Hon. Russell A. Anderson
Chief Justice

ATTACHMENT A
STATE OF MINNESOTA, NINTH JUDICIAL DISTRICT

**PROTOCOL FOR THE USE OF ITV
FOR CRIMINAL MATTERS IN THE DISTRICT COURT**

The following provisions will apply only to criminal matters that are part of the ITV pilot program in the Ninth Judicial District, and will be used only when doing so will best serve the interests of justice:

1. General Provisions.

In specified criminal actions and proceedings, the Court may conduct hearings and admit oral testimony communicated to the Court on the record by live audio-visual means in order to:

- a. ensure timely judicial access where distance and insufficient judicial resources delay case processing
- b. provide judicial coverage in the event of an emergency due to illness of a judge, inclement weather or other impediment
- c. allow witness testimony from distant locations.

2. Definitions.

The following terms used throughout this protocol are defined as follows:

- a. ITV – interactive video teleconference
- b. terminal site – any location where ITV is used for any portion of a court proceeding
- c. venue county – the county where pleadings are filed and hearings are held under current court procedures

3. Approved Case Types.

Felony and Gross Misdemeanor

ITV may be used to conduct the following criminal hearings when it is not reasonably possible for a judge to handle the matters on-site:

- a. Rule 5 and Rule 6 Hearings

A defendant in custody may be brought before any judge of the district by ITV for a Rule 5 or Rule 6 hearing if no judge is available in the venue county.

- b. Rule 8 and Rule 13 Hearings

A defendant may be brought before any judge of the district by ITV for a Rule 8 or Rule 13 hearing if no judge is available in the venue county. No plea of guilty may be taken.

c. Rule 11 Hearings

A defendant may be brought before an available judge of the district by ITV for the purpose of waiving an omnibus hearing.

ITV may not be used to conduct a trial, sentencing, contested omnibus hearing or any other contested matter except as provided herein.

Misdemeanor

A defendant may be brought before any available judge of the district by ITV for any of the following:

- a. Arraignment
- b. Plea
- c. Sentencing

Trials, contested pretrial hearings or other contested hearings may not be conducted by ITV except as provided herein.

Petty Misdemeanor and Criminal Offenses Deemed Regulatory Offenses

A defendant may be brought before any available judge of the district by ITV for all hearings, including trials, related to petty misdemeanors and those criminal offenses deemed to be regulatory offenses.

4. Special Provisions.

a. Rights Advisory/Waiver Form

Each defendant will be given an ITV rights advisory/waiver form upon arrest and detention, or upon first appearance before a judge, whichever occurs first. When a hearing by ITV is scheduled and the defendant is to appear by summons, the rights advisory/waiver form will be mailed or otherwise delivered to the defendant together with the notice of hearing.

b. Request for Rehearing

When a defendant appears before the Court by ITV for a Rule 5 or Rule 6 hearing, the defendant may request to appear in person before a judge. The hearing will be held *de novo* within three business days of the ITV hearing.

c. Consents

In all proceedings other than a Rule 5 or Rule 6 hearing the defendant, defense attorney, prosecuting attorney and the presiding judge must consent to holding

the hearing by ITV. If the defendant's attorney is a public defender, the district's chief public defender or his or her designee must also consent.

d. Multi-county Violations

When a defendant is charged in more than one county with like or similar offenses, all of the pending charges from the various counties may be disposed of in a consolidated hearing held by ITV before any available judge of the district.

5. Standard Procedures.

In any proceeding conducted by ITV under this section:

- a. Parties who are entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant electing to appear by ITV shall give notice to the Court and to other parties of the terminal site location from which the appearance will be made.
- b. Witnesses may appear by ITV at all hearings, including contested matters.
- c. Regardless of the physical location of any party to the ITV hearings, any waiver, stipulation, motion, objection, decision, order or any other action taken by the Court or a party at an ITV hearing has the same effect as if done in person.
- d. All hearings will be conducted in a courtroom or other room reasonably accessible to the public.
- e. If the hearing requires a written record, a court reporter shall be in simultaneous voice communication with all ITV terminal sites, and shall make the appropriate verbatim record of the proceeding as if heard in person.
- f. The court administrator of the venue county will keep court minutes and maintain court records as if the proceeding were heard in person.
- g. All proceedings held by ITV will be governed by the Minnesota Rules of Criminal Procedure, the General Rules of Practice and state law, except as herein provided.
- h. Courtroom decorum during ITV hearings will conform to the extent possible to that required during traditional court proceedings. This may include the presence of one or more bailiffs at any ITV site.

6. Location of Participants.

During the ITV hearing:

- a. The defendant's attorney shall be present at the same terminal site from which the defendant appears, except in unusual or emergency circumstances, and then only if all parties agree on the record.
- b. The judge may be at any terminal site.
- c. The prosecutor may be at any terminal site.
- d. The court clerk shall be in the venue county unless otherwise authorized by the presiding judge.

- e. Witnesses may be located at any terminal site that will allow satisfactory video and audio reception at all other sites.

Adopted by the Ninth District Protocol Committee 11-23-98. Adopted by the Ninth District Bench 1-29-99.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF BELTRAMI

NINTH JUDICIAL DISTRICT

State of Minnesota,)
Plaintiff,)
-v-)
Defendant.)

WAIVER OF PERSONAL PRESENCE

Ct. File No.

PLEASE TAKE NOTICE THAT the undersigned Defendant, acknowledges his or her right to be personally present before the presiding Judge at all stages of these proceedings. I hereby waive that right for the present hearing, and agree to appear before the presiding Judge via interactive television. I further understand that I am entitled to an in-person hearing within three business days if conditions of release were addressed at the interactive television hearing.

I understand that this waiver of personal presence before the presiding Judge of this hearing may not be extended to any future hearing without my subsequent written consent.

Dated:

Signature of the Defendant

**ATTACHMENT B
STATE OF MINNESOTA**

**PROPOSED PROTOCOL FOR THE USE OF ITV
FOR CRIMINAL MATTERS IN THE DISTRICT COURT**

Preamble

Although in-person hearings in criminal cases are preferred, service to defendants, other parties and the public may be enhanced by the use of interactive video in specified criminal matters. The opportunity for more timely access to the court (e.g., for earlier appointment of counsel and review of release conditions), options for less costly appearances by witnesses, and more efficient use of judicial resources are some of the potential benefits.

1. **General Provisions.** In specified criminal actions and proceedings, the Court may conduct hearings and admit oral testimony communicated to the Court on the record by live audio-visual means.
2. **Definitions.** The following terms used throughout this protocol are defined as follows:
 - a. ITV – interactive video teleconference;
 - b. terminal site – any location where ITV is used for any portion of a court proceeding;
 - c. venue county – the county where pleadings are filed and hearings are held under current court procedures
3. **Approved Case Types.**
 - a. **Felony and Gross Misdemeanor.** ITV may be used to conduct the following criminal hearings:
 - i. **Rule 5 and Rule 6 Hearings.** A defendant in custody may be brought before any available judge of the district by ITV for a Rule 5 or Rule 6 hearing if no judge is available in the venue county.
 - ii. **Rule 8 and Rule 13 Hearings.** A defendant may be brought before any available judge of the district by ITV for a Rule 8 or Rule 13 hearing if no judge is available in the venue county.
 - iii. **Rule 11 Hearings.** A defendant may be brought before any available judge of the district by ITV for the purpose of waiving an omnibus hearing.
 - iv. **Restitution Hearings.** A defendant being held in another county may be brought before any available judge of the district by ITV for a restitution hearing.
 - v. **Other.** Any hearing where the court and parties agree

- b. **Misdemeanor.** A defendant may be brought before any available judge of the district by ITV for any of the following:
 - i. Arraignment;
 - ii. Plea;
 - iii. Sentencing;
 - iv. Restitution hearing;
 - v. Any hearing where the court and parties agree.
 - c. **Petty Misdemeanor and Criminal Offenses Deemed Regulatory Offenses.** A defendant may be brought before any available judge of the district by ITV for all hearings, including trials, related to petty misdemeanors and those criminal offenses deemed to be regulatory offenses or administrative offenses.
4. **Request for rehearing/in person hearings.**
- a. **Rule 5 or Rule 6 Hearing.** When a defendant appears before the Court by ITV for a Rule 5 or Rule 6 hearing, the defendant may request to appear in person before a judge. If the request is made, the hearing will be held within three business days of the ITV hearing and shall be deemed a continuance of the ITV hearing.
 - b. **Other Hearings.** In all proceedings other than a Rule 5 or Rule 6 hearing the defendant, defense attorney, or prosecuting attorney may submit an objection in writing on or before the time of the hearing to request to appear in person. The presiding judge shall determine whether the objection is granted.
 - c. **Multi-county Violations.** When a defendant has pending charges in more than one county within a district, any or all appearances authorized in this protocol may be heard by ITV by any judge of that district. Cases from other districts may be heard upon any necessary Supreme Court authorization.
5. **Standard Procedures.** In any proceeding conducted by ITV under this section:
- a. Parties who are entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant other than the court electing to appear by ITV at a terminal site other than the venue county shall give notice to the Court and to other parties of the terminal site location from which the appearance will be made. The court and counsel shall use reasonable efforts to confer with one another in scheduling ITV hearings or proceedings so as not to cause, delay or create scheduling conflicts. Unless otherwise ordered by the court, a participant electing to appear at a terminal site other than the venue county, or the party on whose behalf the participant is appearing, shall be responsible for any additional use or other fees over and above those normally incurred by the court in the venue county in connecting from one court site to another court site within the judicial district or collaboration area.

- b. Witnesses, victims and other interested persons may, subject to the constitutional rights of the defendant, testify by ITV at all hearings, including contested matters.
- c. Regardless of the physical location of any party to the ITV hearings, any waiver, stipulation, motion, objection, decision, order or any other action taken by the Court or a party at an ITV hearing has the same effect as if done in person.
- d. The court administrator of the venue county will keep court minutes and maintain court records as if the proceeding were heard in person.
- e. All proceedings held by ITV will be governed by the Minnesota Rules of Criminal Procedure, the General Rules of Practice and state law, except as herein provided.
- f. Courtroom decorum during ITV hearings will conform to the extent possible to that required during traditional court proceedings. This may include the presence of one or more bailiffs at any ITV site.
- g. The court shall insure that the defendant has adequate opportunity to speak privately with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the client in private.
- h. No recording shall be made of any ITV proceeding except the recording made as the official court record.

6. Location of Participants. During the ITV hearing:

- a. The defendant's attorney shall be present at the same terminal site from which the defendant appears, except in unusual or emergency circumstances, and then only if all parties agree on the record.
- b. Where the right to counsel applies, the use of ITV should not result in a situation where only the prosecutor or defense counsel is physically present before the judge unless all parties agree.
- c. Subject to part (b), the judge may be at any terminal site.
- d. Subject to part (b), the prosecutor may be at any terminal site.
- e. The court clerk shall be in the venue county unless otherwise authorized by the presiding judge.
- f. Witnesses, victims and other interested parties may be located at any terminal site that will allow satisfactory video and audio reception at all other sites.

7. Equipment and Room Standards.

- a. All hearings will be conducted in a courtroom or other room at the courthouse reasonably accessible to the public, either in person or via ITV. Restitution hearings

- may be conducted in a reasonably accessible room at a location determined by the presiding judge.
- b. If the hearing requires a written record, a court reporter shall be in simultaneous voice communication with all ITV terminal sites, and shall make the appropriate verbatim record of the proceeding as if heard in person.
 - c. To optimize picture clarity, the room should have diffused lighting (e.g., through louvered grids) and window shades to block external light. To optimize viewing, monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants. Cameras and microphones should be sufficient in number to allow video and audio coverage of all participants, prevent crowding of participants, facilitate security, and protect confidential communications. To minimize blurred video images, courts should use the highest affordable quality of cameras, processors, and transmission line speed, and the presiding judge shall control and minimize movement of participants.
 - d. It is important to ensure that the presiding judge, counsel, witnesses and other participants speak directly into their microphones. This is particularly important for softly spoken persons. The presiding judge must advise parties to move closer and/or speak directly into microphones if this problem becomes apparent.
 - e. Audio and visual must be synchronized and undistorted.

Drafting Committee Comments - 2006

The Preamble recognizes that the Confrontation Clause reflects a preference for face to face confrontation at criminal trials. *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990); *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999); *State v. Sewell*, 595 N.W.2d 207, 212 (Minn.Ct.App. 1999) review denied Aug. 25, 1999; see AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, STANDARD 6-1.8(a) (Third ed. 2000) ("trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present"). In certain criminal proceedings where the confrontation clause is either not implicated or is waived or otherwise satisfied, the use of interactive video teleconference (ITV) may be an appropriate means to administer justice fairly, effectively and efficiently.

The typical ITV scenario envisioned by this protocol is that of a judge being in one terminal site such as a courtroom in county A, and the parties at another terminal site, such as a courtroom in county B. This has been the experience of the Ninth Judicial District in its pilot project, where the process has allowed judges to promptly handle proceedings in a different courthouse where a resident judge is not otherwise available. The success of the pilot project is reported in NATIONAL CENTER FOR STATE COURTS, COURT SERVICES DIVISION, ASSESSMENT OF THE INTERACTIVE TELEVISION PROGRAM IN THE NINTH JUDICIAL DISTRICT OF MINNESOTA (Sept. 1999).

Other possible scenarios where ITV use is contemplated include situations where the judge,

lawyers and defendant are at one terminal site in a courtroom and a witness or other participant is located at another terminal site (e.g. a hospital or a terminal site in another jurisdiction). The frequency of ITV use in such situations will likely be dictated by confrontation clause analysis (discussed further, below). For reasons of fairness, section 6.b. of the protocol discourages use of ITV in situations where the judge and prosecutor are at one terminal site such as a courtroom, and the defendant and defense counsel are at another terminal site, such as a jail, unless all parties agree.

To help meet the constitutional requirement of a probable cause determination within 48 hours of a warrantless arrest, *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), section 3.a.i. of the protocol allows use of ITV for rule 5 and 6 hearings. These hearings encompass reading of charges, appointment of counsel, and establishing release conditions for all case types, and guilty/not guilty pleas in misdemeanor cases. Release conditions are the key because if the defendant is released, the 48-hour time limit for a probable cause determination does not apply. MINN.R.CRIM.P. 4.03, subd. 1.

Although a prior task force on ITV use recommended that there should be no ITV appearance without a meaningful, voluntary waiver of an in-person appearance by the defendant, *Final Report of the Minnesota Supreme Court Task Force on Closed Circuit Television*, Dec. 1991, at page 19 (S.Ct. file no. C0-91-1421), the vast majority of other jurisdictions known to use ITV in criminal matters (see summary of ITV use in other jurisdictions at end of these comments) currently authorize the use of ITV for rule 5 and 6 purposes without the defendant's prior consent. Section 4.a. of this protocol attempts to strike a balance between the need to meet constitutional probable cause requirements and a defendant's desire to have an in-person proceeding by allowing the defendant an automatic right to continue the rule 5 or 6 proceeding in-person, coupled with the requirement that the in-person portion of the hearing must be held within three days of the ITV proceeding.

The drafting committee is mindful of the concerns raised by public defenders of the potentially dehumanizing impact of the use of ITV particularly for minority and indigent defendants who are already vulnerable to biases inherent in our criminal justice system. In greater Minnesota, however, time, distance, and lack of judicial resources may pose a more serious threat to the fair administration of justice than in the metro area where time and distance are not an issue and racial disparity has been well documented. See, e.g., *Final Report, Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, May 1993, at pages 21-23. Thus the protocol merely authorizes, but does not mandate, the use of ITV. The extent to which the protocol is implemented in each judicial district is best left to the sound discretion of the trial bench.

Section 3.a.ii. also allows use of ITV for rule 8 and 13 hearings, which encompass reading of charges, pleas, and demand or waiver of omnibus hearing in felony and gross misdemeanor cases. Under section 4.b. of the protocol, any objection to use of ITV at a rule 8 or 13 hearing must be submitted in writing at or before the hearing, and the presiding judge has discretion to determine whether the objection will be sustained.

Section 3.a.iii. of the protocol authorizes waiver of omnibus hearings by ITV, and this waiver typically occurs at the rule 8 hearing. The omnibus hearing encompasses evidentiary issues, which may require testimony. Section 3.a.iv. authorizes use of ITV for such hearings if the court and parties agree.

Section 3.b. of the protocol permits wider use of ITV in misdemeanor and petty misdemeanor cases, as a defendant is authorized to appear by counsel in such cases under MINN.R.CRIM.P. 5.04, subd. 1, and there is no right to a jury trial in petty misdemeanors, which are not considered a crime. MINN.R.CRIM.P. 23.05-.06.

The requirement of notice of ITV sessions in section 5.a. is necessary in order to allow participants to object under section 4. This protocol presumes that the court as a scheduling matter will typically initiate use of ITV, with notice to the parties. Once a matter is scheduled as an ITV session, the protocol permits participants to elect the terminal site from which they will participate, subject to the limitations in section 6. Participants electing to appear at a terminal site other than the venue county must be aware that they, or the party on whose behalf they are appearing, will be responsible for any additional use or other fees over and above those normally incurred by the court in the venue county in connecting from one court site to another court site within the judicial district or the local telecommunications collaboration area. Thus, where a witness is to appear on behalf of the prosecution or defense from a terminal site other than the venue county, the prosecution or defense would be responsible for paying any additional costs required in connecting that terminal site to the venue county. If indigence of a party or participant is an issue in this regard, that matter is left to the sound discretion of the court.

Section 5.b. recognizes that witness testimony during an ITV session is subject to constitutional rights, such as a defendant's right to confront witnesses. In the typical ITV scenario envisioned by this protocol the witness would be physically present at the same site as the defendant. Where the witness is located at another site and the defendant objects, however, a confrontation analysis is required. Witness testimony by ITV in a criminal trial was upheld by the Minnesota Court of Appeals in *State v. Sewell*, 595 N.W.2d 207 (Minn.Ct.App. 1999) review denied Aug. 25, 1999. In this case the court found that ITV testimony of a witness who was under medical restriction not to travel because he was recovering from surgery for a broken neck was the functional equivalent of a videotaped deposition under R.Crim.P. 21. The court applied a confrontation clause analysis, indicating that once the unavailability of the witness and the necessity of the witnesses' testimony have been established, the reliability of the testimony is determined by looking at four features:

The salutary effects of face-to-face confrontation include:

1. the giving of testimony under oath;
2. the opportunity for cross examination;
3. the ability of the fact finder to observe demeanor evidence; and
4. the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.

Id. at 595 N.W.2d 212-213. It should be noted, however, that the United States Supreme Court rejected on confrontation grounds a proposal to modify FED.R.CRIM.P. 26 allowing witness testimony by ITV when: (1) the requesting party establishes compelling circumstances for ITV testimony; (2) appropriate safeguards for the ITV transmission are used; and (3) the witness is unavailable within the meaning of rule 804(a)(4)-(5) of the Federal Rules of Evidence. 71 CRIM. LAW REPORTER No. 5 at 133 (BNA 2002) (comments of Justice Scalia).

Witnesses testifying from another state or nation raise special confrontation clause concerns because an oath is only effective if the witness can be subjected to prosecution for perjury upon making a knowingly false statement. *See, e.g., Harrell v. State*, 709 So.2d 1364, 1371 (Fla. 1998) *cert. den.* 525 U.S. 903, 119 S.Ct. 236, 142 L.Ed.2d 194 (1998) (permitting foreign tourists assaulted and robbed while visiting Florida to testify from Argentina by satellite; court found that extradition treaty between the United States and Argentina subjected the witnesses to a potential perjury prosecution), cited with approval in *State v. Sewell, supra*, at 595 N.W.2d 212.

Reliability can also be affected by off-camera activity. The U.S. Navy-Marine Corps Court of Criminal Appeals decided in *U.S. v. Shabazz*, NMCM 98 00309 (Nov. 5, 1999), that the defendant's sixth amendment confrontation rights were violated when the witness was coached by an off-camera person.

The emphasis on decorum in section 5.f. recognizes that rules of decorum such as Minn.Gen.R.Prac. 2.01-2.03 encompasses not only acceptable standards of behavior and procedural formalities, but the physical dignity of the courtroom, including display of flags and appropriate attire. A terminal site that lacks the physical dignity of a courtroom should be avoided because it has the potential for fostering disrespect for the criminal justice process. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, STANDARD 6-1.8(d) (Third ed. 2000).

The requirement in section 5.g. that the defendant and the defendant's counsel must be provided adequate opportunity to speak privately is related to the requirement in section 6.a. that the defendant and defendant's attorney must be located at the same terminal site (except in rare cases and then only upon agreement of all parties) is necessary to ensure that the defendant's right to counsel are not infringed. An identical requirement has been imposed for use of ITV in commitment proceedings. Rule 14, Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act.

The prohibition on recording ITV sessions set forth in section 5.h. is identical to that applicable to telephone hearings under Minn.Gen.R.Prac. 115.09. This requirement is consistent with the directives of the Minnesota Supreme Court regarding use of cameras in the courtroom. *See In re Modification of Section 3A(10) of the Minnesota code of Judicial Conduct*, No. C4-87-697 (Minn.S.Ct. filed April Jan. 11, 1996) (order reinstating experimental program for audio and video coverage of trial court proceedings); *Order for Interactive Audio-Video Communications Experiment in First Judicial District-Mental Illness Commitment Proceedings*, No. C6-90-649 (Minn.S.Ct. filed April 5, 1995); *Order Re Interactive Audio-Video communications Pilot Program in Third Judicial District Mental Illness commitment Proceedings*, No. C6-90-649 (Minn.S.Ct. filed Jan. 29, 1999); *Order for Interactive Audio and Video Communications, Fourth Judicial District, Mental Health Division, Price and Jarvis Proceedings*, No. C6-90-649 (Minn.S.Ct. filed April 8, 1991). Courts will have to ensure that this prohibition is understood, particularly where an ITV session involves a terminal site that is not a courtroom under the control of the state courts.

Section 6.b., which discourages use of ITV where only the prosecutor or defense counsel is physically present before the judge unless all parties agree, is taken from AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE,

STANDARD 6-1.8(d) (Third ed. 2000). Commentary to ABA Standard 6-1.8(d) explains that the presence of only the prosecutor or the defense counsel physically with the judge raises fairness and perhaps even due process issues based on the appearance of undue influences. Thus, where feasible, the prosecutor and defense counsel should appear before the court in the same fashion. Moreover, both defense lawyers and prosecutors have also stressed to the drafting committee the importance of a “meaningful appearance” where the lawyers can discuss the case, the client is there, and often a resolution occurs. If the prosecutor and defense counsel are at different locations, however, resolution of cases may be delayed.

There have been several situations in the Ninth Judicial District pilot project where a defendant charged with a relatively minor type of offense has been eager to proceed with a rule 5 or 6 hearing via ITV rather than spend the better part of a weekend in jail until a judge is physically present in the county. The presence of a prosecutor, via ITV or otherwise, has also been rare in such cases, resulting in a judge-to-defendant only ITV proceeding, with the defendant ultimately being released rather than waiting in jail for the better part of a weekend. The same benefits may be possible even when a prosecutor and defense lawyer are involved at such an early stage, and thus section 6.b. of the protocol allows the parties to agree to use of ITV when they feel the advantages outweigh any perceived fairness concerns.

Section 7.a. recognizes that public access must be considered when arranging ITV sessions. The public should be permitted to attend the session from any courtroom terminal site where one or more of the participants are physically present. The protocol recognizes that there may be situations where one terminal site is not physically suitable for live public presence, and section 7.a. requires public access to that site via ITV in some other room that is reasonably accessible to the public. *See, e.g., In Re: Detention Center Arraignments, Washington County* (Minn.S.Ct. April 26, 1996) (order permitting temporary use of ITV from detention center during court facility remodeling; judge, attorneys, and defendant present in arraignment room; family members victims, advocates, probation officers, and others permitted to view proceedings via ITV from another room in detention facility and then brought to arraignment room to provide information or testimony in presence of judge and defendant if necessary).

Sections 7c-7e of the protocol are based on the collective experience of Minnesota courts and agencies that have implemented ITV. Presiding judges may also want to alert participants to the very slight time delay that may occur between questions and answers during an ITV session.

Use of ITV in Criminal Matters in Other Jurisdictions

ALASKA.R.CRIM.P. 38.2(b) (in custody defendants shall appear by ITV in traffic and misdemeanor cases for arraignment, pleas, non-evidentiary bail reviews, and, with defendant's consent, sentencing; in felony cases for initial appearance hearings, non-evidentiary bail reviews, and not guilty plea arraignments, unless otherwise ordered for cause; in all cases court may order in person hearing upon finding that defendant's rights would be prejudiced by use of ITV).

ARIZ. R. CRIM. P. 1.6 (at court's discretion ITV can be used in initial appearance and not guilty arraignments, for other ITV use written stipulation of parties including that defendant knowingly, voluntarily and intelligently agrees to appear; no ITV use in trial, evidentiary hearing, probation revocation hearing, or felony sentencing).

ARK. reports that there is no specific authority for the use of ITV (in absence of the defendant's consent) but some courts may use it for first appearance, plea and arraignment and other such pretrial/preliminary hearings. Email from John Millar, attorney, Administrative Office of the Courts, to Devin Hallin, Office Assistant, State Court Administrator's Office (Nov. 2005). Little Rock Municipal Court uses ITV in bail review proceedings if defense attorney consents. Telephone interview with Mike Kindle, Little Rock Municipal Court Probation (Jan. 16, 2001). ARK. CODE § 16-43-4004, which deals with closed circuit testimony in criminal cases where children 12 and under are involved

CAL. PENAL CODE § 977, 977.1, 977.4 (if defendant agrees, may appear by ITV in misdemeanor and felony for initial appearance, arraignment, and plea, but in domestic violence cases court may order appearance for service of process; if incarcerated in state, county, or local facility, initial appearances and arraignments may be conducted by ITV without defendant's consent).

COLO.R.CRIM.P. 43(e) (ITV may be used for first appearance for purpose of advisement and setting of bail, further appearances for purposes of filing charges or setting preliminary hearing, and unless defendant objects, hearings to modify bail).

CONN. reports that currently there is no use of video technology in criminal cases, although it is used in habeas corpus proceedings. Email from Larry D'Orsi, Deputy Director, Criminal Courts Operation, to ITV Subcommittee staff Mike Johnson (Jan. 2, 2001).

DEL. CT. COMMON PLEAS R.CRIM.P. 10(b) (closed circuit television may be used for arraignments); 43(c)(6) (for Title 21 offense, other traffic offense, a class B or unclassified misdemeanor or a violation, with the consent and waiver of the defendant's appearance, the Court may permit in custody arraignment and/or plea by video phone and impose sentence. DEL. JUSTICE OF PEACE CT. R.CRIM.P 4 (ITV may be used for issuance of warrant).

FLA.R.CRIM.P. 3.130, 3.131, 3.160, and 2.071 (ITV may be used in discretion of court for first appearance and arraignment; bail modifications in felony matters must be in-person; county and circuit judges may take testimony by ITV if defendant makes informed waiver of any confrontational rights that may be abridged by use of ITV).

GA. CODE ANN. § 17-4-47 (video conference may be used to conduct hearings relating to arrest warrant applications and issuance of an initial bond connected with an offense for which an arrest warrant was issued).

HAWAII R. PENAL PROC. 10, 43, (allows use of video teleconferencing for arraignment if defendant waives right to be present); HAWAII R. EVID. 616 (allows use of closed circuit video for testimony of child in any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the time of the testimony)

IDAHO R.CRIM.P. 43.1 (electronic audio visual devices may be used in the discretion of the district judge or magistrate for a first or subsequent appearance, bail hearing, arraignment and plea in a misdemeanor case, or arraignment and plea of not guilty in a felony case).

INDIANA ADMIN. R. 14 (allows use of video telecommunications for: initial hearings including any probable cause hearing; determination of indigence and assignment of counsel; amount and conditions of bail; setting of omnibus date; pre-trial conferences; taking of a plea of guilty to a misdemeanor charge; sentencing hearings when the defendant has given a written waiver of his or her right to be present in person and the prosecution has consented; with the written consent of the parties, post-conviction hearings; and any other hearing or proceeding in which the parties waive their rights of appearance).

KAN. CRIM. PROC. CODE §§ 22-2802 (11); 22-3205 (b); 22-3208 (7); 22-3717 (j); 38-1632 (g)(allows ITV use in discretion of court for review of release conditions, arraignment, motion hearings, parole board proceedings; juvenile detention hearings, and juvenile pre-trial hearings; adult defendants must be informed of the right to be personally present in the courtroom during these proceedings and exercising their right to be present shall in no way prejudice the defendant).

KENT. *Commonwealth of Kentucky v. Ingram* at 46 S.W.3d 569 (Ky. 2001) (allows use of ITV for arraignments, and consent of defendant is not required). ITV also used for testimony by chemists from the six state crime labs. Email from Sarah Dent, Administrative Office of the Courts, to ITV Subcommittee staff Mike Johnson (Jan. 11, 2001).

LA. R. FOURTH JUD. DIST. XXXI (Ouachita Parish; appearance before a judge under C.Cr.P. Art. 2300.1, and arraignment under C.Cr.P. Art 551, may be either in person or by simultaneous transmission through audio-video electronic equipment).

MAINE R.CRIM.P. 5 (initial appearance by ITV in the discretion of the court).

MASS. reports that ITV is used for arraignments, criminal complaint hearings, pre-trial conferences, hearings to order psychological exams, and probation violation hearings. , There are no statutes that permit use of video conferencing. It is left to the discretion of the local courts, some of which require a waiver from the defendant and defense attorney. E-mail from Theresa Gillis, Court Program Manager of Video Conferencing, Administrative Office of the Trial Court of Massachusetts, to Devin Hallin, Office Assistant, State Court Administrator's Office(Nov. 2005); .Email from Bill Letendre, Court Program Manager, Administrative office of the Trial Court, to ITV Subcommittee staff Mike Johnson (Jan. 2, 2001); MASSACHUSETTS TRIAL COURT ADMIN. OFFICE OF THE TRIAL COURT, PLANNING AND DEVELOPMENT DEPT., VIDEO CONFERENCING JULY - SEPTEMBER 2000 (2000).

MICH. ADMIN. ORDER 2000-3 (July 18, 2000; file no. 89-44) (State Court Administrator authorized to approve the use of two-way interactive video technology between a courtroom and a prison, jail, or other place of detention for: initial arraignments on the warrant, arraignments on the information, pretrials, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations; Model Local Administrative Order 13 provides that local Judge/Magistrate has the sole discretion to terminate or suspend an interactive video proceeding once initiated and to require that the defendant be brought physically before the court); *compare* MICH. COMP. LAWS § 767.37a (unless the defendant requests physical presence before the court, allows use of 2-way closed circuit television for initial criminal arraignments and the setting of bail between a court facility and a prison, jail, or other place where a person is imprisoned or detained; does not prohibit use of 2-way closed circuit television for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use).

MO. REV. STAT. § 561.031 (for persons held in custody, personal appearance may be made by means of two-way audio-visual communication for: first appearance before an associate circuit judge on a criminal complaint; waiver of preliminary hearing; arraignment on an information or indictment where a plea of not guilty is entered; arraignment on an information or indictment where a plea of guilty is entered upon waiver of any right such person might have to be physically present; any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses; sentencing after conviction at trial upon waiver of any right such person might have to be physically present; sentencing after entry of a plea of guilty; and other appearances via closed circuit television upon waiver of any right such person held in custody or confinement might have to be physically present).

MONT. CODE ANN. §§ 46-7-101 (initial appearance by ITV in court's discretion); 46-9-201 (bail by ITV in court's discretion); 46-9-206 (bail by ITV in court's discretion); 46-12-201 (arraignment by ITV in court's discretion); 46-12-211 (plea agreement disclosure by ITV if no party objects); 46-16-105 (guilty plea by ITV if no party objects and court agrees); 46-17-203 (misdemeanor guilty plea if no party objects and judge agrees); 46-18-102 (render judgment and sentencing by ITV if no party objects and court agrees); 46-18-115 (sentencing by ITV if no party objects and court agrees).

NEB. is currently developing rules for ITV use . E-mail from Janice Walker, Nebraska State Courts to Sue Dosal, State Court Administrator (Nov. 2005).

NEVADA reports that Clark County (Las Vegas area) Justice Center uses ITV routinely for arraignments without the consent of the defendant. (Source: Nov. 2005 Survey Response). Statutes also authorize ITV use in preliminary examinations and grand jury proceedings if the witness is 500 miles away or has a medical condition preventing attendance, NEV. REV. STAT. §§ 171.1975, 172.138 (2005), and out of state witnesses may testify by ITV in child support matters. NEV. REV. STAT. §§ 125A.285, 130.316, 425.3832 (2005).

N.J. Mun. Ct. R 7:8-7(a) (authorizes appearance of defendant by ITV as approved by the Administrative Office of the Courts); N.J. reports that ITV may be used for bail review/arraignment proceedings with the defendant's consent. (Nov. 2005 Survey Response).

N.M. R. CRIM. P. 5-303(H) (two-way audio-visual communication may be used for arraignment or first appearance if the defendant and the defendant's counsel are together in one room, the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public, and no plea is entered except a plea of not guilty).

N.C. GEN. STAT. §§ 15A-532 (Any proceeding to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission; upon motion of the defendant, the court may not use an audio and video transmission); 15A-941 (arraignment in a noncapital case may be conducted by an audio and video transmission).

N.D. SUP. CT. ADMIN. R. 52 (2005) (allows court wide use of ITV for all hearings, conferences, and other proceedings in criminal cases; only limits are: defendant may not plead guilty or be sentenced via ITV unless the parties consent; and a witness may not testify by ITV unless defendant knowingly and voluntarily waives his or her right to have the witness testify in person; in a guilty plea proceeding, the court may not allow the defendant's attorney to participate from a site separate from the defendant unless the court: finds that the attorney's participation from the separate site is necessary; confirms on the record that the defendant has knowingly and voluntarily consented to the attorney's participation from a separate site; and allows confidential attorney-client communication, if requested.).

OHIO R. CRIM. P. 10(b) (arraignment by ITV with consent of parties if not guilty plea entered); *State v. Phillips*, 74 Ohio St. 3d 72, 656 N.E.2d 643 (1995) (rule does not violate due process).

ORE. UNIF. TR. CT. R. 4.080 (incorporating sections 4-12 of 2005 Enrolled House Bill 2282) (court may direct defendant to appear by simultaneous electronic transmission –includes ITV--- in bail review/arraignment proceedings, to enter a guilty plea, for in-custody inmates, for judgment/sentencing, and for probation violations; requires private communication with counsel and ability of judge and defendant to see each other; but a person may not appear before the jury by e-appearance). Survey Response also noted that Oregon courts also use ITV for oral and sign language interpretation in court proceedings.

42 PA. CONS. STAT. §§ 8703 (allows court discretion to hold arraignment by two-way electronic audio-video communication); 5985 (allows a child victim to testify by closed circuit television). PA. R. CRIM. P. 118 (may use ITV for post-sentence motions, bail hearings, extradition hearings, and Gagnon I hearings, but not for other preliminary hearings, trials, sentencing, revocation, or hearings where defendant has a constitutional or statutory right to be physically present), 540 (court has discretion to hold preliminary arraignments by ITV) and 571 (court has discretion to hold arraignments by ITV).

RHODE IS. R. CRIM. P. 5 (initial appearance by ITV in discretion of court when state opposes bail); 7 (waiver of indictment by ITV with leave of court and consent fo prosecutor); 10 (arraignment by ITV in discretion of court); may be used in bail review/arraignment proceedings. Survey response also indicated that ITV may also be used in determination of attorney, probation review and motion to withdraw.

SOUTH CAROLINA: ITV may be used in bail review/arraignment proceedings. The consent of the defendant is required, and the defendant may “opt out.” The consent of the prosecutor is not

required. It may also be used in the following proceedings: non-capital initial appearances; bond hearings; preliminary hearings; contested motions; and, acceptance of guilty pleas and sentencing (for offenses initially within court of limited jurisdiction: initial appearances, bond hearings, probation revocations, contested motions, and acceptance of guilty pleas and sentencing in our court of general jurisdiction.) *Legal Authority:* Authority created in courts of limited jurisdiction statewide by Order dated August 2003. Authority created in courts of general jurisdiction by Order dated June 2005.

SO.DAK. 2005 survey response indicates that ITV may be used in bail review/arraignment proceedings. The consent of the defendant is **not** required. The defendant may “opt out.” The consent of the prosecutor is **not** required. *Legal Authority:* No SD statutes or court rules specifically address this, but legal research found it permissible under existing statutes and caselaw. reports one judge using ITV on a regular basis on criminal arraignments based on a mutual consent. Email from D.J. Hanson, State Court Administrator, to ITV Subcommittee staff Mike Johnson (Jan. 10. 2001).

TENN. R. CRIM. P. 43(d), (e) (initial appearance by ITV in court’s discretion if the use promotes the purposes of the rules, allows the judge and defendant to communicate with and view each other simultaneously, permits discussions to be heard by the public, and does not involve the defendant's entry of a guilty plea; same applies to an arraignment, in the absence of objection by the defendant).

TEX. CRIM. PROC. CODE ANN. Tit. 1, Chap. 27, Art. 27.18 (Vernon 2005) (Plea or Waiver of Rights by ITV with consent of the defendant and prosecutor); TEX. CRIM. PROC. ANN. Tit 1, Chap. 15, Art 15.17 (Vernon 2005) (initial appearance).

UTAH CODE JUD. ADMIN. Rule 4-106 (In the judge's discretion, any hearing may be conducted using telephone or video conferencing; applicable to all courts of record and not of record).

VERMONT ADMIN. ORDER NO. 38. (2005) (authorizes use in single county at judge’s discretion for in-custody proceedings). Survey response reports limited use for bail review/arraignments and for plea bargains in simple cases.

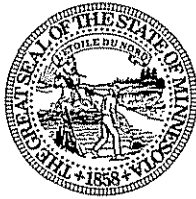
VIR. CODE ANN. §§ 19.2-3.1 (any appearance required or permitted before a magistrate, intake officer or, prior to trial, before a judge, may be by use of two-way electronic video and audio communication); 19.2-82 (probable cause determination may be made using two-way electronic video and audio communication).

WASH. SUP. CT. CRIM. R. 3.4 (Preliminary appearances, arraignments, bail hearings, and trial settings may be conducted by video conference; any party may request an in-person hearing, which may in the trial court judge's discretion be granted; other trial court proceedings may be conducted by video conference only by agreement of the parties and upon the approval of the trial court judge pursuant to local court rule; In interpreted proceedings, the interpreter must be located next to the defendant); numerous local rules repeat the same, see, e.g., Wash. Crim. R. Courts of Lim. Juris. 3.4 (same). Survey response indicates that six of 31 districts use ITV in criminal cases for bail review/arraignments.

WIS. STAT. §§ 967.08-.09; 970.01; 971.04 (2005) (allows use of ITV for initial appearance if pleading not guilty, waiver of preliminary exams, waiver of competency proceeding, waiver of

jury trial, non-evidentiary bail and other release hearings, and non-evidentiary motions for severance, testing physical evidence, testing sufficiency of affidavits for arrest or search warrants, *in limine*, and to postpone; defendant may appear personally for good cause shown; physical presence otherwise required at arraignment, trial, during voir dire, any evidentiary hearing, any view by the jury, when the jury returns its verdict, and at the pronouncement of judgment and the imposition of sentence, except it may be excused in misdemeanor cases).

FED. R. CRIM. P. 5(f), 10(b), 43(a) (2005) allow use of ITV for initial appearances and arraignments if the defendant consents.



OFFICE OF
APPELLATE COURTS

SEP 6 2006

FILED

STATE OF MINNESOTA
STATE PUBLIC DEFENDER

John M. Stuart
State Public Defender

331 Second Avenue South
Suite 900
Minneapolis, MN 55401

(612) 349-2565
FAX (612) 349-2568
john.stuart@pubdef.state.mn.us

September 5, 2006

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St Paul, MN 55155

Dear Mr. Grittner:

RE: ITV Proposed Protocol Implementation

I am writing to request that the Rules of Criminal Procedure Advisory Committee decline to develop rules to implement the proposed protocol at this time, because there has not been an opportunity for concerned persons to be heard on the underlying question of whether this proposed protocol should be adopted.

In December of 2000, when a previous proposed ITV protocol was being discussed, I and the District Chief Public Defenders wrote to Supreme Court Senior Staff Attorney Michael B. Johnson (copy attached) raising six serious concerns about the proposal. These included:

- lack of inclusion of prosecutors and defenders from the previous Supreme Court Task Force on Closed Circuit Television (1991) in the discussion;
- omission of the safeguards that were developed for the Ninth District Pilot Project;
- failure to consider ITV's potential to exacerbate economic class and race divisions in the justice system.

The 1999-2000 proposal lay dormant for five and a half years.

Then the 2006 Proposed Protocol was issued. This Proposed Protocol accentuates the worst features of its predecessor:

- it was developed with no public hearing, no testimony, no solicitation of comments—overall a less-inclusive process than the flawed process that occurred in 1999;
- it totally abolishes the Ninth District Pilot Project safeguards, while at the same time greatly expanding the permissible use of ITV; and
- it minimizes concerns expressed about race and class, failing to take up the suggestion made in the December, 2000, letter to Mr. Johnson, recommending consideration of the Supreme Court's case-and-race database.

These concerns are the basis of the (attached) May 4, 2006, "Minnesota Public Defenders' Policy on ITV in Adult Criminal Cases," adopted by myself, the Deputy State Public Defender, the District Chief Public Defenders, and the Minnesota State Board of Public Defense.

In the past, these concerns have been widely shared in the judicial branch. For example, in writing to Chief Judge Richard Spicer in October, 2004 (attached--"2005" in the heading is an error) former Chief Justice Kathleen Blatz cites them as reasons to deny a First District proposal that would have deviated from the Ninth District Pilot Project. She refers to a Judicial Branch committee that "may yet bring forth a revised protocol **for review.**" (emphasis added.)

Now we have the "revised protocol," but we have not had the "review." It is not time yet for procedures for the implementation of the proposal. I respectfully submit that the Advisory Committee on the Rules of Criminal Procedure, with its shared core values of due process, notice, and the opportunity to be heard, should send the Proposed Protocol back to the Judicial Council for broader consideration which includes the communities that work in, and those that deeply care about, the future of Minnesota's courts.

Sincerely,



John Stuart (enclosed—12 copies with attachments.)

December 5, 2000

Michael B. Johnson, Senior Staff Attorney
The Supreme Court of Minnesota
Court Services Division
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Proposed Protocol for Use of ITV in Criminal Cases

Dear Mr. Johnson:

Thank you for the opportunity to respond to the proposed protocol. I am writing on behalf of myself and all the District Chief Public Defenders around the state. As you know, collectively we handle about 200,000 cases a year, and believe ourselves to be the largest user of the District Courts in Minnesota.

We see that your ITV Subcommittee included neither defenders nor prosecutors, which puts us in the position of having to raise some major concerns after a lot of time and energy have already been invested. Both prosecutors and public defenders were members of the Minnesota Supreme Court Task Force on Closed Circuit Television, in 1991. None of the members of that Task Force were on the Subcommittee which issued the Proposed Protocol. Nor was the 1991 Task Force Final Report cited in the Proposed Protocol or its notes or comments. We acknowledge that the subcommittee had the best of intentions, and certainly did not plan to impose disadvantages on our clients in jail. Nevertheless, we have some grave concerns about the proposal.

I. BAIL HEARINGS SHOULD BE HELD WITH ALL PARTIES IN OPEN COURT.

As one of Minnesota's defenders has already written you, ". . . it is absolutely vital for a person who is accused of a crime to be able to look the judge in the eye and explain why he or she should not be held in jail." In addition to the defendant looking the judge in the eye, our clients often have family members, pastors, employers, treatment providers, AA sponsors, or others willing to come to court to vouch for them. To put the client and public defender on camera in the jail, while the judge, prosecutor, and victims' advocate are in the courtroom together, greatly reduces our ability to advocate effectively for the clients' release. It also detracts from the ability of loved ones and other concerned persons to support our clients.

II. SUBSEQUENT HEARINGS SHOULD NOT DIVIDE CRIMINAL DEFENDANTS BY ECONOMIC CLASS.

In the late 1960's the Kerner Commission reported that we were moving, as a society, to two groups, "separate but unequal." We are concerned that the judges will begin to see defendants in two classes: middle-class defendants, with bail posted, in court; and indigent defendants, in jail with their lawyers, on the screen.

On an unconscious level, it would seem natural to favor the "live" clients. One defender wrote that: "[r]educing our clients to a little image on a TV monitor hides their human dignity and makes them more vulnerable than they already are to the injustices which easily and insidiously accrue to disenfranchised classes of persons."

This is the same conclusion reached by the Task Force Minority Report signers in 1991: "Closed-circuit hearings . . . strip the defendant of his or her humanity. The judge sees an image on a screen; there is no eye contact, no body language, no real person." (Final Report, December 1991, p. 13.)

III. CLIENTS OF COLOR ALREADY ARE AT A DISADVANTAGE IN BAIL STATUS.

The Supreme Court Race Bias Task Force Report (May, 1993) devoted eight pages to bail. Among their observations:

- 86% of the metro judges under the age of 50 “expressed the opinion that minority defendant were more likely to remain in custody prior to trial.” (p. 20)
- After controlling for case type, white defendants were significantly more likely to get a summons rather than an arrest warrant, than African Americans. (p. 21)
- African Americans were 200 to 300% more likely to be detained prior to trial in Hennepin County, for every felony case type, than white defendants. (p. 22)
- A 1986 study showed NBR recommendations by race as follows: Whites, 33%; African Americans, 21%; Native Americans, 8%; Hispanics, 13%. (p. 25)

Seven years after the Report, the Human Rights Watch has found that racial disproportionality in incarceration in Minnesota has actually increased. Read the report at <http://www.hrw.org/reports/2000/usa/>. We know, from long experience, that custody status affects the ability of a client to assist in preparing a defense, or becoming involved in an alternative sentence. So, any proposal which might affect the setting of bail needs the greatest possible care and scrutiny.

IV. THE PROPOSED PROTOCOL OMITTS SAFEGUARDS THAT THE PILOT PROJECTS AND 1991 STANDARDS INCLUDED.

The Ninth District Pilot Project, in particular, avoided the problems of jail-cell-to-courtroom TV. ITV was used, in limited cases, courtroom-to-courtroom. More importantly, during the Pilot Project, the District Chief Public Defender reviewed ITV hearing proposals on a case-by-case basis and had the power to insist on a “live” court appearance. The current proposal leaves out this feature. Instead we are put in the position of having to ask for

a hearing on what kind of hearing to have. And, during the wait to have the hearing on the type of hearing, the public defender client stays in jail.

This mandatory approach to ITV appearances is much different from that of the 1991 Supreme Court Task Force. That Task Force provided, in Standard 7, that there would be no ITV appearance without a meaningful, voluntary waiver of an in-person appearance by the defendant. (Final Report, December 1991, p. 19.) This is not to say that a waiver would solve the problems described here. The defendant, defense counsel, and, in public defender cases, the Chief Public Defender should be required to approve the use of ITV. Even with these safeguards, the 1991 Task Force produced a strong Minority Report stating that ITV would always be a dehumanizing force.

V. THE PROPOSED PROTOCOL WOULD SUBSTANTIALLY INCREASE OUR COSTS.

A. Public defenders might need to attend both ends of the ITV transmission.

We do not feel that the plan to have defenders in the jail, and everyone else in the courtroom, is satisfactory. For our clients, it does not further the goal of "public confidence in the courts." Perhaps the result would be that ITV cases would require two public defenders. This option was recognized in 1991 as one which would "shift costs onto the public defender system." (Final Report, December 1991, p. 18.)

B. Mixed calendars of "live" and ITV clients would be unmanageable.

Often we appear in calendars where some clients are in custody and some are not. Currently, they all come to the courtroom.

We know that some counties are preparing to use ITV in cases where the jail is just across the parking lot from the courthouse. We think the perceived resource savings in those situations are illusory because our staff will have to run back and forth, delaying the proceedings for everyone involved.

C. Most public defender office sites were chosen to be near the courthouse, not near the remote jail.

The sheriff would save transportation costs when, for example, ten defendants in Duluth appear on ITV from jail, which is several miles from the courthouse.

But when the costs of having ten public defenders drive to the jail from their downtown, near-the-courthouse offices, and back, are considered, the result may not be cost-effective for the taxpayers. Certainly there would be tremendous costs to our agency, which, so far, do not seem to have been taken into account. In particular, ITV would impose additional stress on part-time rural defenders, who already have been hit hard by rising costs and caseloads.

VI. ITV WOULD DECREASE "MEANINGFUL APPEARANCES" THAT LEAD TO THE RESOLUTION OF CASES.

As the state system of public defense has developed, we have constantly tried to get public defenders to court in early stages of a case. When prosecutors are there too, we often can have a "meaningful appearance;" that is, the litigants can discuss the case, the client is there, and often a resolution occurs.

This would not happen with ITV cases. The prosecutor would be in a different building. The formal requirements of a court appearance might be satisfied, but the bringing together of the parties who might conclude the matter is denied. Thus, while saving the cost of transporting the defendant, ITV could increase costs to the justice system as a whole, by delaying the resolution of cases.

VII. CONCLUSION:

In 1991, the Supreme Court Task Force on Closed Circuit Television recommended Standards to ensure that defendants' appearance on ITV would be voluntary, because of concerns like the ones raised here. Since then, technology has improved, but the underlying values which should govern this situation have not changed.

Courts exist, first, to bring people together to solve problems. If ITV makes it possible to keep the defendant's family away from her bail hearing, or to keep the prosecutor and public defender from resolving the case at first appearance,

Mr. Michael B. Johnson
December 5, 2000
Page 6

it is not an improvement. The formal requirements of a "court hearing" may be met by ITV, at the expense of the human element which gives it meaning.

People have confidence in court, second, because court stands for "Equal Justice Under Law." When people with the same legal situation are divided into two groups, the live and the electronic, because the economic status of one group allows for bail to be posted, the perceived legitimacy of the court suffers. The signers of the Minority Report in 1991 found that: "... closed circuit hearings will disparately impact minorities and indigents. Only those who cannot immediately post bail will be asked to forfeit their right to an open-court hearing." (Final Report, December, 1991, p. 15.)

This division of groups is especially to be avoided while Minnesota persists in giving harsher treatment to people of color. If an ITV protocol is to be developed, we suggest, at least wait until the Supreme Court has had a chance to analyze the criminal case race data which will begin to be collected January 1, 2001.

While it may be unrealistic to expect immediate solutions to all the issues in the Race Bias Task Force Report, at least we can expect the court system not to use ITV to create new racial disparities.

Meanwhile, we will be willing to be involved in discussions of ITV. Perhaps there has been some thought already on how to address our concerns. In any case, we would like to participate in trying to solve these problems. Please call if we can provide you with anything further. We certainly would like to be notified of any public hearings that are held regarding ITV.

Respectfully submitted,

John Stuart
State Public Defender

JS/pyj

Mr. Michael B. Johnson
December 5, 2000
Page 7

This letter has also been approved by the following:

Joe Carter, District Chief Public Defender, First Judicial District
Jim Hanks, District Chief Public Defender, Second Judicial District
Joseph Buettel, District Chief Public Defender, Third Judicial District
David Knutson, First Assistant Public Defender, Fourth Judicial District
Leonardo Castro, District Chief Public Defender, Fifth Judicial District
Fred Friedman, District Chief Public Defender, Sixth Judicial District
John Moosbrugger, District Chief Public Defender, Seventh Judicial District
Tim Johnson, District Chief Public Defender, Eighth Judicial District
Kris Kolar, District Chief Public Defender, Ninth Judicial District
Luke Stellflug, District Chief Public Defender, Tenth Judicial District
Michael Holland, President, Minnesota Public Defender Association

**Minnesota Public Defenders' Policy on ITV
in Adult Criminal Cases**

May 4, 2006

INTRODUCTION: These positions were adopted by the State Public Defender, Deputy State Public Defender, and the ten District Chief Public Defenders on May 3, 2006.

We represent the poorest people in the state, disproportionately people of color, in 170,000 cases every year in Minnesota's courts. We are the largest user of the court system in our state. We believe the purpose of the courts is to bring people together to achieve justice.

It follows that we believe that in almost every hearing in adult criminal court, proceedings should be conducted openly, with the parties, counsel, judge, witnesses, and the public physically in the same room. The substitution of televised images for the presence of any of these people dehumanizes the judicial process. It increases the gap between rich and poor. It diminishes the ability of the judge and the courtroom setting to express to parties, the importance and fairness of the proceedings. It diminishes trust and confidence in the courts.

There are circumstances where interactive television (ITV) can be beneficial. For example, sometimes no judge can be physically present in a county to release an accused person from custody in a timely manner. We believe these situations should be the exception, not the rule.

As technology develops, as counties construct remote jails, as the costs of transportation rise, pressures increase to use electronic substitutes for the open courtroom. We do not agree that these pressures should drive the justice system to give up solemn procedures and traditions developed over the course of centuries.

The Public Defenders of Minnesota oppose the use of ITV in adult criminal cases where:

- a judge is physically present in the venue county
- the case has progressed beyond the first appearance
- the client is required to be televised from jail
- the prosecutor is separate from the client and defense counsel
- rich and poor accused persons are treated differently
- the public is excluded from bail hearings
- costs are shifted to public defense
- a witness is available, as defined by law, and
- in any other instance where the client, lawyer, and district chief public defender do not consent.



THE SUPREME COURT OF MINNESOTA
MINNESOTA JUDICIAL CENTER
25 REV. DR. MARTIN LUTHER KING JR. BLVD.
SAINT PAUL, MINNESOTA 55155

CHAMBERS OF
KATHLEEN A. BLATZ
CHIEF JUSTICE

16511 206-3340

October 28, 2005

Honorable Richard G. Spicer, Chief Judge
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033

Dear Judge Spicer:

The First Judicial District has requested a 90-day pilot project using interactive audio-visual teleconferencing to conduct all Rule 5 and Rule 6 in-custody hearings in criminal matters. While most Dakota County parties are in agreement with the proposed protocol, the public defender's office is not enthusiastic about this project. It is concerned that the rights of the defendant may be infringed upon. In addition, as communicated to the Conference of Chief Judges, the state public defender's office has raised the following concerns:

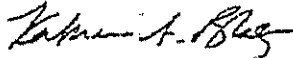
- a. Separating criminal justice into a "five-middle class" division and a "televised, in jail, poor people's" division, based on the ability to post bail. This division often correlates with race.
- b. Having "meaningful" or "productive" appearances where case resolution discussions can take place, which is much more difficult where everyone is in a different room watching a monitor. If an appearance is not going to be "meaningful," public defenders would prefer developing procedures to waive an appearance rather than televise it.
- c. Cost reductions to other participants (e.g., the sheriff) may be more than offset by additional costs for public defenders who may have to have staff in both locations (i.e., with the defendant and with the judge team.)

In addition to these concerns, the proposed project does not comply with the Ninth Judicial District Criminal ITV Protocol previously approved by this Court because it would allow use of ITV even when there is a resident judge available in the courthouse to preside over the hearings. The Court is aware that efforts to modify the Ninth Judicial District Criminal ITV Protocol were

Honorable Richard G. Spicer, Chief Judge
October 28, 2004
Page 2

met with resistance by the Advisory Committee on the Rules of Criminal Procedure, and that a subcommittee of the Judicial Branch Technology Planning Committee may yet bring forth a revised protocol for review. In light of this and the concerns above, at this time we are reluctant to go beyond the parameters of the approved Ninth Judicial District Criminal ITV Protocol, and must respectfully deny your request.

Very truly yours,



Kathleen A. Blatz

SEP 8 2006

FILED

MACDL

Minnesota Association of Criminal Defense Lawyers

September 8, 2006

John Brink *President*
Dan Guerrero *Vice President*
Michael McGlennen *Treasurer*
Robert Sicoli *Secretary*

Directors:
Carolyn Agin Schmidt
Manny Atwal
Jeffrey DeGree
Caroline Durham
John Hughes
Brockton Hunter
Kate Latimer
Sarah Aho MacGillis
Kelly Madden
Robert Malone
Mary F. Moriarty
Doug Olson
James Ostgard
Thomas Plunkett
Michael Samuelson
Pia Maria Sass
Faison Sessoms

Paula Brummel E D

Frederick Grittner
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Implementation of ITV Protocol and the
Minnesota Rules of Criminal Procedure
Case Number C1-84-2137

Dear Mr. Grittner:

I am writing on behalf of the Minnesota Association of Criminal Defense Lawyers in response to the Minnesota Supreme Court's May 16, 2006 request for comments concerning the implementation of the Criminal ITV Protocol and the Court's request that the Advisory Committee on the Rules of Criminal Procedure "recommend and comment upon draft rules implementing the protocol..." The MACDL requests that the Advisory Committee not adopt proposed rules implementing the ITV Protocol until after there has been an opportunity for concerned persons to review the proposed rule changes and be heard on the ITV Protocol proposal. The MACDL has serious reservations about the implementation of the ITV Protocol in its current form and believes that such a significant proposal deserves the benefit of public comment and input prior to implementation.


With respect to the merits of the Protocol, the MACDL notes that the protocol deviates from the earlier Protocol in two significant respects - ITV can be used without consent of the parties, and it permits the use of ITV where there is a judge available in the courthouse to preside over the hearings. It is my understanding that the pilot program used in the

Ninth District was designed primarily as a courtroom-to-courtroom ITV system; the new protocol has the potential for significantly wider application and implementation of jail-to-courtroom procedures which we believe should be avoided unless absolutely necessary. The salutary benefits of the use of ITV in out-state districts such as the widely dispersed multi-county Ninth District may not apply in many other districts.

The potential for widespread use of "court TV" as a substitute for live appearances will undoubtedly have an unintended yet hard to ignore discriminatory and dehumanizing impact on those that can not make bail. At a time when the court system is making efforts to minimize bias and discriminatory impacts in the court system it seems difficult to find justification for widespread implementation of a system which will undoubtedly create additional divisiveness in the criminal justice system between those that can make bail and those that cannot. Any mechanism which encourages further perception that there is a two tiered system of justice divided along economic lines should be cautiously reviewed and implemented only with significant safeguards and only when necessary. The potential for widespread use of in-custody ATV will further public perception that the poor are treated differently in the court system and, in a sense, serve as verification of this as fact. In short, the MACDL believes that the absence of many of the safeguards which were used in the original Ninth District pilot project, in particular, its potential to be used without consent of defendants and its use in cases where it is not necessary, weigh heavily against its implementation as proposed.

The MACDL believes that the advisory committee on the Rules of Criminal Procedure should carefully consider whether the Protocol should be implemented at all, and if so, only with significantly more safeguards and limitations on its use than are permitted in its current proposal. Finally, the process of implementing any such protocol, with the significant rules changes it will require, should be opened up for public debate and hearings before any changes are recommended by the Advisory Committee to the Supreme Court.

Very truly yours,

By 
Douglas H.R. Olson

DHRO/dlr



OFFICE OF
APPELLATE COURTS

SEP 11 2006

FILED

September 11, 2006

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155

Dear Mr. Grittner:

The National Alliance on Mental Illness of Minnesota (NAMI-MN) is a grassroots advocacy organization dedicated to improving the lives of children and adults with mental illness and their families. We provide education, support and advocacy.

NAMI works on a number of public policy issues, including those related to criminal justice. Just last week, the U.S. Department of Justice released a report on the mental health problems of prison and jail inmates. Their data show that 64% of local jail inmates and 56% of state prisoners have symptoms of mental illness and only a small percentage receive an assessment or treatment while incarcerated. NAMI believes these figures represent a failure of our mental health system and also a failure of our criminal justice system. The response to a mental health crisis should be a mental health team. Yet, all too often, police and then the courts and prisons are the response.

NAMI believes that whenever possible, people with an un- or undertreated mental illness whose symptoms or behaviors leads them into the criminal justice system, should be diverted into the mental health system. Jail diversion programs and mental health courts are springing up across the country by those who recognize that we cannot continue to lock people up because they are having a mental health crisis.

The point persons in making diversions happen are the judge, prosecuting attorney and defense attorney. NAMI is concerned that the use of interactive television will not allow sufficient contact with a defendant to determine if he or she is truly tracking the proceedings and is competent to proceed. During a typical arraignment, the defendant may sit in the courtroom for a significant amount of time. Someone with a mental illness may be able to act coherent for five or ten minutes but certainly cannot do it for hours. With ITV the wait would probably be much shorter, giving the judge less time to witness people's behaviors.

In some situations, the defendant may be technically competent but still have difficulty understanding the proceedings. Under Rule 20 proceedings, it is very important for all three (judge and two attorneys) to have face-to-face contact with the defendant.

Member



Community
Solutions Fund

NAMI-MN National Alliance on Mental Illness of Minnesota

800 Transfer Road, Suite 7A, St. Paul, MN 55114 Tel: 651-645-2948 or 1-888-473-0237 Fax 651-645-7379

NAMI is also concerned that someone whose judgment and thought process is already impaired will not be able to understand the proceedings. Someone who is actively psychotic will certainly be confused by the use of ITV court proceedings.

If the judge is not face-to-face with the individual, NAMI fears that the use of jail diversions will decrease. Instead of community service and treatment, people will end up in jails or prisons. NAMI does not want the criminalization of people with mental illness to increase any more than it already has.

ITV should be used when it may benefit the defendant, for example, NAMI could see it being used for commitment hearings when it may be difficult for an individual to leave the hospital. There are few other situations when we think it would be used for convenience of the person instead of the system.

Thank you for the opportunity to comment and I apologize for the lateness of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Sue Abderholden". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sue Abderholden
Executive Director

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

OFFICE OF
APPELLATE COURTS

SEP 7 2006

FILED

September 7, 2006

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Dr. Rev. Martin Luther King Jr. Boulevard
St. Paul, Minnesota 55155

Re: Proposed Criminal ITV Protocol

Dear Mr. Grittner:

I write on behalf of the Minnesota County Attorneys Association (MCAA) regarding implementation of the proposed criminal ITV protocol, as provided by Chief Justice Anderson in his order of May 16, 2006.

Members of MCAA represent a diverse set of experiences, circumstances and needs. The need for ITV in criminal cases is very limited in areas where there is a local jail and at least one judge on site. It is a different situation, however, in rural areas, where the defendant may be in one county, the judge in another, and the prosecutor in a third, with timelines to be met. For this reason, the needs of smaller, outstate jurisdictions must come to the fore in analyzing ITV rules.

The experience of our members with ITV in criminal cases has been overwhelmingly positive. It enables matters to be heard promptly with a minimum of travel for all concerned. This not only saves time and fuel, but also aids safety, particularly in winter months. ITV has been an important tool in helping rural county court systems handle cases more efficiently and expeditiously with less cost.

We urge that ITV be afforded the broadest availability to the courts and parties consistent with parties' constitutional rights. The MCAA's chief concern with regard to regulating ITV use in criminal proceedings is that rules not be made that will unintentionally limit appropriate but unanticipated applications of this technology. Thus, it is important that *any* hearing be capable of being conducted via ITV on consent of all parties and the court. Typically, certain types of hearings are obviously best held in person, but rare instances will arise in which creative solutions, including ITV, best achieve due process. In the case of witness testimony, only a judge can determine in the particular case whether it should be allowed by ITV; for this reason we urge witness testimony by ITV be allowed only in the trial court's discretion upon oral or

written motion and after consideration of whether doing so would infringe upon a defendant's constitutional rights.

We see no reason for the ITV rules to address non-ITV cameras in the courtroom or multi-county matters. Both situations are adequately addressed by current rules.

In conclusion, ITV has proven itself a useful tool, particularly in outstate courts. It is time for the ITV process to be recognized in a statewide protocol that ensures due process while not unduly hindering applications of the technology in situations that cannot be anticipated by rule makers.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink that reads "Susan Gaertner". The signature is written in a cursive, flowing style.

Susan Gaertner
Ramsey County Attorney
President, Minnesota County Attorneys Association

ASSISTANT
PUBLIC DEFENDERS
PAUL G. THOMPSON
DIANA M. SWEENEY
KRISTINE W. CANNON
JENNIFER L. MOORE
ERICA L.H. AUSTAD



STATE of MINNESOTA
NINTH JUDICIAL DISTRICT

Public Defense

CHIEF PUBLIC DEFENDER
KRISTINE KOLAR

INVESTIGATOR
PAMELA GREGG

PARALEGAL
PENNY WILSON

DISPOSITIONAL ADVISOR
TIMOTHY MOUNTAIN

4 - West Office Building, 403 - 4th Street NW, Suite 160, P.O. Box 945, Bemidji, MN 56619-0945
Telephone (218) 755-4333 (800) 366-2623 FAX (218) 755-4335

OFFICE OF
APPELLATE COURTS

SEP 7 2006

September 7, 2006

FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
Saint Paul, MN 55155

RE: Revised ITV Protocol

Dear Mr. Grittner:

I am very familiar with the original protocol for the use of ITV in criminal courts. I was part of the pilot project team that drafted them. The presence of a public defender on that team was deemed crucial as our clients are the largest user of the criminal justice system. It was important to the team that the Constitutional and procedural rights of criminal defendants were protected in the face of technology.

The original intent of ITV in criminal courts in Minnesota was to afford timely justice to those who would not otherwise receive it due to a lack of judicial resources in counties without sitting judges. Please refer to the general provisions of the original protocol. The proposed new protocol expands the accepted uses of ITV well beyond those intended by the pilot project and its collaborative members. In misdemeanor cases, for example, the Judge can declare that all stages of the proceeding will proceed by ITV, except trial. The parties can object, but the Judge who made the original declaration makes the ruling on that objection.

It is undisputed in this state that minority populations are disproportionately represented in our criminal justice system. Racial profiling and disparities are real, and result in large numbers of minority people being arrested, jailed and charged with low-level offenses such as non-alcohol driving offenses and disorderly conduct. Under the new protocols, the judge can declare that ITV can be used at any stage of these proceedings, except trial, including sentencing. What message does that send to our minority populations; they can be arrested and jailed for offenses that aren't important enough to require the physical presence of a judge?

Mr. Fred Grittner
September 7, 2006
Page 2

Those who have practiced in the criminal justice system have witnessed the lack or respect, and sometimes contempt, some parties have for the establishment and the system. How can we expect parties in the criminal justice system to respect the judge's order and sentencing conditions when the criminal justice system doesn't respect the parties enough to require the judge to make a personal appearance in the courtroom?

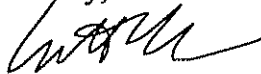
People accused of crimes by the government are protected by the Minnesota and United States Constitutions. The drafters of those documents envisioned the right to have court proceedings in which all parties, including the judge, are present in the courtroom at all stages of the proceedings. As stated in the original protocol, ITV should be used only when it is not reasonably possible for a judge to be present in the venue county. To do otherwise only cheapens the respect and integrity of our justice system.

Under the original protocol, any use of ITV in a criminal matter involving a public defender client required consent of the district chief public defender. In the seven years since the Supreme Court has approved limited use of ITV in criminal matters, it has not been brought to my attention that there was a problem with the original protocol, or a need to expand the allowable uses on ITV in the criminal justice system. As such, it is my request that the Criminal Rules Committee base any changes to the Rules on the original, rather than the revised, protocol. Specifically,

1. ITV should only be allowed when it is not reasonably possible for a Judge to be physically present in the venue county.
2. All parties must consent to the use of ITV, and if the case involves a public defender client, the District Chief Public Defender must also consent.
3. Waiver of the right to have a Judge physically present must be in writing and a standard form should be included in the Appendix of Forms.

Thank you for the opportunity to comment.

Sincerely,



Kristine A. Kolar
Chief Public Defender
Ninth Judicial District

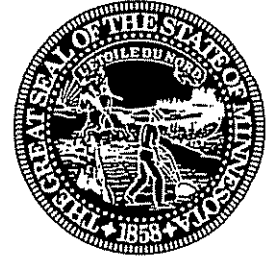
Enclosed 12 copies



Fred T. Friedman
Chief Public Defender

**STATE OF MINNESOTA
OFFICE OF THE SIXTH JUDICIAL DISTRICT
PUBLIC DEFENDER**

1400 Alworth Building
306 West Superior Street
Duluth, Minnesota 55802



Telephone (218) 733-1027
Fax (218) 733-1034

September 5, 2006

OFFICE OF
APPELLATE COURTS

SEP 7 2006

FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St Paul, Minnesota 55155

RE: ITV Proposed Protocol Implementation

Dear Mr. Grittner:

Minnesota courts make reference on their websites and in their vision statements about fairness and equal access. ITV guarantees the denial of both.

Like many others, I am writing to request that the Rules of Criminal Procedure Advisory Committee decline to develop rules to implement the proposed protocol at this time, because there has not been an opportunity for concerned persons to be heard on the underlying question of whether this proposed protocol should be adopted.

In December of 2000, when a previous proposed ITV protocol was being discussed, the State Public Defender and the District Chief Public Defenders wrote to Supreme Court Senior Staff Attorney Michael B. Johnson (copy attached) raising six serious concerns about the proposal. These included:

- lack of inclusion of prosecutors and defenders from the previous Supreme Court Task Force on Closed Circuit Television (1991) in the discussion;
- omission of the safeguards that were developed for the Ninth District Pilot Project;
- failure to consider ITV's potential to exacerbate economic class and race divisions in the justice system.

The 1999-2000 proposal lay dormant for five and a half years.

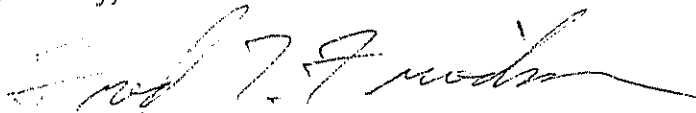
Mr. Frederick Grittner
Clerk of the Appellate Courts
RE: ITV Proposed Protocol Implementation
September 6, 2006

Page 2

Then the 2006 Proposed Protocol was issued. This Proposed Protocol accentuates the worst features of its predecessor:

- it was developed with no public hearing, no testimony, no solicitation of comments—overall a less-inclusive process than the flawed process that occurred in 1999;
- it totally abolishes the Ninth District Pilot Project safeguards, while at the same time greatly expanding the permissible use of ITV; and
- it minimizes concerns expressed about race and class, failing to take up the suggestion made in the December 2000 letter to Mr. Johnson, recommending consideration of the Supreme Court's case-and-race database.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred T. Friedman", written in a cursive style.

Fred T. Friedman
Chief Public Defender
Sixth Judicial District

FTF:kpm

Enclosure

December 5, 2000

Michael B. Johnson, Senior Staff Attorney
The Supreme Court of Minnesota
Court Services Division
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Proposed Protocol for Use of ITV in Criminal Cases

Dear Mr. Johnson:

Thank you for the opportunity to respond to the proposed protocol. I am writing on behalf of myself and all the District Chief Public Defenders around the state. As you know, collectively we handle about 200,000 cases a year, and believe ourselves to be the largest user of the District Courts in Minnesota.

We see that your ITV Subcommittee included neither defenders nor prosecutors, which puts us in the position of having to raise some major concerns after a lot of time and energy have already been invested. Both prosecutors and public defenders were members of the Minnesota Supreme Court Task Force on Closed Circuit Television, in 1991. None of the members of that Task Force were on the Subcommittee which issued the Proposed Protocol. Nor was the 1991 Task Force Final Report cited in the Proposed Protocol or its notes or comments. We acknowledge that the subcommittee had the best of intentions, and certainly did not plan to impose disadvantages on our clients in jail. Nevertheless, we have some grave concerns about the proposal.

I. BAIL HEARINGS SHOULD BE HELD WITH ALL PARTIES IN OPEN COURT.

As one of Minnesota's defenders has already written you, "... it is absolutely vital for a person who is accused of a crime to be able to look the judge in the eye and explain why he or she should not be held in jail." In addition to the defendant looking the judge in the eye, our clients often have family members, pastors, employers, treatment providers, AA sponsors, or others willing to come to court to vouch for them. To put the client and public defender on camera in the jail, while the judge, prosecutor, and victims' advocate are in the courtroom together, greatly reduces our ability to advocate effectively for the clients' release. It also detracts from the ability of loved ones and other concerned persons to support our clients.

II. SUBSEQUENT HEARINGS SHOULD NOT DIVIDE CRIMINAL DEFENDANTS BY ECONOMIC CLASS.

In the late 1960's the Kerner Commission reported that we were moving, as a society, to two groups, "separate but unequal." We are concerned that the judges will begin to see defendants in two classes: middle-class defendants, with bail posted, in court; and indigent defendants, in jail with their lawyers, on the screen.

On an unconscious level, it would seem natural to favor the "live" clients. One defender wrote that: "[r]educing our clients to a little image on a TV monitor hides their human dignity and makes them more vulnerable than they already are to the injustices which easily and insidiously accrue to disenfranchised classes of persons."

This is the same conclusion reached by the Task Force Minority Report signers in 1991: "Closed-circuit hearings . . . strip the defendant of his or her humanity. The judge sees an image on a screen; there is no eye contact, no body language, no real person." (Final Report, December 1991, p. 13.)

III. CLIENTS OF COLOR ALREADY ARE AT A DISADVANTAGE IN BAIL STATUS.

The Supreme Court Race Bias Task Force Report (May, 1993) devoted eight pages to bail. Among their observations:

- 86% of the metro judges under the age of 50 “expressed the opinion that minority defendant were more likely to remain in custody prior to trial.” (p. 20)
- After controlling for case type, white defendants were significantly more likely to get a summons rather than an arrest warrant, than African Americans. (p. 21)
- African Americans were 200 to 300% more likely to be detained prior to trial in Hennepin County, for every felony case type, than white defendants. (p. 22)
- A 1986 study showed NBR recommendations by race as follows: Whites, 33%; African Americans, 21%; Native Americans, 8%; Hispanics, 13%. (p. 25)

Seven years after the Report, the Human Rights Watch has found that racial disproportionality in incarceration in Minnesota has actually increased. Read the report at <http://www.hrw.org/reports/2000/usa/>. We know, from long experience, that custody status affects the ability of a client to assist in preparing a defense, or becoming involved in an alternative sentence. So, any proposal which might affect the setting of bail needs the greatest possible care and scrutiny.

IV. THE PROPOSED PROTOCOL OMITTS SAFEGUARDS THAT THE PILOT PROJECTS AND 1991 STANDARDS INCLUDED.

The Ninth District Pilot Project, in particular, avoided the problems of jail-cell-to-courtroom TV. ITV was used, in limited cases, courtroom-to-courtroom. More importantly, during the Pilot Project, the District Chief Public Defender reviewed ITV hearing proposals on a case-by-case basis and had the power to insist on a “live” court appearance. The current proposal leaves out this feature. Instead we are put in the position of having to ask for

a hearing on what kind of hearing to have. And, during the wait to have the hearing on the type of hearing, the public defender client stays in jail.

This mandatory approach to ITV appearances is much different from that of the 1991 Supreme Court Task Force. That Task Force provided, in Standard 7, that there would be no ITV appearance without a meaningful, voluntary waiver of an in-person appearance by the defendant. (Final Report, December 1991, p. 19.) This is not to say that a waiver would solve the problems described here. The defendant, defense counsel, and, in public defender cases, the Chief Public Defender should be required to approve the use of ITV. Even with these safeguards, the 1991 Task Force produced a strong Minority Report stating that ITV would always be a dehumanizing force.

V. THE PROPOSED PROTOCOL WOULD SUBSTANTIALLY INCREASE OUR COSTS.

A. Public defenders might need to attend both ends of the ITV transmission.

We do not feel that the plan to have defenders in the jail, and everyone else in the courtroom, is satisfactory. For our clients, it does not further the goal of "public confidence in the courts." Perhaps the result would be that ITV cases would require two public defenders. This option was recognized in 1991 as one which would "shift costs onto the public defender system." (Final Report, December 1991, p. 18.)

B. Mixed calendars of "live" and ITV clients would be unmanageable.

Often we appear in calendars where some clients are in custody and some are not. Currently, they all come to the courtroom.

We know that some counties are preparing to use ITV in cases where the jail is just across the parking lot from the courthouse. We think the perceived resource savings in those situations are illusory because our staff will have to run back and forth, delaying the proceedings for everyone involved.

- C. Most public defender office sites were chosen to be near the courthouse, not near the remote jail.

The sheriff would save transportation costs when, for example, ten defendants in Duluth appear on ITV from jail, which is several miles from the courthouse.

But when the costs of having ten public defenders drive to the jail from their downtown, near-the-courthouse offices, and back, are considered, the result may not be cost-effective for the taxpayers. Certainly there would be tremendous costs to our agency, which, so far, do not seem to have been taken into account. In particular, ITV would impose additional stress on part-time rural defenders, who already have been hit hard by rising costs and caseloads.

- VI. ITV WOULD DECREASE "MEANINGFUL APPEARANCES" THAT LEAD TO THE RESOLUTION OF CASES.

As the state system of public defense has developed, we have constantly tried to get public defenders to court in early stages of a case. When prosecutors are there too, we often can have a "meaningful appearance;" that is, the litigants can discuss the case, the client is there, and often a resolution occurs.

This would not happen with ITV cases. The prosecutor would be in a different building. The formal requirements of a court appearance might be satisfied, but the bringing together of the parties who might conclude the matter is denied. Thus, while saving the cost of transporting the defendant, ITV could increase costs to the justice system as a whole, by delaying the resolution of cases.

- VII. CONCLUSION:

In 1991, the Supreme Court Task Force on Closed Circuit Television recommended Standards to ensure that defendants' appearance on ITV would be voluntary, because of concerns like the ones raised here. Since then, technology has improved, but the underlying values which should govern this situation have not changed.

Courts exist, first, to bring people together to solve problems. If ITV makes it possible to keep the defendant's family away from her bail hearing, or to keep the prosecutor and public defender from resolving the case at first appearance,

Mr. Michael B. Johnson
December 5, 2000
Page 6

it is not an improvement. The formal requirements of a "court hearing" may be met by ITV, at the expense of the human element which gives it meaning.

People have confidence in court, second, because court stands for "Equal Justice Under Law." When people with the same legal situation are divided into two groups, the live and the electronic, because the economic status of one group allows for bail to be posted, the perceived legitimacy of the court suffers. The signers of the Minority Report in 1991 found that: "... closed circuit hearings will disparately impact minorities and indigents. Only those who cannot immediately post bail will be asked to forfeit their right to an open-court hearing." (Final Report, December, 1991, p. 15.)

This division of groups is especially to be avoided while Minnesota persists in giving harsher treatment to people of color. If an ITV protocol is to be developed, we suggest, at least wait until the Supreme Court has had a chance to analyze the criminal case race data which will begin to be collected January 1, 2001.

While it may be unrealistic to expect immediate solutions to all the issues in the Race Bias Task Force Report, at least we can expect the court system not to use ITV to create new racial disparities.

Meanwhile, we will be willing to be involved in discussions of ITV. Perhaps there has been some thought already on how to address our concerns. In any case, we would like to participate in trying to solve these problems. Please call if we can provide you with anything further. We certainly would like to be notified of any public hearings that are held regarding ITV.

Respectfully submitted,

John Stuart
State Public Defender

JS/pyj

Mr. Michael B. Johnson
December 5, 2000
Page 7

This letter has also been approved by the following:

Joe Carter, District Chief Public Defender, First Judicial District
Jim Hanks, District Chief Public Defender, Second Judicial District
Joseph Bueltef, District Chief Public Defender, Third Judicial District
David Knutson, First Assistant Public Defender, Fourth Judicial District
Leonardo Castro, District Chief Public Defender, Fifth Judicial District
Fred Friedman, District Chief Public Defender, Sixth Judicial District
John Moosbrugger, District Chief Public Defender, Seventh Judicial District
Tim Johnson, District Chief Public Defender, Eighth Judicial District
Kris Kolar, District Chief Public Defender, Ninth Judicial District
Luke Stellflug, District Chief Public Defender, Tenth Judicial District
Michael Holland, President, Minnesota Public Defender Association



OFFICE OF THE PUBLIC DEFENDER
HENNEPIN COUNTY-FOURTH JUDICIAL DISTRICT
317 SECOND AVENUE SOUTH, SUITE 200
MINNEAPOLIS, MINNESOTA 55401-2700

OFFICE OF
APPELLATE COURTS

SEP 7 2006

FILED

September 8, 2006

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St Paul, MN 55155

Dear Mr. Grittner:

RE: ITV Proposed Protocol Implementation

I write in response to the Minnesota Supreme Court's call for comments regarding the proposed protocol for the use of Interactive Television (ITV) in criminal court hearings.

As a chief public defender who has served this state in both rural and urban districts and having practiced law in multiple counties around this state, I strongly object to the use of ITV in criminal courts and ask the court to reject the protocol proposed by the Minnesota Judicial Council.

Many of my objections to the use of ITV have been included in a memo (which I submit with this letter) provided to me by a law clerk in my office. I respectfully ask the court to review the memo and consider the many policy and legal arguments made. I will not reiterate those arguments in this letter but rather express some of my objections to the use of ITV, the proposed protocol, and the process which the Court has taken to implement these new rules.

Minnesota suffers from a great deal of racial disparities in its systems. Studies find Minnesota with some of the greatest (and in some cases the greatest) racial disparities in our educational, health and criminal justice systems. It is my strong belief that the use of ITV will work to escalate the racial disparities in the criminal justice system and reduce integrity and trust in our system. Improvements to "Access to Justice" and "Trust and Integrity" have been, and must continue to be, goals that we in the legal community always strive to achieve. The use of ITV is contrary to achieving those goals.

The true impact of ITV will be thrust upon those too poor to make bail. Given the already existing disparities in our state systems, it is not an exaggeration to claim that we will have a system of personal court appearances for those that have, and a separate



system of video appearances for those who do not have. In the Fourth Judicial District that translates into a large number of people of color being segregated from the courtroom. This is clearly not the intent of the protocol but it will be the result in some venues across this state. Segregation in any form, whether by race or class, can not be the road we take. In this state our courts must continue to be the great levelers.

The Minnesota Supreme Court Criminal Rules Advisory Committee has been asked by the court to review the ITV proposed protocol for inclusion in the rules. The process the court has taken to adopt ITV rules has been unlike any other. The announcement of a protocol for public comment before the rules committee has had a chance to thoroughly discuss and analyze the process and determine the impact of the changes on all interested parties is putting the cart before the horse. The need for judges, defense lawyers and prosecutors to analyze and deliberate upon a rule change is critical for the improvement of our justice system. It is a matter of maintaining the integrity and trust of our justice system. The court generally will hold public hearings on proposed rule changes. This is done even when the rule change is made to comport with the current state of the law. What the court has before it today is a dramatic change in policy and procedural law. The legal community and community at large should be heard on this issue. We need deliberation, debate, critical review and community input.

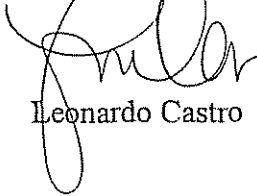
Several years ago a protocol for ITV was “adopted” by the district courts in an effort to accommodate judges in rural areas from having to travel long distances for a short single hearing, law enforcement from having to transport in-custody defendants, and defendants from having to spend more time in custody. This protocol, however, called for the agreement of defendant’s counsel, usually the office of the district public defender, prior to any ITV hearing. That “waiver” option is not present in any real sense in the protocol currently before the court. Giving in-custody defendants the option of spending more time in jail to get an in-court appearance is no option at all. Furthermore, the right to be “present” via ITV is a question that has not been answered in Minnesota and the federal districts do not share a consistent answer. The federal rules do however require a waiver from defendants. This minimal safeguard is essential to the integrity of our constitutional principles.

The implementation of ITV in our criminal courts will have a significant impact on how we conduct our criminal justice system. Notions of “equal protection under law”, “access to justice” and “integrity and trust in the system” are all implicated in this proposed protocol. The proposed protocol includes the majority of the hearings held in our criminal justice system and the impact of these proposed changes will fall mostly upon the poor people served by public defenders across this state.

I recognize the potential efficiencies ITV may potentially have for law enforcement and some district courts. The Bill of Rights and the Due Process Clause were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

I respectfully request the court not adopt the proposed ITV protocols. Alternatively, the court should delay adopting ITV protocols until the Minnesota Supreme Court Criminal Rules Advisory Committee has had an opportunity to critically analyze the impact of such changes, made its recommendations to the court and the court has given the public an opportunity to be heard, in person, on the matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Leonardo Castro', written in a cursive style.

Leonardo Castro

To: Leonardo Castro, Chief Public Defender

From: Daryl Atkinson, Law Clerk

Date: 9/1/2006

Subject: Use of ITV in criminal cases.

FACTS

The Minnesota Judicial Council is considering a protocol for the use of interactive video teleconference (hereinafter "ITV") for specified criminal actions and proceedings. ITV allows judicial proceedings to be conducted with participants in different locations. Audio and visual images are simultaneously transmitted, so that all participants are able to hear and see each other at the same time. The protocol proposes that ITV be used to conduct the following criminal hearings for felony and gross misdemeanors:

Rule 5 and Rule 6 Hearings: These hearings encompass the reading of charges, appointment of counsel, and establishing release conditions for all case types, and guilty/not guilty pleas in misdemeanor cases. Release conditions are key because if the defendant is released, the 48-hour time limit for a probable cause determination does not apply. Minn. R. Crim. P. 4.03, subd. 1. The proposal currently authorizes the use of ITV for rule 5 and 6 purposes without the defendant's prior consent. However, the defendant is allowed the automatic right to continue the rule 5 and 6 proceeding in person, coupled with the requirement that the in-person portion of the hearing must be held within three days of the ITV proceeding.

Rule 8 and Rule 13 Hearings: These hearings encompass the reading of charges, pleas, and demand or waiver of omnibus hearing in felony and gross misdemeanor cases. Any objection to use of ITV at a rule 8 or 13 hearing must be submitted in writing at or before the hearing, and the presiding judge has discretion to determine whether the objection will be sustained.

Rule 11 Hearings: The protocol authorizes waiver of the omnibus hearing by ITV, and this waiver typically occurs at the rule 8 hearing. The omnibus hearing encompasses evidentiary issues, which may require testimony. The parties must agree before an omnibus hearing is conducted via ITV.

During these hearings the proposed location of the parties is as follows: defendant and defendant's attorney must be located at the same terminal site¹, the judge may be at any terminal site, the prosecutor may be at any terminal site, and witnesses, victims and other interested parties may be located at any terminal site that will allow satisfactory video and audio reception at all other sites. Moreover, the protocol permits wider use of ITV in misdemeanor and petty misdemeanor cases.

ANALYSIS

I. ITV SHOULD NOT BE USED IN MINNESOTA BECAUSE THE POTENTIAL NEGATIVE AFFECTS ON THE CRIMINAL DEFENDANT AND THE JUSTICE SYSTEM OUTWEIGH ANY PERCEIVED BENEFITS.

The use of ITV could potentially enhance the efficiency of judicial proceedings by reducing travel time for judges and the need to transport inmates to courtrooms, potentially reducing costs for law enforcement. However, there is a fear the procedure could perpetuate de facto segregation. Judges will see two classes of defendants: middle-class defendants, predominantly white with bail posted, in court; and indigent defendants, predominantly persons of color in jail with their lawyers, on the screen. This is especially true in urban areas of the state. Additionally, the procedure has the potential to disadvantage a criminal defendant in the following ways. (1) The images conveyed by ITV fail to capture the nuances of the defendant's demeanor; thus it is difficult for judges to make reliable credibility determinations when deciding bail and release conditions. Consequently, the use of ITV could have the unintended consequence of hindering a defendant's ability to assist in their representation because they cannot get out of jail. (2) Minnesota's ITV protocol has the potential to separate the criminal defendant and defense counsel from the judge and prosecuting attorney. As a result, the defense counsel is placed at a strategic disadvantage because he is not physically located at the

¹ Exceptions are made in unusual circumstances, and then only if all parties agree on the record.

proceedings with the judge and opposing counsel. In addition, the criminal defendant's distrust of the system is further exacerbated because he views his advocate as an unequal player in the proceedings. (3) The use of ITV does not adequately establish traditional courtroom decorum; hence a criminal defendant may have a diminished respect for the proceedings. (4) Separating the defendant from the courtroom also prevents the defendant from connecting with family, friends, and other support systems. As a result, the defendant feels more isolated from the process, thus life changing decisions regarding pleas and other matters are made in a more coercive environment. For the aforementioned reasons, the Minnesota Judicial Council should decline to endorse the use of ITV in Minnesota District Courts.

A. ITV does not properly convey the demeanor and nonverbal cues of the defendant; thus it is difficult for judges to assess the defendant's credibility.

The use of ITV in criminal proceedings could have the unintended consequence of hindering a defendant's release from custody because the technology does not accurately convey the full range of the defendant's demeanor and nonverbal cues. Anne B. Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089, 1109 (2004). At each stage of the criminal case, the judge must be able to obtain accurate information from the defendant. Technology that changes behavior or distorts information may undermine the accuracy of the judge's perceptions and corrupt the result of the proceeding. This offends the notion of fundamental fairness. Also, the quality of the defendant's representation suffers because suspects in custody are limited in their ability to assist in their representation.

Signals such as facial expression, gaze, posture, and gestures interact with verbal cues to convey a person's credibility. Poulin, supra, at 1111. However, ITV may distort gestures or filter out nonverbal cues completely. For example, a head shot may overemphasize facial expressions but will omit hand gestures or body language. As a result, critical aspects of the defendant's

communicative effort will not be conveyed to those in court. Of primary concern, is how the use of ITV will shade judgments about the defendant.

B. The physical separation of defense counsel and defendant from the judge and prosecuting attorney results in an unfair advantage for the State.

The ITV protocol in Minnesota requires defense counsel at the jail with the defendant, thus like the defendant, counsel appears in court electronically. If the defense attorney is at the remote location with the defendant, communication between the attorney and client may be normal, but the attorney's participation in the court proceeding will be compromised. See LaRose v. Superintendent Hillsborough County, 702 A.2d 326, 328 (N.H. 1997) (reporting that defense counsel who has participated in numerous videoconference bail hearings testified that appearing by video “affected his ability to be an effective advocate for his clients”). Moreover, a defense attorney could face serious logistical challenges. Poulin, supra, at 1131.

For example, the attorney would be forced to collect all necessary paperwork before leaving for the remote site, as they would not have the luxury of asking a court clerk or opposing counsel for a look at previously undiscovered information. Jeffrey M. Silbert, Una Hutton Newman & Laurel Kalser, Telecommunications in the Courtroom: The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida, 38 U. Miami L. Rev. 657, 657 (1984). Furthermore, if witnesses are to speak on defendant's behalf, they may only be able to travel to the courthouse, and not the remote site with the defendant; thus making it difficult for the defense attorney to speak with them before asking for their input. Id. Moreover, the attorney will be unable to gauge the mood of the courtroom, to determine when and how to intervene on the client's behalf. Juliana B. Humphrey, The Folly of Video Courts, NLADA, on-line publication (describing equipment problems in San Diego videoconference proceedings); see also Rusu v. INS, 296 F.3d 316, 319 (4th Cir. 2002) (describing a

videoconference asylum hearing in which equipment experienced technological problems). Also, defense counsel's absence from the courtroom will hinder effective representation, when the situation arises where an impromptu in court conversation with the prosecuting attorney, might foster a favorable plea bargain for the defendant. See Silbert, Newman & Kalsner, supra, at 668 (acknowledging that the absence from the courtroom makes it difficult for defense counsel to communicate quickly with the prosecutor). Finally and probably most importantly, the defense attorney will not be able to have bench conferences with the judge to discuss matters that are not suitable for discussion in open court.

If the prosecutor is in court with the judge and other actors in the criminal justice system, rather than at the remote location, the defense attorney's position in relation to the judge will be inferior to the prosecutor's. Poulin, supra, at 1132. Research done on groups working on a common problem in separate locations, linked by videoconferencing technology, have shown that alliances form among those who are in the same physical location. Gene D. Fowler & Marilyn E. Wackerbarth, Audio Teleconferencing Versus Face-to-Face Conferencing: A Synthesis of the Literature, 44 W. J. Speech Comm. 236, 238-39 (1980) (describing coalition building exercises where people in the same room rated their partners "as more intelligent, competent, sensible, trustworthy, and constructive and less unreasonable, boring, and impersonal than the people at the far end of the audio/ visual communication link"). One could expect the same proximity alliances to transfer to the courtroom if ITV is implemented; as a result the defense will be materially disadvantaged during any contested matter with the prosecutor, due to the physical separation from the prosecutor and judge. In sum, the use of ITV could prejudice any criminal proceeding where the defense attorney is separated from the court, prosecutors, victim advocates, defendant's family and others in the courtroom.

C. ITV does not convey the traditional courtroom decorum, thus defendants are likely to have diminished respect for the proceedings.

Videoconferencing cannot capture and convey the sense of the courtroom; as a result the defendant may have a diminished respect for the proceedings because they fail to realize the gravity of the situation. The physical layout of the courtroom symbolizes the distribution of power and the adversarial divisions. Ray Surette & W. Clinton Terry, Media Technology and the Courts: The Case of Closed Circuit Video Arraignments in Miami, Florida, *The Media and Criminal Justice Policy: Recent Research and Social Effects* 243, 245 (Ray Surette ed. 1990). In expressing his concerns regarding the use of video proceedings in federal court, Judge Joseph R. Goodwin (S.D. W. Va.) noted:

No video monitor can exert the same psychological pressures as a physical presence in the courtroom. The judge in robes, the raised bench, witnesses, lawyers, worried family, flags, seals, armed marshals - these elements invest the occasion with the seriousness it warrants, and they surely impel even those bent on deception to reflect on the advisability of their plans. These are far more than empty trappings. Form and process are the pillars that support the structure of our justice system just as ceremony and ritual reinforce the solemnity of religious practice. All human societies have icons and rituals because we think them important. Surely their universality reflects their totemic power and not just a craving for empty embellishment. (Letter from Judge Joseph R. Goodwin, District Court Judge for the Southern District of West Virginia, to Judge Robin J. Cauthron, Chair, Defender Services Committee (Sept. 6, 2001) (arguing that the federal judicial system must "*carefully segregate those inefficiencies that are mere products of time and place--which we would be foolish to retain--from those that are deliberately built into our system to spare a free people the convenience of the guillotine.*")

Gerald Ashdown & Michael A. Menzel, The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions, 80 *Denv. U.L. Rev.* 63, 67 (2002).

Judge Goodwin argues that conducting proceedings by video teleconference may tarnish the defendant, the defendant's family, and the general public's view of the integrity of the judicial process. Specifically, Judge Goodwin asks:

Does the prisoner thrust into a cinder block chamber with his face stuck in a camera and told to speak to a man in a glass box feel he has been dealt with

equitably? Can the public feel confident he has received a fair hearing? Do families, friends, neighbors, or the press feel they have witnessed the fair administration of justice? All of these participants should have the opportunity to take in the entirety of the courtroom to see and hear and feel what is going on. A court's moral authority rests on the perception that its proceedings are fair and just. Public confidence in the judicial system depends on this perception. The remarkable resiliency of this confidence is something we ought not take for granted, and we should eschew any practice that threatens to demean the dignity of or reduce respect for the courts. Id.

D. ITV separates the defendant from the courtroom, which prevents them from connecting with family, friends and other support systems.

Incarcerated defendants benefit both morally and practically from contact with their support systems (parents, siblings, friends, clergy, and sponsors); the defendant's physical separation from the courthouse eviscerates these benefits. When an incarcerated defendant is brought to court, family and friends can attend the hearing and see the defendant. This in court visual connection between defendant and family members assuages any anxiety the latter may have harbored about the former's health and safety. Moreover, this in court visual connection is essential to the defendant's ability to withstand the coercive environment that comes with incarceration. In most instances, support systems will be able to confer with the defendant, counsel, and the court, if appropriate, in an effort to achieve equal justice.

In addition to providing moral support for the defendant, support systems can also provide important information, such as release provisions that will assure the defendant's reappearance in court. Such information often persuades the court to release the defendant pending trial. A defendant who is not physically present in the courtroom may not even know that family members are in attendance; as a result, the absent defendant is likely to have a much harder time making arrangements for conditional release because they may never have the opportunity to ask family members to vouch for their release plans. Moreover, even if the defendant is aware that support systems are in the courtroom, the potential exchanges between

defendant and family cannot be replicated through the use of video equipment. David A. Davis, Talking Heads--Virtual Reality and the Presence of Defendants in Court, Fla. B.J. 26, 27-28 (Feb. 2001) (reporting that juvenile defendants attending detention hearings via ITV were not provided opportunities to communicate with parents or guardians that were in court) .

II. ITV SHOULD NOT BE USED IN ARRAINGMENTS, BAIL SETTINGS, OR OTHER PRETRIAL HEARINGS BECAUSE THE POTENTIAL HARM SUFFERED BY THE DEFENDANT WILL CORRUPT CRITICAL PHASES OF THE CRIMINAL PROCESS.

The potential negative affects of the use of ITV on defendants and the criminal justice system emerge and converge with varying degrees of severity at all stages of the criminal case. In our current criminal justice system, few cases go to trial. As a result, other stages of the process determine whether justice has been achieved. The unacceptable risk of judicial degeneration resulting from the use of ITV is not rendered acceptable by relegating video proceedings to so-called “minor” or less critical stages of the process. There are no such less critical stages. Every step in a criminal prosecution exists for a necessary due process and equal protection reason. If there be a step that is not important enough to do formally and properly, then it should not be done at all. The following analysis illustrates how the use of ITV in first appearances, bail settings, and probable cause hearings would negatively affect the representation received by a criminal defendant.

A. ITV should not be used in first appearances.

In a criminal case the purpose of the first appearance is multifaceted. Typically, the first appearance consists of: informing the defendant of the charges against him; furnishing them a copy of the complaint; advising the defendant of certain rights; considering entitlement to court-appointed counsel; considering whether bail is necessary; setting bail; reducing bail; possibly releasing the defendant on his own recognizance; conducting a nonadversary probable cause

determination; and allowing the defendant to plead guilty to any misdemeanor charge without the necessity of further formal charges being filed. Judge Karl B. Grube, Electronic Plea Taking at Florida's Weekend First Appearance Hearings: Weekend Justice or Weakened Justice?, 21 Stetson L. Rev. 329, 330 (1992). The first appearance marks the shift from the investigatory stages of the case to the accusatory. See Michigan v. Jackson, 475 U.S. 625, 636 (1986); Kirby v. Illinois, 406 U.S. 682, 690-91 (1972). From the defendant's perspective, the first appearance marks the end of law enforcement's exclusive control. However, the defendant will not receive the sense of judicial intervention if he remains in law enforcement custody, away from the courthouse, appearing only through video. Bringing the defendant into court is an important aspect of this shift.

If the defendant chooses to settle the matter with a guilty plea at the first appearance, the use of ITV must comport with the minimum requirements for substantive and procedural due process. With respect to the plea taking process, there are several substantive due process rights that a defendant must understand prior to adjudication. See, Boykin v. Alabama, 395 U.S. 238 (1969); State v. Nordstrom, 331 N.W.2d 901 (Minn. 1983) (noting that a guilty plea is the relinquishment of three important federal constitutional rights: the privilege against self-incrimination, the right to trial by jury, and the right of confrontation). Additionally, the defendant should be advised of the charges against him, the right to compel the attendance of witnesses, and the right to counsel. Grube, supra, at 345; State v. Rau, 367 N.W.2d 613, 615 (Minn. Ct. App. 1985). The importance of these substantive rights cannot be overstated. "The deprivation of any of these constitutional rights destroys the fairness of a criminal proceeding and renders any resulting conviction inherently unreliable." Allen v. State, 463 So. 2d 351 (Fla.

1st DCA 1985); See also, In re Welfare of G.L.H., 614 N.W.2d 718, 723 (Minn. 2000) (noting that a waiver of these rights must meet a heightened standard of judicial scrutiny).

Procedural due process requires the court to personally investigate and establish minimum competency and willingness or voluntariness on the part of the defendant before accepting his guilty plea. Grube, supra, at 347. The factors affecting procedural due process are less stable and static because they relate to the defendant's mental and physical composition as a human being. Id. Such factors include the defendant's competence to understand the proceedings, the charge, and the consequences of his plea, as well as the defendant's willingness to freely and voluntarily relinquish the substantive rights previously explained. Id.

The study published by Judge Karl Grube found that video technology can substantially impair the fundamental rights owed to defendants in pre-trial proceedings. Judge Grube's article reviewed defects in the plea taking of misdemeanants in first appearance arraignments. Specifically, he found that first appearance arrestees are more likely to suffer physical or mental disabilities that may compromise their ability to enter guilty pleas freely and voluntarily. Id. at 350. Videoconferencing offered less opportunity for judges to become aware of such impediments to the plea taking process. Id. None of the judges who accepted pleas inquired whether the defendants were suffering any mental or physical disability. Id. at 351. This constitutional deficiency in the plea taking process was attributable to the use of ITV. Id. ITV provides only a brief and limited opportunity to observe the demeanor of a defendant and his reaction to the surroundings. Id. Furthermore, ITV reduces the opportunity and perhaps the inclination of judges to properly assess procedural voluntariness in the plea taking process. Id. As a result, first

appearance should only occur in court and any guilty plea accepted through the use of ITV is patently defective.

B. ITV should not be used in making determinations for conditions of release.

When determining bail, courts consider the nature of the offense, as well as the defendant's, prior criminal record, employment history, family ties, and character. See 18 U.S.C. §3142(g) (2000); Minn. R. Crim. P. 6.02 subd. 2 (listing factors to be considered in bond setting). Also, courts must decide whether the defendant poses a risk of flight or harm to the community and whether the defendant understands the conditions of release that the court might impose. Minn. R. Crim. P. 5.05, 6.02. At this stage of the proceedings, the defendant is a critical source of information and the use of ITV will impede the court's ability to capture this information.

A defendant would be able to convey the necessary information to the court more effectively if he was present in the courtroom. Indeed, the Court of Appeals for the District of Columbia remarked that the trial court is "the superior tribunal" for gathering the information necessary to set bail because "the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial." United States v. Stanley, 469 F.2d 576, 581-82 (D.C. Cir. 1972). The bail risk determination is made through formal exchange with the defendant and by informal and subjective assessment of the defendant's sincerity, level of responsibility, and character. Such subtle determinations are influenced by defendant's attractiveness, facial expression and features, or nonverbal conduct. The implementation of ITV would improperly color the bail risk assessment because the technology does not adequately convey the defendant's demeanor and nonverbal cues. Poulin,

supra, at 1117. As a result, the accuracy of the judge's perceptions would be compromised and the results of proceeding would be tainted.

The judge also has the power to define conditions for release, a determination that requires a delicate feel for the defendant and the case. Stanley, 469 F.2d at 581. (noting that the judge's determination is made on "what the judge 'has reason to believe,' and the process of deriving a belief one way or the other is an exacting task"); Minn. R. Crim. P. 6.02 subd. 2 (noting that judges make bail determinations on the basis of "available information"). Even a defendant who poses a flight risk if released may be able to persuade the court that specified conditions will adequately protect the government's interest. United States v. Bronson, 433 F.2d 537, 540 (D.C. Cir. 1970) (discussing release in custody of third party); State v. Brooks, 604 N.W.2d 345 (Minn. 2000) (noting that conditions of release are multifaceted and may be met with sufficient sureties). If the defendant is not in court, he will be hampered in obtaining a release and in assisting counsel to challenge the facts presented.

III. ITV SHOULD NOT BE ADOPTED IN MINNESOTA UNTIL AN EXHAUSTIVE REVIEW IS CONDUCTED OF ITS CONSTITUTIONAL, STATUTORY, AND RULE PROCEDURE IMPLICATIONS.

The courts have considered challenges to ITV on constitutional, statutory, and procedural grounds in a variety of criminal proceedings. Often the focal issue is the right of the accused to be present at the proceeding, and whether videoconferencing satisfies that right. A review of the case law from other jurisdictions indicates that the constitutional rights which may be violated by the use of video proceedings include: the right to confront witnesses, the right to effective assistance of counsel, the right to be present at critical stages of the proceedings, and the right to appear in open court.

Challenges to videoconferencing have also been made under statutes or rules that require the presence of the accused at the proceeding. Usually the salient issue is whether "presence"

means actual physical presence, or whether "presence" can be satisfied by videoconferencing. A review of the recent decisions indicates that the presence requirement of the Federal Rules of Criminal Procedure can only be satisfied through a physical appearance in court.

A. The use of ITV has the potential to violate a defendant's right of confrontation.

The Supreme Court has yet to rule on the constitutionality of electronic production of defendants; however the right to confront one's accusers is a core guarantee protected by both the Minnesota and United State's Constitution. U.S. Const. amends. VI, XIV; Minn. Const. Art. 1 § 6; Coy v. Iowa, 487 U.S. 1012 (1988). There is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair criminal prosecution." Pointer v. Texas, 380 U.S. 400, 404, (1965) (noting the right of confrontation is essential to the protection of liberty and is guarded by provisions in the federal and state constitutions); State v. Shotley, 233 N.W.2d 755 (1975). Furthermore, the right of confrontation grants the defendant the right to physically confront the witnesses against him to insure the integrity of the fact-finding process by making it more difficult for witnesses to lie. Pointer v. Texas, 380 U.S. 400, 403, (1965); State v. Pride, 528 N.W.2d 862, 866 (Minn. 1995); State v. Greer, 635 N.W.2d 82, 89 (Minn. 2001). The minimum requirements of due process include the opportunity to be heard in person and the right to confront and cross-examine adverse witnesses, unless there is good cause for not allowing confrontation. Wilkins v. Wilkinson, WL 47051, 2002 (Ohio Ct. App. 10th Dist. Franklin County 2002) (the court held that no good cause was shown for depriving the parolee the right to confrontation at an parole hearing, thus the use of videoconferencing set forth a claim sounding in a due process violation.); see also R.R. v. Portesy, 629 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 1st Dist. 1994). Any substitute procedure for the defendant's personal participation in a hearing and the right to confront witnesses must insure

compliance with the defendant's due process rights. Portesy, 629 So.2d at 1063 (acknowledging courts must inevitably adapt to the use of new technology; however significant changes in procedure should be **subjected to the critical review** of the rule-making process before such changes are adopted as law).

While court procedures must be expedited to keep pace with rising arrests, not every technological advance fits within constitutional constraints, Seymour v. State, 582 So.2d 127 (Fla. Dist. Ct. App. 4th Dist. 1991); thus something more than mere administrative convenience on the part of court personnel, must be demonstrated before the mass installation of video production equipment will satisfy constitutional guarantees of due process. There is a place for technological innovations in the courtroom but the system must not elevate the process above substance. Procedures adopted to insure every defendant due process of law should not be sacrificed on the altar of expedience and convenience. Thompson v. Smith, 154 S.E. 579, 584 (Va. 1930) (here the court found an ordinance void because it improperly delegated legislative power to an administrative officer because of ease and convenience).

B. The use of ITV has the potential to violate a defendant's right to effective assistance of counsel.

It is of vital importance that defendants have the opportunity to engage in personal and private conference with counsel to resolve the numerous problems and misunderstandings that can develop during the course of pre-trial proceedings. Seymour v. State, 582 So.2d 127, 128 (Fla. App. 4 Dist. 1991).

The ITV protocol under consideration in Minnesota attempted to address the concerns of defense attorneys by placing defense counsel with the defendant at the remote site; however this placement is not without drawbacks. One disadvantage is defense attorney's inability to approach the bench and effectively negotiate a plea bargain for his client. Another disadvantage

is the creation of an "us" against "them" mentality for the court, in which the prosecutor is physically present with the judge, while the defense counsel is produced in an electronic box next to the defendant. This process may give rise to a perception of unfairness. This is particularly true in high-volume, urban courtrooms.

Also troubling is the absence of counsel's physical presence with misdemeanants during arraignments or first appearances. While some may not consider the arraignment a critical stage of the process, a guilty plea, taken at this stage of the process has the same effect as a finding of guilt after a trial on the merits. Such critical decisions should not occur without the accused having an opportunity to confer in person with counsel. In addition, all must insure that a guilty plea given by a defendant is knowing, intelligent, and voluntary. Given the pervasiveness of plea bargaining, it is absolutely essential for voluntariness purposes that the defendant have unfettered access with counsel, and that counsel have unfettered access to the judge, prosecutor, and family of the defendant. Seymour, 582 So.2d at 128.

C. The use of ITV has the potential to violate a defendant's right to be present at critical stages of the proceedings.

The Due Process Clause of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, and the Federal Rules of Criminal Procedure each require a defendant's presence in the courtroom during certain judicial proceedings. See U.S. Const. amend. V; U.S. Const. amend. VI; Fed. R. Crim. P. 5 (addressing when a defendant's presence is required during initial appearances); Fed. R. Crim. P. 10 (addressing when a defendant's presence is required during arraignments); Fed. R. Crim. P. 43 (stating the general "presence requirement"). Courts have held "a defendant's presence . . . is fundamental to the basic legitimacy of the criminal process." United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983). A criminal defendant has the constitutional right "to appear and participate *in person and by counsel* at all proceedings that

involve his substantial rights.” (Emphasis in original.) People v. McDonald, 660 N.E.2d 832, 849 (1995). This right is extended to all procedural stages that are critical to the outcome of the case if the defendant's “presence would contribute to the fairness of the procedure.” Kentucky v. Stincer, 482 U.S. 730, 745, (1987); State v. Grey, 256 N.W.2d 74 (Minn. 1974) (due process requires the defendant to be present in person to defend against the charge).

Previous authority held that defendants have the right to be present at critical stages of the prosecution; however courts have recently limited this right to proceedings where the prosecution’s witnesses may be cross examined. As a result, recent courts have held that a court arraignment is not a critical stage in the prosecution; however several jurisdictions combine the first appearance with the probable cause hearing, arraignment, and bail applications for both felons and misdemeanants. These proceedings have more than a mere incidental effect on a defendant’s due process rights. Consequently, a defendant should have the right to refuse electronic production.

D. The use of ITV has the potential to violate the Rules of Criminal Procedure.

The Constitution and the Federal Rules of Criminal Procedure command the presence of the defendant in the courtroom during certain proceedings; however recent decisions indicate that the Federal Rules of Criminal Procedure require the presence of the defendant in federal court under a broader range of circumstances than does the Constitution. See Smith v. Mann, 173 F.3d at 76; Cuoco v. United States, 208 F.3d at 30-31; see also United States v. Gordon, 829 F.2d 119, 123 (D.C. Cir. 1987) (discussing the broad scope of Rule 43). Pursuant to Rule 43 of the Federal Rules of Criminal Procedure, a defendant is required to be "present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

The Fourth, Fifth, and Ninth Circuits have defined "presence" to mean physical presence. Valenzuela-Gonzalez v. United States, 915 F.2d at 1279-81 (9th Cir. 1990); United States v. Navarro, 169 F.3d at 236 (5th Cir. 1999); United States v. Lawrence, 248 F.3d at 304 (4th Cir. 2001) . The Fourth and Fifth Circuit cases dealt with the defendant's presence during sentencing; while the Ninth Circuit case dealt with the defendant's presence during arraignment. In each case, the court of appeals held that "presence" meant physical presence, thus conducting the proceeding using video conferencing violated the rule.

CONCLUSION

One must admit there are advantages to using ITV at certain stages of criminal proceedings. However, the burden of infringing on an individual's constitutional rights cannot be justified solely on the basis of economic efficiency. Prompt efficacious procedures that achieve legitimate state ends are worthy of cognizance in constitutional adjudication. But the *Constitution recognizes higher values than speed and efficiency.*

The Bill of Rights and the Due Process Clause were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy. Stanley v. Illinois, 405 U.S. 645, 656 (1972). For each advantage associated with video conferencing there may be multiple associated disadvantages.