

JUSTICE IN THE PANDEMIC: In Praise of Trial by “In-Person” Jury

by Becky Smith Jones and Randy Sue Pollock



Justice is more than a noun, an ideal, or a lofty goal. It is an active, integrative process that is foundational to democracy. But it can also seem like a moving target, and for some, unfortunately, nothing more than a broken promise.

Some people imagine that justice depends on the actions of judges and lawyers – the paid, professional guardians of the law who interpret, prosecute, and defend legislation and regulations that affect everyone. Judges and lawyers, however, are like a two-legged stool; they can administer the judicial process, but dispute resolution without societal involvement lacks balance. The strength of the U.S. justice system is rooted in citizen oversight and active participation, and what happens in the courtroom is vitally important to what happens in the community.

To the individual who stands accused of a crime, the jury is the great equalizer. Furthermore, protecting every qualified citizen's opportunity to serve as a juror isn't a quaint notion; it's a hard-won principle that must be defended so that truly representative juries will oversee government, give ear and voice to the accused, and reason together to reach decisions based on the law. Citizen involvement is the crucial third element for a balanced, democratic, responsive and responsible system of justice.

Citizens who give up their time to serve as jurors not only fulfill a sacred duty to their communities, they strengthen our society in subtle but important ways. The experience of jury service requires each individual juror to listen and process information—sometimes complex and complicated—in ways that have become challenging for many people.

Jury trials have been put on hold across much of the country for the better part of a year now, since COVID-19 emerged and reordered lives, behaviors, and activities. But when jury trials can safely resume, let us not forget the lessons we have

learned from the most diligent jurors of the past – individuals who taught us by example how to be considerate, informed, and thoughtful in our consumption of information and in our reactions and responses to one another.

Can we remember what that jury experience was like? Judges would consistently remind jurors to keep an open mind and not reach hasty conclusions about a situation or person based on first appearances or negative accusations, for to do so *before* receiving *all* of the facts would be unfair. Stepping into a courtroom as a juror was (and will be again) like entering a cloistered environment, quite the opposite of everyday life. Outside the courtroom, jurors—normal, everyday people—confront the ubiquitous din of dialogue from technology and social media that challenges our focus and encourages us to “see it and say it.” Who can be first on Facebook, Tweet the fastest, or grab the latest headline news from countless sources?

But jurors are asked to step away from that existence – sometimes for just a day, sometimes for weeks. When those days become weeks on end, it takes a great deal of honesty for jurors to maintain their commitment to the process of pursuing justice for all. Jurors also need a great deal of courage when called to serve on a high-profile, criminal trial involving out-of-state defendants with alleged ties to an international drug trafficking cartel.

Such were the facts surrounding the trial of the federal criminal action *United States v. Matthews*, No. 5:17-cr-188-KKC (E.D. Ky. Oct. 5, 2017), and the Kentucky jurors who would not shirk their duty back in 2020 during those early days of a pending pandemic. *Matthews* became noteworthy because it was, at the time, the ONLY federal trial taking place in the entire country due to the pandemic and a nationwide shutdown of all courts. The jurors were unaware of that distinction.

In July 2020, eight of the *Matthews* jurors graciously participated in a Zoom conference with the authors to share their thoughts and experiences of jury service on that historic case. This is their inspiring story, written with the permission of U.S. District Judge Karen Caldwell who presided over the trial.

The Case Background

On April 21, 2017, a private jet landed at the TAC Air terminal in Lexington, Kentucky. Homeland Security agents and Kentucky State Police detectives were waiting. Agents seized 40 pounds of methamphetamine and 80 bricks of cocaine and arrested three men on the spot.¹ More arrests would follow from the event at Blue Grass Airport that turned out to be one of the largest drug seizures in Kentucky history.²

Fast forward to early 2020, the anticipated year of trial and the unanticipated arrival of the novel coronavirus in the United States. The first case of the coronavirus in this country reportedly occurred on January 19, 2020 in Washington State, according to the New England Journal of Medicine.³ On the same day that first case was reported, January 31, the U.S. Secretary of Health and Human Services declared a national public health emergency.⁴ The coronavirus, however, did not present any scheduling concerns for Kentucky's courts at that time.

Jury Selection

On February 24, 2020, Judge Caldwell began the process of jury selection in the trial of *Matthews* in Lexington, Kentucky. The parties had agreed to a six-week trial schedule which should have taken them to the first week of April. Given the length of anticipated service, Judge Caldwell initially summoned 170 jurors. Through the use of a mutually agreed upon Supplemental Juror Questionnaire (SJQ), the list of 170 possible jurors was culled to a panel of 70 who would make up the venire.⁵

Jury selection was completed in one day. Sixteen jurors were seated – twelve plus four alternates. Jurors expressed a range of emotions to being selected.

- **MAB:** "I knew I was gonna get picked. I just had a feeling that said I'm gonna be on this jury."
- **GJ:** "I knew I'd get picked. I just had that feeling that I was gonna get called for this."
- **SW:** "Oh boy! That was my initial reaction. It was the first time ever to be summoned, first time ever to serve. I felt like it was answering a calling and when my number got called I was like, alright, here we go! It was like stepping up to bat."
- **JM:** "I was kind of excited! My wife had done jury duty; my parents had done jury duty, and it was one of those things that I wanted to do."

- **TL:** "Deer in the headlights. This was a complete unknown for me because I'd never been through that process before."
- **BM:** "I thought they'd finished calling all the numbers but then they called mine. I was deflated. I'd served on many state juries and grand jury but never on a Federal case."
- **EW:** "I was surprised but also glad. The reality, though, that it was gonna be every day for two months didn't sink in with me until the second day."

The Trial Begins... and the Pandemic Arrives

The trial began in earnest on February 25, 2020 as attorneys for the Government and the four defendants presented their opening statements, and the Government launched its case-in-chief.

Just 10 days into the trial, on Friday, March 6, Kentucky learned about the state's first confirmed COVID-19 patient, and Governor Beshear declared a State of Emergency in the Commonwealth.⁶ Still, the trial carried on even as the Beshear administration expanded statewide efforts to control the spread of the coronavirus.

On March 11, Governor Beshear recommended social distancing for everyone and advised that all community gatherings be cancelled or postponed. On March 13, Governor Beshear recommended that all school superintendents in Kentucky cease in-person classes for an extended period of time beginning Monday, March 16.⁷ But the trial, then wrapping up its third week, continued.

- **GJ:** "The attorney I work for kept asking me if I was still supposed to show up because everything was shutting down. We just stuck together. We were in it for the long haul, and as long as Judge Caldwell said we were going forward, that was what we were there to do."
- **SC:** "I'm a nurse and I usually work weekends, but we were supposed to shelter at home outside the courtroom. At first my boss thought I was lying because she said nobody's doin' jury duty right now. So, Judge Caldwell had to issue two or three orders to my boss saying that I couldn't go to work on the weekends anymore because I was doing jury duty during the week and I had to shelter at home on the weekends."

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Reactions to Trial Testimony Following Shelter-In-Place Orders

Presenting witness testimony by video deposition testimony isn't unusual, but livestreaming witnesses to a jury hasn't been quite as popular. The pandemic quickly changed that, and the livestream witness became a regular feature in the courtroom. Here's how the jurors reacted to livestreamed testimony.

- **JM:** "I thought it was very different because some people were (testifying) at their homes, some went to a different place and it was very professional, and some were about half-professional. It gave a different flavor to the testimony."
- **MAB:** "I agree. When someone's testifying in a Lululemon yoga shirt . . . the credibility went out the window."
- **BM:** "I thought many of the defense witnesses came across as very professional on camera, but some didn't. Some people might feel like they don't have to dress up if they're not going out, but (some of the defense witnesses) put the appearance out there that they were right in the courtroom."
- **SW:** "Knowing what we were going through – the travel restrictions, the shelter-in-place, the gravity of the situation – we understood there was a need to do that (livestream witnesses). Given everything that's going on, what a great thing it was to be able to do those kinds of depositions. We were given instructions to treat those just like any other witness we heard in person. I thought it was a good instance of using technology."
- **TL:** "The livestreamed testimony and video depositions were equally effective (as the live witnesses). They were fine."
- **EW:** "There were livestreamed witnesses that I thought weren't effective but it was more because of the lack of substance in their testimony. I don't think it made a difference that they were livestreamed instead of in-person."

Closing Arguments and Deliberations

Seven weeks after being selected to serve, jurors were settled in for closing arguments on April 13 and 14. They retired to deliberate on Tuesday afternoon, April 14, and deliberate they did...for 8½ more days, including Saturday the 18. So how did they engage with each other in the jury room? Did the coronavirus pandemic create dissension or add an

extra level of stress to the trial experience? Almost incredibly, the jurors deliberated with a level of respect toward one another that seemed to be missing in the general public during those days.⁸

- **BM:** "Deliberations became very heated to the point that people were getting sick, blood pressure was going up and tears were being shed. But we had enough respect, concern, and admiration for each other that we knew we had a job to do and it did not affect how we felt about each other."
- **EW:** "It was never personal."
- **TL:** "We did our job the best we could with the evidence in front of us."

One might wonder if jurors' personal political positions ever became a topic of discussion or reference during their extensive deliberations.

- **MAB:** "For me it was only in telling others about myself because I'm involved politically here. It's part of who I am. Politics never got involved with anything having to do with the case."
- **GJ:** "I don't recall having any political discussions at all."
- **SW:** "I think that's what made us feel like a family, realizing that all of us had different backgrounds, different passions, different beliefs and how we approached this. Understanding that was like how it is with siblings: you're not gonna agree on 100% of everything, so there's gonna be times where you agree and times where you disagree. But that's okay because we're here to do a job, and we kept going back to that purpose, that mission that we were all on together."

On April 23 at 5:02 pm, the jury announced that they had reached a verdict as to all defendants. The lone federal pandemic trial had come to a conclusion. The jury found three defendants not guilty and one defendant guilty. The jurors disclosed that finding one of the defendants "not guilty" had been an easy decision for them. They reached that verdict within one hour on the first vote they took. Evaluating the evidence as to the remaining defendants, however, greatly challenged them. But, they wouldn't give up or give in until they were all satisfied with the final decision. The jurors did their job.

Alternative Jury Option 1

In post-verdict interviews, jurors were asked to imagine what it might be like to serve as a juror remotely by signing in on a computer from home, via ZOOM conference, for example. Many thought that scenario would not be effective or fair to the disputing parties, especially to criminal defendants.

- **MAB:** "I watched witnesses from the moment they came through the courtroom door, their mannerisms, how they dressed, how they acted, when they took their oath, when they walked up to the stand, body language. I was really looking at them. And then did they address us? Did they look us in the eye? That's an important element, and you're gonna be missing

that. I understand remote testimony but there's a huge component to in-courtroom testimony."

- **GJ:** "Absolutely!" (agreeing with MAB)
- **SW:** "I agree with MAB and GJ. Also, I think when it comes to criminal cases, I would want them to have every opportunity to have a fair trial and the process to be as consistent as possible. JM is absolutely right: it's easy to get distracted in these kinds of environments and we want to make sure that if someone is participating as a juror, they're giving their 100% dedication and focus to the information at hand. A lot of that gets lost in translation with ZOOM meetings."

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