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March 19, 2020
For Immediate Release

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Dear Criminal Justice Stakeholders,

The way our current criminal justice system is designed, together with the emergence of a novel virus pandemic, has set the stage for potentially catastrophic consequences in the administration of justice in Idaho. Given the sheer number of incarcerated people in Idaho, the turnover in our county jails and holding facilities, the conditions under which they are detained, and the oncoming spread of the COVID-19 coronavirus, immediate changes must be implemented.

The Idaho Association of Criminal Defense Lawyers (IACDL), together with our national affiliate organization, is “calling for the prompt implementation of comprehensive, concrete, and transparent COVID-19 coronavirus readiness plan for the nation’s prison, jails, and other detention facilities.” The plans must include transparency, not just vis-à-vis incarcerated persons and staff at detention facilities, but also as concerns their loved ones, their communities, and the communities in which these facilities are located. Our organization represents over 400 attorneys who represent the criminally accused throughout the State, and our members are on the frontlines of the criminal court system every day. We have a keen interest that the health and well-being of our clients, their families, and our communities all be served while continuing to ensure the public safety.

Reasons for Concern

Recognizing that the coronavirus is spreading quickly among high concentrations of people in close proximity to one another, schools are being closed, conferences are being rescheduled, travel is being cancelled, and cruise ships are being quarantined. These are all sensible measures; but they also underscore the need to address the tens of thousands of Idahoans that are living

in conditions that are ripest for the spread of this contagious and deadly virus: those who are being held in our jails, prisons, and detention facilities.

According to the Center for Disease Control, the elderly and people with underlying medical conditions are most susceptible to falling severely ill with COVID-19. Both populations are well represented among incarcerated people. The National Commission on Correctional Health Care issued a report in 2017 that indicates the prison population of those over 65 is the fastest growing demographic in the nation's prisons.¹ Jail and prisons also house disproportionately large numbers of people with chronic illnesses and complex medical needs that many facilities are already less-equipped to treat.²

Similarly, the Idaho Supreme Court's recent adoption of Idaho Criminal Rule 28, **allows for judicial discretion in ignoring statutory speedy trial rights**. This rule ensures that we will see instances where rights—already granted by the legislature to guarantee that individuals will not be held in detention without a conviction—can easily be circumvented under the current circumstances, and that the entire burden of delays to criminal cases will be borne by the accused who have not yet been convicted but continue to be held in custody.

The IACDL thoughtfully joins the recommendations of thirty-one (31) prosecutors, representing eighteen (18) different states and the District of Columbia, in considering a number of measured responses in light of the coronavirus outbreak.³ Implemented policies should not only reevaluate those who are currently incarcerated, but also seek to assess whether certain individuals should even enter our detention facilities at this moment in time. These proposals would seek to

- (1) Achieve Reduction in Detention and Incarcerated Populations,
- (2) Ensure Humane Conditions of Confinement, and
- (3) Seek Health Care Measure and Protections for Confined Individuals

Reduce Detention and Incarcerated Populations

The IACDL urges local officials to stop admitting people to jail absent a **serious risk** to the physical safety of the community. As a result, the proper responsible agencies should:

- Adopt book-and-release policies for offenses that pose no immediate physical threat to the community, including the simple possession of controlled substances⁴;
- Release all individuals who are being detained solely because they cannot afford cash bail, unless they pose a serious risk to public safety;

¹ See <https://www.ncchc.org/report-examines-trends-in-u.s.-aging-prison-population> and [https://www.n4a.org/Files/n4a_AgingPrisoners_23Feb2017REV%20\(2\).pdf](https://www.n4a.org/Files/n4a_AgingPrisoners_23Feb2017REV%20(2).pdf) .

² See <https://www.prisonpolicy.org/blog/2020/03/06/pandemic/> .

³ See Joint Statement From Elected Prosecutors On COVID-19 And Addressing The Rights And Needs Of Those In Custody, March 2020, at <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> .

⁴ The Idaho Supreme Court issued a Resolution on March 18, 2020, which authorized a new Bond Schedule regarding Idaho Misdemeanor Criminal Rule 13 with “book and release” recommendations for only a short list of 12 different misdemeanors.

- Reduce the prison population to minimize the sharing of cells and ensure that there are sufficient medical quarantine beds, along with adequate staff, to promote the health and safety of staff, the incarcerated, and any visitors;
- Identify and release the following, unless doing so would pose a serious risk to the safety of the community:
 - the elderly,
 - vulnerable individuals (as defined by the CDC, for example, those with asthma, cancer, heart disease, lung disease, and diabetes),
 - people in local jails who are within 3 months of completing their sentences,
 - people incarcerated solely due to technical violations of probation and parole;
- Develop procedures and reforms that enable past lengthy sentences to be revisited and support release for those individuals who can safely return to the community; and
- Cease all requirements of pre-trial release that are in direct conflict with social distancing recommendations by local, state and national officials.

Guarantee Humane Conditions of Confinement

Every effort should be made by those agencies that operate detention facilities to ensure that those who must remain incarcerated have access to good healthcare, and that their basic rights are being met under these changing circumstances. Consequently, the involved organizations should work with sheriffs, the Department of Correction, and public health officials to:

- Eliminate medical co-pays for anyone in confinement;
- **Maintain access to counsel** and preserve family visitation rights as long as possible and with precautions that can address concerns around the introduction and spread of the virus in facilities;
- Make phone calls free and increase teleconferencing capacity and the means to help people stay connected to family and counsel; and
- Ensure that containment measures do not result in the denial of due process or statutory rights granted to ensure speedy trial guarantees or the access to counsel.

Establish Health Care Practices to Protect Confined Individuals

Criminal justice stakeholders ought to work with public health, corrections, immigration and various government leaders to:

- Avoid the use of widespread lock-downs or solitary confinement as a containment measure and implement more targeted quarantines to control the spread of infection;
- Educate those in custody and staff about the virus and the measure they can take to minimize their risk;
- Implement a humane plan for housing of persons who are not released but who are sick;
- Encourage and direct detention and corrections employees to stay home, with pay, if they feel sick;
- Provide free soap and CDC-recommended hand sanitizer, increased medical care, comprehensive sanitation and cleaning of facilities and other safety measures as recommended by the CDC for those who remain in custody.

In addition, Court Administrators and the Supreme Court must ensure that the various courts across the seven judicial districts equitably and consistently protect adequate access to courts, access to attorneys, the right to a speedy trial in criminal cases, and the due process rights afforded the accused under the Fifth and Sixth Amendments; and that even under the cloud of a public health emergency, Constitutional rights are not eroded.

The IACDL recognizes that in this moment, government agencies will be taxed with an overwhelming number of concerns and considerations. Unfortunately, we are facing a serious threat as a country, and it is our charge to protect communities as a whole and the most vulnerable and susceptible populations. It is likely that no measures taken will be able to avoid the slow spread of the virus, and the cost to life may be significant. However, it is in this moment, that the many stakeholders involved should take the opportunity to reassess and evaluate what will be the cost if we continue with our current methods and procedures.

We sincerely appreciate your consideration of these proposals and would be happy to work with any agencies who desire to address these concerns.

Sincerely,

The Executive Committee & Board of Directors
Idaho Association of Criminal Defense Lawyers

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March 19, 2020

Chief District Judge David C. Nye
550 W. Fort Street
Boise, Idaho 83724

Re: General Order No. 360 re Court Operations in Response to Coronavirus
(COVID-19) entered on March 17, 2020

Dear Chief Judge Nye:

Elisa Massoth and I write to you as the representative of the Criminal Justice Act panel and the Executive Director of the Federal Defender Services of Idaho, respectively, to raise our concerns regarding the portions of General Order No. 360 that impact criminal cases. While we understand that the COVID-19 pandemic is an unusual situation that is raising new and serious issues, this should not come at the expense of criminal defendants' constitutional rights. Criminal defendants, especially those who are being detained, are uniquely vulnerable during this crisis and we urge you to take special consideration of their needs.

First, the closing of the courthouse and courtrooms implicates criminal defendants' Sixth and First Amendment rights to public proceedings. *Waller v. Georgia*, 467 U.S. 39, 42 (1984). Both the public in general and the defendants' friends and family members in particular have a strong interest in attending court proceedings. *See United States v. Rivera*, 682 F.3d 1223 (9th Cir. 2012) (reversing where the court excluded the defendant's family from a sentencing hearing). Thus, in order for a total closure of the courtroom like that contemplated in General Order No. 360, the Supreme Court has established the following rules:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings

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specific enough that a reviewing court can determine whether the closure order was properly entered.

Walters, 467 U.S. at 45 (quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984)) (emphases added). The Ninth Circuit has identified a number of core values protected by the Sixth Amendment's right to a public trial: "(1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury." *United States v. Walters*, 627 F.3d 345, 360 (9th Cir. 2010) (quoting *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003)) (internal quotation marks omitted). This right to a public trial is not limited to matters before a jury and extends to pretrial and sentencing hearings. *Walters*, 627 F.3d at 360-61; *Rivera*, 682 F.3d at 1236.

Even a more limited, partial closure of the courtroom, as proposed by the United States Attorney's Office, requires the Court to follow certain specific procedures. First, before ordering a partial closure, the court must hold a hearing on the closure motion and give the defendant whose hearing will be partially closed an opportunity to be heard. *United States v. Sherlock*, 962 F.2d 1349, 1358 (9th Cir. 1989) (noting that where First Amendment concerns are raised, those excluded by the proceedings must be afforded an opportunity to object). "Second, the court must make factual findings to support the closure." *Id.* And finally, "the court must consider reasonable alternatives to closing the courtroom." *Id.* at 1359. Even a partial closure of the courtroom is disfavored under the law and we encourage the Court to consider alternatives, such as scheduling court hearings with plenty of time in between them so audiences will not overlap, requesting counsel notify the court of the number of anticipated attendees, advising attendees who are not household members to sit six feet apart, distancing attendees from court staff, etc.

Second, General Order 360 specifies that if a hearing is conducted before May 11, 2020, "it will be held with only the attorneys, the defendant, court personnel, and security personnel present." This appears to violate the Sixth Amendment confrontation and compulsory process clauses by excluding witnesses from the courtroom. The Supreme Court has found that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1987). The central concern of the confrontation clause is to "ensure the

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reliability of the evidence against the criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990). Face-to-face confrontation is not absolute, but “that does not, of course, mean that it may easily be dispensed with.” *Id.* at 850. “[O]ur precedents confirm that 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.” *Id.* (emphases added). The Sixth Amendment “constitutionalizes the right in an adversary criminal trial to make a defense as we know it.” *Faretta v. California*, 422 U.S. 806, 818 (1975) (citing *California v. Green*, 399 U.S. 149, 176 (Harlan, J. concurring)). This encompasses compulsory process—“the calling and interrogation of favorable witnesses.” *Id.* Unless the individual circumstances of a specific witness raises unique concerns, we believe that the defendants’ rights to call and confront witnesses should be unobstructed.

Third, General Order 360 makes a blanket continuance of all trials scheduled on or before May 11, 2020. We request individualized determinations of each criminal defendant under the Speedy Trial Act, including consideration of the severity and length of pretrial confinement and the limitations of access to counsel. In addition, we request the Court consider adopting the approach taken by other district judges who have issued a standing order that considers the COVID-19 pandemic a change in circumstances under the Bail Reform Act, 18 U.S.C. § 3145(f)(2), warranting reopening of a detention hearing. Particularly for criminal defendants who do not pose a risk of danger to any person or the community, but who are highly vulnerable to COVID-19, alternatives to pretrial detention should be seriously considered.

Very truly yours,



Samuel Richard Rubin
Executive Director
Federal Defender Services of Idaho



Elisa G. Massoth
CJA Panel Representative