

NORTH CAROLINA
CRAVEN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19CRS51436

STATE OF NORTH CAROLINA,

vs

SHERI MENGER MITCHELL,

Defendant.

MOTION TO CONTINUE

Prior to trial, the defendant, who is not incarcerated, by and through undersigned counsel requests a continuance of the trial to protect his United States and North Carolina Constitutional rights based on the following grounds:

That Defendant objects to being compelled to have his trial conducted with the jury panel being masked. Defendant states that doing such would violate the 5th, 6th, and 14th amendments of the U.S. Constitution and applicable sections of the North Carolina Constitution in that he would not be allowed a fair trial as required by law. Specifically, defense counsel would not be afforded an opportunity to fairly and adequately conduct an adequate voir dire (i.e. inability to evaluate facial cues, ask if the jurors know each other, etc.), the impaneled jury would not be able to adequately assess the credibility of witnesses, and the judge will not be able to adequately assess issues involving issues of credibility for purposes of ruling on evidentiary objections from either party.

Essentially, masking potential jurors during the voir dire process creates a structural error. Accordingly, as stated in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), a structural error that “affects the framework”, defies harmless error analysis.

Further, *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), states that “Similarly, when a petit jury has been selected upon improper criteria...[the Supreme Court] required reversal of the conviction because the effect of the violation cannot be ascertained.” *Id.*, citing *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Heppard v. Maxwell*, 384 U.S. 333, 351-352 (1966).

That Defendant objects to the mandates of the Supreme Court Order with respect to the mandatory excusals for potential jurors. Specifically, Defendant objects on the basis that it is a violation of the Due Process and Equal Protection clauses of the U.S. and North Carolina Constitution in that it does not allow for even the semblance of possibility of obtaining a jury of her peers. Further, given the statistics published by the CDC, COVID-19 effects communities of color in disproportionately higher numbers and thus, such excusals would violate the equal protection and due process clauses of the U.S. and North Carolina Constitution. Effectively, it mandates a potential violation of the spirit of *Batson v. Kentucky* 476 U.S. 79, 106 S.Ct. 1712 (1986).

That Defendant objects to the mandates of the Supreme Court Order in that it violates the confrontation clause of the U.S. and North Carolina Constitution. Quite simply, masking all witnesses removes the opportunity to face her accusers in the constitutional sense of the term.

That the masks also allow for the potential of testimony to be unclear, confused, or unheard by the finders of fact. This would lead to unnecessary confusion and potential irreparable harm to the Defendant.

That the Supreme Court mandate to require bench conferences to be held outside of the presence of a jury will cause undue delay, fatigue, and confusion to a jury that would likely cause irreparable prejudice to a defendant.

That this motion is in no way an attempt to unnecessarily delay the trial in this matter. However, her life and liberty are far too important to serve as the basis of an unprecedented, untested format.

That the Supreme Court Order provides no guidance as to potential contingencies in the event that a participant in a trial contracts, exhibits symptoms of, is exposed, or tests positive for COVID-19 during the course of the proceedings. This is an issue that should be addressed and its terms be provided to all participating parties prior to requesting them to make an informed decision regarding their potential participation in a trial.

Additionally, counsel does not believe that the Court would have the authority to compel a member of the jury panel to test for COVID-19 or compel a member of a jury to reveal the results of such testing if such a test is taken.

That it is worth consideration as to the amount of time afforded for trial that much of the requirements of the Supreme Court's Orders will require for additional days to be scheduled to complete a trial in criminal matters.

WHEREFORE, the Defendant respectfully requests that this Honorable Court enter an Order continuing the trial in the above-styled matter.

This the 29th day of October, 2020.

Mary S. Whitford
Assistant Public Defender
1100 Clarks Road
New Bern, NC 28563
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CERTIFICATE OF SERVICE

[X] The undersigned hereby certifies that he has served a copy of ATTACHED, upon the following by handing it to the attorney's office on the date indicated.

Matthew T. Wareham
Assistant District Attorney
Craven County District Attorney's Office

This the 29th day of October, 2020

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