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CAN YOU SEE AND HEAR US, MS. SMITH?: PROTECTING DEFENDANTS' RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN USING AUDIO AND VIDEO CONFERENCING IN JUDICIAL PROCEEDINGS

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As new technology is developed and older technology upgraded, people find new efficiency and flexibility in virtually every aspect of their personal and professional lives. The judiciary and broader legal profession have found the influx of technology just as useful as other professions. However, as new technology continues to reshape the practice of law, we must be cognizant of its effect on judicial proceedings and vigilant in protecting basic Constitutional guarantees, especially for criminal defendants. While the twenty-first-century courtroom is wired to bring efficiency and flexibility to the practice of law, the very core of the judicial process is not modern displays but a document ratified in 1788. This Comment discusses how one emerging technology—audio and video conferencing—poses a risk to the right to effective assistance of counsel. The Comment advances three main arguments. First, the use of audio and video conferencing makes it more difficult for a criminal defendant to confront state witnesses. Second, the extent to which audio and video conferencing negatively impacts the right to effective assistance of counsel is dependent on the type of judicial proceeding. Lastly, the current constitutional tests for finding ineffective assistance of counsel are inadequate in cases where audio and video conferencing may be used.

* Northwestern Pritzker School of Law, JD 2020. Foremost, I would like to thank Nadia Gronkowski for her endless support and encouragement throughout law school and during the writing of this comment, my parents for their many sacrifices that made my legal education a possibility in the first place, my sister Zorie for all of the pep talks, all of the educators throughout my life that improved my writing, the courtroom staff in Springfield, IL that inspired this comment, and the journal staff that worked on this comment.

INTRODUCTION

The twenty-first-century courtroom has little resemblance to its predecessors. While judges, attorneys, defendants, and an assortment of courtroom officials remain as fixtures of the administration of justice, technology has ushered a revolution in the practice of law. In 1998, the Administrative Office of the United States Courts piloted a program that would introduce more technology into federal courts.[1] The program specifically sought to install "monitors, document cameras, video-conferencing capabilities, and internet connections."[2] The program was an early effort to revolutionize courts, and despite funding limitations that

[1] Deborah D. Kuchler & Leslie C. O'Toole, *How Technological Advances in the Courtroom Are Changing the Way We Litigate*, FED'N OF DEF. & CORP. COUNSEL Q., Winter 2008, at 205, http://kuchlerpolk.com/wp-content/uploads/2014/04/how_technological_advances_in_the_courtroom_are_changingddk.pdf [https://perma.cc/FKQ5-KPCS].

[2] *Id.* at 205–06.

followed, many federal and state courtrooms now include upgraded technology.[3]

Technological improvements to courtrooms have focused on updating technology used for presenting evidence.[4] These changes have primarily replaced antiquated techniques of presenting evidence to judges and jurors.[5] Whereas whiteboards or chalkboards, hard copies of documents and photographs, poster boards, and the like were staples of courtrooms before the concerted effort to introduce technology into the courtroom, devices have now replaced many of these functions.[6] An entirely wired courtroom easily includes monitor or screen displays next to the judge, counsels' tables, the jury box, court reporter, deputy, and hanging from the ceiling for the public to view.[7] Other than viewing displays, the technological upgrades have included: annotation monitors allowing witnesses to directly mark exhibits; evidence cameras which allow attorneys to ensure that evidence is easily viewed and displayed; various inputs and outputs allowing for the use of more technology; integrated controls so that judges and courtroom officials can control the displayed content; and video and audio conferencing capabilities that allow for remote appearances.[8]

Audio and video conferencing,[9] in particular, has expanded the communication reach of modern courts. This technology allows individuals to communicate with each other remotely by both hearing and seeing each other.[10] Because of its visual and auditory functions, video conferencing is

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[3] *See id.* at 206.

[4] *Id.* at 207.

[5] *Id.*; *see also* Jess Scherman, *How Courtroom Technology Has Revolutionized Criminal Cases*, RASMUSSEN C.: JUST. STUD. BLOG (Aug. 18, 2016), https://www.rasmussen.edu/degrees/justice-studies/blog/courtroom-technology-revolutionized-criminal-cases/ [https://perma.cc/MN4Z-AF9C].

[6] *See* Scherman, *supra* note 5; *see also* Kuchler & O'Toole, *supra* note 1, at 207–08.

[7] Kuchler & O'Toole, *supra* note 1, at 207.

[8] Judge Herbert B. Dixon Jr., *The Basics of a Technology-Enhanced Courtroom*, AM. BAR ASS'N (Nov. 1, 2017) https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/fall/basics-technologyenhanced-courtroom/ [https://perma.cc/9HMU-WH4L].

[9] Throughout this Comment, I use "audio and video conferencing" (or "video or audio conferencing") and "remote appearances" interchangeably.

[10] CTR. FOR LEGAL & COURT TECH., BEST PRAC. FOR USING VIDEO TELECONFERENCING FOR HEARINGS AND RELATED PROC. 25 (Oct. 8, 2014), https://www.acus.gov/sites/default/files/documents/Draft_Best%2520Practices%2520Video%2520Hearings_10-09-14_1.pdf [https://perma.cc/539E-FSZ4]. The report cited here is a draft report. The draft was intended for use by The Administrative Conference of the United States' Committee on Adjudication. The Author cites to the draft version of the report, as opposed to the final version, because the draft version contained a more comprehensive overview of the relevant subject matter. The final version was published on December 5, 2014.

superior to technology that only uses audio conferencing because it allows individuals to observe the other participants' facial expressions and physical movements, which naturally improves communication.[11] While video conferencing is superior to audio conferencing, both present similar legal problems. In this Comment, their impact on the judicial process will be analyzed simultaneously because the crucial distinction between a remote and physical appearance is not the specific characteristics of the mode of remote appearance—whether it is audio or video—but instead the fact that there *is* a remote appearance.

Inherent in the overall increased reliance on technology in the courtroom is efficiency. The use of video and audio conferencing has unique benefits. For one, the legal community widely accepts the premise that conferencing via audio and video leads to substantial financial savings.[12] These savings are mainly due to a reduction of travel costs for both the attorneys and defendants, especially in cases of incarcerated defendants.[13] Moreover, video conferencing is widely believed to result in reduced travel time, more efficient use of judges' time, scheduling flexibility, and better accommodations for participants who are ill or cannot travel.[14] This not only improves convenience but also has the potential to create efficiencies in courtroom proceedings.

The effects of using video conferencing are not always a net positive. Any technology brings a risk for technical problems, and video conferencing is no different. Some of the technical problems associated with the use of video and audio conferencing technology include: initial connectivity, dropped calls or video, not being able to see or hear the participant, and audio or video delays.[15] As alluded to above, courts have financial limitations in updating courtroom technology. The actual cost of installing a system capable of delivering the type of performance required for a judicial setting can be as high as $200,000.[16] Courts must determine whether the initial cost is worth any future financial savings.[17] Given the substantial increase in the use of this technology, it appears that some courts have found that having video conferencing capabilities is a beneficial cost.

The uses of this technology have real effects on the judicial system, and it is only prudent to consider these effects as the judicial system continues to

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[11] *Id.*
[12] *Id.* at 45.
[13] *Id.* at 63.
[14] *Id.* at 8.
[15] *Id.* at 22.
[16] *Id.* at 62.
[17] *Id*. at 62–63.

embrace technology in the courtroom.[18] Nothing is at higher risk than the constitutional guarantee to effective assistance of counsel. While technological capability will likely only increase and improve in the future, the consequences of its use in the judicial process are still not fully understood or tested as they apply to the decision-making process of judges and jurors.[19] The effect on the adversarial process of the judicial system is an extension of that concern.[20] Broadly, this Comment aims to explore how the use of audio and video conferencing in courts affects the Sixth Amendment right to effective assistance of counsel.

In the "Background" section, this Comment introduces the right to counsel and the right to effective assistance of counsel. The following section examines the Supreme Court case, *Wright v. Van Patten,* and its consideration of how remote appearances affect a defendant's right to effective assistance of counsel. Next, the Comment introduces three arguments about the use of video and audio conferencing and its effects on the effective assistance of counsel. First, it considers the effect of video and audio conferencing on the Confrontation Clause within the context of remote appearances. Next, it explores how different judicial proceedings create more or less favorable conditions for the use of remote appearances by considering the impact on critical stages of the judicial process. Lastly, it argues that current tests for determining ineffective assistance of counsel are inadequate for future uses of technology and also proposes an alternative test. This Comment concludes with a final observation on the topic of the use of remote appearance technology in courts.

I. BACKGROUND

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, [a defendant] shall enjoy the right to . . . have Assistance of Counsel for [her] defense."[21] The right to assistance of counsel is not an independent right but instead works in tandem with other Sixth Amendment guarantees[22] to achieve the Amendment's overall goal of a fair trial. Without the education, knowledge, skills, and expertise counsel

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[18] *Id.* at 23; *see also* Siri Carpenter, *Technology Gets Its Day in Court* AM. PSYCHOL. ASS'N. (Oct. 2001), https://www.apa.org/monitor/oct01/technology [https://perma.cc/UN8G-BUW8].

[19] *See* Carpenter*, supra* note 18.

[20] *Id.*

[21] U.S. CONST. amend. VI.

[22] The Sixth Amendment recognizes that a defendant has the right to a speedy and public trial, an impartial jury of her peers, to be informed of the charges against her, to be confronted by witnesses testifying against her, and to compel witnesses to testify on her behalf. *Id.*

provides when representing a defendant, the adversarial process envisioned by the Amendment would falter.[23] Thus, the guarantees in the Sixth Amendment are critically dependent on the assurance that a defendant has counsel to represent her in criminal prosecutions, making the right to counsel indispensable.

A. THE RECOGNITION OF THE RIGHT TO ASSISTANCE OF COUNSEL

While the Sixth Amendment was ratified in 1791 as part of the Bill of Rights, the Supreme Court did not begin to define the scope of its protections adequately until the twentieth century. Courts mostly believed that the right embedded in the Sixth Amendment was a "declaration of the [defendant's] right to counsel," and not "a duty on the part of the United States to provide it."[24] The Court's recognition that indigent defendants were entitled to an appointed counsel profoundly underscored the importance of counsel in a trial and also created a duty on the part of the government to provide counsel. In the 1938 decision *Johnson v. Zerbst*, the Court held that an indigent *federal* defendant had the right to court-appointed counsel.[25] The *Zerbst* Court reasoned that the right to assistance of counsel was "one of the safeguards of the Sixth Amendment deemed necessary to ensure fundamental human right of life and liberty."[26] The Court recognized that without counsel defending her client, a skilled prosecutor could present a case without any challenge on the merits of the presented theory, the introduced evidence, or, more generally, the knowledge to navigate the judicial process.[27]

In 1963, the Court in *Gideon v. Wainwright* extended the right to assistance of counsel to indigent defendants in state felony cases.[28] It recognized that the right to assistance of counsel is fundamental to the guarantee of a fair trial and, as such, it must apply to the states.[29] Without counsel representing a defendant, there would be little assurance that the envisioned adversarial process in a fair trial would be possible.[30] The Court was particularly concerned about the imbalance between the prosecution and

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[23] *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

[24] John Donohue, *Effective Assistance of Counsel on Appeal: Due Process Prevails in Evitts v. Lucey*, 35 DEPAUL L. REV. 185, 187 (1985).

[25] Johnson v. Zerbst, 304 U.S. 458, 468–69 (1938).

[26] *Id.* at 462.

[27] *See id.* at 462–63.

[28] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[29] *See id.* at 344.

[30] *See id.*

the defense if the defendant was not guaranteed representation.[31] The concern was that the prosecution could always be assumed to have sufficient funds to fulfill its societal public safety role, but defendants could not always be guaranteed representation if only defendants with sufficient funds were able to acquire representation.[32] The equity of having counsel represent both indigent defendants and those defendants who can afford to hire counsel is a fundamental tenet of the Court's emphasis that "every defendant stands equal before the law."[33]

B. RIGHT TO COUNSEL AS THE RIGHT TO EFFECTIVE COUNSEL

The first mention of effective assistance of counsel is embedded in the *Powell v. Alabama*[34] decision. The Court recognized that in some criminal proceedings,[35] trial courts must appoint effective counsel to represent defendants that neither could afford to hire counsel nor had the intellectual ability to present a defense by themselves.[36] Notably, the Court reasoned that the mere appointment of counsel did not remove the guarantee of counsel if counsel could not effectively discharge her duty to prepare and try a case.[37] For example, appointing counsel immediately before a trial begins without giving her the opportunity to investigative the pertinent facts, or appointing counsel that simply chooses not to investigate the pertinent facts, does not satisfy the right to assistance of counsel. Accordingly, "the right to counsel is the right to the *effective* assistance of counsel."[38] "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing

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[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] Powell v. Alabama, 287 U.S. 45 (1932).

[35] The Court was particularly concerned with cases where the life of the defendant is at stake. Additionally, the factual circumstances of the *Powell* case lended themselves to recognizing that defendants needed—and were guaranteed—counsel during their trial. "[T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process." *Id.* at 71.

[36] *See id.* at 71–73.

[37] *See id.* at 71.

[38] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (citing Reece v. Georgia, 350 U.S. 85, 90 (1955)); Glasser v. United States, 315 U.S. 60, 69 (1942); Avery v. Alabama 308 U.S. 444, 446 (1940); *Powell*, 287 U.S. at 57 (emphasis added).

defendants in criminal cases in their cases."[39] The right to effective assistance of counsel derives from the right to counsel itself; if a defendant is not constitutionally or statutorily guaranteed counsel, she cannot be guaranteed effective assistance of counsel.[40]

C. THE EFFECTIVENESS OF COUNSEL IN AUDIO AND VIDEO CONFERENCING

While the Supreme Court has not examined a case regarding effective assistance of counsel in audio and video conferencing on the merits, in 2007, the Court granted certiorari in *Wright v. Van Patten*,[41] which examined the issue under the Antiterrorism & Effective Death Penalty Act of 1996 (AEDPA). Given the procedural posture of the case and the resulting opinions in state and federal courts that form the primary review of the issue, a brief background of the mechanics of AEDPA actions is valuable for understanding the relevant case law presented later in this Comment.

Under AEDPA, a state court claim cannot be overturned by a federal court "unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[42] The Court held that under AEDPA claims, "an unreasonable application of federal law is different from an incorrect application of federal law."[43] Therefore, using an objective test, a federal court must find that a state court's interpretation of the federal law was objectively unreasonable to justify overturning the decision of the state court.[44] Significantly, in the *Van Patten* case, the Court found that the state court, reviewing Van Patten's claim, reasonably interpreted the federal law available to them.[45]

In *Van Patten*, the Court considered whether the state or federal court applied the correct test to determine whether the representation of counsel was ineffective and thus required a remedy. The Court applied one of two tests. The test devised in *Strickland v. Washington* is a test for actual, subjective ineffectiveness, and the test in *United States v. Cronic* is per se, or objective, ineffectiveness. In *Van Patten*, the Court examined the opinions

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[39] *McMann*, 397 U.S. at 771.

[40] *See* Pennsylvania v. Finley, 481 U.S. 551, 558–59 (1987).

[41] 552 U.S. 120 (2008).

[42] 28 U.S.C. § 2254(d)–(d)(1) (2012).

[43] Williams v. Taylor, 529 U.S 362, 410 (2000) (emphasis omitted).

[44] *Id*.

[45] *Van Patten*, 552 U.S. at 120.

of the Seventh Circuit, which applied the *Cronic* test, and the Wisconsin Court of Appeals, which applied the *Strickland* test.[46]

1. Van Patten *Background*

Joseph Van Patten was charged with first-degree intentional homicide under Wisconsin law.[47] He avoided a trial and a likely conviction for first-degree intentional homicide by pleading guilty to first-degree reckless homicide.[48] Van Patten's plea bargain proceeding was the principal concern of this case.

Prior to the hearing, Van Patten's attorney had negotiated a plea bargain with the local prosecutor that required Van Patten to plead no contest to first-degree intentional homicide.[49] The plea would also require "a penalty enhancement for committing the offense while using a dangerous weapon."[50] Van Patten's attorney discussed the plea with Van Patten over the telephone before the hearing.[51] At the hearing, Van Patten's attorney appeared by telephone.[52]

Van Patten's attorney's appearance by telephone instead of in person was not due to any last-minute problem.[53] Rather, he appeared by telephone because of the convenience and benefits to the parties involved, including: "appearances in two other counties that day; that the court was holding time for Van Patten's trial; that witnesses were waiting to know whether they would be needed; and that everyone wanted to get this matter concluded."[54] Van Patten was not asked whether he had an objection to his attorney's absence from court, or if he preferred the hearing to be rescheduled for a day when his attorney could appear in court.[55]

At the hearing, all of the in-court participants huddled around the speakerphone to allow Van Patten's attorney to communicate with them.[56] The presiding judge encouraged Van Patten to take his time to speak to his attorney and stated that the court *might* be able to provide Van Patten the

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[46] *See infra* Sections III.B, III.C.

[47] State v. Van Patten, No. 96-3036-CR, 1997 WL 277952, at *1 (Wis. Ct. App. May 28, 1997).

[48] *Id.*; *see also* WIS. STAT. ANN. § 940.02(1).

[49] Van Patten v. Deppisch, 434 F.3d 1038, 1040 (2006).

[50] *Id.*

[51] *Id.*

[52] *Id.*; *see also Van Patten*, 1997 WL 277952, at *1.

[53] *Van Patten*, 434 F.3d at 1040.

[54] *Id.*

[55] *Id.*

[56] *Id.*

opportunity to speak privately over the phone.[57] No private accommodation was provided nor was a private line set up to allow Van Patten to speak to his attorney.[58] The court assured Van Patten that the hearing would be on the record.[59] The court also "quizzed" Van Patten about his constitutional guarantees and the consequences of pleading instead of going to trial.[60] At the end of the hearing, the judge accepted Van Patten's plea and sentenced him two months later to twenty-five years in prison.[61] Given his sentence, Van Patten retained other counsel and claimed that the absence of his attorney at the plea hearing violated his right to counsel under the Sixth Amendment.[62] Van Patten stated that he felt pressured to accept the plea because his attorney believed that if he did not plead, he would spend the rest of his life in prison.[63] Notably, Van Patten stated that he would not have accepted the plea had his attorney appeared in court in person.[64]

2. *Court of Appeals of Wisconsin Review of* State v. Van Patten

The Wisconsin Court of Appeals reviewed Van Patten's assertion that his Sixth Amendment right to assistance of counsel was violated when his attorney appeared at the plea hearing by telephone.[65] The Wisconsin court applied the *Strickland* test.[66] In *Strickland*, the Supreme Court addressed the issue of inadequate representation. The Court formulated a two-prong test to examine whether the representation of counsel was inadequate enough to require a judicial remedy.[67] First, there must be a showing that the performance of counsel was deficient (performance prong).[68] Second, there must be a showing of prejudice stemming from the deficient performance (prejudice prong).[69]

The Sixth Amendment does not explicitly require that the representation of counsel is effective. However, the professional standards of the legal

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1041.
[65] *Id.*
[66] *Id.*
[67] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[68] *Id.*
[69] *Id.*

profession implicitly require that lawyers meet certain benchmarks.[70] The Court determined that the effectiveness of counsel is measured by "reasonableness under prevailing professional norms."[71] Thus, to prove that counsel was ineffective, a defendant must prove that the "representation fell below an objective standard of reasonableness."[72]

Counsel representing a defendant in a criminal proceeding must advocate for her client's cause, consult with the defendant about critical decisions, and communicate with the defendant about the case.[73] More generally, counsel has a duty to use her education, skills, knowledge, and expertise to ensure a "reliable adversarial testing process" in all criminal proceedings.[74] The Court reasoned that the determination of whether counsel was effective or ineffective could not be an exhaustive checklist of duties and expectations, but instead involves a reasonable consideration of the circumstances of each case.[75] The consideration of circumstances is imperative because the advocacy for and defense of a defendant require that counsel has the independence to make decisions about case strategy without being hampered by an artificial measurement of her performance.[76] Additionally, the goal of the Sixth Amendment was not to create a framework for effective counsel, but instead was to guarantee a fair trial.[77] The guarantee of a fair trial does not necessitate perfect representation from a perfect lawyer but rather that the quality of the representation is sufficient to ensure a fair trial.

The Court held that the examination of counsel's performance by a court has to be highly deferential.[78] There must be a strong presumption of the effectiveness of counsel, in which it is presumed that the "conduct fall[s] within the wide range of reasonable professional assistance."[79] A review of the effectiveness of counsel has to be specific-fact intensive. This review requires lower courts to look at the facts of the specific cases as the attorney saw them at the time of the conduct in question.[80] Thus, determining whether counsel was ineffective cannot be based on what the court believes the

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[70] *Id.* at 688.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
[75] *Id.*
[76] *See id.* at 688–89.
[77] *See id.* at 689.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 690.

attorney should have done, but instead on whether the actions were logical steps taken by a legal professional in preparation for a defense.

The showing of ineffective performance by itself does not necessitate a court setting aside a conviction. A court must find that the performance of counsel also prejudiced the defendant's case.[81] The Sixth Amendment guarantees a fair trial for the defendant. Even if the defendant's counsel took actions that are reasonably ineffective, so long as the overall trial or proceedings were fair, counsel cannot be deemed so ineffective as to result in an overturned conviction.[82] The Court reasoned that the finding of prejudice could not require mere effect on the trial, as that burden would always be met, nor could it require a showing that counsel's conduct more likely than not affected the trial, as that standard would be too high.[83] Instead, the appropriate test is whether there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[84] "[R]easonable probability is a probability sufficient to undermine confidence in the outcome" of the trial or proceeding.[85] This requires that courts examine all of the available evidence and determine whether the attorney's error rendered a piece of evidence likely to prejudice the defendant and affect the outcome of the trial.[86]

Applying the *Strickland* test, the Wisconsin Court of Appeals held that Van Patten's attorney neither acted outside the standards of reasonable representation nor prejudiced his client when he appeared by telephone.[87] The court stated that the record did not show that Van Patten was coerced into entering a plea.[88] The court also concluded that Van Patten did not show any evidence that his attorney's performance at the plea hearing was deficient or that his appearance by itself was so prejudicial as to necessitate withdrawing the plea.[89] Van Patten appealed the case to the Wisconsin Supreme Court, but the court denied further review, thus letting the Court of Appeals decision stand.[90]

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[81] *Id.* at 692.

[82] *Id.* at 691–92.

[83] *Id.* at 694.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 695–96.

[87] State v. Van Patten, No. 96-3036-CR, 1997 WL 277952, at *2 (Wis. Ct. App. May 28, 1997).

[88] *Id.* at *3.

[89] *Id.*

[90] State v. Van Patten, 215 Wis. 2d 425 (1997).

3. Federal Review

After the Wisconsin Supreme Court and a reviewing federal district court agreed with the Wisconsin Court of Appeals, Van Patten appealed to the Seventh Circuit.[91] The Seventh Circuit disagreed with the district court and the Wisconsin Court of Appeals.[92] The Seventh Circuit held that the proper standard of review was the standard laid out in *United States v. Cronic*.[93] Whereas the *Strickland* test looks at the actual, fact-specific performance of counsel to determine her effectiveness, the test in *Cronic* attempts to identify scenarios where per se ineffectiveness of counsel is found.

The Court in *Cronic* was concerned with the complete breakdown of the Sixth Amendment's guarantee to an adversarial process.[94] The Court framed the right to effective assistance of counsel as "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[95] This envisioned right does not require that the defendant's counsel put on a defense without any errors, but simply that the defense is adequate enough to provide meaningful prodding of the prosecution's case.[96] Whereas under *Strickland*, an error sufficient to produce prejudice is essential to prove ineffectiveness of counsel, under *Cronic* the defendant needs to prove that the entire adversarial process was virtually nonexistent.[97]

The Court in *Cronic* attempted to identify sufficient prejudice to the defendant's criminal case in order to justify the per se finding of ineffective representation. The Court explained that a complete denial of counsel—at the most extreme and obvious—would justify such a per se finding if it occurred at a critical stage.[98] Likewise, it is justified to find per se ineffectiveness if counsel fails to test the prosecution's case through an adversarial process, such as cross-examination.[99]

The Seventh Circuit panel reasoned that *Cronic* applied instead of *Strickland*:

> [W]here there has been a complete denial of counsel; where counsel has been prevented from assisting the accused during a critical stage of the prosecution; where counsel

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[91] *See id.*; *see also* Van Patten v. Deppisch, 434 F.3d 1038, 1046 (7th Cir. 2006).
[92] *Van Patten*, 434 F.3d at 1038.
[93] *Id.* at 1041.
[94] United States v. Cronic, 466 U.S. 648, 656–57 (1984).
[95] *Id.* at 656.
[96] *See id.* at 656–57.
[97] *See id.* at 656–58.
[98] *See id.* at 659.
[99] *See id.*

> entirely fails to subject the prosecution's case to meaningful adversarial testing; or under circumstances where although counsel is available . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct[.][100]

To justify the use of the *Cronic* test, there must be a finding of facts that make it unlikely that the defendant received effective assistance of counsel and such a finding then must justify a presumption that the conviction was unconstitutional.[101]

The Seventh Circuit reasoned that the appearance of Van Patten's' attorney by telephone during the plea hearing made it impossible for Van Patten to have the assistance of counsel "in anything but the most perfunctory sense."[102] Van Patten could not turn to his attorney for advice, ask for clarifications, be reassured, or discuss any last-minute doubts about the plea.[103] Additionally, Van Patten's attorney "could not detect or respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceedings, or that he was changing his mind."[104] The court was also concerned with the lack of privacy for Van Patten and his attorney, especially given that the trial court had not arranged "a private line in a private place" through which Van Patten and his attorney could communicate without the court "eavesdropping."[105]

The court stated that Van Patten's claim was not that his attorney's performance was deficient because of inadequate legal judgment or because he was misinformed about the consequences of a plea.[106] Instead, under the circumstances, Van Patten's attorney could not see or communicate privately with Van Patten, which prevented the guaranteed assistance of counsel.[107] Quite pointedly, the court stated that counsel's actual performance could not be acceptable if her means of appearing deprive the defendant of the full benefits of her skills at a critical stage of the proceedings.[108] According to the opinion of the court, no one knows if Van Patten would have taken the plea had his attorney been in court during the proceeding.[109] It is the presence of an attorney that ultimately "enable[s] the accused to know all the defenses

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[100] Van Patten v. Deppisch, 434 F.3d 1038, 1041 (7th Cir. 2006) (quoting United States v. Cronic, 466 U.S. 648, 659–60 (1984)) (internal quotation marks omitted).

[101] *Id.* at 1043.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 1044.

[107] *Id.*

[108] *Id.*

[109] *Id.*

available to him and to plead intelligently."[110] While the court acknowledged that an attorney appearing by telephone might have been better than no attorney, "the Sixth Amendment requires more than 'formal compliance' with its guarantees."[111] Thus, allowing an appearance of counsel by telephone would "treat [the] assistance of counsel as a formality to be overcome through creative use of technology."[112]

The court reasoned that counsel should be as engaged in the adversarial process in a plea hearing as she is at a trial because "in both settings, the accused is confronted with both intricacies of the law and the advocacy of the public prosecutor."[113] Even though a plea hearing is not a trial, it should still be treated "as a confrontation between adversaries."[114] In addition to the counsel's role in the adversarial process, in-person appearances allow courts to maintain adequate judicial control over the counsel's performance.[115] If counsel does not appear in person, the court could miss improper conduct or fail to create a record sufficient to review counsel's actual performance.[116] Moreover, the court—even assuming that counsel could hear every word spoken[117] in court—may not be able to ascertain whether "the defense attorney was hanging on every word, reading documents in another case, surfing the web, or falling asleep."[118]

4. The Supreme Court's Review of Van Patten

The Supreme Court held that in the absence of precedent that squarely addresses the issue in the case, the decision by the Wisconsin Court of Appeals must stand.[119] The Court asserted that no clear precedent indicated that the appearance of counsel by telephone "should be treated as a complete denial of counsel, on par with total absence."[120] The Court claimed that even if it acknowledged that the performance of counsel over telephone could lead to worse performance, it did not necessarily follow that counsel was

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[110] *Id.* (quoting White v. Maryland, 373 U.S. 59, 60 (1963)).

[111] *Id.*

[112] *Id.*

[113] *Id.* (internal quotation marks omitted) (citation omitted).

[114] *Id.* at 1045 (internal quotation marks omitted) (citation omitted).

[115] *Id.*

[116] *See id.*

[117] The court is skeptical that this assumption can even be made given an array of the technical difficulties that may get in the way. *Id*.

[118] *Id.*

[119] *See* Wright v. Van Patten, 552 U.S. 120, 125–26 (2012).

[120] *Id.* at 125.

completely absent, or that counsel could not assist the defendant.[121] "The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effect would not be worth the time."[122]

Given the lack of concrete guidance on the issue by any precedent, the lack of a clear answer from the proceeding, and the fact that this case was brought through an AEDPA action, the Court allowed the decision of the Wisconsin Court of Appeals to stand.[123] The Wisconsin Court of Appeals chose to apply the *Strickland* test and correctly found that Van Patten did not assert a valid claim of ineffective assistance of counsel.[124] The Court also pointed out that all the reviewing courts agreed with the assessment that under *Strickland*, the defendant had no viable claim.[125]

While the Court rendered the decision *per curiam*, Justice Stevens authored a short but crucial concurrence. Justice Stevens believed that the decision rendered in the case was primarily necessary because of a drafting error in *Cronic*.[126] That error was the clarification that the presence of counsel during a critical stage required counsel's physical presence in court.[127] In 1984, when *Cronic* was decided, "neither the parties nor the Court contemplated representation by attorneys who were not present in the flesh."[128] To that end, Stevens believed that the Seventh Circuit's interpretation in *Van Patten v. Deppisch* was correct.[129] However, given that the question for the Court was whether the Wisconsin Court of Appeals was objectively unreasonable to apply *Strickland*, the correctness of the Seventh Circuit was irrelevant. Moreover, the Wisconsin Court of Appeals was justified in concluding that *Cronic* did not apply to Van Patten's case because *Cronic* clearly referenced a complete denial of counsel or a totally absent counsel, and it was reasonable to conclude that an appearance by telephone was not a complete denial or total absence of counsel.[130] Justice Stevens underscored that the decision of the Court in *Wright v. Van Patten* neither

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 126 (Stevens, J., concurring).
[127] *Id.* at 126–27.
[128] *Id.* at 128.
[129] *Id.*
[130] *See id.*

adopted the interpretation of the Wisconsin Court of Appeals nor that of the Seventh Circuit.[131]

II. ARGUMENTS

The *Van Patten* case addresses a much narrower set of circumstances than are possible when considering the use of audio and video conferencing, namely, who is appearing via video or audio and what type of proceedings are they engaging in.

In *Van Patten*, Van Patten's attorney appeared remotely while Van Patten was present in court. However, the use of this technology also presents the possibility that the attorney is physically in the courtroom while the defendant appears remotely, or that both counsel and defendant appear by video or audio separately or together. For this Comment, when I refer to a "Type I" relationship, I am referring to an attorney that is physically in a courtroom and a defendant that is appearing remotely via video or audio. I will refer to a relationship like the one in *Van Patten*, where the defendant appears in person and his attorney appears remotely, as a "Type II" relationship. Lastly, a "Type III" relationship is one where both the attorney and the defendant appear remotely but at different locations, and a "Type IV" relationship is one where they appear remotely but are in the same location.

Other than the four possible categories of appearances, to fully appreciate the consequences of using video or audio conferencing, it is imperative to consider at what point in the judicial process the remote appearance occurs. More specifically, one must consider at what time the right to effective assistance of counsel attaches to the defendant, the implications of that attachment, and the effects of using remote conferencing at any specific stage of judicial proceedings.

A critical component of analyzing how each stage impacts the use of video or audio conferencing is how counsel and defendant communicate with each other. Assuming that communication between counsel and defendant is fundamental to the Sixth Amendment guarantee of effective assistance of counsel, audio and video conferencing in court poses a variety of problems for this communication. These problems stem from differences between when counsel is with the defendant and when she is not. Some of these problems include: the ability of the defendant to ask a question without disrupting the court, the ability to speak directly without any possibility of interference from a poor connection or noise, and the visual cues given by the defendant to counsel. Some of these problems would be significantly more problematic if the court used audio conferencing instead of video

[131] *Id.* at 128–29.

conferencing, or if counsel and defendant are denied a private space to communicate. Types I, II, and III present the greatest threats to clear and private communication between counsel and defendant. Type III would arguably be the worst of the three because both counsel and defendant would appear via audio or video conferencing. Type IV allows counsel and defendant to have a relationship that is the same as it would be had they both physically appeared in court. However, in this scenario, both counsel and the defendant would be absent from the court.

A. THE CONFRONTATION CLAUSE IMPACTS THE EFFECTIVE ASSISTANCE OF COUNSEL DURING AUDIO AND VIDEO CONFERENCE APPEARANCES

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[132] The Supreme Court held that the primary purpose of the Confrontation Clause was to:

> prevent depositions on ex parte affidavits . . . being used against the [defendant] in lieu of a personal examination and cross-examination of the witness, in which the accused has the opportunity, not only of testing recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether is worth of [belief].[133]

In a later case, the Supreme Court summarized the elements of confrontation as: physical presence, oath, cross-examination, and observation of demeanor.[134] Notably, one of the assurances of the Confrontation Clause is that a defendant may cross-examine a witness. The promise that a defendant is guaranteed the right to cross-examine a witness underscores the role of an effective counsel.

In *Maryland v. Craig*, the Supreme Court examined the implications of the Confrontation Clause on the use of teleconferencing testimony in cases where juvenile victims of sexual abuse were allowed to testify against their abuser.[135] In this case, the Court examined whether the right to confront a witness face-to-face is absolute.[136] Even though it affirmed its precedent that the Sixth Amendment guarantees that a defendant is able to confront a witness against her face-to-face, the Court held that the guarantee may have

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[132] U.S. CONST. amend. VI.

[133] Maryland v. Craig, 497 U.S. 836, 845 (1990) (citation omitted) (internal quotation marks omitted).

[134] *Id.* at 846.

[135] *Id.*

[136] *Id.* at 844.

exceptions.[137] The Court reasoned that while its precedent had a *preference* for face-to-face confrontation at trial, "a preference must occasionally give way to considerations of public policy and the necessities of the case."[138] The Court held that the right to confront one's witness may be satisfied absent a physical presence of the witness "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[139]

For this Comment, the Confrontation Clause is essential in two respects: allowing the defendant to exercise (1) her right to confront a witness testifying against her by effective cross-examination from counsel, and (2) her right to confront a witness testifying against her face-to-face.

First, the effectiveness of the cross-examination performed by counsel is most at risk when counsel is not present in court. To that extent, Types II, III, and IV are most vulnerable to criticism as to the effectiveness of the performance of counsel. Counsel that appears in court via audio or video will likely not be able to observe visual cues from a witness, present evidence, or ask questions that rely on a witness observing documents before answering a question. In instances where the adversarial process requires that counsel use her skills to probe the prosecution's case with the testimony of an adverse party, the physical absence of counsel will likely impact her effectiveness. Therefore, during a trial, where it is nearly certain that witnesses will testify, the absence of an attorney in court is problematic. The same problem extends to any hearing where a witness may testify, such as a preliminary hearing. The Type I relationship, therefore, is the least problematic if the ability to cross-examine is the central concern of the Confrontation Clause.

If, however, the central concern is the face-to-face confrontation between the defendant and the witnesses testifying against her, any time the defendant appears in court via audio or video will create a significant strain on the ability to fulfill the Confrontation Clause. Every type except Type II would place a strain on the Confrontation Clause. The strain would be greater if only audio is used instead of audio and video. But for the same reasons that the court prefers the physical presence[140] of a witness over appearance via video, video conferencing is unlikely to resolve the central problem that the witness and the defendant will not be in the same physical location.

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137 *Id.*

138 *Id.* at 849.

139 *Id.* at 850.

140 *See supra* notes 137–139.

No type of relationship between counsel and defendant via audio or video conferencing squarely allows the Confrontation Clause to work as intended in court. Thus, in criminal proceedings where the testimony of a witness is fundamental, the use of audio and video conferencing should be scrutinized with care. Type I is the least problematic because it allows counsel to probe the witnesses' testimony. It also fulfills one critically important function of the adversarial process because counsel appears in court physically. Even though the defendant may not appear in person, her counsel would still maintain an adversarial process. This type of arrangement may also be the least offensive to the Confrontation Clause because it is the defendant that is not in court. Since the right to appear belongs to the defendant[141] and not the witness, the defendant could appear via video and have her counsel confront the witness in court with the proper waiver.

B. THE RISK TO THE EFFECTIVENESS OF COUNSEL WITH APPEARANCE VIA AUDIO AND VIDEO IS REDUCED AT THE EARLIEST STAGES OF THE JUDICIAL PROCESS AND AFTER A TRIAL

The right to counsel is not limited to a trial. The right attaches at the "time . . . or after the initiation of the adversary judicial criminal proceedings,"[142] or at any "critical stage[143] of the prosecution."[144] The *Kirby v. Illinois* Court was explicit in its characterization that the attachment of the right to assistance of counsel at the initiation of judicial criminal proceedings is not merely formalistic.[145] Instead, the initiation of such proceedings is analytically essential because it represents the commitment of the

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[141] *See* Fed. R. Crim. P. 43(c)(2) ("If defendant waives right to be present, the trial may proceed to completion . . . during the defendant's absence."). By inference, if a defendant can waive her right to appear physically, a defendant can waive physical appearance while then appearing via audio or videoconferencing. The appearance via audio and videoconferencing, unlike a complete absence, still allows the defendant's involvement in a proceeding. *See generally* Illinois v. Allen, 397 U.S. 337 (1970) (defendant can implicitly waive his right to be present by conduct); Snyder v. Mass., 291 U.S. 97, 105–06 (1934) ("[D]efendant [has the right] to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.").

[142] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[143] "The determination whether the hearing is a critical stage requiring the provision of counsel depends . . . upon an analysis whether potential substantial prejudice to defendant's rights inheres in the confrontation and the ability of counsel to help avoid that prejudice." Coleman v. Alabama, 399 U.S. 1, 9 (1970) (internal citations omitted) (internal quotation marks omitted).

[144] *Kirby*, 406 U.S. at 690.

[145] *Id.* at 689.

government to bring forth charges against a defendant.[146] From that point, the defendant is subject to legal procedures that she may not understand and that may substantively affect her life and liberty.[147] The need for counsel to guide the defendant through the adversarial judicial system implicates the Sixth Amendment and, more specifically, the right to counsel.[148]

The Court in *Rothgery v. Gillespie* affirmed the decision in *Kirby* and clarified the meaning of initiation of judicial criminal proceedings.[149] The start of the criminal proceedings is not marked by the acknowledgment of or any actions taken by a prosecutor, but instead by the appearance of the defendant before a judge or magistrate.[150] While the right to counsel attaches at the beginning of these judicial appearances, counsel need not be present at the time of attachment.[151] Instead, "counsel must [merely] be appointed within a reasonable time after attachment to allow for adequate presentation at any *critical stage* before trial, as well as trial itself."[152] The attachment of the right to counsel, then, is separate from the actual presence of counsel representing a defendant during a judicial proceeding.

The Court in *United States v. Wide* opined that it was necessary to "scrutinize any pretrial confrontation of the [defendant] to determine whether the presence of [her] counsel is necessary to preserve [her] basic right to a fair trial as affected by [her] right . . . to cross-examine . . . and to have effective assistance of counsel at . . . trial."[153] This requires careful analysis of any "substantial prejudice to [a] defendant's rights . . . in the particular confrontation and the ability of counsel to help avoid the prejudice."[154] The importance of the right to counsel in a pre-trial proceeding is derived from the potential adverse effects of pre-trial judicial decisions on the trial itself.[155] A defendant cannot be guaranteed a fair trial, even one in which counsel appears, if the defendant has had to navigate the process leading up to the trial without any representation.[156]

Critical stages have a key and outsized role in the analysis of the use of audio and video conferencing because each stage creates unique

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146 *Id.*
147 *See id.* at 689–90.
148 *See id.*
149 554 U.S. 191, 213 (2008).
150 *See id.* at 198–99.
151 *See id.* at 211–12.
152 *Id.* at 212 (emphasis added).
153 United States v. Wade, 388 U.S. 218, 227 (1967).
154 *Id.*
155 *Id*. at 226.
156 *See id.* at 226–27.

circumstances that could make it more or less likely that the use of the technology passes constitutional muster. The right to effective assistance of counsel attaches so early in criminal proceedings[157] that it is inherently difficult to determine whether a court would allow counsel or a defendant to appear via audio or video by just considering the type of proceeding. However, examining the general characteristics of proceedings that are considered critical stages and the level of need for an adversarial process in each proceeding yields at least some useful guidelines. For example, if there is no need for cross-examination during a proceeding, the ability of counsel to maintain an adversarial process is not reduced, per se, just because she may appear via video or audio. However, as the Seventh Circuit[158] suggested, there may be proceedings like a plea hearing in which the stakes for the defendant are higher[159] and the need for counsel may be greater even though cross-examination may not be necessary.

A trial is a type of proceeding where counsel should appear in person given that the defendant's freedom and life are at stake at this stage. Additionally, the need for counsel to appear in person may be stronger in other proceedings that also impact the freedom of the defendant. For example, during a plea hearing or sentencing, the impact of the judgment is more significant than it is during an initial appearance, a status hearing, or any other pre-trial proceedings as long as no witnesses are testifying. Only with representation throughout the entire judicial process can the defendant's "interests . . . be protected consistently with [an] adversary theory of criminal prosecution."[160] At each of the critical stages discussed below, a defendant is entitled to effective assistance of counsel, but not in all is the presence of counsel or defendant necessary for the successful protection of the defendant.

The *Powell v. Alabama* Court stated:

> [D]uring perhaps the most critical period of the proceedings against [a defendant], that is to say, from the time of [her] arraignment until the beginning of [her] trial, when consultation, thorough-going investigations and preparations were vitally important, the defendant[] did not have the aid of counsel . . . although [she was] as much entitled to such aid during that period as at the trial itself.[161]

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[157] *See infra* notes 142–152.

[158] Van Patten v. Deppisch, 434 F.3d 1038, 1038 (2006).

[159] At a guilty plea hearing, the defendant admits guilt and her freedom and liberty are at stake. The defendant effectively allows the state to take away her freedom and liberty without a trial. There is also a liberty interest during a sentencing hearing because the length of the sentence matters a great deal to the defendant. Given the sometimes-varying sentencing guideline ranges, a defendant receiving the lower end of the range is preferable, and only counsel can fully advocate for the lower range.

[160] United States v. Wade, 388 U.S. 218, 227 (1967).

[161] Powell v. Alabama, 287 U.S. 45, 57 (1932).

In *Brewer v. Williams*, the Court added, "Whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against [her] whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[162]

The Court in *Coleman v. Alabama* held that a defendant is entitled to counsel even if the initial hearing with a judicial officer is not a requirement of prosecution under state law.[163] The Court advanced four arguments buttressing the benefits of having counsel at such a critical stage of proceedings. First, counsel could expose weaknesses in the state's case that would make it unlikely that an indictment is issued at all.[164] While the role of counsel here may seem strong, in practice a defense attorney is unlikely to convince a prosecutor to drop the charges against a defendant this early in the process. Thus, even if counsel appeared remotely, it would be highly unlikely that the remote appearance would have any effect on whether or not the proceedings continue against the defendant. Second, the Court held that during the initial hearing, counsel could elicit impeachable testimony from state witnesses that would testify at trial or preserve useful testimony from witnesses that may not appear at trial.[165] Here, a remote appearance of counsel may greatly disadvantage a defendant because of the need to cross-examine or probe witnesses. So if the initial hearing *does* have witnesses, the need for counsel to appear in person is greater. Nonetheless, it likely does not rise to the same need as in a trial.

Third, counsel could determine the prosecution's theory early in the process and build a defense to address this theory.[166] The formation of a trial theory is pertinent to how counsel will conduct herself throughout the adversarial process, but a remote appearance is unlikely to affect counsel's understanding of the theory of the case solely because of the lack of physical presence.

Lastly, the Court held that counsel could more effectively advocate for necessary testing for trial or advocate for fairer bail for the defendant.[167] The

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[162] Brewer v. Williams, 430 U.S. 387, 398 (1977).

[163] 399 U.S. 1, 8 (1970). Under Alabama law, the initial hearing serves two purposes. First, it is to determine whether there is enough evidence for a grand jury to issue an indictment against the defendant. Second, if the court finds that there is sufficient evidence for a grand jury to indict and the grand jury does indict, then the hearing also involves the determination of bail.

[164] *Id*. at 9.

[165] *Id.*

[166] *Id.*

[167] *Id.*

Court is indeed correct that counsel can advocate for testing and fairer bail, but there is little indication that physical presence will make it any more likely that the defendant would receive more testing or a fairer bail.

Similarly, an arraignment is also considered a critical stage. In *Hamilton v. Alabama*, the Court held that a defendant is entitled to counsel during her arraignment.[168] The Court reasoned that the presence of counsel is necessary to avoid the prejudice of not exercising an available defense during the arraignment or simply to ensure that the defendant pleads intelligently after receiving her counsel's advice.[169] An arraignment is a critical stage of a judicial proceeding because it can affect the outcome of a trial.[170] Generally, the need for counsel at this stage is similar to the need during an initial hearing. Thus, the reduced need for the physical presence of counsel is comparable in two ways: (1) the remote appearance of counsel is unlikely to increase the net benefit of their appearance during the proceedings, and (2) the efficiency created by the possibility of counsel appearing remotely is strong and compelling. One possible difference is the need to communicate with and advise the defendant privately. Because a defendant is generally required to plead guilty or not guilty during the process, communicating with counsel is a significant consideration that is impacted regardless of whether the defendant or counsel appears via video or audio. At this stage, if both counsel and defendant are together and appear via audio or video, then the communication consideration is unnecessary because counsel and defendant can communicate freely.

Initial hearings and arraignments are perfect examples of proceedings where the use of video or audio conferencing may bring efficiency to the judicial process. Given the nature of initial hearings and arraignments—attorneys cannot predict when someone will get arrested or formally indicted—having the flexibility to have counsel appear from anywhere, at any time, to represent a defendant during these stages is a net benefit for the judicial process and defendants.

Other than the trial, the process of negotiation and entry of guilty pleas and sentencing represent stages where the expertise and skills of counsel greatly impact the defendant. As such, the need for the physical presence of counsel is likely greater than it is for initial proceedings.

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[168] 368 U.S. 52, 54–55 (1961).
[169] *Id.*
[170] *Id.* at 54.

The Court has implicitly held that a defendant is entitled to counsel during the negotiation or entry of a guilty plea.[171] In examining the effectiveness of counsel pertaining to plea bargains, the Court showed that it had determined that plea proceedings entitle defendants to the right to counsel. If the Court had determined that plea bargains were noncritical stages of judicial proceedings, then it would not have examined the effectiveness of counsel in relation to the plea proceedings. The Court has also found that a defendant is entitled to counsel during sentencing proceedings for both capital and noncapital cases because the length of a defendant's sentence is at stake.[172] "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in [] prejudice because any amount of additional jail time has Sixth Amendment significance."[173]

Both the negotiation and entry of a guilty plea and sentencing require a sophisticated level of communication from counsel. Informing a defendant about the consequences of a guilty plea is of the utmost importance for the defendant and the fairness of the judicial system. All precautions should be taken to ensure that counsel can communicate with her client about the expected outcomes of the guilty plea, whether they impact the appeals process or the years served in prison. The same is true during the sentencing process. Communication between counsel and defendant is a significant component of what occurs during these two stages, and therefore the remote appearance of either counsel or defendant should be scrutinized.

Critical stages are not limited to pre-trial and trial proceedings. A defendant is entitled to representation by counsel at her appeal because a layperson is generally not equipped to present an appeal case effectively. The process is a "perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning

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[171] *See* Lafler v. Cooper, 566 U.S. 156, 174 (2012) ("[R]espondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea."); Padilla v. Kentucky, 559 U.S. 356, 357 (2010) ("The consequences of [the defendant's] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect."); McMann v. Richardson, 397 U.S 759, 770 (1970) ("In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession.").

[172] *Lafler,* 566 U.S. at 165.

[173] *Id.* (citing Glover v. United States, 531 U.S. 198 (2001)) (internal quotation marks omitted).

disabilities, and mental impairments."[174] At this stage, the need for counsel to be physically present may be critically important because of counsel's relationship with the court. During an appellate argument, counsel would be in a better position to react and respond to questions from the court and the opposing side. Even though this stage is of great importance to the defendant, the defendant's communication with counsel during the process is reduced because of the nature of the proceedings. Appellate proceedings are about legal arguments and exposing errors in judgment during the trial process. Therefore, the defendant's presence is less important to the outcome of the proceeding. In these types of proceedings, having the defendant appear via video or audio from prison would likely be acceptable without any major effect on the effectiveness of counsel because of the remote appearance. Moreover, at this stage, the defendant will not confront any witnesses as she would have in prior stages.

Finally, the right to effective counsel in probation and parole proceedings is not a guaranteed right, but instead a case-by-case determination that depends on the circumstances and seriousness of the revocation.[175] "[C]ertain cases in which fundamental fairness [is] the touchstone of due process . . . will require the state [to] provide at its expense counsel for indigent probationers or parolees."[176] The Court did not attempt to formulate a manner in which officials could determine the necessity of counsel for probation and parole revocation.[177] Since these two proceedings require a case-by-case determination as to whether counsel is guaranteed, the ability of counsel or defendant to appear remotely is less likely to be problematic. While the need for communication between counsel and defendant is strong, the concern that the freedom of the defendant is at stake is reduced. Regardless of whether the defendant is paroled or on probation, she is still under the custody or care of the state. The overall stake of losing one's freedom is not the same here as it is before and during a trial, a guilty plea, or the sentencing process.

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[174] Halbert v. Michigan, 545 U.S. 605, 621 (2005). "Michigan's very procedure for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled." *Id.* at 622.

[175] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[176] *Id.*

[177] *Id.*

C. NEITHER *STRICKLAND* NOR *CRONIC* CAN ADEQUATELY ASSESS THE EFFECTIVENESS OF COUNSEL WHEN CONSIDERING AUDIO AND VIDEO CONFERENCING

Testing a counsel-defendant relationship using the *Strickland* test is a fact-specific exercise. Thus, appearing by video or audio by itself would not lead to an overturned conviction based on ineffective assistance of counsel. Instead, the court would have to find that the attorney's performance via video or audio was unreasonable and that the performance prejudiced the defendant. The likelihood that a court could find a lackluster performance and prejudice is higher for Types II, III, and IV, where counsel would not be physically present in court. However, a likely increase in possibility hardly makes it overall more likely that a court would find ineffective assistance of counsel. The court would have to examine, for example, the need to cross-examine, the type of proceeding, and the ease or availability of communication between the defendant and her counsel. The performance of an attorney may be found to be substandard over video or audio if counsel was not able to cross-examine a witness thoroughly during a proceeding where cross-examination is a component. Substandard performance could also be found if an unstable connection prevented counsel and defendant from communicating about the proceedings in real time as in a plea bargaining setting or sentencing. Yet the *Strickland* test as currently applied does little to consider that there are real differences in how counsel fulfills her duties depending on whether she appears remotely or in person. Thus, the *Strickland* test generally seems to underestimate the possible repercussions of an attorney who is not present in court.

In contrast, under the construction of *Cronic* presented by Justice Stevens and the Seventh Circuit, it is hard to imagine that counsel appearing via video or audio would ever survive constitutional muster. To that extent, the *Cronic* test has the opposite flaw of *Strickland*—it overestimates the impact of counsel appearing remotely instead of in person.

Under *Cronic*, Types II, III, and IV would likely be unconstitutional because counsel does not physically appear in court. Type I may survive *Cronic,* but both Stevens and the Seventh Circuit suggested that the requirement that counsel appear in court physically also means that counsel appears in court physically *alongside* her client. Justice Stevens claimed that the Seventh Circuit "assumed that the constitutional right at stake was the right to have counsel by one's side at all critical stages of the proceeding" and presence of counsel meant physical presence in court.[178] If that holds true, even a Type I relationship may be struck down because the defendant

[178] Wright v. Van Patten, 552 U.S. 120, 127–28 (2008).

does not get the benefit of being physically next to her counsel, including the benefit of communicating about the proceedings. Under this construction, counsel's presence in court does not fulfill the Sixth Amendment guarantee in itself because the defendant does not get the benefit of counsel *next* to her. If the Court determines that counsel appearing via video or audio results in per se ineffective assistance of counsel, then it would inadequately adapt to the ever-increasing use of technology in courts. That type of decision would foreclose the application of technology in all proceedings that entitle or could entitle a defendant to assistance of counsel. As discussed in the previous subsection, not every judicial proceeding presents unequivocally harmful effects on counsel or the defendant appearing in court via video or audio conference.

Alternatively, the Court should find that the test in *Cronic* is broader than the one recognized by Justice Stevens and the Seventh Circuit. This test would allow a broader interpretation of the presence requirement to encompass both a physical presence and a presence in mind. A broader interpretation of *Cronic* would be more consistent with the language that only finds per se ineffectiveness of counsel if there is a *complete* denial or *absence* of counsel.[179]

If courts simply examine whether there was a complete denial or absence of counsel, then appearance via audio or video conference would likely not be deemed per se ineffective because the defendant was represented by counsel. While this may be a satisfactory result because it allows representation that involves audio and video conferencing, it tends to oversimplify the issue. While the result of the Seventh Circuit's interpretation is unsatisfactory, the court's concern that it would lack oversight over an attorney appearing via audio and video is valid. One way to remedy this concern is to have the reviewing court determine if the counsel appearing via audio and video conferencing appears engaged in the proceeding, i.e. if she is present in mind. If the court finds that counsel was engaged in the proceeding, actively probed the prosecution's case, and was, in general, aware and responsive to the proceedings, then it cannot find a per se ineffectiveness. This type of first step would allow courts to acknowledge that the appearance via video or audio is partially different from an in-person appearance, but not such that courts necessarily need either an automatic finding of a per se ineffectiveness or direct examination under *Strickland*. If the Court did find that the first step was satisfied, namely that counsel who appeared remotely was at least present in mind, then an application of *Strickland* as a second step would complete the analysis.

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[179] *See supra* Section I.C.3.

CONCLUSION

It is inevitable that courts will increasingly utilize technology during the judicial process. The ability of courts to have counsel and defendant appear remotely offers greater flexibility for courts and shows promising efficiencies. However, courts do not operate outside the restrictions prescribed by the Constitution. The fairness of the criminal justice system is dependent on constitutional guarantees that should not be lessened in the name of the efficiency or flexibility without careful consideration and without taking the necessary precautions to preserve the full scope and efficacy of these guarantees. Audio and video conferencing can improve the criminal justice system as long as defendants can depend on the uncompromising right to effective representation. To that end, courts should define the constitutional parameters of remote appearances. Without concrete guidance and a decision on the merits from the Supreme Court, more questions remain than are answered. This Comment has attempted to propose ways that courts could analyze the effect of remote appearances on the right to effective counsel. It has also provided several considerations in that analysis.

Twenty-first-century courtrooms may be significantly different from their eighteenth century counterparts, but the rights guaranteed by the Constitution in criminal proceedings remain constant. The inherent challenge is to find the precise limit of an administration of justice that is able to continuously adapt to technological advances in a manner that still conforms to the Constitution.