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THE RIGHT TO "SKYPE": THE DUE PROCESS CONCERNS OF VIDEOCONFERENCING AT PAROLE REVOCATION HEARINGS

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I. INTRODUCTION

In 2009, Christopher Thompson was returned to prison after he violated the conditions of his supervised release.[1] Prior to his revocation, the district court in Rockford, Illinois, held a revocation hearing, at which all parties were physically present except for the judge, who participated by videoconference from Key West, Florida.[2] Thompson appealed to the Seventh Circuit Court of Appeals, challenging the judge's decision to conduct the revocation hearing by videoconference.[3] His appeal required the Seventh Circuit to confront a question of first impression for federal courts of appeals: whether the use of videoconferencing to conduct a revocation hearing violated Rule 32.1 of the Federal Rules of Criminal Procedure[4] or, alternatively, the Fifth Amendment's Due Process Clause.[5]

Although no federal circuit had previously confronted this exact issue, the question of the constitutional and statutory validity of the use of videoconferencing technology by the judicial system was far from novel. As technology has advanced rapidly, the judiciary has been faced with a surge of new, unforeseen issues that it has had to resolve without legislative direction.[6] The invention of videoconferencing appeared to

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1. United States v. Thompson, 599 F.3d 595, 597 (7th Cir. 2010).

2. *Id*.

3. *Id.*

4. FED. R. CRIM. P. 32.1. Rule 32.1 governs the revocation or modification of probation of supervised release. Rule 32.1(b)(2) governs revocation hearings and provides, in pertinent part, that: "Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and (E) an opportunity to make a statement and present any information in mitigation."

5. *Thompson*, 599 F.3d at 596–97.

6. These problems are not unique to criminal law. One author has discussed a related issue in the system of intellectual property rights, stating, "Once a relatively slow and ponderous process, technological change is now outpacing the legal structure that governs the system, and is creating pressures on Congress to adjust the law to accommodate these changes." Ivan K. Fong, *Law and New Technology: The Virtues of Muddling Through*, 19 YALE L. & POL'Y REV. 443, 443 (2001) (quoting OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 3 (1986)).

many district courts and government agencies to be a perfect solution to inefficient, time-consuming, and costly procedures clogging up dockets around the country.[7] Even the Judicial Conference of the United States,[8] the governing body of the federal courts, encouraged the use of videoconferencing systems in the courtroom.[9] By 2002, approximately eighty-five percent of federal district courts had access to videoconferencing equipment in at least one of their courtrooms.[10]

Criminal defendants quickly reacted by challenging the constitutional and statutory validity of the use of videoconferencing technology at the proceedings at which their liberty was at stake.[11] In response, multiple federal courts of appeals rejected the use of videoconferencing in criminal proceedings governed by Rule 43 of the Federal Rules of Criminal Procedure,[12] including all proceedings leading up to and including sentencing, because the procedure violated a defendant's statutory and constitutional rights—rights which could not be

7. *See, e.g.*, United States v. Navarro, 169 F.3d 228, 235 (5th Cir. 1999) ("The Government . . . argues that [videoconferencing] is widely used, that it is beneficial because it increases productivity by reducing travel time, and that it is less costly and more safe than transporting prisoners."); United States v. Torres-Palma, 290 F.3d 1244, 1245 (10th Cir. 2002) ("The [district] court concluded video conferencing would provide an ideal solution" to the impracticalities and timeliness issues of a judge travelling to another state to pronounce a sentence "because the defendant would be able to communicate with and see the court, and the court would have the ability to see and hear the defendant."); Terrell v. United States, 564 F.3d 442, 445 (6th Cir. 2009) (explaining that the Parole Commission's "proffered reason [for allowing conducting parole hearings by videoconference] was 'to reduce travel costs and conserve the time of its hearing examiners' without diminishing the prisoner's ability to effectively participate in the hearing").

8. 28 U.S.C. § 331 (2006). The Conference consists of each judicial circuit's chief judge, the Chief Judge of the Court of International Trade, and a district judge from each regional circuit, and is presided over by the Chief Justice of the Supreme Court of the United States. *Id*.

9. *See* Elizabeth C. Wiggins, *What We Know and What We Need to Know About the Effects of Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 731, 731 (2003–2004) (referencing the Conference's approval of the recommendation of its Committee on Automation and Technology endorsing the use of certain technologies, ADMIN. OFF. OF THE U.S. CTS, REP. OF THE PROCEEDINGS OF THE U.S. JUD. CONF. 8 (Mar. 1999)).

10. *Id*. at 732–33. This statistic was derived from a June 2002 survey of all federal district courts by the Federal Judicial Center concerning the use of technology in district and magistrate judge courtrooms, to which ninety of the ninety-four districts responded. *Id*.

11. *Id*. at 737 (discussing defense lawyers' concerns that videoconferencing in certain criminal proceedings interfered with the right to due process and adequate representation, as well as with the right to due process and a fair trial); *see also* United States v. Thompson, 599 F.3d 595, 597 (7th Cir. 2010) ("Thompson appealed [his reimprisonment], challenging the judge's decision to conduct the revocation hearing by videoconference."); *Terrell*, 564 F.3d at 444 (explaining that Terrell filed a petition for writ of habeas corpus "asking the court to order in-person parole determination hearings" instead of the scheduled hearing by videoconference); *Navarro*, 169 F.3d at 231 (noting Navarro "challenges his sentencing by video conferencing as violative of" Federal Rule of Criminal Procedure 43).

12. FED. R. CRIM. P. 43. Rule 43 requires that a criminal defendant be present at the initial appearance, the initial arraignment, and the plea, as well as every trial stage, including jury impanelment, the return of the verdict, and sentencing. FED. R. CRIM. P. 43(a).

outweighed by efficiency concerns.[13]

Courts and government agencies have since implemented the use of videoconferencing technology in post-conviction proceedings, including probation, parole, and supervised release revocation hearings.[14] Like the parallel line of cases involving Rule 43 criminal proceedings, the courts of appeals are beginning to strike down the practice, but only on statutory grounds.[15] This trend appears to rest on the general principle of judicial restraint that requires courts to avoid constitutional questions if statutory analysis is sufficient.[16]

However, in the absence of legislation or a decision from the United States Supreme Court, there remains the potential that federal courts, as well as state courts ruling on similar state statutes, could find that videoconferencing does not violate a parolee's statutory rights.[17] It is

13. *See* United States v. Torres-Palma, 290 F.3d 1244, 1248 (10th Cir. 2002) (holding that videoconferencing at sentencing violated Rule 43); United States v. Lawrence, 248 F.3d 300, 303–04 (4th Cir. 2001) (same); *Navarro*, 169 F.3d at 235–39 (same); Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Ariz., 915 F.2d 1276, 1280 (9th Cir. 2000) (holding that videoconferencing at arraignment violated Rule 43's presence requirement and Rule 10's requirement that arraignments be held in "open court").

14. *See Terrell*, 564 F.3d at 454–55 (holding that the use of videoconferencing at parole determination hearings violates the Parole Commission Reorganization Act, 18 U.S.C. §§ 4201–18 (1976)); *Thompson*, 599 F.3d at 596–97 (holding that the use of videoconferencing at parole revocation hearings violates the defendant's statutory right to appear). The term "parolee" will be used to encompass all defendants who are subject to any form of release supervision, including parole and supervised release. Both the United States Supreme Court and authors of scholarly articles have viewed the forms of release supervision as synonymous because the rights of each are often interchangeable. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 478, 782 n.3 (1973) (noting that "[d]espite the undoubted minor differences between probation and parole, the . . . revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole"); Bruce Zucker, *The Right to Confront Adverse Witnesses at Post-Conviction Release Revocation Hearings*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 87, 87 n.3 (2008) (referring to all forms of post-incarceration release supervision as "parole" because courts have found that the rights afforded to each are often interchangeable). Likewise, the term "revocation hearing" will be used to encompass parole, probation, and supervised release revocation hearings.

15. *See Thompson*, 599 F.3d at 596.

16. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) (noting, "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"). But is this exercise of judicial restraint wise? This doctrine, like the immunity doctrine, is evidence that there is not always a constitutional right to a remedy, even where there is a constitutional violation and a right to judicial review of such violation. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 313, 337 (1993) (discussing the juxtaposition often created by the due process doctrine). According to Fallon, "recognition that the Due Process Clause does not require a remedy for every constitutional violation throws into doubt the prevalent assumption of another pocket of due process law that the Constitution requires judicial review of all constitutional claims," and that "[u]ltimately, the crucial question is whether the governing principles are good ones." *Id*. at 311, 372.

17. In fact, a court's decision to find that physical presence is not required by statute is more than a possibility, it is a reality. In 1983, the Court of Appeals for the District of Columbia held that a defendant's absence from a Rule 43 proceeding would not always be a violation of his or her statutory

also possible that Congress will amend the rule to allow videoconferencing at parole revocation hearings.[18] Therefore, the due process rights undermined by the use of videoconferencing technology deserve the judiciary's attention, particularly the right to effective assistance of counsel and the right to confront adverse witnesses. This Comment will address these issues.

Part II of this Comment examines the background of parallel cases leading up to the Seventh Circuit's 2010 decision in *United States v. Thompson*, including cases concerning Rule 43 criminal proceedings decided on statutory and constitutional grounds. Part II also examines *Terrell v. United States*, in which the Sixth Circuit decided a case regarding the use of videoconferencing strictly by statutory interpretation. Part III then analyzes the Seventh Circuit's *Thompson* decision. Part IV examines the due process rights granted to parolees by the Supreme Court as well as lower federal courts. Part V discusses the underlying due process concerns implicated by the use of videoconferencing technology at parole revocation hearings, particularly the parolee's right to effective assistance of counsel and the right to confront adverse witnesses. In conclusion, this Comment will argue that "Skyping in"[19] parolees to hearings at which their liberty is at stake violates their due process rights and should be rejected by courts.

II. EARLY CASES CONFRONTING THE USE OF VIDEOCONFERENCING

Beginning in the 1990s, defendants who appeared at their criminal proceedings or parole determination hearings by videoconferencing technology contested the constitutional and statutory validity of the

right to be present. United States v. Washington, 705 F.2d 489, 492 (D.C. Cir. 1983). There, the defendant argued that her right to be present during voir dire under Rule 43(a) was violated when a portion of it was conducted at a bench conference, out of her direct observation and range of hearing. *Id*. at 493. Oddly, the court discussed at length the purpose and necessity of the Rule 43 presence requirement before dismissing the defendant's contention as harmless error. *Id*. at 496–98. The court noted that the requirement "implements a leading principle that . . . nothing shall be done in the absence of the prisoner." *Id.* at 496–97 (internal quotations omitted). The court also said that "the defendant's right to be present is an essential concomitant of a defendant's right to effective assistance of counsel" and that the right to confront adverse witnesses "may require knowing participation by the defendant to be fully exercised." *Id.* at 497.

18. Other Federal Rules of Criminal Procedure have already been amended to allow the use of videoconferencing technology where the individual consents, including Rule 5 (permitting videoconferencing at initial appearances only if the defendant consents) and Rule 10 (permitting the use of videoconferencing for arraignments only if the defendant consents). FED. R. CRIM. P. 5(f), 10(c).

19. "Skyping" is a slang term that refers to when a person uses Skype, an online program that allows for many types of computer-to-computer communication, for the purpose of videoconferencing. *See Facts on Skyping*, EHOW.COM, http://www.ehow.com/about_ 6614558_ skyping.html (last visited June 7, 2013).

practice.[20] Despite the practice's endorsement by many district courts and government agencies, including the governing body of the federal courts, multiple courts of appeals quickly denounced the practice.[21]

A. Videoconferencing at Rule 43 Criminal Proceedings

In the 1990s and early 2000s, circuit courts first considered whether the use of videoconferencing at a criminal proceeding governed by Rule 43[22] satisfies the statutory requirement that a defendant be "present."[23] Since that time, the Fourth, Fifth, Ninth, and Tenth Circuits have held that the use of videoconferencing at Rule 43 proceedings violates a defendant's statutory rights.[24]

For example, the Tenth Circuit confronted this issue in 2002 in *United States v. Torres-Palma*. In *Torres-Palma*, the defendant appeared by videoconference at his sentencing, which took place in a different state than where the judge presided.[25] In determining that Rule 43 required a defendant to be physically present at sentencing,[26] the court concluded that the content and the plain reading of the text of Rule 43, along with the Webster's Dictionary and Black's Law Dictionary definitions of presence and present, mandated that physical presence was required.[27]

The *Torres-Palma* court also discussed the *United States v. Navarro* decision from the Fifth Circuit, which analyzed the constitutional implications of the physical presence requirement.[28] In *Navarro*, the

20. *See* United States v. Torres-Palma, 290 F.3d 1244 (10th Cir. 2002) (challenging the use of videoconferencing at Rule 43 sentencing proceedings); United States v. Lawrence, 248 F.3d 300, 303–04 (4th Cir. 2001) (same); United States v. Navarro, 169 F.3d 228, 235 (5th Cir. 1999) (same); Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Ariz., 915 F.2d 1276, 1276 (9th Cir. 2000) (challenging the use of videoconferencing at a Rule 43 arraignment).

21. *See supra* note 13 and accompanying text.

22. Rule 43 requires a defendant's presence at "(1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing." FED. R. CRIM. P. 43(a).

23. *See* United States v. Burke, 345 F.3d 416, 421 (6th Cir. 2003) (noting the Fourth, Fifth, Ninth, and Tenth Circuit's decisions holding that the use of videoconferencing at Rule 43 proceedings violated the presence requirement).

24. *See supra* note 13 and accompanying text.

25. *Torres-Palma*, 290 F.3d at 1245. The presiding judge's district was not located in New Mexico because, at the time, judges from other districts in the Tenth Circuit were voluntarily presiding over the New Mexico criminal docket because of the unusually high incidence of criminal cases involving across the border transactions with Mexico coupled with the limited judicial resources in the District of New Mexico.

26. *Id*. at 1248. The Tenth Circuit, however, took the analysis one step further and held that, because "Rule 43 vindicates a central principle of the criminal justice system, violation [of it] is *per se* prejudicial," and that, therefore, a showing or prejudice is irrelevant. *Id*.

27. *Id*. at 1247.

28. *Id.*

Fifth Circuit noted that the rights protected by Rule 43 include not only due process rights and the common law right to be present, but also the right of a defendant to meet face-to-face with witnesses appearing before the trier of fact, as governed by the Confrontation Clause.[29]

After the Tenth Circuit's decision and the decisions of its sister circuits, it was clear that, even though the use of videoconferencing could increase productivity and save money,[30] the technology was not appropriate for Rule 43 proceedings because it violated both the statutory and constitutional rights of criminal defendants.

B. Videoconferencing at Parole Determination Hearings

After a seven year hiatus, the issue of videoconferencing in criminal proceedings resurfaced in the context of parole determination hearings.[31] In 2004, the United States Parole Commission launched a pilot project to conduct parole release hearings by videoconference at a few institutions by promulgating new rules that eliminated the "in person" requirement for hearings and allowed for videoconferencing.[32] The reason for the project, according to the commission, "was to reduce travel costs and conserve the time of its hearing examiners without diminishing the prisoner's ability to effectively participate in the hearing."[33] One year later, the commission announced that the pilot program successfully met its objectives and extended the use of videoconferencing to parole determination hearings.[34]

In *Terrell v. United States*, the Sixth Circuit addressed the validity of

29. United States v. Navarro, 169 F.3d 228, 236–37 (5th Cir. 1999). The court noted that the Confrontation Clause provides for constitutional protection in all stages of trial except for sentencing. *Id*. at 236. Therefore, it concluded, "Video conferencing would seemingly violate a defendant's Confrontation Clause rights at those other stages of trial." *Id*. at 237. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. CONST. amend. VI.

30. *See, e.g.*, *Navarro*, 169 F.3d at 235 (acknowledging the government's contention that videoconferencing is "beneficial because it increases productivity by reducing travel time, and . . . is less costly and more safe than transporting prisoners").

31. *See* Terrell v. United States, 564 F.3d 442, 454–55 (6th Cir. 2009) (holding that the use of videoconferencing at parole determination hearings violates the Parole Commission Reorganization Act, 18 U.S.C. §§ 4201–18 (1976)).

32. *Id.* at 445. The 2002 amended rules apply to the parole system as governed by the Parole Commission Reorganization Act, 18 U.S.C. §§ 4201–18 (1976), though parole was replaced with supervised release in 1984 by the Sentencing Reform Act, Pub.L. No. 98-473, 98 Stat. 1987 (1984). *Terrell*, 564 F.3d at 444. However, Congress continued to amend the Parole Commission Reorganization Act because the reform does not apply to prisoners who committed offenses prior to November 1, 1987, who remain eligible for parole proceedings. *Id*. at 444–45.

33. *Terrell*, 564 F.3d at 445 (quoting the Commission's published notice, "Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes," 69 Fed. Reg. 5,273 (Feb. 4, 2004)).

34. *Id.* at 445.

the commission decision to allow videoconferencing at parole determination hearings.[35] Terrell filed a petition for writ of habeas corpus after being scheduled for an interim parole hearing by videoconference, requesting the court to order an in-person parole determination hearing.[36] The magistrate judge recommended the court deny his petition, and his hearing was held via videoconference.[37] The district court subsequently held that the use of videoconferencing violated his due process rights and ordered an in-person parole determination hearing.[38] This decision was appealed to the Sixth Circuit, who also granted a stay at the request of the government pending its determination of the validity of the procedure.[39]

Terrell contended that the commission violated his statutory and constitutional rights when it denied his request for an in-person hearing.[40] Specifically, he argued that the use of videoconferencing violated his due process rights and 18 U.S.C. § 4208(e), which requires that a prisoner "be allowed to appear and testify on his own behalf at the parole determination proceeding."[41]

The Sixth Circuit first considered the statutory argument and held that § 4208(e) was unambiguous at the time it was enacted and, even though videoconferencing did not exist at that time, no subsequent technological development could change the fact that "appear" required an in-person hearing.[42] In reaching this conclusion, the court relied on the ordinary meaning of appear, as well as the entire statutory scheme.[43] The court then briefly dismissed Terrell's constitutional argument by saying that its conclusion on statutory grounds made it unnecessary for it to reach the issue of whether videoconferencing violated due process.[44]

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35. *Id*. at 442.

36. *Id*. at 444.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 445.

41. *Id*. 18 U.S.C. § 4208 governs the parole determination proceeding as part of the Parole Commission Reorganization Act of 1976. Terrell was subject to the parole proceedings as opposed to the Sentencing Reform Act's supervised release proceedings because he pled guilty to robbing three banks in 1983, which was four years prior to the effective date of the Sentencing Reform Act. *Terrell*, 564 F.3d at 444.

42. *Id.* at 449–50.

43. *Id*. at 451–52.

44. *Id.* at 454. The court likely made this decision based on the "fundamental and long-standing principle of judicial restraint [which] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988).

III. *UNITED STATES V. THOMPSON*

Christopher Thompson, who served a prison term for robbing two banks and a shorter term for violating his first supervised release, was arrested for multiple driving infractions while out on supervision.[45] He violated a condition of his release by failing to notify his probation officer of his arrest within seventy-two hours.[46] Because of these violations, the government sought to revoke Thompson's supervised release for the second time and return him to prison.[47]

The district court first held an initial hearing to appoint counsel for Thompson and schedule his revocation hearing.[48] All parties were present in the Illinois courthouse except for the judge, who participated by videoconference from Key West, Florida.[49] The parties reassembled the following week in the judge's courtroom for the parole revocation hearing, again with the judge appearing by videoconference.[50] Counsel for Thompson objected, arguing that the judge's appearance by videoconference violated Rule 32.1, which governs the procedures for revoking or modifying probation or supervised release.[51] The district court, however, overruled the objection, stating that "[t]he court believes that video conferencing for a supervised release hearing meets the standards of due process, that there's no case law that would prohibit it nor any rule or statute that would prohibit it."[52] The hearing proceeded, and the court heard statements from both parties' counsel and Thompson, who admitted to all but one allegation.[53] The judge then revoked Thompson's supervised release and sentenced him to twelve months in prison and one year of supervised release.[54] Thompson appealed to the Seventh Circuit.

Thompson's appeal presented the Seventh Circuit with a question of first impression for federal courts of appeals.[55] Namely, whether the use of videoconferencing to conduct a revocation hearing violates Rule 32.1

45. United States v. Thompson, 599 F.3d 595, 596–97 (7th Cir. 2010). Thompson violated his first supervised release when he was caught using illegal drugs. *Id*. After serving six additional months in prison, Thompson was arrested for driving under the influence of alcohol, operating an uninsured motor vehicle, driving with a suspended license, speeding, and improper lane usage. *Id*. at 597.

46. *Id*. at 597.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id*.

51. *Id*.; FED. R. CRIM. P. 32.1.

52. *Thompson*, 599 F.3d at 597.

53. *Id*. The only allegation Thompson did not admit was his drunk-driving charge.

54. *Id*. The judge imposed the twelve month sentence even though the probation officer recommended only eight months. *Id*.

55. *Id*.

or, alternatively, whether it violates the Fifth Amendment's Due Process Clause.[56] The court first turned to Rule 32.1 and analyzed the meaning of its language by referring to definitional standards, parallel cases, and other Federal Rules of Criminal Procedure.[57] The court also determined a defendant's rights under Rule 32.1.[58]

Thompson argued that the district court must give the defendant an "opportunity to appear," as provided in Rule 32.1(b)(2), which requires the defendant and the judge to be physically present in the same courtroom.[59] The court agreed with his contention, and in reaching this result, referred to the meaning of appear and to the traditional understanding of an accused person's appearance before a court empowered to deprive him of his liberty.[60] It noted that both the Webster's Dictionary and the Black's Law Dictionary define appear and appearance so as to suggest that an appearance can only occur if the parolee comes into the physical presence of the judge.[61]

The court supported its conclusion by examining the Sixth Circuit's decision in *Terrell*, where the court held that the use of videoconferencing did not satisfy a parole statute's requirement that a "prisoner shall be allowed to appear and testify on his behalf at the parole determination proceeding."[62] The Sixth Circuit found that "to appear mean[s] to be *physically* present."[63] Although *Terrell* involved a different statute, the Seventh Circuit noted that the Sixth Circuit's

56. *Id.* at 596–97.

57. *Id*. at 599–601. Before analyzing Rule 32.1, the court determined that Rule 43 was not the appropriate rule under which to determine the propriety of videoconferencing because it does not explicitly provide for post-trial proceedings such as revocation hearings. *Id*. at 598. But, before discarding the Rule 43 analysis, the court also noted a parallel issue other circuits have confronted: Whether the use of videoconferencing violated the Rule 43 "presence" requirement. *Id*. In all three circuits referenced, the courts held that physical presence was required of all parties and the judge. *Id*. (citing United States v. Torres-Palma, 290 F.3d 1244, 1247–48 (10th Cir. 2002); United States v. Lawrence, 248 F.3d 300, 305 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 238–39 (5th Cir. 1999)). The court also distinguished Rule 43 from Rule 32.1 based on the rights at stake in proceedings governed by each Rule. *Thompson*, 599 F.3d at 598. Citing the U.S. Supreme Court, the court noted that "a defendant at a revocation hearing is not owed the full panoply of rights due a defendant at sentencing" and that "revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.* (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

58. *Thompson*, 599 F.3d at 599–601.

59. *Id*. at 599; FED. R. CRIM. P. 32.1(b)(2).

60. *Thompson*, 599 F.3d at 599–600.

61. *Id*. at 599. Webster's Dictionary defines "appear" as "to come formally before an authoritative body" and Black's Law Dictionary defines "appearance" as a "coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 103 (1981); BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

62. *Thompson*, 599 F.3d at 600 (quoting Terrell v. United States, 564 F.3d 442 (6th Cir. 2009), regarding 18 U.S.C. § 4208(e)).

63. *Id.* at 600 (quoting *Terrell*, 564 F.3d at 451) (emphasis added).

decision highlighted that the form and substantive quality of a hearing is altered when either the defendant or the judge is absent from the hearing room, even if he or she is participating by videoconference.[64]

The Seventh Circuit also referred to the Supreme Court's decision in *Escoe v. Zerbst*, in which the Supreme Court determined that a lower court's decision to revoke a defendant's probation without a hearing violated the requirement that he be "brought before the court."[65] Although *Escoe* pre-dated videoconferencing technology, and the Internet for that matter, the case provided the traditional legal understanding of a person's appearance.[66] In *Escoe*, the Court held that "'the end and aim of an appearance before the court' under the statute was to 'enable an accused [parolee] to explain away the accusation,' and this required 'bringing the [parolee] into the presence of his judge.'"[67]

Additionally, the Seventh Circuit referenced the statutory language of other Federal Rules of Criminal Procedure that explicitly allow for the use of videoconferencing.[68] The court reasoned that, since videoconferencing is permitted only with stated exceptions in the rules, the use of the technology "is the exception to the rule, not the default rule itself," and that Rule 32.1's "opportunity to appear," therefore, excludes appearance by videoconference.[69]

During its interpretation of the opportunity to appear, the court also examined the statutory rights owed to a defendant at a revocation hearing. Rule 32.1 provides, in pertinent part, that:

> The person is entitled to: . . . (C) an opportunity to appear, present evidence, and question any adverse witness . . . ; [and] (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel . . . .[70]

After determining that the opportunity to appear requires a parolee to come into the physical presence of the judge, the court furthered its statutory analysis by noting that this right is not isolated, but instead exists in conjunction with the right to "present evidence," to "question any adverse witness," and to "make a statement and present any

64. *Id*.

65. Escoe v. Zerbst, 295 U.S. 490 (1935). The *Thompson* Court noted the obvious difference between a hearing by videoconference and no hearing at all. *Thompson*, 599 F.3d at 600. However, the court still found the case informative for the interpretation of "appearance" required by Rule 32.1. *Id.*

66. *Thompson*, 599 F.3d at 600.

67. *Id*. (quoting *Escoe*, 295 U.S. at 492–94).

68. *Id.* at 600. These Rules include Rule 5 (permitting videoconferencing at initial appearances only if the defendant consents) and Rule 10 (permitting the use of videoconferencing for arraignments only if the defendant consents). *Id.*

69. *Id*. at 600–01.

70. FED. R. CRIM. P. 32.1(b)(2).

information in mitigation."[71] The court reasoned that a parolee's appearance in court is "the means by which he effectuates the other rights conferred" by Rule 32.1.[72]

The conjunctive force of a defendant's opportunity to appear is particularly important to the defendant's right to "make a statement and present any information in mitigation" because "appearing before the court allows the [parolee] to plead his case *personally* to the [deciding] judge."[73] This right, known as the right of allocution, "ensures that the defendant has the opportunity to 'personally address the court' before punishment is imposed."[74] Without the physical meeting, the court reasoned, the judge could not experience the impressions of any personal confrontation wherein he or she attempts to assess the parolee's credibility or to evaluate the defendant's true moral fiber.[75] Consequently, without the personal, physical interaction between a judge and a parolee, the force of the parolee's other rights guaranteed by Rule 32.1 is diminished.[76]

Finally, after determining that the judge's participation by videoconferencing in Thompson's revocation hearing violated Rule 32.1, the court vacated Thompson's term of reimprisonment and remanded.[77] The court resolved the second issue, whether videoconferencing violated Thompson's due process rights, in a one-sentence footnote: "Because we hold that the judge's participation by video-conference violated Rule 32.1, we need not address Thompson's argument that holding the hearing by videoconference violated the Fifth Amendment's Due Process Clause."[78]

IV. THE DUE PROCESS RIGHTS OF PAROLEES

The determination of what process is due to parolees continues to be a fluid topic in American jurisprudence. Since the 1970s, federal courts have continually attempted to define and interpret the constitutional rights afforded to parolees.[79]

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71. *Thompson*, 599 F.3d at 599.

72. *Id*.

73. *Id*.; FED. R. CRIM. P. 32.1(b)(2)(E).

74. *Thompson*, 599 F.3d at 599 (quoting United States v. Pitre, 504 F.3d 657, 662 (7th Cir. 2007)).

75. *Id.* at 599.

76. *Id*. at 600.

77. *Id*. at 601.

78. *Id*. at 601 n.6.

79. *See* Morrissey v. Brewer, 408 U.S. 471, 472 (1972) (defining the minimum due process rights of a parolee); Gagnon v. Scarpelli 411 U.S. 778, 779 (1973) (deciding what right the parolee has to counsel); United States v. Lloyd, 566 F.3d 341, 344 (3d Cir. 2009) (creating a balancing test for when

A. The Minimum Due Process Rights of Parolees

In 1972, the U.S. Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment required a state to afford a parolee some opportunity to be heard prior to revoking his or her parole.[80] In *Morrissey v. Brewer*, the Court consolidated two cases from the same district court where parolees claimed to have received no hearing prior to revocation of their parole.[81] Both petitioners filed habeas corpus petitions, alleging that their lack of procedure denied them due process after the district court and the court of appeals held that due process did not require a revocation hearing.[82] The Supreme Court, however, disagreed.[83]

Although the Court acknowledged that a parolee at a revocation hearing is not entitled to the "full panoply of rights due a defendant" in a criminal prosecution, the Court stated that "[r]evocation deprives an individual . . . of the conditional liberty properly dependent on observance of special parole restrictions."[84] At this time, approximately 35 to 45 percent of all parolees were subjected to revocation and returned to prison; therefore, the Court acknowledged the importance of parolees retaining their liberty as long as they substantially abide by their supervised release conditions.[85]

In determining what process is due a parolee, the Court first examined the nature of the parolee's interest in his continued liberty and whether this interest is within the contemplation of the Fourteenth Amendment.[86] The extent to which an individual will be condemned to suffer grievous loss is determinative of whether any procedural protections are due.[87] Although parolees are not free to do as they please, the supervised release enables them to engage in a wide range of activities that are denied to an incarcerated person.[88] As a result, the Court concluded,

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a parolee has the right to confront an adverse witness).

80. *Morrissey*, 408 U.S. at 472. The Fourteenth Amendment's due process clause states that that state shall note "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

81. *Morrissey*, 408 U.S. at 472–74.

82. *Id*. at 471, 474.

83. *Id.* at 481–90.

84. *Id*. at 480.

85. *Id*. at 479. As of 2005, approximately thirty-eight percent of all adults on federal or state probation or parole supervision were returned to custody for violating their release conditions. *See* Zucker, *supra* note 14, at 88 (citing Lauren E. Glaze & Thomas P. Bonzcar, U.S. DEP'T OF JUSTICE, PROB. AND PAROLE STATISTICS IN THE U.S., 2005 1–2 (2006), *available at* http://www.bjs.ojp.usdoj.gov/content/pub/pdf/ppus05.pdf).

86. *Morrissey*, 408 U.S. at 481–82.

87. *Id*. at 481.

88. *Id*. at 482. A parolee can be gainfully employed and can be with family and friends. *Id.*

"[T]he liberty of a parolee . . . includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee" and "the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."[89]

The Court then turned its analysis to the nature of the process that is due a parolee at a revocation hearing, wherein it laid out the minimum requirements of due process.[90] Accordingly, a parolee must have an opportunity to be heard and to show either that he or she did not violate the conditions of release or, alternatively, that there are mitigating circumstances.[91] Further, the Court held that the minimum requirements of due process include, in pertinent part, the "(c) opportunity to be heard in person and to present witnesses and documentary evidence; [and] (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).[92]

B. The Parolee's Right to Effective Assistance of Counsel

Although *Morrissey* clearly enumerated various minimum due process protections afforded to parolees, it did not decide whether a parolee has the right to effective assistance of counsel.[93] A year later, though, the Court confronted the issue in *Gagnon v. Scarpelli*. In *Gagnon*, the Court, while acknowledging that "the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess,"[94] determined that counsel should be provided on a case-by-

89. *Id*. (internal quotations omitted). The Court also determined that, even though the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a criminal trial, it has no interest in revoking parole without some informal procedural guarantees. *Id*. at 483. The Court further reasoned that society, not just the parolee, has a stake in parolees' conditional liberties. *Id*. at 483–84. Society has an interest in restoring parolees to normal, useful, lawful lives. *Id.* at 484. Such rehabilitation is accomplished by not having parole revoked by erroneous information or evaluation and by ensuring basic fairness. *Id*.

90. *Id*. at 484, 488–89. The Court also determined what due process requires at the arrest of the parolee and the preliminary hearing. The Court determined that due process requires some minimal inquiry as promptly as convenient after arrest and that this inquiry should be conducted by an independent officer. *Id*. at 485–86. The independent officer should determine if reasonable grounds exist for revocation of parole. *Id*. at 485. Also, the parolee should be given notice that the preliminary hearing will take place and that its purpose is to determine whether there is probable cause to believe a parole violation has been committed. *Id*. at 486–87.

91. *Id*. at 488.

92. *Id*. at 489.

93. *Id*.

94. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973). The Court acknowledged that "the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or

case basis because there are "certain cases in which fundamental fairness—the touchstone of due process—will require [the government to] provide . . . counsel for indigent probationers or parolees."[95]

Due process, according to the Court, requires that counsel be provided in cases where parolees first exercise their right to request counsel and then either claim that they have not committed the alleged violation of their release conditions or that there were substantial reasons that justified or mitigated the violation which are complex and otherwise difficult for the parolee to develop or present.[96] The judge should also independently consider whether a parolee appears to be capable of speaking effectively for him or herself.[97]

Although the determination of whether a parolee has the right to counsel is determined on a case-by-case basis in the federal court system,[98] when the right does attach, so does the right to effective assistance of counsel.[99] Therefore, when the right to effective assistance of counsel has been granted to a parolee, a violation of this right is a constitutional violation.

In *Strickland v. Washington*, the Supreme Court set forth the standard of proof for a defendant to argue ineffective assistance of counsel.[100] To demonstrate ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient, which requires a "showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant," and (2) that counsel's deficient performance prejudiced the defense, which can be demonstrated by the

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dissecting of complex documentary evidence." *Id*. at 787.

95. *Id*. at 788, 790. The Court acknowledged that the case-by-case approach has not worked for criminal proceedings, citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), which established a per se rule that provides defendants with the right to counsel. *Gagnon*, 411 U.S. at 788. It then decided that the case-by-case approach is not necessarily inadequate for revocation hearings because the hearings are critically difference from criminal trials. *Id*. The Court focused on the fact that "a criminal [proceeding] . . . is an adversary proceeding." *Id*. at 788–89.

96. *Ganon*, 411 U.S. at 790.

97. *Id*. at 790–91. This is especially true in "doubtful cases." *Id*.

98. This is not the standard in all jurisdictions. For example, "In Rhode Island a defendant who is faced with the possible loss of liberty after a probation-violation hearing at which the court may order him or her to serve all or a portion of a previously suspended sentence, has the right to the effective assistance of counsel in connection with that hearing." Hampton v. State, 786 A.2d 375, 380 (R.I. 2001). The Rhode Island Supreme Court acknowledged that the U.S. Supreme Court "has not yet recognized the existence of a similar federal guaranty in connection with all probation-violation hearings." *Id.*

99. Strickland v. Washington, 466 U.S. 668, 685–86 (1984). According to the Supreme Court in *Strickland*, "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the [Supreme] Court has recognized that *the right to counsel is the right to effective assistance of counsel*." *Id.* (emphasis added).

100. The two-prong test established in *Strickland* is also used in the context of parolee challenges to effective assistance of counsel. *See, e.g.*, Delong v. Snyder, No. 5:07-HC-2195-FL, 2008 WL 4510583, at *11 (E.D.N.C. Sept. 29, 2008).

counsel's errors being "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[101] Furthermore, "the proper standard for attorney performance is that of reasonably effective assistance," and "the defendant must show that counsel's representation fell below an objective standard of reasonableness."[102]

However, there are some situations where the circumstances are so likely to prejudice a defendant that the matter will not even be litigated under the *Strickland* test, and a court will instead presume that counsel was ineffective.[103] In *United States v. Cronic*, decided the same day as *Strickland*, the Court recognized that there sometimes will be occasions when counsel is available, but "the likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct."[104] Some relevant factors, although not exhaustive, may include how much time counsel had to prepare, counsel's experience, the gravity of the charge, the complexity of possible defenses, and the accessibility of witnesses to counsel.[105]

C. The Parolee's Right to Confront Adverse Witnesses

In *Morrissey*, the Supreme Court held that the minimum requirements of due process at a parole revocation hearing include the right to confront and cross-examine adverse witnesses.[106] It noted that this right

101. *Strickland*, 466 U.S. at 687.

102. *Id.* at 687–88.

103. United States v. Cronic, 466 U.S. 648, 658 (1984).

104. *Id.* at 659–60.

105. *Id.* at 653.

106. Morrissey v. Brewer, 408 U.S. 471, 489 (1972). Because *Morrissey* determined that the right to confront adverse witnesses is a due process right, the circuit courts of appeals have had to determine, without guidance from the Supreme Court, whether the right to confront adverse witnesses applied to parolees under the Sixth Amendment's Confrontation Clause. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right . . . be confronted with the witnesses against him." U.S. CONST. amend. VI. The circuits that have addressed this issue include the Second, Eighth, and Ninth Circuits. *See* United States v. Aspinall, 389 F.3d 332, 335 (2d Cir. 2004) ("On appeal, Aspinall contends primarily that she . . . was denied . . . the right of confrontation by the admission of hearsay evidence at her probation revocation hearing."); United States v. Martin, 382 F.3d 840, 841(8th Cir. 2004) ("Martin argues that the district court erred in permitting the government to present hearsay evidence at the revocation hearing in violation of . . . his constitutional right to confront witnesses against him."); United States v. Hall, 419 F.3d 980, 982 (9th Cir. 2005) ("We must decide whether the Sixth Amendment right to confront testimonial witnesses established in *Crawford* . . . applies to the admission of hearsay evidence during revocation of supervised release proceedings."). All three circuits decided not to extend the Sixth Amendment to supervised release proceedings. *See Aspinall*, 389 F.3d at 343 ("Nothing in *Crawford*, which reviewed a criminal trial, purported to alter the standards set by *Morrissey/Scarpelli* or otherwise suggested that the Confrontation Clause principle enunciated in *Crawford* is applicable to probation revocation proceedings."); *Martin*, 382 F.3d at 844, 844 n.4 ("[T]he constitutional standard applicable in this type of post-conviction revocation hearing will sometimes

is not absolute and will be limited in a situation where the hearing officer specifically finds good cause for not allowing confrontation.[107] The Court, however, gave no further guidance as to how the right would be limited, leaving the courts of appeals to determine its scope.[108]

In response, many circuits have constructed balancing tests to determine when the right to confrontation is necessary, and when the right must give way to a good cause finding to not allow confrontation.[109] In a recent decision that adopted the most common balancing test, the Third Circuit in *United States v. Lloyd* noted that "[d]ue process requires that [parolees] retain at least a limited right to confront adverse witnesses in a revocation hearing."[110] Under this balancing test, the presiding court must consider a parolee's asserted right to cross-examine adverse witnesses, balancing "the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it."[111] Further, the presiding court should "consider both the reliability of proffered hearsay and the cause why a witness is not produced."[112]

The Ninth Circuit employs the same balancing test and has determined that a parolee's interest in the right of confrontation depends on two primary factors.[113] In *United States v. Comito*, the court determined that a parolee's interest depends on the importance of the hearsay evidence to the presiding court's ultimate finding, as well as the nature of the facts to be proven by the hearsay evidence.[114] The court held that "the more subject to question the accuracy and reliability of the proffered evidence, the greater the [parolee's] interest in testing it by exercising his right to confrontation."[115]

With regard to the government's good cause, the determination of

permit the admission of evidence that would otherwise be inadmissible in a criminal prosecution" and "[f]or this reason, *Crawford* . . . , involving the contours of the confrontation right in criminal prosecutions, does not apply to the present case."); *Hall*, 419 F.3d at 985 ("We reject Hall's assertion that *Crawford* extends the Sixth Amendment right to confrontation to revocation of supervised release proceedings.").

107. *Morrissey*, 408 U.S. at 489.

108. *See* Zucker, *supra* note 14, at 90.

109. *See* United States v. Lloyd, 566 F.3d 341, 344 (3d Cir. 2009) (noting that the First, Second, Fifth, Eighth, Ninth, and Eleventh Circuits have interpreted the due process rights enumerated in *Morrissey*, and codified in Federal Rule of Criminal Procedure 32.1(b), to require a balancing test considering "both the reliability of proffered hearsay and the cause why a witness is not produced").

110. *Id*. at 343. The court referenced this due process right as derived from *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Lloyd*, 566 F.3d at 343.

111. *Lloyd*, 566 F.3d at 343–44.

112. *Id.* at 344.

113. United States v. Comito, 177 F.3d 1166, 1170–71 (9th Cir. 1999).

114. *Id.* at 1171.

115. *Id.*

what will suffice varies.[116] "Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the [parolee's] right."[117] Mere inconvenience or expense may be enough in some circuits.[118] For instance, in a previous Ninth Circuit decision, the court held that some of the factors examined for good cause include the difficulty and expense of procuring witnesses and the traditional indicia of reliability borne by the evidence.[119]

V. DISCUSSION

The *Thompson* court's decision to resolve the issue of whether the use of videoconferencing to conduct a revocation hearing violates Rule 32.1 or the Fifth Amendment's Due Process Clause strictly on statutory grounds appears to rest on the general principle of judicial restraint, which urges courts to avoid reaching constitutional questions if statutory analysis can be determinative.[120] Although the court's statutory analysis reached the correct result in finding that videoconferencing violates a parolee's statutory rights, the due process rights that are harmed by the use of the technology deserve the judiciary's attention.

Statutory rights are malleable and open to interpretation, especially in the absence of a clear explanation from Congress or the Supreme Court. Other courts faced with this issue in the future may determine that Rule 32.1, or a similar state statute, does not require physical presence and, therefore, may find that the use of videoconferencing technology does not violate a parolee's statutory rights.[121] Also, the rule could be amended to explicitly permit the practice.[122]

Because these possibilities are within the purview of the courts and the legislature, the due process rights undermined by the use of videoconferencing technology should be given full consideration. In particular, courts should consider a parolee's due process right to effective assistance of counsel, as well as a parolee's right to confront adverse witnesses. Courts should also consider that the basic right the videoconferencing issue centers on—specifically, whether a parolee's physical presence is required—largely impacts the effectiveness of all other due process rights.

116. *Id.* at 1172.
117. *Id.*
118. *Id.*
119. United States v. Martin, 984 F.2d 308, 312 (9th Cir. 1993).
120. *See supra* note 16 and accompanying text.
121. *See supra* note 17 and accompanying text.
122. *See supra* note 18 and accompanying text.

The Seventh Circuit in *Thompson* wisely noted that the Rule 32.1 right to be physically present is conjunctive in nature.[123] The court reasoned that other statutory rights owed to a parolee are effective only if the right to be physically present is fulfilled.[124] The statutory right to be present is derived from the Supreme Court's *Morrissey* decision, which provided that a parolee's minimum due process rights include the "opportunity to be heard in person."[125] The *Morrissey* due process right, even more clearly than Rule 32.1's opportunity to appear, indicates that physical presence is critical to a revocation hearing, and that physical absence is violative of a parolee's due process rights.

By requiring the opportunity to be heard in person,[126] due process requires, at the very minimum, that a parolee be physically present at a revocation hearing. If a parolee is denied this right to be heard in person,[127] then other due process rights, including the right to effective assistance of counsel and to confront adverse witnesses, could not be effectuated in a manner that meets minimum due process requirements. Therefore, these concomitant rights would likewise be violated.

A. The Parolee's Right to Effective Assistance of Counsel

Videoconferencing technology at revocation hearings deprives a parolee of the right to effective assistance of counsel. A parolee's due process right "to be heard in person"[128] works in conjunction with the parolee's other due process rights. The right to effective assistance of counsel is one of the rights that can be effectuated only by first ensuring the parolee's opportunity to be heard in person.[129]

When either the parolee or the judge virtually appears at a revocation hearing, the effectiveness of the parolee's counsel is in jeopardy. Defense attorneys are put in a difficult position because they are forced to choose between being with their client to ensure effective attorney–client communications and being in the courtroom with the prosecutor

123. United States v. Thompson, 599 F.3d 595, 599 (7th Cir. 2010).

124. *Id.*

125. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

126. *Id*. (emphasis added).

127. In at least two scenarios, a defendant could be denied his right to be heard in person. A court could find that videoconferencing qualified as "opportunity to appear" under Rule 32.1, *see supra* note 17 and accompanying text, or Congress could amend Rule 32.1 to allow for videoconferencing, *see supra* note 18 and accompanying text.

128. *Morrissey*, 408 U.S. at 489.

129. Under some circumstances a court may determine that a parolee who has requested counsel should not be provided with assistance. The court may determine that the parolee is capable of speaking for himself effectively, or that parolee has not claimed his innocence or that there are mitigating circumstances. However, for purposes of this discussion, we are assuming that the presiding court has afforded the parolee the right to retain counsel, and, in turn, the right to effective assistance of counsel.

so that their communication with the court is not disadvantaged.[130] Whichever choice the defense attorney makes, the parolee's right to effective assistance of counsel is jeopardized.[131]

Defense counsel suffers a multitude of communication challenges when not in the presence of the judge or the courtroom. Anne Bowen Poulin, a law professor at the Villanova University School of Law, stressed in her discussion of the use of videoconferencing technology that "[t]he attorney will be unable to gauge the emotional interactions and mood of the courtroom as effectively to determine when and how to intervene on the client's behalf."[132] She also examined various studies that suggest that alliances form among those who are in the same physical location—alliances against those who appear via videoconference.[133]

In the case where neither the parolee nor counsel is physically present at the revocation hearing, the effectiveness of counsel is even more imperiled. The court in *Thompson*, although faced with the opposite situation in which the judge appeared by videoconference, foresaw this consequence[134] and determined that "[t]he important point is that the form and substantive quality of the hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of a cable or satellite link."[135]

The physical separation of a parolee from counsel inevitably takes its toll on the effectiveness of the counsel, and this effect is most strongly felt by the communication between them. Some courts have tried to curb this problem by providing telephone lines that allow for privileged communication.[136] However, this practice still cannot replace the quality of the attorney–client relationship created by in-person interaction. According to Poulin, the human interactions that foster the relationship are muted by the technology, which detracts from the defendant's experience.[137] Likewise, counsel cannot gauge the defendant's mental and emotional state, and neither party can use

130. *See* Wiggins, *supra* note 9, at 737.

131. *Id.*

132. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1131 (2004) (addressing the concerns raised by using videoconferencing technology to avoid bringing criminal defendants to court).

133. *Id.* at 1132.

134. United States v. Thompson, 599 F.3d 595, 600 (7th Cir. 2010).

135. *Id.* The court went on to say that "[t]his is particularly true when the one who is absent has the power to impose a prison term." *Id*. However, I would argue that the effect is more substantial when the parolee is the absent party because his due process rights are substantially affected, whereas the judge is not being forced to forego his rights in a proceeding that risks his liberty.

136. Poulin, *supra* note 132, at 1129.

137. *Id*.

nonverbal cues to communicate with each other during a proceeding, both of which are necessary to effective communication.[138]

Despite the surplus of communication problems caused by the use of videoconferencing technology, Poulin believes that these adversities will not rise to the level of ineffective assistance of counsel in the eyes of the courts.[139] However, effective communication is so integral to the role of counsel, and counsel's ability to effectively assist a client, that it is likely to be a key consideration when a court determines whether the right to effective assistance of counsel has been violated by the use of videoconferencing technology at a revocation hearing.

In fact, at least one court has recognized that the use of technology to physically exclude a parolee from the courtroom, as well as from counsel, violates the right to counsel because of the detrimental effect it has on communication.[140] In *Schiffer v. State*, the District Court of Appeal of Florida heard an appeal from a revocation hearing and a subsequent sentencing hearing in which the parolee participated via video/audio arrangement. The court found that, because the parolee had no means by which to access and to communicate privately with his counsel, his right to counsel was "obliterated."[141] The court held that "[w]e 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."[142]

When a parolee is forced to appear at a revocation hearing by videoconference while all other parties are in the courtroom, including counsel, the parolee can fulfill the *Strickland* standard for ineffective assistance of counsel. The lack of communication between counsel and client when a parolee is separated from counsel ultimately results in the counsel's deficient performance. Because the parties cannot confer privately, there is no opportunity for them to convene and strategize.

Even if the parties are able to confer privately beforehand and are thereby able to create a satisfactory strategy, the communication lost during the revocation hearing, including the nonverbal cues between attorney and client, could result in deficient performance by counsel. In such a situation, the attorney is incapable of reading the parolee's body language and other nonverbal cues during the proceeding, and therefore cannot adjust accordingly.

A parolee can then show that this deficient performance prejudiced

138. *Id.* at 1130.

139. *Id.* at 1129.

140. Schiffer v. State, 617 So. 2d 357, 358 (Fla. Dist. Ct. App. 1993).

141. *Id*.

142. *Id.* (quoting Seymour v. State, 582 So. 2d 127, 128 (Fla. Dist Ct. App. 1991)).

the revocation hearing. As in *Schiffer*, the parolee can illustrate that this inability to confer privately with counsel "obliterates" the parolee's right to effective assistance of counsel. If the parolee is unable to inform counsel of all circumstances surrounding the hearing, then the counsel is unable to create an effective defensive strategy, thereby prejudicing the outcome of the case. Likewise, without the ability to confer privately, or even the ability to signal the need to confer through nonverbal cues, counsel is not able to alter the strategy during the proceeding. Consequently, the counsel's inability to create an effective defense strategy as a result of the use of videoconferencing technology will result in an unfair and unreliable revocation hearing.

However, the *Strickland* test need not apply when the parolee appears alone by videoconference. Because the use of videoconferencing technology that physically excludes a parolee from a revocation hearing and from the physical presence of counsel is so likely to prejudice the parolee, the *Cronic* presumption arises.[143] *Cronic* raises a presumption of ineffective assistance of counsel when even a competent lawyer would be unlikely to effectively assist the parolee under the circumstances. A parolee can argue that an appearance by videoconferencing so adversely affected the ability to communicate with counsel that, even if the parolee's counsel was perfectly competent, counsel could not represent the parolee in a manner that would result in a fair and just revocation hearing.

Therefore, under either *Strickland* or *Cronic*, the parolee will be able to successfully demonstrate that the use of videoconferencing technology to exclude the parolee from the revocation hearing violates the due process right to effective assistance of counsel.

B. The Parolee's Right to Confront Adverse Witnesses

The use of videoconferencing technology in revocation hearings also violates the parolee's due process right to confront adverse witnesses. As with the right to effective assistance of counsel, the parolee's due process right "to be heard in person"[144] works in conjunction with the due process right to confront adverse witnesses. Without the parolee's physical presence, there is no effective right to confront adverse witnesses that satisfies the minimum requirements of due process.

The Ninth Circuit addressed this issue in *White v. White* when it considered whether a bar to the presence of an adverse witness at a parole revocation hearing violated due process.[145] Parolee White

143. *See supra* Part IV(B).

144. *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

145. White v. White, 925 F.2d 287, 288 (9th Cir. 1991).

contended that "the denial of his request to confront adverse witnesses at his parole revocation hearing denied him due process," and the court agreed,[146] The court held that "[w]here the facts are contested, the presence of adverse witnesses, absent good cause for their nonappearance, is necessary to enable the parole board to make accurate findings."[147] Therefore, without good cause, the appearance or the presence of adverse witnesses is necessary.

Similarly, an Ohio state appellate court found that the use of videoconferencing technology violated a parolee's due process right of confrontation.[148] In *Wilkins v. Wilkinson*, the parolee argued that *Morrissey*'s minimal due process requirements were not met because the government could not show good cause for forcing him to appear at his revocation hearing via videoconference, separate from adverse witnesses, thereby abridging his due process right of confrontation.

Further, the parolee argued that he could not even make eye contact or observe the demeanor of the witnesses because of how the cameras were situated and because they froze several times.[149] The government failed to demonstrate good cause, stating that its only reason for using videoconferencing was to test the technology.[150] The court agreed that, because the government was unable to prove good cause, the parolee could make a due process violation claim based on the use of videoconferencing's effect on his right to confront adverse witnesses.[151]

Under the balancing test used by many federal circuits, a parolee who is forced to appear at his revocation hearing via videoconference without good cause can successfully argue that the right of confrontation is violated when adverse witnesses are physically in the courtroom. Under this test, the presiding court must consider the parolee's due process rights, balanced against the government's good cause for denying it.[152]

A parolee has a strong interest in the right to confront adverse witnesses at a revocation hearing, a proceeding at which the parolee's liberty is at stake. The parolee, who will either want to argue innocence or prove factors in mitigation, cannot effectively exercise a right of confrontation when appearing via videoconference, away from the physical presence of the adverse witnesses. Like in *Wilkinson*, a parolee who can observe witnesses only on screen will not be able to observe their demeanor and properly ascertain the accuracy and reliability of

146. *Id.*

147. *Id.* at 291 (emphasis added).

148. Wilkins v. Wilkinson, No. 01AP-468, 2002 WL 47051, at *3 (Ohio Ct. App. Jan. 15, 2002).

149. *Id.* at *2.

150. *Id.* at *2–3.

151. *Id.*

152. *See* United States v. Lloyd, 566 F.3d 341, 343 (3d Cir. 2009).

their proffered evidence, evidence that is often determinative of the parolee's fate.

Once a parolee demonstrates the right of confrontation was violated, the government must show good cause for "skyping in" the parolee. In most of the cases involving the use of videoconferencing, the government has argued that the technology was employed for reasons such as convenience, efficiency, and cost and time savings.[153] However, these are not reasons that amount to "good cause" when balanced against the parolee's significant constitutional right to confrontation. The government will also not be able to demonstrate good cause on the grounds that witnesses are difficult and expensive to procure because their presence in the courtroom indicates this is not true. The government may be able to argue that the witness's safety is at risk, or that the witness at least perceives such a risk. However, if this were the case, the witness could be the one appearing via videoconference instead of prohibiting the parolee from being physically present at the revocation hearing.

Therefore, given the strength of a parolee's due process right of confrontation, and the insufficiency, or even the complete absence of good cause by the government, a parolee will be able to successfully demonstrate successfully that the use of videoconferencing technology to exclude the parolee from the revocation hearing violates the parolee's due process right to confront adverse witnesses.

VI. CONCLUSION

Although courts may resolve appeals from revocation hearing decisions where parolees were forced to appear by videoconference by looking to statutes for guidance, the concerning implications for parolees' due process rights should be given the judiciary's full attention. The Seventh Circuit in *United States v. Thompson* acknowledged that "virtual reality is rarely a substitute for actual presence and . . . watching an event on the screen remains less than the complete equivalent of actually attending it."[154] In the absence of direct interpretation from Congress or the Supreme Court, courts confronted with the issue of the use of videoconferencing technology should heed the constitutional concerns raised by the practice.

153. *See supra* note 7 and accompanying text.

154. United States v. Thompson, 599 F.3d 595, 601 (7th Cir. 2010) (quoting United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).