Filing # 115236452 E-Filed 10/19/2020 06:42:25 PM

CASE NO: 3D20-1461

In the District Court of the State of Florida
Third District

JERMAINE CLARINGTON,
Appellant / Petitioner,

v.

STATE OF FLORIDA,
Appellee / Respondent.

BRIEF OF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA PUBLIC DEFENDER ASSOCIATION

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STATEMENT OF IDENTITY AND INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization with twenty-nine chapters and more than 1,300 members, all of whom are active criminal defense practitioners. FACDL is a nonprofit corporation with a purpose of assisting in the fair administration of the state's criminal justice system. Its participation in this case serves the organization's purpose by assisting the courts in reaching just results in cases involving the constitutional rights of criminal defendants in Florida.

The Florida Public Defender Association, Inc., ("FPDA") consists of elected public defenders who supervise hundreds of assistant public defenders and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members and staff have tremendous practical experience with clients in

criminal cases. All FPDA members are deeply committed to promoting the interests of fairness and justice in the criminal law process.

NACDL, FACDL, and FPDA have a particular interest in Mr. Clarington's petition for writ of prohibition because the outcome will have a significant impact throughout the state on the constitutional rights of criminal defendants who are facing probation revocation proceedings during the nationwide novel coronavirus (COVID-19) pandemic. At present, this Court is the first appellate court in Florida to address the constitutionality of conducting entirely virtual probation revocation proceedings over the objection of the defendant during the pandemic.

SUMMARY OF THE ARGUMENT

Petitioner Jermaine Clarington has never met his lawyer in person. Like other defendants detained during the pandemic, Mr. Clarington's only relationship with his lawyer has been over a monitor. Detained pretrial and charged with violating probation, Mr. Clarington faces a possible sentence of life in prison.

Although Mr. Clarington agrees to wait in jail for his day in court, and the State agrees to wait for Mr. Clarington to have his day in court, the trial judge does not agree. Citing concerns over a growing docket and the cost of detaining Mr. Clarington at the Dade County Jail, the judge has decided to proceed with a probation violation hearing and possible sentencing entirely by video, meaning that

no one from the defense will appear in court—not Mr. Clarington or his virtual lawyer.

The judge has never met Mr. Clarington in person. All the judge has seen is a black face on a virtual monitor, sitting in the Dade County jail. The court proposes to hold a virtual hearing to decide whether to keep Mr. Clarington in a cage for the rest of his life. The writ should issue to prevent such a hearing.

Florida Rules of Criminal Procedure 3.180(a)(9) & (b) categorically prohibit courts from holding a probation violation and sentencing hearing without the defendant's physical presence in the courtroom. The Rule codifies the settled constitutional principle that "one of a criminal defendant's most basic constitutional rights" is "the right to be present in the courtroom at every critical stage in the proceedings," including sentencing. Multiple cases considering the issue have reversed sentences as fatally flawed when the trial court ordered a defendant to appear at a probation violation or sentencing hearing virtually.

The emergency orders issued by the Florida Supreme Court addressing the use of technology to mitigate the spread of COVID-19 do not override the protections of Rule 3.180. To the contrary, the orders make clear that trial courts *must* consider the rights of criminal defendants when implementing technology to criminal proceedings. A defendant has a due process right to be physically present

in the courtroom at any stage of the criminal proceeding that is critical to the outcome of his case, including a probation revocation and sentencing hearing.

The right to be physically present in the courtroom works in conjunction with a criminal defendant's other constitutional and statutory rights, including the right to testify with defense counsel by his side, the right to the effective assistance of counsel, to be meaningfully heard, to present evidence, to question adverse witnesses, and to allocute at sentencing.

But allocuting and expressing remorse, sincerity, genuine apology, and a sincere understanding of the seriousness of the offense cannot be fully conveyed through the impersonal presentation of a disembodied form appearing as an image on a screen. And the ability to observe demeanor, which is central to the fact-finding process, may be diminished by video conferencing. Facial expressions, the tonality of our voice, eye contact, and body language tell a story in a way that a screen cannot.

Absent the defendant's consent, the trial court errs when it forces a defendant to attend a probation violation and sentencing hearing virtually.

ARGUMENT

VIRTUAL PROBATION REVOCATION PROCEEDINGS VIOLATE A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL, ABSENT A VALID WAIVER

The spread of the novel coronavirus (COVID-19) has upended Florida's criminal justice system, requiring trial courts to find innovative solutions for addressing pending cases while protecting the health of its participants. Although videoconferencing technology has long existed in criminal courtrooms,[1] its use during the pandemic has begun expanding in unprecedented ways to encompass matters traditionally conducted in person. "[N]ot every technological advance," however, "fits within constitutional constraints or the realities of criminal proceedings." *Seymour v. State*, 582 So. 2d 127, 129 (Fla. 4th DCA 1991).

This case concerns "one of a criminal defendant's most basic constitutional rights"—"the right to be present in the courtroom at every critical stage in the proceedings." *Jackson v. State*, 767 So. 2d 1156, 1159 (Fla. 2000); *accord Jordan v. State*, 143 So. 3d 335, 338 (Fla. 2014); *Dunbar v. State*, 89 So. 3d 901, 907 (Fla. 2012). Petitioner Jermaine Clarington, despite being unable to meet with his defense counsel in person, is being forced to proceed to a virtual probation revocation hearing where he faces the prospect of being sentenced to life

[1] *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836 (1990); *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998).

imprisonment. Not only would this virtual revocation hearing expressly violate Florida Rule of Criminal Procedure 3.180—it would also deny Mr. Clarington his constitutional rights to due process and effective assistance of counsel.

"Prohibition is an extraordinary remedy that [is] used to restrain the unlawful use of judicial power." *Taylor v. State*, 65 So. 3d 531, 533 (Fla. 1st DCA 2011). "The purpose of prohibition is to prevent something rather than to undo something . . . . " *Millennium Diagnostic Imaging Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 129 So. 3d 1086, 1088 (Fla. 3d DCA 2013). Mr. Clarington's petition should be granted because it fulfills the preventative purpose for a writ of prohibition[2] by seeking to prevent the trial court from proceeding with an unlawful probation revocation hearing that violates his rights under the United States and Florida Constitutions. As further guidance to support this remedy, this Amicus Brief will explain why a virtual probation revocation hearing constitutes constitutional error, rather than the mere violation of a procedural rule.

[2] Alternatively, this Court may review Mr. Clarington's claim as a petition for writ of mandamus. *See* Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy."); *see also Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000) ("In order to be entitled to a writ of mandamus the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.").

A. The Florida Supreme Court's Emergency Orders Prohibit the Use of Technology in a Manner That Is Inconsistent with the United States or Florida Constitutions

Through emergency orders, the Florida Supreme Court has provided guidelines for mitigating the spread of COVID-19 within the court system. First among the "guiding principles" enumerated in the emergency measure is that "[t]he presiding judge in all cases must consider the constitutional rights of crime victims and criminal defendants and the public's constitutional right of access to the courts." *In Re: Comprehensive COVID-19 Emergency Measures for Florida State Courts, No. AOSC20-23, Amendment 7*, Guiding Principles, at Section I.A. (Oct. 2, 2020). To promote safety through remote proceedings, the order provides that "[a]ll rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for the remote conduct of proceedings shall remain suspended." *Id.* at Section II A.

With regards to criminal cases, the Florida Supreme Court's most recent order mandates that: (1) all criminal jury selection and trial proceedings be conducted in person, *In Re: Comprehensive COVID-19 Emergency Measures for Florida State Courts, No. AOSC20-23, Amendment 7*, Section E.(1) (October 2, 2020); (2) non-jury trials in "[c]riminal cases shall be conducted remotely *if the parties agree* to such conduct or, if not, shall be conducted in person." *Id.* at Section III.E.(2)a (emphasis added); and (3) all other criminal court proceedings

shall be conducted remotely unless "[r]emote conduct of the proceeding is inconsistent with the United States or Florida Constitution, a statute, or a rule of court that has not been suspended by administrative order." *Id*. Section III.E.(3)a.

Taken together, these provisions permit the expanded use of technology during criminal proceedings under limited circumstances—other than jury or nonjury trials—where remote conduct would not be inconsistent with the United States or Florida Constitutions. Because the order does not expressly address probation revocation proceedings, it leaves open the question of whether entirely virtual probation revocation proceedings would be constitutional.

B. Criminal Defendants Have a Constitutional Right to Be Physically Present at Violation of Probation Hearings

Rooted in longstanding federal jurisprudence, a defendant's right to be physically present derives from the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the fairness of the procedure"), as well as the Confrontation Clause of the Sixth Amendment, *see Illinois v. Allen,* 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage if his trial".).

Along with these federal protections, Article I, Section 16(a) of the Florida Constitution provides the accused in criminal proceedings with the right to be heard "in person." The Florida Supreme Court has recognized that a criminal defendant "has the due process right to be present at proceedings whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Muhammad v. State*, 782 So. 2d 343, 355-56 (Fla. 2011) (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985)); *accord Hojan v. State*, 212 So. 3d 982, 991 (Fla. 2017). Furthermore, the Court has found the physical presence of a judge to be a fundamental right. *See Doe v. State*, 217 So. 3d 1020, 1026 (Fla. 2017); *Brown v. State*, 538 So. 2d 833, 835 (Fla. 1989).

As additional safeguard, Florida Rule of Criminal Procedure 3.180 codifies a defendant's right to be physically present at every critical stage in the proceedings, including sentencing.[3] *See Jarrett v. State*, 654 So. 2d 973, 975 (Fla. 1st DCA 1995). Rather than a mere procedural right, Rule "3.180 restates the long-established principle of constitutional law that sentencing is a critical stage in a criminal prosecution for which a defendant has a right to be present." *Capuzzo v. State*, 578 So. 2d 328, 330 (Fla. 5th DCA 1991); *see also Gonzalez v. State*, 221

[3] *See* Fla. R. Crim. P. 3.180 (a)(9) (providing that the defendant must be present "at the pronouncement of judgment and the imposition of sentence"); Fla. R. Crim. P. 3.180(b) (defining "presence" as being "physically in attendance for the courtroom proceeding, and [having] a meaningful opportunity to be heard through counsel on the issues being discussed").

So. 3d 1225, 1227 (Fla. 3d DCA 2017) (Emas, J.) ("[T]he rule is a recognition of the basic constitutional principle that a defendant has the right to be present in the courtroom at every critical stage of the proceeding." (quoting *Jackson*, 767 So. 2d at 1159)); *see also Lee v. State*, 257 So. 3d 1132 (Fla. 3d DCA 2018) (Emas, J.) (holding that defendant was entitled to be physically present in the courtroom for resentencing after a motion to correct an illegal sentence was granted)

That the requirements of Rule 3.180 are intertwined with a criminal defendant's constitutional right to be physically present in the courtroom during a probation violation hearing is demonstrated by case law, which holds that, "[i]n situations involving violations of rule 3.180, 'it is the **constitutional question** of whether fundamental fairness has been thwarted which determines whether the error is reversible.'" *Pomeranz v. State*, 703 So. 2d 465, 471 (Fla. 1997) (quoting *Garcia v. State,* 492 So. 2d 360, 364 (Fla. 1986)) (emphasis added). In other words, a violation of Rule 3.180 constitutes reversible error only when the error is also a violation of the criminal defendant's constitutional rights, which occurs when the defendant's presence "would contribute to the fairness of the proceeding." *Stincer*, 482 U.S. at 745.

As applicable to Mr. Clarington's prohibition petition, "the pronouncement of a verdict and sentence in a . . . probation revocation hearing is a critical stage of the proceedings at which the defendant is entitled to be present, absent a voluntary

waiver of same by the defendant." *Benitez v. State*, 57 So. 3d 939, 940 (Fla. 3d DCA 2011) (quoting *Summerall v. State*, 588 So. 2d 31, 32 (Fla. 3d DCA 1991)). Because "[t]he purpose of a probation revocation hearing is to determine whether the terms of a defendant's probation for a prior crime have been violated," a "probation revocation hearing constitutes a deferred sentencing proceeding" and thus is "a critical stage of criminal prosecution for which the defendant has a **constitutional right** to attend." *Santeufemio v. State*, 745 So. 2d 1002, 1003 (Fla. 2d DCA 1999) (emphasis added).

The right of probationers to be present in probation revocation hearings is also codified within Section 948.06(2)(d), Florida Statutes, which provides that if a violation of probation charge is not admitted, "the court, as soon as may be practicable, shall give the probationer . . . an opportunity to be fully heard on his or her behalf in person or by counsel." § 948.06(2)(d), Fla. Stat.

The right to be physically present is afforded to criminal defendants during probation revocation hearings because "the power to revoke [probation] is not unrestrained; the trial court must afford due process." *Turner v. State*, 261 So. 3d 729, 735 (Fla. 2d DCA 2018); *see also Black v. Romano*, 471 U.S. 606, 610 (1985) ("The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty

created by probation."). Although probationers, much like parolees,[4] are not entitled to the "full panoply" of due process rights afforded during a jury trial,[5] the United States Supreme Court has held that the minimum due process requirements for revocation hearings include the "opportunity to be heard **in person** and to present witnesses and documentary evidence." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (emphasis added); *see also Romano*, 471 U.S. at 612 (holding that a "final revocation of probation must be preceded by a hearing," at which the defendant must have, among other things, "an opportunity to be heard in person"); *McCloud v. State*, 653 So. 2d 453, 545-55 (Fla. 3d DCA 1995) (recognizing that the "due process requirements of a probation revocation hearing include . . . an opportunity to be heard in person").

As the above demonstrates, Mr. Clarington is entitled as a matter of constitutional right to be physically present during his revocation hearing and possible sentencing. *See Schiffer v. State*, 617 So. 2d 357, 358 (Fla. 4th DCA

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[4] In considering the due process rights afforded in probation revocation hearings, the United States Supreme Court has recognized that parole revocation and probation revocation are "constitutionally indistinguishable." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n. 3 (1973).

[5] "In probation revocation proceedings, 'the probationer is entitled to less than the full panoply of due process rights accorded a defendant at a criminal trial.'" *Del Valle v. State*, 80 So. 3d 999, 1018 (Fla. 2011) (quoting *Carchman v. Nash*, 473 U.S. 716, 726 (1985)).

1993), *disapproved of on other grounds by Franquiz v. State*, 682 So. 2d 536 (Fla. 1996) (holding that a "[d]efendant has the right to be physically present at a probation revocation hearing"). Therefore, the trial court's decision to go forward with a virtual probation revocation hearing is unauthorized by the Florida Supreme Court's order, as it is inconsistent with the United States and Florida Constitutions.

C. Virtual Probation Revocation Proceedings Do Not Comply With a Defendant's Constitutional Right to Be Present

In tacit acknowledgement of Mr. Clarington's right to be present during a probation revocation proceeding, the trial court determined that this right could be satisfied through entirely virtual proceedings where Mr. Clarington could speak to his attorney in a private Zoom breakout group. However, "guarding this right requires more than merely ensuring a defendant's physical attendance. Instead, 'presence' includes both physical attendance and 'a meaningful opportunity to be heard through counsel on the issues being discussed.'"[6] *Wilson v. State*, 276 So. 3d 454, 456 (Fla. 5th DCA 2019) (quoting Fla. R. Crim. P. 3.180 (b)).

[6] "If [a] probationer does not admit to the violation and the charged violation is not dismissed, the court must give the probationer an opportunity to be fully heard." *Balsinger v. State*, 974 So. 2d 592, 593 (Fla. 2d DCA 2008). This due process requirement includes the "opportunity to be heard on . . . (1) whether defendant has violated a condition of probation, and (2) what sentence should be imposed." *Estevez v. State*, 705 So. 2d 972, 973 (Fla. 3d DCA 1998). "A defendant's due process rights include the right to present a closing argument at a violation of probation hearing, just as in a jury or non-jury trial." *Selman v. State*, 160 So. 3d 102, 103 (Fla. 4th DCA 2015). Furthermore, "the right to allocution must be afforded to a defendant prior to sentencing in a VOP hearing, just as that same

As common experience dictates, virtual proceedings are not equivalent to in-person proceedings simply because the parties can see each other in real time. Rather, there are "unique benefits of physical presence" that, even with advances in technology, cannot be replicated through a virtual appearance. *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018); *see also Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) ("Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.").

"[T]he form and substantive quality of [a] hearing is altered when a key participant is absent from the hearing room, even if he is participating by virtue of" videoconferencing. *United States v. Thompson*, 599 F.3d 595, 600 (7th Cir. 2010). "Being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference." *United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011). That is to say, "virtual reality is rarely a substitute for actual presence and that, even in

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opportunity must be provided before sentencing in any other criminal trial or proceeding." *Hill v. State*, 246 So. 3d 392, 396 (Fla. 4th DCA 2018).

an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

This is particularly true in the context of sentencing. A "face-to-face meeting between the defendant and the judge permits the judge to experience 'those impressions gleaned through . . . any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.'" *Thompson*, 599 F.3d at 599 (quoting *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)). "Physical presence makes unavoidable the recognition that—in sentencing—one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen." *United States v. Fagan*, 2:19-CR-123-DBH, 2020 WL 2850225, at *2 (D. Me. June 2, 2020); *see also Green v. United States*, 365 U.S. 301, 304 (1961) ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.").

For these reasons, a defendant's due process right to be physically present is not merely a technical formality. Rather, it works in conjunction with a defendant's other due process rights to ensure the fairness of court proceedings—those rights being the right to be meaningfully heard, the right to effective assistance of counsel, the right to present evidence, the right to question adverse witnesses, and

the right to provide mitigation at sentencing, including allocution. When a defendant's right to physical presence is extinguished, the defendant's other rights are diminished because video conferencing impairs a fact finder's ability to personally assess testimony as well as the ability to assess demeanor and credibility, all of which may be essential to proper resolution of the revocation hearing. Therefore, virtual probation violation proceedings violate a defendant's due process rights and negatively impact the administration of justice.

D. Virtual Probation Revocation Proceedings Violate a Defendant's Right to Effective Assistance of Counsel

Along with due process, virtual probation revocation proceedings would also violate a defendant's constitutional right to the effective assistance of counsel. Under Florida law, criminal defendants are guaranteed the right to counsel during probation revocation proceedings. *See State v. Hicks*, 478 So. 2d 22, 23 (Fla. 1985); *Bowden v. State*, 150 So. 3d 264, 266 (Fla. 1st DCA 2014). When the Sixth Amendment right to counsel attaches, it guarantees not only the presence of a person who happens to a lawyer, but the effective assistance of that lawyer:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel."

Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

Though it is generally presumed that defense counsel acts competently, the United States Supreme Court has recognized that "[c]ircumstances of [a] magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659–60 (1984) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). This can include situations where defense counsel is totally absent from the proceedings or has been prevented from assisting the accused during a critical stage of the proceedings. *See id.* at 659 n.25.

At present, the criminal justice system is operating under unprecedented circumstances. Due to the pandemic and restrictions on legal visits, many criminal defense lawyers across the state have not met in person with their clients for many weeks, perhaps months, and in some cases, like Mr. Clarington, never. In many judicial circuits, defense attorneys are unable to effectively conduct discovery depositions with material witnesses. As a result, conducting remote substantive violation hearings and sentencing hearings during this unique time, over the defense's objection, jeopardizes a defendant's Sixth Amendment right to effective

assistance of counsel by placing defense counsel in the untenable situation where he or she is unable to properly prepare.

Moreover, logistical problems inherent in the virtual probation revocation hearing itself would further diminish defense counsel's effectiveness. Where all parties appear virtually, defense counsel "will be unable to gauge the emotional interactions and mood of the courtroom as effectively to determine when and how to intervene on the client's behalf." Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1131 (2004). As one commentator has explained for parole revocation proceedings where the defendant and defense counsel appear separately by video:

> The physical separation of a parolee from counsel inevitably takes its toll on the effectiveness of the counsel, and this effect is most strongly felt by the communication between them. Some courts have tried to curb this problem by providing telephone lines that allow for privileged communication. However, this practice still cannot replace the quality of the attorney-client relationship created by in-person interaction. . . . [T]he human interactions that foster the relationship are muted by the technology, which detracts from the defendant's experience. Likewise, counsel cannot gauge the defendant's mental and emotional state, and neither party can use nonverbal cues to communicate with each other during a proceeding, both of which are necessary to effective communication.

Kacey Marr, *The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. Cin. L. Rev. 1515, 1533–34 (2013) (footnotes omitted).

During a typical criminal proceeding, the defendant can communicate directly with defense counsel, either verbally or in writing, without disrupting the proceedings. But under the trial court's ruling in this case, every privileged communication between counsel and the defendant would require a complete stoppage of the proceedings, assuredly resulting in a chilling effect. This would greatly reduce counsel's real-time ability to confer with and react to the defendant. And "[e]ven if the parties are able to confer privately beforehand and are thereby able to create a satisfactory strategy, the communication lost during the revocation hearing, including the nonverbal cues between attorney and client, could result in deficient performance by counsel. In such a situation, the attorney is incapable of reading the [defendant's] body language and other nonverbal cues during the proceeding, and therefore cannot adjust accordingly." *Marr*, *supra*, at 1534.

Finally, the use of videoconferencing technology "raises a number of technical questions and forces the criminal justice system to confront the limitations and implications of technology." Poulin, *supra*, at 1104-05. This could include technical glitches that change the complexion of a hearing, such as: poor internet connection causing lag, jails having inadequate streaming capabilities, parties being unintentionally muted, parties being dropped from the proceedings, inability to effectively confront witnesses with documents or prior statements, and the courtroom's video system failing. *Cf.* Fredric I. Lederer, *Technology-*

Augmented Courtrooms: Progress Amid A Few Complications, or the Problematic Interrelationship Between Court and Counsel, 60 N.Y.U. Ann. Surv. Am. L. 675, 680 (2005). These glitches could result in serious repercussions—particularly for a defendant like Mr. Clarington facing life imprisonment—such as defense counsel failing to make a timely objection or missing objectionable matters completely.

CONCLUSION

Amici recognize the difficulties Florida's criminal judicial system is facing in its efforts to prevent a system-wide backlog of cases. But judicial efficiency, cost savings, or alleviating trial courts' dockets do not justify dispensing with constitutional protections to order a defendant to prepare for and appear at a probation revocation hearing and possible sentencing through a television monitor. Nor is there a reasoned argument for insisting on such procedure when the defendant is prepared to await his day in court. The persistence to hold probation violation hearings by remote video during this national health crisis would lead the trial courts to constitutional error when such expediency is not necessary. Never more is that true than in the case of Mr. Clarington, who faces a potential lifetime in prison if found to be in violation.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that this brief has been furnished to been furnished via electronic service to Daniel Tibbitt, Law Office of Daniel J. Tibbitt PA, at dan@tibbittlaw.com; to Michael Mervine and Jeffrey Geldens, Office of the Attorney General, at crimappmia@myfloridalegal.com, michael.mervine@myfloridalegal.com and jeffrey.geldens@myfloridalegal.com; and to the Honorable Miguel De La O at mdelao@jud11.flcourts.org, on this 19th day of October, 2020. I also hereby certify that this been has been prepared using Times New Roman 14-point font.

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