JENNER&BLOCK

February 15, 2010

Jenner & Block LLP
919 Third Avenue
37th Floor
New York, NY 10022
Tel 212-891-1600
www.jenner.com

Chicago
Los Angeles
New York
Washington, DC

Sharmila Sohoni
Tel 212 891-1674
ssohoni@jenner.com

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20544

09-CR-008

Re: Proposed Amendments to Federal Rule of Criminal Procedure 43

To the Committee:

We were recently appointed as amicus curiae by the U.S. Court of Appeals for the Seventh Circuit to brief the court on whether a district court may conduct a Rule 32.1 supervised release revocation hearing by videoconference. The defendant contended that the videoconferencing was improper because supervised release revocation hearings constitute "sentencings" under Rule 43 and several courts have construed Rule 43's requirement of "presence" at sentencing to forbid the use of videoconferencing. As amicus curiae, we researched the issue and concluded that supervised release revocation hearings, even those that result in a term of reincarceration for the defendant, are not in fact "sentencings" for purposes of Rule 43, and that the requirements of that rule were therefore irrelevant to the question whether a district court may utilize videoconferencing at a supervised release revocation hearing.

We are concerned to observe that one of the Committee's proposed amendments to Rule 43 will inadvertently promote the notion that Rule 43 applies to Rule 32.1 hearings. The proposed amendment would alter Rule 43(a) to state: "Unless this rule, Rule 5, Rule 10 *or Rule 32.1* provide otherwise, the defendant must be present at" appearance, arraignment, trial, and sentencing. (Emphasis added.) Although the Committee Notes are silent on this point, the Report of the Advisory Committee explains that this change "conform[s] the rule to permit video teleconferencing as specified in other amendments." This amendment appears to flow from the incorrect assumption that a Rule 32.1 proceeding constitutes a "sentencing" under Rule 43, and that Rule 32.1 must therefore be referenced in Rule 43 for the new video teleconferencing amendment to Rule 32.1 to go into effect.

This view represents a misapprehension of the law. *See* Brief of Amicus Curiae, attached, at 4-15. There is no need to amend Rule 43(a) to "conform" to new Rule 32.1, as Rule 43 does not apply to Rule 32.1 proceedings. Changes to Rule 32.1 proceedings — including the proposed amendment that introduces videoconferencing at the defendant's option — may therefore be made without impact on or alterations to Rule 43.

Of course, it may have been the Committee's intention to make Rule 43's presence requirement applicable to Rule 32.1 hearings by inserting a cross-reference to Rule 32.1 into Rule 43(a). If that is the case, the Committee ought to make that change more explicitly and ought to comment on it in the notes to the new rule, as it would represent a substantial shift in the current law.

Sincerely,

Sharmila Sohoni

No. 09-1926

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	Appeal from the United States
	)	District Court for the Northern
Plaintiff-Appellee,	)	District of Illinois, Western
v.	)	Division.
	)	
CHRISTOPHER R. THOMPSON,	)	Case No. 3:00-cr-50002-1
	)	
Defendant-Appellant.	)	Philip G. Reinhard,
	)	Judge
	)	
	)	

BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Barry Levenstam
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
(312) 222-9350

Andrew Weissmann
Sharmila Sohoni
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, New York 10022
(212) 891-1600

Amicus Curiae

December 4, 2009

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

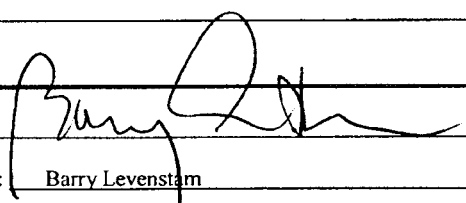
(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature:  Date: Dec 3 2009

Attorney's Printed Name: Barry Levenstam

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 353 N. Clark Street
Chicago, Il 60654-3456
Phone Number: 312-222-9350 Fax Number: 312-840-7735
E-Mail Address: blevenstam@jenner.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

| | **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: _____ Date: 12/2/09

Attorney's Printed Name: Andrew Weissmann

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 919 Third Avenue
New York, New York 10022

Phone Number: 212-891-1600 Fax Number: 212-909-0806

E-Mail Address: aweissmann@jenner.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: S. Soh Date: 12/2/2009

Attorney's Printed Name: Sharmila Sohoni

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: 919 Third Avenue
New York, New York 10022

Phone Number: 212-891-1600 Fax Number: 212-909-0806

E-Mail Address: ssohoni@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Defendant appealed on the ground that the district court improperly infringed his rights under the Federal Rules of Criminal Procedure and the due process clause of the fifth amendment to the United States Constitution by conducting his second supervised release hearing by videoconference, with both parties in court and the judge in another location. (*See* A19.)[1] In response, the government argued that the district court erred under the Federal Rules and that the error was not harmless, and thus did not address the constitutional issue. On October 9, 2009, this Court on its own motion appointed the undersigned counsel to file a brief and present oral argument in support of the district court's decision to conduct defendant's supervised release hearing by videoconference without being in the same location as the defendant.

ISSUES PRESENTED FOR REVIEW

1. Did the district court act within its discretion under the Federal Rules of Criminal Procedure by revoking the defendant's supervised release and committing him to serve time in prison at a hearing at which (a) the parties did not present evidence and (b) the defendant, his counsel, and the government were present in court, but the district court judge participated by live, two-way videoconference from a remote location?

2. Did the above-described hearing satisfy the requirements of the due process clause of the fifth amendment to the United States Constitution for

---

[1] Citations to A__ are to the appendix filed with Defendant's brief.

revoking supervised release and committing a defendant to a term of imprisonment of 12 months?

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed. Neither the Federal Rules of Criminal Procedure nor the due process clause of the fifth amendment requires the defendant and the judge to be present in the same room during a supervised release revocation hearing, particularly where no evidence is presented. Accordingly, the district court did not err by conducting the hearing via videoconference from a remote location while the parties and counsel were present in court.

Federal Rules of Criminal Procedure 43 and 32 require the defendant's presence only at the various phases of a criminal trial and at the sentencing in connection with the trial. In contrast, no rule requires the defendant's presence at a hearing on the revocation or modification of supervised release, which is governed by Rule 32.1. Even though a district court may commit a defendant to imprisonment at such a hearing, the revocation hearing does not constitute a Rule 32 criminal "sentencing" at which the defendant's presence is required by Rule 43.

The language and drafting history of the Rules confirm that a Rule 32.1 revocation hearing does not constitute a "sentencing" as that term is used in Rules 32 and 43. A term of imprisonment for violating a condition of supervised release is not a "sentence" under either Rule 32 or Rule 43. As a

result, this case did not involve a sentencing at which Rule 43 requires the defendant's presence.

The videoconferencing of the hearing also did not abrogate the defendant's right to allocution under Rule 32.1. The right of allocution does not require that a defendant be present in the same room as the court, but only that the defendant be asked personally by the court if he wishes to make a statement or provide evidence in mitigation. The defendant enjoyed that right in the hearing that gave rise to this appeal.

Finally, the district court did not violate the defendant's due process rights by conducting the supervised release revocation hearing via videoconference. The due process clause does not guarantee a defendant the right to be present in the same room as the judge at post-trial proceedings such as supervised release revocation hearings. The hearing in this case satisfied the applicable demands of due process: the defendant, defense counsel, and the prosecutor were in the courtroom in Illinois together, and the judge therefore was equally distant from both parties. Through the videoconferencing system, the judge could see and hear all of the parties and counsel in attendance and participated fully in the proceedings. The court provided the defendant with the right to speak on his behalf and he in fact exercised that right and spoke on his own behalf. The parties did not call any witnesses and the defendant did not say anything that necessitated a hearing with witnesses. Due process requires no more.

Therefore, this Court should affirm the judgment of the district court.

ARGUMENT

I. The District Court Did Not Abrogate The Federal Rules Of Criminal Procedure By Conducting The Defendant's Supervised Release Revocation Hearing Via Videoconference.

The district court did not err under the applicable Federal Rules of Criminal Procedure when it conducted defendant's supervised release hearing via videoconference, without being present physically in the same courtroom as the defendant, his counsel, and the government's attorneys. Only two rules in the Federal Rules of Criminal Procedure arguably require a defendant's physical presence during a supervised release hearing: Rule 43, which requires that the defendant be present at "sentencing," and Rule 32.1, which safeguards the defendant's right of allocution. Neither rule requires that the defendant and the judge be present physically in the same room at a supervised release revocation hearing, as opposed to a criminal sentencing.

Rule 43 is inapplicable to supervised release revocation hearings, even those that result in a term of imprisonment for the defendant. Further, a defendant need not be present physically to exercise effectively the right of allocution protected by Rule 32.1. As neither Rule 43 nor Rule 32.1 required the defendant and the court to be present physically in the same room at this supervised release revocation hearing, the district court did not err by conducting the hearing via videoconference.

A. Rule 43 Does Not Require The Defendant's Presence At A Supervised Release Revocation Hearing.

Rule 43, captioned "Presence of the Defendant," was adopted in 1944. At that time, Rule 43 required the presence of the defendant at "the imposition of

sentence." *See* Rule 43 (U.S. Code 1946 ed.). This was a reference to Rule 32, captioned "Sentence and Judgment," which was adopted contemporaneously. *See* Rule 32 (U.S. Code 1946 ed.). The Advisory Committee Notes to Rule 43 explicitly stated that the provisions of the rule "setting forth the necessity of the defendant's presence at arraignment and trial ... [do] not apply to hearings on motions made prior to or after trial." Adv. Comm. Notes to Rule 43, 1944 Adoption.[2] Accordingly, at the adoption of Rule 43, it was clear that post-trial proceedings such as probation revocation hearings lay beyond its ambit.[3]

In the subsequent decades, Rule 43 was modified and expanded on numerous occasions. None of these amendments, however, altered the rule to add a reference to probation or supervised release revocation hearings. The version of Rule 43 currently in force provides that a defendant "must be present" at the initial appearance, the initial arraignment, the plea, at "every trial stage," and at sentencing. Fed. R. Crim. P. 43(a). Supervised release and probation revocation hearings thus remain beyond the scope of Rule 43.

The parties contend that because a Rule 32.1 supervised release hearing can result in a term of imprisonment for the defendant (as it did here), such a

---

[2] Courts may consult the Advisory Committee Notes to ascertain the drafters' intent in promulgating the federal rules. *See Williamson v. United States*, 512 U.S. 594, 614-15 (1994) (Kennedy, J., concurring) (collecting cases relying upon Advisory Committee Notes as authoritative evidence of intent).

[3] At that time, federal courts did not impose supervised release. That came about in 1987, when Congress reformed the treatment of probation and introduced supervised release pursuant to the Sentencing Reform Act of 1984, P.L. 98-473, 98 Stat. 1987. Prior to those reforms, courts could impose probation, but only in lieu of a term of imprisonment. *See* 18 U.S.C. § 3651 (repealed).

proceeding should be treated as a "sentencing" for purposes of Rule 43. This argument ignores that sentencing is governed by Rule 32, "Sentencing and Judgment." In contrast, Rule 32.1, which is captioned "Revoking or Modifying Probation or Supervised Release," governs supervised release revocation and never uses the term "sentencing." Rule 32.1(d) instead states that the "disposition" of a supervised release case is governed by 18 U.S.C. § 3583. This statute, in turn, authorizes the court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision ...." 18 U.S.C. § 3583(e)(3). Like Rule 32.1 and unlike Rule 32, this statute does not use the term "sentence" to describe the term of imprisonment that a court may impose upon a defendant whose supervised release the court has revoked. If the drafters of the Rules intended that "revok[ing] a term of supervised release and requir[ing] the defendant to serve in prison" be treated as a "sentencing," the Rules simply would have used the word "sentencing" or required expressly that the defendant be present for the revocation proceeding.

The history of the Rules further confirms that a Rule 32.1 supervised release hearing, even one that results in a term of imprisonment for the defendant, does not constitute a "sentencing" under Rule 43. Moreover, important policy reasons exist for courts to maintain the distinction between sentencings and Rule 32.1 revocation hearings.

1. The History Of The Rules Demonstrates That A Revocation Proceeding Is Not A "Sentencing" At Which A Defendant's Presence Is Required.

The first mention of revocation of probation in the Rules occurred in 1966, when Rule 32 was amended to add a new subsection providing that the court "shall not revoke probation except after a hearing at which the defendant *shall be present* and apprised of the grounds on which such action is proposed." *See* Rule 32(f) (U.S. Code 1970 ed.) (emphasis added); Wright *et al.*, 3 Fed. Prac. & Proc. Crim. § 541 (3d ed.).

By including an express requirement of "presence" in this new subsection, the drafters of the Rules signaled that probation revocations had not been considered "sentencings," for which Rule 43 already required a defendant's presence. The drafters also indicated that probation revocation hearings should not in future be deemed "sentencings" governed by Rule 43 merely because the provision dealing with such hearings was included in a rule that otherwise addressed sentencing.

In 1980, Rule 32(f) was eliminated and a new Rule 32.1 was introduced to govern probation revocation hearings. The new rule eliminated the requirement of the defendant's presence. Instead, Rule 32.1 required only that the defendant be given "an opportunity to appear and to present evidence in his own behalf" at the revocation hearing. *See* Rule 32.1(a)(2)(C) (U.S. Code 1982 ed.).

The new Rule's substitution for the former explicit requirement of "presence" of the new weaker language requiring only the "opportunity to

appear" was a telling change. By separating out Rule 32.1 proceedings from the rules controlling Rule 32 sentencings and by removing the "presence" language from the new Rule 32.1, the drafters confirmed that the requirement of presence in Rule 43 would thereafter apply to Rule 32 sentencings, but not to Rule 32.1 revocation proceedings.

2. Amendments To Rule 32.1 Prove That A Rule 32.1 Revocation Proceeding Does Not Constitute A "Sentencing" At Which A Defendant's Presence Is Required.

In 1989, Rule 32.1 was expanded to cover supervised release revocation as well as probation revocation. Since then, the distinction between Rule 32.1 proceedings and Rule 32 sentencings has generated some confusion in the courts. Because probation and supervised release revocation hearings often result in a term of imprisonment, some courts assumed that these proceedings were sentencings governed by Rule 32. In particular, a split emerged among the circuits regarding whether a defendant had the right of allocution at a revocation hearing because Rule 32 safeguards the right to allocute at a criminal sentencing of the defendant. When the Advisory Committee stepped in to resolve this disagreement in 2005, it did so in a manner that conclusively established that a Rule 32.1 revocation hearing should not be deemed a "sentencing" even if it results in a term of imprisonment for the defendant.

Before 2005, several circuits had concluded that aspects of Rule 32's sentencing procedures applied to a Rule 32.1 revocation hearing. *See, e.g., United States v. Reyna*, 358 F.3d 344, 347 (5th Cir. 2004) (en banc); *United States v. Patterson*, 128 F.3d 1259 (8th Cir. 1997); *United States v. Carper*, 24

F.3d 1157 (9th Cir. 1994). According to these courts, a district court conducting a Rule 32.1 revocation hearing was required to grant the defendant the right to allocution under Rule 32 before imposing a "sentence" upon the defendant. For example, in *Patterson*, the Eighth Circuit held: "Rule 32 is not expressly limited to sentencing immediately following conviction.... Rules 32 and 32.1 are 'complementing rather than conflicting,' and ... Rule 32 applies to sentencing upon revocation of supervised release." 128 F.3d at 1261 (quoting *Carper*, 24 F.3d at 1159-60, 1162). Courts adopting this approach held that defendants had the right to allocution before "sentencing" at supervised release revocation hearings even though at that time Rule 32.1 did not guarantee that right.

Other circuits rejected that view. The Sixth Circuit held that despite the Rule 32 requirement of allocution before imposing sentence, a court could impose a term of imprisonment upon a defendant under Rule 32.1 without affording him the right of allocution. *See United States v. Coffey*, 871 F.2d 39, 40-41 (6th Cir. 1989) (holding that allocution was not required in Rule 32.1 hearing following revocation of the defendant's probation).[4]

---

[4] In an early and influential case decided before the adoption of Rule 32.1, *United States v. Core*, 532 F.2d 40, 42 (7th Cir. 1976), this Court held that Rule 32 "does not specifically mention probation revocation hearings but only requires the right of allocution be given before imposing sentence." 532 F.2d at 42. The Sixth Circuit relied upon *Core* in *Coffey*. This Court subsequently held that where a court postpones the imposition of an "original sentence" on an initial count to a probation revocation hearing, Rule 32 applies. *United States v. Barnes*, 948 F.2d 325, 329-30 (7th Cir. 1991). Although some courts have misread *Barnes* as requiring allocution in Rule 32.1 hearings, *Barnes* in fact did *not* address whether Rule 32 applied to the imposition of a term of

As the Sixth Circuit subsequently noted, it would make no sense to treat revocation hearings as implicitly subject to Rule 32's strictures on sentencing: "applying Rule 32 to supervised release sentencing would require, in addition to allocution, probation officers to prepare presentence reports before a supervised release sentencing.... There is no indication that Congress intended these additional requirements to apply to supervised release sentencing." *United States v. Waters*, 158 F.3d 933, 944 (6th Cir. 1998). Instead of misapplying Rule 32 in this fashion, the Sixth Circuit ruled that it would instead use its discretionary powers to require district courts under its supervision to provide defendants with an opportunity to allocute at supervised release sentencing. *Waters*, 158 F.3d at 944-45.

The Eleventh Circuit followed suit in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), *vacated as moot*, 324 F.3d 1224 (11th Cir. 2003). In *Frazier* the court rejected the defendant's contention that Rule 32.1 "incorporates" the provision of Rule 32 concerning the right of allocution:

> The focus of the discussion before us is whether Rule 32.1 also incorporates the additional provisions of Rule 32 including, but not limited to, the right of allocution. We think not. ... Were we to hold that Rule 32.1 incorporates all of the provisions of Rule 32, the sentencing court would not only have to give the defendant a right to allocution, it would have to require presentence investigation reports along with all of the other demands of the rule.... In our opinion, this would render Rule 32.1 superfluous.

---

imprisonment under Rule 32.1 due to a defendant's violation of the conditions of supervised release.

Accordingly, the Eleventh Circuit ruled that because Rule 32.1 did not expressly protect the right to allocute at a revocation hearing, there was no legal requirement that a district court grant a defendant the right to allocution at a revocation hearing for supervised release. *Frazier*, 283 F.3d at 1244-45.

Soon after the opinion in *Frazier*, the Advisory Committee addressed the dispute among the circuits, proposing to modify Rule 32.1 solely to add that it contained a right to allocution. The 2005 amendments to Rule 32.1 added a new section that expressly provided that a defendant "is entitled to ... an opportunity to make a statement and present any information in mitigation" at a revocation hearing. Rule 32.1(b)(2)(E). In the accompanying notes, the Advisory Committee cites the Eleventh Circuit's observation in *Frazier* that the protections of Rule 32 were not directly incorporated into Rule 32.1 hearings because that approach "would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1." *See* Adv. Comm. Notes on Rule 32.1, 2005 Amendments.

By thus modifying Rule 32.1, the drafters confirmed that the interpretation of the Rules adopted by the Sixth and Eleventh Circuits was correct and the interpretation adopted by the Fifth, Eighth and Ninth Circuits had been incorrect. If, prior to the 2005 amendments, the imposition of a term of imprisonment at a Rule 32.1 hearing constituted a "sentencing" governed by Rule 32, then Rule 32 by its own terms would have provided the right of allocution to defendants at such hearings. The Advisory Committee rejected

this view by confirming that an amendment was necessary to guarantee the right of allocution at such a hearing. The drafters thereby also confirmed that a Rule 32.1 hearing is not itself a "sentencing" governed by Rule 32, and that where rights that attend sentencing should apply to Rule 32.1 hearings, Rule 32.1 must adopt them expressly.

Bartone v. United States, 375 U.S. 52 (1963), relied on by the defendant, does not undermine this fact. In *Bartone*, the Supreme Court held that Rule 43 prohibited a district court from imposing a term of imprisonment upon an absent defendant for violation of a condition of probation. *Id.* at 53. The Court reached this result without the courts below deciding or even addressing the issue. *See id.* at 54-55 (Clark, J., dissenting). The Court appears to have assumed that the term of imprisonment imposed by the district court after the probation hearing constituted a Rule 43 sentencing, but did not discuss the issue. *See id.* at 53-55. In view of the subsequent changes to the Rules described above and *Bartone*'s unsteady foundation, *Bartone* should be limited to its facts. Notwithstanding the outcome in *Bartone*, Rule 43 has never expressly required the presence of the defendant at a probation or supervised release revocation hearing.

3. The Distinction Between Rule 32.1 Proceedings and "Sentencings" Is Meaningful And Should Be Enforced.

The Federal Rules of Criminal Procedure set forth the boundary between Rule 32.1 proceedings and "sentencings" under Rules 32 and 43. The drafters of the Rules have deliberately maintained the distinction between the two proceedings since Rule 32.1 was adopted in 1980. Although litigants and

courts may speak informally of imposing "sentences" (or of "resentencing") when referring to Rule 32.1 hearings, this colloquial shorthand cannot convey more procedural rights to defendants than the Rules do.

The practical distinction between the two types of proceedings is not merely a matter of formality. "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973). As many courts have recognized, the procedural safeguards on criminal sentencing imposed by Rule 32 do not apply in the context of Rule 32.1 revocation proceedings. For example, in *In re Judicial Misconduct*, 583 F.3d 597, 597 (9th Cir. 2009), the Ninth Circuit held that the Rule 32(i) requirement that judges "advise defendants of any facts conveyed by probation officers during off-the-record communications, if the judge plans to rely on those facts during sentencing ... doesn't apply when a judge merely modifies the terms of probation [under Rule 32.1]." Similarly, in *United States v. Hernandez-Gonzalez*, 163 F. App'x 520, 522 (9th Cir. 2006), the court held that Rule 32(i)(3)(B), which requires a district court to make a ruling before sentencing on any dispute as to a presentence report or any other controverted matter, does not apply to supervised release revocation proceedings.

These procedural differences reflect the different interests that are at stake in the two settings. In contrast to a criminal defendant at his original sentencing, the defendant at a supervised release hearing has a limited interest

in continued liberty. As the Supreme Court noted in *Morrissey v. Brewer*, "[r]evocation 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." 408 U.S. 471, 480 (1972). Fewer procedural safeguards are thus necessary in this context: "there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489. Treating Rule 32.1 proceedings as "sentencings" under Rules 32 and 43 would result in the loss of the valuable procedural flexibility that courts legitimately enjoy in the supervised release context.

Blurring the distinction between the two types of proceeding would also ignore that the defendant at a revocation hearing already has received the complete panoply of procedural rights that appertain to a full-fledged criminal trial and sentencing, as well as instructions regarding the consequences of violating supervised release.[5] The procedural constraints at supervised release revocation need not be as rigorous as in the context of full criminal sentencing, where the sentencing court is determining in the first instance the appropriate contours of punishment. Although a defendant's presence may be important, even constitutionally demanded, at criminal sentencing, the same is not true at

---

[5] *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (recognizing that a jury need not determine the fact of a prior conviction because that fact had previously been decided by a jury with "the certainty [of] procedural safeguards").

revocation, which is merely an "administrative proceeding designed to determine whether a parolee has violated the terms of his parole, not a proceeding designed to punish a criminal defendant for violation of a criminal law." *United States v. Wyatt*, 102 F.3d 241, 244 (7th Cir. 1996); *see also United States v. Crudup*, 461 F.3d 433, 437-38 (4th Cir. 2006) (summarizing guidelines commentaries and statutory provisions indicating that "revocation sentences should not be treated exactly the same as original sentences").

In sum, although they are similar in certain respects, a Rule 32.1 proceeding culminating in a term of imprisonment differs from a Rule 32 criminal sentencing. The distinction between the two settings cannot be disregarded merely because of the frequent informal shorthand use of the term "sentencing" to apply to both types of proceedings. Rule 43 grants a defendant no right to be present at his revocation hearing, and the district court's method of conducting that hearing neither implicated nor offended Rule 43.[6]

B. The Right Of Allocution Under Rule 32.1 Does Not Require Physical Presence In The Same Room As The Court.

Under the 2005 amendments to Rule 32.1, defendants have the right of allocution at supervised release hearings. Specifically, a defendant "is entitled to ... an opportunity to make a statement and present any information in mitigation." Rule 32.1(b)(2)(E). As both defendant and the United States

---

[6] The cases cited by the parties from other circuits holding that video-conferencing at criminal sentencings after trial cannot satisfy Rule 43 are therefore irrelevant to this appeal. *See United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (all construing requirements of Rule 43 at criminal sentencing).

recognize, this Court has not addressed whether the requirements of Rule 32.1 can be satisfied when the defendant exercises this right via videoconference. The parties jointly contend, however, that the videoconferencing in this case abrogated the defendant's right of allocution under Rule 32.1. The parties incorrectly reason that because the right of allocution under Rule 32.1 is identical to the right of allocution under Rule 32, and because courts in other circuits have demanded a defendant's *physical* presence in the same room as the court during Rule 32 sentencing, Rule 32.1 must also require the same degree of physical presence during allocution. *See* Brief of Defendants at 12; Brief of United States at 11-12.

This argument ignores that the right to allocution does not, by itself, subsume within it the right to be physically present before the court to which allocution is being made. The core right to allocution — the right recognized in Rule 32 and extended to Rule 32.1 in 2005, *see United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) — is the defendant's right to address the court personally rather than have his lawyer address the court on his behalf. In *Green v. United States*, 365 U.S. 301, 304 (1961), a plurality of the Supreme Court held: "[T]here can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded *the opportunity to speak* before imposition of sentence.... The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, *speak for himself*." (Emphasis added.) Relying on *Green*, this Court recently recognized in *United States v. Noel*, 581 F.3d 490, 502 (7th Cir. 2009) that

"before imposing a sentence, a trial judge must address the defendant *personally* and offer him the opportunity to speak," rather than merely inviting defendant's counsel to speak. (Emphasis in original.) *See also United States v. Williams*, 258 F.3d 669, 674-75 (7th Cir. 2001) (holding that court satisfied right to allocution by requesting "Williams himself, not his lawyer or any other representative," to speak).

The defendant's right to the opportunity to "speak for himself" to the court does not require that he be in the same room physically as the court. Where courts have demanded physical presence during allocution at Rule 32 sentencings, they have done so because Rule 43 applies to such sentencings, not because the right of allocution itself demands presence. The right to allocute safeguards not the right to physical presence but rather the right of the defendant to make a statement to the court. *See id.* Specifically, Rule 32.1(b)(2)(E) guarantees "an opportunity to make a statement and present any information in mitigation" at a supervised release revocation hearing. There is no question that in this case, the defendant received — and exercised — that right. The court specifically informed the defendant that he would be allowed to address the court and asked him to "go ahead and tell me what you want to say." (A20.) When the defendant hesitated, the court encouraged him to continue: "Go ahead. You can say anything else in your own behalf, if you so desire." (*Id.*) As this record makes clear, the court gave the defendant a full and fair chance to allocute, and in fact he did exercise that right at his supervised release hearing. The district court thus committed no error under

Rule 32.1 when it conducted the supervised release hearing from a remote location via videoconference.

II. The Videoconferenced Supervised Release Revocation Hearing In This Case Did Not Violate The Defendant's Due Process Rights.

The constitutional question of whether the defendant was entitled to be physically present during a revocation hearing effectively is answered by the analysis of the Rules set forth in Section I because Rule 43 confers greater protections than the due process clause. The fact that the defendant's hearing did not contravene Rule 43 therefore means that it likewise did not contravene due process. "[T]he protective scope of [R]ule 43(a) is broader than the constitutional rights embodied in the rule." *United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983). *Accord United States v. Navarro*, 169 F.3d 228, 237 (5th Cir. 1999) ("The scope of the protection offered by Rule 43 is broader than that offered by the Constitution."). *See also United States v. Boyd*, 131 F.3d 951, 953 n.3 (11th Cir. 1997) (collecting cases holding that "Rule 43's protections are broader than those afforded ... by due process, and thus if the rule does not require a defendant's presence at a given proceeding, neither does the Constitution").

Consistently with the foregoing, courts discussing the scope of the due process clause have held that due process does not create a requirement of presence at post-trial hearings. While it is a settled rule of law that due process requires the defendant to be present at trial, it is equally settled that due process does not require defendant's presence at post-trial proceedings such as supervised release hearings. "We do not understand that the right of a

defendant to be present in court throughout his trial has ever been considered to embrace a right to be present also at the argument of motions prior to trial or subsequent to verdict." *United States v. Lynch*, 132 F.2d 111, 113 (3d Cir. 1942). *See also Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934), *overruled on other grounds by Duncan v. Louisiana*, 391 U.S. 145, 154-155 (1968) ("The underlying principle [that the defendant must be present at trial] gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after."). Trial, in turn, "denote[s] the time between the impaneling of the jury and the delivery of the sentence," *United States v. Burke*, 345 F.3d 416, 422 (6th Cir. 2003), and does not extend to post-sentencing proceedings such as probation or supervised release revocation hearings. *See, e.g., Boyd*, 131 F.3d at 954 (holding that due process did not require defendant to be present at a post-trial evidentiary hearing).

United States v. Panzeca, 463 F.2d 1216, 1218 (7th Cir. 1972), the only due process case relevant to probation revocation hearings cited by the defendant, is not to the contrary. In that case, the defendant was entirely absent from his hearing and was deprived of the opportunity to speak in his own defense. *Id.* Here, the court conducted the hearing via videoconference, and specifically invited the defendant to speak. Accordingly, *Panzeca* does not control. In addition, *Panzeca*'s holding is infirm given the Supreme Court's subsequent decisions in *Morrissey*, 408 U.S. at 480, and *Gagnon*, 411 U.S. at 789, both of which extensively address the due process clause's requirements

in the probation revocation setting and neither of which demand that defendant and the court be present in the same room.

Even if the due process clause did impose some minimal requirement of presence at a supervised release revocation hearing, the videoconferencing conducted here would have satisfied that requirement. In *Morrissey*, 408 U.S. at 487, the Supreme Court announced the due process standards applicable to probation and supervised release revocation hearings. *See United States v. Neal*, 512 F.3d 427, 435 (7th Cir. 2008). *Morrissey* held that at such hearings, "[o]n request of the parolee, person[s] who ha[ve] given adverse information on which parole revocation is to be based [are] to be made available for questioning *in his presence*." *Id.* at 487 (emphasis added).[7] The next year, in *Gagnon*, the Court addressed the due process standards applicable to probation revocation hearings and clarified that the "presence" demanded by *Morrissey* did not entail physical presence in the same room of all participants: "While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the *conventional substitutes for live testimony*, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States ... from developing *other creative solutions* to the practical difficulties of the *Morrissey* requirements." 411 U.S. at 782 n.5 (emphasis added).

---

[7] No such evidence was presented here, and in any event the defendant would have been present for such testimony had it been presented; only the district court would not have been present physically in the courtroom at the time.

As these cases prove, the Supreme Court did not intend to impose strict procedural limits upon courts conducting probation and supervised release revocation hearings. Rather, the Supreme Court expressly sanctioned the use of "substitutes" and other "creative solutions" for actual presence at revocation hearings. Videoconferencing, whether of the defendant, of witnesses, or of the judge, is one such "creative solution." *See Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 775-76 (6th Cir. 2008) (holding, on habeas, that videoconferencing of witnesses at state parole revocation did not violate due process given the authorization of such measures by *Morrissey* and *Gagnon*); *cf. United States v. Gigante*, 166 F.3d 75, 79 (2d Cir. 1999) (affirming district court's holding over defense objection that Confrontation Clause was satisfied by use of "two-way, closed circuit, television" for witness testimony at trial).

Thus, the videoconferencing by the district court did not violate the defendant's due process rights. The defendant, defendant's counsel, and the government were gathered together in a courtroom in Illinois, while the district court participated via videoconference from a remote courtroom. Because they were together, both parties were equidistant from the judge. This was not a case where the court was closeted in the same room as the government while the defendant participated from a distance. The court affirmed that it could "both see and hear everybody in the courthouse in Rockford and [could] comprehend everything that has transpired." (A19.) The defendant was represented by able counsel and received more than one opportunity to be heard by the court. (A20-21.) The due process clause demands nothing more.

CONCLUSION

The district court did not err under either the applicable Federal Rules of Criminal Procedure or under the due process clause of the fifth amendment to the United States Constitution when it conducted defendant's supervised release revocation hearing via videoconference. The Court should affirm the judgment of the district court.

Respectfully submitted,

Barry Levenstam
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
(312) 222-9350

Andrew Weissmann
Sharmila Sohoni
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, New York 10022
(212) 891-1600

Amicus Curiae

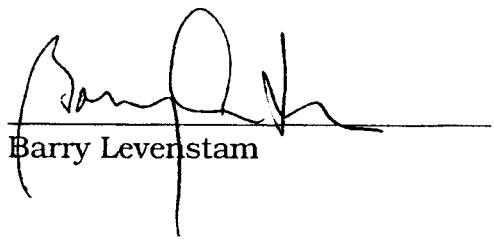
December 4, 2009

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Bookman Old Style, Font Size 12.

Dated: December 4, 2009

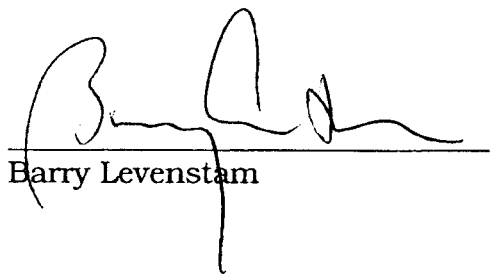


Barry Levenstam

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e)(1), the Brief of Amicus Curiae.

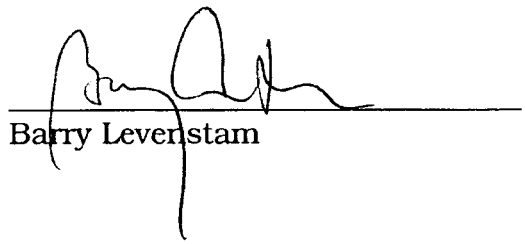
Dated: December 4, 2009



Barry Levenstam

CERTIFICATE OF SERVICE

Barry Levenstam, an attorney, hereby certifies that he caused an original and 14 copies and an electronic version of the foregoing Brief of Amicus Curiae to be transmitted to the Court for filing via hand delivery, and two copies and an electronic disk version of the Brief of Amicus Curiae to be served on the parties below, via the methods indicated, on December 4, 2009.



Barry Levenstam

William H. Theis
Office of the Federal Defender
55 E. Monroe Street, Suite 2800
Chicago, IL 60603-0000
(via messenger)

Joseph C. Pedersen
Office of the United States Attorney
308 W. State Street, Room 300
Rockford, IL 61101-0000
(via U.P.S. overnight delivery)