

AFFIDAVIT

Comes the affiant, Denise deLaRue, after being duly sworn and states as follows:

(1) I am a jury and trial consultant based in Decatur, Georgia. I have a Bachelor of Science in Psychology, with distinction, from Georgia State University and a Doctor of Jurisprudence from Georgia State University College of Law. Though I am a licensed attorney, I have exclusively a jury/trial consulting practice. I have served as a jury and trial consultant in hundreds of cases, both civil and criminal, throughout the United States in both federal and state courts, to include criminal and civil cases in Tennessee. A copy of my curriculum vitae is attached.

(2) I have served as the jury consultant for the defense in *State of South Carolina vs. Susan Smith*, *United States vs. Theodore Kaczynski*, *State of Georgia vs. Ray Lewis*, *United States vs. Eric Rudolph*, *United States vs. Richard Scrushy*, and *United States vs. Dzhokhar Tsarnaev*. I was an adjunct professor at Georgia State University College of Law from 2005-2011. I lecture frequently on the topic of jury selection and voir dire at law schools and continuing legal education programs, and have served or currently serve as faculty of the National Criminal Defense College, the Georgia Institute of Trial Advocacy, the Institute of Criminal Defense Advocacy at California Western University, the Western Institute of Trial Advocacy at University of Wyoming, the New York State Defender's Association, and the Kessler-Eidson Program for Trial Techniques at Emory University School of Law. I am an original author of Lexis-Nexis Practical Guide: Georgia Civil Trial Procedure (Trial Preparation and Jury Selection chapters).

(3) I have been asked to give my opinion about resuming jury trials at a time in which wearing masks and social distancing throughout a trial are necessary measures to attempt to provide a safe courtroom environment for jurors, courtroom staff, attorneys, and litigants considering the COVID-19 pandemic.

(4) It is well established in scientific and medical literature that wearing masks and social distancing are essential practices for public health and safety. However, the wearing of masks or other personal protective equipment and social distancing by jurors, lawyers, witnesses, and defendants, though necessary if jury trials were to resume, would interfere with essential courtroom communication to the point that the critical functions of a traditional jury trial would be significantly impaired.¹

(5) In voir dire, it is not simply the words that the juror says, but the way they are said that are important to ascertain the credibility, impartiality, attitude, and nature of a juror by counsel and the court. Counsel must carefully make all these assessments to decide whether each juror should be challenged for cause and also to make intelligent use of peremptory challenges. There is no way to make this evaluation if a juror's face is mostly hidden by a mask. Not only could counsel and the court not adequately judge a juror's credibility, a juror would not likely be as forthcoming when questioned by an attorney

¹ In June of 2020, a report published by the National Association of Criminal Defense Lawyers, which has been cited by state and federal courts in reopening plans, addressed the constitutional and health issues with conducting jury trials in this environment. While the science on COVID-19 has advanced much in the past months, so has the severity of the pandemic. *See* Criminal Court Reopening and Public Health in the COVID-19 Era, NACDL Statement of Principles and Report (June 2, 2020), located at <https://www.nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf> (last visited Feb. 28, 2021).

whose face they could not see. It is important for the attorney and juror to be able to develop some modicum of rapport, especially if the topic is of a sensitive nature, for a juror to feel even minimally comfortable opening up and giving honest answers to probing questions. This is much less likely to occur when both the attorney and the juror are masked.

(6) Facial expressions play a major role in interpersonal communication, comprehension, and delivering and receiving intended messages. Face masks impede the ability of seeing, thus understanding, another's expressions and decrease the effectiveness of communications.² The necessary wearing of personal protective equipment among some or all of the participants in the courtroom – the judge, court staff, jurors, counsel and their staff, the person or persons charged and on trial, and/or the witnesses - not only adversely affects the communication between counsel and jurors, but also jurors' abilities to evaluate witness testimony, the presentations of the lawyers, and the overall nature of the proceedings. Trials are not a cold viewing of merely the statements of the witnesses on the stand. The inability for jurors to observe facial expressions of the attorneys when asking questions, and the witnesses when responding to them, significantly impairs their ability to assess and evaluate the evidence. A traditional jury trial that meets constitutional norms finds no equivalent in one that is inhibited by masking, social distancing, and physical barriers of plexiglass or other materials.

² Mheidly, N., Fares, M. Y., Zalzale, H., & Fares, J. (2020). Effect of Face Masks on Interpersonal Communication During the COVID-19 Pandemic. *Frontiers in public health*, 8, 582191, located at <https://doi.org/10.3389/fpubh.2020.582191> (last visited Feb. 28, 2021).

(7) Likewise, jurors' abilities to observe a masked criminal defendant would be impaired in ways that would likely to result in bias against the accused. In virtually every case, a goal of a criminal defense attorney is to humanize the defendant. A masked defendant is practically faceless. A face shield alters one's appearance significantly, making one appear alien or at best unnatural. In an interview with a juror who served on a criminal trial in June of 2020 in which the defendant was masked, the juror said the mask made the defendant "look a little like the infamous villain Hannibal Lecter. I would have liked to have seen his whole face, if nothing else, out of curiosity." This juror had convicted the defendant, who was homeless, of the theft of a block of cheese.³

(8) Jurors also make judgements about a criminal defendant by the way that he or she interacts with defense counsel. If defense counsel were also masked and physically distanced from the defendant, not only would their communications with each other be impaired, but the jury would not witness attorney-client interactions that would otherwise occur. Further, a jury trial is a public proceeding. Jurors notice and pay attention to persons in the courtroom, such as the families or supporters of the litigants. A trial with social distancing and restrictions on public access to the courtroom can further negatively impact juror impressions.

³ Dewan, Shaila, "Jurors Please Remove Your Masks: Courtrooms Confront the Pandemic". New York Times. June, 10, 2020, located at <https://www.nytimes.com/2020/06/10/us/coronavirus-jury-trial-oregon.html?smid=em-share> (last visited Feb. 28, 2021).

(9) While masks are viewed by many as a public health issue, to some potential jurors they would inevitably be viewed as controversial, a political issue, or even as oppressive. If jurors who object to wearing a mask were forced to serve as jurors and wear a mask, it could well result in anger or resentment at having to participate in the process, which would likely adversely impact the defendant. Other jurors who do not have a philosophical objection to wearing a mask may find having to wear a mask for seven or eight hours a day so uncomfortable that it would distract them from being attentive to the evidence, or drive them reach a verdict quickly in order to end their discomfort.

(10) The jury deliberation process would be adversely impacted by COVID precautions, and by jurors' concerns for their own safety. Just as jurors' abilities to communicate with counsel in voir dire or make observations about a witness or the defendant would be hampered by masks and distancing, so would their ability to communicate with each other. The inability to read emotions or decipher voices muffled by masks (especially if jurors attempted to distance the recommended six feet or more) could make robust deliberations much more difficult and exhausting. Obviously, jurors who have any level of hearing or comprehension challenges, perhaps elderly jurors, jurors who do not speak English as their first language, jurors with certain learning disabilities or processing issues, would all be impacted more severely. And the longer jurors were forced to remain in an enclosed room deliberating with others, the more their safety concerns might reasonably increase. We know the length of time spent indoors with others is a risk factor for contracting the coronavirus.

(11) Some suggest that a thorough and sifting voir dire on COVID-19 issues, and a liberal practice of dismissing jurors who have been affected by the pandemic, have fears for their safety or that of their loved ones, are bothered or disagree with wearing masks, could adequately address the concerns raised thus far. The problem with that approach is that it would most certainly result in a jury panel that is not a fair cross section of the community. We know that Black and Latino communities, as well as the elderly and the poor, have suffered disproportionate harm by the pandemic, so it would be reasonable that individuals from those communities would also be reluctant to serve as jurors due to COVID-19 concerns. White people, young people, and persons who identify politically in certain ways are the least concerned about contracting and spreading the coronavirus, according to recent survey data.⁴ It is quite possible that those whose communities who have suffered greater harm by the pandemic may not show up for jury service at all, or would ask to be excused if they do, while white people, young people, and those with certain political beliefs might be more willing to serve, since studies show they are less concerned about contracting COVID-19. This phenomenon could easily result in very skewed jury panels that are not a representative cross-section of the community.⁵

⁴ PEW Research Center, Republican, Democrats Move Even Further Apart in Coronavirus Concerns 5 (2020), located at <https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/> (last visited Feb. 28, 2021).

⁵ Wilson, Melanie D., The Pandemic Juror (August 21, 2020). 77 Wash. & Lee L. Rev. Online 102 (2020), located at SSRN: <https://ssrn.com/abstract=3678923> or <http://dx.doi.org/10.2139/ssrn.3678923> (last visited Feb. 28, 2021).


(12) For these reasons, I do not believe that it is possible at this point in the pandemic, or at any point until herd immunity has been effectively acquired or infection and transmission rates are medically acceptable, to conduct a jury trial with the safeguards necessary to protect the health and safety of jurors without adversely impacting the integrity of the trial, from the first moment of voir dire to the final moment of jury deliberations. I have grave concern that the result of such a process would be a jury made up of individuals whose impartiality has not been adequately assessed, whose abilities to discharge their duties were impaired, and it would be a jury that would not be representative of the community.

Further the affiant saith not.



DENISE DELARUE

Date: February 28, 2021



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