IN THE SALT LAKE CITY JUSTICE COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

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| SALT LAKE CITY, | : | |
| Plaintiff | : | **ORDER** |
| vs. | : | |
| | : | |
| Deonte Deron Burton, | : | CASE NO. 191402024 |
| Defendant | : | JUDGE CLEMENS A. LANDAU |

On January 21, 2021, the court directed the parties to file objections to the remote procedures the court has proposed for resuming jury trials during this next—and hopefully final—stage of the Covid-19 pandemic. Defendant Deonte Burton filed an objection on February 12, 2021, arguing the United States Constitution and Utah Constitution require two things with respect to confrontation: (1) the venire's presence in the courtroom during voir dire, and (2) the jury's presence in the courtroom during trial. Neither party has requested oral argument on these objections. The court thanks defense counsel for his thoughtful and well-researched brief, and rules as follows.[1]

## Procedural Background

On March 12, 2020, the Salt Lake City Justice Court issued a standing order in response to the Covid-19 pandemic continuing all jury trials set between March 13, 2020, and April 10, 2020. The next day, the Utah Supreme Court issued its first Administrative Order on Court Operations During the Pandemic, suspending all justice court trials. The court has not held a jury trial since.

[1] Because the constitutional questions raised depend—at least in part—on the severity of the pandemic existing at the time of trial, this order will become ripe for reconsideration as the pandemic subsides.

During the remainder of 2020, the court worked alongside the Utah Administrative Office of the Courts as well as the court's justice partners to craft a variety of plans for safely restarting jury trials. One of those plans involved having the jury venire appear remotely via video conference for jury selection, and then having the jury observe the trial via six closed-circuit screens in a room across the hall from the trial courtroom.

Under this plan, jury selection will proceed remotely. Potential jurors will receive a link from the court asking them to each fill out a series of questionnaires using eVoirDire software developed by JurorSearch. The questionnaires focus on four main areas: (1) the juror's Coivd-19 related health concerns, (2) the juror's general demographic background, (3) the juror's ability to follow the court's instructions on a variety of legal questions, and (4) the juror's attitudes with respect to the criminal justice system.[2] Prior to trial, the attorneys will be given access to the eVoireDire program.[3] The program's dashboards allow the attorneys to see the entire venire at a glance, click through the questionnaire responses, take notes on each potential juror, and later track the challenges and strikes made during jury selection. Jury selection will then be completed via the Webex video-conferencing platform.

After the completion of jury selection, the trial will then proceed in-person at the courthouse. The trial courtroom, approximately 1000 sq. ft., is equipped with a series of plexiglass panels to protect the defendant, attorneys, witnesses, judge, bailiff, and judicial assistants. It also features four video

[2] The attitudes portion of the questionnaire includes the questions from the Revised Legal Attitudes Questionnaire (RLAQ), which are crafted to help attorneys identify authoritarian, anti-authoritarian, and egalitarian personality traits in the venire. For more information on the RLAQ and related juror attitude tests, see, e.g., David Ferguson & Len Lecci, *Coaxing Authoritarians out of the Jury Pool*, UTAH J. CRIM. L. (forthcoming 2021); Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY, 2010, 2025 (2008); David A. Kravitz, et. al., *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, 17 LAW AND HUMAN BEHAVIOR, 661 (1993).

[3] For a video demonstration of this program, see jurorsearch.com.

cameras trained on the two counsel tables, the witness stand, and the judge, as well as a two, big-screen televisions: one in the jury box (for displaying closed circuit video of the four jurors), and one on the other side of the courtroom (for displaying exhibits, demonstratives, jury instructions and powerpoint slides as needed.).

The jury courtroom, approximately 200 sq. ft., is across the hall from the trial courtroom. Each juror is seated in front of a computer screen displaying the video feeds from each of the four courtroom cameras. The jury room also features two additional big-screen televisions mounted at the front of the room: one to display a larger and higher definition view of the witness, and the other to display exhibits, demonstratives, jury instructions and powerpoint slides as needed.

Although all jury trials set for March 2021—including this one—have been continued because Salt Lake County's transmission index is still too high to allow them to proceed, the court anticipates proceeding with jury trials in April 2021 using these procedures, if they are constitutional.[4]

**Analysis**

The Sixth Amendment's Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against [them]." U.S. Const. amend. VI. Similarly, Article I, Section 12 of the Utah Constitution provides that "[i]n criminal prosecutions the accused shall have the right to appear and defend in person and by counsel" and "to be confronted by the witnesses against the accused." Utah Const. art. I, § 12.[5] The "primary object" of these provisions is

> to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing

[4] This order only addresses the Defendant's constitutional concerns, both of which center on the court's proposed use of video-conferencing technology. It therefore does not describe in detail the variety of masking, cleaning, HVAC, screening, and other health measures the court has implemented at the courthouse in consultation with the state's medical experts.

[5] The court assumes the Confrontation Clause and its state analog are identical in scope because they appear functionally equivalent and Mr. Burton has not argued otherwise.

> 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.

*Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (emphasis added); *see also State v. Anderson*, 612 P.2d 778, 785 (Utah 1980) (quoting *Mattox*). The confrontation provisions serve a three-fold purpose: (1) "insur[ing] that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury," (2) forc[ing] the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," and (3) permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

Courts recognize that the general preference for in-person proceedings set forth in *Mattox* must "occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. 237, at 243. In such instances, the Confrontation Clause must be interpreted "in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process." *Craig*, 497 U.S. 836, at 844. And face-to-face confrontation may only be dispensed with "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850 (citing *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), overruled by *Crawford v. Washington*, 541 U.S. 36 (2004)).[6] The court will apply this framework to first address whether Mr. Burton has the right to the venire's physical presence in the courtroom during voir dire and then to address whether Mr. Burton has the right to the jury's physical presence in the courtroom during the trial.

[6] Reliance on the *Craig* framework is still appropriate under Utah law. *State v. Henriod*, 2006 UT 11, ¶16 ("We disagree with the conclusion of the district court that *Crawford* abrogated *Craig.*"); *but see, e.g.*, *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020) (holding, more viciously, that *Crawford* "took out [*Craig*'s] legs).

**1. During the current stage of the pandemic, Mr. Burton does not have the right to have the venire physically present during voir dire.**

Voir dire is "a critical stage of [a] criminal proceeding, during which the defendant has a constitutional right to be present." *Gomez v. United States*, 490 U.S. 858, 873 (1989); *see also United States v. Gordon*, 829 F.2d 119 (D.C. Cir. 1987); *Commonwealth v. Owens*, 609 N.E.2d 1208 (Mass. 1993); *State v. Irby*, 246 P.3d 796 (Wash. 2011); *cf. State v. Hubbard*, 2002 UT 45, ¶33 ("We assume, without deciding the issue . . . that defendant has a right to be present at sidebar discussions with potential jurors during the jury selection process"); *State v. Martinez-Castellanos*, 2017 UT App 13, ¶36, rev'd, 2018 UT 46 (same). This right to be present, however, can be met "using alternate procedures" as long as the "defendant h[as] the ability to hear and to observe jurors' response." *Boone v. United States*, 483 A.2d 1135, 1141-42 (D.C. 1984) ("We do not intend to convey the meaning that once a defendant's right to be present at voir dire is involved, it can only be satisfied by his presence at the bench."). As a result, "[w]hen security is a problem or a dangerous defendant or a group of defendants is involved, the right to be present during jury voir dire can be satisfied by use of closed circuit television and opportunity to consult with counsel." *United States v. Washington*, 705 F.2d 489, 497 n.4 (D.C. Cir. 1983).

In the present case, the court rules that the Covid-19 pandemic presents the type of dangerous situation that permits the court to satisfy the defendant's right to be present during voir dire "using alternate procedures."[7] But the court must still determine whether the alternate procedure at issue—a video-conference via WEBEX—represents an adequately balancing of the interests under *Craig*. More specifically, the alternate procedure must be sufficient to "otherwise ensure" the "reliability" of the

[7] Courts have ruled that a defendant's right to be present during voir dire does not include the right to view facial features during a global pandemic. *See United States v. Robertson*, 2020 WL 6701874, at *2 (D.N.M., Nov. 13, 2020) (holding the defendant does not have a constitutional right to "have unimpeded visual access to prospective jurors' facial expressions during jury selection"); *United States v. Trimarco*, 2020 WL 5211051, at *5 (E.D.N.Y., Sept. 1, 2020) (rejecting argument that there is a constitutional right to see juror's facial expression during voir dire); *United States v. Crittenden*, 2020 WL 4917733, at *8 (M.D. Ga., Aug. 21, 2020) (holding the constitution does not required the potential juror's face to be fully in view during voir dire).

process by allowing the defendant to hear and observe the jurors' responses, and to consult with counsel about those observations. *Craig*, 497 U.S. 836, at 850. To determine the adequacy of the alternate procedure, it is necessary to first assess the scope of the pre-Covid-19 in-person process, especially with respect to the concerns surrounding implicit bias raised by Mr. Burton.

During traditional, in-person voir dire, the venire sits together on benches in the gallery of the courtroom. Although it depends somewhat on the size of the venire, the jurors are usually squished into four rows, and none of the jury trial participants—defendants, attorneys, judge, witness, or victims—have the opportunity to see all of the potential jurors at a glance. For their part, the potential jurors—perhaps intimidated by the courtroom or distracted by other pressing concerns—are often unwilling to unable to speak freely about issues surrounding bias. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, *The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 160 (2010) ("As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'"). In such proceedings, the court is faced with the choice of either having potential jurors stand as they address the parties (which only causes them to clam up more), or allowing them to remain seated (which interferes with the parties' ability to meaningfully assess their demeanor).

Appellate courts have noticed this dilemma as well. In 1984, long before the catchphrase "implicit bias" became a part of our national dialogue, the Utah Supreme Court recognized that "[t]he most characteristic feature of prejudice is its inability to recognize itself." *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984). The court added: "It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands in court and declare themselves biased." *Id.* Thirty-three years later the United States Supreme Court followed suit, recognizing that although "[g]eneric questions about juror

impartiality may not expose specific attitudes or biases that can poison jury deliberations," "more pointed questions could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *see also, e.g.*, Cynthia Lee, *A New Approach to Voir Dire on Racial* Bias, 5 UC IRVINE L. REV. 843, 872 (2015) ("Making jurors aware of their own implicit biases while not triggering stereotype threat is likely to be a difficult balancing act, somewhat like walking a very thin tight rope."); Robin DiAngelo, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM, passim (Beacon Press 2018).

But even though jurors might be unwilling to truthfully share information about their conscious biases—as well as wholly unequipped to share information about their unconscious ones—it is nevertheless possible that Mr. Burton and/or his counsel might be able to draw accurate inferences about the biases of a group of strangers if given the ability to observe their demeanor in person. The research on the actual benefits of this type of in-person demeanor evidence does not appear to support this contention. *See* Malcolm Gladwell, TALKING TO STRANGERS: WHAT WE SHOULD KNOW ABOUT THE PEOPLE WE DON'T KNOW (2019) (collecting research and historical anecdotes suggesting that in-person interactions actually interfere with our ability to discern the truth).

The Online Courtroom Project and National Institute for Trial Advocacy recently published a whitepaper contending that voir dire may actually be better *online*. Online Courtroom Project, *The Online Courtroom and the Future of Jury Trial* (2020) [OCP Whitepaper], *available at* https://go.nita.org/. The OCP Whitepaper observed several positive results of conducting online jury selection, noting that "if properly positioned, attorneys, judges, and jurors . . . actually have a much clearer view of each other's nonverbal behavior" and that "[a]necdotal reports from online trials have shown that conducting online jury selection increases response rates, participation, and the diversity of jury pools." *Id.* at 4, 10, 40. Notably, it also observed that "in truth, most people are quite poor at interpreting body language, and court participants are no exception." *Id.*; *see also, e.g.*, Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO.

WASH. L. Rev. 158, 169 (2020); Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 237-39 (2018) ("Whether these unobserved variables are internal states, such as mood, or specific features of the case that are salient and overweighted, such as the defendant's appearance, the net result is to create noise, not signal.").

Based on the foregoing, the court concludes that having potential jurors appear remotely during a pandemic represents an adequately balancing of the interests under *Craig*. The court is not persuaded that the demeanor evidence Mr. Burton might be able to gather in person is of no value. But the court is persuaded that it is not necessary to gather in person such evidence in person to satisfy the "quintessential elements" of his right to be present during voir dire. *Boone*, 483 A.2d at 1131-42.[8] The

[8] The court agrees with Mr. Burton that it has an obligation under *State v. Saunders* to attempt to ferret out all biases in the venire. 1999 UT 59, ¶34. The court will continue to meet this obligation during the pandemic by carrying forward all of its other pre-pandemic practices. During jury selection, the court will describe the concepts of explicit and implicit bias, and pass along the recommendations included in the American Bar Association's videos. American Bar Association, *Bias on the Bench* (2018), *available at* https://www.americanbar.org/groups/diversity/resources/implicit-bias/ (video describing the evidence-based strategies finders of fact can employ to mitigate the impact of their implicit biases: (1) stay humble, (2) go slow, (3) be highly self-motivated to be fair).

The court will also continue to use the opening and closing instructions drafted by the American College of Trial Lawyers, *see* American College of Trial Lawyers, *Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science* (2019), *available at* https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/improving-jury-deliberations-final.pdf?sfvrsn=9a786c69_6, as well as a stand alone instruction based on ABA materials on implicit bias, which reads:

> I'd like to talk to you a little more about unconscious bias. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Our system of justice requires all of us—prosecutors, defense attorneys, judges and jurors—to minimize the impact of our unconscious biases on our decision making. Researchers have identified several techniques we can use to accomplish this difficult task. I have found the following techniques helpful in lessening the impact of my own biases on my decision making as a judge, and I therefore ask you to use these techniques as you consider the evidence in this case:

remote procedures the court has in place will give Mr. Burton the ability to hear and observe the potential jurors, as well as the ability to consult with counsel during jury selection. At least during the present stage of the Covid-19 pandemic, the use of such procedures does not infringe on any of Mr. Burton's confrontation rights.

**2. During the current stage of the pandemic, Mr. Burton does not have the right to have the jury physically present in the trial courtroom.**

The court must now apply the *Craig* framework to the more difficult question of whether Mr. Burton's confrontation rights are infringed if the jurors observe the trial via a series of closed-circuit television feeds from a completely different room at the courthouse. This arrangement undoubtedly fulfills the first two *Craig* requirements. First, all of the witnesses will appear live, and will therefore be as "impressed with the seriousness of the matter" as the witnesses were during a pre-pandemic trial. *Craig*, 497 U.S. at 844. Second, all of the attorneys will have in-person access to the "greatest legal engine ever invented for the discovery of truth": in-person cross-examination. *Id.* Whether the arrangement fulfills the third *Craig* requirement, however, is far from clear.

The arrangement in *Craig* involved a one-way closed-circuit television procedure that allowed the Judge, Jury, and Defendant to be able to view the witness "by video monitor." 497 U.S. at 851. The

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> **First**, take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
>
> **Second**, focus on individual facts; don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
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> **Third**, try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group.
>
> **Fourth**, listen to the opinions of the other jurors, who may have different backgrounds and perspectives from yours.
>
> Working together will help achieve a fair result. But keep in mind that your vote must be your own.

Court concluded, without much ado, that a single video feed provided an adequate mechanism for conveying the witness's demeanor, even though other "subtle effects" were undoubtedly lost as a result. *Id.* Other courts are all over the map. The Second Circuit in *United States v. Gigante* went so far as to conclude that two-way closed-circuit television preserves all of the characteristics of in-court testimony, including demeanor evidence. 166 F.3d 75, 80 (2d Cir. 1999). But most other courts are not so sure. *See, e.g.*, *United States v. Carter*, 907 F.3d 1199, 1208 n.4 (9th Cir. 2018) (criticizing *Gigante*); *United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005) (same); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006)(same); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993); *United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997).

Notably, the cases disapproving of the use of two-way closed-circuit television focus more on the loss of the face-to-face encounter between the witness and the accused, and less on the loss of the factfinder's ability to assess demeanor. *Carter*, 907 F.3d at 1206-07 (describing, among other things, the loss of the defendant's ability to see if the witness is being coached, to see if the witness is improperly relying on documents, or have the witness identify the defendant in-person); *Bordeaux*, 400 F.3d at 554 (focusing on the "truth-inducing" effect a defendant's "unmediated gaze across the courtroom); *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (relying on *Bordeaux* without providing much additional analysis) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."). Because the court's set-up preserves the defendant's right to sit face-to-face with the witness, observe what the defendant is relying on as she testifies, have the witness make traditional, in-court identifications, and otherwise gaze upon the witnesses in an unmediated way, at least part of the reasoning of the above cases is inapplicable here. But that fact does not resolve the question either.

Absent any clear binding or persuasive authority, the court against finds it helpful to first assess the scope of the pre-Covid-19 in-person process with respect to demeanor evidence. To be sure, the

court's courtrooms were never set up to provide jury trial participants with unbridled access to one another's demeanor. The witnesses are seated in a well, the jurors in a box, and the judge on an elevated bench, all of which conceal a substantial portion of their body language. And depending on where they are sitting, a participant in a fully in-person trial may be left with little more than a profile view of the person whose demeanor they are trying to assess. Although the jury box is usually situated near the witness well, the witnesses and the fact-finders are rarely locked in on each another. To the contrary, the witness's gaze is usually trained on the questioning attorney or judge, and the jurors' and/or judge's gaze, although usually trained in the general direction of the attorney or witness, often meanders throughout the courtroom, especially if other interactions between witnesses, alleged victims, family members, and bailiffs in the often busy courtroom environment are available.

The court agrees with *Gigante*'s critics and believes that the closed-circuit system certainly does not preserve all of the characteristics of in-person interactions with respect to demeanor evidence. But it also finds that the perfect transmission of that evidence is not necessary under the present circumstances. The traditional, in-person jury arrangements described above were set-up with an apparent preference for auditory and audiovisual cues—not demeanor evidence. In this way, the historical format already incorporated—at least to a certain extent—the now growing consensus in the social sciences that "paying attention to visual cues, as compared to auditory and audiovisual cues, may hinder our ability to detect lies rather than help." Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 166-67 (Sept. 2020) (citing Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230-31 (2006)); *see also* Gladwell, *Talking to Strangers* at 152, 162 (noting that "transparency," defined as "the idea that people's behavior and demeanor—the way they represent themselves on the outside—provides an authentic and reliable window into the way they feel on the inside" "is a myth . . . we've picked up from watching too much

television and reading too many novels where the hero's 'jaw dropped with astonishment' or 'eyes went wide with surprise.'").

Based on the foregoing, the court rules that reducing jury participants' exposure to the Covid-19 virus presents a sufficiently "important public policy" to allows the court to seat jurors in a separate room where they can observe the trial via a series of closed-circuit video feeds. *Craig*, 497 U.S. at 850. Further, based on its assessment of the role demeanor evidence has traditionally occupied during a trial, the growing consensus that such evidence is often "noise, not signal," and the video feeds' ability to approximate the role such evidence has traditionally played—the court also concludes that the reliability of these pandemic-related procedures is "otherwise assured," as required by *Craig*. *Id.* at 850. Although the court is mindful that this conclusion may soon be ripe for reconsideration, the court rules that at least during the current state of the pandemic, Mr. Burton's confrontation rights are not infringed by having the jurors observe the trial via six closed-circuit video screens from a room "down the hall."

Dated: March 1, 2021

BY THE COURT

Honorable Judge Clemens A. Landau