

JUDICIAL COUNCIL OF THE NINTH CIRCUIT

Judicial Council Order

Judicial Council of the Ninth Circuit (April 9, 2020)

OPINION

PER CURIAM.

REPORT OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT REGARDING A JUDICIAL EMERGENCY IN THE CENTRAL DISTRICT OF CALIFORNIA Submitted to the Administrative Office of the U.S. Courts Pursuant to 18 U.S.C. § 3174(d)(1) April 9, 2020 On March 13, 2020, Chief District Judge Virginia A. Phillips declared a judicial emergency in the Central District of California under 18 U.S.C. § 3174(e).

She reported that under the emergency declarations of national, state, and local governments, as well as recommendations from the Centers for Disease Control and Prevention to convene groups of no more than 10 people, the Court is unable to obtain an adequate spectrum of trial and grand jurors.

The suggested physical distancing measures required to protect public safety diminishes the availability of counsel, witnesses, parties, the public, Probation and Pretrial Services, and Court staff to be present in the courtroom. Chief Judge Phillips sought the Ninth Circuit Judicial Council's approval in declaring an emergency that would extend the time limits of the Speedy Trial Act (STA) for bringing accused criminal defendants to trial.

This type of request has been approved on four occasions, with circuit Judicial Councils approving judicial emergencies under 18 U.S.C. § 3174(e) since the STA was enacted. With the immediate and pending national and local state of emergencies, Chief District Judge Virginia A. Phillips was compelled to declare a judicial emergency under 18 U.S.C. § 3174(e).

This judicial emergency period commenced on March 13, 2020, and will end on April 13, 2020. After gathering additional data, the Judicial Council found no reasonable remedy, thus agreed to declare a judicial emergency and suspend the STA time limits required by 18 U.S.C. 3161(c) in the District for one year.

The continued judicial emergency will commence on April 13, 2020, and will conclude on April 13, 2021. Under 18 U.S.C. § 3174(d), the Judicial Council hereby submits to the Administrative Office of the United States Courts the Central District of California's application for a declaration of a judicial emergency and a written report stating in detail the reasons for granting the application.

Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 2 I. National, State, and County State of Emergencies – Public Safety On March 13, 2020, the President of the United States issued a proclamation declaring a National Emergency in response to the COVID-19 (Coronavirus Disease) pandemic.

The Governor of the State of California declared a Proclamation of a State of Emergency to exist in California on March 4, 2020. Health Officers from Los Angeles, Riverside, Orange, San Bernardino, Santa Barbara, San Luis Obispo, and Ventura Counties subsequently issued local emergency orders and proclamations related to public gatherings.

On March 27, 2020, the Judicial Conference of the United States, acting pursuant to the authority granted it under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), specifically found 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.” The World Health Organization declared COVID-19 a pandemic on March 11, 2020.

In their continuing guidance, the Centers for Disease Control and Prevention (CDC) and other public health authorities have suggested the public avoid social gatherings in groups of more than 10 people and practice physical distancing (within about six feet) between individuals to potentially slow the spread of COVID-19.

The virus is thought to spread mainly from person-to-person contact, and no vaccine currently exists. No information is currently available to determine when the CDC may retract its recommendations regarding limited group gatherings and physical distancing. By limiting person-to-person contact, the public may “flatten” the epidemic curve of the COVID-19 outbreak.

II. A Judicial Emergency Exists in the Central District of California A. 18 U.S.C. § 3174: The Judicial Emergency Provision According to 18 U.S.C. § 3174(a), upon application by the district, a judicial council “shall evaluate the capabilities of the district, the availability of visiting Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 3 judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.” If a judicial council finds no reasonably available remedy, it may declare a judicial emergency and suspend the 70-day time limit for a period up to one year, instead allowing up to 180 days before a trial must commence.

See 18 U.S.C. § 3174(b). The time limits to try detained persons “who are being detained solely because they are awaiting trial” are not affected by the emergency provision. *Id.* If the time limits

are not suspended, the sanction for not bringing a defendant to trial within 70 days of the filing of the indictment is a dismissal of the indictment. See 18 U.S.C. § 3162(a)(2).

The statute does not specify what qualifies as an emergency or what factors to assess before determining that there is “no reasonably available remedy.” In the legislative history of the STA, many members of Congress commented on the importance of a court’s resources to be able to comply with the Act’s time limits, and the ability to suspend time limits if a court could not meet those requirements.

See 120 Cong. Rec. 41,733, 41,755 (1974). Congress did not intend that a district court demonstrate its inability to comply with the STA by dismissing criminal cases and releasing would-be convicted criminals into society. See H.R. Rep. No. 93-1508 at 80-82, reprinted in 1974 U.S.C.C.A.N. 7401.

In fact, the emergency provision has been used previously on four occasions to avoid imminent criminal dismissals as a sanction for non-compliance. See *United States v. Bilsky*, 664 F.2d 613,619-20 (6th Cir. 1981) (Sixth Circuit suspended time limits for one year in the Western District of Tennessee shortly after the STA became effective in 1980); *United States v. Rodriguez-Restrepo*, 680 F.2d 920, 921 at n.1 (2d Cir.

1982) (Second Circuit approved emergency for the Eastern District of New York, noting the district’s “burgeoning caseload and calendar congestion.”); the Ninth Circuit approved a declaration of emergency pursuant to 18 U.S.C. § 3174(b) for the District of Arizona on February 24, 2011, and the Southern District of California on April 2, 2020.

In addition to the statutory judicial emergency, as outlined above, the Central District of California also has a “judicial emergency” as defined by Judicial Conference policy. A vacancy on a district court is considered an “emergency” if the court’s “weighted filings” exceed 600 per judgeship.

The Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 4 Central District of California’s weighted filings, 692 per judgeship (61 percent above the Conference standard), are high enough to be deemed an emergency.

The District is authorized 27 permanent judgeships, one temporary judgeship, and has 10 vacancies, the oldest of which has remained unfilled since 2014. The adjusted weighted filing per judge is 1,076. All vacancies are categorized as judicial emergencies. There are eight nominees pending, but due to the COVID-19 pandemic, the status of confirmation hearing dates remains uncertain.

Seven active district judges are eligible to take senior status or retire immediately. B. The Central District of California’s Application Chief Judge Phillips’ application dated April 6, 2020, outlines

the measures the Court is taking to maintain the public's safety while trying to remain in compliance with applicable statutes and mandated deadlines.

The CDC recommendations regarding gatherings of 10 or fewer people make essential tasks such as convening the grand jury, holding civil and criminal jury trials, and criminal proceedings including sentencings, initial appearances, etc., unattainable. III. Reasons for Granting the Central District of California's Application A. Weighted Caseload The Central District of California currently ranks 3rd in the Ninth Circuit and 12th nationally in weighted filings, with 692 weighted filings per judgeship for the 12-month period ending December 31, 2019.

Considering the 10 judicial vacancies, the adjusted weighted filings per judge is 1,076. Overall, the total civil and criminal filings in the District reached 16,890 in 2019. Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 5 Numerical Numerical 12 Month Period Ending December 31, 2019 Standing US Circuit Total 647 21 5 Civil 564 12 3 Filings Criminal Felony 53 82 12 Action per Supervised Release 30 55 12 Judgeship Pending Cases 525 40 7 Weighted Filings 692 12 3 Terminations 630 19 4 Trials Completed 10 77 11 The district judges are required under the STA to give priority to criminal cases.

The District has not received any additional permanent or temporary judgeships since 1990. B. Limitations of In-Person Appearances Pursuant to the authority granted under the CARES Act and the Judicial Conference of the United States, along with previous authority granted by the Judicial Council of the Ninth Circuit Court of Appeals, the District has been exploring the use of audio and video capabilities for required in-person hearings such as initial appearances.

Many detention centers are not capable of handling audio or video appearances. The welfare of the court, federal public defenders, CJA attorneys, U.S. Marshals Service, and defendants are placed at risk each time parties congregate in person for hearings and defendants are transported to and from the courthouse. Until a remedy is made available, the Court cannot feasibly sustain compliance with STA deadlines given the high number of criminal defendants processed daily while concurrently practicing small gathering and physical distancing guidelines.

C. Increased Criminal Filings from the U.S. Attorney's Office Over the past couple of years, the number of criminal cases the U.S. Attorney's Office (USAO) has filed rose substantially over previous totals, and the USAO expects continued increased productivity from their assistant U.S. attorneys Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 6 (AUSAs).

The number of AUSAs in the Central District is at an all-time high, as the USAO will soon have approximately 220 AUSAs to prosecute criminal cases. The USAO has more than doubled the size of its Riverside branch. The Eastern Division, which handles cases from San Bernardino and

Riverside Counties, has only one district judge, which is insufficient to cover the number of criminal cases filed there.

Overflow cases are assigned to the district judges in Los Angeles and, pre-COVID-19, the AUSAs had to travel over 120 miles roundtrip to appear at those hearings. D. Judicial Vacancies The District is authorized 27 permanent judgeships, one temporary judgeship, and has 10 vacancies, the oldest of which has remained unfilled since 2014. All are categorized as judicial emergencies.

There are eight nominees pending, but due to the COVID-19 pandemic the status of confirmation hearing dates remains uncertain. Seven active district judges are eligible to take senior status or retire immediately. Twenty-four full-time, one part-time, and two recalled magistrate judges are leveraged to manage the District's congested court.

In the recent 2021 Biennial Survey of Judgeship Needs, the District has requested 15 additional judgeships and the conversion of its one temporary judgeship to permanent status. Since 2011, the District has requested anywhere from 8 to 13 additional judgeships. E. Limited Courtroom Availability Chief Judge Phillips has reported that the District is currently operating under limited capacity during the COVID-19 pandemic.

Only limited hearings are being conducted, and there are constraints on the use of video and teleconference resources. The District has limited access to its local detention centers and jails. These facilities have limited resources for video and telephonic conferences, and defendants must be transferred to the closest courthouse for conferencing. Given the sheer number of hearings, there are not enough telephone and video resources to accommodate all 52 district and magistrate judges who need to use the equipment at any given time.

Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 7 The District also needs to minimize the exposure in courtroom spaces and accommodate the necessary daily sanitizing by the General Services Administration (GSA) staff.

Under pandemic protocols, GSA is required to follow separate disinfection procedures to meet California Department of Public Health and Cal/OSHA guidelines to contain and control harmful exposures from aerosol transmissible pathogens requiring droplet precautions, including COVID-19. IV. Proposal for Alleviating Congestion A. Visiting Judges The District is unable to seek designations for visiting judges due to the COVID-19 pandemic.

While travel restrictions may be mitigated by utilizing telephone or video hearings where possible, the judiciary is impacted on a national level by the public safety guidelines recommending gatherings of less than 10 persons and physical distancing of at least six feet. B. Declaration from CDC Regarding Public Gatherings The backlog of cases caused by the restriction on public safety mandates can only start to be alleviated once the CDC lifts its guidance regarding travel-

associated risks and congregate settings and physical distancing and the Court is able to determine that it is once again safe to resume its operations as usual.

The one-year extension will allow the court the necessary time to process the backlog as well as manage the influx of new cases once it is deemed once again safe for members of the public to congregate. C. Resumption of Normal Courtroom Operations Until the CDC lifts restrictions on the size of public gatherings and there is consensus that it is once again safe to return the court to its high level of operations in all courtrooms, the District is required to conduct court proceedings in as minimal court spaces as possible.

Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California April 9, 2020 Page 8 V. Conclusion The Central District of California (along with all of the other districts across the Circuit) and the Ninth Circuit Judicial Council are exploring every alternative to prioritize essential hearings and keep court operations moving as quickly as possible while maintaining the welfare of the public.

However, the emergency situation in the Central District of California has required the District and the Judicial Council of the Ninth Circuit to invoke the provisions of 18 U.S.C. § 3174(c) to extend the STA time periods for bringing defendants to trials. Submitted by the Judicial Council of the Ninth Circuit: Sidney R. Thomas, Chief Circuit Judge Jay S. Bybee, Senior Circuit Judge Sandra S. Ikuta, Circuit Judge N. Randy Smith, Senior Circuit Judge Mary H. Murguia, Circuit Judge Morgan Christen, Circuit Judge Phyllis J. Hamilton, Chief District Judge Ricardo S. Martinez, Chief District Judge Virginia A. Phillips, Chief District Judge Michael J. Seabright, Chief District Judge Ronald S.W.

Lew, Senior District Judge