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COVID-19 and the Resumption of Criminal Jury Trials
Part 1: Jury Selection

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Following a long layoff, criminal jury trials have resumed in some places in North Carolina. Pursuant to the Chief Justice's orders, individual districts have implemented local plans that describe the protocols to be followed, so as to mitigate the risk of transmission of COVID-19 among trial participants. The plans to accomplish this are varied in terms of their level of detail, but all of them make significant modifications to the typical jury trial arrangement. Some of the changes, such as those contemplated for selecting the jury, have constitutional significance, and they will need to be implemented with care so as not to run afoul of defendants' trial rights.

I. *Fair Cross Section Concerns about Changes in the Jury Selection Process*

One of the more difficult issues facing trial courts during the pandemic is the question of how to safely seat a jury while complying with all of the relevant constitutional requirements. Already, a number of courts have been forced to postpone scheduled trials because so few of those issued jury summons reported to court. In some districts, defense lawyers have reported that pandemic venires have been whiter and younger than is typical for their district. At this juncture, it is unclear the extent to which courts may be disproportionately excusing members of certain groups from service in response to pandemic-related concerns, but the issue is a real one and could have significant ramifications.

Increasing Courts' Discretion to Excuse Jury Service. Most of the jury trial resumption plans presently in effect around the state direct courts to show flexibility in response to requests from prospective jurors to excuse or postpone their service.[1] Some anticipate and attempt to accommodate the constitutional issues with implementing such a directive. The 18th District's plan, for example, provides that "clerks and judges shall grant deferrals or excuses during the pandemic liberally, taking into account the CDC's guidance with regard to high risk individuals, . . . provided that due consideration is given to fair cross section challenges and diversity."[2]

This last clause reflects the fact that courts presiding over trials during the pandemic must consider the effect of granting such requests on defendants' rights under both the Sixth and Fourteenth Amendments, as well as article I, sections 24 and 26, of the N.C. Constitution, each of which protect the right to a jury drawn from a cross section of the community.[3] While

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[1] *See, e.g.*, 14th Judicial District Jury Trial Resumption Plan, Nov. 16, 2020, at 10–11 (directing that "the district's excusal or deferral policy . . . [t]ake into account those who may be elderly, high-risk and not in a position to serve" and "[a]llow more flexibility regarding the issuance of show cause orders for persons who fail to appear").

[2] 18th Judicial District, Administrative Order Re: Jury Trial Resumption Plan, Oct. 29, 2020, at 3–4.

[3] *State v. Bowman*, 349 N.C. 459, 467 (1998); *State v. Avery*, 299 N.C. 126, 134–35 (1980).

the dismissal of prospective jurors belonging to a cognizable group can in some instances implicate equal protection, the practice seems unlikely to amount to a violation in the context of COVID-related excusals, which are a function of a desire to protect jurors rather than "the product of discriminatory animus."[4] The Sixth Amendment, by contrast, raises greater concerns about trial resumption plans that increase courts' discretion to excuse jurors or that empower them to excuse members of identifiable groups.

The Sixth Amendment's Fair Cross Section Standard. The U.S. Supreme Court has characterized "the selection of a petit jury from a representative cross section of the community [as] an essential component of the Sixth Amendment right to a jury trial."[5] It has held that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[6] It has further explained that the imperative of maintaining the "diverse and representative character of the jury" serves, among other things, the critical purpose of providing "'assurance of [the jury's] diffused impartiality.'"[7]

Unlike fair cross section challenges brought under the Fourteenth Amendment, which are principally concerned with whether there was intent to discriminate, those brought under the Sixth Amendment are "concerned with *impact*, or the systematic exclusion of a cognizable group regardless of how benevolent the reasons."[8] A violation may occur if a particular jury plan has the effect of systematically undermining their likelihood of creating a venire or seating a jury that represents a cross section of the community. In *Duren v. Missouri*, the U.S. Supreme Court held that a defendant establishes a prima facie case by demonstrating that the "venires from which juries are selected [are] not fair and reasonable in relation to the number of such persons in the community," and that this "underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."[9]

Reconciling the Standards and the Science. Courts may find this Sixth Amendment requirement difficult to reconcile with the science of COVID-19. The deadliness of the virus, which has killed over half a million Americans in less than a year,[10] as well as its more significant lethality for certain identifiable groups,[11] is likely to make courts more inclined to excuse members of these groups from service. After all, health concerns and advanced age have traditionally been

[4] *State v. Brooks*, 205 N.C. App. 321, at *4 (2010) (unpublished).
[5] *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).
[6] *Id.* at 530.
[7] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 134 (1994) (quoting *Taylor*, 419 U.S. at 530–31).
[8] *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis in original), *rev'd on other grounds*, 426 F.3d 1 (1st Cir. 2005).
[9] 439 U.S. 357, 364 & 366 (1979).
[10] Adam Geller, Half a Million Dead in US, Confirming Virus's Tragic Reach, ASSOCIATED PRESS, Feb. 22, 2021.
[11] *See, e.g.*, U.S. Centers for Disease Control (C.D.C.), COVID-19 Racial and Ethnic Health Disparities, Dec. 10, 2020; C.D.C., Older Adults and COVID-19, Feb. 26, 2021.

regarded as a valid basis to be discharged from jury duty.[12] Yet at the same time, they cannot reflexively result in excusal, which must "reflect a genuine exercise of judicial discretion."[13]

In normal times, the practice of excusing one or more prospective jurors on the basis of health or age would rarely provide a basis for concern. In the context of the pandemic, however, requests to be excused have reached all-time highs[14] and arguably bear greater consequence, both to defendants and prospective jurors themselves. Courts that consistently accommodate these requests run a risk of violating the defendant's rights under the Sixth Amendment, which "forbids any substantial underrepresentation of minorities, regardless of . . . the State's motive[.]"[15] And yet courts that deny the requests may increase the prospect that potential jurors who are more vulnerable to the virus, and whose protection from it the court cannot guarantee, will become seriously ill.

These rules seem poorly suited for a pandemic, particularly one that has proven much more fatal for some groups than others. Doctrinally, the problem is that having a compelling reason to excuse members of certain groups from service does not lessen the constitutional injury to the defendant of granting the exemptions. A jury cannot serve its "prophylactic" and constitutional function "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[16] In the age of COVID-19, that creates a quandary, particularly in districts with diverse populations. Even in more racially homogeneous districts, the increased risk of severe illness for older adults could mean that they are underrepresented for a time, an issue that may create fair cross section issues.[17]

Statutory Requirements. In addition to the limitations imposed by constitutional law, North Carolina's statutes impose "a system for [the] objective selection of veniremen," which further

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[12] *See, e.g.*, *Waller v. Butkovich*, 593 F. Supp. 942, 965 (M.D.N.C. 1984) (reprinting jury selection plan for M.D.N.C., which defined "[u]ndue hardship or extreme inconvenience" to jurors to include "grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned"); *State v. Rogers*, 355 N.C. 420, 448 (2002) ("We have stated that a juror may properly be excused on the basis of age."); *State v. Neal*, 346 N.C. 608, 619 (1997) (finding no error where "the trial court . . . excused a prospective juror for medical reasons" after determining "the juror had experienced drug dependency," citing G.S. 9-6(a)'s "compelling personal hardship" provision).

[13] *Rogers*, 355 N.C. at 448.

[14] Dave Collins, *Pandemic Justice? US Trials Suspended as People Refuse Jury Duty*, CHRISTIAN SCIENCE MONITOR, Nov. 23, 2020.

[15] *Alston v. Manson*, 791 F.2d 255, 258 (2d. Cir. 1986); *cf. Smith v. Berghuis*, 543 F.3d 326, 341 (6th Cir. 2008) ("[T]he Sixth Amendment is concerned . . . when the particular system of selecting jurors makes [social] factors relevant to who is . . . ultimately . . . excused from service."), *rev'd on other grounds*, 559 U.S. 314 (2010).

[16] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

[17] *See, e.g.*, *Willis v. Zant*, 720 F.2d 1212, 1216–17 (11th Cir. 1983) (vacating denial of relief and remanding case back to district court to determine whether "young adults constituted a distinct group," noting that the "distinctiveness and homogeneity of a group under the sixth amendment depends upon the time and location of the trial"); *cf. State v. Price*, 301 N.C. 437, 446 (1980) (declining to find "young people between the ages of 18 and 29 constituted such a group," but noting an opinion that found a prima facie case of underrepresentation of young adults, defined as 21 to 34 (citing *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970)).

restricts the discretion of courts to excuse prospective jurors on account of their membership in identifiable groups.[18] The statutes obligate trial courts to employ a "reliable" and "random method" for the selection of jurors, to be drawn from a master list of "registered voters and persons with drivers license records[.]"[19] They also state that "[a]ll persons are qualified to serve," provided that they are citizens, residents of the county, over 18, understand English, are physically and mentally competent, and have not served during the preceding two years.[20] The Supreme Court of North Carolina has held that judges should "excuse jurors only in keeping with the language and the spirit of the statute," G.S. 9-6, which "sets forth the proper procedure for excusing or deferring jurors from the jury list."[21] That statute includes a "personal hardship" provision and authorizes the court to excuse those whose service "would be contrary to the public welfare, health or safety."[22] However, for reasons discussed in the preceding sections, exercise of that power is constrained by a number of factors.

Framing Fair Cross Section Challenges. Early indications suggest many trial courts are likely to err on the side of safety when faced with requests to be excused from unvaccinated individuals, in turn laying a basis for defendants to bring fair cross section challenges. Defendants who challenge the excusal of jurors during the pandemic do not need to show under the Sixth Amendment that the court or prosecution intended to disadvantage them in order to prevail.[23] It is sufficient to demonstrate that the trial court has employed a "subjective" or "discretionary" selection process that resulted in the underrepresentation of an identifiable group.[24]

II. *Due Process Concerns about Changes in the* Voir Dire *Process*

Limits to Courts' Authority Regarding *Voir Dire*. Some jury trial resumption plans contemplate an abbreviated *voir dire* process in an attempt to minimize the amount of time people congregate in the courtroom.[25] In some instances, this shortened process may violate defendants' rights. While trial courts generally enjoy "broad discretion to regulate jury *voir*

[18] *State v. Blakeney*, 352 N.C. 287, 298 (2000) (quoting *State v. McNeill*, 326 N.C. 712, 718 (1990) (quoting *Avery*, 299 N.C. at 133)).
[19] G.S. 9-2(b).
[20] G.S. 9-3.
[21] *State v. Murdock*, 325 N.C. 522, 527 (1989).
[22] G.S. 9-6(a).
[23] *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979); *Price*, 301 N.C. at 448 ("When a defendant makes a Sixth Amendment challenge alleging that the jury pool does not represent a fair cross-section of the community, there is no requirement that a discriminatory purpose or intention be proven.").
[24] *State v. Avery*, 299 N.C. 126, 130–31 (1980).
[25] Guilford County's plan, for example, provides that attorneys will not be able to question jurors but in writing, "except to ask follow-up questions when needed." 18th Judicial District, Administration Order Re: Jury Trial Resumption Plan, Oct. 29, 2020, at 4–5.

dire,"[26] this discretion is not without limits.[27] The state's statutes, for one, give the defense the right to "personally question prospective jurors individually[.]"[28] The Sixth and Fourteenth Amendments also impose important constraints on the authority of courts to truncate the process of *voir dire* during criminal jury trials.[29] The U.S. Supreme Court has described the process of *voir dire* as playing "a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."[30] Criminal defendants accordingly have a federal constitutional right to question prospective jurors where there is a special reason to inquire into a particular subject,[31] as well as "concomitant rights under the North Carolina Constitution."[32] The circumstances of each case dictate the specific questions that defendants are constitutionally entitled to ask. However, courts may not "foreclose inquiry" [33] of critical issues or prohibit defendants and their counsel from asking questions that are "inextricably bound up with the conduct of the trial."[34]

Recognizing the critical functions served by *voir dire*, the Supreme Court of North Carolina and U.S. Supreme Court have each recently reaffirmed their commitment to protecting criminal defendants' right to question prospective jurors.[35] In *State v. Crump*, the North Carolina court reversed the conviction of a man charged with shooting at police officers without needing to reach his constitutional objections, concluding the trial court had abused its discretion when it "categorically denied" defense counsel the opportunity to question jurors "even *generally* about their opinion and/or biases."[36] In *Pena-Rodriguez v. Colorado*, the U.S. Supreme Court reversed a man's sexual assault conviction after it became clear a juror had

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[26] *State v. Rodriguez*, 371 N.C. 295, 312 (2018) (quoting *State v. Fullwood*, 343 N.C. 725, 732 (1996) (citing *State v. Lee*, 335 N.C. 244, 268, *cert. denied*, 513 U.S. 891 (1994))); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) ("[F]ederal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." (citing *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524, 528 (1973)).

[27] *Davis v. Fla.*, 473 U.S. 913, 915–16 (Mem.) (1985) (Marshall, J., dissenting from denial of certiorari) ("Trial judges certainly have broad discretion over the structuring of *voir dire,* but as federal and state courts have recognized, [circumstances] may necessitate individual *voir dire* to assure fair process in the selection of an impartial jury.").

[28] G.S. 15A-1214(c).

[29] *Morgan v. Illinois*, 504 U.S. 719, 726 (1992) (stating that "the Fourteenth Amendment's Due Process Clause itself independently require[s] the impartiality of any jury empaneled to try a cause" (citing *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961)); *Rosales-Lopez*, 451 U.S. at 188 (stating that a "lack of adequate *voir dire* impairs" the defendant's Sixth Amendment right to exercise peremptory challenges).

[30] *Rosales-Lopez*, 451 U.S. at 188.

[31] *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

[32] *State v. Crump*, 851 S.E.2d 904, 911 (N.C. 2020).

[33] *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (quoting *Lisenba v. People of State of Calif.*, 314 U.S. 219, 236 (1941)).

[34] *Ristaino v. Ross*, 424 U.S. 589, 596–97 (1976).

[35] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017); *see also Crump*, 851 S.E.2d at 915 & 917 (holding that trial court's "restriction on defendant's questioning during *voir dire* was an abuse of discretion" and prejudicial).

[36] *Crump*, 851 S.E.2d at 910 n.1 & 913 (emphasis in original).

relied on racial stereotypes to reach his verdict.[37] The Court extolled the "advantages of careful *voir dire*" to include serving as an important "safeguard" against juror bias infecting the proceedings.[38] Even before *Pena-Rodriguez*, *voir dire* was long regarded as one of the most "important mechanisms for discovering bias" at trial.[39]

Collectively, the case law suggests that while courts have inherent authority to truncate the *voir dire* process,[40] they may not categorically do away with it or restrict its inquiry into key issues, even in the face of a compelling reason like mitigating the transmission of a disease. To do so would dispense with a critical "safeguard" that enables the jury to serve its purpose as "a necessary check on government power" and to be an "effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases."[41]

***Voir Dire* and Juror Challenges.** Trial courts need to be similarly mindful about the effect of pandemic-related changes to the *voir dire* process on the defendant's ability to intelligently exercise for cause and peremptory challenges. To the extent that defense counsel believes pandemic processes have interfered with their ability to meaningfully exercise these challenges, they should note and constitutionalize their objections for the record.[42]

The U.S. Supreme Court has held that the exercise of a trial court's discretion over the *voir dire* process, as well as its "restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness."[43] The Court has repeatedly recognized that proper "[*v*]*oir dire* examination . . . assist[s] counsel in exercising peremptory challenges"[44] and that the "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges."[45] But the Court has given less guidance as to when a trial court's decision to limit the *voir dire* process crosses a threshold and violates due process. Its most direct case on point, *McDonough Power Equip., Inc. v. Greenwood*, was a civil case concerning a juror who gave false

[37] 137 S. Ct. 855 (2017).
[38] *Pena-Rodriguez*, 137 S. Ct. at 866–68 & 871.
[39] *Id.* at 868; *see also id.* ("[T]he Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*." (citing *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales–Lopez*, 451 U.S. 182 (1981); *Turner v. Murray*, 476 U.S. 28 (1986)).
[40] *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) ("[F]ederal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." (citing *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524, 528 (1973)); *State v. Fisher*, 336 N.C. 684, 693–94 (1994) ("Regulation of the manner and extent of the inquiry of prospective jurors concerning their fitness rests largely in the discretion of the trial court[.]" (citing *State v. McLamb*, 313 N.C. 572 (1985); *State v. King*, 311 N.C. 603 (1984)); *see also* Jeff Welty, *Individual Voir Dire*, N.C. CRIM. LAW BLOG, Nov. 28, 2011 (discussing "the inherent authority of trial judges to regulate voir dire").
[41] *Pena-Rodriguez*, 137 S. Ct. at 860 & 866.
[42] *See generally* 2 JULIE R. LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL Ch. 25, Selection of Jury (May 2020) (detailing possible objections and their grounds during *voir dire* process).
[43] *Aldridge v. United States*, 283 U.S. 308, 310 (1931).
[44] *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).
[45] *Rosales-Lopez*, 451 U.S. at 188.

information. It is of limited value, but it suggests that to warrant a new trial, the interference must speak to a "material question" and have stopped the exercise of a valid challenge.[46]

Many of the federal circuit courts of appeal, however, have held that a trial court's exercise of discretion in shaping the form and results of the *voir dire* process denies a defendant due process if it has the effect of interfering with their intelligent exercise of peremptory challenges.[47] The U.S. Court of Appeals for the Fourth Circuit has held that criminal defendants must have an opportunity to exercise their peremptory challenges "meaningfully" and that, in some instances, "*voir dire* that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice."[48]

[46] 464 U.S. 548, 556 (1984).
[47] *Knox v. Collins*, 928 F.2d 657, 660–62 (5th Cir. 1991) (collecting cases).
[48] *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977).