

No. \_\_\_\_\_

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**In The Supreme Court of The United States**

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THOMAS WILLIAM CORNELIUS, JR., *Petitioner.*

v.

UNITED STATES OF AMERICA, *Respondent,*

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED ON REVIEW**

With respect to a defendant who does not waive his right to be physically present during a re-sentencing hearing, held pursuant to a stipulated resolution of a motion under 28 U.S.C. § 2255, is it reversible error for the district court to refuse defendant's request to physically appear for the re-sentencing hearing?

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Thomas William Cornelius, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **Orders Below**

The unpublished Memorandum decision of the United States Court of Appeals for the Ninth Circuit in Case Number 18-35733 is attached in the Appendix. *See also United States v. Cornelius*, 789 Fed. Appx 70 (9th Cir., January 2, 2020). The appeal arose from the proceedings in *United States of America v. Thomas William Cornelius, Jr.*, United States District Court, District of Oregon, Case Numbers 3:97-cr-00014-HZ-1 and 3:16-cv-01149-HZ.

### **Jurisdictional Statement**

The Ninth Circuit entered its final order in this case on January 2, 2020. The petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **Relevant Constitutional and Statutory Provisions**

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall \* \* \* be deprived of life, liberty, or property, without due process of law \* \* \*."

Federal Rule of Criminal Procedure 43(a)(3) provides:

(a) When Required. **Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:**

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) **sentencing.**

(b) When Not Required. A defendant need not be present under any of the following circumstances:

- (1) Organizational Defendant. The defendant is an organization represented by counsel who is present.
- (2) Misdemeanor Offense. The 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.
- (3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.
- (4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

(Emphasis added).

Federal Rule of Criminal Procedure 32.1 provides in relevant part:

\* \* \*

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. **The person is entitled to:**

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

- (C) **an opportunity to appear**, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
- (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
- (E) an opportunity to make a statement and present any information in mitigation.

(Emphasis added).

### **Statement of the Case**

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 2255. The proceeding under Section 2255 arose from the prison sentence that was imposed for a violation of petitioner's supervised release in his underlying criminal matter.

In 1997, petitioner was convicted of one count of Felon in Possession of a Firearm pursuant to the Armed Career Criminal Act (ACCA). He received a sentence of 181 months imprisonment, based on the assumption, uncontested at the time, that he had at least three predicate violent felonies under the ACCA. Petitioner served the full sentence and was released on supervised release.

On September 1, 2015, the district court revoked petitioner's supervised release and imposed a revocation sentence of 60 months consecutive to sentences imposed in other matters. The 60-month sanction

was premised on petitioner having been convicted under the ACCA, as five years was the maximum period of imprisonment that could be imposed for an ACCA offense.

On June 21, 2016, petitioner filed a motion to vacate or correct sentence under 28 U.S.C. § 2255, asserting, in essence, that subsequent case law rendered his ACCA conviction and the supervised release violation (SRV) sanction erroneous. The motion was based on *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016).

The parties resolved the Section 2255 motion by asking the district court to enter an amended judgment showing a time served sentence of 10 years imprisonment (the maximum for a non-ACCA Felon in Possession offense), and a revocation sanction of two years (the maximum sanction for a supervised release violation for the non-ACCA offense). Counsel for petitioner and the government appeared for a telephonic hearing on April 2, 2018. In that hearing, petitioner, through counsel, asserted his right to be physically present at the re-sentencing hearing. The Court subsequently ruled that petitioner would not be transported from his prison in Florence, Colorado, for the hearing in Oregon, and that he would instead appear telephonically.

All parties, including the petitioner, appeared by telephone for the re-sentencing hearing held on June 27, 2018. Petitioner objected to not being physically present, arguing that Federal Rule of Criminal Procedure 43(a)(3) required his physical presence. The district court overruled that objection and imposed the sentences contemplated by the parties' stipulation. On appeal, in an unpublished memorandum decision, the Ninth Circuit ruled that, to the extent Rule 43 was violated, petitioner was not prejudiced. (App. at 3).

### **Reasons to Allow the Writ**

The Supreme Court should grant the writ of certiorari in order to determine whether Rule 43 and the constitution require a defendant's physical presence at a re-sentencing hearing even when the court imposes a stipulated sentence to resolve a Section 2255 motion.

The parties reached a settlement of petitioner's Section 2255 petition that called for petitioner to be re-sentenced on the underlying conviction for Felon in Possession of a Firearm and on the revocation of supervised release. Mr. Cornelius had a right under the Due Process Clause of the Fifth Amendment to the United States Constitution to be present during his re-sentencing hearing. *See United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016) ("The United States Constitution protects the right to be present at one's trial and sentencing"), *citing Illinois v. Allen*, 397 U.S.

337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”).

Petitioner’s physical appearance at the re-sentencing hearing was required pursuant to Federal Rules of Criminal Procedure, Rule 43(a)(3), which embodies the right to be present derived from the Sixth Amendment Confrontation Clause, the Due Process Clause of the Fifth and Fourteenth Amendments, and the common law right. *Ornelas*, 828 F.3d at 1021. Rule 43(a)(3) provides that, “[u]nless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at: \* \* \* sentencing.” None of the exceptions set forth in the rule apply to Mr. Cornelius. The waiver provision of FRCrP 43(c) makes clear that a waiver occurs only when the defendant has been “voluntarily absent,” which did not happen in this case. Also, the Ninth Circuit has held that FRCrP 43 “unequivocally” states that the defendant must be present at sentencing. *United States v. Aguilar-Reyes*, 723 F.3d 1014, 1017 (9th Cir. 2013). The exceptions set forth in the rule are “exclusive.” *Ibid*, citing *Crosby v. United States*, 506 U.S. 255, 260 (1993) (holding that the “list of situations” in which sentencing may proceed “without the defendant \* \* \* is exclusive.”).

Because the hearing involved a sentence for a revocation of supervised release, FRCrP 32.1 also is applicable. That rule provides that

in a revocation hearing, the person is “entitled to \* \* \* an opportunity to appear.” FRCrP 32.1(b)(2). Here, petitioner was denied that opportunity.

The requirement of defendant’s presence at sentencing hearings applies with equal force to re-sentencings. *Aguilar-Reyes*, 723 F.3d at 1018, citing *United States v. Bryant*, 643 F.3d 28, 29 (1st Cir. 2011) (“A resentencing, assuming that the full range of ordinary sentencing issues is open, is treated essentially the same as an initial sentencing for purposes of the presence requirement.”); *United States v. Garcia-Robles*, 640 F.3d 159, 164 (6th Cir. 2011) (“Every circuit court to address the issue has held that when resentencing is directed pursuant to a general remand order, a defendant is entitled to be present and/or allocute. Such holdings rely upon the Federal Rules of Criminal Procedure, although some are constitutionally based.”)

The Ninth Circuit in this case held that any error under Rule 43 was harmless, citing *United States v. Berger*, 473 F.3d 1080 (9th Cir. 2007). However, this Court is asked to review this matter to determine whether the error in this case, which implicates petitioner’s fundamental constitutional right to be present during all critical stages of trial and sentence, see *Illinois v. Allen*, 397 U.S. at 338, falls into the category of structural error for which the harmless error standard of review does not apply. See *Neder v. United States*, 527 U.S. 1, 8 (1999) (harmless error

standard does not apply to errors that deprive defendants of “basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilty or innocence ... and no criminal punishment may be regarded as fundamentally fair.””).

## **CONCLUSION**

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

HOEVET OLSON HOWES, PC

*s/ Per C. Olson*  
\_\_\_\_\_  
Per C. Olson, OSB #933863  
Counsel of Record for Petitioner

# APPENDIX

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**FILED**

**NOT FOR PUBLICATION**

JAN 2 2020

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS WILLIAM CORNELIUS, Jr.,

Defendant-Appellant.

No. 18-35733

D.C. Nos. 3:16-cv-01149-HZ  
3:97-cr-00014-HZ-1

**MEMORANDUM\***

Appeal from the United States District Court  
for the District of Oregon  
Marco A. Hernandez, District Judge, Presiding

Submitted November 6, 2019\*\*  
Portland, Oregon

Before: PAEZ and RAWLINSON, Circuit Judges, and WU,\*\*\* District Judge.

Thomas Cornelius, Jr. (Cornelius) appeals the district court's denial of his

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

\*\*\* The Honorable George H. Wu, United States District Judge for the Central District of California, sitting by designation.

request to personally attend a hearing to resolve the motion to vacate his sentence under 28 U.S.C. § 2255 (§ 2255).

Section 2255 confers upon district court judges broad and flexible power to determine the scope of § 2255 proceedings. *See Troiano v. United States*, 918 F.3d 1082, 1086 (9th Cir. 2019). Resolution of a § 2255 motion occurs in two steps. First, the district court determines if the sentence is unlawful, and if so, vacates and sets aside the sentence. *See* 28 U.S.C. § 2255(b). Second, if the sentence is set aside, the district court fashions the appropriate remedy by: (1) discharging the prisoner; (2) resentencing the prisoner; (3) granting a new trial; or (4) correcting the sentence as appropriate. *See United States v. Castro-Verdugo*, 750 F.3d 1065, 1070 (9th Cir. 2014) (citing 8 U.S.C. § 2255(b)).

The record reflects that the district court opted to correct the sentence through approval of a stipulated amendment to the previously imposed sentence. Nevertheless, the proceeding at which the stipulation was approved was labeled a “Re-Sentencing Hearing.” Cornelius argues that Rule 43 of the Federal Rules of Criminal Procedure mandated his physical presence at the hearing. *See* Fed. R.

Crim. Pro. 43(a)(3) (providing that “the defendant must be present at . . . sentencing”).<sup>1</sup>

In any event, we conclude that to the extent Rule 43 was violated, “there [was] no reasonable possibility that prejudice resulted from [Cornelius’s] absence.” *United States v. Berger*, 473 F.3d 1080, 1094 n.2 (9th Cir. 2007) (citation omitted). The parties appeared telephonically, and the district court imposed the agreed-upon sentence. Cornelius was allowed to express his views regarding his absence and regarding the agreed-upon sentence. On this record, we are confident that Cornelius’s presence would not have altered the outcome of the proceeding. See *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139 (9th Cir. 2013).

**AFFIRMED.**

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<sup>1</sup> Although Cornelius makes a passing reference to a constitutional violation, he failed to develop the argument in his Opening Brief. In this circumstance, we decline to address any potential constitutional concerns. See *Am. Freedom Def. Initiative v. King Cty.*, 904 F.3d 1126, 1129 n.2 (9th Cir. 2018).