



participate remotely.

The COVID-19 global pandemic has turned our nation's jails and prisons into ticking time bombs. These jails and prisons do not provide adequate medical care in the best of times.<sup>3</sup> Many prisons and pretrial detention facilities are dramatically understaffed,<sup>4</sup> and populated by individuals who are older and medically compromised.<sup>5</sup> The Bureau of Prisons (BOP) first confirmed that two staff members were presumed positive for COVID-19, marking the first

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<sup>3</sup> See U.S. Dep't of Justice Office of the Inspector General, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges* (Mar. 2016), <https://oig.justice.gov/reports/2016/e1602.pdf> (finding that the BOP experienced chronic medical staff shortages and failed to take adequate measures to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions); U.S. Dep't of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (Rev. Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf> (finding that BOP facilities and services, including medical services, were inadequate to meet the needs of an aging prison population leading to delays in medical treatment for prisoners with acute and chronic heart and neurological conditions, who wait an average of 114 days to see medical specialists.); David Patton, *Statement from Federal Defenders of New York, Federal Defenders of New York* (Mar. 8, 2020), <https://federaldefendersny.org/about-us/news/statement-from-federal-defenders-of-new-york.html>.

<sup>4</sup> See Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 115th Cong. 2-4 (2019) (statement of Kathleen Hawk Sawyer, Director, Fed. Bureau of Prisons).

<sup>5</sup> See U.S. Dep't of Justice Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 1 (Rev. Feb. 2016) (showing that from FY 2009 to FY 2013 "the number of inmates age 50 and older in BOP-managed institutions was the fastest growing segment of the BOP population, increasing by 25 percent."); Erica Zunkel, *18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "the Most Effective Manner,"* Notre Dame J. Int'l & Comp. L., Vol. 9: Issue 1, Article 5, at 57-61 (2019) (detailing how, even before this crisis, the BOP's overcrowding, staffing shortages, and treatment approach compromise its ability to provide adequate medical care to people in federal prisons, in particular those fifty and older).

possible cases in the federal prison system,<sup>6</sup> and that number has since risen to eight.<sup>7</sup> The Associated Press has reported a federal inmate at a federal jail in New York City (Metropolitan Detention Center in Brooklyn) has tested positive for coronavirus.<sup>8</sup> A Chattanooga television station reported on March 21, 2020, that an arrestee at the Hamilton County Jail exhibited suspected symptoms of COVID-19 while being booked inside the jail on March 20th and was taken to the hospital.<sup>9</sup> On March 21, 2020, 1,500 Tennessee physicians urged Governor Lee to issue stay-at-home orders.<sup>10</sup> As of March 26, 2020, ten inmates are infected with the virus in six different facilities.<sup>11</sup> One of the inmates, a prisoner in Louisiana, was in critical condition.<sup>12</sup> As BOP has itself acknowledged, the risks of the rapid transmission of contagion in the tight

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<sup>6</sup> See Cassidy McDonald, *Federal Prison Workers Say Conflicting Orders on Coronavirus Response is Putting Lives at Risk*, CBS News (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-prison-federal-employeeessay-conflicting-orders-putting-lives-at-risk-2020-03-19/>.

<sup>7</sup> See BOP, <https://www.bop.gov/coronavirus/> (last visited Mar. 26, 2020).

<sup>8</sup> See AP Exclusive: *1st fed inmate tests positive for coronavirus*, AP News (Mar. 22, 2020), <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

<sup>9</sup> Preston Steger, *Hamilton County arrestee suspected of COVID-19 symptoms*, WRCBtv News (March 21, 2020), <https://www.wrcbtv.com/story/41923913/hamilton-county-arrestee-suspected-of-covid19-symptoms>.

<sup>10</sup> Joi Dueks, *1,500 Tennessee Physicians Urge Gov. Lee to Issue Stay-At-Home Order*, WRCBtv (March 21, 2020), <https://www.wrcbtv.com/story/41924603/1500-tennessee-physicians-urge-gov-lee-to-issue-stayathome-order>.

<sup>11</sup> See BOP, <https://www.bop.gov/coronavirus/> (last visited Mar. 26, 2020).

<sup>12</sup> See Kevin Johnson, *Feds to expand home confinement for elderly inmates to avoid larger coronavirus outbreak*, USA Today (March 26, 2020), <https://www.usatoday.com/story/news/politics/2020/03/26/feds-expand-home-confinement-elderly-inmates/2916853001/>.

quarters of prisons and jails present major challenges in keeping inmates and staff safe and healthy.<sup>13</sup> This stark reality has been widely recognized.<sup>14</sup>

Those brought into the courtroom for in-person hearings can bring the virus into the courtroom due to insufficient protections at the jail and/or bring the virus back to the jail due to contact with surfaces that others have touched and infected. The disease is spread through respiratory droplets expelled through the nose or mouth when a person coughs or exhales.<sup>15</sup> “Scientists discovered the virus is detectable for up to three hours in aerosols, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel.”<sup>16</sup>

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<sup>13</sup> See Fed. Bureau of Prisons, Program Statement 6190.04: Infectious Disease Management (2014).

<sup>14</sup> See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047-155 (2007), <https://doi.org/10.1086/521910>; Gregg S. Gonsalves, et al., *Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States* (Mar. 2, 2020), <https://bit.ly/2W9V6oS> (open letter signed by 815 experts in public health, law, and human rights); see also Danielle Ivory, ‘We Are Not a Hospital’: A Prison Braces for the Coronavirus, *N.Y. Times* (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/coronavirusprisons-jails.html>; Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’*, *NPR* (Mar. 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirusincubators>; Keri Blakinger & Beth Schwarzapfel, *How Can Prisons Contain Coronavirus When Purell is a Contraband?*, *ABA JOURNAL* (Mar 13, 2020), <https://www.abajournal.com/news/article/when-purell-iscontraband-how-can-prisons-contain-coronavirus>; Jennifer Hansler & Kylie Atwood, *Pompeo Calls for Humanitarian Release of Wrongfully Detained Americans in Iran Amid Coronavirus Outbreak*, *CNN* (Mar. 10, 2020), <https://cnn.it/2W4OpV7>.

<sup>15</sup> World Health Organization, Q&A on coronaviruses (COVID-19), *How Does COVID-19 Spread?* (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

<sup>16</sup> University of California-Los Angeles, *Study reveals how long COVID-19 remains infectious on cardboard, metal and plastic*, *Science Daily* (March 20, 2020), <https://www.sciencedaily.com/releases/2020/03/200320192755.htm>.

The Senate Bill regarding the fiscal response to the Coronavirus Disease which was passed in the Senate on March 25, 2020, provides:

[I]f the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus disease will materially affect the functioning of either the Federal Courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding ... upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing, or telephone conferencing, if video conferencing is not reasonably available, for the following events:

- (A) Detention hearings under section 3142 of the title 18, United States Code,
- (B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure,
- (C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure,
- (D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure,
- (E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure,
- (F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure,
- (G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code,
- (H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure,
- (I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure,
- (J) Proceedings under chapter 403 of title 18, United States Code (commonly

known as the “Federal Juvenile Delinquent Act”), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

Amended H.R. 748 (pgs. 661-663)

The Bill then provides for the same procedure to apply to felony pleas and felony sentencings if the chief judge specifically finds that such hearings cannot be conducted without

seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference, or by telephone conference if video conferencing is not reasonably available.

Amended H.R. 748 (pgs. 663-665)

The Bill also provides for a review by the chief judge of an authorization for the use of video teleconferencing or telephone conferencing not less than 90 days after the authorization until the earlier of (1) the date on which the chief judge determines the authorization is no longer warranted or (2) the date on which the emergency authority is terminated under the Bill.

Amended H.R. 748 (pgs. 665-667).

During the COVID-19 public health crisis, other courts have authorized sentencing hearings to be conducted without a defendant’s physical presence in the courtroom. *See, e.g., United States v. Bustillo-Sevilla*, No. 3:20-cr-00021-VC-1, 2020 WL 1239669, at \*1 (N.D. Cal. Mar. 15, 2020) (ordering sentencing hearing to take place as scheduled but to be held telephonically); *United States v. Stoltz*, No. 2:18-cr-31, ECF No. 56 (E.D. Cal. Mar. 19, 2020) (conducting sentencing hearing with defendant’s voluntary presence by videoconference). At least one court has proceeded with sentencing when a defendant voluntarily consented to

being absent entirely because even telephonic attendance could not be arranged. *See United States v. Trejo*, No. 3:19-cr-535, ECF No. 23 (N.D. Cal. Mar. 16, 2020).

It is impossible for most prisoners to follow even basic recommended guidelines around social distancing, hand washing, and disinfecting surfaces.<sup>17</sup> A client of FDSET reported to counsel on March 26, 2020 that he is currently in a small cell with three other persons. People are being urged to self-quarantine, practice social distancing and wash their hands frequently; yet those incarcerated don't have those options.<sup>18</sup> “[T]he research community should be alert to the possibility that [Covid-19] could hit some populations with substance use disorders particularly hard,” Dr. Nora Volkow, director of the National Institute on Drug Abuse wrote in a blog post published last week.<sup>19</sup> Those who smoke tobacco or marijuana, or vape, could be particularly vulnerable to COVID-19 because it attacks the lungs.<sup>20</sup> Odds are 14 times higher among these smokers that COVID-19 will be more severe or even lead to death over non-smokers.<sup>21</sup> Those who abuse opioids or methamphetamine are also at a higher risk because

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<sup>17</sup> Jessica Schulberg, *What It's Like to Wait For Coronavirus To Get You In Prison*, HuffPost, (Mar. 21, 2020), [https://www.huffpost.com/entry/coronavirus-response-monroe-washington-prison\\_n\\_5e750a21c5b63c3b64901d65](https://www.huffpost.com/entry/coronavirus-response-monroe-washington-prison_n_5e750a21c5b63c3b64901d65).

<sup>18</sup> Jessica Schulberg, *Nearly 500,000 People Who Have Not Been Convicted Are In Jail At High Coronavirus Risk*, HuffPost (Mar. 13, 2020), [https://www.huffpost.com/entry/pretrial-detention-coronavirus-money-bail\\_n\\_5e6c24a6c5b6bd8156f7647a](https://www.huffpost.com/entry/pretrial-detention-coronavirus-money-bail_n_5e6c24a6c5b6bd8156f7647a).

<sup>19</sup> Gina Yu, *How Smoking, Vaping and Drug Use Might Increase Risks from COVID-19*, CNN Health (March 20, 2020), at <https://www.cnn.com/2020/03/20/health/coronavirus-vaping-drugs/index.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

of the effects they have on respiratory and pulmonary health.<sup>22</sup>

The defendants do not have ways to protect themselves. As this pandemic progresses, it becomes more imperative to protect the defendants and those in close contact with them. Most jails have video conferencing capabilities. The federal courthouses in the Eastern District of Tennessee do as well. While this is not the best method for talks with clients, defense attorneys are using this technology to visit with them during this emergency. While face to face meetings are preferred, when those meetings present a danger, compromises must temporarily be made for the best interest of the inmates.

Defense attorneys have an ethical obligation to protect the best interests of their clients. Limiting their exposure to COVID-19 would undoubtedly be in their best interests. Limiting the exposure of court personnel and attorneys would also be in the best interests of the client as an infected courthouse could mean longer delays in the progression of the case, reassignments, and a defense attorney potentially not providing the most effective representation due to health concerns of their own. At some point, if the defense attorney is infected, it is a direct threat to the client.

Tennessee Rule of Professional Conduct 1.7, Conflict of Interest: Current Clients, offers some guidance. It advises, in pertinent part, that “[a] concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer.” Tenn. RPC 1.7(a)(2). It is submitted that

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<sup>22</sup> *Id.*



avoiding infection with COVID-19 is a personal interest of the lawyer.

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” Tenn. RPC, Preamble, § 2. The Preamble likewise recognizes that, “a lawyer is also guided by personal conscience and the approbation of professional peers.” Tenn. RPC, Preamble, § 8. Under this public health crisis, which is without recent precedent in our country, lawyers certainly have the best interest of the client on their minds, which is affected by worries of the health of the client, the health of court staff and the health of the lawyer themselves.

**Wherefore, Premises Considered**, based on the above, FDSET, requests that the court enter a uniform order applicable to all district court proceedings in the Eastern District of Tennessee requiring teleconferencing or video-conferencing of any court hearing, with defendant consent, and that all parties be permitted to participate remotely.

Respectfully submitted,

FEDERAL DEFENDER SERVICES  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 27, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. The following parties will be served by electronic Mail: U.S. Attorney Douglas Overbey, U.S. Marshal David Jolley, Chief U.S. Probation Officer Adrienne Simpson-Brown, and U.S. District Court Clerk John Medearis. Parties may access this filing through the Court's electronic filing system.

s/ Elizabeth B. Ford  
Elizabeth B. Ford  
Community Defender