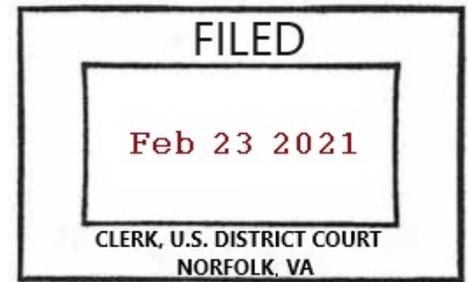


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



In re:
COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE OUTBREAK
OF CORONAVIRUS DISEASE 2019 (COVID-19):
RESUMPTION OF CRIMINAL JURY TRIALS AND
GRAND JURIES; TEMPORARY SUSPENSION OF
IN-PERSON MISDEMEANOR, TRAFFIC, AND
PETTY OFFENSE DOCKETS

Case No. 2:20mc7

General Order No. 2021-02

The United States District Court for the Eastern District of Virginia has continued to closely monitor the outbreak of Coronavirus Disease 2019 (COVID-19), as well as the developing guidance from the Centers for Disease Control and Prevention (CDC) and local health authorities. Beginning in March of last year, the Court implemented a staged response to limit operations and in-person hearings in response to the expanding risks posed by the pandemic. In mid-June, after a statewide "stay at home" order issued by the Governor of Virginia was lifted, this Court began increasing Court operations. All jury trials, however, remained suspended throughout the summer in light of the additional COVID-19 exposure risk associated with such proceedings and the need to modify the trial process in order to provide adequate safeguards for mid-pandemic jury trials. After months of careful planning, culminating in the development of a modified jury trial process using retrofitted courtrooms that allow for sufficient social

distancing throughout the jury selection, trial, and deliberation stages, criminal jury trials resumed in all four Divisions of this Court in September of 2020. This step was taken after consultation with the Virginia Department of Health (VDH) and consideration of this Court's constitutional obligations, defendants' speedy trial rights, and the need to protect the safety of all persons involved in the jury trial process, to include summonsed jurors ordered to appear in federal court in the midst of a deadly pandemic.¹

While multiple criminal jury trials were successfully completed during the fall, COVID-19 conditions in this District, and the Commonwealth of Virginia, began deteriorating in November of 2020. Accordingly, on November 16, 2020, this Court issued General Order 2020-22, temporarily suspending all criminal jury trials through January 18, 2021. Additionally, on December 11, 2020, this Court issued General Order 2020-23, temporarily suspending all in-person misdemeanor, traffic, and petty offense dockets through January 18, 2021. On January 8, 2021, the Court issued General Order 2021-01, extending the temporary suspension of both criminal jury trials and the misdemeanor, traffic, and petty offense dockets through February 28, 2021. Such Order also

¹ In light of speedy trial concerns and the Court's reduced ability to safely conduct multiple simultaneous jury trials, civil jury trials remain suspended until the Court has addressed pending criminal jury trials and has the capacity to begin civil jury trials. See Gen. Order 2020-16.

formally suspended grand jury proceedings through February 28, 2021, although no such proceedings were occurring at the time.

Over the last several weeks, community COVID-19 conditions have markedly improved, signaling the end of the post-holiday "surge" in COVID-19 cases and hospitalizations. In anticipation of the impending expiration of the above-referenced General Orders, the Court has again performed a "gating criteria" analysis consistent with recommendations from the Administrative Office of the United States Courts, and as outlined below, concludes that all three gating criteria (Facility Exposure Risk, Community Case Analysis, and Community Action Assessment) return passing grades, thus supporting the expansion of Court operations.

First, in the last several weeks, there has been a notable decline in COVID-19 facility exposure or potential exposure events in this District's Courthouses. These incidents involve employees, contractors, counsel, defendants, or probationers having been inside a Court building shortly before they, or an immediate family member, experienced symptoms indicative of COVID-19 and/or tested positive for COVID-19. Critically, when such Courthouse exposures or potential exposures occurred, this Court took swift remedial action, to include contact tracing, appropriate notifications of potentially exposed employees, precautionary quarantines, and enhanced cleaning of potentially affected areas.

Second, this Court's careful monitoring of COVID-19 case counts, hospitalizations, and percent positivity across Virginia, and in the specific regions, counties, and cities where our Courthouses are located, reveals sustained downward trends over the last month. When this Court suspended criminal jury trials in mid-November, the 7-day average of new daily cases in Virginia was approximately 1,600 cases, and such daily average rapidly rose to approximately 2,600 cases just 10 days later. By January 8, 2021, the average number of daily cases in Virginia was over 4,700, and 10 days after that new cases peaked at over 6,100. Since such peak, new cases have declined sharply, with the 7-day average now under 2,000 daily cases.² Similarly, the number of people hospitalized in Virginia has experienced a sustained decline, and as of the date of this General Order, there are more than 50% fewer people hospitalized with a confirmed positive COVID-19 test than the peak for this metric one month ago.

The "percent positivity" of COVID-19 tests across Virginia, and across this District, has similarly seen a sharp decline since peaking in January. Most of the cities/counties surrounding this District's Courthouses were experiencing positivity rates between 6% and 9% as of mid-November when criminal jury trials were suspended, and such percentages rose quickly thereafter. As of

² Two weeks ago, the 7-day average was approximately 3,500.

early January, 2021, the "Northern Region," as defined by the VDH, peaked at a positivity rate of nearly 16% (this region includes the Alexandria Division). About a week later, the "Central Region" (Richmond Division) and the "Eastern Region" (Norfolk/Newport News Divisions) peaked at 15% and 21%, respectively. Currently, the Northern, Central, and Eastern Regions' percent positivity rates have declined to approximately 7.5%, 9%, and 12.5%, respectively. The above metrics, as well as others,³ reveal sufficiently sustained downward trends for this gating criterion to return a passing grade.

Third, moving on to an assessment of "Community Action," a few weeks after this Court issued its mid-November General Order temporarily suspending criminal jury trials, the Governor of Virginia issued a "modified stay at home order" imposing increased community restrictions, which included limits on certain public and private gatherings to no more than 10 people (the limit was 250 people during the early fall and was reduced to 25 people in November before reaching the current limit in December). Such Executive Order was later extended by the Governor, and currently

³ Virginia's 7-day average for newly reported COVID-19 deaths has been widely fluctuating over the last several weeks, and VDH now reports that the "post-holiday surge of COVID-19 cases" resulted in data entry delays for death certificates. While it is therefore hard to draw any clear conclusion on trendlines associated with daily deaths, this data point is clearly a "lagging" metric anyway, so it does not take primacy when analyzing the current state of community transmission or when projecting the likely state of transmission in the weeks to come.

has a scheduled expiration date of February 28, 2021. Moreover, just last week, the Governor began modifying such Executive Order to loosen certain restrictions. Additionally, the Governor has recently announced that he expects all Virginia K-12 school districts to offer an in-school instruction option by March 15, 2021, utilizing safety protocols similar to those adopted by this Court (mask wearing, social distancing, hand washing/sanitizing, contact tracing and quarantining, etc.). While the calculus for resuming in-person schooling is somewhat unique in light of the reduced risk that COVID-19 apparently poses to school-aged children, the fact that multiple schools within this District have already resumed in-person instruction over the last several weeks is an indicator that "community restrictions" are currently declining in our District.⁴ The relevant community restrictions will presumably further decline on March 1, 2021, when the current Executive Order expires.⁵ Furthermore, last week, at least one

⁴ Most cities/counties surrounding this District's Courthouses continue to report metrics that qualify the area as a "high transmission" risk (as defined by the CDC's recently updated "Operational Strategy for K-12 Schools through Phased Mitigation" risk framework). While a "high transmission" risk does not preclude K-12 schools from reopening, such category carries a recommendation for resuming only lower grade levels, having reduced attendance, requiring universal mask wearing, and mandating social distancing of at least six feet at all times. In other words, the CDC's school reopening Guidelines, not unlike this Court's operational plan, calls for the reopening of only the most critical functions during times of high transmission risk, and requires strict safety protocols.

⁵ Based on recent comments from the Governor, the Court does not expect that all community restrictions will be eliminated starting March 1, 2021; but rather, it appears likely that the Governor will adopt a staged approach reducing some restrictions. This Court's decision to resume criminal jury

neighboring federal district court (the District of Maryland) issued an order announcing a plan to resume certain in-person proceedings on March 1, 2021, and to resume at least some jury trials on or after March 15, 2021. Considering the above, it is apparent that community restrictive movement orders are being lessened and that relevant communities are adopting less restrictive postures, resulting in a passing grade for this third and final gating criterion.

After carefully balancing the available data on COVID-19, to include the still unquantifiable risk posed by COVID-19 "variants," and after consulting with public health experts in multiple Divisions of this District, the Court finds that it is appropriate to take an incremental step forward to expand Court operations, to include the resumption of criminal jury trials.

Criminal Jury Trials

Barring a material change in circumstances, to include the potential impact of COVID-19 variants on community transmission, the previously ordered suspension of all criminal jury trials will

trials is made with the realization that the risk of COVID-19 spread in the community remains substantially elevated, which is why jury trials have not been resumed up until this point. However, after reviewing the trends described above, and after consultation with VDH, this Court has now concluded that current metrics suggest that by March 1, 2021, the risk will have declined to such a level where the resumption of certain critical functions, to include criminal jury trials and grand jury proceedings, should resume with strict mask wearing, social distancing, and other protective measures notwithstanding the ongoing elevated risk posed by COVID-19.

be permitted to expire on February 28, 2021. Such planned expiration is announced herein to provide clarity for litigants and counsel in order to facilitate their final preparations for upcoming trials. The speedy trial analysis, discussed in General Orders 2020-22 and 2021-01, as well as previous General Orders, continue to apply up through and including February 28, 2021.

Although the Court acknowledges the substantial uncertainty associated with the spread of COVID-19 variants, based on currently available data, the status of vaccine rollouts, and the constitutional obligation of the Court to conduct criminal jury trials when it is feasible to do so, the Court finds that such trials should resume on March 1, 2021. The Court makes such decision after close consultation with local public health experts, who indicated that even after the recent decline in COVID-19 cases and hospitalizations, criminal jury trials should only be resumed if the Court's current very strict safety protocols remain in place based on the risks posed by emerging variants, which may predominate in Virginia as early as March. As criminal jury trials resume, scheduling priority **SHALL be given** to trials with any defendants held in custody, with consideration given to the length of time that cases have been pending.

Grand Jury Proceedings

In light of the recent decline in COVID-19 metrics in this District, the Court will similarly allow the previous suspension

of all grand jury proceedings to expire on February 28, 2021. However, because the risk associated with allowing a previously empaneled grand jury to convene is significantly less than the risk associated with empaneling a new grand jury, and because the backlog of criminal jury trials will have an immediate and significant impact on the foot traffic in this District's Courthouses beginning on March 1, 2021, the Court temporarily further **SUSPENDS** the empanelment of new grand juries **through March 31, 2021**. As conditions evolve and exigencies arise, the Chief Judge may make an exception to such suspension; however, the expectation is that authorized extensions of current grand juries, which have not met in this District since criminal jury trials were suspended in mid-November, will be sufficient to handle all necessary matters in the immediate future.

Misdemeanor, Traffic, and Petty Offense Dockets

Notwithstanding the notable improvement in COVID-19 metrics in this District, the Court finds that an incremental approach is necessary in order to balance the still notable risk of community spread of COVID-19 with the need to safely resume previously suspended Court operations. Given the precedence that felony criminal jury trials warrant, and the expected surge in foot traffic that will accompany the resumption of the above discussed jury proceedings, the Court **ORDERS** that, **all misdemeanor, traffic, and petty offense** dockets with **in-person hearings** scheduled in

this District **through March 31, 2021, are hereby SUSPENDED.** Such decision is made in light of the fact that misdemeanor, traffic, and petty offense dockets involve numerous defendants, counsel, witnesses, and family members coming into the Courthouse on the same day, and that Courthouse transmission risks would rise to an unacceptable level if all previously suspended operations, which now all have backlogs, began at precisely the same time. The decision to take a staggered approach takes into consideration the guidance from local public health officials, to include the risk posed by COVID-19 variants, a risk that is incrementally increased with each additional in-person docket. As with prior suspensions of the misdemeanor, traffic, and petty offense dockets, the Court anticipates that the various Divisions of this Court will issue their own individual Orders/Notices identifying the names and/or dates of the specific dockets that are covered by the instant District-wide General Order.

Relevant to **all of the above categories of proceedings**, this Court will continue to monitor COVID-19 conditions in the community, and expressly reserves the right to modify the terms of this General Order should conditions so require.⁶ As to in-person proceedings that do occur, the Court will continue to take all feasible steps to protect the health and safety of jurors and

⁶ As previously noted, this Court's ongoing monitoring considers not only statewide metrics, but metrics on a regional/Division-specific basis.

prospective jurors, court employees, criminal defendants, counsel, witnesses, judges, and the public. Notwithstanding the phased expansion of high priority in-person proceedings, judges are encouraged to continue utilizing video teleconferencing to the greatest extent possible for all authorized proceedings.

Additionally, judges and court personnel should continue to take all reasonably available steps to reduce the number of individuals gathered (masked and socially distanced) for any live proceeding. While no mandated numerical limits on gatherings will be in force beginning on March 1, 2021, the undersigned judge anticipates that, with the exception of criminal jury proceedings, most, if not all, gatherings in our Courtrooms and Courthouses during the next several months will have 25 or less people (masked and socially distanced) present in the same room.

It is so ORDERED.

/s/ 

Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 23, 2021