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JEREMY DALE SORTOR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
(HONORABLE EDWARD J. LODGE)

UNITED STATES OF AMERICA,)	CR19-226-S-BLW
)	
Plaintiff,)	DEFENDANT'S OBJECTION TO
)	CLOSING THE COURTROOM
vs.)	AND ASSERTION OF SIXTH,
)	AND FIRST AMENDMENT
JEREMY DALE SORTOR,)	RIGHTS
)	
Defendant.)	
_____)	

TO: BART M. DAVIS, UNITED STATES ATTORNEY
KATE HORWITZ, ASSISTANT UNITED STATES ATTORNEY
MIKE LEE, UNITED STATES PROBATION OFFICER

JEREMY DALE SORTOR, by and through counsel Nicole Owens and the Federal Defender Services of Idaho, objects to General Order No. 360, specifically the total closure of the courthouse during his sentencing hearing, and (1) asserts his Sixth and First Amendment rights to a public hearing as

well as (2) his constitutional right to confront and call witnesses and have the Court assess their credibility in person. (3) In the alternative, Mr. Sortor seeks to be released from custody until his constitutional rights can be honored if his hearing is continued.

Tomorrow is Mr. Sortor's third scheduled sentencing hearing. (ECF Nos. 20, 30, 37.) He was previously scheduled to be sentenced on March 12, 2020, before the Honorable Judge David C. Nye, who recused himself after Mr. Sortor's nine friends and family members traveled to Boise to attend the hearing from southern Idaho. (ECF No. 36.) As the Court can see from the letters of support that have been filed in this case, Mr. Sortor has significant support in the community. (ECF No. 28.) His loved ones want to help him through this difficult time, bear witness to the events that will take place in the courtroom, and offer testimony and statements on his behalf. They plan to attend tomorrow just as they have traveled many miles to attend his prior hearings.

Counsel learned this morning in a different sentencing hearing before the Honorable Judge B. Lynn Winmill that it was possible family members would be excluded from the courtroom in other proceedings. This was confirmed in communications with the courtroom deputy, who referenced an anticipated general order. Communications with other court staff indicated that witnesses may also be prohibited from taking the stand and may be

restricted to testifying by telephone. General Order No. 360 was issued late this afternoon. It contains the following statement:

b. All change of plea hearings, suppression hearings, and sentencing hearings currently scheduled before a District Judge will be continued until after May 11, 2020, and any such proceedings not yet scheduled will be set for a hearing after that date. Counsel will be notified of the continuance/scheduling and provided the opportunity to object if delaying the hearing will negatively impact the substantive rights of the defendant, witnesses, or victims. The Court will then conduct a telephonic hearing to consider the objection and determine whether an in-person hearing must be held before May 11. If the Court determines that the hearing must be conducted before that date, it will be held with only the attorneys, the defendant, court personnel, and security personnel present;

Counsel for the government has no objection to Mr. Sortor's friends and family attending the sentencing hearing as they have on each prior occasion as long as they remain six feet from her.

1. Mr. Sortor's Sixth and First Amendment Rights Are Violated By the Exclusion of the Public, Including His Friends and Family from His Sentencing Hearing.

The Sixth Amendment guarantees the right to a "public trial." And this right extends to "those hearings whose subject matter involve[s] the values the right to a public trial serves." *United States v. Walters*, 627 F.3d 345, 360 (9th Cir. 2010) (alteration in original). The Sixth Amendment protection extends "with as much force to sentencing proceedings as to the trial itself." *United States v. Rivera*, 682 F.3d 1223, 1228 (9th Cir. 2012). Similarly, the First

Amendment guarantees the public's right of access to sentencing proceedings. *Id.* at 1229.

The right to a public trial entitles a criminal defendant “at the very least . . . to have his friends, relatives and counsel present, no matter with what offense he may be charged.” *Id.* (internal quotation marks and citations omitted). Closures can be too trivial to implicate Sixth Amendment guarantees if they do not involve the values served by the public trial—“ensuring fair proceedings; reminding the prosecutor and judge of their grave responsibilities; discouraging perjury; and encouraging witnesses to come forward.” *Id.* Excluding a defendant's family members for the entirety of a sentencing hearing is a substantial exclusion that falls squarely within Sixth and First Amendment protections. *Id.* at 1231.

As the Ninth Circuit has described, “matters of vital importance [are] discussed and decided” during a sentencing hearing, including “comput[ing] the Sentencing Guideline range, hear[ing] closing statements from defense counsel and a personal statement from [the defendant], weigh[ing] the § 3553(a) factors, and impos[ing] its sentence.” *Id.* at 1232. “The Supreme Court has long recognized ‘the critical nature of sentencing in a criminal case.’” *Id.* at 1233 (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)).

Thus, the Ninth Circuit found the court's exclusion of the defendant's family members from the sentencing hearing “implicated important values

served by the Sixth Amendment.” *Id.* “Most saliently, the district court imposed Rivera’s sentence free from the watchful eyes of Rivera’s family members, and thus without the most significant reminders of the importance of the court’s sentencing function and the gravity of its actions. The closure was therefore not trivial.” *Id.*

The presumption of openness requires the Court to close the courtroom *only* under highly specific circumstances. First, the Court must distinguish whether the closure will be (a) total, i.e., “all persons other than witnesses, court personnel, the parties and their lawyers are excluded for the duration of the hearing,” *Waller v. Georgia*, 467 U.S. 39, 42 (1984), or (b) partial, i.e., where “the closure is more narrowly tailored to exclude spectators only to the extent necessary to satisfy the purpose for which it was ordered.” *Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1992). The general order is a total closure since all persons other than the parties and the court personnel will be excluded from the courtroom. The Supreme Court made clear that such closures should be rare “and the balance of interests must be struck with special care.” *Waller*, 467, U.S. at 45. The applicable rules are:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. (quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984)) (emphases added). Mr. Sortor asserts that the general order fails to make the requisite findings, fails to identify an overriding interest, and that the closure of the courtroom is neither essential nor narrowly tailored. Given Mr. Sortor’s strong Sixth and First Amendment rights of having his relatives and friends present at his sentencing hearing, the courtroom should not be closed.

2. Mr. Sortor’s Sixth Amendment Confrontation and Compulsory Process Rights Are Violated by the Exclusion of Witnesses from the Courtroom.

Further, Mr. Sortor intends to call an individual as a witness in his hearing tomorrow. The General Order states that even if the hearing goes forward, witnesses are not among the individuals who will be allowed in the courtroom. This clearly violates his Sixth Amendment rights under the confrontation and compulsory process clauses. The Supreme Court has found that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1016 (1987). The central concern of the confrontation clause is to “ensure the reliability of the evidence against the criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990). Face-to-face confrontation is not absolute, but “that does not, of course, mean that it

may easily be dispensed with.” *Id.* at 850. “[O]ur precedents confirm that a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* 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.* (emphases added).

The Sixth Amendment “constitutionalizes the right in an adversary criminal trial to make a defense as we know it.” *Faretta v. California*, 422 U.S. 806, 818 (1975) (citing *California v. Green*, 399 U.S. 149, 176 (Harlan, J. concurring)). This encompasses compulsory process—“the calling and interrogation of favorable witnesses.” *Id.* Naturally, these rights extend to sentencing proceedings. *See, e.g., United States v. Hantzis*, 625 F.3d 575, 579 (9th Cir. 2010).

3. Mr. Sortor Objects to Further Continuance of His Third Scheduled Sentencing Hearing Unless He Is Released from Custody Immediately.

As one alternative, Mr. Sortor requests that if the courtroom is to be closed for his sentencing hearing, he be released from custody and his hearing be continued until his constitutional rights can be honored. To be clear, Mr. Sortor is requesting a sentence of time served¹. Thus, any continuance will affect his substantive rights.

¹ Mr. Sortor erroneously calculated his guideline range in his objection to the PSR as he omitted the calculation for acceptance of responsibility.

At the time of tomorrow's scheduled sentencing hearing, Mr. Sortor will have been in custody for more than eight (8) months. The Final Pre-Sentence Report (PSR) calculates Mr. Sortor's total offense level as 12 and a criminal history category of V, which leads to a guideline range of 27-33 months. However, Mr. Sortor has objected to this calculation.

Mr. Sortor has submitted evidence whereby his possession of the firearms was for lawful sporting purposes. With that adjustment his total offense level would be six (6) which leads to a guideline imprisonment range of four (4) to ten (10) months. Thus, even if the Court were to sentence him at the high end of this guideline range, by May 11, 2020, he will have served over ten (10) months.

Dated: March 17, 2020

Respectfully submitted,
SAMUEL RICHARD RUBIN
FEDERAL PUBLIC DEFENDER
By:

/s/ Nicole Owens
Nicole Owens
Assistant Federal Defender
Federal Defender Services of Idaho
Attorneys for Defendant
JEREMY DALE SORTOR

CERTIFICATE OF SERVICE

I CERTIFY that I am an employee of the Federal Defender Services of Idaho, and that a copy of the foregoing document, DEFENDANT’S OBJECTION TO CLOSING THE COURTROOM AND ASSERTION OF SIXTH AND FIRST AMENDMENT RIGHTS, was served on all parties named below on this 17th day of March, 2020.

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Dated: March 17, 2020

/s/ Nicole Owens
Nicole Owens