

**IN THE CRIMINAL COURT FOR _____
DIVISION _____**

STATE OF _____)	
Plaintiff,)	
v.)	No.
)	Hon.
DEFENDANT)	
Defendant,)	

**DEFENDANT’S MOTION TO CONTINUE DUE
TO THE COVID-19 CORONAVIRUS PANDEMIC**

Defendant, _____, by and through counsel, pursuant to U.S. Const. amend. V, VI, XIV and the authorities cited below and their progeny, respectfully moves this Court to continue the trial date and modify all other corresponding deadlines.

The trial in this matter is currently scheduled to begin on _____. Defendant, through counsel, respectfully submits that the ends of justice are served by continuing the trial and all corresponding deadlines, and that a continuance is necessary to ensure that his due process rights are not violated and that he receives a fair trial and effective assistance of counsel required by the Sixth Amendment of the United States Constitution. The following is offered in support of this motion:

I. Background.

(1) The World Health Organization declared that COVID-19 was a pandemic in March 2020. *See* COVID-19 Timeline, WHO, “Leadership” (Mar. 11, 2020).¹ As of February 28, 2021,

¹ Available online at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline/#> (last visited Feb. 14, 2021).

the State of Tennessee had 775,004 cases and 11,411 fatalities. *See* Staff, *Coronavirus in Tennessee: Nashville reports 133 new cases, no new deaths*, *Tennessean*, Mar. 1, 2021.³

(2) The Supreme Court of Tennessee declared a state of emergency for the Judicial Branch of Tennessee on March 13, 2020. Order Extending State of Emergency and Reinstating Suspension of In-Person Court Proceedings, No. ADM2020-00428 (Tenn. Dec. 22, 2020). The order suspended in-person court proceedings and was continued on March 25, 2020. *Id.* On April 24, 2020, the court began to gradually reinstate in-person proceedings. *Id.* Orders on May 26, 2020 and July 9, 2020 continued to permit in-person proceedings. *Id.* On November 17, 2020, jury trials were again suspended due to the escalating deaths and case counts resulting from the pandemic. *Id.* An order on December 22, 2020 again extended the suspension of jury trials. *Id.* On January 15, 2021, the Tennessee Supreme Court extended the suspension of jury trials and in-person court proceedings through March 31, 2021. *See* Order Extending State of Emergency, Suspension of Jury Trials, and Suspension of In-Person Court Proceedings, No. ADM2020-00428 (Tenn. Jan. 15, 2021). “This order is intended to be interpreted broadly for protection of the public from risk associated with COVID-19.” *Id.*

(3) As of March 1, 2021, Knox County alone has had 46,965 cases of COVID-19 resulting in 536 deaths. *See* Knox County COVID-19 Data.⁴ To help curb the spread of COVID-19, Knox County recommends Five Core Actions: social distancing, wearing cloth face coverings, regularly washing or sanitizing hands, cleaning frequently-touched surfaces, and staying home

³ Available online at <https://www.tennessean.com/story/news/health/2021/03/01/covid-19-tennessee-latest-coronavirus-cases-numbers-restrictions/6863223002/> (last visited Mar. 1, 2021).

⁴ Available online at <https://covid.knoxcountyttn.gov/case-count.html> (updated daily) (last visited Mar. 1, 2021).

when sick. *See* Five Core Actions, COVID-19 Public Guidance, Knox County.⁵ As recently as February 10, 2021, the Knox County Board of Health has continued to maintain COVID-19 safety precautions for limiting social gatherings;⁶ limiting occupancy of restaurants and mandating early closure of restaurants and bars;⁷ maintaining “COVID-19 Risk Reduction Guidelines” to include restricting non-essential activity, maintaining social distance, wearing masks, avoiding situations where social distancing is not possible, avoiding travel, and avoiding social gatherings of more than eight people.⁸

(4) A mutant strain of COVID-19 that originated in the United Kingdom is expected to become the majority of COVID-19 cases in the United States by the end of March 2021. Joel Achenbach, *CDC warns highly transmissible coronavirus variant to become dominant in U.S.*, Wash. Post (Jan. 15, 2021).⁹ The mutant strain is more contagious than the original iteration of COVID-19. *Id.* This new strain was first identified in Tennessee in January 2021. *See* Joneé Lewis, *Variant strain of COVID-19 virus reported in Tennessee*, WREG Memphis (Jan. 21, 2021).¹⁰

(5) Given that the new strain of the virus is more infectious than the current, dominate strain, there remains a high likelihood that the Tennessee Supreme Court will again suspend jury

⁵ Available online https://covid.knoxcountytn.gov/pdfs/COVID-19-Public-Guidance_10-30-20.pdf (last visited Feb. 11, 2021).

⁶ Social Gathering Limitation, Regulation No. 2020-8, (extended until March 3, 2021 by Feb. 10, 2021 vote by the Board of Health) (https://covid.knoxcountytn.gov/pdfs/Signed_Regulation_2020-8.pdf).

⁷ COVID-19 Restaurant Occupancy Limitation and Early Closure Regulation, Regulation No. 2021-1 (extended until March 3, 2021 by Feb. 10, 2021 vote by the Board of Health) (https://covid.knoxcountytn.gov/pdfs/Regulation_2021-1.pdf).

⁸ COVID-19 Risk Reduction Guidelines, Resolution 2020-A (https://covid.knoxcountytn.gov/pdfs/Resolution_2020-A_Signed.pdf).

⁹ Available online at https://www.washingtonpost.com/health/coronavirus-variant-dominant-us/2021/01/15/4420d814-5738-11eb-a817-e5e7f8a406d6_story.html (last visited Feb. 10, 2021).

¹⁰ Available online at <https://wreg.com/news/coronavirus/tennessee-health-officials-report-variant-strain-of-covid-19-virus-found-in-state/> (last visited Feb. 10, 2021).

trials and other in-person hearings at some point before or after the end of March, 2021, even if for a period of time in-person proceedings are permitted.

(6) Even before the more transmissible variant, federal authorities warned individuals over the age of 65 or with significant health conditions not to enter public spaces where anyone is unmasked due to immediate risks to their health. Flaherty & Margolin, ‘*You need to assume you became infected*’ at *Thanksgiving: White House task force warning*, ABC News (Dec. 2, 2020).¹¹

(7) If the Tennessee Supreme Court does not extend its order continuing in-person proceedings and jury trials, counsel anticipates that the Court would nonetheless require the parties and public (including jurors) to wear face masks and engage in social distancing to mitigate the virus’ spread.

(8) Court safety precautions typically include “requiring masks, moving trial and deliberations to overlarge rooms to ensure social distancing, reducing the size of juror pools, and/or conducting proceedings via video conferencing platforms (e.g., Zoom or Microsoft Teams). *See* Dublin Research & Consulting, *Article: COVID-19’s Next Victim? The Rights of the Accused*, 44 *Champion* 22, 22 (May 2020). “But while safety is imperative, the integrity of the jury system is also sacrosanct.” *Id.* “Allowing criminal defendants to look their accusers in the eye, for instance, serves the truthseeking function of cross-examination. Likewise, packed courtrooms open to the parties’ friends and families, as well as the press, promote systemic fairness. Limiting not only *who* may view the proceedings, but also *how* they are viewed, could fundamentally alter the judicial system.” *Id.*

¹¹ Available online at <https://abcnews.go.com/Politics/assume-infected-thanksgiving-white-house-task-force-warning/story?id=74506860> (last visited Feb. 14, 2021).

II. A continuance is necessary to protect Defendant’s federal and state constitutional rights to due process, a fair trial, confrontation, to prepare and present a defense, and the effective assistance of counsel.

(9) In general, this court has discretion to grant a trial continuance. *See State v. Blair*, 145 S.W.3d 633, 640 (Tenn. Crim. App. 2004). In such circumstances, courts consider potential harm to both parties, its duty to administer the criminal justice system, and properly maintaining its docket. *See State v. Morgan*, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). A continuance should be granted on a showing of good cause. R. Practice Crim. Ct. Knox Cty. Rule II(4).

(10) Unlike typical motions to continue, however, this motion is not premised upon a mere preference for a delayed trial setting. In this case and at this time, this Court’s discretionary authority must be understood to be constrained by the state and federal constitutions. That is, Defendant’s constitutional rights will be adversely impacted by proceeding on the current schedule: while the drafters of the United States and Tennessee constitutions could not have contemplated jury trials being conducted during a global pandemic—with all counsel, the judge, witnesses, and jurors wearing masks, social distancing during the proceedings, and significantly limiting the public’s in-person access to the proceedings by curtailing the number of persons present for social distancing purposes—the constitutional protections that the drafters put in place (as discussed below) result in the simple conclusion that neither the state nor federal constitutions can tolerate a criminal trial during these circumstances. *See IN RE: COURT OPERATIONS UNDER THE EXIGENT CIRCUMSTANCES CREATED BY COVID-19* (Dec. 15, 2020).¹²

(11) In Middle Tennessee, the federal court has concluded that jury trials are not safe and has specifically explained that prospective jurors are “not available or not willing” to serve

¹² Available online at <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20209%20amended%20-%20coronavirus%20ninth%20amendment%2012.14.pdf> (last visited March 1, 2021).

because of the pandemic, that the disparate impact on the population may compromise the right to be tried by a fair cross section of the community, and that the participants in a trial cannot comply with social distancing provisions. *Id.*

(12) Trials conducted with pandemic safety measures conflict with defendants' rights under the Due Process and Confrontations Clauses of our state and federal constitutions. *See* U.S. Const. amend's V, VI, XIV; Tenn. Const., art. I, §§ 8, 9. The Sixth Amendment guarantees face-to-face encounters to deter lying ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back'"), bolster the right of cross-examination, and question credibility before the jurors. *See Coy v. Iowa*, 487 U.S. 1012, 1017-20 (1988). For example, the ability to view facial expressions of jurors, witnesses, counsel, and the judge is critical to make effective decisions during jury selection and to communicate with the jury. The same presentation of information to the jury with the persuasive advocacy required of counsel in a criminal case where a person's liberty, and sometimes life, are at stake cannot be done effectively with counsel wearing masks and the jury unable to see facial expressions and the demeanor of counsel. During the trial, the jury cannot view the demeanor of a witness in the same fashion when much of the face of the witness is masked. *See* Julia Simon-Kerr, *Article: Unmasking Demeanor*, 88 *Geo. Wash. L. Rev. Arguendo* 158, 160 (September 2020) ("For the legal system [...] the mask requirement contravenes a central tenant of this country's credibility jurisprudence: that demeanor is fundamental to assessing the credibility of witnesses.") Effective confrontation cannot be conducted with counsel and the witness masked, and that confrontation cannot be effectively observed, and credibility decisions made, by the finder of fact when facial demeanors of the witness and counsel cannot be observed by the jury during that witness's testimony.

(13) Moreover, trials conducted during a pandemic contravene a defendant's right to a fair trial. U.S. Const. amend's V, VI, XIV; Tenn. Const., art. I, §§ 6, 8, 9. Over the past year, public health experts have found disproportionate medical and economic impacts from the COVID-19 crisis on certain populations, including the elderly, those with preexisting conditions, and on racial and ethnic minorities. *See* U.S. Centers for Disease Control and Prevention, *COVID-19 Racial and Ethnic Health Disparities*.¹³ In addition to the disproportionate health impacts, the economic crisis that has resulted from the pandemic has disproportionately impacted populations and therefore negatively impacted the ability to ensure representative jury pools. *See* National Jury Project Litigation Consulting/West Survey Findings June 2020: COVID-19 and Jury Service (June 12-18 survey of more than 400 jury-eligible residents in Los Angeles and the six Bay Area counties finding difficulties in "select[ng] juries throughout 2020 which are diverse and represent a cross section of the public without imposing undue hardship").¹⁴ It is likely that many prospective jurors who would otherwise serve are going to have legitimate health concerns for themselves and individuals they live with or encounter, leading to issues with the jury representing a fair cross-section of the community. Those same health concerns will undoubtedly be present in the jury's mind during all stages of the trial process, including deliberations, creating a concern of the jury's focus on the proceedings and one or more members of the jury rushing deliberations in order to avoid being in a confined indoor space with a group of strangers for multiple hours. Fair deliberations will further be impeded by the wearing of masks and/or physical safeguards like plexiglass dividers in the jury room.

¹³ Available online at <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html>.

¹⁴ Available online at <http://www.njp.com/covid-19-and-jury-service/>.

(14) The pandemic further makes it difficult to ensure the defendant will have a public trial. U.S. Const. amend's VI, XIV; Tenn. Const. art. I, § 9. "[A]n accused is at the very least entitled to have his friends, relatives, and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. 257, 272 (1948).

(15) Trials conducted during this pandemic conflict with the right to effective counsel. U.S. Const. amend. VI; *Powell v. Alabama*, 287 U.S. 45, 66 (1932). Inherent within the right to counsel is the duty of trial counsel to conduct pre-trial investigation and meaningfully consult with the person accused. *See Nichols v. State*, 90 S.W.3d 576, 687 (Tenn. 2002) (commenting that counsel has a duty to make reasonable investigations); *State v. Covington*, 845 S.W.2d 784, 786 (Tenn. Crim. App. 1992) ("Since the landmark decision of *Powell v. Alabama*, the phrase "effective assistance of counsel" has encompassed the pre-trial investigation of the crimes charged in the indictment and the defenses available to the accused."). The COVID-19 pandemic has placed a significant strain on counsel's ability to conduct a meaningful pre-trial investigation and prepare for trial. Indeed, many of the tasks (such as consultation with the defendant, preparation of pretrial motions, working with experts, pretrial investigation, creation of trial materials, witness preparation, etc) have required additional time and resources due to the pandemic. More than that, trial-preparation tasks will continue to require members of the defense team to undertake actions that public health officials have deemed inadvisable.

(16) Denise deLaRue, an experienced jury consultant in criminal and civil cases throughout the United States, has analyzed the issues surrounding conducting a jury trial during the COVID-19 pandemic. Ms. deLaRue states, "I do not believe that it is possible at this point in the pandemic, or at any point until herd immunity has been effectively acquired or infection and transmission rates are medically acceptable, to conduct a jury trial with the safeguards necessary

to protect the health and safety of jurors without adversely impacting the integrity of the trial, from the first moment of voir dire to the final moment of jury deliberations.” See Affidavit of Denise deLaRue, attached hereto as **EXHIBIT A**.

(17) Just since the pendency of this case, all members of Defendant’s defense team have either suffered from COVID-19, had family members in their household become infected and ill, or been subjected to one or more COVID-19 quarantine or isolation periods. Defendant himself/herself was ill with COVID-19 last month and still suffers lingering issues, and because of his/her infection and illness certain expert evaluations were delayed and his ability to meet and confer with counsel impeded just when necessary pretrial motions were being investigated, researched, drafted, and finalized. The pretrial motions deadline was extended because members of defense counsel’s household were ill. The essential out-of-court defense functions critical to a criminal case, much less one of this significance, have already been hampered, and continue to be adversely impacted, by the COVID-19 pandemic.

(18) There are case-specific circumstances where a defendant’s desire for a speedy trial, particularly for those incarcerated pretrial, will result in a defendant’s willingness to be put to trial during the COVID-19 pandemic even with all the concerns of such a proceeding that are listed above. There is not a one-size-fits-all solution for every case. In this case, though, Defendant need not face such a Hobson’s choice.¹⁵ This case is complex, factually and legally, and will take a significant amount of time to try before a jury. Defendant desires pretrial preparations and

¹⁵ “This phrase originated with Thomas Hobson, a livery stable owner in Cambridge, England, in the 16th and 17th century, who reportedly offered customers the choice of either taking the horse nearest the stall door or taking none at all.” *Hooker v. Haslam*, 393 S.W.3d 156, 169 n.10 (Tenn. 2012); see also *Simmons v. United States*, 390 U.S. 377, 391-392 (1968) (removing Hobson’s choice between constitutional protections and holding a criminal defendant doesn’t forfeit right to remain silent at trial when defendant testifies at pretrial hearing on suppression of evidence).

proceedings to meet the allegations levied against him, and a jury trial, that are fully consistent with the protections afforded under the United States and Tennessee constitutions, applicable statutory authority, and procedural rules.

(19) WHEREFORE, Defendant respectfully requests this Court issue an Order continuing the trial in this matter and any accompanying deadlines. Given the seriousness of the allegations in this case, and the defense investigation and preparation that must be undertaken, the defense needs additional time to prepare, adequately advise the defendant, and prepare for trial. Because of the necessary safety precautions required to curb the COVID-19 pandemic, and the concerns that a proper jury cannot be constructed due to the legitimate health concerns of potential jurors, a trial cannot be safely conducted while complying with the United States and Tennessee constitutions. Moreover, pursuant to this Court's Local Rule II(2), Defendant gives notice that he requests the State file written responses to this and all other motions in this case.

Respectfully submitted this 1st day of March 2021, by:

John Doe

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on March 1, 2021, a true and correct copy of the foregoing has been forwarded
to:

John Doe

Attorney for Defendant