



# The Washington Association Of Prosecuting Attorneys

## MEMORANDUM

To: All Prosecuting Attorneys

From: Pam Loginsky, Staff Attorney

Date: May 18, 2020

Re: Courtrooms and Cloth Face Masks

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## INTRODUCTION

The novel coronavirus disease (COVID-19) has engendered a public safety emergency in Washington. Many Washington courts have taken important steps to protect public health while ensuring continued access to justice and essential court services, including by strictly observing social distancing measures, holding proceedings remotely, suspending many in-building operations, and promulgating emergency rules as necessary.

On April 29, 2020, the Washington Supreme Court issued a “[Second Revised and Extended Order Regarding Court Operations](#),” that allows for a slow resumption of trials, hearings and other court proceedings. This Order states, in pertinent part, that

[C]ourts are encouraged to move toward conducting as much court business as can be done consistent with public health and safety. . . . Courts should follow the most protective public health guidance applicable in their jurisdiction, based on current guidelines from the Centers for Disease Control, the Washington Department of Health or their local health department.

*Id.* at 12-13, ¶ 22.

Both the Washington Department of Health and the Centers for Disease Control and Prevention recommend that individuals wear a cloth face mask to protect themselves and others when they leave the house. *See* [Washington State Coronavirus Response \(COVID-19\), Guidance on wearing cloth face coverings/masks](#);<sup>1</sup> [Centers for Disease Control and Prevention \(“CDC”\), Coronavirus Disease 2019 \(COVID-19\), Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission: Use of Cloth Face Coverings to Help Slow](#)

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<sup>1</sup>Available at <https://coronavirus.wa.gov/spread-facts/partner-toolkit/covid-19-article-library#facecoveringmask> (last visited May 8, 2020).

[the Spread of COVID-19.](#)<sup>2</sup> Both entities urge individuals to not purchase or wear medical grade masks, as these are in short supply and are needed by health care workers. *Id.*

This memo addresses the legal authority that supports a mandatory cloth face covering rule, and accommodations or exemptions from the rule required by both constitutional provisions and the Americans With Disability Act. While the memo is largely directed toward preparation for reopening the courts and resuming jury trials, it does highlight issues that are likely to arise in individual cases.

## **SAFETY MEASURE**

“A safe courthouse environment is fundamental to the administration of justice. Employees, case participants, and members of the public should expect safe and secure courthouses.” GR 36(a). A safe courthouse environment can be imperiled in a number of ways, including by a pandemic. Courts may impose reasonable measures to promote public health and welfare during trials in response to an epidemic. *See Colletti v. State*, 12 Ohio App. 104, 122-123, 31 Ohio C.A. 81 (1919) (trial court familiar with local conditions associated with epidemic properly took action to protect the public health and welfare of the spectators, the court, officers, and jury). *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 27, 25 S. Ct. 358, 49 L. Ed. 2d 643 (1905) (both the principles of self defense and necessity allow a community to protect itself against an epidemic of disease that threatens the safety of its members).

Trial judges possess significant discretion regarding what measures to employ to provide a safe environment. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). Practices, however, that are “inherently prejudicial” to the fairness of the fact finding process will be struck down absent an essential state policy and individualized findings that the measure is necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape. *State v. Jamie*, 168 Wn.2d 857, 865-66, 233 P.3d 554 (2010). “Inherently prejudicial” measures single out the defendant and/or convey that a defendant is particularly dangerous or culpable. *See, e.g., Estelle v. Williams*, 425 U.S. 501, (1976) (no “essential state policy” served by compelling defendant to wear prison clothes when appearing before the jury); *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed.2d 353 (1970) (shackling an inmate in front of jurors only permissible with a particularly obstreperous and disruptive defendant); *Jamie*, 168 Wn.2d at 865 (trial in courtroom located in a jail prohibited in all but the most extraordinary cases).

A safety or security measure is not inherently prejudicial when a juror can attribute the reason for the measure to a concern that is generally present. *See Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (presence of guards in courtrooms not inherently prejudicial as “[j]urors may just as easily believe that the officers are there to guard against disruptions

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<sup>2</sup>Available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (Last visited May 8, 2020).

emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence,” rather than a sign that a defendant is particularly dangerous or culpable). A mandatory cloth face mask requirement is not inherently prejudicial as the public, familiar with the emergency “Stay Home, Stay Healthy” proclamations, will attribute the measure to COVID-19 rather than to the defendant. Most adults, moreover, have become inured to the presence of face masks in most public places. *Cf. Holbrook*, 475 U.S. at 568-69 (presence of security guards in the courtroom is not inherently prejudicial because “[o]ur society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.”).

A court that wishes to adopt a mandatory face mask requirement should set forth the factual basis for the requirement. *See State v. Hartzog*, 96 Wn.2d at 400 (need for factual basis in the record for security measures). The court must include a health exception to the requirement.<sup>3</sup> The CDC states that the following individuals should not wear cloth face coverings:

Cloth face coverings should not be placed on young children younger than 2 years of age, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance.

[Centers for Disease Control and Prevention \("CDC"\), Coronavirus Disease 2019 \(COVID-19\), Cloth Face Coverings: Questions and Answers.](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html)<sup>4</sup> A court must also strike a reasonable balance between a cloth mask requirement and other important public policies.

A court should post its policy on the use of face masks at the door of the courtroom to avoid any confusion about the policy and to avoid concerns that the policy is being selectively enforced. The court should establish a protocol for court security personnel to follow if a person refuses to don a cloth face mask prior to entering the courthouse or courtroom. The protocol should note which type of face masks are acceptable and any exceptions to the requirement. *See Special Accommodations, infra*.

### **IMPACT UPON OPEN COURTS/PUBLIC TRIAL RIGHTS**

Imposing a cloth face mask requirement may impact a criminal defendant’s Sixth Amendment and Wash. Const. article I, § 22 rights to a public trial. The requirement can also impact the public’s First Amendment and Wash. Const. article I, § 10 rights to open courts. These rights, however, may be curtailed to some degree when responding to a pandemic. *See generally Terminiello v. City of Chicago*, 337 U.S. 1, 37, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (Jackson, J., dissenting) (the Bill of

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<sup>3</sup>*See Jacobson*, 197 U.S. at 39 (assuming that a mandatory immunization law would not be enforced against a person who can demonstrate “with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death”).

<sup>4</sup>Available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html> (last visited May 13, 2020)

Rights is not “a suicide pact”); *Jacobson v. Massachusetts*, 197 U.S. at 26-27 (“All rights are subject to such reasonable conditions . . . essential to the safety, health, peace, good order, and morals of the community.”); *Colletti v. State, supra* (excluding general public from courtroom during pandemic).

To the extent that an individual may not be allowed to enter a courtroom due to the lack of a mask or will be deterred from coming to the courthouse by a cloth mask requirement, this narrowly tailored safety measure to the clear threat posed by COVID-19 passes constitutional muster. *See, e.g., United States v. DeLuca*, 137 F.3d 24, 32 -36 (1st Cir. 1998) (no 6th Amendment violation when security measures required spectators to present written identification, used for later background checks, to access the courtroom); *United States v. Brazel*, 102 F.3d 1120, 1155-57 (11th Cir. 1997) (no 6th Amendment violation when probability of witness intimidation required public to provide name, identification card, address, and birthdate to enter courtroom); *State v. Clark*, 2016-Ohio-948, 2016 Ohio App. LEXIS 860 (2016), *cert. denied*, 137 S. Ct. 820 (2017) (defendant’s Sixth Amendment right to a public trial was not violated by his grandmother’s inability to reenter the courtroom due to a lack of identification after the court, in response to an episode of witness intimidation, required all spectators to show identification to officers at a security table located outside the courtroom); *Hernandez v. State*, 914 S.W.2d 218 (Tex. App. 1996) (photographing of spectators attending trial did not violate defendant’s right to a public trial as a means of protecting the jury from intimidation where significant gang activity was observed during the previous trial of the defendant’s co-defendant).

A court may, however, choose to have a supply of cloth face masks available for those individuals whose presence is compelled, such as witnesses, jurors, and criminal defendants, in order to avoid continuances or delays in proceedings.

### **SPECIAL ACCOMMODATIONS**

In addition to a health exemption to a cloth face masks mandated by *Jacobson v. Massachusetts*, both the Americans With Disabilities Act of 1990 (“ADA”) (42 U.S.C. §§ 12101-12213) and the Washington State Law Against Discrimination (“WLAD”) (ch. 49.60 RCW) require courts to ensure equal access for people with disabilities. *See generally* Keri Gould, *And Equal Participation for All. . . The Americans with Disabilities Act in the Courtroom*, 8 J. Law & Health 123 (1993-94); These laws require “accommodations” to be made to a particular court service or program to render them readily accessible to and usable by a person with a disability. *See generally* Marc Charmatz and Antoinette McRae, *Access to the Courts: A Blueprint for Successful Litigation Under the Americans With Disabilities Act and the Rehabilitation Act*, 3 Margins 333 (2003) (hereinafter “*Blueprint for Successful Litigation*”); GR 33(a)(1).

Accommodations may include, but are not limited to, “making reasonable modifications in policies, practices, and procedures,” and “furnishing, at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, or readers.” GR 33(a)(1)(A) and (B). While the disabled person bears the cost of personal adaptive equipment

or personal assistants, the cost of other accommodations must be borne by the court. GR 33(a)(1)(B) (“at no charge”); 28 C.F.R. 35.130(f) (all costs of accommodation must be borne by the court); RCW 2.42.120 (cost of interpreter for a hearing impaired party or witness in any judicial proceeding or hearing to be paid by the court that appoints the interpreter).

A court may only refuse to make an accommodation for a disability when:

- (A) the person requesting application has failed to satisfy the substantive requirements of this rule; or
- (B) the court is unable to provide the requested accommodation on the date of the proceeding and the proceeding cannot be continued without significant prejudice to a party; or
- (C) permitting the applicant to participate in the proceedings with the requested accommodation would create a direct threat to the health or well being of the applicant or others.
- (D) the requested accommodation would create an undue financial or administrative burden for the court; or would fundamentally alter the nature of the court service, program, or activity under (i) or (ii):
  - (i) An accommodation may be denied based on a fundamental alteration or undue burden only after considering all resources available for the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.
  - (ii) If a fundamental alteration or undue burden would result from fulfilling the request, the court shall nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the court.

GR 33(c)(2)(A) - (D). *Accord* 42 U.S.C. § 12182(b)(2)(A). The wrongful denial of a requested accommodation can result in individual liability. *See Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (explaining when damages are available for violating the ADA and the WLAD and when judicial immunity will be extended to court staff in such cases); *Blueprint for Successful Litigation*, *supra*.

For individuals with certain disabilities, certain safety practices, such as physical distancing<sup>5</sup> or wearing a safety mask over the mouth and nose may not be possible. Many medical conditions affect the ability to breathe properly, making wearing a cloth mask problematic for afflicted individuals. For some, wearing a court provided face shield<sup>6</sup> rather than a cloth mask is a reasonable accommodation. For others, the cloth mask requirement may be dispensed with entirely when such can be done without causing undue risk to others.<sup>7</sup>



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<sup>5</sup>Some individuals with disabilities may have personal assistants with them to assist with mobility and independence.

<sup>6</sup>Face shields are commercially available, though many vendors currently have none in stock. Instructions for DIY face shields are readily available on the internet.

<sup>7</sup>A court may wish to check the temperature of someone who cannot wear a face mask or face shield due to a disability and/or ask some screening questions to determine whether such a person will pose a heightened risk to others in the courtroom. If they answer “yes” to any of the following questions or to other questions developed with input from the county health officer or district, the court should consider continuing the hearing for at least 14 days if the person is an essential participant.

Suggested screening questions:

#### TRAVEL HISTORY

1. In the past 30 days, have you traveled outside of the United States? \_\_\_ YES \_\_\_ NO

If so: When \_\_\_\_\_ Where \_\_\_\_\_

#### CONTACT HISTORY

2. In the past 30 days, have you had close contact with anyone known to have traveled to Europe or Asia? \_\_\_ YES \_\_\_ NO

3. Have you or anyone you’ve been in contact with had a laboratory confirmed Coronavirus test? (The incubation period is 2-14 days.) \_\_\_ YES \_\_\_ NO

4. Do you now or in the last 48 hours have you had a fever, cough, shortness of breath, or other symptoms of a lower respiratory illness? \_\_\_ YES \_\_\_ NO



Reasonable accommodations may be required for sensory disabilities, such as hearing loss. Many people with a hearing loss may rely, in part, on lip reading to augment or supplement personal hearing aids, interpreters, or other assistive listening systems. Educators and others who work with the deaf and hard of hearing community have designed cotton masks (DHH masks)<sup>8</sup> that allow the wearers' mouth to be visible. Whether DHH masks or face shields are utilized, it is the court's responsibility to provide one or the other to all participants in the proceeding involving the person with a hearing loss.

When an individual requires the services of a sign language interpreter, the court will need to provide that interpreter with either a face shield or a DHH mask. *See generally* [Comment \(1\)\[2\] to GR 11.2](#) (“Sign language interpreters . . . should employ visual cues, including *facial expressions*, body language, and hand gestures, which are structural elements of sign languages.” [Emphasis added.]).

Although not mandated by the ADA, interpreters for limited English Proficient (LEP) individuals may find that an opaque mask interferes with their ability to accurately reproduce the source language. As LEP interpreters are provided to ensure important constitutional rights to participants,<sup>9</sup> a court should provide face shields or DHH masks to speakers whenever requested by an interpreter. *See* [Comment \(1\)\[3\] to GR 11.2](#) (“Interpreters have the duty to immediately address any situation or condition that impedes their ability to accurately interpret. Examples include, but are not limited to, linguistic ambiguities, unfamiliar terms, inaudible speech, inability to see a speaker, background noise or distraction, and pace of speech.”).

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<sup>8</sup>DHH face masks may not be commercially available at this time. The DHH Mask project provides a detailed tutorial for making these masks. The tutorial is available at <https://drive.google.com/file/d/1Pk7hMTtOEq6BIIUys82RAuDs7oxD7fe4/view> (last visited May 13, 2020). A court may wish to solicit proposals from the community for a local source from whom a sufficient number of these masks can be purchased.

<sup>9</sup>In order to effectuate the guarantees of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States, an LEP defendant must be provided with an interpreter. These principles are found in federal and state case law. *See, e.g., United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (“clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered”); *United States ex rel Negron v. State*, 434 F.2d 386, 389 (2nd Cir. 1970) (proceeding in the absence of an interpreter, where the defendant was LEP, “lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment”); *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (“the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and ‘the right inherent in a fair trial to be present at one’s own trial’”). “[I]t is also the declared policy of this state under RCW 2.43.010 to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.” *Gonzales-Morales*, 138 Wn.2d at 379, quoting [RCW 2.43.010](#).

As courts prepare to resume large number of in-person proceedings and jury trials, it is incumbent that adequate supplies be obtained to accommodate persons with disabilities or LEP. Information should be clearly posted advising individuals that reasonable accommodations will be made with respect to the cloth mask requirement and how to request an accommodation. *See generally* [GR 33](#). Finally, courts will need to develop a plan for safely collecting the DHH masks or face shields for cleaning between use.<sup>10</sup>

## IMPACT UPON RIGHT TO CONFRONTATION

The confrontation clause requires that a witness give a statement under oath and submit to cross-examination, and that the jury be able “to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” [Citation.]” *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed.2d 666 (1990). *Accord State v. Fullen*, 7 Wn. App. 369, 380, 499 P.2d 893 (1972) (“The right of confrontation is a trial right which includes the opportunity of cross-examination and the occasion for the jury to weigh the demeanor of the witness.”). “The right . . . to have the trier of fact observe the testifying witness” is one of the “more central[] confrontation interests.” *Coy v. Iowa*, 487 U.S. at 8, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) (Blackmun, J., dissenting).

Demeanor evidence is of considerable legal consequence. From early statehood through modern times, jurors have been instructed that they should take into consideration the demeanor and manner of the witness when testifying. *See, e.g., State v. Hoshor*, 26 Wash. 643, 656-57, 67 P. 386 (1901); WPIC 1.02.<sup>11</sup>

A witness’s demeanor can include everything from facial expressions and hand gestures to tone and attire. *In re Detention of Stout*, 159 Wn.2d 357, 382-83, 150 P.3d 86 (2007), quoting *Penasquitos Vill., Inc v. Nat’l Labor Relations Bd.*, 565 F.2d 1074, 1078-79 (9th Cir. 1977) (“A witness’s demeanor includes the ‘expression[s] of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his

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<sup>10</sup>The CDC indicates that a washing machine is sufficient to clean a cloth face mask. *See* [CDC, Coronavirus Disease 2019 \(COVID-19\), Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission: Use of Cloth Face Coverings to Help Slow the Spread of COVID-19](#). Face shields generally require a bleach solution. Various protocols for properly cleaning face shields are available from a number of universities, medical professional organizations, and government bodies.

<sup>11</sup>WPIC 1.02 states, in part, that:

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.



speech, and other non-verbal communication”). The ability to view a witness’s face, however, is traditionally regarded as one of the most important factors in assessing credibility. *Romero v. State (Romero II)*, 173 S.W.3d 502, 505-06 (Tex. Crim. App. 2005). *Accord United States v Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985) (“The facial expressions of a witness may convey much more to the trier of facts than do the spoken words.”).

The wearing of an opaque cloth face mask interferes with a juror’s ability to view a witness’s face. The Supreme Court has never addressed whether a criminal defendant’s constitutional right is violated by such a covering. See Aron Goldschneider, *Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial*, 15 Geo. Mason U. Civ. Rts. L.J. 25, 48 (2004). A handful of lower courts, however, have addressed whether allowing a witness to testify while disguised violates a defendant’s Sixth Amendment right of confrontation. See, e.g., *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002) (upholding admission of adult witness testimony when witness testified while wearing sunglasses); *People v. Brandon*, 52 Cal. Rptr. 3d 427 (Ct. App. 2006) (holding one witness's wearing dark sunglasses and scarf during testimony did not deny defendant's confrontation right); *Commonwealth v. Lynch*, 789 N.E.2d 1052 (Mass. 2003) (holding a witness's wearing dark or tinted glasses does not create a substantial likelihood of a miscarriage of justice); *People v. Sammons*, 478 N.W.2d 901 (Mich. Ct. App. 1991) (holding that permitting the prosecution's chief witness to wear a mask and prohibiting the disclosure of identifying information about the witness violated the defendant's right of confrontation); *People v. Smith*, 869 N.Y.S.2d 88 (App. Div. 2008) (holding the trial court properly allowed witness to wear a wig and fake facial hair because there was a heightened need to protect the security of the witness and any prejudice to the defendant was alleviated by the court's supplemental instruction); *Romero v. State (Romero I)*, 136 S.W.3d 680 (Tex. Ct. App. 2004) (holding defendant's Sixth Amendment Right to confront witnesses was violated when adult witness was allowed to testify in disguise), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005).

An argument against allowing testimony by a disguised witness focuses on the threat to the presumption of innocence. See, e.g., *Romero I*, 136 S.W.3d at 689-90 (ruling that a witness's disguise prejudiced the defense by improperly conveying to the jury that the defendant was particularly dangerous or culpable, and thus posed an unconstitutional threat to his right to a fair trial). This concern is not present as the need for cloth face masks is caused by COVID-19, not by a defendant’s actions. A court can address this concern through a proper instruction.

A review of disguise cases indicate that their use will most likely be upheld when the jury can still see the witness’s facial reactions to questions. Compare *United States v. De Jesus-Casteneda*, 705 F.3d 1117 (9th Cir. 2013) (Confrontation Clause not violated despite the CI’s fake mustache and wig as the jury could still see the CI’s entire face), with *People v. Sammons*, 478 N.W.2d 901 (Mich. Ct. App. 1992) (right to confront witness violated as the full-face mask prevented the fact-finder from assessing witness credibility through observation of demeanor). A cloth face mask conceals far more of a witness’s face than the disguises in the cases wherein courts found no Confrontation Clause violation.

A consistent theme running through all of the disguise cases is that any procedures devised to protect the witness must be tailored to preserve the essence of effective confrontation by ensuring the reliability of evidence in the face of rigorous adversarial testing. *See, e.g., De Jesus-Cateneda*, 705 F.3d at 1119-20, *citing Maryland v Craig*, 497 U.S. 836, 110 S Ct 3157; 111 L Ed 2d 666 (1990). This restriction is consistent with Washington Confrontation Clause cases. *See, e.g., State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998) (courts may only allow a child witness to testify via one-way closed circuit television after determining that no less restrictive methods are available). Because courts have a number of available options other than cloth face masks to reduce the spread of COVID-19 by or to witnesses, it is extremely unlikely that an appellate court would affirm a conviction obtained in a trial at which witnesses testified while wearing an opaque fabric face mask.

Courts can install plexiglass or glass shields around the witness stand to contain exhaled vapor. Courts must consider durability/safety in choosing the type of barrier. Courts must also consider cleaning protocols, including issues such as frequency of cleaning, what method will be used, and who will be responsible for cleaning the barriers. Audibility of witnesses is another consideration as certain barriers can muffle sound.

There are some down sides to installed barriers. A witness who is asked to step down from the stand in order to mark an exhibit or demonstrate an activity such as field sobriety tests, cannot take the barrier with him or her. An alternative to installed barriers or a supplement to installed barriers in these circumstances include the face shields or special DHH masks described in the Special Accommodations portion of this memorandum.

Whatever options a court chooses to utilize to preserve both the defendant's right to confrontation and the health of witnesses and others, it is prudent to describe the procedures on the record and whether there is any impairment of either the jury or the defendant's ability to observe the witness's facial expressions.

## **ADDITIONAL LEGAL ISSUES**

### **1. In-court identifications**

Courts will need to discuss with parties prior to the start of any trial or hearing in which it is anticipated a witness will be requested to identify the defendant or another person for the trier of fact. Options run the gamut from asking the witness to make his/her identification while everyone in the courtroom is masked to requiring some or all of the courtroom occupants to drop their cloth face masks. Care must be taken that the option selected does not constitute an improper judicial comment on the evidence. *See Const. art. IV, § 16* (“Judges shall not charge juries with respect to matters of fact, nor comment thereon”).

A middle ground might be for the attorney to just ask the witness if he/she sees the perpetrator in the courtroom. If the witness says yes and points out the masked defendant, the case can proceed. Defense counsel, of course, can use the presence of the mask to challenge the validity of the

identification, and the defendant might be asked to unmask during redirect to reaffirm his/her identification.

If the witness says, “I think the defendant is him/her, but I can't be sure with the mask,” the judge can ask only the defendant to unmask. The judge’s request would not be a comment on the evidence or an interference with the presumption of innocence, because the witness, not the judge, identified the defendant as possibly the perpetrator.

The judge in this scenario would only need to ask multiple people in the courtroom to unmask when a witness says “I can't tell with the masks.”

## **2. Impact on communication between defendant and his/her counsel**

The federal and state constitutional right to have the assistance of counsel, const. article I, § 22 and Sixth Amendment, include a reasonable time for consultation and preparation. Consultation includes not only assistance in trial preparation, but opportunity for private and continual discussions between defendant and his attorney during the trial. *State v. Hartzog*, 96 Wn.2d at 402; *State v. Ulestad*, 127 Wn. App. 209, 214-15, 111 P.3d 276 (2009).

A court must be sensitive to the impact cloth face masks may have upon a particular defendant’s ability to consult with his or her counsel during proceedings. Upon request a court must explore alternatives to a cloth mask, selecting the option that offers the greatest protection against exposure to COVID-19 while impinging as minimally as possible on this important right. *Hartzog*, at 402, citing *Geders v. United States*, 425 U.S. 80, 89-90, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976).

## **3. Impact on ability to observe demeanor when Confrontation Clause does not apply**

Facial expressions are an important factor in demeanor and demeanor is a legally important aspect of credibility determinations. *See* Impact upon Right to Confrontation, *supra*. The court and litigants will need to consider what, if any, alternations to make to a cloth face mask requirement during suppression hearings and other pre-trial evidentiary hearings. *See, e.g., People v. Simmons, supra* (reversing conviction because a witness was allowed to testify in a heavy disguise during a pre-trial hearing); *State v. Hill*, 123 Wash. 2d 641, 646, 870 P.2d 313 (1994) (appellate court accepts credibility determinations made by the trial court in CrR 3.6 hearings because that court is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying).

Jury selection can pose a particular challenge as appellate courts note the important role demeanor plays to a defendant’s participation in jury selection and to a trial court’s consideration of *Batson*<sup>12</sup> challenges and challenges for cause. *See, e.g., People v Sloan*, 592 N.E.2d 784, 787 (N.Y. App. 1992) (“Defendants’ presence at the questioning on such matters and the resultant opportunity for

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<sup>12</sup>*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

them to assess the jurors’ facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility, could have been critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories.”); *City of Seattle v. Erickson*, 188 Wn.2d 721, 735, 398 P.3d 1124 (2017) (“The trial court’s in-person examination of the credibility and demeanor of the prosecutor and jury is essential in a *Batson* analysis.”).

A court can balance the tension between public health needs and effective jury selection in a number of ways. First, a court can determine whether the parties will stipulate that their ability to observe the upper part of the face, tone of voice, and body language is sufficient to enable them to intelligently prosecute both for cause and peremptory challenges. Second, a court may provide jurors with face shields or DHH masks. If neither of these options is available, a court may proceed with jury selection with masks in place upon an individualized inquiry into the necessity of this protective measure and the entry of findings to justify their use in the particular case. *Cf. Hartzog*, 96 Wn.2d at 400 (allowing a defendant to be restrained during trial based upon an individualized inquiry that considers, among other facts, threats of harm to others, the size and mood of the audience, the nature of the courtroom, and the adequacy and availability of other options).