**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA**

**CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA, :

:

vs. : No.: CP-39-CR-3985-2018

:

:

ANTWAN WASHINGTON, :

Defendant. :

**DEFENDANT’S MOTION *IN LIMINE***

**OBJECTING TO COVID-19 TRIAL PROCEDURES**

**AND NOW**, comes the Defendant, by and through undersigned counsel, Carol A. Marciano, Senior Deputy Public Defender, and respectfully makes the following motion *in limine*:

1. Defendant, Antwan Washington, is charged in the above-captioned matter with criminal homicide, attempted homicide and related charges for a shooting that occurred on July 31, 2018, at 533 Harrison Street in the City of Allentown.
2. The shooting resulted in three people shot—one person succumbed to her injuries.
3. Trial in this matter is scheduled to begin September 21, 2020.
4. Defendant faces a lifetime sentence, without parole, if convicted of 1st degree murder.
5. Trial, including jury selection, is expected to last approximately one week.

**I. Global Health Pandemic**

1. We know that on March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic. See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.
2. Since March, this once-in-a-hundred-year pandemic has and continues to spread across the globe.
3. As of August 22, 2020 at 12:27:47 PM, the United States leads the world in the total number of cases at 5,638,633 and the total number of deaths at 175,674. See <https://coronavirus.jhu.edu/map.html>.
4. The United States has approximately 4% of the world’s population, but 25% of COVID-19 infections. See Id. and <https://www.worldometers.info/world-population/us-population/> .
5. As of August 22, 2020 at 12 PM, Pennsylvania has recorded 124,802 cases and 7,576 deaths. See <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.
6. COVID-19 is caused by a previously-unknown strain of coronavirus which is highly contagious and is spread by respiratory droplets and/or touching the virus on a surface and then touching one’s mouth, nose, or eyes. See <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.
7. COVID-19 spreads easily and especially when people are in close proximity in confined spaces for extended periods of time. See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.
8. Approximately 40% of infected people are asymptomatic, but still able to pass the virus to others. See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> and <https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article#:~:text=Recent%20epidemiologic%2C%20virologic%2C,symptoms%20never%20develop).>
9. Although previously healthy people have died from the virus, the following groups are *or might be* at an increased risk of severe illness from COVID-19: older adults and those of any age with cancer, COPD, obesity, diabetes, asthma, high blood pressure, and other conditions. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html>.
10. Hispanic, African Americans and other people of color are “overly affected” by COVID-19 and represent 60% of the cases although only 40% of the population. See <https://twitter.com/CDCgov/status/1296191629968187395?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet>.
11. Because of the novelty of COVID-19 “information about the biological and epidemiological characteristics of COVID-19 and SARS-CoV-2 remain limited, and uncertainty remains around all parameter values.” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.
12. States and some local regions around the country have seen spikes recently in the number of cases due to colleges, schools and businesses re-opening as well as portions of our country’s population refusing to wear PPE.
13. These same colleges, schools, and businesses have had to reverse course upon experiencing new clusters of COVID-19 cases.
14. The clusters revealed themselves because these entities tested for COVID-19.
15. Although Pennsylvania’s daily case and death numbers have declined since April, 2020, the Commonwealth has seen spikes since June, which prompted our Governor to reimpose some restrictions. See <https://www.governor.pa.gov/newsroom/wolf-administration-announces-targeted-mitigation-efforts-in-response-to-recent-covid-case-increases/> and <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>.
16. Medical experts warn the approaching change of season will bring increased deaths because of the combination of COVID-19 and the flu. See <https://www.marketwatch.com/story/cdc-director-warns-america-is-in-for-the-worst-fallweve-ever-had-2020-08-13> (CDC Director says we are in for the “the worst fall . . . we ever had”).
17. Notably, the percentage of people in Pennsylvania being tested is among the lowest in the country at 1.1 per 1,000. See <https://coronavirus.jhu.edu/testing/tracker/overview>.

**II. Lehigh County Court of Common Pleas Modified Trial Procedures**

1. Amidst this pandemic, the Lehigh County Court of Common Pleas has and intends to conduct criminal jury trials and, particularly in this case, a homicide trial.
2. To that end, the Court has modified its procedures including those for jury selection.
3. The modified procedures are partially described on the Court’s website, see Exhibit A attached, and via instructional video found at <https://www.youtube.com/watch?v=j4iywuzY9dw&feature=youtu.be>.
4. Defendant also became aware anecdotally of some of the modified procedures after a jury trial was conducted in Courtroom 2D on August 17th and 18th.
5. Defendant is unaware of any plans by the Court or its administration to conduct regular testing of any of the trial participants including jurors and courthouse employees.
6. Defendant is unaware of any plans by the Lehigh County Jail to test the defendant who is an inmate.
7. Defendant is unaware whether the Court or its administration consulted with or obtained certification from a medical expert regarding the Court’s modified procedures and whether those procedures were effective to keep trial participants safe from the deadly and highly contagious coronavirus.
8. For example, the Court’s instructional video depicts participants, including jurors, wearing only face shields when the CDC “does *not* currently recommend use of face shields as a substitute for masks.” <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#:~:text=CDC%20does%20not%20recommend>

%20use,other%20people%20is%20expected.

1. Defense counsel visited Courtroom 2D where the jury trial will be held.
2. Courtroom 2D, as every other courtroom in the courthouse, is a confined space with stale air requiring trial participants to be in close proximity for extended periods of time where talking and breathing (and to a lesser extent sneezing and coughing) are the primary activities and occur continually.
3. Defendant submits there is currently no combination of masks, social distancing or plexiglass that can assure trial participants of their safety *in such an environment* while a highly contagious and potentially deadly virus circulates amongst us and, because of the *absence of testing*, said participants are unknowingly exposing themselves to it.
4. Because the virus infects via aerosol particles which can survive in the air for hours and travel like an aroma, masking, distancing, being outdoors as much as possible, speaking minimally, and avoiding prolonged encounters are the recommended ways to reduce risk of infection; plexiglass is only marginally helpful. See <https://www.ucdavis.edu/coronavirus/news/your-mask-cuts-own-risk-65-percent/>.
5. For the Court’s trial of August 17th and 18th, defendant learned that coronavirus-related questions were sent out with prospective juror summonses and a juror could be automatically excused upon a self-reported coronavirus-related issue or concern including not feeling safe.
6. Defendant learned that practically half of those prospective jurors summoned were either no shows, no response, deferrals, or excused for: COVID-19; hardship; medical excuse; and over 70.
7. Defendant learned that prospective jurors had to wear masks during jury selection.
8. During trial, the jury panel was separated into three groups when not in the courtroom.
9. During trial, jurors and witnesses had to wear masks at all times except witnesses could remove their mask when testifying.
10. During trial, the attorneys had to wear masks at all times.
11. During jury selection and trial, the defendant had to wear a mask at all times.
12. During trial, jurors were spread throughout the courtroom with most sitting in the audience section behind counsel tables.
13. Because of masking and juror-seating, attorneys were unable to see juror’s faces during trial; some jurors were unable to see the defendant’s face.
14. Sidebars were conducted in a conference room adjacent to the courtroom which required the Judge, the attorneys and the transcriptionist to move to another room every time a sidebar was required.
15. Jurors deliberated in the courtroom which has microphones throughout, has cameras streaming footage into the Sheriff’s office, and has multiple doors to various hallways.
16. Defendant respectfully submits the Court’s procedures expose all trial participants to an unnecessary health risk and deprives the defendant his constitutional right to effective assistance of counsel, an impartial jury from a fair cross-section of the community, a fair trial, and a public trial.

**III. Issues with the Jury Pool**

1. During a pandemic, prospective jurors who appear for jury duty will not represent a fair cross-section of the community.
2. Allowing automatic exclusion to prospective jurors for any reason related to the COVID-19 pandemic or allowing significant numbers of no shows/no responses may be good public health policy, but constitutionally infringes on the defendant’s right to a fair trial.
3. Jurors who are concerned for their safety or the safety of their family members because of age, underlying medical conditions or simply out of fear of dying from contracting a highly contagious novel virus will not want or be able to serve.
4. Jurors who were unemployed or furloughed during the lockdowns and who recently went back to work will not want or be able to serve.
5. Jurors who work from home and must also supervise minor children attending online school will not want or be able to serve.
6. Hispanics, African-Americans, and other people of color who have been disproportionately affected by the virus will not want or be able to serve.
7. Research has shown that women will be underrepresented in jury pools; women have disproportionally experienced hardship due to losing jobs and having to care for children or elders. See NACDL Statement of Principles and Report on “Criminal Court Reopening and Public Health in the COVID-19 Era” (June 2020) at pg. 11.
8. The above-described groups of people represent significant portions of the community.
9. Limiting jury selection to those people remaining after the above groups are excluded systematically alters the jury pool and will not represent a fair cross-section of the community.
10. A fair cross-section is violated under the Sixth Amendment if

the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

Commonwealth v. Jones, 350 A.2d 862, 864 (Pa. 1976) (citation omitted).

1. Also, prospective jurors also will be called from a community of people who are extremely divided between those who trust and follow the science behind COVID-19 and those who do not; those who take recommended measures to contain the virus and those who do not; this divide creates a real concern that prospective jurors will consist only of the latter types who will have a disdain for government authority and rules; such prospective jurors cannot be trusted to follow the Court’s instructions.
2. Defendant submits the Court’s procedure and the circumstances of the pandemic will not produce a jury pool containing a fair cross-section of the community, nor will it comport with due process or the guarantee of a fair trial.

**IV. Issues with Masks**

1. Facial coverings are usually associated with hidden identity, cover-ups, and crime.
2. The defendant, who sits accused and masked throughout the trial, especially one who does not testify, will appear in stark contrast to the witnesses who will be unmasked when testifying.
3. The witnesses’ demeanor, expressions, and humanness will be seen by the jury; the masked defendant’s will not.
4. A masked and distanced defendant destroys the presumption of innocence.
5. Masks, distancing and plexiglass walls are all barriers that remove jurors from the humanness of the attorneys and the defendant.
6. Counsel cannot be an effective advocate while masked and distanced from the jurors who counsel must persuade.
7. Masking prospective jurors during *voir dire* prevents clear communication between counsel and a juror and prevents counsel from accurately assessing non-verbal cues communicated through facial demeanor and expression.
8. Counsel cannot meaningfully *voir dire* or challenge jurors without being able to observe their demeanor.
9. A prospective juror’s demeanor is a critical factor in determining her impartiality. See, e.g., Commonwealth v. Rush, 162 A.3d 530, 537 (Pa.Super. 2017).
10. Counsel bases tactics and challenges on jurors’ demeanor and may strike a juror on demeanor alone.
11. The same is true of masking jurors during trial.
12. Masking attorneys, who are speaking continually throughout the trial, creates muffled speech, prevents full expression, and destroys effective interactions between counsel and the Judge, the witnesses, and the jurors which are vital to effective representation.
13. The use of “clear” or “transparent” masks does not alleviate these concerns.
14. The majority of clear masks are only clear to the extent there is a square cut out around the mouth area where transparent plastic is substituted for cloth; aside from making the wearer look foolish, such a mask still covers most of the lower portion of the face and remains a barrier to clear speech and expression.
15. Additionally, defendant is not aware whether 100% transparent masks are breathable and effective against transmission of the virus.
16. The CDC has suggested clear masks over cloth ones in limited situations such as for those who rely on lip-reading to communicate. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>
17. Masks at trial, although mandatory for health reasons, impede counsel’s effectiveness and prevent the meaningful participation of the defendant, the jurors and the witnesses.
18. Masks create a substantially unfair trial.

**V. Issues with Social Distancing Logistics**

1. Because jurors have to be spread out in the courtroom during trial, they are no longer a spatially-cohesive group receiving evidence in the same manner or subject to the same experiences.
2. Some jurors will be forced to sit farther from, and even behind, all the “action.”
3. Some jurors will be forced to view the evidence and the parties from the audience section which is purposely separated and removed from the well of the courtroom.
4. Some jurors will only be able to see the backs of the defendant and the attorneys.
5. Having jurors spread out in the courtroom makes delivering opening statements and closing arguments logistically ineffective, audibly inferior, and emotionally bereft.
6. In order to be an effective advocate, counsel needs to see the jurors’ demeanor during selection and trial and needs to object if any jurors are sleeping, talking, or doing something inappropriate.
7. Counsel cannot see jurors who are seated behind counsel.
8. With jurors spread out in the audience section, they will be in a position to hear counsel’s conversations with the defendant which are to be protected and confidential.
9. Counsel cannot socially distance with the defendant during a trial; this may offend some jurors or cause disdain toward counsel.
10. Masks, distancing, and plexiglass throughout the courtroom creates a maze of barriers that isolates the participants from one another.
11. The jurors will be removed from and unable to observe a masked defendant’s demeanor.
12. Research has shown that “proximity affects empathy.” See NACDL Statement of Principles and Report on “Criminal Court Reopening and Public Health in the COVID-19 Era” (June 2020) at pg. 9-10.
13. “[S]eparating an accused person from the jury by [any barrier such as plexiglass, masks, or virtual mechanisms] dehumanizes the person on trial and reduces juror empathy.” Id.
14. Separating jurors into smaller groups when they are outside the courtroom invites misconduct.
15. Sidebars are a necessary part of any trial; requiring the participants to remove themselves to another room is unduly disruptive and time-consuming.
16. Prohibiting exhibits and other documents from being passed to and from the witnesses absolutely hamstrings and hinders effective cross-examination.
17. Having jurors deliberate in the courtroom increases the chance that, by intention or accident, others may easily eavesdrop on their conversations; the courtroom has multiple entrances, is outfitted with a microphone system that can be accessed remotely, and is equipped with surveillance cameras that can be accessed remotely.
18. For all these reasons, defendant objects to the Court’s social distancing procedures which deprive him of effective counsel, an impartial jury, and a fair trial.

**VI. Issues with Excluding the Public**

1. Upon information and belief, the Court’s trial procedures will exclude the public from defendant’s trial.
2. The Sixth Amendment and Article I, Section 9 guarantee the defendant the right to a public trial and excluding the public is a violation of the defendant’s rights under these constitutional provisions. See, e.g., Waller v. Georgia, 467 U.S. 39 (1984); Commonwealth v. Jordan, 212 A.3d 91 (Pa.Super. 2019).
3. A court can exclude the public only if the following criteria are met: “(1) there is an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closure, and (4) the trial court makes findings adequate to support the closure.” Id. at 101 (citation and quotations omitted).

 **WHEREFORE**, defendant requests the Court to provide him with a fair trial procedure that does not interfere with his right to a public trial, effective counsel, an impartial jury from a fair cross-section of the community, and a trial wherein the jurors are seated together in full view of the evidence, attorneys and witnesses; or in the alternative, stay his trial until such time as the pandemic has abated sufficiently to allow a trial comporting with longstanding constitutional requirements.

Dated: \_\_\_8/24/20\_\_\_\_\_\_\_\_\_\_\_\_ Respectfully submitted by:

 

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 Carol A. Marciano, Esquire

 Senior Deputy Public Defender

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA**

**CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA, :

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vs. : No.: CP-39-CR-3985-2018

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ANTWAN WASHINGTON, :

Defendant. :

**CERTIFICATE OF SERVICE**

I, Carol A. Marciano, Esq., hereby certify and state that on this day I have served a true and correct copy of the attached Motion by electronic delivery on the following:

Honorable Douglas Reichley

c/o Court Administration

Judge of the Court of Common Pleas

Lehigh County Courthouse

455 W. Hamilton Street

Allentown, PA 18101

**VIA EMAIL to “CA SERVICE” and “lawclerkdouglasreichley@lehighcounty.org”**

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Allentown, PA 18101

**VIA EMAIL to “DA SERVICE” and “stevenluksa@lehighcounty.org”**



Dated: \_\_\_\_8/24/20\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Carol A. Marciano, Esq.

 Senior Deputy Public Defender