

**SM-18 DEFENDANT'S CONSENT TO PROCEED BY VIDEOCONFERENCE –
WAIVER OF RIGHT TO BE PRESENT UNDER § 971.04**

The following is intended for use when a defendant with counsel wishes to waive the statutory right to be present in the same courtroom as the presiding judge at a proceeding. See § 971.04 and State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848. If the defendant is without counsel, it may be necessary to obtain or renew a waiver of counsel. See SM-30, Waiver and Forfeiture of Counsel.

1. The court should have the participants state their appearances and should identify where each participant is located.
2. The court should ascertain that the technology is working properly and ask questions like the following:¹
 - a. "Can you hear me?"
 - b. "Can you see me?"
 - c. "Do you understand that if at any time there is a problem with your ability to hear or see what is occurring in court today you are to immediately inform the court?"
 - d. "Do you understand that if at any time you need to speak privately with your lawyer, you should inform the court and proper accommodations will be made?"
3. The court should identify for those appearing from a remote location any person in the courtroom who may not be visible to them. If the litigant or counsel wishes to physically see a particular individual, the court should accommodate that request if appropriate.

4. The court should engage in a colloquy with the defendant to ascertain whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing:²

a. "Do you understand that you have the right to be physically present in the same courtroom³ as the presiding judge during this proceeding?"

b. "Do you understand that you are not required to consent to having this proceeding conducted by videoconferencing?"

c. "Have you discussed this with your lawyer?"

d. "Has anyone made any promises or threats to you in connection with waiving your right to be present?"

e. "Do you wish to waive your right to be physically present in this courtroom at this proceeding?"

d. "Do you consent to conducting this proceeding by videoconferencing?"

5. The court should make a finding, on the record, that the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing.

COMMENT

SM-18 was approved by the Committee in February 2014.

This Special Material provides a model for an inquiry that is to be conducted when a defendant wishes to consent to having a court appearance conducted by video-conferencing. It applies where the defendant has the right to be present at a proceeding under § 971.04. The decision in State v. Soto, 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, suggested that a colloquy be conducted in this situation.

See §§ 885.50 to 885.64, which address the "use of videoconferencing in the circuit courts." Section 885.60(2)(a) provides in part: "Except as may otherwise be provided by law, a defendant in a criminal

case . . . is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings." Soto held that the defendant's right to be physically present under § 885.60(2)(a) does not enlarge or diminish the statutory right under § 971.04. ¶31.

Section 971.04(1) provides that the defendant shall be present:

- (a) At the arraignment;
- (b) At trial;
- (c) During voir dire of the trial jury;
- (d) At any evidentiary hearing;
- (e) At any view by the jury;
- (f) When the jury returns its verdict;
- (g) At the pronouncement of judgment and the imposition of sentence;
- (h) At any other proceeding when ordered by the court.

Plea hearings are not listed in § 971.04; however, if the defendant is found guilty at the conclusion of a plea hearing, it qualifies as "pronouncement of judgment" under sub. (1)(g).

When the defendant in Soto entered his guilty plea, he, defense counsel, and the DA were present in the courtroom in Trempealeau County. The judge participated via videoconference from Jackson County. A complete plea colloquy was conducted. The court held:

¶2 We conclude that Wis. Stat. § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived and that Soto waived it prior to pleading and the court's pronouncement of judgment. We so conclude because Soto appeared in a courtroom in the Trempealeau County courthouse; both his attorney and the prosecuting attorney also appeared in the same courtroom; through videoconferencing, the judge was able to see, speak to and hear Soto and Soto was able to see, speak to and hear the circuit court judge; the judge explained that videoconferencing would be used for the plea hearing if Soto chose to enter a plea that day; and Soto expressly consented to the use of videoconferencing for the plea hearing. Accordingly, we affirm the circuit court's order denying Soto's motion to withdraw his guilty plea.

The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required:

¶46 When videoconferencing is proposed for a plea hearing at which it is anticipated that judgment will be pronounced, the judge should enter into a colloquy with the defendant that explores the effectiveness of the videoconferencing then being employed. In that regard, the judge shall ascertain whether the defendant and his attorney, if represented by counsel, are able to see, speak to and hear the judge and that the judge can see, speak to and hear the defendant and counsel. The judge shall also ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. In so doing, questions should be asked to suggest to the defendant that he has the option of refusing to employ videoconferencing for a plea hearing at which judgment will be pronounced.

Note: Soto addressed the right to be present under § 971.04. The court did not address whether presence was required as a matter of due process, noting that Soto "abandoned his constitutional challenge in this court." ¶15, footnote 4.

This Special Material addresses waiver of the right to be present. However, the right may also be forfeited. State v. Vaughn, 2012 WI App 129, 344 Wis.2d 764, 823 N.W.2d 543, involved a defendant who, after being found competent to stand trial, was very difficult to deal with in the courtroom. The trial court warned him repeatedly, but ultimately had him removed from the courtroom. Trial proceeded with him absent and a jury found him guilty of attempted first degree intentional homicide. The court of appeals affirmed the conviction, finding that the record established that Vaughn forfeited his right to be present.

1. There are two aspects to the waiver inquiry: whether the technology is working properly and whether the defendant is waiving his or her right to present in the same courtroom as the judge. The questions in this section address the first aspect and are adopted from the "Video Conferencing Appearance Colloquy" distributed to trial judges.

2. The questions in this section address the second aspect of the waiver inquiry: whether the defendant is waiving his or her right to present in the same courtroom as the judge.

3. The Soto decision emphasized the importance of the courtroom setting:

¶23 We have required that the defendant be in a courtroom because the statute clearly speaks to the defendant's presence at the location of the proceeding. Requiring that the defendant be present in the courtroom is guided also by the belief that a courtroom is a setting epitomizing and guaranteeing "calmness and solemnity," see Cox v. Louisiana, 379 U.S. 536, 583 (1965) (Black, J., dissenting), so that a defendant may recognize that he has had access to the judicial process in a criminal proceeding. Finally, requiring the defendant to make his appearance in a courtroom avoids the potential or perceived problems that can occur when the defendant is located in another facility such as a jail, while the judge, prosecutor, and perhaps even defense counsel are in the courtroom. See generally Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004). 2012 WI 93, 343 Wis.2d 43, 817 N.W.2d 848, ¶23.