

IN THE SUPREME COURT OF THE STATE OF ALASKA
SPECIAL ORDER OF THE CHIEF JUSTICE
ORDER NO. 8333

Order Providing Factors to Restrict or Suspend In-person Jury Trials

The Alaska Court System’s mission “is to provide an accessible and impartial forum for the just resolution of all cases that come before it, and to decide such cases in accordance with the law, expeditiously and with integrity.” The COVID-19 pandemic, however, causes the court system to balance its fundamental obligation to ensure the accessible, impartial and expeditious administration of justice against the risk to individuals who must enter courthouses to participate in the justice process. For example, the Alaska Constitution requires the judicial branch to convene jury trials for criminal cases to be fairly and publicly tried in an expeditious fashion so as to ensure the rights of defendants,¹ victims of crime,² and the public generally.³ This obligation to hold jury trials, however, must be tempered by the responsibility to implement procedures to protect those who must physically come to courthouses, often because they are required to be there.

Supreme Court Order No. 1974 delegates authority to the presiding judge of each judicial district to “limit or suspend felony, misdemeanor, or violation trials for

¹ “In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury...” Alaska Const. art. I, § 11. Alaska Rule of Criminal Procedure 45 governs a criminal defendant's statutory speedy trial rights under Alaska law.

² “Crime victims, as defined by law, shall have the following rights as provided by law: [...] the right to timely disposition of the case following the arrest of the accused.” Alaska Const. art. I, § 24.

³ “[T]here is a compelling public interest in the prompt and orderly disposition of such matters.” Green v. State, 544 P.2d 1018, 1023 (Alaska 1976) (citing in a footnote to Chief Justice Warren Burger’s comments to the American Bar Association in 1970: “Indeed the delays in trials are often one of the gravest threats to individual rights. Both the accused and the public are entitled to a prompt trial.”).

any district or location when required for public health or to comply with local health mandates.” The decision-making process to restrict or to suspend criminal jury trials should be transparent and based upon clearly articulated factors. Moreover, given that “[t]rial by jury is one of the oldest discernible and distinguishing institutions of our Anglo-American system of jurisprudence”⁴ and “an essential institution in our democracy,”⁵ the presumption must be that criminal jury trials will proceed to the greatest extent possible.

It may be necessary to suspend criminal jury trials at certain locations when transmission rates and daily case numbers are extraordinarily high. Total suspension of criminal trials, however, will be used as a last resort when no set of procedures or restrictions are available for trials to proceed at an acceptable risk level. When criminal jury trials must be restricted at a specific location, the presiding judge should issue an order according to the procedures outlined in this order, clearly stating the period of restriction and the factors considered in making that decision. Some level of risk will always be present and no process can ensure zero risk. The intent of this order is to create a transparent process for evaluating the risk and a clear understanding of the important interests that must be balanced and how the decision was made. It should be clear to all interested persons how such an important decision was made.

COVID-19 Criminal Jury Trial Restriction Procedure

The presiding judge will monitor the Alaska Department of Health and Social Services (DHSS) COVID-19 alert level.⁶ Anytime the DHSS alert level is at

⁴ State v. Browder, 486 P.2d 925, 937 FN 38 (Alaska 1971) (citing Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970)).

⁵ Alvarado v. State, 486 P.2d 891, 903 (Alaska 1971).

⁶ DHSS has significantly overhauled its alert system to rely on the total number of cases over the previous 7 days per 100,000 residents, using a four-level alert system. More information about the new DHSS alert system is found at: <http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/alertlevels.aspx>. Of particular concern are local alert levels of “Substantial” (50-99 cases per 100,000) and “High” (100+ cases per 100,000). COVID-19 Substantial alert levels do not necessarily require immediate restrictions on criminal jury trials. Rather, they require heightened vigilance and careful consideration.

“Substantial” or “High” at a particular location, the presiding judge will evaluate whether to take steps to mitigate risk of COVID-19 transmission through issuance of additional orders. Depending on the situation, the presiding judge may decide that it is necessary to restrict trials such that they are able to continue with specific limitations. Or the presiding judge may determine that there is no way to safely mitigate the risk and trials must be suspended until the conditions improve. The process to guide presiding judges in determining whether to restrict (continue to conduct jury trials with specific limitations) or suspend in-person jury trials is outlined below. To be clear, a presiding judge shall make such decisions based on publicly available information about the pandemic’s current status and the presiding judge’s knowledge of court facilities and personnel - this decision is not to be the subject of an evidentiary hearing.

A. Mitigation Efforts

The presiding judge will consider the following conditions at a specific court location to determine whether it is possible to mitigate the risk of transmission in the courthouse during a trial:⁷

1. adequate ventilation;⁸
2. enforceable mask compliance;⁹

⁷ Scientific Brief: SARS-CoV-2 Transmission, CDC, May 7, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html>. (“[T]he available evidence continues to demonstrate that existing recommendations to prevent SARS-CoV-2 transmission remain effective. These include physical distancing, community use of well-fitting masks (e.g., barrier face coverings, procedure/surgical masks), adequate ventilation, and avoidance of crowded indoor spaces.”)

⁸ Ventilation in Buildings, CDC, June 2, 2021 available at <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html>, (“When indoors, ventilation mitigation strategies can help reduce viral particle concentration. The lower the concentration, the less likely viral particles can be inhaled into the lungs (potentially lowering the inhaled dose); contact eyes, nose, and mouth; or fall out of the air to accumulate on surfaces. Protective ventilation practices and interventions can reduce the airborne concentrations and reduce the overall viral dose to occupants.”).

3. enforceable social distancing;¹⁰
4. available screening for symptoms or concerning COVID-19 close contact;¹¹
and
5. high vaccination rates in the relevant community.¹²

The presiding judge shall consider the following factors to determine whether these conditions exist in a particular courthouse and if not, whether they can be mitigated:

1. Availability of staffing inside the courthouse and inside the courtroom to monitor and confirm compliance with COVID-19 protocols and to report back to the trial judge;
2. Whether adequate staffing and procedures are in place to screen all individuals entering the courthouse for recent exposure or current symptoms;

⁹ Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, CDC, May 7, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html>.

¹⁰ How to Protect Yourself and Others, CDC, August 13, 2021 available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#stay6ft%20>.

¹¹ Science Brief: Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and Diagnostic Testing, CDC, December 2, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-options-to-reduce-quarantine.html>.

¹² Science Brief: COVID-19 Vaccines and Vaccination, CDC, July 27, 2021 available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> (“Available evidence suggests the currently authorized mRNA COVID-19 vaccines (Pfizer-BioNTech and Moderna) are highly effective against hospitalization and death for a variety of strains, including Alpha (B.1.1.7), Beta (B.1.351), Gamma (P.1), and Delta (B.1.617.2).”). Vaccine Monitoring Dashboard, Alaska COVID-19 Information Hub, ADHSS, available at <https://experience.arcgis.com/experience/b2f5a105a41c4ca88024efbc2c2e868f/>.

3. Whether appropriate air filters have been installed and are properly functioning in the courthouse and courtrooms;
4. Whether the courthouse location is large enough to permit social distancing in courtrooms and deliberation rooms, when queuing to enter courtrooms and deliberation rooms, and when moving throughout the courthouse;
5. Whether seating, walkways, waiting areas, signage, etc. are in place to ensure the efficient and socially distanced movement of people through the courthouse;
6. Whether adjustments to the number, type, sequence, or specific timing of trials can be implemented to improve conditions;
7. Whether modifications to jury selection can be implemented to decrease the number of people in the courthouse and reduce waiting time;
8. Prior experience of staff and judges at the specific location in complying with COVID-19 procedures outlined in previous orders;
9. Any other modification to procedures or the physical space in a courthouse that would improve the conditions listed above;
10. Whether additional training, oversight, or staff intervention is necessary to ensure compliance with COVID-19 protocols;
11. Local ordinances or emergency orders regarding COVID-19 to protect the public;¹³ and
12. Local conditions such as school closures that may restrict the number of jurors available to serve.

¹³ The Alaska Court System will follow all local COVID-19 related ordinances or emergency orders.

B. Requiring Restrictions Necessary to Permit Ongoing Criminal Jury Trials

After ensuring that all available mitigation efforts have been made, the presiding judge shall consider whether specific restrictions on criminal jury trials are necessary to permit such trials to proceed at an acceptable risk level. The presiding judge will consider the current transmission rates and trends based on DHSS data at the location of the courthouse and region from which any jury will be selected and local hospital numbers if provide more specific community-based information. If necessary, the presiding judge will issue restrictions per Supreme Court Order No. 1974 so that criminal trials may proceed. The presiding judge shall use Alaska DHSS alert levels and associated reported cases per 100,000 persons in the past 7 days,¹⁴ as follows:

1. Reported cases of **50 or greater per 100,000 residents over the previous 7 days** for a specific court location and jury selection area will automatically prompt the presiding judge to evaluate whether further restrictions are necessary to permit criminal jury trials to proceed. If necessary, further orders will issue.
2. The presiding judge shall consider factors such as upward or downward trending of COVID-19 case numbers, vaccination rates, hospitalizations rates and availability of hospital beds, test positivity rates, and any other objective and identifiable factor to determine whether restrictions are necessary to permit ongoing criminal jury trials.
3. The presiding judge shall consider imposing any restriction that will effectively mitigate risk of COVID-19 transmission while maintaining the requirement that criminal jury trials be public hearings of record in compliance with substantive and procedural due process rights of the parties, including but not limited to:
 - a. ordering public participation by audio or video broadcast;

¹⁴ If the DHSS reporting is not specific enough to identify the reported cases for a specific court location, the presiding judge and trial judge should consider other accurate measures of local COVID-19 cases such as reported by the local hospital, city or tribal government.

- b. limiting the number of trials permitted at a location at one time;
 - c. limiting the number of prospective jurors allowed in the courthouse at any one time;
 - d. limiting the classification of offenses that may be tried;
 - e. conducting jury selection by video;
 - f. issuing directives or orders to judges, staff, attorneys, and parties concerning courtroom procedure;
 - g. providing rapid tests for COVID-19 to courtroom participants; and
 - h. issuing any other order or directive that will permit criminal trials to proceed without depriving any party of substantive or procedural due process.
4. The presiding judge shall review any order restricting trials at a particular location every 14 days and renew it only if, after considering the factors in this order, no less restrictive or more narrowly tailored approach will adequately protect the public health.

C. Requiring Suspension of Criminal Jury Trials

After implementing all available mitigation efforts and after issuing all less-restrictive limitations available on jury trials if possible, the presiding judge shall issue a general suspension of criminal jury trials at a specific location or judicial district if no less restrictive or more narrowly tailored approach will adequately protect the public health.

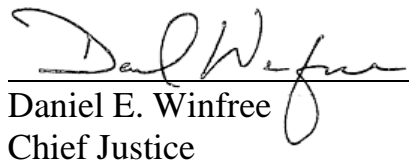
1. Reported cases of **100 or greater per 100,000 residents over the previous 7 days** for a specific court location and jury selection area will presumptively require suspension of jury trials for public safety. The

- presiding judge will automatically issue an order suspending trials for a specific court location when numbers exceed these amounts in compliance with this order.
2. The presiding judge shall review any order suspending trial at a particular location or district every 14 days and renew it only if, after considering the factors in this order, no less restrictive or more narrowly tailored approach will adequately protect the public health.
 3. Notwithstanding a general suspension order, the presiding judge may approve a request for a specific jury trial when circumstances warrant, as set forth in Special Order of Chief Justice 8259.

D. Conclusion

The Alaska Court System takes very seriously fulfilling its mission “to provide an accessible and impartial forum for the just resolution of all cases that come before it, and to decide such cases in accordance with the law, expeditiously and with integrity.” As such, the goal is to conduct in-person criminal jury trials to the extent possible while protecting public health. If current pandemic conditions require restriction or suspension of criminal jury trials, the presiding judge must articulate the reasons underlying this decision according to the procedures outlined in this order. This order will apply to the restriction or suspension of in-person jury trials across all locations in the Alaska until further notice.

DATED: September 20, 2021



Daniel E. Winfree
Chief Justice

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