STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP002273-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON ANTHONY SOTO,

Defendant-Appellant.

On Certification of the Appeal From the Judgment of Conviction Entered in the Trempealeau County Circuit Court, the Honorable Thomas E. Lister, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

STATUTES CITED

ISSUE PRESENTED

Is Mr. Soto entitled to withdraw his guilty plea because the court conducted the plea colloquy, and accepted his felony guilty plea, via video teleconferencing, in violation of Wis. Stats. §§ 885.60(2)(a) and 971.04(1)?

The circuit court answered: no.

The court of appeals certified this question to this Court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This court's granting of the petition for review indicates that the case is sufficiently important to warrant both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment of conviction entered in Trempealeau County, the Honorable Thomas E. Lister, presiding.

Mr. Soto was charged with one count of stalking resulting in bodily harm, one count of false imprisonment, two counts of aggravated battery and one count of second degree reckless endangerment. (1:1-3). The charges arose out of the State's allegation that, on April 13, 2009, Mr. Soto stabbed his girlfriend, DMK, outside of her home. (1:3-5). After a preliminary hearing, the State filed an information adding one charge of first degree sexual assault and one

charge of attempted first degree sexual assault, both as a repeater. (9). Those charges arose from a domestic incident involving DMK, which purportedly occurred on February 15, 2009. (9).

A plea hearing took place on July 8, 2009. The presiding judge conducted the hearing from the Jackson County Courthouse, located in Black River Falls, Wisconsin. (63:1). However, Mr. Soto—along with defense counsel and the State's attorney—appeared at the Trempealeau County Courthouse, located in Whitehall, Wisconsin. (63:1). Communication between the two locations occurred via video teleconferencing. (63:1). Although the view of the Jackson County Courthouse permitted the parties to see the presiding judge, the parties could not see whether other individuals, including a court reporter, were present. (63:4).

During the hearing, the court conducted a plea colloquy and accepted Mr. Soto's guilty plea to one count of second degree recklessly endangerment with a dangerous weapon enhancer. (63:5-21). Pursuant to the plea agreement, the court dismissed and read in both counts of aggravated battery. (63:21). All remaining counts were dismissed outright. (63:21).

At a later hearing, the court sentenced Mr. Soto to fifteen years of imprisonment, consisting of ten years initial confinement and five years of extended supervision. (59:30). Mr. Soto subsequently filed a timely postconviction motion in the circuit court. (38). Among other issues, Mr. Soto argued that his statutory right to be physically present at the plea hearing, pursuant to Wis. Stat. § 971.04(1), was violated by the court's decision to conduct that hearing from a courthouse other than the one at which the parties appeared. (38:2-5).

The court issued oral findings, concluding that plea withdrawal was not warranted. (65:3-6; App. 104-107).

Mr. Soto renewed his request for plea withdrawal in the Court of Appeals, which certified the appeal to this Court. (Certification of May 17, 2011; App. 109-113). This Court accepted certification on June 15, 2011. (Order of June 15, 2011; App. 114-115).

ARGUMENT

I. Mr. Soto Is Entitled to Withdraw His Guilty Plea because the Court Conducted the Plea Colloquy and Accepted His Felony Guilty Plea via Video Teleconferencing, in Violation of Wis. Stats §§ 885.60(2)(a) and 971.04(1).

A. Summary of the argument and standard of review.

This Court's interpretation of Wisconsin Statutes §§ 886.60 and 971.04 is a question of law which this court reviews independently, without deference to the lower court. ***State v. Sweat***, 208 Wis. 2d 409, 414-15, 516 N.W. 2d 695 (1997).

This Court has adopted rules, set forth in Wisconsin Statutes §§ 885.50-64, which govern the quality and uses of video technology in courtrooms—including the circumstances in which a defendant's physical presence is required. Those rules require, among other things, that a defendant "is entitled to be physically present in the courtroom at all critical stages of the proceedings, including

. . . plea hearings at which a plea of guilty or no contest, or an admission, will be offered . . ." Wis. Stat. § 885.60(2)(a). [1]

A defendant has a separate but complimentary right to be physically present under Wisconsin Statute § 971.04(1). That statute mandates that the defendant "shall be present" at specific enumerated proceeding, including any hearing at which evidence is offered or judgment is pronounced. Wis. Stat. § 971.04(1). Because a plea hearing is a proceeding at which both evidence is offered (in the form of the defendant's admissions) and judgment is pronounced (in the court's finding of guilt), the defendant's physical presence is required under § 971.04(1). The right to be physically present under § 971.04(1) is one which cannot be waived. ***State v. Koopmans***, 210 Wis. 2d 670, 672, 679, 563 N.W.2d 528 (1997).

B. A plea hearing is a proceeding at which a defendant must be physically present.

Wisconsin Statute § 885.60 sets forth clear limitations on the uses of videoconferencing technology in criminal proceedings. Subject to rules of notice and objections by either party, § 885.60 permits its use "in any pre-trial; trial or fact-finding; or post-trial proceeding." Wis. Stat. § 885.60(1), 2(b)-(d). However, it carves out a distinct exception:

> Except as may otherwise be provided by law, a defendant in a criminal case . . . is entitled to be physically present in the courtroom at all critical stages

[1] On July 1, 2011, legislative revisions to Chapter 885 concerning the use of videoconferencing technology went into affect. Pursuant to these amendments, the defendant's presence will no longer be mandatory at certain critical stages, including the plea hearing. Because these revisions do not apply retroactively, they are not at issue in this case.

> of the proceedings, including evidentiary hearings; trials or fact-finding hearings; plea hearings at which a plea of guilty or no contest, or an admission, will be offered; and sentencing or dispositional hearings.

Wis. Stat. § 885.60(2)(b). The rule is straightforward: the use videoconferencing technology, while generally accepted, is not a substitute for a defendant's physical presence at the enumerated proceedings—including the plea hearing.

Criminal defendants have an additional, independent statutory right to be present under Wisconsin Statute § 971.04(1). That statute provides that a defendant "shall be present" at the following: arraignment, trial, voir dire of the trial jury, any hearing at which evidence is presented, any view by the jury, any hearing at which judgment is pronounced, the imposition of sentence, and at any other proceeding when ordered by the court. Wis. Stat. § 971.04(1). The statute provides for limited exceptions, applicable only to misdemeanor cases, pronouncement of postconviction relief, and to defendants who voluntarily absent themselves from trial without leave of the court. Wis. Stat. § 971.04(2) and (3). Those exceptions are not applicable here.

The Wisconsin Supreme Court has clarified that the statutory right to be present under § 971.04 refers to the right to be "physically" present in the courtroom. ***State v. Vennemann***, 180 Wis. 2d 81, 93, 508 N.W. 2d 404 (1993) (holding that the defendant's telephonic presence was insufficient). *See also* ***State v. Peters***, 2000 WI App 154, ¶ 7, 237 Wis. 2d 741, 615 N.W.2d 655 (***Peters I***), *rev'd on other grounds by* 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797 (***Peters II***) (holding that the defendant's presence at the plea hearing via video teleconferencing was insufficient). Furthermore, numerous jurisdictions, including Wisconsin, have indicated that the right to be physically present

encompasses the right to be at the same location as the judge. *See* ***State v. Cook***, 2002 WI App. 56, ¶ 19, 251 Wis. 2d 482, 640 N.W.2d 566 ("We will assume without deciding that [the defendant] could not, as a matter of law, waive his right under § 971.04(1)(g) to be in the physical presence of the judge at sentencing").[2] Accordingly, although a defendant may be physically present in a courtroom, that presence does not satisfy the mandate of § 971.04(1) mandate if the judge appears from a separate location.

A defendant's physical presence at the plea hearing is required under § 971.04(1)(d) and (g). Specifically, a plea hearing is a proceeding at which both evidence is offered (in the form of the defendant's admissions) and judgment is pronounced (in the court's finding of guilt). *See* Wis. Stat. § 971.08 *and* ***State v. Hoppe***, 2009 WI 41, ¶ 18, 317 Wis. 2d 16, 765 N.W.2d 794 (each addressing the evidence a court must collect at the plea hearing prior to adjudging a defendant guilty). In ***Boykin v. Alabama***, 395 U.S. 238, 242 n. 4 (1969), the United States Supreme Court agreed, holding that a guilty plea "supplies both evidence and verdict, ending controversy." The State does not contest this point.

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[2] *See also* ***Fogel v. Kenox Hill Hospital***, 512 N.Y.S. 2d 109 (N.W. App. Div. 1st Dept. 1987) (noting "disapproval of the practice employed by the court in delivering [the] charge to the jury by means of a tape-recording device"); ***United States v. Torres-Palma***, 290 F.3d 1244, 1248 (10th Cir. 2002) (holding that the judge's decision to conduct the sentencing hearing via videoconferencing from another jurisdiction was improper); ***United States v. Lawrence***, 248 F.3d 300, 303-304 (4th Cir. 2001) ("presence" means "the state of being before, in front of, or in the same place" as the presiding judge); ***United States v. Navarro***, 169 F.3d 228, 235-239 (5th Cir. 1999) (the "common-sense understanding . . . is that a person must be in the same place as others in order to be present"); ***United States v. Wright***, 342 F. Supp. 2d 1068, 1069 (M.D. Ala. 2004) ("the term 'present' means physical presence in the same location as the judge").

In this case, the circuit court conducted Mr. Soto's plea hearing and accepted his felony guilty plea via video teleconferencing. (63:1). Although Mr. Soto was present with trial counsel at the Trempealeau County Courthouse, the presiding judge appeared from the Jackson County Courthouse. (63:1). Furthermore, none of the exceptions identified in § 971.04(2)-(3) were applicable. Accordingly, Mr. Soto's right to be physically present under both §§ 885.60(2)(a) and 971.04(1) was violated.

In rejecting Mr. Soto's request for postconviction relief, the circuit court relied heavily ***Peters I.*** In that case, the Wisconsin Court of Appeals specifically held that a defendant's appearance at a plea hearing via video teleconferencing violates § 971.04(1). 237 Wis. 2d 741, ¶ 7. However, because the defendant's claim involved a collateral attack on an earlier conviction, rather than a direct appeal from that conviction, the statutory violation under § 971.04(1) was not sufficient to entitle the defendant to relief. Rather, under the standard applicable at the time of ***Peters I***, the defendant was additionally required to "establish a *constitutional* violation that affect[ed] [the conviction's] reliability." Id. ¶ 6, citing ***State v. Baker***, 169 Wis. 2d 49, 485 N.W. 2d 237 (1992) (emphasis added). Therefore, despite finding a violation under § 971.04(1), the court of appeals denied relief on the basis that the defendant's constitutional claim was lacking. Id. ¶ 8-13.

The circuit court distinguished ***Peters I*** from the facts of this case. In doing so, however, the court failed to separate the statutory and constitutional analyses contained therein. The court's discussion is as follows:

> I found the arguments raised in support of the motion to be unconvincing because the Peters case actually endorsed the use of VTC and places the burden on

> Mr. Soto and his counsel to establish how the method used by the Court in this instance denies him – denied him a fair and just hearing or was in any way coercive or violative of due process. The court in Peters recognized that the use of VTC is widespread and is an acceptable means of conducting the commercial business of the world, affairs between nations, political debates, the process of education and of communicating artistic achievement. Video and audio systems, the court said, have also been increasingly used and replied upon to conduct a variety of court proceedings.
>
> Citing a Florida case, the court noted that an audio/video hookup may well be a legal equivalent of physical presence.
>
> The Court is well aware of the VTC standards where judges are required to satisfy themselves that the defendant is virtually present for the proceeding, and I find that the proceeding I conducted in Mr. Soto's case was such a hearing. He was virtually present. I cannot imagine any different outcome that could have resulted by my being present the same place that Mr. Soto and his counsel were. Peters and Vennemann spoke to situations where the defendant in the Peters case was in jail and was connected to the jail. He didn't have a lawyer and both plea and sentencing were conducted fairly and were not violative of Mr. Peters' rights. In the Vennemann case, that was a postconviction evidentiary hearing where, first of all, counsel had repeatedly requested that the court allow Mr. Vennemann to be present, had been denied that opportunity. Mr. Vennemann was forced to participate by a bad telephone connection in an evidentiary hearing where events were being discussed in which Mr. Vennemann had participated. That's a far cry from what occurred in this case.

(65:4-6; App. 105-107)

The court misstates the holding in ***Peters I*** in several significant ways. First, although it is true that ***Peters I*** recognized the growing efficacy of videoconferencing technology, it also held that "the closed-circuit television procedure violate[s] statutory criminal procedure." 237 Wis. 2d 741, ¶ 1. It additionally noted that those jurisdictions which rely heavily on videoconferencing technology require defendants to explicitly waive their right to be present—something which, as discussed below, did not occur in this case. Id. ¶ 7 n. 8.

Second, in finding that ***Peters I*** required Mr. Soto to establish that his appearance via video teleconferencing "denied him a fair and just hearing or was in any way coercive or violative of his due process," the court applied a constitutional, rather than statutory, analysis. (65:4-5; App. 105-106). *See also* 237 Wis. 2d 741, ¶ 8, *quoting* ***May v. State***, 97 Wis. 2d 175, 186, 293 N.W.2d 478 (1980) ("the presence of a defendant is required as a constitutional condition of due process to the extent that a fair and just hearing would be thwarted by his absence"). Although preserving the constitutional claim for appeal, Mr. Soto did not specifically argue it in his postconviction motion and does not renew the claim here. Furthermore, unlike the defendant in ***Peters I***, Mr. Soto pursued a direct appeal, rather than a collateral attack, thereby relieving him of any duty to establish a constitutional violation. Accordingly, the court's reliance on the constitutional language of ***Peters I***—and failure to discuss the alternative statutory language—was improper.

Third, although it is true that the defendant in ***Peters I*** appeared from jail and was not represented by counsel, the court in ***Peters I*** concluded that a violation of § 971.04(1) had occurred without reliance on those facts. Rather, the sole fact

that the defendant appeared by video, regardless of his location or *pro se* status, was sufficient to establish a violation. Thus, as clarified by ***Peters I***, § 971.04(1) establishes a bright-line rule requiring criminal defendants to be physically present. The fact that Mr. Soto appeared in a courtroom, but not the same courtroom where the judge—acting as the court—appeared, does not satisfy this rule.

Finally, the language of § 971.04 is notably inconsistent with the court's application of ***Peters I***. Specifically, § 971.04 does not permit a court to deviate from the required procedures so long as the defendant is represented by counsel, or the judge can view the defendant on a monitor, or the judge finds that the alterative procedure is "fair." Indeed, holding that such exceptions are permitted, notwithstanding the clear language of § 971.04, would create a slippery slope that would eventually abrogate a defendant's statutory right to be present—even at the trial stage.

C. Mr. Soto did not waive or forfeit his right to be physically present at his plea hearing.

This Court has held that a defendant may not waive or forfeit his statutory right to be physically present under § 971.04(1). ***Koopmans***, 210 Wis. 2d at 672, 679. Indeed, the State admits as much. (State's COA Br. at 5, citing 210 Wis. 2d at 679). Therefore, neither waiver nor forfeiture is at issue in this appeal.

Nonetheless, in its certification, the court of appeals pointed to the State's argument that the adoption of § 885.60 supersedes the holding in ***Koopmans*** and asked this Court to provide clarification. (Certification of May 17, 2011; App. 109-113). However, the State's strained interpretation of § 885.60 is incorrect.

In essence, the State argues that § 885.60(2)(d) places an affirmative duty on the defendant to object to his own presence via video teleconferencing. (State's COA Br. at 5). That Subsection provides: "If an objection is made by the defendant or respondent in a matter listed in sub. (1), the court shall sustain the objection." However, this Court has disagreed with the State's interpretation. As noted in its own comments to § 885.60, Subsection (2)(d) applies only to objections to witness testimony via videoconferencing, rather than to unlawful attempts to hold proceedings outside of the defendant's physical presence. *See* Wis. Stat. § 885.50 ("Comment, 2008"). Accordingly, § 885.60(2)(d) does not place an affirmative duty on a defendant to object to his own virtual presence.

Even if waiver were permitted, it would first require the sort of formal colloquy contemplated by ***State v. Ndina*** to satisfy the court that Mr. Soto made an "intentional relinquishment or abandonment of a known right." 2009 WI 21, ¶ 29, 31, 315 Wis. 2d 653, 761 N.W.2d 612 (holding that certain fundamental rights may only be waived "personally and expressly"). *See also* ***Peters I***, 237 Wis. 2d 741, ¶ 7 (finding that the court erred by accepting the defendant's plea via video teleconferencing where the defendant "did not explicitly waive his right to be physically present"). Here, the court's discussion regarding Mr. Soto's alleged waiver was minimal at best:

> THE COURT: All right. [Defense counsel], are you satisfied at this plea hearing by video teleconferencing?
>
> COUNSEL: Yes, Your Honor.
>
> THE COURT: And, Mr. Soto, is it all right with you that we are doing this plea hearing by video teleconferencing?

MR. SOTO: Yes, sir.

(63:3). The court did not inform Mr. Soto that he had a right to be physically present, and in his postconviction motion, Mr. Soto affirmatively alleged that he did not know that he had such a right. (38:5). The parties agreed that, if there was court error, then the State could be entitled to a hearing. (40:6; 41:5). At such a hearing, the State would bear the burden of proving that any waiver had been knowing and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 270-72, 389 N.W.2d 12 (1986). The circuit court did not hold a hearing regarding waiver; therefore, to the extent that its oral decision on the postconviction motion suggested a finding of waiver, such finding was clearly erroneous.

D. The violation of Mr. Soto's right to be physically present at his plea hearing was not harmless.

In assessing whether the violation of Mr. Soto's right to be physically present was harmless, the circuit court made the following remarks:

> First, the plea hearing for Mr. Soto was set up in such a way that Mr. Soto, together with his attorney, were present in the Trempealeau County Circuit Courtroom with the district attorney's office represented. The Court was present in the Jackson County Circuit Courtroom. VTC was utilized from my end. I could clearly see Mr. Soto, [defense counsel] and the district attorney's representative all—all at the same time. The connection for Jackson and Trempealeau affords a view from the bench which includes both the prosecutor's table and defense counsel table. Similarly, Mr. Soto and his counsel were able to see me clearly. I was able to hear everything that occurred in Trempealeau County clearly and there was never an indication at any time that they could not clearly see or hear me. Thereafter I conducted

> a careful plea colloquy with Mr. Soto. I advised him repeatedly that he could take time to discuss matters with his counsel, and there was never an indication from [defense counsel] or Mr. Soto that he did not understand what was occurring or that somehow he felt that the Court needed to be physically present in the same courtroom.

(65:3-4; App. 104-105).

The court's remarks are misguided for several reasons. First, and as discussed above, the fact that the parties and the presiding judge appeared in separate locations—albeit courtrooms—is a plain violation of § 971.04(1) and therefore cannot factor into the harmlessness analysis.

Second, although it is true that the view of the Jackson County Courthouse permitted Mr. Soto to see the presiding judge, the record demonstrates that Mr. Soto could not see whether other individuals, including a court reporter, were present. (63:4). As suggested by former Supreme Court Chief Justice Earl Warren, a view of the entire courtroom, rather than just the major players, is central to the concept of "justice":

> [T]he courtroom . . . is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself and important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process.

Estes v. Texas, 381 U.S. 532 (1965) (Warren, C.J., concurring, joined by Douglas and Goldberg, JJ.). Without a complete view of the courtroom, the constitutional conception of the proceeding is diminished, and the defendant must necessarily rely on the presiding judge's own word as to

activities beyond the camera's range. Accordingly, that Mr. Soto was not afforded a complete view of the Jackson County Courtroom should have factored into the court's analysis.

Third, the court greatly emphasized the fact that Mr. Soto neither turned to counsel to ask questions nor indicated he was unable to hear any part of the proceeding. While these omissions may be relevant to the harmlessness inquiry, they must be interpreted in light of the unique technological circumstances. As a general rule, a defendant may be reluctant to interject out of fear that any interruption will be perceived as disrespectful to the court. Individuals who appear on camera or believe they are being recorded are unknowingly often more self-conscious of their appearance and demeanor, which can distract them from the proceedings and increase their reluctance to interject. Defendants who are unable to effectively hear the transmissions may remain silent on the assumption that their attorney can hear more clearly. A defendant may also believe that nothing can be done to improve poor sound quality, rendering any objection meaningless. Similarly, defendants who wish to ask counsel a question during the proceedings may be hesitant to do so, out of fear that any conversations would not remain confidential. Indeed, the record in this case indicates that Mr. Soto was never given any assurances that if he did wish to ask a question, the Court would have some ability to mute the ensuing discussion.

Fourth, certain harms are inherent in the limitations of videoconferencing technology, the effects of which are impossible for the court to adequately assess. Signal transmission latency, blurred and shaky images, screen size, and camera position can all impact the court's ability to notice and interpret subtle clues regarding a defendant's

comfort with his plea; his understanding of the applicable crimes and punishments; his overall intelligence, alertness, and comprehension of the proceeding; and whether any strain has developing in the defendant's relationship with his attorney. For example, an angled camera may give the impression of eye contact avoidance, and the slightest delay in signal transmission can make a defendant appear disinterested or slow to respond. A camera which affords a view of the entire courtroom may not pick up small details in body language or facial expressions, whereas a zoom feature would necessarily hinder the ability to view an entire space at once. The absence of true human interaction may create a sense of detachment and depersonalization, which can diminish the defendant's ability to understand the formality of the proceedings and the seriousness of its consequences.

In this case, the court concluded that it, Mr. Soto and defense counsel had seen and heard everything clearly. (65:4; App. 105). However, it is impossible for each to know whether anything was missed. Similarly, the decision to use videoconferencing technology placed Mr. Soto's defense counsel in the difficult position of having to choose whether to be present with Mr. Soto in one location, or with the judge in another. There is simply no way to determine whether a different choice by defense counsel or the parties' physical presence in the same location as the judge would have rendered a different outcome. Where, as here, a reviewing court lacks adequate tools to asses the presence and extent of the harm, justice should air on the side of caution by permitting Mr. Soto to withdraw his guilty plea.

CONCLUSION

For the reasons stated in this brief, Mr. Soto respectfully requests that this court vacate the judgment of conviction and remand the case to the circuit court with instructions to permit Mr. Soto to withdraw his guilty plea and to set this case for trial.

Dated this 14th day of July, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,138 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of July, 2011.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of July, 2011.

Signed:

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encompasses the right to be at the same location as the judge. *See* ***Laasch v. State,*** 84 Wis. 2d 587, 590, 267 N.W.2d 278 (1978) ("The jurisdiction of a court over the person of an accused depends upon the physical presence of the accused before the judge").[4] Accordingly, although a defendant may be physically present in a courtroom, that presence does not satisfy the mandate of § 971.04(1) mandate if the judge appears from a separate location.

A defendant's physical presence at the plea hearing is required under § 971.04(1)(d) and (g). Specifically, a plea hearing is a proceeding at which both evidence is offered (in the form of the defendant's admissions) and judgment is pronounced (in the court's finding of guilt). *See* Wis. Stat. § 971.08 *and* ***State v. Hoppe***, 2009 WI 41, ¶ 18, 317 Wis. 2d 16, 765 N.W.2d 794 (each addressing the evidence a court must collect at the plea hearing prior to adjudging a defendant guilty). In ***Boykin v. Alabama***, 395 U.S. 238, 242 n. 4 (1969), the United States Supreme Court agreed, holding that a guilty plea "supplies both evidence and verdict, ending controversy." The State does not contest this point.

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[4] *See also* ***Fogel v. Kenox Hill Hospital***, 512 N.Y.S. 2d 109 (N.W. App. Div. 1st Dept. 1987) (noting "disapproval of the practice employed by the court in delivering [the] charge to the jury by means of a tape-recording device"); ***United States v. Torres-Palma***, 290 F.3d 1244, 1248 (10th Cir. 2002) (holding that the judge's decision to conduct the sentencing hearing via videoconferencing from another jurisdiction was improper); ***United States v. Lawrence***, 248 F.3d 300, 303-304 (4th Cir. 2001) ("presence" means "the state of being before, in front of, or in the same place" as the presiding judge); ***United States v. Navarro***, 169 F.3d 228, 235-239 (5th Cir. 1999) (the "common-sense understanding . . . is that a person must be in the same place as others in order to be present"); ***United States v. Wright***, 342 F. Supp. 2d 1068, 1069 (M.D. Ala. 2004) ("the term 'present' means physical presence in the same location as the judge").

APPENDIX

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State of Wisconsin vs. Jon Anthony Soto

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Date of Birth: 04-25-1961

Case No.: 2009CF000028

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
5	[968.075(1)(a) Domestic Abuse Incident] [939.63(1)(b) Use Dangerous Weapon (Felony 5 Yrs)] Second Degree Reckless Endangerment, Use of Dangerous Weapon, Domestic Abuse	941.30(2)	Guilty	Felony G	04-13-2009		07-08-2009

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
5	11-12-2009	State Prison	10 YR 0 MO	Wisconsin State Prison	Consecutive to sentence now serving. Not eligible for risk reduction sentence.

Total Bifurcated Sentence Time

Confinement Period					Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
5	10	0	0		5	0	0	15	0	0

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	20.00		15,116.88	8.00	85.00		

Ct.	Condition	Agency/Program	Comments
5	Restitution		Restitution shall be paid while in confinement and while on extended supervision. Department of Corrections shall deduct 25% of prison funds to apply to restitution. The ambulance bill shall also be added to the total restitution amount when received barring any objections.
5	Prohibitions		No use or possession of alcohol or controlled substance. No bars or taverns. No association with drug dealers/users/manufacturer. No contact with the victim, victim's family, employment, or residence.
5	Other		Participation and completion of Sex Offender Treatment. Participation and completion of Domestic Abuse Programming. Participation and completion of Cognitive Interventions Program. Attendance at any counseling as directed by Agent. Letter of apology to victim.
5	Alcohol assessment		Participation and completion of AODA treatment.
5	Costs		

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☒ eligible for the Earned Release Program.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 TREMPEALEAU COUNTY

For Official Use Only

State of Wisconsin vs. Jon Anthony Soto

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Date of Birth: 04-25-1961

Case No.: 2009CF000028

The following charges were Dismissed but read In

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Date(s) Read In
2	False Imprisonment, Domestic Abuse, Use Of Dangerous Weapon, Repeater	940.30		Felony H	04-13-2009	07-08-2009
3	Aggravated Battery, Use Of Dangerous Weapon, Domestic Abuse - Infliction Of Physical Pain Or Injury,	940.19(6)		Felony H	04-13-2009	07-08-2009
4	Aggravated Battery, Use Of Dangerous Weapon, Domestic Abuse - Infliction of Physical Pain or Injury,	940.19(6)		Felony H	04-13-2009	07-08-2009

IT IS ADJUDGED that **0** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

Distribution:

Thomas E Lister, Judge
Jeri A. Marsolek, District Attorney
James L Kroner, Defense Attorney
Defendant
Jail
Probation
Prison

BY THE COURT:

Renee Marsolek

~~Circuit Court Judge/Clerk~~/Deputy Clerk

November 12, 2009

Date

STATE OF WISCONSIN: IN CIRCUIT COURT: TREMPEALEAU COUNTY:

STATE OF WISCONSIN,

Plaintiff,

-vs-

JON ANTHONY SOTO,

Defendant.

DECISION

Case No: 09-CF-28

The above-entitled matter coming on for hearing before the Honorable Thomas E. Lister on the 1st day of July, 2010 at the Jackson County Courthouse, Black River Falls, Wisconsin, commencing at approximately 9:02 a.m.

APPEARANCES:

JERI MARSOLEK, District Attorney, Trempealeau County Courthouse, P.O. Box 67, Whitehall, Wisconsin 54773-0067, appearing by telephone on behalf of the State of Wisconsin.

SHELLEY FITE, Assistant State Public Defender, P.O. Box 7862, Madison, Wisconsin 53707-7862, appearing by telephone on behalf of Jon Anthony Soto.

JON ANTHONY SOTO, the Defendant, appearing by telephone.

would prefer to be on the phone just as we are.

THE COURT: Ms. Fite, you're not -- you are not arguing that he must be physically present with you or that he must be physically present where I am?

MS. FITE: No, not -- Your Honor, not for the legal decision.

THE COURT: All right. Thank you.

The Court has two motions before it filed by Ms. Fite. The second motion is a motion asking that the Court find Mr. Soto eligible for ERP. The only reason that the Court found that he was not eligible for ERP was due to the Court's reliance on the PSI in the case. The PSI was in error, and, therefore, he was eligible for ERP and I will declare him eligible.

With respect to the primary motion brought by Ms. Fite challenging the procedures followed at the plea hearing in this matter, the Court rejects her arguments. The Court denies her -- her motion, and -- and I will address my reasons.

First, the plea hearing for Mr. Soto was set up in such a way that Mr. Soto, together with his attorney, were present in the Trempealeau County Circuit Courtroom with the district attorney's office represented. The Court was present in the Jackson County Circuit Courtroom. VTC was utilized from my

end. I could clearly see Mr. Soto, Mr. Kroner and the district attorney's representative all -- all at the same time. The connection for Jackson and Trempealeau affords a view from the bench which includes both the prosecutor's table and defense counsel table. Similarly, Mr. Soto and his counsel were able to see me clearly. I was able to hear everything that occurred in Trempealeau County clearly and there was never an indication at any time that they could not clearly see or hear me. I inquired before proceeding whether or not Mr. Soto and his counsel wanted to proceed by video teleconferencing. I thereafter conducted a careful plea colloquy of Mr. Soto. I advised him repeatedly that he could take time to discuss matters with his counsel, and there was never an indication from Mr. Kroner or Mr. Soto that he did not understand what was occurring or that somehow he felt that the Court needed to be physically present in the same courtroom. I found the arguments raised in support of the motion to be unconvincing because the Peters case actually endorsed the use of VTC and places the burden on Mr. Soto and his counsel to establish how the method used by the Court in this instance denies him -- denied him a fair and just hearing or was in any way coercive or violative of due

process. The court in Peters recognized that the use of VTC is widespread and is an acceptable means of conducting the commercial business of the world, affairs between nations, political debates, the process of education and of communicating artistic achievement. Video and audio systems, the court said, have also been increasingly used and replied upon to conduct a variety of court proceedings.

Citing a Florida case, the court noted that an audio/video hookup may well be a legal equivalent of physical presence.

The Court is well aware of the VTC standards where judges are required to satisfy themselves that the defendant is virtually present for the proceeding, and I find that the proceeding I conducted in Mr. Soto's case was such a hearing. He was virtually present. I cannot imagine any different outcome that could have resulted by my being present the same place that Mr. Soto and his counsel were. Peters and Vennemann spoke to situations where the defendant in the Peters case was in jail and was connected to the jail. He didn't have a lawyer and both plea and sentencing was conducted, and even under those circumstances, the -- our court found that the plea and the sentencing were conducted fairly and were not violative of Mr. Peters'

rights. In the Vennemann case, that was a postconviction evidentiary hearing where, first of all, counsel had repeatedly requested that the court allow Mr. Vennemann to be present, had been denied that opportunity. Mr. Vennemann was forced to participate by a bad telephone connection in an evidentiary hearing where events were being discussed in which Mr. Vennemann had participated. That's a far cry from what occurred in this case.

I'm fully satisfied that Mr. Soto received full due process, that he was treated fairly, that he experienced a detailed plea colloquy and that his now late objection to the fact that I wasn't physically present is not convincing to this Court. I will rely upon and stand on the transcript of my proceeding and I'll leave it to the appellate courts to determine whether or not Mr. Soto's rights were violated in any way. The motion is denied.

Anything further?

MS. MARSOLEK: Not from the State, Your Honor.

MS. FITE: Well, Your Honor, I -- actually, with your permission, I would like to raise one additional motion that I think should be brief and easy, and that is a motion to make Mr. Soto also

STATE OF WISCONSIN CIRCUIT COURT TREMPEALEAU COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 09-CF-28

JON ANTHONY SOTO,

Defendant.

CORRECTED ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF UNDER WIS. STAT. RULE § 809.30

For the reasons stated on the record at the hearing held on July 1, 2010, it is hereby ordered that the defendant's motion to withdraw his guilty plea and vacate the judgment of conviction is DENIED.

Furthermore, for the reasons stated on the record at the hearing held on August 16, 2010, it is ordered that the defendant's motion for imposition of a risk reduction sentence is also DENIED.

Dated this 17 day of August, 2010.

BY THE COURT:

THOMAS E. LISTER
Circuit Court Judge

Shelley File/CI

Appeal No. 2010AP2273-CR Cir. Ct. No. 2009CF28

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON ANTHONY SOTO,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine whether Jon Soto's statutory right to be physically present during a plea hearing was violated when the judge conducted the hearing through video teleconferencing and whether this issue was properly preserved.

BACKGROUND

Soto was charged with numerous felonies in Trempealeau County. Pursuant to a plea agreement, he pled guilty to second-degree recklessly endangering safety with a dangerous weapon. Soto, his attorney, and the State's attorney appeared at the Trempealeau County Courthouse. The judge, however, communicated through video teleconferencing from the Jackson County Courthouse. At the start of the hearing, the court asked Soto's counsel whether he was satisfied conducting the plea hearing by video teleconferencing. Counsel answered, "Yes." The court then asked, "[A]nd, Mr. Soto, is it alright with you

that we are doing this plea hearing by video teleconferencing?" Soto answered, "Yes, sir."

Following his conviction, Soto filed a motion to withdraw his guilty plea, arguing that conducting the plea hearing via video teleconferencing violated WIS. STAT. § 971.04(1)(g) (2009-10)[1] and Soto's due process rights.[2] The circuit court denied the motion. Its language suggests that Soto waived or forfeited his claim by agreeing to the video teleconference and that any error was harmless. It found the technology allowed the court to clearly see Soto, defense counsel and the State's attorney all at the same time. Soto and his counsel were also able to clearly see the court. The court concluded that Soto had the burden of establishing how the technology used denied him a fair and just hearing, and it could not imagine any different outcome from being present in the same place as Soto and his counsel.

DISCUSSION

WISCONSIN STAT. § 971.04(1)(g) provides that a defendant "shall be present" at the pronouncement of judgment and the imposition of sentence. "Present" means "physically present." ***State v. Vennemann***, 180 Wis. 2d 81, 93, 96, 508 N.W.2d 404 (1993). In ***State v. Peters***, 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds*, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, this court held that a plea taken via closed-circuit television

[1] All references to the Wisconsin Statutes refer to the 2009-10 version unless otherwise noted.

[2] The court did not differentiate in its ruling between Soto's statutory claim and his constitutional claim. Soto abandoned the due process argument on appeal.

violates WIS. STAT. § 971.04(1). In ***State v. Koopmans***, 210 Wis. 2d 670, 672, 679, 563 N.W.2d 528 (1997), the court held that a defendant may not waive his statutory right to be present.

In 2008, the supreme court created rules on the use of video conferencing and adopted WIS. STAT. § 885.60[3] to govern the use of

[3] WISCONSIN STAT. § 885.60 provides in its entirety:

> Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980.
>
> (1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding.
>
> (2)(a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.
>
> (b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.
>
> (c) If an objection is made by the plaintiff or petitioner in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.
>
> (d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), the court shall sustain the objection.

teleconferencing technology in criminal cases. Subsection (1) allows the circuit court to permit the use of video conferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding. Subsection (2)(a) provides that, except as may otherwise be provided by law, a defendant in a criminal case is entitled to be physically present in the courtroom at all critical stages of the proceedings, including plea hearings at which a plea of guilty will be offered. Subsection (2)(b) creates procedures relating to a witness testifying via video conferencing technology. Subsection (2)(c) gives the court discretion regarding the use of video conferencing if an objection is made by the plaintiff or petitioner. Subsection (2)(d) gives a defendant in a criminal case veto power over conducting a plea hearing by video conferencing.

The State concedes that Soto's argument "might have some force prior to adoption of the video conferencing rules." However, the State asserts that the adoption of WIS. STAT. § 885.60 supersedes the holding in ***Koopmans***, and allows a defendant to waive or forfeit his right to be physically present at a plea hearing.

Soto contends that WIS. STAT. § 885.60(2)(a) mirrors WIS. STAT. § 971.04(1) as interpreted and does not modify it. He supports that argument with the supreme court's comments and an article published by one of the drafters of the subchapter indicating that the new teleconferencing rule was meant to preserve a defendant's existing rights. Soto argues that subsection (2)(a) is a complete exception to the general rule of subsection (1) and the provisions of subsection (2)(d) only make sense in reference to the objection discussed in subsections (2)(b) and (2)(c) which refer to witnesses' testimony, not a criminal defendant's physical presence.

Soto also argues that even if Soto's right to physical presence can be waived or forfeited, the court should have conducted a formal colloquy to fully inform Soto of his rights before accepting any waiver. The State contends that the requirement for a colloquy before waiver of a right applies only to a constitutional right, and Soto's renunciation of his statutory right is merely a forfeiture of the right for which no colloquy was necessary.

Finally, the State argues that any error in conducting the hearing by video conferencing was harmless because the quality of the technology was much better than the defective technology used in earlier cases. Soto replies that the State cannot meet its burden of proving harmless error because it is impossible for the court to know whether it has seen and heard everything that occurred in the courtroom when it was not physically present in the same room as the parties.

We certify this appeal to the Wisconsin Supreme Court to determine whether WIS. STAT. § 885.60 modifies the case law interpreting WIS. STAT. § 971.04. We also request that the court clarify whether forfeiture or waiver applies and, if forfeiture, whether Soto's agreement was sufficient, and if waiver, must the court conduct a more thorough colloquy. This court cannot overturn existing precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We assert that only the supreme court can resolve a conflict between its rule and its existing precedent. The supreme court is in the best position to interpret its own rule. In addition, courts are increasingly using video technology as the technology improves. Video conferencing can save circuit courts' time, travel, and expense and, in some situations, enhance court security and public safety. Resolution of these issues would assist the circuit courts in determining the proper use of video conferencing technology for taking guilty or no contest pleas.

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

June 15, 2011

To:

Hon. Thomas E. Lister
Jackson County Circuit Court Judge
307 Main St.
Black River Falls, WI 54615

Jeri A. Marsolek
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P.O. Box 67
Whitehall, WI 54773

Michelle Weisenberger
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Asst. Attorney General
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Madison, WI 53707-7857

Shelley Fite
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

You are hereby notified that the Court has entered the following order:

No. 2010AP2273-CR State v. Soto L.C.#2009CF28

The court having considered the court of appeals' request pursuant to Wis. Stat. § (Rule) 809.61 that this court accept the certification of this appeal;

IT IS ORDERED the certification is granted and the appeal is accepted for consideration of all issues raised before the court of appeals. When this court grants direct review upon certification, it acquires jurisdiction of the case, Wis. Const. art. VII, § 3(3), that is, the entire appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts the certification. State v. Stoehr, 134 Wis. 2d 66, 70, 396 N.W.2d 177 (1986); Wis. Stat. §§ 808.05(2) and (Rule) 809.61. Further, the court has jurisdiction over issues not certified because the court may review an issue directly on its own motion. Wis. Stat. § 808.05(3); and

IT IS FURTHER ORDERED that within 30 days after the date of this order the appellant must file either a brief in this court or a statement that no brief will be filed; that within 20 days

of filing, the respondent must file either a brief or a statement that no brief will be filed; and that if a brief is filed by the respondent, within 10 days of filing, the appellant must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their court of appeals' brief; instead, any material upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that in the event any party elects not to file a brief in this court, the briefs previously submitted by that party to the court of appeals shall stand as that party's brief in the Supreme Court; and

IT IS FURTHER ORDERED that within the time period established for the filing of briefs, each party must provide the clerk of this court with copies of the briefs previously filed on behalf of that party in the court of appeals. If a party elects to file a new brief(s), 10 copies of their court of appeals brief(s) must be provided. If a party elects to stand on their court of appeals brief(s), 17 copies of each of their court of appeals brief(s) must be provided.

IT IS FURTHER ORDERED that the parties shall be notified of the date and time for oral argument in this appeal in due course.

A. John Voelker
Acting Clerk of Supreme Court

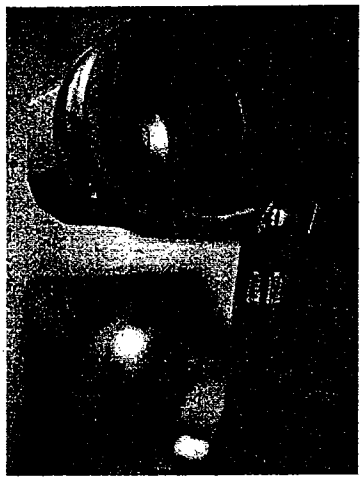
Wisconsin Lawyer

Vol. 81, No. 7, July 2008

Bridging the Distance: Videoconferencing in Wisconsin Circuit Courts

On July 1, a new rule took effect that regulates and expands the use of video technology in Wisconsin circuit courts while protecting litigants' rights. Here's how it works.

by ***Hon. Edward E. Leineweber***



Sidebar:

- **Need more guidance on implementing videoconferencing?**
- **Watch Video** (4:32)

More than two years in the making, subchapter III of Wis. Stat. chapter 885, entitled "Use of Videoconferencing in the Circuit Courts," was adopted recently by the Wisconsin Supreme Court and took effect on July 1, 2008.[1] This new rule, perhaps the most advanced in the country in terms of encouraging the expanded use of this technology while carefully protecting the rights of litigants, gives the circuit courts the authority and guidance to move forward in implementing videoconferencing in court proceedings, subject to clearly expressed limits and litigant safeguards.

The rule is relatively short and simple in structure and is easy to apply once its basic mechanisms are understood. This article briefly lays out the history of the adoption of the rule, explains its structure and operation, and provides several examples to illustrate its application in practice. Finally, because the use of videoconferencing in the courts is developing rapidly, feedback on the implementation of and early experience with the new rule is encouraged.

A Brief History

Although Wisconsin has over the years accumulated a vast patchwork of statutes and rules concerning the use in court proceedings of electronic communications with a visual or video component, together these laws gave courts only limited express authority in specifically enumerated situations and left many obvious and likely unobjectionable situations unaddressed. Some courts reacted to this ambiguous state of affairs by assuming they had authority to require the use of videoconferencing technology in situations they thought appropriate, while other courts were reluctant to take advantage of this tool in even innocuous situations for fear that the use was without legal authority. The result was the sporadic and uncertain advance of a technology that offers, if properly employed, substantial benefits for all participants.

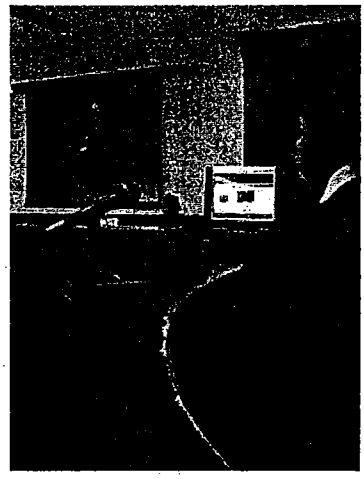
For more than a decade, the Wisconsin Supreme Court has adhered to a policy of embracing the introduction of videoconferencing technology into court proceedings. In 1998 the supreme court's policy and planning advisory committee (PPAC) joined with the Wisconsin Counties Association to form a videoconferencing subcommittee, which was charged with the task of developing a "standards of good practice" manual to help counties and courts understand, design, and implement this technology.[2] *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, published in 1999, was the result. A technically-oriented how-to manual, it quickly gained national recognition, as well as widespread use in Wisconsin.

By 2004, the original manual was becoming outdated because of the advance of videoconferencing technology, and so the PPAC revived the subcommittee to update it. *Bridging the Distance - 2005,* available both in print and online, was issued shortly thereafter and is systematically updated as the technology continues to advance.

The PPAC videoconferencing subcommittee next turned its attention to developing a comprehensive court rule to facilitate the use of this technology while protecting litigant rights and the dignity of court proceedings. For this task, the lawyers, judges, and end-users of videoconferencing in court proceedings took the leading roles while the more technically-oriented committee members rested from their recent labors. This more narrowly-focused subcommittee included two public defenders, an assistant attorney general, a district attorney, state mental institution staff members, a district court administrator, and three judges.

A proposed rule on the use of videoconferencing in the courts was developed by the subcommittee, presented to the full PPAC in May 2007,[3] and accepted. The director of state courts petitioned the supreme court for adoption of the proposed rule in September 2007, and the court heard the petition, No. 07-12, in January.[4] The supreme court solicited additional input from various institutional stakeholders, made minor modifications to the rule as proposed, and adopted the rule as subchapter III of Wis. Stat. chapter 885 by order dated May 1, 2008. Pursuant to Wis. Stat. section 751.12, the rule took effect July 1, 2008.[5]

The Rule's Overall Intent and Structure



Videoconferencing component's on Judge Leineweber's desk include a microphone and monitor.

The new videoconferencing rule applies to both civil and criminal proceedings. It permits the use of videoconferencing technology at the discretion of the circuit courts, even over the objection of litigants, if certain technical and operational standards are met. The rule provides courts with specific criteria to inform the exercise of their discretion, and comments published with the rule offer additional guidance in interpreting and applying the rule.

The rule itself is comprised of eight subsections, including a statement of intent; definitions; technical and operational standards; criteria for exercise of the courts' discretion; specific provisions for use of videoconferencing in civil cases and special proceedings; specific provisions for use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980; provisions for waivers and stipulations; and applicability. As mentioned, substantial commentary follows the rule itself.

Subsection 885.50 contains the statement of intent. It recognizes and summarizes the larger debate concerning the use of videoconferencing in court proceedings and makes it clear that, although the supreme court wants circuit courts to use this technology to the greatest extent possible consistent with the limits of the technology, the rights of litigants must be scrupulously preserved, as must the fairness, dignity, solemnity, and decorum of court proceedings themselves.

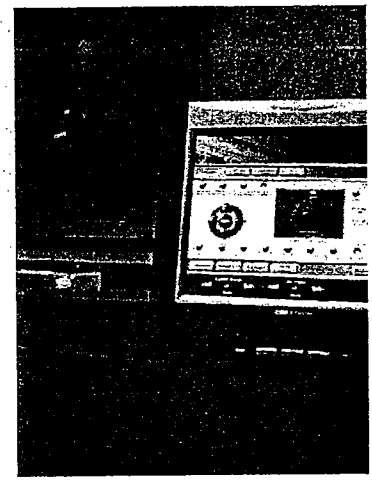
The supreme court recognizes that, while cost savings and efficiencies might be achieved in one constituent part of the entire court system, the indiscriminate use of this technology can result in the abridgment of fundamental rights,[6] the shifting of costs to other parts of the court system, and the overall degradation of the proceedings.

It does not take much imagination to envision unfortunate scenarios such as the following: the depiction on a tiny courtroom video screen of a criminal defendant standing in a jail cellblock hallway, perhaps being arraigned or having bail set, while jailers move other prisoners down the hall behind the defendant, shouting instructions to other staff or inmates, with the crash of jail doors being opened and closed in the background, shattering the usual hushed quiet of the courtroom. People who have experience with the early use of videoconferencing know this scenario is not an exaggeration.

The supreme court expressed its confidence that the benefits of videoconferencing to all participants can best be promoted by taking an open-ended approach to implementation, under

the supervision and control of the circuit courts, subject to the limitations and guidance provided in subchapter III.

Technical and Operational Standards



Audio and video components, like the monitor shown on Judge Leineweber's bench, enable in-court and remote participation

During spirited debate, the rule-writing members of the PPAC videoconferencing subcommittee expressed the significant concern that the quality of much of the videoconferencing equipment presently available in circuit courts was not good. Single-camera, cart-based systems; poor or nonexistent private communication facilities; uncontrolled, noisy, cramped quarters for the remote locations; and other similar problems actually experienced in the past raised substantial concerns. Committee members agreed that litigants must be able to materially participate[7] in all critical stages of proceedings that might subject them to criminal sanctions or impairment of other fundamental rights. Similarly, the presentation of witness testimony via video had to be controlled in a manner that preserved the fundamental fairness of the proceedings and other well-established constitutional rights. The establishment of stringent technical and operational standards was an important component of the solution embodied in the new rule.

Section 885.54 sets forth those technical and operational standards. In commonsense, plain-language terms, this subsection describes the minimum elements of a videoconferencing court scenario that, if established and maintained throughout the proceeding, will ensure that the persons at the remote location will be able to materially participate in what is taking place in the courtroom. The standards address such things as the quality and clarity of the video and audio components; the basic ability to communicate visually and audibly between the courtroom and the remote location; the ability to share documents and other exhibits; and the capacity for counsel to communicate privately with clients. The rule provides that these minimum standards must be met if videoconferencing is to be used over a litigant's objection.

The rule provides that, if the court is considering using the system over objection, the court must certify for the record that the technical and operational standards of the videoconferencing system in use in a specific hearing are met. If the standards are not met, then videoconferencing is not appropriate for that hearing, absent the parties' court-approved waiver or stipulation.

Decisional Criteria; Exercise of Discretion

Subsection 885.56 establishes criteria that the circuit court may consider in ruling on an objection to the use of videoconferencing, which might be made even though the technical and operational standards of section 885.54 are met for a particular proceeding. These criteria, drawn largely from Wis. Stat. section 807.13(2) and familiar to most attorneys, answer the following question: "Our video system is good enough to meet the minimum standards of the rule, but do we really want to use video in this particular situation, especially in light of the objection being made?"

The decisional criteria, which are meant to be illustrative but not exhaustive, include such factors as whether surprise or prejudice will result; the proponent's efforts to secure the personal appearance of a witness; the convenience of the parties; the cost of producing the witness in person, especially in light of the anticipated significance of his or her testimony; the importance of having the witness present to impress on him or her the need to be truthful; the ability to cross-examine the witness; the significance of the interest at stake in the proceeding; the danger of the remote participant appearing via video in a diminished or distorted sense; and whether the person who might appear by video presents a significant security risk if produced in person in court.

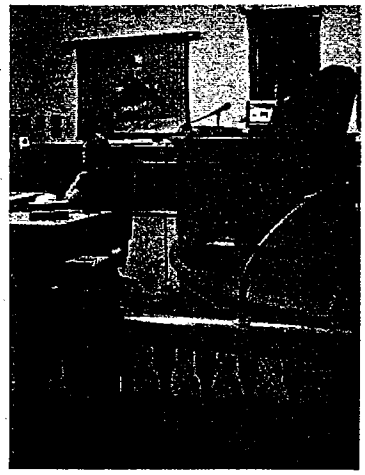
To encourage courts to err on the side of caution in ruling on objections to the use of video, the rule provides that denial of the use of videoconferencing technology is not appealable.[8]

Procedures to Propose and Object to Use of Videoconferencing

Sections 885.58 and 885.60 deal with objections to use of videoconferencing in civil cases and special proceedings, in the first instance, and in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980, in the second instance. In general, the procedures are similar for proposing the use of videoconferencing, objecting to its use, and ruling on an objection once made.

In all cases, absent a waiver or stipulation, the technical and operational standards of section 885.54 must be met before a witness may be called via video over objection. If the standards are met, the proponent may offer the testimony by videoconference if the proper advance notice, 30 days in cases under section 885.58 and 20 days under section 885.60, is given. In all cases, any objections to the video presentation of the testimony must be made within 10 days of receiving the notice of intent. The court may for cause shorten the time to provide notice and to make objection. If an objection is made, the court resolves the matter pursuant to either section 885.58 or section 885.60, applying the decisional criteria of section 885.56.

Criminal Cases and Proceedings Under Chapters 48, 51, 55, 938, and 980



A witness testifies via videoconference in Judge Leineweber's Richland County courtroom.
Photos: Jesse Peckham

These proceedings are treated differently under the new videoconferencing rules because of the significant constitutional rights involved[9] and because of the severe consequences that can befall defendants and respondents in these matters, including the imposition of criminal sanctions; removal of children from the home and termination of parental rights; loss of independence; and loss of liberty through long periods of incarceration or institutionalization. Litigants in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980 are afforded veto rights in many situations in which a court might deny an objection to the use of videoconferencing in purely civil-type cases.

Most significantly, the new videoconferencing rule preserves to defendants and respondents their rights to materially participate in the proceedings by being physically present in the courtroom during all critical stages of the proceedings. Although the rule specifically enumerates several types of hearings as being critical stages, that is, evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest or an admission will be offered, and sentencing or dispositional hearings, the rule does not attempt to define the concept further but incorporates existing law and new law as it is adopted or decided.[10]

In addition, section 885.60 grants to defendants and respondents in these types of proceedings the additional right to exercise a veto over the presentation by videoconferencing of any of an opponent's evidence. If a timely objection is made to the plaintiff's or petitioner's notice of intent to present video evidence, the court must sustain the objection. On the other hand, if the defendant or respondent proposes to present evidence by video, a timely objection by the plaintiff or petitioner is resolved by the court in the same manner as in civil cases under section 885.58, that is, by the application of the decisional criteria of section 885.56.

The supreme court's solicitousness of the rights of defendants and respondents in these cases is apparent in these special provisions designed to protect their constitutional and fundamental rights by preventing the use of videoconferencing when such rights might only arguably be impaired by using videoconferencing.

Waivers, Stipulations, and Applicability

Videoconferencing systems that do not meet the technical and operational standards of section 885.54, but that function adequately for the purposes employed, are presently in daily use in Wisconsin circuit courts. Section 885.54 makes clear that litigants, counsel, and courts may continue to use this equipment as long as they do so by agreement and the court approves.

The new videoconferencing rule specifically supplants all other statutes and rules concerning use of any form of electronic communication with a video or visual component, but it preserves without modification authority for the use of telephone communication or any other form of electronic communication having only an audio component. The rule's import is simple but clear: Keep using the telephone as you have been, but start operating under this rule for videoconferencing.

Examples of the Rule in Operation

Several simple examples illustrate the structure and operation of the rule in practice.

1) **Records custodians in civil case or special proceeding.** In a personal injury case, trial counsel neglects to provide certified health care records in time to avoid the necessity of calling records custodians. The health care records custodians are not present in Wisconsin, and it would be quite expensive to produce them in person in court. The proponent serves and files the notice required by section 885.58(2)(a) to offer the testimony of the records custodians by videoconferencing, and the opponent objects. At the hearing, the proponent first certifies that the courtroom videoconferencing system meets the technical and operational standards of section 885.54, as required by subsection (2), which enables the court to consider the request on the merits.

After weighing the decisional criteria of section 885.56, the court concludes that the objection should be overruled, and the video testimony permitted, because the opponent cannot identify any surprise or prejudice that would result from allowing the video testimony, no significant cross-examination concerning the documents is anticipated, no credibility concerns are expressed, and the cost of producing these witnesses in court in person would far exceed the significance of this testimony to a determination of the action. The other decisional criteria of the subsection do not appear to be relevant.

Edward E. Leineweber, U.W. 1976, Richland County Circuit Court judge, is a member of the Wisconsin Supreme Court's policy and planning advisory committee and a member of the PPAC videoconferencing subcommittee, which originally proposed the new videoconferencing rule. He serves on the State Bar Bench and Bar Committee and cochairs its uniform local rules subcommittee. He is a member of the Wisconsin Judicial Council and chairs its strategic planning committee and evidence and civil procedure committee, which is drafting electronic discovery rules.

2) **Eyewitness in civil case.** Trial counsel wants to have an eyewitness to an intersection collision testify by video. The attorney argues that the witness, who lives in a neighboring state, a distance of about 350 miles, cannot afford to take time off work, and it would be very expensive for his client to pay hotel bills, travel expenses, and meals. The opponent objects, pointing out that a major dispute in the case concerns which party entered the intersection first, and that she will need to extensively cross-examine this witness using aerial photos, intersection diagrams, and the witness's prior contradictory statements. Further, opposing counsel argues, this witness needs to be present in person in the courtroom to be sufficiently impressed with the need to be truthful, and to be subject to any realistic possibility of a perjury prosecution if it can be shown that she lied in her testimony.

In addressing the motion, the court first finds that the video system in the court meets the technical and operational standards, but the court nevertheless sustains the objection and denies the use of video testimony. The court holds that substantial prejudice to the opponent might result from an inability to effectively cross-examine this crucial witness, and that the witness

needs to be personally present so that the court can impress on her the importance of telling the truth before the jury, subject to the jeopardy of a perjury prosecution.

3) **Records custodians and witnesses in criminal case or chapter 48, 51, 55, 938, or 980 proceeding.** In a negligent homicide prosecution involving similar scenarios as the first two examples, the district attorney seeks to offer the records custodians' testimony by video, but the defendant objects. Even though the videoconferencing system meets the technical and operational standards of section 885.54, and the decisional criteria of section 885.56 support allowing the custodians to appear by video, the court must sustain the objection of the defendant prohibiting the use of video, and the witness must be produced in person, pursuant to rights granted to defendants and respondents under section 885.60(2)(d).

On the other hand, the court will analyze the prosecutor's objection to the defendant's request to have the out-of-state eyewitness appear by video in the same way as in the civil suit, weighing the decisional criteria before making a ruling.

4) **Inadequate equipment in all types of cases.** The courtroom videoconferencing system is inadequate to meet the technical and operational standards of section 885.54 because both the sound and picture quality are poor, and it is very difficult to manipulate exhibits during testimony without a fax machine being available at the remote location. In spite of these shortcomings, all parties agree that a certain witness may appear by video without objection, and that the exhibits can be mailed to her in advance.

The court is presented with the stipulation waiving compliance with the minimal technical and operational standards and waiving any other objections under the decisional criteria of section 885.56. The court, satisfied that the proceedings will not be compromised by permitting the testimony by video, approves the parties' stipulation pursuant to section 885.62.

Opportunity for Improvement While Avoiding Negative Consequences

The new rule on use of videoconferencing in the circuit courts is the product of years of careful and comprehensive study of issues concerning the use of video technology in court proceedings and represents a bold step forward by the Wisconsin Supreme Court. Significant increases in productivity and efficiency can be achieved, while avoiding the serious negative consequences that could attend the indiscriminate, unfair use of this technology. The supreme court has carefully crafted a rule that enables Wisconsin circuit courts to capture the benefits of the technology while protecting the rights of litigants and preserving the fairness, dignity, solemnity, and decorum of court proceedings.

The PPAC videoconferencing subcommittee will monitor the implementation of the new rule and report to the PPAC and the court periodically on its findings. Attorneys, judges, court commissioners, court staff, and other interested observers are encouraged to report their experiences to the subcommittee.[11] All comments and opinions will be most welcome.

Endnotes

[1] *Videoconferencing*, as defined in section 885.52(3) of the new rule, means an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors. It is a live, real-time, interactive form of communication and does not include the presentation of prerecorded video testimony pursuant to subchapter II of Wis. Stat. chapter 885. The definition is intended to encompass emerging technologies such as Web-based solutions, as they appear, so long as the functional requirements of the definition are met.

[2] The original impetus to explore the use of videoconferencing in Wisconsin courts came from the Hon. William M. McMonigal, Green Lake County Circuit Court judge, who chaired the original videoconferencing committee created by the supreme court in 1996. Judge McMonigal, a former long-time vice chair of the PPAC, has remained the chair of the PPAC subcommittee on videoconferencing, which grew out of the original efforts. Other persons who have served the subcommittee over the years are listed in *Bridging the Distance - 2005*, which can be found online at **www.wicourts.gov/about/committees/docs/ppacvidconf.pdf**.

[3] The Final Report and Recommendations of the PPAC Subcommittee on Videoconferencing can be obtained by contacting Michelle Cyrulik, PPAC senior policy analyst, at michelle.**cyrulik@wicourts.gov**.

[4] The full text of Petition 07-12, including supporting materials submitted with the petition, and an audio archive of the Jan. 8, 2008, hearing on the petition, can be found at **www.wicourts.gov/supreme/petitions_audio.htm**.

[5] The order creating subchapter III of Wis. Stat. chapter 885, which includes a copy of the rule and the comments published with the rule, can be found online at **www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=32608**.

[6] The PPAC videoconferencing subcommittee and the supreme court specifically avoided attempts to define certain concepts mentioned in the rule, such as *material participation*, *critical stages of the proceeding*, and *fundamental rights*, preferring to allow these concepts to develop over time in the case law or in future rule-making or legislation. Case law already exists to some extent, and the rule is to be applied in light of this existing precedent. It is not the intent of this procedural rule to create or affect substantive legal rights. See the comments to section 885.60, which are published with the rule.

[7] While the term *material participation* is not specifically defined for the reasons set out in n.6, *supra*, one might think of the ultimate degree of participation in the proceeding as that which a litigant would enjoy if personally present in the courtroom. The concept of material participation recognizes that some degree of interference with that ultimate degree of participation caused by the use of video technology might be tolerated and still pass muster. However, it is not

permissible for that interference to be so substantial as to have significant impact on a litigant's rights to a fair and impartial hearing, effective confrontation and cross-examination, the effective presentation of evidence, or the exercise of other substantive and procedural rights.

[8]In its comments to section 885.56, the supreme court noted that the denial of the use of videoconferencing is not appealable as an interlocutory order but might be as part of the appeal from the final judgment, to the extent that the denial involves issues related to a party's ability to present its case and broader issues related to the presentation of evidence.

[9]Such rights might include, but are not limited to, the defendant's right to appear in street clothes without apparent restraints; to take the stand to testify or choose to remain silent; to confront and cross-examine the state's witnesses; and to effectively present favorable evidence in his or her defense.

[10]See the comments to Wis. Stat. section 885.60, which are published with the rule.

[11]Please direct comments to Michelle Cyrulik, PPAC senior policy analyst, at **michelle.cyrulik@wicourts.gov**.

Wisconsin Lawyer

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of July, 2011.

Signed:

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP2273-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON ANTHONY SOTO,

Defendant-Appellant.

ON CERTIFICATION OF APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR TREMPEALEAU COUNTY, THE HONORABLE THOMAS E. LISTER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested.

SUPPLEMENTARY STATEMENT OF THE CASE

Defendant-Appellant-Petitioner Jon Anthony Soto's guilty plea hearing took place on July 8, 2009 (63). Soto was not physically present in the same courtroom with presiding Judge Thomas Lister during the hearing. Soto was in the Trempealeau County courtroom and Judge Lister was in the Jackson County courtroom (63:1). Defense counsel James Kroner and Assistant District Attorney Jeri Marsolek were present in the Trempealeau County courthouse with Soto (63:1-3). The two courtrooms were connected by videoconferencing technology (63:3-4). At the beginning of the hearing, the court asked whether Soto had any objection to the videoconference procedure (63:3). Soto made no objection and gave his consent (*id.*).

The transcript records the following:

> (Whereupon, the following proceedings were had in open court, with the Court present and counsel and the defendant appearing via video teleconferencing).
>
> THE COURT: Counsel, good morning.
>
> MS. MARSOLEK: Good morning, Your Honor.
>
> MR. KRONER: Good morning, Your Honor.
>
> THE COURT: Can everyone hear me all right there?
>
> MS. MARSOLEK: Yes.
>
> MR. KRONER: Yes.
>
> THE COURT: And can everyone see me all right?

MS. MARSOLEK: Yes.

MR. KRONER: Yes.

THE COURT: I am going to take up the matter of 09-CF-28. This is in the matter of the State of Wisconsin versus Jon Anthony Soto. Would you please state the appearances.

MS. MARSOLEK: State appears by Jeri Marsolek.

MR. KRONER: Mr. Soto appears in person with Attorney James Kroner.

THE COURT: My understanding, counsel, is that this matter is scheduled for a plea, and you are then jointly requesting a Pre-Sentence Investigation?

MS. MARSOLEK: The State is requesting one, Judge.

MR. KRONER: That's fine, Your Honor. The defendant does not object.

THE COURT: All right. Mr. Kroner, are you satisfied with appearing at this plea hearing by video teleconferencing?

MR. KRONER: Yes, Your Honor.

THE COURT: And, Mr. Soto, is it all right with you that we are doing this plea hearing by video teleconferencing?

THE DEFENDANT: Yes, sir.

(63:2-3).

ARGUMENT

THE CIRCUIT COURT'S ORDER DENYING SOTO'S MOTION TO WITHDRAW HIS GUILTY PLEA SHOULD BE AFFIRMED.

A. Soto Has not Demonstrated a Manifest Injustice Warranting the Postsentence Withdrawal of his Guilty Plea.

A defendant seeking to withdraw a guilty plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "The manifest injustice standard requires the showing of a serious flaw in the fundamental integrity of the plea." *State v. Manke*, 230 Wis. 2d 421, 426, 602 N.W.2d 139 (Ct. App. 1999) (citations omitted). "A 'manifest injustice' occurs where a defendant makes a plea involuntarily." *State v. James*, 176 Wis. 2d 230, 237, 500 N.W.2d 345 (Ct. App. 1993). The heavy burden of the manifest injustice standard acts as "a deterrent to defendants testing the waters for possible punishments." *State v. Nawrocke*, 193 Wis. 2d 373, 379-80, 534 N.W.2d 624 (Ct. App. 1995).

Soto entered his guilty plea at a proceeding in which two courtrooms—one occupied by the trial judge and the other occupied by Soto and counsel—were connected by videoconferencing technology. Soto consented to this procedure. Nevertheless, Soto contends that this use of videoconferencing technology violated his statutory right to be present at his guilty plea hearing. On this basis, he moved to withdraw his guilty plea after sentencing.

The State will show that (1) Wis. Stat. § 885.60 authorizes the use of videoconferencing for guilty plea hearings; (2) Soto validly and effectively consented to the use of videoconferencing at his guilty plea hearing; and (3) any conceivable error was harmless. In other words, there was either no error in the court's acceptance of Soto's guilty plea or the error was harmless. Without prejudicial error there can be no manifest injustice warranting the withdrawal of Soto's guilty plea. Accordingly, this court should affirm the circuit court's order denying Soto's motion to withdraw his guilty plea.

B. The Right To Be "Present" at a Guilty Plea Proceeding Is Not a Constitutional Right. Therefore, the Circuit Court Was Not Required To Conduct a Formal Waiver Colloquy with Soto in Order to Obtain his Consent to Appear at the Guilty Plea Hearing by Videoconference.

1. The defendant's right to be "present" at a guilty plea proceeding is not constitutional.

Due process does not require that a defendant be physically present in the courtroom with the judge when the defendant enters a guilty or no contest plea. *See State v. Peters*, 2000 WI App 154, ¶11-13, 237 Wis. 2d 741, 615 N.W.2d 655, *reversed on other grounds*, 2001 WI

74, 244 Wis. 2d 470, 628 N.W.2d 797.[1] In *Peters*, the defendant pleaded no contest "via closed-circuit television" in the days before the enactment of Wis. Stat. § 885.60. *See id.* ¶1. The court concluded that the defendant was not "physically present" at the plea. The court held that the television appearance "violated statutory criminal procedure," *i.e.*, Wis. Stat. § 971.04(1), but did not violate the constitution.[2] *Id.*

The *Peters* court based the constitutional portion of its decision on *May v. State*, 97 Wis. 2d 175, 293 N.W.2d 478 (1980), and *Boykin v. Alabama*, 395 U.S. 238 (1969). In *May*, this court stated that "the presence of the defendant is required as a constitutional condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *May*, 97 Wis. 2d at 186 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107-08 (1934)[3]), *quoted in Peters*, 237 Wis. 2d 741, ¶8. The *Peters* court looked to *Boykin* to determine whether a no-contest plea entered over a closed-circuit television violated the *May-Snyder* due process standard:

---

[1]In *Blum v. 1st Auto & Casualty Ins. Co.*, 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78, the supreme court held that court of appeals decisions overruled by the supreme court are overruled in all respects and have no remaining precedential value whatsoever. *See id.* at ¶42. This rule is distinct from the rule "that *holdings not specifically reversed* on appeal retain precedential value." *Id.* at ¶44 (citation omitted); *accord id.* at ¶91 (Roggensack, J., concurring in part and dissenting in part).

[2]Soto does not argue that he had a constitutional right to be present at the guilty plea hearing. *See* Soto's Brief at 9. However, he argues that his consent to proceed by videoconference was ineffective because the court did not conduct a formal colloquy prior to his "waiver" of his statutory right to be present. *Id.* at 11. Under current law, such a colloquy is required only for the waiver of a limited number of *constitutional* rights. *See infra* at 7-8. Despite Soto's concession, the State argues in this section that no constitutional right was at issue here in order to provide a foundation for its argument that a formal waiver colloquy was not required.

[3] *Overruled in part on other grounds*, *Malloy v. Hogan*, 378 U.S. 1, 2, 6, 17 (1964); certain dicta from *Snyder* rejected by *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

> For accepting a no contest plea, [*Boykin*] "requires an *affirmative* showing or *an allegation and evidence* which show that the defendant entered the plea knowingly, voluntarily and intelligently." … [H]owever, *Boykin* does not set forth the specific procedural requirements that a circuit court must follow in accepting a no contest plea.

Peters, 237 Wis. 2d 741, ¶9 (citation omitted; emphasis in original).

Against this background, the *Peters* court held that "[t]o meet his initial burden [of demonstrating a constitutional violation], Peters must show that the closed-circuit television procedure denied him a fair and just hearing." *Id.* ¶10. As Judge Hoover explained in his concurrence: "In order to implicate due process, the defendant must make specific showings that the environment was coercive in fact and the manner in which the circumstances affected his or her decision to plead guilty or no contest." 237 Wis. 2d at 751 (Hoover, J., concurring).

Peters failed to meet his initial burden.

> We conclude that the closed-circuit television procedure did not violate Peters' due process rights. During the hearing, the court clarified for Peters the elements of the offense and the ramifications of a decision to waive counsel. The court explained the constitutional rights Peters would be waiving by entering his plea. Peters stated that he understood his rights and wanted to plead no contest. The court inquired of Peters' education and his physical condition. On two separate occasions the court asked Peters if anyone had threatened him or coerced him into entering his plea and waiving his constitutional rights. Peters answered each time that he had not been coerced or threatened. The judge was able to observe Peters' demeanor, and Peters was able to observe the judge. Peters did not object to the procedure, and freely explained that he desired to plead no contest and did not want the assistance of counsel. The court accepted Peters' plea and sentenced him according to a negotiated recommendation. Other than conducting the hearing

> by closed-circuit television, the plea and sentencing followed appropriate procedure.
>
> We note that there is no indication from Peters now that he was coerced or threatened by outside forces. Peters does not even suggest that he lacked an ability to effectively communicate with the judge and other participants in the courtroom. We conclude that the record clearly and convincingly indicates that the hearing's fairness and justness was not thwarted by Peters' physical absence.

Peters, 237 Wis. 2d 741, ¶¶11-12 (citation and footnote omitted).

The court went on to

> reject Peters' contention that entering a no contest plea from jail by closed-circuit television is always coercive or violative of due process. We agree with a Florida district court of appeals that noted that "an audio-video hookup may well be the legal equivalent of physical presence." *Scott v. Florida*, 618 So.2d 1386, 1388 (Fla. App. 1993). Absent any substantiated allegations of unfairness, we are not persuaded that simply appearing live via closed-circuit television, as opposed to being physically present in the courtroom, would inherently damage the fairness or justness of the plea hearing.

Id. ¶13 (footnotes omitted).

The court's analysis of Peters' plea proceedings tracked the items listed in *Bangert* as necessary for insuring a knowing, intelligent, and voluntary plea waiver. *Compare id. with State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Under *Peters*, a videoconferenced plea hearing that comports with the specific requirements of *Bangert* and the general requirements of *Boykin* satisfies due process despite the physical absence of the defendant from the judge's courtroom. If the court conducts a thorough *Bangert* waiver colloquy and the defendant can suggest no reason that "a fair and just hearing [was] thwarted by his absence," there is no due process violation because the

defendant's presence is required "only" to the "extent" that "a fair and just hearing would be thwarted by his absence." *Snyder*, 291 U.S. at 107-08; *May*, 97 Wis. 2d at 186.

The court in the present case conducted a thorough plea colloquy that comported with *Bangert* in every respect. "Other than conducting the hearing by [videoconference], the plea and sentencing followed appropriate procedure." *Peters*, 237 Wis. 2d 741, ¶11.

As in *Peters*: The court clarified for Soto the elements of the offense (63:6-9). It explained the constitutional rights Soto would waive by entering a guilty plea (63:10-14). Soto stated that he understood his rights and wanted to plead guilty (*id.*). The court asked Soto if he had been threatened or coerced in connection with his decision to plead guilty; Soto said he had not been (63:16-17). Although not in the same room, "[t]he judge was able to observe [Soto's] demeanor, and [Soto] was able to observe the judge" (65:4). *Peters*, 237 Wis. 2d 741, ¶11. Soto did not object to pleading guilty by videoconference—on the contrary, he expressly consented to the procedure (63:3). The court accepted Soto's plea (63:20-21).

Soto's colloquy went beyond Peters' colloquy as summarized by the court of appeals. In Soto's case: Judge Lister asked Soto whether he had received and understood the statement of the negotiated plea agreement; Soto answered affirmatively (63:4-5). He asked whether Soto understood that the court was not bound by the plea negotiation and recommendation, and that the court was entitled to sentence Soto "to the maximum possible penalties provided by law"; Soto said he did (63:5). Judge Lister told Soto that the plea negotiations included "read-in charges," and explained the read-in process to Soto; Soto said he understood (63:8). He told Soto that the victim might make a restitution claim in the future; Soto said he understood (63:8-9). Judger Lister reviewed the plea questionnaire form with Soto (63:9-12). He discussed Soto's medication and

depression with him, and whether it affected his ability to enter a guilty plea; Soto said it did not (63:15-16). Judge Lister asked Soto whether he was satisfied with his attorney's representation; Soto said he was (63:16). He asked whether Soto understood that, by pleading guilty, he was giving up the specific defenses of intoxication and insanity; Soto said he did (63:19). Finally, Judge Lister asked Soto if he understood that his right to vote would be suspended by his felony conviction and that he would be permanently deprived of his right to bear arms; Soto said he did (*id.*).

Judge Lister also asked defense counsel Kroner whether he agreed that Soto's plea was free, voluntary, and intelligent; whether he thoroughly reviewed the plea questionnaire with Soto; whether Soto understood the charges against him, the maximum possible penalty, any available defenses, and the effects of his plea; and whether he believed the plea was in Soto's best interest (63:17-18). Kroner answered all these questions affirmatively (*id.*).

Soto's plea hearing complied with *Bangert* and *Boykin*. Judge Lister was scrupulous in his examination of both Soto and Kroner to insure that Soto entered his guilty plea knowingly, intelligently, and voluntarily. Soto's physical presence in the same courtroom with Judge Lister was therefore not constitutionally required. Due process requires the defendant's presence "'to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Peters*, 237 Wis. 2d 741, ¶8 (citation omitted). There is absolutely no suggestion that "'a fair and just hearing [was] thwarted by [Soto's] absence.'" *Id.* Therefore, the use of videoconferencing during Soto's guilty plea hearing was constitutional and did not violate due process.

2. The circuit court was not required to conduct a formal waiver colloquy with Soto in order to obtain his consent to appear at the guilty plea hearing by videoconference

Soto consented to entering his guilty plea by videoconference (63:3). Soto argues that "[e]ven if waiver were permitted it would first require the sort of formal colloquy contemplated by *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612." Soto's Brief at 11.

Ndina is not applicable. The State has shown that Soto did not have a *constitutional* right to be physically present in the same courtroom with Judge Lister when entering his guilty plea. The formal waiver colloquy outlined in *Ndina* is applicable only to the surrender of a narrow compass of constitutional rights. Statutory rights, and constitutional rights outside of the narrow compass described in *Ndina*, can be relinquished without a formal waiver colloquy.

Ndina explained the difference between the rules of "forfeiture" and "waiver."

> Although cases sometimes use the words "forfeiture" and "waiver" interchangeably, the two words embody very different legal concepts. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right."
>
> In other words, some rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review. The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit

> court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.
>
> In contrast, some rights are not lost by a counsel's or a litigant's mere failure to register an objection at trial. These rights are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes the right. As the court explained in *State v. Huebner,* 2000 WI 59, ¶14, 235 Wis. 2d 486, 611 N.W.2d 727, "a criminal defendant has certain fundamental constitutional rights that may only be waived personally and expressly," including "the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury.... Such rights cannot be forfeited by mere failure to object."
>
> Similarly, the United States Supreme Court warned that "[a] strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.... The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial."

Ndina, 315 Wis. 2d 653, ¶¶29-32 (citations and footnotes omitted except as indicated).

A constitutional right that falls in the waiver column can only be lost if the defendant makes a knowing and voluntary renunciation of the right. For many such rights, the circuit court must conduct a formal colloquy with the defendant before he relinquishes the right. *See*, *e.g.*, *State v. Imani*, 2010 WI 66, ¶23, 326 Wis. 2d 179, 786 N.W.2d 40 (waiver of right to counsel requires colloquy), *reconsideration denied*, 2011 WI 1, 330 Wis. 2d 443, 793 N.W.2d 71. However, even where the explicit waiver of a constitutional right is required, a

formal waiver colloquy between the court and the defendant is not always necessary. *See State v. Denson*, 2011 WI 70, ¶¶56-57, 63, __ Wis. 2d __, __ N.W.2d __ (formal colloquy between court and defendant not required prior to defendant's waiver of constitutional right not to testify at trial).

In contrast, a right that falls in the forfeiture column can be abandoned by the defendant's mere failure to object. *See*, *e.g.*, *State v. Huebner*, 2000 WI 59, ¶26, 235 Wis. 2d 486, 611 N.W.2d 727 (defendant's failure to object to use of six-person jury forfeits right to twelve-person jury); *State v. Ellington*, 2005 WI App 243, ¶¶11-14, 288 Wis. 2d 264, 707 N.W.2d 907 (forfeiture of confrontation clause right by failure to make specific objection); *State v. Koller*, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838 (multiplicity protection forfeited by failure to object prior to submission of case to jury); *State v. Howard*, 2001 WI App 137, ¶¶12-13, 246 Wis. 2d 475, 630 N.W.2d 244 (defendant's failure to object to State's alleged breach forfeited constitutional right to enforcement of negotiated plea agreement).

The right to be present at a guilty plea hearing is a statutory right only; it is not one of the constitutional rights of criminal procedure listed in paragraphs 31 and 32 of *Ndina*. Nevertheless, the State believes that the surrender of that right cannot be simply forfeited but must be explicitly waived. *See infra* at 14-20. However, the State knows of no legal authority—and Soto cites none—requiring a formal waiver colloquy prior to the renunciation of this particular statutory right or any other statutory right.

Soto waived his right to be physically present with the trial judge at the guilty plea hearing by consenting to and failing to object to the videoconference. The fact that the circuit court did not conduct a formal colloquy is irrelevant. Such colloquies are only necessary in limited circumstances as explained by *Ndina*. As will be shown below, in the circumstances of this case, Soto's simple

consent was sufficient to waive his non-constitutional right to be physically present with the trial judge.

C. Soto's Consent to Appear at his Guilty Plea Proceeding by Videoconference Was Legally Effective.

1. The legal landscape prior to the enactment of Wis. Stat. § 885.60.

Wisconsin Statute § 971.04(1) provides that

> the defendant shall be present:
>
> a) At the arraignment;
>
> b) At trial;
>
> c) During voir dire of the trial jury;
>
> d) At any evidentiary hearing;
>
> e) At any view by the jury;
>
> f) When the jury returns its verdict;
>
> g) At the pronouncement of judgment and the imposition of sentence;
>
> h) At any other proceeding when ordered by the court.

Wis. Stat. § 971.04(1).

This court has interpreted § 971.04(1)'s presence requirement to mean that the defendant must be *physically* present in the courtroom. *See State v. Vennemann*, 180 Wis. 2d 81, 87-88, 508 N.W.2d 404 (1993).

In *Vennemann*, the defendant appeared at a postconviction evidentiary hearing[4] by telephone. The court of appeals held that Vennemann was therefore "present at the hearing … pursuant to sec. 967.08, Stats.," which allows certain specified court proceedings to be conducted by telephone. *Id.* at 96. The supreme court disagreed.

> Section 967.08 specifically enumerates proceedings intended to be included within the parameters of the statute. There is no mention of a postconviction evidentiary hearing. We apply the principle of statutory construction that a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded. A postconviction evidentiary hearing pursuant to secs. 974.02 and 809.30(2)(h), Stats. clearly is not a criminal proceeding which may be conducted by telephone.

Id. at 96-97 (citations omitted). In other words, Wis. Stat. § 967.08 does not provide a general exception to § 971.04's physical presence requirement, although it provides specifically-enumerated exceptions to the requirement. Thus, had the case involved an "[a]rraignment … [in which] the defendant intends to plead not guilty or to refuse to plead," the telephonic appearance would have presumably been allowed despite § 971.04(1)'s requirement that a defendant "shall be present" "[a]t the arraignment." Wis. Stat. §§ 967.08(1)(d) and 971.04(1)(a).

In *Peters*, the court of appeals held that the circuit court violated § 971.04(1) when it accepted Peters' no contest plea via closed-circuit television without his explicit waiver of the right to be present. *Peters*, 237

[4]Generally, Wis. Stat. § 971.04(1) does not apply to postconviction hearings. However, under the facts of the particular case, the court held that "Venemann should have been physically present at his postconviction evidentiary hearing" because "there exist[ed] substantial issues of fact to be resolved." *Vennemann*, 180 Wis. 2d at 93-94 (footnote omitted).

Wis. 2d 741, ¶7.[5] Nevertheless, the court noted that "'an audio-video hookup may well be the legal equivalent of physical presence.'" *Id.* ¶13 (quoting *Scott v. Florida*, 618 So.2d 1386, 1388 (Fla. Dist. Ct. App. 1993)).

In 1997, this court held that a defendant cannot "voluntarily absent himself or herself from any proceeding" enumerated in § 971.04(1). *See State v. Koopmans*, 210 Wis. 2d 670, 678-80, 563 N.W.2d 528 (1997). In *Koopmans*, the defendant was absent from her sentencing hearing because she absconded from the jurisdiction. *Id.* at 673-74. This court, applying basic rules of statutory construction, concluded that a defendant's presence at each of the proceedings specified in § 974.01(1) was mandatory and could not be voluntarily waived. *Id.* at 675-80.

On the basis of Wis. Stat. § 971.04(1), *Vennemann*, *Peters*, and *Koopmans*, the State concludes that the following legal propositions were true prior to the adoption of Wis. Stat. § 885.60:

1. "presence" under § 971.04(1) means personal physical presence (*Vennemann*);

2. absent an explicit waiver of the right to be physically present, a defendant must be present at a plea hearing at which he enters a guilty or no contest plea (*Peters*);

3. as a general matter, a defendant may not voluntarily absent herself from any proceeding enumerated in § 971.04(1) (*Koopmans*);

---

[5]The court did not specify which of § 971.04(1)'s subsections required Peters' presence. The State concludes that the applicable subsection is (g), "pronouncement of judgment." According to Wis. Stat. § 967.02(8), "judgment" "means an adjudication by the court that the defendant is guilty or not guilty." *See State v. Kasuboski*, 83 Wis. 2d 909, 912, 266 N.W.2d 433 (1978); *see also* Wis. Stat. § 972.13 ("judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest").

4. however, if (in another statute) the legislature specifically authorizes a defendant to appear remotely by technological means, that appearance does not violate the defendant's right to be present under § 971.04(1) (*Vennemann*).

2. Wis. Stat. § 885.60.

In 2008, under its Wis. Stat. § 751.12 rulemaking authority, this court created Subchapter III of Chapter 885, setting rules for the "Use of Videoconferencing in the Circuit Courts." *See* 2008 WI 37, 305 Wis. 2d xli.

The court stated its general intent as follows:

> It is the intent of the Supreme Court that videoconferencing technology be available for use in the circuit courts of Wisconsin to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve the fairness, dignity, solemnity, and decorum of court proceedings.

Wis. Stat. § 885.50(1). The court further noted that "careful use of this evolving technology can make proceedings in the circuit courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings." *Id.* at (2). On the other hand, the court acknowledged that "improper use of videoconferencing technology … can result in abridgment of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice." *Id.* at (3).

Section 885.60 specifically addresses the use of videoconferencing in criminal cases.[6] In subsection (1), it states broadly that "a circuit court may, *on its own motion or at the request of any party*, in a criminal case … permit the use of videoconferencing technology in *any* pre-trial, trial or fact-finding, or post-trial proceeding." Wis. Stat. § 885.60(1).

This broad authority is subject to "the limitations" of subsection (2). *Id.* In pertinent part, subsection (2) provides that:

> (a) Except as may otherwise be provided by law, a defendant in a criminal case … is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.

Wis. Stat. § 885.60(2)(a).

The State interprets the plain language of § 885.60(1) as authorizing the circuit court to permit the use of videoconferencing in a guilty plea hearing on its own motion or the motion of any party, including the defendant. Section 885.60(2)(a) provides a brake on the availability of this procedure. Because the defendant is "entitled to be physically present" at his guilty plea hearing, Wis. Stat. § 885.60(2)(a), he is implicitly empowered to veto the use of the videoconferencing procedure by asserting his right to be physically present. Granted, the statutory language is not explicit on this point. However, the statute generally allows parties "to stipulate to any different or modified procedure." And, during the court's hearing on Petition 07-12, which led to the adoption of Wis. Stat. § 885.60, members of the court and proponents of the legislation both assumed that the defendant could *voluntarily* appear at a guilty plea hearing

[6]Section 885.60 also applies to proceedings under Wis. Stat. Chs. 48, 51, 55, 938, and 990.

by videoconference and waive his right to be "physically present." *See* January 8, 2008 Public Hearing at 5:00-16:00, 31:05-31:40, 40:00-41:00, 47:30-49:52, 1:00:00-1:02:15, 1:12:20-1:15:40, *In the matter of the petition to create a rule governing the use of videoconferencing in the courts*, *available at* http://wicourts.gov/scrules/0712.htm.

In contrast, Soto interprets subsection (2)(a) as limiting the reach of subsection (1) more dramatically. "The rule is straightforward: the use [of] videoconferencing technology, while generally accepted, is not a substitute for a defendant's physical presence at the enumerated proceedings—including the plea hearing." Soto's Brief at 5. The State disagrees. Subsection (2)(a)'s reiteration of the defendant's constitutional and/or statutory rights to be present at certain enumerated proceedings does not prevent the defendant from moving to use videoconferencing at those proceedings, or agreeing to a prosecutorial motion to use videoconferencing, or consenting to a court's sua sponte motion to use videoconferencing.

Soto's interpretation of subsection (2)(a) is generally inconsistent with the broad language of subsection (1), which permits "the use of videoconferencing technology in *any* pre-trial, trial or fact-finding, or post-trial proceeding." Wis. Stat. § 885.60(1).

Moreover, Soto's interpretation is directly inconsistent with specific language in subsection (1). Subsection (1) explicitly includes within the statute's scope "trial or fact-finding" proceedings. Meanwhile, subsection (2)(a) specifies "trial or fact-finding" proceedings as proceedings at which the defendant "is entitled to be physically present." Because videoconferencing of "trial or fact-finding" proceedings is clearly permissible under subsection (1), it would be irrational to interpret subsection (2)(a) as precluding videoconferencing of those same proceedings. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI

58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. If subsection (2)(a) cannot be interpreted as precluding videoconferencing of "trial or fact-finding" proceedings, it cannot be interpreted as precluding videoconferencing in the other specified proceedings—*e.g.*, "plea hearings at which a plea of guilty … will be offered"—either. Wis. Stat. § 885.60(2)(a).

Under Wis. Stat. § 885.60, guilty plea hearings may be conducted by videoconferencing. If the motion to use videoconferencing is made by the court or the prosecutor, the defendant has the right to veto or approve the request. That is because the defendant is "*entitled* to be physically present" at his guilty plea hearing. Wis. Stat. § 885.60(2)(a). *See* BLACK'S LAW DICTIONARY 612 (9th ed. 2009) ("entitle" means "[t]o grant a legal right to or qualify for"). If the defendant is "entitled to be physically present" at the proceeding, he has the right to object to a videoconferencing request and prevent the use of videoconferencing. He cannot be forced to participate in the proceeding against his will. By the same token, if the defendant is "entitled to be physically present" at the proceeding, he has the right to consent and agree to a videoconferencing request or even seek the use of videoconferencing on his own motion. The defendant's entitlement to be physically present at a particular proceeding is not a bar to the defendant's appearance by videoconference if he so chooses.

3. Harmonizing Wis. Stat. § 885.60 with *Koopmans* and *Vennemann* in the context of the present case.

The heart of the present controversy is whether the broad goal of Wis. Stat. § 885.60(1) to enable the use of videoconferencing at "*any* pre-trial, trial or fact-finding, or post-trial proceeding" is restricted by the *Koopmans* holding that a defendant's right to be present at the

proceedings enumerated in Wis. Stat. § 971.04(1) cannot be knowingly and voluntarily surrendered, and the *Vennemann* holding that a defendant's right to be present means the right to be *physically* present. In other words, do *Koopmans* and *Vennemann* prevent a defendant from agreeing, consenting, or moving to appear at a guilty plea hearing by videoconference? The court's answer to this question should be "no."

In *Vennemann*, this court interpreted § 971.04(1)'s presence requirement to mean that the defendant must be *physically* present in the courtroom, and held that his appearance by telephone did not constitute physical presence. *See Vennemann*, 180 Wis. 2d at 87-88. Notably, neither *Vennemann* nor any other published Wisconsin decision has ever held that § 971.04(1)'s physical presence requirement means that the defendant and the trial judge must be present in the same courtroom.[7] Regardless, technical advances in videoconferencing technology and the legal imprimatur

[7] *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978), does not address this question. In *Laasch*, the defendant argued that "her arrest was unlawful and that the trial court therefore lacked personal jurisdiction." *Id.* at 589. The State argued that "the trial court obtained jurisdiction over the defendant at the time of her initial arrest." *Id.* at 590. This court rejected the State's argument because Laasch "was not brought before a judge during the period of her initial arrest and no warrant was issued or served upon her." *Id.* In this context, the court noted that "[t]he *jurisdiction of a court over the person of an accused* depends upon the physical presence of the accused before the judge." *Id.* (emphasis added). As this court later explained in *State v. Monje*, 109 Wis. 2d 138, 147, 325 N.W.2d 695 (1982), *Laasch* "divest[s] [the] trial court of personal jurisdiction over a defendant arrested in his own home without an arrest warrant and absent exigent circumstances." This court later abandoned the *Laasch* rule in *State v. Smith*, 131 Wis. 2d 220, 236, 388 N.W.2d 601 (1986), holding that "the better rule to follow is that a defendant appearing before a trial court pursuant to an unlawful arrest presents no barrier to that court's obtaining jurisdiction over the defendant." Regardless of the twisted history of *Laasch*'s personal jurisdiction analysis, *Laasch* does not answer the present question because the circuit court's personal jurisdiction over Soto is not at issue here.

given by this court to the use of such technology in judicial proceedings call for a fresh consideration of the meaning of "physical presence." Where, as here, the defendant and the judge are located in two separate courtrooms connected by videoconferencing technology, the physical presence requirement is met and Wis. Stat. § 971.04(1) and *Vennemann* completely satisfied.

Indeed, several jurisdictions have concluded that an appearance by videoconference can be the legal or functional equivalent of physical presence. *See Scott*, 618 So.2d at 1388; *People v. Lindsey*, 772 N.E.2d 1268, 1277 (Ill. 2002) ("While defendant was not physically present in the courtroom for his arraignment and jury waiver, neither was he entirely absent from these proceedings. Defendant participated in the proceedings through audio-visual transmission.")[8]; *Commonwealth v. Ingram*, 46 S.W.3d 569, 571 (Ky. 2001) ("A properly functioning video arraignment system is the equivalent of in-court arraignment."); *Guinan v. State*, 769 S.W.2d 427, 430 (Mo. 1989) (en banc) (under Missouri statute, "'physical appearance in person" requirement satisfied by "personal appearance … made by means of closed circuit television from the place of custody or confinement'") (emphasis omitted); *State v. Phillips*, 656 N.E.2d 643, 665 (Ohio 1995) ("arraignment of an accused via closed-circuit television is constitutionally adequate when the procedure is functionally equivalent to live, in-person arraignment"); *see also Peters*, 237 Wis. 2d 741, ¶13 (finding statutory violation but noting that "'an audiovisual hookup may well be the legal equivalent of physical presence'") (citation omitted).

At worst, a defendant's appearance at his guilty plea hearing by a courtroom-to-courtroom videoconference is a hybrid form of physical presence not

[8]In a subsequent opinion, the Illinois Supreme Court held that the defendant has a constitutional right to be physically present at his guilty plea hearing, which can be waived if the defendant chooses to appear by closed circuit court television. *See People v. Stroud*, 804 N.E.2d 510 (Ill. 2004).

contemplated by *Vennemann*. After the adoption of § 885.60, a defendant should be allowed to consent to this hybrid form of physical presence without running afoul of Wis. Stat. § 971.04(1). However, at first blush, this conclusion appears to be foreclosed by the absolute anti-waiver rule of *Koopmans*.

The *Koopmans* rule is not workable in the post-§ 885.60 courtroom. When *Koopmans* was decided, this court had not yet authorized the use of videoconferencing in circuit courts. *Koopmans* construed § 971.04(1) in a binary world in which the defendant was either present in or absent from the courtroom. Koopmans did not appear at her sentencing hearing in any form; she was totally absent from the court, the state, and the country.[9] In this context, the court concluded that § 971.04(1) absolutely precluded a defendant's voluntary waiver of her right to be present. *See Koopmans*, 210 Wis. 2d at 679-80. The grey area of videoconferencing does not lend itself to the stark black-and-white dualism of *Koopmans*. This is especially true where, as here, the court employs videoconferencing technology that connects two courtrooms. With a courtroom-to-courtroom connection, the defendant is undeniably present in court even if he is not in the literal presence of the judge. In this setting, a defendant should be allowed to give up his right to be "physically present" in the strictest sense of standing face-to-face with the judge.

In the present case, the defendant, his attorney, and the assistant district attorney appeared in the Trempealeau County courtroom (63:1-3). Judge Lister was in the Jackson County courtroom (63:1). The courtrooms were

[9]The circuit court concluded that Koopmans knowingly and voluntarily waived her right to be present at her sentencing hearing by leaving the country and failing to appear. Indeed, Koopmans' attorney "stipulated that Koopmans was a fugitive, and that her absence from the sentencing was voluntary." *Koopmans*, 210 Wis. 2d at 674. Koopmans' waiver was therefore neither express nor explicit. She constructively waived her right to be present by absconding from the jurisdiction and not coming to court.

connected by videoconferencing technology (63:1-3). While the judge and the defendant were not in the same room, and thus were not literally in each other's physical presence, "neither [were they] entirely absent" from each other's physical presence. *Lindsey* 772 N.E.2d at 1277. In the words of the circuit court, Soto was "virtually present" (65:5). There is no allegation that the statutory technical and operational standards were not met. *See* Wis. Stat. § 885.54. *Cf. Vennemann*, 180 Wis. 2d at 85, 91-92 (Vennemann's telephonic participation in his postconviction evidentiary hearing significantly marred by technical difficulties and he "complained several times that he had a bad connection and could not hear the proceedings").

Significantly, Soto was not in a prison or jail, he was in a courtroom, which is not potentially coercive, noisy, or otherwise distracting as a prison or jail might be. *Cf. Peters*, 237 Wis. 2d 741, ¶4. Furthermore, Soto was not separated from his attorney; they were in the same courtroom with no impediments to their communication. *Cf. Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam) (defendant was present in the courtroom at guilty plea hearing, but defense counsel appeared by telephone; habeas corpus relief denied because no clearly established federal law violated). Finally, the State's representative was in the same courtroom with the defense and had the same access to the judge enjoyed by the defense.

Soto's appearance at this two-court videoconference was the "functional" or "legal" equivalent of "physical presence." *See Scott*, 618 So.2d at 1388; *Phillips*, 656 N.E.2d at 665; *Ingram*, 46 S.W.3d at 571; *Peters*, 237 Wis. 2d 741, ¶13. Soto agreed to the videoconference procedure voluntarily. This court should hold that Soto's voluntary participation in these proceedings was legally valid under the statutes. The holdings of *Vennemann* and *Koopmans* should be modified to the extent they interfere with a defendant's voluntary agreement, consent, or motion to participate in a guilty plea hearing by videoconference.

Soto's appearance at his guilty plea hearing by videoconference was permissible under Wis. Stat. § 885.60. He waived his right to be present in the same courtroom with the judge by affirmatively agreeing to the videoconferencing procedure. Accordingly, the circuit court's order denying Soto's motion to withdraw his guilty plea should be affirmed. Soto has failed to show any "manifest injustice" in the entry of his plea.

D. Any Error Was Harmless.

Alleged violations of Wis. Stat. § 971.04(1) are subject to the harmless error rule. *See State v. Harris,* 229 Wis. 2d 832, 840, 601 N.W.2d 682 (Ct. App. 1999). "'[A]n error is harmless if it does not [a]ffect the substantial rights of the party seeking reversal of the judgment.'" *Id.* (citation omitted). The State must prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Id.* "[I]f the possibility of prejudice is found beyond a reasonable doubt to be merely speculative or hypothetical, the harmless error rule applies." *State v. Mills*, 107 Wis. 2d 368, 372, 320 N.W.2d 38 (Ct. App. 1982).

Any error here was harmless. The procedure employed here "in no way subjected appellant to a greater risk of prejudice than personal appearance would have done." *Phillips*, 656 N.E.2d at 664.

As the circuit court explained in its oral ruling denying Soto's postconviction motion, the plea hearing was error-free. The court could clearly see and hear Soto, his attorney, and ADA Marsolek (65:4). They could see and hear the court (*id.*).

> The connection for Jackson [County] … affords a view from the bench which includes both the prosecutor's table and defense counsel. Similarly, Mr. Soto and his counsel were able to see me clearly. I was able to hear everything that occurred in Trempealeau County clearly and there was never

> an indication that they could not clearly see or hear me.

(65:4). The court conducted a careful and scrupulous plea colloquy (63:4-21). *See supra* at 9-10. "I advised him repeatedly that he could take time to discuss matters with his counsel, and there was never an indication from Mr. Kroner or Mr. Soto that he did not understand what was occurring or that somehow he felt that the Court needed to be physically present in the same courtroom" (65:4). The court contrasted this case with *Peters* and *Vennemann*, in which the defendants were in jail and unrepresented (65:6).[10]

Soto's only specific response to the court's analysis is that "Mr. Soto could not see whether other individuals, including a court reporter, were present." Soto's Brief at 13. Soto fails to explain what possible significance his inability to see the court reporter might have. He does not allege that the transcription of his guilty plea hearing was in any way inaccurate. Moreover, it is hard to imagine how the ability to see the court reporter could guarantee the accuracy of the transcription.

Soto argues that videoconferencing has inherent drawbacks that counteract the circuit court's conclusion of harmless error. Soto's Brief at 14-15. Soto's critique is irrelevant to the harmless error analysis because it has nothing to do with the specifics of his own hearing, which had no apparent flaws or deficiencies. Soto provides a catalogue of reasons not to use videoconferencing in judicial proceedings. However, this court has already decided that videoconferencing technology is sufficiently advanced that it may be generally used in the courtroom in lieu of live appearances by all parties in a single place. *See* Wis. Stat. § 885.50. Section 885.54 requires that videoconferencing technology used in the State's courtrooms meet specified technical and operational standards. There is no indication that the

[10]Actually, although Peters appeared pro se, Vennemann was represented by counsel. *See Vennemann*, 180 Wis. 2d at 85.

videoconferencing equipment used at Soto's plea hearing did not satisfy the statutory standards.

Soto acknowledges that the circuit court stated at the postconviction hearing that he and defense counsel had seen and heard everything clearly. Soto's Brief at 15. He counters that "it is impossible for each to know whether anything was missed." *Id.* But he does not suggest what might have been missed. Because this generalized statement of prejudice is at best "speculative or hypothetical, the harmless error rule applies." *Mills*, 107 Wis. 2d at 372. Soto further asserts that "the decision to use videoconferencing technology placed Mr. Soto's defense counsel in the difficult position of having to choose whether to be present with Mr. Soto in one location, or with the judge in another." Soto's Brief at 15. There is absolutely nothing in the record to support the contention that defense counsel Kroner had any such concern or that his choice to stand with Soto in the Trempealeau County courtroom was at all prejudicial to Soto.

Even if this court concludes that the circuit court erred in conducting Soto's guilty plea hearing by videoconference, its decision denying his plea withdrawal motion should nevertheless be affirmed because the error was harmless.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 4th day of August, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7459 words.

Dated this 4th day of August, 2011.

_____
Maura FJ Whelan
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of August, 2011.

_____
Maura FJ Whelan
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP002273-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON ANTHONY SOTO,

Defendant-Appellant.

On Certification of the Appeal From the Judgment of Conviction Entered in the Trempealeau County Circuit Court, the Honorable Thomas E. Lister, Presiding

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I. Mr. Soto Is Entitled to Withdraw His Guilty Plea because the Court Conducted the Plea Colloquy and Accepted His Felony Guilty Plea via Video Teleconferencing, in Violation of Wis. Stats. §§ 885.60(2)(a) and 971.04(1).

A. Whether the right to be physically present at a plea hearing is a constitutional right is not an issue before this court.

Whether there is a constitutional right to be physically present at a plea hearing is not as clear-cut as the State suggests. In ***Illinois v. Allen***, 397 U.S. 337, 338 (1970), the United States Supreme Court held that "[o]ne of the most basic rights guaranteed by the Confrontation Clause [of the Sixth Amendment] is the accused's right to be present in the courtroom at every stage of his trial." That protection is obligatory upon states under the Fourteenth Amendment. ***Id.***

However, this issue was not raised in the court of appeals and is not now before this Court. Accordingly, the State's argument on this question is not germane. Rather, the question this case presents is whether Mr. Soto's statutory right to be physically present pursuant to Wisconsin Statutes §§ 885.60(2)(a) and 971.04(1) was violated when the trial court conducted his plea hearing via video teleconferencing. As discussed below, this Court should answer: "Yes."

B. Defendant may not waive the right to be physically present at the plea hearing.

1. Wis. Stat. § 885.60 does not nullify ***State v. Koopmans***, which holds that the right to be present cannot be waived.

The State agrees with Mr. Soto that the right to be present includes the right to be physically present at a plea hearing. (State's br. at 16). The State concedes that under ***State v. Peters***, 2000 WI App 154, ¶ 1, 237 Wis. 2d 741, 615 N.W.2d 655, *rev'd on other grounds by* 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797, "the closed-circuit television procedure violate[s] statutory criminal procedure"—specifically Wis. Stat. § 971.04(1). (State's br. at 6). The State also concedes, pursuant to ***State v. Koopmans***, 210 Wis. 2d 670, 678-80, 563 N.W.2d 528 (1997), that a defendant may not waive the right to be physically present. (State's br. at 16).

Nonetheless—and in an attempt to circumvent the clear language of the law—the State offers a creative interpretation of Wisconsin Statute § 885.60 which would require its sections to be read in contradiction to both ***Peters*** and ***Koopmans***. In whole, § 885.60 reads as follows:

> **885.60. Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980. (1)** Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding.

> **(2)** (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.
>
> (b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.
>
> (c) If an objection is made by the plaintiff or petitioner in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56
>
> (d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), the court shall sustain the objection.

The State acknowledges that Paragraph (2)(a), which enumerates the specific proceedings at which a defendant's physical presence is required, "provides a brake" on the ability of courts to permit, pursuant to Subsection (1), "the use of videoconferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding." (State's br. at 18). Nonetheless, the State asserts that § 885.60 must be read as permitting the defendant to request his own virtual presence at his guilty plea hearing and alternatively placing the burden

on the defendant to object when his virtual presence is requested by another. (State's br. at 18-19). In support of this proposition, the State routes back to Subsection (1), arguing that although Subsection (1) is "subject to the limitations of sub. (2)," the general rule set forth in Subsection (1) must impliedly permit the defendant's virtual presence at the very proceedings which his physical presence is required under Paragraph (2)(a). (State's br. at 19-20). This circular logic runs afoul of the rules of statutory interpretation, and accordingly should not be adopted by this Court.

"Statutory interpretation begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane Co***., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotations omitted). This language is "not read in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably, to avoid absurd or unreasonable results." ***Id.*** ¶ 46. If the meaning of the statute is plain, the court ordinarily stops the inquiry. ***Id.*** ¶ 45. If, however, it is ambiguous, "the reviewing court turns to the scope, history, context, and purpose of the statute." ***Id.*** ¶ 48.

Contrary to the State's assertion, the meaning of § 885.60 is plain for four reasons. First, by designating numerical and alphabetical values to subparts of statutes, the legislature has indicated that there is an order in which those subparts are to be read and applied. Subsection (1) establishes a general rule that is "subject to the limitations of sub. (2)." Wis. Stat. § 885.60(1). Accordingly, Paragraph (2)(a) constitutes an exception to Subsection (1), not the reverse. Thus, the general rule permitting the use of videoconferencing technology is plainly subject to a defendant's right to by physically present.

Second, as noted by the State, this Court in ***State v. Venneman***, 180 Wis. 2d 81, 96, 508 N.W.2d 404 (1993), reaffirmed that "any alterative not so enumerated [in a statute] is to be excluded." (State's br. at 15). Accordingly, courts may not craft exceptions to a rule which are not expressly provided for in its language. As the State concedes, § 885.60 does *not* expressly permit a defendant to appear virtually at the proceedings enumerated in Paragraph (2)(a). (State's br. at 18). Had the drafters of the rule intended to create such an exception, they would have done so explicitly. This Court should not now substitute an alternative intent for that of the rule drafters. ***Meyers v. Bayer AG***, 2007 WI 99, ¶ 53, 303 Wis. 2d 295, 735 N.W.2d 448.

Third, the prohibitions against the defendant's virtual presence set forth in Paragraph (2)(a) do not, as the State contends, nullify the general rule permitting the use of videoconferencing technology set forth in Subsection (1). Neither § 971.04 nor § 885.60 place absolute prohibitions on a court's ability to secure the presence of opposing counsel, a witness, or an expert via videoconferencing technology. Accordingly, the fact that the defendant's physical presence may be required at a given proceeding does not prevent the court from using videoconferencing technology in other capacities at that same proceeding.

Fourth, in asking this court to find that § 885.60 permits a defendant to request his own virtual presence or to appear virtually at the request of another, the State would have this Court overrule the holdings of both ***Peters*** and ***Koopmans***. Permitting virtual presence under § 885.60 directly contradicts this court's holding in ***Peters*** that a defendant's presence via videoconferencing violates § 974.01. 237 Wis. 2d 741, ¶ 7. Such a consequence would be contrary to the rule of statutory interpretation that this

court must read statutory sections to give each "full force and effect." ***State v. Fischer***, 2010 WI 6, ¶ 24, 322 Wis. 2d 265, 778 N.W.2d 629. Moreover, as this Court has said, § 885.60 was intended to "preserve" any existing rights to be physically present "and to avoid abrogating by virtue of the adoption of this subchapter any such rights." *See* Wis. Stat. § 885.50 ("Comment, 2008").

Likewise, permitting a defendant to request his own virtual appearance or consent to the same at the request of another would contradict the prohibition against waiver set forth in ***Koopmans***. The State acknowledges as much, but asks this court for "fresh consideration" on the assertion that "[t]he ***Koopmans*** rule is not workable in the § 885.60 courtroom." (State's br. at 22, 23). In support of this position, the State argues that "several jurisdictions have concluded that an appearance by videoconference can be the legal or functional equivalent of physical presence." (State's br. at 22).

The State's perspective is troubling. Three of the five cases cited by the State involve the defendant's virtual presence at his arraignment. (State's br. at 22).[1] Another

[1] *See* ***Scott v. State***, 618 So.2d 1386, 1387-1388 (Fla. 1993) (holding defendant knowingly and voluntarily waiver his physical presence at his plea and sentencing hearing); ***People v. Lindsey***, 772 N.E.2d 1268, 1275-1278 (Ill. 2002) (although the arraignment and jury waiver were "critical stages" at which a defendant's physical presence is guaranteed by the Sixth Amendment, defendant failed to demonstrate that his video appearance at the *arraignment* and *jury waiver* was unfai*r*); ***Commonwealth v. Ingram***, 46 S.W.3d 569, 570-571 (Ky. 2001) (upholding Kentucky's policy of conducting video *arraignments*); ***Guinan v. State***, 769 S.W.2d 427, 430-431 (Mo. 1989) (the Sixth Amendment's right to be physically present does not extend to *civil post-conviction proceedings*); ***State v. Phillips***, 656 N.E.2d 643, 663-665 (Ohio 1995) (video *arraignments* do not violate the Ohio Constitution).

involves a civil proceeding. None, however, stand for the proposition that a defendant may appear virtually at his guilty plea hearing in the absence of a knowing and voluntary waiver. Indeed, civil proceedings and criminal arraignments are markedly different from guilty plea hearings: unlike the latter, the former do not subject a defendant to the finality of a conviction through which the loss of his liberty will result.

The State's reliance on ***Peters***, 237 Wis. 2d 741, is equally misplaced. Although it is true that the ***Peters*** court noted that "an audio visual hookup may well be the legal equivalent of physical presence," it ultimately held that "the closed-circuit television procedure violate[s] statutory criminal procedure." ***Id.*** ¶ 1. It additionally noted that those jurisdictions which rely heavily on videoconferencing technology require defendants to explicitly waive their right to be present—something which did not occur in this case. ***Id.*** ¶ 7 n. 8.

Furthermore, Wisconsin is not alone in holding that a defendant's right to be physically present may not be waived. *See*, *e.g.*, ***State v. Gatcomb***, 397 A.2d 185, 187 (Me. 1979) (defendant has an "affirmative legal obligation of presence at every stage of the trial"); ***Johnson v. State***, 604 S.W.2d 927, 929 (Ark. 1980) (noting that a criminal defendant cannot waive his right to be present in a capital case); ***State v. Wise***, 472 N.W.2d 278, 279 (Iowa 1991) ("barring exceptional circumstances, a criminal defendant should be personally present at every stage of the trial"); ***State v. Brown***, 907 So. 2d 1, 14 (La. Apr. 12, 2005) ("[T]his Court . . . has never ruled that a defendant in a capital case may absent himself during key phases of the trial," including the guilty plea stage). While these prohibitions against waiver may be overcome by the defendant's disruptive behavior and failure to appear after the commencement of a proceeding at which

he initially appeared, other jurisdictions have declined to recognize an actual "right to be absent." *See*, *e.g.*, ***State v. Roberts***, 632 S.E.2d 871, 873 (S.C. 2006) (there is no "constitutional right to be absent"). It is therefore clear that despite advances in technology, numerous jurisdictions have not been compelled by arguments in support of "fresh consideration".

Accordingly, this court should reject the State's interpretation of § 885.60 as contrary to the rules of statutory interpretation, and hold that the plain language of § 885.60 does not permit a defendant to request his own virtual presence at a guilty plea hearing or to appear virtually at the request of another.

2. To the extent that a defendant may waive the right to be physically present, the court must engage the defendant in a personal colloquy.

In his brief-in-chief, Mr. Soto submitted that even if a defendant is permitted to waive his right to be physically present at his guilty plea hearing, it would first require the sort of formal colloquy contemplated by ***State v. Ndina*** to satisfy the court that Mr. Soto made an "intentional relinquishment or abandonment of a known right." 2009 WI 21, ¶ 29, 31, 315 Wis. 2d 653, 761 N.W.2d 612 (holding that certain fundamental rights may only be waived "personally and expressly"). The State disagrees, arguing that apart from those constitutional rights specifically mentioned in ***Ndina***, the waiver of all other rights "can be relinquished without a formal waiver colloquy." (State's br. at 11).

Contrary to the State's assertion, ***Ndina*** does not excuse a court from conducting a personal colloquy where the right being waived is a statutory one. Rather, ***Ndina*** merely

provides a non-exhaustive list of rights which the waiver of absolutely requires a personal colloquy. Indeed, the colloquy requirement has been extended to rights—both constitutional and statutory—beyond those few listed in ***Ndina***. As the Wisconsin Supreme Court has observed, "[w]hen a *statute* confers a private right or benefit . . . [any] waiver must be clear and unambiguous," demonstrating "a voluntary and intentional relinquishment." ***Faust v. Ladysmith-Hawkins School Systems***, 88 Wis. 2d 525, 532, 277 N.W.2d 303 (Wis. 1979) (emphasis added).

Tellingly, those jurisdictions which do permit a defendant to waive his right to be physically present unanimously require some proof that the waiver is knowingly and voluntarily made: either a written waiver or a personal colloquy conducted by the court. *See*, *e.g.*, Ala. R. Crim. Pro. 9.1; Cal. Pen. Code. § 977(b); ***State v. Willis***, 864 P.2d 1198, 1202 (Kan. 1993) (a waiver of the right to be present must be "freely and voluntarily, with full knowledge of the possible consequences and with advice of counsel"). The defendant's mere consent to a virtual appearance —achieved without an explanation by the court of the right to be waived and the consequences of a waiver—does not rise to this level. Accordingly, as the court in this case failed to conduct a personal colloquy with Mr. Soto, or alternatively obtain his written waiver, Mr. Soto's "consent" to the use of video conferencing technology at his guilty plea hearing does not constitute a valid waiver.

C. The circuit court's error was not harmless.

The State argues that the violations of §§ 885.60 and 971.04(1) which occurred in this case are harmless. (State's br. at 25). It faults Mr. Soto for noting general drawbacks to the use of videoconferencing technology in a felony guilty

plea hearing, rather than citing to specific instances of harm. (State's br. at 25). However, it is the State's burden, not Mr. Soto's, to prove harmlessness beyond a reasonable doubt. *See* ***State v. LaCount***, 2008 WI 59, ¶ 85, 310 Wis. 2d 85, 750 N.W.2d 780.

As discussed in detail in Mr. Soto's brief-in-chief, specific harms are inherent in the limitations of videoconferencing technology. (Brief-in-chief at 13-15). However, the presence of these harms is difficult—if not impossible—for a court to detect. Nonetheless, research indicates that defendants suffer a general disadvantage from the use of video teleconferencing technology. One such study examines the disparity of treatment at bail hearings between defendants who appear virtually versus those who appear physically, and confirms that bail is set at on average at 51% higher when the defendant's appearance is virtual. Diamond, *Efficiency And Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 892. While more difficult to quantify, it is likely defendants are similarly disadvantaged when video conferencing technology is utilized at those proceedings where more is at stake, such as the guilty plea hearing.

In this case, the trial court asserted without consideration for potential harm that it and the parties saw and heard everything clearly. (65:4; App. 105). However, this statement contradicts the record, which specifically confirms that Mr. Soto was unable to determine whether individuals other than the presiding judge were present in the Jackson County Courtroom. Furthermore, it is impossible for the Court, Mr. Soto and defense counsel to know each whether anything was misunderstood or completely missed. This lack of clarity regarding the negative effects of the court's erroneous procedure does not indicate that the error

was harmless. Rather, it indicates that the State has failed to prove harmlessness beyond a reasonable doubt.

CONCLUSION

For the reasons stated in this brief, Mr. Soto respectfully requests that this court vacate the judgment of conviction and remand the case to the circuit court with instructions to permit Mr. Soto to withdraw his guilty plea and to set this case for trial.

Dated this 16th day of August, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,959 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of August, 2011.

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