No. SJC-13093

# Commonwealth of Massachusetts

# Supreme Judicial Court

COMMONWEALTH

*vs.*

MARTIN CURRAN

ON DIRECT APPELLATE REVIEW OF A JUDGMENT OF THE FITCHBURG DISTRICT COURT

**BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, THE BOSTON BAR ASSOCIATION, THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF MARTIN CURRAN & REVERSAL**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Other Authorities**

**Rules**



**Constitutional Provisions**

## Corporate disclosure statement

Pursuant to Mass. R. App. P.17(c)(1) and Supreme Judicial Court Rule 1:21, amici make the following disclosures: CPCS is a statutorily created agency established by G.L. c. 211D, § 1. The BBA is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly-held corporation that owns 10% or more of the BBA's stock. MACDL is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL. CHHIRJ is fiscally sponsored by Harvard University, a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. CHHIRJ does not issue any stock or have parent corporations. No publicly held corporations own stock in CHHIRJ.

## Preparation of Amicus Brief

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;
(b) no party or party's counsel contributed money to fund preparing or submitting the brief;
(c) no person or entity, including the amici curiae, contributed money that was intended to fund preparing or submitting a brief; and
(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

## Interest of Amici Curiae

The Committee for Public Counsel Services (CPCS), Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. *See* G. L. c. 211D, §§ 5, 14. The issue addressed in this brief is one that could affect numerous indigent defendants whom CPCS attorneys are appointed to represent. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated") (citation, quotation marks omitted).

The Boston Bar Association (BBA), with more than 13,000 members, traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's interests in this case relate most strongly to its goal of ensuring access to justice for all criminal defendants. The BBA recognizes that part of achieving this goal must include addressing structural and institutional racism that impact those who come before the court system. More broadly, the BBA is concerned about the multi-faceted potential implications of the application of new technologies to long-established practices in the court system. The ramifications for individuals' rights have not been fully explored to date, and as such raise concern for the BBA, an organization for which facilitating access to justice and improving the administration of justice have historically been essential elements of our mission.

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished

work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. Ensuring that defendants and communities of color have full and equal access to our courts and receive the protection of their fundamental constitutional rights is critical to our racial justice work, particularly during a global pandemic when they and their loved ones are specifically at heightened risk of death.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

## Summary of Argument

The COVID-19 pandemic forced much of the Commonwealth's court business to move to the realm of the virtual. But no criminal defendant in Massachusetts was compelled, by statute or standing order, to submit to a virtual trial.

This protection for defendants at the most significant event in the life of a criminal case has been critical, given that a virtual trial is different than a traditional courtroom trial in so many respects. The lack of a formal courtroom setting undermines the dignity and respect of the proceedings. *Infra* at 14-15. Defendants who participate virtually and from jail are likely to be disengaged and have trouble communicating with their attorneys. *Infra* at 15-16. Family members and friends may be alienated by difficulties in accessing the proceedings. *Infra* at 17-18. And the nature of videoconferenced communication is at once both more limited and more challenging for participants than face-to-face communication, which may result in hampered credibility assessments and impaired performance by attorneys and judges. *Infra* at 18-21. Defense attorneys surveyed during the pandemic have widely reported problems with virtual proceedings, and there is evidence that outcomes for litigants in such proceedings are worse than for their counterparts in the courtroom. *Infra* at 21-24. And this may not be all: given the novelty of the virtual trial, there is still much that we do not know about how it affects both rights and outcomes. *Infra* at 24-25.

As this Court has recognized, virtual court proceedings implicate several fundamental constitutional rights, including the rights to confront witnesses, to be present at trial, to receive the effective assistance of counsel, and to a public proceeding. *Infra* at 25-29. Particularly at trial, where the need to safeguard those

rights is most paramount, those rights may not be merely implicated, but actually impaired, by videoconferenced proceedings. *Infra* at 25-29.

Despite these disadvantages, and despite the fact that our system has never required a defendant to proceed to a virtual trial, a small number of defendants[1] in the Commonwealth elected to proceed to a virtual trial—or, as here, a hybrid trial.[2] And some even smaller number did so without being advised by a judge about the constitutional rights adversely affected by that decision. That was a violation of their constitutional due process rights. *Infra* at 29-33. Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation, quotation marks omitted). Without a colloquy to safeguard against the unwitting relinquishment of the many constitutional rights impaired by a virtual or hybrid trial, we simply cannot know whether

[1] Amicus CPCS is responsible for assigning counsel in all criminal appeals for indigent defendants, and does so upon receipt of an appeal referral from counsel. CPCS received fewer than ten appeal referrals between April 1, 2020 and July 31, 2021 for appeals arising from virtual or hybrid trials.

[2] For purposes of this amicus brief, a "hybrid" trial refers to one in which some but not all parties or witnesses appear via videoconference. This was the case at Mr. Curran's trial—he and the Commonwealth's lead witnesses both appeared by Zoom, while the judge, attorneys, and remaining witnesses appeared in person. Def. Br. 12-13. A "hybrid" proceeding could also happen in other ways – for example, a hybrid trial might be one in which part (e.g., jury selection) but not all of the trial occurs via videoconference, or one in which public access is limited to video feed or phone. See Bannon & Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw. U. L. Rev. 1875, 1884 (2021).

a defendant would have knowingly and voluntarily chosen to forego a courtroom trial. *Infra* at 29-33.

Even if this Court does not conclude that a colloquy before a virtual or hybrid trial is constitutionally mandated, it should exercise its supervisory power to require one. *Infra* at 33-34. And, in the unusual circumstances presented by these cases during the pandemic, it should do so retroactively, in order to fully protect the rights of the very small number of defendants who may have chosen an inferior proceeding unknowingly and under the unprecedented pressures created by the pandemic. *Infra* at 34-36.

## ARGUMENT

### I. As this Court recently recognized, videoconferenced proceedings are significantly different from in-person proceedings and can negatively affect experiences and outcomes for criminal defendants, to an extent we do not yet fully understand.

"[A] virtual hearing differs significantly from an in-person hearing." *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 343 n.10 (2021). The mediating effect of videoconferencing is unavoidable; the use of any media necessarily changes communication. See Wainfan & Davis, *Challenges in Virtual Collaboration: Videoconferencing, Audioconferencing, and Computer-Mediated Communications*, RAND National Defense Research Institute, xiii (2004) https://www.rand.org/pubs/monographs/MG273.html.

Some of the deficiencies inherent in a videoconferenced proceeding, including the loss of the formal courtroom setting and the barriers to confidential

communication, are obvious. Other effects of mediated communication—for example, the way it impairs the performance of participants by distracting them and increasing their cognitive load—are perhaps not as perceptible to the lay observer, but no less real. In the context of a criminal proceeding, many of these effects are disproportionately borne by defendants and may be underappreciated by judges. And because this is a new and evolving area of social scientific research, there is still much that we do not understand about the differences between virtual and in-court trials.

*a. The lack of a formal courtroom setting in a videoconferenced trial undermines core values of dignity, respect, and fairness; moreover, when defendants participate in their trials virtually and from jail, they are likely to be disengaged and alienated and to find it difficult to communicate with their attorneys.*

The "courtroom in Anglo-American jurisprudence is more than a location with seats for judge, jury, witnesses, defendant, prosecutor, defense counsel, and public observers; the . . . courtroom . . . is itself an important element in the constitutional conception of trial, contributing a dignity essential to the integrity of the trial process." *Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring) (internal citation, quotation marks omitted). "The nobility and often grandeur of the courthouse . . . reaffirm the authority of the state and the centrality of adjudication to good government while simultaneously recognizing every litigant and witness as worthy of dignity and respect." *Vazquez Diaz*, 487 Mass. at 363 (Kafker, J., concurring), quoting Bandes & Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275, 1311-1312 (2020). The physical space of the courthouse thus plays a central role in ensuring that participants feel that they have had the opportunity to be heard and that they have been treated

fairly—that is, that procedural justice has been served. Bandes & Feigenson, supra at 1319-1320.

In contrast, in a Zoom trial, the solemnity of the proceedings is not reinforced by their physical location. There is not even a uniform virtual experience in a Zoom trial. Each participant determines how much space to permit the trial, and the other participants therein, to take up on their screen—which may be as small as a cell phone. *Vazquez Diaz*, 487 Mass. at 364 (Kafker, J., concurring). And the configuration of the participants on screen is "arbitrary [and] . . . unstable and may be disrupted when someone starts to speak or leaves the proceeding." *Id.*[3] Videoconferenced "proceedings risk becoming just another video call, rather than an occasion the solemnity of which is reinforced by the environment in which it takes place." *Id.*

When, as here, some participants are in the courtroom but the defendant appears on Zoom from jail, he is both "immersed within the oppressive aesthetics of state detention" and estranged from his own trial. See McKay, *Video Links from Prison: Court 'Appearance' within Carceral Space*, Law, Culture and the Humanities 14(2), 243 (2015). Many people whose participation in court proceedings was relegated to a video link from jail "expressed feelings of disengagement and isolation, becoming spectators rather than immersed participants in their own legal proceedings." *Id.* at 262. Several described it as "like watching TV," *id.* at 257, and noted

[3] The informal setting of the hybrid trial here may well have been what led the Commonwealth's primary witness (participating via Zoom) to feel comfortable enough to interrupt defense counsel's argument on his motion for required finding to express her disagreement. Tr.27. Later, she repeatedly interrupted the proceedings again, this time apparently inadvertently—she told the judge "I didn't know I was on. Oh, crap." Tr.28-29.

difficulty following the proceedings, *id.* at 250. This last problem—the increased difficulty that defendants have in understanding what is happening—is one reason that Florida abandoned a pilot program permitting videoconferenced juvenile detention hearings after just one year. Amendment to Florida Rule of Juvenile Procedure 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).

The struggle that remote litigants face in trying to understand the proceedings against them is no doubt due in part to the fact that they are separated from their attorneys. "[E]ven at its best," a Zoom breakout room "constitutes a significant downgrade in accessibility to counsel for defendants." Abu, *Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials*, 34 Harv. J.L. & Tech. 307, 340 (2020). Breakout rooms cannot closely approximate typical attorney-client communication during an ordinary trial, "in which responsive meeting and conferral with counsel may affect trial strategy and the psychological experience of a defendant." *Id*. at n. 199.

Here, while the judge advised Mr. Curran that he should let the court know if he had any trouble seeing or hearing the proceedings, Tr.7, he did not inform him that he could use a private breakout room to confer with his lawyer. And nothing in the transcript indicates that Mr. Curran and counsel ever did use a breakout room—or that they exchanged even a word during the course of this hybrid trial. That turn of events would be unfathomable if it occurred during a traditional trial, in which counsel and client stand elbow to elbow.

*b. Family members and friends are alienated from virtual proceedings by access issues.*

The alienation that defendants appearing via Zoom experience at virtual or hybrid trials is exacerbated when their families are not able to appear to support them. Whether any members of Mr. Curran's family would have been permitted to be present in court is unclear on the record.[4] Alternatively, they might have attempted to "attend" the proceedings via Zoom or via a telephonic access line. However, as this Court recognized in *Vazquez Diaz*, 487 Mass. at 353, requiring Zoom access to attend court "disproportionately affect[s] low-income members of our community, who often have less access to technology."

And a study conducted by Bentley University for the Massachusetts trial courts found the telephonic access lines were essentially non-functioning: in September 2020, only 5 of 45 lines were activated. Gaylord, et al., Bentley University, *Understanding & Improving Remote Court Proceedings: Research for the Massachusetts Trial Court* at 13-15 (Dec. 21, 2020) (Bentley Report). "In the few cases where the team gained access to court proceedings . . . [m]ost conversations were inaudible

[4] District Court Amended Standing Order 8-20, Court Operations Under the Exigent Circumstances Created by COVID-19 (coronavirus), § IV.C (effective Aug. 10, 2020) (District Court Standing Order 8-20), https://archives.lib.state.ma.us/bitstream/handle/2452/831798/on1183038657.pdf, in effect at the time of the trial, authorized the first justice of each court to determine whether members of the public would be permitted to sit in the courtroom, depending at least in part on whether there was sufficient space for physical distancing. The record does not indicate whether the courtroom here was one the public could enter.

or unintelligible aside from the clerk by the phone." *Id*. at 15. This obviously implicates the right to a public trial, see *infra* at 27-28. And the frustration experienced by family members thus excluded from their loved ones' trials—and of defendants who learn only once the trial is over that their relatives could not hear the proceedings after all—must not go unnoticed or be underestimated.

*c. The nature of videoconferenced communication is both more limited and more challenging for participants than in-person communication, hampering credibility assessments and impairing participant performance.*

Mediated communication, including videoconferencing, is more limited and less rich than in-person communication. Nonverbal communication and cues are hampered, see Wainfan & Davis, *supra* at 19, and without the constant emotional "modulation and recalibration based on the moment-to-moment feedback" experienced in real life, "emotional interactions can seem illegible and inscrutable," Bandes & Feigenson, *supra* at 1327-1328.

Social scientists use the term "social bandwidth" to explain the idea that "the more communication paths (verbal, non-verbal, para-verbal[5]) are used in the transmission of information by a sender, the better the information is understood by the recipient." Basch, et al., *It Takes More than a Good Camera: Which Factors Contribute to Differences Between Face-to-Face Interviews and Videoconference Interviews Regarding Performance Ratings and Interviewee Perceptions*, J. Bus. & Psych. at *3 (2020). In several respects, "Zoom affords much less information about others'

[5] "Paraverbal" refers to *how* we say the words we say—our pitch, tone, pacing, and volume. Videoconferencing limits paraverbal communication. See Wainfan & Davis, *supra* at 19.

demeanors" than in-person communication. Bandes & Feigenson, *supra* at 1299. "Most notably, it is impossible to make true eye contact via [Zoom] because the camera and display are not in the same place." *Vazquez Diaz*, 487 Mass. at 360 (Kafker, J., concurring). This creates an "ongoing sense of uncertainty about whether [witnesses] are truly being paid attention to," which in turn is reflected in demeanor, which in turn may be perceived as a lack of credibility. *Id.*, quoting Bandes & Feigenson, *supra* at 1294-1295. "[M]ultiple studies have indicated that witnesses who testify remotely may be viewed as less favorable, less credible, and less memorable than in-person witnesses." *Id.* at 359. And of particular relevance for Mr. Curran, given the hybrid nature of his trial, there is also evidence of a tendency in videoconferencing to form "negative attitudes about . . . participants who are more 'distant.'" Wainfan & Davis, *supra* at xvii.

Videoconferencing also limits the sense of "social presence" or "co-presence" that is evoked by face-to-face communication. See Basch, *supra* at *5. This "impairs the ability to empathize with remote participants . . . [and] may not only reduce a participant's sense of procedural justice, but also pose a risk that accusing another person is made easier by the lack of empathetic connection in a remote proceeding." *Vazquez Diaz*, 487 Mass. at 362-363 (Kafker, J., concurring). Our state constitution prizes face-to-face confrontation precisely because of the belief that "a witness is more likely to testify truthfully if . . . in the presence of the accused and the trier of fact." *Commonwealth v. Bergstrom*, 402 Mass. 534, 541 (1988).[6]

[6] In this respect, Mr. Curran's hybrid trial may have been the worst of both worlds: he and the primary witness against him appeared virtually, which made it more difficult to assess her credibility and deprived him of the opportunity to confront

Perhaps due in part to the more limited nature of videoconferenced communication, many studies have also found that, despite its conveniences, the "cognitive workload" of participants in videoconferences is increased. See, e.g., Wainfan & Davis, *supra* at 17; Ferran & Watts, *Videoconferencing in the Field: A Heuristic Processing Model*, 54 Management Science 9, 1565, 1565 (September 2008); Hassell & Cotton, *Some things are better left unseen: Toward more effective communication and team performance in video-mediated interactions*, Computers in Human Behavior 73, 200, 201 (2017).[7] This increased burden on the mental resources of participants likely impairs the performance not only of witnesses but of judges and attorneys. A study of group work via videoconference found that the increase in cognitive workload "can cause group members to shift to simpler problem-solving strategies that are not consistent with their training, be unable to raise counterarguments, or be more biased in their judgments." Wainfan & Davis, *supra* at 17.

Increased cognitive workload leads to cognitive shortcuts. Participants in videoconference seminars "reported being more influenced by how much they liked the speaker than by their assessment of the quality of the arguments presented." Ferran & Watts, *supra* at 1574. Videoconferencing also exacerbates the

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her face-to-face, whereas his only witness appeared in court in person and was subjected to face-to-face cross-examination by the prosecutor.

[7] This is true "even for systems that are high bandwidth and high quality." Ferran & Watts, *supra* at 1567. One reason for increased cognitive load is that videoconferencing participants who can see themselves on screen, as is typical in Zoom proceedings, experience a "state of objective self-awareness" that "add[s] to the cognitive load of the subjects, reducing their performance on a task that required concentration." Hassell & Cotton, *supra* at 201.

"fundamental attribution error"—our inherent tendency to attribute the demeanor or actions of others to their personal character rather than their current circumstances, while attributing our own actions to situational factors. Wainfan & Davis, *supra* at 32.[8] And research suggests that cognitive overload exacerbates implicit biases. See, e.g., van Ryn & Saha, *Exploring Unconscious Bias in Disparities Research and Medical Education*, 306 JAMA 995, 995 (2011). This presents a risk that Black and Hispanic defendants will face particular harm at remote trials.

The evidence that credibility assessments, empathy for the defendant and other parties, and performance of judges and attorneys may all be impaired by the limits and demands of virtual communication weighs heavily in favor of requiring a colloquy to ensure a knowing and voluntary decision to proceed with a virtual trial.

*d. There is evidence that outcomes are worse for litigants in virtual proceedings, and that problems with virtual proceedings, though widely reported by defense attorneys, are not as readily apparent to judges.*

Given the challenges presented by videoconferencing, it is not surprising that the existing evidence demonstrates negative outcomes for litigants in virtual proceedings. A study of bail hearings in Cook County, Illinois, immediately before and after the implementation of a closed circuit television system, showed that bail amounts set following a virtual hearing were 51% greater on average than

[8] "For example, an observer might attribute fidgeting, diverted gaze, or similar behaviors to a person's guilt, rather than acknowledging that a court proceeding mediated by videoconferencing technology could make someone feel uneasy or alienated." Virtual Justice: A National Study Analyzing the Transition to Remote Criminal Court, Stanford Law School Criminal Justice Center, 18 (Aug. 2021) (Virtual Justice Report).

bails set after in-person hearings. Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology* 869, 897 (2010). Along the same lines, a study of over 500,000 asylum cases found that conducting a removal proceeding via videoconference "roughly double[d] to a statistically significant degree the likelihood that an applicant would be denied asylum." Walsh & Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 259 (2008). See also Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 937 (2015) (teleconferenced immigration proceedings more likely to result in deportation).[9]

Two recent surveys found that criminal defense attorneys widely report that their clients are disadvantaged by the remote proceedings that have been occasioned by the COVID-19 pandemic. A Stanford study of hundreds of defense attorneys around the country found that an overwhelming majority reported technical difficulties (most pervasively, poor audio quality). Virtual Justice Report, *supra* at 27. Two-thirds agreed that attorney-client communication has been hurt in the shift to virtual proceedings, with a substantial majority of those respondents focusing on the harm to relationship-building and confidentiality. *Id.* at 33. And in answers to a free-response question about access to justice, "respondents consistently indicated that the shift to virtual proceedings has dehumanized defendants and decreased defendants' trust in the criminal legal system." *Id.* at 41.

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[9] Outcomes in other contexts are also impaired by videoconferencing. For example, job applicants are more likely to be hired if they are interviewed face-to-face rather than virtually. See Basch, *supra* at *15.

A survey of hundreds of Texas judges, prosecutors, and defense attorneys found statistically significant differences in their responses to questions about disadvantages in virtual proceedings, with a "significantly larger percentage of defense attorney respondents perceiv[ing] the disadvantages of online proceedings to be present 'sometimes,' 'often,' or 'always.'" Turner, *Remote Criminal Justice*, 53 Tex. Tech. L. Rev. 197, 252 (2021). While more than half of judges believed that virtual proceedings rarely or never interfere with attorney-client confidentiality, 89% of defense attorneys believed that they sometimes, often, or always do. *Id.* at 247-248. Defense attorneys were almost twice as likely as judges to report that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings. *Id*. And they were more than twice as likely as judges to believe that the online setting increases the risk of a guilty plea that is involuntary, or not factually based. *Id.*

As the author of the Texas survey notes, the disparities in how judges and defense attorneys perceive the advantages and disadvantages of remote proceedings may arise because "the burdens of online proceedings fall disproportionately on the defense, whereas the benefits [principally, cost savings, and efficiency] are more likely to be evenly divided or to accrue more to the court and the prosecution." *Id.* at 252. Indeed, of the five main areas of disadvantage identified, three are specific to defendants, and the other two affect them. *Id.* at 216-222.[10] Amici urge

[10] Those areas of concern are: 1) impairment of defense representation; 2) difficulty defendants might have in hearing, observing, or understanding the proceedings; 3) disengagement and loss of trust in the system on the part of defendants; 4) impairment of credibility assessments of defendants and witnesses; 5) lawyers, judges, and jurors might lose focus because of the demands of technology. *Id*.

this Court to be mindful of the extent to which "many of the disadvantages of remote proceedings are likely to be less visible to judges and other court officials than the[ir] efficiency benefits." Bannon & Keith, *supra* at 1879.

*e. There is still much that we do not know about the impact of virtual trials.*

A final point on the research on virtual trials bears emphasis: this is a relatively new area of social scientific inquiry, and we do not fully understand the impact of remote trials—let alone hybrid trials like the one here—on outcomes. Given that "the scholarship of these effects and problems is still developing," it "requires rigorous testing in court [and] raises concerns that require a cautious approach." *Vazquez Diaz*, 487 Mass. at 356-357 (Kafker, J., concurring). While the past two years have seen a significant amount of legal and empirical analysis on the impact of remote hearings, the field remains too speculative to proceed without precautions.

Too often, courts have relied on conventional wisdom that fails to hold up to rigorous testing. For example, until the 1970s, eyewitness testimony was considered the gold standard in prosecutorial evidence; four decades—and countless improper identifications—later, it is recognized as "the single biggest contributing factor to wrongful convictions." Singh, *In Eyes, We Trust: The Changing Landscape of Eyewitness Testimony*, 37 N. Ill. U. L. Rev. 444, 446-52 (2017). One veteran Superior Court judge attributed this, in part, to misconceptions on the part of attorneys, judges, and jurors as to how memory functions. See generally Hallisey, *Experts on Eyewitness Testimony in Court-A Short Historical Perspective*, 39 How. L.J. 237 (1995). Today, this Court recommends special jury instructions cautioning against over-reliance on eyewitness identification. See Supreme Judicial Court of

Massachusetts, Model Jury Instructions on Eyewitness Identification (Nov. 16, 2015). In the face of uncertainty about the impact of virtual trials, this Court should err in favor of avoiding prejudice to defendants and preserving the rights of the accused. Amici therefore urge the Court to require judges to conduct a colloquy with defendants before accepting their agreement to a virtual or hybrid trial, see *infra* at 29-36.

## II. This Court has recognized that the significant differences between virtual and in-court proceedings implicate important constitutional rights.

The use of videoconferencing implicates specific constitutional rights, as this Court has recognized. And in no context are the differences between virtual and in-person court proceedings more significant than at trial. But the defendant here was never advised by the judge about those differences or about their impact on his constitutional rights.

Our state constitution requires that defendants "have a right to meet the witnesses against [them] . . . face to face." Art. 12, Massachusetts Declaration of Rights. And our federal constitution also enshrines a right "to be confronted with the witnesses against [them]." Sixth Amendment, U.S. Constitution. But "Zoom does not allow for physical, face-to-face confrontation." *Vazquez Diaz*, 487 Mass. at 349. Nonetheless, this Court has held, in the context of a suppression hearing during the COVID-19 pandemic, that Zoom creates a sufficiently "close approximation of the courtroom setting" to safeguard the right to face-to-face confrontation. *Id.* But it has never held that virtual confrontation at *trial* satisfies the demands of art. 12 or the Sixth Amendment. Cf. Order of the Supreme Court, 207 F.R.D. 89, 94

(2002) (statement of Scalia, J.) ("Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.") Moreover, it has recognized that the right to confrontation is implicated by a Zoom proceeding, such that face-to-face confrontation cannot constitutionally be dispensed with absent a "case-specific finding of necessity." *Vazquez Diaz* 487 Mass. at 349-50.

Here, no such finding of necessity was made. Nor could it have been—under the standing order in effect at the time, once the judge in the case determined that a bench trial would be held, the defendant was entitled to participate in his trial in person rather than via Zoom. See District Court Standing Order 8-20, §§ IV.B, 7.C. He likewise should have been able to insist that the lead witness against him appear in person, in order to vindicate his confrontation right.[11] But the judge who presided over his trial never told him that he had this core constitutional right, or that it could be impaired if he and the witnesses against him did not appear in court.

A defendant also has a state and federal constitutional right to be present at trial, deriving from the Sixth and Fourteenth Amendments and article 12. See, e.g., *Robinson v. Commonwealth*, 445 Mass. 280, 285 (2005). In *Vazquez Diaz*, this Court

[11] Nothing in the transcript of this trial explains why the Commonwealth's key witness, Lisa Lashua, did not appear in person. The District Court standing order in effect at the time permitted a judge to allow "a participant. . . to appear virtually while other participants appear[ed] in person," but only "so long as it [was] consistent with constitutional rights." District Court Standing Order 8-20. Nothing in the transcript indicates that the judge here considered the impact of Ms. Lashua's virtual appearance on the defendant's constitutional rights, including his right to confront her.

held that while a virtual hearing on a motion to suppress "implicated" the right to be present, it would not constitute a "per se" violation of this right "in the midst of the COVID-19 pandemic," given the need to protect the public health. 487 Mass. at 343. But the Court did not say that a virtual trial would survive constitutional scrutiny. And again, in this case, there apparently was no public health need for a virtual trial: most of the trial participants were in the courtroom.

Moreover, this Court in *Vazquez Diaz* predicated its conclusion—that in the context of a suppression hearing during the pandemic, Zoom presence might be constitutionally adequate—on the fact that the defendant could "listen to the evidence, adequately observe the witnesses who testify at trial, and privately consult with his attorney at any time." *Id*. at 342 (emphasis added). But in this case, the judge never told the defendant that he could consult with his attorney privately during the trial—and it appears that defendant and counsel never did so. It was thus even more critical that the defendant be advised of his right to be present in the courtroom and of the risks of foregoing it.

The failure to advise the defendant that he could consult privately with his attorney also implicates the constitutional right to effective assistance of counsel. "[A]ttorney-client communication over Zoom [is not] immune from constitutional scrutiny." *Id.* at 355. Where it appears that neither the attorney nor the judge took care that the "defendant ha[d] the opportunity to use the private breakout room," *id*. at 355-356, that constitutional right was violated.

Finally, virtual and hybrid proceedings implicate the right to a public trial. On the record in this case, it is unclear whether members of Mr. Curran's family could have attended the trial in person. See p. 17 & n. 4, *supra*. It is clear, of course,

that fully virtual trials are only "open" to the public virtually.[12] As this Court recognized in *Vazquez Diaz*, the need for access to the internet and a smart device "prevent[s] some members of the public from participating in the hearing . . . disproportionately . . . low-income members of our community, who often have less access to technology." *Id.* at 353.[13] And the telephonic access lines that should have provided an alternative for those without access to a smart device and the internet have been a huge failure: barely ten percent of telephonic access lines surveyed in September and November 2020 were actually activated; when they were, the audio was generally of such poor quality that the proceedings were unintelligible; and even when speakers could be understood, it was often hard to discern their

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[12] The standing order in effect at the time purported to permit members of the public to "remotely watch a videoconference hearing or listen to a telephone hearing as it is happening." District Court Standing Order 8-20, § IX.F.

[13] According to a May 2020 MassINC report, Lawrence, Lowell, New Bedford, and Pittsfield are all home to neighborhoods where more than forty percent of residents lack home internet access. Forman, *Gateway Cities at the center of the digital divide in Massachusetts*, MassINC (May 5, 2020), https://massinc.org/2020/05/05/gateway-cities-at-thecenter-of-the-digital-divide-in-massachusetts. Internet access in Massachusetts communities is highly correlated with neighborhood poverty rates. *Id.* And many families in these same communities do not have computers at home. *Id.*

This "digital divide" disproportionately impacts families of color: a 2021 Pew survey found that 29% of Black families and 35% of Hispanic families lack broadband internet at home. *Internet/Broadband Fact Sheet*, Pew Research Center (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

Disparate access to technology affects not only families attempting to "attend" virtual proceedings. Indigent defendants at virtual trials who are not incarcerated (and thus responsible for their own technology) may also lack the device (i.e., a computer rather than a smart phone) and broadband internet necessary for optimal participation.

roles and follow the proceedings. Bentley Report, *supra* at 13-15. These conditions raise grave concerns about the right to a public trial.

## III. A defendant who elects a virtual or hybrid trial should first be fully apprised by the judge of how such a trial will affect their rights to be present, to confrontation, to a public trial, and to the effective assistance of counsel.

### *a. Due process requires a colloquy because of the number of important rights at stake, particularly given that there are no countervailing government interests that weigh against the defendant's interest in a knowing and voluntary waiver of rights.*

Pursuant to the standing order in place at the time of the defendant's trial, criminal bench trials for incarcerated defendants were permitted to be held in person. District Court Standing Order 8-20, § IV.B. A virtual trial could not be held without the consent of the defendant. *Id*., § VII.C. Indeed, amici are unaware of any instances during the pandemic where any court in the Commonwealth formally compelled a criminal defendant to proceed to trial by videoconference.

But for the choice to proceed with a virtual or hybrid trial to be knowing and voluntary, it had to be made with an understanding of the constitutional rights at stake. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). In the absence of an on-the-record colloquy regarding a decision to elect a virtual or hybrid trial, and the consequent impairment of the constitutional rights protected by an in-person trial, a judge can have no way of knowing whether a defendant would have knowingly chosen to proceed virtually.

The Boston Municipal Court standing order in effect at the time of this defendant's trial recognized that. It permitted virtual bench trials only upon the filing of an affidavit signed by the defendant and their counsel affirming that the defendant had been advised of their rights. It also required a colloquy with the defendant to ensure that the defendant was "knowingly, intelligently, and voluntarily waiving their right to physical presence, agreeing to the use of videoconferencing for the hearing, and [affirming] that the COVID-19 pandemic had not unduly influenced the decisions made in connection with their case." Boston Municipal Court Standing Order 9-20: Phase Two of the Partial Reopening of Boston Municipal Courthouses After Limiting Appearances due to COVID-19 Pandemic, § I.F (effective Aug. 10, 2020), https://archives.lib.state.ma.us/bitstream/handle/2452/831802/on1183036163.pdf. The District Court standing order required no such affidavit or colloquy, and the judge in this case did not conduct a colloquy with the defendant prior to holding a trial at which the defendant and the Commonwealth's principal witness participated via Zoom. This was reversible error.

A virtual or hybrid trial implicates (and, at least in some circumstances, may violate) at least four core constitutional trial rights. See *supra* at 25-29. The sheer number of important trial rights implicated by a virtual or hybrid trial weighs in favor of a conclusion that a colloquy is constitutionally mandated to ensure that defendants understand the consequences of opting for such a trial. In *Boykin v. Alabama,* 395 U.S. 238, 243 (1969), the Supreme Court concluded that, given that a guilty plea involved the relinquishment of three constitutional trial rights, it could not "presume a waiver of these three important federal rights from a silent record." The Court reasoned that the consequences of a plea required "the utmost

solicitude . . . to make sure [the defendant] has a full understanding of what the plea connotes and of its consequences." *Id*. at 243-244. A colloquy demonstrating a contemporaneous showing that a guilty plea is voluntary is required as a matter of constitutional due process. *Commonwealth v. Fernandes*, 390 Mass. 714, 720-721 (1984).[14]

The decision to forego an in-person trial and accept a compromised version of at least four of the constitutional rights that an in-person trial guarantees is similarly important enough to require an inquiry into whether it is made knowingly and voluntarily. This is particularly so given that a lay person may not know that they have a right, for example, to be physically present or to face-to-face confrontation, or how those rights may be impaired via Zoom. Moreover, conducting a colloquy has the advantage of "leav[ing] a record adequate for any review that may be later sought . . . and forestall[ing] the spin-off collateral proceedings that seek to probe murky memories." *Boykin, 395 U.S.* at 244.

In considering whether due process demands that judges assure themselves that defendants embarking on virtual or hybrid trials understand the attendant risks to their constitutional rights, it bears emphasis that no governmental interest weighs *against* a colloquy. There is no cost to requiring a colloquy, and a colloquy takes very little time or resources. There was a thorough jury waiver colloquy in

[14] A colloquy may be required even when only one constitutional right is at stake. See, e.g., *Commonwealth v. Goldman*, 395 Mass. 495, 507 (2000) (judge "actively should participate" in defendant's decision to waive unconflicted counsel); SJC Rule 3:10, § 3 (requiring written waiver of right to counsel and colloquy to ensure waiver is knowing and voluntary).

this case. Tr.3-5. It would have been a matter of mere minutes to also inquire about the choice to proceed with a hybrid trial.[15] Given the importance of the constitutional rights involved and the risk to the defendant of an unknowing or involuntary compromise of those rights, the due process balancing test weighs heavily in favor of requiring a colloquy before a virtual or hybrid trial. See *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) (in determining process necessary to protect private interests, court balances the "risk of erroneous deprivation" of those interests against the governmental interests involved).

Finally, a cautious approach that includes a colloquy is warranted given that we still do not fully understand how a virtual or hybrid trial affects either rights or outcomes. See *supra* at 24-25; *Vazquez Diaz*, 487 Mass. at 356-357 (Kafker, J., concurring). Defendants who proceed to such a trial are essentially subjects in a legal experiment. It offends basic notions of fairness not to at least advise them of the potential risks involved.

This Court has traditionally been reluctant to mandate the precise terms of required colloquies. See *Ciummei v. Commonwealth*, 378 Mass.504, 508-509 (1979). But, at a minimum, it "should require that the defendant receive a full disclosure of the [issue] and its projected ramifications." See *Goldman*, 395 Mass. at 507. This requires that a judge ensure that defendants understand their entitlement to an

[15] Indeed, the risk of an invalid waiver of constitutional rights here was heightened by the fact of the jury waiver colloquy. By focusing only on the right to a jury trial, to the exclusion of the other implicated rights, the judge may well have inadvertently lulled the defendant into believing that none of his other constitutional rights were compromised by a hybrid trial.

in-person trial, at which their rights to confrontation, presence, the effective assistance of counsel, and a public proceeding can be fully vindicated. The judge should caution the defendant about the "potential perils" of proceeding via a virtual or hybrid trial. See *id.* (citation omitted). That should include disclosure of the potential impairment of the rights just mentioned, and of the fact that there is evidence that videoconferencing makes communication and performance (of attorneys and judges) more difficult. The judge should also inquire as to whether the defendant has had an adequate opportunity to discuss the decision with counsel, and whether any threats, inducements, or undue pressure were placed on the defendant before the decision was made. See *Fernandes*, 390 Mass. at 790-791. Moreover, this Court should require a written waiver describing the list of remote parameters being consented to (e.g., all parties will attend via Zoom, some parties will be in the courtroom, witness will stand with hands visible at distance from the camera, etc.). In the case of a hybrid trial like this one, the waiver should disclose with specificity which participants or witnesses will appear remotely. And judges should confirm at the time of the proceeding that those parameters are observed as anticipated and agreed-to in the written waiver.

*b. If this Court does not conclude that our state and federal constitutions require a colloquy, it should nonetheless exercise its supervisory powers to mandate that colloquies in this circumstance are conducted, and it should apply that rule to this defendant and others who had videoconferenced trials during the pandemic.*

If this Court is not persuaded that a colloquy is constitutionally required as a matter of due process before a defendant can validly elect a hybrid or virtual

trial, it can and should require such colloquies pursuant to its supervisory authority under G.L. c. 211, § 3. This Court has done so to require a colloquy before a defendant waives their right to a jury trial. *Ciummei*, 378 Mass. at 509-511. All of the reasons just offered in support of a constitutionally-required mandate similarly weigh in favor of a court-created colloquy requirement.

And in the unusual circumstances of the pandemic, this Court should apply any colloquy mandate—whether rooted in our state and federal constitutions or imposed via its supervisory authority—retroactively. While this Court typically applies new rules that are not constitutionally-based only prospectively, it has at times applied them to the case at hand. See, e.g., *Commonwealth v. Hernandez*, 481 Mass. 582, 583 (2019); *Commonwealth v. Adjutant*, 443 Mass. 649, 667 (2005). In the context of a virtual or hybrid trial elected during the COVID-19 pandemic, the Court should go further and apply a colloquy requirement retroactively.

The pandemic has created circumstances of great duress for everyone in the Commonwealth, and particularly criminal defendants, none more so than those who were incarcerated as the pandemic raged and thus were exposed to a heightened risk of contracting the virus. See *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 436 (2021). While defense attorneys, prosecutors, sheriffs, trial judges, and this Court worked diligently to release some people detained pretrial, see *id.*, for people who were subject to pretrial detention without the possibility of release, for some defendants that detention became perpetual during a pandemic of indefinite duration, see *Commonwealth v. Lougee*, 485

Mass. 70 (2020). Meanwhile, for a period of the pandemic, the only trial a defendant could have obtained was a virtual bench trial.[16] There was thus enormous pressure on some incarcerated defendants to cede to a virtual trial. And that pressure was disproportionately experienced by Black and Hispanic people, who are subject to pretrial detention in numbers far greater than their share of the population would predict.[17] Without the protection of a retroactive colloquy requirement, the rights of those defendants will not be adequately safeguarded.

Even when in-person bench trials became available, concerns that had nothing to do with the cases themselves continued to weigh in favor of virtual trials. Incarcerated defendants who opted for in-court trials would have done so with the understanding that they would be subjected to quarantine, essentially in

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[16] See District Court Standing Order 5-20, Court Operations Under the Exigent Circumstances Created by COVID-19 (coronavirus) (effective May 4, 2020), § IV.H, https://archives.lib.state.ma.us/bitstream/handle/2452/826496/on1153169108.pdf, and District Court Standing Order 6-20, Court Operations Under the Exigent Circumstances Created by COVID-19 (coronavirus) (effective June 1, 2020), § V.H., https://masslawyersweekly.com/files/2020/05/jud-District-Court-Standing-Order-6-20.pdf.

[17] A 2015 MassINC policy brief found, for example, that Black people comprise 2.4% of the population of Barnstable County but 24.7% of Barnstable's pretrial detainees. In Middlesex County, Black people are 5.4% of residents but 21.6% of pretrial detainees; in Norfolk, those numbers are 6.7% and 33.1%, respectively. Jones & Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MassINC (Sept. 2015), at 5 (available at http://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf). Black defendants are 20% more likely than white defendants to be held pretrial; Hispanic defendants, 11% more likely. See Report by the Criminal Justice Policy Program, Harvard Law School, *Racial Disparities in the Massachusetts Criminal System (*Sept. 2020), at 25.

solitary confinement, during the trial and for up to two weeks after its conclusion.[18] And of course any defendant considering a virtual trial would have been aware that such a proceeding provided a greater guarantee of safety from the COVID-19 virus than an in-court trial would. All of these circumstances created great pressure on defendants to submit to being tried virtually. Although it appears that few virtual or hybrid trials ultimately went forward, see *supra* n. 1, and there were surely even fewer where, as here, the judge did not undertake a colloquy in advance, there was undoubtedly a small group of defendants who were tried virtually and without an understanding of how the proceedings impaired their constitutional rights. That handful of people, who volunteered for this unprecedented legal experiment in virtual trials without being apprised of all of the attendant risks, should be entitled to elect a new trial.

## Conclusion

For the foregoing reasons, amici urge this Court to hold that before a virtual or hybrid trial may be held, a judge must hold a colloquy in order to determine that the defendant is knowingly and voluntarily relinquishing the rights guaranteed at an in-court trial.

[18]See, e.g., Affidavit of Osvaldo Vidal (Middlesex Sheriff's Office Superintendent of Operations) at ¶9(h), Affidavit of James M. Cummings (Barnstable County Sheriff) at ¶10(g), Affidavit of Joseph D. McDonald, Jr. (Plymouth County Sheriff) at ¶4(g). All affidavits contained in Plaintiff's Record Appendix, *Comm. for Pub. Counsel Servs., et al., v. Barnstable County Sheriff's Office, et al.,* SJC-13116.

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## Certificate of Compliance

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas font and contains 7,455 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word 2016.

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## Certificate of Service

I hereby certify that in the matter of Commonwealth *vs.* Martin Curran, Supreme Judicial Court No. SJC-13093 I have today made service of the amicus brief of the Committee for Public Counsel Services, the Boston Bar Association, the Charles Hamilton Houston Institute for Race & Justice, and the Massachusetts Association of Criminal Defense Lawyers by directing copies through the electronic filing service provider to Assistant District Attorney Michelle King of the Worcester County District Attorney's Office and to Attorney Robert Spavento, counsel for Mr. Curran.

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