

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:
CORONAVIRUS/COVID-19 PANDEMIC

**ADMINISTRATIVE ORDER
NO. 2021-05-2**

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SIXTH 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, 528–529.

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, and June 22, 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, and 2021-05-1 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 2021-05-1 will expire on September 19, 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 noted that “some infections do occur among fully vaccinated people” and that “[f]ully vaccinated people who do become infected with the Delta variant can transmit it to others.”⁸ The CDC concluded that “fully vaccinated people can further reduce their risk of becoming infected with the Delta variant and transmitting it to others by wearing a mask in public indoor settings in areas of substantial or high community transmission.”⁹

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).

⁶ *Interim Public Health Recommendations for Fully Vaccinated People*, Ctrs. for Disease Control (last updated Sept. 1, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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

Pursuant to the CARES Act and Administrative Order 2021-05-1, I have reviewed the need to continue for a sixth time the authorization to conduct proceedings remotely. I find that since the issuance of Administrative Order 2021-05-1, 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 at least one dose of a vaccine, many people, including court employees, have not been vaccinated, and a significant percentage of vaccinated individuals may soon have waning immunity and be susceptible to infection.¹² In addition, at the Metropolitan Detention Center in Brooklyn, where most of the District’s defendants are detained, it appears that the majority of inmates have not been vaccinated,¹³ 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

¹⁰ *COVID-19 Integrated County View*, Ctrs. for Disease Control (last visited Sept. 17, 2021), <https://covid.cdc.gov/covid-data-tracker/#county-view>.

¹¹ *COVID-19 Tracker*, Health.ny.gov, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last visited Sept. 17, 2021).

¹² Although 82.0% of New York State’s eighteen years and older population has received the first dose of a vaccine, *see COVID-19 Vaccine Tracker*, Health.ny.gov, <https://covid19vaccine.health.ny.gov/covid-19-vaccine-tracker> (last visited Sept. 17, 2021), percentages in some of the counties in the District are lower, *see id.* (showing vaccination rates for eighteen years and older population in Eastern District counties as follows: Kings, 74.1% and Richmond, 76.7%).

¹³ *MDC Brooklyn*, Fed. Bureau of Prisons, <https://www.bop.gov/locations/institutions/bro/> (last visited Sept. 17, 2021) (reflecting inmate population of 1,635); Report from the Bureau of Prisons Pursuant to Admin. Order 2020-14, at 1 & n.2 (Sept. 14, 2021), <https://www.nyed.uscourts.gov/covid-19> (stating that 715 inmates (less than fifty percent) have been vaccinated as of September 14, 2021, not including inmates vaccinated at another institution or prior to incarceration).

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.

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.¹⁴ 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.

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 September 19, 2021, when the period authorized in Administrative Order 2021-05-1 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.

¹⁴ 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 2021-04-6, and for the reasons stated therein, this Court has suspended through September 30, 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, sentences, 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.

- (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 September 20, 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: September 18, 2021
Brooklyn, New York

s/ MKB

MARGO K. BRODIE
Chief United States District Judge