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SJC-13009

JOHN W. VAZQUEZ DIAZ vs. COMMONWEALTH.

Suffolk. December 7, 2020. - May 5, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker,
& Wendlandt, JJ.

Practice, Criminal, Motion to suppress, Continuance, Presence of defendant, Confrontation of witnesses, Public trial, Assistance of counsel. Due Process of Law, Presence of defendant in courtroom. Constitutional Law, Confrontation of witnesses, Public trial, Assistance of counsel.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on September 10, 2020.

The case was reported by Budd, J.

Rebecca Kiley, Committee for Public Counsel Services (Benjamin H. Keehn, Committee for Public Counsel Services, also present) for the petitioner.

Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

Katharine Naples-Mitchell, Chauncey B. Wood, & Meredith Shih, for Boston Bar Association & others, amici curiae, submitted a brief.

CYPHER, J. This case concerns whether the use of an Internet-based video conferencing platform, Zoom Video

Communications, Inc. (Zoom), for an evidentiary hearing during the COVID-19 pandemic violates certain of the defendant's constitutional rights. The defendant, John W. Vazquez Diaz, has waived his right to a speedy trial and seeks to continue his suppression hearing until it may be held in person. We conclude that a virtual hearing is not a per se violation of the defendant's constitutional rights in the midst of the COVID-19 pandemic.

Nonetheless, where the defendant has waived his right to a speedy trial and there are no civilian victims or witnesses, we conclude that the judge, who had to make a decision in unchartered territory, abused her discretion in denying the defendant's motion to continue his suppression hearing until it may be held in person. Accordingly, we reverse the judge's order denying the defendant's motion to continue.¹

1. Background. a. Defendant's case. The defendant was charged with trafficking in 200 or more grams of cocaine. On November 25, 2019, the defendant filed a motion to suppress evidence and statements. The evidentiary hearing on the defendant's motion to suppress originally was scheduled for January 21, 2020, but it was continued at the defendant's

¹ We acknowledge the amicus brief of the Boston Bar Association, Massachusetts Association of Criminal Defense Lawyers, and Charles Hamilton Houston Institute for Race and Justice.

request. On the next date, the hearing was continued at the request of the Commonwealth. On May 4, 2020, the hearing was postponed for a third time because of the COVID-19 pandemic. The judge subsequently ordered that the hearing take place via Zoom. The defendant filed a motion objecting to a Zoom hearing and instead requested that the case be continued until an in-court hearing could be held safely. The defendant is incarcerated on cash bail and agreed to waive his right to a speedy trial to wait for an in-person evidentiary hearing on his motion to suppress.

After a hearing on the defendant's motion to continue, which was held over Zoom, the judge denied the motion and overruled the defendant's objection to conducting a hearing via Zoom. The defendant appealed directly to this court pursuant to G. L. c. 211, § 3. At the Commonwealth's request, and without objection, a single justice reserved and reported the question of the constitutionality of virtual evidentiary hearings to the full court.

b. COVID-19 pandemic. In response to COVID-19, the Governor declared a state of emergency on March 10, 2020, and the President declared a national emergency on March 13. COVID-19 can cause severe illness in infected persons and may lead to death. Person-to-person contact is the primary method by which the virus spreads, and an asymptomatic person may spread the

virus. There currently is no cure. Vaccine distribution and administration has begun only recently. From the onset of the pandemic to the writing of this opinion, the Commonwealth has suffered over 17,000 deaths and over 648,000 confirmed cases of illness.

In an effort to reduce the number of COVID-19 cases, the Governor issued numerous emergency orders. The Massachusetts court system also responded to the pandemic with various orders concerning court proceedings and building access. Because the situation is fluid, the courts have periodically changed such orders in response to public health data. We issued multiple orders, which included continuances of jury trials, restricting access to State court houses and facilities, and tolling certain deadlines and statutes of limitation.

The trial courts also issued orders to address procedures in their respective courts. For instance, a Superior Court order outlined the proceedings that would be presumptively held virtually and those that may be heard in person. The order requires that criminal matters, including arraignment if a defendant is in custody, bail reviews, bail determinations following arrest or surrender pursuant to a Superior Court warrant, dangerousness hearings, pretrial conferences, nonevidentiary motions, and guilty pleas where the defendant has waived the right to physical presence, be held virtually.

Evidentiary hearings may be held in person; however, even then, the order permits only essential court personnel, attorneys, parties, witnesses, and others specifically allowed by the presiding judge to be physically present in the court room.

c. Use of Zoom. The following description is a summary of the judge's findings.² Throughout the Commonwealth, courts have adapted to the restrictions of the COVID-19 pandemic by increasingly relying on Zoom. Zoom hearings are recorded through the court's "For The Record" recording system.

Zoom provides two ways for a participant to view the other participants: the gallery view or the active speaker view. The gallery view allows a participant to see all other participants at once, in a thumbnail-style grid. The active speaker view shows only the individual presently speaking. The speaker's image fills the screen.³ Within the active speaker view, a participant has the option of displaying a strip of thumbnail

² The judge's explanation of the Zoom procedure was thorough, careful, and a significant aid to this court.

³ More precisely, the speaker's image fills the Zoom window, which can be expanded to fill the entire screen of a participant's device. Zoom also has a feature called "full screen mode," where a user can select to have the window automatically expand to fill the user's screen. Zoom Help Center, https://support.zoom.us/hc/en-us/articles/201362323-Changing-the-video-layout-Active-Speaker-View-and-Gallery-View?_ga=2.218367769.1603384994.1599747531-2115160787.1579018343#h_b80d529d-edd7-4486-8c21-bec9c9d55395 [https://perma.cc/4WD3-TM87].

displays containing the participant and all other participants beneath the larger video screen of the active speaker.

The judge found that the Zoom software used by the Superior Court has three features that are relevant to the defendant's motion in this case. The first is the "breakout room" function, which allows participants to have private virtual meetings during the hearing without disconnecting from Zoom. For instance, the defendant may enter a breakout room with only his or her attorney, excluding all other participants in the hearing. These breakout session meetings are also private in the sense that they are not recorded or streamed. The second is the "interpreter" function, which allows an interpreter to simultaneously interpret a hearing for a participant on a separate audio channel that only that participant can hear, similar to the use of a transmitter and an earpiece sometimes used by a defendant and interpreter in the court room. The third function is the "share screen" function, which permits participants to show electronic documents to the other participants. If a participant does not wish to use this function, or cannot use this function, he or she simply can hold a physical document in front of the camera to display it to the other participants.⁴

⁴ We note, however, that this type of sharing can be less reliable and may require more careful attention from the judge

The judge also described the two ways in which the public can attend a Zoom hearing. First, the public can listen to the hearing through an audio-only public telephone line. In Suffolk County, each Superior Court session has been assigned a permanent telephone line. Instructions for public access to this line are listed on the mass.gov website.⁵

Second, a Zoom link to the proceeding is provided to counsel by e-mail. The court encourages distribution of the link to those who are interested in the matter, especially the defendant's family and other supporters. The judge found that there is no limit to the number of persons who may virtually attend a hearing.⁶ The judge noted that this is in "direct contrast to the strict limits upon the number of persons who may enter the courthouse and each courtroom." The Zoom hearing is

and the parties. This is especially true if any individual is using a "smartphone" device, rather than a computer, to participate in the hearing.

⁵ Each court room is assigned a toll-free telephone number that is posted on <https://www.mass.gov/info-details/public-access-to-superior-court-criminal-events-in-suffolk-county> [<https://perma.cc/7KES-TKFF>]. Members of the public can call this telephone number and type in a participant code, which is also posted on the website, to listen to court proceedings.

⁶ Depending upon the Zoom plan the court uses, there is a limit to the number of participants who can attend the hearing; however, it is unlikely that a hearing would reach this limit. Even the most basic Zoom plan allows for at least one hundred participants at one time. The most advanced Zoom plan allows for up to 1,000 participants at one time.

accessible by cell phone, tablet, computer, or similar device.⁷

2. Discussion. The defendant argues that a Zoom hearing on an evidentiary motion to suppress would violate several of his State and Federal constitutional rights.⁸ Specifically, the defendant contends that a Zoom hearing would violate his right to be present, to confrontation, to a public trial, and to effective assistance of counsel.

a. Right to be present. Rule 18 (a) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 887 (1979), provides that

⁷ We note that these procedures are specific to the Superior Court in Suffolk County and that there may be some variance in how virtual proceedings are conducted throughout the Commonwealth.

⁸ This is an issue of first impression in Massachusetts, and as of the writing of this opinion, few other jurisdictions have directly addressed whether a virtual evidentiary hearing violates a defendant's constitutional rights during the pandemic. See, e.g., Gould Elecs., Inc., v. Livingston County Road Comm'n, 470 F. Supp. 3d 735, 742-744 (E.D. Mich. 2020) (concluding over both parties' objections that conducting bench trial via video conference does not violate plaintiff's due process rights); In re RFC & ResCap Liquidating Trust Action, 444 F. Supp. 3d 967, 969, 971 (D. Minn. 2020) (allowing final two defense witnesses to testify via video conference due to COVID-19 over objection of defendant); People in the Interest of R.J.B., 2021 COA 4, ¶¶ 25-35 (denying mother's request for continuance and conducting termination of parental rights hearing virtually via Webex remote video conference platform due to COVID-19 did not violate mother's due process and equal protection rights); Clarrington vs. State, No. 3D20-1461, slip op. at 10-12, 26-28 (Fla. Dist. Ct. App. Dec. 2, 2020) (holding virtual prohibition violation hearing over defendant's objection did not violate defendant's constitutional rights of confrontation or due process).

a defendant has the right to be present at all critical stages of court proceedings. "This right to be present derives from the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, and art. 12 of the Massachusetts Declaration of Rights." Robinson v. Commonwealth, 445 Mass. 280, 285 (2005). A suppression hearing constitutes a critical stage at which the defendant has a right to be present. See Commonwealth v. Campbell, 83 Mass. App. Ct. 368, 372 (2013). See generally Robinson, supra at 286 (defendant has right to be present where suppression hearing "would have required the taking of evidence and also involved the admissibility of substantial evidence that could determine the outcome of the case").

Whether a virtual hearing satisfies the defendant's right to be present at a motion to suppress hearing presents a novel question. The defendant argues that he has a right to be present at a hearing on a motion to suppress pursuant our State and Federal Constitutions, common law, and Mass. R. Crim. P. 18. He further argues that the word "presence" means physical presence and that a Zoom hearing would violate his due process rights. Although the right to be present at a motion to suppress hearing is implicated by the facts of this case, it is not violated by a virtual hearing. We conclude that, in certain

circumstances, a motion to suppress hearing may be conducted by video conference without violating the defendant's right to be present, so long as the video conferencing technology provides adequate safeguards.

"Due process is not a technical conception with a fixed content, but varies with context, and therefore is a flexible concept that calls for such procedural protections as the particular situation demands" (quotations and citations omitted). Abbott A. v. Commonwealth, 458 Mass. 24, 28 (2010). See Commonwealth v. Preston P., 483 Mass. 759, 767 (2020). To determine what procedures are sufficient in a particular case, a court balances "the private interests affected, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the governmental interests involved" (citation omitted). Id. See Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976); Doe, Sex Offender Registry Bd. No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 674 (2020).

In considering the private interests affected, there is no doubt that a defendant has a significant liberty interest at stake in a motion to suppress. See Preston P., 483 Mass. at 767. In a criminal proceeding, the ruling on a motion to suppress often leads to the resolution of the case. Robinson, 445 Mass. at 285-286. See Campbell, 83 Mass. App. Ct. at 373 ("the outcome of the hearing may determine the final outcome of

the case"). The risk of erroneous deprivation, however, is minimal, given the safeguards provided by a Zoom hearing in this case. The defendant's attendance helps assure that he has a fair and just hearing under due process "because he can consult with his lawyer, listen to the evidence, and assess the credibility of the witnesses (and the evidence) against him." Id. at 374. Although generally not preferable, with today's video conferencing technology, a virtual hearing can approximate a live physical hearing in ways that it could not previously. The use of Zoom can effectively safeguard the defendant's right to be present by allowing him to listen to the evidence, adequately observe the witnesses who testify at the hearing, and privately consult with his attorney at any time during the Zoom hearing.⁹

The judge also outlined the steps that would be taken in the event any technological difficulties arose. She stated that the court would suspend the hearing at the request of counsel and resume the hearing after the issue was resolved. We emphasize that this is an important protection and urge judges

⁹ As noted above, Zoom allows a participant to see all the other participants at once, in a thumbnail-style grid, or to view the individual who is actively speaking in an image that fills the window, which the participant can expand to fill his or her entire screen by using "full screen mode." If the participant chooses the active speaker view option, he or she can also view a strip of thumbnail displays containing the other participants above the larger video image of the active speaker.

to pay careful attention to the technology. If the technology does not function as described, it is crucial that the court suspend the hearing, rather than risk sacrificing certain of the defendant's constitutional rights.

Next, we consider the government interests in proceeding with a Zoom hearing rather than an in-person hearing. The Commonwealth first argues that it has a significant interest in protecting the public health by holding a virtual rather than in-person hearing. "[C]onfined, enclosed environments," including court rooms, "increase transmissibility" of this virus. Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 436, S.C., 484 Mass. 1029 (2020). Additionally, the Commonwealth argues that its ability to proceed with evidentiary pretrial hearings on Zoom will help alleviate the growing backlog of cases due to COVID-19.

The litigation of a motion to suppress often advances plea negotiations. Cf. Commonwealth v. Gomez, 480 Mass. 240, 250 (2018). Ensuring expeditious suppression hearings when possible may lead to the resolution of many cases. Moreover, we recognize that a case becomes less viable for the Commonwealth over time. This is because "[a]s time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more

easily impeachable as the events recounted become more remote." Commonwealth v. Delnegro, 91 Mass. App. Ct. 337, 340-341 (2017), quoting Flanagan v. United States, 465 U.S. 259, 264 (1984). This is true especially in cases with civilian victims and witnesses.

The Commonwealth's interest in protecting the public health during the COVID-19 pandemic is significant and, combined with its interest in the timely disposition of a case, would, in many instances, outweigh the defendant's interest in an in-person hearing. Accordingly, we conclude that a virtual motion to suppress hearing is not a per se violation of the defendant's right to be present in the midst of the COVID-19 pandemic.¹⁰

An analysis of the defendant's right to be present under our case law and under Mass. R. Crim. P. 18 (a) yields the same result. The defendant cites Commonwealth v. Bergstrom, 402 Mass. 534, 543 (1988), for the proposition that a defendant's right "to be personally present at every step of the proceedings

¹⁰ We are "mindful that courts must indulge every reasonable presumption against the loss of constitutional rights." Illinois v. Allen, 397 U.S. 337, 343 (1970), citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although we conclude that a virtual evidentiary hearing is not a per se violation of the defendant's constitutional right to be present in these circumstances, we recognize that a virtual hearing differs significantly from an in-person hearing. Where a virtual evidentiary hearing does not take precautions similar to those described by the judge in this case, the defendant's right to be present may be violated.

against him . . . is of ancient origin" (citation omitted). There, we recognized the defendant's right to be present as a corollary right to the right to confrontation. Id. Although we concluded that the art. 12 "face-to-face" requirement of confrontation was violated when a witness testified against the defendant from a separate room over a one-way video transmission,¹¹ we did not conclude that a virtual court proceeding is a per se violation of a defendant's right to be present. See id. at 551 n.18 ("Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation").

Rule 18 (a) provides that criminal defendants have the right to be present at all critical stages of a court proceeding. The right to be present under rule 18 (a) also derives from the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and art. 12. See Robinson, 445 Mass. at 285. For this reason, while we agree with the defendant that an evidentiary hearing on a motion to suppress constitutes a critical stage of a court proceeding, we conclude that the right to be present under rule 18 (a) does not

¹¹ Although the defendant was able to have two-way communication with his counsel, who was in the room with each witness, the judge, the prosecutor, the witness's grandmother, and a video technician, the defendant merely "observed the testimony on a television monitor in the courtroom." Bergstrom, 402 Mass. at 539-540.

prohibit a virtual hearing in certain circumstances.

Although we find no constitutional violation, we conclude that the judge abused her discretion in this particular instance in denying the defendant's motion to continue his hearing where he waived his right to a speedy trial. Rule 10 of the Massachusetts Rules of Criminal Procedure, 378 Mass. 861 (1979), provides that "a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served."¹² Whether a continuance should be granted lies within the discretion of the trial judge. See Commonwealth v. Jackson, 376 Mass. 790, 792 (1978). "Such a determination will be disturbed only if there was a clear abuse of discretion." Id., citing Commonwealth v. Watkins, 375 Mass. 472, 490 (1978), S.C., 486 Mass. 801 (2021).¹³

¹² Rule 10 specially refers to a party's right to continue a trial, not a pretrial hearing. See Mass. R. Crim. P. 10 (a) (1) ("After a case has been entered upon the trial calendar, a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served"). However, in practice, we also have applied rule 10 to pretrial evidentiary hearings. See, e.g., Commonwealth v. Burston, 77 Mass. App. Ct. 411, 417-418 (2010) (judge did not abuse his discretion in denying Commonwealth's rule 10 motion to continue hearing on motion to suppress where prosecutor failed to produce witness); Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 200-201 (2004) (judge abused discretion by denying Commonwealth's request for continuance of hearing on motion to suppress when its sole witness failed to appear).

¹³ Typically, we would not review a continuance such as the one at issue here. Weighing the factors relevant to deciding a motion to continue is well within the purview of a judge. The

"An appellate court's review of a trial judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). In L.L., however, we held that the abuse of discretion standard of review is far less deferential than our previous "no conscientious judge" articulation of the standard suggested. See id. See also Commonwealth v. Ira I., 439 Mass. 805, 809 (2003). Concluding that a judge abused her discretion does not equate to finding that "the judge was not conscientious or, for that matter, not intelligent or honest." L.L., supra. Instead, "a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). Id.

The Sixth Amendment provides, among other protections: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" See Commonwealth v. Nicoll, 452 Mass. 816, 820 (2008). "As

COVID-19 pandemic, however, has given rise to exceptional circumstances. We caution that our decision today is a reflection of these exceptional circumstances and does not apply outside the confines of the COVID-19 pandemic.

important as these rights may be, the accused is entitled to waive each of them." Id. See Commonwealth v. Spaulding, 411 Mass. 503, 504 (1992) (defendant may waive constitutional right to speedy trial). The defendant's decision to waive his right to a speedy trial and accept the consequences of such a delay eliminates any public health concerns that would accompany an in-person hearing during the pandemic. The government's primary interest in holding a virtual hearing is the timely disposition of the case.

Here, where there are no civilian witnesses or victims, the harm to the government's case caused by any further delay is minimal. The evidence and the testimony of police officers can be preserved adequately. The Commonwealth has presented no evidence that the officers or the evidence that is in their custody will be unavailable if the hearing is continued. While reducing the backlog of cases is a legitimate interest, there are many other cases that may be ripe for a virtual hearing at this time. The defendant must be aware, however, that when in-person proceedings resume, there will be a significant backlog and he may not be able to obtain a hearing as soon as he might wish.¹⁴

¹⁴ We note that the Superior Court issued guidelines for all proceedings that are held presumptively virtually during the COVID-19 pandemic. An evidentiary hearing on a motion to suppress is not one of those proceedings. The Superior Court

We emphasize, however, that a defendant does not have an absolute right to continue his or her Zoom hearing until it may be held in person, even where a defendant waives his or her right to a speedy trial. While a defendant's decision to waive his or her speedy trial right to wait for an in-person hearing does minimize the public health risk presented by the COVID-19 pandemic, delaying the defendant's motion to suppress for what may be an indefinite period of time does not come without a cost. In other circumstances, it may well be within the judge's discretion to deny a defendant's motion to continue.

b. Right to confrontation. We now consider whether a virtual hearing on a motion to suppress deprives a defendant of his or her right to confrontation under art. 12 and the Sixth Amendment. Neither this court nor the United States Supreme Court has addressed whether the right to confrontation applies at a suppression hearing. Today, we join a minority of States that have held that there is a right to confrontation at a hearing on a motion to suppress. See State v. Kitzman, 323 Or. 589, 605 (1996) (confrontation rights apply at pretrial availability hearing); Commonwealth ex rel. Buchanan v. Verbonitz, 525 Pa. 413, 419 (1990), cert. denied, 499 U.S. 907

order, however, does not preclude judges from holding a virtual evidentiary hearing even though it permits evidentiary hearings to be held in person at this time.

(1991) ("A preliminary hearing is an adversarial proceeding which is a critical stage in a criminal prosecution. It is not a sidebar conference at which offers of proof are made"); State v. Grace, 2016 VT 113, ¶ 14 (when suppression hearing requires taking of evidence, defendant has confrontation right because confrontation right cannot be disaggregated from well-established right to be present). See also United States v. Elfgeeh, 515 F.3d 100, 124-125 (2d Cir. 2008) (no violation of Sixth Amendment confrontation right at suppression hearing where judge terminated counsel's cross-examination of one witness after approximately one and one-half hours); Ferrer v. State, 785 So. 2d 709, 711 (Fla. Ct. App. 2001) (right to confrontation applies at suppression hearing but not to same extent as at trial).

We previously have recognized the right to confrontation as a trial right under both art. 12 and the Sixth Amendment. See Commonwealth v. Barry, 481 Mass. 388, 409, cert. denied, 140 S. Ct. 51 (2019) ("The right to confrontation, under both art. 12 and the Sixth Amendment, has been considered to be a trial right"). See also Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) ("the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination"). In doing so, we did not explicitly consider whether the right applies at

a motion to suppress hearing. We did conclude, however, that confrontation rights do not apply in pretrial discovery. See Barry, supra ("the right to confrontation is a trial right and is inapplicable to pretrial discovery under both art. 12 . . . and the Sixth Amendment"). See also Ritchie, supra (confrontation clause is not "a constitutionally compelled rule of pretrial discovery"). Similarly, the Supreme Court has held that the right to confrontation does not apply at a preliminary hearing for establishing probable cause, which "is ordinarily a much less searching exploration into the merits of a case than a trial." Barber v. Page, 390 U.S. 719, 725 (1968).

A hearing on a motion to suppress differs significantly from a pretrial hearing on discovery or even a hearing to establish probable cause. Suppression hearings typically involve important issues that require the taking of evidence and often lead to the resolution of a case. See Robinson, 445 Mass. at 285-286. In determining whether the right to confrontation applies, "[i]nstead of attempting to characterize a . . . hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination." Kentucky v. Stincer, 482 U.S. 730, 740 (1987). We are satisfied that a suppression hearing constitutes a critical stage of a criminal proceeding, in which the defendant

enjoys a right to confrontation.

We now turn to the question whether a virtual hearing violates the defendant's right to confrontation at a suppression hearing in the circumstances. The defendant's constitutional rights to be present and to confrontation are distinct, but they are related. Much like the right to be present, the right to confrontation is implicated but not violated in this case. The purpose of confrontation under the Sixth Amendment is to enhance "the truth-seeking process . . . by affording the accused an opportunity for face-to-face contact with adverse witnesses at trial; by ensuring that a witness will give his statements under oath, which impresses upon him the seriousness of the proceedings and importance that he testify truthfully; by forcing a witness to submit to cross-examination, a practice designed to elicit the truth; and by aiding the jury in assessing the credibility of a witness by observing his demeanor on the stand." Bergstrom, 402 Mass. at 543, quoting State v. Jarzbek, 204 Conn. 683, 692-693 (1987), cert. denied, 484 U.S. 1061 (1988).

Similarly, under art. 12, "[e]very subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election." We have interpreted face-to-face to mean that "the

accused shall not be tried without the presence, in a court of law, of both himself and the witnesses testifying against him." Bergstrom, 402 Mass. at 542. See Commonwealth v. Amirault, 424 Mass. 618, 628 (1997). In doing so, we have been careful to recognize that "[a]ll [the] words [of the Constitution] must be presumed to have been chosen advisedly." Mount Washington v. Cook, 288 Mass. 67, 70 (1934).

Nevertheless, the right to confrontation under art. 12 is not absolute. See Commonwealth v. Johnson, 417 Mass. 498, 503 (1994) ("the right to confrontation under art. 12 . . . may yield in appropriate, although limited, circumstances"). "[W]e have recognized narrow circumstances in which a defendant's Sixth Amendment or art. 12 rights must yield to unique interests." Bergstrom, 402 Mass. at 545-546, and cases cited. See State v. Peters, 133 N.H. 791, 794 (1991) (face-to-face confrontation right is preferable but may occasionally give way to considerations of public policy and necessities of case).

In Bergstrom, 402 Mass. at 553, we concluded that there was a violation of art. 12 when child victims of sexual assault testified against the defendant from a separate room, with the defendant and the jury watching from the court room by one-way video transmission. There, the art. 12 "face-to-face" requirement of confrontation could not be satisfied where "[m]any of the technical aspects of these videotapes [were]

troublesome." Id. at 549. The video footage that was played for the jury distorted the color and sound of the witnesses' testimony, and their faces were obscured during some of it. Id. The footage did not show the face of the presiding judge or the attorneys. Id. Only the "disembodied voices of the participants in the interrogations were transmitted." Id. In addition to the video footage failing to satisfy the face-to-face requirement of art. 12, we concluded that, "[a]bsent compelling circumstances, a jury ought to be able to view the interaction between a witness and others who are present." Id. at 550.

Although we declined to uphold broad categorical exemptions to art. 12 in Bergstrom, such as excusing child witnesses from testifying in person, we left the door open to "consider the validity of new techniques of preserving and presenting evidence at a criminal trial on a case-by-case basis." Id. at 547-548. Indeed, we noted that "[the] decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming." Id. at 551 n.18, quoting United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979).

Today we conclude that a virtual evidentiary hearing on a

motion to suppress is not a per se violation of the defendant's right to confrontation under art. 12 in the midst of the COVID-19 pandemic. The possibility of a virtual hearing was, of course, not contemplated by the framers of our Constitution in 1780. In fact, much of our most recent case law addressing the defendant's right to confrontation at an evidentiary hearing predates the advent of technologically advanced video conferencing platforms, including Zoom, which was established in 2011.¹⁵ See, e.g., Robinson, 445 Mass. at 285-286. In the years since our Bergstrom decision in 1988, video conferencing technology has significantly improved. Unlike the video footage presented to the jury in Bergstrom, Zoom permits two-way video transmission that allows for live cross-examination. See Bergstrom, 402 Mass. at 540. The defendant is virtually present for the duration of the hearing and is able to see all participants of the hearing. The judge also is present on the screen at all times and would herself be able to see all

¹⁵ Even after video conferencing became widely available, the need for extensive use of this technology in our judicial system was not present until the onset of COVID-19, a disease that is easily transmissible by person-to-person contact. We note that even once the spread of COVID-19 is under control, there may be future pandemics that require the use of video conferencing in our judicial system. As we learned from COVID-19, pandemics are unpredictable with potentially widespread and catastrophic impacts. It is crucial that we learn from the COVID-19 pandemic and continue to perfect the procedures we have implemented to safeguard our judicial system in the event of another pandemic or natural disaster.

participants during the hearing. Although Zoom does not allow for physical, face-to-face confrontation, the technology creates a close approximation of the court room setting that can sufficiently safeguard the defendant's right to confrontation. See id. at 551 n.18 ("where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming").

Having concluded that art. 12 permits, in certain circumstances, the use of video conferencing for a motion to suppress, we consider Sixth Amendment protections. In Maryland v. Craig, 497 U.S. 836, 850 (1990), the Supreme Court held that although the face-to-face confrontation requirement should not "easily be dispensed with," it is not absolute. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973). "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Craig, supra. Thus, under the Sixth Amendment, the Supreme Court requires a "case-specific finding of necessity" to dispense with the preference for face-to-face confrontation and an assurance that the testimony is reliable. Id. at 860.

Protecting the public health during this pandemic

constitutes an important public policy that may be the basis of a finding of necessity. COVID-19 is a highly contagious disease that spreads from person to person. An in-person hearing, with physical, face-to-face confrontation, must take place in a confined space. Such a hearing increases the risk of transmitting the virus. See Committee for Pub. Counsel Servs., 484 Mass. at 436.

With regard to the requirement that there be an assurance that the testimony is reliable, the use of two-way video conferencing technology, where all parties are virtually present, is sufficient to provide that assurance. Although the parties are not physically in the same room, this two-way video procedure preserves the other elements of confrontation. Even at a virtual hearing, "oath, cross-examination, and observation of the witness'[s] demeanor . . . adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." Craig, 497 U.S. at 851.

We conclude that, in some circumstances, a virtual evidentiary hearing on a motion to suppress may be necessary to further the important public policy of protecting the public health from COVID-19. Because we conclude that the judge abused her discretion in denying the defendant's motion to continue his hearing until it may be held in-person, we need not consider

whether a virtual hearing is necessary in this case.

c. Right to public trial. The defendant next argues that a virtual evidentiary hearing on his motion to suppress violates his Sixth Amendment right to a public hearing because the public cannot physically be present. He contends that the manner in which the public can attend, either through a Zoom link where nonparticipants' video displays are turned off and sound is muted, or through an audio-only telephone line, will prevent the public hearing from serving as an effective check upon the judicial process. We disagree and conclude that a virtual hearing does not constitute a closure in the constitutional sense. Furthermore, even if a virtual hearing constituted a partial closure, it would be appropriate considering the substantial need to protect public health during the COVID-19 pandemic. See Commonwealth v. Cohen (No. 1), 456 Mass. 94, 111 (2010).

"[A]n open court room 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" Id. at 107, quoting Press-Enterprise v. Superior Court, 464 U.S. 501, 508 (1984). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their

responsibility and to the importance of their functions" Waller v. Georgia, 467 U.S. 39, 46 (1984), quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979).

We have identified several interests that the public trial right serves: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury." Commonwealth v. Jones, 472 Mass. 707, 723-724 (2015), quoting Peterson v. Williams, 85 F.3d 39, 43 (2d Cir.), cert. denied, 519 U.S. 878 (1996). In Waller, 467 U.S. at 46, the Supreme Court recognized that "[t]hese aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence." Indeed, as we have already said, an evidentiary hearing on a motion to suppress is often as important as the trial itself. Id.

Nonetheless, the public trial right is not absolute. See Jones, 472 Mass. at 723. A court may impose conditions on entry to a proceeding without violating the defendant's right to an open court even if those conditions may prevent some members of the public from entry. See Commonwealth v. Maldonado, 466 Mass. 742, 748, cert. denied, 572 U.S. 1125 (2014). In determining whether such conditions violate the defendant's constitutional right to a public trial, we must first assess whether the conditions constitute a complete, partial, or

nonconstitutionally relevant "de minimis" closure. Cohen (No. 1), 456 Mass. at 108-111. The defendant bears the burden of proving that the public would in fact be excluded from attending the public proceeding. Id. at 107.

The Supreme Court articulated a four-part test in Waller that, in the event of a complete closure, the party seeking the closure must satisfy: "[(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] it must make findings adequate to support the closure." Waller, 467 U.S. at 48.

In Cohen (No. 1), 456 Mass. at 111-113, we articulated a modified four-part test to determine whether a partial closure is permissible. Instead of requiring that the party seeking partial closure advance an "overriding interest," the party must advance a "substantial reason." Id. at 111-112.

"In all the cases where we have found a full or partial closure of the court room, spectators have been intentionally barred from the court room" Maldonado, 466 Mass. at 748. See Commonwealth v. Hardy, 464 Mass. 660, 665 n.8, cert. denied, 571 U.S. 903 (2013). In Cohen (No. 1), 456 Mass. at 114-116, the court held that there was a troubling

constitutional "partial" court closure for the first three days of jury empanelment where court personnel, unbeknownst to the judge, placed a "Do Not Enter" sign in front of the court room because of concerns about limited space and the possibility of jurors intermingling with spectators. The court concluded that this closure was merely "partial" because "family members and some other individuals beyond the parties" were present, either because they ignored the sign or because the court made special arrangements for them. Id. at 109-110.

A closure that is de minimis is so limited in scope or duration that it is not constitutionally relevant. See Cohen (No. 1), 456 Mass. at 108. See also Peterson, 85 F.3d at 44. We review a de minimis closure for abuse of discretion. See id. In Maldonado, 466 Mass. at 751, we concluded that there was neither partial nor complete closure in the constitutional sense where a judge required spectators to present identification. See id. ("The modest condition of entry in this case is qualitatively different . . .").

Although such a condition on public access did not amount to a constitutional closure, in Maldonado we held that the spectators' loss of anonymity warranted limited judicial review to assess whether "conditions are no broader than needed to accomplish their purpose." Id. at 752. Ultimately, we concluded that the case-specific concern of witness intimidation

and court room disruption justified the condition. Id.

Here, we first consider the threshold question whether a virtual hearing constitutes a closure and, if so, what type of closure. The Superior Court standing order permits public access to video conference proceedings through a Zoom link or designated telephone lines.¹⁶ These limitations are comparable to the limitations in Maldonado. As in Maldonado, 466 Mass. at 748, spectators are not "intentionally barred from the court room." In fact, there is no limit on who or how many individuals may virtually or telephonically attend the hearing. In the case of a virtual hearing, only the forum has been adjusted, not the prospective audience. Accordingly, such a hearing does not amount to a constitutional closure.

"Although . . . the conditions imposed by the judge . . . fell short of a constitutional closure, that does not mean that they may be imposed without justification or that they are exempt from judicial review." Maldonado, 466 Mass. at 751. We recognize that these conditions will prevent some members of the public from participating in the hearing. Further, it is not lost on us that these restrictions will disproportionately

¹⁶ We urge the trial courts, to the best of their ability, to provide a functioning public access line with satisfactory audio quality. If this is not possible, courts should be prepared to provide a Zoom link to all members of the public who wish to observe the proceedings.

affect low-income members of our community, who often have less access to technology.^{17,18}

There is a presumption that spectators should be free to physically enter a court room and observe a hearing. Maldonado, 466 Mass. at 751. Accordingly, "[w]e exercise our supervisory power to preserve the presumption of openness of our court rooms." Id. That presumption, however, may be overcome, and the public may be required to attend a hearing virtually or telephonically where the judge sets forth on the record reasons that justify imposing this condition and where the condition is no broader than necessary to accomplish its purpose. Id. at 752.

Here, reducing the spread of COVID-19 by limiting in-person gatherings during the pandemic is sufficient justification to impose such conditions. As we have already acknowledged, "confined, enclosed environments increase transmissibility" of

¹⁷ The trial courts have sought to combat this problem by providing access to public "Zoom Rooms" at certain court houses chosen because of the perceived needs of the surrounding community. The rooms contain computer stations separated by partitions, telephones, COVID-19 signage, and disinfecting materials.

¹⁸ Even in-person court proceedings present accessibility disparities. Individuals with better access to transportation or a more flexible work schedule may have an easier time attending court proceedings. In fact, a virtual hearing may better accommodate certain individuals with obligations that make it difficult to travel to court or to wait in court for the hearing.

this virus. Committee for Pub. Counsel Servs., 484 Mass. at 436. Anyone who is required to attend a court hearing faces risk of exposure to COVID-19, not only while they are in the court room, but also while they are traveling to and from the court proceeding.

The conditions limiting in-person access are no broader than necessary given the severity of the pandemic. Additionally, the Superior Court has provided a virtual alternative that is accessible to all members of the public with access to the requisite technology. The judge has set forth adequate findings in the record regarding the impact of COVID-19 on the court system and the Commonwealth as a whole to support this type of de minimis closure.¹⁹ See Cohen (No.1), 456 Mass. at 108.

d. Effective assistance of counsel. The Sixth Amendment and art. 12 guarantee a defendant a right to counsel. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004). The defendant is entitled to counsel at "every

¹⁹ The defendant also argues that the limitations of a virtual evidentiary hearing result in the violation of the public's right under the First Amendment to the United States Constitution to attend a pretrial hearing regarding a motion to suppress. See Waller, 467 U.S. at 46. The constitutional analysis under the First and Sixth Amendments is largely the same, and, accordingly, we conclude that the public's First Amendment right is not violated. See Commonwealth v. Martin, 417 Mass. 187, 193 n.8 (1994).

critical stage of the criminal process," including an evidentiary hearing on a motion to suppress (quotation and citation omitted). Commonwealth v. Trapp, 423 Mass. 356, 358, cert. denied, 519 U.S. 1045 (1996). Further, the right to counsel in a criminal case is the right to "effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984), quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

The defendant argues that a Zoom hearing would inhibit his communication with counsel such that it would impair his right to effective assistance of counsel. Specifically, the defendant contends that informal communication between attorney and client, such as passing notes, whispering, or communicating via body language, will be absent during a Zoom hearing. The defendant recognizes that a Zoom hearing allows him to communicate with counsel privately upon request and through the Zoom "breakout room" feature, but he contends that this form of communication is not sufficient and impermissibly burdens his right to counsel. We disagree and conclude that a virtual evidentiary hearing as contemplated by the judge does not deprive the defendant of effective assistance of counsel.

While the issue of attorney-client communication during a virtual hearing never has been directly before the court, we have addressed similar restrictions on attorney-client

communication in other contexts. In Guerin v. Commonwealth, 339 Mass. 731, 735 (1959), we concluded that counsel was not ineffective where he was seated separately from the defendant but the defendant could have asked for permission to communicate with counsel at any time. See Commonwealth v. Moore, 379 Mass. 106, 111 (1979) (counsel and defendant may be seated separately where least restrictive measure available to address security concerns). There, at one point during the trial, the defendant was led to believe by a court officer that he could not speak with counsel. Guerin, supra at 733. Nonetheless, we concluded that the defendant could have spoken to counsel before or after court and during recess. Id. at 734. Further, we concluded that the defendant could have asked the judge permission to speak to counsel at any time during the proceeding. Id. Here, while the defendant may be unable to use nonverbal cues to catch his attorney's attention and unable to whisper to his attorney or pass a note, the defendant can interrupt the proceeding at any time to confer with counsel.

Although we recognize the "value to a defendant in a criminal case to be able to communicate orally with his counsel in the course of a witness's testimony," we also consider that "counsel is in control of the examination of witnesses and the tactics he wishes to employ and normally is far more skilful in the conduct of the defence than is the defendant." Guerin, 339

Mass. at 734-735. The degree of client consultation and participation required for strategic or tactical matters is dependent on the circumstances. See Commonwealth v. Donlan, 436 Mass. 329, 334-335 (2002). A defendant's inability to immediately communicate regarding tactical or strategic decisions with counsel does not interfere with the effective assistance of counsel, nor does the defendant's inability to pass notes to counsel or use nonverbal cues to communicate with counsel.

Our ruling today, however, does not render attorney-client communication over Zoom immune from constitutional scrutiny. Attorney-client communication during a Zoom hearing is more restrictive than during an in-person hearing and requires both the attorney and the judge to take care that the technology is functioning properly and that a defendant has the opportunity to use the private breakout room with counsel if he or she requests to do so. Inquiries should be made regularly of all parties to ensure that there is clear audio and video transmission, but particularly of the defendant, to ensure that he or she has the opportunity to consult with counsel.²⁰

We also note that although a Zoom hearing differs

²⁰ In these circumstances, it also may be incumbent on counsel to inquire periodically of the defendant whether he or she wishes to communicate with counsel. The judge should encourage such inquiries during a virtual evidentiary hearing.

significantly from an in-person hearing, Zoom may provide some advantages, particularly in the time of COVID-19. The defendant here wishes to continue his hearing until it may be held in-person, but even with the recent distribution of the vaccine, we cannot say for how long the virus might persist. For many defendants, the duration of the COVID-19 pandemic may extend far too long to wait for an in-person hearing. Presently, a defendant cannot easily confer with his or her attorney in-person during a court proceeding because of social distancing protocols. In fact, it is likely more difficult for a defendant to communicate privately with counsel at an in-person hearing than a virtual hearing because of these social distancing protocols.

3. Conclusion. We reverse the judge's order denying the defendant's motion to continue and his objection to conducting the evidentiary hearing on his motion to suppress via Zoom video conference, and we remand the case for further proceedings consistent with this opinion.²¹

So ordered.

²¹ After argument in this case, the defendant filed an assented-to motion to vacate the stay of the Superior Court proceedings. In light of our decision today, no action is necessary on the motion.

KAFKER, J. (concurring). I agree with the court's conclusion that the judge's denial of the defendant's motion to continue constituted an abuse of discretion, but I write separately to emphasize that as we zoom into the future of this brave new digital world, judges must be acutely attentive to the subtle and not so subtle distorting effects on perception and other potential problems presented by virtual evidentiary hearings. Although the scholarship of these effects and problems is still developing and requires rigorous testing in court, it raises concerns that require a cautious approach, particularly after the pandemic ends and our court rooms can return to some semblance of normal.

During the COVID-19 pandemic, the judicial system has been required to rely on virtual proceedings to continue to function effectively. In particular, the judicial system has placed heavy reliance on video conferencing technology, such as that of Zoom Video Communications, Inc. (Zoom). We have also discovered the advantages of virtual proceedings in certain important respects, particularly in terms of safety and convenience. That being said, a virtual evidentiary hearing on Zoom, or similar technologies, is not the same as an in-person evidentiary proceeding. The evolving empirical evidence indicates a virtual hearing may alter our evaluation of demeanor evidence, diminish the solemnity of the legal process, and affect our ability to

use emotional intelligence, thereby subtly influencing our assessment of other participants. It is important that judges be sensitive to these issues when they proceed virtually, and that they be prepared, in cases such as this one, to allow continuances when a defendant is willing to remain in custody and waive his speedy trial rights in order to receive a safe in-person hearing within a reasonable time.

Although arguably more pronounced for lay person jurors and witnesses, the subtle effects of video conferencing may alter the perception and behavior of even experienced judges and law enforcement witnesses. As the court emphasizes today, a suppression hearing is a critical stage of a criminal proceeding that often leads to the resolution of a case. Ante at . In the defendant's case, then, it is certainly appropriate to consider the potential distorting effects of using Zoom video conferencing for his suppression hearing.

Technology has significantly advanced since this court addressed the constitutionality of confrontation via video transmission over thirty years ago in Commonwealth v. Bergstrom, 402 Mass. 534 (1988), but a Zoom hearing is still only a smaller, mirror image of reality, and sometimes that image may be distorted. Id. at 550 (televised testimony not equivalent to personal observation). The full extent of Zoom's specific impact on court proceedings, and the ways in which Zoom improves

or lessens judicial process, are yet to be completely understood. See, e.g., Bandes & Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 *Buff. L. Rev.* 1275, 1278-1282 (2020) (drawing on social science to assess essential goals of justice system and impact of virtual proceedings during COVID-19).

This court has long acknowledged that video testimony may alter a fact finder's perception of a witness. Bergstrom, 402 *Mass.* at 550 ("Subtle indications of a witness's credibility . . . often may not be transmitted. . . . [W]e cannot conclude that reducing the life-size picture of trial testimony to the image on a television screen affords to a jury the equivalent of personal observation"). The potential effects of video testimony on perception are compounded in jury trials by the sheer amount of evidence and number of fact finders, but those effects are still important in bench suppression hearings, as the judicial system places great weight on the assessment of demeanor at every evidentiary hearing, and even those who are aware of video conferencing's effects are not immune from them. See Bandes & Feigenson, supra at 1284; Simon-Kerr, *Unmasking Demeanor*, 88 *Geo. Wash. L. Rev. Arguendo* 158, 162-165 (2020). Although a number of studies have raised questions about the

reliability of demeanor assessments,¹ the use of demeanor remains central to our jurisprudence as a necessary tool -- albeit a blunt one -- for determining credibility. See Simon-Kerr, supra at 162-165, 170. It is certainly an important aspect of evidentiary hearings such as those on motions to suppress. For example, the credibility of at least two witnesses was to be evaluated in this hearing.

Virtual proceedings using Zoom or like technology have the potential to further diminish the reliability of demeanor

¹ Social science suggests that people, including judges, are less accurate than they believe themselves to be when relying on witnesses' demeanor to differentiate truthful from untruthful testimony. See, e.g., Bandes & Feigenson, supra at 1306 ("the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility"); DePaulo, Charlton, Cooper, Lindsay, & Muhlenbruck, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 *Personality & Soc. Psychol. Rev.* 346, 346 (1997) ("In experimental studies of detecting deception, accuracy is typically only slightly better than chance"). See also Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008) ("The belief that many people form from watching television and movies -- that [determining honesty] can be done by careful attention to a witness's demeanor -- has been tested and rejected by social scientists"); United States v. Wells, 154 F.3d 412, 414 (7th Cir. 1998) ("Judges fool themselves if they think they can infer sincerity from rhetoric and demeanor"). Reliance on demeanor as an indicator of credibility also allows the interjection of the subconscious influence of stereotypes and selective empathy, leading scholars to theorize that there is a "demeanor gap" along lines of culture, race, and gender. Simon-Kerr, supra at 170. See Bandes & Feigenson, supra at 1291; Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 *UCLA L. Rev.* 450, 476-477 (2016); Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *Conn. L. Rev.* 1, 42, 53-54 (2000).

assessments. Since Bergstrom, multiple studies have indicated that witnesses who testify remotely may be viewed as less favorable, less credible, and less memorable than in-person witnesses.² See, e.g., United States Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* 55 (June 2017); Landström, Granhag, & Hartwig, *Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory*, 12 *Legal & Criminological Psych.* 333, 344-345 (2007); Orcutt, Goodman, Tobey, Batterman-Faunce, & Thomas, *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 *L. & Hum. Behav.* 339, 357-358, 366 (2001); Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 *Tul. L. Rev.* 1089, 1118 (2004). The video conferencing technology available in this case makes it more difficult to observe certain nonverbal behaviors, which are integral to our communication with and

² There is some indication that today's video conferencing technology may also, when used in a particular manner, have positive effects on the perception of a witness. See Bandes & Feigenson, supra at 1298, 1321, 1330 n.185. However, the repeated finding that video conferencing leads to negative perception, even given its potential positive effects, requires careful attention. Most importantly, analysis of studies of the effect of technology is naturally limited by the fact that technology is constantly changing. Today's video conferencing technology will not be tomorrow's.

evaluation of others.³ See, e.g., Diamond, Bowman, Wong, & Patton, Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology 869, 900 (2010); Doherty-Sneddon, O'Malley, Garrod, Anderson, Langton, & Bruce, Face-to-Face and Video-Mediated Communication: A Comparison of Dialogue Structure and Task Performance, 3 J. Experimental Psychol.: Applied 105, 105 (1997) (communication is "the result of an integration between both nonverbal and linguistic processes"); Grahe & Bernieri, The Importance of Nonverbal Cues in Judging Rapport, 23 J. Nonverbal Behav. 253, 263-266 (1999) (assessing significance of nonverbal behavioral cues in developing rapport).

Most notably, it is impossible to make true eye contact via the video conferencing technology available in this case, because the camera and display are not in the same place. See Bades & Feigenson, supra at 1294-1295; Lanier, Virtually There, Scientific Am., Apr. 2001, at 68. Lack of eye contact creates a risk that viewers will perceive the speaker as uncertain or dishonest, and results in an over-all reduction in the ability

³ Of course, it is not only difficult, but impossible to observe the nonverbal behaviors that are not displayed in the video frame. For most video conferencing users, this will include anything outside the head and shoulders. Tapping feet and fidgeting hands, for example, are mostly lost while video conferencing.

to use emotional intelligence⁴ to assess the communication.⁵ Because they are unable to maintain eye contact, virtual participants using Zoom or like technology "may lose access to the sorts of feedback they would ordinarily receive in the physical courtroom. This ongoing sense of uncertainty about whether they are truly being paid attention to and understood may be reflected in witnesses' demeanor while testifying, which decision-makers may then construe as a lack of confidence or lack of interactivity" (Footnotes omitted.) Bandes & Feigenson, supra at 1294-1295, citing Tenney, MacCoun, Spellman, & Hastie, Calibration Trumps Confidence as a Basis for Witness Credibility, 18 Psychol. Sci. 46 (2007).⁶

⁴ Emotional intelligence is the capability of individuals to recognize their own emotions and those of others, discern between different feelings and label them appropriately, use emotional information to guide thinking and behavior, and adjust emotions to adapt to environments. A.M. Colman, A Dictionary of Psychology (3d ed. 2008).

⁵ See Bandes & Feigenson, supra at 1294-1295; Connor, Human Rights Violations in the Information Age, 16 Geo. Immigration L.J. 207, 217 (2001); Garau, Slater, Bee, & Sasse, The Impact of Eye Gaze on Communication Using Humanoid Avatars, 3 SIGCHI '01 309, 309 (2001) ("[Gaze] serves at least five distinct communicative functions": "regulating conversation flow, providing feedback, communicating emotional information, communicating the nature of interpersonal relationships and avoiding distraction by restricting visual input").

⁶ See Brewer & Burke, Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments, 26 Law & Hum. Behav. 353, 360-363 (2002); Burgoon, Buller, White, Afifi, & Buslig, The Role of Conversational Involvement in Deceptive Interpersonal Interactions, 25 Personality & Soc. Psychol. Bull.

Video conferencing technology may also diminish the amount of communicative information presented by participants in a hearing, which affects the ability of observers to assess the communication.

"Most images on the interface are small; even speaking witnesses will appear in small frames if the proceedings are shown in [Zoom's] gallery view. All other things being equal, smaller images tend to create less emotional impact, so whatever demeanor observers think they discern is likely to have less effect on their judgments. The size of the frame in which each person appears on Zoom, the fact that they will usually be seated for the duration, and their distance from their own cameras ordinarily means that viewers will see only witnesses' and parties' heads and upper bodies. In contrast to the views afforded in physical court, judges and jurors will not have much if any sense of witnesses' and parties' posture or bodily movements other than shifting in their seats, depriving them of cues that people use to read others' demeanor in their everyday lives and that have, for better or worse, been considered important in physical trials Some participants, notwithstanding published guidance to the contrary, will appear in suboptimal lighting, which will make their facial expressions harder to see, or in cluttered environments, which will complicate the effort to identify the emotional valence of their expressions. Videoconferencing may also provide less audio information than in-person courtroom speech does, impairing decision-makers' ability to discern the emotions conveyed by the sound of the voice." (Footnotes omitted.)

Bandes & Feigenson, supra at 1299-1301.⁷ As with any video

669, 682 (1999). See also Poulin, supra at 1125-1127 (discussing how video conferencing affects both how defendant behaves and how that behavior is perceived); Walsh & Walsh, Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings, 22 Geo. Immigration L.J. 259, 269-270 (2008) (same regarding asylum applicant).

⁷ See Connor, supra at 216-217 (limited information available via video transmission reduces mental stimuli

communication, synchronous or not, the distance and angle of the camera, and the context or background in which a participant is seen, may affect perception and lead to subconscious bias.⁸ For example, seeing the defendant separately from his or her lawyer, as opposed to seated next to each other, influences at least lay observers' assessment of the defendant. D. Tait, B. McKimmie, R. Sarre, D. Jones, L.W. McDonald, & K. Gelb, Western Sydney University, *Towards a Distributed Courtroom* 52-53 (2017) (study found defendants seated with lawyer, either on screen or in person, seen as "significantly more honest" than defendants appearing alone virtually). The close-up (head-and-shoulders) shot typical of today's video conferencing leads fact finders to "overestimate maturity and build" of defendants, which has the potential to skew their assessment of the defendant's behavior. Poulin, supra at 1121-1122.⁹ Even when the technology works

necessary for fact finder to make assessment); Poulin, supra at 1120 (limited view of video may cause exaggerations or distractions of defendant's physical and emotional presentation, leading to false impression).

⁸ See Bandes & Feigenson at 1302-1303; Johnson & Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 *Law & Pol'y* 211, 222 (2006); Poulin, supra at 1121-1122 (size of screen and type of shot influence viewer's impression).

⁹ At a trial or sentencing, this factor could also increase the risk that the judge or jury will view the defendant as more of a threat or more culpable than if appearing live. Poulin, supra at 1121-1122.

perfectly, consciously imperceptible delays that are inherent to video conferencing and the increased cognitive demands of virtual hearings may still adversely affect the perception of a speaker. See Bandes & Feigenson, supra at 1295-1296, 1301-1302; Walsh & Walsh, Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings, 22 Geo. Immigration L.J. 259, 269-270 (2008). Where interpretation is necessary, it may further complicate this evaluation. See, e.g., E. Flandreau, H. Hyatt, & W. Pultinas, Remote Spanish Interpreting in the Massachusetts State Court System During COVID-19, at 17-18 (Fall 2020).

Virtual hearings may also diminish the sense of "co-presence" that is produced by being together in a physical court room, which impairs the ability to empathize with remote participants.¹⁰ Bandes & Feigenson, supra at 1294-1295, 1304-1306. See Diamond, Bowman, Wong, & Patton, supra at 900-901; Poulin, supra at 1118 (decision makers interacting "through the

¹⁰ Empathy plays an obvious role in sentencing and mitigation, but also affects credibility assessments, and therefore is relevant here for our analysis of an evidentiary suppression hearing. See Brown, The Affective Blindness of Evidence Law, 89 Denv. U. L. Rev. 47, 89-91 (2011) (discussing connection between emotion and credibility assessments); Taslitz, Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?, 45 Tex. Tech L. Rev. 315, 352-353 (2012) (forces that block empathy and sympathy can "mark defendants as simply not credible").

barrier of technology . . . are likely to be less sensitive to the impact of negative decisions on the defendant"); Walsh & Walsh, supra at 269. In contrast to the direct experience of participating in a court room proceeding, virtual hearings have been found to diminish the sensory impressions necessary to structure our perceptions; "[w]ithout those sensory impressions . . . a dehumanizing effect occurs." Connor, Human Rights Violations in the Information Age, 16 Geo. Immigration L.J. 207, 217 (2001). See, e.g., Bandes & Feigenson, supra at 1318-1319 (virtual hearings are more likely to seem "depersonalized" and "less humane"); Walsh & Walsh, supra at 269 (artificial distance created by video conferencing leads to "dehumanizing effect"). This 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.¹¹

Further, today's video conferencing technology disrupts the effects of the physical court room atmosphere. "The nobility and often grandeur of the courthouse and the courtrooms within it reaffirm the authority of the state and the centrality of

¹¹ See Bandes & Feigenson, supra at 1319-1320 ("sense of inconsequentiality" of video proceedings may affect participants' sense of fairness and procedural justice); Connor, supra at 217-219 (describing effects of lack of empathetic connection).

adjudication to good government while simultaneously recognizing every litigant and witness as worthy of dignity and respect."¹² Bades & Feigenson, supra at 1311-1312. See Gélinas, Camion, Bates, & Grant, Architecture, Rituals, and Norms in Civil Procedure, 32 Windsor Y.B. Access Just. 213, 221 (2015) (discussing how judicial architecture produces "sense of authority," "democracy's immanence," and "transparency"). Repeat participants in court proceedings, such as judges, attorneys, and law enforcement witnesses, may from experience treat virtual court proceedings with more traditional solemnity than lay persons, but they should nonetheless be proactively aware of the subtle ways in which the virtual environment communicates informality.

When a person physically comes to court, he or she is immediately aware of the gravity of proceedings felt in an actual court room. The transition to a virtual court room is different. There, the participants experience court in the same way in which they experience much of their everyday life,

¹² "In practice, of course, courtrooms in courthouses may fail to achieve some or all of these goals. Much adjudicatory business is done in unprepossessing rooms that convey little sense of dignity or state authority. Antiquated facilities and overcrowding can make showing up for court an oppressive experience. . . . Poor acoustics in the courtroom or street noises intruding from outside can distract participants, making it harder for parties, lawyers, judges, and jurors to attend to the testimony and argument on which the decision will be based." (Footnotes omitted.) Bades & Feigenson, supra at 1312.

usually from the same location in which they live, work, or socialize -- or, as in this case, from the jail in which the defendant is held in custody. See Poulin, supra at 1134-1135. Seeing other participants on screen in similar environments both deemphasizes the formal nature of court and diminishes the sense that they are engaging in a unified proceeding. See Bandes & Feigenson, supra at 1322-1323. While this has often been necessary during the COVID-19 pandemic, judges must be conscious that when so many communications take place through video conferencing, court 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.

The importance and solemnity of a court proceeding are deemphasized not only by the environment in which a participant sits, but also by the interface design of video conferencing technology. A court room's physical configuration reinforces the role and authority of each participant. See Bandes & Feigenson, supra at 1322-1323; Rosenbloom, Social Ideology as Seen Through Courtroom and Courthouse Architecture, 22 Colum.-VLA J.L. & Arts 463 (1998). In contrast, each Zoom participant may exert control over how much space the court proceeding occupies on his or her screen -- a screen that could be as small as a hand-held cell phone. Thus, a participant can physically alter the proceedings, minimizing, for example, the presence of

some other participants or the proceedings altogether. See Poulin, supra at 1120-1122 (size of screen affects sense of what is viewed on it). In addition, rather than participants sitting in predetermined, symbolic places in a court room, the order in which speakers appear in a virtual hearing is more arbitrary. The configuration of participants depends on the view the participant selects ("active speaker" or "gallery" view) or the order in which participants joined the proceeding. Under any circumstances, unlike the fixed places of the court room, the configuration of virtual speakers is unstable and may be disrupted when someone starts to speak or leaves the proceeding. See Bandes & Feigenson, supra at 1325. In short, video conferencing affects both perception and communication, which in turn affect many aspects of a virtual proceeding.

This effect is directly relevant to our assessment of the defendant's confrontation rights in this case. As the United States Supreme Court has recognized, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser" as essential to fairness, a concept that has "persisted over the centuries because there is much truth to it." Coy v. Iowa, 487 U.S. 1012, 1017, 1019 (1988). Face-to-face confrontation must, at times, give way to public necessity; but the fact remains that "[a] witness may feel quite differently when he has to repeat his story looking at the man

whom he will harm greatly by distorting or mistaking the facts" (quotation and citation omitted). Id. at 1019.¹³ When participating via Zoom, a witness, unbeknownst to other participants, could choose to completely eliminate the defendant's image from view by selecting active speaker view, pinning other video displays, minimizing Zoom, or simply looking away. Cf. id. ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions"). The witness thereby has the ability to avoid looking at the defendant and to otherwise manipulate the technology to create emotional distance from the defendant. The technology, as explained above, may also distort fact finders' ability to evaluate the witness, particularly nonverbal communication clues. All of these technological effects may

¹³ Scholars have noted that the Federal confrontation clause is driven by twin aims of substantive and procedural justice, as evidenced by the notion that promoting the accuracy of testimony and its evaluation promotes both a correct result and a sense of fair process. See Eddy, *Throwing Stones from Within a Glass House: Why the Procedural Approach to Confrontation Fails to Remedy the Ills of the Indicia of Reliability Test, and an Argument for A Balanced Rule*, 71 Alb. L. Rev. 1287, 1290 n.24, 1314-1315 (2008); LaMagna, *(Re)constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. Cal. L. Rev. 1499, 1505-1507 (2006). Although the Court in Coy, 487 U.S. at 1017, cited anecdotal evidence and persuasive writings rather than social science regarding the impact of face-to-face confrontation on truthfulness, the language the Court used in Coy aligns with these twin aims of safeguarding fairness and accuracy.

alter the process and values protected by the confrontation clause. See Eddy, *Throwing Stones from Within a Glass House: Why the Procedural Approach to Confrontation Fails to Remedy the Ills of the Indicia of Reliability Test, and an Argument for A Balanced Rule*, 71 Alb. L. Rev. 1287, 1290 n.24, 1314-1315 (2008) (analyzing confrontation's goals of ensuring accuracy and enacting procedural justice); LaMagna, *(Re)constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. Cal. L. Rev. 1499, 1505-1507 (2006) (confrontation serves accuracy and fair procedure by protecting

right to cross-examine testimonial witnesses).^{14,15}

The issues discussed above are all at play even when

¹⁴ In addition to altering confrontation rights, "videoconferencing can also affect the ability of defense counsel to provide effective representation," which "depends on the ability of the defendant and her counsel to confer confidentially before and during the proceedings." Turner, Remote Criminal Justice, 53 Tex. Tech. L. Rev., manuscript at 10 (forthcoming 2021). See Bellone, Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom, 8 J. Int'l Com. L. & Tech. 24, 31-32 (2013). The court appropriately notes the differences between attorney-client communications in in-person and virtual evidentiary proceedings and suggests precautions. Ante at . However, I find the fact that participants must actively interrupt the virtual proceedings in order to request the opportunity to confer in a private breakout room perhaps more concerning than the court. It is obviously impossible for a defendant to simply pass a note to counsel or whisper into counsel's ear in a virtual proceeding. The communication and perception problems inherent in video conferencing make it difficult to approximate these informal attorney-client communications even if judges are proactive about providing opportunities to confer. When COVID-19 subsides such that in-court, close interpersonal communication between client and counsel can safely resume, these differences between virtual and in-court proceedings should be taken into account.

¹⁵ I agree with the court's conclusion that the right to be present does not necessarily require physical presence. The right to be present helps ensure that a defendant is afforded the fair and just hearing required by due process, which in turn contributes to the defendant's sense of procedural justice. See Robinson v. Commonwealth, 445 Mass. 280, 285 (2005); Commonwealth v. Campbell, 83 Mass. App. Ct. 368, 372 (2013); Bades & Feigenson, supra at 1320. However, as discussed, there are legitimate questions as to whether the perception and communication possible in virtual hearings are comparable to in-person proceedings. Bades & Feigenson, supra. See Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 247, 273 (2004) (models of procedural justice include sense of fairness and value of participation separate from system's need for accuracy).

today's video conferencing technology works well. But like all other technology, video conferencing is prone to both technological issues and user errors. Technological issues create additional barriers for participants. Not all litigants -- or even their attorneys -- have access to stable and reliable Internet, have Zoom-ready devices, or have enough familiarity with Zoom to have an opportunity to fully participate in a virtual hearing, as they would in an in-person hearing.¹⁶ Gaylord, Hou, Mayfield, Muth, & Karis, Bentley University, *Understanding & Improving Remote Court Proceedings: Research for the Massachusetts Trial Court*, at 23-24 (Dec. 21, 2020) (Bentley University study). The communication problems caused by video conferencing can be exacerbated by a dropped connection, a frozen or lagged video display of a witness, or a pause in the proceedings to deal with a technological delay on the part of one or all participants.

¹⁶ Importantly, access to reliable Internet is often dependent on income, socioeconomic background, and educational attainment. See Perrin & Atske, *Pew Research Center, 7% of Americans Don't Use the Internet. Who Are They?* (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they> [<https://perma.cc/P8XV-JWPG>]; Ryan, *United States Census Bureau, American Community Survey Reports, Computer and Internet Use in the United States: 2016*, at 9 (Aug. 2018). Lack of Internet access is more common among racial minorities. *Pew Research Center, Internet/Broadband Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#who-has-home-broadband> [<https://perma.cc/RAD8-ZWU5>].

The practical technical difficulties of virtual hearings at this time are well illustrated by the recent Bentley University study regarding public access to Massachusetts trial courts. The website regarding public access to Superior Court proceedings indicates that the public may call audio-only telephone lines to listen to a proceeding or, in certain cases, watch a livestream or the Zoom proceeding. Public access to Superior Court Criminal Events in Suffolk County, <https://www.mass.gov/info-details/public-access-to-superior-court-criminal-events-in-suffolk-county> [<https://perma.cc/2T5T-3VS7>] ("In some instances, the Superior Court may choose to live stream certain events via YouTube or Zoom. For more information on a particular live stream event, please contact the Clerk's Office"). The study identified multiple problems with access to the public telephone lines. Bentley University study, supra at 12. Although some of these problems appear readily correctable, ensuring that those listening over the call line can hear all participants will require careful attention. Judges and other court personnel must be keenly attentive to whether the technology is working properly to assure that public access is allowed and uninterrupted. This is far more difficult to monitor than in an open court room. A judge's mistaken understanding that the hearing is public does not make it so when the barriers of technological or administrative failure

significantly impair the practical ability of the public to attend a proceeding. Commonwealth v. Cohen (No. 1), 456 Mass. 94, 109-110 (2010) (court partially closed when "Do Not Enter" sign was hung on door, even though trial judge was unaware of sign).

The data regarding differences between virtual and in-person proceedings naturally invite consideration of the effects of those differences. So far, we have only limited data, based on older technology, and that data has not been challenged in court, but the data we do have suggests that judges need to be attentive to these effects and that courts should proceed cautiously. Studies of bail and asylum hearings on older technology have concluded that the use of video conferencing technology leads to worse outcomes for defendants and asylum applicants. See Diamond, Bowman, Wong, & Patton, supra at 870 (use of video technology for felony bail hearings led to sharp increase in average amount of bail, with no changes in live bail hearings); Eagly, Remote Adjudication in Immigration, 109 Nw. U. L. Rev. 933, 937 (2015) (televideo immigration cases more likely to result in deportation);¹⁷ Walsh & Walsh, supra at 271 (use of

¹⁷ A 2019 replication of Eagly's study confirmed her original findings. Thorley & Mitts, Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings, 59 Int'l Rev. L. & Econ. 82, 82-83 (2019).

video teleconferencing roughly doubles likelihood of denial of asylum and materially affects outcome even when controlling for represented versus unrepresented applicants).¹⁸ How these findings translate to evidentiary hearings over Zoom remains unclear, as technology frequently outpaces research and legal scholarship, leaving us to analyze new, improved technology based on studies of its predecessors.¹⁹ Additionally, even when researchers can control a study to compare virtual and in-person proceedings adequately, they have not been able to single out the cause of different results. See Diamond, Bowman, Wong, & Patton, supra at 901 ("At this point, we simply cannot tell which of the differences between live and videoconferenced hearings, or which combination of these differences, was responsible for the large jump in bond levels . . ."); Eagly,

¹⁸ I do not mean to suggest that bail or other nonevidentiary hearings cannot proceed virtually, particularly during the COVID-19 pandemic. When circumstances require a virtual hearing, judges must be aware of and sensitive to the effects of video conferencing, and make proactive attempts to correct for them as much as possible. There is no justifiable reason why bail should be set higher at a virtual hearing than at an in-court hearing.

¹⁹ See Bandes & Feigenson, supra at 1321 (technological advances may improve participants' sense of presence and co-presence, and increased use of video conferencing may reduce feeling that online proceedings are unreal, but may also reflect resignation to diminished interactions); Diamond, Bowman, Wong, & Patton, supra at 898-900 (discussing improvements to picture quality and sound but noting that improvements do not address all concerns).

supra at 937-938 (study showed no significant evidence that judges adjudicated deportation cases more harshly via video conference, but showed televideo litigants exhibited "depressed engagement with the adversarial process" and were less likely to retain counsel or actively pursue alternative pathways to relief).

Nonetheless, the limited, but repeated, findings we have so far merit careful attention to the ways video conferencing may negatively affect defendants' rights in evidentiary hearings. This requires sensitivity to the subtle effects of the technology, and cautious application, particularly when a defendant is willing to remain in custody and waive his speedy trial rights until he or she can get a safe in-court hearing. The court's decision today reflects that caution, and for that reason I join it. My main reason for writing separately is to emphasize that, as virtual hearings become a fixture of the judicial process, judges must be keenly attentive not only to the proper functioning of the technology, but also to the ways the virtual setting subtly influences all participants -- including themselves.