

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA,

Plaintiff,

V.

ROBERT MCCUNE, TAMARICK
VANOVER, and CLINTON PORTIS,

Defendants.

CRIMINAL NO. 5:19-206-KKC

ORDER

*** **

At the parties' request, the Court held a status conference on November 3, 2020 to discuss the duration of the trial that had originally been scheduled for 5 days. (DE 322). All parties agreed that the allotted time was insufficient and that a 10 to 14-day trial would be necessary, taking into account all COVID-19 precautions. To accommodate this required extension, the Court rescheduled the November 16, 2020 trial to December 7, 2020. (*Id.*).

Although COVID-19 cases had been rising in Kentucky on the date of the pretrial conference, they have continued to surge in Kentucky and elsewhere. On November 11, 2020, Governor Andy Beshear revealed the state's newest single-day record: 2,700 positive cases of the novel coronavirus.¹ This continued increase in coronavirus cases presents an unreasonable risk of safety to all trial participants and leaves the Court no choice but to postpone the trial on December 7th.

¹ Alex Acquisto, *Kentucky coronavirus record: 2,700 new cases and 14 deaths. Positivity rate above 8%.*, LEXINGTON HERALD LEADER (Updated Nov. 11, 2020, 5:18 p.m.), https://www.kentucky.com/news/coronavirus/article247129816.html?ac_cid=DM321688&ac_bid=-1463019275.

This trial is expected to last 10-14 trial days, falling directly in the midst of two major holidays. It is to begin eleven days after Thanksgiving and to end on or about a week before Christmas. All defendants in this case live outside Kentucky. Four defense lawyers and three Assistant United States Attorneys live and practice outside Kentucky. Witnesses will be coming from outside Kentucky. Jurors in this district will travel from all over Eastern Kentucky where the novel coronavirus continues to spread.

In response to the recent surge in COVID-19 cases, and in light of the upcoming holiday season, government officials have called on the people of Kentucky to avoid large crowds. This week, Steven Stack, Kentucky Public Health Commissioner, cautioned that *any* in-person gatherings with those from differing households should be avoided in order to reduce the spread of the coronavirus.² Fourteen states are currently on Kentucky's state travel advisory list, with officials recommending a 14-day self-quarantine for travelers who travel from any of the listed states.³ And "[s]tates can fall off the list or be added to it, depending on their positivity rates."⁴

Due to the continuing spike in COVID-19 cases, court systems have joined in implementing necessary precautions. The Kentucky Supreme Court recently cautioned

² Alex Acquisto, *2,120 new KY COVID-19 cases. Don't gather for Thanksgiving, Beshear pleads.*, LEXINGTON HERALD LEADER (Updated Nov. 10, 2020, 5:24 p.m.), https://www.kentucky.com/news/coronavirus/article247102092.html?ac_cid=DM320882&ac_bid=-1476584396.

³ *Travel Advisory*, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, <https://govstatus.egov.com/ky-travel-advisory>. (last visited Nov. 12, 2020).

⁴ Ayana Archie, *Indiana is on Kentucky's COVID-19 travel advisory list. What does that mean?*, LOUISVILLE COURIER JOURNAL (Oct. 20, 2020, 5:06 p.m.), <https://www.courier-journal.com/story/news/local/indiana/2020/10/20/covid-19-travel-advisories-indiana-on-kentucky-list/3712399001/>.

counties located in red zones⁵ to consider postponing jury trials until the counties return to “yellow” zones.⁶ Fayette County currently falls into a designated red zone,⁷ and is “considered ... to be in the most critical red zone” by the state.⁸ Due to the high number of counties in red zones, the United States District Court for the Western District of Kentucky has postponed all civil and criminal jury trials scheduled to begin on or before December 31, 2020, and ordered that no trial shall begin on or before January 2, 2021.⁹

The Court notes that none of the defendants in this complex case are in custody. Thus, given the unique circumstances of this trial — including the expected trial length and the number of out-of-town participants — the Court concludes that under current public health conditions, it is not in the best interest of jurors, counsel, court staff, or the public to gather for trial on December 7, 2020. This finding is made with particular emphasis on the safety and health of all trial participants in light of the alarming surge of novel coronavirus cases in Kentucky and throughout the nation. It would be unduly prejudicial to all involved to begin the trial only to have it end in mistrial because of coronavirus.

⁵ A county is classified as a red zone when it reports more than 100 new daily cases of COVID-19 per every 100,000. Liz Essley Whyte, *42 States are now in the red zone for Coronavirus Cases, White House says*, THE CENTER FOR PUBLIC INTEGRITY (Nov. 10, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/42-states-are-now-in-the-red-zone-for-coronavirus-cases-white-house-says/>.

⁶ *Supreme Court issues guidelines for COVID precautions in ‘red zones’ as cases surge this fall and winter*, KENTUCKY.GOV (Oct. 29, 2020), <https://kentucky.gov/Pages/Activity-stream.aspx?n=KentuckyCourtofJustice&prId=196>.

⁷ *Kentucky Coronavirus Monitoring, current as of November 12, 2020*, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, <https://govstatus.egov.com/kycovid19>.

⁸ Valerie Honeycutt Spears, *Fayette schools will stop limited in-person learning before Thanksgiving as COVID-19 cases grow*, LEXINGTON HERALD LEADER (Updated Nov. 21, 2020, 7:30, p.m.), https://www.kentucky.com/news/local/education/article247157229.html?ac_cid=DM322578&ac_bid=-1451934323.

⁹ *In Re: Fifth Supplemental Order Concerning Court Operations Related to COVID-19*, General Order 20-23, (W.D. Ky. Nov. 3, 2020).

The ongoing COVID-19 pandemic has caused multiple federal district courts to continue criminal trials and to exclude time under the Speedy Trial Act based on findings that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. 3161(h)(7)(A). This Court makes that finding here. In the interest of the public health, to accommodate the recommendations of public health officials, and to avoid the risk and resulting prejudice of commencing a trial that cannot be finished, the Court finds that the time period between the previously scheduled trial date and the trial date that will be set by separate order should be excluded from the Speedy Trial Act calculations.

The following dates in the upcoming year have been set aside for purposes of scheduling trial in this matter: Option A: February 22, 2021 – March 5, 2021; Option B: April 5, 2021 – April 23, 2021. Accordingly, for all the reasons set forth above, the Court hereby ORDERS that the trial date of December 7, 2020 is SET ASIDE. No later than NOVEMBER 20, 2020, the parties SHALL FILE a Joint Status report, indicating which of these dates are mutually convenient for all parties to proceed to trial.

Dated November 13, 2020.



Karen K. Caldwell

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY