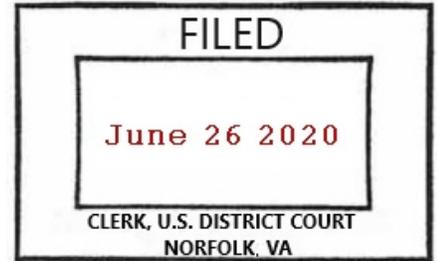


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



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

CORRECTION ORDER

In General Order 2020-18 there is a typographical error on line 5 of page 1. The date stated there is corrected to read March 30, 2020.

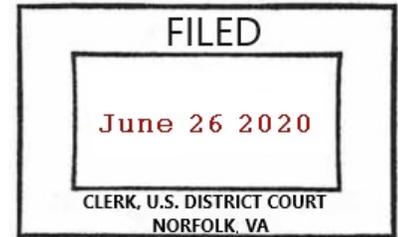
It is so ORDERED.

/s/ 

Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 26, 2020

UNITED STATES DISTRICT COURT
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General Order No. 2020-18

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 state and local health authorities. On March 30, 2019, 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).

Just under 90 days have passed since the issuance of General Order 2020-09,¹ and in the interim, the undersigned judge has continuously monitored available COVID-19 data within and outside this District. In late March and early April of this year, most states, including Virginia, adopted various forms of "stay-home" orders. However, COVID-19 case counts in Virginia continued to rise until the last week of May. While the daily number of newly reported COVID-19 cases has been trending down, or been flat, since that peak, the available data clearly establishes that the community spread of this potentially fatal disease is continuing in all Divisions of this Court. Moreover, the average number of new daily cases at which Virginia has currently plateaued (slightly more than 500 new cases per day) is still greater than the average number of new cases reported by nearly three quarters of other states, and is similar to the number of cases that were reported in Virginia during the third week of April, a time when our state,

¹ The date ninety days after this Court's original authorization falls on a weekend, causing the Court to issue this extension Order on the preceding Friday.

and most of the rest of the country, was under a "stay-home" order. Furthermore, a significant number of states, some of which implemented less restrictive and/or shorter "stay-home" orders than Virginia, have recently reported a rapid resurgence in COVID-19 cases and/or hospitalizations. Such recent spike in cases demonstrates that the "first wave" of COVID-19 infections in this country is far from over, as illustrated by the fact that multiple states have adopted policies in the last several days requiring a fourteen-day "quarantine" for individuals traveling from states with a statistical resurgence in COVID-19 cases. Although Virginia's recent decrease in cases, followed by a plateau, is certainly encouraging news, Virginia has plateaued at a level that still presents a grave risk to the public, and current conditions render it premature to discontinue heavy reliance on remote criminal proceedings.

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 prosecutors and defense lawyers, judges, courthouse employees, members of the public, and some criminal defendants, fall into one or more of the "higher-risk" categories for COVID-19 complications. In order to exclusively conduct in-

person criminal hearings, such higher-risk individuals would not only be required to come together in enclosed courtrooms, some of which are far smaller than others, but the U.S. Marshals Service would have to coordinate transportation of a large number of defendants from local jails to our Courthouses and back again. Additionally, for all proceedings involving a detained defendant, the Marshals Service must remain in close physical contact with such defendant in order to provide a safe escort in our Courthouses and courtrooms. In short, the risk of COVID-19 spread increases in step with the number of in-person criminal hearings and the number of defendants requiring transport and escort.²

Therefore, the Chief Judge of this District finds that current conditions warrant extending the findings made in General Order 2020-09. 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, the Court should "continu[e] to use video- and tele-conferencing to

² Each additional in-person hearing also increases the close contact that occurs in the security screening areas located at Courthouse entrances.

the greatest extent possible.”³ While it is true that a subset of criminal proceedings can be safely conducted in our Courthouses at this time (especially hearings involving participants that are not in higher-risk categories, and/or those in which the defendant is not in custody), if all CARES Act criminal proceedings, or even all 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. Current conditions continue to mandate reduced capacity in our courtrooms and Courthouses, and each additional in-person hearing that is conducted further taxes the limited resources of our Court, resources that require more physical space in order to strike the proper balance between the need to continue Court operations with the critical need to reduce crowding and ensure that six-foot social distancing is maintained in our Courthouses to the greatest extent possible. Without the ability to conduct remote criminal proceedings, the Court would be placed in a position of either

³ This District’s reopening approach has closely tracked, but does not mirror, the phases listed in the AO Recovery Guidelines. Beginning just two weeks ago, this Court expanded operations in a manner similar to “Phase Two” as described by the AO. As of the date of this Order, the Commonwealth of Virginia is likewise operating in what the Governor has defined as “Phase Two” of Virginia’s reopening plan, and while local conditions have improved, it would be premature to conclude that the ongoing community spread of COVID-19 has been reduced to a sufficient degree such that there is no longer an emergency warranting remote CARES Act approved proceedings. The recent spike in COVID-19 case counts in numerous states so many weeks after “stay-home” orders were first put in place confirms such point, as does the fact that Virginia’s multi-week downward trend in newly reported COVID-19 cases has recently plateaued, with newly reported cases remaining largely flat over the last ten days.

completing significantly fewer proceedings or condoning an intolerable risk level for hearing participants and visitors.⁴

Therefore, 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 at the time,⁵ and that, for specific reasons, such felony plea or

⁴ In light of the lengthy period of reduced operations that occurred in this District due to COVID-19, if all criminal hearings resumed in person at this time, case backlogs would likely lead to our Courthouses being far more crowded than before the pandemic began. Such unacceptable crowding would also likely extend into the limited number of holding cells available at some of our Courthouses. Additionally, when considering the risk of COVID-19 exposure in our Courthouses, it is important to note that various participants in criminal proceedings are compelled to be present, and the calculus is thus critically different from a scenario where a member of the public voluntarily decides to make a transient visit to a business establishment in the midst of the deadly pandemic.

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,

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.

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
June 26, 2020

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).