
From: Brett Ludwig
Sent: Sunday, March 24, 2024 8:23 PM
To: RulesCommittee Secretary
Subject: Proposed Change to Federal Rules of Criminal Procedure -- Post-COVID Use of Videoconferencing Technology

Dear Rules Committee,

My name is Brett Ludwig. I serve as a District Judge in the Eastern District of Wisconsin. I write to urge the committee to amend the Federal Rules of Criminal Procedure to allow district judges greater flexibility in using videoconference technology to conduct pretrial hearings in criminal cases. The change I propose is minor; it simply extends a court's authority to use videoconferencing, beyond Initial Appearances and Arraignments, with the defendant's consent. I am attaching a Word document showing how this could be accomplished with two minor revisions to Fed. R. Crim P. 43. The change would also eliminate the need for separate authorization in Rules 5 and 10; simplification of those rules is also shown in the attachment.

Currently, the Rules allow the use of videoconferencing with the defendant's consent, but only for Initial Appearances and Arraignments. *See* Fed. R. Crim P. 5(g) and 10(c). There is no good reason to limit the use of technology to those types of hearings. During the COVID-19 pandemic, the CARES Act expanded district court authority to use videoconferencing, and courts around the country embraced the use of technology without any noticeable deficit in the administration of justice. Indeed, my court and others were able to fairly and efficiently conduct all manner pretrial hearings by videoconference, including Change of Plea Hearings under Rule 11 and Sentencing Hearings under Rule 32. With the expiration of the CARES Act on May 11, 2023, however, courts lost this ability and were forced to abandon the use of videoconferencing, even when doing so would have been more efficient and even when a defendant wished to proceed by videoconference. Indeed, in my circuit, district courts are *prohibited* from conducting change of plea or sentencing hearings by videoconference, even when a defendant consents. *See United State v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (reversing and remanding district court's sentencing judgment based on use of videoconferencing even though defendant affirmatively requested sentencing by videoconference.)

Allowing the use of videoconferencing technology post-pandemic would enable district judges to continue to schedule and conduct hearings in a flexible manner while also ensuring that judicial resources are maximized. Most courts were required to invest additional judiciary funds in technology in response to the COVID-19 pandemic. Authorizing courts to continue to use videoconferencing will ensure that the judiciary makes the most of those expenditures. At a time of increased budget scrutiny, the judiciary should show Congress and the public that we are taking steps to maximize our efficient use of appropriated funds.

Use of videoconferencing also offers substantial affirmative cost savings in many districts, including mine. Our district does not have long-term pretrial detention facilities within close proximity to the courthouse. Accordingly, when a pretrial hearing requires a defendant's physical presence in the courtroom, we must expend significant resources to comply. These costs include personnel, transportation and security expenses at both the jail and courthouse. And these costs must be incurred even for relatively short (sometimes mere 20 minute) hearings. As our COVID experience showed, we can avoid those costs without sacrificing the rights of defendants or the needs of judicial administration.

The current rules also impose a physical and mental cost on defendants. By requiring their physical presence in the courthouse, the rules force defendants to get up early, well in advance of the hearing, to be transported to the courthouse, where they wait in a small holding cell until their hearing commences. They then have to undergo the time and hassle associated with their return trip to their holding facility. When the CARES Act authority ended, several frustrated defendants and defense counsel complained, insisting they would have preferred to appear by videoconference. Under the current rules, I could not accommodate them.

In the end, my proposal is a modest one. I simply ask that the rules be amended to permit courts to use technology that was already purchased during the pandemic to handle pretrial hearings as we did during the pandemic with the defendant's consent.

Let me know if you have any questions. I look forward to hearing from you.

Brett Ludwig

Brett H. Ludwig
United States District Judge
Eastern District of Wisconsin
United States Federal Building and Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-297-3071

Fed. R. Crim. P. 43: Defendant's Presence

- (a) **When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
- (1) the initial appearance, the initial arraignment, and the plea;
 - (2) every trial stage, including jury empanelment and the return of the verdict; and
 - (3) sentencing.
- (b) **When Not Required.** A defendant need not be present under any of the following circumstances:
- (1) **Organizational Defendant.** The defendant is an organization represented by counsel who is present.
 - (2) **Misdemeanor Offense.** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur ~~by video teleconferencing or~~ in the defendant's absence.
 - (3) **Conference or Hearing on a Legal Question.** The proceeding involves only a conference or hearing on a question of law.
 - (4) **Sentence Correction.** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).
- (c) **Waiving Continued Presence.**
- (1) **In General.** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
 - (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
 - (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
 - (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
 - (2) **Waiver's Effect.** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.
- (d) **Definition of Presence.** A defendant is present when appearing in person in the courtroom. The court may, for good cause and with the defendant's consent, allow a defendant to be present by videoconference from another location, or when videoconference is not feasible, by teleconference.

Rule 5: Initial Appearance

~~(g) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.~~

Rule 10: Arraignment

- (a) **In General.** An arraignment must be conducted in open court and must consist of:
- (1) ensuring that the defendant has a copy of the indictment or information;
 - (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then
 - (3) asking the defendant to plead to the indictment or information.
- (b) **Waiving Appearance.** A defendant need not be present for the arraignment if:
- (1) The defendant has been charged by indictment or misdemeanor information;

- (2) The defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and
 - (3) The court accepts the waiver.
- ~~(e) **Video teleconferencing.**—Video teleconferencing may be used to arraign a defendant if the defendant consents.~~