

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re: Extending Authorization of
Temporary Use of Video Teleconferencing,
Telephone Conferencing, and Other Procedures
in Criminal Matters Pursuant to the
Coronavirus Aid, Relief, and
Economic Security Act ("CARES ACT")

Administrative Order
21-AO-035

ADMINISTRATIVE ORDER

The Court issues this Administrative Order as another in a series of Administrative Orders¹ to address court operations during the time of the spread of the Coronavirus Disease that emerged in 2019, known as COVID-19. This Order extends the temporary use of video teleconferencing, telephone conferencing and other procedures in criminal proceedings until March 21, 2022.

In response to a declaration² on March 13, 2020, under the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.*, that the COVID-19 outbreak constitutes a national emergency, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which was signed into law on March 27, 2020. Under section 15002(1) of that Act, on March 29, 2020, the Judicial Conference of the United States found and, continues to find to date, that emergency conditions due to the declared national emergency with respect to COVID-19 have materially affected and continue to materially affect the functioning of the federal courts. On March 30, 2020, I initially authorized the use of video teleconferencing and telephone conferencing for all court hearings listed in section 15002(b) of the Act in Administrative Order 20-AO-25, extending such use by Administrative Orders 20-AO-027, 20-AO-038R, 20-AO-046, 20-AO-059, 21-AO-006, 21-AO-012 and 21-AO-023.

On March 10, 2020, the Governor of the State of Michigan issued Executive Order No. 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. The latest Rescission of Emergency Orders by the Michigan Department of Health and Human Services effective June 22, 2021 noted that "although the COVID-19 pandemic continues to constitute an epidemic in Michigan, certain protective measures and requirements can be lifted at this time." The CDC updated its Mask recommendations on August 13, 2021 stating, among other recommendations, that individuals wear masks indoors and in crowded outdoor settings, no matter the vaccination status, in areas of substantial or high transmission. On November 19,

¹ See, e.g., 20-AO-039 for the Administrative Order "In re: Extending the Excludable Time under The Speedy Trial Act, 28 U.S.C. § 3161(h)(7) in Criminal Matters."

² Presidential Proclamation 9994 (the Notice of February 24, 2021 continues the national emergency declared in Proclamation 9994 beyond March 1, 2021).

2021, the MDHHS issued a Public Health Advisory that all Michiganders regardless of vaccination status, should wear a mask in indoor public settings.

On September 19, 2021, the President issued the COVID-19 Action Plan, which includes: vaccination requirements for employers with 100+ employees or be tested weekly; requiring vaccinations for all federal workers and contractors that do business with the federal government; requiring vaccinations for health care workers at Medicare and Medicaid participating hospitals and health care settings; calling on large entertainment venues to require proof of vaccination or testing for entry; and, requiring employers to provide paid time off for employees to get vaccinated. The United States Courts Administrative Office issued a guidance to the courts on August 27, 2021 (clarified on September 1, 2021) to implement the Executive Branch's "COVID-10 Workplace Safety: Agency Model Safety Principles." The Court issued a policy requiring: employees to attest as fully vaccinated or test twice a week; health screenings for all who enter the courthouses; and, wearing masks in courtrooms and common areas no matter the vaccination status. On September 7, 2021, the courthouses opened to the public, with the mitigation strategies noted. In addition, jury trials are limited to keep the population down in the courthouses at any given time.

The CARES Act provides that ninety days after the chief judge makes the authorizations in the Administrative Orders cited above, the chief judge must "review the authorization and determine whether to extend the authorization." Section 15002(b)(3)(A). If the authorization is extended, the chief judge must "review the extension of authority not less frequently than once every 90 days until the earlier of—(i) the date on which the chief judge (or other judge or justice) determines the authorization is no longer warranted; or (ii) the date on which the emergency authority is terminated under paragraph (5)." Section 15002(b)(3)(B).

As of December 15, 2021, there were 1,408,189 confirmed cases of COVID-19 (25,570 confirmed deaths) in Michigan, with the 7-day case average at 5,664 and 7-day death average at 113. The CDC Michigan COVID-19 Vaccine Dashboard noted that 62.4% of Michigan residents have received at least one dose of the vaccine. In the City of Detroit, where the District's main courthouse sits, 44.5% of its residents age 5 and above have been vaccinated with at least one dose of the vaccine. The 7-day average rate of cases significantly increased from the September 22, 2021 Administrative Order, which was at 2,616 cases and is now up to 5,664 cases. This is due mostly to the COVID-19 Delta variant amongst unvaccinated individuals and some breakthrough cases. The recently-identified COVID-19 Omicron variant has now been detected in Michigan. The CDC noted that the rapid spread of the Omicron variant means that it is vital for everyone to get vaccinated and boosted if they are eligible. The Judiciary's level of transmission dashboard indicates that this District is currently at high transmission for all counties.

COVID-19 has caused and continues to cause extraordinary disruption throughout this District, including, but not limited to, the temporary closure of offices; the imposition of travel and crowd gathering restrictions; discouragement of the use of mass

transportation; the dislocation of many residents; and encouragement of wearing facemasks. Cases of COVID-19 continue to be diagnosed among employees and contractors working at the courthouses. Continued contact restrictions put in place by the detention facilities used by the U.S. Marshal's Service in this District hindered and continues to hinder the movement of defendants to and from court. Many of the detention facilities have reported positive COVID-19 cases among the prisoners and staff. These and other considerations made it necessary for judges in this District to conduct proceedings remotely, by video teleconference or telephone conference, with defense counsel and defendants sometimes in separate locations. Although the courthouses are now open to the public and in person proceedings are now being conducted with mitigation strategies in place, because of the continued surge of COVID-19 cases in this District, in Michigan and throughout the country, remote proceedings in certain instances will be required to dispense justice.

After review of the previous authorizations and based on these findings on the status of the continued public health crisis, on my own motion, I hereby continue to authorize under section 15002(b)(1) and (b)(3) of the CARES Act, the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, for the following proceedings, with the consent of the defendant, or juvenile, after consultation with counsel:

- Detention hearings under section 3142 of title 18, United States Code;
- Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure;
- Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure;
- Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure;
- Arraignments under Rule 10 of the Federal Rules of Criminal Procedure
- Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure;
- Pretrial release revocation proceedings under section 3148 of title 18, United States Code;
- Appearances under Rule 40 of the Federal Rules of Criminal Procedure;
- Misdemeanor pleas and sentencings as described in Rule 43(6)(2) of the Federal Rules of Criminal Procedure;
- 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.

For the reasons stated above, on my own motion, I find that while felony pleas under Rule 11 of the Federal Rules of Criminal Procedure; felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure; and equivalent plea and sentencing, or disposition, proceedings under chapter 403 of title 18, United States Code (commonly known as the "Federal Juvenile Delinquency Act"), could be

conducted safely in person with stringent mitigation processes in place, there are situations where such cannot be conducted in person without seriously jeopardizing public health and safety. I therefore continue to authorize video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available, to be used in such proceedings under the following conditions:

- (1) the defendant, or juvenile, after consultation with counsel, consents to the use of video teleconferencing or teleconferencing for the proceeding; and
- (2) the presiding judge finds that the proceeding cannot be further delayed without serious harm to the interests of justice.

Because the CARES Act does not require the consent of a defendant or juvenile to be in writing, such consent may be obtained in whatever form is most practicable under the circumstances, as long as the defendant's consent is clearly reflected in the record.

For instances in which the Federal Rules of Criminal Procedure explicitly require the consent of a defendant to be in writing (such as, for example, Rule 32(e), which requires the written consent of the defendant before a pre-plea presentence report is disclosed), if obtaining an actual signature is impractical given the health and safety concerns presented:

- (1) a defendant may sign a document electronically; or
- (2) defense counsel or the presiding judge may sign on the defendant's behalf if the defendant, after an opportunity to consult with counsel, consents.

All participants in video teleconferencing or telephone conferencing, the media, and members of the public are strictly prohibited from recording or broadcasting proceedings. Anyone violating this provision is subject to sanctions, including fines and/or a ban from participating in any future court proceedings, in person or remotely.

Any authorization to use video teleconferencing or telephone conferencing pursuant to this Order may be terminated by further Order of the Court or under subsections (b)(3) and (b)(5) of the relevant provisions of the CARES Act.

Under section 15002(b)(3) of the CARES Act, these authorizations will remain in effect until March 21, 2022, unless terminated earlier by order of this Court. If emergency conditions continue to exist, I will review these authorizations and determine whether to extend all or some of them.

IT IS SO ORDERED.

FOR THE COURT:

S/DENISE PAGE HOOD
Denise Page Hood, Chief Judge