

# The Pandemic's Toll On Criminal Defendant Rights: Part 2

By **Eric Christofferson, John Hillebrecht and Paul Lewis** (December 2, 2020)

The U.S. Constitution guarantees the criminally accused certain fundamental rights — such as the right to confront witnesses, a speedy trial, a public trial, a representative jury venire and counsel. But safety-related accommodations during the pandemic collide with the practical mechanics that ensure these constitutional rights, and courts and parties are being forced to choose from among imperfect alternatives.

In the first installment of this two-part article, we examined how courts are wrestling with defendants' rights to counsel and an impartial jury venire during a pandemic. Here, we look at defendants' rights to confrontation and a speedy trial.

## Confrontation Clause

One of the most fundamental issues with which courts are grappling is how to conduct witness examinations in a criminal case. Defendants' Sixth Amendment right to confront witnesses is not absolute.

Indeed, the U.S. Supreme Court in its 1990 opinion in *Maryland v. 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."<sup>[1]</sup>

And in an earlier case, *Chambers v. Mississippi*, the Supreme Court held that this right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."<sup>[2]</sup>

Accordingly, a number of courts, mostly before the pandemic, have held that allowing a witness to testify during a criminal trial by two-way video conference does not violate defendants' right to confront them — provided that the mechanism of testimony "is necessary to protect the health or well-being of the witness or someone else, and the defendant is able to cross-examine and confront the witness through the video platform," as a Massachusetts Superior Court put it in *Commonwealth v. Masa*.<sup>[3]</sup>

To date, a number of federal courts have already determined that the right to confrontation must give way to pandemic-related safety measures for witnesses and the public alike; as the U.S. District Court for the Southern District of New York observed in *U.S. v. Donziger*, "there is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies."<sup>[4]</sup>

Another court, the U.S. District Court for the Middle District of Georgia, noted in *U.S. v. Crittenden* that requiring masks "does not diminish that confrontation or the reliability of a witness's testimony in a material way, and it is necessary to protect the trial participants and spectators from COVID-19."<sup>[5]</sup>



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Other courts have, however, suggested that the right to confrontation will not give way to pandemic-related concerns in every instance. For example, after the government moved to allow a witness to testify by video in a criminal trial in *U.S. v. Vorley et al.*, the U.S. District Court for the Northern District of Illinois found that the direct and ancillary effects of COVID-19 did not preclude a particular witness from traveling and testifying.[6]

Characterizing the issue as a mere "unwilling[ness] to travel to Chicago for pandemic-related reasons," the court explained that, although out-of-state travel presented some risks, "[o]ur criminal justice system — on which we all rely — depends on witnesses and jurors alike answering the call to participate in criminal trials, even when doing so is burdensome or inconvenient, and even when it exposes them to risks they would not face were they excused from participation." [7]

The Vorley court is not alone.[8] And where witnesses are compelled to appear and testify at a trial in a different state, some will be required to arrive 14 days early for quarantine purposes based on state travel restrictions, like those in place in New York and elsewhere.[9] Such orders cause the burdens on witnesses and the rights of defendants to collide .

In sum, although pre-pandemic precedent may afford state and federal courts some flexibility to take certain steps to prevent proceedings from grinding to a halt, courts' willingness to do so is not unlimited and courts will continue to evaluate circumstances on a case-by-case basis.

## **Speedy Trial**

As with the Sixth Amendment right to confrontation, the direct and indirect effects of the pandemic may also clash with defendants' Sixth Amendment right to a speedy trial, as codified in the federal Speedy Trial Act.

As a general matter, when evaluating whether certain delays infringe upon a defendant's speedy trial right, the Supreme Court in its 1972 opinion in *Barker v. Wingo* instructed federal courts to balance a number of factors, such as the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." [10]

More specifically, where unexpected, yet objectively understandable delays collide with defendants' Sixth Amendment rights, the federal statute affords courts considerable flexibility to extend the statutory deadline, provided that the "ends of justice served by [delaying a trial] outweigh the best interests of the public and the defendant in a speedy trial." [12]

A number of circuits have, in some form, endorsed the general proposition that there is no fixed limit to the amount of time that may be excluded under the ends-of-justice provision, provided that the continuance at issue is reasonable in length under the circumstances.[13] However, at least two circuits, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Second Circuit, have indicated that the speedy trial right necessarily entails a limit to such open-ended continuances.[14]

Although the reasons for such justifiable delays typically include issues such as the necessity for additional time to handle voluminous discovery or preparation of particularly complex cases, a number of federal and state courts have already applied this exception to allow for pandemic-related realities. These courts have more or less endorsed the general proposition that since COVID-19 has put every participant in the criminal justice process at

risk, "continuances necessitated by the pandemic are in the interest of justice and are excludable under the Speedy Trial Act," as the U.S. District Court for the District of New Hampshire put it in *U.S. v. Diaz-Nivar*.<sup>[15]</sup>

Some courts, however, have evidently resisted the temptation to make such blanket proclamations and have instead emphasized that these determinations should still be made on a case-by-case basis.<sup>[16]</sup> Those courts, including the U.S. District Court for the Eastern District of California in *U.S. v. Harris*, have enumerated additional — i.e., nonstatutory — factors to be considered, including:

- Whether the defendant is detained pending trial;
- Whether COVID-19 is present in the facility where the defendant is detained (and if so, whether the defendant belongs to a population that is particularly susceptible to the virus);
- Whether the court can safely conduct a jury trial;
- Whether the defendant has invoked his speedy trial rights since the cases inception;
- How long the defendant has been detained;
- Whether the defendant is charged with a violent crime or has a history of violent crime;
- Whether the defendant was denied bail solely because of the risk of nonappearance; and
- Whether there is a specific reason to suspect recidivism if charges are dismissed.<sup>[17]</sup>

Unsurprisingly, some of the thorniest cases bedeviling the courts are those in which defendants are detained pretrial, especially where the trials will involve multiple defendants — which further complicates the logistics of conducting a trial safely. Moreover, the constantly changing nature of the pandemic increases the degree of difficulty for courts and litigants.

## **Conclusion**

Courts are facing unique and largely unprecedented constitutional questions in this new normal. Prepandemic precedent affords courts substantial discretion to force defendants to make some constitutional compromises, where such compromises are deemed necessary under the circumstances. As such, courts have made substantial modifications to their procedural routines. But while these changes may keep the criminal courts open and protect public health, whether they sufficiently protect defendants' fundamental rights is another question.

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[1] See *Maryland v. Craig* , 497 U.S. 836, 849-850 (1990).

[2] *Chambers v. Mississippi* , 410 U.S. 284, 295 (1973).

[3] *Commonwealth v. Masa* , No. 1981CR0307, 2020 Mass. Super. LEXIS 109, at \*5 (Aug. 10, 2020) (citing cases); see, e.g., *Horn v. Quarterman* , 508 F.3d 306, 313-318 (5th Cir. 2007)(terminally ill witness); *Stevens v. State* , 234 S.W.3d 748, 781-83 (Tex. Ct. App. 2007)(75-year old witness with significant heart disease); *United States v. Gigante* , 166 F.3d 75, 79-81 (2d Cir. 1999)(fatally ill witness); *State v. Seelig* , 226 N.C. App. 147, 156-58, 738 S.E.2d 427, 434-435 (N.C. Ct. App. 2013) (out-of-state expert witness who suffered panic attacks from flying); *New York v. Wrotten* , 14 N.Y.3d 33, 36-40, 923 N.E.2d 1099, 1100-1103, 896 N.Y.S.2d 711 (N.Y. 2009) (85-year old with coronary disease).

[4] *United States v. Donziger* , Nos. 19-CR-561 (LAP), 11-CV-691 (LAK), 2020 U.S. Dist. LEXIS 157797, at \*5-6 (S.D.N.Y. Aug. 31, 2020); see also *C.C. v. A.R.*, 2020 N.Y. Misc. LEXIS 6769, at \*14 (N.Y. Sup. Ct. Sept. 30, 2020) ("This Court finds that this global pandemic is an 'exceptional circumstance' allowing this Court to proceed on all aspects of this proceeding, including the issue of criminal contempt, by virtual means."); *Commonwealth v. Masa*, No. 1981CR0307, 2020 Mass. Super. LEXIS 109, at \*10-11 (Aug. 10, 2020) ("Conducting ... an evidentiary suppression hearing with everyone physically present in the same room would create very real risks that the defendant, lawyers, witnesses, court staff, and judge may be exposed to the novel coronavirus and as a result contract COVID-19 ... These added risks can be avoided, completely, if the hearing is instead conducted remotely using the Zoom video conferencing platform that is available for use in Massachusetts trial courts.").

[5] *United States v. Crittenden* , No. 4:20-CR-7 (CDL), 2020 U.S. Dist. LEXIS 151950, at \*22 (M.D. Ga. Aug. 21, 2020).

[6] See Order, *United States v. Vorley*, No. 18 CR 00035 (N.D. Ill. Aug. 4, 2020), ECF 269 (Order on Government's "motion to permit two-way live video witness testimony").

[7] On Sept. 25, 2020, the jury returned convictions for both defendants on several counts of wire fraud and acquitted them on the conspiracy charges, so it is likely that the Seventh Circuit will review this decision in the coming months.

[8] See, e.g., *United States v. Pangelinan* , No. 19-10077-JWB, 2020 U.S. Dist. LEXIS 157465, at \*12 (D. Kan. Aug. 31, 2020) ("The court finds that the government has not shown that it is necessary to present the witnesses' testimony by video to further important public policies. Under the circumstances here, there are reasonable alternatives which would allow this case to proceed, including a continuance.").

[9] See, e.g., October 6, 2020 U.S. District Court for the Southern District of New York Protocol for Witnesses Traveling from Restricted States in Criminal Cases (adopting and applying protocol for "essential workers" promulgated by New York State Executive Order No. 205: Quarantine Restrictions on Travelers Arriving in New York).

[10] *Barker v. Wingo* , 407 U.S. 514, 530 (1972).

[11] *United States v. Twitty* , 107 F.3d 1482, 1488-90 (11th Cir. 1997).

[12] 18 U.S.C. § 3161(h)(7)(A).

[13] See, e.g., *United States v. Spring* , 80 F.3d 1450, 1458 (10th Cir. 1996); *United States v. Lattany* , 982 F.2d 866, 868 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993); *United States v. Rush* , 738 F.2d 497, 508 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985), rehearing denied, 471 U.S. 1120 (1985); *United States v. Jones* , 56 F.3d 581, 585-86 (5th Cir. 1995); *U.S. v. Twitty*, 107 F.3d 1482, 1488-90 (11th Cir. 1997).

[14] See, e.g., *United States v. Jordan* , 915 F.2d 563, 565 (9th Cir. 1990); *United States v. Gambino* , 59 F.3d 353, 358, 359 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996).

[15] *United States v. Diaz-Nivar* , No. 20-cr-38-JD, 2020 WL 3848200, at \*3 (D. N.H. July 8, 2020); see, e.g., *In re Covid-19 Pub. Health & Safety*, No. STANDING ORDER 2020-08 , 2020 U.S. Dist. LEXIS 158957, at \*2 (M.D. Ga. July 1, 2020); *In re Court Operations Under the Exigent Circumstances Created by the Outbreak of Coronavirus Disease 2019 (COVID-19)*, No. 2:20mc7, 2020 U.S. Dist. LEXIS 115032, at \*24 (E.D. Va. June 30, 2020); *United States v. Carrillo-Villa* , 451 F. Supp.3d 257, 261 (S.D.N.Y. 2020); *United States v. Lev* , MAGISTRATE NO. 17-3195, 2020 WL 2615477, at \*3 (D. N.J. May 22, 2020); *United States v. Kemprud* , No. 2:19-CR-00218-MCE, 2020 U.S. Dist. LEXIS 95833, 2020 WL 2836784, at \*4 (E.D. Cal. June 1, 2020).

[16] See, e.g., *United States v. Harris* , F. Supp.3d, No. 2:20-cr-00049, 2020 WL 2539321, at \*3 (E.D. Cal. May 19, 2020) ("Because Section 3161(h)(7)(A) requires this balancing to be case-specific, the Court cannot find that considerations surrounding COVID-19's impact on public safety and this Court's operations will, in every case, outweigh the best interest of the defendant and the public in a speedy trial."); *United States v. Kane* , No. MJ20-5054-BHS-TLF, 2020 U.S. Dist. LEXIS 150304, at \*8 (W.D. Wash. June 9, 2020) ("While the circumstances of a global pandemic broadly affect all federal district courts, the Court may not assume that the ends of justice are uniformly served by a policy of 'coronavirus continuances' to consistently outweigh the speedy trial rights of criminal defendants.").

[17] See, e.g., *United States v. Kane*, No. MJ20-5054-BHS-TLF, 2020 U.S. Dist. LEXIS 150304, at \*9 (W.D. Wash. June 9, 2020); *United States v. Harris*, F. Supp.3d, No. 2:20-cr-00049, 2020 WL 2539321, at \*5 (E.D. Cal. May 19, 2020).