

# THE EMERGING CONSTITUTIONAL LAW OF REMOTE CRIMINAL JUSTICE

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*The COVID-19 pandemic compelled courts to experiment with a novel mode of criminal process: conducting proceedings via video. The remote format helped protect public health during the pandemic, and its convenience has led many states to continue using it in certain circumstances. Yet questions about its desirability and constitutionality have lingered, and many are concerned that it undermines the justice and integrity of criminal proceedings.*

*As the future of remote criminal justice is up for debate, it is important to assess to what degree it complies with fundamental constitutional principles. To that end, this Article offers a comprehensive analysis of cases addressing due process, confrontation, and right to counsel challenges to remote criminal proceedings. It analyzes courts' reasons for granting or denying such challenges in decisions rendered by state and federal courts in 2020–23. The Article evaluates the decisions in light of relevant empirical research and then offers a framework to guide the emerging doctrine. It identifies several areas in which constitutional doctrine needs to be elaborated to provide greater transparency, predictability, and fairness. A coherent framework, informed by both research and precedent, can help ensure that the use of novel technologies to conduct criminal proceedings remains consistent with constitutional values.*

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## INTRODUCTION

Remote criminal justice reached new heights during the COVID-19 pandemic. State and federal criminal courts relied on videoconferencing to conduct business during much of 2020–22.<sup>1</sup> Although the pandemic is now over, many states have decided to continue using videoconferencing for certain criminal proceedings, and other states are considering the possibility.<sup>2</sup>

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1. See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 527–28 (2020); Administrative Order at 3, *In re* Comprehensive COVID-19 Emergency Measures for the Fla. State Cts., No. AOSC 20-23 (Fla. Apr. 6, 2020); N.J. Admin. Directive No. 12-20, Principles and Protocols for Virtual Court Operations During the COVID-19 Coronavirus Pandemic (Apr. 27, 2020); First Emergency Order Regarding the COVID-19 State of Disaster, 596 S.W.3d 265, 265 (Tex. 2020).

2. See, e.g., GA. UNIF. SUPER. CT. R. 9.1; N.C. GEN. STAT. § 7A-49.6; WASH. CRIM. R. CTS. LTD. JURIS. 3.4; Administrative Order at 1, *In re* Adoption and Implementation of Plan B Workgroup Recommendations as Presumptive Standards for Remote and In-Person Hearings No. 2022-88 (Ariz. Aug. 3, 2022); Jim Ash, *Supreme Court Adopts Rules for Remote Proceedings*, FLA. BAR NEWS (July 18, 2022), <https://www.floridabar.org/the-florida-bar-news/supreme-court->

The remote format offers certain conveniences for defendants, witnesses, and attorneys, especially now that the technology for videoconferencing is available broadly and familiarity with it has increased.<sup>3</sup> During the pandemic, the remote format also helped protect public health. But despite these advantages, criminal proceedings via video remain controversial. As Part I lays out, scholars and practitioners alike have raised questions about their fairness, reliability, and legitimacy.<sup>4</sup> The constitutional validity of remote proceedings has also come into question because they implicate a range of fundamental rights, including due process rights, the right to counsel, and the right to confront witnesses.<sup>5</sup>

As the future of remote criminal justice is up for debate, it is important to analyze whether its use so far has complied with core constitutional principles. This Article offers a comprehensive analysis of state and federal decisions addressing constitutional challenges to remote criminal and quasi-criminal proceedings during the

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adopts-rules-for-remote-proceedings/ [https://perma.cc/X7KD-NFB2]; Kelly Caplan, *Divided Court Adopts Remote Proceedings Amendments*, MICH. LAWS. WKLY. (Aug. 24, 2022), <https://milawyersweekly.com/news/2022/08/24/divided-court-adopts-remote-proceedings-amendments/> [https://perma.cc/Z9HR-4423]; 1 OHIO SUP. CT., REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO ON IMPROVING COURT OPERATIONS USING REMOTE TECHNOLOGY 10 (2021) (recommending expanding the use of remote criminal proceedings); Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG NEWS (May 18, 2023, 4:45 AM EDT), <https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end> [https://perma.cc/3QS4-Z6HV]. Many states had used videoconferencing for select criminal proceedings before 2020, but expanded the practice during the pandemic. See *infra* notes 22–32 and accompanying text.

3. See *infra* Part I.

4. See, e.g., TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, STAN. CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 5–7 (2021); CAROLYN MCKAY, THE PIXELATED PRISONER: PRISON VIDEO LINKS, COURT ‘APPEARANCE’ AND THE JUSTICE MATRIX 154–56 (2018); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1279–82 (2020); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1916–17 (2021); D.L.F. de Vocht, *Trials by Video Link After the Pandemic: The Pros and Cons of the Expansion of Virtual Justice*, 8 CHINA-EU L.J. 33, 34–35 (2022); Neal Feigenson, *Adjudication on Zoom and Beyond: Human Interaction in Virtual Courts*, 62 WASHBURN L.J. 461, 462–63 (2023); Christina Peristeridou & Dorris de Vocht, *I’m Not a Cat! Remote Criminal Justice and a Human-Centred Approach to the Legitimacy of the Trial*, 30 MAASTRICHT J. EUR. & COMP. L. 97, 98–99 (2023); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1104 (2004); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 201–03 (2021).

5. Turner, *supra* note 4, at 203–09.

pandemic.<sup>6</sup> It reviews 182 published decisions from March 2020 to December 2023 and examines the reasons for the success or failure of challenges to the remote format.

As Part II details, challenges were unsuccessful in all but a few pretrial proceedings. This reflects the lower stakes of pretrial proceedings, the more abbreviated presentation of evidence, and the lesser importance of defendants' in-person presence in these settings.<sup>7</sup> Challenges also failed when the court concluded that the need to protect public health during the pandemic justified some modifications to the ordinary procedures.<sup>8</sup> The failure of the defense to object to the remote format before the trial court also doomed many constitutional claims on appeal.<sup>9</sup>

Conversely, criminal defendants were more likely to prevail in their challenges to the remote format in proceedings involving higher stakes, witness or defendant testimony, or vulnerable defendants.<sup>10</sup> Such proceedings included probation revocation, juvenile delinquency proceedings, plea hearings, criminal trials, and sentencing.<sup>11</sup> Concerns about the fairness, reliability, and legitimacy of the remote format led courts to declare it unconstitutional in more than a third of the cases examined, even amid the COVID-19 emergency.<sup>12</sup> This rate of success of defense challenges to remote proceedings is notable not only because of the pandemic context, but also because it is roughly double the average defense success rate on appeal.<sup>13</sup>

Part III addresses what happened in a different category of cases: those in which defendants actually requested remote proceedings.

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6. In the quasi-criminal proceedings category, I include probation revocation and juvenile delinquency proceedings. Although these proceedings are not formally criminal, they carry similar consequences for the defendants involved, and the procedural safeguards that apply are comparable to those in criminal proceedings. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (establishing due process protections applicable to probation and parole revocation proceedings); Morrissey v. Brewer, 408 U.S. 471, 487–88 (1972) (same); *In re Gault*, 387 U.S. 1, 29–31 (1967) (establishing due process protections applicable to juvenile delinquency proceedings).

7. *See infra* Subpart II.A.1.

8. *See infra* Subparts II.A.1, II.B.1.

9. *See infra* Subparts II.A.1, II.B.1, II.C.1.

10. *See infra* Subpart II.A.2.

11. *See infra* Subpart II.A.2.

12. *See infra* Subparts II.A.2, II.B.2, II.C.2. Due to stringent review standards on appeal, relief was granted less commonly, in closer to a quarter of the cases examined. *See infra* Subparts II.A.2, II.B.2, II.C.2; *see also infra* Table 1.

13. NICOLE L. WATERS, ANNE GALLEGOS, JAMES GREEN & MARTHA ROZSI, U.S. DEPT OF JUST., *CRIMINAL APPEALS IN STATE COURTS 5* (2015) (finding a reversal rate of 13% for defendant-initiated appeals in intermediate courts of appeal); Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1965 (2017) (reporting a 14.9% rate of decisions favorable to defendants in first appeals of right).

Unlike cases dealing with defense challenges to the remote format, which mostly arose on appeal, these decisions were all made by trial courts. Interestingly, courts rejected defense requests to proceed remotely in most of the reported cases.<sup>14</sup> Courts declined the requests on nonconstitutional grounds, but the decisions again featured concerns about the fairness and reliability of proceeding by video.

Part IV evaluates the emerging constitutional doctrine of remote criminal justice in light of relevant empirical research.<sup>15</sup> It identifies several areas in which constitutional doctrine needs to be elaborated to provide a more transparent and predictable framework for future decisions. First, courts need to provide guidance about the types of compelling state interests that might justify the use of remote proceedings.<sup>16</sup> Next, they should clarify how the characteristics of a given hearing, including whether it features witness or defendant testimony, affect its constitutionality.<sup>17</sup> They should also assess whether special vulnerabilities of the defendant make the remote format unsuitable in some cases.<sup>18</sup> Finally, courts must take into account the effects of unreliable technology on the constitutionality of remote proceedings.<sup>19</sup>

In developing doctrine on these questions, courts would do well to consult the growing empirical research on virtual legal proceedings.<sup>20</sup> Technology is rapidly evolving, and research into its effects will yield new insights over time. Courts should therefore continually revise and revisit their approach.<sup>21</sup> An informed and adaptive mindset will help ensure that the process remains fair, reliable, and constitutionally sound.

#### I. THE ADVANTAGES AND DISADVANTAGES OF REMOTE CRIMINAL JUSTICE

Even before the COVID-19 pandemic suspended in-person proceedings across American courthouses, many U.S. states had used videoconferencing for certain criminal proceedings, particularly for arraignments, bail hearings, and occasional remote testimony.<sup>22</sup> In arraignments and bail hearings, the remote format reduced the costs

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14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Subpart IV.A.

17. *See infra* Subpart IV.B.

18. *See infra* Subpart IV.C.

19. *See infra* Subpart IV.E.

20. *See infra* Part IV.

21. *See infra* Part IV.

22. *See, e.g.*, CAMILLE GOURDET, AMANDA R. WITWER, LYNN LANGTON, DUREN BANKS, MICHAEL G. PLANTY, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE: IDENTIFYING RESEARCH AND PRACTICE NEEDS TO PRESERVE FAIRNESS WHILE LEVERAGING NEW TECHNOLOGY 3 (2020); Turner, *supra* note 4, at 201–03.

and safety concerns related to transporting pretrial detainees to court.<sup>23</sup> In cases involving remote witnesses, it helped secure testimony that would otherwise be unavailable—from witnesses who lived abroad, witnesses who had serious medical conditions, or children who would be unduly traumatized by testifying in person.<sup>24</sup> On the whole, however, videoconferencing remained an exceptional and largely disfavored procedure in criminal cases.

This all changed as a result of the COVID-19 emergency in 2020. The remote format gained ascendancy because it allowed courts to continue processing criminal cases while protecting the health of the participants and the public.<sup>25</sup> During the pandemic, state and federal courts conducted not only arraignments and bail hearings, but also plea and sentencing hearings, probation revocation hearings, juvenile delinquency proceedings, and even some trials partially or fully online.<sup>26</sup>

While public health concerns have now abated, a number of states have decided to retain the remote format for at least some criminal proceedings.<sup>27</sup> Judicial systems in these states have already invested in the technology required to conduct video proceedings efficiently, and understanding of the technology has increased.<sup>28</sup> The remote format is valued for reducing travel time and costs for everyone involved.<sup>29</sup> It allows participants with work and childcare commitments or health problems to attend more easily.<sup>30</sup> It also permits defense counsel to appear in different jurisdictions without having to travel extensively, and it increases the availability of

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23. Poulin, *supra* note 4, at 1098–1100.

24. GOURDET ET AL., *supra* note 22, at 5, 10–11.

25. Turner, *supra* note 4, at 199.

26. *See, e.g., id.* at 198.

27. *See* sources cited *supra* note 2 (listing rule amendments in different states that permit broader use of the remote format in criminal cases).

28. *See, e.g.,* Order Permitting Remote Appearances at 3–4, *In re Suggested Amend. to CrRLJ 3.4—Appearance of the Defendant*, No. 25700-A-1479 (Wash. Nov. 10, 2022), [https://www.courts.wa.gov/court\\_rule\\_related\\_orders/orders/25700-A-1479.pdf](https://www.courts.wa.gov/court_rule_related_orders/orders/25700-A-1479.pdf) [<https://perma.cc/9J54-ZNLR>].

29. *Id.*; Kaitlyn Filip & Kat Albrecht, *Virtual Justice: Measuring Perceptions of Fairness in Civil and Criminal Courts*, 54 LOY. U. CHI. L.J. 1067, 1087 (2023) (reporting public survey finding that “the most common theme endorsed by participants in support of virtual courts was accessibility”); Nicole Lemire-Garlic & Adam Dunbar, *Public Perceptions of Remote Courts and Equal Access: Who Prefers Remote Video Proceedings and Why?*, CURRENT ISSUES CRIM. JUST. 1, 6 (Jan. 25, 2024) (conducting a public survey and finding that the most common reason given for supporting remote proceedings was that they alleviated logistical difficulties with attending court); Turner, *supra* note 4, at 212–14.

30. Filip & Albrecht, *supra* note 29, at 1087; Lemire-Garlic & Dunbar, *supra* note 29, at 6; Turner, *supra* note 4, at 213.

counsel in more remote rural areas.<sup>31</sup> Some have also argued that the virtual format provides courts with greater flexibility in scheduling hearings and reduces wait times for hearing participants.<sup>32</sup>

Yet despite their expanded use during the pandemic, remote criminal proceedings remain controversial—and for good reason. Practitioners and scholars alike have raised concerns about the reliability, fairness, and legitimacy of the virtual process.<sup>33</sup> Empirical studies have suggested that in some circumstances, the remote format may prejudice judges’ and jurors’ perceptions of witnesses and defendants.<sup>34</sup> It may also impair the ability of defendants to communicate with counsel or the court.<sup>35</sup> Likewise, it can hinder the ability of counsel to evaluate and cross-examine witnesses and to present the defendant’s case effectively.<sup>36</sup> Finally, the remote format may lead to defendants’ disengagement from the process and engender perceptions of unfair treatment.<sup>37</sup>

Because of these potential negative effects, the remote format implicates constitutional protections aimed at protecting fairness in the criminal process. These include the defendant’s due process right to be physically present in court, the right to confront adverse witnesses, and the right to effective representation by counsel.<sup>38</sup> As

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31. *State v. Heng*, 539 P.3d 13, 16–17 (Wash. 2023) (explaining that “technological progress has made it increasingly feasible to have counsel present at a defendant’s first judicial appearance, even in small counties” and concluding that “[b]ecause it is increasingly feasible, courts are required to provide counsel at earlier stages than was previously possible”); *Turner*, *supra* note 4, at 212–14 (noting further that this is significant benefit in rural areas).

32. *Turner*, *supra* note 4, at 212–14; *see also* Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1483–84 (2022).

33. *See* sources cited *supra* note 4.

34. *See infra* Subpart IV.B.

35. *See* BENNINGER ET AL., *supra* note 4, at 107–08, 115–16 (noting concerns expressed in surveys and interviews of practitioners that the virtual format makes it more challenging for attorneys and their clients to communicate privately); MCKAY, *supra* note 4, at 108–12 (interviewing detainees and finding that they were less likely to be engaged or to seek the help of an attorney when they appeared remotely); Lemire-Garlic & Dunbar, *supra* note 29, at 12 (noting “perceived inability to persuasively communicate in an unfamiliar digital context” as a common reason public survey participants gave for preferring in-person proceedings); *Turner*, *supra* note 4, at 253 (finding that 89% of surveyed defense attorneys believed that the online setting interferes with attorney-client confidentiality “sometimes, often, or always”).

36. *Bannon & Keith*, *supra* note 4, at 1902–05; *Turner*, *supra* note 4, at 217–19.

37. MCKAY, *supra* note 4, at 108–12; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 978 (2015); NIGEL FIELDING, SABINE BRAUN, GRAHAM HIEKE & CHELSEA MAINWARING, VIDEO ENABLED JUSTICE EVALUATION 69–71 (2020); Poulin, *supra* note 4, at 1140–41.

38. Because courts refrained from conducting remote jury trials even during the pandemic, defendants invoked the right to a fair and impartial jury only in

remote criminal proceedings proliferated during the pandemic, constitutional challenges to the new format also became more common. The next Part reviews how courts addressed these challenges.

## II. CONSTITUTIONAL CHALLENGES TO REMOTE CRIMINAL PROCEEDINGS

During the pandemic, many defendants waived their right to be present in person. They did so in the hope of appearing cooperative, because of health concerns, out of a desire to resolve the case more quickly, or because of a lack of awareness of their right to appear in person.<sup>39</sup> Other defendants, however, challenged the remote format on constitutional grounds.

This Part examines how courts responded to due process, confrontation, and right to counsel challenges in 182 criminal, probation revocation, and juvenile delinquency cases decided between March 2020 and December 2023 and available on Westlaw.<sup>40</sup> For ease

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the context of virtual jury selection during the pandemic. The right to a public trial was more commonly invoked to challenge remote criminal proceedings, but since it can be more easily accommodated in a virtual format (by streaming the proceedings or providing a link to interested observers), it does not represent a similar existential objection to the use of remote proceedings that objections based on the right to be physically present, the right to confront witnesses, and the right to effective counsel tend to present. *Cf.* Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 6–7 (2020) (discussing ways in which the right to a public trial can be accommodated in virtual proceedings).

39. See Tarika Daftary-Kapur, Kelsey S. Henderson & Tina M. Zottoli, *COVID-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings from a National Survey of Defense Attorneys*, 45 L. & HUM. BEHAV. 81, 89–90 (2021) (noting increased pressures during the pandemic to agree to a waiver to appear in person); Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 249–50 (2022) (discussing an observational study of remote plea hearings and noting that most judges did not inform defendants of their rights to appear in person); *infra* Part III (discussing reasons for defense requests of remote proceedings). In some states, statutes, rules, or pandemic-related emergency orders required express waivers of the right to be present and the right to confront witnesses in person before a proceeding could occur remotely.

40. To find relevant case law, I conducted searches on Westlaw's ALLCASES database with a range of terms, including "remote," "virtual," "video!" "audiovi!," "electronic," "Zoom," "Webex," and "online." I combined these in various ways with the terms "criminal," "supervision," "probation," "revol!," "delinq!," "juvenile," "minor," and "child" and then with the terms "due process," "confrontation," and "right to counsel." I then limited the search to cases decided between March 2020 and December 2023. After finding relevant cases through the above queries, I also cross-checked decisions cited in and citing to these cases in the relevant period. I then reviewed the results and excluded those that did not feature due process, confrontation, or right to counsel challenges to remote criminal or quasi-criminal proceedings.



of reference, I refer to these opinions as “published,” even though many of them were not formally designated for publication in a reporter.<sup>41</sup> The focus on written opinions available in a commercial database was driven by the practical need of conducting a complex keyword search of state and federal decisions across the United States.<sup>42</sup> But the reliance on a commercial database to find relevant decisions introduces the risk of selection bias.<sup>43</sup> Many challenges to remote criminal proceedings by defendants were undoubtedly resolved through oral decisions or written orders that are not available on Westlaw, and it is possible that these “unpublished” decisions skew further in favor of or against defendants than the “published” decisions analyzed here.<sup>44</sup> Moreover, in some jurisdictions, constitutional challenges to the remote proceedings were less likely to be lodged because statutes or emergency orders during COVID-19 required the defendant’s express waiver of constitutional rights to be present and/or to confront witnesses in person.<sup>45</sup> Therefore, certain jurisdictions are less likely to be represented in the analysis.

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41. See Alexander A. Reinert, *Measuring Selection Bias in Publicly Available Judicial Opinions*, 38 REV. LITIG. 255, 259 (2019) (using the term “published” in the same fashion).

42. Mass keyword searches are not possible on more inclusive databases such as PACER or individual state court databases. See *id.* at 258.

43. In other contexts, studies have found that the sample of cases available on such databases often skews in ways that are correlated with important variables that researchers wish to study, including the outcome of motions. *Id.* at 260; see also Keith Carlson, Michael A. Livermore & Daniel N. Rockmore, *The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions*, 17 J. EMPIRICAL LEGAL STUD. 224, 228 (2020); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 92 (2008); Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1107 (2021); Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 CLEV. ST. L. REV. 289, 317 (2021). For example, a study of civil cases involving motions to dismiss found that “publicly available opinions are biased in favor of granting motions to dismiss”; therefore, “looking only at publicly available opinions will tend to overstate the rate at which motions to dismiss are granted.” Reinert, *supra* note 41, at 270.

44. See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 539 (2016) (noting that “judges must weigh the time it takes to write an opinion with the utility of having a written, reasoned elaboration accompany each decision” and that “[e]asy cases and cases not likely to be reviewed by an appellate court can tip the balance away from reasoning—or at least away from elaborating reasoning in sufficient depth and refinement to be a candidate for publishing”).

45. See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 15002(b)(4) (2020) (requiring defendant consent for remote criminal proceedings during the pandemic); Emergency Rules Related to COVID-19, app. I (Cal. Apr. 20, 2020), <https://www.courts.ca.gov/documents/appendix-i.pdf> [<https://perma.cc/YM9U-B6LA>] (requiring defendant waiver of the right to be present in person during criminal proceedings); Order of the Chief Justice of

The focus on published decisions also means that the analysis overrepresents decisions by appellate courts, which are more likely to issue written decisions and make them publicly available. Indeed, 84% of the opinions reviewed in this analysis were issued by appeals or supreme courts.<sup>46</sup> Because defendants are more likely to appeal than prosecutors in criminal cases (indeed, all of the appellate decisions reviewed here were brought by defendants), this skews the results in favor of the prosecution to some degree, as appeals courts are reviewing decisions in which the government has already won at the trial level.<sup>47</sup> Decisions on appeal are also resolved under the very demanding harmless error and plain error standards, so they reflect the deference that is ordinarily granted to trial courts on review.<sup>48</sup>

Another sampling choice that deserves explanation is the period chosen—March 2020 to December 2023. This period captures decisions on remote proceedings that typically took place during the pandemic. It is an important time to study because the use of the remote format increased significantly, and many courts used remote proceedings in novel ways and in a broader range of hearings. Constitutional issues were also more likely to arise during this period of experimentation. At the same time, the pandemic presented a special situation in which the state had a particularly weighty interest in holding proceedings remotely—to protect the health of the participants in the proceedings, as well as of the public at large. The constitutional rights in question—to due process, confrontation, and effective representation—have been interpreted to permit some

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the Supreme Court of North Carolina, Emergency Directive 3 (N.C. Apr. 2, 2020), <https://www.nccourts.gov/assets/news-uploads/2%20April%202020%20-%207A-39%28b%29%282%29%20Order%20%28Final%29.pdf> [https://perma.cc/R7BE-N38L] (requiring defendant consent to remote criminal proceedings during the pandemic).

46. See Remote Criminal Cases Chart (on file with author and Wake Forest Law Review) (identifying 120 out of 144 criminal cases as featuring an appeals or supreme court decision); Probation Revocation Cases Chart, col. G (on file with author and Wake Forest Law Review) (identifying 11 out of 13 probation revocation cases as featuring an appeals or supreme court decision); Juvenile Delinquency Cases Chart, col. G (on file with author and Wake Forest Law Review) (identifying 25 out of 25 juvenile delinquency cases as featuring an appeals or supreme court decision).

47. See, e.g., U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 180, 183 (2021) (reporting that in 2021, federal defendants filed 2,525 sentencing appeals while the government filed 32 sentencing appeals, meaning that defendants in federal cases were 79 times more likely than prosecutors to file an appeal); Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860–1940*, 36 LAW & SOC'Y REV. 51, 91 (2002) (noting how asymmetrical rules in criminal cases, which prevent the government from appealing acquittals, may skew results in analyses of appellate decisions).

48. See *supra* note 13 and accompanying text; see also *infra* notes 108–17 and accompanying text.

procedural modification during emergencies to accommodate compelling state interests.<sup>49</sup> Given the substantial state interest in protecting public health, courts might reasonably be expected to reject many challenges to the constitutionality of remote proceedings during the pandemic. For this reason, decisions from this period may not be entirely representative of court decisions on virtual proceedings in ordinary times.

The following Subparts examine in greater depth the circumstances in which courts rejected or granted defendants' challenges. The analysis reveals both the promise and the limits of remote criminal justice. On one hand, it shows that many courts accepted a novel technology and a modified criminal process during the pandemic to accommodate the strong state interest in protecting public health. On the other hand, the analysis reveals that even during an emergency, and even when the costs might include a reversal of a conviction or resentencing, a significant fraction of courts rejected the remote format as unconstitutional because of concerns about the fairness and integrity of the process. Analyzing courts' decisions during this brief era of necessary remote justice use helps us assess the desirability and constitutionality of the format in more ordinary times.

#### A. *Due Process*

One of the most common constitutional challenges to the remote format is that it conflicts with the defendant's due process right to be personally present at critical stages of the criminal process. The Supreme Court has held that under the Due Process Clause, a criminal defendant has the right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."<sup>50</sup> The right to an in-person appearance has a long pedigree dating back to the common law.<sup>51</sup> It is central to our adversarial system's method of seeking the truth in a criminal case, and it is closely connected to the right to confront adverse witnesses.<sup>52</sup>

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49. *See infra* Subparts II.A.1, II.B.1.

50. *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934).

51. *Crosby v. United States*, 506 U.S. 255, 259 (1993) ("It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence."); *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.");

52. *Coronado v. State*, 351 S.W.3d 315, 325 (Tex. Crim. App. 2011); *see also Crosby*, 506 U.S. at 259.

In *Snyder v. Massachusetts*<sup>53</sup> in 1934, the Supreme Court clarified that physical presence of the defendant is required “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”<sup>54</sup> The right does not apply if “presence would be useless, or the benefit but a shadow.”<sup>55</sup>

In *Snyder*, the defendant had been excluded from the jurors’ viewing of the crime scene, although the judge, the stenographer, the prosecutor, and Snyder’s attorney had all been present.<sup>56</sup> The majority concluded that Snyder had not been denied due process because there was little that his presence at the viewing would have added to his ability to mount a defense.<sup>57</sup> Snyder had conceded that the crime had occurred at the location, and the defense could comment on the crime scene at trial, as photographs and diagrams of the place were admitted into evidence and a transcript of the viewing was made.<sup>58</sup> The Court therefore concluded that Snyder could gain “almost nothing” by being present at the crime scene viewing.<sup>59</sup>

Four Justices dissented, however, and pointed out that viewing the crime scene was important in weighing conflicting testimonies concerning Snyder’s culpability—whether he had fired the lethal bullet or had abandoned the common plan before then.<sup>60</sup> Because the viewing was critical to this determination, the dissenters reasoned, “the Constitution secure[d] the accused’s presence.”<sup>61</sup>

Since *Snyder*, the Supreme Court has affirmed that the right to be present applies “at any stage of the criminal proceeding that is critical to its outcome if [the defendant’s] presence would contribute to the fairness of the procedure.”<sup>62</sup> This includes non-trial proceedings and “situations where the defendant is not actually confronting witnesses or evidence against him.”<sup>63</sup> Following this standard, lower courts have affirmed that in felony cases, the right extends to a range of critical non-trial proceedings, including arraignments, bail and plea hearings, jury selection, and sentencing hearings.<sup>64</sup> Most have

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53. 291 U.S. 97 (1934).

54. *Id.* at 107–08.

55. *Id.* at 106–07.

56. *Id.* at 103.

57. *Id.* at 108–10, 112.

58. *Id.* at 109, 112.

59. *Id.* at 108.

60. *Id.* at 123 (Roberts, J., dissenting).

61. *Id.* at 134.

62. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

63. *Id.* at 745. *But cf. id.* at 747 (concluding that the defendant did not have the right to be present at a witness competency hearing because no testimony would be given about facts of the case, and the defendant offered no evidence that his presence “would have resulted in a more assured determination of competency”).

64. *Clark v. Chappell*, 936 F.3d 944, 990–91 (9th Cir. 2019) (“The right to a public trial under the Sixth Amendment, ‘taken together with the right to due

also extended the right to pretrial hearings involving factual issues, including hearings on the admissibility of evidence, immunity, and witness competency.<sup>65</sup> Likewise, courts have generally held that the

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process, includes a right of . . . defendant[ ] and [his] counsel to be present at all stages of the trial from arraignment to verdict and discharge of the jury.” (alteration in original) (quoting *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976)); *United States v. Martinez*, 578 F. Supp. 3d 848, 849 (S.D. Tex. 2022) (“Although the defendant’s presence may not be required, the court can move forward with the detention hearing in the defendant’s absence only if he voluntarily and knowingly chooses not to be present.”); *People v. Stroud*, 804 N.E.2d 510, 517 (Ill. 2004) (affirming due process right to be physically present at plea hearings); *People v. Lindsey*, 772 N.E.2d 1268, 1275 (Ill. 2002) (“[B]oth the federal constitution and our state constitution afford criminal defendants the general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing.”); *Commonwealth v. Torres*, 806 N.E.2d 895, 897 (Mass. 2004) (holding that the defendant has a due process right to be present at bail hearing); *State v. Fann*, 571 A.2d 1023, 1031 (N.J. Super. Ct. Law Div. 1990) (“Defendant has a due process right to be present” at bail hearing); 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 24.2(a), at 363–67 (4th ed. 2015); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 881 (2010) (“[T]here is at least a serious argument that procedural due process requires the defendant’s physical presence at a bail hearing.”). *But see* 3B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 721 (4th ed. 2024) (“It is doubtful whether defendant has a constitutional right to be present at the arraignment.”).

65. *United States v. Law*, 528 F.3d 888, 904 (D.C. Cir. 2008) (holding that the defendant’s right to be present “turns on whether the district court needed to resolve any disputes of material fact to decide [the] suppression motion”); *Sturgis v. Goldsmith*, 796 F.2d 1103, 1108 (9th Cir. 1986) (holding that a “defendant has a constitutional right to be present at every stage of the trial where his absence might frustrate the fairness of the proceedings,” including pretrial competency hearings); *Ex parte Stout*, 547 So. 2d 901, 903 (Ala. 1989) (“The right to a public trial concomitant with the right to due process and the right to confront the witnesses against oneself includes a right of the defendant and his attorney to be present at all stages of a criminal proceeding,” including “at a suppression hearing.”); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 833 (Mass. 2021) (holding that right to be present applies at suppression hearing and “at all critical stages of a court proceeding”); *State v. Frazier*, 873 N.E.2d 1263, 1288 (Ohio 2007) (“An accused has a fundamental right to be present at all critical stages of his criminal trial.”); *State v. Allenbaugh*, 151 N.E.3d 50, 60 (Ohio Ct. App. 2020) (holding that defendant had a right to be present at *Daubert* hearing); *State v. Grace*, 165 A.3d 122, 127 (Vt. 2016) (noting that “the vast majority of courts, state and federal . . . hold that a suppression hearing constitutes a critical stage of a criminal trial in which the defendant enjoys a constitutional right to be present,” at least when evidence is presented at the hearing). *But see* LAFAVE ET AL., *supra* note 64, at 368 (citing to cases that did not recognize a categorical right to be present at such pretrial hearings).

due process right to be present applies at juvenile delinquency proceedings and probation revocation proceedings.<sup>66</sup>

Even as they have affirmed that the right to in-person presence applies at certain non-trial hearings, courts have qualified these pronouncements by noting that the right is not absolute.<sup>67</sup> Accordingly, courts have at times found that a defendant's absence from a critical stage of the proceeding was not a due process violation because the defendant's presence at the particular hearing would not have contributed meaningfully to the fairness of the process.<sup>68</sup> Along the same lines, courts have held that certain non-evidentiary or uncontested proceedings—status conferences or hearings to determine legal questions—can be conducted in the absence of the defendant.<sup>69</sup>

In brief, the decision about whether the defendant's absence at a particular stage of the criminal process undermines procedural fairness will often be difficult and contested. This is even more likely to be the case in virtual proceedings, where the defendant is present in some way and can therefore participate, yet not quite in the same fashion as in person. Particularly as the technology for remote proceedings evolves rapidly, courts often have to make new and empirically untested judgments about the effects of technology on procedural fairness. During the pandemic, courts also had to weigh the defendant's right to be present against the state's interest in protecting public health.<sup>70</sup> Due process cases from the period were therefore complex and often unpredictable.

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66. *J.A.T. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 1, 8 (Mo. 2022) (en banc) (affirming juvenile's right to be present at delinquency hearing); see also *In re Sidney M.*, 208 Cal. Rptr. 378, 383 (Cal. Ct. App. 1984) (same); *In re Borden*, 546 A.2d 123, 125 (Pa. Super. Ct. 1988) (same); *In re C.T.C.*, 2 S.W.3d 407, 410 (Tex. App. 1999) (same); cf. *In re Gault*, 387 U.S. 1, 13 (1967) (establishing due process protections applicable to juvenile delinquency proceedings). Regarding parole and probation revocation proceedings, see *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972).

67. *Lindsey*, 772 N.E.2d at 1276.

68. *E.g.*, *id.* at 1277; *Stincer*, 482 U.S. at 745.

69. *E.g.*, *Small v. Endicott*, 998 F.2d 411, 416 (7th Cir. 1993) (holding that the defendant had no right to be present at a conference dealing with assignment and scheduling issues); *United States v. Shukitis*, 877 F.2d 1322, 1330 (7th Cir. 1989) (holding that the defendant had no right to be present at a hearing to address violations of the court's witness sequestration order); *United States v. Nelson*, No. 17-CR-00533-EMC-1, 2020 WL 3791588, at \*4, \*6–7 (N.D. Cal. July 7, 2020) (holding that the defendant had no right to be present at a pretrial *Daubert* hearing); *State v. Wilson*, 171 P.3d 501, 505–06 (Wash. App. Ct. 2007) (holding that the defendant had no right to be present during in chambers questioning of juror because his ability to contribute to a fair or just hearing was purely hypothetical); cf. *Stincer*, 482 U.S. at 745–47 (holding that the defendant had no right to be present at a witness competency hearing where no testimony about facts of the case would be tendered).

70. See, e.g., *J.A.T.*, 637 S.W.3d at 4; *Vazquez Diaz*, 167 N.E.3d at 833 n.13.

### 1. Failed Challenges

Due process challenges were raised in 58 virtual criminal proceedings, which included one partially remote trial,<sup>71</sup> two contempt hearings,<sup>72</sup> a jury selection proceeding,<sup>73</sup> pretrial hearings,<sup>74</sup> plea hearings,<sup>75</sup> and sentencing proceedings.<sup>76</sup> None of the challenges concerned arraignments or detention hearings. Defendants also made challenges on due process grounds in quasi-criminal virtual proceedings, including 13 probation revocation proceedings and 25 juvenile delinquency proceedings. In total, due process challenges were raised in 96 published decisions in the period under analysis.<sup>77</sup>

In due process challenges that trial courts resolved, defendants typically requested the court to hold the relevant proceeding in person rather than remotely.<sup>78</sup> In the challenges resolved on appeal, defendants asked the appeals court to hold that the remote format used by the trial court had violated due process and that defendants

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71. Commonwealth v. Curran, 178 N.E.3d 399, 403 (Mass. 2021).

72. Tilford v. Commonwealth, No. 2020-CA-0835-MR, 2021 WL 2274323, at \*2 (Ky. Ct. App. June 4, 2021); *In re* NMH, No. 355983, 2023 WL 174807, at \*1 (Mich. Ct. App. Jan. 12, 2023).

73. State v. Kiner, No. 83593-9-I, 2023 WL 3946837, at \*24–27 (Wash. Ct. App. 2023). The analysis does not include decisions that challenge remote jury selection proceedings on the grounds that they violate the Sixth Amendment right to a fair and impartial jury. It focuses only on the one decision from the relevant period that featured a challenge based on the defendant's due process right to be present at jury selection.

74. *E.g.*, United States v. Sheppard, No. 5:17-CR-00026-TBR, 2020 WL 6534326, at \*2 (W.D. Ky. Nov. 5, 2020) (*Daubert* hearing); United States v. Rosenschein, 474 F. Supp. 3d 1203, 1209 (D.N.M. 2020) (suppression hearing).

75. *E.g.*, Rimes v. State, No. 05-21-00038-CR, 2022 WL 3593282, at \*1 (Tex. App. Aug. 23, 2022).

76. *E.g.*, People v. Stefanski, No. 357102, 2022 WL 2760434, at \*2 (Mich. Ct. App. July 14, 2022).

77. In some of the cases labeled “due process challenges,” the courts did not formally base their decision on the Due Process Clause. But if the court analyzed the challenge as concerning the defendant's constitutional “right to be present,” it was counted as a due process challenge. The analysis also includes a few close cases where the court's holding was based on a statutory right to be present, but the court also acknowledged that the right is (or at least may be) constitutionally rooted. Likewise, with respect to quasi-criminal proceedings such as probation revocation and juvenile delinquency proceedings, challenges that were formally raised as confrontation challenges were treated as due process challenges because most courts have held that in such quasi-criminal proceedings, confrontation rights are analyzed under a broader due process analysis.

78. *E.g.*, United States v. Rosenschein, 474 F. Supp. 3d 1203, 1205 (D.N.M. 2020).

should therefore be provided a remedy—either the reversal of their conviction and a new trial or resentencing.<sup>79</sup>

For purposes of the analysis, a due process challenge was considered successful if the court found a due process violation *and* awarded a remedy to the defendant. Under this approach, which focuses on the clearest instances of due process violations, courts granted relief in 37 of the 96 due process challenges, a 38.5% success rate.<sup>80</sup> Notably, however, courts found due process violations not only in these 37 cases, but also in 11 more cases where no relief was ordered because the violation did not meet the relevant heightened review standard on appeal.<sup>81</sup> Therefore, in total, courts found a due process violation in 48 cases, or 50% of the cases reviewed, but they provided a remedy in only a subset of these cases.

This Subpart focuses on the reasons that courts gave for rejecting due process challenges, while the next Subpart reviews reasons provided for granting them. The first reason that courts offered for rejecting these challenges was that, in their estimation, video appearance was largely functionally equivalent to appearance in person, at least in the case before them.<sup>82</sup> These courts emphasized that the videoconferencing technology allowed participants “to see, hear, and speak” to one another and to the court.<sup>83</sup> Although virtual and physical presence were not “precisely the same . . . , the difference between the two [was] not enough to render the proceeding fundamentally unfair.”<sup>84</sup> In general, courts found that even if there were some minor differences between the in-person and virtual formats, the videoconferencing technology used during the pandemic allowed for “rigorous adversarial testing” of the prosecution’s case and

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79. In probation revocation and juvenile adjudication cases, defendants were seeking a reversal and a new adjudication or resentencing.

80. Relief was granted in 13 out of 58 (22.4%) criminal cases and 3 out of 13 (23%) probation revocation cases. *See infra* Table 1. In juvenile delinquency cases, the courts granted relief in 21 out of 25 (84%) cases. *See infra* Table 1. For the three types of proceedings combined, defendants obtained relief on their due process claims in 37 out of 96 cases (38.5%). *See infra* Tables 1 & 2.

81. *See infra* Table 2.

82. *Rosenschein*, 474 F. Supp. 3d at 1209.

83. *Id.*

84. *Id.*; *see also* *Stewart v. State*, 378 So. 3d 379, 386 (Miss. 2024) (“*Stewart* was not fully excluded from the tender-years hearing. *Stewart* attended, albeit virtually. While we caution not to equate appearing by video conference with appearing in person, we do find *Stewart*’s virtual presence certainly factors into the *Stincer* consideration whether *Stewart*’s in-person presence would have ‘contribute[d] to the fairness of the procedure’ or would have ‘benefit[ed] but a shadow.’ (alteration in original) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)); *Montgomery v. State*, No. 02-21-00002-CR, 2022 WL 5240472, at \*4 (Tex. App. Oct. 6, 2022) (“Although generally not preferable, with today’s video[conferencing] technology, a virtual hearing can approximate a live physical hearing in ways that it could not previously.”).



therefore complied with due process.<sup>85</sup> Notably, all of the decisions rejecting due process challenges on this basis relied on the judges' own conclusions that remote proceedings were not qualitatively different from in-person proceedings; they did not cite to any empirical studies about the effects of the virtual format.<sup>86</sup>

Decisions that rested their holding on the functional equivalence between the virtual and in-person formats, however, tended to feature mostly pretrial proceedings, such as suppression hearings,<sup>87</sup> *Daubert* hearings,<sup>88</sup> and jury selection proceedings.<sup>89</sup> Courts often distinguished between these proceedings and trials on the grounds that the former are typically less critical to the outcome of the case.<sup>90</sup> The benefit of the defendant's in-person presence in these proceedings was therefore seen as marginal.<sup>91</sup> The functional equivalence point was also made to support some decisions on appeal holding that appearing in person would not have made a difference to the outcome

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85. *United States v. Dinuwelle*, No. 1:21-CR-00797-KWR, 2022 WL 952082, at \*3 (D.N.M. Mar. 30, 2022); *see also Nunez v. State*, No. 13-22-00024-CR, 2023 WL 5122531, at \*3–4 (Tex. App. Aug. 10, 2023) (although defendant appeared via video at pretrial hearing and “could not personally and directly communicate with his counsel in real time,” defense counsel “sufficiently advocated on the defendant’s behalf” and defendant “has not shown how his presence would have furthered his defense”).

86. *See, e.g., Rosenschein*, 474 F. Supp. 3d at 1209 (justifying the use of a video hearing without reference to empirical studies).

87. *Dinuwelle*, 2022 WL 952082, at \*3; *United States v. Lawson*, No. 5:20-CR-060-GFVT-MAS-1, 2020 WL 6110969, at \*2 (E.D. Ky. Oct. 16, 2020); *Rosenschein*, 474 F. Supp. 3d at 1208; *State v. Kolaco*, No. 1910010939, 2020 WL 7334176, at \*1 (Del. Super. Ct. Dec. 14, 2020); *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at \*2 (Mass. Super. Ct. Aug. 10, 2020); *see also Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 828 (Mass. 2021) (remote suppression hearing was not constitutionally infirm, but trial judge abused discretion in conducting hearing over Zoom rather than continuing proceedings).

88. *United States v. Sheppard*, No. 5:17-CR-00026-TBR, 2020 WL 6534326, at \*2 (W.D. Ky. Nov. 5, 2020); *United States v. Nelson*, No. 17-CR-00533-EMC-1, 2020 WL 3791588, at \*1 (N.D. Cal. July 7, 2020).

89. *State v. Kiner*, No. 83593-9-I, 2023 WL 3946837, at \*11 (Wash. Ct. App. June 12, 2023).

90. *See, e.g., United States v. Lattimore*, 525 F. Supp. 3d 142, 150–51 (D.D.C. 2021) (“[W]hatever due process rights a defendant may have in being physically present in a courtroom, the right is implicated to a lesser degree in a suppression hearing than in an actual trial.”); *Rosenschein*, 474 F. Supp. 3d at 1209 (noting that due process right “is implicated to a lesser degree in a suppression hearing than it is in an actual trial”); *Nunez*, 2023 WL 5122531, at \*5 (“Nothing decided about either the State’s or Nunez’s motion in limine was final in this case and thus, Nunez’s presence could not have furthered his defense.”).

91. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 106–07 (1934).

of the proceeding, thus avoiding the need to order burdensome relief, such as reversal or resentencing.<sup>92</sup>

Contesting the notion that virtual proceedings are functionally equivalent to in-person proceedings, several defendants argued that technological malfunctions during their proceedings were so disruptive as to violate due process.<sup>93</sup> None of these challenges succeeded, however. In one case, the defendant pointed to “several instances where hearing participants commented on defense counsel’s poor connection and one instance where the district court questioned [the defendant] while his attorney was disconnected” during a virtual sentencing hearing.<sup>94</sup> Deciding this question under a plain error standard, the appeals court concluded that there was no “breakdown of the trial process” and that the malfunctions had “no adverse effect on [the defendant’s] sentence.”<sup>95</sup> In another case, a defense witness “fell off” a Zoom waiting room before he could testify at a sentencing hearing about a treatment program for which the defendant was eligible.<sup>96</sup> The appeals court nonetheless found that the malfunction was not prejudicial because defense counsel had made an alternative offer of proof of the defendant’s eligibility for the program.<sup>97</sup> Another defendant challenged his remote sentencing on due process grounds in part because the “video technology reduced his ability to see who was questioning him,” and he thought he was responding to the prosecutor rather than the judge when making arguments in mitigation.<sup>98</sup> The appeals court denied this challenge as well, finding that “nothing . . . indicates the defendant said anything to damage his mitigation argument, or that his responses would have been different if he had known the questions had come from the prosecutor and not the judge.”<sup>99</sup> Courts were generally satisfied that

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92. See, e.g., *State v. Nelson*, No. 21-0797, 2023 WL 2785797, at \*3 (W. Va. Apr. 5, 2023). For a critique of this assumption, see, e.g., *In re NMH*, No. 355983, 2023 WL 174807, at \*8 (Mich. Ct. App. Jan. 12, 2023) (Hood, J., concurring) (noting that “a sentencing judge who imposed a harsher sentence due to remote sentencing” may not be “able to recognize that prejudicial effect of remote proceedings on remand” and that “implicit prejudices in sentencing may be quantifiable, but hard—or impossible—for an individual trial judge to recognize”).

93. E.g., *United States v. Rodriguez*, 75 F.4th 1231, 1245 (11th Cir. 2023); *Brown v. State*, 335 So. 3d 123, 127 (Fla. Dist. Ct. App. 2022); *Montgomery v. State*, No. 02-21-00002-CR, 2022 WL 5240472, at \*3 (Tex. App. Oct. 6, 2022); *Rimes v. State*, No. 05-21-00038-CR, 2022 WL 3593282, at \*7 (Tex. App. Aug. 23, 2022); *Cathey v. State*, No. 07-20-00235-CR, 2021 WL 1376961, at \*2 (Tex. App. Apr. 12, 2021).

94. *Rodriguez*, 75 F.4th at 1245.

95. *Id.*

96. *Rimes*, 2022 WL 3593282, at \*8.

97. *Id.*

98. *Brown*, 335 So. 3d at 129.

99. *Id.* at 129–30.

even when technological setbacks did occur, they were not serious enough to tarnish the integrity of the hearing.<sup>100</sup> As one court explained, technological difficulties would only violate due process if they were of such magnitude that they “unreasonably limit[ed] the right of the accused . . . to observe and participate in the hearing.”<sup>101</sup>

Another reason that defendants’ due process claims failed was that, during the pandemic, the state maintained a strong interest in using the remote format to protect public health.<sup>102</sup> In deciding whether the remote format violated due process, courts often weighed the state’s interest against the prejudice to the defendant’s rights.<sup>103</sup> In ordinary times, the state usually can point merely to efficiency and convenience as reasons for virtual proceedings.<sup>104</sup> These are unlikely to outweigh the defendant’s constitutional right to an in-person proceeding.<sup>105</sup> But at the height of the pandemic, when the virus was spreading and no vaccine was available, the state’s interest in protecting public health was in many cases significant enough to prevail over the defendant’s right to be physically present at pretrial, plea, jury selection, sentencing, and probation revocation

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100. *E.g.*, *Cathey v. State*, No. 07-20-00235-CR, 2021 WL 1376961, at \*2 (Tex. App. Apr. 12, 2021) (noting that there was no evidence on the record that technical “glitches” that occurred during a probation revocation hearing “affected appellant’s defense or her ability to examine witnesses in any substantive way. They may have been frustrating, but frustration is the byword in these times of growing technology.”).

101. *Pueblo v. Santiago Cruz*, 105 P.R. Offic. Trans. 2 (P.R. 2020).

102. *Brown*, 335 So. 3d at 128.

103. *E.g.*, *People v. Whitmore*, 295 Cal. Rptr. 3d 461, 470 (2022) (“[T]he trial court had to balance Whitmore’s right to be physically present [at sentencing] against the need to minimize the danger created by the spread of a contagious disease.”); *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at \*3 (Mass. Super. Aug. 10, 2020) (“To determine what procedures are sufficient in a given case, a court must balance ‘the private interests affected, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the governmental interests involved.’” (quoting *Commonwealth v. Preston P.*, 136 N.E.3d 1179, 1190 (Mass. 2020))).

104. *State v. Smith*, 636 S.W.3d 576, 583 (Mo. 2022).

105. *Cf. M.D. v. State*, 345 So. 3d 359, 360 (Fla. Dist. Ct. App. 2022) (explaining that “due process requires a case-specific finding of necessity before a trial court may conduct a remote adjudicatory hearing over objection”). Although courts have not expressly addressed in their due process case law whether convenience would be a sufficient reason to conduct a remote proceeding over the objection of the defendant, in Confrontation Clause cases, they have clarified that it is not. *See, e.g.*, *State v. Smith*, 636 S.W.3d 576, 579 (Mo. 2022).

proceedings.<sup>106</sup> As some courts explained, due process is flexible and permits deviations from ordinary procedures in an emergency.<sup>107</sup>

Another frequent reason due process challenges failed was that defendants had either waived their right to be present, or at least failed to object to the remote format at the trial level.<sup>108</sup> If a defendant had expressly waived the right to be physically present, as many did during the pandemic, they could not subsequently challenge the constitutionality of the remote format unless they could show that the waiver was invalid.<sup>109</sup> If a defendant had failed to object to the remote format at the trial level (but had not expressly consented to it), an appellate challenge might still be possible, but it would be very difficult to succeed on. Indeed, in a few states, failing to raise a due process challenge at the trial level serves as a complete bar to appellate relief.<sup>110</sup> Even in states that do not use such a forbidding forfeiture standard, the failure to object triggers a very exacting “plain error” review rule.<sup>111</sup> The plain error rule requires the

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106. *Gibson v. Commonwealth*, 2020-SC-0250-MR, 2021 WL 3828558, at \*4 (Ky. Aug. 26, 2021) (noting that “the pandemic created a strong, albeit temporary, public interest in ensuring the safety of all parties involved by requiring remote participation” at sentencing); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 832 (Mass. 2021) (“The Commonwealth’s interest in protecting the public health during the COVID-19 pandemic is significant and, combined with its interest in the timely disposition of a case, would, in many instances, outweigh the defendant’s interest in an in-person hearing.”); *People v. Stapp*, No. 355976, 2023 WL 2051185, at \*15 (Mich. Ct. App. Feb. 16, 2023) (“The virtual sentencing was held during the global COVID-19 pandemic and appeared to have been conducted with fairness and integrity in light of the circumstances created by the pandemic.”); *Montgomery v. State*, No. 02-21-00002-CR, 2022 WL 5240472, at \*4 (Tex. App. Oct. 6, 2022) (“After balancing the due process factors, it is clear that the State’s interest in protecting the public health during the COVID-19 pandemic is significant, as is the State’s interest in the timely disposition of cases.”); *State v. Kiner*, No. 83593-9-I, 2023 WL 3946837, at \*11 (Wash. Ct. App. 2023) (permitting remote jury selection in light of the state’s compelling interest to protect public health during the pandemic).

107. *E.g.*, *Stapp*, 2023 WL 2051185, at \*15; *Vazquez Diaz*, 167 N.E.3d at 831.

108. *E.g.*, *People v. Randolph*, No. 358033, 2023 WL 2618129, at \*5 (Mich. Ct. App. Mar. 23, 2023); *People v. Sindone*, No. 357543, 2023 WL 2334679, at \*2 (Mich. Ct. App. Mar. 2, 2023); *Stapp*, 2023 WL 2051185, at \*15; *People v. Anderson*, 989 N.W.2d 832, 840–41 (Mich. Ct. App. 2022); *People v. Webb*, No. 356943, 2022 WL 4390977, at \*6–7 (Mich. Ct. App. Sept. 22, 2022); *People v. Nguyen*, No. 357031, 2022 WL 3329476, at \*7 (Mich. Ct. App. Aug. 11, 2022).

109. *See, e.g.*, *United States v. Sealed Defendant One*, 49 F.4th 690, 700 (2d Cir. 2022); *Micheaux v. State*, 675 S.W.3d 658, 668 (Mo. Ct. App. 2023); *Turner*, *supra* note 39, at 249 (discussing remote criminal proceedings occurring with the consent of the defendant during the pandemic); *id.* at 238–43, 266–67 (discussing case law and statutes requiring a knowing and voluntary waiver of the right to be present in order to conduct a remote plea hearing).

110. *See* 6 LAFAYETTE ET AL., *supra* note 64, § 27.5(d).

111. *E.g.*, *Anderson*, 989 N.W.2d at 840–42; 6 LAFAYETTE ET AL., *supra* note 64, § 27.5(d).

defendant to show, among other requirements, that the trial court's error both prejudiced the outcome and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."<sup>112</sup> This is a difficult bar to meet, and only a few cases in the sample surmounted it.<sup>113</sup> Most appellate courts reviewing cases under the plain error standard denied relief on the grounds that holding the proceedings remotely did not prejudice the outcome; even if it did, it did not "seriously affect[] the fairness, integrity or public reputation" of the proceedings.<sup>114</sup>

In cases where defendants had objected to the remote format before the trial court, the harmless error standard applied on appeal.<sup>115</sup> Here, the prosecution had the burden of proving that the error did not negatively affect the outcome.<sup>116</sup> While this standard is more forgiving than plain error, appellate courts still frequently accepted the prosecution's argument that the outcome would not have been different had the proceedings occurred in person.<sup>117</sup> Once again, such decisions rested on the empirically untested assumption that remote appearance is not qualitatively different from in-person appearance in terms of fairness and reliability. The following application of the harmless error standard is illustrative:

There is no indication in this record that [the defendant's] physical presence in the courtroom [at sentencing] would have benefited his case in any way or otherwise altered the outcome, nor does the record reflect any difficulties or irregularities attributable to [the defendant's] remote appearance. To the contrary, the record shows he was able to effectively understand and meaningfully participate in the hearing, he was adequately represented by and able to communicate with his defense counsel, and he was permitted to address the trial court at

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112. *United States v. Olano*, 507 U.S. 725, 732 (1993); *Anderson*, 989 N.W.2d at 841.

113. *See* *People v. Stefanski*, No. 357102, 2022 WL 2760434, at \*4–5 (Mich. Ct. App. July 14, 2022); *People v. Harbenski*, No. 356731, 2022 WL 982741, at \*5 (Mich. Ct. App. Mar. 31, 2022); *People v. Swoffer-Sauls*, No. 353827, 2022 WL 881147, at \*4–5 (Mich. Ct. App. Mar. 24, 2022); *People v. Christian*, No. 356693, 2021 WL 3707992, at \*4 (Mich. Ct. App. Aug. 19, 2021).

114. *See, e.g., Anderson*, 989 N.W.2d at 842 (“[P]hysical absence from the courtroom—but actual participation in the sentencing—did not restrict defendant’s ability to put in evidence or argument in favor of a low sentence. . . . Nor did defendant’s remote participation affect the composition of the record or otherwise undermine the fairness of the criminal proceeding as a whole.”); *People v. Sindone*, No. 357543, 2023 WL 2334679, at \*2 (Mich. Ct. App. Mar. 2, 2023) (concluding that the defendant failed to show that the sentence would have been different if he had appeared in person).

115. *See, e.g., State v. Anderson*, 497 P.3d 880, 885 (Wash. Ct. App. 2021).

116. *See, e.g., People v. Whitmore*, 295 Cal. Rptr. 3d 461, 472 (2022).

117. *Anderson*, 497 P.3d at 885; *State v. Saunders*, No. 56335-5-II, 2023 WL 4348886, at \*7 (Wash. Ct. App. July 5, 2023).

length. Although he was not able to see the courtroom when the hearing began, the connection was adjusted and [the defendant] confirmed he was able to see and hear the judge. . . . Finally, there is no indication that the trial court gave any greater consideration to statements of participants who appeared in person.<sup>118</sup>

The court in the case above recognized that “video appearance is not the same as actual physical presence,” but it relied on the heightened standard of review on appeal to conclude that whatever difference did exist between in-person and virtual presence “was not enough to create reversible error in this case.”<sup>119</sup>

Demanding appellate standards thus precluded relief in a significant number of cases, including 11 cases in which the court established that an error had occurred—i.e., that due process had been violated—but nonetheless concluded that the error did not warrant a reversal.<sup>120</sup> In another 21 cases, courts denied the relief sought by the defendant but left unsettled the issue of whether an error had occurred, stating simply that the defendant had forfeited the right to appeal or had not met the relevant review standard.<sup>121</sup>

In summary, defendants obtained relief based on due process challenges to the remote format in 38.5% of the analyzed cases.<sup>122</sup> Advances in videoconferencing technology that allowed defendants to participate more effectively in the proceedings convinced many courts that virtual proceedings were not qualitatively different from proceedings in person. To the extent there were notable differences, courts often found that the need to protect public health during the pandemic justified the procedural modification.<sup>123</sup> Finally, many defendants failed to object to the use of the remote format at the trial level, which made it much more difficult for them to prevail on appeal.

Given that around 92% of the decisions concerning due process claims occurred on appeal, the success rate must be understood within the context of the appellate system, where a larger percentage of convictions are typically upheld.<sup>124</sup> Indeed, in the sample analyzed,

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118. *Whitmore*, 295 Cal. Rptr. 3d at 471.

119. *Id.*

120. *See infra* Table 2.

121. *See* Due Process Criminal Cases Chart, I-61 (on file with author and Wake Forest Law Review) (identifying 16 criminal cases in which courts left it unclear whether the virtual format violated due process); Probation Revocation Cases Chart, *supra* note 46, at I-18 (identifying three cases in which courts left it unclear whether the virtual format violated due process); Juvenile Delinquency Cases Chart, *supra* note 46, at I-30 (identifying two cases in which courts left it unclear whether the virtual format violated due process).

122. *See infra* Table 2.

123. *See supra* notes 102–07 and accompanying text.

124. *See supra* note 13 and accompanying text. Eighty-eight out of the 96 due process decisions were made by an appellate or supreme court. *See* Due Process Criminal Cases Chart, *supra* note 121, at G-61 (identifying 52 out of 58 due

courts found that the remote proceeding violated due process in exactly half of the cases; yet due to the heightened standard of review on appeal, in a sizeable subset of these cases, the error did not warrant reversal or resentencing.<sup>125</sup>

## 2. *Successful Challenges*

Due process challenges to remote proceedings did sometimes succeed. Courts found that the remote format violated due process in more than a third of criminal and probation revocation cases analyzed.<sup>126</sup> They granted relief in a smaller subset of cases, however—only 22.4%. The rate was significantly higher in juvenile delinquency cases—defendants succeeded in obtaining relief in 84% of cases.<sup>127</sup> Three factors made due process challenges to the remote format more likely to prevail: (1) when the proceedings at issue were outcome-dispositive with respect to the verdict or the sentence; (2) when the defendant was seen as more vulnerable; and (3) when the proceedings involved witness testimony or an assessment of the defendant's credibility.

During 2020–23, courts found due process violations in virtual plea and sentencing hearings,<sup>128</sup> parole and probation revocation

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process decisions as featuring an appeal); Probation Revocation Cases Chart, *supra* note 46, at G-11 (identifying 11 out of 13 due process decisions as featuring an appeal); Juvenile Delinquency Cases Chart, *supra* note 46, at G-30 (identifying 25 out of 25 due process decisions as featuring an appeal).

125. *See supra* notes 120–22 and accompanying text.

126. *See infra* Table 1. Courts found a due process violation in 27 out of 71 criminal and probation revocation proceedings, for an average rate of 38%; they granted relief in a smaller subset of cases—22.4%. *See infra* Table 1.

127. In some of the juvenile delinquency cases, challenges succeeded on confrontation grounds. But because many courts analyzed confrontation questions as part of a broader due process analysis in juvenile delinquency cases, it was difficult to disentangle the two, so they were all treated as due process challenges. As noted below, however, remote testimony was an important concern for courts and a major factor in the success of due process challenges. *See infra* Part IV.

128. Courts found due process challenges and ordered relief in 13 out of 58 cases published decisions in criminal cases. *E.g.*, *People v. Stefanski*, No. 357102, 2022 WL 2760434, at \*4–5 (Mich. Ct. App. July 14, 2022); *People v. Harbanski*, No. 356731, 2022 WL 982741, at \*5 (Mich. Ct. App. Mar. 31, 2022); *People v. Swoffer-Sauls*, No. 353827, 2022 WL 881147, at \*4–5 (Mich. Ct. App. Mar. 24, 2022); *People v. Christian*, No. 356693, 2021 WL 3707992, at \*2 (Mich. Ct. App. Aug. 19, 2021).

hearings,<sup>129</sup> and juvenile delinquency hearings<sup>130</sup> in 48 published decisions. What is notable about these types of hearings is that they all result in a final decision that directly affects a defendant's fate. As a Michigan court explained, sentencing hearings represent a "grave moment in the criminal process [that] often seals a defendant's fate or dictates the contours of his or her future."<sup>131</sup> Likewise, the Missouri Supreme Court emphasized that "generalized concerns about the virus may not override an individual's constitutional right of due process to be physically present for his juvenile adjudication hearing *at which his guilt or innocence will be determined.*"<sup>132</sup> Amid the high stakes of such proceedings, use of the virtual format is more worrisome.

Courts also emphasized the expressive functions of in-person proceedings as a reason to sustain due process challenges in these cases. Courts explained that the virtual format lacked the dignity of the "courtroom setting" and thus "clash[ed] with the judge's duty to acknowledge the humanity of even a convicted felon."<sup>133</sup> Conducting high-stakes proceedings in person was also seen as important to "impress[] the gravity of the proceedings upon the participants."<sup>134</sup> Courts emphasized that a fair process requires the witnesses and factfinders to meet the defendant face-to-face before giving testimony

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129. In 2020–23, there were 13 published decisions concerning a due process challenge to the remote format of a probation or parole revocation proceeding. In 4 of the 13, courts held that the remote format was constitutionally defective, and they ordered relief in 3 of those cases. *E.g.*, *Arnold v. State*, 358 So. 3d 792, 798 (Fla. Dist. Ct. App. 2023) (holding that remote sentencing after probation revocation violated due process); *Hughes v. State*, 651 S.W.3d 461, 470 (Tex. App. 2022) (holding that remote probation revocation proceeding, where defendant was unable to communicate with counsel privately about cross-examining state's witness, violated the due process and confrontation clauses).

130. Courts granted due process challenges in 21 out of 25 published decisions in juvenile delinquency cases. *E.g.*, *J.A.T. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 1, 10 (Mo. 2022) (en banc); *J.T.B. v. State*, 345 So. 3d 927, 929 (Fla. Dist. Ct. App. 2022).

131. *Christian*, 2021 WL 3707992, at \*1 (quoting *People v. Heller*, 891 N.W.2d 541 (Mich. Ct. App. 2016)); *Harbensi*, 2022 WL 982741, at \*5.

132. *J.A.T.*, 637 S.W.3d at 10 (emphasis added).

133. *Heller*, 891 N.W.2d at 543–44 (Mich. Ct. App. 2016); *see also* *People v. Stefanski*, No. 357102, 2022 WL 2760434, at \*3 (Mich. Ct. App. July 14, 2022) ("A defendant's right to allocute before sentence is passed—to look a judge in the eye in a public courtroom while making his or her plea—stems from our legal tradition's centuries-old recognition of a defendant's personhood, even at the moment he or she is condemned to prison."); *State v. Byers*, 875 S.E.2d 306, 316 (W. Va. 2022) ("Physical presence makes unavoidable the recognition that—in sentencing—one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen." (quoting *United States v. Fagan*, 464 F. Supp. 3d 427, 430 (D. Me. 2020))).

134. *In re C.A.M.*, 644 S.W.3d 600, 606 (Mo. Ct. App. 2022).



or making decisions about his future.<sup>135</sup> The in-person requirement reminds judges and jurors that they are about to change the course of a person's life and helps them appreciate the effect of their decision.<sup>136</sup> As one court explained, seeing in person the "sad plight" of the defendant might "inclin[e] the hearts of the jurors to listen to his defence [sic] with indulgence."<sup>137</sup> Holding proceedings in person is also intended to convey to the defendant the seriousness of the occasion.<sup>138</sup>

In addition, cases in which due process challenges succeeded often involved the examination of witnesses.<sup>139</sup> These were typically non-trial or quasi-criminal proceedings at which the Confrontation Clause did not apply, so confrontation concerns were analyzed under the Due Process Clause instead.<sup>140</sup> Courts were worried that the virtual format could impair factfinders' perceptions of witnesses and prejudice the search for truth.<sup>141</sup> Many recognized that evaluating and challenging witness testimony is more difficult via video than in person.<sup>142</sup>

Courts granting due process challenges also expressed concerns that the remote format could impair both a defendant's engagement with the proceeding and the factfinder's perceptions of the

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135. *K.D.D. v. Juv. Officer*, 655 S.W.3d 222, 227 (Mo. Ct. App. 2022) (citing *Crosby v. United States*, 506 U.S. 255, 259 (1993)); *see also* *Arnold v. State*, 358 So. 3d 792, 800 (Fla. Dist. Ct. App. 2023) ("[A] judicial officer should be physically present to preside over any matter that could lead to the 'massive curtailment of [an individual's] liberty.'" (quoting *Doe v. State* 217 So. 3d 1020, 1027 (Fla. 2017))).

136. *See Arnold*, 358 So. 3d at 801.

137. *Lira v. State*, 666 S.W.3d 498, 510 (Tex. Crim. App. 2023) (quoting *Crosby*, 506 U.S. at 259).

138. *In re C.A.M.*, 644 S.W.3d at 606.

139. For example, all of the juvenile delinquency hearings involved witnesses, and challenges in these cases had the highest rate of success.

140. *See, e.g., Henderson v. Commonwealth*, 736 S.E.2d 901, 905 (Va. 2013) ("Although the Sixth Amendment right of confrontation applies only in criminal trials, a more limited right of confrontation was included in the Due Process Clause of the Fourteenth Amendment, applicable to parole and probation revocation proceedings.").

141. *Lira*, 666 S.W.3d at 502–03; *see also* *M.D. v. State*, 345 So. 3d 359, 360 (Fla. Dist. Ct. App. 2022) (expressing concerns about virtual confrontation of witnesses during a juvenile delinquency proceeding); *J.T.B. v. State*, 345 So. 3d 927, 933 (Fla. Dist. Ct. App. 2022) (emphasizing the "truth-inducing effect" of in-person testimony); *C.A.R.A. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 50, 55–65 (Mo. 2022) (acknowledging the truth-promoting effects of in-person confrontation and concluding that despite the pandemic, no case-specific necessity justified the use of remote testimony in the case).

142. *Hughes v. State*, 651 S.W.3d 461, 470–71 (Tex. App. 2022); *see also* *T.H. v. State*, 349 So. 3d 951, 959 (Fla. Dist. Ct. App. 2022) (emphasizing the importance of face-to-face confrontation as an element of due process).

defendant's character.<sup>143</sup> It can “dehumanize[] the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom.”<sup>144</sup> Referencing research findings, some courts also concluded that the remote format can “color a viewer's assessment of a person's credibility, sincerity, and emotional depth,” and therefore, “individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators.”<sup>145</sup> For all these reasons, courts have been more likely to grant due process challenges in cases concerning plea and sentencing hearings, probation revocation hearings, and juvenile delinquency hearings, where an evaluation of the defendant's character is often a central part of the court's judgment.

Another factor that appears to have affected courts' decisions to grant due process challenges is the vulnerability of the defendant.<sup>146</sup> This consideration likely explains the significantly higher success rate of constitutional challenges to juvenile delinquency proceedings. A Florida appeals court remarked on the special difficulties that children and adolescents may have with the remote format: “During the hearing, there were times when [the minor defendant] did not seem to understand he was participating in a remote trial. For example, he interrupted his attorney in the middle of cross-examination because he wanted to say something to the Court[.]”<sup>147</sup> In another example of the difficulties that the remote format may pose for juveniles, the defendant in the same case “interrupted the proceedings during the State's closing argument,”<sup>148</sup> prompting the judge to ask him to put his hands down because it was distracting.

Although only one court expressly mentioned the vulnerability of juvenile defendants as a reason for granting a due process challenge, its decision set the stage for other Florida appeals courts to

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143. *Arnold v. State*, 358 So. 3d 792, 801 (Fla. Dist. Ct. App. 2023); *People v. Stefanski*, No. 357102, 2022 WL 2760434, at \*4 (Mich. Ct. App. July 14, 2022); *People v. Harbensi*, No. 356731, 2022 WL 982741, at \*5 (Mich. Ct. App. Mar. 31, 2022); *People v. Swoffer-Sauls*, No. 353827, 2022 WL 881147, at \*5 (Mich. Ct. App. Mar. 24, 2022); *State v. Byers*, 875 S.E.2d 306, 315 (W. Va. 2022) (“[B]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference.” (quoting *United States v. Williams*, 641 F.3d 758, 764–65 (6th Cir. 2011))).

144. *People v. Christian*, No. 356693, 2021 WL 3707992, at \*2 (Mich. Ct. App. Aug. 19, 2021); *Arnold*, 358 So. 3d at 801 (emphasizing the “depersonalizing aspects of acting or speaking via a remote box at a significant distance from the individual being affected”).

145. *Harbensi*, 2022 WL 982741, at \*5 (quoting *People v. Heller*, 891 N.W.2d 541, 544 (Mich. Ct. App. 2016)).

146. *See M.D.*, 345 So. 3d at 362.

147. *Id.* at 361.

148. *Id.*

subsequently hold remote juvenile delinquency proceedings unconstitutional.<sup>149</sup>

In brief, even when faced with a substantial state interest—protection of public health during a pandemic—some appellate courts held that the defendant’s due process right to be physically present at critical stages of the criminal process prevailed. Due process rights were most likely to overcome the state’s interest when the proceedings carried high stakes for defendants, featured an assessment of witness testimony or the defendant’s character, or involved a vulnerable defendant.

### B. Confrontation

Remote proceedings raise questions about the ability of defendants to confront adverse witnesses, a right guaranteed under the Confrontation Clause of the Sixth Amendment.<sup>150</sup> The right to face opposing witnesses in person traces its origins to Roman times and was recognized under the common law before the jury trial.<sup>151</sup> Face-to-face confrontation has been praised for its truth-promoting effects. It encourages witnesses to be candid, as “[i]t is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”<sup>152</sup> It impresses on witnesses “the seriousness of the matter” by requiring an oath to be sworn in the courtroom.<sup>153</sup> Confrontation also “forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth.’”<sup>154</sup> Lastly, it “permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”<sup>155</sup>

Virtual confrontation, courts have generally concluded, does not have the same truth-inducing effect. As one court explained, appearing at the courthouse in person is “a significant moment for the witness, during which any witness in a criminal proceeding understands the wide-ranging implications their testimony may have

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149. See, e.g., *K.M. v. State*, 347 So. 3d 435, 436 (Fla. Dist. Ct. App. 2022) (rendering decision “in light of” *M.D. v. State*); *P.J.S. v. State*, 354 So. 3d 568, 569 (Fla. Dist. Ct. App. 2022) (same).

150. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

151. *Id.* at 1015–16 (citing Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384–87 (1959)).

152. *Id.* at 1019.

153. *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990).

154. *California v. Green*, 399 U.S. 149, 158 (1970); see also *Craig*, 497 U.S. at 846.

155. *Green*, 399 U.S. at 158; see also *Craig*, 497 U.S. at 846; see generally Andrea Roth, *The Fallacy of “Live” Confrontation: A Surprising Lesson from Virtual Courts*, 2023 U. ILL. L. REV. 1657, 1661–63, 1667–72 (discussing and critiquing this understanding of the value of live confrontation).

on the life of another.”<sup>156</sup> Courts have also noted that it is more difficult to evaluate witness testimony via video, which raises concerns about the reliability of virtual testimony.<sup>157</sup>

While affirming that confrontation generally requires in-person testimony, most courts have also held that the Confrontation Clause applies only at trial and only in criminal cases.<sup>158</sup> Accordingly, when it comes to pretrial, sentencing, juvenile, and probation revocation proceedings, the Clause does not apply, and confrontation concerns are instead typically analyzed under the broader due process framework discussed in Subpart II.A.<sup>159</sup>

In *Maryland v. Craig*,<sup>160</sup> the Supreme Court also expressly permitted the use of remote testimony at trial in certain limited circumstances, when remote testimony is *necessary* to protect a *substantial* state interest, and when the testimony’s reliability can be ensured.<sup>161</sup> Because *Craig* rested in part on a reliability framework that was subsequently rejected by the Court in *Crawford v. Washington*,<sup>162</sup> some lower courts have suggested that the holdings in *Crawford* and *Craig* are in tension.<sup>163</sup> The Supreme Court has not overruled or expressly limited *Craig*, however, so lower courts have generally continued to follow *Craig*’s necessity and reliability framework in assessing whether remote testimony complies with the Confrontation Clause.<sup>164</sup> As this Subpart explains, during the pandemic, courts frequently held that remote testimony was necessary to advance the state interest in protecting public health and the health of trial participants.

### 1. Failed Challenges

Defendants raised confrontation challenges to remote testimony in 85 criminal cases with “published” decisions in the period studied.

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156. *State v. Seale*, No. M2019-01913-CCA-R9-CD, 2020 WL 4045227, at \*8 (Tenn. Crim. App. July 20, 2020).

157. *See Coy*, 487 U.S. at 1014, 1019.

158. *E.g.*, *United States v. Faunce*, 66 F.4th 1244, 1251, 1254–55 (10th Cir. 2023) (finding the Due Process Clause protects the right to confront adverse witnesses in hearings to revoke supervised release, and the use of virtual testimony during the pandemic did not violate Due Process Clause).

159. *See supra* Subpart II.A.

160. 497 U.S. 836 (1990).

161. *Id.* at 857.

162. 541 U.S. 36 (2004).

163. *E.g.*, *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).

164. *See infra* Subparts II.B.1, II.B.2. Courts in the Second Circuit follow a somewhat different, arguably easier to meet, standard for two-way remote testimony, but this standard still requires the government to prove that a witness is unavailable to testify in person, similar to proving necessity under *Craig*. *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (“Upon a finding of exceptional circumstances . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice.”).

In 73 out of the 85 cases, the remote testimony had been or would be tendered during a trial.<sup>165</sup> In the remaining 12 decisions, remote testimony would be or had been given during suppression hearings (6 cases), other pretrial hearings (3 cases), pretrial depositions (2 cases), and sentencing (1 case).<sup>166</sup> Notably, in a significant percentage of cases, 24 out of 85 (28.2%), defendants sought prospective relief; that is, they asked the court to rule that testimony should be given in person rather than remotely.<sup>167</sup> In the remaining cases, testimony had already been tendered, and the question was whether it had violated the Confrontation Clause and, if so, what relief was appropriate.

Courts found Confrontation Clause violations in 29 (34.1%) of the examined cases, but granted relief in only 19 (22.4%) cases.<sup>168</sup> In the 10 cases where no relief was granted despite the finding of a constitutional violation, the prosecution had shown that the violation was harmless.<sup>169</sup> In 8 other cases, the court did not clarify whether a violation had occurred and simply noted that the defendant had forfeited the right to appeal or had not met the stringent harmless error or plain error standard.<sup>170</sup>

Confrontation challenges tended to fail for three main reasons: (1) the Confrontation Clause only applies to criminal trial proceedings; (2) the state had presented a compelling reason to offer certain testimony remotely and taken measures to ensure its reliability; or (3) even if the Confrontation Clause had been violated, the violation had not prejudiced the outcome of the case.

When defendants raised confrontation challenges to pretrial, sentencing, probation revocation, or juvenile delinquency decisions, most courts denied the challenges on the grounds that the Confrontation Clause did not apply outside the criminal trial context.<sup>171</sup> In the criminal context, only one out of the 10 courts that

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165. See Confrontation Cases Chart, col. F (on file with author and the Wake Forest Law Review).

166. See *id.*

167. *Id.* at M-91.

168. See *infra* Table 2.

169. See Confrontation Cases Chart, *supra* note 165, cols. D & H.

170. See *id.* col. I.

171. *E.g.*, United States v. Dinuwelle, No. 1:21-CR-00797, 2022 WL 952082, at \*2–3 (D.N.M. Mar. 30, 2022); United States v. Lattimore, 525 F. Supp. 3d 142, 149 (D.D.C. 2021); United States v. Sheppard, No. 5:17-CR-00026, 2020 WL 6534326, at \*2 (W.D. Ky. Nov. 5, 2020); United States v. Lawson, No. 20-CR-060-GFVT-MAS-1, 2020 WL 6110969, at \*2–3 (E.D. Ky. Oct. 16, 2020); State v. Kolaco, No. 1910010939, 2020 WL 7334176, at \*1 (Del. Super. Ct. Dec. 14, 2020); *Ex parte K.W.*, 650 S.W.3d 862, 873 (Tex. App. 2022). For this reason, all juvenile delinquency and probation revocation cases that raised confrontation claims were analyzed here as “due process” cases, even if some defendants raised claims under the Confrontation Clause. Such quasi-criminal proceedings are therefore not included in the analysis in this Part.

considered confrontation claims in a non-trial proceeding concluded that the Confrontation Clause applied.<sup>172</sup>

Even when courts held that the Confrontation Clause did not apply to non-criminal and non-trial proceedings, they examined confrontation concerns under a broader due process analysis.<sup>173</sup> The Due Process Clause applies to all critical stages of the proceedings, and courts consider the availability of confrontation as a critical element of due process and adversarial fairness.<sup>174</sup> In the sample of cases reviewed, courts differed somewhat in how they analyzed confrontation concerns under the Due Process Clause. Some applied the *Craig* framework to examine whether virtual confrontation was necessary and reliable, while others used a balancing test that weighs the defendant's interest in a fair adversarial proceeding against the state's interests in efficiency, convenience, and public health.

In about a third of the cases featuring confrontation challenges, the challenges failed because courts agreed that protecting the health of trial participants and the public was a substantial state interest that justified the use of remote testimony.<sup>175</sup> Some courts allowed remote testimony simply on the grounds that it was necessary to minimize the spread of the virus during the pandemic.<sup>176</sup> Other courts allowed remote testimony because the state presented a case-specific reason for it, such as the illness or medical vulnerability of a witness.<sup>177</sup>

The case-specific necessity warranting remote testimony was not always related to the pandemic. In some cases, remote testimony was

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172. That proceeding was a suppression hearing. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 835 (Mass. 2021) (holding that Confrontation Clause applies at suppression hearings).

173. *E.g., Dinuwelle*, 2022 WL 952082, at \*3.

174. *Id.*

175. Confrontation Cases Chart, *supra* note 165, cols. D & E.

176. *United States v. Davis*, No. 19-101-LPS, 2020 WL 6196741, at \*2–4 (D. Del. Oct. 23, 2020); *People v. Hernandez*, 488 P.3d 1055, 1062 (Colo. 2021); *Gibson v. Commonwealth*, No. 2020-SC-0250-MR, 2021 WL 3828558, at \*3–4 (Ky. Aug. 26, 2021); *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at \*3–4 (Mass. Super. Ct. Aug. 10, 2020); *State v. Castonguay*, No. 2021-CA-2, 2021 WL 4129533, at \*7 (Ohio Ct. App. Sept. 10, 2021); *Ex parte K.W.*, 650 S.W.3d 862, 873 (Tex. Ct. App. 2022).

177. *E.g., United States v. Akhavan*, 523 F. Supp. 3d 443, 455 (S.D.N.Y. 2021); *United States v. Donziger*, No. 11-CV-691 (LAK), 2020 WL 5152162, at \*1 (S.D.N.Y. Aug. 31, 2020); *State v. Tate*, 985 N.W.2d 291, 301–05 (Minn. 2023); *State v. Roberson*, No. A21-0585, 2022 WL 664184, at \*2–3 (Minn. Ct. App. Mar. 7, 2022); *State v. Cherry*, 533 P.3d 675 (Mont. Aug. 8, 2023); *State v. Comacho*, 960 N.W.2d 739, 755–56 (Neb. 2021); *State v. Bowers*, No. M2022-00949-CCA-R3-CD, 2023 WL 6211909, at \*7 (Tenn. Crim. App. Sept. 25, 2023); *Dies v. State*, 649 S.W.3d 273, 276–77 (Tex. App. 2022); *State v. Milko*, 505 P.3d 1251, 1253–54 (Wash. Ct. App. 2022); *People v. Warner*, No. ST-17-CR-031, 2020 WL 8019120, at \*2 (V.I. Super. Ct. Nov. 2, 2020).

allowed because a child witness would be traumatized if they had to testify in person.<sup>178</sup> In other cases, the testimony was justified because a witness was located abroad, outside the court's subpoena power, and was unwilling or unable to travel to testify in person.<sup>179</sup>

Courts that rejected confrontation challenges on the grounds of necessity further opined that the type of two-way videoconferencing used during the pandemic, via platforms such as WebEx and Zoom and projected on a screen in the courtroom, sufficiently ensured the reliability of testimony.<sup>180</sup> Virtual testimony on these platforms was deemed reliable enough because it was given under oath and was subject to cross-examination.<sup>181</sup> To emphasize this point, courts often noted how the defense had engaged in vigorous cross-examination and how the remote format had not prevented it from contesting the prosecution's case.<sup>182</sup> They also sometimes described the measures taken to ensure adequate visibility of the remote witnesses (most commonly the use of a large screen<sup>183</sup>), thus addressing concerns that the remote format might undermine the lawyers' and factfinders' ability to assess witness credibility.

Even when measures fell short of this ideal, however, confrontation challenges tended to fail on appeal. For example, one trial court had conducted a telephonic hearing during which the participants could not observe the remote witness. The reviewing court nonetheless found that the arrangement was sufficiently reliable and had not prejudiced the outcome of the proceeding.<sup>184</sup> In another case, a witness was using his cell phone to testify "so that his view of the proceedings was necessarily limited to the size of that screen,"<sup>185</sup> but the remote testimony was still found to comply with

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178. *E.g.*, *Lavalley v. State*, 892 S.E.2d 803, 808 (Ga. Ct. App. 2023); *State v. White*, No. 22-0522, 2023 WL 5607148, at \*6 (Iowa Ct. App. Aug. 30, 2023); *State v. Carter*, 857 S.E.2d 910, 912 (S.C. Ct. App. 2021).

179. *E.g.*, *United States v. Cole*, No. 1:20-CR-424, 2022 WL 278960, at \*4–5 (N.D. Ohio Jan. 31, 2022); *Bragg v. State*, No. CR-21-0361, 2023 WL 2623206, at \*5 (Ala. Crim. App. Mar. 24, 2023); *Spinks v. State*, 260 A.3d 726, 736 (Md. Ct. Spec. App. 2021).

180. *E.g.*, *Spinks*, 260 A.3d at 733–34.

181. *Id.*

182. *E.g.*, *Bragg*, 2023 WL 2623206, at \*6.

183. *E.g.*, *State v. Sanon*, 223 N.E.3d 91, 108 (Ohio Ct. App. 2023) (noting jury could see "almost life-sized" image of witness); *State v. Crawford*, No. 110986, 2022 WL 3099189, at \*9 (Ohio Ct. App. Aug. 4, 2022) (noting the use of a large screen); *State v. Johnson*, No. 1 CA-CR 21-0015, 2021 WL 5457502, at \*2 (Ariz. Ct. App. Nov. 23, 2021) (same).

184. *Tilford v. Commonwealth*, No. 2020-CA-0835-MR, 2021 WL 2274323, at \*2–3 (Ky. Ct. App. June 4, 2021). *But cf.* *State v. Clapp*, 510 P.3d 667, 677 (Idaho 2022) (finding that Confrontation Clause was violated in part because telephonic hearing did not allow the defense and the court to see the witness during the testimony).

185. *Spinks*, 260 A.3d at 736.

the Confrontation Clause. Likewise, no violations were found in some cases where witnesses could not see the accused while they were testifying.<sup>186</sup>

As with due process challenges, some confrontation challenges failed because a more stringent review standard applied on appeal. Since most of the published decisions in the period studied were appellate decisions, this was a common reason for challenges to fail.<sup>187</sup> In a few cases, defendants had failed to object at trial and thus had forfeited their right to raise the issue on appeal.<sup>188</sup> Even when defendants objected at trial and then showed on appeal that a confrontation violation had occurred, the prosecution could still prevail by showing that the violation was harmless beyond a reasonable doubt.<sup>189</sup> In 10 out of the 85 cases, the reviewing courts concluded that, even though the remote testimony violated the Confrontation Clause, the error was harmless because other evidence sufficiently established the defendant's guilt.<sup>190</sup>

## 2. Successful Challenges

Defendants established that a Confrontation Clause violation had occurred (or would occur if testimony were admitted) in about a third of the cases reviewed.<sup>191</sup> They obtained relief—ensuring that the testimony would occur in person or obtaining reversal of a conviction and a new trial—in close to a quarter of cases.<sup>192</sup>

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186. *E.g.*, *State v. Bowers*, No. M2022-00949-CCA-R3-CD, 2023 WL 6211909, at \*8 (Tenn. Crim. App. Sept. 25, 2023) (“The record does not expressly reveal whether Mr. Mash was able to see the Defendant during his testimony, but as we have seen in *Craig*, this sole fact is not determinative of the reliability question because it was clear that the witness in *Craig* could not see the accused in that case.”).

187. Out of the 85 reviewed decisions, 62 were appellate decisions.

188. *E.g.*, *United States v. Collins*, No. ACM 39296 (REM), 2022 WL 1439979, at \*14 (A.F. Ct. Crim. App. May 6, 2022); *Commonwealth v. Serrbocco*, No. 1259-CD-2021, 2023 WL 1489735, at \*2 (Pa. Commw. Ct. 2023); *Oliver v. State*, No. 03-19-00725-CR, 2020 WL 5105209, at \*2 (Tex. App. Aug. 27, 2020).

189. *See, e.g.*, *Spalding v. Commonwealth*, 671 S.W.3d 693, 699 (Ky. 2023).

190. *See, e.g., id.*; *Kinder v. Commonwealth*, No. 2021-CA-0978-MR, 2023 WL 7392540, at \*3 (Ky. Ct. App. Nov. 9, 2023) (“Given the totality of the ‘remaining evidence’ presented at trial against Kinder, we believe that any error in admitting Pam’s remote testimony was harmless beyond a reasonable doubt.”); *Newson v. State*, 526 P.3d 717, 723–24 (Nev. 2023) (holding that “general concerns related to the spread of the virus are not sufficient to dispense with” confrontation rights, but “that the district court’s error was harmless beyond a reasonable doubt in light of the testimony’s nature, the fact that the jury was able to assess Newson’s credibility in light of his own testimony, and because it did not contribute to the jury’s verdict”); *State v. Banks*, No. C-200395, 2021 WL 5860873, at \*6 (Ohio Ct. App. Dec. 10, 2021).

191. *See infra* Table 2.

192. *See infra* Table 2.



A few courts that granted Confrontation Clause objections recognized the importance of the stage at which remote testimony was typically given—namely, at trial.<sup>193</sup> Presenting remote testimony at trial raises more serious concerns than doing so at a pretrial proceeding because the stakes—the defendant’s conviction or acquittal—are so high.

The most common reason for confrontation challenges to succeed was that the prosecution had failed to show that remote testimony was *necessary* to protect a *substantial* state interest. In some cases, the interest to be protected was found not to be substantial enough, such as when remote testimony was used to spare a witness some inconvenience or to advance judicial economy.<sup>194</sup> As courts noted in rejecting such justifications, “convenience, efficiency, and cost are insufficient to support the necessity” required to permit remote testimony.<sup>195</sup> While acknowledging that “[t]raveling to appear in court and testify can be frustrating and difficult for various reasons, [including] finances, hectic schedules, health issues, [and] sheer distance,” one court emphasized that “physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness.”<sup>196</sup> Likewise, non-specific allegations of threats from the defendant’s friends and family were held insufficient to permit remote testimony.<sup>197</sup>

Some defendants succeeded in their confrontation challenges because the trial court had not made a case-specific finding that remote testimony was necessary.<sup>198</sup> For example, some courts had allowed remote testimony based on generalized concerns about public health, without examining whether a witness in the case was

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193. *Campbell v. Commonwealth*, 671 S.W.3d 153, 161 (Ky. 2023) (“There are many proceedings which could be contemplated under this order [encouraging the use of remote proceedings]. For instance: criminal motion hour, routine hearings, a trial in which a defendant waives a confrontation issue because his right to a speedy trial is more important to him. However, in this instance, we are dealing with a jury trial where the defendant was facing a considerable amount of jail time and the Commonwealth’s expert witness testimony was crucial in proving a key element of the assault charge.”).

194. *United States v. Davis*, No. 5:19-CR-50033-TLB, 2021 WL 3572670, at \*8 (W.D. Ark. Aug. 12, 2021); *Campbell*, 671 S.W.3d at 161; *State v. Smith*, 636 S.W.3d 576, 583 (Mo. 2022); *State v. Mercier*, 479 P.3d 967, 976–77 (Mont. 2021); *Haggard v. State*, 612 S.W.3d 318, 324 (Tex. Crim. App. 2020).

195. *Smith*, 636 S.W.3d at 583; *see also Mercier*, 479 P.3d at 976 (“Although judicial economy may be an important public policy in other contexts, standing alone, it must yield to the constitutional rights of the accused.”).

196. *Haggard*, 612 S.W.3d at 328.

197. *McCumber v. State*, No. 09-22-00157-CR, 2023 WL 4098960, at \*6 (Tex. App. June 21, 2023), *rev’d*, No. PD-0467-23, 2024 WL 3049830 (Tex. Crim. App. June 19, 2024).

198. *E.g.*, *State v. Clapp*, 510 P.3d 667, 677 (Idaho 2022).

medically vulnerable or likely to be contagious.<sup>199</sup> A few courts held that remote testimony was not permitted under the Confrontation Clause because there were other reasonable alternatives, such as granting a continuance or offering another witness, that the prosecution had not adequately explored.<sup>200</sup> Finally, one court limited the permissibility of remote testimony even further, holding that outside the child witness context, remote testimony is allowed only when the witness is unavailable at trial (e.g., due to illness) *and* the defendant has had the opportunity to depose the witness in person before trial.<sup>201</sup>

While courts examined the reliability of remote testimony as part of their analysis, no challenges succeeded solely on the grounds that testimony via video would be or had been unreliable. In two cases, however, concerns about reliability reinforced the court's decision to grant a confrontation challenge where the prosecution had failed to show sufficient necessity for the remote testimony. In the first case, testimony had occurred over the phone, making it very difficult for defense counsel to evaluate and challenge it.<sup>202</sup> In the second, the court expressed concern that the witness "appear[ed] in the lower right quadrant of the screen and the visual [wa]s blurry and fragmented," and that it did "not appear [the witness] could view either the [defendant] or the members of the jury when he testified."<sup>203</sup>

In brief, many courts recognized the importance of physical, in-person confrontation, even in the context of the pandemic. In most of the cases reviewed, remote testimony was sought to be provided at trial, triggering concerns about the high stakes for the defendant and the ability to evaluate and challenge the credibility of the witness. This explains why challenges succeeded in close to a quarter of the cases, even when protecting the witnesses' and the public's health

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199. *E.g.*, *Commonwealth v. Gardner*, No. 2020-CA-1383-MR, 2021 WL 3573304, at \*5 (Ky. App. Aug. 13, 2021).

200. *E.g.*, *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550, at \*4 (D. Kan. Aug. 31, 2020); *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541, at \*3 (D. Mont. June 17, 2020).

201. *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).

202. *Clapp*, 510 P.3d at 677 (noting that the reliability of phone testimony in the case was "less assured than the closed-circuit television testimony in *Craig*" because the witness "was at no point visible to the judge, counsel, or Clapp" so they could not "view or assess [the witness's] demeanor as he testified, which is one of the 'other elements of confrontation' that 'adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony'" (quoting *Maryland v. Craig*, 497 U.S. 836, 851 (1999))). *But cf.* *Tilford v. Commonwealth*, No. 2020-CA-0835-MR, 2021 WL 2274323, at \*2 (Ky. Ct. App. June 4, 2021) (finding telephonic testimony sufficiently reliable).

203. *Campbell v. Commonwealth*, 671 S.W.3d 153, 161 (Ky. 2023).

during the COVID-19 emergency weighed heavily in favor of permitting remote testimony.

### C. *Right to Counsel*

In addition to due process and confrontation rights, the remote format can also affect the right to counsel. Under the Sixth Amendment, defendants have the right to effective representation by counsel.<sup>204</sup> This encompasses the right of defendants to confer confidentially with their attorneys.<sup>205</sup> The California Supreme Court explained in *Barber v. Municipal Court for Luis Obispo County*:

[I]f an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney. . . . It is . . . essential to the enjoyment of this constitutional guarantee that the accused should have the right to a private consultation with his counsel.<sup>206</sup>

While defense counsel takes the lead on most strategic decisions during the case, the defendant is entitled to contribute actively to the process, whether by commenting on the evidence presented, suggesting lines of questioning, or discussing with counsel in real time how to respond to developments in the case.<sup>207</sup> The virtual format can thus violate the Sixth Amendment if it frustrates the ability of defendants to speak privately with counsel during the proceedings.<sup>208</sup>

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204. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

205. *See, e.g., Geders v. United States*, 425 U.S. 80, 88–89 (1976) (noting the importance of the right to consult privately with counsel not only during trial, but also during recess, “because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance”).

206. *Barber v. Mun. Ct.*, 598 P.2d 818, 822–23 (Cal. 1979).

207. *See, e.g., Anne Bowen Poulin, Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1225 (2006).

208. *Schiffer v. State*, 617 So. 2d 357, 358 (Fla. Dist. Ct. App. 1993) (“Without any procedure whereby defendant could communicate privately with his attorney, defendant’s Sixth Amendment right to counsel was more than impaired, it was obliterated.”); *Seymour v. State*, 582 So. 2d 127, 128 (Fla. Dist. Ct. App. 1991) (“It is of vital importance that a defendant have the opportunity to engage in personal and private conference with his counsel to resolve the numerous problems and misunderstandings that can develop during the course of pre-trial proceedings.”). While courts generally presume that the right to counsel is violated if the defendant and his counsel cannot communicate confidentially, some courts require defendants to explain how exactly the limitations on confidential communications prejudiced fairness in the case. *See, e.g., Brown v. State*, 335 So. 3d 123, 127 (Fla. Dist. Ct. App. 2022) (“[A]lthough the defendant argues he ‘did not have confidential access to his attorney’ and thus did not have the ‘right to fully participate with his own defense,’ the record shows neither the defendant nor his counsel ever requested to speak privately with one

In-person proceedings also allow defense counsel to help their clients present themselves appropriately to the court.<sup>209</sup> Inappropriate attire, informal background settings, disruptions, and outbursts from defendants are not uncommon during remote hearings.<sup>210</sup> When the defense attorney is not in the same room, the attorney cannot intervene in a timely fashion to prevent the defendant from leaving a bad impression with the court.

### 1. *Failed Challenges*

Although the remote format can impair defense representation in a range of ways, right-to-counsel challenges were brought relatively rarely, in only 25 of the 182 cases examined.<sup>211</sup> In the large majority of cases featuring right-to-counsel challenges, courts denied the challenges. Defendants obtained the sought relief in only 3 of the 25 cases (12%), and courts declared that a violation of the right to counsel occurred in another 2 cases, but the error was found to be harmless.<sup>212</sup> Therefore, courts found that a violation of the right to counsel occurred in just 5 out of 25 (20%) of cases.<sup>213</sup> In another 9 (36%) cases, courts left unsettled the question of whether a constitutional error had occurred, while denying relief on appeal.<sup>214</sup>

In many cases, courts concluded that while the remote format may have complicated the task of defending clients, it did not entirely

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another at any point during the sentencing hearing.”); *see also* United States v. Chaney, No. 20-4294-CR, 2022 WL 2315184, at \*2 (2d Cir. June 28, 2022) (“The added hurdle of having to request a Zoom breakout room did not render counsel ‘effectively unavailable.’ . . . Any practical impediment to communication posed by that format was ‘so trivial that [it] [did] not amount to a constitutional violation.’” (alteration in original) (quoting United States v. Triumph Cap. Grp., Inc., 487 F.3d 124, 129 (2d Cir. 2007))).

209. Poulin, *supra* note 4, at 1126–27, 1130; *see also* People v. Webb, No. 356943, 2022 WL 4390977, at \*7–8 (Mich. Ct. App. Sept. 22, 2022) (rejecting defendant’s claim that “the result of the proceedings would have been different because, if he had been present in the courtroom with his counsel, ‘it is less likely that he would have behaved inappropriately and it is hard to imagine that counsel would not have at least made an effort to counsel [defendant] to be more respectful”).

210. Turner, *supra* note 4, at 255–57; Gabrielle Banks, *In Houston’s Zoom Court Proceedings, Decorum Often Gets Muted*, HOUS. CHRON. (Dec. 24, 2020, 8:38 AM), <https://www.houstonchronicle.com/news/houstontexas/houston/article/In-Houston-s-Zoom-court-proceedings-decorum-15825974.php> [<https://perma.cc/DY2V-3GGT>].

211. Twenty of these cases involved criminal proceedings, five involved probation revocation proceedings, and none involved juvenile delinquency proceedings. *See infra* Tables 1 & 2.

212. *See infra* Table 2.

213. *See infra* Table 2.

214. *See* Right to Counsel Cases Chart, E-31 & I-28 (on file with author and Wake Forest Law Review).

prevent attorneys from providing effective representation.<sup>215</sup> One trial court explained:

[A]ny diminished effectiveness of counsel attributable to the use of videoconferencing is unlikely to be so great as to implicate the defendant's Sixth Amendment rights. This Court, like every other court in the country, has conducted a great number of video hearings . . . and has found that by and large counsel is able to see, hear, assess, and examine witnesses in an effective manner.<sup>216</sup>

In general, courts found the virtual format to be consistent with the right to counsel as long as some method was made available to the defendant to speak privately with counsel (e.g., being told they could use a virtual "breakout room" or a private phone line to consult)<sup>217</sup> and no severe technological malfunctions frustrated counsel's ability to represent the client effectively.<sup>218</sup>

In rejecting challenges based on the right to counsel, many courts emphasized that the attorneys in the cases before them had actively participated in the proceedings despite the limitations of the remote format. Judges explained that the attorneys had ably cross-examined

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215. *E.g.*, *United States v. Lattimore*, 525 F. Supp. 3d 142, 150 (D.D.C. 2021); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 842 (Mass. 2021) ("A defendant's inability to immediately communicate regarding tactical or strategic decisions with counsel does not interfere with the effective assistance of counsel, nor does the defendant's inability to pass notes to counsel or use nonverbal cues to communicate with counsel."); *United States v. Chaney*, No. 20-4294-CR, 2022 WL 2315184, at \*2 (2d Cir. June 28, 2022) ("Videoconferencing merely affected the format of Chaney's communication with counsel. . . . Any practical impediment to communication posed by that format was 'so trivial that [it] [did] not amount to a constitutional violation.'" (alteration in original) (quoting *United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 129 (2d Cir. 2007))).

216. *Lattimore*, 525 F. Supp. 3d at 150.

217. *E.g.*, *Broussard v. State*, No. 09-20-00259-CR, 2022 WL 2056388, at \*9 (Tex. App. June 8, 2022).

218. *E.g.*, *United States v. Rodriguez*, 75 F.4th 1231, 1245 (11th Cir. 2023) (holding that although the defendant pointed to "several instances [during a sentencing hearing] where hearing participants commented on defense counsel's poor connection and one instance where the district court questioned [the defendant] while his attorney was disconnected," these malfunctions were not significant enough to violate the right to counsel); *Pueblo v. Santiago Cruz*, 205 D.P.R. 7, 2020 WL 5646360, at \*50 (P.R. 2020) (holding that "the constitutional right to assistance of counsel during online hearings are met when (1) defense counsel can see and hear the participants of the proceedings, and vice versa, and (2) the accused or the minor has access to means through which to communicate with counsel privately during the hearings, and vice versa. If these two requirements are met, then a hearing held by videoconference adequately safeguards the constitutional right of assistance of counsel at this stage of the proceedings.").

witnesses, challenged prosecution arguments and pre-sentencing reports, and argued vigorously on behalf of the defendants.<sup>219</sup>

Some courts noted that even if a defendant had been limited to some degree in communicating with counsel during a remote proceeding, this limitation was not so significant as to impair the right to counsel.<sup>220</sup> For example, one court concluded that “the added hurdle of having to request a Zoom breakout room did not render counsel ‘effectively unavailable.’”<sup>221</sup> The court explained that “[a]ny practical impediment to communication posed by that format was ‘so trivial that [it] [did] not amount to a constitutional violation.’”<sup>222</sup> Others likewise concluded that while technological glitches or limitations on the ability to speak privately were regrettable, they were not sufficiently serious to undermine the defense to such a degree as to violate the right to counsel.<sup>223</sup>

Finally, as with other constitutional challenges, some failed simply because neither the defendant nor the defense attorney had objected to the alleged violation at the trial level.<sup>224</sup> This failure to

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219. *United States v. Lawson*, No. 5:20-CR-060-GFVT-MAS-1, 2020 WL 6110969, at \*3 (E.D. Ky. Oct. 16, 2020) (noting counsel’s “thorough questioning” of prosecution witness); *People v. Fraly*, No. 361312, 2023 WL 4141081, at \*2 (Mich. Ct. App. June 22, 2023) (in reviewing a due process challenge to remote sentencing, noting that “[d]efense counsel successfully challenged certain information in the PSIR and . . . ably advocated for defendant”); *Rimes v. State*, No. 05-21-00038-CR, 2022 WL 3593282, at \*6 (Tex. App. Aug. 23, 2022) (noting “counsel’s active participation in the proceedings” and explaining that “[s]he cross-examined the State’s witnesses, objected to the admission of evidence, made an opening statement and closing argument, . . . consulted with appellant in a separate breakout room before concluding her cross-examination of the State’s witnesses [and] offered evidence of appellant’s admission to a substance abuse treatment program and appellant’s written statements supporting his previous cooperation with authorities and his determination to change his life”).

220. *Lawson*, 2020 WL 6110969, at \*3 (“[T]here is no indication that further direct participation from Lawson would have benefited or altered the hearing outcome. And Lawson surely had no guaranteed right to micromanage counsel’s cross-examination or hearing performance to the degree he suggests.”).

221. *United States v. Chaney*, No. 20-4294-CR, 2022 WL 2315184, at \*2 (2d Cir. June 28, 2022).

222. *Id.* (quoting *United States v. Triumph Cap Grp., Inc.*, 487 F.3d 124, 129 (2d Cir. 2007)).

223. *See, e.g.*, *Cathey v. State*, No. 07-20-00235-CR, 2021 WL 1376961, at \*2 (Tex. App. Apr. 12, 2021) (“Nor does the record illustrate that the ‘glitches’ affected appellant’s defense or her ability to exam witnesses in any substantive way. They may have been frustrating, but frustration is the byword in these times of growing technology.”); *People v. Churchill*, No. A162078, 2022 WL 950749, at \*4, \*8 (Cal. Ct. App. Mar. 30, 2022) (ruling that the inability to speak privately with counsel during probation revocation hearing did not prejudice outcome).

224. *E.g.*, *People v. Strong*, No. A160880, 2022 WL 1301860, at \*12 (Cal. Ct. App. Apr. 29, 2022).

preserve error triggered a more stringent review standard on appeal, under which defendants could not prevail unless they could show that the remote proceeding undermined fundamental fairness.<sup>225</sup> Furthermore, in two cases in which the defendant had objected, the appeals court held that the remote proceeding had violated the right to counsel, but the harmless error standard ultimately undercut the challenge.<sup>226</sup> The prosecution was able to show that the failure to allow for private communication between client and counsel had not prejudiced the outcome in the case.<sup>227</sup>

## 2. Successful Challenges

As noted earlier, courts declared that a violation of the right to counsel occurred in 5 out of 25 (20%) of cases, but granted the relief sought by defendants (retrial or resentencing) in just 3 out of the 25 cases (12%).<sup>228</sup> While this success rate may appear low, given that all but three of the decisions reviewed involved appeals, the rate is consistent with the average defense success rate on direct appeal.<sup>229</sup> Compared to ineffectiveness of counsel claims, for example, which have succeeded in a mere 3.6% of cases reviewed on the merits on appeal, right to counsel claims in the remote criminal context have a relatively high success rate.<sup>230</sup>

In all five cases in which the courts found violation of the right to counsel, the critical issue was that defendants had been denied the opportunity to consult privately with counsel during a remote proceeding. In three of these cases, the courts concluded that the error

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225. *E.g.*, *Brown v. State*, 335 So. 3d 123, 130 (Fla. Dist. Ct. App. 2022); *Gonzalez v. State*, 343 So. 3d 166, 169 (Fla. Dist. Ct. App. 2022).

226. *State v. Anderson*, 497 P.3d 880, 885 (Wash. Ct. App. 2021) (concluding that violation was harmless because defendant “received all the forms of relief that were requested at his resentencing hearing”); *State v. Saunders*, No. 56335-5-II, 2023 WL 4348886, at \*7 (Wash. Ct. App. July 5, 2023) (concluding that violation was harmless because “attorney made every argument reasonably available” in support of sentence mitigation).

227. *Anderson*, 497 P.3d at 884 (concluding that violation was harmless because defendant “received all the forms of relief that were requested at his resentencing hearing”); *Saunders*, 2023 WL 4348886, at \*7 (concluding that violation was harmless because “attorney made every argument reasonably available” in support of sentence mitigation).

228. In criminal proceedings, defendants obtained relief in 2 out of 20 challenges (10%), and the court found violation in another 2 cases (20%). *See infra* Table 1. In probation revocation proceedings, 1 out of 5 (20%) challenges were successful and resulted in the relief sought. *See infra* Table 1. No right to counsel challenges were made in juvenile delinquency proceedings.

229. Heise et al., *supra* note 13, at 1965–66 (reporting a 14.9% rate of decisions favorable to defendants in first appeals of right); WATERS ET AL., *supra* note 13, at 5 (finding a reversal rate of 13% for defendant-initiated appeals in intermediate courts of appeal).

230. WATERS ET AL., *supra* note 13, at 6.

had harmed the defendant's case and therefore warranted reversal or resentencing. In the first case, involving a remote sentencing hearing, the court determined that the defendant's constitutional rights were violated when the trial court failed to provide the defendant "with a means to communicate in private with his attorney during the sentencing hearing (through a breakout room or other means), even after [the defendant] request[ed] to speak with his attorney."<sup>231</sup> In the second case, also a remote sentencing hearing, the court had failed "to set any ground rules for [the defendant] to exercise his right to privately confer with his counsel" and "place[d] an unreasonable expectation on a defendant to interrupt a proceeding to assert their right to confer with . . . counsel."<sup>232</sup> In the final case, the defendant was denied the opportunity to consult privately with counsel during the cross-examination of an adverse witness and therefore could not "point out to his counsel any inconsistencies or inaccuracies in the [witness's] testimony."<sup>233</sup>

A few courts, even while denying the constitutional challenges in the cases before them, nonetheless provided guidance for the types of measures courts ought to take in the future to ensure that counsel and defendant have a meaningful opportunity to consult during a remote proceeding. The Supreme Judicial Court of Massachusetts urged judges to "take care that the technology is functioning properly and that a defendant has the opportunity to use the private breakout room with counsel if he or she requests to do so" and to inquire "regularly of all parties to ensure that there is clear audio and video transmission, but particularly of the defendant, to ensure that he or she has the opportunity to consult with counsel."<sup>234</sup> Washington appeals courts have likewise recognized that "[i]t is the role of the judge to make sure that attorneys and clients have the opportunity to engage in private consultation" and that when conducting remote proceedings, "trial courts should make a record of what has been done to ensure confidential communication."<sup>235</sup> Other jurisdictions have required judges by statute or rule to "inform the defendant of the available means of confidential communications with defense

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231. *People v. Harris*, 231 N.E.3d 777, 804 (Ill. App. Ct. 2023).

232. *Bragg v. State*, 536 P.3d 1176, 1183 (Wash. Ct. App. 2023).

233. *Hughes v. State*, 651 S.W.3d 461, 471 (Tex. App. 2022).

234. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 842 (Mass. 2021).

235. *State v. Anderson*, 497 P.3d 880, 885 (Wash. App. Ct. 2021); *see also* *Bragg v. State*, 536 P.3d 1176, 1183 (Wash. Ct. App. 2023); *State v. Saunders*, No. 56335-5-II, 2023 WL 4348886, at \*7 (Wash. Ct. App. July 5, 2023).



counsel,”<sup>236</sup> and more generally, to “ensure that the defendant has adequate opportunity to confidentially communicate with counsel.”<sup>237</sup>

### III. DEFENSE REQUESTS FOR REMOTE PROCEEDINGS

Most cases involving challenges to the remote format featured defendants insisting on an in-person proceeding. Sometimes, however, defendants actually requested that their proceedings be conducted remotely. This Part examines the 19 published court decisions from 2020–23 that involved such defense motions.<sup>238</sup> Eighteen of these decisions were issued by trial courts, and one was issued by an appeals court. Courts rejected defense requests to proceed remotely in 12 of the 19 cases (63.2%).

There were four general reasons for defense requests to proceed remotely: cost, convenience, health concerns, and expediting the resolution of the case.<sup>239</sup> While defendants can validly waive their constitutional right to appear in person, the court is typically not obligated to accept that waiver.<sup>240</sup> Defendants have no constitutional right to a remote proceeding, and many statutes require more than

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236. ARIZ. CODE JUD. ADMIN. § 5-208 (2010); *see also* OHIO CRIM. R. 43(A)(2)(d) (stating that the court must “inform the defendant on the record how to, at any time, communicate privately with counsel” when a criminal proceeding occurs via video).

237. MINN. R. CRIM. P. 1.05 subdiv. 10(3).

238. As with the analysis of decisions featuring constitutional challenges to the remote format, the reliance on published decisions available on commercially available databases introduces the risk of selection bias. *See supra* notes 40–48 and accompanying text.

239. *E.g.*, *United States v. Emakoji*, 990 F.3d 885, 887 (5th Cir. 2021) (requesting remote arraignment because of concerns about contracting COVID-19 from traveling to the courthouse); *United States v. Fagan*, 464 F. Supp. 3d 427, 428 (D. Me. 2020) (requesting remote sentencing in order to obtain a quicker resolution); *United States v. Normandin*, No. 8:21-CR-0180-KKM-TGW, 2022 WL 295367, at \*1–2 (M.D. Fla. Feb. 1, 2022) (requesting remote sentencing for health and convenience reasons); *United States v. Almeida*, No. 2:11-CR-127-DBH-01, 2020 WL 4227391, at \*1 (D. Me. July 23, 2020) (requesting remote sentencing for reasons of health and the potential to apply for compassionate release upon sentencing); Order Denying the Motion for Leave to Attend Initial Appearance by Video Conference, *United States v. Biden*, No. 1:23-cr-00061-MN (D. Del. Sept. 20, 2023) (requesting remote arraignment for reasons of convenience for the defendant and the U.S. Secret Service); *In re T.W.*, No. A-1698-22, 2023 WL 6117953, at \*6 (N.J. Super. Ct. App. Div. Sept. 19, 2023) (requesting remote attendance because of inability to afford travel to the courthouse from another state).

240. *E.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 528–29 (2020) (permitting remote plea and sentencing hearings during the pandemic if the defendant consents and if “the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice”).

the defendant's consent for a proceeding to occur via video.<sup>241</sup> Sometimes, the consent of both parties is required for a remote proceeding.<sup>242</sup> Often, the decision lies within the court's discretion, though statutes may limit that discretion to some degree.<sup>243</sup> Notably, higher-stakes proceedings, such as pleas, sentencing proceedings, and trials, are more likely to require the consent of both parties, as well as the court's approval.<sup>244</sup>

In federal court, where a request to hold a plea or sentencing remotely during the pandemic had to be justified in the interest of justice, courts often denied such requests.<sup>245</sup> Some courts did so simply by referring to the presumption in the federal statute for in-person plea and sentencing proceedings.<sup>246</sup> But others provided more

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241. Only one case has suggested that the defendant may have a right to insist on a remote proceeding where the insistence on an in-person juvenile delinquency proceeding would be the equivalent of forcing her to waive her right to be present at all because of her financial inability to travel interstate to attend the proceeding. *In re T.W.*, No. A-1698-22, 2023 WL 6117953, at \*6 (N.J. Super. Ct. App. Div. Sept. 19, 2023) (holding that trial court abused discretion when it denied juvenile's request for her and her mother to appear remotely at delinquency proceeding because they cannot afford to travel from South Carolina to attend proceedings in New Jersey).

242. *E.g.*, ARIZ. R. CRIM. P. 1.5 (allowing certain proceedings to be conducted remotely "in the court's discretion" and others to occur remotely if "the court finds extraordinary circumstances and the parties consent by written stipulation or on the record"); MINN. R. CRIM. P. 1.05 subdiv. 6.2 (requiring "defendant, defense attorney, prosecutor, and judge must consent to holding" a range of hearings remotely); TEX. CODE CRIM. PROC. art. 27.18 (providing that "a court *may* accept the plea or waiver by videoconference to the court if . . . the defendant and the attorney representing the state file with the court written consent to the use of videoconference" (emphasis added)).

243. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 528–29 (2020) (permitting remote plea and sentencing hearings during the pandemic if the defendant consents and if "the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice"); ARIZ. R. CRIM. P. 1.5; COLO. CRIM. P. 43; TEX. CODE CRIM. PROC. art. 27.18.

244. *E.g.*, ARIZ. R. CRIM. P. 1.5; MINN. R. CRIM. P. 1.05 subdiv. 6.2; TEX. CODE CRIM. PROC. art. 27.18.

245. *United States v. Ruiz*, No. CR20-5002 BHS, 2020 U.S. Dist. LEXIS 89870, at \*3–4 (W.D. Wash. May 21, 2020) (noting that federal courts have been "sparing" in granting requests for remote plea and sentencing proceedings during the pandemic).

246. *E.g.*, *id.* at \*3 ("The CARES Act presents a limited exception to what is ordinarily a mandatory requirement that a plea hearing be conducted in person."); *United States v. Long*, No. 2:19-cr-00128-RAJ, 2020 U.S. Dist. LEXIS 129253, \*5 (W.D. Wash. July 22, 2020) (finding that "delaying sentencing will not cause harm to the interests of justice"); *United States v. Mathisen*, No. CR19-238 RAJs, 2020 U.S. Dist. LEXIS 96834 (W.D. Wash. June 2, 2020) (finding that

thorough explanations. In many ways, their reasons echoed those given by courts evaluating constitutional challenges to remote proceedings.

Courts rejecting requests for virtual proceedings reasoned that the virtual format is unsuitable for proceedings that carry high stakes for the defendant and involve the evaluation of evidence or the defendant's character.<sup>247</sup> One court explained that sentencing is not an appropriate occasion for the virtual format: "Physical presence makes unavoidable the recognition that—in sentencing—one human being sits in judgment of another, with a dramatic impact on the future of a living, breathing person, not just a face on a screen."<sup>248</sup> Another added that an "in-person proceeding enables the Court to assess the credibility of a defendant's allocution and his demeanor with a level of accuracy that a virtual medium cannot match."<sup>249</sup> Another court reasoned similarly:

Criminal punishment impacts the most fundamental of human rights, liberty, and there are many important policy reasons why the physical presence of the defendant at sentencing is critically important: to [e]nsure the defendant has the opportunity to (1) challenge the accuracy of the information upon which the court is relying; (2) present any mitigating evidence he may have[;] and (3) make a personal statement.<sup>250</sup>

The same court also explained that virtual sentencing would make it "difficult to give any meaningful adherence to [the right to counsel] if defendant and defense counsel are not together in the same place at the same time."<sup>251</sup> Finally, a New Jersey state court denied a juvenile's request to have her delinquency proceeding conducted remotely on the grounds that a remote proceeding would interfere with the juvenile's "ability to confer with counsel and assess witness credibility," that it would be difficult to safeguard the confidential nature of the proceedings "and the sensitive evidence to be presented," and that the court would struggle to evaluate "the juvenile's virtual testimony in the event she elected to testify."<sup>252</sup>

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delaying plea hearing until it can be conducted in person would not seriously harm the interests of justice).

247. *United States v. Normandin*, No. 8:21-cr-0180-KKM-TGW, 2022 WL 295367, at \*1 (M.D. Fla. Feb. 1, 2022); *United States v. Fagan*, 464 F. Supp. 3d 427, 430 (D. Me. 2020); *United States v. Harry*, No. 19-CR-535, 2020 WL 1528000, at \*1 (E.D.N.Y. Mar. 31, 2020); *see also* *United States v. Emory*, No. CR 19-00109 JAO, 2020 WL 1856454, at \*2 (D. Haw. Apr. 13, 2020) (expressing concern about resolving sentencing arguments in a telephonic hearing).

248. *Fagan*, 464 F. Supp. 3d at 430.

249. *Normandin*, 2022 WL 295367, at \*1.

250. *Harry*, 2020 WL 1528000, at \*1.

251. *Id.*

252. The trial court's concerns were rejected on appeal, however, when the appeals court held that the trial court had abused its discretion in denying the

For all these reasons, even during the pandemic, many courts continued to insist on in-person criminal proceedings. This occurred even in cases where defendants had requested to proceed remotely and waived their constitutional rights to appear in person. As the reasoning in these decisions suggests, concerns persist about the effects of the remote format on the fairness and integrity of the process.

#### IV. A CONSTITUTIONAL FRAMEWORK FOR REMOTE CRIMINAL JUSTICE

The end of the pandemic has obviously lessened the need for virtual proceedings. Still, many states plan to continue using them to one extent or another because of their convenience and efficiency.<sup>253</sup> As questions about the desirability and constitutionality of remote criminal justice linger, it is useful to examine the lessons learned from pandemic-era case law on these issues.

The analysis highlights several factors that courts have considered in evaluating the constitutionality of remote criminal proceedings: (1) the significance of the state's interest in holding the proceeding remotely; (2) the nature and stakes of the proceeding, including whether it involves witness testimony or assessment of the defendant's credibility; (3) the vulnerability of the defendant; (4) the consent or objection by the defendant to the remote format; and (5) the reliability of the technology.

Only a portion of the decisions examined in this analysis expressly identified these factors as reasons for the courts' holdings, however. To catalog the relevant factors, it was necessary to conduct a comprehensive analysis of case law patterns. While decisions involving Confrontation Clause challenges followed a somewhat more predictable framework, those involving due process and right to counsel challenges used disparate approaches and were often far from clear in explaining the reasoning behind their holdings. To strengthen the transparency and fairness of the process, courts ought to expressly state and explain the factors that drive constitutional decisions about remote proceedings.

In developing a clearer and more predictable constitutional doctrine on these issues, courts would do well to consult empirical studies about the effects of the remote format. Due process and confrontation doctrines are premised at least in part on judgments about the effects of the video format on reliability and fairness.<sup>254</sup>

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juvenile's request to appear remotely at the delinquency proceeding because she and her mother could not afford to travel from South Carolina to the proceeding in New Jersey. *In re T.W.*, No. A-1698-22, 2023 WL 6117953, at \*1–2, \*6 (N.J. Super. Ct. App. Div. Sept. 19, 2023).

253. See *supra* notes 2, 27–32 and accompanying text.

254. *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (requiring courts to assess the reliability of the remote testimony arrangement used); *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934) (requiring courts to assess whether

Empirical studies can offer courts guidance in this respect. This Part examines the doctrinal questions that courts should address and the insights that empirical research provides.

A. *Necessity*

One important question that courts must clarify is what type of public necessity justifies a deviation from the historic constitutional norm of in-person criminal proceedings. During COVID-19, courts frequently found that the state's interest in protecting public health overrode defendants' rights to in-person proceedings.<sup>255</sup> But as courts have repeatedly emphasized in Confrontation Clause cases, lesser state interests, such as convenience or efficiency, are ordinarily not enough to justify a departure from the historic standard.<sup>256</sup>

It remains unclear, however, whether courts would apply the same approach in non-trial or quasi-criminal proceedings, where the Confrontation Clause does not apply and instead only the Due Process Clause is relevant. Would convenience to the participants and judicial economy be sufficient reasons to depart from in-person proceedings under the Due Process Clause? Some courts have stressed the flexibility of due process doctrine, which balances state interests and individual rights and may therefore be more tolerant of procedural modifications than the Confrontation Clause.<sup>257</sup> But other courts have emphasized that our longstanding commitment to in-person proceedings is central to a fair process and cannot be easily dispensed with.<sup>258</sup>

As courts resolve these questions, they would benefit from consulting the growing scholarship regarding the effects of the remote format on the fairness and outcomes of criminal proceedings. Several studies have found that the remote format can result in harsher treatment of defendants.<sup>259</sup> Given this risk of depriving fundamental

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the lack of in-person presence by the defendant has a discernible effect on the fairness of the proceedings).

255. See *supra* Subparts II.A.1, II.B.1.

256. See *supra* notes 194–97 and accompanying text.

257. See *supra* note 107 and accompanying text.

258. See *supra* Subpart II.A.2.

259. See FIELDING ET AL., *supra* note 37, at 100–01 (finding that criminal defendants in England and Wales were more likely to get custodial sentences if appearing via video); Matthew Terry, Steve Johnson & Peter Thompson, *Virtual Court Pilot: Outcome Evaluation*, MINISTRY JUST. 42–43 (Dec. 2010) (same); EMMA SNELL, REMAND DECISION-MAKING IN THE MAGISTRATES' COURT: A RESEARCH REPORT 35–36 (2023) (finding that in England and Wales, “defendants appearing by video-link were 40% more likely to be remanded in custody” and “this rose to 76% for defendants accused of high to very high severity offences”); Diamond et al., *supra* note 64, at 897 (finding that criminal defendants in Chicago received higher bail when appearing via video); Eagly, *supra* note 37, at 937–38 (finding worse immigration outcomes in videoconferenced proceedings as a result of higher rates of defendant disengagement from the process). *But cf.* KAI

rights, only a significant necessity, such as a public health or other serious emergency, ought to justify the use of remote proceedings in the absence of valid defendant consent.

*B. Nature and Stakes of the Proceeding*

Courts also need to clarify whether and how the characteristics of a remote proceeding might be relevant to its constitutionality. Specifically, does it matter whether the proceeding is outcome determinative, whether it entails witness testimony, or whether it involves an evaluation of the defendant's character? If so, how should courts weigh these factors in a due process analysis?

Confrontation doctrine has already established that in-person witness testimony is critical to the fairness and integrity of the trial process.<sup>260</sup> Case law has established a presumption that remote testimony at trial is unconstitutional, except under certain narrow conditions.<sup>261</sup> But in non-trial proceedings, where the Confrontation Clause does not apply and confrontation concerns are instead subsumed under a broader due process analysis, the case law is less clear on the significance of witness testimony. For example, some courts during the pandemic found that remote non-trial proceedings were consistent with due process even when they involved witness testimony.<sup>262</sup> Other courts, however, pointed to the risks of evaluating witness testimony remotely as a reason to invalidate remote proceedings that feature such testimony.<sup>263</sup>

Here again, social science studies have highlighted the various ways in which the virtual format may prejudice the fairness and outcome of proceedings featuring remote testimony. In a virtual setting, eye contact is more difficult to maintain, interlocutors are more likely to interrupt each other, the sense of co-presence with other participants is reduced, and maintaining focus is more

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BRISCOE, ELEANOR ROSE & IRINA PEHKONEN, THE IMPACT OF REMOTE HEARINGS ON THE CROWN COURT: AN EVALUATION OF REMOTE HEARINGS' IMPACT ON THE DURATION AND OUTCOMES OF HEARINGS AND TRIAL CASES IN THE CROWN COURT (2023) (finding that the use of videoconferencing in criminal proceedings in England and Wales had no significant effect on decisions to plead guilty or go to trial, or on conviction rates, but not examining the effect on sentences and not controlling for different variables that might affect the outcomes); FIELDING ET AL., *supra* note 37, at 100–01 (finding that the use of videoconferencing in criminal proceedings in England and Wales had no negative impact on bail decisions).

260. *Coy v. Iowa*, 487 U.S. 1012, 1015–16 (1988); *see also supra* Subpart II.B.

261. *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990); *see also supra* Subpart II.B.

262. *See supra* Subpart II.A.1.

263. *See supra* Subpart II.A.2.

difficult.<sup>264</sup> Some witnesses also experience uncertainty about the video format, leading observers to interpret this as a lack of confidence.<sup>265</sup>

These features complicate factfinders' assessments of remote witnesses' credibility. Research has shown that the inability to see a speaker's nonverbal cues and gestures reduces perceived likeability.<sup>266</sup> Similarly, witnesses testifying via video are judged as less believable and less forthcoming.<sup>267</sup> Some experimental studies

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264. See Feigenson, *supra* note 4, at 463; Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 537, 554–55 (2022).

265. Feigenson, *supra* note 4, at 467–68.

266. Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & POL'Y 211, 222 (2006) (first citing James E. Driskell & Paul H. Radtke, *The Effect of Gesture on Speech Production and Comprehension*, 45 HUM. FACTORS 445 (2003); and then citing Spencer D. Kelly & Leslie H. Goldsmith, *Gesture and Right Hemisphere Involvement in Evaluating Lecture Material*, 4 GESTURE 25 (2004)).

267. Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, Holly Orcutt, Sherry Thomas, Cheryl Shapiro & Toby Sachsenmaier, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & HUM. BEHAV. 165, 195 (1998); Sara Landström & Pär Anders Granhag, *In-Court Versus Out-of-Court Testimonies: Children's Experiences and Adults' Assessments*, 24 APPLIED COGN. PSYCH. 941, 949 (2010) (finding that adult observers perceived children seen live as more forthcoming, more straightforward, and more natural than children seen via CCTV); Sara Landström, Karl Ask & Charlotte Sommar, *Credibility Judgments in Context: Effects of Emotional Expression, Presentation Mode, and Statement Consistency*, 25 PSYCH., CRIME & L. 279, 281 (2019); Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce & Sherry Thomas, *Detecting Deception in Children's Testimony: Factfinders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 L. & HUM. BEHAV. 339, 357 (2001); see also Sara Landström, Karl Ask, Charlotte Sommar & Rebecca Willén, *Children's Testimony and the Emotional Victim Effect*, 20 LEGAL & CRIMINOLOGICAL PSYCH. 365, 367 (2015) (“When the camera is focused on the child alone, the child’s statement is assessed as more truthful, compared with when the focus is on both the child and the interviewer.”); Chris Fullwood, *The Effect of Mediation on Impression Formation: A Comparison of Face-to-Face and Video-Mediated Conditions*, 38 APPLIED ERGONOMICS 267, 270–71 (2007) (finding that “participants [in a joint task] were regarded as significantly less likeable and intelligent” when interacting via video than in-person); D.A. Baker, Devin M. Burns & Clair Reynolds Kueny, *Just Sit Back and Watch: Large Disparities between Video and Face-to-face Interview Observers in Applicant Ratings*, 36 INT’L J. HUM.-COMPUT. INTERACTION 1968, 1968 (2020) (finding that “passive participants [in a videoconference job interview] rated the job applicant as less likeable, less hireable, and as having less agency than did [face-to-face] passive participants”).

have further found that the perceived loss of credibility that comes from video testimony can prejudice case outcomes.<sup>268</sup>

Some research has found that the video format reduces the ability of observers to assess credibility accurately, though other studies have found no such effect.<sup>269</sup> While social science scholarship has produced mixed views on this point, practitioners have consistently expressed concerns about their ability to evaluate and cross-examine witnesses effectively in a virtual format.<sup>270</sup> Defense attorneys are especially troubled about this issue.<sup>271</sup> As one explained, “To judge the credibility of witnesses and of the venire requires of the trial lawyers the access to the person of the subject. It is not possible to make such evaluations via a video screen.”<sup>272</sup>

Likewise, empirical studies have found that the virtual format can prejudice how factfinders assess the defendant’s character. Surveys and interviews of practitioners and judges have found that

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268. Goodman et al., *supra* note 267, at 199, 200; Orcutt et al., *supra* note 267, at 358. *But cf.* Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, 20 PRAC. LITIGATOR 19, 21 (2009) (finding “no statistically significant difference in [the] verdict whether the experts were physically in the courtroom or elsewhere, at least so long as witness images are displayed life-size behind the witness stand, and the witness is subject to cross-examination under oath” in a study of testimony by medical experts in civil personal injury trials); Louise Ellison & Vanessa E. Munro, *A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 23 SOC. & LEGAL STUD. 3, 23 (2014) (finding no significant effect of the use of video testimony on the verdict in rape cases); Natalie Taylor & Jacqueline Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, in AUSTL. INST. CRIMINOLOGY 62 (Rsch. & Pub. Pol’y Ser. No. 68, 2005) (finding no impact of use the of CCTV testimony on verdict in mock rape jury trial but acknowledging that “some jurors in the CCTV condition expressed the view that they would have preferred the complainant to be physically in the courtroom”).

269. Norah E. Dunbar, Matthew L. Jensen, Judee K. Burgoon, Katherine M. Kelley, Kylie J. Harrison, Bradley J. Adame & Daniel Rex Bernard, *Effects of Veracity, Modality, and Sanctioning on Credibility Assessment During Mediated and Unmediated Interviews*, 42 COMM. RSCH. 649, 670 (2015). *But cf.* Zoe Given-Wilson & Amina Memon, *Seeing Is Believing? A Systematic Review of Credibility Perceptions of Live and Remote Video-Mediated Communication in Legal Settings*, 36 APPLIED COGN. PSYCH. 1168, 1173 (2022) (conducting meta-analysis of social science studies and finding “[m]ixed results” on “whether the communication medium [video vs. in-person] influences veracity detection”); Landström & Granhag, *supra* note 267, at 950 (finding that adults observing children live were not better at distinguishing between lies and truth than adults observing children on CCTV).

270. Turner, *supra* note 4, at 251.

271. BENNINGER ET AL., *supra* note 4, at 95–98; Daftary-Kapur et al., *supra* note 39, at 85–86 & tbl.3.

272. Turner, *supra* note 4, at 251 (quoting Defense Attorney Respondent #84).



many are worried that the remote format dehumanizes defendants.<sup>273</sup> This is a theme that also emerged in the analysis of judicial opinions, particularly in sentencing cases.<sup>274</sup> The concern is that when defendants appear remotely, judges can more easily ignore the grave consequences that their decision would have on the defendant's life.<sup>275</sup> Indeed, observations of remote proceedings during the pandemic found that attorneys and judges at times did not take the virtual hearings as seriously as they would in-person hearings.<sup>276</sup>

Studies have found that defendants are also less likely to appreciate the gravity of the proceedings when appearing remotely.<sup>277</sup> Defendants tend to be more passive and disconnected in a remote setting.<sup>278</sup> This altered behavior can in turn affect how defendants are perceived and judged.

Given these findings about participant behavior and credibility assessments in a virtual setting, courts should make clear that it would be constitutionally problematic to use the remote format for proceedings with high stakes for defendants, proceedings featuring witness testimony, and proceedings involving assessments of the defendant's credibility. The remote format is thus less suitable for detention hearings, plea hearings, trials, probation violation proceedings, juvenile delinquency proceedings, and sentencing hearings, as many courts have already recognized.

### C. Vulnerability

Another consideration in the courts' analysis of remote criminal proceedings has been the vulnerability of the defendant. Specifically, courts were more likely to hold unconstitutional remote proceedings involving juvenile defendants.<sup>279</sup>

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273. BENNINGER ET AL., *supra* note 4, at 86–94; Emma Rowden, *Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?* 14 L. CULT. & HUMANS. 263, 274 (2018).

274. *See supra* notes 143–45 and accompanying text.

275. Carolyn McKay & Kristin Macintosh, *Digital Vulnerability: People-in-Prison, Videoconferencing and the Digital Criminal Justice System*, J. CRIMINOLOGY 1, 11 (2024) (discussing findings from interviews of judges and practitioners in Australia).

276. Esther Nir & Jennifer Musial, *Zooming In: Courtrooms and Defendants' Rights During the COVID-19 Pandemic*, 31 SOC. & LEGAL STUD. 725, 735–36, 739 (2022); Turner, *supra* note 39, at 255–58.

277. *See, e.g.*, Nessa Lynch & Ursula Kilkelly, “Zooming In” on Children's Rights During a Pandemic: Technology, Child Justice and COVID-19, 29 INT'L J. CHILD.'S RTS. 286, 294 (2021); Emma Rowden, Anne Wallace & Jane Goodman-Delahunty, *Sentencing by Videolink in Australia: Up in the Air*, 34 CRIM. L.J. 363, 376 (2010).

278. *E.g.*, MCKAY, *supra* note 4, at 108–12; Eagly, *supra* note 37, at 978; FIELDING ET AL., *supra* note 37, at 69–71; Poulin, *supra* note 4, at 1140–41; Terry et al., *supra* note 259, at 23.

279. *See supra* Subpart II.A.2.

Some might contend that juveniles are not an especially vulnerable group when it comes to online proceedings. Children and adolescents might be expected to be comfortable with the virtual format because they use it frequently in daily activities, from schoolwork to social media and video games.<sup>280</sup> But research suggests that, whatever their comfort level with daily online activities, juveniles have difficulty understanding and participating in judicial proceedings that occur via video, especially as communication and support from their lawyers is more limited in that setting.<sup>281</sup> For example, in a survey of juvenile defendants who had participated in remote proceedings in Ireland, most reported having no “idea what was happening,” feeling that they were not “part of the hearing,” being concerned about not having their lawyer with them, and believing that “they would not be able to speak with the judge if they needed to.”<sup>282</sup> Likewise, interviews with practitioners have found that the ability of children and adolescents to participate effectively in virtual hearings is “completely hamstrung.”<sup>283</sup> Courts have therefore been correct to scrutinize carefully the use of the remote format in juvenile justice hearings.

Research indicates that other vulnerable defendants, including those with intellectual disabilities and those who require language interpretation, often struggle with the remote format as well.<sup>284</sup> They

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280. See de Vocht, *supra* note 4, at 37.

281. See ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT 8* (Sept. 10, 2020); Lynch & Kilkelly, *supra* note 277; McKay & Macintosh, *supra* note 275, at 11–13; see also Tamara Walsh, *Video Links in Youth Justice Proceedings: When Rights and Convenience Collide*, 27 J. JUD. ADMIN. 161, 167–68 (2018).

282. Lynch & Kilkelly, *supra* note 277, at 296.

283. McKay & Macintosh, *supra* note 275, at 12; see also Jan Pudlow, *Court Rejects First Appearance via TV for Juveniles*, FLA. BAR NEWS (Aug. 1, 2000) (noting Florida practitioners’ comments that “At the end of too many [remote] hearings, . . . children didn’t understand what had happened”); NAT’L JUV. DEF. CTR., *GUIDANCE TO JUVENILE COURTS ON CONDUCTING REMOTE HEARINGS DURING THE COVID-19 PANDEMIC 1–2* (2020) (organization of juvenile defenders opining that “due to the limitations inherent in remote hearings and youth’s still-developing cognition and socioemotional maturity,” remote juvenile delinquency proceedings are likely to violate due process).

284. EQUAL. & HUM. RTS. COMM’N, *INCLUSIVE JUSTICE: A SYSTEM DESIGNED FOR ALL 11–12, 28–29* (2020); L. SOC’Y, *LAW UNDER LOCKDOWN: THE IMPACT OF COVID-19 MEASURES ON ACCESS TO JUSTICE AND VULNERABLE PEOPLE 15–16* (2020) (noting widespread concerns among UK lawyers about the ability of vulnerable clients to participate effectively in remote proceedings); McKay & Macintosh, *supra* note 275, at 11–13; see also de Vocht, *supra* note 4, at 38; Carolyn McKay & Kristin Macintosh, *Accessing Digitalised Criminal Justice from Prison: Communication, Effective Participation, and Digital Vulnerability*, NEWCASTLE L. REV. 1, 6–7 (2023); Turner, *supra* note 4, at 254 (conducting survey of Texas criminal law practitioners and finding that 70% of defense attorneys,

are less able to communicate with their lawyers and the court and less likely to comprehend remote proceedings.<sup>285</sup> Moreover, courts are less aware of a defendant's vulnerability when hearings occur via video and therefore less apt to take corrective measures.<sup>286</sup>

While this is an area where further academic study is warranted, courts should be attentive to the question of digital vulnerability.<sup>287</sup> Before conducting a remote hearing, courts should consider whether a defendant or a witness lacks maturity, has cognitive disabilities, or suffers from language barriers, and whether these vulnerabilities might produce confusion, misunderstanding, or communication difficulties. If the answer is yes, then the risk of unfairness from the remote format is too high, and courts should instead hold the hearing in person.

#### D. Waiver and Forfeiture

Another area in which courts could gain insights from social science is the doctrine on defendant waivers and forfeiture in remote proceedings. Courts have repeatedly held that if a defendant does not object to a remote proceeding at the trial level, then this failure either entirely forfeits or significantly limits subsequent challenges to the proceeding's constitutionality.<sup>288</sup> Courts have justified the forfeiture rule on two primary grounds. First, it prevents defendants from trying to "game the system" and "seeking a second bite at the apple" by waiting to see if they obtain a favorable result at the trial level and only raising an issue on appeal if they are not satisfied with the outcome.<sup>289</sup> Second, the rule encourages defendants to raise objections before the trial court because that court is best placed to address most of the objections.<sup>290</sup> If defendants are concerned that technical malfunctions are unduly disruptive, for example, the court can address the malfunctions immediately, or it may continue the proceedings until they can be held in person or under better conditions. Even if the trial court rejects a defendant's objection when

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39% of prosecutors, and 35% of judges surveyed believed that "the online setting makes it difficult for disabled defendants to participate in proceedings").

285. EQUAL. & HUM. RTS. COMM'N, *supra* note 284, at 11–12, 28–29; McKay & Macintosh, *supra* note 275, at 11–13; de Vocht, *supra* note 4, at 38.

286. EQUAL. & HUM. RTS. COMM'N, *supra* note 284, at 11–12, 28–29.

287. McKay & Macintosh, *supra* note 275, at 13.

288. *See supra* notes 108–14 and accompanying text.

289. *Puckett v. United States*, 556 U.S. 129, 140 (2009); *see also* Darryl K. Brown, *Does It Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process*, 98 TEX. L. REV. 625, 631 (2020).

290. *Puckett*, 556 U.S. at 140; *People v. Strong*, No. A160880, 2022 WL 1301860, at \*12 (Cal. Ct. App. Apr. 29, 2022) ("In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." (citations omitted)).

it is raised, it can at least create a record that makes the matter easier to review on appeal.<sup>291</sup>

Empirical studies, however, have repeatedly found that defendants are more likely to remain passive and disengaged when appearing remotely.<sup>292</sup> Given these findings on the effects of the remote format, appellate courts should be more forgiving of defendants' failure to object during a remote proceeding, at least in situations where defendants appear pro se and perhaps in cases where defense attorneys appear remotely. Courts should not equate the failure to object with forfeiture, but should instead apply the harmless or plain error standards.

A more forgiving appeals standard would be especially fitting for cases arising out of the pandemic. In the midst of a global health emergency, at a time of heightened stress for everyone, some defendants likely opted not to object to the remote format because they did not want to be seen as a burden on the court.<sup>293</sup> Moreover, at least early on in the pandemic, some defense attorneys were not attuned to the potential constitutional infirmities of the remote format.<sup>294</sup> Remote proceedings and the specific technologies used for videoconferencing were new and untested in many jurisdictions. The pandemic itself was also unprecedented. It is therefore not surprising that defense attorneys may not have realized right away that their clients could challenge the use of remote technology on constitutional grounds.

When assessing challenges to the constitutionality of the virtual format on appeal, therefore, courts should be alert to the special context of the pandemic and the effect it may have had on defendants' willingness and capacity to object to the remote format. Just as courts have allowed the prosecution to rely on the pandemic to depart from constitutional protections, so they should allow defendants to rely on pandemic conditions in arguing for a more lenient appeals standard. As analysis of the case law shows, even the more forgiving appeals

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291. *Puckett*, 556 U.S. at 140.

292. MCKAY, *supra* note 4, at 108–12; Eagly, *supra* note 37, at 978; FIELDING ET AL., *supra* note 37, at 69–71; Poulin, *supra* note 4, at 1140–41; Terry et al., *supra* note 259, at 23.

293. *Rimes v. State*, No. 05-21-00038-CR, 2022 WL 3593282, at \*7 (Tex. App. Aug. 23, 2022) (noting the defendant's argument that his strategy in a remote plea hearing was "to be perceived as a defendant who was not burdening the process, requiring him to 'balance his desire to participate with the burden it clearly caused every other member of the Zoom conference' when he availed himself of the opportunity to consult with counsel in a breakout room"). After acknowledging the defendant's argument, the court proceeded to hold that because the defendant failed to raise this issue at trial, it could not be reviewed on appeal unless it affected the fundamental fairness of the proceeding. *Id.* at \*8.

294. *Cf. Commonwealth v. Serrbocco*, 293 A.3d 1242 (Pa. Commw. Ct.) (confrontation right claim forfeited because counsel objected to remote witness testimony merely on due process grounds).

standard (the harmless error standard) is very demanding.<sup>295</sup> Applying that standard to all pandemic-era constitutional challenges to the remote format would offer a more evenhanded approach.

Going forward, courts should also take preventive measures to ensure that defendants are not unknowingly forfeiting their rights to object to the remote format. They ought to remind defendants of the rights to appear in person, to confront witnesses in person, and to consult with counsel privately.<sup>296</sup> Such reminders can help ensure that waivers of the right to an in-person proceeding are informed, voluntary, and intelligent—and therefore constitutionally valid.

### *E. Technology and Background Settings*

Courts play an important role in ensuring that the technology used for remote proceedings does not undermine fairness and reliability. In confrontation cases, Supreme Court precedent requires courts to assess the reliability of the medium used.<sup>297</sup> In due process cases, courts have been somewhat less attentive to this issue but have still emphasized the importance of smoothly functioning technology.<sup>298</sup>

In future cases, courts ought to scrutinize more carefully the effects of different virtual platforms and settings on fairness and reliability. Empirical studies strongly suggest that poor lighting, sound, and image quality may prejudice assessments of credibility and affect evidence comprehension and recall. For example, video screens that are not sufficiently large or do not display a full body image of the defendant or witnesses may negatively affect the perceptions of factfinder observers.<sup>299</sup> Camera “perspective bias” may

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295. See *supra* Subparts II.A.1, II.B.1, II.C.1.

296. Order, *Commonwealth v. Curran*, No. SJC-13093 (Mass. Sept. 29, 2021) (laying out procedure for obtaining a voluntary and informed waiver of the right to an in-person trial and instructing judges, *inter alia*, to “ensure that the defendant has had an opportunity to discuss the decision to proceed with a virtual bench trial with trial counsel”); *In re Videoconferencing Approval* in Gen. Sessions Cts. for Sixth Jud. Cir., 776 S.E.2d 748, 748 (S.C. 2015) (“No videoconference proceeding may take place in the Sixth Judicial Circuit unless the Defendant consents in writing and orally on the record to appear at the hearing by videoconference, rather than in person.”); *State v. Soto*, 817 N.W.2d 848, 860 (Wis. 2012) (“When videoconferencing is proposed for a plea hearing . . . [t]he judge shall . . . ascertain . . . whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing . . . [and] suggest to the defendant that he has the option of refusing.”).

297. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

298. See *supra* Subpart II.A.

299. Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant*, 32 BEHAV. SCI. L. 496, 503 (2014) (finding that “an increase in video size resulted in strong evidence appearing stronger and weak evidence appearing weaker” and that “participants

also render witnesses less believable in certain circumstances, such as when witnesses appear in the video alongside other people.<sup>300</sup> Low-quality audio can lead factfinders to rate witnesses as “less credible, reliable, and trustworthy” and can result in the factfinders retaining less of the testimony when the time for decision arrives.<sup>301</sup> Connectivity lag can also prejudice assessments of speakers’ credibility.<sup>302</sup> Finally, “cluttered or otherwise distracting environments . . . [may] complicate[] viewers’ ability to interpret [virtual speakers’] expressions.”<sup>303</sup>

Unfortunately, we know from observational studies that technological problems and unflattering settings remain common in remote criminal proceedings. Such problems include poor video or audio quality, small images and inadequate lighting, connectivity difficulties (including participants entirely dropping off), and the muting of participants during portions of the proceedings.<sup>304</sup> In addition, remote participants during the pandemic regularly appeared in overly informal or distracting settings.<sup>305</sup> Many virtual proceedings also failed to provide confidential channels of communication between counsel and defendant.<sup>306</sup>

Going forward, courts need to be closely attentive to the negative effects of subpar technologies and settings. If the technology is deficient, courts should “suspend the hearing, rather than risk sacrificing certain of the defendant’s constitutional rights.”<sup>307</sup> Preventive measures by court administrators and judges would be especially helpful to ensure that high-quality audio and video and proper lighting are being used and that a private counsel-client

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assigned shorter sentences to the defendant presented on a large as compared with a small screen”); *see also* Johnson & Wiggins, *supra* note 266, at 222.

300. Landström et al., *supra* note 267, at 367 (“When the camera is focused on the child alone, the child’s statement is assessed as more truthful, compared with when the focus is on both the child and the interviewer.”).

301. Elena Bild, Annabel Redman, Eryn J. Newman, Bethany R. Muir, David Tait & Norbert Schwarz, *Sound and Credibility in the Virtual Court: Low Audio Quality Leads to Less Favorable Evaluations of Witnesses and Lower Weighting of Evidence*, 45 L. & HUM. BEHAV. 481, 481 (2021).

302. Sternlight & Robbennolt, *supra* note 264, at 578–79 (citing studies).

303. Feigenson, *supra* note 4, at 469 (citing James E. Cutting & Kacie L. Armstrong, *Facial Expression, Size, and Clutter: Inferences from Movie Structure to Emotion Judgments and Back*, 78 ATTENTION, PERCEPTION & PSYCHOPHYSICS 891 (2016)).

304. Roni Factor, Dana Kariti, Hagit Lernau & Danielle Yaffe Ayubi, *Videoconferencing in Legal Hearings and Procedural Justice*, 18 VICTIMS & OFFENDERS 1557 (2023); Turner, *supra* note 39, at 251–55.

305. Nir & Musial, *supra* note 276, at 735–36, 739; Turner, *supra* note 39, at 255–58.

306. *See supra* Subpart II.C; BENNINGER ET AL., *supra* note 4, at 35, 105–06.

307. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 832 (Mass. 2021).

communication channel is available.<sup>308</sup> Courts should also specifically inquire, before any remote hearing is held, whether the participants are able to adequately see, hear, and participate in the proceeding, and explain to defendants how they can consult with counsel confidentially.<sup>309</sup>

Judges should be open to reviewing and revising their assessments of the technology on a regular basis. Videoconferencing technology is evolving rapidly and will continue to present new constitutional puzzles for litigants and courts. For example, a law school recently experimented with presenting hologram witnesses in its mock trial program.<sup>310</sup> A Colombian court heard a traffic case in the metaverse and hopes to continue experimenting with virtual reality proceedings.<sup>311</sup> Scientists are developing ever more advanced immersive technologies that can be used for legal proceedings.<sup>312</sup> Given these steady advances in the field, courts should continually assess whether emerging technologies are consistent with constitutional protections.

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308. The following guidelines for cases with remote testimony are instructive:

[W]e encourage the trial court or the State, with the court's concurrence, to verify on the record the structure and the mechanics of the videoconference presentation. Such details should include the number and location of the video screens in the courtroom, the technology present at the location of the witness, the dimensions of the respective screens, and what sections of the witness's body the jury can see on the screen. The record should confirm that the jury and the defendant see the witness and the witness's body language, and that they hear the witness. The record should also verify that the witness sees the jury and the defendant. Finally, at the conclusion of the testimony, the trial court or the State should substantiate that no errors in the transmission occurred.

State v. Sweidan, 461 P.3d 378, 390–91 (Wash. Ct. App. 2020).

309. State v. Soto, 817 N.W.2d 848, 860 (Wis. 2012).

310. Karen Sloan, *Beam Me Up, Counselor: Are Hologram Witnesses Headed to Court?*, REUTERS (May 16, 2023, 1:43 PM CST), <https://www.reuters.com/legal/government/beam-me-up-counselor-are-hologram-witnesses-headed-court-2023-05-16> [<https://perma.cc/NY6K-J2QC>].

311. Isabel Woodford, *Colombia Court Moves to Metaverse to Host Hearing*, REUTERS (Feb. 24, 2023, 4:08 PM CST), <https://www.reuters.com/world/americas/colombia-court-moves-metaverse-host-hearing-2023-02-24/> [<https://perma.cc/BS7W-GWJQ>].

312. See generally Jeremy N. Bailenson, Jim Blascovich, Andrew C. Beall & Beth Noveck, *Courtroom Applications of Virtual Environments, Immersive Virtual Environments, and Collaborative Virtual Environments*, 28 L. & POL'Y 249 (2006); Aurore Troussel-Clément, *Towards Immersive Virtual Courts, Moving Beyond the Status Quo: Feedback from Experiences Conducted in the Cyberjustice Laboratory*, CYBERJUSTICE LAB'Y BLOG NEWS (Apr. 28, 2023), <https://www.cyberjustice.ca/en/2023/04/28/towards-immersive-virtual-courts-moving-beyond-the-status-quo-feedback-from-experiences-conducted-in-the-cyberjustice-laboratory> [<https://perma.cc/762K-GVS6>].

## CONCLUSION

The pandemic compelled courts to experiment with a novel mode of criminal process via video. The advantages of the remote format have prompted many states to continue using it, but questions about its constitutionality and desirability remain.

A review of recent case law suggests that while most courts found the remote criminal process constitutionally acceptable during a public emergency, many judges remain concerned about its effects on fundamental fairness. It is time to develop a clearer framework for assessing the constitutionality of remote proceedings. Building on prior cases and social science research, courts should explain what state interests might justify the use of remote proceedings in criminal cases. They should delineate what other features of the process—such as the stakes of the proceedings, the presence of witness testimony, the vulnerability of the defendants, and the quality of the technology—are relevant to the constitutionality of the remote format. An approach informed by both precedent and empirical evidence can help ensure that the use of novel technologies to conduct criminal proceedings remains consistent with constitutional values.



## APPENDIX

TABLE 1: CONSTITUTIONAL CHALLENGES TO REMOTE CRIMINAL AND QUASI-CRIMINAL PROCEEDINGS, BY TYPE OF PROCEEDING

<b>Type of Proceeding</b>	<b>Total Challenges</b>	<b>Violation Found (%)</b>	<b>Relief Granted (%)</b>
<i>Criminal Proceedings: Due Process</i>	58	23 (39.6%)	13 (22.4%)
<i>Criminal Proceedings: Confrontation</i>	85	29 (34.1%)	19 (22.4%)
<i>Criminal Proceedings: Right to Counsel</i>	20	4 (20%)	2 (10%)
<i>Probation Revocation Proceedings: Due Process</i>	13	4 (30.8%)	3 (23.1%)
<i>Probation Revocation Proceedings: Right to Counsel</i>	5	1 (25%)	1 (25%)
<i>Juvenile Delinquency Proceedings</i>	25	21 (84%)	21 (84%)
<i>All Proceedings</i>	206 <sup>313</sup>	82 (38.9%)	59 (28.6%)

313. The number of challenges analyzed (206) is higher than the number of cases reviewed (182) because some cases featured multiple challenges.

TABLE 2: CONSTITUTIONAL CHALLENGES TO REMOTE PROCEEDINGS,  
BY TYPE OF CHALLENGE

<b>Type of Challenge</b>	<b>Total</b>	<b>Violation Found (%)</b>	<b>Relief Granted (%)</b>
<i>Due Process</i>	96	48 (50%)	37 (38.5%)
<i>Right to Counsel</i>	25	5 (20%)	3 (12%)
<i>Confrontation</i>	85	29 (34.1%)	19 (22.4%)