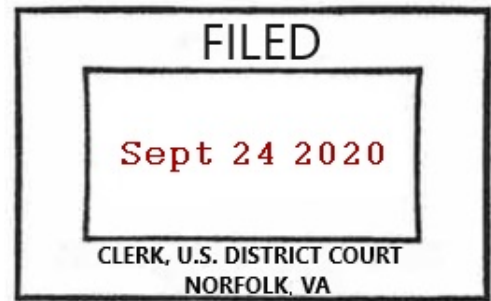


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



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. 2020-21

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.

Just under ninety days have passed since the issuance of General Order 2020-18, 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 continuing in all Divisions of this Court. Moreover, the average number of new daily COVID-19 cases in Virginia is currently plateaued at approximately 900 to 1,000 cases, a level nearly double the average number of new daily cases reported in Virginia when the CARES Act video conferencing authorization was last extended by this Court. Additionally, a state-by-state comparison of new cases per 100,000 residents reveals that Virginia is experiencing a greater number of new cases, per capita, than nearly half of the states in the nation.

After considering the ongoing community transmission of COVID-19 in the United States, Virginia, and our District, the

Court finds that the continuing risk of COVID-19 transmission warrants an 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 necessarily be required to come together with others in enclosed courtrooms, some of which are far smaller than others, 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. Such transportation frequently involves multiple defendants being transported in the same vehicle. The Deputy Marshals, of course, need to remain in close physical contact with detained defendants to provide safe escort in our Courthouses and courtrooms. Additionally, in light of the limited space in Courthouse holding cells, increasing the number of detained defendants brought into our Courthouses threatens to eliminate the Marshals' ability to socially distance such individuals throughout the day, which greatly increases the risk of spread of COVID-19 among inmate populations across multiple

local jails, and among defense counsel, court personnel, and the public.

In addition to the above, the Court notes that criminal jury trials have recently resumed in this District in designated courtrooms retrofitted for conducting jury trials during the pandemic. The redesigned jury trial process frequently requires the use of three different courtrooms to conduct a single jury trial, with some of our Courthouses in preparations to simultaneously conduct more than one criminal jury trial at a time, meaning that as many as six courtrooms will be occupied to ensure a safe and socially distanced jury trial process. The consumption of physical resources to allow the resumption of criminal jury trials, which is necessary to protect defendants' speedy trial rights to the greatest extent possible within the space available to the Court, results in minimal remaining space for conducting all other in-person proceedings, and the space that does remain is often smaller courtrooms, some of which are not suitable for jury trials and lack the same degree of pandemic protections that are present in the retrofitted jury courtrooms (such as custom designed plexiglass dividers). In addition to the lack of physical courtroom space, the backlog of continued criminal jury trials is expected to consume a significant amount of holding cell space for months to come, and the continuation of virtual hearings avoids

placing additional detained individuals, often housed at different local jails, in the same small Courthouse lockup area as the trial defendants and the in-custody witnesses that are present to testify at criminal trials. Virtual hearings also reduce the number of instances in which defendants are transported together to the Court in a shared vehicle. Finally, the continued use of virtual hearings enhances access to justice for defendants housed at local jails that implement full or partial restrictions due to other inmates at the same facility testing positive for COVID-19, an event that has occurred over the last ninety days in local jails serving multiple different Divisions of this Court.

Each and every criminal proceeding conducted in our Courthouses is unique, and the experience gained after working through pandemic scheduling for many months now (even before criminal jury trials resumed) reveals a wide spectrum of recurring scenarios, some in which in-person proceedings are prudent and can be safely conducted, and others in which a defense attorney, defendant, judge, or other necessary participant, has elevated COVID-19 exposure risk factors. The resumption of criminal jury trials, which is necessary for the Court to carry out its constitutional mandate, has further underscored the importance of reducing the overall foot traffic and crowding in our Courthouses, and the number of people coming into close contact in our Court

buildings remains a consideration at the forefront of the CARES Act reauthorization calculus. In short, 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.¹

Therefore, the Chief Judge of this District finds that current conditions warrant extending the findings made in General Orders 2020-09 and 2020-18. 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) in its "Federal Judiciary COVID-19 Recovery Guidelines," indicating that when a district is in "Phase Two" of the reopening process,² the Court should "continu[e] to use video- and teleconferencing to the greatest extent possible." Federal Judiciary COVID-19 Recovery Guidelines, at 18 (emphasis added). While a subset of criminal proceedings can be safely conducted in our Courthouses, if all CARES Act criminal proceedings, or even all

¹ Each additional in-person hearing also increases the close contact that occurs in the security screening areas located at Courthouse entrances.

² This Court is currently operating in a manner consistent with Phase Two of the four phases of the Federal Judiciary COVID-19 Recovery Guidelines.

felony pleas and sentencings, were placed back on Court calendars and required to be conducted in-person, the risk of COVID-19 spread in our Courthouses would simply be too great and the business of the Court would be significantly impeded as a result of many matters being unable to proceed. Because in-person hearings, and most notably trials, now require far 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 to the greatest extent possible,³ eliminating all remote criminal proceedings would place the Court in a position of either indefinitely postponing some proceedings, completing significantly fewer proceedings, or condoning an intolerable risk level for hearing participants and visitors.

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

³ The Court separately notes the ongoing learning curve regarding the manner in which COVID-19 is spread, with the scientific community raising concerns regarding "airborne" transmission of COVID-19 in indoor spaces, to include the World Health Organization, <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>, and a panel of 239 scientists, <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa939/5867798>. Additionally, just last week, the CDC released, then retracted, updated guidance addressing the risk of airborne transmission, now indicating that the CDC is currently updating its recommendations regarding airborne transmission of SARS-CoV-2 (the virus that causes COVID-19)." <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

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,⁴ 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 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.

⁴ 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).

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/ 

Mark S. Davis

CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
September 24, 2020