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BRIEF

PROMISING PRACTICES FROM THE COURT SYSTEM'S COVID-19 RESPONSE

ENSURING ACCESS TO JUSTICE WHILE PROTECTING PUBLIC HEALTH

SINCE SPRING 2020, CORONAVIRUS DISEASE 2019 (COVID-19) has infected millions of Americans, resulting in hundreds of thousands of deaths and disrupting all facets of life. The criminal justice system has not escaped this disruption unscathed. As the central component in the criminal justice process—and a Constitutional check on the power of police—the court system is critical to ensure that the rights of both victims of crime and the accused are upheld. These rights, such as the right to a speedy and public trial enshrined in the Sixth Amendment to the U.S. Constitution, have met one of their most serious challenges in public health directives that call for limiting the closeness and number of people who interact. Courts have struggled to meet their obligations while protecting the health of staff and the public. But challenges introduced by the COVID-19 pandemic also have driven implementation of innovations and reforms that might have taken years or decades to undertake under normal conditions.

To better understand how the COVID-19 pandemic has affected the criminal justice system in terms of the challenges it created and how agencies adapted to those challenges, the Priority Criminal Justice Needs Initiative conducted a series of panel workshops with representatives of different sectors within the system.¹ One of the key goals of the discussions was to identify which adaptations presented promising practices that agencies should consider continuing beyond the COVID-19 pandemic.

One such panel workshop brought together judges, court administrators, prosecutors, defense counsel, and academics to discuss how the pandemic has affected the court system. Participants represented jurisdictions that are geographically dispersed and included representatives from individual courts, statewide court systems, and cross-cutting organizations with national-level perspective. In addition, a separate community workshop provided input on the broader effects of changes made by court systems and the justice system more generally.



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HIGHLIGHTS THE CHALLENGES

THIS BRIEF

the COVID-19 pandemic introduced, shows how courts adapted to those challenges, describes which adaptations may hold promise to even after the pandemic ebbs, and provides suggestions for evaluations to demonstrate the efficacy of such adaptations.

WHY WAS THE COVID-19 PANDEMIC SO CHALLENGING FOR COURT SYSTEMS?

The Number of People Involved

The sheer number of people who interact in the court system is enormous. Beyond the accused, who might be held in custody in jail settings before and during a trial or who might be released pre-trial, courts employ judges, administrative employees, security staff, and others, and cases have associated prosecutors, defense counsel, witnesses, forensic examiners, and citizens summoned to serve on grand and trial juries. Individuals affected by the crimes also have the right to observe and participate in the process, and in some cases, this right is legally or Constitutionally protected.

In addition, other activities bring people to the courthouse for access to justice, including seeking protection orders, solving civil disputes, and handling other administrative matters. Courts are also largely open to the public, and there is a Constitutional imperative for them to remain so, because the actions of the courts should be open to public scrutiny as a protection of individual rights and a check on government power.

In a major courthouse, where multiple cases and other court services occur simultaneously, the interaction of these individuals—who may come together from local, regional, or even national areas—makes the courthouse a high-risk location for disease transmission. This risk is compounded by the fact that many court facilities were constructed decades ago and might lack appropriate systems for proper ventilation. In addition, the design goal for court buildings has generally focused on fitting as many courtrooms in as possible—which presents considerable obstacles for managing an airborne virus. To counter the threat of widespread disease transmission and in keeping with local and state mandates for public buildings, many courts quickly closed to the public at the beginning of the pandemic and have had to develop adaptations to allow their work to continue.

Concerns About Time Sensitivity

Some specific court services face critical time sensitivity. These services include protecting vulnerable people, such as children, the elderly, and people with disabilities; conducting preliminary hearings, bail hearings, and arraignments for criminal defendants; issuing protection orders in domestic or family violence cases in which victims fear for their safety; and issuing warrants and providing other support to law enforcement. Courts that closed to the public at the beginning of the pandemic needed to respond quickly to create space for these essential services.

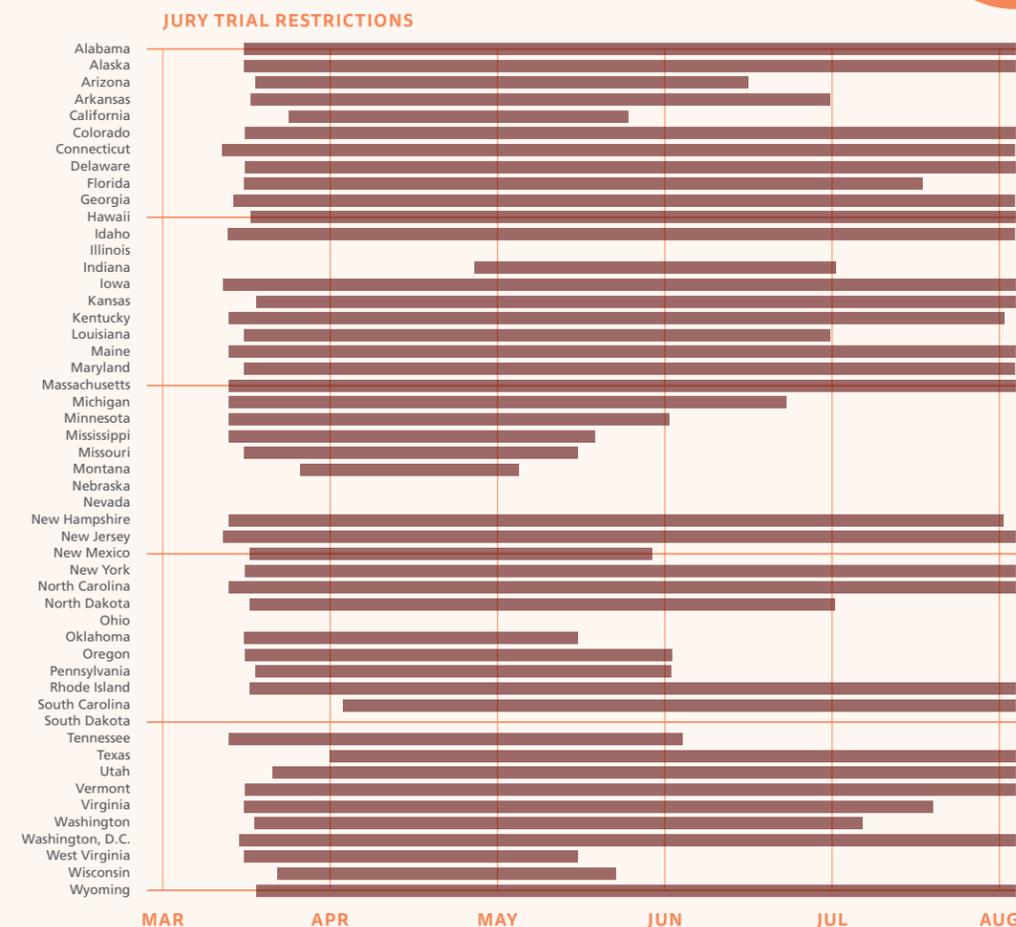
In normal circumstances, court activities and timelines—particularly when defendants are held in custody because they cannot pay bail—are shaped by the requirement to protect a defendant's right to a speedy trial. However, an early recommended practice for limiting the spread of the virus was the suspension of jury trials, which require large numbers of people to be brought together for extended periods of time. Limiting jury trials has required courts to suspend speedy trial requirements in many cases (see Figure 1).

There's a huge tension, obviously, between defendants who've been sitting in custody . . . who have not had a court appearance in six months now since the beginning of [the pandemic] . . . and no trial in sight.

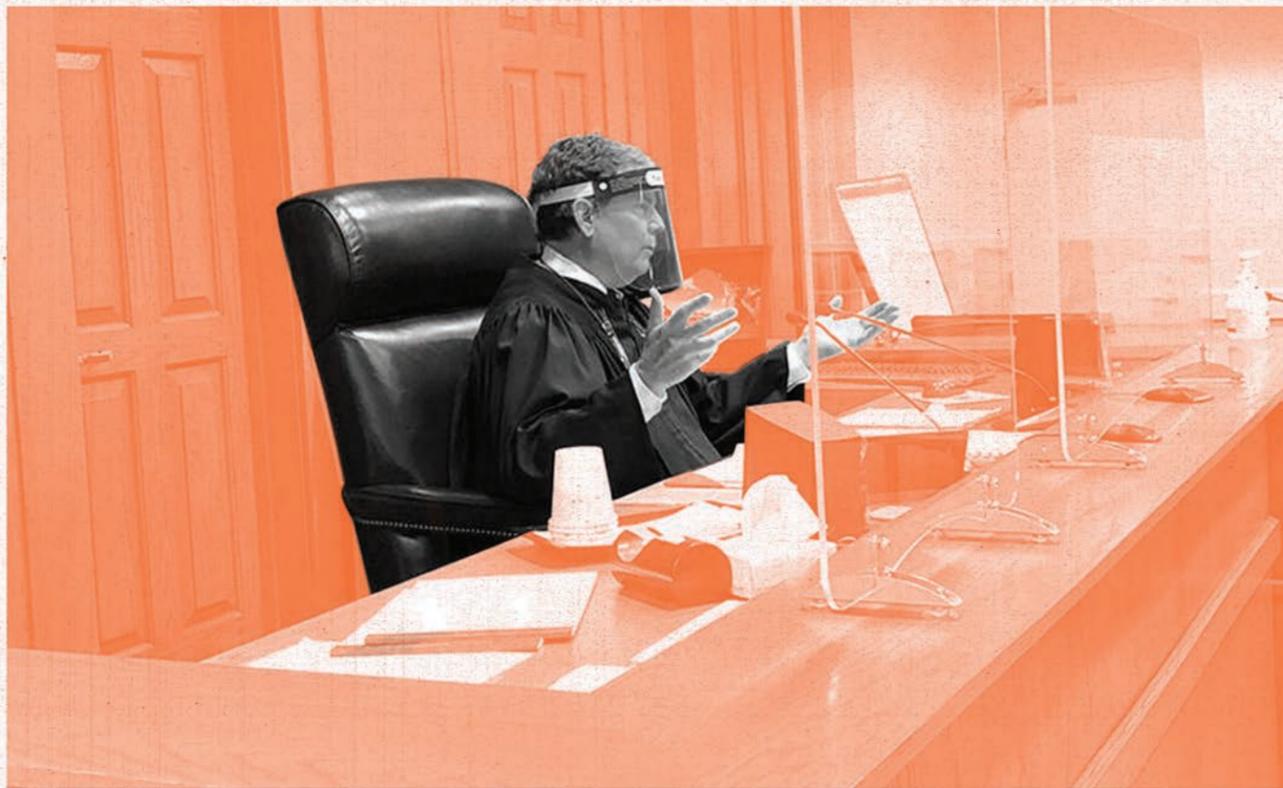
—Court system panelist

FIGURE 1.

Variation in State-Level Prohibition of In-Person Jury Trials, as of October 2020



SOURCE: Data are from National Center for State Courts, "Coronavirus and the Courts," webpage, undated a, <https://www.ncsc.org/newsroom/public-health-emergency>.



HOW DID COURT SYSTEMS ADAPT?

To address the challenges introduced by the pandemic and prevent the spread of the virus, court systems have taken a variety of steps, some of which represent major changes to how they have functioned historically. Pandemic adaptations have varied by jurisdiction because of differences in administrative structures, legal frameworks, and other factors that have constrained what actions could be taken in some parts of the country. Different types of courts also have had different constraints; for example, trial versus appellate courts, specialty courts focused on diversion processes, and other types of courts have faced different considerations regarding practical and effective adaptations. Across jurisdictions, some changes have had significant effects on the capacity of court processes. The following are some key adaptations implemented by court systems across the United States in response to the COVID-19 pandemic:

- Because of significant concern about virus transmission at courts, many court processes were initially stopped to reduce the risk of transmission.
- Because virtual hearings are viewed as inappropriate by many for serious felonies and other cases requiring a jury trial, some areas have resumed jury trials—for example, in alternative locations where physical distancing is possible or in alternative courtroom arrangements—although capacity is still limited.
- To restart operations, some courts made significant shifts to virtual models for many types of proceedings and services, providing benefits to both justice agencies and individuals who must appear.
- Virtual proceedings raised concerns about public access to courts and transparency. Some courts responded by streaming proceedings widely on the internet. However that approach raised different concerns about the effect on participants in proceedings. (See the “Concerns Around Virtual Court Models” box.)

Concern About Growing Backlogs

The suspension of jury trials in many areas has not only introduced concerns about defendants’ access to a speedy trial but also led to a large backlog of cases, compounding the backlog of other court proceedings that are simply taking time to churn through courts because of reduced capacity. These backlogs are growing in spite of other efforts to reduce the flow into the system, such as law enforcement postponing arrests and citations, prosecutors declining to file charges for low-level offenses, a reduction in the issuance of warrants or the suspension of existing warrants, increases in release without bail to reduce pretrial detention, and settlements of pending cases through plea bargaining. For cases that are still in the system under the suspension of speedy trial requirements, those requirements will be reimposed and the stakes for addressing the backlog will increase even further. Panelists described pending case numbers that amounted to multiple years’ worth of trial capacity, even under ideal circumstances, which will almost certainly not be the case for the foreseeable future.



We have an enormous backlog of felony cases. We normally carry about 2,500 at any time of pending unresolved cases. We now have 6,000 and another thousand cases that I could file tomorrow if they gave me a date for people to appear in court. So that’s a tremendous problem.

Court system panelist



Now that everything is remote, we can use retired judges. We can use judges that aren’t so busy [in different regions of the state,] who were all connected. And so they could pick up the slack in places that are [busy], that are really overwhelmed with a backlog. . . . [E]specially if it’s judges who are currently working and already getting paid, it doesn’t cost the local jurisdiction anything to put that visiting judge to work remotely.

—Court system panelist

- Limitations in bandwidth, connectivity, and available technology make it difficult for some individuals or organizations to participate in virtual court processes. To address concerns about these digital divides, systems had to develop such approaches as loaning technology or providing other ways to join virtual proceedings.
- In addition to their own adaptations, courts supported adaptations seeking to reduce populations in other parts of the criminal justice system, including by reducing pretrial detention, limiting issuance of warrants, and facilitating release of individuals from custody where appropriate.
- Because of pressure on the funding streams on which some courts depend to operate, including filing fees or specific tax revenues, these systems face resource constraints and have had to reduce staff. These constraints could make resolving court backlogs even more challenging.

We’re almost all sales tax-funded. All of a sudden we went from an even budget to [a] \$150 million hole . . . [and] my office was looking at a \$9 million cut in the next biennium.

—Court system panelist



CONCERNS AROUND VIRTUAL COURT MODELS

A significant number of pandemic-related adaptations implemented by court systems across the country involved shifts to virtual processes. In addition to practical challenges presented by virtual court models—for example, digital divides in accessibility and know-how—panelists highlighted a variety of concerns about the appropriateness of such processes. These concerns are relevant for courts that are currently implementing virtual processes and those that might consider such processes in the future. The following are some examples of considerations raised by the panelists:

- In response to the need for transparency, some court systems have moved to either livestream proceedings or to post videos after the fact. However, streaming might overcorrect, making essentially all such court proceedings immediately available to anyone with a very low barrier to access. Given the sensitivity of the issues that individuals go to the courts to resolve, privacy interests of the participants must be considered. In the past, the requirement to go to the courthouse and attend in person limited the potential invasion of participants' privacy even during formally open, public proceedings.
- The accessibility of virtual court proceedings has raised concerns for the safety of witnesses involved in trials. The broad dissemination of video showing victims describing traumatic events of serious personal harm has the potential to further victimize them.
- Beyond concerns about witnesses and victims, observers have argued that streaming trials is potentially unfair to the accused, regardless of whether they are found guilty in the end. Streaming risks creating additional “digital punishment” as a result of broadcasting the images of those involved, the full content of the proceedings, and their archiving for an indefinite period in the future. Broadcasting proceedings is particularly incompatible with the goals of problem-solving courts, whose actions straddle the boundary between adjudication and treatment. Broad public dissemination of the proceedings of such courts has the potential to seriously undermine their value as alternatives to standard criminal justice processes.
- Distance introduced by virtual proceedings can limit the efficiency of some tasks, such as document-sharing

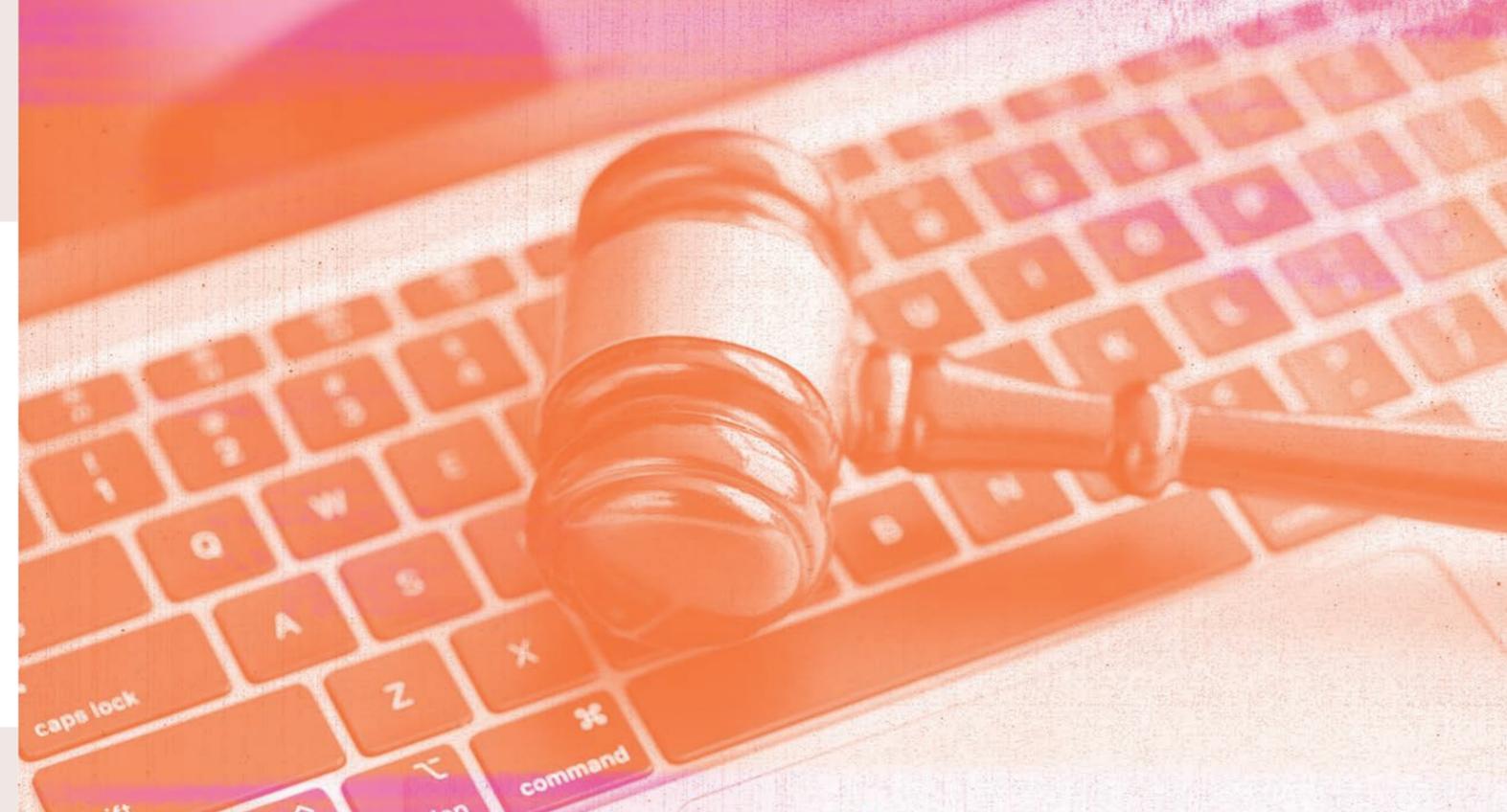
So we have had cases where people have been arrested—and it makes it very uncomfortable, to be honest—people have been arrested, they plead, they get the pre-sentence process, they get sentenced and they've never actually been to court. They've never met their lawyer in person. They've never met the judge in person. Some of [the proceedings] aren't even by video. . . . Is it necessary? Yes, obviously, but we have to recognize that some of these innovations are great and how quickly they came into being is great. . . . [But] we're talking about a fundamental realignment of our system . . . [and while] a lot of these innovations, I think . . . are great for the system, so to speak, but may not be great for the human beings involved in the system, the litigants.

—Law enforcement operations panelist



during proceedings or easy access to private conference between individuals involved in the process.

- Panelists noted that technology can be an obstacle to key processes, including defense counsel building rapport with clients. That lack of connection was viewed as particularly problematic for specialty and treatment courts—and the requirements to safeguard participant treatment data also meant that those courts' virtual systems had to be compliant with regulations for protecting personal health information.
- There were broader concerns about virtual jury trials, in particular—both concerns that the virtual environment risks the perceived legitimacy of the judicial process itself and concerns about whether virtual proceedings are appropriate where individuals' liberty interests are at stake. Panelists were not convinced that virtual proceedings had the same gravity, and therefore legitimacy, for the victims, witnesses, and defendants involved.
- Other objections to virtual jury trials relate to whether they truly meet the requirement for the accused to be able to confront their accusers; whether the virtual environment affords the same opportunity for participants to read the body language of the accused, lawyers, witnesses, and jurors (although some have argued that the close-up, face-front view of witnesses and ease of reviewing evidence provided by virtualization could be superior to the in-person experience); and whether outcomes from virtual proceedings will be different from those of proceedings conducted in person.



PROMISING PRACTICES TO CARRY BEYOND THE PANDEMIC

Looking across the changes made in court systems, some appeared to be valuable in terms of strengthening the system to address future challenges and because they could be more broadly beneficial. Our panelists emphasized the following practices to consider carrying beyond the pandemic:

- **Maintaining virtual access to the courts:** The ability of individuals to attend court remotely not only improves efficiency but also appears to have improved access to justice by making it easier and less costly for individuals to participate. Although digital divide concerns—which might increase because of the economic effects of the pandemic must be resolved, the value of virtual options appears to be considerable.
- **Maintaining remote and paperless work processes for courts:** Even before the COVID-19 pandemic, courts were

pursuing paperless processes and other improvements in information technology. Although models that allowed easy work from home were valuable in the pandemic, they also would improve efficiency after the pandemic.

- **Continuing virtual elements of in-person processes:** Although a return to traditional in-person jury trials is a priority, maintaining virtual components wherever possible for example, in the jury selection process—would increase efficiency and make jury service less burdensome.
- **Maintaining virtual connectivity between courts and corrections facilities:** In both the courts and corrections panels, participants noted the high value of bringing individuals from custody to court virtually because it increased safety for all and cut costs involved with prisoner transportation and security at court.

WHAT WILL BE NEEDED TO ENSURE THAT PRACTICES ARE FAIR AND EFFECTIVE?



The panel discussions surfaced multiple questions, the answers to which would inform post-pandemic decisionmaking. Research efforts focused on these questions could provide a broader understanding of the effects of substantially adopting virtual technologies in particular and inform decisions for court technology and policy going forward. The following are some examples of research and evaluation questions proposed by the participants:

- Have remote-appearance options reduced failure-to-appear rates?
- Has the significant reduction in pretrial detention and money bail had an effect on appearance rates or other violations of release conditions?
- Do victims of crime have a different perception of whether justice is served in remote hearings and proceedings?
- How do jurors perceive the experience of serving on a virtual jury?

- If virtual juries are used, are there issues maintaining the representativeness of the jury pool?
- In virtual proceedings, do outcomes differ from those of in-person court processes on measurable factors, such as bail, sentences, or other outcomes? If there are differences, do they arise from the medium itself or from differences in participant behavior (e.g., attentiveness to proceedings by jurors, how well judges can control the room in virtual versus physical space)?
- Can the positive effects of virtual proceedings on litigants—in easier access, lower costs, and other factors—be quantified? If costs are lower, is access to justice increased?
- Could online dispute-resolution processes be applied in the criminal area to help reduce backlog while maintaining procedural justice?

¹The Priority Criminal Justice Needs Initiative is a joint effort managed by the RAND Corporation in partnership with the Police Executive Research Forum, RTI International, and the University of Denver on behalf of the U.S. Department of Justice's National Institute of Justice.

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