Denver Law Review

Volume 80 | Issue 1 Article 4

January 2002

The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions

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THE CONVENIENCE OF THE GUILLOTINE?: VIDEO PROCEEDINGS IN FEDERAL PROSECUTIONS

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INTRODUCTION

The screen flickers. At first the defendant stares, confused; he stares at an image of himself—staring back. As he moves, the image moves. Six small circles appear in the lower left corner of the screen, three over three. A hand, like the second hand of a watch, appears in each clock-like circle. One by one the hands begin rotating in a clockwise direction. After each has made a complete revolution, a new image appears on the screen. The defendant now peers, through the eyes of the monitor, into the courtroom or a conference room in the judge's chambers.

The defendant has seen the judge's picture in the local newspaper. He would recognize her if he passed her on the street. But now, seeing her through the eyes of the monitor, she looks quite different. There is a slight tremor in the picture; the image is fuzzy; the judge appears to have aged considerably. The time delay associated with each word spoken, as well as the screen blur accompanying each movement, is more acute and disorienting than the delays accompanying the speech and movements of television personalities reporting from Afghanistan on the War Against Terrorism.

There is little mystery surrounding the motives driving the increased use of video teleconferencing in court proceedings.[1] Video teleconferencing saves time and money.[2] It reduces the amount of travel required by

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1. Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 811 (1994) (focusing on the use of video conferencing to conduct arraignments and initial appearances); *see also* Fredric I. Lederer, *The Randolph W. Thrower Symposium: Changing Litigation with Science and Technology: Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1102 (1994) (describing the general process of conducting an arraignment or initial appearance by video teleconference: "[r]emote arraignments leave the defendant at the jail, ordinarily in a special room designated for the purpose. The judge and prosecution are in the courtroom; depending on the jurisdiction and counsel's personal choice, defense counsel may either be in the courtroom or at the jail with the client. The arraignment is accomplished by live two-way television. The television can be as basic as a two-camera system, with one camera at each location, or as sophisticated as . . . [a] six-camera system, which shows the defendant every aspect of the courtroom.").

2. *See Courts Use Video To Conduct Hearing*, FED. CT. MGMT. REP. (Admin. Office of the U.S. Courts, Office of Pub. Affairs, Wash., D.C.), Apr. 2000, at 5-6. Some states have experienced cost savings associated with increased use of video conferencing. *See, e.g.*, Honerable Ronald T.Y. Moon, *1995 State of the Judiciary Address*, HAW. B.J. 25, Jan. 1996, at 28 (discussing the implementation of a video teleconferencing program in the First Circuit of Hawaii where "case processing time [was] reduced by at least 50 percent, and because of decreased staff demands on the

judges in large districts.[3] For attorneys and witnesses, video teleconferencing reduces the inconvenience associated with appearing in the courtroom. The use of video teleconferencing often means fewer annoyances for clerks.[4] In short, the use of video proceedings in the federal courtroom can increase judicial efficiency.

Criminal defendants also may benefit. Few defense attorneys argue that their clients are served by overloaded court dockets and overworked judges. The more time attorneys have to investigate and prepare for trial, the more thorough their representation. As judges have more time to analyze complex questions of law, their legal reasoning becomes more acute.

Although defendants often benefit from increased judicial efficiency, the benefits must be weighed against the costs associated with the tools used to effectuate this increased efficiency. To take an extreme example, judicial efficiency would be greatly increased by eliminating juries. Without juries, there would be no need for *voir dire* or preliminary and final jury instructions. There would be no evidentiary objections, no need for conferences at sidebar, and, of course, no jury deliberations. Although defendants might obtain some benefit from the increased efficiency achieved by eliminating juries, it would be trivial compared to the benefits to the government and the cost to defendants of not being tried by their peers. Thus, the costs associated with increased reliance on video technology in the courtroom must be considered in light of the recent amendments to the Federal Rules of Criminal Procedure permitting the use of video proceedings in federal court.

I. BENEFITS AND COSTS ASSOCIATED WITH VIDEO PROCEEDINGS

A. Potential Increases in Institutional Economy, Safety, and Convenience

The competing sides of the dilemma are not hard to identify. Video teleconferencing has been used in many types of federal court proceedings, including witness appearances in trials, arraignments, bankruptcy hearings, *Spears* hearings,[5] sentencings, settlement conferences, and various other civil and criminal proceedings.[6] Court clerks from large

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Department of Public Safety (DPS), the DPS has saved 2,400 hours of staff time, which translates to $45,000 annually").

3. *Id.*

4. *Id.*

5. A Spears hearing is a preliminary judicial hearing used to evaluate an inmate's claim and determine whether legal proceedings should move forward. *See* Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

6. *Videoconferencing in Courts Shows Potential and Possible Problems*, 33 THE THIRD BRANCH 12 (2001), *at* http://www.uscourts.gov/ttb/dec01ttb/videoconferencing.html [hereinafter *Videoconferencing*].

judicial districts argue that the use of video teleconferencing strengthens their courts because they are able to handle prisoner civil rights and criminal proceedings more efficiently, without transporting the prisoners involved in each hearing to the courthouse.[7]

Prisoner civil rights cases are often tried using video technology. For example, in 2001, Judge Edward Nottingham (D. Colo.) used video teleconferencing technology to try a civil rights case in which the prisoner plaintiff was incarcerated at a location 800 miles from the courthouse.[8] Use of video technology in prisoner civil rights cases, authorized by the Prison Litigation Reform Act,[9] avoids the expense and safety concerns associated with transporting prisoners to the courthouse for trial.

Because a person's liberty is often at risk in a criminal trial, the use of video teleconferencing in criminal trials is more controversial than its use in civil trials. Despite this controversy, Magistrate Judge Lorenzo F. Garcia (D.N.M.) argues that the use of video teleconferencing for arraignments avoids unnecessary costs associated with transporting prisoners to court.[10] Although Judge Judith Guthrie (E.D. Tex.) prefers conducting hearings "face to face," she notes that, because video teleconferencing saves prisons time preparing a prisoner for transport, reduces safety concerns, and decreases costs, she uses video technology extensively for *Spears* hearings.[11] Judge Guthrie also handles some other aspects of criminal cases by video to reduce transportation costs.[12]

B. Sparing Defendants the "Convenience of the Guillotine"[13]

The use of video proceedings can increase judicial economy, safety, and convenience. However, "[w]hile court procedures must be expedited to keep pace with rising arrests, something more than mere administrative convenience . . . must be demonstrated before the mass installation of video production equipment in the courts of the United States will satisfy constitutional guarantees of due process."[14] Federal court procedures employed to insure that every criminal defendant receives a fair

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7. *Id.*
8. *Id.*
9. 42 U.S.C. § 1997(f) (2000).
10. *Videoconferencing*, *supra* note 6.
11. *See supra* note 5 and accompanying text.
12. *Videoconferencing*, *supra* note 6.
13. The phrase "convenience of the guillotine" was first used by Judge Joseph R. Goodwin to describe the use of video proceedings in federal criminal trials. 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") (on file with authors) [hereinafter *Goodwin Letter*].
14. Rabum-Remfry, *supra* note 1, at 827.

trial should not be sacrificed on the altar of expedience and convenience. As noted by the Supreme Court of Appeals of Virginia, "the rights of man are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency." [15]

Concerns raised regarding the fairness of conducting video proceedings in federal court include (1) accurately assessing the credibility of a witness who appears via video; (2) undermining the solemnity of court proceedings, inducing the defendant to underestimate their importance; and (3) forcing a defense attorney to decide between being in court with the judge and prosecutor or in jail with the defendant during a video proceeding.

The Advisory Committee on Criminal Rules recommended, and the Supreme Court and Congress approved, amending Rules 5 and 10 of the Federal Rules of Criminal Procedure to expressly allow the use of video teleconferencing for initial appearances and arraignments.[16] The Committee, however, noted that the suggested changes "could be viewed as an erosion of an important element of the judicial process," and listed three potential concerns regarding conducting arraignments by video.[17] First, conducting an arraignment by video may lessen the "impact of reading of the charge."[18] Second, the court may need "to personally see and speak with the defendant [during] the arraignment" to insure that the defendant adequately understands the gravity of the charge. [19] Finally, the ability of counsel to communicate with the defendant may be impaired if the defense attorney is physically present in court, while the defendant appears by video.[20] Despite these concerns, the Committee concluded that "the benefits of using video teleconferencing outweighed the costs,"[21] and that "in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment" by video teleconference.[22]

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15. Thompson v. Smith, 154 S.E. 579, 584 (Va. 1930).

16. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

17. FED. R. CRIM. P. 10 (2002 amendment).

18. *Id.*

21. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* Although the Advisory Committee drafted alternative versions of Rules 5 and 10 that did not require the defendant's consent to conduct the proceeding by video teleconference, the Judicial Conference passed the version of the amendment of both Rules requiring the defendant's consent. *See* FED. R. CRIM. P. 5 advisory committee's note (2002) (Alternative Version for Video Teleconferencing - Defendant's Consent Required, p. 146-47); FED. R. CRIM. P. 10 advisory committee's note (2002) (Alternative Version for Video Teleconferencing - Defendant's Consent Required, p. 163-64).

As predicted by the Committee, many judges have expressed concern that the use of video teleconferencing in federal court will cause defendants to underestimate the importance of the proceedings. 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.[23]

Judge Goodwin's concerns are not limited to the potential impact video proceedings may have on the defendant's perception of the seriousness of the proceeding. He also argues that conducting proceedings by video teleconference may tarnish the defendant's, 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.[24]

These potential costs so eloquently expressed by Judge Goodwin warrant careful consideration in light of the recent move to expand the use of video proceedings in federal court. When considering the appropriate use of video teleconferencing, 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

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23. *See Goodwin Letter, supra* note 13.
24. *Id.*

deliberately built into our system to spare a free people the convenience of the guillotine."[25]

When considering the potential impacts that the expanded use of video proceedings will have in federal court, emotion must be tempered with reason. In his dissent in *United States v. Baker*,[26] Judge Widener noted that the controversy surrounding the use of video teleconferencing in federal court is as "old as the trial of Walter Raleigh, who begged the court in vain to bring Lord Cobham from the tower. Sending the televised image of a witness from Butner to the City of Raleigh is no different than sending Cobham's writings from the Tower of Winchester."[27] While this is an oft-quoted passage by members of the judiciary that oppose expanding the use of video teleconferencing in federal court proceedings, there is something both qualitatively and intuitively different between a writing and an interactive image of a defendant or witness on a video teleconferencing monitor. Intangible, but real, costs are associated with electronically producing a defendant before the court. And video "presence" is not an adequate substitute for physical presence in a federal courtroom in all circumstances or for all proceedings. However, transmitting a defendant's image into the courtroom in a format that allows the defendant to interact with the courtroom environment certainly differs from interacting with a defendant through writings.

This is the dilemma. Producing a defendant electronically is qualitatively different from requiring the defendant's physical presence in the courtroom. A video presence is something less than physical presence. However, producing a defendant electronically also is qualitatively different from dispensing with his appearance altogether. Simply stated, the common (and probably accurate) perception is that attending a proceeding by video is better than not attending the proceeding at all, but it is not as good as being physically present in the courtroom. To accurately assess the costs associated with the use of video teleconferencing in federal court, video presence must be considered as a class unto itself, independent from physical presence or complete absence.

II. "PRESENCE" UNDER RULE 43 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

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 federal courtroom during certain judicial proceedings.[28] Federal courts have held that "a defen-

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25. *Id.*

26. 45 F.3d 837 (4th Cir. 1995).

27. *Baker*, 45 F.3d at 850-51.

28. *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

dant's presence [at trial] is fundamental to the basic legitimacy of the criminal process,"[29] and that a "leading principle [pervading] the entire law of criminal procedure is that, after indictment . . . , nothing shall be lawfully done in the absence of the prisoner."[30] Although the Constitution and the Federal Rules of Criminal Procedure command the presence of the defendant in the courtroom during certain proceedings, the decisions in *Smith v. Mann*[31] and *Cuoco v. United States*[32] 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.[33]

In *Smith v. Mann*,[34] the defendant, Smith, was indicted for allegedly possessing cocaine with the intent to distribute.[35] Smith failed to appear for his trial.[36] After determining that Smith knew the time and place of the trial, the court determined that by his absence, Smith voluntarily waived his Sixth Amendment right to be present at trial.[37] The court conducted the trial and Smith was convicted *in absentia*.[38] The court then sentenced Smith to serve a term of imprisonment of 25 years to life on the charge of criminal possession of a controlled substance in the first degree.[39]

In *Cuoco v. United States*,[40] the defendant, Cuoco, was indicted on four counts of robbing offices of the United States Postal Service.[41] When the marshals attempted to bring Cuoco to court for his trial, he refused.[42] At defense counsel's request, the marshals brought Cuoco to court forcibly.[43] The judge then informed Cuoco that he would not be brought to court during the trial if he continued to refuse to cooperate.[44]

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a defendant's presence is required during arraignments); FED. R. CRIM. P. 43 (stating the general "presence requirement").

29. United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983).

30. Lewis v. United States, 146 U.S. 370, 372 (1892).

31. 173 F.3d 73 (2d Cir. 1999).

32. 208 F.3d 27 (2d Cir. 2000).

33. *See Smith*, 173 F.3d at 76; *Cuoco*, 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).

34. 173 F.3d 73.

35. *Id.* at 75.

36. *Id.*

37. *Id.* at 76-77.

38. *Id.* at 75.

39. *Id.*

40. 208 F.3d 27.

41. *Id.* at 29.

42. *Id.*

43. *Id.*

44. *Id.*

Cuoco stated that he would "rather not be present."[45] Like Smith, Cuoco was convicted *in absentia*.[46]

The defendants in *Smith* and *Cuoco* collaterally attacked their convictions, arguing that their due process rights and the Confrontation Clause of the Sixth Amendment were violated when the court conducted portions of their trials *in absentia*.[47] In both cases, the United States Court of Appeals for the Second Circuit affirmed the district court's ruling—upholding the convictions.[48] The Second Circuit concluded that holding the trials *in absentia* did not violate the Constitution because the defendants had waived their constitutional rights to be present at trial.[49] The Second Circuit, however, noted that Rule 43 of the Federal Rules of Criminal Procedure might have been violated.[50] Nonetheless, the Federal Rules of Criminal Procedure were not applicable to Smith's state conviction,[51] and, although *Cuoco* involved a federal prosecution, Cuoco's counsel failed to raise a rule violation claim.[52] Because the provisions of the Federal Rules of Criminal Procedure requiring a defendant's presence in federal court appear to be broader than their Constitutional counterparts, which are deemed waived under some circumstances, we focus on the evolution of the "presence requirement" under the Federal Rules of Criminal Procedure.

The basic provision of Rule 43 of the Federal Rules of Criminal Procedure defines when a defendant is required to be present in federal court and when a defendant may waive his right to be present. Under Rule 43(a), 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."[53]

Rules 43(b) and (c) specify when a defendant is not required to be present.[54] Rule 43(b) essentially embodies the Supreme Court's decisions in *Illinois v. Allen*[55] and *Taylor v. United States*,[56] which read together hold that a defendant waives his right to be present at trial if, after being

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45. *Id.*
46. *Id.* at 29-30.
47. *Smith*, 173 F.3d at 75; *Cuoco*, 208 F.3d at 29.
48. *Smith*, 173 F.3d at 77; *Cuoco*, 208 F.3d at 32.
49. *Smith*, 173 F.3d at 76 (holding that "nothing in the Constitution prohibits a trial from being commenced in the defendant's absence so long as the defendant knowing and voluntarily waives his right to be present"); *Cuoco*, 208 F.3d at 30.
50. *Smith*, 173 F.3d at 76; *Cuoco*, 208 F.3d at 30-32.
51. *Smith*, 173 F.3d at 77.
52. *Cuoco*, 208 F.3d at 30.
53. FED. R. CRIM. P. 43(a).
54. FED. R. CRIM. P. 43(b), (c).
55. 397 U.S. 337 (1970).
56. 414 U.S. 17 (1973).

present at commencement of the trial, the defendant is voluntarily absent from the trial,[57] or, after being warned by the court, the defendant engages in disruptive conduct that justifies his removal.[58] Furthermore, Rule 43(c) states that presence is not required when the defendant is an organization represented by counsel;[59] in a misdemeanor case at arraignment, plea, trial, and imposition of sentence when the defendant provides written consent;[60] at a conference or hearing involving a question of law;[61] or at a proceeding involving a reduction or correction of a sentence.[62]

Although sections of rules regarding initial appearances (Fed. R. Crim. P. 5), arraignments (Fed. R. Crim. P. 10), and pleas (Fed. R. Crim. P. 11) include language that could be construed as requiring the defendant's presence in court during these specific proceedings,[63] Rule 43 is the rule that specifically addresses the "presence requirement" under the Federal Rules of Criminal Procedure. Because Rule 43 is the "umbrella rule" regarding the necessity of the defendant's presence under these rules, the evolution of the "presence requirement" has revolved around Rule 43.

The definition of the word "presence" in Rule 43 is of paramount importance to the issue of when video proceedings can be employed in federal court. One of the definitions of "presence" in Black's Law Dictionary is "within sight or call."[64] If the judiciary defined presence as "within sight or call," a defendant would be present in the courtroom whenever he appeared by video teleconference, and the use of video proceedings in federal court would be almost unlimited.[65] Wisely, federal courts have unanimously rejected this definition.[66]

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57. *See Taylor*, 414 U.S. at 20.
58. *See Allen*, 397 U.S. at 342-43.
59. FED. R. CRIM. P. 43(c)(1).
60. FED. R. CRIM. P. 43(c)(2).
61. FED. R. CRIM. P. 43(c)(3).
62. FED. R. CRIM. P. 43(c)(4).
63. *See* FED. R. CRIM. P. 5, 10, 11.
64. BLACK'S LAW DICTIONARY 820 (6th ed. 1991).
65. *See, e.g.*, MO. ANN. STAT. § 561.031 (West 2002) (allowing for most physical appearances by a defendant in court to be made by means of closed circuit television, but also noting that these appearances "shall not prohibit other appearances via closed circuit television upon waiver of any right such persons held in custody or confinement might have to be physically present").
66. *See* United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 236 (5th Cir. 1999); Valenzuela-Gonzalez v. United States Dist. Court, 915 F.2d 1276, 1280 (9th Cir. 1990).

A. *The effect of* Valenzuela-Gonzalez v. United States District Court,[67] United States v. Navarro,[68] *and* United States v. Lawrence[69] *on Video Proceedings in Federal Prosecutions*

The Fourth, Fifth, and Ninth Circuits have defined "presence" under Rule 43 to mean physical presence.[70] The Fourth and Fifth Circuit cases dealt with the defendant's presence during sentencing;[71] the Ninth Circuit case dealt with the defendant's presence during arraignment.[72] In each case, the court of appeals held that "presence" under Rule 43 meant physical presence, and thus conducting the proceeding using video teleconferencing violated the rule.[73]

Black's Law Dictionary defines presence as an "[a]ct, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of."[74] In *United States v. Navarro*,[75] the dissent noted that, if presence were defined as "within sight or call," a person involved in a video teleconference would be present.[76] However, the majority in *Navarro*, as well as the courts in *United States v. Lawrence*[77] and *Valenzuela-Gonzalez v. United States District Court*,[78] held that the overall definition of presence in Black's Law Dictionary, along with the "bare meaning" and "common-sense understanding" of the term, indicated that to be present, the defendant had to be physically present in the courtroom.[79]

There are indications that the drafters of Rule 43 were speaking of physical presence. As noted in *Bailey v. United States*,[80] "[t]he meaning of statutory language . . . depends on context."[81] Rule 43 states that a defendant, initially present at trial, can waive his right to continued presence at trial through conduct that would justify his exclusion from the courtroom.[82] The word presence in this section of the rule clearly antici-

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67. 915 F.2d 1276 (9th Cir. 1990).
68. 169 F.3d 228 (5th Cir. 1999).
69. 248 F.3d 300 (4th Cir. 2001).
70. *Lawrence*, 248 F.3d at 304; *Navarro*, 169 F.3d at 236; *Valenzuela-Gonzalez*, 915 F.2d at 1280.
71. *Lawrence*, 248 F.3d at 301; *Navarro*, 169 F.3d at 235.
72. *Valenzuela-Gonzalez*, 915 F.2d at 1279-81.
73. *Lawrence*, 248 F.3d at 302; *Navarro*, 169 F.3d at 237; *Valenzuela-Gonzalez*, 915 F.2d at 1281.
74. BLACK'S LAW DICTIONARY 820 (6th ed. 1991).
75. 169 F.3d 228.
76. *Id.* at 241-42 (Politz, J., dissenting).
77. 248 F.3d 300.
78. 915 F.2d 1276.
79. *Lawrence*, 248 F.3d at 304; *Navarro*, 169 F.3d at 236; *Valenzuela-Gonzalez*, 915 F.2d at 1281.
80. 516 U.S. 137 (1995).
81. *Bailey*, 516 U.S. at 145.
82. FED. R. CRIM. P. 43(c)(1)(C) (2002 amendment).

pates that the defendant would be physically present; a contortion of language is necessary to imagine excluding a defendant from the courtroom who is not physically present at trial.

The Advisory Committee Notes to Rule 43 indicate that there is an express provision allowing a misdemeanant to waive his right to be present at trial.[83] A policy consideration behind this provision was the realization that, with misdemeanors, the expense associated with traveling great distances to attend trial may not be "commensurate with the gravity of the charge."[84] Because of this, Rule 43 was drafted so that the court could permit defendants charged with misdemeanors to waive their right to attend trial if the defendant felt that the costs associated with attending the trial were not justified. The inclusion of a specific provision allowing misdemeanants to avoid costs associated with traveling to trial by waiving their right to attend trial, and the absence of such a provision for defendants charged with felonies, indicates that the drafters of Rule 43 did not intend to permit defendants charged with felonies to waive their right to physically attend trial.[85]

Additionally, there is an express provision in Rule 43 of the Federal Rules of Civil Procedure permitting testimony "by contemporaneous transmission from a different location."[86] The existence of a provision expressly permitting the use of video teleconferencing in Rule 43 of the Federal Rules of Civil Procedure indicates the drafters were aware of the availability of video teleconferencing technology for use in trials. The express provision for the use of video teleconferencing technology in the Federal Rules of Civil Procedure, along with the lack of a reference to video technology in the Federal Rules of Criminal Procedure, suggests that the omission was not inadvertent; rather, the drafters specifically avoided referring to video teleconferencing in the Federal Rules of Criminal Procedure because they did not intend video teleconferences to be substituted for physical presence in criminal proceedings. Thus, the "presence" analyses in *Navarro*, *Lawrence*, and *Valenzuela-Gonzalez* appear to be correct. "Presence" under Rule 43 of the Federal Rules of Criminal Procedure, therefore, requires physical presence, and video proceedings generally cannot be used.

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83. FED. R. CRIM. P. 43 advisory committee's note 3 (1944) (2002 amendment).

84. *Id.*

85. Numerous cases consider the advisory committee's notes included with the Federal Rules of Criminal Procedure as authoritative evidence of the drafters' intent. *See, e.g.*, Williamson v. United States, 512 U.S. 594, 614-15 (1994) (Kennedy, J., concurring).

86. FED. R. CIV. P. 43(a).

B. The Move to Amend the Federal Rules of Criminal Procedure to Expressly Allow Video Proceedings

In response to the Ninth Circuit's holding in *Valenzuela-Gonzalez* in 1990, the Advisory Committee on Criminal Rules proposed an amendment to Rule 10 of the Federal Rules of Criminal Procedure to permit video teleconferencing of arraignments with the defendant's consent.[87] After the amendment was proposed, the Committee on Defender Services requested that the Advisory Committee withdraw the proposed amendment until a pilot video teleconferencing project could be conducted.[88] The Advisory Committee agreed, but when one of the public defenders involved in the pilot project refused to participate, the project collapsed.[89]

Nonetheless, several recent events prompted the Advisory Committee to reconsider amendments expressly allowing initial appearances and arraignments to be conducted by video teleconference. First, state courts increasingly conduct initial proceedings by video teleconference.[90] Second, the Judicial Conference supports the use of video teleconferencing to conduct some procedures in federal court.[91] Third, Senator Strom Thurmond recently introduced legislation in Congress that would allow federal courts to conduct initial appearances and arraignments by video teleconference without defendants' consent.[92] Finally, the rapid improvement in the quality of video teleconferencing technology enables video presence to more closely approximate physical presence in the courtroom.

In response to their perpetually increasing caseloads, judges continually strive to increase the efficiency with which they handle their judicial proceedings.[93] Allowing judges to conduct summary pre-trial

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87. FED. R. CRIM. P. 10 advisory committee's note (2002 amendment).

88. FED. R. CRIM. P. 10 advisory committee's note (2002) (Alternative Version for Video Teleconferencing - Defendant's Consent Required, p. 163).

89. *Id.*

90. FED. R. CRIM. P. 5 advisory committee's note (2002 amendment) ("The major substantive change is in new Rule 5(f), which permits video teleconferencing for an appearance under this rule, if the defendant consents. *This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings.*") (emphasis added).

91. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, 1997 LONG RANGE PLAN FOR AUTOMATION IN THE FEDERAL JUDICIARY, at 10 (Mar. 1997) (encouraging federal courts to "use video telecommunications technologies to facilitate more efficient . . . judicial proceedings"); LEONIDAS R. MECHAM, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES, at 9 (Feb. 2000), *available at* http://www.uscourts.gov/optimal00/optimal2000.pdf (noting that "technology in the courtroom can facilitate case management and decision making, reduce trial time and litigation costs, and improve the quality of evidence presentation, fact-finding, jury attentiveness, and understanding, and access to court proceedings").

92. S. 791, 107th Cong. (2001).

93. In the mid-1990s, judges in Florida's Fifth, Ninth, Thirteenth, Seventeenth, and Nineteenth Judicial Circuits petitioned the Supreme Court of Florida to amend Rule 8.100(a) of the Florida

proceedings by video teleconference may enhance flexibility in scheduling. In an attempt to increase judicial efficiency, an ever-growing number of states permit criminal proceedings to be conducted using video technology.[94] Over half of the states currently permit certain types of criminal proceedings to be conducted by video teleconference.[95]

The Judicial Conference recently encouraged federal courts to "use video telecommunications technologies to facilitate more efficient . . . judicial proceedings."[96] Video technology has proven beneficial in various criminal proceedings, including sentencings and arraignments. The Director of the Administrative Office of the United States Courts February 2000 report on Optimal Utilization of Judicial Resources stated that videoconferencing "can facilitate case management and decision making, reduce trial time and litigation costs, and improve . . . access to court proceedings."[97]

The support for increased use of video proceedings in federal court was further bolstered in 2001, when Senator Strom Thurmond (R-SC) introduced legislation to amend the Federal Rules of Criminal Procedure so that initial appearances and arraignments could be conducted by video teleconference without a defendant's consent.[98] Senator Thurmond argued that increased use of video teleconferencing would increase court safety and permit federal courts to "operate more efficiently and at lower costs, while maintaining many of the benefits of communicating in person."[99]

Many teleconferencing systems employed by courts in the 1980s and 1990s relied on low quality monitors, and the pronounced time delay associated with these systems made communicating difficult. Recently developed video teleconferencing equipment has almost eliminated time delays, and the monitors used in these newly developed systems have large screens with excellent picture quality.

Based on these factors, on October 1, 2001, the Judicial Conference of the United States passed proposed amendments to Rules 5 and 10 of the Federal Rules of Criminal Procedure, expressly allowing federal courts to conduct initial appearances and arraignments by video telecon-

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Rules of Juvenile Procedure to allow juveniles to attend detention hearings via audio-video device. *See* Amendment to Fla. Rule of Juvenile Procedure 8.100(a), 753 So. 2d 541, 542 (Fla. 1999) [herinafter *Fla. Amendment 1999*].

94. *See infra* note 107 and accompanying text.

95. *Id.* Arraignments and initial appearances are the proceedings most commonly permitted to be conducted by video teleconference. *Id.*

96. JUDICIAL CONFERENCE OF THE UNITED STATES, 1997 LONG RANGE PLAN FOR AUTOMATION IN THE FEDERAL JUDICIARY, at 10 (Mar. 1997).

97. MECHAM, *supra* note 91, at 9.

98. S. 791, 107th Cong. (2001).

99. 147 CONG. REC. S4,007 (daily ed. Apr. 26, 2001) (statement of Sen. Thurmond).

ference with the defendant's consent.[100] On May 1, 2002, the Supreme Court approved these proposed amendments,[101] sending them on to Congress.[102] Although past proposals allowing the use of video proceedings in federal criminal trials failed to receive the support necessary for their approval, the recent increase in the use of video technology by state courts, the general "pro-technology" policy of the Judicial Conference, and legislation recently introduced in Congress suggested that the amendments allowing the use of video proceedings to conduct initial appearances and arraignments might now have the support necessary to receive congressional approval. On November 20, 2002, the United States Senate adjourned *sine die* for the 2nd Session of the 107th Congress,[103] followed by the United States House of Representative's *sine die* adjournment on November 22, 2002.[104] Because Congress did not act upon the proposed amendments to the Federal Rules of Criminal Procedure forwarded by the Supreme Court, the proposed amendments to Rules 5, 10, and 43 went into effect on December 1, 2002.[105]

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100. The Judicial Conference approved proposed amendments to Rules 5 and 10 on October 1, 2001. *See* Advisory Committee on Criminal Rules, Doc. No. 1276, Dec. 12, 2001.

101. Recent orders and the journal of the Unites States Supreme Court can be viewed at http://www.supremecourtus.gov. For information concerning the Supreme Court's approval of the proposed amendments to Rules 5, 10, and 43, navigate to "Orders and Journal," then to "Journal." Information concerning amendments to Rule 5, 10, and 43 may be viewed on page 836 of the Journal. Alternatively, this information may be viewed by navigating to "Orders and Journal," then to "Orders of the Court, October Term 2001," then to "Federal Rules of Criminal Procedure" on April 29, 2002.

102. The following steps are involved in amending the Federal Rules of Criminal Procedure. First, the Judicial Conference appoints an Advisory Committee on the Criminal Rules and a Standing Committee on the Rules of Practice and Procedure. GEOFFREY C. HAZARD ET AL., CASES AND MATERIALS: PLEADING AND PROCEDURE: STATE AND FEDERAL 27-29 (8th ed. 1999). Members of both committees "are composed of federal Court of Appeal and District Judges, and members of the practicing bar." *Id.* The Advisory Committee drafts proposed amendments and publishes them for public comment. *Id.* After incorporating the necessary changes suggested by the public, the Advisory Committee forwards the proposed amendments to the Standing Committee. *Id.* The Standing Committee may accept, reject, or modify the proposed amendments. *Id.* If the Standing Committee accepts the proposed amendments, it forwards them to the Judicial Conference. *Id.* Like the Standing Committee, the Judicial Conference has the option of accepting, rejecting, or modifying the proposed amendments. *Id.* If the Judicial Conference accepts the amendments, or after it has made all modifications it deems necessary, the Judicial Conference forwards the proposed amendments to the Supreme Court. *Id.* If the Supreme Court accepts the proposed amendments, it must forward them to "Congress by May 1 of the year they are to take effect." Congressional approval is the final step in the rule amendment process. *Id.* "If Congress does nothing with the rules forwarded by the Supreme Court, they automatically become law on December 1 of the year in which they are forwarded." *Id.*

103. 148 CONG. REC. S11,801 (daily ed. Nov. 20, 2002).

104. 148 CONG. REC. H9,126 (daily ed. Nov. 22, 2002).

105. *See* HAZARD, *supra* note 102.

III. USE OF VIDEO TECHNOLOGY IN STATE COURTS

Several states have enacted legislation expressly permitting courts to conduct criminal proceedings by video teleconference.[106] The types of proceedings that can be conducted by video teleconference, the type of waiver required by the defendant to conduct the proceeding by video teleconference, and the standardization of video teleconferencing equipment varies greatly among states permitting the use of video proceedings in criminal trials.[107] For example, under a California statute, only initial

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106. Raburn-Remfry, *supra* note 1, at 805.

107. For an excellent overview of the use of video teleconferencing in state court criminal proceedings, see LIS, Inc., *Use of Interactive Video for Court Proceedings: Legal Status and Use Nationwide*, Report prepared under U.S. Dep't of Justice contract J100C0017DQ9 (1995), *at* http://www.nicic.org/pubs/titles.htm (click on the title of the article under "U"). Data presented in this report were obtained through a survey sent to the attorneys general in the fifty states and the District of Columbia. *Id.* The purpose of the survey was to "examine the legal status of interactive video technology as a means of providing a live linkage between arrestees/defendants in jails with the courts." *Id.*

No information was obtained for Mississippi or New York. *Id.* Information received from the other jurisdictions indicated that video teleconferencing was used for some criminal proceedings in twenty-nine of the forty-nine jurisdictions. *Id.* Half of the states using video teleconferencing to conduct criminal proceedings reported the existence of no legislation, rules, or case law authorizing its use. *Id.* Eight states reported the existence of legislation authorizing video teleconferencing in criminal proceedings. *Id.* Ten states reported that court administrative rules authorized the use of video teleconferencing, and five states reported that case law from their state supported the use of video teleconferencing in criminal proceedings. *Id.*

Arraignments and initial appearances are the proceedings most commonly permitted to be conducted by video teleconference. *Id.* However, Colorado allows defendants to appear by video for any proceeding other than trial, and Missouri allows any pre-trial or post-trial proceeding where the cross-examination of witnesses is not allowed to be conducted by video teleconference. *Id.* In all states, video teleconferencing is used at the judges' discretion. *Id.* In six states the defendant's consent is required prior to conducting his proceeding by video teleconference. *Id.* These states include California, Florida, Hawaii, Missouri, South Carolina, and Wisconsin. *Id.* Wisconsin takes a unique position with regard to consent. *Id.* In Wisconsin, defendants who object to conducting their criminal proceeding in a video teleconference must show good cause why the proceeding should not be conducted by video. *Id.* States permitting the use of video teleconferencing to conduct arraignments (abbreviated A) or initial appearances (abbreviated IA) include Alaska (IA, A), Arizona (A), California (IA, A), Colorado (IA, A), Delaware (IA, A), Florida (IA, A), Hawaii (A), Idaho (IA, A), Kansas (IA), Louisiana (IA, A), Maine (IA, A), Massachusetts (IA, A), Michigan (A), Missouri (IA, A), Montana (IA, A), Nevada (A), New Jersey (IA), Ohio (A), Oklahoma (A), Pennsylvania (A), South Carolina (IA), Utah (A), Wisconsin (IA, A), Wyoming (IA). *Id.* (Table 1 of the report gives a description of the types of video proceedings allowed in the five jurisdictions that do not permit either initial appearances or arraignments to be conducted by video teleconference.).

A 1997 survey of the use of video technology in state courts indicated eight additional states permit the use of video teleconferencing for arraignments. John M. Greacen, *Session No. 106: Court Rules and Technology*, Fifth National Court Technology Conference (CTC5), National Center for State Courts (1997), *at* http://www.ncsc.dni.us/NCSC/TIS/ctc5/106.htm. These states included Arkansas, Indiana, Kentucky, New Mexico, New York, Tennessee, Virginia, and Washington. *Id.*

In addition to the states listed above, Illinois, 725 ILL. COMP. STAT. 5/1060-1 (2001), New Hampshire, *see LaRose v. Superintendent, Hillsborough County Corr. Admin.*, 702 N.H. 364 (1997), and some jurisdictions in Oregon, Oregon Umatill and Morrow Cir. SLR 7.020 (2002), permit arraignments to be conducted by video teleconference.

appearances and arraignments may be conducted via video.[108] In contrast, a Missouri statute permits the use of video teleconferences for initial appearances, waiver of preliminary hearings, arraignment on an information or indictment where a plea of not guilty is entered, any pretrial or post-trial proceeding that does not permit the cross-examination of witnesses, and sentencing after a plea of guilty.[109] Under the California statute, defendants must execute a written waiver before they can make their initial appearance or be arraigned by video teleconference.[110] In Missouri, waiver is required only for arraignments where the defendant will enter a plea of guilty and sentencings following a conviction at trial; the defendant's consent is not required for all other video proceedings authorized under the Missouri statute.[111] In Florida, the law regarding video proceedings is more restrictive than in California with respect to the procedures that can be conducted by video, limiting the use of video proceedings to arraignments,[112] but the law is less restrictive with respect to the consent required of the defendant.[113]

The success of the infusion of video proceedings into state criminal justice systems also has varied. A comparison of the video procedure programs employed by Florida in its juvenile detention program and by Missouri in its criminal justice program illustrate both ends of the spectrum with regard to the extensiveness of the use of video teleconferencing in state courts and the success of video teleconferencing programs.[114]

A. The Failed Amendment to the Florida Rules of Juvenile Procedure

In 1999, judges from the Fifth, Ninth, Thirteenth, Seventeenth, and Nineteenth Judicial Circuits of Florida petitioned the Florida Supreme Court to amend Rule 8.100(a) of the Florida Rules of Juvenile Procedure.[115] The proposed amendment allowed juvenile detention hearings to be held by video teleconference.[116] Judges arguing for the amendment noted that: (1) under the Florida Rules of Criminal Procedure, adults could appear at initial appearances and arraignments by video teleconference; (2) allowing juveniles to attend detention hearings by video teleconference would reduce transportation time, giving juveniles more time to attend counseling sessions and classes; and (3) producing juveniles by

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108. CAL. PENAL CODE § 977 (West 2001).

109. MO. ANN. STAT. § 561.031 (West 2001).

110. CAL. PENAL CODE § 977 (West 2001).

111. MO. ANN. STAT. § 561.031 (West 2001).

112. FLA. R. CRIM. P. 3.160(a) (2001) (limiting the use of video proceedings to arraignments).

113. *Id.* (leaving the use of video proceedings to the discretion of the court).

114. *See* Raburn-Remfry, *supra* note 1 (detailing the significant variations among states in the types of teleconferencing equipment used and procedures applied in regulating this equipment). Of the three states mentioned in the text, only Missouri prescribes minimal procedures that must be followed when conducting video proceedings. *See* MO. ANN. STAT. §561.031 (West 2001).

115. *Fla. Amendment 1999*, 753 So. 2d 541.

116. *Id.* at 541.

video would eliminate the need to transport them to the courthouse, eliminating fights that commonly occur during transportation and in the courthouse.[117]

Several groups opposed the amendment, including individual public defenders, the Juvenile Court Rules Committee of the Florida Bar, and the Juvenile Justice Committee of the Florida Public Defenders Association.[118] Opponents of the amendment argued that: (1) detention hearings are not analogous to initial appearances or arraignments because detention hearings, unlike initial appearances or arraignments, are "evidentiary and adversarial in nature, often requiring witness confrontation, challenging of evidence, and review of records and documents;" (2) conducting detention hearings by video would give prosecutors unequal footing because the prosecutor would be present in the courtroom during the hearing, while the defense attorney would be with the defendant; and (3) conducting detention hearings by video might prevent juvenile defendants from having meaningful contact with their parents or guardians during the proceeding.[119]

After reviewing the arguments regarding the proposed amendment, the Florida Supreme Court examined reports concerning the results of a pilot project designed to assess the possibility of conducting video detention hearings in Florida.[120] In explaining the results of the pilot project, Chief Judge Alvarez noted that approximately 2,900 children attended video detention hearings during the pilot project.[121] The results of the pilot project indicated that video detention hearings provide numerous benefits.[122] Judge Alvarez reported that with video detention hearings, juveniles "no longer have to be transported in crowded vans through rush hour traffic and then spend several hours sitting in the holding cells at the courthouse. The juveniles are no longer humiliated by being paraded through the courthouse in handcuffs and shackles," and, if the judge orders that they be released, they can be "released in a more timely fashion since they are already at the detention center."[123] In addition, Judge Alvarez noted that conducting detention hearings via video results in the juveniles spending "less time away from their classes, groups, and appointments."[124]

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117. *Id.* at 542.

118. *Id.*

119. *Id.*

120. *See* Amendment to Fla. Rule of Juvenile Procedure 8.100(a), 667 So. 2d 195, 197 (Fla. 1996) (detailing the pilot program) [hereinafter *Fla. Amendment 1996*].

121. *Fla. Amendment 1999*, 753 So. 2d at 544.

122. *Id.* at 543.

123. *Id.* at 544.

124. *Id.*

Based on the judges' petitions and the positive results of the pilot project, the Florida Supreme Court adopted an amendment to Florida Rule of Juvenile Procedure 8.100(a) on an interim basis.[125] The amendment expressly allowed juveniles to attend detention hearings via video teleconference.[126] The Court held that, "while every . . . citizen is entitled to due process of law in any legal proceeding where his or her personal freedom is directly in issue, his right is not vitiated by technological changes in court procedure;" furthermore, the Court noted that it "endorse[d] technological improvements in courtroom procedure."[127]

In 2001, the Florida Supreme Court revisited the use of video technology in conducting juvenile detention hearings.[128] The Court noted several specific shortfalls associated with this practice, including (1) juveniles were not provided an opportunity to have meaningful, private communication with their parents or guardians; (2) in many circumstances, juveniles did not understand what occurred during the proceeding and, upon completion of the hearing, had to ask the public defender if they were being released; and (3) video teleconference "hearings totally lacked the dignity, decorum, and respect one would anticipate in a personal appearance before the court."[129] In reviewing the use of such hearings, the Court concluded that the system, imposed on a temporary basis, elevated "process above substance."[130] Although conducting detention hearings by video was much more efficient and less costly than requiring juveniles to make personal appearances, the Court felt that Florida's "youth must never take a second position to institutional convenience and economy," and declined to adopt the interim amendment on a permanent basis.[131]

In retrospect, perhaps the Florida Supreme Court overstated the issue when it passed the amendment to section 8.100(a) in 1999; perhaps a more accurate statement would have been: "While every . . . citizen is entitled to due process of law in any legal proceeding where his or her personal freedom is directly in issue, his right is not vitiated by [*all*] technological changes in court procedure."[132] Clearly, two years after implementing the amendment, the Court concluded that some technological changes in court procedure vitiate a defendant's due process rights.

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125. *Id.* at 545.

126. *Id.* at 542.

127. *Id.* at 543.

128. *See* Amendment to Fla. Rule of Juvenile Procedure, 796 So. 2d 470 (Fla. 2001) [hereinafter *Fla. Amendment 2001*].

129. *See Fla. Amendment 2001*, 796 So. 2d at 473.

130. *Id.* at 474.

131. *Id.*

132. *Fla. Amendment 1999*, 753 So. 2d at 543 (emphasis and emphasized section added).

A brief review of some of the problems associated with Florida's video detention hearings illustrates potential difficulties that might arise in federal court. For example, the Florida Supreme Court noted that the use of video teleconferences hampered communication between juveniles and their parents or their guardians, as well as between the parents or guardians and the public defender.[133] Florida's experience suggests that conducting proceedings by video may impair a defendant's ability to communicate with his lawyer.

The Florida experience also indicates that defendants often have difficultly comprehending what is transpiring during a video proceeding.[134] The Florida Supreme Court found that several parties often spoke simultaneously during video detention hearings, adding to the confusion of the proceeding.[135] In many circumstances, the juveniles' understanding of the proceeding was so incomplete that, upon completion of the proceeding, they were forced to ask the public defender if they were being released or detained.[136] Many opponents of conducting video proceedings in federal court argue that it is more difficult for defendants to understand and follow proceedings when they are conducted by video.[137] Florida's experience with video detention hearings suggests these concerns may be warranted.

Finally, Florida's experience suggests that it is difficult for a video teleconference to portray the decorum and maintain the dignity befitting a courtroom. The Florida Supreme Court found that video hearings "totally lacked the dignity, decorum, and respect [anticipated] in a personal appearance before the court."[138] The Court noted that changes could have been made to the video detention hearing procedures to more closely assimilate the decorum of a courtroom.[139] However, the Court found that the costs associated with insuring that video proceedings portrayed the decorum of a courtroom outweighed the benefits of conducting detention hearings by video teleconference.[140] Opponents of the use of video teleconferencing in federal court note that the "courtroom in Anglo-

133. *Fla. Amendment 2001*, 796 So. 2d at 473.

134. *See id.*

135. *Id.*

136. *Id.*

137. *See Goodwin Letter*, *supra* note 13; *see also Fla. Amendment 1999*, 753 So. 2d at 546 (Lewis, J., dissenting) (stating that "this procedure which substitutes a T.V. chamber with glass faces and sound system voices for human contact is an Orwellian prophecy fulfilled, merely substituting one evil for another in the name of technological advancement," and "[i]f fights, disruptions, and the spectacle of parades in handcuffs and shackles are the ills to be corrected, then we should correct and change these disgraceful problems rather than avoiding correction by attempting to implement robotic justice").

138. *Fla. Amendment 2001*, 796 So. 2d at 473.

139. *See id.*

140. *Id.*

American jurisprudence is more than a location with seats . . . the setting that the courtroom provides is itself an important element in the constitutional conception of a trial, contributing a dignity essential to the integrity of the trial process."[141]

What is the predictive value of the failure of Florida's video detention hearing program for the potential success of video proceedings in federal court? Although Florida's use of video teleconferencing to conduct detention hearings failed, Florida continues to use video teleconferencing to conduct arraignments, and other states use video teleconferencing to conduct many pre- and post-trial proceedings.[142]

Factors specific to juvenile detention hearings may have been responsible for the failure of Florida's video detention program. The age of the defendants involved in the video proceedings is one obvious factor differentiating juvenile detention hearings from other criminal proceedings. The young age of those in the juvenile system may have contributed to their inability to follow the video proceedings. Because of their age, most juvenile defendants are relatively unsophisticated. Lack of life experience may impede their ability to communicate with public defenders. This factor may be partly responsible for the failure of Florida's video detention hearing program, and may limit the predictive value of Florida's experiment with regard to the likely success of video proceedings in federal court.

A second factor distinguishing juvenile detention hearings from other criminal proceedings is that juveniles in detention hearings must be able to communicate with their parents or guardians during the proceeding. The Florida Supreme Court noted that a primary negative impact of conducting detention hearings by video was that defendants had a difficult time communicating confidentially with their parents or guardians.[143] Because communication between defendants and their parents is not a concern in most proceedings in federal court, this failure of Florida's program may not be predictive of the potential success of video proceedings in federal court. However, communication difficulties between defendants and their parents suggest that defendants in federal court may have greater difficulty communicating with their attorneys

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141. *Goodwin Letter*, *supra* note 13 (quoting Estes v. Texas, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring)) (internal quotation marks omitted).

142. *See* FLA. R. CRIM. P. 3.160(a); MO. ANN. STAT. § 561.031 (West 2001); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, 1997 LONG RANGE PLAN FOR AUTOMATION IN THE FEDERAL JUDICIARY, at 10 (Mar. 1997) (encouraging federal courts to "use video telecommunications technologies to facilitate more efficient . . . judicial proceedings").

143. *Fla. Amendment 2001*, 796 So. 2d at 473.

when proceedings are conducted by video, than when the defendants are physically present in the courtroom.[144]

The specific shortcomings noted by the Florida Supreme Court in implementing Florida's video detention hearing program should be carefully examined in light of the recent amendments to the Federal Rules permitting the use of video teleconferencing in federal criminal proceedings. However, unique issues particular to juvenile detention hearings—including the age and inexperience of the defendants, as well as the defendants' need to communicate with their parents or guardians—make it difficult to evaluate the predictive value of Florida's experience on the potential success of video proceedings in federal court.

B. Expansive Use of Video Technology by Missouri State Courts

In 1987, in *State v. Kinder*,[145] the Missouri Supreme Court considered the ability of Missouri courts to conduct video proceedings in criminal cases, specifically addressing taking guilty pleas and conducting preliminary examinations via video hookup. In *Kinder*, the defendants objected to conducting their proceedings, which involved the entering of guilty pleas, through a video connection. Each defendant requested to be physically present in the courtroom.[146] The circuit court denied the defendants' requests and forced each of them to conduct their proceeding by video teleconference.[147] The issue before the Missouri Supreme Court centered on the interpretation of the presence requirements in the relevant sections of the Missouri Annotated Statutes.[148]

The Missouri Supreme Court began its analysis by acknowledging that the state statutes dealing with preliminary examinations and guilty pleas were drafted before video teleconferencing was contemplated; therefore, the Court could not discern the intent of the legislature by examining the text of the relevant statutes.[149] Because the state statutes were silent on the subject, the Court held that presence meant physical presence and that video presence did not satisfy the mandates of the "presence requirements" under the governing rules and statutes.[150]

Justice Blackmar, concurring in part and dissenting in part, noted that although he was "inclined to accept the State's argument that the use of [video proceedings] satisfies requirements of 'presence' and 'open

144. This, of course, depends where the defense attorney is situated—whether she is in the courtroom with the judge or physically present with her client.

145. 740 S.W.2d 654 (Mo. 1987) (en banc) (superceded by statute).

146. *See Kinder*, 740 S.W.2d at 655.

147. *Id.*

148. *Id.* at 656.

149. *Id.*

150. *Id.*

court' as used in the governing statutes and rules," he was reluctant to decide the case based on those terms.[151] Specifically, Justice Blackmar was concerned that a holding equating video presence with physical presence could result in defendants being denied the opportunity to be physically present in court when a personal exchange between the defendant and the judge, of a quality not obtainable by video teleconference, was required.[152] He noted that he did not have "similar qualms regarding arraignment and the entry of a plea of not guilty" and that, in his opinion, arraignments and the entry of not guilty pleas could be conducted in a video teleconference.[153]

Although Justice Blackmar concurred with the majority's holding, he noted some interesting advantages video proceedings might provide towards increasing public confidence in the integrity of the judicial system.[154] Section 544.275 of the Missouri Annotated Statutes expressly allowed preliminary hearings and pre-trial proceedings to be conducted in a conference room in the penitentiary or in a courtroom at the courthouse.[155] Justice Blackmar noted that these pre-trial proceedings were commonly held at the penitentiary and that "few members of the general pubic [found] their way to the penitentiary" to view these proceedings.[156] Conducting the proceedings by video, with the defendant in the conference room and the judge in the courtroom, as opposed to conducting the proceeding with both the judge and the defendant in the penitentiary conference room, would allow members of the public, who were not willing or permitted to travel to the penitentiary to view the proceedings, to watch on monitors in the courthouse. Thus, because the courthouse is the "most public of places," Justice Blackmar suggested that video proceedings would allow greater public access to hearings.[157]

In his dissent in *Kinder*, Justice Welliver argued that he "would quash the writs as to guilty pleas, as to preliminary hearings, and as to arraignments and not guilty pleas," and would expressly allow these proceedings to be conducted by video teleconference.[158] In support of his pro-video proceedings stance, Justice Welliver stated that "split screen video appears to be an acceptable means of conducting the commercial business of the world, of conducting affairs between nations, of conducting political debate, of conducting the process of education, of communicating all forms of artistic pursuit, and for communicating . . . the news

151. *Id.* (Blackmar, J., concurring in part, dissenting in part).
152. *See id.* at 657.
153. *Id.*
154. *Id.*
155. *Id.* at 656.
156. *Id.* at 657.
157. *Id.*
158. *Id.* at 658 (Welliver, J., dissenting) (internal citations omitted).

of the world."[159] He noted that the Missouri Supreme Court commonly "excused deviation from long established trial procedures" so long as the deviation did not prejudice the defendant.[160] Justice Welliver found "no prejudice to the defendant" associated with conducting certain proceedings in state court by video.[161]

The Missouri Legislature's response to *Kinder* was swift. On March 1, 1988, the General Assembly passed section 561.031 of the Missouri Annotated Statutes.[162] This statute effectively overruled *Kinder* and greatly expanded the use of video proceedings in Missouri. In pertinent part, section 561.031 states that, "when the physical appearance in person in court is required . . . such personal appearance may be made by means of closed circuit television . . . between the court and the place of custody or confinement . . . ."[163] Specifically, section 561.031 permits state courts to force defendants to proceed via video teleconference in a wide array of proceedings, including (1) initial appearances, (2) waiver of preliminary hearings, (3) arraignments, (4) any pre-trial or post-trial criminal proceedings not allowing the cross-examination of witnesses, (5) sentencings after conviction at trial, and (6) sentencings after entry of a plea.[164] In addition, the above list does "not prohibit other appearances via closed circuit television upon waiver of any right such persons held in custody or confinement might have to be physically present."[165]

Shortly after the General Assembly's passage of section 561.031, a defendant in Missouri appealed the use of closed circuit television in a post-conviction hearing.[166] The defendant argued that conducting the proceeding by audio/visual two-way hookup violated his right to confrontation, equal protection, due process, and effective representation.[167] Justice Welliver, the author of the dissent in *Kinder*, wrote the opinion.

After reviewing the tape of the proceeding, the Missouri Supreme Court noted:

> [T]he defendant was able to confer privately with his counsel, the cameras used provided a clear picture of the witnesses, examiners, and others present during the proceedings, and the cameras clearly

159. *See id.*
160. *Id.*
161. *Id.*
162. *See* MO. ANN. STAT. § 561.031 (West 2001).
163. *Id.*
164. *Id.*
165. *Id.*
166. *See* Guinan v. State, 769 S.W.2d 427, 429-30 (Mo. 1989).
167. *Guinan*, 769 S.W.2d at 430.

> and effectively conveyed both the text and the content of the testimony and the demeanor of the persons testifying.[168]

In ruling against the defendant, the Court concluded, "[w]e find no diminution of our traditional standards of fair trial resulting from injecting the video cameras into the proceeding."[169]

The Missouri statute represents one end of the spectrum regarding the use of video proceedings in state courts.[170] Under section 561.031, video presence can be substituted for physical presence in most pre- and post-trial criminal proceedings, as well as all civil proceedings excluding a jury trial.[171] Although many argue that the greatly expanded use of video proceedings in Missouri under section 561.031 provides courts with too much latitude to substitute video presence for physical presence,[172] Judge Welliver's dissent in *Kinder* illustrates that some members of the judiciary support further expansion of the use of video proceedings.[173] Judge Welliver virtually equates video presence with physical presence, making the use of video proceedings in Missouri courts almost unlimited.[174]

Analyzing Florida and Missouri's use of video teleconferencing in the criminal justice system provides insight into the use of video technology in the courtroom and the potential problems associated with its use.[175] The successes and failures of these state programs should serve as beacons to guide the development and use of video proceedings in federal court.

IV. EFFECT OF THE AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

The amendments to Rules 5, 10, and 43 of the Federal Rules of Criminal Procedure significantly expand the types of proceedings that can be conducted by video teleconference, including initial appearances and arraignments.[176] The Advisory Committee originally drafted two alternative versions of Rule 5(f).[177] Under the first version, "[v]ideo tele-

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168. *Id.* at 431.

169. *Id.*

170. *See generally* Raburn-Remfry, *supra* note 1 (comparing video use in jurisdictions within California, Florida, and Missouri).

171. MO. ANN. STAT. § 561.031 (West 2001).

172. *See Kinder*, 740 S.W.2d at 655-56 (discussing video teleconferencing under Missouri statute).

173. *Id.* at 658-60.

174. *Id.*

175. Raburn-Remfry, *supra* note 1, at 810-12, 835-36.

176. FED. R. CRIM. P. 5(f) (2002 amendment); FED. R. CRIM. P. 10(c) (2002 amendment); FED. R. CRIM. P. 43(a) (2002 amendment).

177. *See* Memorandum from the Advisory Committee on Federal Rules of Criminal Procedure, W. Eugene Davis, Chair, to the Standing Committee on Rules of Practice and Procedure, Honerable

conferencing [could] be used to conduct an appearance . . . if the defendant waive[d] the right to be present."[178] The only difference between the first and second versions was that the first version required the defendant's consent prior to conducting the initial appearance in a video proceeding.[179] In addition, Rule 10 had two alternative versions, distinguished only by the consent of the defendant.[180] Under the first version of Rule 10, "[v]ideo teleconferencing [could] be used to arraign a defendant if the defendant waive[d] the right to be arraigned in open court."[181] The alternative version allowed the use of video teleconferencing at arraignments without the defendant's consent.[182]

The Advisory Committee noted that it preferred the second version because pilot studies indicated defendants rarely waived their rights to appear in person.[183] The Advisory Committee published both versions of the proposed amendments for Rules 5 and 10 for public comment.[184] However, the negative response received about the non-consent provisions prompted the Committee to withdraw those versions.[185]

Amended Rule 43(a) states that "[u]nless this rule, *Rule 5, or Rule 10*, provides otherwise, the defendant must be present . . . ."[186] This change continues to require physical presence under the Federal Rules of Criminal Procedure, limiting the use of video proceedings to initial appearances and arraignments.[187] The Committee noted that these changes:

> could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the de-

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Anthony J. Scirica, Chair, 5 (May 10, 2001), *available at* http://www.uscourts.gov/rules/newrules6.html [hereinafter *Memorandum*].

178. *See* Memorandum from the Advisory Committee on Federal Rules of Criminal Procedure, W. Eugene Davis, Chair, to the Standing Committee on Rules of Practice and Procedure, Honorable Anthony J. Scirica, Chair, 143 (May 8, 2001), *available at* http://www.uscourts.gov/rules/newrules6.html [hereinafter *Memorandum II*].

179. *Id.* at 146.

180. *Memorandum, supra* note 177, at 10.

181. *Memorandum II, supra* note 178, at 160.

182. *Id.* at 161.

183. *Id.* at 165.

184. *Memorandum, supra* note 177, at 5, 10; *Memorandum II, supra* note 178, at 148, 166.

185. *Memorandum, supra* note 177, at 6, 11.

186. FED. R. CRIM. P. 43(a) (2002 amendment) (emphasis added).

187. *Id.* Under the amendments to the Federal Rules of Criminal Procedure, only Rules 5 and 10 expressly allow the use of video teleconferencing.

> fendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.[188]

After noting these concerns, however, the Committee indicated it "believed that the benefits of using video teleconferencing outweighed the costs of doing so."[189]

Although the Advisory Committee, in response to negative public comment, withdrew the versions of the proposed amendments allowing federal courts to conduct video proceedings without a defendant's consent, the Committee originally believed that "the beneficial use of video teleconferenced arraignments would be lost if the defendant's consent was required" because defendants would rarely consent.[190] Although the "consent required" amendments were subject to less criticism, the amendments to Rules 5 and 10 that survived public review, and that were subsequently passed by the Judicial Conference, Supreme Court, and Congress, may have an insignificant practical effect on the functioning of federal courts.[191] This would be true under either of two scenarios. First, if defendants refuse to consent, these proceedings will have to be conducted with the defendants physically present in the courtroom. Second, for those districts currently conducting video proceedings with defendants' consent, the new rules add nothing.[192]

A. The Need to Standardize Video Teleconferencing Equipment and Procedures

Despite potential quality variations between video teleconferencing equipment available, there are no plans currently to standardize the type and quality of video teleconferencing equipment used in federal courts. The Committee Notes following the amendment to Rule 5 state that the amendments to the Federal Rules of Criminal Procedure do not "specify any particular technical requirements regarding the [video teleconferencing] system to be used."[193] The Committee Notes following the amendment to Rule 10 explain that the "amendment leaves to the courts . . . the procedures to be used" when conducting arraignments by video teleconference.[194] In comparison, state courts conducting video proceedings use a variety of camera systems, from simple two camera systems to complex six camera systems that give the defendant multiple views of the

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188. *Memorandum II*, *supra* note 178, at 161-62.

189. *Id.* at 163.

190. *Id.* at 165. The Advisory Committee noted that data from pilot programs suggests defendants rarely consent to the use of video teleconferencing. *Id.*

191. *See id.* at 163.

192. *See infra* note 249 and accompanying text. In this second category, however, at least the practice will be made uniform among districts.

193. *Memorandum II*, *supra* note 178, at 147.

194. *Id.* at 165.

courtroom,[195] and a variety of monitor sizes, from 45 inches to "as small as nine inches."[196]

It is impossible to predict how federal court proceedings will be affected by the lack of standardization in the quality and use of video technology. However, past use of video technology in state courts indicates that, without rules standardizing the quality and use of video equipment in the federal judicial system, the type of equipment, and therefore the quality of the resulting video proceeding, may vary dramatically among courts.[197]

The amendments to the Federal Rules of Criminal Procedure also fail to standardize the spatial location of the judge, prosecutor, and defense attorney during video proceedings.[198] In addition to standardizing the quality of the video teleconferencing equipment employed by federal courts, rules should be promulgated standardizing the physical location of the defense attorney and prosecutor during video proceedings. For example, in most state courts, the prosecutor and judge are located in the courtroom during video proceedings.[199] The location of the defense attorney varies depending on the rules of the state or the discretion of the attorney.[200] In most states, the attorney has the option of either attending the video proceeding with the defendant by video or physically appearing in court.[201]

The physical location of the prosecutor and defense attorney may affect the fairness of the proceeding, or at least the appearance of judicial impartiality.[202] If the prosecutor is physically present in the courtroom during the video proceeding, the defense attorney, who is with the defendant appearing by video, may be unable to communicate with the judge

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195. Lederer, *supra* note 1, at 1102.

196. Ronnie Thaxton, Note, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 181 (1993).

197. *See generally* Rabum-Remfry, *supra* note 1 (showing disparity in quality of video production from state to state and arguing for uniform standards in order to protect due process rights of defendants).

198. *See* FED. R. CRIM. P. 5(f) (2002 amendment); FED. R. CRIM. P. 10(c) (2002 amendment); FED. R. CRIM. P. 43(a) (2002 amendment). None of these amendments specifically refer to the spatial location of any of the parties during video proceedings.

199. Lederer, *supra* note 1, at 1102.

200. *Id.* at 1102, 1106; *see also* Thaxton, *supra* note 196, at 181.

201. Lederer, *supra* note 1, at 1102.

202. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.8(d) (3d ed. 2000) (addressing this concern). The standard addressing video proceedings "cautions the trial judge to avoid electronic procedures where only one of the parties is physically represented before the judge. . . . If defense counsel is not physically present in the courtroom due to the use of electronic transmission procedures, the prosecutor should not be permitted to be physically present. Instead, where feasible, the prosecutor should appear before the court in the same fashion as defense counsel, that is, through electronic means." *Id.*

as effectively as the prosecutor.[203] However, in order to be physically present in court, the defense attorney must abandon her client and forfeit face-to-face communication with the client during the proceeding.[204] Without rules regulating the spatial location of prosecutors and defense attorneys during video proceedings, the physical location of the attorneys may cause the quality of video proceedings to vary dramatically among federal courts. Standardization will assist the appearance of judicial impartiality and promote fairness within the criminal system. Standardization should include rules concerning the type of video equipment to be employed by the courts, as well as assigning spatial positions for both the prosecutor and the defense attorney.

1. Equalizing Teleconferencing Systems Technology

Although appearing before the court on a video monitor is better than not appearing at all, it is not a perfect substitute for physical presence. Arguments concerning how much information must be obtained in a video teleconference to allow it to substitute for physical presence involve implicit assumptions about both the importance of physical presence and how closely video presence simulates physical presence.[205] Therefore, the amendments to the Federal Rules of Criminal Procedure expressly permitting the substitution of video presence for physical presence necessarily assume that the quality of the video presence will meet certain minimums.[206] Conducting federal criminal proceedings by video would probably receive more enthusiastic support if defendants could appear before the court as life-size, interactive holograms, rather than blurry, monochromatic images on a small monitor.[207] Although this

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203. Raburn-Remfry, *supra* note 1, at 829; Thaxton, *supra* note 196, at 192, 200.

204. *See* Lederer, *supra* note 1, at 1106; Thaxton, *supra* note 196, at 191-92.

205. *See* Raburn-Remfry, *supra* note 1, at 837 (arguing for the promulgation of uniform standards of video production by both the courts and professional legal organizations, and urging U.S. Supreme Court review of such standards).

206. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment); FED. R. CRIM. P. 43 (2002 amendment) (The amendments are silent concerning the standards and criteria regulating the use of video teleconferencing equipment in federal court.); *see also Fla. Amendment 1999*, 753 So. 2d at 546 (Lewis, J., dissenting) (arguing in his dissent from the Supreme Court of Florida's decision to implement the use of video conferencing to conduct juvenile detention hearings that "not only are standards and criteria for the equipment to be utilized missing, the provision we approve today is also deceptively silent on its face as to the practical operation of the procedures followed").

207. Standardization efforts should address the size of viewing screens and the number of cameras that must be in the courtroom and remote location. However, the focus of these efforts should also be to establish minimum transmission rates. Video signals may be transmitted between locations as either analog or digital signals. John T. Matthias & James C. Twedt, *Session No. 208: TeleJustice - Videoconferencing for the 21st Century*, Fifth National Court Technology Conference (CTC5), National Center for State Courts (1997), *at* http://www.ncsc.dni.us/NCSC/TIS/CTC5/-208.htm. The quality of video transmission signals is controlled by the bandwidth capacity of the transmission media. *Id.* Examples of analog video signals include television broadcasts (excluding situations where the reporter is reporting from a remote location and the transmission is beamed over

digital satellites) and the closed-circuit television systems typically employed in security systems. *Id.* The use of analog signals produces high quality video. *Id.* However, a large amount of bandwidth is required to transmit analog signals. *Id.* Because of bandwidth requirements, analog signals typically are transmitted over coaxial cable, fiber-optic cable, or by microwave; they cannot be transmitted by digital satellite or over the Internet. *Id.* Analog transmission commonly produces the highest quality, least expensive video transmission for locations connected by coaxial or fiber-optic cables. *Id.* However, because the number of locations connected over the Internet greatly exceeds the number that are connected by coaxial or fiber-optic cable, video teleconferencing systems that depend on the transmission of digital, rather than analog video signals, allow users greater access to the global teleconferencing network. *Id.* On a more local scale, the technology required to transmit digital video signals between local courthouses and prisons is already installed, greatly reducing the start-up costs associated with installing digital teleconferencing systems. *Id.* The key advantage of transmitting digital rather than analog signals is that the capability to compress digital signals makes it possible to transmit digital video images by *satellite* or over the *existing public telephone network.* *Id.*

Digital signals may be transmitted over a smaller bandwidth than analog signals because digital signals can be compressed prior to transmission. John Voelker, *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, Report to the Planning and Policy Advisory Committee, Wisconsin Counties Association (1999), *at* http://www.courts.state.wi.us/circuit/pdf/-vcman.pdf. Signals are compressed by an instrument termed a codec (coder/decoder). *Id.* The codec also reconstructs or expands compressed signals as they are received at the other teleconferencing site. *Id.* Because of the greater versatility, more expansive existing network, lower start-up time, and reduced cost associated with digital video transmission systems, most state courts employ the use of digital transmission teleconferencing systems. *Id.*

Many different methods can be used to transmit compressed digital signals including an Integrated Services Digital Network (ISDN), Switched 56 system, or T-1 line. *Id.* Digital, single-line systems have a bandwidth of 33.6-56.0 Kbps. *Id.* These sorts of systems involve transmitting information through a modem and are the standard method currently used to connect to the Internet. *Id.* A 33.6-56.0 bandwidth produces fuzzy, stop-frame action that is unsuitable for use in the judicial system. Matthias & Twedt, *supra*.

By relying on ISDN for communication, teleconferencing systems achieve much greater transmission rates, while maintaining the versatility of single-line systems. Voelker, *supra*. Because ISDN service is available in most countries, teleconferencing systems that rely on the ISDN can connect to other teleconferencing systems across the globe. *Id.* There are two types of ISDN lines: basic rate interface (BRI) and primary rate interface (PRI). *Id.* One BRI is the equivalent of two ordinary phone lines. *Id.* Although images transmitted at 128 Kbps over a BRI are clearer than images transmitted over a single-line system, they remain jerky and somewhat fuzzy. Matthias & Twedt, *supra*. Participants of video teleconferences in the Australian judicial system were "generally satisfied" with the 128 Kb transmission system Australia used during the last decade. Martin E. Gruen & Tom Wetter, *Session No. 303: Courtroom Audio, Video, and Videoconferencing*, Fifth National Court Technology Conference (CTC5), National Center for State Courts (1997), *at* http://www.ncsc.dni.us/NCSC/TIS/ctc5/303.htm. However, most video teleconferencing specialists agree that a transmission bandwidth of 384 Kbps is required for "court quality" video teleconferencing applications. *Id.*; Matthias & Twedt, *supra*; Voelker, *supra*; Court Technology and Advisory Committee, *Report on the Application of Video Technology in the California Courts*, Judicial Council of California (1997), *at* http://www.courtinfo.ca.gov/reference/documents/video-report.pdf [hereinafter *Report*]. There are several ways to transmit 384 Kbps including simultaneously using six phone lines with a Switched 56 system, simultaneously using 3 BRI, using one PRI, or using a T-1 line. *Report, supra*. A T-1 line consists of 24, 64 Kbps channels, for a combined capacity of 1.544 Mbps. *Id.* The cost associated with use of T-1 lines commonly makes this option prohibitively expensive and T-1 systems cannot connect to all ISDN-based systems. *Id.* The use of three BRI is less expensive than the use of a PRI system and the benefits associated with the use of a PRI may not justify its additional cost. *Id.* Television quality video consists of a transmission rate of thirty frames per second. *Id.* Three BRI can transmit 384 Kbps, which is approximately twenty to thirty frames per second. *Id.* This transmission rate is near television

"minimum quality assumption" is implicit in the promulgation of any rule expressly permitting a defendant to attend proceedings by video teleconference, as noted previously, the amendments to the Federal Rules of Criminal Procedure do not include such minimum standards.[208] Likewise, most state courts and legislatures have failed to promulgate minimal technical requirements for video proceedings.[209] California and Wisconsin, however, have established minimum technical requirements for video teleconferencing systems used in their respective state judicial systems.[210] The federal judicial system should follow the lead of California and Wisconsin in establishing minimal technical requirements for teleconferencing systems used in federal courts.

When standardizing the use of video technology in federal criminal proceedings, the suggestions of New Jersey's Supreme Court Committee on Court Reporting should be considered.[211] Before implementing its video arraignment program, the Chief Judge in New Jersey requested that the Supreme Court Committee on Court Reporting suggest ways of

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quality. Because transmission costs increase exponentially as frame-rate increases, and because the improvement in picture quality is slight with frame-rate increases beyond twenty-two to twenty-three frames per second, the federal standards should require that all video teleconferencing systems used in the federal judicial system have a minimum transmission rate or bandwidth of 384 Kbps. *Id.* Having the *capability* to connect over three BRI simultaneously is not enough. The requirements should mandate that unless a connection can be established over all three, the video proceeding cannot proceed.

Analizing the hypothetical at the beginning of this article's introduction, experiences like that described can occur with state-of-the-art teleconferencing systems. *See supra* text at beginning of Introduction. The six clock-like circles described appear during the connection phase of a teleconference. Each circle represents one 64 Kbps line and displays the connection status of that line. As a connection is established over each line, the hand makes one complete clockwise revolution and the clock-like circle turns green. Technical problems may prevent a connection over all six lines. If the system is set for a minimum transmission rate of 384 Kbps, the system will not allow the video teleconference to begin. Under these circumstances, it is possible for the teleconferencing system administrator to reset the connection parameters so that the video teleconference may be conducted at a transmission rate of less than 384 Kbps. This results in the transmission of delayed audio and fuzzy, jerky video.

Not only should the federal standards require that federal video teleconferencing systems have the *capability* of transmitting 384 Kbps, but they should also require that a transmission rate of 384 Kbps be *achieved* during the video proceeding.

208. FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment); FED. R. CRIM. P. 43 (2002 amendment). *But see* Standing Order Implementing Videoconferencing, United States District Court for the Northern District of West Virginia (requiring that "[t]he judge must be able to view fully the out of court party and counsel" and that the "out of court party . . . must be able to view fully the judge and all attorneys present in the courtroom . . . ." The court and remote location must have the capacity for the "contemporaneous transmission of documents and exhibits," the monitor screens must be "no smaller than twenty-five (25) inches," and the images must be in color.).

209. *See* MO. ANN. STAT. § 561.031 (West 2001).

210. Voelker, *supra* note 207; *Report*, *supra* note 207.

211. Committee on Court Reporting (Stenographic & Electronic), Supreme Court of the State of N. J., Final Report (1991), *cited in* Raburn-Remfry, *supra* note 1, at 832-33.

avoiding problems associated with variation in video technology among state courts.[212] The Committee recommended that:

> 1) all counties should have a courtroom with video recording equipment of . . . [a standardized] quality; 2) each of these courtrooms should be provided with sufficient audio and video backup to ensure that the court proceedings [could] continue with a minimum of interruption in the event of equipment failure; 3) the role of the audio-video operators should be professionalized by expanding the current training program and creating a certification program; 4) the judiciary should initiate a required orientation program on the in-court steps necessary to ensure an accurate record; 5) written instructions should be provided to attorneys prior to video proceedings on attorney conduct which facilitates a clear record; [and] 6) trained audio-visual coordinators should be hired who are directly responsible to the assignment judge and appellate division's court reporting services . . . .[213]

The simple step of adopting minimum requirements regarding the quality and use of video technology for conducting remote criminal proceedings would eliminate many potential due process concerns resulting from discrepancies between federal courts in the quality of video presence.[214]

2. Maintaining the Appearance of Impartiality: Standardizing the Physical Location of Defense Counsel and the Prosecutor During Video Proceedings

During their criminal proceedings, many defendants do not feel that they are active participants in the criminal justice system.[215] They often feel like outsiders and distrust the process.[216] Conducting proceedings by video may exacerbate these feelings of disengagement. When courts conduct criminal proceedings by video, the defense attorney must decide if she will attend the proceeding via video from her client's side, or if she

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212. *Id.*

213. *Id.*

214. The type of standardization argued for here and in footnotes 204 and 207 should not be confused with the teleconferencing standards promulgated by the International Multimedia Telecommunications Consortium, Inc. (IMTC). *See* IMTC Standards (Mar. 1993), *at* http://www.imtc.org/standards.htm (listing several promugated standards). The IMTC standards maintain compatibility among international teleconferencing systems; they do not set minimum standards for transmission bandwidths. IMTC Standard T.120, *Overview* (Mar. 1993), *at* http://www.imtc.org/t120.htm. However, some of the IMTC standards should also be adopted by the federal judiciary. For example, adoption of Standard H.320 (IMCT Standard H.320 (Mar. 1993), *at* http://www.imtc.org/h320.htm) would insure the compatibility of all teleconferencing systems in the federal judiciary and adoption of IMTC's picture quality standard (IMCT Standard H.261 (Mar. 1993) *at* http://www.itu.int/rec/recommendation.asp?type=products&parent=T-REC-h) would insure all video conferencing systems used by the federal judiciary exceed a minimum that can be quantified in terms of number of luminance lines and pixels. All IMTC standards can be viewed at http://www.itu.int/rec/recommendation.asp?type=products&parent=T-REC-h.

215. Thaxton, *supra* note 196, at 197.

216. *Id.*

will be physically present in the courtroom with the judge (and prosecutor).[217] Disadvantages accompany either choice. If the attorney decides to attend the proceeding via video from her client's side, the ability to confidentially communicate with her client would be improved; however, the ability of the attorney to effectively communicate with the judge would simultaneously be weakened.[218] The opposite would be true if the attorney chose to remain in the courtroom. Research indicates that nonverbal behavior may account for over fifty percent of a message's impact.[219] Although, to some extent, a defense attorney can communicate non-verbally in a video teleconference, until video technology approximates actual presence, some non-verbal signals will be lost in video transfer.[220] Perhaps more importantly, if a defense attorney attends the proceeding from the side of her incarcerated client, while the prosecutor is physically present in the courtroom only a few yards from the judge, this may support the defendant's belief that his attorney is isolated from the system, that prosecutors are insiders, and that the judge is not a fair and impartial adjudicator of his case.[221]

To avoid these problems, a defense attorney could decide to be physically present in the courtroom, leaving her client to proceed as the sole video participant in the proceeding. Although the physical presence of defense and prosecuting attorneys in the courtroom reduces the appearance of impropriety and partiality, it often leaves defendants feeling deserted and alienated.[222] Defense attorneys should not have to choose. Standardized procedures regarding the location of defendants, defense attorneys, and prosecutors during video proceedings should be promulgated.

Standardization has been suggested by the American Bar Association ("ABA").[223] The ABA suggests that if a single attorney represents a defendant, the attorney should be required to attend the proceeding by

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217. It should be noted that generally neither the government nor the defendant is represented by counsel at the initial appearance held pursuant to Rule 5, which in the federal system customarily takes place within six hours following arrest. *See* 18 U.S.C. § 3501(c) (2000). An indigent defendant will not, as yet, have a lawyer assigned. *Id.*

218. W. Clinton Terry III & Ray Surette, *Video in the Misdemeanor Court: The South Florida Experience*, 69 JUDICATURE 13, 18 (1985) (noting that eighty-six percent of public defenders in Miami felt that the use of video proceedings impaired their representation of their clients).

219. LAWRENCE J. SMITH & LORETTA A. MALANDRO, COURTROOM COMMUNICATION STRATEGIES 5 (1985) (citing RAY L. BIRDWHISTLE, KINESICS AND CONTEXT (Barton Jones ed., Univ. of Pennsylvania Press 1970)).

220. *See* W. Clinton Terry III & Ray Surette, *Media Technology and the Courts: The Case of Closed Circuit Video Arraignments in Miami, Florida*, 11 CRIM. JUST. REV. 33-34 (1986) (stating public defenders' concerns about difficulties communicating between themselves, the judge, the prosecutor, the defendant, and the defendant's family).

221. *Id.* at 199.

222. *Id.*

223. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PROCEEDINGS IN AND OUTSIDE THE COURTROOM § 6-1.8(d) (3d ed. 1999).

video from her client's side.[224] In addition, the prosecutor also should be required to attend the proceeding by video, either from a third location (e.g., the U.S. Attorney's office) or from the same conference room used by the defendant and defense attorney.[225] This spatial arrangement is the only arrangement that simultaneously maximizes the ability of the defense attorney to communicate with her client, minimizes feelings of alienation, maintains the appearance of propriety, and imposes all handicaps associated with the use of video proceedings equally on all sides.

If multiple attorneys represent the defendant, the Federal Rules of Criminal Procedure could allow a spatial arrangement mirroring that used by Dade County, Florida in misdemeanor pre-trial proceedings.[226] During video proceedings in Dade County, one public defender remains with the defendant in a conference room of the jail, while a second public defender physically attends the proceeding.[227] The public defender in the conference room advises the defendant, while the public defender in the courtroom communicates with the judge and prosecutor.[228] The public defenders can communicate with each other confidentially over a secure phone line between the courtroom and the conference room.[229] Because this spatial arrangement requires multiple defense counsel, most video proceedings in federal court probably should be conducted with both the defense attorney and prosecutor appearing via video.[230]

B. Consent and Waiver

Any analysis of video teleconferencing is incomplete without addressing the ability of defendants to waive their right to be present at certain court proceedings. If a defendant can waive his right to be present at a proceeding, he should be able to engage in the lesser relinquishment of his right associated with conducting the proceeding by video.[231]

Federal courts have stated that a defendant's presence at trial is essential to "the basic legitimacy of the criminal process."[232] Early on, the United States Supreme Court stated that, at least in cases involving felony charges, "it is not in the power of the prisoner . . . to waive the right

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224. *See id.*

225. *Id.*

226. FLA. R. CRIM. P. 3.160.

227. Raburn-Remfry, *supra* note 1, at 818.

228. *Id.*

229. *Id.*

230. Multiple representation of a defendant and dual presence are more likely when the defendant is represented by the federal public defender's office.

231. A defendant's ability to waive his right to be present a sentencing or the commencement of trial under Rule 43 remains unresolved. *See* United States v. Navarro, 169 F.3d 228, 235-37 (5th Cir. 1999).

232. United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983).

to be personally present."[233] In *Hopt v. Utah*,[234] the Court held that it is "not within the power of the accused or his counsel to dispense with statutory requirement as to his personal presence at the trial. . . . The public has an interest in his life and liberty."[235] The argument that the prisoner "alone is concerned as to the mode by which he may be deprived of his life or liberty . . . is a mistaken view."[236]

Nevertheless, in later cases, the Supreme Court held that a defendant could forfeit his constitutional right to be present at trial under certain circumstances. In *Illinois v. Allen*,[237] the Court held that a defendant's right to be present could be lost by his disruptive behavior.[238] In *Taylor v. United States*,[239] the Court held that a defendant also could lose his right to be present by voluntarily absenting himself after the commencement of the trial.[240] *Taylor* relied upon *Diaz v. United States*,[241] a case, which although factually similar to *Taylor*, gave rise to the proposition that a defendant who fled prior to trial could not be tried *in absentia*.[242] Lower courts, nevertheless, have held that a defendant can waive his right to be present at the commencement of trail by his failure to attend.[243] However, even if starting a trial without the defendant does not offend the Constitution, the Supreme Court recently held in *Crosby v. United States*,[244] that the "language, history and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."[245] Rule 43 of the Federal Rules of Criminal Procedure incorporates the rulings in *Allen* and *Taylor*, permitting trial *in absentia* in the case of disruption or absence following commencement of trial.[246]

In the alternative, courts have not addressed the ability of a defendant to waive his right to be physically present in the courtroom after the

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233. Lewis v. United States, 146 U.S. 370, 372 (1892).

234. 110 U.S. 574 (1884).

235. *Hopt*, 110 U.S. at 579 (interpreting and applying an early version of the Criminal Code of Procedure of Utah § 218).

236. *Lewis*, 146 U.S. at 374; Bustamante v. Eyman, 456 F.2d 269, 271-73 (9th Cir. 1972).

237. 397 U.S. 337 (1970).

238. *Allen*, 397 U.S. at 343 (later codified in FED. R. CRIM. P. 43(b)(3)).

239. 414 U.S. 17 (1973).

240. *Taylor*, 414 U.S. at 20 (later codified in FED. R. CRIM. P. 43(b)(1)).

241. 223 U.S. 442 (1912).

242. *Diaz*, 223 U.S. at 462.

243. Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999); United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir. 1972); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.2(d) (3d ed. 2000).

244. 506 U.S. 255 (1993).

245. *Crosby*, 506 U.S. at 262. The Court stated, "If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw that line." *Id.* at 261.

246. *See Allen*, 397 U.S. at 343 (later codified in FED. R. CRIM. P. 43(b)(3)); *Taylor*, 414 U.S. at 20 (later codified in FED. R. CRIM. P. 43(b)(1)).

commencement of the trial, and, instead of continuing *in absentia*, to choose to attend the remainder of the trial by video teleconference.[247] The ability to waive the right to be present at trial by being voluntarily absent from the courtroom after commencement of the trial would suggest that a defendant could engage in the lesser relinquishment of his right by deciding, after the commencement of the trial, to attend the trial by video teleconference.[248] In reality, this issue is unlikely to arise. Both the precedent of the cases mentioned above, as well Rule 43(b), deny a defendant the opportunity to purposefully disrupt or delay his trial—either by engaging in disruptive conduct during the trial or by voluntarily absenting himself from the courtroom. The trial can simply proceed without him. Furthermore, defendants interested in proceeding legitimately through the trial process are not likely to voluntarily waive their right to physically attend their trial and appear instead by video teleconference. In the case of disruptive defendants, however, courts would seem to have the option of continuing court proceedings by video teleconferencing instead of continuing trials *in absentia*.

A defendant's willingness to waive his right to be present at pre- and post-trial stages of the judicial process and appear by video is of great *practical* concern. Some defendants have waived their right to be present at these proceedings, and the courts have upheld the waivers.[249] The United States Supreme Court has consistently held that constitutional and statutory rights, including the Federal Rules of Criminal Procedure, are subject to waiver. Nevertheless, in *United States v. Mezzanatto*,[250] the Court stated that "the provisions of those Rules are presumptively waivable, though an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances."[251] Therefore, the fact that Rule 43(c) contains a provision not requiring presence in certain circumstances, i.e., waiver,[252] suggests that presence cannot be waived for other proceedings,

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247. *See supra* notes 232-46 and accompanying text.

248. *See supra* note 240 and accompanying text.

249. *See Navarro*, 169 F.3d at 235-39 (The court did not to directly address the issue of the validity of waiver, but did allow the sentence of defendant Navarro, who had consented to being sentenced by video, to stand, while invalidating the sentence of defendant Edmonson, who had objected to the video sentencing.); Cambell v. Blodgett, 978 F.2d 1502, 1511 (9th Cir. 1992) (defendant requested to be absent during jury selection).

250. 513 U.S. 196 (1995).

251. *Mezzanatto*, 513 U.S. at 201.

252. FED. R. CRIM. P. 43(c). These circumstances include an organizational defendant represented by counsel, misdemeanor cases with the defendant's written consent, a conference or hearing upon a question of law, and a proceeding involving a reduction or correction of sentence. *Id.* The written consent requirement to dispense with presence in misdemeanor cases strengthens the argument that the rule does not provide for waiver of presence by the defendant in felony proceedings. *See Crosby*, 506 U.S. at 262 (Rule 43 prevents a trial *in absentia* of a defendant who is voluntarily absent at the beginning of the trial.).

including all those in Rule 43(a) not covered by the express waiver rule and not permitted to be conducted by video teleconference.[253]

Assuming the right to presence legitimately can be waived, the issue under Rule 43 focuses on the interpretation of the word "presence" in the Rule in cases—other than those permitted to be conducted by video teleconference under Rule 43(a), i.e., initial appearances and arraignments—where the defendant objects to conducting the proceeding by video teleconference.[254] All circuits considering the issue have concluded that when a defendant refuses to consent to a video teleconference, presence means physical presence, and video teleconferencing cannot be used in pre- and post-trial proceedings when presence is required.[255] At the least, this applies to entering of pleas and every stage of a trial, including the impaneling of the jury, the return of verdict, and the imposition of sentence.[256] Under Rule 43(c), however, these proceedings presumably could be conducted by video teleconference when presence is not required.[257]

The issue regarding the amendments to Rules 5, 10, and 43 of the Federal Rules of Criminal Procedure—permitting the initial appearance and arraignment by video teleconferencing upon consent—is the wisdom of this policy. In the Notes accompanying the amendment to Rule 10, the Committee noted that it proposed amending the Federal Rules of Criminal Procedure, so that initial appearances and arraignments could be conducted by video teleconference, because "some districts deal with a very high volume of arraignments of defendants who are in custody."[258] The Advisory Committee noted that many defendants "must be transported long distances" for their arraignment, creating potential "security risks to law enforcement and court personnel."[259] The Committee also noted that it feared "the beneficial use of video teleconferenced arraignments would be lost if the defendant's consent was required" because pilot programs

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253. *See supra* notes 53-62 and accompanying text.

254. FED. R. CRIM. P. 43(a).

255. *See* United States v. Lawrence, 248 F.3d 300, 302 (4th Cir. 2001) (concluding that "the plain text of Rule 43 mandates that a defendant be physically present at sentencing except when the rule specifically provides otherwise"); *Navarro*, 169 F.3d at 237 (stating that "[t]he context of the rest of Rule 43 supports the interpretation that 'presence' means a defendant's physical presence in court"); Valenzuela-Gonzalez v. United States, 915 F.2d 1276, 1280 (9th Cir. 1990) (stating that "there is no provision for arraignment by closed circuit television," and that "[u]nder Rule 43, the defendant must be present at arraignment").

256. FED. R. CRIM. P. 43(a).

257. FED. R. CRIM. P. 43(c) (allowing defendant's absence: (1) when defendant is a corporation represented by counsel; (2) in misdemeanor cases with the written consent of the defendant; (3) when only a question of law needs resolution; and (4) when a proceeding only involves a reduction or correction of sentence).

258. *Memorandum*, *supra* note 177, at 10.

259. *Id.*

indicated defendants would not voluntarily forgo an opportunity to be physically present at arraignment.[260]

Nevertheless, the use of video teleconferencing in federal criminal proceedings receives much wider support when consent requirements accompany each rule permitting video proceedings.[261] The Advisory Committee's alternative amendments, which allowed proceedings to be conducted by video teleconference without the defendant's consent, were subject to scathing criticism from public defenders and the Defender Services Committee.[262] In response, the Advisory Committee withdrew the "no-consent amendments," noting that it believed requiring consent satisfied many of the remaining concerns raised regarding video proceedings.[263] This decision seems to ignore the results of the pilot study reviewed by the Advisory Committee on Criminal Rules, which suggested that because defendants rarely waive their right to physically attend pretrial proceedings, consent requirements might eliminate most of the benefits associated with video proceedings.[264] In addition, some courts allowed proceedings to be conducted by video teleconference prior to the implementation of the amended Rules, which specifically permit video teleconferencing, when consent of the defendant could be obtained.[265] The amendments to Rules 5 and 10 will have little practical effect on the functioning of these courts, except to make the practice uniform throughout the federal system.[266]

If it is determined that the consent requirements emasculate the amendments, because defendants will rarely consent, Congress appears to have two viable choices. First, if, in the future, Congress concludes that defendants generally are unwilling to consent, or that some feel so pressured or compelled to waive their rights that consent requirements are not effective in regulating the use of video proceedings, as some crit-

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260. *Memorandum II*, *supra* note 178, at 165. The criminal pilot program was funded by the Bureau of Prisons and the U.S. Marshals Service. *Minutes of the Advisory Committee on Federal Rules of Criminal Procedure* (Oct. 7-8, 1999), *at* http://www.uscourts.gov/rules/newrules6.html [hereinafter *Minutes*]. The studies were conducted in the Eastern District of Pennsylvania and Puerto Rico. *Id.* The pilot projects were established to determine if many pre-trial procedures could be effectively conducted by video teleconference. *Id.* A paucity of data was collected in each study because, under the advice of counsel, most defendants refused to consent to conduct their proceedings by video teleconference. *Id.*

261. The general preference of a "consent required" amendment over a "no consent required" version is evidenced by the Judicial Conference's rejection of the "no consent required" amendments to Rules 5 and 10 and simultaneous adoption of identical "consent required" alternatives. *Compare* FED. R. CRIM. P. 5 (2002 amendment), *and* FED. R. CRIM. P. 10 (2002 amendment), *with Memorandum II*, *supra* note 178, at 143, 161.

262. *See Memorandum*, *supra* note 177, at 6.

263. *See id.* at 36.

264. *Compare Memorandum*, *supra* note 177, at 36, *with Minutes*, *supra* note 260, at 3.

265. *See* FED. R. CRIM. P. 5 advisory committee's notes (2002 amendment).

266. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

ics contend,[267] the amended language permitting the use of video teleconferencing should be stricken. Otherwise, the federal system will leave the security of the current rules, and incur expenses associated with purchasing video conferencing equipment, without obtaining the increased efficiency and safety from conducting criminal proceedings by video. After incurring the expense of this technology, defendants may face increased pressure to waive their rights under a consent regime. Furthermore, abandoning the consent amendments would demonstrate support for the arguments made by critics of using video proceedings in the criminal process.[268]

Additionally, the desire for efficiency that video technology provides has largely been created by the increase in federal criminal prosecutions brought about by the war on drugs and the federalization of crime.[269] Cutbacks in these areas may prove equally salutary.

Second, Congress alternatively could eliminate the consent requirements. To do so, Congress would have to be unconvinced by the arguments promulgated by critics of video teleconferencing in criminal proceedings.[270] Congress would have to be absolutely satisfied both that the use of video teleconferences for initial appearances and arraignments would afford defendants sufficient due process, and that the use of video teleconferences would not undermine the public's perception of the fairness of the proceedings. This choice would facilitate the efficiency that video conferencing provides, as well as foster experimentation with video technology in federal criminal proceedings—both of which were largely sacrificed with the adoption of the consent requirements.

V. OTHER USES OF VIDEO PROCEEDINGS IN FEDERAL COURT?

As the quality of video teleconferencing technology continues to improve, courts will face increasing pressure to rely more heavily on video teleconferencing to conduct their daily activities.[271] Past efforts to deal with "video presence" attempted to categorize it as either being

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267. Rabum-Remfry, *supra* note 1, at 833 (stating that "the use of adversarial counsel, or jailhouse guards, to distribute and explain [a waiver of the defendant's right to appear before the court in person] is both highly inappropriate and unduly coercive" and that "the physical and psychological atmosphere of a jail, as opposed to the atmosphere of a courtroom, is so inherently coercive that the jail itself prevents detainees from objectively assessing their situation").

268. Rabum-Remfry, *supra* note 1, at 814-18 (discussing the disadvantages of video conferencing).

269. *See generally* TASK FORCE ON THE FEDRERALIZATION OF CRIMINAL LAW, ABA CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW (1998); Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

270. *See, e.g.*, Rabum-Remfry, *supra* note 1.

271. *Id.* at 812 (stating that "[t]he use of video for court production in the foreseeable future will rapidly accelerate because of the need for cost controls in criminal courts").

"physically present" or "not physically present."[272] This assumes that the concept of presence does not exist along a gradient; an object is either *physically* present or it is not. However, the focus on *physical* presence overlooks the "within sight or call" element of presence.[273] Limiting presence to one of two categories, physical presence or absence, may be counterproductive and signals a refusal to recognize the possibility that the "presence" concept exists along a gradient.

Justice William O. Douglas once observed that "[c]ommon sense often makes good law."[274] Common sense suggests that while interacting with a court through a 45-inch color monitor is something less than physical presence, it provides greater due process and confrontation than being altogether excluded from the courtroom. It may be more useful and productive to view video presence, for the purpose of conducting judicial proceedings, as existing in a category independent of physical presence or absence.

In a letter to Judge Robin J. Cauthron, the Chair of the Defender Services Committee, Judge Joseph R. Goodwin noted that:

> [The] unacceptable risk of judicial degeneration [resulting from conducting judicial proceedings in video teleconferences] is not rendered acceptable by relegating video proceedings to "minor" or "unimportant" stages of the process. There are no such stages. Every step in a criminal prosecution exists for a reason, and citizens have been freed at each of them. If there be a step that is not important enough to do formally and properly, then it should not be done at all.[275]

Each stage in a criminal prosecution must be done "formally and properly."[276] Thus, the issue becomes whether, in order to do it "formally and properly," the same elements of presence, or the same "quality of presence," must exist at each stage of a criminal prosecution.[277]

When the amendments to Rules 5, 10, and 43 of the Federal Rules of Criminal Procedure were before the Judicial Conference, the Defender Services Committee opposed the use of video teleconferencing to conduct initial appearances and arraignments, even with the defendant's consent.[278] Despite this opposition, the Advisory Committee, Standing Committee, Judicial Conference, Supreme Court, and Congress approved

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272. *See supra* notes 70-86 and accompanying text.
273. BLACK'S LAW DICTIONARY 1183 (6th ed. 1990).
274. Peak v. United States, 353 U.S. 43, 46 (1957).
275. *Goodwin Letter*, *supra* note 13.
276. *Id.*
277. *Id.*
278. *Memorandum*, *supra* note 177, at 6.

the amendments.[279] While the amendments limit the use of video teleconferencing to initial appearances and arraignments,[280] "video presence" cannot be substituted for "physical presence" in other criminal proceedings. The Judicial Conference's decision to allow the use of video teleconferencing in initial appearances and arraignments indicates that most members of the Committee believed that these proceedings could be conducted "formally and properly"[281] with fewer "presence elements" or a lower quality of presence than could other stages of the criminal process.[282] In passing the amendments to Rules 5, 10, and 43, the Judicial Conference impliedly recognized that presence exists along a gradient, that while "video presence" cannot be equated with physical presence, it is something more than absence, and that the quality of presence required to conduct criminal proceedings "formally and properly" varies among different stages of a criminal prosecution.[283]

The Judicial Conference's decision to pass the amendments to Rules 5, 10, and 43 raises an important question regarding the expanded use of video teleconferencing in criminal prosecutions.[284] Should judges have more discretion in deciding when various stages of a criminal prosecution can be conducted by video teleconference? Obviously, under the amendments, judges are not obligated to conduct all initial appearances or arraignments by video teleconference.[285] If the judge decides that, based on the circumstances of the case, a quality of presence not obtainable in a video teleconference is needed for an initial appearance or arraignment, the judge can conduct the proceeding with the defendant physically present.[286] This latitude was established because the Judicial Conference recognized that the quality of presence required varies, not only among the different stages of a criminal prosecution, but also among cases in regard to a particular stage of the prosecution.[287] Possibly, judges should be allowed the discretion, under some circumstances, to conduct other stages in the process by video teleconference. An anecdote will help illustrate.

On July 11, 2001, a defendant in the Northern District of West Virginia was indicted for knowingly and willfully making a threat against the President-elect of the United States in violation of 18 U.S.C § 871(a),

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279. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment); FED. R. CRIM. P. 43 (2002 amendment).

280. *Id.*

281. *Goodwin Letter*, *supra* note 13.

282. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

283. *Goodwin Letter*, *supra* note 13.

284. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment); FED. R. CRIM. P. 43 (2002 amendment).

285. *Id.*

286. The amendments for Rules 5(f) and 10(c) utilize the "may be used" terminology. FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

287. *Id.*

and transmitting a threat in interstate commerce in violation of 18 U.S.C. § 875(c).[288] Between the date of the indictment and his initial appearance, the defendant moved to Everett, Washington.[289] In an effort to avoid the expense associated with traveling from Washington to West Virginia for each stage of the criminal prosecution, the defendant moved the district court for a change of venue, arguing that a transfer to the Northern District of California would serve the convenience of the parties and/or witnesses.[290] Because the witnesses involved in the case resided in West Virginia, District Judge Irene Keeley denied the defendant's motion.[291]

In January 2002, the district court was advised that the defendant entered into a plea agreement with the government.[292] After the district court scheduled the plea hearing, the defendant filed a motion requesting to appear at the hearing by video teleconference so that he could avoid the expense associated with traveling from his home in Washington to West Virginia.[293] The defendant signed a waiver relinquishing his right to be present "personally" and "in open court," and stating that he agreed that his appearance by video teleconference would meet the "presence" requirement for the hearing.[294]

Under Rule 43(a) of the Federal Rules of Criminal Procedure, a defendant "shall be present . . . at the time of the plea."[295] In determining if the defendant could appear at his plea hearing by video teleconference, Judge Keeley first examined the Fourth Circuit's stance on substituting physical presence with video presence.[296] In *United States v. Lawrence*,[297] the Fourth Circuit expressly rejected the argument that video presence could be substituted for physical presence.[298] The Fourth Circuit stated "that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[299]

The district court next addressed whether a defendant could avoid a perceived unnecessary expense associated with traveling across country

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288. United States v. Starfield, No. 1:01CR22 (N.D. W. Va. filed Jan. 17, 2002).
289. *Starfield*, No. 1:01CR22.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. FED. R. CRIM. P. 43(a).
296. *Starfield*, No. 1:01CR22.
297. 248 F.3d 300 (4th Cir. 2001).
298. *See Lawrence*, 248 F.3d at 304.
299. *Id.* at 304.

to enter his plea by waiving his right to be physically present and attending the plea hearing by video teleconference.[300] Judge Keeley concluded that, without an express provision allowing a defendant to waive his right to be present at his plea hearing, waiver in this circumstance could not be allowed.[301] The district court relied on the Supreme Court's statement in *United States v. Mezzanatto*,[302] that although the "provisions of [the Federal Rules of Criminal Procedure] . . . are presumptively waivable, . . . an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances."[303] The district court held that Rule 43 contained such express waiver provisions in subsections (b)["Continued Presence Not Required"] and (c)["Presence Not Required"].[304]

Because the Fourth Circuit, like other circuits, had held that video presence could not be substituted for physical presence, and because Rule 43 does not expressly allow a defendant to waive the right to be present at a plea hearing,[305] the district court denied the defendant's motion to appear at his plea hearing by video teleconference.[306] The decision forced the defendant, against his wishes, to travel more than 2,000 miles to attend the plea hearing, which lasted approximately 45 minutes.[307]

Perhaps the Advisory Committee, the Supreme Court, and Congress should recognize that "presence" exists along a gradient and that, irrespective of, or as a future substitute for, the amendments permitting initial appearances and arraignments by video,[308] a general rule is needed permitting video teleconferencing for most non-trial proceedings "[w]henever due to exceptional circumstances of the case it is in the interest of justice."[309] Such a rule would avoid labels such as "presence" and "absence," and the confusion surrounding whether presence can be waived in non-trial proceedings.[310] This rule would permit a video plea hearing in cases like the one discussed above and would authorize other proceedings by video teleconference when warranted by "exceptional circumstances," such as safety concerns.[311] Additionally, the "excep-

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300. *Starfield*, No. 1:01CR22.

301. *Id.*

302. 513 U.S. 196 (1995).

303. *Mezzanatto*, 513 U.S. at 201; *see also* Crosby v. United States, 506 U.S. 255, 259 (1993); Smith v. United States, 360 U.S. 1, 9 (1959).

304. *Starfield*, No. 1:01CR22.

305. *See Lawrence*, 248 F.3d at 304.

306. *Starfield*, No. 1:01CR22.

307. *Id.*

308. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

309. *See* FED. R. CRIM. P. 15 (authorizing the taking of depositions under the "exceptional circumstance" standard).

310. *See* FED. R. CRIM. P. 43 (2002 amendment).

311. *See Lawrence*, 248 F.3d at 305 (allowing the re-sentencing of unruly and abusive defendant by video, with warning).

tional circumstances" requirement[312] could displace the need for the defendant's consent, eliminating some of the concerns about the practicality of the "consent required" amendments to Rules 5 and 10.[313] A general "exceptional circumstances" provision authorizing the substitution of video presence for physical presence in special cases has much to offer over blanket, "consent required" or "consent not required" amendments.

CONCLUSION

There are advantages to using video teleconferencing to conduct certain stages of federal prosecutions. Use of video teleconferencing reduces the amount of travel required by judges in large districts, increases judicial efficiency, and reduces safety concerns associated with transporting defendants to the courthouse for each stage of a criminal prosecution. For each advantage associated with video teleconferencing there is an associated disadvantage. If a court conducts a proceeding by video teleconference, a judge may have a difficult time insuring that a defendant understands the importance of a criminal proceeding or the gravity of the charge against him; the lines of communication between defense attorneys and their clients may be impaired; video teleconferencing may limit public access to federal criminal proceedings; and proceedings conducted by video may not reflect the solemnity and decorum befitting a proceeding in federal court. These costs and benefits associated with conducting criminal proceedings by video teleconferencing should be carefully considered by the federal courts in their discretion to use of video teleconferencing under the newly amended Federal Rules of Criminal Procedure.

The Due Process Clause, the Confrontation Clause, and the Federal Rules of Criminal Procedure each require a defendant's presence during certain stages of a criminal prosecution. The "presence requirements" are most restrictive under the Federal Rules of Criminal Procedure, so analysis of the "presence requirement" necessarily focuses on Rule 43. If video presence could be substituted for physical presence under Rule 43, the use of video teleconferencing in federal courts would be almost unlimited. Wisely, federal appellate courts have refused to recognize video presence as a substitute for physical presence, and have defined presence under Rule 43 to mean physical presence. Therefore, under the former version of the Federal Rules of Criminal Procedure, the use of video proceedings in federal court was limited. Initial appearances, arraignments, trials, plea hearings, and sentencings could not be conducted

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312. The Advisory Committee notes to such a rule would have to make clear that "exceptional circumstances" did not amount to mere judicial efficiency and convenience, and there would have to be real evidence of safety concerns before the standard would be satisfied.

313. *See* FED. R. CRIM. P. 5 (2002 amendment); FED. R. CRIM. P. 10 (2002 amendment).

by video teleconference over the defendant's objection, and it was unclear whether a defendant could validly consent to conduct these proceedings by video teleconference.[314]

After federal appellate courts held that "presence" under Rule 43 meant "physical presence," the drive for increased use of video teleconferencing in federal courts gained momentum. This drive was fueled by recent increases in the use of video teleconferencing to conduct certain stages of criminal trials in state courts, the Judicial Conference's pro-video teleconferencing policy, pro-video teleconferencing legislation introduced in Congress by an influential senator, and rapid improvements in the quality of video teleconferencing technology. As a result of this drive, the Advisory Committee proposed amendments to Rules 5, 10, and 43 of the Federal Rules of Criminal Procedure expressly allowing federal courts to conduct initial appearances and arraignments by video teleconference.

Several states now rely on video teleconferencing to conduct various stages of criminal prosecutions. These state video-teleconferencing programs have met with mixed success. Under current Missouri law, most pre- and post-trial proceedings can be conducted by video teleconference. In the late 1990s, Florida initiated a program to conduct juvenile detention hearings by video teleconference. However, the Florida detention-hearing program failed. The value of these state programs in predicting the future success of video teleconferencing in federal courts is unknown, an the existence of this practice at the state level does not necessarily justify its use in federal courts.[315]

The Advisory Committee originally drafted two alternative sets of revisions for Rules 5 and 10. One set of revisions required a defendant's consent before conducting his proceeding by video teleconference; the other set did not. The Advisory Committee, however, withdrew the "no consent" alternatives in response to negative public comment about these proposed amendments. Although the remaining "consent required" amendments received less criticism, and were subsequently approved by the Judicial Conference, Supreme Court, and Congress, data from pilot projects indicates that, because defendants rarely waive their right to physically attend court, these amendments probably will have little practical effect.

There are two major shortfalls of the amendments. First, the amendments do not provide minimal technical standards for the quality of video teleconferencing equipment employed by federal courts. Because the quality of "video presence" differs significantly among video

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314. *See supra* notes 249-57 and accompanying text.

315. *See* Rabum-Remfry, *supra* note 1, at 817-27.

teleconferencing systems, and because variance in the quality of judicial proceedings among federal courts should be minimized, rules should be promulgated to standardize the quality of the video technology employed. Second, the amendments do not standardize the physical location of the prosecutor and defense attorney with respect to the judge. Allowing the prosecutor to physically attend a hearing, while the defense attorney appears with the client by video, gives the prosecutor an unfair advantage and destroys the appearance of judicial impartiality. The rules should require that both the defense attorney and the prosecutor appear by video in a video proceeding.

The principal debate surrounding the amendments to Rules 5 and 10 centers on the consent requirements. If, in fact, few defendants will waive their right to be physically present in court, little will be gained by the amendments. In addition, nothing will be gained in those courts that already permit defendants to waive the presence requirement under Rule 43 and appear by video. In the alternative, elimination of the consent requirements could garner severe criticism based on due process concerns.

Perhaps a better alternative would be for the Supreme Court and Congress to adopt a general amendment to the Federal Rules of Criminal Procedure to permit video proceedings "[w]henever due to exceptional circumstances of the case it is in the interest of justice." Such a rule would enable initial appearances and arraignments to be conducted by video, but only under readily identifiable, exceptional circumstances. Furthermore, such an approach would authorize the use of video teleconferencing in unusual cases for other non-trial proceedings, simultaneously promoting efficiency and avoiding additional defendant hardship. It also would avoid most of the criticism aimed at blanket rules permitting video proceedings for certain stages of the process in all cases.

Viewing "presence" dichotomously, as either physically present or absent, is counterproductive. Envisioning the concept of presence as existing along a gradient may provide a better analytical framework for determining the future of video teleconferencing in the federal courtroom. Lord Cobham is not physically present in the courtroom if only his writings are transported from the tower to the trial. Similarly, Lord Cobham is not physically present in the courtroom if he remains in the tower, while his interactive image is beamed into the courtroom on a 45-inch color monitor. However, on the monitor, Lord Cobham is within sight and call, he can interact with the court, and the court can interact with him. Common sense suggests that on the 45-inch monitor, Lord Cobham is more present than if he appeared only through his writings, and is less present than if he physically appeared in court.

It is impossible to predict what the future of video or virtual presence holds. The line between physical and virtual presence becomes increasingly blurred with new advancements in video technology. What is needed is an analytical framework that prepares the federal courts to address the challenges and reap the benefits accompanying these advancements—permitting increased judicial efficiency, while maintaining judicial integrity.

If presence exists along a gradient, the quality of presence required may vary among criminal cases and among the various stages of a criminal prosecution. If the quality of presence required demands physical presence, there is little room for the use of video teleconferencing in federal court. However, in passing the amendments to Rules 5 and 10 of the Federal Rules of Criminal Procedure, the Judicial Conference, Supreme Court, and Congress implicitly assumed that either video presence is equal to physical presence, or that the quality of presence required to conduct a proceeding varies among stages of a criminal prosecution. Because appellate courts have universally rejected the former, the latter assumption seems most probable. The question then becomes whether the essential functions of the stages in the criminal process can be maintained through video proceedings, whether due process and the appearance of fairness can be protected, and whether consent requirements will vitiate the practicability of the new rules. If any of these questions is answered in the negative, then we should spare criminal defendants "the convenience of the guillotine," and discourage the use of video teleconferencing in the criminal justice system. Nevertheless, for cases like that in the Northern District of West Virginia, there should be a clear, general safety valve provision permitting video appearances when special circumstances exist and the interests of justice warrant.