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ARTICLES

The Practical and Constitutional Issues with Virtual Jury Trials in Criminal Cases

Virtual jury trials in criminal cases are constitutionally questionable and far from ideal in terms of effective criminal trial practice.

By Phillip C. Hamilton

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Trial is theater, and the jury is the audience—watching every part of the show.

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When government shutdowns forced the closures of courthouses around the nation last year, questions arose as to how criminal trials would proceed. Some jurisdictions conducted virtual bench trials on consent, while one court in Texas conducted a virtual jury trial. Since then, many jurisdictions have sporadically resumed in-person court proceedings, hearings, and jury trials.

With the COVID-19 vaccination effort well underway in 2021, there seems to be light at the end of a very dark tunnel. Of course, because there is no exact timetable as to when the pandemic will be behind us, many jurisdictions will continue to exercise caution in the face of COVID-19, which will continue to limit the availability for jury trials. Thus, one can only wonder: Will more parties in criminal actions feel pressured to try their cases virtually as opposed to waiting indefinitely? And, if so, is that a good idea?

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The Confrontation Clause and Virtual Testimony: An Inharmonious Marriage

American courtrooms, by their very nature, are physically constructed from the blueprint of the Sixth Amendment. The witness stand is built for the right to confrontation. The jury box is built for the right to an impartial jury. And the pews are installed for the public's right to view the trial. Without question, it is highly doubtful that the framers ever envisioned government witnesses testifying via Zoom or Microsoft Teams.

The idea of witnesses testifying by video in criminal trials is still a relatively novel concept. Only in 1990 did the Supreme Court take up the first case involving the constitutionality of a witness testifying by video. In *Maryland v. Craig*, the Court, in a 5-4 decision by Justice O'Connor, held that the Confrontation Clause did not bar the use of one-way, closed-circuit television to present testimony by an alleged child sex abuse victim. 497 U.S. 836 (1990). Thus, post-*Craig*, a witness may testify against a criminal defendant by video where the court "(1) holds an evidentiary hearing and (2) finds: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006).

Notwithstanding *Craig*, video testimony in criminal cases remains the rare exception to the constitutional rule. The fact that face-to-face confrontation is not absolutely required by the Sixth Amendment "does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. at 850. Face-to-face confrontation still forms "the core of the values furthered by the Confrontation Clause." *Id.* at 848. And from a practical perspective, "it enhances the accuracy of [fact-finding] by reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846. Indeed, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'" which is why "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa*, 487 U.S. 1012, 1017, 1019 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

Anyone who has ever tried, judged, or watched a criminal jury trial can speak to the moment and feeling of tension when the prosecution's star witness walks into the courtroom. Not only are the eyes of the criminal defendant locked upon the witness, but so are the eyes of the entire jury and courtroom. The gravity of that moment is enough to keep some witnesses from ever taking the stand—especially those witnesses who have no problem with lying under oath but who in no way want to be embarrassed and exposed in a room full of people during an effective cross-examination. By physically removing the jury and/or the trial from the courtroom, virtual jury trials will inevitably take away the intangible constitutional protections and accountability measures that are built into in-person jury trials.

Virtual Juries: Selection from a Fair Cross-Section of the Community?

The Supreme Court has held that a criminal defendant has the constitutional right to draw an impartial jury from a group "composed of [his] peers or equals; that is, of his neighbors, fellows,

associates, [and] persons having the same legal status in society [that] he holds.” *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

Unfortunately, virtual jury trials will inevitably stymie that right due to the digital divide that currently exists in the United States. “Roughly three-in-ten adults with household incomes below \$30,000 a year (29%) don’t own a smartphone. More than four-in-ten don’t have home broadband services (44%) or a traditional computer (46%). And a majority of lower-income Americans are not tablet owners.” Monica Anderson & Madhumitha Kumar, [“Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption,”](#) *Pew Rsch.* (May 7, 2019). Accordingly, it will be difficult, if not impossible, to guarantee a criminal defendant a virtual jury selected from a “fair cross-section of the community” when a large percentage of lower-income jurors do not have the technology required to be included in the virtual jury pool. *See* 28 U.S.C. § 1861. And even when they do have the technology, it is often of lesser quality and prone to connectivity issues that undercut the ability to truly be a part of the process.

Moreover, because Black Americans are twice as likely to live in poverty as White Americans, virtual jury trials could effectively undercut the ability of Black Americans to serve on virtual juries, implicating the Fourteenth Amendment’s Equal Protection Clause in a manner reminiscent to the Jim Crow–era jury pool litigation of the early 20th century. *See generally Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939). There is likewise a strong practical consideration to this issue: studies have proven that criminal defendants—of any race—need black jurors to hold the prosecution accountable to its burden of proof. Indeed, the presence of even one or two Blacks in the jury pool, let alone on the actual jury, often results in significantly lower conviction rates for criminal defendants.

Identifying Juror Competency and Misconduct in a Virtual Trial

Generally speaking, the validity of a jury’s verdict may not be impeached. *Tanner v. United States*, 483 U.S. 107 (1987). The “no-impeachment” rule dates back to English common law and has few exceptions in American jurisprudence. Federal Rule of Evidence 606(b), which is generally followed in most states, only allows a jury’s verdict to be impeached where “(A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.” Fed. R. Evid. 606(b)(2). Additionally, the Supreme Court recently has held that where a juror makes a clear statement indicating reliance on racial stereotypes or animus to

convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Short of the courts finding an exception in the “gravest and most important cases” (*see generally United States v. Reid*, 53 U.S. 361 (1851); *McDonald v. Pless*, 238 U.S. 264 (1915)), however, a jury’s verdict will stand even where the jurors were drunk and/or high on drugs throughout the trial. *Tanner*, 483 U.S. at 116–27. Thus, the onus generally falls to the parties in a criminal action to immediately put the court on notice of any potential juror misconduct.

But in the virtual trial context, how is this practical? How will the parties be able to discern whether a juror is actually paying attention to the trial as opposed to catching up on some work on another open tab? Or worse, contemporaneously researching issues arising in testimony with the same technology being used to watch the trial? When jurors are on “mute,” how will the parties know when a juror is being distracted by a screaming child or missing critical testimony because of a neighbor’s noisy landscaping company? Where jurors cannot be fully observed, real-time objections to their circumstances cannot be made.

A judge cannot effectively impose the rules and decorum of the courtroom within a juror’s home, place of business, or anywhere outside of the courthouse. Whether grand or bland in design, physical courtrooms connote seriousness, process, and high stakes. From the power of the judge seated high on the bench to armed court officers watching over the courtroom, jurors can never escape the formality of the process. This creates a controlled environment generally devoid of outside distractions, which better commands jurors’ adherence to the rules. From a constitutional perspective, there is no better forum.

Stage Acting Versus Television Acting: A Criminal Trial Perspective

For criminal trial attorneys, the scariest prospect of virtual jury trials is the inherent inability to connect with the jurors. From a procedural perspective, trial is theater. The courtroom is the stage. The attorneys are the performers. And the jury is the audience—watching every part of the show.

If an attorney appears organized and well put together, the jury will notice. If a criminal defendant or alleged victim is supported by family attending the trial every day, the jury will notice. If the judge is making subtle nonverbal cues in favor of one of the parties, the jury will notice. These off-

the-record intangibles that can best be observed inside the courtroom often influence how jurors come to view the parties and the ultimate issues within the case.

And just like Broadway performers feeding off the energy of their audience, seasoned trial attorneys do the same with their juries. Especially when jurors are positively signaling to them—be it by nodding their heads during an opening statement, rolling their eyes at an adversary, or warmly smiling at a witness on the stand—that their case is going well. These cues are priceless, but not easily discernable in speaker view on Zoom. It is therefore no surprise that most trial attorneys are not keen on virtual jury trials and would prefer a return to the courtroom stage.

Looking Forward

Virtual jury trials in criminal cases are constitutionally questionable and far from ideal in terms of effective criminal trial practice. They should never be contemplated outside of extreme circumstances, and only then on a case-by-case basis where the inherent constitutional risks are outweighed by a criminal defendant's well-informed desire for a more expeditious resolution.

Thus, before jury selection commences in a virtual criminal case, an exhaustive record should be made detailing the practical and constitutional issues that come with virtually conducting a criminal jury trial. Subsequently, the court will have to make certain that a defendant understands and accepts each and every prospective issue prior to moving forward with the case. Fair and equitable justice will always demand much more, but certainly no less.

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