

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

IN RE THE MATTER OF)
THE RESPONSE BY) Nos. 20-2-00001-03 (BCSC)
BENTON & FRANKLIN) 20-2-50001-11 (FCSC)
SUPERIOR COURT TO THE COUNTIES)
PUBLIC HEALTH EMERGENCY) EMERGENCY ORDER #5G¹
IN BENTON & FRANKLIN COUNTIES) *Re: Jury Trial Procedures*
AND THE STATE OF WASHINGTON)
) **Effective: December 18, 2020**

The public health emergency in Washington State posed by the Coronavirus 2019, also known as SARS-Cov-2 (hereinafter COVID-19), continues to evolve and requires modification of prior Orders of this Court. The Court has in mind the factual record of prior Emergency Orders and incorporates the same by reference. In particular, the Court has in mind the following guidance from the judicial and executive branch:

1. Washington Supreme Court Order No. 25700-B-626, AMENDED THIRD REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS, entered May 29, 2020, Order No. 25700-B-631, ORDER RE: MODIFICATIONS OF JURY TRIAL PROCEEDINGS, entered June 18, 2020, Order No. 25700-B-642, ORDER EXTENDING EXCLUDED PERIOD IN CALCULATING TIME FOR TRIAL, AND ADOPTING RELATED EMERGENCY MEASURES, entered September 10, 2020, and Order No. 25700-B-646, FOURTH REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS, entered October 13, 2020.²
2. Washington State Department of Health (Hereinafter DOH) COVID-19 and Washington State Courts Public Health Risk Reduction Recommendations, amended August 4, 2020 and further revised on August 28, 2020. Guidance from the Centers for Disease Control and Prevention (hereinafter "CDC"), as revised and amended on September 21, 2020 and October 5, 2020.
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid->

¹ While this Order is of general application, it has been given this number to reflect its unique impact on the rights of parties in criminal proceedings.

² The Order states that this Court, "[a]fter October 15, 2020, may further exclude time under these rules based on "individual findings of unavoidable circumstances" due to COVID-19 or other circumstances." This Court, comparing this provision with prior orders, where the qualifying word "individual" is not present, has in previous orders assumed that the Court is now required to make findings in individual cases, as opposed to the prior ability to exclude time in all pending matters based on the public health emergency. The actions of other Superior Courts, some of which have previously excluded the same period of time from speedy trial, would appear to be consistent with the original broad authority. This Court will proceed henceforth, where such findings are appropriate, in the alternative.

spreads.html (accessed September 28, 2020), *also see* revisions at, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed October 5, 2020).

3. The Governor's "Safe Start" Program as a part of Washington State's Coronavirus Response page. <https://coronavirus.wa.gov/what-you-need-know/safe-start/whats-open-each-phase> (accessed September 28, 2020).

The Court also has in mind the following factual history:

4. Benton and Franklin County have, as of October 13, 2020, been advanced to Phase 2 of the Governor's phased reopening plan ("Safe Start"), while long-term care facilities remain in Phase 1. However, infection rates both locally, statewide, and nationally, as of the date of this order, have again risen, with what has been termed a "third wave" of infection locally currently is more than double any prior peak in the 14-day rolling average.. *See* Benton-Franklin Health District, https://www.bfhd.wa.gov/programs_services/investigations_outbreaks/covid-19/benton-franklin_case_count (accessed December 2, 2020). As a result of this local and statewide infection rate spike, which "puts us in a more dangerous position as we were in March," Governor Inslee announced statewide restrictions, beginning November 18, 2020, and lasting until Monday, December 14, 2020. <https://www.governor.wa.gov/news-media/inslee-announces-statewide-restrictions-four-weeks> (accessed November 21, 2020). Therein, indoor activities are restricted to slow the spread of the virus. On December 8, 2020, Governor Inslee extended these statewide restrictions until January 4, 2021.
5. The Washington State Department of Health 7-day rolling average of Confirmed cases has only continued to increase since October 13, 2020, the date on which the Washington Supreme Court excluded time for trial through at least October 15, 2020. *See* Wash. State Dept. of Health Epidemiologic Curves. <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> (accessed December 2, 2020). This state-wide "third wave" currently is also more than double any prior peak in the 7-day rolling average. <https://www.governor.wa.gov/news-media/inslee-extends-modifies-proclamation-statewide-restrictions> (accessed December 11, 2020).
6. Significant numbers of jurors, called for service as a precautionary measure during October and November, have expressed concern regarding a risk to their health from potential jury service. The Clerks of the Court in the Counties of this Judicial District have reported the following returns on jury summons, which they both indicate are markedly lower than traditional rates of return prior to the present emergency.

Benton County - 2020 - (Jurors Summoned/Jurors Confirmed³)

March	-	1,800	/	596
April	-	1,799	/	392
May	-	1,800	/	761
June	-	1,798	/	738
July	-	1,799	/	698
August	-	900	/	330
September	-	1,800	/	660
October	-	1,800	/	705
November	-	2,700 ⁴	/	836

Franklin County - 2020 - (Jurors Summoned/Jurors Confirmed)

March	-	2,000	/	310
April	-	2,000	/	179
May	-	1,000	/	155
June	-	1,000	/	109
July	-	1,000	/	139
August	-	1,000	/	138
September	-	1,000	/	140
October	-	1,000	/	161
November	-	1,500 ⁵	/	228

7. The majority of counsel and parties on all dockets, including Criminal Dockets in both Counties, continue to appear by telephone or Videoconference, or to avoid any appearance by stipulations and agreements available to them under emergency rules currently in place.

NOW, THEREFORE it is hereby **ORDERED**, pursuant to the authority of Washington Supreme Court Order No. 257000-B-631, No. 25700-B-626, Order No. 25700-B-642, and Order No. 25700-B-646 and the authority as the Presiding Judge of Benton & Franklin Counties, that the following shall be in effect:

- A. Jury Trial Procedure:** While hearings are currently available when sought in the interest of justice under existing emergency rules, jury trials in criminal and civil cases, as well as evidentiary hearings in civil and domestic cases

³ A confirmed juror may subsequently be excused or deferred if appropriate and do not reflect the anticipated number of jurors that would appear for selection. The "no-show" rate for confirmed jurors is estimated to be 25% for Benton County, and 35% for Franklin County, according the respective Clerks of the Court.

⁴ Summons are sent approximately 6 weeks prior to the anticipated dates of juror service in both Benton and Franklin Counties.

⁵ The number of jurors summons sent on November 30, 2020 was not available.

will proceed under these procedural rules from the date of this order forward. Criminal trials will take precedence over civil trials for any available setting(s), and criminal in-custody matters will take precedence over criminal out-of-custody matters for any available setting(s).

1. Clerk's Jury Procedure Prior To Trial:

No case will be considered ready for trial unless the parties have fully and in good faith complied with the pre-trial procedures set forth in Emergency Order #5E. The Clerk of the Court in both Benton and Franklin County will, using the juror telephone notification system and/or their respective web sites, encourage jurors to complete the electronic juror questionnaire, which will include advising jurors that they may request deferral of jury service due to "higher risk from COVID-19 based on their age or existing health conditions, or those of a household member." Order No. 25700-B-631, ORDER RE: MODIFICATIONS OF JURY TRIAL PROCEEDINGS, entered June 18, 2020, pg. 2. Jurors will be advised, consistent with "the most protective applicable public health guidance" from the Benton Franklin Health District, of the circumstances under which they should not appear in person for jury selection, and will be instructed to fill out the relevant portion of the electronic juror questionnaire, if available, or to call the Clerk to indicate which of the circumstances apply in their case. Those jurors who request deferral or who request to be excused based on their responses to the electronic questionnaire or who report qualifying circumstances above that prevent their appearance in person will be excused or deferred. The protective measures to be followed by the Court will be available on the Court's website prior to re-start of jury trials, and the Clerks' website in this regard shall mirror the Court's website, which may be accomplished by linking to the Court's website. Order No. 25700-B-631, pg. 2-3.

2. The First Morning Of Trial:

a. Initial Jury Excusal:

The Parties, and the Defendant in a criminal matter, will be present in the Courtroom by 8:15 a.m. on the first morning of trial, and proceedings will begin at 8:30 a.m. for the purpose of addressing whether counsel has reached agreement regarding for-cause hardship excusals of jurors who are appearing for initial check-in that day. At 9:00 a.m., proceedings will begin to address remaining pre-trial motions, pursuant to Emergency Order #5E. If a party is requesting that any participant in the proceedings appear unmasked remotely, as provided in Emergency Order #5D, this shall be addressed, and the Court will rule. Failure to address a

request for unmasked remote appearance at this time will be deemed a waiver of the request.

b. Initial Jury Check-In:

The Clerk of the Court, through a combination of call-in and/or website notification, will advise jurors to appear in groups at regular 30 minute intervals throughout the morning⁶, with each group consisting of a number of jurors no greater than the capacity, consistent with social distancing, of the gallery (public) area of the Courtroom where initial selection for the trial will occur. The capacity of those courtrooms are as follows:

- Benton County Courtroom B (24 persons)
- Benton County Courtroom E (20 persons),
- Franklin County Courtroom 2 (22 persons)

c. Juror *Voir Dire*:

Pursuant to this Court's emergency authority, juror selection will be conducted in separate groups, beginning at either 1:00 p.m. or 1:30 p.m., each group consisting of a number of jurors no greater than the capacity, consistent with social distancing, of the gallery (public) area of the Courtroom where *voir dire* will occur. Order No. 25700-B-631, pgs. 3-4. The Court will, at the 8:45 a.m. hearing, after considering the comments of counsel, advise the Clerk as to the number of individuals to be called in each *voir dire* group, after deciding whether an alternate or alternates will be chosen, and having in mind that the parties are limited to 3 peremptory challenges and the right to additional challenges for alternate jurors has been eliminated. Order No. 25700-B-631, pg. 4. The Court will set the interval between each group between 1 hour and 1.5 hours as the Court determines is reasonable, except in cases where special juror questionnaires are allowed, in which case the court will set other procedures for appearance and questioning in advance of the procedure below:

- i. Each *voir dire* group will be addressed as follows: First, the court will give the introductory instructions as provided in the pattern instructions, with additional instructions/questions if the parties have requested, and the court has allowed them to be given. Each party will then have 15 minutes to

⁶ If experience shows that the timeframe above should be modified to allow the Clerk to complete check-in and/or protect the public, the Court may direct a different timeframe or that the number of jurors called during the timeframe be modified.

question the panel. The parties will not repeat the Court's questions to the venire. Challenges for cause will be made on the record in open court. Jurors who are not removed for cause will be instructed to contact the Clerk to determine if they have been selected as jurors in the matter.

- ii. When the Court concludes that there are a sufficient number of potential jurors, having in mind whether there will be alternate jurors, and the number of available peremptory challenges, any remaining *voir dire* groups will be released, and the parties will immediately exercise their peremptory challenges without the potential jurors present. After the parties confirm the composition of the jury selected, the Clerk will advise those jurors (who have previously been instructed to contact the clerk) as to which jurors have been selected and when they are to appear to be sworn and begin the case.

d. Pre-Trial Motions:

As indicated in Emergency Order #5E, Pre-trial motions will be addressed on the first morning of trial, at 9:00 a.m.

e. Trial Procedure:

Emergency Order #5D on Courtroom Appearances and Masking will be enforced during Trial. Trial will commence the morning of the second day of trial, unless the Court determines that jury selection requires a different commencement time. The parties will have all potential witnesses present and ready to testify such that the court day is used for witness testimony during a party's case. If this procedure is not sufficient to prevent recesses based on the unavailability of a party's witnesses, the Court will consider further requirements.

f. Question/Verdict Call:

The parties, and the Defendant in a criminal case, will be available within 10 minutes notice to take a verdict or address a question from the jury.

g. Public Trial:

Due to the need to socially distance, the gallery of each of the aforementioned trial courtrooms will be used for jury selection and for the impaneled jury during the presentation of the case. The public will be able to view the proceedings. The public will not be allowed in the trial courtroom to allow for social distancing of the jury. Each trial courtroom will have another courtroom in the respective facilities connected via WebEx for members of the public and the media to observe the proceedings in real time (It is anticipated that Courtroom C will be the public space for Courtroom B when Courtroom B is used as a trial courtroom).

These proceedings will not be live-streamed, nor will the WebEx connection be open to additional participants, other than parties or witnesses, should the Court allow them to participate remotely. Those members of the public present in the WebEx-connected courtrooms, other than credentialed media, may not record the proceedings. Space in the WebEx-connected courtrooms will be provided on a first-come, first-served basis. If an individual departs the WebEx-connected courtroom during the proceedings (other than during a recess) that person will have no preference for re-admittance.

h. Jury Deliberations:

Prior to the submission of the case to the jury, the jury may be held in multiple jury rooms during recesses in proceedings to allow for social distancing. When the case is submitted to the jury for deliberation, the jury will use deliberate in either multiple jury rooms (linked by a secure videoconferencing system), an adjoining courtroom (which will then be closed to the public and have its video cameras disabled), or, in Benton County, in the jury assembly room.

i. Safety:

It is anticipated that the courtrooms, WebEx-connected courtrooms, and jury deliberation rooms will be cleaned during the lunch break and at the end of the day's session (so that they will be clean for the following morning). . These and other safety measures that may be followed by the Court will be available on Court's website prior to re-start of jury trials. The Clerks' website in this regard shall mirror the Court's website, which can again be accomplished through linking to the Court's website.

Jurors will be issued notebooks and sterilized pens in a sealable clear plastic bag. The bailiff will collect the bags containing these

items at the end of each morning and afternoon session (prior to courtroom cleaning). Jurors will also be provided with hand sanitizer so that they can sanitize their hands and other items, including the exterior of their zip-loc bag.

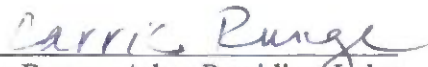
B. Prior Orders: This emergency Order supplements the prior emergency orders which remain in full force and effect to the extent that they are not inconsistent with this order.

C. Certification Under Rule Of Appellate Procedure⁷ 2.3: The novel coronavirus, as far as this Court can discern, presents an issue of first impression. The issue as this Court conceives it is as follows: What is the scope of discretion in the Superior Court to adopt a policy of general application regarding the requirements for conducting a jury trial in response to the present and ongoing emergency posed by SARS-Cov-2?⁸ Further, are this Court's procedures: 1) Within the bounds of its discretion? and; 2) Sufficient to protect the rights of the parties and participants?

It is important that all parties affected by this Order have every properly available avenue to seek review of this order, as swiftly as possible. Therefore, this Court certifies that this Order and all rulings of the court based upon it "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." See RAP 2.3(b)(4).

D. Incorporation Into The Record: As with all prior Orders of the Supreme Court of Washington, and prior orders of this Court, this Order is deemed part of the record in affected cases for the purposes of appeal without the need to file this order in each case.

Dated at Kennewick, Washington, this 18th day of December, 2020.


Carrie Runge, Adm. Presiding Judge
Benton & Franklin Counties Superior Court

⁷ Hereinafer "RAP"

⁸ If, given enough mutation, the underlying virus is given a new designation, or the resulting illness is reclassified, i.e. COVID-20 or COVID-21, this Court's concerns and conclusions remain the same.