

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Miscellaneous Case No. 2:20-mc-00052



IN RE: COURT OPERATIONS IN LIGHT OF
THE EXIGENT CIRCUMSTANCES
PRESENTED BY THE COVID-19 PANDEMIC

GENERAL ORDER #11

Since March 13, 2020 a series of General Orders have been entered modifying court operations in light of the exigent circumstances created by the COVID-19 pandemic. From that time through June 30, 2020, petit jury trials and most grand jury meetings were postponed. By General Order #7 entered on June 25, 2020, petit jury trials and grand jury matters were permitted to resume in light of the status of the presence of COVID-19 in the community and taking into account guidance from public health authorities. Between July and mid-September, several jury trials and grand jury meetings occurred throughout the district, with safety protocols in place intended to minimize the possibility that participants may be exposed to the virus. However, on September 18, 2020, in response to a rise in the spread of the virus in the community, the Court issued General Order #9 continuing all jury matters until further notice. In addition, the grand jury meetings scheduled for the months of September and October were continued. In General Order #10 entered on December

4, 2020 the Court took note of the continued extent of the virus outbreak in the community and determined that the restrictions on petit jury trials and grand jury meetings should continue until further order of the Court.

The Court adopts its previous findings on this matter contained in the prior orders. The Court further finds that over the past few weeks, the presence of the virus in the community has demonstrated a sustained downward trend. According to figures available from the West Virginia Department of Health and Human Resources¹, the number of daily cases reported is now very close to the figures seen on September 18, 2020, when the Court entered General Order #9. According to those same figures, the number of current hospitalizations, daily case positivity percentage, and deaths, are all declining. Furthermore, the State of West Virginia has undertaken an aggressive approach to vaccinations in the community and has been recognized as a nationwide leader, with one of the highest per capita distribution of COVID-19 vaccinations in the country.² As of March 11, 2021, just over 12% of West Virginia's population has been fully vaccinated. News reports indicate that there will be an increased number of vaccine doses released to the states in the coming weeks, which will continue to bolster the overall vaccination rate of the population.

¹ The figures quoted are available at: West Virginia Department of Health and Human Services "Coronavirus Disease 2019" <https://dhhr.wv.gov/COVID-19/Pages/default.aspx> (last visited March 11, 2021).

² See, e.g. "How West Virginia Became a U.S. Leader in Vaccine Rollout" <https://www.nytimes.com/2021/01/24/us/west-virginia-vaccine.html> (New York Times, January 24, 2021); "The Key to West Virginia's Vaccine Success" <https://www.theatlantic.com/ideas/archive/2021/02/key-our-vaccine-hesitancy-story/617944/> (The Atlantic, February 8, 2021).

When taken together, the sustained downward trend in daily cases, the reduction in hospitalization metrics, and the efficient distribution of vaccinations all support the conclusion that this district may resume jury activities in the near future, provided that all of these factors continue a positive trend.

Courts around the nation have struggled to conduct trial proceedings safely in the pandemic environment.³ In determining how best to resume jury activities, the Court is mindful of the lessons learned during the ten-week period between July 1, 2020 and September 18, 2020, when jury trials were permitted in this district. During that time, just over a half-dozen trials were successfully conducted. In each instance, the facilities were carefully evaluated and modified so that jury assembly, jury selection, the trial itself, and jury deliberations could all be conducted in a safe manner that complies with masking and social distancing protocols. As a result, we determined that only three of the four points of holding court in this district (Charleston, Huntington, and Beckley) are suitable for the needs of jury selection in a pandemic environment. In each of those venues, large spaces in the courthouse are needed for socially distanced jury assembly and jury selection, which necessitates using multiple courtrooms linked by video and audio. Particularly in criminal cases, the redesigned jury trial process means that two or three courtrooms will be occupied to ensure a jury trial that is safe and complies with social distancing protocols. This arrangement also requires closely coordinated scheduling not only for the courtrooms

³ See e.g. “Only 9 Trials in 9 Months: Virus Wreaks Havok on N.Y.C. Courts” <https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html> (New York Times, Dec. 2, 2020); “COVID-19 Outbreak Leads to Mistrial in EDTX” <https://www.law360.com/articles/1329617> (Katie Buehler, Nov. 17, 2020).

and other facilities involved, but also for the technology support and jury support personnel required. As a result of this use of physical and human resources, it is very difficult if not impossible to conduct two simultaneous jury selection days at the same time in the district. In addition, the use of resources required to support a return to pandemic-era jury trials impinges upon the Court's ability to conduct other in-person hearings, resulting in an outsized impact on the schedules of everyone in the district.

In making the determination to resume criminal jury trials under these conditions, the Court must also be mindful of the unprecedented scheduling concerns that apply in light of the Speedy Trial Act. Apart from a ten-week window last summer, jury trials have been on hold for the past year, and the time period of the continuances implemented by this Court's series of General Orders was excluded under the Speedy Trial Act pursuant to the ends of justice under 18 U.S.C. §3161(h)(7)(A). As a result, there are dozens of criminal cases whose trial dates have been continued repeatedly. Without question, many of the defendants in those cases have been detained prior to trial and are now in custody for the sole purpose of awaiting trial. The Court is aware that "ends of justice" continuances cannot be based upon "general congestion of the court's calendar," 18 U.S.C. §3161(h)(7)(C), but the continuances ordered over the past year were not based upon a congested calendar. Where a calendar is congested, the assigned judge can seek help from colleagues, transfer the case to an available judge, or otherwise continue non-criminal matters in order to prioritize a defendant's speedy trial rights. However,

none of those options are available in the context of a nationwide pandemic that has resulted in significant limitations on the ability to safely conduct trials.

Compounding the difficulty of this issue is the fact that new criminal cases are being added to the Court's docket. For example, new indictments were returned by a grand jury that was permitted to meet in the last week of February. In normal circumstances, applying the 70-day speedy trial clock to those new indictments would mean that many of those cases would have a trial date set in May 2021. However, applying the 70-day clock in a strict fashion would have the anomalous and inequitable result of trials in the new indictments leapfrogging over the dozens of other criminal cases that have been continued over the past year, many of which are presumably ready for trial.

It is critical that this Court assure that the resumption of criminal jury trials in a pandemic environment will provide an accused defendant with the full range of trial rights, to include not only a live in-person trial, but one where the jury represents a fair cross section of the community, and one that will not be rushed to judgment during deliberations based upon a fear of contracting COVID-19. As previously noted, accomplishing these goals requires establishing a safe mode for conducting jury trials, which results in scheduling limitations that require a staggered approach to conducting trials. Such a staggered approach will also ensure that counsel involved in the trial are able to remain safe and to have adequate time for preparation. If the Court announces a date that jury trials can resume and simultaneously removes the finding that pandemic-related trial delays are

excludable from the speedy trial clock, it will result in an untenable situation requiring multiple trials to be scheduled on the same day or within days of each other. Not only would this situation be unsafe for jurors, court personnel, counsel, and witnesses, but it would also interfere substantially with an accused defendant's right to a fair trial.

Bearing all of these factors in mind, the Court finds that the best method to return to jury trials in the safest manner for all parties is to announce a future date when jury trials may resume, and to extend for four months beyond that date the applicable time window in which a continuance of a trial date will be excluded from the Speedy Trial Act. This staggered approach will not only take into account the realities of safely conducting trials in a socially distanced environment, but will also assure that the judges of this district may exercise discretion to review their criminal trial dockets in an equitable manner to take into account all relevant factors, including the time that an accused defendant has been in custody for the sole purpose of awaiting trial. In so concluding, the Court is mindful of the fact that the national pandemic is an unprecedented event faced by the federal judiciary requiring creative solutions that are unlikely ever to be repeated. In some respects, it is as if we are implementing the Speedy Trial Act again for the second time, a process that Congress phased in⁴ over a three-year period. Given the lengthy interruptions in jury trials due to an unprecedented national emergency, a phased approach is entirely justified, albeit of a much shorter duration.

⁴ The 70-day trial clock was phased in over a three-year period. 18 U.S.C. § 3161(g). In the first year, the trial clock was 180 days, in the second year it was 120 days, and in the third year it was 80 days.

IT IS THEREFORE ORDERED, that effective May 3, 2021, civil and criminal petit jury selections may commence before any district or magistrate judge in the Southern District of West Virginia, provided that efforts are made to minimize the number of jurors who are reporting to a courthouse, and that social distancing and other safety protocols are followed; and it is further

ORDERED, with regard to criminal trials, based upon the findings outlined herein, including that (1) jury trials have not been conducted for the majority of the past year; (2) resource and safety limitations prevent simultaneous trials and impose other scheduling limitations; (3) inequities will result if the speedy trial clock is lifted at the same time for all cases, even those that have waited for months; (4) the Court has a reduced ability to obtain an adequate spectrum of petit jurors; and (5) the public health recommendations for conducting indoor in-person events have an impact on the availability of counsel and court staff, the time period between May 3, 2021 and August 31, 2021 will be excluded under the Speedy Trial Act, as the Court specifically finds for the reasons outlined herein that the ends of justice served by excluding this time period outweigh the best interests of the public and each defendant in a speedy trial, pursuant to 18 U.S.C. § 3161(h)(7)(A); and it is further

ORDERED that grand jury meetings currently scheduled between the date of this order and August 31, 2021 will be evaluated on a case-by-case basis in light of the circumstances in the relevant community as well as the trial schedule in place at each point of holding court; and it is further

ORDERED that all other civil and criminal proceedings in the U.S. District Court for the Southern District of West Virginia, may be conducted in-person in the discretion of the presiding judicial officer, provided that the in-person proceeding is conducted in a manner that complies with social distancing and other safety guidelines. The courtrooms of the district are all marked with social distancing locations, and the presiding judicial officer has authority and discretion to require the participants and officials who are present at any in-person court proceeding to comply with any additional precautions that are deemed necessary under the circumstances. Where practical, presiding judicial officers may continue the use of existing videoconferencing and other technologies to conduct court proceedings in accordance with prior directives of the Court; and it is further

ORDERED that the mask-wearing requirements of General Order #8 remain in full force and effect, and the courthouse entry restrictions set forth in General Order #2 remain in full force and effect, and it is finally

ORDERED that the United States Marshal, his Deputies, and the Court Security Officers shall enforce this order and deny entry to those individuals not wearing a mask.

SO ORDERED this 15th day of March, 2021.



THOMAS E. JOHNSTON, CHIEF JUDGE