

# The Supreme Court of South Carolina

RE: Use of Remote Communication Technology by the  
Trial Courts

Appellate Case No. 2020-000447

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## ORDER

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**(a) Purpose.** Pursuant to Rule 612 of the South Carolina Appellate Court Rules (SCACR), this Court may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. The purpose of this order is to provide guidance on the use of remote communication technology by the trial courts, including appellate proceedings before the circuit court.

Since the start of the coronavirus emergency, remote communication technology has been used extensively by the trial courts, and this use has allowed court proceedings to safely occur despite the pandemic. In addition, this recent use of remote communication technology has shown it can, if used appropriately, conserve judicial resources, reduce travel and wait times for court participants, and reduce courtroom security and safety concerns.

While this order addresses some specific types of matters, it is impossible for it to address every type of matter that can possibly come before a trial court. For matters not specifically addressed in this order, judges should consider the general guidance along with how this order deals with similar matters to determine if a particular use of remote communication technology is appropriate.

When this order indicates that a proceeding may be conducted in whole or part using remote communication technology, it means that the use of remote communication technology can range from allowing a single person, such as a witness or other participant in the proceedings, to participate by remote means, to a proceeding in which all of the participants (judge, counsel, parties, witnesses, etc.) are participating by remote means, or anything in between.

This Court recognizes that various trials, pleas or hearings may have already been scheduled to be conducted using remote communication technology under the guidance

contained in the order of June 15, 2021.<sup>1</sup> If so, the use of remote communication technology for that trial, plea or hearing may continue to be conducted under the guidance contained in the June 15, 2021 order, notwithstanding any new limitations in this order.

**(b) Definitions.** For the purpose of this order:

**(1) Judge:** a judge of the circuit court, family court, probate court, magistrate court and municipal court, including masters-in-equity and special referees.

**(2) Remote Communication Technology (RCT):** technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time. This can range from a telephone call or conference call which provides only audio to sophisticated software products like WebEx, Zoom or Microsoft Teams which allows both audio and video to be shared. When this order refers to using RCT, Enhanced Remote Communication Technology (ERCT) may be used instead.

**(3) Enhanced Remote Communication Technology (ERCT):** a form of RCT such as WebEx, Zoom and Microsoft Teams which allows audio and video to be shared at differing locations in real time. When this order indicates ERCT is to be used, that form of RCT must be used.

**(4) Trial Court:** the circuit court (including masters-in-equity court), family court, probate court, magistrate court and municipal court.

**(c) General Guidance Regarding Use of RCT.**

**(1) Discretion of Judges.** In various provisions of this order, the decision to allow RCT to be used rests in the discretion of the judge. Even when the language in this order indicates RCT may be used, the facts and circumstances in a particular case or matter may indicate that the use of this technology is inappropriate. To some extent, the exercise of this discretion will necessarily be influenced by the technical skill of the judge, attorneys, other case participants and any supporting staff who will be using this technology. Finally, for some proceedings, this order may restrict this discretion. For example, this order may indicate that certain proceedings must be conducted using ERCT. Another example is that for some types of proceedings the consent of the parties or a sufficient justification must exist before RCT of any type may be used.

**(2) Constitutional Rights of Parties.** In the absence of a waiver, judges should not allow RCT to be used in a manner which would violate the rights of a party under the either the State or Federal Constitution.

**(3) Victims' Rights.** Victims' rights under Article I, Section 24 of the South Carolina Constitution and Article 15 of Chapter 3 of Title 16 of the South Carolina Code of Laws must be honored when RCT is used to conduct court proceedings. Nothing in this order shall be construed as preventing a judge, in the exercise of discretion, from allowing a victim to hear and/or view a proceeding or trial by RCT.

**(4) Public Access.** When a hearing, trial or other court proceeding is of a nature that it would normally be open to the public, the judge should take reasonable measures to provide public access to the portion of the proceeding that is being conducted using RCT. When a portion of a proceeding is being

conducted in a courtroom open to the public, this requirement is satisfied if the testimony presented using RCT can be heard by any observers in the courtroom. In other situations, this may be accomplished by other methods such as live streaming the proceeding over the internet, broadcasting the proceeding at a publicly accessible room at a courthouse or other facility, or utilizing a process that permits members of the public to view and/or listen to the proceedings. [2](#)

**(5) Use of ERCT.** Even when the use of ERCT, an enhanced form of RCT, is not required by this order, judges should consider using ERCT when the ability to both see and hear the persons participating remotely will assist in reaching a resolution of the matter under consideration.

**(6) Consent of the Parties.** Except as restricted by the guidance in this order, including the limits on the use of RCT in jury trials under section (d)(11) below, a judge may use RCT to the extent consented to by the parties. Even when the parties have consented, the judge may find it is inappropriate to use RCT based on the specific facts and circumstance of the case, including, but not limited to, the number of parties in the case, the number of witnesses expected to testify or the complexity of the legal issues involved.

**(7) COVID-19 and Other Communicable Diseases; Disasters.** While the number of COVID-19 infections has decreased significantly from its peak, the virus continues to pose a risk to those participating in court proceedings. Further, in the future, other communicable diseases may pose similar risks. Since the use of RCT can reduce the risk of infection to participants, judges should consider this factor in determining if the use of RCT is appropriate. In the event of a natural or man-made disaster, such as a hurricane, earthquake, flood, war or other armed conflict, or riot, the effects of the disaster may require a greater use of RCT. Finally, nothing in this order should be construed as preventing the Chief Justice from issuing guidance requiring the use of RCT by the trial courts in response to a public health emergency or other disaster.

**(8) Attorney-Client Communications.** If the use of RCT results in the attorney and the client being at different locations, a means must be available for the attorney and client to communicate confidentially while RCT is being used. This could be done outside of the RCT software using telephonic or text communication, and judges should allow persons to possess cell phones or other electronic devices in the courtroom when necessary for this purpose. Further, this private communication may be possible using the features of the RCT software, such as virtual breakout rooms. In any event, it is the responsibility of the attorney to ensure that an adequate method of communication is available.

**(9) Recording Remote Proceedings.** Other than the judge or court staff assisting the judge, no person shall record any court proceedings which are conducted using RCT except when the recording is authorized by the judge under Rule 605, SCACR.

**(10) Conducting Remote Proceedings to Facilitate Transcript Preparation in Courts of Record.** Where a court reporter or court monitor is unavailable, the judge shall conduct the RCT proceedings in a manner that will allow a court reporter to create a transcript at a later date. This would include, but is not

limited to, making sure the names and spelling of all of the persons speaking or testifying are placed on the record; ensuring exhibits or other documents referred to are clearly identified and properly marked; controlling the proceeding so that multiple persons do not speak at the same time; and noting on the record the start times and the time of any recess or adjournment.

**(11) Remote Administration of Oaths.** Where this order authorizes a hearing, trial or other matter to be conducted by RCT, any oath necessary during that hearing, trial or other matter may be administered using RCT. While it is preferable that the person administering the oath have both audio and visual communication with the person taking the oath, the oath may be administered if only audio communication is available, provided the person administering the oath can reasonably verify the identity of the person taking the oath. Notaries who are authorized to administer oaths may administer oaths utilizing RCT in the case of depositions. Nothing in this order shall be construed as authorizing remote administration of oaths for any other purpose than those contained in this order. For the purpose of this provision, the term "oath" includes an affirmation.

**(12) Effect of Remote Proceedings; Direct Contempt.** Proceedings conducted using RCT shall have the same effect as if all of the participants had been physically present in the courtroom. For the purpose of any direct contempt, a person participating by RCT shall be deemed to be in the presence of the judge.

**(13) Exhibits.** In the event an exhibit is to be introduced during the course of a proceeding conducted using RCT, the party introducing the exhibit must ensure that the judge, the other parties and counsel, and any court reporter all have a copy of the exhibit prior to the time it is introduced. This copy may be provided in paper or electronically. Nothing in this order shall be construed as preventing a judge from requiring the original of an exhibit to be presented to the court.

**(d) Guidance as to Specific Proceedings and Other Matters.**

**(1) County Grand Jury Proceedings.** The Solicitor or the Attorney General is authorized to present an indictment to the grand jury using RCT, and any necessary oath may be administered using RCT (see section (c)(11) above). Consistent with the law regarding the secrecy of county grand jury proceedings,[3](#) any recording feature in the RCT must not be used, and the person presenting testimony by RCT must be warned that no recording of any of the proceedings before the grand jury can be made.

**(2) South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR).** RCT and ERCT may be used for Online Dispute Resolution under Rule 5(h), SCADR.

**(3) Discovery in Civil Cases.** The parties in a civil case may agree to use RCT to conduct any discovery under the South Carolina Rules of Civil Procedure. Further, in the exercise of discretion, a judge may require discovery in a case to be conducted using RCT, and may direct that ERCT be used.

**(4) Arrest and Search Warrants.** An officer seeking the issuance of an arrest warrant or search warrant may appear before a judge using RCT. During

this appearance, the judge may administer the oath to the officer (see section (c)(11) above) and, if appropriate, may take sworn testimony to supplement the allegations in the warrant. The judge shall make a notation on the warrant indicating the oath was administered remotely and the officer was not available to sign the warrant in the presence of the judge. If probable cause is found, the judge shall sign the warrant and return the warrant to the officer for execution. While the officer may sign the warrant when it is returned, the failure to do so shall not affect the validity of the warrant. The warrant may be transmitted to the judge and returned to the officer by e-mail, fax or other electronic means. For the purpose of this section, the term "search warrant" shall also include applications under the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145.

**(5) Determination of Probable Cause Following Warrantless Arrest.** If after considering the affidavit submitted to support a warrantless arrest, a judge determines it is appropriate to supplement the affidavit with sworn testimony, a judge may take the testimony using RCT and administer the oath (see section (c)(11) above).

**(6) Bail Hearings in Criminal Cases.** At the discretion of the judge, a hearing to set bail, modify the terms of bail or to revoke bail for a criminal defendant may be conducted in whole or part using RCT.

**(7) Preliminary Hearings.** With the consent of the defendant and the representative of the State, a preliminary hearing may be conducted using RCT. Further, even without consent, a judge may allow a witness to testify at a preliminary hearing using RCT if the judge finds there is sufficient justification to do so.

**(8) Defense of Persons and Property Act.** A hearing under the Defense of Persons and Property Act (S.C. Code Ann. §§ 16-11-410, 16-11-440(C), and 16-11-450) can have far reaching consequences not only on the criminal case itself, but also on the civil remedies available to the victim. In light of this, any use of RCT in these hearings shall be limited to that provided by section (d)(12) below for non-jury trials.

**(9) Guilty Pleas.** The judge, the defendant, any counsel for the defendant, and the prosecutor must be physically present in the courtroom during a guilty plea<sup>4</sup>. A judge may allow another person, including but not limited to a victim, interpreter, or law enforcement officer, to participate in the guilty plea by RCT. Once the plea has been accepted, the use of RCT in sentencing is governed by section (d)(13) below.

**(10) Trials in General.** As a general rule, trials, whether jury or non-jury, should be conducted with all the necessary participants (i.e., judge, jury (if applicable), criminal defendant, counsel, self-represented litigant, etc.) being present in the courtroom, with witnesses appearing in the courtroom to testify.

In addition to being consistent with our longstanding practice and tradition in this State, this Court continues to believe there is great value in conducting trials live and in-person. In light of this, the following provisions relating to jury and non-jury trials restrict the use of RCT in these trials.

**(11) Use of RCT in Jury Trials.**



(A) With the consent of all parties, the judge may allow a witness to testify using ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

(B) Without the consent of the parties, a judge may allow a witness to testify using ERCT if the judge finds there is sufficient justification to do so. In a criminal case, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990).[5](#)

## **(12) Use of RCT in Non-Jury Trials.**

(A) If all the parties consent, the judge may allow a non-jury trial to be conducted in whole or part using RCT or ERCT. The consent shall be placed on the record and, in a criminal case, the judge must question the defendant to ensure this consent is being made knowingly and intelligently.

(B) Without the consent of the parties, a judge may allow a witness to appear by ERCT if the Court finds there is an adequate justification for allowing the witness to testify by ERCT. In criminal cases, this justification must rise to a level to satisfy the standard established by *Maryland v. Craig*, 497 U.S. 836 (1990) (see footnote 5).

## **(13) Criminal Sentencing.**

(A) **Non-Capital Cases.** Consistent with the broad discretion given to judges in sentencing,[6](#) a judge may allow testimony or other information to be presented using RCT during sentencing in a non-capital case.

(B) **Capital Cases.** In capital sentencing proceedings, the use of RCT shall be limited to that provided by section (d)(11) above if sentencing involves a jury, or by section (d)(12) above if sentencing is by a judge without a jury.

**(14) Other Pretrial and Post-Trial Proceedings.** Except for those pretrial proceedings addressed in other sections of this order, judges may, in their discretion, use RCT, either in whole or part, for pretrial proceedings. This includes, but is not limited to, hearings on motions, proceedings on procedural matters such as rights advisements or waivers of those rights, and status conferences. Further, in the discretion of the judge, post-trial proceedings, including hearings on post-trial motions under Rule 29, SCRCrimP, or Rules 50, 52, 59 or 60, SCRCP, may be conducted in whole or part using RCT. Without the consent of the parties to use RCT, judges should be cautious in using RCT for complex motions or where it appears the resolution of a motion may be dispositive of the case or a cause of action.

## **(15) Family Court Proceedings.**

**(A) Juvenile Delinquency Cases.** During the adjudicatory hearing in a juvenile delinquency case, ERCT may be used to the same extent as permitted in a non-jury criminal case under section (d)(12) above. In the dispositional hearing, RTC may be used to the same extent permitted for non-capital sentencing under section (d)(13)(A) above.

**(B) Other Hearings or Proceedings.** In many situations, a provision of this order will be directly applicable, and the family court should follow the guidance given in that provision. Due to the wide ranging and diverse matters which come before the family court, it is simply impossible to provide specific guidance that can be made applicable to every situation that may come before the family court, and this order does not attempt to do so. Instead, for matters not specifically covered by this order, this Court is confident the family court judges will consider the general guidance and make analogies to the specific guidance given for similar proceedings to determine the extent to which RCT should be used.

**(16) Appellate Proceedings Before the Circuit Court.** In appeals to the circuit court, the circuit court may, in its discretion, conduct any necessary hearings either in whole or part using RCT.

This order is effective immediately, and shall remain in effect until modified or rescinded by this Court. \_

s/Donald W. Beatty C.J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

s/George C. James, Jr. J.

Columbia, South Carolina  
August 27, 2021

<sup>1</sup> This amended order is available at <https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2596>.

<sup>2</sup> This Court is aware of the efforts made by the trial courts to provide public access to court proceedings during the coronavirus pandemic. In many situations, this involved new and creative uses of technology. We commend these efforts and ask the trial courts to continue to explore ways to ensure public access.

<sup>3</sup> *Ex parte McLeod*, 272 S.C. 373, 377-78, 252 S.E.2d 126, 128 (1979) (In a case involving

a county grand jury, the Court stated "the investigation and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes all its proceedings are legally sealed against divulgence" and "the presence or use of a court stenographer in proceedings before the grand jury is likewise not permissible.").

4 This represents a significant change from the prior order. While it was necessary to allow the more extensive use of RCT in guilty pleas during the height of the coronavirus pandemic, the admission of guilt by a criminal defendant in a courtroom is an important aspect of a guilty plea, and this Court no longer finds it necessary or appropriate to dispense with an in-person admission of guilt by a defendant when pleading guilty.

5 "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy* [*v. Iowa*, 487 U.S. 1012, at 1021 (1988)], our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850.

6 *State v. Gullede*, 326 S.C. 220, 229, 487 S.E.2d. 590, 594 (1997) ("A court may consider any relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided the information has sufficient indicia of reliability to support its probable accuracy."); *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (in sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he [or she] may consider or the source from which it may come."); Rule 1101(d)(3), SCRE ("rules of evidence are inapplicable to sentencing except in the penalty phase of capital trials").