CRIMINAL

The Perils of Criminal Trials During Covid-19

By Peter H. Mayer

In this era of the coronavirus pandemic it is of paramount importance that we do not undermine the Constitutional rights guaranteed to those accused of criminal conduct for the sake of expediency. These issues are about to crystallize here in Suffolk County as our jurisdiction has been chosen as one of three counties in the state to commence criminal jury trials in September. Given the continued presence of the virus in our daily lives and the myriad challenges presented by Covid-19, the criminally accused will be forced to choose between an arguably speedier but constitutionally light trial, or to try to wait it out so as to ensure his or her rights to a full and fair trial containing all the safeguards that are associated with our criminal process historically.

Notably, the push to reopen the courts could become a justification for across the board limitations on the accused's rights to cross examination and confrontation, effective assistance of counsel and due process. Counsel must object in all cases where there is the slightest compromise of these constitutionally protected rights. Failure to do so not only precludes preservation of the issue for appeal but also runs the risk of creating a "new normal" that subverts the constitution by allowing criminal proceedings that fall short of the constitutional and statutory protections intended to ensure fair trials.

The confrontation clause guaranteed by the 6th Amendment to the constitution together with its New York state constitutional counterpart includes within it the right of cross examination, the right to have the jury observe the demeanor of a witness, and the right to a face to face encounter with his or her accuser. There is no doubt that commencing jury trials now presents new challenges to constitutionally guaranteed rights of cross examination as well as the basic fairness, safety and due process for all concerned.

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Consider the questions of masks. Relevant to this analysis is a United States Supreme Court case authored by Justice Scalia who wrote that the defendant's right to a face to face encounter with an adversary's witness is at the "core" of a defendant's "confrontation rights, as that right serves to ensure the integrity of the fact-finding process." (*Coy v. Iowa*, 487 U.S. 1012, 108 Sup Ct. 2798 [1988]). How does a lawyer or, just as importantly, the fact finders, pick up the smirks, scowls and other non-verbal cues of the witness when he or she is answering questions on direct and cross examination with a mask?

Indeed, how is a lawyer to pick a jury if while he is questioning juror number one he can't pick up a scowl of juror number 11 because they are all masked. All trial lawyers are doing this when questioning unmasked jurors as they are skilled in seeing the reactions of other jurors when questioning one particular juror. Thus, the right to confrontation as well as the right to conduct a voir dire that ensures a fair jury is compromised with the presence of masks and is, therefore, an unconstitutional condition that should never be allowed. The same problem exists if jurors are placed throughout the courtroom in places that preclude the observation of defense counsel and the defendant.

These principles were crystallized in *People v. Antommarchi* (80 NY 2d 247[1992]), a well-recognized case among those who practice criminal law. In the matter, the judge questioned several jurors at the sidebar while the defendant remained a few feet away. On appeal, the defendant claimed that his absence from the side bar conferences deprived him of his right to be present at the trial. The Court of Appeals agreed saying: "Defendants are entitled to hear questions intended to search out a juror's bias, hostility, or predisposition to believe or discredit the testimony of prospective witnesses and the venire person's answers so that they have the opportunity to assess the juror's *facial expressions, demeanor and other subliminal responses*."

Moreover, the ability to observe the jury in its entirety during each question on direct and cross examination is fundamental to due process. Indeed, there a myriad of questions that will arise with the imposition of any mitigation plans imposed on those in the courtroom. The constitution guarantees a public trial. The question arises as to which members of the public will be allowed to attend. Any defendant with supportive family members will want them present as will family members of people testifying for the prosecution. How these issues will be resolved is still an open question.

Perhaps more important than all of these issues is the fundamental conflict that has impaired the required robust relationship that the rules of professional responsibility require for all defense counsel. This includes the requirement that counsel have sufficient opportunities to confer with the client to review evidence, discuss the charges, potential defenses as well as the need for specific areas of pretrial investigation that should be pursued. Any limitation or accommodation necessitated to permit the continuation of court operations must not impede counsel's obligations under the relevant rules of professional conduct. Conflict free representation is not possible when counsel is placed at risk of infection and fear of transmission to family and loved ones. This is of concern for those who are representing defendants who are detained. Many lawyers are experiencing the chilling effect that comes from the fear of infection when going into the correctional facility which in turn causes them to hesitate to visit their clients. This fear can fatally undermine the trust necessary to listen to advice and make intelligent and informed choices, including, but not limited to whether to go to trial or plead guilty. This is especially significant now with commencement of criminal trials less than a month away. Proper representation is not possible where defense counsel and their families and staff are at risk of infection. Fear of infection during attorney-client meetings creates a conflict with the duty of zealous advocacy required by the rules of professional responsibility.

Given the nature of the disease and the manner of transmission, criminal jury trials present a serious risk to all participants. The courtrooms here in Suffolk County for both the District and all Superior Criminal courts are either without windows or have windows incapable of being opened. We know that transmission occurs through droplets emitted by individuals by breathing, talking, coughing, or sneezing. Participants in criminal trials speak loudly as a matter of course which only enhances the possibility of transmitting the virus.

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CIVIL RIGHTS

Focus on FOIL: Police Misconduct Records

By Cory Morris

For four decades, a civil rights law protected police misconduct records from public disclosure. There was no debate that this law applied to misconduct records or that police are public officers, literally paid by the people who sought such records and accountability under the Public Officers Law, Sections 84-89, otherwise known as the Freedom of Information Law or FOIL.

FOIL is a statutory civil right. "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy."[1] An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

Repeal of Civil Rights Law § 50-a

Governor Andrew Cuomo signed into law the repeal of Civil Rights Law Section 50-a, that "up until now has allowed law enforcement to shield police misconduct records from the public."[2] "New York's 50-a is one of the strongest police secrecy laws in the country, the spoils of the unfettered political power New York police unions have enjoyed."[3] In the February, 2019, edition of The Suffolk Lawyer, the Focus on FOIL section discussed body camera and dashboard camera footage along with the Committee on Open Government position that there should be the outright repeal of Civil Rights Law Section 50-a ("50-a"). It looks like that suggestion under former Executive Director Robert Freeman has become a reality for New Yorkers.

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In the midst of national demonstration and protest, the change in the law amends FOIL, the Public Officers Law, by adding multiple clauses to require a law enforcement agency to redact any portion of a record containing personal medical information, the use of an employee assistance program, social security number, home addresses, or personal information.[4] Police agencies may utilize other exemptions, such as Public Officers Law § 87(2)(b), to withhold records on the basis of an invasion of privacy.[5] Other exemptions may very well apply but police misconduct records should now be accessible. As the head of one local police force lamented, this means that we may even learn when an officer showed up to the job unshaven.

Moving forward

On one side, social justice advocates celebrate the ability to hold public officers accountable while, on the other, police, politicians and law and order is touted as being sacrificed by the repeal of this 50-a. Policing is a tough job, a needed vocation unique from others, and is currently under enormous public scrutiny. Some police agencies have refused to comply with the repeal of the law and others have embraced the change in releasing these records to the public without delay. Some agencies voluntarily released records that were subject to 50-a without a FOIL request. Lost in this debate as to these records is that both sides agree that nobody wants another death like George Floyd or another police officer like Derek Chauvin.[6] The repeal of Section 50-a is a positive step towards preventing another similar occurrence in New York state.

In collaboration with MuckRock,[7] requests for preservation and records of police officer misconduct were sent to nearly every police agency within New York state. The agency responses varied from there being no records of misconduct to responses that the law did not apply retroactively. One New York State Senator, George Borrello, made press releases[8] both before and after becoming aware of a FOIL request sent by MuckRock to the Town of Cuba, New York. Sen. Borrello stated that the constitution was violated and there was no discourse on a controversial statute for which the Committee on Open Government repeatedly condemned as antithetical to free and open government. Not just discussed, the problems with Civil Rights Law § 50-A were delineated in written reports and were far from knee-jerk reactions well before Sen. Borello's 2019 election win.

Since the repeal and our collaboration with MuckRock, I had the pleasure of speaking to various police agencies, some that embraced the idea that there would be a watchful eye

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on Feb. 23, 2002, the plaintiff's complaint was likewise dismissed, as it was filed on March 19, 2002 and not eligible for any time extension at all (*Scheja v. Sosa*, 44 AD2d 410 [2nd Dept. 2004]). What tripped the plaintiffs up in *Randolph* and *Scheja* was a misunderstanding of the difference between a "toll" and an "extension." Gov. Pataki's Executive Orders did not add a 58-days toll to everyone's statutes of limitations. Rather, it merely provided that if lawyers or litigants affected by the attacks had a limitations period expiring between Sept. 11 and Nov. 8, 2001, the plaintiffs' time to commence their actions was "extended" to a hard deadline of Nov. 8, 2001.

One may wonder whether CPLR 209 needs to be re-tooled to better protect the rights of litigants given the nature of today's security threats. That said, the Executive Law and Executive Orders that filled the void in 2001 appeared again this year in response to Covid-19. Prayerfully, we will not need to see them used in the future again.

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Experts have validated that while anyone can become seriously ill or die from contracting Covid-19, it is irrefutable that that there is an extremely high morbidity rate for older people and people with a wide range of underlying conditions including hypertension, diabetes, asthma, heart conditions and anyone who is immunocompromised. The present variables to be considered in selecting juries in criminal cases here in New York state require consideration of determining how many jurors the court needs to call as it is axiomatic that there will be increases in deferral requests and absentees. Certainly, those with co-morbidities cannot and will not want to participate even though they would have been qualified prior to the onset of the pandemic. We know that preeminent infectious disease and epidemiological experts have opined that the risk of person-to-person transmission in the trial courtroom setting remains high, and that in addition to the risk of exposure, many people suffer from "Covid panic." Measures such as social distancing and plexiglass dividers cannot overcome normal atmospheric transmission of the virus in settings typical of trials which, in many cases, form the basis of the public's fear of attendance.

The New York State Commission that authored recommendations on that which is to be considered before commencing jury trials states that the courts should "consider a more liberal deferral policy" to include a one-time deferral without any need of an explanation and include jurors in high risk categories such as "senior citizens, those with respiratory conditions, diabetes, and who provide appropriate documentation." They also recommend a more "forgiving policy" for jurors who fail to attend. Vulnerable subsets of people based on medical and/or economic reasons are likely to be underrepresented in these jury pools. This includes elderly persons, immunocompromised persons and racial and ethnic minorities who have been disproportionately affected by the virus. This policy will create a jury selection process that will preclude the attendance of people otherwise qualified who have a well-grounded fear, panic and uncertainty regarding the possibility of infection in the closed in setting of a courtroom, irrespective of any mitigation measures that have been imposed.

The process will also enhance the likelihood of an increased percentage of respondents who believe the entire pandemic is a hoax. Although nothing precludes people of this persuasion from serving, it justifies the conclusion that the accused will be deprived of a venire that represents a fair cross section of the community

The process will also enhance the likelihood of an increased percentage of respondents who believe the entire pandemic is a hoax. Although nothing precludes people of this persuasion from serving, it justifies the conclusion that the accused will be deprived of a venire that represents a fair cross section of the community. Moreover, recent studies suggest that the hardship is disproportionately experienced by women who are more likely to have lost their jobs and are more likely to be caring for children, elders or the sick. For these reasons, the defendant's right to a venire that properly represents a fair cross section of the community will be precluded. This constitutes a violation of the defendant's constitutionally protected right to a jury pool properly reflecting a proportional representation of all citizens of Suffolk County, a necessary ingredient in obtaining an impartial jury. (See *Taylor v. Louisiana*, 419 U.S. 522 [1975], *Holland v. Illinois* 493 U.S. [1990])

Finally, any combination of changes put in effect as an alternative to what we have heretofore been accustomed to in criminal jury trials and guaranteed by our constitution must not place an accused in a position in which he or she must decide between one set of rights or another. An accused who is detained should not be in the position of having to choose between what is arguably a "constitutionally light trial" or pleading guilty. Such a system will inevitably lead to coerced plea bargains without the safeguards that have been the traditional hallmarks of our criminal justice system and to which all lawyers have a sworn duty to uphold.

Note: Peter H. Mayer is retired from the bench where he served as a Justice of the Supreme Court. Prior to ascending the bench, he specialized in defending criminal cases on the federal and state level in Suffolk County and throughout the country. He served in the Suffolk County District Attorney's Office for over 10 years as a trial assistant, as Bureau Chief of the Major Crime Bureau as well as serving as an Assistant in the Suffolk County Attorney's Office defending civil rights cases. He is also a member of the Colorado state bar. He is presently in private practice primarily specializing in the defense of criminal and civil cases. He also serves as an advisor to the Assigned Counsel Program of Suffolk County.

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from the public while others never even heard of FOIL.

What good will this information serve?

To answer NYS State Senator George M. Borrello, this allows for meaningful opportunity for the accused to obtain, among other things, exculpatory information, name police officers, establish a pattern and practice of civil rights violations and address a police department's failure to train its officers. It also helps the public help good police officers, the majority of police officers, by maintaining a watchful eye over those who are trusted to perform police work. It helps prevent massive municipal payouts borne by the taxpayer for police misconduct, something we still feel the pain of here in Suffolk County, New York.[9]

Already municipal entities are being forewarned by prominent defense firms that: "… this law applies to law enforcement agencies at all municipal levels (state, city, village and/or town) such as a sheriff's department, a department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or even a force of local individuals employed as firefighters or paramedics."[10]

If the records are open under the Public Officers Law, such records should be accessible in our various courts.[11] Civil Rights Plaintiffs can easier access misconduct records in seeking civil accountability.[12] Law enforcement and public officials can easier make decisions, ascertain data and avoid tragic deaths like that of JoAnne Bird.[13] To highlight that Nassau County case, a publicly elected official "went on TV to discuss aspects of an internal police investigation that led to the settlement of a $7.7 million civil rights lawsuit, but insisted he did not violate the spirit of a federal judge's gag order not to discuss the case." Rather than worry about violating gag orders based on 50-a, public officials can explain civilian deaths and millions of dollars in payout related to police misconduct in New York state now that this law is repealed.

The repeal of Civil Rights Law § 50-a helps good police do their job by allowing the public to help public officials excise bad police who were, previously, protected under a shroud of secrecy for their misconduct. While our nation reels from various deaths at the hands of certain individual police officers, this light, the openness of government, will hopefully bring both sides together to improve our democratic system of government.

In the words of Dr. Martin Luther King, Jr., "Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that."

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1. *Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 (2005) (internal quotation marks and citation omitted)).
2. Innocence Staff, *In a Historic Victory, Governor Cuomo Signs Repeal of 50-A Into Law*, Innocence Project (June 9, 2020), https://bit.ly/2EPPXfb.
3. Mara Gay, *Good Riddance to One of America's Strongest Police Secrecy Laws*, NY Times (June 9, 2020), https://nyti.ms/3bewxwk.
4. See Public Officers Law § 87(4).
5. See, e.g., *Carpenter v. US*, 138 S. Ct. 2206, 585 U.S. 2018, 201 L. Ed. 2d 507 (2018).
6. Scottie Andrew, *Derek Chauvin: What we know about the former officer charged in George Floyd's death*, CNN (June 1, 2020), https://cnn.it/3hKPx8r.
7. Beryl Lipton *New York repealed Section 50-a last week. Now it's time to get the records, MuckRock* (June 16, 2020), https://bit.ly/3gKGseu.
8. NYS Senate, *Statement by Senator Borrello on the Unintended Consequences of the Repeal of 50-A* , NYS State Senator George M. Borrello (June 22, 2020), https://bit.ly/2YJd7ej; see also NYS Senate, *Senator Borrello's Comments on the Senate Floor on the Repeal of 50-a of the Civil Rights Law*, NYS State Senator George M. Borrello (June 10, 2020), available at: https://bit.ly/34IfZfd.
9. Michael O'Keefe, *Suffolk sues Spota, McPartland and Burke for back pay and benefits*, Newsday (March 8, 2020), https://nwsdy.li/34MT6av.
10. Terrance P. Flynn, Patrick M. Malgieri, Michael V. Curti, Christian R. Flemming, *Repeal of Civil Rights Law 50-a Makes Police Disciplinary Records Public Through FOIL*, Harris Beach (June 12, 2020), https://bit.ly/3jlPT5E.
11. *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (holding defendants could not reasonably expect document to remain confidential when it was "arguably" subject to state Open Records Act).
12. See *Hayes v. City of New York*, 2020 NY Slip Op 30672 (NYC Sup. Ct. 2020).
13. See Frank Eltman, *Judge Mulls Contempt Charge vs. LI Lawmaker*, Long Island Press (May 31, 2012) https://bit.ly/31IBPxl.