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JURY TRIALS DURING THE COVID-19 PANDEMIC – MYTH OR REALITY

I. INTRODUCTION

Courts across the country are struggling with developing and implementing procedures and protocols to address the docket back-log that has resulted from the COVID-19 pandemic. While many trial judges have now recognized the difficulties inherent in conducting jury trials in the midst of this pandemic, cases continue to be set for trial. While some judges employing this tactic may merely be trying to apply pressure on the parties to resolve cases by settlement, others seem adamant in pushing cases to trial. We believe that many of the processes and protocols put in place in an attempt to mitigate COVID-19 risks can have the unintended consequence of encroaching upon fundamental cornerstones of due process and the right to a fair trial by a randomly selected jury. [1]

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[1] For illustration, the issues and considerations impacting the practical ability to conduct jury trials during this pandemic are primarily analyzed in the context of Alabama law. The statutory and constitutional requirements and limitations addressed, however, generally apply in all state and federal courts.

Although certainly recognizing and appreciating the untenable situation court systems are facing, there are important tenets of a defendant's right to a fair trial by jury that cannot be sacrificed in the name of expedience. The COVID-19 plans courts are utilizing in an attempt to resume jury trials raise significant risks of violating fundamental constitutional and statutory due process safeguards applicable to both the jury selection process and the administration of the trial itself. The potential legal and logistical issues with COVID-19 jury trial plans immediately arise with the threshold requirement of a randomly selected panel of jurors, from a cross-section of the community, and are further implicated at each subsequent step in the proceedings.

The analysis below provides an overview of certain requirements and rights implicit in the right to fair trial that should be evaluated in any case that proceeds to trial during the COVID-19 pandemic, and that we believe must be addressed with any court planning to move forward with a jury trial in the near future. In the expected event that some judges may remain insentient on moving forward with trials despite these obstacles, it is imperative to raise detailed and timely objections to each potentially infirm step in the proceedings in order to preserve these issues for appellate review. The unfortunately reality that courts across the country are having to tread new ground in attempting to move their dockets forward amidst this

global pandemic simply does not permit adjusting the otherwise infrangible constitutional and statutory hallmarks of a fair trial.

II. Fundamental Concerns with Alabama's Effort to Resume Jury Trials.

Although the specific details of COVID-19 juror service protocols remain ever-evolving, the initial appearance is that in Alabama, and several other jurisdictions, jurors are effectively being released from service based only upon their individualized concerns and fears of exposure to the coronavirus. On August 10, 2020, the Alabama State Bar issued a notice advising that jury trials would resume in September. In this notice, the Bar explained:

> A secure, dedicated juror website has been developed so that potential jurors can qualify for jury service in advance of their appearance date, avoiding the requirement of large numbers of jurors gathering on opening day of jury service for qualification and empaneling. *Jurors who are at a heightened risk of contracting COVID-19 due to age or an underlying medical condition may use the online form to request excusal or deference to a later date*.

Id. (emphasis added).

It is the later emphasized portion of the above excerpt that gives rise to a primary basis for concern. The relevant portion of the on-line juror questionnaire we were able to obtain from the Alabama Administrative Office of Courts ("AOC") shows:

The court realizes that this is a very trying time in our nation's history and that many jurors have had their lives disrupted as a result of the COVID-19 pandemic. One of the core foundations of our freedom and democracy is trials by jury.

Can you make the necessary sacrifice to assist the court and serve as a potential juror?

☑ YES

No, and the reason is because: (Uncheck YES)

☐ 1. I am currently positive for the Coronavirus

☐ 2. I am currently ill and I am concerned that I may test positive for the Coronavirus

☐ 3. I am caring for a family member or loved one who has tested positive for the Coronavirus

☐ 4. I am afraid to be in a room with a large group of people

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At the threshold, asking potential jurors if they "Can make the necessary sacrifice to assist the court and serve as a potential juror?" and providing an option of "No, and the reason is because: I am afraid to be in a room with a large group of people" is highly suggestive of a process that would yield a prohibited volunteer jury. To be clear, identifying the questions to potential jurors is just the first piece of the puzzle. The core issue is how a specific Circuit Court Clerk is using the information in excusing or otherwise releasing individuals from their jury service obligations.

The AOC does not make juror qualification or deferral decisions. It merely provides the data it obtains from prospective jurors to the relevant court. The pivotal question, therefore, is whether a given Circuit Clerk's office is categorically releasing all jurors who select "No" option number "4" and indicate a reservation

about participating in a trial during the COVID-19 pandemic. Circuit clerks can access the AOC data from these juror questionnaires and run queries to sort the responding jurors in a spreadsheet format based upon their responses to specific questions. If the clerk then excuses or otherwise releases or excludes all "No" responses, or all number "4" No responses, we posit that a very strong argument exists that the juror selection process fails to comply with the controlling Alabama statutes and is irreparably infirm. The same result would be yielded under the federal statutes and similar statutes in other states. *E.g.,* Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869.

III. COURTS CANNOT EMPLOY A JURY SELECTION PROCESS THAT YIELDS A *DE FACTO* VOLUNTARY JURY.

The Alabama Constitution unequivocally declares: "That the right of trial by jury shall remain inviolate." Art. I, § 11. The Alabama Legislature has the authority to regulate the right of trial by jury, within certain constitutional guideposts, and the courts are charged with the administration of those requirements. *See Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 188 (Ala. 1991). "Alabama has for many years statutorily regulated the procedures for drawing, summoning, selecting, and empaneling both grand and petit juries." *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987). So, the crux of the issue is whether COVID-19 jury trial protocols comply with the pertinent statutory and constitutional requirements. Primarily applicable to the present inquiry are Ala. Code §§ 12-16-55, 12-16-59, 12-16-60, 12-16-62, and

12-16-63, and the broader considerations of due process and equal protection under the United States and Alabama Constitutions.

In § 12-16-55, the Legislature declared: "It is the policy of this state that all persons selected for jury service be selected *at random* from *a fair cross section of the population* of the area served by the court." *Id.* (emphasis added). Our current perception of the Alabama COVID-19 juror selection process gives concern as to both the random selection and cross-section of the community requirements of § 12-16-55.

A. RANDOM SELECTION

At the threshold, "§ 12-16-55, Ala. Code 1975, requires the random selection of jurors." *Ford Motor Co. v. Duckett*, 70 So. 3d 1177, 1184 (Ala. 2011). The Alabama Supreme Court has made clear:

> The random-selection requirement of § 12-16-55, Ala. Code 1975, must necessarily apply to all stages of the jury-selection process…As the Fifth Circuit stated in *Kennedy*: "Nonrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup. Former purity cannot randomize what has become unrandom."

Id. at 1183 n.6 (quoting *United States v. Kennedy,* 548 F.2d 608, 612 (5th Cir. 1977)).

Accordingly, permitting potential jurors to opt out of, or in to, the venire at will, based upon whether they are willing to "make the necessary sacrifice to assist the court and serve as a potential juror" is inconsistent with the mandates of § 12-16-55, as such a process would fail to preserve the random nature of the entire

selection process. As the Court has explained, even if the "original jury pool [is] selected in accordance with this statute," § 12-16-55 is violated if "the trial court reduced the original pool" in a way which is not random. *Id.* at 1181.

The statutes governing juror qualifications, and the release of jurors from their obligation to serve, provide guidelines to, among other things, ensure that the random character of the venire is preserved until jury selection. Initially, the statutory grounds for juror qualification are of specific import here, as § 12-16-62 unequivocally dictates: "No qualified prospective juror is exempt from jury service." *Id.*

Section 12-16-60 establishes the criterion for juror qualification:

> **(a)** A prospective juror is qualified to serve on a jury if the juror is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment and also:
>
> **(1)** Is a citizen of the United States, has been a resident of the county for more than 12 months and is over the age of 19 years;
>
> **(2)** Is able to read, speak, understand and follow instructions given by a judge in the English language;
>
> **(3)** Is capable by reason of physical and mental ability to render satisfactory jury service, and is not afflicted with any permanent disease or physical weakness whereby the juror is unfit to discharge the duties of a juror;
>
> **(4)** Has not lost the right to vote by conviction for any offense involving moral turpitude.

§ 12-16-60(a).

No criteria delineated in § 12-16-60(a) permits a juror to be deemed unqualified for jury service based upon individualized susceptibility, concern, fear or risk regarding the potential of being exposed to, or contracting, any disease during jury service. A juror's subjective apprehension that jury service could increase their risk of exposure to COVID-19 is simply not equivalent to being actually "afflicted with a[] permanent disease or physical weakness whereby the juror is unfit to discharge the duties of a juror." § 12-16-60(a)(3). Accordingly, § 12-16-62 precludes a juror from being deemed exempt from jury duty based upon a fear of COVID-19 exposure.

The Alabama Legislature also prescribed the information that is to be solicited in the juror qualification form, which logically mirrors the statutory requirements for juror qualification:

> **(b)** The juror qualification form shall be prepared by the Supreme Court of Alabama and shall elicit the name, age and address of the prospective juror, and whether or not the prospective juror:
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> **(1)** Is a citizen of the United States;
>
> **(2)** Has been a resident of the county for 12 months;
>
> **(3)** Is able to read, speak, understand and follow instructions given by a judge in the English language;
>
> **(4)** Has lost the right to vote by conviction for any offense involving moral turpitude.

§ 12-16-59(b).

Although § 12-16-59 does not explicitly state that its statutory requirements for the content of juror qualification form are exclusive, it equally does not provide a permissive clause authorizing that the form obtain such other information as the Court deems necessary or appropriate. If the circuit clerk releasing jurors from jury service on the basis of their response to the above excerpt from the on-line juror qualification form, the juror qualification and qualification form statues, § 12-16-59; § 12-16-60, further indicate that this practice is contrary to statutory prescribed juror selection process. COVID-19 concerns are not within the scope of the statutory prescribed grounds germane to juror qualification – no "prospective juror" that satisfies § 12-16-60's qualification criteria "is exempt from jury service." § 12-16-62.

Moreover, releasing a perspective juror from service based on responses to the juror qualification form, alone, would not be the appropriate mechanism to conduct the inquiry required to release a statutorily qualified juror. *See Colley v. State*, 436 So. 2d 11, 14 (Ala. Crim. App. 1983); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946); § 12-16-62. Instead, § 12-16-63 delineates the express grounds upon which a juror may permissibly be excused from jury service:

> **(b)** A person who is not disqualified for jury service may apply to be excused from jury service by the court only upon a showing of undue or extreme physical or financial hardship, a mental or physical condition that incapacitates the person, or public necessity, for a period of up to 24 months, at the conclusion of which the person may be

directed to reappear for jury service in accordance with the court's direction.

> **(1)** A person asking to be excused based on undue or extreme physical or financial hardship shall take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty. Documentation of such hardship shall be provided to the court upon request.
>
> **(2)** For purposes of this article, "undue or extreme physical or financial hardship" is limited to any of the following circumstances in which an individual would:
>
> > **a.** Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury.
> >
> > **b.** Incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the principal means of support.
> >
> > **c.** Suffer physical hardship that would result in illness or disease.

§ 12-16-63(b).

Although trial courts are generally afforded great discretion in excusing a juror from service, no statutory ground upon which a juror may permissibly be excused squarely applies to a juror's subjective concern or fear of an increased risk of exposure to COVID-19. Moreover, if the juror is being released based upon a response in the juror qualification form, neither the judge or the circuit clerk is exercising any discretion or actually making the required individualized

determination that a specific juror is entitled to excusal under § 12-16-63. "[I]t is the duty of the court to hear all the excuses and himself pass upon the same." *Windsor v. State*, 683 So. 2d 1021, 1026 (Ala. 1994); *See* § 12-16-145 (authorizing an alternative plan with delegation of the judge's authority to excuse jurors to other court officials).

The *Duckett* court made clear that "§ 12-16-63(b)…sets forth the reasons for which a potential juror may be excused from jury service." 70 So. 3d at 1184. The undue or extreme physical hardship requirement is generally limited to circumstances where, because of a preexisting malady, the physical requirements of jury service "*would result in* illness or disease." § 12-16-63(b)(2)(c) (emphasis added).[2] Although there is no appellate decision directly addressing the issue, it would require an extremely strained reading of this provision to encompass subjective and speculative concerns that jury service *could result in* contracting COVID-19. Additionally, although certain demographics have shown to have a higher risk of complications, or an increased susceptibility to a more serious outcome, it would seem that the risk of contracting COVID-19 would be the same

[2] *See, e.g., McNair v. State*, 653 So. 2d 320, 324-25 (Ala. Crim. App. 1992) (Affirming excusal of one juror that "was a diabetic, who sometimes took three shots a day and was on a strict diet," and another that "had been bitten by a snake 'a couple of years back,' and her feet would sometimes swell so bad while she was sitting that she could not walk."); *Turner v. State*, 924 So. 2d 737, 753 (Ala. Crim. App. 2002) ("[P]rospective juror P.S. was excused because he indicated that he had a nervous condition that prevented him from sitting for long periods and that he wanted to be excused from jury service. Prospective juror J.D. notified the court that he was a diabetic and that he was taking insulin for his diabetes and that he needed to eat at regular intervals.").

for all jurors. If the court were to conclude this provision applied, then it would at least suggest a high probability that jury service "would result in illness or disease" for all jurors, and excusing potential jurors on that basis would not comply with the requirement that courts "use…objective criteria for determination of disqualifications, excuses, exemptions, and exclusions." *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984). For these reasons, we cannot surmise that this provision applies to the present circumstance.

B. Prohibition of Juror Opt-In/Opt-Out Procedures.

Initially, to the extent that courts are categorically releasing all prospective jurors with responses to the AOC's on-line juror qualification questionnaire that indicate they are not "willing" to serve because of subjective COVID-19 related fears or concerns, as we perceive to be the case, such a process for excusing jurors would directly conflict with the governing statutes, and improperly convert a potential ground for excusal to a blanket juror qualification criterion – categorically violating § 12-16-62's mandate that: "No qualified prospective juror is exempt from jury service." *Id. See* § 12-16-63(b); § 12-16-59; § 12-16-60.

Moreover, a process that permits venire members to, in practice and application, unilaterally opt-out of jury service based upon their concerns for exposure to the coronavirus is facially inconsistent with § 12-16-55's requirement that randomness be maintained through all stages of the jury-selection process.

Specifically, allowing a juror to self-elect not to serve based upon subjective concerns and motivations would seem analytically indistinguishable from the volunteer jury process the Alabama Supreme Court expressly condemned in *Ford Motor Co. v. Duckett*, 70 So. 3d 1177 (Ala. 2011). In *Duckett,* the trial judge addressed the entire venire and asked that any jurors who were willing to serve for a 3-to-4 week trial raise their hands – the inverse being that any juror who did not wish to participate in an extended trial not raise their hand. A group of jurors raised their hands and the trial judge directed the circuit clerk to take down their names. This group of jurors was later brought into the courtroom for *voir dire* by the parties and jury selection. *Id.* at 1180. The Court held that Ford was "entitled to a new trial on the ground that the trial court violated the statutory requirement of random jury selection by asking for volunteers to serve on the jury." 70 So. 3d at 1180. Notably, the Court reached this conclusion even though there was no contention that the jury ultimately empaneled did not represent a fair cross-section of the community. *Id.* at 1181 n. 5.

The practical effect of the volunteer process in *Duckett* was that any prospective juror who did not want to serve during an extended trial, did not raise their hand and was summarily excused. Here, if the clerk is excusing all prospective jurors who indicate that they are not are not comfortable serving on a jury during the COVID-19 pandemic, the ultimate result is indistinguishable – a *de facto* volunteer

jury. There simply is no material distinction between the population of the venire with jurors that are willing to serve during a 3-4 week trial and those that are willing to "make the necessary sacrifice to assist the court and serve as a potential juror." Accordingly, a system categorically eliminating all jurors that provide a negative response to that inquiry should presumably be deemed incompetent on the same basis: "*Providing prospective jurors with complete discretion whether or not to serve negates the statutory mandate of random selection*." *Duckett*, 70 So. 3d at 1183 (quoting *Kennedy,* 548 F.2d at 612) (emphasis added). *See* § 12-16-55.

As the *Duckett* Court made clear, "allowing people to decide whether they wish to perform a particular task is quite the opposite of randomly selecting." *Id.* at 1184 (quoting *Kennedy,* 548 F.2d at 611). The ultimate effect of allowing potential jurors to essentially "opt-out" of jury service based upon their individual and subjective concerns about the risks associated with COVID-19 effectively "introduce[s] into the jury selection process a substantial variable, not contemplated by the Alabama jury statutes' few, narrow categories of qualifications, exemptions, and excuses." *Id. See* § 12-16-60(a); § 12-16-62; § 12-16-63(b). "***None of these statutory provisions permits juror self-selection based upon the juror's willingness to serve***." *Id.* at 1185 (emphasis added); *United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982) ("selection of volunteers introduces a subjective criterion for grand jury service not authorized by the Act, and…the selection of volunteers results

in a non-random selection process in violation of the Congressional intent that random selection be preserved throughout the entire selection process").

The conclusion that allowing potential jurors to freely opt-out of service violates § 12-16-55's random selection requirement is further supported by the United States District Court for the Middle District of Alabama's opinion in *United States v. Clay*, 159 F. Supp. 2d 1357 (M.D. Ala. 2001). Although decided under the Federal Jury Selection and Service Act, as recognized in *Duckett* there is no substantive difference § 12-16-55's random selection requirement, and the JSSA's requirement that juries shall be "selected at random from a fair cross section of the community," 28 U.S.C. § 1861. *See Duckett,* 70 So. 3d at 1183-84. In light of that mandate, the court reasoned that "[w]hen the JSSA's goals of random selection of juror names or the use of objective criteria for determination of disqualifications, excuses, exemptions, or exclusions are frustrated, the court may find that a substantial violation of the act has taken place." *Id.* at 1365.

In *Clay,* the defendant challenged, among other procedures, the court clerk's "custom of almost always granting deferrals to anyone…who claimed that jury service would be unduly harsh or inconvenient." *Id.* at 1364. Although the court did not hold that this infirmity, alone, rose to the level of a substantial violation of the JSSA, it made clear that it did violate the random selection requirement. "Permitting jurors to volunteer to serve, or not to serve, introduces an element of non-randomness

into the selection of jurors." *Id.* at 1367. "[T]hen, when the clerk almost always granted deferrals to jurors, essentially permitting selected jurors to opt in or out of a trial term at will, the practice introduced a non-random element into the jury-selection process." *Id.* at 1367-68. As did the Court in *Duckett,* the *Clay* court likewise cited with approval the Fifth Circuit's explanation in *Kennedy* that "the introduction of predilections of prospective jurors affects the random nature of the selection process cannot be gainsaid. Surely a district would be in substantial violation of the statute JSSA if it selected all its jurors by randomly drawing names from the qualified wheel and allowing those selected to opt in or out at will." *Id.* (quoting *Kennedy,* 548 F.2d at 612).

Under this same analysis from *Kennedy,* adopted by the Alabama Supreme Court in *Duckett*: "Surely [an Alabama Circuit Court] would be in substantial violation of [§ 12-16-55] if it selected all its jurors by randomly drawing names from the qualified wheel and allowing those selected to opt in or out at will." *See Duckett,* 70 So. 3d at 1183-84. This, however, would be the practical effect of a system that allowed jurors to defer or otherwise opt-out of jury service based upon subjective COVID-19 concerns. Any attempt to distinguish a system allowing potential jurors to "opt-in" to a jury panel, from one that allows jurors to "opt-out" of the panel, is in substance merely semantics. *See Kennedy,* 548 F.2d at 612. In either event, the

court is improperly authorizing "juror self-selection based upon the juror's willingness to serve." *Duckett,* 70 So. 3d at 1185.

If the COVID-19 jury selection procedure results in the circuit clerk "always grant[ing] deferrals to jurors" claiming COVID-19 concerns, the practical effect is a prohibited volunteer jury practice "essentially permitting selected jurors to opt in or out of a trial term at will," that necessarily "introduce[s] a non-random element into the jury-selection process." *Clay*, 159 F. Supp. 2d at 1367-68. Consequently, artificially limiting the pool of potential jurors to those who are willing to serve during the COVID-19 pandemic is no less "a violation of § 12-16-55 that affect[s] [a defendant's] right to a randomly selected jury." *Duckett,* 70 So. 3d at 1186. Simply put, categorically excusing jurors who elect not to serve because of COVID-19, or any other, concerns "introduces a subjective criterion for service not authorized by the Alabama jury statutes, and introduces a significant element of nonrandomization into the selection process that not only technically violates, but substantially departs from § 12-16-55's requirements." *Id.* at 1185. "It seems self-evident that allowing people to decide whether they wish to perform a particular task is quite the opposite of randomly selecting those who, unless within narrow and objectively determined categories of exemptions and excuses, must perform the task." *Kennedy*, 548 F.2d at 611.

C. FAIR CROSS-SECTION OF THE COMMUNITY

Whether a juror selection process violates § 12-16-55's fair cross-section of the community requirement is a more complicated inquiry, that likely cannot be fully assessed until the actual makeup of the venire is known. Nevertheless, it bears attention because the failure to timely object on this ground is waived, once the jury is seated.

A litigant's right to the selection of a jury from a representative cross-section of the community is an essential component of the right to a fair trial by jury. *Ex parte Dobyne*, 672 So. 2d 1354, 1356 (Ala. 1995). In order to establish a prima facie violation of the fair-cross-section requirement, it must be shown:

> (1) that the persons alleged to have been excluded constitute a distinctive group in the community; (2) that the representation of the group on venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process

Id.

Here, the COVID-19 jury selection process would not necessarily facially violate fair cross-section requirement. Specifically, the perspective jurors in the ultimately underrepresented classes are not systematically excluded from the jury selection process as they would necessarily have been included in the original jury pool, and their absence from the venire is at their election. *See Dobyne*, 672 So. 2d at 1357. Nevertheless, it creates a circumstance with a high propensity to yield an

underrepresentation of several discernable classes of otherwise qualified jurors, including those above a certain age, with school age children, and those with certain health conditions. There is certainly an argument that the logic of the Alabama Supreme Court's determination that "[t]he random-selection requirement of § 12-16-55[] must necessarily apply to all stages of the jury-selection process," should apply with equal force to the § 12-16-55's fair cross-section requirement. *Duckett,* 70 So. 3d at 1183 n.6. By analogy, even if the initial venire was properly drawn from a fair cross-section of the community, implementing a process that disproportionately reduces the representation of certain ascertainable classes in the venire from which the parties must ultimately obtain their jurors circumvents the intent of that statutory requirement. *See id.* at 1183-84. In fact, this very concern was expressly raised by a federal district court in California. "[T]he court is aware that in some other districts where a jury trial has been conducted [during the COVID-19 pandemic] those jurors who expressed concern over the coronavirus or who were in a high-risk group were excused for cause. This court has serious doubts that allowing such excuses would produce a fairly constituted jury representing a cross-section of the community." *United States v. Sheikh*, 2020 U.S. Dist. LEXIS 188189, at *6 (E.D. Cal. Oct. 9, 2020). In short: "What cannot be done directly, is also prohibited to be done indirectly." *Ex parte Hardy*, 68 Ala. 303, 322 (1880); *Maring-Crawford Motor Co. v. Smith*, 233 So. 2d 484, 493-94 (Ala. 1970); *Magee v. Boyd*, 175 So. 3d 79,

127 (Ala. 2015); *Goodyear Tire & Rubber Co. v. J. M. Tull Metals Co.*, 629 So. 2d 633, 635 (Ala. 1993).

Preserving a fair cross-section objection would most likely be presented in the nature of asserting an "as applied" Equal Protection and Due Process violation. "The doctrine of equal protection of the laws requires that the guarantee of trial by an impartial jury not be illusory." *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987). "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel*, 328 U.S. at 220. "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." *Id.* Nevertheless, a system that results in the "blanket exclusion" of jurors with an identifiable demographic characteristic "however well-intentioned and however justified…, must be counted among those tendencies which undermine and weaken the institution of jury trial. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." *Id.* at 224-25. *See United States v. Davis*, 2020 U.S. Dist. LEXIS 182504, at *6 (D. Colo. Sep. 18, 2020) ("The court will experience difficulty,

due to various public health directives and general health concerns, obtaining an adequate cross-section of the community for jury selection.”).

IV. POTENTIAL IMPAIRMENT OF RIGHTS DURING TRIAL

In addition to the issues with the selection of a jury addressed above, many of the trial protocols courts are imposing implicate rights to cross-examination under the Confrontation Clause. For instance, several courts have entered orders requiring that all trial participants, including witnesses, must wear facial coverings while in the courtroom, limiting the duration of direct and cross-examination of witnesses, excluding all non-party witnesses, including experts, from the courtroom, or even the courthouse, when not on the stand, restricting the use of paper exhibits in examination and cross-examination of witnesses, allowing witnesses to present testimony remotely, for instance via ZOOM, and/or, directly or indirectly, limiting the number of attorneys a party may have present in the courtroom during trial. While at first blush such limitations may appear to be fairly reasonable measures to mitigate COVID-19 risks, in application they can result in the impairment of a defendant’s rights to a fair trial.

Initially, a court cannot impair a defendant’s right to confront the witnesses presented against it, including through a thorough and sifting face-to-face cross examination. *See Coy v. Iowa*, 487 U.S. 1012, 1016-20, (1988); *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The Alabama Legislature has unequivocally mandated

that: “The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him.” Ala. Code. § 12-21-137. In fact, the Alabama Supreme Court has emphasized that “this privilege or, more properly, right [to cross-examination] inheres in the confrontation clauses of the State and Federal constitutions” *Buckelew v. State,* 265 So.2d 195, 198 (Ala.Crim.App. 1972). “The right of cross-examination is a fundamental right granted by Article 1, § 6, of the Constitution of Alabama 1901…The right of cross-examination is not limited to criminal cases [but] has been extended to civil cases.” *Case v. Case,* 627 So.2d 980, 984 (Ala.Civ.App. 1993).

The bedrock requirement that a defendant’s opportunity to a face-to-face cross-examination of its accuser’s witnesses not be infringed is deeply entrenched in our judicial system. *See California v. Green*, 399 U.S. 149, 173-74 (1970) (“the Confrontation Clause comes to us on faded parchment”). Accordingly, it is highly doubtful that placing arbitrary time restrictions on cross-examination would withstand appellate review; if the objection to such limitations is properly preserved during trial. “Any limitation on that fundamental right will be closely scrutinized by the appellate court.” *Hembree v. City of Birmingham,* 381 So.2d 664, 666 (Ala. Crim.App. 1980); *Riley v. City of Huntsville,* 379 So.2d 557, 560 (Ala. 1980) (“Every party has the right to a ‘thorough and sifting’ cross-examination of the opponent’s witnesses…Cross-examination should not be so limited as to lose its

benefit to the questioner."); Ala.R.Evid. 611(b) ("The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness.").

Likewise, requiring or permitting witnesses to conceal the majority of their face with a mask while testifying also has Confrontation Clause implications. "The opportunity to cross-examine a witness is of paramount importance and has been widely recognized. The test of cross-examination provides the most powerful means of ascertaining the circumstances which affect the trustworthiness of the witness's assertion." *Hunt v. Hunt,* 282 So.2d 689, 690-91 (Ala.Civ.App. 1973). The right to cross-examination, therefore, is intended to ensure that a defendant "has 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." *Mattox v. United States*, 156 U.S. 237, 259 (1895).

Although, when weighed against the speedy trial requirements applicable to criminal cases, some courts have justified allowing witnesses to testify while wearing a mask,[3] others have indicated that doing so implicates serious

[3] *E.g, United States v. Crittenden*, 2020 U.S. Dist. LEXIS 151950, at *20 (M.D. Ga. Aug. 21, 2020) ("The Court finds that being able to see a witness's nose and mouth is not essential to testing the reliability of the testimony.").

constitutional concerns. A federal district court in New Mexico recently entered an order requiring "testifying witnesses to replace their cloth face masks with clear face shields" based upon its recognition of the importance of the jury to observe the witnesses' facial expressions in judging the credibility of their testimony - "An unimpeded opportunity to cross-examine adverse witnesses face-to-face and in full view of the jury is core to the" right of cross-examination. *United States v. Robertson*, 2020 U.S. Dist. LEXIS 212449, at *3-5 (D.N.M. Nov. 13, 2020).

A federal district court in New York reached the same conclusion: "effective credibility evaluation (and perhaps the Confrontation Clause) requires that witnesses testify without traditional masks." *United States v. Cohn*, 2020 U.S. Dist. LEXIS 155287, at *10 (E.D.N.Y. Aug. 26, 2020). "Trial requisites are, in some instances, contraindicated by current knowledge of the disease and the mechanisms by which it spreads, which has been developing and changing over the past months." *Id.* at *10-11. "Current thinking suggests that the number of individuals involved in a gathering and the length of the interaction serve as multipliers of infection risk, while interpersonal distance between individuals and the use of personal protective equipment can help reduce that risk. Thus, safeguards appropriate for more common interactions — like a relatively quick retail transaction — may prove inadequate for a lengthy trial. And testimony by witnesses without masks for hours at a time — the primary activity at a trial — presents unique challenges." *Id.* at *11. *See United*

States v. Fortson, 2020 U.S. Dist. LEXIS 127148, at *6-7 (M.D. Ala. July 20, 2020) ("The court planned to mandate all trial participants, *except for the testifying witness*, to wear face masks.").

Given that the right to a Speedy Trial is not implicated in a civil case, there is no balancing of that right against the right of cross-examination that could be relied upon to justify constraints that would not be permissible in the absence of the COVID-19 pandemic. Accordingly, we perceive that the logic of the courts concluding that an effective credibility evaluation requires that witnesses testify without masks covering their faces must remain unabridged in a civil case, as there is no contravening consideration that must be weighed against the right to confrontation and cross-examination. *See* Ala. Code. § 12-21-137.

A defendant's right to cross-examine the witnesses presented against it would likewise be undermined if the Court were to permit a plaintiff's witnesses, especially expert witnesses, to present testimony remotely – such as via ZOOM or other video conferencing media.[4] In addition to being contrary to the face-to-face requirement,

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[4] *See Commonwealth v. Clark*, 2020 Va. Cir. LEXIS 58, at *11-12 (Orange County Cir. Ct. Apr. 27, 2020) ("This court has used ZOOM for certain uncontested hearings. In a jury trial, however, having a witness potentially testify by video presents confrontation clause issues…There are only very limited and narrow exceptions to the direct right of confrontation."); *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (Finding Confrontation Clause violated by allowing "Australian witnesses to testify by two-way video conference broadcast on a television monitor at the trial"); *McDonald v. Crews*, 2014 U.S. Dist. LEXIS 43382, at *3-4 (N.D. Fla. Mar. 31, 2014) (Face-to-face requirement of the Confrontation Clause "ordinarily means that the witnesses must testify live in the courtroom with the defendant present. The framers probably gave little thought to video transmission of testimony from a remote location, but video transmission is now

such remote testimony also implicates a defendant's ability to effectively impeach the witness through the use of exhibits. Raising this objection can be specifically impactful in expert intensive cases, where many of plaintiff's experts are frequently from other states and travel bands and restrictions to traveling to and from Alabama may mandate certain quarantine protocols upon the witness returning to his or her home state. Thus, this issue may have the practical effect of leaving plaintiffs with no option other than to concede that the trial cannot go forward under current pandemic restrictions, as they often cannot satisfy their burden of proof without the testimony of out-of-state expert witnesses.

A defendant's constitutional right to counsel of its choosing is an additional issue that can be implicated by a court's trial protocols. While some courts have issued orders expressly prescribing the number of attorneys each party may have present in the courtroom at any one time, others effectively yield the same result through implementing social distancing requirements. The courtroom obviously only has finite space, and social distancing requirements, such as mandating that all parties and their counsel remain 6 feet away from all other parties, will necessarily

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feasible. Even so, unless the defendant consents, the Confrontation Clause prohibits the practice.").

have the practical effect of limiting the number of attorneys a party can have present in the courtroom.[5]

"Section 10 of the [Alabama] Constitution, part of the Bill of Rights, guarantees the right to be heard by counsel in civil cases." *State Realty Co. v. Ligon*, 119 So. 672, 673 (Ala. 1929). The right to representation by counsel of the parties choosing includes the right to be represented by multiple attorneys, each delegated with their own responsibilities and scope of representation, in the manner the client determines are in its best interest. *Id.* Accordingly, "this right cannot be restricted to representation by a single individual. The Legislature and the court itself may of course impose reasonable regulations upon the cumulative functioning of counsel in the conduct of a trial, but cannot properly suppress the timely and appropriate action of any individual counsel acting alone--without duplication--in the particular matter." *McKinley v. Campbell*, 115 So. 98, 99 (Ala. 1927); *Ex parte McCain*, 804 So. 2d 186, 189 (Ala. 2001) ("The right to appear through privately retained counsel in a civil matter is embedded in Article I, § 10, Ala. Constitution, 1901.").

Simply put, the Court cannot impose any limitation on the number of attorneys a defendant is permitted to have in the courtroom during trial, directly or indirectly. Ala. Const. art. I, § 10. Whether directly capping the number of attorneys a party may have in the courtroom or by effectively limiting the space available to each

[5] A 6' social distancing halo is +/- 113 ft^2.

party, the court is placing a material limitation on the parties' rights to representation of their choosing, and an appropriate objection should be made prior to trial commencing. "[A] party has the right to employ more than one counsel upon the trial of an issue of fact." *Ligon*, 119 So. at 673. This is "a matter of right, which no court can take away from him unless the privilege is abused." *Id.*

V. ADDITIONAL PRACTICAL CONCERNS RECOGNIZED BY COURTS

Courts across the country have identified practical and legal impediments to conducting jury trials during this global pandemic. The common theme appears to be a focus on the unprecedented scope of this pandemic and the inherent conflicts between CDC and State Health Department guidelines, and the logistical and constitutional requirements of conducting a trial by jury. Below are excerpts from representative orders and opinions illustrating a number of the issues courts have consistently focused on in their analysis. The practical problems and constitutional concerns identified are equally applicable in any jurisdiction, and given that all judges are struggling with the same issues, we anticipate that most judges would welcome guidance from other courts and find their logic persuasive.

***United States v. Fortson*, 2020 U.S. Dist. LEXIS 127148 (M.D. Ala. July 20, 2020) (J. Watkins):**

> [I]t is continuing concerns with a focus on jurors…that convince the undersigned under a totality of circumstances that an ends-of-justice continuance is justified.

Id. at *9.

The court takes seriously its special responsibility to protect trial participants, members of the public, and, particularly, the members of the jury, who were to be called upon during a national crisis to carry on one of the nation's most sacred civic duties.

Id. at *6-7.

The nation and this judicial district have been greatly impacted by the ongoing COVID-19 pandemic. The health and safety of trial participants and the public are interests of the highest order for this court. The President of the United States has declared a national emergency. General Orders have been entered in response to the outbreak of Coronavirus Disease of 2019 (COVID-19) within the Middle District of Alabama, and to the rapidly evolving threat to health and safety posed by the outbreak.

Id. at *3-4.

COVID-19 can cause severe illness, and it poses particularly high risks for older adults and people of any age who have serious underlying medical conditions.

Id. at * 5.

Both the State of Alabama and the Centers for Disease Control and Prevention recommend that individuals stay at home as much as possible.

Id. at *6.

[T]he ends of justice served by continuing the trial outweigh the best interest of the public and Defendant in a speedy trial…Ensuring that the prospective jurors and members of the petit jury can focus on the trial presentation with as few distractions as possible is necessary to prevent a miscarriage of justice.

Id. at *9-10.

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***Commonwealth v. Vila*, 104 Va. Cir. 389 (Fairfax County Cir. Ct. March 30, 2020):**

> The Court finds that it cannot conduct a jury trial in this case on the schedule previously set without endangering the health and safety of potential jurors, actual jurors, actual alternative jurors, prosecutors, defense counsel, the defendant, deputy sheriffs, clerks, court reporters, victim service personnel, interpreters (as necessary), other court personnel, witnesses — and all those persons with whom these individuals are in close contact, such as their families.
>
> *Id.* at 394.
>
> The Court finds that *consistent* "social distancing" in the context of a jury trial is not possible. Beginning with the pool of jurors who are summoned for jury duty, the jurors must first get to Court. For many jurors, especially in a large county like Fairfax. this will require travel on buses, or the Metro, or travel in cabs, or by Uber or Lyft. Some jurors must use a combination of buses, Metro, and cars, with each means of transport presenting another opportunity for viral exposure. They then enter the courthouse and go through a screening process, which may necessitate close inspection by a security officer. They then check in with the jury clerk and settle down for what may be a multi-hour wait. They are subsequently led to the courtroom by a bailiff and seated in the jury box. In the close confines of a courtroom, it will not be possible to keep jurors consistently six feet apart from each other, or from the deputy sheriff, or from the witnesses who are approaching the witness chair, and from each other. The jury box itself is a confined space with 14 seats. Placing each juror six feet away from every other juror, and six feet away from everyone else in the courtroom, is a practical impossibility, even if the Court added an additional row of jury seating in front of the jury box.
>
> Further, placing jurors somewhere other than the jury box, perhaps spread out throughout the courtroom, will present problems of its own. These problems fit into six primary categories. First, there is the problem of jurors sitting 30, 40, 50 (or more) feet from the witness and being able to hear the witnesses, attorneys and the Court, even with the use of courtroom amplification technology. Second, there is the

problem of jurors spread out through the courtroom and being able to see the exhibits. There are two ways this can be mitigated, but both are problematic. One way is to hand exhibits from juror to juror, which defeats the goal of "social distancing." The other way is to publish the exhibits on the large screens in the courtroom. While this may be suitable for some exhibits, it may not be at all suitable given the nature and sensitivity of some of the exhibits, and privacy concerns, even with the limitations imposed on courtroom attendance. In addition, even with the Court's large screens, it is often not possible to see pertinent details. Third, having jurors seated throughout the courtroom presents security issues, including ensuring no inappropriate or inadvertent communication with jurors by other individuals seated in the gallery or entering the courtroom, and also ensuring that jurors do not inadvertently see or hear inadmissible material. Fourth, normal juror seating permits counsel and the Defendant to be looking at the jury whenever they wish and vice versa; in contrast, seating jurors throughout the courtroom means that counsel will be questioning witnesses with their backs to the jury and that the Defendant will be facing away from the jury as well. Fifth, what do you do with the jury during trial recesses and breaks? They cannot remain in the courtroom and they cannot be in the jury room, due to its limited size. Perhaps jurors could be returned to the jury assembly room, if there are not other jurors or other juries in the room at the time, but that will require transporting the jurors through the hallway, maintaining proper separation, and ensuring no inadvertent or inappropriate contact with witnesses or other individuals. Sixth, we tell all jurors at the beginning of *voir dire* that if for privacy reasons they wish to give an answer at the bench, they may do so. Typically, that leads to a close gathering at the bench involving the judge, court reporter, attorneys, the Defendant (if he or she chooses to attend), and the juror, with everyone within a foot or two of each other.

These various "social distancing" problems do not end at the moment the matter is submitted to the jury for deliberations. Rather, if anything, they multiply…jurors typically and frequently need to be in close proximity to each other to examine documents and tangible evidence, which will not be possible if the jurors are practicing "social distancing." [And,] can a jury meaningfully deliberate when every juror is at least six feet apart from every other juror, meaning potentially some jurors will be multiple yards away from other jurors…jurors

examining evidence will inevitably and unavoidably be handing or passing the evidence to each other, which will also defeat "social distancing."

And this is just the jury. Witnesses…subpoenaed to Court to testify at trial will face similar "social distancing" problems…Prosecutors and defense attorneys will face similar and constant difficulties in maintain social distancing, as well as bailiffs handing exhibits to witnesses, to the Court, to the clerks. Something as routine as using an exhibit at trial typically involves an attorney handing the exhibit to the bailiff who hands it to the clerk, who marks it with an exhibit sticker, returns it to the bailiff, who returns it to the attorney or to the witness, and then ultimately retrieves it and hands it back to the clerk. Each of these contacts is at odds with "social distancing." And then there is the issue of bench conferences during the trial, which places counsel, the Defendant, the court reporter and the Court in close proximity to each other.

In short, while the Court can impose some periods of "social distancing" — for example, in the jury assembly room, the Court cannot impose it consistently, effectively and throughout the proceedings.

Id. at 395-97.

Further, proximity to potentially-affected individuals is not the only concern. As the CDC states: "Current evidence suggests that novel coronavirus may remain viable for hours to days on surfaces made from a variety of materials." Thus, the CDC also provides recommendations for cleaning and disinfecting "frequently touched surfaces (for example: tables, doorknobs, light switches, handles, desks, toilets, faucets, sinks.)" In a jury trial, frequently touched surfaces would include tables, railings, the witness box, screens for the exhibition of exhibits (some of which actually are intended to be touched to identify points of significance), as well as the restrooms, light switches, doors, etc. Moreover, in a jury trial, it is anticipated that jurors will handle exhibits, and pass the exhibits to each other. Some of the exhibits will be papers but many will be tangible objects whose surfaces may present the same types of concerns that animated the CDC to issue these warnings.

A further concern is the challenge of selecting a jury that represents a fair cross-section of the community, in light of the need to excuse all jurors who are self-quarantined, infected with the coronavirus, otherwise ill, taking care of an ill relative, taking care of children under the age of 16, or otherwise in a "high-risk" category…According to the CDC, high risk individuals include: "Older adults, 65 years and older"; "People with chronic lung disease or moderate to severe asthma"; "People who have serious heart conditions"; "People who are immunocompromised including cancer treatment"; "People of any age with severe obesity"; People with "diabetes, renal failure or liver disease"; and, CDC suggests, possibly "People who are pregnant." In addition, it is anticipated that even jurors who are young and otherwise healthy will seek exemptions from jury duty knowing that it would put them in close proximity to other jurors and place them, and others, at risk. Moreover, the same issues impacting jurors will inevitably impact witnesses as well.

A further significant consideration is juror distraction for those jurors who ultimately are selected to serve on a jury. The Court has grave reservations as to whether jurors will be able to focus on the critical task before them, given the consuming and ongoing concerns about the pandemic, given the fact that many jurors will have older school children at home who are unattended, given jurors' inevitable concerns about elderly relatives or family members or friends or co-workers at high risk, given the economic difficulties associated with the pandemic, and given the jurors' own anxiety about potential virus exposure in and about the courtroom, the jury room, the restrooms, and the courthouse itself.

As to technology, it has been an invaluable help in this emergency for the conduct of bond motions and arraignments. But in a jury trial, or even a bench trial, presenting a witness by video may present confrontation clause issues.

Id. at 397.

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***United States v. Sheikh*, 2020 U.S. Dist. LEXIS 188189 (E.D. Cal. Oct. 9, 2020):**

[T]here are…compelling reasons why this court would not attempt to empanel a jury under the current circumstances.

Id. at * 2.

[F]rom a practical and moral perspective this court has an obligation to safeguard the health and safety of the citizens it orders by force of law to come to our courthouse, and not to subject those citizens to unnecessary risk of serious illness or death. If the State of California has determined it is unsafe to recreate in a bowling alley for a few hours, even with masks and social distancing, how can this court say it is any safer, to sit for several days or weeks in one of our courtrooms?

Id. at *4.

Even if this court were to satisfy itself that it was able to devise a set of safeguards (such as masks, social distancing, plexiglass separators, and the use of multiple courtrooms and other areas of the courthouse) to adequately ensure the safety of the participants in the trial, it would be another thing to persuade those participants that they are indeed safe. After months of being told how dangerous it is to be in a room with strangers, particularly for an extended period of time, how likely are people to believe it has suddenly become safe just because a federal judge has told them so?

Id. at *4-5

Finally, if the court were to forge ahead and attempt a jury trial in this case at the present time, it is not at all satisfied that the result would pass constitutional muster, let alone satisfy the concerns of both the government and the defense. Anecdotally, the court is aware that in some other districts where a jury trial has been conducted those jurors who expressed concern over the coronavirus or who were in a high-risk group were excused for cause. This court has serious doubts that allowing such excuses would produce a fairly constituted jury representing a cross-section of the community. Further, lawyers have expressed concerns about the ability to effectively evaluate prospective jurors, assess the credibility of witnesses, or communicate with the jury if the participants are wearing masks. The court shares those concerns.

Id. at *6.

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***Commonwealth v. Clark*, 2020 Va. Cir. LEXIS 58 (Orange County Cir. Ct. Apr. 27, 2020)**:

> The Coronavirus (Covid-19) pandemic is something that is beyond the control of the court, attorneys and the parties involved in the case.
>
> *Id.* at *7.
>
> The Court specifically finds that it cannot conduct a jury trial in this case without explicitly endangering the health, welfare, and safety of all parties, including, without limitation, potential jurors, actual jurors, actual alternate jurors, prosecutors, defense counsel, the defendant, deputy sheriffs, clerks, court reporters, news media, victim service personnel, and the witnesses summonsed to appear in the case. In any trial, the courtroom must remain open for public scrutiny. This concern is extended further and to all the persons with whom the above referenced parties interact with daily, including, without limitation, their families, neighbors and housemates.
>
> *Id.* at *8.
>
> [T]he prospective jurors must enter the Orange County courthouse and engage in a detailed security assessment process, which mandates a screening by a deputy sheriff that places both parties well within six feet of each other. The jurors must then register with the jury clerk of the Orange County Circuit Court by providing photo identification (again within six feet) and remain seated within six feet of each other in the Orange County Circuit Court. In this case, the court has summonsed forty-two (42) jurors for service.
>
> *Id.* at *8-9
>
> The court has seriously considered whether the jury would or could conduct its deliberations either in the courtroom itself or some other larger space (such as the historic Orange County Circuit Court or one

of the district courtrooms on the 1st or 2nd floor). Any option presents tremendous difficulties and challenges.

Id. at *10.

Practically, jurors require sitting closely with each other to examine documents and exhibits introduced as evidence during the trial.

Id.

A jury cannot thoughtfully deliberate when every juror is at least six feet apart from every other juror. Jurors examining evidence will necessarily have to exchange evidence and exhibits during deliberations. This practice also defeats the concept of "social distancing."

Id. at *10-11.

Some jurors may also have minor children at home who are unattended because the Orange County School system is closed through the remainder of the spring semester. There is also the paramount issue about elderly relatives, family members or friends given the enormous medical concerns associated with COVID-19. The potential forty-two (42) member jury pool is undoubtedly worried about potential exposure in the confines of the Orange County Circuit Court.

The court finds that video-technology has been helpful for bail motions and arraignments during the pandemic. This court has used ZOOM for certain uncontested hearings. In a jury trial, however, having a witness potentially testify by video presents confrontation clause issues under the sixth amendment. There are only very limited and narrow exceptions to the direct right of confrontation.

Prosecutors and defense attorneys will also face consistent challenging in maintain social distancing. This problem is further exacerbated when considering bailiffs handing numerous exhibits to witnesses, to the Court, and the clerks.

Id. at *11-12.

> The Court finds that it cannot appropriately protect the "health and safety" of the trial participants if it conducts a jury trial during this judicial emergency and pandemic.
>
> *Id.* at *13

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***United States v. Davis*, 2020 U.S. Dist. LEXIS 182504 (D. Colo. Sep. 18, 2020):**

> The court finds that the ends of justice served by the granting of a continuance of the trial in this case outweigh the best interests of the public and the defendant in a speedy trial.
>
> *Id.* at * 7.
>
> Gatherings of people continue to pose a threat to public health and safety. The court will experience difficulty, due to various public health directives and general health concerns, obtaining an adequate cross-section of the community for jury selection, and there are difficulties in maintaining appropriate distancing between individuals during both jury trials and court trials.
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> *Id.* at *6.

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***United States v. Cohn*, 2020 U.S. Dist. LEXIS 155287 (E.D.N.Y. Aug. 26, 2020):**

> We are living in an effectively unprecedented time. At this writing, the world continues to experience the effects of COVID-19, which has caused a historic pandemic of a kind not seen in more than century.
>
> *Id.* at *1-2.
>
> [This] pandemic has presented challenges to nearly every aspect of our society. A court attempting to protect fundamental Constitutional guarantees while continuing to manage the crush of business arising from a crowded docket faces unique problems.
>
> *Id.*

> “[E]ffective credibility evaluation (and perhaps the Confrontation Clause) requires that witnesses testify without traditional masks; and the sheer number of individuals, often from far-flung locations, involved at jury selection and trial, make the problem of conducting a trial with reasonable safeguards exquisitely difficult.
>
> *Id.* at *10.

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***United States v. Gruber*, 2020 U.S. Dist. LEXIS 206142 (D.N.M. Nov. 4, 2020):**

> THIS MATTER comes before the Court *sua sponte*, having determined it is necessary to continue the criminal trial currently scheduled for November 9, 2020. This order contains individualized findings under the Speedy Trial Act…:
>
> (1) The Coronovirus “COVID-19” pandemic has been declared a national health emergency by the President of the United States and the New Mexico State Governor. The COVID-19 emergency has not yet ended, and it recently became much worse.
>
> (2) The Centers for Disease Control and Prevention and other public health authorities continue to advise precautions to reduce the possibility of exposure to the virus and slow the spread of the disease. Chief among these is social distancing and mask use…
>
> (7) *The health risks posed by the virus will adversely impact the ability of the Court to obtain an adequate spectrum of jurors.* Jurors are likely to request excusal from jury duty…Not only is it difficult for jurors to travel under the current restrictions, but travel adds to the risk of spreading the virus and endangers the health and safety of jurors.
>
> (8) The Governor has ordered that group gatherings be limited to five individuals. The Court is unable to observe that limitation in a jury trial.
>
> (9) In the typical past practice, trials inherently involved crowded courtrooms; in addition to the attorneys, the defendant, and Court

> and security staff, sometimes 50 to 100 prospective jurors spend hours on crowded seats where they cannot avoid close physical proximity with others. Additionally, once selected, a minimum of twelve jurors must meet and deliberate in a closed room. *Thus, even if the Court could obtain an adequate spectrum of jurors and manage the safe selection of a jury in the midst of the COVID-19 pandemic, the nature of jury work hampers the Court's ability to protect the safety of those jurors as recommended by the CDC and DOH. Accordingly, the Court's ability to maintain compliance with current public health and safety recommendations using its prior courtroom space makes jury trials practically impossible, in light of the recent outbreak.*

Id. at *1-4 (emphasis added).

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***United States v. McGraw*, 2020 U.S. Dist. LEXIS 164288, (D. Colo. Sep. 8, 2020):**

> The President of the United States declared a state of emergency in response to the spread of COVID-19, and the Governor of the State of Colorado issued a state-wide "Stay at Home" orders for a period of time, a "Safe at Home" order urging persons of a certain age or other risk factors to limit excursions from home and issued other orders limiting gathering sizes, mask wearing and other restrictions designed to slow the spread of the disease and reduce the possibility of exposure to the virus continue to this day. Gatherings of people continue to pose a threat to public health and safety. The court will experience difficulty, due to various public health directives and general health concerns, obtaining an adequate cross-section of the community for jury selection, and there are difficulties in maintaining appropriate distancing between individuals during both jury trials and court trials.

Id. at *5-6.

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