
**PLEADING GUILTY AND VIDEO TELECONFERENCE:
Is a Defendant Constitutionally “Present” when
Pleading Guilty by Video Teleconference?**

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Courtrooms throughout the country are generally not perceived as fertile grounds for the implementation of new technology. Nevertheless, for over twenty years, judicial systems across the nation have employed video technology to connect an out of court defendant with the court. Jurisdictions that have utilized video technology find multiple benefits, including improved efficiency, security, and monetary savings. While the benefits of such technology sound impressive, serious concerns exist regarding the effects of the technology on the constitutional rights of criminal defendants.

One particularly troubling use of video technology occurs when a criminal defendant enters his or her guilty plea by video teleconference. Every criminal defendant has a constitutional due process right under the Fifth and Fourteenth Amendments to be physically present at all critical stages of their criminal proceeding, including the entry of a guilty plea. A guilty plea entered via video teleconference may negatively affect the defendant in a manner that ultimately impacts the overall fairness of the defendant’s hearing. Therefore, unless a criminal defendant voluntarily and intelligently waives their right to be physically present when pleading guilty, a defendant appearing by video teleconference to enter a guilty plea should not be considered “present” in accordance with the constitutional meaning of that word.

This note discusses the nature of the right to be physically present in the courtroom when entering a guilty plea and analyzes the consequences that arise when a criminal defendant pleads guilty

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through the medium of video teleconference. Section I of this note examines the development of the due process right to be present at critical stages of one's criminal proceeding as established by Supreme Court case law. Section II discusses the evolving usage of video technology to connect an out of court defendant with the court, the benefits and concerns of such a process, and the procedural rules established through statutes and case law that address the issue in different jurisdictions. Finally, section III analyzes the effects that video teleconferencing has upon a defendant wishing to plead guilty and concludes that, without a knowing and intelligent waiver of the right to be physically present in the courtroom, the negative affects of such a system violate the defendant's due process rights because they deprive him or her of a fair and just hearing.

I. Criminal Defendants' Due Process Right To Be Physically Present At Entry Of Guilty Plea

The United States Constitution does not explicitly grant a criminal defendant the right to be present at a criminal proceeding beyond the right to confront a witness.¹ While the right to be physically present at one's trial is largely derived from the Confrontation Clause of the Sixth Amendment, the Supreme Court has interpreted the Fifth and Fourteenth Amendments to the United States Constitution as providing a due process right to be present at a trial *proceeding* in which the defendant is not actually confronting witnesses.² This right attaches to any stage of a criminal proceeding that is critical to its outcome³ and continues to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only.⁴

1. See U.S. CONST. amend. VI. The text of the Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Thus, while the Sixth Amendment expressly guarantees a criminal defendant the right to be present at his trial to confront those against him, no provision is made for those phases where the defendant is not confronting a witness.

2. See *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (noting that the Court has recognized a right to be present in some situations when the defendant is not actually confronting witnesses).

3. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (holding defendant is guaranteed the right to be present at any stage of criminal proceeding that is "critical to its outcome").

4. *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934) (holding defendant has a due process right to be present at trial proceedings to the extent that "a fair and just hearing would be thwarted by his absence, and to that extent only"). See *infra* note 7 for examples of trial proceedings in which a fair and just hearing would

A defendant's right to be physically present at critical stages of court proceedings is not absolute. While a defendant has the right to be at all phases of the trial critical to its outcome, the right does not extend to a situation where the defendant's presence would be unnecessary to secure a fair and just hearing.⁵ Examples of proceedings not deemed critical to the outcome of the case include a witness competency hearing, exclusion of a defendant from the jury's view of a crime scene, and an *in camera* discussion between judge and juror in absence of defendant.⁶

As the above examples indicate, the Court has drawn a fine line to protect the defendant's right to be present at critical stages of his or her court proceeding while preserving the integrity and efficiency of the criminal justice system. In doing so, the Court has set a standard whereby the defendant's presence is constitutionally required during all *critical* stages of the proceeding because fairness demands that the defendant be present when his substantial rights are at stake.⁷ Conversely, if fairness does not require the defendant's presence because his or her substantial rights are not at stake, then the proceeding is not critical and the defendant does not have the right to be physically present in the courtroom.⁸

Pleading guilty is a critical phase of a defendant's trial because of the numerous rights given up and because the direct result is the defendant's conviction.⁹ When a defendant pleads guilty, he or she waives a number of rights, including their right to trial by jury, the right to be confronted with the witnesses against him, the right to present evidence, and the right to raise the privilege against self-incrimination.¹⁰ Further, a plea of guilty is a critical moment in the proceeding because it obviates the prosecution's burden of proof, and

not be thwarted by the defendant's absence.

5. See, e.g., *id.* at 97 (declaring defendant's right to be present not violated when there is nothing that he could do if present and were there is nothing he could gain if present).

6. See, e.g., *Stincer*, 482 U.S. at 747 (holding defendant's rights not violated when excluded from witness competency hearing); *Snyder*, 291 U.S. at 115 (holding exclusion of defendant from jury's view of crime scene not violation of Constitution); *Gagnon*, 470 U.S. at 529 (holding *in camera* discussion between judge and juror in absence of defendant not a violation of Constitution).

7. See *Stincer*, 482 U.S. at 745.

8. See, e.g., *id.* at 747 (holding defendant's rights not violated when excluded from witness competency hearing); *Snyder*, 291 U.S. 115 (holding exclusion of defendant from jury's view of crime scene not violation of Constitution); *Gagnon*, 470 U.S. 529 (holding *in camera* discussion between judge and juror in absence of defendant not a violation of Constitution).

9. *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969).

10. *Id.* at 243.

supplies both evidence and verdict, ending the controversy.¹¹ As with other constitutional rights, the defendant has the option to waive these rights, which is what he or she has to expressly do before they can plead guilty.¹² The judge has to be certain before any waiver is accepted that the waiver is voluntary and intelligent and made with a full understanding of its consequences.¹³ Thus, as a critical stage in one's criminal proceeding, a guilty plea requires that the defendant be physically present when doing so.

II. Evolution Of Video Technology Connecting Court And Remote Defendant And Jurisdictional Variance In Approaching The Issue

Although the use of video teleconference confers a number of benefits upon the court, defendants, attorneys, judges and scholars have expressed concern over the impact of technology on the defendant's due process rights.¹⁴ Part A of this section discusses the evolution of the use of technology in courtrooms throughout the country. Part B examines the benefits and concerns stemming from the use of video conferencing. Finally, Part C will look at the different statutory schemes and case law that deal with video teleconferencing.

A. Courtroom Use of Video Technology

For over two decades, courts in the United States have employed technology to connect an out of court defendant with the court.¹⁵

11. *Id.* at 242, n 4.

12. *Id.* at 242-43 (discussing waiver procedure).

13. *See* Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"); Kercheval v. United States, 274 U.S. 220, 223 (1927) ("a plea of guilty shall not be accepted unless made voluntary after proper advice and with full understanding of the consequences").

14. *See, e.g.,* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1098-1103 (2004) (discussing various problems created by use of video technology); Karl B. Grubbe, *Electronic Plea Taking at Florida's Weekend First Appearance Hearings: Weekend Justice or Weakened Justice?*, 21 STETSON L. REV. 329, 365-367 (1991-1992) (describing the use of video teleconference in weekend arraignments and the potential negative effects in such a system); Daniel Wise, *Jailed Defendants Set to Make Video-Audio Court Appearances*, N.Y.L.J., April 28, 1997, at 2 (quoting legal aid employee as describing the use of video technology potentially "dehumanizing" and having the effect of making the defendant or judge "just a face on a television screen.").

15. *See* Jeffrey M. Silbert et al., *Special Topic: Telecommunications in the*

Today court administrators lobby for increases in courtroom technology in order to administer justice more efficiently.¹⁶ Early on, courts realized the potential benefits by employing courtroom technology.¹⁷ Criminal justice systems throughout the country are frequently overburdened with too heavy a caseload, insufficient space inside the courtroom, safety concerns, and the high cost of transporting defendants to and from the courthouse.¹⁸ In addressing these problems, courts found a ready participant in video technology to help alleviate these concerns.¹⁹ Although it is generally accepted that the defendant should be physically present at his or her trial,²⁰ courts began in the early 1980s to employ video teleconference for non-trial criminal proceedings such as arraignments, bail hearings, sentencing, and violations of parole or probation.²¹

In developing the link connecting the court with a remote defendant, courts experimented with different technologies, including various connections, monitors, setups, and locales to offer the video feed from.²² When courts first employed the technology, the video images and connections were shaky at best.²³ Nonetheless, technological advances have grown so rapidly that today judges, jurors, and the general public can receive a crystal clear picture of the defendant, and vice versa, with virtually no time lapse between the

Courtroom: The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida, 38 U. MIAMI L. REV. 657 (1984).

16. Charles Toutant, *Beaming in the Defendant: Counties' Press For Expansion of Videoconferenced Hearings Raises Public Defenders' Hackles*, 180 N.J.L.J. 341 (2005) (describing sheriffs' push for expansion of video teleconference technology).

17. Silbert et al., *supra* note 15, at 657 (describing various benefits realized in utilization of video technology).

18. E.g., Poulin, *supra* note 14, at 1098-1103 (discussing various problems that judicial systems throughout the country face); Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 810-812 (1994); Silbert et al., *supra* note 15, at 657.

19. See, e.g., Silbert et al., *supra* note 15. See also Tim Waters, *Court Tests Cable Hookup; Experiment Uses Remote Testimony*, L. A. TIMES, Feb. 27, 1986, at part 9, page 5, column 1; *Facing the Judge Via Television*, CHIC. TRIB., Feb. 13, 1994, at 2C.

20. See Poulin, *supra* note 14, at 1092.

21. See Poulin, *supra* note 14, at 1095; Toutant, *supra* note 16.

22. See generally Frederick I. Lederer, *Technology Comes to the Courtroom, And...*, 43 EMORY L.J. 1095 (1994); Raburn-Remfry, *supra* note 18, at 818-822; Silbert et al., *supra* note 15. See also The Center for Legal and Court Technology, <http://www.legaltechcenter.net/> (last visited Nov. 19, 2006). The Courtroom 21 Project was instituted in 1993 to best determine how courts can utilize technology to administer justice. As one of its goals, it constantly experiments with different ways in which technology can best facilitate the administration of justice.

23. See Poulin, *supra* note 14, at 1105 (describing various shortcomings of technology). See also Silbert et al., *supra* note 15, at 660.

interaction.²⁴

Today, different jurisdictions and courts employ various video setups. Some courtrooms employ one camera that focuses directly on the defendant and one that focuses on the judge.²⁵ The image is then broadcast to a television directly in front of the participant.²⁶ Other courts employ a similar camera hookup but with the image broadcast on a computer that is split screen, which allows a defendant to view his image as well as that of the judge, and vice-versa.²⁷ The camera shots also vary with each courtroom, with some focusing on a panoramic view, some focusing on a full picture of the defendant, and with some focusing on just the head of the defendant or judge.²⁸ These, of course, are just two examples; judicial systems continue to experiment and implement new technology and innovations as they become available.²⁹

B. Benefits and Concerns of Video Teleconference in the Courtroom

The debate over the use of video teleconferencing by the judicial system centers around two groups: those who champion its use citing the numerous benefits it provides to both the court system and the defendant, and those who claim that the use of such technology violates the due process rights of the defendant. Both sides of the debate present persuasive arguments with vigor and merit. The following section recites the most commonly cited benefits of such a system as well as the most commonly cited concerns of the use of video technology.

1. Benefits To The Government

As stated above, court systems throughout the United States have employed video technology in earnest throughout the past two decades. Such use of video technology allows the government to accrue a number of benefits.³⁰ In fact, one commentator has noted

24. Miglena Sternadori, *Fiber-optics to lend sharper image to court proceedings in Boone County, MO*, COLUMBIA DAILY TRIB., Aug. 31, 2004, at 1.

25. See Poulin, *supra* note 14, at 1107-1108.

26. See Silbert et al., *supra* note 15, at 658-659.

27. See Shannon P. Duffy, *Judge's Tele-Pleas' Overcome Logistical Hitches to Justice*, The Legal Intelligencer, Sept. 16, 1998, at 1.

28. See Poulin, *supra* note 14, at 1108.

29. See The Center for Legal and Court Technology, *supra* note 22 (discussing continual evolution and experimentation of technology to better facilitate the administration of justice).

30. See Poulin, *supra* note 14, at 1098.

that the benefits of such a system flow primarily to the government.³¹ One of the most substantial benefits of such a system is the enhanced safety of the courtroom.³² When defendants are broadcast to the courtroom from the jail by video technology, the need to transport the defendants is obviated.³³ Therefore, corrections and court personnel are spared the security concerns of transporting defendants through open parking lots and hallways in the court building.³⁴ The use of video technology may relieve a possible volatile situation between violent and antagonistic defendants.³⁵ The use of video technology may also relieve the concerns of a victim who fears the sight of a defendant.³⁶ Further, an effect produced by eliminating the transportation of defendants is that less police and court officers are needed at the courthouse, allowing more patrol time on the streets.³⁷

Another significant benefit gained by the government by the adoption of video technology is monetary savings. Transporting

31. See Poulin, *supra* note 14, at 1098.

32. See, e.g., Poulin, *supra* note 14, at 1099; Raburn-Remfry, *supra* note 18, at 812.

33. See, e.g., Poulin, *supra* note 14, at 1099; Raburn-Remfry, *supra* note 18, at 812.

34. See Raburn-Remfry, *supra* note 18, at 812; Silbert et al., *supra* note 15, at 659 (noting the security benefits because defendants do not leave the jail and the potential for causing disruptions and inflicting harm is depleted). An extreme and tragic example of the ever present security concerns occurred in 2005 when a defendant in Georgia took a court officer's gun and shot and killed the judge in his case, a court stenographer, and a sheriff's deputy. Shaila Dewan and Ariel Hart, *Suspect Kills 3, Including Judge, at Atlanta Court*, N.Y. TIMES, Mar. 12, 2005, at A6. See also, e.g., Michael Brick, *Lawyer Attacked In Courtroom*, N.Y. TIMES, Jan. 20, 2006, at B4; Statement of Judge Norman H. Stahl on the Courthouse Construction Program and the Fiscal Year 1999 Budget Before the Committee On Environment and Public Works, United States Senate (Sept. 17, 1998) http://epw.senate.gov/105th/sta_9-17.htm (last visited Nov. 19, 2006) (discussing various security shortcomings, including the transporting of dangerous prisoners through public hallways, in the federal courthouse in Springfield, MA).

35. In a conversation with a former Massachusetts Superior Court Judge, the judge stated that in one instance the court arraigned a former priest accused of sexual assault by video teleconference rather than in person because court personnel worried that violence would possibly erupt between this detainee and another charged with killing a former priest convicted of sexual assault, who was in the courthouse that day. Telephone Interview with Timothy S. Hillman, United States Magistrate Judge (Feb. 12, 2006).

36. See Duffy, *supra* note 27, at 1 (quoting judge as stating that he found that victim was relieved that she did not have to be in the same room as the defendant during plea).

37. See *Guidelines for Video Court Proceedings Considered*, PA. L. WEEKLY, Aug. 27, 2001, at 8 (quoting a District Justice as stating that such a system saved 10,000 police hours from being spent in court which had instead been spent on street patrol).

defendants to the courthouse requires time and money.³⁸ Often times the courthouse and the jail are a significant distance apart.³⁹ When the defendant is processed by video teleconference, travel expenses are relieved, as is the expense of housing the defendant at the courthouse holding center.⁴⁰ Further, as discussed above, when security concerns are eliminated, the need for more court officers is alleviated, which may itself save a great deal of money that can then be used for more street patrol.⁴¹

Monetary savings are part of the overall improved efficiency of the judicial system when video technology is used. The traditional means of processing a defendant requires the defendant to travel from the detention center to the courthouse to await his arraignment, sentence, plea, etc.; many times this is a debilitating process.⁴² Moreover, the travel time for the prisoners, court personnel, and judges is reduced.⁴³ As a result, reduced travel time means that more cases can be processed in the available amount of time, allowing the judge to move more quickly through the process.⁴⁴

The government is not the sole recipient of the benefits bestowed by the use of video teleconference. The defendant also realizes various benefits when video technology is used.⁴⁵ The defendant is relieved of the uncomfortable trip from the detention center to the courtroom.⁴⁶ In some instances, the defendant may prefer the video teleconference because it results in less physical and emotional stress of the courtroom.⁴⁷ Finally, some commentators have argued that the judge will focus more intently on the defendant's case because all external interruptions are minimized.⁴⁸

38. *E.g.*, Lederer, *supra* note 22, at 1101-1102; Poulin, *supra* note 14, at 1099; Raburn-Remfry *supra* note 18, at 811.

39. *E.g.*, Duffy, *supra* note 27, at 1; Poulin, *supra* note 14, at 1099; Raburn-Remfry, *supra* note 18, at 807.

40. Duffy, *supra* note 27, at 1.

41. *See Guidelines for Video Court Proceedings Considered, supra* note 37, at 8.

42. *See generally* Raburn-Remfry, *supra* note 18, at 807 (describing in detail the arduous process of bringing detainees from the detention center to the courthouse in Los Angeles County).

43. *See generally* Raburn-Remfry, *supra* note 19, at 811; Silbert et al., *supra* note 15, at 659.

44. Lederer, *supra* note 22, at 1101-1102.

45. Raburn-Remfry, *supra* note 18, at 807.

46. *See id.* at 807. *See also* United States v. Melgoza, 248 F.Supp.2d 691, 692-693 (S.D. Ohio 2003) (defendants wished to enter pleas of guilty by video teleconference for convenience's sake, as they were in Arizona and the court was in Ohio).

47. Raburn-Remfry, *supra* note 18, at 811.

48. *See* Silbert et al., *supra* note 15, at 659 (examining the effect of the video

2. Concerns Raised By The Use Of Video Teleconference

Although there are a number of persuasive arguments for the use of video technology in the courtroom, there are serious concerns regarding the due process rights of the defendant involved in the video teleconference. These concerns include problems caused by the equipment, ineffectual counsel, a poor environment from which to enter a plea, and negative effects upon the defendant.

Technology has grown markedly since the inception of video teleconference in the courtroom. Despite the beneficial effects of these technological improvements, technology is “never neutral.”⁴⁹ As one can imagine, there are instances where technology has failed in the course of a broadcast.⁵⁰ Further, video teleconference cannot guarantee that the same impression created by a defendant physically present in court will be replicated.⁵¹ Technology can introduce distortion and delete some of the non-verbal and visual cues which are so often relied upon in the courtroom.⁵² When a camera focuses on the defendant or the judge in the courtroom, a full vision of the room is not available unless the camera is moved to take in all the viewer wants to see.⁵³ Therefore a defendant, judge, or member of the viewing public cannot see all the action at one time unless multiple cameras are set up, which as one commentator noted, is not likely because the court rarely employs the latest or most expensive technology.⁵⁴ Even if a court system employs the latest technology, equipment drawbacks create other concerns, including misleading

procedure, and stating that all external noise of the courtroom is omitted, thereby allowing the judge to deal exclusively with the case at hand).

49. Poulin, *supra* note 14, at 1106.

50. *See generally* Kentucky v. Ingram, 46 S.W.3d 569, 570-571 (Ky. 2001) (reciting defendant’s concerns that the printer hooked up to the video teleconference system often failed and that it was difficult to hear and communicate over the video teleconference system).

51. *See generally* Poulin, *supra* note 14, at 1104-1113 (describing various shortcomings of videototechnology).

52. *High Tech Courts*, NAT’L L.J., Jan. 10, 1994, at 16. *See also* Illinois v. Guttendorf, 723 N.E.2d 838, 840-841 (Ill. App. Ct. 2000) (describing how crucial aspects of defendant’s physical appearance that are relied upon by a judge may be lost in the transmission of a guilty plea by video teleconference).

53. *See generally* Poulin, *supra* note 14, at 1108-1109.

54. Rorie Sherman, *Technology Now in Use May Someday Create a Courtroom in Cyberspace*, NAT’L L.J., Jan. 10, 1994, at 1 (quoting Kentucky Chief Justice Robert F. Stephens as stating: “When everyone else was using fountain pens, the court was using quills. When we finally got fountain pens, everybody else was using typewriters...”). *See also* Poulin, *supra* note 14, at 1105-1106 (noting the lack of funding in criminal justice systems throughout the U.S., and stating that criminal justice systems are unlikely to support cutting edge, high quality equipment).

camera shots, nonverbal cues that may be lost in transmission, and loss of eye contact.⁵⁵

Video teleconferencing also raises concerns regarding the overall environment in which criminal defendants enter their plea from. The room in the detention center where the defendant enters his plea from is much different than a courtroom.⁵⁶ As a result, the use of video teleconference impacts the criminal justice system itself.⁵⁷ The use of such technology may lessen the ceremonial and formal atmosphere of the courtroom, which may lead the defendant to not take the proceeding as seriously as they should.⁵⁸ A guilty plea entered from a detention center may lead to reduced opportunity by a judge to observe the interaction of defendant and his or her environment.⁵⁹ It may also lead to a more coercive atmosphere for the defendant.⁶⁰ Use of video teleconference also disallows familial support that is so often important to the defendant.⁶¹

Another serious concern is how prominent a role the defendant's counsel can play, if there is counsel at all, when a video teleconference is used. In all felony cases the right to counsel attaches when a guilty plea is entered.⁶² This is not so with regards to misdemeanor offenses: a defendant's guilty plea may be accepted by a court even though no counsel presented assistance as long as there is no actual jail sentence.⁶³ Even if the defendant does have the

55. See generally Poulin, *supra* note 14, at 1108 (discussing in great detail the ways in which video technology distorts perceptions of others in these three critical areas: camera shots, nonverbal cues, and eye contact); Wise, *supra* note 14, at 2 (quoting legal aid employee as describing the use of video technology potentially "dehumanizing" and having the effect of making the defendant or judge "just a face on a television screen.").

56. See Raburn-Remfry, *supra* note 18, at 833 (declaring that jail cell may prevent "detainees from objectively assessing their situation").

57. See Poulin, *supra* note 14, at 1135; Raburn-Remfry, *supra* note 18, at 833.

58. See Poulin, *supra* note 14, at 1135; Raburn-Remfry, *supra* note 18, at 833. See also *Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring, joined by Douglas and Goldberg, JJ.) (declaring the setting of the courtroom an important element into the constitutional conception of a trial, contributing a dignity essential to "the integrity of the trial process").

59. See Grubbe, *supra* note 14, at 365-367 (describing the use of video teleconference in weekend arraignments and the potential negative effects in such a system); Raburn-Remfry, *supra* note 18, at 830.

60. Poulin, *supra* note 14, at 1134-1135 (describing the jail atmosphere as "inherently coercive"); Raburn-Remfry, *supra* note 18, at 833 (describing physical and psychological atmosphere of jail as "inherently coercive").

61. See Raburn-Remfry, *supra* note 18, at 836.

62. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (declaring that a person haled into court has the right to an attorney).

63. See *Scott v. Illinois*, 440 U.S. 367, 369-374 (1979) (declaring rule that Sixth and Fourteenth Amendments only offer right to counsel where there is an actual jail sentence).

assistance of counsel, there is no guarantee that counsel is with the defendant at the jail cell; counsel may be in the courtroom while the defendant is at the jail.⁶⁴

Even if a defendant is represented by counsel and counsel is at the detention center with his or her client, a number of practical problems arise. Counsel cannot approach the bench if they need to or meet with prosecution to discuss potential plea bargains.⁶⁵ Further, there is no guarantee that the judge can hear the defense attorney, or the defendant for that matter, given the potential for the equipment problems expressed above.⁶⁶

These concerns can have far-reaching effects on the defendant. If video teleconferencing is used in the processing of a defendant, there are questions to how those in the court will perceive the defendant.⁶⁷ Those in the court may question the defendant's credibility,⁶⁸ and there are concerns that a defendant may be less effective on video.⁶⁹ Another concern is whether the judge can accurately tell if the defendant understands what he or she is pleading.⁷⁰

C. Statutes and Case Law Addressing Guilty Pleas by Video Teleconference

As video and closed circuit television became readily available and economically feasible, courts jumped at the chance to utilize it.⁷¹ As courts began employing the video technology, questions about its constitutional legitimacy arose almost as quickly.⁷² In response, a number of jurisdictions around the country have taken steps to address the "presence" question with regard to pleading guilty by video, both statutorily and through case law.⁷³ In each of these

64. Poulin, *supra* note 14, at 1128-1133.

65. See Poulin, *supra* note 14, at 1131.

66. See discussion *supra* Part II.B.2., at 12-14.

67. See Poulin, *supra* note 14, at 1114.

68. See Poulin, *supra* note 14, at 1115.

69. See Poulin, *supra* note 14, at 1115.

70. See Grubbe, *supra* note 14, at 367-370.

71. See, e.g., Silbert et al., *supra* note 15 (describing the use of video technology in the Florida judicial system beginning in the early 1980s).

72. See Silbert et al., *supra* note 15 (describing the disadvantages of the video arraignment system and noting that effect on judge of not being able to see defendant not fully understood. Silbert et al., were one of the first groups to look at the legitimacy of such a system in 1984).

73. It is important to note here that statutes enacted by the various states do not solve, or are dispositive of, the constitutional issues confronting us. See *Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004). However, the different statutory schemes enacted by the different states are important because they are examples of the approaches that may be taken when confronted with the need to delicately balance

situations, either the legislature or the court addressing the question took into account the factors described in the above sections, i.e., the extent of the defendant's right to be present in court and the possible benefits that the court derives from the technology.⁷⁴ In each instance the court and legislature must balance the convenience of processing the defendant without violating their constitutional rights. Jurisdictions apply this balancing exercise differently.

1. Legislative Approaches

In those states that have enacted statutory interpretations of the presence question, there are essentially three groups into which they fall. The first group consists of those states that allow a defendant to plead guilty via closed-circuit television or video.⁷⁵ The second group allows a defendant to plead guilty by closed-circuit television or video only upon specific waiver of their right to be physically present in court.⁷⁶ The third statutory scheme holds that a defendant may not plead guilty to a felony unless the defendant is physically in the courtroom.⁷⁷ Jurisdictions subscribing to this latter statutory scheme are dwindling.⁷⁸

While some states have enacted statutes addressing the use of video teleconferencing, the Federal Rules of Criminal Procedure govern the "presence" situation in federal criminal trials.⁷⁹ Under the

efficiency and safety with constitutional rights.

74. See discussion, *supra* Part II.B.1-2., at 9-16.

75. See, e.g., MICH. COMP. LAWS ANN. § 767.37a(5) (2005) (absent request by defendant to be physically present in court, act does not prohibit the use of 2-way closed circuit television for criminal pleas); NEV. REV. STAT. ANN. § 178.388(4) (2004) (presence of defendant for plea at arraignment is not required if the court has provided for the use of closed-circuit television); N.C. GEN. STAT. ANN. § 15A-941(b) (2006) (video and audio pleas in noncapital case may be taken).

76. See, e.g., CAL. PENAL CODE § 977(c) (West 2005) (defendant may plead guilty by closed-circuit television if written waiver of right to be present and stipulation by the parties executed); MISS. CODE ANN. § 99-1-23(1)(d) (2005) (defendant may enter plea of guilty at arraignment by a personal appearance via closed-circuit television upon waiver or right to be present); MO. REV. STAT. § 561.031 (2005) (defendant may enter plea of guilty at arraignment via closed-circuit television upon waiver of right to be physically present at such proceeding); TEX. CODE CRIM. PROC. ANN. 27.18(a) (Vernon 2005) (court may accept a guilty plea or a waiver by closed-circuit video if defendant executes a written consent to the procedure and prosecution consents).

77. See N.Y. CRIM. PROC. LAW §182.30(1) (McKinney 2005).

78. MONT. CODE ANN. § 46-12-201(5) (2005), allows for the entry of a guilty plea by video teleconference. This statute was amended from the 2001 statute that did not categorically allow a guilty plea by video teleconference.

79. FED. R. CRIM. P. 43(a)(1).

Federal Rules, a defendant must be present at the plea⁸⁰ unless the defendant is pleading guilty to a misdemeanor, in which case the defendant must specifically waive his or her right to be physically present.⁸¹ Federal Rule of Criminal Procedure 43(a)(1) is likened to the third category of those states that have enacted statutes applying to a defendant that pleads guilty by video teleconference, in that it imposes a strict paradigm upon a federal court (or, for that matter, a defendant), wishing to accept or give a guilty plea via video technology.⁸² Indeed, the Federal Rules of Criminal Procedure have been described as offering protection that is “broader than the Constitution provides.”⁸³ Essentially, the standard set forth by the Federal Rules of Criminal Procedure mandates that a defendant *must* be physically present at the issuance of a guilty plea unless he is charged with a misdemeanor, in which case he must expressly waive his right to be present.⁸⁴

2. Court Decisions

Although some states have taken statutory steps to address the presence question, a number of states addressed the issue through court decisions. In state court decisions that directly address the question, a jurisdictional variance appears regarding the question of whether to allow a guilty plea by video teleconference.⁸⁵ On one end

80. *Id.* Under FED. R. CRIM. P. 43(a)(1) a defendant must be present unless provided otherwise by FED. R. CRIM. P. 5 (covering initial appearances) or FED. R. CRIM. P. 10 (covering arraignments).

81. FED. R. CRIM. P. 43(b)(2).

82. FED. R. CRIM. P. 43(a)(1) requires that a defendant must be present at certain proceeding, including the entry of a guilty plea. *See also* N.Y. CRIM. PROC. LAW § 182.30(1) (requiring defendant’s physical presence at entry of guilty plea).

83. *Valenzuela-Gonzalez v. U.S. Dist. Ct. for Dist. of Ariz.*, 915 F.2d 1276, 1280 (9th Cir. 1990).

84. Under FED. R. CRIM. P. 43(a)(1) a defendant must be present unless provided otherwise by FED. R. CRIM. P. 5 (covering initial appearances) or FED. R. CRIM. P. 10 (covering arraignments). Congress amended both Rule 5 and Rule 10 in 2002, whereby the court could henceforth conduct initial appearance and arraignment via video conferencing. Conspicuously absent from the 2002 amendments allowing for video teleconferencing is FED. R. CRIM. P. 11, which covers entering of pleas. *See also* *United States v. Melgoza*, 248 F.Supp.2d 691 (S.D. Ohio 2003) (ruling that defendants could not enter their pleas by video teleconference because FED. R. CRIM. P. does not provide for entry of pleas by video teleconference).

85. *Compare* *State of Wisconsin v. Peters*, 615 N.W.2d 655 (Wis. Ct. App. 2000) (holding right to fair and just hearing not thwarted by his physical absence when plea of no contest entered by closed-circuit television) *with* *Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004) (holding defendant’s due process right to be physically present at guilty plea violated when plea entered by video

of the spectrum are states whose courts have held that a due process violation does not occur when a defendant pleads guilty via video teleconference; in fact, one court held that such a hearing's fairness and justness was not thwarted by the defendant's physical absence because "an audio-visual hookup may well be the legal equivalent of physical presence."⁸⁶ This declaration seems to indicate that, far from making the defendant a remote person on the other end of a technological connection, the defendant is actually "present" in the courtroom within the meaning of the right afforded by the Fourteenth Amendment.⁸⁷

In direct contradiction to those states that do not find guilty pleas via teleconference to be constitutional violations are those states that hold that a defendant's plea of guilty made via video violates the defendant's due process rights under the U.S. Constitution unless an intelligent and understanding entered-into waiver is made.⁸⁸ One court has noted that "not every technological advance fits within constitutional constraints or the realities of criminal proceedings."⁸⁹ Unlike the court decisions at the other end of the spectrum, these decisions seem to indicate that a defendant on video teleconference is not "present" within the courtroom because of the required waiver of the right to be physically present.⁹⁰

teleconference).

86. *Peters*, 615 N.W.2d at 660 (holding defendant's voluntary plea of no contest by closed-circuit television did not violate his due process rights under the U.S. Constitution because his right to a fair and just hearing was not thwarted by his physical absence).

87. See Raburn-Remfry, *supra* note 18, at 823 (interpreting state and federal decisions that deal with video teleconference in the courtroom to hold that the defendant is "present" when viewed through video); Silbert et al., *supra* note 15, at 663 (declaring defendant present when the court can view them through video teleconference).

88. See *Stroud*, 804 N.E.2d at 517 (holding that defendant's due process rights are violated if guilty plea is entered via video unless an express waiver is made); *Illinois v. Guttendorf*, 723 N.E.2d 838 (Ill. App. Ct. 2000) (declaring, considering the crucial aspects of a defendant's physical presence when pleading guilty, due process rights are violated when entering a plea of guilty via video); *Seymour v. Florida*, 582 So.2d 127 (Fla. Dist. Ct. App. 1991) (holding fair and just hearing cannot be granted to defendant who wishes to plead guilty via video when defendant and his or her attorney consult through video); *Jacobs v. Florida*, 567 So.2d 16 (Fla. Dist. Ct. App. 1990). Cf. *Scott v. Florida*, 618 So.2d 1386 (Fla. Dist. Ct. App. 1993) (holding defendant's due process rights not violated when plea of guilty entered via video after making a knowing, voluntary and intelligent waiver of his rights to be physically present in court).

89. *Seymour*, 582 So.2d at 129.

90. See *Peters*, 615 N.W.2d at 660 (holding defendant's voluntary plea of no contest by closed-circuit television did not violate his due process rights under the U.S. Constitution because his right to a fair and just hearing was not thwarted by his physical absence).

In these jurisdictions, the courts take pains to emphasize the critical nature of an entry of a guilty plea.⁹¹ Because so many of a defendant's crucial rights are lost when he or she pleads guilty, these courts scrutinize any such plea rigorously.⁹² When, however, a court is faced with procedural rights that are not as critical to a fair and just hearing, such as those implicit in pleading not guilty during arraignment, they will many times distinguish such rights from those couched in pleading guilty and will allow the defendant to appear through video.⁹³

III. Discussion

At this point, while we can hardly expect criminal justice systems across the country to give up the use of video technology, we do have to recognize the serious impact that the use of such technology has upon the rights of the defendant. The following section analyzes the effects that video teleconference have upon the defendant and concludes that the defendant should not be considered "present" in fulfillment of their constitutional right if they plead guilty by video because such a process does not afford them a fair and just hearing, as required by the Supreme Court in *Snyder v. Massachusetts*.⁹⁴ This does not mean that all guilty pleas should be made by a physically present defendant. Rather, courts should continue to entertain such a process only if the judge accepting the plea is fully satisfied that the defendant has voluntarily and intelligently waived his right to appear physically in court, opting instead to do so by video teleconference.

91. See *Stroud*, 804 N.E.2d at 515 (discussing the crucial nature of a guilty plea).

92. See *Stroud*, 804 N.E.2d at 515 (declaring "the number and gravity of the rights at stake at a guilty plea hearing are greater than when a defendant intends to plead not guilty at arraignment.").

93. Compare *Illinois v. Lindsey*, 772 N.E.2d 1268, 1275-1279 (Ill. 2002) (holding defendant's constitutional right to be present at critical stages of criminal proceeding not violated at arraignment in which defendant plead not guilty was conducted via video teleconference because his physical absence from the proceedings did not result in denial of any "underlying right.") with *Stroud* 804 N.E.2d at 515 (holding defendant's right to be physically present at entry of guilty plea violated when done by video teleconference because "number and gravity of the rights at stake at a guilty plea hearing are greater than when a defendant intends to plead guilty at arraignment.").

94. 291 U.S. 97.

A. The Use of Video Teleconference Negatively Affects the Criminal Defendant, Thus Destroying the Fairness and Justness of the Hearing

1. Technological Limitations

When a criminal defendant appears in court by video teleconference he or she may suffer a number of negative tangible and intangible effects.⁹⁵ This is especially true when a defendant pleads guilty.⁹⁶ One of the major concerns revolves around the technology itself.⁹⁷ In order for video teleconference to work, there has to be a constant, uninterrupted flow of conversation between the parties.⁹⁸ As with any implementation of technology, however, there have been instances where the technology failed during a hearing.⁹⁹ Such failures include the inability of the defense attorney, defendant, and judge to hear and see one another, which may cause one of the parties to miss out on important information, both auditory and visual.¹⁰⁰ In such circumstances, if the technology fails during the conference, it has failed its purpose and it will adversely affect the defendant.¹⁰¹ While technology has become more reliable since its

95. See generally, e.g., Grubbe, *supra* note 14, at 365-370; Poulin, *supra* note 14, at 1104-1105; Raburn-Remfry, *supra* note 18, at 814-818. See also, e.g., Guttendorf, 723 N.E.2d at 840-841 (declaring that video teleconference negates crucial aspects of defendant's personal presence.); Seymour, 582 So.2d at 128 (holding plea invalid where defendant was only able to confer with counsel via video teleconference, declaring that such conversation is "of vital importance").

96. See generally Stroud, 804 N.E.2d 510 (holding defendant's due process right to be physically present at guilty plea violated when done via video teleconference without waiver of such right). See also Grubbe, *supra* note 14, at 366 (noting judge's ability to observe defendants is of "particular importance" in acceptance of guilty pleas); Poulin, *supra* note 14, at 1150 (declaring, "one of the most troubling uses of videoteleconferencing is for taking guilty pleas from incarcerated defendants.").

97. See generally Poulin, *supra* note 14, at 1105; Sherman, *supra* note 54, at 3; Silbert et al., *supra* note 15, at 660.

98. Cf. Poulin *supra* note 14, at 1105 (discussing technological failures that negatively impact defendant's criminal proceeding).

99. See Kentucky v. Ingram, 46 S.W.3d 569, 571-572 (Ky. 2001) (discussing the problems posed by video teleconferencing, including the frequent malfunction of the printer which was supposed to convey the defendant's new court date and the frequent inability to hear and communicate with the defendant); see also Silbert et al., *supra* note 15, at 660 (describing inability to hear and see defendant accurately at all times).

100. See Silbert et al., *supra* note 15, at 660.

101. See Poulin, *supra* note 14, at 1114 (declaring, "If...the perception of the defendant...changes because of the use of video or because of the off-site location, videoconferencing undermines the fairness of the system."). Certainly the perception of the defendant is altered if either the picture of the defendant is

first implementation in the courts, the use of video teleconference cannot guarantee that the interaction will be uninterrupted by technological failure, the way the process is when the defendant is physically in court before the judge.¹⁰²

Another significant concern raised by the technology itself occurs even if the technology is operating properly. The interaction between defendant and judge is severely limited, and as a result, a number of non-verbal and visual cues can be lost during transmission.¹⁰³ These cues include “facial expression, gaze, posture, and gestures.”¹⁰⁴ Nonverbal cues serve various important functions. They convey mutual attention and responsiveness and communicate interpersonal attitudes.¹⁰⁵ Nonverbal cues call attention to who is speaking and for how long they should speak.¹⁰⁶ Cues from one person may provide feedback.¹⁰⁷ These cues can also illustrate verbal expression, as for example, when someone uses a head shake to express a negative.¹⁰⁸ The cues play an important part of the process, including conveying to the judge the general understanding and competence of the defendant.¹⁰⁹

interrupted or his voice is muted due to technological failure. *But see Ingram*, 46 S.W.3d at 571-572 (holding that while the process may not have been ideal, “there was nothing about the proceeding that violated due process as that concept is generally understood.”). It should be noted, however, that *Ingram* involved not a video teleconferenced guilty plea, but an arraignment.

102. *Cf. Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004) (declaring, after considering the negative effects of video teleconferencing that could potentially impact upon the fairness of the defendant’s proceeding, that pleading guilty via video teleconference without waiving one’s right to be physically present in court at entry of plea violated defendant’s due process rights).

103. *See Grubbe, supra* note 14, at 365 (Stating, “ensuring procedural due process in plea taking involves being able to assess a defendant’s ability and willingness to plead voluntarily”); Poulin, *supra* note 14, at 1104-1128 (discussing at length the effect that video teleconference plays upon the verbal and non verbal cues relied upon by the judge and jury); Wise, *supra* note 14, at 2 (quoting Michele Maxian, who monitored the legislation on behalf of Legal Aid, as stating that the use of video technology having a “dehumanizing” effect on the defendants and making them “just a face on a television screen”). *See also Illinois v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000) (noting crucial aspects of a defendant’s physical presence may be distorted, among them facial expressions and demeanor).

104. Poulin, *supra* note 14, at 1110.

105. Poulin, *supra* note 14, at 1110.

106. Poulin, *supra* note 14, at 1110.

107. Poulin, *supra* note 14, at 1110.

108. Poulin, *supra* note 14, at 1110.

109. *See Grubbe, supra* note 14, at 366. The article by Judge Grubbe is especially authoritative. As a judge, he notes his responsibility to determine the voluntariness of the plea, and the ways in which video teleconference may impede upon his ability to do so. *See also Poulin, supra* note 14, at 1110; *Illinois v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000) (noting crucial aspects of a

In many instances, the judge may depend on these non-verbal cues when determining whether to accept a defendant's plea.¹¹⁰ If the judge cannot adequately assess the voluntariness of the defendant's plea, he or she may improperly accept a guilty plea which was neither intelligent nor voluntary, thus leaving the process tainted and unfair.¹¹¹ In fact, one judge noted that "electronic communications may be an impediment to a magistrates determination of procedural voluntariness."¹¹² Furthermore, when a defendant pleads guilty, the judge must be positive that the waiver of rights inherent in the plea are voluntarily and intelligently waived.¹¹³ Determining whether a guilty plea is voluntary and intelligent will become much harder for a judge to make this distinction if the defendant appears by video.¹¹⁴

The setup of the video teleconference also raises problems. Different jurisdictions employ different video setups.¹¹⁵ In one courtroom, a defendant may appear on a split-screen monitor with one view of the defendant's head up close, and one panoramic of the detention center.¹¹⁶ The defendant would have a similar view of the court.¹¹⁷ In other courtrooms the judge may only have one screen which views just the head shot of the defendant and vice versa for the defendant.¹¹⁸

The divergence in such systems clearly provides the former defendant with a more fair hearing. The judge in the first example (i.e., the split screen setup) has a better opportunity to examine not only up close cues given by the headshot, but also has the opportunity to examine the atmosphere surrounding the defendant, enabling the judge to better determine whether the plea is voluntary and

defendant's physical presence may be distorted, among them facial expressions and demeanor).

110. See Grubbe, *supra* note 14, at 366 (describing how judges rely on verbal and non verbal cues of defendants, especially at first appearance hearings when they are potentially affected by trauma or drugs or alcohol); Poulin, *supra* note 14, at 1110 (describing how an observer may view a defendant differently on screen than they would in person).

111. See generally Grubbe, *supra* note 14 at 366; Poulin, *supra* note 14, at 1114.

112. Grubbe, *supra* note 14, at 366.

113. See discussion *supra* Part I, at 4-5.

114. Grubbe, *supra* note 14 (observing "the failure of magistrates to screen for impairments and disabilities which affect voluntariness may be attributable to the use of the electronic communications system, insofar as this medium may hinder the magistrates' ability to personally assess the physical and mental demeanor of the arrestees").

115. See Poulin, *supra* note 14, at 1107.

116. Duffy, *supra* note 27, at 1.

117. Duffy, *supra* note 27, at 1.

118. Toutant, *supra* note 16 at 1.

intelligent.¹¹⁹ Even here, however, the defendant is disadvantaged.¹²⁰ In a panoramic view, not only is the defendant shown, but all other distracting elements of the detention center are as well.¹²¹ This may distract the judge from focusing on the defendant.¹²²

The effect in the second example (i.e., the single view of the defendant) puts the defendant in a much more disadvantaged position. The only exposure that the judge has in the second example is the defendant's face.¹²³ While this will omit all other distractions around, it will cut out all other surrounding information that the judge may find useful.¹²⁴ This leaves the judge with an inability to examine the atmosphere of the detention center, including whether the defendant is at all coerced.¹²⁵ Furthermore, if all that is shown is the defendant's headshot, one commentator has noted that video may produce a false impression which may "assume an exaggerated effect and certain mannerisms may be particularly distracting."¹²⁶ In a close up shot, a defendant's features may be exaggerated and body language is indiscernible.¹²⁷

These foregoing situations make example of the inherent limitations in technology. When a defendant is not physically in court, vital non-verbal cues may be lost and unfavorable impressions may be conveyed.¹²⁸ Further, the judge may not have a full opportunity to examine the atmosphere of the detention center.¹²⁹ All of these factors may impede the judge's ability to determine how voluntary and intelligent the guilty plea is and, for this reason, negatively impacts upon the fairness and justness of the proceeding.¹³⁰

119. See Poulin, *supra* note 14, at 1108-1109.

120. See Poulin, *supra* note 14, at 1108-1109.

121. See Poulin, *supra* note 14, at 1108-1109.

122. See Poulin, *supra* note 14, at 1108-1109. But see Silbert et al., *supra* note 15, at 659 (hypothesizing that judge will focus more intently on a defendant and their case if appearing by video teleconference).

123. See Toutant, *supra* note 16, at 1; Poulin, *supra* note 14, at 1107-1108.

124. See Poulin, *supra* note 14, at 1108-1109.

125. See generally Raburn-Remfry, *supra* note 18, at 833.

126. Poulin, *supra* note 14, at 1120.

127. Poulin, *supra* note 14, at 1120.

128. See discussion, *supra* Part III.A.1., at 57-59.

129. See discussion, *supra* Part II.B.2., at 50-50.

130. See Poulin, *supra* note 14, at 1107-1111 (discussing negative effects that technological limitations impose on a criminal defendant appearing by video teleconference).

2. The Environment Where Guilty Plea Is Taken

Another major concern brought about by the use of video teleconference concerns the environment where the plea is taken.¹³¹ The courtroom in American jurisprudence is an almost sacrosanct space.¹³² The formal and impartial atmosphere lends credibility to the judicial system, both criminal and civil.¹³³ Chief Justice Warren described the courtroom as

...not an end in itself. Rather, [the American judicial system] recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; 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.¹³⁴

While Chief Justice Warren spoke of the "trial" process, his words speak equally to the entry of a guilty plea because the same concerns apply.¹³⁵ The courtroom breeds a sense of justice and impartiality.¹³⁶ The symbols of the courtroom – the marble floors, emblems and flags, the use of the wooden bar to separate lawyers from the laity, the height of the judge's podium, and the gavel used to ensure order in the court – all reinforce the recognition of the authority of the court to act as "surrogates for society's censure of criminal acts."¹³⁷ These factors may encourage the defendant in his or her entry in their plea of guilty, persuading them that they are receiving the best deal that they can receive.¹³⁸

Further, if the defendant is in the court, the judge has an unfettered view of all the proceedings. The judge can see with his or her own eyes whether the defendant's plea is made intelligently and

131. See, e.g., *Stroud*, 804 N.E.2d at 515 (declaring that the courtroom can play a "critical, albeit intangible, role in the proceedings, including a hearing on a plea."); Poulin, *supra* note 14, at 1134-1135 (describing the importance of the courtroom, and the possible negative effects of taking a plea at the jail or detention center).

132. E.g., *Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring) (describing importance of courtroom in American jurisprudence).

133. See Raburn-Remfry, *supra* note 18, at 836 (describing the ceremonial and important effect of a courtroom).

134. *Estes*, 381 U.S. at 561 (Warren, C.J., concurring).

135. See generally Poulin, *supra* note 14, at 1125.

136. Poulin, *supra* note 14, at 1125.

137. Raburn-Remfry, *supra* note 18, at 836.

138. See generally Poulin, *supra* note 14, at 1125 (noting that the courtroom may act as an inducement to defendants to tell the truth, as well as encouraging defendants to "take the proceedings seriously and adopt an appropriate demeanor.").

voluntarily.¹³⁹ If the defendant is at the detention center, which is hardly a replication of a courtroom, he or she may feel coerced as a result of the environment itself.¹⁴⁰ A detention center, by its nature, is a less hopeful and distinguished atmosphere because it lacks the dignity and impartiality of the courtroom.¹⁴¹ This may cause the defendant to become despondent, which may in turn, cause the defendant to render a guilty plea which is neither voluntary nor intelligent.¹⁴² Finally, as discussed above, if the only view that the judge has of the defendant is his headshot on camera, he or she will not have the same opportunity to determine if the plea is voluntary and intelligent.¹⁴³ If a defendant's guilty plea is neither voluntary nor intelligent, and this is caused by the use of video teleconference, the fairness and justness of the process is compromised.

3. Adequacy Of Counsel

Another major reason for concern raised by the use of video teleconference is the extent to which defendant's counsel can adequately assist them in their guilty plea. The concern is shelved upon two situations: the represented defendant and the unrepresented defendant. Both situations raise separate concerns.

i. Unrepresented Defendants

A defendant charged with a misdemeanor which does not carry a sentence is not entitled, as a constitutional right, to counsel.¹⁴⁴ This, however, does not mean that this particular defendant's right to be physically present should be shortchanged; instead, as with represented defendants, the judge who hears the misdemeanor's guilty plea should be absolutely certain that such a plea is voluntary and intelligent.¹⁴⁵ Indeed, defendants in this circumstance may be at

139. See Grubbe, *supra* note 14, at 365-367 (describing the importance of verbal and non verbal cues in determining whether a particular defendant is rendering his or her guilty plea voluntarily and intelligently).

140. See Poulin, *supra* note 14, at 1134-1135 (describing detention center as "inherently coercive"); Raburn-Remfry, *supra* note 18, at 833 (describing physical and psychological atmosphere of jail as "inherently coercive").

141. See generally Poulin, *supra* note 14, at 1135; Raburn-Remfry, *supra* note 18, at 833.

142. See generally Poulin, *supra* note 14, at 1135; Raburn-Remfry, *supra* note 18, at 833.

143. See discussion *supra* Part III.A.1., at 58-59.

144. See generally *Scott*, 440 U.S. at 369-374 (declaring right to counsel not applicable unless actual jail sentence imposed on defendant).

145. See *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (stating, "plea of

a significant disadvantage in light of the concerns raised above. They will not have counsel to explain to them the rights given up.¹⁴⁶ They will be in a more coercive environment in the detention center.¹⁴⁷ And, of course, many of the nonverbal cues may be lost in the transmission of the video teleconference.¹⁴⁸ In short, unrepresented misdemeanants are at a huge disadvantage when they plead guilty by video because they are deprived of the benefits of pleading before the judge in the court, and this negatively affects the fairness and justness of the process.¹⁴⁹

ii. Represented Defendants

When a defendant pleads guilty, he or she waives a plethora of rights.¹⁵⁰ Because of this, a guilty plea should not be entered lightly.¹⁵¹ Defendants should only plead guilty if they are receiving a “specific advantage.”¹⁵² Thus, the importance of counsel at this stage should not be undercut or underestimated; defense counsel has the responsibility to make sure that the plea is not in response to pressure from the prosecutor or the court.¹⁵³

There are also potentially serious problems when a defendant pleads guilty by video teleconference even if the defendant has

guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.”)

146. See Poulin, *supra* note 14, at 1153 (discussing situation where defendants who were charged with misdemeanor offenses received no legal advice when plea process proceeds); *Seymour v. Florida*, 582 So.2d 127, 128 (Fla. Dist. Ct. App. 1991) (declaring, “It is of vital importance that a defendant have the opportunity to engage in personal and private conference with his counsel to resolved the numerous problems and misunderstandings that develop during the course of pre-trial proceedings.”); *Jacobs v. Florida*, 567 So.2d 17 (Fla. Dist. Ct. App. 1990) (finding reversible error in sentence of defendant when defendant was in jail and counsel was in courtroom and communication was achieved through use of video teleconference because a defendant should be able to confer privately and to have the benefit of the advice of his counsel.).

147. See Poulin, *supra* note 14, at 1134-1135; Raburn-Remfry, *supra* note 18, at 833.

148. See discussion *supra* Part III.A.1., at 57-57.

149. See Poulin, *supra* note 14, at 1153-1154 (discussing the effects of video teleconference on an unrepresented defendant, and declaring, “the court is in a poor position [when video teleconference is used in a guilty plea] to determine that the defendant is competent and has not been pressured”).

150. *Boykin*, *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969).

151. See Poulin, *supra* note 14, at 1151 (stating, “[t]he decision to plead at any stage should be made only after careful investigation and consultation.”).

152. See Poulin, *supra* note 14, at 1151. Such an advantage many times will be leniency in sentencing.

153. See Poulin, *supra* note 14, at 1151.

counsel.¹⁵⁴ This stems in part from the different locations where counsel offers assistance.¹⁵⁵ One situation is where the defendant is at the detention center and counsel is present at the courtroom.¹⁵⁶ The major concern here is one of effectiveness.¹⁵⁷ One public defender summed up the situation succinctly: “An attorney can’t be in two places at once; we don’t want to leave the client alone.”¹⁵⁸ If the defendant needs to speak privately with counsel, in some instances he or she is forced to do so in front of the court via video teleconference.¹⁵⁹

One can scarcely imagine a more ineffective situation regarding counsel-client private matters than when the defendant and counsel are in different locations.¹⁶⁰ The defendant relies upon his or her attorney to offer sound advice and to argue their case as effectively as possible.¹⁶¹ When a defendant is separated from his or her attorney, the situation changes dramatically.¹⁶² The reliance and trust created during the attorney client relationship may become suspended by the technology.¹⁶³ If, as one commentator noted, the situation serves to “chill” communications, the attorney may not be able to adequately

154. See generally, e.g., Grubbe, *supra* note 14, at 367-370 (describing the duties of counsel, and the possible problems that can arise due to video teleconference).

155. See Poulin, *supra* note 14, at 1129-1133 (discussing different ways in which counsel can interact with the court when video teleconference is used).

156. See *Jacobs v. Florida*, 567 So.2d 16 (Fla. Dist. Ct. App. 1990). See also Poulin, *supra* note 14, at 1129-1130.

157. See generally *Jacobs*, 567 So.2d 16 (Finding reversible error in sentencing procedure which was made by video teleconference where defendant was in jail and counsel was in court, noting that such procedure did not allow the defendant to confer with counsel effectively.).

158. Toutant, *supra* note 16, at 2.

159. Toutant, *supra* note 16, at 2.

160. See *Jacobs*, 567 So.2d 16 (although holding sentencing by closed circuit television was unauthorized by statute, the court declared that counsel and defendant should be together in same room because “essential to permit the defendant to confer with his counsel privately and to have the benefit of his advice.”). See also Poulin, *supra* note 14, at 1129; Raburn-Remfry, *supra* note 18, at 828-829. But see Silbert et al., *supra* note 15, at 664 (declaring that video teleconferencing able to preserve the attorney-client relationship); Toutant, *supra* note 16, at 2 (quoting a Deputy Public Defender as stating, “I had a lot of objections to it [video teleconferencing], quite frankly. I like one-on-one relationship with my clients. I thought having them on camera would affect the interaction with the client. I was wrong.”).

161. See generally Poulin, *supra* note 14, at 1128-1129 (discussing the attorney-client relationship).

162. Poulin, *supra* note 14, at 1129 (describing situation where the attorney is in court and the defendant is in jail as “profoundly chang[ing] the defendant’s experience”).

163. See Lederer, *supra* note 22, at 1106-1107 (observing situation where defendant and counsel not in same room may serve to “chill” communications)

argue on behalf of his or her client, thus rendering the defendant's situation less fair and just.¹⁶⁴

Furthermore, even if the defendant and counsel can speak over a private line, counsel will suffer from the same problems that a judge may encounter when video teleconference is used, i.e., the inability to detect non-verbal cues and the problems caused by the camera-video setup.¹⁶⁵ Again, there is the chance that, even if privileged communications can be provided, the relationship and conversation between attorney and defendant may be chilled.¹⁶⁶ This will contribute to a lower threshold of advice and communication which weighs unfairly against the defendant.¹⁶⁷

In a situation where the defendant and counsel both appear from the detention center, problems remain. These include the above discussed problems of non-verbal cues and camera setbacks.¹⁶⁸ They also include the physical restraints imposed by the use of video teleconference.¹⁶⁹ While this situation fosters better communication between the defendant and counsel than in the alternative situation, it precludes the counsel from full interaction with the court.¹⁷⁰ Further, one commentator noted the possibility of creating an "us" against "them" situation, where the prosecutor is in the court with the judge while the defendant and defense counsel are connected by a television screen.¹⁷¹ Thus, the same limitations that technology imposes upon the defendant – that of decreased credibility and effectiveness – are now imposed upon the counsel, which can impede his or her effectiveness.¹⁷² If his effectiveness as counsel is at all diminished because of the use of video teleconference, then the process becomes less fair and just.¹⁷³

164. See Lederer, *supra* note 22, at 1106-1107.

165. See discussion *supra* Part III.A.1., at 57-57.

166. Lederer, *supra* note 22, at 1106-1107.

167. See Lederer, *supra* note 22, at 1106-1107.

168. See discussion *supra* Part III.A.1., at 56-59.

169. See Poulin, *supra* note 14, at 1131-1132.

170. See Poulin, *supra* note 14, at 1131-1132. Included among the tasks that may be affected by such a situation include the inability for the defense counsel to collect necessary paperwork, speak with witnesses before they testify, the inability to gauge emotion cues and competency, when to intervene on behalf of the defendant, and the ability, should the situation arise, to enter into plea negotiations on behalf of the defendant.

171. Raburn-Remfry, *supra* note 18, at 829.

172. See Poulin, *supra* note 14, at 1130-1131 (noting that situation where attorney is with the defendant in the jail will compromise the attorney's participation in the court proceeding).

173. See *Jacobs v. Florida*, 567 So.2d 16 (Fla. Dist. Ct. App. 1990) (Holding that video teleconference did not adequately preserve the attorney-client relationship where attorney was in court and defendant was in detention center). See also

Thus, there are serious concerns that come with pleading guilty by video teleconference. Because these concerns negatively impact the fairness and justness of the process, they deprive the defendant of his due process right to be present in a court for the critical stage of pleading guilty. For this reason, courts should require a waiver.

B. *Wisconsin v. Peters* and *Illinois v. Stroud*; Different Approaches to Video Teleconferenced Guilty Pleas

The foregoing discussion highlights how video teleconference negatively impacts the fairness and justness of a guilty plea. Because technology does not allow a televised guilty plea to comply with minimum constitutional standards of due process as defined by the Supreme Court in *Snyder*,¹⁷⁴ any hearing where a defendant pleads guilty by video teleconference without waiving his due process right to be physically present should uniformly be held unconstitutional.¹⁷⁵ Should a criminal defendant wish to enter his or her guilty plea by video teleconference, courts across the country should require an intelligent and voluntary waiver by the defendant of his or her right to be physically present.¹⁷⁶

While case law addressing the issue of teleconferenced guilty pleas is sparse, there are two decisions that highlight the benefits and concerns raised in this discussion. *Wisconsin v. Peters* offers a less than satisfactory exploration of the issues present and concludes, perhaps shortsightedly, that such a system provides a defendant with a fair and just hearing.¹⁷⁷ *Stroud v. Illinois* discusses the issues raised in this Note and concludes that a defendant may only appear by video teleconference if he or she has made an intelligent and voluntary waiver of his or her right to be physically present; anything else, the court concluded, amounts to a due process violation.¹⁷⁸ It is this author's conclusion that the standard espoused by the *Stroud* court is the more satisfactory application in order to adequately protect the rights of the defendant.

In *Wisconsin v. Peters*, the court was faced with a defendant who

Poulin, *supra* note 14, at 1129-1133 (discussing negative effects of video teleconferencing on attorney-client relationship).

174. In *Snyder*, the Court held that a defendant has a due process to be present at trial proceedings to the extent that a "fair and just hearing would be thwarted by his absence and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934).

175. See *Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004).

176. *Id.*

177. 615 N.W.2d 655.

178. 804 N.E.2d 510.

pled no contest to a fifth violation of operating a motor vehicle after license revocation.¹⁷⁹ The court noted in its decision that the trial court inquired upon his plea whether he had been coerced,¹⁸⁰ and that it and the defendant could clearly see one another.¹⁸¹ The court also opined that “an audio-visual hookup may well be the legal equivalent of physical presence.”¹⁸² The court then concluded that upon such review, they were convinced that “the hearing’s fairness and justness was not thwarted by Peter’s physical absence.”¹⁸³

The court in *Peters*, however, failed to subject itself to any of the concerns raised in this note. The court did not consider whether video teleconferencing could omit non-verbal cues and movements that may aid the judge in determining whether the defendant’s plea was guilty. They did not contemplate the effect that the detention center may have upon a defendant, other than asking if he had been coerced.¹⁸⁴ The court also failed to ask the defendant if he understood his right to be physically present at the hearing, focusing instead on whether he understood the rights that he waived as a result of the guilty plea.¹⁸⁵ Without asking the questions that probe deeper into the effects of such a hearing, and looking solely at the hearing on its face, the court concluded that the fairness and justness of the hearing was not thwarted by the defendant’s absence.¹⁸⁶

In holding that the fairness and justness of *this* guilty plea hearing was not thwarted by the defendant’s absence, the court’s decision begs the question: what would it take to thwart the fairness and justness of such a hearing? Would some clearly noticeable situation have to occur such as an equipment malfunction in the middle of the plea?¹⁸⁷ What if the judge could only see the defendant’s head and could not tell that a prison guard was coercing the defendant from off-camera?¹⁸⁸ Or could it be some intangible feature such as mentally impaired defendant making an unintelligent plea that the judge could not discern due to the video?¹⁸⁹

These concerns can, concededly, be minute and difficult to notice. Nevertheless, they all impact upon the fairness and justness of the

179. 615 N.W.2d at 655.

180. *Id.*

181. *Id.* at 659.

182. *Id.* at 660 (quoting *Scott*, 618 So.2d at 1388).

183. *Peters*, 615 N.W.2d at 660.

184. *Id.*

185. *Id.* at 748-749.

186. *Id.*

187. See discussion *supra* Part III.A.1., at 56-56.

188. See discussion *supra* Part III.A.1., at 58-59.

189. See discussion *supra* Part III.A.1., at 57-57.

hearing.¹⁹⁰ Without inquiring into whether the defendant knew about his right to be physically present and the effects that could come from not being physically in court, *Peters* court afforded the defendant little alternative to video teleconference and subjected him to the negative effects of such a system.¹⁹¹ And, as one commentator declared, if the judge is unable to determine whether the defendant knew of his or her rights, “videoconferencing undermines the fairness of the system.”¹⁹² Further, while *Peters* involved a misdemeanor charge, the questions raised above still underscore the concerns present in such a situation, both misdemeanor and felony.¹⁹³

In *Illinois v. Stroud*,¹⁹⁴ the Illinois Supreme Court held that the defendant, charged with violation of probation, which is an offense carrying a possible prison sentence, could not constitutionally plead guilty by video teleconference unless the defendant was advised of his right to be physically present, and entered a voluntary and intelligent waiver of his right to be physically present.¹⁹⁵ The court discussed the critical nature of a guilty plea, and described how loss or misinterpretation of the defendant’s demeanor, the ability for immediate contact with counsel, and the solemnity of the court proceeding could affect the nature of hearing.¹⁹⁶ The court held that the defendant’s physical absence from the proceeding caused it to be unfair because the defendant lost an underlying constitutional right, stating, “[w]e believe that the defendant’s physical presence would have contributed to the fairness of the proceeding.”¹⁹⁷ The court declared that if a defendant wishes to plead guilty by video teleconference, it is “constitutionally permissible only if the defendant waives the right to physical presence on the record after being advised on his right to be present.”¹⁹⁸

The *Stroud* decision imparts a bottom line standard that adequately provides the defendant with protection of his due process rights to be physically present at his or her guilty plea hearing.¹⁹⁹ This decision

190. See generally, Grubbe, *supra* note 14, at 365 (noting that the impaired ability of the judges to screen for impairment “may be attributable” to the use of video teleconference).

191. See *Illinois v. Stroud*, 804 N.E.2d 510, 516 (Ill. 2004). In its analysis of the present issue, the court in *Stroud* reviewed the *Peters* decision and dismissed it due in part to the “scant analysis.”

192. Poulin, *supra* note 14, at 1114.

193. See discussion, *supra* Part III.A.1-3., at 56-59.

194. 804 N.E.2d 510.

195. *Stroud*, 804 N.E.2d at 517.

196. *Id.* at 515-516.

197. *Id.* at 517.

198. *Id.*

199. See *Stroud*, 804 N.E.2d at 519.

also allows courts to keep their use of video teleconference and all the benefits that come with such a system.²⁰⁰ The standard espouses, essentially, two waivers before a guilty plea can be entered by video teleconference: the waiver of rights inherent in a guilty plea,²⁰¹ and the waiver of the right to be physically present in court for the entry of a guilty plea.²⁰²

Further, the *Stroud* court essentially provides another layer of protection for the televised defendant on top of that offered for a defendant pleading guilty by providing that he or she can plead guilty by video teleconference *only* if he or she is advised of their rights and intelligently and voluntarily waives their right to be physically present.²⁰³ Of course, as with other waivers of constitutional rights, the judge must be satisfied that the waiver is intelligent and voluntary.²⁰⁴ If the defendant does not wish to waive their right to appear physically in court, the judge must allow him to do so.²⁰⁵ If the judge accepts the waiver of the defendant's right to be physically present, the judge then has to decide whether to accept the waiver of the rights given up by pleading guilty.²⁰⁶

Thus, unlike *Peters*, the standard espoused by the *Stroud* court provides both a blanket of protection for the defendant's constitutional rights and preserves the benefits that criminal justice systems across the country gain through the use of video technology. The *Peters* court only recognized the benefits of video teleconference at the expense of a deeper inquiry into how that system may negatively impact upon the fairness and justness to the defendant. If the *Peters* court, and indeed, all courts, employed the standard set forth in *Stroud*, the defendant would be advised of his right to be physically present right away, the effects that a waiver of the right may have, and thus, his constitutional right to due process would be preserved.

Furthermore, given the protections offered to the defendant and the recognition of the benefits gained by the criminal justice's use of video teleconference by the *Stroud* court, should states choose to enact statutes that regulate the taking of pleas by video teleconference, they should follow the lead of states like California

200. See discussion, *supra* Part II.B.1., at 46-48.

201. See *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969).

202. See *Stroud*, 804 N.E.2d at 517.

203. *Stroud*, 804 N.E.2d at 517.

204. See *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

205. See generally *Stroud*, 804 N.E.2d at 519.

206. See *Boykin*, 395 U.S. at 243; *Kercheval*, 274 U.S. at 223.

and Missouri.²⁰⁷ The statutory scheme enacted by these states requires a written waiver of the defendant's right to physically appear before the court should they choose to enter their plea by video teleconference.²⁰⁸ Such a standard mirrors the safeguards recognized in *Stroud*, while also identifying and employing the various benefits of video teleconference. These statutory schemes find a common ground where the other two groups, mentioned above,²⁰⁹ advocate polarized positions: one group recognizes only the beneficial uses of video teleconference at the expense of the defendant's right to be present, and the other recognizes only the absolute right of the defendant to be present without acknowledging the beneficial uses of video teleconference.²¹⁰

IV. Conclusion

Courts across the country use video technology in a number of different proceedings, and while most can agree on the benefits that they gain by using such technology, there is a jurisdictional split on the affect that its use has upon a defendant who wishes to plead guilty by video teleconference. In the face of these benefits, however, we should be mindful of the statement made by Justice Brennan in *Bruton v. United States*: "We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."²¹¹

When a defendant pleads guilty by video teleconference, a number of negative effects may greatly impinge upon his or her ability to have a fair and just hearing. These effects include the loss and

207. See discussion *supra* Part II.C.1., at 52-52.

208. See discussion *supra* Part II.C.1., at 52-52.

209. See discussion *supra* Part II.C.1., at 52-52.

210. Compare MICH. COMP. LAWS ANN. § 767.37a(5) (2005) (absent request by defendant to be physically present in court, act does not prohibit the use of 2-way closed circuit television for criminal pleas); N.C. GEN. STAT. ANN. § 15A-941(b) (video and audio pleas in noncapital case may be taken); NEV. REV. STAT. ANN. § 178.388(4) (2004) (presence of defendant for plea at arraignment is not required if the court has provided for the use of closed-circuit television) with N.Y. CRIM. PROC. LAW §182. 30(1) (McKinney 2005).

211. 391 U.S. 123, 134 91968) (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting)). *Bruton* did not involve a defendant pleading guilty by video teleconference; in fact, it did not involve any issue of technology at all. In *Bruton*, the issue was whether the admission of one co-defendant which implicated his co-defendant could be used against the co-defendant at the expense of severing the combined trial into separate ones. The concern, however, of carving away an individual's constitutional rights in favor of greater efficiency and convenience applies here as aptly as it did in *Bruton*.

distortion of non verbal cues; the lessening of the ability of the judge to adequately discern how voluntary and intelligent the waiver of rights given up with a guilty plea is; a more coercive atmosphere provided by the detention center; and the inability for counsel to provide adequate assistance. If any of these circumstances occur, the justness and fairness of the hearing is tainted, and may violate the due process rights of the defendant.

In response to these concerns, the ideal situation would be for the rest of the country to follow the standard set forth by the Supreme Court of Illinois in *Illinois v. Stroud*. Under this standard, any guilty plea which is made by video teleconference would be held unconstitutional because the “defendant’s physical presence would contribut[e] to the fairness of the proceeding.”²¹² Further, if the defendant wishes to plead guilty by video teleconference, he or she may do so as long as the judge satisfies themselves that the plea is made voluntarily and intelligently.

We cannot, at this point, expect criminal justice systems across the country to give up their use of video conferencing. With the *Stroud* standard, they would not have to. The defendant’s due process right to be physically present at the critical stage of pleading guilty is protected, and the court still is able to realize the benefits of video technology.

212. *Illinois v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004).