ONGOING CONSTITUTIONAL CHALLENGES TO THE CRIMINAL JUSTICE SYSTEM AS A RESULT OF THE COVID-19 PANDEMIC

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ONGOING CONSTITUTIONAL CHALLENGES TO THE CRIMINAL JUSTICE SYSTEM AS A RESULT OF THE COVID-19 PANDEMIC

An update to the College's "Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic" *published July 29, 2020*

I. INTRODUCTION

On July 29, 2020, the American College of Trial Lawyers published a paper titled "Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic,"[1] which forecast constitutional considerations that logically flowed from various responses to the COVID-19 pandemic during the first half of 2020. The issues highlighted therein include the impact of pandemic risk mitigation measures on a defendant's Fifth Amendment right to indictment by grand jury and Sixth Amendment rights to a speedy and public trial, to the effective assistance of counsel, to a fair and impartial jury, to confront witnesses as well as statutory and state constitutional rights of victims.

The need to ensure continuing access to justice is no less urgent now than it was at the beginning of the pandemic. This update describes how courts, attorneys, and defendants have continued to confront the constitutional and logistical challenges to the functioning of the criminal justice system.

II. DISCUSSION

a. The Prospect of a New Emergency Federal Criminal Procedural Rule

While courts have used existing precedent, the CARES Act, and a patchwork of emergency orders to administer justice throughout the pandemic, blanket rules broadly permitting virtual proceedings are unlikely to be established because of their failure to satisfy a criminal defendant's right to confrontation. While initial appearances, arraignments and limited other proceedings may take place virtually with the defendant's consent, the Supreme Court has historically expressed skepticism that virtual proceedings could satisfy the Confrontation Clause. For example, in 2002, the Court declined to transmit a proposed Amendment to the Federal Rules of Criminal Procedure to Congress that would have allowed for videoconferencing in "exceptional circumstances . . . [with] appropriate safeguards for the transmission . . . [only where] the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)."[2] Justice Scalia filed a separate statement in which he said that he "share[d] the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to

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1 American College of Trial Lawyers, Position Statements and White Papers (July 29, 2020) (*available at* https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/2020---constitutional-protections-in-reopening-of-criminal-courts-in-the-pandemic.pdf?sfvrsn=cfe61769_6).

2 *Order of the Supreme Court*, 207 F.R.D. 89, 99 (2002) (appendix to statement of Breyer, J.).

transmit a Conference recommendation."[3] He also wrote that the proposal to allow the use of video transmission "whenever the parties are merely unable to take a deposition under Fed. R. Crim. Proc. 15" or using video "generally as an alternative to depositions" was "unquestionably contrary to the rule enunciated in [*Maryland v.*] *Craig*." According to Justice Scalia, "[v]irtual confrontation might be sufficient to protect virtual constitutional rights. I doubt whether it is sufficient to protect real ones."[4]

Recognizing the complexity of protecting constitutional safeguards in the face of the ongoing crises confronting the criminal justice system, the federal Advisory Committee on Criminal Rules is developing a new permanent Rule 62 that would permit limited departures from the existing rules during times of emergency.[5] The current draft of Rule 62 permits videoconferencing for certain proceedings for which a defendant has a right to be present, but explicitly excepts felony trials. The draft rule would also permit videoconferencing for felony pleas and sentencings, provided the defendant has an adequate opportunity to consult with counsel and consents. These departures require that appropriate findings of emergency conditions first be made.[6] Draft Rule 62 is likely to continue to be revised and is expected to be ready for publication by August of 2021. A formal opportunity for written public comments and possible testimony (if needed) would then ensue.

b. The Speedy Trial Act, Grand Juries, and Other Statutes Governing Timing of Proceedings

i. Use of the "ends of justice" provision of the Speedy Trial Act

As discussed in our first paper, the federal Speedy Trial Act (the "STA") ameliorates the strictness of its nominal 70-day time limit by providing exceptions for various periods of delay that must be "excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial . . . must commence."[7] These include § 3161(h)(7)(A), a broad and flexible provision authorizing the exclusion of "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel, or at the request of the attorney for the Government" if the judge finds that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The "ends of justice" provision has previously been relied upon by courts as a basis for granting continuances and exclusions of time under the STA in situations where a federal district court's ability to

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3 *Id.* at 93 (statement of Scalia, J.).

4 *Id.* at 94; *see also id.* at 96-97 (Joined by Justice O'Connor, Justice Breyer dissented from the decision not to transmit the proposed amendment. The crux of Justice Breyer's argument was that the proposed amendment would only apply to situations in which a witness was absent under the Federal Rules of Evidence and therefore the concerns about abridging a defendant's Confrontation Clause rights were "not obvious.").

5 *See, e.g.*, Advisory Committee on Criminal Rules Agenda Book, Draft New Rule 62 (Rules Emergency) pp. 121-155, Nov. 2, 2020 (*available at* https://www.uscourts.gov/sites/default/files/2020-11_criminal_rules_agenda_book.pdf).

6 *Id.*

7 18 U.S.C. § 3161(h).

conduct its normal operations was disrupted by natural disasters[8] or by terrorist attacks.[9]

Since the onset of the pandemic, federal district courts have relied upon the "ends of justice" provision in issuing general orders or continuances in individual cases that excluded time from the limits established by the STA when the courts were largely shut down.[10] As one judge noted in *United States v. Harris*,[11] "[t]he spread of COVID-19 and the resulting court closures have made § 3161(h)(7)(A) the exclusion of choice in recent months," with a number of courts adopting standard two-page form orders granting continuances based upon that provision. Among the many other examples of court decisions that based standing orders suspending all jury trials for varying periods of time on § 3161(h)(7)(A) are *United States v. Crittenden*,[12] in which the Middle District of Georgia imposed a 60-day moratorium on conducting jury trials, and *United States v. Diaz-Nivar*,[13] where a court in the District of New Hampshire, after describing successive standing orders postponing all jury trials from March 20 through August 1, 2020, made a finding that "issuing individual findings in each separate case would be redundant and unnecessary and a waste of scarce judicial resources." The Eastern District of Virginia likewise specifically held in a general order that the COVID-19 crisis supported an "ends of justice" exclusion of time from the STA clock.[14]

An "ends of justice" continuance must at least be reasonable in time, as the courts in *United States v. Lattany*[15] and *United States v. Huebner*[16] stated. The Ninth Circuit requires that such continuances must be "specifically limited in time."[17] In *Zedner v. United States*, the Supreme Court rejected a completely open-ended, prospective speedy trial waiver "for all time."[18] Courts have similarly relied upon the "ends of justice" provision to extend deadlines or exclude time periods with regard to the 30-day time limit set by § 3161(b) for either conducting a preliminary hearing or filing an indictment or information after a defendant is arrested based on a criminal complaint.[19]

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8 *See, e.g., Furlow v. United States*, 644 F.2d 764, 768-69 (9th Cir. 1981) (approving "ends of justice" continuance granted in the aftermath of the eruption of the Mount St. Helens volcano); *United States v. Richman*, 600 F.2d 286, 293 (1st Cir. 1979) (granting continuance and exclusion of time justified by delay caused by the "paralyzing" great blizzard of February 1978); *United States v. Scott*, 245 Fed. App'x 391, 394 (5th Cir. 2007) (continuance and exclusion of time was justified by the after-effects of Hurricane Katrina).

9 *United States v. Correa*, 182 F. Supp. 2d 326, 329 (S.D.N.Y. 2001) (delay caused by the impact of the 9/11 terrorist attacks on the functioning of the federal court in lower Manhattan).

10 N.D. Cal. General Order 72-1 dated Mar. 16, 2020; E.D. Cal. General Order 617, dated April 17, 2020 (*available at* http://www.caed.uscourts.gov/caednew/assets/File/GO%20617.pdf); E. D. Wash. General Order No. 20-101-1, dated March 18, 2020; W.D. Wash. General Order 07-20, dated April 13, 2020 (*available at* https://www.wawd.uscourts.gov/sites/wawd/files/09-04-20GOreFourthExtension.pdf); D. Nev. General Order 2020-03, dated March 16, 2020 (*available at* https://www.nvd.uscourts.gov/wp-content/uploads/2020/04/GO-2020-03-filestamped-signed.pdf).

11 460 F. Supp. 3d 973, 976 (E.D. Cal. 2020).

12 No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *2 (M.D. Ga. Aug. 21, 2020).

13 No. 20-cr-38-JD, 2020 WL 3848200, at *1 (D.N.H. July 8, 2020).

14 E.D. Va. General Order 2020-01, dated March 12, 2020 (*available at* https://www.vaed.uscourts.gov/sites/vaed/files/General%20Order%20No.%202020-01.pdf).

15 982 F.2d 866, 868 (3d Cir. 1992).

16 No. 3:12 CR 443, 2013 WL 6199599, at *2 (N.D. Ohio Nov. 27, 2013).

17 *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000).

18 547 U.S. 489, 502-04 (2006).

19 *See, e.g.*, E.D. Va. General Order 2020-3, dated March 16, 2020; *United States v. Carrillo-Villa*, 451 F. Supp. 3d 257, 259-61 (S.D.N.Y. 2020).

ii. Defense Response to Delays

Defendants have responded to these unprecedented circumstances in different ways. Some have sought to assert their rights to a speedy trial notwithstanding the novel circumstances presented by COVID-19, pressing that their cases be allowed to proceed promptly to trial, or moving to dismiss the charges against them if the court found that was not possible. Generally, arguments to dismiss indictments based on delays have not been successful. For example, in *United States v. Tapp*[20] and *United States v. Foley*,[21] the district courts rejected defendants' arguments that the delays in bringing the cases to trial caused by COVID-19 mandated dismissal of the indictments under both the Sixth Amendment's Speedy Trial Clause and the STA. Similarly, in *United States v. Reese*,[22] the court rejected a motion to dismiss the indictment where the defendant argued that "the COVID pandemic is not a sufficient ground" to support application of the STA's "ends of justice" exception.

In contrast, *United States v. Olsen*[23] presents an example of a case in which a defendant successfully moved to dismiss the indictment against him on speedy trial grounds during the COVID-19 pandemic. The district court in *Olsen* disagreed with the decision by the chief judge of the Central District of California not to summon a panel of jurors for the defendant's scheduled trial on October 13, 2020. Asserting that an "ends of justice" continuance should be granted only "if without a continuance, holding the trial would be *impossible,*"[24] the court in *Olsen* noted that a federal grand jury had continued meeting and returning indictments in the same courthouse where the defendant's trial was scheduled to be held over the summer, and that a state courthouse across the street from its federal counterpart had resumed holding trials in June and had since conducted 82 criminal and 4 civil jury trials. The court therefore granted the defendant's motion and dismissed the indictment with prejudice.[25] The court's decision in *Olsen* is now on appeal to the Ninth Circuit.[26]

Other defendants have contended that they cannot receive a fair trial under the conditions resulting from the coronavirus pandemic and therefore their cases should be continued until circumstances return to something more normal. Attempts to secure often lengthy postponements based on COVID-19 have been met with varying results. In *United States v. Lamb*,[27] the district court readily granted a joint request by eight defendants that their trial be postponed from September 28, 2020, to a date on or after August 1, 2021. Individual defendants fared less well with similar requests in *United States v. Trimarco*[28] and *United States v. Donziger*,[29] where the courts denied requests for continuances.

The defendant in *Trimarco* took a particularly assertive approach, moving to delay his October 13, 2020 trial date "indefinitely until some indeterminate time in the future

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20 No. 19-35, 2020 WL 6483141, at *1-2 (E.D. La. Nov. 4, 2020).
21 No. 18-CR-333 (VLB), 2020 WL 6198949, at *6-10 (D. Conn. Oct. 22, 2020).
22 No. 19-cr-0149 (WMW/KMM), 2020 WL 5097041, at *2-3 (D. Minn. August 28, 2020).
23 No. SACR 17-00076-CJC, 2020 WL 6145206 (C.D. Cal. October 14, 2020).
24 *Id.* at *4 (citing 18 U.S.C. § 3161(h)(7)(B)(1)).
25 *Id.* at *4-8.
26 *Id.*, *appeal docketed*, No. 20-50329 (9th Cir. Nov. 13, 2020).
27 No. 5:19-cr-25 RWS, 2020 WL 5269535, at *2 (E.D. Tex. Sept. 4, 2020).
28 No. 17-CR-583 (JMA), 2020 WL 5211051 (E.D.N.Y. Sept. 1, 2020).
29 No. 19-CR-561 (LAP), 2020 WL 4747532 (S.D.N.Y. Aug. 17, 2020).

– months and possibly even years away – when the trial 'can be conducted in a manner that is as close to normal as possible.'"[30] The district court rejected the idea that the various rights to which a criminal defendant was entitled under the Constitution and federal law included "an ironclad veto that allows defendants to postpone their trials until some indeterminate point in the future because of the COVID-19 crisis."[31] The Court considered, but found no merit to, various objections raised by the defendant to proceeding to trial as scheduled. These included that his 79-year-old father would be unwilling to attend the trial for fear of contracting the coronavirus; that only members of the public who were willing to risk contracting the virus would attend the trial; that the composition of the jury might be unrepresentative because older persons and those with pre-existing health conditions would either refuse to appear or would ask to be excused; that his counsel would be unable to fully assess the reactions of mask-wearing jurors, both during the jury selection process and during the trial itself, and that jurors would likewise be unable to fully assess his own reactions to the evidence and demeanor during the trial; and that witnesses might decline to be interviewed.[32] In reaching this ruling, the Court stressed that the defendant's case had already been pending for close to three years and that it was unclear when matters would return to "normal," or whether some uncertain "new normal" would persist well into the future. It further noted that postponements "increase[] the likelihood that witnesses may become unavailable or uncooperative, or their memories may fade."[33]

iii. Grand juries

Many courts eventually resumed grand jury meetings on a limited basis by spacing grand jurors out in courtrooms, using plexiglass barriers, and imposing rigorous cleaning requirements. Still, the normal business of investigating and charging criminal cases in both federal and state courts was significantly disrupted for an extended period of time.[34]

The pandemic-related inability of federal prosecutors to obtain an indictment from a sitting grand jury has significant implications with regard to (1) the potential requirement of holding a preliminary hearing under 18 U.S.C. § 3060 and Rule 5.1 of the Federal Rules of Criminal Procedure; (2) the 30-day time deadline for securing an indictment or filing an information under § 3161(b) of the STA; and (3) the prosecution of individual charges or even entire cases if a statute of limitations deadline was looming when the pandemic forced the court system to suspend its operations.

Rules 5.1(a) and 5.1(c) provide that once a defendant is arrested or appears pursuant to a summons issued by the court, the court must hold a preliminary hearing to evaluate whether the charge is supported by probable cause unless the defendant waives this right; the government obtains an indictment from the grand jury; or it files an information[35] with the defendant's

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30 No. 17-CR-583 (JMA), 2020 WL 5211051, at *1.

31 *Id.* at *1, *7.

32 *Id.* at *2-7.

33 *Id.* at *7.

34 *See, e.g.*, *United States v. Kane*, No. MJ20-5054-BHS-TLF, 2020 WL 6434792, at *1, *5 (W.D. Wash. June 9, 2020) (Report and Recommendation of magistrate judge noted that federal grand juries in that district were successively suspended from at least March 6 through August 3, 2020); *United States v. Briggs*, 471 F. Supp. 3d 634, 634 (E.D. Pa. July 9, 2020) (federal grand juries in the district were successively suspended from at least mid-March through mid-July); *United States v. Santacruz-Cortes*, No. 20-08566MJ-001-TUC-MSA, 2020 WL 3884509, at *1 (D. Ariz. July 9, 2020) (federal grand juries in the district were suspended from March 16th "until further order of the Court").

35 An information is a charging document similar in form to an indictment, but it is issued upon the authority of the prosecutor's

consent within either 14 or 21 days, depending on whether the defendant is in custody. However, Rule 5.1(d) provides that judges also have the authority to extend those time limits even without the defendant's consent if the government makes a showing that "extraordinary circumstances exist and justice requires the delay." Under 18 U.S.C. § 3060(d), the government's failure to comply with these requirements requires that the defendant be discharged from custody or from any other release conditions the court has imposed, although this does not preclude the government from subsequently re-filing the charges.

During the pandemic, court responses to government requests to extend the time period for holding a preliminary hearing due to the unavailability of grand juries have been varied. A number of courts, including the Eastern District of New York, the Western District of Washington, the District of New Jersey, and the District of Nebraska, simply issued standing orders excluding time periods when court operations were suspended or grand juries were not available from the time calculations required by Rule 5.1(c) or the STA.[36] Some courts have readily granted government requests to extend the time within which a preliminary hearing must be held or an indictment or information filed pursuant to the thirty-day time limit imposed by § 3161(b), reasoning that the pandemic and the resulting suspension of grand juries readily qualified as an "extraordinary circumstance[]" under Rule 5.1(d) and/or also met the STA's "ends of justice" standard for excluding time under § 3161(h)(7)(B).[37] In contrast, the district court in *United States v. Elms*[38] held that because the CARES Act had authorized the use of video and telephone conferencing for criminal proceedings during the course of the COVID-19 emergency, a magistrate judge had erred in ruling that the deadlines for holding a preliminary hearing and returning an indictment should be extended. Because no preliminary hearing had been held within the time limits established by Rule 5.1(c), the court ordered the defendants released from custody and the case closed.

Turning to the time limits for returning an indictment or securing an information imposed by the STA, § 3161(b) provides that when an individual is charged with an offense based upon a criminal complaint and is either arrested or presented with a summons, an indictment or information must be filed with 30 days of that date, unless no grand jury was in session during that period, in which event the time period is extended for an additional 30 days.[39] Even aside from the 60-day exclusion expressly provided by the statute during periods when no grand jury is in

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office, rather than the grand jury. A defendant may only be prosecuted based upon an information if he knowingly waives his right to proceed by indictment after a hearing in open court. Fed. R. Crim. P. 7(b). Rule 5.1(a)(3) expressly provides that the defendant must consent to the filing of the information in accordance with Fed. R. Crim. P. 7(b) in order for it to make holding a preliminary hearing unnecessary.

36 *United States v. Carrillo-Villa*, 20 Mag. 3073, 2020 WL 1644773, at *3 n.3 (S.D.N.Y. Apr. 2, 2020); *United States v. Lev*, MAGISTRATE NO. 17-3195, 2020 WL 2615477, at *1 (D.N.J. May 22, 2020) (discussing standing orders entered in New Jersey). See also *supra*, at 4-5.

37 *See, e.g., Carrillo-Villa*, 2020 WL 1644773, at *2-*3 (noting that "on March 31, 2020, the only remaining active grand jury in the Southern District of New York failed to secure the quorum necessary to vote on indictments" and further stressing that "there is no realistic scenario under which a grand jury can be convened in the near future"); *United States v. Munoz*, No. 20MJ1138-MDD, 2020 WL 1433400, at *1 (S.D. Cal. Mar. 24, 2020).

38 457 F. Supp. 3d 897, 901-05 (D. Nev. 2020).

39 Historically, federal grand juries were not necessarily in session year-round in all federal judicial districts, and the federal rules of criminal procedure and the provisions of the federal criminal code include a number of provisions reflecting this. *See, e.g.*, 18 U.S.C. § 3161(b); § 3288 ("if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed . . . ."); *Id.* § 3331(a) ("In addition to such other grand juries as shall be called from time to time . . . ."); Fed. R. Crim. P. 6(a)(1) (grand juries may be summoned "[w]hen the public interest so requires") and Advisory Committee Note to Subdivision (a) (1944). The provisions authorizing the government to issue an information and to rely upon that to meet certain deadlines were likely a response to this circumstance.

session, however, courts have generally shown themselves extremely reluctant during the pandemic to dismiss complaints filed against a defendant based upon the government's inability to secure an indictment within the time limits otherwise specified by the STA.[40] This reluctance is grounded on the standing orders issued by many federal courts based upon the STA's "ends of justice" provision that excluded time periods when court operations were suspended, and because authority that long pre-dates the pandemic recognizes that the STA's "ends of justice" standard is far more flexible and less rigorous than is the "extraordinary circumstances" standard imposed by Rule 5.1(d) for continuing a preliminary hearing.[41]

Even if a defendant can continue to be held on a complaint while no grand juries are sitting in a district, the Fifth Amendment's grand jury clause provides that "[n]o person shall be held to answer" for a felony offense – i.e., proceed to trial – except on an indictment returned by a grand jury. Of course, any constitutional right may be waived, provided the waiver is knowing and voluntary.[42] Fed. R. Crim. P. 7(b) therefore clarifies that a felony offense may be prosecuted by an information "if the defendant – in open court and after being advised of the nature of the charge and of the defendant's rights – waives prosecution by indictment." But virtually no defendants make the choice to waive indictment under normal circumstances, and they would be even less likely to do so when the government is hamstrung by the absence of a sitting grand jury from obtaining an indictment on which they could actually be taken to trial. Thus, for as long as the pandemic persists, the prosecution and criminal defendants may find themselves at an impasse in which the defendant is unable to secure the dismissal of the charges against him or her based upon the STA, but the government is equally unable to secure an indictment and proceed to trial because of the unavailability of a functioning grand jury. That state of limbo could conceivably continue until the pandemic is brought under control.

Particularly in the federal judicial system, where courts have suspended grand juries without tolling criminal statutes of limitations, prosecutors might raise the doctrine of equitable tolling in an effort to salvage otherwise time-barred prosecutions. Equitable tolling – which is typically asserted in civil cases or in support of *habeas* petitions that fall beyond the limitations period – applies in those "rare instances where – due to circumstances external to the party's own conduct – it would be unconscionable to enforce the limitation against the party and gross injustice would result."[43] The Supreme Court has stated that "[o]rdinarily limitations statutes use fairly simply language, which one can often plausibly read as containing an 'equitable tolling' exception."[44] Accordingly, 18 U.S.C. § 3282 and similar criminal limitations statutes may also be read to contain an equitable tolling exception. The party asserting equitable tolling must demonstrate (1) that he or she exercised reasonable diligence in pursuing their rights, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing of the action.[45]

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40 *Kane*, 2020 WL 64344792, at *1, *5; *Briggs*, 2020 WL 3899279, at *1; *Santacruz-Cortes*, 2020 WL 3884509, at *1; *Lev*, 2020 WL 2615477, at *3-4.

41 *United States v. Gurary*, 793 F.2d 468, 473 (2d Cir. 1986).

42 *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917); *Barkman v. Sanford*, 162 F.2d 592, 594 (5th Cir. 1947).

43 *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*).

44 *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

45 *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Bates v. United States*, No. ELH-13-512, 2019 WL 427321, at *3 (D. Md. Feb. 4, 2019).

The unusual circumstances created by the COVID-19 pandemic might seem particularly appropriate for application of the equitable tolling doctrine in criminal cases – and, indeed, equitable tolling considerations clearly underlie some courts' decisions to toll statutes of limitations in criminal cases. For example, the Massachusetts Supreme Judicial Court issued a series of orders tolling the running of statutes of limitations in criminal cases for a period that ultimately extended at least from March 17th through October 23rd, "because of the limited availability of grand juries."[46]

In the absence of court orders tolling statutes of limitations while grand juries are suspended, an alternative approach to preserving criminal charges has been pursued by federal prosecutors in at least two federal criminal cases since the pandemic commenced. In *United States v. Holmes*[47] and *United States v. Briscoe*,[48] prosecutors sought to satisfy limitations requirements and preserve potentially time-barred charges by filing an information within the statutory period, with the intention of subsequently replacing it with an indictment once grand juries resumed their sessions in those districts. This approach relies upon the language of 18 U.S.C. § 3282(a), the primary limitations provision for non-capital offenses in the federal criminal code, which states that "no person shall be prosecuted, tried, or punished for any offense, not capital, *unless the indictment is found or the information is instituted* within five years next after such offense shall have been committed."[49] But as noted above, *supra* p. 12, Rule 7(b) of the Federal Rules of Criminal Procedure provides that no individual "may be prosecuted by information" – whether by way of a guilty plea or by means of a trial – unless the defendant "waives prosecution by indictment" in open court after being advised of the nature of the charge and of his or her rights to require that an indictment be returned by the grand jury.

As might be expected, there is limited authority on this issue, and the few federal judges who have addressed this question have reached somewhat different conclusions. But the clear majority of federal courts that have considered it have concluded that a proceeding can be "instituted" simply by filing an information with the court,[50] without it being accompanied by a written waiver and without having the formal court proceeding contemplated by Rule 7(b). In the view of these courts, the formal court hearing addressed in Rule 7(b) is necessary before the charges can go forward to be litigated or resolved based upon an information rather than an indictment, but the proceeding can be commenced or started, and the running of the limitations period stopped, based purely upon the filing of an information with the court.

Since the pandemic commenced, two federal district courts have held that if the prosecution files an information prior to the expiration of the limitations period, that suffices to toll the running of the statute. The first of these cases, *United States v. Briscoe*,[51] involved the filing of narcotics trafficking and firearms possession charges (all of which were subject to a five-

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46 Massachusetts Supreme Judicial Court Fourth Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the Covid-19 (Coronavirus) Pandemic, dated September 17, 2020, ¶ 14 (https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-fourth-updated-order-regarding-court-operations#10-continuances-and-speedy-trial-computations).

47 No. 18-cr-00258-EJD, 2020 WL 5500425 (N.D. Cal. Sept. 11, 2020).

48 No. RDB-20-0139, 2020 WL 5076053 (D. Md. Aug. 26, 2020).

49 18 U.S.C. § 3282(a) (emphasis added).

50 Note, however, that under both §§ 3281 and 3282(a), a capital charge may not be brought by means of an information.

51 2020 WL 5076053, at *1.

year statute of limitations) arising out of a suspected drug-related homicide in which the defendant was believed to have murdered a mother and her seven-year-old son on May 28, 2015. By the time the government was ready to charge and arrest the defendant in late May 2020, all federal grand juries had been suspended in the District of Maryland since the middle of March. The government therefore obtained a criminal complaint from a federal Magistrate Judge and then followed up by filing an information against the defendant on May 26th after he was taken into custody. A little over a month later, when limited grand jury sessions were resumed in early July, the government obtained a three-count indictment that tracked the charges previously brought in the information. The defense moved to dismiss, arguing that the statute of limitations had expired on May 27th, notwithstanding the government's filing of an information the day before. The district court denied the defense's motion. The Court found that:

> The terms "prosecuted" and "instituted" are not equivalent. An information is "instituted" when it is properly filed, regardless of the Defendant's waiver. Further prosecutorial actions – such as a trial or a plea agreement – would require waiver, ads Rule 7(b) sets forth. This interpretation comports with the plain language of the statute and Rule, and is consistent with the majority view of those Courts which have addressed this issue.[52]

The court similarly rejected a due process claim advanced by the defendant, noting that "most importantly, the delay in this matter is attributable to the COVID-19 pandemic, not to any tactical maneuvering," and adding that "[t]he suspension of these proceedings, though necessary to safeguard the public health, is equally detrimental to the Government and the Defendant."[53]

A similar defense argument fared no better in *United States v. Holmes*,[54] a prosecution arising out of the collapse of the health sciences company Theranos that was chronicled in the best-selling book Bad Blood: Secrets and Lies in a Silicon Valley Start-up.[55] In *Holmes*, the government originally indicted the two defendants in September 2018. In the spring of 2020, it determined to supersede the indictment and add two additional wire fraud charges, as to which the statute of limitations would expire in mid-May 2020. Because grand juries were suspended in the Northern District of California at the time, the government filed a superseding information with the new charges on May 8th, after having previously notified the defense of its intention to do so and having provided defense counsel with a draft of the proposed superseding information.[56]

The defense moved to dismiss the two new charges, arguing that the filing of a "waiverless" information did not suffice to toll the running of the statute of limitations. The district court disagreed, reasoning that "[i]t does not follow . . . that an information must be effective for all prosecutorial actions in order for it to toll the statute of limitations. . . [T]he Court holds that the filing of an information without an accompanying waiver is sufficient to toll the statute of limitations – even though it may not be effective for all purposes."[57]

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52 *Id.* at *2 (citations omitted).
53 *Id.* at *3.
54 2020 WL 5500425, at *1.
55 John Carreyrou, (2018).
56 *Id.* at *1-2, *8.
57 *Id.* at *8.

The court in *Holmes* likewise noted that this holding was supported by "the plain language of the statute" and was consistent with "the majority of those courts which have addressed this precise issue . . . ."[58] Finally, it stressed that the central policy underlying statutes of limitations was that of providing notice to the defendant, and that this function was as effectively accomplished by an information as by an indictment, at least where the information was publicly filed, especially where other steps had been taken to timely give notice to the defense, as the prosecution had done in *Holmes*.[59]

While the district courts in *Briscoe* and *Holmes* took the position that potentially time-barred charges can be preserved by filing a "waiverless" information, the district court in *United States v. B.G.G.* held that the information did not "institute" proceedings for purposes of tolling the statute of limitations.[60] In *B.G.G.*, the prosecution moved to dismiss its own information without prejudice, after filing it for the purpose of tolling the statute of limitations. The court rejected the motion, instead dismissing the information *with prejudice*. The court conducted a study of the legislative meaning of "instituted," and concluded that proceedings were not instituted because "§ 3282 presupposes that an instituted information can initiate a criminal prosecution."[61] The court noted that while Congress may make exceptions to constitutional norms, "in March of 2020 when the Department of Justice asked [Congress] to suspend criminal statutes of limitations during the coronavirus pandemic and for one year thereafter, Congress declined to make such a special dispensation."[62]

In any case, it is unclear how often prosecutors will find it necessary to resort to this approach in the future. Most federal courts now appear to be trying to maintain at least some degree of grand jury operations going forward, thereby enabling charges to be presented and indictments to be obtained when limitations periods are on the verge of expiring.

The promise of a safe and effective vaccine for the coronavirus offers encouragement to all participants in both the state and federal criminal justice systems that better days lie ahead. As long as the virus and the risk of contagion persists at a substantial level, efficient court operations will be significantly impacted. And with the backlog of cases awaiting trial that have accumulated during the course of the pandemic to date, defendants and their counsel will likely continue to press constitutional and statutory speedy trial claims, particularly in cases where it is possible to demonstrate that some specific prejudice resulted from pandemic-caused delay.

c. Access to counsel

The public health and logistical challenges precipitated by the pandemic may inhibit access to counsel entirely. Lawyers, especially those who by age or underlying conditions are vulnerable to infection, may be reluctant to represent defendants in settings exposing them to risk of contracting COVID-19.[63] Defendants represented by counsel in high-

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58 *Id.* at *9-10.
59 *Id.* at *9.
60 Order of Dismissal, *United States v. B.G.G.*, No. 20-80063-CR-MIDDLEBROOKS (S.D. Fl. January 11, 2021) (DE 19).
61 *Id.* at 12.
62 *Id.* at 19.
63 Paul Duggan, *Maryland Public Defender Complains of 'Superspreader' Court Hearings*, Washington Post (November 24, 2020)

risk categories also face the probability that their counsel may be compelled to withdraw to avoid exposure to illness.

Access is particularly impaired where there exists a substantial "digital divide." According to the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race.[64] Americans who live in rural communities are also less likely to have access to broadband internet. The same is true for people with disabilities, who may also require special technology to engage in online activities such as remote court proceedings.[65]

The closing of businesses and libraries – ordinarily areas where clients could access the internet – likewise poses a hurdle for contacting counsel. Unemployment may hinder a defendant's ability to pay phone and internet bills. Pretrial release provisions (especially in internet crime prosecutions), seizure of a defendant's computers and cell phones, and restrictive discovery policies also impede a client's ability to review sometimes voluminous discovery materials and exhibits, locate potential witness, assist with pretrial investigation, prepare for testifying and cross-examination, or evaluate proposed plea agreements.[66]

Social and psychological research shows that "people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. When decision makers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant."[67] In-person meetings are critical to the lawyer's duty to establish trust and confidence with their clients and to assure the lawyer's ability to evaluate the client's capacity to understand the proceedings.[68]

d. The Pandemic's Impact on the Sixth Amendment Right to an Impartial Jury Drawn from a Fair Cross-Section of the Community

As experience with COVID-19 has increased, The Centers for Disease Control and Prevention (CDC) have reported that "racial and ethnic minority groups are disproportionately represented among COVID-19 cases."[69] In particular, the CDC has noted that most studies "found a higher percent of hospitalized patients were non-Hispanic Black or Hispanic or Latino people than

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(*available at* https://www.washingtonpost.com/local/public-safety/maryland-court-hearings-covid/2020/11/24/75c62d68-2e86-11eb-96c2-aac3f162215d_story.html).

64 Anderson and Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center: Fact Tank (May 7, 2019) (*available at* https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/).

65 Bannon and Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Center for Justice, New York University School of Law, (September 10, 2020) ("Roughly three-in-ten adults with household incomes below $30,000 a year (29%) don't own a smartphone. More than four-in-ten don't have home broadband services (44%) or a traditional computer.") (*available at* https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court).

66 For example, pretrial discovery policies in the districts of Iowa bar counsel from copying and disseminating discovery materials.

67 Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant," 78 *Tulane Law Review* 1089*,* 1118 (2004).

68 See *Criminal Justice Standards and Best Practices During the COVID-19 Pandemic*, Federal Defenders, CJA Panel Representatives for the SDNY and EDNY, and New York Council of Defense Lawyers (May 2020); Poulin, 78 Tulane L. Rev. at 1129.

69 Centers for Disease Control and Prevention, COVID-19 Racial and Ethnic Health Disparities, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-illness.html (December 10, 2020).

non-Hispanic White people."[70] These studies found that patients who were hospitalized with lab-confirmed COVID-19 were disproportionately Black (44% of patients) and Hispanic or Latino (36% of patients), while whites made up only 16% of hospitalized patients.[71] Similarly, the CDC has noted that "Hispanic or Latino, non-Hispanic Black, and non-Hispanic American Indian or Alaska Native people also have a disproportionate burden of COVID-19 deaths among specific age groups across the lifespan – children, youth, adults, and older adults."[72]

COVID-19's disproportionate effect on certain populations, including racial and ethnic minorities, has therefore raised concerns about whether it will be possible for the courts to continue to assemble jury pools or venires that reflect a fair cross-section of the community, as mandated by Supreme Court precedent and the Jury Selection and Service Act.[73] If courts readily agree to excuse high-risk individuals who are disproportionately members of certain ethnic or racial groups or age categories, that could potentially produce a significant under-representation of those groups within the pools of potential jurors that are required to constitute a fair cross-section of the community.

Over the course of the past several months, as jury trials resumed in many federal districts to at least a limited degree, and new grand juries in some cases were impaneled for the first time under the novel circumstances presented by the pandemic, many defense attorneys filed motions raising fair cross-section issues. These motions typically seek the production of records relating to any changes courts have made in their procedures for summoning prospective jurors as a result of the pandemic as well as extensive demographic information relating to the jurors who reported and those who either failed to do so or who sought exemptions. Because of the JSSA's provision (28 U.S.C. § 1867(f)) authorizing the parties to a case to have access to these jury selection records, the courts have generally granted defendants most of what they asked for, although requests for the names and other personal identifying information (PII) of individual venire members have often been denied, presumably being viewed as both unnecessary and as involving an unwarranted intrusion into citizens' personal privacy.[74] In addition, where courts have approved disclosure of juror information to the defense, they have often coupled that disclosure with the entry of a protective order that, *inter alia*, prohibits the defense from making use of the information for any purpose other than making a fair cross-section challenge, such as using it in connection with jury selection.[75]

Because most of these defense requests seeking to compel the production of information were filed between July and mid-December, few if any courts to date have resolved defense motions that either requested postponements of trials or dismissals of indictments on the grounds that the courts' procedures for summoning jurors during the pandemic had not produced jury venires that represented a fair cross-section of the court's community.

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70 Centers for Disease Control and Prevention, COVID-19 Racial and Ethnic Health Disparities, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-hospitalization.html (December 10, 2020).

71 *Id.*

72 Centers for Disease Control and Prevention, COVID-19 Racial and Ethnic Health Disparities (December 10, 2020) (*available at* https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-deaths.html).

73 28 U.S.C. § 1861 *et seq.*

74 *See, e.g., United States v. Shader*, 472 F. Supp. 3d 1, 5-7 (E.D.N.Y. 2020); *United States v. Madison*, No. 6:17-cr-15-Orl-37LRH, 2020 WL 6134669, at *1 (M.D. Fla. Oct. 19, 2020); *United States v. Sullivan*, No. 3:20-cr-00337-WHO-1, 2020 WL 5944433, at *2-5 (N.D. Cal. Oct. 7, 2020); *United States v. Holmes*, No. 18-cr-00258-EJD-1, 2020 WL 5408163 (N.D. Cal. Sept. 9, 2020); *United States v. Corbett*, No. 20-cr-213(KAM), 2020 WL 5803243, at *4 (E.D.N.Y. Aug. 21, 2020).

75 *See, e.g., Shader*, 472 F. Supp. 3d at 6-7 ("The materials may not be used for purposes of jury selection.").

The federal District of Maryland's Standing Order 2020-19 (issued on October 22, 2020)[76] provides an example of how one court has dealt with the challenges posed by COVID-19 without singling out distinctive groups who are at greater risk of infection. The Order states expressly that "Random selection of prospective jurors from the Qualified Jury Wheel shall be conducted without deviation from the Court's usual procedures, pursuant to the Jury Selection Plan." Beyond the standard procedures for excluding prospective jurors who demonstrate that service would cause them undue hardship or extreme inconvenience, the Court's Order further provides:

> [F]or the duration of the pandemic, the Clerk shall also grant a deferral of service to any prospective juror who requests a onetime deferral of service and who answers in the affirmative to one or more of the COVID-19 Juror Questionnaire's supplemental screening questions. . . . [T]hese supplemental screening questions are:
>
> 1) Do you have an underlying health condition that puts you at a higher risk of developing serious health complications from COVID-19?
>
> 2) Do you live with or provide direct care for a person of any age with underlying medical conditions that puts them at a higher risk of developing serious health complications from COVID-19?
>
> 3) Are you age 65 or older?

Notably, under the District of Maryland's plan, the Jury Clerk is left with no discretion in granting a onetime deferral of service to any juror who has answered affirmatively to one of the Court's three COVID-19 screening questions. In the Eastern District of Virginia, an order that based much of its planning for the resumption of criminal jury trials on its ability to draw jurors from a fair cross section of the community reflects substantial consideration of concerns expressed by defense counsel about the resumption of jury trials.[77]

It accordingly remains to be seen whether, when the demographic data is evaluated in particular cases, underrepresentation of distinctive groups that is of constitutional magnitude will manifest itself.

e. COVID-19 Safety Measures and the Confrontation Clause

Maryland v. Craig held that limitations on the Sixth Amendment right to confrontation are only proper where they are "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[78] As various safety measures were implemented in response to the COVID-19 pandemic, courts began applying the *Craig* test when faced with challenges to mask mandates and the use of video conferencing. Courts have also relied on analogous previous holdings that partial face coverings do not violate the Sixth Amendment.

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76 (*available at* https://www.mdd.uscourts.gov/sites/mdd/files/2020-19.pdf).

77 E.D. Va. General Order No. 2020-19 (June 30, 2020), (*available at* https://www.vaed.uscourts.gov/sites/vaed/files/Gen%20Order%202020-19%20-%20Resumption%20of%20Criminal%20Jury%20Trials.pdf).

78 497 U.S. 836, 850 (1990)

In *United States v. James*, the court found that masks did not violate a defendant's right to confront the witnesses against him.[79] The District of Arizona mandates that "all persons attending jury trials conducted in the Phoenix courthouse wear masks and practice social distancing, except as authorized by the presiding judge."[80] The defendant objected, based on, among other things, the ineffectiveness of masks, generally, and his Sixth Amendment right to confrontation. The court evaluated then-current CDC guidelines and overruled the objection to the efficacy and safety of masks because "[t]he modest sacrifice of donning a face mask mitigates for all trial participants the risk of transmission of a potentially deadly or disabling virus."[81]

The court next analyzed the Confrontation Clause argument by applying the *Craig* two-pronged test. The court held that the first prong was satisfied because, while the mask mandate denied the defendant the ability to observe a witness's nose and mouth movements, the mandate was "necessary to further an important public policy: ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic.'"[82] As for the second prong of the Craig analysis – reliability – the court held that the only element that the mask protocol would interfere with is observation of demeanor, and the obfuscation of only the nose and movement of the mouth did not "significantly obstruct the ability to observe demeanor." Specifically, the court explained that "[t]he Confrontation Clause does not require that the jury be able to see a witness's entire face or body."[83]

Perhaps the most robust analysis so far of the effect of COVID-19 protocols on a defendant's Sixth Amendment rights, including but not limited to the right to confrontation, came in *United States v. Crittenden.*[84] Significantly, *the government* objected to the court's mask requirement out of concern that "by requiring witnesses to wear a mask that covers their nose and mouth during their testimony, the Court may infringe upon the Defendant's confrontation clause rights.[85] The court held that "the mask requirement is necessary to further an important public policy: ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic."[86] The court held that all the *Craig* factors were present, including the ability of the trier of fact to observe the witness's demeanor despite their nose and mouth being covered by the mask.[87]

The *Crittenden* court compared its masking procedure to the accommodation at issue in *Coy v. Iowa*, in which the Supreme Court found a courtroom procedure which involved placing a large screen between the defendant and witness to shield the defendant from the witness violated the Sixth Amendment's Confrontation Clause, and held that its masking procedure was not nearly as severe.[88] The court reasoned that "[t]he only thing that will stand in the way of the Defendant and his accusers is a tiny piece of cloth covering only each witness's nose and mouth." While the court acknowledged that a mask would eliminate the jurors' ability to observe a witness's nose and

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79 No. CR1908019001PCTDLR, 2020 WL 6081501 (D. Ariz. Oct. 15, 2020).
80 *Id.* at *1.
81 *Id.*
82 *Id.* at *2 (quoting *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 491773, at *6 (M.D. Ga. Aug. 21, 2020)).
83 *Id.*
84 No. 4:20-CR-7 (CDL), 2020 WL 4917733 (M.D. Ga. Aug. 21, 2020) (The court also addressed arguments that a mask mandate infringed upon the Sixth Amendment right to an impartial jury and the right to assistance of counsel. All such rights were analyzed against the defendant's right to a speedy trial.).
85 *Id.* at *5.
86 *Id.* at *6.
87 *Id.*
88 *Id.*

movements of their mouth, it held that the Sixth Amendment does not require that the jury be able to see a witness's every physical cue.[89] In conclusion, the court held that "observation of demeanor by the jury cannot be an irreducible constitutional requirement and must be subject to exception in certain circumstances." *Id.*

Recently, the Southern District of New York instituted the use of plexiglass encasements around attorney tables, jurors, and court personnel, as well as the attorney podium. That practice was challenged in *United States v. Petit.*[90] The court required that all jury trials take place in one of its two largest courtrooms in order to account for proper social distancing, which included placing jurors in a second jury box. The court encased the attorney podium and witness box in plexiglass, including overhead, in order to ensure that witnesses could testify and attorneys could examine without masks obstructing their faces. The defendants argued that the court's COVID-19 re-entry procedures violated the Confrontation Clause of the Sixth Amendment, specifically because "'a juror sitting 60 or more feet from a witness encased in a plexiglass cube with light reflecting off it and creating a glare likely cannot make an informed assessment of the witness's testimony[,]'" and that the encasement surrounding the attorney podium will interfere "'with an examiner's ability to observe witnesses' demeanor.'"[91]

The court disagreed, holding that "[t]he Clause's 'preference' for face-to-face confrontation, however, is just that – a preference – one that 'must occasionally give way to considerations of public policy and the necessities of the case.'"[92] Further, the court stated that "the defendants imagine a Confrontation Clause that transforms minor inconveniences into constitutional violations," positing that the Confrontation Clause "is far less sensitive to perceptual disturbances than is supposed by the defendants." In doing so, the court analogized Morales v. Artuz,93 in which the Second Circuit "expressed doubt that permitting a witness to testify behind the disguise of dark sunglasses violated the Confrontation Clause." Ultimately, the court determined that the encasements posed only "a minimal threat to the jurors' opportunity to assess the credibility of witnesses" at trial and that such a "minimal disturbance is vastly outweighed by the compelling interest in resuming criminal trials and the compelling need to do so safely."[94] Finally, the court held that "the Speedy Trial Act … which instructs courts to promote the 'swift administration of justice,' . . . militates against another adjournment."[95]

On June 17, 2020, the District of Montana held that allowing witnesses to testify via videoconference was insufficient to satisfy a defendant's Sixth Amendment confrontation clause

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89 *Id.* at *7. The *Crittenden* court cited three cases which are analogous to a mask mandate, generally. *See Morales v. Artuz*, 281 F.3d 55, 56, 60-61 (2d Cir. 2002) (finding that permitting a witness to testify while wearing dark sunglasses was not contrary to clearly established federal law because it "resulted in only a minimal impairment of the jurors' opportunity to assess her credibility"); *United States v. de Jesus-Castaneda*, 705 F.3d 1117, 1120-21 (9th Cir. 2013) (finding that permitting a confidential informant to testify wearing a wig and fake mustache did not violate the Confrontation Clause); *People v. Ketchens*, No. B282486, 2019 WL 2404393, at *9 (Cal. Ct. App. June 7, 2019) (finding a jury could adequately observe the demeanor of a witness who testified while wearing a hijab when the hijab was tight around her mouth and ultimately did not prevent the jurors from seeing her nose and eyes).

90 No. 19-cr-850 (JSR), 2020 WL 6131423 (S.D.N.Y. Oct. 19, 2020).

91 *Id.* at *3 (quoting Def. Mem. 11-12).

92 *Id.* at *3 (quoting *Maryland v. Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157 (1990)).

93 281 F.3d 55, 62 (2d Cir. 2002)

94 *Petit* at *4.

95 *Id.* (internal citation omitted).

rights in United States v. Casher.[96] The court, applying Maryland v. Craig, found that the ability to come in person made the denial of confrontation inherent in videoconferencing not "necessary" to further its health and safety policy.[97] The court evaluated the witnesses' concerns against the practical realities at the time, noting that that the per-capita infection rate in Montana was the second-lowest nationally.[98] Accordingly, the court denied the motion to quash, tentatively requiring the witnesses to still appear in person with the understanding that the court would continue to monitor the pandemic and related health guidance in the days leading up to the trial.[99]

f. The Rights of Victims and the Public

District courts vary in conducting proceedings in person or remotely through video/telephonic conferencing, or both. There is also much variation among the districts in providing detailed information to the public about how exactly to access those court proceedings. For example, the Southern District of Alabama requires the public to apply for access to hearings that proceed via video teleconferencing through a registration link on their webpage, and the viewer must request access to each individual hearing.[100] In the Southern District of Florida, the public may access the court proceedings via telephone conference. The process requires calling a toll-free number and entering an access code. The Eastern District of Kentucky requires the public to search the courts' calendars and review the various dockets. [101] If the docket states "videoconference," no further information regarding access is provided. A non-party wishing to observe the hearing must come to the courthouse and watch the hearing from the courtroom, even though one or more of the parties may be appearing by video conference.

At the state level, the National Center for Supreme Courts has established a public health emergency page on its website dedicated to the "Coronavirus and the courts."[102] Oregon provides a public access guide, a calendar with links to hearings for that day, and allows members of the public to join as "anonymous."[103] Michigan gives the public the ability to locate all existing virtual courts within the state and to easily access proceedings currently streaming on YouTube.[104]

Some state courts have had difficulty providing public access to court proceedings. In North Carolina, the Mecklenberg County courts moved to improve virtual access to the hearings for the public after a Charlotte television station reported being shut out of a hearing.[105] However, according to the North Carolina Judicial Branch website, information regarding criminal proceedings in Mecklenberg County is still "forthcoming."[106] The website header of the Superior Court of

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96 No. CR 19-65-BLG-SPW, 2020 WL 3270541 (D. Mont. June 17, 2020).
97 *Id.* at *4.
98 *Id.* at *3.
99 *Id.* at *4.
100 Request General Public Access, Dec. 6, 2020 (*available at* https://www.almd.uscourts.gov/request-general-public-access).
101 Eastern District of Kentucky, Dec. 6, 2020 (*available at* http://www.kyed.uscourts.gov/).
102 National Center for State Courts, Coronavirus and the courts, last visited Jan. 12, 2021, (*available at* https://www.ncsc.org/newsroom/public-health-emergency).
103 Oregon Judicial Department, Online Services, Live Stream Proceedings, last visited Jan. 12, 2021(*available at* https://www.courts.oregon.gov/services/online/Pages/live-stream.aspx).
104 Michigan Courts, Michigan Trial Courts, MiCOURT Virtual Courtroom Directory, last visited Jan. 12, 2021 (*available at* https://micourt.courts.michigan.gov/virtualcourtroomdirectory/).
105 Nick Ochsner, *Mecklenburg Co. Courts Improving Virtual Access After Public Shot Out of Hearing*, WBTV Investigates, May 14, 2020 (*available at* https://www.wbtv.com/2020/05/14/mecklenburg-co-courts-improving-virtual-court-access-after-public-shut-out-hearing/).
106 North Carolina Judicial Branch, Criminal Remote Hearings, last visited Jan. 12. 2021 (*available at* https://www.nccourts.gov/

California, County of San Bernardino, recently read "Audio Streaming is currently unavailable until further notice. We are working to resolve the issue and apologize for any inconvenience."[107]

While the Justice Department worked on release initiatives for at risk inmates early in the pandemic, the same is happening in state prisons.[108] Crime victims who are registered through the national crime victims' notification system (VINE) should still receive notification of release but will not enjoy their constitutional or statutory right to be heard about the release when it is due to reducing the numbers of prisoners on account of COVID-19.[109]

As courts provide public access through livestreaming of criminal proceedings, crime victims' advocates are concerned that the measures could lead to violating a victims' right to dignity, respect and privacy, and/or potentially putting victims and witnesses in danger of harassment or risking their physical safety.[110]

In Concord, New Hampshire, a county prosecutor said his office was forced to drop second-degree assault charges against a college student because the victim backed out of testifying when she learned her testimony would be broadcast online.[111] In response, New Hampshire announced it will not automatically livestream cases involving the testimony of victims, stating "[i]n this regard, we appreciate the concerns raised by victims' rights advocates. We have determined this revised policy would better ensure an appropriate balance between the defendant's and public's right to observe jury trials during the COVID-19 pandemic and victims' rights to prevent their identity from being spread across the Internet."[112]

Philadelphia, Pennsylvania District Attorney Larry Krasner filed a Petition for King's Bench or Extraordinary Jurisdiction to stay the First Judicial District's "Public Access to Judicial Proceedings During the COVID-19 Pandemic-Livestream Policy" that permitted live-streaming criminal trials over YouTube. The Commonwealth's objections included that YouTube streaming would allow individuals to record testimony and arguments undetected, those recordings could be used to intimidate witnesses, streaming could have a chilling effect on testimony generally, potential distribution of a victim's testimony would jeopardize their privacy and could re-traumatize them and, recording and distribution precludes any meaningful sequestration process. The Pennsylvania Supreme Court thereafter issued an order staying the paragraph of the First Judicial District's policy where it permitted the public "to access judicial proceedings remotely, on dedicated court YouTube channels."[113]

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locations/mecklenburg-county/mecklenburg-county-remote-hearings/criminal-remote-hearings).

107 Superior Court of California, County of San Bernardino, Dec. 6, 2020 (*available at* https://www.sb-court.org/).

108 *Responses to the COVID-19 Pandemic*, Prison Policy Initiative, Dec. 23, 2020 (*available at* https://www.prisonpolicy.org/virus/virusresponse.html)

109 *See, e.g.,* VINE (*available at* https://www.vinelink.com/#state-selection); City News Service, *DA's Office to Notify Crime Victims of Early Prisoner Release*, NBC News San Diego, Aug. 19, 2020 (*available at* https://www.nbcsandiego.com/news/local/das-office-to-notify-crime-victims-of-early-prisoner-release/2388242/).

110 Kara Urland, *Courts Opening and Victims' Rights in the Time of COVID*, ABC 27, Aug. 10, 2020 (*available at* https://www.abc27.com/news/local/harrisburg/court-opening-and-victims-rights-in-the-time-of-covid/).

111 *Victims Decide if Court Trials are Livestreamed Online*, Concord Monitor, Oct. 21, 2020, (*available at* https://www.concordmonitor.com/Victim-testimony-36903869).

112 *New Hampshire Superior Court Limits Livestream of Jury Trials*, News Release from the Judicial Branch, State of New Hampshire, Oct. 21, 2020 (*available at* https://www.courts.state.nh.us/press/2020/Livestream.htm).

113 *In re: First Judicial District Livestream Policy*, No. 539 (Pa. 2020) (per curiam).

III. CONCLUSION

The COVID-19 pandemic continues to create challenges for defendants, their counsel, prosecutors, and courts alike. Existing frameworks, such as the Speedy Trial Act's "ends of justice" provision, or the test laid out in *Maryland v. Craig*, have allowed courts to make case by case determinations where constitutional rights are at risk of being abridged. Logistical difficulties for defendants and their counsel persist. Counsel and the courts must be vigilant in the face of ongoing challenges presented by the pandemic to properly balance the protection of defendants' constitutional rights while preserving the health and wellbeing of the public.

American College of Trial Lawyers
Phone: 949-752-1801
Website: www.actl.com
Email: nationaloffice@actl.com