

The Constitutional Risks In Pandemic-Era Criminal Jury Trials

By **Karin Portlock and Vinay Limbachia** (October 9, 2020, 3:49 PM EDT)

COVID-19 has impacted nearly every aspect of daily life, and the administration of criminal justice during the pandemic is no exception. As federal courts grapple with how to resume criminal trials, thorny constitutional issues have emerged, including whether jury selection can be conducted consistent with the Sixth Amendment.

Emerging case law suggests that courts fashioning modifications to the jury selection process do so at constitutional risk and that defendants challenging pandemic-era trial convictions may have a unique opportunity to test long-standing precedent concerning the proper constitutional implementation of the Sixth Amendment's requirement that juries be drawn from a fair cross-section of the community.[1]

Specifically, the pandemic's disproportionate impact on certain racial, ethnic and age demographics, including Blacks, Hispanics and older Americans,[2] portends that these groups may be underrepresented in venues, distorting the composition of criminal juries and undermining the defendant's right to the fair trial contemplated by the Sixth Amendment.

Moreover, selecting jurors virtually and evaluating jurors wearing face masks raises additional constitutional concerns. Accordingly, federal courts empaneling pandemic-era juries for trial should be cognizant that resulting criminal convictions might be vulnerable to constitutional attack.

In February, an intergovernmental federal judiciary COVID-19 task force, including federal judges, was established to provide courts guidance on pandemic-related issues.[3] The task force's jury subgroup published a report suggesting modifications to jury selection procedures for courts conducting trials during the pandemic, including allowing jurors to wear face masks and other personal protective equipment and, with a criminal defendant's consent, permitting courts to conduct voir dire virtually.[4]

While the report advised judges to develop criteria for evaluating requests from potential jurors to be excused for health reasons based on Centers for Disease Control and Prevention guidelines,[5] some judges have allowed potential jurors who reported feeling threatened[6] or uncomfortable[7] to be excused.



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Compounding the challenges to implementing these modifications in practice, courts are confronted with the pandemic's disproportionate impact on racial and ethnic minority groups and the elderly, groups that may — as a result of heightened risk — avoid jury service altogether.[8] Economically vulnerable individuals may also be more likely to seek excusals if called during the pandemic due to increased financial stress.

Against this backdrop, numerous courts have considered whether the pandemic might impair their ability to assemble a fair cross-section of the community in the venire. Already, several courts have adjourned scheduled trials based partly on the obstacles to obtaining a representative cross-section during the pandemic.[9]

Last month, in *U.S. v. Davis*, the U.S. District Court for the District of Colorado adjourned a trial scheduled to commence on Nov. 25, observing the difficulty in obtaining an adequate cross-section of the community for jury selection due to public health directives such as stay-at-home orders and general health concerns.[10]

Similarly, in two other federal trial court decisions in Colorado and Alabama, the courts acknowledged concerns with assembling a fair cross-section and adjourned criminal trials.[11] While these courts' analyses of the cross-section issue were not rigorous, the rulings suggest a reluctance to proceed with such a constitutionally significant event — i.e., a criminal jury trial — under the unprecedented conditions of a pandemic.

By contrast, in *U.S. v. Trimarco*, the U.S. District Court for the Eastern District of New York denied the defendant's request to adjourn trial where he had argued that the venire would likely exclude elderly Americans. The court rejected his concerns as speculative, finding that the defendant had no evidence to support his contention.[12] The trial in *Trimarco* is scheduled to begin Oct. 13, and the demographic composition of the venire and empaneled jury may reveal whether the defendant's cross-section concerns were prescient.

These divergent decisions underscore the difficulty of navigating an uncharted legal landscape as courts rewrite the rules of criminal justice in circumstances never contemplated by the U.S. Constitution. Even the COVID-19 judicial task force's report on conducting jury trials makes no mention of possible fair-cross-section challenges and lacks guidance for courts now tasked with resolving defendants' legitimate Sixth Amendment concerns.[13]

The U.S. Supreme Court articulated the test for identifying violations of the fair cross-section requirement in the 1979 case, *Duren v. Missouri*.

In *Duren*, the court held that a defendant could establish a prima facie violation of the requirement by showing that a "distinctive" group was disproportionately represented in the venire relative to its presence in the community, and that this underrepresentation was due to the "systematic exclusion of that group in the jury-selection process." [14]

However, *Duren* held that even where a prima facie violation is established, there is no constitutional violation if the government can show that the disproportionate exclusion of a distinctive group is the result of a process that "manifestly and primarily" advances a "significant state interest." [15] The question then, for courts selecting criminal juries during the pandemic is whether the restrictions they have fashioned to protect jurors from COVID-19 advance the public health interest or sweep more broadly than the Sixth Amendment can tolerate.

Defendants forced to trial during the pandemic can argue that demographics at greater risk from COVID-19 are likely to be underrepresented in the venire and that even demographics at lesser risk may elect not to serve out of fear of contracting COVID-19, economic insecurity and other COVID-19-related concerns. Black and Hispanic defendants may risk a jury pool lacking any jurors of their race.

Furthermore, courts proceeding with jury trials during the pandemic will have to determine how to evaluate requests from potential jurors to be excused. If excusals for COVID-19 risk must be substantiated by proof of a potential juror's medical condition, would a court's request for medical information be permissible?

Alternatively, if courts automatically grant jurors' requests to be excused because of COVID-19 risk or fear of contracting COVID-19, the jury pool could dwindle significantly and empaneled juries may be skewed in a variety of ways. Specifically, the composition of pandemic-era jury pools may significantly skew younger and more white if jurors defect based on documented COVID-19 risk factors.

While court rules and legislation that systematically exclude certain groups from jury service have typically been the subject of fair-cross-section challenges, jury selection modifications during the pandemic risk the underrepresentation of vulnerable demographics as a de facto consequence of the pandemic's severe effect on racial minorities and older Americans[16] — as well as its economic effects on economically vulnerable populations across demographics.

Both the government and the defense bar have also raised constitutional concerns over mask mandates for potential jurors during jury selection.[17] In challenging these requirements, parties have argued that masks inhibit their ability to evaluate jurors' demeanor in response to voir dire inquiries.[18]

Some courts have rejected such concerns. In *U.S. v. Crittenden*, the U.S. District Court for the Middle District of Georgia stated that while it may be "tactically preferable" to see a potential juror's full facial expressions, a juror's "demeanor includes many aspects of body language which will still be present for evaluation." [19]

However, this reasoning may understate the importance of facial expressions in evaluating potential jurors, and, at least one court — the U.S. District Court for the Middle District of Alabama in *U.S. v. Fortson* — adjourned trial so it could "consider the safety of face shields or transparent face masks — which may ameliorate the parties' concerns regarding the inability to see the jurors' and Defendant's demeanors." [20]

Of course, pandemic-era modifications to jury selection are animated by legitimate practical concerns, including courts' obligations to resume proceedings safely and avoid clogged dockets. Indefinite adjournments are undesirable, and defendants are entitled to their day in court.

Adjourning trials until late 2020 or early 2021 is not a sure solution. How can courts be confident there will not be a second wave of COVID-19 then? And even once a vaccine is available, it may take many months or longer to meaningfully reduce community spread, leaving courts no better positioned to gather a fair cross-section of the community for jury service a year from now.

The jury is the touchstone of the American criminal justice system. In this developing legal landscape, courts should exercise caution to ensure that COVID-19-era adaptations to jury selection procedures do not curtail criminal defendants' Sixth Amendment rights.

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[1] *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

[2] See <https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic>; see also https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html#fn17.

[3] <https://www.uscourts.gov/news/2020/06/25/judge-testifies-house-hearing-pandemic-impacts>.

[4] See COVID-19 Judicial Task Force, *Conducting Jury Trials and Convening Grand Juries During the Pandemic*, §VI.B., available at https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

[5] *Id.* §§ III.B., XIII.A.

[6] <https://www.uscourts.gov/news/2020/09/10/courts-making-juror-safety-top-priority>.

[7] <https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic>.

[8] <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html#fn3>; <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

[9] *United States v. Davis*, No. CR 20-MJ-00140-KMT, 2020 WL 5653332, at *1 (D. Colo. Sept. 18, 2020); *United States v. Young*, No. 19-CR-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020); *United States v. Fortson*, No. 2:18-CR-416-WKW, 2020 WL 4059718, at *1 (M.D. Ala. July 20, 2020).

[10] *Davis*, 2020 WL 5653332, at *3.

[11] *Young*, No. 19-CR-00496-CMA, 2020 WL 3963715, at *2; *Fortson*, No. 2:18-CR-416-WKW, 2020 WL 4059718, at *3.

[12] *United States v. Trimarco*, No. 17-CR-583 (JMA), 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020).

[13] See COVID-19 Judicial Task Force, *Conducting Jury Trials and Convening Grand Juries During the Pandemic*, available at https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

[14] 439 U.S. at 364.

[15] *Id.* at 367-68.

[16] This analysis is further complicated by jurisdictions, like the Eastern District of New York, which excuse individuals over 70 from jury duty upon request based on the assumption that it would "entail undue hardship or extreme inconvenience," thus making it possible that older individuals may have been excluded from the jury regardless of COVID-19. See Eastern District of New York, Jury Selection Plan (as amended Oct. 30, 2006), § 7, available at https://img.nyed.uscourts.gov/files/local_rules/juryplan.pdf.

[17] *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *8 (M.D. Ga. Aug. 21, 2020); *United States v. Fortson*, No. 2:18-CR-416-WKW, 2020 WL 4059718, at *1 (M.D. Ala. July 20, 2020).

[18] *Id.*

[19] *Crittenden*, 2020 WL 4917733, at *8; see also *Trimarco*, 2020 WL 5211051, at *7.

[20] *Fortson*, 2020 WL 4059718, at *4.