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**IN THE JUSTICE COURT OF ELY TOWNSHIP NO. 1**

**COUNTY OF WHITE PINE, STATE OF NEVADA**

IN RE: PRECAUTIONS REGARDING COVID-19

**ORDER FOR APPEARANCES AND TESTIMONY VIA AUDIOVISUAL TRANSMISSION EQUIPMENT AT PRELIMINARY HEARINGS**

## I. Global Pandemic

The world is currently in the midst of a lethal pandemic from severe acute respiratory syndrome coronavirus 2 (hereafter "coronavirus"). The outbreak has been described as "unprecedented".[1] Many of those infected with coronavirus are asymptomatic.[2] As of April 8, 2020, the Centers for Disease Control have reported 12,754 deaths from coronavirus, in the United States alone.[3] In Nevada, there have been over 2,000 confirmed cases of infection and approximately 80 deaths.[4] The virus has also reached White Pine County.[5]

[1] *See e.g.* Reilly, Claire, *'I'm scared': Johns Hopkins expert says coronavirus is totally unprecedented*, CNet, April 3, 2020, available online at. https://www.cnet.com/news/johns-hopkins-pandemic-expert-says-coronavirus-covid-19-is-totally-unprecedented/

[2] *See* Mandavilli, Apoorva, *Infected but Feeling Fine*, New York Times, March 31, 2020, available online. https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html

[3] *See* Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html, last accessed, April 9, 2020

[4] *See* Nevada Health Response, https://nvhealthresponse.nv.gov/, last accessed April 9, 2020

[5] *See e.g.* Roberts-McMurray, KayLynn, Ely's CoVID-19 Patient Zero Confirmed, the Ely Times, April 7, 2020, available



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States of emergency have been declared.[6] Both state and federal recommendations to prevent infection and to slow the spread of the disease include: (1) cancellation of events; (2) closure of non-essential businesses; (3) keeping a 6 foot distance between individuals (a.k.a. social distancing).[7] White Pine County has enacted similar declarations, guidance, directives and/or requirements.[8]

## II. Ely Justice Court

Ely Justice Court has multiple preliminary hearings scheduled for individuals in custody, who have not waived their right to preliminary hearing within 15 days. (e.g. 20-CR-00076-7K; 20-CR-00077-7K; 20-CR-00078-7K; 20-CR-00079-7K; 20-CR-00081-7K).

Ely Justice Court's courtroom is very small. Its area encompasses approximately 375 square feet, not all of which is usable space. Approximately 6 feet separate the bench from defense counsel table. A similar distance separates the witness stand from counsel tables. Approximately 3 feet separate the bench from the witness stand. Approximately 3 feet and no physical barrier separate the public gallery from counsel table A similar distance separates the two counsel tables. Presentation of testimony during a preliminary hearing requires, at least 7 people (judge, court clerk, bailiff, prosecuting attorney, defense attorney, defendant and the testifying witness) to be present in the confined space. Every person entering or exiting the courtroom must generally walk in the 6 feet between the bench and counsel table or the 3 feet between the gallery and counsel table.

Prior to the pandemic outbreak, the Court regularly conducted trials, where witnesses

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online https //elynews com/2020/04/07/elys-covid-19-patient-zero-confirmed/

[6] *See e g.* Nevada Governor, http //gov nv gov/News/Press/2020/Governor_Sisolak_Declares_State_of_Emergency_in_Response_to_COVID-19/, last accessed April 9, 2020

[7] *See e.g.* Centers for Disease Control, https.//www cdc gov, Nevada Health Response, https·//nvhealthresponse nv gov, last accessed April 9, 2020.

[8] *See* White Pine County Public Health, https://www.whitepinecounty.net/634/White-Pine-County-Board-of-Public-Health, last accessed April 9, 2020.

-including expert witnesses- testified via audiovisual transmission equipment. Since the outbreak of the pandemic, both Ely Justice Court and the 7th Judicial District Court have recently began conducting criminal and/or civil hearings via audio-visual transmission equipment, utilizing the services of Zoom. Further, Hon. Stephen J. Bishop Ely Justice Court has much recent experience utilizing Zoom and other similar audiovisual transmission equipment to successfully participate in continuing judicial education and statewide judicial committee meetings.

## III. Relevant Law

An individual charged with a felony or gross misdemeanor generally has a right to a preliminary hearing "within 15 days." NRS 171.196(2). The Court may, however, continue the preliminary hearing for "good cause." *Id.* At a preliminary hearing, a defendant has the right to "cross-examine witnesses against him." NRS 171.196(5).

The confrontation clause protects a defendant's right to confront witnesses at trial, but not at other hearings *See e.g. State v. Zamzow*, 374 Wis.2d 220, 892 N W 2d 637 (2017); *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010); *State v. Lopez*, 314 P.3d. 236 (N.M. 2013). Indeed, even in Nevada, hearsay is admissible in certain cases. NRS 171.196(6).

The right to confrontation "has never been held to be absolute." *People v. Gonzales*, 54 Cal. 4th 1234, 1266, 144 Cal. Rptr. 3d 757, 791, 281 P.3d 834, 863 (2012).

"[T]he Constitution... is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S Ct. 554, 563 (1963). Circumstances can exist to justify allowing witnesses to testify at trial, from behind a screen or via closed circuit television, without violating the confrontation clause. *See e.g. Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798 (1988).

Nevada law favors appearance by telephonic means. SCR Part IX-A(A) R.2. Indeed, Nevada law permits appearances in criminal cases via telephone "in all criminal proceedings and hearings except trial" for a "party or witness." SCR Part IX-A(A) R.4(1). The Court is empowered to permit

such telephonic appearances even at a trial. SCR Part IX-A(A) R.4(2); SCR Part IX-A(A) R.4(3). Similarly, the Court is empowered to permit a witness to appear via audiovisual transmission equipment in criminal proceedings. SCR Part IX-A(B) R.4.

## IV. Analysis

The current circumstances facing the Court are unprecedented. The Court is required to balance the defendant(s) right to a preliminary hearing with the health and safety of the court, court staff, attorneys, defendants and the public. Infection by coronavirus creates a very real possibility of, not just serious sickness, but death.

The courtroom facilities provided for Ely Justice Court are so small it is impossible to practice the recommended social distancing. Similarly, as many of those infected are asymptomatic but still contagious, the Court has no way to identify and exclude contagious persons. These factors create an unreasonable risk of infection (and death) from conducting in-person preliminary hearings.

There is no constitutional right to confrontation in preliminary hearings. The only right to confrontation at a preliminary hearing comes from statute. Further, such a right is not absolute and circumstances may justify limiting the right. The Court finds it difficult to fathom circumstances which could more necessitate limitation of the right than those of the present times (i.e. a severe global pandemic of a virus resulting in serious illness and/or death).

Before the pandemic, Nevada law favored remote appearances –whether by telephone or audiovisual transmission equipment- even at trial. Given the severity of the pandemic, it is illogical to conclude this favor has lessened.

Given the Courts' recent successful experiences using audiovisual transmission, the Court is confident cross-examination can be effective by audiovisual transmission equipment. Thus, the Court sees little reason not to expand the use of such technology to protect not only the health of the court, counsel, witnesses, defendant and the public, while at the same time respecting defendant(s)'s rights to

a timely preliminary hearing and confrontation

## V. Conclusion

It is appropriate and necessary to conduct preliminary hearings via audiovisual transmission equipment. The Court specifically finds denial of physical confrontation is necessary to: (1) promote the health and safety of the court, counsel, witnesses, defendant and the public; and (2) inhibit the spread of and reduce the risk of infection by coronavirus. The Court further specifically finds the reliability of the testimony will not be impaired by being presented via audiovisual transmission equipment.

## VI. Order

Accordingly and good cause appearing, it is the ORDER of the Court that:

1. All preliminary hearings shall be conducted entirely via audiovisual transmission equipment:
    a. Counsel shall appear via audiovisual transmission equipment.
    b. Defendant shall appear via audiovisual transmission equipment.
    c. Witnesses shall offer testimony via audiovisual transmission equipment.
2. The Court will schedule and provide access instructions for each hearing to the parties and/or their counsel, prior to the preliminary hearing.
3. Evidence shall be handled in the following manner:
    a. All evidence to be admitted will be marked, by the proffering party, and submitted to the Court not less than one judicial day prior to the scheduled hearing
    b. In the event the evidence is photographic or documentary, a copy of the exhibit with the identifying marking shall be provided to opposing counsel

not less than one judicial day prior to the scheduled hearing.

c. In the event the evidence is not amenable to copying, counsel for the proffering party shall notify both the Court and opposing counsel in writing, not less than one judicial day prior to the scheduled hearing, and shall offer suggestions on how to introduce and present the evidence.

d. Failure to comply shall constitute grounds for exclusion of such evidence.

4. Members of the public seeking to observe proceedings shall be provided with information to view the proceedings via audiovisual transmission equipment.

5. In the event a defendant does not wish to conduct a preliminary hearing via audiovisual transmission equipment, he/she shall, notify the Court in writing – specific to his/her particular case- of such objection. Blanket and/or standing objections are not permitted.

6. The Court may, in its discretion, modify this order, at any time, by verbal or written order, including without limitation, if the Court concludes a personal appearance is necessary to ensure the integrity of the proceedings.

7. This order shall remain in effect until either:

a. The State of Emergency declared by the Governor of Nevada, on March 16, 2020, is lifted; or

b The order is modified by subsequent order of the Ely Justice Court.

whichever occurs first.

8 As Judge Bishop has recused himself from Case No. 20-CR-00075-7K, this order shall not apply to said case.

Date: April 9 2020.

JUSTICE OF THE PEACE