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Deprivation of the Right to Counsel for Federal Pretrial Detainees During the 2019 Novel Coronavirus Pandemic, 54 UIC L. Rev. 659 (2021)

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DEPRIVATION OF THE RIGHT TO COUNSEL FOR FEDERAL PRETRIAL DETAINEES DURING THE 2019 NOVEL CORONAVIRUS PANDEMIC

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I. INTRODUCTION

The Sixth Amendment's guarantee of the right to counsel has been recognized as early as the United States's founding.¹ Eleven of

* Mary Vukovich, Juris Doctor Candidate, UIC Law School. Thank you to my family for their continued support, especially my parents who taught me to stand up for what I believe in. I would also like to extend my gratitude to all of the Waukegan Community Unit School District #60 teachers who fostered my intrigue with the Constitution.

1. Patrick S. Metzke, *Sixth Annual Criminal Law Symposium; The Sixth Amendment: Panel Two: The Right to Counsel at Trial: Speaking Truth to*

the thirteen original states “rejected the common law rule and recognized the right to counsel in criminal prosecutions in all manner of cases.”² It was not until the twentieth century, however, that the United States Supreme Court applied constitutional concepts “to the basic mechanics of a trial and started defining the proper role of trial counsel in a criminal case.”³ The right to counsel was not a guarantee for all defendants, but “[d]uring this period the Supreme Court continued to interpret the Constitution to guarantee counsel and to correct constitutional violations.”⁴

For over fifty years, the Supreme Court has held that the assistance of counsel is “one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.”⁵ In 1938, in *Johnson v. Zerbst*, the Supreme Court held that federal courts must provide a defendant with an attorney if he is unable to afford one.⁶ Further, in 1963, the Supreme Court extended the right acknowledged in *Johnson* to defendants in state courts in its landmark decision *Gideon v. Wainwright*.⁷ In *Gideon*, Justice Black famously stated that “the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”⁸

Due to the 2019 Novel Coronavirus (“COVID-19”), however, many federal pretrial detainees were denied the right to counsel that has long been deemed fundamental in our criminal justice system.⁹ Despite the emergency situation COVID-19 presented, the Sixth Amendment right to counsel remains fundamental.¹⁰ The federal correctional and detention facilities where pretrial detainees are housed need to be prepared to uphold the right to counsel in emergencies.

This Comment will address federal pretrial detainees’ constitutional right to the assistance of counsel under the Sixth Amendment in light of COVID-19. It will discuss how the federal correctional and detention facilities where the detainees are housed

Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial, 45 TEX. TECH L. REV. 163, 169 (2012).

2. *Id.* at 170.

3. *Id.* at 177.

4. *Id.* at 180.

5. *Id.* at 343-44 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

6. *Johnson*, 304 U.S. at 462-63.

7. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Landmark United States Supreme Court Cases*, A.B.A., www.americanbar.org/groups/public_education/programs/constitution_day/landmark-cases/ (last visited Oct. 10, 2020).

8. *Gideon*, 372 U.S. at 344.

9. See discussion *infra* Sections III.A-B. (examining how federal pretrial detainees were being denied their right to counsel); *Johnson*, 304 U.S. at 462-63.

10. *Gideon*, 372 U.S. at 343-44.

responded to COVID-19 in terms of access to legal counsel and how these institutions can be better prepared to respond to future emergencies.

Part II will cover the history of assistance to legal counsel in the United States and how the emergence of COVID-19 affected the right for pretrial detainees. Part III will address how inmates were denied their constitutionally guaranteed right afforded to them by the Sixth Amendment due to COVID-19 and the federal facilities' responses to it. Lastly, Part IV will propose solutions to the problem of denial of the right to counsel due to COVID-19 by proposing the release of certain pretrial detainees, as well as discussing specific actions that should have been taken by the federal facilities.

II. BACKGROUND

Assistance of legal counsel is one of the fundamental rights afforded under the United States Constitution.¹¹ The right to counsel is “inextricably linked to the legitimacy of our criminal justice system,” especially for those who are confined awaiting trial since they are afforded a presumption of innocence.¹² Part A of this section will outline the history of the right to counsel in the United States. Part B will discuss the consequences that occur when the right is denied. Part C will discuss the emergence of COVID-19. Part D will examine how COVID-19 impacted federal pretrial detainees.

A. Sixth Amendment Right to Counsel for Federal Pretrial Detainees

Pursuant to the Sixth Amendment of the United States Constitution, “[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense.”¹³ The right to counsel is fundamental to fair trials in the United States.¹⁴ The United States Supreme Court holds that the right to counsel guaranteed by the Sixth Amendment means that counsel must be provided for defendants in federal court if the defendant is unable to employ counsel.¹⁵ This right must be provided unless defendants

11. See *Gideon*, 372 U.S. at 342-43 (holding that the Sixth Amendment guarantees defendants the right to the assistance of counsel in all criminal prosecutions and that the fundamental nature of the right to counsel made it obligatory to states by the Fourteenth Amendment).

12. Fed. Defs. of N.Y. v. Fed. Bureau of Prisons, 954 F.3d 118, 134 (2d Cir. 2020).

13. U.S. CONST. amend. VI.

14. *Gideon*, 372 U.S. at 344.

15. See *Johnson*, 304 U.S. at 463 (“The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive

“competently and intelligently waiv[e]” the right.¹⁶

Further, the Supreme Court has interpreted the right to counsel to mean that a person is entitled to the assistance of an attorney once judicial proceedings have begun.¹⁷ The Supreme Court holds that the right to counsel attaches at the earlier stages of the criminal justice process.¹⁸ Due to the belief that the deprivation of assistance of counsel during the pretrial period may have a more damaging effect on the process than denial during the trial, the right to counsel has been deemed necessary at the pretrial stage.¹⁹

Following the Supreme Court’s interpretation of the Sixth Amendment’s guarantee of the right to counsel, the Supreme Court further held that inmates need to be able to “seek and receive the assistance of [their] attorneys.”²⁰ In order for pretrial detainees to enjoy the right to counsel guaranteed by the Constitution, they must be able to discuss matters with their attorney even while confined awaiting trial.²¹ Restrictions by regulation or practice that obstruct pretrial detainees’ access to their attorneys are unconstitutional²² when they prevent inmates from being able to consult with their attorneys to prepare their defense.²³ When the interest in effective communication with counsel is denied during pretrial confinement,²⁴ there is a risk that “the ultimate fairness of their eventual trial” will be compromised.²⁵ Through its opinions,

an accused of his life or liberty unless he has or waives the assistance of counsel.”).

16. *Johnson*, 304 U.S. at 468.

17. *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

18. *See Maine*, 474 U.S. at 170 (citing *United States v. Wade*, 388 U.S. 218, 224 (1967)) (“Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, ‘critical’ stages in the criminal justice process ‘where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.’”).

19. *Id.*

20. *Benjamin v. Fraser*, 264 F.3d 175, 184 (2d Cir. 2001) (citing *Procunier v. Martinez*, 416 U.S. 396, 419 (1974)).

21. *Lynch v. Leis*, No. C-1-00-274, 2002 U.S. Dist. LEXIS 27604, at *17 (S.D. Ohio Feb. 19, 2002).

22. *Contra Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (stating that although pretrial detainees retain certain constitutional rights, those rights are subject to restrictions and limitations in correctional institutions and that the institutions’ legitimate goals, such as maintaining security and order, may require restrictions to pretrial detainees’ constitutional rights).

23. *Benjamin*, 264 F.3d at 187.

24. *But see Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (reversing the United States Court of Appeals for the Ninth Circuit’s conclusion that the Sixth Amendment right to counsel would be “without substance” without a right to meaningful attorney client relationship, the Supreme Court held that the Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel).

25. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989).

the Supreme Court of the United States has recognized that the value of trial fairness is reflected in the Sixth Amendment right to counsel.²⁶

In order for the right to counsel to be meaningful, there needs to be “[f]ree two-way communication between client and attorney.”²⁷ The right to counsel is compromised when clients and their attorneys cannot have private consultations.²⁸ The right to counsel therefore requires private consultation between attorney and client.²⁹ The Supreme Court has implied that the Sixth Amendment right to counsel also includes the “existence of a substantive right to attorney-client privacy.”³⁰

B. Consequences of Denying Federal Pretrial Detainees Access to Legal Counsel

1. Frustration of the Value of Trial Fairness Reflected in the Right to Counsel

In its jurisprudence, the Supreme Court has “alluded to three values - trial fairness, substantive privacy interests, and respecting the autonomy of the accused as reflected in the Sixth Amendment right to counsel.”³¹ The most important value underlying the Sixth Amendment right to counsel is the “concern for providing fair trials for criminal defendants.”³² In *Gideon v. Wainwright*, the Supreme Court noted that in order to ensure a fair trial, a defendant needs the assistance of a lawyer.³³ The right to counsel is necessary to ensure that fairness is achieved at the eventual trial since defendants often lack the legal skill and knowledge needed to prepare a defense and may risk being convicted simply because they do not know how to prove their innocence.³⁴

Pretrial detainees’ have a “substantial due process interest in effective communication with their counsel and in access to legal materials.”³⁵ Pretrial detainees’ right to counsel includes being able

26. Martin R. Gardner, *Criminal Law: The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 410 (2000).

27. *United States v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978).

28. *Johnson-El*, 878 F.2d at 1052.

29. *Johnson-El*, 878 F.2d at 1052-53 (citing *Mastrian v. MacManus*, 554 F.2d 813, 820-21 (8th Cir. 1977)).

30. Gardner, *supra* note 26, at 410.

31. *Id.* As the issue discussed here relates to the denial of access to federal pretrial detainees, the value of respecting the autonomy of the accused is not implicated and will therefore not be addressed.

32. *Id.* at 399.

33. *Id.* at 399; *Gideon*, 372 U.S. at 344.

34. Gardner, *supra* note 26, at 402.

35. *Johnson-El*, 878 F.2d at 1051.

to effectively communicate with their attorneys prior to their trials.³⁶ Preparation for trial by the attorney is “generally recognized as the *sine qua non* of effective advocacy.”³⁷ In order to guarantee their clients the right to counsel, defense attorneys need to be able to prepare to “test the adequacy of the state’s case” by investigating and speaking with witnesses.³⁸ Counsel is unable to prepare for trial when they cannot speak with their client or if they are allowed only a few interactions.³⁹ Denying access to an inmate’s attorney has grave consequences for their ongoing legal matters since defense attorneys cannot review these matters with their clients and cannot discuss the client’s objectives with them.⁴⁰ When restrictions inhibit pretrial detainees’ access to their attorney and unreasonably burden the detainees’ ability to consult and prepare for their defense, the restrictions are unconstitutional.⁴¹

Impairment of the effective communication between the pretrial detainee and their attorney can have consequences that affect the fairness of the trial.⁴² Denial of the right to counsel violates “one of our most cherished and fundamental human rights - freedom.”⁴³

36. See *Johnson-El*, 878 F.2d at 1052 (“The right to an attorney would mean little if it did not effectively attach until the hushed whispers at the defense table the morning of trial.”).

37. Joe Margulies, *Criminal Law: Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 679 (1989).

38. *Id.*

39. See Frank G. Runyeon, *Judge Warns NYC Prisons to “Do Better” on Attorney Access*, LAW 360 (Apr. 3, 2020, 3:54 PM), www.law360.com/articles/1260215 [perma.cc/R7WD-BGYH] (reporting that the attorney for the Federal Defenders said that the denial of phone calls by the MDC “impedes the clients’ ability to prepare for trial...”); see also Pete Brush, *Bail Hearing Yields News that MCC to Reopen for Atty Visits*, LAW 360 (Sept. 11, 2020, 4:20 PM), www.law360.com/articles/1309426 [perma.cc/TC24-9JV5] (referencing defense counsel’s statements that he cannot properly formulate a defense for his client because they have only been able to communicate very shortly on the phone and that he does not have enough time to speak with his client).

40. See Nick Pinto, *As Coronavirus Looms in Federal Detention, People Inside are Being Denied Constitutional Right to Speak with Lawyers*, INTERCEPT (Apr. 5, 2020, 9:04 PM), www.theintercept.com/2020/04/05/coronavirus-federal-prison-mdc-mcc-new-york/ [perma.cc/4GA8-XSPX] (reporting that with the emergence of COVID-19, inmates in federal detention facilities were being denied their Sixth Amendment right since they could not visit or talk with their attorneys).

41. *Benjamin*, 264 F.3d at 184-87.

42. *Johnson-El*, 878 F.2d at 1051.

43. Tim Young, *The Right to Counsel: An Unfulfilled Constitutional Right*, A.B.A., (Oct. 1, 2013), www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/the_right_to_counsel/.

2. *Frustration of the Value of Attorney Client Privacy Reflected in the Right to Counsel*

When detainees do not have access to private communications with their attorneys, they are denied the value of privacy represented in the Sixth Amendment right to counsel.⁴⁴ The Supreme Court has implied that the Sixth Amendment right to counsel “protects substantive interests in addition to promoting the procedural goal of trial fairness.”⁴⁵ Although the fairness and autonomy interests are “primary” to the right to counsel, the Supreme Court has implicitly noted the “existence of a substantive right to attorney-client privacy as a value distinct from those of procedural fairness and personal autonomy.”⁴⁶ The attorney-client privilege, like the right to counsel, is “fundamental to ensuring fairness in the justice system,” as it allows for the “candor and cooperation a lawyer needs to effectively represent and serve his or her client.”⁴⁷

The right to counsel is made meaningful when there is “[f]ree two-way communication between client and attorney.”⁴⁸ The right to counsel can be “compromised by a lack of privacy in consultations with counsel.”⁴⁹ When detainees have to take legal calls “in the open” or have to “yell over the phone,” the consultation between the detainee and the attorney is compromised.⁵⁰ The Sixth Amendment’s right to counsel is only made meaningful when criminal defendants know that they can privately communicate with their attorneys and that their trial preparations are secure from the government.⁵¹

44. See Gardner, *supra* note 26, at 406-07 (arguing that the Supreme Court seems to recognize a Sixth Amendment right to privacy as a substantive right, distinct from the Sixth Amendment’s procedural guarantee of fairness).

45. *Id.* at 404.

46. *Id.* at 410.

47. *Protect the Attorney-Client Privilege and Right to Effective Counsel: Ensuring Fairness in the Federal Prison System*, A.B.A. (Mar. 30, 2020), www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/march-washington-letter-2020/bop-032020/ (“The attorney-client privilege is fundamental to ensuring fairness in the justice system and vital to securing the candor and cooperation a lawyer needs to effectively represent and serve his or her client.”). “That is why it is extremely troubling to discover that the email system used in federal prisons forces inmates to submit to routine monitoring and review of all their email communications—including confidential emails with their lawyers.” *Id.*

48. *Levy*, 577 F.2d at 209.

49. *Johnson-El*, 878 F.2d at 1052.

50. *Id.*

51. *Weatherford v. Bursey*, 429 U.S. 545, 555 n.4 (1977) (quoting the Brief for United States as *Amicus Curiae* which quoted the Brief for United States in *Hoffa v. United States*).

C. COVID-19 and its Effects on Federal Correctional and Detention Facilities

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency in response to the 2019 Novel Coronavirus pursuant to section 319 of the Public Health and Safety Act.⁵² COVID-19 is a novel coronavirus that was first detected in December 2019 in Wuhan, China.⁵³ Due to the increasing spread of the virus, the World Health Organization (“WHO”) characterized COVID-19 as a pandemic on March 11, 2020.⁵⁴

In response to the rapid spread of COVID-19, the WHO issued precautions for the public to take in order to reduce the chance of infection and spread among the population.⁵⁵ Suggested precautions included distancing oneself from others, wearing face masks, and avoiding going to crowded places.⁵⁶ In response to the COVID-19 pandemic, the Centers for Disease Control and Prevention (“CDC”) issued guidelines for correctional and detention facilities in its “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.”⁵⁷

The Federal Bureau of Prisons (“BOP”) issued a “COVID-19

52. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020), www.trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/?utm_source=link [perma.cc/J3T6-J689].

53. *See id.* (“In December 2019, a novel (new) coronavirus known as SARS-CoV-2 (“the virus”) was first detected in Wuhan, Hubei Province, People’s Republic of China, causing outbreaks of the coronavirus disease COVID-19 that has now spread globally.”).

54. *Listings of WHO’s response to COVID-19*, WORLD HEALTH ORG. (Jan. 29, 2021), www.who.int/news-room/detail/29-06-2020-covidtimeline [perma.cc/3UE6-Z4J4] (“Deeply concerned both by the alarming levels of spread and severity, and by the alarming level of inaction, WHO made the assessment that COVID-19 could be characterized as a pandemic.”).

55. *Coronavirus disease (COVID-19) Advice for the Public*, WORLD HEALTH ORG. (Aug. 13, 2021), www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public [perma.cc/9P3L-EPZD] (“Protect yourself and others from COVID-19. If COVID-19 is spreading in your community, stay safe by taking some simple precautions, such as physical distancing, wearing a mask, keeping rooms well ventilated, avoiding crowds, cleaning your hands, and coughing into a bent elbow or tissue.”). “Check local advice where you live and work. Do it all!” *Id.*

56. *Id.*

57. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTR. FOR DISEASE CONTROL & PREVENTION (July 22, 2020), www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [perma.cc/74JU-Y83A].

Action Plan” outlining modified operations for the agency to address the growing concern surrounding COVID-19 and its spread to correctional and detention facilities.⁵⁸ Issued on March 13, 2020, the conditions of the modified operations included suspension of all social and legal visits.⁵⁹ In August 2020, the BOP outlined its “Coronavirus (COVID-19) Phase Nine Action Plan,” which included specific precautions that should be taken during in-person visits.⁶⁰ On October 8, 2020, the BOP updated its modified operations to express that as courts started to open and conduct more proceedings, “inmates will need increased access to counsel and legal materials.”⁶¹

While experts in 2020 predicted that the United States would return to “pre-pandemic normalcy” around late 2021,⁶² COVID-19 cases continued to rise well into 2021.⁶³ Additionally, although

58. *Federal Bureau of Prisons COVID-19 Action Plan: Agency-wide Modified Operations*, FED. BUREAU OF PRISONS, (Mar. 13, 2020, 3:09 PM) www.bop.gov/resources/news/20200313_covid-19.jsp [perma.cc/VC9N-QH9T].

59. *Id.*

60. Memorandum re: Coronavirus (COVID-19) Phase Nine Action Plan from Andre Matevousian, Assistant Director Correctional Programs Division, L. Cristina Griffith, Assistant Director Human Resource Management Division, and N.C. English, Assistant Director Health Services Division (Aug. 5, 2020), www.prisonology.com/wp-content/uploads/2020/08/COVID-19-Phase-9-COVID-Action-Plan.pdf [perma.cc/F59E-5UM9].

61. *BOP Modified Operations*, FED. BUREAU OF PRISONS, (Oct. 8, 2020), www.bop.gov/coronavirus/covid19_status.jsp [perma.cc/AJW3-BUAH].

62. Alexandra Kelley, *Fauci Predicts Pandemic Will End in Late 2021*, HILL (Sept. 18, 2020), www.thehill.com/changing-america/well-being/prevention-cures/517095-fauci-reveals-when-he-thinks-the-us-can-return [perma.cc/NL95-BU8M] (“Anthony Fauci, the nation’s lead infectious diseases expert and head of the National Institute for Allergies and Infectious Diseases, maintains that the coronavirus crisis is likely to end in late 2021.”).

63. See *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG., www.covid19.who.int/ [perma.cc/2HCJ-LLTA] (last visited Nov. 1, 2020) (charting the global number of confirmed coronavirus cases and deaths); see also Mitch Smith et al., *U.S. Coronavirus Cases Surpass 9 Million With No End in Sight*, N. Y. TIMES (Oct. 29, 2020), www.nytimes.com/2020/10/29/us/coronavirus-nine-million-cases.html [perma.cc/PR47-PZ9Q] (“The United States, which reported its first known coronavirus case in Washington State 282 days ago, surpassed nine million total infections on Thursday [October 29, 2020], including more than half a million in the past week, as Covid-19 spiraled out of control in the lead-up to Election Day.”). “Across the country, alarming signs suggested the worst was yet to come: The nation reported more cases on Thursday [October 29, 2020] — more than 90,000 — than on any other single day.” *Id.*; see also Madeline Holcombe & Eric Levens, *California Reports More than 45,000 New Coronavirus Cases as Surge Continues into New Year*, CNN (Jan. 4, 2021), www.cnn.com/2021/01/03/health/us-coronavirus-sunday/index.html [perma.cc/94MZ-UHD5] (“Around the United States, hospitals are racing to keep up with surges of Covid-19 patients at numbers they have not seen at any other time in the pandemic.”).

COVID-19 vaccinations began to roll out in December of 2020,⁶⁴ by January 2021 vaccinating the population was slow,⁶⁵ and vaccinating inmates was controversial.⁶⁶ Therefore, federal correctional and detention facilities need to be better equipped to ensure that access to legal counsel is maintained so that in the event another pandemic lockdown happens⁶⁷ or a different emergency situation emerged,⁶⁸ federal pretrial detainees receive

64. See Sarah Zhang, *The End of the Pandemic Is Now in Sight*, ATLANTIC (Nov. 18, 2020), www.theatlantic.com/health/archive/2020/11/vaccines-end-covid-19-pandemic-sight/617141/ [perma.cc/MTJ4-2MZC] (reporting that scientists have found that a vaccine can stop COVID-19, that two companies, Pfizer and Moderna, “have separately released preliminary data that suggest their vaccines are both more than 90 percent effective, far more than many scientists expected” and that the initial vaccines should be available in December of 2020).

65. See Holly Yan & Madeline Holcombe, *One American Dies from Covid-19 Every 33 Seconds as the Vaccine Rollout Hits Snag*, CNN (Jan. 5, 2021, 4:33 AM), www.cnn.com/2021/01/04/health/us-coronavirus-monday/index.html [perma.cc/9S9N-H5LX] (“About 15.4 million vaccine doses have been distributed in the US, but only 4.5 million people have received their first doses, the US Centers for Disease Control and Prevention said Monday.”). “That’s far behind what officials had hoped for by now. And it means herd immunity is still many months away.” *Id.*

66. See Roni Caryn Rabin, *In Massachusetts, Inmates will be Among First to Get Vaccines*, N. Y. TIMES (Dec. 18, 2020), www.nytimes.com/2020/12/18/health/coronavirus-vaccine-prisons-massachusetts.html [perma.cc/W6JD-G3XZ] (stating Massachusetts’s “high prioritization of inmates is unusual” as “federal health officials have recommended that corrections officers and staff at state facilities receive high priority but have said nothing about inmates”); see also Isaac Stanley-Becker, *Early Vaccination in Prisons, a Public Health Priority, Proves Politically Charged*, WASH. POST (Jan. 2, 2021, 4:30 PM), www.washingtonpost.com/health/2021/01/02/covid-vaccine-prisons/ [perma.cc/JP2H-3V6V] (reporting that after Colorado officials received backlash for the state’s health department plan, “which put incarcerated people in line for coronavirus immunization ahead of the elderly and those with chronic conditions,” Colorado Governor Jared Polis stated that “there was ‘no way’ the limited supply of shots would ‘go to prisoners before it goes to people who haven’t committed any crime’” and the state revised its plan).

67. See Ed Yong, *America Should Prepare for a Double Pandemic*, ATLANTIC (July 15, 2020), www.theatlantic.com/health/archive/2020/07/double-pandemic-covid-flu/614152/ [perma.cc/DQU3-KVW7] (“As new diseases emerge at a quickening pace, the only certainty is that pandemics [more than just COVID-19] are inevitable.”); see also Michaela Doucleff, *Next Pandemic: Scientists Fear Another Coronavirus Could Jump From Animals To Humans*, NPR (Mar. 19, 2021, 6:25 PM), www.npr.org/sections/goatsandsoda/2021/03/19/979314118/ [perma.cc/G9UC-JFMS] (“Coronavirus pandemics are not a once in a hundred year event.”). “The next one could come at any time.” *Id.*

68. See *infra* notes 78-79 and accompanying text (detailing previous emergency situations at Metropolitan Detention Center-Brooklyn in which attorney visitation was limited); see also Akua Amaning, *A Call for Effective Emergency Management in Correctional Facilities During COVID-19*, CTR. FOR AM. PROGRESS (July 31, 2020, 9:01 AM), www.americanprogress.org/issues/criminal-justice/news/2020/07/31/488408/call-effective-emergency-management-

their Sixth Amendment right to counsel. The 2019 Novel Coronavirus can inform the federal government and help to ensure that the federal correctional and detention facilities are prepared and equipped to provide adequate access to legal representation even amidst an emergency.

D. COVID-19 and its Effects on Access to Legal Counsel for Federal Pretrial Detainees

Due to the heightened fear of COVID-19's spread in correctional and detention facilities, pretrial detainees and inmates began requesting the courts to evaluate their release in light of the unprecedented situation COVID-19 presented.⁶⁹ In *United States v. Stephens*, the United States District Court for the Southern District of New York granted a defendant's motion for reconsideration of his bail conditions due to the change in circumstances since his previous hearing.⁷⁰ The District Court stated that a reconsideration of the defendant's bail was warranted due to the "unprecedented and extraordinary dangerous nature of the COVID-19 pandemic [that had] become apparent" since the defendant's bail hearing ten days prior.⁷¹ Considering the greater risk COVID-19 posed to correctional institutions, the District Court concluded that the obstacles to the defendant's ability to prepare his defense created by the COVID-19 pandemic constituted a compelling reason that necessitated the defendant's release.⁷²

Similarly, in *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, the United States Court of Appeals for the Second Circuit recognized the emergence of COVID-19 and the

correctional-facilities-covid-19/ [perma.cc/L2MH-8G78] (addressing the need for proactive emergency response measures in the event of future national emergencies).

69. See *United States v. Stephens*, 447 F. Supp. 3d 63, 64 (S.D.N.Y. Mar. 18, 2020) (granting defendant's motion for bail reconsideration due to spread of COVID-19 and the Bureau of Prisons subsequent suspension of all visits, including legal ones); *United States v. Gold*, 459 F. Supp. 3d 1117, 1119-20 (N.D. Ill. May 6, 2020) (denying defendant's motion for compassionate release or alternatively, a recommendation for home confinement, due to COVID-19, the court stated that the defendant's generalized concerns about possible COVID-19 exposure were not extraordinary and compelling reasons for his release); *United States v. Lewellen*, No. 09-CR-0332 (-2), 2020 U.S. Dist. LEXIS 90195, at *10-11 (N.D. Ill. May 22, 2020) (distinguishing the case from *United States v. Gold*, the court granted defendant's motion for compassionate release due to the defendant's medical conditions and age, which made him more susceptible to COVID-19 and noted that the defendant here had more than a generalized fear of contracting COVID-19).

70. *Stephens*, 447 F. Supp. 3d at 64.

71. *Id.* at 65.

72. *Id.* at 67.

challenges the pandemic brought to correctional institutions.⁷³ The appeal addressed the “severe curtailment” of the Federal Defenders’ access to their clients at the Metropolitan Detention Center in Brooklyn (“MDC”).⁷⁴ The court acknowledged that most of the inmates housed at MDC were pretrial detainees who had not yet been convicted of a crime.⁷⁵ The appeal concerned the Federal Defenders’ suit against the BOP from February 2019 that alleged that the cancellation of visits with their clients violated the right to counsel guaranteed by the Sixth Amendment of the Constitution.⁷⁶

The Federal Defenders pointed to multiple events beginning in January 2019 that resulted in the curtailment of their access to clients at MDC.⁷⁷ They noted four different instances in which the MDC canceled or delayed attorney visitation.⁷⁸ Those instances were staffing issues due to the partial federal government shutdown, a fire in MDC which resulted in power outages, a confrontation in MDC’s lobby, and a bomb threat to the facility.⁷⁹ The Federal Defenders represented that the cancellations and delays of attorney visits impaired their ability to represent their clients because they could not review discovery with their clients, could not discuss pleading decisions, trial strategy, or the sentencing process, and had to cancel interviews with various other court actors, including expert witnesses.⁸⁰

The Court of Appeals vacated the District Court’s judgment and remanded the case, urging the District Court to mediate the dispute and facilitate adopting procedures to handle emergencies at the federal facilities, which included COVID-19.⁸¹ After the case was remanded to the District Court, the District Court judge appointed former U.S. Attorney General Loretta Lynch as the mediator.⁸² Despite Ms. Lynch’s efforts to have video conferencing

73. *Fed. Defs. of N.Y.*, 954 F.3d at 127-36.

74. *Id.* at 122.

75. *Id.* (“This appeal concerns the severe curtailment of defense attorneys’ access to client inmates held at the Metropolitan Detention Center-Brooklyn (“MDC”), most of whom are pretrial detainees who have not been convicted of a crime.”); *cf. Johnson-El*, 878 F.2d at 1048 (stating that the state has no right to punish pretrial detainees); *see also Taylor v. Kentucky*, 436 U.S. 478, 479 (1978) (holding that the presumption of innocence in favor of the accused was the law).

76. *Fed. Defs. of N.Y.*, 954 F.3d at 122.

77. *Id.* at 123.

78. *Id.* at 123-24.

79. *Id.*

80. *Id.* at 124.

81. *Id.* at 136.

82. Stewart Bishop, *Loretta Lynch to Referee Dispute Over Detainee’s Atty Access*, LAW 360 (Mar. 23, 2020, 9:44 PM), www.law360.com/articles/1256200 [perma.cc/TJU8-GJYA] (“New York federal judge appointed former U.S. Attorney General Loretta Lynch on Monday to handle the dispute between the Federal Defenders of New York and the Federal Bureau of Prisons over attorney access to detainees . . .”).

options available, the attorney representing the Federal Defenders stated in a letter to District Court Judge Margo Brodie that the problem of denial of access to counsel “remain[ed] severe and intractable.”⁸³ The attorney argued that BOP’s constitutional violations “[had] grown worse.”⁸⁴

Federal pretrial detainees housed in federal correctional and detention facilities were not the only inmates experiencing deprivation of their constitutionally guaranteed right to counsel.⁸⁵ In *Southern Poverty Law Center v. U.S. Department of Homeland Security*, the United States District Court for the District of Columbia addressed concerns regarding immigrants’ access to legal counsel, who were detained in Immigration and Customs Enforcement (“ICE”) detention facilities.⁸⁶ Plaintiffs, in this case, argued that the ICE facilities violated their client’s rights to access counsel due to their response to COVID-19.⁸⁷ Ruling that the plaintiffs were entitled to injunctive relief on behalf of their clients housed at the ICE detention facilities, the court outlined seven steps that the defendants should adhere to in order to provide the clients with access to counsel.⁸⁸ To ensure that ICE and the other defendants would comply with the ruling, the D.C. District Court required that the defendants certify their compliance with the Court’s Order with the District Court.⁸⁹ Although the clients in this case are detained immigrants in ICE detention facilities, the relief the court granted can inform federal facilities on how they should

83. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 2, (Apr. 2, 2020) (Civ. No. 19-cv-660).

84. Runyeon, *supra* note 39 (“Counsel for the Federal Defenders of New York . . . argued . . . that the MDC and MCC’s constitutional violations ‘have grown worse. Much worse.’”); accord Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 1-2, (Oct. 28, 2020) (Civ. No. 19-cv-660) (outlining ongoing issues relating to access to counsel in regard to in-person visits and telephone and video calls).

85. See Katie Fernelius, *Without Visits or Confidential Calls, Louisiana Prisoners Can’t Access Legal Help*, SCALAWAG (May 8, 2020), www.scalawagmagazine.org/2020/05/incarceration-legal-protections-covid19/ [perma.cc/UEC9-URGT] (discussing the denial of the right to counsel to prisoners in the state of Louisiana); see also Spencer S. Hsu, D.C. Jail Inmates with Coronavirus Barred from Access to Lawyers, Family, Showers and Changes of Clothing, *Inspectors Say*, WASH. POST (Apr. 15, 2020, 7:47 PM), www.washingtonpost.com/local/legal-issues/dc-jail-inmates-with-coronavirus-barred-from-access-to-lawyers-family-showers-changes-of-clothing-inspectors-say/2020/04/15/69a86c9e-7f36-11ea-9040-68981f488eed_story.html [perma.cc/CJY5-SJHN] (discussing how D.C. Jail inmates were being denied access to their lawyers); see also *S. Poverty Law Ctr. v. U.S. Dep’t of Homeland Sec.*, 2020 U.S. Dist. LEXIS 106416, *6-8 (D.D.C. June 17, 2020) (holding that detained immigrants in Immigration and Customs Enforcement detention facilities were being denied access to counsel).

86. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *3.

87. *Id.*

88. *Id.* at *117-21.

89. *Id.* at *121.

ensure the right to counsel for federal pretrial detainees.⁹⁰

While the right to counsel can be guaranteed by adopting procedures to ensure detainees have access to their attorneys, some other jurisdictions have released certain inmates to guarantee the Sixth Amendment right to counsel.⁹¹ Many of those confined have not been convicted of a crime and are only detained because of their inability to pay the bail amount set.⁹² Because of the new reality of COVID-19, jurisdictions in the United States began releasing certain detainees.⁹³

Jails in over twenty states took steps to reduce the populations in their facilities in order to reduce the spread of COVID-19.⁹⁴ Some jurisdictions released individuals who were being held for low-level offenses and nonviolent offenses.⁹⁵ Others released those who were close to their release dates and only had a small number of days left on their sentence.⁹⁶ A few jurisdictions released those who were at higher risk for COVID-19, such as the elderly and pregnant women.⁹⁷ Lastly, some jurisdictions did a mix of all three release options.⁹⁸ This Comment will discuss how federal pretrial detainees were denied their constitutionally guaranteed Sixth Amendment

90. *Id.* at *48-58.

91. *The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POLICY INITIATIVE (May 18, 2021), www.prisonpolicy.org/virus/virusresponse.html [perma.cc/2GMD-A697] (listing all of the jurisdictions that are releasing individuals from their jails and prisons).

92. *Human Rights Dimensions of COVID-19 Response*, HUMAN RIGHTS WATCH, (Mar. 19, 2020, 12:01 AM) www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response [perma.cc/V8W3-YQ8T] (“Many people in US jails have not been convicted of a crime but are locked up simply because they cannot afford to pay the bail set in their case.”); see *Q & A: Pretrial Incarceration, Bail and Profile Based Risk Assessment in the United States*, HUMAN RIGHTS WATCH, (June 1, 2018, 7:00 AM) www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states [perma.cc/W2VB-NWQX] (discussing pretrial incarceration and bail in the United States).

93. *Human Rights Dimensions of COVID-19 Response*, *supra* note 92 (“As a response, in one county in the US state of Ohio, the courts expedited review of people in jail, releasing some and transferring others to prisons.”); accord PRISON POLICY INITIATIVE, *supra* note 91 (listing all of the jurisdictions that are releasing individuals from their jails and prisons); see Justin Wm. Moyer & Neena Satija, *Frail inmates could be sent home to prevent the spread of covid-19. Instead, some are dying in federal prisons.*, WASH. POST (Aug. 3, 2020, 5:00 AM), www.washingtonpost.com/local/public-safety/frail-inmates-could-be-sent-home-to-prevent-the-spread-of-covid-19-instead-some-are-dying-in-federal-prisons/2020/08/02/992fd484-b636-11ea-9b0f-c797548c1154_story.html [perma.cc/2PKB-JNXX] (arguing that frail and elderly individuals in federal prisons were dying of COVID-19 because they were not being released).

94. PRISON POLICY INITIATIVE, *supra* note 91.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

right to counsel due to the emergence of COVID-19 and how releasing certain detainees and adopting procedures can help to ensure that the right is maintained in the future, in the event of another emergency situation.

III. ANALYSIS

Since the outbreak of the 2019 Novel Coronavirus in the United States, correctional and detention facilities have needed to make changes in order to respond to and prevent the spread of the virus.⁹⁹ With the emergence of COVID-19, federal facilities did not adequately ensure that pretrial detainees had access to their attorneys as guaranteed by the Sixth Amendment of the Constitution.¹⁰⁰ Part A of this section will examine how federal pretrial detainees were denied the means to communicate with their attorneys. Part B will discuss the Sixth Amendment violations that occurred due to COVID-19 and how the COVID-19 restrictions in place amounted to a constitutional violation.

A. Federal Pretrial Detainees Denied their Constitutionally Guaranteed Sixth Amendment Right to Counsel due to COVID-19

1. Suspension of In-Person Visits and the Risk Posed due to COVID-19

As part of its Modified Operations in response to COVID-19, the Federal Bureau of Prisons suspended social and legal visits for thirty days starting on March 13, 2020.¹⁰¹ While stating that “in general” legal visits, like social visits, were suspended for thirty days, the BOP clarified that “access to legal counsel remain[ed] a paramount requirement in the BOP,” and so legal visits would be allowed on a “case-by-case” basis.¹⁰² The “case-by-case accommodation” would be assessed at the local level.¹⁰³ In a letter to the United States District Court for the Southern District of New York, however, an attorney stated that “since the suspension of counsel visits on March 13, the [Metropolitan Correctional Center

99. See *BOP Modified Operations*, *supra* note 61 (listing the conditions and the modifications the BOP and its facilities were operating under “in order to mitigate the spread of COVID-19.”).

100. See discussion *infra* Sections III.A-B (outlining federal pretrial detainees' deprivation of counsel during the COVID-19 pandemic).

101. See *Federal Bureau of Prisons COVID-19 Action Plan: Agency-wide Modified Operations*, *supra* note 58 (stating that “social visits will be suspended for 30 days” and that “in general, legal visits will be suspended for 30 days”).

102. *Id.*

103. *Id.*

in New York] reports that it has not received a single request from any defense counsel that they deem appropriate for an in-person visit.”¹⁰⁴

In an August 5, 2020 Memorandum, the BOP outlined its “Coronavirus (COVID-19) Phase Nine Action Plan.”¹⁰⁵ The section detailing legal access stated that when allowed, in-person legal visits should include precautions such as the use of face coverings and hand hygiene.¹⁰⁶ The section further stated that in-person legal visits between the client and the attorney should include Plexiglass or a barrier, and that if there was no barrier between the two individuals, social distancing should be employed.¹⁰⁷ The action plan also read that during legal visits, the individuals should avoid passing documents back and forth in order to avoid touching one another.¹⁰⁸

Further, while the BOP maintained that attorneys could be approved for a legal visit on a “case-by-case basis,”¹⁰⁹ one of the BOP’s facilities, the Metropolitan Correctional Center in New York (“MCC”), was still not open for in-person legal visits as late as September 11, 2020.¹¹⁰ The Metropolitan Detention Center in Brooklyn, New York (“MDC”) only resumed in-person legal visits on September 10, 2020.¹¹¹ On September 30, 2020, the BOP announced that it planned to resume social visits on October 3, 2020.¹¹² After

104. *United States v. Peralta*, 2020 U.S. Dist. LEXIS 85578, at *17-18 (S.D.N.Y. May 12, 2020).

105. Memorandum re: Coronavirus (COVID-19) Phase Nine Action Plan *supra* note 60.

106. *See id.* (detailing that when meeting for in-person legal visits, inmates and attorneys should wear face coverings and perform hand hygiene before and after in-person visits).

107. *See id.* (detailing that when meeting for in-person visits, there should be a Plexiglass or other barrier between the inmate and the attorney and if there is no barrier, the inmate and attorney should social distance, 6 feet apart).

108. *See id.* (listing considerations for in-person legal visits, stating that “if necessary, documents should be passed back and forth in a manner to avoid touching.”).

109. *See Federal Bureau of Prisons COVID-19 Action Plan: Agency-wide Modified Operations*, *supra* note 58 (“While in general, legal visits will be suspended for 30 days, case-by-case accommodation will be accomplished at the local level.”).

110. *See Brush*, *supra* note 39 (reporting that a prosecutor in a case in which a man is being held pretrial in the Metropolitan Correctional Center in Manhattan stated that “the government was informed last week that MCC will be resuming in-person legal visits on Sept. 21” in response to the detainee’s defense counsel representing that he has only been able to communicate with his client in a “few ‘short bursts’ over the phone”).

111. Office of the Inspector General, *Pandemic Response Report: Remote Inspection of Metropolitan Detention Center Brooklyn*, DEPT. OF JUSTICE, 11 (Nov. 2020), www.oig.justice.gov/sites/default/files/reports/21-002.pdf [perma.cc/7Z9U-6QZF]

112. *Bureau to Resume Social Visitation*, FED. BUREAU OF PRISONS (Sep. 30, 2020, 4:07 PM), www.bop.gov/resources/news/20200902_visitation.jsp

the September 30th announcement, the BOP's Modified Operations was updated on October 8, 2020 stating that in-person legal visits will be "accommodated upon request, based on local resources, and [would] follow preventative protocols."¹¹³

Although the BOP announced that legal visits were no longer per se suspended, in-person visits still posed health risks to the detainees and their attorneys as COVID-19 continued to rapidly spread after the BOP's announcement.¹¹⁴ Health experts have concluded that COVID-19 spreads when an infected individual comes into close contact, less than one meter apart, with someone else.¹¹⁵ Additionally, there is a risk of aerosol transmission of COVID-19 in areas of poor ventilation.¹¹⁶ Since correctional facilities are poorly ventilated¹¹⁷ and in-person legal visits would

[perma.cc/MAQ7-GNLS].

113. *BOP Modified Operations*, *supra* note 61.

114. See Maura Turcotte & Libby Seline, *Federal Prisons Will Let Inmates Have Visitors During Pandemic*, N. Y. TIMES (Oct. 1, 2020), www.nytimes.com/2020/10/01/us/federal-prisons-visits-coronavirus.html [perma.cc/BEX8-9YJX] (reporting that as COVID "has hit prisons particularly hard...some prison workers and families questioned whether outside visits — and the risk of further spread from inside and outside of facilities — were wise."); see also Runyeon, *supra* note 39 ("One immunocompromised attorney had to cancel one of those [video] calls [promised by the BOP to the Federal Defenders] due to concerns over venturing out into public during the pandemic, because attorneys must make video calls to the MDC federal inmates from designated stations at federal courthouses."); see also Reis Thebault et al., *U.S. Surpasses 15 Million Coronavirus Cases as Spread Accelerates*, WASH. POST (Dec. 8, 2020), www.washingtonpost.com/nation/2020/12/08/coronavirus-covid-live-updates-us/ [perma.cc/82CV-FXW2] (reporting that in December of 2020, the United States was "in the middle of the most severe surge yet"); see also *Coronavirus in the U.S.: Latest Map and Case Count*, N. Y. TIMES www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html [perma.cc/3TRJ-5BHL] (last visited Aug. 27, 2021), (tracking the number of Coronavirus cases, deaths, and how many people have been hospitalized in the United States over time since COVID-19's emergence in the United States in March 2020).

115. *Coronavirus disease (COVID-19): How is it transmitted?*, WORLD HEALTH ORG. (July 9, 2020), www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted [perma.cc/68B4-6F2B] ("COVID-19 is caused by the SARS-CoV-2 virus, which spreads between people, mainly when an infected person is in close contact with another person.") "Current evidence suggests that the main way the virus spreads is by respiratory droplets among people who are in close contact with each other... Aerosol transmission can occur in specific settings, particularly in indoor, crowded and inadequately ventilated spaces, where infected person(s) spend long periods of time with others, such as restaurants, choir practices, fitness classes, nightclubs, offices and/or places of worship." *Id.*

116. *Id.*

117. See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047-52 (2007) ("Most jails and prisons were constructed to maximize public safety, not to minimize the transmission of disease or to efficiently deliver health care."). Infection due to airborne

have required the detainees and attorneys to be in close proximity, the risks COVID-19 presented were high.¹¹⁸ Because some attorneys were not able to visit their clients in-person due to underlying conditions that put the attorneys at an increased risk for severe effects of the COVID-19 virus¹¹⁹ or were fearful of spreading the virus to a client with an underlying condition, additional adequate means of attorney client communication, such as private legal video and phone calls, are needed.¹²⁰

2. Lack of Access to Private Legal Phone and Video Calls

While in-person legal visits were not available at certain facilities depending on local conditions¹²¹ and may not have been practical for immunocompromised attorneys or detainees,¹²² other modes of access to counsel were necessary and should have been made available. However, federal pretrial detainees were denied alternative modes of access to their attorneys, such as private legal

organisms such as Mycobacterium Tuberculosis, spread due to “overcrowding, poor ventilation, delayed diagnosis, and failure to adhere to recognized standards for prevention, screening, and containment.” *Id.*

118. See Joshua Matz, *The Coronavirus is Testing America’s Commitment to People’s Constitutional Rights*, ATLANTIC (Apr. 20, 2020), www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216/ [perma.cc/375A-BVHL] (reporting that pretrial detainees “are stuck in jails with much higher risks of exposure to COVID-19—and much less access to quality health care—but without any end in sight” and that this means that “access to counsel is paramount, especially for the many detainees whose age or medical conditions put them in high-risk categories.”).

119. *People with Certain Medical Conditions*, CENTER FOR DISEASE CONTROL AND PREVENTION (Dec. 29, 2020), www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html [perma.cc/N2WW-UX8Z] (“Adults of any age with certain underlying medical conditions [such as cancer, chronic kidney disease, down syndrome, obesity, and others] are at increased risk for severe illness from the virus that causes COVID-19.”). “Severe illness from COVID-19 is defined as hospitalization, admission to the ICU, intubation or mechanical ventilation, or death.” *Id.*

120. See Jane Wester, *Plans for In-Person Legal Visits at New York City’s Federal Jails Are Still in the Works, Bureau of Prisons Says*, N. Y. L. J. (June 25, 2020, 6:06 PM), www.plus.lexis.com/search?crd=3a504933-d48c-4522-b9c0-3e35b3266515&pdsearchterms=LNSDUID-ALM-NYLAWJ-20200625PLANSFORINPERSONLEGALVISITSATNEWYORKCITYSFEDERALJAILSARESTILLINTHEWORKSBUREAUOFFPRISONSSAYS&pdbypassci tatordocs=False&pdsourcingroupingtype=&pdmfid=1530671&pdisurlapi=true (last visited Sept. 6, 2021)(“The Federal Defenders’ proposal emphasized that legal videoconferences and telephone calls should continue even after the facilities reopen to physical visits.”). “Some attorneys, experts and interpreters won’t be able to visit in person for health reasons, the Federal Defenders wrote, and larger legal teams might not have access to a space big enough to meet while social distancing.” *Id.*

121. *BOP Modified Operations*, *supra* note 61.

122. See *supra* notes 114-20 and accompanying text (explaining how in-person legal visits posed health risks to both the attorney and client).

phone calls.¹²³

In the Office of the Inspector General's Remote Inspection of Metropolitan Correctional Center Brooklyn Pandemic Response Report, conducted between April 30 and June 10, 2020, an MDC Staff Attorney noted: "most inmate legal visits continued to be conducted remotely, either by telephone or video teleconference, even after the resumption of in-person legal visiting."¹²⁴ The Remote Inspection Report explained that although MDC previously had temporary duty staff help coordinate and schedule legal calls, MDC stopped receiving this help around July even though legal calls were still being requested at a high volume.¹²⁵ One complaint the Office of the Inspector General received from an inmate's attorney "stated that it was challenging to coordinate the scheduling of inmate legal calls" at MDC.¹²⁶

Additionally, the Remote Inspection Report included the results of an anonymous, electronic survey of all BOP government employees done in April 2020.¹²⁷ In the survey, one question stated, "[p]lease identify which, if any, of the following strategies your institution is currently employing to facilitate inmates' ability to communicate with legal counsel."¹²⁸ In response, only thirty-five percent of respondents chose "[i]nmates have access to their counsel when requested, through institution phones."¹²⁹

As previously discussed, the Federal Defenders in New York, concerned with their inability to contact their clients at MDC, revived their 2019 lawsuit suing the Federal Bureau of Prisons in *Federal Defenders of New York*.¹³⁰ While the United States Court of Appeals for the Second Circuit urged for the "adoption of procedures [regarding access to counsel] for dealing with ongoing and future emergencies, including the COVID-19 outbreak," the Federal Defenders noted that "since that decision, most requests for legal calls have simply gone unanswered," and that access to counsel "only deteriorated."¹³¹

In an April 7, 2020 letter to U.S. District Court Judge Brodie, Attorney Sean Hecker, the lawyer representing the Federal Defenders, detailed how legal call requests were not answered.¹³² In his letter, Hecker addressed the BOP's representation that the

123. See discussion *infra* Section III. A.2 (outlining how federal pretrial detainees were denied access to private legal phone and video calls).

124. Office of the Inspector General, *supra* note 111, at 11.

125. *Id.*

126. *Id.*

127. *Id.* at 21-27.

128. *Id.* at 27.

129. *Id.*

130. *Fed. Defs. of N.Y.*, 954 F.3d at 122.

131. Letter Re: *Fed. Defs. of N.Y., v. Fed. Bureau of Prisons*, No. 19 Civ. 660 (E.D.N.Y.) at 1, (Apr. 7, 2020) (Civ. No. 19-cv-660).

132. *Id.*

MDC could only accommodate thirty-six legal, Probation, or Pretrial Services calls in a day and that the MCC could only accommodate forty legal, Probation, or Pretrial Services calls in a day.¹³³ Allowing thirty-six phone calls at the MDC would allow only two percent of the population at the facility access to counsel per day.¹³⁴ This letter, and the representations made by the BOP, came after Judge Brodie demanded that the BOP explain why the MDC could not manage to allow more than fifteen to twenty calls a day.¹³⁵

Before Hecker's April 7th letter, Judge Brodie stated that she would issue a court order requiring the MDC to allow the legal calls if the BOP could not "do better," due to her concerns regarding the insufficient number of calls and the fact that, at that time, phone calls were the "only access" inmates had to their attorneys.¹³⁶ Judge Brodie's statement came after Hecker stated that in the last eight days of March, only eighteen of the approximately fifty-nine calls requested were accommodated.¹³⁷ Hecker further stated that the calls the Federal Defenders requested often never happened, and if they did, would take three or four days to schedule.¹³⁸

In July 2020, Judge Brodie was still not satisfied with the BOP's handling of detainees' access to legal phone calls with their attorneys.¹³⁹ Although the parties had tried to make progress in ensuring access to legal phone calls, Judge Brodie was still concerned regarding the "backlog of dozens of inmates who [had]

133. *Id.* at 2.

134. *Id.* at 2-3. ("That would still mean that the MDC is allowing only 1-2 calls per unit, and that only 2 percent of the MDC inmate population would have access to counsel on any given day.")

135. *See* Runyeon, *supra* note 39 ("U.S. District Judge Margo K. Brodie demanded an explanation for why the Metropolitan Detention Center in Brooklyn cannot handle more than 15 to 20 phone calls a day for its 1,700 inmates..."); *see also* Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, *supra* note 131, at 2 (noting that the Defendants (the BOP) represented that they could only accommodate thirty-six legal or Probation or Pretrial services call at the MDC and forty of those calls at MCC per day).

136. Runyeon, *supra* note 39.

137. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, *supra* note 84 at 2 ("In fact, in the final eight days of March alone, the Federal Defenders requested calls with approximately 59 clients; they have been able to speak with only 18 of them.")

138. *See id.* at 5. ("Approximately half the time, attorneys are unable to arrange a single call with a client, despite multiple requests, and when calls do get scheduled, it's typically after 3-4 days, and, in the vast majority of cases, not at a time certain such that the Federal Defenders can arrange for interpreters, experts, or other needed call participants.")

139. *See* Stewart Bishop, *Judge Derides Backlog of Legal Calls at NYC Jails*, LAW 360 (July 10, 2020, 10:17 PM), www.law360.com/articles/1291014 [perma.cc/2Y75-NBDA] ("The New York federal judge overseeing the dispute between the Federal Defenders of New York and the Federal Bureau of Prisons over attorneys' access to clients in detention on Friday criticized the backlog of inmate requests for calls with their lawyers, calling the government's effort insufficient.")

waited [forty-eight] hours or more at the MDC after requesting to speak with their attorneys.”¹⁴⁰ Further, Judge Brodie was dissatisfied with the United States Attorney’s Office, which represented the BOP, and their argument that the backlog existed because of the “outrageous” number of calls that were being requested.¹⁴¹ Judge Brodie rejected this argument stating that the increased demand for legal phone calls should have been anticipated as courts began to re-open, and that the U.S. Attorney’s Office’s representations that they were dealing with the backlog was insufficient.¹⁴² “As of July 28, 2020, the MDC [had] eliminated, *i.e.*, reduced to zero, the number of legal telephone call requests that had been pending more than [forty-eight] hours” in compliance with the Court’s July 10, 2020 order.¹⁴³

Similarly, in *United States v. Stephens*, the United States District Court for the Southern District of New York concluded that reconsideration of the Defendant’s bail conditions were warranted due to the new circumstances presented by COVID-19’s emergence.¹⁴⁴ Like many of the detainees the Federal Defenders represent, the defendant was awaiting trial in the custody of the BOP at the MCC.¹⁴⁵ The District Court noted the BOP’s suspension of legal visits and defense counsel’s representations that he had contacted the MCC Legal Department to arrange legal calls with his client, but that the MCC would not allow legal calls to the defendant.¹⁴⁶ The District Court also took into consideration the defense counsel’s statement that other defense attorneys had similar issues with trying to communicate with their respective clients at the facility.¹⁴⁷

Likewise, video calls with attorneys were being denied.¹⁴⁸ In his April 7, 2020 letter to District Court Judge Brodie in *Federal Defenders of New York*, Sean Hecker contested that although the Court had previously instructed the MDC to fill the available video conference slots, it only filled one of the four slots.¹⁴⁹ Hecker further

140. *Id.*

141. *Id.*

142. *Id.*

143. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 1, (Aug. 5, 2020) (Civ. No. 19-cv-660).

144. *Stephens*, 447 F. Supp. 3d at 64.

145. *Id.* at 64-67.

146. *See id.* at 67 (“After contacting the MCC Legal Department to arrange legal calls with the Defendant, ‘the MCC did not permit a legal call to Mr. Stephens.’”).

147. *Id.*

148. *See Runyeon*, *supra* note 39 (representing that the Federal Defenders stated that “video calls have been even less successful” than phone calls).

149. *See* Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons *supra*, note 131, at 3 (“The Court instructed the MDC to fill each of the videoconference slots available this week, consistent with its prior representations . . . yet Defendants failed to fill three of the four videoconference slots that were available today.”).

stated that the one video conference that was scheduled was “stopped abruptly due to an apparent technical issue at the MDC” and that the attorney on the call was not able to reconnect.¹⁵⁰

Further, in a letter to the United States District Court for the Southern District of New York, a defense attorney wrote that the defense community was “attempting to arrange videoconferencing with the MCC going forward, but that [was] more aspirational than functional.”¹⁵¹ This “aspiration,” rather than reality, was reflected in the Office of the Inspector General's Remote Inspection of Metropolitan Correctional Center Brooklyn Pandemic Response Report.¹⁵² In response to the survey question to BOP employees, “[p]lease identify which, if any, of the following strategies your institution is currently employing to facilitate inmates’ ability to communicate with legal counsel,” only nine percent of respondents indicated “[i]nmates have access to their counsel when requested, through institution video conferencing.”¹⁵³

Furthermore, when phone calls between the detainees and their attorneys are being facilitated, the legal phone calls are not private.¹⁵⁴ In his April 7, 2020 letter to Judge Brodie, Attorney Hecker wrote that lawyers have reported hearing staff and other inmates in the background during legal calls with their clients.¹⁵⁵ Later in April of 2020, the Federal Defenders stated that there were still issues with attorney client access and that some inmates had to take their legal calls while in the presence of other inmates.¹⁵⁶ Specifically addressing a female unit at the MDC, the Federal Defenders stated that guards were retaliating against inmates after speaking about the facility’s conditions and issues with social distancing while on legal calls.¹⁵⁷

Additionally, some inmates were not getting the “necessary

150. *Id.*

151. *Peralta*, 2020 U.S. Dist. LEXIS 85578, at *18.

152. Office of the Inspector General, *supra* note 111, at 21-27.

153. *Id.* at 27.

154. *See* Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, *supra* note 131, at 1 (“Even when an attorney is given the opportunity to speak with his or her client, it often takes multiple days and multiple pleas for a short, often non-private, call to be scheduled.”).

155. *See id.* (“The revised order also makes clear that legal calls must be confidential—a change necessitated by Defendants’ suggestion, unfortunately not supported by the lawyers who repeatedly report hearing staff and other inmates speaking to their client during legal calls, that inmates have been allowed to take legal calls without facility staff within earshot.”).

156. Stewart Bishop, *NY Inmates Still Getting Burned on Atty Access, Judge Told*, LAW 360 (Apr. 24, 2020, 6:34 PM), www.law360.com/articles/1267224 [perma.cc/PYY9-W9A7].

157. *See id.* (“Inmates have been retaliated against by guards for speaking about jail conditions and social distancing problems with their attorneys on legal calls, von Dornum [of the Federal Defenders] said, including by forcing inmates to stay in their bunks for four days a week.”).

zone of privacy” they needed to have during their legal phone calls.¹⁵⁸ In a subsequent conference call between Judge Brodie and the parties, the Federal Defenders continued to represent that inmates were not being granted the privacy necessary for conversations with their attorneys.¹⁵⁹ The Federal Defenders cited to an instance in which the guards were close enough to the inmate on a legal call that the guards could be heard shouting out parts of the inmate’s conversation with his attorney.¹⁶⁰ Judge Brodie stated that it was problematic that guards were “brazen enough to be listening [in on inmates’ legal calls] and then to indicate” that they were indeed listening.¹⁶¹

3. Lack of Access to Private Legal Correspondence

Similar to the denial of legal phone calls, federal pretrial inmates were also being denied private legal correspondence with their attorneys.¹⁶² On a July 2020 conference call with Judge Brodie, in the *Federal Defenders of New York*, the Attorney-in-Charge of the Federal Defenders for the Eastern District of New York raised concerns regarding how the federal facilities’ were handling legal mail¹⁶³ The Attorney-in-Charge, Deirdre von Dornum, stated that two weeks prior to the call, a number of legal documents and discovery CDs were taken from the inmates at the MDC and destroyed during an “apparent search for weapons.”¹⁶⁴ While the government said that it would investigate the incident and “report back on how legal mail is treated,” Von Dornum expressed concern that the search “show[ed] a continued disregard for the importance of legal mail.”¹⁶⁵

On June 24, 2020, the Federal Defenders stated that their clients still represented that their legal mail was opened before they

158. *Id.*

159. See Stewart Bishop, *Judge Troubled By ‘Brazen’ Acts Affecting Inmate/Atty Access*, LAW 360 (May 1, 2020, 9:18 PM), www.law360.com/articles/1269587 [perma.cc/G4T8-7VZ5] (reporting that the Federal Defenders “raised concerns about inmates being denied the requisite privacy for an attorney/client conversation.”).

160. *See id.* (reporting that Von Dornum “cited one instance where guards were not out of earshot as an inmate was speaking to their attorney, and the guards would even shout out parts of the inmate’s privileged conversation.”).

161. *Id.* (“Judge Brodie thanked the parties for their work on ensuring attorney/client calls, but said ‘some of the issues just should really not be happening.’”). “Guards should know why they shouldn’t be listening to calls,” Judge Brodie said.” *Id.* “The fact that they’re brazen enough to be listening and then to indicate that they are, that’s problematic.” *Id.*

162. See discussion *infra* Section III.A.3. (discussing instances in which inmates are being denied their private legal correspondence).

163. Bishop, *supra* note 139.

164. *Id.*

165. *Id.*

had received it and that there were delays in receiving the legal mail.¹⁶⁶ Mediator Loretta Lynch stated in her mediation status report that the government was looking into the specific instances¹⁶⁷ and were gathering more information.¹⁶⁸ Further, in the Office of the Inspector General's Remote Inspection of MDC, the report noted that two inmates submitted complaints to the Office of the Inspector General alleging that MDC did not provide them with "access to legal materials, including legal mail."¹⁶⁹

4. *Implications of Denying Federal Pretrial Detainees' the Right to Counsel During COVID-19*

Due to the health risks COVID-19 posed to in-person legal visits between the pretrial detainees and their attorneys, alternative means of communication are crucial to ensure the right to counsel is being upheld.¹⁷⁰ Those alternative means, such as phone or video calls and legal mail, however, were denied.¹⁷¹ Without access to any of these modes of communication, the detainees could not "seek and receive the assistance of [their] attorneys."¹⁷² This inability to prepare a client's defense hinders the Sixth Amendment right to counsel's protection of the value of trial fairness. Additionally, in the instances when legal phone or video calls were provided during COVID-19, the calls were not private since other inmates or correctional staff could listen.¹⁷³ This inability to have private legal communication with their attorneys ultimately frustrates the value of privacy that the Sixth Amendment right to counsel implicitly protects.¹⁷⁴ Lastly, denial of all modes of legal communication¹⁷⁵ impeded lawyers' ability to

166. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 2, (June 24, 2020) (Civ. No. 19-cv-660).

167. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 2, (June 11, 2020) (Civ. No. 19-cv-660).

168. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, No. 19 Civ. 660 (E.D.N.Y.) at 2, (Aug. 6, 2020) (Civ. No. 19-cv-660).

169. Office of the Inspector General, *supra* note 111 at 11.

170. *See supra* notes 114-20 and accompanying text (explaining how in-person legal visits posed health risks to both the attorney and client); *see also supra* Section III.A.1 (explaining the risk in-person visits posed health risks to both the attorney and the client)

171. *See supra* Sections III.A.2-3 (outlining how pretrial detainees were being denied access to private legal phone and video calls and denied access to private legal mail).

172. *Benjamin*, 264 F.3d at 184.

173. *See supra* Section III.A.2 (outlining instances in which legal phone calls were not private).

174. Gardner, *supra* note 26, at 458; *Johnson-El*, 878 F.2d at 1052.

175. *See* discussion *supra* Sections III.A.1-3 (explaining that pretrial detainees could not meet attorneys in person, had no access to private phone and video calls, and had no access to private legal mail).

make necessary COVID-19 related motions such as “bail, temporary release, transfer, compassionate release, or other [necessary] relief.”¹⁷⁶

B. COVID-19 Related Restrictions Violate Pretrial Detainees' Sixth Amendment Right to Counsel

Like most aspects of American life, the pandemic disrupted the United States court system.¹⁷⁷ The effects of COVID-19 were “bound to clash with the Sixth Amendment right to counsel” as “COVID-19-related lockdowns” occurred in most detention facilities.¹⁷⁸ According to the United States Supreme Court’s decision in *Morris v. Slappy*, “[n]ot every restriction on counsel’s time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant’s Sixth Amendment right to counsel.”¹⁷⁹ This decision allows the courts’ discretion in assessing Sixth Amendment deprivation claims.¹⁸⁰

Courts such as the United States Court of Appeals for the Sixth Circuit, the United States District Court for the Eastern District of Pennsylvania, and the United States District Court for the Southern District of New York “have endorsed the proposition that limited contact with counsel due to COVID-19 concerns is not sufficient to violate the right to counsel, particularly where there are still opportunities for significant trial preparation.”¹⁸¹ Courts endorsing this proposition have taken note of “a defendant’s attorney’s personal choice to refrain from visits in light of COVID-19” and that given the COVID-19 situation, if defendants were released, there would still be issues with attorneys and defendants meeting in-person.¹⁸² Courts have acknowledged, however, that Sixth Amendment violations have occurred during COVID-19.¹⁸³

176. See Matz, *supra* note 118. (“It is through defense counsel that these men and women can seek bail, temporary release, transfer, compassionate release, or other relief.”).

177. Eric Christofferson, et al., *The Pandemic's Toll on Criminal Defendant Rights: Part 1*, LAW 360 (Dec. 1, 2020 5:21 PM), www.law360.com/articles/1332463/the-pandemic-s-toll-on-criminal-defendant-rights-part-1 [perma.cc/RD2V-BUP4] (“But while the wheels of justice infamously turn slowly in the best of times, the pandemic kicked a whole bunch of sand into the gears of courtrooms across the country.”).

178. *Id.*

179. *Morris*, 461 U.S. at 11.

180. Christofferson, *supra* note 177.

181. *Id.*

182. *Id.*

183. *Id.*; see also *Stephens*, 447 F. Supp. 3d at 64-67 (holding that the obstacles that the COVID-19 pandemic created to the defendant’s ability to prepare his defense constituted a compelling reason that necessitated the defendant’s release); *United States v. Perez*, 2020 U.S. Dist. LEXIS 51867, at *1-2 (S.D.N.Y. Mar. 19, 2020) (granting defendant’s release because of COVID-

While “[n]ot every restriction on counsel’s time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant’s Sixth Amendment right to counsel,”¹⁸⁴ denying and severely restricting all modes of communication between attorney and client is violative of the Sixth Amendment.¹⁸⁵ The Supreme Court’s decision in *Morris* held that a defendant could not delay trial until a specific public defender was available.¹⁸⁶ COVID-19, however, presents a different situation in regard to the right to counsel. Federal pretrial detainees were being denied the trial fairness and privacy that is reflected in the Sixth Amendment right to counsel because they could not see their attorneys in person, had difficulty speaking with them on the phone or video calls and were not receiving their legal mail.¹⁸⁷ With no way to consistently communicate with their attorneys, there were no “opportunities for significant trial preparation.”¹⁸⁸ Denying the right to counsel when some detainees needed it most because of the risk COVID-19 presented was unjust and violated one of the fundamental rights of our nation’s Constitution.¹⁸⁹

IV. PROPOSAL

Although the COVID-19 pandemic created unprecedented circumstances in the United States,¹⁹⁰ federal pretrial detainees’ constitutionally guaranteed rights must be maintained.¹⁹¹ Denying

19 and the defendant’s health conditions); *United States v. Peralta*, 2020 U.S. Dist. LEXIS 86979, at *11-12 (S.D.N.Y. May 18, 2020) (holding that although the defendant could not be released the court still acknowledged right to counsel had been impeded).

184. *Morris*, 461 U.S. at 11.

185. *See supra* Part III (outlining how federal pretrial detainees were being denied their Sixth Amendment right to counsel).

186. *Morris*, 461 U.S. at 12-14.

187. *See supra* Sections III.A-B (outlining how without access to their attorney, federal pretrial detainees were denied the ideals reflected in the Sixth Amendment right to counsel).

188. Christofferson, *supra* note 177; *see supra* Part III (outlining how federal pretrial detainees were being denied their Sixth Amendment right to counsel).

189. Young, *supra* note 43; *see discussion supra* Sections III.A-B (explaining that pretrial detainees could not meet attorneys in person, had no access to private phone and video calls, and had no access to private legal mail and were therefore denied their right to counsel).

190. *See Nicole Brown, Coronavirus “unknowns” put U.S. in unprecedented situation, top infectious disease expert says*, CBS NEWS (Mar. 13, 2020, 10:10 AM), www.cbsnews.com/news/coronavirus-us-testing-closures-unprecedented-anthony-fauci-nih/ [perma.cc/U94E-3V8Q] (reporting that Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health, has noted the “disruption to everyday life” that has not happened before, as well as the “unknowns” associated with the COVID-19 pandemic).

191. *See discussion supra* Sections III.A.1-3 (explaining that pretrial

those detained the ability to speak with their attorney amounts to a violation of the Sixth Amendment of the Constitution.¹⁹² With the safety concerns COVID-19 created for in-person legal visits,¹⁹³ safe alternative means of communication between the pretrial detainees and their attorneys must be made available in order to ensure that the detainees receive their constitutionally guaranteed right to counsel. Part A will discuss the release of pretrial detainees that fit certain criteria from the federal institutions. Part B will discuss adequate measures that need to be implemented at the federal facilities. Federal institutions can learn from the COVID-19 situation in order to be prepared in the event of future emergencies that may prevent in-person legal visits once again. Adoption of adequate safeguards, in combination with the release of certain pretrial detainees, can ensure that those in federal pretrial confinement will be able to communicate with their attorneys as guaranteed by the Sixth Amendment of the Constitution.¹⁹⁴

A. Release of Certain Federal Pretrial Detainees

In order to guarantee pretrial detainees housed in federal correctional and detention facilities their constitutionally afforded right to counsel, these institutions should have released pretrial detainees that met specific criteria, such as being detained awaiting trial for non-violent and less serious offenses. These releases would have ensured that those who were released had access to legal counsel, but also ensured that those who could not be released still received their constitutional right to counsel amid the COVID-19 pandemic.

In *Federal Defenders of New York*, the government's counsel suggested that the federal correctional intuitions were having difficulty with accommodating legal phone and video calls because "staffing was down [ten percent] since COVID-19 hit [New York City]."¹⁹⁵ In response, attorneys for the Federal Defenders of New York stated that it was unacceptable that the Federal Bureau of Prisons could not "safeguard the constitutional rights of its

detainees could not meet attorneys in person, had no access to private phone and video calls, and had no access to private legal mail).

192. See discussion *supra* Part III (addressing how federal pretrial detainees were denied any mode of communication with their attorneys and how this violated the Sixth Amendment right to counsel).

193. See discussion *supra* Section III.A.1 (discussing the health risks posed by in-person visits during COVID-19).

194. See *Levy*, 577 F.2d at 209 ("Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.").

195. Frank Runyeon, *NYC Prisons Rebuked for Blocking Sick Inmates' Phone Calls*, LAW 360 (Apr. 10, 2020, 4:54 PM), www.law360.com/articles/1262671 [perma.cc/55UP-LA2R].

detainees” and that the BOP needed to be honest about being able to accommodate those in their care given the BOP’s claimed circumstances.¹⁹⁶ Noting that the “Sixth Amendment guarantees of a right to counsel is the bedrock of the American justice system,” David Patton, the executive director of the Federal Defenders of New York, stated that “you can either jail people constitutionally, or you [cannot] jail them.”¹⁹⁷ Patton further elaborated that “you [cannot] just jail [people] and say, ‘We’ll get back to you on the whole right-to-a-lawyer thing.’”¹⁹⁸ Sean Hecker, an attorney representing the Federal Defenders in their suit against the BOP, emphasized that “if the BOP cannot ensure meaningful attorney access for people in [their] custody, [then] they need to release enough people in their custody to ensure that those who are there have their Sixth Amendment rights respected.”¹⁹⁹

In order to ensure that those who remain in the Federal Bureau of Prisons’ custody received their constitutionally guaranteed right to counsel, the BOP should have released “those who [were] in pre-trial detention for non-violent and lesser offenses.”²⁰⁰ Those held in pretrial detention have not been convicted of a crime and are presumed innocent.²⁰¹ Jails across the United States released pretrial detainees²⁰² in order to reduce overcrowding in the facilities.²⁰³ For example, California issued a “statewide emergency bail schedule that reduced bail to [zero dollars] for most misdemeanor and low-level felony offenses,” which resulted in a decrease of the California jail populations.²⁰⁴ In Massachusetts, the Supreme Judicial Court issued an order that “authorized the release of people held in jails pretrial for “nonviolent offenses and those held on technical probation and parole violations.”²⁰⁵ The states and individual counties that released pretrial detainees released those who were charged with

196. *Id.*

197. Pinto, *supra* note 40.

198. *Id.*

199. *Id.*

200. *Human Rights Dimensions of COVID-19 Response*, *supra* note 92.

201. *See Taylor*, 436 U.S. at 479 (holding that the presumption of innocence in favor of the accused was the law).

202. While this comment is focused on federal pretrial detainees, and this section is focused on releasing those individuals in order to ensure that both those released and those still confined are guaranteed their right to counsel, many states and counties are releasing both pretrial detainees and inmates already serving their sentence in order to protect their health as correctional institutions are at higher risk for infectious diseases like COVID-19. *See The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 91 (listing all of the jurisdictions that are releasing individuals from their jails and prisons).

203. PRISON POLICY INITIATIVE, *supra* note 91.

204. *Id.*

205. *Id.*

non-violent offenses and low-level misdemeanors in order to maintain public safety²⁰⁶ while also protecting those detained.²⁰⁷

While former Attorney General, William Barr, issued a memorandum to the Director of the BOP regarding the “Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic” on March 26, 2020, the memorandum focused on inmates already serving sentences at BOP facilities.²⁰⁸ The memorandum directed the BOP to transfer inmates to home confinement on an individual case by case basis after assessing a list of factors.²⁰⁹ Although the memorandum was a positive directive to protect federal inmates from COVID-19, it only focused on inmates already serving their sentences rather than pretrial detainees.²¹⁰

Additionally, individually assessing which inmates could be sent home would be time consuming and would not be as effective in decreasing the facilities’ population. Individually assessing which individuals can be released was not as effective at decreasing the facilities’ population, which was necessary to ensure that those who remained detained received their constitutionally guaranteed

206. Releasing pretrial detainees can raise arguments regarding the risk it may pose to public safety, as well as the effects it may have on victims. See John Eligon, *It’s a Slap in the Face: Victims are Angered as Jails Free Inmates*, N. Y. TIMES (Apr. 24, 2020), www.nytimes.com/2020/04/24/us/coronavirus-jail-inmates-released.html [perma.cc/E425-QJGN] (reporting that as more individuals are being released from jails during COVID-19, “[t]he debate over who should be let out has become fierce in some places”). Proponents of releasing inmates note that releasing people will carry risks, but inmates need to be protected from COVID-19 and have constitutional rights that need to be maintained. *Id.* Further, federal pretrial detainees have not yet been convicted of a crime and are afforded a presumption of innocence. See *Taylor*, 436 U.S. at 479 (holding that the presumption of innocence in favor of the accused was the law).

207. PRISON POLICY INITIATIVE, *supra* note 91.

208. Memorandum re: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic from Attorney General William Barr (Mar. 26, 2020), www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf [perma.cc/SM6X-CC8W].

209. *Id.* (listing discretionary factors such as the age and vulnerability of the inmate to COVID-19, the security level of the facility where the inmate is being held, the inmate’s conduct in prison, the inmate’s score under PATTERN, whether the inmate has a verifiable re-entry plan, and the inmate’s crime of conviction and assessment of the danger the inmate poses to the community).

210. See *id.* (“There are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities”); see also *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUSTICE (Feb. 26, 2021), www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [perma.cc/M66S-MAU5] (focusing on the Brennan Center’s recommendation to reduce jail and prison populations during COVID-19 by releasing elderly and sick people and those incarcerated for parole violations).

right to counsel. According to the BOP, since William Barr's memorandum on March 26, 2020, 17,642 inmates had been placed in home confinement as of November 21, 2020, which was approximately eleven percent of the BOP's approximately 160,000 inmate population.²¹¹ In comparison, the Massachusetts Supreme Judicial Court's order, which allowed for the release of pretrial detainees confined for "nonviolent offenses" and for "probation and parole violations," helped some county jails to reduce their populations by twenty percent.²¹² If BOP facilities could not increase legal calls because staffing was down due to COVID-19, then releasing certain pretrial detainees could have helped by decreasing the amount of legal calls that needed to be made within the facilities and could have safeguarded the constitutional rights of those released as well as those still detained.²¹³

Although the March 2020 memorandum directing the BOP to transfer inmates to home confinement on an individual basis was a positive step, its primary focus on inmates already serving their sentence and the slower nature of individual assessments made it a less effective option to decrease the facilities' populations than the broader release schemes utilized by other jurisdictions.²¹⁴ Releasing those detained awaiting trial for non-violent or lesser offenses, as done in states like California and Massachusetts, rather than on an individualized basis, would have been more effective.²¹⁵ A greater decrease in the pretrial detention population in the federal correctional and detention facilities was necessary in order to ensure that the Sixth Amendment right to counsel the federal

211. *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, FED. BUREAU OF PRISONS, www.bop.gov/coronavirus/faq.jsp [perma.cc/DWW6-K3XX] (last visited Aug. 28, 2021); accord Moyer, *supra* note 93 ("To fight the virus's spread, Attorney General William P. Barr in late March directed federal prisons to send vulnerable, low-risk inmates to home confinement or release them outright."). "According to the Bureau of Prisons website, about 7,000 inmates, or about 4 percent of its 160,000-inmate population, have been sent home since." *Id.*

212. PRISON POLICY INITIATIVE, *supra* note 91.

213. See Runyeon, *supra* note 195 (reporting that in the *Federal Defenders of New York*, the government counsel "noted that part of the problem with increasing the number of phone calls was that staffing was down [ten percent] since COVID-19."). Counsel for the Federal Defenders responded that it "is not acceptable [that] the BOP cannot safeguard the constitutional rights of its detainees, [and that] something else has to shift to account for [the decrease in staffing and the resulting decrease in legal calls]." *Id.*

214. See Moyer *supra* note 93 ("To fight the virus's spread, Attorney General William P. Barr in late March directed federal prisons to send vulnerable, low-risk inmates to home confinement or release them outright."). "According to the Bureau of Prisons website, about 7,000 inmates, or about [four] percent of its 160,000-inmate population, have been sent home since." *Id.*

215. See *supra* notes 202-07, 212 and accompanying text (outlining jurisdictions who have released certain pretrial detainees in light of COVID-19).

government had difficulty providing during COVID-19²¹⁶ could be maintained by those housed in federal facilities. Learning from the situation COVID-19 presented in federal facilities, the federal government should adopt release plans utilized in other jurisdictions to be prepared in the event of future emergencies in which legal visits and calls may be restricted.

B. Adoption of Adequate Measures to Ensure Access to Legal Counsel for Federal Pretrial Detainees

In addition to releasing certain pretrial detainees, federal correctional and detention facilities needed to adopt measures to ensure that legal phone and video calls occurred and that legal mail was delivered. To make certain that federal pretrial detainees received their Sixth Amendment right to counsel during COVID-19, the federal government should have required all of the federal correctional and detention facilities to adopt specific policies regarding legal communication. Adopting adequate measures to safeguard detainee-attorney communication would help to ensure the pretrial detainees who could not be released had access to legal counsel by delineating exactly what the federal government excepts from its various federal correctional and detention facilities.

Those measures should include requiring the facilities to facilitate legal phone calls within forty-eight hours of a request by an attorney and schedule such call for a one-hour timeframe communicated to the requesting attorney,²¹⁷ ensuring that the equipment used for remote visits are in working condition,²¹⁸ and specifying that legal calls should not be monitored and should occur where the call cannot be overheard.²¹⁹ Measures should also include creating and implementing procedures in writing for scheduling legal calls,²²⁰ creating and implementing procedures to allow the exchange of confidential documents by electronic means,²²¹ and

216. See *supra* notes 195-99 and accompanying text (addressing how staffing issues in the BOP created difficulties in providing the right to counsel); see also Part III (discussing how pretrial detainees were denied any mode of communication with their attorneys).

217. See *infra* note 233 and accompanying text (discussing the New York Federal Defenders proposed order request regarding scheduling of confidential legal consultation).

218. See *infra* note 235 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding technology being in proper working condition).

219. See *infra* note 236 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding the privacy of legal calls).

220. See *infra* note 237 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding implementing procedures for legal calls).

221. See *infra* note 238 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding implementing procedures to ensure confidential legal access).

training staff to make certain they ensure legal access.²²² Lastly, the measures should include compliance with the Center for Disease Control Interim Guidance regarding cleaning the devices and spaces used for remote visits.²²³

The relief the United States District Court for the District of Columbia granted in *Southern Poverty Law Center* and the order proposed by the Federal Defenders in *Federal Defenders of New York* should advise the federal government on what measures to adopt in the event of another pandemic lockdown or other emergency situation. In *Southern Poverty Law Center*, the Southern Poverty Law Center, an organization that provides representation for detained immigrants confined in Immigration and Customs Enforcement (“ICE”) detention facilities, sued the U.S. Department of Homeland Security and ICE regarding the detained immigrants’ access to legal counsel in the ICE facilities.²²⁴ After assessing the plaintiff’s claims regarding the denial of access to legal counsel, the United States District Court for the District of Columbia granted relief to the Southern Poverty Law Center.²²⁵

Stating that “in light of the COVID-19 pandemic, which has resulted in in-person legal visits becoming unsafe and not an acceptable alternative,” the United States District Court outlined seven measures that the defendant must comply with in order to ensure those detained received access to legal counsel.²²⁶ Although the Southern Poverty Law Center represents immigrants detained in ICE facilities, rather than federal pretrial detainees confined in the BOP-run facilities, the specific relief granted can advise the BOP on how to proceed with their facilities as both immigrants and the federal pretrial detainees are granted access to legal counsel.²²⁷

The United States District Court outlined seven things the ICE detention facilities must do in order to maintain access to counsel during COVID-19.²²⁸ The first thing the District Court ordered the facilities to do was to comply with the ICE Performance-Based National Detention Standards (“PBNDs”) requirements for Telephone Access.²²⁹ This requirement, which included ensuring

222. See *infra* note 239 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding training staff on the various procedures implemented).

223. See *infra* note 240 and accompanying text (discussing the relief granted in *S. Poverty Law Ctr.* regarding compliance with CDC guidelines on cleaning).

224. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *3.

225. *Id.* at *117.

226. *Id.* at *117-21.

227. See *supra* notes 85-90 and accompanying text (explaining how *S. Poverty Law Ctr.* concerns ICE detained immigrants, the relief granted can still inform federal correctional and detention facilities on how they should ensure the right to counsel for those housed in their facilities); *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *48-58.

228. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *117-21.

229. *Id.* at *117.

that there was at least one telephone for every ten detained individuals,²³⁰ is specific to the ICE detention facilities since the PBNDS is “[tailored to] the conditions of immigration detention [and] its unique purpose.”²³¹ The ICE PBNDS outlined requirement, however, can be substituted for what the Federal Defenders of New York outlined in their proposed order in the *Federal Defenders of New York*. In an April 7, 2020 letter to District Court Judge Margo Brodie, the Federal Defenders attached as an exhibit their proposed order.²³² In the proposed order, the Federal Defenders requested that the BOP “arrange for confidential legal consultation by phone to take place within 48 hours of receipt of an attorney request for a legal call, and shall schedule such a call for a specified one-hour window, communicated to the requesting attorney in advance.”²³³ Like the first requirement regarding the ICE PBNDS Telephone Access in *Southern Poverty Law Center*, what the Federal Defenders of New York outlined in their proposed order would help to ensure that legal phone calls occur in the same way the ICE PBNDS requirement was supposed to achieve.

While the first requirement to comply with the ICE PBNDS requirements for Telephone Access in *Southern Poverty Law Center* was specific to ICE detention facilities, the other relief granted can be implemented by federal facilities run by the BOP since it is not specified by the ICE PBNDS.²³⁴ Detailing the specific relief granted, the United States District Court for the District of Columbia stated that the facilities need to ensure that that the phones, video calling systems, and any other technology used to connect those detained to their attorneys need to be in proper working condition.²³⁵ Next, the District Court said that facilities need to ensure that attorney-client confidentiality can be maintained on all legal video and phone calls, specifying that legal calls should not be monitored and should not take place where they could be overheard by other individuals.²³⁶ The facilities must “devise and implement clear internal and external procedures, in writing, for scheduling and accessing telephone calls and [video calls]” so that all of the individuals involved have “clear information regarding these procedures.”²³⁷ Next, the Court stated that the facilities shall also

230. *Id.*

231. *Performance-Based National Detention Standards 2011*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, i, www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [perma.cc/8H DU-3XF8] (last visited Aug. 22, 2021).

232. Letter Re: Fed. Defs. of N.Y., v. Fed. Bureau of Prisons, *supra* note 131.

233. *Id.*

234. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *117-21; *Performance-Based National Detention Standards 2011*, *supra* note 231.

235. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *117-18.

236. *Id.* at *118.

237. *Id.* at *119.

“create and implement procedures, in writing, through which detained individuals and legal representatives may exchange confidential documents . . . via electronic means.”²³⁸ In order to maintain those procedures, the Court stated that the facilities should train their staff regarding those implemented procedures and to train staff on how to ensure confidential legal access.²³⁹ Lastly, the facilities must comply with the Center for Disease Control Interim Guidance, specifically regarding cleaning the devices and areas that are used for remote legal visits.²⁴⁰

The relief granted can inform the federal government on how to ensure that those in federal facilities receive the access to counsel they have been denied amidst the COVID-19 pandemic²⁴¹ since the specific relief in *Southern Poverty Law Center* was granted in response to the Southern Poverty Law Center’s representation that their clients were not receiving access to legal counsel.²⁴² The above-mentioned policies, however, need to be enforced to ensure that federal pretrial detainees receive their Sixth Amendment right to counsel. In *Southern Poverty Law Center*, the “Plaintiff’s preliminary injunction requests require[d] close supervision of each Facility by the Court.”²⁴³ With specific policies that outline what the federal correctional and detention facilities should do in regard to access to legal counsel in emergency situations such as the COVID-19 pandemic already in place, it will be less likely the right to counsel will be compromised during future emergency situations as it has been during COVID-19.²⁴⁴

V. CONCLUSION

The 2019 Novel Coronavirus halted American lives “in seemingly no time” in March of 2020.²⁴⁵ As the coronavirus quickly

238. *Id.* at *120.

239. *Id.* at *121.

240. *Id.* at *119-20.

241. *See supra* notes 85-90 and accompanying text (explaining how *S. Poverty Law Ctr.* concerns ICE detained immigrants, the relief granted can still inform federal correctional and detention facilities on how they should ensure the right to counsel for those housed in their facilities); *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *48-58.

242. *S. Poverty Law Ctr.*, 2020 U.S. Dist. LEXIS 106416, at *117-21.

243. *Id.* at *116 (citing *Brown v. Plata*, U.S. 493, 511 (2011), “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration”).

244. *See supra* Part III (detailing how the right to counsel has been denied to federal pretrial detainees during COVID-19).

245. Katie Zezima et al., *Coronavirus is Shutting Down American Life as States Try to Battle Outbreak*, WASH. POST (Mar. 13, 2020 7:57 PM), www.washingtonpost.com/national/coronavirus-outbreak-shutdown-america/2020/03/13/d8589434-6550-11ea-acca-80c22bbee96f_story.html [perma.cc/UA23-TRWA].

spread throughout the United States, schools closed, travel ceased, and people began working from home.²⁴⁶ As Americans adopted precautions to prevent the spread of COVID-19,²⁴⁷ the Center for Disease Control outlined what should also be done to prevent the spread of the virus in correctional and detention facilities.²⁴⁸ Despite the issuance of precautions, COVID-19 raged in jails and prisons throughout the U.S.²⁴⁹

While COVID-19 presented an unprecedented situation in correctional and detention facilities,²⁵⁰ those facilities must still abide by the Constitution and the rights it guarantees to those detained awaiting trial.²⁵¹ The Sixth Amendment right to counsel is a fundamental right in the United States.²⁵² Denying federal pretrial detainees any way to communicate with their attorneys violates the Sixth Amendment of the Constitution.²⁵³ Emergency situations, such as the COVID-19 pandemic require that those in charge of the confinement of pretrial detainees adhere to constitutional requirements such as the right to counsel.²⁵⁴

246. *See id.* (“Much of life in America, and across the globe, has ground to a near halt in recent days as the coronavirus spreads, closing schools, thwarting travel, forcing employees to telework and shuttering beloved institutions.”).

247. *See Coronavirus disease (COVID-19) Advice for the Public, supra* note 55 (“Protect yourself and others from COVID-19. If COVID-19 is spreading in your community, stay safe by taking some simple precautions, such as physical distancing, wearing a mask, keeping rooms well ventilated, avoiding crowds, cleaning your hands, and coughing into a bent elbow or tissue.”). “Check local advice where you live and work. Do it all!” *Id.*

248. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, supra* note 57 (listing guidelines specific to correctional and detention facilities).

249. *See* Cid Standifer & Frances Stead Sellers, *Prisons and jails have become a ‘public health threat’ during the pandemic, advocates say*, WASH. POST (Nov. 11, 2020 6:05 PM), www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html [perma.cc/7UKC-RTSA] (“Measures such as distributing masks or allowing access to hand sanitizer do little to stop the spread of the virus in facilities where people live so close together”); *see also A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (Nov. 20, 2020 7:43 PM), www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [perma.cc/8KWR-92RV] (collecting data on the COVID-19 cases and deaths in both state and federal prisons).

250. *See Federal Bureau of Prisons COVID-19 Action Plan: Agency-wide Modified Operations, supra* note 58 (outlining the “national measures [that were] being deployed by the BOP in order to mitigate the spread of COVID-19” in the federal correctional system).

251. *See* Matz, *supra* note 118 (“The government’s reaction to COVID-19 in jails and ICE detention facilities must follow settled legal precedent on acceptable conditions of confinement. The pandemic does not change that obligation.”).

252. *Gideon*, 372 U.S. at 343-44.

253. *See* discussion *supra* Part III (detailing how the right to counsel has been denied to federal pretrial detainees during COVID-19).

254. *See* Matz, *supra* note 118 (“The pandemic does not change that clear

Emergencies like COVID-19 may even require more diligence to uphold the Constitution as health concerns may increase the need for motions for release.²⁵⁵

As it is unknown exactly when the United States will return to pre-COVID-19 pandemic normalcy,²⁵⁶ COVID-19 can teach correctional and detention facilities that even in unprecedented times, the Constitution and the rights it affords pretrial detainees must be followed. If another lockdown occurs due to COVID-19 in the future or another situation arises in which in-person visits are not feasible,²⁵⁷ federal facilities will have clear procedures to follow to ensure that the right to counsel is guaranteed. As demonstrated by the Federal Defenders' initial lawsuit filed in 2019,²⁵⁸ which was revived after the outbreak of COVID-19, there were issues regarding denial of access to legal counsel due to emergencies in the federal facilities before COVID-19's emergence, and there is bound to be emergencies in the facilities after COVID-19 ends. Ensuring that pretrial detainees are guaranteed their fundamental Sixth Amendment right to counsel remains paramount throughout any emergency situation.

obligation [to follow settled legal precedent]. American officials must adhere to the Constitution, now more than ever, for the consequences of failure are dire.”).

255. *Id.* (“In these [COVID-19] circumstances, access to counsel is paramount . . . It is through defense counsel that these men and women [detainees] can seek bail, temporary release, transfer, compassionate release or other relief . . .”).

256. *See* Kelley, *supra* note 62 (“Anthony Fauci, the nation’s lead infectious diseases expert and head of the National Institute for Allergies and Infectious Diseases, maintains that the coronavirus crisis is likely to end in late 2021.”).

257. *See supra* notes 68-69 and accompanying text (discussing the possibility of another COVID-19 lockdown or a different pandemic's emergence).

258. *See supra* notes 74-82 and accompanying text (outlining the emergency situations that occurred in *Federal Defenders of New York* even before COVID-19 that led to the filing of that lawsuit in 2019).