

1-1-2024

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Recommended Citation

29 Suffolk J. Trial & App. Advoc. 55 (2023-2024)

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PUSHBACK ON ZOOM[®] COURT PROCEEDINGS: IS “EFFECTIVE” COUNSEL STILL EFFECTIVE?

Adrienne Downey

“You have to remember, the comparison is not to perfection . . . Every day, we don’t have perfection. The question is, can we have a fair process?”¹

I. INTRODUCTION

Parties to a lawsuit are entitled to effective assistance of counsel via the Sixth Amendment to the Constitution and numerous other state rights.² Although this is a constitutional right, the bar to prove ineffective assistance of counsel can be unduly burdensome.³ For example, in *McFarland v. State*,⁴ McFarland’s lead attorney, Benn, fell asleep during critical stages of the legal proceedings because he was “[seventy-two] years old and [he] customarily [took] a short nap in the afternoon.”⁵ However, the *McFarland* court appointed McFarland a second defense attorney named Melamed, despite McFarland’s refusal due to his indigency, on the condition that Benn served as the lead attorney.⁶ Despite Melamed serving as a secondary source of

¹ Eric Scigliano, *Zoom Court is Changing How Justice Is Served*, ATLANTIC (Apr. 13, 2021), [https://perma.cc/SMP3-N2G8]. This statement was made by Jennifer D. Bailey, an administrative circuit civil judge for Miami-Dade County, Florida. *Id.*

² See U.S. CONST. amend VI (ensuring right to effective assistance of counsel for United States citizens). See, e.g., MASS. CONST. DECL. RIGHTS art. 12 (guaranteeing right to effective assistance of counsel for Massachusetts residents); TEX. CONST. art. I § X (providing right to effective assistance of counsel for Texas residents in criminal proceedings); CAL. CONST. art. I § XV (ensuring right to effective assistance of counsel for California residents).

³ See *McFarland v. Texas*, 519 U.S. 1119, 1119 (1997) (denying certiorari for defendant alleging ineffective assistance of counsel). In *McFarland v. State*, McFarland was convicted for capital murder which occurred during a robbery. 928 S.W.2d 482 (Tex. Crim. App. 1996) (per curiam), *reh’g denied*, 928 S.W.2d 482 (Tex. Crim. App. 1996), *cert. denied sub nom.* *McFarland v. Texas*, 519 U.S. 1119 (1997).

⁴ 928 S.W.2d 482 (Tex. Crim. App. 1996).

⁵ *Id.* at 525-26 (Baird, J., dissenting) (highlighting lead attorney’s willingness to nap at client’s detriment). Benn, McFarland’s lead attorney, reported that he took a nap during the proceedings due to his age and not for a medical reason. *Id.* at 526.

⁶ See *id.* at 526 (detailing how McFarland obtained two defense attorneys). Although the trial judge decided that McFarland required a court-appointed defense attorney for this matter, the trial judge determined that Benn, McFarland’s self-hired defense attorney, would serve as the lead attorney and that Melamed would serve as McFarland’s secondary counsel. *Id.*

assistance to Benn, Benn did very little to prepare for McFarland's proceedings compared to Melamed's minimal efforts for a case involving capital punishment.⁷ Although Benn fell asleep during the proceedings, the majority did not find this to be ineffective assistance of counsel, but rather a strategic approach to litigation by Benn to make the jury pity McFarland and make them more likely to rule in his favor.⁸ Instances like *McFarland* push the bounds of what is considered ineffective assistance of counsel, which has only compounded due to the COVID-19 pandemic and increased use of videoconferencing software during judicial proceedings.⁹ As seen in *Vazquez Diaz v. Commonwealth*,¹⁰ defendants have challenged the quality of assistance of counsel they received during videoconference proceedings upon appeal for varying reasons, including impeded communication with counsel.¹¹

⁷ See *id.* (discussing Benn's lack of preparation for McFarland's proceedings). Benn testified that he and Melamed only prepared together for "three or four hours." *Id.* During this preparation time, Benn had no interest in determining who would be responsible for each part of the proceedings. *Id.* Additionally, Benn did not file any motions or subpoena witnesses for McFarland. *Id.* Instead, Melamed performed these tasks, although he "felt constrained to obtain an agreement from Benn and [McFarland] on any decision." *Id.* Melamed's preparation for the trial was limited to reviewing the State's files for seven hours, conferring with McFarland via phone calls and through the trial, visiting McFarland on a single occasion in jail, and filing motions for McFarland. *Id.* Benn visited McFarland less than five times, "[read] the State's case[,] and [briefed] a few points of law on evidence." *Id.*

⁸ See *id.* (criticizing majority's finding that Benn's sleeping could have been "trial strategy"). Justice Baird justly commented, "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense. In my view, a sleeping attorney is *no attorney at all.*" *Id.* at 527 (emphasis added) (challenging that Benn's napping did not prejudice McFarland's trial because he had secondary counsel).

⁹ See *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 827-29 (Mass. 2021) (reviewing whether defendant received effective assistance of counsel following Zoom proceeding). *Vazquez Diaz* was charged with trafficking in 200 or more grams of cocaine. *Id.* at 828. Before the pandemic began, *Vazquez Diaz* filed a motion to suppress statements and evidence. *Id.* The hearing on the motion was also set to occur prior to the pandemic, but it was continued on two separate instances because of requests by *Vazquez Diaz* and the Commonwealth, respectively. *Id.* *Vazquez Diaz*'s motion was postponed on May 4, 2020, due to the pandemic, but the judge ordered that it take place via a Zoom conference call. *Id.* Consequently, *Vazquez Diaz* objected to the Zoom hearing and requested a continuance until the hearing could occur in person. *Id.* The judge denied this motion, prompting *Vazquez Diaz* to appeal directly to the Massachusetts Supreme Judicial Court. *Id.* *Vazquez Diaz* was in custody on cash bail and agreed to waive his right to a speedy trial to wait for an in-person hearing. *Id.*

¹⁰ 167 N.E.3d 822 (Mass. 2021).

¹¹ See *id.* at 830, 841 (arguing communication with counsel over Zoom would be inhibited in impermissible and unconstitutional ways). *Vazquez Diaz* argued that communications with his counsel through a Zoom proceeding would be inhibited because "informal communication between attorney and client, such as passing notes, whispering, or communicating via body language, [would] be absent." *Id.* at 841. However, *Vazquez Diaz* recognized he had access to the "breakout room" feature that would allow him to speak with his counsel privately at his request. *Id.* *Vazquez Diaz* argued that the use of a "breakout room" was insufficient compared to the communication offered by in-person proceedings. *Id.*

In response to a rise in questions regarding the impact of videoconference proceedings on the effectiveness of counsel, state and federal governments issued emergency orders to address how courts may continue judicial proceedings in light of COVID-19.¹² It is important to evaluate how the increase of videoconference proceedings due to COVID-19 affects the judicial system's definition of effective assistance of counsel.¹³

The changes imposed upon the judicial system due to the COVID-19 pandemic warrant courts to revisit the current standards for effective assistance of counsel.¹⁴ The closure of federal and state courthouses triggered an increase in demand for videoconferencing platforms, such as Zoom and Microsoft Teams, to address the courts' backlogged caseload.¹⁵ Although there are moments where the use of videoconferencing software is less than ideal, courts have benefitted from pandemic-era videoconferencing methods in ways unimaginable compared to pre-pandemic videoconferencing methods.¹⁶ However, as the COVID-19 pandemic begins to stabilize, it is likely

¹² See, e.g., Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, 629 S.W.3d 863, 863-64 (Tex. 2020) (allowing Texas courts to proceed using videoconferencing platforms where appropriate to protect all participants); *Vazquez Diaz*, 167 N.E.3d at 828-29 (discussing Massachusetts' emergency orders to continue proceedings during COVID-19 pandemic); Coronavirus Aid, Relief, & Econ. Sec. Act ("CARES"), 116 Pub. L. 136 § 15002(b), 134 Stat. 281 (2020) (permitting federal use of videoconferencing to prevent backlog of cases and protect constitutional rights); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 223-30 (2021) (discussing federal and state governments approaches to remote proceedings). The increased questions of effectiveness of counsel through videoconference proceedings included questioning how a strictly digital platform impacted defendants' communication with their attorneys, how the disparity of access to the internet and appropriate devices impacted a defendant's ability to partake in their proceedings, and more. See Turner, *supra*, at 205-06, 217-18 (highlighting impacts of videoconference proceedings on effective assistance of counsel).

¹³ See Turner, *supra* note 12, at 199 (mentioning challenges imposed by videoconference proceedings on effective assistance of counsel). Remote proceedings challenge defendants' abilities to effectively communicate with their defense attorneys, which can also be hindered by accessibility issues, causing defendants to misunderstand or not properly observe the proceedings. *Id.*

¹⁴ See Turner, *supra* note 12, at 199 (highlighting novel challenges posed by videoconferences in criminal proceedings). Videoconference proceedings introduce new benefits and detriments to the criminal justice system that are worth balancing to determine their utility to serving justice. *Id.*

¹⁵ See Turner, *supra* note 12, at 223-24 (discussing increased reliance on videoconferencing platforms for judicial proceedings). The courts' previous calling systems were insufficient to handle the demands that remote hearings imposed upon them. *Id.* Courts implemented videoconferencing platforms such as Zoom and Microsoft Teams to ensure all necessary participants could attend. *Id.* Due to the unknown consequences of contracting COVID-19, states deviated from previous practices of only having the defendant appear remotely and allowed judges, attorneys, and other courthouse staff to appear on the conference call. *Id.*

¹⁶ See Turner, *supra* note 12, at 212-16 (discussing benefits of pandemic-era videoconferencing services on judicial proceedings). Cf. Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. OF INT'L COM. L. & TECH. 24, 37-40 (2013) (highlighting benefits and detriments of pre-pandemic judicial proceedings via videoconference). In pre-pandemic videoconferences for criminal proceedings, defendants often did not

that the use of videoconference proceedings is here to stay.¹⁷ Accordingly, it is crucial to consider the implications of the increased use of digital technologies on defendants' constitutional right to effective assistance of counsel.¹⁸ For example, in *Broussard v. State*,¹⁹ Broussard argued he received ineffective assistance of counsel during his criminal proceedings because "his counsel . . . was physically absent from the courtroom during the court proceedings and only appeared via remote technology."²⁰ During his plea hearing, Broussard had to call his attorney to hear and participate in the proceeding because his audio failed to connect to the virtual courtroom.²¹ He could watch the proceedings on his own, but this additional call to his attorney was crucial to his participation in the matter.²² Moreover, during his sentencing hearing, Broussard joined the virtual courtroom from the physical courtroom while the rest of the participants appeared remotely.²³ Following these proceedings, Broussard argued he received ineffective assistance of counsel because he lacked adequate communication with his lawyer and his lawyer misled him regarding the outcome of his case.²⁴

To determine if assistance of counsel was ineffective, an appellant must prove that his or her case did not undergo "meaningful adversarial testing," under the *Cronic* test, or that counsel's assistance was deficient and

have an effective way to build trust and privately communicate with his or her attorney. *See id.* at 29-30 (noting impact of videoconferences on attorney-client interactions). In pandemic-era videoconferences, defendants typically have access to a "breakout room" during the proceeding with their counsel at their request. *See Vazquez Diaz*, 167 N.E.3d at 841 (explaining that Vazquez Diaz had access to counsel during proceedings despite everyone appearing remotely).

¹⁷ *See Turner*, *supra* note 12, at 259-61 (offering empirical data showing judges and attorneys expect videoconference proceedings to extend past pandemic). Judges and attorneys found that videoconference proceedings saved time and resources, such as reducing travel times and increasing safety. *Id.* at 261. Videoconference proceedings also secured the presence of out-of-town witnesses and rural, indigent defendants. *Id.* at 262. Additionally, attorneys found that videoconferences eased attorneys' consultations with their clients. *Id.*

¹⁸ *See, e.g., Vazquez Diaz*, 167 N.E.3d at 830, 841-42 (challenging effectiveness of assistance of counsel on Zoom proceedings); *Rimes v. State*, No. CIV. 05-21-00038, 2022 WL 3593282, at *5-6 (Tex. App. Aug. 23, 2022) (arguing defendant did not waive right to assistance of counsel in same room); *United States v. Rosenschein*, 474 F. Supp. 3d 1203, 1209 (D.N.M. 2020) (asserting ineffective assistance of counsel because of difficulties in fully assessing participants' body language).

¹⁹ No. CIV. 09-20-00259, 2022 WL 2056388, at *1 (Tex. App. June 8, 2022).

²⁰ *See id.* at *4 (detailing Broussard's ineffective assistance of counsel argument).

²¹ *See id.* at *1 (describing Broussard's technological issues during proceeding).

²² *See id.* (detailing court's solution to Broussard's audio not connecting to proceeding). To work around this issue, Broussard's attorney had him on a phone call, using the speakerphone feature. *Id.* This way, the court and Broussard could see and hear each other. *Id.*

²³ *See id.* at *3 (reviewing how different participants attended Broussard's sentencing hearing).

²⁴ *See Broussard*, 2022 WL 2056388, at *4-5 (elaborating on Broussard's ineffective assistance claims unrelated to technology).

that deficient performance prejudiced the defense, under the two-pronged *Strickland* test.²⁵ The *Cronic* test allows defendants to prove that they received *constructive* ineffective assistance of counsel, while the *Strickland* test requires defendants to prove that they received *actual* ineffective assistance of counsel.²⁶ Videoconference proceedings placed new challenges on defendants that had yet to exist when the Court defined the *Strickland* and *Cronic* tests, as the Court decided both cases prior to the technological boom that blossomed into the possibility of frequent online criminal proceedings.²⁷ Although courts have danced around similar issues of access to counsel during proceedings as those posed by videoconference proceedings, video calling platforms create an additional layer of difficulty when communicating with counsel because defendants may not be in the physical presence of their attorneys.²⁸ These issues are further compounded by the unequal availability of proper technology and sufficient internet access for videoconference proceedings.²⁹ Despite concerns over inequitable access to courts through such technologies, videoconference proceedings have been shown to reduce costs and time spent in court, therefore minimizing the overall financial burden on the legal system.³⁰ This note argues that the Supreme Court should reconsider the *Strickland* and *Cronic* effective assistance of counsel tests in light

²⁵ See *United States v. Cronic*, 466 U.S. 648, 656 (1984) (stating “the prosecution’s case must survive the crucible of meaningful adversarial testing”); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining two-pronged test to prove ineffective assistance of counsel). Under the *Strickland* test, a defendant must prove that counsel performed deficiently and “that the deficient performance prejudiced the defense.” See *Strickland*, 466 U.S. at 687 (enumerating two-pronged test for actual ineffective assistance of counsel). Demonstrable errors do not amount to ineffective assistance of counsel if a true adversarial criminal trial was conducted. See *Cronic*, 466 U.S. at 656 (prioritizing true adversarial proceedings over demonstrable errors made by counsel during proceedings).

²⁶ See COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL 253-55 (12th ed. 2020) [hereinafter COLUM. HUM. RTS. L. REV.] (discussing which ineffective assistance of counsel test proves constructive and actual ineffective assistance) (emphasis added).

²⁷ See *Strickland*, 466 U.S. at 668 (noting date of decision as May 14, 1984); see also *Cronic*, 466 U.S. at 648 (stating date of decision as May 14, 1984).

²⁸ See *Guerin v. Commonwealth*, 162 N.E.2d 38, 41 (Mass. 1959) (holding defendant is not denied counsel when he cannot immediately speak with attorneys). The Massachusetts Supreme Judicial Court reasoned that a defendant would be able to speak with his or her attorney during breaks in the proceeding. *Id.*; see also *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 841-42 (Mass. 2021) (discussing holding of *Guerin* and its relationship to Zoom proceedings).

²⁹ See Taylor Benninger et al., *Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court*, Stanford Criminal Justice Center 75-83 (Apr. 5, 2021), [<https://perma.cc/QR4X-AFAK>] (discussing impacts of internet and technological inaccessibility on defendants).

³⁰ See *Turner*, *supra* note 12, at 212-13 (highlighting benefits of reduced time and money spent in court).

of the adoption of virtual proceedings as a result of the COVID-19 pandemic, which posed issues of first impression.³¹

II. FACTS

In a time when a deadly pandemic halted in-person court proceedings, courts had to resort to the next best thing: videoconferencing.³² Although the CARES Act set forth when videoconference proceedings could be used in federal courts, states issued their own coronavirus emergency orders that limited or expanded the ways in which courts could utilize videoconference proceedings.³³ For instance, while some states limited their pandemic videoconference proceedings to “initial appearances[,] . . . arraignments[,] . . . pleas, sentencing, and bench trials,” other states included “grand and petit jury proceedings” within their permitted uses of videoconferencing.³⁴

³¹ See *Vazquez Diaz*, 167 N.E.3d at 851 n.8 (noting constitutional issues of first impression involving videoconference criminal proceedings during COVID-19 pandemic). Although videoconferencing is not entirely new to criminal proceedings, the advances in videoconferencing platforms affect proceedings in ways pre-pandemic videoconferencing platforms could not. Compare Turner, *supra* note 12, at 224, 239-41 (highlighting changes in current court videoconferencing systems due to use of newer platforms), with Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 59-61 (2006) (noting impact of defendant’s separation from attorney on private communication during immigration proceeding).

³² See CARES, 116 Pub. L. 136 § 15002(b) (permitting federal courts to use videoconference proceedings in lieu of in-person proceedings). Due to the national emergency regarding the COVID-19 pandemic, courts were permitted to use videoconferencing or teleconferencing—if videoconferencing was not reasonably available—to conduct detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, probation and supervised release revocation proceedings, pretrial release revocation proceedings, misdemeanor pleas and sentencings under Rule 43(b)(2) of the Federal Rules of Criminal Procedure, and juvenile proceedings. *Id.* § 15002(b)(1) (enumerating proceedings where videoconferences could be used in place of in-person proceedings).

³³ See § 15002(b) (enumerating federal proceedings where videoconferencing is allowed); see also Turner, *supra* note 12, at 224-25 (discussing variations in state emergency orders permitting videoconference proceedings); Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, 629 S.W.3d 863, 863-66 (Tex. 2020) (permitting Texas courts to conduct criminal proceedings via videoconference proceedings). Although courts varied in the types of hearings that could be held remotely, courts tended to take a broader approach to their limitations with public health as a driving factor. See Turner, *supra* note 12, at 224 (highlighting importance of public health on allowance of videoconference proceedings).

³⁴ See Turner, *supra* note 12, at 224-25 (noting range of permissible uses for videoconferencing in criminal proceedings); see also Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, 629 S.W.3d at 863-65 (permitting use of videoconferencing for criminal proceedings in Texas). To promote efficiency and preserve public health, Texas officials decided that

[s]ubject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent . . . allow or require anyone involved in any hearing,

However, prior to the COVID-19 pandemic, videoconferencing during judicial proceedings was traditionally limited to immigration proceedings and family law proceedings.³⁵ Videoconferences also had limited uses in criminal proceedings beginning in the 1970s and 1980s in some states and counties for arraignments, bail hearings, sentencing, and post-conviction hearings.³⁶ As the COVID-19 pandemic stabilizes, the use of videoconference proceedings in place of in-person proceedings will likely find a permanent place in the American legal system.³⁷

The acceptance of videoconference proceedings in American jurisprudence, largely due to COVID-19, brought benefits that the courts would not have otherwise experienced, had they not been propelled onto videoconference platforms to prevent a backlog of cases and potential violations of

deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means.

Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, 629 S.W.3d at 863-64. The only limitation Texas officials imposed on remote criminal proceedings beyond constitutional requirements is if “confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor.” *Id.* at 865. Texas became the first state to use videoconference proceedings for a misdemeanor jury trial in August 2020. *See Turner, supra* note 12, at 198, 225 (naming Texas as first state to use virtual proceedings for criminal jury trials); *see also* David Lee, *Texas Judge Holds First Virtual Jury Trial in Criminal Case*, COURTHOUSE NEWS SERV. (Aug. 11, 2020), [<https://perma.cc/5H5D-DNGK>] (“A Texas justice of the peace opened the country’s first virtual criminal jury trial . . . in a misdemeanor case against a Texas woman accused of speeding in a construction zone.”).

³⁵ *See Haas, supra* note 31, at 59, 62 (describing use of videoconference technology in judicial proceedings prior to COVID-19 pandemic). Commonly, during immigration proceedings, a respondent’s lawyer was present in a room with the respondent’s family and friends and government counsel. *Id.* at 59. However, the judge would be present on the television in the room, despite possibly being in another state. *Id.* The respondent’s location further challenges this issue, as he or she is present on the other side of the screen, calling from a detention center in a different and sometimes distant location. *Id.* Jurors noticed an impact on the communications during removal proceedings due to the videoconferencing system. *Id.* at 62. Most frequently, courts used videoconference proceedings in sexual assault cases to shield children from being in the same space as their accused abuser. *Id.*

³⁶ *See id.* at 62 (noting beginning of videoconferences in criminal proceedings).

³⁷ *See Turner, supra* note 12, at 259-60 (sharing survey results that lawyers and judges predicted videoconferencing will continue post-pandemic). Professor Turner conducted a survey where she sent an online confidential survey to state and federal attorneys and judges in Texas to gauge their perceptions on the continuation of videoconference proceedings after the COVID-19 pandemic. *Id.* at 230-32. Professor Turner found that roughly seventy-five percent of her respondents believed that videoconference proceedings would be used more frequently after the end of the pandemic. *Id.* at 260. Although videoconference proceedings will likely extend past the end of the COVID-19 pandemic, more federal judges and attorneys do not prefer this continued use compared to their state counterparts. *Id.* (noting twenty to thirty-five percent more federal participants preferred continuation of videoconferencing than state counterparts).

defendants' constitutional rights to a speedy trial and effective assistance of counsel.³⁸ For example, litigants, attorneys, witnesses, and jurors could attend proceedings from wherever they were located, which saved time and travel expenses, as they no longer had to miss work for proceedings or get stuck in traffic.³⁹ Due to the increased accessibility of courts through videoconference proceedings, courts may also see more diverse jury pools.⁴⁰ The addition of more diverse perspectives to jury pools through videoconference proceedings has been found to increase the length and thoroughness of jurors' deliberations.⁴¹ Additionally, courts no longer had to rent out stadiums and music venues to prevent an ongoing backlog of cases because virtual courtrooms removed the need to provide room for social distancing during proceedings.⁴² Furthermore, although courts must face upfront costs to upgrade the technology in courthouses to support videoconference proceedings, these costs offset the expense of "transport[ing] detained defendants from the jail to the courtroom."⁴³ Importantly, videoconference proceedings

³⁸ See Shalini Nangia et al., *The Pros and Cons of Zoom Court Hearings*, THE NAT'L L. REV. (May 20, 2020), [<https://perma.cc/M9RE-9Z9R>] (discussing benefits of Zoom conference proceedings at beginning of COVID-19 pandemic).

³⁹ See *id.* (noting convenience of Zoom court proceedings); see also Scigliano, *supra* note 1 (highlighting heightened accessibility of courts that utilize Zoom proceedings). Proponents of using videoconference calls in place of in-person proceedings emphasize that "[w]itnesses, jurors, and litigants no longer need to miss hours of work and fight traffic. Attorneys with cases in multiple courts can jump from one to another by swiping on their phones." Scigliano, *supra* note 1.

⁴⁰ See Huo Jingnan, *To Try or Not to Try – Remotely. As Jury Trials Move Online, Courts See Pros and Cons*, NATIONAL PUBLIC RADIO (Mar. 18, 2022, 5:45 AM), [<https://perma.cc/NAZ5-D37Y>] (reasoning removal of courthouse barriers permit more people to participate in judicial system). Proponents argue that because jurors can log into a proceeding from their workplace, the courtroom doors opened to "potential jurors who don't have the time to spend days in a courtroom or don't have a convenient way to get there." *Id.* The Honorable Matthew Williams from King County, Washington, noted that he "had jurors log in on their phones from their break room at Amazon, from the coffee shop where they worked . . . There is no question in [his] mind that the economic diversity, the social diversity, the ethnic diversity, [and] the racial diversity [are] significantly higher" with the use of videoconference proceedings. *Id.*

⁴¹ See *id.* (discussing impact of more diverse jury pools on deliberations). Judges found that jurors feel more satisfied with their deliberations following a videoconference proceeding, as they were able to explore the issues at hand more deeply with more perspectives at their disposal than what traditionally would have been. *Id.*

⁴² See *id.* (noting vast steps courts took to try to hold in-person proceedings while social distancing).

⁴³ See Turner, *supra* note 12, at 212 (emphasizing financial benefits of videoconference proceedings on parties and counties). The transportation of defendants can be costly and unsafe, as defendants are subject to body searches and long waits when they reenter the jail or prison. *Id.* at 212-13. Los Angeles County found that it spent about sixty-three million dollars to transport defendants to and from local courthouses, supporting its claim that it spends "[tens of] millions of dollars in transportation and security expenses every year." *Id.* at n.100 (quoting Los Angeles County's Video Arraignment Report).

have allowed attorneys to assist underserved regions because participants no longer had to travel great distances to access the courts.⁴⁴ The overarching benefit of videoconference proceedings is the added efficiency they provide because attorneys would be more prepared to reach agreements on exhibits, trials are less likely to be unnecessarily delayed, and judges might gain flexibility in scheduling criminal proceedings to reduce the impact of participants' personal delays.⁴⁵

In order to effectively determine videoconference proceedings' utility in a post-pandemic world, courts must also consider the disadvantages of virtual proceedings and the disparate impacts they impose upon defendants.⁴⁶ After the implementation of more frequent uses of videoconference proceedings, defendants noted multiple new barriers they faced during their proceedings, ranging from connectivity issues to ineffective communication with their defense attorneys.⁴⁷ Many critics challenge the use of videoconference proceedings because participants in rural and poorer parts of the country "are less likely to have adequate internet access, if at all."⁴⁸ Malfunctions in technology and internet access can cause participants to miss parts of the proceeding, such as important statements and the conclusion of the proceeding itself.⁴⁹ For example, during Texas's first online criminal trial in August 2020, the prosecutor suffered multiple audio issues which required "jurors

⁴⁴ See *id.* at 212-13 (discussing increased ability of legal aid organizations to serve underserved communities via videoconference proceedings).

⁴⁵ See Scigliano, *supra* note 1 (highlighting fewer parties missed court dates when proceeding occurred virtually); see also Nangia, *supra* note 38 (explaining virtual proceedings helped clear dockets during pandemic); Turner, *supra* note 12, at 213-14 (noting quicker disposition of cases due to removal of personal delays and physical limitations).

⁴⁶ See Jingnan, *supra* note 40 (weighing benefits of videoconference proceedings against disadvantages to determine their utility post-pandemic).

⁴⁷ See Bellone, *supra* note 16, at 28-31 (highlighting disadvantages of videoconference proceedings); see also Turner, *supra* note 12, at 246-58 (noting strains on attorney-client relationship among other issues of videoconference proceedings); Nangia, *supra* note 38 (contesting judges' ability to control virtual courtrooms in similar manner as physical courtrooms).

⁴⁸ Jingnan, *supra* note 40 (discussing impact of poor internet connectivity on trials). Although some jurors are excused for not having adequate access to the internet, other courts have paused trials until the jurors can reestablish adequate internet connection. See *id.* (pointing to issues neighborhood utility repairs impose on videoconference proceedings).

⁴⁹ See Turner, *supra* note 12, at 255-56 (noting internet access issues with all proceeding participants, not just defendants). Effective videoconference proceedings in place of in-person criminal proceedings often require strong access to the internet, such as broadband internet access, which is not as readily available in poorer and rural areas of the country. See *id.* at 255 (emphasizing lack of broadband internet availability in rural areas). As of May 2021, "[a]n estimated forty-two million Americans live beyond the reach of broadband service." See Scigliano, *supra* note 1 (illustrating quantity of Americans that cannot adequately access virtual courthouses due to internet issues).

to ask the prosecutor to repeat herself.”⁵⁰ In order to prevent connectivity issues from negatively impacting the fairness of videoconference proceedings, judges must “take special care to ensure that everyone can hear and see well throughout the proceeding.”⁵¹ Other attorneys have found that on top of connectivity issues due to poverty, non-English-speaking defendants face difficulties navigating virtual proceedings.⁵² Additionally, videoconference proceedings challenge effective assistance of counsel and privacy aspects of the attorney-client privilege.⁵³ These proceedings might also implicate privacy issues because both lawyers and defendants must ensure they are physically alone in the room from which they are calling to preserve the attorney-client privilege.⁵⁴ Consequently, defendants might lack the opportunity to foster a trusting relationship with their attorneys because they do not have the same flexibility to communicate with their attorneys as they would in person.⁵⁵

In addition to issues of ineffective assistance of counsel, as it pertains to the quality of the attorney-client relationship, videoconference proceedings are likely to impede counsels’ ability to effectively cross-examine

⁵⁰ See Turner, *supra* note 12, at 255-56 (describing issues arising from connectivity and audio problems in Texas virtual criminal proceedings). Out of fifty-nine online plea proceedings in Texas, approximately twenty percent suffered from audio or connectivity issues. *Id.*

⁵¹ See *id.* at 256 (recommending judges to be responsible for monitoring participants’ access to virtual courtrooms).

⁵² See Scigliano, *supra* note 1 (demonstrating additional barriers for non-English speakers during videoconference proceedings).

⁵³ See Bellone, *supra* note 16, at 37-39 (emphasizing how videoconference proceedings negatively impact complexity of courtroom communications); see also Turner, *supra* note 12, at 199, 205-06 (highlighting difficulties for counsel to provide effective assistance and for defendants to participate in proceedings).

⁵⁴ See Turner, *supra* note 12, at 205-06 (noting hardship of preserving privacy of conversations for attorney-client relationship purposes); see also Bellone, *supra* note 16, at 28 (setting forth issues with attorney-client communications where defendant is not at courthouse). To partially combat this issue, Congress proposed the Effective Assistance of Counsel in the Digital Era Act, which prohibits prison officials from monitoring privileged electronic communications shared between an incarcerated individual and his or her counsel. Effective Assistance of Counsel in the Digital Era Act, H.R. 546, 117th Cong. § 2(a) (1st Sess. 2021) (requiring attorney generals to create programs protecting electronic communications).

⁵⁵ See Bellone, *supra* note 16, at 29 (challenging quality of attorney-client relationships formed via videoconferencing proceedings); see also Esther Nir & Jennifer Musial, *Zooming In: Courtrooms and Defendants’ Rights During the COVID-19 Pandemic*, 31 SOC. & LEGAL STUDIES 725, 732-35 (2022) (highlighting moments when judges and counsel ignored defendants). Students noted minimal connections between defendants and attorneys while observing virtual court proceedings because clients seemed frustrated when their attorneys consistently ignored them, even when they waved to get a moment to speak. See Nir & Musial, *supra*, at 733-34 (describing defendants’ frustration from inability to speak during their own proceedings). A student sensibly highlighted that “Zoom just makes it even easier for attorneys to ignore their clients. It is much harder to tune out someone sitting next to you than to ignore a Zoom box on a screen.” *Id.* at 733.

witnesses and analyze their demeanor because “the fog of video” hinders an attorney’s ability to assess witness credibility.⁵⁶ This is a valid concern because witnesses could be subject to the coercion of others off-camera, therefore compromising the witness’s testimony.⁵⁷ Some argue that virtual proceedings enhance the ability to assess witness credibility as witnesses tend to “[make] prolonged eye-to-contact, often on a large screen in their courtrooms [and] [s]uch a format allows for fewer distractions and more focus on the witness than in a traditional courtroom.”⁵⁸ However, attorneys and judges do not get a completely accurate perception of the witness because they cannot fully examine a “witness’s demeanor, such as shaky hands[,]” that typically occur off-camera.⁵⁹ This impediment to gauging demeanor extends to selecting jurors, as video conferencing obscures non-verbal cues upon which attorneys rely to select jurors that would best help their clients.⁶⁰ Although videoconference proceedings have increased accessibility to the courtroom, these proceedings have also created barriers to the courtroom for those who do not have the necessary technology or internet access to engage in videoconferences.⁶¹ The court would benefit immensely from incorporating standards for videoconference proceedings due to accessibility issues which do not arise during in-person proceedings.⁶² Adopting accessibility

⁵⁶ See Scigliano, *supra* note 1 (cautioning authenticity of witness’ testimony via videoconference calls); see also Turner, *supra* note 12, at 207 (noting virtual proceedings reduce chances that witness testifies truthfully). *But see* Nangia, *supra* note 38 (including increased witness credibility as benefit of videoconference proceedings).

⁵⁷ See Scigliano, *supra* note 1 (raising concerns that witnesses can be influenced by those off-screen—especially domestic-violence victims).

⁵⁸ See Nangia, *supra* note 38 (highlighting body language and focus via videoconference proceedings connects to perception of witness credibility).

⁵⁹ See *id.* (questioning ability to accurately perceive witness’ demeanor in virtual proceedings).

⁶⁰ See Jingnan, *supra* note 40 (noting attorneys’ change in approach to selecting jurors in virtual proceedings). For example, a lawyer noted that he would pay attention to the reading materials jurors brought in with them during jury selection to determine whether they fall more conservative or liberal. *Id.* Additionally, attorneys had to allocate staff members to specifically monitor jurors’ behavior and reactions during the selection because they could not keep track of jurors’ reactions to their arguments while making them. *Id.* However, some attorneys have taken to mimicking the environments of prospective jurors, such as having plants in their background, to appear more relatable. *Id.*

⁶¹ See Bellone, *supra* note 16, at 28, 30-31 (discussing barriers to courtroom caused by videoconference proceedings); see also Turner, *supra* note 12, at 212-23 (mentioning barriers that videoconference proceedings both removed and introduced).

⁶² See Turner, *supra* note 12, at 255 (emphasizing effect of poor internet connection on all parties in proceeding). For example, a defense attorney in one Texas court lost connection to the videoconference, but the proceeding continued *and concluded* without anyone noticing he or she was missing. See *id.* (emphasis added). To effectively participate in a Zoom call, Zoom requires various device capabilities, such as recommended internet bandwidths, specific versions of internet browsers, and newer versions of computer processing software. See *Zoom System Requirements*:

standards for videoconference proceedings and ensuring full, informed consent of defendants electing virtual proceedings might mitigate some of the challenges posed to effective assistance of counsel.⁶³

Vazquez Diaz highlighted the main contention between videoconference proceedings and in-person proceedings – although the standard for effective assistance of counsel has proven to be difficult to overcome, trials held on videoconferencing platforms are not immune from constitutional review.⁶⁴ In 2020, the National Center for State Courts introduced guidelines to ensure participants are not harmed by barriers introduced by the increased use of videoconference proceedings.⁶⁵ These guidelines recommend that courts take precautions to preserve the fundamental principles of the judicial system, by using platforms accessible via mobile phones and by conducting technological research to determine which platforms would best meet a court’s needs.⁶⁶ In addition, the International Commission of Jurists recommended actions to ensure effective participation and confidentiality in virtual proceedings, such as suspending proceedings when connection issues occur or operating communication systems in a way that would not make a reasonable person question the confidentiality of their conversation.⁶⁷ Incorporating these recommendations while taking other precautions to make courts more accessible might reduce defendants’ claims of ineffective assistance of counsel as a result of videoconference proceedings.⁶⁸

Windows, macOS, Linux, ZOOM SUPPORT, (Oct. 20, 2023), [<https://perma.cc/7NHT-FCWS>] (discussing necessary technical specifications to operate Zoom on internet devices).

⁶³ See Int’l Comm’n of Jurists, *Videoconferencing, Courts and COVID-19 Recommendations Based on International Standards*, 15-17 (Nov. 2020), [<https://perma.cc/5FS4-V4EZ>] (recommending courts should provide defendants with adequate resources to mimic in-person proceeding).

⁶⁴ See *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 842 (Mass. 2021) (cautioning videoconference proceedings are more restrictive and cannot evade constitutional review). The Massachusetts Supreme Judicial Court noted that attorneys and judges have the duty to make sure equipment is functioning appropriately and that the defendant has access to private communications with his or her counsel if requested. *Id.*

⁶⁵ Nat’l Ctr. for State Cts., *Guiding Principles for Post-Pandemic Court Technology*, 1-8 (July 16, 2020), [<https://perma.cc/2MAT-VXSQ>] (recommending state courts prioritize user experiences when conducting videoconference proceedings).

⁶⁶ See Nat’l Ctr. for State Cts., *supra* note 65, at 2-8 (explaining guidelines courts should follow when choosing videoconferencing platforms). These recommendations are court-user-oriented because effective virtual access to courts should not be limited to courthouse staff. *See id.* at 4-5. Court users include “judges, clerk and court staff, . . . attorneys, self-represented litigants, community partners, researchers, and the public.” *Id.* at 3.

⁶⁷ See Int’l Comm’n of Jurists, *supra* note 63, at 16 (recommending precautions courts should take to ensure effective assistance of counsel and confidentiality).

⁶⁸ See *Vazquez Diaz*, 167 N.E.3d at 842 (noting duty of judges and attorneys to ensure technology functions properly to utilize videoconference proceedings).

III. HISTORY

A. *The Sixth Amendment's Right to Counsel*

To protect criminal defendants during judicial proceedings, the Sixth Amendment of the United States Constitution importantly included the right to assistance of counsel.⁶⁹ However, in *Rothgery v. Gillespie County*,⁷⁰ the Supreme Court held that the right to assistance of counsel does not attach until “the first formal proceeding.”⁷¹ Although the right attaches at the outset of formal proceedings, defendants are only entitled to assistance of counsel “during any ‘critical stage’ of the post attachment proceedings; what makes a stage critical is what shows the need for counsel’s presence.”⁷² Therefore, if the right to assistance of counsel has not attached, defendants cannot raise ineffective assistance of counsel claims.⁷³ Although the Sixth Amendment did not automatically apply to state criminal proceedings, the Supreme Court in *Gideon v. Wainwright*⁷⁴ held that the Due Process clause of the Fourteenth Amendment safeguarded the first eight amendments of the Constitution against state action.⁷⁵ Even in state criminal proceedings, states must guarantee the right to counsel for indigent defendants as guaranteed under the Sixth Amendment.⁷⁶ These important applications of the right to assistance

⁶⁹ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense.”).

⁷⁰ 554 U.S. 191 (2008).

⁷¹ See *id.* at 203 (reaffirming right to assistance of counsel attaches at first formal proceeding).

⁷² See *id.* at 212 (noting appointed counsel must be present for critical stages of proceedings).

⁷³ See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (holding defendants cannot claim ineffective assistance of counsel if right did not attach). Torna petitioned for habeas corpus in the United States District Court for the District of South Florida following the failure of his attorney to timely file a writ of certiorari to the Florida Supreme Court. *Id.* at 586-87. The District Court denied this motion because this action did not make the proceedings “fundamentally unfair” and review by the Florida Supreme Court was discretionary. *Id.* at 587. This failure only prevented Torna from receiving further discretionary review. *Id.* The Fifth Circuit Court of Appeals reversed this decision. *Id.* In his writ for certiorari, Torna conceded that he did not have an absolute right to appeal his conviction to the Florida Supreme Court, so the Supreme Court reversed the Fifth Circuit’s decision and held that the dismissal was proper. *Id.* at 587-88.

⁷⁴ 372 U.S. 335 (1963).

⁷⁵ See *id.* at 343 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936)) (finding Fourteenth Amendment’s Due Process clause safeguards first eight constitutional amendments from state actions).

⁷⁶ See *Gideon*, 372 U.S. at 343 (noting federal right to counsel extends to state proceedings regardless of state law). Under Florida state law, a court would only appoint counsel when the defendant is charged with a capital offense. *Id.* at 337. The court denied the appointment of counsel for Gideon despite his indigency because Gideon was charged with a felony that did not carry the weight of capital punishment. See *id.* at 336-37 (describing Gideon’s felony of breaking and

of counsel impact when courts apply tests to consider whether defendants experienced ineffective assistance of counsel.⁷⁷

In its determination of ineffective assistance of counsel, the Supreme Court applies two tests which analyze actual and constructive ineffective assistance of counsel.⁷⁸ First, in *Strickland v. Washington*,⁷⁹ the Court crafted a two-prong test which required the defendant to prove that counsel performed deficiently and “that the deficient performance prejudiced the defense.”⁸⁰ Counsel performed deficiently when they “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”⁸¹ Deficient performance prejudices the defense when counsel’s errors were so serious that the defendant was deprived of a fair trial and that the results of that trial would be unreliable.⁸² In *Strickland*, Washington’s counsel pursued pretrial motions and discovery, but cut his efforts short when he learned that Washington confessed to murder against

entering with intent to commit misdemeanor therein). The Supreme Court held that Gideon required appointed representation because

[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Id. at 344.

⁷⁷ See *Torna*, 455 U.S. at 586-87 (holding defendant cannot argue ineffective assistance if right does not attach to that proceeding); see also *Rothgery*, 554 U.S. at 212 (attaching right to counsel at first formal proceeding and requiring counsel’s presence at critical stages); *Gideon*, 372 U.S. at 344-45 (extending Sixth Amendment right to counsel to state criminal proceedings regardless of state laws).

⁷⁸ See COLUM. HUM. RTS. L. REV., *supra* note 26, at 253-55 (discussing actual ineffectiveness and constructive ineffectiveness tests).

⁷⁹ 466 U.S. 668 (1984).

⁸⁰ See *id.* at 687 (describing *Strickland*’s two-prong test for ineffective assistance of counsel).

⁸¹ See *id.* (defining deficient performance by counsel for ineffective assistance standard). Courts must determine counsel’s deficiency in performance through an objective standard of reasonableness based on the surrounding circumstances. *Id.* at 687-88.

⁸² See *id.* at 687 (explaining second prong of *Strickland*’s ineffective assistance test). A defendant must prove “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” to successfully prove *Strickland*’s second prong. *Id.* at 694 (assigning reasonableness standard for finding that but for prejudicial conduct, case’s outcome would differ).

his advice.⁸³ Following Washington's failure to take his counsel's advice, Washington's attorney did not pursue crucial evidence of his character and emotional state.⁸⁴ Although the Court of Appeals held for Washington, the Supreme Court reversed this decision because "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."⁸⁵ Defendants must prove both prongs of this test to have a successful ineffective assistance of counsel claim.⁸⁶ Defendants struggle to successfully argue ineffective assistance of counsel claims due to the second prong of this test, as "courts usually do not find that an attorney's behavior affected a trial so strongly that the outcome is unreliable."⁸⁷ However, even if defendants cannot prove actual ineffective assistance of counsel, the second test to determine ineffective assistance of counsel analyzes constructive ineffectiveness of counsel.⁸⁸

The Supreme Court's second test for ineffective assistance of counsel allows defendants to argue that they experienced constructive ineffective assistance of counsel, even without an inquiry into any actual prejudice.⁸⁹ In *United States v. Cronin*,⁹⁰ the Court noted that defendants could claim constructive ineffective assistance of counsel where "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual

⁸³ See *id.* at 672-73 (discussing why Washington's counsel's effort stopped short on his defense). Washington also waived his right to a jury trial against his counsel's advice and pleaded guilty to his charges, which included three capital murder charges. *Id.*

⁸⁴ See *Strickland*, 466 U.S. at 672-73 (explaining Washington's counsel's effort that Washington alleged prejudiced his defense). Washington argued that his counsel's assistance was ineffective because his counsel did not motion to request a psychiatric report, investigate, and present character witnesses, seek a presentence investigation report, investigate the medical examiner's report, or cross-examine medical experts. *Id.* at 675 (listing efforts counsel did not take in Washington's defense).

⁸⁵ See *id.* at 693, 701 (noting conceivable effects on outcomes of proceedings are insufficient to prove ineffective assistance claims). The Supreme Court commented that had conceivable effects been sufficient to prove the level of prejudice required for successful ineffective assistance of counsel claims, "[v]irtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding." *Id.* at 693.

⁸⁶ See *id.* at 687 (describing both elements' defendants must prove to successfully argue ineffective assistance of counsel).

⁸⁷ See COLUM. HUM. RTS. L. REV., *supra* note 26, at 254 (highlighting difficulty of successfully arguing ineffective assistance claims lays in *Strickland's* second prong).

⁸⁸ See *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (allowing defendants to argue constructive ineffective assistance of counsel).

⁸⁹ See *id.* (noting prejudice can be presumed).

⁹⁰ 466 U.S. 648 (1984).

performance at trial.”⁹¹ This standard applies in three situations: (1) where a defendant is denied counsel during a critical stage of the proceeding; (2) where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing”; and (3) even when counsel is present, where the circumstances of the proceeding made it very unlikely “that any lawyer . . . could provide effective assistance.”⁹² Shortly before Cronic’s trial for mail fraud, Cronic’s counsel withdrew and the court appointed an attorney for him.⁹³ However, the court-appointed attorney was young, had a real estate law practice, and had twenty-five days to prepare a matter for pretrial that the government took four and one-half years to prepare for trial.⁹⁴ Although Cronic argued that the surrounding circumstances made it so unlikely that he received effective assistance of counsel, the Supreme Court rejected this argument and held that Cronic personally could only point to errors made by the attorney, rather than circumstances that made his counsel constructively ineffective, to claim ineffective assistance of counsel.⁹⁵ The *Cronic* test importantly gives defendants an opportunity to argue ineffective assistance of counsel within certain circumstances without needing to prove actual ineffectiveness, unlike the *Strickland* test.⁹⁶

These standards are difficult to overcome because the courts “apply a strong presumption of reliability to judicial proceedings.”⁹⁷ For example, in *Lee v. United States*,⁹⁸ Lee argued that his counsel performed deficiently by not informing him that he would be deported if he pleaded guilty and that the deficiency would have changed his decision from pleading guilty to pursuing trial instead.⁹⁹ Lee’s priority in his proceedings was to remain in the

⁹¹ See *id.* at 661 (holding prejudice can be presumed where surrounding circumstances made effective assistance very unlikely).

⁹² See *id.* at 659-60 (describing three instances where *Cronic* ineffective assistance standard applies). A case underwent “meaningful adversarial testing” when “a confrontation between adversaries” occurred, regardless of whether counsel made demonstrable errors. *Id.* at 656-57. Additionally, “[t]he character of a particular lawyer’s experience may shed light in evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.” *Id.* at 665 (emphasizing that little trial experience does not automatically presume ineffective assistance).

⁹³ See *id.* at 649 (explaining Cronic’s change in counsel).

⁹⁴ See *id.* (identifying court-appointed attorney’s lack of criminal law experience).

⁹⁵ See *Cronic*, 466 U.S. at 666 (rejecting argument that surrounding circumstances made effective assistance of counsel so unlikely).

⁹⁶ See COLUM. HUM. RTS. L. REV., *supra* note 26, at 254-55 (discussing appeal of proving constructive ineffectiveness of counsel over actual ineffectiveness).

⁹⁷ *Lee v. United States*, 582 U.S. 357, 364 (2017) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000)) (noting courts presume reliability of judicial proceedings).

⁹⁸ 582 U.S. 357 (2017).

⁹⁹ See *id.* at 366-69 (discussing how attorney’s failure to inform Lee of consequences denied his opportunity to pursue trial).

United States, so had he known that a guilty plea would prompt deportation, he would have pursued trial, even if his chances of acquittal were slim.¹⁰⁰ The Court found that Lee satisfied both prongs of the *Strickland* test because the attorney's deficient performance had a substantial impact on Lee's expressed preferences for his proceedings, as Lee would have approached his litigation differently had he known his guilty plea would automatically result in his deportation.¹⁰¹ This decision reversed the Court of Appeals' holding, which held that Lee had not proved the level of prejudice necessary to find ineffective assistance of counsel.¹⁰²

The presumption of reliability for judicial proceedings starkly impacts defendants' abilities to successfully claim ineffective assistance of counsel, as discussed in *McFarland v. State*.¹⁰³ Melamed's presence as secondary co-counsel in *McFarland* prevented McFarland from proving that he suffered ineffective assistance of counsel due to his lead counsel's napping throughout the proceedings, although neither McFarland or Benn wanted Melamed as co-counsel.¹⁰⁴ As such, these cases emphasize the difficulties criminal defendants encounter when asserting their Sixth Amendment right to effective counsel in videoconference proceedings, as evaluated through both the *Strickland* and *Cronic* tests.¹⁰⁵

¹⁰⁰ See *id.* (discussing Lee's rationale for why his counsel's inaccurate advice prejudiced him).

¹⁰¹ See *id.* at 366-70 (explaining Court's finding of ineffective assistance of counsel). The Court determined that Lee's decisions in his proceedings relied on the risk of deportation because he "repeatedly asked whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified . . . that Lee would have gone to trial had he known about the deportation consequences." *Id.* at 369.

¹⁰² See *id.* at 362-64, 371 (reversing Sixth Circuit's decision that ineffective assistance of counsel did not occur under *Strickland*).

¹⁰³ 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (per curiam), *reh'g denied*, 928 S.W. 482 (Tex. Crim. App. 1996), *cert. denied sub nom.* *McFarland v. Texas*, 519 U.S. 1119 (1997) (emphasizing importance of successfully proving both prongs of *Strickland* test). A defendant must prove that counsel's errors deviated from an objective standard of reasonableness for professionalism. *Id.* Unfortunately for defendants, courts maintain "wide range[s] of reasonable representation." *Id.*

¹⁰⁴ See *Ex parte McFarland*, 163 S.W.3d 743, 752-53 (Tex. Crim. App. 2005) (discussing impact of Benn's naps and Melamed's presence during trial). McFarland and Benn both declined Melamed's assistance, but the trial judge appointed Mr. Melamed as co-counsel "in the abundance of caution." *Id.* at 750. The Court of Criminal Appeals of Texas noted that had Benn been McFarland's only attorney on the matter, McFarland might have satisfied the *Cronic* test for constructive ineffective assistance of counsel. *Id.* at 753.

¹⁰⁵ See *Lee v. United States*, 582 U.S. 357, 362-71 (2017) (explaining correct advice would have changed Lee's decision to plead guilty); *McFarland*, 928 S.W.2d at 482-524 (arguing ineffective assistance of counsel due to attorney that napped during proceedings); see also *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 841 (Mass. 2021) (discussing implication of *Strickland* test on Zoom proceedings); *Rimes v. State*, No. CIV. 05-21-00038, 2022 WL 3593282, at *14-15 (Tex. App. Aug. 23, 2022) (applying *Cronic* test for ineffective assistance of counsel in Zoom proceedings).

B. Right to Effective Assistance of Counsel and Zoom Proceedings

Due to the COVID-19 pandemic, courtrooms moved online to handle an ever-growing docket to increase public safety from the unknown effects of a novel virus.¹⁰⁶ This relatively new system for conducting criminal proceedings prompted questions of whether defendants experienced effective assistance of counsel through videoconferencing platforms.¹⁰⁷ Currently, defendants argue that they received ineffective assistance of counsel through videoconference proceedings, including the inability to confer privately with counsel, as well as counsel's impacted ability to effectively interview witnesses.¹⁰⁸ Although defendants cannot have in-person access to their attorney during virtual proceedings, mechanisms exist for them to consult with their counsel throughout the proceeding.¹⁰⁹ For example, Suffolk Superior Court in Boston, Massachusetts, along with other courts, incorporated the use of "breakout rooms" for defendants and their counsel during virtual proceedings.¹¹⁰ This feature allows selected users to speak privately in a separate "room" without disconnecting from the main call and without being recorded as part of the main session.¹¹¹ Defendants may access this feature upon request during the proceeding.¹¹² Yet, judges and attorneys

¹⁰⁶ See CARES, 116 Pub. L. 136 § 15002(b) (allowing courts to continue proceedings online in preservation of public health).

¹⁰⁷ See Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1519-21 (2022) (discussing multiple issues presented by criminal videoconference proceedings). Some critics of videoconference proceedings consider effective assistance of counsel to be "the right most endangered by the move to online criminal courts." *Id.* at 1519.

¹⁰⁸ See Turner, *supra* note 12, at 205-06, 217 (noting issues of attorney-client communication and witness evaluations on videoconferencing platforms); see also Ferguson, *supra* note 107, at 1519-21 (discussing technological impacts of videoconference proceedings on detained and released defendants). However, defendants' issues are not strictly limited to communication and witness evaluations. See Turner, *supra* note 12, at 217-18 (describing additional issues defendants experience via videoconference proceedings). Defendants can also experience hearing, observation, audiovisual interruptions, technological malfunctions, comprehension difficulties, and background distractions that impair their ability to participate in their criminal videoconference proceedings. See *id.*

¹⁰⁹ See Turner, *supra* note 12, at 206 (describing lawyers' ability to pause videoconferences to make phone calls to clients to consult privately); see also Vazquez Diaz, 167 N.E.3d at 829 (discussing Suffolk Superior Court's tools to assist defendants in accessing justice).

¹¹⁰ See Vazquez Diaz, 167 N.E.3d at 829 (detailing Suffolk Superior Court's utilization of breakout rooms for private, unrecorded meetings during videoconference proceedings). When in a breakout room, a defendant may meet virtually with only their attorney, despite others being present on the conference call. *Id.* (emphasizing private nature of Zoom breakout rooms).

¹¹¹ See *id.* (describing function of breakout rooms on Zoom calls).

¹¹² See *id.* at 841 (allowing defendants to request private breakout rooms with counsel during virtual proceedings). However, to access this feature, defendants must interrupt the proceeding. *Id.* at 842, 851 n.14 (cautioning defendants need to interrupt proceedings to utilize breakout rooms).

reported technology accessibility issues that impaired participants' abilities to log into virtual proceedings.¹¹³ To combat technological accessibility issues that further disrupt videoconference proceedings, states have distributed tablets to jurors, created Zoom kiosks, provided cellphone minutes, and set up additional hotspots for those who do not have adequate internet access.¹¹⁴ The National Center for State Courts also released guidelines for extending videoconference use beyond the pandemic, emphasizing user experience to ensure accessibility, collaborating with other courts to prevent use of customized technology, and making data-driven technological decisions.¹¹⁵ Although these measures have been implemented to help reduce the strain imposed upon defendants' Sixth Amendment right to effective assistance of counsel, they do not resolve the absence of traditional communication opportunities with counsel in virtual criminal proceedings.¹¹⁶

In the peak of videoconference proceedings due to the COVID-19 pandemic, some defendants asserted that the proceedings violated their right to effective assistance of counsel.¹¹⁷ For example, defendants commonly argued that videoconference proceedings denied them effective assistance of

¹¹³ See Benninger et al., *supra* note 29, at 75-83 (identifying access to phones, computers, and internet as concerns for continuing virtual proceedings). Judges and attorneys found that inaccessibility to phones, computers, and internet predominated certain demographics based on low-income and generational informational gaps. *Id.* at 78-79. More specifically, a judge emphasized that although Zoom proceedings benefit society, the practice also disenfranchises certain racial groups, especially when they experience extreme poverty. *Id.* at 79.

¹¹⁴ See Scigliano, *supra* note 1 (noting steps courts took to increase access to virtual proceedings); see also Jingnan, *supra* note 40 (describing methods used to mitigate inaccessibility of virtual proceedings). These changes have helped increase participation in court proceedings, as seen by an increase in jurors being able to attend their jury duty service when the proceeding is held virtually. See Jingnan, *supra* note 40 (considering impact of proactive steps taken by courts to increase accessibility).

¹¹⁵ See Nat'l Ctr. for State Cts., *supra* note 65, at 1-8 (recommending state courts consider various factors in development of post-pandemic virtual proceedings). The National Center for State Courts emphasized that the central focus of the development of technology should not be limited to the use by judges, attorneys, and court staff. *Id.* at 3-4.

¹¹⁶ See Ferguson, *supra* note 107, at 1521 ("While this section recognizes that some online equivalents could pass constitutional muster, the main takeaway is that virtual trial rights are lesser than traditional, in-person trial practices.").

¹¹⁷ See, e.g., *Commonwealth v. Curran*, 178 N.E.3d 399, 406 (Mass. 2021) (addressing defendant's potential constitutional implications in remote proceedings); *Broussard v. State*, No. CIV. 09-20-00259, 2022 WL 2056388, at *7 (Tex. App. June 8, 2022) (arguing defendant received ineffective assistance because he could not communicate with counsel in courtroom); *Rimes v. State*, No. CIV. 05-21-00038, 2022 WL 3593282, at *5-6 (Tex. App. Aug. 23, 2022) (reviewing ineffective counsel when defendant is isolated in courtroom while others attend via Zoom). In *Broussard*, the defendant argued he received ineffective assistance of counsel because his attorney appeared virtually and communicated solely via speakerphone, without physically attending the proceedings. See *Broussard*, 2022 WL 2056388, at *4, *7 (arguing virtual appearance by attorney is insufficient to protect Sixth Amendment rights).

counsel because they could not speak with their attorney about the proceedings due to differences in location.¹¹⁸ Additionally, defendants have challenged whether they received effective assistance of counsel through a virtual proceeding because they lost the ability to informally communicate with their attorney during the actual proceeding, “such as [through] passing notes, whispering, or communicating via body language.”¹¹⁹ Further, defendants have also argued that virtual proceedings violate the right to effective assistance of counsel because defendants and their counsel could not fully assess

¹¹⁸ See, e.g., *Curran*, 178 N.E.3d at 406 (arguing ineffective assistance because defendant could not communicate with counsel due to different physical locations); *Broussard*, 2022 WL 2056388, at *7 (highlighting lack of communication with counsel because counsel was not physically with defendant); *Rimes*, 2022 WL 3593282, at *5-6 (arguing ineffective assistance because defendant did not waive right to counsel in same room). In *Curran*, the defendant was convicted of simple assault and battery following a bench trial that was conducted partially on Zoom. 178 N.E.3d at 403. He challenged the effectiveness of his counsel because “he ‘could not participate in the trial (except to observe)’ and ‘could not discuss the trial with his attorney’ because ‘they were in different locations.’” *Id.* at 406. The court rejected this argument, suggesting that Curran could have used the court’s “Zoom Room” for private communication, where attorneys in physical court sessions can confer with remote clients. *Id.* at 405-406. Similarly, when Broussard was sentenced to twenty-five years of confinement after pleading guilty to aggravated robbery, his counsel appeared remotely while he physically reported to the courtroom. *Broussard*, 2022 WL 2056388, at *1, *3 (describing Broussard’s sentencing hearing). Broussard argued that he received ineffective assistance of counsel because he “appeared for the proceedings in the physical absence of his counsel [and,] [e]ven with the attempt at remote technological assistance[,] [Broussard] was left incommunicado in the courtroom without any lawyer during a significant portion of the proceedings.” *Id.* at *7. The court rejected this argument because it informed Broussard of the protocol for his sentencing hearing and he consented to it. *Id.* Additionally, in *Rimes*, the defendant entered a non-negotiated guilty plea for the possession of methamphetamine on Zoom. 2022 WL 3593282, at *1 (describing Rimes’ criminal proceeding). During the proceeding, Rimes and the bailiff were the only people present in the courtroom, as the judge, witnesses, and attorneys all appeared on Zoom, to which Rimes consented. *Id.* at *1-2 (noting virtual presence of all other parties on Zoom). Rimes argued that he received ineffective assistance of counsel because he did not waive his right to assistance of counsel at trial in the same room. *Id.* at *5. The court denied this claim because Rimes was informed that his counsel would be appearing remotely via Zoom and that he could consult with his counsel in a separate breakout room at his request, which he used. *Id.* at *5-6.

¹¹⁹ *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 841 (Mass. 2021). After multiple postponements of the hearing for Vazquez Diaz’s motion to suppress statements and evidence, the court postponed the hearing again on May 4, 2020, due to the pandemic, and ordered the hearing to occur on Zoom. *Id.* at 828. Vazquez Diaz motioned to object to a Zoom proceeding, as he was in custody on cash bail and agreed to waive his right to a speedy trial to wait for an in-person hearing. *Id.* The judge denied this motion, which caused Vazquez Diaz to appeal directly to the Massachusetts Supreme Judicial Court. *Id.* In his appeal, Vazquez Diaz argued that he would not have effective assistance of counsel during his motion hearing if it occurred over a Zoom call because he would not be able to utilize informal methods of communication with his counsel during the proceeding. *Id.* at 830, 841. He also recognized that he had access to a “breakout room” during the videoconference but argued that this was insufficient. *Id.* at 841. The court rejected this argument because although he could not use informal communication or nonverbal cues to communicate with his attorney during the proceeding, he could still interrupt the proceeding at any point to speak with his attorneys. *Id.* at 842.

the body language of witnesses and other participants of the court.¹²⁰ These challenges to effective assistance of counsel follow incidents where defendants were not made aware that they could participate in the virtual proceeding and where they experienced difficulties in communicating with counsel.¹²¹ These incidents frustrated and overwhelmed defendants as the videoconferencing software can prevent defendants from unmuting themselves to speak and can be set to “speaker mode,” therefore hiding any non-verbal cues from those who cannot unmute themselves.¹²² Ultimately, the high standards of the *Strickland* and *Cronic* tests for ineffective assistance of counsel create possibilities for videoconference proceedings to evade constitutional scrutiny.¹²³

¹²⁰ See *United States v. Rosenschein*, 474 F. Supp. 3d 1203, 1209 (D.N.M. 2020) (challenging effective assistance of counsel when evaluating witnesses over Zoom proceedings). In *Rosenschein*, the defendant filed numerous motions to suppress evidence since 2018 that resulted in the hearing being scheduled on Zoom for July 2020. *Id.* at 1205-06. While other participants joined remotely, Rosenschein and his counsel attended virtually from the courtroom. *Id.* Rosenschein argued that having the motion hearing on Zoom would violate his right to effective assistance of counsel because he and his counsel could not fully assess the body language of witnesses and other participants of the court. *Id.* at 1209. The court rejected this argument because Rosenschein agreed to have some witnesses testify via videoconference before the pandemic and the court trusted “defense counsel’s ability to see, hear, assess, and cross examine witnesses in an effective manner in that format.” *Id.*

¹²¹ See Nir & Musial, *supra* note 55, at 732-35 (highlighting issues in effective assistance of counsel observed by students). After observing local New Jersey court proceedings from September to November 2020, students echoed concerns shared by professors and legal professionals nationwide regarding videoconference proceedings. See *id.* at 727 (explaining how students observed local virtual courtrooms and participated in study); see also sources cited *supra* notes 46-55 and accompanying text (expressing concerns regarding complications of virtual court proceedings). Although the students had access to proceedings throughout New Jersey, “the majority observed virtual courtrooms in densely populated, racially, economically, linguistically, and culturally diverse counties . . .” See Nir & Musial, *supra* note 55, at 727 (emphasizing how students wanted to watch courtroom proceedings with more diversity and higher caseloads).

¹²² See Nir & Musial, *supra* note 55, at 732-35 (discussing impact of virtual proceedings on defendants). In one proceeding, students noticed that the defendant kept waving to the camera and gesturing to get the court’s attention, but both the court and his attorney ignored him. *Id.* at 734. Other students observed that these issues were prevalent when the proceeding displayed only the speaking party and consequently hid the other participants. *Id.* Additionally, students found that defendants seemed isolated from their attorneys because they could not form a connection virtually. *Id.* at 733.

¹²³ See *Vazquez Diaz*, 167 N.E.3d at 842 (noting difficulties of overcoming *Strickland* and *Cronic* tests for ineffective assistance via virtual proceedings). In *Vazquez Diaz*, the Massachusetts Supreme Judicial Court referred to *Commonwealth v. Guerin*, discussing all the things Guerin could have done to exercise his right to counsel, such as interrupting the proceeding to ask to confer with his attorney at any point. See *id.* (citing *Guerin v. Commonwealth*, 162 N.E.2d 38, 41 (Mass. 1959)) (expressing actions Guerin could have taken to access his counsel).

IV. ANALYSIS

To effectively use videoconferencing proceedings in place of in-person proceedings, the Court should reconsider the *Cronic* and *Strickland* tests pertaining to criminal videoconference proceedings.¹²⁴ Although these standards have their hardships when testing whether a defendant received ineffective assistance of counsel in a physical courtroom, courts need to adapt to the challenges and negative impacts of virtual proceedings.¹²⁵ These challenges often include improper communication between a defendant and counsel, an attorney's inability to effectively analyze a witness's responses and demeanor over a videocall, and a disparity in technological accessibility to effectively partake in the proceedings.¹²⁶ By adapting these tests to keep up with recent technological advances, courts can optimally utilize the benefits videoconference proceedings provide.¹²⁷

A. Reconsidering the Cronic Test

Due to the advancement of videoconferencing technology, disparate access to adequate electronic devices and sufficient internet connection challenges how well defendants' cases are litigated.¹²⁸ Currently, under the *Cronic* test, a defendant receives ineffective assistance of counsel when the circumstances of the proceedings prevent the facts from undergoing

¹²⁴ See *id.* at 851 n.8 (highlighting new challenges videoconference proceedings place on ineffective assistance tests). This was an issue of first impression in Massachusetts, but other jurisdictions are beginning to address it as well. See *id.* (affirming protection of Sixth Amendment rights in virtual proceedings in Michigan and Minnesota); see also *Gould Elecs., Inc., v. Livingston Cnty. Rd. Comm'n*, 470 F. Supp. 3d 735, 742-44 (E.D. Mich. 2020) (holding bench trial via videoconferencing does not violate plaintiff's due process rights); *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 969, 971 (D. Minn. 2020) (permitting witness testimony via videoconference).

¹²⁵ See sources cited *supra* notes 46-55 and accompanying text (discussing negative implications and challenges of use of videoconference proceedings).

¹²⁶ See *Turner*, *supra* note 12, at 199 (detailing possible impediments on defendants' assistance of counsel). These challenges are important to consider when extending the use of videoconference proceedings because they do not arise when all the participants of the proceeding are present in the courtroom. See *id.*

¹²⁷ See Nat'l Ctr. for State Cts., *supra* note 65, at 1 (highlighting social utility of videoconference proceedings after COVID-19). The increased use of videoconferences for criminal proceedings helped courts "transform . . . into a more accessible, transparent, efficient, and user-friendly branch of government." *Id.* See sources cited *supra* notes 38-44 and accompanying text (describing benefits of increased videoconferencing for criminal proceedings).

¹²⁸ See *Benninger et al.*, *supra* note 29, at 75-83 (discussing lack of adequate technological resources in different communities); see also *Ferguson*, *supra* note 107, at 1520-21 (highlighting issues of accessible technology for defendants in custody and released defendants).

“meaningful adversarial testing.”¹²⁹ The *Cronic* test’s application is limited to circumstances where (1) a defendant is denied counsel during a critical stage of the proceedings; (2) counsel fails to make the proceeding a true confrontation between adversaries; or (3) the circumstances of the proceeding made it very unlikely “that any lawyer . . . could provide effective assistance” even when counsel is present.¹³⁰ Technological issues posed by increased virtual proceedings challenge not only a defendant’s ability to communicate with his or her attorney and to participate in the proceedings, but they can also impair an attorney’s ability to effectively question and analyze a witness.¹³¹ To better protect a defendant’s right to effective assistance of counsel and to account for the effects of videoconferencing on this right, courts should include inadequate access to technology and internet as an additional circumstance where prejudice can be presumed when a defendant previously claimed insufficient access to technology but wishes to proceed via videoconference.¹³²

Adding a fourth factor to the *Cronic* ineffective assistance of counsel test would properly account for recent technological advances that were not considered in the case’s decision in 1984.¹³³ Videoconference proceedings greatly benefit courts, but they should not be “immune from constitutional scrutiny.”¹³⁴ A fourth factor would prevent attorney-client communication from being further restricted during online proceedings because attorneys, judges, and other courthouse personnel would have an incentive to ensure

¹²⁹ See *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (noting adjudication of cases must be truly adversarial to not prompt ineffective assistance of counsel).

¹³⁰ See *id.* at 659-60 (explaining three circumstances where *Cronic*’s ineffective assistance standard applies). If any of these circumstances occur, the court presumes ineffective assistance of counsel, and the defendant does not need to prove how he or she was prejudiced by the ineffective assistance. See *id.* at 658-60.

¹³¹ See Scigliano, *supra* note 1 (describing difficulties created by videoconference proceedings). Videoconference platforms create new variables that attorneys need to be aware of, especially because their vision is limited to what they can see within the angle of witnesses’ cameras. *Id.* (expressing concerns about external influences on witnesses outside camera’s view). Witnesses can be influenced by others off camera and by the testimonies of other witnesses when testifying virtually because they lack the formal structure of the courtroom to police their actions. See Turner, *supra* note 12, at 219 (expounding upon difficulties judges and juries have when determining credibility of remote witnesses); see also Ferguson, *supra* note 107, at 1474-75 (emphasizing importance of formality of courtroom, including for witnesses).

¹³² See *Cronic*, 466 U.S. at 659-60 (noting *Cronic* can only be applied in specific circumstances).

¹³³ See *id.* (listing circumstances where prejudice could be presumed in context of judicial proceedings in 1984).

¹³⁴ *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 842 (Mass. 2021) (noting benefits of videoconference proceedings do not permit them to evade constitutional review).

that defendants have proper access to the proceedings, enabling their participation in the matter.¹³⁵

To keep videoconference proceedings as an efficient option for judicial proceedings, they must be readily accessible to those for whom they are provided.¹³⁶ If a jurisdiction cannot allocate resources to assist defendants to ensure uninterrupted virtual attendance due to inadequate connectivity and access to technology, courts should not offer videoconference proceedings as an option unless there is a compelling societal need, such as a deadly pandemic.¹³⁷ Although providing these resources can be expensive up front, the social utility of accessing courts virtually offsets these costs.¹³⁸ To reduce instances where defendants believe they received ineffective assistance of counsel, courts should provide tablets and offer internet hotspots to defendants who have demonstrated an inability to access virtual courtrooms due to a lack of resources in their communities.¹³⁹ This would be especially helpful in rural communities where fewer individuals have smartphones, data plans, Wi-Fi, or access to computers to call into their virtual proceedings.¹⁴⁰ Access to adequate technology is not exclusively limited to defendants in rural settings, as those in urban areas are competing with

¹³⁵ See *id.* (recommending placing responsibility of ensuring defendant's technology is working properly on attorney and judge).

¹³⁶ See Nat'l Ctr. for State Cts., *supra* note 65, at 1-2 (discussing necessity of accessible courts for all, regardless of their walk of life, post-pandemic). With these improvements, all parties can participate in proceedings "regardless of race, ethnicity, gender, English proficiency, disability, socio-economic status[,] or whether they are self-represented." *Id.* at 2. Although access to some sort of technology is increasingly common, access to sufficient technology that supports videoconferencing platforms varies by demographic factors, such as geographical location and income. See Benninger et al., *supra* note 29, at 76-77 (comparing accessibility issues in North Dakota, Milwaukee, and Miami).

¹³⁷ See Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, 629 S.W.3d 863, 863-65 (Tex. 2020) (permitting use of videoconference proceedings due to unknown impacts of COVID-19); see also CARES, 116 Pub. L. No. 116, § 15002(b), 134 Stat. 527 (2020) (allowing videoconferences for federal criminal proceedings to protect defendants' constitutional rights during COVID-19 pandemic).

¹³⁸ See Turner, *supra* note 12, at 212 (highlighting long-term cost benefits of videoconference proceedings). Investing in proper technology for access to videoconference proceedings would initially be expensive, but it would reduce costs in the future in important ways, such as eliminating travel costs and expediting case proceedings. *Id.* at 212-13.

¹³⁹ See Jingnan, *supra* note 40 (noting resources Texas offered to increase jurors' attendance for jury duty during videoconference proceedings); see also Benninger et al., *supra* note 29, at 76 (acknowledging North Dakota's attempts to conceptualize distributing tablets for virtual proceedings in juvenile court).

¹⁴⁰ See Benninger et al., *supra* note 29, at 76-77 (highlighting technological accessibility concerns for low-income and rural communities); see also Turner, *supra* note 12, at 244 (reasoning lack of adequate technology results from lean budgets and staffing models in rural communities).

nearby residents for sufficient internet access.¹⁴¹ Notably, in *Broussard v. State*, Broussard encountered connection issues contributing to his ineffective assistance claim because his audio would not connect to the Zoom call and his attorney needed to call him and keep him on speakerphone so he could hear the proceeding.¹⁴² Ensuring access to sufficient technology would alleviate problems defendants like Broussard faced, and would help safeguard the constitutional rights of those who participate in videoconference proceedings.¹⁴³

To determine what constitutes sufficient technology access for videoconference proceedings, courts should consider the device specifications required by their selected videoconferencing platform, the National Center for State Courts' guidelines "for [p]ost-[p]andemic [c]ourt [t]echnology[.]" and the International Commission of Jurists' recommendations regarding the preservation of effective assistance of counsel in videoconference proceedings.¹⁴⁴ By using these resources to influence their decisions, courts would effectively identify which resources their community requires to efficiently and effectively use videoconference proceedings following the COVID-19 pandemic.¹⁴⁵ It is most beneficial to implement courts' findings on their

¹⁴¹ See Benninger et al., *supra* note 29, at 76-77 (discussing impact of high demand for internet access on urban communities). Attorneys have noted that cities realistically need city-wide Wi-Fi access to reliably host videoconference proceedings to ensure that all court participants can appear virtually and do not need to rely on the resources of those around them. See *id.* at 77 (explaining how defendant had to connect to his neighbor's Wi-Fi to attend hearing). Most importantly, the access to internet must be stable to support showing video during the proceeding. See *id.* (highlighting stability of internet required to support videoconference proceedings).

¹⁴² *Broussard v. State*, No. CIV. 09-20-00259, 2022 WL 2056388, at *1, *7 (Tex. App. June 8, 2022) (describing technological complications Broussard experienced during his plea hearing). Broussard argued that he received ineffective assistance of counsel because "[e]ven with the attempt at remote technological assistance, [Broussard] was left incommunicado in the courtroom without any lawyer during a significant portion of the proceedings." *Id.* at *7.

¹⁴³ See Ferguson, *supra* note 107, at 1521 (explaining impact of videoconference proceedings on defendants' constitutional rights). Ferguson considers effective assistance of counsel to be the constitutional "right most endangered by the move to online criminal courts." *Id.* at 1519. Consequently, "states must . . . ensure that technological glitches do not prevent counsel from adequately representing their clients in remote proceedings." Turner, *supra* note 12, at 206 (recommending states to take action to preserve integrity of videoconference proceedings).

¹⁴⁴ See Nat'l Ctr. for State Cts., *supra* note 65, at 3-8 (encouraging courts to use data-driven methods when implementing technology in courts); see also Int'l Comm'n of Jurists, *supra* note 63, at 15-17 (discussing precautions courts should take and consider when implementing videoconference proceedings); *Zoom System Requirements*, *supra* note 55 (describing necessary device specifications to run Zoom videocalls).

¹⁴⁵ See Nat'l Ctr. for State Cts., *supra* note 65, at 3 (placing emphasis on user experiences when studying potential methods to implement technology). Importantly, the National Center for State Courts recommends that "courts should . . . [l]ook to the impact the innovation would have on underserved communities and ensure their perspectives and needs are effectively addressed in design and functionality." *Id.*

technological research “only after carefully considering the benefits, costs[,] and burdens on court users and ways to bridge the digital divide.”¹⁴⁶ By doing so, courts can consider various technological approaches within their communities and adopt a plan that suits their specific needs, rather than one designed for a different locality.¹⁴⁷ At a minimum, courts’ technological resources should allow all parties “to effectively participate in the proceedings and provide confidential instructions to counsel where necessary.”¹⁴⁸ To safeguard these actions, courts should halt virtual proceedings until any technological disruptions are resolved and offer technical support.¹⁴⁹ Providing reliable access to the necessary technology to engage in videoconference proceedings is essential to the future utilization of videoconferencing in lieu of in-person criminal proceedings following the COVID-19 pandemic.¹⁵⁰

B. *Reconsidering the Strickland Test*

Under the *Strickland* test, a defendant receives ineffective assistance of counsel if his or her attorney performed deficiently and “that the deficient performance prejudiced the defense.”¹⁵¹ An attorney performs deficiently when his or her errors in representation are so serious that they fall below an objective standard of reasonableness based on the surrounding

¹⁴⁶ *Id.* (noting importance of balancing burdens on courts and necessary reductions to digital divide).

¹⁴⁷ *See id.* at 7-8 (recommending testing technology with members of public to make sure it meets their needs).

¹⁴⁸ Int’l Comm’n of Jurists, *supra* note 63, at 16 (noting technological features that must be present to ensure effective assistance of counsel). Courts can provide these features by ensuring:

- (i) the individual party or accused can see witnesses providing testimony and can (personally or through their lawyer) cross-examine and otherwise respond to them;
- (ii) the accused or his lawyer can inspect and submit evidence during proceedings;
- (iii) proceedings are suspended when interruptions in video-communications occur and they are resolved; and
- (iv) technical support is available at the court and detention facilities.

Id. Courts must also consider supplemental accommodations for those who require additional support, such as “victims of gender-based violence, children and persons with disabilities.” *Id.* at 16-17.

¹⁴⁹ *See id.* at 16 (highlighting importance of properly functioning technology in videoconference proceedings).

¹⁵⁰ *See Nat’l Ctr. for State Cts.*, *supra* note 65, at 1 (noting long-term beneficial uses of videoconference proceedings). Although the COVID-19 pandemic interrupted traditional judicial proceedings as courts knew them, the pandemic was the catalyst the court system needed to become more accessible to the public. *Id.*

¹⁵¹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (enumerating both prongs of *Strickland* test).

circumstances.¹⁵² Courts maintain a “strong presumption that counsel’s conduct falls within a wide range of representation,” so defendants have difficulties overcoming the first prong of the *Strickland* test.¹⁵³ Additionally, in relation to *Strickland*’s second prong, defendants must prove a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” to succeed in a claim of ineffective assistance of counsel.¹⁵⁴ This poses challenges for defendants because “courts usually do not find that an attorney’s behavior affected a trial so strongly that the outcome is unreliable.”¹⁵⁵ To address the unique challenges to the integrity of virtual proceedings that do not exist in in-person proceedings, courts should contemplate the use of videoconferencing platforms during proceedings as a mitigating factor to lessen the standard of reliability required to prove ineffective assistance of counsel.¹⁵⁶

The court should revise the *Strickland* test to address challenges exacerbated by videoconference proceedings because these issues did not influence its 1984 decision.¹⁵⁷ The COVID-19 pandemic prompted courts to reconsider their own procedures in light of increased videoconference proceedings, so the right to effective assistance of counsel should not be left behind.¹⁵⁸ Although courts should not deviate from using an objective standard of reasonableness to gauge whether ineffective assistance of counsel

¹⁵² See *id.* at 687-88 (defining deficient performance that could prejudice trial).

¹⁵³ See *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (discussing presumptions of reasonableness weigh in favor of attorneys).

¹⁵⁴ *Strickland*, 466 U.S. at 694 (noting without counsel’s errors, outcome of case would be different). Defendants must prove “a ‘reasonable probability’ of a different result,” not that their “lawyer’s errors ‘more likely than not altered the outcome’ of [their] trial.” See COLUM. HUM. RTS. L. REV., *supra* note 26, at 254 (distinguishing level of proof required to successfully prove *Strickland*’s second prong).

¹⁵⁵ See COLUM. HUM. RTS. L. REV., *supra* note 26, at 254 (highlighting high degree of reliability given to attorneys).

¹⁵⁶ See Benninger et al., *supra* note 29, at 75-77, 103-11, 115 (listing impacts of videoconference proceedings on aspects of assistance of counsel). These challenges include impairment to the attorney-client relationship, difficulties in attorney-client communication, impediments on the formation of attorney-client relationships, and disparate access to sufficient technology necessary for videocalls. *Id.*

¹⁵⁷ See *id.* at 58-60 (describing COVID-19 as catalyst for innovation in court).

¹⁵⁸ See *id.* at 60 (discussing courts’ reconsiderations of their own procedures following increased videoconference proceedings). A judge in Miami noted that

[T]here was a tremendous amount of stuff that we handle in court live that we didn’t need to handle in court live, that could have been disposed of by agreed orders And now with what’s going on, COVID, it forced us to sort of examine those processes I think this has really kicked it up a notch.

Id.

occurred, characterizing errors as “so serious” creates a burdensome objective standard that does not realistically account for issues present in virtual proceedings and not in-person proceedings.¹⁵⁹ Therefore, courts should consider that a lawyer’s errors did not meet an objective standard of reasonableness based on the surrounding circumstances of the videoconference proceedings when evaluating deficient assistance, rather than emphasizing the seriousness of the lawyers’ errors and ignoring technological issues.¹⁶⁰

The challenges videoconferences impose on effective assistance of counsel deserve a lower level of presumed reliability to better protect the rights of defendants who engage in virtual proceedings by considering the virtual proceeding as a mitigating factor.¹⁶¹ For example, when an attorney and his client are physically present, they can speak privately to discuss matters from the proceeding.¹⁶² This same opportunity cannot extend to virtual proceedings because a defendant and his attorney are typically in different locations.¹⁶³ Instead, courts need to resort to the next best thing: breakout

¹⁵⁹ See *Strickland*, 466 U.S. at 687-88 (using objective standard of reasonableness and “so serious” to discuss lawyers’ errors). The current level of seriousness required to prevail on ineffective assistance of counsel claims is a result of self-policing, which is problematic for holding attorneys accountable for their conduct. See Ferguson, *supra* note 107, at 1491-92 (elaborating upon issues with self-policing that insulate lawyers from ineffective assistance of counsel claims).

¹⁶⁰ See *Strickland*, 466 U.S. at 687-88 (explaining standard required to prove counsel acted deficiently, resulting in ineffective assistance of counsel). For example, when analyzing whether Broussard received ineffective assistance of counsel in *Broussard*, the court did not consider the use and quality of videoconferencing platforms as a mitigating factor, beyond his ability to converse with his attorney during the proceedings. See *Broussard*, 2022 WL 2056388, at *7 (focusing on communication for ineffective assistance of counsel claims during virtual proceedings).

¹⁶¹ See COLUM. HUM. RTS. L. REV., *supra* note 26, at 253 (noting *Strickland*’s deficient performance test “can apply differently in different situations”). Critics consider the right to effective assistance of counsel to be “the right most endangered by the move to online criminal courts,” so it should be awarded additional protections within this scope. See Ferguson, *supra* note 107, at 1519 (highlighting potentially drastic impacts on effective assistance of counsel compared to other constitutional rights).

¹⁶² See Benninger et al., *supra* note 29, at 106 (discussing ease of protecting privacy of attorney-client communications during in-person proceedings). An attorney highlighted that breakout rooms cannot replace the opportunities for private attorney-client communications that in-person proceedings provide, despite the convenience of videoconferencing platforms. See *id.* at 106-07 (elaborating on attorney’s response to questions regarding impact of videoconferences on attorney-client communications).

¹⁶³ See Ferguson, *supra* note 107, at 1519-21 (questioning ability to maintain private attorney-client relationships for both detained defendants and released defendants). Virtual proceedings present multiple challenges to preserving private communications between an attorney and his client, including from where attorneys should call, from where released defendants should call, and how secure jail communication systems are. *Id.* Currently, the best alternative, though still imperfect, is to allow a defendant and his or her attorney to meet individually in a “breakout room.” See *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 829, 841 (Mass. 2021) (proposing use of Zoom’s “breakout room” feature to resolve communication issues between attorneys and defendants).

rooms.¹⁶⁴ However, both the defendant and the attorney must be in a private setting where others cannot overhear their communications to preserve the attorney-client privilege.¹⁶⁵ This can be challenging, especially when a defendant joins the videocall from a public place like a library or from a jail where correctional officers supervise the call.¹⁶⁶ Without precautions set in place to protect attorney-client communications, defendants may experience ineffective assistance of counsel solely because their proceedings occurred virtually.¹⁶⁷ Additionally, during a virtual proceeding, it is easier for attorneys to ignore their clients.¹⁶⁸ Multiple virtual court observers noted that defendants were muted beyond their control and that defendants would wave and raise their hands to the camera to receive an opportunity to speak.¹⁶⁹ Their defense attorneys did not address these actions and consequently, the defendant did not receive an opportunity to speak, even if he or she just wanted to consult privately with his or her attorney in a breakout room.¹⁷⁰ The same observers also noted that some of the proceedings were displayed in speaker mode, so there were times where the defendant could not be seen.¹⁷¹ At least in a physical courtroom, an attorney can briefly address the defendant's requests to speak privately and defer them until after the

¹⁶⁴ See Benninger et al., *supra* note 29, at 106 (describing implementation of breakout rooms to provide attorneys and clients private places to discuss case); see also *Vazquez Diaz*, 167 N.E.3d at 829 (discussing breakout room functions during videoconferences). Conversations in these rooms occur privately and are not recorded. See *Vazquez Diaz*, 167 N.E.3d at 829 (emphasizing privacy features of breakout rooms).

¹⁶⁵ See Benninger et al., *supra* note 29, at 106-07 (noting impact of presence of third parties on attorney-client communications).

¹⁶⁶ See Ferguson, *supra* note 107, at 1520-21 (describing how defendants' locations impact ability to maintain private communications). For example, attorneys expressed concerns for maintaining confidential communications with detained defendants because "corrections officers were in close proximity" to the call. See Benninger et al., *supra* note 29, at 106. Additionally, another attorney shared that, although he does not believe the judges and clerks who host the videocall would breach his privacy in a breakout room, but he still worries about their potential to do so. *Id.* at 107.

¹⁶⁷ See Ferguson, *supra* note 107, at 1520-21 (advocating for protections to maintain confidential attorney-client communications).

¹⁶⁸ See Nir & Musial, *supra* note 55, at 734 (noting increase in ignoring clients during proceedings through videoconferencing platforms). Students who observed court proceedings as part of a college course witnessed multiple lawyers ignore their clients' attempts to request to consult with them during virtual criminal proceedings. *Id.*

¹⁶⁹ See *id.* In one proceeding, students noted that "[t]he defendant was [waving] his hands at the camera, raising his hand, and continually gesturing for his turn to speak . . . and everyone ignored him." *Id.*

¹⁷⁰ See *id.* (describing attorneys continuing to ignore clients' gestures to get their attention).

¹⁷¹ See *id.* (highlighting issues involving speaker view in virtual proceedings). This is problematic because if a court displays the proceeding in speaker mode, a defendant that cannot unmute himself cannot come into view and have his gestures noticed by anyone who could give him the ability to speak. *Id.*

proceeding if appropriate, rather than refusing to engage with the defendant.¹⁷² Last, unlike in in-person proceedings, attorneys cannot control their defendants' microphones.¹⁷³ This causes an increased risk that a defendant would state something on the record that his or her attorney could not advise him or her against saying.¹⁷⁴ For instance, during a Zoom hearing, a defendant "was charged with intent to deliver drugs."¹⁷⁵ The defendant proceeded to agree to the possession charge because he did possess the drugs, but he denied the intent to deliver allegation because he did not deal the drugs.¹⁷⁶ His attorney noted that in-person, he would have muted the microphone at the table and advised his client to stop speaking.¹⁷⁷ However, because this was an online proceeding, he had no way to stop the defendant from incriminating himself, therefore hindering the attorney's ability to represent his client.¹⁷⁸ These three situations show that videoconferences negatively impact assistance of counsel in criminal proceedings in ways in-person proceedings would not.¹⁷⁹ To balance the benefits videoconference proceedings provide with the negative impacts they pose on ineffective assistance of counsel, courts should consider the virtual occurrence of the proceeding to mitigate the standard of reliability assigned to lawyers' conduct when determining

¹⁷² See *id.* at 733 (noting increase in attorneys ignoring clients during videoconferences compared to in-person proceedings). A student who participated in this study and witnessed both pre-pandemic in-person proceedings and virtual proceedings noted "attorneys ignoring their clients' is not a problem unique to virtual settings, but is exacerbated by them: 'Zoom just makes it even easier for attorneys to ignore their clients. It is much harder to tune out someone sitting next to you than to ignore a Zoom box on a screen.'" *Id.*

¹⁷³ See Benninger et al., *supra* note 29, at 107 (discussing differences between sitting in-person with defendants and monitoring their conduct virtually). Attorneys noted that defendants have gone on to share information that hurts their cases and yet they cannot stop them due to the nature of videoconference proceedings. *Id.*

¹⁷⁴ See *id.* (describing when attorneys could not stop defendants from speaking in ways that hurt their case).

¹⁷⁵ See *id.* (explaining instance where attorney wished he could shut off defendant's microphone).

¹⁷⁶ See *id.* (noting when defendant admitted to part of criminal act during virtual proceeding).

¹⁷⁷ See Benninger et al., *supra* note 29, at 107 (highlighting steps attorney would have taken to protect defendant). Virtual proceedings challenge an attorney's ability to limit what damaging information his client shares during the proceedings. *Id.*

¹⁷⁸ See *id.* (describing how attorney felt helpless following defendant's oversharing during proceeding). The attorney noted that the information his client gave would become part of the record and would be extremely useful in the case against the defendant. *Id.*

¹⁷⁹ See *id.* at 106-07 (discussing issues raised by breakout rooms and attorneys' inability to control defendants' microphones during videoconferences); see also Nir & Musial, *supra* note 55, at 733-34 (noting increased ability to ignore defendants during virtual proceedings).

whether their actions met an objective standard of reasonableness based on the surrounding circumstances.¹⁸⁰

C. Applying the Reconsidered Cronin and Strickland Tests to Broussard

First, when applying the reconsidered *Cronin* test to *Broussard*, the outcome of the matter likely would have changed had Broussard not appeared physically in the courtroom for his sentencing hearing.¹⁸¹ Under the reconsidered *Cronin* test, the court would consider the fourth circumstance where prejudice can be presumed: insufficient technological and internet access when a defendant previously asserted that he or she did not have sufficient access to technology but would like to proceed via videoconference.¹⁸² Here, Broussard experienced connectivity issues that impaired his access to his proceedings.¹⁸³ He also asserted that he would prefer to continue his proceedings virtually.¹⁸⁴ Following his plea hearing, the court knew Broussard experienced connectivity issues that would have impacted his proceeding, had his attorney not stepped in.¹⁸⁵ Here, the court would not need to consider how Broussard's insufficient technological access caused him to receive ineffective assistance of counsel because Broussard joined the virtual call for his sentencing proceeding from the courtroom.¹⁸⁶ However, had Broussard's next hearing occurred virtually through his own technology, the court could have presumed ineffective assistance of counsel if Broussard's connectivity issues greatly impacted his ability to receive assistance from his lawyer.¹⁸⁷ Here, the court knew Broussard did not have reliable access to resources to participate in Zoom call.¹⁸⁸ Without the presence of judicially conscripted precautionary measures to reduce and prevent accessibility

¹⁸⁰ See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (describing high level of reliability given to lawyers' conduct).

¹⁸¹ See *Broussard v. State*, NO. 09-20-00259-CR, 2022 WL 2056388, at *3 (Tex. App. June 8, 2022) (listing which parties appeared virtually, and which party was physically present in courtroom for proceeding).

¹⁸² See *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (expounding circumstances where prejudice can be presumed).

¹⁸³ See *Broussard*, 2022 WL 2056388, at *1 (summarizing Broussard's connectivity issues).

¹⁸⁴ See *id.* at *1, *3 (noting Broussard's consent to proceed virtually for his plea and sentencing hearings).

¹⁸⁵ See *id.* at *1 (explaining court's acknowledgement of Broussard's connectivity issues).

¹⁸⁶ See *id.* at *3 (explaining that Broussard joined videoconference while physically present in courtroom with bailiff).

¹⁸⁷ *Contra id.* (articulating Broussard appeared using court's technology).

¹⁸⁸ See *Broussard*, 2022 WL 2056388, at *1 (indicating court's knowledge of Broussard's connectivity issues).

issues, Broussard's insufficient access to technology is a compelling reason to presume prejudice in an ineffective assistance of counsel claim.¹⁸⁹

Second, under the reconsideration of the *Strickland* test, where the Court would place an emphasis on the surrounding circumstances of the videoconference as a mitigating factor rather than solely focusing on a lawyer's errors during the proceeding when making a finding of prejudice, Broussard did not present enough evidence to make this determination.¹⁹⁰ Based on the procession of Broussard's case, he did not experience the requisite technological issues that would have impeded his assistance of counsel.¹⁹¹ For example, had Broussard experienced technological issues that were not resolved by a workaround solution, such as his phone call to his attorney during his virtual proceedings when his audio did not connect, those technological issues would have lowered the applicable standard of reliability when determining the effectiveness of his counsel.¹⁹² Additionally, Broussard did not present evidence to support his other claims that could arise to ineffective assistance of counsel, such as his attorney's allegedly misleading statements.¹⁹³ If Broussard had presented evidence that reflected ineffective assistance of counsel that was partially due to technological issues, the court would not only focus on the seriousness of the lawyer's errors, but also how errors that may not be "so serious" on their own to constitute ineffective assistance of counsel were heightened by implications of videoconferencing.¹⁹⁴ This way, the *Strickland* test still does not decide whether ineffective assistance of counsel occurred based on minor issues, but rather on issues that do not meet its intensely high "so serious" standard on their own.¹⁹⁵ Therefore, if Broussard could prove that the virtual occurrence of his proceeding should mitigate the level of reliability assigned to his attorney's conduct, as proposed by the reconsidered *Strickland* test, he would have prevailed on his ineffective assistance of counsel claim.¹⁹⁶

¹⁸⁹ See *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (arguing situations exist where prejudice can be presumed when analyzing ineffective assistance of counsel).

¹⁹⁰ See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (focusing on seriousness of lawyer's errors when analyzing ineffective assistance of counsel).

¹⁹¹ See *Broussard*, 2022 WL 2056388, at *1 (explaining Broussard still received legal advice despite connectivity issues).

¹⁹² See *id.* at *1 (resolving Broussard's audio connectivity issue).

¹⁹³ See *id.* at *5-6 (elaborating on Broussard's ineffective assistance argument that did not involve technology).

¹⁹⁴ See *id.* at *5-7 (describing Broussard's ineffective assistance arguments); see also *Strickland*, 466 U.S. at 687-88 (applying "so serious" standard of error to find prejudice).

¹⁹⁵ See *Strickland*, 466 U.S. at 687-88 (describing "so serious" standard).

¹⁹⁶ See *Broussard*, 2022 WL 2056388, at *5-7 (ruling against Broussard using current *Strickland* test).

The increased use of videoconferencing platforms for criminal proceedings made courts more accessible to all.¹⁹⁷ To continue using these continually advancing resources, courts must take steps to make virtual proceedings accessible to all communities.¹⁹⁸ In light of growing challenges to the standards for effective assistance of counsel, courts should reconsider their applications of the *Cronic* and *Strickland* tests to reflect novel issues imposed by videoconference proceedings.¹⁹⁹

V. CONCLUSION

Largely due to the COVID-19 pandemic, the use of videoconferencing platforms to conduct criminal proceedings prompted issues of first impression regarding virtual proceedings and effective assistance of counsel. Although virtual proceedings greatly benefit the judicial system, one cannot deny the practical challenges they place on the attorney-client relationship and an attorney's ability to zealously represent his or her client. Consequently, the *Cronic* and *Strickland* tests for ineffective assistance of counsel need to be reconsidered to account for challenges imposed by videoconferencing platforms. To account for the impacts of virtual proceedings in the *Cronic* test, the Court should add a fourth circumstance where prejudice can be presumed. This fourth circumstance occurs when a defendant would like to proceed via videoconference but has insufficient access to technology and internet and previously asserted that he or she did not have sufficient access to those resources. Under the *Strickland* test, the Court should consider the impacts of virtual proceedings as mitigating factors to the level of reliability assigned to a lawyer's conduct. These factors should be taken into account when determining whether an attorney rendered effective assistance of counsel during a virtual proceeding rather than analyzing the attorney's performance as if the proceeding occurred in person. These reconsiderations to the ineffective assistance of counsel tests are crucial if courts wish to continue to use virtual proceedings in the aftermath of the COVID-19 pandemic.

Defendants' Sixth Amendment right to effective assistance of counsel should not be abridged based on the setting in which their proceeding occurs. Therefore, the legal system must protect virtual defendants with the same diligence as in-person defendants. These reconsiderations would help

¹⁹⁷ See Nat'l Ctr. for State Cts., *supra* note 65, at 1 (emphasizing need for accessible videoconference proceedings following pandemic emergency exceptions).

¹⁹⁸ See *id.* (balancing importance of using videoconference proceedings post-pandemic and severity of accessibility issues).

¹⁹⁹ See cases cited *supra* notes 118-120 and accompanying text (describing recent decisions regarding ineffective assistance of counsel claims).

courts achieve this important goal to preserve the social utility provided by the exacerbated use of videoconference proceedings due to the COVID-19 pandemic.