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## State of Ohio v. Whited

1 message

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Max,

The significance of this case cannot be overstated as it combines the physical well-being of anyone to enter a courthouse with the importance of ensuring fair trial rights to all defendants. The National Association of Criminal Defense Lawyers and Ohio Association of Criminal Defense Lawyers will examine this case and use it to protect the rights of the defendant and his lawyer while helping to educate other courts on what must be done before trials should commence. On behalf of the NACDL strike force, we urge courts to only proceed with the most essential matters or where a defendant demands to proceed with their trial. In either circumstance, the Courts must ensure the safety of all parties while also honoring the defendant's constitutional protections including that of a fair trial. Affording a trial is not adequate. It must be a fair trial.

The Ashland County Court of Common Pleas case made clear that a court cannot take the simplistic view of asking whether it should just start trials or not. This and other courts must recognize the needs of the lawyers before commencing trials. It is too late once trial has started. Some of the questions and problems that arose include:

1. During the COVID pandemic, defense counsel is unable to effectively investigate the case. It is not as if they can knock on the doors of witnesses right now.
2. Counsel is extremely limited in their ability to prepare their clients to testify or even how to conduct themselves in the courtroom. Virtual sessions are better than the telephone but nothing can replace in-person meetings where non-verbal communication is addressed.
3. Counsel, whether defense lawyer or prosecutor, cannot safely confer with their co-counsel during trial. It is important for a defense lawyer to be able to communicate with his client throughout the trial. To do so now, faces would be inches away from each other so as not to be overheard by the court or jury. In this case, counsel and the defendant were wearing masks and gloves making it that much more difficult to speak as needed.
4. As for the masks, they are an obstacle to clear communication. Because of that, defense counsel was forced to remove his mask while speaking to the jury placing him in a more compromised position.
5. Masks worn by jurors prevent the ability to see their reactions during voir dire or during other critical stages of the trial. This holds true for witnesses that are wearing masks. The lawyers and triers of fact are unable to fully assess their non-verbal responses which play major roles during trial.
6. Voir dire questioning by the judge as to prospective juror's health concerns may not be effective particularly where the judge inquires into underlying conditions. Many jurors simply agree with the judge out of fear. In the instant matter, jurors, who just the day before represented in court that they felt safe, spoke very differently amongst themselves in the hallway. This was overheard by defense counsel. Perhaps a better method of juror inquiry on issues of COVID-19 is to utilize jury questionnaires prior to court appearances. Such questionnaires routinely lead to more truthful and meaningful responses.
7. As to trial procedure, how does a lawyer safely approach a witness on the stand? How does one pass documents or other evidence to the witness for refreshment and impeachment?
8. During the current health crisis, defense counsel are limited in their ability to review large amounts of paper or electronic discovery while keeping social distancing. This is especially true with jailed clients when there are no face-to-face visits.
9. A defendant has a right to a jury comprised of all demographics within the eligible community. The courts need to address the issue of losing elderly jurors as they are automatically considered high risk.
10. Lastly, courts cannot paint with a broad brush and must look at each case individually. While a trial may be deemed safe for participants who are not high risk, the same would not hold true for those that are.

Undoubtedly, enforcing defendant's rights and keeping all people safe is tough under the circumstances. As such, there must not be a rush to open doors before best trial and safety practices are considered and instituted. It is imperative that neither consideration be compromised. The Ashland case was premature.

Call me as needed.

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