

**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

IN RE:

TRANSITION PLAN FOR CIVIL AND) Administrative Order 2020-10
CRIMINAL HEARINGS DURING)
PANDEMIC)

ORDER

WHEREAS this Court continues to evaluate its response to the spread of the COVID-19 virus, and recognizes the need to foster the preservation of public safety and health while effectively administering justice during this period of national emergency;

WHEREAS the Judicial Conference of the United States (“JCUS”) has found under the CARES Act, H.R. 748 (“CARES Act”), that emergency conditions due to the national emergency declared by the President will materially affect the functioning of the federal courts generally;

WHEREAS on March 13, 2020, the Court adopted Administrative Order 2020-3 postponing non-emergency criminal cases and grand juries and excluding certain time under the Speedy Trial Act;

WHEREAS on March 30, 2020, the Court adopted Administrative Order 2020-4 finding that emergency conditions exist throughout this District, as found by the JCUS under the CARES Act, and authorized audio and video conferences as outlined in the CARES Act;

WHEREAS this Court is comprised of three divisional courthouses in Kansas City, Topeka and Wichita which span a distance of 200 miles, and there may be relevant differences in the severity of the COVID-19 outbreak;

WHEREAS the Centers for Disease Control and Prevention (“CDC”), the Administrative Office of United States Courts, and state and local governments have recommended or adopted various phased transition plans for purposes of making local decisions on operational status based on local data on “gating” criteria as emergency conditions improve;

WHEREAS certain people are more vulnerable to the COVID-19 virus because of the age or health conditions of themselves or those with whom they reside; and

WHEREAS custodial defendants in particular have living arrangements that do not allow for social distancing or other recognized forms of disease prevention rendering them at an increased risk of virus transmission;

NOW THEREFORE, the Court hereby adopts the following Order:

Review and Monitoring of Gating Criteria and Determining Whether Courtroom Hearings Are Safe for Custodial Defendants

1. In consultation with the Clerk of Court, the senior active district judge (“Judge”) in each division of this Court will periodically monitor and review the COVID-19 data in the counties of their respective courthouses and surrounding counties, including counties in which custodial criminal defendants are housed (“relevant geographical area”) for purposes of applying the three gating criteria identified in the Federal Judiciary COVID-19 Recovery Guidelines published by the Administrative Office of United States Courts on April 24, 2020 (“Recovery Guidelines”).
2. Consistent with the Recovery Guidelines and CDC guidance, the Judge in each division shall determine if the following three gating criteria have been satisfied: (1) There is a sustained downward trending of COVID-19 data in the relevant geographic area over a 14-day period; (2) There are no COVID-19 confirmed or suspected cases in the court facility within a 14-day period or, if such cases have occurred, there has been mitigation through deep cleaning and disinfecting of exposed areas and applicable employee self-quarantine actions have been taken; and (3) Rescission of local (not statewide) restrictive movement and/or shelter in place recommendations. Regarding the first gating criteria of a sustained downward trend over a 14-day period, the Judge in each division shall consider, if available, the following nonexhaustive list of data: new COVID-19 cases, deaths, new hospitalizations and positive percentage rates. No datum is singularly dispositive.
3. Further, in the event there is a documented COVID-19 outbreak in a detention facility, the gating criteria have not been met with respect to custodial defendants housed in that facility such that no hearing with the custodial defendant present in the courtroom will be

conducted until the outbreak has been contained for 14 days and the facility warrants that the particular custodial defendant has no symptoms of COVID-19.

4. After consultation with the Clerk of Court, if the Judge determines that the three gating criteria have been met in his or her division and that hearings can be conducted with a custodial defendant present in the courtroom without seriously jeopardizing public health and safety, the Judge will advise the other judges in that division that, in their discretion, they may conduct hearings with custodial defendants present in the courtroom.
5. In consultation with the Clerk of Court, the Judge in each division must continue to periodically monitor and review the gating criteria to determine if the gating criteria continue to be met. If the gating criteria are not met, the Judge in each division will advise the other judges in that division that they may not conduct hearings in cases with custodial defendants present in the courtroom until further notice.

Presiding Judge Discretion to Conduct Courtroom Hearings in Civil Cases and Criminal Cases that Do Not Involve Custodial Defendants in the Courtroom

6. Giving due consideration to public health and safety and the interests of justice, the presiding judge has the discretion to conduct courtroom hearings in civil and criminal cases that do not involve custodial defendants or in which the custodial defendant has waived appearance or is appearing remotely rather than in the courtroom.

Protective Measures

7. In conducting courtroom hearings, this Court will take all reasonable protective measures to ensure the safety and health of parties, attorneys, court personnel, and other courtroom participants, including but not limited to: requiring social distancing, requiring wearing of masks when doing so does not impede communication, and requiring sanitizing of exposed areas between hearings. The presiding judge has the discretion to determine what reasonable measures should be taken, giving due consideration to the health and safety of all persons in the courtroom.

Presiding Judge Discretion to Conduct Hearings by Video and Teleconferencing

8. Pursuant to the CARES Act and the Recovery Guidelines, the presiding judge has the discretion to use video and teleconferencing in criminal hearings. The presiding judge also has the discretion to use video and teleconferencing in civil hearings.

Anonymous Request to Opt-Out of Courtroom Hearing

9. If a pro se party, counsel, or witness has a particularized vulnerability to the COVID-19 virus and objects to appearing in the courtroom on the date set, counsel or the pro se party shall send an email to that effect to the Clerk of Court (not to the presiding judge nor to opposing counsel) concisely stating their particularized objection to appearing. The email must be sent to the Clerk of Court at ksd_covidconcerns@ksd.uscourts.gov no later than three days before the scheduled hearing unless good cause is shown. Any such email may request a video or teleconference hearing or rescheduling in lieu of the courtroom hearing. The email will be kept confidential by the Clerk of Court and not shown to the presiding judge, nor will the presiding judge be informed of the identity of any party or attorney who requested the accommodation. The Clerk of Court will work with the presiding judge to set the hearing by video or teleconference or reschedule the courtroom hearing to a later date. In a criminal case, the period of postponement caused by the objection to the courtroom hearing will be excluded under the Speedy Trial Act as the Court specifically finds that for public safety reasons, the ends of justice served by granting the continuance outweigh the best interest of the public and the defendant in a speedy trial, pursuant to 18 U.S.C. section 3161(h)(7)(A).

CARES Act Authorizations for Video or Teleconferencing Hearings

10. Pursuant to the CARES Act, the Chief Judge of this Court hereby authorizes the use of videoconferencing, or teleconferencing if videoconferencing is not reasonably available, 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; and
- 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.

Under section 15002(b)(4) of the CARES Act, the presiding judge may use this authorization only upon the consent of the defendant after consultation with counsel. Such consultation with counsel may be accomplished by remote means, including but not limited to video or teleconference. Absent consent of the defendant, the presiding judge may hold a courtroom hearing, or continue the hearing, in the judge’s discretion, giving due consideration to public health and safety, and the interests of justice. Because the hearings under section 15002(b)(4) must be conducted without undue delay, if the defendant does not consent to hearing by video or teleconference, the presiding judge has the discretion to conduct a courtroom hearing with the defendant present, irrespective of Paragraph 5 of this Order. Any time periods of postponement caused by the defendant not consenting to a remote hearing will be excluded under the Speedy Trial Act, as the Court specifically finds that for public safety reasons, the ends of justice served by granting this continuance outweigh the best interest of the public and the defendant in a speedy trial, pursuant to 18 U.S.C. section 3161(h)(7)(A).

11. Pursuant to the CARES Act and Paragraphs 1 through 5 of this Order, if the Judge in a division determines based on the gating criteria that felony pleas and sentencing hearings cannot be conducted in the courtroom without seriously jeopardizing public health and safety, then this Court authorizes on its own motion the use of videoconferencing, or teleconferencing if videoconferencing is not reasonably available, in the criminal procedures specifically enumerated in section 15002(b)(2)(A) of the CARES Act, to wit: 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. Under section 15002(b)(2)(A) of the CARES Act, the presiding judge in a particular case must find for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice. Further, under section 15002(b)(2) of the CARES Act, the presiding judge may use this authorization only upon the consent of the defendant after consultation with counsel. Such consultation with counsel may be accomplished by remote means, including but not limited to video or teleconference. Any time periods of postponement caused by the defendant not consenting to a remote hearing will be excluded under the Speedy Trial Act, as the Court specifically finds that for public safety reasons, the ends of justice served by granting this continuance outweigh the best interests of the public and the defendant in a speedy trial, pursuant to 18 U.S.C. section 3161(h)(7)(A).
12. The Chief Judge has reviewed the CARES Act authorizations granted in Administrative Order 2020-4 and pursuant to section 15002(b)(3) of the CARES Act, the aforementioned authorizations are extended until the earlier of: (1) the date the Chief Judge determines the authorization is no longer warranted, (2) the date on which emergency authority granted by the JCUS is terminated, (3) the date authorization has been terminated pursuant to section 15002(b)(5) of the CARES Act, or (4) September 11, 2020. If this authorization has not been terminated before September 11, 2020, this Court will repeatedly review this authorization and determine whether to extend it, in a frequency not to exceed 90 days.

Supersedes Administrative Orders 2020-3 and 2020-4

13. This Order supersedes Administrative Orders 2020-3 and 2020-4.

SO ORDERED this 12th day of June, 2020.

s/ Julie A. Robinson
JULIE A. ROBINSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT