

NO. 2019-CR-0000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 187th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves the Court to continue his sentencing hearing for sufficient cause shown, pursuant to article 29.03 of the Texas Code of Criminal Procedure.

I.

Sentencing is set on May 4, 2020. We request that it be reset for at least 30 days, because the pandemic has already restricted – and it will continue to restrict – the defense's ability to properly investigate potential jury misconduct in this case, and if there was, to develop that evidence, and to present it to the Court in a timely and persuasive fashion.

II.

These dates are pertinent to this motion:

- **March 6, 2020:** Joe Smith was convicted by a jury and his case was initially set for sentencing on April 15, 2020. Mr. Smith had voluntarily surrendered on December 7, 2018, he was released on bond that date, and has been free on bond since then, never having missed a court appearance. As ordered by the Court, the defense surrendered its juror information shortly after the jury began its deliberations.
- **March 19, 2020:** On or about this date the Court notified the defense and the prosecution of an email received from one of the jurors who served on Mr. Smith's jury, that related her experience, and the questionable conduct of at least one juror. As noted above, the

defense had previously surrendered its juror information to the Court and therefore had no way to contact the jurors at this time. Undersigned counsel suggested a motion to unseal juror information so that the parties could contact the jurors to investigate the possibility of misconduct. Later that day assistant district attorney John Jones filed such a motion.

- **March 25, 2020:** Effective 11:59pm the previous day, San Antonio Mayor Ron Nirenberg's "Stay Home/Work Safe" order went into effect. Accordingly, with some exceptions for essential needs, all residents of San Antonio were ordered to stay at home.
- **March 30, 2020:** On or about this date the Court entered an order releasing the juror information to counsel for both parties, subject to a protective order. Mr. Jones immediately advised undersigned counsel that he had copies of the information, and counsel drove at once from his home to the courthouse to pick up his copy. From the parking lot across from the courthouse, counsel called his investigator, James Moore and orally provided to him the name and address listed on this information for the juror who wrote the email to the court suggesting possible jury misconduct. Returning home, counsel made his own list of the 12 jurors who had served on the jury, along with their addresses and occupations, and called Mr. Moore again to provide this information. Phone numbers are not listed on the juror information, so Mr. Moore had to use investigative tools available to him to acquire those phone numbers. Counsel instructed Mr. Moore to find numbers for all jurors as quickly as possible, and to contact them immediately and to question them about possible misconduct. Counsel told Mr. Moore to make contact by telephone only, consistent with the Mayor's Stay Home/Work Safe order. Counsel and investigator talked periodically about the investigation during the next few weeks.
- **April 3, 2020:** In response to an inquiry from the State, this Court sent an email stating its intent to set sentencing for the week of May 4, 2020.
- **April 22, 2020:** Honorable Ron Rangel, Local Administrative Judge for the Bexar County Courts, published an order suspending all regularly scheduled dockets in criminal district courts through

May 29, 2020. This order also suggested that certain hearings could be held remotely.

- **April 27, 2020:** Undersigned counsel emailed Ms. Nancy Garcia, coordinator for this Court, for clarification concerning scheduling for Mr. Smith's sentencing. Later that same day, the Court called, and advised counsel for both parties that the sentencing would in fact go forward on May 4, by Zoom teleconferencing. Counsel respectfully requested that the sentencing be delayed because the defense had not yet completed its investigation into jury misconduct and that, because of the pandemic and the local stay-at-home orders, counsel anticipated that the investigation might not be completed within 30 days of sentencing, if sentencing were not continued to some date subsequent to May 4, 2020. The Court was not persuaded at that time to continue sentencing. After speaking with the Court, counsel conferred with investigator Moore and confirmed that he had talked to 9 of the 12 jurors who had served, but, despite using all the investigative tools he has, he has been unable to reach anyone else by telephone. Mr. Moore still has not obtained working phone numbers for the 3 remaining jurors, and believes that the only way to communicate with them is in person, by showing up at their residences or work places.
- **April 29, 2020:** Although the Governor has ordered limited re-openings to begin on May 1, 2020, Mayor Nirenberg extended his Stay Home/Work Safe order until May 19, 2020. Some retail openings have been allowed locally, with significant restrictions, but social distancing of at least 6 feet are required for other gatherings beyond households. And face masking is required.

III.

After carefully considering the options, counsel is unwilling to ask Mr. Moore to jeopardize his health, and the health of his family, by attempting face-to-face visits at this time with the remaining 3 jurors. Even if Mr. Moore were willing to attempt these meetings, it is not fair to jeopardize the health of the jurors and their families. And given the Stay

Home/Work Safe order presently in place, and legitimate concerns of all San Antonians, it seems likely that one, two, or even three of these remaining jurors might refuse to meet in person. Counsel does not believe he can effectively represent Mr. Smith without talking to all 12 jurors, or at least exhausting every possible effort to do so, and, as set forth, that cannot be safely or reliably accomplished at this time.

IV.

And more must be done, well beyond merely talking to the last 3 jurors. Affidavits will have to be drafted for those jurors who are aware of misconduct. Then these drafts will have to be submitted to the jurors so that they can review them for accuracy. Discussions will be necessary, and revisions might be required. Those affidavits will have to be signed, either before a notary or by declaration, and then collected by the defense. Some jurors may need to be subpoenaed for a hearing. These various tasks require the sort of face-to-face contact that is not practicable, electronically or by telephone. Without affidavits, the defense may be unable to justify a hearing on a motion for new trial based on jury misconduct; and without a hearing, there can be no relief.

V.

Based on the investigation done so far, counsel have a good-faith belief that there has been jury misconduct in this case, and that, if we are allowed to complete the juror interviews, obtain affidavits, and have a hearing, Mr. Smith can establish his right to a new trial. Conversely, if we are unable to have necessary face-to-face interviews, and obtain the

affidavits and the hearing, Mr. Smith will be deprived of a fair opportunity to seek relief. If that happens, Mr. Smith will have been deprived of the effective assistance of counsel, guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Texas Constitution.

VI.

The present Stay Home/Work Safe order is not scheduled to expire until May 19, 2020, a full two weeks after the sentencing date now scheduled. Under Texas law, a motion for new trial is due no later than 30 days after sentencing.¹ For reasons stated above, there is ample reason to believe that the remaining investigation required in this case cannot be commenced until at least the expiration of the Mayor's emergency order. In other words, assuming the best case scenario, the defense has already lost valuable time to properly investigate a motion for new trial, and can be expected to lose at least two more weeks of the time statutorily allotted for this work, if sentencing goes forward on May 4. And this, of course, assumes that safe face-to-face contact becomes possible at some time in the near future. We respectfully request that a continuance be granted for at least 30 days from May 4, 2020.

¹ Counsel is aware of the order of March 13, 2020, issued jointly by the Texas Court of Criminal Appeals and the Texas Supreme Court that purports to give this and other Courts the authority to "[m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." But when will the Governor lift the present state of disaster? And what sort of modification or suspension will this Court order, if any? Until the answer to these questions are known, Mr. Smith's only safe course of action is to urge this motion for continuance.

VII.

As shown, there is a real possibility that Mr. Smith's right to effective assistance will be denied without the continuance we request. Conversely, neither the Court, nor any person or party will be prejudiced by such a continuance. Mr. Smith is on bond, and has been since December, 2018. Both sides have announced that they intend to present no witnesses at the sentencing hearing. Mr. Smith's pre-sentence investigation and TAIP evaluation have been completed. The sentencing has already been continued once – not at our request, but because of the pandemic. No harm will result from a further brief continuance that is necessary to determine whether the jury's verdict in this case was based only on evidence properly presented in the courtroom.

WHEREFORE, the defendant prays the Court continue this cause on the docket of this Court until a later date so that the defendant may receive a fair trial.

Respectfully submitted:

/s/ Mark Stevens
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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion for Continuance has been electronically delivered to the Bexar County District Attorney's Office on this the 4th day of May, 2020.

/s/ Mark Stevens
MARK STEVENS

DECLARATION UNDER PENALTY OF PERJURY

My name is Mark Stevens, my date of birth is xxx and my address is 310 S. St. Mary's St., Ste. 1920, San Antonio TX 78205. I declare under penalty of perjury that the foregoing Motion For Continuance is true and correct.

Executed in Bexar County, State of Texas on May 4, 2020.

/s/ Mark Stevens
MARK STEVENS

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ORDER

On this the _____ day of _____, 2020, came to be considered
defendant's Motion for Continuance, and it appears to the Court that this Motion should be

(GRANTED) (DENIED)

JUDGE PRESIDING