

NO. _____

In The
Supreme Court of the United States

SACHIN AJI BHASKAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What is required under the CARES Act for a remote sentencing to comport with a defendant's Fifth Amendment right to due process under the constitution?

Whether a defendant's Fifth Amendment right to due process was violated by a remote sentencing proceeding that was coerced by the district court, contrary to his interests, and in violation of any statutory authority?

Whether the "interests of justice" standard is exacting and case specific, such that a district court may not use the CARES Act exception to the constitutional requirement of in-person presence without making individualized findings?

Whether the district court's decision to proceed to sentencing by videoconference should be reviewed for "structural error"?

LIST OF PARTIES

1. Sachin Bhaskar, Petitioner
2. United States of America, Respondent

RELATED PROCEEDINGS

United States v. Sachin Aji Bhaskar, Case No. 19 Cr 00007-WMS-HKS (W.D.N.Y., October 13, 2020.)
United States v. Sachin Aji Bhaskar, Case No. 20-3527 (Second Circuit, September 8, 2022.)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sachin Bhaskar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

CITATION OF OPINIONS BELOW

The unpublished summary order of the United States Court of Appeals for the Second Circuit, the unpublished sentencing order from the district court, and the court of appeals' order denying the petition for rehearing *en banc* are appended hereto.

JURISDICTION

The United States District Court for the Western District of New York had jurisdiction over this matter pursuant to 18 U.S.C. §§ 1153 and 3231. The Second Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Second Circuit decided Mr. Bhaskar's appeal on June 21, 2022. Petitioner filed a petition for panel rehearing and rehearing *en banc*, which was denied on September 8, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Video Teleconferencing for Criminal Proceedings § 15002

(a) DEFINITION.—

In this section, the term “covered emergency period” means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.

....

(b) VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS.— (1) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court), upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following events:

...

(2) FELONY PLEAS AND SENTENCING.—

(A) IN GENERAL.—Subject to paragraphs (3), (4), and (5), if the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available

active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, 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, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video teleconferencing is not reasonably available.

Federal Rule of Criminal Procedure 43

(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...

...

(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.

18 U.S.C. § 3553(c)

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.

STATEMENT OF THE CASE

The denial of the right to be present at one's sentencing is an error of constitutional magnitude, implicating a defendant's rights under the Fifth Amendment to the United States Constitution not to be deprived of his liberty without due process of law, and a defendant's right, under the Sixth Amendment, to be present at all phases of his criminal prosecution. This case presents the question of whether a defendant's Fifth Amendment right to due process was violated by a remote sentencing proceeding that was coerced by the district court, contrary to his interests, and in violation of any statutory authority.

Rule 43 of the Federal Rules of Criminal Procedure has codified a defendant's right to be physically present at certain criminal proceedings, including sentencings. The rule is unambiguous that a defendant may not consent to a remote proceeding where he has been convicted of a felony. A provision enacted through the Coronavirus Aid, Relief, and Economic Security Act (hereinafter "CARES Act") provided a narrow exception to the requirement of physical presence at such sentencings where a district court judge has found "for specific reasons that the ... sentencing cannot be further delayed without serious harm to the interests of justice." P.L. 116-136, 134 Stat. 281 (2020). Disregarding the plain text of the statute, a number of district courts have failed to make the requisite findings before conducting video-conferenced proceedings, and several circuit courts have upheld these plainly erroneous findings.

Given the constitutional violations in Petitioner’s case, which obstructed his ability to meaningfully consent to physically appear at his sentencing, the district court’s decision to proceed by videoconference should be examined as a “structural error.” Even under a “plain error” standard, Petitioner’s case demonstrates prejudice. Notably, the virtual sentencing that Petitioner received raises serious concerns about the “fairness, integrity or public reputation of judicial proceedings” given that he faced life imprisonment. This Court should grant a *writ of certiori* to protect the judiciary from the accusation that the sentences meted by the district courts are the product of haste, rather than the product of a just and deliberative process.

Procedural History

On March 5, 2020, Petitioner appeared before the district court to plead guilty to enticement of a minor in violation of 18 U.S.C. § 2422(b), on an indictment without the benefit of a plea agreement. He faced a mandatory minimum of 10 years on this conviction. On March 13, 2020, the President of the United States issued a proclamation declaring a National Emergency in response to the Coronavirus Disease-2019 (“COVID-19”) pandemic, pursuant to the National Emergencies Act. 50 U.S.C. § 1601, *et seq.* The passage of the CARES Act followed, authorizing the Judicial Conference of the United States to allow Chief District Judges the use of video or audio conference to conduct certain criminal proceedings

in their district courts only after certain procedural conditions were met. *See* CARES Act, Pub. L. 116-136 (March 27, 2020).¹

After the Judicial Conference authorized such proceedings, the District Court for the Western District of New York issued its first standing order concerning the use of videoconferencing under the CARES Act, finding that felony pleas and sentencings “cannot be conducted in person without seriously jeopardizing public health and safety”² and permitting judges to conduct certain proceedings remotely by video conference or teleconference where they had obtained the consent of the defendant, and only “if a judge in an individual case finds, for specific reasons, that felony pleas or sentencings in those cases cannot be further delayed without serious harm to the interests of justice.”³

Defense counsel sought three adjournments of the sentencing in Petitioner’s case in the spring and summer of 2020, when COVID-19, a new, terrifying, and poorly understood virus was overrunning hospitals and claiming hundreds of thousands of American lives, with no vaccine in sight.

¹ The National Emergency proclaimed on March 13, 2020 remains in effect, and was extended as recently as November 14, 2022 for 60 days, with Department of Health and Human Services officials not yet signaling an end date. District courts have continued to issue standing orders permitting videoconferencing based on criteria such as the waning effects of vaccination.

² March 30, 2020 WDNY Standing Order, available at <https://www.nywd.uscourts.gov/sites/nywd/files/PAND-COVID19-2020-03-30%20Video%20Conferencing%20Under%20CARES%20Act.pdf>

³ *Id.* This order was extended every 30 days and was in place at the time of Petitioner’s sentence on October 7, 2020. *See* September 23, 2020 WDNY Standing Order, available at <https://www.nywd.uscourts.gov/sites/nywd/files/COVID-19%20General%20Order%20-%20Extension%20to%20December%2024%2C%202020.pdf>

First, on May 13, 2020, defense counsel moved to adjourn the sentence for 60 days on the basis that the COVID-19 pandemic had impacted counsel's ability to meet with Petitioner and prepare sentencing submissions. Counsel further explained that both attorneys lived and worked in the New York City metropolitan area and could not safely travel to the courthouse by air to appear on the current sentencing date. The court granted that request in a docketed text order, set a new submission schedule, and adjourned sentencing to August 5, 2020.

On June 30, 2020, Petitioner filed a second motion to adjourn the sentencing. Counsel again explained that the ongoing COVID-19 pandemic made it unsafe to travel by air and argued that, given the lengthy sentence Petitioner faced, that it was important for them appear in person. The court granted this second request in a docketed text order, adjourning the sentence until September 9, 2020. The court made it abundantly clear that this adjournment would be the last in its docketed order: "This Court fully expects that sentencing will proceed as scheduled on the new date below. THIS IS THE FINAL SENTENCING ADJOURNMENT." The court further stated that "if the Defendant elects not to consent to proceed by video conference, this sentencing will take place in person...and all counsel will be required to attend."

On August 21, 2020, counsel moved for a third adjournment of sentence, due technical difficulties with videoconferencing, and challenges with reviewing the sentencing submission remotely with Petitioner. Counsel also explained that both of Petitioner's attorneys were vulnerable to COVID complications because of their age,

and one had a lengthy cancer history, underscoring the dangers of in-person travel. Counsel further contended that it was important that Petitioner, who was facing a mandatory minimum of 10 years and a maximum of life, have the opportunity to make his case in-person. The district court granted this adjournment request in a docketed text order and adjourned the case for October 7, 2020. Again, the court stated in its order that “no further adjournments [would] be permitted,” reiterating that it was requiring all counsel to appear in person on October 7 if Petitioner did not consent to a remote proceeding.

The Sentencing Hearing

The remote sentencing went forward on October 7, 2020. Petitioner was 24 years old, a non-native English speaker and foreign national from a country with different societal and cultural norms. From the transcript of the proceedings, it is clear that Petitioner, the judge, and the court reporter each had trouble hearing each other at numerous critical moments.

First, the district court judge read a litany related to the rights that Petitioner was waiving by proceeding through videoconferencing rather than in-person. The court stated:

We are proceeding by way of Government Zoom platform, which means, bottom line, is we are proceeding remotely. And in my judgment that is probably the most efficient and effective way to proceed today, with the understanding that if Mr. Bhaskar required or demanded that he be brought into the courtroom itself, arrangements can be made for that, but it would take a little bit of scheduling time to accomplish that. The consent must be a voluntary consent to proceeding by way of this Zoom platform proceeding. I think in some respects it can be more effective and efficient, even than an in-court proceeding. I believe that the interests of justice will be well served by

this proceeding. That it is in the public interest to proceed in this fashion. I find that there is really no prejudice as long as everybody is on board to going forward in this fashion.

The court then engaged in a back and forth with Petitioner's two attorneys about which of them would be addressing the court. Returning to the issue of consent, the court then said to Petitioner, "I need to know that you're doing or agreeing voluntarily, with no threats or no force to get you to consent." When the court asked Petitioner if this is something it could rely on, and whether it was "fair statement" that the Petitioner was "okay going forward on Zoom" and "doing it voluntarily," Petitioner responded "You are talking to me? I couldn't hear that. Hello."

Without confirming that Petitioner understood, or had even heard, any of the information it had previously relayed, including the critical fact that Petitioner could withhold consent and demand to be brought into the courtroom for an in-person sentencing, the court had the following exchange with him:

THE COURT:	Sure. The question is, are you voluntarily consenting to go forward with sentencing remotely using this Zoom platform?
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THE DEFENDANT:	Yes.
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After confirming with defense counsel that they had discussed proceeding remotely with Petitioner, the district court found that with respect to Zoom, there was "voluntariness."

The court then permitted Petitioner to have a short private “breakout” session with his attorneys.⁴

The District Court’s CARES Act Findings

As to the specific findings that the CARES Act requires in order to justify an exception to the requirement of in-person proceedings, the district court found the following: (1) that a remote proceeding was “probably the most efficient and effective way to proceed today;” (2) that “the interests of justice” would be “well served;” and, (3), that it was “the public interest to proceed in this fashion.” The court also executed a form “Order Regarding Use of Teleconferencing for Felony Pleas and/or Sentencings,” checking boxes indicating that Petitioner had consented and that the proceeding could not be delayed without serious harm to the interests of justice, including the following specific reasons: “the Defendant’s interest in finality, and the public interests in health, safety, and in an efficient resolution to this matter, outweigh any harm that could result from proceeding by videoconference.”

The Sentencing

When given an opportunity to address the court before the pronouncement of sentence, Petitioner was interrupted by the district court no less than six times with

⁴ Appearing on video conference alone from a cell, Petitioner could only access or communicate with his attorneys if he or they made an on-the-record request for the provision of such a session.

directives to slow down, take his time, and compose himself.⁵ Petitioner was ultimately unable to complete his sentencing statement.

Given Petitioner's clear distress, defense counsel attempted to intervene, asking the court for "a minute to speak to him," explaining that "normally, obviously, we would be right next to him. It's difficult to do that." The court responded "sure, sure," but did not provide this opportunity. Perceiving counsel's request as a cue to stop him from speaking, Petitioner stated that he would "just end it," and that he knew "the objection is just going to be for me to stop talking, so I will."

The court advised Petitioner to take a deep breath and relax, and stated it that it would continue to listen, but Petitioner gave up and said he was "done speaking." He apologized and thanked everyone.

In addressing the court, counsel for the government called the sincerity of Petitioner's remarks into question, stating:

You saw him get emotional, but I wonder is he getting emotional or -- I guess, is his emotional response from more a genuine expression of remorse or is it just an expression of regret that he got caught and now he is facing a lengthy prison sentence.

For that and other reasons, the government argued that a sentence of 30 years was "fair, just and reasonable."

⁵ The transcription of the sentencing proceeding is filled with incoherent nonsensical statements attributed to Petitioner that call into question whether the court reporter was able to properly hear him. For example, the transcript contains the following statements as part of Petitioner's sentencing statement to the district court: "I'm not for who to suffer;" "the entire conference of emotion;" "I have a God-given right with dreams;" and "I will share it with everyone on the street to live."

Without identifying why, the district court found remorse “was not genuine,” that it was “replete with excuses,” and that Petitioner was “truly... a child sexual predator and a danger to the community.” The court then sentenced Mr. Bhaskar to 20 years’ incarceration.

Proceedings before the Second Circuit Court of Appeals

On direct appeal, Petitioner argued that the district court violated his right to be physically present at sentencing as guaranteed by the Fifth Amendment and Rule 43 of the Federal Rules of Criminal Procedure in that his consent to proceed remotely was neither knowing or voluntary, and the district court failed to make specific findings to justify the remote sentencing, both of which were requirements for the exception to physical presence authorized by CARES Act. Petitioner further argued that the error was “structural”, such that no showing of prejudice was required, but that Petitioner could nonetheless make such a showing.⁶

After review, the Second Circuit Court of Appeals affirmed the district court’s sentence. The Circuit found that “the district court properly found that Bhaskar had knowingly and voluntarily consented to move forward with the sentencing by videoconference.” With respect to the generalized reasons offered by the court to justify a remote sentencing, the Panel found that “[t]he record as a whole ... satisfies the requirements of § 15002(b)(2)(A).”

Petitioner filed a petition for rehearing/rehearing *en banc* which was denied.

⁶ Petitioner raised two other issues; whether the remote sentencing violated Petitioner’s right to the effective assistance of counsel as guaranteed by the Sixth Amendment, and whether his sentence was procedurally and substantively unreasonable, which are not raised here.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT *WRIT OF CERTIORARI* IN ORDER TO RESOLVE THE SCOPE OF WHAT IS REQUIRED UNDER THE CARES ACT FOR A REMOTE SENTENCING TO COMPORT WITH A DEFENDANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS UNDER THE CONSTITUTION

As this Court has previously recognized, defendants have a constitutional right to be present at all stages of their trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). This is particularly so “where [their] absence might frustrate the fairness of the proceedings.” *Farella v. California*, 422 U.S. 806, 819, n. 15 (1975). The right to be present “is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but [the Supreme Court has] recognized that this right is [also] protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.” *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (citations omitted). This Court has recognized that sentencing is a critical stage of the criminal process that must satisfy the Due Process Clause. *See Mempa v. Rhay*, 389 U.S. 128, 133-134 (1967); see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“[it is] clear that the sentencing process ... must satisfy the requirements of the Due Process Clause.”)

A. Rule 43’s Unwaivable Protection of a Defendant’s Right to Be Present at Sentencing is of Constitutional Magnitude

Rule 43 of the Federal Rules of Criminal Procedure codified a defendant’s right to be present at sentencing in no uncertain terms. In 2011, Rule 43 was amended to include Rule 43(b), which permitted videoconferencing for misdemeanor

sentencings. But the 2011 Advisory Committee Notes to Rule 43(b) reiterate the concern that “the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence” and note that “[t]hese concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing.” Fed. R. Crim. P. 43(b) Committee Notes on Rules—2011 Amendment. The Committee Notes make clear that the exception was adopted solely for the reason that “the use of video teleconferencing may be valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.” *Id.* Notably, the Rule has no similar provision for a felony sentencing.

Recognizing the indispensable role that the defendant plays at sentencing, several provisions mandate physical presence for sentencing. For example, Rule 43 safeguards the defendant’s rights to appear before the court. Under Rule 35 (i)(4)(A)(ii) (ii), at sentencing, a district court must “address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence.” In the same vein, 18 U.S.C. § 3553(c), demands that “[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c) (2022). In determining the appropriate sentence, a district court is required to consider a defendant’s “history and characteristics” under 18 U.S.C. § 3553(a). And having considered all of the section 3553(a) factors, the district court must reach “an informed and

individualized judgment in each case as to what is ‘sufficient, but not greater than necessary’ to fulfill the purposes of sentencing.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (quoting 18 U.S.C. § 3553(a)).

This Court’s jurisprudence on a defendant’s right to be present at sentencing stems from a line of cases in which defendants voluntarily absented themselves from the proceedings. For example, in *Crosby v. United States*, 506 U.S. 255 (1993), this Court noted that “at common law the personal presence of the defendant [was] essential to a valid trial and conviction on a charge of felony.”⁷ In felony trials, the right was generally considered unwaivable and was premised on the notion that fairness required that the jurors meet the defendant face-to-face and that witnesses testify in his presence.⁸ Quoting an 1851 Pennsylvania opinion, the Court added, “It was thought ‘contrary to the dictates of humanity to let a prisoner ‘waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.’”⁹ For most defendants, sentencing is their only opportunity during the entirety of the criminal proceedings against them to address the court.

Recognizing the constitutional dimensions of the rights protected under Fed. R. Crim. P. 43(a)(3), several circuit courts have held that sentencing via videoconferencing or teleconferencing in felony cases is not permitted and that a defendant “must be present” at sentencing in the physical sense regardless of

⁷ *Id.* at 259 (quoting WM. L. CLARK, JR. & WILLIAM E. MIKELL, HANDBOOK OF CRIMINAL PROCEDURE 492 (2d ed. 1918)).

⁸ *Id.*

⁹ *Id.* (quoting 1 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE 178 (4th ed. 1895) (quoting *Prine v. Commonwealth*, 18 Pa. 103, 104 (1851))).

whether the defendant, defense counsel and the government consent to such a procedure. *See United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) (“[W]hile an individual may determine that the benefits of not having to travel outweigh the costs of having a meeting by video conference, we do not, and cannot, perform such a balancing with a criminal defendant's rights.”); *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018) (“[W]hile it might be convenient for a defendant or the judge to appear via videoconference, we conclude the district court has no discretion to conduct a guilty plea hearing by videoconference, even with the defendant’s permission.”).

Simply put, it is well-established in American jurisprudence that the defendant’s physical presence in criminal proceedings is an indispensable part of sentencing in the most serious cases. This Court should grant *writ of certiori* to ensure that any statutory exceptions that implicate the Due Process right of a defendant to appear at sentencing are narrowly construed in accordance with fundamental constitutional guarantees.

B. Petitioner’s Due Process Rights Were Also Violated When the District Court Coerced Him to Proceed by Videoconferencing

Petitioner’s “consent” to the remote proceedings was compelled by the district court and cannot be considered a voluntary relinquishment of a constitutional right. The government did not meet its burden of establishing by a preponderance of the evidence that Petitioner knowingly and voluntarily waived his constitutional right to appear at sentencing.

Under the facts of the case, Petitioner was presented with an illusory choice. Petitioner's attorneys had informed the court that their respective vulnerabilities to illness made it unsafe to appear in person. In granting the adjournment, and ruling that no further adjournments would be permitted, the district court made clear that counsel's inability to safely travel to appear in person would not be acceptable grounds for further adjournments. In this case, the record clearly indicates that counsel was attempting to adjourn the sentencing date for a future time when in-person proceedings would be possible again. Offering Petitioner a choice between appearing in person at a time when the Western District had already proclaimed was unsafe to do so, or proceed remotely, was no choice at all.

Next, as outlined above, it is not even clear from the record that Petitioner heard or understood the district court when it informed him that he had the right to withhold consent and demand an in-person sentencing, as the court failed to confirm either. After moving to a different, unrelated subject, and engaging in a back-and-forth on that subject with Petitioner's counsel, the court returned to the issue of consent, but in less detail, saying "I need to know that you're doing or agreeing voluntarily, with no threats or no force to get you to consent" and asking whether it was "fair statement" that the Petitioner was "okay going forward on Zoom" and "doing it voluntarily." Petitioner responded to this question with, "You are talking to me? I couldn't hear that. Hello." Rather than determine how much of its explanation of the consent requirement Petitioner had heard or understood, the court just asked him if he was voluntarily consenting, to which Petitioner responded

in the affirmative. In any event, the court made it clear that the “bottomline” was that it planned to proceed virtually.

Further, district court never explained to Petitioner that if he wanted to proceed in person, he had a right to postpone his sentence until such time as it was safe to do so. The court’s offer, clear from its on-the-record order denying any further adjournment, was for either an in-person or remote sentencing on *the same date*. Petitioner’s Due Process rights to appear at his sentencing were violated because he did not consent to proceed by videoconference where the district court left him with no choice.

Given the appeal of proceeding by videoconference for district courts around this country to alleviate their dockets, this Court should grant this *writ of certiori* and clarify that defendants must not be coerced into consenting into waiving their rights to physically appear at a sentencing.

II. THE FAILURE OF FEDERAL DISTRICT COURTS TO MAKE “SPECIFIC” FINDINGS THAT FELONY CRIMINAL PROCEEDINGS “COULD NOT BE FURTHER DELAYED WITHOUT SERIOUS HARM TO THE INTERESTS OF JUSTICE” AS REQUIRED BY THE CARES ACT IS CONTRARY TO THE PLAIN LANGUAGE OF THE EMERGENCY STATUTE AND EVISCERATES RULE 43

The global health crisis engendered by COVID-19 pandemic, and the difficulties it created for safe, in-person court proceedings, resulted in the passage of the CARES Act, which created a new legislative exception to the requirement for in-person sentencings. Pursuant to the CARES Act, felony sentencings were permitted by video or telephone conference, “with the consent of the defendant...after

consultation with counsel” only if certain procedural requirements were met. These include:

the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding (or, if the chief judge is unavailable, the most senior available active judge of the court or the chief judge or circuit justice of the circuit that includes the district court) specifically finds, upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without seriously jeopardizing public health and safety, 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, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video conferencing is not reasonably available.

Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

As long as emergency conditions are present, the limited exception to Rule 43 created by the CARES Act requires a district court in a particular case to find “for *specific* reasons that the plea or sentencing in that case cannot be further delayed without *serious* harm to the *interests of justice*.” Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136, 134 Stat. 281 (2020) (emphasis added).

This Court’s guidance is needed to clarify that the “interests of justice” standard is exacting and case specific. Some courts have recognized that the “interests of justice” is triggered by circumstances where a delay in sentencing would create an injustice, such as where a defendant might be eligible for a time-served sentence or might be entitled to receive credits for a period of confinement. *See United States v. Leroux*, 36 F.4th 115, 123 (2d Cir. 2022); *United States v. Collazo*, No. CR 2:19-00120, 2020 WL 1905293, at *2 (S.D.W. Va. Apr. 17, 2020). Correspondingly, in cases where the Sentencing Guidelines range did not suggest immediate release, district courts have denied remote sentencings, finding no harm to the defendant in postponing the sentence when additional time behind bars was likely. *See United States v. Fagan*, 464 F. Supp. 3d 427, 428 (D. Me. 2020); *United States v. Harry*, No. 19-cr-535, 2020 WL 1528000, at *2 (E.D.N.Y. Mar. 31, 2020); *United States v. Emory*, No. 19-00109, 2020 WL 1856454, at *2 (D. Haw. Apr. 13, 2020); *United States v. Jones*, No. 19-225, 2020 WL 1644257, at *1 (D. Minn. Apr. 2, 2020); *United States v. Normandin*, No. 8:21-CR-0180-KKM-TGW, 2022 WL 295367, at *2 (M.D. Fla. Feb. 1, 2022). These courts have applied the standard correctly by recognizing that the “interests of justice” requires a finding that the any delay by waiting for physical sentencings would work a special injustice to the defendant in that specific case.

However, several circuits have simply rubber-stamped generalized findings by the district court or have even accepted no findings at all. *See United States v. Chaney*, No. 20-4294-CR, 2022 WL 2315184, at *1 (2d Cir. June 28, 2022)

(proceeding with video-conferencing even though no “serious harm” would result from a delay because the defendant was already in custody serving a 25-year sentence); *United States v. Acevedo*, No. 21-40122, 2021 WL 4562275, at *1 (5th Cir. Oct. 5, 2021) (district court simply failed to state reasons on the record for why delaying plea would cause “serious harm to the interests of justice”); *United States v. Hernandez*, 37 F.4th 1316, 1318 (7th Cir. 2022) (district court made findings related to consent but “the required interests-of-justice finding was overlooked.”).

So, too, in Petitioner’s case, the Second Circuit did not hold the district court to the requisite standard. The district court utterly failed to make the findings required of it. On the record, the court found (1) that a remote proceeding was “probably the most efficient and effective way to proceed today;” (2) that “the interests of justice” would be “well served;” and, (3), that it was “the public interest to proceed in this fashion.” The court also executed a form “Order Regarding Use of Teleconferencing for Felony Pleas and/or Sentencings,” checking boxes indicating that the Petitioner had consented and that the proceeding could not be delayed without serious harm to the interests of justice, including the following specific reasons: “the Defendant’s interest in finality, and the public interests in health, safety, and in an efficient resolution to this matter, outweigh any harm that could result from proceeding by videoconference.”

Notably, these findings particularly did not apply to Petitioner’s case. Petitioner expressed no interest in finality and no desire to proceed with expediency via a remote proceeding. To the contrary, defense counsel sought adjournments on

Petitioner's behalf in pursuit of a just determination. The court's desire to resolve the matter expeditiously drove the remote proceeding; there was no benefit to Petitioner, and no specific reasons to support the use of the CARES Act to proceed remotely in this instance where he faced a mandatory 10-year minimum. Even though these generalized reasons supplied by the district court were not "specific reasons" that sentencing in this case could not be "further delayed without serious harm to the interests of justice," the Second Circuit found that the CARES Act requirements were satisfied.

As discussed *supra*, in Part II, the failure of the circuit courts to correctly apply the narrow CARES Act exception in the "interests of justice" to Rule 43 has resulted in the violation of defendants' Due Process rights at sentencing. This Court's guidance is necessary for ensuring that the district courts properly adhere to the CARES's Act's limited emergency provisions given the well-established policies and protections codified in Rule 43.

III. THE DISTRICT COURT'S FAILURE TO MAKE THE REQUISITE SPECIFIC FINDINGS JUSTIFYING VIDEOCONFERENCING UNDER THE CARES ACT IS REVERSIBLE ERROR

Prior to this Court's decision in *Chapman v. California*, 386 U.S. 18 (1967), all constitutional errors resulted in reversal and a remand for proceedings that were consistent with the Constitution. In *Chapman*, however, the Court held that even constitutional errors sometimes could be "harmless" and not require reversal. *Id.* at 20-22. The burden of showing harmless error lays with the beneficiary of the error. *Id.* at 18, 24. In *Arizona v. Fulminante*, the Court introduced the concept of

“structural defects,” a category of constitutional errors – such as violations of one’s right to counsel, the right to self-representation, or one’s right to be tried before an impartial judge – that affect “the constitution of the trial mechanism, which defy analysis by ‘harmless error’ standards.” 499 U.S. 279, 307–12 (1991). The right to be present at one’s sentencing is of constitutional magnitude.

A. Under *Weaver*, a District Court’s Violation of the Narrow Cares Act Exemption Constitutes a Structural Error, Mandating Reversal Without a Showing of Prejudice

Because neither Petitioner nor defense counsel consented to proceed by videoconferencing under the facts of this case, *supra* Part I-B, the district court’s erroneous decision to proceed by videoconference should be reviewed for “structural error.”

Under *Weaver v. Massachusetts*, 582 U.S. —, 137 S.Ct. 1899 (2017), a defendant’s right to be present at sentencing falls under the Court’s “three broad rationales”: (1) “the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,” (2) “the effects of the error are simply too hard to measure,” and (3) “the error always results in fundamental unfairness.” *Weaver*, 137 S. Ct. at 1908.

A defendant’s right to physically appear at sentencing was designed protect a defendant’s due process right to a fair adversarial process, and the government’s independent interest in the appearance of justice. Further, it is impossible to measure impact, as there is no knowing what the defendant might have said or done differently, how the arguments of government or defense counsel might have

changed, or how the judge would have responded to these changes. Finally, denial of this right is an error that always results in a fundamental unfairness, as the right to be present at all phases of one's criminal prosecution is a central principal of our criminal justice system. Applying this rationale, the Ninth and Tenth Circuits have found violations of this right to be structural errors. *See Hays v. Arave*, 977 F.2d 475 (9th Cir. 1992); *United States v. Torres-Palma* 290 F.3d 1244 (10th Cir. 2002); *see also Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996).

The district court's incorrect application of the CARES Act exception and violation of Due Process should similarly constitute a structural error.

B. Even Under a “Plain Error” Standard, the District Court’s Failure to Make “Specific Findings” Requires Reversal

Petitioner would also be entitled to relief under a “plain error” standard. As this Court explained in *United States v. Olano*, 507 U.S. 725 (1993), plain-error review involves four steps, or prongs. First, there must be an error or defect or “[d]eviation from a legal rule” that has not been intentionally relinquished or abandoned or affirmatively waived by the appellant. *Id.*, at 732–733. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. *Id.* at 734. Third, the error must have affected the appellant's substantial rights. *Id.* To satisfy this third condition, the defendant ordinarily must “‘show a reasonable probability that, but for the error,’ the outcome of the proceeding would have been different.” *Molina–Martinez v. United States*, 578 U.S. 189, 194 (2016) (*quoting United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82 (2004)) Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to

remedy the error—discretion which ought to be exercised only if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Here, there is a clear error as Petitioner was denied his constitutional right to be physically present at his sentencing hearing, without the court finding, as mandated by the plain text of the CARES Act exception, that for specific reasons, that his sentence could not be further delayed without serious harm to the interests of justice. As discussed *supra*, Petitioner did not knowingly and voluntarily consent to the relinquishment of this right so it cannot be said that his presence was affirmatively waived. Accordingly, the court’s decision to proceed under these circumstances was plainly error.

With respect to the third prong, a reasonable probability exists that Petitioner’s sentence would have been different if he had appeared in person. A sentencing court’s authority is discretionary, and thus the court very well could have handed down a lower sentence. *See United States v. Acosta*, 234 F. App’x 647, 650 (9th Cir. 2007). Numerous cases have recognized that defendants receive an inferior hearing over videoconferencing. *See United States v. Thompson*, 599 F.3d 595, 600 (7th Cir. 2010). (“[T]he form and substantive quality of [a] hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of videoconferencing.”); *United States v. Williams*, 641 F.3d 758, 764-65 (6th Cir. 2011). (“Being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly

absent when communicating by video conference.”) That is to say, “virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.” *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

In the context of sentencing, videoconferencing impedes a defendant’s ability to convey credibility and remorse to the court. A “face-to-face meeting between the defendant and the judge permits the judge to experience ‘those impressions gleaned through... any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.’” *Thompson*, 599 F.3d at 599 (*quoting Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)). “Physical presence makes unavoidable the recognition that - in sentencing - one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen.” *United States v. Fagan*, 2:19-CR-123-DBH, 2020 WL 2850225, at *2 (D. Me. June 2, 2020); *see also Green v. United States*, 365 U.S. 301, 304 (1961) (“The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”). In this case, the actual prejudice suffered by the Petitioner in the remote sentencing was abundantly clear from the record. Petitioner was required to speak into a camera through the cross hatch of the metal grating that enclosed him, making it difficult for him to see or be seen. The remote nature of the proceeding compounded the isolation of this 24-year-old young man, a non-native English speaker who was

suffering from depression, and imprisoned in a foreign country. Under these circumstances, Petitioner showed clear distress when addressing the district court, as evidenced by the six times the court paused the proceedings, asking Petitioner to slow down or giving him time to compose himself. In recognition of Petitioner's clear distress, counsel requested – but was not afforded – a private moment to speak with him. At an in-person proceeding, there would have been numerous other, perhaps unquantifiable, ways for counsel to steady or support Petitioner which were not possible here, such as making eye contact, putting a comforting hand on Petitioner's shoulder, or even merely by standing beside him.

Petitioner's credibility and statements of remorse were at the forefront of the district court's mind at sentencing. The court explicitly stated, “[t]he expressions of remorse that you did intermix with your comments, I was clearly focused on that. And I don't hesitate to say that in my observations of you and what you said, my view is that your remorse is not genuine.”

Furthermore, Petitioner expressed his challenges in expressing remorse without anyone he had harmed present to accept his apology. The court misconstrued those statements and took them to mean that Petitioner was complaining about being denied an opportunity to speak to the families of the victims.

Yet despite Petitioner's obvious difficulties in expressing his emotions in a remote proceeding, after hearing from him under these inadequate conditions, the court made a credibility determination. The court found that “remorse [was] not

genuine,” that it was “replete with excuses,” that was Petitioner “truly was” was a “child predator and a danger to the community.” The court’s credibility finding, made over videoconferencing, when its ability to personally assess Petitioner’s demeanor and credibility was impaired, establishes the prejudice Petitioner experienced from not being at his sentencing. The finding, which was used to justify the sentence imposed, cannot be separated from the remote nature of the proceedings. Under these circumstances, there is a reasonable probability that an in-person proceeding would have affected the outcome of this proceeding.

Finally, the deprivation of Petitioner’s right to an in-person proceeding “seriously affected the fairness, integrity or public reputation of judicial proceedings.” Petitioner faced a sentence of 10 years to life imprisonment. The sentencing proceeding he received through a small screen through a jail cell, isolated and removed from his counsel, before a judge he could not entirely hear and he could not be sure was able to hear him does not reflect the seriousness of the proceeding. Nor is it any notion of justice that this country should be prepared to accept. This Court should grant *writ of certiori* to prevent the great harm to the reputation of the judiciary caused by proceedings conducted virtually and hastily to clear court dockets. Such proceedings are not in the “interests of justice.” Rather, they are a grave miscarriage of justice.

CONCLUSION

This case presents this Court with the opportunity to resolve the scope of what is required under the CARES Act for a remote sentencing to comport with the Constitution, the proper interpretation of the specific “interest of justice” findings required by the statute to permit a video-conferenced sentencing, and which standard of review applies where a defendant’s consent to a remote proceeding has been coerced by the district court.

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

Dated this 7th day of December, 2022, in Brooklyn, New York.

Respectfully submitted,

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