

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NEDELTCCHO VALDIMIROV

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Confrontation Clause of the Sixth Amendment is violated by requiring all trial witnesses to testify with masks that covered the majority of their faces when the court did not make any findings supporting their use or consider less obtrusive alternatives.

Whether a criminal defendant's seventeen-month incarceration before trial, during which he lived in a constant fear of contracting COVID-19 and was brutally assaulted, violated his Sixth Amendment right to a speedy trial.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

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PETITION FOR WRIT OF CERTIORARI

Nedeltcho Vladimirov, an inmate currently incarcerated at Federal Correctional Institution in Ashland, Kentucky, by and through Richard W. Weston, Criminal Justice Act panel attorney, respectfully petitions this court for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Fourth Circuit Court of Appeals appears at Appendix 1a to the petition and is unpublished.

JURISDICTION

Mr. Vladimirov's appeal was denied on March 16, 2023. He did not file a rehearing petition. The Court has jurisdiction under 28 U.S.C. §1254(1) having timely filed this petition for a writ of certiorari within ninety days of the Fourth Circuit Court of Appeal's judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI provides,
in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and...to be confronted with the witnesses against him.

STATEMENT OF THE CASE

I. The Sixth Amendment's Confrontation Clause was Violated by Requiring Witnesses to Wear Masks while Testifying at Trial

The Sixth Amendment demands that criminal defendants “be confronted with the witnesses against him.” This guarantees the defendant a face-to-face encounter between the witness and accused. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988). In *Maryland v. Craig*, 497 U.S. 836 (1990), this court determined that while there are exceptions to the absolute right to confront witnesses, they are subject to rigorous analysis. This court articulated a two-part test that “a physical, face-to-face confrontation [can be eliminated] at trial 1) only where denial of such confrontation is necessary to further an important public policy and 2) only where the reliability of the testimony is otherwise assured.” *Id.* at 850. If face-to-face confrontation is not provided, the court must provide case-specific findings of necessity. *Id.* at 857-8. The case-specific findings must find that the confrontation denial 1) “is necessary to further an important public policy and 2) only where the reliability of the testimony is otherwise assured.” *Id.* at 850(internal citations omitted).

Mr. Vladimirov was indicted for various money laundering charges reacted to his mobile pawnshop

business in March of 2020. App. 2a. This coincided with the onset of the COVID-19 pandemic. After lengthy trial delays mostly caused by the government, his trial was finally set for trial in July of 2021. App. 3a. Due to the pandemic, the Southern District of West Virginia required unvaccinated persons to wear masks in the courtroom. App. 3a. Although it is unclear from the record, the parties somehow learned or anticipated that the district court created its own rule that all witnesses at trial would be required to wear a mask covering their face regardless of vaccination status. Due to this ruling, the defendant and the government petitioned the court “to allow the witnesses to testify without masks, explaining that the witnesses’ ‘demeanor’ and ‘credibility’ would “be very important in this case.” App. 3a. The court denied the motion simply stating it did so because the court did not know what precautions the witnesses had taken, all witnesses were required to wear masks. App. 3a. After a three-day jury trial, the Petitioner was convicted of one count of conspiracy to commit money laundering, 18 U.S.C. § 1956(h), and three counts of money laundering, 18 U.S.C. § 1957(a).

On direct appeal, Petitioner argued that requiring the witnesses to wear masks covering a large portion of their face violated the Sixth Amendment’s Confrontation Clause. The parties agreed that the proper standard of review was *de*

novo. Despite this agreement, the appellate court *sua sponte* raised the issue at oral argument that because Petitioner did not specifically state the request to not require the jury to wear mask implicated the Confrontation Clause, the error was not properly preserved and thus subject to plain error review. App. 7-9a. The court erred in this ruling because our Confrontation Clause has four pillars which are 1) physical presence, 2) oath, 3) cross-examination, and 4) observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 837 (1990). Counsel's proposed procedure to unmask the witnesses specifically stated that it was made so that the jury could properly assess the credibility and demeanor of the witnesses, many of whom were drug addicts and possibly on drugs at the trial. App. 7-9a. This statement was very specific about the effect masks would have regarding confrontation and specifically involved one of the four pillars of the Confrontation Clause.

Federal Rule of Criminal Procedure 51 provides that a "party may preserve a claim of error 1) by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or 2) the party's objection to the court's action and the grounds for that objection." While the trial transcript does not reveal if the district court made a pretrial ruling that all witnesses

were required to wear masks, it clearly evinces that the Petitioner and Respondent approached the court the day before trial and made a joint motion to the court to not require the witnesses to wear masks. Therefore, Rule 51's requirement of informing the court of the action the party wishes to take is satisfied and the inquiry stops there.

Assuming *arguendo* that the first prong of Rule 51 is not satisfied, Petitioner's motion was essentially on objection to the court's ruling. Further, he stated the grounds for that objection as the credibility of the witnesses and in order to judge that credibility "the demeanor of the witness is vastly important." This is even more specific than a generic Sixth Amendment objection because it specifies the exact pillar of the Confrontation Clause upon which the objection is made. Although the Fourth Circuit cited its case of *United States v. Mackins*, 315 F.3d 399 (2003) as support for its position, the case actually supports Petitioner. In *Mackins*, an objection which simply cited a case related to the constitutional provision sufficed to preserve the constitutional objection.

Even if the proper standard of review is plain error, this constitutional violation satisfies the standard. To establish plain error, a defendant must show that (1) the district court erred, (2) the error was plain, and (3) the error affected the defendant's substantial rights. See *United States v. Olano*, 507

U.S. 725, 732–34 (1993). Even if the defendant meets his burden, we will “exercise [our] discretion to correct the error only if it ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Lynn*, 592 F.3d 572, 577 (4th Cir. 2010) (quoting *United States v. Massenburg*, 564 F.3d 337, 343 (4th Cir. 2009)).

It is undisputed that all witnesses that testified at Petitioner’s trial wore standard COVID-19 masks which covered a large portion of the witnesses’ face including the mouth and nose. The circuit court assumed, without deciding, that face-to-face-confrontation is violated when a witness wears a mask. App. 10a. However, in deciding against Petitioner, it narrowly framed the issue holding:

Because neither the Supreme Court nor this Circuit has provided any precedent addressing the constitutional implications of witnesses wearing masks while testifying during the COVID-19 pandemic, and our sister circuits have not adopted a uniform position on this issue, we will not find plain error in the district court’s ruling. *See id.* at 516, 516 n.14. Thus, we reject Vladimirov’s Confrontation Clause challenge because any such error was not plain.

App. 7-9a.

However, this analysis is incorrect due to the circuit court's narrow framing of the issue. *Coy v. Iowa* and *Maryland v. Craig* provide a clear framework for determining if a denial of face-to-face confrontation occurs. That framework requires a hearing to determine if the confrontation violation if 1) "is necessary to further an important public policy and 2) only where the reliability of the testimony is otherwise assured." *Craig* at 850(internal citations omitted). Because the district court failed to invoke this framework, or provide any analysis, the error is plain. It is impossible for a court to determine the error was not plain without invoking the proper framework.

Furthermore, the issue is not as narrow as the circuit court holds. If a face-to-face meeting is denied, then the *Craig* framework is required to analyze whether a violation occurred. Notably, the circuit court decision did not discuss the *Craig* framework because if it had done so, the plain error is obvious. It is obvious that forcing witnesses to wear masks which cover a large portion of their face thus obscuring the jury's view of their demeanor violates the right to confrontation.

Additionally, the error seriously affected the fairness and integrity Petitioner's trial. The crux of the trial was whether Petitioner knew the items he bought from various individuals were stolen thus

setting up a factual determination between whether the sellers or Petitioner were telling the truth. Petitioner's counsel informed the court that the demeanor of the witnesses was "vastly important" even beyond normal concerns because there was evidence they may be under the influence of drugs during their testimony. Requiring these witnesses to wear masks without any data supporting their need seriously affected the fairness of Petitioner's trial and his right to confrontation.

II. The Sixth Amendment's Speedy Trial Clause was Violated by Waiting Seventeen Months from Indictment Until Trial

The district court's response to COVID-19 not only violated the Sixth Amendment's Confrontation Clause but also violated its right to a speedy trial. The Sixth Amendment provides the "right to speedy...trial." U.S. Const. Amend. VI. To determine if this right is violated, courts examine several factors of "(1) whether the delay was uncommonly long; (2) what the reason was for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice resulted to the defendant." *United States v. Shealey*, 641 F.3d 627, 634 (4th Cir. 2011)(citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

(1) *whether the delay was uncommonly long*

The circuit court agreed that the seventeen-month trial delay was presumptively prejudicial. App. 11a.

(2) the reason for the delay

Petitioner made his initial appearance and was incarcerated on February 10, 2020. Despite his protests, he would not go to trial until over 17 months later. Petitioner's trial was initially set on May 11, 2020. In April, the West Virginia governor issued a stay-at-home order due to COVID rendering trial preparation nearly impossible. Therefore, the court continued the case until July 13, 2021.

Even though jury trials were allowed in the Southern District of West Virginia on that date, the United States filed a motion to continue based on COVID. Despite the defendant's objection, the court granted the continuance for "ends of justice" due to COVID. Trial was rescheduled for August 17, 2020. In July of 2020, the court again continued the trial due to COVID and rescheduled trial until October 19, 2020. About a month before trial, the United States filed another motion to continue the trial due to COVID. The defense objected to this motion noting that while COVID may contain certain risk to the government preparing for trial, Petitioner had been incarcerated for an extensive period of time making his health risks higher than anyone else. The court

continued the trial over defendant's objection. A new trial date was not set due to COVID-19.

After a Superseding Indictment, trial was scheduled for April 19, 2021. Again, the United States filed a motion to continue due to COVID-19. The court granted this motion because of a general order by the Southern District of West Virginia barring jury trials at the time. Trial was continued until July 7, 2021. While Petitioner's counsel did request two continuances during the pendency of the case, he did not agree to these requests, they were for short periods, and contributed little to the seventeen-month delay. Nevertheless, the circuit court held the delay "was attributable to the unpredictable and unavoidable public health crisis presented by the COVID-19 pandemic." App. 11a. However, only the initial period of the delay was responsible for COVID-19 closing the courts. The vast majority of the delay was due to the government's continuance requests for "difficulty" meeting with witnesses being difficult due to COVID-19. Furthermore, the government never identified which witnesses it was having difficulty meeting with or unable to prepare for trial. The circuit court did not balance these factors but instead simply relied on its general statement that COVID-19 caused the delays.

(3) *whether the defendant asserted his right to a speedy trial;*

Convinced of his innocence, Petitioner desired a trial as soon as possible. Anytime he was asked by counsel, he objected to a continuance. Shortly before trial, Petitioner still maintained his speedy trial right was violated but his appointed counsel would not file a motion to dismiss because it occurred from a previous attorney. A few days before trial, Petitioner mailed his *pro se* motion to dismiss based on his Sixth Amendment right to a speedy trial. Despite the seventeen-month delay of his trial, the district court did not provide any analysis of the motion simply stating “after careful review and finding no merit,” the motion was denied. The circuit court held that Petitioner’s attempts to object and his *pro se* motion for a speedy trial were outweighed by the fact that his prior counsel had twice requested continuances. App. 11a. It made this finding even though it is relevant to the length of delay and not whether a speedy trial was requested. Furthermore, Petitioner never agreed to let his counsel move for a continuance.

(4) *whether prejudice resulted to the defendant.*

Prejudice should be assessed in light of three interests: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Barker*, 407 U.S. at 532. Petitioner was incarcerated for the entire seventeen-month trial delay. While there was no specific defense

impairment, Petitioner suffered an inordinate amount of anxiety and concern. COVID-19 was rampant in the jails and he was not able to protect himself as a free person could have. Most important, he was also assaulted by another inmate receiving a broken nose, concussion, broken cheek bone and multiple contusions. The circuit court dismissed this fact because Petitioner also wrote in his *pro se* motion to dismiss that “this is happening in jails around the U.S....all the time,” therefore it should not have unduly worried Petitioner. App. 12a. If true, our country’s jails require a serious overhaul if every inmate is receiving concussion and broken bones. However, it is more likely that the circuit court seized on this language to justify its result knowing that receiving this type of beating in jail causes extensive pain, anxiety and concern.

REASONS FOR GRANTING THE WRIT

I. To Avoid Erroneous Deprivations of the Confrontation Right, this Court should Clarify that any Violation of the Right to Observe the Demeanor of a Witness only Occurs After a Rigorous Analysis

It is unclear how courts are to approach the confrontation clause analysis after *Crawford v. Washington*, 541 U.S. 36 (2004). It appears that *Crawford* vitiates the second prong of the Craig test which requires a judicial determination that the

reliability of the testimony is otherwise assured. *Crawford* eliminates judicial determinations of indicia of reliability for testimonial statements. *Id.* Nevertheless, even under the *Craig* standard which requires the judicial determination of reliability, the constitutional violation in our case was a serious error that affected the integrity of the proceeding. Petitioner made a motion to allow the witnesses to testify without mask. The court denied the motion without conducting any analysis of whether COVID-19 required witnesses to wear masks or provided a safety benefit to anyone. The court should not have been allowed to violate the confrontation clause's right to a face-to-face meeting to observe demeanor without conducting an analysis to determine if the violation was warranted in the light of public safety.

The case is a proper vehicle for review because the circuit court did not rule on the merits but instead improperly based its ruling on a failure to properly object. This court should protect the right to confront witnesses by ruling on the merits and decide that Petitioner did not receive a fair trial due to the denial of face-to-face confrontation.

II. To Avoid Erroneous Deprivations of the Speedy Trial Right, this Court should Clarify that a Seventeen-Month Trial Delay Mostly Attributable to the Government Requires Dismissal of the Case

Only a small portion of the seventeen-month trial delay was attributable to either the defendant or court closure due to COVID-19. Instead, the vast amount of delay was due to the government not being able to prepare witnesses for trial. Yet the government did not identify which witnesses were problematic or what steps it had taken to prepare the witnesses. Therefore, this Court should uphold the values espoused in *Barker* and determine that the Sixth Amendment's speedy trial right was violated.

CONCLUSION

This court should grant certiorari.



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