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## WHITE PAPER

December 2020

### Criminal Jury Trials in a Global Pandemic: Safeguarding the Constitutional Rights of the Accused

The Sixth Amendment to the U.S. Constitution provides that, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” The ongoing COVID-19 pandemic and its effect on the ability of individuals to travel and assemble at all, much less to convene in the close quarters of a jury, present particular challenges for the U.S. criminal justice system.

In the face of this pandemic, how can the accused’s Sixth Amendment rights be safeguarded—in particular, how can criminal defendants be assured that their trials will be “speedy and public,” that their fates will be determined by an “impartial jury” drawn from the district, that they may be “confronted by witnesses against [them]” in a constitutionally adequate way, and that they will have the effective assistance of defense counsel?

This Jones Day *White Paper* explores the tension between preserving the health and safety of the public and the demands of justice with respect to criminal trials.

## TABLE OF CONTENTS

INTRODUCTION .....	1
STATE OF AFFAIRS.....	1
SPEEDY TRIAL.....	2
OTHER SIXTH AMENDMENT CONCERNS .....	2
THE FALLIBILITY OF PROPOSED SOLUTIONS.....	4
CONCLUSION .....	6
AUTHORS.....	6
ADDITIONAL CONTACTS.....	6
ENDNOTES.....	8

## INTRODUCTION

When the extent of the outbreak of COVID-19 in the United States became apparent, the country's judicial system came to an abrupt halt. All manner of court proceedings, ranging from appearances on routine pretrial matters to multiweek jury trials, were postponed as cities nationwide adopted stay-at-home and shelter-in-place orders, and there was a general lack of certainty as to how long the system would need to be on hold. As the pandemic and associated restrictions in activity and operations approach a year with little prospect for a return to "normal" in the near future, the way forward remains unclear. Indeed, at this point, as private and government lawyers, judges, and court personnel have, by necessity, dramatically altered the ways in which they engage in, preside over, and administer litigation, it is reasonable to contemplate whether our justice system will ever completely return to the prior normal. And yet, the language of the Constitution and the basic rights it affords criminal defendants remain unchanged, as does the importance of ensuring that those rights are honored in particular cases.

As the pandemic persists, courts and litigants must continue to give considered thought to how to preserve the constitutional guarantees that are most fundamental to our criminal justice system. Our system has been, at its core, deeply personal; it has forever depended upon "live" human interaction with parties, judges, witnesses, jurors, and court personnel literally in the same room with one another playing out real-life dramas. The process of rethinking and retooling trials in the short term (and perhaps beyond) has required some innovation on the part of the judiciary and those who work alongside it. At present, proposed solutions focus on preserving the system we know to conserve the constitutional rights we value. But these solutions are fallible, with jury trials ill-suited to the virtual format and in-person trials facing practical limitations.

This *White Paper* will: (i) provide a sampling of the status of jury trials throughout the United States, and (ii) address the guarantees of the Sixth Amendment in criminal cases within the context of the present pandemic.

## STATE OF AFFAIRS

The pandemic has dramatically disrupted almost every aspect of our society, and the judicial system is no exception.

Beginning in early March 2020, judiciaries across the country suspended in-person proceedings ranging from daily motion practice to multiweek jury trials. Though the last nine months have seen courts across the country successfully transition many of their usual functions to a virtual setting, the puzzle of conducting jury trials in the age of COVID-19 is still in its infancy.

Criminal jury trials, in particular, have proven largely incompatible with the present state of the world, given the constitutional guarantees discussed in this *White Paper*. As a result, months passed as courts grappled with these competing tensions. On June 4, 2020, the U.S. Courts' COVID-19 Judicial Task Force published a report titled "Conducting Jury Trials and Convening Grand Juries During the Pandemic," which contained a series of recommendations for courts seeking to undertake trials once again.<sup>1</sup>

In the time since, federal district courts have attempted to resume criminal trials with varying success.<sup>2</sup> For example, in the Western District of North Carolina, criminal jury trials have been underway since early June 2020, following a May 29, 2020, order by the district's chief judge permitting their resumption.<sup>3</sup>

In contrast, the Northern District of Texas was among the first to stage a criminal jury trial employing social distancing protocols, but a month later, the resurgence of COVID-19 in the area led the court to continue all trials scheduled through the end of July 2020.<sup>4</sup> Similarly, the Eastern District of Missouri's first criminal jury trial in three months was briefly interrupted when a court officer tested positive for the virus.<sup>5</sup>

Some federal jurisdictions are exploring pilot programs, while others are conducting a reduced number of in-person trials with COVID-19 protocols, and still others continue to delay the return to jury trials altogether. There is similar variance among state courts.<sup>6</sup> In August 2020, a Texas state court reportedly became the first in the nation to conduct a virtual criminal jury trial over Zoom.<sup>7</sup> Few, if any, courts have since followed suit.

Any progress made in the anticipated or actual resumption of in-person criminal jury trials faced yet another setback as COVID-19 cases continued to rise in the second half of 2020, leading to additional court closures and postponement of trials. In late October 2020, for instance, the Northern District of Illinois' Chief Judge immediately suspended criminal jury trials, which had resumed in August 2020, through January

2021.<sup>8</sup> Despite the varying responses across the country, all must contend with the same constitutional demands as they proceed with their reopening (and reclosing).

## SPEEDY TRIAL

Per the Sixth Amendment, every criminal defendant “shall enjoy the right to a speedy and public trial.”<sup>9</sup> The right to a speedy trial is driven by three interests: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.”<sup>10</sup> Delays in proceedings may inhibit a defendant’s ability to fairly defend himself, due to the deterioration of memories, as well as physical evidence, or the later absence of witnesses.<sup>11</sup> Rather than adhering to a particular time frame, courts engage in a balancing test to determine whether a defendant’s right to a speedy trial has been violated, considering the length of the delay, the cause of the delay, the defendant’s assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay.<sup>12</sup>

As to federal courts, in particular, the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, governs the time frames in which various stages of prosecution must be completed. The Act dictates that a trial must commence not less than 30 days, but no more than 70 days, from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later.<sup>13</sup>

Although the Speedy Trial Act provides for a host of delays that will be excluded from the speedy trial calculation,<sup>14</sup> none of these exclusions contemplates circumstances such as a global pandemic. The Act, however, states that if the trial judge determines that the “ends of justice” served by a continuance “outweigh the best interest of the public and the defendant in a speedy trial, the delay occasioned by such continuance is excluded from the Act’s time limits.”<sup>15</sup> As the Supreme Court explained, “the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.”<sup>16</sup>

On the state level, whose courts are subject to the Sixth Amendment by way of the Fourteenth Amendment, speedy

trial requirements vary by jurisdiction. Governors in some states have suspended state speedy trial requirements.<sup>17</sup> But even suspensions of speedy trial laws by individual states will not obviate the increasing potential for violations of the constitutional rights afforded defendants by the Sixth Amendment.

Even as courts take steps to resume jury trials, some reopening plans are being challenged by defense lawyers who say more needs to be done to protect defendants’ speedy trial rights. An order authorizing the resumption of certain jury trials in New Jersey courts in late September 2020 explained: “The decision to resume a limited number of jury trials is motivated by the ongoing restrictions of the rights of criminal defendants, including more than 2,500 defendants who have been indicted and are detained in jail awaiting trial.”<sup>18</sup> In a report detailing objections and recommendations to the reopening plan, the Association of Criminal Defense Lawyers argued defendants should have the right to demand bench trials without the government’s consent in order to protect their speedy trial rights.<sup>19</sup> While the reopening plan has since been amended, this particular concern was not addressed.<sup>20</sup>

Of course, as the pandemic persists, criminal activity and arrests continue, as do indictments and arraignments (albeit virtually). In an already overwhelmed judicial system, resolution of these matters in a timely, fair, and otherwise constitutionally appropriate manner is crucial. Under normal circumstances, violation of the right to a speedy trial may result in a conviction being set aside. However, at present, the predominant concern seems to be practical rather than legal. Given the extraordinary nature of events, it seems unlikely that any court will find defendants have been prejudiced by COVID-related delays in their proceedings, but that is certainly left to be seen.

## OTHER SIXTH AMENDMENT CONCERNS

The Amendment also guarantees the accused an impartial jury, commonly understood as an unbiased jury of one’s peers. Although the Supreme Court has made clear that defendants are not entitled to a jury of any particular composition, it is “an essential component of the Sixth Amendment” that at least the pool from which a jury is selected must be a “representative cross-section of the community” in which the proceedings take place.<sup>21</sup> The pandemic’s disproportionate effects on certain communities might well contribute to the empaneling of

juries not properly representative of the public, at least in comparison to pre-pandemic juries in those same jurisdictions.

It is also possible, perhaps likely, that virtual jurors would need a certain type or quality of technology, as well as extensive internet access, which might disproportionately exclude lower-income communities. Some defense counsel have objected to virtual jury selection on these grounds, but to no avail.<sup>22</sup> On the other hand, in-person jury trials during the pandemic may result in the disproportionate exclusion of elderly and other vulnerable populations. The Northern District of Illinois' in-person jury trial plan released in late July 2020, for instance, allows for prospective jurors to defer service for "legitimate pandemic-related reasons."<sup>23</sup>

In addition, the ability for a criminal defendant to confront witnesses against him is a fundamental right and a hallmark of American criminal jurisprudence. The primary object of this constitutional right, grounded in the Confrontation Clause of the Sixth Amendment, has been characterized as giving the accused "an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to *stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"<sup>24</sup> However, even such an aim "must occasionally give way to considerations of public policy and the necessities of the case."<sup>25</sup>

For example, defendants may be prevented from confronting witnesses against them when the well-being of the witness is at issue.<sup>26</sup> With in-person interaction in the midst of this pandemic, the well-being of all parties involved is at issue. In July 2020, the Michigan Supreme Court and the State Court Administrative Office released a number of standards and recommendations for remote jury trials. Regarding the right to confront witnesses, this guidance clarified that allowing two-way, interactive video testimony over a criminal defendant's objection violates a defendant's rights under the Confrontation Clause.<sup>27</sup>

Further, in-person jury trials during the pandemic have typically involved a requirement of social distancing and face masks, introducing potential barriers to the fact finder's ability to assess a witness's demeanor and overall credibility while testifying.<sup>28</sup> Still, some courts that have resumed in-person jury trials have devised creative solutions to this issue. In early July 2020, for instance, a federal court in the Northern District of

California resumed the first jury trial in the district since the pandemic. There, the court installed plexiglass for the witness box so that witnesses do not need to wear face masks.<sup>29</sup>

Even so, this does not address the issue of masked jurors. Following a weeklong civil jury trial in the Indiana Supreme Court, counsel reported the difficulty of reading the juror's expressions and reactions, especially during voir dire.<sup>30</sup> Social distancing requirements further impede one's ability to accurately assess facial expressions of a witness when making credibility determinations.

Effective assistance of counsel is yet another constitutional right afforded to criminal defendants being affected by the pandemic. Chief Judge Thomas Thrash of the Northern District of Georgia acknowledged this in a September 2020 order delaying all jury trials until 2021:

[E]mergency conditions have prevented defense counsel from meeting with their in-custody clients and have severely limited communications with those clients in general. Capabilities provided by technology, while helpful, are inadequate to offset the impediments currently confronted by counsel in this District. Other aspects of case preparation have been similarly impacted. As a result of Georgia's level of COVID-19 infections and test positivity, witness travel has been problematic due to quarantine regulations in effect in many states that apply to persons traveling to and from Georgia. These circumstances and others have severely impeded if not prevented counsels' ability to prepare for trial.<sup>31</sup>

Preserving confidential communications between a defendant and his or her counsel is an issue during a jury trial itself, as well as in the trial preparation phase. Until a last-minute order rescheduling a jury trial to January 2021, a federal judge in New York planned to conduct a criminal contempt trial despite the out-of-state defense counsel's inability to attend in person due to medical reasons. The judge initially denied the defendant's request to delay the proceeding, ruling that the defendant would be permitted to use his cell phone during trial to send text messages to his counsel, as he would pass a note at trial.<sup>32</sup> According to the defendant, Steven Donziger, the federal judge reversed course following "massive public pressure from 55 Nobel laureates and international trial monitors" alleging violations including Donziger's constitutional right to effective counsel.<sup>33</sup>

Courts contemplating remote jury trials must also provide an avenue for these confidential communications. In their July 2020 publication, the Michigan Supreme Court and the State Court Administrative Office recommended that courts both: (i) ensure attorneys and clients have access to a means or method of direct and immediate communication during all phases of a remote jury trial, and (ii) allow attorneys to meet with their clients in a virtual breakout room when requested.<sup>34</sup>

## THE FALLIBILITY OF PROPOSED SOLUTIONS

While the pandemic marches on, trials, like other business and legal activities, cannot cease altogether. Indeed, jury trials will need to resume, for practical reasons such as backlogs, and moral and constitutional ones, such as achieving justice and upholding the Constitution. As a result, our criminal justice system must reconcile competing incentives—the obligation to protect the health and safety of the public and the commitment to giving the accused his day in court.

At first glance, a virtual incarnation of criminal proceedings seems the most reasonable option. Indeed, some courts already held certain hearings virtually in criminal cases prior to the pandemic. For instance, in some jurisdictions it is not uncommon for incarcerated defendants to appear virtually for bail hearings. But, even these types of virtual hearings have resulted in problematic patterns for the defendant, as studies have shown that defendants in remote proceedings generally fare poorly compared to those participating in in-person proceedings.<sup>35</sup>

Further, unlike these other judicial operations (including bench trials), which are more easily adapted to a remote form, jury trials are not fundamentally suited to remote operations, and conducting them remotely may lead to a variety of disruptions and distractions for the jury. Jury trials are typically highly controlled events, with the court dictating where the jury goes and when, what the jury hears, and what materials jurors have access to. Virtual trials will leave much of this up to the jurors themselves, forcing them to deal with technological and logistical difficulties, such as stable internet connection and security issues. A juror could temporarily lose internet connection and miss 15 minutes of witness testimony. Another juror could be browsing the internet, looking up outside information on the case. At the same time, a juror could be working or answering emails on his computer while streaming the testimony.

In a virtual civil jury trial in July 2020, for instance, defense counsel filed a notice in support of its continued objection to the virtual proceedings, citing specific instances of jurors working, emailing, and walking around during proceedings. In addition, multiple jurors dropped off of the Zoom platform or lost internet connection throughout the proceeding.<sup>36</sup> The court carried on with the proceedings.

Some courts conducting remote proceedings have tried to remedy some of these issues, by, for instance, providing court-issued iPads for jurors who lack adequate technology, requiring jurors to remain visible at all times, and prohibiting jurors from multi-tasking.<sup>37</sup> Nevertheless, the significant loss of control courts may face with virtual jury trials raises questions of how much disruption and distraction will still result in a fair trial for the defendant.

For these and other reasons, courts have largely decided to postpone criminal jury trials altogether, rather than attempting to conduct them virtually. And while at least one Texas state court successfully conducted a virtual criminal jury trial for misdemeanor charges in August 2020 after getting consent from both the defendant and the government, constitutional concerns have thus far prevented any widespread shift toward remote jury trials in criminal cases.

Similarly, physical and behavioral modifications to the familiar in-person trial model pose problems of their own. Legitimate concerns prevail regarding the safety of all participants, including judges, attorneys, clients, witnesses, jurors, court reporters, and other court personnel, as well as members of the general public, when broad physical access to courts is reinstated. Many courts remain concerned with their ability to comply with social distancing practices while resuming normal operations. While some courts have taken over convention centers to allow for social distancing, other courts may not have such options.<sup>38</sup>

Further, the financial costs of reopening may be impractical or irrational for some courthouses. Physical and behavioral modifications in the courtroom to limit opportunities for transmission, including reconfiguration of courtrooms to allow for social distancing, mandating the use of face masks, providing trial participants with personal protective equipment, and constructing plexiglass witness boxes are labor- and cost-intensive. Upon recommendation from an epidemiologist, Idaho federal Judge B. Lynn Winmill adjusted his court's air circulation system so that every hour, the courtroom was replenished with 100% fresh

air from the outdoors rather than a mix of fresh air and recycled indoor air.<sup>39</sup> A number of courts are also requiring temperature checks and COVID-19 screening questions for everyone entering the building or courtroom.<sup>40</sup>

Hybrid models, where some aspects of the trial are done remotely, may prove most workable. The first jury trial in Florida since March 2020, for instance, piloted a hybrid approach in July. There, the court conducted jury selection for a civil trial remotely, followed by a carefully orchestrated day in court involving social distancing, masks, and plexiglass.<sup>41</sup> New Jersey state courts released a similar plan, except that the final phase of jury selection will also take place in person.<sup>42</sup>

These solutions, even where practicable, will result in reduced efficiency of the judiciary until the pandemic ends. The in-person portion of the civil jury trial in Miami, for instance, occupied three additional courtrooms in order to maintain social distancing for attorneys and jurors during breaks.<sup>43</sup> The judge overseeing the trial, Judge Beatrice Butchko, later described the immense amount of time and resources poured into the one-day trial, expressing skepticism that this could work with complex or extended cases. Judge Butchko estimated that, with a lot of coordination, her court could maybe handle two small trials a week.<sup>44</sup>

Chief Judge Barbara M.G. Lynn in the Northern District of Texas expressed similar concerns after conducting one of the first in-person criminal jury trials during the pandemic in June 2020. Following the experience, Judge Lynn published a handbook detailing the trial and concluded that while jury trials are possible during the pandemic, the “tangible and intangible costs are very high.”<sup>45</sup> Further, the Northern District of Illinois’ plan allows for only one jury trial to begin on any given day.<sup>46</sup> Modified schedules for judges and limits on the number of concurrent trials will have a lasting impact on the backlog of cases waiting for their day in court.

In light of the current limitations and inefficiencies of jury trials, some courts are encouraging parties to opt for bench trials.<sup>47</sup> As a number of courts are suspending jury trials until 2021 in response to the recent uptick in COVID-19 case numbers, it might make sense in some cases for defense counsel to reevaluate their client’s options for a prompt resolution of their case.

As seen above, the wide-ranging and ongoing changes in the ways in which justice is being administered across state and federal courts resulting from the pandemic call for increased vigilance and preparation on behalf of defense counsel to safeguard their clients’ constitutional rights and provide the most effective representation in these unfamiliar territories. Attorneys participating in socially distant in-person or remote criminal proceedings may want to consider the following non-exhaustive list of issues well in advance of trial:

- Evidence and testimony preservation while awaiting trial
- Challenges with socially distant or virtual voir dire (e.g., ensuring a representative jury, reasons to grant cause challenges, number of peremptory challenges)
- Number of jurors and alternates
- Efficacy and best use of certain exhibits in light of available technology or socially distant courtroom layout (e.g., presentation of physical evidence, adequacy of exhibit review on small laptop screens or iPads, capabilities of trial presentation software, jury’s use of exhibits in deliberation)
- Means and methods for attorney–client communication during trial
- Means, methods, and rules for remote witness testimony
- Issues relating to public access to the trial and exclusion of testifying witnesses
- Communication/oral presentation concerns with social distancing, personal protective equipment, plexiglass and other barriers, or technology glitches (e.g., juror comprehension issues, adequacy of trial record)
- Contingency plans for technology issues
- Trial war room issues (e.g., space unavailable in court building under COVID-19 protocols, virtual trial war room concerns)
- Technology support staff



- Various jury issues (e.g., health concerns mid-trial; if remote, inattentiveness, technology issues)
- Special jury instructions relating to the modified manner of conducting the trial
- Increasing efficiency through joint stipulations
- Applicable safety and health protocols and any corresponding delays
- Advantages and disadvantages of jury trial versus bench trial

## CONCLUSION

Courts continue to grapple with whether resolution of criminal cases through jury trials can indeed wait until resolution of the pandemic, especially when the timeline for the latter remains just as uncertain—if not more so—than in the pandemic’s early days. With each passing moment, the tension between protecting the health and safety of participants in the criminal justice system, including jurors, on the one hand, and honoring the constitutional rights of the accused, on the other hand, only increases. Defense counsel, together with courts and prosecutors, will need to stay vigilant to ensure that measures adopted to accomplish the former do not impair the latter.

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## ENDNOTES

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- 29 Hannah Albarazi, “Jury Trial Of Russian Suspect In LinkedIn Breach Resumes,” *Law360* (July 6, 2020) (discussing *U.S. v. Yevgeniy Aleksandrovich Nikulin*, No. 3:16-cr-00440 (N.D. Cal.)).
- 30 Angela Hall and Jason Rauch, “Lessons From An In-Court Jury Trial During The Pandemic,” *Law360* (Sept. 23, 2020).
- 31 General Order 20-01 Eighth Amendment, *In re: Court Operations Under the Exigent Circumstances Created By Covid-19 and Related Coronavirus* at 2 (N.D. GA Sept. 28, 2020).
- 32 *U.S. v. Donziger*, No. 1:19-cr-00561-LAP-1, ECF No. 202 (E.D. NY Nov. 5, 2020).
- 33 We Don’t Have Time, “Good news in the *Donziger vs Chevron* case—trial postponed again” (Nov. 9, 2020).
- 34 State Court Administrative Office, *Michigan Trial Courts Remote Jury Trial Standards and Recommendations* 1, 13 (July 20, 2020).
- 35 Shari Seidman Diamond et al., “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions,” 100 *J. Crim. L. & Criminology* 869 (2010).
- 36 Defendant Honeywell International Inc.’s Notice of Irregularities at Remote Jury Trial From July 27-29, 2020, *Ricardo Ocampo et al. v. Honeywell International Inc.*, Case No. RG19041182 (July 29, 2020).
- 37 Madison Adler, “Virtual Criminal Jury Trial Getting Texas Test—iPads Included,” *Bloomberg Law* (Aug. 11, 2020); Illinois Circuit Court Remote Jury Guidelines, *Juror Admonishments and Rules of Conduct for Remote Jury Selection – Appendix 4*.
- 38 Pennsylvania’s Fifth Judicial District, for instance, announced its plan to resume jury trials, which includes occupying the courthouse and a nearby convention center in order to provide enough space for social distancing. Jury trials resumed on October 19, 2020. *In re: Amended Fifth Judicial District Emergency Operations Plan*, Order, No. 23 WM 2020 (Pa. Sept. 15, 2020).
- 39 U.S. Courts, *Federal Judges Reinventing the Jury Trial During Pandemic* (Aug. 27, 2020).
- 40 See, e.g., *In re: Amended Fifth Judicial District Emergency Operations Plan*, Order, No. 23 WM 2020 (Pa. Sept. 15, 2020).
- 41 Carolina Balado, “Miami Court Pulls Off Fla.’s First Jury Trial In Pandemic,” *Law360* (July 15, 2020).
- 42 Jeannie O’Sullivan, “Waiting Is Not An Option’: NJ Plans To Restart Jury Trials,” *Law360* (July 22, 2020).
- 43 Carolina Balado, “Miami Court Pulls Off Fla.’s First Jury Trial In Pandemic,” *Law360* (July 15, 2020).
- 44 Daniel Siegal, “Don’t Expect Pandemic Trials To Scale Up, Fla. Judge Says,” *Law360* (Aug. 20, 2020).
- 45 Chief Judge Barbara M. G. Lynn, *Coronavirus Trial Handbook* (June 15, 2020). Judge Lynn further explained: “Conducting the first federal jury trial under coronavirus precautions was a massive undertaking. It involved at least 17 people in the Clerk’s Office, countless other personnel, and weeks of planning. It required an enormous expenditure of resources, including essentially a full day of voir dire, three courtrooms, and countless staff going above and beyond the call of duty.” *Id.* at 11.
- 46 Northern District of Illinois, *Summary of Northern District of Illinois Jury Trial Plan* ¶ 2.
- 47 See, e.g., Seventh Amended General Order 20-0012, *In re: Coronavirus Covid-19 Public Emergency* 1 (N.D. IL Oct. 29, 2020) (“Bench trials may proceed without restriction, and are encouraged, so long as any out-of-state witnesses comply with any relevant quarantine requirement or testify remotely.”)

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