## STATE OF MAINE SUPREME JUDICIAL COURT

### **ADMINISTRATIVE ORDER JB-15-4**

# PENOBSCOT COUNTY PILOT PROJECT TO ALLOW REMOTE TESTIMONY IN CRIMINAL CASES

## Effective: July 1, 2015

#### I. SCOPE AND PURPOSE

This Administrative Order creates a pilot project for criminal cases in Penobscot County only, though nothing contained herein shall prevent a judge from exercising discretion in addressing the presentation of witnesses in any other Region, including consideration of allowing remote testimony, upon appropriate findings demonstrating good cause, and with necessary protections to assure due process of law.

The Pilot Project authorizes the court, as in civil proceedings, to permit presentation of testimony in open court by contemporaneous transmission from a different location on the court's own motion or for good cause shown. Although the Sixth Amendment right to confrontation is not absolute, *see Maryland v. Craig,* 497 U.S. 836, 850 (1990), it may be restricted only "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," *id.* Courts have addressed remote testimony by video conferencing technology in cases such as in *United States v. Fee,* 425 F. App'x 847, 848-51 (11th Cir. 2011); *Horn v. Quarterman,* 508 F.3d 306 (5th Cir. 2007); and *United States v. Yates,* 438 F.3d 1307 (11th Cir. 2006).

Before allowing remote testimony of a witness, the court must have in place adequate procedural safeguards to ensure that the defendant's right to confrontation is otherwise assured and must specifically find that the procedure is necessitated by important policy considerations. Factors to evaluate in determining if remote testimony should be permitted include whether (1) the witness is unable or unwilling to testify in the courtroom because of fear of the courtroom process or of a person who will be in attendance in the courtroom; (2) there is a substantial likelihood, established by expert testimony, that the witness would suffer emotional trauma from testifying in the courtroom; (3) the witness suffers from some kind of severe physical or mental illness or other infirmity that renders the witness unable to appear and testify in the courtroom setting; or (4) conduct by the defendant or counsel, or persons associated with the defendant or counsel causes the witness's inability or unwillingness to testify in the courtroom.

The "adequate procedural safeguards" include assurances that the testimony is properly sworn; the identity of the individual testifying is confirmed; the testimony, questions to the witness, and communications between individuals at the remote location and the court can be heard at both locations and are properly recorded; the witness is subject to the authority of counsel and the court; and the presence of others at the remote location and other environmental factors that could affect the testimony are recognized and, if necessary, controlled.

# II. REMOTE TESTIMONY IN PENOBSCOT COUNTY CRIMINAL CASES

- A. In criminal cases in Penobscot County, the court may, on its own motion or for good cause shown, permit presentation of testimony in open court by contemporaneous transmission from a different location upon appropriate safeguards.
- B. Before permitting questioning of a witness at a different location, the court must, after inquiry, make specific findings that the procedure is necessitated by important policy considerations and that the defendant's right to confrontation is otherwise assured.
- C. The witness's closed-circuit testimony must be clearly viewable in court by the jury, the judge, and the defendant; the defendant must have the ability for meaningful cross-examination; and the defendant must be able to communicate privately and contemporaneously with defense counsel during the witness's testimony.

For the Court,

/s/

Leigh I. Saufley Chief Justice

Promulgation date: June 3, 2015