

In the Supreme Court of the State of Idaho

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MAY 21 2021

RE: EMERGENCY ORDER)
REGARDING COURT)
SERVICES)

AMENDED ORDER
May 20, 2021

FOURTH DISTRICT COURT

Over the last 14 months, in order to ensure that the courts in Idaho's 44 counties remain "open to every person," as required by Article I, Section 13 of the Idaho Constitution, this Court has issued a series of emergency orders to address the substantial health and safety risks faced by the public accessing the courts, court personnel, and participants in court proceedings caused by the community spread of the COVID-19 virus.

Since the issuance of those orders, vaccines for COVID-19 have now become available throughout the state of Idaho. In addition, the incidence rate of COVID-19 in the state has been reduced. According to the Center for Disease Control, there is a growing body of evidence that fully vaccinated people are less likely to have asymptomatic infection or transmit the virus to others. The Center also reports that how long vaccine protection lasts and how much vaccines protect against emerging variants of the virus are still under investigation. There is limited data on vaccine protection in people who are immunocompromised.

Accessing Idaho's state courts, including participation in court and grand jury proceedings, requires groups of people to congregate in indoor settings. In addition, participants are often not voluntarily present, but rather are required under penalty of law to appear and participate.

In order to continue to foster public safety and mitigation against the spread of COVID-19 cases, while providing for full access to court offices and participation in court proceedings, court operations shall now be governed by the following rules until further order of the Court.

1. **Minimum Operating Personnel:** The minimum operating personnel for each court facility shall include at least one front desk deputy clerk and one courthouse security officer. If any non-court staff appear in-person for a hearing, at least one additional court security officer in the courtroom is required.
2. **Courthouse Risk Reduction Protocols:** The Administrative District Judge is responsible for ensuring adequate measures are in place so that while in a courthouse all persons participating in a court proceeding or doing court business:
 - a. have easy access to sanitation stations where hand sanitizer, bleach wipes, or handwashing is available; and
 - b. can maintain appropriate social distance of at least six feet from any persons not living in their household.

- c. Additionally, all court personnel are strongly encouraged to receive a COVID-19 vaccine and to wear a mask covering their nose and mouth while in a courthouse.
- 3. **Courthouse Signage:** Signage shall be conspicuously posted at all public entry points of a courthouse or other locations designated for court business strongly encouraging all individuals who enter to wear a mask covering their nose and mouth as a safety precaution and advising individuals not to enter courtrooms or approach court services offices if they:
 - a. have been asked to self-isolate by any doctor, hospital, or health agency;
 - b. have been diagnosed with, but have not yet recovered from, COVID-19; or
 - c. are experiencing any signs or symptoms of illness including: fever, cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, or new loss of taste or smell;
- 4. **Court Proceedings:** Court rules which prohibit hearing any case or part thereof remotely are suspended during the effective term of this order. Unless otherwise directed by the district's Administrative District Judge, an assigned judge has the discretion to hold proceedings in person or remotely, i.e. with all participants utilizing remote technologies including teleconferencing and video conferencing, subject to the following conditions and requirements:
 - a. all trials on a petition to terminate parental rights shall be held in person;
 - b. all felony sentencing hearings shall be held in person beginning June 1, 2021;
 - c. any party intending to offer documentary evidence during a hearing held remotely must provide the court and all parties a list of such exhibits and copies thereof at least seventy-two hours before such hearing unless the assigned judge modifies the time for good cause shown;
 - d. an audio recording of all court proceedings must be created in For The Record (FTR) software or in Zoom software. For court proceedings in district court, the official record may be kept by a court reporter in addition to the audio recording. With the permission of the assigned judge, a court reporter may report proceedings remotely.
 - e. An assigned judge has the discretion to enter other orders or impose other requirements to promote the safety of participants, to promote efficiency, and to protect the integrity of the remote proceeding.
- 5. **In-Court and Grand Jury Proceeding Risk Reduction Protocols:**
 - a. All persons physically present in a courtroom or grand jury proceeding must remain a minimum of six feet away from all other persons at all times in the absence of permission from the assigned judge. However, at the request of counsel, the assigned judge may permit counsel to be closer to a client to facilitate appropriate consultation or to approach a testifying witness, if allowed by the presiding judge.
 - b. All participants in a court or grand jury proceeding are strongly encouraged to wear a mask covering their nose and mouth.

- c. Upon request, an assigned judge may require all participants to wear a mask covering their nose and mouth in order to protect an unvaccinated or immunocompromised participant.
 - d. If a witness, while testifying, cannot maintain a six foot distance from all other courtroom participants, the assigned judge may require the witness or an interpreter while interpreting, to wear a face shield or be behind a transparent barrier.
- 6. **Preliminary Hearing Timelines:** The 21-day preliminary hearing requirement for out-of-custody defendants under Idaho Criminal Rule 5.1 is waived until further order of this Court.
- 7. **Disqualification Without Cause:** No judge shall be disqualified without cause from any proceeding pursuant to Idaho Criminal Rule 25(a), Idaho Rule of Civil Procedure 40(a), Idaho Rule of Family Law Procedure 107 (2015), and Idaho Rule of Family Law Procedure 109 (effective July 1, 2021) during the effective term of this order. When this order is lifted, disqualification without cause rules will only operate prospectively and may not be exercised retrospectively in any existing case.
- 8. **Priority of Jury Trial Settings.** Jury trials shall, to the extent that a case is ready to go to trial, be held in the following order of priority with the first having the highest priority and then listed in descending order:
 - a. Criminal cases in which defendants are incarcerated
 - b. Criminal cases
 - c. Civil cases
- 9. **Weekly Publication of COVID-19 Incident Rates.** The Data and Evaluation Unit of the Administrative Office of Courts shall utilize data obtained from the Idaho Department of Health and Welfare's COVID-19 Data Dashboard, and shall determine the weekly COVID-19 incident rates for each county every Thursday evening after 5:00 p.m. Mountain Time. The weekly COVID-19 incident rates shall be published to the Administrative District Judges and Trial Court Administrators on Friday mornings of each week.
- 10. **Weekly COVID-19 Incident Rate Postponements.** Jury proceedings, including jury trials and grand jury proceedings, may commence anytime during a calendar week unless the Administrative District Judge has determined that the county in which the prospective juror has been summoned to attend court has a seven-day moving average incidence rate of confirmed or presumed cases of COVID-19 of 25.0 or greater per 100,000 population as reflected on the Cases by County page of the Idaho Department of Health and Welfare's COVID-19 Data Dashboard available at www.coronavirus.idaho.gov

The Administrative District Judge's determination described in this paragraph shall be based on the weekly COVID-19 incident rates for that county published ten days prior to the calendar week in which the jury trial is scheduled to occur. For example, a jury trial may commence during the week of May 31, 2021 in a county unless the Administrative District Judge determines on May 21, 2021, that the weekly COVID-19 incident rates published that day exceed the limit.

Once a trial has commenced, it should continue to verdict unless, in the discretion of the assigned judge, a significant increase in the weekly COVID-19 incidence rate or other local COVID-19 incident or public health action justifies a temporary suspension of the trial. Any order in this regard must be supported with written findings.

11. **Other Administrative District Judge Postponements.** Notwithstanding the conditions set forth in paragraph 10, an Administrative District Judge may, in the exercise of discretion, enter an order prohibiting the commencement of jury trials or the impanelment of a grand jury in a county where there are circumstances beyond the acceptable incidence rates which pose a substantial increase in the health or safety risks to participants. Such an order shall be in writing and contain the factual basis for the determination and shall upon entry be submitted via email to the Administrative Office of the Courts.
12. **Trial Court Discretion to Commence or Discontinue Jury Trial.** Nothing contained in this order shall be construed to limit or expand an assigned judge's discretion to commence or suspend a jury trial for reasons unrelated to COVID-19.
13. **Tolling of Speedy Trial.** If this order, any previous COVID-19 emergency orders of this Court, or an order entered by an Administrative District Judge pursuant to paragraphs 10 or 11 above result in any delay in the commencement of jury trials due to COVID-19, the time used to calculate the right to a speedy trial pursuant to I.C. § 19-3501 shall be deemed to have been tolled for those counties affected by said order.
14. **Conduct of Grand Jury Proceedings:**
 - a. Each prospective grand juror shall be sent a COVID-19 Initial Screening Questionnaire for Prospective Grand Jurors which appears as Attachment A to this order. Prospective grand jurors must complete and return this questionnaire to the jury commissioner prior to appearing for proceedings to impanel a grand jury.
 - b. Any person sixty-five years of age or older, or who is a health care provider, is eligible to have grand jury service postponed for six months.
 - c. The completed COVID-19 Initial Screening Questionnaire for Prospective Grand Jurors shall be available to the presiding judge.
 - d. Prospective grand jurors who report positive responses to any of the questions on the COVID-19 Initial Screening Questionnaire for Prospective Grand Jurors are eligible to have jury service postponed for six months.
 - e. All persons physically present in the courtroom or designated facility must remain a minimum of six feet away from all other persons at all times in the absence of permission from the presiding judge.
 - f. All persons in the courtroom or designated facility are strongly encouraged to wear a mask covering their nose and mouth.
 - g. A verbatim record of all grand jury proceedings must be kept either by a certified court reporter or in For The Record Software.

- h. Access to hand sanitizer and bleach wipes must be available in any room in which grand jury proceedings are taking place. Access to a sanitation station, where hands can be washed with soap and water, must be available within the building.

15. **Conduct of Jury Trials:** All provisions of I.C.R. 24 and I.R.C.P. 47, not otherwise modified in this order, shall remain in force and effect. Provided, any jury trial shall be subject to the following conditions:

- a. Any person sixty-five years of age or older, or who is a health care provider, is eligible to have jury service postponed for six months.
- b. COVID-19 Jury Questionnaires:
 - i. Each jury commissioner, in addition to the summons sent to prospective jurors, shall send each juror a COVID-19 Questionnaire in the form provided in Attachment A to this order, which must be completed by the juror and returned to the jury commissioner prior to the prospective juror appearing for jury duty. In the event a juror does not return the questionnaire, the Jury Commissioner shall contact the juror and attempt to resolve the issue, which may include completing the questionnaire over the telephone.
 - ii. The Jury Commissioner may modify this COVID-19 questionnaire to include a juror number or other similar identifying feature.
 - iii. The completed questionnaires, which include private and individual health information, shall be available to the Judge, Jury Commissioner, and each party for use in the jury selection process. Such questionnaires are otherwise confidential and shall be exempt from disclosure as defined in Idaho Court Administrative Rule 32(g). The questionnaires may not be further disseminated by the parties or counsel of record. The district judge may place additional conditions on the use or publication of jury COVID-19 questionnaires. Any violation by a person granted access to the COVID-19 questionnaires as provided in this order, or as provided by a district court order regarding disclosure will constitute contempt of court.
 - iv. Jurors who report positive responses to any of the questions on the COVID-19 questionnaire are eligible to have jury service postponed for six months.
- c. The following shall govern jury selection in all jury trials:
 - i. For all jury trials, the court shall use the struck jury system as outlined in I.R.C.P 47(g) for civil cases and I.C.R. 24(f) in criminal cases;
 - ii. Peremptory challenges allotted to each side, being procedural mechanisms and not substantive rights, shall be modified as follows
 - 1. Pursuant to I.C.R. 24(d), if the offense charged is punishable by death and the state is seeking a death sentence when voir dire commences, each party, regardless of the number of defendants, is entitled to 10 peremptory challenges.

2. Pursuant to I.C.R. 24(d), in all other felonies, each party, regardless of the number of defendants, is entitled to three peremptory challenges; however, if there are co-defendants and the court determines that there is a conflict of interest between them or among them, the court may allow one additional peremptory challenge (total of four), and permit them to be exercised separately (e.g. two each), or jointly.
 3. Pursuant to I. C.R. 24(d), in all misdemeanors, each side, regardless of the number of defendants, is entitled to two peremptory challenges.
 4. Pursuant to I.R.C.P. 47(i), in every civil case, each party is entitled to two peremptory challenges. If there are co-parties the court must determine the degree of conflict of interest, if any, among the co-parties and may allocate no more than two peremptory challenges to the co-parties, not to exceed a total of four, to be apportioned as determined by the court.
 5. Pursuant to I.C.R. 24(e) and I.R.C.P. 47(j), no additional peremptory challenges are authorized for alternate or additional jurors, irrespective of the number of additional or alternate jurors which are used.
- d. Implementation of Struck Jury Method. In order to minimize the number of prospective jurors in the venire and the movement of persons in the courtroom, the following methods are strongly recommended for jury selection in all jury trials:
- i. Before a specific panel arrives for jury selection, all potential jurors in that panel shall be randomly selected and assigned a juror number, which number shall be used both to seat the jurors in numerical order, and to maintain the priority of potential jurors during selection of the jury;
 - ii. Whenever a juror is excused by the court for any reason, including in sustaining a challenge for cause, the next juror in numerical order who is not among those in the struck panel will be included in the struck panel, but the original randomly selected number priority of the jurors will not change.
- e. If sufficient space to allow for adherence to the six (6) foot social distancing safety requirements for the jury venire is unavailable in the county courthouse, alternative locations with sufficient space may be utilized at the discretion of the Administrative District Judge for each district.
- f. In criminal cases, during voir dire, the struck panel of jurors must be in the physical presence of the defendant and counsel. Nothing in this provision shall limit the assigned judge from conducting in camera voir dire with an individual juror, so long as counsel for all parties are present, all defendants are present, and a verbatim record is made of the in camera proceeding. If reasonably feasible, and as sufficient space allows for adherence to safety requirements, a reasonable

number of additional potential jurors should also be present in the event there are excusals for cause in the struck panel.

- g. Only one room may be used to seat jurors during the voir dire process. Jurors may be brought in by smaller panels from the venire, if necessary.
 - h. For all felony criminal trials, a verbatim record of voir dire proceedings must be kept by a certified court reporter. In trials held in the magistrate division a record of voir dire proceedings must be kept either through a digital recording created in For The Record software or a verbatim record kept by a certified court reporter.
 - i. In criminal jury trials, all challenges for cause and all peremptory challenges shall be exercised in the presence of the defendant and counsel.
 - j. In all jury trials, the assigned judge, attorneys, and jurors must be physically present in the courtroom. This requirement shall not be construed to limit the implementation of the struck jury panel method set forth above.
 - k. In a criminal jury trial, with the judge's approval, counsel for both parties and defendant may stipulate that a witness may testify remotely. If the defendant is not present pursuant to Idaho Criminal Rule 43, counsel for the defendant may stipulate on his behalf.
 - l. In civil jury trials, with the assigned judge's approval, counsel for the parties may stipulate to offer any or all testimony by video teleconferencing.
 - m. At no time shall a juror be asked or required to remove a mask against their wishes.
 - n. If a witness while testifying cannot maintain a six foot distance from all other courtroom participants while testifying, the assigned judge may require the witness or an interpreter while interpreting, to wear a face shield or be behind a transparent barrier or both.
 - o. All court personnel in the courtroom, including court clerks, bailiffs, and security personnel, will be limited to those deemed necessary by the assigned judge.
 - p. Easy access to hand sanitizer and bleach wipes must be available in the courtroom and jury room. Access to a sanitation station where hands can be washed with soap and water must be available within the building.
 - q. If the public is physically excluded from the courtroom, the court must make findings on the record as required in paragraph 16.
 - r. Witnesses must be on call or scheduled for a time certain for their appearance to reduce exposure and unnecessary waiting.
 - s. An assigned judge has the discretion to impose additional requirements or restrictions within the courtroom to promote the safety of participants, to promote efficiency, and to protect the integrity of the jury proceeding.
16. **Live Streaming of Proceedings:** Idaho Court Administrative Rule 45 shall be applicable when the public is allowed to attend a proceeding and a camera supplements the public access.

- a. Before the public is prevented from attending a proceeding traditionally open to the public the assigned judge must find:
 - i. health and safety concerns override other interests in allowing the public to be physically present in the courtroom;
 - ii. denial of the public's physical presence in the courtroom is necessary to protect the health and safety of those participating in the proceeding, including, if applicable, a lack of sufficient physical space for adherence to required social distancing;
 - iii. The assigned judge has considered other reasonable alternatives to allow the physical presence of the public;
 - iv. The assigned judge has made findings on the record that live streaming is an appropriate alternative because
 - 1. No reasonable in-person alternative is available that would sufficiently ensure the health and safety of those participating in the trial; and
 - 2. The available live streaming capability is a narrowly tailored and reasonable alternative.
 - b. If the public cannot be physically present in the courtroom, a publically accessible live audio and video stream of the proceedings must be provided. Such live stream may be publically accessible either:
 - i. via transmission to the internet, or
 - ii. by transmission to a separate room in the courthouse. Any live stream of a court proceeding shall not be a part of the official court record.
 - c. There shall be no live streaming of the following:
 - i. Images of jurors, unless the live streaming is by transmission to a separate room in the courthouse;
 - ii. audio of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench;
 - iii. images of notes upon the counsel table, nor of any exhibits before they are admitted into evidence;
 - iv. audio or images of off-the-record, in-chambers sessions or judicial deliberations;
 - v. audio or images of proceedings in which jurors may have to disclose personal, embarrassing, or prejudicial information that traditionally would be addressed outside of the presence of the other jurors and the public.
17. Individuals who, in violation of these protocols, approach a juror, grand juror, prospective juror, prospective grand juror, court services office, or other court participant, or is otherwise disruptive of a proceeding, or who enter a courthouse or other venue where court is being held in violation of these protocols, shall be denied access by anyone


designated for courthouse security by the Administrative District Judge. Any violation of this order may be dealt with through contempt proceedings set forth in Idaho Rule of Civil Procedure 75. Any violation witnessed by a judge may be addressed through summary contempt proceedings set forth in I.R.C.P. 75(b).

18. Unless specifically stated otherwise, the terms of this order are effective immediately. This order supersedes the following emergency orders previously entered by this Court:

- a. September 16, 2020 Order RE: Grand Jury Proceedings,
- b. October 6, 2020 Order In Re: Revised COVID-19 Grand Jury Questionnaire
- c. October 8, 2020 Order In Re: Limitations on Access to Court Facilities,
- d. October 8, 2020 Amended Order In Re: Jury Trials,
- e. November 23, 2020 Order Re: Limitations on Access to Court Facilities,
- f. February 3, 2021 Order Re: Commencement of Jury Trials and Grand Jury Impanelment

IT IS SO ORDERED.

DATED this 20th day of May, 2021.



G. Richard Bevan,
Chief Justice, Idaho Supreme Court

ATTEST:



Clerk

ATTACHMENT A

Date: _____

Juror # _____

COVID-19 initial screening questionnaire for prospective jurors and grand jurors

The virus that causes novel coronavirus disease (COVID-19) is primarily spread from person to person. Courtrooms are considered exposure risk environments. To help protect the health of Idahoans, an initial screening to determine juror eligibility to serve should be conducted. Answering the questions is solely for the purpose of determining whether a juror can serve and the answers to the questions must be kept confidential.

1. Are you 65 years of age or older?

☐ No

☐ Yes

a. If yes, would you like your service to be postponed for six months?

☐ No

☐ Yes

2. Do you, or does anyone in your household, have any medical conditions that put you or a member of your household at high risk for COVID-19? Examples are, but are not limited to, cancer, chronic kidney disease, chronic lung disease, dementia, diabetes, down syndrome, heart conditions, HIV infection, immunocompromised (weakened immune system), liver disease, overweight or obesity (body mass index [BMI] of 25 or higher), pregnancy, sickle cell disease or thalassemia, or solid organ or blood stem cell transplant, stroke or cerebrovascular disease, smoking (current or former), substance use disorder. . [Note: COVID-19 is a new disease and this list is subject to change. Changes will be posted to <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.] Please explain:

a. If you answered yes to the above question, would you like your service to be postponed or would you like to remain as a juror in your current term?

☐ No, keep me in my current term. I do not feel that my above listed condition will limit my ability to serve.

☐ Yes, please postpone my service for six months.

3. Are you a healthcare worker directly involved with the diagnosis, treatment, management, or care of patients who have or are suspected of having COVID-19? [Note: Healthcare workers include physicians, nurses, nursing assistants, emergency medical personnel, dental professionals and students, medical and nursing students, laboratory technicians, phlebotomists, pharmacists, therapists, hospital volunteers, and some administrative staff and environmental services staff.]

☐ No, keep me in my current term. I do not feel that my profession will limit my ability to serve.

☐ Yes, please postpone my service for six months.

Return this completed questionnaire to the Jury Commissioner. You will be contacted by the Commissioner if there are any concerns about your service.