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THE INVALIDITY OF A PLEA OF GUILTY TO A CRIMINAL OFFENSE MADE BY VIDEO TELECONFERENCING WHEN THE DEFENDANT IS NOT PRESENT IN OPEN COURT

William R. Simpson, Jr., Clint Miller,** and David Sudduth****

“And no man putteth new wine into old bottles . . . but new wine must be put into new bottles.”¹

I. INTRODUCTION

“[A] plea of guilty is more than an admission of conduct; it is a conviction.”² Nonetheless, defendants are not required to be physically present in the courtroom for this moment. The taking of guilty pleas from defendants in criminal cases by video conferencing (VTC) is becoming more common in Arkansas district courts and circuit courts. For three reasons, a defendant’s plea of guilty to a criminal offense by VTC when the defendant is not present in open court is invalid as a matter of Arkansas law and unconstitutional as a matter of due process.

First, there are no Arkansas statutes or court rules that explicitly permit a defendant to plead guilty to a criminal offense by VTC. Second, as a matter of Arkansas statute and court rule, a defendant must be present in open court when he pleads guilty to a felony offense. The provisions of Arkansas’s pertinent statute and court rule are old bottles into which the new wine of felony guilty pleas by VTC cannot be poured without violating several rules of statutory interpretation. Third, a guilty plea to a criminal offense is a critical stage of a criminal prosecution, and the defendant’s actual presence in the courtroom when he pleads guilty is necessary for the requirements of due process of law to be met. VTC places limitations on communication

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1. *Mark* 2:22 (King James).
2. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

between a defendant and a judge, to whom the defendant is pleading guilty. Therefore, VTC is not a substitute for the actual presence of the defendant in open court before the judge when the defendant pleads guilty to a felony offense.

II. THERE IS NO ARKANSAS LAW PERMITTING A DEFENDANT TO PLEAD GUILTY TO A CRIMINAL OFFENSE BY VTC

The use of VTC to take guilty pleas from defendants in criminal cases in Arkansas district courts and circuit courts is increasing.³ However, there is no Arkansas statute or court rule that permits a defendant to plead guilty to a criminal offense by VTC. Although some jurisdictions permit a defendant to plead guilty by VTC, there are statutes or court rules that explicitly permit such guilty pleas.⁴

The VTC protocols that are used in Arkansas courts are not the product of legislative deliberation or rule promulgation by the Arkansas Supreme Court. These protocols have not been subject to review by interested members of the public. Instead, the VTC procedure is typically put in place by court personnel and the local sheriff's office in the name of efficiency and reducing expenses.⁵ The Arkansas Supreme Court does not look with favor on innovations in criminal procedure put in place by circuit courts. The court made its displeasure known with such circuit court initiated changes in criminal procedure in *Woolbright v. State*.⁶

In *Woolbright*, the court considered the validity of a dual-jury trial.⁷ A dual-jury trial is a trial in which there are two defendants, and two separate juries are empanelled: one jury to try one defendant and the other jury to try the other defendant. The court affirmed *Woolbright's* first-degree murder conviction, finding that she had suffered no prejudice as a result of the dual-jury procedure.⁸ In the course of its analysis, the court noted that "[t]he use

3. The increase in guilty pleas by video teleconferencing in Arkansas is part of a national trend. *E.g.* Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 810–12 (1994).

4. *See* *People v. Stroud*, 804 N.E.2d 510, 517–18 (Ill. 2004) (Michigan, North Carolina, and Nevada have statutes that explicitly permit guilty pleas by VTC); Zachary M. Hillman, Note, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" When Pleading Guilty by Video Teleconference?* 7 J. HIGH TECH. L. 41, 52 nn. 75–76 (2007) (California, Michigan, Mississippi, Missouri, Nevada, North Carolina, and Texas have statutes that explicitly permit guilty pleas by VTC).

5. Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 64–65 (2002); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1098–1100 (2004).

6. 357 Ark. 63, 160 S.W.3d 315 (2004).

7. *Id.* at 73, 160 S.W.3d at 321.

8. *Id.* at 80, 160 S.W.3d at 326.

of a dual jury has recently come into vogue in the trial courts.”⁹ The court noted further that a joint trial of co-defendants is permitted as a matter of Ark. R. Crim. P. 22 (a) if one co-defendant’s out-of-court statement is not admitted into evidence against the other co-defendant.¹⁰

However, the court refused to hold that a dual jury was permitted where co-defendants are properly tried together. With regard to the future use of dual juries, the court held:

Regardless of the propriety of the dual-jury procedure under our rules, we join the majority of courts that have expressed concern about dual juries. Accordingly, we condemn the practice and prohibit the use of dual juries until such time as a rule has been implemented to specifically address the practical considerations necessary for safeguarding the defendants’ rights.¹¹

Woolbright is not, of course, directly on point because it does not address guilty pleas to criminal offenses by VTC. Nevertheless, *Woolbright* does stand for two important points that militate against the VTC procedures being used. First, the Arkansas Supreme Court favors fundamental changes in criminal procedure to be brought about by its own power to promulgate rules of criminal procedure. In this respect, a change to Arkansas’s criminal procedure is a process that starts with the court’s criminal practice committee, rather than with trial courts. Second, *Woolbright* establishes that whatever reforms are made in Arkansas’s criminal procedure, these changes must safeguard the rights of defendants. The Arkansas Supreme Court is, itself, more than capable of promulgating rules that accommodate changes in communications technology with court procedure that protect the rights of defendants in criminal prosecutions.¹²

III. ARKANSAS’S PRESENT COURT RULE AND STATUTE THAT GOVERN THE MAKING OF GUILTY PLEAS CANNOT BE “INTERPRETED” TO ALLOW GUILTY PLEAS TO FELONY CHARGES BY VTC

A. The Pertinent Statute and Court Rule

Arkansas’s present law governing the presence of the defendant when pleading guilty is set forth in Arkansas Code Annotated section 16-90-106¹³ and in Criminal Procedure Rule 24.3.¹⁴ Section 16-90-106(a) states that,

9. *Id.* at 76, 160 S.W.3d at 323.

10. *Id.* at 77, 160 S.W.3d at 324.

11. *Id.* at 78, 160 S.W.3d at 324–25.

12. *See* ARK. SUP. CT. ORDER NO. 6 (regulating the televised broadcasting of trials).

13. ARK. CODE ANN. § 16-90-106(a) (Repl. 2006).

14. ARK. R. CRIM. P. 24.3(a) (2011).

Judgment shall not be rendered against a defendant in case of felony, except in his or her presence. If the defendant is in custody, he or she shall be brought into court by the proper officer, and if not in custody, a bench warrant . . . shall be issued for his or her arrest.

Rule 24.3(a) states, in pertinent part, that,

A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except that counsel may enter a plea of guilty on behalf of a defendant in misdemeanor cases where only a fine is imposed by the court.

Reading both the statute and the court rule together establishes the procedure that to plead guilty to a criminal charge, a defendant must be present in open court, except for “fine only” misdemeanors.

Can this rule be interpreted to allow for a guilty plea by VTC? No, if the principles of statutory interpretation are correctly followed. Three maxims of statutory interpretation prohibit an interpretation of “be present” and “in open court” so expansive so as to permit guilty pleas by VTC: (1) the rule requiring strict interpretation of statutes and rules governing criminal procedure;¹⁵ (2) the “ordinary meaning” rule;¹⁶ and (3) the “separation of powers” rule.¹⁷ These principles of statutory interpretation also govern the interpretation of court rules.¹⁸ In Arkansas, the rules of statutory interpretation have their origin in the common law and in decisions of the Arkansas Supreme Court.¹⁹

B. The Rule Requiring Strict Interpretation of Statutes and Rules Governing Criminal Procedure

Statutes as rules governing criminal procedure are strictly construed, and any doubts are resolved in favor of the defendant.²⁰ Assuming that the meaning of “present” and “open court” are doubtful, application of the strict interpretation would be narrow and in favor of the defendant. An “open

15. See *infra* Part III.B.

16. See *infra* Part III.C.

17. See *infra* Part III.D.

18. *Velek v. State*, 364 Ark. 531, 533, 222 S.W.3d 182, 184 (2006).

19. Michael W. Mullane, *Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach*, 2005 ARK. L. NOTES 73; Michael W. Mullane, *Statutory Interpretation in Arkansas: How Should A Statute Be Read? When Is It Subject to Interpretation? What Our Courts Say and What They Do*, 2004 ARK. L. NOTES 85.

20. *State v. Britt*, 368 Ark. 273, 276, 244 S.W.3d 665, 667 (2005); *Lampkin v. State*, 101 Ark. App. 275, 277, 275 S.W.3d 679, 681 (2008).

court” is one that the public can freely attend.²¹ Only an expansive definition of “open court” could encompass a VTC room in the county jail, if the public were prohibited from freely entering the room. Moreover, a narrow definition of “present” in court means “[t]he fact or condition of being present; the state of being before, in front of, or in the same place with a person or thing; being there.”²²

C. The “Common Sense Meaning” Rule of Statutory Interpretation

In Arkansas, courts interpret the provisions of court rules and statutes by giving the words that make up the provisions their ordinary and usually accepted meaning in common language.²³ Numerous federal and state courts have considered what the common sense, ordinary meaning of “appear” in court or “present” in court is in the context of VTC and conferencing by telephone. These courts have overwhelmingly held that the common sense meaning of “present” or “appear” is “actual presence” in the courtroom.²⁴ This overwhelming weight of authority establishes that the common sense meaning of “presence” in Arkansas Code Annotated section 16-90-106(a) means actually physically present in the courtroom with the judge and counsel.

21. *U.S. v. Alcantara*, 396 F.3d 189, 204–06 (2d Cir. 2005); BLACK’S LAW DICTIONARY 1199 (9th ed. 2009).

22. *U.S. v. Lawrence*, 248 F.3d 300, 303–04 (4th Cir. 2001) (citing four dictionaries in the course of deciding that a defendant is not “present” for his sentencing hearing if the defendant appears by VTC).

23. *State v. L.P.*, 369 Ark. 21, 27, 250 S.W.3d 248, 252–53 (2007); *City of Fort Smith v. Hairston*, 196 Ark. 1005, 1008 (1938); *Hancock v. State*, 97 Ark. 38, 43 (1910).

24. *U.S. v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011); *U.S. v. Thompson*, 599 F.3d 595, 598–601 (7th Cir. 2010); *Terrell v. U.S.*, 564 F.3d 442, 451–53 (6th Cir. 2009); *U.S. v. Torres-Palma*, 290 F.3d 1244, 1246–48 (10th Cir. 2002); *U.S. v. Lawrence*, 248 F.3d 300, 303–04 (4th Cir. 2001); *U.S. v. Navarro*, 169 F.3d 228, 238–39 (5th Cir. 1999); *Valenzuela-Gonzales v. U.S. Dist. Ct.*, 915 F.2d 1276, 1281 (9th Cir. 1990); *U.S. v. Wise*, 489 F. Supp. 2d 968, 970–71 (S.D. 2007); *U.S. v. Melgoza*, 248 F. Supp. 2d 691, 692 (S.D. Ohio 2003); *U.S. v. Reynolds*, 44 M.J. 726, 728–29 (Army Ct. Crim. App. 1996); *Henry v. State*, 861 P.2d 582, 592–93 (Alaska Ct. App. 1993); *R.R. v. Portesy*, 629 So. 2d 1059, 1060–62 (Fla. Dist. Ct. App. 1994); *State ex rel. Turner v. Kinder*, 740 S.W.2d 654, 656 (Mo. 1987); see also Fern L. Kletter, Annotation, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R. 5th 509 at § 9(b), § 11(b) (2011).

D. The Rule Prohibiting Courts from Usurping the Legislative Function of the General Assembly

The public policy of the State of Arkansas is set forth in the statutes enacted by the General Assembly and not by the Arkansas courts.²⁵ Courts in Arkansas cannot perform the legislative function of the General Assembly by rewriting statutes under the guise of interpreting them.²⁶ Further, courts may not rewrite statutes, under the guise of interpreting them, in order to “improve” the statutes.²⁷ Although courts may interpret the ambiguous provisions of a statute, the proper time frame for determining whether a word or phrase in a statute is ambiguous is the time when the statute was enacted.²⁸ For well over one hundred years in Arkansas, as a matter of statute, a defendant in a felony prosecution could not be sentenced unless he was personally present in court.²⁹ Over one hundred years ago, the General Assembly did not have VTC in mind when it enacted statutes that required the defendant to be personally present in court to be sentenced on a felony offense.³⁰ Over the passing years, the General Assembly has not modified this “presence” requirement. When the General Assembly chooses to dispense with the requirement of the presence of a defendant in a criminal proceeding, it will enact a statute that does so.

For example, in 2005 the General Assembly enacted a statute that allowed a defendant accused of committing a traffic violation to waive his right to appear in court and plead guilty by a signed statement.³¹ Here, the General Assembly was, so to speak, pouring new wine into a new bottle. Arkansas’s courts cannot, without violating the doctrine of separation of powers, pour new wine into old bottles by imposing a meaning on the provisions of a statute that would never have occurred to the members of the session of the General Assembly that enacted the statute.

25. *State v. Lester*, 343 Ark. 662, 669, 38 S.W.3d 313, 317 (2001); *see also Carter Oil Co. v. Weil*, 209 Ark. 653, 660, 192 S.W.2d 215, 218 (1946) (“... courts do not make the law.”).

26. *Neeve v. City of Caddo Valley*, 351 Ark. 235, 238, 91 S.W.3d 71, 74 (2002); *Hazelrigg v. Bd. of Penitentiary Comms.*, 184 Ark. 154, 155–56, 40 S.W.2d 998, 999 (1931). 73 AM. JUR. 2D *Statutes* § 116 (2001); 82 C.J.S. *Statutes* § 370 (2009).

27. *See McBoyle v. U.S.*, 283 U.S. 25, 27 (1931); *McCaa Chevrolet Co. v. Bounds*, 207 Ark. 1043, 1050, 183 S.W.2d 932, 935 (1944).

28. *Perrin v. U.S.*, 444 U.S. 37, 42–43 (1979); Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 *FORDHAM L. REV.* 2177, 2192 (2003).

29. *See, e.g., Sneed v. State*, 5 Ark. 431, 432 (1843); *ARK. STAT. ANN.* § 43-2302-03 (1947).

30. *See Terrell v. U.S.*, 564 F.3d 442, 449 (6th Cir. 2009) (subsequent technological developments cannot change the common sense meaning of “appear”).

31. *ARK. CODE ANN.* § 16-17-136(1)(Repl. 2010).

IV. A GUILTY PLEA TO A CRIMINAL OFFENSE IS A CRITICAL STAGE OF A CRIMINAL PROCEEDING FOR PURPOSES OF DUE PROCESS OF LAW THAT REQUIRES THAT THE DEFENDANT BE ACTUALLY PRESENT IN THE COURTROOM WHEN HE PLEADS GUILTY

A defendant's plea of guilty to a criminal charge is a critical stage of the criminal proceedings against him for purposes of the application of due process of law.³² Why a defendant's plea of guilty to a criminal offense is a critical stage of the proceedings for purposes of the requirements of due process of law was explained by the Illinois Court of Appeals in 2000. In the course of holding that a guilty plea to a felony offense by VTC was violative of the defendant's right to due process of law, the court noted:

A guilty plea is a critical stage because its direct result is defendant's conviction. It is an admission of guilt of the criminal acts charged as well as of all material facts alleged in the charging instrument. This admission rebuts the presumption of innocence. The entry of a guilty plea results in the waiver of a defendant's "right to a trial by jury and the right to be confronted with the witnesses against him." A guilty plea also waives other constitutional rights, such as the fundamental right to present evidence and to raise the privilege against self-incrimination.

A guilty plea is a decisive moment for the defendant in the criminal process. The plea obviates the prosecution's burden of proof. "It supplies both evidence and verdict, ending controversy." It carries the same finality as a jury verdict. The atmosphere of the courtroom can play a critical, albeit intangible, role in the proceedings, including a hearing on a plea. A 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 an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.³³

Because the entry of a guilty plea to a criminal charge is a critical stage of the criminal proceedings against him, a defendant must be present in court. However, a defendant who "appears" in court by VTC is not present in the court. The defendant's video image in the courtroom is not the equivalent of the defendant's actual presence. When taking a guilty plea, a judge should closely evaluate the defendant's body language, hand gestures, and facial expressions, none of which can accurately be conveyed through a television screen. VTC impacts nonverbal cues and eye contact, and "[t]o the extent that technology changes behavior or masks or distorts informa-

32. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

33. *People v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000) (citations omitted).

tion, it may undermine the accuracy of perceptions and corrupt the result of the proceeding.”³⁴

Lastly, when a defendant is not present in court for his guilty plea, his absence will complicate communication between him and his attorney.³⁵ If the defendant is prevented from asking his attorney questions in confidence, it may affect the voluntariness of the defendant’s plea.³⁶

V. CONCLUSION

The taking of a defendant’s plea of guilty to a felony offense by VTC is not permitted by any Arkansas statute or court rule. At least three rules of statutory construction prohibit Arkansas courts from legitimizing the taking of a guilty plea to a felony offense by VTC by “interpreting” Arkansas Code Annotated section 16-90-106(a) or Arkansas Rule of Criminal Procedure 24.3(a). Moreover, because VTC does not completely convey nonverbal communication, it cannot make a defendant “present” in court, and due process requires that a defendant pleading guilty to a criminal offense be actually present in court. Any changes in the procedure for taking guilty pleas that could diminish a defendant’s due process rights cannot be initiated by county sheriffs or bailiffs, but must, instead, be the product of careful deliberation by the legislature or by the Arkansas Supreme Court acting as a rule-maker.

34. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1114 (2004). *Accord* Terrell v. U.S., 564 F.3d 442, 451–53 (6th Cir. 2009); U.S. v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001); Edwards v. Logan, 38 F. Supp. 2d 463 (W.D. Vir. 1999); People v. Guttendorf, 723 N.E.2d 838, 840–41 (Ill. App. Ct. 2000); *see also* Advisory Committee Notes of the 2002 amendment to FED. R. CRIM. P. 5(f).

35. Poulin, *supra* note 34, at 1152.

36. *Id.* (citing Seymore v. State, 582 So.2d 127 (Fla. Dist. Ct. App. 1991)).