

**FEDERAL PUBLIC DEFENDER
DISTRICT OF OREGON**

LISA C. HAY
Federal Public Defender
STEPHEN R. SADY
Chief Deputy Defender
Gerald M. Needham
Thomas J. Hester
Ruben L. Iñiguez
Anthony D. Bornstein
Susan Russell
Francesca Freccero
C. Renée Manes
Nell Brown
Kristina Hellman
Fidel Cassino-DuCloux
Alison M. Clark
Brian Butler +
Thomas E. Price
Michelle Sweet
Mark Ahlemeyer
Susan Wilk

**101 SW Main Street, Suite 1700
Portland, OR 97204
503-326-2123 / Fax: 503-326-5524**

Branch Offices:

859 Willamette Street
Suite 200
Eugene, OR 97401
541-465-6937
Fax: 541-465-6975

15 Newtown Street
Medford, OR 97501
541-776-3630
Fax: 541-776-3624

Oliver W. Loewy
Elizabeth G. Daily
Conor Huseby
Robert Hamilton
Bryan Francesconi
Ryan Costello
Irina Hughes ▲
Kurt D. Hermansen ▲
Devin Huseby +
Jessica Snyder π
Cassidy R. Rice π

In Memoriam
Nancy Bergeson
1951 – 2009

▲ Eugene Office
+ Medford Office
π Research /Writing Attorney

**LAW IN THE TIME OF CORONA:
FEDERAL DEFENSE EDITION**

**By Stephen R. Sady
March 16, 2020**

Federal criminal defense attorneys have special responsibilities during the coronavirus pandemic. As with all our compatriots, we are protecting families and communities by following the hygiene and social distancing instructions from the Centers for Disease Control ([here](#)). And we have responsibilities in our workplaces, both our offices and the courts. As reflected in Oregon Federal Public Defender Lisa Hay’s posting, we are working to protect our workmates, our clients, and all the players in the system by working remotely to the extent possible and by urging the court and the prosecutors to take substantial steps to limit courthouse functions and to decrease the number of people in custody ([here](#)). Prisons and jails are especially dangerous for all occupants because of the ease of rapid transmission of disease, which does not distinguish among prisoners, guards, and other justice system personnel.

Last Friday, Chief Judge Marco Hernández signed an order drastically limiting courthouse activity in the District of Oregon ([here](#)). This is a step in the right direction, but federal defense lawyers have a lot more to do. Our Sixth Amendment responsibility to each individual client requires us to reconcile the rules for our self-protection and the protection of others with our clients’ interests in liberty and safety.

For individual clients and the collective interests of all imprisoned persons (and their custodians), we need to do all we can to maximize safety by working for fewer people to be in detention.

At every stage of the criminal process, we need to evaluate what we can do for clients past and present. The prison and jail administrators have a common interest with our clients in moving prisoners out of custody. Here are some initial thoughts on how we can help our clients and reduce the number of incarcerated individuals during this national emergency:

Pretrial Release: We should review our case lists to determine whether, based on the national emergency and any new facts, clients previously detained could receive a conditional release. On a new arrest, I watched a defender successfully argue for release based on, among other factors, the World Health Organization's statistics demonstrating the client's health condition created greater vulnerability to coronavirus. Which makes perfect sense because one of the release factors is the person's physical condition, under 18 U.S.C. § 3142(g)(3)(A). Note also that, for pretrial detainees, "temporary release" to "another appropriate person" can be ordered where necessary for preparing the defense or "for another compelling reason." 18 U.S.C. § 3142(i).

Pending Cases: For clients who are out of custody awaiting a guilty plea or voluntary surrender, can those matters be deferred while safety in prison can be better assessed and assured? At sentencing, we can argue that judges should consider the safety of the client and others in prison in determining whether and how long to incarcerate. Vulnerability to physical attacks was recognized in the pre-*Booker* era when the Supreme Court approved a Second Circuit case that allowed departure under the mandatory Guidelines based on "potential for victimization" due to the defendant's "diminutive size, immature appearance, and bisexual orientation." *Koon v. United States*, 518 U.S. 81, 107 (1996) (citing *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990)). Vulnerability to coronavirus, especially for our sick, disabled, and aged clients, seems like a direct analogy to vulnerability to victimization by others in prison and a reason for non-custodial or reduced sentences. For our clients whose interests are hurt by delay, we need to take positions that may run counter to judicial and prosecutorial interests. For example, we need to fight for our clients' speedy trial rights when those interests conflict with the courts' institutional calls for delay. Similarly, clients likely to obtain a time served or other disposition allowing for release to the community should be resisting delays in sentencing hearings. We also need to do all we can to encourage probation and supervised release matters to be

handled by summons and without incarceration, with timing taking into consideration the national emergency.

Community Corrections: For prisoners serving a sentence who are within or approaching one year of their projected release date, we should be seeking maximum community corrections so they are no longer adding to the crowded and dangerous prisons. Under 18 U.S.C. 3624(c), Congress expanded the available time in community corrections to up to one year, with six months or ten percent, whichever is less, in home confinement. The home confinement time can be stacked on the reentry center time to reach or come close to the full year in community corrections. But the Bureau of Prisons chronically under-utilizes community corrections, a problem that has worsened in the past couple of years. At any time, a sentencing judge can make designation recommendations to the BOP under 18 U.S.C. 3621(b)(4). *See United States v. Ceballos*, 671 F.3d 852, 856 n.2 (9th Cir. 2011). For any client approaching or in the last year of prison, consider a motion requesting a judicial recommendation based on the client's individual characteristics as well as the national emergency. Our understanding is that the BOP's limits on prisoner transportation do not apply to those who are transferring from institutions to community corrections. Although the recommendation is not binding, anything we can do to make it more likely our clients leave prison sooner is worth the effort, and we can hope that the BOP will be encouraged to recognize and to exploit this tool for prison population reduction.

Other Sentenced Prisoners: The new compassionate release provisions of the First Step Act permit the sentencing court to reduce sentences based on "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A)(i) ([here](#)). The prisoners eligible for the reduction include the most vulnerable to coronavirus: the sick, the disabled, and the aged. In the opinion granting time served for an old lifer who had done 30 years, the judge considered as one of the factors favoring release physical vulnerability to attack ([here](#)). The same logic applies to vulnerability to coronavirus, both as a factor making the situation "extraordinary and compelling" and as a factor under 18 U.S.C. 3553(a) why the motion should be granted. We should be thinking creatively about other jurisdictional hooks for obtaining a second look at the sentences our clients are serving.

Client Care: We need to be thoughtful in our interactions with clients at a time when fear and uncertainty adds to the great stress of being a federal defendant. Even while detention facilities are limiting social and legal access, we need to maintain telephone and written communications, fight for in-person access when

needed, and advocate for appropriate medical treatment when such issues arise. Remember when personally interacting with clients, we need to be sure that we are exercising all hygiene and distancing protocols because we may be unknowing risks to them as much as they are risks to us. FPD Hay has sent a general letter to our clients in pretrial detention providing our best information on what we know and assuring them we want to be aware of and to try to address problems. By listening to our clients, and taking the actions we can, we can hope to ameliorate what is a very difficult time to be behind bars.