

Constitutional Concerns Related to Jury Trials During the COVID-19 Pandemic



A Pandemic Resource from NCSC

December 2, 2020 | Version #1

Conducting jury trials and grand jury proceedings during the pandemic has posed significant practical and legal challenges for courts. This memo identifies constitutional issues implicated when courts have suspended jury trials or adjusted jury trial procedures to minimize risks to public health during COVID-19. It is beyond the scope of this writing to describe laws state-by-state that define public emergencies and authorize government officials to require certain unusual actions (for example, wearing face coverings) or prohibit certain normal practices (for example, completely in-person jury trials). Rather, the goal here is to set forth established legal standards that apply broadly to jury trials in the United States.

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*Special thanks go to Weston Coward, a graduating law student, Georgetown University Law Center, for assisting in the legal research that supports this paper.

Right to Speedy Trial

Pandemic Issue: With many courts ordering the suspension of jury trials (sometimes indefinitely), does freezing trial dates violate the defendant’s right to a speedy trial?

Black Letter Law

The Constitution’s Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial, by an impartial *jury* of the state and district wherein the crime shall have been committed.”¹ In *Duncan v. Louisiana*, the Supreme Court held that the right to a jury trial applies to states by the Fourteenth Amendment.² The Court explained that “[b]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”³ The Sixth Amendment right to jury trial applies to “serious” crimes (distinguished from petty offenses), which is generally interpreted to mean felonies in which the penalty is one year or more in prison.

In *Klopper v. North Carolina*, the Supreme Court held that the guarantee of a speedy trial applied to the States by the Fourteenth Amendment’s Due Process Clause.⁴ The Supreme Court has not interpreted the right to a speedy trial to require that a case be brought within a specific number of days. The Court explained in *Barker v. Wingo* that a defendant’s constitutional right to a speedy trial can only be determined on an *ad hoc* basis.⁵ Courts must balance four factors when determining whether a defendant has been deprived of his right to a speedy trial: (1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of his right, and (4) the prejudice to the defendant.⁶ None of these factors are dispositive, and courts must also consider any other circumstances that are relevant to the inquiry.⁷ A court opinion issued in *Delaware v. Duonnolo*⁸ discusses the *Wingo* factors in response to the defendant’s motion to dismiss charges on speedy trial grounds due to the suspension of jury trials during the COVID-19 pandemic.

Whether the Constitutional speedy trial requirement applies to defendants not being held in custody depends on whether charges are currently pending. In *United States v. Loud Hawk*, the Supreme Court held that “when no indictment [or information] is outstanding, only the ‘*actual*’ restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment.”⁹ This means that when the *actual* restraints are removed and “defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under

¹ U.S. CONST. amend. VI (emphasis added).

² See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³ *Id.* at 149.

⁴ *Klopper v. North Carolina*, 386 U.S. 213, 222–23 (1967).

⁵ See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

⁶ *Id.*

⁷ *Id.* at 533.

⁸ *State v. Duonnolo*, 2020 Del. Super. LEXIS 230 (Nos. 1906013925,1906013859, May 13, 2020).

⁹ *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (ellipsis in original) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

the Speedy Trial Clause.”¹⁰ The Court explained that one of the goals of the speedy trial guarantee is to “minimize the possibility of lengthy incarceration prior to trial,” and applying the speedy trial guarantee to out-of-custody defendants does not further that goal.¹¹ However, the speedy trial guarantee does apply to an out-of-custody defendant if there are “outstanding” or “pending” charges.¹² The Speedy Trial Clause applies in that situation because the defendant is still “the subject of public accusation” and his life is being disrupted by “the presence of unresolved criminal charges.”¹³

Several states have codified the number of days in which defendants must be brought to trial, including out-of-custody defendants. Though, the time frame for when the state must conduct the trial usually depends on whether or not the accused is in custody or free on bail.¹⁴ Many of these statutes, however, allow for the speedy trial period to toll during natural emergencies.¹⁵ Both executive and judicial emergency orders during the pandemic have cited these provisions.¹⁶

Conclusions and Recommendations

It appears that the public health emergency caused by the pandemic justifies postponement of trials, but not cancellation. As emergency orders suspending jury trials expire or are repealed, speedy trial requirements will again become operational. Many states have authorized trial courts to resume in-person jury trials provided they comply with federal, state, and local health requirements. In many instances, public health orders restrict the number of individuals who can gather in groups, which necessarily limits the number of prospective jurors who can appear in-person for jury selection and creates a bottleneck for the number of jury trials that can begin at any given time. Depending on the backlog of jury trials, it is possible that slowdowns in the rate at which jury trials can commence will continue to challenge the ability of courts to comply with defendants’ rights to a speedy trial. Administrative orders authorizing the resumption of jury trials should establish clear criteria for prioritizing cases eligible for trial. If feasible, these administrative orders should extend the time frame for speedy trials to address the logistical problems associated with existing backlogs and the slowdowns.

¹⁰ *Id.* at 312.

¹¹ *Id.* at 311 (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)).

¹² *Id.* (quoting *MacDonald*, 456 U.S. at 8).

¹³ *Id.* (quoting *MacDonald*, 456 U.S. at 8, 9).

¹⁴ Compare 725 Ill. Comp. Stat. Ann. 5/103-5(a) (“Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody.”), with 725 Ill. Comp. Stat. Ann. 5/103-5(b) (“Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial.”).

¹⁵ See, e.g., *People v. Lucy*, 467 P.3d 332 (Colo. June 29, 2020)(authorizing the trial court to grant a prosecution motion for continuance with tolling of the speedy trial period up to 6 months).

¹⁶ See, e.g., N.Y. Governor’s Exec. Order 202.8 Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency (March 20, 2020); *In re Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, 141 N.E.3d 388 (March 16, 2020).

Right to a Public Trial

Pandemic Issues: Many public health agencies have required courts and other public enterprises to observe safety precautions such as social distancing, face coverings, and sanitation protocols. These directives have prompted courts to radically change the methods for accessing court proceedings. These include conducting: (1) completely online trials, or (2) hybrid trials where some parts are online (for example, jury selection) and some parts are live (such as receipt of witness testimony or jury deliberations), or (3) completely in-person trials with radical adjustment of the physical layout of court spaces. In any of these scenarios, the public at large is physically absent from all or large parts of the trial. In purely remote trials, audio-visual platforms are devoted exclusively to courtroom actors (parties, attorneys, witnesses, and court personnel). In hybrid or completely live trials, social distancing requirements have caused court managers to convert courtroom galleries (normally reserved for public observers and news media) into extended space for courtroom actors. For example, the gallery becomes an extended jury box exclusively for jurors. Members of the press and interested citizens are assigned to satellite spaces to “view” or listen to the trial remotely. Does the exclusion of the public from the courtroom violate the defendant’s right to a public trial? If so, does streaming the trial proceedings online provide an acceptable alternative for public access?

Black Letter Law:

The Sixth Amendment’s establishment of a public trial right was made applicable to the states in *In re Oliver*.¹⁷ There, the Court stated a public trial is “for the benefit of the accused” because “the public may see he is fairly dealt with and not unjustly condemned,” which has the effect of “keep[ing] his triers keenly alive to a sense of their responsibility and to the importance of their functions.”¹⁸ However, like most constitutional rights, the right to a public trial is not absolute. In *Waller v. Georgia*, the Supreme Court set forth the test that trial courts must use to determine whether a courtroom closure is appropriate.¹⁹ A closure is appropriate when:

[1] the party [or a court during a pandemic] seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.²⁰

At least some courts have interpreted the *Waller* test to require the application of strict scrutiny.²¹ In the event of a partial closure, some courts have applied a less rigorous test than the one outlined in *Waller*.²²

¹⁷ *In re Oliver*, 333 U.S. 257, 270 n.25 (1948).

¹⁸ *Id.* at 270 n.25.

¹⁹ *Waller v. Georgia*, 467 U.S. 39 (1984).

²⁰ *Id.* at 48.

²¹ See *Commonwealth v. Chism*, 65 N.E.3d 1171, 1178 (Mass. 2017) (referring to the “four-part strict scrutiny test articulated in *Waller*”).

²² See *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (requiring a “substantial” reason for a partial closure)

It should also be noted that the right to a public trial has been interpreted to apply to other proceedings, including *voir dire*.²³ The *Waller* test also governs an inquiry into whether the public can be excluded from *voir dire*.²⁴

The Supreme Court has also held that the press and the public have a similar right under the First Amendment to attend criminal trials.²⁵ In *Press-Enterprise Co. v. Superior Court of Cal. For the Cnty. of Riverside*, the Supreme Court outlined the test that determines whether the courts can restrict the public's access to proceedings.²⁶ To establish a claim of a First Amendment right of access to criminal proceedings, the requesting party must prove two elements. First, that "the place and process have historically been open to the press and general public."²⁷ Second, that "public access plays a significant role in the functioning of the particular process in question."²⁸ Then, "[i]f the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches."²⁹ This right of access can only be overcome by an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."³⁰ A court must also articulate "findings specific enough" for a reviewing court to determine whether the closure was proper.³¹

Conclusions and Recommendations

Live streaming of trial proceedings during the pandemic likely satisfies the *Waller* test. In *United States v. Richards*, for example, the court found that allowing the public to observe trial proceedings via livestream video and audio to a viewing room within the courthouse and on the court's website was a partial closure that satisfied the *Waller* test.³² Streaming should provide clear video footage of judge, lawyers, and witnesses. Streaming of jurors should be done in ways that protect their privacy and prevent intimidation. Since juror demeanor is important in selecting a jury, images of jurors should only occur during *voir dire* and not during the remainder of the trial. Each juror should only be identified by their juror identification number. Any re-configuring of courthouse space or use of remote means to engage the media and public at large should be accompanied by a clear, public statement by court management that, in the words of the *Press Enterprise* court, the space adjustments and digital access is "essential to preserve higher values (public safety, public trust, etc.) and is narrowly tailored to serve [those] interest[s]." Independent legal advice should be engaged in the drafting of the public statement.

²³ See *Presley v. Georgia*, 558 U.S. 209 (2010).

²⁴ *Id.* at 213.

²⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

²⁶ *Press-Enterprise Co. v. Superior Court of Cal. for the Cnty. of Riverside*, 478 U.S. 1 (1978).

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ *Id.* at 9–10.

³² *United States v. Richards*, 2020 U.S. Dist. LEXIS 158887 (M.D. Ala., Sept. 1, 2020).

Right to an Impartial Jury

Pandemic Issues: The public health emergency challenges the creation of impartial juries in two major ways: (1) summoning representative jury pools, and (2) selecting unbiased petit jurors. These are discussed separately below.

Representative Jury Pools

Healthcare experts have identified segments of the population that are especially vulnerable to the effects of COVID-19. These include the elderly and those with pre-existing medical conditions. They commonly are advised to take extra precautions such as avoiding public gatherings. Members of racial minorities appear to be disproportionately at risk for serious health effects. In addition, many schools and businesses are closed pursuant to public health agency directives. Thus, parents and caretakers of vulnerable family members must stay in place with their dependents. Accordingly, many endeavors such as schooling and job duties can only be done remotely from home. The quality of remote communications is dependent, in varying degrees, upon the quality of a citizen's digital devices and internet access. These qualifiers are largely dictated by the user's financial means. In addition, during the current public health emergency, first responders such as healthcare workers are constrained from leaving their jobs. When courts undertake jury trials, either in-person or as remote or hybrid jury trials, there is a risk that the jury pool will not reflect a fair cross section of the community because distinct populations cannot or will not participate in jury service due to health concerns or essential job duties (for in-person jury trials) or to financial inability to have broadband access (for remote or hybrid jury trials).

Black Letter Law:

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the state and district wherein the crime shall have been committed."³³ In *Parker v. Gladden*, the Supreme Court held that the right to a trial by an impartial jury applied to the States by the Fourteenth Amendment's Due Process Clause.³⁴

With regard to the composition of the jury pool, the Supreme Court in *Taylor v. Louisiana* recognized that the presence of a fair cross-section of the community in the jury pool is essential to a criminal defendant's right to an impartial jury.³⁵ *Duren v. Missouri* established a three-prong test that defendants must use to establish a prima facie violation of the fair cross-section requirement. Defendants must show:

- (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 systematic exclusion of the group in the jury-selection process.³⁶

³³ U.S. CONST. amend. VI (emphasis added).

³⁴ *Parker v. Gladden*, 385 U.S. 363, 364 (1966).

³⁵ See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

³⁶ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

The Court has never precisely defined the term “distinctive group,” but it has noted that distinctiveness “must be related to the purposes of the fair-cross-section requirement.”³⁷ Most courts have incorporated Equal Protection considerations into the “distinctive group” prong, limiting the scope to race, ethnicity, gender, and other “immutable characteristics.” With rare exceptions, characteristics that can change (age, education, socioeconomic status, political affiliation) are not recognized as distinctive groups.

The exclusion of distinctive groups merely needs to be “systemic” – that is, inherent in the jury selection process itself. It does not need to be intentional exclusion, which is the higher threshold required for an Equal Protection violation. Early fair cross section challenges during the public health crisis have failed on grounds that the exclusion of distinctive groups from the jury pool was not systemic, but instead was due to the pandemic.³⁸

If a defendant introduces evidence supporting all three prongs, the burden shifts to the State to provide a compelling justification for excluding the distinctive group. The Supreme Court also grants broad discretion to the state to define qualification and exemption criteria for jury service.

Conclusions and Recommendations

Courts can reasonably expect that jury pools will be less representative of their respective communities due to the need to excuse individuals at high risk of severe health effects from COVID-19 as well as individuals suffering significant hardship due to the economic impact of the pandemic. In addition, digital divide considerations for individuals who lack access to internet-enabled devices or connectivity may undermine the representativeness of jury pools available for remote or hybrid jury trials. Principle 10 of the [ABA Principles for Juries & Jury Trials](#), recommends courts “periodically review ... the assembled jury pool for their representativeness and inclusiveness of the eligible population.... Should the court determine that improvement is needed in the representativeness or inclusiveness of the ... assembled jury pool, appropriate corrective action should be taken.” Courts should avoid offering broad exemptions from jury service to affected groups. Instead, they should follow existing procedures concerning requests to be excused from jury service, and carefully document the impact on the demographic composition of the jury pool. Courts can also encourage prospective juror participation by publicizing the measures to protect public health and safety in the courthouse. Courts pursuing remote or hybrid jury trial options should consider options for persons without access to internet-enabled devices or connectivity to participate, including allocating facilities within the courthouse for them to participate remotely or in-person, or partnering with community organizations (libraries, community centers, government agencies, nonprofit organizations) to provide space and the ability to participate remotely.

³⁷ *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). The three purposes of the fair-cross-section requirement are: “(1) guarding against the exercise of arbitrary power and ensuring that the commonsense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor, (2) preserving public confidence in the fairness of the criminal justice system, and (3) implementing our belief that sharing in the administration of justice is a phase of civic responsibility.” *Id.* at 174–75 (alterations and quotations omitted).

³⁸ *State of New Jersey v. Dangcil*, Superior Court of N.J. App. Div. No. AM-0053-20.

Selecting Unbiased Petit Jurors

In totally remote and hybrid jury selections, the ability of the parties and the court to observe the demeanor of prospective jurors may be compromised. During remote *voir dire*, the nuances of a juror's body language are cramped by the confines of a video screen. In hybrid jury selections conducted in socially distanced courthouse settings, evaluation of a juror's demeanor is compromised by face coverings and spatial distance.

With regard to the right of *voir dire*, the Supreme Court has held that defendants must be given a fair and meaningful opportunity to determine whether potential jurors are prejudiced. In *Smith v. Phillips*, the Court wrote that due process entitles a defendant to an impartial jury, which is a jury comprised of people “capable and willing to decide the case solely on the evidence before it.”³⁹ And based on the Court's holding in *Ristaino v. Ross*, “the demands of due process” seem to require at least a “generalized but thorough inquiry into the impartiality of the veniremen.”⁴⁰

The Supreme Court has generally refused to regulate jury deliberations in the same way that it has regulated other parts of the trial. However, the Court has explained that “[p]robing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases.”⁴¹ Additionally, the Court has encouraged trial courts to give instructions that emphasize “the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues.”⁴²

In *U.S. v. Trimarco*, 2020 WL 5211051 (E.D.N.Y. Sept. 1, 2020), a trial judge faced with a defense complaint about juror face masks inhibited the crucial task of measuring juror credibility ruled, “Being able to see jurors' noses and mouths ‘is not essential’ for assessing credibility because ‘[d]emeanor consists of more than those two body parts’ since it ‘includes the language of the entire body.’ (Citation omitted) Defendant's attorneys can still observe and evaluate other aspects of jurors' body language that will be fully visible during the trial. While recognizing that ‘being able to see a potential juror's full facial expressions may be tactically preferable, ... the Court is unconvinced that it is required by the Constitution.’ (Citation omitted) Further, even if they cannot see jurors' noses and mouths, Defendant's attorneys still have access to other tools to assess the credibility of potential jurors. All potential jurors will complete informative questionnaires, which defendant himself will draft with the government for the Court's approval, and must respond to follow-up questioning by the Court during *voir dire*, to which defendant may submit his own proposed questions. The Court therefore finds that Defendant's right to a fair and impartial jury will not be impaired because jurors will be wearing masks during trial.

Conclusions and Recommendations

Trial courts have addressed concerns about the ability of attorneys to assess juror demeanor during in-court jury selection by permitting jurors to lower the masks when responding to

³⁹ *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

⁴⁰ *Ristaino v. Ross*, 424 U.S. 589, 598 (1976).

⁴¹ *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

⁴² *Id.*

questions and by providing jurors with clear facemasks.⁴³ To date, only a handful of courts have experiments with remote jury selection, however attorneys who have participated report no difficulty in seeing jurors' facial expressions. Several also commented that jurors appeared to be more forthcoming in response to questions, possibly due to being more comfortable communicating on the videoconferencing platform than in the comparative solemnity of the courtroom environment. In addition, several also learned useful information from jurors' background environment.

⁴³ The CDC does not recommend the use of face shields as a substitute for masks due to a lack of evidence of their effectiveness to control the spread of the virus. See <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/cloth-face-cover.html>.

Confrontation Clause

Pandemic Issues: In purely remote trials, live testimony is rendered through a digital platform. In hybrid trials evidence is presented in a courthouse setting with witnesses wearing face masks and a social distance from other courtroom actors. As with jury selection, these settings may compromise a party’s ability to assess and challenge credibility. However, unlike *voir dire*, there is a constitutional protection afforded an accused.

Black Letter Law:

The Sixth Amendment assures that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁴⁴ The “core of the values furthered” by this clause is the “literal right to confront the witness at the time of trial.”⁴⁵ The Court has interpreted the Confrontation Clause to protect “the right physically to face those who testify, and “the right to conduct cross-examination.”⁴⁶ The right of confrontation is a fundamental right that the Supreme Court has incorporated against the States.⁴⁷

In *Maryland v. Craig*, the Supreme Court explained that the right to confrontation is not absolute.⁴⁸ Although the Court emphasized that the preference for face-to-face confrontation is strong, it can sometimes be dispensed with.⁴⁹ The Court held that “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where” (1) the “denial of such confrontation is necessary to further an important public policy,” and (2) “the reliability of the testimony is otherwise assured.”⁵⁰ The Court later noted that the “requisite finding of necessity must of course be a case-specific one.”⁵¹ Using this two-part test, *Craig* permitted the testimony of a child abuse victim to be received by a one-way closed-circuit television transmitted from outside the courtroom. This arrangement allowed the defendant to see the child and communicate with his lawyer, without forcing the child to see the defendant.⁵²

Years later the Second Federal Circuit in *United States v. Gigante*⁵³ addressed constitutionality of a witness in a witness protection program testifying by way of two-way closed-circuit television. The court found that expert testimony supported a finding that it was medically unsafe for the witness to travel and deliver live testimony. Without applying the two-part test in *Craig*, the *Gigante* court warned that the use of remote testimony needed to be “carefully circumscribed” but found no Confrontation Clause violation. It reasoned that the testimony of the remote witness preserved a sufficient number of characteristics of live testimony. Namely he

⁴⁴ U.S. CONST. amend. VI (emphasis added).

⁴⁵ *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quotations omitted).

⁴⁶ *Id.*

⁴⁷ *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

⁴⁸ *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

⁴⁹ *Id.* at 850.

⁵⁰ *Id.*

⁵¹ *Id.* at 855.

⁵² *Id.* at 857.

⁵³ *United States v. Gigante*, 166 F. 3d 75 (2d Cir. 1999).

was sworn; was subject to full cross-examination; testified in full view of the jury, court, and defense counsel; and gave testimony under the eye of the defendant himself.⁵⁴

Since the COVID-19 crisis began, at least two federal trial courts have concluded that a defendant's rights are not abridged by prosecutions witnesses wearing face masks during their testimony.⁵⁵

Conclusions and Recommendations

Courts should rely on the findings and directives of public health officials in determining when and for how long face masks must be used in courtrooms.

⁵⁴ *Id.* at 80.

⁵⁵ *U.S. V. Donzinger*, 2020 U.S. District LEXIS 157797 (SDNY Aug. 31, 2020) While the [Sixth Amendment's Confrontation Clause](#) gives defendants the right "to be confronted with the witnesses against [them]," [U.S. Const. amend. VI](#), the Supreme Court made clear in *Maryland v. Craig* (*citation omitted*) that it does not "guarantee[]" defendants "the absolute right to a face-to-face meeting" with accusatory witnesses. *Id.* at 844 (emphasis in original). Rather, "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (emphasis in original, citation and internal quotation marks omitted). Accordingly, *Craig* held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. See also, *U.S. v. Crittenden*, 2020 WL 4917733 (M.D. Georgia Aug. 21, 2020).

Grand Juries

Pandemic Issue: While not all states require grand juries, those that do have varying requirements for size, quorum, and decision rules. Unless specifically authorized to release reports or proceeding transcripts publicly by statute, court rule, or court order, grand juries are required to maintain the secrecy of their proceedings. Like trial juries, grand jurors are prohibited from making *ex parte* contacts with non-jurors. How can this be maintained if grand jurors participate remotely?

Black Letter Law:

The Constitution's Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a *Grand Jury*."⁵⁶ However, the right to a grand jury indictment in criminal cases has never been incorporated and does not apply to state and local governments.⁵⁷

In federal court, "[t]he right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment."⁵⁸ But the Fifth Amendment does not require states to use grand juries. If states want, they can choose alternatives such as preliminary hearings and prosecutorial informations.⁵⁹ States that do employ grand juries must adhere to the same constitutional requirements as federal courts (e.g., Equal Protection, Due Process, etc.).

The NCSC in 2019 published an overview about grand jury practices and procedures in state courts. It discusses recent legislative and regulatory reforms proposed in several states to strengthen public trust in the grand jury. [*Reforming the Grand jury Indictment Process: Recent Efforts to Improve Public Confidence in Cases Involving Police Use of Lethal Force*](#).

Conclusions and Recommendations

Just as with trial juries, courts should fashion jury instructions to grand jurors explaining the reasoning for secrecy and the prohibition of *ex parte* contacts. Valuable lessons have been learned from the steps taken in recent years to educate jurors about the importance of not doing Internet research and avoiding *ex parte* contacts throughout a trial.

⁵⁶ U.S. CONST. amend. V (emphasis added).

⁵⁷ *Hurtado v. California*, 110 U.S. 516 (1884).

⁵⁸ *Stirone v. United States*, 361 U.S. 212, 218–19 (1960).

⁵⁹ See *Hurtado*, 110 U.S. at 516.

Right to a Civil Jury Trial

Pandemic Issue: Although there are fewer constitutional issues pertinent to civil jury trials, many of the practical concerns raised above for criminal trials will arise in civil trials.

Black Letter Law:

The Constitution's Seventh Amendment provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved."⁶⁰ The Supreme Court has ruled that the Seventh Amendment right to jury trial in civil cases is not incorporated,⁶¹ however many state constitutions contain similar provisions. States therefore can eliminate juries in some or even all civil suits without violating the United States Constitution.⁶²

The Supreme Court held in *Beacon Theatres, Inc. v. Westover* that the Seventh Amendment requires a jury trial for all legal issues, including those intertwined with equitable issues.⁶³ State courts, however, are not compelled to accept *Beacon Theatres* and are instead required to look at their own state constitutions and state laws.

Conclusions and Recommendations

In general, the procedures and practices employed for civil jury trials mirror those for criminal trials. Constitutional and statutory speedy trial requirements are inapplicable, but many states have adopted time standards for civil cases that provide guidance on expected time frame for civil cases, including those tried by jury, to conclude. There are no restrictions on public access to civil jury trials, and procedures for summoning and selecting civil juries are the same as for criminal juries. There is no constitutional right for parties in civil cases to confront witnesses in person, and increasingly parties have consented to remote testimony, deposition videotapes or transcripts, or written reports to be admitted as evidence in lieu of in-person testimony. As civil jury trials resume, courts should consult and adapt as appropriate recommendations for compliance with constitutional requirements in criminal trials.

⁶⁰ U.S. CONST. amend. VII (emphasis added).

⁶¹ *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

⁶² *See id.*

⁶³ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 503, 508–10 (1959).