

District Court, 2 nd Judicial District, State of Colorado 520 W Colfax Avenue, Denver CO 80204 720-865-8301	▲ COURT USE ONLY ▲
People of the State of Colorado vs. DONTE C. ELLIS	
Attorneys for Mr. Ellis: Mary Claire Mulligan, Reg. No. 21988 89 Gold Trail, Boulder CO 80302 (303) 898-0381 mcmulligan@me.com R. Christian Griffin, #42325 P.O. Box 270310, Louisville, CO 80027 (720) 524-4406 christian@christiangriffinlaw.com	Case Number: 18CR20002 Courtroom 4G
OBJECTIONS TO THE COURT’S “JURY TRIAL CALL AND TRIAL PROCEDURES IN RESPONSE TO THE COVID-19 PANDEMIC”	

Mr. Ellis objects to the Second Judicial District’s “Jury Trial Call and Trial Procedures in Response to the COVID-19 Pandemic” (“Procedures,” attached to the Court’s Notice filed August 4, 2020), pursuant to his constitutional rights under U.S. Const., Amends. V, VI, VII, and XIV; and Colo. Const., Art. II, §§ 16 and 25.

JURY SELECTION—SIZE OF VENIRE

The Court intends to bring 75 prospective jurors into the jury assembly room as the venire in this case (Hearing, July 15, 2020; Procedures pp. 4, 13). That number represents the maximum number of jurors who can be in the assembly room with the

social distancing now recommended by the Centers for Disease Control. This is a first-degree murder case, which involves a history of the alleged victim's domestic violence against Mr. Ellis's mother. The nature of the charges—even before the current COVID pandemic—mean that a large number of jurors will not be able to serve at this trial because of their own personal experiences, biases, and emotions.

There will also be prospective jurors who are not able to serve because of their concerns about the pandemic and the potential of illness represented by remaining in the courthouse for up to two weeks (for example, the risk in Denver of another person being infected by COVID in any group of 50 people is 60% right now¹).

Since the Court intends to have two alternates, the final selected jury will be 14 people, and each side is entitled to 12 peremptory challenges pursuant to R.Cr.P 24. This means that 38, or more than half of the proposed venire, must survive challenges for cause.

JURY SELECTION—DEFERRALS AND RESCHEDULES

The Court's website² provides the following information for prospective jurors:

PLEASE DO NOT REPORT FOR JURY SERVICE if any of the following apply:

1. You have been diagnosed with COVID-19 and you have not been symptom free for at least 72 hours.
2. You have been in direct contact with someone who has tested positive for COVID-19 within the past fourteen days.
3. You are experiencing a fever, cough, shortness of breath, or any other respiratory illness symptoms.

If any of the above criteria apply to you, please do not report. Instead, please contact our office immediately to re-schedule your jury service. You may call us at 720-337-0600 or email us at denverjury@judicial.state.co.us. Please allow 1-2 business days for a response.

¹ Chande, A.T., Gussler, W., Harris, M., Lee, S., Rishishwar, L., Hilley, T., Jordan, I.K., Andris, C.M., and Weitz, J.S. 'Interactive COVID-19 Event Risk Assessment Planning Tool', Georgia Institute of Technology Applied Bioinformatics Laboratory, <https://covid19risk.biosci.gatech.edu> (last visited August 5, 2020)

² https://www.courts.state.co.us/Jury/District/Location.cfm?Location_ID=82&Section=Reporting

This means that not only those with current COVID symptoms will be rescheduled for jury duty, but also those who have had exposure within the last two weeks.

The novel coronavirus does not affect all groups equally. Black Americans and Latinx people are more likely to be infected and to experience more severe illness. In the City and County of Denver, the rate of infection among Latinx persons is nearly three times the rate for white people; and the rate among African-Americans is more than twice that of white patients.³

Also, as people age, their risk for severe illness from COVID increases.⁴ Eight out of ten COVID deaths occurred in those 65 and over. According to CDPHE, those at higher risk, including those over 65, should leave home “only for medical care and essential activities, like grocery shopping.”⁵

Because African-American and Latinx potential jurors are more likely both to be infected and to be exposed to COVID, they are more likely than white jurors to be deferred or rescheduled. Because those over 65 are more likely to suffer serious consequences if they are infected, they have been warned to avoid non-essential situations, and they are more likely than younger jurors to be deferred or rescheduled.

³ Oppel, Gelbeloff, Lai, Wright, and Smith, “The Fullest Look Yet at the Racial Inequity of Coronavirus, *The New York Times*, July 5, 2020 (<https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html?action=click&module=Top%20Stories&pgtype=Homepage>)

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>; also <https://covid19.colorado.gov/prepare-protect-yourself/protect-those-at-higher-risk/resources-for-older-adults-and-their-families>

⁵ <https://covid19.colorado.gov/prepare-protect-yourself/protect-those-at-higher-risk/resources-for-older-adults-and-their-families>

Any of these situations results in a venire that is not a fair cross-section of the community, in violation of Mr. Ellis's United States and Colorado constitutional rights. *Duren v. Missouri*, 439 U.S. 357 (1979); *Washington v. People*, 186 P.3d 594 (Colo. 2008).

JURY SELECTION—TIME ALLOTTED

The Court anticipates that one to one-and-a-half hours may be necessary for voir dire (Procedures, p. 19). Given the cumbersome process involved in selecting the jury during the pandemic, the need to question jurors about their ability and willingness to serve during a pandemic, and the issues in Mr. Ellis's case, he asks that the defense get a minimum of two hours for jury selection. Counsel's requests for jury questionnaires have been denied by the Court, and additional time for voir dire is the only way to effectuate Mr. Ellis's constitutional rights to a fair and impartial jury.

JURY SELECTION—TEAM MEMBERS AND MEMBERS OF THE PUBLIC

The Court's procedures allow for the attorneys and defendant to be present during jury selection. Mr. Ellis also has a paralegal, Michele Venter, and investigator, Rayelle Noble, to assist with trial, and asks that they be allowed to present during jury selection to assist Mr. Ellis and counsel with note-taking and documentation. Mr. Ellis asks that Ms. Noble be allowed to be present throughout the trial as advisory witness.

The Procedures (pp. 15-16) anticipate that one to two members of the public will be allowed to stand in the back of the room during jury selection "if space allows." Mr. Ellis's family and supporters wish to observe the proceedings, and the jurors should be aware that the public is observing the proceedings. Limiting spectators to one or two people violates Mr. Ellis's right to a public trial, and he objects to such a limitation. See,

e.g., *Presley v. Georgia*, 558 U.S. 209 (2010); *Waller v. Georgia*, 469 U.S. 39 (1984); *Anderson v. People*, 176 Colo. 224, 490 P.2d 47 (1971).

JURY SELECTION—JURORS WEARING MASKS

The Court's proposed procedures for jury selection anticipate that jurors will wear masks at all times, including when they are speaking (Procedures, p. 16).

During voir dire, the court must assess whether potential jurors are being honest and forthcoming. To do so, the court needs to see the potential jurors' faces while speaking, but also while they are not speaking to gauge their reaction to others' comments. *People v. Rodriguez*, 2015 CO 55, ¶ 18 ("We accord great deference to the trial court's handling of challenges for cause because such decisions turn on an assessment of the juror's credibility, demeanor, and sincerity in explaining his or her state of mind."); *Marko v. People*, 2018 CO 97, ¶ 21 ("a trial court must evaluate the prospective juror's state of mind by assessing (1) the juror's responses to questions posed by either counsel or the court and (2) the demeanor and body language of the juror throughout voir dire.").

For the same reasons, Defendant and counsel for both sides must be able to view potential jurors' faces during all of voir dire. Without a meaningful opportunity to observe the potential jury members' reactions, Mr. Ellis's rights to due process, a fair trial, and a fair and impartial jury will be violated. See *People v. Beauvais*, 2017 CO 34, ¶ 53 (noting importance of counsel developing record of jurors' facial expressions, gestures, or body language in order to decide *Batson* challenge).

Additionally, defense counsel will be unable to effectively assist Mr. Ellis with protecting his right to an impartial jury if counsel cannot see potential jury members' faces during all of voir dire.

Allowing the jurors to remain masked violates Mr. Ellis's rights under U.S. Const. Amendments V, VI, and XIV; and Colo. Const. Art. II §§ 16 and 25.

JURY SELECTION—LAWYERS WEARING MASKS

The Court's proposed procedure is that everyone will wear masks during the entire trial process except for testifying witnesses, in Mr. Ellis's case (Procedures, p 20). This includes the lawyers.

It is the Court's obligation to observe the prosecutor's demeanor during voir dire, challenges for cause, and peremptory strikes to determine if there is any discriminatory intent in the striking of jurors. "[T]he trial court's firsthand observations are crucial: it must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the [prospective] juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the [prospective] juror by the prosecutor.'" *People v. Rodriguez*, 2015 CO 55, ¶ 18. Because of their ability to observe challenged jurors and the challenging attorneys, trial courts are "uniquely positioned" to judge their credibility and demeanor. *People v. Beauvais*, 2017 CO 34, ¶ 31.

If this Court cannot fully observe both the jurors' and the attorneys' faces during voir dire and any challenges, Mr. Ellis's right to due process, a fair trial, and a fair and impartial jury will be violated.

TRIAL—MEMBERS OF THE PUBLIC

If there is insufficient room in the courtroom, the Court will broadcast the trial proceedings via Webex (Procedures, p. 21). This violates Mr. Ellis's right to a public trial. If a member of the public wants to watch a trial in normal times, she walks into the courtroom. If she wants to watch Mr. Ellis's trial, she must be instructed how to use Webex and connect to the court's website. Those without internet access are completely barred from the trial.

TRIAL—JURORS WEARING MASKS

During any trial, defense counsel continually reassesses the effectiveness of a line of questioning and the defense generally, as well as whether a break is needed, in part by observing the jury panel. Defense counsel makes numerous strategic and tactical decisions based on the information gathered from observing the panel and must frequently make these decisions in the blink of an eye. There is no adequate substitute for observing the jurors' faces during trial.

By requiring or allowing jurors to obscure their faces with a mask, counsel cannot make necessary strategic and tactical decisions about the defense. If jurors cover their faces with masks, Mr. Ellis will be deprived of the effective assistance of his counsel and his right to due process. U.S. Const., amends. V & VI; Colo. Const., Art. II, §§ 16 & 25.

TRIAL—WITNESSES WEARING MASKS

The Court's Procedures allow testifying witnesses to testify without a mask if they are behind a plexiglass barrier or wearing a clear face shield (Procedures, pp. 20-21, 24). It is unclear whether the Court will provide these. To the extent that any witnesses

wears a mask during their testimony, or that their face is obscured by glare on a barrier or face shield, this violates Mr. Ellis's right to confront the witnesses against him under the federal and Colorado constitutions. U.S. Const., amend. VI; Colo. Const., Art. II, § 16. See *Coy v. Iowa*, 487 U.S. 1012 (1988); *People v. Topping*, 793 P.2d 1168 (Colo. 1990); *People v. Mosley*, 167 P.3d 157 (Colo. App. 2007).

TRIAL—MR. ELLIS WEARING A MASK

The jury is entitled to consider a defendant's courtroom demeanor in reaching a verdict. *People v. Thames*, 2019 COA 124, ¶ 32; *People v. Constant*, 645 P.2d 843, 846 (Colo. 1982) (jury entitled to consider demeanor of defendant during victim's testimony). Mr. Ellis must therefore be entitled to reveal his demeanor to the jury for their assessment.

Furthermore, requiring Mr. Ellis to wear a mask during trial would be prejudicial to him. Although many people in the room will apparently be wearing masks, it is only he who is on trial and who the jury will be judging. If his face is obscured, the jury will be frustrated in its assigned role and will be unable to fairly evaluate him. Requiring him to obscure his face with a mask would violate his rights to due process, a fair trial, to a trial by jury, to appear and defend in person, and to present a defense. U.S. Const., amends. V, VI, VII, & XIV; Colo. Const., Art. II, §§ 16, 23, & 25.

TRIAL—SIX-FOOT DISTANCING

The positioning determined by the Court (Procedures, p. 21) requires six feet of separation among everyone in the courtroom. This includes Mr. Ellis, his two lawyers, his paralegal, and his investigator.

Mr. Ellis has the right to confer with counsel at all times during the trial. His lawyers cannot provide him with the effective assistance of counsel if they cannot expeditiously discuss events during the trial contemporaneously. Handwritten notes are too slow and cumbersome to take the place of immediate conversations among Mr. Ellis and his team.

Requiring six feet of separation between Mr. Ellis and his lawyers violates his rights to due process, a fair trial, to the effective assistance of counsel, and to present a defense. U.S. Const., amends. V, VI, & XIV; Colo. Const., Art. II, §§ 16, 23, & 25.

TRIAL—JURORS IN THE GALLERY

The layout of the courtroom anticipates that the jurors will sit in the courtroom gallery. This means that some jurors will be at least thirty feet away from the witnesses who testify. At that distance, it will be impossible for the jurors to be able to see and hear the witnesses clearly enough to judge their credibility.

A significant portion of human communication is non-verbal. See, e.g., *People v. Vigil*, 2015 COA 88M, ¶ 7 (court entitled to make decisions about credibility based on juror responses, demeanor, and body language); *People v. Saiz*, 32 P.3d 441, 454 (Colo. 2001), Bender, J., dissenting (discussing non-verbal communication). Yet, many of these cues are subconscious. Witnesses, for example, frequently struggle to explain the subconscious determinations they make based on nonverbal communication. See *People v. Acosta*, 2014 COA 82, ¶ 105, Berger, J., concurring (discussing witness difficulty explaining why defendant was “very guilty looking”).

Without having a sufficiently close view of a witness, jurors will not necessarily understand what they are missing and will easily fall into the trap of judging witnesses’

credibility not by their actual demeanor, but by what the juror presumes about them by other indicators (e.g., their skin color, ethnicity, hair style, gender, tone of voice, and words alone).

Additionally, depending on their position in the courtroom, the jurors will not be able to see Mr. Ellis at all, or not from the same perspective. *See People v. Aldridge*, 446 P.3d 897, 904 (Colo. App. 2018) (“The jury could not see Aldridge when that testimony was taken. Thus, the procedure violated not only the statutory provision, but also Aldridge’s due process right to be present at his own trial because he was denied any opportunity to exert psychological influence on the jury.”)

Seating jurors so far from witnesses and from Mr. Ellis violates Mr. Ellis’s rights to due process, a fair trial, and trial by a fair and impartial jury. U.S. Const., amends. VI, & XIV; Colo. Const., Art. II, §§ 16, 23, & 25.

August 5, 2020



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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading using the Colorado Courts E-Filing system, which will send notification to the prosecution.

A handwritten signature in black ink, appearing to read 'mcm', followed by a period.

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