

**Cordova-Lopez v. State, No. 01-20-00724-CR (Tex. App.-Houston [1st Dist.] Dec. 20, 2022)**

**Attorneys.** Mark Hochglaupe (appellate), Jose Julio "JV" Vela, Jr. (trial).

**Issue & Answer.** Is it structural error to conduct a trial during a pandemic where citizens are less likely to respond to a jury summons, where those who do will feel pressured to return a quick verdict, and where witnesses and participants wear face coverings? **No.**

**Facts.** The State tried the defendant for sexual assault of a child and obtained a 60-year sentence during the peak of the COVID-19 pandemic. The defendant filed a motion to continue his jury trial. In that motion he raised concerns about distracted jurors and court-instituted pandemic procedures that would interfere with his rights to a fair trial and representation by counsel. The trial court denied the defendant's motion for continuance.

**Analysis.** Structural errors are errors affecting the framework of the trial and thus require no harm analysis on appeal. Structural errors must be founded on a violation of federal constitutional right-but not all violations of constitutional rights are structural error.

Structural errors include a total deprivation of the right to counsel, lack of an impartial trial judge, denial of self representation, denial of a public trial, and lack of proper reasonable doubt instruction. See *United States v. Marcus*, 560 U.S. 258, 263 (2010).

The defendant lists the following reasons why a pandemic trial triggers structural error: (1) it amounts to a complete denial of counsel, (2) it denies a fair cross-section of the community, (3) safety precautions infringe on the right to confrontation, and (4) participants wearing face coverings infringe upon the right to a fair trial. The record shows that counsel participated and fails to show what deficiencies in representation existed because of the pandemic procedures adopted by the court. The record does not support the conclusion that the venire was the result of an erroneous cross-section. Such an error occurs only when underrepresentation is due to the systematic exclusion of an identifiable group. The defendant's identified groups-college educated and unemployed individuals-are not recognized groups for a fair cross-section analysis. Moreover, the defendant did not identify a practice of systematic exclusion. That participants in the trial could not hear at times did not affect the defendant's right to a fair trial because the record reflects that participants who could not hear were allowed to ask for testimony to be repeated. That witnesses were required to wear face coverings impeding the jury's credibility determinations did not affect defendant's right to a fair trial because no court has ever said witnesses wearing face coverings amounts to structural error.

Defendant's motion for continuance cited these concerns and additional ones, including: the insufficiency of the health and safety procedures, counsel's fear of contracting COVID-19, and the coercive pressure for a jury to quickly reach a verdict. However, these proposed harms are just speculative-not real.

**Comment.** This is not a very thoughtful opinion. It's a difficult issue and I'm not saying I have qualms with the outcome even though it is not consistent with my personal belief. The opinion has all the hallmarks of a conveyor-belt appellate disposition (a lot of "the

argument fails because it fails" logic). That the defendant did not prove any prejudice in his motion to continue is consistent with the argument why the errors should be treated as structural (structural errors are recognized as errors with unprovable prejudice). Adding to the inherent difficulties in proving prejudice were the realities of the rapid re-mobilization of our courts when they all decided to re-open.

The defendant filed a PDR on December 29, 2022.