

IN THE COURT OF COMMON PLEAS
 MAHONING COUNTY, OHIO

)	
)	JUDGE ANTHONY D'APOLITO
)	GRAND JURY JUDGE
)	
)	2020 CR OPEN
)	
IN RE: GRAND JURY)	
JANUARY TERM 2020)	<u>MOTION TO CONTINUE</u>
)	(PROPOSED JUDGMENT ENTRY
)	ATTACHED)

COMES NOW the State of Ohio, by and through its undersigned counsel, and respectfully requests that the Court grant continuances on all cases before the Grand Jury for March 19, 2020 (retroactively) and March 26, 2020, due to the current national pandemic.

For cause, the State has outlined its reasons in the attached memorandum.

This request is not made for purposes of delay, but rather to preserve the integrity of the cases currently before the grand jury for reasons beyond the State's control. The State asks that this Court find that this continuance is both reasonable and necessary for public health and grant the State's continuance.

The State is requesting that time is tolled to April 2, 2020 in an effort to provide the court with a definite period of time and to coincide with the Court's two week moratorium placed on jury trials in its March 16, 2020 "Order Declaring a Judicial Emergency and Continuity of Operations of the Court due to the Covid-19 Pandemic." The State does, however, intend to move for similar continuances in the future during the duration of this public health crisis.

WHEREFORE, the State respectfully requests that all cases before the Grand Jury on March 19, 2020 and March 26, 2020 (listed below) and time tolled for purposes of R.C. 2945.71, 2945.72, and Sup. R. 39(B)(2) to April 2, 2020.

Respectfully submitted,

Michael J. Yacovone/mjy
MICHAEL J. YACOVONE (#0089852)
Assistant County Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, OH 44503
myacovone@mahoningcountyoh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served via facsimile upon The Mahoning County Bar Association at 330-746-7101 this 20th day of March, 2020.

Michael J. Yacovone/mjy
MICHAEL J. YACOVONE (#0089852)
Assistant County Prosecutor

PENDING CASES BEFORE THE GRAND JURY (JANUARY 2020 TERM)

<u>CASE NO.</u>	<u>DEFENDANT</u>
19 CR 142	Steven Jones
20 CR 24	Robert Maravola
20 CR 64	Askari Loury
20 CR 97	Craig Higham
20 CR 132	Sara Markulin
20 CR 142	Kenneth Coates
20 CR 157	Dontae Hubbert
20 CR 159	Aaron Kramer
20 CR 160	Emanuel Boyd
20 CR 161	Matthew Cochrane, Jr.
20 CR 162	Demetria Curtis
20 CR 163	Tarane Hatcher
20 CR 164	Roger Humphrey
20 CR 167	Grant Daniel Adams
20 CR 168	Nathaniel Freedman
20 CR 169	Joseph Garchar
20 CR 170	Nicholas Romeo
20 CR 171	Marcus Lee
20 CR 172	Lamar Herring
20 CR 176	Kimberly Hines
20 CR 177	Deviel Jones
20 CR 178	Nathaniel Olzak
20 CR 179	Robert Shelton
20 CR 180	Jessica Quick
20 CR 181	Jaquon Rozier
20 CR 182	Jose Rosado
20 CR 183	David Perry
20 CR 187	Russell Swegan, Jr.
20 CR 188	Tiffany Rabquer
20 CR 190	Jeffrey Harper
20 CR 192	John Bruner, III
20 CR 193	Rebecca Bonilla
20 CR 194	Rhonda Pierce
20 CR 195	Brittney Watson
20 CR 196	Tony Curry
20 CR 197	Arthur Finley
20 CR 198	Korie Ball
20 CR 199	Leila Rood
20 CR 203	Archelaus Williams
20 CR 204	Archelaus Williams
20 CR 205	Braylon Richardson
20 CR 206	Patricia Bennett
20 CR 207	Jeffrey Woods
20 CR 208	Sheade Robinson
20 CR 209	Lateaka Madison
20 CR 210	Jason Henninger
20 CR 211	Virginia Daniels
20 CR 212	Destaney Phillips
20 CR 213	Kelim Rushton
20 CR 214	Ronald Pal, Jr.
20 CR 215	Archelaus Williams
20 CR 216	Ladale Jennings
20 CR 217	Thomas Poyssick, Jr.

MEMORANDUM IN SUPPORT

Ohio Courts have the discretion to continue criminal cases due to a public health emergency.

Ohio Courts have the legal authority to continue criminal cases *sua sponte*, or on the State's motion, to deal with a public health emergency. The Covid-19 pandemic severely threatens the health and welfare of anyone who comes in contact with the Covid-19 virus. Courts can and should use their discretion to grant reasonable continuances in criminal cases to protect the health and welfare of court staff, attorneys, witnesses, jurors, defendants, and members of the public, and limit the spread of the Covid-19 virus within courthouses.

"The right to a speedy trial is a fundamental right of a criminal defendant that is guaranteed by the United States and Ohio Constitutions. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10." *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, at ¶ 14. Ohio codifies a criminal defendant's speedy trial rights in R.C. 2945.71, which provides that a criminal defendant charged with a felony must be brought to trial within 270 days, or if the person is held in jail in lieu of bond, each day spent in jail counts as three days against the 270. However, R.C. 2945.72(H) allows the time to be extended during "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" These extensions are to be strictly construed, and not liberalized in favor of the state. *Ramey*, at ¶ 24. The *Ramey* Court explained:

R.C. 2945.72(H) permits the speedy-trial clock to be tolled for the "period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." (Emphasis added.)

When a trial court exercises its discretion to continue the period for trial beyond the statutory limit, the continuance is entered under the second clause of subsection (H) and, therefore, the period of continuance must be reasonable.

Id., at ¶ 27-28, citing *State v. Davis*, 46 Ohio St.2d 444, 449, 349 N.E.2d 315 (1976), and syllabus. [T]he determination of reasonableness must be made on the existing record,” and it “must affirmatively demonstrate the reasonableness of the delay.” *Ramey*, at ¶ 34.

Furthermore, the Ohio Rules of Superintendence address the issue of time limits when it comes to matters before the Grand Jury. Under Sup. R. 39 (B)(2), “When an accused has been bound over to a grand jury and no final action is taken by the grand jury within sixty days after the date of the bindover, the court or the administrative judge of the court shall dismiss the charge *unless for good cause shown the prosecuting attorney is granted a continuance for a definite period of time*” [emphasis added].

There is at least one example in Ohio of a public emergency becoming the basis for a reasonable continuance pursuant to R.C. 2945.72(H). In 2007, Lucas County experienced a Level 3 snow emergency that caused the courthouse to have power outages and phone system interruptions, which in turn led the court to continue a criminal case for safety and logistical reasons, and which pushed the trial date outside the statutory 270 day window. On appeal, the Sixth District Court of Appeals upheld the court’s sua sponte continuance as reasonable:

We have carefully reviewed the record from below and find that the trial court properly acted within its statutory right to sua sponte continue appellant’s trial date beyond the statutory time limit, pursuant to R.C. 2945.72(H). On February 15, 2007, prior to the expiration of the time limit, the trial court thoroughly delineated the compelling reasons for its continuance by journal entry. A Level 3 snow emergency precluded the conduct of trial on February 14, 2007. The trial court exercised its right and fully comported with the parameters of R.C. 2945.72(H) in sua sponte continuing the trial on the record prior to expiration, furnished an explanation, and implemented a reasonable continuance to the next date available to all necessary parties.

State v. Talley, 6th Dist. Lucas No. L-07-1153, 2008-Ohio-6807, ¶ 15.

Health emergencies that affect trial participants also may serve as reasonable grounds for a continuance under R.C. 2945.72(H). In *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2014-Ohio-1507, at ¶ 8, the Eighth District approvingly cited continuances attributable to “witnesses [who] were unavailable because of health conditions” as one of the justifications for rejecting a criminal defendant’s statutory speedy trial argument on appeal.

Federal cases likewise provide support for the argument that natural disasters and public safety emergencies can support a constitutionally reasonable continuance of a criminal trial. See *Furlow v. United States*, 644 F.2d 764, 768-69 (9th Cir. 1981) (delaying trial as a result of the eruption of Mount St. Helens); *United States v. Correa*, 182 F.Supp.2d 326, 330 (S.D.N.Y. 2001) (delaying trial as a result of the terrorist attacks on September 11, 2001).

Applying these authorities to a public health emergency such as the Covid-19 pandemic, there should be little doubt that a sua sponte continuance or a continuance granted on the State’s motion should withstand any reasonableness argument. In the Cuyahoga County Court of Common Pleas’ recent March 16, 2020 “Order Declaring a Judicial Emergency and Continuity of Operations due to Covid-19 Pandemic,” the Court cited what were then the latest advisories from the Center for Disease Control safeguard the health of people and prevent the spread of the Covid-19, which was 100 people. Since the Court issued that extraordinary order on March 16, however, on March 17, 2020, the President of the United States and the Center for Disease Control changed the federal advisory to limit social gatherings to no more than 10 people in order to prevent the spread of the Covid-19 virus. See 15 Days to Slow the Spread, The President’s

Guidelines for America, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf. The President's advisory also stated that "[i]n states with evidence of community transmission, bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed." *Id.* The Ohio Department of Health has publicly stated that there is evidence that the Covid-19 has reached the point of community transmission in Ohio. See Drew Scofield, Ohio Department of Health believes 100,000 Ohioans are carrying coronavirus, available at <https://www.news5cleveland.com/news/continuing-coverage/coronavirus/ohio-department-of-health-says-100-000-ohioans-are-carrying-coronavirus>.

There is already evidence that the ban on gatherings larger than 10 people is preventing Ohio courts from properly conducting business. In one ongoing capital case, the Summit County Court of Common Pleas cited the President's most recent March 17, 2020 advisory as the basis for postponing an ongoing criminal trial until April 1, 2020. In *State v. Ford*, Summit County Court of Common Pleas Christine Croce reportedly stated:

Croce said she struggled with whether to suspend the trial. She said other trials across the country are continuing, but court officials have been advised against having more than 10 people together at the same time. Even if the courtroom was closed to visitors, the judge said, there would still be 27 people assembled.

In addition, Croce said three of the 17 jurors are older than 65 and five are between 60 and 65 — age groups that are considered more vulnerable to the virus.

See Stephanie Warsmith, *Murder trial for Akron man accused of killing 9 suspended by coronavirus pandemic*, available at

<https://www.beaconjournal.com/news/20200317/murder-trial-for-akron-man-accused-of-killing-9-suspended-by-coronavirus-pandemic> (last viewed March 17, 2020).

At least one federal case has cited the public health ramifications of the Covid-19 pandemic as the basis to continue a criminal case. In *United States v. Gonzalez-Tello*, the Northern District of Mississippi explained:

The defendant was scheduled to proceed to trial during the time period while he was in mandatory quarantine. Id. at *1. The district court was advised via letter from a doctor submitted by the government that there is a potential for [the defendant] to spread the virus to others during transport and/or court hearings." Id. at *3. The district court ultimately continued the defendant's trial, noting that "[u]nder these circumstances, including the obvious benefit to the public of containing a harmful contagion, the Court finds that the 'ends of justice served by the granting of a continuance outweigh the best interest of the public and the defendant in a speedy trial. . . the Court's 'ends of justice' continuance is driven by public health concerns, rather than the impossibility of a future proceeding; a potential miscarriage of justice; the complexity of the case; the timing of the arrest of indictment; or interference with either party's representation." Id. at *4, 5.

The Court finds that the public health concerns associated with the COVID-19 pandemic warrants the continuance of the trial of this cause. As in *Allen*, the Court's continuance of this matter is driven by public health concerns, including the safety of jurors, counsel, court personnel, and the defendant himself, rather than the enumerated 3161(h)(7)(B)(i)-(iv) factors. Recognizing the significance of the current public safety issue associated with the COVID-19 pandemic, the Court finds that the ends of justice will be served by granting the subject continuance.

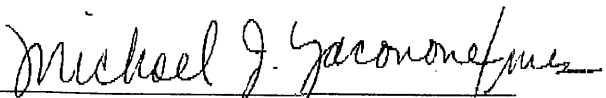
United States v. Gonzalez-Tello, N.D.Miss. No. 1:19CR147-SA, 2020 U.S. Dist. LEXIS 43873, at *4-5 (Mar. 13, 2020).

As the Court in *Gonzalez-Tello* recognized, exposing court staff, attorneys, witnesses, jurors, defendants, and members of the public to the Covid-19 virus would defeat the ends of public justice. Since the Ohio Department of Health has announced that Covid-19 is already accelerated to community transmission, and that Ohio's infected

public could already exceed 100,000, it is statistically inevitable that individuals currently working within the Cuyahoga County Justice Center are infected with Covid-19.

In Mahoning County, Grand Jury proceedings are no exception. No less than twelve people are present in the room during presentation of each case, nine certain for deliberations. At risk at any given time would be any jurors present, the court reporter(s), witnesses (usually a police officer/first responder who is tasked with returning to the public and his fellow officers following court), and the presenting prosecutor. This conservative count fails to account for the assembly of witnesses waiting to present (more first responders) and the State's grand jury coordinator, *all* necessary to the efficiency of the process.

Accordingly, any continuance of criminal cases under these circumstances will serve the ends of public justice and protect the health and welfare of court staff, attorneys, witnesses, jurors, defendants, and members of the public.



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Assistant County Prosecutor

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IN RE: GRAND JURY)	
JANUARY TERM 2020)	<u>ORDER</u>
)	
)	

Upon Motion by the State, for good cause shown, and consistent with the Court's March 16, 2020 "Order Declaring a Judicial Emergency and Continuity of Operations of the Court due to the Covid-19 Pandemic," the Grand Jury Proceedings of March 19, 2020 and March 26, 2020 are hereby CONTINUED and re-set to April 2, 2020.

Time is tolled under R.C. 2945.72 and Sup. R. 39(B)(2) for the duration of this continuance.

IT IS SO ORDERED.

DATE

HON. ANTHONY M. D'APOLITO

- cc. The Supreme Court of Ohio
- The Seventh District Court of Appeals
- The Mahoning County Prosecutor's Office
- The Mahoning County Bar Association