**UNITED STATES DISTRICT COURT**

**MIDDLE DISTRICT OF TENNESSEE**

**NASHVILLE DIVISION**

**UNITED STATES OF AMERICA )**

**)**

**v. ) No. 3:17-00130**

**) Chief Judge Crenshaw**

**JAMES WESLEY FRAZIER )**

**AELIX SANTIAGO )**

**JAMIE HERN )**

**DEREK LEIGHTON STANLEY )**

**WILLIAM BOYLSTON )**

**JASON MEYERHOLZ )**

**JOINT MOTION TO CONTINUE THE TRIAL AND ALL RELATED DEADLINES**

**COME NOW** Defendants, **James Wesley Frazier, Aelix Santiago,** **Jamie Hern**, **Derek Stanley**, **William Boylston** and **Jason Meyerholz**, by and through their undersigned counsel, and hereby submit this Joint Motion to Continue the Trial and All Related Deadlines. The grounds are stated herein.

1. The three-month long trial of this case is scheduled to begin on April 6, 2020. For months, the parties have been working diligently to meet deadlines and prepare for trial.

2. On March 11, 2020, the World Health Organization (WHO) declared the outbreak of novel coronavirus (COVID-19) to be a pandemic. On March 12, 2020, the Governor of Tennessee declared a state of emergency in response to the COVID-19 outbreak in Tennessee.[[1]](#footnote-1) On March 13, 2020, the President of the United States declared a national state of emergency in response to the COVID-19 outbreak.[[2]](#footnote-2)

3. On Friday, March 13, 2020 at 2 p.m., the Tennessee Department of Health reported 39 confirmed COVID-19 cases in Tennessee. Of those 39 confirmations, 17 cases are in Davidson County and 14 cases are in Williamson County. **Exhibit A**, Tennessee Department of Health Publication as of March 13, 2020.

On Monday, March 16, 2020 at 2 p.m., the Tennessee Department of Health reported 52 confirmed COVID-19 cases in Tennessee. Of those 52 confirmations, 25 cases are in Davidson County and 18 cases are in Williamson County. **Exhibit B**, Tennessee Department of Health Publication as of March 16, 2020.

On Tuesday, March 17, 2020 at p.m., the Tennessee Department of Health reported 73 confirmed COVID-19 cases in Tennessee. Of those 73 confirmations, 42 cases are in Davidson County (Nashville) and 21 cases are in Williamson County (Franklin). **Exhibit C**, Tennessee Department of Health Publication as of March 17, 2020. Thus, 87.5 % of Tennessee’s reported and confirmed cases are in Davidson and Williamson County.[[3]](#footnote-3) Of course, given the severe shortage of COVID-19 tests,[[4]](#footnote-4) it is virtually certain that the true number of COVID-19 cases is exponentially higher.

The United States District Court for the Middle District of Tennessee’s primary courthouse sits in Nashville, Davidson County, Tennessee. Williamson County is an adjacent county. Most lawyers in this case reside in Davidson and Williamson County.

4. In an effort to slow the spread of the disease in the United States, on March 15, 2020, the Centers for Disease Control and Prevention (CDC) published guidance recommending that

…for the next 8 weeks, organizers (whether groups or individuals) cancel or postpone in-person events that consist of 50 people or more throughout the United States. Events of any size should only be continued if they can be carried out with adherence to guidelines for protecting vulnerable populations, hand hygiene and social distancing.

**Exhibit D**, CDC’s Notice Regarding Public Gatherings.[[5]](#footnote-5) In a White House Press Briefing today, it was announced that gatherings of 10 or more people should be avoided.

As the White House announced on March 16, 2020, the WHO and CDC agree that the number of COVID-19 cases is far greater than currently reported because of testing and reporting delays, strict criteria for testing, and other considerations. Every report of infection numbers lags by several days. Moreover, Surgeon General Jerome Adams confirmed on March 16, 2020 that the United States has the same number of cases that Italy had 2 weeks ago.[[6]](#footnote-6) Italy currently has the second most cases in the world (after China), and its entire population is now in quarantine.[[7]](#footnote-7)

5. The scheduled trial would gather approximately 200 jurors on April 6, 2020 in a courtroom already packed with 50 to 60 other persons (8 defendants, 13 defense lawyers, 6 government attorneys and representative, 5 or more court personnel, numerous Court security officers and U.S. Marshals). Simply put, the trial of this case cannot be conducted without jeopardizing the health and safety of all participants, their families and those with whom they interact.[[8]](#footnote-8)

6. Additionally, the defense cannot continue the pretrial investigation and interviews necessary for adequate trial preparation. It would be irresponsible and unsafe to ask investigators to attempt witness interviews amidst the “social distancing” recommendations and the instructions to limit contact by the CDC. Moreover, several defense investigators are at risk because of age or co-morbidity. Others live out-of-district and are under restrictions and lockdowns in their communities.[[9]](#footnote-9) An adequate defense investigation cannot be conducted in the current national crisis.

7. As the Court is aware from the Defendants’ separate filing, defense counsel presently have either no access or severely limited access to their clients. As of Friday, March 13, 2020, both jails housing trial defendants (Warren County Regional Jail and Daviess County Detention Center) have issued no contact restrictions with inmates. Warren County forbids all attorney contact until April 10, 2020. **Exhibit J**, Warren County Notice. Daviess County will only permit “booth” (no contact) visitation with clients until further notice, which will prevent confidential attorney-client communications and document review. **Exhibit K**, Daviess County Notice. Trial preparation cannot be conducted without direct face-to-face client contact. The Defendants cannot assist in their defenses without the ability to prepare with their counsel. *See Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1990) (holding that “a prisoner's right of access to the courts includes contact visitation with his counsel … the policy of denying a prisoner contact visits with his attorney prohibits effective attorney-client communication and unnecessarily abridges the prisoner's right to meaningful access to the courts.”); *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980) (“an inmate's opportunity to confer with counsel is a particularly important constitutional right which the courts will not permit to be unnecessarily abridged”); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977) (the Fourteenth Amendment guarantees meaningful access to courts); *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800 (1974) (overruled in part on other grounds)(substantial and unjustifiable burdens on the right of access to courts are invalid; “inmates must have a reasonable opportunity to seek and receive the assistance of attorneys.”).

8. Furthermore, some if not most jurors who were summoned and reported availability for a trial from April through June may very well answer those same questions differently today. Thus, the prospective jury conflict questionnaires are likely invalid. Presumably, some jurors fall into “high risk” categories because of age or comorbidities and others now have conflicts because of immuno-compromised family members or care-giving needs. Others may face new challenges because of school cancelations and the unavailability of childcare. Even if none of these issues exists, the jurors are likely to have difficulty focusing on the proof under the pressure of sitting in a courtroom packed with strangers. *See Grandison v. Miller*, No. 96 CV 1236(RR),1997 U.S. Dist. LEXIS 19915 (E.D.N.Y. 1997) (trial court did not abuse “its discretion in declaring a mistrial based on the illness of a deliberating juror”; noting that “illness can affect a juror's ability to concentrate on and weigh the evidence in a case. An unwell juror, particularly one who is sequestered, may also feel pressured to acquiesce in the conclusions of fellow jurors in order to escape more readily from the discomforts of the jury room.”); *Richardson v. Bellnier*, No. 13 Civ. 672 (WHP)(MHD), 2013 U.S. Dist. LEXIS 188025 (S.D.N.Y. 2013) (upholding trial court’s decision to declare a mistrial where a juror “was not only claiming illness, but also apparently refusing to leave her home to attend the trial;” noting that “an ill juror can compromise the integrity of the deliberation process, as it may impact his or her ability to assess evidence in a case, and increase pressure to ‘acquiesce in the conclusions of fellow jurors in order to escape more readily from the discomforts of the jury room.’”) (quoting *Grandison*, *supra,* at \*4);  *State v. Gonzales*, 1999 Ohio App. LEXIS 5725, \*10-11, 1999 WL 1101976 (when there is an ill juror, a defendant cannot receive a fair trial before objective and rational jurors who are able “to concentrate on and weigh the evidence in a case” and not feel increased … “pressure to ‘acquiesce in the conclusions of fellow jurors in order to escape more readily from the discomforts of the jury room.”).

It is apt to note that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is when the juror’s views would prevent or substantially impair the performance of his duties in accordance with his instructions and oath. *See Adams v. Texas*, 448 U.S. 38, 45 (1980); *Wainwright v. Witt*, 469 U.S. 412, 414, 105 S.Ct. 844, 847 (1985). A juror’s fear and emotional apprehension about the ongoing State of Emergency from COVID-19, including the prospect of themselves or their family members being quarantined or of contracting COVID-19 during jury selection or while serving in close quarters with other jurors on a daily basis for three months, will certainly create a situation which would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id*.

9. With the existing global pandemic and growing impact of COVID-19 in the Middle District of Tennessee, the defendants respectfully request that the trial of this case be continued and all trial-related deadlines be reset. For the sake of health and safety of all involved and to protect the constitutional rights of these trial defendants, the case should be continued.

10. Defense counsel respectfully suggest that the case be reset to a “place holder” date (not expected to be a realistic trial date) at least 90 days from this filing and a telephone status conference scheduled in 60 days. Defense counsel need a minimum of 30 days of direct, unrestricted access to their clients before a trial of this case can be conducted. A “place holder” date 90 days away will permit a reassessment of the global pandemic and jail situation in real time. Further, the parties request an order extending issued subpoenas to that new “place holder” date until a realistic trial date can be selected and a new jury pool can be assembled.

11. Given the unknowable future of how long this pandemic may last and the known variables existing today (no access to clients, an inability to conduct investigation, a daily escalation in cases and panic among the public), the Defendants respectfully suggest that the trial should be continued and all trial related deadlines should be reset commensurate with a new trial date.

12. Counsel for the government were consulted and report that this motion will be opposed.

For all of these reasons, Defendants respectfully request that this motion be granted.

Respectfully submitted,

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| **TERRY & GORE**  1906 Glen Echo Road #150787  Nashville, TN 37215  (615) 321-2750  BY: /s/ *Stephanie Gore* (by permission)  STEPHANIE GORE  Attorney for Defendant Frazier | **TERRY & GORE**  1906 Glen Echo Road #150787  Nashville, TN 37215  (615) 321-2750  BY: /s/ *Michael Terry* (by permission)  MICHAEL TERRY  Attorney for Defendant Frazier |
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| **LAW OFFICE OF DAVID L. COOPER**  Third Avenue North Building  208 Third Avenue, North, Suite 300  Nashville, TN 37201  (615) 256-1008  BY: /s/ David L. Cooper (by permission)  DAVID L. COOPER  Attorney for Defendant Stanley | **JOSEPH F. EDWARDS**  1957 Benson Road  Cookeville, TN 38506  (931) 251-1315  BY: /s/ Joe Edwards (by permission)  JOSEPH F. EDWARDS  Attorney for Defendant Stanley |
| **CHARLES D. BUCKHOLTS**  40 Burton Hills Blvd  Suite 200  Nashville, TN 37215  (615) 386-7118  By: */s/ Chuck Buckholts* (by permission)  CHUCK BUCKHOLTS  Attorney for Defendant Hern |  |

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion has been sent via the Court’s ECF system or via email attachment to:

Katy Risinger

Assistant United States Attorney

110 Ninth Avenue South

Suite A961

Nashville, TN 37203

This 17th day of March, 2020.

s/ Kimberly S. Hodde

KIMBERLY S. HODDE

1. <https://www.tn.gov/governor/news/2020/3/12/gov--bill-lee-issues-executive-order-declaring-state-of-emergency-in-response-to-covid-19.html> [↑](#footnote-ref-1)
2. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [↑](#footnote-ref-2)
3. [https://www.tn.gov/health/cedep/ncov.html](about:blank) [↑](#footnote-ref-3)
4. https://www.ajc.com/blog/jamie-dupree/fauci-lack-coronavirus-tests-failing-the-health-system/0LnVTrh5LVczslIJeBHDBK [↑](#footnote-ref-4)
5. <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html> [↑](#footnote-ref-5)
6. According to the World Health Organization (WHO), on Sunday, March 15, 2020, Italy reported 21,157 confirmed COVID-19 cases and 1,441 deaths. **Exhibit E**, WHO published data as of March 15, 2020. According to WHO Italy, on Monday, March 16, 2020, Italy reports 55,155 confirmed COVID-19 cases and 2,303 deaths. **Exhibit F**, WHO Italy publication as of March 16, 2020 ([www.euro.who.int/en/countries/italy](http://www.euro.who.int/en/countries/italy)). Reported cases in Italy more than doubled overnight.

   As of Friday, March 13, 2020, the CDC reported that as of March 12, 2020, there were 1,629 total COVID-19 cases in the United States with 41 deaths. **Exhibit G**, CDC data published March 13, 2020. Today, March 16, 2020, the CDC reports 3,487 COVID-19 cases and 68 deaths existed as of Friday, March 13, 2020. **Exhibit H**, CDC data published March 16, 2020. The number of cases in the United States doubled overnight from last Thursday to Friday. As of noon on March 17, 2020, the CDC reports 4,226 confirmed COVID-19 cases. **Exhibit I**, CDC data published March 17, 2020.

   <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-in-us.html>

   It is also significant to note that the CDC’s data reporting for Tennessee is one third of Tennessee’s reporting. The CDC appears to only be counting confirmation numbers from government labs and not private labs. [↑](#footnote-ref-6)
7. <https://www.pharmaceutical-technology.com/features/covid-19-italy-coronavirus-deaths-measures-airports-tourism/> [↑](#footnote-ref-7)
8. On March 16, 2020, the Court entered Administrative Order 209, suspending trials through March 30, 2020 and providing other guidance. Paragraph 5 provides, in pertinent part:

   Any matter involving an attorney or party who is ill or in a high-risk category may be rescheduled by the presiding judge. However, counsel shall be responsible for advising the presiding judge of such illness or high risk by filing an appropriate notice or motion containing sufficient information to allow the presiding judge to make an informed decision regarding any cancellation or continuance.

   Administrative Order 209. The defense is providing notice to the Court that six of thirteen defense lawyers (Terry, Gore, Holdridge, Cooper, Edwards and McNally) are sixty years or older placing them at high health risk for contracting COVID-19 and experiencing complications from COVID-19. *See*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>; CDC, *Coronavirus Disease 2019 (COVID-19)*, *If You Are at Higher Risk*.  The pandemic and related health concerns will be a distraction for the lawyers who are at a higher risk of death, compromising the representation of their clients. Additionally, over a dozen defense team members are in the “high risk” or “very high risk” categories. Likewise, many Court security officers (commonly referred to as “blue coats”) are over 60 years of age. The Court ordered daily trial attendance of the United States Marshal for the Middle District of Tennessee who is believed to be over 60 years of age. D.E. 1367, pp. 7-8. The jury coordinator and presumably many prospective jurors will be over the age of 60. Moreover, some defense counsel are caretakers for elderly parents who are in the “very high risk” category because of age and infirmity. A trial of this case during this pandemic will compromise the health and safety of all of these individuals and is contrary to the general instruction of the CDC. [↑](#footnote-ref-8)
9. For example, the main defense investigator for the Boylston team is at “high risk” because of age. She resides in an area of New Jersey that is presently under curfew (8pm to 5am) with a National Guard presence. Flights in and out of the area have been severely limited by the airlines. She is unable to travel to the Middle District of Tennessee this week for planned defense investigation because of these restrictions and considerations. Likewise, the second investigator for the Boylston team resides in Portland, Maine and is also under a strict curfew and similar restrictions and cannot travel at this time. <https://www.portlandmaine.gov/AlertCenter.aspx?AID=City-Announces-Establishment-Curfew-Othe-119> [↑](#footnote-ref-9)