

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304	DATE FILED: October 19, 2020 4:38 PM
Plaintiff(s): PEOPLE OF THE STATE OF COLORADO v. Defendant(s): MARK ALLEN REDWINE	▲ COURT USE ONLY ▲
	Case Number: 17CR343
ORDER REGARDING THE DEFENDANT'S OBJECTION TO THE WEARING OF FACE SHIELDS [D-168] AND THE DEFENDANT'S RENEWED MOTION TO DECLARE A MISTRIAL [D-169]	

The defendant has filed two related motions, D-168 and D-169. In D-168, the defendant argues that this Court's orders giving the defendant the option of wearing a clear plastic face shield instead of a cloth mask and ordering witnesses to testify wearing clear face shields while testifying are not safe trial procedures during the COVID-19 pandemic. The defendant in D-168 states that he will not wear a clear face shield during the trial and objects to anyone not wearing a mask being in the courtroom. Finally, the defendant states that he refuses to waive any confrontation rights he possesses regarding facial coverings in the courtroom. D-169 is a renewed motion for mistrial based upon the COVID-19 pandemic and the recent increase in cases in La Plata County. The Court will issue a combined order to both D-168 and D-169 as the issues in both overlap to some extent.

The COVID-19 pandemic has caused considerable challenges to courts across the country. The courts are a vital component to the continuity of government during the pandemic, ensuring the maintenance of public safety and justice in civil society. Neither the Constitutions

of the United States of America nor the State of Colorado were written or developed through case law with any consideration of the physical limitations a dangerous infectious disease would place upon the judicial branch in dispensing justice while maintaining the constitutional rights of criminal defendants.

The Court is aware that the rate of COVID-19 infection in Colorado and all of Southwest Colorado has been variable, and the national predictions that the rate of COVID-19 infections would increase during the fall and winter appear to be coming to fruition in Colorado and the rest of the nation. The defendant is correct that the infection rate in Southwest Colorado has increased significantly in the past two weeks. The Court notes, however, as of the date of writing this order, October 18, 2020, Southwest Colorado, comprised of the Sixth and Twenty-Second Judicial Districts, is the only region in the State of Colorado showing a sustained decline in the number of new cases. COVID-19 Data, Epidemic Curve, Colorado Department of Health and Environment, <https://covid19.colorado.gov/data>.

The Court also notes that Dylan Redwine disappeared seven years and eleven months ago. Prior to the indictment in this case, the prosecution lost one witness, Denise Hess. As is suggested by the defendant's notice regarding one of its witnesses, D-171, the longer the defendant's trial is delayed, the more likely both sides are to lose evidence necessary to fairly try the defendant. Over three years have passed since the defendant was arrested and placed in the La Plata County Jail, where he remains to this day without resolution as to his future. Dylan's mother has consistently pleaded with this Court to try this case. Dylan's mother desires closure, which is more likely after the trial of this criminal case, and the ability after court proceedings are completed to bury the few remains of Dylan that have been recovered. The vast majority of the delay in bringing this case to trial has been to ensure that the defendant has effective

assistance of counsel, both by defense counsel being able to understand the voluminous discovery this case has generated and for both defense counsel to be able to be physically present to try the case.

The Court cannot control the behavior outside of the courtroom. However, the Court can control how people behave inside the courtroom. The Court finds that the procedures described in Second Amended Administrative Order 2020-9, the Court's October 2020 Changes to Redwine Trial Procedures (C-53), and the orders below allow the Court to safely conduct this trial. Currently, the Court denies the motion to declare a mistrial. This order is without prejudice and may be re-evaluated depending on future circumstances.

The Court has spent considerable time and thought trying to find a way to provide a safe trial environment while ensuring the defendant's constitutional rights are not violated. To that end, all persons entering the courthouse will be required to either self-screen or be screened for COVID-19 symptoms. The courtroom in which this trial will occur has been significantly rearranged so that no one in the courtroom needs to be within six (6) feet of any other person in the courtroom. In order to maintain social distancing, only three (3) jurors will sit in the jury box. The remainder will be seated throughout the west side of the courtroom, some in the well of the courtroom and some in the gallery that normally holds spectators. Counsel tables for both the prosecution and defense have been shifted to the east side of the courtroom. The location of jurors and the defendant have been situated to allow the defendant and jurors to see each other, as well as witnesses called to testify. The number of individuals allowed to be in the courtroom have been severely limited. The courtroom in which this trial will be held, during normal times, is allowed to contain 130 persons pursuant to the applicable fire code. During this trial, the Court is limiting the number of people allowed to be present in the courtroom to 33, reducing the

courtroom to 25% of its normal capacity. By streaming the trial via Webex Events after voir dire is complete, the Court will limit the number of different people who could potentially bring the virus into the courtroom. The courtroom's ventilation system is set to its most inefficient setting, thereby allowing the maximum exchange of fresh air into the courtroom throughout the trial.

While plastic face shields are not as effective at containing the spread of the virus, they do prevent “. . . the initial forward motion of the exhaled. . .” virus and decrease the concentration of the virus in the air. D-168, p. 2 citing <https://phys.org/news/2020-09-shields-masks-valves-ineffective-covid-.html>. COVID-19 spreads “. . . primarily through respiratory droplet transmission within a short range (e.g., less than six feet).” Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission, CDC, October 5, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>. Thus, wearing a face shield will decrease the concentration of any COVID-19 virus that may be released by an asymptomatic participant in the trial, providing more safety to others in the courtroom than if clear face shields were not required by individuals unable to wear masks.

The defendant objects to allowing any person participating in this trial without wearing a face mask. With the exception of the Court's reporter, for reasons previously discussed on the record, the Court orders that all persons attending the trial shall wear a face mask unless they have a physical condition which prohibits them from doing so or are unable to be understood while speaking on the record. Any such persons will be required to wear a face shield while speaking. The Court does not find that the wearing of face shields by trial participants violates the defendant's confrontation rights during this pandemic.

In sum, our precedents establish that “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,” *Roberts, supra*, 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that “must

occasionally give way to considerations of public policy and the necessities of the case,” *Mattox*, *supra*, 156 U.S., at 243, 15 S.Ct., at 339–340.¹

Maryland v. Craig, 497 U.S. 836, 849–50, 110 S. Ct. 3157, 3165–66, 111 L. Ed. 2d 666 (1990).

Clearly, the health and safety of all participants at the trial during the COVID-19 pandemic is a public policy consideration of paramount importance which requires procedural changes to jury trials.

The United States Supreme Court has held that a criminal defendant’s right to face-to-face confrontation at trial is only when absolutely necessary and only “. . . where the reliability of the testimony is otherwise assured.” *Craig*, 497 U.S. at 50, 110 S. Ct. at 66, citing *Coy v. Iowa*, 487 U.S. 1012, 1020, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857 (1988). In this case, the procedures being adopted by the Court do not deny the defendant face-to-face confrontation. Witnesses will still be brought into the courtroom to testify against the defendant. The witnesses’ eyes and the rest of their faces will be visible above their masks.

The Supreme Court has recognized four elements of confrontation in the trial context: physical presence of the witness, testimony under oath, cross-examination, and observation of demeanor by the trier of fact. [*Craig*] at 846. “The combined effect of these elements ... serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.” *Id.*

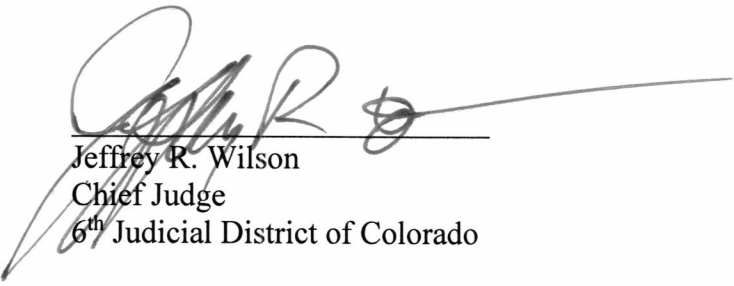
United States v. Crittenden, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020). See also, *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002), where the Second Circuit held that allowing a witness to testify against a criminal defendant while wearing dark sunglasses

¹ The Court is aware that the *Roberts*’ holding regarding the admission of testimonial hearsay statements against a criminal defendant was reversed in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). However, *Roberts* and the other cases cited in this order are being cited to discuss general Confrontation Clause considerations as this order does not involve the admission of hearsay statements. The full citation for *Roberts* is *Ohio v. Roberts*, 448 U.S. 56, 61, 100 S. Ct. 2531, 2537, 65 L. Ed. 2d 597 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The full citation for *Mattox* is *Mattox v. United States*, 156 U.S. 237, 237, 15 S. Ct. 337, 338, 39 L. Ed. 409 (1895).

obscuring the witness's eyes did not require reversal of the defendant's conviction because the jury was able to observe the witness's body language for any signs of nervousness and was able to evaluate her testimony for hostility against the defendant. The witness was subject to cross-examination and the jury was able to evaluate the witness's testimony using ". . . all the other traditional bases for evaluating testimony," except being able to observe the witness's eyes. *Id.*, p. 62.

For the foregoing reasons, the Court finds that all persons in the courtroom during the defendant's trial will wear appropriate face masks with the exceptions noted above. The Court further finds the masking procedures are necessary to protect the health and safety of all participants in the defendant's trial and do not violate the defendant's confrontation rights as guaranteed by the United States and Colorado Constitutions. Both the motion to declare a mistrial, D-169, and the motion objecting to trial procedures regarding facial coverings and refusing to waive confrontation rights, D-168, are denied.

Done and signed this 19th day of October, 2020.



Jeffrey R. Wilson
Chief Judge
6th Judicial District of Colorado