STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 162311**

BENONI JONATHAN ENCISO,
Defendant-Appellant.

Court of Appeals No. 342965
Circuit Court No. 17-004527-FH

On appeal from the Court of Appeals
Boonstra, P.J., and Tukel and Letica, JJ.

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED

Filed under AO 2019-6

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Before a reviewing court determines the governing standard of review, it must first ascertain whether an error occurred in the trial court and if the record is unclear, it must order a remand. Here, the record—when coupled with the People's offer of proof—shows that defendant affirmatively waived his right to be physically present at his August 2017 sentencing hearing. Must this Court order a remand to establish whether defendant waived his constitutional right to be physically present?[1]

The trial court did not answer this question.

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

[1] This section of the People's brief addresses the first and third questions asked by this Court's April 2022 MOAA order. See 79a.

II

Most constitutional errors can be deemed harmless, but for a very narrow class of structural errors which are so intrinsically harmful as to require automatic reversal. In this case, defendant appeared at sentencing by video, he was able to fully participate in the proceeding, was represented by able counsel, and was sentenced by an impartial jurist. Because defendant's appearance, by video, at his sentencing hearing did not render the proceeding *fundamentally unfair*, was it structural error?[2]

The trial court did not answer this question.

The Court of Appeals did not answer this question.

The People answer, "No."

Defendant would answer, "Yes."

[2] This section of the People's brief addresses the second and fourth questions asked by this Court. See *id.*

INTRODUCTION

In setting the scene for this Court's review, defendant paints the following picture: he was "relegated to a secondary role" at his own felony sentencing hearing by virtue of the fact that he was "required" to participate in the hearing over video while everyone else—attorneys, the judge, and the victims' families—were physically present in the courtroom.[3] This set up, a lone defendant speaking only through a video link while everyone else was able to engage with the trial court judge in the same physical courtroom space, tees this case up as righteous struggle between David and Goliath: defendant against an uncaring court system, a system which violated his fundamental constitutional right to be physically present at sentencing.

The record tells another story. Or, at least, it is clear that this is not the *whole* story.

It is true that defendant appeared for his August 7, 2017 sentencing hearing by video and that the court rule in place at the time (MCR 6.006(C)) did not expressly allow for this. Putting aside the court rule violation, this Court's April 2022 MOAA order evinces its interest in the potential constitutional violation, to wit: violation of one's right to be physically present at a critical stage of a proceeding. This, of course, presupposes that the right was denied. But the People have obtained and supplied this Court with an offer of proof showing that *defendant himself* chose not to be physically present at his sentencing hearing.

[3] Defendant's supplemental brief, 11.

Why did defendant make this choice? Because he did not want to sit in the same courtroom as the victims' families as they told the trial court judge about the pain, horror, and betrayal defendant caused by his deplorable conduct: gaining their trust in his position as a youth pastor, exploiting that trust to have the families stay in his home, all so that he could set up an iPhone to video record their underaged daughters as they changed clothing and showered, thereafter creating more than a hundred still images of their nude bodies.

This Court's MOAA order has asked important questions about a defendant's right to physical presence at sentencing. The People have sought to answer these questions and all their many permutations because they know that the Court is interested in not just deciding this case, but the next hundred as well.[4] But the People's supplemental brief shows why this case is not a suitable vehicle to make broad pronouncements in this area: it is a sentencing case that occurred years before the pandemic, under a court rule that has since been modified multiple times. It used technology that is no longer the norm for video proceedings in this state. And most critically, it appears more likely than not that if this case was remanded for the development of a record in the trial court, it could be shown that defendant affirmatively *waived his right* to physically appear at sentencing, which necessarily extinguishes any constitutional error. The application must be denied.

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[4] The Court has held several cases in abeyance pending the disposition of this one. See *People v Anderson*, __ Mich __; 978 NW2d 835 (2022); *People v Hardrick*, __ Mich __; 979 NW2d 323 (2022); *People v Kula*, __ Mich __; 978 NW2d 842 (2022); *People v Crumpton*, __ Mich __; 978 NW2d 839 (2022); *People v Wagner*, __ Mich __; 972 NW2d 50 (2022).

COUNTERSTATEMENT OF FACTS

Background facts and investigation

In early February 2017, a family (mother, father, and their three daughters) went to Boyne City, Michigan in Charlevoix County to visit defendant, 49-year-old, Benoni Jonathan Enciso. Defendant had been the girls' youth pastor at Heritage Church in Sterling Heights, Michigan when he lived downstate. The family had known defendant for years and referred to him as "Pastor Jon." Defendant would later describe himself as one of the girls' favorite people in the world. When defendant moved upstate, he continued to work as a pastor, taking a job with Genesis Church in Petoskey, Michigan.[5]

During the visit, the family stayed in defendant's home. At one point, the oldest daughter, 18 year old A.S., went into the downstairs bathroom to take a shower. Before she could do so, defendant knocked on the door and said that he had to get something out of the bathroom. A.S. left the room and defendant closed the door. She heard him open a cabinet, flush the toilet, and run the water. When defendant exited the bathroom, she went back in and took a shower. Afterwards, A.S. searched the bathroom for some Q-tips and opened the medicine cabinet: she found an iPhone that had been continuously recording video for the

[5] To protect their privacy, the People have omitted mention of the family's last name. The facts relayed here are taken from the 2017 presentence investigation report (PSIR), which is filed under separate cover. See 46b-99b. The contents of the PSIR were verified as accurate by defense counsel at sentencing. See 34a-36a; see also *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997) ("A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.") (cleaned up).

past 17 minutes. Realizing that this must be defendant's phone, A.S. "panicked" and immediately deleted the video.[6] Later, A.S. found a video of her 16 year old sister, D.S., on this device: the video depicted D.S. showering. It was obvious to A.S. that her sister had no idea that she had been recorded during this intimate act. A.S. was shocked and confused by what she had found; she felt angry and betrayed by defendant, whom she loved, trusted, and treated as "another dad[.]" 89. A.S. reported what she had found to her parents, who in turn took the phone to the police.

During a police interview, defendant admitted to recording the girls, but said that it was a one-time thing. At the end of February 2017, the Charlevoix County Prosecutor's Office charged defendant with six felonies: possession of child sexually abusive material; two counts of surveilling an unclothed person; two counts of using a device to eavesdrop; and using a computer to commit a crime. Defendant pleaded guilty to all but for the last charge and was ordered, on May 12, 2017, to serve a sentence of 2 to 4 years of imprisonment. 51b, 87b, 89b.

During the investigation into the above-described crimes, police sought and obtained a search warrant for defendant's home in Boyne City. Multiple electronic devices were seized during the execution of the warrant. One media storage device that was found during the search contained more videos and images of young girls in various stage of undress. Police determined that these images had been recorded in 2015 while defendant had rented a cottage in the Bay View Association in

[6] 88b. A.S. was later able to recover this deleted video: it had captured her getting undressed and getting into and out of the shower. See *id.*

Emmet County, Michigan. Review of these videos revealed that defendant had recorded A.S., D.S., and their youngest sister, K.S., as they used one of the bedrooms to change out of their clothing: the sisters were 16, 14, and 12 years old at the time. All three videos showed the young girls completely nude with their intimate body parts exposed. 51b.

Police also found four separate videos of another girl, 16 year old H.N., on this storage device. Similar to above, three of the videos showed H.N. using a bedroom to change out of her clothing while being unaware that her actions were being recorded. Multiple videos showed defendant immediately recovering the recording device (a phone) after H.N. left the room. Finally, investigators found video and multiple still images of H.N.'s nude body as she entered and exited a shower in a bathroom. 51b.

All told, investigators found that defendant had created 144 still images from videos he recorded in 2015. The vast majority of the still images showed the young girls' nude body parts; several images had been enhanced by zooming and by altering the lighting in the photographs. 52b, 92b.

Two investigators went to visit defendant while he was in the Charlevoix County Jail and spoke to him about the evidence that they had recovered during the search warrant. After waiving his *Miranda* rights,[7] defendant admitted to recording the three sisters, H.N., and another girl (M.H.) as well. Defendant further admitted to recording H.N. at around the same time as the 2015 events described above; this took place in Muskegon, Michigan. Defendant confessed that he had

[7] See *Miranda v Arizona*, 384 US 436, 444; 86 SCt 1602; 16 LEd2d 694 (1966).

created these videos and still images for his own sexual pleasure and arousal. Defendant explained that he thought he had gotten rid of all of the evidence by physically destroying one thumb drive and manually deleting images on another hard drive. 52b, 89b.

Proceedings in the 90th District Court

Upon completion of the investigation, the 2015 videos and still images were turned over to the Emmet County Prosecutor's Office. On May 17, 2017, defendant appeared with appointed counsel, Peter J. Lyons, before 90th District Court Attorney Magistrate Katrina Dawn Martin for the arraignment on the warrant on twenty felony counts: counts 1-4: child sexually abusive activity;[8] counts 5-8: possession of child sexually abusive material;[9] counts 9-12: capturing/distributing an image of unclothed person;[10] counts 13-16: using a computer to commit a crime: (maximum imprisonment of twenty years or more or life);[11] and counts 17-20: using a computer to commit a crime (maximum imprisonment of 4 years or more but less than 10 years).[12] Defendant stood mute and the court entered a not guilty plea on his behalf.

On May 31, 2017, defendant waived his right to a preliminary examination and the case was bound over to the 57th Circuit Court for trial. 21a; 2b.

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[8] MCL 750.145c(2).
[9] MCL 750.145c(4)
[10] MCL 750.539i(2)(b).
[11] MCL 752.797(3)(f).
[12] MCL 752.796 and MCL 752.797(3)(d).

Proceedings in the 57th Circuit Court

On June 2, 2017, defendant stood mute at the arraignment on the information and Judge Charles W. Johnson entered a not guilty plea on his behalf. 2b.

Shortly thereafter, the People filed a witness list and a demand for discovery, which contained the following notice to defense counsel:

> If your client is in custody other than in the Emmet County [sic], please notify the Assistant Prosecutor assigned to this case, in writing 30 days prior to the next court event, if you would like our office to prepare a Writ of Habeas Corpus. Otherwise, you should prepare and process the same pursuant to MCR 3.304.[13]

On June 6, 2017, the People filed a writ of habeas corpus in the 57th Circuit Court. 2b. This writ directed the Michigan Department of Corrections to produce defendant, via compatible two-way interactive video technology, for purposes of a plea hearing on July 5, 2017 at 10:00 a.m. The writ was signed and entered by Judge Johnson that same day. 8b.

The plea hearing

On July 5, 2017, attorney Lyons and Chief Assistant Prosecuting Attorney Stuart L. Fenton appeared before Judge Johnson.[14] Attorney Lyons provided the court with a copy of a plea agreement, which he

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[13] 7b. (style changed from the original). Recall that defendant began serving a prison sentence for the Charlevoix County case May 12, 2017.

[14] In 2017, MCR 6.006(A) expressly permitted the Circuit Court to use two-way interactive video technology to conduct a plea hearing.

stated had been signed by all parties.[15] In accordance with the above-described writ, defendant did not personally appear at this hearing, which Judge Johnson noted for the record:

> THE COURT: Mr. Enciso, you're participating by audio-visual today, is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Alright. Are you able to hear me well?
>
> THE DEFENDANT: Yes, Your Honor.[16]

Judge Johnson swore in defendant and then reviewed the pending charges with him, including the maximum sentence for each offense. The court reviewed the trial rights defendant would be giving up if he chose to enter a plea, his appeal rights, and asked whether anyone had threatened or induced defendant into tendering the plea. Defendant insisted that he understood the plea and that it was his own choice to plead guilty in this case. 26a-28a.

Defendant told the court that he was pleading guilty to counts 9-12: capturing/distributing image of an unclothed person and counts 17-20: using a computer to commit a crime and, through his sworn testimony, established the factual basis for each offense. 28a-29a. After

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[15] Defendant signed the plea agreement on June 29, 2017. 9b. In exchange for defendant's guilty plea to counts 9-12 and 17-20, the People agreed to dismiss the remaining counts, as well as not to issue charges on a pending complaint of fourth-degree criminal sexual conduct. The parties further acknowledged that there was no sentence agreement in this case.

[16] 24a-25a.

finding that defendant had tendered his guilty pleas freely, voluntarily, and accurately, the court accepted them. 30a.

On July 7, 2017, the trial court issued a notice to appear: this notice was sent not only to the prosecutor, but to defendant's attorney of record, Peter Lyons, as well. The notice directed the parties to appear at the Emmet County courthouse in Petoskey, Michigan, on the following day and time for the following purpose:

> ON—MONDAY DATE—AUGUST 7, 2017
>
> TIME—2:30 PM
>
> FOR SENTENCING VIA POLYCOM.[17]

On July 10, 2017, the People filed a writ of habeas corpus in the 57th Circuit Court. 3b. This writ directed the Michigan Department of Corrections to produce defendant, via compatible two-way interactive video technology, for sentencing on August 7, 2017 at 2:30 p.m. The writ was signed and entered by Judge Johnson that same day. 11b.

The sentencing hearing

On the afternoon of August 7, 2017, attorney Lyons and Chief Assistant Prosecuting Attorney Fenton appeared before Judge Johnson for sentencing. In accordance with the above-described notice and writ, defendant did not personally appear at this hearing, which Judge Johnson noted for the record:

> THE COURT: This Court is back in session. The matter before the Court at this time is the case of the People versus

[17] 3b, 10b.

> Benoni Jonathan Enciso. This is the date and time set for sentencing in this matter.
>
> Defendant is participating by Polycom. Mr. Enciso, can you hear me?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Alright. You've had a chance to discuss this matter with your attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: In particular, have you and he had adequate time to review and discuss the presentence investigation report in your case?
>
> THE DEFENDANT: Yes, sir.[18]

The court then asked attorney Lyons whether he had any factual challenges to the content of the PSIR.[19] Attorney Lyons asked that certain information contained in the report be modified; the People stipulated to the changes and the court accepted them. Neither party asked that any changes be made to the guidelines. 34a-36a.

The court then provided defense counsel with an opportunity to make a statement regarding defendant's sentence. 36a. Attorney Lyons began by noting that defendant was already serving a minimum sentence of 24 months for the charges arising out of Charlevoix County. Attorney Lyons emphasized that defendant had been cooperative in both cases and that he had a long history of service to the communities he

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[18] 34a.

[19] See *id.*; see also 46b-99b (PSIR).

had lived in. Counsel asked that the court follow Agent Jacob B. Kanine's sentencing recommendation in the PSIR, but for his recommendation for consecutive sentencing. Counsel instead asked that all sentences be ordered concurrent. See 36a-38a; 48b.

Judge Johnson then heard from H.N.'s mother who described how the lives of her family had been turned upside down by defendant's criminal conduct. His actions had shaken their faith, lost them friends, and had changed the life of their beautiful daughter forever. 38a-39a. H.N.'s father spoke next. He emphasized how much trust their family had placed in defendant, as he had been their pastor and one of their great friends. Defendant had abused that trust and the authority he had had as a youth pastor, all for his "own pleasure without remorse" for the life-long impact his actions would have on the young girls he targeted. 39a-41a.

The parents of the three sisters (A.S., D.S., and K.S.) followed, with their father speaking first. He observed that at the previous sentencing hearing (for the Charlevoix County case, which had taken place just a few months before), defendant would not even make eye contact with him: he had "just sniveled and cried like a coward[.]" 41a. He then went on to describe the trauma he and his family had gone through over the course of discovering that defendant—a person whom they had greatly trusted—had secretly videotaped all three girls while they were unclothed, with the youngest just having turned 12 years old at the time of the crime. Defendant had specifically used his position as a man of God, a youth pastor, and a close friend of the family, to gain access to and prey on these young girls. 42a-46a. The girls' father closed

by asking the court to hand down a fair and just sentence and to give his "daughters some closure to this horrible situation which" defendant had forced them to endure. 45a.

The girls' mother was the last to provide a victim impact statement. She spoke about the years-long close relationship she and her family had had with defendant and his family; their relationship had begun at church and then grew from there. When she discovered that defendant had recorded her daughters, "everything unraveled." 47a. She became sick to her stomach that someone she had trusted so much and thought of so highly could hurt her children in that way. Once this case was picked up in the local news, the girls—who were otherwise independent and happy—"shrivel[ed] before" their parents' eyes. 48a. The girls wanted to stay home and stop socializing. They cried at night and no longer wanted to travel up north. *Id.*

Things took another turn at the end of March 2017: that is when the parents found out that defendant had not only recorded their daughters in February 2017, but also had videos of them from 2015. She was "so upset that we had to start all over again with a similar situation. 48a-49a. She and her husband waited until April to tell their girls about this new evidence. Their reaction broke their mother's heart: "No parent should have to explain that someone they trusted and looked up to like another dad violated them." 49a. As she relayed the news, she held her youngest daughter, who trembled and cried.

She closed by describing how her daughters were impacted, daily, by what defendant had done. Her oldest daughter did not want to go to college anywhere near the prison facility housing defendant. None of the

three girls wanted to personally participate in the sentencing hearing because they did not think defendant was worth it. But one of them wrote a statement as part of her ongoing therapy and her mother read it into the record:

> I hate how I can't do anything with anyone anymore without questioning whether or not I can trust them. You ruined everything, and I hate how you made me feel weak. I am not weak; you are. I hope your sick twisted mind is happy, and the only good thing about this is that you are going away, and I will get therapy.[20]

Finally, the girls' mother asked that the court consider ordering defendant to serve consecutive sentences, "since he committed the crimes separately." 53a.

> The People then addressed the court:
>
> MR. FENTON: I believe that there is a special place in Hell for men who abuse and use their position of authority in a church, and portray themselves as servants of God, religious and moral leaders, all for the purpose of selfishly manipulating and deceiving children and their parents in order to satisfy their own deviant, perverted sexual desires.[21]

The People asked that the court impose a consecutive sentence, at the top-end of the guidelines, because defendant's crimes were ongoing, not a one-time mistake. The People also pointed to the fact that defendant had victimized multiple girls and had taken advantage of children and families with whom he had a close relationship. 54a-55a.

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[20] 52a.
[21] *Id.*

Defendant accepted the opportunity to provide allocution. He apologized to the families for his actions. He told the court that he was in counseling and would work towards rehabilitating himself so that he could return to the community a healthier and more stable person. Punishment, in his case, was "well deserved and just." 56a. Defendant had "never ever said [that he] did not deserve to be punished." *Id*. But he asked the court for mercy: for the sake and at the request of his family, defendant ask the court not to order consecutive sentencing.

Taking all of the information provided thus far, Judge Johnson made a lengthy record in imposing defendant's sentence. 57a-61a. He reviewed the charges to which defendant had pleaded guilty; defendant's background (including penological, educational, and biographical); and acknowledged that it was the court's duty "to impose a fair and just sentence." 57a. He reviewed the *Snow* factors[22] one at a time and discussed each in detail. With regard to protection of society, Judge Johnson found that defendant's actions in this case (preying on children, lying about it afterwards, and attempting to avoid responsibility until it was clear he could no longer do so) suggested that he was a danger to society and "to people who would trust him; someone who is eloquent enough to portray himself as trustworthy and to take advantage of the trust in the ways that he did." 59a. The court went on:

> His appeals, again, to the benefit of his family here today, fall on mostly deaf ears of this Court; not because the Court is unsympathetic to his family. It's said that sin always

[22] See 57a-59a. Judge Johnson did not expressly refer to them as the *Snow* factors, but he nonetheless listed all of them at sentencing. See 58a-60a and compare *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

> harms others; wrongs always harm others, and his actions have harmed those he loves as well as the victims that are here today, but he went ahead and did it anyway. He went ahead and did these things knowing the families, the parents—knowing as he should have as a father—how he would have felt if someone was doing this sort of thing to one of his dear children, and so the Court believes that a significant sentence to protect the public is needed and warranted under these circumstances.[23]

With regard to disciplining the offender, Judge Johnson observed that the crimes committed by defendant in this case, along with the other conduct described in the PSIR, made it such that there was "no sentence…that reflects the seriousness of the wrongs that he's done and the harm that he has caused to these young children." 58a. Judge Johnson noted that defendant's actions had turned the victims' lives upside down and had caused them prolonged harm.

As to deterrence, the court stated that it needed "to send a strong message…to anyone else out there who may be contemplating this sort of depraved behavior, that if they go forward with it, they'll be punished heavily." 60a. Finally, with respect to rehabilitation, Judge Johnson stated his wish that defendant would resume a productive life upon his release from prison, that he could be a good father to his children, and a good husband to his wife. But the court stressed that defendant would

[23] 59a-60a. The People block-quote this portion of the trial court's sentencing explanation because it is otherwise presented in defendant's brief as if Judge Johnson wholly discounted the entirety of defendant's allocution. See defendant's supplemental brief, 12 ("After noting that Mr. Enciso's allocution had fallen on 'mostly deaf ears,' the judge sentenced him[.]"), 43 ("In contrast, Mr. Enciso's video plea for mercy had, in the judge's words, fallen 'on mostly deaf ears of this court.'"). The People flatly dispute this interpretation of the sentencing record.

have to establish and take steps towards rehabilitation in order to overcome whatever it was that had brought him to the point of committing these crimes. 60a-61a.

Judge Johnson concluded by ordering defendant to serve the within-guidelines sentences that were recommended by Agent Kanine in the PSIR: two to five years of imprisonment for counts 17-20, to be served consecutively to 54 months to seven years of imprisonment on counts 9-12.[24]

Proceedings on appeal

On September 12, 2017, defendant submitted a request for the appointment of counsel. On March 23, 2018, he filed a delayed application for leave to appeal in the Michigan Court of Appeals. Issue one in defendant's application was his claim—made for the first time ever in this case—that his lack of physical presence at the August 2017 sentencing hearing violated his federal (6th and 14th Amendment) and state (article 1, §17 and §20) constitutional rights, as well as his rights under MCL 768.3, MCR 6.425(E), and MCR 6.006. Under the *Carines* four-part plain error test, defendant asserted that he was entitled to a remand for resentencing.[25]

On April 30, 2018, the Court of Appeals ordered the People to file a response to the application.

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[24] See 61a, 63a-64a (guidelines); 65a-66a (orders). Recall that defendant's own attorney asked that Judge Johnson follow Agent Kanine's sentencing recommendation, but for consecutive sentencing. See 36a-38a.

[25] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); 12b-16b.

On May 11, 2018, the People filed their answer. With regard to defendant's first issue, the People acknowledged that defendant had asked to be resentenced

> because he appeared by video instead of being present in the courtroom. Defendant chose not to be physically present at his sentencing. Resentencing is not necessary if any such waiver occurred. Defendant expressed to his trial attorney that he did not wish to be physically present at sentencing because he did not wish to see the families of the victims. This was then expressed to the trial court and the prosecutor's office. During sentencing, the trial court noted on the record that defendant was appearing by [P]olycom and defendant acknowledged being able to hear the court. At no time did defendant state an objection to being sentenced while on video.[26]

On May 21, 2018, the Court of Appeals issued an order denying defendant's delayed application for lack of merit in the grounds presented. 67a.

On June 6, 2018, defendant filed an application for leave to appeal in this Court. The argument provided in support of the first issue in defendant's application (lack of physical presence at sentencing) was the same as that presented in the Court of Appeals, including his concession that the issue should be evaluated under the *Carines* plain error test. 19b-23b.

On July 2, 2018, the People filed a letter indicating that they did not intend on filing an answer to the application.

[26] 17b-18b.

On December 19, 2018, this Court, in lieu of granting leave to appeal, entered an order remanding the case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals was directed to address whether:

> (1) a defendant's waiver of the right to be physically present at sentencing is valid only if accomplished on the record, see *People v Palmerton*, 200 Mich App 302 (1993); and (2) a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error. See *People v Heller*, 316 Mich App 314 (2016).[27]

On February 12, 2019, defendant filed a brief asserting, in pertinent part, that he was entitled to a remand for resentencing because of his virtual (and not physical) presence at sentencing. Although defendant acknowledged that some out-of-state courts had found that the denial of a defendant's presence at trial or sentencing constituted structural error, defendant did not ask for the Court of Appeals to adopt that rule. Defendant, instead, asserted that he was entitled to relief under the four-part *Carines* test. 24b-28b.

On January 14, 2020, defendant's appellate counsel appeared for oral argument in the Court of Appeals. Counsel argued that defendant was entitled to resentencing because the trial court had erred by conducting a video sentencing hearing without securing defendant's express waiver on the record.[28] Counsel further stated, emphatically,

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[27] 68a.

[28] The audio of the oral argument may be found here: https://www.courts.michigan.gov/4a36f4/siteassets/case-documents/uploads/coa/public/audiofiles/audio_342965_01142020_121112.mp3 (last accessed October 28, 2022).

that this unpreserved sentencing issue was subject to plain error review under *Carines* and that the plain error test was met in this case.[29]

On October 8, 2020, the Court of Appeals issued an unpublished per curiam opinion affirming defendant's sentences. 69a-78a. The Court first rejected defendant's argument that a waiver of his right to be physically present at sentencing can only be accomplished if stated on the record. 70a-71a. The Court, instead, held "that there is no requirement of an on-the-record waiver of the right to be present at sentencing, provided that the evidence establishes that a defendant made an intentional relinquishment or abandonment of a known right or privilege." 73a (internal quotation and citing reference omitted).

The Court of Appeals refused to rule on the exact nature of the constitutional error that defendant alleged had occurred in the trial court. The Court explained that the Michigan court rules provided a narrower ground for its ruling and case law made clear that judicial review cautioned against deciding a constitutional question if the case could be disposed of on alternative grounds.[30]

The Court of Appeals further held that defendant's unpreserved sentencing complaint had to be reviewed for plain error under *Carines*. In applying the plain error test, the Court found that defendant met the first two prongs: plain error occurred when he was sentenced in violation

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[29] *Id.* at 07:20-11:27.

[30] 73a-74a (footnote 7). Nonetheless, the Court observed that it had just recently held in *People v Bailey*, 330 Mich App 41; 944 NW2d 370 (2019), that regardless of whether an unpreserved constitutional issue was considered a structural or nonstructural error, both were to be reviewed for plain error affecting substantial rights. See *id.* at 59; 74a.

of MCR 6.006 and *People v Heller*, 316 Mich App 314; 891 NW2d 541 (2016), which otherwise prohibited felony sentencing proceedings from being conducted by video. But the Court found that defendant had failed to establish prejudice, the third prong under the plain error test. The only prejudice identified by defendant was his alleged failure to consult with counsel. But the record showed that defendant *had* conferred with his attorney prior to sentencing and that the two men had reviewed the PSIR. Further, the record amply showed that defense counsel advocated for his client, that the judge had rejected the People's request for an out-of-guidelines sentence, and defendant had provided an extensive allocution to the court. The Court of Appeals, therefore, rejected defendant's unpreserved "argument regarding his participation in the sentencing through videoconferencing." 75a.

On December 3, 2020, defendant filed an application for leave to appeal in this Court. While defendant continued to protest his virtual appearance at sentencing, he once again conceded that the issue was properly reviewed under the plain error test set forth in *Carines*. 29b-37b.

On January 8, 2021, the People filed a letter stating that they did not intend to file a response to the application for two reasons: the application lacked merit and the case did not meet the criteria for review as set forth in the court rule.

On October 8, 2021, the Court entered an order directing the People to file a response. On October 12, 2021, the People filed an answer opposing the application for defendant's failure to establish entitlement to relief under the *Carines* plain error test.

On April 15, 2022, this Court entered an order granting a MOAA on defendant's application and directed the parties to file supplemental briefs addressing whether:

> (1) a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error; (2) lack of presence at sentencing is structural error; (3) if the error is not structural how a defendant could show the error affected the outcome of the lower court proceedings; and (4) if the error is structural how a prosecutor could rebut the presumption that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. See *People v Davis*, __ Mich __ (2022) (Docket No. 161396).[31]

On August 22, 2022, defendant filed his supplemental brief and appendix.[32]

On September 8, 2022, undersigned counsel filed an appearance in this case; the appearance is limited to representing the People of the State of Michigan for purposes of this Court's April 15, 2022 MOAA order. Counsel is acting as a Special Assistant Prosecuting Attorney for Emmet County during the pendency of this proceeding.

On September 12, 2022, the People filed a motion to extend the time for filing their supplemental brief to October 28, 2022. On September 14, 2022, the Court granted the motion.

The People's brief now follows and is timely filed pursuant to this Court's order. Additional facts are provided *infra*.

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[31] 79a.

[32] The brief was filed after defendant sought and obtained permission to extend the due date for his supplemental brief.

ARGUMENT

I.

Before a reviewing court determines the governing standard of review, it must first ascertain whether an error occurred in the trial court and if the record is unclear, it must order a remand. Here, the record—when coupled with the People's offer of proof—shows that defendant affirmatively waived his right to be physically present at his August 2017 sentencing hearing. This Court must order a remand to establish whether defendant waived his constitutional right to be physically present.

Issue Preservation and Standard of Review

The People agree that neither defendant nor his attorney objected on the record to defendant appearing for the August 7, 2017 sentencing hearing via Polycom. Nor is there an express on-the-record waiver of defendant's right to be physically present in the courtroom for this proceeding (although as set forth *infra*, there is a strong possibility this can be established on remand). Assuming no waiver, the standard of review for defendant's unpreserved constitutional claim is plain error under *Carines*, 460 Mich at 763.

As discussed below, the People firmly disagree with defendant's various argument regarding the application of some other standard of review to the sentencing error described in this case. These arguments are made for the first time in the long appellate history of this case and without any recognition of the years of defense concessions that the four-part plain error standard in *Carines is* the correct standard of review that applies to this case. See MCR 7.305(H)(4)(a); MCR 7.312(A); MCR 7.212(D)(2).

Discussion

The answer to this Court's first question (whether "defendant's unpreserved claim regarding his…lack of physical presence at sentencing is subject to review for plain error")[33] is simple: Yes. Both the People and defendant have expressly accepted this standard of review as correct and controlling ever since defendant began these appellate proceedings more than four-and-a-half years ago.[34] It is reasonable to presume that the defendant's concession in this regard induced the Court of Appeals to accept and apply the plain error test when it was expressly directed by this Court to decide, on remand, whether plain error applied here. See 68a; 73a-75a. And when defendant appealed that decision to this Court, he did not seek reversal on the ground that the plain error test was somehow inapplicable to this case and the Court of Appeals erred by finding otherwise. 32b-37b.

So it is a bit odd for us to be here arguing over the standard of review in a case where, until this Court's April 2022 MOAA order, application of the standard four-part *Carines* plain error test had not been disputed by either party. But not only are the parties asked by the order to address whether the plain error test *is* the correct standard of review, we are asked to evaluate whether a defendant's lack of presence at sentencing constitutes structural error under *People v Davis*, __ Mich __; __ NW2d __; 2022 WL 779132 (2022),[35] an issue injected into this case by this Court contrary to principles of party presentation. See

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[33] 79a.

[34] See *supra* at pages 27-31.

[35] *Davis* was released 32 days before the April 2022 MOAA order and 498 days after defendant filed his application for leave to appeal in this Court.

Greenlaw v United States, 554 US 237, 243; 128 SCt 2559; 171 LEd2d 399 (2008); *United States v Sineneng-Smith*, __ US __; 140 SCt 1575; 206 LEd2d 866 (2020); *Michigan Gun Owners, Inc., v Ann Arbor Public Schools*, 502 Mich 695, 710 and 710 n 9; 918 NW2d 756 (2018).

It is clear that the MOAA order opens the door to this Court making a seismic shift in this area of law and holding that the test in *Davis* is perhaps the correct one to apply in cases such as this. Defendant bursts through the open door presented to him by this Court and seizes the opportunity. But he does not ask for the application of the *Carines* plain error rule (to which he has otherwise freely conceded for the past four plus years). He does not even ask for the application of the structural error rule in *Davis* (if anything, it is his backup argument). Defendant wants more: he asks the Court to find that the alleged error that occurred in this case is of a class and kind that is unwaivable and unforfeitable and because it is "self-executing," warrants automatic reversal. If that rule goes too far, defendant asks, at a minimum, for a change to the *Carines* plain error test itself so that it incorporates a standard adopted by this Court 45 years ago for purposes of evaluating whether a defendant's complete absence (physical and virtual) from part of a jury trial requires reversal of his conviction. See *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).

This simply cannot be. Putting aside the not insignificant issue of the Court inserting new issues into this appeal, when a party advances through our appellate courts exclusively conceding a point of law and advocating for a particular result, this Court should hold him to it. See, e.g., *Gross v General Motors Corp.*, 488 Mich 147, 161 n 8; 528 NW2d

707 (1995). A majority of this Court routinely accepts concessions of law from parties and will rule according to that concession. See *People v Hernandez*, 508 Mich 972; 965 NW2d 554 (2021).

And this Court does not shy away from applying the "rule" that if the prosecutor does not raise an argument in the Court of Appeals, it will refuse to consider it. See *People v Jemison*, 505 Mich 352, 397 n 4; 952 NW2d 394 (2020), citing *People v Walker*, 504 Mich 267, 276 n 3; 934 NW2d 727 (2019) and *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009); see also *Booth Newspapers, Inc., v University of Michigan Bd. of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). The United States Supreme Court likewise follows the practice of not deciding questions that have not been raised or decided below. See *Youakim v Miller*, 425 US 231, 234; 96 SCt 1399; 47 LEd2d 701 (1987); *Calhoun v United States*, 586 US 1206; 133 SCt 1136, 1137; 185 LEd2d 385 (2013) (Sotomayor, J., respecting denial of certiorari). Nor does the Court countenance a party arguing before it to "devise additional questions at the last minute[,]" as this "would thwart [the appellate] system." *Taylor v Freeland & Kronz*, 503 US 638, 646; 112 SCt 1644; 118 LEd2d 280 (1992).

For these reasons, using this case as a vehicle to adopt and apply anything other than the work-a-day four-part plain error test in *Carines* would require this Court to steamroll or ignore fundamental principles of appellate practice and procedure. See *People v McKinney*, 468 Mich 928, 970; 663 NW2d 469 (2003) (Corrigan, C.J., dissenting); *id.* (Young, J., dissenting). The application should be denied on this basis alone.

A. *All lack of presence claims first require the defendant to establish that an error occurred in the trial court: when—like in this case—there is evidence suggesting that no error occurred because the defendant waived his right to physical presence, the Court must order a remand.*

This Court's April 2022 MOAA order necessarily assumes that an error occurred in the trial court, as all four questions ask the parties to address the appropriate standard of review for a defendant's unpreserved claim regarding his lack of physical presence at sentencing. But the order does *not* ask the antecedent question, even though it is dispositive: *did error even occur?* See *McGraw*, 484 Mich at 139 (Corrigan, J., dissenting) (explaining that issue preservation, "including forfeiture and waiver, is a threshold question that inheres in *every issue* raised on appeal and must be considered by an appellate court."); (emphasis added); see also *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006). It is only if an error occurred that a court must address what the proper standard of review is on appeal. See *Puckett v United States*, 556 US 129, 138; 129 SCt 1423; 173 LEd2d 266 (2009).

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v Olano*, 507 US 725, 732-733; 113 SCt 1770; 123 LEd2d 508 (1993). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733, quoting *Johnson v Zerbst*, 304 US 458, 464; 58 SCt 1019; 82 LEd 1461 (1938). A waiver *extinguishes* an error leaving nothing for defendant to raise on appeal. See *People v Carter*, 462 Mich 206, 209; 612 NW2d 144 (2000). In contrast, if an error occurs in the trial court

and defendant does not affirmatively waive it, "then there has been an 'error'…despite the absence of a timely objection." *Olano*, 507 US at 733-734. With regard to the issue in this case, because the right to be present (even at a critical stage of a proceeding) is not absolute, it is subject to waiver.[36]

The People recognize that an appellate court will "indulge every reasonable presumption against waiver of fundamental constitutional rights"[37] and will "not presume acquiescence in the loss of fundamental rights."[38] But where the record is silent or otherwise unclear, an appellate court should likewise not indulge in a presumption that a waiver of a fundamental right *cannot* be established on remand. With an offer of proof, the court, instead, should remand the case for the trial court to determine whether a valid waiver can be established. That is exactly what the United States Supreme Court did in *Johnson*, 304 US at 469, and this is what it (and our Court of Appeals) have done in other cases as well. See *Rice v Olson*, 324 US 786, 791; 65 SCt 989; 89 LEd 1367 (1945) (remanding for the defendant to have a hearing on his allegation that he did not waive his constitutional right to have the benefit of counsel); *Carnley v Cochran*, 369 US 506, 515-516; 82 SCt 884; 8 LEd2d 70 (1962) (affirming that a hearing is required when the facts of waiver are in dispute); *Rushen v Spain*, 464 US 114, 119-120; 104 SCt

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[36] See *Illinois v Allen*, 397 US 337, 343; 90 SCt 1057; 25 LEd2d 353 (1970) (explaining that a defendant may waive his right to be present at trial); *People v Palmerton*, 200 Mich App 302, 303-304; 503 NW2d 663 (1993) (same with regard to sentencing).

[37] *Johnson*, 304 US at 464.

[38] *Ohio Bell Tel. Co. v Public Utilities Commission of Ohio*, 301 US 292, 307; 57 SCt 724; 81 LEd 1093 (1937).

453; 78 LEd2d 267 (1983); *Morgan*, 400 Mich at 605. And while the Court of Appeals in this case held "that there is no requirement of an on-the-record waiver of the right to be present at sentencing," it made no further findings about waiver or whether a waiver could be established on remand.[39]

Speaking broadly, ordering a remand in the manner described here for defendants who bring these types of claims serves three key purposes: first, it preserves judicial economy because if it is established that the defendant did, in fact, voluntarily agree not to appear in person for his sentencing hearing, then his later claim of an alleged deprivation of his constitutional right to be present would necessarily evaporate, leaving nothing for the appellate court to do. See *Carter*, 462 Mich at 209. Relatedly, nipping these cases in the bud preserves judicial economy in the trial court as well, as the court is not forced to spend precious time and resources presiding over a second (or third, or fourth) sentencing hearing which may be altogether unnecessary.

Second—and unacknowledged by defendant—is the fact that any resentencing ordered by an appellate court has a tremendous emotional and psychological impact on the victim(s) associated with each case.[40] A

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[39] 73a. But the notion that one *could* develop irrefutable proof of a defendant's voluntary waiver of a constitutional right, despite the fact that it had not been placed on the record, was expressly explored by Judges Tukel and Letica at oral argument when this case was in the Court of Appeals. See *supra* at footnote 28.

[40] See defendant's supplemental brief, 40 (listing the costs associated with a resentencing hearing but omitting any mention of the victims, unless perhaps they are encompassed by his reference to the "few select individuals" who are otherwise required to attend). Crime victims have a court rule, statutory, and

new sentencing hearing brings fear and anxiety that the offender may be imminently released. It forces the victim and/or the surviving family members to relive the events that gave rise to the case. It is for this reason that a resentencing hearing should not be casually ordered without appreciating the real-life societal impact that flows from that decision. See generally Dorislee Gilbert and Emily Bonistall Postel, *Truth Without Trauma: Reducing Re-Traumatization Throughout the Justice System*, 60 U. Louisville L. Rev. 521, 525 (2022) (describing the trauma suffered by crime victims and the court system's role in adding to trauma); Kayla Lasswell Otano, *Victimizing the Victim Again, Weaponizing Continuances in Criminal Cases*, 18 Ave Maria L. Rev. 110, 112 (2020) (outlining the risk of secondary trauma crime victims are exposed to when the criminal justice system becomes involved and describing one crime victim as feeling as if she had been treated "like 'a piece of evidence like a fingerprint or a photograph, but not as a feeling, thinking human being[.]'").

Third, there is a pragmatic reason to order a remand in cases such as these. Shouldn't we want to know the truth of what happened in the trial court? Why should a defendant benefit (at great judicial and societal cost) from what may be nothing more than an oversight at the start of a sentencing hearing?[41] Imagine what is surely, by now, a very common scenario: the parties appear over Zoom for sentencing and the

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constitutional right to be present—and speak—at a defendant's sentencing hearing, as well as contribute a statement for use in the preparation of the presentence investigation report. See MCR 6.425(D)(1)(c); MCL 780.764; MCL 780.765(1); Const. 1963, art. 1, §24. Note that at the time sentencing occurred in this case in 2017, the governing court rule was MCR 6.425(E)(1)(c).

[41] See *supra* at footnote 39.

judge asks the defendant and his attorney if they are consenting to appear and participate over video. Both say yes. The judge then begins to record the proceeding: the clerk calls the case and counsel put on their appearances. When the judge addresses the defendant directly, he (like the judge in this case), makes note of the defendant's appearance by video but does not ask whether the defendant is consenting to appear that way. The sentencing hearing continues with a discussion of the contents of the presentence investigation report, and so on. Both the defendant and his counsel could sit back, silently note with satisfaction that the judge failed to make an express inquiry on the record about defendant's waiver of his right to be physically present, and then later claim on appeal a deprivation of that right. This is classic sandbagging, and we should not sanction any practice that allows for it. See *Puckett*, 556 US at 134.

The case before this Court screams out for a remand in order to determine whether this defendant voluntarily waived his right to be physically present at his August 7, 2017 sentencing hearing.[42] At both hearings in the Circuit Court (plea and sentencing), defendant appeared over Polycom and did not object to doing so. The record shows that video writs were prepared in advance of each hearing, that both writs were filed with the trial court, and that defense counsel objected to neither. Moreover, the trial court sent a written notice to defense counsel a full

[42] See defendant's supplemental brief, 35 (acknowledging that there is nothing in the record establishing defendant's consent or waiver); 34 (generally recognizing that even if an on-the-record waiver is not in the record, it may be possible to establish a waiver nonetheless). The Court of Appeals in this case correctly found that a waiver of a defendant's right to be present at sentencing need not necessarily be placed on the record in order to be valid. See 72a-73a.

31 days before the sentencing hearing: this notice specifically apprised him that the sentencing hearing would take place over video. Defense counsel did not object to this notice, nor has defendant ever argued on appeal that counsel was ineffective in any way. In their May 11, 2018 response filed in the Court of Appeals, the People explained why it was that defendant did not appear in person at sentencing:

> Defendant chose not to be physically present at his sentencing. Resentencing is not necessary if any such waiver occurred. Defendant expressed to his trial attorney that he did not wish to be physically present at sentencing because he did not wish to see the families of the victims. This was then expressed to the trial court and the prosecutor's office. During sentencing, the trial court noted on the record that defendant was appearing by [P]olycom and defendant acknowledged being able to hear the court. At no time did defendant state an objection to being sentenced while on video.[43]

Two points must be made here. First, there is a reason why the People included such a detailed statement of facts in this brief.[44] The facts of this case give credence to the People's assertion that defendant did not want to sit in the same room as the four anguished parents who attended his sentencing hearing. These were people whom he had

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[43] 17b. Funnily enough, this description nearly perfectly aligns with the process defendant himself seems to find acceptable. See defendant's supplemental brief, 41 (explaining that court-ordered resentencings would not be needed "if trial courts would simply follow a practice that makes the defendants the one who initiates the process by requesting remote participation followed by a personal and timely on-record waiver.").

[44] Compare the People's statement of facts with defendant's, a far more truncated description not only of what took place in the trial court, but of the precise scope and nature of the crimes committed by defendant. See defendant's supplemental brief, 11-13.

betrayed in the most fundamental way: a former youth pastor who had spied on and recorded their underaged daughters while they were in their most intimate and vulnerable moments, all for his own sexual pleasure. As one parent said, defendant was a coward who did not want to truly face what he had done to these children and their families. 41a.

Second, the People freely acknowledge that defendant has voiced his objection to the content of their May 11, 2018 Court of Appeals filing, attacking it as improperly resting on information that is outside the record on appeal.[45] *But he has never said that the information is untrue*.[46] And after undersigned counsel took over this case, she obtained an offer of proof which supports the representations made in that May 11, 2018 pleading. 44b-45b. Before taking the extreme step of ordering a new sentencing hearing and putting these families through the trauma of a resentencing hearing, *the least* this Court can do is find out whether an error even occurred in the trial court. Remand this case and allow for a record to be made establishing defendant's intelligent and understanding waiver of his right to be physically present at the August 7, 2017 sentencing hearing.[47]

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[45] See *supra* at footnote 28; 32b.

[46] See *id.* That the People's 2018 pleading contained an "unsubstantiated, unsourced, and unproven" description of what happened in the trial court does not mean that the description is *untrue*. 32b.

[47] See *Johnson*, 304 US at 464 and *Carnley*, 369 US at 516 for the test to be used on remand. A remand that could establish that defendant made an informed, voluntary waiver of his right to be physically present at his sentencing hearing would extinguish his claim of constitutional error and that is the apparatus ambulating his appeal through this Court.

B. *In the event this Court does not order a remand and assuming* in arguendo *that an error occurred below, the People continue to agree with the clear defense concession—made over the span of three years, four appellate pleadings, and one appellate oral argument—that his unpreserved sentencing issue must be reviewed under the four-part plain error test set forth in* Carines.

Returning now to the first question in this Court's MOAA order: whether the plain error test applies to a defendant's unpreserved claim regarding his lack of physical presence at sentencing.[48] The answer is yes. See *People v Anderson*, __ Mich App __; __ NW2d __; 2022 WL 981299 (2022) (reviewing the defendant's unpreserved constitutional claim regarding his lack of physical presence at sentencing, which occurred over Zoom, for plain error under *Carines*).[49] History and common sense support this conclusion.

Litigants have a duty to preserve claims of error that occur in the trial court. See *Carines*, 460 Mich at 767. The rationale behind this rule is "strongly supported by history as well as by policy." *People v Vaughn*, 491 Mich 642, 653; 821 NW2d 288 (2012). Preservation rules serve "the important need" of encouraging all participants "to seek a fair and accurate" proceeding "the first time around[.]" *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). "There is good reason for this; anyone familiar with the work of courts understands that errors are a constant

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[48] As set forth *supra*, answering this question requires this Court to find that an error occurred. See *Puckett*, 556 US at 138. The People so assume *in arguendo*.

[49] The defendant's application seeking leave to appeal in *Anderson* has been held in abeyance pending the disposition of this case. See *Anderson*, 978 NW2d 835.

in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett*, 556 US at 134 (cleaned up). In *Mechanik*, the Supreme Court provided further insight on this point:

> reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders.[50]

Incentivizing a party to raise an objection at a time when the trial court has an opportunity to correct the error may very well obviate the necessity of further legal proceedings because given the opportunity, the trial court is able to directly address any alleged deprivation of a defendant's constitutional and nonconstitutional rights. See *id.*; *Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987) (quoting, with favor, from LaFave for the proposition "that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right."). The rule also "prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not

[50] *United States v Mechanik*, 475 US 66, 72; 106 SCt 938; 89 LEd2d 50 (1986) (cleaned up); see also *Grant*, 445 Mich at 551.

conclude in his favor" and precludes him from harboring error as an appellate parachute. *People v Cain*, 498 Mich 108, 115; 869 NW2d 829 (2015); see also *Carter*, 462 Mich at 214.

"The policy underlying Michigan's preservation requirement governs all issues" and it "provides no basis for distinguishing constitutional from nonconstitutional error." *Carines*, 460 Mich at 767, 764. When a defendant fails to make the timely assertion of a right (whether constitutional or nonconstitutional) in the trial court, the error will be deemed forfeited on appeal. See *Olano*, 507 US at 733. While this result may seem harsh, both the United States Supreme Court and this Court have emphasized time and again that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v United States*, 321 US 414, 444; 64 SCt 660; 88 LEd 834 (1944); see also *Olano*, 507 US at 731; *Puckett*, 556 US at 134; *Vaughn*, 491 Mich at 654; *Grant*, 445 Mich at 551 n 29. "Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken." *Yakus*, 321 US at 444.

For many years, this Court enforced the "'No objection—no ruling—no error presented'" rule, which prohibited attorneys from standing by, failing to make timely objections in the court with jurisdiction to address an error, "take his chances on the verdict of the jury, and if not satisfied with the verdict, then make his objection on a

motion for a new trial for the first time."[51] But in present day, a defendant who fails to make a timely assertion of a right before the tribunal who had the jurisdiction to remedy the error may seek relief on appeal. In order to overcome his forfeiture, he must pass the plain error test described in *Olano* and later adopted by this Court in *Carines*:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.[52]

The appellate court conducting a review for plain error "may consider the *entire* record—not just the record from the *particular proceeding* where the error occurred." *Greer v United States*, __ US __; 141 SCt 2090; 210 LEd2d 121 (2021) (emphasis in the original).

It is true that meeting all four parts of the *Carines* test is not easy, but that is by design—it is *supposed* to be difficult. See *Puckett*, 556 US

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[51] *Herbert v Durgis*, 276 Mich 158, 166; 267 NW 809 (1936). The United States Supreme Court enforced a similar rule. See *United States v Atkinson*, 297 US 157, 159; 56 SCt 391; 80 LEd 555 (1936).

[52] *Carines*, 460 Mich at 763-764 (cleaned up).

at 135; see also *United States v Frady*, 456 US 152, 163 n 14; 102 SCt 1584; 71 LEd2d 816 (1982) (citing with approval to lower federal court cases which emphasized that the plain error rule is not "a run-of-the-mill remedy[;]" it, instead, is to be invoked only in exceptional cases to avoid a miscarriage of justice."); *United States v Dominguez Benitez*, 542 US 74, 83 n 9; 124 SCt 2333; 159 LEd2d 157 (2004). The purpose of the rule tells us why: it acts as an impetus for litigants to speak up when the court still has time to correct the error. Review under the plain error test, however, "does not deny that error 'close consideration,' […] because the plain-error analysis already requires reviewing courts to consider carefully whether any forfeited error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Vaughn*, 491 Mich at 655 n 42.

C. How a defendant meets his burden to prove prejudice under the third prong of the Carines *plain error test.*

Under the third part of the plain error test, a defendant must show that the plain error affected substantial rights. See *Carines*, 460 Mich at 763. This Court has asked the parties to address how a defendant could show that his unpreserved claim of non-structural constitutional error, to wit: his lack of physical presence at sentencing, affected the outcome of the lower court proceedings.[53] This is not the herculean task that defendant makes it out to be.

[53] This is the third question posed in this Court's MOAA order. See 79a. A detailed discussion of structural error is set forth *infra* in Issue II.

In *People v Stefanski*, unpublished per curiam opinion, issued July 14, 2022, 2022 WL 2760434 (Docket no. 357102), the defendant won a resentencing based on an unpreserved lack of physical presence claim. 38b-43b. In that case, the defendant appeared for his felony sentencing hearing on the crime of armed robbery[54] by video from the jail, while his attorney, the prosecutor, and the judge appeared in person in the courtroom.[55] During the hearing, the parties contested the proper scoring of an offense variable and each attorney made different requests for the court's ultimate sentence. When defense counsel directly addressed the court, he "stated that he wished that defendant was in the courtroom so that he could express" his remorse "to the trial court…so that the trial court could see that defendant was 'looking forward to his opportunities of rehabilitation in prison.'" 39b. Counsel further noted "that it was difficult to see defendant on the camera." *Id.*

On appeal, the defendant protested his appearance, by video, at sentencing and the Court of Appeals analyzed his claim of error under the standard four-part *Carines* test. See *id.* The Court of Appeals first noted that the record did not reflect a waiver of defendant's right to be present at sentencing. Indeed, his attorney had specifically stated on the record that he wished his client was in the courtroom because it was difficult to see him on camera. The Court of Appeals made other observations as well: there was no explanation on the record about

[54] MCL 750.529. Defendant was also charged as a second habitual offender, MCL 769.10.

[55] Unlike this case, sentencing in *Stefanski* occurred during the COVID-19 pandemic, at which time a slate of different court rules and administrative orders dictated the use of video technology at sentencing.

whether the defendant's appearance by video was necessitated by the pandemic and some technological hiccups during the proceeding supported the defendant's appellate argument that he was not able to properly consult with his attorney during the hearing. Finally, unlike in *Anderson*, 2022 WL 981299, the People had made no argument, on appeal, defending the overall fairness of the sentencing hearing. The Court of Appeals therefore ordered defendant to be resentenced. See 40b-41b. Because the prosecution did not file an appeal to this Court, *Stefanski* became final on September 8, 2022, thereby guaranteeing the defendant's receipt of a new sentencing hearing. See MCR 7.215(F)(1)(a).

The issues identified in *Stefanski* broadly cover the areas that may tend to establish prejudice when a defendant appears, by video, at his sentencing hearing: inability to speak with counsel when requested;[56] technological problems in the transmission of sound and video during the hearing;[57] and the parties' inability to clearly see

[56] See also *Heller*, 316 Mich App at 316 (noting that the record in that case showed that although counsel had met with his client in the days leading up to sentencing, he had not had the PSIR at that time and could only assume that his client had since received a copy; there was no evidence in the record that the defendant had, in fact, received and reviewed a copy of this report as of the day he appeared, by video, for his felony sentencing hearing); cf 34a (defendant confirming on the record in this case that he had prepared for the sentencing hearing with his attorney and had had adequate time to review and discuss with him the PSIR).

[57] For example, the failure of video (on either side of the transmission), but working audio or vice versa; streaming video and audio, but buffering issues cause the transmission to come in on a delay which leads to the failure to of the audio and video to sync up; a party unable to unmute themselves on Zoom.

defendant on the screen.[58] In addition, a defendant's inability to navigate and use the technology (whether due to a disability or otherwise) may come into play here. But each of these requires a factual record to support the proposition that prejudice ensued from defendant's video appearance—a reviewing court cannot simply *presume* that the defendant's appearance over video resulted in any of these potential problems. As shown in *Stefanski*, this is not in any way a futile endeavor—it requires minimal effort by defendant and/or his attorney to inform the trial court of the problems (if any) that they are experiencing while using this technology, thereby giving the judge the opportunity to find a remedy.[59]

D. This Court must decline defendant's invitation to modify Carines *and hold him, instead, to the theory he has proceeded on throughout the long history of this case.*

Just as the Supreme Court said in *Puckett*, 556 US 129, "[t]he real question in this case is not *whether* plain-error review applies" to an unpreserved claim of error, "but rather what conceivable reason exists for disregarding its evident application." *Id.* at 136 (emphasis in the original). Defendant gives over a tremendous amount of real estate in his brief to the idea that the error claimed in this case (lack of physical presence at sentencing in violation of a court rule, statute, and both the

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[58] This is an important consideration when a defendant chooses to provide allocution to the sentencing judge, as the judge must be able to clearly see defendant when he addresses the court.

[59] This is especially true if the factual scenario is as it was in this case: attorneys in the courtroom and defendant appearing by video. The judge simply has no way to know whether the defendant is experiencing a problem hearing and clearly seeing the courtroom if he does not speak up.

federal and state constitutions) is one that is not subject to forfeiture, so the *Carines* test does not apply.[60] And if this Court is not taken in by that argument, he asks that it make a dramatic change to the *Carines* test itself by altering the third prejudice prong to require only a showing of any reasonable possibility of prejudice, a standard this Court applied 45 years ago in a completely distinguishable factual context.[61]

But not only are defendant's new arguments unfounded,[62] the Court should find them abandoned for his failure to raise these issues in any previous appellate proceeding. See *Walker*, 504 Mich at 276 n 3; *McGraw*, 484 Mich at 131 n 36. This result must follow, given that the Court expressly teed up the issue of the controlling standard of review in its December 19, 2018 remand order[63] and defendant deliberately chose not to make any of these arguments in the Court of Appeals, nor did he make them when he applied to leave in this Court.[64] Defendant

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[60] See defendant's supplemental brief, 17-21. Defendant cites in support to *Taylor v Illinois*, 484 US 400, 418 n 24; 108 SCt 646; 98 LEd2d 798 (1988), but the footnote relied upon by him discussed a defendant's right be present at *trial*, which (if violated) is subject to harmless error review. See *Rose v Clark*, 478 US 570, 576; 106 SCt 3101; 92 LEd2d 460 (1986). In *People v Mallory*, 421 Mich 229, 248 n 13; 365 NW2d 673 (1984), this Court observed that a defendant may waive or forfeit his right to be present at a critical stage of a trial. And see *infra* at footnote 74 (rejecting defendant's repeated reliance upon MCL 768.3—a trial rights statute—to this sentencing case).

[61] See defendant's supplemental brief, 36-43. The standard is from *Morgan*, 400 Mich 527, and concerned a defendant's (unobjected to) absence from a portion of his *jury trial*. *Morgan* adopted and applied a test from *Wade v United States*, 441 F2d 1046, 1050 (D.C.Cir., 1971), which had expressly grounded the right at issue as falling within the Sixth Amendment confrontation right, a matter not implicated here. See *infra* at Issue II, sub-issue B.

[62] See *supra* at footnotes 60 and 61.

[63] See 68a.

[64] See 24b-37b; see also *supra* at footnote 28.

must be bound to the theory he expressly advanced in all previous pleadings filed in this Court and the Court of Appeals: that a lack of presence claim *is* subject to forfeiture and review of that forfeited claim is for plain error under *Carines*. See *Gross*, 488 Mich at 161 n 8. Declining to reach these new issues raised by defendant does nothing to prejudice this Court's ability to take them up in the future, in a case where the issues *are* properly presented. See *Michigan Gun Owners, Inc.*, 502 Mich 695 at 724 (Clement, J., concurring).

II.

Most constitutional errors can be deemed harmless, but for a very narrow class of structural errors which are so intrinsically harmful as to require automatic reversal. In this case, defendant appeared at sentencing by video, he was able to fully participate in the proceeding, was represented by able counsel, and was sentenced by an impartial jurist. Because defendant's appearance, by video, at his sentencing hearing did not render the proceeding *fundamentally unfair*, it was not structural error.

Issue Preservation and Standard of Review

The People rely upon the discussion regarding issue preservation that is provided forth *supra* in Issue I. The standard of review for an unpreserved claim of structural error is discussed *infra*.

Discussion

The second question asked in this Court's MOAA order is whether a defendant's "lack of presence at sentencing is structural error[.]"[65] This question does not distinguish between a defendant's complete absence from sentencing (i.e., sentencing *in absentia*) versus a defendant's presence and active participation in the sentencing hearing via two-way interactive video, although the two are worlds apart. This question also does not consider how a party's presentation and framing of the issue on appeal will impact whether or not the error is reviewed as a constitutional violation, nor does the question parse what is meant by

[65] 79a. See *Davis*, 2022 WL 779132 at *8 n 7 (acknowledging that the term structural error actually applies to preserved constitutional errors, but using the term "for brevity's sake" when discussing an unpreserved error).

sentencing, as not all sentencing hearings require defendant's physical (or virtual) presence. The many nuances of this question will be addressed *infra*. But put simply, the answer to this Court's question is no: a defendant's virtual, and not physical, presence at sentencing is not structural error. See *Anderson*, 2022 WL 981299 at *6.

A. A defendant's choice in how he frames an unpreserved lack of presence claim may take it out of a constitutional analysis, leaving the question of structural error irrelevant.

The question of whether an error is structural necessary assumes that it is a constitutional error. See *Neder v United States*, 527 US 1, 8-9; 119 SCt 1827; 144 LEd2d 35 (1999); *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010) ("A structural error…is a fundamental constitutional error that defies a harmless error analysis."). But a defendant bringing an unpreserved lack of presence claim to an appellate court's attention may do so without cloaking the error in the constitution. For example, a defendant could present the error as a court rule or statutory violation without complaining any deprivation of his constitutional rights. In that case, the court should (following the traditional rules of party presentation) review the issue as presented and engage in an analysis of unpreserved, nonconstitutional error.[66]

A defendant could bring the complaint as an ineffective assistance of counsel claim: counsel's failure to object to what defendant believes

[66] See *Carines*, 460 Mich 750; see also *Jemison*, 505 Mich at 366 n 9 (vacating part of the Court of Appeals' opinion which had treated a violation of MCR 6.006(C) as interchangeable with a Confrontation Clause violation and remanding for a determination as to whether the court rule violation was harmless beyond a reasonable doubt).

was a violation of his constitutional right to be present at sentencing. In that scenario, the prejudice that the defendant is required to establish is that set forth in *Strickland v Washington*, 466 US 668, 695; 104 SCt 2052; 80 LEd2d 674 (1984). Under this standard, prejudice is not automatically established even when the error complained of is counsel's failure to object to a structural error that occurred in the trial court. See *Weaver v Massachusetts*, __ US __; 137 SCt 1899, 1911; 198 LEd2d 420 (2017). Because an ineffective assistance of counsel claim is not raised by a defendant until after the trial court would have an opportunity to correct the alleged error, it "can function as a way to escape rules of waiver and forfeiture[,]" which undermines the finality of the resulting judgment. *Id*. at 1912 (cleaned up). "For this reason, the rules governing ineffective-assistance claims must be applied with scrupulous care." *Id*. (cleaned up). In denying the defendant's request for a new trial, *Weaver* found that the defendant—who raised an ineffective assistance of counsel claim with regard to an alleged violation of his Sixth Amendment right to a jury trial—had "not shown a reasonable probability of a different outcome but for counsel's failure to object, and he ha[d] not shown that counsel's shortcomings led to a fundamentally unfair trial." *Id.* at 1913.

Or take, as an example, what defendant did in this case: voice no objection or complaint about his video appearance at sentencing and then, more than seven months later, seek appellate relief on the basis of a violation of MCR 6.006; MCR 6.425(E);[67] MCL 768.3; US Const., Ams

[67] MCR 6.425(E) governed felony sentencing procedure back in 2017; that procedure is currently set forth in MCR 6.425(D).

VI and XIV; and Const. 1963, art. 1, §17 and §20. See 12b. Because the issue presented could be decided just on the basis of an alleged court rule or statutory violation, an appellate court should confine its ruling to those issues, without ever reaching the constitutional question.[68] A ruling that avoids the constitutional question aligns with this Court's repeated "admonition that constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds." *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001); see also *Booth Newspapers*, 444 Mich at 234. This Court's opinion in *People v Krueger*, 466 Mich 50; 643 NW2d 223 (2002), is instructive on this point. In that case, the defendant objected in the trial court to the judge removing him from the courtroom while the complainant testified at his first-degree criminal sexual conduct jury trial. On appeal, the defendant claimed that his removal from the courtroom violated both his statutory (MCL 768.3) and constitutional right to be present at trial. See *id.* at 51. This Court, in a unanimous opinion, confined its ruling to the violation of MCL 768.3 and applied *Lukity* (the governing standard of review for preserved, nonconstitutional error).[69] Because the case could be

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[68] See, e.g., *Crosby v United States*, 506 US 255, 262; 113 SCt 748; 122 LEd2d 25 (1993) (stating that because the Court had decided the defendant's trial *in absentia* issue strictly on Rule 43 grounds, it need not reach his claim that trial *in absentia* was also prohibited by the Constitution). Note that Rule 43 provides defendants broader protections in federal court than does the United States Constitution. See *United States v Orneals*, 828 F3d 1018, 1021 (9th Cir., 2016).

[69] See *id.* at 54; *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999) (applying the harmless error rule, MCL 769.26, to the defendant's preserved claim of nonconstitutional error and making clear that under the harmless error rule, the burden is on defendant to demonstrate that the error complained of resulted in a miscarriage of justice).

disposed of on statutory grounds, the Court found no need to reach the constitutional question. See *Krueger*, 466 Mich at 56.

The Court of Appeals in this case heeded this Court's admonishment that cases should be decided on nonconstitutional grounds and disposed of defendant's lack of presence claim based on an analysis of MCR 6.006.[70] This Court should likewise confine its ruling to the court rule violation alleged in defendant's supplemental brief.[71] Because defendant failed to raise these issues in the trial court, these unpreserved claims of nonconstitutional error would be reviewed for plain error affecting substantial rights under the standard four-part *Carines* test, making the question of structural constitutional error inapposite.[72]

B. Identifying the constitutional basis for a defendant's right to be physically present at sentencing.

In the event the Court forges ahead and reaches the constitutional question, we must begin with identifying the right at issue. Neither party disputes the fact that "sentencing is a critical stage" of a criminal proceeding at which defendant has a right to be present. *Gardner v Florida*, 430 US 349, 358; 97 SCt 1197; 51 LEd2d 393 (1977). But discerning where this right comes from (which then allows us to

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[70] See 73a-74a, citing to *J & J Const. Co. v Bricklayers and Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003).

[71] As set forth *infra* at footnote 74, the statute relied upon by defendant (MCL 768.3) is inapposite.

[72] See *Krueger*, 466 Mich at 54. The People adopt and incorporate by reference the thorough analysis provided by the Court of Appeals on this point: defendant's video appearance at his sentencing hearing fails under *Carines*. See 73a-75a.

understand the rights conferred upon defendant) is not straightforward, as not an insubstantial number of authorities make mention of a right to presence without grounding it in any particular part of the constitution.

For example, defendant places great emphasis on *Heller*, 316 Mich App 314, which said that "sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present[.]" *Id.* at 318. But the legal basis for this statement is not at all clear, as *Heller* did not attribute this right in any particular part of either the federal or Michigan constitutions. See generally, *Heller*, 316 Mich App at 317-321. And although *Heller* cited in support to *Mallory*, 421 Mich at 247, that case—which was about whether the defendants had the right to be physically present when the jury viewed the crime scene—merely made mention of a defendant's right to be present "during the…imposition of sentence" without labeling it as a right emanating from a specific provision of either the federal or Michigan constitutions.[73] Defendant also cites to *In the Matter of Fowler*, 49 Mich 234, 238; 13 NW 520 (1882), but this case too suffers from the same infirmity: lofty language about the right to be present at sentencing without any indication of where that right may be found.

[73] *Mallory*, 421 Mich at 247. A defendant's right to be present when sentence is imposed was included by the *Mallory* Court in a list of other times in which a defendant also has a right to be present. See *id.* at 247 (listing voir dire, selection of and challenges to the jury, presentation of evidence, etc.). *Mallory* followed up this list with a string-cite of authority, with *Snyder v Commonwealth of Massachusetts*, 291 US 97; 54 SCt 330; 78 LEd 674 (1934), overruled in part on other grounds in *Malloy v Hogan*, 378 US 1; 84 SCt 1489; 12 LEd2d 653 (1964), being first.

"In order to evaluate the significance of an alleged constitutional deprivation, it is essential that it first be correctly identified." *Rushen*, 464 US at 124 (Stevens, J., concurring). "[C]onstitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule applicable for one type of constitutional error and not for another." *Chapman v California*, 386 US 18, 44; 17 LEd2d 705; 17 LEd2d 705 (1967) (Stewart, J., concurring).

To begin, trial rights and sentencing rights occupy "separate universes" which are "governed by very different rules." John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1968 (2005). Traditionally, the constitutional rights available to a defendant "have been more circumscribed at sentencing, even capital sentencing, than during the guilt phase." *United States v Fields*, 483 F3d 313, 326 (5th Cir., 2007). "At best, a defendant's 'sentencing rights' are a faint shadow of his 'trial rights.'"[74]

Turning now to the right to be present, it is not an express right under the United States Constitution; it is, instead, conferred by implication. See *Kentucky v Stincer*, 482 US 730, 745; 107 SCt 2658; 96 LEd2d 631 (1987). A review of the authorities reveals that this right is different at sentencing than at trial. See *United States v Gagnon*, 470 US 522, 526; 105 SCt 1482; 84 LEd2d 486 (1985). The latter right "is

[74] Douglass, *Confronting Death*, 105 Colum. L. Rev. at 1968. Because trial and sentencing rights are not the same, defendant's repeated reliance on and citation to MCL 768.3 (which addresses the right to be present *at trial*) is inapposite.

rooted to a large extent in the Confrontation Clause of the Sixth Amendment[.]"[75] In contrast, a defendant's right to be physically present at sentencing—a proceeding where no testimony is taken or given—is protected by the Fifth Amendment's Due Process Clause. See *Gagnon*, 470 US at 526; see also *United States v Diggles*, 957 F3d 551, 557 (5th Cir., 2020). But that part of the Fifth Amendment only applies to the federal government and therefore does not provide defendant any protection in this state court proceeding.[76]

In either situation (trial or sentencing), the Fourteenth Amendment of the United States Constitution[77] steps in to do what the Fifth Amendment's Due Process Clause cannot in this state court proceeding.[78] "Many controversies have raged about the cryptic and

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[75] *Id.*; see also *Barber v Page*, 390 US 719, 725; 88 SCt 1318; 20 LEd2d 255 (1968) ("The right to confrontation is basically a trial right."); *Snyder*, 291 US at 107. This is not to say that the Sixth Amendment does not have other roles to play at sentencing (such as safeguarding defendant's right to counsel, see *Mempa v Rhay*, 389 US 128, 134; 88 SCt 254; 19 LEd2d 336 (1967)), but the question before the Court is the defendant's constitutional right to be present at sentencing, not his right to counsel at sentencing.

[76] See *Rodriguez-Silva v INS*, 242 F3d 243, 247 (5th Cir., 2001). The People therefore disagree with defendant's assertion, made at page 16 of his supplemental brief, that his right to physical presence at the August 7, 2017 sentencing hearing was "mandated" by the Fifth Amendment of the United States Constitution. The People further note that none of defendant's previous appellate pleadings sought relief for an alleged Fifth Amendment violation. See 12b, 19b, 24b, 29b.

[77] US Const., Am XIV ("[…N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]").

[78] Although defendant also cites to the Due Process Clause of the Michigan Constitution, Const. 1963, art. 1, §17, he does not make any argument (nor has he ever) that its protection is somehow different from or broader than its federal counterpart. See defendant's supplemental brief, 16 (listing the Michigan Constitution in a string cite with other authority). Because

abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v Central Hanover Bank & Trust Co*., 339 US 306, 313; 70 SCt 652; 94 LEd 865 (1950); see *Grannis v Ordean*, 234 US 385, 394; 34 SCt 779; 58 LEd 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). But "[n]owhere in the decisions of" the United States Supreme Court has it been said in "dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided, is distinctly to the contrary." *Snyder*, 291 US at 106-107.

With respect to sentencing, our Court of Appeals has found it "safe to say that [the right to an in person sentencing hearing] at least in part emanates from the Due Process Clause of the 14th Amendment because of the importance of sentencing in the criminal process, which includes a defendant's ability to address the court prior to the sentence being imposed." *Anderson*, 2022 WL 981299 at *4 n 2; see *Gagnon*, 470 US at 526 (recognizing that the constitutional right to presence "is protected by the Due Process Clause in some situations where [like at a sentencing hearing,] the defendant is not actually confronting witnesses or evidence against him."). But "[t]he fact that due process applies…does

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defendant does not develop this potential argument and because our appellate courts have recognized that the two clauses are coextensive, the People will leave it at that. See *Mays v Governor of Michigan*, 506 Mich 157, 225 n 3; 954 NW2d 139 (2020) (Viviano, J., concurring in part).

not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner*, 430 US at 358 n 9. This is because

> [o]nce it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[79]

The *Snyder* Court summed up this point succinctly: "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder*, 291 US at 107-108.

C. What is structural error?

Now that we have identified the right at issue (a defendant's right, under the Due Process Clause of the Fourteenth Amendment, to be present at sentencing), this Court has asked whether an alleged violation of that right is structural error, or an error falling within the "limited class of fundamental constitutional errors that defy analysis by harmless error standards." *Neder*, 527 US at 7; see also *Arizona v*

[79] *Morrissey v Brewer*, 408 US 471, 481; 92 SCt 2593; 33 LEd2d 484 (1972) (cleaned up). See also *id.* ("To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.").

Fulminante, 499 US 279, 309; 111 SCt 1246; 113 LEd2d 302 (1991); 79a. When preserved, it is an error that is "so intrinsically harmful as to require automatic reversal (*i.e.,* 'affect substantial rights') without regard to their effect on the outcome." *Neder*, 527 US at 7.

But "[d]espite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Weaver*, 137 SCt at 1910. The Supreme Court long ago rejected a rule which would "hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Chapman*, 386 US at 21. Indeed, the opposite is true: "most constitutional errors can be harmless" and are therefore not structural. *Fulminante*, 499 US at 306. To date, only a very limited class of fundamental constitutional errors has been categorized as being so intrinsically harmful as to require automatic reversal when preserved:

- Total deprivation of the right to counsel;
- Lack of an impartial trial judge;
- Unlawful exclusion of grand jurors of defendant's race;
- Violation of the right to self-representation at trial;
- Violation of the right to public trial;
- Erroneous reasonable-doubt jury instruction;
- Complete failure to instruct on all elements of an offense.[80]

[80] See *Rose*, 478 US at 577.

These structural errors "are the exception and not the rule." *Id.* at 578. Since *Chapman*, 386 US 18, the United States Supreme Court "has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]" *United States v Hasting*, 461 US 499, 509; 103 SCt 1974; 76 LEd2d 96 (1983).

D. What isn't structural error?

The list of errors that are non-structural in nature is far too lengthy to list here. See *Fulminante*, 499 US at 306 (listing "a wide range of errors" to which the Supreme Court had "applied harmless-error analysis[.]"). But of particular relevance to the issue in this case is the United States Supreme Court's decision in *Rushen*, 464 US 114, which confirmed that a violation of a defendant's right to be physically present at trial is subject to review for harmless, not structural, error.

In reversing the Court of Appeals for the Ninth Circuit, *Rushen* expressed its emphatic disagreement with the notion that a violation of a defendant's right to be present during all stages of his trial could *never* be harmless error. See *id.* at 117. While prior cases had recognized "that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant[,]" the Court stressed that it had "implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving such constitutional deprivations are therefore subject to the general rule that remedies should be tailored to the injury suffered and should not unnecessarily infringe on competing interests." *Id.* at 118 (cleaned up). Any prejudice stemming from the error alleged in that case

could be ascertained at a post-trial hearing, which the Court approved as being "adequately tailored to this task." *Id.* at 120. Because the state court judge had presided over a post-trial evidentiary hearing and had concluded that there was no prejudice from the error, the Supreme Court admonished the lower federal courts for failing to defer to the state court's finding. See *id.* at 121.

Similarly, this Court has—for more than 130 years—refused to find that a defendant's complete absence from a portion of his jury trial constituted structural error. See *People v LaMunion*, 64 Mich 709, 715; 31 NW 593 (1887); see also *Smith v Kelly*, 43 Mich 390, 393; 5 NW 437 (1880); *Morgan*, 400 Mich at 535.

E. Is a defendant's complete physical and virtual absence from a sentencing hearing structural error?

Maybe so, but only in one very specific context. Any answer to the question asked by the Court—whether a defendant's lack of presence at sentencing is structural error—must depend on the specific facts of the case under review. It is impossible to set down a blanket rule in this area, as identifying the precise error complained of is critical to assessing whether it is "so intrinsically harmful as to require automatic reversal (*i.e.,* 'affect substantial rights') without regard to their effect on the outcome." *Neder*, 527 US at 7. Take just a few examples of a few different kinds of sentencing problems, each resulting in a different outcome:

- Defendant is *not* present at an in-chambers, off-the-record, presentence conference between the judge and his attorney (at which counsel and the judge discuss the PSIR and presumably the defendant's sentence), but he *is* physically present for the rest

of the sentencing hearing and gives in-person allocution. Defendant's claim was reviewed in *People v Pulley*, 411 Mich 523; 309 NW2d 170 (1981), for harmless, not structural, error. See *id.* at 531 ("A majority of the Court…is of the opinion that this defendant was not prejudiced by his absence from the sentence conference."); see also *People v Madsen*, 110 Mich App 386, 387-388; 313 NW2d 296 (1981).

- The trial court presides over a discrete resentencing hearing that has been ordered by an appellate court and defendant is not present (physically or virtually). Federal courts have found that the defendant's presence is not required at this limited sentencing proceeding. See *United States v Jackson*, 923 F2d 1494, 1497 (11th Cir., 1991) (explaining that where the entire sentencing package has not been set aside, a correction of an illegal sentence does not constitute a resentencing requiring the presence of the defendant, so long as the modification does not make the sentence more onerous."); see also *United States v Shubbie*, 778 F2d 199, 200 (5th Cir., 1985); *United States v Doe*, 987 F3d 1216, 1219 (9th Cir., 2016).

- The trial court sentences defendant *in absentia* and the record supports a finding that he had not waived his right to be present. At least one court has found this to be structural error warranting reversal. See *Hays v Arave*, 977 F2d 475, 479 (9th Cir., 1992), limited by *Rice v Wood*, 77 F3d 1138, 1144 n 8 (9th Cir., 1996) (en banc plurality opinion holding that defendant's absence—when the jury returned from its deliberations and sentenced him to death—did not amount to structural error); see also *Palmerton*, 200 Mich App at 303-304 (making no finding on structural error, but stating that the trial court lacked sufficient information to sentence the defendant *in absentia* without knowing whether his absence constituted a valid waiver of the right to be present at sentencing).

F. Is a defendant's complete physical absence, but his full virtual presence, at a critical stage of the proceedings structural error?

Given the prevalence of video proceedings, special attention must be paid to the dichotomy between physical versus virtual appearance. This Court's MOAA order does not make this distinction, but it is crucial because the defendant in this case was not sentenced *in absentia*: he *was* there, he was just present over Polycom. It would require serious Doublethink to treat this defendant's personal and active participation by video in his sentencing hearing as indistinguishable, for purposes of evaluating constitutional error, as his complete and *total absence* from that proceeding. This difference is singularly important, as the vast majority of the "right to be present" cases deal with a defendant's complete and total *absence* not his *virtual presence* at a proceeding. See, e.g., *Mallory*, 421 Mich 229; *Palmerton*, 200 Mich App 302; *People v Williams*, 196 Mich App 404; 493 NW2d 277 (1992); *Gagnon*, 470 US at 526-527. This makes sense insofar as a defendant's virtual appearance at a court proceeding was simply impossible prior to the relatively recent creation of this technology and its adoption and implementation by our court system.

So let us see how courts have treated virtual presence in the context of a defendant's due process right to be present:

- The parties are present in the courtroom, but the judge appears by video at a suppression hearing. Defense counsel objects, on court rule grounds, mid-way through the proceeding. In *United States v Burke*, 345 F3d 416 (6th Cir., 2003), the Court rejected the defendant's unpreserved due process claim, finding that although "presence through a television is not the same thing as

direct physical presence, in this case the difference between the two was not of constitutional dimension." *Id.* The Court held that "[t]he judge's presence via video-conferencing did not deprive [the defendant] of due process by rendering his suppression hearing fundamentally unfair, and it did not constitute a structural error." *Id.*; see also *United States v Lattimore*, 525 FSupp3d 142, 150-151 (D.D.C. 2021) (denying a defendant's motion for an in person suppression hearing and finding "no reason to think that a video hearing would deprive the defendant of any due process rights.").

- The trial court conducts a termination of parental rights hearing over Zoom during the COVID-19 pandemic; mother argues on appeal that this constituted a *per se* violation of her due process right to be physically present. The Kansas Court of Appeals disagreed and found no constitutional violation. See *Interests of C.T.*, 61 KanApp2d 218, 228-232; 501 P3d 899 (2021); see also *Matter of Dependency of J.D.E.C.*, 18 WashApp2d 414; 491 P3d 224 (2021); *Adoption of Patty*, 489 Mass 630, 638; 186 NE3d 184 (2022) (finding no *per se* violation, despite its recognition that a parent's interest in the care, custody, and control of her child is perhaps the oldest of fundamental liberty interests recognized by the United States Supreme Court).

- The trial court sentences defendant, by video, during the COVID-19 pandemic, despite his objection and request to be sentenced in person. In this factual scenario, the Nevada Supreme Court found no violation of the defendant's due process rights. See *Chaparro v State*, 497 P3d 1187, 1191 (Nev. 2021); see also *People v Whitmore*, 80 CalApp5th 116, 125 (Cal. Ct. App. 2022); *People v Lindsey*, 201 Ill2d 45, 56; 772 NE2d 1268 (Ill. 2002) (finding no due process violation for a defendant's video appearance at a critical stage of the proceedings).

- The trial court sentences defendant, by video, during the COVID-19 pandemic (when Administrative Order 2020-6 superseded MCR 6.006), and he voices no objection to the procedure. On these facts, the Court of Appeals in *Anderson*, 2022 WL 981299, found no structural error and no due process violation.

- The trial court sentences defendant, by video, prior to the pandemic when the court rule did not permit felony sentencings to be facilitated with video technology; defendant does not object. The Missouri Court of Appeals found no plain error, no prejudice, and affirmed the sentence. See *State v Porter*, 755 SW2d 3, 4-5 (Mo. App., 1988); see also *Scott v State*, 618 So2d 1386 (Fla. 2d DCA, 1993). In *Heller*, 316 Mich App 314, the Michigan Court of Appeals ordered resentencing on different grounds, but went out of its way to lambast the trial court for conducting the sentencing hearing with defendant present on video, finding that his physical absence "nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair." *Id.* at 321.

Sticking with *Heller* for a moment: the opinion did not address issue preservation or the governing standard of review, a threshold question which must be addressed in every appeal. See *McGraw*, 484 Mich at 139. But its fiery opposition to the use of video technology at a felony sentencing hearing forms the basis for much of the argument in defendant's supplemental brief. See *Heller*, 316 Mich App at 319-320. The analysis in *Heller*, however, is problematic. The Court of Appeals made generalized assumptions about video technology without any consideration about its specific use in the case before it, including whether the technology provided defendant with adequate safeguards.[81]

[81] *Heller*, 316 Mich App at 319, spoke broadly in its vociferous objection to the use of video at sentencing and *assumed* that a defendant so appearing would be unable to privately communicate with his attorney and unable to visualize all the participants in the courtroom. The Court cited to nothing in the record in the case before it to support its assumptions. *Heller* also cited to "[a]bundant social science research" which it said demonstrated that video technology "may color a viewer's assessment of a person's credibility." *Id.* at 320. The article *Heller* cited to in support was from 2012. More recent research in this area suggests that there is no firm evidence that the remote nature of a legal proceeding, in itself, has the type of negative impact described by the *Heller*

Since the focus must be on an alleged deprivation of defendant's due process rights, this oversight is significant.

Remember that "[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder*, 291 US at 107-108. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v McElroy*, 367 US 886, 895; 81 SCt 1743; 6 LEd2d 1230 (1961) (cleaned up). To the contrary, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.*; see also *Morrissey*, 408 US at 481.

The Massachusetts Supreme Court's thoughtful analysis in *Vazquez Diaz v Commonwealth*, 487 Mass 336; 167 NE3d 822 (2021), is instructive on this point. The issue there was the defendant's right to demand an in-person evidentiary hearing on a motion to suppress.[82] The Court agreed that this type of hearing was a critical stage of the proceedings to which the defendant had a Sixth and Fourteenth Amendment right to be present. But the question of whether a *virtual* hearing satisfied this constitutional requirement was a novel question for the Court. See *id.* at 340-341. After acknowledging prior cases which had made clear that due process is not a technical, inflexible concept,

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Court. See Susan A. Bandes and Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 Sw. L. Rev. 20, 21 (2021).

[82] An objection, unlike here, that the defendant preserved for appellate review.

the Court found that the defendant's right to be present was not violated by a virtual hearing "so long as the video conferencing technology provide[d] adequate safeguards." *Vazquez Diaz*, 487 Mass at 341. In so finding, the Court described the video conferencing software utilized in the trial court as follows:

> with today's video conferencing technology, a virtual hearing can approximate a live physical hearing in ways that it could not previously. The use of Zoom can effectively safeguard the defendant's right to be present by allowing him to listen to the evidence, adequately observe the witnesses who testify at the hearing, and privately consult with his attorney at any time during the Zoom hearing.[83]

The use of Zoom technology to conduct the hearing, when combined with the State's significant interest in protecting the public health during the COVID-19 pandemic, as well as its interest in the timely disposition of cases, led to the Court concluding that there was no *per se* violation of the "defendant's right to be [physically] present in the midst of the COVID-19 pandemic." *Id*. at 343; see also *Chaparro*, 497 P3d at 1191-1192; *Adoption of Patty*, 489 Mass at 638.

[83] *Vazquez Diaz*, 487 Mass at 342; compare *Heller*, 316 Mich App at 319 (criticizing the video conferencing used in that case because it rendered a defendant incapable of private communication with his attorney and likely did not allow him to visualize all the participants in the courtroom).

G. Because defendant's virtual appearance at sentencing comported with the dictates of due process, it cannot be considered structural error.

Defendant's appearance, by Polycom, at his August 7, 2017 sentencing hearing did not constitute structural error.[84] The People agree that it is not unreasonable to describe defendant's presence, over video, at sentencing as affecting the *framework* within which the hearing proceeded. See *Fulminante*, 499 US at 310. The hearing started and ended with defendant present over video and not physically present in the courtroom with the judge, attorneys, and victims' families.[85] But a structural error requires more. It requires that the error strike at the heart of the proceeding to the extent that what results is a *fundamentally unfair* process. See *Neder*, 527 US at 8; *Rose*, 478 US at 577. Put another way, defendant's appearance by video must be found to have deprived him of a basic protection, without which the entirety of his sentencing hearing cannot be regarded as fundamentally fair. See *Neder*, 527 US at 8-9; see also *Rose*, 478 US at 577-578.

A finding that defendant's video appearance at sentencing falls within this narrow definition would be very strange indeed, given this Court's express sanctioning of the use of this technology during various

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[84] This section of the People's brief assumes *in arguendo* that defendant did not waive his right to physically appear at sentencing. The People also assume that the Court's second question (whether lack of presence at sentencing is structural error) refers to his lack of physical presence, and yet his full virtual presence. 79a. A question that only considers the former without acknowledging the latter defies objective reality.

[85] Of course, this may not always be the case. Since the March 2020 COVID-19 pandemic, trial courts throughout the state have likely presided over hundreds (if not more) felony sentencing hearings at which *all* parties, the judge, and the victim(s), appeared over Zoom.

critical stages of a criminal proceeding. Take the court rule as it existed at the time of this defendant's August 2017 sentencing hearing:

> MCR 6.006(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjudications of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.
>
> […] (C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings: (1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status; (2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.[86]

The rule allowed for a trial court to take a defendant's plea using two-way video technology, even though this Court held years ago that the entry of a plea is a critical stage of the proceedings. See *People v Pubrat*, 451 Mich 589, 593-594; 548 NW2d 595 (1996). By promulgating MCR

[86] MCR 6.006(A) and (C) as it existed in 2017 is substantially similar to the original MCR 6.006(A) and (C), which became effective in January 2006.

6.006(A) and including pleas on the list of eligible proceedings at which this technology was approved, this Court must have believed that a plea taken over video *would* reliably serve its function as a vehicle for determining guilt or innocence and that the result *would* be regarded as fundamentally fair. See *Rose*, 478 US at 577-578.

And take the rule's express allowance of the use of this technology at a sentencing for a misdemeanor offense. The People know of no authority standing for the proposition that sentencing is a critical stage of the proceedings in a felony case, but not so in a misdemeanor. It seems that *Heller*, 316 Mich App 314, tried to draw some kind of line here, as it emphasized the fact that MCR 6.006(A) was limited to sentencings for misdemeanor offenses with no mention of felony sentences (which, by implication, excluded them). Why, *Heller* asked, would this Court

> omit felony sentencings from MCR 6.006(A)? Presumably because sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984), and virtual appearance is not a suitable substitute for physical presence. 'The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty.' *United States v Villano*, 816 F2d 1448, 1452 (CA 10, 1987).[87]

Heller did not explain, at all, why a misdemeanor sentencing hearing should be considered a less "critical" stage of the proceedings than a felony sentencing hearing, with one class of defendants entitled snugly wrapped up and protected by the constitution, and the other regulated to video. It cannot be that felonies (unlike misdemeanors),

[87] *Heller*, 316 Mich at 318.

always embrace serious crimes. Take a look at MCL 257.312b(7), which makes it a felony to vary, shorten, or change the driving skills test one must pass in order to obtain a license to operate a motorcycle in this state. Or perhaps you entered a horse into a speed contest under a false name. You, too, are guilty of a felony. See MCL 750.332.

The inverse is equally unfounded: misdemeanors (like felonies), can embrace the most serious crimes one can perpetrate against a fellow citizen. For example, if a defendant commits a moving violation while driving on a highway and proximately causes the death of an innocent person, he may be charged with a one-year misdemeanor.[88] Alternatively, the defendant could be charged with reckless driving causing death (a felony, MCL 257.626(4)), only to enter a guilty plea, after the bindover, to this misdemeanor offense, thereby resulting in a sentencing hearing that takes place in the circuit court. See MCR 6.301(D); MCR 6.302(D)(1). Nonetheless, MCR 6.006(A) as it stood in 2017, permitted the misdemeanor sentencing hearing to be conducted with the defendant appearing by video from a remote location. The gravity and importance of that proceeding is not lessened just because the court sentences the defendant to a misdemeanor offense. To the contrary: the sentencing hearing is the time for the victim's family to express their devastation over the loss of their loved one and to have

[88] See MCL 257.601d. Like in a felony prosecution, the defendant has the right to be present at his jury trial for this criminal misdemeanor offense. See, e.g., *Williams*, 196 Mich App at 406; *People v Antkoviak*, 242 Mich App 424, 481-482; 619 NW2d 18 (2000); cf *Glover v United States*, 531 US 198, 203; 121 SCt 696; 148 LEd2d 604 (2001).

direct input on the sentence the defendant will receive.[89] And the defendant's interest at the hearing is no less, as he would likely seize the opportunity to ask the court to order the lowest possible sentence. Cf *Glover*, 531 US at 203 (noting that precedent suggested "that *any* amount of actual jail time has Sixth Amendment significance.") (emphasis added).

Further, there is no meaningful constitutional distinction between the penological sentencing consequences for a misdemeanor versus a felony offense, as misdemeanors can result in jail or prison time, just like felonies (and both, of course, may result only in probation). Take just one crime, indecent exposure: this is a one-year misdemeanor which may result in jail time. See MCL 750.335a(1)-(2)(a). Or if aggravating circumstances are present, it is a two-year high-court misdemeanor which may result in prison time. See *id.*; see also *People v Arnold*, 502 Mich 438, 448; 918 NW2d 164 (2018). A defendant facing a jail or prison sentence for either of these offenses back in 2017 could have been sentenced by video in complete compliance with MCR 6.006(A).

By promulgating MCR 6.006(A) and encouraging district and circuit courts to use video technology during these critical stages of criminal proceedings, this Court evidenced its belief that the process *would* afford defendants basic protections, with the end result being

[89] See MCL 780.825(1) (establishing—in a case where no PSIR is prepared—the right of the victim to submit a written impact statement, along with the victim's right to appear and make an oral impact statement at sentencing); MCL 771.14(1) (making the preparation of a PSIR discretionary in a misdemeanor case).

deemed fair and reliable. Cf *Rose*, 478 US at 577-578. This Court's recent activity shows that it has continued to embrace video technology in a far-ranging array of proceedings, including making the use of video technology the *preferred* mode for taking pleas.[90] The modified court rules even allow for judges to use two-way interactive video at a jury or bench trial.[91] Again, why would the Court expressly allow courts to do this if the end result is a *necessarily* unfair and unreliable process? Defendant has no answer to his question.

A few final points that weigh against any finding that virtual presence constitutes structural error: if defendant's appearance by video at his own sentencing was an error, it was of a "kind and degree" that could vary, an error that can come "in various shapes and sizes" and whose effect discernible from the record. *United States v Marcus*, 560 US 258, 265; 130 SCt 2159; 176 LEd2d 1012 (2010). In some cases, the entire proceeding may (like here) go off without a hitch: all parties can see and hear each other clearly; the defendant participates in the proceeding without any technological problems; there is no evidence that

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[90] See MCR 6.006(B)(2)(d) (in effect as of August 10, 2022); see also Kelly Caplan, *Zoom hearings in Michigan: 3 million hours and counting*, Michigan Lawyers Weekly, issued May 17, 2021 (https://milawyersweekly.com/news/2021/05/17/zoom-hearings-in-michigan-3-million-hours-and-counting/) (last accessed October 28, 2022); see also *Remote proceedings for Michigan courts are "here to stay," says state*, by Caroline Llanes, NPR/Michigan Radio, issued June 4, 2021 (https://www.michiganradio.org/law/2021-06-04/remote-proceedings-for-michigan-courts-are-here-to-stay-says-state) (last accessed October 28, 2022).

[91] See MCR 6.006(B)(4) (in effect as of August 10, 2022) (allowing evidence to be taken by video in the discretion of the trial court, after the parties have an opportunity to be heard).

he was prevented from consulting with his attorney, etc.[92] In other cases, the proceeding may go off the rails: the defendant cannot unmute himself; the technology cannot accommodate his request to consult with counsel during the hearing; his audio is staticky or garbled, rendering his allocution indecipherable.[93] Unlike a violation of a public trial right (which has been deemed a structural error for the specific reason that it is difficult to assess the effect of the error),[94] the effect of the defendant's appearance by video may be ascertained from review of the record.

Finally, while defendant's right to physical presence at sentencing is important, it does not differ significantly in importance from the other constitutional rights where the Supreme Court "has insisted upon an individual showing of prejudice." *Marcus*, 560 US at 265, citing *Fulminante*, 499 US at 306 (collecting cases). To the contrary: where (as here) the defendant had counsel and was adjudicated by an impartial jurist, "there is a strong presumption that any other errors that may have occurred" are not "structural errors." *Rose*, 478 US at 579; see also *Marcus*, 560 US at 265. No one in this case denies that defendant was represented by able counsel throughout the life of the trial court proceedings, and no one denies that defendant's plea and sentencing hearings were presided over by an impartial jurist. And at

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[92] See, e.g., *Vazquez Diaz*, 487 Mass at 342.

[93] See, e.g., *Adoption of Patty*, 489 Mass at 631 (finding no *per se* due process violation when a termination of parental rights bench trial was conducted by Zoom, but finding that because the trial was plagued by technological issues and inadequate safeguards, a due process violation occurred).

[94] See *Weaver*, 137 SCt at 1910 (making clear that "[i]n the two cases in which the Court has discussed the reason for classifying a public-trial violation as structural error, the Court has said that [it] is structural for a different reason: because of the difficulty of assessing the effect of the error.") (cleaned up).

sentencing, defendant had "a full opportunity" to make any argument he wished in support of the specific sentence sought, which makes the "error" of his appearance by video akin to other errors that are reviewable for harmlessness. *Rose*, 478 US at 579; see also *Sullivan v Louisiana*, 508 US 275, 283; 113 SCt 2078; 124 LEd2d 182 (1993) (Rehnquist, C.J., concurring).

"Unlike such defects as the complete deprivation of counsel or trial before a biased judge," defendant's appearance over video at his sentencing hearing did "not *necessarily* render" the hearing "fundamentally unfair or an unreliable vehicle" for determining his sentence. *Neder*, 527 US at 9 (emphasis in the original); see also *United States v Rosenschein*, 474 FSupp3d 1203, 1209 (D.N.M. 2020) (observing that although "presence through a screen is not precisely the same as direct physical presence, the difference between the two is not enough to render the proceeding fundamentally unfair and does not deprive Defendant of due process."). For all of these reasons, a defendant's video appearance at sentencing does not fall within the extremely narrow class of structural errors.

H. Davis*, the test adopted by this Court a few months ago for purposes of evaluating an unpreserved structural constitutional error, should be reversed.*

This Court, citing to *Davis*, 2022 WL 779132, has asked the parties to address the standard of review which would govern a defendant's unpreserved claim that structural error occurred in the trial court. See 79a. The question of course assumes that a defendant's virtual presence at sentencing is structural error, which the People strongly

dispute. Assuming *in arguendo* that it is for purposes of answering this question, a review of the test set forth in *Davis* is necessary.

In *Davis*, this Court addressed the defendant's unpreserved claim that his Sixth Amendment right to a jury trial had been violated (a structural error) by the judge's closure of the courtroom. The Court found that the defendant met the first two parts of *Carines*: plain error occurred when the trial court judge cleared the courtroom and ordered several spectators not to return. But with respect to the third part of the test, the Court "jettison[ed] the prejudice analysis for forfeited structural errors" and, instead, held that because a structural error renders the trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence, as well as affects the framework within which the trial proceeds, the error necessary affects the defendant's substantial rights. *Davis*, 2022 WL 779132 at *11.

The Court then went further: it took "this opportunity" to embrace an argument that had been proffered as an alternative request in the defendant's supplemental brief—"that a forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied."[95] The Court therefore shifted "the burden to prosecutors to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding." *Id.* at *12. The idea for this burden-shifting rule was attributed to Justice

[95] *Id.* The request was made at section D(4) of the defendant's April 14, 2021 supplemental brief and expressly acknowledged that the Court would have to overrule *Vaughn*, 491 Mich 642, in order to reach this result.

Viviano's dissenting opinion in *Cain*, 498 Mich 108, to which only one other member of the Court (the Chief Justice) had signed. See *id.* at 129.

Respectfully, *Davis* is antithetical to principles of judicial modesty. First, the MOAA order gave no warning that this Court was considering any change to the standard of review set forth in *Vaughn*, 491 Mich 642, which had governed unpreserved structural errors for the previous ten years (and was a precedent that the Court subsequently reaffirmed in *Cain*).[96] Second, *Davis*' adoption of the dissent's theory in *Cain* and its overruling of *Vaughn* was completely unnecessary to resolving the case. As pointed out by Justice Zahra, the plain error test adopted for structural errors in *Vaughn* was well-equipped to handle defendant's unpreserved claim of constitutional error.[97] *Davis* identified no recent developments, in law or fact, to erode or cast doubt on *Vaughn* or *Cain*.[98] Nothing, in short, had changed other than the composition of this Court.[99]

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[96] See, e.g., *People v Davis*, 507 Mich 853; 969 NW2d 1 (2021) and compare *People v Monroe*, __ Mich __; 975 NW2d 482 (2022) (asking the parties to address whether a pair of previous cases had been correctly decided and if not, "whether they should nonetheless be retained under principles of stare decisis, *Robinson v City of Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000).").

[97] See *Davis*, 2022 WL 779132 at *13 (Zahra, J., concurring in the judgment only) ("That is, because defendant can demonstrate that he is entitled to reversal under all four prongs of the current plain-error standard, this Court fashions a rule it need not even apply to afford defendant relief."); see also *Robinson*, 462 Mich at 464 (asking—for purposes of overruling precedent—"whether the decision at issue defies 'practical workability[.]").

[98] See *id.* at 464 (asking—for purposes of overruling precedent—"whether changes in the law or facts no longer justify the questioned decision.").

[99] Compare *Vaughn*, 491 Mich at 675 (listing the Justices signing on to Justice Young's opinion) with *Davis*, 2022 WL 779132 at *13 (listing the Justices signing on to Justice Clement's opinion).

Third, *Davis* overruled *Vaughn* without any acknowledgment that it was doing so and without any recognition of stare decisis. See *Davis*, 2022 WL 779132 at *16 (Zahra, J., concurring in the judgment only). This is significant, as the "doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v Hillery*, 474 US 254, 265-266; 106 SCt 617; 88 LEd2d 598 (1986). Although the doctrine "is not an inexorable command," detours from that straight path should occur "for articulable reasons, and only when the Court" feels "obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Id.* at 266 (internal quotation and citing reference omitted). That did not happen in *Davis*.

Bringing the matter closer to home, the Chief Justice of this Court emphasized, just three months ago, that the casual overruling of precedent "renders stare decisis irrelevant. Yet stare decisis is an important commitment for courts because it allows people to order their affairs consistently with the law's requirements." *People v Stovall*, __ Mich __; __ NW __; 2022 WL 3007491, *15 (2022) (McCormack, C.J., concurring). This Court "normally require[s] more than a majority of a court thinking that a precent [is] incorrectly decided" before taking any action. *Id.*, citing *Robinson*, 462 Mich at 462-468. "If stare decisis means anything, it means not every judicial decision is up for grabs from scratch." *Id.* The Chief Justice closed out her impassioned concurring opinion in *Stovall* by warning that the overruling of precedent

constituted "judicial immodestly" that was "likely to erode confidence in judicial neutrality." *Id.*

More fundamentally, the rule adopted in *Davis* (a rebuttable presumption that the fourth prong of the plain error test is satisfied upon a showing of structural error and placing the burden on the People to prove otherwise) is simply wrong as a matter of law. See *Robinson*, 462 Mich at 464. As *Vaughn*, *Cain*, and many other courts have observed, "the seriousness of the error claimed does not remove" it from a standard plain error analysis.[100]

Davis collapsed the third and fourth prongs of the plain error test by necessarily assuming that if structural error is shown, it will meet both prongs. This is incorrect, as each part of the test engages in a different inquiry. The third prong requires defendant to show that the error complained of affected *his* substantial rights. See *Carines*, 460

[100] *Johnson*, 520 US at 466; see *Olano*, 507 US at 737 (noting that a finding of plain error affecting substantial rights does not, without more, satisfy the fourth prong of the plain error test, because otherwise the discretion afforded in that part of the test "would be illusory."); *United States v Cotton*, 535 US 625, 634; 122 SCt 1781; 152 LEd2d 860 (2002) (emphasizing that the importance of the Sixth Amendment right to a petit jury had not prevented the Court in *Johnson* from applying the longstanding rule that a constitutional right may be forfeited); see also *Puckett*, 556 US at 135-136;); *United States v Turrietta*, 696 F3d 972, 976 n 9 (10th Cir., 2012) (emphasizing that labeling an error as "'structural' has nothing to do with plain error review[.]"); *State v West*, __ NE3d __; 2022 WL 1480280 (Oh. Sup. Ct., 2022) (continuing to reject "the notion that there is any category of forfeited error that is not subject to the plain error rule's requirement of prejudicial effect on the outcome.") (cleaned up); *Pulczinski v State*, 972 NW2d 347, 356-358 (Minn. Sup. Ct., 2022) (refusing to modify the plain error rule for defendant's unpreserved claim of structural error); *State v Brandolese*, 601 SW3d 519, 529-530 (Mo. Sup. Ct., 2020); *Williams v United States*, 51 A3d 1273, 1283 (DC, 2012) (applying the plain error test to a defendant's unpreserved claim of structural error).

Mich at 765. But the fourth prong asks this Court to consider—before deciding to exercise its discretion to reverse—whether the error complained of resulted in the conviction of an actually innocent defendant or *seriously* affected the fairness, integrity, or public reputation of judicial proceedings. Even in the case of a violation of a defendant's right to a public trial (a structural error), there may be no evidence which shows that the violation *seriously* affected the fairness of the proceeding, such as in the case of a de minimums violation.[101]

This Court should have taken heed of the United Supreme Court's admonition that "[t]he fourth prong is meant to be applied on a case-specific and fact-intensive basis" and any "*per se* approach to plain error review is flawed." *Puckett,* 556 US at 142, quoting *United States v Young*, 470 US 1, 17 n 14; 105 SCt 1038; 84 LEd2d 1 (1985). The Washington D.C. Court of Appeals has observed that although *Puckett* did not involve structural error,

> its admonition about applying the fourth-prong analysis of an error's effect on the fairness of a criminal proceeding on a 'case-specific and fact-intensive basis' was consistent with the Court's observation a few years earlier that, even in preserved-error cases, '[i]t is only for *certain* structural errors undermining the fairness of a criminal proceeding as a whole' that the error 'requires reversal without regard to the mistake's effect on the proceeding.'[102]

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[101] See *Gibbons v Savage*, 555 F3d 112, 120 (2nd Cir., 2009); *Weaver*, 137 SCt at 1909-1910 (recognizing that the public trial right is structural, but subject to exceptions, which suggests that not every public trial violation results in fundamental unfairness. "As a result, it would be likewise unconvincing if the Court had said that a public-trial violation always leads to a fundamentally unfair trial.").

[102] *Barrows v United States*, 15 A3d 673, 680 (DC, 2011), quoting *Dominguez Benitez,* 542 US at 81 (italics added by *Barrows*).

Lastly, the People respectfully disagree with the Court's statement that its creation of a rebuttable presumption made its modification of the plain error test "consistent with [the Court's] historical differentiation between preserved and unpreserved errors." *Davis*, 2022 WL 779132 at * 12 n 16. *Davis* now puts the burden on the People to rebut the presumption that the underlying proceeding was not fair, a burden that does not (on its face) seem especially different from the People's burden to disprove the harmfulness of an error when the defendant objects to it in the trial court. This erodes the meaningful distinction between preserved and unpreserved error, the latter of which is supposed to be difficult to prove in order to encourage issue preservation in the trial court. See *Puckett*, 556 US at 135. The Court seemed to support this burden shift by explaining that the People are better positioned than the defendant to "marshal record facts supporting the overall fairness of the trial proceedings." *Davis*, 2022 WL 779132 at *12. But in support, the Court merely pointed to the People's ability to look at the record and then identify different information contained therein. The defendant, however, has this exact same ability to review the trial record for purposes of identifying how an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings—look no further than the facts of *Davis* itself.[103]

For all of these reasons, if this Court does anything with defendant's application other than enter an order denying it (or ordering

[103] And in some circumstances, a defendant may have a *better* grasp on the facts than the People. Take this case: the People cannot say what defendant himself experienced as he participated over Polycom at his sentencing hearing.

a remand), the People take this opportunity to ask the Court to overrule *Davis*.[104] The practical workability of *Davis* is suspect, in that it requires appellate courts to distinguish between structural and non-structural constitutional error, a task that (as shown in this brief) is not at all straightforward. See *Robinson*, 462 Mich at 466. The standard plain error test in *Carines* (and as adopted in *Vaughn* for structural errors) does not require courts to engage in that analysis, making it simpler and more straightforward to apply: this preserves judicial economy and makes it more likely that the rule is applied in a consistent way. And given its short lifespan, *Davis* has "not become so embedded, accepted or fundamental to society's expectations that overruling[it] would produce significant dislocation[]." *Robinson*, 462 Mich at 466. To the contrary: we would simply revert back to the long-used and well-familiar plain error rule which has been the cornerstone of this State's judicial review for decades.

Finally, assuming—*in arguendo* and as seemingly contemplated by the MOAA order—that the Court deems a defendant's virtual presence at sentencing to be structural error and refuses to abandon the *Davis* test, the People can rebut the presumption that the error seriously affected the fairness, integrity, or public reputation of the proceedings.[105] Recall that a defendant's right to presence at sentencing is grounded in due process principles and "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis*, 234 US at

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[104] See, e.g., *People v Wafer*, __ Mich __; __ NW2d __; 2022 WL 481644 (2022) (noting that the People had not expressly asked the Court to overrule its own precedent).

[105] This is the fourth question asked in the MOAA order. See 79a.

394. Defendant's presence at sentencing "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder*, 291 US at 107-108. Put another way, when the record shows that a fair and just hearing occurred despite defendant's virtual presence, the People meet their burden under *Davis*.[106]

So for example, where defendant participates by video and there is no technological impediment to his ability to view and participate in the proceedings, the judge follows the sentencing procedure set forth in the court rules (see, e.g., MCR 6.425(E) at the time of this case; MCR 6.425(D) in modern times), and defendant either does not ask for or is not denied a mid-hearing opportunity to confer with counsel, the People will meet their burden because the overall proceeding was fair. This conclusion may be strengthened by evidence showing that the trial court did nothing more than order defendant to serve a sentence in accordance with a sentence agreement (i.e., that defendant received the exact bargain to which he expressly agreed).[107] Or where the trial court orders the exact sentence defense counsel (or defendant himself) asks for and defendant does not argue on appeal that counsel was ineffective. In both of these latter scenarios, the defendant's virtual appearance can in no way to be said to have seriously affected the fairness or integrity of the

[106] If *Davis* is not vacated, the People will take the Court at their word that the People's burden under the fourth *Carines* prong should not be a very demanding one. Anything to the contrary would eviscerate the line between preserved and unpreserved error. See *Davis*, 2022 WL 779132 at *12 n 16.
[107] See defendant's supplemental brief, 35 (expressing agreement here).

sentencing hearing because the sentence is exactly what he asked for. See *Snyder*, 291 US at 106-107.

In defendant's telling, the times in which the People may be found to have met their burden should be extremely rare, a point of view which would turn the plain error test on its head. And his lead-off example of how the People would be able to meet their burden—by showing that a defendant may have waived his right to be physically present—is wrongheaded.[108] If defendant is correct and the People can show that the record may contain evidence of his waiver of the right to physical presence, then the case contains the possibility that no *constitutional error occurred*, which renders application of *Davis* wholly irrelevant. See *Puckett*, 556 US at 138. The remedy is to remand for purposes of establishing the waiver on the record, which is exactly what the People have asked for in this case.

Applying *Davis* to this defendant's claim of error: even with the use of video technology at defendant's sentencing hearing, the overall fairness, integrity, and reputation of the proceeding was preserved. See *Davis*, 2022 WL 779132 at *12. Review of the record shows a lack of evidence supporting a finding that a technological issue precluded the parties in the courtroom from clearly hearing and seeing defendant and vice versa. The trial court judge ran the sentencing hearing in the manner proscribed by MCR 6.425(E)[109] and led the hearing off by verifying that defendant had had ample time to prepare for the hearing with his attorney and that he had reviewed the content of the PSIR. 34a;

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[108] See defendant's supplemental brief, 34.
[109] See *supra* at footnote 67.

MCR 6.425(E)(1)(a). There is no evidence that defendant ever sought or was denied the opportunity to speak with his attorney during the hearing.

Defense counsel addressed the contents of the PSIR and made certain corrections. See MCR 6.425(E)(1)(b). He then spoke, at length, in support of his client, highlighting defendant's remorse, as well as his cooperation with law enforcement. See MCR 6.425(E)(1)(c). Counsel asked the judge to order his client to serve the sentence that was recommended by the author of the PSIR, but for the recommendation that defendant serve consecutive sentences. 36a-38a. Defendant provided a lengthy and thoughtful allocution to the court (again, without any evidence of technological difficulty): he apologized to the victims' families and told the judge that he "well deserved" to be punished. 56a. His only request was that the court show "mercy" and order concurrent, rather than consecutive sentences. His reason for this request was "for the sake of and at the request of [his] family." *Id.*

In handing down the sentences, the trial court judge too spoke at length, without any evidence of technological impediment in the record. See MCR 6.425(E)(1)(d). He considered defendant's background, along with all of the appropriate sentencing factors, and applied them to the specific facts of this case.[110] Contrary to the argument made in defendant's brief, the court did *not* discount defendant's allocution; to the contrary: the court acknowledged defendant's plea for mercy as it related to his specific request that his family not suffer for the crimes he

[110] See *supra* at footnote 22.

had committed. 59a-60a. The court simply found that defendant's appeal for mercy in this specific regard was not very compelling when contrasted to the deliberate harm he had caused. 60a. The court ultimately ordered defendant to serve the *exact* sentence his attorney had requested, but for the imposition of consecutive sentencing.[111] Review of the appellate record shows that defendant has—over the course of this years-long appeal—abandoned his challenge to the propriety of the consecutive sentences ordered in this case, thereby accepting their validity.[112]

All of these facts, taken together, are more than sufficient to affirmatively demonstrate that defendant had a meaningful opportunity to be heard before an impartial decision maker, which is the fundamental requirement of procedural due process. See *Grannis*, 234 US at 394. The trial court—while following the sentencing procedure set forth in MCR 6.425(E)(1)-(2)—carefully tailored its sentence "to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). Because the overall fairness, integrity, and

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[111] See 61a and compare defendant's supplemental brief, 35 (characterizing what the judge did as "twice exercise[ing] his discretion" to increase punishment "far beyond the minimum.").

[112] When this Court sent the case back to the Court of Appeals in 2018, defendant reiterated his objection to the consecutive sentences ordered in this case. The Court of Appeals rejected defendant's arguments and held that the judge had not abused his discretion by imposing consecutive sentences. See 76a. Then when defendant pursued an appeal in this Court, he did not include the Court of Appeals' consecutive sentencing ruling as part of his application, which leaves that portion of the opinion final. See 29b-37b.

reputation of the sentencing proceeding was preserved, the People have met their burden under *Davis*, 2022 WL 779132, should this Court apply it to this case.

For all of the forgoing reasons, defendant's unpreserved lack of presence claim must be rejected.

RELIEF

THEREFORE, the People ask that the Court deny defendant's application. If the Court is inclined to take some other action, remand for an evidentiary hearing concerning the defendant's waiver of his right to be present is the most appropriate remedy for the reasons set forth *supra* at pages 46-48.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 23,252 countable words.

/s/ *Amanda Morris Smith*

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