

# Judicial Toolkit:

## Guidance on the Special Procedural Issues Raised in Hate Crime Trials and Similar High-Profile Proceedings

A Resource Guide, 2025 1st Edition

**Judicial Process**

*Working Group, Eradicate Hate*



# TABLE OF CONTENTS

**FOREWORD..... 5**

**I. GENERAL PRINCIPLES..... 6**

**A. Determine Location or Medium of the Proceeding..... 6**

- 1. In-person v. Virtual..... 6
- 2. Evaluate Existing Courtroom Rules..... 6
- 3. Confirm Safe Access for Potential Witnesses or Victims..... 6
- 4. Use Courtrooms with Adequate and Visible Security..... 7
- 5. Consider Reserved Seating..... 7
- 6. Evaluate Courthouse Security Protocols..... 7
- 7. Electronic devices..... 7

**B. Prepare Courtroom Staff..... 7**

- 1. Confirm Courtroom Staff Readiness and Training..... 7
- 2. Designating Responsive Procedures..... 7
- 3. Positioning Courtroom Staff..... 8

**C. Victims’ Rights..... 8**

- 1. Victims of Crime Have Statutory Rights..... 8
- 2. Rights Under the Crime Victims’ Rights Act..... 8
- 3. Victim Impact Statements..... 9

**D. Defendants’ Rights..... 9**

- 1. Overview: Due Process..... 9
- 2. The Brady Doctrine..... 10
- 3. The Presumption of Innocence..... 11
- 4. Right to Public Trial By Jury..... 11
- 5. Right to Testify..... 12
- 6. Right to Self-Representation and the Assistance of Counsel..... 13
- 7. Right to Be Present During Criminal Proceedings..... 13
- 8. Right to an Impartial Jury and Voir Dire..... 14
- 9. Judicial Recusal and Disqualification..... 17
- 10. Judicial Substitution – State Law..... 23

11. Pretrial Publicity and Due Process.....	24
<b>E. Public Interest and Media Rights.....</b>	<b>27</b>
<b>II. CASE MANAGEMENT ORDERS.....</b>	<b>28</b>
A. Motion Deadlines.....	28
B. Establish Clear Ground Rules.....	28
C. Protective Orders.....	28
D. Confidentiality Orders.....	29
E. Discovery.....	31
F. Judicial Dismissal.....	32
<b>III. TRIAL-SPECIFIC PREPARATION.....</b>	<b>37</b>
A. Prepare the Courtroom for Trial.....	37
B. Prepare Courtroom Staff .....	37
C. Evaluate Potential Courtroom Closure.....	38
<b>IV. JURY SELECTION.....</b>	<b>40</b>
A. Juror Anonymity.....	40
B. Juror Sequestration.....	42
<b>V. TRIAL – IN-COURT BEHAVIOR.....</b>	<b>43</b>
A. General Warnings to the Courtroom.....	43
B. Contempt Principles.....	43
C. Partially or Fully Anonymous Testimony or Testimony via Video-link or Teleconference.....	45
D. Specific Responses to Disruptive or Improper Behavior by Case Participants.....	46
E. Specific to Counsel.....	48

F. Specific to Witnesses ..... 49  
G. Specific to Jurors ..... 50  
H. Specific Responses to Disruptive or  
Improper Behavior by Spectators or the Public ..... 52

**VI. PSYCHOLOGICAL CONSIDERATIONS  
FOR JURORS, WITNESSES, AND VICTIMS ..... 54**

A. Jurors ..... 54  
B. Witnesses..... 55  
C. Victims..... 56

**CONCLUSION..... 59**

**TABLE OF AUTHORITIES..... 61**

# FOREWORD

Hate crime reports continue to rise in the United States. Law enforcement agencies reported 11,862 hate crime incidents in 2023, which is an average of over 30 incidents per day.<sup>1</sup> The numbers are likely higher because some law enforcement agencies' reports are not in the FBI's data set. These crimes are receiving added attention, as they should. As a result, we expect prosecutors and victims to bring more hate crime cases – both criminal and civil – in more jurisdictions throughout the United States. To assist the courts and counsel handling those cases, we have prepared this Judicial Toolkit. It will provide advice learned from cases already tried in the United States and focus on American law.

Hate crime cases often raise unique case management, courtroom management, and procedural issues. We spoke with judges, prosecutors, and attorneys who have handled these cases. They described the recurring, unique issues in hate crime and other high-profile cases. In many of these cases, for example, one or more parties may try to manipulate the proceeding to deliver their hateful message to a broader audience, whether or not it helps their case. Judges and counsel repeatedly told us that they would have benefited from forewarning and guidance on these issues.

This toolkit is drafted to capture that collective experience. It is intended to help judges and judicial officers anticipate and respond to key issues of case and courtroom management and procedure common to hate crime trials and similar proceedings.

This toolkit has been drafted with a deep respect and appreciation for the adversarial process, through which these important issues will be raised and resolved. It is intended to provide a checklist of the special issues and a brief overview of relevant legal principles to help judges and attorneys in future cases prepare in advance, counsel clients to avoid creating some of these issues, and ensure that these issues, when raised, are presented for appropriate resolution.

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<sup>1</sup> *Facts and Statistics*, U.S. DEPT. OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Dec. 18, 2024).

# I. GENERAL PRINCIPLES

## A. Determine Location or Medium of the Proceeding

**1. In-person v. virtual:** Consider whether the hearing in a criminal matter warrants in-person appearance and by whom, or whether a virtual option is permitted and would be more appropriate. Considerations include:

- a. Whether applicable constitutional, statutory, and court rules allow for a virtual proceeding, including whether a criminal defendant has a right to appear in person that the defendant has not affirmatively waived.
- b. Whether in-person appearance of counsel can facilitate resolution of open matters.
- c. Whether transporting a criminal defendant to the courtroom creates added safety risks for the defendant, victims, witnesses, or community.
- d. Whether a participant likely will disrupt the proceedings in a way that a virtual hearing could avoid by muting that participant.

**2. Evaluate existing courtroom rules** and determine whether any unique circumstances in your case warrant additional or different rules to allow for greater safety and control over the courtroom if proceedings become contentious.

**3. Confirm safe access for potential witnesses or victims,** away from any likely intimidators:<sup>1</sup>

- a. Key danger areas for witnesses and victims include courthouse entrances, hallways, waiting areas, refreshment areas, and restrooms.<sup>2</sup>
- b. Some courts use electronic notifications with witnesses so they can be available “on call” to reduce the amount of time they are exposed in the courtroom area. Others escort witnesses to, from, and within the courtroom.<sup>3</sup>
- c. Some courts rely on prosecutors and investigating agents to provide space for witnesses and victims, escort them within the courthouse, and let them know when they will be needed. In those

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1 Free to Tell the Truth: Preventing and Combatting Intimidation in Court, Pennsylvania Comm’n on Crime and Delinquency (2nd ed. 2014), which informs multiple points in this section.

2 Responses to the Problem of Witness Intimidation, ARIZ. ST. UNIV. CTR. FOR PROBLEM-ORIENTED POLICING, <https://popcenter.asu.edu/content/witness-intimidation-page-3> (last visited Dec. 18, 2024.)

3 *Id.*

courts, consider confirming that will be done (*e.g.*, court staff could email counsel for both parties, or the judge could ask in open court).

#### **4. Use courtrooms with adequate and visible security:**

a. Consider the needs of your particular hearing, such as proximity of security to the defendant. Visible security is important to make victims, family members, jurors, and witnesses feel safer.

**5. Consider reserved seating** for news media, witnesses, victims, family members, and other interested parties. For alternative seating and overflow, consider livestreaming the proceedings in designated media rooms.

**6. Evaluate courthouse security protocols:** If not already required, consider requiring everyone entering the building to provide identification and pass through a metal detector.

a. If not already present, consider placing video cameras at courtroom entrances and exits.

b. Depending on the needs of the case, consider additional security measures such as: (1) using security firms to control building access; (2) fencing off surrounding streets and buildings if there are risks of violence, such as explosives; (3) consulting with the FBI and independent experts in high-profile cases for threat assessments.

**7. Electronic devices:** Evaluate courthouse policy for electronic devices by parties, counsel, and spectators. If not already required, consider requiring parties, witnesses, victims, families, and spectators to relinquish electronic devices before entering the courtroom.

a. Media reporters may warrant special consideration to determine whether relinquishing their devices would inhibit their ability to report on the proceedings.

b. Consider whether to set rules for anyone permitted to bring an electronic device into a courtroom, including prohibiting or restricting photography and recording of certain categories of persons.

c. Cell phones in the courtroom, for example, have great potential for misuse, including to photograph participants for future intimidation or to spread information that is inaccurate or without proper context that could disrupt a proceeding.

## **B. Prepare Courtroom Staff**

**1. Confirm courtroom staff readiness and training** to recognize intimidating or improper acts by parties or spectators in the courtroom, including hand gestures, clothing, tattoos, and other non-verbal communication. In high-profile cases, consider consulting with independent experts regarding the risk of nonobvious signals unique to specific communities.

**2. Designate a procedure** for courtroom staff to respond to any intimidating or improper act in the courtroom, especially if that act occurs in front of the jury, such as immediately reporting the act to the judge or removing a non-party.

**3. Position courtroom staff** in locations where they can observe and respond to all improper behavior.

a. Note that the presence of security guards and other security measures at trial can potentially raise issues of prejudice with respect to the defendant's constitutional right to a fair trial. *See, e.g., Deck v. Missouri*, 544 U.S. 622, 633 (2005) (holding routine use of shackles during criminal trial and penalty phase of capital proceeding is inherently prejudicial absent special security concerns); *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding presence of security guards at trial was not inherently prejudicial and did not undermine the defendant's right to a fair trial); *Morgan v. Aispuro*, 946 F.2d 1462, 1464-65 (9th Cir. 1991) (holding that security measures were not inherently prejudicial but left open the possibility that such measures could be).

**4. Ensure that courtroom staff** treat all spectators in an equally respectful manner.

5. As always, judges should prepare to monitor their own tone to avoid any appearance of impatience, anger, or hostility. *See also* Section I.D.11 (due process requirement for a fair, unbiased judge).

## C. Victims' Rights

**1. Victims of crime have statutory rights:**

a. The Victims' Rights and Restitution Act (VRRRA) (34 U.S.C. § 20141) **requires the federal government to provide certain services to victims of federal crime.**

b. Additionally, the Crime Victims' Rights Act (CVRA) (18 U.S.C. § 3771) lists rights afforded to crime victims.

c. Under the CVRA, **a court must ensure that a victim is afforded the listed rights** in any criminal proceeding involving an offense against the victim. 18 U.S.C. § 3771(b)(1).

d. State laws may also provide victims crime-specific rights.

(1) *See e.g.,* ARIZ. REV. STAT. ANN. § 13-4401 et seq.; CAL. CONST. art. 1, § 28; 18 PA. CONS STAT. §§ 11.101–11.5104; UTAH CODE ANN. § 77-38-2 et seq.

**2. The rights listed in the CVRA** that relate to a judge's ability to maintain order in the court are:

a. The right to be reasonably protected from the accused;

b. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;

c. The right not to be excluded from any such public court proceeding unless the court, after receiving clear and convincing evidence, determines that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding;

- d. The right to be reasonably heard at any public proceeding in the trial court involving release, plea, sentencing, or any parole proceeding;
- e. The reasonable right to confer with the attorney for the government in the case;
- f. The right to proceedings free from unreasonable delay;
- g. The right to be treated with fairness and with respect for the victim’s dignity and privacy;
- h. The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; and
- i. The right to be informed of the rights under this section.

3. Victims have a right to **submit a Victim Impact Statement at sentencing hearings** for cases involving a guilty plea or verdict.

a. This Victim Impact Statement allows the victim to “inform the court about the physical, emotional, financial, social, and spiritual impact the crime has had on them and their families.” ALYSSA A. RHEINGOLD ET AL., THE NAT’L MASS VIOLENCE VICTIMIZATION RES. CTR., PLANNING AND IMPLEMENTATION GUIDE: COMPREHENSIVE, COORDINATED VICTIM ASSISTANCE FOR MASS VIOLENCE INCIDENT TRIALS 24 (2022). This information can help guide the court in determining the appropriate sentence for the defendant.

b. **The Victim Impact Statement can be written or oral.** As noted above, under the CVRA victims have “[t]he right to be reasonably heard at any public proceeding in the [trial] court involving . . . sentencing[,]” so victims can read this statement at sentencing. 18 U.S.C. § 3771(a)(4).

c. Requirements and **guidelines for Victim Impact Statements can vary based on jurisdiction** and potentially on the presiding judge. ALYSSA A. RHEINGOLD ET AL., THE NAT’L MASS VIOLENCE VICTIMIZATION RES. CTR., PLANNING AND IMPLEMENTATION GUIDE: COMPREHENSIVE, COORDINATED VICTIM ASSISTANCE FOR MASS VIOLENCE INCIDENT TRIALS 24 (2022).

## D. Defendants’ Rights

### 1. Overview: Due Process

a. Defendants’ rights are imperative to protect, even when defendants are resistant. Any defendant’s waiver of rights must be knowing, intelligent, and voluntary. The court, consequently, may find itself in the challenging role of ensuring that defendants’ rights are preserved even though the defendants disdain their rights as part of their cause. Here are some key rights typically at stake:

b. The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee defendants certain Due Process Rights.

(1) Due process is a fundamental principle of justice in the United States legal system. It mandates fair treatment throughout the legal process by establishing a number of guarantees.

(2) In the context of hate crimes, legal proceedings can be tremendously emotional, attract widespread media attention, and invite public scrutiny. Due process, therefore, occupies a critical role and establishes necessary rights to ensure that defendants and their cases proceed through the justice system fairly.

c. The United States Constitution provides two sources of due process rights, which differ in their application.

(1) The Due Process Clause of the Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V; *see also Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008) (stating that the Fifth Amendment’s due process provision applies only to the federal government).

(2) The Due Process Clause of the Fourteenth Amendment provides that *no state* shall “deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV.

(3) Other Due Process principles are derived from these amendments.

## 2. The Brady Doctrine

a. For criminal proceedings, the **Brady doctrine** is a critical due process requirement.

(1) In *Brady v. Maryland*, the U.S. Supreme Court held that the government violates a defendant’s due process rights by withholding evidence favorable to the accused that is material to either guilt or punishment. 373 U.S. 83, 87 (1963).

(2) A defendant must establish three elements to prove a Brady violation: “(1) the evidence is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) this favorable evidence was suppressed by the State, either willfully or inadvertently; and (3) the defendant suffered prejudice as a result.” *Downs v. Sec’y, Fla. Dep’t of Corr.*, 738 F.3d 240, 258 (11th Cir. 2013) (internal quotations and citations omitted).

(a) Evidence is “material” if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *See United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also United States v. Warshak*, 631 F.3d 266, 300 (6th Cir. 2010) (stating that evidence “is considered collectively, rather than item-by-item, to determine if the reasonable probability test is met”) (internal quotations and citation omitted).

(3) **Example:** A recent high-profile case involving a Brady violation was the trial of famous actor Alec Baldwin. Baldwin was arrested and charged with involuntary manslaughter in connection with an accidental death that occurred during filming of his movie “*Rust*.” A gun

intended to shoot blanks fired live ammunition and killed the cinematographer. The 1st Judicial District Court of New Mexico dismissed the charges against Baldwin, however, after finding that the State had committed a *Brady* violation by failing to turn over material evidence until the third day of trial. First, the court found that the State suppressed evidence by: (1) failing to provide an undisclosed box of set-supplied ammunition; (2) failing to disclose a supplemental report relating to that ammunition; and (3) intentionally filing those pieces of evidence under an investigation case number unrelated to Baldwin. Second, the court found that the evidence was favorable impeachment evidence and potentially exculpatory, as it was likely to affect the jury's calculus of whether the State had met the elements of involuntary manslaughter. Third, the court found that the withheld evidence was material because it affected the defense's use of the evidence by preventing the defense team from analyzing or requesting a forensic analysis of the suppressed ammunition. As a result, the court held that the State engaged in prosecutorial misconduct and dismissed the charges against Baldwin. *State v. Baldwin*, No. D-101-CR-2024-00013, slip op. at 15-17 (1st Jud. Dist. Ct. Ariz. July 31, 2024), <https://nmcourts.gov/wp-content/uploads/2024/08/July-31-2024.-Order-Granting-Defendants-Motion-for-Dismissal-and-Sanctions-Under-Brady-Giglio-and-Rule-5-501-NMRA-1044a.pdf>.

### 3. The Presumption of Innocence

a. Another aspect of due process is the presumption of innocence.

(1) The law presumes that criminal defendants are innocent until they are proven guilty.

(2) While the presumption of innocence is not articulated in the Constitution, it has long been integral to the American justice system. *See, e.g., Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

(a) For example, because of the presumption of innocence, a defendant should not generally be required to stand trial dressed in prison garb. *See Estelle v. Williams*, 425 U.S. 501, 501 (1976).

b. Judges and litigants should remain mindful of other components of due process, some of which are addressed in other subsections of this toolkit.

### 4. Right to Public Trial By Jury

a. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. U.S. CONST. amend. VI; U.S. CONST. art. III, § 2.

(1) The Federal Rules of Criminal Procedure require three conditions for defendants to waive their right to a jury trial: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.” FED. R. CRIM. P. 23(a).

(2) The waiver must also be knowing, voluntary, and intelligent. *See United States v. Ceja*,

23 F.4th 1218, 1224 (9th Cir. 2022); *United States v. Carmenate*, 544 F.3d 105, 107 (2d Cir. 2008).

(3) “Compliance with the requirements of Fed. R. Crim. P. 23(a) creates a presumption that the waiver is a voluntary, knowing and intelligent one.” *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985).

(4) According to the Sixth Circuit, “a defendant ignorant of the nature of the jury trial right cannot intelligently weigh the value of the safeguard.” *United States v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983). Before being allowed to waive the jury trial right, the defendant “should have both the mental ability and some knowledge of the jury trial.” *Id.*

(5) Although not required, knowledge of four essential attributes is “generally sufficient to enable a defendant to make a knowing and intelligent decision”:

- (a) a jury is composed of 12 community members;
- (b) the defendant may participate in juror selection;
- (c) the jury’s verdict must be unanimous;
- and

(d) if the defendant waives his right to a jury trial, the judge alone will determine guilt or innocence. *Id.*



b. The Sixth Amendment guarantees a criminal defendant the right to a public trial. U.S. CONST. amend. VI.

(1) The right to a public trial protects the defendant, the press, and the public. See *Waller v. Virginia*, 467 U.S. 39, 46 (1984).

(2) This right can be overcome, as discussed below in Section IV.

c. The Seventh Amendment guarantees the jury trial right in civil cases. U.S. CONST. amend. VII.

## 5. Right to Testify

a. **The criminal defendant has a constitutional right to testify** in his or her own defense. See *Rock v. Arkansas*, 483 U.S. 44 (1987) (noting that the sources of this right are the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment).

(1) This right cannot be waived without the defendant’s consent. See *Starkweather v. Smith*,

574 F.3d 399, 403 (7th Cir. 2009) (citing cases). The defendant's waiver must be knowingly and intelligently made in order to be valid. See *Ward v. Sternes*, 334 F.3d 696, 705 (7th Cir. 2003) (citing *Schnecko v. Bustamonte*, 412 U.S. 218, 241 (1973)).

(2) However, a defendant's right to testify is not absolute.

(a) The right does not extend to testifying falsely. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986).

(b) The right to present relevant testimony in general may "bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

(c) However, "restrictions of a defendant's right to testify may not be **arbitrary or disproportionate** to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987).

(d) Accordingly, states "must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* at 56.

## 6. Right to Self-Representation and the Assistance of Counsel

a. The Sixth Amendment guarantees a criminal defendant the **right to self-representation along with the right to the assistance of counsel**. See *Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.")

b. Because accused who represent themselves relinquish "many of the benefits associated with the right to counsel," they "must knowingly and intelligently forgo those relinquished benefits." *Id.* at 835.

c. **Standby Counsel:** (1) "[T]he pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury," and (2) "participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

(1) A defendant's Sixth Amendment rights are not violated, however, when a trial judge appoints standby counsel to "relieve the judge of the need to explain and enforce basic rules of courtroom protocol" or "steer a defendant through the basic procedures of trial." *Id.* at 184.

(2) **Example:** The prosecution of Dylan Roof for the Charleston, South Carolina mass attack targeting black churchgoers in 2015 exemplifies the difficulties courts face when seeking to prevent further harm while preserving a defendant's right to control his case. There, Roof discharged his lawyers and represented himself through parts of his criminal proceedings, though still assisted by standby counsel. Roof's disagreements with counsel's trial strategy revolved around Roof's bigoted belief that showing he was mentally incompetent or ill would undermine the impact of his crime. In fact, Roof "continuously affirmed that it was, in his view, better to die than be considered autistic or mentally ill." *United States v. Roof*, 10 F.4th

314, 348 (4th Cir. 2021). Roof desired to not present evidence of his mental health against his counsel's wishes and the court's advice. At every step, however, the court made sure to inform Roof of the significance of his decisions and possible consequences of proceeding pro se. The court denied motions from standby counsel that conflicted with Roof's desired strategies, stating it "would not allow the defense to speak with two voices." *Id.*

## 7. Right to Be Present During Criminal Proceedings

- a. **The right of a criminal defendant to be present** during criminal proceedings stems from both the Confrontation Clause and the Due Process Clause of the Fifth Amendment.
- b. The Confrontation Clause guarantees a defendant the right to be present at any stage that would contribute to the opportunity for effective cross-examination. *See Kentucky v. Stincer*, 482 U.S. 730, 744 n.17 (1987) (noting that the confrontation right does not turn on whether the stage is critical to the outcome of the trial).
- c. The Due Process Clause grants the defendant an additional "right to be present at any stage of the proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedures." *Id.* at 745.
- d. Together these two guarantees entitle the defendant to be present at all "important stages" of the proceedings. *See, e.g., Cohen v. Senkowski*, 290 F.3d 485, 489 (2d Cir. 2002) ("pre-screening of prospective jurors is a material stage of trial at which the defendant has a constitutional right to be present"); *United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001) (right to be physically present violated when defendant only allowed to attend resentencing via video conference); *United States v. Faulks*, 201 F.3d 208, 211-12 (3d Cir. 2000) (Confrontation Clause violated when court imposed new sentence by written judgment in defendant's absence); *United States v. Pressley*, 100 F.3d 57, 59 (7th Cir. 1996) (Confrontation Clause violated because judge conducted *ex parte* discussions with juror in chambers without presence of defendant or counsel).

## 8. Right to an Impartial Jury and *Voir Dire*

- a. The Supreme Court has stated that "[v]oir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)).
  - (1) *Voir dire* can present complications in high-profile cases, but appropriate planning with counsel can reduce issues with jury selection. In the case of Dylan Roof, *United States v. Roof*, Docket No. 2:15-cr-00472 (D.S.C. July 22, 2015) (ECF 193), for example, the court took initiative to confer with counsel to limit disclosures of jurors' identities and seal certain jury information for the duration of the case until such information no longer would prejudice Roof's right to a fair trial.
- b. *Voir dire* protects civil and criminal defendants' right to an impartial jury by "exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

c. Under federal and state law, prospective jurors can be struck for cause based on bias and discriminatory views if those views affect their ability to remain impartial. For courts, the critical inquiry is whether a prospective juror can disregard those biases and decide a given case objectively based on the evidence presented. See *United States v. Johnson*, No. 22-2845, 2024 WL 617719, at \*6 (3d Cir. Feb. 14, 2024); *People v. Clark*, 512 P.3d 1074, 1078-79 (Colo. Ct. App. 2022).

d. **Federal Law:**

(1) The Sixth Amendment guarantees criminal defendants the **right to an impartial jury**. U.S. CONST. amend. VI.

(a) Given that guarantee, “[i]f only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial jury.” *Love v. Yates*, 586 F. Supp. 2d 1155, 1185 (N.D. Cal. 2008).

(2) The Seventh Amendment **right to a jury trial** in civil cases **encompasses the right to an impartial jury**. See *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514 (10th Cir. 1998) (stating that the “right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury”).

(3) **Pretrial voir dire** is the principal vehicle through which juror partiality and bias can be determined. *Fylling v. Royal Caribbean Cruises, Ltd.*, 91 F.4th 1371, 1376 (11th Cir. 2024); see also *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (stating *voir dire* is critical to “assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored”).

(4) Trial court judges are afforded **substantial discretion** in determining how best to conduct *voir dire* and the questioning of prospective jurors. See, e.g., *Skilling v. United States*, 561 U.S. 358, 386 (2010) (“Jury selection, we have repeatedly emphasized, is ‘particularly within the province of the trial judge.’”); FED. R. CIV. P. 47(a) (providing district courts with latitude in controlling the examination of prospective jurors); FED. R. CRIM. P. 24(a) (“The court may examine prospective jurors or may permit the attorneys for the parties to do so.”).

(a) The U.S. Supreme Court has held that the standard for whether a court should excuse a prospective juror for cause “is whether the juror’s views would **prevent or substantially impair the performance of his duties** as a juror in accordance with his instructions and oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); see also *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 515 (10th Cir. 1998) (applying a similar standard under the Seventh Amendment and stating, “To violate due process, the bias must affect the juror’s ability to impartially consider the evidence presented at trial”).

(b) This inquiry is a question of fact and turns on whether jurors can disregard their opinions and decide the case based on the evidence presented. See *Gutierrez v. Dretke*, 392 F. Supp. 2d 802, 838 (W.D. Tex. 2005).

(5) **Racial prejudice** is one form of bias that may provide grounds for disqualifying a prospective juror for cause.

(a) The United States Supreme Court has held that the fact that a criminal defendant is a minority does not establish a federal constitutional right to have prospective jurors questioned with respect to potential racial prejudice. Instead, that constitutional right exists only where **specific circumstances indicate that racial prejudice might affect the trial**. See *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976).

(b) Critically, “a trial court’s failure to inquire as to prospective jurors’ ethnic or racial prejudices is constitutionally infirm only if ethnic or racial issues are inextricably intertwined with conduct of the trial, or if circumstances in the case suggest that racial prejudice might infect the defendant’s trial.” *United States v. Borders*, 270 F.3d 1180, 1182 (8th Cir. 2001).

(c) *Ham v. South Carolina* is a controlling precedent on this issue. There, the U.S. Supreme Court held that *voir dire* on racial prejudice was constitutionally required when an African-American civil rights activist asserted that law enforcement framed him. 409 U.S. 524, 527 (1973).

(d) Courts may excuse prospective jurors with racial biases if they are **unable to proceed in an impartial fashion**. See *United States v. Johnson*, No. 22-2845, 2024 WL 617719, at \*6 (3d Cir. Feb. 14, 2024) (holding that the district court did not err in striking for cause two jurors whose inherent biases about race would affect their ability to remain impartial).

(e) *United States v. Johnson* illustrates that explicit racial bigotry is not required in order to strike a juror for cause; instead, prospective jurors with implicit biases and racial preconceptions may also be struck.

(6) **Religion** can also provide grounds for disqualifying prospective jurors for cause. For example, courts have held that prospective jurors may be properly dismissed where they state during *voir dire* that their faith would prevent or substantially impair voting for the death penalty. See *Gutierrez v. Dretke*, 392 F. Supp. 2d 802, 825 (W.D. Tex. 2005).

(7) In the event that a juror indicates bias or prejudice, courts should inquire deeper into whether or not the prospective juror can set aside those beliefs. Navigating this issue may require obtaining clear statements that jurors can and will follow all instructions, disregard any biases, and suspend judgment until all evidence has been presented. See *Gutierrez v. Dretke*, 392 F. Supp. 2d 802, 838 (W.D. Tex. 2005).

#### e. State Law

(1) Many states have statutes and rules of procedure that allow for cause challenges against prospective jurors if they harbor views that preclude them from rendering an impartial verdict based on the evidence presented at trial. Notable examples include:

(a) N.Y. CRIM. PRO. L. § 270.20(1)(b) (permitting challenges for cause where a prospective juror “has a state of mind that is likely to preclude him from rendering an

impartial verdict based upon the evidence adduced at the trial”).

(b) MINN. R. CIV. PROC. 26.02(5)(1) (providing for a for cause challenge when the “juror’s state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party”).

(c) ARIZ. R. CRIM. P. 18.4(b) (permitting for cause challenges to prospective jurors “if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict”).

(d) GA. CODE ANN. § 15-12-164(d) (mandating that the court must excuse for cause any juror who “is determined by the court to be substantially impaired” in his or her ability to remain impartial in felony cases).

(e) N.C. GEN. STAT. § 15A-1212(9) (permitting challenges for cause to be made against any prospective juror who is “unable to render a fair and impartial verdict”).

(2) Similarly, state courts have held that prospective jurors can and must be struck for cause if they cannot fulfill the charge of impartiality required for trial. *See, e.g., People v. Clark*, 512 P.3d 1074, 1078-79 (Colo. Ct. App. 2022) (holding that the trial court abused its discretion by refusing to strike for cause a prospective juror who expressed bias against non-white people and refused to set aside his views in a case involving an African-American defendant).

(a) It is the judge’s duty to determine whether prospective jurors, despite their opinions or biases, can remain impartial. If prospective jurors cannot fairly evaluate the matter, then the court may excuse them for cause. *See Commonwealth v. Williams*, 116 N.E.3d 609, 618-19 (Mass. 2019).

(b) Note, however, that some courts have held that a court need not excuse prospective jurors who admit bias against members of the defendant’s race if they commit to deciding the case solely on the evidence presented. *See, e.g., Herrera v. State*, 702 S.E.2d 854, 858 (Ga. 2010).

(3) State courts should be cautious and ensure that any potential biases do not extend beyond *voir dire*.

(4) Securing assurances of impartiality and a fair application of the law from prospective jurors may be necessary. *See People v. Oliver*, 474 P.3d 207, 213 (Colo. Ct. App. 2020) (“In determining whether a potential juror can set aside any preconceived notions and render an impartial verdict, the trial court may consider a juror’s assurances that he or she can serve fairly and impartially.”).

(5) In the event that prospective jurors are uncertain of their ability to disregard any biases and maintain an impartial perspective, dismissal for cause may be appropriate. *See Commonwealth v. Williams*, 116 N.E.3d 609, 618-19 (Mass. 2019).

## 9. Judicial Recusal and Disqualification

- a. Due process guarantees criminal defendants the right to a **fair and impartial judge**. See *Marks v. Davis*, 106 F.4th 941, 988 (9th Cir. 2024); *Bonnet v. Whitaker*, 118 F.4th 154, 166 (1st Cir. 2024).
- b. The U.S. Supreme Court has long held that “[a] **fair trial in a fair tribunal is a basic requirement of due process**,” and “[f]airness of course requires an absence of actual bias in the trial of cases.” *In re Murchison*, 349 U.S. 133, 136 (1955).
- c. Moreover, judicial **bias or any form of antagonism** toward a criminal defendant “makes any fair judgment impossible” and is “constitutionally unacceptable.” *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013).
- d. The standard for assessing judicial bias is an objective one. As a matter of due process, recusal is required when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009).
  - (1) **Example:** In *Jackson v. Cool*, the Sixth Circuit granted the defendant a writ of habeas corpus and held that the defendant’s due process rights were violated where a state trial court judge held multiple *ex parte* communications with the prosecution regarding the defendant’s sentencing, refused to recuse himself, and refused to grant a new sentencing hearing. 111 F.4th 689, 697-99 (6th Cir. 2024).
- e. Due process sets the outer parameters governing judicial recusal and disqualification. The principal sources that judges and litigants should consult on this issue are **professional conduct standards, statutes, and jurisdiction-specific case law**. See *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).
- f. Model Rule of Judicial Conduct 2.11(A) provides, “A judge shall disqualify himself or herself in any proceeding **in which the judge’s impartiality might reasonably be questioned[.]**” MODEL RULE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS’N 2020). Rule 2.11 includes a non-exhaustive list of circumstances in which disqualification may be appropriate, including:
  - (1) The judge has **personal bias or prejudice** concerning a party or its lawyer, or personal knowledge of facts in dispute. MODEL RULE OF JUD. CONDUCT r. 2.11(A)(1).
- g. Litigants in **federal court** can move for trial judges to recuse themselves—in both **civil and criminal** cases—under two principal statutes: 28 U.S.C. § 455 and 28 U.S.C. § 144.
- h. **28 U.S.C. § 455** provides specific grounds giving rise to mandatory disqualification, and can be used by parties via motion or invoked by a judge *sua sponte*:
  - (1) Section 455(a) states: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding **in which his impartiality might be questioned.**” Section 455(a) is the provision that judges most often use to disqualify themselves *sua sponte*.
  - (2) This subsection imposes a high standard on federal courts because it is not limited to

actual bias, but instead **applies broadly to the appearance of bias**. See *Liteky v. United States*, 510 U.S. 540, 548 (1994) (stating that subsection (a) must be “evaluated on an objective basis, so what matters is not the reality of bias or prejudice but its appearance”); see also *id.* (“Quite simply and quite universally, recusal [is] required whenever impartiality might reasonably be questioned.”).

(3) The question for a judge to consider when addressing disqualification is **whether an objective, reasonable person with full knowledge of the underlying facts would conclude that the judge’s impartiality is at risk of being questioned**. See *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 107 (2d Cir. 2012); *United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008) (noting that the inquiry is whether “an objective, disinterested observer fully informed of the underlying facts, [would] entertain significant doubt that justice would be done absent recusal”).

(4) Additionally, disqualification is typically only proper under § 455(a) when the question of a judge’s impartiality arises from **extrajudicial sources of information**, rather than the proceedings themselves. See *Liteky v. United States*, 510 U.S. 540, 550-51 (1994) (holding that a judge is not generally required to recuse for bias, even if the judge is “exceedingly ill disposed towards the defendant,” when the judge’s “knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings”).

(a) However, “bias” or “prejudice” developed during the course of the trial can provide grounds for disqualification when “**it is so extreme as to display clear inability to render fair judgment.**” *Id.* at 551.

(5) The United States Circuit Courts of Appeal have fashioned a **non-exhaustive list of matters that are ordinarily insufficient to require recusal under § 455(a)**. See *Clemens v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 428 F.3d 1175, 1178-79 (9th Cir. 2005) (citing *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995)). These matters include:

(a) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters;

(b) The mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense;

(c) Prior rulings in the proceeding, or another proceeding, solely because they were adverse;

(d) Mere familiarity with the defendant(s), or the type of charge, or the kind of defense presented;

(e) A party’s baseless personal attacks on or suits against the judge;

(f) Reporters’ personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed

to the judge or others, but which are in fact false or materially inaccurate or misleading;  
and

(g) Threats or other attempts to intimidate the judge.

(6) **Example:** In *United States v. Liggins*, the Sixth Circuit vacated a defendant's conviction and sentence where the district court judge stated that the defendant, who was African-American, "looks like a criminal to me," but refused to recuse himself under 28 U.S.C. § 455(a). 76 F.4th 500, 508 (6th Cir. 2023).

(7) Section 455(b)(1) calls for disqualification in the event of **actual bias or prejudice** against a party, or personal knowledge of disputed evidentiary facts.

(a) Disqualification under this section is generally only required if the bias or prejudice can be proved by compelling evidence. *United States v. Barr*, 960 F.3d 906, 920 (7th Cir. 2020) ("Bias must be proven by compelling evidence, and it must be grounded in some form of personal animus that the judge harbors against the litigant.").

(b) Personal knowledge of disputed evidentiary facts also requires disqualification under § 455(b)(1); however, courts generally hold that "personal knowledge" means information gained outside of judicial proceedings. See *United States v. Randall*, 440 F. App'x 283, 286 (5th Cir. 2011) (noting that "personal knowledge of evidentiary facts" means "extrajudicial" and does not include facts learned by a judge in his or her judicial capacity).

(c) Sections 455(b)(2)-(5) provides additional fact-specific circumstances requiring disqualification.

i. While 28 U.S.C. § 455 permits *sua sponte* self-disqualification by federal judges of all levels, 28 U.S.C. § 144 applies only to motions filed in federal district court by the parties.

j. Section 144 provides: "Whenever a party to any proceeding in a district court makes and files a **timely and sufficient affidavit** that the judge before whom the matter is pending has a **personal bias or prejudice** either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

(1) Substantively, § 144 mirrors the situations provided for in § 455 and applies where the judge "has a personal bias or prejudice" against a party. See also *Liteky v. United States*, 510 U.S. 540, 548 (1994) (stating that 455(b)(1) is "entirely duplicated on the grounds set forth in § 144").

(2) The affidavit must "state the facts and the reasons for the belief that bias or prejudice exists," and must be filed within ten days of "the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." § 144.

(3) Courts require an affidavit to satisfy three requirements to be legally sufficient: "(1) state

the material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists, and (3) state facts that show the bias is personal, as opposed to judicial, in nature.” *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003); see also *United States v. Thompson*, 483 F.2d 527, 528 (3d Cir. 1973) (establishing the three requirements an affidavit must satisfy to be legally sufficient under 28 U.S.C. § 144).

**k. Appealing Denial of Motion to Recuse/Disqualify:** In federal court, a denial of a motion for recusal is typically not a final order and therefore must be reviewed through a petition for a writ of mandamus. See, e.g., *In re Prall*, 569 F. App’x 88, 89 (3d Cir. 2014); *In re U.S.*, 572 F.3d 301, 307 (7th Cir. 2009) (noting that a petition for writ of mandamus is the “proper—indeed the only—means of reviewing a district court’s denial of a motion for recusal”).

**l. State courts** vary in their approach to judicial recusal/disqualification. It is critical that attorneys and judges apprise themselves of the applicable disqualification/recusal provisions in their jurisdiction. As with the federal statutes governing recusal/disqualification, state rules and statutes focus on the appearance and presence of bias, prejudice, and impropriety. Below are some prominent examples of how different states approach the issue.

(1) **California:** Rules of civil procedure in California regulate judicial conduct and establish specific circumstances where disqualification is mandatory. See CAL. CIV. PROC. CODE § 170.1(a)(6)(A)(ii) (requiring disqualification if “[t]he judge believes there is substantial doubt as to his or her capacity to be impartial”); see also *In re Scott*, 61 P.3d 402, 420 (Cal. 2003) (holding that the standard for disqualification under the California Code of Civil Procedure “is objective, but potential bias and prejudice must clearly be established”).

(2) **Michigan:** Judicial disqualification in Michigan is governed by Michigan Court Rule § 2.003, which largely tracks with the federal standards governing judicial disqualification. See Mich. Ct. R. 2.003.

(a) Under Rule 2.003(c)(1)(a), “[d]isqualification of a judge is warranted for reasons that include but are not limited to . . . (a) The judge is biased or prejudiced for or against a party or attorney.” Rule 2.003(c)(1)(b) states further that disqualification is warranted if “[t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party . . . or (ii) has failed to adhere to the appearance of impropriety standard” set forth in the Michigan Code of Judicial Conduct.

(3) **Texas:** The Texas Constitution, the Texas Rules of Civil Procedure, and the Texas Code of Judicial Conduct govern disqualification in Texas. See *In re K.E.M.*, 89 S.W.3d 814, 820-28 (Tex. Ct. App. 2002).

(a) The Texas Constitution provides: “No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.” TEX. CONST. art. V, § 11.

(b) The Texas Rules of Civil Procedure provide a number of bases for which

disqualification and recusal are appropriate. For example, judges must recuse themselves from any proceeding where “the judge’s impartiality might be reasonably questioned” or “the judge has a personal bias or prejudice concerning the subject matter or a party.” TEX. R. CIV. P. 18(b)(1)-(2).

(c) The Texas Code of Judicial Conduct mandates that a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities. “A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” TEX. CODE JUD. CONDUCT, CANON 2A.

m. **Example:** The sentencing of Nikolas Cruz presents a recent example of a highly-publicized case that involved judicial bias. In February 2017, Cruz killed 17 people in a mass attack at Marjory Stoneman Douglas High School in Parkland, Florida. The trial judge was found to have engaged in inappropriate behavior while presiding over the penalty phase and sentencing proceedings.

(1) The trial judge “unduly chastised defense counsel,” wrongly accused the defense team of “threatening her children,” “failed to curtail vitriolic statements directed to defense counsel,” and “embraced members of the prosecution after sentencing.”

(2) As a result of the trial judge’s actions, the Florida Supreme Court found that the judge appeared to be partial to the prosecution. The judge’s behavior fell short of the high standards of conduct expected of Florida judges, and the Florida Supreme Court publicly reprimanded the judge as a result. See *Findings and Recommendation of Discipline, Inquiry Concerning A Judge, the Honorable Elizabeth A. Scherer* (Fla. June 2, 2023).

n. **Example:** Donald Trump’s lawyers made three recusal motions to disqualify Judge Juan Merchan in Mr. Trump’s criminal trial. Mr. Trump argued that Judge Merchan had a conflict of interest because his daughter worked for a progressive digital agency, and previously worked for President Biden and Vice President Harris. See Zach Schonfeld, *Trump’s Hush Money Judge Refuses Third Recusal Request*, THE HILL (Aug. 14, 2024, 8:44 AM ET), <https://thehill.com/regulation/court-battles/4823780-trump-hush-money-judge-recusal/>. Each time, Judge Merchan refused to recuse himself.



(1) Prior to the first recusal motion, the court sought a formal opinion from the Advisory Committee on Judicial Ethics. The Advisory Committee found no grounds for recusal, explaining that “[a] judge’s relatives remain free to engage in their own bona fide independent political activities.” *People v. Trump*, No. 71543-23, 2024 WL 3841211, at \*1 (N.Y. Sup. Ct. Aug. 13, 2024).

## 10. Judicial Substitution – State Law

a. Some states allow parties to move to substitute or preemptively challenge a judge without cause in both criminal and civil cases. For example, both Wisconsin and Illinois have well-recognized judicial substitution statutes.

b. Illinois law permits a party to move for judicial substitution (1) as a matter of right or (2) upon a showing of cause.

(1) Under 735 ILL. COMP. STAT. § 5/2-1001(a)(2)(i), each litigant is entitled to **one judicial substitution as of right**, provided that the request is made before trial or hearing begins, and before the judge has ruled on any substantial issue in the case. *See also Chavis v. Woodworker’s Shop, Inc.*, 115 N.E.3d 341, 343 (Ill. App. Ct. 2018) (“Under section 2-1001(a)(2)(i) of the Code, a civil litigant is entitled to one substitution of judge without cause as a matter of right.”).

(2) Under 735 ILL. COMP. STAT. § 5/2-1001(a)(3)(i), each litigant is also entitled to a **judicial substitution upon a showing of good cause**. The procedure for exercising for cause judicial substitution requires the party to submit a verified affidavit along with a petition to the court, “setting forth the specific cause for substitution.” *Id.* § 2-1001(a)(3)(ii); *Petalino v. Williams*, 61 N.E.3d 1014, 1023-24 (Ill. Ct. App. 2016).

c. Similarly, Wisconsin permits litigants to move for judicial substitution as a matter of right; however, Wisconsin has separate substitution statutes for civil and criminal proceedings.

(1) In civil proceedings, WIS. STAT. § 801.58(1) permits parties to request a judicial substitution, provided the request is made before “the hearing of any preliminary contested matters” and “not later than 60 days after the summons and the complaint are filed.” *See also In re Commitment of Matthews*, 959 N.W.2d 640, 647 (Wis. 2021) (holding that, for purposes of § 801.58(1), the term “preliminary contested matter” refers to “a substantive issue that goes to the ultimate merits of the case”).

(2) In criminal proceedings, the applicable statute provides that “the defendant has a right to only one substitution of a judge[.]” WIS. STAT. § 971.20 (2).

(a) This right may be exercised to substitute the judge assigned to preside over the preliminary examination under § 971.20(3), or to substitute the trial judge originally assigned to the case under § 971.20(4). *See State ex rel. Mace v. Cir. Ct. for Green Lake Cnty.*, 532 N.W.2d 720, 723 (Wis. 1995) (holding that a defendant who requests to substitute the preliminary examination judge exhausts the right to substitution for the duration of their proceedings).

d. **Additional Resources:** ALASKA R. CIV. P. 42(c)(1); ALASKA R. CRIM. P. 25(d); ARIZ. R. CRIM. P. 10.2(a)(1); ARIZ. R. CIV. P. 42.1(a); IDAHO R. CIV. P. 40(a); IDAHO CRIM. R. 25(a); IND. ST. TRIAL P. R. 76(B); MINN. R. CIV. P. 63.03; MINN. R. CRIM. P. 26.03.14(4); MO. R. CIV. P. 51.05(a); MO. R. CRIM. P. 36.07; MONT. CODE ANN. § 3-1-804(1); NEV. SUP. CT. R. 48.1.1; N.M. STAT. ANN. § 38-3-9; N.D. CENT. CODE § 29-15-21.1; TEX. GOV’T CODE § 74.053(b); UTAH R. CRIM. P.

29A(a) (requiring unanimous agreement of all parties to criminal action); WYO. R. CIV. P. 40.1(b)(1).

## 11. Pretrial Publicity and Due Process

a. Hate crimes, mass violence, and other similar crimes can attract an abundance of media attention from the moment the crimes are committed. See *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (“In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public[.]”).

b. In certain circumstances, pretrial publicity can violate a defendant’s due process rights. The principal concern in this area is the effect that pretrial publicity has on jurors’ ability to maintain impartiality.

(1) The Seventh Amendment right to a jury trial in civil cases encompasses the right to an impartial jury. See *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514 (10th Cir. 1998)

(2) The Sixth Amendment guarantees criminal defendants an “impartial jury of the State and district wherein the crime shall have been committed[.]” U.S. CONST. amend. VI.

c. Concerning pretrial publicity, the U.S. Constitution entitles a criminal defendant “not to a trial by a body of jurors ignorant of all facts surrounding the case, but to an impartial jury which will render a verdict based exclusively on the evidence presented in court.” *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979).

d. The U.S. Supreme Court has recognized that “[t]o hold that the mere existence of any preconceived notion as to guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard.” *Irvin v. Dowd*, 366 U.S. at 717, 723 (1961).

(1) Instead, what matters is the juror’s ability to “lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Id.*

e. **The requirement of a local trial cannot hamper the right to a fair one.** See *Skilling v. United States*, 561 U.S. 358, 378 (2010).

(1) Thus, in cases where “extraordinary local prejudice” prevents impartiality, courts must transfer the trial to a location where an impartial jury can be drawn. *Id.*

f. Federal courts recognize two forms of prejudice relating to pretrial publicity, both of which are determined by objective standards.

(1) Pretrial publicity can create a **presumption of prejudice** in “extreme cases” where the coverage is so pervasive that it poisons the trial atmosphere and makes it impossible for the defendant to receive a fair trial by an impartial jury. See *United States v. Webster*, 102 F.4th 471, 479 (D.C. Cir. 2024). Presumptive prejudice is extraordinarily rare.

(a) Juror exposure to news accounts alone, for example, does not presumptively deprive the defendant of due process; instead, the presumption of prejudice arises only in extreme cases. *See id.*

(2) **Actual prejudice** requires a showing that, as a result of extensive pretrial publicity, jurors who sat on the case were biased and could not impartially decide the case based on the evidence presented. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 798-99 (1975); *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979).

g. Courts consider several factors to determine whether pretrial publicity has prejudiced the jury in violation of a criminal defendant's Sixth Amendment rights. According to the U.S. Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358, 383-84 (2010), issues for courts to analyze include:

- (1) The size and characteristics of the community in which the crime occurred;
- (2) Whether the publicity involved "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to keep from sight;"
- (3) The time that elapsed between the height of media attention and the trial; and
- (4) Jury actions with respect to earlier prosecutions of similar or related crimes.

h. **Example:** The prosecution of Timothy McVeigh and Terry Nichols was a high-profile case where pretrial publicity required a change in venue. McVeigh and Nichols were arrested in connection with the April 19, 1995 truck-bombing at the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma. The bombing killed 168 people, injured hundreds of others, and destroyed the building.

(1) Initially, the parties stipulated that the venue had to be moved outside of Oklahoma City—where the United States District Court for the Western District of Oklahoma is located—because "[t]he effects of the explosion on the community [were] so profound and pervasive" that it was certain McVeigh and Nichols could not receive a fair trial before an impartial jury.

(2) The subsequent dispute was over whether the trial should stay in Oklahoma or be transferred to Denver, Colorado. The district court determined that "there is so great a prejudice against these two defendants in the State of Oklahoma that they cannot obtain a fair and impartial trial at any place fixed by law for holding court in that state."

(3) That determination considered three factors: (1) what began as comprehensive national media attention reduced with the passage of time to personal coverage of the victims, their families, and "individual stories of grief and recovery;" (2) "Oklahomans [were] united as a family with a spirit unique to the state," and the response and subsequent healing required effort by Oklahoma as a whole; and (3) "[t]he possible prejudicial impact of this type of publicity" was "not something measurable by any objective standards."

(4) As a result, the Oklahoma federal district court concluded that that District of Colorado was the appropriate venue where the defendants could obtain a fair and impartial trial. *United States v. McVeigh*, 918 F. Supp. 1467, 1470-74 (W.D. Okla. 1996).

i. As discussed more fully above, pretrial *voir dire* is an essential stage in ensuring that criminal defendants receive a fair trial before an impartial jury.

j. **Example:** Larry Brock was charged with multiple offenses, including obstruction of an official proceeding, related to the violence at the United States Capitol on January 6, 2021. Brock was prosecuted in Washington, D.C., and moved for a change of venue based on assertions that he could not have a fair and impartial jury there.

(1) The United States District Court for the District of Columbia denied Brock’s motion and held that the events of January 6th and the subsequent press attention did not rise to the level of “extreme circumstances” required to presume prejudice prior to *voir dire*.

(2) In support of its ruling, the district court relied on four lines of reasoning: (1) Washington, D.C.’s size and characteristics—a population greater than 600,000—reduced the likelihood of prejudice; (2) no pretrial publicity specifically referred to the defendant, let alone the level of intense publicity necessary to give rise to a presumption of prejudice; (3) the appropriate stage and procedure for rooting out prejudice is *voir dire*; and (4) nearly two years would have elapsed between the events of January 6th and Brock’s trial.

(3) As a result, the district court concluded that a vigorous *voir dire* was sufficient to filter out bias in individual jurors and denied Brock’s motion to transfer venue. See *United States v. Brock*, 628 F. Supp. 3d 85 (D.D.C. 2022).

## E. Public Interest and Media Rights

1. Under the First Amendment’s “freedom of speech, or of the press,” the U.S. Supreme Court has held that the press and the public have a presumed right of access to civil and criminal proceedings, absent some overriding interest. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013).

2. **This right is not absolute.** The U.S. Supreme Court has explained that when there is a right of access claim in a criminal proceeding, courts should consider (1) “whether the place and process have historically been open to the press and general public” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 8 (1986).

a. The right of public access does not apply to witness sequestration orders issued under Rule 615 of the Federal Rules of Evidence to prevent altered testimony. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (finding the right of public access applies to the public at large and specific, personalized witness sequestration does not implicate the public or press). Victim-witnesses, however, have a statutory right under the Crime Victims’ Rights Act to attend the accused defendant’s criminal trial unless there is clear and convincing evidence the victim-witness’s testimony would be materially altered if the victim heard other testimony. *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006).

3. According to these considerations, the right of access extends to trials, *voir dire*, suppression hearings, and preliminary hearings, but does not extend to grand jury proceedings. See, e.g., *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 10 (1986) (noting the public right of access to preliminary hearings but not to grand jury proceedings); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (noting the public right of access to suppression hearings); *Press Enterprise I*, 464 U.S. 501, 508 (1984) (noting the public right of access to *voir dire*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (noting public right of access to criminal trials).

4. **Recording or Televising:** The right of access does not require that the court permit the media to broadcast any part of the trial. *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

a. Taking photographs in a federal criminal case in the courtroom during judicial proceedings and broadcasting proceedings from the courtroom are prohibited. FED. R. CRIM. P. 53.

b. Courts may forbid broadcasting and photographing from other limited areas of the courthouse if they would lead to disruption of the proceedings. See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

c. However, there is no strict prohibition on televising criminal trials. See *Chandler v. Florida*, 449 U.S. 560, 583 (1981).

d. The court should be aware that televising proceedings over the objection of defendants may interfere with the defendants' due process rights. *Estes v. Texas*, 381 U.S. 532, 551-52 (1965).

5. The right of access to attend criminal trials extends to inspecting and copying judicial records. *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 597 (1978).

## II. CASE MANAGEMENT ORDERS

### A. Motion Deadlines

Hate crime and other high-profile cases tend to have a proliferation of pretrial motions. Many courts routinely set deadlines to file motions in advance of trial, but in some courts, especially for criminal cases, the deadlines are very close to trial. Consider whether, in your case, setting earlier deadlines to limit unexpected controversies shortly before or during proceedings will outweigh other interests.

### B. Establish Clear Ground Rules

Active case management from the beginning of the case promotes efficiency and can avoid unnecessary delay. Set clear expectations for the parties and counsel. Evaluate whether existing court rules, Chamber policies, standing orders, and other similar binding documents fully address the needs of your case. If not, consider issuing an order to cover any additional concerns.

1. For example, consider whether depositions in your case raise unique security concerns and whether to require or offer courthouse space for the parties to conduct the depositions.

### C. Protective Orders

1. **Protective orders during the discovery process** may restrict the dissemination of discovered material, such as names, addresses, and other identifying information about witnesses. *See, e.g.*, N.Y. CRIM. PROC. LAW § 245.70.

#### a. Prerequisites:

(1) In New York, a protective order in a criminal matter has three requirements: (1) A motion of any party is made which (2) puts forth a showing of good cause, and (3) a hearing is held within three business days to determine whether good cause has been shown. N.Y. CRIM. PROC. LAW § 245.70(1)–(3).

(2) The public right of access to court documents (e.g., filings and exhibits) is a strong presumption, not an absolute rule. The presumption can be overridden if sealing the documents is “essential to preserve higher values and is narrowly tailored to serve that interest.” *Press Enterprise I*, 464 U.S. 501, 510 (1984); *United States v. McCraney*, 99 F. Supp. 3d 651, 654 (E.D. Tex. 2015).

(a) Compelling interests outweigh the public's interest in disclosure when "court files might . . . become a vehicle for improper purposes." *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978). Improper purposes may include the use of records to gratify private spite, promote public scandal, spread libelous statements, or release trade secrets. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

**b. Notes:**

(1) Proceedings on a motion for protective order may be held *in camera*.

(2) Before withholding discovery entirely, consider less restrictive means (like redacting statements or prohibiting copying). Redacted information should be kept under seal so as to be available for appellate review.

**c. Example:** Not all protective orders must meet the stringent requirements for full sealing, and in some cases less restrictive measures can protect the dignity of victims and prevent defendants from using court processes to immortalize hateful messages. In the case of Dylan Roof, the court granted a protective order limiting distribution of depictions of the deceased victims. While the public was permitted to view evidence in open court and hear testimony, the court ordered that depictions of the deceased victims at the crime scene would not be put on the Court's website or be available for copying. *United States v. Roof*, Docket No. 2:15-cr-00472 (D.S.C. July 22, 2015) (ECF 702).

**2. Protective orders may prevent acts of intimidation** against witnesses or victims outside of the courtroom. See, e.g., 18 PA. CONS. STAT. § 4954. A court may invoke this type of order *sua sponte*. See *id.*

**a. Prerequisites:**

(1) Two requirements for such an order are (1) substantial evidence of wrongdoing and (2) a hearing. See 18 PA. CONS. STAT. § 4954.

**b. Note:**

(1) The court order should be specific as to the prohibited actions, the prohibited persons, the protected persons, and its duration.

## D. Confidentiality Orders

**1. Courts may issue a gag order** to prevent individuals from disclosing certain information. See FEDERAL TRIAL HANDBOOK: *Criminal* § 5:7 (2024-2025 ed.); FEDERAL TRIAL HANDBOOK: *Civil* § 9:29 (2024-2025 ed.).

**a. Prerequisites:**

(1) Gag orders are often subject to the strict scrutiny analysis. Therefore, the gag order must (1) serve a compelling government interest and (2) be narrowly tailored to achieving that

goal. See, e.g., *In re Murphy-Brown, LLC*, 907 F.3d 788, 797 (4th Cir. 2018) (stating that gag orders must survive a strict scrutiny analysis).

**b. Notes:**

(1) Gag orders on the press are rarely upheld because they generally represent an impermissible form of prior restraint. See *id.* at 798.

2. To protect a criminal defendant's Sixth Amendment right to a fair trial, courts can issue gag orders against trial participants and even the press itself. The application of gag orders to third parties not participating in the trial can raise questions about whether the gag orders are enforceable. However, courts may have the power to enforce gag orders against third parties in particular circumstances.

3. Courts have issued gag orders directly on the media, but precedent notes that there is a "heavy burden imposed as a condition to securing a prior restraint." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

a. For example, in *Nebraska Press Ass'n v. Stuart*, the U.S. Supreme Court found that a state court order directly restraining the media from publishing or broadcasting certain facts from the trial was improper under the First Amendment. *Id.*

b. Additionally, the Court discussed how "[t]he need for In personam Jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction." *Id.* at 565-66. In a footnote, the Court explained that the Nebraska Supreme Court found the lower court only had jurisdiction over the petitioners "by virtue of their voluntary submission . . . when they moved to intervene." *Id.* at 566, n.9 (citing *State v. Simants*, 236 N.W.2d 794, 802 (Neb. 1975), *rev'd Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)).

4. More often, courts impose a gag order on trial participants, and the media challenges the order as unconstitutional under the First Amendment because it impairs the media's ability to gather and report news.

a. In these cases, some courts have distinguished the standard of review for gag orders when a third party not subject to the order challenges it, as opposed to those persons directly subject to the order. See, e.g., *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 609 (2d Cir. 1988) ("[T]here is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not.").

5. Although not directly consistent with gag orders, courts have enjoined non-parties from disseminating information falling under a protective order in the context of discovery **when the third party "aids or abets" in the violation of the order.**

a. In *Eli Lilly & Co. v. Gottstein*, the Second Circuit found that a nonparty who aids or abets a violation of a court order submits themselves to the personal jurisdiction of the court and can be enjoined from violating the protective order. 617 F.3d 186, 194-95 (2d Cir. 2010) ("If courts cannot bind third parties who aid and abet the violation of their protective orders, then any party, agent, attorney or expert who comes into possession of material he wanted to use against the producing party could simply

disseminate the information quickly, then deal with the damages issue after the fact.”).

6. Gag orders can also function like injunctions, so similar arguments may be made regarding the applicability of injunctions to third parties.

a. According to the Federal Rules of Civil Procedure, courts may enjoin third parties “**who are in active concert or participation**” with “the parties, the parties’ officers, agents, servants, employees [or] attorneys.” FED. R. CIV. P. 65(d)(2).

(1) The U.S. Supreme Court explained that “defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

b. The Fifth Circuit has held that “[n]onparties who reside outside the territorial jurisdiction of a district court may be subject to that court’s jurisdiction if, with actual notice of the court’s order, they actively aid and abet a party in violating that order.” *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985). This jurisdiction exists even without additional contacts within the forum. *Id.*

## E. Discovery

1. If a party fails to comply with Fed. R. Crim. P. 16, Discovery and Inspection, the court may:

- a. order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
- b. grant a continuance;
- c. prohibit the party from introducing the undisclosed evidence; or
- d. enter any other order that is just under the circumstances.

2. Under Fed. R. Crim. P. 16(d)(2), the trial court has discretion to exclude evidence for non-compliance with Rule 16(b)(1)(A), which permits the government to inspect and copy or photograph papers and documents that are within defendant’s possession and control that the defendant intends to use at trial. Exclusions are reviewed for an abuse of discretion. *See United States v. Rodriguez Cortes*, 949 F.2d 532 (1st Cir. 1991) (finding proper exclusion and that even if documents proffered by defendant were improperly excluded under Rule 16(d)(2), evidence had not been shown to be otherwise admissible).

3. Courts should consider:

- a. “(1) the reasons the party delayed producing the requested materials, including whether or not the party acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to other party as a result of the delay; and (3) the feasibility of curing the prejudice with a continuance.” *United States v. Ivy*, 83 F.3d 1266, 1280 (10th Cir. 1996) (quoting *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988)).

4. Some courts and statutes recognize other sanctions and remedies for failing to comply with discovery.

- a. These include: (1) instructing the jury to assume certain facts that might have been established through the nondisclosed material, (2) granting a mistrial, (3) holding in contempt the party responsible for the nondisclosure, and (4) dismissal of the prosecution. *See, e.g.*, ARIZ. R. CRIM. P. 15.7(c) (3) (2018) (noting available sanctions as granting a continuance or declaring a mistrial); WIS. STAT. ANN. § 971.23(7m) (2017) (permitting courts to advise jury of the nondisclosure of such information); MONT. CODE ANN. § 46-15-329(5) (1991) (authorizing declaring a mistrial in response to discovery violations); LA. CODE CRIM. PROC. ANN. art. 729.5(A) (1977) (permitting court to order discovery or inspection, grant a continuance, order a mistrial, and prohibit the party from introducing into evidence the subject matter not disclosed).

## F. Judicial Dismissal

1. Rule 48 of the Federal Rules of Criminal Procedure establishes two avenues for dismissal—one by the government and one by the court. FED. R. CRIM. P. 48.

2. **The government** “may, with leave of court, dismiss an indictment, information, or complaint.” FED. R. CRIM. P. 48(a).

a. It may not, however, “dismiss the prosecution during trial without the defendant’s consent.” FED. R. CRIM. P. 48(a).

b. Generally, the government has broad prosecutorial discretion, and courts have limited power when the government decides to stop prosecuting a criminal defendant. *Wayte v. United States*, 470 U.S. 598, 607–08 (1985); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) (discussing prosecutorial discretion in “decisions to dismiss pending criminal charges”).

c. The United States Supreme Court has nonetheless recognized that the “leave of court” requirement in Rule 48(a) “obviously vest[s] some discretion in the court.” *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977); *see also United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (noting that judicial discretion is granted to “guard[] against abuse of prosecutorial discretion”).

d. Federal trial court judges are without power “to deny a prosecutor’s Rule 48(a) motion to dismiss charges based on disagreement with the prosecution’s exercise of charging authority.” *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) (“It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less impose its own charging preferences.”); *see also United States v. B.G.G.*, 53 F.4th 1353, 1361 (11th Cir. 2022) (“The judiciary has a role to play when government seeks to dismiss a prosecution—but it’s a limited one.”).

(1) Courts may deny a Rule 48(a) motion upon finding abuse of prosecutorial discretion if dismissal is “clearly contrary to manifest public interest.” *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000) (internal quotation and citation omitted).

(2) In evaluating the public interest, courts must determine whether the government’s “effort to terminate the prosecution” is “tainted with impropriety.” *Rinaldi v. United States*, 434 U.S. 22, 30 (1977).

(a) Examples of prosecutorial impropriety include where “dismissal does not serve due

and legitimate prosecutorial interests,” where dismissal “was a sham or a deception,” and where dismissal is based on “acceptance of a bribe, personal dislike of the victim, and dissatisfaction with the jury impaneled.” *United States v. Flynn*, 507 F. Supp. 3d 116, 130 (D.D.C. 2020) (quoting, *inter alia*, *United States v. Smith*, 55 F.3d 157, 159 (4th Cir. 1995); *United States v. Cowan*, 524 F.2d 504, 514 (5th Cir. 1975); *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973)).

e. Dismissal may be granted with prejudice or without prejudice.

(1) Rule 48(a) dismissals are typically without prejudice and “permit the government to reindict within the statute of limitations.” *United States v. Raineri*, 42 F.3d 36, 43 (1st Cir. 1994); see also *United States v. B.G.G.*, 53 F.4th 1353, 1363 (11th Cir. 2022) (“It is precisely because a dismissal under [R]ule 48(a) does not bar a subsequent prosecution that the rule requires the consent of the court.”) (internal quotation and citation omitted).

(a) There is a “strong presumption in favor of a no-prejudice dismissal.” *United States v. Poindexter*, 719 F. Supp. 6, 10 (D.D.C. 1989); see also *United States v. Borges*, 153 F. Supp. 3d 216, 219 (D.D.C. 2015) (noting that dismissal without prejudice is favored unless “circumstances are ‘exceptional,’ such as where a dismissal without prejudice ‘would result in harassment of the defendant or would otherwise be contrary to the manifest public interest’”).

(2) Dismissal with prejudice may be appropriate, however, when necessary to preserve the public interest or integrity of the justice system. See, e.g., *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (noting that “the judge might rightly condition dismissal [under Rule 48] on its being with prejudice” to “protect a defendant from the government’s harassing him by repeatedly filing charges and then dismissing them before they are adjudicated”); *United States v. Borges*, 153 F. Supp. 3d 216, 221 (holding that dismissal with prejudice was necessary to protect the defendants from harassment and “the threat of reprosecution hanging over their heads indefinitely”); *United States v. Wecht*, Crim. No. 06-0026, 2008 WL 65605, at \*6 (W.D. Pa. Jan. 4, 2008) (“[A] district court is authorized to dismiss with prejudice where it finds that dismissal without prejudice is contrary to the public interest or is necessary to protect a defendant against prosecutorial harassment of the sort Rule 48(a) is designed to prevent.”).

f. Right to Appeal A Dismissal Without Prejudice

(1) Defendants generally may not appeal dismissals without prejudice.

(a) Such a dismissal is not considered a final decision, which is a prerequisite for appealability. See 28 U.S.C. § 1291 (establishing that courts of appeals “shall have jurisdiction of appeals from all final decisions of the district courts of the United States”).

(b) The U.S. Supreme Court has long recognized that a final decision for purposes of appeal is one that “terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.” *Parr v. United States*, 351 U.S. 513, 518 (1956).

(c) Courts have held that a dismissal without prejudice does not satisfy the *Parr* criterion because it does not preclude the government from subsequently indicting the defendant on the same grounds. *See, e.g., United States v. Kelley*, 849 F.2d 1395, 1397 (11th Cir. 1988) (“The rule that emerges from the Supreme Court’s decision in *Parr* is that a criminal defendant may not immediately appeal a district court’s order dismissing an indictment.”); *United States v. Day*, 806 F.2d 1240, 1242 (5th Cir. 1986) (“It is well settled that an order dismissing a criminal indictment without prejudice is not a ‘final judgment’ under section 1291.”).

(2) The government, on the other hand, may appeal from a dismissal without prejudice under the Criminal Appeals Act.

(a) Section 3731 of the Criminal Appeals Act authorizes the government to appeal an order “dismissing an indictment or information.” 18 U.S.C. § 3731.

(b) The U.S. Supreme Court has distinguished § 1291 appeals from those under § 3731 and has recognized § 3731 as “a statutory exception to the final judgment rule.” *Flanagan v. United States*, 465 U.S. 259, 265 n.3 (1984); *see also United States v. Davis*, 793 F.3d 712, 717 (7th Cir. 2015) (referring to § 3731 as “an exception to the final-decision rule”).

(c) The Ninth Circuit has interpreted § 3731 to permit the government “to appeal from a dismissal of an indictment without prejudice.” *United States v. Woodruff*, 50 F.3d 673, 675 (9th Cir. 1995).

(d) Similarly, the Seventh and Eighth Circuits have held that the government may immediately appeal under § 3731 a trial court’s dismissal of an indictment without prejudice. *See United States v. Davis*, 793 F.3d 712, 719 (7th Cir. 2015) (holding that § 3731 “authorizes an appeal when a district court dismissed an indictment . . . without prejudice to the possibility of a successive indictment containing the same charge”); *United States v. Lester*, 992 F.2d 174, 176 (8th Cir. 1993) (“The plain language of the statute gives the government the right to appeal the district court’s dismissal of an indictment and does not distinguish between dismissal with prejudice or without prejudice.”).

**g. High-Profile Example:** On January 20, 2025, President Donald J. Trump issued an Executive Order directing the Attorney General to “pursue dismissal with prejudice” of each pending prosecution of defendants in connection with the January 6, 2021 events at the United States Capitol. *See Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/granting-pardons-and-commutation-of-sentences-for-certain-offenses-relating-to-the-events-at-or-near-the-united-states-capitol-on-january-6-2021/>.

(1) In response, three United States District Court Judges for the District of Columbia dismissed *without prejudice* the indictments of three January 6 defendants. *See United States v. Banuelos*, 1:24-cr-00135, ECF No. 30 at 2 (D.D.C. Mar. 14, 2024); *United States v. Harding*, 1:23-cr-0080, ECF No. 72 at 2 (D.D.C. Mar. 14, 2023); *United States v. DeCarlo*,

1:21-cr-00073, ECF No. 134 at 7 (D.D.C. Feb. 3, 2021).

**3. The Court:** Under Federal Rule of Criminal Procedure 48(b), district courts are permitted to dismiss “an indictment, information, or complaint” in three circumstances:

- (1) Unnecessary delay in presenting a charge to a grand jury under Rule 48(b)(1);
- (2) Unnecessary delay in filing an information against the defendant under Rule 48(b)(2); or
- (3) Unnecessary delay in bringing a defendant to trial under Rule 48(b)(3).

b. Rule 48(b) restates “the inherent power of the court to dismiss a case for want of prosecution.” FED. R. CRIM. P. 48(b) advisory committee’s notes to 1944 amendment.

(1) Rule 48(b) is often addressed in conjunction with the district court’s inherent power to dismiss for want of prosecution and the Sixth Amendment right to a speedy trial. *See United States v. Goodson*, 204 F.3d 508, 513 (4th Cir. 2000).

(2) Rule 48(b) is broader in scope than the Sixth Amendment guarantee of a speedy trial; however, courts have examined Rule 48(b) issues under the four-part framework used to assess speedy trial claims. *See, e.g., United States v. Ward*, 211 F.3d 356, 362-63 (7th Cir. 2000) (noting that the same considerations underlying the Sixth Amendment right to a speedy trial apply to Rule 48); *United States v. Becker*, 585 F.2d 703, 708 (4th Cir. 1978) (analyzing the constitutional right to a speedy trial and Rule 48(b) under the same criteria).

(a) Those four factors, which the U.S. Supreme Court identified in *Barker v. Wingo*, are: (1) the length of delay (2) the reason for the delay (3) the defendant’s assertion of his right, and (4) prejudice to the defendant. 407 U.S. 514, 530 (1972).

(b) Although the Sixth Amendment does not limit Rule 48(b), the rule is “particularly focused [ ] on some type of fault by the government, resulting in lack of diligent prosecution.” *United States v. Reumayr*, 530 F. Supp. 2d 1200, 1209 (D.N.M. 2007).

c. Dismissal under Rule 48(b) is a matter within the trial court’s sound discretion. *See United States v. Begay*, 602 F.3d 1150, 1154 (10th Cir. 2010).

(1) Nonetheless, courts have recognized that, “[a]lthough the rule confers discretion upon the district judge, a Rule 48(b) dismissal” should be reserved for “extreme circumstances.” *United States v. Yuan Qing Jiang*, 214 F.3d 1099, 1100 (9th Cir. 2000) (stating further that it is “especially true when a dismissal is with prejudice”).

(2) The favored approach, in the event that extreme circumstances arise, is dismissal without prejudice. *See, e.g., United States v. Clay*, 481 F.2d 133, 135 (7th Cir. 1973) (noting that “normally” a Rule 48 dismissal “is without prejudice to a subsequent prosecution”); *United States v. Dobek*, 989 F. Supp. 2d 723, 733 (E.D. Wis. 2013) (stating that case law “generally favors dismissal without prejudice” and “appears to make clear that a Rule 48(b) dismissal is presumed to be without prejudice”).

(a) Dismissal with prejudice is “a harsh remedy for enforcement” in that a court “allows its interest in the orderly administration of justice to override the interests of victims and the public interest in the enforcement of the criminal law.” *United States v. Goodson*, 204 F.3d 508, 514 (4th Cir. 2000).

# III. TRIAL-SPECIFIC PREPARATION

## A. Prepare the Courtroom for Trial

1. Hate crime trials require special attention to preparation of the courthouse and courtroom to preserve defendants' rights while also ensuring the safety of all participants in the trial and spectators. Ensure safe access for the parties, counsel, jurors, witnesses, survivors, and victims' families, including safe entry into the building, secure gathering areas, secure or separate restrooms, and safe egress.



2. Use adequate and visible security in the courtroom, including a balance between security's proximity to a criminal defendant or other party, security's visibility to the jury, spacing for the parties and counsel, and access for the victims, families, media, and public.

3. Meet with court personnel responsible for security to plan courtroom security before trial.

4. Consider an overflow courtroom for spectators and the media separate from the

actual courtroom – both to ensure sufficient space and to prevent them from disrupting the trial.

5. Consider reserved seating and whether other unique arrangements should be made for trial.

a. For example, will all counsel fit in front of the bar or will they need space in the front of the gallery.

b. Consider reserving appropriate seating for news media. Some judges reserve the first two rows of seating in the courtroom for news media to create a **buffer zone** of neutral persons between (a) spectators and (b) the parties, counsel, and witnesses.

## B. Prepare Courtroom Staff

1. **Train courtroom staff** to be alert to intimidation, as in all proceedings, with added emphasis on acts toward the jury or that could influence the jury, including:

a. Spectators' or parties' visible or audible reactions, prolonged stares at jurors or witnesses, and attempts to photograph or record jurors or witnesses.

2. Consider how any enhanced security presence and locations will appear to the jury.

3. Train courtroom staff on the rights and needs of victims and their families, and the rights and needs of media.
4. Ensure that courtroom staff and security personnel have all relevant court orders regarding courtroom access, seating, conduct, and decorum.
5. Advise courtroom staff and security personnel in advance when particularly sensitive or inflammatory evidence will be presented.

## C. Evaluate Potential Courtroom Closure

1. Although various rights generally warrant keeping the courtroom open to the public (see Section I.E), those rights can be overcome for some or all of a trial.
2. In rare instances, courts may exclude all spectators during judicial proceedings.

### a. Prerequisites:

(1) The closure of the judicial proceeding advances an overriding interest, (2) the closure is no broader than necessary to protect that interest, (3) the court considers reasonable alternatives to closure, and (4) the judge makes adequate findings to support the closure. *United States v. Mendonca*, 88 F.4th 144, 151 (2d Cir. 2023), cert. denied, 144 S. Ct. 2531 (2024) (citing *Waller v. Georgia*, 467 U.S. 39 (1984)).

3. Courts have found several compelling interests to justify closure:

a. Defendant's rights to a fair trial. See e.g., *United States v. Edwards*, 303 F.3d 606, 617 (5th Cir. 2002) (holding that right to fair trial justified closure of hearings on whether to empanel an anonymous jury); *United States v. Gerena*, 869 F.2d 82, 86 (2d Cir. 1989) (holding that right to fair trial justified sealing of wiretapped conversations if there is a substantial probability that publicity would prejudice defendant).

b. The privacy rights of jurors, informants, and witnesses. See, e.g., *United States v. Jones*, 965 F.2d 1507, 1513 (8th Cir. 1992) (holding protection of witness from danger justified screening witness from general public); *United States v. De Los Santos*, 810 F.2d 1326, 1333 (5th Cir. 1987) (*per curiam*) (holding that protection of informant's identity in investigation justified closure of suppression hearing); *In re Tribune Co.*, 784 F.2d 1518, 1522-23 (11th Cir. 1986) (holding that protection of jurors' privacy interests justified closure of *voir dire* examination).

c. The protection of ongoing government investigations. See, e.g., *Brown v. Artuz*, 283 F.3d 492, 502 (2d Cir. 2002) (interest in preserving secrecy of undercover officer's identity and ensuring his safety justified closure during his testimony); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 574 (8th Cir. 1988) (protection of ongoing investigation justified sealing of search warrant application); *In re Tribune Co.*, 784 F.2d at 1522-23 (preservation of secrecy of criminal investigations and jurors' privacy interests justified closure of *voir dire* examination); but see *Presley v. Georgia*, 558 U.S. 209, 215

(2010) (holding closed *voir dire* proceedings violated defendant's Sixth Amendment right to public trial *voir dire*).

d. The protection of classified national security information in civil cases. *Dhiab v. Trump*, 852 F.3d 1087, 1098 (D.C. Cir. 2017).

e. A court may deny the right of access when an overriding interest necessitates closure of the courtroom to preserve higher values and the court's order is narrowly tailored to further that interest. *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 9 (1986).

f. The protection of witnesses from the threat of harassment or physical harm. *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979).

**4. When a court determines that exclusion of the press and the public is necessary**, the "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 609 n.25 (1982). Further, the court must consider alternatives to closure for the closure to be constitutional. *Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)*, 478 U.S. 1, 14 (1986).

# IV. JURY SELECTION

## A. Juror Anonymity

1. Nearly every federal court permits anonymous juries in appropriate circumstances.<sup>1</sup>

2. **Balancing interests:** Defendants and the public have a right to know that a trial is proceeding fairly, which generally counsels in favor of disclosing the jurors' names. But publicity comes with risks, including threats to jurors' personal safety and risks of outside influence or intimidation on jurors' decision-making. As a result, courts weigh the question of juror anonymity carefully.

### a. Prerequisites:

(1) A court's decision to empanel an anonymous jury is generally entitled to deference. *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995) (citing cases in the Second, Third, Seventh, and Eleventh Circuits).

(2) However, (1) there must be strong grounds to believe the jury needs protection, and (2) reasonable precautions must be taken to minimize the risk of infringing on the defendant's fundamental rights. *United States v. Suarez*, No. 16-CR-403 (JFB)(20), 2020 WL 7699663, at \*7 (E.D.N.Y. Dec. 28, 2020) (explaining that a neutral explanation to the jury for the anonymous empanelment and a detailed *voir dire* would reasonably protect against any prejudice to the defendant's rights); *United States v. LaFond*, 783 F.3d 1216, 1223 (11th Cir. 2015) (holding that an anonymous jury was permissible because the defendants were members of racist gangs who were facing life sentences and whose affiliates could harm the jurors); *Menendez-Cordero v. State*, 445 P.3d 1235, 1242 (2019) (explaining that the court's neutral explanation to jurors for their anonymous empanelment, citing privacy concerns, protected the defendant's rights by preserving the presumption of innocence). The decision



<sup>1</sup> See, e.g., *United States v. Castillo-Rubio*, 34 F.4th 404, 408–09 (5th Cir. 2022); *United States v. Suarez*, No. 16-CR-403 (JFB)(20), 2020 WL 7699663, at \*2 (E.D.N.Y. Dec. 28, 2020) (citing *United States v. Quinones*, 511 F.3d 289, 295 (2d Cir. 2007)); *United States v. Baca*, 761 F. App'x 724, 727 (9th Cir. 2019); *Allen v. United States*, 829 F.3d 965, 967 (8th Cir. 2016) (citing *United States v. Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995)); *United States v. LaFond*, 783 F.3d 1216, 1223 (11th Cir. 2015); *United States v. White*, 698 F.3d 1005, 1017 (7th Cir. 2012); *United States v. Deitz*, 577 F.3d 672, 685 (6th Cir. 2009); *United States v. Eiland*, No. CRIM. 04-379(RCL), 2006 WL 288403, at \*2 (D.D.C. Jan. 31, 2006); *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998).

to empanel an anonymous jury involves dual considerations: “the court must ensure that the defendant retains his or her right to an unbiased jury by conducting ‘a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself,’ and by providing the jury a neutral and non-prejudicial reason for requiring that it be anonymous, so that jurors will refrain from inferring that anonymity was necessary due to the character of the defendant.” *United States v. Deitz*, 577 F.3d 672, 685 (6th Cir. 2009) (quoting *United States v. Talley*, 164 F.3d 989, 1001–02 (6th Cir. 1999)).

(3) Consider the “*Ross* factors” when determining whether strong reasons support the empanelment of an anonymous jury: (1) The defendant’s involvement in organized crime, (2) the defendant’s participation in a group with the capacity to harm jurors, (3) the defendant’s past attempts to interfere with the judicial process, (4) the potential that the defendant would suffer large penalties or incarceration if convicted, and (5) extensive publicity that could expose the jurors to intimidation or harassment. *United States v. Gutierrez*, 963 F.3d 320, 330 (4th Cir. 2020) (holding that the *Ross* factors supported the empanelment of an anonymous jury); *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994) (establishing the *Ross* factors in holding that an anonymous jury was correctly empaneled).

(4) Note that some courts have said that juror anonymity could potentially violate a criminal defendant’s Sixth Amendment rights by inhibiting the ability to challenge jurors. See *People v. Lopez*, 65 Cal. App. 5th 484, 497 (2021) (“[T]he use of an anonymous jury may interfere with defendants’ ability to conduct *voir dire* and to exercise meaningful peremptory challenges, thereby implicating defendants’ Sixth Amendment right to an impartial jury.”). Moreover, anonymity can potentially be equated with guilt and have a prejudicial effect because it “may undermine the presumption of innocence by conveying, before any evidence is presented, that the defendant is a dangerous person from whom the prospective jurors must be protected.” *People v. Flores*, 153 A.D.3d 182, 191 (N.Y. App. Div. 2017), *aff’d*, 32 N.Y.3d 1087 (2018).

**b. Note:**

(1) To avoid the risk that an anonymous jury will cause prejudice to criminal defendants, courts frame instructions carefully to avoid a belief that the anonymous procedure is extraordinary or that it reflects adversely on the defendants. *United States v. Dinkins*, 691 F.3d 358, 379 (4th Cir. 2012) (“[T]he generally accepted practice for minimizing prejudice . . . is to downplay (not accentuate) the significance of the juror anonymity procedure.”).

**Additional Resources:** *United States v. LaFond*, 783 F.3d 1216, 1219 (11th Cir. 2015) (discussing a district court’s order during a murder trial to identify jurors only by numbers after a juror admitted that “she was ‘shaking like a leaf’” at the prospect that the defendants knew her name); Trial Tr. Vol. 1, 27–30, *United States v. LaFond*, No. 1:13-cr-00092-TWT-LW, ECF 113 (N.D. Ga. July 21, 2014) (trial transcript of same).

## B. Juror Sequestration

1. Another issue to consider is whether to sequester the jury to avoid potential outside influence and information from affecting the jury.

a. **Prerequisites:**

(1) The decision to sequester a jury is left to the trial court's discretion. *Holt v. Sec'y, Dep't of Corr.*, No. 8:19-CV-2730-SDM-TGW, 2023 WL 2044771, at \*24 (M.D. Fla. Feb. 16, 2023), *certificate of appealability denied sub nom. Holt v. Sec'y, Dep't of Corr.*, No. 23-12128, 2024 WL 3100756 (11th Cir. Apr. 11, 2024) (citing *United States v. Hill*, 496 F.2d 201, 203 (5th Cir. 1974)); *United States v. Rosario*, No. 3:18-CR-7 (VLB), 2019 WL 266957, at \*2 (D. Conn. Jan. 18, 2019) (citing *United States v. Salerno*, 868 F.2d 524, 540 (2d Cir. 1989)).

**Additional Resources:** Jury Sequestration Order, *United States v. McMichael et al.*, No. 2:21-cr-00022-LGW-BWC, ECF 181 (S.D. Ga. Feb. 14, 2022) (issued during trial for the racially motivated killing of Ahmaud Arbery).

# V. TRIAL - IN-COURT BEHAVIOR

## A. General Warnings to the Courtroom

1. In high-profile proceedings where emotions run high, courts often warn everyone in the courtroom at the beginning of each day's proceedings and at other appropriate times (*e.g.*, when returning from a lunch break) that the judge will use all available powers to respond to disruptions or misbehavior in the courtroom, attempts to influence the jury, and improper use of electronic devices.

2. These warnings may include:

- a. "Any criminal conduct will be referred to law enforcement agencies for arrest and prosecution."
- b. "Misbehaving parties will be held in contempt of court with accompanying fines and imprisonment."
- c. "Misbehaving parties will be excluded from the courtroom."

3. **Electronic device and cell phone policy:** Unless cell phones are confiscated before entering the courtroom, regular warnings will likely be necessary because the gallery members will likely change and because people are so accustomed to using their cell phones everywhere.

a. Here is a potential sample warning:

- (1) "All cell phones or other electronic devices that are not powered off and out of sight may be confiscated and may result in criminal contempt and your expulsion from the courtroom unless you have the presiding judge's express permission to use the device."

## B. Contempt Principles

1. There are two different kinds of contempt with different standards.

a. **Direct Contempt:** Conduct directly observed by the judge may be summarily punished without a hearing or procedural formalities if the penalty is less than six months' imprisonment. FED. R. CRIM. P. 42(b); *S.E.C. v. First Choice Mgmt. Servs., Inc.*, 678 F.3d 538, 544 (7th Cir. 2012) (citing *Codispoti v. Pennsylvania*, 418 U.S. 506, 514 (1974)).

- (1) To hold an individual in *direct criminal contempt*, proof beyond a reasonable doubt must establish (1) misbehavior (2) in the court's presence (3) committed with the intent to obstruct the proceedings (4) that obstructs the administration of justice. *See, e.g.*, 18 U.S.C. § 401 (listing the federal criminal contempt statute's general elements); *United States v. Berroa*, No. CRIM. A. 07-243-01, 2008 WL 3272054 (E.D. Pa. Aug. 7, 2008) (holding a defendant in direct criminal contempt for spontaneous outbursts during the proceeding); *Commonwealth*

*v. Moody*, 125 A.3d 1 (Pa. 2015) (listing all elements); *In re Brown*, 454 F.2d 999, 1006 (D.C. Cir. 1971) (finding wrongful intent necessary to establish criminal contempt).

b. **Indirect Contempt:** Under federal rules, a court may punish misconduct reported to the judge after notice to the defendant, appointment of a prosecutor, and a trial. FED. R. CRIM. P. 42(a). Be sure to make full records of the incident in either event. 18 U.S.C. § 401–02.

(1) To hold an individual in *indirect criminal contempt*, the government must prove (1) the court order was reasonably clear and definite; (2) the defendant violated the order; and (3) the violation was willful and with wrongful intent. See, e.g., *United States v. Robinson*, 922 F.2d 1531, 1534–35 (11th Cir. 1991) (listing those elements of indirect criminal contempt); *Commonwealth v. Boyer*, 282 A.3d 1161, 1167 (Pa. Super. Ct. 2022) (same, though splitting “willful” and “wrongful” into two separate elements); see also *Parkhurst v. U.S. Dep’t of Educ.*, 9 F. App’x 900, 904 (10th Cir. 2001) (“An indirect criminal contempt consists of contumacious conduct directed to the court but not committed in its presence.”).

c. **Notes:**

(1) Because contempt is viewed with disfavor, courts should use only the least possible power adequate to achieve its objective. *Gascho v. Glob. Fitness Holdings, LLC*, 875 F.3d 795, 799 (6th Cir. 2017) (citing *United States v. Wilson*, 421 U.S. 309, 326–27 (1975)).

## 2. Declaring a mistrial:

a. Courts may terminate criminal actions by declaring a mistrial if there is a “manifest necessity” or “legal necessity” to do so. See AM. JUR. 2D, *Criminal Law* § 285. Courts should make specific findings on the record regarding manifest necessity or legal necessity.

(1) Courts have generally declined to adopt bright-line rules as to what constitutes “manifest necessity.” Instead, courts base their decisions on the facts of each case, looking to such factors as whether a less drastic alternative could adequately resolve the problem. The trial judge is ordinarily in the best position to observe the circumstances that adequately call for a mistrial and is granted deference. The court must make a full inquiry into all pertinent circumstances and deliberately consider the options available. John E. Theuman, Annotation, *Former Jeopardy as Bar to Retrial of Criminal Defendant After Original Trial Court’s Sua Sponte Declaration of a Mistrial – State Cases*, 40 A.L.R. 4th 741.

b. Some voluntary, disruptive efforts have been strategically used in attempts for mistrials but have proven unsuccessful. See *United States v. Rodriguez-Velez*, 597 F.3d 32, 43 (1st Cir. 2010) (“When a defendant has willfully disrupted the proceedings, a trial court ordinarily acts within its discretion in refusing to grant a mistrial by reason of that disruption. Were the rule otherwise, a defendant could, in effect, ensure a mistrial by the simple expedient of disrupting the proceedings.”) (internal citations omitted).

3. The court should use its power to enforce rules of order and decorum judiciously where the threat to the administration of justice is not significant.

- a. See *Spallone v. United States*, 493 U.S. 265, 276 (1990) (“[I]n selecting contempt sanctions, a court is obliged to use the ‘least possible power adequate to the end proposed.’”); see also *Eaton v. City of Tulsa*, 415 U.S. 697, 699 (1974) (holding that a defendant was denied due process of law when he was convicted of violating a municipal ordinance authorizing contempt for insolent behavior when he referred to his assailant as “chicken shit”); *In re Little*, 404 U.S. 553, 555 (1972) (reversing a contempt finding where the defendant expressed in his summation that the court was biased, that it had prejudiced his case, and that he was a political prisoner).

## C. Partially or Fully Anonymous Testimony or Testimony via Video-link or Teleconference

### 1. Prerequisites:

- a. **Partially or fully anonymous testimony:** (1) The government must demonstrate a specific threat to the witness’s personal safety, and (2) the defendant must still be able to effectively cross-examine the witness. *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1140–42 (10th Cir. 2014) (applying this standard when evaluating the feasibility of anonymous testimony); *United States v. El-Mezain*, 664 F.3d 467, 492–93 (5th Cir. 2011) (same); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (same). In these instances, a court may properly withhold a witness’s name and address.
- b. **Virtual testimony:** Courts have occasionally allowed witnesses to testify via two-way, closed-circuit television upon: the consent of all parties (*Matter of State of N.Y. v. Robert F.*, 34 N.E.3d 829, 832–33 (N.Y. 2015)); a finding of exceptional circumstances like a witness’s participation in a witness protection program (*United States v. Gigante*, 166 F.3d 75, 81–82 (2d Cir. 1999)); or the presence of all elements of in-person confrontation, such as testimony under oath, the opportunity for cross-examination, and the ability of the fact-finder to observe demeanor (*Stevens v. State*, 234 S.W.3d 748 (Tex. App. 2007)).

### 2. Notes:

- a. “When [criminal] defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.” *Davis v. Washington*, 547 U.S. 813, 833 (2006); see also *United States v. Blackshire*, 98 F.4th 1146 (9th Cir. 2024).
- b. “[T]he Confrontation Clause reflects a *preference* for face-to-face confrontation at trial [but it] must occasionally give way to considerations of public policy and the necessities of the case.” *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (emphasis in original) (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)); see also *Rosales-Martinez v. Ludwick*, 893 F.3d 558, 561 (8th Cir. 2018) (involving a child witness testifying via closed-circuit television); *United States v. Rothenberg*, No. 20-CR-00266-JST-1, 2024 WL 966992, at \*3–\*4 (N.D. Cal. Mar. 6, 2024) (involving the use of masks in the courtroom during the COVID-19 pandemic).

## D. Specific Responses to Disruptive or Improper Behavior by Case Participants

### 1. Specific to a criminal defendant:

a. **Contempt:** As discussed above, contempt can be direct or indirect. See Section V.B.

b. **Remove or limit self-representation:**

(1) The fact that defendants are mentally competent to stand trial does not preclude a court from finding them not mentally competent to exercise their right to self-representation. See *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008) (“We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.”); see also *People v. Johnson*, 267 P.3d 1125, 1133 (Cal. 2012) (“The record here supports the trial court’s conclusion that defendant, although competent to stand trial, was not competent to conduct trial proceedings by himself.”).

**Additional Resources:** *United States v. Roof*, 10 F.4th 314, 361 (4th Cir. 2021) (holding that defendant’s waiver of right to counsel before *voir dire* was valid and finding that courts are not required to “authorize a phase-by-phase approach” or “help defendants strategize their self-representation”); *id.* at 347–50 (explaining that counsel represented defendant during the guilt phase of trial but defendant represented himself during the criminal sentencing phase).

c. **Limit testimony:**

(1) Restrictions on defendants’ fundamental right to testify on their own behalf “may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Jones v. Davis*, 8 F.4th 1027, 1036 (9th Cir. 2021) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987)).

(2) The right to testify on one’s own behalf, though fundamental, “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process[.]” *United States v. Evans*, 908 F.3d 346, 354 (8th Cir. 2018) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); see also *People v. Lesley*, 123 N.E.3d 1060, 1069 (Ill. 2018).

(3) For example, well-established rules of evidence constitute such legitimate interests in the criminal trial process. See, e.g., *United States v. Gomez*, 774 F. App’x 136 (4th Cir. 2019) (holding that trial court’s exclusion of co-conspirator’s statement as hearsay was not plain error); *Hood v. Uchtman*, 414 F.3d 736, 738-39 (7th Cir. 2005) (holding that trial court’s decision to exclude “speculative, remote, and therefore irrelevant” evidence did not violate the defendant’s right to present a defense); but see *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (holding that state courts deprived defendant of a fair trial by foreclosing a defendant’s efforts to introduce relevant testimony about how police secured his confession).

d. **Removal from the courtroom:** Defendants may waive their right to be present at trial expressly or implicitly. *Illinois v. Allen*, 397 U.S. 337, 343–44 (1970); *United States v. Hill*, 63 F.4th 335 (5th Cir. 2023); *United States v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989).

(1) **Prerequisites:** (1) Even after a warning, (2) the defendants' behavior must continue to be "so disorderly, disruptive, and disrespectful to the court," (3) that the trial cannot be carried on without their removal. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Defendants should be readmitted to the courtroom if they are "willing to conduct [themselves] consistently with the decorum and respect inherent in the concept of courts." *Id.*

(2) **Note:** Although removed, the defendant should be permitted to watch and hear the proceedings via streamed video and audio. At the very least, the defendant's attorney should keep the defendant properly informed. See *Commonwealth v. Abu Jamal*, 720 A.2d 79, 109 (Pa. 1998) (rejecting a defendant's claim of improper removal because, in part, he did not assert that his attorney failed to keep him properly informed); but see *State v. Chapple*, 36 P.3d 1025 (Wash. 2001) (holding that trial court did not err by refusing to let disruptive defendant watch trial in an adjacent room via closed-circuit television, where the defendant could still have disrupted the proceeding).

e. **Gag or physically restrain the defendant in the courtroom:** *This is an option of last resort.*

(1) **Prerequisites:** Given the prejudicial effects of visible restraints, due process requires the trial court "to take account of special circumstances, including security concerns, that may call for shackling." *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

(a) "[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635.

(2) The court **should warn the defendant before defendant is gagged**, and **use the gag only as long as necessary**. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *United States v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015) (holding that shackling did not violate defendants' due process rights when *voir dire* questioning did not suggest defendants' dangerous character, the shackling was not visible, and the evidence of guilt was overwhelming); *Rogers v. Hall*, 567 F. App'x 873, 888-89 (11th Cir. 2014) (holding that trial court did not violate defendant's Sixth Amendment rights when it gagged defendant after warning him 31 times for disruptive behavior); *Lewis v. Robinson*, 67 F. App'x 914, 922 (6th Cir. 2003) (holding that state trial court did not abuse its discretion in physically restraining and gagging defendant after warnings about defendant's extreme misconduct and disruptive behavior) (available at 2003 WL 21456238).

(3) **Note:** Although binding and gagging the defendant avoids potential constitutional violations stemming from removing the defendant from the courtroom, **a court should only use it as a last resort due to its highly prejudicial effect on the jury**. *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *Claiborne v. Blausen*, 934 F.3d 885, 895 (9th Cir. 2019) ("[T]rial courts [must] engage in a two-step process before shackling a criminal defendant: '[f]irst, the court must be persuaded by compelling circumstances' that the measure is necessary to 'maintain security[:]' and '[s]econd, the court must 'pursue less restrictive alternatives before imposing physical restraints.'").

(4) **Alternatives:** Due process requires less restrictive alternatives before permitting a defendant to be restrained. See, e.g., *Gonzalez v. Piller*, 341 F.3d 897, 901 (9th Cir. 2003) (holding that state court violated defendant’s due process rights when courtroom bailiff forced him to wear a stun belt, and the court failed to identify compelling circumstances or less restrictive alternatives); *Szuchon v. Lehman*, 273 F.3d 299, 314 (3d Cir. 2001) (holding that the trial court properly ordered that defendant be shackled after defendant violently assaulted a witness in front of the jury and after carefully considering alternatives); *Rhoden v. Rowland*, 172 F.3d 633, 636-37 (9th Cir. 1999) (granting habeas petition based on evidence that the jury saw defendant’s shackles during a trial in which the judge instructed defendant to keep his legs under counsel table).

(a) Alternatives include barring the defendant from the courtroom or issuing a contempt citation. Such judicial action might conflict, however, with other rights of the defendant noted above.

**Additional Resources:** *State v. Chapple*, 36 P.3d 1025, 1030 (Wash. 2001) (discussing guidelines for courts to deal with disruptive defendants); Brian Kerhin, *Judge Walks Out Twice Amid Outbursts in Sentencing for Racially Motivated GBCI Murder*, FOX11 (Apr. 11, 2024 at 3:20 PM), <https://fox11online.com/news/crime/judge-walks-out-twice-amid-outbursts-in-sentencing-for-racially-motivated-gbci-murder-joshua-scolman-timothy-nabor-lamonte-washington-green-bay-correctional-institution-milwaukee-drunk-driving-donald-zuidmulder>; David Gonzalez, *Blaze Bernstein Murder: Jury Selection to Start Over After Courtroom Outburst by Defendant*, ABC7 EYEWITNESS NEWS (Mar. 5, 2024), <https://abc7.com/blaze-bernstein-murder-samuel-woodward-trial/14494645/>.

## E. Specific to Counsel

1. **Contempt:** As discussed above, contempt can be direct or indirect. See Section V.B.

2. **Removal of admission *pro hac vice*:** The court can remove the admission of an out-of-state attorney for the case.

a. The court has discretion over an attorney’s *pro hac vice* admission. There is a point at which “an attorney’s repeated, documented instances of uncivilized behavior, whether or not rising to the level of a disbarable offense, strips him of the privilege of *pro hac vice* admission.” *Kohlmayer v. Nat’l R.R. Passenger Corp.*, 124 F. Supp. 2d 877, 883 (D.N.J. 2000); see also *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 954 (7th Cir. 2020) (“Admission *pro hac vice* is a privilege, not a right. We recognize that attorneys may have an interest in that privilege, but that does not abridge the district court’s inherent authority ‘to control admission to its bar and to discipline attorneys who appear before it.’”).

b. However, when a court seeks to revoke an attorney’s *pro hac vice* status, “some type of notice and an opportunity to respond” are required. *Johnson v. Trueblood*, 629 F.2d 302, 303 (3d Cir. 1980); see also *Belue v. Leventhal*, 640 F.3d 567, 577 (4th Cir. 2011) (“[W]hile it may be true that no attorney has a due process right to *pro hac vice* status, once such status is granted, attorneys must receive some modicum of due process before it is revoked.”).

3. **Referral to state bar or its professional misconduct review entity:**

a. Grounds for a finding of professional misconduct often include “(1) a violation of a clear and unambiguous legal obligation or professional standard and (2) the violation was intentional, or resulted from the attorney’s reckless disregard[.]” See *Attorney Professional Misconduct Matters*, OFF. OF PRO. RESP.: U.S. DEPT. OF JUST., <https://www.justice.gov/opr/professional-misconduct> (last updated Nov. 22, 2019).

#### 4. Exercise control over the examination of witnesses.

a. Courts also have an inherent ability to maintain order and decorum through controlling the examination of witnesses. See FED. R. EVID. 611(a).

b. Under the Federal Rules of Evidence, for example, “[t]he Court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) to protect witnesses from harassment or undue embarrassment.” FED. R. EVID. 611(a).

c. Courts may invoke this rule to:

(1) **Prevent offensive questions.** See *Meyers v. Hall*, 7:19-cv-250, 2020 WL 1482561, at \*8 (W.D. Va. Mar. 27, 2020) (concluding that harassing questions about a doctor-witness’ Parkinson’s disease, “incompetence and medical malpractice” history were properly struck under Rule 611); *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 13–cv–03206, 2017 WL 633044, at \*10 (D. Colo. Feb. 16, 2017) (prohibiting “prejudicial or inflammatory phrasing of questions that implicates any witness’s nationality or country of origin”).

(2) **Prohibit repeated attacks on the witness.** See *Miller v. Greenleaf Orthopedic Assocs., S.C.*, 827 F.3d 569, 572–73 (7th Cir. 2016) (concluding trial judge did not err in prohibiting counsel from attempting to repeatedly “bang away at a witness who ha[d] already been adequately impeached”).

(3) **Exclude time-wasting or irrelevant testimony.** See *Angelopoulos v. Keystone Orthopedic Specialists, S.C.*, 12-cv-5836, 2017 WL 2178504, at \*13, 15 (N.D. Ill. May 16, 2017) (“The Court will not permit a lengthy sideshow on these issues or time consuming mini-trials regarding the merits of these other allegations.”) (internal quotation and citation omitted); *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 2017 WL 633044, at \*13 (D. Colo. Feb. 16, 2017) (noting that the court can effectively prevent mini-trials through Rule 611 and other evidentiary rules “to limit cumulative, confusing, or prejudicial evidence or a waste of time”).

d. State rules similarly provide courts with broad discretion over controlling the means of witness examinations, and many states have adopted analogs to Federal Rule 611. See, e.g., PA. R. EVID. 611; MD. R. EVID. 5-11; TEX. R. EVID. 611.

## F. Specific to Witnesses

1. **Contempt:** As discussed above, contempt can be direct or indirect. See Section V.B.

## 2. Striking testimony:

- a. A motion to strike is the proper remedy for purging the record of improper, incompetent, unresponsive, or uncertain testimony or testimony that has no probative value but may prejudice a party. 75 AM. JUR. 2D *Trial* § 389.

## 3. Limiting instruction to the jury:

- a. A court may provide an instruction to admit evidence for a limited purpose. A court’s “careful and frequent limiting instructions to the jury, explaining how and against whom certain evidence may be considered, can reduce or eliminate any possibility of prejudice.” See *United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004) (internal citations omitted); see also *United States v. Warren*, 728 F. App’x 249, 253 (5th Cir. 2018) (“[L]ess drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.”) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)).
- b. **Pre-recording the testimony** with all parties and counsel present but without the jury present, so irrelevant statements can be cut before presentation to the jury.
- c. Live testimony is preferred to pre-recorded testimony. See *Palmer v. Valdez*, 560 F.3d 965, 973 (9th Cir. 2009). However, pre-recorded testimony may be admitted “[a]bsent insurmountable logistical considerations or some compelling reason.” *Id.* (highlighting that, when taken together, the rules of civil procedure and evidence allow for pre-recorded testimony to be used at trial, and that “our system is set up to make specific use and accommodation of testimony via electronic means”); see also *Yu Tian Li v. United States*, 648 F.3d 524, 530 (7th Cir. 2011) (“[T]he use of pre-recorded deposition testimony does not violate that right where the witness is unavailable for trial and the defendant had a prior opportunity for cross-examination.”).

**Additional Resources:** *Miller v. State*, 379 So.3d 1109 (Fla. 2024) (acknowledging that evidence of religious or political beliefs can be prejudicial but holding that the defendant’s racist Facebook posts were probative as to his motive); *United States v. Hunt*, 534 F. Supp. 3d 233, 245–46 (E.D.N.Y. 2021) (holding that the defendant’s text messages related to attacking members of Congress were admissible as they related to his intent); *People v. Lindberg*, 190 P.3d 664, 698 (Cal. 2008) (allowing expert testimony on white supremacist views where it was relevant to establish the defendant’s state of mind at time of the murder).

## G. Specific to Jurors

1. High-profile cases are bound to attract a significant following, raising concerns about the effect of social media on jurors’ impartiality. The media can create and spin narratives that can influence potential jurors’ opinions.

2. Adverse effects can include: **priming, confirmation bias, stereotype activation, and emotional manipulation.** See *The Power of Media Coverage: How it Shapes Jurors’ Perceptions and How Scientific Jury Analysis Can Help Mitigate Bias*, JURY ANALYST (May 19, 2023), <https://juryanalyst.com/blog/the-power-of-media-coverage-how-it-shapes-jurors-perceptions-and-how-scientific-jury-analysis-can-help-mitigate-bias/#:~:text=From%20television%20broadcasts%20to%20newspaper,trials%20%5B1%2C%202%5D>.

3. In response, some trial courts have taken extra precautions to reduce the likelihood of juror misconduct. One study evaluated the effectiveness of the preventative measures listed below and found **that “the consensus appears to be that almost any action taken will be at least somewhat effective.”** See PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE CTS., JURORS AND NEW MEDIA: FILLING KNOWLEDGE GAPS FOR JUDGES AND LAWYERS 17 (2021), [https://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0020/63803/Jurors-and-New-Media-Report.pdf](https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0020/63803/Jurors-and-New-Media-Report.pdf)

- a. Explaining rationale for admonition;
- b. Repeating admonitions;
- c. Using explicit instructions;
- d. Explaining juror consequences;
- e. Banning technology in the courtroom;
- f. Explaining litigant consequences;
- g. Collecting written or oral promises;
- h. Banning technology in the courthouse; and
- i. Identifying high-use jurors during *voir dire*.

4. In 2020, the Judicial Conference Committee on Court Administration and Case Management released proposed model jury instructions titled “**The Use of Electronic Technology to Learn or Communicate about a Case**” to guide judges in instructing the jury. The complete model instructions are included in the Appendix.

- a. Instructions are included for each potential stage of case progression: during *voir dire*, before trial, during trial at the beginning and end of each day, and at the close of the case. See Jud. Conf. Comm. on Ct. Admin. and Case Mgmt., *Proposed Model Jury Instructions The Use of Electronic Technology to Learn or Communicate about a Case*, U.S. CTS. (2020), <https://www.uscourts.gov/file/28705/download>.

5. The court also may give instructions to restrict juror use of social media during trial. See MEGHAN DUNN, JURORS’ USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (2011), <https://www.fjc.gov/sites/default/files/2012/DunnJuror.pdf>.

- a. Here is one example [Judge Anna J. Brown (D. Or.)]:  
“Because you must base your verdict only on the evidence and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations: Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing,

by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court. Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.”

## H. Specific Responses to Disruptive or Improper Behavior by Spectators or the Public

1. **Closure of the courtroom:** See Section III.C.

2. **A court may summarily exclude any spectator** who is observed acting in a manner that disrupts the proceedings, intimidates a party, juror, victim, or spectator, or violates the rules of courtroom decorum. See FREE TO TELL THE TRUTH: PREVENTING AND COMBATTING INTIMIDATION IN COURT, PENNSYLVANIA COMM’N ON CRIME AND DELINQUENCY 17 (3d ed. 2021).

3. **During the testimony of a specific witness:** A court may temporarily exclude specific spectators during the testimony of a witness.

a. **Prerequisites:**

(1) The witness expresses reluctance to testify based on fear or concern caused by identifiable or unknown spectators at trial, (2) there is more than a generalized assertion of fear, (3) the court makes factual findings regarding the credibility of evidence regarding whether a threat exists, (4) the court explicitly considers alternatives to exclusion and finds them to be inadequate, and (5) the order is not excessive in scope or length. *Free to Tell the Truth: Preventing and Combatting Intimidation in Court*, Pennsylvania Comm’n on Crime and Delinquency 16–17 (2nd ed. 2014).

b. **Notes:**

(1) Counsel for a criminal defendant will often agree on the record to an order excluding certain spectators because they may cause the jury to view the defendant negatively.  
(2) Some courts modify this standard to only require a “substantial reason” rather than an “overriding interest” when the proceedings are partially closed rather than fully closed. See, e.g., *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989).

**Additional Resources:** Michael Ruiz, *NYC Palestinian Man Sentenced in Brutal Antisemitic Beating Before Judge Ejects Angry Supporters from Court*, Fox News, Nov. 23, 2023 (discussing removal of spectators from the courthouse after outburst in support of criminal defendant).

# VI. PSYCHOLOGICAL CONSIDERATIONS FOR JURORS, WITNESSES, AND VICTIMS

## A. Jurors

1. Evidence and testimony presented in cases involving hate crimes **can have serious negative effects on jurors.**
2. Studies indicate that “exposure to disturbing, gruesome, and/or emotional courtroom testimony and other circumstances related to jury duty can lead to **jurors experiencing symptoms associated with psychological trauma and stress-related disorders.**” Dawn E. McQuiston et al., *Vicarious Trauma in the Courtroom: Judicial Perceptions of Juror Distress*, ABA (May 1, 2019), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2019/spring/vicarious-trauma-the-courtroom-judicial-perceptions-juror-distress/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/spring/vicarious-trauma-the-courtroom-judicial-perceptions-juror-distress/).
3. As many as **50% of jurors experience these symptoms** of Post Traumatic Stress Disorder and depression, and the symptoms can persist for months. Michelle Lonergan et al., *Prevalence and Severity of Trauma- and Stressor-Related Symptoms Among Jurors: A Review*, 47 J. CRIM. JUST. 51 (2016).
4. The **nature of the trial** can also contribute to the negative psychological effects.
  - a. Sitting on a jury for violent criminal trials can lead to “clinically significant symptoms of trauma- and stressor-related disorders, anxiety, and/or depression.” *Id.*
  - b. Jurors sitting for a capital trial may experience “**severe emotional and psychological duress,**” which can cause “**extreme emotional setbacks**” after the trial. Michele E. Antonio, *Jurors’ Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE, Mar–Apr. 2006, at 282, 282.
  - c. Jurors in high-profile cases must also deal with **enhanced publicity, fear of their identities being revealed, and potential threats from the public.** See Dominique Farrell, *Jurors on High-Profile Cases Face Stress, Anxiety, Scrutiny: From Trump to Karen Read’s Murder Trial*, GBH (May 31, 2024), <https://www.wgbh.org/news/local/2024-05-31/jurors-on-high-profile-cases-face-stress-anxiety-scrutiny-from-trump-to-karen-reads-murder-trial>.
5. These negative effects highlight the necessity of providing jurors with support and resources during and after the trial. Some **potentially beneficial interventions** include:
  - a. Having conversations with jurors before trial to explain the possibility of stress-related symptoms and coping mechanisms;

- b. Debriefing with the jurors after trial to discuss the jurors' emotional experience, led by the judge or a trained clinician;
- c. Offering free counseling sessions after a federal court trial through the federal Employee Assistance Program (EAP) by extending jury service; and

(1) Some state courts also offer counseling services in certain circumstances. For example, see ALASKA STAT. § 12.45.018.

- d. Providing jurors with informational brochures having tips for coping.

6. **Example:** After the federal trial of Dzhokhar Tsarnaev, the perpetrator behind the Boston Marathon Bombing, Judge George O'Toole entered an order to extend jury service for 90 days so that jurors could receive free counseling through the federal EAP. The order is included in the Appendix.

**Additional Resources:** Dawn E. McQuiston et al., *Vicarious Trauma in the Courtroom: Judicial Perceptions of Juror Distress*, ABA (May 1, 2019), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2019/spring/vicarious-trauma-the-courtroom-judicial-perceptions-juror-distress/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/spring/vicarious-trauma-the-courtroom-judicial-perceptions-juror-distress/); *Tips for Coping After Jury Duty*, NAT'L CTR. FOR STATE CTS., [https://www.ncsc.org/data/assets/pdf\\_file/0021/26283/jury\\_trial\\_innovations-pages-209\\_210.pdf](https://www.ncsc.org/data/assets/pdf_file/0021/26283/jury_trial_innovations-pages-209_210.pdf).



## B. Witnesses

1. Similar to jurors, witnesses who testify at traumatic trials may experience psychological distress. These witnesses may be victims themselves or individuals who witnessed the crime, and might already have stress-related symptoms resulting from the trauma they experienced or witnessed.

- a. Testifying at trial **can place immense pressure on the witness and potentially result in re-traumatization.** See *The Victim as a Witness*, OFF. FOR VICTIMS OF A CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/54-landing-a-successful-prosecution/the-victim-as-a-witness/>.

- b. The evidence presented at trial and testifying can cause feelings of “**panic, anger, disorientation, physical pain, grief, or numbing and shutting down.**” Olga Trujillo & Patricia Moen, *Enhancing Access to Justice through a Trauma-Informed Approach*, THE NAT'L RES. CTR.

FOR REACHING VICTIMS (July 2019), [https://ilaging.illinois.gov/content/dam/soi/en/web/aging/protectionadvocacy/aps-toolkit/resources-and-handouts\\_creating-culturally-responsive-and-trauma-informed-legal-services.pdf](https://ilaging.illinois.gov/content/dam/soi/en/web/aging/protectionadvocacy/aps-toolkit/resources-and-handouts_creating-culturally-responsive-and-trauma-informed-legal-services.pdf).

2. Judges should take a **trauma-informed approach** when working with these witnesses to help mitigate the negative psychological effects that can impact witness testimony. Some **helpful interventions** include:

- a. Ensuring witnesses have a good understanding of the legal process so they know what to expect;
- b. Arranging for the witness to have a support person during the legal proceedings (*i.e.*, victim advocate, family member, close friend, or clinician);
- c. Limiting the defendant’s ability to interact with the witnesses;
- d. Being patient with witnesses as they recount traumatic events; and
- e. Providing additional support post-trial.

3. For more information regarding a trauma-informed approach, see Olga Trujillo & Patricia Moen, *Enhancing Access to Justice through a Trauma-Informed Approach*, THE NAT’L RES. CTR. FOR REACHING VICTIMS (July 2019), [https://ilaging.illinois.gov/content/dam/soi/en/web/aging/protectionadvocacy/aps-toolkit/resources-and-handouts\\_creating-culturally-responsive-and-trauma-informed-legal-services.pdf](https://ilaging.illinois.gov/content/dam/soi/en/web/aging/protectionadvocacy/aps-toolkit/resources-and-handouts_creating-culturally-responsive-and-trauma-informed-legal-services.pdf); *The Victim as a Witness*, OFF. FOR VICTIMS OF A CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/54-landing-a-successful-prosecution/the-victim-as-a-witness/>.

## C. Victims

1. Victims of violent crime may experience **physical and psychological trauma** from their victimization. See *Physical and Mental Health*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/topics/physical-and-mental-health#:~:text=What%20is%20Post%20Traumatic%20Stress,hypervigilance;%20and%20other%20related%20problems> (last visited Dec. 24, 2024).

2. Resultant injuries from violent crime can be placed into three distinct categories: (1) physical, (2) financial, and (3) emotional. See *The Trauma of Victimization*, NAT’L CTR. FOR VICTIMS, <https://www.fredericksburgva.gov/DocumentCenter/View/9552/Responding-to-Traumatic-Situations?bidId=> (last visited Dec. 26, 2024).

- a. “Secondary injuries” arise when victims do not receive necessary support in the aftermath of a crime. Virtually anybody, including friends, family, law enforcement officials, judges, the press, and lawyers, may cause these injuries. *Id.*

3. Mental health issues are common for victims of violent crime and are likely to persist through the recovery process.

- a. Violent crime victims “have reported feelings of distress, problems with work and school, and problems with family members and friends that include more arguments and an inability to trust them.” *Physical and Mental Health*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/topics/physical-and-mental-health#:~:text=What%20is%20Post%20Traumatic%20Stress,hypervigilance;%20and%20other%20related%20problems> (last visited Dec. 24, 2024).

b. In addition to anxiety and depression, one common mental health diagnosis for victims is Post Traumatic Stress Disorder, which consists of several symptoms, among others:

(1) Sleeping disorders;

(2) Constant flashbacks and invasive thoughts;

(3) Extreme and persistent anxiety;

(4) Outbursts of anger; and

(5) Length periods of detachment and estrangement.

(6) For additional discussion of related symptoms, see *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS, <https://www.fredericksburgva.gov/DocumentCenter/View/9552/Responding-to-Traumatic-Situations?bidId=> (last visited Dec. 26, 2024).

4. A victim's involvement in the legal process can present additional difficulties, known as "secondary victimization," which can include several symptoms:

a. Feelings of no control over the proceedings;

b. Lack of involvement;

c. Persistent senses of shame, traumatization, and powerlessness; and

d. An inability to come to terms with the fact that the crime is considered to be committed against the State, and the victim is now considered to be a witness.

e. For additional discussion on secondary victimization, see *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS, <https://www.fredericksburgva.gov/DocumentCenter/View/9552/Responding-to-Traumatic-Situations?bidId=> (last visited Dec. 26, 2024).

5. These difficulties may be reduced, however, by keeping the victims informed about the proceedings and ensuring that they have a voice in the process.

a. Studies have found that victims' involvement in the legal process can provide feelings of justice, closure, and empowerment. See Ekta Chandrakar, *The Impact of Legal Intervention on Mental Health*, 20 NEUROQUANTOLOGY 349, 351 (2022).

6. Judges, lawyers, and parties should recognize the tremendous hardship that victims go through as a result of their victimization.

a. These parties can ensure a victim's healing and well-being by remaining educated on available services, securing the victim's participation at important stages, and establishing outright that the victim is a valued and critical part of the legal process. See Jim Parsons and Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. OF TRAUMATIC STRESS 3-4 (2010).

**Additional Resources:** *Resources for Victims of Crime*, U.S. ATT'YS OFF.: W. DIST. PA., <https://www>.

[justice.gov/usao-wdpa/vw/resources-for-victims-of-crime](https://www.justice.gov/usao-wdpa/vw/resources-for-victims-of-crime); *Find Help and Information for Crime Victims*, U.S. DEPT. OF JUST., <https://www.justice.gov/action-center/find-help-and-information-crime-victims>; *Help for Victims*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/help-for-victims/overview>; *Child Victims and Witnesses Support Materials*, OFF. FOR VICTIMS OF CRIMES, <https://ovc.ojp.gov/child-victims-and-witnesses-support/guides/practitioners>.

# CONCLUSION

We envision this toolkit as a living document. As hate crime-related case law and legislation evolve, so, too, will the contents of the toolkit. We encourage readers to share any pertinent information, exemplary orders, and other resources to continue to improve the toolkit and keep it current. For exemplary orders and additional resources on issues discussed in this toolkit, please see the attached Appendix. We welcome your feedback and contributions.

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# TABLE OF AUTHORITIES

## Cases

## Page numbers

<i>Allen v. United States</i> , 829 F.3d 965 (8th Cir. 2016) . . . . .	41
<i>Angelopoulos v. Keystone Orthopedic Specialists, S.C.</i> , 2017 WL 2178504 (N.D. Ill. May 16, 2017) . . . . .	50
<i>Application of Dow Jones &amp; Co., Inc.</i> , 842 F.2d 603 (2d Cir. 1988) . . . . .	31
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972) . . . . .	36
<i>Belue v. Leventhal</i> , 640 F.3d 567 (4th Cir. 2011) . . . . .	49
<i>Bingue v. Prunchak</i> , 512 F.3d 1169 (9th Cir. 2008) . . . . .	10
<i>Bonnet v. Whitaker</i> , 118 F.4th 154 (1st Cir. 2024) . . . . .	17
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997) . . . . .	18
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963) . . . . .	10
<i>Brown v. Artuz</i> , 283 F.3d 492 (2d Cir. 2002) . . . . .	39
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868 (2009) . . . . .	18
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973) . . . . .	12
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981) . . . . .	27

<i>Chavis v. Woodworker’s Shop, Inc.</i> , 115 N.E.3d 341 (Ill. App. Ct. 2018).	23
<i>Claiborne v. Blauser</i> , 934 F.3d 885 (9th Cir. 2019).	48
<i>Clemens v. U.S. Dist. Ct. for the Cent. Dist. of Cal.</i> , 428 F.3d 1175 (9th Cir. 2005).	19
<i>Del. Coal. for Open Gov’t, Inc. v. Strine</i> , 733 F.3d 510 (3d Cir. 2013).	26
<i>Codispoti v. Pennsylvania</i> , 418 U.S. 506 (1974).	44
<i>Coffin v. United States</i> , 156 U.S. 432 (1895).	11
<i>Cohen v. Senkowski</i> , 290 F.3d 485 (2d Cir. 2002).	14
<i>Coley v. Bagley</i> , 706 F.3d 741 (6th Cir. 2013).	18
<i>Commonwealth v. Abu Jamal</i> , 720 A.2d 79 (Pa. 1998).	48
<i>Commonwealth v. Boyer</i> , 282 A.3d 1161 (Pa. Super. Ct. 2022).	45
<i>Commonwealth v. Moody</i> , 125 A.3d 1 (Pa. 2015).	45
<i>Commonwealth v. Williams</i> , 116 N.E.3d 609 (Mass. 2019).	17
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986).	47
<i>Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.</i> , 2017 WL 633044 (D. Colo. Feb. 16, 2017).	50
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).	46
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005).	8, 48

<i>Dhiab v. Trump</i> , 852 F.3d 1087 (D.C. Cir. 2017).	40
<i>Downs v. Sec’y, Fla. Dep’t of Corr.</i> , 738 F.3d 240 (11th Cir. 2013).	10
<i>Eaton v. City of Tulsa</i> , 415 U.S. 697 (1974).	46
<i>Eli Lilly &amp; Co. v. Gottstein</i> , 617 F.3d 186 (2d Cir. 2010).	31
<i>Estelle v. Williams</i> , 425 U.S. 501 (1976).	11
<i>Estes v. Texas</i> , 381 U.S. 532 (1965).	27
<i>Faretta v. California</i> , 422 U.S. 806 (1975).	13
<i>Flanagan v. United States</i> , 465 U.S. 259 (1984).	35
<i>Fyelling v. Royal Caribbean Cruises, Ltd.</i> , 91 F.4th 1371 (11th Cir. 2024).	15
<i>Gascho v. Glob. Fitness Holdings, LLC</i> , 875 F.3d 795 (6th Cir. 2017).	45
<i>Globe Newspaper Co. v. Superior Ct.</i> , 457 U.S. 596 (1982).	40
<i>Gonzalez v. Pliker</i> , 341 F.3d 897 (9th Cir. 2003).	49
<i>Gutierrez v. Dretke</i> , 392 F. Supp. 2d 802 (W.D. Tex. 2005).	15, 16
<i>Ham v. South Carolina</i> , 409 U.S. 524 (1973).	16
<i>Herrera v. State</i> , 702 S.E.2d 854 (Ga. 2010).	17
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986).	8

<i>Holt v. Sec’y, Dep’t of Corr.</i> , 2023 WL 2044771 (M.D. Fla. Feb. 16, 2023).	43
<i>Hood v. Uchtman</i> , 414 F.3d 736 (7th Cir. 2005).	47
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970).	47, 48
<i>In re Brown</i> , 454 F.2d 999 (D.C. Cir. 1971).	45
<i>In re Commitment of Matthews</i> , 959 N.W.2d 640 (Wis. 2021).	23
<i>In re K.E.M.</i> , 89 S.W.3d 814 (Tex. Ct. App. 2002).	21
<i>In re Little</i> , 404 U.S. 553 (1972).	46
<i>In re Mikhel</i> , 453 F.3d 1137 (9th Cir. 2006).	27
<i>In re Murchison</i> , 349 U.S. 133 (1955).	18
<i>In re Murphy-Brown, LLC</i> , 907 F.3d 788 (4th Cir. 2018).	31
<i>In re Prall</i> , 569 F. App’x 88 (3d Cir. 2014).	21
<i>In re Richards</i> , 213 F.3d 773 (3d Cir. 2000).	32
<i>In re Scott</i> , 61 P.3d 402 (Cal. 2003).	21
<i>In re Search Warrant for Secretarial Area</i> , 855 F.2d 569 (8th Cir. 1988).	39
<i>In re Tribune Co.</i> , 784 F.2d 1518 (11th Cir. 1986).	39, 39

<i>In re U.S.</i> , 572 F.3d 301 (7th Cir. 2009).....	21
<i>In re United States</i> , 345 F.3d 450 (7th Cir. 2003).....	34
<i>Indiana v. Edwards</i> , 554 U.S. 164 (2008).....	47
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	24
<i>ISC Holding AG v. Nobel Biocare Fin. AG</i> , 688 F.3d 98 (2d Cir. 2012).....	19
<i>Jackson v. Cool</i> , 111 F.4th 689 (6th Cir. 2024).....	18
<i>Johnson v. Trueblood</i> , 629 F.2d 302 (3d Cir. 1980).....	49
<i>Jones v. Davis</i> , 8 F.4th 1027 (9th Cir. 2021).....	47
<i>Kamakana v. City &amp; Cnty. of Honolulu</i> , 447 F.3d 1172 (9th Cir. 2006).....	30
<i>Kentucky v. Stincer</i> , 482 U.S. 730 (1987).....	14
<i>Kohlmayer v. Nat’l R.R. Passenger Corp.</i> , 124 F. Supp. 2d 877 (D.N.J. 2000).....	49
<i>Lewis v. Robinson</i> , 67 F. App’x 914 (6th Cir. 2003).....	48
<i>Liteky v. United States</i> , 510 U.S. 540 (1994).....	18, 19, 20
<i>Love v. Yates</i> , 586 F. Supp. 2d 1155 (N.D. Cal. 2008).....	15
<i>Marks v. Davis</i> , 106 F.4th 941 (9th Cir. 2024).....	17
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990).....	46

<i>Matter of State of N.Y. v. Robert F.,</i> 34 N.E.3d 829 (N.Y. 2015))	46
<i>Mattox v. United States,</i> 156 U.S. 237 (1895).	46
<i>McDonough Power Equip., Inc. v. Greenwood,</i> 464 U.S. 548 (1984).	14
<i>McKaskle v. Wiggins,</i> 465 U.S. 168 (1984).	13
<i>Menendez-Cordero v. State,</i> 445 P.3d 1235 (2019).	41
<i>Meyers v. Hall,</i> 2020 WL 1482561 (W.D. Va. Mar. 27, 2020).	50
<i>Miller v. Greenleaf Orthopedic Assocs., S.C.,</i> 827 F.3d 569 (7th Cir. 2016).	50
<i>Miller v. State,</i> 379 So.3d 1109 (Fla. 2024).	51
<i>Morgan v. Aispuro,</i> 946 F.2d 1462 (9th Cir. 1991).	8
<i>Morgan v. Illinois,</i> 504 U.S. 719 (1992).	14
<i>Murphy v. Florida,</i> 421 U.S. 794 (1975).	25
<i>Nebraska Press Ass'n v. Stuart,</i> 427 U.S. 539 (1976).	31
<i>Nichols v. Alley,</i> 71 F.3d 347 (10th Cir. 1995).	19
<i>Nix v. Whiteside,</i> 475 U.S. 157 (1986).	12
<i>Nixon v. Warner Comm'ns, Inc.,</i> 435 U.S. 589 (1978).	28, 30
<i>Palmer v. Valdez,</i> 560 F.3d 965 (9th Cir. 2009).	51

<i>Parkhurst v. U.S. Dep’t of Educ.</i> , 9 F. App’x 900 (10th Cir. 2001).	45
<i>Parr v. United States</i> , 351 U.S. 513 (1956).	35
<i>Patterson v. Mobil Oil Corp.</i> , 335 F.3d 476 (5th Cir. 2003).	21
<i>People v. Clark</i> , 512 P.3d 1074 (Colo. Ct. App. 2022).	14, 17
<i>People v. Flores</i> , 153 A.D.3d 182 (N.Y. App. Div. 2017).	42
<i>People v. Johnson</i> , 267 P.3d 1125 (Cal. 2012).	47
<i>People v. Lesley</i> , 123 N.E.3d 1060 (Ill. 2018).	47
<i>People v. Lindberg</i> , 190 P.3d 664 (Cal. 2008).	51
<i>People v. Lopez</i> , 65 Cal. App. 5th 484 (2021).	42
<i>People v. Oliver</i> , 474 P.3d 207 (Colo. Ct. App. 2020).	17
<i>People v. Trump</i> , 2024 WL 3841211 (N.Y. Sup. Ct. Aug. 13, 2024).	22
<i>Petalino v. Williams</i> , 61 N.E.3d 1014 (Ill. Ct. App. 2016).	23
<i>Presley v. Georgia</i> , 558 U.S. 209 (2010).	39
<i>Press Enterprise Co. v. Super. Ct. of Cal. for Riverside Cnty. (Press-Enterprise I)</i> , 464 U.S. 501 (1984).	27, 28
<i>Press-Enterprise Co. v. Superior Ct. of Cal. for Riverside Cnty. (Press-Enterprise II)</i> , 478 U.S. 1 (1986).	27, 27, 40, 40
<i>Regal Knitwear Co. v. N.L.R.B.</i> , 324 U.S. 9 (1945).	32

<i>Rhoden v. Rowland</i> , 172 F.3d 633 (9th Cir. 1999) . . . . .	49
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980) . . . . .	26, 27
<i>Rinaldi v. United States</i> , 434 U.S. 22 (1977) . . . . .	33, 34
<i>Ristaino v. Ross</i> , 424 U.S. 589 (1976) . . . . .	15
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987) . . . . .	12, 13
<i>Rogers v. Hall</i> , 567 F. App'x 873 (11th Cir. 2014) . . . . .	48
<i>Rosales-Lopez v. United States</i> , 451 U.S. 182 (1981) . . . . .	14, 15
<i>Rosales-Martinez v. Ludwick</i> , 893 F.3d 558 (8th Cir. 2018) . . . . .	46
<i>Royce v. Michael R. Needle P.C.</i> , 950 F.3d 939 (7th Cir. 2020) . . . . .	49
<i>S.E.C. v. First Choice Mgmt. Servs., Inc.</i> , 678 F.3d 538 (7th Cir. 2012) . . . . .	44
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973) . . . . .	12
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966) . . . . .	27
<i>Skaggs v. Otis Elevator Co.</i> , 164 F.3d 511 (10th Cir. 1998) . . . . .	15, 15, 24
<i>Skilling v. United States</i> , 561 U.S. 358 (2010) . . . . .	15, 24, 25
<i>Spallone v. United States</i> , 493 U.S. 265 (1990) . . . . .	46

<i>Starkweather v. Smith</i> , 574 F.3d 399 (7th Cir. 2009).....	12
<i>State ex rel. Mace v. Cir. Ct. for Green Lake Cnty.</i> , 532 N.W.2d 720 (Wis. 1995).....	23
<i>State v. Chapple</i> , 36 P.3d 1025 (Wash. 2001).....	48, 49
<i>State v. Simants</i> , 236 N.W.2d 794 (Neb. 1975).....	31
<i>Stevens v. State</i> , 234 S.W.3d 748 (Tex. App. 2007).....	46
<i>Szuchon v. Lehman</i> , 273 F.3d 299 (3d Cir. 2001).....	49
<i>United States v. Ammidown</i> , 497 F.2d 615 (D.C. Cir. 1973).....	33, 34
<i>United States v. B.G.G.</i> , 53 F.4th 1353 (11th Cir. 2022).....	33, 34
<i>United States v. Baca</i> , 761 F. App'x 724 (9th Cir. 2019).....	41
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	10
<i>United States v. Barr</i> , 960 F.3d 906 (7th Cir. 2020).....	20
<i>United States v. Becker</i> , 585 F.2d 703 (4th Cir. 1978).....	36
<i>United States v. Begay</i> , 602 F.3d 1150 (10th Cir. 2010).....	36
<i>United States v. Berroa</i> , 2008 WL 3272054 (E.D. Pa. Aug. 7, 2008).....	44
<i>United States v. Blackshire</i> , 98 F.4th 1146 (9th Cir. 2024).....	46
<i>United States v. Borders</i> , 270 F.3d 1180 (8th Cir. 2001).....	16

<i>United States v. Borges</i> , 153 F. Supp. 3d 216 (D.D.C. 2015).....	34
<i>United States v. Brock</i> , 628 F. Supp. 3d 85 (D.D.C. 2022).....	26
<i>United States v. Capo</i> , 595 F.2d 1086 (5th Cir. 1979).....	24, 25
<i>United States v. Carlton</i> , 534 F.3d 97 (2d Cir. 2008).....	19
<i>United States v. Carmenate</i> , 544 F.3d 105 (2d Cir. 2008).....	11
<i>United States v. Castillo-Rubio</i> , 34 F.4th 404 (5th Cir. 2022).....	41
<i>United States v. Cazares</i> , 788 F.3d 956 (9th Cir. 2015).....	48
<i>United States v. Ceja</i> , 23 F.4th 1218 (9th Cir. 2022).....	11
<i>United States v. Clay</i> , 481 F.2d 133 (7th Cir. 1973).....	36
<i>United States v. Cochran</i> , 770 F.2d 850 (9th Cir. 1985).....	11
<i>United States v. Cowan</i> , 524 F.2d 504 (5th Cir. 1975).....	34
<i>United States v. Darden</i> , 70 F.3d 1507 (8th Cir. 1995).....	41
<i>United States v. Davis</i> , 793 F.3d 712 (7th Cir. 2015).....	47
<i>United States v. Day</i> , 806 F.2d 1240 (5th Cir. 1986).....	35
<i>United States v. DeCarlo</i> , 1:21-cr-00073, ECF No. 134 at 7 (D.D.C. Feb. 3, 2021).....	35

<i>United States v. De Los Santos</i> , 810 F.2d 1326 (5th Cir. 1987) . . . . .	39
<i>United States v. Deitz</i> , 577 F.3d 672 (6th Cir. 2009) . . . . .	41, 42
<i>United States v. DeLuca</i> , 137 F.3d 24 (1st Cir. 1998) . . . . .	41
<i>United States v. Dinkins</i> , 691 F.3d 358 (4th Cir. 2012) . . . . .	42
<i>United States v. Dobek</i> , 989 F. Supp. 2d 723 (E.D. Wis. 2013) . . . . .	36
<i>United States v. Edwards</i> , 303 F.3d 606 (5th Cir. 2002) . . . . .	39
<i>United States v. Eiland</i> , 2006 WL 288403 (D.D.C. Jan. 31, 2006) . . . . .	41
<i>United States v. El-Mezain</i> , 664 F.3d 467 (5th Cir. 2011) . . . . .	46
<i>United States v. Evans</i> , 908 F.3d 346 (8th Cir. 2018) . . . . .	47
<i>United States v. Faulks</i> , 201 F.3d 208 (3d Cir. 2000) . . . . .	14
<i>United States v. Fernandez</i> , 388 F.3d 1199 (9th Cir. 2004) . . . . .	51
<i>United States v. Flynn</i> , 507 F. Supp. 3d 116 (D.D.C. 2020) . . . . .	34
<i>United States v. Fokker Servs. B.V.</i> , 818 F.3d 733 (D.C Cir. 2016) . . . . .	33
<i>United States v. Fontanez</i> , 878 F.2d 33 (2d Cir. 1989) . . . . .	48
<i>United States v. Gerena</i> , 869 F.2d 82 (2d Cir. 1989) . . . . .	39
<i>United States v. Gigante</i> , 166 F.3d 75 (2d Cir. 1999) . . . . .	46

<i>United States v. Gomez</i> , 774 F. App'x 136 (4th Cir. 2019)	47
<i>United States v. Goodson</i> , 204 F.3d 508 (4th Cir. 2000)	36, 37
<i>United States v. Gutierrez</i> , 963 F.3d 320 (4th Cir. 2020)	42
<i>United States v. Gutierrez de Lopez</i> , 761 F.3d 1123 (10th Cir. 2014)	46
<i>United States v. Hastings</i> , 695 F.2d 1278 (11th Cir. 1983)	27
<i>United States v. Hernandez</i> , 608 F.2d 741 (9th Cir. 1979)	40
<i>United States v. Hill</i> , 63 F.4th 335 (5th Cir. 2023)	47
<i>United States v. Hill</i> , 496 F.2d 201 (5th Cir. 1974)	43
<i>United States v. Hunt</i> , 534 F. Supp. 3d 233 (E.D.N.Y. 2021)	51
<i>United States v. Ivy</i> , 83 F.3d 1266 (10th Cir. 1996)	31
<i>United States v. Johnson</i> , 2024 WL 617719 (3d Cir. Feb. 14, 2024)	14, 16, 16
<i>United States v. Jones</i> , 965 F.2d 1507 (8th Cir. 1992)	39
<i>United States v. Kelley</i> , 849 F.2d 1395 (11th Cir. 1988)	35
<i>United States v. Krout</i> , 66 F.3d 1420 (5th Cir. 1995)	41
<i>United States v. LaFond</i> , 783 F.3d 1216 (11th Cir. 2015)	41, 42
<i>United States v. Lawrence</i> , 248 F.3d 300 (4th Cir. 2001)	14

<i>United States v. Lester</i> , 992 F.2d 174 (8th Cir. 1993).....	35
<i>United States v. Liggins</i> , 76 F.4th 500 (6th Cir. 2023).....	20
<i>United States v. Martin</i> , 704 F.2d 267 (6th Cir. 1983).....	11
<i>United States v. McCraney</i> , 99 F. Supp. 3d 651 (E.D. Tex. 2015).....	28
<i>United States v. McVeigh</i> , 106 F.3d 325 (10th Cir. 1997).....	28
<i>United States v. McVeigh</i> , 918 F. Supp. 1467 (W.D. Okla. 1996).....	25
<i>United States v. Mendonca</i> , 88 F.4th 144 (2d Cir. 2023).....	39
<i>United States v. Palermo</i> , 410 F.2d 468 (7th Cir. 1969).....	46
<i>United States v. Poindexter</i> , 719 F. Supp. 6 (D.D.C. 1989).....	33
<i>United States v. Pressley</i> , 100 F.3d 57 (7th Cir. 1996).....	14
<i>United States v. Quinones</i> , 511 F.3d 289 (2d Cir. 2007).....	41
<i>United States v. Raineri</i> , 42 F.3d 36 (1st Cir. 1994).....	34
<i>United States v. Randall</i> , 440 F. App'x 283 (5th Cir. 2011).....	20
<i>United States v. Reumayr</i> , 530 F. Supp. 2d 1200 (D.N.M. 2007).....	36
<i>United States v. Robinson</i> , 922 F.2d 1531 (11th Cir. 1991).....	45
<i>United States v. Rodriguez Cortes</i> , 949 F.2d 532 (1st Cir. 1991).....	32

<i>United States v. Rodriguez-Velez</i> , 597 F.3d 32 (1st Cir. 2010) . . . . .	45
<i>United States v. Roof</i> , 10 F.4th 314 (4th Cir. 2021). . . . .	13, 14, 47
<i>United States v. Rosario</i> , 2019 WL 266957 (D. Conn. Jan. 18, 2019). . . . .	43
<i>United States v. Ross</i> , 33 F.3d 1507 (11th Cir. 1994). . . . .	42
<i>United States v. Rothenberg</i> , 2024 WL 966992 (N.D. Cal. Mar. 6, 2024). . . . .	46
<i>United States v. Salerno</i> , 868 F.2d 524 (2d Cir. 1989). . . . .	43
<i>United States v. Sherlock</i> , 962 F.2d 1349 (9th Cir. 1989). . . . .	53
<i>United States v. Smith</i> , 55 F.3d 157 (4th Cir. 1995). . . . .	34
<i>United States v. Suarez</i> , 2020 WL 7699663 (E.D.N.Y. Dec. 28, 2020). . . . .	41
<i>United States v. Talley</i> , 164 F.3d 989 (6th Cir. 1999). . . . .	42
<i>United States v. Thompson</i> , 483 F.2d 527 (3d Cir. 1973). . . . .	21
<i>United States v. Ward</i> , 211 F.3d 356 (7th Cir. 2000). . . . .	36
<i>United States v. Warren</i> , 728 F. App'x 249 (5th Cir. 2018). . . . .	51
<i>United States v. Warshak</i> , 631 F.3d 266 (6th Cir. 2010). . . . .	10
<i>United States v. Webster</i> , 102 F.4th 471 (D.C. Cir. 2024). . . . .	25
<i>United States v. Wecht</i> , 2008 WL 65605 (W.D. Pa. Jan. 4, 2008). . . . .	34

<i>United States v. White</i> , 698 F.3d 1005 (7th Cir. 2012).....	41
<i>United States v. Wicker</i> , 848 F.2d 1059 (10th Cir. 1988).....	32
<i>United States v. Wilson</i> , 421 U.S. 309 (1975).....	46
<i>United States v. Woodruff</i> , 50 F.3d 673 (9th Cir. 1995).....	36
<i>United States v. Yuan Qing Jiang</i> , 214 F.3d 1099 (9th Cir. 2000).....	37
<i>Waffenschmidt v. MacKay</i> , 763 F.2d 711 (5th Cir. 1985).....	33
<i>Wainwright v. Witt</i> , 469 U.S. 412 (1985).....	15
<i>Waller v. Virginia</i> , 467 U.S. 39 (1984).....	12
<i>Ward v. Sterne</i> , 334 F.3d 696 (7th Cir. 2003).....	12
<i>Wayte v. United States</i> , 470 U.S. 598 (1985).....	33
<i>Woods v. Kuhlmann</i> , 977 F.2d 74 (2d Cir. 1992).....	54
<i>Yu Tian Li v. United States</i> , 648 F.3d 524 (7th Cir. 2011).....	51
<i>Zafiro v. United States</i> , 506 U.S. 534 (1993).....	51



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