

In the United States District Court
for the Northern District of Texas
Dallas Division

United States of America,	§	
Plaintiff,	§	
	§	Case No. 3:19-R-245-M
v.	§	
	§	
Timothy Bernard Tanner,	§	
Defendant.	§	
_____	§	

SUPPLEMENT TO MOTION TO CONTINUE

Defendant Timothy Bernard Tanner re-urges his earlier motion to continue the trial. He submits this Supplement to provide additional support for that request, and to emphasize the urgency and severity of the threat to public health and a fair, public trial.

I. There has been no obvious improvement in the conditions that led to postponement of in-person jury trials.

The situation in Dallas County—the site of the trial, and the location where most witnesses and potential jurors live—remains extremely precarious. It has not markedly improved since the filing of the Motion to Continue. Local officials have identified one benchmark that would start to justify resumption of in-person dining and other large gatherings—a fourteen-day decline in hospitalizations and ICU admissions—and they acknowledge that they have not achieved that benchmark. The County remains in the current status of red “Stay Home Stay Safe”. *See* News Release, “Dallas County Reports 171 Additional Positive 2019 Novel Coronavirus (COVID-19) Cases (May 25, 2020) (“May 25 Press Release”, available at <https://www.dallascounty.org/Assets/uploads/docs/covid-19/press-releases/052520-PressRelease-DallasCountyReports171AdditionalPositiveCOVID-19Cases.pdf>).

All counties in the Dallas Division have seen a significant increase in the number of positive cases. The following chart summarizes the total number of COVID-19 cases reported from each county to Texas Department of State Health Services:

County Name	Population	18-May	19-May	20-May	21-May	22-May	23-May	24-May	25-May	(7-Day Total: New Pos. Cases)
Dallas	2,734,111	7455	7679	7904	7904	8273	8477	8649	8827	1372
Ellis	177,721	247	258	264	266	272	272	272	272	25
Hunt	95,324	66	68	69	71	71	75	75	75	9
Johnson	171,701	123	136	142	144	148	148	148	148	25
Kaufman	125,134	147	155	165	173	182	182	182	182	35
Navarro	47,985	38	38	40	40	42	44	44	44	6
Rockwall	102,243	134	136	143	147	151	151	151	151	17
TOTAL	3,454,219	8210	8470	8727	8745	9139	9349	9521	9699	1489
(New positive cases)			260	257	18	394	210	172	178	

These numbers only represent *confirmed* positive cases; asymptomatic carriers would have no reason to seek testing.

On May 19, 2020, Dallas County had its deadliest day since the start of the pandemic as 14 people died as the result of the virus. *See* Press Release, “Dallas County Reports 225 Additional Positive 2019 novel Coronavirus (COVID-19) Cases,” (May 19, 2020), available at <https://www.dallascounty.org/Assets/uploads/docs/covid-19/press-releases/051920-PressRelease-DallasCountyReports225AdditionalPositiveCOVID-19Cases.pdf>

As of 11:00am, May 25, 2020, Dallas County Health and Human Services states that the total case count in Dallas County is 8,998 cases including 211 deaths. “Of cases requiring hospitalization, two-thirds have been under 65 years of age, and about half do not have high-risk

chronic health conditions. Diabetes has been an underlying high-risk health condition reported in about a third of all hospitalized patients with COVID-19.” *See* May 25 Press Release.

II. The social distancing procedures contemplated by the Court are not sufficient to protect the participants or the public.

As explained in the attached declaration from Dr. Eric Lofgren, an expert in epidemiology of infectious diseases, “a jury trial held on June 1, 2020” in this Division “represent a substantial health risk to all participants due to the ongoing COVID-19 epidemic.” *See* Exh. A. This remains true even if the Court orders the participants to wear cloth face coverings and sit at least six feet apart.

Our experience—and the experience of our colleagues—confirms that even the best laid plans to limit exposure often go astray. Where in-court proceedings could not be avoided—such as at in-person initial appearances and detention hearings—defense counsel have personally observed several violations of protective protocol, including people passing within 6 feet of each other; using hands to adjust masks; and temporary lowering of masks exposing mouth or nose.

Our review of potential juror questionnaires reveals widespread about the pandemic. Specifically, the questionnaires returned to date show that 51 of 65 people sought postpone or excuse; most of these invoked COVID-19. If the Court goes forward with a trial on June 1, the Court will be bringing in most of these jurors against their will. These jurors have expressed concerns stating:

- They have very high risk family members they are caring for and they do not feel comfortable serving or even going near the courthouse.
- That the virus is being spread in confined spaces and they are terrified of being in a crowded room right now.
- They are fearful about congregating in groups with reported cases still high and the lack of testing for everyone.

These add to the concerns expressed in the Initial Motion by the Defendant and his anticipated witnesses. They also suggest that the jury will be distracted by the dangers of the

pandemic, and that will compromise its ability to fairly evaluate the evidence. It is also possible that the jury will hold one side (or both) responsible for exposing them to this risk.

These fears will only be compounded if members of the public are allowed into the courtroom to observe proceedings. But excluding the public would deny Defendant his right to a public trial, and would deny the public their full right to open and accessible court proceedings.

III. Most, if not all, courts in the area have continued all jury trials until August.

Recognizing these dangers, courts throughout the nation (and this region of Texas in particular) have continued jury trials well past June 2020. The state district and county courts in Region One, which includes Dallas County, are not moving forward on jury trials until August 1. The Honorable Ray Wheless, the presiding judge over the First Administrative Judicial Region has communicated to his colleagues that district and county courts should not plan on conducting jury trials until August 1, 2020.

Even appellate courts—who do not have to deal with crowded jury rooms or cycling witnesses in and out—have experience the pains of trying to operate normally during a deadly pandemic. Even though the Texas Supreme Court has been working remotely, on May 21, 2019, Texas Supreme Court Justice Debra Lehrmann tweeted that she and her husband have tested positive for COVID-19. Justice Lehrmann noted that, “We began to exhibit symptoms last week, despite diligently complying with stay-at-home rules.”

https://twitter.com/JusticeLehrmann?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

Indeed, even the United States Court of Appeals for the Fifth Circuit, a courthouse with cavernous courtrooms where participants can easily spread out, has canceled in person oral arguments that were scheduled for June 1-4, 2020.

Finally, the Administrative Office of the US Courts and Director James Duff issued a memorandum on May 7, 2020, announcing that he is “forming a Jury Subgroup of the Judiciary’s COVID-19 Task Force, comprised primarily of district judges, to develop guidance for district courts as they begin phased-in resumption of petit and grand jury proceedings. The Jury Subgroup will develop guidance on: (1) legal and policy parameters for jury operations; (2) criteria courts should use to determine when a court may safely restart juries; and (3) best practices recommendations to provide a safe environment for jurors, court staff, judges, counsel, and trial participants when jurors are summoned to report.” These guidelines are currently being debated and are not expected to be released until next week. If the guidelines for deciding when to resume jury trials (and how to safely conduct them) will not be released before next week, it is logical to assume it will not be safe to commence a trial next week.

IV. The pandemic will deprive Defendant of a fair cross-section of the community to serve as jurors.

As of today May 26, 2020, this Court has disclosed 65 jury questionnaires returned by the potential venire. By counsel’s count, 51 people have requested exemption, excuse or postponement of service. Most of these cited concerns about COVID-19. For at least two reasons, it does not appear that a lawful petit jury may be empaneled on the basis of these responses.

First, the extraordinarily high number of people requesting postponement of jury service and/or invoking an exemption destroys the random nature of jury selection. “It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.” 28 U.S.C. §1861. A jury selection practice that

destroys the random nature or objectivity of the selection process represents a substantial failure to comply with this statute. *See United States v. Hemmingson*, 157 F. 3d 347 (5th Cir. 1998).

In the ordinary case, postponements and other exercises of discretion in jury selection do not destroy the random nature of selection. *See Sosa v. Dretke*, No. CIV. SA-00-CA-312-XR, 2004 WL 1124949, at *35 (W.D. Tex. May 20, 2004)(“Reasonable exemptions, such as those based on special hardship, incapacity, or community needs, are unlikely to pose a substantial threat that the remaining pool of jurors will not be representative of the community”)(citing *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975)). In the present case, however, 51 of 65 people who returned a questionnaire sought postponement or excuse from jury service. Most of these will require an exercise of discretion concerning the risk of COVID-19 exposure. As such, in the unique circumstances of the present case, the jury would essentially be hand-picked from the venire by the judge, not selected at random.

The government suggests that this problem (and the cross-section claim) could be cured by summoning additional jurors in accordance with this District’s Amended Jury Plan. It is doubtful that this could be accomplished before Monday. But if so, it would not cure the problem – if most of the array asserts grounds for postponement that the Court enjoys a power to affirm or deny, selection is not random. And if the Court simply grants all COVID-19 related requests for postponement, it is likely skewing the jury on bases that are not demographically neutral.

Second, the decision to schedule the trial at the height of a deadly pandemic appears to have systematically excluded at least one cognizable demographic groups from the venire, and hence to have violated Mr. Tanner’s right to trial by a fair cross section of the community. Of the

65 questionnaires returned, it does not appear that more than 21 came from men.¹ The most recent AO-12 form indicates that the qualified jury wheel is 43.72% male. *See* Exh. B. Assuming that men and women in this case received questionnaires in this proportion, and further assuming that they were equally likely to return their surveys, a group of 65 returned surveys would contain 21 or fewer authored by men in only 4% of cases.² In other words, the radically skewed response rate reflected in the returned questionnaires is almost certainly due to the timing of the trial, and not due to mere chance.

To show a Sixth Amendment violation, the defendant must show that 1) “the group alleged to be excluded [from the jury system] is a ‘distinctive’ group in the community,” (2) “the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community,” and (3) “this underrepresentation is due to systematic exclusion of the group in the jury selection process.” *Duren v. Missouri*, 439 U.S. 357, 364 (1976). This test is satisfied. Gender is a cognizable demographic characteristic for the purposes of the Sixth Amendment. *Taylor v. Louisiana*, 419 U.S. at 537. The percent of men in the potential venire – a little more than 32% -- falls radically below their proportion of the population. Finally, this underrepresentation stems from an affirmative barrier to jury service, namely the decision to schedule the trial at the height of the deadliest pandemic in at least a century. For whatever reason, this decision has disproportionately burdened the jury service of men as opposed to women.

¹ Doubts about the gender of potential jurors – which is not indicated explicitly on the questionnaires – has been resolved in favor of assuming that they are male.

² *See* Binomial Probability Calculator, <https://stattrek.com/online-calculator/binomial.aspx?fbclid=IwAR016-cOeE-ALZpNTg4pxqSOKIBbbLXmGZruZkJDNA4-3tMVwltbV5YngnE>, last visited May 26, 2020

The government suggests that no systemic underrepresentation can be found on the basis of a single venire. That is ordinarily a sound enough rule, but it presumes that the jury system is operating the same way in successive venires. That is not the case here, where the jury is shaped largely, perhaps primarily, by the scheduling decision. For the same reason, the Court should reject the government's argument that cross-section claims may not be based on response rates. Again, we may assume this to be true in the ordinary case. But here, response rates are determined in large, perhaps primary, part by the Court's action, namely its scheduling decision. That decision decides whether the trial complies with the Constitution, and whether it can possibly be fair.

CONCLUSION

This Court should: 1) continue the trial to another date, at least 60 days from June 1, 2020 to be tried by a venire selected by a new set of summonses, or, alternatively, 2) continue the trial to another date at least sixty days from June 1, 2020, and by the same venire, or 3) alternatively, continue the trial for such brief period as may be necessary to review the discovery ordered produced by the Court today. Of this, the Clerk's office has been able to produce only the AO-12's.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on May 11, 2020, I conferred with AUSA John Boyle and learned that the government is opposed to this request.

/s/ Michael W. Kawi
MICHAEL W. KAWI

CERTIFICATE OF DEFENDANT'S CONSENT

I certify that on April 20, 2020, I spoke directly with the defendant, Mr. Timothy Tanner and, after explaining the reason for filing this motion, Mr. Tanner agreed with the filing of this motion and all requests made therein.

/s/ Michael W. Kawi
MICHAEL W. KAWI

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on attorneys of record.

/s/ Michael W. Kawi
MICHAEL W. KAWI