Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

HERMIN RODRIGUEZ-MONSERRATE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Should certiorari be granted because the district court conducted Petitioner's sentence and revocation hearing in his physical absence, even though it lacked grounds to do so under the Coronavirus Aid, Relief, and Economic Security Act?

2. Should certiorari be granted where the district court conditioned Petitioner's three-year term of supervised release on his successful completion of his high school education, even though, at the time of sentence, the 35-year-old Petitioner had only completed third-grade, and had failed fourth grade four separate times because he had a learning disability in both reading and writing?

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OPINION BELOW

There was one decision below, which is attached to this petition. *United States v. Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574 (1st Cir. Dec. 30, 2021).

JURISDICTION

The judgment of the Court of Appeals was decided on December 30, 2021, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Coronavirus Aid, Relief, and Economic Security Act and Rule 32.1(c) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Petitioner pleaded guilty to 18 U.S.C §922(g)(1) and 924(a)(2), being a prohibited person in possession of ammunition, and was sentenced to 37 months' imprisonment. The Court also revoked his supervised release, and sentenced him to a consecutive sentence of 18 months' imprisonment.

The First Circuit Court of Appeals affirmed Petitioner's conviction on December 30, 2021. *United States v. Rodriguez-Monserrate*, Nos. 20-1905, 20-1907, 2021 U.S. App. LEXIS 38574 (1st Cir. Dec. 30, 2021).

STATEMENT OF FACTS

In 2019, law enforcement agents saw a gun and magazines on a ledge near a window to the apartment occupied by Rodriguez's paramour in Puerto Rico. The partner allowed agents to search her apartment while Rodriguez was present. During the search, agents found ammunition, marijuana, face masks, a radio scanner, and various gun holsters. Rodriguez admitted most of these items were his. He also admitted that, at the time of his arrest, he had been convicted of a felony and was serving a term of supervised release.

On these facts, the government charged Rodriguez with possessing ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and sought the revocation of his supervised release.

In February 2020, Rodriguez pleaded guilty to the section 922(g)(1) charge pursuant to a plea agreement in which the parties agreed to seek a prison term of 30 months. The agreement specified he would waive his right to appeal if his sentence did not exceed 37 months.

Rodriguez's sentencing hearing was scheduled to be held on the same day as the hearing on the government's request to revoke his supervised release. At the time those hearings were set to occur, in

August 2020, the COVID-19 pandemic had caused the United States District Court for the District of Puerto Rico to defer all in-person proceedings until October 2020.

The district court thus asked Rodriguez to "consent" to proceed via videoconference. Rodriguez also filed a motion asking the court to take note of his consent and to hold the sentencing hearing via videoconference. At the start of the August 2020 proceedings, the court asked Rodriguez's whether his appearance by video was voluntary and he said yes. Rodriguez "consented" to appear by video for both his sentencing and revocation hearings.

The Court never told Petitioner his physical presence at sentence was required under the Federal Rules of Criminal Procedure. Nor did it tell him that, under the recently enacted CARES Act, it was still required it to defer his sentence until he could appear in court, because there was no risk he would remain in prison beyond the recommended period of incarceration. Finally, it never set forth any reasons--specific or otherwise--why the sentencing hearing could not be further delayed without serious harm to the interests of justice.

Instead, the court simply sentenced Rodriguez to 37 months on the §922(g)(1) conviction, the upper end of the guideline range. As a special condition of supervised release, it ordered Rodriguez, then 35-year-old "to complete his high school education," even though he had only managed to finish third-grade, and had failed fourth grade four separate times because he had a learning disability in both reading and writing.

The court then conducted Rodriguez's revocation hearing during the same videoconference. The government sought a 10-month revocation sentence, but the court agreed with the probation officer and imposed an 18-month revocation sentence, to be served consecutive to the 37-month sentence for §922(g)(1) conviction.

SUMMARY OF ARGUMENT

Certiorari should be granted for two reasons.

First, even with consent, the CARES Act does not permit a district court to dispense with the in-person sentencing requirement of Rule 43(a)(3) of the Federal Rules of Criminal Procedure, where, as here, the Petitioner faced no risk he might be required to remain in prison beyond the recommended period of incarceration. This especially true where the government and the defendant below both agreed that the district court did not, as required by the Act, offer any specific reasons that Petitioner's sentencing hearing could not be further delayed without serious harm to the interests of justice.

Second, a district court may not condition a Petitioner's three-year term of supervised release on his successful completion of his high school education where, at 35-year-old, he has only completed third-grade, and had failed fourth grade four separate times because he had a learning disability in both reading and writing.

The remedy is not, as the First Circuit found, to impose an unjust special condition, and then place the burden on a disabled and uncounseled Petitioner to either face re-incarceration or return to court

and file a motion under Rule 32.1(c) of the Federal Rules of Criminal Procedure seeking a modification of the condition. That would violate all notions of fair play and fundamental justice.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT CONDUCTED PETITIONER'S SENTENCE AND REVOCATION HEARING IN HIS PHYSICAL ABSENCE, EVEN THOUGH IT LACKED GROUNDS TO DO SO UNDER THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT.

The District Court violated the Coronavirus Aid, Relief, and Economic Security Act [hereinafter "CARES Act"], by conducting the sentence and revocation hearing in Petitioner's physical absence, and by failing to set forth specific reasons, on the record, why it could not simply adjourn the sentence until he could be present in court.

Where, as here, Petitioner faced a sentence of 18 months on the revocation, and a total sentence, with his plea, of 55 month's imprisonment, there was no risk he might be required to remain in prison beyond the recommended period of incarceration. The CARES Act did not, therefore, apply to Petitioner, and the district court should not have conducted the sentence in his absence. *See United States v. Fagan*, 464 F. Supp. 3d 427, 433 (D. Me. 2020)(motion for combined plea and sentencing hearing via telephone or video conferencing denied because delay until he could appear in person posed no risk of serious harm to the

interests of justice where he faced a sentence of 30 to 37 or 33 to 41 months' imprisonment).

Here, too, the district court should have adjourned Petitioner's sentence, until such date as the pandemic would permit his physical presence in court. Contrary to the First Circuit's ruling, the district court never should have reached or accepted Petitioner's "consent," when the CARE Act precluded a non-physical sentence.

Certiorari should now be granted in this case of first impression, which has such enormous national significance, during the pandemic, where a defendant faces no risk he might be required to remain in prison beyond the recommended period of incarceration, the CARES Act does not apply, and a defendant must be physically present in court, as required by Rule 43(a)(3) of the Federal Rules of Criminal Procedure.

In affirming, the First Circuit Court of Appeals disagreed. It claimed that, with the revocation hearing, which had no appeal waiver, "Rodriguez is at best entitled to plain error review." *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, at *5 and that, "*[i]n his opening brief* on appeal, Rodriguez makes no attempt to satisfy that standard as to his arguments based on either Rule 32.1 or the

CARES Act (emphasis added). Those arguments are therefore waived." *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, at *5 (citations omitted).

In finding waiver, the Court never addressed the merits of Petitioner's contention. The Court is mistaken. In fact, Petitioner specifically argued that, "[a]lthough Appellant did not object, and actually consented to the videoconference, the structural defect in the trial mechanism is neither plain error, *United States v. Riccio*, 529 F.3d 40, 46 (1st Cir. 2008), invited error, *United States v. Vachon*, 869 F.2d 653, 658 (1st Cir. 1989), nor harmless error. On the contrary, it is automatic *per se* reversible error.

When the government argued in its respondent's brief that the error was not automatic *per se* reversible error, and was, in fact, waived, Petitioner argued, in his reply brief, that the error was not waived, and was, in fact, plain (Petitioner's reply brief: 13-14).

Indeed, he specifically argued that, to prevail on plain error review, he bears the heavy burden of showing (1) that an error occurred; (2) that the error was clear or obvious; (3) that the error affected his substantial rights; and (4) that the error also seriously impaired the fairness,

integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997); *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Under this standard, he argued an error occurred under the CARES Act, because it does not permit a sentence in his physical presence where he faced a lengthy, non-time-served sentence that presents no risk he will overserve his sentence as a result of the Covid-19 pandemic. The error was clear because a defendant's physical absence at sentence violates Rule 43(a)(3), and constitutes *per se* error. The error affected his substantial rights because, when a defendant is absent from sentence, it "frustrate[s] the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Finally, it seriously impaired the fairness of the sentence because Petitioner's absence prevented him from either conferring with defense counsel in person, or from making a final plea on his own behalf to the sentencer, again, in person. *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002).

The fact that Petitioner replied to the government's waiver argument with a plain error analysis in his reply brief, rather than in his

opening brief, is of no moment. That is permitted, and does not constitute appellate waiver, as the First Circuit found. *See United States v. Leffler*, 942 F.3d 1192, 1198 (10th Cir. 2019)(" ... we have left open the door for a criminal defendant to argue error in an opening brief and then allege plain error in a reply brief after the Government asserts waiver"); *United States v. MacKay*, 715 F.3d 807, 831 n.17 (10th Cir. 2013)("An appellant certainly would benefit from a more developed argument if he acknowledged forfeiture in his opening brief, but we do not discount the possibility that *we may consider a plain error argument made for the first time in an appellant's reply brief*")(emphasis added).

In support of its waiver finding, the First Circuit cites *United States v. Pabon*, 819 F.3d 26, 33 (1st Cir. 2016), in which the Court ruled that "Pabon has waived these challenges because he has not even attempted to meet his four-part burden for forfeited claims under *United States v. Padilla*, 415 F.3d 211, 218 (1st Cir. 2005)(en banc)." Yet in *Pabon*, Appellant never argued plain error at all; here, he did. The issue, therefore, is not waived on appeal.

On the merits, even though a defendant's absence from sentence is a structural and reversible error *per se*, that is not subject to harmless error analysis, the First Circuit writes:

> Nor does Rodriguez's use of the phrase "structural defect" to describe this rather prosaic and relatively inconsequential procedural error change the equation. Structural errors comprise a 'tiny class,' which 'includes only the most pervasive and debilitating errors' that 'infect '[t]he entire conduct of [a] trial from beginning to end.'" *United States v. Padilla*, 415 F.3d 211, 219 (1st Cir. 2005)(*en banc*)(first alteration in original)(*quoting Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). Here, proving structural error is an especially daunting task .... *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, at *18-19.

Yet in *United States v. Williams*, 641 F.3d 758, 764-65 (6th Cir. 2011), the Sixth Circuit emphasized that physical non-presence at sentence, even with electronic presence, is a structural, reversible defect, when it said:

> The district court erred by conducting the sentencing hearing by video conference with Williams not physically present in the courtroom. With certain limited exceptions not applicable here, Rule 43(a) requires that a criminal defendant be present at certain stages of his or her proceedings, including sentencing. Fed. R. Crim. P. 43(a)(3). This requirement comports with the general view adopted by our sister circuits that criminal defendants have a constitutional right to be present at sentencing. *See United States v. DeMott*, 513 F.3d 55, 58 (2d Cir. 2008); *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169 (1st Cir. 2006); *United States v. Bigelow*, 462 F.3d 378, 381 (5th Cir.

> 2006); *United States v. Agostino*, 132 F.3d 1183, 1199 n.7 (7th Cir. 1997).
>
> Three different courts of appeal have addressed whether electronic 'presence' by video conference at sentencing satisfies the requirements of Rule 43(a), and all have concluded that it does not. *See United States v. Torres-Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999). Consistent with the results reached by our sister circuits, we agree that a district court may not conduct a sentencing hearing by video conference. The text of Rule 43 does not allow video conferencing. The structure of the Rule does not support it. As our sister circuits have recognized, and anyone who has used video conferencing software is aware, 'virtual reality is rarely a substitute for actual presence.' *Lawrence*, 248 F.3d at 303.

Critically, the CARES Act does not permit video sentences--with or without consent--where a district court fails to set forth specific reasons, on the record, why it cannot adjourn a sentence, and where there is no risk Petitioner might be required to remain in prison beyond the recommended period of incarceration.

The First Circuit thus erred when it found that, ""[b]ecause Rodriguez did affirmatively consent to videoconferencing, th[e] [above cited] cases are inapposite," *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, at *15. A Court cannot ask a Petitioner to consent to violate of Rule 43. Conducting a sentence, in Petitioner's absence,

constitutes *per se* automatic error, and the plain error standard is inapplicable.

Even though the First Circuit claims consent distinguishes *Williams* from this case, it is incorrect. In *Williams*, for example, the defendant consented to a video sentence, by never objecting, yet that was still found constitutionally inadequate. *See, e.g., Williams,* 641 F.3d 758, 763 (6th Cir. 2011)("Williams did not object to not being physically present in the courtroom.").

Because presence, not consent, is determinative, a defendant's absence from sentence is a structural defect in the trial mechanism, which defies "harmless-error" standards. Without the basic protection of the Fourteenth Amendment due process right to be heard, in person, at sentence, no criminal punishment may be regarded as fundamentally fair. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1264-65 (1991)("The admission of an involuntary confession -- a classic 'trial error' -- is markedly different from the other two constitutional violations referred to in the Chapman footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the total deprivation of the right

to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."). Not being physically present at sentence to make a personal plea about one's liberty interest is an even graver structural defect than not having counsel.

Certioarari should thus be granted because the CARES Act does not dispense with the in-person sentencing requirement of Rule 43(a)(3) of the Federal Rules of Criminal Procedure where a defendant faces no risk he might be required to remain in prison beyond the recommended period of incarceration. This is especially true where the First Circuit, the government and the Defendant all agreed that the district court never set forth, on the record, any reason--let alone a specific reason--why the hearing could not be adjourned, during the pandemic, so that Petitioner could physically appear in court. *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, *17 ("As to the first contention, the parties agree that the

court did not (as required by the Act) offer any 'specific reasons that' Rodriguez's sentencing hearing could not 'be further delayed without serious harm to the interests of justice.' CARES Act § 15002(b)(2)(A), 134 Stat. at 528-29.").

Still, the First Circuit found that, "[e]ven if there was error here because the district court failed to strictly comply with the CARES Act, such error would not come close to making this an egregious case triggering the miscarriage-of-justice exception to plain error forfeiture. On these facts, neither the error nor its impact on Rodriguez would be grave." *Id*. at 18 (citations, internal quotation and grammatical marks omitted). It is again incorrect. A criminal defendant has a constitutional right to be physically present at sentence, and his illegal absence constitutes a miscarriage of justice, and a defect in the trial mechanism, because it violates his Fourteenth Amendment due process right to be heard, and present, in court. Certiorari should be granted to so find.

POINT II

CERTIORARI SHOULD BE GRANTED WHERE THE DISTRICT COURT CONDITIONED PETITIONER'S THREE-YEAR TERM OF SUPERVISED RELEASE ON HIS SUCCESSFUL COMPLETION OF HIS HIGH SCHOOL EDUCATION, EVEN THOUGH, AT THE TIME OF SENTENCE, THE 35-YEAR-OLD PETITIONER HAD ONLY COMPLETED THIRD-GRADE, AND HAD FAILED FOURTH GRADE FOUR SEPARATE TIMES BECAUSE HE HAD A LEARNING DISABILITY IN BOTH READING AND WRITING.

The district court conditioned Petitioner's three-year term of supervised release on his successful completion of his high school education--even though, at the time of sentence, the 35-year-old defendant had only completed third-grade, and had failed fourth grade four separate times because he had a learning disability in both reading and writing.

Certiorari should be granted because the purpose of supervised release is training and treatment, *United States v. Johnson*, 529 U.S. 53, 59-60, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000), not unattainable goals and certain reincarceration.

Critically, the First Circuit acknowledged that it was " ... sympathetic to Rodriguez's claim that his liberty should not be curtailed if he fails to 'complete his high school education' after a good-faith

effort." *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, *21. Yet it held that " ... we think it too soon to say more about this issue given the limitations of our review." *Id*. It is not. A district court may not impose a special condition of supervised release it knows cannot be met, and thus curtail a defendant's liberty. That is not beyond a circuit court's reviewing powers.

The First Circuit's rationale is unsound. It concedes that, " ... given Rodriguez's educational history, he may not be an ideal candidate for the sort of mandatory educational requirement the district court imposed," yet claims "Rodriguez expressed a desire to continue his education while incarcerated, and nothing in the record conclusively illustrates that he cannot find a way to satisfy the court-imposed condition." *Id*. Not so. Petitioner's disabilities, and his failed efforts to pass fourth grade, conclusively prove he cannot obtain a high school degree, let alone pass grades five through 12. His wish to continue his education is not the same as obtaining a high school degree, and conditioning his liberty on graduating is far different than encouraging him to obtain additional education.

The First Circuit's alternative rationale--that this issue is unripe--is equally unsound. It says, "[o]n the whole, we think it too soon to say more about this issue given the limitations of our review. Rodriguez has more than three years of his prison term yet to serve. Certainly Rodriguez need try to complete a high school education. If he succeeds, the better for everyone, and the issue disappears. Conversely, should he fail, he can ask the district court to modify the mandatory educational condition under Federal Rule of Criminal Procedure 32.1(c)." *Rodriguez-Monserrate*, 2021 U.S. App. LEXIS 38574, *21-22.

This Court has never addressed Rule 32.1(c), making this a case of first impression. Certiorari should be granted because a district court cannot impose an unreasonable special condition of supervised release on a learning-disabled defendant with a third-grade education, and then expect him to return to court, without counsel, to modify the condition, or face arrest. To do so violates all notions of fair play and substantial justice.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: January 5, 2022
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

HERMIN RODRIGUEZ-MONSERRATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on January 5, 2022, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney for the District of Puerto Rico, Torre Chardon, Suite 12-1, 350 Carlos Chardon Street, San Juan, Puerto Rico 00918, and on Hermin Rodriguez-Monserrate, 3798-069, Tallahatchie County Correctional Facility, 415 U.S. Highway 49 North,Tutwiler, MS 38963. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court and are filing one copy of the petition, instead of 10, with this Court, pursuant to its April 15, 2020 order regarding the Covid-19 pandemic.

Arza Feldman
Arza Feldman

United States Court of Appeals
For the First Circuit

Nos. 20-1905, 20-1907

UNITED STATES OF AMERICA,

Appellee,

v.

HERMIN RODRIGUEZ-MONSERRATE, a/k/a Cano, a/k/a Canito.

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Francisco A. Besosa, U.S. District Judge]

Before

Thompson, Kayatta, and Barron,
Circuit Judges.

Arza Feldman, with whom Feldman and Feldman was on brief, for appellant.

Robert P. Coleman III, Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, were on brief, for appellee.

December 30, 2021

KAYATTA, Circuit Judge. In this consolidated appeal, Hermin Rodriguez-Monserrate raises a host of procedural and substantive challenges to two sentences he received at hearings conducted via videoconference during the COVID-19 pandemic. We find that all but one of his challenges are waived or otherwise without merit and that his remaining challenge is not yet ripe for review. Our reasoning follows.

I.

This case arises out of the following events. In 2019, law enforcement agents saw a gun and magazines on a ledge near a window to the apartment occupied by Rodriguez's romantic partner. The partner allowed agents to search her apartment while Rodriguez was present. During the search, agents found ammunition, marijuana, face masks, a radio scanner, and various gun holsters. Rodriguez was arrested and admitted that most of these items were his, though he denied owning the gun and associated magazines found on the ledge.[1] Rodriguez further admitted that, at the time of his arrest, he had been convicted of a felony and was serving a term of supervised release.

Rodriguez's arrest led to two actions against him. First, the government charged him with committing a new crime:

[1] Rodriguez's partner told the agents the gun belonged to Rodriguez. Neither party contends that this factual dispute is salient to the issues on appeal.

possessing ammunition as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Second, the government sought revocation of his supervised release.

At an in-person hearing in February 2020, Rodriguez pleaded guilty to the section 922(g)(1) charge pursuant to a plea agreement in which the parties agreed to seek a prison term of 30 months. The agreement specified that Rodriguez waived his "right to appeal any aspect of [the] case's judgment and sentence, including but not limited to the term of imprisonment . . . and conditions of supervised release" so long as his sentence did not exceed 37 months.

Rodriguez's sentencing hearing on the section 922(g)(1) conviction was scheduled to be held on the same day as the hearing on the government's request to revoke his supervised release. By the time those hearings were to occur, in August 2020, the COVID-19 pandemic had caused the United States District Court for the District of Puerto Rico to continue all in-person proceedings until October 2020. See Third Am. Order Continuing Civil & Criminal Proceedings, Misc. No. 20-0088 (GAG) (Aug. 25, 2020), ECF No. 21.[2] Accordingly, the district court sought Rodriguez's consent to proceed via videoconference. The court obtained that consent in

[2] Both hearings had already been continued once before due to the COVID-19 pandemic; they were previously scheduled to occur on May 27, 2020.

two ways. First, Rodriguez filed a motion "respectfully request[ing] th[e] court to take note of his consent and to hold the [sentencing] hearing via videoconference." Second, at the start of the August 2020 proceedings, the court orally confirmed on the record that Rodriguez's "appear[ance] by video" was "voluntary" and that he "[did] not have to appear by video." The court told Rodriguez that he could consent to appear by video for both his sentencing and revocation hearings. Rodriguez consented to conducting both hearings by videoconference.

The court sentenced Rodriguez on the section 922(g)(1) conviction to 37 months -- the upper bound of the guideline range. The district court also imposed as one of several conditions of supervised release a requirement that Rodriguez "shall complete his high school education."

The court conducted Rodriguez's revocation hearing during the same videoconference pursuant to Rodriguez's earlier consent. The government sought a 10-month revocation sentence based on an estimated guideline range of 4-10 months, but the probation officer calculated the range to be 12-18 months. The court agreed with the probation officer and imposed an 18-month revocation sentence, to be served consecutive to the 37-month sentence for the section 922(g)(1) conviction.

During each hearing, Rodriguez asked the court to reconsider the pertinent sentence. The court denied each request.

Rodriguez now brings an array of challenges to both of his sentences.

II.

We begin with the revocation hearing and sentence. Unimpeded by his appeal waiver, which applies only to his sentence for the section 922(g)(1) conviction, Rodriguez raises two types of challenges to his revocation hearing and sentence. First, he argues that, notwithstanding his consent to proceed by videoconference, the district court erred in conducting the revocation hearing in that manner. Second, he argues that his revocation sentence was procedurally and substantively unreasonable. For the following reasons, both claims fail.

A.

Rodriguez argues that the district court erred in conducting his revocation hearing via videoconference because doing so was impermissible under both Federal Rule of Criminal Procedure 32.1 and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Rodriguez did not raise these arguments below; rather, he consented to proceeding via videoconference, telling the district court that he "want[ed] to appear here and now." Hence, Rodriguez is at best entitled to plain error review. See United States v. Delgado-Sánchez, 849 F.3d 1, 6 (1st Cir. 2017). In his opening brief on appeal, Rodriguez makes no attempt to satisfy that standard as to

his arguments based on either Rule 32.1 or the CARES Act. Those arguments are therefore waived. United States v. Pabon, 819 F.3d 26, 33-34 (1st Cir. 2016) (failure to address plain error standard waives challenge); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000) ("[I]ssues advanced for the first time in an appellant's reply brief are deemed waived.").

Rodriguez also briefly asserts that proceeding by videoconference "impacted his right to the effective and meaningful assistance of counsel." Again, though, he made no claim below that the particular video format employed by the court impaired his ability to consult confidentially with his lawyer. Indeed, he does not dispute that the district court explained, "If you want to speak with your lawyer before I sentence you, or before I make a decision on your revocation, please let us know, and we will make arrangements for both of you to have a confidential communication." Nor does Rodriguez develop on appeal any argument as to how the format plainly impaired his ability to receive the assistance of counsel. This argument is therefore both forfeited and waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); Pabon, 819 F.3d at 33-34.

B.

Rodriguez next attacks his revocation sentence on procedural and substantive grounds. These challenges also fail.

We begin with procedural reasonableness. Rodriguez does not direct our attention to any objection below that was "sufficiently specific to call the district court's attention to the asserted [procedural] error," as required to preserve for appellate review an argument that a sentence is procedurally unreasonable. United States v. Soto-Soto, 855 F.3d 445, 448 n.1 (1st Cir. 2017). We must therefore conclude that the argument was not preserved, and is subject to plain error review. Because Rodriguez does not attempt to satisfy that standard of review, his procedural reasonableness argument is waived on appeal. Pabon, 819 F.3d at 33-34.[3]

In contrast, Rodriguez preserved his substantive reasonableness challenge below by "advocat[ing] for a sentence shorter than the one ultimately imposed." United States v. García-Mojica, 955 F.3d 187, 194 (1st Cir. 2020) (quoting Holguin-Hernandez v. United States, 140 S. Ct. 762, 766 (2020)). We

[3] The crux of Rodriguez's procedural reasonableness claim seems to be that the sentencing court disregarded his arguments for leniency. We shortly return to -- and reject -- this contention. Thus, even if Rodriguez had preserved his procedural reasonableness claim before the sentencing court and had not waived it on appeal, it would fail for the reasons discussed below.

therefore review for abuse of discretion the substantive reasonableness of the sentence. Id.

A sentence is substantively reasonable if it rests on "a plausible sentencing rationale" and reaches "a defensible result." United States v. Cox, 851 F.3d 113, 120 (1st Cir. 2017) (quoting United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008)). The "universe of reasonable sentences" is "expansive." Id. (quoting United States v. King, 741 F.3d 305, 308 (1st Cir. 2014)). And "[w]e have repeatedly emphasized that '[a] challenge to the substantive reasonableness of a sentence is particularly unpromising when the sentence imposed comes within the confines of a properly calculated [guideline range].'" Id. at 126 (second alteration in original) (quoting United States v. Demers, 842 F.3d 8, 15 (1st Cir. 2016)).

Rodriguez's revocation sentence is substantively reasonable. The district court imposed a sentence within (albeit at the high end of) the probation officer's proffered guideline range, and Rodriguez does not argue that the range was improperly calculated. The district court also provided a plausible rationale for the sentence when it explained that Rodriguez's "new criminal conduct . . . has shown his serious disrespect for the law and his lack of commitment to make changes towards a pro-social reintegration into society." The court determined "that a sentence at the high end of the guidelines [was] sufficient but not greater

than necessary in this case" given Rodriguez's "noncompliance history and characteristics."

On appeal, Rodriguez focuses on the district court's failure to address potentially mitigating evidence, including his "extremely difficult childhood," his learning disability, and his responsibilities caring for his ailing mother. But this court "do[es] not require an express weighing of mitigating and aggravating factors or that each factor be individually mentioned." United States v. Lozada-Aponte, 689 F.3d 791, 793 (1st Cir. 2012). We have upheld sentences imposed after the district court "ha[s] read the defense's sentencing memo and ha[s] heard the defense's leniency plea." United States v. Dávila-Bonilla, 968 F.3d 1, 12 (1st Cir. 2020). That is precisely what happened here. Further, the presentence investigation report -- which the court referenced before the revocation hearing -- described Rodriguez's childhood, his learning disability, and his mother's ill health/medical needs. So the fact "that the district court did not explicitly mention [mitigating factors] during the sentencing hearing suggests they were unconvincing, not ignored." Lozada-Aponte, 689 F.3d at 793.

III.

Rodriguez also raises a host of challenges to his sentence on the section 922(g)(1) conviction for possessing

ammunition. We begin with the question whether Rodriguez effectively waived his right to appeal that sentence.

A.

Rodriguez's plea deal contained the following provision:

> Defendant knowingly and voluntarily agrees that, if the total term of imprisonment imposed by the Court is 37 months or less, the defendant waives the right to appeal any aspect of this case's judgment and sentence, including but not limited to the term of imprisonment or probation, restitution, fines, forfeiture, and the term and conditions of supervised release.

Rodriguez signed the document containing this provision and, after consulting with his lawyer off the record, confirmed he understood that if the district court "sentence[d] [him] according to the terms, conditions, and recommendations contained in [his] plea agreement, [he] waive[d] and g[a]ve up [his] right to appeal [the] sentence and the judgment in the case."

Rodriguez challenges his waiver as inadequate under Federal Rule of Criminal Procedure 11(b)(1)(N), which requires a district court to "inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Because Rodriguez did not preserve any purported Rule 11(b)(1)(N) error below, we consider his argument only on plain error review. United States v. Morillo, 910 F.3d 1, 3 (1st Cir. 2018). To satisfy that stringent standard, Rodriguez must

demonstrate "(1) error, (2) that is plain, and (3) that affects substantial rights." United States v. Borrero-Acevedo, 533 F.3d 11, 15 (1st Cir. 2008) (cleaned up) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)). To satisfy the third prong of this test, Rodriguez must "show a reasonable probability that, but for the [Rule 11] error, he would not have entered the plea." Id. at 16 (alteration in original) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004)). If Rodriguez clears each of these hurdles, we "may then exercise [our] discretion to notice [the] forfeited error, but only if" the Rule 11 error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. at 15 (third alteration in original) (internal quotation marks omitted) (quoting Johnson, 520 U.S. at 467).

Rodriguez alleges that the district court failed to confirm that he "freely, knowingly and intelligently waived his right to appeal." Rodriguez claims "eight discrete" errors with the court's inquiry: He argues that the court did not "explain the [waiver's] ramifications"; explain its meaning "in plain English"; explain that "the length of the sentence would be firm and final"; "question[] the defendant about his understanding of the waiver"; "ask[] the defendant if he had any questions about the waiver"; "ask[] the defendant if anyone had forced or coerced him to waive his right to appeal"; "advise[] the defendant

that . . . he would be statutorily entitled to free counsel" if he proceeded to trial and appeal; or "specifically ask[] [Rodriguez] if he had discussed the appellate waiver with counsel."

Through his objections, Rodriguez effectively describes his ideal plea colloquy. But while he is correct that Rule 11(b)(1)(N) requires a district court to ascertain that a defendant understands and freely accepts his plea waiver, we have "refrain[ed] from prescribing any mandatory language for such an inquiry" so long as "the court's interrogation [is] specific enough to confirm the defendant's understanding of the waiver and [his] acquiescence in the relinquishment of rights that it betokens." United States v. Teeter, 257 F.3d 14, 24 n.7 (1st Cir. 2001).

None of Rodriguez's complaints about this colloquy rises to the level of establishing error, plain or otherwise. Rodriguez's colloquy was quite similar to the one we upheld under a less deferential standard of review in United States v. De-La-Cruz Castro, 299 F.3d 5 (1st Cir. 2002). In that case, the court "asked Cruz Castro and his counsel if he knew 'that by entering into this plea agreement and entering a plea of guilty [he] would have waived or given up [his] right to appeal all or part of [his] sentence,'" and "Cruz Castro answered, 'Yes, sir.'" Id. at 12 (alterations in original). "The district court also determined that Cruz Castro's counsel had 'explained this agreement to Cruz Castro in Spanish and [was] satisfied that he [understood] it.'"

Id. (alterations in original). We upheld the waiver in that case despite the district court's "indicat[ion] that [the defendant] could appeal 'in some circumstances,'" id. -- a potentially confusing qualification not given here.

At Rodriguez's in-person change-of-plea hearing, the prosecutor explained the plea agreement, including its "waiver of appeal which indicates that the Defendant knowingly and voluntarily agrees that if the total term of imprisonment is 37 months or less, the Defendant waives his right to appeal this case's judgment." The court asked Rodriguez if he "agreed with the [prosecutor's] summary" of the agreement, and Rodriguez said "Yes." The court then confirmed that Rodriguez's counsel had "explain[ed] the plea agreement" to Rodriguez "[w]ord for word" "in Spanish," and that counsel was "satisfied that [Rodriguez] underst[ood] it." Rodriguez then confirmed that he understood the plea agreement's terms.

The court then asked Rodriguez whether he understood the appellate waiver specifically. Rodriguez initially professed some uncertainty and was permitted to consult with counsel off the record. Afterward, Rodriguez confirmed that he understood that he would "waive and give up [his] right to appeal [the] sentence and the judgment in the case" if the judge sentenced him "according to the terms, conditions, and recommendations contained in [the] plea agreement." The court then ascertained that no one had "made any

promise or assurance to . . . induce" Rodriguez to sign the plea agreement, that no one had "attempted in any way to force" him to do so, and that he was "pleading guilty of [his] own free will."

Most of Rodriguez's numerous challenges to the colloquy boil down to one broad contention: that the court should have done more to "explain to him, in plain English, what [the] waiver meant, namely, the loss of appellate rights." But the court asked Rodriguez: "[D]o you understand that if I sentence you according to the terms, conditions, and recommendations contained in your plea agreement, you waive and give up your right to appeal your sentence and the judgment in the case?" We think this language is sufficiently clear -- indeed, it is perhaps clearer than language we have upheld in other cases. See, e.g., United States v. González-Colón, 582 F.3d 124, 127 (1st Cir. 2009) ("Do you understand that by pleading guilty, you will be held accountable to the waiver of appeal clause that appears in your respective plea agreements?"); United States v. Gil-Quezada, 445 F.3d 33, 37 (1st Cir. 2006) ("Do you understand that by entering into this plea agreement you may have waived or given up your right to appeal or collaterally attack all or part of the sentence?").

Beyond that, the court ensured that Rodriguez and his counsel had reviewed the plea agreement "[w]ord for word" "in Spanish" before Rodriguez signed it, and that Rodriguez had freely

consented to the agreement. In short, we are satisfied that the court did not plainly err in conducting its 11(b)(1)(N) inquiry.

B.

Finding that the district court did not plainly err in performing its duties under Rule 11(b)(1)(N) does not quite end our analysis. A valid appeal waiver does not necessarily prevent us from averting a miscarriage of justice. Morillo, 910 F.3d at 3-4. And we have explained that, "[a]s a subset of this premise," we may "refuse to honor" a valid appeal waiver "when the district court plainly errs in sentencing." Teeter, 257 F.3d at 25. So we turn to the substance of Rodriguez's complaints about his sentencing. We do so not to search again for error per se, but to make sure that there is no error so "egregious" as to warrant setting aside the valid appeal waiver. United States v. Goodman, 971 F.3d 16, 21 (1st Cir. 2020) (quoting United States v. Villodas-Rosario, 901 F.3d 10, 18 (2018)).

Rodriguez argues that conducting his sentencing hearing via videoconference was impermissible under Federal Rule of Criminal Procedure 43 and the CARES Act notwithstanding his consent.[4] For the following reasons, we see no egregious error here rising to the level of a miscarriage of justice.

[4] Rodriguez also gestures at an ineffective assistance of counsel claim, largely reprising the sparse argument discussed above. It fails for the reasons already described.

We begin with Rule 43. Federal Rule of Criminal Procedure 43(c) provides that a defendant "who ha[s] pleaded guilty . . . waives the right to be present" at sentencing when he "is voluntarily absent during sentencing" "in a noncapital case." A fortiori, it is by no means clear that a defendant could not opt to appear by videoconference, rather than not at all as permitted by the rule. In resisting this conclusion, Rodriguez points to cases in which several of our sister circuits concluded that Rule 43 does not permit sentencing via videoconference where the defendant has not affirmatively consented to that format. See United States v. Williams, 641 F.3d 758, 763-65 (6th Cir. 2011); United States v. Torres-Palma, 290 F.3d 1244, 1245 (10th Cir. 2002); United States v. Lawrence, 248 F.3d 300, 302-05 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 235 (5th Cir. 1999). Because Rodriguez did affirmatively consent to videoconferencing, those cases are inapposite. Also distinguishable is the Seventh Circuit's decision United States v. Bethea, 888 F.3d 864 (7th Cir. 2018). In that case, the defendant argued that questions of consent (or waiver) were irrelevant. See id. at 866. However, he had not previously entered his plea in person, which the Seventh Circuit determined was required under Rule 43. Id. at 867. Here, Rodriguez entered his plea in person several months before his sentencing videoconference. As a result, the Seventh Circuit's reasoning in Bethea does not apply.

Of course, even if videoconferencing were permissible under Rule 43, it is possible that the CARES Act's apparently more robust requirements for remote sentencing should govern. The CARES Act permits sentencing via videoconference under certain public health conditions related to COVID-19. § 15002(a)-(b), 134 Stat. at 527-30. Even then, videoconferencing is permissible only if the defendant consents "after consultation with counsel" and "the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice." Id. § 15002(b)(2)(A), (4), 134 Stat. at 528-29. On appeal, Rodriguez faults the district court for failing to conduct the interests-of-justice analysis and for "failing to ask [him] if he had conferred with counsel about his decision to waive his physical presence."

As to the first contention, the parties agree that the court did not (as required by the Act) offer any "specific reasons that" Rodriguez's sentencing hearing could not "be further delayed without serious harm to the interests of justice." CARES Act § 15002(b)(2)(A), 134 Stat. at 528-29.

As to the second contention, Rodriguez stops short of claiming that he did not, in fact, confer with counsel prior to waiving his right to appear in person -- rather, he complains that "there is no proof he waived his physical presence at sentence

only after conferring with counsel." Yet this claim is directly contradicted by the pre-hearing filing in which Rodriguez confirmed that he was consenting to videoconference "[a]fter thorough discussion with his attorney." The court again addressed the issue during the August 2020 proceedings. Shortly before asking whether Rodriguez "wish[ed] to waive [his] right to appear in person . . . and to appear instead by video," the district court confirmed that Rodriguez understood he had "a right to consult with [his] lawyer" before the sentencing and revocation hearings. The court then asked Rodriguez's attorney if there was "any reason why [it] should not accept" Rodriguez's waiver, and counsel said he knew of none. The district court concluded that Rodriguez had "knowingly and voluntarily waived his right to appear physically" "after consulting with his attorney."

How to ultimately reconcile Rule 43 with the CARES Act, we need not decide. Even if there was error here because the district court failed to strictly comply with the CARES Act, such error would not come close to making this an "egregious case[]" triggering the miscarriage-of-justice exception to plain error forfeiture. On these facts, neither the error nor its impact on Rodriguez would be "grav[e]." González-Colón, 582 F.3d at 128 (quoting Gil-Quezada, 445 F.3d at 37).

Nor does Rodriguez's use of the phrase "structural defect" to describe this rather prosaic and relatively

inconsequential procedural error change the equation. Structural errors comprise a "tiny class," which "includes only the most pervasive and debilitating errors" that "infect '[t]he entire conduct of [a] trial from beginning to end.'" United States v. Padilla, 415 F.3d 211, 219 (1st Cir. 2005) (en banc) (first alteration in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)). Here, proving structural error is an especially daunting task: Because Rodriguez did not raise his claim below, plain error review applies. United States v. Lara, 970 F.3d 68, 86 (1st Cir. 2020) ("The plain error standard of review applies . . . even to challenges to structural errors if they were not raised below." (citing Johnson, 520 U.S. at 466)), cert. denied sub nom. Williams v. United States, 141 S. Ct. 2821 (2021).

Perhaps Rodriguez believes that the district court would have been more receptive to his entreaties for leniency had he appeared in person. But while we do not doubt the value of in-person sentencing as a general matter, Rodriguez has failed to persuade us that proceeding via videoconference during a global pandemic with the express consent of a criminal defendant constitutes error sufficiently grave to warrant setting aside an otherwise valid appeal waiver.

C.

As to his sentence on the section 922(g)(1) conviction, Rodriguez argues that the district court erred when it "failed to

either explicitly or implicitly rule on appellant's motion for a downward departure due to extraordinary family circumstances." For its part, the government maintains that Rodriguez never made such a motion.

Even assuming arguendo that Rodriguez's requests for leniency constituted a motion for a downward departure, this challenge fails. Rodriguez does not attempt to show that sustaining the sentence would work a miscarriage of justice. As a result, his claim cannot survive his valid appeal waiver.

D.

Rodriguez also alleges that his within-guideline-range sentence was substantively unreasonable. But, once again, Rodriguez fails to argue that sustaining the sentence would work a miscarriage of justice. So his valid appeal waiver dooms this claim as well.

E.

Finally, Rodriguez argues that the district court erred by ordering him to "complete his high school education" as a condition of supervised release included in his sentence on the section 922(g)(1) conviction. Rodriguez's valid appeal wavier covers conditions of supervised release, so we again consider whether Rodriguez has demonstrated a miscarriage of justice. Because we have suggested that plain sentencing error is "a subset"

of the miscarriage-of-justice exception, Teeter, 257 F.3d at 25, we use the two standards interchangeably in this analysis.

Rodriguez concedes that "[d]istrict courts have significant flexibility to impose special conditions of supervised release." United States v. Garrasteguy, 559 F.3d 34, 41 (1st Cir. 2009). Accordingly, he does not argue that a district court is without authority to impose educational conditions of supervised release. Nor does he dispute that educational opportunities can "benefit [a] defendant so that . . . he's better equipped to not re-commit crimes." Rather, he asserts that on the "unusual facts" of his particular case, imposing a mandatory educational condition was plain error. Rodriguez has a documented learning disability and failed to complete the fourth grade on four separate occasions.

We are sympathetic to Rodriguez's claim that his liberty should not be curtailed if he fails to "complete his high school education" after a good-faith effort.[5] And, given Rodriguez's educational history, he may not be an ideal candidate for the sort of mandatory educational requirement the district court imposed. Cf. United States v. McKissic, 428 F.3d 719, 724 (7th Cir. 2005) (opining that a requirement to complete high school was "especially

[5] Rodriguez's stated "inten[tion] to use the [Bureau of Prisons] to complete his education" and his request to serve his sentence in a facility where he could pursue a GED suggest he will make such a good-faith effort.

suited to" the defendant, who had "nearly completed his high school education"). That being said, Rodriguez expressed a desire to continue his education while incarcerated, and nothing in the record conclusively illustrates that he cannot find a way to satisfy the court-imposed condition.

On the whole, we think it too soon to say more about this issue given the limitations of our review. Rodriguez has more than three years of his prison term yet to serve. Certainly Rodriguez need try to complete a high school education. If he succeeds, the better for everyone, and the issue disappears. Conversely, should he fail, he can ask the district court to modify the mandatory educational condition under Federal Rule of Criminal Procedure 32.1(c).[6] Should the district court deny his request, Rodriguez can appeal that denial, and his challenge will be ripe for our review. Cf. United States v. Davis, 242 F.3d 49, 51 (1st Cir. 2001) (per curiam) (challenge was ripe where petitioner's "term of supervised release [would] commence in less than two months"); United States v. Medina, 779 F.3d 55, 67 (1st Cir. 2015) (challenge was ripe where petitioner "could be subject to the

[6] We have previously noted that "[t]he showing required for a defendant to obtain a modification of a condition of supervised release pursuant to [18 U.S.C. § 3583(e)] is an open question in this circuit." Garrasteguy, 559 F.3d at 43 n.12. Whatever the appropriate standard, we feel confident that it is less stringent than the miscarriage-of-justice standard that governs our own review in this appeal. See id. (comparing standards adopted by two of our sister circuits).

condition he challenges in the near term"). And the record at that time will contain much more information, facilitating a more informed evaluation of the condition's validity, likely under a different standard than the one that controls our review of this direct appeal of the imposition of the condition.

IV.

For the foregoing reasons, we affirm Rodriguez's sentences.