

PROSECUTORIAL DILEMMAS AMID THE PANDEMIC AND ONLINE JURY TRIALS

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I. INTRODUCTION

Jury trials represent an integral feature of the criminal justice system in the United States. Jury trials are especially important for prosecutors, both as means of seeking justice and as a practical method of proving their trial skills (or lack thereof). Despite the several benefits of conducting trials, they can be costly, time consuming, and not necessarily consistent with a prosecutor's duty to seek justice.¹ When the pandemic began, prosecutors as a group faced several additional hurdles in their ability to properly investigate criminal allegations, conduct hearings and trials, and ultimately seek justice.² To facilitate the prompt disposition of cases within the criminal justice system as the pandemic continued, criminal courts began to conduct hearings and trials in the following three formats: (1) in-person and compliant with social distancing guidelines, (2) via video conference, or (3) with a hybrid model.³ Over one year into the pandemic, several states are now considering whether to make these pandemic measures permanent. This Essay argues that prosecutors should exercise caution when agreeing to conduct a trial by video conference. While such trials may be necessary to ensure that the

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1. See Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 212-13 (2021); see Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 50-51 (1991).

2. Turner, *supra* note 1, at 199-200, 252.

3. Victor A. Afanador, *Technology for Trial Attorneys During the Advent of Hybrid and Virtual Trials*, N.J. LAW., June 2021, at 27.

criminal justice system continues to function during the pandemic, they present several issues that may otherwise hinder a prosecutor's ability to seek justice. Such issues include limited courtroom technology, the potential for remote juries to have a greater likelihood of rendering a not guilty verdict or giving a more lenient sentence, and the potential that such proceedings may result in *per se* reversible error.

II. PROSECUTORIAL CONSIDERATIONS

Prosecutors bear the responsibility to seek justice in all of their cases. In many instances, justice can only be sought through a trial. Even when that is the scenario, the decision to choose to pursue a trial or offer a plea deal has never been simple. For prosecutors, their considerations fall into general categories of strength of the case and costs (both direct and indirect).⁴ The following represents a thorough, but by no means exhaustive, list of such considerations.

With respect to the strength of the case, prosecutors first consider whether they have the evidence needed to prove guilt beyond a reasonable doubt.⁵ If they do, then they also regularly consider the quality of the defense attorney trying the case, whether the judge hearing the case is likely to acquit regardless of the strength of the evidence, the quality of the officers who investigated the case and any *Brady*⁶ material that the officers have in their record, the credibility of any potential victims or civilian witnesses who may testify, evidence that may be suppressed or excluded during the trial or in pretrial hearings and motions, the race and sex of the accused and victim,⁷

4. John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 17 (2007).

5. See *id.* at 6.

6. 373 U.S. 83 (1963).

7. This can be especially important where the witness's or victim's testimony entails a cross-racial identification. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 950-51 (1984).

juror demographics, the type of charge, current political issues,⁸ the age of the case, and the likely sentence based on all of the above.⁹

Regarding costs, prosecutors likely consider the cost of transportation and lodging for non-local witnesses, the cost of hiring experts, witness availability, the time it takes to proceed to trial, the expected difference in sentence post-plea and post-jury verdict,¹⁰ whether to consent to a bench trial,¹¹ whether the defendant is in jail or out-of-custody, the impact of a trial on victims and their families, whether the victim and defendant are family members or in an intimate relationship with each other, the time it takes to prepare the case for trial, how proceeding to trial on this case impacts their ability to investigate and try other cases, and whether the case furthers the goals of the elected district attorney.¹² For federal cases, they will also likely consider whether the judge was appointed by a Democratic or Republican President.¹³

8. For example, in the 2020-21 political climate, defendants may be more likely to seek a trial where the officers used excessive force against them and less likely where the officer is accused of a hate crime. See *Torres v. Madrid*, 141 S. Ct. 989, 994-95, 1003 (2021) (widening plaintiff's ability to bring suit against a police officer for use of excessive force by finding that "the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."); for use-of-force data, see also Deepak Premkumar et al., *Police Use of Force and Misconduct in California*, PUB. POL'Y INST. OF CAL. (Oct. 2021), <https://www.ppic.org/publication/police-use-of-force-and-misconduct-in-california/>; Fed. Bureau of Investigation, *National Use-of-Force Data Collection*, U.S. DEP'T OF JUST. (July 2, 2019) <https://s3-us-gov-west-1.amazonaws.com/cg-d4b776d0-d898-4153-90c8-8336f86bdfec/use-of-force-flyer.pdf>.

9. Stickels et al., *supra* note 4, at 9-11; Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMPAR. L. 532, 536 (1970); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 2 (2012); SANTA CLARA CNTY. DIST. ATT'Y'S OFF., *The Basic Brady, Statutory, and Ethical Discovery Obligations Outline*, in THE INQUISITIVE PROSECUTOR'S GUIDE 86, 156 (2019) [hereinafter PROSECUTOR'S GUIDE]; Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. & SOC'Y REV. 291, 309-10 (1987).

10. See Michael Conklin, *In Defense of Plea Bargaining: Answering Critics' Objections*, 47 W. ST. L. REV. 1, 22 (2020).

11. Some states require the government to consent to a bench trial, while others leave the choice solely with the defendant. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (West 2011) ("The defendant in a criminal prosecution . . . shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that . . . the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state.") (emphasis added); N.Y. CRIM. PROC. LAW § 320.10(1) (McKinney 2019) ("Except where the indictment charges the crime of murder in the first degree, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.") (emphasis added).

12. Conklin, *supra* note 10, at 22; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-73, 2476 (2004).

13. See Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J. 160, 160-61 (2019).

Should prosecutors determine that a trial is appropriate, they must then prepare the case for trial. For felonies, this typically includes verifying the validity of the indictment; meeting with witnesses in person and preparing them for trial, including direct questioning, cross-examination, and visiting the courtroom where the trial will be held; visiting the crime scene; ensuring that they have fully complied with discovery and other pretrial requests from the defendant; working with the arresting officer to follow up on leads or further question potential witnesses; meeting with officers who will likely testify to prepare them for trial and confirm if they have any *Brady* material in their personnel records; creating trial binders with copies of all of the evidence that will be needed (or originals where required); drafting an opening statement, closing arguments, questions for jury selection, direct questioning, and cross examination of likely witnesses; and drafting and filing any pretrial notices or motions that may be required.¹⁴

III. SURVEYING PROSECUTORS DURING COVID-19

Amid the pandemic, prosecutors not only considered the aforementioned factors, but also faced new and potentially greater barriers to pursuing a trial. Recently, *The Texas Prosecutor* discussed many of these new challenges to conducting trials amid the pandemic, asking prosecutors across the state the following questions:

1. Has your office conducted any trials since the COVID-19 shutdown?
2. What has been the hardest part about holding a live trial?
3. What has been the hardest part about not doing any trials, or only very few trials?
4. Have any good things come from conducting trials during COVID?¹⁵

For conducting trials, several prosecutors indicated that their offices did not conduct any trials amid the pandemic, in part due to constitutional concerns, health and safety issues, and counties indefinitely halting all in-person trials.¹⁶ Where trials did occur, they were mostly conducted in person, with limited instances of a court reporter or a witness appearing or testifying remotely due to COVID-19 exposure concerns.¹⁷

14. See NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS 22, 31, 33, 61, 74-78 (3d ed. 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>; PROSECUTOR'S GUIDE, *supra* note 9, at 86.

15. Sarah Halverson, *How Prosecutors Are Making It Work*, TEX. PROSECUTOR, Jan.-Feb. 2021, at 1, 1, 16-22.

16. *Id.* at 1, 16.

17. *Id.*

When asked about the hardest part of conducting trials, prosecutors noted logistical issues with seeing or hearing witnesses when jury selection was conducted in a socially distanced format or where potential jurors were speaking through their masks, the reluctance of witnesses to testify in person, last minute cancellations due to a positive COVID test result, and handling physical evidence.¹⁸ For the prosecutors who had not done any trials, they lamented the pandemic causing an inability to resolve cases because it impacted case backlogs, the ability for victims to obtain justice, and the ability for in-custody defendants to get a prompt resolution of their cases.¹⁹ Finally, regarding the good things to come from attempting to conduct trials during the pandemic, prosecutors noted that it caused them to more greatly scrutinize whether a trial was appropriate and led to important enhancements to the use of video conference technology that they hoped would continue post-pandemic.²⁰ This anecdotal evidence was largely confirmed by Professor Jenia Turner's comprehensive survey of attorneys across the State of Texas, where a majority of prosecutors polled agreed that virtual proceedings saved time and resources and that they would welcome continued use of remote criminal proceedings after all pandemic restrictions were lifted.²¹

Absent from these surveys, however, is the impact the pandemic has had on prosecutors' ability to work with police and witnesses to determine if a trial would be appropriate and ultimately prepare for trial. Almost every case a prosecutor has involves at least one police officer who could testify at trial.²² As such, prosecutors regularly work with officers to follow up on leads, visit crime scenes, and meet in person to discuss the trial.²³ Such activity has become particularly difficult amid the pandemic, where in 2020,

18. *Id.* at 17-18.

19. *Id.* at 19-20.

20. *Id.* at 21-22.

21. See Turner, *supra* note 1, at 230, 239, 259-60.

22. Prosecutors have several cases that involve many police officers who could testify as witnesses. However, there are many reasons why a prosecutor would willingly choose to call the minimum number needed to meet their burden of proof, or, where no officers are needed to meet that burden, not call any. Prosecutors are most likely to do the former in order to conduct a more efficient trial and not waste the time of the jury. And they might do the latter where juries either have a generally negative impression of police or if the current political climate suggests a negative impression.

23. See STANDARDS FOR CRIM. JUST.: PROSECUTORIAL INVESTIGATIONS §1.3 (AM. BAR ASS'N 2008), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate/.

COVID-19 was the number one cause of death among police officers.²⁴ This fact may impact prosecutors' willingness to ask officers to investigate cases further. Of course, the dangers associated with the pandemic are likely to make prosecutors worry about the health and safety of themselves, of any civilian witnesses involved in the case, and of the jurors. Indeed, such concern can greatly impact a prosecutor's ability to seek justice via a jury trial, especially if such a trial is in person.

IV. VIRTUAL CRIMINAL PROCEEDINGS

As the pandemic has progressed, many courts throughout the country considered jury trials by video conference as a means of maintaining a functioning criminal justice system.²⁵ This solution presents many problems for prosecutors as well. Notably, data has shown that viewers who observe speakers on platforms such as Zoom may incorrectly perceive them as "uninterested, shifty, haughty, servile or guilty."²⁶ In preparation for a jury trial by video conference, prosecutors should share such information with the victim and their witnesses so as to best prepare them for any negative outcome at trial. However, this information may cause an otherwise interested victim to reconsider whether a trial is appropriate, which could turn a case where guilt can be proven beyond a reasonable doubt into one that requires a plea or dismissal.

Prosecutors must also consider the type of jurors who would end up on their jury should the trial be conducted by video conference. At the beginning of the pandemic, polling suggested that a juror who appeared for a pandemic jury trial would be more likely to be white and more conservative, two characteristics that typically favor the prosecution.²⁷ More recently, studies regarding jury trials by video conference have shown that such juries are more likely to be young and more diverse, two characteristics

24. Harmeet Kaur, *Covid-19 Has Killed More Law Enforcement Officers This Year than All Other Causes Combined*, CNN (Sept. 3, 2020, 2:13 PM), <https://www.cnn.com/2020/09/03/us/covid-19-police-officers-deaths-trnd/index.html>.

25. See generally *Court Operations During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/> (June 2020) (illustrating how each state altered its operations in response to the COVID-19 pandemic).

26. Kate Murphy, *Why Zoom Is Terrible*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>.

27. See Mark Curriden, *Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists*, HOUS. CHRON. (July 2, 2020), <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php>.

that typically favor the defense.²⁸ Prosecutors could use this as an opportunity to reevaluate the severity of their plea offers. After all, suggested punishment should be based on what is appropriate, not the longest jail term a jury is willing to give.

Over one year into the pandemic, some states are either considering or enacting measures to make trials by video conference a permanent feature of their criminal justice systems.²⁹ For example, the Texas Legislature recently passed a law that will make criminal jury trials by video conference an option for any future jury trial.³⁰ Interestingly, instead of allowing for a completely virtual jury trial, the new Texas law allows a “judge, party, attorney, witness, court reporter, juror, or any other individual” to appear by video conference.³¹ So, it is technically possible that a criminal jury trial in Texas could include a jury where half of them appear in person while the other half appears by video conference. Empirical studies would need to be performed to determine whether such a jury could properly hear evidence, deliberate, and serve as a fair and impartial jury.³²

Another important and troubling aspect of the Texas law is its potential conflict with other Texas statutes. For example, the new law appears to allow for an entire trial to be conducted by video conference. Yet, section 33.03 of the Texas Code of Criminal Procedure requires the defendant to appear in person through jury selection.³³ Thus, even if all of the parties consented to the defendant appearing virtually during jury selection, such virtual appearance may be a *per se* reversible error. If it is, any conviction would be overturned and a future trial, if any, would potentially suffer from a loss of

28. See, e.g., Shamina Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1004 (2014); See, e.g., Shamina Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1032 (2012); Memorandum from GBAO on Jury Trials in a (Post) Pandemic World – Nat’l Surv. Analysis to Nat’l Ctr. for State Cts. (June 22, 2020), https://www.ncsc.org/_data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf.

29. See, e.g., S.B. 690, 87th Leg., Reg. Sess. (Tex. 2021).

30. *Id.*

31. *Id.* (emphasis added).

32. For additional discussion regarding online juries and jury selection studies, see Jeffrey T. Frederick, *Online Jury Selection: New Tools for Jury Trials*, 51 SW. L. REV. 40 (2021); Karen Lisko, *Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 SW. L. REV. 63 (2021). For further reading on how being remote affects juror’s sense of empathy, see Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20 (2021).

33. See *Morrison v. State*, 480 S.W.3d 647, 657 (Tex. App. 2015) (holding that “as the Texas Court of Criminal Appeals has recognized, although a defendant may waive his Sixth Amendment right to be present in the courtroom virtually any time after a trial commences, under Article 33.03, ‘an accused’s right to be present at his trial is unwaivable until such a time as the jury has been selected.’”) (quoting *Miller v. State*, 692 S.W.2d 88, 89 (Tex. Crim. App. 1985)).

interested witnesses, evidence, and other problems that delays cause on the prosecution of criminal cases.

Yet another cause for concern regarding online jury trials is the technology available for conducting the case. In a recent misdemeanor trial during the pandemic in Houston, the defense team had asked to withdraw as counsel out of concern for their health and safety.³⁴ When that request was denied, they were ultimately forced to try the case by video conference while every other party to the trial appeared in person.³⁵ There, the technology did not allow the defense attorneys to see anyone but themselves on camera.³⁶ As such, they were unable to gauge the reactions of the judge, jury, or prosecutors regarding any of the evidence as they were presenting it.³⁷

V. CONCLUSION

Online jury trial options used during the pandemic created a viable method for prosecutors to seek justice when in-person trials were not feasible. As criminal court systems begin to more widely employ this option, or as legislatures pass laws to make remote jury trials a permanent feature of the criminal justice system, prosecutors must be ready to conduct jury trials for even the most serious offenses in a remote setting. Remote criminal proceedings offer many benefits, namely that they appear to save time and resources for all of the parties involved. These benefits may make remote jury trials particularly appealing. However, prosecutors must also consider the potential costs of proceeding to jury trial by video conference. Prosecutors must be aware of their court's technological capabilities as technological limitations can cause even the strongest of cases to result in an acquittal. Similarly, prosecutors must be certain that when they agree to conduct a jury trial remotely, they are not agreeing to something that, if it results in a conviction, is a *per se* reversible error. They must also prepare their victims and officers for the increased likelihood of a remote jury rendering a verdict of "not guilty" or giving a more lenient punishment.

Despite the new realities of criminal jury trials by video conference, prosecutors should agree to proceed to jury trial by video conference where they can be conducted in a fair and constitutional manner. While remote criminal jury trials currently have several potential constitutional and

34. See Brent Mayr & Sierra Tabone, *Blinded Justice: Lessons Learned from Trying a Case via Zoom*, VOICE FOR THE DEFENSE ONLINE (Jan. 26, 2021), <https://www.voiceforthedefenseonline.com/blinded-justice-lessons-learned-from-trying-a-case-via-zoom/>.

35. *Id.*

36. *Id.*

37. *Id.*

logistical issues, flatly refusing to employ this method could lead to undue delays that prevent victims from seeing the justice system work for them, result in witnesses or evidence becoming unavailable, or prevent justice from being done. With seeking justice as the goal, prosecutors should proceed to trial by video conference, albeit with some caution.