Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic

INTERIM GUIDELINES

This document was developed in response to the COVID-19 pandemic. It is meant to contribute to the ultimate development of "best practices" as courts and advocates adapt in an effort to ensure that Justice in the courtrooms of our two countries does not become a victim of the current economic and health crisis. Readers are (a) encouraged to provide feedback about their experiences with these and other ideas for addressing the issues identified in the Interim Guideline; and (b) continue to visit the College website to see the latest version of the document. Please email comments, orders, rules, etc. on this topic to advocacy@actl.com.

Task Force on Advocacy in the 21st Century

Version 2 Published July 29, 2020

www.actl.com

American College of Trial Lawyers

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Task Force on Advocacy in the 21st Century

The purpose of the Task Force on Advocacy in the 21st Century is to develop and make available the College's expertise on the issues that will confront the administration of justice in a post-pandemic world, in particular those issues that impact the discovery component and trial of civil and criminal cases and oral arguments before appellate courts.

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I. INTRODUCTION

The COVID-19 pandemic has severely impaired nearly every aspect of the criminal justice system. Reopening criminal courts presents enormous challenges to a fair and constitutional process for those suspected or accused of crimes while ensuring the rights of victims and the public's right of access. Nevertheless, the American College of Trial Lawyers recognizes the urgent need to ensure continuing access to justice in this setting. Understanding that there are no universal answers and that the balance of rights and interests depends on the specific facts and circumstances of each case, the ACTL has endeavored to identify important foundational rights of defendants, victims and the public that may be impaired by various pandemic risk mitigation measures. This paper is intended for practitioners, in order to help them identify and begin thinking about the issues. Any motions or briefing raising any challenge in a particular case would require more in-depth analysis and would need to take into account then current rules and circumstances.

II. DISCUSSION

Many of the unfolding pandemic risk mitigation measures potentially implicate 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.

a. *Suspending the Speedy Trial Act, Grand Juries, and other Statutes Governing the Timing of Proceedings*

The COVID-19 pandemic had an immediate impact on the ability of prosecutors to investigate, charge and prosecute criminal cases. Investigating agents may be hampered in their

ability to conduct interviews and gather evidence from shuttered businesses. In response to the pandemic, grand juries were suspended across the country and are only now beginning to restart.[1]

Likewise, courts have had difficulty addressing criminal cases that are pending or filed. Courthouse staff were sent home to shelter-in-place, jury trials were postponed, and many courthouses remain closed. At the same time of course, subjects of criminal investigations and defendants in criminal prosecutions have the right to be investigated and prosecuted within certain statutory and constitutional provisions governing the timing of the proceedings. Statutes of limitations provide finality for criminal investigations. The Speedy Trial Act, derived from the Sixth Amendment, requires trials be commenced within a certain, relatively short, timeframe. Responses to the COVID-19 pandemic have a concerning impact on these rights and will likely lead to various challenges in court by defense counsel.

i. *Suspensions of Speedy Trial Act Time Limits*

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, provides for certain 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[.]"[2] This includes any "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 . . . ."[3] In

[1] *U.S. Courts Try Out Social Distancing, Video for Grand Juries*, The United States Law Week, Bloomberg Law (*available at* https://news.bloomberglaw.com/us-law-week/u-s-courts-try-out-social-distancing-video-for-grand-juries); *Zoom grand juries continue in N.J. despite backlash from prosecutors, defense attorneys*, WHYY (*available at* https://whyy.org/articles/zoom-grand-juries-continue-in-n-j-despite-backlash-from-prosecutors-defense-attorneys/).
[2] 18 U.S.C. § 3161(h).
[3] *Id.* § 3161(h)(7)(A).

response to the pandemic, courts have used this provision to continue trials and other proceedings that have specific time limits provided in the Speedy Trial Act.

For example, pursuant to Section 3161(h)(7)(A), a number of federal district courts ordered the exclusion of time periods for continuances under the Court's general orders from Speedy Trial Act calculations.[4] The Act requires that any delay resulting from a continuance is not excludable "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Accordingly, the District of Hawaii and the Northern District of California, among others, instructed judges to enter orders tolling time under the Speedy Trial Act based on "appropriate findings."[5] The Eastern District of Virginia specifically ordered that the COVID-19 crisis allows for an "ends of justice" exclusion of time from the Speedy Trial Act clock.[6] Courts are also excluding time periods from calculations of the 30-day limit for filing an indictment or information as required under 18 U.S.C. § 3161(b).[7]

The Ninth Circuit court of Appeals used a different provision to suspend Speedy Trial Act time limits in the federal District Courts for the Eastern, Southern, and Central Districts of California. Section 3174(b) provides that the chief judge of any district court may apply to the judicial council of the circuit for a suspension of the time limits of 3161(c) "due to the status of

[4] NDCA General Order 72 dated Mar. 16, 2020; EDCA General Order 617, dated April 17, 2020; EDWA General Order No. 20-101-1, dated March 18, 2020; WDWA General Order 02-20, dated March 17, 2020 and General Order 07-20, dated April 13, 2020; D. Nevada General Order 2020-03, dated March 16, 2020.
[5] Temporary General Order Regarding District of Hawaii Response to Covid-19 Emergency, dated March 23, 2020; NDCA General Order 72, dated April 30, 2020.
[6] EDVA General Order 2020-06, dated March 23, 2020.
[7] *See, e.g.*, EDVA General Order 2020-3, dated March 16, 2020.

its court calendars . . . where the existing resources are being efficiently utilized" and the circuit may make recommendations after evaluating "the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate the calendar congestion resulting from the lack of resources."[8] 18 U.S.C. 3174(b) provides that if the circuit finds that there is "no remedy for such congestion [that] is reasonably available . . . [it may] grant a suspension of the time limits in section 3161(c)" for a time period no longer than one year.[9] The Eastern, Southern, and Central Districts applied for relief under section 3174(a) based at least in part on conditions caused by the COVID-19 pandemic and the Ninth Circuit found that there was no reasonably available remedy under the authority of 18 U.S.C. § 3174(b), thereby suspending the Speedy Trial Act's time limits.[10]

ii. *State Statutes of Limitations and the Federal Rules of Criminal Procedure*

Several states have taken steps to toll statutes of limitations in response to the COVID-19 crisis. Governor Andrew Cuomo of New York issued Executive Order 202.8 on March 20, 2020, which purported to toll "any specific time limit for the commencement, filing, or service of any legal action . . . including but not limited to the criminal procedure law . . . ." A number of states, including Massachusetts, tolled their statutes of limitations for a defined period of time.[11] The Massachusetts tolling period for criminal statutes was extended through September 30, 2020. Other states, such as Nevada and Connecticut, tolled statutes of limitations and left the

[8] 18 U.S.C. 3174(b).
[9] 18 U.S.C. 3174(b)
[10] Order, In re Approval of the Judicial Emergency Declared in the Central District of California, adopted April 9, 2020; Order, In re Approval of the Judicial Emergency Declared in the Eastern District of California, adopted April 16, 2020; Order, In re Approval of the Judicial Emergency Declared in the Southern District of California, adopted April 2, 2020.
[11] Massachusetts Order Regarding Court Operations Under the Exigent Circumstances Created by the Covid-19 (Coronavirus) Pandemic, dated April 6, 2020.

end date undefined.[12] California is allowing the presiding judges in each of its 58 counties to petition for an emergency order, creating a patchwork of laws regarding statutes of limitations in that state. At least one federal judicial district, the Middle District of Louisiana, ordered the suspension of statutes of limitations, while another – the Eastern District of Virginia – expressly declined to do so.[13]

Rule 5.1(c) of the Federal Rules of Criminal Procedure requires magistrate judges to hold preliminary hearings "within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody."[14] But under Rule 5.1(d) judges may extend the time limit without the defendant's consent based on a showing that "extraordinary circumstances exist and justice requires the delay."[15]

iii. *Suspensions of Grand Juries and Statutes of Limitations Implications: The Theranos Case*

The Fifth Amendment to the U.S. Constitution guarantees the right to indictment by a grand jury in all felony cases brought in the federal courts. It provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." Amendments to an existing indictment must also be returned by a grand jury.[16] The use of grand juries to protect against over-zealous

[12] Nevada Declaration of Emergency Directive 009 (Revised, dated April 1, 2020); Connecticut Executive Order 7G, dated March 19, 2020.
[13] MDLA First Amended Administrative Order 2020-1, dated March 18, 2020; MDLA Fourth Amended Administrative Order 2020-5, dated April 8, 2020; EDVA General Order 2020; EDVA General Order 2020-3, dated March 16, 2020.
[14] Fed. R. Crim. P. 5.1(c).
[15] Fed R. Crim P. 5.1(d).
[16] *Stirone v. United States*, 361 U.S. 212, 215-16 (1960).

prosecutions and to provide a check on government power traces back to British common law, and was adopted by the Founding Fathers in the U.S. Constitution as a fundamental right.

The process of selecting grand juries typically involves crowded courtrooms with little or no social distancing and requires large numbers of people to spend long days together indoors. Once grand juries are seated, they typically spend the day in a room that has not been designed with social distancing in mind.[17] The COVID-19 pandemic has resulted in the suspension of grand juries in federal courts throughout the country. Some courts have specifically allowed for United States Attorneys to petition the Court for exceptions in certain circumstances.[18]

Attorneys for the United States in the Northern District of California employed a strategic workaround to the statute of limitations issues created by the suspension of grand juries while admitting that the workaround was not consistent with the defendants' right to indictment by grand jury. In *United States v. Elizabeth Holmes and Ramesh "Sunny" Balwani*, the Theranos case (Case No. CR-18-00258-EJD-SVK), the grand jury returned an indictment against Ms. Holmes and Mr. Balwani in 2018. In the Spring of 2020, after the COVID-19 crisis began, the government filed a "Superseding Information," which broadened and amended the existing charges, and added a felony wire fraud count that would have been time-barred just days after the filing. The defendants moved to dismiss the indictment because they had not waived their Sixth Amendment right to indictment by grand jury and argued that the Superseding Information was thus patently unconstitutional.[19]

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[17] *See, e.g.*, EDVA General Order 2020-02, dated March 13, 2020.
[18] *See, e.g.*, NDCA General Order 72-3, dated May 21, 2020; District of Montana Administrative Order 20-18, dated April 10, 2020.
[19] *See*, Defendant Holmes' Motion to Dismiss Superseding Information; Defendant Ramesh "Sunny" Balwani's Joinder in Motion to Dismiss Superseding Information, and Government's Opposition to Defendants' Motion to Dismiss; Defendant Holmes' Reply in Support of Motion

In its opposition to the motion to dismiss, the government conceded that prosecution under the Superseding Information could not proceed without a valid waiver and admitted that the defendants had not waived their Sixth Amendment right. The government argued, however, that certain charges in the Superseding Information would have been time-barred if they had waited for a grand jury and that filing a "waiverless" criminal information "institutes" the charges for purposes of the statute of limitations.[20]

In reply, the defendants argued that "[t]he government concedes the unconstitutionality of its conduct, but nevertheless persists in it, apparently to preserve a potential procedural argument that the charges are not brought in contravention of the applicable statute of limitations. . . . The government is asking the Court to leave in place, and to conduct (unidentified) proceedings on, an information that all agree violates the Constitution. No authority – none – permits the Court to do that." The defense cited a case which held that the filing of an information does not satisfy the statute of limitations absent waiver,[21] and noted that neither the Ninth Circuit nor any court in the Northern District of California had ever considered the question. The motion to dismiss remains pending so it remains to be seen whether the government's argument is successful. The government recently assembled a grand jury and replaced the superseding information with a superseding indictment, but the statute of limitations issue remains and the defense likely will challenge the superseding indictment on the same grounds.

The right to indictment by grand jury has existed in one form or another since the 12th Century, is embodied in the United States Constitution, and is sacrosanct in our system of

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to Dismiss Superseding Indictment; Defendant Ramesh "Sunny" Balwani's Joinder in Reply in Support of Motion to Dismiss Superseding Information.

[20] *Citing e.g.*, *U.S. v. Stewart*, 425 F. Supp. 727, 729 (E.D. Va. 2006); *U.S. v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998); 18 U.S.C. § 3282.

[21] *U.S. v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3, 2005).

criminal justice. The government may continue to press the strategy reflected in the Theranos case and may also look for other arguments around the Fifth Amendment in the absence of grand juries. Defense counsel will undoubtedly challenge these efforts.

The landscape of the judicial response to the pandemic changes on a daily basis, and this discussion captures only a handful of examples of issues to be resolved. The courts are in uncharted territory in their efforts to address an unprecedented national and global emergency. Suspending deadlines, statutes of limitations, Speedy Trial Act protections, and other timing-related measures may be viewed as necessary and unavoidable, but such measures may significantly infringe upon time-honored rights of criminal defendants.

b. ***The Impact of the COVID-19 Pandemic on the Attorney-Client Relationship and Effective Assistance of Counsel***

The COVID-19 pandemic and the impact of social distancing and other protective measures present serious impediments to the very bedrock of criminal defense: the relationship of trust and candor between attorney and client. The pandemic also presents barriers to counsel's ability to effectively perform many of the tasks required in order to meet professional and constitutional standards, such as the ability to conduct a defense investigation, to prepare for cross-examination of lay and expert witnesses and the ability to prepare and evaluate testimony by the defendant and defense witnesses. Developing the attorney-client relationship and the performance of discrete defense functions are related but different features of criminal defense. While the former is critical to the performance of the latter, the adverse impact of the pandemic on the relationship between client and counsel has the potential to jeopardize the entire process.

In short, all aspects of the defense function are affected by COVID-19 and related safety measures. While the adverse impact of the pandemic is most worrisome for incarcerated clients, many of the same concerns obtain for clients who are not behind bars.

A fully formed attorney-client relationship is at the heart of the criminal defense function. Flowing from the Sixth Amendment right to counsel is the attorney-client privilege, the purpose of which "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[22] The attorney client privilege, and with it, the attorney-client relationship, is paramount to effective criminal defense. The American Bar Association's Criminal Justice Standards for the Defense Function provide that "defense counsel should work to establish a relationship of trust and confidence with each client" and "should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense."[23] Moreover, attorneys should "serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity."[24]

To provide high-quality legal representation, counsel must earn the client's trust such that the client will be candid about events that might be embarrassing, incriminating and even horrifying. It is not as simple as saying "trust me, I'm your lawyer and everything you tell me is a secret." The relationship must also include the client's trust in counsel's experience, resources, skill and commitment to his or her defense. The bond of trust facilitates decision making when defendants and their counsel are faced with complex strategic decisions.

The pandemic and the necessary measures against its spread present major barriers to developing this relationship. It is difficult enough to ask a client to trust you across a conference

[22] *Upjohn v. United States et al.*, 449 U.S. 383, 389 (1981).
[23] American Bar Association, Criminal Justice Standards for the Defense Function § 4-3.1 (4th ed. 2017).
[24] *Id*. § 4-2.1(b).

room table – or in the attorney interview room in a detention facility – but it is far more fraught to ask a client to trust you when you are a disembodied voice on a video display that may or may not be secure. Aversion to in-person meetings, wearing masks and taking other safety precautions during meetings, and the general discomfort in settings that are the norm for legal representation all present significant barriers to developing a meaningful relationship. For incarcerated clients, whose attorneys already faced some of these barriers, the COVID-19 pandemic has only exacerbated the situation.[25] The communication difficulties in those cases are especially problematic. A recent article in the New York Times described one attorney sifting through virtual courtrooms on Skype to find her client, only to access a "room" in which another attorney was already speaking to someone.[26] After she found her client, the audio and video feed kept cutting out. In another case, one defendant was able to reenter the "video booth" after a preliminary hearing and made incriminating statements without the presence of his counsel, who could have stopped him.[27] But regardless of where a client is housed, the pandemic carries a significant risk of impairing attorneys' abilities to carry out some of their most basic duties required by the constitution and professional ethics.

Thus, constitutional standards and the standards of professional practice require that defense counsel perform a variety of tasks in defense of criminal charges, some of which emanate from the Sixth Amendment. The Sixth Amendment provides "[i]n all criminal

[25] *See*, *e.g.*, CJA COVID-19 Steering Committee June 17, 2020 Letter to The Honorable Colleen McMahon, Chief Judge of the United States District Court for the Southern District of New York (noting lack of in-person client access and lack of telephone and videoconferencing between attorneys and their clients).
[26] Feuer, Hong, Weiser, and Ransom, N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases, The New York Times, June 22, 2020 (*available at* https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html).
[27] *Id*.

prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."[28] In *Strickland v. Washington*, for example, the Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[29] Indeed, the "[f]ailure to interview important potential witnesses can constitute ineffective assistance."[30]

Defense counsel often find that witnesses are reluctant to submit to an interview even in ordinary times. In the current pandemic, the defense may be stymied by the quite reasonable unwillingness of potential witnesses to meet with attorneys whom they do not know. Whether in custody or not, reviewing discovery or investigative material with the defendant is another defense task that will be difficult, if not impossible, to accomplish. Complex cases often involve large quantities of documentation or recordings, requiring substantial face-to-face interaction between client and counsel.

While the prosecution may face similar limitations when seeking to prepare witnesses, the stakes for the defense are potentially catastrophic. For example, in *Wiggins v. Smith*, 539 U.S. 510, 510 (2003), the Court reversed a death sentence, finding that counsel violated the defendant's Sixth Amendment right to effective assistance of counsel when counsel failed to investigate the defendant's prior history of abuse as a mitigating factor for sentencing. Further, the Innocence Project's 2010 review of the first 255 DNA exonerees revealed that "54 of the first

[28] Const. am. VI.
[29] 466 U.S. 688, 691 (1984).
[30] *Nelson v. Davis*, 952 F.3d 651 (citing *Richards v. Quarterman*, 566 F.3d 553, 570-71 (5th Cir. 2009); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994)).

255 DNA exonerees (21%) raised claims of ineffective assistance of counsel. In the overwhelming majority of these appeals, the courts rejected the claims (81%), however in seven cases, courts agreed with appellants and found ineffective assistance of counsel, leading to reversals of convictions" for six exonerees and new counsel for one.[31]

c. ***The Pandemic's Potential Impact on the Sixth Amendment Right to An Impartial Jury***

The Sixth Amendment provides that defendants in criminal prosecutions have a right to an impartial jury.[32] The Supreme Court has construed this right to ensure "an impartial jury drawn from a fair cross section of the community."[33] The Court subsequently clarified that the "'fair cross section' requirement is limited to the venire from which the jury is selected; it does not extend to the actual seated jury."[34] To satisfy the Sixth Amendment, jury venires (or "pools"), from which both grand and petit juries are drawn, "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[35] Courts have struggled to define "distinctiveness" for purposes of Sixth Amendment fair cross section challenges, and often conflate the distinctiveness requirement with the "suspect class" requirement of the Equal Protection Clause.[36] Scholars have discussed issues of Sixth Amendment fair cross section jurisprudence even before COVID-19; this paper will not reach those underlying concerns.[37]

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[31] West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases,* Innocence Project (Sept. 2010).
[32] U.S. Const. amend. VI.
[33] *Berghuis v. Smith*, 559 U.S. 314, 314 (2010) (emphasis added) (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975)).
[34] Sanjay K. Chhablani, *Re-Framing the "Fair Cross-Section" Requirement*, 13 U. Pa. J. Const. L. 931, 945 (2011) (citing *Holland v. Illinois*, 493 U.S. 474 (1990)).
[35] *Taylor*, 419 U.S. 522 (1975).
[36] Chhablani, 12 U. Pa. J. Const. L. at 947.
[37] *See, e.g., id.*

Despite the lack of jurisprudential clarity in other bases for distinctive groups, groups based on race and gender clearly are distinct for purposes of fair cross section challenges.[38] Thus COVID-19's disproportionate effect on certain populations, including racial and ethnic minorities, may impair a defendant's Sixth Amendment right to a jury composed of a fair cross section of the community. Court excusal of high-risk individuals, while in the interest of public safety, may nonetheless result in the systematic exclusion of distinctive groups in violation of the Sixth Amendment.

The Centers for Disease Control and Prevention (the "CDC") states that "current [COVID-19] data suggest a disproportionate burden of illness and death among racial and ethnic minority groups."[39] The CDC data collected thus far "suggest an overrepresentation of blacks among hospitalized patients."[40] Patients who were hospitalized with lab-confirmed COVID-19 were disproportionately black (33% of patients compared to 18% of the community) and COVID-19 death rates among Black/African American persons and Hispanic/Latino persons (92.3 and 74.3 deaths per 100,000, respectively) were substantially higher than death rates among white or Asian persons (45.2 and 34.5 deaths per 100,000, respectively).[41]

If those disproportionate effects manifest in lower numbers of Black/African American persons and Hispanic/Latino persons in venires, defendants may challenge the jury selection process on the grounds that venires are not pulled from a fair cross section of the community. In contrast to an Equal Protection Clause challenge, a defendant would not need to prove

[38] *See Taylor*, 419 U.S. 522 (1975); *Holland v. Illinois*, 493 U.S. 474 (1990).
[39] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Racial & Ethnic Minority Groups, *available at* (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html).
[40] *Id.*
[41] *Id.*

discriminatory intent. Instead, a prima facie case is established by showing "1) that the group alleged to be excluded is a 'distinctive' group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process."[42] The burden then shifts to the state to prove "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."[43] This burden shifting framework for fair cross section challenges creates a high bar for the state when faced with a prima facie case of systematic exclusion of a distinctive group such that the group is unreasonably underrepresented in venires. The state's interest in protecting public health and safety by allowing high-risk individuals to be excused from jury service, however, may be significant enough to overcome that burden.

The Jury Selection and Service Act, 28 U.S.C. § 1861 et seq., (the "Act") protects the Sixth Amendment right to a fair cross section in jury venires.[44] The Act requires each district court to implement a written plan for random selection of grand and petit jurors designed to achieve the objectives of that right.[45] The Act sets out specific groups that are to be "excused" from jury service upon request, as well as groups that are "barred from jury service on the ground that they are exempt."[46] Excusal or exemption completely removes a juror from service.

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[42] *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
[43] *Id.* at 367-368.
[44] 28 U.S.C. § 1861 ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").
[45] *Id.* § 1863(a).
[46] *Id.* § 1863(b)(5) (A-B) (emphasis added).

By contrast, deferral of jury service, rather than exemption or excusal, is authorized by 18 U.S.C. § 1866(c). The statute provides that the court has discretion to excuse persons who can show "undue hardship or extreme inconvenience for such period as the court deems necessary."[47] Risk of infection or severe symptoms experienced by a prospective juror or a juror's family member could constitute "undue hardship" and the court could defer the juror's service for an indefinite amount of time, rather than excuse it entirely.

It is unclear whether deferment resolves the constitutional issues presented by excusal or exemption. While the deferment of high-risk jurors does not remove them from the pool, individual grand and petit juries during this time could still underrepresent racial and ethnic minorities and other high-risk groups. The pool would effectively be unreasonably unrepresentative of a fair cross section of the community. For example, if a court adopts a policy allowing high-risk individuals to defer service, and populations that qualify as "distinctive groups" for Sixth Amendment purposes exercise the option more frequently, the groups would be systematically excluded from jury pools during the deferment period and would infringe upon the right to a fair cross section of the community.

Notably, a defendant who is not a member of the "distinctive" group that may be underrepresented still has standing to bring a challenge to the jury selection process. In *Taylor v.*

[47] 28 U.S.C. § 1866(c)(1) provides that:

> No persons or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, that any person summoned for jury service may be 1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service. . . . or . . . the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section.

Louisiana,[48] a male defendant successfully challenged the systematic exclusion of female jurors and in *Holland v. Illinois*,[49] a white defendant had standing to challenge the systematic exclusion of black jurors.

Courts are required by the Jury Selection and Service Act to maintain and preserve issuance of summons and demographic data of the jury venire.[50] This may provide aggregate data to support subsequent constitutional challenges. Individual challenges to jury pools, from which both grand and petit juries are selected, alleging that the pools are not representative of a district may not have the same strength without aggregate data to support the claim that the exclusions are systematic. Courts – which have an interest in the impartiality of juries and the protection of defendants' constitutional rights – should review records of the demographics of juror excusals related to COVID-19 to revisit the issue as more data is gathered.[51] Ultimately, under the burden-shifting framework for fair cross section challenges, it remains to be seen whether distinctive groups that are affected most by COVID-19 will request to be excused in sufficient number such that challenges would be successful. Both the prosecution and defense are encouraged to consider issues concerning the composition of their juries to attempt where possible to reduce the likelihood of reversible error being found on appeal.

d. ***The Impact of Social Distancing Measures at Trial***

Today, public health officials are almost universally of the view that the use of masks and other social distancing tools are critical in containing the spread of COVID-19. This is

[48] 419 U.S. 522 (1975).
[49] 493 U.S. 474 (1990).
[50] 28 U.S.C. § 1868.
[51] *See* Federal Defenders of New York, CJA Panel Representatives for the SDNY and EDNY and the New York Council of Defense Lawyers, *Criminal Justice Standards and Best Practices During the COVID-19 Pandemic*, June 2020.

especially impactful when people are unable to maintain proper social distance from others, and when they are inside buildings, airplanes, and other contained spaces. In testimony before the House Energy and Commerce Committee on June 23, 2020, Dr. Anthony S. Fauci, Director of the National Institute of Allergy and Infectious Diseases, discussed a disturbing recent surge of COVID-19 cases, and implored people to wear masks in public, advising "Plan A, don't go in a crowd. Plan B, if you do, make sure you wear a mask."[52]

Although there have been some criminal trials during the pandemic[53] there is little data or analysis at this early stage regarding the impact of social distancing and other pandemic-related measures on the fairness of trial proceedings. It seems likely, however, that the use of masks in criminal jury trials – by counsel, the defendant, the jury, and the judge and courtroom staff – will have implications for a defendant's Constitutional rights. Counsel's use of a mask could significantly affect her ability to effectively connect and communicate with the jury. Cross-examination may be less effective if the witness, counsel and the jury have trouble hearing each other, or the flow between witness and questioner is hampered by the inability to read facial

[52] Stolberg and Weiland, Fauci, citing 'Disturbing Surge,' Tells Congress the Virus is not Under Control, The New York Times, June 22, 2020 (*available at* https://www.nytimes.com/2020/06/23/us/politics/fauci-congress-coronavirus.html).

[53] *See, e.g.*, Morris, Jury Trials are Back in Texas. Here's what you should know. Law.com/Texas Lawyer, June 8, 2020 (available at https://www.law.com/texaslawyer/2020/06/08/jury-trials-are-back-in-texas-heres-what-you-should-know/); Gordon, Place your Hand on the Bible: Federal Jury Trials Resume after Weeks of Planning, The Charlotte Observer, June 13, 2020 (available at https://www.charlotteobserver.com/news/coronavirus/article243514632.html); Wolfson, A Jury Social Distanced Through an 8-Week Trial as Covid-19 Raged. Here's how they did it. Louisville Courier Journal, April 26, 2020 (available at https://www.courier-journal.com/story/news/crime/2020/04/26/federal-jury-sits-through-8-week-trial-amid-coronavirus-pandemic/3028236001/); Olson, First Hennepin County Jury Trial Since Pandemic Results in Quarantine for Judge, Staff, Star Tribune, June 11, 2020 (available at https://www.startribune.com/first-hennepin-county-jury-trial-since-pandemic-results-in-quarantine-for-judge-and-her-staff/571165002/).

expressions. Concerns about their own health and safety may impact the work of the jury. Jurors may have trouble assessing the credibility of witnesses, including the defendant, and might develop negative impressions of the defendant as he sits, inscrutably, behind a mask.

Although it is too early for there to be developed caselaw on the use of masks in response to COVID-19, there is analogous authority. For example, courts have allowed witnesses to testify while wearing disguises where the witness's safety was at issue. In *United States v. DeJesus-Castaneda*,[54] the defendant, who was a confidential informant in a case involving a drug cartel, was allowed to testify wearing a wig and fake moustache. In ruling that this procedure did not run afoul of the Confrontation Clause, the court observed that the jury was able to hear his voice, see his eyes and facial reactions, and observe his body language.[55]

Courts have also addressed the impact on the Sixth Amendment in cases where witnesses testified wearing religious garb that obscured their faces. In *People v. Ketchens*,[56] the court upheld a lower court's order allowing a witness to testify while wearing a hijab. The court observed that the jury could hear the witness's voice and observe her body language, and focused on the fact that the hijab was white and worn "tight against [the witness's] face," which allowed the jury to "see clearly the outline of her face when she talks," and to "see her facial expressions even through the head scarf." The court also noted that after discussion between counsel and the court, the witness was asked to and did pull down her scarf so that her eyes and nose were exposed.[57]

[54] 705 F.3d 1117 (9th Cir. 2013).
[55] *Id*. at 1121.
[56] 2019 Cal. App. Unpub. LEXIS 3920 (Cal Ct. App. June 7, 2019).
[57] *Id.* at *23.

It remains to be seen whether pandemic-related social distancing measures will have a significant adverse impact on the rights of criminal defendants. Courts and practitioners should seek to alleviate such concerns to the extent reasonably possible.

e. *The Impact of the use of Videoconference Proceedings on a Criminal Defendant's Constitutional Rights*

As a result of the pandemic, a significant number of criminal defendants in state and federal courts are languishing in pre-trial detention with no end in sight, and their rights to speedy trial and trial by jury are being severely impacted.[58] As the New York Times recently reported, as of June 23, 2020, there existed a backlog of 39,200 cases in New York City courts alone. To resolve this problem, video conference technology is being used in some criminal proceedings. The prospect of using video conferencing in felony criminal trials, however, raises several issues. Federal Rule of Criminal Procedure 43 does not permit felony trials without the presence of the defendant. Moreover, the Confrontation Clause of the Sixth Amendment guarantees the defendant's right to be present in the courtroom at every stage of trial, starting with jury selection.[59] Finally, that right is "obligatory upon the States."[60]

First, it should be noted that there is currently no mechanism for courts to authorize felony criminal trials to be conducted by video conference. While some virtual criminal proceedings were already authorized by the Federal Rules of Criminal Procedure,[61] the

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[58] *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, New York Times, June 23, 2020 (available at https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html).
[59] *Lewis v. United States*, 146 U.S. 370 (1892).
[60] *Illinois v. Allen*, 398 U.S. 915 (1970).
[61] Rule 5(f) (allowing video teleconferencing for initial appearances with defendant's consent), Rule 10(c) (allowing video teleconferencing for arraignments with defendant's consent), Rule 40 (allowing video teleconferencing (with defendant's consent) for appearance before a magistrate when arrested in one district for failing to appear in another), and Rule 43(b) (not requiring "presence" where "[t]he offense is punishable by fine or by imprisonment for not more than one

Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") authorized video teleconferencing in a broader group of proceedings, but did not include felony trials.[62] The use of these procedures is triggered by a finding of the Judicial Conference of the United States that the COVID-19 emergency will "materially affect the functioning of . . . federal courts generally . . . ." The Judicial Conference made the required finding to invoke the emergency procedures on March 29, 2020, and district courts began issuing orders implementing virtual procedures pursuant to the CARES Act. The emergency procedures authorized by the CARES Act are to be reviewed every ninety days until it is determined that the authorization is no longer needed. Under the CARES Act, a felony plea under Rule 11 or a felony sentencing under Rule 32 of the Federal Rules of Criminal Procedure may proceed by video conference or telephone if the court finds that further delay would cause serious harm to the interests of justice and if the defendant consents.[63] Further legislation would be required to conduct felony criminal trials by video conference, and for the reasons discussed below, may face various constitutional challenges.

Videoconferencing is reportedly exhausting and influences our impressions of each other in ways that in-person meetings do not.[64] It might be more difficult to select a jury, and for jurors to effectively participate, deliberate and render a verdict by videoconference. Jurors might

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year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence").

[62] Pub. L. 116 – 136 (proceedings include Initial Appearances (Rule 5 of the Fed. R. Crim. P.), Preliminary Hearings (Rule 5.1 of the Fed. R. Crim. P), Waivers of Indictment (Rule 7(b) of the Fed. R. Crim. P), Arraignments (Rule 10 of the Fed. R. Crim. P), Probation and Supervised Release Revocation Hearings (32.1 of the Fed. R. Crim. P), Pretrial Release Revocation Proceedings (18 U.S.C. § 3148), Appearances (Rule 40 of the Fed. R. Crim. P), Misdemeanor Pleas and Sentences (Rule 43(b)(2) of the Fed. R. Crim. P), some Juvenile Delinquency Proceedings (18 U.S.C. § 403)).

[63] *Id.* at § 15002(b).

[64] *Why Zoom is Terrible*, New York Times, April 29, 2020 (*available at* https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html).

have difficulty assessing the credibility of witnesses appearing before them on a screen. Videoconferences may make it difficult to effectively cross-examine witnesses, implicating the right to effective assistance of counsel as well as the Confrontation Clause. The right to counsel may be impacted if, because of the pandemic, counsel and her client cannot be in the same room together. There is, of course, no developed caselaw concerning the use of videoconference technology in criminal trials in the COVID-19 context, but analogous caselaw (and common sense) provide some direction and insight, as discussed below.

Videoconferencing presents various difficult questions of constitutional law and criminal procedure. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[65] Would criminal trials by videoconference, where witnesses appear remotely, satisfy the Confrontation Clause? The right to cross-examine witnesses is rooted in the Confrontation Clause: "The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the factfinding process."[66] Will courts consider the ability to cross-examine by videoconference enough to satisfy the Sixth Amendment? The Supreme Court has called cross-examination the "greatest legal engine ever invented for the discovery of the truth."[67] Will that hold true if done remotely by video?

A jury's ability to judge the credibility of witnesses is a "fundamental premise of our criminal trial system,"[68] and involves in part the jury's ability to observe the witness's demeanor on the stand.[69] Is it enough for the jury to see the witness only on a screen? What if technology

[65] *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).
[66] *Id.*
[67] *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore Section 1367).
[68] *U.S. v. Scheffer*, 523 U.S. 303, 313 (1998).
[69] *California v. Green*, 399 U.S. at 158.

fails and the testimony is interrupted, frozen, or the witness is blurred or difficult to see? The Supreme Court wrote long ago that "[t]he primary object of the [Sixth Amendment] . . . was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[70]

The right to confront witnesses face-to-face is not absolute, but it is not easily overcome. In *Maryland v. Craig*, the Supreme Court considered the issue of whether testimony of an alleged child abuse victim can be presented by one-way closed-circuit television and adhere to the requirements of the Confrontation Clause.[71] The Court held that the Confrontation Clause does not guarantee criminal defendants an absolute right to face-to-face meetings with the witnesses against them and that it "must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process."[72] The right may only be satisfied without face-to-face confrontation where "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[73] In the case of alleged child abuse victims, the Court found that the state's interest in protecting the well-being of children could sufficiently outweigh a defendant's Confrontation Clause rights, provided the state made an adequate showing of necessity in the individual case.[74] The

[70] *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).
[71] 497 U.S. 836 (1990).
[72] *Id*. at 850.
[73] *Id*. at 850.
[74] *Id*.

applicability of this standard to the COVID-19 pandemic would thus require a court to find 1) that two-way videoconferencing is a denial of confrontation; 2) that the COVID-19 pandemic measures are an important public policy; and 3) whether, on a case-by-case basis, the reliability of testimony is otherwise assured.

Asking a criminal defendant for consent to waive his right to be physically present at certain proceedings when faced with a global pandemic and perhaps concerns about his own health and safety, may ultimately be found to be coercive and hence ineffective.[75]

In addition to deciding whether to proceed by videoconference in the context of plea and sentencing, a defendant in a federal criminal case might decide, in trying to balance the effects of COVID-19 with his Constitutional rights, that it is best to waive his right to a jury trial and to instead proceed with a bench trial. However, the government also has the right to a jury trial and must therefore consent before the court can proceed in the absence of a jury.[76] Unless all parties consent, a bench trial is not an option.

f. *The Rights of Victims and the Public*

In *Richmond Newspapers v. Virginia,* the Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"[77] The Sixth Amendment provides all criminal

[75] *See, e.g.*, *United States v. Davila*, 569 U.S. 597, 609 (2013) (Court recognizes that criminal settlement conferences conducted by federal magistrate judges violate FRCP 11(c)(1) and are coercive, even when the defendant requests or assents to the procedure); *United States v. Myers*, 804 F.3d 1246, 1250, 1255 (2015) (agreeing that *Davila* set forth a bright-line rule against magistrate judges participating in judge-led settlement conferences and that the record did not reflect a knowing waiver by the defendant).
[76] Fed. R. Crim. P. 23.
[77] 448 U.S. 555, 580 (1980) (quoting *Branzburg*, 408 U.S. 665, 681 (1972)); *see also Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596 (1982).

defendants the right to a speedy *and public* trial.[78] That right was extended to voir dire proceedings in *Press-Enterprise Co. v. Superior Court of California*,[79] and to pretrial suppression hearings in *Waller v. Georgia*.[80] In *Waller*, the Court discussed the policy interests behind the Sixth Amendment right to a public trial, including ensuring a fair process, encouraging witnesses to come forward, and discouraging perjury.[81] The Sixth Amendment right to public proceedings thus is not only for the benefit of the accused; it also "plays an important role in the administration of justice."[82]

Accordingly, some courts were quick to ensure that as proceedings shifted to telephone and video conferencing as authorized by the CARES Act,[83] the public's access would, too. The Administrative Office of the U.S. Courts website explains that the CARES Act, which authorized the use of video and telephone conferencing in certain criminal proceedings with the defendant's consent, "is interpreted to permit courts to include the usual participants and observers of such proceedings by remote access. This includes not only defendants, lawyers, probation and pretrial services officers, and court personnel, but also others who normally participate in or observe such criminal proceedings, including victims, family members, the public, and the press."[84]

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[78] Const. am. VI.
[79] 464 U.S. 501, 505 (1984).
[80] 467 U.S. 39, 43 (1984).
[81] *Id.* at 46
[82] *Press-Enterprise Co.*, 464 U.S. at 508.
[83] Pub.L. 116-136.
[84] Administrative Office of the United States Courts, *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, Apr. 3, 2020 (*available at* https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings).

Some district courts offer access to proceedings through several media including Zoom, Cisco Jabber, and Skype.[85] For example, the Northern District of California provides the public with guidance on its website, entitled "Preparing to Participate in a Zoom Video Conference."[86] Several options are available for the public to gain access: Attendees, or "the public, press, and or other non-participating observers of a Zoom proceeding" have specific published guidance for attendance, and access information is available on the court's "Remote Hearings web page, on PACER, on the presiding judge's calendar, or by emailing media@cand.uscourts.gov."[87] However, the page does note that some proceedings are telephone-only and some are limited to 100 participants – which may actually be more than the number of observers that would fit into the average federal courtroom gallery. While proceedings are livestreamed, any recording or photography may result in various sanctions.[88]

Some states are similarly implementing measures to ensure public access rights, which may even be expanded in some state constitutions. For example, the Texas judicial branch provides extensive and detailed Zoom information and YouTube support on its website.[89] Many of its courtrooms are livestreaming at all times.[90] Of course, this is not as radical as the federal system's move to virtual courtrooms, as many states had been livestreaming proceedings long before the pandemic. Much of these efforts, however, operate on an assumption that all United

[85] Administrative Office of the United States Courts, *Courts Deliver Justice Virtually Amid Coronavirus Outbreak,* Apr. 8, 2020 (*available at* https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak).
[86] United States District Court, Northern District of California, Preparing to Participate in a Zoom Video Conference (*available at* https://www.cand.uscourts.gov/zoom/).
[87] *Id.*
[88] *Id.*
[89] Texas Judicial Branch, Court Coronavirus Information, Electronic Hearings (Zoom) (*available at* http://txcourts.gov/court-coronavirus-information/electronic-hearings-zoom/).
[90] Texas Judicial Branch, Texas Court Live Streams (*available at* http://streams.txcourts.gov/).

States citizens have access to the internet and can readily access virtual proceedings. Access to the internet and electronic devices from which to participate in virtual proceedings, and technological wherewithal to access or participate as readily as in-person proceedings, are not universal.

Victims of crimes are specifically afforded access and participation in court proceedings, as mentioned in the Administrative Office of the U.S. Courts' interpretation of the CARES Act's authorization of video and telephonic criminal proceedings. In most states, and in federal cases, victims also have their own set of enumerated rights. The Crime Victims' Rights Act, 18 U.S.C. § 3771, provides in pertinent part that crime victims in federal criminal cases have the right to "proceedings free from unreasonable delay"[91] and the right "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."[92]

After the 2018 elections, in which six states approved Crime Victims' Rights Amendments to their constitutions, two-thirds of states now have a constitutional amendment providing crime victims' rights. The remaining states provide crime victims' rights by statute. The laws are known as Marsy's Laws, and, while they vary from state to state in the breadth of the rights that they provide, most provide a right to access judicial proceedings and a right to different forms of meaningful participation in the criminal justice process.

Crime victims' rights may be impaired by release of prisoners in response to the dire situations in prisons across the country. The Justice Department, through various memoranda

[91] 18 U.S.C. § 3771(a)(7).
[92] *Id.* § 3771(a)(3).

issued to the Bureau of Prisons, has attempted to work out a process for expediting release of lower risk prisoners, those who are nearing the end of their sentence, and prisoners who are at very high risk of severe symptoms if they are infected with COVID-19.

As discussed above, victims' access to courts, like public access, will be somewhat limited by video and telephonic conference. While suspensions of the Speedy Trial Act obviate concerns about the constitutional right to a speedy trial under the Sixth Amendment, crime victims' rights are also abridged by delay in judicial proceedings. If defendants do not consent to video and telephonic proceedings, the delay may be indefinite.

III. CONCLUSION

The COVID-19 pandemic has created urgent issues for the criminal justice system and the response is in its infancy. Courts across the country are working hard to adjust to the realities of the pandemic, putting new processes and procedures in place, and amending them continually, with little precedent or law to guide them. Practitioners are wrestling with potential outcomes for clients based on new and prospective changes. And the already extraordinary challenges are further complicated by the fact that the landscape changes week to week, and varies by county, state, and federal judicial district. ACTL hopes that this paper can serve as a framework for analyzing the issues that have begun to emerge and what they mean for the rights of criminal defendants, victims, and the public.