

**IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

Case No.

Miami-Dade County Circuit Court
Complex Business Litigation
Case No. 18-000596-CA-44

THE CANTOR LAW GROUP, P.A.,
f/k/a CANTOR & WEBB, P.A., a Florida
for profit corporation, SHARON DRESSER and
THE ESTATE OF STEVEN L. CANTOR,

Petitioners,

v.

HAL J. WEBB and HAL J. WEBB, P.A.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI AND
ALTERNATIVE PETITION FOR WRIT OF PROHIBITION**

Appeal of April 5, 2021 Non-Final Order entered by Circuit Court of the
Eleventh Judicial Circuit, in and for Miami-Dade County, Florida

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BASIS FOR INVOKING JURISDICTION OF THE COURT

This is a petition for a Writ of Certiorari, or alternatively, a Writ of Prohibition, seeking review of the non-final Order Overruling Counter-Defendants' Objection to Masked Witness Testimony issued by the Honorable William Thomas, Circuit Court Judge, Eleventh Judicial Circuit (the "Trial Court"), dated April 1, 2021 ("Order on Review"). App. 0001-0008. The Order on Review overruled the Petitioners' Due Process objection to the administrative procedures implemented by the Administrative Judge of the Miami-Dade Circuit Court, and applied by the Trial Court, which will require witnesses to wear masks while testifying during an in-person jury trial proceeding.

This Court has certiorari jurisdiction to review the Order on Review, which is a non-final order of a circuit court other than those prescribed by Fla. R. App. P. 9.130. See Fla. R. App. P. 9.030(b)(2)(A) and Fla. R. App. P. 9.100. Certiorari review of a non-final Circuit Court Order is appropriate when a party shows that the trial court departed from the essential requirements of law, causing irreparable harm that cannot be adequately remedied on final appeal. *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011); *Kirlin v. Green*, 955 So.2d 28, 29 (Fla. 3d DCA 2007). Here, forcing

witnesses to testify wearing masks is an error that will infect the entire jury trial proceeding.

When a trial court fails to implement the correct trial procedures, certiorari is the appropriate remedy. See, e.g., *State v. Baldwin*, 978 So. 2d 807, 808 (Fla. 1st DCA 2008) (holding that certiorari relief was appropriate because “the trial court failed to inquire into reasonable alternatives to the categorical exclusion of three State witnesses, and thus, failed to apply the proper procedure for taking the extreme measure of preventing a witness from testifying.”); *Printing House, Inc. v. State, Dept. of Revenue*, 614 So. 2d 1119, 1122 (Fla. 1st DCA 1992), *approved and remanded sub nom. Dep’t of Revenue v. Printing House*, 644 So. 2d 498 (Fla. 1994) (“Certiorari is the appropriate remedy for review of an interlocutory order which erroneously denies a jury trial.”); *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995) (recognizing certiorari was appropriate for irreparable harm caused by trial court failing to follow procedural requirements in Fla. Stat. 768.72); *Valdez v. Chief Judge of Eleventh Judicial Circuit of Florida*, 640 So. 2d 1164, 1165 (Fla. 3d DCA 1994) (“Because the petition alleges that the chief judge exceeded his jurisdiction in promulgating the instant administrative order, certiorari is an appropriate remedy and we have jurisdiction.”).

Alternatively, this Court has the authority to issue a Writ of Prohibition to prevent the Trial Court from conducting the jury trial in a manner that will infringe Petitioners' Due Process rights. See *Clarrington v. State*, Case No. 3D20-1461, 2020 WL 7050095 (Fla. 3d DCA Dec. 2, 2020)(considering a challenge to a trial court conducting a remote probationary proceeding under the Court's power to consider a Writ of Prohibition.); *Millennium Diagnostic Imaging Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 129 So. 3d 1086, 1088 (Fla. 3d DCA 2013)("The purpose of prohibition is to prevent something rather than to undo something . . ."). See also, *Onwu v. State*, 692 So. 2d 881, 883 (Fla. 1997) (granting writ of prohibition and invalidating administrative order by chief circuit judge that affected manner in which competency hearings were conducted).

At the March 23, 2021 pretrial conference where argument was presented on the objection to the masking of witnesses, the Trial Court agreed with Petitioners that seeking a writ for appellate review would be appropriate prior to the commencement of trial:

THE COURT: I will give you a ruling [on the issue of masked witnesses] before we start trial. If you want to take a writ, you can take a writ and we can hopefully get some guidance.

. . .

THE COURT: **Actually, I think it should go up as a writ** because they will deal with it more urgently and maybe we will get a decision...

App 0037, T 137:4-16. As the Trial Court also explained, appellate guidance is crucial because a decision on masked witness testimony is a decision that “is going to impact everybody.” App. 0035, T 98:4. As Florida courts are beginning to resume jury trials, the issue of the appropriate procedure to implement for conducting jury trials is one of great public importance. Indeed, the issue of whether it is appropriate to mask witnesses during a jury trial is a topic of national discussion, with a significant divergence among courts as to the appropriate balance between the protection of health during the COVID-19 pandemic, and the protection of a party’s due process right to have the jury fully and adequately evaluate the credibility of a witness.

This issue is appropriate for certiorari review because the Trial Court’s ruling also impacts petitioners’ Right of Access to the Courts, as protected by the Florida Constitution. “In these circumstances, the trial court must fashion a remedy that has the least intrusive impact...” *Shimon v. R. B.*, No. 3D20-1599, 2021 WL 357956 (Fla. 3d DCA Feb. 3, 2021)(evaluating the balance between protecting a litigant’s constitutional rights and implementing procedures to effectively manage the administration of justice). The Trial Court erred here in

failing to consider Petitioners' reasonable suggested alternatives that would have had the least intrusive impact on Petitioners' Due Process rights.

Guidance on the manner in which a litigant's Due Process rights are to be protected while protecting the health of the participants in a jury trial is needed from this Court.¹

FACTS UPON WHICH PETITIONER RELIES

Petitioners Sharon Dresser, the Cantor Law Group, P.A. and the Estate of Steven L. Cantor (collectively "Dresser") have been engaged in contentious litigation with Hal J. Webb and Hal J. Webb, P.A. ("Webb") for over three years. This litigation commenced when Dresser filed claims against Webb arising from his departure as a law partner in the Cantor Law Group after Ms. Dresser's husband, Steven L., Cantor, committed suicide. At the time the initial complaint was filed, Dresser's then counsel issued a press release summarizing and commenting upon the claims that the Cantor Group filed against Webb. That press release led to publications in five news

¹ Certiorari review is also the appropriate remedy as the Trial Court did not consider Petitioners' request for a continuance of the jury trial if the Trial Court was unwilling to utilize the procedures requested by Petitioners to protect their Due Process rights. See e.g. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 129 So. 3d 1153 (Fla. 3d DCA 2014) (granting certiorari review of defendants' motion to stay state court action.)

sources. Webb subsequently filed a counterclaim against Ms. Dresser, the Estate and the Cantor Group for defamation based on statements contained in the news articles. App 0074-0083, Docket Entry 467. Webb also filed a counterclaim for breach of contract, claiming moneys owed to him from the Estate or Ms. Dresser based on a claimed breach of an obligation from a related entity owned by Webb and Mr. Cantor. *Id.*

After three years of litigation, the Trial Court entered an order granting summary judgment in favor of Webb, dismissing all of Dresser's claims, on February 23, 2021. App 0179, docket entry 770. As a result of that order, Webb's counterclaims for defamation and breach of contract remained for resolution by jury trial. In his defamation claim, Webb seeks a finding that the news articles constituted defamation per se and that he be awarded nominal damages. Webb also seeks an award of punitive damages to punish Dresser for the alleged defamation.

On January 13, 2021, the Trial Court entered an Amended Case Management Order, scheduling the case for trial on the three-week calendar commencing March 29, 2021. App 0180, Docket entry 758. On February 8, 2021, the Trial Court entered an order that the defamation claim would be tried to a jury in a bifurcated trial. App 0179, Docket entry 763.

As the parties were preparing for trial, the Miami-Dade Circuit Court Administrative Judge entered an Administrative Memorandum No. 21-A AF 24 CA 01, dated January 25, 2021, which sets forth the procedures that trial courts and parties are required to use in conducting jury trials. Hereinafter “AM.” App. 0039-0043. The AM required all persons involved in the trial to testify with a mask fully covering their noses and mouths. App. 0040. At a March 11, 2021 Final Pretrial Conference, the Trial Court informed the parties that the Administrative Judge would be making a presentation to all counsel scheduled for the March 29 trial calendar as to the trial procedures that would need to be used pursuant to the AM. On March 16, 2021, the Trial Court hosted a presentation, attended by approximately 75 lawyers whose cases were scheduled for jury trial, at which the Administrative Judge presented the guidelines for conducting jury trials. The Administrative Judge confirmed that witnesses will be required to be masked when testifying. See March 15, 2015 Email from Trial Court to counsel, App 0098-0099.

Because masked witness testimony would impede the jury’s assessment of credibility, Dresser filed an objection to masked witness testimony on March 22, 2021. App 0009-0016, docket entry 796. Dresser’s objection sought to have alternatives to masked witnesses that would protect the participants at the trial while protecting Dresser’s Due Process rights.

One alternative, used by many courts, would be to surround the witnesses with plexiglass. Another alternative, based on the fact that the Court was setting aside three rooms to conduct the trial, would be to allow the witness to testify by live stream video from one of the adjacent rooms. If neither of those alternatives were deemed adequate, Dresser requested that the trial be continued until such time that procedures respectful of Ms. Dresser's due process rights could be implemented. *Id.*

On March 23, the Trial Court held a hearing on the objection to masked witnesses. App 0017-0038. Counsel for Webb took no position on the objection. App 0033-0034. The Trial Court expressed concern that he did not have the authority to overrule the Administrative Judge's AM. App 0027. On March 24, 2021, Petitioners filed and served a Notice of Supplemental Authority, which highlighted specific CDC guidance on masked witnesses. App 0100-0132. On April 5, 2021, the Trial Court served counsel with the Order on Review overruling and denying the Objection, dated April 1, 2021. App 0001-0008, docket entry 805.

Webb's defamation claim seeks to punish Dresser and must meet standards under Florida law that are the equivalent of seeking to impose criminal liability on a defendant. See e.g., *Diaz by Rivas v. Sears, Roebuck & Co.*, 475 So. 2d 932, 935 (Fla. 3d DCA 1985) ("that the character of

negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages.”)(internal quotations omitted). The jury will be required to consider Ms. Dresser’s specific intent if it finds Counter-Defendants responsible for the press release and resulting news articles issued by Dresser’s then counsel. Evidence of the reprehensibility of Dresser’s conduct requires a full examination of the witnesses that will be presented by Webb, as well as her own testimony. The jury has to be able to fully assess the demeanor and credibility of every witness.

The Order on Review subordinated Petitioner’s Due Process rights to COVID-19 precautions. App 0001-0008. Although the Trial Court stated that “[t]here is no question that the constitutional rights to which we are all entitled to are one of the most precious privileges we enjoy,” it ultimately held that wearing a mask does not infringe a civil litigant’s due process rights. *Id.* The Trial Court acknowledged that masked witness testimony impedes a jury’s ability to assess witness credibility. *Id.* (acknowledging that masked witness testimony “eliminates two aspects of the observation of demeanor by the jury”). The Trial Court also recognized that there was a divergence of views among courts as to whether witnesses should be allowed to testify with masks.

The Trial Court rejected the use of plexiglass as being violative of the current views of the Centers of Disease Control (“CDC”). *Id.* at 006. However, the Order on Review conflated the issue of plexiglass separating a witness, with an unmasked person wearing a face shield. The CDC has not rejected the use of plexiglass and many courts have used that protection to avoid the valid concerns caused by masked witnesses. App. 0104-0118.

With regard to the alternative of having the witness testify, unmasked, from an adjacent courtroom, the Trial Court expressed concern over the “task of coordinating all the logistics” of placing the witness “in a separate room for a live video stream.” *Id.* at 0006. The Trial Court claimed that the sole solution that it found to be reasonable – masked witnesses - was ordered with the goal in mind of “providing the parties with an opportunity to achieve finality in their pending cases in an attempt to provide prompt administration of justice during these Covid-19 times.” *Id.*

Unfortunately, what is clear is that the Trial Judge, following the AM, elevated the goal of clearing the Court’s docket over the necessity of implementing alternatives that would protect the participants in the trial while protecting Petitioner’s Due Process rights. Finally, the Court did not even consider the alternative of continuing the trial until the Court could use updated guidelines that will eventually permit jury trials to proceed in a

manner that would uphold the Due Process rights of litigants. *Id.* If, as the Administrative Judge explained, the Court is facing a significant backlog of cases to be tried, the Court should not be forcing a litigant to proceed to a jury trial in a manner that undermines full Due Process protection when the Court can choose to schedule non-jury trials and jury trials where the participants are not objecting to masked witnesses, to move the docket forward.

NATURE OF THE RELIEF SOUGHT

While Petitioners appreciate the desire of the Trial Court to move jury trials forward during this unprecedented time, the pressure to move cases towards final resolution cannot come at the expense of a litigant's due process rights to conduct a proper and complete examination of witnesses at trial. Surely, the Order on Review, cannot be justified as a measure to pressure Petitioners to simply agree to pay Webb a settlement to avoid trial.

Petitioners presented three reasonable alternatives to forcing a live witness to be masked while he or she testifies at trial. The Trial Court rejected two alternatives (plexiglass and live streaming from an adjacent courtroom) and did not consider the third (granting a continuance of the trial until the Court would be comfortable allowing unmasked witnesses). Thus, Petitioners seek reversal of the Order on Review and a remand to the Trial

Court to implement a trial procedure that requires witnesses to testify at trial unmasked, or to continue the trial until the Court is prepared to allow witnesses to testify unmasked.

ARGUMENT IN SUPPORT OF PETITION

The constitutional right to due process in judicial proceedings requires that a party be allowed to examine a witness in a form that allows the factfinder to fully assess the witness's credibility. Under the circumstances of this case, the process due to Dresser includes the right both to testify unmasked, and to require to her witnesses to testify without a mask.

I. Due Process Requires That the Factfinder Be Allowed to Meaningfully Assess Witness Credibility and Demeanor.

In general, the process that is constitutionally required to be provided to a litigant turns on “at least three factors: (1) the weight of the right being limited, (2) the risk of error in light of reasonable alternatives, and (3) the government's interests, including the weight of the burden on the government if better process is provided.” *Massey v. Charlotte Cty.*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003). The “specific parameters” of the due process right turn on the “requirements of the particular proceeding.” *Id.* More particularly, for judicial proceedings, due process at an “evidentiary hearing includes more than simply being allowed to be present and to speak.

Instead, the right to be heard includes the right to introduce evidence at a meaningful time and in a ***meaningful manner.***” *Cole v. Cole*, 159 So. 3d 124, 125–26 (Fla. 3d DCA 2013), as corrected (Dec. 18, 2013) (edited and emphasis added).

As the Supreme Court has explained, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelley*, 397 U.S. 254, 270 (1970). Florida courts have recognized the same Due Process right. See, e.g., *Grabau v. Dep’t of Health*, 816 So.2d 701, 709 (Fla. 1st DCA 2002) (“One aspect of due process is the privilege of a party to view and cross-examine a witness.”); *Drogaris v. Martine’s Inc.*, 118 So. 2d 95, 97 (Fla. 1st DCA 1960) (“the compulsory attendance of witnesses is a vital part of the American concept of due process and a fair hearing.”)

This right to test witness credibility is not limited to criminal cases; it applies in virtually every judicial and quasi-judicial proceeding. For instance, as then-Federal Circuit Judge Amy Coney Barrett recently wrote for the U.S. Court of Appeals for the Seventh Circuit, even university disciplinary proceedings are subject to the due process right to examine an adversary so that the factfinder can evaluate the adversary’s credibility. *Doe v. Purdue Univ.*, 928 F.3d 652, 664 (7th Cir. 2019). There can be no other fair method

to resolve a “he said/she said” dispute. *Id.* The U.S. Court of Appeals for the Sixth Circuit reached the same conclusion, reasoning that a dispute turning on “a credibility determination” demands a process to “cross-examine” adverse witnesses before the factfinder. *Doe v. Baum*, 903 F.3d 575, 581–82 (6th Cir. 2018). There is too great a risk of an erroneous deprivation, and too little a burden on the government, to preclude a full examination of a witness’s credibility. *Id.* at 582.

The importance of witness demeanor goes to the accuracy of the trial itself, because the jury’s assessment of the evidence depends on how it credits each witness. See *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (explaining that face-to-face testimony “enhances the accuracy of fact-finding” by making it harder for a witness to lie without detection). A party must have “an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” *California v. Green*, 399 U.S. 149, 157–58 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242–243 (1895)); see also Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness*

Credibility, 64 Am. U.L. Rev. 1331, 1332 (2015) (“Few legal principles are more deeply embedded in American jurisprudence than the importance of demeanor evidence in deciding witness credibility.”). Only that kind of encounter allows the factfinder “to obtain the elusive and incommunicable evidence of a witness’ deportment while testifying.” *Kentucky v. Stincer*, 482 U.S. 730, 737 n.8 (1987).

The power and unpredictable nature of a live examination of a witness, in which the jury is allowed to assess a witness’ demeanor, is well recognized, not only within the legal community, but the public at large. Indeed, “[e]very actor worth his salt understands that his success depends on his ability to convey emotions credibly through his facial expressions and demeanor.” *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1118 (9th Cir. 2013). Just like an audience watches an actor’s demeanor, “so too does a jury assess a witness’s credibility and emotions by examining the witness’s demeanor and eyes.” *Id.*

The Florida Supreme Court has recognized the same important evaluation of a witness’s credibility. At the conclusion of civil trials, juries are charged in the standard jury instructions to consider witness demeanor in making a credibility assessment. Witness demeanor is the very first factor that juries are charged with considering: “In evaluating the believability of

any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying” See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 801 (Fla. 2010).

Petitioners’ right of access to the courts as protected by the Florida Constitution is also impacted by the Order on Review, adopting an AE that mandated that witnesses be masked. “In these circumstances, the trial court must fashion a remedy that has the least intrusive impact...” *Shimon v. R. B.*, Case No. 3D20-1599, 2021 WL 357956 (Fla. 3d DCA Feb. 3, 2021). A remedy that has the least intrusive impact is one of those reasonable alternatives that Petitioners’ have suggested that will allow a jury to view witness testimony without a mask.

For these reasons, due process requires that Petitioners be allowed to examine witnesses and present Ms. Dresser’s testimony in a way that the factfinder can completely assess the witness’s credibility through demeanor – without being masked.

II. The Government's Legitimate Interests in Public Safety Do Not Outweigh Ms. Dresser's Right to a Fair and Accurate Trial.

There can be no reasonable dispute that the government has a compelling interest in protecting the public during a pandemic. "But even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam). The Trial Court erred in rejecting alternatives that will protected the public while preserving Petitioner's right to fully and effectively present traditional demeanor evidence. Further, the Order on Review was based upon the AM which was issued by the Administrative Judge with no process of participation by the bench and par or public hearing before these procedures were implemented. While the Order on Review claims that the interests of all stakeholders was considered, there was no public participation in these trial measures before the AM was implemented. Under these circumstances, the AM cannot be properly used to infringe Petitioner's Due Process rights. See *Onwu v. State*, 692 So. 2d at 883. The trial judge expressed concern that he could not overrule the Administrative Judge's AM. App 0027, T 90. However, an Administrative Order cannot be used to restrict the discretion of a trial judge, especially when a litigant's rights are at stake. See *Valdez v. Chief Judge of Eleventh Judicial Circuit of Florida*, 640 So. 2d

1164, 1164 (Fla. 3d DCA 1994) (granting certiorari review in case where chief circuit judge exceeded proper school of administrative authority under Florida Rules of Judicial Administration in issuing Administrative Order and holding that “[a] judge of a paramount court cannot direct a colleague of that court or of an inferior court how to rule upon a matter except through an established writ or appellate process.”).

A. Unmasked testimony behind plexiglass balances the Trial Court’s competing interests.

Courts around the country have recognized that fair and safe trials during the pandemic can be provided through unmasked witness testimony coupled with plexiglass surrounding the witness stand. For instance, the U.S. District Court for the District of New Mexico reaffirmed that “[a]n unimpeded opportunity to cross-examine adverse witnesses face-to-face and in full view of the jury is core to the Sixth Amendment right of confrontation.” *United States v. Robertson*, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *1–2 (D.N.M. Nov. 13, 2020). The prosecution in that case had urged the court to permit unmasked testimony, concerned that a contrary holding would violate the defendant’s confrontation rights. *Id.* The court in *Robertson* required the witnesses to testify without a mask but with a face

shield and behind plexiglass, concluding that such arrangement did not create an unacceptable health risk.

Many other courts around the country have taken the same approach:

- “The witnesses at Tagliaferro’s trial will remain unmasked and completely visible to both him and the jury. Accordingly, the jury will be able to adequately assess their credibility, and the witnesses, in turn, will be impressed of the gravity of the proceedings at which they testify.” *United States v. Salvatore Tagliaferro*, No. 19-CR-472 (PAC), 2021 WL 1225990, at *3 (S.D.N.Y. Mar. 31, 2021).
- “It is this Court’s view that all testifying witnesses, in order to be subject to proper cross-examination, will have to remove medical face masks while testifying.” *United States v. Cohn*, 481 F. Supp. 3d 122, 132 (E.D.N.Y. 2020).
- “All party-affiliated trial participants are encouraged to use an N95 mask or a generally equivalent mask to be worn at all times in all shared spaces except by . . . a witness while testifying in the witness box surrounded by plexi-glass or other similar protective barrier.” *Vlsi Tech. v. Intel Corp.*, No. 6:21-cv-00057 (W.D. Tex. Feb. 10, 2021), ECF No. 421, App 0120-132.

- “Defendant may be prejudiced by the jury’s inability to clearly observe witness reactions to assess credibility” if witnesses are “required to wear masks that cover their face.” *United States v. Young*, 19-CR-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020).
- “Further, lawyers have expressed concerns about the ability to effectively evaluate prospective jurors, assess the credibility of witnesses, or communicate with the jury if the participants are wearing masks. The court shares those concerns.” *United States v. Sheikh*, 2:18-CR-00119 WBS, 2020 WL 5995226, at *2 (E.D. Cal. Oct. 9, 2020).
- “[T]he Court is highly unlikely to allow trial witnesses to testify in court with a face covering.” *Joffe v. King & Spalding LLP*, 17-CV-3392 (VEC), 2020 WL 3453452, at *6 (S.D.N.Y. June 24, 2020).
- “Notably, many courts are allowing or requiring witnesses who appear in person to testify without masks because masks may hinder or preclude assessment of a witness’s demeanor, which can have a major impact on the fact finder’s credibility determination.” Meredith Dearborn, *Civil Jury Trials in a*

Pandemic, Practical Law (Dec. 2020),

https://www.paulweiss.com/media/3980655/lit_dec20jan21_spo_tlighton.pdf, App. 0136-0143.

- “However, the weight of authorities, pre- and post-pandemic, suggests that a State’s witness may not testify in a criminal trial while wearing a face mask. This is because the use of face masks by testifying witnesses undermines a defendant’s right to confrontation under the Sixth Amendment and also may run afoul of a defendant’s right to due process under the Fifth and Fourteenth Amendments” Ian Mance, COVID-19 and the Use of Masks by Testifying Witnesses in Criminal Trials, N.C. Criminal Law Blog, <https://nccriminallaw.sog.unc.edu/covid-19-and-the-use-of-masks-by-testifying-witnesses-in-criminal-trials/> (Jan. 4, 2021), App. 0144-0148.

In fact, the most prominent example of the use of plexiglass and unmasked witness is the ongoing trial of Derek Chauvin arising from the death of George Floyd. See, e.g., C-SPAN, Derek Chauvin Trial for the Death of George Floyd, Day 1 Part 1, <https://www.c-span.org/video/?510294-1/derek-chauvin-trial-death-george-floyd-day-1-part-1> (first witness testimony begins around timestamp 2:16:23). Americans

across the country are watching a broadcast of the same trial procedure that Dresser seeks here.

The Trial Court, following the AM, and the instructions of the Administrative Judge, justified its departure from procedure used in all of these cases by concluding that plexiglass does not comply with guidance from the CDC. App. 0006. But the Trial Court's explanation of its decision runs **contrary** to CDC guidance. In the *ABA Journal*, a question and answer session with medical professionals from the CDC, entitled *Court Proceedings During a Pandemic*, addressed the concern that "juries and other court participants want to see the facial expressions of testifying witnesses." One solution to this was the use of plexiglass around the witness stand. Zenilman et al., *Court Proceedings During a Pandemic*, CDC Oct 1 2020, https://www.abajournal.com/images/main_images/Federal_Court_022321.pdf, App 0104-0118. The entire question and the answer from the CDC was as follows:

What about Plexiglass around the witness stand?

Ideally, everyone in the courtroom space should be masked and distanced, with 6 feet between persons. Testifying witnesses present a dilemma, as there are **compelling reasons for juries and other observers to be able to clearly see their facial expression**. There are two solutions to this dilemma; both assume that the witness stand is >6 feet from any of the jurors, from the judge or other court participants, and that the mask is

not used only for the duration of the witness' testimony. Ideally air flow around the witness stand should also be in the direction away from the seated jury.

1). Constructing a transparent plexiglass barrier on the witness stand, which extends 2-3 feet above the individual.

2). Wearing a transparent face shield, if there is not a plexiglass barrier. If used, the face shields have to start at the forehead and be firmly affixed to the forehead, come down past the cheeks and at least to the level, if not beyond the chin.

In some situations, judges may want to have the witness use both a shield and plexiglass barrier. For other court participants, such as lawyers, judges, and jury members, we do not recommend using face shields without masks.

App 0112-0113 (emphasis added). The Trial Court improperly conflated the protection of plexiglass with a face shield. See *also* guidance from the Florida Department of Health:

All individuals in Florida *should* wear face coverings in any setting where social distancing is not possible, unless any of the following is applicable:

...

- An individual works in a profession where use of a face covering will not be compatible with the duties of the profession

App 0134 (emphasis added). The “use of a face covering” is not “compatible with the duties of” a trial witness. Further, it is unnecessary. At trial, the Court will enforce social distancing within the courtroom. Indeed, the

Administrative Judge addressed the elaborate procedures that will be utilized to transport trial participants to and from the Courtrooms in this century old Courthouse.

The Trial Court, applying the AM, also erred in adopting a mechanistic and impractically quantitative concept of witness demeanor to justify its limitations on Dresser's right to present her testimony and to examine other witnesses. The Trial Court erroneously dismissed Dresser's concern about a mask covering a witness's mouth and nose because the jury can still see the witness's eyes and hand movements. App. 0003. That explanation failed to appreciate how juries evaluate demeanor. People do not observe demeanor in parts, but in wholes. It is all of a person's demeanor that distinguishes between a smile and a smirk, and between a statement made in jest and sincerity. By covering witnesses' faces, the trial court disguised the "the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility." *Romero v. State*, 173 S.W.3d 502, 505–06 (Tex. Crim. Ct. App. 2005). The limitation employed by the Trial Court virtually guarantees miscommunication at trial.

It is far from clear whether a jury can "halfway" assess credibility, as the Trial Court supposed. If the jury only has access to half the information

to assess credibility, it is even more unclear how this Court will adequately review a final judgment based on such a stilted jury determination. Normally, the factfinder's assessment of credibility is reviewed deferentially on appeal, since the factfinder observes "the bearing, demeanor and credibility of the witnesses appearing in the cause." *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976). But a verdict from a trial where the jury receives just half the information needed for a crucial credibility determination may be entitled to lesser deference. The Trial Court's order unnecessarily set sail into uncharted waters.

Dresser gave the trial court a reasonable alternative to hiding witness demeanor behind a mask. The use of plexiglass follows direct guidance from the CDC. The Trial Court erred by rejecting this guidance.

B. The trial court erred by rejecting video transmission from a separate room in the courthouse.

Dresser alternatively proposed that witnesses be allowed to testify remotely from a different room in the courthouse. Because witnesses would testify from a separate room, they could safely speak without a mask, and the jury could view their demeanor through a video feed. By requiring that witnesses testify from the courthouse, and not the informality of one's

bedroom or kitchen, over Zoom, the proposal would have ensured that witnesses appreciated their oath and the solemnity of a trial.

The main reason the trial court gave for rejecting this alternative proposal was that it would be no different from a full trial-by-Zoom. App. 0005-0006. The Trial Court erred in this analysis. Conducting trials in courthouses are intentionally formal—they are intended to impose on parties and witnesses the need for attention and truthful testimony. The decorum of court is not an accident, but a feature of American trials. Each witness would be required to appear before the Court and jury, masked, to be sworn in, and then would retire to the adjacent room to present the live feed testimony. Further, the witness would know that he or she could be commanded back to the Courtroom, masked, at any time, to appear before the Court and the jury, if necessary to provide instruction during the testimony. No Zoom trial could duplicate that level of soberness. Full Zoom trials also lead to juror distraction and bias. See, e.g., Connor Perrett, *Jury trials conducted by Zoom can lead to biased juries, distractions, and other dangers, lawyers say*, Insider.com (Mar. 20, 2021), <https://www.insider.com/virtual-trials-can-lead-to-biased-juries-distractions-lawyers-say-2021-3>, App. 0149-0159.

What's more, a full Zoom trial was not an option before the trial court. Under Rule 1.451 of the Florida Rules of Civil Procedure, the default rule is

that witnesses must testify live at trial. Fla. R. Civ. P. 1.451(a). Remote testimony can be allowed, but only if either: (1) the parties agree to it; or (2) one party moves in writing for remote testimony and proves good cause for it. Fla. R. Civ. P. 1.451(b). The parties had not agreed to remote testimony, nor had either party filed a written motion requesting it. Indeed, the preference of *both* parties was for a normal trial, with live testimony. App. 0033, T 96.

The Trial Court also believed that this proposal was just too difficult to implement. But requiring a witness to testify on live video feed from an adjacent room is no harder than putting a Zoom-capable laptop into a conference room. The witnesses would be unmasked only while testifying. After that, they would re-mask and leave the building.

C. At a minimum, the court should have granted a continuance.

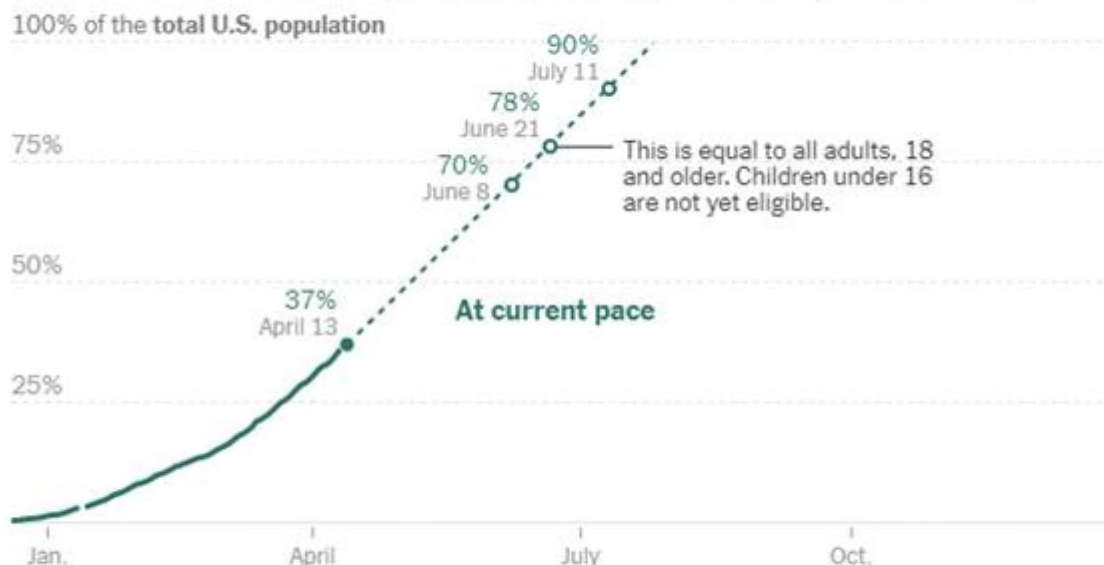
The Trial Court's summary rejection of the two practical alternatives proposed by Dresser was not reasonable and surely was insufficient to overcome Petitioner's Due Process rights. However, assuming that the CDC had advised that plexiglass not be used at trial, that all the other Courts that have used the plexiglass procedure have simply been reckless and wrong in their approach, and that requiring the witness to testify from an adjacent room by live feed is just too hard for the Court to be required to utilize, such

findings do not justify forcing Dresser to proceed to trial at this time. The Trial Court should have removed the case from the trial calendar and monitored developments in the pandemic to determine if trial procedures that would protect Dresser's Due Process rights can be implemented. *Sheinheit v. Cuenca*, 840 So. 2d 1122, 1123 (Fla. 3d DCA 2003) ("Although the discretion to grant a continuance rests with the trial court, that discretion cannot be used to deny a party the basic tenets of due process.") (internal quotation omitted).

Florida is increasingly providing all adults with the opportunity to be vaccinated. Florida Dep't of Health, *COVID-19 Vaccines in Florida*, <https://floridahealthcovid19.gov/vaccines/> (last visited Apr. 8, 2021), App. 0160-0163; Office of the Governor, Executive Order 21-79 (Mar. 26, 2021), https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-79.pdf, App. 0164-0165. By April 12, over one-third of all Floridians have received a vaccine. Florida Dep't of Health, *COVID-19: Vaccine Summary* (vaccination data through Apr. 12, 2021 as of Apr. 1, 2021), *current version available at* http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/vaccine/vaccine_report_latest.pdf, App. 0166-0167. By June 30, 2021, the CDC estimates that all adults in the country will vaccinated or have had a chance to be vaccinated:

At the current pace of vaccination, everyone could get a shot this year. But no vaccine has been authorized for children under 16.

Based on the seven-day average of people receiving a first or single dose each day.



Source: Centers for Disease Control and Prevention | Note: Total population includes states, territories and three countries with [special agreements](#) with the United States: Palau, Micronesia and the Marshall Islands.

N.Y. Times, *See How the Vaccine Rollout Is Going in Your County and State*, <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html#projection> (last accessed Apr. 13, 2021), App. 0168-0177.

If this Court is not prepared to remand the case for the Trial Court to utilize one of the alternatives proposed by Dresser, then the Trial Court should be required to remove this case from the trial calendar to monitor the developments in vaccination efforts. The combination of a vaccinated public with the use of plexiglass is a sufficient precaution that all reasonable jurists would accept. The trial court erred by ignoring this straightforward request.

CONCLUSION

Although the Circuit Court has a compelling interest in preserving public health for participants in a jury trial, that interest would have been sufficiently protected by utilizing either of Dresser's proposals. There was no reason to force Dresser to trial while denying Petitioners' right to have a jury assess the demeanor of all trial witnesses. This Court should reverse the Order on Review and require the Trial Court to utilize a procedure that requires witnesses to remove their masks while testifying. If the Court's interest in protecting the trial participants cannot be fulfilled without making witnesses at this time, then the case should be removed from the trial calendar and reset when the trial can be presented with unmasked witnesses.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Petition complies with the applicable font and word count limit requirements pursuant to Fla. R. App. P. 9.045(e).

 /s/ Joseph A. DeMaria
Counsel

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel of record as noted below and the Honorable William Thomas, Circuit Judge, Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida, Dade County Courthouse, 73 West Flagler Street, Room DCC 1307, Miami, Florida 33131, via email and by U. S. Mail, on April 13, 2021. I certify that the foregoing has been sent in compliance with the Eleventh Judicial Circuit of Florida, Circuit Civil Division, Complex Business Litigation Rules, Rule 3.3.

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