

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)
VERSUS)
PETER FRANK JOEL GARCIA VILA)

CRIMINAL NUMBER FE-2019-0000939

INDICTMENT – AGGRAVATED SEXUAL
BATTERY (2 Counts)

ORDER

Before the Court is the question of whether the time period during which this Court is not conducting criminal jury or bench trials due to the COVID-19 emergency is excludable from the time limits set forth in Virginia Code Section 19.2-243, pursuant to provision 7 of the statute. The Court issued a *sua sponte* Order concerning this matter on March 20, 2020 and set a briefing schedule and a hearing date. The Court has reviewed the briefs that have been filed in this matter and has now presided over the hearing. Therefore, the matter is ripe for decision.

For the reasons stated herein, and on the record, the Court finds that the time period between which the above-entitled matter was set for trial and continued pursuant to the COVID-19 emergency, and the time period up to and including the date the matter is now set for trial pursuant to this Order, is excluded from the time limits set forth in the Virginia Code.

Background

A. The Governor’s Orders

On March 12, 2020, the Governor of Virginia, Ralph S. Northam, issued Executive Order Number 51, entitled *Declaration of a State of Emergency Due to Novel Coronavirus (Covid-19)*. That Order read in part: “I declare that a state of emergency exists in the Commonwealth of Virginia to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat. The anticipated effects of COVID-19 constitute a disaster as described in § 44-146.16 of the *Code of Virginia (Code)*.”¹ The time period covered by the Governor’s Declaration was March 12, 2020 until June 10, 2020, unless “sooner amended or rescinded by further executive order.”

On March 20, 2020, the Governor issued *Amended Order of the Governor and State Health Commissioner Declaration of Public Health Emergency*. That Order, in pertinent part, prohibited more than 10 patrons in restaurants, fitness centers and theaters.

¹ Va. Code Ann. § 44-146.16 defines “disaster”, in pertinent part, as follows: “‘Disaster’ means ... (ii) any natural disaster including ... communicable disease of public health threat. . . .”

On March 23, 2020, the Governor issued Executive Order 53 entitled *Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (Covid-19)*. That Order noted that “COVID-19 presents an ongoing threat to our communities” and that the State “must take additional long term action to mitigate the impacts of this virus on or Commonwealth.” Among other provisions, the Order: (1) Prohibited “all public and private in person gatherings of 10 or more individuals”; (2) Suspended “all in-person instruction at K-12 schools, public and private, for the remainder of the 2019-2020 school year”; (3) Closed “all dining and congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets; and (4) Closed all “public access to recreation and entertainment businesses,” to include theaters, museums, fitness centers, beauty salons and barbershops, indoor public amusement facilities.

Although “law enforcement agencies” and “operation of government” were excluded from the March 23, 2020 Order, these three Orders, taken together, reflect the severity and unprecedented nature of the public health crisis confronting the Commonwealth, the Nation and the rest of the world.

B. The Chief Justice’s March 16, 2020 Order

On March 16, 2020, the Chief Justice of the Supreme Court of Virginia, Donald W. Lemons, issued an Order entitled *In Re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency*. That Order read in part:

[P]ursuant to Virginia Code § 17.1-330², this Order declaring a judicial emergency is hereby issued for all district and circuit courts of the Commonwealth to protect the health and safety of court employees, litigants, judges, and the general public. This Order shall be in effect from today, Monday, March 16, to Monday, April 6, 2020, and is hereby ORDERED that NON-ESSENTIAL, NON-EMERGENCY court proceedings in all circuit and district courts be and hereby are SUSPENDED and all deadlines are hereby tolled and extended, pursuant to Va. Code § 17.1-330(D)³, for a period of twenty-one (21) days, and all circuit and district courts shall implement the following measures absent a specific exception as listed below:

1. Continue all civil, traffic and criminal matters, including jury trials, subject to a defendant’s right to a speedy trial, with the exception of emergency matters, including

² Va. Code Ann. § 17.1-330 is entitled “Declaration of judicial emergency” and sets out the procedures for the declaration of a judicial emergency “when a disaster, as defined in § 44-146.16, substantially endangers or impedes the operation of a court, the ability of persons to avail themselves of the court, or the ability of litigants or others to have access to the court or to meet schedules or time deadlines imposed by court order, rule, or statute.”

³ Va. Code Ann. § 17.1-330(D) reads as follows: “Notwithstanding any other provision of law, such order may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders in any court processes and proceedings, including all appellate court time limitations.”

but not limited to, quarantine or isolation matters, arraignments, bail reviews, protective order cases, emergency child custody or protection cases, and civil commitment hearings. Judges may exercise their discretion with regard to proceeding with ongoing jury trials, and in cases where the defendant is incarcerated.”

* * *

Nothing in this Order shall preclude the chief district and chief circuit judges from implementing additional local policies as needed. * * * This Order may be extended for additional period not to exceed twenty-one (21) calendar days or for the duration of the threat, by a majority of the justices of the Supreme Court to mitigate the risks potential spread of COVID-19.

C. The Chief Judge’s March 16, 2020 Order

On March 16, 2020, subsequent to the issuance of the Chief Justice’s Order, this Court issued a memorandum entitled: *Updated and Amended Memorandum Covid-19 Contingency/Action Plan Fairfax County Circuit Court Ordered Procedures*. That memorandum stated in part: “All criminal trials, both jury and bench, are suspended for the next thirty (30) days through April 17, 2020. These cases will be set for status on the criminal term day docket on May 21, 2020 at 10:00 a.m., unless the parties agree to appear telephonically and set a new trial date in calendar control.” The March 16, 2020 memorandum was incorporated into an Order issued by the Chief Judge of the Fairfax Circuit Court, dated March 16, 2020.

D. The Chief Justice’s March 27, 2020 Order

On March 27, 2020, the Supreme Court of Virginia Ordered “that the declaration of judicial emergency be in effect and continue beginning April 6 through April 26, 2020, for all district and circuit courts of the Commonwealth. The Order states that, absent a specific listed exception, the “court shall continue all civil, traffic and criminal matters, including jury trials, except for emergency and other matters as provided in this Order.” In addition, the Order states in part the following:

- “With the exception of matters enumerated herein, all applicable deadlines, time schedules and filing requirements, including any applicable statute of limitations which would otherwise run during the period this order is in effect, are hereby tolled and extended, pursuant to Va. Code Section 17.1-330(D), for the duration of this Order.”
- “In any matter heard or considered by a court as provided in this order, judges shall exercise their discretion as necessary in determining whether the matter is urgent and must be heard without delay in order to protect important liberty and constitutional interests and the health and safety of the parties, and others necessarily involved and affected by the proceedings.”
- “The court’s determination that a criminal case must be heard in order to avoid violating a defendant’s right to a speedy trial shall be made by the presiding judge on a case by case basis. Among other things, considerations may include the liberty interests of the defendant, and the health and safety of the parties, attorneys, court personnel, and others necessarily involved and the ability of the court to

safely proceed, taking into account the ability of the court to use technology as authorized by law, social distancing and other measures.”

- “Judges should exercise their discretion with regard to holding ongoing jury trials, grand jury proceedings, cases where the defendant is incarcerated, foster care cases, and child dependency cases. The exercise of discretion should focus primarily on considerations of liberty and constitutional interests at stake, the health and safety of the parties, attorneys, court personnel, and others necessarily involved, and the ability of the court to safely proceed, taking into account the ability of the court to use technology as authorized by law, social distancing and other measures.”

Decision

A. The Issues Before the Court

Before the Court are three principal issues: The first issue is whether the coronavirus pandemic is a “natural disaster” as that term is used in Va. Code Section 19.2-243. The second issue is whether the pandemic – if found to constitute a “natural disaster” – necessitates a delay in the trial of this matter. As the Supreme Court makes clear, this is a discretionary decision requiring the Court to consider a number of factors in the context of the particular circumstance of this Defendant and this case. The third issue is whether the Defendant’s right to a speedy trial under the Sixth Amendment and under Article I, Section 8 of the Virginia Constitution is violated by a delay in the trial of this matter.

1. Is the coronavirus pandemic a “natural disaster”?

Virginia Code Section 44-146.16 answers this question. It states in part that a “natural disaster” includes a “communicable disease of public health threat,” which is defined as “an illness of public health significance, as determined by the State Health Commissioner in accordance with regulations of the Board of Health, caused by a specific or suspected infectious agent that may be reasonably expected or is known to be readily transmitted directly or indirectly from one individual to another and has been found to create a risk of death or significant injury or impairment; this definition shall not, however, be construed to include human immunodeficiency viruses or tuberculosis, unless used as a bioterrorism weapon.” On February 7, 2020, the State Health Commissioner declared COVID-19 “a disease of public health threat.” See *Amended Order of the Governor and State Health Commissioner Declaration of Public Health Emergency* (March 20, 2020).

Given the fact that, as of today, 122,653 United States residents have been infected and 2,112 have died,⁴ and given the fact that, as of today, 1,020 Virginia residents have been infected and 25 have died,⁵

⁴ Coronavirus Disease 2019 Cases in U.S., Centers for Disease Control and Prevention, [CDC.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html) (accessed on March 30, 2020).

⁵ COVID-19 in Virginia, Virginia Department of Health, www.vdh.virginia.gov/coronavirus/ (accessed on March 30, 2020).

and given the fact that, as of today, 188 Fairfax residents have been infected and two have died,⁶ there is no question but that the coronavirus pandemic is a “communicable disease of public health threat” and, therefore, constitutes a “natural disaster.”

2. Does this natural disaster necessitate a delay in the trial of this matter?

A. Nature of the Case

1. Date of Arrest: July 1, 2019.
2. Date of Preliminary Hearing: December 5, 2019.
3. Date of Indictment: December 16, 2019.
4. Charge(s): Aggravated Sexual Battery (2 Counts).
5. Amount of time in custody on the instant charges: October 15, 2019-Present.
6. Date that time limits set forth in VA. Code Section 19.2-243 will run if a “natural disaster” exclusion is not found: May 4, 2020.
7. Estimated number of Commonwealth witnesses, if available: 6 witnesses per the Commonwealth.
8. Estimated number of Defense witnesses, if available: 2-3 witnesses per the Defense.

B. The Impact of the Coronavirus Pandemic on a Potential Jury Trial

The Court finds that it cannot conduct a jury trial in this case on the schedule previously set without endangering the health and safety of potential jurors, actual jurors, actual alternative jurors, prosecutors, defense counsel, the defendant, deputy sheriffs, clerks, court reporters, victim service personnel, interpreters (as necessary), other court personnel, witnesses – and all those persons with whom these individuals are in close contact, such as their families.

The Chief Justice’s March 27, 2020 Order states that in determining a speedy trial issue, such as the one now before the Court, “considerations may include the liberty interests of the defendant, and the health and safety of the parties, attorneys, court personnel, and others necessarily involved and the ability of the court to safely proceed, taking into account the ability of the court to use technology as authorized by law, social distancing and other measures.”

The “liberty interests” of the defendant is clear. He is incarcerated pending trial. Any period of delay necessitated by this natural disaster will result in further incarceration of the defendant. Against this circumstance the Court must consider the “health and safety” of all trial participants and the “ability of the court to use technology as authorized by law, social distancing and other measures.”

For the following reasons, the Court finds that it cannot protect the “health and safety” of the trial participants if it conducts a jury trial in the midst of this judicial emergency and pandemic.

First, the key issue in preventing the spread of the coronavirus is “social distancing.” As the Governor said in his March 23, 2020 Executive Order: “Unnecessary person-to-person contact increases

⁶ COVID-19, Fairfax County Government, <https://www.fairfaxcounty.gov/covid19/> (accessed on March 30, 2020).

the risk of transmission and community spread. Consequently, we must limit such interactions to those necessary to access food and essential materials.” Similarly, the Centers for Disease Control and Prevention (hereafter “CDC”) advises “[o]lder adults, 65 years and older” to “Stay home”.⁷ The CDC advises all persons to “[p]ut distance between yourself and other people if COVID-19 is spreading in your community.”⁸ The CDC also explains what it means by “distance”: “Based on what is currently known about the novel coronavirus and similar coronaviruses that cause SARS and MERS, spread from person-to-person with these viruses happens most frequently among close contacts (within about 6 feet).”

The Court finds that *consistent* “social distancing” in the context of a felony jury trial is not possible. Beginning with the pool of jurors who are summoned for jury duty, the jurors must first get to Court. For many jurors, especially in a large county like Fairfax, this will require travel on buses, or the Metro, or travel in cabs, or by Uber or Lyft. Some jurors must use a combination of buses, Metro, and cars, with each means of transport presenting another opportunity for viral exposure. They then enter the courthouse and go through a screening process, which may necessitate close inspection by a security officer. They then check in with the jury clerk and settle down for what may be a multi-hour wait. They are subsequently led to the courtroom by a bailiff and seated in the jury box. In the close confines of a courtroom, it will not be possible to keep jurors consistently six feet apart from each other, or from the deputy sheriff, or from the witnesses who are approaching the witness chair, and from each other. The jury box itself is a confined space with 14 seats. Placing each juror six feet away from every other juror, and six feet away from everyone else in the courtroom, is a practical impossibility, even if the Court added an additional row of jury seating in front of the jury box.

Further, placing jurors somewhere other than the jury box, perhaps spread out throughout the courtroom, will present problems of its own. These problems fit into six primary categories. First, there is the problem of jurors sitting 30, 40, 50 (or more) feet from the witness and being able to hear the witnesses, attorneys and the Court, even with the use of courtroom amplification technology. Second, there is the problem of jurors spread out through the courtroom and being able to see the exhibits. There are two ways this can be mitigated, but both are problematic. One way is to hand exhibits from juror to juror, which defeats the goal of “social distancing.” The other way is to publish the exhibits on the large screens in the courtroom. While this may be suitable for some exhibits, it may not be at all suitable given the nature and sensitivity of some of the exhibits, and privacy concerns, even with the limitations imposed on courtroom attendance.⁹ In addition, even with the Court’s large screens, it is often not possible to see pertinent details. Third, having jurors seated throughout the courtroom presents security

⁷ Coronavirus Disease 2019: Older Adults, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html> (accessed on March 30, 2020).

⁸ Coronavirus Disease 2019: How to Protect Yourself, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (accessed March 30, 2020).

⁹ See Paragraph 7 of the Chief Justice’s March 27, 2020 Order: “The court shall limit courtroom attendance in any matter that cannot be continued to attorneys, parties, necessary witnesses, interpreters, court personnel, court reporters, bailiffs and those deemed necessary by the presiding judge, and members of the press where permitted by law.”

issues, including ensuring no inappropriate or inadvertent communication with jurors by other individuals seated in the gallery or entering the courtroom, and also ensuring that jurors do not inadvertently see or hear inadmissible material. Fourth, normal juror seating permits counsel and the Defendant to be looking at the jury whenever they wish and vice versa; in contrast, seating jurors throughout the courtroom means that counsel will be questioning witnesses with their backs to the jury and that the Defendant will be facing away from the jury as well. Fifth, what do you do with the jury during trial recesses and breaks? They cannot remain in the courtroom and they cannot be in the jury room, due to its limited size. Perhaps jurors could be returned to the jury assembly room, if there are not other jurors or other juries in the room at the time, but that will require transporting the jurors through the hallway, maintaining proper separation, and ensuring no inadvertent or inappropriate contact with witnesses or other individuals. Sixth, we tell all jurors at the beginning of *voir dire* that if for privacy reasons they wish to give an answer at the bench, they may do so. Typically, that leads to a close gathering at the bench involving the judge, court reporter, attorneys, the Defendant (if he or she chooses to attend), and the juror, with everyone within a foot or two of each other.

These various “social distancing” problems do not end at the moment the matter is submitted to the jury for deliberations. Rather, if anything, they multiply. Jury deliberations typically take place in a mid-size conference room which comfortably sits a 12-person jury. None of our jury rooms, however, could accommodate a 12-person jury that needs to be separated from one another by six feet. Therefore, the jury would need to conduct its deliberations either in the courtroom itself or some other large space. This presents its own set of problems. First, if deliberations are conducted in the courtroom, where do you put the jurors every time there is a jury note or other issue that requires the jurors to be excluded from the courtroom? Second, jurors typically and frequently need to be in close proximity to each other to examine documents and tangible evidence, which will not be possible if the jurors are practicing “social distancing.” Third, can a jury meaningfully deliberate when every juror is at least six feet apart from every other juror, meaning potentially some jurors will be multiple yards away from other jurors. Fourth, jurors examining evidence will inevitably and unavoidably be handing or passing the evidence to each other, which will also defeat “social distancing.”

And this is just the jury. Witnesses – civilian and police officers – subpoenaed to Court to testify at trial will face similar “social distancing” problems. Victim service personnel, who typically sit right next to victims in order to be a source of comfort and to explain proceedings, will need to sit several feet away. Prosecutors and defense attorneys will face similar and constant difficulties in maintain social distancing, as well as bailiffs handing exhibits to witnesses, to the Court, to the clerks. Something as routine as using an exhibit at trial typically involves an attorney handing the exhibit to the bailiff who hands it to the clerk, who marks it with an exhibit sticker, returns it to the bailiff, who returns it to the attorney or to the witness, and then ultimately retrieves it and hands it back to the clerk. Each of these contacts is at odds with “social distancing.” And then there is the issue of bench conferences during the trial, which places counsel, the Defendant, the court reporter and the Court in close proximity to each other.

In short, while the Court can impose some periods of “social distancing” – for example, in the jury assembly room – the Court cannot impose it consistently, effectively and throughout the proceedings.

Further, proximity to potentially-affected individuals is not the only concern. As the CDC states: “Current evidence suggests that novel coronavirus may remain viable for hours to days on surfaces made

from a variety of materials.”¹⁰ Thus, the CDC also provides recommendations for cleaning and disinfecting “frequently touched surfaces (for example: tables, doorknobs, light switches, handles, desks, toilets, faucets, sinks.)”¹¹ In a jury trial, frequently touched surfaces would include tables, railings, the witness box, screens for the exhibition of exhibits (some of which actually are intended to be touched to identify points of significance), as well as the restrooms, light switches, doors, etc. Moreover, in a jury trial, it is anticipated that jurors will handle exhibits, and pass the exhibits to each other. Some of the exhibits will be papers but many will be tangible objects whose surfaces may present the same types of concerns that animated the CDC to issue these warnings.

A further concern is the challenge of selecting a jury that represents a fair cross-section of the community, in light of the need to excuse all jurors who are self-quarantined, infected with the coronavirus, otherwise ill, taking care of an ill relative, taking care of children under the age of 16, or otherwise in a “high-risk” category. See Paragraph 9 of the Chief Justice’s March 27, 2020 Order. According to the CDC, high risk individuals include: “Older adults, 65 years and older”; “People with chronic lung disease or moderate to severe asthma”; “People who have serious heart conditions”; “People who are immunocompromised including cancer treatment”; “People of any age with severe obesity”; People with “diabetes, renal failure or liver disease”; and, CDC suggests, possibly “People who are pregnant.”¹² In addition, it is anticipated that even jurors who are young and otherwise healthy will seek exemptions from jury duty knowing that it would put them in close proximity to other jurors and place them, and others, at risk.¹³ Moreover, the same issues impacting jurors will inevitably impact witnesses as well.¹⁴

¹⁰ Coronavirus Disease 2019: Cleaning and Disinfecting for Households, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/cleaning-disinfection.html> (last accessed March 30, 2020).

¹¹ Coronavirus Disease 2019: Cleaning and Disinfecting for Households, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/cleaning-disinfection.html> (last accessed March 30, 2020).

¹² Coronavirus Disease 2019: People at Higher Risk, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

¹³ See *15 Days to Slow the Spread*: “Even if you are young and otherwise healthy, you are at risk – and your activities can increase the risk of contracting the Coronavirus for others.” White House Healthcare (March 16, 2020), <https://www.whitehouse.gov/articles/15-days-slow-spread/>.

¹⁴ While some witnesses in a felony jury trial may be able to testify by “two-way electronic audio-visual communication,” see the Chief Justice’s March 27, 2020 Order at Paragraph 5, the Defendant’s Sixth Amendment Confrontation Clause rights may be implicated with respect, in particular, to key Commonwealth witnesses. See, generally, *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).

A further significant consideration is juror distraction for those jurors who ultimately are selected to serve on a jury. The Court has grave reservations as to whether jurors will be able to focus on the critical task before them, given the consuming and ongoing concerns about the pandemic, given the fact that many jurors will have older school children at home who are unattended, given jurors' inevitable concerns about elderly relatives or family members or friends or co-workers at high risk, given the economic difficulties associated with the pandemic, and given the jurors' own anxiety about potential virus exposure in and about the courtroom, the jury room, the restrooms, and the courthouse itself.

As to technology, it has been an invaluable help in this emergency for the conduct of bond motions and arraignments. But in a jury trial, or even a bench trial, presenting a witness by video may present confrontation clause issues. Further, technology will not solve the jury problems described above, nor the handling of evidence in the courtroom, nor facilitate "social distancing" by the jury during trial or deliberations.

The grave concerns identified in this Order with regard to seating a jury and conducting a jury trial in the midst of the coronavirus pandemic is shared by other trial courts facing identical issues. For example, on March 23, 2020, the Chief United States District Judge for the Eastern District of Virginia, the Honorable Mark S. Davis, issued an Order explaining in detail the Court's rationale for excluding "Court-ordered suspensions from the Speedy Trial clocks governing the time for filing indictments, and the time for commencing a jury trial...." The Court's Order reads in part as follows:

As referenced in General Order 2020-02, the process of selecting a grand or petit jury for federal proceedings in this District inherently involves a crowded courtroom, sometimes requiring prospective jurors to spend an entire day, or longer, crowded onto bench seats where they cannot avoid physical contact with the individuals sitting next to them. Moreover, in order to accommodate peremptory challenges and challenges for cause, the 'jury pool' from which a jury is selected for a criminal trial typically ranges from 45 to over 100 prospective jurors. Similarly, the process of empanelling a new grand jury involves between 85 and 100 prospective grand jurors.

At the conclusion of the jury selection process, the petit jury in a criminal case must consist of twelve jurors, and two alternates are frequently selected by the Court, bringing the total number of jurors to fourteen. * * * As to both grand and petit juries, the jurors are required to sit closely together in the jury box and/or jury room and they spend the majority of the day sharing the same confined space. Therefore, even if this Court could manage to safely select a jury in the midst of the COVID-19 outbreak, the Court could not adequately protect the safety of jurors in light of the fact that they need to sit together, listen to evidence together, and deliberate together through group collaboration and discussion. Such group collaboration involves more than sharing a confined space, as the jurors frequently must handle the same physical evidence, and routinely experience other forms of prolonged close contact within the group of more than ten individuals, many of whom routinely fall in the age range identified by the CDC and the president as a high-risk group.

In addition to the obstacles presented above, the Court's communication with the U.S. Attorney and the Federal Public Defender have highlighted shared concerns about

the practical ability of the Court to effectively seat a jury during the current state of emergency declared in Virginia and the United States. Notably, even if a sufficient number of prospective jurors complied with their summons and appeared at the relevant courthouse, the Court has grave concerns as to whether jurors could provide their full and complete attention during a multi-day or multi-week federal trial in light of the health risks, and the fact that many younger individuals who do not fall into a high risk group may be struggling with the fact that their young children have recently been ordered home from school. Seating a distracted jury and/or a jury impatient to end the trial in order to promote their own physical well-being and to care for loved ones would result in a miscarriage of justice and undermine the fairness and integrity of our criminal justice system.

In re: Administrative Order Regarding Computation of Time Under the Speedy Trial Act, 18 U.S.C. Section 3161, General Order No. 2020-06, Case No. 2:20mc7, United States District Court for the Eastern District of Virginia (March 23, 2020) (Emphasis in Original).

THEREFORE, the Court finds that a continuance of the trial is necessitated – in other words, “caused” – by the coronavirus pandemic “natural disaster.” See Virginia Code 19.2-243. The Court would note that this finding is consistent with decisions currently being issued by the state courts¹⁵ and federal courts¹⁶ of our country.

¹⁵ See, e.g., *Order Declaring A Judicial Emergency*, Supreme Court of the State of Delaware (March 13, 2020) (declaring a judicial emergency for a 30 day period and tolling “all time requirements under the Speedy Trial Guidelines”), *In re: COVID-19 Emergency Procedures in the Florida State Courts*, Florida Supreme Court, No. AOSC20-13 (March 13, 2020) (“WHEREAS, a public health emergency currently exists in the Florida State Courts System that requires mitigation of its effects by adopting ‘social distancing’ measures meant to reduce the increase in person-to-person transmission of the virus that causes COVID-19,” the Court suspends “[a]ll grand jury proceedings, jury selection proceedings, jury selection proceedings, and criminal and civil jury trials” from March 16 through March 27 or “as provided by subsequent order” and suspends “[a]ll time periods involving the speedy trial procedure, in criminal and juvenile court proceedings...” from March 13 to March 30 “or as provided by subsequent order.”), and *In Re The Matter of Jury Trials During the COVID-19 Pandemic*, Supreme Court of Wisconsin (March 22, 2020) (“[T]he ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial. . .”).

¹⁶ See, e.g., *In re: Extension to the Modifications of Court Operations: Supplement to General Orders 2020-02 and 2020-003*, United States District Court for the Eastern District of Virginia, Case No. 2:20mc7 (March 24, 2020) (“For the same reasons stated above outlining the day-to-day evolution of state-wide shutdowns and increasing community spread of COVID-19-reasons that highlight the necessity of a further continuance of all in-person proceedings other than critical or emergency proceedings – and for the reasons explained in detail in General Order 2020-06, to include the procedural challenges to seating a jury in the midst of the COVID-19 pandemic, the following time periods are hereby excluded from the relevant speedy trial calculations pursuant to 18 U.S.C. Section 3161(h)(7)(A)...”), *In Re: Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus*, United States District Court for the Western District of Washington, General Order No. 01-20 (March 6, 2020) (“With regard to criminal matters, due to the Court’s reduced ability to obtain an adequate spectrum of jurors and the effect of the above public health recommendations on the availability of counsel and Court staff to be present in the courtroom [regarding social distancing], the

3. Constitutional Implications of a Trial Delay¹⁷

The Court does not find that the period of delay imposed by this Order violates either the Defendant's speedy trial rights under the Sixth Amendment or under Article 1, Section 8 of the Virginia Constitution.

As the Supreme Court of Virginia said in *Howard v. Commonwealth*, 281 Va. 455, 462 (2011) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)): "A claim of a violation of speedy trial rights under the federal constitution is resolved by the balancing of four factors – length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant." Here, the length of delay is for a limited duration.

As to the reason for delay, the coronavirus pandemic is a unique and catastrophic crisis of a dimension and consequence that has few rivals in American history. The third factor – the defendant's assertion of his rights – is present in this case, the defense having noted its objection. The fourth factor is prejudice to the Defendant.¹⁸ This is not solely an issue of the prejudicial impact of delay itself on an incarcerated defendant but also the impact of delay on related issues, such as defense witnesses becoming unavailable by virtue of delay. Each case "should be examined individually to determine the extent of the defendant's harm, if any, and whether that harm merits dismissal of the charges. The defendant's right to speedy trial is 'necessarily relative.... It does not preclude the rights of public justice.'" *Beachem v. Commonwealth*, 10 Va. App. 124, 130 (1990) (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

The Court does not find that the Defendant in this case is prejudiced by the delay imposed by this Order. While this will extend the period of the Defendant's pre-trial incarceration, and that is to be

time period of the continuances implemented by this General Order will be excluded under the Speedy Trial Act...."), *In Re: Coronavirus COVID-19 Public Emergency*, United States District Court for the Northern District of Illinois, General Order 20-0012 (March 12, 2020) ("The time period of any continuance entered through April 6 as a result of this order shall be excluded under the Speedy Trial Act, 18 U.S.C. Section 3161(h)(7)(A), as the Court finds that the ends of justice served by taking that action outweigh the interests of the parties and the public in a speedy trial."), and *In Re: Coronavirus/COVID-19 Pandemic*, United States District Court for the Southern District of New York, M10-468 (March 13, 2020) ("The time period of any continuance entered as a result of this order shall be excluded under the Speedy Trial Act....").

¹⁷ The Defendant, in his March 23, 2020 *Defendant's Objection to the Court's Order Continuing His Trial*, objected on both statutory and constitutional speedy trial grounds. The Court addresses both issues in this order. However, in light of the fact that this matter was set for a 19.2-243 hearing, the Defendant is not precluded from raising additional constitutional objections regarding speedy trial rights.

¹⁸ "[T]here is no requirement that prejudice be established, but evidence relating to these factors is considered, together with any other circumstances as may be relevant, and balanced in determining whether a constitutional violation has occurred." *Howard v. Commonwealth*, 281 Va. at 462 (citation omitted).

avoided if possible, here it is not possible. Further, the Court does not find there to be other circumstances that warrant a finding of prejudice.¹⁹

Therefore, the Court does not find there to be a Sixth Amendment or Article 1, Section 8 constitutional speedy trial violation.

Conclusion

For the foregoing reasons, the following time period is excluded from the calculation of time period limitations under VA. Code 19.2-243:

FROM: Date scheduled for trial and continued due to emergency: March 23, 2020

TO: New trial date: May 18, 2020²⁰

SO ORDERED, THIS 30 DAY OF MARCH, 2020.



JUDGE RANDY I. BELLOWS

¹⁹ See, generally, *Arnold v. Commonwealth*, 18 Va. App. 218 (1994), *Wallace v. Commonwealth*, 65 Va. App. 80 (2015), and *Holliday v. Commonwealth*, 3 Va. App. 612 (1987).

²⁰ This date was set at Calendar Control on March 23, 2020 based on the current emergency. The Defendant did not waive his speedy trial objections. The Court advised Counsel at the hearing on today's date that either the Commonwealth or the Defense may seek to advance the trial date at Calendar Control.