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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	COMMENT TO PETITION TO
Petition to Amend Rule 1.6 of	AMEND RULE 1.6 OF THE
the Rules of Criminal Procedure	ARIZONA RULES OF CRIMINAL
	PROCEDURE

Robert Hooker, the Pima County Public Defender, comments on the Pima County Attorney's Petition to Amend Rule 1.6 of the Ariz. R. Crim. P.

INTRODUCTION. The Arizona Supreme Court, after due consideration for the law and input by all interested parties, adopted Rule 1.6 on May 31, 2000. It became effective on December 1, 2000. Now and when adopted, Rule 1.6 is in accord with the majority of states that have addressed the teleconferencing video hearing process. It is also consistent with Rules 5(f) and 10(e) of the Federal Rules of Criminal Procedure, both of which allow teleconferencing video appearances only with the consent of the defendant. These rule making decisions of the United States Supreme Court are reflective of that Court's views of a defendant's rights under the United States Constitution.

The waiver requirements of Rule 1.6(b)(2) and (c)(1) and the record requirement of (b)(1) demonstrate that this Court too clearly recognized the constitutional implications raised by a remote hearing process, and clearly viewed video hearings as extraordinary substitutes for courtroom proceedings. Petitioner now seeks to change the rules in an attempt to accommodate what is uniquely a Pima County aberration.[1]

[1]Although this comment deals largely with initial appearances and though the initial appearance procedure is primarily at issue, the proposed change will give judges carte blanche authority to order video hearings in many other critical court appearances, such as: changes of plea, case management conferences; omnibus hearings, pretrial conferences;

Sometime ago, Pima County to installed cameras and monitors at the jail and in various courtrooms. No provision, or attempt, was made to comply with Rule I.6, most importantly with sections b(I)and(2) and c(I). Prior to April 2006, despite Rule 4.2(a)(5), Rule 6.I and the comment to Rule 6.I, no lawyer was present to represent arrestees.[2]

DISCUSSION. I. Generally. Petitioner suggests three changes to Rule I.6: the abolition of the requirement that the judge or magistrate ensure that the accused has knowingly, intelligently, and voluntarily waived the right to be physically present in the same room as the judge or magistrate; the addition of a statement that appearance by interactive video device shall be permitted for initial appearances; and, the deletion of the requirement for a written stipulation.

The petition is confusing. Petitioner proposes to change Rule I.6(c) to read:

> Appearances by interactive audiovisual device, including videoconferencing, shall be permitted at any hearing, <u>including initial appearance, arraignment, and</u> any <u>other court proceeding</u> except that:
> (I) This Rule I.6 shall not apply to any trial, evidentiary hearing or probation violation hearing; and
> (2) This Rule I.6 shall not apply to any felony sentencing.

The proposed added language is underlined. The proposal leaves the meaning of evidentiary hearing unclear and ignores that initial appearances are critical evidentiary hearings. Rule 4.2(a)(4) requires the magistrate to determine probable cause based on sworn testimony. Rule 4.2(a)(6) requires the magistrate to consider the views of victims. Rule 4.2(a)(7) requires the magistrate to determine the conditions of release. Rule 7.2(c) requires the prosecution to prove by the preponderance of the evidence that the person should not be released.

In *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975), the United States Supreme Court held that the probable cause determination after arrest uses the same standard as for arrest

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Rule 7.5(c) (1) hearings to modify conditions of release; contested motions to continue the trial, motions to compel discovery; and motions for sanctions.

2 This was not unique to Pima County. At that time, only Pinal County had lawyers at the initial appearances.

warrants. The Supreme Court has held that "[t]he decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." *Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560, 564 (1971). Clearly, evidence must be presented in order to permit the magistrate to make an independent judgment. The victim's views may or may not be in the form of testimonial evidence.

Rules 7.2 (a) and (c) require the arrestee to be released on his/her own recognizance unless the state proves by a preponderance of the evidence that this is not adequate to assure the arrestee's appearance at later hearings. The factors to be considered are listed in A.R.S. § 13-3967(B), including the circumstances of the offense, the weight of the evidence against the accused and the views of the victim. If there was ever any doubt that the initial appearance was an important evidentiary hearing, that doubt has been recently laid to rest. On April 4, 2007, Chief Justice McGregor issued Administrative Order 2007-30 requiring an evidentiary hearing pursuant to *Simpson v. Owens,* 207 Ariz. 261, 85 P.3d 478 (App.2004), when there is probable cause to believe that a person is not eligible for bail because he or she entered or remained in the United States illegally:

> IT IS ORDERED that judicial officers conducting IA hearings involving the offenses listed in A.R.S. § 13-3961.A shall utilize the following procedure:
> 1. **Based on information presented at the initial appearance,** the court shall initially determine whether probable cause exists to find that the defendant committed the charged offenses.
> 2. If the allegation involves A.R.S. § 13-3961.A.5, the court shall then determine whether probable cause exists to believe that the defendant entered or remained in the United States illegally and that the proof is evident or the presumption great that the defendant committed the charged serious felony.
> 3. If the court finds probable cause under paragraphs 1 and 2 above, the court shall order an evidentiary hearing on the question of whether bail should be denied. **Such hearing may be held immediately** or scheduled for a time within twenty-four hours of the initial appearance . . . The defendant is entitled to representation by counsel, and **to present evidence,** testimony, and witnesses, by proffer or otherwise, to provide evidence on the defendant's behalf. . . .

(Emphasis added). Thus, evidence must be presented to establish probable cause and a full evidentiary hearing must be held to determine if the arrestee is not eligible for bail. The proposed change to Rule 1.6 fails to consider this development and seeks to reduce the initial appearance to a mere ministerial formality and ignores the fact that the initial appearance is a critical evidentiary hearing.

There are other serious problems with the proposal. The proposed reference to initial appearances in Rule 1.6(c) and the deletion of the requirement for knowing, voluntary, and intelligent agreement to videoconferencing in Rule 1.6(b)(2) are clearly intended to permit the imposition of videoconferencing on arrestees at all initial appearances and other significant hearings. During video conferencing, the accused is not physically present with the judicial officer. This impact will be discussed below. Because constitutional rights are involved, this Court recognized in 2000 that any waiver of the right to be physically present must be knowing, voluntary, and intelligent. The arrestee's right to require an in-person initial appearance is especially important to protect against the use of inferior quality video and audio equipment.

The right to be physically present in the courtroom with the magistrate is as important at initial appearances as at any other hearing, because at the initial appearance the magistrate decides critical liberty interest issues. As noted in *Simpson v. Owens,* substantive and procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, §4 of the Arizona Constitution, also apply to decisions on whether to release on bail "not because of a constitutional right to bail, but because liberty is a fundamental right independently guaranteed." Decisions regarding fundamental rights cannot, without the informed consent of the individual, be made from remote locations by a judicial officer isolated from those whose rights are at issue.

Without adequate explanation, Petitioner contends that Arizona counties may have an economic interest in conducting more hearings by video conferencing if it saves transportation and additional security costs. Even if true, these economic interests do not outweigh fundamental constitutional considerations. In Pima and Maricopa Counties, the

initial appearance hearing is conducted with the accused in a courtroom in the jail. In Maricopa County, all arrestees are physically present with counsel and the judge at the initial appearances. Transportation is not involved. The perceived need for increased security at the Pima County Jail is minimal, if any. If it is somehow critical in Pima County, when it is not in Maricopa County, the burden of rectifying that problem is on the Pima County Sheriff. The solution is better security; or to transport the arrestees to a courtroom at the court house. Constitutional rights should not bear the burden of law enforcement deficiencies, lack of planning, deficient architectural considerations, or budget constraints.

Security at the jail where only duly processed inmates are present with properly trained jail personnel is imminently more certain than the proposed alternative where family and friends of the accused and victims are present some times late at night, with less security and fewer jail personnel. Martha Cramer, Corrections Chief at the Pima County jail, stated: "We're not as well-appointed as other courtrooms, but we're the safest courtroom in the county." Routine jail procedures require control of the arrestees when they are moved about the jail and in Pima County three correction officers are assigned to the jail courtroom and only a few arrestees are brought in at a time.

Tucson City Court Judge Bernal in support of the Petition complains that the courtroom at the Pima County Jail is small, noisy, and inconvenient, contending apparently that the comfort of magistrates outweighs the rights of the accused. Initial appearances in the jail courtroom with defense counsel, the arrestee, the court and court personnel have been occurring in Pima County since April 2006. Maricopa County has had the judge in the jail courtroom for years. The proposed amendment would change this in Pima County so that judges, court personnel, prosecutors and family and friends of the victim and accused, along with other interested parties, are at one location. The arrestee and defense counsel would be at the jail, unless the lawyer chooses to have no personal contact with the client and to be in the same location as the judge. Such a choice, however, is not without its problems. Ironically, the very deficiencies the proponents claim exist with the jail

courtroom become insurmountable to their own proposal. Rule I.6(b)(3), which the petition does not seek to change, mandates that facilities exist that will allow confidential communications before and during the hearing between the defendant and counsel. Those facilities do not exist in a meaningful or lawful way.

With no supporting data or cogent argument that the current rule jeopardizes the right to a prompt initial appearance, Petitioner asserts that video conferencing will ensure that the arrestees will have a prompt appearance before a magistrate. The counties of Arizona already have a legal obligation to provide a prompt hearing and have been complying with it for years; *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); Rule 4.1, Ariz. Crim.P. Asserting that the proposed changes will ensure the prompt appearance of arrestees before the magistrate is essentially a non sequitur.

2. **Right to Counsel.** Appearance by video interferes with the right to counsel.[3] When the accused appears by video, there are two possible locations for counsel: in the courtroom with the judge or magistrate and the prosecutor; or in the jail with the client.,

When the attorney is in the same room, as in a regular courtroom, with the accused, consultation with the client is much more effective. Video appearances require communication over a video link or by private telephone. Face-to-face contact is especially important at an initial appearance where the client does not have more than a few minutes acquaintance with the attorney. A client is more likely to confide in an attorney who is physically present than with someone over the phone whom the client has seen briefly, if indeed the system allows adequate visual contact. The Illinois Court of Appeals has recognized the importance of communication with counsel that is not allowed by electronic devices:

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[3] Rule 6.1 of the Arizona Rules of Criminal Procedure provides that "(a) defendant shall be entitled to be represented by counsel in **any criminal proceeding**, except in those petty offenses...." (Emphasis added.) The comment to the Rule makes clear that this right applies at the initial appearance as well as later states:

> This section entitles the defendant to the aid of counsel during all phases of the criminal process from an arrest or grand jury proceeding and **initial appearance** through a preliminary hearing and competency hearing, if any, trial or plea, sentencing hearing, sentencing, appeal, post conviction proceeding, and probation revocation. (Emphasis added.)

> In a televised appearance, crucial aspects of a defendant' physical presence may be lost or misinterpreted, such as the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding. In a guilty plea hearing, as in a trial, these components may be lost if a defendant's appearance is through closed circuit television.

People v. Guttendorf, 723 N.E.2d 838, 840-41 (Ill.App.Ct. 2000). The Illinois Supreme Court later confirmed that video conferencing impairs the right to counsel:

> We acknowledge that defendant's absence from the courtroom had some impact on defendant's access to counsel. Because defendant and his attorney appeared at separate locations during the arraignment and jury waiver, defendant's ability to communicate freely with counsel was impaired-communication through the closed circuit system could not be done privately and, to speak privately, counsel was required to leave the courtroom to contact defendant by telephone.

People v. Lindsey, 772 N.E.2d 1268, 1278 (Ill. 2002), *citing Guttenndorf.* In Pima County, the only available method for communicating between counsel and defendant who are in different locations is the same as that condemned by the Illinois court.

Though impairment is not significant for merely ministerial proceedings, initial appearances and many other criminal court proceedings that the proposed amendment would allow are not ministerial. Initial appearances and other hearings involve the presentation of information to the magistrate and a decision regarding constitutionally protected liberty issues.

The Florida Court of Appeals has also recognized the negative impact of video conferencing on the attorney-client interaction:

> We can imagine no more fettered and ineffective consultation and communication between an accused and his lawyer than to do so by television in front of a crowded courtroom with the prosecutor and judge able to hear the exchange. Quite apart from that obvious inhibition is the added circumstance that the accused is deprived of the opportunity to look directly into the eyes of his counsel, to see facial movements, to perceive subtle changes in tone and inflection, in short, to use all of the intangible methods by which human beings discern meaning and intent in oral communication.

Seymour v. State, 582 So.2d 127, 129 (Fla.Dist.Ct.App. 1991). Even if a private telephone is provided, the interaction is still impaired by the inability of the attorney and client to

look into each others eyes, see facial movements, and perceive subtle changes in inflection. If a victim exercises the right to be heard, how do the defendant and the lawyer communicate effectively regarding veracity or accuracy of the statements?

To overcome these impediments, the lawyer must then choose to be at the jail with the client. This is a Hobson's choice. Does the lawyer do this at his peril if the proponents' safety concerns are valid? Is it fair, in an evidentiary hearing when Rule 7.2(c) evidence is presented and/or when a *Simpson* hearing is conducted, for the judge, prosecutor, witnesses and victims to be together out of the presence of defense counsel? How does a defendant in a *Simpson* hearing provide documentary evidence over a video link? Frequently, evidence is brought to court by family and friends. How is the lawyer at the jail supposed to communicate with them prior to and during the hearing? When a victim exercises the right to be heard on release issues, are the defendant and counsel not entitled to be present?

Whether counsel and the accused are together or separate, the nature and timing of the initial appearance militate against video hearings in many instances. When conducted 24 hours or less from arrest, there is no time to prepare and no ability to predict what evidence will be presented, or what witnesses or victims will testify. Effective and immediate attorney/client communication is critical. Effective cross-examination of a testifying witness or victim may be necessary and can best be done face-to-face.

For important hearings the proposed rule change will leave defense counsel in an untenable position to the detriment of the accuser's rights.

3. The Right to be Present. The Arizona Constitution guarantees that an accused can defend in person and confront witnesses: "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, . . . to meet the witnesses against him face to face, . . ." Ariz. Const. art. 2 § 24. This Court has previously recognized that this provision guarantees the right to be present. *State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996).

The United States Constitution also guarantees the right to be present. The Sixth Amendment to the United States Constitution, like the Arizona Constitution, guarantees

the right to confrontation: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The United States Supreme Court has recognized that this gives rise to a right to be present at trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial,") The right to be present also arises from the Due Process Clauses of the Fifth and Fourteenth Amendment:

> We have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge···· [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, . . ."

United States v. Gagnon, 470 U.S. 522, 526-27 (1985) (citation omitted). This Court has recognized the right to be present guaranteed by the United States Constitution. *State v. Dann*, 205 Ariz. 557, 571-72 ¶ 53, 74 P.3d 231, 245-46 (2003). This right extends to all procedural stages that are critical to the outcome of the case if the accused's "presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). A defendant has a right to be present when presence has "a relationship, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Gagnon*, 470 U.S. at 526-27.

Video "presence" is inadequate to ensure the fairness of the procedure or permit the accused a full opportunity to defend. This can be seen by what occurs during video conferencing. The most important result of the accused's presence is that the judge or magistrate can see and hear the accused and the accused can see and hear the judge or magistrate, counsel for the state, and what is occurring in the courtroom. Video only permits a person to see what the camera is pointed at, in other words the judge, and hear those who have microphones, usually only the judge. If the video system does not permit

the accused to see the magistrate or judge clearly and to hear the magistrate or judge and prosecutor accurately, it is not an adequate substitute for physical presence. Even a well-functioning system is an inadequate substitute for physical presence. The accused will not be able to see or hear everything that is going on in the courtroom and therefore is not truly present. Moreover, an accused's physical presence at the initial appearance contributes to fairness and is necessary for an adequate defense because of the impact of physical presence on the magistrate. First, during video conferencing, the magistrate is unable to adequately appraise the accused's demeanor. This Court has recognized the importance of demeanor at sentencing:

> It is only when the defendant is before the court that a reasonable and rational sentencing can take place. A presentence report based upon personal interview, the defendant exercising his right of allocution, and a chance for the judge to **personally question and observe the defendant** are minimum requirements in most cases.

State v. Fettis, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983)(emphasis added). It is also important in determining bail. *United States v. Shakur*, 817 F.2d 189, 198 (2nd Cir. 1987)("The court stated that, based on Shakur's demeanor, it believed that Shakur would not flee if released on bail."); *United States. v. Rabena*, 339 F.Supp. 1140, 1142 (D.Pa. 1972) ("The Court is authorized to consider such factors as the demeanor of the defendants at trial, the facts of the case, any patterns of behavior which may reflect on the defendants' future conduct, and the likelihood of the defendants' committing future unlawful acts while released on bail.").

Demeanor includes the way a person stands or sits, what he does with his hands and feet, and the tone of voice and minute facial changes. Many of these factors are excluded by the choice to focus the camera on the head and upper torso, and others are limited by the inherent lack of clarity of even the best video systems. Indeed, the Illinois Court of Appeals has found appearance by video to be inadequate for a guilty plea hearing (a hearing which the proposed change would allow) because of the limitation of the judge's ability to judge demeanor:

> In a televised appearance, crucial aspects of a defendant' physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding. In a guilty plea hearing, as in a trial, these components may be lost if a defendant's appearance is through closed circuit television.
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> Because of the critical significance of a guilty plea to a defendant, we hold that a televised guilty plea is not permitted under either the United States or the Illinois Constitution. *See* U.S. Const., amend VI; Ill. Const.1970, art. I, §8. Thus, defendant should have been physically present at the time he entered his guilty plea.

Guttendorf, 723 N.E.2d at 840-41; *People v. Stroud*, 775 N.E.2d 1038, 1040 (Ill.App.Ct. 2002)(vacating conviction because "the defendant pled guilty over closed circuit television and was denied the substantial right to be present at a critical stage of his conviction proceeding.").

Second, video appearance lessens the psychological impact on the judge or magistrate of making a decision about a person's life. The accused's right to have the decision about his/her fate announced in person has been recognized in various criminal proceedings. For example, in *United States v. Canady*, 126 F.3d 352, 361-62 (2nd Cir. 1997), the court noted:

> We see no reason why a defendant's presence is less critical when the court, instead of the jury, renders its decision as to the ultimate issue of whether the defendant is guilty or innocent. In the jury context, several courts, in rejecting the argument that the defendant's presence is useless, have pointed to the fact that the defendant's mere presence exerts a "psychological influence upon the jury." This is because the jury in deliberating towards a decision knows that it must tell the defendant directly of its decision in the solemnity of the courtroom. We fail to see how the situation is any different when the fact finder is the district judge.

In *Henry v. State*, 861 P.2d 582 (Alaska Ct.App. 1993), the court recognized "the importance of in-person allocution and the psychological difference of having the sentencing judge and the defendant address each other face-to-face," and vacated Henry's sentence. *Id.* at 593-94. The importance of physical presence was recognized as a value protected by the Confrontation Clause: "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking

the facts." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). The decision made "in a room that contains a television set beaming electrons that portray the defendant's image," is not the same as a decision made in the physical presence of a person. *Order of the Supreme Court on Court Rules*, 207 F.R.D. 89, 94 (2002)(Statement of Justice Scalia). As Justice Scalia observed: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Id.* Our extensive experience with television as a source of entertaining fiction makes a decision about a face on television much less real than a decision about a person who is physically present. Arrestees and defendants have a right to have the magistrate or judge make a decision about a real person.

4. **Waiver.** "A defendant's rights under the Constitution may be waived, provided such waiver is voluntary, knowing, and intelligent." *Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir.1994) (jury selection); *see also Scott v. State*, 618 So.2d 1386, 1388 (Fla.Dist.Ct.App. 1993) (sentencing hearing); *Jacobs v. State*, 567 So.2d 16 (Fla.Dist.Ct.App. 1990) (reversing video sentencing where defendant did not sign a waiver of the right to be present or have private access to confer with counsel). In 2000 this Court included the requirement for knowing, voluntary and intelligent waiver in Rule 1.6(b)(2) in recognition of the constitutional rights involved when videoconferencing is substituted for physical presence.

Petitioner also seeks to delete the requirement of a written stipulation to the use of video conferencing in Rule 1.6(c)(1). This does not apply to initial appearances. However, this provision is important in many other contexts such as those listed in footnote[1] hereof. It should not be deleted.

5. **The videoconferencing systems used in Pima County and elsewhere fail to meet the requirements of Rule 1.6 and Chapters 5 and 6 of the Arizona Judicial Code.** Rule 1.6 contains several requirements for the videoconferencing system:

> a. . . . An interactive audiovisual device shall at a minimum operate so as to
> b. Requirements. In utilizing an interactive audiovisual device the following are required:
> (1) A full record of the proceedings shall be made as provided in applicable statutes and rules; and

. . .

(3) Provisions shall be made to allow for confidential communications between the defendant and counsel prior to and during the proceeding; and

(4) Provisions shall be made to allow a victim a means to view the proceedings;

This Court has also specified requirements for audio-visual systems in the Arizona Judicial Code, Part I, Chapters 5 and 6. When the Pima County Public Defender began providing counsel at all felony initial appearances in April 2006, the videoconferencing system failed to comply with these rules. In March 2007 a new system was installed permitting the parties to see and hear each other for the first time. The system purportedly makes a digital audio (FTR) record.

The proponents of change to Rule 1.6 assume, falsely, that the video conferencing system is in compliance with constitutional requirements and the Arizona Judicial Code. When the Pima County Public Defender lodged its objections to the video conferencing system that was in place in April, 2006, the Superior Court attempted a band-aid solution. The inadequacy of that solution became readily apparent. Between April 15, 2006 and February 28, 2007, the record failed to maintain an audio or video record for 321 initial appearances in Pima County. Pima County conducts two initial appearances per day at which there is an average of from 10 to 20 felony initial appearances. Taking the lower number, the deficiencies in the system up until February 28, 2007, had the potential to affect at least 3,210 arrested persons. Not only was there a failure to create an adequate and proper record, the Pima County Superior Court failed to recognize and adhere to the Arizona Judicial Code, Part 1, Chapters 5 and 6. These inadequacies were noted by an expert in the field, Winton Wood. Not only was there a lack of record, but the video system was not maintained and monitored by trained court personnel; jail clerks were given that responsibility; there was no monitoring during the course of the hearings; and, there was no backup system that provided an adequate and consistent record.

Ostensibly, these issues were resolved by the installation of a new video system which allows all participants to view and communicate, one with the other. However, the only record that is maintained is a digital FTR audio record. No video record, as required by

Rule I.6(b)(I), is capable of being maintained with this new system. Maintaining a full video record is easily within current technological capabilities. This "new system" of a FTR record has substantial deficiencies as became apparent on May 17, 2007, during a meeting of the Pima County Superior Court's Arrest to Arraignment Committee. Exhibit I. Two or three times a week, the video system does not work. The system is not maintained and monitored by trained court personnel as required by Arizona Judicial Code, Part I, Chapter 5 and 6; there is no backup system; no monitoring during the course of hearings; the system is not operated by trained court personnel, but rather by untrained jail employees.

Perhaps most disturbing, although the FTR recording system may accurately reflect what was actually said, it does not always record what was heard by the participants. There are instances in which what the listener hears is different from what the speaker actually said. Therefore, should the defendant choose to attack the hearing process, the record will reflect that the defendant's contentions were erroneous when in actuality they were not. The FTR system picks up the communication as it is stated from the communicator, but does not record what is actually transmitted to the listener.

Although these situations may be redeemable, they point out at least six separate problems: I) there is no adequate and proper system in place, therefore, there is no adequate and proper record; 2) there is no adequate and proper backup system; 3) there is no monitoring during the course of the hearing; 4) the system is not being operated by trained court personnel; 5) the courts are attempting to impose a system for which all of the deficiencies have not been worked out; 6) since there is no video record that is created and maintained a "full record" is not kept and the defendant is left with no basis for which to attack the video system regarding its audio or visual clarity and sufficiency.

The only way to protect the arrestee's right to have compliant systems is to permit him or her to decide with counsel whether to have the hearing by videoconferencing.

6. History of the Adoption of Rule I.6. All the issues raised by Petitioner were brought to this Court's attention before it adopted Rule I.6 in 2000. The Court therefore

has no reason to reconsider its decision.

On November 30, 1998, the administrator of the Flagstaff Municipal Court filed a Petition to Amend Rule 9.1 of the Arizona Rules of Criminal Procedure, proposing that two additional sections be added to Rule 9.1 dealing with the use of video "or other satisfactory means" for conducting arraignments, entry of pleas of not guilty or no contest, and presentencing and sentencing hearings. Appendix 1 to 11/30/1998 Petition. The proposed amendment to the Rule specified that waiver must be knowing, intelligent, and voluntary. *Id.* The Petition noted that Cochise County was already conducting initial appearances by videoconferencing, *Id.* at 2, and that Cochise County is the second largest county in the State so videoconferencing would decrease transportation costs and increase security, *id.* at 3, the same issues raised by Petitioner here.

Another petition related to the use of videoconferencing was filed on July 1, 1999, by the Administrative Office of the Courts. It sought to amend Rule 1.4 to permit the appearance of a defendant by audiovisual devices. That petition proposed two alternatives, neither of which contained a requirement for knowing, voluntary, and intelligent waiver. Thus, when adopting Rule 1.6, the Court was faced with a proposal without the language Petitioner now seeks to delete.

On August 10, 1999, William Kirchner, an attorney from Pima County, filed a comment to the proposed changes in Rule 1.4, pointing out that the Rule as proposed would permit a court to prevent defendants from personally attending Rule 11 hearings, and evidentiary hearings where communication between client and counsel about witness testimony is important. *Id.* at 2. He noted that the proposed rule failed to spell out how confidential communication was to be carried out and that it failed to require that the witness be able to see counsel or witnesses or anything else going on in the courtroom. *Id.* at 2-3. He also argued that defendants needed to be able to testify on equal terms with other witnesses and pointed out that it was easier for witnesses to lie about, and judges to rule against, a "disembodied" person. *Id.* at 3. In Mr. Kirchner's view, the proposed amendments to the rule also violated the Arizona constitutional right to appear and defend

in person. *Id.* at 3, *citing* Ariz. Const. art. 2, § 24. Mr. Kirchner also mentioned that, as implemented in Pima County, closed-circuit television often malfunctions and is afflicted by static, and complained that there was no confidential means of communicating with the client. *Id.* at 4. He concluded that while closed-circuit television might be suitable for pro forma hearings, the proposal permitted its use for any trial or hearing as well. *Id.* at 4. Thus, Mr. Kirchner presented many of the arguments presented in the present Comment.

A comment filed by the Maricopa County Attorney on August 17, 1999, argued that the proposal should be placed in a separate rule to be numbered Rule 1.6. *Id.* at 1. He opposed the portion of the rule limiting the audiovisual device to interaction between the defendant and judicial officer. *Id.* at 3. He noted that technical problems frequently prevented the prosecutor from hearing the defense attorneys and defendants, and, because the prosecutor did not have a microphone, the defense attorney and defendant could not hear the prosecutor. *Id.* The Maricopa County Attorney recognized that, in many situations, it is important for the judge to address the defendant personally and for the victim to see the defendant in court. *Id.* at 3. He therefore recommended a requirement that all parties agree to videoconferencing. *Id.*

On January 20, 2000, the Court ordered that the "committee draft of Rule 1.6" be circulated. On March 10, 2000, the court administrator of the Mohave County Limited Jurisdiction Courts filed a comment stating that the requirement that waivers be knowing, intelligent, and voluntary was problematic since the consequences of waiving the right were not clear. Nevertheless, the Court retained the requirement of knowing, intelligent, and voluntary waiver.

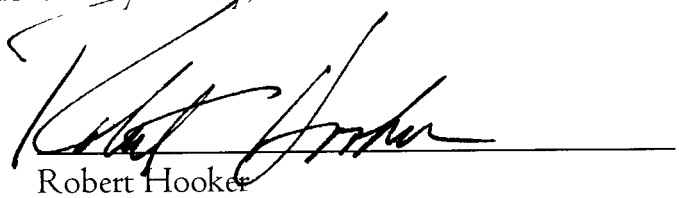
On April 7, 2000, the Arizona State Bar commented on a version, which apparently was similar to the adopted form of Rule 1.6. The Bar believed, as does Petitioner, that section "c.1" which deals with the written stipulation, should be deleted. This Court, however, believed otherwise.

Thus, the changes which the Petitioner belatedly proposes were raised by other parties before Rule 1.6 was promulgated and were rejected by this Court. Nothing substantively

has occurred in the ensuing six years that now warrant reconsideration. Petitioner had no objection to Rule 1.6 until April 2006 when the Pima County Public Defender began providing counsel at all felony initial appearances and arrestees began to request to be physically present with the judge. Indeed, Petitioner now appears to be at cross-purposes with her Maricopa County counterpart and with this Court.

CONCLUSION. No change to Rule 1.6 is warranted. When adopted, the Rule was well considered and well drafted. It complied then and complies now with appropriate constitutional standards. The proponents have demonstrated no hardship that the current rule imposes and have lodged no convincing argument as to why constitutional rights should be diminished. Though the proponents purport at this time to be concerned with initial appearances, the ramifications of the petition are much broader. It will affect numerous other hearings and lead to protracted and needless litigation and appeals. Little, if any, litigation has resulted from the current version of Rule 1.6. If judicial economy, certainty and finality of judicial decisions are important goals, then the rule should not be changed.

Respectfully submitted this 21st day of May, 2007.



Robert Hooker
Pima County Public Defender

Copy delivered this 21st day of
May, 2007, to:
Barbara LaWall
Pima County Attorney
32 North Stone, 14th Floor
Tucson, Arizona 85701

ARREST THROUGH ARRAIGNMENT
VOLUNTARY COORDINATION COMMITTEE
Minutes, Thursday May 17, 2007

Present: K.C. Stanford, Bob Hooker, Rick Peck, Lisa Royal, Maria Grzeskowiak, Eric Silverberg, India Davis, Lily Shafer Michael Schlueter

Guests: Jan Kearny, Barbara Daniels, Manuela Baker & Darla Wandell

Absent: Tony Riojas, Kent Batty, David Berkman, Joan Harphant, Laura Brynwood, Sharon Allen, Isabel Garcia, Tracy Miller, Warren Alter Caryn Caramella & Cindy Linnertz

1. Introduction of Guests.

A roundtable introduction is made of all members and guests

2. Approval of Minutes.

The minutes of April 19,2007 were approved, as amended to reflect Michael Schlueter was not present.

3. Report of Chair.

KC had no new matters to report.

4. Old Business.

A. Roundtable Update /Review of 2XIA changes

The system is working most of the time. There is a re-occurring auditory complaint. Approximately 3 times per week the Mission judge stops the proceeding and moves to the East jail facility because of the sound difficulties. The main difficulty is a partial sound cut-out at the Defendant's microphone. This could be related to the sophistication of the equipment or the tone of voice variation in people. The mixer senses what it perceives as a duplicate communication and cuts the words short. On the other hand, FTR

is not affected because it stands alone and does not run through the mixer. FTR records the proceeding independent of the sound difficulties experienced by the parties. FTR may have a record that shows a perfectly stated sentence from the Defendant followed by the Judge saying " I didn't hear you, could you repeat that?" Capt. Davis noted there might be a need for additional staff training on operation.

Bob Hooker stated his belief that the FTR is not a full record of the proceedings because FTR does not capture the sound & video impairments experienced in the live proceeding. Moreover, he also requested the committee recommend a video record be maintained because he interprets "full record" under the Rule to require capturing not only the sound but the quality or lack of quality of the audio/video connection. Capt. Davis and Lt. Schelecter noted the sound problems have been addressed by CCS and still re-occur. Eric noted the CCS system has the ability to capture video. Mike remarked it might be difficult to preserve enough computer space for the video data. Bob also indicated his concern that the PCSO is taking the lead on resolving the problems when the responsibility for a proper proceeding and full record rests with the Court. Lisa indicated the Clerk maintains FTR and FTR is the full record of the proceedings. She also indicated FTR is on continuous during entire proceeding both felony and misdemeanors.

KC noted there was not a consensus on the committee for adding a video component. Bob reiterated the Rule must be followed if his interpretation is correct and there was no harm in making a video although the state opposed his request that they join his recommendation. The recommendation was not approved at this time.

KC remarked that if personnel shift 15-20% of the time, the sound system needs to be fixed. He stated shifts should be rare and limited to extraordinary circumstances. Eric and Mike agree to review in detail with CCS the re-occurring sound problems. Mike is now tracking the number of shifts from Mission to East and will report back on the scope of the problem at the next meeting.

B. Pros & Cons of Superior Court As Felony Complaint Initiation

KC reviewed the list outlined in last month's minutes. A roundtable discussion ensued. The committee concluded the principle barrier to the shift is the impact/workarounds for data populating by AGAVE and its partner

systems. Data sharing could be diminished or have to be re-invented when the system flow is changed.

Darla Wandell shared her knowledge that in the Clerk's office the critical event is the grand jury return. The Clerk staff trigger the CR # and judge assignment automatically by keystrokes in AGAVE in their office the same day as the return is filed. AGAVE interacts with CAPS (the County Attorney System), CAPS changes from the IC # to the CR # and gives back to AGAVE all the base data in CAPS, thus populating the AGAVE CR case instantly. CAPS was originally populated from FORCE (the PCSO system) which data was created and keyed in at the jail intake. Lily did not know the cost/time commitment for a re-write of AGAVE to allow the CR # to be given at filing of a complaint and than link up from CAPS later for data population if/when GJ return occurs. Since AGAVE is still in its infancy and has new rollouts, Lisa suggested we return to the subject later in the year. KC indicated he would bring the topic back in 6 months.

Lisa asked if the committee could review the current process and eliminate glitches. Committee members noted other paper chases, which the new idea could eliminate, occur in-between the JP court, PTS, Ctt. Att and PD s. Manuela Baker indicated a particular concern that at the 20 day mark no IC should be left unresolved in the justice court yet their staff must chase down outcomes. As an average, 9000 IC#s are issued with PHs set and only 7 PH's went forward to hearing in 2006. As a result, the JP staff works on the assumption none will go unless confirmed within 24 hours of hearing time. Nonetheless, for a variety of reasons, 25 % of the defendants or 2,250 people a year appear at JP court on the scheduled PH date. Most are told, " your case is dismissed but may be refiled so watch your mailbox for a summons." Others are told, your case went to GJ , contact your attorney. A small percentage are told, " we don't know the status of your case but it is not going to PH today." The questions remains, where is the bottleneck or lack of timely notice to the JP court and the public? Manuela will track some examples and bring them to the next meeting.

5. New Business

Lily circulated the new COR. No objections were made and KC requested that as each court uses up its old stock, the new format language be incorporated. Lily can share versions with the other courts of the mockup or template.