USE OF INTERACTIVE VIDEO FOR COURT PROCEEDINGS: LEGAL STATUS AND USE NATIONWIDE

Prepared for the NIC Jails Division by LIS, Inc.,
NIC Information Center Contractor
Longmont, Colorado

January 1995

USE OF INTERACTIVE VIDEO FOR COURT PROCEEDINGS: LEGAL STATUS AND USE NATIONWIDE

Prepared for the NIC Jails Division by LIS, inc.,
NIC information Center Contractor
Longmont, Colorado

January 1995

This material was prepared by LIS, Inc., under contract J100C0017DQ9 with the U.S. Department of Justice, National Institute of Corrections.

Assessing the Status of interactive Video

> ***These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.***
> -Ohio Crim. R. l(B)

Though it refers to broad criminal procedure rather than interactive video itself, the text of this Ohio statute expresses the aim of jurisdictions that have adopted interactive video to provide a linkage between the courts and jails. Interactive video involves two-way, televised coverage of both the court and the defendant and allows the judge and the defendant to converse directly, "face to face," though separated by city blocks or rural miles. The use of interactive video for arraignments, bond hearings, and other proceedings is viewed by many agencies as a cost-effective alternative for providing arrestees/defendants with access to the courts.

Scope of the project. This research was undertaken for two purposes. The first was to briefly examine the legal status of interactive video technology as a means of providing a live linkage between arrestees/defendants in jails with the courts. A number of principles affect whether and how a video linkage can be used. These include, for example, Constitutional and statutory requirements for the personal appearance of the defendant in court and for access to private counsel; evidentiary and procedural restrictions, which often depend on the type of proceeding; requirements for original signatures on case documents; judges' discretion; and defendant preference.

The secondary intent of the project was to identify jurisdictions that are now using interactive video technology or are developing new systems. The National Institute of Corrections anticipates working with such jurisdictions to explore the operational issues surrounding the use of this technology.

Method. A survey instrument was sent to the attorneys general in the fifty states and to the District of Columbia Department of Corrections, which manages the District's jails. A copy of the survey instrument is attached as Appendix I. Where no response could be obtained from the office of the attorney general, contacts were initiated among other agencies-such as the state judicial administration, jail inspection agencies, and sheriff's departments in major cities-or relevant data were located in published material. Information for some of the latter states may be incomplete in regard to legislation or caselaw. However, through these methods some information was obtained for all but two states: Mississippi and New York.

Findings in Brief

The project found that authority to implement interactive video exists in at least twenty-nine of the forty-nine jurisdictions for which information was obtained, or more than one-half of responding jurisdictions.

- Respondents from twenty-seven states reported that interactive video is currently being used for court proceedings in one or more locations.

- Half of the states that are using interactive video reported the existence of no authorizing legislation, rules, or caselaw.

- Among states reporting a specific authorization for interactive video, the authority has more often been through court administrative rules (ten states) than through legislation (eight states) or caselaw (five states).

- Few states reported caselaw relating to interactive video, and no state reported a legal challenge that has deterred agencies from using it. Courts have upheld its use as being equivalent to the defendant's personal appearance in the courtroom. Other cases have dealt with jurisdictions' failure to obtain a waiver of personal appearance in states where such a waiver is required.

Summary data on legal authority and requirements for interactive video, sites where the technology is used or being considered, and its specific applications for court proceedings are presented in Table 1.

Legal Authority for interactive Video Linkage

Among the twenty-nine states reporting the use of interactive video for court proceedings, thirteen reported no formal legal authority for their use. Eight states reported the passage of authorizing legislation, and ten cited court administrative rules as the source of authorization. Five states cited caselaw that supports the use of video, but only one of these states (New Jersey) did not also report the existence of authorization in the form of either legislation or court rules.

Statutory authority. Respondents in eight states indicated that their legislatures have passed laws related to the use of interactive video for court proceedings. These states included California, Colorado, Louisiana, Missouri, Montana, North Carolina, Oregon, and Wisconsin. In each of these states, the legislatures acted to authorize use of the technology. Statutory language from many of these states is provided in Appendix II.

In two states, Massachusetts and Nevada, legislation was being developed at the time of the survey that was intended to encourage the adoption of interactive video systems. In Massachusetts, this was an initiative of the state sheriffs' association.

State legislation defines appropriate uses for video linkage. Felony and misdemeanor initial appearances, arraignments, and pleas are the main court proceedings in which jurisdictions are authorized to use interactive video. Pretrial release and bail hearings also were cited with some frequency. Subsequent proceedings, such as sentencing, often have more restrictive requirements to ensure the defendant's presence before the judge or ability to contest evidence face to face. In Montana, for example, the judge may not accept a guilty plea from a defendant who is not physically present in the courtroom. However, judges in Missouri can use video linkage to sentence persons who have previously signed a waiver of physical presence or who have entered a guilty plea.

Statutes also impose procedural requirements on how interactive video can be used:

- The technology is usually used at the judge's discretion.
- Some states require a waiver of the defendant's personal appearance in court to permit the use of interactive video for some or all types of proceedings. These states include California, Florida, Hawaii, Missouri, South Carolina, and Wisconsin.
- Though defendants in all states can demand an in-court appearance, at least one state (Wisconsin) requires defendants who object to the use of interactive video to show good cause.
- In Louisiana, state legislation permits each judicial district to adopt its own rules.

Several respondents referred to laws defining the use of videotaped testimony for specific types of criminal trials, e.g., trials of persons accused of child sexual abuse. Though not directly applicable to the present topic, these laws may be useful in establishing the type of situations in which face-to-face confrontation of witnesses by the defendant is not required.

Court administrative rules. In ten states, court administrative rules--either statewide or at the local level-provide authorization for jurisdictions to develop and use interactive video systems. Administrative rules also define various criteria and procedures. In some states, rules extend to defining the role of the state court administration in local system development and evaluation. The text of several rules appears in Appendix II.

The content of court rules illustrates their function in facilitating the use of video technology. For example, two states have taken differing approaches to the question of obtaining a signature from an offender at a remote site. South Carolina rules permit the defendant's signature to be sent by fax but require that it be followed promptly by a paper copy. Delaware rules permit a faxed signature to be considered legally valid.

Litigation. Five respondents identified caselaw in their states that specifically addresses the use of interactive video for court proceedings. These states include Florida, Idaho, Missouri, New Jersey, and Ohio. Case descriptions and/or citations are provided in Appendix III.

Reported court decisions focused on the defendant's personal presence in court, access to counsel, appropriateness of the technology for sentencing and probation revocation hearings, and requirements for waiver of personal presence by the defendant.

- Courts in New Jersey and Ohio affirmed that interactive video provides the defendant a presence at a public proceeding in open court.
- The Florida Supreme Court approved an amendment to court rules in 1988 that allowed the use of interactive video in felony and misdemeanor arraignments. Two appellate cases in 1990 and 1991 were remanded based on a failure to obtain written waivers of the defendants' personal appearance in the courtroom, and a 1991 appeal was denied because a signed waiver had been properly obtained. A 1993 decision found inappropriate a probation revocation hearing that was held by video with no waiver and no access to private counsel. Also found inappropriate was a 1994 juve-

nile detention hearing in which the judge overruled the defendant's preference to be physically present in court, and the defendant was not in a physical or mental condition that otherwise would have precluded his physical presence.

Some responses cited litigation that defines the appropriateness of other uses of video technology. For example, Alabama referred to restrictions on the use of video cameras in the courtroom, and Indiana cited caselaw that supports the use of videotaped advisement on the rights of the accused. Other caselaw cited refers to the use of video following removal of disruptive defendants from the courtroom or to provide testimony of child victims of abuse. Again, aspects of the findings and arguments in these cases may prove to be relevant to broader questions in the use of video communications.

Current Use of interactive Video

Prevalence of interactive video. Sites where interactive video has been implemented include both metropolitan and rural areas, and they are distributed randomly across the country rather than being clustered in any particular geographic region.

With courts in at least twenty-seven states using interactive video, it is evident that the technology is becoming established in accepted criminal justice practice. Agencies in another two states, Connecticut and West Virginia, are currently exploring the technology or have partially implemented systems. Respondents in two states (Maine and Montana) were uncertain whether the technology has actually been implemented within their states' borders but indicated favorable environments for its use.

A total of sixty-three counties or courts were identified as sites where interactive video is being used for court proceedings, and other jurisdictions were listed as possible sites. Some use of interactive video for probation and parole revocation hearings was also noted, and a new and expanding system in Delaware will link law enforcement and criminal justice agencies statewide, providing both interactive communication and access to offender data on a split screen.

Project data suggest that use of the technology is increasing:

- Four survey respondents indicated that video systems are now being expanded to serve additional sites within their jurisdictions.
- Survey respondents in four states described pilot programs, which indicates some likelihood of expansion in those states in the future.
- One state reported that court authorization has been granted for interactive video, but the technology so far has had only limited implementation statewide.
- One state has video technology in place in newly constructed regional jails that will be activated when the courts also become equipped.

Respondents' additional comments on the ways interactive video is being used were decidedly positive. For example, sites in Wisconsin are using interactive video for "almost every pretrial proceeding," and notes from Ohio indicate that one municipal court there "would not do without it."

Notes on System implementation

Survey respondents volunteered additional comments that shed light on issues in planning and implementing interactive video systems:

- Lower costs and improved technology are converging to make systems practical after several years of study.
- Older systems based on picture-tel technology are being replaced with fiber optic systems to eliminate lag-time effects in transmission.
- Using regional telephone systems for data transmission is preferable to contracting with cable companies because it avoids the complication of interface between different cable companies at each end.
- When developing a new system, it can be important to get all the parties involved to sign an agreement on how the system will be used, so that objections to the technology do not surface after implementation.

Table 1. Use of interactive Video for Court Proceedings: State Profiles

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Alabama	No legislation or litigation; no other authority specified. [1]	None identified	N/A
Alaska	No legislation or litigation; no other authority specified.	1) Anchorage; 2) Fairbanks, pilot program using older technology; 3) possibly using at Kenai with compressed data. There are plans to expand its use.	Limited use for arraignments and other preliminary proceedings.
Arizona	Not specified.	Pilot program underway in Maricopa County.	Arraignment.
Arkansas	No legislation or litigation; no other authority specified.	None identified.	N/A
California	Legislation authorizes the use of interactive video. No litigation; no other authority specified.	Orange County.	Initial appearance, arraignment, plea; requires written waiver of presence.
Colorado	Legislation authorizes the use of interactive video. No litigation; no other authority specified.	2nd, 8th, 18th, and 21st Judicial Districts (Denver, Fort Collins, Littleton [municipal cases only], and Grand Junction); 10th Judicial District (Pueblo) is putting equipment in place.	Any appearances other than trial, unless judge or magistrate orders personal appearance in court.
Connecticut	No legislation or litigation; no other authority specified.	None identified.	Currently under consideration; may have been some exploration in past.

1. Though no restrictions specific to interactive video systems were cited, the Alabama respondent noted that video cameras are not to be used in courtroom unless the presiding judge so directs.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Delaware	Court rules authorize interactive video; no legislation or litigation.	In place in several sites, including Newcastle and Sussex Counties, Wilmington and Newark Police Depts., municipal courts, justice of the peace courts, state police, and a juvenile detention center; system is being developed by and linked through the attorney general; expansion to statewide network underway.	Initial arraignment; intake interviews by police depts.
District of Columbia	No legislation or litigation; no other authority specified.	None identified.	N/A
Florida	Use of video is authorized by the rules of criminal procedure. Caselaw upholds its use. No legislation identified.	1st, 4th, and 5th District Courts of Appeals; Broward and Dade Counties, and others	First appearances; arraignments at discretion of trial judge. Not permitted for sentencing or probation revocation hearings unless presence in court is waived.
Georgia	No legislation or litigation; no other authority specified.	None identified.	N/A
Hawaii	Authorized by rule of the supreme court. No litigation or legislation.	Though statewide authorization exists for the circuit courts, video has been implemented to date only in Honolulu.	Arraignments; requires written waiver of presence.
Idaho	Authorized by rule of the supreme court; litigation also supportive. No legislation.	Ada County; possibly Bannock County, where technology is in place.	First or subsequent appearance, bail hearing, arraignment, and plea.
Illinois	No legislation or litigation; no other authority specified.	None identified.	N/A
Indiana	Not specified [2]	None identified.	N/A
Iowa	No legislation or litigation; no other authority specified.	Scott and Clinton Counties	Not specified.

2. In Indiana, videotaped advisement of rights has been accepted by the courts.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Kansas	No legislation or litigation; no other authority specified.	Shawnee, Johnson, and Sedgwick Counties	First appearances; some bond reduction motions.
Kentucky	No legislation or litigation; no other authority specified.	None identified.	N/A
Louisiana	Legislation authorizes use of video. No litigation; no other authority specified.	East Baton Rouge Parish	Arraignment and pleas; 72-hour initial hearings.
Maine	Authorized by rule of court. No legislation or litigation.	Possibly Cumberland County	Rule authorizes experimental use for initial appearance, bail hearing, certain classes of arraignment.
Maryland	No legislation or litigation; no other authority specified.	Hartford, Prince George's, and Anne Arundel Counties.	Bail review.
Massachusetts	No legislation or litigation; no other authority specified. [3]	Hampden, Plymouth, and Suffolk Counties.	Pretrial arraignment; bond review; warrant removal; attorney counsel.
Michigan	Authorized by administrative order of the supreme court; each county must apply for supreme court approval. No litigation or legislation.	Genessee County; possibly others.	Arraignment, pretrials, pleas, misdemeanor sentencing, hearings to show cause.
Minnesota	No legislation or litigation; no other authority specified.	None identified.	N/A
Mississippi	(No response)		
Missouri	Existing legislation and caselaw both support use of video. No other authority specified.	Cole County; possibly others.	First appearance; waiver of preliminary hearing; arraignment where plea of not guilty is offered, unless waiver is signed; any pretrial or post-trial hearing not allowing cross-examination of witnesses; sentencing after conviction, with waiver; sentencing after entry of guilty plea; any civil proceeding other than trial by jury.

3. Proposed legislation in support of interactive video has been developed by the Massachusetts Sheriffs' Association.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Montana	Legislation authorizes use of video technology. No litigation; no other authority specified.	Unknown.	Bail proceedings and arraignment; in a felony arraignment, the judge may not accept a guilty plea from a defendant not physically present in the courtroom.
Nebraska	No legislation or litigation; no other authority specified.	None identified.	N/A
Nevada	Legislation is being drafted. No litigation; no other authority specified.	Reno Municipal Court.	Arraignment.
New Hampshire	Authorized by county superior court. No legislation or litigation.	Hillsborough County (pilot project).	Not specified.
New Jersey	Caselaw supports use of video. No legislation; no other authority specified.	Essex County.	Initial appearance.
New Mexico	No legislation or litigation; no other authority specified.	None identified.	N/A
New York	(No response)		
North Carolina	Legislation supports use of video. No litigation; no other authority specified.	Guilford and Mecklenburg Counties; other counties are developing systems.	Pretrial release; defendant may move to prohibit use.
North Dakota	No legislation or litigation; no other authority specified.	None identified.	N/A
Ohio	Local courts authorize use of video. No legislation or litigation specified.	Akron Municipal Court, 1992 pilot; Bowling Greene Municipal Court; Delaware Municipal Court (possibly); Norwalk Municipal Court; Sandusky Municipal Court; Wayne County (possibly); Xenia Municipal Court and Court of Common Pleas.	Varies by jurisdiction: arraignment, pretrials, and/or sentencing.
Oklahoma	Not specified.	Carr, Oklahoma, and Tulsa Counties.	Arraignments only.
Oregon	Legislation authorizes use of video. No litigation; no other authority specified.	Multnomah, Klamath, and possibly Marion Counties.	Sentencing; probation and parole violation hearings.

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Pennsylvania	No legislation or litigation; no other authority specified.	City and County of Philadelphia; possibly Allegheny.	Preliminary hearings and arraignments.
Rhode Island	No legislation or litigation; no other authority specified.	None identified.	N/A
South Carolina	Authorized by administrative order of supreme court. No legislation or litigation.	City of Hilton Head; Dorchester and Aikin Counties; Spartanburg; Greenville magistrate has pilot.	Permitted with defendant's written consent for non-capital initial appearances, bond hearings, contested motions, and acceptance of guilty pleas and sentencing.
South Dakota	No legislation or litigation; no other authority specified.	None identified.	N/A
Tennessee	No legislation or litigation; no other authority specified.	None identified.	N/A
Texas	Legislation may authorize; no litigation or other authority specified.	Travis and Harris Counties.	Not specified.
Utah	No legislation; no litigation or other authority specified.	Cash, Millard, Salt Lake, and Weber Counties.	Arraignments; probation hearings. Had used for parole hearings, but ceased.
Vermont	No legislation or litigation; no other authority specified.	None identified.	N/A
Virginia	No legislation or litigation; no other authority specified.	None identified.	N/A
Washington	No legislation or litigation; no other authority specified.	None identified.	N/A
West Virginia	No legislation or litigation; no other authority specified.	New regional jails are equipped for video linkage to circuit or magistrate courts, but courts are not yet equipped.	(Systems are not yet in use.)

	Legal Authority for the Use of Interactive Video	Current Use of Interactive Video	
		Sites where interactive video is in use	Types of court proceedings involved
Wisconsin	Legislation authorizes use of video technology. No litigation; no other authority specified.	Milwaukee County, Portage County, and Columbia/Dodge Counties.	"Almost every pretrial proceeding." Milwaukee Co. is using video arraignments for municipal court; at new jail, are awaiting supreme court hearing re: whether court reporter needed. Columbia/ Dodge Cos. are exploring use for prison inmates. Defendants must waive personal appearance.
Wyoming	No legislation or litigation; no other authority specified.	Laramie County	Felony first appearances and bonding.

APPENDIX I

Survey Instrument

Please return to the
NIC Information Center
by October 31, 1994

Survey of State Attorneys General, October 1994

U.S. Department of Justice
National Institute of Corrections
Jails Division and NIC Information Center

TOPIC: Use of Video Technology for Court Proceedings

State: _____

This survey is being conducted to obtain current, nationwide data on the legal status of video technology as a means of communication between arrestees/offenders in jails and the courts.

Video linkage is available in many jurisdictions for interactions between arrestees/offenders in the facility and components of the criminal justice system that are outside the jail, such as courts, prosecutors, and public defenders. For purposes of this survey, the term "court proceedings" is used inclusively to refer to arraignments, attorney/client interviews, bond and other hearings, and other possible mid-phase court appearances.

Within each state, the legal status of this use of video technology may be defined by legislation and/or caselaw: legislatures may have acted to support, ban, or restrict the use of video; court rulings also may provide definition of how video can or cannot be used within a state.

To complete the survey, respondents will either check appropriate responses or provide short answers. Respondents also have the option of including related documentation where appropriate. The name of the survey respondent is requested only to allow for follow-up if questions arise during data analysis. Any questions regarding the survey may be directed to Connie Clem, Project Coordinator, (800) 877-1461.

Survey results will be forwarded to responding jurisdictions and made available to other interested parties through the NIC Information Center. We appreciate your assistance in this effort.

Return to: Publications Office
NIC Information Center
1860 Industrial Circle, Suite A
Longmont, CO 80501
FAX: (303) 682-0558

Part 1: Legislation Related to the Use of Video Linkage

1. Has your state legislature passed a law regarding the use of video technology to provide arrestees/ offenders access to court proceedings?

   _____ *Yes*

   _____ *No*

   _____ Legislation is pending

   If no legislation is pending or has passed, please skip to Part 2, question 5.

2. Which of the following best describes your state's passed or pending legislation on the use of video technology for court proceedings?

   _____ Legislation supports the use of video technology.

   _____ Legislation mandates the use of video technology.

   _____ Legislation prohibits the use of video technology.

   _____ Legislation permits objecting parties to prohibit the use of video in particular cases.

3. Please briefly describe the major points in your state's passed or pending legislation. Identify any potential uses of video technology that the legislation specifically permits or prohibits. Attach a copy of the legislation if desired.

   _____

   _____

   _____

   _____

   _____

   _____

   _____

4. Please list any jurisdictions in your state that have implemented video technology for court proceedings.

   _____

   _____

   _____

   _____

   _____

Part 2: Litigation Related to the Use of Video Linkage

5. Have the courts in your state handed down decisions related to the use of video technology to provide arrestees/offenders access to court proceedings?

_____ Yes

_____ No

_____ Case is/cases are currently pending

6. Which of the following best describes the outcome of cases relating to the use of video technology for court proceedings?

_____ Decisions have supported justice agencies in the use of video technology.

_____ Decisions have prohibited or deterred the use of video technology.

_____ Decisions have defined the ability of parties to a case to prohibit the use of video technology for matters relating to that case.

7. Please briefly describe the major points of court decisions in your state that relate to the use of video technology. Attach a copy or a summary of the decision(s) if desired.

_____

_____

_____

_____

_____

_____

_____

_____

Response prepared by:

Name _____

Title: _____

Agency: _____

Address: _____

_____

City/State/ZIP: _____

Phone: _____

FAX: _____

APPENDIX II

Authority for Use of Interactive Video Technology: Legislation and Court Rules

CHAPTER 1. OF THE ARRAIGNMENT OF THE DEFENDANT

Section
976. Necessity; court; transfer; telephone calls.
976.5. Accusatory pleading filed in Sierra County with defendant in custody of Nevada County.
977. Presence of defendant; exception; presence of counsel.
977.1. Resolution of certain fact or law questions pending determination of mental competency.
977.2. Repealed.
977.3. Repealed.
978. Defendant in custody; officer to bring him before court.
978.5. Bench warrant of arrest; issuance; service.
979. Defendant discharged on hail or deposit; nonappearance; forfeiture; bench warrant.
980. Bench warrant; issuance.
981. Bench warrant; form; felony case.
982. Nonbailable offense; custody of defendant; bail upon habeas corpus; bailable offense; direction on bench warrant as to bail.
983. Bench warrant; service.
984. Bench warrant: proceeding on giving bail in another county.
985. Increased bail on felony charge; custody until increased bail given.
986. Increased bail on felony charge; commitment of defendant or issuance of bench warrant.
987. Right to, and necessity for, counsel; informing defendant; assignment and duties of counsel; financial statement or other information; cocounsel in capital case.
987a. Renumbered.
987b. Renumbered.
987.05. Assignment of counsel; felony cases.
987.1. Counsel at preliminary examination, continuity in representation.
987.2. Assigned counsel; compensation: pubic defenders; multiple county representation; recovery of costs.
987.3. Court-appointed counsel; compensation and expenses; criteria.
987.4. Reimbursement by parent or guardian for services of public defender or assigned counsel in representing minor.
987.6. State payments to counties for providing counsel for persons unable to afford counsel.
987.8 Lien on real estate; ability of defendant to pay cost of legal assistance; determination: notice; order; defendant's rights; enforcement, definitions; petition to vacate or modify.
987.81. Ability of defendant to pay cost of legal assistance; hearing; appearance before county officer for inquiry; notice; application of section.
987.9. Investigators, experts and others; payment for defense of indigent defendant in capital cases; application, reimbursement of expenses; accounting.
988. Definition; procedure
989. True name of defendant; entry in minutes, use in subsequent proceedings.
990. Reasonable time to answer; maximum and minimum time.
991. Probable cause determination; misdemeanor to which 'defendant has pleaded not guilty; motion by defendant; setting for trial or dismissal and discharge; refiling complaint.

§ 976. Necessity; court; transfer; telephone calls

(a) When the accusatory pleading is filed, the defendant shall be arraigned thereon before the court in which it is filed, unless the action is transferred to some other court for trial. However, within any county. if the defendant is in custody, upon the approval of both the presiding judge of the court in which the accusatory pleading is filed and the presiding judge of the court nearest to the place in which he or she is held in custody the arraignment may be before the court nearest to that place of custody.

(b) A defendant arrested in another county shall have the right to be taken before a magistrate in the arresting county for the purpose of being admitted to bail, as provided in Section 821 or 822. The defendant shall be informed of this right.

(c) Prior to being taken from the place where he or she is in custody to the place where he or she is to be arraigned, the defendant shall be allowed to make three completed telephone calls, at no expense to the defendant, in addition to any other telephone calls which the defendant is entitled to make pursuant to law. *(Enacted 1872. Amended by Code Am.1880, c. 47, p. 15, § 34; Stats.1951, c. 1674, p. 3840, § 63; Stats.1974, c. 881, p. 1875, § 1; Stats.1975, c 669, p. 1461, § 1; Stats.1979, c. 735, p. 2572, § 2; Stats.1982, c. 395, p. 1731, § 1.)*

Cross References

Appearance before magistrate, unnecessary delay, maximum time, see § 825.
Assignment of judge of another court to hear indictment against a judge, see § 1029.
Change of venue, see § 1033 et seq.
Construction of accusatory pleading, see § 957.
First pleading, see § 949.
Forfeiture of bail for nonappearance, see § 1305.
Form of indictment, see § 951.
Magistrate defined, see § 807.
Superior court judge, indictment or information against transmission to Judicial Council, see § 1029.
Telephone call. right of accused, see § 851.5.

§ 976.5. Accusatory pleading filed in Sierra County with defendant in custody of Nevada County

(a) Notwithstanding any other provision of law, when an accusatory pleading is filed in Sierra County and the defendant is in the custody of Nevada County, he or she may be arraigned before a court in Nevada County.

(b) This section shall not interfere with the right of a defendant to demur to an accusatory pleading, as specified in Chapter 3 (commencing with Section 1002) of Title 6.

(c) This section shall remain in effect only until January I, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date. *(Added by Stats.1990, c. 259 (A.B.3784). § 1.)*

Repeal

This section is repealed by its own terms on Jan. 1, 1996.

§ 977. Presence of defendant; exception; presence of counsel

(a)(l) In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only, except as provided in paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) When the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the * * * Family Code, or a misdemeanor violation of Section 273.6, upon a satisfactory showing of necessity, the court may order through counsel that the accused be personally present in court for the purpose of the service of an order under Section 136.2, unless the court determines that the defendant will make another court appearance within a reasonable period of time and the defendant could be served with a restraining order at that time.

(b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally

present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following form:

"WAIVER OF DEFENDANT'S PERSONAL PRESENCE"

"The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if the defendant were personally present in court, and further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place."

(c) The court may permit the initial court appearance and arraignment in municipal or superior court of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury. to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an initial hearing in superior court, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney IS not present with the defendant. the attorney shall be present in court during the hearing. The defendant shall have the right to make his or her plea while physically present in the courtroom if he or she so request: If the defendant decides not to exercise the right to be physically present in the courtroom. he or she shall execute a written waiver of that right. A judge may order a defendant's personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision. accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(d) Notwithstanding subdivision (c), if the defendant is represented by counsel, the attorney shall be present with the defendant in any county exceeding 4,000,000 persons in population. *(Enacted 1872. Amended by Code Am.1880, c. 47, p. 16, § 35; Stats.1951 c. 1674, p. 3840, p 64; Stats.1968, c. 1064, p, 2064, § I; Stats.1992, c. 264 (S.B.2003), § 1; Stats. 1992, c. 863 MB.2628), § 1.5; Stats.1993, c. 219 (A.B.1500), § 218; Stats.1993, c. 220 (S.B.1117), § 1; Stats.1993, c. 876 (S.B.1068), § 28.5, eff. Oct. 6, 1993, operative Jan. 1, 1994.)*

Cross References

Attorney's authority. see Code of Civil Procedure § 283.
Commitment after appearance. see § 1129.
Compliance with promise to appear, see Vehicle Code § 40507.
Constitutional safeguards to fair trial, see Const. Art. 1, § 15.
Conversation between prisoner and attorney, confidentiality, see § 636,
Corporation's appearance, see § 1396.
Counsel for accused, see §§ 686. 686.1, 858 et seq.
Felony, defined, xc § 17.
Misdemeanor defined, see § 17.
Presence of defendant at trial, see § 1043.
Procedure on arraignment, see § 988.
Right of attorney to visit prisoner after arrest, see § 825.
Rules of pleading, see § 948 et seq.
Telephone call, right of accused, see § 851.5.

§ 977.1. Resolution of certain fact or law questions pending determination of mental competency

The resolution of questions of fact or issues of law by trial or hearing which can be made without the assistance or participation of the defendant is not prohibited by the existence of any pending proceeding to determine whether the defendant is or remains mentally incompetent or gravely disabled pursuant to the provisions of either this code or the Welfare and Institutions Code. *(Added by Stats.1974, c. 1511, p. 3316, § 1, eff: Sept. 27, 1974.)*

Cross References

Mentally disordered persons, court-ordered evaluation, see Welfare and Institutions Code § 5200 et seq.
Mentally retarded persons, see Welfare and Institutions Code § 6500 et seq.

§ 977.2. Repealed by Stats.1992, c. 264 (S.B2003), § 2

§ 977.3. Repealed by Stats.1990, c. 427 (A.B3678), § 2, eff. July 26, 1990

§ 978. Defendant in custody; officer to bring him before court

IF IN CUSTODY, TO BE BROUGHT BEFORE COURT. When his personal appearance is necessary, if he IS in custody, the Court may direct and the officer in whose custody he is must bring him before it to be arraigned. *(Enacted 1872.)*

Cross References

Bail. see § 1268 et seq.
Forfeiture of bail or deposit, nonappearance of defendant, for arraignment, see § 1305 et seq.
Offenses requiring custody of defendant, see § 1285
Presence of defendant in felony and misdemeanor cases, see § 1043.
Removal of action when defendant in custody, see § 1037.

§ 978.5. Bench warrant of arrest; issuance; service

(a) A bench warrant of arrest may be issued whenever a defendant fails to appear in court as required by law including, but not limited to, the following situations:

(1) If the defendant is ordered by a judge or magistrate to personally appear in court at a specific time and place.

(2) If the defendant is released from custody on bail and is ordered by a judge or magistrate, or other person authorized to accept bail, to personally appear in court at a specific time and place.

(3) If the defendant is released from custody on his own recognizance and promises to personally appear in court at a specific time and place.

(4) If the defendant is released from custody or arrest upon citation by a peace officer or other person authorized to issue citations and the defendant has signed a promise to personally appear in court at a specific time and place.

13-1-131. Speedy trial option in civil actions. If a trial date has not been fixed by the court in any civil action within ninety days from the date the case is at issue, upon agreement of all the parties, the parties may elect to have the matter heard by a master, appointed by the court in accordance with the Colorado rules of civil procedure. When such a trial is held before a master, the parties shall pay the costs of such trial, as allocated fairly among the parties by the master, The master shall have all the powers of a judge.

Source: L, 90: Entire section added, p. 851, § 11, effective May 31.

' Cross references For the legislative declaration contained in the act enacting the section. See section I of chapter 100, Session Laws of Colorado 1990.

13-1-132. Use of interactive audiovisual devices in court proceedings. (1) Except for trials; when the appearance of any person is required in any court of this state, such appearance may be made by the use of an interactive audiovisual device. An interactive audiovisual device shall operate so as to' enable the person and the judge or magistrate to view and converse with each other simultaneously.

(2) Notwithstanding any provision of this &ion, a judge or magistrate may order a person to appear in court.

(3) A full record of such proceeding shall be made.

(4) The supreme court may prescribe rules of procedure pursuant to section 13-2-109 to implement this section.

Source: L. 92; Entire section added, p. 3 18, § 1, effective April 29.

13-1-133. Use of recycled paper. (1) The general assembly finds and declares that there is a need to expand upon existing laws which foster the effective and efficient management of solid waste by requiring that certain documentssubmitted by attorneys-at-law to state courts of record be submitted on recycled paper, The general assembly further finds that such expansion will protect and enhance the environment and the health and safety of the citizens of Colorado.

(2) (a) (I) Except as provided in paragraph (b) of this subsection (2), no document shall be submitted by an attorney to a court of record after January II 1994, unless such document is submitted on recycled paper, The provisions of this section shall apply to all papers appended to each such document.

(II) (A) Procedures adopted to implement the provisions of this section shall not impede the conduct of court business nor create grounds for an additional cause of action or sanction.

(B) No document shall be refused by a court of record solely because it was not submitted on recycled paper.

(b) Nothing in this section shall be construed to apply to:

(I) Photographs;

(II) An original document that was prepared or printed prior to January 1,1994;

(III) A document that was not created at the direction or under the control of the submitting attorney;

3.220(b)(1), (b)(2), (c)(1), and (h)(1) to change the reference from "indictment or information" to "charging document."

Cross References

Traffic offenses, procedure on failure to appear, see Traffic Court Rule 6.190.

Rule 3.130. First Appearance

(a) Prompt First Appearance. Except when previously released in a lawful manner, every arrested person shall be taken before a judicial officer, either in person or by electronic audiovisual device in the discretion of the court, within 24 hours of arrest. In the case of a child in the custody of juvenile authorities, against whom an information or indictment hearing within 24 hours of the filing of the information or indictment. The chief judge of the circuit for each county within the circuit shall designate 1 or more judicial officers from the circuit court, or county court, to be available for the first appearance and proceedings.

(b) Advice to Defendant. At the defendant's first appearance the magistrate shall immediately inform the defendant of the charge and provide the defendant with a copy of the complaint. The magistrate shall also adequately advise the defendant that:

(1) the defendant is not required to say anything, and that anything the defendant says may be used against him or her;

(2) if unrepresented, that the defendant has a right to counsel, and, if financially unable to afford counsel, that counsel will be appointed; and

(3) the defendant has a right to communicate with counsel, family, or friends, and if necessary, will be provided reasonable means to do so.

(c) Counsel for Defendant.

(1) *Appointed counsel.* If practicable, the magistrate should determine prior to the first appearance whether the defendant is financially able to afford counsel and whether the defendant desires representation. When the magistrate determines that the defendant is entitled to court-appointed counsel and desires counsel, the magistrate shall immediately appoint counsel. This determination must be made and, if required, counsel appointed no later than the time of the first appearance and before any other proceedings at the first appearance. If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance or at subsequent proceedings before the magistrate.

(2) *Retained counsel.* When the defendant has employed counsel or is financially able and desires to employ counsel to represent him or her at first appearance, the magistrate shall allow the defendant a reasonable time to send for counsel and shall, if necessary, postpone the first appearance hearing for that purpose. The magistrate shall also, on request of the defendant, require an officer to communicate a message to such counsel as the defendant may name. The officer shall, with diligence and without cost to the defendant if the counsel is within the county, perform the duty. If the postponement will likely result in the continued incarceration of the defendant beyond a 24-hour period, at the request of the defendant the magistrate may appoint counsel to represent the defendant for the first appearance hearing.

(3) *Opportunity to confer.* No further steps in the proceedings should be taken until the defendant and counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(4) *Waiver of counsel.* The defendant may waive the right to counsel at first appearance. The waiver, containing an explanation of the right to counsel, shall be in writing and signed and dated by the defendant. This written waiver of counsel shall, in addition, contain a statement that it is limited to first appearance only and shall in no way be construed to be a waiver of counsel for subsequent proceedings.

(d) Pretrial Release. The judicial officer shall proceed to determine conditions of release pursuant to rule 3.131. *Amended July 21, 1983, effective Oct. 1, 1983 (436 So.2d 60); Nov. 29, 1984, effective Jan. 1, 1985 (462 So.2d 386); Dec. 5, 1991, effective Dec. 15, 1991 (591 So.2d 173); Sept. 24, 1992, effective Jan. 1, 1993 (606 So.2d 227).*

Committee Notes

1972 Amendment. Same as prior rule except (b), which is new.

Rule 3.131. Pretrial Release

(a) Right to Pretrial Release. Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

(b) Hearing at First Appearance—Conditions of Release.

(1) Unless the state has filed a motion for pretrial detention pursuant to rule 3.132, the court shall conduct a hearing to determine pretrial release. For the purpose of this rule, bail is defined as any of the forms of release stated below. There is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release. The judicial officer shall impose the first of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process: or, if no single

fendant, it shall require the state to elect 1 of the following courses:

(A) a joint trial at which evidence of the statement will not be admitted:

(B) a joint trial at which evidence of the statement will be admitted after all references to the moving defendant have been deleted, provided the court determines that admission of the evidence with deletions will not prejudice the moving defendant; or

(C) severance of the moving defendant.

(3) In cases in which, at the close of the state's case or at the close of all of the evidence. the evidence is not sufficient to support a finding that allegations on which the joinder of a defendant is based have been proved, the court shall, on motion of that defendant, grant a severance unless the court finds that severance is unnecessary to achieve a fair determination of that defendant's guilt or innocence.

Amended Sept. 24, 1992, effective Jan. 1, 1993 (606 So.2d 227).

Committee Notes

1968 Adoption. This subdivision rewords and adds to federal rule 14. It covers subject matter of section 918.02, Florida Statutes.

1972 Amendment. (a)(l) Severance on timely motion by defendant is mandatory if multiple offenses are improperly joined.

(a)(2) Provides for severance of offenses before trial on showing that severance will promote a fair determination of guilt or innocence substantially as provided by former rule 3.190(j)(2) and. unlike any Florida rule. distinguishes motion during trial.

(b)(l) Based on ABA Standard 2.3(b). Expands rule 3.190(j) to include defendant's right to speedy trial as ground for severance and. unlike any Florida rule, distinguishes between motion before and motion during trial.

(b)(2) Based on ABA Standard 2.3, subparagraphs (a) and (c). Requires court to determine whether the statement will be offered as distinguished from asking the state its intention. Requires production of evidence of the statement in the event it will be offered so that the court and counsel can intelligently deal with the problem. Florida has no similar rule.

(b)(3) Substantially the same as ABA Standard. except that the proposed rule requires severance unless the court affirmatively finds that severance is unnecessary. Florida has no similar rule.

Cross References

Prejudicial or confusing evidence. see F.S.A. §. 90.403

Rule 3.153. Timeliness of Defendant's Motion: Waiver

(a) Timeliness; Waiver. A defendant's motion for severance of multiple offenses or defendants charged in a single indictment or information shall be made before trial unless opportunity there for did not exist or the defendant was not aware of the grounds for such a motion. but the court in its discretion may entertain such a motion at the trial. The right to file such a motion is waived if it is not timely made.

(b) Renewal of Motion. If a defendant's pretrial motion for severance is overruled, the defendant may renew the motion on the same grounds at or before the close of all the evidence at the trial. *Amended Sept.* 24. 1992, *effective Jan. 1, 1993 (606 So.2d 227).*

Committee Notes

1972 Adoption. (a) Relates solely to defendant's motion for severance. Florida has no similar rule.

(b) Florida has no similar rule.

IV. ARRAIGNMENT AND PLEAS

Rule 3.160. Arraignment

(a) Nature of Arraignment. The arraignment shall be conducted in open court or by audiovisual device in the discretion of the court and shall consist of the judge or clerk or prosecuting attorney reading the indictment or information on which the defendant will be tried to the defendant or stating orally to the defendant the substances of the charge or charges and calling on the defendant to plead thereto. The reading or statement as to the charge or charges may be waived by the defendant. If the defendant is represented by counsel, counsel may file a written plea of not guilty at or before arraignment and thereupon arraignment shall be deemed waived.

(b) Effect of Failure to Arraign or Irregularity of Arraignment. Neither a failure to arraign nor an irregularity in the arraignment shall affect the validity or any proceeding in the cause if the defendant pleads to the indictment or information on which the defendant is to be tried or proceeds to trial without objection to Such failure or irregularity.

(c) Plea of Guilty after Indictment or Information Filed. If a person who has been indicted or informed against for an offense, but who has not been arraigned. desires to plead guilty thereto, the person may so inform the court having jurisdiction of the offense, and the court shall, as soon as convenient, arraign the defendant and permit the defendant to plead guilty to the indictment or information.

(d) Time to Prepare for Trial. After a plea of not guilty the defendant is entitled to a reasonable time in which to prepare for trial.

(e) Defendant Not Represented by Counsel. Prior to arraignment of any person charged with the commission of a crime, if he or she is not represented by counsel, the court shall advise the person of the right to counsel and. if he or she is financially unable to

obtain counsel, of the right to be assigned court-appointed counsel to represent him or her at the arraignment and at all subsequent proceedings. The person shall execute an affidavit that he or she is unable financially or otherwise to obtain counsel. and if the court shall determine the reason to be true, the court shall appoint counsel to represent the person.

If the defendant, however, understandingly waives representation by counsel, he or she shall execute a written waiver of such representation, which shall be filed in the case. If counsel is appointed, a reasonable time shall be accorded to counsel before the defendant shall be required to plead to the indictment or information on which he or she is to be arraigned or tried, or otherwise to proceed further. *Amended Nov. 29, 1984. effective Jan. 1, 1985 (462 So.2d 386); July 14, 1988 (528 So.2d 1179); Sept. 24, 1992, effective Jan. 1, 1993 (606 So.2d 227).*

Committee Notes

1968 Adoption. (a) A combination of section 908.01, Florida Statutes, and Federal Rule of Criminal Procedure 10.

(b) Same as section 908.02, Florida Statutes.

(c) Same as section 909.15, Florida Statutes, except provision is made for trial by affidavit.

(d) Same as section 909.20, Florida Statutes.

(c)Federal rule 44 provides:

"If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

A presently proposed amendment to such rule provides:

"(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment.

"(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law or by local rules of district courts of appeal."

In lieu of such latter, blanket provision, it is suggested that the rule provide, as stated. for inquiry of the defendant and determination by the court as to the defendant's desire for and inability to obtain counsel, after being advised of entitlement thereto. Many defendants, of course. will waive counsel.

In view of Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) and White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963) holding that entitlement to counsel does not depend upon whether the offense charged is a felony or misdemeanor, it is suggested that the word "crime" be used instead of "felony" only in the first sentence of the proposed rule.

In Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). involving breaking and entering with intent to commit rape, the Supreme Court held the defendant was entitled to counsel at the arraignment. if the arraignment be deemed a part of the trial, as apparently it is under Alabama law. In Ex parte Jeffcoat. 109 Fla. 207. 146 So. 827 (1933). the Supreme Court of Florida held the arraignment to be a mere formal preliminary step to an answer or plea. However. in Sardinia v. State, 168 So.2d 674 (Fla. 1964). the court recognized the accused's right to counsel upon arraignment. Section 909.21. Florida Statutes. provides for appointmen' of counsel in capital cases.

1972 Amendment. Substantially the same as prior rule. The committee considered changes recommended by The Florida Bar and incorporated the proposed change relating to written plea of not guilty and waiver of arraignment.

1992 Amendment. The amendment allows the judge to participate in the arraignment process by including the judge as one of the designated individuals who may advise the defendant of the pending charges Apparently. the 1958 amendment to rule 3.160(a) inadvertently eliminated the judge from the arraignment procedure. In re Rule 3.160(a). Florida Rules of Criminal Procedure. 528 So.2d 1179. 1180 (Fla. 1988). The prior amendment did include the judge. The Florida Bar Re: Amendment to Rules - Criminal Procedure. 462 So.2d 386 (Fla. 1984). While the language of rule 3.160(a) as presently set out in the Florida Bar pamphlet, Florida Rules of Criminal Procedure, is identical to the language of this proposed amendment (that is. it includes the judge in the arraignment process), the West publications, Florida Criminal Laws and Rules (1991) and Florida Rules of Court (1991), nevertheless follow the language set out in 528 So.2d at 1180.

Cross References

Notice of arraignment. see F.S.A. § 913.02.
Persons in custody. see F.S.A. § 907.055.
Presence of accused. see Criminal Procedure Rule 3.180.
Right to assignment of counsel. indigents. see Criminal Procedure Rule 3.111.
Traffic offenses. arraignment. see Traffic Court Rule 6.170.

Rule 3.170. Pleas

(a) Types of Plea; Court's Discretion. A defendant may plead not guilty, guilty, or, with the consent of the court. *nolo contendere*. Except as otherwise provided by these rules, all pleas to a charge shall be in open court and shall be entered by the defendant. If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charge at the first appearance under rule 3.130, and the judge may thereupon enter judgment and sentence without the necessity of any further formal charges being filed. **A** plea of not guilty may be entered in writing by counsel. Every plea shall be entered of record, but a failure to enter it shall not affect the validity of any proceeding in the cause.

(b) Pleading to Other Charges. Having entered a plea in accordance with this rule, the defendant may, with the court's permission. enter a plea of guilty or nolo contendere to any and all charges pending against him or her in the State of Florida over which the court

Part 2: Litigation Related to the Use of Video Linkage

5. Have the courts in your state handed down decisions related to the use of video technology to provide arrestees/offenders access to court proceedings?

XX Yes

____ No

____ Case is/cases are currently pending

6. Which of the following best describes the outcome of cases relating to the use of video technology for court proceedings?

XX Decisions have supported justice agencies in the use of video technology.

____ Decisions have prohibited or deterred the use of video technology.

____ Decisions have defined the ability of parties to a case to prohibit the use of video technology for matters relating to that case.

7. Please briefly describe the major points of court decisions in your state that relate to the use of video technology. Attach a copy or a summary of the decision(s) if desired.

State v. Porter, 109 ID 967 Ct. App. 1985

Defendant became disruptive and verbally abusive during closing statements. Subsequently deffendant was removed, placed in a room where he could view the proceeding via closed circuit T.V.

Idaho Court Rule 43.1 allows for use of electronic audio visual devicesin misdemeanor of felony cases for first or subsequent appearance, bail hearing, arraignment and plea.

Response prepared by:

Name: Doug Graves

Title: Protocol Coordinator

Agency: Idaho Office of the Attorney General

Address: P.O. Box 83720

City/State/ZIP: Boise, ID 83720-0010

Phone: (208) 334-4543

FAX: (208) 334-2942

released from custody within 48 hours after arrest, including Saturdays, Sundays, and legal holidays, a District Court judge or justice of the peace shall determine, within that time period, whether there is probable cause to believe that an offense has been committed and that the defendant has committed it.

In making this determination the District Court judge or justice of the peace shall consider:

(1) the sworn complaint,

(2) an affidavit or affidavits, if any, filed by the state,

(3) a sworn oral statement or statements, if any, made before the District Court judge or justice of the peace which is reduced to writing or electronically recorded by equipment that is capable of providing a record adequate for purposes of review.

A District Court judge or justice of the peace may administer the oath and receive an oral statement by telephone.

In the absence of a showing of such probable cause, the District Court judge or justice of the peace shall discharge the defendant.

A finding that probable cause does or does not exist shall be endorsed on the complaint or other appropriate document and filed together with the sworn complaint, affidavit(s) or other written or recorded record with the clerk of the court having jurisdiction of the offense for which the defendant is charged.

"Custody" for purposes of this subsection shall mean incarceration.

[Amended effective March 11, 1991; February 1, 1992; February 15, 1994.]

RULE 5B. EXPERIMENTAL USE OF AUDIOVISUAL DEVICES

The Chief Justice of the Supreme Judicial Court may by administrative order approve the experimental use of audiovisual devices in specified district courts for a specified period of time under specified conditions in the following situations:

(1) The initial appearance of a defendant in custody pursuant to Rule 5 or 5A, including a bail hearing;

(2) The arraignment of a defendant in custody charged with a Class D or E offense.

[Adopted effective February 15, 1994.]

III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(a) Number of Grand Jurors. The grand jury shall consist of not less than thirteen nor more than twenty-three jurors and a sufficient number of legally qualified persons shall be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) *Challenges.* Either the attorney for the state or a defendant who has been held to answer may challenge an individual grand juror on the ground that the juror is not legally qualified or that a state of mind exists on the juror's part which may prevent the juror from acting impartially. All challenges must be in writing and allege the ground upon which the challenge is made, and such challenges must be made prior to the time the grand jurors commence receiving evidence at each session of the grand jury. If a challenge to an individual grand juror is sustained, the juror shall be discharged and the court may replace the juror from persons drawn or selected for grand jury service.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or, if not previously determined upon challenge, on the lack of legal qualifications of an individual juror or on the ground that a state of mind existed on the juror's part which prevented the juror from acting impartially, but an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that twelve or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. The foreman or another juror designated by the foreman shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record shall not be public except on order of the court. During the absence of the foreman the deputy foreman shall act as foreman.

(d) Presence During Proceedings. While the grand jury is taking evidence, only the attorneys for the state, the witness under examination, and, when ordered by the court, an interpreter and a court reporter may be present. While the grand jury is deliberating or voting, only the jurors may be present.

(e) Restricted Disclosure of Proceedings. A juror, attorney, interpreter or court reporter may disclose matters occurring before the grand jury only when so directed by the court.

No obligation of secrecy may be imposed upon any person except in accordance with this rule. In the event an indictment is not returned any stenographic notes of an official court reporter and any transcriptions of such notes shall be impounded by the court.

for a special panel. The filing of a motion for rehearing before the original panel shall suspend consideration of the question of convening a special panel. If rehearing is denied, consideration of that question shall proceed. If rehearing is granted, the petition shall be considered moot.

After a case has been submitted to the special panel, the Chief Judge shall assign the duty of writing the opinion and any dissent. The decision of the special panel shall be binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court. A party may not move for rehearing of the decision of the special panel. A petition to convene a special panel is not a prerequisite to filing an application for leave to appeal to the Supreme Court.

The Court of Appeals may assess actual and punitive damages pursuant to MCR 7.2 16(C) for abuse of the procedures described in this order.

This Administrative Order shall take effect November 1, 1990, and shall remain in effect until December 31, 1991.

Administrative Order 1984-2 is RESCINDED, effective November 1, 1990.

Boyle, J., dissents in part and states: I cannot agree with that portion of the order adopting the "first out" rule. Such a momentous change in the legal culture of this state should be preceded by full research and study of such matters as the experience with the conflict question in the intermediate courts of appeals of our sister states and/or experimentation by the entire Court of Appeals with a version of the en banc procedure permitting oral argument and rebriefing by the parties. Conflict itself is neither bad or good; it may be an agent for change or the source of chaos. Wisdom dictates that we act only after full inquiry and the input of all affected, balancing the need for order against the ultimate objective of ensuring justice through an evolving legal process.

(Entered October 5, 1990, effective November 1, 1990.)

For order continuing Administrative Order 1990-6 in effect until April 30, 1994, see Administrative Order 1994-3, post

ADMINISTRATIVE ORDER 1991-2

VIDEO ARRAIGNMENT

Text of Administrative Order 1991-2, as continued by Administrative Order 1993-1,* in *effect until further order of the Court.

On order of the Court, the State Court Administrator is authorized to approve, until February 1,

1992, or until further order of this Court, trial courts to use two-way closed circuit television from a jail to a courtroom in each court for initial criminal arraignments on the warrant, arraignments on the information, criminal pretrials, criminal pleas, criminal sentencings for misdemeanor offenses cognizable in the district court and show cause hearings.

The previous authorizations by this Court and by the State Court Administrator pursuant to Administrative Order 1990-1, as amended October 31, 1990, for pilot courtrooms in the circuit and district courts of Genesee and Oakland Counties to utilize two-way closed circuit television, are continued until further order of this Court or the State Court Administrator.

Each court requesting authorization is directed to expeditiously submit a local administrative order to the State Court Administrator pursuant to MCR 8.112(B) to implement the pilot program and prescribe the administrative procedures for each type of hearing in which closed circuit television will be utilized.

The State Court Administrative Office shall provide assistance in the implementation of the pilot projects, and shall conduct an assessment of the experimental program and report to the Court. The pilot courts shall cooperate with the State Court Administrative Office.

(Entered April 30, 1991.)

For order continuing Administrative Order 1991-2 in effect until further or&r of the Court, see Administrative Order 1993-1, post

ADMINISTRATIVE ORDER 1991-5

PILOT PROJECTS FOR DISTRICT COURT JUDGES ACCEPTING GUILTY PLEAS IN FELONY CASES

On order of the Court, effective July 1, 1991 and until July 1, 1992, or until further order of the Court, the State Court Administrator is authorized to approve the assignment of judges of the district court as judges in the court with trial jurisdiction over felony cases for experimental projects for the purpose of taking guilty pleas in criminal cases cognizable in the court with trial jurisdiction over felony cases.

ing the pleas, the cases will be transferred to the court with trial court jurisdiction over felony cases.

The previous authorization by this Court and the State Court Administrator pursuant to Administrative Order 1991-5 to the eleven pilot courts to take guilty pleas in criminal cases cognizable in the circuit court is continued until further order of this Court or the State Court Administrator.

(Entered June 30, 1992.)

ADMINISTRATIVE ORDER 1993-1

VIDEO ARRAIGNMENT

On order of the Court, the provisions of Administrative Order 1991-2 regarding video arraignment are continued in effect until the further order of this Court.

(Entered January 28, 1993.)

For text of Administrative Order 1991-2 continued in effect until further order of the Court, see Administrative Order 1991-2, ante

ADMINISTRATIVE ORDER 1994-3

RESOLUTION OF CONFLICTS IN COURT OF APPEALS DECISIONS

On order of the Court, the provisions of Administrative Order 1990-6 are continued in effect until April 30, 1994.

(Entered February **28, 1994.)**

For text of Administrative Order 1990-6 continued in effect until April 30, 1994, see Administrative Order 1990-6. ante

Chapter 561

COLLATERAL CONSEQUENCES OF CONVICTION

Sec.

561.021. Forfeiture of public office—disqualification.
561.031. Physical appearance in court of a prisoner may be made by using closed circuit television, when—requirements.
561.035. Persons convicted of drug or intoxication-related traffic offense. costs.

561.021. Forfeiture of public office-disqualification.- 1. A person holding any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, who is convicted of a crime shall, upon sentencing, forfeit such office if

(1) He is convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony, or he pleads guilty or nolo contendere of such a crime: or

(2) He is convicted of or pleads guilty or nolo contenders IO a crime involving misconduct in office, or dishonesty: or

(3) The constitution or a statute other than the code so provides.

2. Except as provided in subsection 3 of this section, a person who pleads guilty or nolo contendere or is convicted under the laws of this state of a felony or under the laws of another jurisdiction of a crime which, if committed within this state, would be a felony, shall be ineligible to hold any public office, elective or appointive, under the government of this state or any agency or political subdivision thereof, until the completion of his sentence or period of probation.

3. A person who pleads guilty or nolo contendere or is convicted under the laws of this state or under the laws of another jurisdiction of a felony connected with the exercise of the right of suffrage shall be forever disqualified from holding any public office, elective or appointive. under the government of this state or any agency or political subdivision thereof.

(L. 1977 S.B. 60, A.L. 1991 S.B. 262)

561.026.

(1987) This disqualification together with others in Missouri law means that Missouri has not substantially preserved or restored the civil rights of former felons for the purpose of permitting possession of a firearm by the felon **pursuant to federal law. United States v. Presley, 667** F. Supp. 678 (W.D. Ma. 1987).

561.031. Physical appearance in court of a prisoner my be made by using closed circuit television, when-requirements.- 1. In the following proceedings, the provisions of section 544.250, 544.210, 544.275, RSMo, 546.030, RSMo, or of any other statute, or the provisions of supreme court rules 21.10, 22.07, 24.01, 24.02, 27.01. 29.07, 31.02, 31.03, 36.01, 37.16, 37.47, 37.48, 37.50, 37.57, 37.58, 37.59, and 37.64 to the contrary notwithstanding, when the physical appearance in person in court is required of any person held in a place of custody or confinement in any city not within a county or in any county in which there is located a place of custody or confinement operated by the department of corrections, or in any other class county or any seeond class county with a population of at least one hundred thousand that does not adjoin any first class county and which contains a campus of the University of Missouri, such personal appearance may be made by means of closed circuit television from the place of custody *or* confinement; provided that such television facilities provide two-way audio-visual communication between the court and the place of custody or confinement and that a full record of such proceedings be made by split-screen imaging and recording of the proceedings in the courtroom and the place of confinement or custody in addition to such other record as may be required:

(1) First appearance before an associate circuit judge on a criminal complaint:

(2) Waiver of preliminary hearing:

(3) Arraignment on an information or indictment where a plea of not guilty is entered:

(4) Arraignment of an information or indictment where a plea of guilty is entered upon waiver of any right such person might have to be physically present;

(5) Any pretrial or posttrial criminal proceeding not allowing the cross-examination of witnesses;

(6) Sentencing after conviction al trial upon waiver of any right such person might have to be physically present;

(7) Sentencing after entry of a plea of guilty; and

(8) Any civil proceeding other than trial by jury.

2. This section shall not prohibit other appearances via closed circuit television upon waiver of any right such person held in custody or confinement might have to be physically present.

3. Nothing contained in this section shall be construed as establishing a right for any person held in custody to appear on television or as requiring that a place of custody shall provide a two-way audio-visual communication system.

(L. 1988 H.B. 1344 § 1, A.L. 1990 H.B. 974 and S.B. 558)

Effective 7-1-91

561.035. Persons convicted of drug or intoxication-related traffic offense, costs.—Any person who is convicted of or pleads guilty to a drug-related offense pursuant to the provisions of chapter 195, RSMo, or an intoxication-related traffic offense, as defined in section 577.023, RSMo, shall be assessed as costs a fee in the amount of five dollars. Such fee shall be collected by the clerk of the court and paid at least monthly to the director of revenue and placed to the credit of the independent living center fund created in section 178.653, RSMo.

(L. 1993 S.B. 167 § 2 and S.B. 180 § 7)

Chapter 562

GENERAL PRINCIPLES OF LIABILITY

Sec.

562.021. Culpable mental state, application
562.076. Intoxicated or drugged condition.
562.086. Lack of responsibility because of mental disease or defect

562.021. Culpable mental state, application.—1. If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

2. If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

3. Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

(L. 1977 S.B. 60, A.L. 1993 S.B. 167)

562.076. Intoxicated or drugged condition.—1. A person who is in an intoxicated or drugged condition, whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct.

2. The defendant shall have the burden of injecting the issue of intoxicated or drugged condition.

3. Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense. In a trial by jury, the jury shall be so instructed when evidence that a person was in a voluntarily intoxicated or drugged condition has been received into evidence.

(L. 1977 S.B. 60, A.L. 1983 S.B. 276; Effective 10-1-84 S.B. 448 § A, A.L. 1993 S.B. 167)

562.086. Lack of responsibility because of mental disease or defect.—1. A person is not responsible for criminal conduct if at the time

46-9-206. Setting bail -- appearance or use of two-way electronic audio-video communication. The requirement that a defendant be taken before a judge for setting of bail may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and his counsel, if any, can communicate privately, and so that the defendant and his counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that his counsel be in the defendant's physical presence during the two-way electronic audio-video communication. A judge may order a defendant's physical appearance in court for the hearing of an application for admission to bail.

46-12-201. Manner of conducting arraignment -- use of two-way electronic audio-video communication -- exception. (1) Arraignment must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plead. For purposes of this chapter, an arraignment that is conducted by the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an arraignment in open court.

(2) The court shall inquire of the defendant or the defendant's counsel the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court shall order the defendant's name to be substituted for the name under which the defendant is charged.

(3) The court shall determine whether the defendant is under any disability that would prevent the court, in its discretion, from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.

(4) Whenever the law requires that a defendant in a misdemeanor or felony case be taken before **a** court for an arraignment, this requirement may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and his counsel, if any, can communicate privately, and so that the defendant and his counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant

may waive the requirement that his counsel be in the defendant's physical presence during the two-way electronic audio-video communication.

(5) A judge may order a defendant's physical appearance in court for arraignment. In a felony case, a judge may not accept a plea of guilty from a defendant not physically present in the courtroom.

rights under subsection (b) of this section, §§ 15A-533(b) and 15A-534(c) and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Stated in State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).

ARTICLE *26.*

Bail.

§ 15A-531. Definitions.

CASE NOTES

Quoted in State v. Cox, 90 N.C. App. 742. 370 S.E.2d 260 (1988).

§ 15A-532. Persons authorized to determine conditions for release; use of two-way audio and video transmission.

(a) Judicial officials may determine conditions for release of persons brought-before them or as provided in subsection (b) of this section, in accordance with this Article.

(b) Any proceeding under this Article to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission between the judicial official and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding. Upon motion of the defendant, the court may not use an audio and video transmission.

(c) Prior to the use of audio and video transmission pursuant to subsection (b) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts. (1973, c. 1286, s. 1; 1993, c. 30. s. 1.)

Effect of Amendments. - The 1993 amendment, effective April 22, 1993. and applicable to proceedings occurring on or after that date, in the section catchline substituted "release; use of two-way audio and video transmission" for "release"; in subsection (a) added the subsection designation and inserted "or as provided in subsection (b) of this section," following "before them": and added subsections (b) and (c).

§ 15A-533. Right to pretrial release in capital and noncapital cases.

CASE NOTES

Failure to Advise Defendants of Their Rights. - Defendants made a sufficient showing of a substantial statutory violation and of the prejudice aris-

BOWLING GREEN MUNICIPAL COURT
515 E. Poe Rd., P.O. Box 326
Bowling Green, OH 43402-0326
(419) 352-5263

ADMINISTRATIVE ORDER

In Re: Video Arraignments

No. 92-AO-01

Effective now, the court may conduct hearings on initial appearances, arraignments, and bonds of defendants housed in the Wood County Justice Center through the video arraignment system. This may include sentencings for those defendants entering pleas of guilty or no contest at the time of initial appearance or arraignment. This may also include Criminal Rule 4(E) hearings and R.C. Chapter 2963 extradition hearings.

SO ORDERED.

Clerk of Court: File this order and return it to me, after you sign the proof of service. Mail copies to Capt. Larry Pilzecker (Wood County Justice Center) and to Sheriff Matt Brichta (Wood County Sheriff's Department).

2/18/92

James W Bachman
James W. Bachman, Judge

Copies mailed on 2/19/92.

Teresa Firsdon
Teresa Firsdon, Clerk of Court

Example of local rule

Office of Court Technology and Services

Survey Results of Courts using Video Arraignment

AKRON MUNICIPAL - KATHLEEN CAMERON, CT. ADMR. - (216) 375-2120
Installed - l/22/92
Leasing equipment for 1 year/pilot
Concern: "Is or will there be legislation addressing video arraignment?"
A few local attorneys are questioning the possibility of challenges.
Developing local rule to be entered in the journal.
Ms. Cameron has volunteered to serve on a committee addressing video issues.

BOWLING GREENE MUNICIPAL - JUDGE JAMES W. BACHMAN - (419) 352-5263
Additional Contact - Mary Cowell, Court Reporter
Installed Feb. 21, 1992 - Local cable company
Split screen on videotape. Full view judge to defendant, defendant to judge during live arraignment.
Monitors in courtroom for the judge and public.
Issues - news media accommodation.

DELAWARE MUNICIPAL - JAMES MILLS, CHIEF DEPUTY CLERK - (614) 363-1296
Installed 1990
Local rule regarding video transcript. Arraignment not addressed in rule.

NORWALK MUNICIPAL - DONNA STIVELY, COURT ADMINISTRATOR - (419) 663-6771
Installed October 1990
Arraignments, Pre-trials with privacy, sentencing - no preliminary hearings.
FAX - Rights to be signed, bond, jail releases . . . delivery of originals sent later in the day, bulk delivery of original papers.
Split cost with sheriff's department - total cost $10,400-$11,000
City electrician installed cabling.

SANDUSKY MUNICIPAL - JUDGE JAMES STACEY, CONTACT - (419) 627-5920
Installed - 1984
Black and white system originally. New color system. Special video/courtroom in jail.
Wouldn't do without it.

WAYNE COUNTY MUNICIPAL - DOUGLAS LENHART, CONTACT - (216) 263-1350
Installed - 1986
Open Court - A monitor is present allowing anyone to view the proceedings.
No local rule.

XENIA MUNICIPAL - JOHN AMES, CONTACT - (513) 376-7304
XENIA COMMON PLEAS 1 AND 2
Installed - about 1988 or 1989
Municipal court - 90% arraignments, may be used for dispositions
Common Pleas 1 and 2 - Arraignments and dispositions.
Courtroom to video room directly. Client may speak with attorney with sound off - others see picture, no sound.
New courtroom - Camera in ceiling facing the bench - only those around the bench can be seen by the defendant. Monitor for those in the courtroom to view the defendant.

CHAPTER 581

AN ACT SB 1047

lelating to criminal proceedings without defendant being physically present; amending ORS 137.030, 137.550 and 144.343.

le It Enacted by the People of the State of)regon:

SECTION 1. ORS 137.030 is amended to read:

137.030. **(1)** For the purpose of giving judgment, ' the conviction is for a felony, the defendant shall e personally present; but if it is for a misdemeanor, ıdgment may be given in the absence of the de- :ndant.

(2) As used in this section, "personally pres- nt" means that a defendant:

(a) Is physically present before the court; or

(b) Is imprisoned and elects to appear before he court by means of simultaneous television ransmission allowing the court to observe and ommunicate with the defendant and the de- :ndant to observe and communicate with the ourt.

(3) Notwithstanding subsection (2) of this ection, appearance by simultaneous television ransmission shall not be permitted unless the ıcilities used enable the defendant to consult rivately with defense counsel during the pro- eedings.

SECTION 2. ORS 137.550 is amended to read:

137.550. (1) Subject to the limitations in ORS 37.010 and to rules of the State Sentencing Guide- nes Board for felonies committed on or after No- ember 1, 1989:

(a) The period of probation shall be such as the)urt determines and may, in the discretion of the)urt, be continued or extended.

(b) The court may at any time discharge a person ·om probation.

(2) At any time during the probation period, the)urt may issue a warrant and cause a defendant to e arrested for violating any of the conditions of robation. Any probation officer, police officer or ther officer with power of arrest may arrest a robationer without a warrant for violating any)ndition of probation, and a statement by the pro- ation officer setting forth that the probationer has, ı the judgment of the probation officer, violated the)nditions of probation is sufficient warrant for the etention of the probationer in the county jail until ıe probationer can be brought before the court. The robation officer, as soon as practicable, but within ne judicial day, shall report such arrest or de- :ntion to the court that imposed the probation. The robation officer shall promptly submit to the court report showing in what manner the probationer as violated the conditions of probation.

(3) Except for good cause shown or at the re- uest of the probationer, the probationer shall be rought before a magistrate during the first 36 hours of custody, excluding holidays, Saturdays and Sundays. That magistrate, in the exercise of discretion may order the probationer held pending revocation hearing or pending transfer to the jurisdiction of another court where the probation was imposed. In lieu of an order that the probationer be held, the magistrate may release the probationer upon the condition that the probationer appear in court at a later date for a prob ation revocation hearing. If the probationer is being held on an out-of-county warrant, the magistrate may order the probationer released subject to an additional order to the probationer that the probationer report within seven calendar days to the court that imposed the probation.

(4)(a) For defendants sentenced for felonies committed prior to November 1, 1989, and for any misdemeanor, the court that imposed the probation, after summary hearing, may revoke the probation:

(A) If the execution of sentence has been suspended, the court shall cause the sentence imposed to be executed.

(B) If no sentence has been imposed, the court may impose any sentence which originally could have been imposed.

(b) For defendants sentenced for felonies committed on or after November 1, 1989, the court that imposed the probationary sentence may revoke probation supervision and impose a sanction as provided by rules of the State Sentencing Guidelines Board.

(5) Except for good cause shown., if the revocation hearing is not conducted within 14 calendar days following the arrest or detention of the probationer, the probationer shall be released from custody.

(6) A defendant who has been previously confined in the county jail as a condition of probation pursuant to ORS 137.540 or as part of a probationary sentence pursuant to the rules of the State Sentencing Guidelines Board may be given credit for all time thus served in any order or judgment of confinement resulting from revocation of probation.

(7) In the case of any defendant whose sentence has been suspended but who is not on probation, the court may issue a warrant and cause the defendant to be arrested and brought before the court at any time within the maximum period for which the defendant might originally have been sentenced. Thereupon the court, after summary hearing, may revoke the suspension of sentence and cause the sentence imposed to be executed.

(8) If a probationer fails to appear or report to a court for further proceedin s as required by an order under subsection (3) of this section, the failure to appear may be prosecuted in the county to which the probationer was ordered to appear or report.

(9)(a) If requested b the probationer and agreed to by the court, the probationer may admit or deny the violation without being physically present at the hearing if the probationer appears before the court by means of simul taneous television transmission allowing the court to observe and communicate with the de-

fendant and the defendant to observe and communicate with the court.

(b) Notwithstanding paragraph (a) of this subsection, appearance by simultaneous television transmission shall not be permitted unless the facilities used enable the defendant to consult privately with defense counsel during the proceedings.

SECTION 3. ORS 144.343 is amended to read:

144.343. (1) When the State Board of Parole and Post-Prison Supervision or its designated representative has been informed and has reasonable grounds to believe that a person under its jurisdiction has violated a condition of parole and that revocation of parole may be warranted, the board or its designated representative shall conduct a hearing as promptly as convenient to determine whether there is probable cause to believe a violation of one or more of the conditions of parole has occurred and also conduct a parole violation hearing if necessary. Evidence received and the order of the court at a preliminary hearing under ORS 135.070 to 135.225 may be used by the board to determine the existence of probable cause. A waiver by the defendant of any preliminary hearing shall also constitute a waiver of probable cause hearing by the board. The location of the hearing shall be reasonably near the place of the alleged violation or the place of confinement.

(2) The board may:

(a) Reinstate or continue the alleged violator on parole subject to the same or modified conditions of parole;

(b) Revoke parole and require that the parole violator serve the remaining balance of the sentence as provided by law;

(c) Impose sanctions as provided in ORS 144.106; or

(d) Delegate the authority, in whole or in part, granted by this subsection to its designated representative as provided by rule.

(3) Within a reasonable time prior to the hearing, the board or its designated representative shall provide the parolee with written notice which shall contain the following information:

(a) A concise written statement of the suspected violations and the evidence which forms the basis of the alleged violations.

(b) The parolee's right to a hearing and the time, place and purpose of the hearing.

(c) The names of persons who have given adverse information upon which the alleged violations are based and the right of the parolee to have such persons present at the hearing for the purposes of confrontation and cross-examination unless it has been determined that there is good cause for not allowing confrontation.

(d) The parolee's right to present letters, documents, affidavits or persons with relevant information at the hearing unless it has been determined that informants would be subject to risk of harm if their identity were disclosed.

(e) The parolee's right to subpoena witnesses under ORS 144.347.

(f) The parolee's right to be represented by counsel and, if indigent, to have counsel appointed at board expense if the board or its designated representative determines, after request, that the request is based on a timely and colorable claim that:

(A) The parolee has not committed the alleged violation of the conditions upon which the parolee is at liberty;

(B) Even if the violation is a matter of public record or is uncontested, there are substantial reasons which justify or mitigate the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present; or

(C) The parolee, in doubtful cases, appears to be incapable of speaking effectively on the parolee's own behalf.

(g) That the hearing is being held to determine:

(A) Whether there is probable cause to believe a violation of one or more of the conditions of parole has occurred; and

(B) If there is probable cause to believe a violation of one or more of the conditions of parole has occurred:

(i) Whether to reinstate parole;

(ii) Whether to continue the alleged violator on parole subject to the same or modified conditions of parole; or

(iii) Whether to revoke parole and require that the parole violator serve a term of imprisonment consistent with ORS 144.346.

(4) At the hearing the parolee shall have the right:

(a) To present evidence on the parolee's behalf which shall include the right to present letters, documents, affidavits or persons with relevant information regarding the alleged violations;

(b) To confront witnesses against the parolee unless it has been determined that there is good cause not to allow confrontation;

(c) To examine information or documents which form the basis of the alleged violation unless it has been determined that informants would be subject to risk of harm if their identity is disclosed; and

(d) To be represented by counsel and, if indigent to have counsel provided at board expense if the request and determination provided in subsection (3)(f) of this section have been made. If an indigent's request is refused, the grounds for the refusal shall be succinctly stated in the record.

(5) Within a reasonable time after the preliminary hearing, the parolee shall be given a written summary of what transpired at the hearing, including the board's or its designated representative's decision or recommendation and reasons for the decision or recommendation and the evidence upon which the decision or recommendation was based. If an indigent parolee's request for counsel at board expense has been made in the manner provided in subsection (3)(f) of this section and refused, the

grounds for the refusal shall be succinctly stated in the summary.

(6)(a) The parolee may admit or deny the violation without being physically present at the hearing if the parolee appears before the board or its designee by means of simultaneous television transmission allowing the board to observe and communicate with the parolee and the parolee to observe and communicate with the board or by telephonic communication allowing the board to communicate with the parolee and the parolee to communicate with the board.

(b) Notwithstanding paragraph (a) of this subsection, appearance by simultaneous television transmission or telephonic communication shall not be permitted unless the facilities used enable the parolee to consult privately with counsel during the proceedings.

[(6)] **(7)** If the board or its designated representative has determined that there is probable cause to believe that a violation of one or more of the conditions of parole has occurred, the hearing shall proceed to receive evidence from which the board may determine whether to reinstate or continue the alleged parole violator on parole subject to the same or modified conditions of parole or revoke parole and require that the parole violator serve a term of imprisonment as provided by ORS 144.346.

[(7)] **(8)** At the conclusion of the hearing if probable cause has been determined and the hearing has been held by a member of the board or by a designated representative of the board, the person conducting the hearing shall transmit the record of the hearing, together with a proposed order including findings of fact, recommendation and reasons for the recommendation to the board. The parolee or the parolee's representative shall have the right to file exceptions and written arguments with the board. The right to file exceptions and written arguments may be waived. After consideration of the record, recommendations, exceptions and arguments a quorum of the board shall enter a final order including findings of fact, its decision and reasons for the decision.

Approved by the Governor August 3, 1993
Filed in the office of Secretary of State August 3, 1993
Effective date - Regular effective date

CHAPTER 582

AN ACT SB 1118

Relating to credit services; creating new provisions; and amending ORS 646.608.

Be It Enacted by the People of the State of Oregon:

SECTION 1. The Legislative Assembly finds and declares that:

(1) The ability to obtain and use credit has become of great importance to consumers who have a vital interest in establishing and maintaining their creditworthiness and credit standing. As a result, consumers who have experienced credit problems may seek assistance from credit services organizations which offer to obtain credit or improve the credit standing of consumers.

(2) Certain advertising and business practices of some credit services organizations have worked a financial hardship upon the people of this state, particularly on those who have limited economic means and are inexperienced in credit matters. Credit services organizations have significant impact upon the economy and well-being of this state and its people.

(3) The purposes of sections 2 to 10 of this Act are to provide prospective customers of credit services organizations with the information necessary to make intelligent decisions regarding the purchase of those services and to protect the public from unfair or deceptive advertising and business practices. Sections 2 to 10 of this Act shall be interpreted liberally to achieve these purposes.

SECTION 2. As used in sections 2 to 10 of this Act:

(1) "Consumer" means any individual who is solicited to purchase or who purchases the services of a credit services organization.

(2)(a) "Credit services organization" means any person who, with respect to the extension of credit by others, sells, provides, performs, or represents that the organization can or will sell, provide or perform, in return for the payment of money or other valuable consideration, any of the following services:

(A) Improving, saving or preserving a consumer's credit record, history or rating.

(B) Obtaining an extension of credit for a consumer.

(C) Providing advice, assistance, instruction or instructional materials to a consumer with regard to either subparagraph (A) or (B) of this paragraph.

(b) "Credit services organization" does not include:

(A) Any person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States or a lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act.

(B) Any financial institution as defined in ORS 706.005, any bank holding company as defined in ORS 715.010 or any subsidiary or affiliate of a financial institution or bank holding company.

(C) A mortgage banker as defined in ORS 59.015.

(D) A mortgage broker who:

The Supreme Court of South Carolina

ORDER

As new detention facilities are built at locations distant from population centers, the use of videoconference and facsimile equipment may enhance the efficiency and security of the courts, but must continue to protect all the constitutional and statutory rights of the accused. The creation of pilot programs would be helpful in the assessment of the use of this technology for hearings in criminal court and in development of statewide procedures if the technology proves beneficial. Now, therefore,

IT IS ORDERED that a magistrate or municipal judge, upon approval of the governing body of the county or municipality, may use videoconferencing equipment for the conduct of non-capital initial appearances; bond hearings; contested motions; and, acceptance of guilty pleas and sentencing (for offenses initially within jurisdiction of the magistrate or municipal court), upon the following conditions:

1. The magistrate must submit to the Supreme Court prior to their implementation written procedures for use of videoconferencing equipment, to include specifications for types of equipment and their placement.

2. Supreme Court approval of local procedures for use of videoconferencing equipment shall be for a period of one (1) year from date of such approval, but may be extended for good cause.

3. Use of videoconferencing equipment in magistrate and municipal courts shall be limited to noncapital initial appearances; bond hearings; contested motions; and acceptance of guilty pleas and sentencing (for offenses initially within jurisdiction of that magistrate or municipal court).

4. Written consent of the defendant, upon a form prescribed by South Carolina Court Administration and approved by the Chief Justice, shall be obtained for use of videoconference equipment at a hearing or first appearance.

5. The magistrate or municipal judge must verify written and oral waiver of defendant's right to personal appearance at the commencement of any hearing or first appearance.

6. A copy of the videotape of the hearing or first appearance shall be made upon written request of the defendant or prosecution, provided such request is received by the court within thirty (30) days of the date of the hearing or first appearance. The original videotape may be destroyed thirty (30) days after the date of hearing or appearance.

7. Facsimile equipment shall be available for transmission of documents between the judge and the defendant, and facsimile signatures shall be acceptable for purposes of releasing the defendant from custody; however, both actual, signed copies must be promptly filed with the court, and the defendant must promptly be provided with a copy of all documents he or she signs.

8. Equipment and facilities must include:

   a. Locations provided for the defendants and for the judges which are properly situated and furnished to be suitable for and conducive to judicial hearings. The locations must be sufficiently quiet and lighted for use of the video equipment and must also be furnished so as to apprise the defendant of the seriousness of the proceedings.

   b. At least two (2) video cameras, one to record the defendant, and one to record the judge. The cameras must also be capable of filming the defense counsel and witnesses as necessary.

   c. i. At least two (2) television monitors so that the defendant and judge can observe the proceedings at the other's location simultaneously and converse with each other.

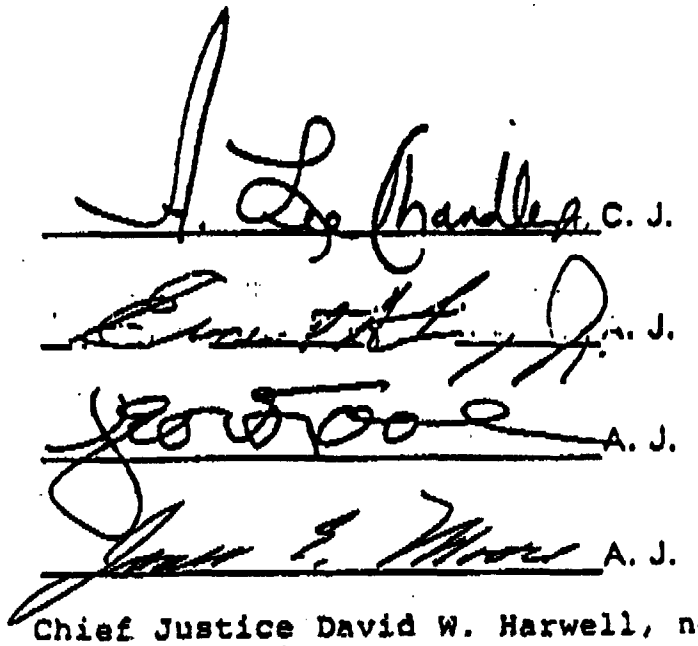
      ii. The room in which the judge is presiding should be accessible to the public, and interested parties should have an opportunity to observe the proceedings.

Therefore, a third monitor should be positioned in the courtroom or seating provided behind the judge for interested parties and counsel for the defense and prosecution.

d. A private telephone line so that defendant and defense counsel can communicate when in different locations.

e. Two (2) facsimile machines so that court documents, witness statements, and other papers can be sent back and forth between the two locations. The defendant must also be allowed to confidentially fax papers back and forth to defense counsel.

IT IS SO ORDERED.



C. J.

A. J.

A. J.

A. J.

Chief Justice David W. Harwell, no participating

March 7, 1994

Columbia, South Carolina

the documents were required in order to provide representation to the indigent person.

History: Sup. Ct. Order, 71 W (2d) ix; 1977 c. 29, 418; 1979 c. 356; 1981 c. 20; 1983 a. 377.

Defendant was entitled to court-appointed counsel in state-initiated civil contempt action. Brotzman v. Brotzman, 91 W (2d) 335, 283 NW (2d) 600 (Ct. App. 1979).

This section gives public defender right to receive juvenile records of indigent client notwithstanding 48.396 (2). State ex rel. S. M. O. 110 W (2d) 447, 329 NW (2d) 275 (Ct. App. 1982).

See note to 971.04, *citing* State v. Neave, 117 W (2d) 359, 344 NW (2d) 181 (1984).

See note to Art. I, s. 8, citing State v. Hanson, 136 W (2d) 195, 401 NW (2d) 771 (1987).

County must provide free transcripts to state public defender. State v. Dresel, 136 W (2d) 461, 401 NW (2d) 855 (Ct. App. 1987).

State public defender may be denied access to jail inmates who have not requested counsel, and jail authorities need only provide over telephone that information necessary for public defender to assess need to make indigency determination in person under 977.07 (1) for inmate who has requested counsel and claims indigency. WAC sec. SPD 2.03 (3) and (5) (July, 1990) exceed bounds of this section. 78 Atty. Gen. 133.

967.07 Court commissioners. A court commissioner may exercise powers or perform duties specified for a judge if such action is permitted under s. 757.69.

History: 1977 c. 323.

967.08 Telephone proceedings. (1) Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by telephone or live audio-visual means, if available. If the proceeding is required to be reported under SCR 71.01 (2), the proceeding shall be reported by a court reporter who is in simultaneous voice communication with all parties to the proceeding. Regardless of the physical location of any party to the call, any plea, waiver, stipulation, motion, objection, decision, order or other action taken by the court or any party shall have the same effect as if made in open court. With the exceptions of scheduling conferences, pretrial conferences, and, during hours the court is not in session, setting, review, modification of bail and other conditions of release under ch. 969, the proceeding shall be conducted in a courtroom or other place reasonably accessible to the public. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without charge.

(2) The court may permit the following proceedings to be conducted under sub. (1) with the consent of the defendant. The defendant's consent and any party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Initial appearance under s. 970.01.

(b) Waiver of preliminary examination under s. 970.03, competency hearing under s. 971.14 (4) or jury trial under s. 972.02 (1).

(c) Motions for extension of time under ss. 970.03 (2), 971.10 or other statutes.

(d) Arraignment under s. 971.05, if the defendant intends to plead not guilty or to refuse to plead.

(3) Non-evidentiary proceedings on the following matters may be conducted under sub. (1) on request of either party. The request and the opposing party's showing of good cause for not conducting the proceeding under sub. (1) may be made by telephone.

(a) Setting, review and modification of bail and other conditions of release under ch. 969.

(b) Motions for severance under s. 971.12 (3) or consolidation under s. 971.12 (4).

(c) Motions for inspection or testing of physical evidence under s. 971.23 (4) or (5) or for protective orders under s. 971.23 (6).

(d) Motions under s. 971.31 directed to the sufficiency of the complaint or the affidavits supporting the issuance of a warrant for arrest or search.

(e) Motions in limine, including those under s. 972.11 (2) (b).

(f) Motions to postpone, including those under s. 971.29.

History: Sup. Ct. Order, 141 W (2d) xxvii; 1987 a. 403; Sup. Ct. Order, 158 W (2d) xix.

Judicial Council Note, 1988: This section [created] allows various criminal proceedings to be conducted by telephone conference or live audio-visual means, if available. Requirements for reporting and public access are preserved. [Re Order eff. 1-1-88]

Judicial Council Note, 1990: [Re amendment of (1)] Supreme Court Rule 71.01 (2) specifies when a verbatim record is required of a judicial proceeding. Such a record should not be required solely because the proceeding is conducted by telephone or live audio-visual means. Likewise, the requirement in the prior rule that all telephone proceedings be conducted in the courtroom or other reasonably accessible public place discouraged the practice of setting and modifying bail by telephone conference during hours the court was not in session.

[Re amendment of (2)] The appearances, motions and waivers listed in this subsection are rights of the defendant. If the defendant consents that telephone procedures be used, any party objecting should show good cause. [Re Order eff. 1-1-91]

967.09 Interpreters may serve by telephone or video. On request of any party, the court may permit an interpreter to act in any criminal proceeding, other than trial, by telephone or live audiovisual means.

History: Sup. Ct. Order, 141 W (2d) xxviii; 1987 a. 403.

(3) If the amount awarded to a minor by judgment or by an order of the court approving a compromise settlement of a claim or cause of action of the minor does not exceed $5,000 (exclusive of interest and costs and disbursements), and if there is no general guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon the payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto and enter into a stipulation dismissing the action upon its merits. The order shall also direct the clerk upon the payment to pay the costs and disbursements and expenses of the action and to dispose of the balance in one of the manners provided in s. 880.04 (2) as selected by the court. The fee for the clerk's services for handling, depositing and disbursing funds under this subsection is prescribed in s. 814.61 (12) (a).

History: Sup. Ct. Order. 67 W (2d) 746; 1975 c. 218: 1981 c. 317.

cross Reference: See 880.125 for provision requiring a court approving settlements to be satisfied as to the sufficiency of the guardian's bond.

807.11 Orders: rendition and entry. (1) An order is rendered when it is signed by the judge.

(2) An order is entered when it is filed in the office of the clerk of court.

History: Sup. Ct. Order. 67 W (2d) 747.

Oral order of state court that Injunction be issued was valid even though case was removed to federal court before order was signed. Heidel v. Voight. 456 F Supp. 959 (I 978).

807.12 Suing by fictitious name or as unknown; partners' names unknown. (1) When the name or a part of the name of any defendant, or when any proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to property is unknown to the plaintiff, such defendant may be designated a defendant by so much of the name as is known, or by a fictitious name, or as an unknown heir, representative, owner or person as the case may require, adding such description as may reasonably indicate the person intended. But no person whose title to or interest in land appears of record or who is in actual occupancy of land shall be proceeded against as an unknown owner.

(2) When the name of such defendant is ascertained the process, pleadings and all proceedings may be amended by an order directing the insertion of the true name instead of the designation employed.

(3) In an action against a partnership, if the names of the partners are unknown to the plaintiff, all proceedings may be in the partnership name until the names of the partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by order directing the insertion of such names.

History: Sup. Ct. Order. 67 W (2d) 748.

This section does not authorize judgment against unnamed individual. Miller v. Smith, 100 W (2d) 609. 302 NW (2d) 468 (1981).

See note to 893.02. citing Lak v. Richardson-Merrell. Inc. 100 W (2d) 641. 302 NW (2d) 483 (1981).

See note to 893.02. citing Lavine v. Hartford Act. & Indemnity. 140 W (2d) 434. 410 NW (2d) 623 (Ct. ADD. 19871.

See note to 893.57. citing Spitler v. Dean. 148 W (2d) 630,436 NW (2d) 308 (1989).

807.13 Telephone and audio-visual proceedings. (1) ORAL ARGUMENTS. The court may permit any oral argument by telephone.

(2) EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audio-visual means, subject to cross-examination, when:

(a) The applicable statutes or rules permit;

(b) The parties so stipulate; or

(c) The proponent shows good cause to the court. Appropriate considerations are:

1. Whether any undue surprise or prejudice would result;

2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;

3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;

4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;

5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;

6. Whether the quality of the communication is sufficient to understand the offered testimony;

7. Whether a physical liberty interest is at stake in the proceeding; and

8. Such other factors as the court may, in each individual case, determine to be relevant.

(3) CONFERENCES. Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so. conferences in civil actions and proceedings may be conducted by telephone.

(4) NOTICE: REPORTING; STIPULATION; WAIVERS; ETC.; ACCESS. In any proceeding conducted by telephone under this section:

(a) If the proceeding is required to be reported, a court reporter shall be in simultaneous voice communication with all parties to the call. whether or not in the physical presence of any of them.

(b) Parties entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant other than the reporter electing to be present with any other participant shall give reasonable notice thereof to the other participants.

(c) Regardless of the physical location of any party to the call, any waiver. stipulation, motion, objection, decision, order or any other action taken by the court or a party to a reported telephone hearing has the same effect as if made in open court.

(d) With the exception of scheduling conferences and pretrial conferences, proceedings shall be conducted in a courtroom or other place reasonably accessible to the public. Participants in the proceeding may participate by telephone from any location or may elect to be physically present with one or more of the other participants. Simultaneous access to the proceeding shall be provided to persons entitled to attend by means of a loudspeaker or, upon request to the court, by making a person party to the telephone call without charge.

History: Sup. Ct. Order, 141 W (2d) xxiv; Sup. Ct. Order. 158 W (2d) xviii: 1991 a. 32.

Judicial Council Note, 1988: This section [created] allows oral arguments **IO** be heard, evidence to be taken, or conferences to be conducted. by telephone. Sub. (4) prescribes the basic procedure for such proceedings. [Re Order eff. l-1-88]

Judicial Council Note, 1990; The change in sub. (2) (c) (intro,) from "interest of justice" to "good cause" is not intended as substantive. but merely to conform it to the language used in other statutes relating to use of telephonic procedures in judicial proceedings. SS, 967.08. 970.03 (13). 971.14 (I) (c) and (4) (b). and 971.17 (2). Stats. [Re Order eff. 1-1-91]

Speaker-telephone testimony in civil jury trials: The next best thing to being there? 1988 WLR 293.

807.14 Interpreters. On request of any party, the court may permit an interpreter to act in any civil proceeding other than trial by telephone or live audio-visual means.

History: Sup. Ct. Order, 141 W (2d) xxv.

Judicial Council Note, 1988: This section [created] allows interpreters to serve by telephone or live audio-visual means in civil proceedings other than trials, on request of any party and approval by the court. [Re Order effective Jan. 1, 1988]

CHAPTER 970

CRIMINAL PROCEDURE - PRELIMINARY PROCEEDINGS

970.01 Initial appearance before a judge.
970.02 Duty of a judge at the initial appearance
970.03 Preliminary examination.
970.035 Preliminary examination; child younger than 16 years old.
970.04 Second examination.
970.05 Testimony at preliminary examination.

970.01 Initial appearance before a judge. (1) Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed. The person may waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audiovisual means under s. 967.08. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction.

(2) When a person is arrested without a warrant and brought before a judge, a complaint shall be filed forthwith.

History: Sup. Ct. Order, 141 W (2d) xxxi: 1987 a. 403.

Judicial Council Note, 1988: Sub. (1) is amended to authorize the arrested person to waive physical appearance and request that the initial appearance be conducted on the record by telephone or live audio-visual means. [Re Order effective Jan. 1, 1988]

It is not unreasonable to detain a person arrested on Saturday after the courthouse is closed until his arraignment Monday morning. Kain v. State, 48 W (2d) 212. 179 NW (2d) 777.

Where defendant confessed to 8 robberies within one half hour after arrest in the early morning and was not taken before a judge until the next day. the period ofdetention was not unreasonable. Quinn v. State, 50 W (2d) 101. 183 NW (2d) 64.

The fact that a defendant confesses between the time of arrest and appearance before a magistrate does not prove that the delay was unreasonable Pinczkonski v. State. 51 W (2d) 249. 186 NW (2d) 203

Where defendant was taken to jail in the evening on suspicion of murder. and questioning resumed at 8:30 the next morning and continued at intervals until 9:50 that evening. after defendant was given the warning and said he did not want an attorney. A delay until the following morning in taking him to court was not unreasonable. since the police needed time to-check out various information supplied by defendant and others. State v. Hunt. 53 W (2d) 734. 193 NW (2d) 858.

A delay in taking defendant before a magistrate from Saturday noon to Monday afternoon was justified when caused by attempts to locate witnesses and giving a lie detector test requested by defendant. State v. Wallace. 59 W (2d) 66. 207 NW (2d) 855.

See note to 971.04. citing State v. Neave. 117 W (2d) 359, 344 NW (2d) 181 (1984).

970.02 Duty of a judge at the initial appearance. (1) At the initial appearance the judge shall inform the defendant:

(a) Of the charge against him and shall furnish the defendant with a copy of the complaint which shall contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged.

(b) Of his or her right to counsel and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel.

(c) That he is entitled to a preliminary examination if charged with a felony in any complaint, including a complaint issued under s. 968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, unless waived in writing or in open court, or unless he is a corporation.

(2) The judge shall admit the defendant to bail in accordance with ch. 969.

(3) Upon request of a defendant charged with a misdemeanor, the judge shall immediately set a date for the trial.

(4) A defendant charged with a felony may waive preliminary examination, and upon the waiver, the judge shall bind the defendant over for trial.

(5) If the defendant does not waive preliminary examination, the judge shall forthwith set the action for a preliminary examination under s. 970.03.

(6) In all cases in which the defendant is entitled to legal representation under the constitution or laws of the United States or this state, the judge or magistrate shall inform the defendant of his or her right to counsel and, if the defendant claims or appears to be indigent, shall refer the person to the authority for indigency determinations specified under s. **977.07 (1).**

(7) If the offense charged is one specified under s. 165.83 (2) (a), the judge shall determine if the defendant's lingerprints, photographs and other identifying data have been taken and, if not, the judge shall direct that this information be obtained.

History: 1973 c. 45; 1975 c. 39; 1977 c. 29.449; 1979 c. 356: 1981 c. 144; 1987 a. 151.

There is no need to appoint both a guardian ad litem and defense counsel unless it appears that prejudice would result from dual representation. Gibson v. State, 47 W (2d) 810, 177 NW (2d) 912.

970.03 Preliminary examination. (1) A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. A preliminary examination may be held in conjunction with a bail revocation hearing under s. 969.08 (5) (b). but separate findings shall be made by the judge relating to the preliminary examination and to the bail revocation.

(2) The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within IO days if the defendant is in custody and bail has been fixed in excess of $500. On stipulation of the parties or on motion and for cause, the court may extend such time.

(3) A plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof.

(4) (a) If the defendant is accused of a crime under **S.** 940.225,948.02,948.05 or 948.06, the court may exclude from the hearing all persons who are not officers of the court, members of the complainant's or defendant's families or others considered by the court to be supportive of the complainant or defendant, the service representative, as defined in s. 895.73 (1) (c), or other persons required to attend, if the court finds that the state or the defendant has established a compelling interest that would likely be prejudiced if the persons were not excluded. The court may consider as a compelling interest, among others, the need to protect a complainant from undue embarrassment and emotional trauma.

(b) In making its order under this subsection. the court shall set forth specific findings sufficient to support the closure order. In making these findings, the court shall consider, and give substantial weight to, the desires, if any, of the complainant. Additional factors that the court may consider in making these findings include. but are not limited

to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family.

(c) The court shall make its closure order under this subsection no broader than is necessary to protect the compelling interest under par. (a) and shall consider any reasonable alternatives to full closure of the entire hearing.

(6) All witnesses shall be sworn and their testimony reported by a phonographic reporter. The defendant may cross-examine witnesses against him, and may call witnesses on his own behalf who then are subject to cross-examination.

(6) During the preliminary examination, the court may exclude witnesses until they are called to testify, may direct that persons who are expected to be called as witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined.

(7) If the court finds probable cause to believe that a felony has been committed by the defendant. it shall bind the defendant over for trial.

(6) If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action.

(9) If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith.

(10) In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information filed pursuant to ch. 971. Section 970.04 shall apply to any dismissed count.

(11) The court may admit a statement which is hearsay and which is not excluded from the hearsay rule under ss. 908.02 to 908.045 to prove ownership of property or lack of consent to entry to or possession or destruction of property.

(12) (a) In this subsection:

1. "Hospital" has the meaning designated in s. 50.33 (2).

2. "Local health department" means a city, county, city-county or multicounty health department.

(b) At any preliminary examination. a report of one of the crime laboratory's, the state laboratory of hygiene's, a federal bureau of investigation laboratory's, a hospital laboratory's or a local health department's findings with reference to all or any part of the evidence submitted, certified as correct by the attorney general, the director of the state laboratory of hygiene, the director of the federal bureau of investigation, the chief hospital administrator, the head of the local health department or a person designated by any of them, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated. if relevant. The expert who made the findings need not be called as a witness.

(c) 1. Except as provided in subd. 2 at any preliminary examination in Milwaukee county a latent fingerprint report of the city of Milwaukee police department bureau of identification division's latent fingerprint identification unit, certified as correct by the police chief, shall, when offered by the state or the accused, be received as evidence of the facts and findings stated, if relevant. The expert who made the findings need not be called as a witness except as provided in subd. 2.

2. Subdivision 1 applies only if the state provides the latent fingerprint report to the defendant's attorney at least 72 hours before the preliminary examination. If the state provides the report in this manner, subd. 1 applies unless the defendant's attorney notifies the unit. in writing, at least 24 hours before the preliminary examination that the defendant objects to the receipt of the report in the manner described under subd. 1. If the defendant's attorney provides this notification in this manner, the latent fingerprint report shall be received under subd. 1 only if the expert who made the findings is called as a witness.

(13) Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of a preliminary examination by telephone or live audio-visual means.

History: 1975 c. 184; 1977 c. 449; 1979 c. 112. 332; 1985 a. 267; Sup. Ct. **Order, 141** W (2d) xxxi: 1987 a. 332 s. 64; 1987 a. 403: Sup. Ct. Order. 158 W (2d) xix; 1991 a. 193. 276.

Judicial Council Note, 1990:: (Re amendment of (13)] The right to confront one's accusers does not apply to the preliminary examination. and since credibility is not an issue, demeanor evidence is of less significance than at trial. For these reasons, a party should not be permitted to prevent the admission of telephone testimony. although the proponent of such evidence should bear the burden of showing good cause for its admission. [Re Order eff. 1-1-91]

While hearsay relied upon in support of a criminal complaint requires some basis for crediting its reliability whether the informants are named or not. that requirement is satisfied where the hearsay is based upon observation of the informants. State ex rel. Cullen v. Ceci, 45 W (2d) 432. 173 NW (2d) 175.

There is no obligation on the magistrate to conduct an investigation to verify the contents of a criminal complaint, for this is the duty of the state, and if the latter fails to put sufficient facts before the magistrate to show probable cause. the complaint must fail even though clews and leads that could provide such information are revealed therein. State ex rel. Cullen v. Ceci. 45 W (2d) 432. 173 NW (2d) 175.

At the preliminary defendant is entitled to cross-examine witnesses who identified him thereat and who also identified him at a lineup, because if the lineup was unfair the identification evidence might be suppressed. Hayes 1. State, 46 W (2d) 93, 175 NW (2d) 625.

A ruling on admissibility of evidence at a preliminary hearing is not res adjudicata at the trial. Meunier v. State, 46 W (2d) 271. 174 NW (2d) 277

A failure to comply with the procedural requirements of 954.05 (1), Stats 1967. affects only the court's jurisdiction over the person and is waived by a guilty plea. Crummel v. State. 46 W (2d) 348. 174 NW (2d) 517.

It was not error for the magistrate and trial court to fail to sequester witnesses without motion by the defendant. especially in the absence of a showing of prejudice. Abraham v. State, 47 W (2d) 44. 176 NW (2d) 349.

A bind over is not invalid because the judge stated it was "for the purpose of accepting a plea". Dolan v. State. 48 W (2d) 696, 180 NW (2d) 673

A defendant is not entitled to call witnesses for pretrial discovery or to shake the credibility of the state's witness. State v. Knudson. 51 W (2d) 270. 187 NW (2d) 321.

Where a defendant has been indicted by a grand jury he is not entitled to a preliminary examination. State ex rel. Welch v. Waukesha Co. Cir. Court. 52 W (2d) 221. 189 NW (2d)417.

When the preliminary examination is not timely held, personal jurisdiction is lost, but when defendant on arraignment entered a plea he waived the defense Armstrong v. State. 55 W (2d) 282, 198 NW (2d) 357

Defense counsel should be allowed to cross-examine a state's witness to determine the plausability of the witness. but not to attack his general trustworthiness. Wilson v. State. 59 W (2d) 269. 208 NW (7d) 134.

Purpose of hearing under (1) is to determine whether any felony, whether charged or not. probably was committed. After bind over. prosecutor may charge any crime not wholly unrelated to transactions and facts adduced at preliminary examination. Wittke v. State ex rel. Smith. SOW (2d) 332.259 NW (2d) 515.

Appellate renew of preliminary hearing is limited to determination whether record contains competent evidence to support the examining magistrate's exercise of judgment. Although motive is not clement of any crime and does not of itself establish guilt or innocence, evidence of motive may be given as much weight as fact finder deems it entitled to at preliminary hearing or trial. State v. Berby. 81 W (2d) 677, 260 NW (2d) 798.

Section 970.03 (8) neither limits prosecutor's discretion to prosecute under 59.47 nor prohibits second examination under 970.04. State v. Kenyon. 85 W (2d) 36. 270 NW (2d) 160 (1978).

This section does not require that proof of exact time of offense be shown. State v. Sirisun, 90 W (2d) 58. 279 NW (2d) 484 (Ct App. 1979).

See note to 902.01. citing State cx rel. Cholka v. Johnson. 96 W (2d) 704. 292 NW (2d) 835 (1980)

See note to 971.01. citing State v. Hooper. 101 W (2d) 517. 305 NW (2d) 110 (1981).

Accused does not have Constitutional right to closing argument at preliminary examination. State ex rel. Funmaker v. Klamm, 106 W (2d) 624.317 NW (2d) 458 (1982).

If any reasonable inference supports conclusion that defendant probably committed a crime. magistrate must bind over defendant. State v. Dunn. 117 W (2d) 487, 345 NW (2d) 69 (Ct. App. 1984); affd. 121 W (2d) 389, 359 NW (2d) 151 (1984).

State has right to appeal dismissal when it believes error of law was committed. Uncorroborated confession alone was sufficient to support probable cause finding. State v. Fry, 129 W (2d) 301. 385 NW (2d) 196 (Ct. App. 1985).

Mandatory closure of hearing solely at request of complaining witness over objection ofdefendant violates right to public trial. Stevens v. Manitowoc Cir. Ct.. 141 W (2d) 239.414 NW (2d) 832 (1987).

If appellate court stays trial court proceedings on interlocutory appeal. (2) does not set a mandatory time limit for the preliminary hearing upon remittitur. State v. Horton. 151 W (2d) 250, 445 NW (2d) 46 (Ct. App. 1989).

common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

(2) JOINDER OF **DEFENDANTS.** Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(3) **RELIEF FROM** PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or ofdefendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if he intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

(4) TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints. informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

Where 2 defendants were charged and the cases consolidated, and one then pleads guilty. there is no need for a severance. especially where the trial is to the court. Nicholas v. State, 49 W (2d) 678. 183 NW (2d) 8.

Severance is not required where the 2 charges involving a single act or transaction are so inextricably intertwined so as to make proof of one crime impossible without proof of the other. Holmes v. State. 63 W (2d) 389. 217 NW (2d) 657.

Due process of law was not violated. nor did the trial court abuse its discretion. by denial of defendant's motion to sever 3 counts of sex offenses from a count of first-degree murder. Bailey v. State. 65 W (2d) 331.222 NW (2d) 871.

In a joint trial on charges of burglary and obstructing an officer, while evidence as to the fabrication of an alibi by defendant has probative as to the burglary. the substantial danger that the Jury might employ such evidence as affirmative proof of the elements of that crime, for which the state was required to introduce separate and independent evidence showing guilt beyond a reasonable doubt. required the court to administer a clear and certain cautionary instruction that the jury should not consider evidence on the obstructing count as sufficient in itself to find defendant guilty of burglary. Peters v. State. 70 W (2d) 22. 233 NW (2d) 420.

Joinder was not prejudicial to defendant moving for severance where possibly prejudicial effect of inadmissible hearsay regarding other defendant was presumptively cured by instructions. State v. Jennaro. 76 W (2d) 499.251 NW (2d) 800.

Where codefendant's antagonistic testimony merely corroborates overwhelming prosecution evidence, refusal to grant severance is not abuse of discretion. Haldane v. State. 85 W (2d) 182. 270 NW (2d) 75 (1978).

Joinder of charges against defendant was proper where separate acts exhibited some modus operandi. Francis v. State. 86 W (2d) 554. 273 NW (2d) 310 (1979).

Trial court properly deleted implicating references from codefendant's confession rather than granting defendant's motion for severance under (3). Pohl v. State, 96 W (2d) 290, 291 NW (2d) 554 (1980).

Trial court did not abuse discretion in denying severance motion and failing to caution jury against prejudice where 2 counts were joined. State v. Bettinger. 100 W (2d) 691. 303 NW (2d) 585 (1981).

Joinder is not prejudicial where same evidence would be admissible under 904.04 if there were separate trials. State v. Hall, 103 W (2d) 125.307 NW (2d) 289 (1981).

Trial court abused discretion in denying motion for severance of codefendants' trials. where accused made initial showing that codefendant's testimony would have established accused's alibi defense and accused's entire defense was based on alibi. State v. Brown. 114 W (2d) 554,338 NW (2d) 857 (Ct. App. 1983).

Joinder under (2) was proper where both robberies were instigated by one defendant's prostitution and other defendant systematically robbed customers who refused to pay. State v. King. I20 W (2d) 285.354 NW (2d) 742 (Ct. App. 1984).

Misjoinder was harmless error. State v. Leach, 124 W (2d) 648. 370 NW (2d) 240 (1985).

To be of "same or similar character" under (1). crimes must be of same type. occur over relatively short time period, and evidence as to each must overlap. State v. Hamm. 146 W (2d) 130.430 NW (2d) 584 (Ct. App. 1988).

Joinder and severance. 1971 WLR 604.

971.13 Competency. (1) No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

(2) A defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency.

(3) The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

History: 1981 c. 367.

Judicial Council Committee's Note, 1981: Fundamental fairness precludes criminal prosecution of a defendant who is not mentally competent to exercise his or her constitutional and procedural rights. State ex rel. Matalik v. Schubert, 57 Wis. 2d 315, 322 (1973).

Sub. (1) states the competency standard in conformity with Dusky v. U.S., 362 U.S. 402 (1960) and State ex rel. Haskins v. Dodge County Court, 62 Wis. 2d 250, 265 (1974). Competency is a judicial rather than a medical determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant's capacity to assist counsel and make decisions which counsel cannot make for him or her. See State v. Harper, 57 Wis. 2d 543 (1973); Norwood v. State, 74 Wis. 2d 343 (1976); State v. Albright, 96 Wis. 2d 122 (1980); Pickens v. State, 96 Wis. 2d 549 (1980).

Sub. (2) clarifies that a defendant who requires medication to remain competent is nevertheless competent; the court may order the defendant to be administered such medication for the duration of the criminal proceedings under s. 971.14 (5) (c).

Sub. (3) is identical to prior s. 971.14 (6). It has been renumbered for better statutory placement, adjacent to the rule which it clarifies. [Bill 765-A]

Competency to stand trial is not necessarily sufficient competency to represent oneself. Pickens v. State, 96 W (2d) 549, 292 NW (2d) 601 (1980).

Defense counsel having reason to doubt competency of client must raise issue with court, strategic considerations notwithstanding. State v. Johnson, 133 W (2d) 207, 395 NW (2d) 176 (1986).

971.14 Competency proceedings. (1) PROCEEDINGS. (a) The court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed.

(b) If reason to doubt competency arises after the defendant has been bound over for trial after a preliminary examination, or after a finding of guilty has been rendered by the jury or made by the court, a probable cause determination shall not be required and the court shall proceed under sub. (2).

(c) Except as provided in par. (b), the court shall not proceed under sub. (2) until it has found that it is probable that the defendant committed the offense charged. The finding may be based upon the complaint or, if the defendant submits an affidavit alleging with particularity that the averments of the complaint are materially false, upon the complaint and the evidence presented at a hearing ordered by the court. The defendant may call and cross-examine witnesses at a hearing under this paragraph but the court shall limit the issues and witnesses to those required for determining probable cause. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audio-visual means. If the court finds that any charge lacks probable cause, it shall dismiss the charge without prejudice and release the defendant except as provided in s. 971.31 (6).

(2) EXAMINATION. (a) The court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant. If an inpatient examination is determined by the court to be necessary, the defendant may be committed to a suitable mental health facility for the examination period specified in par. (c), which shall be deemed days spent in custody under s. 973.155. If the examination is to be conducted by the department of health and social services, the court shall order the individual to the facility designated by the department of health and social services.

(am) Notwithstanding par. (a). if the court orders the defendant to be examined by the department or a department

facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case under this paragraph in which the department determines that an inpatient examination is necessary, the 15day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

(b) If the defendant has been released on bail, the court may not order an involuntary inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary for an adequate examination.

(c) Inpatient examinations shall be completed and the report of examination filed within 15 days after the examination is ordered or as specified in par. (am), whichever is applicable, unless, for good cause, the facility or examiner appointed by the court cannot complete the examination within this period and requests an extension. In that case, the court may allow one 15-day extension of the examination period. Outpatient examinations shall be completed and the report of examination filed within 30 days after the examination is ordered.

(d) If the court orders that the examination be conducted on an inpatient basis, it shall arrange for the transportation of any defendant not free on bail to the examining facility within a reasonable time after the examination is ordered and for the defendant to be returned to the jail within a reasonable time after receiving notice from the examining facility that the examination has been completed.

(e) The examiner shall personally observe and examine the defendant and shall have access to his or her past or present treatment records, as defined under s. 51.30 (1) (b).

(f) A defendant ordered to undergo examination under this section may receive voluntary treatment appropriate to his or her medical needs. The defendant may refuse medication and treatment except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others.

(g) The defendant may be examined for competency purposes at any stage of the competency proceedings by physicians or other experts chosen by the defendant or by the district attorney, who shall be permitted reasonable access to the defendant for purposes of the examination.

(3) REPORT. The examiner shall submit to the court a written report which shall include all of the following:

(a) A description of the nature of the examination and an identification of the persons interviewed, the specific records reviewed and any tests administered to the defendant.

(b) The clinical findings of the examiner.

(c) The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense.

(d) If the examiner reports that the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5) (a).

(dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment for the defendant's mental condition. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment, and the alternatives to accepting the particular medication or treatment offered, after the advantages, disadvantages and alternatives have been explained to the defendant.

(e) The facts and reasoning, in reasonable detail, upon which the findings and opinions under pars. (b) to (dm) are based.

(4) HEARING. (a) The court shall cause copies of the report to be delivered forthwith to the district attorney and the defense counsel, or the defendant personally if not represented by counsel. The report shall not be otherwise disclosed prior to the hearing under this subsection.

(b) If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audiovisual means. At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent. If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3) (dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

(c) If the court determines that the defendant is competent, the criminal proceeding shall be resumed.

(d) If the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5) (a), the proceedings shall be suspended and the defendant released. except as provided in sub. (6) (b).

(5) COMMITMENT. (a) If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department of health and social services for placement in an appropriate institution for a period of time not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less. Days spent in commitment under this paragraph are considered days spent in custody under s. 973.155.

(am) If the defendant is not subject to a court order determining the defendant to be not competent to refuse medication or treatment for the defendant's mental condition

APPENDIX III

Authority for Use of Interactive Video Technology: Caselaw

motion for directed verdict. However, we agree with appellant that the trial court erred in admitting evidence of complaints by unspecified neighbors of suspected drug activity at appellant's residence and police surveillance prior to the search of his home, as well as discussion about and admission of the actual search warrant that lead to the charges against appellant for possession of drugs in his home. *See Johnson v. State*, 559 So.2d 729 (Fla. 4th DCA 1990); *Adams v. State*, 559 So.2d 436 (Fla. 1st DCA 1990); and *Cabral v. State*, 550 So.2d 46 (Fla. 3d DCA 1989).

ANSTEAD, GLICKSTEIN, JJ., and KAHN, MARTIN D., Associate Judge, concur.

Hasan JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 90–2069.

District Court of Appeal of Florida, Fourth District.

Sept. 5, 1990.

Clarification Denied Oct. 17, 1990.

Appeal from Denial of Rule 3.850 motion by the Circuit Court for Palm Beach County; Walter N. Colbath, Judge.

Hasan Jones, Lowell, pro se appellant.

No appearance required for appellee.

PER CURIAM.

We affirm the trial court's action in summarily denying Jones's Rule 3.850 motion. The motion was legally insufficient. However, this affirmance is without prejudice to Jones's filing a legally sufficient Rule 3.850 motion if he is so advised.

LETTS, DELL and WALDEN, JJ., concur.

Marvin JACOBS, Appellant,

v.

STATE of Florida, Appellee.

No. 89–1184.

District Court of Appeal of Florida, Fourth District.

Sept. 5, 1990.

Rehearing and Clarification Denied Oct. 17, 1990.

Defendant was convicted in the Circuit Court, St. Lucie County, Charles E. Smith, J., and he appealed. The District Court of Appeal held that it was error to sentence defendant while he was in jail, watching his attorney and sentencing judge on closed circuit television.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⇐987

It was error to use sentencing procedure in which defendant was in jail at the time of sentencing, viewing his attorney and sentencing judge in the courtroom through closed circuit television. West's F.S.A. RCrP Rules 3.130(a), 3.160(a), 3.180(a)(9).

2. Costs ⇐292, 314

Imposition of costs and requirement that defendant pay public defender's fee was improper where there was no prior notice and defendant was indigent.

Richard L. Jorandby, Public Defender, Cherry Grant and Eric M. Cumfer, Asst. Public Defenders, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

[1] We affirm appellant's conviction; however, we find reversible error in the sentencing procedure which will require resentencing. Appellant was in jail at the time of sentencing. His attorney and the sentencing judge were in the courtroom.

Communication was accomplished through closed-circuit television. Such an arrangement is not authorized by rule or statute and is consequently fatally and fundamentally flawed. Rule 3.180(a)(9), Florida Rules of Criminal Procedure, provides that a defendant shall be present at the pronouncement of judgment and the imposition of sentence. This is essential to permit the defendant to confer with his counsel privately and to have the benefit of his advice. Further, the rules specifically permit communication by way of audiovisual video camera at first appearances and at the arraignment stage of proceedings. Fla.R.Crim.P. 3.130(a) and 3.160(a). Failure to include sentencing as an exception to the "personally present" requirement cannot be deemed mere oversight. Accordingly, we reverse the sentence and remand for resentencing.

[2] We also strike the imposition of costs imposed upon the indigent appellant without prior notice. *Mays v. State*, 519 So.2d 618 (Fla.1988); *Jenkins v. State*, 444 So.2d 947 (Fla.1984). The requirement that appellant pay the Public Defender's fee is similarly flawed. *Thomas v. State*, 486 So.2d 69 (Fla. 4th DCA 1986).

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

HERSEY, C.J., STONE, J. and OWEN, WILLIAM C., Jr., Associate Judge, concur.

George STUDNICKA, Petitioner,

v.

James T. CARLISLE, et al., Respondents.

No. 90–0820.

District Court of Appeal of Florida, Fourth District.

Sept. 5, 1990.

Rehearing and Clarification Denied Oct. 18, 1990.

Petition for writ of prohibition.

George Studnicka, West Palm Beach, pro se.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Carol Cobourn Asbury, Asst. Atty. Gen., West Palm Beach, for respondent, James T. Carlisle.

PER CURIAM.

The petition for writ of prohibition is denied. Petitioners who are represented by counsel should file pleadings only through counsel. A defendant who has court-appointed counsel may not act as co-counsel as a matter of right. *Goode v. State*, 365 So.2d 381 (Fla.1978). Nonetheless, we have considered the petition for writ of prohibition on the merits, and deny the petition on each point raised. As to the issue of proper venue, our denial is without prejudice to address this issue in the trial court.

GLICKSTEIN, DELL and POLEN, JJ., concur.

COSCAN FLORIDA, INC., Appellant,

v.

EQUIVENTURE FLORIDA, a Florida partnership consisting of I.T.S. Corp., a Georgia corporation, and H–G Equity Corp., a Florida corporation, Appellee.

No. 89–2854.

District Court of Appeal of Florida, Third District.

Sept. 11, 1990.

Rehearing Denied Oct. 12, 1990.

Appeal was taken from judgment of the Circuit Court, Dade County, Sam I.

et from the DOC indicating all his convictions.

[1] To reach a fully informed sentencing decision, the trial court must have the benefit of an accurately prepared scoresheet. *Erickson v. State*, 565 So.2d 328, 336 (Fla. 4th DCA 1990). The rationale for requiring the trial court to have the benefit of an accurately prepared scoresheet is that it might have imposed a different sentence with a corrected scoresheet. *Id.* at 336; *Dawson v. State*, 532 So.2d 89, 90 (Fla. 4th DCA 1988). The state has the responsibility of providing a properly prepared guidelines scoresheet. *Sanders v. State*, 560 So.2d 298 (Fla. 1st DCA 1990). Good practice dictates providing the trial court the scoresheet in a timely manner so that the trial court has an opportunity to consider it and resolve any discrepancies, as the sentencing court has the ultimate responsibility of assuring that scoresheets are accurately prepared. When a discrepancy concerning the scoresheet is brought to the sentencing court's attention, the court should resolve the discrepancy and correct the scoresheet to reflect the accurate numbers. *Erickson*, 565 So.2d at 336. Although it is entitled to the opportunity to do so with deliberation, it cannot ignore a discrepancy because it was not brought to its attention in advance of the sentencing hearing date.

[2] However, the fact that a trial court does not correct the scoresheet after being apprised of the improper scoring alone is not necessarily reversible error when the trial court knew the correct recommended range. *Mitchell v. State*, 507 So.2d 686, 687 (Fla. 1st DCA 1987). In *Mitchell*, although the trial court did not correct a scoresheet with improper scoring, it knew the recommended range and gave written reasons for departure from the guidelines. *Id.* at 687.

[3] In the instant case, the trial court had both scoresheets in front of it and the recommended ranges differed. Comparing the scoresheet appended to the PSI report to the one submitted by the state shows discrepancies in two areas, scoring for prior record and for legal constraint at the time of the offense. The scoresheet which was used reflected a total of 352 points with a sentencing range of seventeen to twenty years. The trial court went one step below to sentence defendant to fifteen years to run concurrent with a violation of probation case that appellant was serving.

Thus, assuming the state's guideline sheet is accurate, appellee was sentenced outside the guideline range of twenty-seven to forty years on this scoresheet of 503 points, without written reasons for the downward departure, as required for a departure of more than one step. *Erickson* suggests that the trial court must resolve a discrepancy brought to its attention, and cannot disregard the discrepancy because it was not brought to the trial court's attention prior to the sentencing hearing and use an inaccurate scoresheet because it was received earlier. Accordingly, we vacate the sentence and remand for resentencing pursuant to the correct sentencing guideline scoresheet.

GLICKSTEIN, WARNER and GARRETT, JJ., concur.

Timothy HAWKINS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1503.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Barbara A. White, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Georgina Jimenez-Orosa, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

We dismiss this appeal on the authority of *Ross v. State*, 566 So.2d 356 (Fla. 4th DCA 1990).

HERSEY, C.J., and LETTS and GLICKSTEIN, JJ., concur.

Anthony M. THOMAS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1625.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Appeal from the Circuit Court for St. Lucie County; Marc A. Cianca, Judge.

Richard L. Jorandby, Public Defender and Joseph R. Chloupek, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Joan Fowler, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

We affirm appellant's convictions, but reverse and remand for resentencing so that the appellant can be physically present in the courtroom. *See Jacobs v. State*, 567 So.2d 16 (Fla. 4th DCA 1990).

WARNER and GARRETT, JJ., concur.

LETTS, J., concurs specially with opinion.

LETTS, Judge, specially concurring.

The majority has appropriately followed the dictates of *Jacobs* out of this very court and so must I. However, I find *Jacobs*, as written, unconvincing. We live in a Star-Trek era, in which "presence" is effected by electronic wizardry thought impossible fifteen-years-ago, short of ectoplasm. Under Florida Rules of Criminal Procedure 3.130(a) and 3.160(a), if being "present," in the discretion of the trial judge, can be accomplished by an "electronic audiovisual device" during arraignments and first appearances, I see no reason why the same cannot be extended to sentencing, with appropriate safeguards. It is true that a specific rules exception to Florida Rules of Criminal Procedure 3.180(a)(9) has not been promulgated as to sentencing, yet I see no reason why case law can not provide one if the facts and circumstances warrant it. In truth, the facts and circumstances, sub judice, do exactly that.

Jacobs grounds its conclusion requiring physical presence on the premise that such "is essential to permit the defendant to confer with his counsel privately and have the benefit of his advice." However, *Jacobs* does not tell us whether the defendant in that case was, in fact, *denied* private access to counsel for advice. In the case at bar, defense counsel not only did not object to the mere video presence of the defendant,[1] but the court specifically declared a recess so that defense counsel could privately advise and conference with his client, which the record clearly indicates he, in fact, did.

All this being so, if this particular case had preceded *Jacobs*, I would have voted to affirm it. As it is, since *Jacobs* has branded the method employed here "fatally and fundamentally flawed," I have no alternative but to concur.[2] However, I believe the Supreme Court of Florida may have tacitly agreed with me when it adopted *In re Rule 3.160(a) Florida Rules of Criminal Procedure*, 528 So.2d 1179 (Fla.1988). *See also*

1. Indeed, for aught we know, he may have implemented it.

2. I note that the trial judge conducted this sentencing hearing prior to the publication of Jacobs.

State v. Porter, 755 S.W.2d 3 (Mo.App. 1988).

STATE of Florida, Appellant,

v.

Jamie Lou WARD, Appellee.

No. 90–1682.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Appeal from the Circuit Court for Palm Beach County; Tom Johnson, Judge.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John M. Koenig, Jr., Asst. Atty. Gen., West Palm Beach, for appellant.

Mark R. Hanson of Brown, Olson & Hanson, P.A., West Palm Beach, for appellee.

PER CURIAM.

The defendant/appellee, Jamie Lou Ward, was charged with one count of sale of cocaine within 1000 feet of a school, a first degree felony.[1] Over the state's objection the trial judge accepted Ward's guilty plea to a lesser included offense of sale of cocaine, a second degree felony.

We reverse the conviction which was based upon Ward's guilty plea, on authority of *Cox v. State*, 412 So.2d 354 (Fla.1982) and Rule 3.170(g), Florida Rules of Criminal Procedure. It was necessary that the state consent to the plea to the lesser offense.

REVERSED and REMANDED for further consistent proceedings.

1. Section 893.13(1)(e), Fla.Stat. (1989).

HERSEY, C.J., LETTS, J., and WALDEN, JAMES H., (Retired) Associate Judge, concur.

Timothy B. DAY, Appellant,

v.

Mary L. DAY, Appellee.

No. 90–1786.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Appeal of a non-final order from the Circuit Court for Palm Beach County; John D. Wessel, Judge.

Peter Grable of William Lasley Law Offices, P.A., West Palm Beach, for appellant.

Kalman H. Gerb of Kalman H. Gerb, P.A., Lake Worth, for appellee.

PER CURIAM.

The trial court did not err in considering the former husband's disability benefits when determining that he did in fact have the ability to comply with both the previous judgments and orders of the court and the purge provision of the contempt order. *Mims v. Mims*, 442 So.2d 102 (Ala.Civ.App. 1983); *Riley v. Riley*, 82 Md.App. 400, 571 A.2d 1261, 1266, *cert. denied*, 320 Md. 222, 577 A.2d 50 (1990); *Christmas v. Christmas*, 787 P.2d 1267, 1268 (Okla.1990); *Murphy v. Murphy*, 302 Ark. 157, 787 S.W.2d 684, 685 (1990). Accordingly, we affirm.

HERSEY, C.J., and GLICKSTEIN and WARNER, JJ., concur.

James A. BONFIGLIO, Petitioner,

v.

Daniel HAMPTON, Respondent.

No. 90–1982.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Petition for writ of common law certiorari to the Circuit Court for Palm Beach County; Timothy P. Poulton, Judge.

James A. Bonfiglio of James A. Bonfiglio, P.A., Palm Beach, pro se.

Daniel Hampton, West Palm Beach, pro se.

PER CURIAM.

Petitioner James A. Bonfiglio, an attorney, seeks issuance of a writ of certiorari quashing a trial court order granting his former client's motion for return of documents, notwithstanding petitioner's retaining lien against the client file and documents in his possession. We grant the petition and quash the trial court order requiring return of the documents, and the order denying rehearing therefrom. *Smith v. Patton*, 562 So.2d 859 (Fla. 1st DCA 1990); *Dowda and Fields, P.A. v. Cobb*, 452 So.2d 1140 (Fla. 5th DCA 1984).

In doing so, we acknowledge that the underlying lawsuit from which the attorney's retaining lien arose has been settled. However, petitioner's lien remains to be resolved. Thus the controversy is not moot. *Hutchins v. Hutchins*, 522 So.2d 547 (Fla. 4th DCA 1988).

GLICKSTEIN, J., and WALDEN, JAMES H., (Retired), Associate Judge, concur.

GUNTHER, J., dissents without opinion.

John ARCARA, Petitioner,

v.

PHILIP M. WARREN, P.A., Respondent.

No. 90–3155.

District Court of Appeal of Florida, Fourth District.

Feb. 20, 1991.

Attorney sued former client fo recover fees. Thereafter the Circuit Court, Broward County, Geoffrey D. Cohen, J., granted attorney's motion to have former client's present attorney disqualified. Former client appealed. The District Court of Appeal held that disqualification of lawyers, who had completed matter started by attorneys and for which fee was claimed, could not be disqualified based on former attorney's statement that they would call attorney from present firm to testify.

Certiorari granted; order quashed.

1. Attorney and Client ⇐19

Disqualification of a party's chosen counsel is an extraordinary remedy that should be resorted to only sparingly.

2. Certiorari ⇐17

Certiorari will lie to quash an order improperly disqualifying counsel.

3. Certiorari ⇐22

Attorney's law firm which had represented client in later stages of tenant eviction suit could defend client in lawsuit brought by former attorneys connected with matter who were suing for their fees, even though former firm said they would call attorney from present firm as witness.

Teri L. Di Giulian of Esler & Kirschbaum, P.A., Fort Lauderdale, for petitioner.

Philip M. Warren, Pompano Beach, for respondent.

Harold WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 90-2431.

District Court of Appeal of Florida, Fourth District.

May 1, 1991.

Defendant was convicted in the Circuit Court, Indian River County, L.B. Vocelle, J., of burglary and grand theft, and defendant appealed. The District Court of Appeal held that: (1) the trial court erred in extending the term of probation after the sentencing hearing was completed, and (2) it was not error to sentence defendant when defendant was "present" by video means.

Reversed and remanded in part.

1. Criminal Law ⇐982.6(4)

Court erred in extending term of probation from five to twelve and one-half years after sentencing hearing was completed. West's F.S.A. RCrP Rule 3.800(a, b); U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐982.5(2)

When restitution is made condition of probation that defendant must perform, trial judge should have some indication that it would not be impossible for defendant to do so.

3. Criminal Law ⇐987

There was no error in sentencing defendant who was "present" by video means, as he specifically agreed in writing to procedure and thus waived any right to be "personally" present in court.

Richard L. Jorandby, Public Defender and Joseph Chloupek, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Don M. Rogers, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Appellant complains of errors in his sentencing on burglary and grand theft charges. We agree and reverse.

Appellant and the state jointly filed a Petition to Enter Plea of Guilty/Nolo Contendere which specifically provided:

> 12. I understand that both the entry of my plea and my sentencing may be done using an audio-visual device. This procedure will allow me to see the judge and hear all matters which are discussed in open court, and further, allow the judge to simultaneously see and hear me. I will have an opportunity to see and hear both my attorney, state attorney, and any witnesses that may come forth in these proceedings. I further understand that if my plea and/or sentencing are handled in this matter, a complete record of the proceedings will be made. I freely and voluntarily agree to the use of such audio-visual device for the taking of my plea and/or sentencing.

The sentencing hearing was held on July 23, 1990. Appellant was not physically present but was present by video.

The state and appellant were in dispute about the amount of restitution, and a hearing was set for August 27, 1990. Appellant agreed to waive his presence for this hearing. He was neither personally present nor present by video means. The victim testified as to her total loss as a result of the burglary and grand theft, and the trial court found the total restitution owed to the victim was $17,568.90. Appellant's counsel objected on the basis that appellant would not have the ability to pay this amount considering the information in the PSI of appellant's financial status. The trial court responded by orally ordering that the probation be extended from five years to twelve and a half years, to which appellant's counsel objected.

Appellant asserts that the trial court had no authority to extend appellant's probation period at the subsequent restitution hearing when sentence was already imposed at the earlier sentencing hearing. Appellant also asserts that the extension of his "sentence" of probation violates his double jeopardy rights. We agree.

[1] Under Florida Rule of Criminal Procedure 3.800(a) the court is permitted to correct an illegal sentence at any time. Under Rule 3.800(b) the revision of a legal sentence is allowed but only if it reduces the sentence. In *Cherry v. State*, 439 So.2d 998 (Fla. 4th DCA 1983), this court held that an increase in the sentence at a hearing held later in the day after adjournment of the original sentencing hearing was in contravention of this rule and also was expressly prohibited under the double jeopardy clause. *See also Tessier v. Moe*, 485 So.2d 46 (Fla. 4th DCA 1986); *Westover v. State*, 521 So.2d 344 (Fla. 2d DCA 1988). Based on the foregoing, the trial court erred in extending the term of probation from five to twelve and a half years after the sentencing hearing was completed. We remand for correction of the sentence.

[2] Finally, we also reverse the restitution award because there was absolutely no evidence presented on appellant's ability to pay the amount. When restitution is made a condition of probation that appellant must perform, the trial judge should have some indication that it would not be impossible for appellant to do so. *Peters v. State*, 555 So.2d 450 (Fla. 4th DCA 1990).

[3] With respect to the original sentencing hearing, we find no error in sentencing appellant where appellant was "present" by video means, since he specifically agreed in writing to the procedure and thus waived any right to be "personally" present in open court. We distinguish *Jacobs v. State*, 567 So.2d 16 (Fla. 4th DCA 1990), because in that case it does not appear that there was any written agreement to the video sentencing. In the instant case the appellant was present by video; saw, heard and was able to speak to the judge; and was able to speak privately with his attorney during the proceeding. He was afforded all of the constitutional protections to which he was entitled. Therefore, we find no fundamental error has occurred where "personal" presence was voluntarily waived.

We find no error in the remaining points raised.

Reverse and remand for resentencing consistent with this opinion.

LETTS, GUNTHER and WARNER, JJ., concur.

Tammy Jo MONROE, Appellant,

v.

STATE of Florida, Appellee.

No. 87-02855.

District Court of Appeal of Florida, Second District.

May 1, 1991.

Automobile driver was convicted on plea of nolo contendere in the Circuit Court, Polk County, Carolyn K. Fulmer, J., of possession of cannabis. Driver appealed. The District Court of Appeal, Campbell, Acting C.J., held that: (1) length of detention, at least one hour, prior to automobile passenger's signing of consent form to search vehicle's trunk, in addition to officers' coercive, threatening methods and passenger's lack of authority to consent to search, warranted conclusion that consent was not voluntary, and (2) officers lacked probable cause to search trunk of vehicle without consent.

Reversed and vacated.

1. Searches and Seizures ⇐181, 184

Length of detention, at least one hour, prior to automobile passenger's signing of consent form to search vehicle's trunk, in addition to officers' coercive, threatening methods and passenger's lack of authority to consent to search, warranted conclusion that consent was not voluntary; officers

STONE, J., concurs specially with opinion.

OWEN, WILLIAM C., Jr., Senior Judge, dissents with opinion.

STONE, Judge, concurring specially.

As Judge Owen's dissent correctly states, the trial court did not specify in writing that Appellee was a substance abuser amenable to rehabilitation. However, a court form entitled "court status," incorporated into the written sentencing documents, required Appellee to go into the "Straight" program (obviously for substance abusers), to provide a periodic urinalysis, and to attend Alcoholics and Narcotics Anonymous meetings. Another executed contemporaneous order mandated Appellee's placement in, and successful completion of, a residential treatment program that "meets" his "needs." The documents additionally included an order that Appellee be held in custody until a representative from the Straight program picked him up. Considering the totality of the circumstances, these writings are sufficient to permit the trial court to revisit the question of a downward departure.

I also note that our majority opinion does not comment on whether probation is a viable alternative sentence. That issue is not raised on this appeal.

OWEN, WILLIAM C., Jr., Senior Judge, dissenting:

From a reading of the transcripts of the several sentencing hearings of appellee, a thrice-convicted robber, one could fairly discern that a conscientious trial judge had reached the conclusion (even though never expressly articulated as a finding) appellee was a substance abuser amenable to rehabilitation. That would be a valid reason for a downward departure from the sentencing guidelines. *Herrin v. State*, 568 So.2d 920 (Fla.1990); *Barbera v. State*, 505 So.2d 413 (Fla.1987), *receded from on other grounds, Pope v. State*, 561 So.2d 554 (Fla.1990). But, even with the liberality allowed in *State v. Sally*, 601 So.2d 309 (Fla. 4th DCA 1992), I cannot find in the record anywhere, including the court status report referred to in the majority opinion, any writing signed by the court listing either that or any other reason for departure. A trial court's failure to comply with the requirements of Florida Rule of Criminal Procedure 3.701(d)(11) requires the sentence to be vacated, *State v. Jackson*, 478 So.2d 1054 (Fla.1985), *receded from on other grounds, Wilkerson v. State*, 513 So.2d 664 (Fla.1987), and upon remand the defendant must be re-sentenced with no possibility of departing from the guidelines. *Pope v. State*, 561 So.2d 554 (Fla.1990).

For the reasons stated, I dissent from the majority and would vacate the sentence with direction that upon remand appellee be sentenced within the guidelines. Whether the trial court's failure to comply with Rule. 3.701(d)(11) can be the basis of a claim of ineffective assistance of counsel should be determined if an when presented by an appropriate procedure and at the appropriate time and place, upon an evidentiary hearing if necessary, rather than summarily from the face of this record. If such a claim were to be filed, fairness would require that appellee's trial counsel be afforded an opportunity to respond.

I do agree with that part of the majority opinion which recognizes that Section 948.01(10), Florida Statutes (1991) precludes appellee being placed on community control. The area of disagreement here (as with this Court's recent opinion in *State v. Burgos*, cited by the majority) is the failure to make clear that upon re-sentencing neither community control nor probation is a viable alternative. If the Legislature would not allow one convicted of a forcible felony to be placed on community control if previously convicted of a forcible felony, it logically follows that it was most certainly the legislative intent that one convicted of a forcible felony not be placed on probation if previously convicted of a forcible felony. Thus, with community control and probation ruled out as alternatives, it seems to me that the 15 year sentence that the court imposed on Count I (and then suspended in favor of two years community control followed by three years probation) is proper.

James E. SCHIFFER, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1000.

District Court of Appeal of Florida, Fourth District.

April 14, 1993.

Following probation revocation hearing, the Circuit Court, St. Lucie County, L.B. Vocelle, J., sentenced defendant, and he appealed. The District Court of Appeal held that: (1) defendant was entitled to credit for full five years to which he was sentenced regardless of time actually incarcerated; (2) trial court was not required to provide written reasons for downward departure; and (3) defendant's participation by video/audio arrangement during probation revocation proceeding violated his right to counsel.

Reversed and remanded.

1. Criminal Law ⇐982.9(7)

For purposes of sentencing probation violator, probationer was entitled to credit for full five years to which he was sentenced regardless of time he was actually incarcerated where offense for which he was convicted occurred prior to effective date of statute under which probation violator forfeits gain time or commutation of time for good conduct up to date of release on probation. West's F.S.A. § 948.06(6).

2. Criminal Law ⇐1321(1)

Trial court was not required to give written reasons for its downward departure.

3. Criminal Law ⇐987

Defendant has right to be physically present at probation revocation hearing absent record evidence of waiver. West's F.S.A. RCrP Rule 3.180(a)(9).

4. Criminal Law ⇐982.9(2)

Probation revocation hearing in which defendant participated via video/audio arrangement violated defendant's right to counsel where defendant had no means by which he could confer privately with counsel. U.S.C.A. Const.Amend. 6.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James J. Carney, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Defendant was charged by information with dealing in stolen property between February 2, and February 4, 1988. He pled no contest and was sentenced to five years in the Department of Corrections, to be followed by six months probation. He violated his probation in October of 1989 by failing to pay costs, to report regularly to his probation officer, and by moving without his probation officer's consent. His probation was extended one year. In February of 1992 another violation of probation warrant was issued. Defendant was charged with a number of violations. The court held a probation revocation hearing which defendant participated in via video/audio arrangement. Several weeks later, the court held a sentencing hearing. Defendant also participated in this hearing via the video setup. The prosecutor advised the court as follows:

> He scores 27 to life, Judge, which is the next lowest possible permitted sentence under the guidelines in excess of the maximum possible sentence. So the court would be bound to give the 15 years.

The court sentenced the defendant to 15 years, with credit for 497 days.

[1] Defendant raises three issues on appeal. We reverse on all three. First of all, we agree that the trial court erred in limiting the credit received to 497 days. In this case, defendant, with credit for time served, had completed his original five-year sentence. Because the offense for which he was convicted occurred prior to the effective date of section 948.06(6), Florida Statutes, he is entitled to credit to the full

five years regardless of the time he was actually incarcerated. *Harrington v. State*, 609 So.2d 712 (Fla. 4th DCA 1992).

[2] We also agree with defendant's contention that the trial court erroneously believed it had to provide written reasons to justify a downward departure. We have recently held to the contrary. *State v. Hogan*, 611 So.2d 78 (Fla. 4th DCA 1992). Moreover, not only does the record demonstrate that the trial court believed that it had to provide written reasons to justify departure, but the record does not indicate that the trial court understood that the prior plea agreement provided the reasons to support departure. *See State v. Nickerson*, 541 So.2d 725 (Fla. 1st DCA 1989).

[3, 4] We also find error with the video/audio procedure employed in this case. Defendant has the right to be physically present at a probation revocation hearing. Rule 3.180(a)(9) Florida Rules of Criminal Procedure states "in all prosecutions for crime the defendant shall be present * * * at the pronouncement of judgment and the imposition of sentence." A probation revocation hearing constitutes a deferred sentencing proceeding. *Green v. State*, 463 So.2d 1139, 1140 (Fla.1985). We have, however, permitted the defendant to waive this right. *Williams v. State*, 578 So.2d 846 (Fla. 4th DCA 1991).

In *Williams*, the defendant was present at his sentencing hearing via a video/audio arrangement. We found no fundamental error with the proceedings in that the defendant had signed a written no contest plea specifically agreeing to a video sentencing and, because the defendant was afforded an opportunity to speak privately with his attorney during the proceeding. We distinguished *Williams* from *Jacobs v. State*, 567 So.2d 16 (Fla. 4th DCA 1990), a case where we found reversible error in a video sentencing procedure, by pointing out that the defendant in *Jacobs* did not sign a waiver agreement nor did the *Jacobs* defendant have private access to confer with his counsel.

This case is indistinguishable from *Jacobs*. The record does not indicate that defendant affirmatively waived his right to be physically present at the revocation proceeding. Moreover, defendant had no means by which he could confer privately with counsel. *See Seymour v. State*, 582 So.2d 127, 128 (Fla. 4th DCA 1991) ("It is of vital importance that a defendant have the opportunity to engage in personal and private conference with his counsel"). Defendant has a right to counsel at a probation revocation hearing. *State v. Hicks*, 478 So.2d 22 (Fla.1985). Without any procedure whereby defendant could communicate privately with his attorney, defendant's Sixth Amendment right to counsel was more than impaired, it was obliterated. *See Seymour*, 582 So.2d at 129. ("We can imagine no more fettered and ineffective consultation and communication between an accused and his lawyer than to do so by television in front of a crowded courtroom with the prosecutor and judge able to hear the exchange.").

We therefore reverse and remand. The defendant is entitled to be present at his probation revocation hearing absent record evidence of waiver. If the defendant's probation is revoked, at resentencing the trial court may consider the prior plea agreement as a basis to justify a downward departure from the guidelines sentence. In addition, the defendant must be given credit for the full five year term previously imposed.

REVERSE AND REMAND.

DELL, FARMER and KLEIN, JJ., concur.

Donald Richard HELD, Appellant,

v.

Esther L. HELD, Appellee.

No. 92-1496.

District Court of Appeal of Florida, Fourth District.

April 14, 1993.

Dissolution of marriage action was brought. The Circuit Court, Palm Beach County, John L. Phillips, J., dissolved marriage. Husband appealed. The District Court of Appeal, Polen, J., held that: (1) child support award of $400 per month was not an abuse of discretion, and (2) awarding wife child support "in advance" by sequestering husband's share of equity in marital home was not an abuse of discretion.

Affirmed.

1. Divorce ⇐308

Child support award of $400 per month was not an abuse of discretion, although husband was presently incarcerated for drug-related offense and earned no income where prior to conviction, husband earned approximately $40,000 per year from legitimate employment as boat builder and after incarceration he arranged to pay $100 per week in child support from undisclosed source.

2. Appeal and Error ⇐882(1)

Party cannot claim as error on appeal that which he invited or introduced below.

3. Divorce ⇐312.6(.5)

Husband could not raise on appeal of dissolution of marriage action claim that trial court lacked authority to award wife child support "in advance" by sequestering his share of equity in marital home where husband's attorney had suggested that option to court.

4. Parent and Child ⇐3.1(5)

Trial courts must look to all available assets in determining whether individual has ability to pay child support. West's F.S.A. §§ 61.13(1)(c), 61.30.

5. Divorce ⇐296

Awarding wife child support "in advance" by sequestering husband's share of equity in marital home was not an abuse of discretion. West's F.S.A. §§ 61.13(1)(c), 61.30.

6. Divorce ⇐252.3(3)

Distribution of checking account to wife was proper in dissolution of marriage action where wife opened account with her sole earnings, apparently after husband was arrested on drug charges, so that funds were never joint funds and were never commingled.

Gary S. Israel, Palm Beach, for appellant.

Martin L. Haines, III, of Martin L. Haines, III, Chartered, Lake Park, for appellee.

POLEN, Judge.

The former husband appeals from a final judgment of dissolution of marriage. We affirm.

[1] The former husband first contends that the trial court abused its discretion when it awarded the former wife child support in the amount of $400.00 per month, because he is presently incarcerated for a drug-related offense and earns no income.[1] The former wife answers that the husband's unemployment must be considered voluntary under subsection 61.30(2)(b), Florida Statutes (1991),[2] because he was well aware that he faced the possibility of incarceration if caught and convicted a second time. The record shows that prior to his conviction, the husband earned approximately $40,000 per year from his legitimate employment as a boat builder. We also note that after the husband's incarceration, he arranged to pay $100 per week in child support to the wife from an undisclosed source. Under the circumstances, we find no abuse of discretion in the trial court's award. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla.1980).

[2-5] The husband next complains that the trial court lacked the authority to award the wife child support "in advance" by sequestering his share of the equity in

1. This is the husband's second conviction for a drug offense, the first having been in 1981.

2. Subsection 61.30(2)(b) provides in pertinent part:

> Income shall be imputed to an unemployed or underemployed parent when such unemployment or underemployment is found to be voluntary on that parent's part....

case the only mention of such resources or needs came from the defendant, not in the form of evidence, but in the form of a question:

[I] would like to know how will I pay this fourteen thousand dollars? I'm incarcerated for ten years with habitual sentence....

Kirkland's response and question do not satisfy the statutory burden to show the court why he cannot pay the restitution.

The restitution order is affirmed.

AFFIRMED.

HARRIS, C.J., and W. SHARP, J., concur.

Ezra HENRY, Gloria Miller, and Jack Harris Dent, Appellant,

v.

STATE of Florida, Appellee.

Nos. 92-2861 thru 92-2863.

District Court of Appeal of Florida, Fifth District.

Dec. 30, 1993.

Rehearing Denied Jan. 21, 1994.

Defendants were convicted in the Circuit Court, Lake County, Mark J. Hill, J., of trafficking in cocaine. Defendants appealed. The District Court of Appeal, Cobb, J., held that: (1) it was harmless error for trial court to allow transcript of audio tape of defendants' conversation to be used by jury, but (2) trial court committed reversible error by failing to grant mistrial motion prompted by prosecutor's remark during closing argument which suggested, without any evidentiary basis, that defendants previously had been involved in drug trafficking.

Reversed and remanded for new trial.

1. Criminal Law ⇐444, 1169.1(10)

It was error for trial court to allow transcript of partially inaudible tape recording of defendant's conversation to be used by jury because transcript was not properly authenticated; given extensive deletion of disputed words and phrases, however, use of transcript, standing alone, did not constitute reversible error.

2. Criminal Law ⇐438.1

General rule regarding admissibility of partially inaudible tape recordings is that such recordings are admissible unless inaudible and unintelligible portions are so substantial as to deprive remainder of relevance.

3. Criminal Law ⇐444

Transcript of audio tape may be authenticated by one of two methods: person who prepared transcript could testify that he witnessed events recited in transcript and thus had personal knowledge that transcript was an accurate rendition of tape recording, or expert witness professionally skilled in understanding indistinguishable taped conversations could testify that transcript was accurate rendition of tape recording.

4. Criminal Law ⇐719(1), 1171.3

In prosecution of defendants for trafficking in cocaine, trial court committed reversible error by failing to grant mistrial motion prompted by prosecutor's remark during closing argument which suggested, without any evidentiary basis, that defendants previously had been involved in drug trafficking; state failed to sustain burden of proving beyond reasonable doubt that error complained of did not contribute to verdict.

5. Criminal Law ⇐1163(1)

Under harmless error test, state, as beneficiary of error, has burden to prove beyond reasonable doubt that error complained of did not contribute to verdict.

James B. Gibson, Public Defender, and Anne Moorman Reeves, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Anthony J. Golden, Asst. Atty. Gen., Daytona Beach, for appellee.

COBB, Judge.

The appellants, Ezra Henry, Gloria Miller and Jack Dent, were convicted of trafficking in cocaine as a result of being stopped on the Florida Turnpike for a non-functioning tag light. The lessor of the car, Henry, consented to a search by the arresting officers. As the defendants were waiting for the search to take place, an audio tape of their conversation was made. Five packages of cocaine were found beneath the hood of the vehicle.

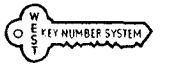
[1] At trial the state, over defense objection, submitted a transcript of the tape as an aid to the jury. The transcript was prepared by the sheriff's office, and represented the interpretation of the transcriber. The audibility of the tape can only be described as poor. The transcript was not entered into evidence, but the jury was permitted to use it during the trial.

[2, 3] The general rule regarding admissibility of partially inaudible tape recordings is that such recordings are admissible unless the inaudible and unintelligible portions are so substantial as to deprive the remainder of relevance. *Odom v. State*, 403 So.2d 936 (Fla.1981), *cert. denied*, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); *Harris v. State*, 619 So.2d 340 (Fla. 1st DCA 1993). In regard to admissibility of the transcript of the tape, the law of Florida requires authentication by one of two methods: (1) the person who prepared the transcript could testify that he witnessed the events recited in the transcript and thus had personal knowledge that the transcript was an accurate rendition of the tape-recording; or (2) an expert witness professionally skilled in understanding indistinguishable taped conversations could testify that the transcript was an accurate rendition of the tape-recording. *See Uliano v. State*, 536 So.2d 393 (Fla. 4th DCA 1989); *Golden v. State*, 429 So.2d 45 (Fla. 1st DCA), *rev. denied*, 431 So.2d 988 (Fla.1983); *Duggan v. State*, 189 So.2d 890 (Fla. 1st DCA 1966). Neither method was used in the instant case; hence it was error for the trial court to allow the transcript to be used by the jury. Given the extensive deletions of disputed words and phrases, however, the use of the transcript, standing alone, would not constitute reversible error. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[4, 5] The more egregious error was the trial court's failure to grant a mistrial motion prompted by the prosecutor's remark during closing argument which suggested, without any evidentiary basis, that the defendants previously had been involved in drug trafficking. In *DiGuilio*, the Florida Supreme Court adopted the harmless error test enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967): the state, as beneficiary of the error, has the burden to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *DiGuilio* at 1138. The state has not sustained that burden in respect to the prosecutor's comments suggesting that the defendants were repeat offenders. *See Finklea v. State*, 471 So.2d 596 (Fla. 1st DCA 1985).

REVERSED AND REMANDED FOR NEW TRIAL.

DAUKSCH and GRIFFIN, JJ., concur.



R.R., a child, Petitioner,

v.

Gary PORTESY, Acting Superintendent, Leon Regional Juvenile Detention Center, and Honorable Charles D. McClure, as Circuit Judge, Second Judicial Circuit, in and for Leon County, Florida, Respondents.

No. 93-2869.

District Court of Appeal of Florida, First District.

Jan. 3, 1994.

Juvenile sought writ of habeas corpus or mandamus, challenging detention order is-

sued following hearing at which he was permitted to participate only by way of video-telephone. The District Court of Appeal, Zehmer, C.J., held that there was no authority for court to hold detention hearing with juvenile's presence secured only by video-telephone.

Ordered accordingly.

1. Habeas Corpus ⇐826(3.1)

Where juvenile had been released from detention, petition for writ of habeas corpus or mandamus challenging validity of detention hearing at which juvenile's presence was by way of video-telephone was moot, but issues were of sufficient importance and frequent recurrence to warrant ruling on the legality of the procedure.

2. Infants ⇐68.3

There was no authority for court to hold detention hearing with juvenile's presence secured only by video-telephone; juvenile's physical presence was required in the absence of waiver or specific finding that juvenile's mental or physical condition precluded his presence. West's F.S.A. R.Juv.P.Rule 8.010.

3. Infants ⇐68.1, 203

Juvenile's physical presence is required at all hearings held under the juvenile rules, in the absence of waiver or specific finding that juvenile's mental or physical condition precluded his presence. West's F.S.A. R.Juv.P.Rule 8.010.

4. Infants ⇐68.1, 203

Waiver of juvenile's right to be present at any hearing under the juvenile rules must be made personally by the juvenile, not by counsel. West's F.S.A. R.Juv.P.Rule 8.010.

5. Courts ⇐78, 79

While courts must inevitably adapt to the use of new technology, significant changes in procedure should be subjected to the critical review accorded by Supreme Court's rule-making process or the legislative hearing process before the changes are adopted as law.

6. Constitutional Law ⇐268(6)

Any substitute procedure for accused's personal participation in hearing and right to confront witnesses must insure compliance with accused's due process rights. U.S.C.A. Const.Amend. 14.

7. Infants ⇐68.3

Juvenile's detention under detention order that ensued from hearing at which he was permitted to participate only by way of video-telephone was illegal and void. West's F.S.A. R.Juv.P.Rule 8.010.

Nancy Daniels, Public Defender, and Josephine Holland, Asst. Public Defender, Tallahassee, for petitioner.

Robert A. Butterworth, Atty. Gen., and Charlie McCoy, Asst. Atty. Gen., Tallahassee, for respondents.

ZEHMER, Chief Judge.

R.R., a juvenile, petitions for a writ of habeas corpus or mandamus, challenging the validity of the secure detention order issued by the respondent judge based on the circuit court's use of a procedure whereby petitioner's presence at the juvenile detention hearing was accomplished by video-telephone while he remained at a location remote from the judge and counsel. Because the procedure used in this case has not been authorized by rule or statute, we disapprove the use of audio-visual technology under these circumstances.

Petitioner was charged with arson of a dwelling and taken into custody by law enforcement authorities. Shortly after he was placed in the Leon Regional Juvenile Detention Center, a juvenile detention hearing was held in the judge's chambers at the Leon County Courthouse in Tallahassee. Present in chambers with the judge were an assistant public defender representing petitioner, an assistant state attorney prosecuting the case, and an HRS employee. R.R. remained at the juvenile detention center and was not physically present at the detention hearing held in the judge's chambers. R.R.'s communication with the court and his counsel was by video-telephone.[1] The Public Defender had previously objected to the use of this procedure in other juvenile cases, and the trial court confirmed that R.R. had a standing objection to the use of the video-telephone in lieu of being physically present. The trial judge overruled petitioner's objection, just as he had done in prior cases, and at the conclusion of the hearing ordered R.R. held in secure detention. R.R. has filed the instant petition to challenge the legality of this procedure and the ensuing detention order, asserting that he was unlawfully deprived of his right to be physically present at the detention hearing in the judge's chambers.

[1] While R.R. has been released from secure detention and the petition is now moot as to him, the issues presented are of sufficient importance and frequent recurrence to warrant our ruling on the legality of the procedure followed. As we stated in *C.L.B. v. Jones*, 381 So.2d 1178, 1179 (Fla. 1st DCA 1980):

> The issues involve the fundamental right to liberty and are subject to repetition, not only as to numerous other children who have been and will be incarcerated in similar circumstances, but also as to petitioner herself since she remains in the status of a child committed to the Department under Chapter 39, Fla.Stat. These issues involve the duties and authority of public officials in the administration of the law, yet they consistently evade review, because of the relatively short periods of incarceration prior to the disposition of juvenile cases. For these reasons we will review the merits of this petition. Compare *Walker v. Pendarvis*, 132 So.2d 186 (Fla.1961), and *Ervin v. Capital Weekly Post*, 97 So.2d 464 (Fla.1957).

R.R. contends that holding him in secure detention is illegal because he was not afforded the opportunity to be physically present at the detention hearing. Specifically, he points out that Florida Rule of Juvenile Procedure 8.100 requires his presence at the detention hearing and argues that it means that he be physically present before the judge with his counsel.[2] He relies by way of analogy on similar language in Florida Rule of Criminal Procedure 3.180 ("the defendant shall be present" at specified hearings) that has been construed to mean the defendant must be "physically present." *Schiffer v. State*, 617 So.2d 357 (Fla. 4th DCA 1993); *Seymour v. State*, 582 So.2d 127 (Fla. 4th DCA 1991); and *Jacobs v. State*, 567 So.2d 16 (Fla. 4th DCA 1990). R.R. argues that the video-telephone procedure used in this case did not satisfy the requirement of physical presence, and further notes that no rule or statute authorizes the procedure used in this case.

The state acknowledges that the procedure employed in this case is not authorized by any specific rule of court or statute; however, the state defends the procedure with the argument that public policy is being served by using the video-telephone device despite the absence of express authority in a rule or statute. The state cites *State v. Ford*, 626 So.2d 1338 (Fla.1993), as authority for the trial court to fashion and employ novel procedures to facilitate the disposition of cases so long as such procedures advance public policy and do not otherwise run afoul of existing law. The state argues that the procedure used in this case advances public policy, and

1. The record does not contain any detailed description of the equipment and how it was used (i.e., the size of the video screen, who or what was shown on the screen, or how much of the proceedings could be heard on the telephone).

2. Rule 8.100 provides in pertinent part:
> Unless otherwise provided, the following provisions apply to all hearings:
> (a) Presence of the Child. The child shall be present unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interests.
>
> (b) Absence of the Child. If the child is present at the beginning of a hearing and shall thereafter during the progress of the hearing voluntarily absent himself or herself from the presence of the court without leave of the court, or is removed from the presence of the court because of disruptive conduct during the hearing, the hearing shall not thereby be postponed or delayed, but shall proceed in all respects as if the child were present in court at all times.

that no law or rule, expressly or by implication, prohibits its use in these circumstances.

[2–4] We conclude that petitioner's arguments have merit and reject the state's argument on this issue. We construe rule 8.100(a) to mean that the accused child is required to be physically present at all hearings held under the juvenile rules, except when there has been a waiver of the right to be present[3] or the court makes specific findings regarding the child's physical or mental condition that precludes physical presence. Since neither of these exceptions occurred in this case, the video-telephone procedure failed to comply with the rule's requirements.

We reach this decision primarily by reference to the express language in rule 8.010.[4] The rule sets forth the requirements for a detention hearing and makes abundantly clear that an accused juvenile has the right to be present at the hearing and the right to consult with and be represented by counsel. The rule contemplates that evidence will be taken to enable the judge to determine the issues described in 8.010(f), and the accused juvenile is accorded the right to participate and challenge the evidence on which the state relies in its presentation. Thus, we believe that the rationale underlying the decisions in *Schiffer v. State*, 617 So.2d 357 (Fla. 4th DCA 1993), *Seymour v. State*, 582 So.2d 127 (Fla. 4th DCA 1991), and *Jacobs v. State*, 567 So.2d 16 (Fla. 4th DCA 1990) construing rule 3.180 to mean that a defendant's physical presence is required at a hearing, applies with equal force in deriving the meaning of rules 8.010 and 8.100. The matter to be determined in a rule 8.010 detention hearing is whether the accused juvenile will remain at liberty, while several of the hearings described in rule 3.180 involve far less serious matters. Illustrative of that rationale is the following discussion:

> Appellant was in jail at the time of sentencing. His attorney and the sentencing judge were in the courtroom. Communication was accomplished through closed-circuit television. Such an arrangement is not authorized by rule or statute and is consequently fatally and fundamentally flawed. Rule 3.180(a)(9), Florida Rules of Criminal Procedure, provides that a defendant shall be present at the pronouncement of judgment and the imposition of sentence. This is essential to permit the defendant to confer with his counsel privately and to have the benefit of his advice. Further, the rules specifically permit communication by way of audiovisual video camera at first appearances and at the arraignment stage of proceedings. Fla. R.Crim.P. 3.130(a) and 3.160(a). Failure to include sentencing as an exception to the "personally present" requirement cannot be deemed mere oversight.

Jacobs, 567 So.2d at 16, 17.

[5, 6] There has been no showing in this case that the video-telephone procedure allowed R.R. to confer with counsel in private during the hearing. Nor is there any rule or statute that authorizes the use of audio-visual technology as a substitute for the personal presence of the juvenile at the hearing. No order of the supreme court authorizing this procedure as a pilot project is even suggested to exist. Absent R.R.'s personal voluntary consent to the use of this technology as a substitute for his personal appearance at the hearing, the trial court should not have used the video-telephone without first seeking and obtaining an order from the supreme court that would authorize its use on a trial basis. While the courts must inevitably adapt to the use of new technology, significant changes in procedure should be subjected to the critical review accorded by the supreme court's rule-making process or the legislative hearing process before such changes are adopted as law. This is especially true when dispensing with the accused's presence at a hearing and the clear language of a rule requires such presence. Any substitute procedure for an accused's personal participation in a hearing and the right to confront witnesses must insure compliance with the accused's due process rights.

We decline to broadly read the supreme court's decision in *Ford* as authorizing the audio-visual procedure used in this case as a substitute for the accused's presence at the detention hearing. In *Ford*, the trial court allowed a child who witnessed a murder to present her testimony by videotape, relying on sections 92.53 and 92.54, Florida Statues (1989), as authority for doing so. Those sections authorize the use of videotape or closed circuit television for the presentation of a child's testimony in cases involving sexual abuse, child abuse, or sexual offenses against victims under the age of 16. Although finding the use of the videotape procedure in *Ford* was improper, the supreme court stated that "absent appropriate authority a trial court in a criminal case may employ a procedure if necessary to further an important public policy interest." *Id.* at 1340. In *Ford*, the public policy interest in protecting child witnesses from harm when giving testimony in certain situations was established by statutory enactments. Even though the statutes dealt specifically with child sexual abuse cases, the court approved the use of similar protection in a murder case based on a showing that the child witness would suffer harm if compelled to testify in the direct presence of the defendant in the courtroom.

In *Ford* a clearly defined public policy to protect young witnesses from harm when testifying in the presence of the accused was firmly established by legislative enactments, and procedural safeguards were included in the statutes to insure against the deprivation of the accused's constitutional rights. The unique circumstances of that case provided an opportunity to apply that clearly defined public policy to achieve the same result in a murder case rather than a sexual battery or child abuse case. Nothing of the sort has occurred in the case now before us. Here, there were no detailed procedures outlined and followed to insure that the juvenile was being accorded his constitutional right to counsel and the right to personally participate in the evidentiary hearing. Moreover, the use of the video-telephone in this case was not a single instance of an attempt to avert potential harm to a participant at the hearing; rather, it was being uniformly used in all juvenile cases in this circuit court even though no compelling public interest was explicated and shown to be served by it. Indeed, if avoidance of the transfer of the accused juvenile to the Leon County Courthouse in order to attend the hearing was the underlying reason for using this procedure, there was no showing that the detention hearing could not just as well have been held at the juvenile detention center.

By this decision we do not intend to offer any view on the feasibility of using such technology to improve the efficiency of the court system. Nor do we intend to discourage the investigation and use of innovative techniques that can enhance the efficiency of court procedure. We only hold that the use of video-telephones for juvenile detention hearings is a substantial change in policy which should not be made sua sponte by a trial court, but should be developed and approved through the rule-making authority of the Florida Supreme Court or through the legislative process. In contrast to the circumstances in *Ford*, no such policy concerning juvenile defendants has been developed by the Florida Legislature or the Supreme Court.

3. Such waiver must be made personally by the accused, not by counsel for the accused. *See R.D.M. v. State*, 626 So.2d 1088 (Fla. 1st DCA 1993).

4. Rule 8.010 sets forth the requirements for a detention hearing and provides in part:

> (a) When required. No detention order provided for in rule 8.013 shall be entered without a hearing at which all parties shall have an opportunity to be heard on the necessity for the child's being held in detention, unless the court finds that the parent or custodian cannot be located, or that the child's mental or physical condition is such that a court appearance is not in the child's best interest.
>
> * * * * * *
>
> (c) Advice of Rights. At the detention hearing the persons present shall be advised of the purpose of the hearing and the child shall be advised of:
>
> (1) the nature of the charge for which he or she was taken into custody;
>
> (2) the right to be represented by counsel and if insolvent the right to appointed counsel;
>
> (3) that the child is not required to say anything and that anything said may be used against him or her;
>
> (4) if the child's parent, custodian, or counsel is not present, that he or she has a right to communicate with them and that, if necessary, reasonable means will be provided to do so; and
>
> (5) the reason continued detention is requested.

[7] To summarize, the use of the video-telephone in these circumstances was contrary to the requirements of existing rules, and was not authorized by any statute, rule or order of the supreme court. For these reasons, petitioner's detention under the detention order that ensued from the hearing at which R.R. was only permitted to participate via video-telephone was illegal and void. As petitioner R.R. has already been released from detention, however, the petition for habeas corpus or mandamus is now moot and must be denied.

Currently, at least 30 petitions similar to R.R.'s petition raising the identical issue are now pending in this court. Our opinion and decision in this case is controlling on the disposition of those cases, and they will be disposed of by unpublished order. In the cases where the petitioner has already been released from detention, relief will be denied as moot. In the cases where petitioner remains under detention pursuant to an order entered without petitioner having been accorded the right to be physically present at the detention hearing, the detention order will be vacated as illegally obtained with directions that the petitioner be given a new detention hearing or be released immediately if such hearing is not provided forthwith.

BOOTH and JOANOS, JJ., concur.

HILTON HOTELS CORPORATION, a Delaware corporation, Appellant,

v.

EMPLOYERS INSURANCE OF WAUSAU, Appellee.

No. 93-240.

District Court of Appeal of Florida, Third District.

Jan. 4, 1994.

Tenant's employee brought action against landlord to recover for slip and fall in landlord's lobby. Landlord filed third-party claim to obtain indemnity from tenant's general liability insurer. The Circuit Court, Dade County, Rosemary Usher Jones, J., entered summary judgment in favor of insurer. Landlord appealed. The District Court of Appeal, Levy, J., held that tenant's policy did not provide coverage to landlord for slip and fall in landlord's lobby.

Affirmed.

Insurance ⇐435(3)

Employee's slip and fall that occurred in lobby of employer's landlord and on way to work did not arise out of tenant's use of gift shop, and, thus, landlord was not "insured" under tenant's general liability policy.

George, Hartz, Lundeen, Flagg & Fulmer and Esther E. Galicia, Coral Gables, for appellant.

Conroy, Simberg & Lewis and Hinda Klein, Hollywood, for appellee.

Before HUBBART,[1] NESBITT, and LEVY, JJ.

LEVY, Judge.

An insured defendant in a slip-and-fall case appeals an adverse summary judgment on a third-party claim against an insurer for indemnity. Because we agree with the trial court's conclusion that the accident here is not covered by the policy, we affirm.

Margaret Burns slipped and fell in the lobby of the Miami Airport Hilton. Burns was an employee of W.H. Smith Hotel Services, and was on her way to work at the W.H. Smith gift shop located inside the Hilton. W.H. Smith leased its store premises from Hilton. Pursuant to the lease, W.H. Smith obtained general liability insurance coverage from Employers Insurance of Wausau. The policy named Hilton as an additional insured, "but only with respect to liability arising out of the ownership, maintenance, or use of" the W.H. Smith gift shop.

1. Judge Hubbart did not participate in oral argument.

Burns filed suit against Hilton, and Hilton filed a third-party claim against Wausau Insurance seeking indemnity under the policy. The facts were undisputed in the trial court, and each party moved for summary judgment. The trial court entered summary judgment for Wausau Insurance, finding that there was no coverage because Burns' accident did not arise out of the ownership, maintenance, or use of the leased premises. Hilton now appeals, and we must decide whether, under the terms of the policy, this accident arose out of the ownership, maintenance, or use of the gift shop premises.

"We are mindful that 'arising out of' is not synonymous with the words 'caused by,' but is given a broader meaning in determining whether coverage applies." *O'Dwyer v. Manchester Ins. Co.*, 303 So.2d 347, 348 (Fla. 3d DCA 1974). However, the level of causal connection implied by the 'arising out of' language is something less than proximate causation. *O'Dwyer*, 303 So.2d at 348 (interpreting 'arising out of' in context of automobile insurance). "The words 'arising out of' ... have been said to mean 'originating from', 'having its origin in', 'growing out of' or 'flowing from', or in short, 'incident to' or 'having connection with'...." *St. Paul Fire & Marine Ins. Co. v. Thomas*, 273 So.2d 117, 120 (Fla. 4th DCA) (interpreting "arising out of" in context of homeowner's insurance), *cert. denied*, 282 So.2d 638 (Fla.1973). *See also Race v. Nationwide Mut. Fire Ins. Co.*, 542 So.2d 347 (Fla.1989) (interpreting "arising out of" in context of U.M. automobile insurance); *Hernandez v. Protective Casualty Ins. Co.*, 473 So.2d 1241 (Fla.1985) (interpreting "arising out of" in context of P.I.P. automobile insurance). It is with these principles in mind that we undertake the fact sensitive analysis necessary to decide this case.

We reject Hilton's contention that this accident arose out of the use of the W.H. Smith premises. First, and most importantly, this accident did not physically occur on the premises which were covered by the policy, i.e. the gift shop. Rather, it occurred some undetermined distance from the gift shop.[2] *See Totten v. Underwriters at Lloyd's London Subscribing Certificate E.B. 4102*, 176 Cal.App.2d 440, 1 Cal.Rptr. 520 (1959) (horse accident which occurred away from insured horse stable not covered); *United States Fire Ins. Co. v. Schnackenberg*, 88 Ill.2d 1, 57 Ill.Dec. 840, 429 N.E.2d 1203 (1981) (bicycle accident two and a half blocks from insured premises not covered); *Rensselaer Polytechnic Inst. v. Zurich American Ins. Co.*, 176 A.D.2d 1156, 575 N.Y.S.2d 598 (1991) (slip-and-fall on sidewalk leading from insured premises not covered). Second, there was no physical connection between the accident and the premises. The accident was not a result of any physical condition which emanated from the premises, such as flowing liquid, an escaped animal, or a runaway vehicle. *See generally* E.T. Tsai, Annotation, *Premises Liability Insurance: Coverage of Injury Sustained On or In Connection With Sidewalks or Ways Adjacent to Certain Named Property*, 23 A.L.R.3d 1230 (1969). The only way that this accident was even remotely related to the gift shop, was due to the pure coincidence that the injured party was a W.H. Smith employee on her way to work. We deem this isolated connection insufficient to bring this accident within the coverage of the policy. *See Rensselaer Polytechnic Inst.*, 575 N.Y.S.2d at 598-99.

The summary judgment rendered below is affirmed.

Bobby BARCLAY, Appellant,

v.

The STATE of Florida, Appellee.

No. 92-2540.

District Court of Appeal of Florida, Third District.

Jan. 4, 1994.

Rehearing Denied Jan. 26, 1994.

An Appeal from the Circuit Court for Dade County; Leonard E. Glick, Judge.

2. Counsel for both sides admitted at oral argument that there were no findings of fact regarding the exact distance of the accident from the gift shop.

HERRING: He put, I think it was his right, his right hand up, and I shot him. But it was by mistake, I didn't mean to shoot him.

WHITE: Where did you shoot him at that time, Ted?

HERRING: In the head.

WHITE: Did you shoot him again?

HERRING: Yeah. Yes, I did, out of fear I did.

WHITE: Did you shoot him once he was down on the ground?

HERRING: Yeah, when he hit the ground I shot him.

WHITE: Where did you shoot him that time?

HERRING: In the head.

WHITE: What did you use?

HERRING: .22 snubnose.

WHITE: Okay. Before I go any further with this, has, has anyone threatened or coerced you to make these statements to us?

HERRING: No, they haven't.

WHITE: You made them of your own free will and volition?

HERRING: My own free will.

After Herring had been taken into custody and signed the *Miranda* rights waiver, but while he was still in the county jail, Herring spoke to a probation officer. During the penalty phase, over defense counsel's objection, the probation officer testified that she talked with Herring regarding "the murder of one Dale Hoeltzel at 205 South Ridgewood, Daytona Beach, Florida." She stated, "[Herring] indicated to me that the young man got what he deserved due to the fact that, him trying to play hero. And that it was just one less cracker."

Controlling case law establishes that a warning and waiver of rights given following the arrest for a criminal offense is sufficient to cover any later statements to a law enforcement officer concerning other criminal offenses. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). There is no necessity to continually readvise an individual in custody as to his or her *Miranda* rights, particularly when the place of custody is the same and the time periods are not remote. *Shriner v. Wainwright*, 715 F.2d 1452 (11th Cir.1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984); *United States ex rel. Henne v. Fike*, 563 F.2d 809 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072, 98 S.Ct. 1257, 55 L.Ed.2d 776 (1978); *Biddy v. Diamond*, 516 F.2d 118 (5th Cir.1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *Maguire v. United States*, 396 F.2d 327 (9th Cir.1968), *cert. denied*, 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792 (1969); *Deluca v. State*, 384 So.2d 212 (Fla. 4th DCA 1980). It is not disputed that the probation officer talked to Herring concerning the homicide only after Herring had been taken into custody, *Miranda* warnings had been given, and Herring had executed a waiver of his rights. We find the statement was clearly admissible and, consequently, appellate counsel was not deficient in failing to raise this issue.

Cold and Calculating as an Aggravating Circumstance

[2] Basically, Herring claims appellate counsel was ineffective for failing, on direct appeal, to convince more justices on this Court that cold and calculating was an inappropriate aggravating circumstance. Under the standard expressed in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the test for determining whether counsel rendered ineffective assistance is as follows: "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. Neither of these requirements has been established in the record. We note that appellate counsel did convince Justice Ehrlich, as reflected in the dissent, although Justice Ehrlich still concluded the death sentence was appropriate. Since our decision in *Herring*, this Court, in *Rogers v. State*, 511 So.2d 526 (Fla.1987), adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). We find that counsel's performance is not deficient simply for failing to convince enough members of this Court on direct appeal that the cold, calculating aggravating circumstance did not apply. Correspondingly, we conclude there was no ineffective assistance of counsel on the initial appeal. In view of this finding, we need not address whether *Rogers* applies retroactively.

For the reasons expressed, we deny the habeas corpus writ and affirm Herring's conviction and sentence.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

Cite as 528 So.2d 1179 (Fla. 1988)

Constitutional Law ⇐268(6)
Criminal Law ⇐636(3)

Due process did not require the personal presence of defendant in a courtroom before a judge for arraignment when, through a mechanical means, he could see the judge and the judge could see him through audiovisual transmission; thus, both felony and misdemeanor arraignments could be done either personally in open court or by audiovisual device at the discretion of the court. West's F.S.A. RCrP Rule 3.160(a).

In re RULE 3.160(a), FLORIDA RULES OF CRIMINAL PROCEDURE.

No. 72670.

Supreme Court of Florida.

July 14, 1988.

An emergency request was filed by the chief judge of a circuit to amend a rule of criminal procedure to permit all felony as well as misdemeanor arraignments to be done either personally in open court or by audiovisual device at the discretion of the court. The Supreme Court held that due process did not require the personal presence of a defendant in a courtroom before a judge when, through mechanical means, he could see the judge and the judge could see him.

Petition granted.

Clarence T. Johnson, Jr., Chief Judge, Eighteenth Judicial Circuit, Rockledge, Gerald T. Wetherington, Chief Judge, Eleventh Judicial Circuit, Miami, and William C. Gridley, Chief Judge, Ninth Judicial Circuit, Orlando, for petitioners.

PER CURIAM.

We have been presented an emergency request by the chief judge of the 18th Circuit, joined in by the chief judges of the 9th and 11th Circuits, to amend rule 3.160(a), Florida Rules of Criminal Procedure, to permit all felony as well as misdemeanor arraignments to be done either personally in open court or by audiovisual device at the discretion of the court. Because some circuits are doing this by administrative order and because the procedure affects many arraignments, we have accepted the petition as an emergency.

After reviewing the application, the Court finds that it should be granted. Present rule 3.130 permits first appearances "in person or by audio device." When the technology is available, audiovisual arraignments, as well as appearances, can save time and expense, provide safety, minimize the need for additional court personnel, and still fully and accurately protect defendants' rights.

The word "arraign" means to call a prisoner to the bar of the court to answer the matters charged upon him in an indictment. *Ex Parte Jeffcoat*, 109 Fla. 207, 146 So. 827 (1933). The purpose of an arraignment is

to identify the accused and give him an opportunity to plead and to inform him of the nature of the accusation against him. *Ex Parte Livingston*, 116 Fla. 640, 156 So. 612 (1934); *Moore v. State*, 44 Fla. 146, 32 So. 795 (1902). We are satisfied that due process does not require the personal presence of a defendant in a courtroom before a judge when, through mechanical means, he can see the judge and the judge can see him.

As the population grows, with the attendant multiple places of confinement and courthouses, the use of audiovisual transmissions can enhance the efficiency of the courts. Care must be taken to fully protect all the constitutional rights of an accused. This rule change, however, does not adversely affect any such right.

Accordingly, we grant the petition. Rule 3.160(a), Florida Rules of Criminal Procedure, is amended to read:

> (a) Nature of Arraignment. The arraignment shall be conducted in open court ~~personally, or in misdemeanor cases, either personally~~ or by audiovisual device in the discretion of the court and shall consist of the clerk or prosecuting attorney reading the indictment or information upon which the defendant will be tried to the defendant or stating orally to him the substances of the charge or charges and calling upon him to plead thereto. Such reading or statement as to the charge or charges may be waived by the defendant. If the defendant is represented by counsel, his counsel may file a written plea of not guilty at or before arraignment and thereupon arraignment shall be deemed waived.

This amendment will be effective immediately upon the filing of this opinion.

It is so ordered.

NO MOTION FOR REHEARING WILL BE ALLOWED.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

Supreme Court of Florida.

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Arnold v. Howard	71993	6/3/88	Rev. den.	1st DCA 519 So.2d 679
Ashley v. Ocean Roc Motel, Inc.	72056	6/3/88	Rev. den.	3d DCA 518 So.2d 943
Auer v. Wade	72267	5/20/88	Hab.Corp. den.	
Behar v. Southeast Bank Trust Co., N.A.	72455	5/24/88	Rev. dism.	3d DCA 523 So.2d 1144
Belcher v. Ferrara	71989	5/27/88	Rev. den.	3d DCA 517 So.2d 47
Brighton v. Brighton	71970	6/1/88	Rev. den.	4th DCA 517 So.2d 53
Broida v. District Court of Appeal, Third Dist.	72152	6/15/88	Mand. den.	3d DCA 519 So.2d 994
Bush v. State	72115	6/3/88	Rev. den.	1st DCA 519 So.2d 1014
City of Port Orange v. Florida Min. and Materials Corp.	71924	5/13/88	Rev. den.	5th DCA 518 So.2d 311
Coral Gables Federal Sav. & Loan Ass'n v. City of Opa Locka	71917	5/27/88	Rev. den.	3d DCA 516 So.2d 989
C.P., In Interest of	72284	6/7/88	Cause dism.	
Daughtry v. State	72118	6/3/88	Rev. den.	2d DCA 521 So.2d 208
Department of Ins. v. American Ins. Ass'n	72061	6/3/88	Rev. den.	1st DCA 518 So.2d 1342
Edwards v. Dugger	72099	6/1/88	Hab.Corp. den.	
Elson v. Vargas	72179	5/18/88	Rev. den.	3d DCA 520 So.2d 76
Ewen v. State	72119	5/13/88	Rev. den.	4th DCA 518 So.2d 1285
Fedders USA, Inc. v. Appliance & Refrigeration Distributors, Inc.	72057	6/6/88	Rev. den.	3d DCA 518 So.2d 1384
Ferrara v. Belcher	71976	5/27/88	Rev. den.	3d DCA 517 So.2d 47
Fidelity and Cas. Ins. Co. of New York v. Taylor	71855	5/13/88	Rev. den.	3d DCA 525 So.2d 908
Foshee v. Ross Oil Corp.	71733	6/6/88	Rev. den.	5th DCA 517 So.2d 713
Frazier v. State	71994	5/13/88	Rev. den.	5th DCA
Gilman v. U.S. Fidelity and Guar. Co.	71964	6/1/88	Rev. den.	1st DCA 517 So.2d 97

* Date of decision or date rehearing denied (if requested).
** Court or agency rendering decision appealed and citation (if reported).

5. Have the courts in your state handed down decisions related to the use of video technology to provide arrestees/offenders access to court proceedings?

XX Yes

____ No

____ Case is/cases are currently pending

6. Which of the following best describes the outcome of cases relating to the use of video technology for court proceedings?

XX Decisions have supported justice agencies in the use of video technology.

____ Decisions have prohibited or deterred the use of video technology.

____ Decisions have defined the ability of parties to a case to prohibit the use of video technology for matters relating to that case.

7. Please briefly describe the major points of court decisions in your state that relate to the use of video technology. Attach a copy or a summary of the decision(s) if desired.

State v. Porter, 109 ID 967 Ct. App. 1985

Defendant became disruptive and verbally abusive during closing statements. Subsequently deffendant was removed, placed in a room where he could view the proceeding via closed circuit T.V.

Idaho Court Rule 43.1 allows for use of electronic audio visual devicesin misdemeanor of felony cases for first or subsequent appearance, bail hearing, arraignment and plea.

Response prepared by:

Name Doug Graves

Title: Protocol Coordinator

Agency: Idaho Office of the Attorney General

Address: P.O. Box 83720

City/State/ZIP: Boise, ID 83720-0010

Phone: (208) 334-4543

FAX: (208) 334-2942

Part 2: Litigation Related to the Use of Video Linkage

5. Have the courts in your state handed down decisions related to the use of video technology to provide arrestees/offenders access to court proceedings?

___✓___ Yes

_____ No

_____ Case is/cases are currently pending

6. Which of the following best describes the outcome of cases relating to the use of video technology for court proceedings?

___✓___ Decisions have supported justice agencies in the use of video technology.

_____ Decisions have prohibited or deterred the use of video technology.

_____ Decisions have defined the ability of parties to a case to prohibit the use of video technology for matters relating to that case.

7. Please briefly describe the major points of court decisions in your state that relate to the use of video technology. Attach a copy or a summary of the decision(s) if desired.

Guinan v. State, 769 SW2d 427 (Mo banc 1989), cert denied 493 U.S. 900 (1989)

American Inmate Paralegal Assn - Cline, 859 F.2d 59 (8th Cir 1988), cert denied sub nom. Tyler v. Cline 488 U.S. 996 (1988)

Response prepared by:

Name John M Morris
Title: Chief Counsel, Criminal Div
Agency: Missouri AG
Address: PO Box 899
City/State/ZIP: Jefferson City, Mo 65109
Phone: (314) 751-4129
FAX: 751-5391

Part 2: Litigation Related to the Use of Video Linkage

5. Have the courts in your state handed down decisions related to the use of video technology to provide arrestees/offenders access to court proceedings?

__X__ Yes

_____ No

_____ Case is/cases are currently pending

6. Which of the following best describes the outcome of cases relating to the use of video technology for court proceedings?

__X__ Decisions have supported justice agencies in the use of video technology.

_____ Decisions have prohibited or deterred the use of video technology.

_____ Decisions have defined the ability of parties to a case to prohibit the use of video technology for matters relating to that case.

7. Please briefly describe the major points of court decisions in your state that relate to the use of video technology. Attach a copy or a summary of the decision(s) if desired.

Only one unreported decision has addressed the issue. It upheld the use of closed-circuit T.V. between court and jail for purposes of initial appearance only. The court rejected arguments that this procedure violated the defendant's right to be present in court and right to a public proceeding. The court also held that it had the power to institute such a procedure under local court rules. For more specific information, contact John Redden, Deputy First Assistant Prosecutor, Essex County Prosecutor's Office (Phone 201-621-4665; FAX 201-242-4901)

Response prepared by:

Name: Boris Moczula

Title: Deputy Attorney General

Agency: Division of Criminal Justice

Address: Hughes Justice Complex, CN 085

City/State/ZIP: Trenton, New Jersey 08625

Phone: 609-984-6374

FAX: 609-984-4496

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

CITY OF BELLBROOK :

Plaintiff-Appellee :

vs. : CASE NO. 90 CA 127

SHERIDAN P. ARMEY :

Defendant-Appellant :

.....

O P I N I O N

Rendered on the 9th day of July, 1992

.....

STEPHEN K. HALLER, Bellbrook City Prosecutor, 330 N. Detroit Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

THOMAS L. WHITESIDE, 333 West First Street, Suite 236, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

WILSON, J.

Sheridan P. Armey was stopped for speeding during the early morning hours of September 10, 1990. He was arrested and jailed

for the traffic offense as well as two other misdemeanors, driving while under suspension and liquor consumption in a motor vehicle.

It is undisputed that the defendant was arraigned a few hours after his arrest via closed circuit T.V. by an acting judge of the Xenia Municipal Court. He entered guilty pleas to all three petty offenses and was fined a total of $625 and was sentenced to serve ninety days in jail. The defendant was in jail during his arraignment and made no objection to the proceedings. However, he was not represented by counsel.

The defendant has appealed form his convictions of September 10, 1990. There is one assignment of error.

> THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT PROCEEDED TO ACCEPT THE PLEA OF DEFENDANT AND TO SENTENCE THE DEFENDANT TO A TERM OF INCARCERATION BUT PROHIBITED THE DEFENDANT FROM MAKING A PERSONAL APPEARANCE BEFORE THE COURT.

The primary issue raised by the assignment of error is whether the trial court committed prejudicial error by arraigning the defendant via closed circuit T.V.

Crim. R. 43(A) provides that "the defendant shall be present at the arraignment." The same "be present" requirement appears in Traf. R. 8(C) and Crim. R. 10(B). Crim. R. 10(A) requires the arraignment to be conducted in open court. Traf. R. 12 also provides that "the pleas of guilty and no contest shall be received only by personal appearance of the defendant in open court" except that the plea of guilty may be received by a traffic violation bureau in some traffic cases.

The appellant has cited no cases prohibiting electronic arraignments, and we have found none.

Crim. R. 1(B) provides:

> These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

Applying this rule of construction, it is our view that the arraignment proceedings in the petty offenses before us satisfied the "open court" and "be present" requirements of the Ohio Rules.

We affirm.

BROGAN, J., and GRADY, J., concur.

Copies mailed to:

Stephen K. Haller
Thomas L. Whiteside