
THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

,

Defendants.

**COVID-19 TRIAL ORDER ADDENDUM
and ORDER FOR NOTICE RE TRIAL
PARTICIPANT STATUS**

Case No. 4:20-cr-000134-DN

District Judge David Nuffer

The Trial Order entered **July, 2021**,¹ applies under normal circumstances, but does not take into account the COVID-19 Pandemic. With advice from the U.S. Attorney's Office, Federal Public Defender's Office, the Utah State Health Department, and others, the Court adopted a [plan for resuming jury trials](#). That plan is consistent with the measures adopted to protect the public and court employees described in the [District of Utah COVID-19 Information Center](#) and [Resumption of Certain In-Person Court Proceedings](#) web pages. Counsel must review information on those pages for important background information.

This trial setting is a firm trial setting but the conditions of trial may change. For example, voir dire will be conducted **September 21st, 2021**, with counsel in the courtroom with the jury panel present via Zoom.²

Changing Conditions. Trial is just weeks away, but the pandemic is still affecting court functions.

- While many persons in Utah are vaccinated, many are not.
- Most of Utah currently has a high transmission rate.
- Utah is sixth worst in the nation for new COVID-19 cases.
- The highly contagious delta variant now accounts for an estimated 80% of cases in Utah.
- Vaccination protects against severe symptoms from the delta variant but does not prevent delta variant infection or retransmission.
- Governmental permission for vaccinated people to not wear masks, coupled with mask resistance among the unvaccinated, resulted in few people wearing masks, reducing protection for everyone.
- The Utah State Courts now require masks and distancing for everyone in the courthouse.

¹ **Docket no.**

² Supplemental Trial Order for Possible Virtual Jury Voir Dire, **Docket no.** filed **July**, 2021.

- The CDC is changing guidance for mask wearing.
- There are [new mask mandates](#) for persons in federal facilities, regardless of vaccination status and [vaccination mandates](#) for federal employees.
- [Final approval of vaccines has started to issue.](#)

These changing conditions require agility in trial safety precautions and necessitate regular communication between the Court and counsel. To evaluate the changing risks in the specific context of this trial,

IT IS HEREBY ORDERED that on or before **Friday September 3rd, 2021**, counsel must file with the court a notice in the following form identifying:

- each member of the trial team;
- each person (such as defendant, family member, victim, potential witness) who is anticipated to attend trial;
- whether each person listed under a. and b. has been fully vaccinated; and
- whether each person, regardless of vaccination status, will wear a mask when in the courthouse.

Name	Role	Fully vaccinated?	Will wear mask?
		Yes/No	Yes/No
		Yes/No	Yes/No

For any defendant in custody, counsel should also state whether the jail has a quarantine policy for trial participants.

PREPARATION FOR DECISION MAKING

Pandemic Risks and Precautions: Counsel form a vital part of the decision-making group and must be educated about general pandemic risks and precautions, in addition to staying advised of current changes in the pandemic characteristics.

The pandemic has long interfered with the ability to safely conduct jury trials. Now that more information is known, more consensus on health and safety practices has emerged and adjustments have been made to courtrooms and the [plan for resuming jury trials](#) has been adopted to help assure safe conduct of jury trials. Some of the currently known risks that would be present in a jury trial include:

- transmission of virus as droplets or aerosols;
- closed space;
- long duration event;
- proximity to others;
- surface contamination; and
- contamination outside the courthouse.

Measures the court is planning to take include:

- properly worn face masks for those who are not vaccinated and possibly for those who are vaccinated as well;

- Plexiglas™ barriers;
- increased air circulation and outside air mix;
- physical distancing of six feet at all times;
- regular surface cleaning;
- hand sanitizer,
- no items, including exhibits, will be passed to court staff, parties, witnesses, or jurors;
- meals brought in for jurors;
- recommended restrictions on social activities between trial days;
- trial participant health questionnaires;
- temperature screening (when available); and
- rapid testing (when available).

The defendant, prosecution, public, and the court have constitutionally significant interests in having cases brought to trial speedily. While the practices under the [plan for resuming jury trials](#) seem odd when compared to traditional trial practices, the practices have been designed to protect rather than impinge on constitutional rights.

As soon as receiving this addendum, counsel must read or review:

- a. District of Utah [petit jury trial plan](#) (including the applicable courtroom diagrams);
- b. [Jury selection timetable](#);
- c. [Letter sent to all jury pool members](#);
- d. [Standard jury health and general questionnaires for jury panel](#);
- e. [Pre voir dire jury instruction](#); and
- f. Courtroom photographs ([St. George](#)) and Courtroom Photographs ([Salt Lake City](#)).

These documents contain vital information about the trial and may suggest topics for discussion at the final pretrial conference.

PREPARATION FOR FINAL PRETRIAL

Before the final pretrial, counsel may wish to visit the trial courtroom to see the COVID-19 protective measures, including re-arranged seating and plexiglass barriers.

Counsel should consider the need to discuss the following items at the final pretrial:

1. Venire and Voir Dire considerations:
 - a. Jurors deserve reasonable assurance of their safety before participating in jury selection and trial so they may focus on the evidence and not be distracted by the risk of a COVID-19 infection. We should discuss how we will convey reasonable assurances to jurors.
 - b. We will discuss how we might deal with COVID-19 related concerns for jurors as we conduct voir dire, including factors such as home situations; transportation to

and from the courthouse; safety within the courthouse; and concerns regarding being away from home.

- c. The pre-trial jury questionnaires³ that jurors fill out will be given to you in advance of trial but must be returned.
- d. No later than final pretrial, you must raise questions or objections about the procedures in this document and the documents listed in paragraph 1; composition of the jury venire during the pandemic; and access to the jury venire composition data. Serious objections to the venire itself—as opposed to the case-specific noticed jury pool—may necessitate rescheduling the jury trial.
- e. We may have a lower yield from the jury pool during the pandemic.
- f. The Supplemental Trial Order for Possible Virtual Jury Voir Dire⁴ describes the process for voir dire with jurors at remote locations and court staff, counsel, and defendants in the courtroom. The District [petit jury trial plan](#) discusses how in-person voir dire will proceed; how private questioning of jurors will take place; and how and when challenges for cause and peremptory challenges will be made. Questions should be asked at the final pretrial.

2. Trial Considerations:

- a. The level of personal protective equipment to be worn by all parties and who is responsible for providing a criminal defendant's personal protective equipment (PPE). Discuss what to do if a defendant or other participant refuses to wear PPE.
- b. Whether to rotate the jurors' seating daily to allow all jurors an opportunity to sit in the box or well during the trial. Discuss how to inform participants of the changed seating arrangements if rotation will be used.
- c. Courtroom cleaning plans and individual responsibilities for the use of court-supplied sanitizing spray and paper towels.
- d. The presentation of evidence and questioning of witnesses using only electronic evidence (whenever possible); the need for any physical evidence to be used; and ensuring all jurors can see and hear evidence presentations.
 - i. In St. George, where Zoom will be used to present evidence and for sidebar chat, the final pretrial conference will test every participant's

³ [Sample Supplemental Juror Questionnaire](#); [Sample Supplemental Juror Questionnaire - COVID Questions](#); [Sample Supplemental Juror Questionnaire - Technology Requirements for Virtual Voir Dire](#).

⁴ [Docket no. 113](#), filed July 20, 2021.

laptop connection to the FedBar network and ability to join Zoom while muting audio and video.

- e. Restrictions on sidebars and approaching the witnesses. We will conduct sidebars by Zoom chat in St. George. Counsel must not approach the reporter, courtroom deputy, judge, or each other.
- f. The reporting process for situations where a juror or other trial participant exhibits symptoms of illness during the trial. A record will be made and a ruling will enter on how or whether the trial will proceed.
 - i. In criminal cases, in St. George, we will start with 13 jurors, the maximum who can be seated in our courtroom. In Salt Lake City, we will start with 14. If the number of jurors drops below 11, verdicts may be delivered by a unanimous jury of ten or fewer in criminal trials. *See* Fed. R. Crim. P. 23(b) (requiring stipulation of the parties for a jury of less than twelve persons and, in the absence of stipulation, for the court to permit return of verdict by fewer than eleven jurors if a juror must be excused after deliberation starts); *Williams v. Florida*, 399 U.S. 78, 103 (1970) (six-member jury constitutionally permissible); *Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545, at *9 (U.S. Apr. 20, 2020) (unanimous verdict constitutionally required).
 - ii. Discuss privacy and consent issues that may arise with affected individuals' health status and notifying those in the courtroom of test results.
 - iii. Discuss conditions under which a mistrial may be called.
- g. Inquire about the expected number of family members, victims, etc. who want to attend trial and how they can be accommodated. There is no room for spectators in the courtroom. We should be able to stream proceedings by Zoom or telephone conference.
- h. Where witnesses may wait in a physically distanced manner.
- i. Whether there will be special, young witnesses entitled to more protection under [18 U.S.C. § 3509](#). Those witnesses will require additional accommodation, such as a separate entry to the courtroom and/or a separate entry for waiting.
- j. Procedures for in-court identification by witnesses when all participants are wearing masks.
- k. Logistics for any in-custody witnesses.
- l. Confrontation Clause issues if the parties request an ill witness to testify by video conference.

- m. Accommodations made to allow for socially distanced confidential attorney-client conferences during trial. We will test those mechanisms at the final pretrial. Parties may brief any remaining issues of concern.
- n. Interpreter issues with witnesses, defendant, and between counsel and defendant during trial.
- o. Address the courtroom layout and effect of courtroom rules, including inability to read jurors' expressions.
- p. The best manner in which bathroom breaks may proceed with proper social distancing.
- q. When and where jury instruction conferences will take place.

SIGNED this 28th day of August, 2021.

BY THE COURT:

David Nuffer
United States District Judge