

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:
CORONAVIRUS/COVID-19 PANDEMIC

**ADMINISTRATIVE ORDER
NO. 2021-05-3**

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SEVENTH AUTHORIZATION TO CONTINUE THE
USE OF VIDEOCONFERENCING OR
TELECONFERENCING IN CRIMINAL MATTERS

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MARGO K. BRODIE, Chief Judge.

On March 13, 2020, the President of the United States issued a proclamation declaring a National Emergency in response to the Coronavirus Disease-2019 (“COVID-19”) pandemic pursuant to the National Emergencies Act (50 U.S.C. § 1601, *et seq.*). On February 26, 2021, the President published formal notice in the Federal Registry continuing the national emergency.¹

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (“CARES Act”), which authorized the Judicial Conference of the United States to provide authority to Chief District Judges to permit the conduct of certain criminal proceedings by video or audio conference.² The President signed the CARES Act into law on March 27, 2020.

On March 29, 2020, the Judicial Conference of the United States made the appropriate findings as required under the CARES Act, finding specifically that “emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601, *et seq.*) with respect to the Coronavirus Disease 2019 (COVID-19) have materially affected and will materially affect the functioning of the federal courts generally,”³ which finding remains in effect.

¹ *A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, The White House (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/>.

² CARES Act, Pub. L. No. 116-136, § 15002(b)(1)–(2), 134 Stat. 281, 528–29.

³ Memorandum from Jim Duff, Director of the Administrative Office of the Courts, Re: Update on CARES Act Provisions for Criminal Proceedings 1 (Mar. 29, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

On March 30, 2020, acting pursuant to § 15002(b) of the CARES Act and the authority granted by the Judicial Conference of the United States, this Court entered Administrative Order 2020-13, making certain findings and authorizing judges of this District to conduct proceedings remotely in accordance with the CARES Act.⁴

On June 25, 2020, and again on September 21, 2020, December 21, 2020, March 20, 2021, June 22, 2021, and September 18, 2021, and in light of the conditions then existing, this Court entered Administrative Orders 2020-13-1, 2020-13-2, 2020-13-3, 2021-05, 2021-05-1, and 2021-05-2, respectively, further authorizing judges of this District to conduct proceedings remotely in accordance with § 15002(b) of the CARES Act and the authority granted by the Judicial Conference of the United States.⁵ By law, Administrative Order 2021-05-2 will expire on December 18, 2021.

On July 27, 2021, the Centers for Disease Control (“CDC”) issued updated public health recommendations for fully vaccinated individuals in light of the increased circulation of the Delta variant of the coronavirus in the United States.⁶ The CDC added a recommendation for fully vaccinated individuals to wear a mask in public indoor settings in areas of “substantial or high transmission.”⁷ The CDC notes that “[f]ully vaccinated people who do become infected can transmit it to others.”⁸ The CDC concluded that “fully vaccinated people can further reduce their

⁴ *Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 2020-13 (Mar. 30, 2020).

⁵ *See Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-1 (June 25, 2020); *Second Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-2 (Sept. 21, 2020); *Third Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-3 (Dec. 21, 2020); *Fourth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05 (Mar. 20, 2021); *Fifth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05-1 (June 22, 2021); *Sixth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05-2 (Sept. 18, 2021).

⁶ *Interim Public Health Recommendations for Fully Vaccinated People*, Ctrs. for Disease Control (last updated Nov. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

⁷ *Id.*

⁸ *Id.*

risk of becoming infected with SARS-CoV-2 and transmitting it to others by wearing a mask indoors in public in areas of substantial or high community transmission.”⁹

Currently, the community transmission rate in all counties comprising the Eastern District is considered “high.”¹⁰

Pursuant to the CARES Act and Administrative Order 2021-05-2, I have reviewed the need to continue for a seventh time the authorization to conduct proceedings remotely. I find that since the issuance of Administrative Order 2021-05-2, the public health crisis has caused, is causing, and is expected to continue to cause disruption throughout this District, and to the functioning of the courts within this District.

While the number of cases in this District has fluctuated over the course of the COVID-19 pandemic, the number of active cases has risen significantly in recent weeks, particularly in areas with lower vaccination rates, in part due to the presence of more transmissible variants, such as the Delta variant.¹¹ Although vaccines are now widely available and significant portions of the populations in the counties comprising the District have received the vaccine, many people, including some court employees, have not been vaccinated,¹² and a significant percentage of vaccinated individuals may soon have waning immunity and be susceptible to infection.¹³ In addition, at the Metropolitan Detention Center in Brooklyn, where most of the District’s defendants are detained, it appears that almost half of the inmates have not been

⁹ *Id.*

¹⁰ *COVID-19 Integrated County View*, Ctrs. for Disease Control (last visited Dec. 16, 2021), <https://covid.cdc.gov/covid-data-tracker/#county-view>.

¹¹ *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (last updated Dec. 16, 2021).

¹² The CDC has confirmed that “COVID-19 vaccines are effective at helping protect against severe disease and death from the virus that causes COVID-19, including known variants currently circulating (e.g., Delta variant).” *Key Things to Know About COVID-19 Vaccines*, Ctrs. for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last updated Nov. 30, 2021). Accordingly, the Court adopted a policy requiring that all employees be vaccinated unless they can demonstrate a valid medical or religious exemption. The vaccine mandate becomes effective January 1, 2022.

¹³ Although 70.5% of New York State’s population is fully vaccinated, *see Vaccination Progress to Date*, Health.ny.gov, <https://coronavirus.health.ny.gov/vaccination-progress-date> (last visited Dec. 16, 2021), percentages in some of the counties in the District are lower, *see id.* (reflecting that 64.2% of the population in Kings County, 66.8% of the population in Richmond County, and 69.7% of the population in Suffolk County are fully vaccinated).

vaccinated,¹⁴ and operational restrictions, including quarantining and isolation of detainees, and limitations on the movement of detainees within the facility and to and from court, remain in place and continue to constrain the court's ability to conduct in-person criminal proceedings. In addition, several judges, court staff, and attorneys, including those at the United States Attorney's Office for the Eastern District of New York and the Federal Defenders of New York, continue to work remotely, and many defendants, members of the public, and others continue to limit their travel or are unable to come to the courthouse because they are at higher risk for contracting COVID-19, and the CDC and other public health authorities continue to advise taking precautions to reduce the possibility of exposure to COVID-19, particularly for those who are not fully vaccinated or are immunocompromised.

In addition, because the vaccination status of attorneys, jurors, members of the media, members of the public, and others in the courthouse may not be known, health and safety protocols, including mask and social distancing requirements, remain in place in the public spaces of the courthouse. The need to maintain appropriate protocols also necessarily restricts the Court's ability to resume conducting all criminal proceedings in person. For all of these reasons, continued vigilance with mitigation strategies remains important, as does continued monitoring of the effectiveness of the vaccines against current and future variants, such as the new Omicron variant.

Based on these circumstances, among others, in-person proceedings in this District must continue to be limited to avoid seriously jeopardizing the public health and safety of in-court participants and others with whom they may have contact.¹⁵ As such, it is necessary for the judges in this District to be able to continue to conduct proceedings remotely, by videoconference or teleconference, except as allowed by Administrative Order 2020-26, as amended by Administrative Orders 2020-26-1, 2021-04, and 2021-04-1.

¹⁴ *MDC Brooklyn*, Fed. Bureau of Prisons, <https://www.bop.gov/locations/institutions/bro/> (last visited Dec. 16, 2021) (reflecting inmate population of 1,618); Report from the Bureau of Prisons Pursuant to Admin. Order 2020-14, at 1 & n.1 (Dec. 14, 2021), <https://www.nyed.uscourts.gov/covid-19> (stating that 882 inmates (about 54% percent) have been vaccinated as of December 14, 2021, not including inmates vaccinated at another institution or prior to incarceration).

¹⁵ Pursuant to Administrative Order 2020-26, as amended by Administrative Orders 2020-26-1, 2021-04, and 2021-04-1, and as recently extended by Administrative Order 2021-04-9, and for the reasons stated therein, this Court has suspended through December 31, 2021, in-person proceedings other than criminal and civil jury selections, trials, and bench trials; the selections of new grand juries and replacement grand jurors; and criminal hearings, conferences, sentencing, and change of plea hearings. In-person proceedings that remain suspended pursuant to Administrative Order 2020-26, as amended, include all civil proceedings other than those mentioned, as well as arraignments, detention hearings, preliminary hearings, and pre-indictment proceedings.

The undersigned, as Chief Judge of this Court, hereby concludes that it remains necessary to invoke the provisions of the CARES Act for an additional ninety (90) days, commencing on December 18, 2021, when the period authorized in Administrative Order 2021-05-2 expires.

Thus, pursuant to the authority granted under § 15002(b)(1) of the CARES Act, I hereby authorize judges in this District, with the consent of the defendant or the juvenile after consultation with counsel, to continue to use videoconferencing, or teleconferencing if videoconferencing is not reasonably available for use, for the following events:

- (A) Detention hearings under section 3142 of title 18, United States Code.
- (B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.
- (C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.
- (D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.
- (E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.
- (F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.
- (G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.
- (H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.
- (I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.
- (J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the “Federal Juvenile Delinquency Act”), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

Pursuant to § 15002(b)(2) of the CARES Act, 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 should continue to be held remotely to the maximum extent possible. As a result, if judges in individual cases find, for specific reasons, that felony pleas or sentencings in those cases cannot be further delayed without serious harm to the interests of justice, judges may, with the consent of the defendant or the juvenile after consultation with counsel, conduct those proceedings by videoconference, or by teleconference if videoconferencing is not reasonably available. This authority extends to equivalent plea, sentencing, or disposition proceedings under 18 U.S.C. § 403 (commonly referred to as the “Federal Juvenile Delinquency Act”).

This authorization is effective for ninety (90) days, commencing on December 18, 2021, unless earlier terminated. If the emergency persists longer than ninety (90) days, I will review this authorization and determine whether to extend it pursuant to the provisions of the CARES Act. Notwithstanding the foregoing, pursuant to the provisions of the CARES Act, this authority shall terminate on the last day of the covered emergency period or the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act with respect to the COVID-19 virus outbreak no longer materially affect the functioning of either the federal courts generally or the courts within this District.

SO ORDERED:

Dated: December 16, 2021
Brooklyn, New York

s/ MKB

MARGO K. BRODIE
Chief United States District Judge