March 18, 2020

The Honorable S. Forrest Thompson
Medina County Prosecuting Attorney
60 Public Square
Medina, Ohio 44256

SYLLABUS: 2020-002

1. Courts may suspend jury trials to prevent the spread of the novel coronavirus, and they may do so consistent with state and federal speedy-trial obligations.

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OPINION NO. 2020-002

The Honorable S. Forrest Thompson
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Dear Prosecutor Thompson:

This opinion addresses your question whether courts may, due to the current emergency pandemic concerns, suspend jury trial activity consistent with speedy-trial obligations. The answer is yes; courts may suspend jury trials to prevent the spread of the novel coronavirus, and they may do so consistent with state and federal speedy-trial obligations. Although tolling speedy-trial time by suspending jury trial activity is an extraordinary step, it is lawful—and responsible—to do so during a pandemic emergency. To protect future convictions, prosecutors who request a continuance should ask the court to issue an order explaining in detail why a trial delay is reasonable and prudent. (When a court continues a jury trial *sua sponte*, prosecutors should request an order along these lines, if the court does not issue one on its own.) In any given case, the prosecutor should argue to the court, and ask the court to explain in detail, why delaying a jury trial during a pandemic does not prejudice a defendant's right to a defense.

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The Ohio and federal constitutions both guarantee criminal defendants a right to a speedy trial. Ohio Const., Art. I §10; U.S. Const., Amend. VI; *see also*

State v. MacDonald, 48 Ohio St.2d 66, 68 (1976). The U.S. Supreme Court has not identified a precise number of days within which the Sixth Amendment requires a defendant to be brought to trial. It has instead left it up to the States to "prescribe a reasonable period of time consistent with constitutional standards." *Barker v. Wingo*, 407 U.S. 514, 523 (1972).

In Ohio, defendants' speedy-trial rights have been codified in R.C. 2945.71 *et seq*. These statutes were "implemented to incorporate the constitutional protection of the right to a speedy trial provided for in the Sixth Amendment to the United States Constitution and in Section 10, Article I of the Ohio Constitution." *State v. Parker*, 113 Ohio St. 3d 207, 2007-Ohio-1534 ¶13. Three are worth highlighting here. First, there is R.C. 2945.71, which sets the period of time within which a trial must be held. Second, R.C. 2945.72 creates exceptions that allow that time to be extended. Finally, R.C. 2945.73 provides a remedy if the statutory speedy trial deadlines are not met.

The answer to your question turns on two separate issues. *First*, is there a statutory basis to toll the speedy-trial requirements of R.C. 2945.71 during a pandemic emergency? *Second*, if those requirements may be tolled under statute, would doing so violate a defendant's constitutional speedy-trial rights? *See State v. Davis*, 46 Ohio St. 2d 444 (1976) (discussing statutory and constitutional speedy trial guarantees separately). I address these issues in turn.

State Statutory Law

R.C. 2945.71 provides default rules regarding the number of days in which trials must be held. But those defaults are just that, defaults—the timeframes they call for are not absolute. *State v. Lee*, 48 Ohio St. 2d 208, syl. (1976). The reason is R.C. 2945.72. The General Assembly enacted that statute, which gives courts flexibility to extend the limits of R.C. 2945.71 where necessary, because it recognized that delay is the prudent

course in some situations. Relevant here, R.C. 2945.72 includes a catch-all provision that allows delay during "the period of any reasonable continuance granted other than upon the accused's own motion." R.C. 2945.72(H). For ease of reference, I will call this simply "subsection (H)."

The broad language of subsection (H) permits prosecutors to seek, and courts to grant, reasonable continuances. And the Ohio Supreme Court has held that it permits courts to *sua sponte* grant such continuances as well, though "only when reasonable and only when the continuances are made by journal entry prior to the expiration of the time limit." *State v. King*, 70 Ohio St. 3d 158, 162 (1994); *see also State v. Mincy*, 2 Ohio St. 3d 6, 7–8 (1982). Whether granted on a motion or *sua sponte*, the key consideration is whether the basis for a continuance beyond the time limit is "reasonable."

So, turning to the facts at issue here, does the current pandemic emergency provide a "reasonable" basis for continuance? Yes, it does. Owing to the high risk of contagion and the danger presented by the novel coronavirus, especially to the elderly population, the Ohio Department of Health has recently banned gatherings of 50 or more people in a single room. Although smaller gatherings are not prohibited, the Department of Health "strongly recommend[s]" that Ohioans avoid unnecessary non-family social gatherings of more than 10 people. Even for those smaller gatherings, the Department of Health has encouraged people to remain approximately six feet away from one another. These steps have been deemed necessary to halt the community spread of the novel coronavirus that causes COVID-19. *See* Ohio Department of Health Amended Order to Limit and/or Prohibit Mass Gatherings and the Closure of Venues in the State of Ohio, March 17, 2020.

The practicalities of jury service make it difficult, if not impossible, to adhere to these recommendations. That means going forward with a trial would endanger

jurors—and thus anyone else with whom those jurors might interact. As your request for an opinion indicates, the daily operation of the Medina County courthouse "has the potential of putting over one hundred citizens from all different levels of potential exposure in close proximity to one another for extended periods of time."

The novel coronavirus also poses unique threats *to incarcerated defendants* and other individuals with whom they might be incarcerated. That is one reason that the Ohio Department of Rehabilitation and Correction has implemented measures prohibiting visitors and volunteers from entering Ohio correctional facilities and has limited transfers to only those that are mission critical. COVID-19 Updates, Ohio Department of Rehabilitation and Correction, *available* at https://perma.cc/338M-GE96. Continuing jury trials and extending Ohio's speedy trial requirements will help address those threats by reducing the number of people to whom incarcerated defendants might be exposed. That, in turn, will reduce the risk that defendants might infect other jailed or incarcerated individuals while awaiting trial or upon being convicted.

Numerous other courts have suspended jury trials because of the current pandemic emergency. The specific statutes on which these courts have relied differ in meaningful ways from R.C. 2945.72. But even if those decisions are not directly applicable in Ohio, their reasoning further supports the conclusion that continuing a trial because of a pandemic emergency is "reasonable" under subsection (H).

First, the King County Superior Court in Washington State has been most explicit in discussing why the current pandemic emergency justifies a continuation of jury trials. That court issued a blanket order continuing all jury trials until April 27, 2020. King Cty. Emergency Order, p.9, online at https://tinyurl.com/KingCty Order. The court's order highlighted the large number of citizens who are called to act as jurors, the close

proximity of those citizens throughout all stages of trial, and the inability to implement social-distancing practices. *Id.* at pp.6–7. And it determined that requiring citizens to appear for jury duty "will more probably than not transmit the COVID-19 disease." *Id.* at p.7. For these reasons, it concluded that good cause existed to continue the trials. *Id.* at p.9. The Iowa Supreme Court recently followed suit, finding that the novel coronavirus created "good cause," under Iowa procedural rules, for continuing all criminal jury trials to dates no earlier than April 20, 2020. *In the Matter of Ongoing Preparation for Coronavirus/COVID-19 Impact on Court Services*, March 14, 2020 Order, online at https://tinyurl.com/IowaSCtOrder.

As discussed above, concerns about the number of individuals involved in jury service, the inability to implement social-distancing practices, and the likelihood of transmitting the novel coronavirus are not unique to Washington courts. Thus, although Ohio's speedy-trial statutes do not contain the same "good cause" exception that the Washington court relied on, the same considerations that justified the continuation of jury trials in King County also support a determination that the continuance of a jury trial because of a pandemic emergency is reasonable under subsection (H).

Second, federal courts—including the United States District Court for the Southern District of Ohio—have also suspended jury trials because of the current pandemic emergency. *In re: Court Operations Under the Exigent Circumstanevs Created by COVID-19*, General Order 20-02, online at https://tinyurl.com/SDOHorder. They have acted pursuant to a federal statute that specifically excludes from a speedy-trial calculation "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, *if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy*

trial." 18 U.S.C. §3161(h)(7)(A) (emphasis added). None of Ohio's speedy trial statutes contain similar language. But if a pandemic emergency provides a reason to conclude that the "ends of justice" outweigh the interest of the public and a defendant in a speedy trial, then a continuance for the same reason ought to be regarded as "reasonable."

Third, at least one California court held prior to the current emergency that when a defendant had been quarantined because of a pandemic illness (H1N1), his trial could be delayed without violating his speedy-trial rights. That court held that "[g]ood cause for the delay of trial exists when an incarcerated criminal defendant is under quarantine to prevent the spread of infectious disease. A contrary holding would require trial court personnel, jurors, and witnesses to be exposed to debilitating and perhaps life-threatening illness. Public-health concerns trump the right to a speedy trial." *People v. Tucker*, 196 Cal. App. 4th 1313, 1314 (Cal. Apt. Ct. 2011). As was true of the other orders discussed above, the *Tucker* decision is not directly applicable in Ohio. The California statute provided that a "court, unless good cause to the contrary is shown, shall order [an] action to be dismissed" if a case was not brought to trial within the requisite period of time. *Tucker*, 196 Cal. App 4th at 1317 (quoting Cal Pen Code § 1382). And, as already noted, none of Ohio's speedy trial statutes contain similar "good cause" language. Still, the California court's conclusion that a quarantine provides "good cause" for a delay nevertheless supports the conclusion that a continuance because of a pandemic is "reasonable" under subsection (H). After all, if it is reasonable to delay trial to protect jurors from the defendant, then it is equally reasonable to delay trial to protect jurors and the defendant from one another, and from anyone else who might be in the court room.

Finally, if a court grants a motion for a continuance, or continues a jury trial *sua sponte*, I recommend that the prosecutor request an order providing explicit reasons

for the continuance. The Ohio Supreme Court has held that when granting a *sua sponte* continuance, "the trial court must enter the order of continuance and *the reasons therefor* by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." *Mincy*, 2 Ohio St. 3d 6 at syl. (emphasis added). It has not applied the same requirement to other continuances. When a continuance is granted upon motion, the reasons for a continuance need only be discernable from the trial record. *See State v. Myers*, 97 Ohio St. 3d 335, 2002-Ohio-6658, ¶62; *see also State v. Martin*, 156 Ohio St. 3d 503, 2019-Ohio-2010, ¶19. But even though it may not be required, a clear statement from a court articulating its reasons for granting a continuance will be beneficial in light of the unique nature of present circumstances and the possibility that any such order may be challenged on appeal.

The King County Washington order provides a helpful model in this respect. It discusses in detail the on-going pandemic emergency, the circumstances surrounding jury trials and jury service in the county, and it explains why those circumstances are incompatible with the social-distancing practices that are currently required to protect public-health. The order also sets a date certain for its expiration, at which point trials will automatically resume unless the Court issues a second continuance.

Constitutional Requirements

Because state law will permit a continuance, the question becomes whether a continuance would comport with state and federal constitutional guarantees. It would.

The U.S. Supreme Court has identified four factors that courts should consider when determining whether a trial delay violates the Sixth Amendment's speedy-trial guarantee. They include: "Length of delay, the reason for the delay, the defendant's assertion of his

right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The Ohio Supreme Court has applied the same set of factors under the Ohio Constitution. *State v. Selvage*, 80 Ohio St.3d 465, 467, 1997-Ohio-287. There is no need to balance these factors, however, "[u]ntil there is some delay which is presumptively prejudicial." *Barker*, 407 U.S. at 530–31; *State v. O'Brien*, 34 Ohio St. 3d 7, 10 (1987). "A delay becomes presumptively prejudicial as it approaches one year in length." *State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954¶90 (citing *Doggett v. United States*, 505 U.S. 647, 652, n.1 (1992)).

Although it is unknown how long the current pandemic emergency may last, in most cases it is unlikely that the cumulative delay (accounting for other reasons why a trial may have been continued) will approach one year. Even if in some cases it does, that means only that a court will need to consider the remaining *Barker* factors. Absent unusual circumstances, those factors will permit a delay.

While each of the *Baker* factors must be considered when determining whether a delay is constitutionally permissible, "[t]he flag all litigants seek to capture is the second factor, the reason for delay." *United States v. Loud Hawk*, 474 U. S. 302, 315 (1986). As long as there is a "valid reason" for a delay, it should be justified. *Barker*, 407 U.S. at 531. When considering the reason for a delay, the U.S. Supreme Court has also examined which party should be held responsible for a delay. *See Doggett v. United States*, 505 U.S. 647, 651 (1992).

The question, then, is whether a pandemic emergency is a valid reason for a delay. For the reasons discussed above, it is. It poses a health threat to jurors, court personnel, and defendants themselves. As a result, it poses a public-health threat to the entire community in which jurors, court personnel, and anyone else in the courtroom live. The nature and requirements of jury service means that this threat cannot be mitigated or

reduced by implementing the social-distancing measures that health experts have recommended.

Additionally, any trial delays that are caused by a pandemic emergency are attributable to neither the State nor the defendant. In that respect, a nationwide pandemic emergency is akin to a natural disaster. *Cf. State v. Gibson*, 971 So. 2d 389, 393–94 (La. Ct. App. 2007) (Delays caused by Hurricane Katrina were not attributable to either party). Delaying a trial for that reason does not reflect the type of gamesmanship that would warrant "the unsatisfactorily severe remedy of dismissal of the indictment." *See Barker*, 407 U.S. at 522, 531 ("A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."); *see also Doggett*, 505 U.S. at 656–58.

It is important to conclude by emphasizing an important point. The right to a speedy trial is a foundational guarantee. While the law, as summarized in this opinion, recognizes that the right is not always defined by a specific, absolute number of days, it is not infinitely elastic. Any tolling of time due to the current public health emergency must be limited by the actual duration of that emergency.

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Based on the foregoing, it is my opinion, and you are hereby advised that, courts may suspend jury trials to prevent the spread of the novel coronavirus, and they may do so consistent with state and federal speedy-trial obligations.

Respectfully,

DAVE YOST
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