

# CARES Act And The Future Of Remote Criminal Proceedings

By **Steven Gordon** (April 7, 2020)

Recently, a California mother pled guilty in the so-called Varsity Blues college admissions case and agreed to be sentenced via videoconference by the federal court in Boston rather than travel to the court or postpone the proceeding.

This attracted considerable attention because sentencings conducted by videoconference have heretofore been a rare occurrence. But, given the new reality that the coronavirus pandemic has imposed on the country and the legal system, this case was viewed as "a high profile example of courts adapting on the fly to an unprecedented situation."<sup>[1]</sup>



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The use of video teleconferencing in criminal proceedings may now become more common as a result of a provision inserted in the Coronavirus Aid, Relief, and Economic Security Act, or CARES, Act, enacted on March 27.

Section 15002 of the act provides for conducting certain federal criminal proceedings via video teleconferencing (or telephone conferencing if video teleconferencing is not reasonably available) if two preconditions are satisfied:

1. The Judicial Conference of the United States finds that emergency conditions due to the pandemic have and will materially affect the functioning of federal courts; and
2. The chief judge of the federal district court then authorizes the use of video teleconferencing.

The Judicial Conference has already made the requisite finding, and district courts across the country are quickly authorizing the use of video teleconferencing.

## The CARES Act Provisions

The CARES Act provides for the use of video teleconferencing for a variety of pretrial and post-conviction proceedings:

- Detention hearings;
- Initial appearances;
- Preliminary hearings;
- Waivers of indictment;
- Arraignments;
- Probation and supervised release revocation proceedings;
- Pretrial release revocation proceedings; and
- Appearances based on failing to appear in another district or for violating conditions of release set in another district.

More significantly, the act authorizes video teleconferencing for guilty pleas and sentencings in both misdemeanor and felony cases. There is a general authorization to utilize video teleconferencing in misdemeanor cases. For felony cases, the district judge in a particular case must find for specific reasons that the plea or sentencing in that case cannot be further

delayed without serious harm to the interests of justice.

In no case, however, can video teleconferencing be used for any of these proceedings without the consent of the defendant, after consultation with counsel. The act's authorization of video teleconferencing is an emergency provision and will terminate upon the end of the pandemic emergency.

The impact of this new authority is difficult to predict. As discussed below, in large measure it replicates existing law and the changes it makes are relatively modest, although they may prove important.

### **The Existing Law Governing Video Teleconferencing in Criminal Proceedings**

Under the Constitution, nontrial proceedings do not demand all of the protections provided during criminal trials. For example, post-conviction proceedings such as "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."<sup>[2]</sup>

Similarly, a pretrial arraignment is not required by the Fifth Amendment, and the confrontation clause is not implicated in that proceeding because there are no witnesses.<sup>[3]</sup>

Moreover, the Constitution does not explicitly grant a criminal defendant the right to be present at a criminal proceeding beyond the right to confront a witness:

[T]he Supreme Court has interpreted the Fifth and Fourteenth Amendments ... as providing a due process right to be present at a trial proceeding in which the defendant is not actually confronting witnesses. This right attaches to any stage of a criminal proceeding that is critical to its outcome and continues to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only.<sup>[4]</sup>

Thus, courts have ruled, for instance, that defendants do have a constitutional right to be present at sentencing.<sup>[5]</sup>

The Constitution has thus been less of an obstacle to conducting nontrial criminal proceedings by video teleconference than have applicable statutes and the Federal Rules of Criminal Procedure, which provide that the defendant has a right to appear at proceedings.

For example, the U.S. Court of Appeals for the Sixth Circuit rejected the use of videoconferencing for federal parole determination proceedings, reasoning that "[t]he statute unambiguously required an in-person parole proceeding when Congress enacted it in 1976 [and] Congress never acted to change the statute to allow videoconferencing."<sup>[6]</sup>

Similarly, the U.S. Court of Appeals for the Seventh Circuit ruled that a judge's participation in the defendant's supervised release revocation hearing via videoconference violated Federal Rule of Criminal Procedure 32.1, which grants the defendant an opportunity to appear, present evidence, question any adverse witness and to make a statement and present any information in mitigation.

The court opined that "the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link."<sup>[7]</sup>

Federal Rule of Criminal Procedure 43 governs the circumstances under which a criminal

defendant must be present in the courtroom. The rule states that the defendant must be present at the initial appearance, the initial arraignment, the plea, every trial stage and sentencing. Rules 5(f) and 10(c) provide that video teleconferencing may be used to conduct an initial appearance or an arraignment if the defendant consents.

Rule 43 was amended in 2011 to permit videoconference pleas for misdemeanor offenses, with the defendant's written consent. But it makes no provision for videoconference pleas for felony offenses, nor does it provide for videoconference sentencing proceedings.

The Seventh Circuit recently held that "the plain language of Rule 43 requires all parties to be present for a defendant's [felony] plea and that a defendant cannot consent to a plea via videoconference."<sup>[8]</sup> Finally, a number of circuits have held that the rule prevents a district court from conducting a sentencing hearing by videoconference.<sup>[9]</sup>

### **The Implications of the New CARES Act Provisions**

The principal change effected by the CARES Act is to authorize video teleconferencing for felony pleas and for all sentencings. This is a useful option with no evident downside since it also requires the consent of the defendant. Indeed, it is disappointing that Congress did not make this change permanent, although that may happen at the end of the trial run provided by the current emergency.

A more controversial issue is whether the use of video teleconferencing should be authorized for certain proceedings, excluding pleas and sentencings, even if the defendant does not consent. A video teleconference is in actuality not fully equivalent to personal attendance. The courts have recognized "the unique benefits of physical presence."<sup>[10]</sup>

But, for some of these proceedings, it is debatable whether the benefits of physical presence justify the attendant expenditure of resources and time commitments necessary to assemble all of the participants in the same room. This is a judgment call to be made by the Congress.

The judgments in favor of physical presence that are embodied in extant statutes and criminal rules were often made before the advent and widespread adoption of video teleconferencing technology. It may be time to revisit those judgments, apart from the present emergency, in light of the development of technology and its role in modern life.

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[1] Chris Villani, "Rare 'Varsity Blues' Video Sentence Carries Risks for Defense," Law 360 (March 30, 2020), <https://www.law360.com/articles/1257966/rare-varsity-blues-video-sentence-carries-risks-for-defense>.

[2] *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

[3] *Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1276, 1279 (9th

Cir. 1990).

[4] Zak Hillman, "Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally 'Present' when Pleading Guilty by Video Teleconference," 7 J. High Tech. L. 41 (2007) (emphasis in the original; citations omitted).

[5] See U.S. v. Williams [🔴](#), 641 F.3d 758, 764 (6th Cir. 2011).

[6] Terrell v. U.S. [🔴](#), 564 F.3d 442, 454-55 (6th Cir. 2009).

[7] U.S. v. Thompson [🔴](#), 599 F.3d 595, 600 (7th Cir. 2010) (emphasis in the original).

[8] U.S. v. Bethea [🔴](#), 888 F.3d 864, 867 (7th Cir. 2018).

[9] See U.S. v. Williams, 641 F.3d at 764.

[10] U.S. v. Bethea, 888 F.3d at 867.