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IN THIS ISSUE

Pandemic: Protecting the Accused's Right to In-Person Pretrial Hearings

DANIEL E. MONNAT

Daniel E. Monnat of Monnat & Spurrier, Chtd., has been a practicing criminal-defense lawyer for the past 44 years in his hometown of Wichita, Kansas. His successful jury trials have been featured in the New York Times, the L.A. Times and CBS 48 Hours. Mr. Monnat is currently listed as one of the top 10 Super Lawyers® of Kansas and Missouri, and he has been listed in The Best Lawyers® in America for over three decades. Mr. Monnat is a past two-term president of the Kansas Association of Criminal-Defense Lawyers, a former member of the Board of Directors of the National Association of Criminal Defense Lawyers, an Advocate Eagle member of KTLA and its Journal Editorial Board, and a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the American Board of Criminal Defense Lawyers.

TREVOR D. RIDDLE

Trevor Riddle of Monnat & Spurrier, Chtd., has devoted the majority of his 15-year career to defending criminal and white collar criminal cases in municipal, state and federal court. Mr. Riddle is listed in The Best Lawyers® in America. He is a member of the National Association of Criminal Defense Lawyers and a graduate of the NACDL White Collar Criminal Defense College. He is also a member of The American Bar Association, Kansas Association of Criminal Defense Lawyers, The National College for DUI Defense, and since 2017, he has served as the chair of the Wichita Bar Association's Criminal Practice Committee.

Introduction

The COVID-19 pandemic has brought challenges to criminal defense practice that no one could have anticipated. We were trained to advocate for our clients in the courtroom, whether we are cross-examining a difficult witness, delivering closing argument face-to-face with a jury, or sitting beside the accused during a hearing, easily accessible to address any confusion or concern. Now, the rights of the accused seem to be at odds with a public health emergency: the government is taking steps to reduce the spread of the pandemic by expanding the use of virtual proceedings, but fair functioning of the criminal justice system still depends on people being able to gather in public.

Courts generally agree that in a criminal case, the state and federal constitutions require that any trial must be a live, in-court, public trial – even during a pandemic. A "Zoom trial" or virtual trial conducted "by two-way electronic audio-visual communication" because of the general public health crisis posed by the pandemic is unlikely to pass constitutional scrutiny.[1] But, what about pretrial proceedings in a criminal case? After all, even the most recent Kansas Supreme Court Administrative Order, 2020-PR-076, continues to encourage that "[a]ll hearings should be conducted remotely, if possible."[2] This article addresses whether the federal Constitution and Kansas Constitution, statutes, and court rules permit virtual pretrial proceedings in criminal cases without the accused's consent, and under what possible circumstances. True, some accused persons may prefer virtual hearings in some circumstances and be willing to knowingly, intelligently, and voluntarily give consent. There is a risk, however, that they will be discouraged from insisting upon in-person hearings when they have every right to do so.

Fortunately, when we need to resist pressure from prosecutors or the courts to hold hearings virtually, the law is on the side of the accused. The United States Constitution, the Kansas Constitution, and Kansas statutory law protect the accused's right to be present at pretrial hearings, to have such hearings open to the public, and to have the effective assistance of counsel.[3] And while the Kansas Supreme Court's standing Administrative Order, 2020-PR-045, broadly authorizes virtual proceedings in light of the pandemic,[4] it cannot—and does not purport to—abridge the constitutional or statutory rights of any accused person.[5]

Understanding Administrative Order 2020-PR-045

Kansas Supreme Court Administrative Order 2020-PR-045 orders that "for the safety of litigants, attorneys, members of the public, judicial branch employees, judicial officers, and others, remote proceedings through the use of two-way telephonic or electronic audio-visual communication is authorized for any essential or nonessential court proceeding," including in "all criminal . . . pretrial, trial, and post-trial proceedings…"[6]

While some might take this to mean that the Court ordered the use of virtual proceedings, this interpretation would be incorrect. The order does not dispense with the necessity of the accused's voluntary consent. The order never commands any party to take part in a virtual proceeding, and specifically notes that "[n]othing in the order requires an individual to waive a constitutional right."[7] Nor does it purport to abridge statutory rights.

This language in Administrative Order 2020-PR-045 was necessary to expressly encourage the type of virtual hearing already authorized by the Court.[8] However, as is presented herein, evidentiary hearings in criminal cases may not be held virtually without the direct consent of the accused.

The Constitutional and Statutory Right to Presence

"A defendant has the constitutional right to be present at all critical stages of the trial."[9] This right – and perhaps much more – is codified in K.S.A. 22-3405(a). The statute provides: "The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law."[10]

The right to be present is grounded both in the Confrontation Clause and the Due Process Clause.[11] However, with respect to pretrial hearings, a due process argument is the only constitutional argument to make, because confrontation rights only apply at trial, not at any other "critical stage."[12]

There is no legal doctrine providing that the accused's right to be present may ever be abridged by other interests (such as public safety during a pandemic), no matter how compelling those interests are. Absent voluntary waiver, accused persons may only lose their right to be present by extreme misbehavior: "[I]f, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."[13]

The Scope of the Right to Presence

Kansas' statutory right to presence is quite broad and "might be greater in scope than the constitutional right to be present."[14] State statutory law specifically provides that the accused has a right to be "personally present in the courtroom" during "[a]ny hearing conducted by the court to determine the merits of any motion."[15] While virtual pretrial motion hearings are authorized, the relevant statute further provides that "[e]xercising the right to be present shall in no way prejudice the defendant."[16] In addition, accused persons have a statutory right to presence at preliminary hearings[17] and bond hearings.[18]

It deserves emphasis that the terminology of all these statutory guarantees clarifies that "presence" and "two-way electronic audio-video communication" are mutually exclusive concepts. Thus, an accused's right to be present for a hearing, or to have witnesses examined in the accused's presence, cannot be legally accomplished by an accused sitting in a courtroom watching witnesses appearing virtually by way of "two-way electronic audio-video communication."

With respect to the constitutional right to presence, the relevant question in examining the scope of the right is whether the specific type of proceeding is a "critical stage." To answer this question, the court "must examine whether the defendant's presence is essential to a fair and just determination of a substantial issue."[19] However, "a defendant does not have a right to be present at proceedings before the court involving matters of law."[20] This test may sound murky, but in application, the definition of a constitutional "critical stage" appears to encompass nearly any circumstance where testimony is taken, as opposed to hearings that address purely legal questions.[21]In the alternative, in Kansas, an accused person is always free to argue that, regardless of any constitutional right to be present at "all critical stages of the trial,"[22] black letter state statute guarantees an accused's presence at "every stage of the trial."[23]

Kansas law establishes that a preliminary hearing is a "critical stage."[24] Several courts have held that a hearing on a motion to suppress evidence is a "critical stage."[25] Even where there is no case law precisely on point, a strong argument can often be made that a given type of hearing is a critical stage.[26]

The Right to a Public Trial

The Sixth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights guarantee the right to "a speedy public trial" to the accused in "all criminal prosecutions."[27] "The central aim of a criminal proceeding must be to try the accused fairly," and the public-trial guarantee is "one created for the benefit of the defendant."[28] "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[29]

The right to an open trial is not absolute.[30] Rather, "the right to an open trial may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information."[31]

The United States Supreme Court established the Sixth Amendment framework for evaluating the constitutionality of a court closure in *Waller v. Georgia.*[32] The Court explained, "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[33] "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[34]

The issue of whether the right to a public trial "attach[es]" to a particular type of pretrial hearing has been addressed "infrequently" in this jurisdiction.[35] On this issue, the Kansas Supreme Court has relied upon the values served by a public trial, as well as several federal courts' analyses of the *Waller* rationale.[36] The purposes of the right to a public trial include ensuring a fair trial, reminding the prosecutor and the judge "of their responsibility to the accused and the importance of their functions," and discouraging perjury.[37] Courts must consider "whether the place and process have historically been open to the press and general public[,] . . . . whether public access plays a significant positive role in the functioning of the particular process in question[,] . . . . [and] whether openness in the proceedings 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'"[38]

The Supreme Court has held that the right to a public trial applies to suppression hearings[39] and preliminary hearings.[40] For additional types of proceedings, the analysis will be a case-specific one based on the above analysis. With respect to pure issues of law, there will likely be no public trial right.[41]

In support of closure, the State may argue that, if the proceedings are streamed via audio-visual technology, the hearing is therefore "public," and there will have been no closure at all. Administrative Order 2020-PR-045 provides that "[a]ccess to a remote proceeding must be provided to the public either during the proceeding or immediately after via access to a recording of the proceeding . . . ."[42]

However, remote access to virtual proceedings is no substitute for physical access. Providing access "immediately after" the proceeding would plainly be insufficient because, as *Waller* noted, the power of the right to a public trial comes from "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion . . . ."[43] Moreover, the public trial guarantee does not exist merely so the public can see the judges, lawyers, and witnesses. It also exists for the judges, lawyers, and witnesses to be able to see the public, "embod[ying] a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings."[44] While a proceeding shared with the public only via technology would not be "secret," it would also not be one where the judges, lawyers, and witnesses will see the eyes of the public on them.[45] Moreover, the distinction between physical access to the court and the technological transmission of trial proceedings has long been recognized.[46]

The State may also argue that the "overriding interest" of public safety justifies closure. This would echo the language of Administrative Order 2020-PR-045, authorizing the use of two-way audio-visual communication "[f]or the safety of litigants, attorneys, members of the public, judicial branch employees, judicial officers, and others."[47]

There is no applicable legal precedent concerning the safety issue presented here—a pandemic and public health crisis. Generally, where safety has provided the basis for a courtroom closure, it has been based on concerns for the safety of a particular witness and limited to that witness's testimony.[48] Broad, nonspecific safety concerns are not enough to justify closure.[49] Absent a particularized, substantiated safety issue – for example, the poor health of a specific individual – a court's approval of closing the courtroom entirely in the name of public health would justify closure in every single criminal case indefinitely. This result is certainly unconstitutional, given the fact that circumstances justifying closure are supposed to be "rare" and must overcome a "presumption of openness."[50]

Ultimately, given the extraordinary situation we are in, it will likely be most effective to prioritize the aspects of open proceedings most important to the accused. Few, if any, judges will agree to hold the courtroom doors open to all who can physically fit inside, under the current circumstances. But an agreement to limit the total number of people in the courtroom may not, in effect, require any compromise on our part, unless there is an unusual amount of public interest

in the accused's case. While providing only audio-visual access would be a particularly broad closure, it may be an appropriate component of a limited closure, with some spectators permitted to remain in the courtroom.[51] The attendance of the accused's family members may also be prioritized.[52]

The Right to Counsel

We may also argue that requiring virtual proceedings would force a violation of the accused's right to counsel.

The Sixth Amendment provides accused persons the right to effective assistance of counsel.[53] While claims of ineffective assistance of counsel may be more familiar in the context of scrutinizing counsel's own performance on appeal, the government may also violate the right to effective assistance of counsel.[54] The government does so "when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[55] The Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."[56]

While there is no legal precedent for the factual scenario possible here—that is, the government forcing the defense to take part in virtual proceedings—the risks posed by virtual hearings are unsurprising. Whether or not the technology even works properly, attorneys' ability to advocate for, and communicate with, the accused is often impaired. As reported in a recent New York Times article, accused persons – now separated from their attorneys – have increasingly made unwise or incriminating statements and been more prone to "sudden outbursts."[57] The article also recounts the experience of an attorney who, "clicking through links on Skype looking for a client" before an arraignment, ended up in a virtual room already being used by another attorney and accused person.[58] When she finally found the right link and tried to discuss the case with her client, the audio cut in and out.[59] Other challenges posed by virtual hearings are "the inability to see a witness's body language and quietly confer with the defendant."[60]

In line with these observations, we may argue that mandated virtual proceedings violate the Sixth Amendment by restricting the accused's right to consult with counsel.[61] Such proceedings may also violate the Sixth Amendment by restricting counsel's ability to argue the accused's case effectively.[62]

A few courts have examined the issue of whether virtual appearance by counsel constitutes ineffective assistance of counsel. The answer will depend on the facts of each individual case.[63] Potential issues, such as the fact that it would be "all too easy for a lawyer to miss something" and that "counsel's ability to represent the accused would suffer from counsel's inability to 'detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding'" have been observed.[64]

Conclusion

While the desire for virtual hearings due to the pandemic is understandable, we must make sure that accused persons are not prejudiced by these changes or pressured to give up their constitutional and statutory right to be present and the constitutional right to public hearings. As detailed above, there is a large body of case law to assist us in this challenge. Moreover, much of what an attorney does – cross examine witnesses, put on evidence, make arguments, and communicate with clients – is most effectively done in person, and there is a risk that accused persons will be deprived of the effective assistance of counsel in the brave, new, and unknown world of virtual proceedings.

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1 The quoted language is from K.S.A. 22-2802(14) (Release prior to trial; conditions of release; appearance bond, cash bond or personal recognizance). This language is repeated in K.S.A. 22-3208(7) (pleadings and motions) and 22-3205(b) (arraignment); *See also* Kansas Supreme Court Administrative Order 2020-PR-045: Order under 2020 House Substitute for Senate Bill 102 and Governor's April 30, 2020, State of Disaster Emergency Declaration Authorizing the Use of Two-Way Audio-Visual Communication In Any Court Proceeding, p. 2, ¶1, May 1, 2020 ("through the use of two-way telephonic or electronic audio-visual communication"); *See, e.g., Waller v. Georgia*, 467 U.S. 39 (1984) (recognizing that the presumptive "right to an open trial" "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that reviewing court can determine whether the closure order was properly entered."); *Presley v. Georgia*, 558 U.S. 209 (2010); Hon. Amy Hanley, et al., *Ad Hoc Jury Task Force Report: Resuming Trials Amid COVID-19: Recommendations for Best Practices*, Kansas Supreme Court Ad Hoc Jury Task Force, pp. 4-5, Jul. 31, 2020 ("Judges should conduct criminal jury trials in-person due to Constitutional and statutory barriers, unless a defendant clearly waives the right to in-person proceedings"); *Id.* at p. 25 (same); *Id.* at p. 26 ("As a result, the Task Force does not recommend the use of virtual technology for criminal jury trials. The Sixth Amendment right to effective counsel could be negatively impacted by the use of virtual proceedings in criminal matters.)

2 Kansas Supreme Court Administrative Order 2020-PR-076: Order Related to Appellate and District Court Operations as of June 16, 2020, p. 3, ¶3, Jun. 16, 2020.

3 All the constitutional rights discussed in this article apply equally to juvenile proceedings in this state. *See In re Gault*, 387 U.S. 1, 41 (1967) (holding that juveniles have right to counsel and right to due process in delinquency proceedings); *In re L.M.*, 286 Kan. 460, 472 (2008) (guaranteeing juveniles the right to "a speedy *public trial* by an impartial jury" under the United States and Kansas Constitutions) (emphasis added, original emphasis removed); *State v. Owens*, 310 Kan. 865 (2019) (same).

4 While the Kansas Supreme Court has issued many administrative orders subsequent to Administrative Order 2020-PR-045, as of this writing, none of these orders have superseded or modified the provisions of 2020-PR-045 pertinent to the constitutional rights of the accused to presence and a public trial. *See* Supreme Court Administrative Order 2020-PR-093: District and Appellate Court Operations as of August 4, 2020, p.1, Aug. 4, 2020 ("This order does not affect any provisions in prior orders issued by the Chief Justice related to 2020 House Substitute for Senate Bill 102, and its amendments in 2020 Spec. Sess. House Bill 2016, including authorization to use two-way audio-visual communications in any court proceeding[] . . . .") This or similar language has been repeated in each order subsequent to Administrative Order 2020-PR-045.

5 *See* Kansas Supreme Court Administrative Order 2020-PR-045, p. 2, ¶2 ("Nothing in this order requires an individual to waive a constitutional right.")

6 *See* Kansas Supreme Court Administrative Order 2020-PR-045, at p. 2, ¶1.

7 *See* Kansas Supreme Court Administrative Order 2020-PR-045, at p. 2, ¶2.

8 *See* Kansas Supreme Court Rule 145.

9 *State v. Edwards*, 264 Kan. 177, 197 (1998) (citing *State v. Johnson*, 258 Kan. 61, 68 (1995)).

10 K.S.A. 22-3405(a).

11 *See United States v. Gagnon*, 470 U.S. 522, 526 (1985) (explaining that the constitutional right to presence, while rooted to a large extent in the Confrontation Clause of the Sixth Amendment, is protected by the Due Process Clause in some situations where the accused is not actually confronting witnesses or evidence against him); *State v. Wells*, 296 Kan. 65, 90 (2012) (explaining that K.S.A. 22-3405(1) "is analytically and functionally identical to the requirements under the Confrontation Clause and the Due Process Clause of the federal Constitution that a criminal defendant be present at any critical stage of the proceedings against him or her.").

12 *See State v. Sherry*, 233 Kan. 920, 929 (1983) (holding that the confrontation right is a trial right that does not apply at preliminary hearings); *State v. Watkins*, 40 Kan.App.2d 1 (2007) (holding that confrontation right does not apply at pretrial hearings and reaffirming *State v. Sherry* after United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004)).

13 *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *see State v. Williams*, 259 Kan. 432, 445 (1996).

14 *State v. McDaniel*, 306 Kan. 595, 601 (2017) (citing *State v. Brownlee*, 302 Kan. 491, 507-8 (2015), which "declin[ed] to address whether every motion hearing is [a] critical stage of trial . . . .").

15 K.S.A. 22-3208(7). Similarly, with the exception of certain child witnesses, K.S.A. 22-2902(3) also provides that the accused has the right to cross-examine witnesses at the preliminary hearing, and that "the witnesses shall be examined in the defendant's presence."

16 K.S.A. 22-3208(7).

17 K.S.A. 22-2902(3).

18 K.S.A. 22-2802(14).

19 *State v. Edwards*, 264 Kan. 177, 197 (1998) (citing *State v. Knapp*, 234 Kan. 170, 180 (1983)).

20 *State v. Minski*, 252 Kan. 806, 815 (1993) (citing *State v. Mantz,* 222 Kan. 453, 463-64 (1977)).

21 *See, e.g., State v. Mantz*, 222 Kan. 453 (1977) (holding in-chambers conference considering jury instructions did not violate the accused's right to be present); *State v. Wilkerson*, No. 110,860, 2015 WL 326466 (Kan. Ct. App. Jan. 16, 2015) (explaining that the accused had no right to be present for court's in camera review of evidence).

22 *State v. Edwards*, 264 Kan. at 197 (1998) (citing *State v. Johnson*, 258 Kan. 61, 68 (1995)).

23 K.S.A. 22-3405(a).

24 *State v. McDaniel*, 306 Kan. 595, 603 (2017) (holding that the accused's constitutional and statutory right to be present were violated when he was excluded from on-the-record discussion after preliminary hearing); *State v. Jones*, 290 Kan. 373, 380 (2010) (holding preliminary hearing was a critical stage of the prosecution because probable cause was determined and witness testimony was taken).

25 *See, e.g., United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (holding that suppression hearing is critical stage because outcome of hearing "may often determine the eventual outcome of conviction or acquittal"); *Henderson v. Frank*, 155 F.3d 159, 165 (3d Cir. 1998) (stating that suppression hearing was a critical stage); *Robinson v. Commonwealth*, 837 N.E.2d 241, 247 (Mass. 2005) (holding that suppression hearing was critical stage, and the accused was entitled to be present, because hearing "would have required the taking of evidence and also involved the admissibility of substantial evidence that could determine the outcome of the case.").

26 For example, a court would likely find a self-defense immunity hearing to be a critical stage. A motion for immunity is a dispositive motion. *See State v. Hardy*, 305 Kan. 1001, 1010-11 (2017). In fact, "[the] question of immunity [is one] that ought to be settled as early in the process as possible to fully vindicate the statutory guarantee." *Id.* at 1012. As at a preliminary hearing, the State must establish probable cause. *Id.* at 1011. Furthermore, the court's determination may be based on witness testimony. *Id* at 1011-12.

27 *State v. Owens*, 310 Kan. 865, 868-69 (2019) (citing U.S. Const. amends. VI and XIV).

28 *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Gannett Co. v. DePasquale,* 443 U.S. 368, 380 (1979)).

29 *Id*. at 46, n.4 (1984) (quoting *In re Oliver*, 333 U.S. 257 (1948)).

30 *Id.* at 45.

31 *Id*.

32 467 U.S. 39 (1984). In *Waller*, the Supreme Court adopted the test and principles it had previously articulated in the First Amendment context in *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside Cnty.,* 464 U.S. 501 (1984). The press and public have a "qualified First Amendment right" to attend a criminal trial. *Waller*, 467 U.S. at 44. Thus, we may safely rely on case law in which challenges to closures were brought by the press, rather than the accused, when we challenge a court closure on behalf of an accused person.

33 *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise*, 464 U.S. at 510).

34 *Id.* at 48 (citing *Press-Enterprise*, 464 U.S. at 509); *see also State v. Barnes*, 45 Kan.App.2d 608, 613 (2011) (explaining that decision to deny right to public trial "requires that the decision be no broader than necessary and the court consider reasonable alternatives to closure.").

35 *See State v. Reed*, 302 Kan. 227, 239 (2015).

36 *Id.* at 243.

37 *Id.* at 241 (citing *United States v. Waters*, 627 F.3d 345, 360 (9th Cir. 2010)).

38 *Id.* at 240 (internal citations omitted) (quoting *Press-Enterprise*, *Co. v. Super. Ct. of Cal. for Riverside Cnty.,* 478 U.S. 1, 8-9 (1986)).

39 *Waller* itself concerned a suppression hearing. In holding that the accused had a right to an open proceeding, the Court reasoned that suppression hearings "often are as important as the trial itself" and, in many cases, "the *only* trial," as the case is often resolved shortly thereafter. 467 U.S. at 46-7 (emphasis added). Furthermore, "a suppression hearing often resembles a bench trial: witnesses are sworn in and testify, and of course counsel argue their positions." *Id.* at 47. The court also observed that "[t]he need for an open proceeding may be particularly strong with respect to suppression hearings," which often challenge the conduct of the government. *Id.*

40 *See Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside Cnty.,* 478 U.S. 1, 12 (1986) (explaining that California preliminary hearings were "sufficiently like a trial" to justify conclusion that public access to them is "essential to the proper functioning of the criminal justice system.").

41 *State v. Reed,* No. 106,807, 2013 WL 451900, *13 (Kan. Ct. App Feb. 1, 2013) (holding "Sixth Amendment right to a public trial was not implicated" where hearing involved "only a question of law").

42 Administrative Order 2020-PR-045, p.2, ¶4.

43 *Waller*, 467 U.S. at 46, n.4 (1984) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)) (emphasis added).

44 *State v. Barnes*, 45 Kan.App.2d 608, 614 (2011) (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)).

45 The Supreme Court has emphasized the profound effect of being able to see one's observers in the Confrontation Clause context. The Supreme Court held that the accused's confrontation rights were violated where the placement of a screen enabled the complaining witnesses to avoid viewing the accused during testimony but allowed the accused to view the witnesses. *Coy v. Iowa,* 487 U.S. 1012, 1020 (1988). The Court reasoned that "standing in the presence of the person the witness accuses" has a "profound effect" upon a witness, and "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.* at 1019-20.

46 The Supreme Court explained in *Estes v. Texas*: "A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity." 381 U.S. 532, 589 (1965).

47 Administrative Order 2020-PR-045, p. 2, ¶1.

48 *State v. Reed,* No. 106,807, 2013 WL 451900, *11 (Kan. Ct. App. Feb. 1, 2013) (explaining that trial court temporarily closed courtroom because witness feared for his safety); *Woods v. Kuhlmann*, 977 F.2d 74, 76, 78 (2d Cir. 1992) (holding that temporary exclusion of the accused's family during one witness's testimony did not violate right to public trial where witness was "scared to death" after threats from the accused's family); *Bobb v. Senkowski*, 196 F.3d 350, 354 (2d Cir. 1999) (upholding closure based on need to protect identity and safety of undercover officer).

49 *See Presley v. Georgia*, 558 U.S. 209, 215 (2010) (explaining that "[t]here are no doubt circumstances where a judge could conclude . . . safety concerns are concrete enough to warrant closing *voir dire*," but the particular interest and threat to that interest must be articulated with specific findings); *State v. Washington*, 755 N.E.2d 422, 425 (Ohio. Ct. App. 2001) (finding record did not establish substantial probability that informant's public testimony would prejudice his safety); *Com. v. Murray*, 50 A.2d 624, 629 (Pa. Super. Ct. 1985) (holding that vague "security" interest did not justify closure where courts routinely provide security for the trial of prison inmates).

50 *Waller*, 467 U.S. at 45. As the Supreme Court explained in *Presley*: "The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override the accused's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. As noted in the dissent below, 'the majority's reasoning permits the closure of voir dire in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators.'" *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (emphasis in original). Similarly, here, despite the novel circumstances, the pandemic is now part of the world we live in and presents a "generic risk" that "is inherent whenever members of the public are present."

51 *See State v. Uhre*, 922 N.W.2d 789, 798 (S.D. 2019) (observing that option of using closed circuit video for child victim's testimony "would have been more, not less" restrictive than court's order, which excluded only members of the general public but allowed members of the media to remain); *State v. Rolfe*, 851 N.W.2d 897, 905 (S.D. 2014) (upholding trial court's reasoning "that closing the courtroom to the entire public except through audio or visual access was a broader closure than that ordered," which was excluding general spectators but allowing media access during child victim testimony); *United States v. Urena*, 8 F.Supp.3d 568, 571 (S.D.N.Y. 2014) (finding harmful effects of closure would be limited where live audio feed was available in separate room of courthouse, transcripts of testimony would be immediately released, and the accused's family was permitted to remain in courtroom).

52 *See Smith v. Hollins*, 448 F.3d 533, 539 (2d Cir. 2006) (explaining that "[u]nder *Waller* and its progeny, courts must undertake a more exacting inquiry when excluding family members, as distinguished from the general public"); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (explaining that "the Supreme Court has specifically noted a special concern for assuring the attendance of family members of the accused") (citing *In re Oliver*, 333 U.S. 257, 271-72 & n.29 (1948)).

53 *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

54 *See Id.*

55 *Id.*

56 *United States v. Cronic*, 466 U.S. 648, 659, n.25 (1984) (citing numerous cases).

57 Alex Feuer, Nicole Hong, Benjamin Weiser, and Jan Ransom, N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases, The New York Times (Jun. 22, 2020), https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html.

58 *Id.*

59 *Id.*

60 *Id.*

61 *See Geders v. United States*, 425 U.S. 80, 91 (1976) (holding that order preventing petitioner from consulting with attorney during overnight recess "impinged upon" his right to effective assistance of counsel).

62 *See Herring v. New York*, 422 U.S. 853, 865 (1975) (holding statute that allowed judges to deny opportunity for closing argument in bench trials was unconstitutional).

63 *See Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (explaining that Supreme Court precedent does "not clearly hold that counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence" and that *Strickland* standard applies; citing *Strickland v. Washington,* 466 U.S. 668 (1984)).

64 *La Garza v. State*, 302 P.3d 697, 714 (Haw. 2013) (citing *Van Patten v. Deppisch*, 434 F.3d 1038, 1043, 1045 (7th Cir. 2006), *cert. granted, judgment vacated sub nom. Schmidt v. Van Patten* , 549 U.S. 1163 (2007), *judgment reinstated sub nom. Van Patten v. Endicott* , 489 F.3d 827 (7th Cir. 2007), *vacated by Van Patten v. Wright*, No. 04-1276, 2008 WL 2415909, (7th Cir. Jun. 16, 2008)). In *Van Patten v. Deppisch*, the Seventh Circuit reversed the accused's conviction where the attorney appeared at a plea colloquy via speaker-phone, holding that "the physical absence of counsel from a hearing where the accused gives up his most valuable constitutional rights and admits his guilt to a serious charge is a structural defect" requiring no proof of prejudice. Though the *Van Patten* court's holding that this was a structural error is no longer good law, it contained a lengthy analysis of the problems posed by counsel's virtual appearance that remains useful.