NO. XXXXXX

THE STATE OF TEXAS § IN THE [XXX]DISTRICT

VS. § COURT OF

[DEFENDANT] § TARRANT COUNTY, TEXAS

# STATE’S OBJECTION TO IN-PERSON HEARING AND MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through the undersigned Assistant Criminal District Attorney of Tarrant County, Texas, in the above‑styled and numbered cause, submits its State’s Objection to In-Person Hearing and Motion for Continuance pursuant to Article 29 of the Texas Code of Criminal Procedure and in support of the Motion would show:

**I.**

The above-styled and numbered cause is presently set for a Contested Sentencing Hearing on [DATE].

**II.**

 On May 27, 2020, the Supreme Court of Texas issued its “Seventeenth Emergency Order Regarding the COVID-19 State of Disaster.” *See Seventeenth Emergency Order*, No. 20-9071 (Tex. May 27, 2020). The Court order stated:

Courts must not conduct in-person proceedings contrary to guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions. Prior to holding any in-person proceedings on or after June 1, 2020, a court must submit an operating plan that is consistent with the requirements set forth by the Office of Court Administration’s Guidance for All Court Proceedings During COVID-19 Pandemic issued on May 4, 2020. Courts must continue to use all reasonable efforts to conduct proceedings remotely.

*Seventeenth Emergency Order* at 2. The Office of Court Administration (OCA) has issued “Guidance for All Court Proceedings During COVID-19 Pandemic (For Proceedings on or after June 1, 2020)”. *Court Operation Guidance: Guidance*, TXCourts.gov, *available at* https://www.txcourts.gov/court-coronavirus-information/court-guidance/ (last visited May 27, 2020) (OCA Guidance). The OCA Guidance provides:

* **Courts should use all reasonable efforts to conduct proceedings remotely.**

All proceedings, both essential and non-essential, should occur remotely (such as by teleconferencing, videoconferencing, or other means) unless litigants or other court participants are unable to successfully participate in a remote hearing for reasons beyond the court’s control.3 Courts may need to conduct hybrid hearings in certain proceedings.

* **Prior to any court holding in person proceedings**, other than essential hearings that cannot be conducted remotely because doing so is not possible or practicable, the local administrative district judge for a county or the presiding judge of a municipal court, as applicable, must submit an operating plan for all courts in the county or municipality to the Regional Presiding Judge.

*Id*. (emphasis in original). Examples of essential proceedings include criminal magistration proceedings, CPS removal hearings, temporary restraining orders/temporary injunctions, juvenile detention hearings, family violence protective orders, and certain mental health proceedings. *Id*. Sentencing hearings, such as the one scheduled in the present case, are not essential proceedings. *Id*.At the time of filing, an operating plan for Tarrant County courts has not been submitted by the local administrative district judge to the Regional Presiding Judge. Therefore, conducting sentencing hearings in person at the present time goes against the OCA Guidance and is prohibited by the Seventeenth Emergency Order. *Id*.; *Seventeenth Emergency Order* at 2.

In addition to the restrictions of the Seventeenth Emergency Order and the OCA Guidance, there exists additional sufficient cause to continue this case to a future date in line with the OCA Guidance. An in-person hearing during the current COVID-19 pandemic puts all participants involved in the hearing at great risk of contracting the virus. At a minimum, there will be [#] individuals present for the hearing: the Honorable Judge [XXXX], the undersigned Assistant Criminal District Attorney (or another Assistant Criminal District Attorney), the Honorable [XXXX] (counsel for defense), the Defendant, the Court Reporter, one or me deputy sheriff, and one or more witnesses [add any additional individuals]. Each of these individuals are potential carriers of COVID-19. At this time, neither the Tim Curry Criminal Justice Center nor the XXXth Judicial District Court has screening tools to determine whether an individual who enters the building or courtroom may have COVID-19. An in-person hearing exposes each participant to the unnecessary risk of contracting the virus. The risk of exposure can be avoided by continuing this proceeding until the threat of COVID-19 has decreased.

The risk of contracting COVID-19 may also deter the victim and/or witnesses from attending the proceeding. The victim has a right to attend the hearing and make a statement, and the defendant has the right to present his witnesses. *See* Tex. Code Crim. Proc. art. 42.03(b); U.S. Const. amend. VI. Such rights are best protected by continuing the proceeding to a time when victims and witnesses are not at risk of contracting COVID-19 by attending the hearing.

An additional concern with an in-person hearing during this time, is defense counsel’s ability to effectively communicate with the Defendant during the proceeding. Assuming the Court enforces social distancing requirements, defense counsel and the Defendant will have to sit at least six feet away from each other during the hearing. Social distancing will inevitably interfere with the Defendant’s ability to confer with his counsel during the hearing. A continuance to a time when social distancing requirements have been relaxed will alleviate this concern, as defense counsel and the Defendant will then be permitted to sit near each other.

The State contends that the aforesaid circumstances constitute sufficient cause for continuance pursuant to Article 29.03 of the Texas Code of Criminal Procedure.

**III.**

 As an alternative to an in-person hearing, the Court could order the sentencing hearing to be conducted remotely. This may be a viable option if the only participants were the trial court, the State, and the defense. However, defense counsel [Name] has indicated that he intends to present witnesses at the hearing. Presentation of witnesses would be difficult through a remote hearing.

A remote hearing raises the question of where the witness would testify from. If the witness were to testify from their own home, the Court would have no way to ensure that the witness is alone while testifying and not subject to undue influence of others. If a witness uses her own computer devices, she may open websites, documents, or other applications to assist in her testimony without the knowledge of the court. Further, the witness may not have adequate technology to facilitate testifying via video conference (no computer, no/poor internet, etc.). If the witness is to appear at the Tim Curry Criminal Justice Center and testify from a location outside of the courtroom, the logistics of this would need to be quickly determined. At a minimum, a deputy sheriff would be needed to monitor the witness as she testifies to ensure that the witness is alone and only accessing the trial court video conference while testifying. This option also poses similar COVID-19 exposure risks as an in-person hearing.

Admitting evidence through the use of remote witnesses could also present issues. For example, the Texas Rules of Evidence require the authentication or identification of evidence as a condition precedent to the admissibility of evidence. *See* Tex. R. Evid. 901(a). If a witness is needed to authentic a piece of evidence, the witness may not be able to properly view and identify the exhibit through a video conference.

Further, the Court would not be able to adequately observe the witnesses’ demeanor if witnesses testify remotely. At a sentencing hearing, the trial court is the sole judge of the credibility of the witnesses and weight to be given their testimony. *See Goodwin v. State*, 376 S.W.3d 259, 264 (Tex. App.—Austin 2012, pet. ref’d). A witness’s body language and demeanor plays a crucial role in whether she is worthy of belief. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). If the Court is only able to view a witness’s face and upper body through a video conference, it will not be able to adequately assess the witness’s credibility.

 Due to the complications that a remote hearing involving witnesses would entail, the State requests that the Court grant this Motion for Continuance.

**IV.**

This Motion for Continuance is not sought for delay or any other purpose other than to ensure the safety of each individual involved with the proceeding.

**V.**

By the signature below, the undersigned counsel for the State hereby certifies that Assistant Criminal District Attorney [NAME] has conferred with the Honorable [XXXX], defense counsel for [DEFENDANT], about the merits of this Motion and [Mr./Ms. XXXX] does not object to this Motion.

**VI.**

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays this Court grant this continuance for the reasons asserted herein.

 Respectfully Submitted,

 [SIGNATURE BLOCK]

**VERIFICATION**

STATE OF TEXAS §

 § KNOW ALL MEN BY THESE PRESENTS

COUNTY OF TARRANT §

“My name is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I am the attorney for the State in this case. I have knowledge of the facts stated in the foregoing Motion for Continuance and they are true and correct.”

Signed on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name of Affiant]

SWORN AND SUBSCRIBED TO BEFORE ME, the undersigned Notary Public on

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public in and for the State of Texas

NO. XXXXXX

THE STATE OF TEXAS § IN THE [XXX]DISTRICT

VS. § COURT OF

[DEFENDANT] § TARRANT COUNTY, TEXAS

#### ORDER ON THE STATE’S OBJECTION TO IN-PERSON HEARING AND MOTION FOR CONTINUANCE

On \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020, CAME ON FOR CONSIDERATION, the State’s Objection to In-Person Hearing and Motion for Continuance in the above numbered and entitled cause. After examining the State’s Motion on file with the Court, the Court finds and now holds that the State’s Motion for Continuance should in all things be GRANTED.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the State’s Motion for Continuance is hereby GRANTED and the scheduled [DATE] contested punishment hearing is continued to a later date mutually agreed upon by the parties and Court.

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 SIGNED on this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge Presiding