Filing # 114753975 E-Filed 10/09/2020 04:23:23 PM

**IN THE DISTRICT COURT OF APPEAL**
**OF THE STATE OF FLORIDA**
**THIRD DISTRICT**

CASE NO: 3D20-________
L.T. CASE NO: F90-354C

JERMAINE CLARINGTON
Appellant / Petitioner

and

STATE OF FLORIDA
Appellee /Respondent
_____________________________/

# PETITION FOR WRIT OF PROHIBITION

Pursuant to Florida Rules of Appellate Procedure 9.030(b)(3) and 9.100, the Appellant, Jermaine Clarington, respectfully petitions this Court for a Writ of Prohibition directed to the Honorable Miguel De La O, Circuit Court Judge for the Eleventh Judicial Circuit, ordering Judge De La O not to hold a probation violation hearing over videoconference.

## Facts.

Jermaine Clarington is on probation for first degree murder and other serious felony charges arising out of crimes committed when he was fifteen years old. The sentence which includes the current probationary term was imposed after a previous life sentence was vacated due to new sentencing laws

applicable to juvenile offenders. Mr. Clarington, who is now 45 years old, faces a lengthy prison sentence, possibly up to life, if he is found to have violated his probation. The main allegation of violation of probation is the commission of a new substantive criminal case, which was separately charged in another county (Columbia County) and is still pending.

The Circuit Court initially articulated in open court a belief that it could go forward with the probation violation hearing over the Zoom videoconferencing platform.

Mr. Clarington's trial counsel, as well as undersigned counsel who filed a limited notice of appearance as to this issue, filed an attached "Motion/Objection to Holding Pending Probation Violation Hearing Via Zoom", which included an attached resolution and memorandum of law from the Florida Association of Criminal Defense Lawyers.

On September 8, 2020, the Circuit Court held oral argument[1] (over Zoom) on the motion, at which point the State of Florida (the opposing party here) indicated that they were taking no position on the motion as they "do have concerns about being able to adequately protect against claims of ineffective assistance of counsel". (T. 5). The Circuit Court and undersigned

---

[1] The attached transcript of this argument is cited herein at "T. [page number]".

counsel thereafter dialogued on the legal issues. On September 10, 2020, the Circuit Court (the Honorable Miguel De La O) issued an "Order Overruling Objection to Zoom Probation Violation Hearing".[2] This Order scheduled the probation violation hearing for October 16, 2020,[3] ordering that it will be held over Zoom with the Judge, prosecutor, defense attorney, defendant, and witnesses all appearing via videoconference from separate physical locations. This is the Order which this writ seeks this Court to prohibit from going into effect. The requested relief is that instead the probation violation hearing be held in person, and since that is not currently possible due to valid Covid-19-related restrictions on in-person court, that the hearing be delayed until it is possible. In the meantime, Mr. Clarington will remain where he is, in custody at the Dade County Jail, held without bond.

[2] Although this was, to undersigned counsel's knowledge, the first Order of its kind issued either in this Circuit or in the State, undersigned counsel is aware of multiple other cases where Eleventh Circuit Judges have discussed holding probation violation hearings over Zoom. In one case, State v. Curtis Johnson, case numbers F13-28127, F13-4213, and F14-13568, the Honorable Cristina Miranda held argument after a substantially identical motion was filed, but ultimately did not rule and stated that she preferred to await resolution of this case. It appears that multiple Eleventh Circuit Judges are awaiting a decision from this Court on this issue.

[3] This date was later continued based on other issues with readiness for the hearing, and the probation violation hearing is now scheduled for November 16, 2020.

The written Motion/Objection argued that a probation violation hearing held over Zoom would violate Mr. Clarington's rights to counsel, due process, and confrontation, guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Both the right to have counsel physically present and the right of the defendant to be physically present in court themselves are, the motion argued, constitutional rights. Further detail on these arguments will be made in the Argument section of this Petition. The motion attached a Resolution and Memorandum from the Florida Association of Criminal Defense Lawyers also arguing that a remote probation violation hearing would violate the defendant's right to be present.

At oral argument, the defense argued that a defendant had a right to be physically present with his attorney, in court, in front of the judge, prosecutor, and witnesses. Judge De La O asked for a case that said there was a constitutional right to be physically present rather than present over a Zoom teleconference. (T. 11). The defense pointed out that there were no cases saying the opposite, that a probation violation hearing could be held over Zoom consistent with the Constitution, which the Court agreed with. (T. 13-14). To answer the Court's question, the defense mentioned *Illinois v. Allen*, 397 U.S. 337 (1970) and *Jackson v. State*, 767 So.2d 156 (Fla. 2000), both of

which state that one of a defendant's most basic constitutional rights is the right to be present in the courtroom at every critical stage of the proceedings. (T. 12-13). To the Court, though, "that doesn't mean that they have to be physically present in the courtroom as opposed to a situation like this, where they are virtually present, where there is interaction". (T. 13).

The Court believed that language in the Administrative Order (Florida Supreme Court Administrative Order 20-23(III)(E)(3)) that states that "all other trial court proceedings **shall** be conducted remotely unless . . . remote conduct of the proceedings is inconsistent with the United States or Florida Constitution, a statute, or a rule of court that has not been suspended by administrative order" (emphasis added) required him to hold the probation violation hearing remotely. (T. 15). The defense argued that the Administrative Order was not meant to suspend a defendant's rights regarding physical presence at a hearing where his liberty interest is directly at stake over his objection, but only to facilitate and allow the Court to proceed with remote hearings that would otherwise be prohibited by the rules. (T. 17-22). Alternatively, though, if the applicable rule (Florida Rule of Criminal Procedure 3.180) which explicitly extends a right to defendants to in-person, in-court, appearances, was suspended by the Administrative Order, that would be unconstitutional and the exception the Florida Supreme Court carved out

for when remote proceedings are inconsistent with the United States or Florida constitutions would apply. (T. 22). The defense also pointed out that there was no countervailing need to push this case to a resolution, as Mr. Clarington would sit in custody until the probation violation hearing could be held in person. (T. 22-23).

As to the right to be physically present with counsel, the Court asked why it could not afford that right by allowing breaks and private consultation between Mr. Clarington and his attorney in Zoom breakout rooms. (T. 23). The defense responded that a Zoom interaction is not the same as an in-person interaction, and that allowing periodic breaks would not allow the dynamic, real-time, verbal and nonverbal communication that occurs between client and counsel in a courtroom setting. (T. 24-26).

Finally, the defense argued if Mr. Clarington was found in violation of his probation and the case proceeded to sentencing, Mr. Clarington's right to allocute and his ability to display his humanity to the Court and argue equitable mitigating factors would be compromised. (T. 26-27).

The Court Order recited the portion of Administrative Order 20-23 cited above and found that the Florida Supreme Court had ordered it to conduct the probation violation hearing remotely (over Zoom) due to the "shall" language in the Administrative Order. (Order p. 2-3). The Court

acknowledged that Florida Rule of Criminal Procedure 3.180 would normally prohibit probation violation hearings held over Zoom, but found that the language in Administrative Order 20-23(II)(A) that says "All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communications equipment for conducting proceedings by remote means shall remain suspended" acted to suspend Florida Rule of Criminal Procedure 3.180. (Order p. 4-6).

As to the central constitutional issue, the Court found that there was no constitutional right to physical presence, claiming that the cases the defense cited all dealt with either applications of Rule 3.180, not the Constitution, or they were cases where the defendant was not present by any means, or both. (Order p. 8-9). The Court did not cite any case finding that a Zoom probation violation hearing *was* constitutional, instead relying on the alleged lack of cases saying it *was not*. (Order 8-9).

The Court acknowledged that a Zoom hearing was "not optimal" but found "this is not a perfect world, and it is more than good enough for Clarington to appear on Zoom from the jail". (Order p. 9).

As to the defense's argument that there was no countervailing reason to push this hearing forward when Mr. Clarington was willing to, and would be required to, wait in jail until he could appear in person, the Court found that

holding the hearing would save the County money in jail housing costs (nobody from the County appeared to claim this was a concern), and also found that since court dockets would be crowded with trials when courts reopen, it makes sense to handle probation violation hearings now so they do not compete for that limited docket space later. (Order at 10). However, for the Court, the bottom line was that it believed it had been ordered by the Florida Supreme Court to hold this hearing, and thus it would do so. (Order at 10.

## ARGUMENT.

### Forcing Jermaine Clarington to Go Forward to a Zoom Probation Violation Hearing Over His Objection Would Violate His Constitutionally-Guaranteed Rights to Counsel and Due Process.

Ultimately, although there was a dispute below as to whether AO 20-23 suspended Rule 3.180, there was no dispute that: 1) Rule 3.180 requires in-person physical presence at probation violation hearings; and 2) if in-person physical presence at probation violation hearings was a right guaranteed by the Florida or United States Constitutions, it could not be suspended by AO

20-23. This petition will focus on the constitutional issue, which is not dependent on either the Rule or the Administrative Order.[4]

It is worth briefly stating the obvious: The Covid-19 pandemic has upended normal practices all over the world, including in the criminal courts of the Eleventh Judicial Circuit. Those Courts have been closed to almost all in-person appearances since March, and remain so. From a short term perspective, this is undoubtedly extremely inconvenient to all stakeholders in the criminal justice system. That said, Miami judges, lawyers, and other

[4] Petitioner maintains that AO 20-23 did not suspend Rule 3.180 as applied to probation violation hearings. AO 20-23 is designed to facilitate remote hearings when the parties agree to them—the Florida Supreme Court did not intend to, and did not, suspend the statutory right to be physically present at one's probation violation hearing. Probation violation hearings are not listed in the order as one of the essential functions of the Court. AO 20-23(III)(D). The language that would supposedly suspend the rule is that "All rules of procedure, court orders, and opinions applicable to court proceedings that would limit or prohibit the use of communications equipment for the remote conduct of proceedings shall remain suspended." AO 20-23(II)(A). Taken at face value, this suspends rules that "limit or prohibit the use of communications equipment", and Rule 3.180 does not do that. It does not discuss communications equipment at all and simply says that a defendant must be physically present in the courtroom. AO 20-23 explicitly says that jury trials must be conducted in person, and that non-jury trials must be conducted in person unless the parties agree otherwise. AO 20-23(III)(E). A probation violation hearing, which is presided over by a judge who makes factual findings of guilt and pronounces sentence, is analogous to a non-jury trial, thus requiring the agreement of the parties to be conducted remotely. If the Florida Supreme Court was permitting, or as the Circuit Court believed requiring, probation violation hearings to be conducted remotely, given the gravity of these proceedings and the liberty interests at stake the Court would have taken such a step explicitly rather than implicitly.

participants in the criminal justice system have shown resilience and adaptability. The county jails, commendably, are actually less crowded now then they were before March. Police officers and prosecutors, who are primarily responsible for bringing new cases into the system, have admirably focused on alternatives to arrest and criminal process in many cases. Courts are functioning, albeit on Zoom videoconferences rather than in person. Cases have plead out. Justice continues to be done, in a manner that mirrors in spirit if not in precise form that which was done last year and many years before that. The sky has, quite simply, not fallen.

Of course, this case, involving someone who is contesting his involvement in new criminal allegations and who is facing tremendous exposure as he is on probation for first degree murder (committed as a juvenile), is the sort of case that always would have been difficult to resolve. And it is probably more difficult to resolve now, given that counsel cannot see his client in person and cannot depose witnesses in person, and that the court and prosecutor cannot address the defendant in person regarding their views of the legal situation he faces. The defense suggests that there simply may be some cases that will have to wait for resolution until courts reopen—this is a feature, not a bug, of the American criminal justice system. Adhering to the principles of due process, effective representation, confrontation, and the

other constitutional guarantees that make our criminal justice system what it is may seem inconvenient now—but history, both in this country and around the world, shows that when these principles are discarded in difficult times the decision to do so is ultimately regretted—whereas when they are adhered to, despite momentary inconvenience, the long-term benefits to the perceived and actual legitimacy of our system are well worth the immediate cost. All lawyers and judges know that the systems we toil in work because of a collective societal buy-in, the preservation of which is one of our most sacred responsibilities.

Here, the practical result if the Circuit Court's plan goes forward as it proposes will be that Jermaine Clarington could be sentenced to life in prison over a computer screen. He will sit in a room at the Dade County Jail and look at a split-screen of the judge, the prosecutor, his lawyer, and the witnesses. And what happens on that screen will determine whether he goes to prison for the rest of his life. The judge who determines whether he has violated his probation and then sentences him, and the prosecutor who commands the force of the State against him, will have never lain eyes on him in person, as a living, breathing, human being. His own lawyer, charged with defending him against the force of criminal sanctions, will have never been able to look him in the eye without a pixelated screen intermediating the

interaction. The witnesses will never have to even look at the man against whom they offer testimony.

Right now, it is dangerous for us to breathe the same air—but it will not always be so. Throughout human history, in societies which are considered civilized, momentous decisions such as whether a man should be sent to prison for the rest of his life have been made by people in the same room, breathing the same air. That shared tradition has served us well and, as with all shared traditions, we should be very mindful before we abandon this one. Abandoning it, Petitioner suggests, would mean losing something the importance of which we were not fully attuned to until it was gone.

There is no doubt that six months ago it would have been clearly illegal (under Rule 3.180, if not the Constitution) to hold this probation violation hearing over Zoom. It is very likely that in six months from now it will be clearly illegal again, as the Administrative Order that purportedly suspends Rule 3.180 will cease to be in effect once courts can safely reopen. Suppose that this hearing goes forward, Mr. Clarington is found in violation, and he is sentenced to life. In thirty years from now, when he is 75 years old and still in prison, society will, one hopes, have long since moved on from this pandemic. It will be a piece of our shared history, something that our children tell their children about. And yet Mr. Clarington, in this scenario, will still be

languishing in prison until he dies, with neither judge, prosecutor, defense lawyer, or witnesses ever having seen him except on a screen. Are we really confident that we will feel that this was acceptable when the current crisis recedes? And if we sacrifice the rights of our fellow citizens due to the current crisis, what happens in the next crisis, and the next one, and the one after that?

Ultimately, we should look to the state and federal Constitutions, and the cases interpreting them, for guidance here. Assuming that Rule 3.180's explicit requirement for in-person probation violation hearings that cannot be held over videoconference is suspended by the Florida Supreme Court's Administrative Order (which, again, Petitioner does not concede), the question at bottom becomes whether the right codified in Rule 3.180 has an independent constitutional foundation, because if it does, of course it cannot be suspended by Administrative Order. This, incidentally, does not mean that the Florida Supreme Court passed an unconstitutional Administrative Order or that this Court should so rule—they did not, because they explicitly carved out situations where remote proceedings would be inconsistent with the Constitution.

The dominant mode of constitutional interpretation today is originalism, to put it one way that the meaning of the Constitution does not shift and evolve due to time and circumstance, but means what it meant when

the Founding Fathers saw fit to write and ratify it as the guiding law of this land. As a leading proponent of originalism, the late Justice Antonin Scalia, put it, "the constitution that I interpret is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted." *God's Justice and Ours*, Antonin Scalia, *First Things* (A Monthly Journal of Religion and Public Life), May 2002. Seen this way, there can be no serious dispute that the Constitution requires in-person court hearings when someone's liberty is at stake. This was, indeed, at the heart of the Founder's conception of the justice system, as they created a system where democratically accountable juries and judges, not distant kings, determined both guilt and punishment. Thomas Jefferson, writing to Thomas Paine, said "I consider trial by jury as the only anchor ever yet imagined by man, by which government can be held to the principles of its constitution."[5] King George having depriving the colonists of the right to trial by jury was one of the explicit abuses of power listed in the Declaration of Independence. The Fifth, Sixth, and Seventh Amendments to the United States Constitution explicitly address the right to jury trials. Clearly, if one follows the principals of

---

[5] http://famguardian1.org/Subjects/Politics/ThomasJefferson/jeff1520.htm

originalism, the text of the Constitution referred to in person jury trials, and part of the due process guarantee was physical presence when liberty is at stake. If any of the founders looked centuries into the future and foresaw recorded audio, photography, moving pictures, television, computers, the internet, and ultimately the Zoom videoconferencing platform, they left no trace of such musings. Transport the founders into a criminal courtroom today and they would immediately recognize the proceeding—transport them into a Zoom video court hearing and they would not. By an original understanding of the due process clause of the federal and Florida constitutions, then, what due process requires is an in-person hearing where the defendant and his lawyer are physically present, as are the judge, prosecutor, and witnesses. That is what the Constitution meant when it was enacted, so that is what it means now.

We know this not just because of common sense, and not just because in our long American tradition (which includes at least one other pandemic, in 1918, during which jury trials were largely suspended and then resumed when it was safe to do so) we have continually upheld the right of a criminal defendant to be physically present when his liberty is directly at stake, but because the judges who have interpreted the Constitution have consistently said so.

In *Illinois v. Allen*, 397 U.S. 337 (1970), the Supreme Court held that "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 of his trial." (emphasis added). The Florida Supreme Court in *Jackson v. State*, 767 So.2d 1156 (Fla. 2000), held that the defendant had a right to present at resentencing, writing that "Fundamental fairness, however, requires that at a minimum Jackson have the right to be present at her resentencing. . . . One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process, which includes a reasonable opportunity to be heard. Indeed, 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 proceeding." *Id.* at 1159, *quoting Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990), *citing Illinois v. Allen* (emphasis added). And, Judge Lagoa, writing for this Court in *Thompson v. State*, 208 So.3d 1183, 1187 (Fla. 3rd DCA 2017), applied the same principal to a violation of probation hearing, specifically a resentencing which was at issue, again using the "right to be present in the courtroom" language. If this were not clear enough, this Court said "due process considerations attached, and Thompson had a right to be **physically present at his resentencing**." *Id.* at 1188. (emphasis added).

The Court below found the cited language to not differentiate between presence on a Zoom videoconference and in-person physical presence. This ignores both that this Court in *Thompson* explicitly identified a due process (constitutional) right to be "physically present" and that "present in the courtroom" means exactly what it says, in-person physical presence. "The courtroom" is a physical location—it is the physical location where the decisions about the liberty of Americans are made. The plain language of the phrase "present in the courtroom" speaks for itself. Nobody would say they were "present in the courtroom" when they were in fact sitting in a jail cell watching video of proceedings that are being conducted in no physical space at all other than a computer server somewhere. Every participant in a Zoom hearing is in a different physical location which is not the courtroom—even the judge may or may not be physically in the courtroom, and whether they are or not makes no difference as the defendant indisputably is not. If there is any ambiguity in the phrase "present in the courtroom" (there is not) basic principles of language and construction demonstrate that it means what it sounds like it means, physical presence in the physical courtroom. *See Stenberg v. Carhart*, 530 U.S. 914, 993 n.9 (2000) ("It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning.").

Neither the United States Supreme Court in *Allen*, the Florida Supreme court in *Jackson*, nor this Court in *Thompson* relied on Rule 3.180 as the basis for the holdings that the defendant had a right to be physically present in the courtroom at critical stages where their liberty was directly at stake. These were decisions rooted in the Constitution, either the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fifth and Fourteenth Amendments. The Circuit Court here was wrong that there are no cases that conclude that critical stage hearings held without the defendant's physical presence violate the defendant's constitutional rights. It is true that many of the Florida cases cited in the motion below relied on Rule 3.180, but that is only logical because Rule 3.180 provided a clear answer to the question and made resort to constitutional interpretation unnecessary and thus disfavored. *See Inquiry Regarding a Judge (Holder)*, 945 So.2d 1130, 1133 (Fla. 2006) ("we have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds"). The fact that Florida courts have generally found it unnecessary to resort to interpreting the Constitution when (uniformly) ruling that a defendant has a right to be physically present at a proceeding where their liberty is directly at stake, because a Rule explicitly grants that right, does not mean that the Constitution does not also grant that

right, and is certainly not evidence against the right being found in the Constitution.

The Circuit Court, it should be noted, candidly acknowledged that it found no cases that stated that the Constitution did *not* grant the right to physical presence. It does. If Rule 3.180 would have otherwise been suspended by the Administrative Order, it was not in this context, because that would violate the Constitution, and situations where the Constitution would be violated are an explicit carveout of the Administrative Order.

Constitutional due process protections, of course, apply to probation violation hearings. *See Black v. Romano*, 471 U.S. 606 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Bernhardt v. State*, 288 So.2d 490 (Fla. 1974).

At least one other state Supreme Court, that of Alaska, has addressed the constitutional due process right to in-person physical presence at court hearings. In *Whitesides v. State*, 20 P.3d 1130 (Alaska 2001), at issue was whether a driver's license revocation hearing had to be held in person to satisfy constitutional due process requirements if the driver so desired, or if it could be held over the telephone. The former, the Court said, based on the Constitution. If the Constitution requires an in-person hearing before revoking a drivers license, surely it does before finding someone in violation

of probation for committing a new substantive offense while on probation for first degree murder and potentially sentencing them to up to life in prison.

Multiple federal cases also require in-person hearings where a defendant's liberty is at stake, although like the bulk of the Florida cases they generally rely on rules rather than the Constitution. The reason for this is simple and has already been mentioned—when courts can resolve questions on non-constitutional grounds, they generally will. The federal rules are far more ambiguous than Florida's rule, generally just requiring that people "appear" for their hearings where their liberty is at stake, but still have been interpreted to require in-person physical presence. This uniform federal authority finding that in-person hearings are required, even if not explicitly on constitutional grounds, should give this Court pause before being apparently the first appellate court in the nation to approve videoconferencing at a criminal proceeding the direct result of which can be the loss of a defendant's liberty. *See, e.g., Terrell v. United States*, 564 F.3d 442 (6th Cir. 2009) (parole determination hearing must be held in person, not over videoconference, pursuant to 18 U.S.C. § 4208, which states that "the prisoner shall be allowed to appear and testify on his own behalf at the parole determination hearing"); *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002) (Federal Rule of Criminal Procedure 43 which states "the defendant shall be present at the

arraignment, the time of plea, at every stage of the trial . . . and at the imposition of sentence" requires physical, in-person presence); *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001) (same); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (same).

*United States v. Thompson*, 599 F.3d 595 (7th Cir. 2010) is particularly instructive. There, the holding is that in revocation of federal supervised release proceedings (which are the federal equivalent of Florida violation of probation hearings) the defendant's physical presence is mandated by Federal Rule of Criminal Procedure 32, which requires that court give the defendant "an opportunity to appear". A video appearance did not suffice. Although *Thompson* was rooted in the federal rule, it did note that the right to allocute codifed in Rule 32 was a

> common law right . . . [which] ensures that the defendant has an opportunity to personally address the court before punishment is imposed." *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991). This 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." *Del Piano v. United States,* 575 F.2d 1066, 1069 (3d Cir. 1978) (discussing allocution); 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."). Without this personal interaction between the judge

> and the defendant--which videoconferencing cannot fully replicate--the force of the other rights guaranteed by Rule 32.1(b)(2) is diminished.

*Thompson* at 599-600. Furthermore, the *Thompson* Court held,

> Our reading of Rule 32.1(b)(2) also comports with the traditional legal understanding of a person's "appearance" before a court when his liberty is at stake in the proceeding; in this situation, to "appear" has generally been understood to require the defendant to come personally before a judicial officer. Not only is this intuitive -- videoconferencing technology was obviously unknown at common law--but the Supreme Court's decision in *Escoe v. Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935) (Cardozo, J.), confirms this understanding. In *Escoe* the Court considered the propriety of a judge's order summarily revoking a criminal defendant's probation without a hearing. The Court held that an ex parte revocation of probation violated the applicable federal probation statute, which required the probationer to be "brought before the court" before probation could be revoked and a prison term imposed. Id. at 492. The Court held that "the end and aim of an appearance before the court" under the statute was to "enable an accused probationer to explain away the accusation," id. at 493, and this required "bringing the probationer into the presence of his judge," id. at 494. Although a hearing by videoconference is not the same as no hearing at all, the Court's interpretation of the statute at issue in *Escoe* informs our interpretation of the "appearance" required by Rule 32.1(b)(2).

This discussion of what the common law and traditional understandings of what a defendant's presence means (in person physical appearance in court) is instructive in this case.

In addition to violating the Constitutional (Fifth and Fourteenth Amendment) right to due process, a Zoom probation violation hearing would violate the Constitutional (Sixth Amendment) right to counsel. As was pointed out in the motion below, the right to counsel applies at probation violation hearing and if it is violated the results of those hearings are vacated. *Scott v. Illinois*, 440 U.S. 367 (1979). When a lawyer is "physically absent at a critical stage", which he will be if he is not in the same physical location as his client and neither of them are in the courtroom with the judge, prosecutor, and witnesses, it is a *per se* violation of the right to counsel as laid out in *United States v. Cronic*, 466 U.S. 648 (1984). *See Schmidt v. Foster*, 911 F.3d 469, 481 (7th Cir. 2018). The right to counsel includes a right to be able to consult in real time with counsel and to engage in interpersonal, verbal and nonverbal, communications with counsel. All of this is unavailable or severely limited over a Zoom video feed.

Petitioner notes that this case is limited to probation violation hearings. Petitioner does not claim that other hearings at which a defendant's ultimate liberty is not directly at stake (such as pretrial motion hearings and bond

hearings) cannot be held over Zoom. And although the Petititoner does believe that holding trials over Zoom would also be unconstitutional, that is not at issue either because the Florida Supreme Court's Administrative Order already prohibits remote jury trials and remote non-jury trials without the parties consent. Thus, what is at stake is solely probation violation hearings, hearings where the direct and immediate result of the proceeding will be a final determination of guilt and a final sentencing. Due process requires these hearings be held with the defendant and his lawyer physically present in court, although of course like other Constitutional rights this one can be waived if doing so is what an individual defendant and his lawyer determine is in their interest. Granting this writ will also not result in a change in the status quo—probation violation hearings are already not going forward over Zoom unless the parties consent. That status quo is what the Circuit Court in this case seeks to change. Finally, it should be reiterated that the State took no position on this and articulated their own concerns with Zoom probation violation hearings. It is telling that there is no party, other than the judge, who is seeking to push for a Zoom probation violation hearing.

At the end of the day, this Court should grant the writ of prohibition because there is a constitutional due process right to be physically present in court, and a constitutional right to counsel that demands physical presence

with one's attorney. The Circuit Court erred in finding that there is no such constitutionally-based right, when in fact an originalist reading of the constitution demonstrates otherwise, and so do cases from the United States Supreme Court, the Florida Supreme Court, and this Court which all speak of the defendant's constitutionally-based right to be "present in the courtroom", and, per this Court, to be "physically present".

I CERTIFY that a copy of this Petition for Writ of Prohibition has been efiled with the Clerk of Courts of the Third District Court of Appeals and served by email service on the Attorney General's Office at crimappmia@myfloridalegal.com, and on the State Attorney's Office at felonyservice@miamisao.com, and on Assistant State Attorney Sonali Desai at SonaliDesai@miamisao.com, and on the Honorable Miguel De La O at mdelao@jud11.flcourts.org, this 9th day of October, 2020.

Respectfully submitted,

_/s/ Daniel Tibbitt__________

Daniel Tibbitt, Esq.
Law Offices of Daniel J. Tibbitt
1175 NE 125th Street
Suite 404
North Miami, Florida 33161
(305) 384-6160
Fl. Bar No: 816361
dan@tibbittlaw.com