The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	NO. CR20-174JCC **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR A TRIAL WITHOUT COVID-RELATED RESTRICTIONS (Dkt. #77)**

I. INTRODUCTION

Defendant's Motion for a Trial Without COVID-related Restrictions requests that: 1) vaccinated trial participants not be required to wear a mask; and 2) the removal of plexiglass partitions in the courtroom. The government respectfully suggests that the Court take defendant's Motion under advisement. In light of changing conditions related to the COVID-19 pandemic, the Court will be in a better position to determine the need (if any) for masking and partitions closer to the November 15, 2021 trial date.

II. BACKGROUND

In March 2020, acting under Sections 15002(b)(1) and 15002(b)(2)(A) of the Coronavirus, Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. 116-136, the Judicial Conference of the United States found that emergency conditions due to the

UNITED STATES ATTORNEY
700 STEWART ST, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601 et seq.) with respect to COVID–19 will materially affect the Federal courts generally. For example, Section 15002 of the CARES Act provides that the chief judge of a district court covered by that finding may authorize the use of video conferencing for certain criminal proceedings. Relatedly, the Chief Judge for this District has issued various COVID-19-related General Orders that describe rules for the United States District Courthouse.

In May 2020, the Chief Judge entered general order 08-20, which required that "… all persons over two years of age seeking entry to, or occupying, the Seattle and Tacoma Courthouses are required to wear a face covering or mask at all times unless otherwise directed by the Court or a Courthouse official." (See Exhibit A, General Order 08-20.)

In June 2021, the Chief Judge entered a new general order, 10-21, noting that, in light of improving conditions, masks were no longer required in the courthouse for vaccinated individuals but still required for unvaccinated ones. (See Exhibit B, General Order 10-21.)

In August 2021, after new recommendations by the Center for Disease Control and certain Washington counties, the Chief Judge entered general order 11-21 revising the face-mask requirement again. The new order requires all individuals, regardless of vaccination status, to wear a mask in the public areas of the courthouse. (See Exhibit C, General Order 11-21.) The order also provides that individuals must wear a mask in the courtroom except as directed by the presiding judge. The order continued: "Individuals who are participating in court proceedings will be advised to remove their mask to speak. Witnesses will be asked to remove their mask while they are on the witness stand."

III. GOVERNMENT RESPONSE

A. Defendant's Request to Exempt Trial Participants from the Mask Requirement

As an initial matter, it is the government's understanding the Court's general order means that witnesses will not be required to wear a mask while testifying. Similarly, it is

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700 STEWART ST, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

the government's understanding that, when a trial participant such as an attorney or potential juror is speaking, he or she will not be required to wear a mask. The authorization for witnesses and trial participants to remove their masks while speaking set out in the Court's general order reflects an appropriate balance between the serious need to protect the public health during a pandemic and the goal of ensuring as natural a setting for witnesses and trial participants as can reasonably be accommodated.[1] The authorization also resolves many of the concerns set out in defendant's motion.

Indeed, the only issue regarding masks in defendant's motion that is not satisfied by the authorization is whether jurors, lawyers, the defendant, and other trial participants should be required to wear a mask when they are in the courtroom but not speaking.[2] Defendant's references to due process and the Sixth Amendment right to a fair trial do not show that he has a right to a trial where counsel, witnesses, trial participants, jurors, and members of the public do not have to wear masks even when they are not speaking. Fed. R. Crim. P. 57(b) gives courts broad discretion to decide how to conduct a trial, providing that a "judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district"; *see also United States v. Warren*, 601 F.2d 471, 473 (9th Cir. 1979) (recognizing court's broad discretion to set rules for the conduct of their business).

As defendant recognizes, the COVID-19 pandemic provides a reason for taking health and safety precautions during public hearings. The CDC and other health organizations have consistently recognized that masking and social distancing can help limit the spread of COVID-19. "Protecting the public from unnecessarily spreading a potentially fatal virus is not only a purpose the government may pursue; it is one it has an obligation to." *United States* v. *Babichenko*, 2020 WL 7502456, *3 (D. Idaho Dec. 21,

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[1] The past year and a half has made clear that the rates of infection in particular communities rise and fall. The appropriate balance rises and falls with them.

[2] It is not clear whether defendant objects to members of the public wearing a mask while observing the trial. The government is not aware of a justification for such an objection.

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700 STEWART ST, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

2020) (quoting Stephen E. Smith, "*The Right to a Public Trial in the Time of COVID-19*," 77 Wash & Lee L. Rev. Online 1, 6 (2020)). For that reason, several courts have rejected arguments that masking requirements during the pandemic violate the confrontation clause, due process, or the right to a fair trial. *United States v. Holder*, No. 18-CR-00381-CMA, 2021 WL 4427254, at *9 (D. Colo. Sept. 27, 2021); *United States v. Watkins*, No. 18-CR-32-A, 2021 WL 3732298, at *6 (W.D.N.Y. Aug. 24, 2021); *United States v. James*, No. CR-19-08019-DLR, 2021 WL 6081501, at *3 (D. Ariz. Oct 15, 2020); *United States v. Crittenden*, No. 4:20-CR-7(CDL), 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020).

Under current conditions, the government would nevertheless not oppose defendant's request that defense counsel and his client be allowed to be mask-free during the trial and would ask only that the same rule be applied to counsel for the government, who are also fully vaccinated. But given the changing nature of the pandemic and pandemic-related restrictions, the government respectfully suggests that the Court should take Defendant's motion under advisement and determine the appropriate restrictions (if any) closer to the start of trial – November 15, 2021.

B. Defendant's Request for Removal of Plexiglass Partitions

The government also would not oppose the removal of the plexiglass partitions under current conditions. But again, the government respectfully suggests that the Court take this request under advisement and determine whether plexiglass partitions are warranted closer to the start of trial.

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UNITED STATES ATTORNEY
700 STEWART ST, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court take the matter under advisement.

Dated this 8th day of October 2021.

Respectfully submitted,

TESSA M. GORMAN
Acting United States Attorney

JOSEPH BEEMSTERBOER
Acting Chief, Fraud Section,
Criminal Division
U.S. Department of Justice

s/ Brian Werner
BRIAN WERNER
Assistant United States Attorney

s/ Laura Connelly
LAURA CONNELLY
Trial Attorney

UNITED STATES ATTORNEY
700 STEWART ST, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970