No. 24-_____

In the Supreme Court of the United States

AGHEE SMITH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts are split on a critical question:

Whether a living witness can be "unavailable" under the Confrontation Clause if the government has made no effort—even through a subpoena—to compel the witness to appear at trial.

RELATED PROCEEDINGS

United States v. Alcorn, Case No. 2:19-cr-00047-2. United States District Court for the Eastern District of Virginia. Judgment was entered on August 31, 2022.

United States v. Smith, Case No. 2:19-cr-00047-3. United States District Court for the Eastern District of Virginia. Judgment was entered on August 25, 2022.

United States v. Smith, et al., Case No. 22-4508. United States Court of Appeals for the Fourth Circuit (consolidated appeal for Case Nos. 22-4508 and 22-4521 that included petitioner's appeal). Judgment was entered on September 17, 2024 and amended on September 18, 2024,

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PETITION FOR WRIT OF CERTIORARI

The Sixth Amendment gives every criminal defendant the right to be "confronted with the witnesses against him." U.S. CONST. AMEND. VI. This Court has long held that a "face-to-face encounter between witness and accused * * * [is] essential to a fair trial in a criminal prosecution." *Coy v. Iowa*, 487 U.S. 1012, 1018 (1988). For that reason, even when adopting limited exceptions to the Confrontation Clause, the Court has refused to allow the government to present testimonial statements of an absent witness unless it has made "good-faith efforts * * * to locate and present that witness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) This requirement—known as "unavailability"—was entirely abandoned for *three* of the accusing witnesses at the petitioner's trial.

In February 2022, Aghee Smith was convicted of fraud in the Eastern District of Virginia. The district court permitted three of Smith's accusers to testify against him by video deposition. The government never served these witnesses with a subpoena or otherwise attempted to compel their attendance through the judicial process. The district court nonetheless held that all three witnesses were "unavailable" because they claimed to have general concerns about the COVID-19 pandemic and other health- or family-related limitations.

The Fourth Circuit affirmed in a split decision. It held that the Confrontation Clause does not "require an effort to compel [a] witness's trial appearance through the subpoena process, nor does it require the government to take any other specific step to secure the witness's appearance." A37. According

to the majority, it was enough for the government to send a postal inspector to "verify" the witnesses' claims that they were unavailable. A38.

Judge Heytens dissented, explaining that the majority was "unable to cite any case where a witness within the trial court's subpoena power was declared constitutionally 'unavailable' despite the government never even serving a subpoena." A57. Such a rule, he predicted, would "risk eroding criminal defendants' confrontation rights whenever a witness's reasons for not appearing are valid and sympathetic." A58. In other words, the majority's rationale would make the unavailability rule turn on the *desires* of a witness rather than the *efforts* of the government.

The decision below creates a split among the courts that have considered this issue. Several federal and state appellate courts have refused to find a witness "unavailable" when the government makes no formal attempt to secure the witness's live presence—regardless of the witness's reasons for not wanting to appear. The D.C. Circuit has explained, for example, that the government must make "efforts to procure [a] witness's appearance at trial" that are "as vigorous as that which the government would undertake to secure a critical witness if it has no prior testimony to rely upon in the event of 'unavailability.'" *United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019).

The decision below, if adopted, would leave the unavailability rule toothless in any case when a witness does not want to testify for reasons that a trial judge finds plausible. The Court should grant certiorari to resolve a split in authority and reinforce an essential constitutional requirement.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 117 F.4th 584 and reproduced at pages A1-A58 of the appendix. The opinion of the Eastern District of Virginia is unreported and reproduced at pages A76-A85 of the appendix.

JURISDICTION

The Fourth Circuit issued its opinion on September 17, 2024 and amended the opinion on September 18, 2024. A1-A58. The Fourth Circuit denied Smith's petition for rehearing en banc on November 15, 2024. A86-87. Under this Court's rules, this petition was originally due on February 13, 2025. On February 6, the Chief Justice granted Smith's motion to extend the deadline until April 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE[1]

A. Smith Is Convicted Of Fraud Based In Part On The Testimony Of Three Absent Accusing Witnesses.

In 2019, Smith was indicted in the Eastern District of Virginia on charges of conspiracy to commit mail and wire fraud, and substantive wire fraud, under 18 U.S.C. §§ 1341-43. The government alleged that Smith sold investments using materially false and misleading representations. Smith did not dispute that he sold investments in companies that committed fraud, but he claimed that, in his limited role as a salesman, he did not know about the fraud.

Before trial, the government conducted videotaped depositions of three witnesses—S.B., K.S., and V.H.—who were allegedly sold fraudulent investments by Smith. All three witnesses were senior citizens living in the Sacramento area. A83.

Smith moved to preclude the government from admitting the depositions at trial, arguing that their admission would violate his Sixth Amendment right to confront witnesses against him. A82. Among other things, Smith argued that the witnesses were not "unavailable" under the Confrontation Clause because the government had not made the required good-faith effort to compel their presence. A82-83.

In response, the government argued that the witnesses were unavailable for three reasons: (i) all

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[1] Unless otherwise noted, all quotation marks, citations, and alterations are omitted from quotes.

three had concerns about contracting COVID; (ii) S.B. and K.S. suffered from anxiety and vertigo, respectively; and (iii) V.H. and K.S. needed to care for their spouses. A37-38. The government offered only one form of support for these assertions: an undated declaration from a postal inspector who interviewed the witnesses and summarized the reasons that they were allegedly unavailable. A38. The postal inspector claimed that he informed all three witnesses that they would be served with a subpoena, and that "they were going to have to attend and testify at trial." *Id.* But there is no evidence that any witness was in fact served, or that the government made any efforts to compel the witnesses to appear live at trial. A55 n.1.

The district court denied Smith's motion and permitted the government to introduce the three witnesses' video depositions. A84-85. All three testified that Smith sold them fraudulent investments, and the government relied heavily on their testimony during its closing argument. A58. The jury found Smith guilty of each charge. A59-60.

B. The Fourth Circuit Affirms, Holding That The Confrontation Clause Does Not Require Any "Specific Step" To Compel A Witness's Presence.

Smith appealed, and the Fourth Circuit affirmed in a split decision. A1-58. The majority reasoned that the Confrontation Clause "does not require an effort to compel [a] witness's trial appearance through the subpoena process, nor does it require the government to take any other specific step to secure the witness's appearance." A38. According to the majority, the district court "correctly concluded"

that "the three victim witnesses were of advanced ages, with various medical ailments and caretaker obligations," and that "the ongoing COVID-19 pandemic presented heightened risks and substantial hardships" for the witnesses. A38.

Judge Heytens dissented, writing that the "district court erred in concluding the witnesses were 'unavailable' in a constitutional sense." A54.[2] Judge Heytens reasoned as follows:

> The government has been unable to cite any case where a witness within the trial court's subpoena power was declared constitutionally "unavailable" despite the government never even serving a subpoena. * * *
>
> [I]t seems clear there is at least "a *possibility*"—however "remote"—that a person who has expressed an unwillingness or inability to travel to attend a trial may change their tune when presented with a legal document ordering them to appear. *Roberts*, 448 U.S. at 74. Nothing more is required for Smith to prevail.
>
> The government's real argument, it seems to me, is that these witnesses had excellent reasons for not traveling across

[2] Judge Heytens would also have concluded that Smith was denied his right to a public trial—a second Sixth Amendment violation. A52-53. We have not raised that issue in this petition.

> the country and it would have been inappropriate—even irresponsible—for the government to have further prodded them to do so. Fair enough. But the government cites no authority suggesting the strength of a witness's justifications for not testifying at trial has any bearing on whether the witness is "unavailable" in a constitutional sense. Such a principle would also risk eroding criminal defendants' confrontation rights whenever a witness's reasons for not appearing are valid and sympathetic.
>
> The facts here provide an apt illustration. Of the three absent witnesses, all were elderly, two had non-COVID-19 medical conditions that counseled against travel, and two were sole caretakers for family members. They thus would have had strong reasons for not wanting to appear even absent the pandemic. But many people are of "advanced age and poor health" or have substantial family support obligations, and permitting trial courts to declare all such witnesses unavailable and thus permitted to testify via pretrial deposition would violate both the literal language and the purpose of the Confrontation Clause.

A52-58.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. The right of confrontation "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The Court has recognized some limited exceptions to the right, but it has long held that testimonial statements of absent witnesses may be admitted against a defendant "only where the declarant is unavailable." *Crawford v. Washington*, 541 U.S. 36, 59 (2004); *see also United States v. Burden*, 934 F.3d 675, 685-86 (D.C. Cir. 2019) ("Even when a defendant had a prior opportunity to cross-examine the witness, if the government does not establish that the witness is unavailable, the testimony must be excluded.").

Unavailability is a high bar. "A witness is not 'unavailable' for purposes of the [] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724 (1968). The Constitution does not require "futile" actions, but "if there is a *possibility, albeit remote*, that affirmative measures might produce the declarant," and "*procedures exist[]* whereby the witness could be brought to the trial," the government must make those efforts. *Ohio v. Roberts*, 448 U.S. 56, 74, 77 (1980) (emphases added) (overruled on other grounds by *Crawford*); *compare id.* at 74-77 (no Confrontation Clause violation where the government issued five

subpoenas to a witnesses and her family did not know where she was), *with Barber*, 390 U.S. at 724-75 (Confrontation Clause was violated even though the witness was incarcerated in a different state, because the prosecutor knew where the witnesses was and there were procedures to secure his attendance); *see also California v. Green*, 399 U.S. 149, 189 (1970) ("A good-faith effort is, of course, necessary, and added expense or inconvenience is no excuse.").[3]

Here, however, the Fourth Circuit held that the burden on the government is practically nonexistent—that "a good faith showing does not require an effort to compel the witness's trial appearance through the subpoena process, nor does it require the government to take any other specific step to secure the witness's appearance." A37. This decision, if adopted, would fundamentally shift the focus of the "unavailability" inquiry—from the government's *good-faith efforts* to secure a witness's live testimony, to the witness's *alleged justifications* for declining to testify live. The Fourth Circuit's decision creates a split in authority and threatens to undermine the right of confrontation.

I. The Decision Below Created A Split In Authority On The Test For Unavailability Under The Confrontation Clause.

Outside of the Fourth Circuit, federal and state appellate courts have consistently held that a

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[3] "*Crawford* did not change the definition of 'unavailability' * * *; pre-*Crawford* cases on this point remain good law." *United States v. Tirado-Tirado*, 563 F.3d 117, 123 (5th Cir. 2009).

subpoena is the minimum necessary for the government to prove a witness's unavailability. There is, however, some variation in opinion about the kind and degree of effort the government must expend to meet the test. This Court's review is therefore needed for two reasons: (i) to ensure that the Fourth Circuit's rationale is not adopted more broadly; and (ii) to provide guidance on the meaning of "unavailability" for the jurisdictions already within the majority.

In our view, the best articulation of the rule is found in *United States v. Burden*, 934 F.3d 675 (D.C. Cir. 2019). There, the D.C. Circuit held that the government "bears the burden of establishing that its unsuccessful efforts to procure [a] witness's appearance at trial were *as vigorous* as that which the government would undertake to secure a critical witness if it has no prior testimony to rely upon in the event of unavailability." *Id.* at 686 (emphasis added). At trial, the government introduced a "video deposition testimony by a key witness" who had been deported to Thailand. *Id.* at 680. The government made some efforts to secure the witness's presence after he was deported: it "contacted [his] counsel by phone"; it sent the witness a subpoena by mail; and it "promise[d] to help him obtain a visa." *Id.* at 683.

The D.C. Circuit held, however, that the witness was not unavailable because the government "did not give [him] a subpoena" *before* his deportation or otherwise "obtain his *commitment* to appear." *Id.* at 688 (emphasis added). The court recognized that the witness had compelling reasons "to return to Thailand." *Id.* But unlike the Fourth Circuit, it concluded that this made the government's burden

heavier: "[A] witness's known reluctance to testify *adds* to the government's burden to show that it made reasonable, good faith efforts to secure her appearance because it makes her failure to appear voluntarily all the more foreseeable." *Id.* (emphasis added).

The Fifth Circuit reached a similar conclusion in *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009), explaining that the Confrontation Clause requires the government "to make *concrete arrangements* for [the witness's] attendance at trial." *Id.* at 124 (emphasis added). There, the government introduced a video deposition from a witness who had been deported to Mexico prior to trial. *Id.* at 120-21. As in this case, the witness was "only orally informed that his testimony would be required if the case went to trial." *Id.* at 123. The Fifth Circuit found this insufficient, because the witness "was not served with a subpoena" and the government "failed to make any concrete arrangements with [the witness] prior to his deportation." *Id.*

State appellate courts have reached the same conclusion. In *State v. Lee*, 83 Haw. 267 (1996), for example, a trial court admitted a preliminary-hearing transcript with testimony from two out-of-state witnesses who the prosecution had been unable to find. *Id.* at 271. Even though the location of the witnesses was unknown, the Supreme Court of Hawaii refused to hold that the witnesses were unavailable, explaining that the prosecution had not "attempted at any time to issue—much less serve—trial subpoenas on [the witnesses]." *Id.* at 278. Because the prosecution had not "pursu[ed] *all*

available leads," it did not satisfy the good-faith requirement. *Id.* at 279 (emphasis added).

In *Brooks v. United States*, 39 A.3d 873 (D.C. 2012), yet another court stressed the distinction between a witness's willingness to testify and the government's efforts to compel the witness to testify. When a "reluctant and unreliable witness" went missing during a trial, the prosecution introduced the witness's recorded testimony from a prior trial in the same case. *Id.* at 876, 878. Even though the prosecution made some efforts to find the witness, the Court of Appeals reversed, holding that the witness's "evasiveness" was irrelevant to "the government's burden to show the witness's 'unavailability,' which is a measure of the *government's efforts*." *Id.* at 887 (emphasis added). The court provided a lengthy list of measures that the prosecution could have undertaken, including "issu[ing] a fresh subpoena" and "ask[ing] the judge to warn [the witness] that she was under subpoena." *Id.* at 886 n.11.

The same principles apply when a witness is not merely reluctant to testify, but also fearful about testifying. In *State v. King*, 287 Wis. 2d 756 (2005) (abrogated on other grounds), the prosecution admitted a witness's preliminary examination testimony after she "indicated she was fearful and apprehensive about coming to the trial." *Id.* at 767. The prosecution tried to "persuade" her to testify, but it did not attempt to compel her presence. *Id.* at 765, 768. The Wisconsin Court of Appeals reversed: "Not serving [a witness] with a subpoena when that was possible and when that step was a foreseeable potential condition to [the witness's] presence at trial

was not reasonable, and does not reflect the constitutionally required good-faith effort." *Id.* at 769; *see also People v. Foy*, 245 Cal. App. 4th 328, 348-350 (2016) (trial court erred by admitting out-of-court testimony from a witness who did not want to appear due to "work and school obligations," because the state had made no attempt to "compel her attendance" through "the court's process").

In sum, the courts have almost uniformly required that the government to *at least* subpoena a witness before deciding that the witness is "unavailable" to testify live—and several courts have required measures beyond a subpoena, depending on the circumstances. Here, the government failed to do the bare minimum. By affirming, the Fourth Circuit created a lopsided split in authority.

II. The Decision Below Is Wrong.

The majority position is correct and the decision below is wrong. Under this Court's precedents, a witness can be deemed unavailable only if the government makes "good-faith efforts * * * to locate *and present*" the witness—taking advantage of any "procedures [] whereby the witness *could* be brought to the trial." *Roberts*, 448 U.S. at 74, 77 (emphases added). The Fourth Circuit held, however, that the government must do nothing more than observe and document the alleged justifications for a witness's reluctance to attend trial, and the district court need only find that the witness has a "substantial hardship." A38. Under that holding, the government can merely "inform[]" a witness that he will "have to attend and testify at trial"—even if it does nothing to compel or even *facilitate* any attendance. *Id.*

Meanwhile, the decision below raises a host of questions about what qualifies as a "substantial hardship." Are all elderly witnesses exempt from lengthy travel for trial? Are single parents exempt? What kinds of health conditions qualify for an exemption? What kinds of family obligations qualify? What about personal or professional conflicts, like a family member's wedding or the first day of a new job? District courts will have to answer these types of questions whenever the government sympathizes with a witness's reluctance to testify live. The Fourth Circuit's rule would equate the "unavailability" exception with the standard for hardships in jury selection—even when, as here, the subject is the defendant's *accuser*. As Judge Heytens explained, that approach "violate[s] both the literal language and purpose of the Confrontation Clause." A56.

III. The Question Presented Is Important.

It bears repeating that a "face-to-face encounter between witness and accused * * * [is] essential to a fair trial in a criminal prosecution." *Coy*, 487 U.S. at 1018. But the decision below "risk[s] eroding criminal defendants' confrontation rights whenever a witness's reasons for not appearing are valid and sympathetic." A56 (Heytens, J., dissenting). And that risk is by no means limited to the COVID pandemic; "many people are of advanced age and poor health or have substantial family support obligations." *Id.*

The "primary object" of the Confrontation Clause is to ensure that "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that

they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). That objective would be nullified if an accusing witness could avoid live testimony simply by presenting the government with a "substantial hardship." If the Fourth Circuit's approach survives this Court's review, criminal defendants in Maryland, North Carolina, South Carolina, Virginia, and West Virginia will see a bedrock constitutional protection swallowed by a boundless exception.

CONCLUSION

The Court should grant Smith's petition for writ of certiorari.

Respectfully submitted,

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April 14, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 18, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4508

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AGHEE WILLIAM SMITH, II,

Defendant-Appellant.

No. 22-4521

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ALCORN,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, Senior District Judge. (2:19-cr-00047-RAJ-LRL-3; 2:19-cr-00047-RAJ-LRL-2)

Appendix A

ARGUED: May 10, 2024 Decided: September 17, 2024
Amended: September 18, 2024

Filed: September 18, 2024

Before KING, AGEE, and HEYTENS, Circuit Judges.

Appeal No. 22-4508 affirmed, and Appeal No. 22-4521 affirmed in part, vacated in part, and remanded, by published opinion. Judge King wrote the majority opinion. Judge Agee wrote an opinion concurring in part and concurring in the judgment. Judge Heytens wrote a dissenting opinion.

KING, Circuit Judge:

We herein resolve the consolidated appeals of defendants Aghee William Smith, II (No. 22-4508) and David Alcorn (No. 22-4521). Smith and Alcorn appeal from their convictions and sentences in the Eastern District of Virginia for their involvement in long-running illegal schemes that defrauded multiple investors of millions of dollars. In February 2022, during the COVID-19 pandemic, they were tried together before a jury in Norfolk. On appeal, Smith and Alcorn pursue a total of three contentions of error that relate to their trial and sentencing proceedings. They first assert a joint constitutional challenge to their various convictions—that is, that the district court's implementation of the district-wide COVID-19 trial protocol denied them their rights under the Public Trial Clause of the Sixth Amendment. Second, defendant Smith separately

contends that the court fatally erred by its admission into evidence of court-authorized videotaped depositions of three of the fraud victims, in violation of the Sixth Amendment's Confrontation Clause.[1] Finally, defendant Alcorn separately maintains that the court committed a reversible sentencing error, by failing to properly impose his conditions of supervised release.

As explained herein, we reject Smith and Alcorn's joint contention under the Public Trial Clause and Smith's separate contention under the Confrontation Clause. We therefore affirm Smith's multiple convictions and sentences, and we also affirm each of Alcorn's convictions. Because the district court erred in connection with Alcorn's sentencing, however, we vacate his sentences and remand.

I.

A.

On March 21, 2019, the federal grand jury in Norfolk indicted defendants Smith, Alcorn, and four other

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1. The Sixth Amendment provisions that underlie the public trial and witness confrontation issues—which we refer to as the "Public Trial Clause" and the "Confrontation Clause"—provide in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial [the "Public Trial Clause"] . . . and . . . to be confronted with the witnesses against him [the "Confrontation Clause"]. . . .

See U.S. Const. amend. VI.

defendants in a single 17-count indictment returned in connection with long-running mail and wire fraud schemes involving multiple conspirators. *See United States v. Maerki*, No. 2:19-cr-00047 (E.D. Va. Mar. 21, 2019), ECF No. 2 (the "Indictment"). One of the alleged fraud schemes entailed the marketing and selling of phony investments in an entity called Dental Support Plus Franchise, LLC ("DSPF"), which Smith and Alcorn, among others, falsely claimed was a franchisor of a dental services marketing program that would refer patients to dentists in return for a portion of the fees earned from those patients. With respect to DSPF, the Indictment alleged that from early 2011 until August 2014, Smith and Alcorn "pitched DSPF to investors across the country using advertisements that were materially false and misleading." *Id.* at 4, 19. The alleged losses from the DSPF fraud scheme totaled more than $9 million.

Another fraud scheme underlying the Indictment involved the marketing and selling of fraudulent spectrum investments. In relevant part, the Indictment alleged that, between 2012 and 2015, Smith, Alcorn, and other schemers and conspirators "sold, and caused to be sold, fraudulent spectrum investments to investors and then continued to lull investors regarding the purported value of such investments." *See* Indictment 14.[2]

2. The term "spectrum," as used herein, refers to a part of the electromagnetic spectrum (e.g., radio wavelengths) that is licensed by the Federal Communications Commission (the "FCC") for a particular purpose, such as operating a mobile telephone network or a radio station. A license holder is entitled to lease its spectrum allotment to another individual or entity. As part of the spectrum

For his alleged involvement in the mail and wire fraud schemes, Alcorn was indicted on 13 offenses:

- A single count of conspiracy to commit mail and wire fraud (Count Two), in contravention of 18 U.S.C. §§ 1341, 1343, and 1349;

- Eleven counts of wire fraud (Counts Seven through Seventeen), in violation of 18 U.S.C. §§ 1343 and 2; and

- A single count of engaging in unlawful monetary transactions (Count Nineteen), in contravention of 18 U.S.C. § 1957.

For his part, Smith was indicted as a codefendant of Alcorn in five counts of the Indictment, that is, Counts Two, Eight, Nine, Sixteen, and Seventeen. Separately, Smith was charged, along with several codefendants, with a single count of conspiracy to commit mail and wire fraud (Count One), in violation of 18 U.S.C. §§ 1341, 1343, and 1349.

B.

After the Indictment was returned in 2019, the district court conducted extensive pretrial proceedings involving defendants Smith and Alcorn, and their codefendants and coconspirators, concerning the Indictment and several

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fraud scheme, Smith and Alcorn allegedly offered and marketed false and fraudulent FCC license application services to investors.

related prosecutions. For example, the separate case of two coconspirators was consolidated with this one, rendering it a prosecution of eight defendants. In September 2020—in the midst of the COVID-19 pandemic—the court severed those eight defendants into three groups. The court's severance decisions resulted in Smith and Alcorn being joined with another defendant, who pleaded guilty before trial. The 14-day jury trial of Smith and Alcorn was conducted in Norfolk in February 2022.

1.

a.

Of relevance here, the conditions of the COVID-19 pandemic seriously deteriorated in about November 2020. In response, Chief Judge Davis of the Eastern District of Virginia issued a series of administrative orders that suspended all criminal trials in the district until at least March 1, 2021. Shortly thereafter, the Chief Judge issued a district-wide order containing the court's protocol for jury trials conducted during the pandemic. *See* E.D. Va. Gen. Order No. 2021-04 (Mar. 18, 2021) (the "COVID-19 Protocol"). As relevant here, the COVID-19 Protocol specified that

> in order to safely conduct a mid-pandemic jury trial (civil or criminal), the Court must utilize a specially retrofitted courtroom, often repurposing the entire gallery as a socially distanced jury box. Such procedure generally requires the use of two *additional* courtrooms,

> one to act as a jury room, and one to allow members of the public to watch a live video-feed of the trial courtroom.

Id. at 4.

Pursuant to the district court's COVID-19 Protocol, the trial of defendants Smith and Alcorn would utilize three courtrooms. First, the bulk of the trial proceedings would be conducted in a "trial courtroom" to be used by the jury, court personnel, defendants, and lawyers. The trial courtroom would allow for appropriate social distancing to prevent or limit the spread of COVID-19. More specifically, it would allow the jurors to be socially distanced from each other—in an area of the trial courtroom called the "gallery"—instead of sitting in the jury box. Because social distancing would require the jury to take up the majority, if not the entirety, of the gallery, a second courtroom would be designated as the "public-viewing courtroom" in which the public could observe trials through video and audio streams.[3] And a third courtroom would be reserved as a jury room since standard jury rooms did not allow for social distancing.

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3. In applying the COVID-19 Protocol, the district court installed multiple cameras in the trial courtroom to capture audio and video from several angles, seeking to acquire sounds and views from the lectern used by the lawyers, from the witness box, from the exhibits, and otherwise from the judge and the balance of the courtroom. The live audio and video feed were then streamed to the public viewing courtroom.

b.

On October 27, 2021, defendant Smith filed with the district court a "Motion for Courtroom Procedures that Conform with the Constitution," asserting that implementation of the COVID-19 Protocol was unconstitutional under the Sixth Amendment's Public Trial Clause. Smith's motion was promptly joined by defendant Alcorn. They challenged the anticipated closing of the trial courtroom and the use of a video feed that would not permit those in the public viewing courtroom to observe the jury. In challenging the video feed of the trial proceedings, Smith and Alcorn argued that the court had erroneously "used a similar procedure" in conducting an earlier trial of two of Smith and Alcorn's coconspirators, named Bank and Seabolt. *See* J.A. 265.[4] And they argued that, during "the Bank trial, the video feed did not allow the public to observe the jurors." *Id.* Smith and Alcorn maintained that the procedures under the COVID-19 Protocol with respect to the public viewing courtroom—specifically, the inability of the public to view the jurors—would violate their rights under the Public Trial Clause.

In support of their Public Trial Clause contention, Smith and Alcorn relied primarily on the Supreme Court's 1984 decision in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The *Waller* decision identified circumstances where a courtroom closure can be constitutionally permissible:

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4. Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in these appeals.

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48. Arguing that the anticipated video and audio feeds authorized by the COVID-19 Protocol would not permit the public to observe the jury during their trial, Smith and Alcorn contended that "the proposed closure [was] broader than necessary to protect the interest in maintaining safety during the pandemic and there [was] a reasonable alternative to the breadth of the anticipated closure." *See* J.A. 265.

c.

Three months later, on January 28, 2022, the district court filed a memorandum order denying Smith and Alcorn's motion concerning the COVID-19 Protocol. *See United States v. Maerki*, No. 2:19-cr-00047 (E.D. Va. Jan. 28, 2022), ECF No. 370 (the "Protocol Ruling"). The Protocol Ruling addressed, inter alia, whether the court's proposed implementation of the COVID-19 Protocol would contravene Smith's and Alcorn's rights under the Public Trial Clause. Although Smith and Alcorn argued that the video feed to be streamed to the public viewing courtroom—which would not show the jury—violated their constitutional right to a public trial, the Protocol

Ruling rejected that contention. In so ruling, the court first concluded that its compliance with the COVID-19 Protocol would be neither a partial nor a complete courtroom closure. And the Protocol Ruling emphasized that Smith and Alcorn had

> fail[ed] to cite to any authority indicating that the current procedures strictly constitute a "closure" as it is understood under the Sixth Amendment. Instead, their argument relie[d] on the premise that the current set up is a "closure," rather than a "reasonable alternative" to closing the proceedings.

Id. at 7 (footnote omitted). Additionally, the court explained that Smith and Alcorn had "failed to establish as a factual matter that there [would] be any complete closure of the proceedings triggering analysis of the *Waller* factors." *Id.* (internal quotation marks omitted).

The Protocol Ruling also reasoned that, if the district court's implementation of the COVID-19 Protocol constituted some type of courtroom closure, it nevertheless satisfied the *Waller* mandate. With respect to the first *Waller* prong, the court ruled that public health concerns arising from COVID-19 satisfied both the "overriding interest" standard that would apply to a total courtroom closure and the alternative "substantial reason" standard that would apply to a partial courtroom closure. *See* Protocol Ruling 8 (internal quotation marks omitted). And the "presumption of openness" of courtrooms, the court emphasized, was "overcome by an overriding interest in

stemming the spread of COVID-19 and protecting the public health." *Id.* (internal quotation marks omitted).

Turning to the second *Waller* prong—i.e., that the closure of a courtroom can be no broader than necessary to protect the asserted interest—the Protocol Ruling concluded that the district court's COVID-19 Protocol was exactly that. That is, it was, as the court specified, "no broader than necessary to protect" the overriding interest of stopping the spread of COVID-19. *See* Protocol Ruling 9 (internal quotation marks omitted). And the court emphasized the "extraordinary lengths" that courthouse personnel were undertaking to "preserve a defendant's constitutional rights amidst a highly contagious, potentially lethal, and perpetually fluctuating pandemic." *Id.* In particular, the "retrofitted courtrooms" would be equipped "with cameras at several critical angles to feature the Court, lectern, witness box, and exhibits." *Id.* (internal quotation marks omitted). And as the Protocol Ruling observed, "the case law [Smith and Alcorn] cite[d] only support[ed] the importance of jury observation by the trial judge, defendants, and defense counsel." *Id.* That is, the defendants had not presented any legal authority that supported their contention about the public always being able to view the jury. Finally, the court ruled that its implementation of the COVID-19 Protocol was "a reasonable alternative" to completely closing the trial courtroom. *Id.* at 10.

2.

a.

The trial of defendants Smith and Alcorn—after extensive pretrial proceedings—was scheduled for November 16, 2021. As the government prepared for trial during the ongoing pandemic, however, it discovered that several victim witnesses would be unavailable to travel long distances to testify in Virginia, due to preexisting medical conditions, advanced ages, and high risks of serious health complications if they contracted COVID-19. On October 26, 2021—three weeks before the November trial date—the prosecutors filed a motion to take video depositions of several victim witnesses, pursuant to Rule 15 of the Federal Rules of Criminal Procedure, to preserve their testimony for trial.[5] The government's Rule 15 motion was unopposed, but Smith filed a motion on October 27, 2021 to exclude the trial admission of the video depositions pursuant to the Confrontation Clause.

In particular, the evidence of three of Smith's victims—each of whom resided in or near Sacramento, California—is at issue here:

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5. In pertinent part, Rule 15 of the Federal Rules of Criminal Procedure provides as follows:

> A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.

See Fed. R. Crim. P. 15(a)(1).

- Victim V.H., who was 73 years old and was the sole caretaker of her blind husband who was in the early stages of dementia. V.H. was unable to travel or drive long distances due to her age and her husband's condition.

- Victim S.B., who was 81 years old, had medically retired from her job due to a mental breakdown caused by her extreme anxiety. She continued to suffer from crippling anxiety that rendered her unable to travel or drive long distances. S.B. also had limited mobility.

- Victim K.S., who was 64 years old, suffered from severe vertigo, which caused him to be unable to fly. He was the sole caretaker of his disabled wife.

Moreover, the three victim witnesses, due to their ages and health conditions, were each at an increased risk of serious health complications if infected with COVID-19. Compelling statements concerning the three victim witnesses were presented by the federal prosecutors to the trial court in a Declaration made by Inspector Jason W. Thomasson of the Postal Service. Thomasson corroborated each of the witnesses' individual situations with respect to, inter alia, their health problems and inability to travel to and testify in a Virginia trial.[6]

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6. Inspector Thomasson's Declarations relied, in part, on statements made by other federal officers. His sources included

The district court granted the unopposed Rule 15 motion and authorized the prosecution to take the pretrial video depositions being sought, including those of V.H., S.B., and K.S. In so ruling, the court ordered that the government pay the costs incurred by the defendants and their counsel to attend the video depositions, in person or by videoconference. On November 5, 2021, Smith's counsel and the prosecutors conducted the court-authorized depositions in the United States Attorney's Office in Sacramento. Defendant Smith, with his counsel, was present when the three victim witnesses testified, and the lawyers examined the witnesses and objected as they saw fit. Two of the witnesses—V.H. and S.B.—were unable to drive themselves to the depositions, and law enforcement officers had to transport them.

b.

When the trial of defendants Smith and Alcorn was continued for three months—from November 2021 until early February 2022—the prosecutors reconfirmed the continuing unavailability of the three victim witnesses who gave the video depositions. On January 25, 2022—approximately a week before the February trial date—the government filed a Supplemental Declaration made by Inspector Thomasson. The Supplemental Declaration

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special agents of the Federal Bureau of Investigation ("FBI") and the Internal Revenue Service ("IRS"), in addition to an Assistant United States Attorney ("AUSA"). The AUSA had communicated with the three victim witnesses and ascertained that they were each unable to travel from California to Virginia and testify at trial.

explained and confirmed that the bases for the three witnesses not being able to travel to and be present at the trial in Virginia were unchanged and continued to apply.

c.

On January 31, 2022, the district court filed a memorandum order addressing, inter alia, Smith's motion to exclude the video depositions under the Confrontation Clause. *See United States v. Maerki*, No. 2:19-cr-00047 (E.D. Va. Jan. 31, 2022), ECF No. 371 (the "Evidence Ruling"). The court therein denied Smith's motion, concluding that the government had satisfied its burden and established the unavailability of the three deposed witnesses. It also ruled that the prosecutors had made good faith efforts to obtain the trial presence of the three victim witnesses.

In making its Evidence Ruling, the district court explained that "the Government [had spelled] out in detail why the witnesses are unavailable and the good faith efforts they have made to procure their attendance at trial." *See* Evidence Ruling 8. The court emphasized that the ongoing pandemic presented

> heightened risks and substantial hardships for the deposed witnesses because they are all senior citizens who live in the Sacramento, California, area and therefore would need to take a minimum-seven-hour flight, including at least one layover, to travel to Virginia.

Id. The Evidence Ruling explained in further detail how the pandemic had compounded the personal circumstances of the three victim witnesses. And it specified their personal situations in the following detailed recitation:

- First, V.H. is 73 years old, the sole caretaker of her husband, S.H., who is legally blind and in the early stages of dementia. V.H. is also unable to drive long distances. For her deposition in Sacramento, law enforcement had to drive V.H. to and from the location and her husband accompanied her.

- Second, S.B. is 81 years old. Due to a mental breakdown, she medically retired from her job at a telephone company and continues to suffer from extreme, crippling anxiety. Her anxiety renders her unable to travel and she is also unable to drive long distances. For her deposition in Sacramento, law enforcement had to drive S.B. to and from the location. She also has limited mobility.

- Third, K.S. is 64 years old and suffers from extreme vertigo that prevents him from flying. His wife also recently suffered an accident in which she was severely injured, and he is the sole caretaker. There is no one else available to assist him.

- The Government informed all of the deposed witnesses that they were going to have to

> attend and testify at trial, but all of them informed the Government that they are unable to do so for the aforementioned reasons. Moreover, Postal Inspector Jason W. Thomasson personally met V.H., S.H., and S.B., and affirmed their unavailability based on his observations.

Id. at 7-8 (footnote and citations omitted). The Evidence Ruling thus concluded that the government had acted in good faith and sufficiently supported its position on the unavailability issue. As a result, the Evidence Ruling denied Smith's motion to exclude the video depositions.

C.

At the beginning of February 2022, the trial of defendants Smith and Alcorn commenced in Norfolk, and was conducted in accordance with the district court's COVID-19 Protocol. The prosecution presented extensive testimonial and documentary evidence, including 34 witnesses and more than 475 exhibits. And the prosecution's evidence detailed the fraud schemes that had been conceived and carried out by Smith, Alcorn, and their coconspirators—in which they primarily targeted elderly victims. More specifically, the evidence established that Smith was a financial investments salesman in California who had worked for Alcorn—who was primarily located in Arizona—and that Smith had sold millions of dollars' worth of fraudulent investments. More than 20 victims of the vast conspiracy testified at trial about the fraud schemes. Those witnesses included 12 victims to whom Smith had directly sold bogus investments.

The various victim witnesses each testified about being duped and defrauded by Smith. Several of them had learned of Smith through a Christian broadcast radio show that Smith had conducted about financial investments. His victims explained that Smith met with them to discuss their retirement situations and confirmed that they were all unsophisticated investors. In various discussions with Smith, he had vastly inflated his own experiences and successes, convincing the victim witnesses that he was trustworthy. And despite Smith emphasizing his religious beliefs to several of his victims, Smith had lied to them in multiple ways. Smith had falsely advised his victims that the DSPF and spectrum investments had successful track records, that they were safe investments, and that they carried low risks. To several of the victims, Smith falsely asserted that he had personally invested in the marketed products. And Smith had continued to sell those fraudulent investments to his victims, even after being warned that he was being investigated by government authorities and sued for misrepresentations.

Among Smith's victims were the three elderly deposed Californians identified as V.H., S.B., and K.S. V.H. confirmed that she and her husband had trusted Smith with nearly $400,000 of retirement funds, including approximately $40,000 that was invested in DSPF. Similarly, S.B. had given nearly all of her $100,000 pension fund to Smith for investments, and $25,000 of those funds went into the spectrum investments. And K.S. had placed around $25,000 with Smith for spectrum investments. None of those victims received any returns on their investments and, moreover, they lost a significant portion of their initial investments.

During the trial, defendant Smith again objected to the admission of the video depositions, asserting that, even though he and his counsel had been present and participated in the three depositions, their admission into evidence would contravene the Confrontation Clause. More specifically, Smith asserted that the government had not sufficiently established that the three victim witnesses were unavailable for trial, arguing that the existence of the COVID-19 vaccine served to undermine their health concerns. Smith also maintained that the prosecution had failed to exercise good faith in its efforts to secure the trial presence of the three victim witnesses. In that regard, Smith argued that all three witnesses could travel cross-country by rail from California to Virginia and could be present in Norfolk after a 4-day train ride. In the alternative, Smith asserted that the government could charter an airplane and fly the witnesses to Virginia, and thus minimize their health concerns.

In addition to the various fraud victims, other witnesses for the prosecution included representatives of state and federal regulatory agencies, who confirmed Smith and Alcorn's illegal sales of securities and the efforts of government regulators to stymie the fraudulent investments conspiracy.[7] Several of Smith's and Alcorn's convicted coconspirators testified on behalf of the prosecution, and they explained their own "behind the scenes" fraudulent dealings with Smith and Alcorn,

7. The prosecution called supporting witnesses from various agencies, including California's Department of Insurance, the Financial Industry Regulatory Authority, the Securities Division of the Arizona Corporation Commission, and the FCC.

including the operations and sales approaches of the fraud schemes. An expert financial analyst was called by the prosecution, and he traced the flow of fraudulently obtained money for the jury. And an expert on the spectrum investment "market"—and the potentially spurious nature of spectrum investments—explained that complex subject for the jury. For their part, Smith and Alcorn collectively called seven defense witnesses. Neither Smith nor Alcorn testified.

D.

The three-week trial concluded on February 23, 2022, with the jury rendering its verdict of guilty of all charges against both defendants. The jury thus found Smith guilty of the six offenses and Alcorn guilty of the 13 offenses lodged against them. Smith was sentenced on August 24, 2022, and he received a prison term of 156 months, plus three years of supervised release. Alcorn was sentenced on August 30, 2022, to 185 months in prison, plus three years of supervised release.

On appeal, Smith does not challenge his sentences in any respect. Alcorn presents a single appellate challenge that concerns his term of supervised release and the conditions thereof. We will therefore further discuss Alcorn's sentencing proceedings and his appellate contention with respect thereto.

After the jury convicted Alcorn of his 13 fraud-related offenses, the Probation Office prepared his presentence report (the "PSR") for the sentencing court. The PSR

confirmed that Alcorn was a leader and organizer of the mail and wire fraud conspiracies and that the amount of loss established for sentencing purposes was more than $20 million. As pertinent here, the PSR identified multiple supervised-release conditions, under separate categories called "mandatory" conditions and "standard" conditions. *See* J.A. 27882-84. And the PSR recommended that the court impose 13 standard conditions of supervised release, incorrectly characterized in the PSR as "Standard Conditions of Supervision [which] have been adopted by this Court." *Id.* at 27883. Those standard conditions had not, however, "been adopted by this Court" through the entry of a standing order, by publication of a local rule, or otherwise.

During Alcorn's August 30, 2022 sentencing proceedings, the district court heard and considered the arguments of counsel, assessed the PSR, overruled various objections, and evaluated the 18 U.S.C. § 3553(a) sentencing factors. Although the court did not expressly adopt the PSR, the court explained that it had studied and relied on the PSR and its recommendations in fashioning Alcorn's sentences. After imposing the 185-month prison term on Alcorn, the court also imposed his three-year term of supervised release. In the following brief statement, the court explained the standard conditions of supervised release being imposed on Alcorn:

> You shall also comply with all standard conditions of supervised release that have been adopted by this Court—that is, this Court in the Eastern District of Virginia—and are incorporated into this judgment by reference.

See J.A. 27729. The court thereby repeated the PSR's mischaracterization of the standard conditions of supervised release as having "been adopted by this Court."

Alcorn did not object to any conditions of supervised release, nor did he indicate any confusion concerning them. At the conclusion of the sentencing proceedings, the district court invited Alcorn to raise additional issues, and none were asserted. The very next day—August 31, 2022—the court entered its written criminal judgment as to Alcorn, which specifically identified the 13 standard conditions of supervised release recommended in his PSR.[8]

Smith and Alcorn timely noted these consolidated appeals. We possess jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

II.

As explained earlier, defendants Smith and Alcorn present a total of three contentions of error in these

8. The 13 standard conditions, specified in the PSR and identified in Alcorn's criminal judgment, established "the basic expectations for [Alcorn's] behavior while on supervision." *See* J.A. 27801. Those conditions required Alcorn to, inter alia, notify his assigned probation officer of relevant changes in his residence, contact with other felons, or contact with law enforcement; remain in the federal judicial district at a residence approved by his probation officer; seek or maintain full-time employment; and allow his probation officer to conduct visits at his residence or elsewhere.

consolidated appeals—a single joint contention plus two individual contentions. First, Smith and Alcorn jointly maintain that the district court's implementation of the COVID-19 Protocol violated their rights under the Public Trial Clause. Second, Smith contends that the court erred in its Evidence Ruling by admitting the video depositions of three victim witnesses—V.H., S.B., and K.S.—in contravention of the Confrontation Clause. Finally, Alcorn asserts that the court erred in his sentencing by failing to impose in open court, during his sentencing proceedings, the 13 standard conditions recommended in the PSR and listed in the criminal judgment. We address and resolve each of those appellate contentions in turn.

A.

We first assess Smith and Alcorn's joint contention concerning the district court's implementation of the COVID-19 Protocol. That is, they argue that the court contravened the Public Trial Clause and denied their constitutional rights to a public trial. That joint contention, as an issue of law, will be assessed de novo. *See United States v. Barronette*, 46 F.4th 177, 191-92 (4th Cir. 2022).

1.

The Sixth Amendment provides that a criminal defendant has the right to a public trial. As the Supreme Court has explained, an "open trial . . . plays an important role in the administration of justice," and "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are

being observed." *Press-Enter. Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). In contrast, "[p]roceedings held in secret . . . frustrate the broad public interest." *Id.* at 509. Although there is "a strong presumption in favor of openness, the right to an open trial is not absolute." *Bell v. Evatt*, 72 F.3d 421, 433 (4th Cir. 1995). Indeed, it is settled that the presumption of openness "may give way in certain cases to other rights or interests." *Waller*, 467 U.S. at 45. And trial judges possess sufficient discretion to "impose reasonable limitations on access" to a trial courtroom. *Bell v. Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000).

Several of our sister circuits have recognized that the implementation of various restrictions, fashioned to protect public health interests in trial court proceedings, can constitute a courtroom closure—either total or partial—under the Public Trial Clause. *See, e.g., United States v. Veneno*, 94 F.4th 1196, 1204 n.1 (10th Cir. 2024); *United States v. Hunt*, 82 F.4th 129, 141 (2d Cir. 2023); *United States v. Ansari*, 48 F.4th 393, 403 (5th Cir. 2022). In assessing whether a courtroom closure has been "total" or "partial," other courts of appeals have assessed, inter alia, whether members of the public were excluded from the courtroom and whether the public can learn of what transpired while the trial was closed, by way of transcripts, audio feeds, or video feeds. *See, e.g., United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005).

In evaluating whether a total or partial courtroom closure was justified, a reviewing court should look to and apply the *Waller* test. Again, those factors are:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48; *see also Barronette*, 46 F.4th at 193 (same). Under the first *Waller* factor, an "overriding interest" is required to justify a total courtroom closure. But if the closure is partial, "there must only be a 'substantial reason,' rather than an 'overriding interest' justifying the closure." *Smith*, 426 F.3d at 571 (collecting cases). Notably, several of our sister circuits have applied the less demanding "substantial reason" standard in assessing partial courtroom closures, because "a partial closure does not threaten as acutely the historical concerns sought to be addressed by the Sixth Amendment." *Jarvis*, 236 F.3d at 168 n.11 (collecting cases).

2.

Defendants Smith and Alcorn maintain that the trial court's implementation of the COVID-19 Protocol—which involved closing the trial courtroom to the public and streaming a video feed of the trial proceedings into the public viewing courtroom—contravened the Public Trial Clause.[9] As heretofore explained, the video feed

9. Smith and Alcorn do not take a position on whether the district court's procedure amounted to a total or partial closure of the courtroom. In their view, that determination is irrelevant

to the public viewing courtroom included views from multiple angles of the trial courtroom, so that interested observers in the public viewing courtroom could observe the lectern used by the lawyers, see the witnesses, look at the exhibits, and observe the presiding judge. Smith and Alcorn emphasize, however, the lack of any views of the jury in the video feed from the trial courtroom. In response, the government maintains that the trial court's implementation of the COVID-19 Protocol did not contravene the Public Trial Clause. The prosecution contends that Smith and Alcorn cannot show that the COVID-19 Protocol constituted even a partial courtroom closure, in the constitutional sense. And the government maintains that, if there was a partial closure of the trial courtroom, it was readily justified.

3.

a.

As an initial matter, we will evaluate whether implementation of the COVID-19 Protocol—which closed the trial courtroom to members of the public and streamed a live video feed from the trial courtroom into the public viewing courtroom, but omitted views of the jurors—constituted a partial closure under the Public Trial Clause. Smith and Alcorn make two contentions in support of

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because what occurred was sufficient to trigger the Public Trial Clause's safeguards and they allege the district court undertook inadequate safeguards under the last three parts of the *Waller* test. In any event, it is obvious there was not a total closure of the courtroom and we need only address the partial-closure question.

their position that the public should be able to observe trial jurors in a criminal case. First, they argue that a public view of the jury will serve to protect a defendant from an unjust conviction, and help to ensure that the trial participants fulfill their duties. Otherwise put, Smith and Alcorn argue that the "Sixth Amendment public-trial right" was designed in part to keep a defendant's "triers keenly alive to a sense of their responsibility." *See United States v. Mallory*, 40 F.4th 166, 175 (4th Cir. 2022).

Second, Smith and Alcorn argue that the visibility of the jury to the public will serve to maintain the public's confidence in the judicial system. The Ninth Circuit, they point out, recently vacated a conviction because the trial court had "fail[ed] to make the . . . jury subject to the public's eye," and prevented the public from seeing "the reactions of the jury to a witness's testimony" and other juror behavior. *See United States v. Allen*, 34 F.4th 789, 796 (9th Cir. 2022) (concluding that the trial court's failure to show *any* trial participants by way of a video feed "undermine[d] confidence in the proceedings" and violated the Public Trial Clause).

The lack of a view of the jury during Smith and Alcorn's trial is markedly distinct from a completely closed courtroom that might violate a defendant's right to a public trial. Although the jury in the trial courtroom could not be seen by those in the public viewing courtroom, interested observers were not prevented from seeing and hearing the trial proceedings. Rather, the forum for public observation was merely shifted from the gallery of the trial courtroom to the public viewing courtroom.

And the district court's implementation of the COVID-19 Protocol provided a nearly complete public visual access to the trial of Smith and Alcorn. The video feed of the trial proceedings was simultaneously streamed into the public viewing courtroom for members of the public. And the video feed included views of the lectern used by the lawyers, the witness box and thus the witnesses themselves, the various trial exhibits, and the presiding judge.

Smith and Alcorn's contention that it was unconstitutional for the jury not to be captured on the courtroom cameras, and thus not visible to members of the public in the public viewing courtroom, is a claim without merit. As the district court observed in the Protocol Ruling, Smith and Alcorn have failed to identify any authority for the proposition that such a specific angle of video feed is required for a trial proceeding to be deemed constitutional. And the court correctly emphasized that other courts have identified only "the importance of jury observation by the trial judge, defendants, and defense counsel." *See* Protocol Ruling 9.

We thus find ourselves in agreement with a district court in the District of Columbia, which—in a decision relied on by the trial court here—correctly recited that there is "no legal authority indicating that the Sixth Amendment requires every spectator to have a view of every angle of the Courtroom." *See United States v. Barrow*, No. 20-127, 2021 U.S. Dist. LEXIS 152420, 2021 WL 3602859, at *11 (D.D.C. Aug. 13, 2021). And "[a]s a practical matter, a spectator viewing a trial from the

courtroom gallery would not have a perfect sight line of each angle of the courtroom—let alone each individual juror." *Id.* In the context of these principles, and in the circumstances presented, we are satisfied that the lack of a view of the jury from the video feed of the trial courtroom can only be a partial courtroom closure at best.[10]

b.

Assuming, without deciding, that the district court's implementation of the COVID-19 Protocol was a partial closure of the trial courtroom, we will evaluate whether that partial closure was justified. And we know that certain closures of courtrooms can be justified by the circumstances, "such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *See Waller*, 467 U.S. at 45.

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10. Smith and Alcorn contend that the installation of an additional camera facing the jury or, in the alternative, a reconfiguration of the court's video system to provide for a view of the jury into the public viewing courtroom would have been sufficient to preserve their Sixth Amendment rights. But, as a practical matter, one additional jury-facing camera would not have allowed spectators in the public viewing courtroom to fully observe the jury. Under the COVID-19 Protocol, the jurors were socially distanced across "the majority, if not the entirety of the gallery" and thus, multiple cameras and equipment would have been necessary to capture a full view of the jury. *See* Protocol Ruling 7 n.4. We agree with the trial court that the defendants' demand—for a video feed featuring the jury that "would require a reconfiguration of the system that the Court [had] used successfully for months"—was "not required nor even preferred under the Sixth Amendment." *Id.* at 10.

Stemming the spread of COVID-19 and protecting public health are also "overriding interests" that could well support a total courtroom closure, as even Smith and Alcorn concede. *See* Br. of Appellant Smith 16-17 ("Nor do we dispute that under the first *Waller* prong, stemming the spread of COVID-19 and protecting public health are overriding interests that permitted the district court to require the public to view the trial from a separate room using a video feed." (citations and internal quotation marks omitted)).

After conceding *Waller*'s first prong, Smith and Alcorn plant their feet on its second requirement. Pursuant thereto, a partial courtroom closure "must be no broader than necessary" to protect the public health, and it must be justified by a "substantial reason." Smith and Alcorn thus contend that the trial court's implementation of the COVID-19 Protocol by streaming a video that omitted views of the jury—who were dispersed in the trial courtroom's gallery—was "broader than necessary" to protect public health interests.

In support of their broader than necessary contention, Smith and Alcorn primarily rely on the Ninth Circuit's *Allen* decision. *See* 34 F.4th 789 (9th Cir. 2022). The *Allen* decision, however, is readily distinguishable and not our precedent. In *Allen*, the Ninth Circuit was faced with a complete courtroom closure during the COVID-19 pandemic, and the district-wide procedures that were applied excluded the public from the entire courthouse and provided public access to the court proceedings only by an audio feed. *Id.* at 797. Because the public was unable

to observe any of the court proceedings, the Ninth Circuit was faced with a "total closure" of the trial courtroom, which was alleged to be overly broad. *Id.*

In evaluating whether the total courtroom closure in *Allen* was "broader than necessary," the court of appeals examined the COVID-19 protocols then being utilized by other federal courts. *See* 34 F.4th at 798-99. The *Allen* decision's comprehensive review "reveal[ed] that the district court's order to close [the entire courthouse] was 'truly exceptional.'" *Id.* at 798 (quoting *McCullen v. Coakley*, 573 U.S. 464, 490, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)). The Ninth Circuit therefore reversed the trial court in *Allen*, and emphasized that "some form of visual access"—through "a live video feed of the trial in a separate room of the courthouse, or by allowing a limited number of spectators to be present in the courtroom"—was essential to protect "the core of the defendant's Sixth Amendment right . . . to have his trial open for public attendance and observation." *Id.* at 798.[11]

In this situation, as the Protocol Ruling emphasized, "[a]ll courthouse personnel [had] gone to extraordinary lengths to preserve a defendant's constitutional rights amidst a highly contagious, potentially lethal, and

11. In addressing the total courtroom closure in *Allen*, the Ninth Circuit emphasized the "importance of public observation of court proceedings" and agreed that "a transcript is not an adequate substitute for an open trial." *See* 34 F.4th at 796. And "[f]or the purposes of the [Public Trial Clause]," the court of appeals reasoned, "an audio stream is not substantially different than a public transcript." *Id.*

perpetually fluctuating pandemic." *See* Protocol Ruling 9. Given the extenuating circumstances of the COVID-19 pandemic, we are satisfied that if there was a partial closure here—no view of the jurors—it was not "broader than necessary" and it was supported by "substantial reason[s]."[12] Put succinctly, our de novo review of this issue confirms that the district court's implementation of the COVID-19 Protocol did not contravene the Public Trial Clause.

B.

We turn next to defendant Smith's Confrontation Clause contention. Smith maintains therein that his rights under the Confrontation Clause were violated when the trial court admitted the video depositions, instead of requiring the three victim witnesses from California to appear and testify in Norfolk. Although we review de novo a constitutional challenge pursued under the Confrontation Clause, Smith's contention requires us to make certain "subsidiary assessments." *See United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1143 (10th Cir. 2014) (reviewing de novo whether cross-examination restrictions contravened Confrontation Clause, but applying abuse of discretion standard of review to "subsidiary assessment" concerning threats to witness safety).

12. In addition to satisfying the second *Waller* prong, the district court's application of the COVID-19 Protocol satisfied the third and fourth prongs. That is, the trial court considered reasonable alternatives to the partial courtroom closure, including its rejection of Smith and Alcorn's demand for a modified video feed. And the court made the requisite factual findings, including authorizing photographs of the interior of the trial courtroom.

In our situation, we will evaluate for clear error the district court's factual findings that the prosecution made a good faith effort to secure the witnesses' presence at trial, but that the three victim witnesses were unavailable to testify. *See United States v. Gigante*, 166 F.3d 75, 79-80 (2d Cir. 1999) (reviewing for clear error factual findings made by trial court with respect to medical conditions that underpin unavailability ruling). And we will then assess for abuse of discretion the court's decision to admit the video depositions. *See United States v. McGowan*, 590 F.3d 446, 453 (7th Cir. 2009) (reviewing for abuse of discretion admission of deposition evidence due to witness unavailability); *see also United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012) ("A district court abuses its discretion when it acts in an arbitrary manner, when it fails to consider judicially-recognized factors limiting its discretion, or when it relies on erroneous factual or legal premises."). Finally, we examine de novo Smith's contention that the Evidence Ruling violated the Confrontation Clause.

1.

Pursuant to the Confrontation Clause, a court will not admit into evidence "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *United States v. Dargan*, 738 F.3d 643, 650 (4th Cir. 2013) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). And a witness will not be "unavailable . . . unless the prosecutorial authorities have made a good faith effort

to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). A good faith effort, however, does not mean that the government must have exhausted every possible means of obtaining the witness's presence at trial. Rather, "[t]he lengths to which the prosecution must go to produce [the] witness . . . is a question of reasonableness" in the context of the particular case. *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (internal quotation marks omitted). And such an issue will generally be resolved through a highly fact-intensive inquiry. *See United States v. Tirado-Tirado*, 563 F.3d 117, 123 (5th Cir. 2009) ("[T]he inevitable question of precisely how much effort is required on the part of the government to reach the level of a 'good faith' and 'reasonable' effort eludes absolute resolution applicable to all cases." (internal quotation marks omitted)); *Christian v. Rhode*, 41 F.3d 461, 467 (9th Cir. 1994) ("While no court has articulated a standard for the diligence required of the prosecution in attempting to secure the defendant's presence at a deposition to be used at trial, it is clear that herculean efforts are not constitutionally required.").

Smith's unavailability contention requires an understanding of Rule 15 of the Federal Rules of Criminal Procedure and the Sixth Amendment's Confrontation Clause. To reiterate, the government requested that the district court approve the depositions of the three victim witnesses, pursuant to Rule 15. Rule 15(a)(1) provides that, in a criminal prosecution, "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial," and it authorizes the trial court to

"grant the motion because of exceptional circumstances and in the interest of justice." And Rule 15(c) requires that the accused receive notice, and that he be accorded his right to be present at the deposition.

As our colleagues on the Eleventh Circuit have explained, "the carefully-crafted provisions of Rule 15 . . . were designed to protect defendants' rights to [a] physical face-to-face confrontation." *See United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006). And the Supreme Court has recognized that Rule 15 comports with the purposes of the Confrontation Clause. *See Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). In that decision, the Court explained that the rights of an accused under the Confrontation Clause include not only a "Personal Examination," but also that the witness make "his statements under oath" and "submit to cross-examination." *Id.* (citations and internal quotation marks omitted). And the *Craig* decision emphasized that the Confrontation Clause "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness." *Id.* at 846 (internal quotation marks omitted). Finally, the Court therein recognized that it had "never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Id.* at 844.

2.

In his unavailability contention, defendant Smith maintains that the government failed to establish that the three victim witnesses were unavailable to testify at trial

and, as a result, the video depositions were erroneously admitted. He further argues that, contrary to the district court's explicit finding of unavailability, the prosecution failed to make a good faith effort to obtain the presence of the witnesses at trial.

Smith acknowledges that he was present with his lawyer at each of the three depositions, and that his counsel was accorded a full opportunity to cross-examine the three victim witnesses. But Smith nevertheless asserts that the prosecution failed to establish that the deposed witnesses were "unavailable." In support of this assertion, Smith makes two points: (1) that the government failed to make good faith efforts to obtain the trial presence of the three victim witnesses; and (2) that the district court's findings on the witnesses' medical conditions and caretaker obligations were clearly erroneous. Smith maintains that the government's justifications for the three victim witnesses not travelling from California to Virginia were inadequate. More specifically, Smith argues that the prosecutors relied only on generalized concerns about health issues during the pandemic, and that such reliance was insufficient to show that the three witnesses were unavailable.

Smith also argues that the prosecution's efforts were insufficient to satisfy its good faith obligations. He asserts that, "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *See Roberts*, 448 U.S. at 74. He argues that the prosecutors could have subpoenaed the three elderly victim witnesses

and transported them to Virginia from California by way of a chartered cross-country flight or a four-day train trip. As a result, he says that the trial court should have ruled that the prosecutors failed to make good faith efforts to produce the witnesses at trial.

The government responds that the trial court was correct in making its Evidence Ruling. Despite those efforts to secure the trial attendance of the three victim witnesses, they were "legally and factually unavailable." *See* Br. of Appellee 40. And the prosecution emphasizes that the advanced ages of the witnesses, their various medical ailments, and their related difficulties of travelling cross-country rendered each of them unavailable.

3.

A showing of good faith requires that a "reasonable effort" be made to secure the witness's appearance. *See Roberts*, 448 U.S. at 74. According to the Supreme Court in *Roberts*, "[t]he law does not require the doing of a futile act" to secure the witness's trial appearance, much less proscribe some specific act. *Id.* Furthermore, a good faith showing does not require an effort to compel the witness's trial appearance through the subpoena process, nor does it require the government to take any other specific step to secure the witness's appearance. In any event, a multi-day cross-country train ride or a chartered flight were not, in these circumstances, reasonable alternatives for the three victim witnesses.

Indeed, the Evidence Ruling correctly concluded that the prosecutors engaged in good faith efforts to secure

the three victim witnesses' trial presence, observing first that "[t]he Government informed all of the deposed witnesses that they were going to have to attend and testify at trial, but all of them informed the Government that they [were] unable to do so." *See* Evidence Ruling 8. And the court recognized that the three victim witnesses were of advanced ages, with various medical ailments and caretaker obligations. The court thus correctly found that "the ongoing COVID-19 pandemic present[ed] heightened risks and substantial hardships" that prevented them from travelling from California to Virginia for the trial. *Id.* at 7.

Postal Inspector Thomasson, based on his knowledge and investigation of the three victim witnesses' personal situations, confirmed in his Declarations the facts relied on in the Evidence Ruling. In addition to relating his personal observations about V.H. and S.B.'s circumstances, the Declaration explained that the prosecutors had reached out to the three witnesses in several instances to ascertain their ability or inability to travel to and testify in Virginia. The Declaration detailed how federal officials had contacted the witnesses by telephone—V.H. by an IRS special agent, S.B. by an FBI special agent, and K.S. by the same IRS special agent, and also by an AUSA—to assess their health and circumstances. Against the backdrop of the COVID-19 pandemic, and the ages and fragile health conditions of the witnesses, it was entirely reasonable for those efforts to be conducted by telephone.

Meanwhile, Smith presented no evidence on the unavailability issue, contesting only the sufficiency of the Declarations. Because the Declarations are

uncontradicted, however, we are satisfied that the district court could not clearly err in concluding that the three victim witnesses suffered from medical conditions that precluded the witnesses from travelling long distances during the COVID-19 pandemic.

Finally, Smith also argues that the district court's finding of unavailability in the Evidence Ruling was clearly erroneous because it was based only on generalized concerns about the COVID-19 pandemic. But the Confrontation Clause is not blind to witness health and safety. Otherwise put, although "[t]he Confrontation Clause reflects a preference for face-to-face confrontation at trial," that preference "must occasionally give way to considerations of public policy and the necessities of the case." *See Craig*, 497 U.S. at 849. In this situation, public health concerns and the personal safety of the three victim witnesses provided strong support for the Evidence Ruling. As a result, the court's factual findings concerning the prosecution's good faith efforts and the victim witnesses' unavailability were not clearly erroneous. Accordingly, the court did not abuse its discretion in making the Evidence Ruling. And we are also satisfied—upon our ultimate de novo review—that Smith's Confrontation Clause claim must be rejected.

C.

1.

Finally, we address Alcorn's contention that the district court erred in his sentencing proceedings by

failing to impose the "standard" discretionary conditions of supervised release in open court. Section 3583 of Title 18 governs the imposition of conditions of supervised release. Subsection (d) of § 3583 classifies supervised release conditions as either "mandatory" or "discretionary." The mandatory conditions of supervised release must be imposed in every sentencing situation. On the other hand, discretionary conditions of supervised release are subject, in part, to the sentencing court's discretion. The Sentencing Guidelines also subdivide the discretionary conditions into "standard" conditions, which are recommended by the Guidelines for all impositions of supervised release, and "special" or "additional" conditions, which are appropriate only in specific situations. *See* U.S.S.G. § 5D1.3(c)-(e); *see also United States v. Rogers*, 961 F.3d 291, 297 (4th Cir. 2020).

To properly impose a standard condition of supervised release that is discretionary, our precedent is that the "sentencing court must include that condition in its oral pronouncement of [the] defendant's sentence in open court." *See United States v. Singletary*, 984 F.3d 341, 345 (4th Cir. 2021).[13] Otherwise, it is possible for inconsistencies to arise between oral pronouncements of the court in the sentencing proceedings and the later-entered written criminal judgment. And our Court has recognized such

13. The right of a defendant to be present at his sentencing proceedings derives from the Fifth Amendment's Due Process Clause. *See United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); *see also Rogers*, 961 F.3d at 300 ("It is a critical part of the defendant's right to be present at sentencing." (internal quotation marks omitted)).

an inconsistency to be a *Rogers* error. *See Rogers*, 961 F.3d at 300-01 (vacating sentence where written criminal judgment was inconsistent with defendant's oral sentence).

But we also recognize that a sentencing court is entitled to "satisfy its obligation to orally pronounce discretionary conditions through incorporation." *See Rogers*, 961 F.3d at 299. Such an "[e]xpress incorporation," as our *Rogers* decision explained,

> provides us, as a reviewing court, with the crucial objective indication that a district court has undertaken the necessary individualized assessment and made a considered determination, at the time of sentencing, that an identifiable set of discretionary conditions should be imposed on a defendant's supervised release.

Id. at 300. A sentencing court is entitled to incorporate, during the oral sentencing proceedings, a written list of discretionary conditions of supervised release, such as the recommendations of conditions of release that have been spelled out in the defendant's PSR, or those established by a court-wide standing order. *Id.* at 299. In the *Rogers* case, the sentencing court advised the defendant that it was imposing "an additional term of supervision of 12 months." *Id.* (internal quotation marks omitted). But the court failed to orally inform the defendant "that a *certain* set of [standard] conditions [would] be imposed on his supervised release." *Id.* (emphasis added). Because the *Rogers* court failed to incorporate any discretionary conditions of

supervised release in open court during the sentencing proceedings, the "standard" conditions of supervised release thereafter listed—and first identified—in the written criminal judgment were erroneous and had to be vacated. *Id.* at 300-01.

2.

Before addressing the merits of Alcorn's sentencing claim, we must ascertain the appropriate standard of review. Although Alcorn did not present his *Rogers* claim to the sentencing court, he nevertheless argues that his contention is to be reviewed de novo. On the other hand, the government asserts that the de novo standard of review is not applicable, and that the *Rogers* error can only be assessed for plain error, in that Alcorn failed to raise a *Rogers*-related objection during his sentencing hearing. For support of its contention on the plain error standard, the government relies on *United States v. Elbaz*, where our panel applied plain error review in a similar situation. *See* 52 F.4th 593, 612 (4th Cir. 2022).

Put simply, we are satisfied that Alcorn is correct on the standard of review question, and that he is entitled to de novo review of his *Rogers* claim. Although a failure to object will generally trigger a plain error review, a *Rogers* claim has been recognized as different. That is, because the defendant being sentenced lacks any notice of the *Rogers* error until the court has entered its written criminal judgment, a de novo standard of review is applicable. Our decision in *United States v. Cisson* resolved that issue, and our good colleague Judge Motz explained the controlling principle:

> [W]hen a defendant fails to object in the district court, we ordinarily review for plain error. But *Rogers* claims are different by nature. A defendant who raises a *Rogers* claim argues that his written judgment is inconsistent with his oral sentence. A district court does not enter a defendant's written judgment until after it orally pronounces his sentence. So at the time of his sentencing hearing, a defendant would have *no way to know* that the court's oral pronouncement of his sentence might differ from the written judgment the court will later enter. As a result, we explained in *Rogers* that we review the consistency of the oral sentence and the written judgment de novo.

See 33 F.4th 185, 192 (4th Cir. 2022) (citations and internal quotation marks omitted). In *Cisson*, our Court also rejected the government's contention that the defendant's PSR—which recommended and listed the 13 standard discretionary conditions of supervised release—provided the defendant with sufficient notice to warrant his objection during the sentencing hearing. *Id.* at 193.

In this appeal, the government maintains that the *Cisson* ruling is not controlling, and it argues that the *Elbaz* decision controls and requires plain error review. In *Elbaz*, the defendant failed to object in open court at sentencing and our panel reviewed his *Rogers* claim for plain error. But *Elbaz* was not decided until November

2022, six months after our decision in *Cisson*.[14] And because those decisions conflict on the standard of review issue, the *Cisson* decision governs. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("[W]e have made it clear that, as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions.").[15]

Consistent with the foregoing, we are satisfied that *Cisson*—as the earlier panel decision on the standard of review issue—controls our analysis here. As a result, we are obliged to conduct a de novo review of the *Rogers* claim.

3.

Having identified the applicable standard of review, we turn to the merits of Alcorn's claim of a *Rogers* error. That

14. The *Cisson* case was decided on May 5, 2022, and the *Elbaz* case was not decided until November 3, 2022. Pursuant to *Cisson*, our Court has generally reviewed *Rogers* claims de novo. *See, e.g., United States v. Mathis*, 103 F.4th 193, 196 n.5 (4th Cir. 2024); *United States v. Lassiter*, 96 F.4th 629, 639 (4th Cir. 2022).

15. The government—realizing that *Cisson* predates *Elbaz*—has also argued in its response brief that *Elbaz* is nevertheless binding because it relied on our 2020 decision in *United States v. McMiller*, 954 F.3d 670 (4th Cir. 2020) (reviewing for plain error court's failure to explain special supervised release conditions imposed based on defendant's sex offender status). Although *McMiller* predates *Cisson*, however, it is distinguishable and thus not applicable, in that it did not involve a *Rogers* claim.

is, we must decide whether the sentencing court properly incorporated by reference the "standard" discretionary conditions.

As heretofore explained, Alcorn's PSR recommended that the district court impose 13 standard conditions of supervised release, which the PSR characterized as "Standard Conditions of Supervision [which] have been adopted by this Court." *See* J.A. 27883. During the sentencing hearing, the court then stated to Alcorn:

> You shall also comply with all standard conditions of supervised release that have been adopted by this Court—that is, this Court in the Eastern District of Virginia—and are incorporated into this judgment by reference.

Id. at 27729. Significantly, however, the Eastern District of Virginia did not then have a standing order—or any order—adopting "standard conditions of supervised release."

The government contends that the sentencing court implicitly adopted the 13 standard conditions of supervised release that were listed in Alcorn's PSR. For that proposition, the government relies on what it calls the "context" of the sentencing proceedings. Specifically, the government contends that the court referenced the PSR at various points during the sentencing proceedings, most notably when discussing a condition of supervised release that required drug testing. Furthermore, the government observes that the court adopted the PSR "for the purposes

of establishing the advisory guidelines" in the unsigned sentencing minutes filed after the sentencing proceedings. *See* J.A. 22792. This "context," the government argues, means that the court properly incorporated the standard conditions of supervised release, and that Alcorn was given sufficient notice of those conditions.

As our Court recognized in *Rogers*, an adoption of proposed conditions of supervised release by a sentencing court—such as recommendations of such conditions set forth in the defendant's PSR—requires those conditions to be expressly incorporated. *See* 961 F.3d at 299. Here, although the sentencing court stated that it had "read," "considered," and "resolved all objections" to Alcorn's PSR, it did not *expressly adopt* the PSR before orally pronouncing Alcorn's sentence. *See, e.g.*, J.A. 27702-03 ("The Court has read . . . the Presentence Report, and the Court is prepared to go forward."); *id.* at 27730 ("The Court has considered . . . your lifestyle and financial needs as reflected in the Presentence Report. . . ."); *id.* at 27711 ("Mr. Alcorn, the Court has resolved all objections that you have to this Presentence Report.").

Moreover, our Court in *Cisson* rejected the proposition that a probation officer's foreshadowing of a defendant's sentence can relieve the sentencing court of its obligation to pronounce in open court all discretionary terms of supervised release. *See* 33 F.4th at 193 ("Unless and until a district court adopts a presentence report's recommendations, those recommendations remain just that: nonbinding *recommendations*."). Because the sentencing court failed to expressly adopt the PSR's

recommended conditions of supervised release in open court, the government's effort to rely on the list of conditions in the PSR is misplaced.

The prosecutors also have a fallback position, relying on a separate aspect of *Cisson*. In *Cisson*, our panel rejected a claim that the sentencing court had "failed to adequately announce [the defendant's] discretionary conditions," but recognized that the court had "stat[ed] that it would impose the 'standard' conditions of supervised release." *See* 33 F.4th at 194. And *Cisson* recognized that the "District of South Carolina has no standing order listing its own 'standard' conditions that differs from the Guidelines list of standard conditions found at U.S.S.G. § 5D1.3(c)." *Id.* Thus, "there [was] no other set of 'standard' conditions to which the court could have been referring other than the Guidelines 'standard' conditions." *Id.* The government argues that the lack of a standing order in the Eastern District of Virginia when Alcorn was sentenced is similar to the South Carolina situation that was faced in *Cisson*. And it suggests that the sentencing court—in ordering Alcorn to "comply with all standard conditions of supervised release that have been adopted by this Court"—was, in making that statement, actually referring to the standard conditions of supervised release listed in the Sentencing Guidelines, which track the standard conditions recommended and spelled out in Alcorn's PSR.

The facts of *Cisson*, however, are materially distinguishable. In *Cisson*, the sentencing court stated only that it would impose the "mandatory and standard conditions" of supervised release. *See* 33 F.4th at 194. At

Alcorn's sentencing, on the other hand, the court imposed the "standard conditions of supervised release *that have been adopted by this court—that is, this Court in the Eastern District of Virginia*." *See* J.A. 27729 (emphasis added). The specific reference by the judge to the standard conditions adopted by "this Court in the Eastern District of Virginia" fatally undermines the government's final contention, that Alcorn's sentencing court was somehow referring to a list of standard conditions contained in the Sentencing Guidelines.

We are thus constrained to agree with Alcorn. As in the *Rogers* sentencing dispute, "the problem . . . is not with the concept of pronouncement by incorporation." *See* 961 F.3d at 299. The problem is that the district court did not expressly incorporate the standard conditions of supervised release by expressly adopting the PSR or otherwise. *Id.* at 300. Moreover, the court referred only to a standing order in the Eastern District of Virginia that did not exist. Having carefully considered Alcorn's sentencing contention de novo, we are constrained to agree that a *Rogers* error was committed. We thus vacate Alcorn's sentences and remand for plenary resentencing. *See United States v. Lassiter*, 96 F.4th 629, 640 (4th Cir. 2024) ("Our precedents are clear: When a *Rogers* error occurs, we must vacate the entire sentence and remand for full resentencing."); *see also Singletary*, 984 F.3d at 346 n.4.[16]

16. In defense of the sentencing court, it is unfortunate that the PSR contained a misstatement about the standard conditions that "have been adopted by this Court," which appears to have led the court to use that erroneous terminology. *See* J.A. 27883.

III.

Pursuant to the foregoing, we affirm Smith's various convictions and sentences, and we also affirm each of Alcorn's convictions. On the other hand, we vacate Alcorn's sentences and remand for appropriate resentencing proceedings.

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In addition, when the court asked the lawyers near the end of the sentencing proceedings if there were other matters that should be covered, both lawyers — as well as the probation officer — indicated that there was nothing further. *Id.* at 27733.

AGEE, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the majority's opinion insofar as it affirms Smith and Alcorn's convictions (and Smith's sentence), joining fully Judge King's opinion with respect to II.A and II.B, and I concur in the judgment vacating Alcorn's sentence and remanding for resentencing because that is required under the binding precedent of this Court. I write separately, however, to again point out the mess that has resulted from the Court's decisions in *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), and *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021).

Judge King ably explains the district court's error. During a district court's pronouncement of special conditions of supervised release, it can cross-reference specific conditions set out elsewhere without reciting their terms in full. But any such cross-reference must be clear and ultimately consistent with the written judgment. Here, during sentencing, the district court echoed an error in the PSR by purporting to cross-reference special conditions of supervised release listed in a "standing order" within the district. No such standing order existed at the time of sentencing. The written judgment lists special conditions of supervised release set out in Alcorn's PSR, but those conditions were never specifically adopted by the district court (nor did the court expressly adopt the PSR itself). As a result, the supervised release portion of Alcorn's sentence utilizes an ineffective cross-reference and contains an ultimately inconsistent oral pronouncement and written judgment. Under *Rogers* and *Singletary*, Alcorn is thus entitled to plenary resentencing.

I fully recognize that I am bound by *stare decisis*. As Judge Quattlebaum and I have previously opined, however, plenary resentencing in these circumstances is not required by Supreme Court case law. Our precedent to the contrary was a byproduct of inconsistent reasoning in our own case law, rendering it—unsurprisingly—a lonely outlier within the circuit courts of appeals. *See United States v. Kemp*, 88 F.4th 539, 547-53 (4th Cir. 2023) (Quattlebaum, J., concurring); *United States v. Lassiter*, 96 F.4th 629, 640-42 (4th Cir. 2024) (Agee, J., concurring in part and concurring in the judgment).

We should correct course soon, both for the development of the law within our own circuit and to avoid drifting further astray from the approach taken in all other courts of appeals. *See Kemp*, 88 F.4th at 551 (Quattlebaum, J., concurring) (describing why requiring plenary resentencing is "an outlier among other circuits"). Since a panel cannot implement such course correction, however, we remain bound in this case to vacate the sentence and remand for a full resentencing. Therefore, I concur in the judgment as to Alcorn's resentencing. But hopefully this Court sitting en banc or the Supreme Court will intervene sooner rather than later to set the law aright.

TOBY HEYTENS, Circuit Judge, dissenting:

I would vacate both defendants' convictions and remand for a new trial. "The constitutional preference and presumption . . . is that trials be held in courtrooms where the public can be present both to observe the trial and ensure participants in the trial—witnesses, jurors, the judge—know they are being observed." *State v. Bell*, 993 N.W.2d 418, 423 (Minn. 2023). This rule rests in part on the belief "that judges, lawyers, witnesses, *and jurors* will perform their respective functions more responsibly in open court" because "the presence of interested spectators may keep [a defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 & n.4 (1984) (quotation marks removed) (emphasis added); accord *United States v. Allen*, 34 F.4th 789, 796 (9th Cir. 2022) (stressing the value of permitting spectators to see "the reactions of the jury to a witness's testimony").

The COVID-19 pandemic created myriad challenges for the criminal justice system, and the district court and its staff went "to extraordinary lengths to preserve a defendant's constitutional rights amidst a highly contagious, potentially lethal, and perpetually fluctuating pandemic." JA 508. But faced with an unopposed request to ensure spectators could see the jury, it was not enough to cite efforts already made, note that changes "would require a reconfiguration of the [existing] system,"

or observe (correctly) that there is no constitutional requirement that "every spectator [must] have a view of every angle of the Courtroom." JA 508-09 (quotation marks removed). Instead, I would hold the district court needed to "make express, specific findings" about whether there were "reasonable alternatives" that would have given spectators at least some view of the jury, and, if not, why the existing limits on public access were "no broader than necessary." *Bell*, 993 N.W.2d at 426-27 (citing *Waller*, 467 U.S. at 48); see, *e.g., United States v. Veneno*, 107 F.4th 1103, 1121 (10th Cir. 2024) (Rossman, J., concurring in part and dissenting in part) (noting that one district court was able to add a "visual component" to a previously audio-only stream over a day's lunch break). Because no such findings were made here, I would vacate both defendants' convictions and remand for a new trial.

* * *

I would also vacate Smith's conviction for another reason. The Sixth Amendment gives criminal defendants "the right . . . to be confronted with the witnesses against" them. U.S. Const. amend. VI. That provision generally permits introduction of out-of-court "testimonial statements" by a person who does not appear at trial *only* if the person is "unavailable to testify" and the defendant "had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The government never denies that a pretrial deposition under Federal Rule of Criminal

Procedure 15 is a testimonial statement, and Smith admits he "was able to cross-examine the relevant witnesses at their depositions," Smith Br. 24. This case thus comes down to whether the district court erred in concluding the witnesses were "unavailable" in a constitutional sense, and, if so, whether any such error was harmless.

Many "unavailability" situations are straightforward. Take dead people. Or those in an irreversible coma. Or those who have lost the ability to communicate because of a mental condition. Everyone agrees such people are unavailable for Confrontation Clause purposes. A witness is also "unavailable" in a constitutional sense if they cannot be located, see, *e.g., Ohio v. Roberts*, 448 U.S. 56, 75-77, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), or where a witness declines to appear voluntarily and the court lacks the power to compel their attendance, see, *e.g., Mancusi v. Stubbs*, 408 U.S. 204, 211-12, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972) (witness had moved outside the United States).

This case presents no such circumstances. When Smith's trial happened, the witnesses whose pretrial depositions were admitted against him were living, conscious, and competent to offer in-court testimony. The government knew where the witnesses were, and it concedes they were within the court's subpoena power. See Fed. R. Crim. P. 17(e)(1) (authorizing nationwide service of subpoenas in federal criminal cases).

To be sure, the Supreme Court has described the ultimate question for "Sixth Amendment unavailability"

as whether "the prosecutorial authorities have made a *good-faith effort* to obtain" a witness's "presence at trial." *Roberts*, 448 U.S. at 74. But "the prosecution bears the burden of establishing this predicate," *id.* at 75, and all the government offered here was a declaration from a postal inspector stating the witnesses said they were unable to attend and providing the inspector's observations about the witnesses' health problems. The government has been unable to cite any case where a witness within the trial court's subpoena power was declared constitutionally "unavailable" despite the government never even serving a subpoena.[1] I would not make this one the first. Cf. *Barber v. Page*, 390 U.S. 719, 720, 724, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) (holding that state prosecutors failed to show a witness was unavailable when he was being held in a federal prison outside the state at the time of trial and the prosecutors "made no efforts to avail themselves" of legal options for securing his attendance).

At oral argument, the government predicted all three witnesses would have ignored subpoenas and insisted no court would have issued a material witness warrant requiring them to fly across the country amid COVID-19-related lockdowns. Maybe so. But it seems clear there is at least "a *possibility*"—however "remote"—that a person who has expressed an unwillingness or inability to travel

1. Although the postal inspector's declaration says the witnesses were told "the government was serving [them] with a subpoena," JA 423, the government does not challenge Smith's assertion that no subpoenas were ever served.

to attend a trial may change their tune when presented with a legal document ordering them to appear. *Roberts*, 448 U.S. at 74 (emphasis added). Nothing more is required for Smith to prevail.

The government's real argument, it seems to me, is that these witnesses had *excellent reasons* for not traveling across the country and it would have been inappropriate—even irresponsible—for the government to have further prodded them to do so. Fair enough. But the government cites no authority suggesting the strength of a witness's justifications for not testifying at trial has any bearing on whether the witness is "unavailable" in a constitutional sense. Such a principle would also risk eroding criminal defendants' confrontation rights whenever a witness's reasons for not appearing are valid and sympathetic.

The facts here provide an apt illustration. Of the three absent witnesses, all were elderly, two had non-COVID-19 medical conditions that counseled against travel, and two were sole caretakers for family members. They thus would have had strong reasons for not wanting to appear even absent the pandemic. But many people are of "advanced age and poor health" or have substantial family support obligations, and permitting trial courts to declare all such witnesses unavailable and thus permitted to testify via pretrial deposition would "violate[] both the literal language and the purpose of the Confrontation Clause." *Stone v. Sowders*, 997 F.2d 209, 210, 213 (6th Cir. 1993). Here, as in other contexts, the government must weigh

the burdens on potential witnesses against the need for their testimony, and the government—not criminal defendants—must bear the consequences when it elects not to force the issue. In short, I think the constitutional unavailability inquiry turns *solely* on the nature and reasonableness of the government's "effort[s]" to secure the witness's "presence at trial," *Roberts*, 448 U.S. at 74 (quotation marks and emphasis removed), and that the district court made a legal error in concluding otherwise.[2]

Finally, I cannot say the Confrontation Clause violations here were harmless beyond a reasonable doubt.

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2. Although the Supreme Court has approved a procedure permitting a witness to testify outside the defendant's presence in at least one instance, the government does not defend the district court's ruling on that ground. In *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the Supreme Court rejected a Sixth Amendment challenge to a carefully limited procedure that, "when invoked, prevent[ed] a child witness from seeing the defendant as he or she testifie[d] against the defendant at trial." *Id.* at 851. This case does not involve child witnesses, and *Craig* did not sanction taking a pretrial deposition and then playing it during trial. See *id.* (noting that the relevant procedure permitted "the judge, jury, and defendant . . . to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies" and specifically declining to hold that the testimony was even "given out of court"). And far from asking us to extend *Craig*'s holding to cover this situation, the government did not mention *Craig* in its briefs or at oral argument, choosing to go all in on defending the district court's unavailability ruling. Cf. *United States v. Buster*, 26 F.4th 627, 634-35 (4th Cir. 2022) (declining to consider arguments for admissibility the government had not made).

See *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The government has been unable to identify a single case finding it harmless to admit the entire testimony of a witness who accused the defendant of committing a crime—much less a case where the same violation happened three times during one trial. And this case seems a poor candidate to break that streak, given that the government repeatedly referenced all three absent witnesses by name during both its initial closing argument and its rebuttal and implored the jury to "[r]emember" things it had learned from "the depositions you saw." JA 3248-49; see JA 3281-84, 3355. I thus would vacate Smith's convictions based on the Confrontation Clause as well.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED AUGUST 25, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA

v.

AGHEE WILLIAM SMITH, II

Filed: August 25, 2022

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:19CR00047-003

USM Number: 78153-097

The defendant was found guilty, by a jury, on Counts 1, 2, 8, 9, 16 and 17 after a plea of not guilty.

The defendant is adjudged guilty of the following offenses:

Title and Section	Nature of Offense	Offense Ended	Count
T. 18 U.S.C. § 1349, 1341, 1343	Conspiracy to Commit Mail and Wire Fraud	August, 2017	1 and 2

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Title and Section	**Nature of Offense**	**Offense Ended**	**Count**
T. 18 U.S.C. § 1343 and 2	Wire Fraud	May 19, 2014	8, 9, 16 and 17

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 24, 2022
Date of Imposition of Judgment

Raymond A. Jackson
United States District Judge

August 25, 2022
Date

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED FIFTY-SIX (156) MONTHS.**

This term consists of ONE HUNDRED FIFTY-SIX (156) MONTHS on Count I; a term of SIXTY (60) MONTHS on Count 2, to be served CONCURRENTLY; a term of ONE HUNDRED FIFTY-SIX (156) MONTHS on each of Counts 8, 9, 16 and 17, to be served CONCURRENTLY with Count 1.

The Court makes the following recommendations to the Bureau of Prisons:

1. The Court recommends that the defendant be incarcerated in California, FCI Dublin if possible.

☒ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____
_____
Defendant delivered on_____ to _____
_____
at _____, with a certified copy of this Judgment.

Appendix B

_____
UNITED STATES
MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of THREE (3) YEARS. This term consists of THREE (3) YEARS on each of Counts 1, 2, 8, 9, 16 and 17, all to run **CONCURRENTLY.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court and incorporated by reference in this judgment as well as with any other conditions on the attached page.

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

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U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov

Defendant's Signature _____ Date

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

SPECIAL CONDITIONS OF SUPERVISION

1) As reflected in the presentence report, the defendant presents a low risk of future substance abuse, and therefore, the Court hereby suspends the mandatory condition for substance abuse testing as defined by 18 U.S.C. 3563(a)(5). However, this does not preclude the Probation Office from administering drug tests as they deem appropriate.

2) The defendant shall apply monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation; or in a lesser amount to be detennined by the Court upon the recommendation of the probation officer.

3) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

4) The defendant shall provide the probation officer access to any requested financial infonnation.

5) The defendant is prohibited from being employed in any capacity involving investments.

6) The offender shall participate in the Treasury Offset Program (TOP) as directed by the probation officer.

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Restitution**	**Fine**
TOTALS	$ 600.00	$ 21,128,498.48	$ 0.00

	AVAA Assessment*	**JVTA Assessment****
TOTALS	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

☒ Restitution amount ordered $21,128,498.48.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(t). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix B

Case Number: **2:19CR00047-003**
Defendant's Name: **SMITH, AGHEE WILLIAM**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $____ due immediately, balance due
☐ not later than ____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ The Special Assessment and Restitution are due immediately (may be combined with ☐ C, ☒ D, or ☐ F below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☒ Any balance remaining unpaid on the special assessment shall be paid in equal monthly installments of not less than

$50.00, to commence 60 days after release from imprisonment to a term of supervision; any balance remaining unpaid on the restitution shall be paid in equal monthly installments of not less than $400.00 or 25% of net income, whichever is

greated, to commence 60 days after release from imprisonment to a term of supervision.

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

☒ Joint and Several
Case Number
Defendant and Co-Defendant Names
(including defendant number)
Kent Maerki (2:19cr47-01)
David Alcom (2:19cr47-02)
Tony Scott Sellers (2:19c47-04)
Norma Jean Coffin (2:19cr47-06)
Daryl G. Bank (2:17crl26-01)
Raeann Gibson (2:17crl26-02)
Billy J. Seabolt (2:17crl26-03)
Roger Odell Hudspeth (2:17crl22-01)

Appendix B

Total Amount $21,128,498.48	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fme interest, (7) community restitution, (8) NTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED JANUARY 31, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CRIMINAL ACTION NO. 2:19-cr-47

UNITED STATES OF AMERICA,

v.

DAVID ALCORN & AGHEE WILLIAM SMITH, II,

Defendants.

Filed Jnuary 31, 2022

MEMORANDUM ORDER

Before the Court are five motions *in limine* and one motion to exclude filed by Defendant Aghee William Smith and Defendant David Alcorn (collectively, "Defendants"). Upon review of the relevant filings, the Court finds that hearings these motions are not necessary. *See* E.D. VA. LOCAL CRIM. R. 47(J). Each motion is addressed and decided in turn.

I. LEGAL STANDARD

Courts use the term "*in limine*" to "refer to any motion, whether made before or during trial, to exclude

anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984). "Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Id.* at 41 n. 4 (citing FED. R. EVID. 103(c); *cf.* FED. R. CRIM. P. 12(e)). "The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003); *see also United States v. Verges*, 2014 WL 559573, *3 (E.D. Va. Feb. 12, 2014) (noting motions *in limine* also "avoid delay, ensure an even-handed and expeditious trial, and focus the issues the jury will consider").

"The appraisal of the probative and prejudicial value of evidence is entrusted to the sound discretion of the trial court and its appraisal, absent extraordinary circumstances, will not be disturbed." *United States v. Hernandez*, 212 F. App'x 229, 230 (4th Cir. 2007). A court should only grant a motion *in limine* "when the evidence is clearly inadmissible on all potential grounds." *Wechsler,* 381 F. Supp. 2d at 140; *see also Hawthorne Partners v. AT & T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (same). This standard applies because "a court is almost always better situated during the actual trial to assess the value and utility of the evidence." *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1218 (D. Kan. 2007); *see also Luce*, 469 U.S. at 41 (noting the difficulty "in any effort to rule on subtle evidentiary questions outside a factual context"). It is therefore appropriate, unless deemed unnecessary,

for a court to "reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996).

II. DISCUSSION

First, Defendants filed[1] a Motion *in Limine* to Exclude Evidence Respecting the Status of Investments under Securities Law. Def. Smith's Mot. Lim. Evid. Sec. Law, ECF No. 222; Def. Alcorn Mot. Adopt Def. Smith's Mot. Lim. Evid. Sec. Law, ECF No. 232 (collectively, "Defs.' Mot. Sec. Law"). The Government responded in opposition and Defendant Smith replied. *See* Gov't's Mem. Opp. Defs.' Mot. Lim. Sec. Law, ECF No. 293 ("Gov't's Mem. Opp. Sec. Law"), Def. Smith's Reply Sec. Law, ECF No. 308. Defendants argue that "any testimony, evidence, and argument about the status" of several franchises and investments "under securities law" should be excluded as irrelevant, improper pursuant to Federal Rule of Evidence 403, and considered a constructive amendment to the Indictment in violation of their Fifth Amendment Rights. Defs.' Mot. Sec. Law at 1-2. The Court finds that the status of these investments is a factual issue material to understanding the conspiracy and is not unduly prejudicial to Defendants. *See e.g.*, Indictment, ECF No. 2 at ¶¶ 29-

1. Smith originally filed this Motion individually on October 27, 2021. ECF No. 222. On October 28, 2021, Alcorn filed a Motion to Adopt Defendant Smith's Motion. ECF No. 232. On January 25, 2022, the Court granted Alcom's Motion to Adopt. ECF No. 356. Accordingly, both Defendants bring this Motion.

30, 61-66. Moreover, much of Defendants' argument is based on the Government's approach to their previous co-defendant, who was tried separately. Yet, the Government contends in its response that its approach here will be markedly different because the differences in the charges at issue warrant different methods of proof. Gov't's Mem. Opp. Sec. Law at 2. To the extent Defendants' objections persist into the Government's approach in this case, they have not shown that the status of investments under securities law is "clearly inadmissible on all potential grounds." *Wechsler*, 381 F. Supp. 2d at 140. Accordingly, Defendants' Motion *in Limine* to Exclude Evidence Respecting the Status of Investments under Securities Law is **DENIED**.

Second, Defendants filed[2] a Motion *in Limine* to Preclude the Government from Asking Hypothetical Questions of Fact Witnesses to Elicit Subjective Perceptions of Materiality. Def. Smith's Mot. Lim. Gov't Hypo., ECF No. 260; Def. Alcorn Mot. Adopt Def. Smith's Mot. Lim. Gov't Hypo., ECF No. 271. The Government did not respond. The Court finds it appropriate to "reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context." *Nat'l Union*, 937 F. Supp. at 287. Accordingly, Defendants' Motion *in Limine* to Preclude the Government from Asking Hypothetical Questions of Fact Witnesses to Elicit Subjective Perceptions of Materiality is **HELD IN ABEYANCE**.

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2. Smith originally filed this Motion individually on November 8, 2021. ECF No. 260. On November 9, 2021, Alcorn filed a Motion to Adopt Defendant Smith's Motion. ECF No. 271. On January 25, 2022, the Court granted Alcom's Motion to Adopt. ECF No. 357. Accordingly, both Defendants bring this Motion.

Third, Smith filed a Motion *in Limine* to Exclude Evidence about Northridge Holdings Ltd. and Pension Funding, LLC. Def. Smith's Mot. Lim. Evid. Northridge & Pension, ECF No. 223. The Government responded in opposition and Defendant replied. *See* Gov't's Mem. Opp. Def. Smith's Mot. Lim. Evid Northridge & Pension, ECF No. 296; Def. Smith's Reply Northridge & Pension, ECF No. 309. The Court finds it appropriate to "reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context." *Nat'l Union*, 937 F. Supp. at 287. Accordingly, Smith's Motion *in Limine* to Exclude Evidence about Northridge Holdings Ltd. and Pension Funding, LLC is **HELD IN ABEYANCE**.

Fourth, Smith filed a Motion *in Limine* to Preclude Evidence of Misrepresentations that Post-Date the Charged Crimes. Def. Smith's Mot. Lim. Evid. Post-Charge Misreps., ECF No. 351. The Government has not yet responded. The Court finds it appropriate to "reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context." *Nat'l Union*, 937 F. Supp. at 287. Accordingly, Smith's Motion *in Limine* to Preclude Evidence of Misrepresentations that Post-Date the Charged Crimes is **HELD IN ABEYANCE**.

Fifth, Alcorn filed a Motion *in Limine* to Preclude Testimony at Trial of Defendant's Attorneys and Certain Communications between Attorneys and Alcorn. Def. Alcorn's Mot. Lim. Attorney Test., ECF No. 255 ("Alcorn Mot. Lim."). The Government responded in opposition.

Gov't Mem. Opp. Def. Alcorn's Mot. Lim., ECF No. 268 ("Gov't Mem. Opp. Alcorn Mot."). Defendant did not reply. Alcorn moves to preclude the Government from calling Alan Tilles, Esq., Alan Baskan, Esq., and Nathaniel Dodson, Esq. in their case in chief and any communications between counsel and Alcorn that may fall under attorney-client privilege. Alcorn Mot. Lim. at 1. Defendant states these attorneys previously represented him and provided legal advice on his entity and other investigative matters potentially relevant to the upcoming trial. *Id.* at 1-2. Since the Government has listed them as potential witnesses and produced written email communications between them and Defendant in discovery, he notes they may intend to introduce them at trial and objects to such. *Id.*

The Government argues that Alcorn "waived his attorney client privilege as to all of these communications by asserting an advice of counsel defense in the civil securities fraud action brought against him by the Securities and Exchange Commission [SEC]." Gov't's Mem. Opp. Alcorn Mot. at 1 (citing *Securities and Exchange Commission v. Janus Spectrum, LLC, et al.*, 2:15-cv-00609 (D. Ariz.)). The Government asserts that because of this defense, the SEC obtained relevant documents related to it and deposed each of the attorneys listed in Alcorn's Motion. *Id.* The emails at issue also consequently became part of the public record. *Id.* at 2. Based on the Government's supporting documentation and Defendant's failure to address the waiver issue, the Court finds that Alcorn has not met his burden of demonstrating he has not waived his attorney-client privilege. *United States v. Jones*, 696 F.2d 1072 (4th Cir. 1982) (per curium) ("The

proponent [of attorney-client privilege] must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived."). Accordingly, Alcorn's Motion *in Limine* to Preclude Testimony at Trial of Defendant's Attorneys and Certain Communications between Attorneys and Alcorn is **DENIED**.

Finally, Smith filed a Motion to Exclude Trial Admission of Deposition Testimony under the Confrontation Clause. Def. Smith's Mot. Exclude Admiss. Dep. Test. under Confront. Clause, ECF No. 224 ("Smith's Mot. Exclude"). The Government responded in opposition and Defendant replied. *See* Gov't's Mem. Opp. Def. Smith's Mot. Exclude, ECF No. 294 ("Gov't's Mem. Opp. Exclude"); Def. Smith's Reply Exclude, ECF No. 307. The Government also filed a supplemental response. Gov't's. Suppl. Opp. Smith's Mot. Exclude, ECF No. 354 ("Gov't's Suppl. Opp."). On October 26, 2021, the Government filed a Motion to Take Depositions Pursuant to Federal Rule of Criminal Procedure 15 because they argued that the witnesses are unavailable to testify at trial, their testimony is material to the Government's case, and their testimony is necessary to avoid injustice. Gov't's Mot. Take Deps. Pursuant R. 15, ECF No. 217. The Government asserted that the witnesses all live outside of Virginia, are senior citizens, are at increased risk of severe illness should they contract COVID-19, and have various other health and personal issues that make traveling to Virginia to testify a substantial hardship, or impossible. *Id.* at 4. On October 27, 2021, the Court granted the Government's Motion. Order Grant. Gov't's Mot. Take Deps., ECF No.

218. Smith moves to exclude the admission at trial of the deposition testimony of witnesses deposed pursuant to the Government's Motion. Smith's Mot. Exclude at 1-2. In support, Smith claims that the Government "has failed to show that these witnesses are - as a constitutional matter- unavailable to testify in person." *Id.* at 2.

The Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The government bears the burden of establishing the unavailability of the witness and that they have made a good-faith effort to obtain their presence at trial. *Id.* at 57; *see also Barber v. Page*, 390 U.S. 719, 724-25 (1968). A witness is "unavailable" if, *inter alia*, "the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(l)." FED. R. EVID. 804(a)(5)(A) (Rule 804(b)(1) governs former testimony that, in relevant part, "was given as a witness at a . . . lawful deposition . . . and . . . is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination"). The parties do not dispute that Smith was present, either in person or virtually, for all of the depositions to cross-examine the witnesses. The Government gave all defendants and their counsel the opportunity to attend every deposition at the Government's expense. Gov't's Mem. Opp. Exclude at 3. Smith argues, however, that the Government's proffer of unavailability is unsupported and, even if it were, is

insufficient to demonstrate unavailability. Smith's Mot. Exclude at 4.

In their Rule 15 Motion and their response to Smith's Motion, the Government lays out in detail why the witnesses are unavailable and the good faith efforts they have made to procure their attendance at trial.[3] As a preliminary matter, the Government notes that the ongoing COVID-19 pandemic presents heightened risks and substantial hardships for the deposed witnesses because they are all senior citizens who live in the Sacramento, California, area and therefore would need to take a minimum-seven-hour flight, including at least one layover, to travel to Virginia. Gov't's Mem. Opp. Exclude at 6. Moreover, each deposed witness faces other personal circumstances that, compounded with the pandemic, make them unavailable to appear at trial. First, V.H. is 73 years old, the sole caretaker of her husband, S.H., who is legally blind and in the early stages of dementia. *Id.* at 6. V.H. is also unable to drive long distances. *Id.* at 6-7. For her deposition in Sacramento, law enforcement had to drive V.H. to and from the location and her husband accompanied her. *Id.* at Ex. 4, at ¶¶ 8, 10. Second, S.B. is 81 years old. *Id.* at 7. Due to a mental breakdown, she medically retired from her job at a telephone company and continues to suffer from extreme, crippling anxiety.

3. The Court notes that the alleged victims in this case are primarily senior citizens and elderly individuals. *See* Indictment. Moreover, the Court recognizes the Government's concern that "[n]umerous potential witnesses have died or entered into the long decline of dementia while this case has been pending." Gov't's Mem. Opp. at 1.

Id. Her anxiety renders her unable to travel and she is also unable to drive long distances. *Id.* For her deposition in Sacramento, law enforcement had to drive S.B. to and from the location. *Id.* at Ex. 4, at ¶ 17. She also has limited mobility. *Id.* Third, K.S. is 64 years old and suffers from extreme vertigo that prevents him from flying. *Id.* His wife also recently suffered an accident in which she was severely injured, and he is the sole caretaker. *Id.* There is no one else available to assist him. *Id.* The Government informed all of the deposed witnesses that they were going to have to attend and testify at trial, but all of them informed the Government that they are unable to do so for the aforementioned reasons. *Id.* Moreover, Postal Inspector Jason W. Thomasson personally met V.H., S.H., and S.B., and affirmed their unavailability based on his observations.[4] *Id.* at 7.

The Court finds that the aforementioned witnesses are "demonstrably unable to testify in person." Crawford, 541 U.S. at 45. The Court also finds that the Government has met their burden of demonstrating the witnesses' unavailability and has made a good faith effort to obtain their presence at trial. *Id.* at 57; *Barber*, 390 U.S. at 724-25;

4. On January 25 , 2022 , th e Government filed a supplemental response in opposition to update the Court on the witnesses' unavailability since the trial date was continued. Gov't's Suppl. Opp. In this response, they provided a Supplemental Declaration of lnspector Thomasson, who declares that the same reasons rendering S.B., Y.H., and K.S. unavailable persist. *Id.* at Ex. A, at ¶¶ 4, 6. Moreover, he declares that K.S.'s wife has not recovered from her accident and now suffers from severe back pain, which requires routine pain management. *Id.* at ¶ 6.

see also United States v. Shayota, 934 F.3d 1049, 1053-54 (9th Cir. 2019) (a witness's out-of-court examinations are admissible if, inter alia, he or she is "unable to travel"). The Court further finds that the Government has not been able, by process or other reasonable means, to procure the witnesses' attendance at trial. FED. R. EVID. 804(a)(5)(A). Accordingly, Smith's Motion to Exclude Trial Admission of Deposition Testimony under the Confrontation Clause is **DENIED**.

The Court **DIRECTS** the Clerk to provide a copy of this Memorandum Order to all parties.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
January 31, 2022

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED NOVEMBER 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4508 (L)
(2:19-cr-00047-RAJ-LRL-3)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AGHEE WILLIAM SMITH, II,

Defendant-Appellant.

No. 22-4521
(2:19-cr-00047-RAJ-LRL-2)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ALCORN,

Defendant-Appellant.

FILED: November 15, 2024

Appendix D

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk