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To Be Physically Present or Not to Be Physically Present: The Use of Videoconferences During Felony Proceedings

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TO BE PHYSICALLY PRESENT OR NOT TO BE PHYSICALLY PRESENT: THE USE OF VIDEOCONFERENCES DURING FELONY PROCEEDINGS

Abstract: In April 26, 2018, the United States Court of Appeals for the Seventh Circuit held, in *United States v. Bethea*, that a felony defendant could not affirmatively waive his right to be physically present in the courtroom, despite requesting to appear via videoconference during his combined plea and sentencing hearing. *Bethea* represented a matter of first impression among the federal circuit courts. This Comment argues that the Seventh Circuit’s decision is in line with the decisions its sister circuits regarding similar questions that strictly interpreted the plain text of Rule 43 of the Federal Rules of Criminal Procedure. This Comment further argues that courts should consider, when analyzing Rule 43, their power to advocate to Congress for more discretion in allowing videoconferences for defendants with severe health and mobility problems. The Seventh Circuit missed a clear opportunity to do so in *Bethea*.

INTRODUCTION

The primary goal of the Federal Rules of Criminal Procedure is to protect defendants’ constitutional rights during criminal proceedings.¹ Federal case law has established that when a defendant enters a plea, it must be made “voluntarily, knowingly, and intelligently.”² With limited exceptions, Rule 43 of the Federal Rules of Criminal Procedure further requires a defendant be “present” during a plea or sentencing hearing.³ Those exceptions are specifi-

¹ See MARK S. RHODES, ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 43:3 (2d ed. 1987) (noting that Rule 43 “incorporates a defendant’s constitutional due process right to be present at trial”). The presence requirement stems from the need to protect a defendant’s constitutional right to confront witnesses who testify against them. U.S. CONST. amend. VI (“in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”); *Wade v. United States*, 441 F.2d 1046, 1049 (D.C. Cir. 1971) (describing the constitutional history of Rule 43).

² See 22 C.J.S. *Criminal Procedure and Rights of Accused* § 239 (2018) (citing *United States v. Ruiz*, 536 U.S. 622, 629 (2002)) (noting that a guilty plea is valid only if made voluntarily, knowingly, and intelligently). For a plea to be entered voluntarily, knowingly, and intelligently, the accused must affirmatively consent to waiving the accused’s constitutional right to a trial and further the accused must have a general understanding of the facts and law of the proceeding. See *id.* (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)) (detailing that a defendant must “understand[] the law in relation to the facts”). A plea is not made voluntarily, knowingly, and intelligently when, for example, the accused is threatened or coerced to enter a guilty plea. See *id.* (citing *Brady v. United States*, 397 U.S. 742, 750 (1970)) (“a plea must not be induced by improper promises, threats, or coercion”).

³ FED. R. CRIM. P. 43.

cally enumerated in Rule 43(b) and (c) and include allowing a defendant to waive physical presence and appear via videoconference for misdemeanor pleas and sentencing hearings.⁴ Those exceptions align with the Federal Rules of Criminal Procedure's long-standing policy of protecting the rights of defendants by preventing a trial from proceeding in a defendant's absence.⁵

In 2018, in *United States v. Bethea*, the Seventh Circuit decided, as a matter of first impression, that it is *per se* prejudicial error for a felony plea hearing to occur without the defendant being physically in the courtroom, despite the defendant's attempted affirmative waiver of Rule 43's physical presence requirement.⁶ The Seventh Circuit held that it is beyond a court's discretion to permit videoconferences for felony plea and sentencing hearings because Rule 43 is narrowly tailored and requires a defendant's physical presence during such proceedings.⁷ That decision emphasized the judiciary's strict interpretation of the physical presence requirement in felony proceedings.⁸

⁴ *Id.* In the 2011 amendments, the drafters specifically allowed videoconference for misdemeanor offenses. *Id.* There was no explicit discussion in the amendments regarding the choice to limit videoconferences to misdemeanor offenses. *Id.*

⁵ *See Wade*, 441 F.2d at 1050–51 (holding that the defendant's absence during open court proceedings between judge and jury constituted reversible error because of the reasonable possibility of prejudice and adverse inferences regarding the defendant's absence by the initially deadlocked jury); *United States v. Lockwood*, 382 F. Supp. 1111, 1115 (E.D.N.Y. 1974) (holding that the defendant's presence in the courtroom during proceedings is explicit in Rule 43 where there is a sentencing hearing, but that the requirement does not extend to pretrial motions where the defendant's absence would not implicate the Sixth Amendment right to confront witnesses).

⁶ *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018) (citing *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002)) (stating that Rule 43 explicitly requires physical presence during sentencing to uphold a defendant's constitutional rights and that it is a *per se* prejudicial error for a defendant to waive his physical presence requirement). When the court finds a *per se* prejudicial error, the mere fact of the violation of the rule requires reversal and a harmless error analysis is insufficient to remedy the violation. *Id.* In contrast to *per se* prejudicial error interpretations, harmless error analysis requires the court to determine if there was the reasonable possibility of prejudice or if the change would have altered the court's decision. *Torres-Palma*, 290 F.3d at 1248.

⁷ *Bethea*, 888 F.3d at 867. The Seventh Circuit followed its sister circuits' standard of review for interpreting unambiguous rules of criminal procedure, finding no leeway for the court to alter the clear meaning of the rule. *Id.* (stating that the court's decision is based on the plain language of the text of Rule 43); *see United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) (stating that "[t]he text of Rule 43 does not allow video conferencing" and the "structure of the Rule does not support it"); *United States v. Navarro*, 169 F.3d 228, 235–37 (5th Cir. 1999) (relying on the plain language of the text of Rule 43 to determine that a defendant cannot waive the physical presence requirement).

⁸ *Bethea*, 888 F.3d at 867; *see Williams*, 641 F.3d at 764–65 (declining to adopt the government's proposed harmless error analysis for felony defendant's sentencing via videoconference where the videoconference feed was uninterrupted and all parties could adequately hear each other during the proceedings because Rule 43 lays out narrow exceptions where videoconferencing may be permitted and felony sentencings are excluded from those exceptions); *United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001) (rejecting the government's argument that financial and

Part I of this Comment discusses the facts at issue in *Bethea* that initiated the use of videoconferencing in the combined plea and sentencing hearing, the fundamentals of Rule 43, and the Seventh Circuit's ruling.⁹ Part II explains the different positions argued before the Seventh Circuit on the extent to which the physical presence requirement in Rule 43 may be waived.¹⁰ Part III analyzes the legal significance of the word "videoconferencing" and argues that the Seventh Circuit's application of Rule 43 was consistent with its sister circuits' view of a strict physical presence requirement in felony proceedings because of the intangible benefits of physical presence.¹¹ Part III further argues that, despite the court's correct ruling, the Seventh Circuit should have taken the opportunity to address the need for Congress to provide for accommodations to the physical presence requirement.¹²

I. RULE 43'S PRESENCE REQUIREMENT AND THE TRIAL JUDGE'S ACCEPTANCE OF A GUILTY PLEA VIA VIDEOCONFERENCE IN *BETHEA*

As a matter of first impression, the Seventh Circuit held in *Bethea* that a violation of Rule 43's physical presence requirement in a felony plea or sentencing hearing is *per se* prejudicial error, even when the defendant requests to appear via videoconference for such a hearing.¹³ Section A of this Part provides an overview of Rule 43 of the Federal Rules of Criminal Procedure.¹⁴ Section B details the facts of *Bethea* and the procedural history of the case from its initiation in district court to its appeal to the Seventh Circuit.¹⁵

time considerations must be considered in interpreting Rule 43's presence requirement and holding instead that the clear meaning of Rule 43 requires a defendant's physical presence at sentencing where there were no exceptions permitting a videoconference in such instances); *Navarro*, 169 F.3d at 235–37 (reversing the district court's order requiring the defendant to appear via videoconference for sentencing and noting that, although videoconferencing is beneficial for reducing costs, the plain language of Rule 43 does not permit the court to consider such factors regarding waiver of the explicit physical presence requirement).

⁹ See *infra* notes 13–31 and accompanying text.

¹⁰ See *infra* notes 32–52 and accompanying text.

¹¹ See *infra* notes 53–64 and accompanying text.

¹² See *infra* notes 65–76 and accompanying text.

¹³ *Bethea*, 888 F.3d at 867 (citing *Torres-Palma*, 290 F.3d at 1248) (emphasizing the principle that it is both counsel and the judge's duty to inform and protect a defendant from waiving his right to be present in the courtroom during proceedings in order to protect the defendant's Sixth Amendment right to confront witnesses).

¹⁴ See *infra* notes 16–22 and accompanying text.

¹⁵ See *infra* notes 23–31 and accompanying text.

*A. Rule 43's Requirement that the Defendant be Present
During Courtroom Proceedings*

Rule 43(a) specifically requires the defendant to be physically present at plea and sentencing hearings.¹⁶ The primary goal of the physical presence requirement in courtroom proceedings is to provide the defendant and judge with unique benefits that are unavailable in a video teleconference.¹⁷ Those benefits include the ability to prevent an adverse inference from the lack of an appearance, the attention to non-verbal cues, and the ability for the defendant to personally interact with defense counsel.¹⁸

The rule requiring a defendant's presence for her initial appearance, initial arraignment, and plea is not absolute, but its few exceptions are specifically enumerated in Rule 43(a).¹⁹ Notably, in 2011, Rule 43 was amended to allow videoconference pleas for misdemeanor offenses.²⁰ Despite that amendment regarding misdemeanor offenses, there is no provision in Rule 43 explicitly permitting a defendant to waive the presence requirement and affirmatively consent to a felony plea by videoconferencing.²¹ While the amendment notes to the rule are silent regarding videoconferences for felony

¹⁶ FED. R. CRIM. P. 43(a); *Bethea*, 888 F.3d at 866. Jurisdictions outside the Seventh Circuit interpret the language of Rule 43(a) stating that "the defendant must be present" as a mandatory requirement, which the defendant cannot waive. *See, e.g., In re United States*, 784 F.2d 1062, 1062–63 (11th Cir. 1986) (holding that the trial court erred in entering a guilty plea in the defendant's absence). Rule 43(a) requires, except as otherwise provided in Rules 5 or 10, the defendant's presence "at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury empanelment and the return of the verdict; and (3) sentencing." FED. R. CRIM. P. 43(a). Rule 5 and 10 provide exceptions to the presence requirement for a defendant's initial appearance and for a defendant's arraignment, respectively. FED. R. CRIM. P. 5, 10.

¹⁷ *Bethea*, 888 F.3d at 867.

¹⁸ *Id.*; *see Williams*, 641 F.3d at 764 (explaining the "intangible and difficult to articulate effects" of physical presence in a courtroom that are absent when videoconferencing is used); *United States v. Thompson*, 599 F.3d 595, 599–601 (7th Cir. 2010) (noting that face-to-face meetings allow judges to glean impressions and credibility that would not otherwise be noticed in a videoconference); *Lawrence*, 248 F.3d at 303–05 (holding that videoconferencing is not equivalent to physically being present in the courtroom).

¹⁹ FED. R. CRIM. P. 43(b), (c). Exceptions to the physical presence requirement include proceeding involving a sentence correction and instances when an initially present defendant pleads guilty and waives continued presence. *Id.*

²⁰ *Bethea*, 888 F.3d at 866. The amendment to Rule 43 added, in relevant part, Rule 43(b)(2) which provides an exception to the physical presence requirement where "[t]he offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence." FED. R. CRIM. P. 43(b). In *Bethea*, the court found that the drafters' lack of an affirmative approval was an intentional rejection of the use of videoconferencing for felony pleas and sentencings. *Bethea*, 888 F.3d at 866.

²¹ *Bethea*, 888 F.3d at 866. Further, a court may only accept a guilty plea when it is made completely voluntarily. *See* 22 C.J.S., *supra* note 2, § 239 (citing *Ruiz*, 536 U.S. at 629) (noting that a guilty plea is valid only if made voluntarily). Otherwise, the plea may be vacated on appeal. *Id.*

proceedings, courts interpreting related questions have read the absence of such a provision as an intentional rejection of alternative exceptions to the physical presence requirement.²²

B. Bethea's Request to Plead Guilty via Videoconference and Subsequent Argument on Appeal to Vacate his Conviction

Between April and October 2014, Gregory Bethea used eight fraudulently obtained credit card numbers to purchase merchandise from retailers in Janesville and Madison, Wisconsin totaling \$62,888.48.²³ On February 15, 2017, a grand jury in the Western District of Wisconsin indicted Bethea for possession of counterfeit access devices in violation of 18 U.S.C. § 1029(a)(1).²⁴ In May 2017, Bethea agreed to plead guilty to the one-count indictment and, due to his declining health and limited mobility, requested to appear at his combined guilty plea and sentencing hearing via videoconference.²⁵ The district court granted Bethea's request and arranged for Bethea to plea and appear for

²² See *Bethea*, 888 F.3d at 866 (first citing *Williams*, 641 F.3d at 764–65; then citing *Torres-Palma*, 290 F.3d at 1248; then citing *Lawrence*, 248 F.3d at 303–04; and then citing *Navarro*, 169 F.3d at 235–39) (detailing how the Fourth, Fifth, Sixth, and Tenth Circuits rejected expanding Rule 43 to include presence via videoconference).

²³ Reply Brief of Defendant-Appellant, Gregory Bethea at 3, *Bethea*, 888 F.3d 864 (No. 3:17-cr-00008-JDP-1). Bethea used the fraudulently obtained credit cards to purchase merchandise ranging from food to electronics to clothing from retailers, such as Sam's Club. *Id.*; Brief of Plaintiff-Appellee at 3, *Bethea*, 888 F.3d 864 (No. 3:17-cr-00008-JDP-1). The total of all of Bethea's attempted purchases with his fraudulently obtained credit cards was \$91,820.32. Reply Brief of Defendant-Appellant, *supra*, at 3. Authorities also found Bethea had used additional fraudulent credit cards in 2016. *Id.* at 22. While Bethea was only charged for his fraudulent activity in 2014, the trial judge placed great weight on the fact that Bethea still had fraudulent credit cards while his health was steadily declining when the judge imposed a prison sentence during Bethea's combined plea and sentencing hearing. *Id.*

²⁴ Brief of Plaintiff-Appellee, *supra* note 23, at 3; see 18 U.S.C. § 1029(a) (2012) (“Whoever—(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices . . . shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.”); *id.* § 1029(e)(1) (defining counterfeit access devices as “any device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device”). In this case, Bethea used Discover credit card numbers that did not belong to him to make purchases across Wisconsin. Brief of Plaintiff-Appellee, *supra* note 23, at 3. Congress enacted 18 U.S.C. § 1029 due to the rise of computer hacking and the sentiment that fraudulent activity, particularly fraudulent credit card purchases, affect interstate commerce and must be penalized under a criminal statute to deter related activity. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 1029 (2018); see *United States v. Scartz*, 838 F.2d 876, 879 (6th Cir. 1988) (affirming that gaining bank authorization to further fraudulent credit card use affects interstate commerce).

²⁵ Reply Brief of Defendant-Appellant, *supra* note 23, at 3, 6. Bethea was on a continuous dialysis regimen. *Id.* He received care from physicians in Milwaukee to implement his dialysis, to provide retinal treatment, cardiac care treatment, and treatment for Charcot joint syndrome. *Id.* Charcot joint syndrome left Bethea susceptible to fractures even from minor physical conduct. *Id.* Bethea was also wheelchair-bound and had a medical boot on one foot. *Id.* Nine days before his combined guilty plea and sentencing hearing, Bethea received a heart stent. *Id.*

sentencing via videoconference.²⁶ On December 1, 2017, after a plea colloquy, the court accepted Bethea's plea via videoconference and sentenced him to twenty-one months' imprisonment.²⁷ The court acknowledged that, although Bethea's health was a mitigating factor in determining whether prison time was appropriate, the court ultimately imposed prison time on Bethea because he continued his illegal conduct well after realizing his health was deteriorating.²⁸

Bethea then timely appealed his conviction and argued that his guilty plea via videoconference was impermissible under Rule 43(a).²⁹ On the same

²⁶ *Bethea*, 888 F.3d at 865. The parties disputed whether the government or Bethea first suggested Bethea appear via video teleconference. Compare Reply Brief of Defendant-Appellant, *supra* note 23, at 3 (alleging the government first proposed the defendant affirmatively waive his physical presence requirement via videoconference), with Brief of Plaintiff-Appellee, *supra* note 23, at 17 (asserting the defendant invited the error by appearing via videoconference). Bethea contended the government's invited error argument was irrelevant because the government was the first to suggest in an email that Bethea appear via videoconference. Reply Brief of Defendant-Appellant, *supra* note 23, at 3. The Seventh Circuit did not decide who initiated the request for the defendant to appear via videoconference because, regardless of which party initially recommended the defendant appear via videoconference, the court determined the defendant was incapable of waiving his right to be present in the courtroom during plea and sentencing hearings. *Bethea*, 888 F.3d at 865.

²⁷ *Bethea*, 888 F.3d at 865; Brief of Plaintiff-Appellee, *supra* note 23, at 6. Rule 11 of the Federal Rules of Criminal Procedure requires the judge and defendant to engage in a conversation, known as a plea colloquy, in open court under oath before the defendant enters a guilty plea. FED. R. CRIM. P. 11. In this case, the plea colloquy consisted of the judge asking Bethea questions to ensure that Bethea's plea was voluntary. Reply Brief of Defendant-Appellant, *supra* note 23, at 5; see 22 C.J.S., *supra* note 2, § 239 (citing *Matusiak v. Kelly*, 786 F.2d 536, 543 (2d Cir. 1986)) (detailing a judge's determination of voluntariness based on the defendant's understanding of protections relinquished by accepting a guilty plea, including the right to a trial). Following the colloquy, the judge determined that Bethea comprehended the charges, the potential penalties, and the rights he gave up in pleading guilty. *Bethea*, 888 F.3d at 865; Reply Brief of Defendant-Appellant, *supra* note 23, at 5.

²⁸ *Bethea*, 888 F.3d at 865. The sentence of twenty-one months' imprisonment was at the lowest end of the sentencing scale under the sentencing guidelines. Brief of Plaintiff-Appellee, *supra* note 23, at 6. Federal sentencing guidelines help mitigate disparity in imprisonment time by considering (1) the criminal conduct at issue and (2) the defendant's prior criminal infractions. Dawinder Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 681 (2015). Due to Bethea's prior criminal history and the amount of fraudulently purchased merchandise in excess of \$40,000 but less than \$95,000, the guidelines recommended an imprisonment sentence in the range of twenty-one to twenty-seven months. Reply Brief of Defendant-Appellant, *supra* note 23, at 3-4. When asked by defense counsel to heavily consider Bethea's deteriorating health in support of defense counsel's contention that health care in Bethea's community would be superior to health care in prison, the judge noted that he was troubled that Bethea's deteriorating health had not prevented him from continuing to violate 18 U.S.C. § 1029(a)(1) even until 2016. *Bethea*, 888 F.3d at 865; Brief of Plaintiff-Appellee, *supra* note 23, at 8.

²⁹ *Bethea*, 888 F.3d at 865. Bethea filed his appeal on December 5, 2017, a day after the district court entered its written judgment in Bethea's sentencing. Brief of Plaintiff-Appellee, *supra* note 23, at 9. The errors Bethea alleged on appeal illuminate why Bethea changed his mind on the use of videoconference at his plea and sentencing hearing. Reply Brief of Defendant-Appellant, *supra* note 23, at 18-20. By pleading guilty, Bethea had hoped to avoid prison time because he

day that Bethea appealed the court's acceptance of his video teleconference plea and his twenty-one month sentence, Bethea's trial counsel moved to withdraw as counsel for the appeal.³⁰ On appeal, Bethea's new counsel argued that his guilty plea and sentence must be vacated because the court's acceptance of Bethea's guilty plea via teleconference violated Federal Rules of Criminal Procedure Rule 43(a)'s requirement that Bethea be physically present in the courtroom.³¹

II. LEGAL CONTEXT AND FRAMEWORK OF *BETHEA*

The Seventh Circuit's decision is a matter of first impression regarding whether it is invited error or *per se* prejudicial error for a defendant to waive his or her right to be physically present in the courtroom during a combined plea and sentencing hearing for a felony charge by appearing via videoconference.³² While other jurisdictions have not decided the exact question, the Fourth, Fifth, Sixth, and Tenth Circuits have ruled on related issues of presence requirements, and those circuits have determined that physical presence is a requirement that cannot be waived.³³ The courts have found that physical presence is imperative because of the intangible benefits of face-to-face

feared for his health and safety given the combination of his medical conditions and the unsanitary conditions of prison. *Id.* at 7. On appeal, Bethea assigned error to the court's references to his health issues at sentencing, but the Seventh Circuit did not need to reach the substance of that argument given the court's holding that physical presence was not waivable so Bethea had to be resentenced anyway. Reply Brief of Defendant-Appellant, *supra* note 23, at 18; *see Bethea*, 888 F.3d at 867 (citing *Torres-Palma*, 290 F.3d at 1248) (recognizing that Rule 43 requires physical presence during sentencing to uphold a defendant's constitutional rights and that it is a *per se* prejudicial error to allow a defendant to waive his physical presence requirement).

³⁰ Brief of Plaintiff-Appellee, *supra* note 23, at 9. The Federal Defenders Service of Wisconsin initially represented Bethea at trial before withdrawing as counsel for the appeal. *Id.* In their motion to withdraw as counsel, the Federal Defenders Service of Wisconsin argued it would be "poor form" for the office to argue the judge violated Rule 43(a) by allowing Bethea to be sentenced via videoconference, which it had requested at trial. *Id.* at 10.

³¹ Reply Brief of Defendant-Appellant, *supra* note 23, at 9.

³² *United States v. Bethea*, 888 F.3d 864, 866 (7th Cir. 2018) (highlighting that no other circuit had ruled on the effect of a defendant waiving his physical presence). The invited error doctrine precludes a party from appealing an issue that the party introduces because the party was the one who instigated the error. *United States v. Wells*, 519 U.S. 482, 488 (1997). *Contra Bethea*, 888 F.3d at 867 (citing *Torres-Palma*, 290 F.3d at 1248) (stating a *per se* judicial error is a reversible error that must be corrected on appeal).

³³ *Bethea*, 888 F.3d at 867. In *United States v. Lawrence*, the Fourth Circuit rejected expanding Rule 43 beyond physical presence. *United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001). Similarly, in *United States v. Navarro*, the Fifth Circuit acknowledged the benefits of videoconference yet concluded that Rule 43 prohibited its use. 169 F.3d 228, 237 (5th Cir. 1999). The Sixth Circuit, in *United States v. Williams*, also declined to expand Rule 43 beyond its explicit narrow exceptions. 641 F.3d 758, 765 (6th Cir. 2011). In addition, the Tenth Circuit, in *United States v. Torres-Palma*, held it was *per se* judicial error to allow the defendant waive the physical presence requirement. 290 F.3d 1244, 1248 (10th Cir. 2002).

communication provides that are not present during videoconferences.³⁴ Drawing on the related decisions, the positions articulated by the government and the defendant in *United States v. Bethea* categorize the District Court's decision to allow the defendant to waive his physical presence requirement in two ways.³⁵ The government argued that the decision was an invited error, which is one the defendant should be precluded from arguing because the defendant introduced it.³⁶ *Bethea* on the other hand argued that the decision was a *per se* prejudicial error, meaning the plea should be vacated based on the sole fact of the violation of Rule 43.³⁷ The split between the parties' categorization of the error is significant because both positions seek to protect defendants' rights during felony proceedings and uphold the integrity of the court system in divergent ways.³⁸

The government advocated for a harmless error analysis when subjecting invited errors to appellate review, meaning that the defendant's lack of physical presence should not be a cause for a remand because the error did not prejudice the defendant.³⁹ In 2011, the Seventh Circuit, in *United States v. Gaya*, discussed the denial of an appeal due to an invited error by a defendant.⁴⁰ The court refused to classify a defense lawyer's misunderstanding of a judge's instructions as a reversible error, where the defense lawyer neglected to clarify the instructions and misguidedly harped on discussing documents with his client in the midst of cross-examination.⁴¹ In *Bethea*, the government

³⁴ *Bethea*, 888 F.3d at 867; see *Williams*, 641 F.3d at 764–65 (“Being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference.”); *United States v. Thompson*, 599 F.3d 595, 599–601 (7th Cir. 2010) (explaining how in-person courtroom proceedings allow a judge to evaluate credibility and assess the “moral-fiber” of parties in a way that would not otherwise be possible via videoconference).

³⁵ Compare Reply Brief of Defendant-Appellant, *supra* note 23, at 4–6 (characterizing the waiver as a *per se* judicial error), with Brief of Plaintiff-Appellee, *supra* note 23, at 14 (describing defendant's waiver of Rule 43's physical presence requirement as an invited error).

³⁶ Brief of Plaintiff-Appellee, *supra* note 23, at 14.

³⁷ Reply Brief of Defendant-Appellant, *supra* note 23, at 4–6; Brief of Plaintiff-Appellee, *supra* note 23, at 14.

³⁸ See Reply Brief of Defendant-Appellant, *supra* note 23, at 4–6 (seeking to maintain protections for defendants during felony proceedings including the right to appeal errors allegedly instigated by the government); Brief of Plaintiff-Appellee, *supra* note 23, at 14 (seeking to prevent manipulation of the court system by appealing invited errors to better allocate sparse judicial resources).

³⁹ Brief of Plaintiff-Appellee, *supra* note 23, at 14, 21.

⁴⁰ *United States v. Gaya*, 647 F.3d 634, 640 (7th Cir. 2011) (“[A] party may not ‘invite’ error and then argue on appeal that the error for which he was responsible entitles him to relief.”) (internal citation omitted).

⁴¹ *Id.* During the cross-examination of the defendant, Rosales, the government sought to impeach Rosales's testimony through the use of phone records. *Id.* at 637. Rosales's attorney objected to the introduction of the phone records because they were not previously submitted in evidence. *Id.* The judge adjourned the trial for the day resolving to decide the permissibility of the phone records after the overnight recess. *Id.* The judge further instructed Rosales's attorney not to

focused on Bethea's request to appear via video teleconference.⁴² In the government's view, Bethea invited the error he assigned on appeal and thus should be precluded from rescinding his plea because the error was harmless and inconsequential to the result.⁴³

Bethea argued for a strict interpretation of the physical presence requirement in Rule 43 and categorized any such waiver as a *per se* prejudicial error.⁴⁴ Notably, four other circuits had employed a similar interpretation of Rule 43 to arrive at their conclusions regarding whether a judge must be present in the courtroom, whether a denial of defendant's request for a videoconference should be reversed, and whether a defendant may appear via videoconference for a sentencing hearing.⁴⁵ Although Rule 43 does not explicitly define "presence" as physical presence in the courtroom, those circuits had

discuss "this" with his client. *Id.* (noting that "this" clearly referred to the phone records). Later that evening, Rosales's attorney sent a memorandum to the court in which he incorrectly assumed that he was barred from discussing the phone records with his client and all other communications with his client during the overnight recess. *Id.* The court did not see the memorandum until the following day and ultimately barred the use of the phone records at trial. *Id.* On appeal, Rosales's attorney claimed that the judge's instructions resulted in reversible error because the judge's ambiguous instructions prevented him from conferring with his client. *Id.* The Seventh Circuit held the error was invited. *Id.* at 640. The court reasoned Rosales's attorney could have immediately clarified the judge's instructions and, in fact, the judge specified that Rosales's attorney could instruct his client on what they had discussed. *Id.* The court also found it compelling that after the judge's dismissal of the phone records, Rosales's attorney did not seek additional time to confer with his client, indicating that Rosales's attorney only cared about discussing the phone records. *Id.* at 641.

⁴² Brief of Plaintiff-Appellee, *supra* note 23, at 14, 16. For a discussion of the dispute regarding whether the government or the defendant initially suggested to appear via videoconference, see *supra* note 26.

⁴³ Brief of Plaintiff-Appellee, *supra* note 23, at 17. The Seventh Circuit never addressed the merits of this argument because it found the physical presence requirement could not be waived. *Bethea*, 888 F.3d at 867. An invited error is one that is encouraged or prompted by the conduct of a party at trial, which waives that party's right to complain on appeal. 21 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 5039.2 (2d ed. 2018).

⁴⁴ Reply Brief of Defendant-Appellant, *supra* note 23, at 18. Bethea argued that the government's reliance on *United States v. Benabe*, which held that a Rule 43(c) violation for presence due to unruliness during courtroom proceedings was not a *per se* error, was misplaced because, unlike Rule 43(c), Rule 43(a) explicitly requires the defendant to be present during plea and sentencing hearings. *Id.* at 5 (citing *United States v. Benabe*, 654 F.3d 753, 771–74 (7th Cir. 2011)). Bethea highlighted that he was never physically present in the courtroom at the same time as the judge, and therefore argued that an analogy to the applications of Rule 43(c) was inapplicable. *Id.*; see FED. R. CRIM. P. 43(c) (waiving the right of continued physical presence after the defendant was initially physically present at trial).

⁴⁵ *Williams*, 641 F.3d at 764–65 (narrowly reading Rule 43 to encompass only physical presence and precluding the use of virtual reality as a substitute); *Torres-Palma*, 290 F.3d at 1248 (holding that a violation of Rule 43 is a *per se* prejudicial error); *Lawrence*, 248 F.3d at 303–04 (finding a defendant's sentence must be vacated because the defendant was not physically present at the sentencing hearing); *Navarro*, 169 F.3d at 235–39 (emphasizing that "presence" in Rule 43 indicates physical presence).

held that the plain meaning of the word “presence” indicates physical presence.⁴⁶

In 2002, the Sixth Circuit ruled, in *United States v. Williams*, that the district court did not have the discretion to conduct a sentencing hearing via videoconferencing.⁴⁷ The court declined to consider the government’s argument that videoconferences enhance the trial efficiency and are effective to hear both parties argument given the nature of uninterrupted video feeds.⁴⁸ Instead, the court read Rule 43 narrowly due to the exhaustive list of exceptions in the rule that did not include an exemption for felony sentencing via videoconferencing.⁴⁹ Similarly, in 2002, the Tenth Circuit, in *United States v. Torres-Palma*, ruled that a trial judge did not have the discretion, despite the judge’s best intentions to ease the burden of the caseload for border proceedings, to require the defendant to appear via videoconferencing due to the strict wording of Rule 43.⁵⁰ In that case, the court explicitly indicated that violation of Rule 43 was a *per se* prejudicial error.⁵¹ Further, the court noted that if a party did not like the result the appropriate avenue for change was to petition the drafters of the rule, not the courts.⁵²

III. THE SEVENTH CIRCUIT’S CORRECT RULING MISSES AN OPPORTUNITY TO DIG DEEPER

While the Seventh Circuit’s interpretation of the presence requirement in Rule 43 was consistent with its sister circuits and the plain language of the rule, courts should nonetheless exercise their advocacy role to encourage

⁴⁶ *Williams*, 641 F.3d at 764–65; *Torres-Palma*, 290 F.3d at 1248; *Lawrence*, 248 F.3d at 303–04; *Navarro*, 169 F.3d at 235–39.

⁴⁷ *Williams*, 641 F.3d at 764–65.

⁴⁸ *Id.* The prosecution emphasized that during the defendant’s sentencing via videoconferencing, all the parties effectively saw and heard each other without any delay in the video feed. *Id.*

⁴⁹ *Id.* The court in *Williams* reviewed the defendant’s claim *de novo* because the government neglected to object to such a standard of review and therefore the government forfeited the opportunity for the court to apply a plain-error review of defendant’s waiver. *Id.* at 763–64. The court found the exceptions to Rule 43’s presence requirement, including the ability for a court to waive a defendant’s continued presence due to unruly behavior in court, were inapplicable. *Id.* at 764 & n.1.

⁵⁰ *Torres-Palma*, 290 F.3d at 1244, 1248. In *Torres-Palma*, the trial judge was presented with numerous logistical problems arising from the defendant’s alleged criminal activity across the Mexico-New Mexico border. *Id.* at 1245. Because local district courts are often overwhelmed by the number of such cases, other judges from outside the district presided over some matters on a voluntary basis. *Id.* In *Torres-Palma*, the jury was picked from a local pool in the district in New Mexico, but the case was tried by Judge Sven Holmes of the United States District Court for the Northern District of Oklahoma. *Id.*

⁵¹ *Id.* at 1248. The court rejected the government’s harmless error analysis ruling that whether there was prejudice or not was irrelevant given Rule 43’s explicit requirement. *Id.*

⁵² *Id.* (noting that the court was bound by the limits of Rule 43’s list of exceptions and could not expand the rule’s scope).

changes to the rule.⁵³ Section A of this Part discusses why the Seventh Circuit's ruling was correct by exploring the scope of the videoconferencing exception to the physical presence requirement and the intangible benefits of physical presence.⁵⁴ Section B argues that, in the interests of justice, the Seventh Circuit missed an opportunity to argue for modifications to Rule 43.⁵⁵

A. The Seventh Circuit Narrowly Applies the Videoconferencing Exception

The Seventh Circuit analyzed the drafters' inclusion of a videoconferencing exception in Rule 43.⁵⁶ The court focused on the drafters' inclusion of videoconferencing for misdemeanor offense hearings in its 2011 amendments, without any mention of videoconferencing for felony offense hearings.⁵⁷ While the court sympathized with arguments in favor of videoconferencing for felony plea and sentencing hearings, the text of Rule 43 constrained the court's decision.⁵⁸

In reviewing the interpretation of a rule of criminal procedure, it is the court's duty to look to the plain meaning of a rule and to construe those words in the context of the rulebook by looking to the drafters' intent.⁵⁹ The drafters' inclusion of exemptions to the physical presence requirement indicates, that outside that inclusive list, the drafters' perceived that the benefits of physical

⁵³ *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018); see *United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011) (reading Rule 43 to mean only physical presence and finding virtual presence could not be a substitute); *United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002) (holding that a violation of Rule 43 is a *per se* prejudicial error); *United States v. Lawrence*, 248 F.3d 300, 303–04 (4th Cir. 2001) (holding a defendant's sentence must be vacated because the defendant was not physically present at his sentencing hearing); *United States v. Navarro*, 169 F.3d 228, 235–39 (5th Cir. 1999) (emphasizing that "presence" in Rule 43 means physical presence).

⁵⁴ See *infra* notes 56–64 and accompanying text.

⁵⁵ See *infra* notes 65–76 and accompanying text.

⁵⁶ *Bethea*, 888 F.3d at 866. Rule 43(a) allows courts to use videoconferencing under Rule 5 for a defendant's initial appearance, and Rule 10 for a defendant's arraignment. FED. R. CRIM. P. 5(f), 10(c), 43. Rule 43(b)(2) contains Rule 43's only explicit mention and allowance of videoconferencing, which is limited to proceedings related to misdemeanor offenses. FED. R. CRIM. P. 43. That provision was irrelevant here because *Bethea*'s charge at issue was a felony. *Bethea*, 888 F.3d at 866.

⁵⁷ *Bethea*, 888 F.3d at 866 (finding it "telling" that the drafters refrained from including videoconferencing for felony offenses when the drafters explicitly allowed videoconferencing for misdemeanor offenses).

⁵⁸ *Id.* at 868 (expressing a desire that Rule 43 allowed more leeway in videoconferencing where the defendant had significant health problems, yet refraining to define what constitutes a "significant health problem").

⁵⁹ *Navarro*, 169 F.3d at 237 (rejecting the dissent's argument that "presence" in Rule 43 could require mere sight presence as opposed to in-person presence because a common sense reading of Rule 43(b) requires the court to read presence as physical presence in the phrase "initially present in the courtroom").

presence for felony cases outweighed any burdens on time and expense.⁶⁰ The Seventh Circuit was consistent with its sister circuits in viewing the plain meaning and context of Rule 43.⁶¹

In its decision, the Seventh Circuit highlighted the intangible benefits of physical presence in the courtroom for both the defendant and the judge.⁶² While the Seventh Circuit glossed over the implications of those benefits to the judicial process, the physical presence requirement in Rule 43 reinforces the underpinnings of the Sixth Amendment by protecting the defendant from a trial proceedings in his absence.⁶³ Further, as discussed in more detail by sister circuits, requiring physical presence upholds the integrity of courtroom proceedings by allowing judges to better assess non-verbal cues.⁶⁴

⁶⁰ See *id.* at 238 (acknowledging the court's sympathies to the government's argument to ease the court's caseload through the use of videoconference, yet declining to consider such factors because it is outside the scope of the court's analysis of an unambiguous rule).

⁶¹ *Bethea*, 888 F.3d at 867. The Fourth, Fifth, Sixth, and Tenth Circuits have determined that Rule 43 requires a defendant's physical presence in the courtroom, and waiver is not permitted. *Williams*, 641 F.3d at 764–65; *Torres-Palma*, 290 F.3d at 1248; *Lawrence*, 248 F.3d at 303–04; *Navarro*, 169 F.3d at 235–39.

⁶² See *Bethea*, 888 F.3d at 866–67. In-person proceedings allow the judge to observe non-verbal cues, prevent adverse inferences due to lack of physical presence, and promote immediate and efficient communication between the defendant and counsel. *Id.*; *Williams*, 641 F.3d at 764; *Torres-Palma*, 290 F.3d at 1246–48; *Lawrence*, 248 F.3d at 303–05; *Navarro*, 169 F.3d at 238–39.

⁶³ See *Bethea*, 888 F.3d at 867; *Wade v. United States*, 441 F.2d 1046, 1050–51 (D.C. Cir. 1971) (holding that the defendant's absence during open court proceedings between judge and jury constituted reversible error because of the reasonable possibility of prejudice against the defendant for his absence); *United States v. Lockwood*, 382 F. Supp. 1111, 1115 (E.D.N.Y. 1974) (holding that the defendant's presence in the courtroom during proceedings is explicit in Rule 43 for sentencing hearings, but that the requirement does not extend to pretrial motions). While not mentioned in the case law, the rise of hacking has decreased the reliability of a videoconference feed to be pure and unmanipulated. See Scott M. Wornow & Richard F. Langan, Jr., *Communications Technology-Conferencing-Video, Web and "Always-on" Technologies*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE & OUTSIDE COUNSEL* § 28:11 (May 2018) (discussing the security risks of professional hackers in regards to videoconference lines). Additionally, without being able to see the defendant's full surroundings on a videoconference during a plea hearing, it is more difficult to assess whether a defendant is being coerced by another person in the room who is out of the camera's view. See *Brady v. United States*, 397 U.S. 742, 748, 750 (1970) (noting that coercion is a violation of voluntarily giving a plea); *State v. Peters*, 615 N.W.2d 655, 660 (Wis. Ct. App. 2000) (Hoover, J., concurring) (conceiving that a defendant could be coerced by a police officer in the room during a videoconference plea hearing), *rev'd on other grounds*, 628 N.W.2d 470 (Wis. 2001).

⁶⁴ *Williams*, 641 F.3d at 765; *United States v. Thompson*, 599 F.3d 595, 599–601 (7th Cir. 2010).

B. The Seventh Circuit's Missed Opportunity to Advocate for Discretion in Rule 43 When There Are Excessive Burdens on Defendants

Despite the sound reasoning of the opinion, the Seventh Circuit neglected an opportunity to encourage Congress to modify Rule 43.⁶⁵ Given the financial and time burdens on some defendants—particularly those with serious health problems—to appear at trial proceedings, the Seventh Circuit should have explicitly addressed the implications of allowing the court discretion when a defendant has an undue burden, like a health problem, and should have called on the drafters to implement such a change.⁶⁶

In *United States v. Torres-Palma*, the Tenth Circuit, while addressing travel burdens and expenses, albeit focusing on indigent defendants without health problems, explicitly called on the drafters to consider modifying Rule 43 to account for further exemptions to the physical presence requirement.⁶⁷ In *United States v. Navarro*, the Fifth Circuit, alluded to the potential for Congress to declare that videoconferencing satisfies the presence requirement.⁶⁸ Despite those strong sentiments from its sister circuits, *Bethea* is not the first time a court in the Seventh Circuit declined to articulate a strong stance for change to Rule 43.⁶⁹

Similar to *Bethea*, in *United States v. Brunner*, the defendant had severe health problems and was practically immobile.⁷⁰ The cost to transport the

⁶⁵ *Bethea*, 888 F.3d at 868; *c.f.* *Torres-Palma*, 290 F.3d at 1245, 1248 (discussing the benefits of videoconferencing).

⁶⁶ *See Bethea*, 888 F.3d at 868 (expressing the court's sympathies and the defendant's appealing argument, yet refraining to propose any broader change to the drafters for Rule 43). In *Bethea*, only at the end of its opinion did the court suggest that it would be "sensible" for a court to have discretion to permit videoconferences when a defendant has serious health problems. *Id.* The court did not articulate as strong a stance as the court in *Torres-Palma* or the dissent in *Navarro* to suggest that such a change could and should occur. *See Torres-Palma*, 290 F.3d at 1245, 1248 (addressing the efficiency and monetary benefits of videoconferencing); *Navarro*, 169 F.3d at 242 (Politz, J., dissenting) (noting that videoconferencing would ease financial burdens and prevent time delays).

⁶⁷ *Torres-Palma*, 290 F.3d at 1244, 1248.

⁶⁸ *Navarro*, 169 F.3d at 235, 239.

⁶⁹ *Bethea*, 888 F.3d at 868 (recognizing the potential benefit of videoconferences when a defendant faces significant health problems, but refusing to call for a change to Rule 43's physical presence requirement); *United States v. Brunner*, No. 14-cr-189, 2016 WL 6110457, at *3 (E.D. Wis. Sept. 23, 2016). As opposed to *Bethea*, in *Brunner* the court denied defendant's request to appear via videoconference given the scope of Rule 43. *Compare Bethea*, 888 F.3d at 868 (describing the lower court's grant of the defendant's request to appear via videoconference due to the defendant's failing health), *with Brunner*, 2016 WL 6110457, at *3 (acknowledging the constraints on physical presence in the courtroom due to the defendant's health situation, but ultimately denying the defendant's request to appear via videoconference due to the strict physical presence requirements of Rule 43).

⁷⁰ *Brunner*, 2016 WL 6110457, at *3. Brunner was charged for fraudulently concealing assets under 18 U.S.C. § 1344 and lying during his bankruptcy case in violation of 18 U.S.C. § 152. *Id.*

defendant to the courtroom ran upwards of \$3,000.⁷¹ In *Brunner* the Seventh Circuit only flatly stated that while common sense would suggest weighing the burdens of travel and damages to the defendant's health when granting a request to appear via videoconference for a defendant, the court's hands were tied.⁷² In *Bethea*, the Seventh Circuit missed its second chance to advocate for the implementation of more socially conscious discretion in Rule 43 to ease the burden on defendants to physically be present in the courtroom during proceedings.⁷³ That decision, and others like it, stagnate, rather than act as a catalyst for, changes to Rule 43 to benefit indigent defendants with severe health and mobility issues.⁷⁴ Given the disparity in incarceration of indigent defendants, it is imperative for the court to discuss methods to ease the financial and time burdens on defendants.⁷⁵ Otherwise, the court fails to incite change against "cash register justice" that continues to oppress indigent defendants, while also undermining the purpose of the Sixth Amendment to provide just treatment for those during courtroom proceedings.⁷⁶

⁷¹ *Id.* The government did not dispute the financial and medical difficulties that Brunner would face appearing in-person for his proceedings. *Id.* The government's argument in *Brunner*, like the defendant's argument in *Bethea*, focused on a plain reading of Rule 43. Compare *Bethea*, 888 F.3d at 868 (asserting that it was permissible for the district court to grant defendant's affirmative waiver of his physical presence requirement), with *Brunner*, 2016 WL 6110457, at *1 (arguing that Rule 43 forecloses the opportunity for the defendant to appear via videoconference).

⁷² *Brunner*, 2016 WL 6110457, at *3 (referencing the court's sympathies to the defendant and his appealing argument, yet refraining to advocate a strong stance for a proposed change by the drafters).

⁷³ *Bethea*, 888 F.3d at 868; *Brunner*, 2016 WL 6110457, at *3; see *Lawrence*, 248 F.3d at 305 (stating that Rule 43 "should indeed provide some flexibility" beyond only physical presence).

⁷⁴ See *Bethea*, 888 F.3d at 868 (expressing the court's sympathies and the defendant's appealing argument yet refraining to propose any broader change to the drafters for Rule 43).

⁷⁵ *Id.*; see Laura I Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1483–85 (2016) (illustrating examples of how excessive costs in justice administration can lead to further marginalization of indigent defendants, including how Alabama Circuit Court Judge Wiggins, requires defendants to either donate blood to pay their fine or go to jail); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2184–87 (2013) (providing data detailing economic disparity in the criminal justice system and highlighting that indigent defendants receive disproportionately longer imprisonment times in sentencing pleas); Sidhu, *supra* note 28, at 701 (describing how despite the uniform sentencing guidelines' best efforts to create uniformity in sentencing, the actuarial tables used may exacerbate the disparities in sentencing by causing a poor, high risk offender to be sentenced to a longer term than a wealthy, low risk offender).

⁷⁶ *Bethea*, 888 F.3d at 868; see Appleman, *supra* note 75, at 1516–20 (arguing that excessive costs impose a punishment on defendants without the say of a jury as required by the Sixth Amendment). A telling sentiment of *Bethea*'s case: "[a]lthough one might reluctantly accept [vacating the District Court's plea and sentencing], it is proper in light of Rule 43(a)'s text and the pertinent caselaw." Reply Brief of Defendant-Appellant, *supra* note 23, at 14.

CONCLUSION

In *United States v. Bethea*, the Seventh Circuit sided with the Fourth, Fifth, Sixth, and Tenth Circuits by emphasizing the importance of the physical presence requirement for a defendant during felony plea and sentencing hearings and found that a violation of the requirement is a per se judicial error, even where a defendant has affirmatively consented to appear via videoconference. The Seventh Circuit relied on the 2011 amendment permitting waiver of the physical presence requirement via videoconferencing for misdemeanor offenses for its interpretation of the statutory construction of Rule 43. While the Seventh Circuit did not deeply explore the intangible benefits of physical presence, requiring physical presence by a defendant does uphold the integrity of the judicial process by preventing adverse inferences of the defendant, allowing for observation of nonverbal cues, and allowing better communication between the defendant and defense counsel. However, by declining to reference the bigger picture of concerns for defendants, particularly indigent defendants with health and mobility problems, the Seventh Circuit missed an opportunity to address the need for accommodations to Rule 43's presence requirement.

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