Association of Deportation Defense Attorneys

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March 23rd, 2020

Electronic Mail to: H.Kevin.Mart@usdoj.gov; Paul.Friedman@usdoj.gov

Attn: Administrative Chief Immigration Judge Kevin Mart &
Court Administrator Paul Friedman
Executive Office of Immigration Review
201 Varick Street, 11th Floor
New York, NY 10014

Dear ACIJ Mart and Mr. Friedman:

This past Wednesday, March 17th, 2020, we wrote to each of you on behalf of the Association of Deportation Defense Attorneys. We sought to communicate the urgency of the current COVID-19 crisis, and the need for decisive action on the part of EOIR and ICE, in order to impede the spread of this virus, and so prevent placing at risk the judges, interpreters, attorneys, family members of clients, and all whom they come into contact with. We commend OCIJ's decision to cancel all non-detained master calendar hearings, and to close some non-detained courts.

Unfortunately, detained courts remain open, and master and individual hearings continue to be scheduled, putting judges, attorneys and family members of the detainees at continued risk. Requests for telephonic hearings are not being approved expeditiously, or are simply not being acted upon despite a timely request having been made. No blanket standing order granting telephonic hearings on prior written notice has been issued, despite our request.

Most importantly, by virtue of failing to close the courts, attorneys are being compelled to meet with the family and friends of their clients in order to prepare for their proceedings. We are also compelled into taking unnecessary risks to see our clients and their families in order to gather the information needed to prepare relief applications, to prepare for court appearances, and for trial. This has become virtually impossible given the "shelter in place" directives issued here in New York.

In addition, unfortunately, the directive issued by ICE instructing ERO to review the custody status of certain detainees, to determine if they are appropriate for release, was made applicable only to an extremely limited class of individuals. It should be expanded to include all individuals who do not have a conviction for a violent felony; extensive warrant activity; or multiple convictions for misdemeanor offenses involving violence. Just today, the U.S. Court of Appeals

for the Ninth Circuit issued a published decision ordering *sua sponte* that the Petitioner be immediately released from detention '[i]n light of the rapidly escalating health crisis, which public health authorities predict will especially impact immigration detention centers." *Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. March 23, 2020).

In its decision, the Ninth Circuit exhibited both an understanding of the seriousness of the crisis, and a willingness to take appropriate action to protect those under its jurisdiction. We ask the same of you. During this time of crisis, leaders must take decisive action to protect our community. Regrettably, the half measures taken to date, while well intentioned, only ensure the continued spread of this virus throughout our community. Allow us to provide an illustration.

One of our members recently had a detained master calendar hearing scheduled for this past Friday, March 20th, at the Varick St. Court. In order to prepare the bond application and for the master, the attorney and his staff met with the client's mother. A request for a bond hearing, together with the required relief applications, and a request for a telephonic hearing, were hand delivered to the Court at noon on Wednesday March 18th, 2020. The attorney did not receive any response to the motion for a telephonic hearing, and repeated calls to the court that day and the next went unanswered. To ensure that the Court was aware of the request, the client's mother retrieved from the attorney's office, Thursday evening, a letter to the court confirming the request for a telephonic hearing. She traveled to the court in Manhattan, from Long Island, and delivered the letter to the Clerk, and thereafter waited in the waiting area with family members of other detainees and other attorneys who were compelled to appear.

Today we received confirmation the client's mother has been diagnosed with COVID-19 virus, through medical testing. Can you imagine the number of people she came into contact with as the result of the decision to keep this court open? In addition to exposing the attorney and office staff, she traveled from her home on Long Island, on the Long Island Railroad, to Penn Station, from there to the subway and ultimately to the Court. Undoubtedly she came into contact with, and exposed, countless numbers of people, who in turn exposed countless others.

Anyone with a basic grasp of the fundamental principles of epidemiology – easily garnered from watching CNN or the local evening news - understands how easily this virus spreads. Given this, the decision to continue to keep the courts open can only be construed as a conscious decision on the part of EOIR to subject our Immigration Judges, court staff, interpreters, DHS attorneys, institutional defenders, members of the private bar, our clients, their families, and all whom they come into contact with, to an unreasonable risk of infection, serious illness and death.

Keeping the Courts open, under these circumstances, fits the classic definition of criminal recklessness. The administrators are aware keeping that keeping the courts open places lives at risk, yet consciously choose to disregard that risk.

This is just one example that we have experienced. We have also heard anecdotally of an ICE trial attorney presently in intensive care with COVID-19 after appearing at a Master Calendar hearing; of a Legal Aid attorney who tested positive after meeting with detainees at the Hudson detention facility; and of an employee at the Elizabeth detention center testing positive. Medical professionals recently wrote an open letter to the ICE Acting Director strongly urging the agency

to consider community-based alternatives to detention in light of the threat posed by the coronavirus pandemic. On March 20, immigration law professors penned a letter making similar requests to Acting Chief Immigration Judge Santoro.

Just as someone firing randomly into a crowd of Immigration Judges, court staff, attorneys, interpreters and detainees' family members will foreseeably and inevitably kill someone; and just as that person would properly be charged with manslaughter or depraved indifference murder, keeping the courts open ensures continued, needless infection, serious illness and death among those who work in the courts, their families, and those whom they come into contact with. This is a real crisis requiring real leadership to take decisive action which will place the safety of those under its jurisdiction ahead of other concerns.

There is no escaping the inevitable consequences of inaction. Accordingly, we request:

1. That all detained master and individual hearings in the U.S. Immigration Courts be cancelled;

2. That a standing order be issued that upon written notice served upon the Immigration Court, by at least 12:00 p.m. on the day preceding a bond hearing, that respondent's counsel be permitted to appear telephonically at any such hearing. A standing order is needed, and this cannot be committed to the discretion of individual judges, because the courts lack the staff and the time to consider individual requests;

3. That all of DHS's ICE Enforcement and Removal Officers be instructed to refrain from detaining and holding any non-citizens subject to removal during this pandemic, except for strictly limited categories of individuals. Such exception should be limited, for example, to those convicted of a violent felony offense for which a sentence in excess of six (6) months of incarceration was imposed, or those convicted of multiple violent felony offenses. We also ask that during this time of crisis, even those with convictions for non-violent aggravated felony offenses – such as possession of stolen property or a theft offense, with an imposed sentence of a year or more of incarceration - not be placed into, and held in, detention;

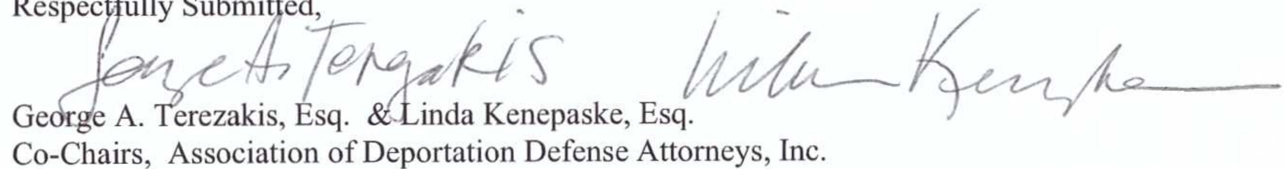
4. That all ICE Enforcement and Removal Officers be directed to immediately conduct a custody review of all individuals being held in ICE detention, with a presumption in favor of releasing all such detainees, with the exception of those referenced in item '2' above;

5. That all case completion standards, for all Immigration Judges, be immediately suspended, and the period of time encompassed by this public health emergency be excluded when assessing whether the judges have achieved their case completion standards. Failure to do so will subject the Judges to an inappropriate and inherent conflict of interest. Once the Courts reopen, they will be subjected to improper pressures to conduct and complete an accelerated numbers of cases, within a greatly shortened time frame, in order to "make-up" their case completion numbers. This would present an irreconcilable conflict of interest: they would be forced to choose

between their sworn duty to ensure our clients receive fundamentally fair hearings, and their desire to keep their jobs and support their families. Suspending these completion goals will avoid the inevitable appeals which would follow, based on Due Process grounds, if those standards are not suspended.

It is our sincere hope your commitment to the safety of the public will inoculate you against any improper pressures to keep the courts open in order to maintain high numbers of deportations, which some might seek to use as some form of future political capital. We look forward to hearing from you and ask that you promptly implement these suggestions.

Respectfully Submitted,



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Co-Chairs, Association of Deportation Defense Attorneys, Inc.

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