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COMMENT

“CAN YOU HEAR ME NOW?”: THE IMPLICATIONS OF VIRTUAL PROCEEDINGS ON CRIMINAL DEFENDANTS’ CONSTITUTIONAL RIGHTS

MADISON C. DEREGIS*

For centuries, “Friday the Thirteenth” has been seen as a harbinger of bad luck.¹ Friday, March 13, 2020 lived up to this superstition.² That day, then-President Donald Trump announced a state of national emergency in response to the World Health Organization (“WHO”) declaring the coronavirus SARS-CoV2 (“COVID-19”) a pandemic.³ This announcement led many states and localities to shutdown⁴ non-essential business for more than two months to support the WHO’s quarantine and social distancing guidelines.⁵ The nationwide shutdown initially included court systems, aside from emergencies.⁶ The United States Senate passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act in the wake of the national emergency announcement, which allocated more than two trillion dollars to

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1. Christobel Hastings, *Why is Friday the 13th Unlucky? The Cultural Origins of an Enduring Superstition*, CNN (Aug. 12, 2021), <https://www.cnn.com/style/article/why-friday-13-unlucky-explained/index.html>.

2. *Id.*

3. *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [hereinafter *Timeline of COVID-19*].

4. From early March 2020 until early May 2020, most states remained in a state of emergency with strict prohibitions in place regarding which businesses could remain open and guidelines regarding social distancing and mask wearing to “flatten the curve.” Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 9, 2021), <https://www.yalemedicine.org/news/covid-timeline>.

5. *Timeline of COVID-19*, *supra* note 3.

6. *See, e.g.*, Order on Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency (Md. Mar. 13, 2020).

aid hospitals, small businesses, and governments.⁷ The federal court system received a large virus stimulus payment to allow it to keep its doors open virtually.⁸ Both the federal and state systems progressively increased the use of virtual platforms like Zoom to conduct court proceedings and eventually resumed some in-person proceedings.⁹ Today, many courts use a hybrid system that creates uncertainty surrounding the long-lasting impacts of virtual platform use by the judiciary.¹⁰

Sections I.A and I.B outlines the foundations of current Sixth and Fourteenth Amendment jurisprudence in criminal proceedings and the present application of technology in criminal proceedings, respectively. Section II.A argues that virtual proceedings implicate defendants' constitutional rights. Section II.B details why the use of virtual proceedings should be limited to a few select proceedings. Lastly, Section II.C explains why federal and state courts need to adopt judicial rules governing the conduct of virtual proceedings.

I. BACKGROUND

The American constitutional protections for criminal defendants have changed over the centuries. Section I.A details the history of constitutional protections guaranteed to criminal defendants. Section I.B.1 discusses the shift to a virtual court room. Section I.B.2 explains the potential implications of shifting to virtual proceedings. Section I.B.3 discusses the recent challenges to defendants' constitutional rights in virtual proceedings.

A. The Foundations of Modern Sixth and Fourteenth Amendment Jurisprudence in Criminal Proceedings

The Sixth Amendment is sacred to criminal defendants because it provides numerous constitutional safeguards.¹¹ These safeguards have been

7. *Timeline of COVID-19*, *supra* note 3. The provided funds could only be used for "COVID related impacts" to help prevent damage to local economies. Tony Nelson, *CARES Act Funds Can Be Used for Small Business Grants*, MUN. RSCH. AND SERVS. CTR. OF WASH. (June 24, 2020), <https://mrsc.org/Home/Stay-Informed/MRSC-Insight/June-2020/CARES-Act-Funds-for-Small-Business-Recovery-Grants.aspx>. This included "costs of business interruption caused by required closures." *Id.*

8. Kimberly Strawbridge Robinson, *Virus Stimulus to Helps Courts, Authorizes Some Video Hearings*, BLOOMBERG L. (Mar. 25, 2020), <https://news.bloomberglaw.com/us-law-week/virus-stimulus-to-help-courts-authorizes-some-video-hearings?context=article-related>; Coronavirus Aid, Relief, and Economic Security Act ("CARES" Act), Pub. L. No. 116-136 § 15002(b), 134 Stat. 281 (2020).

9. *Maryland Judiciary COVID-19 Timeline of Events*, MD. JUDICIARY, <https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf> (last visited Nov. 14, 2021).

10. *Id.*

11. U.S. CONST. amend. VI.

conferred on the states through the Due Process Clause of the Fourteenth Amendment.¹² This Section will discuss three safeguards provided to criminal defendants by the Sixth Amendment—namely, the right to counsel,¹³ the right to confront and cross-examine witnesses,¹⁴ and the right to be present at proceedings. First, this Section will discuss the history of the right to counsel. Second, this Section will discuss the right to confront and cross-examine witnesses.¹⁵

1. *The Right to Counsel*

The right to counsel is fundamental to American democracy.¹⁶ The Framers sought to expand the right to counsel beyond its limited role in English common law¹⁷ by guaranteeing it in all criminal cases.¹⁸ Thus, the Sixth Amendment provides that “[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁹

i. From 1787 to 2021

The right to counsel has expanded with time.²⁰ In 1791, the right to counsel was not a guarantee in state proceedings.²¹ Despite a clear textual reading of the constitution, more than one hundred years passed before a successful challenge in the Supreme Court initiated the process of securing a defendant’s right to counsel in federal proceedings.²² However, until 1963

12. U.S. CONST. amend. XIV.

13. *See infra* Section I.A.1.

14. *See infra* Section I.A.2.

15. *See infra* Section I.A.3.

16. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)) (alteration in original) (“[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”).

17. *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (stating counsel for the crime of treason and for felonies was provided only so far as to answer legal questions that the accused raised himself).

18. *James v. Headley*, 410 F.2d 325, 332 n.9 (5th Cir. 1969) (“[T]he Sixth Amendment was intended as a rejection of the limitations which had existed in England and as an extension of the right to counsel to those classes of offenses from which it had been withheld at common law.”).

19. U.S. CONST. amend. VI; *see also* MD. CONST. art. 21 (“every man hath a right . . . to be allowed counsel”).

20. *Cf.* U.S. CONST. amend. VI (stating criminal defendants will have the assistance of counsel); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (applying the right to counsel to state felony prosecutions).

21. *See infra* note 25 and accompanying text.

22. *See Powell*, 287 U.S. at 68 (“While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts makes it clear that the right to the aid of counsel is of this fundamental character.”).

in *Gideon v. Wainwright*,²³ the right to counsel did not apply to state proceedings.²⁴ The *Gideon* Court obliged the states to adhere to the right to counsel in criminal cases by incorporating the Sixth Amendment right against the states through the Fourteenth Amendment's Due Process Clause.²⁵

Since the Supreme Court's landmark decision in *Gideon*, numerous issues have arisen calling into question the power behind the Sixth Amendment right to counsel.²⁶ In *Kirby v. Illinois*,²⁷ the Supreme Court addressed when the right to counsel attaches. The Court held that the right to counsel "attaches" at the commencement of judicial proceedings, whether it be at the time of a "formal charge, preliminary hearing, indictment, information, or arraignment," but not when a defendant is initially arrested.²⁸ Attachment is particularly relevant in the debate surrounding the constitutionality of virtual proceedings because the right to counsel attaches to practically all proceedings that are approved for a virtual format.²⁹

The modern-day right to counsel is much more expansive than the language that the Sixth Amendment provides.³⁰ The right to counsel encompasses the right to competent counsel and the right to access counsel before, during, and after court proceedings.³¹ Defendants and their counsel are entitled to prepare for trial³² with attorney-client communication that is not interrupted by the state and are entitled to assist in their own defense through privileged conversation with their attorney.³³ Moreover, statements obtained in direct violation of a defendant's right to counsel are inadmissible as evidence.³⁴ Finally, indigent defendants who cannot afford to hire private counsel have an absolute right to have counsel appointed by the court.³⁵

23. 372 U.S. 335 (1963).

24. *Id.*

25. *Id.* (overturning the presumption in *Betts v. Brady*, 316 U.S. 455, 473 (1942), that the right to counsel is not a fundamental right that is essential to a fair trial).

26. See e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (challenging whether the right to counsel applies to misdemeanors); *Kirby v. Illinois*, 406 U.S. 682 (1972) (challenging when the right to counsel attaches); *Maine v. Moulton*, 474 U.S. 159 (1985) (challenging whether the right to counsel prohibits officers from speaking with a defendant regarding unrelated offenses).

27. 406 U.S. 682 (1972).

28. *Kirby*, 406 U.S. at 688–89; *Commonwealth v. Smallwood*, 401 N.E.2d 802, 806 (Mass. 1980).

29. See *infra* note 75 and accompanying text.

30. See *infra* notes 31–35 and accompanying text.

31. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

32. U.S. CONST. amend. VI.

33. *McClelland v. State*, 4 Md. App. 18, 24, 240 A.2d 769, 773 (1968); see *Powell*, 287 U.S. at 69 (holding clients must be provided sufficient time to meet with counsel and prepare their defense).

34. *Michigan v. Harvey*, 494 U.S. 344, 348–49 (1990).

35. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

ii. The Right to Counsel’s Impact on a Fair Trial

Success in America’s complicated, adversarial legal system often requires criminal defendants to have counsel because the vast majority of criminal defendants are untrained in the law and must rely on counsel to further their claims.³⁶ Additionally, the government spares no expense in establishing an effective apparatus to prosecute the accused under the assumption that effective prosecution is essential to safeguard the public’s interest in a civilized society.³⁷ To counter this, effective counsel is fundamental to the American scheme of justice because it ensures a fair trial.³⁸

2. The Right to Confront and Cross-Examine Witnesses

The Sixth Amendment, through the Confrontation Clause, guarantees criminal defendants the right to be “confronted with the witnesses against him.”³⁹ Similar to the right to counsel, the right of confrontation is binding on the states through the Due Process Clause of the Fourteenth Amendment.⁴⁰ The right to confrontation is absolute throughout criminal trials, but its stake in other proceedings differs from state to state.⁴¹ One commonality throughout the majority of states is that there is a right to confrontation at a hearing on a motion to suppress.⁴² This is significant because it recognizes that the right to confrontation is not limited to a criminal trial.⁴³

i. History of Confrontation

The right of confrontation originates from American common law.⁴⁴ The purpose of the Sixth Amendment is to preserve the right of confrontation as it existed when ratified.⁴⁵ Courts have expressly rejected attempts to

36. *Id.* at 344.

37. *Id.*

38. The Court has held that the right to counsel is, in this country, “fundamental and essential to fair trials,” and thus, is a “necessity[y], not luxury[y].” *Id.*

39. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”); *see also* *Waldron v. Maryland*, 62 Md. App. 686, 694, 491 A.2d 595, 599 (1985) (confirming the right to cross-examine witnesses is in its essence the right of confrontation).

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

41. Fed. R. Crim. P. 43(a).

42. *See e.g.*, *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 835 (Mass. 2021).

43. *Id.*

44. *Salinger v. United States*, 272 U.S. 542, 548 (1926) (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

45. *Id.*

broaden the meaning of the Confrontation Clause.⁴⁶ The concept of preserving the Confrontation Clause also includes its recognized exceptions.⁴⁷ One of these exceptions is the admission of testimonial statements of an unavailable witness if the defendant had a prior opportunity to cross-examine the witness.⁴⁸ Despite the courts' efforts to preserve the Confrontation Clause's original exceptions, the introduction of virtual proceedings has inevitably allowed for previously unavailable witnesses to testify remotely, rendering an unforeseen change to the foundation of confrontation.⁴⁹

ii. Why Confrontation?

The Confrontation Clause seeks to ensure the reliability of evidence by subjecting claims to examination and cross-examination.⁵⁰ The Framers sought to distinguish the criminal context from the civil context by rejecting the admission of "depositions or *ex parte* affidavits" only against prisoners in the criminal context without the opportunity to subject this evidence to adversarial review.⁵¹ Adversarial review allows for examination and cross-examination to both test witness recollection and allow the jury an opportunity to judge the credibility of the witness.⁵² The right of confrontation requires that the witnesses come to court and testify under oath—this safeguard assumes that administration of an oath and presence at the proceeding will put pressure on the witness to tell the truth.⁵³ This practice demonstrates the seriousness of the proceeding and reduces the likelihood of an untruthful witness due to the possibility of a "penalty for perjury."⁵⁴

46. *Id.* at 547–48 (expressly declining to broaden the scope of the Confrontation Clause to prevent letters, bank-deposit slips, and book entries from being introduced into evidence under the contention that this action is hearsay and violates a defendant's right to confront the witnesses against him).

47. *Id.* at 548 (citation omitted). One common exception includes the admission of hearsay evidence which deprives defendants of their right to confront witnesses. *Delaney v. United States*, 263 U.S. 586, 590 (1924).

48. *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

49. *Spinks v. State*, No. 1935, 2021 Md. App. LEXIS 710, at *28 (Md. Ct. Spec. App. Aug. 10, 2021).

50. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

51. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

52. *Craig*, 497 U.S. at 845–46 (stating the Confrontation Clause also gives the witness an opportunity to come face-to-face with the situation and understand its severity).

53. *California v. Green*, 399 U.S. 149, 158 (1970) ("Confrontation: [] insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury . . .").

54. *White v. Maryland*, 223 Md. App. 353, 390, 116 A.3d 520, 542 (2015).

3. *The Right to be Present*

The Supreme Court has also addressed a defendant’s right to be present at proceedings under the Confrontation Clause.⁵⁵ In *Illinois v. Allen*,⁵⁶ the Court established that the Confrontation Clause supports the defendant’s right to be present in the courtroom at every stage of the trial.⁵⁷ The *Allen* Court held that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁵⁸ The Fourteenth Amendment’s Due Process Clause incorporates the right to be present at proceedings against the states.⁵⁹ However, this right is not consistent across every type of proceeding.⁶⁰ Whether a defendant’s presence is required at a particular proceeding is determined by whether that proceeding has “a relation, reasonably substantial, to the ful[1]ness of his opportunity to defend against the charge.”⁶¹ Under the Federal Rules of Criminal Procedure, defendants are required to be present at “(1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing.”⁶² Some states have expanded the types of proceedings that require the defendant’s presence.⁶³

i. Historically a Waivable Requirement

While the states have largely characterized the right to be present as a requirement that the defendant be physically present,⁶⁴ in *Taylor v. United States*,⁶⁵ the Court held that after the defendant voluntarily excused himself,

55. *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

56. 397 U.S. 337 (1970).

57. *Id.* at 338.

58. *Id.*

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

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

61. *Id.*

62. Fed. R. Crim. P. 43(a). *But see* Fed. R. Crim. P. 43(b) (“A defendant need not be present under any of the following circumstances: (1) *Organizational Defendant*. The defendant is an organization represented by counsel who is present. (2) *Misdemeanor Offense*. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant’s written consent, the court permits arraignment, plea, trial, and sentencing to occur by video conferencing or in the defendant’s absence. (3) *Conference or Hearing on a Legal Question*. The proceeding involves only a conference or hearing on a question of law. (4) *Sentence Correction*. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).”).

63. *People v. Mullen*, 374 N.E.2d 369, 370 (N.Y. 1978) (including “important proceedings as the impaneling of the jury, the introduction of evidence, the summations of counsel, and the court’s charge to the jury” as proceedings requiring the defendant’s presence).

64. *See e.g.*, *People v. Ramos*, 616 N.Y.S.2d 400, 401 (N.Y. App. Div. 1994) (“[T]rial *in absentia* is not thereby automatically authorized.”).

65. 414 U.S. 17 (1973).

the trial court properly continued the proceeding.⁶⁶ In *People v. Parker*,⁶⁷ the New York Court of Appeals held that a criminal defendant's waiver of the right to be present must be made voluntarily, intelligently, and knowingly.⁶⁸ Subsequently, courts hinged defendants' waivers of their right to be present on what became known as "*Parker* warnings."⁶⁹ To constitute a valid *Parker* warning, the defendant must be made aware of their right to be present and that the trial will continue in their absence.⁷⁰ These warnings are intended to exclude those defendants who initially fail to appear from constituting a waiver of their right to be present.⁷¹ However, under the Federal Rules of Criminal Procedure, a defendant voluntarily waives their continued presence in three circumstances: when the defendant (1) is voluntarily absent after the trial has commenced, (2) is voluntarily absent during sentencing, or (3) is warned that their disruptive and disorderly behavior will lead to their removal, and they continue to act in that manner.⁷²

B. *The Use of Technology in Criminal Proceedings*

The COVID-19 pandemic necessitated the closing of our courts and subsequently changed the circumstances under which criminal defendants are guaranteed their constitutional rights. First, Section I.B.1 discusses how the swiftness with which the remote shift occurred led to insufficient preparation and time to assess the constitutionality of virtual court formats. Section I.B.2 discusses the court system's quick adoption of rules governing virtual proceedings, and how many of these rules did not consider the constitutional ramifications of platforms such as Zoom. Lastly, Section I.B.3 explains how virtual proceedings potentially threaten the right to counsel, the right of confrontation, and the right to be physically present.

1. *The Abrupt Shift to Zoom*

Due to the COVID-19 pandemic, Congress promulgated the CARES Act, which allowed federal courts to abruptly authorize the use of virtual technology to protect the health and safety of the public while allowing

66. *Id.* at 20. For the first time, the Court indicated that the right to be present is not absolute. *Id.*

67. 440 N.E.2d 1313 (N.Y. 1982) (confirming that the right to be present is waivable).

68. *Id.* at 1316.

69. *See e.g.*, *People v. Campbell*, 209 A.D.2d 1042, 1042 (1994) (holding defendant never waived his right to be present on the grounds that he was never given valid *Parker* warnings).

70. *Parker*, 440 N.E.2d at 1316.

71. *Id.* The Federal Rules of Criminal Procedure explicitly exclude failures to initially appear from the list of instances that constitute a voluntary waiver absent *Parker* warnings. Fed. R. Crim. P. 43(c).

72. *Id.*

limited court proceedings.⁷³ The CARES Act states in part that if the Judicial Conference of the United States finds that emergency conditions, as a result of the COVID-19 pandemic, “will materially affect the functioning” of the courts, the Attorney General or on motion of the judge or justice, “may authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available,” for a number of criminal proceedings.⁷⁴ The CARES Act applies to a wide array of proceedings.⁷⁵ Federal district courts have since required a defendant’s consent to proceed with a virtual court format.⁷⁶

Similarly, state courts have authorized a variety of different virtual proceedings.⁷⁷ Some states have limited virtual proceedings to non-evidentiary proceedings and require all other proceedings be conducted in-person.⁷⁸ However, in Maryland, if a party objects to a virtual proceeding, the court must find, “with respect to that proceeding, that remote electronic participation would be likely to cause substantial prejudice to a party or adversely affect the fairness of the proceeding” to hold the proceeding in person.⁷⁹ Conversely, other states allow evidentiary hearings⁸⁰ and even jury trials to occur remotely.⁸¹

73. CARES Act, Pub. L. No. 116-136 § 15002(b), 134 Stat. 281 (2020).

74. *Id.*

75. The CARES Act applies to:

- (A) Detention hearings under section 3142 of title 18, United States Code.
- (B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.
- (C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.
- (D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.
- (E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.
- (F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.
- (G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.
- (H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.
- (I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.
- (J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the “Federal Juvenile Delinquency Act”), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

Id.

76. *See* United States v. Chauvin, No. 21-cr-108, 2021 U.S. Dist. LEXIS 105348, at *7 (D. Minn. June 4, 2021) (finding defendant consented to arraignment and a motion hearing by video conference as required under General Order No. 28); *see also In re Updated Guidance to Court Operations*, No. 28, 2021 U.S. Dist. LEXIS 93618 (D. Minn. Apr. 29, 2021) (authorizing use of videoconferencing with defendant’s consent).

77. *See infra* notes 78, 80–81 and accompanying text.

78. *See* MD. R. 2-802(a) (“[A] court . . . may permit or require one or more participants or all participants to participate in a non-evidentiary proceeding by means of remote electronic participation . . .”).

79. *Id.*

80. *See e.g.*, N.Y. Executive Order No. 202.76.

81. *See e.g.*, Tex. Emergency Order No. 21-9060 (May 26, 2021).

2. *Implications of Using Virtual Meeting Technology in the Judiciary*

While videoconferencing platforms, like Zoom, existed long before 2020, the extensive need for technology in court proceedings did not arise until the COVID-19 pandemic.⁸² With the abrupt introduction of technology into the courtroom came an abrupt increase in the number of filings questioning the adequacy of these proceedings under the United States Constitution and state constitutions.⁸³ As discussed further, many of these filings resulted in opinions, some of which discuss the defendant's and the state's mutual conclusion that virtual hearings are inadequate.⁸⁴ Despite this push from both sides, courts have overwhelmingly held that virtual proceedings do not violate a criminal defendant's constitutional rights.⁸⁵

As cautioned by one Associate Justice of the Supreme Judicial Court of Massachusetts, "as we zoom into the future of this brave new digital world," society needs to stop to consider how technology potentially impairs defendants' fundamental rights.⁸⁶ The novelty of this issue results in a lack of research and understanding of the invasive nature of technology.⁸⁷ Courts recently began to consider the "distorting effects" and "other potential problems presented by virtual" proceedings.⁸⁸ Some of the initial findings recognized by the courts include that virtual proceedings: alter a fact-finder's

82. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 837 n.15 (Mass. 2021).

83. *See id.* at 846 (considering whether a virtual proceeding violated a defendant's federal and state constitutional rights). In *State v. Soto*, a criminal defendant challenged whether his guilty plea was knowing and voluntary under the virtual format. 817 N.W.2d 848, 851 (Wis. 2012). The court held that the purpose of presence is to ensure that a plea is made "knowingly, intelligently, and voluntarily," and that purpose does not require the judge and defendant to be in the same physical location. *Id.* at 855. Furthermore, the right to be present in the same courtroom as the presiding judge is fundamental to the fairness of a criminal proceeding and therefore subject to waiver rather than forfeiture. *Id.* at 859; *see Rachel Oostendorp & Carlton Fields, So You're Telling Me There's A Chance!—The Difference Between Waiver and Forfeiture*, JD SUPRA (Mar. 6, 2018), <https://www.jdsupra.com/legalnews/so-you-re-telling-me-there-s-a-chance-97067/> (explaining that "forfeiture is the failure, often inadvertent, to make the timely assertion of a right" while "waiver is the intentional relinquishment or abandonment of a known right").

84. *State v. Kolaco*, No. 1910010939, 2020 WL 7334176, at *5 (Del. Super. Ct. Dec. 14, 2020) (recognizing the state did not oppose the defendant's objection to a virtual hearing and instead joined in his continuance request).

85. *See id.* at *8 (overruling the parties' mutual objection to a virtual court format); *Vazquez Diaz*, 167 N.E.3d at 846 (holding virtual hearings are not *per se* violations of the right to confrontation, the right to a public hearing, or the right to effective assistance of counsel). *But see* *Matter of a Proceeding Pursuant to Soc. Servs. L. § 384-B*, No. B-XXXXXX-XX/18, 71 Misc.3d 1218(A), at *4 (N.Y. Fam. Ct. Mar. 30, 2021) (holding the court will take steps to ensure that virtual proceedings mirror in-person proceedings to protect fundamental fairness).

86. *Vazquez Diaz*, 167 N.E.3d at 843 (Kafker, J., concurring).

87. *Id.* ("The full extent of Zoom's specific impact on court proceedings, and the ways in which Zoom improves or lessens judicial process, are yet to be completely understood.")

88. *Id.*

perception of participants;⁸⁹ inhibit a fact-finder’s ability to judge the demeanor of witnesses and defendants;⁹⁰ reduce the quantity of “communicative information” available to fact-finders;⁹¹ constrain participants’ empathy for one another by destroying the sense of “co-presence”;⁹² heighten the risk of wrongful accusation⁹³ and promote harsher sentences⁹⁴ due to dehumanization;⁹⁵ disrupt the positive effects of a physical courtroom atmosphere;⁹⁶ and invite a slew of technological difficulties that can create an additional barrier for participants.⁹⁷ Many of these findings inadvertently led to motions challenging the adequacy of a virtual court format.⁹⁸

3. *Recent Challenges to Defendants’ Constitutional Rights in Virtual Proceedings*

i. *The Impact of COVID-19 on the Right to Counsel*

The COVID-19 pandemic and subsequent introduction of virtual court proceedings call into question a criminal defendant’s right to counsel.⁹⁹ The nature of virtual proceedings, which inevitably restrict access to counsel,¹⁰⁰ prompts numerous questions, only some of which have been addressed by the courts.¹⁰¹

The broadest challenge asks whether the quality of communication through platforms like Zoom meets the constitutional bar set out in the Sixth Amendment.¹⁰² Particularly, defendants have challenged the complete

89. *Id.*

90. *Id.* at 844.

91. *Id.* at 845.

92. *Id.* at 847.

93. *Id.*

94. *People v. Christian*, No. 356693, 2021 Mich. App. LEXIS 4975, at *4 (Mich. Ct. App. Aug. 19, 2021) (citation omitted).

95. *Vazquez Diaz*, 167 N.E.3d at 847; *see infra* note 194.

96. *Vazquez Diaz*, 167 N.E.3d at 843; *see infra* Section II.A.

97. *Vazquez Diaz*, 167 N.E.3d at 850.

98. *See supra* Section I.B.3.

99. *See infra* notes 102–112 and accompanying text.

100. While some criminal defendants may have more access to counsel through virtual platforms, virtual proceedings also restrict access to counsel, especially for incarcerated criminal defendants who cannot communicate often or in private with counsel. *See infra* notes 187–190 and accompanying text.

101. *See infra* notes 102–112 and accompanying text.

102. *Vazquez Diaz*, 167 N.E.3d at 841. In *Vazquez Diaz*, the defendant filed a motion to continue the hearing on his motion to suppress so that it could be held in-person. *Id.* at 822. To be constitutionally adequate, must the right to counsel in virtual proceedings directly mirror the right to counsel throughout in-person proceedings? *Compare* *Matter of J.S.*, No. 07-21-00035-CV, 2021 WL 3540776 (Tex. App. Aug. 11, 2021) (noting in a criminal proceeding that the standard under

restriction to informally communicate with counsel during virtual proceedings, such as by passing notes, reading body language, and whispering to one another.¹⁰³ Despite this contention, courts have held that while virtual proceedings may restrict a defendant's access to counsel, this restriction does not rise to the level of a constitutional violation.¹⁰⁴ In so holding, courts compared past decisions that considered similar restrictions.¹⁰⁵ The court in *Guerin v. Massachusetts*¹⁰⁶ held that counsel was not ineffective despite the defendant being seated away from counsel due to safety concerns.¹⁰⁷ The *Guerin* court noted that the defendant could have spoken with counsel before or after the proceeding or during recess, or could have requested to speak with counsel at any time during the proceeding.¹⁰⁸

Furthermore, courts stated that no authority holds "that a right to effective counsel mandates perfection."¹⁰⁹ The court in *Matter of J.S.* held that the recurring concerns about the inability to informally communicate during proceedings can be remedied through extra protections such as allowing a criminal defendant to take notes during a proceeding to later discuss with counsel.¹¹⁰ Although the court introduced these added protections in *Matter of J.S.*, the court failed to address whether this defendant's right to effective counsel was at all implicated when detention center staff remained in the room during private video conversations between the defendant and his attorney.¹¹¹ This raises a constitutional issue as to attorney-client privilege and effective assistance of counsel for incarcerated

the right to counsel is "reasonably effective" not "perfection," which allows for variation in the quality of counsel), with *Matter of a Proceeding Pursuant to Soc. Servs. L. § 384-B*, 71 Misc. 3d 1218(A), 144 N.Y.S.3d 553 (N.Y. Fam. Ct. 2021) (stating that in a civil proceeding, the court will take steps to ensure virtual proceedings mirror in-person proceedings "as closely as possible").

103. *Vazquez Diaz*, 167 N.E.3d at 841.

104. *Id.*; *State v. Kolaco*, No. 1910010939, 2020 WL 7334176, at *8 (Del. Super. Ct. Dec. 14, 2020); *United States v. Lawson*, No. 5:20-CR-060-GFVT-MAS-1, 2020 WL 6110969, at *3 (E.D. Ky. Oct. 16, 2020) (holding the defendant "ha[s] no guaranteed right to micromanage counsel's cross-examination" during the hearing and therefore his right to counsel was not affected by a virtual format).

105. *Vazquez Diaz*, 167 N.E.3d at 841.

106. 162 N.E.2d 38 (Mass. 1959).

107. *Id.* at 40–41.

108. *Id.* at 41.

109. *Matter of J.S.*, No. 07-21-00035-CV, 2021 WL 3540776, at *3 (Tex. App. Aug. 11, 2021); *Robertson v. Texas*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (citing U.S. CONST. amend. VI) (stating effective assistance of counsel "does not mean errorless or perfect counsel").

110. *Matter of J.S.*, 2021 WL 3540776, at *3 (holding the right to counsel was met when the court provided defendant with a system to take notes and relay them to counsel either during a requested recess or at the conclusion of the proceeding, despite the defendant and their counsel being in different locations).

111. *Id.* at *4 (noting that only center staff offered to "try" to arrange an entirely private conversation).

defendants who are not permitted to remain in a room with a computer absent facility staff.¹¹²

ii. COVID-19’s Challenge to the Right of Confrontation

Prior to the widespread use of two-way video communication, courts held that one-way video transmission violated a defendant’s right to “face-to-face confrontation.”¹¹³ While Supreme Court precedent shows a preference for physical presence through face-to-face confrontation,¹¹⁴ the introduction of two-way virtual communication platforms such as Zoom required the courts to reconsider the possibility of remote witness testimony.¹¹⁵

When considering the adequacy of virtual confrontation, courts generally weigh public policy concerns against the circumstances necessitating virtual testimony against defendants’ constitutional rights.¹¹⁶ Similarly, numerous cases allowed parties to introduce previous testimony or hearsay under the same balancing test.¹¹⁷ In *Mattox v. United States*,¹¹⁸ the Court allowed the admission of testimony from a deceased witness.¹¹⁹ Additionally, in *Bourjaily v. United States*,¹²⁰ the Court held that hearsay statements of non-testifying co-conspirators were admissible.¹²¹ Both of these instances represent circumstances in which the right of confrontation yielded to the state’s prosecutorial duties because doing so would not unduly prejudice the defendant’s constitutional rights.¹²²

The main concern raised with a defendant’s right to confrontation in virtual proceedings is whether the virtual format allows adequate confrontation.¹²³ “Essential elements of the right of confrontation include ‘physical presence, oath, cross-examination, and observation of demeanor by

112. *Id.* at *4 (declining to acknowledge the juvenile’s contention that staff in the room during private conversations between himself and counsel made him uncomfortable and therefore violated attorney-client privilege).

113. *Vazquez Diaz*, 167 N.E.3d at 837.

114. *White v. Maryland*, 223 Md. App. 353, 390, 116 A.3d 520, 542 (2015) (citing *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)) (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”).

115. *New Hampshire v. Peter*, 587 A.2d 587, 588–89 (N.H. 1991) (citing *Maryland v. Craig*, 497 U.S. 836, 848 (1990)).

116. *Id.*

117. *See infra* notes 119–120 and accompanying text.

118. 156 U.S. 237 (1895).

119. *Id.* at 243.

120. 483 U.S. 171 (1987).

121. *Id.* at 184.

122. *Mattox*, 165 U.S. at 243; *Bourjaily*, 483 U.S. at 184.

123. *Spinks v. State*, No. 1935, 2021 Md. App. LEXIS 710, at *14 (Md. Ct. Spec. App. Aug. 10, 2021); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 835–36 (Mass. 2021).

the trier of fact”¹²⁴ When challenging the adequacy of confrontation on a virtual platform, defendants contend that “face to face confrontation” is not achieved because individuals cannot see the features of an individual’s face or their body language.¹²⁵ Both of these elements play a large role in the trier of fact’s determination of the witnesses’ credibility.¹²⁶ Despite this, courts have overwhelmingly held that credibility can be adequately judged through a virtual platform.¹²⁷

In *Spinks v. State*,¹²⁸ the Maryland Court of Special Appeals held that victim testimony over the videoconferencing platform Skype did not violate the defendant’s right of confrontation in a felony proceeding.¹²⁹ Because Skype permitted real time face-to-face contact, under oath, with clear video and sound, the court deemed the platform reliable, and all constitutional requirements for adequate confrontation were present.¹³⁰ Furthermore, the court reasoned that the trial court properly weighed the public policy concerns warranting virtual confrontation, since requiring in-courtroom testimony when a witness is unavailable or it is unsafe to meet in-courtroom is contrary to American public law.¹³¹ The court specifically weighed the dangers of requiring in-courtroom confrontation and the dangers of allowing virtual confrontation by looking at the necessity of testimony via Skype in this specific case.¹³² The question that *Spinks* and other decisions leave open is whether the use of virtual proceedings impedes on fundamental fairness when one defendant is permitted to have in-courtroom testimony and another is not.¹³³

124. *Spinks*, 2021 Md. App. LEXIS 710, at *14 (citing *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990)).

125. *Id.* at *10.

126. *Vazquez Diaz*, 167 N.E.3d at 845 (Kafker, J., concurring) (“Video conferencing technology may also diminish the amount of communicative information presented by participants in a hearing, which affects the ability of observers to assess the communication.”).

127. *Spinks*, 2021 Md. App. LEXIS 710, at *28 (holding no Sixth Amendment violation where a victim was permitted to testify via Skype); *Vazquez Diaz*, 167 N.E.3d at 838 (holding a virtual hearing is not a *per se* violation of a defendant’s right of confrontation).

128. *Spinks*, 2021 Md. App. LEXIS 710, at *28.

129. *Id.* at *23–24.

130. *Id.* at *28.

131. *Id.* at *26, 28–29 (stating public law seeks to protect the public from safety concerns such as dangerous assailants).

132. *Id.* at *26 (permitting virtual testimony where a victim needed to return to his home country for a family emergency but did not have the proper visa).

133. *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 846 (Mass. 2021) (Kafker, J., concurring).

iii. Virtual Presence

Videoconferencing brings into question whether virtual presence is an adequate substitute for physical presence under the right to be present.¹³⁴ In *People v. Christian*,¹³⁵ the Michigan Court of Appeals rejected the prosecution’s argument that virtual proceedings were statutorily authorized on the grounds that “any such procedures must be consistent with a party’s Constitutional rights.”¹³⁶ In remanding the case, the court specifically referenced studies showing that individuals sentenced through video technology typically receive harsher sentences.¹³⁷ Furthermore, “[c]ourts, too, have recognized that ‘virtual reality is rarely a substitute for actual presence.’”¹³⁸

Other courts have unanimously held that virtual presence constitutes “presence” in preliminary hearings.¹³⁹ In support of this principle, the court in *Massachusetts v. Masa*¹⁴⁰ noted that due process is “flexible,”¹⁴¹ and “[t]o determine what procedures are sufficient in a given case, a court must balance ‘the private interest affected, the risk of erroneous deprivation, the probative value of additional or substitute safeguards, and the governmental interests involved.’”¹⁴² The distinction between virtual and physical presence, or the lack thereof, is a hotly-debated question left largely unanswered by state courts.¹⁴³ Further, these challenges brought to light the inadequacies of a virtual court system and the need to proceed with caution if virtual court is to be a continued practice in the American justice system.¹⁴⁴

134. *Id.* at 831; *Clarington v. State*, 314 So.3d 495, 499 (Fla. Dist. Ct. App. 2020).

135. *People v. Christian*, No. 356693, 2021 Mich. App. LEXIS 4975, at *6 (Mich. Ct. App. Aug. 19, 2021).

136. *Id.* (quoting *Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely*, AO 2020-6 (Mich. Apr. 7, 2020)); *cf.* *People v. Heller*, 891 N.W.2d 541, 543 (Mich. Ct. App. 2016) (stating virtual sentencing proceedings in the felony context are “simply inconsistent with the intensely personal nature of the process”).

137. *Christian*, 2021 Mich. App. LEXIS 4975, at *4 (citing *People v. Heller*, 891 N.W.2d 541, 543 (Mich. Ct. App. 2016)).

138. *Heller*, 891 N.W.2d at 544.

139. *Massachusetts v. Masa*, No. 1981CR0307, 2020 WL 4743019, at *1 (Mass. Super. Aug. 10, 2020); *State v. Kolaco*, No. 1910010939, 2020 WL 7334176, at *8 (Del. Super. Ct. Dec. 14, 2020).

140. *Masa*, 2020 WL 4743019, at *5–6.

141. *Clarington v. State*, 314 So.3d 495, 501 (Fla. Dist. Ct. App. 2020) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

142. *Masa*, 2020 WL 4743019, at *6 (citing *Commonwealth v. Preston P.*, 136 N.E.3d 1179, 1190 (Mass. 2020)).

143. *See supra* notes 138–142 and accompanying text.

144. *See infra* Section II.

II. ANALYSIS

Despite the nationwide authorization of virtual proceedings, their adequacy under the Constitution remains questionable. Section II.A argues that virtual formats infringe on defendants' constitutional rights more often than they benefit defendants, and thus, should not be used in the majority of proceedings. Section II.B argues that there are a select few proceedings in which a virtual format can permissibly be used. Section II.C contends that Maryland should adopt additional rules to combat the dangers of using a virtual court format.

A. Virtual Proceedings Do More Harm Than Good

In deciding whether to use virtual proceedings, courts have considered the logistical flaws of Zoom that may burden defendants' constitutional rights.¹⁴⁵ Courts have then balanced state interests against defendants' constitutional rights to determine whether the burdens created by virtual platforms require an in-person proceeding.¹⁴⁶

1. Virtual Platforms Burden All Participants

The biggest draw of virtual platforms is convenience. While participation via virtual platforms seems to ease the burden on participants, this ease is a ruse of sorts—virtual platforms create more burdens than they ease.¹⁴⁷ Virtual platforms can reduce commute times and allow individuals to complete activities that would normally occur in public from the comfort of their own home, reducing the anxiety associated with physically entering an adversarial environment.¹⁴⁸ The absence of commute leaves time to focus on additional tasks and for individuals to spend time with their families or participate in hobbies.¹⁴⁹ The absence of commuting benefits organizations by unintentionally extending the work day for many, which leads to an

145. See, e.g., *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822 (Mass. 2021) (discussing defendants' claims regarding technological flaws of Zoom in the context of their constitutional rights).

146. *Massachusetts v. Masa*, No. 1981CR0307, 2020 WL 4743019, at *6 (Mass. Super. Aug. 10, 2020) (citing *Commonwealth v. Preston P.*, 136 N.E.3d 1179, 1190 (Mass. 2020)).

147. *The Benefits of Online Learning in a COVID-19 World and Beyond*, CONSORTIUM FOR N. AM. HIGHER EDUC. COLLABORATION, <https://www.conahec.org/news/benefits-online-learning-covid-19-world-and-beyond> (last visited Oct. 3, 2021) [hereinafter *Benefits of Online Learning*].

148. *Id.*

149. *Surprising Working From Home Productivity Statistics (2021)*, APOLLO TECH. LLC (June 2, 2021), <https://www.apollotechnical.com/working-from-home-productivity-statistics/> [hereinafter *Productivity Statistics*] (stating a reduction in commute time will increase physical and mental health by leaving time for individuals to regularly exercise or participate in activities they enjoy).

increase in productivity¹⁵⁰ and the overall quality of work product.¹⁵¹ Virtual platforms also tend to reduce organizations’ operating costs, and in most cases, online platforms are more affordable for organizations and participants, reducing the cost of maintaining in-person facilities and reducing the cost of commuting for participants.¹⁵² While the cost of commuting may be reduced for individuals released on bail, criminal defendants reap few of the benefits concerning reduced costs aside from expediency during an extended court closure.¹⁵³ For judicial systems, the benefit of convenience touches all but criminal defendants.¹⁵⁴

Online platforms create flexibility,¹⁵⁵ but with that flexibility comes “Zoom fatigue.”¹⁵⁶ Zoom fatigue is the burnout that virtual participants experience from living a largely virtual life.¹⁵⁷ Fatigue occurs for a number of reasons.¹⁵⁸ The continuous and excessive eye contact that Zoom requires is a substantial change from an in-person environment where a participant can look around and take notes.¹⁵⁹ Virtual participants who choose to use their cameras are visible regardless of who is speaking and are prominently featured on others’ screens.¹⁶⁰ Therefore, all participants are constantly treated “nonverbally like a speaker” despite the fact that they are muted.¹⁶¹ Additionally, participants feel a constant inclination to look at themselves as if they are looking in a mirror.¹⁶² Mobility¹⁶³ is also decreased greatly which

150. *Id.*

151. Roy Maurer, *Study Finds Productivity Not Deterred by Shift to Remote Work*, SHRM (Sept. 16, 2020), <https://www.shrm.org/hr-today/news/hr-news/pages/study-productivity-shift-remote-work-covid-coronavirus.aspx>.

152. *Benefits of Online Learning*, *supra* note 147.

153. *See infra* notes 215–218 and accompanying text.

154. *See infra* notes 180–181, 215–219 accompanying text.

155. *Benefits of Online Learning*, *supra* note 147.

156. Vignesh Ramachandran, *Stanford Researchers Identify Four Causes for ‘Zoom Fatigue’ and Their Simple Fixes*, STAN. NEWS (Feb. 23, 2021), <https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions/> [hereinafter Ramachandran].

157. Ramachandran, *supra* note 156.

158. *Id.*

159. *Id.* Maryland permits participants to join virtual hearings by phone or videoconference. MD. R. 2-801(e), 2-802(a), 2-803(a). Similar to individuals who turn their camera off while using platforms like Zoom, defendants who join proceedings via phone are severely disadvantaged due to the complete lack of non-verbal cues and ability to humanize the defendant. CK Español, *4 Simple Reasons Why You Should Turn Your Video On in a Conference Call*, MEDIUM (Apr. 24, 2020), <https://medium.com/swlh/4-simple-reasons-why-you-should-turn-your-camera-on-in-a-conference-call-e1de7a4bbb10>.

160. Ramachandran, *supra* note 156.

161. *Id.*

162. *Id.*

163. Zoom encourages a stationary lifestyle by eliminating the natural aspects of in-person conversation such as walking around and moving one’s body. *Id.* By eliminating commuting and

reduces cognitive ability, further contributing towards Zoom fatigue as discussed *infra*.¹⁶⁴ Lastly, participants' cognitive loads¹⁶⁵ are much higher while using online platforms because they require a higher level of interaction to send and receive cognitive signals.¹⁶⁶ Non-verbal communication is greatly limited, so to communicate agreement, participants must overexaggerate their non-verbal cues, like an exaggerated head nod, or unmute and speak.¹⁶⁷ Zoom fatigue also hinders mental health¹⁶⁸ by preventing the increase in dopamine typically found in face-to-face interactions.¹⁶⁹ The unnatural aspects of Zoom that directly contrast face-to-face communication, like lack of eye contact and the ability to be perceived as a listener, cause discomfort and anxiety, further hindering the mental health of participants.¹⁷⁰

Zoom fatigue affects all participants of virtual proceedings, including judges with full virtual dockets.¹⁷¹ In Cook County, Illinois, the use of video for bail hearings led to the increase in bail amounts by fifty-one percent as compared to the amount for individuals who appeared in-person.¹⁷² Cook County ended its virtual bail system after learning of this shocking disparity.¹⁷³

interaction between individuals in a typical office setting, participants are left at home tied to their computer for hours at a time. *Id.*

164. *Id.*

165. Cognitive Load Theory ("CLT") was first articulated by John Sweller in 1988. *The Importance of Cognitive Load Theory (CLT)*, SOC'Y FOR EDUC. & TRAINING, <https://set-et-foundation.co.uk/resources/the-importance-of-cognitive-load-theory> (last visited Nov. 12, 2021). CLT refers to the idea that individuals' memory can only hold a marginal amount of information at one time, so to maximize learning, education should avoid overloading memory. *Id.*

166. Ramachandran, *supra* note 156.

167. *Id.*

168. *Productivity Statistics*, *supra* note 149 (stating Zoom fatigue eventually causes a reduction in productivity).

169. Tim Walker, *How 'Zoom Fatigue' Impacts Communication With Students*, NAT'L EDUC. ASS'N (Oct. 16, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/how-zoom-fatigue-impacts-communication-students>.

170. Zoom is "not natural" because it forces individuals to focus on their own faces. John Pickrell, *'Zoom Fatigue' is Real, and It's Causing a New Kind of Anxiety Amid Coronavirus Isolation*, SPRINGER NATURE (May 22, 2020), <https://www.natureindex.com/news-blog/zoom-fatigue-stress-anxiety-video-conferencing-researchers-coronavirus-pandemic-covid>. Zoom also removes all the normal breaks in conversation and creates "pressure to be constantly attentive," which in turn makes silences feel awkward. *Id.* These awkward silences can raise participants' anxiety levels. *Id.*

171. Jason Tashea, *The Legal and Technical Danger in Moving Criminal Courts Online*, BROOKINGS (Aug. 6, 2020), <https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/> [hereinafter Tashea].

172. Tashea, *supra* note 171.

173. *Id.* The results of the disparity can be accredited to the way Zoom negatively affects judges' demeanor, perception, and overall mood. *Id.*

2. *Defendant’s Interests Outweigh State Interests*

The Due Process Clause of the Fourteenth Amendment seeks to ensure that both the federal and state government¹⁷⁴ operate justly within the law by providing fundamentally fair procedures.¹⁷⁵ In the criminal context, many guarantees fall under the Due Process Clause including the right to counsel, the right to confront and cross-examine witnesses, and the right to be present.¹⁷⁶ Thus, the procedures necessary to a virtual court system are also protected and any “[a]ction denying the process that is ‘due’” is unconstitutional.¹⁷⁷ In the few challenges to virtual proceedings, courts faced with a potential due process violation have weighed the deprivation of the defendants’ constitutional rights and the actions of the government to remedy the deprivation.¹⁷⁸

i. *Defendants’ Constitutional Rights*

For criminal defendants, the potential benefits of virtual platforms¹⁷⁹ quickly disappear, leaving only the consequences. Non-detained defendants benefit from the absence of commute to the courthouse, which may save them time and money.¹⁸⁰ However, most criminal defendants are held in pre-trial detention.¹⁸¹ While virtual court improves efficiency in terms of the number of proceedings that are conducted,¹⁸² outside the context of an extended court

174. Most amendments in the Bill of Rights are incorporated against the states through the Due Process Clause, meaning that the level of protection afforded under these clauses is the same whether you are in the state judiciary or the federal judiciary. *Due Process*, CORNELL L. SCH., https://www.law.cornell.edu/wex/due_process (last visited Nov. 13, 2021) [hereinafter *Due Process*]. The United States has a selective incorporation system requiring only those rights that are “fundamental to the American scheme of justice” to be incorporated through the Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968).

175. *Due Process*, *supra* note 174.

176. *See supra* note 25 and accompanying text.

177. *Due Process*, *supra* note 174.

178. *See e.g.*, *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822 (Mass. 2021); *State v. Kolaco*, No. 1910010939, 2020 WL 7334176 (Del. Super. Ct. Dec. 14, 2020); *United States v. Lawson*, No. 5:20-CR-060-GFVT-MAS-1, 2020 WL 6110969 (E.D. Ky. Oct. 16, 2020).

179. *See supra* notes 147–152 and accompanying text.

180. *See* Steven Davidson, Michael Baratz & Molly Fox, *Witnesses During COVID Times: Remote Depositions, Virtual Testimony, and Unavailability*, STEPTOE & JOHNSON LLP (Sept. 1, 2020), <https://www.steptoelaw.com/en/news-publications/witnesses-during-covid-times-remote-depositions-virtual-testimony-and-unavailability.html> (stating virtual court may be easier to access for out-of-state participants).

181. *Pretrial Detention*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/pretrial_detention/ [hereinafter *Pretrial Detention*] (last visited Oct. 3, 2021) (noting that seventy-four percent of people in city and county jails are held pre-trial).

182. Jeffrey M. Silbert et al., *Special Topic: Telecommunications in the Courtroom: The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*,

closure, efficiency cannot compromise the constitutional guarantee of due process of law.¹⁸³

Virtual court proceedings create a barrier between the defendant and their counsel.¹⁸⁴ In-person proceedings allow easy communication between clients and attorneys,¹⁸⁵ whether it is a quick meeting before the proceeding, a few whispered communications during, or a debrief as they exit the courtroom.¹⁸⁶ A virtual set up prevents these interactions from occurring.¹⁸⁷ To virtually engage in the equivalent of slipping their attorney a note or whispering a request, a defendant first needs to know that they can request to meet in a separate room—as an unrecorded virtual session—and make the request during the live proceeding.¹⁸⁸ This virtual setup is especially troublesome for incarcerated defendants because they are often in a room with a guard physically present, precluding privileged attorney-client communication,¹⁸⁹ and infringing on their right to counsel.¹⁹⁰

38 U. MIAMI L. REV. 657, 661 (1984) (“The courts expeditiously handle the enormous caseloads . . . by using video arraignment.”).

183. See *supra* note 177 and accompanying text. Many of the constitutional rights of criminal defendants are protected by the Due Process Clause, which prohibits states from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. These procedural due process rights are guaranteed based on principles of fundamental fairness and cannot be overridden by state interests. Nathan Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701> (last visited Oct. 20, 2021).

184. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1129–30 (2004) [hereinafter Poulin].

185. See *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (holding communication between defendants and attorneys is necessary because defendants, as individuals commonly untrained in the law, rely on counsel to guide them through the unfamiliar and foreign aspects of court proceedings).

186. See *Geders v. United States*, 425 U.S. 80, 88 (1976) (stating overnight recess can be used to obtain information from a client). While an overnight recess is still present in a virtual setting, defense counsel would need to either travel to the defendant’s detention facility or have a virtual meeting approved ahead of time. *Inmate Visitation Services*, MD. DEP’T OF PUB. SAFETY AND CORR. SERVS., <https://news.maryland.gov/dpscs/inmate-visitation/> (last updated Oct. 15, 2021) (stating all visits are by appointment only and in-person visits require proof of vaccination from both the inmate and visitor).

187. Because incarcerated defendants are typically seated away from the computer or prohibited from touching the computer, the chat feature is likely not an option for incarcerated defendants. See, e.g., Order Amending OPS.195.0003 (July 9, 2021) (“Position the technology device at least an arm’s length from the inmate to limit tampering with the device.”).

188. Poulin, *supra* note 184.

189. *Id.*

190. See Joshua T. Friedman, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?*, 40 WASH. U. J. URB. & CONTEMP. L. 109, 121 (1991) (“[T]he judiciary has long recognized that privacy of communications between the criminal defendants and their counsel largely defines the sixth amendment right to counsel.”); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (“[T]he essence of the Sixth Amendment right is . . . privacy of communication with counsel.”); see *supra* note 111 and accompanying text.

Similar to concerns surrounding defendants’ limited ability to communicate in virtual court proceedings, virtual court also prejudices victims’ and witnesses’ ability to address the court.¹⁹¹ The weight that triers of fact afford testimony from victims and witnesses largely depends on credibility.¹⁹² Video conferencing automatically reduces the amount of information available to triers of fact to weigh credibility due to the lack of body language, eye contact, and other non-verbal cues.¹⁹³ Furthermore, evidence shows that video footage tends to dehumanize the person on the opposite side of the screen.¹⁹⁴

A virtual platform strains a defendant’s access to the courts due to the internet access requirement.¹⁹⁵ While internet access is becoming increasingly prevalent, households with a lower household income may still lack access to the internet because of its high cost.¹⁹⁶ For families with a household income under \$25,000, internet access is unlikely,¹⁹⁷ let alone quality access.¹⁹⁸ In 2015, people held in jails had a median annual income

191. Poulin, *supra* note 184, at 1108–09.

192. Poulin, *supra* note 184.

193. Poulin, *supra* note 189. “[T]ransmission of message is effective only when all three aspects of communication—the verbal (words – 7% impact), the vocal (intonation, pitch, volume – 38% impact), and the visual (gestures, postures [–] 55% impact) are in tandem with one another.” Pradeep Yammiyavar et al., *Influence of Cultural Background on Non-verbal Communication in a Usability Testing Situation*, 2 INT’L J. DESIGN 1 (2008).

194. Physical distancing risks virtual decision-makers making dehumanizing decisions because they see the other party as “less human,” or as “out-group members” who “are perceived as fundamentally different and even inferior to a perceiver’s in-group.” Min Kyung Lee, Laura A. Dabbish & Nathaniel Frutcher, *Making Decisions From A Distance: The Impact of Technological Mediation on Riskiness and Dehumanization*, HUMAN-COMPUTER INTERACTION INST (2015), <https://www.researchgate.net/publication/268812146>.

195. *Confronting the Covid-19 Access to Justice Crisis: A Report of the Maryland Attorney General’s Covid-19 Access to Justice Task Force*, 3 MD. B.J. 73, 75 (2021).

196. *Computer and Internet Use in the United States: 2018*, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-49.pdf> (“‘High connectivity’ ranged from 84 percent of households with an income of \$150,000 or more to 24 percent of households with an income under \$25,000.”).

197. *Id.* “Almost one household out of every four (24.9 percent) makes less than \$25,000 a year.” Lam Thuy Vo, *What Americans Earn*, NPR (July 16, 2012), <https://www.npr.org/sections/money/2012/07/16/156688596/what-americans-earn> (using a graph to show that 28.6 million Americans earn below \$24,999 per year).

198. Allan Holmes, et al., *Rich People Have Access to High-Speed Internet; Many Poor People Still Don’t*, CTR. FOR PUB. INTEGRITY (May 12, 2016), <https://publicintegrity.org/inequality-poverty-opportunity/rich-people-have-access-to-high-speed-internet-many-poor-people-still-dont/> (“[F]amilies in poor areas are almost five times more likely *not* to have access to high-speed broadband than the most affluent American households.”). High-speed internet providers such as Comcast, Time Warner Cable, and Verizon are typically not available in low-income areas. *Id.* While providers insist demographics are not a factor when deciding whether to run internet connection, many believe that people’s ability to pay is assessed. *Id.*

of \$15,109.¹⁹⁹ Additionally, in 2015,²⁰⁰ fifty-seven percent of males and seventy-two percent of females in prisons reported an annual income of less than \$22,500.²⁰¹ Many Americans simply cannot afford to maintain internet access to attend virtual court proceedings.²⁰² Moreover, access to sound and video technology is not a guarantee in many American households.²⁰³ The absence of both internet access and the technology needed to successfully use it greatly frustrates Americans' right to meaningful access²⁰⁴ to the courts.²⁰⁵

As previously discussed, Zoom causes fatigue for all participants.²⁰⁶ Studies also show that judges experience decision fatigue.²⁰⁷ Given these circumstances, criminal defendants run a higher risk of receiving a harsher decision²⁰⁸ from a judge during a virtual proceeding than in an in-person proceeding.²⁰⁹ Harsher decisions create a slew of negative consequences for these defendants, including longer sentences and more restrictions upon release, which in turn can cause economic despair and potentially even increase recidivism.²¹⁰

199. *Pretrial Detention*, *supra* note 181.

200. In 2015, the United States reported a prison population of 1,526,800. E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, U.S. DEP'T OF JUST. (Dec. 2016), <https://bjs.ojp.gov/content/pub/pdf/p15.pdf>.

201. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

202. Zak Hillman, *Pleading Guilty and Video Teleconference: Is A Defendant Constitutionally "Present" When Pleading Guilty by Video Teleconference?*, 7 J. HIGH TECH. L. 41 (2007) [hereinafter Hillman]. See *supra* notes 302–306 and accompanying text.

203. Hillman, *supra* note 202.

204. "Meaningful access' can be defined as the capacity to appear and effectively participate in proceedings properly presented to the court in a manner that will allow the court to carry out its adjudicative function to the end that justice can be done." James Bamberger, *Confirming the Right to Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 383, 396 (2005) ("[T]he right to access to the courts is fundamental to our system of justice.").

205. Hillman, *supra* note 202.

206. See *supra* Section II.A.2.

207. Blake Thorne, *How Decision Fatigue Makes You Work Worse When You Work More*, I DONE THIS (July 28, 2015), <http://blog.idonethis.com/decision-fatigue/> [hereinafter Thorne] ("[R]ight after a short break, judges came in with more positive attitudes and made more lenient decisions. As they burned up their reserves of energy, they began to make more and more decisions that maintained the status quo" of a harsh judge who is tough on crime).

208. See *supra* note 90 and accompanying text.

209. Thorne, *supra* note 207.

210. See *infra* note 271 and accompanying text.

ii. Minimal State Interests

States contend that virtual proceedings increase access to justice by making court appearances easier and less expensive for participants.²¹¹ In states’ views, attorneys waste less time traveling to court and can allocate time saved to their caseload.²¹² Additionally, in rural areas where access to courts is already limited, virtual court could increase these defendants’ access in particular.²¹³ Access to justice is also increased for members of the public who no longer need to travel to the courthouse to watch proceedings and instead can listen from their own homes.²¹⁴

Virtual proceedings also reduce safety risks for security personnel because the proceedings require fewer defendants to physically attend court.²¹⁵ Additionally, fewer security personnel in the courthouse makes more personnel available to patrol the community.²¹⁶ Virtual proceedings greatly reduce governmental costs—they eliminate transportation costs and require fewer security personnel, which in turn decreases court costs and allows funds to be redirected to street patrols.²¹⁷ Further, reduced travel time to the courthouse leaves more time for judges and attorneys to focus on their workload.²¹⁸

Virtual proceedings also increase efficiency because they increase the number of proceedings over which a judge can preside in one day and create smoother transitions from each phase of the proceeding.²¹⁹ Judges are also able to move more quickly throughout proceedings because they do not need to wait for defendants to be physically present in the courtroom.²²⁰

While these state interests are important, the primary purpose of the Constitution is to prevent the infringement on constitutional rights by limiting

211. See, e.g., Janna Adelstein & Alicia Bannon, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNEN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> (“[A] Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.”).

212. Hon. Tori R.A. Kricken, *Court in the Time of Covid-19: Virtual Court and Video Hearings-What Works, What Doesn't*, WYO. LAW., Apr. 2021, at 18.

213. *Id.*

214. Kate Marples Simpson, *The Future of Live Virtual Hearings: Some Benefits and Concerns for Consideration*, J. KAN. BAR ASS'N, Nov.–Dec. 2020, at 18. Public trials seek to ensure a fair adjudication of a criminal defendant by discouraging perjury and misconduct. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980).

215. Hillman, *supra* note 202.

216. *Id.*

217. *Id.*

218. *Id.*

219. *As Pandemic Lingers, Courts Lean Into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology> (stating judges are easily able to bring individuals together in one virtual room).

220. Hillman, *supra* note 219.

government control.²²¹ Virtual proceedings risk the fundamental rights proscribed in the Constitution.²²² Therefore, the potential government benefits are not enough to justify the use of virtual proceedings.²²³

iii. Defendants' Constitutional Rights Outweigh the Minimal Government Interests

The minimal government interests²²⁴ furthered by virtual proceedings do not outweigh the great intrusion on criminal defendants' constitutional rights.²²⁵ The biggest benefit of virtual court is that it can increase access to justice²²⁶ for some participants.²²⁷ However, requiring technology to participate in proceedings diminishes access to justice for many participants who may not have access to the requisite technology.²²⁸ Additionally, virtual proceedings limit defendants' access to their attorneys and harms the attorney-client relationship.²²⁹ Finally, virtual proceedings strain the fact-finder's ability to judge the credibility of the defendant, witnesses, and victims.²³⁰ Because of the great injustice caused by a virtual format, virtual proceedings should be avoided in most cases, including proceedings such as

221. "A chief aim of the Constitution as drafted by the Convention was to create a government with enough power to act on a national level, but without so much power that fundamental rights would be at risk." *The Constitution*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (last visited Dec. 31, 2021).

222. See *supra* Section I.A.3.

223. See *supra* Section I.A.3.

224. See *supra* notes 174–178 and accompanying text. While it is plausible that a state's police powers may allow them, during a national health emergency, to suspend procedural due process rights, at this stage of the pandemic, the reasons for suspending due process are dwindling. *COVID-19: Emergency Powers and Constitutional Limits*, AKIN GUMP STRAUSS HAUER & FELD LLP (Mar. 23, 2020), <https://www.akingump.com/en/news-insights/covid-19-emergency-powers-and-constitutional-limits.html>. Thus, it is unlikely that a state may constitutionally suspend due process rights absent a national health emergency. *Id.*

225. Hillman, *supra* note 202, at 69 (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)) ("[W]e should be mindful of the statement made by Justice Brennan in *Bruton v. United States*: 'We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.'").

226. Providing legal aid to low-income people in rural areas can be particularly challenging because of distance, lack of access to transportation, and lack of awareness of the kinds of services and help that legal aid can provide. Similar challenges make it difficult for private attorneys to volunteer to take cases. *Access to Justice in Rural Areas*, LEGAL SERVS. CORP., <https://www.lsc.gov/i-am-grantee/model-practices-innovations/provide-legal-services/access-justice-rural-areas> (last visited Nov. 13, 2021). Since 2013, Utah has used Skype to create virtual legal clinics for folks living in distant rural areas. *Id.*

227. *Id.*

228. See *supra* notes 195–205 and accompanying text.

229. See *supra* notes 184–190 and accompanying text.

230. See *supra* notes 194–194 and accompanying text.

trials and sentencings, which require rendering a decision.²³¹ However, in a select group of proceedings,²³² a virtual format can be utilized because the interests of justice outweigh the potential harms caused by the virtual nature of the proceeding.

B. Limit Virtual Proceedings to Those That are Low Risk

Virtual proceedings should be limited to (1) arraignments, (2) “status conferences . . . and diversionary proceedings where no statement of guilt is required to be made on the record,” (3) plea bargains,²³³ and (4) bail hearings,²³⁴ where there is a low risk of adverse effects to a defendant.²³⁵

1. Arraignments

Arraignments typically occur within one day of when the defendant is arrested and charged.²³⁶ In these proceedings, defendants face a judge and are read the charges against them, along with their pre-trial rights.²³⁷ The defendant answers the charges by pleading guilty, not guilty, or no contest.²³⁸ Because most pleas at arraignment are not guilty, the risk of a prejudicial decision rendered against a defendant is low at this stage of the prosecution.²³⁹ A plea of not guilty forces the prosecution to gather evidence and gives the defense an opportunity to review that evidence and advise their client.²⁴⁰ Thus, the only decision rendered at an arraignment is whether the defendant plans to force the prosecution to prove their case against the defendant.²⁴¹ The defendant therefore has the power to limit the negative effects of a virtual format.

231. *NAPD Statement on the Issues with the Use of Virtual Court Technology*, NAT’L ASS’N FOR PUB. DEF. (June 18, 2020), https://www.publicdefenders.us/files/NAPD%20Virtual%20Court%20Statement%208_1.pdf [hereinafter *NAPD Statement*].

232. *See infra* Section I.A.

233. *NAPD Statement*, *supra* note 231.

234. *See infra* Section II.B.iv. Despite the presence of Zoom fatigue and its negative effect on bail hearings, the countervailing interest of a speedy bail hearing outweighs this negative effect. Léon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

235. *See infra* Section II.B.4.

236. *Initial Hearing / Arraignment*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/initial-hearing> (last visited Oct. 22, 2021).

237. *Id.*

238. *Arraignments*, NYCOURTS.GOV, <https://nycourts.gov/courthelp/Criminal/arraignments.shtml> (last visited Oct. 22, 2021).

239. Lauren Baldwin, *Criminal Arraignment: What to Expect*, NOLO, <https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-defense-case/criminal-arraignment-what-expect> (last visited Oct. 22, 2021).

240. *Id.*

241. *Id.*

While access to justice is not furthered by conducting arraignments remotely because all arraigned defendants are presently incarcerated, virtual arraignments expedite the defendant's case and allow the court to proceed to the bail hearing.²⁴² Therefore, defendants and the state have an interest in virtual arraignments because of the expediency factor.²⁴³ As discussed *supra*, the constitutional dangers of conducting an arraignment remotely are relatively low,²⁴⁴ while the benefit to the defendant in conducting an arraignment remotely is relatively high.²⁴⁵

2. *Status Conferences and Diversionary Proceedings*

Status conferences are low-stakes meetings that precede trial in which attorneys from both sides meet with a judge to handle mostly administrative matters.²⁴⁶ Status conferences, unlike arraignments, do not require rendering a decision and thus are lower stakes. Here, like arraignments, the potential for prejudice against a defendant is low while the benefits of a speedy conference are high because of their administrative nature. Additionally, for defendants who have posted bail, remote status conferences increase access to justice by lightening the burden of traveling to court for an administrative affair.²⁴⁷

Diversionary proceedings allow the diversion of a criminal defendant away from the prison system and into a rehabilitation program or probation.²⁴⁸ Diversionary proceedings are in the best interest of the defendant²⁴⁹ because they seek to dismiss the charges against the defendant in exchange for diversion into another avenue of recourse.²⁵⁰ The fact-finder

242. *NAPD Statement, supra* note 231 (stating the “interest in advocating for liberty from incarceration outweighs the impact of a speedy but virtual appearance”).

243. *Id.*

244. *See supra* notes 237–241 and accompanying text.

245. *See supra* notes 242–243 and accompanying text.

246. *Status Conference*, CORNELL L. SCH., https://www.law.cornell.edu/wex/status_conference (last updated Aug. 2021) (noting status conferences can involve a discussion of pleas).

247. *See supra* notes 212–214 and accompanying text.

248. *Diversion*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/diversion> (last updated July 2021) [hereinafter *Diversion*].

249. *Diversion, supra* note 248 (stating that diversion allows a defendant to avoid a criminal conviction on their record). Criminal records can lead to lost income, economic despair, voter suppression, homelessness, and a lack of access to government benefits. Terry-Ann Craigie, et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>; *see What is Diversion?*, VERA INST. JUST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion> (“[G]rowth of these [diversionary] programs has been driven, in part, by research indicating that problem-solving courts reduce recidivism and associated criminal justice costs.”).

250. *Diversion, supra* note 248.

plays an extremely limited role—thus there is little danger of prejudice to the defendant.²⁵¹ Zoom fatigue and technological issues that can affect how a defendant is perceived are not at issue, and thus neither are the harsh outcomes associated with virtual proceedings.²⁵² Similar to bail hearings,²⁵³ diversionary proceedings are time-sensitive.²⁵⁴ They allow an individual to avoid the negative effects of incarceration by remaining free in the community until they are diverted into a program.²⁵⁵

3. *Plea Bargains*

The government generally uses plea bargains when it has a strong case—the government will typically offer the defendant a deal to (1) avoid trial²⁵⁶ and (2) reduce the possibility of a lengthier sentence.²⁵⁷ Guilty pleas occur in front of a judge²⁵⁸ and are required to be knowing²⁵⁹ and voluntary.²⁶⁰ In exchange for a guilty plea, prosecutors typically recommend reduced sentences, which judges are likely to accept so long as the recommendation

251. At the federal level, United States Attorneys have the discretion to divert an individual before they are charged. U.S. Dep’t of Just., Just. Manual § 9-22.010, 9-22.100 (2011).

252. *Diversion*, *supra* note 248 (stating that if defendant is not qualified for diversion, prosecution will continue); see *What is Diversion?*, VERA INST. JUST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion> (stating the prosecutor can recommend diversion and summon the individual to a problem-solving court like drug court, domestic violence court, or mental health court).

253. See *infra* Section II.B.4.

254. See *infra* note 272.

255. See *infra* note 272.

256. Avoiding trial is appealing to both the defendant and the state because it typically results in less jail time, reduces the cost to the state of a trial, and expedites the judicial process. *Plea Bargaining*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/pleabargaining> (last visited Oct. 22, 2021) [hereinafter *Plea Bargaining*].

257. *Id.*

258. CRIM. JUST. STANDARDS: PLEAS OF GUILTY, 3d ed. § 14-1.4(a) (AM. BAR ASS’N 1999) (“The court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court . . .”).

259. Courts are required to address defendants personally to determine if they understand that a plea of guilty will result in the waiver of numerous rights, including rights to a speedy and fair trial, to file further motions, and to appeal. *Id.* This waiver could result in the maximum possible sentence. *Id.* The American Bar Association provides a model list of the rights a judge is required to determine that the defendant knows are affected by their guilty plea. *Id.*

260. MD. R. 4-242(c).

The court may not accept a plea of guilty . . . until after an examination of the defendant on the record in open court conducted by the court, the State’s Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea.

Id.; see CRIM. JUST. STANDARDS: PLEAS OF GUILTY, 3d ed. § 14-1.5 (AM. BAR ASS’N 1999) (stating the court must make a finding of voluntariness to ensure a defendant was not forced or threatened to plead guilty).

from the government is reasonable.²⁶¹ If the defendant has had exposure to effective representation,²⁶² virtual plea bargains present substantially less risks to the defendant than a true adversarial proceeding.²⁶³ However, if presently incarcerated defendants have had few opportunities for confidential discussions with their attorneys—whether it be remotely or in-person—the possibility that they are exposed to injustice when accepting a plea could be exacerbated.²⁶⁴ Similar to bail hearings, the use of virtual pleas should be subject to need, such as an emergency.²⁶⁵ As in the case of the COVID-19 pandemic, virtual pleas allowed defendants to begin serving their time to expedite their release, or even plead to probation or time served so that they could return home to their families.²⁶⁶ Thus, the option of a virtual plea system is important where an avid health and safety concern is present.²⁶⁷ However, because pleas must be both knowing and voluntary, it is crucial that judges inquire into the defendants’ ability to confer in-depth with counsel before choosing to plead guilty.²⁶⁸

4. *Bail Hearings*

Bail hearings are unique in that they are dependent on efficiency because their outcome determines whether the defendant will be forced to sit in pre-trial detention or await their trial free in the community.²⁶⁹ The COVID-19 pandemic created a backlog of criminal proceedings for the courts, thus in-person bail hearings are not as expeditious as a virtual option.²⁷⁰ Holding defendants for longer than necessary creates several

261. *Plea Bargaining*, *supra* note 256.

262. Irving R. Kaufman, *The Injustices of Plea-Bargaining*, N.Y. TIMES (Dec. 13, 1976), <https://www.nytimes.com/1976/12/13/archives/the-injustices-of-pleabargaining.html> (discussing the crucial role that attorneys play in the plea bargaining process and how this impacts fairness).

263. Plea bargaining induces guilty pleas by offering what is proposed as a far shorter sentence than what the defendant would receive if they proceeded to trial. *Id.* This inducement therefore has the potential to undermine the faith in the criminal justice system. *Id.*

264. *See supra* notes 184–190 and accompanying text.

265. *See infra* note 273 and accompanying text.

266. Nancy McDonough, *Plea Bargaining: A Necessary Evil*, 2 U. ARK. LITTLE ROCK L. REV. 381, 383–84 (1979).

267. *See infra* note 273 and accompanying text.

268. Frequent reports regarding virtual plea proceedings focused on “defendant’s constitutional rights, including concerns about the defendant’s understanding of the guilty plea, the judge’s ability to determine whether or not the defendant’s waiver of constitutional rights is knowing, voluntary and intelligent, and the defendant’s ability to communicate privately with counsel.” Sarah E. Duhart Clarke & Jessica Smith, *Virtual Proceedings in North Carolina*, U. N.C. SCH. OF GOV’T, 3 (2021), <https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2021/03/Virtual-Courts-Findings-Report-FINAL-3.15.2021docx.pdf>. Access to defense attorneys may be greatly limited for incarcerated defendants depending on their detention facility’s policy on visitation. *Id.*

269. *NAPD Statement*, *supra* note 231.

270. *Id.*

consequences, including the loss of jobs, housing, and sometimes custody of children.²⁷¹ Thus, the interest in expediting bail proceedings outweighs the potential negative consequences that can come from a harsher decision, such as a higher bail amount.²⁷² However, the use of virtual bail hearings should commence only when a need arises for it, like a complete shutdown of the court system as seen throughout the COVID-19 pandemic, or a severe judicial backlog as seen throughout courts today as they try to catch up after the shutdown.²⁷³ Once the court determines it is again possible to conduct bail hearings in-person in a timely fashion, they should commence solely in-person.

C. Adaption of Laws in Maryland for Targeting Virtual Proceedings

To ensure protection of criminal defendants’ constitutional rights throughout virtual court proceedings, it is imperative that states like Maryland maintain the same quality and level of protection as in an in-person proceeding.²⁷⁴ While Maryland has mandated compliance with standards developed by the State Court Administrator, and approved by the Chief Judge of the Court of Appeals,²⁷⁵ it has not developed a thorough body of law concerning standards throughout virtual proceedings.²⁷⁶ The Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure (“Rules

271. Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/>.

272. Léon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>. Pre-trial detention increases the likelihood of a conviction because it limits the access defendants have to counsel and greatly impairs defendants’ ability to allocate funds for their defense. *Id.* Furthermore, pre-trial detention takes away a defendant’s opportunity to engage in “prophylactic measures,” such as mental health or drug treatment. *Id.*

273. *How the Backlog May Reshape the Future of the Courts*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/backlog-reshape-future-courts> (last visited Nov. 13, 2021) (stating the current backlog has led to an influx of technology use by the court system to increase efficiency).

274. Maryland issued guidelines for remote hearings in Maryland trial courts which specified that all remote proceedings would be conducted with equal standards as in-person hearings, but Maryland has not passed any legislation to this effect. GUIDELINES FOR REMOTE HEARINGS IN THE MD. TRIAL CTS., 1 (MD. CTS. 2021). Similarly, Michigan issued guidelines requiring that virtual proceedings be consistent with a party’s constitutional rights. MICH. VIRTUAL COURTROOM STANDARDS AND GUIDELINES § A(1) (NAT’L CTR. STATE CTS. 2020).

275. MD. R. 2-804(b).

276. See MD. R. 2-801-07 (failing to address logistical guidelines and added protections for virtual proceedings). *But see Remote Hearings and Access to Justice: During COVID-19 and Beyond*, NAT’L CTR. FOR STATE CTS., https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf (last visited Nov. 14, 2021) (“This guide brings together issues and suggestions from the most comprehensive guides we have located on [virtual proceedings].”).

Committee”)²⁷⁷ should adopt binding rules that provide additional protections particular to the nature of virtual proceedings.²⁷⁸

I. Waiver

Maryland should adopt rules governing a defendant’s right to waive²⁷⁹ the right to be physically present in exchange for a virtual proceeding.²⁸⁰ In non-evidentiary proceedings, Maryland currently allows the court, on its own initiative, to require participants to appear virtually unless a party objects to a virtual proceeding.²⁸¹ If a party objects, the court must find that the use of a virtual proceeding causes substantial prejudice or adversely affects the fairness of the proceeding to warrant an in-person proceeding.²⁸² In evidentiary proceedings, Maryland currently allows the court, on its own initiative, to permit participants to appear virtually with the consent of the parties, or absent consent if certain findings are made.²⁸³ Presently, Maryland allows the rule of forfeiture to govern non-evidentiary hearings,²⁸⁴ while the rule of waiver governs evidentiary hearings.²⁸⁵ All virtual proceedings, regardless of their evidentiary nature, should be governed by the rule of waiver because waiver “applies to those rights so important²⁸⁶ to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forgo the right.”²⁸⁷ As seen in *State v. Soto*,²⁸⁸ the right to be present in the same courtroom as the judge is of crucial importance to the fairness of criminal proceedings and

277. The Rules Committee assists the court in developing the rules that govern the practice and procedure of law and judicial administration in Maryland. *Court of Appeals*, MD. JUDICIARY, <https://msa.maryland.gov/msa/mdmanual/29ap/html/rulesf.html> (last updated Mar. 6, 2020).

278. Maryland issued guidelines for remote hearings in Maryland trial courts which outlined specific conduct required of individual participants throughout virtual proceedings. GUIDELINES FOR REMOTE HEARINGS IN THE MD. TRIAL CTS., 1 (MD. CTS. 2021).

279. A waiver is the “intentional relinquishment or abandonment of a known right.” *State v. Soto*, 817 N.W.2d 848, 858 (Wis. 2012) (citation omitted); see *Harrison v. State*, 345 A.2d 830, 841 (Md. 1975) (citation omitted).

280. *Soto*, 817 N.W.2d at 859.

281. MD. R. 2-802(a). Non-evidentiary proceedings are governed under the rule of forfeiture which occurs when “a party fails to raise an . . . objection.” *Soto*, 817 N.W.2d at 858.

282. MD. R. 2-802(a).

283. MD. R. 2-803(a), (c).

284. MD. R. 2-802(a).

285. MD. R. 2-803(a), (c).

286. Courts have held that rights essential to a fair trial include the right to a trial, the right to a jury trial, the right to appeal, and the right to be present at proceedings. *People v. Reyes*, No. 02279/19, 2021 WL 3280570, at *6 (N.Y. Sup. Ct. July 30, 2021); *Nalls v. State*, 89 A.3d 1126, 1133 (Md. 2014) (holding the rule governing the waiver of the right to a jury trial “was intended to incorporate the constitutional due process standard for waiver of a fundamental right”).

287. *State v. Soto*, 817 N.W.2d 848, 858 (Wis. 2012).

288. 817 N.W.2d 848 (Wis. 2012).

thus, it should be subject to waiver, not forfeiture.²⁸⁹ Maryland should amend Rule 2-802(a)²⁹⁰ to reflect the waiver doctrine.²⁹¹

Maryland should also require the court to address, on the record, that parties are waiving their right to be physically present.²⁹² Admission of a waiver on the record ensures that the defendant knowingly and intelligently consents to the use of videoconferencing by requiring the judge to infer that their consent is optional.²⁹³ Additionally, admission of a waiver on the record also provides an opportunity for the judge to inquire into the voluntariness of the consent, like in the context of plea bargaining.²⁹⁴ Furthermore, Maryland should establish that defendants’ waiver of their right to be physically present does not subject them to lesser constitutional standards²⁹⁵ or preclude them from contesting the logistics of the virtual proceeding later on.²⁹⁶ Additionally, defendants should reserve the right to change their mind at any point throughout the proceeding and request an in-person hearing.²⁹⁷

289. *Id.* at 859.

290. MD. R. 2-802(a).

291. *NAPD Statement, supra* note 231. Many courts require a defendant to consent to a virtual court format, and, in some cases, defendants have filed motions to continue until an in-person hearing can be conducted. *Reyes*, 2021 WL 3280570, at *6; Shira Schoenberg, *Defendant Demands In-person, Not Virtual, Day in Court*, COMMONWEALTH MAG. (Dec. 8, 2020), <https://clinics.law.harvard.edu/blog/2020/12/defendant-demands-in-person-not-virtual-day-in-court/>; *see, e.g.*, MICH. VIRTUAL COURTROOM STANDARDS AND GUIDELINES § A(1) (NAT’L CTR. STATE CTS. 2020) (“A defendant may waive the right to be physically present for a hearing and appear by video.”).

292. *See* MICH. VIRTUAL COURTROOM STANDARDS AND GUIDELINES § A(1) (NAT’L CTR. STATE CTS. 2020) (“The court should address, on the record, that the parties are waiving any right they may have to be present in the courtroom for the proceeding.”).

293. *Soto*, 817 N.W.2d at 860. The *Soto* Court went so far as to hold that the judge should ask questions to suggest that the defendant has the option to refuse the use of virtual technology. *Id.*

294. *Id.*; *see supra* notes 258–260 and accompanying text.

295. “[A] virtual evidentiary hearing on Zoom, or similar technologies, is not the same as an in-person evidentiary proceeding.” *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 843 (Mass. 2021) (Kafker, J., concurring). “It is important that judges be sensitive to these issues when they proceed virtually, and that they be prepared, in cases such as this one, to allow continuances when” a virtual proceeding would prejudice the defendant and the “defendant is willing to remain in custody and waive his speedy trial rights in order to receive a safe in-person hearing within a reasonable time.” *Id.*

296. *NAPD Statement, supra* note 231.

297. *Id.* Allowing defendants to change their minds protects fundamental fairness because the dependency of technology is not set in stone and can change throughout the course of a proceeding. *See Tashea, supra* note 171.

In California, pranksters blasted music and danced during online proceedings. In one of the country’s first virtual jury trials, a juror in Texas disappeared from the screen for seven minutes. In Missouri, a judge muted a defense attorney for more than a quarter of a 48-minute hearing while the prosecutor sat in the courtroom.

Id.

2. Access

Maryland should establish additional laws governing access to virtual proceedings for criminal defendants and the public. Technology is essential to conducting virtual proceedings for all parties.²⁹⁸ The quality of the technology can affect a defendant's ability to hear and communicate effectively with the judge and their attorney.²⁹⁹ Ahead of the proceedings, courts should ensure that all participants have access to technology with adequate sound and video capability.³⁰⁰ If a defendant does not have adequate technology, technology should be provided for them free of charge.³⁰¹

Maryland currently requires defendants who are unable to participate by internet or phone to contact the court immediately by phone.³⁰² This requirement lacks foresight because if defendants do not have access to a phone to conduct their proceeding remotely, they likely do not have access to a phone to contact the courthouse. Additionally, Maryland states that participants "may be allowed to participate by phone without video."³⁰³ Not only is this also counterintuitive, but it further prejudices³⁰⁴ the defendant who is already disadvantaged by a video proceeding.³⁰⁵ Finally, Maryland advises defendants to visit a public library where they "may be able to borrow what [they] need to participate" which presupposes that people can receive transportation to the library and receive a library card (if necessary) to borrow the equipment.³⁰⁶ The potential availability of equipment at a public library does not necessarily guarantee accessibility to the courts.³⁰⁷ The Maryland judiciary should adopt a system for loaning technology to remote defendants who are unable to access this technology.

298. *Vazquez Diaz*, 167 N.E.3d at 850.

299. *Id.*

300. JURY TRIALS DURING THE COVID-19 PANDEMIC: OBSERVATIONS AND RECOMMENDATIONS, 17 (TEX. OFF. OF CT. ADMIN. 2020).

301. *NAPD Statement*, *supra* note 231 ("Defendants should not be charged fees for virtual access that would not exist for in-person access.").

302. *Remote Hearing Toolkit*, MD. JUDICIARY, <https://www.mdcourts.gov/legalhelp/remotehearing> (last visited Oct. 22, 2021) [hereinafter *Remote Hearing*].

303. *Id.*

304. The inadequacies created by videoconferencing are further frustrated by teleconferencing due to the complete inability to view the defendant and judge their demeanor through the non-verbal cues necessary to establish credibility. CK Español, *supra* note 159.

305. *See supra* Section II.B.3.

306. *Remote Hearing*, *supra* note 302.

307. *See, e.g., Public Computers and WiFi*, BALT. CNTY. PUB. LIBR., <https://www.bcpl.info/services/public-computers-wifi.html> (last visited Dec. 31, 2021) (stating computers cannot be reserved, computer use is limited to one hour, and computers are housed in one large public room).

Presently, Maryland requires that all participants be able to communicate by “sight, hearing, or both as relevant” throughout virtual proceedings.³⁰⁸ At the start of each virtual proceeding, the judge should establish on the record that each participant can see and hear.³⁰⁹ Furthermore, the judge should be required to make a finding on the record that the video quality is adequate enough for all participants and the fact-finder to judge the “demeanor and non-verbal communications of other participants.”³¹⁰ The adequacy of video technology should be construed, at a minimum, to require all participants to see and hear each other and be able to recognize non-verbal cues.³¹¹

Virtual proceedings should not automatically result in solely virtual representation.³¹² “Public defenders should prioritize in-person communication whenever possible” to ensure confidentiality and trust between defendants and their attorneys.³¹³ Just as the National Association for the Public Defender has published guidelines for virtual proceedings,³¹⁴ Maryland should adopt standards governing criminal defense attorneys’ conduct through the Maryland Office of the Public Defender³¹⁵ and the Attorney Grievance Commission.³¹⁶ The Maryland Office of the Public Defender has released statements concerning the transition to a virtual court system but has not published guidelines for their own attorneys.³¹⁷ Guidelines should promote face-to-face communication.³¹⁸ Additionally, the Office of the Public Defender should work with detention facilities to ensure that incarcerated defendants have access to private rooms with computer technology to allow for privileged attorney-client meetings when they must

308. MD. R. 2-805(c)(1). Maryland also requires that participants be able to observe all physical evidence and exhibits presented. MD. R. 2-805(c)(2).

309. *See* JURY TRIALS DURING THE COVID-19 PANDEMIC, OBSERVATIONS AND RECOMMENDATIONS, 17 (TEX. OFF. OF CT. ADMIN. 2020) (“Each court recited special admonishments to the jurors to address issues that were unique to a virtual trial.”).

310. MD. R. 2-805(c)(3). The Maryland Rules are construed to require that video quality be adequate, but do not specify who is to determine the adequacy or what constitutes adequate. *Id.*

311. *See supra* note 193 and accompanying text.

312. *NAPD Statement, supra* note 231.

313. *Id.*

314. *Id.*

315. *About Us*, MD. OFF. OF THE PUB. DEF., <https://www.opd.state.md.us/about-us> (last visited Dec. 31, 2021) (“A Board of Trustees, composed of 13 members, studies, observes and advises on the operation of the public defender system.”).

316. *Attorney Grievance Commission and Office of Bar Counsel*, MD. JUDICIARY, <https://www.courts.state.md.us/attygrievance> (last visited Dec. 31, 2021) (“The Attorney Grievance Commission oversees the conduct of both Maryland attorneys and nonmembers of the Maryland Bar who engage in the practice of law in the State.”).

317. *COVID Advocacy Resources*, MD. OFF. OF THE PUB. DEF., <https://www.opd.state.md.us/copy-of-youth-resources> (last visited Oct. 22, 2021).

318. *NAPD Statement, supra* note 231.

be conducted remotely.³¹⁹ The guidelines should outline technology requirements and provide resources for defense attorneys who require assistance accessing virtual platforms.³²⁰ Lastly, guidelines should create a plan to research the impact of virtual proceedings on criminal defendants that later can be used to address inadequacies created by virtual proceedings.³²¹

Maryland must also continue to accommodate defendants who require an interpreter throughout virtual proceedings.³²² The Ninth Circuit implemented On-Demand Virtual-Remote Interpreting (“VRI”) in 2018.³²³ VRI allows sitting judges to virtually access an interpreter immediately.³²⁴ VRI technology is crucial for virtual proceedings involving non-English speakers.³²⁵ The National Center for State Courts has also provided platform specific recommendations for successfully incorporating interpreters into virtual proceedings.³²⁶ Maryland should publish a similar guide for court actors to utilize when accommodating interpreters.

Finally, Maryland courts should adopt specific guidelines for public access³²⁷ to virtual proceedings.³²⁸ Maryland currently requires courts to provide information regarding audio access via the clerk’s office or online.³²⁹ Maryland should mandate that the court publish audio access links on the

319. *Id.*

320. *Remote Hearing*, *supra* note 302.

321. *NAPD Statement*, *supra* note 231.

322. The Maryland Rules specify that video technology shall permit interpreters to perform their function in proceedings throughout both attorney-client communication and communication with the court. MD. R. 2-804(c).

323. Hon. Donald A. Myers, Jr., *On-Demand: Transforming Virtual Remote Interpreting*, NAT’L CTR. FOR STATE CTS., https://www.ncsc.org/__data/assets/pdf_file/0021/42168/on_demand_Myers.pdf (last visited Oct. 22, 2021).

324. *Id.*

325. *Id.*

326. *Video Remote Interpretation Solutions and Resources for Courts*, NAT’L CTR. FOR STATE CTS. (June 2020), https://www.ncsc.org/__data/assets/pdf_file/0023/41387/VRI-Solutions.pdf.

327. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . .”).

328. Maryland already requires that the public be able to listen to the audio of virtual proceedings, however no specific rules have been adopted regarding the logistical features of access. MD. R. 2-804(g).

329. GUIDELINES FOR REMOTE HEARINGS IN THE MD. TRIAL CTS., 3 (MD. CTS. 2021).

Maryland Judiciary website to promote widespread public access³³⁰ and consistency throughout the Maryland courts.³³¹

3. *Privacy*

Maryland should pass laws protecting participants’ privacy. Maryland properly prohibits outside recording of remote hearings.³³² However, Maryland should establish a system for ensuring that outside recordings are not available online after the proceeding concludes.

Maryland should utilize the breakout room feature to allow for unrecorded private attorney-client communication.³³³ Similarly, courts should utilize the waiting room and require participants to use their actual names and show proof of identification to ensure that only participants who have been invited are admitted.³³⁴ Maryland courts should take the time to confirm the identity of defendants at the beginning of the proceeding by asking on the record for their full name and identifying documents.

III. CONCLUSION

The negative implications of virtual platforms on defendants’ Sixth Amendment right to counsel, right to confront and cross-examine witnesses, and right to be present create lasting concerns that states, like Maryland, must address within their states’ judicial rules.³³⁵ Mandating procedures to ensure the protection of defendants’ constitutional rights protects principles of fundamental fairness guaranteed in the Bill of Rights and incorporated against the states through the Due Process Clause.³³⁶ These procedures need to address defendants’ right to waive physical presence, equal access to virtual proceedings for defendants and the public, and the privacy of

330. See *Live Oral Argument Audio*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/oral_arguments/live.aspx (last visited Oct. 24, 2021) (publishing a list of audio links for participants to listen to oral arguments). *But see Circuit Courts*, MD. JUDICIARY, <https://www.courts.state.md.us/circuit> (last visited Nov. 14, 2021) (providing no “Webcasts” page).

331. See *Court of Appeals Live Webcast*, MD. JUDICIARY, <https://www.courts.state.md.us/coappeals/webcasts> (last visited Nov. 14, 2021) (including live stream to oral arguments scheduled through May 2022).

332. MD. R. 2-804(f); GUIDELINES FOR REMOTE HEARINGS IN THE MD. TRIAL CTS., 1 (MD. CTS. 2021).

333. MICH. VIRTUAL COURTROOM STANDARDS AND GUIDELINES § B(1) (NAT’L CTR. STATE CTS. 2020); MOD’L RULES OF PROF’L CONDUCT r. 1.6(a), (c) (AM. BAR ASS’N 2021) (“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”).

334. MICH. VIRTUAL COURTROOM STANDARDS AND GUIDELINES § A(3), B(1) (NAT’L CTR. STATE CTS. 2020).

335. See *supra* Section I.A.

336. See *supra* Section II.A.

proceedings that are live streamed over the internet.³³⁷ Furthermore, limiting the use of virtual court to arraignments, status conferences and diversionary proceedings, plea bargains, and bail hearings considers the low stakes involved in these proceedings while protecting defendants' constitutional rights.³³⁸ Addressing the pressing concerns created by virtual proceeding will create a more just system of adjudication for both virtually and physically present defendants.

337. *See supra* Section II.C.

338. *See supra* Section II.B.