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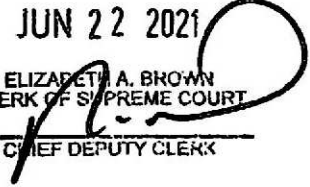
June 21, 2021

Elizabeth A. Brown, Clerk of the Court
Supreme Court of Nevada
201 S. Carson Street
Carson City, NV 89701

RE: *ADKT No. 581*
To nvscclerk@nvcourts.nv.gov only

FILED

JUN 22 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Dear Ms. Brown:

I write in response to the Court's Order Scheduling Public Hearing and Requesting Public Comment in the matter of ADKT 581. In ADKT 581, Chief Justice Hardesty petitioned the Nevada Supreme Court to consider creating a Commission to Study Best Practices for Virtual Advocacy in Nevada's Courts, and to "consider possible rule changes necessary for handling criminal, civil, and family court matters effectively using remote technology."

For the reasons set forth herein, I believe this Commission is a wonderful idea as it will enable the judiciary to learn what remote practices worked best during the COVID-19 pandemic. In addition, the Commission will have an opportunity to streamline the Supreme Court's existing rules governing appearance by telephonic transmission equipment and simultaneous audiovisual transmission equipment for criminal proceedings. See SCR Part IX-A(A) and (B).

I. Virtual Advocacy and the Fundamental Right of Presence.

An initial lesson from the COVID-19 pandemic is that rules regarding remote practice in criminal cases should not deny criminal defendants the fundamental right to be present in the courtroom at all critical stages of proceedings, nor should the rules treat different types of criminal defendants differently in terms of this fundamental right. If the Commission determines that it makes sense to continue the use of remote/virtual options to conduct hearings and court business, the new rules should give criminal defendants the *option* to knowingly waive¹ this right and appear remotely via simultaneous audiovisual transmission equipment.

¹ See *Collins v. State*, 133 Nev. 717, 720, 405 P.3d 657, 661 (2017) (While a criminal defendant may waive his or her constitutional right to presence, "the record supporting waiver should demonstrate, at minimum, that the defendant understands the right he [or she] is waiving. . .").

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Criminal defendants are “guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if [their] presence would contribute to the fairness of the procedure.” Kentucky v. Stincer, 482 U.S. 730, 745 (1987). “The right to be present is rooted in the Confrontation Clause and the Due Process Clause of the Federal Constitution.” Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). Thus, a criminal defendant has a Sixth Amendment right to presence when “the proceeding involves the presentation of evidence” and a Due Process Clause right to presence “to the extent that a fair and just hearing would be thwarted by the defendant’s absence.” *Id.* (citing United States v. Gagnon, 470 U.S. 522, 526–27 (1985)). The right to presence at all critical stages is also enshrined in the Nevada Constitution, which provides, “in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel.” Nev. Const. art. I, § 8(1).

A “critical stage” is “a step of a criminal proceeding ... that h[olds] significant consequences for the accused.” Bell v. Cone, 535 U.S. 685, 696 (2002) (citations omitted). In addition to the trial itself, critical stages of proceedings include arraignments,² bail hearings,³ guilty pleas,⁴ preliminary hearings,⁵ sentencing and any other hearings that will affect a defendant’s substantial rights,⁶ and probation revocation proceedings.⁷

In Nevada, appearance by simultaneous audio-visual transmission is not the same thing as physical presence in the courtroom. By statute, criminal defendants have a substantive statutory right (and, indeed, an obligation) to be physically “present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence.” NRS 178.388(1). The statute distinguishes between physical presence in the courtroom and appearance by “closed circuit television.” Specifically, NRS 178.388(4) states that “[t]he presence of the defendant is not required at the arraignment or any preceding stage if the court has provided for the use of a closed-circuit television to facilitate communication between the court and the defendant during the proceeding.” The only time that “closed-circuit

² Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that arraignment was a “critical stage in a criminal proceeding.”); McCarty v. State, 132 Nev. 218, 222-24, 371 P.3d 1002, 1005-06 (2016) (discussing defendant’s right to counsel at an initial appearance and during critical stages).

³ Valdez-Jimenez v. Eighth Jud. Dist. Ct., 136 Nev. 155, 166, 460 P.3d 976, 987 (2020) (recognizing defendant’s rights at a bail hearing “to be represented by counsel and . . . to testify and present evidence.”).

⁴ Iowa v. Tovar, 541 U.S. 77, 81 (2004) (“The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a ‘critical stage’ at which the right to counsel adheres.”).

⁵ Coleman v. Alabama, 399 U.S. 1, 10 (1970) (holding that “Alabama preliminary hearing is a ‘critical stage’ of the State’s criminal process.”); *c.f.* State v. Sargent, 122 Nev. 210, 213, 128 P.3d 1052, 1054 (2006) (recognizing that “the United States Constitution grants the defendant the *right* to be present during certain stages of his prosecution, but nothing in the Constitution *requires* his presence at a preliminary hearing.”) (emphasis added).

⁶ Kirksey, 112 Nev. at 1000, 923 P.2d at 1115; *see also* Beals v. State, 106 Nev. 729, 731, 802 P.2d 2, 4 (1990) (“A critical stage of the criminal proceeding includes a sentencing hearing or any other hearing that will affect the substantial rights of the defendant.”) (internal citations omitted).

⁷ Rahn v. Warden, 88 Nev. 429, 431, 498 P.2d 1344, 1346 (1972) (choosing to follow federal precedent that “probation revocation is a critical stage of the criminal process.”).

television can take the place of a defendant's presence in court is at "arraignment or any preceding stage." *Id.* And, even then, closed-circuit television is considered an *alternative* to presence in those limited circumstances.

Likewise, federal courts have recognized that the requirement of physical presence is not satisfied when a defendant appears in court by closed-circuit television. See United States v. Salim, 690 F.3d 115, 122 (2d Cir. 2012) ("[E]very federal appellate court to have considered the question has held that a defendant's right to be present requires physical presence and is not satisfied by participation through videoconference.") (citing United States v. Williams, 641 F.3d 758, 764–65 (6th Cir. 2011); United States v. Torres–Palma, 290 F.3d 1244, 1245–48 (10th Cir. 2002); United States v. Lawrence, 248 F.3d 300, 301, 303–04 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 235–39 (5th Cir. 1999), *cert. denied*, 528 U.S. 845 (1999)); see also United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018) (recognizing "the value of the defendant and judge both being physically present" and holding that "all parties" must "be present for a defendant's plea" and that "a defendant cannot consent to a plea via videoconference.").

The federal courts that have considered the issue have recognized the unique benefits of physical presence, and the fact that "virtual reality is rarely a substitute for actual presence." Bethea, 888 F.3d at 867 (quoting Williams, 641 F.3d at 764-65). So, it should come as no surprise then, that when the federal government sought to address the COVID-19 pandemic and authorized the use of videoconferencing for criminal proceedings in the CARES Act, it was careful to preserve criminal defendants' rights to appear in person, authorizing the mechanism of virtual appearance *only* where the defendant had first given consent, after consultation with counsel. See CARES Act, Pub L. No. 116-136, § 15002(b)(4), 134 Stat. 281, 528-29 (2020) ("CONSENT – Video teleconferencing or telephone conferencing authorized under paragraph (1) or (2) may only take place with the consent of the defendant, or the juvenile, after consultation with counsel."); see also United States v. Fagan, 464 F.Supp.3d 427, 429-33 (D. Me. 2020) (outlining the many hurdles imposed by the CARES Act that would need to be overcome before videoconferencing would be a permissible alternative to physical presence, including the requirement of consent, and, in cases of pleas or sentencing, the requirement of a "case-specific" finding by the court that the plea or sentencing could not be delayed without serious harm to the interests of justice).

The CARES Act struck the proper balance between preserving criminal defendants' fundamental right to presence and protecting public health in the face of a worldwide pandemic. This goal was achieved by allowing defendants to knowingly *waive* their right to physical presence and by requiring the courts to conduct a case-specific inquiry before permitting the procedure to be used in cases of guilty pleas and sentencing.

In contrast, the Administrative Orders issued by the Eighth Judicial District Court during the COVID-19 pandemic were not as protective of criminal defendants' fundamental rights. Criminal defendants in Clark County were not given the option of knowingly waiving their fundamental right to presence at critical proceedings; rather, the Eighth Judicial District Court determined that *some* criminal defendants would be permitted to appear in person at *some* critical stages, while others were not.

Beginning with Administrative Order 20-17 and continuing through Administrative Order 21-17 (which remains in effect today), the Eighth Judicial District Court has treated "in-custody" and

“out-of-custody” defendants differently in terms of their fundamental right to physical presence at critical stages of the proceedings.

The section of Administrative Order 20-17 entitled, “In-Custody Appearance” provides, in relevant part:

All in-custody defendants will appear by video to the assigned judicial departments for law and motion calendars. Arraignments, competency, and in-custody specialty court matters will continue to be heard in the lower-level arraignment Courtroom. Except for jury trials, no defendant will be transported to a District Court courtroom absent extraordinary circumstances. Due to limited access to alternative appearances, evidentiary hearings or lengthy sentencings for in-custody defendants should be coordinated through the Chief Judge’s office. Also, no defendant who is in isolation pursuant to Detention Services protocol will be brought for any court appearance.

Admin. Order: 20-17 at pp. 21-22. This language remains unchanged in the Eighth Judicial District Court’s current Administrative Order 21-04. See Admin. Order: 21-04 at p. 20.

The section of Administrative Order 20-17 entitled, “Out-of-Custody Appearances” provides, in relevant part:

Due to the limited capacity of the Regional Justice Center at this time, out-of-custody defendants must appear by alternative means whenever possible, including for entry of plea, status checks, motions, and sentencing where the negotiation contemplates probation. Out-of-custody defendants shall appear in person for probation revocation hearings where jail time or revocation is being sought, sentencings where the negotiation contemplates a prison or jail sentence, trials, and for any matter where the judge makes an individual determination that the defendant’s presence is necessary for the determination of the matter.

Admin. Order: 20-17 at p. 22 (emphasis added). Again, this language remains unchanged in the Eighth Judicial District Court’s current Administrative Order 21-04. See Admin. Order: 21-04 at p. 20.

Given the disparate treatment of in-custody and out-of-custody defendants in terms of the fundamental right to presence at all critical stages, there is concern that these Administrative Orders could violate criminal defendants’ rights to equal protection under the law. This Court has not yet issued a published decision addressing the constitutionality of the Eighth Judicial District Court’s Administrative Orders. As such, it remains an open question whether this section of the Orders is narrowly-tailored to survive strict scrutiny in the event of a constitutional challenge on Equal Protection Clause grounds, or whether the rules violate the Due Process Clause or Confrontation Clause.

Comparing the CARES Act with the Eighth Judicial District Court’s Administrative Orders, it seems that the better practice going forward would be to allow criminal defendants the opportunity to knowingly and voluntarily waive their right to physical presence at critical stages of the proceedings after consultation with counsel. To the extent the Court approves a

Commission to Study Best Practices for Virtual Advocacy in Nevada's Courts, consideration should be given to the fundamental right of criminal defendants to appear in person at all critical stages of the proceedings.

II. Opportunity to Streamline Supreme Court Rules Part IX-A.

The proposed Commission will also offer an opportunity for the Court to streamline its existing rules on telephonic and simultaneous audiovisual transmission equipment, set forth in Supreme Court Rules Part IX-A. A casual reading of the telephonic and audiovisual provisions of Part IX-A reveals a substantial discrepancy between them even though they ostensibly cover the same ground.

Initially, Supreme Court Rules Part IX-A(A), Rule 4 allows *both* parties and witnesses to make appearances by telephonic transmission equipment:

1. In all criminal proceedings or hearings, except trial, where a personal appearance is required, **a party or a witness** may request to appear by telephonic transmission equipment. Parties may stipulate to appearance by telephonic transmission equipment, but the stipulation must be approved by the court.
2. The personal appearance of **a party or a party's witness** is required at trial unless:
 - (a) The parties stipulate to allow **the party or the party's witness** to appear by telephonic transmission equipment, the defendant expressly consents to the use of telephonic transmission equipment, and the court approves the stipulation; or
 - (b) The court makes an individualized determination, based on clear and convincing evidence, that the use of telephonic transmission equipment **for a particular witness** is necessary and that all of the other elements of the right of confrontation are preserved.

SCR Part IX-A(A)(4) (emphasis added).

However, Supreme Court Rules Part IX-A(B), Rule 4 allows only *witnesses* to make appearances via simultaneous audiovisual transmission equipment, and does not apply to parties:

1. Except as set forth in Rule 3, **a witness may appear** by simultaneous audiovisual transmission equipment at trial if the court first makes a case-specific finding that (1) the denial of physical confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is assured; and in all other criminal proceedings or hearings where personal appearance is required unless the court determines that the personal appearance of the witness is necessary.
2. If, at any time during a proceeding conducted by simultaneous audiovisual transmission equipment, the court determines that a personal appearance is

necessary, the court may continue the matter and require a personal appearance by the witness.

3. A party wishing to offer **the appearance of a witness** at a criminal proceeding by simultaneous audiovisual transmission equipment under this rule shall, not later than 5 judicial days before that proceeding, notify the opposing party by certified mail in a form substantially similar to Form 1 attached hereto, unless good cause is shown why such notice could not have been provided.

SCR Part IX-A(B)(4) (emphasis added).

Likewise, Supreme Court Rules Part IX-A(B), Rule 2 states that the rule on simultaneous audiovisual transmission equipment is intended to apply only to witnesses:

The intent of this rule is to promote uniformity in the practices and procedures relating to simultaneous audiovisual transmission appearances. As provided in these rules, **courts may permit a witness to appear by simultaneous audiovisual transmission equipment at appropriate proceedings, including trial.**

SCR Part IX-A (b)(2) (emphasis added).

If the Commission determines that continued use of remote/virtual options to conduct hearings and other court business is appropriate, it will want to consider revising these rules to allow parties to appear via simultaneous audiovisual transmission equipment in addition to telephonically.

III. Conclusion

The COVID-19 pandemic fundamentally altered the practice of law throughout the State of Nevada, increasing reliance on alternate means of appearing in court. It makes a great deal of sense to form a Commission to Study Best Practices for Virtual Advocacy in Nevada's Courts, so we can take what we have learned from the pandemic and improve the practice of law in Nevada, while protecting the constitutional rights of its citizens.

Sincerely,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER



Deborah L. Westbrook
Chief Deputy Public Defender

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