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Ronal Orlando Magana Caisphal

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MENDOCINO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs.- RONAL ORLANDO MAGANA CAISPHAL, Defendant	CASE NO. SCUK-CRCR-19-31853 DEFENDANT'S NOTICE OF MOTION & MOTION FOR MODIFICATION OF SOCIAL DISTANCING PROCEDURES AT TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF COUNSEL AND EXHIBITS DATE: August 6, 2020 TIME: 1:30 p.m. DEPT: H

TO THE DISTRICT ATTORNEY AND TO THE ABOVE COURT:

PLEASE TAKE NOTICE that on August 6, 2020, in the above department of the above-entitled court, defendant, Ronal Orlando Magana Caispal, will move by and through counsel for a jury trial in compliance with the Sixth Amendment of the United States Constitution and to the corresponding provisions of the California State Constitution.

This motion is based upon this notice, the attached memorandum of points and authorities, the attached declaration of counsel and exhibits, and on such oral and documentary evidence and arguments as may be presented at the hearing of this motion.

Dated: July 15, 2020

Respectfully Submitted,

_____
Jeffrey A. Aaron
Public Defender of Mendocino County

REQUEST FOR RELIEF FROM FILING LIMITATIONS

Due to the complexity of the legal and factual issues, the defense could not complete this Memorandum without exceeding the page limits set out in California Rule of Court (CRC) 3.113 (d) and hereby requests leave to file a longer Memorandum as set out in CRC 3.113 (e).

COURT ORDER

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED THAT the defense be permitted to file this Memorandum of Points and Authorities in excess of the page limitations set forth in California Rule of Court 3.113 (d).

Dated: _____

_____
Judge of the Superior Court

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Ronal Orlando Magana Caisphal, charged with multiple life-term sexual offenses, has a jury trial set to begin on 8/24/20, with all the constitutional safeguards that procedure entails in our system of justice. Defendant's trial begins at an unprecedented time, while the world is in the grips of the COVID-19 pandemic. The Court has enacted certain novel procedures for jury trials to cope with the demands medical advice concerning indoor gatherings. Recent experience, though, has taught that these procedures prejudice many precious trial safeguards demanded by the federal and state constitutions. In particular, the new procedures frustrate the rights of public trial and confrontation of witnesses. Accordingly, defendant proposes several modifications outlined below and, if those are simply not possible, will consent to a continuance until the public health emergency has abated sufficiently to allow a trial comporting with longstanding constitutional requirements.

II. STATEMENT OF FACTS

A. Jury Trials and the Mendocino County Courthouse

The state constructed the present Mendocino County Courthouse in the 1920s, with a major remodel in in the 1950s. (See https://www.courts.ca.gov at /facilities-mendocino.htm [as of 7/11/20].) Even absent the COVID-19 pandemic, the courthouse is inadequate. It is "overcrowded and has significant security deficiencies as well as severe functional deficiencies," including compliance problems with the Americans [w]ith Disabilities Act. (*Ibid*.) Due to the lack of proper facilities, "in-custody defendants use the same hallways as court visitors and staff and, because the building lacks a secure sally port, in-custody defendants line up on a public sidewalk to enter the building." (*Ibid*.) The Judicial Council, describing the need for a new Mendocino County Courthouse as "immediate," ranked the courthouse construction project as the second most urgent in the state. (See Statewide List of Trial Court Capital-Outlay Projects, https://www.courts.ca.gov/documents/Statewide-List-Capital-Projects-2019.pdf [visited 7/11/20].) Because of the facility's antiquated design, the social distancing procedures devised by the Superior Court are problematic.

As the Court is no doubt aware, California and the rest of the nation are presently in a state of emergency due to the public health crisis caused by the COVID-19 pandemic. Due to the public health

emergency, the Chief Justice of California ordered jury trials in Mendocino County continued. (Aaron Dec. at ¶ 2.) Before trials resumed, the Superior Court conducted at least two demonstrations of how the Court would apply social distancing procedures in the jury trial context, and solicited the views of the District Attorney, the Public Defender, and the private bar. (*Ibid.*) Counsel received a diagram of the socially distanced criminal trial courtrooms which is attached as Exhibit 1. (*Ibid.*; Exh. 1.)[1]

Defense counsel tried the second jury trial in Mendocino County in which the Court used the social distancing procedures it devised in the preceding weeks. (Aaron Dec. at ¶ 3.) That trial in *People v. Vickie Bell*, SCUK-CRCR-19-33242,[2] began on July 6, 2020. (*Ibid.*) During voir dire, due to the social distancing requirements, only 15 jurors could be present in the courtroom. (*Id.* at ¶ 4; Exh. 1.) They sat in the jury box, in seats on the floor in front of the jury box, and in what used to be the gallery. (*Id.* at ¶ 4; Exh. 1.)

The *Bell* trial took place in Department A. The distance from the juror's chair to the prosecutor's table appeared to counsel to be two to three feet and much less than six, although the closest juror may have been as much as six feet from the prosecutor herself. (*Ibid.*) The prosecutor sat close enough to the jurors that at one point a juror sneezed and the prosecutor was able to reach over and hand the juror a box of tissues. (*Id.* at ¶ 6.) One juror sat so close to the prosecution table that when defense counsel walked to and from the podium, the juror had to draw in his legs so that counsel could pass. (*Ibid.*)

Except for the 15 jurors in the trial court, everyone else in the venire sat in the jury assembly room or in Depts. E or F. (*Id.* at ¶ 7.) Under the eye of court staff, those venire members watched and listened to the proceedings on a closed circuit television screen. (*Ibid.*) Members of the public could also sit in the jury assembly room if space was available. (*Ibid.*) Counsel in the courtroom could not see members of the venire outside Department A. Counsel did not see any signage that would have alerted a member of the public or press that they had to go to the jury assembly room if they wanted to

[1] Defense counsel believes Exhibit 1 is not to scale. In Dept. A, the podium stands to the side and somewhat behind the witness box, Jurors 4 and 8-10 sit closer to the attorneys' tables, and Juror 10 sits so far down towards the other side of the room that the juror sits directly behind the defendant at counsel table. (*Id.* at ¶ 4.)

[2] This trial involved an assault in which scissors were thrown at, and stuck into, the victim's chest. The charge of Penal Code § 245 (a) (1) was a serious felony and strike offense.

observe the proceedings. (*Ibid.*)

The Court also transmitted a portion of trial proceedings into the jury room for public viewing. However, the press or public cannot see everything that happens. (*Id.* at ¶ 8.) They cannot view the jurors, the court staff, or counsel when they sit at counsel table. (*Ibid.*) They can only see a split screen of the judge and the attorney speaking from the podium. (*Ibid.*) In addition, participants not wearing microphones are difficult to hear through the televised proceedings, and, even during the short period when counsel was observing the first jury trial, technical difficulties caused audio to cut in and out during the proceedings. They may see exhibits that are displayed to the jury and displayed on the screen, but they cannot see items handed to the witness. (*Ibid.*)

These procedures disadvantaged defense counsel, and violated defendant's rights, in several ways, described in more detail below.[3] To begin, defense counsel could not see in voir dire the jurors' demeanor and could not hear other jurors because jurors must wear masks at all times. (*Id.* at ¶ 10.) Counsel wear masks when sitting at counsel table, and may remove them when arguing or questioning at the podium. (*Ibid.*) Witnesses have discretion to remove masks when testifying. (*Ibid.*) At all other times, all persons, including the defendant, must be masked. (*Ibid.*) There is no uniformity in masks. (*Id.* at ¶ 11.) At the *Bell* trial, some jurors wore bandanas, some wore medical masks, some wore cloth homemade masks, and so forth. (*Ibid.*) These masks or bandanas concealed the jurors' faces below the eyes. (*Ibid.*) Defense counsel could not see the expression on the jurors' faces who were within six feet or so, let alone those that were more distant or in other rooms. (*Id.* at ¶ 12.) Because counsel questioned jurors who responded from behind masks, it was difficult to hear them at times. (*Ibid.*) At one point the trial judge called counsel into chambers and questioned why defense counsel kept asking a question of a juror when she previously answered it. (*Ibid.*) Counsel apologized and said he simply did not hear the answer and, in general, had difficulties understanding the juror. (*Ibid.*)

Defense counsel was unable to exercise challenges effectively. While defense counsel had more information about each juror when compared to the usual trial, it was harder to assess this information.

[3] The Court invited defense counsel and the prosecutor to put on the record anything that they were unable to do so during the trial itself. Defense counsel did not put these statements or observations on the record as this particular client wanted to proceed with trial and did not object to the procedures that had been addressed in advance. The present client, however, does object. (Aaron Dec. at ¶ XX.)

(*Id.* at ¶ 13.) Lacking knowledge of the jurors' demeanor while they answered voir dire questions deprived counsel of crucial context and non-verbal information necessary to make for-cause or peremptory challenges. (*Ibid.*)

Defense counsel was unable to strategically manage voir dire and his challenges effectively. Counsel could only see 15 jurors in the courtroom at any one time. (*Id.* at ¶ 14.) If the jurors were reduced to 11, a new mini-panel of four was summoned from the jury assembly room or Depts. E or F. (*Ibid.*) As a result, defense counsel could not in those rooms to assess the appearance, expressions, clothing, attitude, response to questioning, etc., of the jurors in those other locations. (*Ibid.*) He could not therefore determine whether he should exercise more challenges to attempt to get those other jurors on the jury, or, conversely, not exercise challenges to keep them off. (*Ibid.*)

The physical demands of this very short trial also handicapped defense counsel. Defense counsel was physically exhausted by the two days of voir dire in which he had to walk to and from the podium for the examination of each individual juror. (*Id.* at ¶ 15.) Counsel cannot address the witnesses or the jurors except when standing at a small rostrum. This is because unless counsel stands at the rostrum, cameras will not televise him or her to jurors outside the courtroom or to members of the public who may be watching with them. . (*Ibid.*)

Even more alarmingly, defense counsel and public spectators could not observe many of the jurors during the trial itself. Defense counsel could not provide effective assistance of counsel as he was unable to see many of the jurors while the court took evidence, because they sat behind counsel and his client. (*Id.* at ¶ 18.) He could not see those jurors and also see the other participants—such as opposing counsel, the court, the witness, or the other jurors—at the same time. (*Ibid.*) Counsel could not determine what impact the evidence had on those jurors unless he was at the podium when, of course, counsel was concentrating on conducting the examination of the witness. (*Id.* at ¶ 19.) Members of the public watching on closed-circuit television were also unable to observe the jury's conduct during the trial, which meant potential misconduct would go unnoticed.

The Court's procedures also hindered defense counsel from providing effective assistance during closing argument. It was extraordinarily difficult for counsel to assess the impact of his closing argument and, indeed, to deliver that argument, because tactics and emphasis during closing argument

often change depending on juror's reactions to counsel's statements. (*Id.* at ¶ 20.) Because some jurors were as close as six feet, and others as far as 30 feet, counsel could not modulate his voice's volume for dramatic effect. (*Id.* at ¶¶ 20, 27.) Defense counsel believed that what might be a soft and low sound for a juror close by would be inaudible to one further away; what might be emphatic and strong to a juror further away might be shouting and physically unpleasant to one close by. (*Id.* at ¶ 20.) Counsel had difficulty concentrating on his argument because he had to turn repeatedly to see the impact on the jurors, scattered throughout the courtroom, some of whom he could barely see given their distance. (*Id.* at ¶ 21.) He was concerned that he had to move his head back and forth, like at a tennis match, and that he appeared disoriented or confused. (*Ibid.*)

Using the courtroom for jury deliberations and granting counsel or staff access without the trial judge being present, and the other inappropriate contacts with the jurors, should concern the court. There are a number of issues related to the lack of decorum and the risks of inappropriate behavior due to the social distancing procedures. One example was the incident discussed above when the prosecutor handed tissues to a juror. Another example involves the lack of a jury deliberation room. The former deliberation rooms do not have enough space for social distancing, so now the jurors deliberate, wait, rest, and deliver the verdict in the courtroom itself. (*Id.* at ¶ 22.) When defense counsel entered the courtroom for the verdict in *Bell* on July 9, he noticed all the jurors were sitting in the courtroom, and there was laughter and general conversation throughout. (*Id.* at ¶ 24.) The trial judge was not there, nor had the defendant arrived yet, but the prosecutor, the bailiff, and the court staff were present. (*Ibid.*)

Whether the prosecutor spoke to the jurors or whether she overheard them talking to themselves or other court staff, counsel cannot say. (*Id.* at ¶ 25.) In any event, when defense counsel entered the prosecutor told him: "The jurors said they were using counsel table as their workbench, so we have to disinfect it." (*Ibid.*) Shocked by the informality and lack of decorum, defense counsel sat down, telling the prosecutor: "I'll take my chances." (*Id.* at ¶ 26.) Jurors laughed, indicating that they were listening to the conversation between counsel. (*Ibid.*)

III. LEGAL ARGUMENT

A. The social distancing procedures in Mendocino County violate the Sixth Amendment of the U.S. Constitution and the Corresponding Provisions of the California State Constitution.

1. Masked witnesses violate the defendant's right of confrontation and prevent the defendant and prevent the jury from assessing the witnesses' demeanor and determining credibility.

It has been said that virtue is veiled, presumably for modesty, whereas vice is masked, presumably for deceit and concealment.[4] Under the social distancing jury trial procedures, the defendant and witnesses must remain masked except while testifying; and since the witnesses have the prerogative to be masked while testifying, counsel must assume that some will avail themselves of that privilege. The masking of the defendant makes him or her appear more criminal. Other than medical personnel or celebrants at Halloween or Mardi Gras, prior to COVID-19 the stereotypical mask wearer was the highwayman, the robber, or the desperado who concealed his identity because of the criminality of his acts. Masking the defendant, and the witnesses, of course, conceals their facial expressions from their eyes down to below their face. As discussed below, this violates the defendant's rights to effective assistance of counsel, since counsel cannot assess the witnesses' demeanor, and to confrontation.

During cross-examination, the jury and counsel must study the witness's demeanor. This is critical to both the defendant's right of confrontation and the jury's task of assessing witness credibility to aid in the fact-finding mission. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358 ["'observation of a witness on direct [examination] is important to the planning and execution of effective cross-examination'"], superseded on other grounds as stated in *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 840.) *People v. Arredondo* (2019) 8 Cal.5th 694, provides an illuminating example of the dangers of blocking the defendant from viewing the complaining sex assault witness. Finding that the monitor in front of a witness was adjusted so that the defendant could not see her, the California Supreme Court reversed, stating that the United States Supreme Court did not have this kind of procedure "in mind when it cautioned that the constitutional 'face-to-face confrontation requirement' may not be 'easily … dispensed with.'" (*People v. Arredondo, supra*, 8 Cal.5th at p. 709.) "A defendant's right to confront accusatory witnesses," wrote the Court, "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." (*Ibid*.)

[4] "Virtue has a veil; vice, a mask." Victor Hugo, *The Man Who Laughs* (1869).

Either counsel or the defendant, presumably having greater familiarity with the witnesses known to him, would observe crucial facts about the witness. That the witness appears to be calm or agitated, engaged or indifferent, confused or focused, all play a role in counsel's advocacy. Such observations by a defendant may "guide counsel in prodding, cajoling, and prying information from the witness to the benefit of the accused." (Houchin, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?* (2009) 36 Pepperdine L.Rev. 823, 861 (Houchin); see also 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* (2004) 15 Geo. Mason U. Civ. Rts. L.J. 25, 55.)

The analysis of demeanor is intuitive and complex, and often depends upon observing the witness's face. One expert "has identified … 46 facial muscle movements as emblems of the speaker's emotions." (James P. Timothy, *Demeanor Credibility* (2000) 49 Cath. U. L. Rev. 903, 916, n. 116.) This observation consists of more than viewing an isolated part of the face:

> "General 'demeanor' encompasses more than just facial expressions, such as voice tone and body language. However, most demeanor evidence is extremely difficult, if not impossible, to evaluate *without the ability to see a witness's face.* For example, demeanor is useful in revealing a witness's surprise, anger, nervousness, disgust, amusement, boredom, fear, or pain. Other looks cannot be so easily categorized, such as the look that says, "I hoped not to be asked that question." Jurors may get a sense of such emotions by evaluating body language and tone of voice but will determine these emotions more confidently and easily through the witness's multitude of facial expressions. . . . Overall, while other forms of demeanor may exist, *none is more useful than the witness's facial expressions*. Covering a witness's face also prevents the jury from evaluating simple aspects of physical appearance." (Houchin, *supra*, 36 Pepp. L. Rev. at p. 864, internal citations omitted, italics added.)

There is more to confrontation that the mere physical presence of witness and defendant in the same courtroom: there is a literal "confrontation" of defendant and witness as well. (*California v. Green* (1970) 399 U.S. 149, 175 [defendant has "right to meet face to face all those who appear and give evidence at trial."].) Ample reasons support a face-to-face confrontation. "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'" (*Coy v. Iowa* (1988) 487 U.S. 1012, 1019.) "It is always more difficult to tell a lie about a person "to his face" than "behind his back" since "[i]n the former context, even if the lie is told, it will often be told less convincingly." (*Ibid*.) Thus, this kind of confrontation is essential to

"ensur[e] the integrity of the fact-finding process." (*Id*. at p. 1020.) The limited exception to *Coy*'s face-to-face confrontation occurs when the act of testifying itself traumatizes a child sexual abuse victim or the well-known line of cases dealing with undercover officers.[5] In those rare cases, such as child witness trauma, courts have crafted a sui generis exception to the strictures of the Confrontation Clause, allowing "a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." (*Maryland v. Craig* (1990) 497 U.S. 836, 857 [limiting *Coy* with a child sexual assault victim].) No such exigency applies here: defendant is willing to wait to have a trial that is done right.

Understandably, the Court may think that the issue is one of balance between the defendant's procedural rights and the prosecution's "right" to a speedy trial where public health concerns mandate either a modification of trial procedures or a delay in the trial. But it is really no contest: only the state constitution purports to confer a speedy trial right on the prosecution. (Cal. Const., Art. I, § 29.) It is thus wholly subordinate to the defendant's federal constitutional rights. (See U.S. Const., Art. VI, cl. 2 [Supremacy Clause].) The Court also cannot supplant a procedure demanded by the Sixth Amendment with one that it perceives as likely to be equally fair: "It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." (*United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 145.) In rejecting the argument that "the purpose of the Confrontation Clause was to ensure the reliability of evidence" and therefore hearsay statements should be admissible "so long as the testimonial hearsay bore 'indicia of reliability," the Supreme Court held that "the Confrontation Clause 'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'" (*Id.* at p. 146, quoting *Crawford v. Washington* (2004) 541 U.S. 36, 61.) Likewise, the Confrontation Clause demands not just that witnesses be discouraged from giving false or embellished testimony, but that they be discouraged from doing so in a particular manner – by

[5] Even there, the use of disguises to protect the identity of undercover officers has limitations. (See *U.S. v. Alimehmeti* (S.D.N.Y. 2018) 284 F.Supp.3d 477, 489 [court rejected undercover officer's use of disguise, "such as using a niqab" while testifying because it would compromise the jury's ability to evaluate the credibility of the officer].)

facing the accused in open court.

In *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, the Court of Appeal held that a trial court denied defendant's confrontation right when the court placed the defendant and his accuser in positions within the courtroom where the defendant could hear, but not see, the witness. (*Id*. at p. 671; see also *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1157-1158 [placement of one-way glass that prevented witness from seeing defendant violated confrontation clause].) A number of other states have found confrontation violations specifically due to masks or disguises. (*People v. Sammons* (Mich. Ct. App. 1992) 478 N.W.2d 901 [finding that a witness's "full-face mask" violated defendant's confrontation rights]; *Romero v. State*, 173 S.W.3d 502 (Tex. Crim App. 2005) [finding that a witness's disguise violated defendant's confrontation rights].)

The literal words of a speaker can be, and often are, contradicted by his facial expression—it is precisely this facial expression that the mask conceals. "The innumerable telltale indications which fall from a witness during the course of his examination," held the Michigan Supreme Court, "are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words." (*People v. Dye* (Mich. 1988) 427 N.W.2d 501, 505.) In *Romero,* for example, one strains to imagine what facial expression could possibly have been observed since the witness "entered the courtroom wearing dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure [the witness's] mouth, jaw, and the lower half of his nose." (*Romero v. State, supra*, 173 S.W.3d at p. 503.)

The fact that only part of the face is visible, and that is the upper part, has crucial significance. For example, Olympian McKayla Maroney's "not impressed" look became such a media sensation that President Obama imitated it at the White House:[6]

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[6] See "Barack Obama and Gymnast McKayla Maroney Strike the 'Not Impressed' Pose," at https://newsfeed.time.com/2012/11/18/barack-obama-and-gymnast-mckayla-maroney-strike-the-not-impressed-pose/ [as of 7/12/2020].

The "Not Impressed" Pose

Although the expressions in the above photo speak volumes, they do so with the lips and mouth exclusively: nothing visible above the eyes alerts the viewer to either Ms. Maroney or President Obama being "not impressed." If anyone in the above photo were to be masked, their expression would necessarily be concealed, and the irony of the deadpan eyes and expressive lips and mouth would be totally lost on the viewer.

2. Masked jurors prevent defendant from assessing the jurors' demeanor and properly challenging jurors for cause, or peremptorily.

Under the social distancing trial procedures, the venire members are masked throughout voir dire. The defendant has rights to effective assistance of counsel in voir dire and to an impartial jury, rights violated by these trial procedures. Counsel cannot meaningfully voir dire or challenge jurors without being able to observe their demeanor. Nor can counsel guarantee that a jury is fair and impartial when their entire voir dire testimony was given from behind masks.

As with any other witness, potential jurors testify under oath in voir dire, and the litigants attempt to draw conclusions from their demeanor. Indeed, in *Batson-Wheeler* motions, the juror's demeanor can be critical, and the cases unanimously state that the trial judge has the best opportunity to assess it. (See, e.g., *People v. Beeler* (1995) 9 Cal.4th 953, 989 ["the trial court was in the best position to observe the juror's demeanor"]; *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1427 ["trial court was in a superior position to observe [the juror's] physical appearance and demeanor"].)"

Defense counsel may base his or her tactics, including cause or peremptory challenges, on the demeanor of the juror, and may even, again based on that demeanor, forgo questioning the potential

juror. (See *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 587 [recognizing counsel may base voir dire tactics on observing a prospective jurors' demeanor: "counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile."]; *United States v. Allen* (E.D.Va. 1987) 666 F.Supp. 847, 851 [recognizing that counsel may base juror strikes on the "juror's demeanor, appearance, and behavior"].) Appellate courts even instruct trial counsel to memorialize juror demeanor evidence. (*Ayala v. Wong* (9th Cir. 2012) 693 F.3d 945, 963-964 [defense counsel can and should "preserve relevant facts regarding prospective jurors' physical appearances, behavior, or other characteristics" to preserve *Batson-Wheeler* challenges].)

Subjective reasons for challenges based on demeanor or "body language" are valid (provided they are not pretexts for invidious discrimination). (*People v Hall* (1983) 35 Cal.3d 161, 170; *People v Gray* (2001) 87 Cal.App.4th 781, 788; *People v Perez* (1994) 29 Cal.App.4th 1313, 1328.) When evaluating cause or peremptory challenges, courts emphasize the ability of the defendant or counsel to observe demeanor. (*People v Long* (2010) 189 CA4th 826, 848 [prosecutor's peremptory challenge can be based on juror's appearance]; *People v Johnson* (1989) 47 Cal.3d 1194, 1215 [demeanor evidence can support a juror strike when the prosecutor believes the juror agrees with defense counsel's questions]; *People v Wheeler* (1978) 22 Cal.3d 258, 275 [demeanor evidence of hostile looks].) A juror's demeanor may weigh so heavily in counsel's evaluation that it can overrule express verbal statements by the juror. In *People v. Lucas* (1995) 12 Cal.4th 415, the Supreme Court wrote that one venire member "had moderated the uncritical views she expressed regarding the death penalty in her questionnaire," and this, "in addition to counsel's observation of the juror's demeanor," may have persuaded the defense to accept her. (*Id.* at p. 486.)

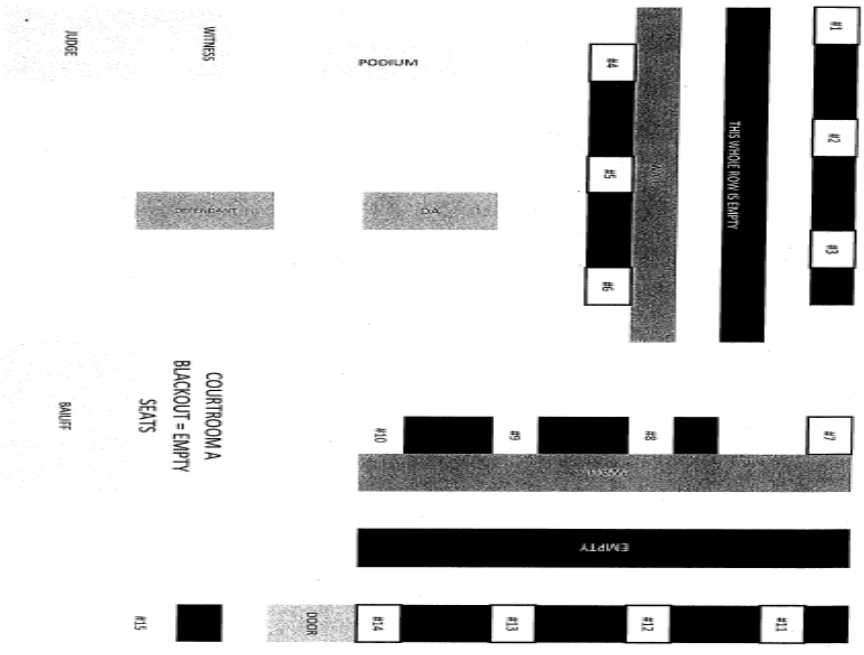
Counsel loses this demeanor evidence in the new social distancing jury trial procedures. Some jurors are near to the podium, some far; but, even with the ones who are close by, assessing demeanor is difficult with the face concealed from the eyes down, and for those jurors who are seated near the back wall, the task is impossible. Counsel cannot determine if cause or peremptory challenges should be made. Nor can counsel meaningfully determine what additional questions to ask or refrain from asking in pursuit of cause challenges. As a result, the new procedures violate defendant's rights to effective assistance of counsel and to an impartial and fair jury.

3. The social distancing procedures deprive defendant of a fair trial due to the unprofessional and constitutionally defective circumstances.

In closing argument, viewing and communicating with the jurors in an honest and sincere way is essential. This is not possible when the jurors are masked and a considerable distance away from counsel. Closing argument is a crucial phase of the trial, and perhaps the most intimate as emotion and drama play a major role. It would be remiss of counsel not to remind the jurors of their solemn responsibility and to try to determine, to the best of counsel's ability, which arguments are most successful with the jurors. While "[e]motion must not reign over reason" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1201), emotional arguments are constitutionally permissible and, in fact, probably the rule rather than the exception.

Appellate courts take an extremely liberal view of the materials available to counsel in closing argument. (14 Witkin Cal. Crim. Law Crim Trial § 788 (4) [Witkin].) "Counsel's summation may be based on matters in evidence or subject to judicial notice. It may also refer to matters of common knowledge or illustrations drawn from experience, history, or literature." (*People v. Farmer* (1989) 47 Cal.3d 888, 922; see also *People v Love* (1961) 56 Cal.2d 720, 730, overruled on other grounds in *People v Morse* (1964) 60 Cal.2d 631, 637.) Counsel needs to assess how the jurors respond to his tone, demeanor, and delivery, as well as his statements.

It is helpful to review Dept. A as show in Exhibit 1:



As discussed previously, Exhibit 1 is not to scale. The podium in Department A stands to the side and somewhat behind the witness box; Jurors 4 and 8-10 sit closer to the attorneys' tables; and Juror 10 sits so far down towards the other side of the room that the juror sits behind the defendant. (Aaron Dec. at ¶ 4; Exh. 1.) In Department A, counsel's podium is 34' 7" from the most distant juror—Juror 11—much further than is typical in a jury trial. (Aaron Dec. at ¶ 27.) Even the distance from the podium to Juror 10, the juror sitting directly behind the defendant and beyond the bar, was 31'—again, much greater than is typical in a trial.

During closing argument, counsel addressed some jurors who sat within six feet (Jurors 1 and 4) and others over 30 feet away (Jurors 8-12); some jurors were directly facing him (Jurors 8-12), some were looking at him from the side (Jurors 1-3, 6-7), and some had to look behind to see him (Jurors 4-5). It was as difficult for counsel to raise his voice for emphasis and reach the distant jurors without startling the close jurors as it was for counsel to lower his voice to the close jurors and still have the distant jurors hear him. It was impossible to read the expressions of the masked jurors. For the jurors who were about 30 feet away, it was difficult to even see their faces, let alone read their expressions. In such circumstances counsel cannot give an effective closing argument.

The situation was the same when counsel was questioning a witness. However, since counsel was now seated at counsel's table, most of the jurors were sitting behind him (Jurors 8-12 and the alternate juror). It was impossible to see the impact of evidence on those jurors since counsel's attention had to be directed towards the front of the courtroom where the judge, the witness, the court reporter, and the examining attorney all stood or sat. It was also impossible to note any misconduct by those jurors during the trial, such as sleeping, texting, or talking among themselves. While the trial judge could monitor this, the parties also should be able to observe the entire panel and make any necessary objections. In addition, the other jurors were at counsel's side, and he could not look at the jurors behind him without turning his back on those jurors.

Using the courtroom for jury deliberations and allowing jurors and attorneys to share access to the room is constitutionally defective and ripe for all kinds of misconduct. It is clearly not the "private and convenient place" referenced in Penal Code § 1128. Jurors may deliberate at an agreed upon place, even a hotel (*People v. Napolitano* (1959) 175 Cal.App.2d 477, 479-80), but using the courtroom for

deliberations, and then for a waiting room for counsel and the jurors, cannot possibly be acceptable. Even though counsel only entered the room after the jurors had stated they had a verdict, that verdict was not yet announced, those jurors were not yet polled. (See *People v. Garcia* (2012) 204 Cal.App.4th 542, 549-550 [jury does not "return" with verdict until individual jurors orally polled or polling waived on written verdict].) Counsel had no way to tell how long the prosecutor and the court staff had been sitting with the jurors before he arrived. In that interval, jurors could have learned something, or formed impressions, that would spur them to change their vote or return to deliberations. Counsel noticed that the jurors laughed when counsel responded to the prosecutor. This indicates that the jurors were paying attention to the interactions of the attorneys, and possibly the court staff and law enforcement as well.

A situation in which Juror 6 was so close to the prosecution's table that he had to draw in his legs so that counsel could walk by, or in which a juror was close enough to the prosecutor that she could hand tissues to that juror, places the jurors and the attorneys in danger of all sorts of inappropriate conduct. With the jurors literally six feet away, they can hear the remarks exchanged between defendant and defense counsel, or the investigating officer and the witness. This undermines the defendant's right to counsel during the trial, since counsel and client cannot be confident their consultations are private. Jurors might even be able to read counsel's notes. The close quarters normalize physical conduct, such as passing a tissue box, that works in favor of the prosecution, which sits closer to more of the jurors, and against the defense which sits further away with a masked defendant.

Finally, the court staff monitoring the jury assembly room where the public can attend does not know all the witnesses in every trial. There is no way to prevent a witness, despite an exclusionary order, from entering the jury assembly room and listening to testimony that he or she should not hear. Court staff should not be put in the position of asking spectators who is or is not a witness in the proceeding and deciding whether it is appropriate for that person to watch the trial on closed-circuit television, since such interrogation discourages viewing of court business by the public. Conversely, however, court staff cannot know who is or is not a witness without either personal familiarity with the spectator or asking them their business. This problem does not exist with the usual filters of counsel and the judge observing who comes and goes from the courtroom gallery.

4. The social distancing procedures deprive defendant of a fair and public trial.

Defendant objects that the social distancing procedures deprive him of his right to a public trial. The press and public will not be able to see the potential jurors during voir dire or the actual trial, nor will they be able to view all the proceedings during trial. During the actual trial, the public and the press in the remote viewing locations will not be able to see exhibits shown to the witness unless they are displayed on the monitor. Additionally, there was nothing in Department A to indicate where the public should go to view the trial.

Every person charged with a criminal offense has a constitutional right to a public trial, or "a trial which is open to the general public at all times." (*People v. Woodward* (1992) 4 Cal.4th 376, 382; see also Code of Civil Procedure § 124.) The state and federal constitutional rights are coextensive. (*Woodward, supra*, 4 Cal.4th 376 at p. 381.) "The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects." (*Id*. at p. 388 [conc. opn. of Mosk, J.], citing *People v. Hartman* (1894) 103 Cal. 242, 245.) The public trial can be modified with "with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial." (*Woodward, supra*, 4 Cal.4th at p. 388.) This federal constitutional right to a public trial extends to the voir dire of the venire members. (*Presley v. Georgia* (2010) 558 U.S. 209 [Sixth Amendment right to public trial extends to voir dire of prospective jurors]; *Press-Enterprise Co. v. Superior Court of California* (1984) 464 U.S. 501 [limited voir dire may be ordered upon good cause provided that timely transcripts are made available].)

A public trial "plays as important a role in the administration of justice today as it did for centuries before our separation from England." (*Id.* at p. 508 [citations deleted].) According to the Supreme Court, "[o]penness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." (*Ibid*.) If a defendant has been denied his Sixth Amendment right to public trial, the error is structural in nature and reversible per se. The courts will not require a defendant "to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." (*Waller v. Georgia* (1984) 467 U.S. 39, 49 [footnotes omitted].) Corollary to the defense right of a public trial, the public itself has a right of general access to court

proceedings. It is a practically ancient doctrine that "in this country it is a first principle that the people have the right to know what is done what is done in their courts." (*In re Shortridge* (1893) 99 Cal. 526, 530.) Allowing the public to observe the judge and counsel, but not defendant, the jury, witnesses, or exhibits, hardly affords the public meaningful knowledge of what it being done in their name. Likewise, it frustrates the public's ability to scrutinize and report on the conduct of proceedings, since they cannot see the witnesses or their demeanor, the defendant, or the jury rendering judgment on behalf of the community. (See *In re Oliver* (1948) 333 U.S. 257, 271-273 [purpose of public trial requirements is to have public scrutiny act as check against abuses of power].) In the actual courtroom, the Court has set aside a mere two seats in Department A for members of the public, effectively abrogating in-person, public attendance of trials.

A public trial helps keep the court and the triers of fact "'keenly alive to a sense of their responsibility and to the importance of their functions'" and may also discourage witnesses from committing perjury. (*Woodward, supra,* 4 Cal.4th at p. 385.) The defendant's trial rights are distinct and superior to the public's right of access. (*Richmond Newspaper v. Virginia* (1980) 448 U.S. 555.) Yet even the First Amendment rights cannot be impaired absent an overriding interest and narrowly tailored procedures: "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Press-Enterprise, supra,* 464 U.S. at p. 510.) This overriding interest "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Ibid*.)

The current social distancing measures do not permit the public or press to view the voir dire proceedings, or even the trial itself in any meaningful way. Two to three people may sit in the jury assembly room and view a closed-circuit television that shows the trial judge and counsel, but they cannot see the jurors or the court staff. They cannot enter the actual courtroom and see if jurors are sleeping, talking, or joking, as when counsel entered shortly before the verdict. They cannot view the public servants doing the public's business, which is precisely the point of a public trial.

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IV. CONCLUSION

Based on the argument and authorities cited above, the defense maintains that a jury trial with the social distancing procedures violates the defendant's constitutional rights. These issues can be resolved by the following suggestions:

(1) Transparent face masks should be provided to all the venire members, witnesses, defendants, and counsel.

(2) The venue for trial should be moved out of the courthouse and into a structure that is large enough so that the jury can sit, socially distanced, in one area. This will allow all jurors essentially the same view of the proceedings, and all the parties have the same view of the jurors.

(3) The venue should be large enough to include an audience area for public access.

If these changes are impossible, defendant will consent to a continuance of the trial for the purpose of allowing the public health emergency to abate.

Dated: July 15, 2020

Respectfully Submitted,

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Jeffrey A. Aaron
Public Defender of Mendocino County

DECLARATION OF JEFFREY A. AARON

I, Jeffrey A. Aaron, declare:

I am the Public Defender of Mendocino County and admitted to all the courts of the State of California. In that capacity I represent the defendant herein.

1. Due to the public health emergency, jury trials in our county were continued by Chief Justice of the California Supreme Court. Prior to the resumption of trials, the Superior Court conducted at least two demonstrations of how the social distancing procedures would be applied, and solicited the views of the District Attorney, the Public Defender, and the private bar. I also received a diagram of the socially distanced criminal trial departments which is attached as Exhibit 1.
2. I tried the second trial in our county in which the social distancing procedures announced by the Superior Court were used. Trial in *People v. Vickie Bell*, SCUK-CRCR-19-33242, began on 7/6/20.
3. When I reviewed Exhibit 1 after the trial, I noticed that it was not to scale. In Dept. A, the podium is actually to the side and somewhat behind the witness box. Jurors 4 and 8-10 are closer to the attorneys' tables. Juror 10 is so far down towards the other side of the room that the Juror would be sitting directly behind the defendant at counsel table.
4. Only 15 jurors can be in court for voir dire due to the size and configuration of the courtrooms. (Exh. 1.) They sit in the jury box, in seats on the floor in front of the jury box, and in what used to be the audience. (*Id.*)
5. In Dept. A, Juror 6, seated on the floor in front of the jury box, was only 3' 11" from the prosecution's table. This juror had to draw in his legs so that counsel could walk from counsel table to the podium.
6. In the *Bell* trial, the prosecutor sat close enough to the jurors that at one point a juror sneezed and the prosecutor handed the juror a box of tissues.
7. All members of the jury venire not in the trial court sit in the jury assembly room or in Depts. E or F, watching and listening to the proceedings on a big screen television. Members of the public can sit in the jury assembly room. There is nothing in Dept. A to indicate that

persons who walk by the department and want to view the trial should go to the jury assembly room.

8. Before my trial began, I watched some of the first trial with the new procedures. Not everything happening in court was visible to members of the public or the other venire members. Counsel and the trial judge are visible; the jurors in the courtroom are not. Spectators of the trial may see exhibits that are displayed to the jury, but they can only view physical exhibits if they are displayed by the testifying witness or counsel.
9. All jurors, witnesses, and counsel are six feet or more from one another. Persons sitting together at counsel table, such as defense counsel and their client, or the prosecution and their investigating officer, are not.
10. The Superior Court requires jurors to wear masks at all times. Counsel when questioning, and witnesses when testifying, have the individual discretion to be masked or not. At all other times, they must be masked. The defendant must be masked unless testifying.
11. There is no uniformity in masks. At the *Bell* trial, some jurors wore bandanas, some wore medical masks, some wore cloth homemade masks, and so forth. These masks or bandanas concealed the jurors' faces from the eyes down to below their face.
12. I could not see the expression on the jurors' faces who were within six feet or so, let alone those that were more distant. Because the jurors testified from behind masks, it was difficult to hear them at times. At one point the trial judge called counsel into chambers and questioned why defense counsel kept asking a question of a juror when she previously answered it. I apologized and said I simply did not hear the answer and, in general, had difficulties understanding the juror.
13. When it came to challenging jurors, I was confused. Although I had more information about each juror, since they were examined individually and not collectively, it was harder to assess this information. Lacking knowledge of their demeanor while giving their answers deprived me of crucial context necessary to make cause or peremptory challenges.
14. Because I could only see 15 jurors at a time, and if we dipped below 12 jurors, a mini-panel of four additional venire members, I could not determine if there were any reasons for

counsel to want to go deeper into the panel of jurors waiting in the jury assembly room or in Depts. E or F. Often the appearance of jurors, their expressions, their clothing, their attitude, etc., will lead counsel to want to exercise more challenges to get them, hopefully, on the jury; or, in some cases, to not exercise more challenges and thereby keep them from ending up on the panel. I was deprived of both possibilities.

15. Counsel cannot address the witnesses or the jurors except when standing at a music stand which functions as a podium. Because the members of the venire and the public watch the proceedings on screens in the jury assembly room or in Depts. E or F, counsel cannot be seen unless he or she stands at the podium, which is between and somewhat behind the witness and jury boxes.

16. During voir dire, opening statement, or closing argument, I addressed jurors who were as near to me as six feet, as well as others who were 30 to 34 feet away. The jurors are essentially as far from the testifying witness as they are from counsel. Each juror receives individual voir dire, so I had to walk to and from the podium for each juror, a physically exhausting process in the two days of voir dire.

17. During voir dire, the jurors spoke into a microphone that was disinfected by the court clerk after the juror finished his or her individual voir dire. This procedure was necessary because the other members of the venire, or members of the public, would otherwise be unable to hear in the jurors speaking.

18. During trial, the jurors who are in the audience or just past the bar sit behind counsel. I could not see those jurors and also see the other participants—such as opposing counsel, the court, the witness, or the other jurors—at the same time.

19. I could not determine what impact the evidence had on those jurors unless I was at the podium when, of course, counsel would be conducting the examination of the witness.

20. During closing arguments, I had an extraordinarily difficult time assessing the impact of his closing argument and, indeed, delivering that argument. Because some jurors were six feet, and others over 30 feet, away, I could not modulate my voice's volume for dramatic effect. I believed that what might be a soft and low sound for a juror close by would be inaudible to

one further away; what might be emphatic and strong to a juror further away might be shouting and physically unpleasant to one close by.

21. I could not concentrate on the words I was speaking when I also had to turn my head repeatedly to see the impact of the above circumstances on some of the jurors, some of whom I could barely see. I was disturbed that my head was going back and forth, like at a tennis match, and that I might appear to the jury to be disoriented or confused.
22. The former jury deliberation rooms do not provide enough space for social distancing. In the new social distancing procedures, the jurors deliberate in the courtroom itself. Before they do so, the trial judge switches of the closed circuit video to the other rooms.
23. On Thursday, 7/9/20, I was contacted by the court clerk and told there was a verdict. I immediately called my client, who was waiting nearby, and went to the court. When I arrived at the department, the door was unlocked.
24. As I entered the courtroom, I noticed all the jurors were still sitting inside, and I could hear laughter and general conversation throughout the courtroom. The trial judge was not there, nor had the defendant arrived yet, but the prosecutor, the bailiff, and the court staff were present.
25. I do not know for sure that the prosecutor had been speaking to the jurors. When I entered, however, the prosecutor told me: "The jurors said they were using counsel table as their workbench, so we have to disinfect it." I was shocked at the informality and lack of decorum.
26. I told the prosecutor: "I'll take my chances," and sat down. Jurors laughed, indicating that they were listening to the conversation between counsel.
27. On 7/15/20, I, along with two investigators from the Public Defender's Office, measured distances in Dept. A. The distance from the jury box to the prosecution's table was 3' 11" – Juror 6 sat in that space. (Exh. 1.) The distance from the podium to Juror 11, who sat against

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the rear wall, was 34’ 7”; and from the podium to Juror 10, who sat behind the defendant and on the other side of the bar, was 31’. (*Id.*)

I declare under penalty of perjury that the foregoing Declaration is true and correct. Executed this _____ day of July, 2020, in Ukiah, California.

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Jeffrey A. Aaron
Public Defender of Mendocino County