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# COVID-19 and the Resumption of Criminal Jury Trials
## Part 3: Jury Management

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As with jury selection, discussed in Part 1 of this series, and the presentation of evidence, discussed in Part 2, the realities of the pandemic pose significant challenges for trial courts with respect to their management of juries during trial and deliberations. One of the most consequential issues facing courts is what to do in the event of a COVID-19 outbreak in the courtroom after the jury has been seated or, worse, once deliberations are under way.

### I. *Double Jeopardy Implications of a COVID-19 Outbreak During Trial*

In cases that proceed to trial at a time when most people remain unvaccinated, courts must be prepared for the prospect of key trial participants, including jurors, testing positive for COVID-19 during trial or deliberations. Depending on the event, public health protocols could require that the trial adjourn for two weeks.[1] Such an adjournment may be prejudicial to a criminal defendant depending on the facts of the case, its complexity, the stage of the proceedings, and other factors. The alternative of declaring a mistrial could implicate double jeopardy and potentially bar future prosecution for the offense in some instances.[2]

**Mistrials, Necessity, and Double Jeopardy.** Both the North Carolina and U.S. Constitution include double jeopardy protections for criminal defendants. The state-law based prohibition against double jeopardy is rooted in the "law of the land" clause of Art. I, sec. 19 of the North Carolina Constitution,[3] while the federal prohibition arises from the Fifth Amendment, applicable to the states through the Fourteenth Amendment.[4] Historically, the rule in North Carolina "was that, in the absence of the defendant's consent, the trial judge had no authority to discharge the jury and hold the defendant to await a second trial 'but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control[.]"[5] Over the past century, the state rule has been "relaxed; and it has been recognized that the necessity justifying an order of mistrial may be one of two kinds,

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[1] *See* Centers for Disease Control, *When to Quarantine* (updated March 12, 2021) (stating that unvaccinated people who have been "within 6 feet of someone who has COVID-19 for a total of 15 minutes or more" should stay home and away from others "for 14 days after your last contact with [the] person").

[2] For a discussion of double jeopardy and mistrials generally, see JULIE LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL, § 31.9 (Dec. 2018).

[3] *State v. Shuler*, 293 N.C. 34, 42–43 (1977).

[4] *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

[5] *State v. Crocker*, 239 N.C. 446, 449–50 (1954) (quoting *State v. Ephraim*, 19 N.C. 162, 162 (1836)).

'physical necessity and the necessity of doing justice.'"[6] A criminal defendant still maintains a general "right to have their guilt or innocence determined by the[ir] first jury."[7]

For purposes of analyzing COVID-related mistrials, the state rule's focus on "physical necessity" aligns with the federal constitutional "manifest necessity" standard, under which "a trial can be discontinued without barring a subsequent one for the same offense when 'particular circumstances manifest a necessity' to declare a mistrial."[8] The Supreme Court of North Carolina has interpreted physical necessity to include "the incapacitating illness of [a] judge, juror or material witness."[9] There is also authority in the Fourth Circuit that "manifest necessity" may exist "when a participant in the proceedings dies or becomes ill."[10]

The U.S. Supreme Court has indicated that "mere illness" will not always warrant the "discharge [of] a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced."[11] Other alternatives may be feasible to enable the trial to go on, such as replacement of a sick juror with an alternate or a short continuance.[12] Most illnesses, however, are not as transmissible, lethal, and widespread as COVID-19. Replacing a COVID-positive juror with an alternate may not be an option when public health guidelines indicate that people who have been in their presence should self-isolate; and the resulting delay may be too long and disruptive for the trial to resume. If termination of the trial is necessary, the question then becomes whether the termination amounts to a physical or manifest necessity that permits a subsequent retrial.

**Foreseeability.** For prosecutors and courts, what may prove consequential in COVID-related mistrial situations is the foreseeability of one or more trial participants contracting the virus during the proceedings. The U.S. Supreme Court has identified the foreseeability of a trial interruption and the relative responsibility of the parties as factors in determining whether a defendant "is entitled to go free if the trial fails to end in a final judgment."[13] Another possible

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[6] *State v. Birckhead*, 256 N.C. 494, 505 (1962) (quoting *State v. Beal*, 154 S.E. 604, 614 (N.C. 1930)).
[7] *State v. Courtney*, 259 N.C. App. 635, 641, *aff'd*, 372 N.C. 458 (2019); *see also Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (discussing defendant's conditional "right . . . to have his trial completed before the first jury empaneled to try him").
[8] *Blueford v. Arkansas*, 566 U.S. 599, 609 (2012) (quoting *Wade v. Hunter*, 336 U.S., 684 690 (1949)).
[9] *Birckhead*, 256 N.C. at 506.
[10] *United States v. Smith*, 390 F.2d 420, 424–25 (4th Cir. 1968) (Sobeloff, J., concurring in part, dissenting in part).
[11] *Downum v. United States*, 372 U.S. 734, 738 n.1 (1963) (quoting *United States v. Watson*, 28 F. Cas. 499, 501 (S.D.N.Y. 1868)).
[12] *Compare, e.g.*, *United States v. McMasters*, 90 F.3d 1394, 1402 (8th Cir. 1996) (discussing removal of ill jurors and stating that "a reasonable delay in the interest of the ultimate goal of justice is often the most prudent choice" (quoting *Rush v. Smith*, 56 F.3d 918, 921 n.1 (8th Cir. 1995) (en banc)), *with People v. Santamaria*, 229 Cal. App. 3d 269, 278 (Ct. App. 1991) ("The People cite no case in which an interruption of jury deliberations of [eleven days] has been countenanced in a criminal case, and our own independent research has not uncovered any similar case.").
[13] *Wade v. Hunter*, 336 U.S. 684, 688–89 (1949) (indicating that "unforeseeable circumstances that arise during a trial making its completion impossible" would not warrant a prohibition on successive prosecutions); *see also Oregon v. Kennedy*, 456 U.S. 667, 674 (1982) (stating that the Double Jeopardy

factor is whether the defendant had earlier supported continuing the case and registered objections about the prospect of a positive COVID test short circuiting their trial.[14]

It is difficult to anticipate how appellate courts might account for the foreseeability of jurors' future physical incapacity in assessing double jeopardy claims in the event of a mistrial. Almost all cases that contemplate the necessity standards in the context of mistrials because of incapacitated trial participants addressed situations "where [someone] by a sudden attack of illness is wholly disqualified from proceeding with the trial."[15] No case seems to address whether the rule permitting retrial applies when the State chooses to proceed in the face of a foreseeable risk, comprehended before the trial begins, that one or more participants would fall ill and become incapable of fulfilling their service.

In non-COVID contexts, courts have sometimes arrested judgment on double jeopardy grounds in cases where prosecutors were granted motions for mistrials based on a sudden, unanticipated illness of key participants.[16] Where this has happened, it has generally been because appellate courts concluded that the trial court had "other reasonable alternatives to granting a mistrial, [such as] granting a continuance" and thus "no imperious necessity was presented."[17] These cases involved the feasibility of a continuance and the necessity for a mistrial after trial commenced. If a court declares a mistrial for a COVID-related reason, appellate courts might consider the State's decision to proceed to trial in the first place, including the feasibility of a requested continuance before trial, the necessity for commencing trial, and the approaching resumption of normalcy with the wider availability and administration of vaccines.

## II. *COVID-19 and the Risk of Rushed Jury Deliberations*

Defense attorneys have expressed concerns about the prospect of jurors rushing deliberations on account of their anxiety about contracting COVID-19.[18] Some courts have echoed these

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Clause protects against government actions that "subject defendants to the substantial burdens imposed by multiple prosecutions" (quoting *United States v. Dinitz*, 424 U.S. 600, 611 (1976)).

[14] *Cf. State v. Mathis*, 258 N.C. App. 651, 656 (2018) (declining to "reach the merits of [a] stand-alone double jeopardy argument" because "Defendant failed to raise the issue . . . before the trial court," but holding that defense counsel was not ineffective for consenting to mistrial and failing to object to second trial because trial judge reasonably concluded that sitting juror would be absent for wife's heart procedure and alternate juror had not listened to much of testimony).

[15] *State v. Crocker*, 239 N.C. 446, 450 (1954) (quoting *State v. Wiseman*, 68 N.C. 203, 205 (1873); *see also State v. Pfeifer*, 266 N.C. 790 (1966) (holding defendant was not subjected to double jeopardy when his first trial ended in a mistrial due to the sudden illness of a juror); *State v. Ledbetter*, 4 N.C. App. 303 (1969) (affirming trial court's declaration of mistrial where juror had been taken to a hospital as the result of a sudden illness).

[16] *Com. v. Ferguson*, 285 A.2d 189 (Pa. 1971); *Cohens v. Elwell*, 600 So.2d 1224 (Fla. Dist. Ct. App. 1992); *People v. McJimson*, 135 Cal. App. 3d 873 (Ct. App. 1982); *Com. v. Brooks*, 310 A.2d 338 (Pa. Super. 1973).

[17] *Ferguson*, 285 A.2d at 190–91.

[18] *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWYERS, COURT REOPENING AND PUBLIC HEALTH IN THE COVID-19 ERA: NACDL STATEMENT OF PRINCIPLES AND REPORT 8 (June 2020) (observing that "the well documented and

"fear[s] that a jury would rush to judgment in the midst of the pandemic."[19] At the federal level, appellate courts are fielding claims that COVID-induced anxiety on the part of jurors distorted their fact-finding function and require that verdicts be set aside.[20] Outside of the pandemic context, courts have sometimes ordered new trials in instances where "jurors . . . had substantial incentives to arrive at a verdict" in a short period of time, thus creating an unacceptable "risk of coercion on the jury's deliberative process."[21]

**Addressing Juror Concerns Pre-Verdict.** Before a verdict is delivered, where parties are concerned that COVID-related fears might make jurors "eager to reach a verdict and go home," the case law suggests that the parties should ask the court to poll the jury about their willingness to deliberate under the circumstances.[22] Once deliberations have concluded, their options are considerably more constrained.

Some defendants may wish to seek specific jury instructions to mitigate the risk of COVID-based anxiety affecting jurors' deliberations. The Supreme Court of North Carolina has said that jury charges serve the critical purpose of eliminating extraneous matters from the jury's deliberations,[23] and that trial courts "must give" instructions about an issue when "the request is correct in law and supported by the evidence in the case."[24] The Court has said that a "judge has a duty to instruct on all substantial and essential features of the case embraced within the issue and arising on the evidence."[25]

While COVID-19 is not a feature of a case in the way the term is traditionally understood, the pandemic looms over every jury trial until it no longer poses a substantial danger to public health.[26] In recognition of its potentially distorting effect on deliberations,

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understandable fear, panic, and uncertainty on the part of jurors" risks "undermin[ing] the truth-seeking purpose of trials).

[19] *United States v. Green*, No. 4:20CR1, 2020 WL 5877893, at *3 n.4 (E.D. Va. Oct. 2, 2020), *appeal dismissed*, 834 F. App'x 21 (4th Cir. 2021); *see also In re Ct. Operations Under Exigent Circumstances Created by Outbreak of Coronavirus Disease 2019 (Covid-19): Revised Schedule for Resumption of Crim. Jury Trials*, No. 2:20MC7, 2020 WL 3545671, at *1 (E.D. Va. June 30, 2020) ("This Court's finding is based . . . on the time necessary to . . . ensure that the resumption of criminal jury trials provides the accused defendant with the full panoply of trial rights, to include . . . [a] jury . . . [that] will not be encouraged to rush to judgment during deliberations based on a fear of exposure to COVID-19." (underline in original)).

[20] *See, e.g.*, *United States v. Dermen*, 452 F. Supp. 3d 1259, 1272–73 (D. Utah 2020) (criminal case in which court did not find sufficient evidence to uphold claim); *ABKCO Music, Inc. v. Sagan*, No. 15 CIV. 4025 (ER), 2021 WL 761852, at *5 (S.D.N.Y. Feb. 26, 2021) (civil case involving similar ruling).

[21] *Key v. People*, 865 P.2d 822, 825 (Colo. 1994); *cf. State v. Jeffries*, 57 N.C. App. 416, 422 (1982) (referring to need to prevent "a coercive and prejudicial climate which pressure[s] jurors into reaching a verdict").

[22] *United States v. Murvine*, 743 F.2d 511, 515–16 (7th Cir. 1984).

[23] *State v. Glover*, 851 S.E.2d 865, 870 (N.C. 2020).

[24] *State v. Monk*, 291 N.C. 37, 54 (1976).

[25] *State v. Higginbottom*, 312 N.C. 760, 764–65 (1985).

[26] *See, e.g.*, *United States v. Donoho*, No. 19-CR-149-WMC, 2020 WL 5350429, at *1 (W.D. Wis. Sept. 4, 2020) (describing the "continued challenges in managing COVID-19 risks during jury selection and trial,

some states have published "COVID-19 Specific Jury Instructions," which, among other things, direct jurors to inform the court of any pandemic-related issues that might interfere with their ability to pay careful attention.[27] Defendants may wish to seek similar instructions during the pendency of the pandemic. Trial judges should avoid suggesting that the jury should expedite their deliberations out of COVID-19 concerns.[28]

**Challenging Improper Influences After the Verdict.** Once a verdict has been rendered, jurors are not generally permitted under North Carolina law to give testimony about the rationale for their verdict.[29] This anti-impeachment rule, precluding jurors from impeaching a verdict once rendered, does not create an absolute bar to a post-verdict challenge. "[A]s an 'accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in [an] individual case,' certain exceptions to the rule have been carved out."[30] In some instances, an evidentiary hearing on the matter may be appropriate.[31]

Generally, jurors may not testify about their deliberations after they render a verdict except in statutorily specified circumstances, such as "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[32] This "general rule . . . give[s] substantial protection to verdict finality," but the constitutional guarantee to a jury trial as well as other constitutional rights may warrant a deviation from the general rule, most notably in cases involving racial animus by jurors.[33] Whether courts might conclude that the unprecedented nature of COVID-19, and the fear it might engender in jurors, warrants a time-limited exception to the general rule remains to be seen. The North Carolina statutes permit

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as well as the strain on jury members dealing with their own, personal COVID-19 challenges (whether work or family related)").

[27] *See, e.g.*, Judicial Branch of New Hampshire, The State Court Jury Trial Plan, Appendix G: COVID-19 Specific Jury Instructions (Feb. 23, 2021).

[28] *See United States v. Fozo*, 904 F.2d 1166, 1171 (7th Cir. 1990) (observing that "procedure a court employs with regard to the management of the jury during its deliberations may raise an issue of coercion which, upon timely objection, would be subject to review"; coercion claim based on upcoming Christmas holiday was waived by defendant's failure to object); *see generally* JULIE LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL, § 34.3 (Jan. 2019).
Jan. 2019) (discussing prohibition on coercion of verdict by trial judge).

[29] *State v. Cherry*, 298 N.C. 86, 101 (1979). For a general discussion of impeachment of a jury verdict, see JULIE LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, VOL. 2 TRIAL, § 34.7K (Jan. 2019).

[30] *State v. Lyles*, 94 N.C. App. 240, 244 (1989) (citation omitted).

[31] *Id.* (holding that "this was a case in which jurors could testify to impeach their verdict").

[32] N.C. R. OF EVID. 606(b); *see also* G.S. 15A-1240(c) (allowing jurors to testify about matters not in evidence that came to their attention).

[33] *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 861 & 869 (2017) (holding that the Sixth Amendment requires that the traditional anti-impeachment rule governing jury deliberations must yield to permit trial courts to consider evidence that a juror relied on racial stereotypes or animus to convict a criminal defendant); *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (recognizing "that it would not be safe to lay down any inflexible rule").

jurors to testify "to impeach the verdict . . . when it concerns . . . intimidation of a juror,"[34] but it is unclear whether the courts would read this statute to include non-human factors like COVID-19 that may have the effect of intimidating jurors in their deliberations. There are no reported or unreported cases that interpret the provision.

Even if defendants are not permitted to offer jurors' testimony, there may be other ways to adduce evidence that a jury was unduly distracted by fears of contracting the virus. Defendants can rely on statements by the jurors themselves during jury selection or the course of the trial, as well as on nonjuror evidence "during the trial [that was] observable by the court, by counsel, and by court personnel."[35] The law permits the court to address such matters, as well as concerns expressed by jurors themselves, before the jury renders a verdict, which is not prohibited by the anti-impeachment rule.[36] Further, the anti-impeachment rule does not bar nonjuror evidence after verdict.[37]

Many people have been understandably unsettled by the pandemic and have gone to great lengths for more than a year to stay away from congregant settings and avoid contracting the virus. Some will invariably find themselves seated on juries and may struggle to focus on the evidence in light of their risk of exposure. In the voting context, courts have found legal significance in, and granted relief in response to, people's documented fear of contracting COVID-19 because of its effect on the exercise of a constitutional right.[38] Whether defendants may obtain post-verdict relief for a violation of their Sixth Amendment right to a jury trial as a result of the impact of COVID-19 on jury deliberations remains unclear. In view of the restrictions on offering admissible evidence after verdict, as well as the presumption of finality to which verdicts are entitled, the best opportunity to address this issue is before the case goes to the jury.

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[34] G.S. 15A-1240(c)(2); *cf. Anderson v. Miller*, 346 F.3d 315, 329 (2d Cir. 2003) (stating that "threats *short of violence*" by one juror against another could justify upsetting of verdict) (emphasis in original).

[35] *Tanner v. United States*, 483 U.S. 107, 127 (1987).

[36] *See* 1 KENNETH S. BROUN, RICHARD E. MYERS II & JONATHAN E. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE at § 148, p. 554 & cases cited therein (8th ed. 2018) ("The rule is not violated by receiving evidence from jurors prior to verdict).

[37] *Id.* at § 148, p. 553 & cases cited therein ("Evidence to impeach the verdict may be received from sources other than the jurors."); *Tanner v. United States*, 483 U.S. at 127 (holding that "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct" and noting that the district court "held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations" (citing *U.S. v. Taliaferro,* 558 F.2d 724 (4th Cir. 1977), in which after verdict the court considered records of juror conduct during deliberations)).

[38] *Mi Familia Vota v. Abbott*, No. SA-20-CV-00830-JKP, 2020 WL 6304991, at *12 & *20 (W.D. Tex. Oct. 27, 2020) (enjoining governor's executive order permitting people to exempt themselves from state mask-mandate while voting, where evidence indicated order had discriminatory effect under the Voting Rights Act because Black and Latino citizens declined to vote due to worries "about standing in line with people who aren't wearing masks").