

Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA,	)	
	)	No. CR20-174 JCC
Plaintiff,	)	
	)	DEFENSE MOTION FOR A TRIAL
v.	)	WITHOUT COVID-RELATED
	)	RESTRICTIONS
ERIC SHIBLEY,	)	
	)	
Defendant.	)	
_____	)	

Motion

Defendant Eric Shibley, through undersigned counsel, moves for a trial free of Covid-related restrictions. Specifically, he asks that mask-wearing in the courtroom remain optional for trial participants and the public, alike, and that no mask mandate apply for vaccinated persons. To further promote visual and auditory clarity, he also asks for the removal of Plexiglass barriers in the courtroom.

This motion is brought to protect due process and fair trial rights guaranteed to Mr. Shibley by the Fifth and Sixth Amendments to the United States Constitution.

Introduction

As of this writing the mandate of General Order 04-20, reinforced by General Order 13-21 issued on September 23, 2021, suggests ongoing concerns with Covid 19 in situations involving gatherings of members of the public but also vests discretion with individual trial judges about conduct within their respective courtrooms. The defense is aware that this Court has conducted a jury trial since the entry of the most recent General Order but is less certain about the constraints it imposed on participants. The defense also appreciates the legitimacy of public health concerns and that the situation is fluid and subject to change between now and the currently scheduled trial date of November 15, 2021.¹

Eric Shibley desires a visceral trial (in-person with other court participants — i.e., parties, court personnel, witnesses, jurors — in the same room) but also a fair trial with reasonable ability to freely communicate with and assist his counsel during trial and the ability to enjoy all the due process protections traditionally afforded criminal defendants. Both he and his undersigned counsel have been fully vaccinated.

¹ Current information from the Center for Disease Control states that persons who are fully vaccinated against COVID are highly protected against serious outcomes of COVID-19, including severe disease, hospitalization, and death. The available evidence suggests vaccines offer protection against known variants, including the Delta variant (B. 1.617.2), particularly against hospitalization and death. The Delta variant, currently the predominant SARS-CoV-2 variant in the United States, is associated with increased transmissibility. www.cdc.gov - 9/27/2021 update

Any residual risks posed by an in-person trial should be balanced against Mr. Shibley's constitutional right to a fair and public trial.

Masks

The defense asks that all participants, including prospective jurors and court security, be questioned as to their vaccination status. Anyone who has been fully vaccinated should not be required to wear a mask.

Many people (undersigned counsel included) find face masks to be uncomfortable, distracting, and an impediment to speaking clearly, particularly over an extended time period. Face masks obscure facial expressions and make evaluating demeanor and body language far more difficult. One study found that the perceptions of persons wearing lower face coverings is distorted, such that negative emotions of the mask wearer (i.e., anger or fear, which is reflected primarily in the eyes) is much more apparent than positive emotions (i.e., happiness, humor, gratitude), which is reflected primarily by the mouth. Calbi M, Langiulli N, Ferroni F, Montalti M, Kolesnikov A, Gallese V, Umiltà MA. *The consequences of COVID-19 on social interactions: an online study on face covering*. Sci Rep. 2021 Jan 28;11(1):2601. doi: 10.1038/s41598-021-81780-w. PMID: 33510195; PMCID: PMC7844002. The masking implications for Mr. Shibley, whose negative emotions would be perceived more readily than his positive ones, would undercut his presumption of innocence.

Until recently, the positive impact of mask requirements (great risk reduction) vastly outweighed whatever inconvenience they caused. But now, with the advent of wide-spread vaccination, that is no longer the case. The medical consensus (the CDC) suggests that the vaccine is highly effective at both providing individual protection and in making persons less likely to spread the virus to others.

The caselaw on COVID-related mask requirements is sparse. *United States v. Tagliaferro*, 2012 U.S. Dist. Lexis 62898 (S.D.N.Y. , March 30, 2021) rejected a confrontation clause challenge to mask wearing requirements. But this challenge apparently only concerned witnesses, who were allowed to testify not wearing a mask. *Tagliaferro* did not address the problems created by the parties not being able to observe the jurors' facial expressions or the discomfort and distraction that wearing a mask may engender.

Mask wearing requirements raise other problems. The parties often exercise peremptory challenges based on demeanor. For example, if the defense notices that a juror is looking askance at the defendant, that juror might well be peremptorily challenged. But if the prospective juror is masked, the defense will miss that opportunity.

Defense counsel needs to be able to communicate with his client during trial. Such communication is part and parcel of the right to effective assistance of counsel. But if both counsel and the defendant are wearing a mask, whispering, the traditional means

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of communicating in court, becomes more onerous. Jurors look at defendants to gauge their reactions to testimony. Perceptive trial advocates seek to gauge jurors' reactions to testimony and adjust their tactics accordingly. Wearing a mask hinders such observations and potentially deprives a defendant from conveying his humanity or a demeanor consistent with innocence and his attorney from being fully effective.

While it may be *possible* to conduct a trial with everyone wearing a mask, this arrangement is far from optimal. The confrontation clause recognizes the importance of face-to-face encounters. Through common sense and experience we rely on people's facial expressions as an important means of evaluating their demeanor and conveying and receiving social cues.

Balancing public health concerns with due process fairness, Mr. Shibley should be able to have an unmasked trial.

Plexiglas Partitions

As best as counsel can be determined there is little to no scientific evidence that Plexiglas shields prevent COVID transmissions. See "Why Face Shields and Plexiglass barriers don'[t] Block Coronavirus", *Forbes*, October 23, 2020. But they unquestionably interfere with and even distort sound transmission. Other trial counsel have reported difficulty clearly hearing witnesses testifying behind a Plexiglass partition barrier and undersigned counsel has experienced sound muffling and distortion in court hearings with Plexiglass. In the absence of some

credible scientific evidence to justify the Plexiglas partitions, they appear to be little more than optics, designed to give the appearance of combatting the virus but actually not accomplishing much. In the interests of clarity for all concerned, the defense asks that all such partitions be removed.

Respectfully submitted this 1st day of October, 2021.

/s/ Michael Nance,. WSBA # 13933
Attorney for Eric Shibley

Certificate of Service

I hereby certify that on the 1st day of October, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

/s/ Michael Nance WSBA # 13933
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