UNITED STATES V. ALLEN AND JUDICIAL REVIEW OF EARLY PANDEMIC COURTROOM CLOSURES

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Trial court judges in 2020 were faced with a remarkable new problem. They were asked to accommodate both public health concerns (preventing trial participants, jurors, and spectators from contracting COVID-19) and criminal defendants' Sixth Amendment right to a public trial. As courts of appeal begin their review of cases alleging violations of the Sixth Amendment's right to a public trial arising during the early pandemic, they should be careful to consider conditions as they were at the time. We have learned much about COVID-19 and its management since then. But reviewing courts should not demand that trial courts possess public health expertise (or information) they did not have in 2020.

On May 16, 2022, the Ninth Circuit issued its decision in *United States v. Allen*,[2] ordering a retrial for a defendant whose suppression hearing and trial were closed to the public in September of 2020. The trial court had closed the proceeding during the height of the COVID pandemic to assure the health of trial participants and would-be spectators.[3] The trial court permitted an audio feed to be made available to the public.[4] However, the court did not provide a video feed and did not permit spectators into the room or into other rooms in the courthouse for purposes of receiving a video feed.[5]

The Ninth Circuit determined that the courtroom closure violated the defendant's Sixth Amendment right to a public trial.[6] In making the determination, the court applied the test set forth by the Supreme Court in *Waller v. Georgia*.[7] There, the Court prescribed a four-part test to determine whether a closure complies with the Sixth Amendment:

> [1] the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced, [2] the

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[2] ___F.4th___, No. 21-10060, 2022 WL 1532371 (9th Cir. May 16, 2022).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] 467 U.S. 39 (1984).

> closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.[8]

The Ninth Circuit acknowledged that the trial court had an overriding interest in keeping participants safe, citing *Roman Cath. Diocese of Brooklyn v. Cuomo*,[9] which had held that "[s]temming the spread of COVID–19 is unquestionably a compelling interest."[10]

The Ninth Circuit concluded that the trial court had failed, however, to narrowly tailor the closure, making it "broader than necessary."[11] The court noted that other courts in the late 2020 period had occasionally permitted some spectators in courtrooms and had opened other rooms in courthouses for video feeds of proceedings.[12] The Ninth Circuit asserted that "[h]ere the district court cannot show that allowing a limited number of members of the public to view the trial in the courtroom, or via a live-streamed video in a different room, would imperil public health."[13] As a result, the Ninth Circuit held that the trial court failed to pass the *Waller* test and violated the defendant's Sixth Amendment public trial right.[14]

Near the beginning of the pandemic, in April of 2020, I wrote a short article on the right to a public trial during the pandemic.[15] At the time, nationwide lockdowns were only a few weeks old. The mechanics of COVID transmission were poorly understood. The effects of the disease were little known, but we were hearing about a great number of deaths.

As the Supreme Court would acknowledge months later, I asserted that preventing COVID transmission was an overriding/compelling

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[8] *Id.* at 47.
[9] 141 S. Ct. 63 (2020). The Court determined that an attendance restriction on New York churches was not narrowly tailored enough to satisfy the Free Exercise clause, writing that "[i]t is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows." This reasoning is not easily transferred to a courtroom setting, which is likely – probably always – much smaller than a church or synagogue, and necessarily includes many trial participants – judge and staff, the parties, a jury.
[10] *Id.* at 67.
[11] *Allen*, 2022 WL 1532371, at *6–7.
[12] *Id.* at *18.
[13] *Id.* at *7.
[14] *Waller*, 467 U.S. at 47.
[15] Stephen E. Smith, *The Right to A Public Trial in the Time of Covid-19*, 77 WASH. & LEE L. REV. ONLINE 1 (2020).

interest.[16] Regarding tailoring of the closure, I concluded that there was little else a court could do, *given what we knew about the virus at the time*. Recall that at the beginning of the pandemic, hand-washing was perhaps the most highly recommended public health measure.[17] The CDC, early on, did not recommend masks,[18] and the Surgeon General recommended *not* using them.[19] We were only beginning to understand the virus.

In my previous article, I wrote that "[a] courtroom is a physical space, with physical limits. It is measurable in square feet. If a group of people wants to honor the social distancing regimen while occupying that space, it can do so only in certain numbers. This requires the exclusion of people beyond those numbers."[20] I further wrote, considering possible alternatives, that, because judges "are not situated to engage in medical testing" and given "the practical restraints on a judge's ability to reduce the possibility of disease being spread in her courtroom, closure, complete or partial, is the only tool at her disposal."[21]

My conclusions on tailoring were criticized in another article for failing to be open to possible alternatives.[22] That article argued that "[t]his past summer, courts began holding trials in locations ranging from ballrooms to county fairgrounds."[23] But it is hard to critique a judge for failing to have the imagination or logistical wherewithal to conceive of those options. The article also relies on judges to be aware of and responsive to public health details that can be difficult to come by. It notes that "[c]ommunity spread of COVID-19 has fluctuated greatly over the past two years" and that during the course of the pandemic there have been "times when local conditions have

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[16] *Id.* at 6.
[17] Subsequently, we have learned it is not especially helpful. *See* James Tapper, *Does Handwashing Stem the Transmission of Covid-19?,* THE GUARDIAN (Feb. 14, 2021, 5:00 AM), https://www.theguardian.com/world/2021/feb/14/qa-does-handwashing-stem-the-transmission-of-covid-19.
[18] @CDCgov, TWITTER (Feb. 27, 2020), https://twitter.com/cdcgov/status/1233134710638825473.
[19] Deborah Netburn, *A Timeline of the CDC's Advice on Face Masks*, L.A. TIMES (July 27, 2021, 4:47 PM), https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic.
[20] Smith, *supra* note 13, at 10.
[21] *Id.*
[22] Maya Chaudhuri, *Using Waller to Uphold First and Sixth Amendment Rights Throughout the Covid-19 Pandemic*, 79 WASH. & LEE L. REV. ONLINE 13 (2022).
[23] *Id.* at 20–21.

made it appropriate to allow a limited number of members of the public to be physically present."[24]

I take issue with this assertion and with the Ninth Circuit's similar conclusion that the trial court in *Allen* had a responsibility to "show [that alternatives] would imperil public health."[25] My issue is not with the bare statements that health may not be at risk in all cases – it may not be – but that trial courts can or should be making those determinations in a way subject to demanding scrutiny. Judges are not public health authorities. They are, in part, courtroom managers. They should be attentive to the public health situation on the ground but need to be given some leeway in making their determinations as non-experts. The emergent, makeshift public health determinations of a 2020 trial court judge seem like a poor subject for the application of exacting scrutiny.

So where were we in terms of public health in September of 2020, the month of the *Allen* trial, when this district judge was making this call? What was on the mind of a judge trying to determine how to balance public health and public trial concerns? Here are some things that were true at the time:

- On August 15, 2020, the WHO reported a record number of COVID cases worldwide.[26]
- On September 21, 2020, the CDC published – then subsequently removed – guidance about aerosol transmission of the virus. [27] This indicates that the scientists tasked with controlling the outbreak were themselves unsure of the mechanism of COVID transmission.
- In September, the U.S. surpassed seven million cases.[28]

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[24] *Id.* at 21.
[25] *Allen*, 2022 WL 153271, at *7.
[26] WORLD HEALTH ORG., CORONAVIRUS DISEASE (COVID-19) 3 (2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200815-covid-19-sitrep-208.pdf?sfvrsn=9dc4e959_2.
[27] *CDC Publishes — Then Withdraws — Guidance on Aerosol Spread of Coronavirus*, NAT'L PUB. RADIO, https://www.npr.org/sections/coronavirus-live-updates/2020/09/21/915351325/cdc-publishes-then-withdraws-guidance-on-aerosol-spread-of-coronavirus (Sept. 21, 2020, 6:03 PM).
[28] Brianna Ehley, *U.S. Coronavirus Case Count Passes 7 Million*, POLITICO (Sept. 25, 2020, 3:20 PM), https://www.politico.com/news/2020/09/25/coronavirus-cases-7-million-421861.

- In September, the CDC continued its order suspending the operation of cruise ships to prevent COVID transmission.[29]
- Social distancing was, and is still, recommended to reduce transmission risks. [30]
- The self-testing we are all now familiar with was not approved until November 17, 2020.[31]
- Self-testing was not available until months later.[32]
- Before these tests became available, the only tests were PCR tests performed by qualified laboratories.[33]
- The possibility of monoclonal antibody treatments was not studied until June 2020, and not approved until November 2020.[34]
- Vaccines were not authorized in the U.S. until December 2020/January 2021.[35]
- To this day, the Supreme Court is closed to the public.[36]

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[29] *Cruise Ship No Sail Order Extended Through October 31, 2020*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2020), https://www.cdc.gov/media/releases/2020/s0930-no-sail-order.html.

[30] *See* Caitlin O'Kane, *CDC Recommends Virtual Thanksgiving to Lessen Risk of COVID-19 Spreading*, CBS NEWS, https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted (Sept. 28, 2020, 7:45 PM) ("The CDC recommends going to pumpkin patches or orchards where hand sanitizer, social distancing and wearing masks is encouraged or enforced."); *Coronavirus Disease (COVID-19): How is it Transmitted?*, WORLD HEALTH ORG., https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted (Dec. 23, 2021).

[31] *Coronavirus (COVID-19) Update: FDA Authorizes First COVID-19 Test for Self-Testing at Home*, U.S. FOOD & DRUG ADMIN. (Nov. 17, 2020), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-first-covid-19-test-self-testing-home.

[32] Rob Stein, *FDA Authorizes 1st Home Coronavirus Test That Doesn't Require a Prescription*, NAT'L PUB. RADIO (Dec. 15, 2020, 1252 PM), https://www.npr.org/sections/health-shots/2020/12/15/946692950/fda-authorizes-first-home-coronavirus-test-that-doesnt-require-a-prescription.

[33] *FDA Takes Significant Step in Coronavirus Response Efforts, Issues Emergency Use Authorization for the First 2019 Novel Coronavirus Diagnostic*, U.S. FOOD & DRUG ADMIN. (Feb. 4, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-significant-step-coronavirus-response-efforts-issues-emergency-use-authorization-first.

[34] Thiago Carvalho, Florian Krammer & Akiko Iwasaki, *The First 12 Months of COVID-19: A Timeline of Immunological Insights*, NATURE (Mar. 15, 2021), https://www.nature.com/articles/s41577-021-00522-1.

[35] *Id.*

[36] *Press Release Regarding April Oral Argument Session*, U.S. SUP. CT. (Apr. 11, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-11-22.

I could go on. There were (and may still be) many reasons for judges to be very cautious about exposing themselves, their staffs, parties, juries, and others to the risks of a dangerous disease. Courtroom closure was a reasonable response to an emergent crisis.

This does not mean that the COVID-19 pandemic creates a general "exception" to the right to a public trial. Today, with the assistance of federal, state, county, and city public health officials, trial courts can make nuanced assessments of what a courtroom space can bear, without exposing anyone to unnecessary risk. Given what we now know about transmission, and with the benefits of masking, some degree of public access to the courtroom can likely be made available. Trial court judges are better informed.

It is asking too much of trial courts, however, that in 2020, at the height of transmission and confusion about a worldwide pandemic, they should have themselves been public health experts carefully weighing how many people could enter their courtrooms. The *Allen* court suggests various alternatives to closure that could have been chosen,[37] but it is unclear whether any particular court should have been aware of those alternatives. Even less clear is what combination of those prophylactic options a *judge*, rather than a public health official, should have chosen to maximize both public health and public trial interests. For instance, *Allen* points to temperature checks to screen out the sick, thereby obviating the need for a courtroom closure.[38] But these temperature checks have been called ineffective.[39] It cannot be constitutionally inadequate to fail to consider an ineffective alternative to closure. Ultimately, however, my point is not that one public health option is better than another, but that judicial determinations about something like this need to be assessed in light of the knowledge of judges at the time.

There is no history to draw on of courtroom closures implemented for public health reasons.[40] Courtroom closures are typically ordered for reasons

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[37] *Allen*, 2022 WL 1532371, at *7.
[38] *Id.*
[39] *See* William F. Wright, Philip A. Mackowiak, *Why Temperature Screening for Coronavirus Disease 2019 With Noncontact Infrared Thermometers Does Not Work*, OPEN F. INFECTIOUS DISEASES, Jan. 2021, at 1.
[40] Little history, anyway – an Ohio case arising during the "Spanish Flu" pandemic of the early 20th Century concluded that closure was within the judge's "police power" and that it was the judge's "duty for the promotion of public health and welfare to proceed with the trial [closure] as he did." Colletti v. State, 12 Ohio App. 104, 122 (Ohio Ct. App. 1919); *see also* United Press Ass'ns v. Valente, 281 A.D. 395, 403 (N.Y. App. Div. 1st Dept.

including, but not limited to, secrecy[41] and privacy.[42] These are things a judge is qualified to evaluate for necessity, or for likelihood of prejudice. Health measures are different in kind. The Supreme Court's opinion in *Presley v. Georgia*[43] provides an example of the type of alternative-consideration a trial judge might normally engage in. In *Presley*, the trial judge had closed the courtroom to the public because there "just wasn't space," and because he worried that the defendant's uncle, the lone spectator attending the trial, might make prejudicial remarks that the close-quarters jurors might hear.[44] The Court indicated that it could easily conceive alternatives to closure: "some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members."[45] These are courtroom management decisions, not medical ones. They can be made by simply looking around the courtroom. The prevention of virus transmission is not subject to the same sort of practical judgment we would reasonably expect from a trial judge.

There is no indication that any trial court imposing a COVID closure in 2020 did so for any nefarious, rights-denying purpose.[46] They did the best they could, based on the information and expertise they possessed. Courts reviewing early pandemic courtroom closures for compliance with the Sixth Amendment should consider those circumstances, rather than looking back with the 20/20 hindsight of a 2022 judge.

1953), (listing as a justification for closure the "danger of epidemic through the spreading of Spanish influenza").

[41] Rodriguez v. Miller, 537 F.3d 102, 110 (2d Cir. 2008) ("It is clear that the State has an 'overriding interest' in protecting the identity of its undercover officers.").

[42] Johnson v. Sherry, 465 F. App'x 477, 479 (6th Cir. 2012) (protecting fearful witnesses).

[43] 558 U.S. 209 (2010).

[44] *Id.* at 210–11.

[45] *Id.* at 215; *see also* People v. Evans, 2016 IL App (1st) 142190, ¶ 15 ("[W]e can conceive reasonable alternatives—many of which are based in common sense.").

[46] The right to a public trial exists, in large part, to prevent the imposition upon defendants of unfair procedures. *See In re* Oliver, 333 U.S. 257, 270 (1948) ("[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.").