IN THE TRIAL COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN THE MATTER OF:	Presiding Judge's Administrative Order
Bethel Criminal Jury Trial Restriction 30 Day Order	21- 13

PRESIDING JUDGE'S ORDER LIMITING THE NUMBER OF SIMULTANEOUS CRIMINAL JURY TRIALS IN BETHEL

In light of the ongoing and indefinite COVID-19 pandemic, courts are called upon almost daily to balance the court system's fundamental obligation to ensure the fair and impartial administration of justice against the risk to people who must enter courthouses and courtrooms to participate in that justice process. First and foremost, the judicial branch of government is constitutionally obligated to convene jury trials and to provide a forum for criminal cases to be publicly and fairly tried in an expeditious fashion so as to ensure the rights of defendants,[1] victims of crime,[2] and the public generally.[3] This primary obligation to hold jury trials, however, must be tempered by the responsibility that all government and court facilities have to implement procedures designed to protect people who must enter courthouses and courtrooms, often by choice but just as often because they are required to do so by court order.

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 any district or location when required for public health or to comply with local health mandates." The decision-making process leading to regulation or suspension of criminal jury trials pursuant to this authority should be transparent and based upon

[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. "Extensive delays threaten the basis of the trial itself and the integrity of the verdict." Rutherford v. State, 486 P.2d 946, 951 (Alaska 1971). "The right to a speedy trial fulfills several purposes. One is to prevent harming the defendant by a weakening of his case as evidence and memory of witnesses grow stale with the passage of time. Another is to prevent prolonged pre-trial incarceration and the infliction of anxiety upon the accused because of long-pending charges." Glasgow v. State, 469 P.2d 682, 685 (Alaska 1970).

[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.").

clearly articulated factors.[4] Moreover, given that "[t]rial by jury is one of the oldest discernible and distinguishing institutions of our Anglo-American system of jurisprudence"[5] and "an essential institution in our democracy"[6] the presumption must be that criminal jury trials will proceed to the greatest extent possible. When criminal jury trials must be restricted at a specific location, the presiding judge should issue an order doing so in accordance with the procedures outlined in this order. Any order generally restricting jury trials will clearly state the period of restriction and explain the factors considered in making that decision.

In times of extraordinary risk, it may even be necessary to suspend criminal jury trials at certain locations, as was done in this judicial district when jury trials were suspended earlier in this pandemic while transmission rates and daily case numbers were extraordinarily high and at a time when the medical and scientific understanding of how to protect against transmission of COVID-19 was lacking.[7] Total suspension of criminal trials, however, will only be implemented as a last resort when no set of procedures, limitations, or modifications are available that would permit trials to proceed at an acceptable level of risk.

Whether a particular level of risk is "acceptable" is a judgment call subject to significant disagreement that will fall to the presiding judge. Some level of risk will always be present and no process can ensure zero risk. However, 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, especially for those who disagree with it.

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[4] Without transparent decision making and clear factors for consideration in suspending criminal jury trials, those living in this judicial district might look to the broader community with open and operating drinking establishments, movie theatres, gymnasiums, public swimming pools, concerts, festivals, in-person schooling, restaurants, tourist attractions, and so on and ask how it is that those activities can safely continue while criminal jury trials cannot. Public confidence in the judiciary requires a clear articulation of any decision-making process that may result in restricting or suspending one of the basic functions of a free and open democratic society.

[5] State v. Browder, 486 P.2d 925, 937 FN 38 (Alaska 1971) (citing Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1969)).

[6] Alvarado v. State, 486 P.2d 891, 903 (Alaska 1971) (citing Williams v. Florida, 399 U.S. 78, 100 (1970).

[7] At the height of the pandemic in Alaska in early December of 2020 case numbers statewide routinely exceeded 600 cases per day with the Y-K Delta case numbers routinely exceeding 60 cases a day. At the same time statewide vaccination rates for people 12 and older were around 2% and much less information about the effectiveness of mitigation procedures was available. Compare this to a nearly 60% statewide vaccination rate for at least the first dose for people 12 years and older as of the date of this order and statewide total daily cases during the current spike in cases at about half that of the December 2020 numbers. "Alaska COVID-19 Information Hub" available at https://alaska-coronavirus-vaccine-outreach-alaska-dhss.hub.arcgis.com. (data extracted 8/15/21). In short, it is now possible to mitigate risk more effectively and a vaccine is widely available and increasingly administered that reduces the risk of serious illness.

Fourth District Presiding Judge's Administrative Order 21-10 remains in effect and will define the minimum procedures for all in-person proceedings. Additional limitations or suspensions will be implemented through the three-step process outlined below. Any limitations to criminal trials will be in addition to the restrictions in the standing PJ order.

Fourth District COVID-19 Criminal Jury Trial Restriction Procedure

A. Mitigation Efforts

The presiding judge will monitor the Alaska Department of Health and Social Services ("DHSS") COVID-19 alert level. Anytime the DHSS alert level is at "Substantial" or "High" at a particular location the presiding judge will routinely evaluate whether steps need to be taken or additional orders issued to mitigate risk of COVID-19 transmission.

To determine what additional procedures or modifications might be necessary and available to mitigate the risk associated with the transmission of COVID-19 at a specific location the presiding judge will consider the following conditions:[8]

1. Adequate Ventilation;[9]
2. Enforceable Mask Compliance;[10]
3. Enforceable Social Distancing;[11]

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[8] "Scientific Brief: SARS-CoV-2 Transmission" May 7, 2021 available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html. (last viewed 8/15/21). ("[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.")

[9] "Ventilation in Buildings" June 2, 2021 available at https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html. (last viewed 8/15/21) ("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.").

[10] "Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2" available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html. (last viewed 08/15/21).

[11] "How to Protect Yourself and Others" August 13, 2021 available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#stay6ft%20. (last viewed 8/15/21).

4. Available Screening for Symptoms;[12]

5. Vaccination Rates in the Relevant Community.[13]

Some examples of the factors that will be considered to determine whether these three conditions can be mitigated in a particular courthouse location would be:

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 people entering the courthouse for recent exposure or current symptoms.

3. Whether appropriate filters and ventilation have been installed and are properly functioning in the courthouse and courtrooms.

4. Whether the courthouse location is large enough to generally permit social distancing and proper socially distanced queuing and movement for jury selection.

5. Whether limitations or adjustments to the number, type, order, or specific timing of trials can be implemented to improve conditions.

6. Whether modifications to jury selection can be implemented to decrease the number of people in the courthouse and reduce waiting time.

7. Whether seating, walkways, waiting areas, signage, etc. are in place to ensure the efficient and socially distanced movement of people through the courthouse.

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 three conditions listed above.

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[12] "Science Brief: Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and Diagnostic Testing" available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-options-to-reduce-quarantine.html. (last viewed 08/15/21).

[13] "Science Brief: COVID-19 Vaccines and Vaccination" July 27, 2021 available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html. (last viewed 8/15/21) ("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).").

10. Whether additional training, oversight, or staff intervention is necessary to ensure compliance with COVID-19 protocols.

11. What local ordinances, provisions, and laws are in place to protect the public.[14]

The presiding judge in consultation with the Area Court Administrator will issue necessary orders and policies to limit COVID-19 transmission risk at all Fourth District court facilities.

B. Limitations On Criminal Jury Trials

After ensuring that all available mitigation efforts have been made, the presiding judge will consider whether restrictions or limitations on criminal jury trials are necessary to permit such trials to proceed at an acceptable level of risk. The presiding judge will consider the current transmission rates and trends based on local hospital numbers and DHSS compiled data at the location of the courthouse and region from which any jury will be selected. If necessary, the presiding judge will issue restrictions per Supreme Court Order No. 1974 so that criminal trials may proceed. The following considerations will apply using Alaska DHSS case rates:

1. Daily average case rates **in excess of 20 per 100,000 residents over the previous 14 days** for a specific court location and jury selection area will automatically prompt the presiding judge, the area court administrator, and the clerk of court at that location to evaluate whether further restrictions are necessary to permit criminal jury trials to proceed. If necessary, further orders will issue.

2. The presiding judge may consider factors such as vaccination rates, hospitalizations rates, testing rates, availability of hospital beds, upward or downward trending case numbers, and any other objective and identifiable factor to determine whether restrictions are necessary to permit ongoing criminal jury trials.

3. The presiding judge will consider imposing any limitation 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;

    b. Limitations on the number of trials permitted at a location;

[14] All local provisions are to be followed in all Alaska Courthouses.

c. Limitations on the number of prospective jurors allowed in the courthouse at any one time;

d. Limitations on the classification of offenses that may be tried;

e. General orders to judges and staff concerning courtroom procedure;

f. Any other order or directive that will permit criminal trials to proceed without depriving any party of substantive or procedural due process.

Whenever possible, the presiding judge in consultation with the Area Court Administrator will order restrictions short of full trial suspension that will permit jury trials to proceed at an acceptable level of risk.

C. Suspension

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

1. Daily average case rates in excess of **50 per 100,000 residents over the previous 14 days** for a specific court location and jury selection area will presumptively require suspension of jury trials for public safety.[15] The presiding judge will automatically issue an order suspending or permitting trials for a specific court location any time numbers exceed 50 per 100,000 in compliance with this order outlining consideration of the factors in this order.

2. Daily average case rates in excess of **30 per 100,000 residents over the previous 14 days** for a specific court location and jury selection area will automatically prompt the presiding judge, the area court administrator, and the clerk of court at that location to evaluate whether suspension jury trials at that location is necessary because no less restrictive or more narrowly tailored approach will adequately protect the public health.

[15] DHSS has significantly overhauled its alert system to rely on the total number of cases over the previous 7 days per 100,000 residents. This order references the 14 day average because that number is the number generally referenced in other Presiding Judge, Chief Justice, and Supreme Court orders. As of today's date under the old and new alert systems the Bethel Census Area is in the "high" or "red" category. High alert levels do not necessarily require immediate limitations or restrictions on criminal jury trials. Rather, they require heightened vigilance. The numbers chosen for presumptive closure are based on general experience that community spread at a case rate of 50 per 100,000 suggests that virtually any group of 12 people together in a space will contain multiple individuals with active and transmissible COVID-19. "Coronavirus in the U.S.: Latest Map and Case Count" August 15, 2021 available at https://www.nytimes.com/interactive/2021/us/covid-cases.html. (last viewed 8/15/21).

3. Any order suspending trial at a particular location will be reviewed every 14 days and will only be renewed if, after considering the factors in this order, the presiding judge finds that no less restrictive or more narrowly tailored approach will adequately protect the public health.

Order Limiting Bethel Criminal Jury Trials

Fourth District Presiding Judge's Administrative Order 21-10 currently limits jury trials at the Bethel Courthouse to "one jury trial per floor." Upon consultation with local health authorities and in consideration of the factors listed in the procedure outlined above, criminal jury trials in Bethel shall be **limited for the next 30 days to one criminal jury trial at a time** in the Bethel Courthouse.

Alaska Department of Health and Social Services ("DHSS") COVID-19 data[16] for the Bethel Census Area lists the average daily case rate on August 13, 2021 for the past 14 days at 24 per 100,000 residents. However, upon consultation with local health authorities, it is clear that a recent spike in cases in the Bethel census area is not yet reflected in the DHSS data.[17] The DHSS based COVID-19 14-day average rate will most likely rise significantly in the coming week most likely passing 40 per 100,000. Jurors for trials held in Bethel are selected from the Bethel Census Area and several trials are currently scheduled to commence in the next week.

Looking to the procedure outlined above, the decision to limit jury trials to one trial in the building is based on the following:

1. Findings Related Mitigating Conditions:

    a. The Bethel Courthouse has adequate and functioning ventilation, including a HEPA filtration system specifically installed to mitigate COVID transmission risk.
    b. Jurors in the Bethel Courthouse have generally been mask compliant. Adequate staffing exists to ensure compliance in and outside the courtroom.[18]
    c. Courtrooms and public spaces are arranged to ensure social distancing and adequate staff are available to enforce social distancing in the courthouse.
    d. Screening for symptoms and recent exposure is available.

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[16] DHSS Data retreived from COVID-19 Table 2c "Geographic Distribution of Case Rates" for the date of this order available at https://www.arcgis.com/sharing/rest/content/items/867f802ce1624b46b40d2bd281490078/data.

[17] Case counts collected by the local hospital are published immediately. There is a delay of approximately one week before that information is reflected in the DHSS data.

[18] Counsel at some recent hearings have indicated that compliance in public areas has been spotty recently. The presiding judge will ensure that better compliance is enforced at Bethel going forward.

e. Vaccination rates are relatively high in the Y-K Delta and Bethel regions, with some villages much lower.

2. Findings Related to Necessity for Further Restrictions
   a. The standing Presiding Judge's order and the mitigating conditions listed above provide good protection against COVID-19 transmission risk in Bethel.
   b. Bethel judges and staff have significant experience handling socially distances trials.
   c. There are credible reports in the previous few weeks that jurors and lawyers have been violating social distancing and masking rules in the hallways in the Bethel Courthouse, though not in courtrooms.
   d. Space in the Bethel Courthouse is very limited and may require the use of an elevator for one courtroom and limited hallway space.
   e. Numbers are going to rise to a level in the next week or so that create a high likelihood that at least one prospective juror will be positive for COVID and capable of transmitting the disease.
   f. ICU Hospital beds statewide are at over 75% full. The YK Delta does not have ICU beds and must transport all critical patients to other communities.
   g. YOUTUBE broadcast is available.
   h. Courtrooms are following COVID requirements, including plexiglass and socially distanced seating, masking requirements, limited jury selection, and judicial oversight of courtroom compliance with COVID procedures.
   i. The number of jurors entering the building can be limited to adequately mitigate risk.
   j. Bethel staffing is currently lower than usual due to staff vacancies and current leave.

3. Suspension of criminal jury trials is not necessary because a less restrictive approach is available to permit criminal jury trials to proceed with an acceptable level of risk.

ORDER

a. No more than one criminal jury trial in the Bethel Courthouse will be permitted for the next 30 days. This includes any criminal trial with a sitting jury in active selection, presentation of evidence, or deliberation.

b. Judicial officers with cases currently scheduled for trial in the next 30 days in Bethel shall communicate with one another, establish which trials will take priority, and issue appropriate orders as appropriate in their respective cases.

c. Judges, Court Staff, Counsel, Members of the Public, JS Officers, and any other persons in the courthouse are subject to all COVID-19 procedures currently in place.

d. Trial judges shall issue all appropriate orders and exercise all necessary supervision to ensure that COVID-19 procedures are followed in the courtroom.

e. The clerk of court shall request any appropriate orders and exercise all necessary supervision to ensure that COVID-19 procedures are followed in the courtroom.

f. All prospective jurors shall be screened at the door in accordance with COVID screening procedures.

g. All local Bethel COVID emergency provisions apply in the Bethel Courthouse.

It is So ORDERED.

Dated this 16th Day of August, 2021 at Bethel, Alaska.

Terrence Haas
Presiding Judge

Distributed via email:
Chief Justice
Administrative Director's Office
4th District Area Court Administrator's Office
Bethel Clerk of Court
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