March 12, 2021

COVID-19 and the Resumption of Criminal Jury Trials
Part 2: Presentation of Evidence

Ian A. Mance*

As with jury selection, discussed in Part 1 of this series on COVID-19 and the Resumption of Jury Trials, courts must navigate a number of issues with respect to the presentation of evidence while pandemic protocols are in effect. In a recent blog, I described how "the weight of authorities, pre- and post-pandemic, suggests that a State's witness may not testify in a criminal trial while wearing a face mask" because it would undermine "a defendant's right to confrontation under the Sixth Amendment and also may run afoul of a defendant's right to due process under the Fifth and Fourteenth Amendments (as well as under parallel North Carolina state constitutional requirements)."[1] John Rubin and I have also written about impediments to the use of remote video testimony and how, "even in the era of COVID-19, the bar for permitting [it] at trial is a high one."[2] Among the various challenges facing courts looking to resume jury trials, these are two of the most significant with respect to the presentation of evidence. However, they are not the only issues. Trial courts must also account for ways in which changes to the physical layout of the courtroom may affect the proceedings and the defendant's ability to obtain a fair trial.

Presentation of Evidence

I. *Due Process Implications of Changes to Courtroom Configurations*

Most trial courts in North Carolina have made changes to their courtroom layouts to facilitate social distancing among trial participants. Some of these changes have been made to accommodate requests from attorneys.[3] Most are reasonable and appropriate in light of the circumstances. For instance, the decision of some trial courts to take the jury out of the jury box and instead seat them in rows traditionally reserved for the viewing public is not legally problematic, as "there is nothing sacrosanct in the placement of the jury in the jury box[.]"[4]

---

* Ian Mance is an attorney who works with the UNC School of Government's Public Defense Education group on issues related to the impact of COVID-19 in criminal cases.

[1] Ian A. Mance, *COVID-19 and the Use of Masks by Testifying Witnesses in Criminal Trials*, N.C. CRIM. LAW BLOG, Jan. 4, 2021.

[2] Ian A. Mance and John Rubin, *COVID-19 and Remote Testimony in Criminal Trials*, ADMINISTRATION OF JUSTICE BULLETIN No. 2020/06 (UNC Sch. Gov't, Dec. 2020).

[3] *See generally,* Ian A. Mance and John Rubin, *Indigent Defense Attorneys and COVID-19: Frequently Asked Questions About Practicing During a Pandemic*, ADMINISTRATION OF JUSTICE BULLETIN No. 2020/03, at 6–10 (UNC Sch. Gov't, Sept. 2020) (discussing accommodations in response to COVID-19, the authority for them, and ways litigants may obtain them).

[4] *People v. Brooks*, 285 N.W.2d 307, 308 (Mich. App. 1979); *see also People v. Harris*, 767 P.2d 619, 630, 637 (Cal. 1989) (en banc) (finding no prejudice in dual jury trial for codefendants where one jury was seated in the jury box and one jury sat in seats reserved for the audience, with the juries regularly switching place); *State v. Watson*, 397 So. 2d 1337, 1339 n.2 (La. 1981) (finding no prejudice in dual jury

However, should the effect of doing that within the setting of particular courtroom be that an attorney can no longer meaningfully communicate with the jury, or that the jury cannot easily observe and absorb the evidence presented, then due process is implicated. Similarly, courts may rearrange where the defense and prosecution sit, but they may not do it in a way that interferes with the ability of the defendant to communicate with their counsel or interferes with counsel's ability to effectively present their case.

COVID-19 Courtroom Protocols and Constitutional Considerations. Generally, procedures and practices that impair a defendant's ability to effectively defend and present their case may violate "the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment requir[ing] a procedure that will assure a fair trial,"[5] something the U.S. and North Carolina Supreme Courts have identified "[a]s 'the most fundamental of all freedoms.'"[6] Collectively, these amendments work "to prevent the right . . . from being reduced to a formality by the intrusion of factors into the trial process that tend to subvert its purpose."[7] Cases focused on this concern have observed that in some instances "the atmosphere in and around the courtroom" might be such "as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law."[8] In recognition of this danger, the U.S. Supreme Court has instructed that trial "courts must be alert to factors that may undermine the fairness of the fact-finding process" and apply "close judicial scrutiny" to any practices that increase "the probability of deleterious effects on fundamental rights."[9]

In the context of COVID-19, trial courts must be mindful about the impact of pandemic-related changes to the traditional configuration of the courtroom on the presentation and defense of a defendant's case.[10] Appellate courts have "rejected speculative claims regarding courtroom configuration," which have been raised in the context of dual jury trials for codefendants.[11] Yet even in solo jury trials, unusual "courtroom configuration[s]" are sometimes found to be "inherently prejudicial" and to violate due process under the Fourteenth Amendment, even in instances where "no one can say with certainty what inferences the jurors actually drew."[12]

---

trial for codefendants where one jury was seated in the jury box while the other was seated in the front row of the courtroom).

[5] *Estes v. State of Tex.*, 381 U.S. 532, 540 (1965).

[6] *State v. Fowler*, 197 N.C. App. 1, 21 (2009) (quoting *Estes*, 381 U.S. at 560).

[7] *Id.* at 560–61 (1965) (citing *Irvin v. Dowd*, 366 U.S. 717 (1961); *Pennekamp v. State of Florida*, 328 U.S. 331 (1946); *Moore v. Dempsey*, 261 U.S. 86 (1923)).

[8] *Estes*, 381 U.S. at 560 (discussing *Moore*, 261 U.S. at 90–91).

[9] *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

[10] *Cf. In re Murchison*, 349 U.S. 133, 136 (1955) ("Every procedure which would offer a possible temptation . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

[11] Kaitlin A. Canty, *To Each His Own Jury: Dual Juries in Joint Trials*, 43 CONN. L. REV. 321, 347 (2010).

[12] *State v. Farrell-Quigle*, 477 P.3d 208, 216–18 (Idaho 2020); *see also id.* at 217 ("[T]he plan approved by the district court did not meet the standard for protections under the Fourteenth Amendment. Instead,

Confidential Communication with Counsel. Another issue for courts to consider is whether the new arrangement ensures that defendants will have the ability to confer confidentially with their counsel throughout the trial.[13] The U.S. Supreme Court has recognized that "a defendant in a criminal case must often consult with his attorney during the trial" and "as a matter of right" must be afforded the opportunity to confer.[14] The Sixth Amendment is thus implicated if a criminal defendant is prevented "from consulting with his attorney . . . when an accused would normally confer with counsel."[15] The Court has repeatedly recognized that defendants who "lack[ ] the ability to communicate effectively with counsel . . . may be unable to exercise other 'rights deemed essential to a fair trial.' "[16] Trial plans that require that defendants socially distance from their attorneys during trial must provide some mechanism for them to regularly and confidentially communicate throughout the proceedings.

Effective Communication with the Jury. Trial courts should also consider whether the configuration permits the defense to effectively present its evidence and for counsel to effectively communicate with the jury. Inherent in the Sixth Amendment is the "right to have one's case presented competently and effectively."[17] The U.S. Supreme Court has said that "the right to counsel is the right to the effective assistance of counsel,"[18] and in some instances it has found that "surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial."[19]

---

it more than likely signaled to the jury that something strange was afoot. The courtroom configuration authorized here was not a routine courtroom arrangement.").

[13] *Fournier-Olavarria v. United States*, 2018 WL 501564, at *3 (D.P.R. Jan. 19, 2018) (considering claim that "arrangement of the courtroom and [defendant's] seating placement prevented him from conferring with [his] attorney," thus "offend[ing] his Sixth Amendment right to assistance of counsel"); *cf. United States v. Allen*, 542 F.2d 630, 634 (4th Cir. 1976) ("We . . . hold that a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible[.]"); *see also State of S.D. v. Long*, 465 F.2d 65, 72 (8th Cir. 1972) (indicating that under some circumstances, the Sixth Amendment right to effective assistance of counsel can be violated where courtroom configuration permits State's attorney to overhear confidential attorney-client communications during trial).

[14] *Geders v. United States*, 425 U.S. 80, 88 (1976); *see also Allen*, 542 F.2d at 634 (observing that "[i]n the course of concurring in *Geders*, Mr. Justice Marshall joined by Mr. Justice Brennan . . . . interpreted the court's opinion as meaning that any order barring communication between a defendant and his attorney is inherently suspect, requiring initial justification by the government, and not requiring that the defendant make a showing of prejudice").

[15] *Geders*, 435 U.S. at 91.

[16] *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring in judgment)).

[17] *Jones v. Barnes*, 463 U.S. 745, 759 (1983).

[18] *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

[19] *Cronic*, 466 U.S. at 660–61 (discussing *Powell v. Alabama*, 287 U.S. 45 (1932)).

COVID-related circumstances that might operate to deprive a defendant of effective assistance of counsel include heavy reliance on poorly performing technology, such as remote video used to transmit courtroom proceedings to a jury in an adjacent room.[20] Attorneys must have the ability to put on their evidence, including documentary evidence, in a way that jurors can reliably see, hear, and absorb. Similarly, a trial court's inability or unwillingness to assuage defense counsel's concerns about their own safety in the courtroom could, in some instances, amount to a constructive denial of counsel or result in ineffective assistance of counsel if the attorney is so distracted that he or she cannot focus on the case.[21] As a general matter, criminal defendants have "a right to be represented by counsel who is able to focus on the proceedings and is not unduly distracted by extraneous matters."[22]

Given the novelty of some the issues at play, in all instances defendants and counsel concerned about the diminution of these and other trial rights should make detailed objections for the record.[23] To the extent they are rooted in concerns about the courtroom layout, that layout should be documented as much as practicable.[24]

[20] This arrangement may itself create due process and Confrontation Clause issues. *See generally*, Mance & Rubin, *Remote Testimony*, *supra* note 2.

[21] *Cf. Jarmon v. State*, 284 So. 3d 368, 382 (Ala. Crim. App. 2019) (concluding defendant's "fundamental right to the assistance of counsel under the Sixth Amendment to the United States Constitution[] was violated" where counsel "developed unexpected health issues that prevented her from continuing," and the trial court denied replacement counsel's motion for a recess until she could resume).

[22] *State v. Frisbee*, 140 A.3d 1230, 1237 (Me. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

[23] *E.g.*, *Fournier-Olavarria v. United States*, 2018 WL 501564, at *3 (D.P.R. Jan. 19, 2018) (concluding that "petitioner has not evinced that his seating arrangement offended his Sixth Amendment right to assistance of counsel" where he "failed to properly develop or otherwise support his contention by—at the very least—mentioning specific instances where he intended but could not communicate with [his counsel] because of where he was seated"); *cf. Estelle v. Williams*, 425 U.S. 501, 512–13 (1976) (holding that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, [but] the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation").

[24] *Davis v. Lewis*, No. 2:11-CV-519-MCE TJB, 2012 WL 2571193, at *4 (E.D. Cal. July 2, 2012) (stating that defendant "challenged the seating arrangement in the courtroom," but noting "the record does not definitively indicate where the sheriff was seated in relationship to defendant and his attorney" (quoting *People v. Davis*, No. C052445, 2008 WL 3846541, at *6 (Cal. Ct. App. Aug. 19, 2008)).