

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)*
) 1st Amended
) **Effective: June 14, 2021**

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 February 19, 2021, Washington Supreme Court Chief Justice Steven Gonzalez entered FIFTH REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS, Order No. 25700-B-658, revising and superseding prior orders to the extent they are inconsistent.
2. On May 21, 2021, Governor Jay Inslee signed Proclamation 20-25.13 – Healthy Washington, which provided:
 5. Employers: COVID-19 continues to pose a significant risk to health and life. Therefore, employers continue to have a responsibility to ensure workplace safety. To that end, employers:
 - a. Must require proof of vaccination or self-attestation from every employee before those employees are permitted to work at the worksite without wearing a face covering as permitted under the general rule referenced above. Employers may choose the form of proof they will require;
 - b. Notwithstanding (a) above, may require that employees wear a face covering while at the worksite regardless of vaccination status; and
 - c. May require vaccination as a condition of employment, except as prohibited by state or federal law.

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.

Earlier therein, the Proclamation recognizes that some settings require additional protections, and allow local authorities to require face coverings, even where they are not Center For Disease Control (CDC) exempted locations. This Court recognizes that guidance may change substantially at any time, but believes, as previously stated in prior orders, that a general masking rule in the Courtrooms is necessary to assure the safety of all who appear therein, including those who appear by order of the Court, including but not limited to potential and serving jurors. The Court considers in this regard, among other considerations, its obligation to adopt safety procedures that could have the indirect effect of unconstitutionally diluting the composition of a jury venire, given the demonstrated disproportionate incidence of morbidity and mortality from COVID-19 on suspect classes.

NOW, THEREFORE it is hereby **ORDERED**, pursuant to the authority of Washington Supreme Court Order No. 257000-B-646 and prior related orders, and the authority as the Presiding Judge of Benton & Franklin Counties, that the following shall be in effect:

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.² If an individual cannot, or elects not to be masked, they may appear via WebEx videoconference.

I. 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.

II. In a criminal matter, parties may request that a participant or witness appear unmasked via WebEx videoconference. A party may request that adverse witnesses appear with approved masks in the courtroom, including a “Bendshape” mask or other subsequently approved mask. The party requesting shall provide the requested masking. In the case of a *pro se* Defendant who has been denied these materials after proper request to the Office Of Public Defense, that *pro se* Defendant may make a request to the Court.

III. This Court is presently unaware of any authority, outside of the context of confrontation of witnesses in a criminal matter, that would grant a party

² In addition to standard approved opaque masks, the Court, after submission, evaluation and review, has approved the use of “Bendshape” masks which have a clear front panel, but have sufficient sealing around all sides and sufficient filtering material to have received approval by the local health department. A party wishing to submit a mask for consideration should first contact the Benton/Franklin health department to receive an evaluation of the proposed mask, and submit the same, along with a complete description and available reference material to Court Administration. The party asking for consideration will be required to provide at least one example of the proposed mask and schedule an evaluation in a Courtroom. If there is a pending matter in which the party is anticipating they will request to use the mask, they must notify and allow the opposing counsel or party to be present. If there is no specific matter pending, they must provide notice and opportunity to be present for a representative of the likely opposing party in either civil or criminal litigation, depending on the party’s primary area of practice.

the right to require or request any other participant in the proceedings, including potential and/or impaneled jurors, to wear alternative masks such as a “Bendshape” mask. As will all challenges to these orders, any such motion must be brought with appropriate citation to authority, on the regular criminal docket. The resolution of this issue is a condition precedent to filling out a Pre-Trial Covid Report.

IV. The Court, with due regard for the health of all, retains the ability to order which masking or appearance options shall apply in both a criminal or civil (including domestic) 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 Procedure³ 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?⁴ 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.

Dated at Kennewick, Washington, this 11th day of June, 2021.



Sam Swanberg, Adm. Presiding Judge

³ Hereinafter “RAP”

⁴ 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.