

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

IN RE THE MATTER OF)
THE RESPONSE BY) Nos. 20-2-00001-03 (BCSC)
BENTON & FRANKLIN) 20-2-50001-11 (FCSC)
SUPERIOR COURT TO THE COUNTIES)
PUBLIC HEALTH EMERGENCY) EMERGENCY ORDER #5D¹
IN BENTON & FRANKLIN COUNTIES) *Re: General Order On Courtroom*
AND THE STATE OF WASHINGTON) *Appearances (Masking)*
) **Effective: October 12, 2020**

The public health emergency in Washington State posed by the coronavirus 2019 (COVID-19) continues to evolve and requires modification of prior Orders of this Court. The Court has in mind the factual record of prior Emergency Orders and incorporates the same by reference. In particular, the Court has in mind the following:

1. On June 18, 2020, Washington Supreme Court Chief Debra Stephens entered ORDER RE: MODIFICATIONS OF JURY TRIAL PROCEEDINGS, Order No. 25700-B-631, revising and superseding prior orders to the extent they are inconsistent and stating as follows:

“1. Jury trials are necessary to the open administration of justice in Washington. *Courts may commence new jury trials* starting July 6, 2020 in courthouse facilities or offsite facilities, while observing social distancing *and following the most appropriate public health guidance in their jurisdiction.*” (Pg. 2, Italics added).

The same order earlier references Washington State Department of Health guidance specific to trial court operations, and the Order concludes as follows:

“9. *Nothing in this Order limits the authority of courts to adopt measures to protect health and safety that are more restrictive than this Order, as circumstances warrant.* Courts are encouraged to move toward conducting as much court business as can be done *consistent with public health and safety*, in the interest of the fair and timely administration of justice.” (Pg. 5, Italics added).

2. Previously, on May 29, 2020, Washington Supreme Court Chief Debra Stephens entered AMENDED THIRD REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS, Order No. 25700-B-626, revising

¹ While this Order is of general application, it has been given this number to reflect its unique impact on the rights of parties in criminal proceedings.

and superseding prior orders to the extent they are inconsistent and stating as follows:

“WHEREAS, the presiding judges across Washington need direction and authority to effectively administer their courts in response to this state of emergency, *including authority to adopt, modify, and suspend court rules and orders as warranted to address the emergency conditions.* (Pg. 2, Italics added).

The same order grants this Court the ability to suspend court rules as required by this emergency, stating as follows:

“23. *Nothing in this order limits the authority of courts to adopt measures to protect health and safety that are more restrictive than this Order, as circumstances warrant, including by extending as necessary the time frames in this Order.*” (Pg. 14, Italics added).

3. On September 10, 2020, Washington Supreme Court Chief Debra Stephens entered ORDER EXTENDING EXCLUDED PERIOD IN CALCULATING TIME FOR TRIAL, AND ADOPTING RELATED EMERGENCY MEASURES, Order No. 25700-B-642.² Therein, under CrR 3.3(e)(3) & JuCR 7.8(e)(3), time for trial in both the Adult & Juvenile Divisions of this Judicial District is excluded through “the next scheduled court hearing after October 15, 2020.” This order, which had both prospective and retroactive effect on the right to a speedy trial, recognized the continuing emergency posed by COVID-19. On September 28, 2020, this Court entered *Emergency Order #5C, Re: Jury Trials for October— Civil and Criminal*,³ which excluded the remainder of October, 2020 (October 16-31, 2020) when calculating time for trial in the Adult Divisions of this Judicial District, pursuant to delegated emergency authority, under to CrR 3.3(e)(3).⁴
4. On August 4, 2020, the Washington State Department of Health (Hereinafter DOH) updated its COVID-19 and Washington State Courts Public Health Risk Reduction Recommendations. Therein, the Department acknowledged:

“While similar jurisdictional courts share similar risk factors (e.g., number of jurors), each court is unique with regard to: size, seating area, entrances

² This Order superseded and replaced an August 24, 2020, this Court, *Emergency Order #5B, Re: Jury Trials for September – Civil and Criminal*, which excluded the month of September when calculating time for trial in the Adult Divisions of this Judicial District, pursuant to the aforementioned delegated emergency authority, under to CrR 3.3(e)(3).

³ The Order has been amended to correct an erroneous reference to September therein.

⁴ In this Order, as in the Order of August 24, 2020, this Court declined to exclude time in juvenile matters, as there was a procedure in place for conducting bench trials. While the difficulties in implementing this process in the Juvenile Division have informed in part the contents of this order, the presence of this procedure and a recognition that the concerns and difficulties posed by a jury trial are substantially greater continue to support this different approach in time for trial in juvenile and adult criminal trials.

and exits, waiting areas, ventilation, etc. Therefore, it is up to each individual court to determine which strategies will comprise the constellation of activities necessary to reduce COVID-19 risk. Additionally, *each individual court will need to tailor the actions outlined below to its particular setting and needs.*”

When considering COVID-19 transmission risk within a particular court jurisdiction, an important consideration is the rate of COVID-19 occurrence within the community served. *The greater the amount of COVID-19 in a community, the higher the risk that a COVID-19 carrying member of the community will be summoned to participate in a jury trial or an in-person court proceeding.* The rate of COVID-19 is likely to fluctuate over time and across communities as social distancing measures are relaxed and/or communities become apathetic. (pg. 5, Italics added).

The DOH further observed:

As counties are approved to progress from Phase 1 towards Phase 4, increasing social and economic activities are allowed to resume under the Safe Start Plan, as long as positive trends are sustained and required safety precautions are implemented. For the courts, it is anticipated that more in-person proceedings will generally resume in Phase 2 and beyond. (pg. 6, Italics added).

The DOH guidelines are not static as to what protective measure are effective at preventing the spread of COVID-19. While face shields were recommended as an effective safety measure for many months, this guidance was revised on August 28, 2020, wherein the DOH now advises:

Face shields: the use of face shields alone is currently viewed as serving no purpose or providing any protection from the transmission of COVID-19 in the courtroom work environment. (pg. 8, Italics added).

5. The evolving guidance on which protective measures are effective is occurring within an environment of changing guidance nationally. On September 21, 2020, after initially posting and the same day removing guidance and recommendations premised on airborne transmission of the virus, the Centers for Disease Control and Prevention (hereinafter “CDC”), advised:

A draft version of proposed changes to these recommendations was posted in error to the agency’s official website. CDC is currently updating its recommendations regarding airborne transmission of SARS-Cov-2 (the virus that causes COVID-19). Once this process has been completed, the update language will be posted.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed September 28, 2020) (Italics added).

On October 5, 2020, the CDC's guidance was revised as follows:

- *Some infections can be spread by exposure to virus in small droplets and particles that can linger in the air for minutes to hours. These viruses may be able to infect people who are further than 6 feet away from the person who is infected or after that person has left the space*
...
- *Available data indicate that it is much more common for the virus that causes COVID-19 to spread through close contact with a person who has COVID-19 than through airborne transmission.*

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed October 5, 2020, Italics added). A footnote to the last bullet point does make clear that "Pathogens that are spread easily through airborne transmission require the use of special engineering controls to prevent infections." *Id.* FN 1. The guidance includes the admonition to:

*Cover your mouth and nose with a mask when around others.
This helps reduce the risk of spread both by close contact and by
airborne transmission.*

Id. (Italics added). It is important to consider the difference in guidance that flows from the conclusion that airborne droplets of the coronavirus are released when people talk, breathe, cough or sneeze, and that those droplets can remain in the air for hours, versus the opposite conclusion, particularly with respect to the efficacy of six(6)-foot distancing. Again, guidance continues to evolve.

6. The Governor's "Safe Start," while consisting of Four (4) Phases, contains the following admonition on Washington State's Coronavirus Response page:

*No matter which phase your county is in, staying home is still the safest.
If you do go out, remember: stay six feet apart, wear a face covering,
wash your hands and stay local!*

<https://coronavirus.wa.gov/what-you-need-know/safe-start/whats-open-each-phase> (accessed September 28, 2020) (Italics added, exclamation mark in original).

All but five counties in the State of Washington have advanced to Phase 2 or 3 of the Governor's phased reopening plan, known as "Safe Start." Benton and Franklin Counties are two of the five counties that remain in

Phase 1.5 (Modified Phase 1) restrictions. As of the date of this Order, COVID-19 infection rates continue to fluctuate in both Counties, and neither Benton nor Franklin Counties have advanced from those modified restrictions since August 1, 2020.

7. Significant numbers of jurors, called for service as a precautionary measure during August and September, have expressed concern regarding a risk to their health from potential jury service. This Court recognizes that its functions are essential, and thus it has the power to operate and even to operate in derogation from existing guidelines in the interest of justice. That said, the evolving guidelines above understandably inform the concerns and expectations of those who appear in court, particularly potential jurors in criminal cases. The damage to not only any individual case, but to future cases, should this Court's procedures be deemed insufficient in hindsight is real. If transmission of the virus is linked in perception or in fact to a failure in the Court's procedures, the trust of the general public in this Judicial District could be damaged to the extent that it may impact the ability to assemble future venues.

Consistent with a persistent level of concern to protect their health and the health of others, despite the opportunity to appear in person while socially distanced, the vast majority of counsel and parties on all dockets, including Criminal Dockets in both Counties, have elected to appear by telephone or Videoconference, or to avoid any appearance by stipulations and agreements available to them under emergency rules currently in place.⁵

8. This Court continues to recognize, as it has in prior orders, that jury trials are necessary and that court operations are essential. The Court is aware that some civil and criminal matters are simply not capable of resolution without resort to a jury trial. The Court is also aware that, in addition to rule-based speedy trial rights, all individuals before the Court on criminal charges have a Constitutional right to a speedy trial. *See State v. Oliver*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013) (incorporating Sixth Amendment analysis of the four-factor test in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed. 2d. 101 (1972)). Finally, the Court continues to be aware of the stress and anxiety that attends the delay in resolution of cases for those accused, both in and out of custody, and those alleged to be victims of charged offenses. Nevertheless, the Court has to date concluded that it is not reasonable to believe it could conduct jury trials, under the totality of present circumstances, while sufficiently protecting the rights of parties nor the safety of parties and participants, including potential jurors, up to and including the month of October, 2020. The Court, however, continues to recognize that, as the length of time without

⁵ With respect to Benton County Superior Court, beginning on September 14, 2020, four (4) of the six (6) Superior Court courtrooms in the Benton County Justice Center have operated as virtual courtrooms only. This temporary change was necessary due to construction to upgrade the lighting, sound and video capabilities of these courtrooms to address the challenges posed by COVID-19. The comment above refers to the time period from the beginning of the shutdown through September 11, 2020.

the effective right to a trial by jury increases, the balance continues to shift more toward attempts to conduct jury trials under sub-optimal conditions.⁶

9. This Court has developed a procedure for juvenile bench trials, which has resulted in one completed juvenile trial. Attempts to apply the procedure have revealed the administrative and practical challenges of leaving decisions regarding masking and other protective measures to an individual judicial officer, particularly where one judicial officer sets the rules and another conducts the hearing. Because individual judicial officers are likely to vary widely in their view as to what constitutes acceptable risk, based on among other factors their individual health status, it has proven to be impractical for one judicial officer to make these pre-trial determinations for their colleague. While this Judicial District has not traditionally employed a master calendar, believing that it allows more hearings to proceed, in the absence of a rule of general application, matters set for trial would have to be pre-assigned earlier. While this Court recognizes that complexity and difficulty alone are not sufficient to justify a rule in the face of Constitutional protections, attempts to develop checklists and a process for both civil and criminal matters have made clear that such pre-trial determinations would be lengthy, as they would have to weigh the risks and concerns of multiple parties as to the manner and mode of appearance of each witness or participant. Given that currently mandated dockets, with the option of virtual appearances, take additional time to complete, when compared with “traditional” in-person only dockets, the Courts already limited ability to provide essential services to this community would be further limited. A valid rule of general application, which can be simply stated and easily applied, upon which all judicial officers in this Judicial District can agree, would promote equal treatment of those in the courtroom, and would avoid disparity in the vindication of the rights of those present, including the confrontation rights of the accused. It would arguably assist in selecting juries, as it would assuage safety concerns.

10. This Court recognizes that individuals charged with a criminal offense have a right to confront the witnesses against them. *See* U.S. Const. amend. VI,⁷ *see also* Wa. Const., art. 1, § 22.⁸ With respect to the Confrontation Clause, the Ninth Circuit follows the United State Supreme Court’s holding in *Maryland*

⁶ The Court is currently limited in its ability to conduct in person proceedings in the Benton County Justice Center, due to the construction mentioned above. The Court does presently have available to it alternative county facilities in which it could, were the above conditions different, attempt to conduct jury trials: the Benton County Fairgrounds, which are located within Benton County. The court presently believes this facility to be of adequate size with the necessary infrastructure for the purpose of conducting a jury trial. This opinion is based on initial planning that included a review of building plans and a physical site visit conducted by the Court and other stakeholders. As of the date of this order, all three Franklin County Superior Court courtrooms are fully operation.

⁷ “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...”

⁸ “In criminal prosecutions, the accused shall have the right...to meet the witnesses against him face to face...”

v. *Craig*, that “the face-to-face confrontation requirement is not absolute” and that the Confrontation Clause “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.” *Maryland v. Craig*, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990), *followed in*, *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1119-20 (9th Cir. 2013) (allowing CI to testify in fake mustache and wig). While not binding on this Court, other trial courts have found this first prong to be satisfied. *See e.g. United States v. Crittenden*, 2020 WL 4917733 (M.D. Ga. August 21, 2020) (Pre-trial order finding that a blanket requirement of masking in the courtroom “including while speaking” was “necessary to further an important public policy: ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic.”)

The second prong of the *Craig* test, which assures the reliability of the testimony, “turns on the extent to which the proceedings respect the four elements of confrontation: physical presence, oath, cross examination, and observation of the demeanor by the trier of fact.” *Craig*, 497 U.S. at 846. This Court recognizes both that a witness’s demeanor “without any definite rules as to its significance, [and] is always assumed to be in evidence.” *Simon-Kerr, Julia Ann, Unmasking Demeanor* (May 22, 2020). 88 Geo. Wash. L. Rev. Arguendo 158, 163 (2020), *quoting*, 2 *John Henry Wigmore, Treatise On The Anglo-American System of Evidence in Trials at Common Law* § 946 (2d ed. 1923). This Court recognizes as well that nonverbal veracity assessments are themselves potentially problematic. *Unmasking Demeanor*, 88 Geo. Wash. L. Rev. Arguendo 167-8. This Court concludes that masking does further the important public policy of protecting the health of everyone in the courtroom. By allowing the alternative for a party or witness to appear via videoconference without a mask (in a location near the courtroom that is under the sole control of the court to ensure the integrity of the proceedings in a criminal proceeding) this Court finds that a party’s ability to elect between physical presence and the full view of a person’s face (while preserving the remaining portion of the face, voice, other non-verbal cues such as body language, and posture) satisfies Confrontation.

This Court recognizes that the right to confront the witnesses in a criminal case is expressed in different language under the Washington State Constitution. *Compare* U.S. Const. amend. VI (“the right...to be confronted”), *and compare*, Wa. Const., art. 1, § 22 (“the right...to meet the witnesses against him face to face”). Most recently, a four Justice plurality opinion declined to engage in an independent analysis, and adopted *Craig* to interpret Washington’s confrontation clause, in the context of remote testimony in limited circumstances. *State v. Foster*, 135 Wash.2d 441, 461 957 P.2d 712

(1998) (plurality opinion)⁹. This Court has in mind *State v. Sweidan*, in which Division III, in a pre-COVID trial, found error in the trial court allowing a two-way videoconference appearance by a State's witness in a criminal case, while observing that both *Craig* and *Foster* addressed only one-way videoconferencing. *State v. Sweidan*, 13 Wash.App.2d 53, 66-67, 461 P.3d 378 (Div. III, 2020). WebEx is a two-way videoconferencing system, which can be employed if, rather than masked actual presence, a party desires a witness to appear remotely, albeit nearby, while unmasked. This Court is cognizant of *Sweidan's* encouragement that the structure and mechanics of the video conference presentation be placed on the record, including the location of video screens and the ability of the witness to see and hear the other participants, and the other participant's ability to see and hear the witness. *Sweidan*, 13 Wash. App. at 75. By maintaining control over both locations, as indicated below, an appropriate record can be made and both facilities can be observed by both parties. This Court believes, as indicated above, the particular risks to health posed by the virus satisfy an important public policy.

11. This Court concludes, based on the current state of the science of the disease, that a general order requiring all who appear in the courtroom to be masked, and that those individuals desiring that they (or another in a criminal matter) appear without a mask appear by videoconference, is the best way to protect the health of all who appear. Because those individuals, such as pro se litigants, who cannot appear unmasked due to their health, and have tried in good faith but are unable to appear using this court's video conference system, WebEx, can request accommodation from Court Administration, access to justice is preserved.¹⁰ Because a criminal defendant who desires to appear unmasked, or who desires that a witness against them testify unmasked, may do so by appearing remotely via WebEx,¹¹ the essentials of confrontation, when balanced against the threat to public health, are sufficiently preserved. To assure the integrity of such appearances, in a criminal case, they will occur from a location under the control of the Court (such as a jury room or another courtroom), monitored by court staff. In a civil matter, the parties will be able to object to an appearance from another location to ensure the integrity of the appearance of the witness.

NOW, THEREFORE it is hereby **ORDERED**, pursuant to the authority of Washington Supreme Court Order No. 257000-B-631, No. 25700-B-626, and Order No. 25700-B-642 and the authority as the Presiding Judge of Benton & Franklin Counties, that the following shall be in effect:

⁹ Justice Alexander concurred in the result, indicating that article 1, section 22 did not require "in all circumstances, an eyeball-to-eyeball confrontation." 135 Wash.2d at 474, *Alexander, J.* (concurring in part, dissenting in part)

¹⁰ For many civil hearings, parties and counsel have appeared by audio only by simply calling into WebEx.

¹¹ This Court has installed WebEx in all Courtrooms in the District. The Court currently has the capability to project the image of an individual who is appearing remotely in all of the courtrooms by way of a large screen TV on a stand. After the CARES funds upgrades, all of the courtrooms will have an integrated system with multiple large screen monitors.

A. Masking In The Courtrooms (Including Adult and Juvenile Criminal Trials): With respect to all appearances by all individuals in the courtrooms of this Judicial District, all individuals who appear in person must be masked. If an individual cannot, or elects not to be masked, they may appear via WebEx videoconference. Litigants, such as *pro se* litigants in a civil matter, who cannot appear in person unmasked and cannot, after good faith efforts, appear via WebEx videoconference, can request accommodation from Court Administration. In a criminal matter, parties may request that a participant or witness appear unmasked via WebEx videoconference. The Court, with due regard for the health of all, retains the ability to order which of these two options for appearance shall apply in a criminal matter.

B. Prior Orders: This emergency Order supplements the prior emergency orders which remain in full force and effect to the extent that they are not inconsistent with this order.

C. Certification Under Rule Of Appellate Procedure¹² 2.3: The novel coronavirus, as far as this Court can discern, presents an issue of first impression. The issue as this Court conceives it as follows: What is the scope of discretion in the Superior Court to adopt a policy of general application regarding masking of those individuals who appear in its courtrooms in response to the present and ongoing emergency posed by SARS-Cov-2?¹³ Further, are this Court's restrictions on appearances in court, when combined with the above listed procedures designed to protect the rights of those present, including the confrontation rights of those in criminal proceedings: 1) Within the bounds of its discretion? and; 2) Sufficient to protect the aforementioned rights of the parties and participants?

It is important that all parties affected by this Order have every properly available avenue to seek review of this order, as swiftly as possible. Therefore, this Court certifies that this Order "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." *See* RAP 2.3(b)(4).

D. Incorporation Into The Record: As with all prior Orders of the Supreme Court of Washington, and prior orders of this Court, this Order is deemed part of the record in affected cases for the purposes of appeal without the need to file this order in each case.

¹² Hereinafer "RAP"

¹³ If, given enough mutation, the underlying virus is given a new designation, or the resulting illness is reclassified, i.e. COVID-20 or COVID-21, this Court's concerns and conclusions remain the same.

Dated at Kennewick, Washington, this 12th day of October, 2020.



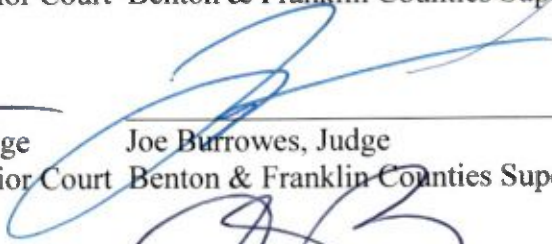
Carrie Runge, Adm. Presiding Judge
Benton & Franklin Counties Superior Court



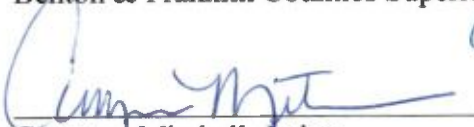
Sam Swanberg, Asst. Admin. Pres. Judge
Benton & Franklin Counties Superior Court



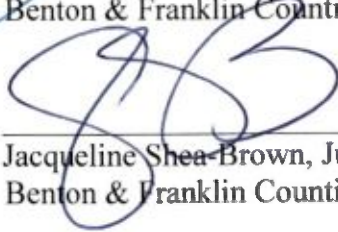
Alex Ekstrom, Crim. Presiding Judge
Benton & Franklin Counties Superior Court



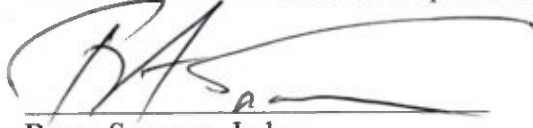
Joe Burrowes, Judge
Benton & Franklin Counties Superior Court



Cameron Mitchell, Judge
Benton & Franklin Counties Superior Court



Jacqueline Shea-Brown, Judge
Benton & Franklin Counties Superior Court



Bruce Spanner, Judge
Benton & Franklin Counties Superior Court