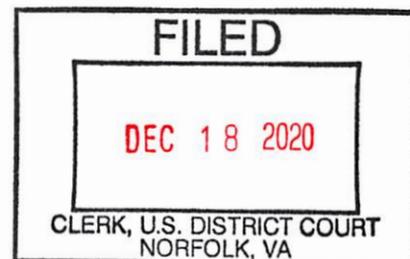


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



In re:
COURT OPERATIONS UNDER THE EXIGENT
CIRCUMSTANCES CREATED BY THE OUTBREAK
OF CORONAVIRUS DISEASE 2019 (COVID-19):
CARES ACT REAUTHORIZATION TO USE VIDEO
CONFERENCING OR TELEPHONE CONFERENCING

Case No. 2:20mc7

General Order No. 2020-24

On March 30, 2020, this Court issued General Order 2020-09, authorizing "the use of video conferencing, or telephone conferencing if video conferencing is not reasonably available, for all events listed in Section 15002(b)" of the CARES Act. Gen. Order 2020-09, at 2. The same General Order further found that "felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person in this district without seriously jeopardizing public health and safety."

Id.

Pursuant to the CARES Act:

(A) In General.-- On the date that is 90 days after the date on which an authorization for the use of video teleconferencing or telephone conferencing . . . is issued, . . . the chief judge of the district court . . . to which the authorization applies shall review the authorization and determine whether to extend the authorization.

(B) Additional Review.-- If an authorization is extended under subparagraph (A), the chief judge of the district

court . . . to which the authorization applies shall review the extension of authority not less frequently than once every 90 days

H.R. 748, § 15002(b)(3)(A)-(B). On June 26, 2020, pursuant to § 15002(b)(3)(B), this Court issued an order extending the CARES Act authorization for an additional 90 days, Gen. Order 2020-18, and on September 24, 2020, the Court issued a second 90-day extension order, Gen. Order 2020-21.

Just under ninety days have passed since the issuance of General Order 2020-21, and in the interim, the undersigned judge has continued to monitor COVID-19 data from within and outside this District, as well as the developing guidance from the Centers for Disease Control and Prevention (CDC) and state and local health authorities. Data available from the Virginia Department of Health, and other sources, plainly reveals that the community spread of COVID-19 is accelerating in all Divisions of this Court. The average number of new COVID-19 cases identified each day in Virginia is currently four times greater than it was in September when this Court issued its last CARES Act extension, with COVID-19 hospitalizations now at their highest level since the pandemic began.¹ In response to the sustained increase in new cases and hospitalizations, on December 10, 2020, the Governor of Virginia

¹ In light of spiking COVID-19 cases and hospitalizations during the month of November, this Court has temporarily suspended criminal jury trials and the in-person dockets for misdemeanor, traffic, and petty offenses. See Gen. Orders 2020-22 and 2020-23.

issued a "modified stay at home order" seeking to curb the ongoing transmission of COVID-19 in Virginia.

After considering the increasing community transmission of COVID-19 across our District and Virginia (as evidenced by a dramatic rise in new cases and the "percent positivity" of COVID-19 tests), as well as the increasing COVID-19 hospitalizations and deaths, the Court easily concludes that the risk created by the COVID-19 pandemic warrants a further extension of the video and teleconferencing authorization under the CARES Act. Such finding reflects the fact that many experienced attorneys, judges, and courthouse employees, as well as some criminal defendants, fall within one or more categories of people having an increased risk "to become severely ill" from COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>. Were this Court to exclusively conduct in-person criminal hearings, higher-risk individuals would be required to come together with others in enclosed courtrooms and the U.S. Marshals Service would need to coordinate transportation of a large number of defendants from local jails to our Courthouses and back again.² Since the issuance of the last extension order, several federal inmates

² As noted in General Order 2020-21, transportation of incarcerated inmates frequently involves multiple defendants being transported in the same vehicle and/or being held in relatively small Courthouse holding cell areas. Additionally, the Deputy Marshals need to remain in close physical contact with detained defendants to provide safe escort in our Courthouses and courtrooms.

housed at local jails in our District have tested positive for COVID-19, as have multiple court employees, contractors, and other individuals working in our Courthouses. The continued use of virtual hearings not only greatly reduces foot-traffic and inmate transport, but enhances access to justice for defendants housed at local jails that implement full or partial restrictions on movement due to other inmates at the same facility testing positive for COVID-19.

Each and every criminal proceeding conducted in our Courthouses is unique, and a review of the hurdles faced over the last nine months reveals a wide spectrum of recurring scenarios, some in which in-person proceedings are prudent and can be safely conducted, and others in which they clearly are not. The risk of COVID-19 spread increases in step with the number of in-person criminal hearings and the number of individuals requiring transport and escort by the Marshals Service,³ and with case counts and hospitalizations in our District currently at their highest levels since the pandemic began, the continued use of virtual hearings is essential to this Court's operation over the next ninety days.

³ Each additional in-person hearing also increases the close contact that occurs in the security screening areas located at Courthouse entrances.

Therefore, the Chief Judge of this District finds that current conditions warrant extending the findings made in General Orders 2020-09, 2020-18, and 2020-21. Such extension is authorized based on the Judicial Conference of the United States' finding that conditions due to the national emergency declared by the President have affected and will continue to materially affect the functioning of the federal courts generally. It is also consistent with the guidance from the Administrative Office of the United States Courts (AO). While a subset of criminal proceedings can be safely conducted in our Courthouses, the elevated risk of COVID-19 spread currently prevents this Court from conducting in-person hearings for all CARES Act criminal proceedings or for all felony pleas and sentencings. Because in-person hearings now require more physical space to strike the proper balance between the need to continue Court operations with the critical need to ensure that six-feet of social distancing is maintained in our Courthouses,⁴ eliminating remote criminal proceedings would require the Court to either indefinitely postpone some proceedings, complete significantly fewer proceedings, or condone an intolerable risk level for hearing participants and visitors.

⁴ The Court notes the ongoing learning curve regarding the manner in which COVID-19 is spread, with the scientific community expressing concern regarding "airborne" transmission in indoor spaces. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>; <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

Accordingly, as Chief Judge, and pursuant to Section 15002(b)(1) of the CARES Act, I hereby re-authorize the use of video conferencing, or telephone conferencing if video conferencing is not reasonably available, for all events listed in Section 15002(b) of the CARES Act. Pursuant to Section 15002(b)(2), I further specifically find that felony pleas under Rule 11 of the Federal Rules of Criminal Procedure, and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure, cannot be conducted exclusively in person in this District without seriously jeopardizing public health and safety. As a result, if a judge in an individual case finds that an in-person felony plea or sentencing hearing is not appropriate,⁵ and that, for specific reasons, such felony plea or sentencing cannot be further delayed without serious harm to the interests of justice, the judge may, with the consent of the defendant after consultation with counsel, use video conferencing, or teleconferencing if video conferencing is not reasonably

⁵ Each Division of this Court, and the circumstances of each individual case, as interpreted by each presiding judge, may present varying factors that bear on whether an in-person criminal hearing can be safely conducted in the midst of the ongoing COVID-19 pandemic. Consistent with guidance from the AO, "each district will have to make local decisions on operational status," and decisions as to whether a specific hearing can be safely conducted will often fall to the presiding judge on a case-by-case basis, guided by the fact that the "health and welfare of each Judiciary employee, contractor, and member of the public that enters our facilities should be paramount in the decisions that are made" as the phased reopening of our Courthouses is implemented. Federal Judiciary COVID-19 Recovery Guidelines, at 2 (emphasis added).

available, for the felony plea or sentencing in that case. Judges may also use this authority for equivalent events in juvenile cases, as described in Section 15002(b)(2)(B) of the CARES Act.

Pursuant to Section 15002(b)(3) of the CARES Act, this authorization will remain in effect for 90 days unless terminated earlier. If emergency conditions continue to exist 90 days from the entry of this General Order, I will review this authorization and determine whether it should be extended.

It is so ORDERED.

/s/ MSA

Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
December 18, 2020