

criminal justice system continues to function during the pandemic, they justice. Such issues include limited courtroom technology, the potential for remote juries to have a greater likelihood of rendering a not guilty verdict or giving a more lenient sentence, and the potential that such proceedings may result in *per se* reversible error.

II. PROSECUTORIAL CONSIDERATIONS

Prosecutors bear the responsibility to seek justice in all of their cases. In many instances, justice can only be sought through a trial. Even when that is the scenario, the decision to choose to pursue a trial or offer a plea deal has never been simple. For prosecutors, their considerations fall into general categories of strength of the case and costs (both direct and indirect).⁴ The following represents a thorough, but by no means exhaustive, list of such considerations.

With respect to the strength of the case, prosecutors first consider whether they have the evidence needed to prove guilt beyond a reasonable doubt.⁵ If they do, then they also regularly consider the quality of the defense attorney trying the case, whether the judge hearing the case is likely to acquit regardless of the strength of the evidence, the quality of the officers who investigated the case and any *Brady*⁶ material that the officers have in their record, the credibility of any potential victims or civilian witnesses who may testify, evidence that may be suppressed or excluded during the trial or in pretrial hearings and motions, the race and sex of the accused and victim,⁷

4. John W. Stickels et al.,
Victim Involvement in Criminal Prosecutions, 14 TEX. WESLEYAN L. R

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Should prosecutors determine that a trial is appropriate, they must then prepare the case for trial. For felonies, this typically includes verifying the validity of the indictment; meeting with witnesses in person and preparing them for trial, including direct questioning, cross-examination, and visiting the courtroom where the trial will be held; visiting the crime scene; ensuring that they have fully complied with discovery and other pretrial requests from the defendant; working with the arresting officer to follow up on leads or further question potential witnesses; meeting with officers who will likely testify to prepare them for trial and confirm if they have any *Brady* material in their personnel records; creating trial binders with copies of all of the evidence that will be needed (or originals where required); drafting an opening statement, closing arguments, questions for jury selection, direct questioning, and cross examination of likely witnesses; and drafting and filing any pretrial notices or motions that may be required.¹⁴

III. SURVEYING PROSECUTORS DURING COVID-19

Amid the pandemic, prosecutors not only considered the aforementioned factors

COVID-19 was the number one cause of death among police officers.²⁴ This further. Of course, the dangers associated with the pandemic are likely to make prosecutors worry about the health and safety of themselves, of any civilian witnesses involved in the case, and of the jurors. Indeed, such to seek justice via a jury trial, especially if such a trial is in person.

IV. VIRTUAL CRIMINAL PROCEEDINGS

As the pandemic has progressed, many courts throughout the country considered jury trials by video conference as a means of maintaining a functioning criminal justice system.²⁵ This solution presents many problems for prosecutors as well. Notably, data has shown that viewers who observe speakers on platforms such as Zoom may incorrectly perceive them as ²⁶ In preparation for a jury trial by video conference, prosecutors should share such information with the victim and their witnesses so as to best prepare them for any negative outcome at trial. However, this information may cause an otherwise interested victim to reconsider whether a trial is appropriate, which could turn a case where guilt can be proven beyond a reasonable doubt into one that requires a plea or dismissal.

Prosecutors must also consider the type of jurors who would end up on their jury should the trial be conducted by video conference. At the beginning of the pandemic, polling suggested that a juror who appeared for a pandemic jury trial would be more likely to be white and more conservative, two characteristics that typically favor the prosecution.²⁷ More recently, studies regarding jury trials by video conference have shown that such juries are more likely to be young and more diverse, two characteristics

24. Harmeet Kaur, *Covid-19 Has Killed More Law Enforcement Officers This Year than All Other Causes Combined*, CNN (Sept. 3, 2020, 2:13 PM), <https://www.cnn.com/2020/09/03/us/covid-19-police-officers-deaths-trnd/index.html>.

25. See generally *Court Operations During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/> (June 2020) (illustrating how each state altered its operations in response to the COVID-19 pandemic).

26. Kate Murphy, *Why Zoom Is Terrible*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>.

27. See Mark Curriden, *Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists*, HOUS. CHRON. (July 2, 2020), <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php>.

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