**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**
**Plaintiff-Appellee,**

**v.**

**No. SC: 162311**

**BENONI JONATHAN ENCISO,**
**Defendant-Appellant.**

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**COA No. 342965**
**CC No. 17-004527**

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# BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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## Statement of the Question

**I.**

**MCL 769.26 provides that no conviction should be reversed unless it affirmatively appears that otherwise a miscarriage of justice would occur. Defendant participated fully in his sentencing by polycom without objection, where the nature of that for which he was convicted made avoiding facing the victims families in person an obvious reasonable choice. Was any error because defendant was not present in the courtroom at sentencing structural, and has defendant shown a miscarriage of justice?**

**Defendant answers: YES**

**The People answer: NO**

## Statement of Facts

Amicus joins the People's statement of the facts.

## Argument

### I.

**MCL 769.26 provides that no conviction should be reversed unless it affirmatively appears that otherwise a miscarriage of justice would occur. Defendant participated fully in his sentencing by polycom without objection, where the nature of that for which he was convicted made avoiding facing the victims families in person an obvious reasonable choice. Any error because defendant was not physically present in the courtroom at sentencing was not structural, nor has defendant shown a miscarriage of justice.**

### Introduction

### A. The MOAA issues in this Court's order

The Court has directed the parties to brief whether:

- a defendant's unpreserved claim regarding his or her lack of physical presence at sentencing is subject to review for plain error;
- lack of presence [physically in the courtroom, as opposed to virtually, by teleconference or polycom] at sentencing is structural error;
- if the error is not structural how a defendant could show the error affected the outcome of the lower court proceedings; and
- if the error is structural [and the defendant has shown the error affected the outcome of the lower court proceedings; here, the sentence] 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).[1]

Amicus answers that:

- a defendant's unpreserved claim that presence at sentencing by way of polycom should not have been employed is reviewed for plain error;

[1] *People v. Enciso*, 972 N.W.2d 49 (2022).

- lack of presence at sentencing physically in the courtroom as opposed to virtually by teleconference or polycom is not structural error;

- the manner in which defendant could show the error affected the outcome of the sentencing is best left to defendant, but might include, for example, a situation where some matter arose during sentencing, such as in victim-impact statements, which the defendant needed to discuss privately with his attorney, but could not given the nature of the proceedings;

- if the error is structural, the record of the present case, with extensive participation by defense counsel, and allocution by the defendant where he accepted his responsibility, saying there "is no justification for the hurts and the damage that I've caused, and to attempt to explain my actions—what led up to them would—only cause further harm or seem disrespectful to the victims and their families," that "punishment in my case is well deserved and just. I've never ever said I did not deserve to be punished," and asking for mercy,[2] rebuts the presumption (which should not exist in any event).

**B. The remand to the Court of Appeals: the issue of waiver**

This Court remanded this case to the Court of Appeals previously. Along with the question of whether plain error is applicable here, the Court directed the Court of Appeals to consider whether "a defendant's waiver of the right to be physically present at sentencing is valid only if accomplished on the record."[3] Amicus assumes the remand on this issue was not an academic exercise,[4] yet the

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[2] Defendant's appendix 55-56a.

Defendant's statement that "*requiring* Mr. Enciso to participate by video from a different location does not satisfy the presence requirement," Defendant's Supplemental Brief, at 16 (emphasis supplied), is at best hyperbolic—there is no indication that the defendant was *required* to proceed in this fashion.

[3] *People v. Enciso*, 503 Mich. 920 (2018).

[4] Defendant says that "There is no question here of waiver. The issue is whether and how sentencing a defendant in his absence without either a valid waiver or an objection affects the standard of review and the necessity for showing harm on appeal." Defendant's supplemental brief, at 16. Amicus begs to differ—this Court in its remand to the Court of Appeals must have thought the question had relevance to this case, and it does. As amicus, and the People, argue, there should at least be a remand on this question so the case can be determined based on that which actually occurred. See footnote 14, infra.

Court of Appeals answered the question in the negative[5] but did not go on to decide whether waiver occurred in this case, or whether, at the least, a remand on the question was appropriate,[6] though the Court of Appeals *did* apply its plain-error decision to the facts of this case.[7] And this Court's MOAA order makes no mention of the Court of Appeals holding on waiver or its possible application to this case.

The Court of Appeals was correct that waiver need not occur on the record, and application of that holding to this case should result—at the least—in a remand to determine whether in fact defendant waived his presence and did not, in fact, wish to be in the courtroom with the victims' families at sentencing. After all, the case should be decided based on that which actually occurred. That which *is* on the record supports waiver, or a remand to determine the facts. As the Court of Appeals pointed out, defendant was certainly aware of the sentencing date. The trial judge commenced the matter by stating defendant was participating by Polycom, and defendant acknowledged that the connection was good, and that he had had the opportunity to discuss the sentencing with his counsel, and adequate time to review the presentence report.[8] In his allocution

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[5] "Defendant first argues that he had a constitutional right to be present at sentencing and that such a right could be waived only if made on the record. Our Supreme Court also directed us to consider that same question. We reject defendant's argument." *People v. Enciso*, 2020 WL 5985069, at 2 (2020).

[6] The court *did* say that "here was thus no question whether defendant was aware of the sentencing—he clearly was. Rather, the questions are whether defendant's participation through Polycom was sufficient to establish his 'presence' at sentencing, and whether he knew of his right to be physically present in the courtroom," id., at 3, but then concluded that "as to the first question posed by our Supreme Court, we hold 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,'" id., at 3, but did not answer whether how its holding applied in this case.

[7] Id., 4-5.

[8] 34a.

defendant apologized to the victims and their families, and said that "there is no justification for the hurts and the damage that I've caused, and to attempt to explain my actions—what led up to them would—only cause further harm or seem disrespectful to the victims and their families."[9] The offenses were a horrible breach of trust by someone who was very close to the minor females and the families involved: the videotaping of young girls in a state of undress on several occasions, and the manufacture of 150 still images from the videos for his viewing.[10] The mother of one victim allocuted at sentencing, pointing out that defendant was "family, friend, counselor, and most of all trusted. For our daughter, you were a friend, mentor, trusted (inaudible) she could turn to . . . .How quickly this all changed almost exactly two years ago. Betrayal, lied to, disbelief, shock. . . . Our lives have been turned upside down. Our faith has been challenged. Friends have been lost; and worst of all, the life of a beautiful, outgoing, smiling, independent young daughter has been changed

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[9] 55a.

[10] From the guilty plea:

> THE COURT: Is it true that during that time you secretly took videos with your smart phone of four underage girls?
> THE DEFENDANT: Yes, sir.
> THE COURT: These girls were guests of yours in your vacation home in the Bayview community?
> THE DEFENDANT: Yes, sir.
> THE COURT: The videos showed the girls changing clothes and showering, correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: Showed them in various stages of nudity including their exposed breasts, buttocks and genitals?
> THE DEFENDANT: Yes, sir.
> THE COURT: Correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: And is it true that you transferred these videos to your computer and made still photographs of the naked images?
> THE DEFENDANT: Yes, sir.

28-29a.

forever. . . . As parents we are crushed to see this change in her."[11] The father said "We trusted you beyond what we should have allowed, as our pastor, our advisor, a great friend, and one of our best great friends. . . . Jon, your damage control put my daughter as the guilty one, not you, but my daughter, and you played yourself as the victim. She lost friends; her life and trust of adults has been tarnished; all for your own sexual pleasure."[12] The father and mother of *three* victims made similar remarks, noting that one of their daughters had written that "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 get therapy."[13]

It is no wonder that defendant would choose not to be in the courtroom with these parents, and if it *was* his choice to appear by Polycam, he waived physical presence at the sentencing, something he knew was going to occur, and he made no request to stop proceedings so he could appear in the courtroom.[14] In *Tankleff v. Senkowski*[15] because of extensive pretrial publicity a special

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[11] 38-39a.

[12] 40a.

[13] 41-53a.

[14] Of course the affidavit attached by the People to their brief cannot be considered to *resolve* the waiver issue by this Court, *People v. Robinson*, 390 Mich. 629, 632 (1973), and the People do not seek to use it for that purpose. But especially along with defendant's repeated extra-record statements that defendant was "required" to proceed by Polycom and "denied" the right to appear physically in the courtroom, see defendant's application for leave, at iii and v, defendant's supplemental brief at 11, 23, and defendant's statements throughout his supplemental brief that he was "denied" physical presence in the court at sentencing, granting the People's requested alternative relief of remand is, amicus submits, appropriate to an accurate resolution of the issue, unless the case is otherwise resolved (by a finding that even if, for the sake of argument, there was no waiver, there was no plain error).

[15] *Tankleff v. Senkowski*, 135 F.3d 235 (CA 2, 1998).

process was employed in voir dire which narrowed the pool to approximately 150 prospective jurors who were then individually questioned in chambers. Though counsel for the prosecution and defense were present, defendant was not. The court held that "[b]ecause the judge discussed the process in open court several times while Tankleff was present, it is reasonable to conclude that Tankleff knew what was going on. There is no indication that he or his lawyers were under the mistaken belief that he could not attend the in camera sessions. The far more likely explanation for his absence is that he and his lawyers did not think it was important for him to be present at this tedious, routine screening designed to eliminate jurors who had been prejudiced by pretrial publicity. Under the circumstances, we think waiver may properly be inferred from the conduct of the defendant and his attorneys."[16] Similarly, in *United States v. Gallego*[17] defendant was also absent from a voir dire of individual jurors. The court agreed that "a defendant is generally entitled to be present throughout trial, with this entitlement extending to the jury's impanelment," but also said that the defendant "may waive his right to be present at any time during trial if his waiver is knowing and voluntary," and that this waiver "may, moreover, be implied by a defendant's conduct."[18] And it found a waiver where the trial judge announced his intention to meet individually with jurors who had said that it would be difficult for them to serve and defendant did not "object to the court's proposal and did not request to participate," the court concluding that "[b]ecause neither [defendant] nor his counsel objected at any point in this process, we conclude that [defendant] waived his right

[16] Id., at 247.

[17] *United States v. Gallego* 191 F.3d 156 (CA 2, 1999), abrogated on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). See further *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

[18] Id., at 171.

to participate and that he therefore was not unconstitutionally deprived of the opportunity to be present during all stages of his trial."[19] Further, in *United States v. Gagnon*[20] the United States Supreme Court held that the defendant waived his presence at an in-chambers hearing with a juror.

> The District Judge, in open court, announced her intention to speak with the juror in chambers, and then called a recess. The in camera discussion took place during the recess, and trial resumed shortly thereafter with no change in the jury. Respondents neither then nor later in the course of the trial asserted any Rule 43 rights they may have had to attend this conference. Respondents did not request to attend the conference at any time. No objections of any sort were lodged, either before or after the conference. Respondents did not even make any post-trial motions, although post-trial hearings may often resolve this sort of claim. . . . We disagree with the Court of Appeals that failure to object is irrelevant to whether a defendant has voluntarily absented himself . . . from an in camera conference of which he is aware. . . . A defendant knowing of such a discussion must assert whatever right he may have . . . to be present.[21]

These cases concern defendant's complete and total absence from a critical stage, and find that presence may be waived by a showing of circumstances, and also that absence may be harmless (which demonstrates that absence is not necessarily structural, a point to which amicus will return). Defendant was not absent in this sense, where he appeared by Polycom and all parties could hear and see each other, as could the judge. The matter is categorically different from an *in absentia*

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[19] Id., at 172. See also *United States v. Jurado-Lara*, 287 F. App'x 704 (CA 10, 2008) ("a defendant has a due process right to be present at any hearing where a fair and just hearing would be thwarted by his absence," but the right "can be waived with the express or implied consent of the accused").

[20] *United States v. Gagnon*, 470 U.S. 522, 527–528, 105 S. Ct. 1482, 1485, 84 L. Ed. 2d 486 (1985).

[21] Id.,105 S.Ct. at 1485. The Court was discussing the federal rule on waiver, but the principle applies equally to the due-process right to be present. See *Tankleff*, supra. But the case also demonstrates that an error with regard to the Michigan rule, MCR 6.006, may be harmless (or waived, or an error not constitute plain error).

proceeding. This Court should consider and find waiver, or at least remand the matter to allow a record to be made of precisely what defendant's wishes were concerning his presence at sentencing and how they were communicated.[22]

**Discussion**

**A. A defendant's unpreserved claim that sentencing by polycom should not have been employed is reviewed for plain error**

Defendant says that the physical presence of the defendant in the courtroom at sentencing is—unlike other constitutional rights—a "self-executing" right that cannot be forfeited by failure to object to proceeding by way of a contemporaneous electronic video/audio method.[23] Amicus disagrees; proceeding to sentence in defendant's total absence—that is *in absentia*—where defendant has not waived his or her presence either specifically or by conduct and thus has had no opportunity to object, is a quite clearly a different thing than proceeding as was done in the present case by Polycom, where nothing precluded defendant or his counsel from objecting to his presence in this fashion. The two should not be equated; they are unquestionably not the same.

A review of case authority demonstrates the distinction. Defendant cites the statement in *United States v. Vallano*[24] that the right to be present at sentencing "is fundamental to the entire law of criminal procedure" (that court beginning that sentence "Although it is not an absolute right"). But the case involved an unambiguous oral pronouncement of sentence which differed from that

[22] And because waiver was not included in the Court's MOAA order, allowance of full briefing on the point by the parties—perhaps after a remand to establish that which occurred—is likely the fairest course—unless the Court proceeds to find that even assuming no waiver occurred relief is not appropriate because in the circumstances here plain-error review would apply, and defendant cannot establish the requirements of relief under that test.

[23] See Defendant's Supplemental Brief, p. 17-18.

[24] *United States v. Villano*, 816 F.2d 1448, 1452 (CA 10, 1987).

entered on the judgment of sentence, which was longer than that orally pronounced. Allowing the sentence pronounced orally to be altered in this fashion after-the-fact, the Court of Appeals said, resulted in a sentencing *in absentia*, and "[s]entencing should be conducted with the judge and defendant facing one another and not in secret."[25] That is very different than a sentence pronounced in open court with the defendant and the judge "facing" each other, even if by electronic means; there was no "secret" sentence here. And plain error could not apply in *Vallano*, as the "correction" of the oral sentence occurred, as the Court of Appeals said, "in secret," without the knowledge of the defendant, which thus afforded him no opportunity for objection, again, quite different from cases such as the present case.

Federal courts have reviewed similar claims for plain error. In *United States v. Salim*[26] the court held that the Government had not shown that defendant knowingly and voluntarily waived his right to be physically present at resentencing. But this was not in end of the inquiry. "The district court's error in finding a valid waiver warrants reversal and remand only if Salim suffered prejudice as a result," the court continued, because ""[w]hen a criminal defendant does not preserve an issue below by objecting, we apply a plain error standard instead of a harmless error one."[27] And, a point to which amicus will return, the court found that defendant had failed to meet the 3rd and 4th prongs

[25] Id., at 1452.

[26] *United States v. Salim*, 690 F.3d 115, 124 (CA 2, 2012).

[27] Id.

of plain-error review. Similarly, in *United States v. Leroux*[28] the court noted that because defendant failed to "object to proceeding with his sentencing by videoconference, we review for plain error."[29]

Nothing prevented defendant or his counsel from objecting to proceeding by Polycom here and instead insisting on a physical rather than a virtual presence in the courtroom. As the Supreme Court has said, "No procedural principle is more familiar to this Court than that *a constitutional right, or a right of any other sort, 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."[30] Plain-error review serves the purpose of "enforc[ing] the requirement that parties object to errors at trial in a timely manner so as to provide the trial judge an opportunity to avoid or correct any error, and

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[28] *United States v. Leroux*, 36 F.4th 115 (CA 2, 2022).

[29] Id., at 121. And see *United States v. Chaney*, 2022 WL 2315184, at 1 (CA 2, 2022):

> [defendant] did not object . . . to proceeding by videoconference at his plea or sentencing. *We therefore review his challenge for plain error*, which exists if "there was an error that is clear or obvious, ... the error affected his substantial rights, ... and the error seriously affects the fairness, integrity or public reputation of judicial proceedings." . . . . *We reject Chaney's argument that his physical absence should be deemed a structural error that would satisfy the third prong of plain error review as to his "substantial rights*." . . . . After examining the record as a whole . . . we find no clear or obvious error, and certainly no error that seriously affects Chaney's substantial rights such as to warrant reversal under the plain error standard (emphasis supplied).

In *United States v. Williams*, 641 F.3d 758, 765 (CA 6, 2011) the court did not review for plain error but only because the government had itself forfeited the issue by arguing only for harmless error, and the court found that the government had failed to establish harmless error because it had not shown that defendant would not have received a lower sentence had he been physically present at sentencing

[30] *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993) (cleaned up) (emphasis supplied).

thus avoid the costs of reversal."[31] So long as the defendant and his counsel had the opportunity to object—and they did—plain-error review is applicable.[32]

**B. Lack of presence at sentencing physically in the courtroom as opposed to virtually by teleconference or polycom is not structural error**

The United States has held that, at least for the federal system, error that can be denominated structural is very limited in scope. Time and again the Court has stated structural error as "the denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt," because these errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence"; in contrast, even the "omission of a single element from jury instructions" does not constitute structural error.[33]

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[31] *United States v. Cedillo-Narvaez*, 761 F.3d 397, 404 (CA 5, 2014). And see *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S. Ct. 2333, 2340, 159 L. Ed. 2d 157 (2004) (the plain-error rule has the purpose of "reduc[ing[ wasteful reversals by demanding strenuous exertion to get relief for unpreserved error"),

[32]Cf. *Greer v. United States,* 141 S. Ct. 2090, 2096*,* 210 L. Ed. 2d 121, (2021) ("If the defendant has an opportunity to object and fails to do so, he forfeits the claim of error")(cleaned up); *United States v. Grogan*, 977 F.3d 348, 352 (CA 5, 2020) (" the standard of review depends on whether [defendant] had an opportunity to object before the district court. . . . If he had that chance but failed to do so, we review for plain error").

[33] See e.g. *Greer v. United States*, 210 L. Ed. 2d 121, 141 S. Ct. 2090, 2100 (2021).

Sentencing *in absentia* without waiver, specific or by conduct, is ordinarily structural error[34]; virtual appearance at sentencing without objection is not,[35] though it constitutes a violation of court rule, a violation which may be waived, or harmless. "The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a structural error."[36] Therefore, "to prevail on his claim, [defendant] must establish that the error caused him prejudice."[37] The Fifth Circuit has also said that a defendant's "claim that she was excluded from critical stages of the trial is also subject to plain error review, because she failed to raise an objection contemporaneously," rejecting an argument that defendant's absence during jury impanelment constituted structural error, requiring no showing of prejudice, as "]t]he Supreme Court has declined to extend automatic reversal of a conviction to violation of a defendant's right to be present at all critical stages of the trial."[38]

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[34] See *United States v. Stevens*, 223 F.3d 239, 244 (CA 3, 2000).

But in some circumstances, the total unwaived absence of the defendant from the *pronouncement* of sentence, as opposed to the sentencing proceeding, may be harmless, as where the proceedings are had before a sentencing jury, which then deliberates and announces its sentence in court. In *Rice v. Wood*, 77 F.3d 1138, 1139 (CA 9, 1996) (en banc) a jury-sentencing hearing was held with defendant present, but defendant was not present when the jury returned and announced its sentence of death. The court held that constitutional error had occurred in that there had been no waiver of presence, but that the error was not structural, saying that "absence when the jury announced his sentence simply does not fall within the narrow category of structural errors. Had he been present, he couldn't have pleaded with the jury or spoken to the judge. He had no active role to play; he was there only to hear the jury announce its decision. The error in this case does not, like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end. Rather, like most trial errors, it can be quantitatively assessed in order to determine whether or not it was harmless." The court then determined the error to be harmless beyond a reasonable doubt. Id., at 1141, 1145.

[35] See *United States v. Chaney*, supra: "We reject Chaney's argument that his physical absence should be deemed a structural error."

[36] *Campbell v. Rice,* 408 F.3d 1166, 1172 (CA 9, 2005) (en banc).

[37] *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1110 (CA 9, 2022).

[38] *United States v. Thomas*, 724 F.3d 632, 641 (CA 5, 2013).

The court found that defendant had failed to meet the 3rd and 4th prongs of plain-error review. As to the 3rd prong, "Salim has not proven that his presence would have affected the outcome of his resentencing. . . . during the resentencing, by virtue of the live videoconference link, Salim was not prevented from making any statement he chose to the district court. Against these considerations, Salim has offered no explanation for why his physical presence might have led to a resentence of less than life imprisonment." As to the 4th prong, the court said "[n]or has Salim proven the fourth plain error factor—that the district court's acceptance of his waiver of presence seriously affected the fairness, integrity or public reputation of judicial proceedings. An error that does not affect the outcome of proceedings typically does not meet this prong. . . . This is because the plain-error exception to the contemporaneous-objection rule is to be used sparingly, to correct only particularly egregious errors when a miscarriage of justice would otherwise result."[39]

**C. The manner in which defendant could show the error affected the outcome of the sentencing is best left to defendant**

Showing prejudice would be difficult—as it should be—but not impossible. For example, a statement or statements might be made by victims during sentencing which are factually incorrect and which defendant might need to discuss privately with his attorney but could not given the nature of the proceedings, and other situations may certainly be hypothesized. And after all, that it is difficult to demonstrate prejudice is quite often because the situation involved caused no prejudice.

[39] Id., at 124-125 (cleaned up).

## D. If the error is structural, and if a showing that a forfeited error was structural creates a rebuttable presumption that the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding, the record here rebuts the presumption

### 1. The presumption should not exist

In *People v. Davis*[40] last term of Court this Court created a rebuttable presumption that a forfeited structural error is reversible, "shif[ting] the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding."[41] The stated justification for creation of this rule was that "[t]he prosecutor is better positioned to marshal record facts supporting the overall fairness of the trial proceedings," with the example of this better positioning given being cases such as the one then before the Court, involving a claim of a denial of a public trial, the Court saying that "in the context of courtroom closures, a prosecutor may successfully rebut the presumption when the trial court failed to sufficiently articulate the basis for the closure under *Waller*, but sufficient justification for the specific closure was present elsewhere in the record. A prosecutor may also successfully rebut such a presumption when an unjustified closure was limited and the courtroom remained open during most of the critical stages of trial."[42] Of course, it is also the case that only the defense possesses the facts concerning the reasons why no objection was made, which may be that the defense was quite content with the closure, as the spectators were entirely, or overwhelmingly, family and friends of the victim. And what of cases such as the instant one, where no objection was made to appearing at sentencing by

[40] *People v. Davis*, —Mich.—, 2022 WL 779132 (2022).

[41] Id., 2022 WL 779132, at 12.

[42] Id.

polycom, and the defendant and his counsel know why (and here the reasons are suggested by the record).

More importantly, MCL 769.26 provides that no verdict is to be set aside or reversed or a new trial granted in any criminal case unless it "shall *affirmatively appear* that the error complained of has resulted in a *miscarriage of justice*" (emphasis supplied). Remarkably, this statute appears nowhere in the *Davis* opinion, and the opinion, amicus submits, cannot be squared with the text of the statute. It is one thing to place the burden on the prosecution to demonstrate that the error was harmless beyond a reasonable doubt for preserved constitutional error—as to federal constitutional error, the United States Supreme Court *requires* it[43]—but another to shift any of the burden to the prosecution for unpreserved error, be it constitutional (even structural) or not. And, though cases from the United States Supreme Court do not bind this Court with regard to its standards for review of error, its cases are, amicus believes, persuasive here, and the Court has never said that the prosecution bears the burden once an unpreserved constitutional error is determined to be structural, nor has, it appears, any federal circuit court of appeals, though it may be more likely that a structural error—and the error here was not, as amicus has argued, structural—may be shown by the defendant to satisfy the 4th plain-error requirement. Indeed, the Supreme Court has said that "*The defendant* has the burden of establishing entitlement to relief for plain error. . . . That means that *the defendant has the burden of establishing each of the four requirements for plain-error relief*. Satisfying all four prongs of the plain-error test is difficult."[44] It is supposed to be.[45]

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[43] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[44] *Greer v. United States*, 141 S. Ct. at 2097(cleaned up; emphasis supplied).
See also *Puckett v. United States*, 556 U.S. 129, 139, 129 S. Ct. 1423, 1431, 173 L. Ed. 2d 266 (2009) ("Whether an error can be found harmless is simply a different question from whether it can be

*Davis* is of extremely recent vintage, and a retreat from its holding would cause no disruption.[46]

**2. In any event, the record here rebuts any presumption**

The record of the present case, with extensive participation by defense counsel, and allocution by the defendant where he essentially accepted his responsibility, saying there "is no justification for the hurts and the damage that I've caused, and to attempt to explain my actions—what led up to them would—only cause further harm or seem disrespectful to the victims and their families," and that "punishment in my case is well deserved and just. I've never ever said I did not deserve to be punished," asking for mercy,[47] rebuts any presumption that the fairness, integrity, or public reputation of judicial proceedings would be seriously affected by not correcting the unpreserved error here.

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subjected to plain-error review"); *Johnson v. United States*, 520 U.S. 461, 466, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718(1997) ("Petitioner argues that she need not fall within the 'limited" and 'circumscribed strictures of *Olano*, because the error she complains of here is 'structural,' and so is outside Rule 52(b) altogether. But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure" (read in Michigan, the ambit of MCL 769.26); *United States v. Gomez*, 705 F.3d 68, 76 (CA 2, 2013) (forfeited structural error did not affect the fairness, integrity, or public reputation of judicial proceedings); *United States v. Turrietta*, 696 F.3d 972, 976 (CA 10, 2012) ("Turrietta's claim of 'structural' error has little bearing on the application of the plain error test"); *United States v. Phipps*, 319 F.3d 177, 189 (CA 5, 2003) ("An error not susceptible to harmless error review is nevertheless susceptible to plain error review if the defendant did not object at trial").

[45] *Puckett*, 129 S. Ct. at 1429 ("Meeting all four prongs is difficult, as it should be").

[46] See *United States v. Scott*, 437 U.S. 82, 86–87, 98 S. Ct. 2187, 2191, 57 L. Ed. 2d 65 (197*8) (*"though our assessment of the history and meaning of the Double Jeopardy Clause in *Wilson, Jenkins*, and *Serfass v. United States* . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided").

[47] Defendant's appendix 55-56a.

**Conclusion**

Any error here—if waiver did not occur—be it court-rule, statutory,[48] or constitutional error, was forfeited. Plain-error review thus applies, requiring defendant to establish all four prongs of that review. The error is not structural, and so defendant must demonstrate that the error affected the outcome. Even if the error were structural, reversal on a forfeited structural error is not automatic, and affirming the sentence here would not affect the fairness, integrity, or public reputation of judicial proceedings; indeed, the setting aside of the sentence under the circumstances here might do so.

[48] Defendant cites MCL 768.3: "No person indicted for a felony shall be tried unless personally present *during the trial*; persons indicted or complained against for misdemeanors may, at their own request, through an attorney, duly authorized for that purpose, by leave of the court, be put on trial in their absence" (emphasis supplied). While sentencing may be a critical stage, the statute does not answer whether sentencing is part of being "present during the trial," and has nothing to say regarding whether presence by electronic means is sufficient.

**Relief**

Wherefore, the People request that this Court deny defendant's application for leave to appeal, or affirm the decision of the Court of Appeals. . . . . .

Respectfully submitted,

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